

ON MIRRORS AND GAVELS: A CHRONICLE OF HOW MENOPAUSE WAS USED AS A LEGAL DEFENSE AGAINST WOMEN

PHYLLIS T. BOOKSPAN*
MAXINE KLINE**

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DEDICATION

In the Fall of 1992, Maxine Klein took a seminar on Gender and the Law

* Professor of Law, Widener University School of Law. A.B., 1976, Herbert H. Lehman College, City University of New York; J.D., 1983, LL.M., 1987, Georgetown University Law Center. The authors thank Martha Chamallas, Florence Roisman, and Nancy Plant for their thoughtful comments and critique; Barbara H. Sohmer, M.D., M.H.S., Lauren Freidus Katz, M.D., American Psychoanalytic Association, for their review of medical information; Jacqueline L. Roach, Reference Librarian, Neumann College, and William E. Baxter, Director, Library and Archives, American Psychiatric Association, for their research assistance; and Julie Reese, Michelle King, and Robin Friend also for careful detailed research assistance.

** J.D., 1993, Widener University School of Law; B.A., 1990, Neumann College.

with me. She was fifty-one years old at the time, an accomplished mother and a professional fine art collector and dealer. When I discussed topic selection for seminar papers, I encouraged all students to write about something they felt passionately about. Maxine asked me if she could write about menopause. Initially I was skeptical of how she could relate menopause to a legal issue, so I asked her to do some preliminary research and submit it to me. A week later, Maxine came into my office and left on my desk a two inch stack of legal cases raising issues surrounding menopause. I approved her topic.

After reading Maxine's completed seminar paper I became convinced that she had uncovered a story that needed to be told to a broader audience. I suggested that we collaborate on an article for publication, and we did some preliminary work together. In May 1993, Maxine graduated from law school and moved on, and I filed the paper away. A little over a year later, Maxine died from a sudden brain aneurysm. To the best of my knowledge, Maxine became absorbed in the details of a law practice and never went back to the paper before her untimely death. And for five years I didn't open my file drawer.

Maxine uncovered a good story—a story that she wanted told. *On Mirrors and Gavels—A Chronicle of How Menopause Was Used as a Legal Defense Against Women* is dedicated to Maxine Klein, as a tribute to her vitality for life and her passion for uncovering injustice. I hope that I have done justice to her ideals.

INTRODUCTION

If you believe that the plaintiff is nervous, and that the condition is not the direct result of the accident, but is brought on by her own actions, or is the material condition liable to women at about her age—change of life—then no damages can be allowed for that condition if you should find for the plaintiff.¹

Anna Laskowski was standing on the sidewalk accompanied by her young daughter when a runaway horse and ice wagon jumped the curb.² Mrs. Laskowski ran into a neighboring yard in an attempt to protect herself and her child.³ The frantic horse, however, followed her into the yard and knocked her down. Anna Laskowski was run over by the wheels of the ice wagon owned by People's Ice.⁴ She was seriously injured.⁵ Her chest was crushed, her collar bones and two ribs were broken, her shoulder was dislocated and her neck, head, and knee were strained and bruised.⁶ The physician who examined Mrs.

1. *Laskowski v. People's Ice Co.*, 157 N.W. 6, 8 (Mich. 1916) (emphasis added) (repeating the defendant's request for jury instructions).

2. *See id.* at 7.

3. *See id.*

4. *See id.*

5. *See id.*

6. *See id.*

Laskowski at the accident scene testified, "I found the woman nearly dead."⁷ Mrs. Laskowski sued for injury, her pain and a resulting chronic nervous condition called traumatic neurasthenia.⁸ The jury found, and the appellate court agreed, that the horse that ran away was unruly, nervous, fractious and excitable, and he was being driven with a bridle that was too large.⁹ Mrs. Laskowski was awarded \$3500.¹⁰ On appeal, People's Ice argued that the award was excessive because Anna Laskowski's injuries were "practically repaired" from the usual healing process, and it was more reasonable to believe that Mrs. Laskowski's nervous condition "resulted from the menopause, or change of life, which comes to all women at or about a certain age"¹¹ Contrary to the defendant's argument, the Michigan Supreme Court found that Mrs. Laskowski's evidence of loss of earnings and permanent loss of capacity to earn in the future plus her pain and suffering were sufficient to sustain a damages award greater than what she received.¹² Yet, before dismissing the defendant's contention that Mrs. Laskowski's injury was attributable to her age and hormone levels, the court obligingly wrote that the defendant failed to prove that the physiological change of menopause had yet "come to the plaintiff."¹³ With no discussion whatsoever about what menopause is, or the admissibility and propriety of a defense based upon a woman's hormone levels and natural physiological state, the Michigan Supreme Court recognized that menopause, if proved, could be a valid defense in a personal injury case.

The idea that "change of life" or menopause is a time of mental and physical derangement for women seemed to be something that the court just knew. Indeed, by noting *only* that the defendants failed to prove that the physical change had come to Mrs. Laskowski, the court implicitly assumed a deficiency/disease model of the group of symptoms that may occur together at menopause.¹⁴ In fact in 1916, the year *Laskowski* was decided, accurate research barely existed about the female ovulatory system and the physical and other changes associated with the natural process that all women experience.¹⁵ Indeed,

7. *See id.*

8. Neurasthenia refers to "a syndrome of chronic mental and physical weakness and fatigue, which was supposed to be caused by exhaustion of the nervous system" while traumatic neurasthenia refers to neurasthenia following shock or injury. DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 1127 (28th ed. 1994) [hereinafter DORLAND'S DICTIONARY].

9. *See Laskowski*, 157 N.W. at 7.

10. *See id.*

11. *Id.* at 8.

12. *Id.*

13. *Id.*

14. *Id.*

15. The processes of menstruation and menopause were not adequately explained until 1920 when the sex hormones were discovered. Prior to that speculations were "totally inaccurate yet titillating in their florid weirdness." Susan E. Bell, *Changing Ideas: The Medicalization of Menopause*, in THE MEANINGS OF MENOPAUSE HISTORICAL MEDICAL AND CLINICAL PERSPECTIVES XV 43, 45-46 (Ruth Formanek ed., 1990) [hereinafter THE MEANINGS OF MENOPAUSE].

even today, researchers are divided on the medical characterization of menopause as disease or normal physiological change.¹⁶ Yet, for the Michigan Supreme Court, there seemed to be no need to investigate or prove either characterization. Attentive defense attorneys took notice; and with varying degrees of success, for the next seventy years or so, menopause found its way into American jurisprudence. This Article tells the story of the rise and fall of this unique defense in American law. For lack of a more artful term, we call it the "menopause defense."

A. *What is the Menopause Defense?*

The menopause defense, which emanates from symptoms commonly associated with the medical and socio-cultural habit of labeling all symptoms at mid-life "menopausal,"¹⁷ pre-dates modern syndrome type defenses such as rape trauma syndrome,¹⁸ post-partum depression, pre-menstrual syndrome,¹⁹ and

16. See generally Madeline J. Goodman, *The Biomedical Study of Menopause*, in THE MEANINGS OF MENOPAUSE, *supra* note 15, at 133, 148-52.

17. Menopause is defined as the "cessation of menstruation in the human female, occurring usually around the age of 50." DORLAND'S DICTIONARY, *supra* note 8, at 1006. Menopause prae'cox is the "premature failure of ovulation, possibly due to primary germ cell deficiency, acquired refractoriness to pituitary gonadotropin, or autoimmunization." *Id.* "Climacteric the syndrome of endocrine, somatic, and psychic changes occurring at the termination of the reproductive period in the female (menopause); it may also accompany the normal diminution of sexual activity in the male. Called also *climacterium*." *Id.* at 345.

18. These controversial syndrome defenses only gained legal recognition in the courts after long-fought battles over their admissibility. See, e.g., *Illinois v. Wheeler*, 602 N.E.2d 826 (Ill. 1992) (holding that evidence of rape trauma syndrome, a subcategory of post traumatic stress disorder, is only admissible if the defendant has fair opportunity to challenge the evidence); *State v. Lawrence*, 541 N.E.2d 451, 455 (Ohio 1989) (stating evidence that a defendant suffered from post traumatic stress disorder is relevant to his ability to formulate intent to murder). *But see, e.g., State v. Alberico*, 861 P.2d 219 (N.M. Ct. App. 1991) (stating that a diagnosis of rape trauma syndrome does not prove cause of symptoms and therefore may not be admitted to prove that victim-witness was raped); *Commonwealth v. Gallagher*, 547 A.2d 355 (Pa. 1988) (holding that expert testimony on rape trauma syndrome was inadmissible for purpose of enhancing credibility of rape victim); *State v. Black*, 745 P.2d 12 (Wash. 1987) (holding expert testimony on rape trauma syndrome as a means of proving lack of consent in a rape case is improper).

19. See, e.g., Robert Mark Carney & Brian D. Williams, *Criminal Law—Premenstrual Syndrome: A Criminal Defense*, 59 NOTRE DAME L. REV. 253 n.3 (1983); Lawrence Taylor & Katharina Dalton, *Premenstrual Syndrome: A New Criminal Defense?*, 19 CAL. W.L. REV. 269 (1983); Marcia Baran, Comment, *Postpartum Psychosis: A Psychiatric Illness, A Legal Defense To Murder, Or Both?*, 10 HAMLIN J. PUBL. L. & POL'Y 121 (1989); Lori A. Button, Comment, *Postpartum Psychosis: The Birth of a New Defense?* 6 COOLEY L. REV. 323 (1989); Amy L. Nelson, Comment, *Postpartum Psychosis: A New Defense?*, 95 DICK. L. REV. 625 (1991); Marc P. Press, Note, *Premenstrual Stress Syndrome as a Defense in Criminal Cases*, 1983 DUKE L.J. 176 (1983).

battered women's syndrome.²⁰ Moreover, unlike modern syndrome defenses, which typically are asserted by female defendants in criminal actions either to explain, justify or excuse acts or to mitigate punishment,²¹ the menopause defense was used primarily by defendants against female plaintiffs in civil actions. The menopause defense is a creation of a civil defense bar that seized upon a cultural stereotype of aging women and prevailing sexist norms.²² The defense predominantly was asserted by men, in male dominated courtrooms, to devalue female plaintiffs, cast blame upon them, and attempt to deny women compensation or other remedies.²³

20. See, e.g., *Lentz v. State*, 604 So. 2d 243 (Miss. 1992) (holding evidence that defendant was battered by the victim is relevant if it assists the jury in understanding the facts of the case); *Commonwealth v. Dillon*, 598 A.2d 963 (Pa. 1991) (holding that in a self-defense case, evidence that defendant is a battered woman is admissible to help jury assess the reasonableness of her fear).

21. See, e.g., *Richter v. Connor*, 21 F.3d 423 (4th Cir. 1994) (pre-menstrual syndrome defense); *California v. Massip*, 271 Cal. Rptr. 868 (Cal. App. 1990) (post-partum defense); *Willgerodt v. Horhri*, 953 F. Supp. 557 (S.D.N.Y. 1997) (post-partum defense); *Commonwealth v. Egrass*, 595 A.2d 789 (Pa. Commw. Ct. 1991) (pre-menstrual syndrome defense). See also *Reid v. Florida Real Estate Comm'n*, 188 So. 2d 846, 855 (Fla. Dist. Ct. App. 1966) (holding that the defendant's mental condition—the change of life—prevented her from acting rationally and thus, she should not be punished). And see *infra* note 23.

22. We call this a cultural stereotype because the language of medical and psychological writings and studies reveal cultural images of menopause as a time of stress, breakdown, decline, regression and decay of women. For example, the following quote is representative of descriptions we found repeatedly: "[T]he way in which the menopause has been written about by predominantly male doctors who describe 'vaginal atrophy,' 'degenerative changes,' 'estrogen starvation,' and 'senile pelvic involution' conditions women to see each sign of the menopause as a stigma by which they are labeled as aging and 'past it.'" RHODA UNGER & MARY CRAWFORD, *WOMEN AND GENDER: A FEMINIST PSYCHOLOGY* 503 (1992) (citing S. KITZINGER, *WOMEN'S EXPERIENCE OF SEX* (London: Dorling Kindersley 1983)). "[M]enopause is the trigger for the powder keg of emotions slowly smoldering somewhere in the hypothalamus." E. Dunlop, *Emotional Imbalances in the Premenopausal Woman*, 9 *PSYCHOSOMATICS* 44, 45 (Supp. 4 1968).

However, an anthropological study based upon actual interviews and observation of mid-life women found relatively little distress. Over and over women reported: "It was nothing;" "Nothing, never had any problem, it just stopped, it slowed up;" and "Nothing. Just stopped and that's about it." EMILY MARTIN, *THE WOMAN IN THE BODY: A CULTURAL ANALYSIS OF REPRODUCTION* 173 (1987).

23. Occasionally, a woman did assert menopause as a defense. For example, in *Reid*, 188 So. 2d at 855, the Florida Real Estate Commission attempted to revoke Kathleen Reid's real estate license after she was caught stealing a \$3.08 steak from a Winn Dixie. Although, Ms. Reid was not prosecuted for the crime, the Commission voted to suspend her license for "dishonest dealing." On her behalf, two doctors testified that Kathleen Reid was suffering anxiety, stress, and tension, and that she was experiencing "the change of life." One of her experts testified "that the taking of the steak was an isolated-behavior incident produced by her menopause state." *Id.* at 855. See also *In re Grants Estate*, 47 P.2d 508, 509 (Cal. 1935) (explaining that the daughter of a decedent argued that the decedent, who eliminated the plaintiff and her siblings from her will, had suffered "a mental

The essential premise of this defense was that a woman approaching mid-life was either mentally ill, physically ill or both.²⁴ It was a manifestation of two pervasive negative stereotypes of sexism and ageism. Crafty defendants attempted to exploit these social and cultural "isms" to cast female plaintiffs in a negative light and try to persuade courts and juries that the woman suing them was already a damaged person and thus entitled to little or no recovery. For example, a woman spent thirty-one days in a hospital as a result of injuries sustained in an auto accident. Yet, when she sued the driver for negligence, she found the defendant attempting to deny liability by claiming that the plaintiff's injuries were due to menopause.²⁵

In another case, a defense medical witness testified that the female plaintiff's physical and emotional distress were related to her menopause rather than the emergency landing of the airplane in which she had been traveling.²⁶

In a case documenting that a rusty, used, razor blade was in a bottle of soda the plaintiff ingested, defendant, Pepsi-Cola Co., unabashedly claimed that plaintiff's digestive problems and vomiting were due to her menopause rather than to the contaminated Pepsi that she drank.²⁷

A 1941 divorce case also is representative of the thinking of courts during the heyday of the menopause defense. An Ohio Court of Appeals reviewing a petition for divorce, upheld both the denial of the wife's divorce petition on grounds of cruelty that arose from her husband's excessive drinking, and the divorce grant to the husband on grounds of extreme cruelty that he blamed on his

disturbance occasioned by her period of menopause"); *Wiley v. Wiley*, 190 A. 363, 366 (Pa. 1937) (explaining acts in divorce proceedings as based upon her "undergoing her menopause").

24. See, e.g., *Fox v. Capital*, 96 F.2d 684, 685 (3rd Cir. 1938) (discussing plaintiff's "menopausal insanity"); *Tate v. Western Union Tel. Co.*, 96 S.W.2d 364 (Mo. 1936) (stating plaintiff is at age of menopause, a condition that is accompanied by nervousness); *Hanson v. City Light & Traction Co.*, 178 S.W.2d 804, 808 (Mo. App. 1944) (attributing the plaintiff's symptoms to her menopause); *Maryland Cas. Co. v. Davis*, 464 S.W.2d 433 (Tex. App. 1971) (explaining defendant's argument that menopause was the cause of the plaintiff's keratoconjunctivitis); *City of Beaumont v. Wiggins*, 136 S.W.2d 260 (Tex. App. 1940) (alleging that plaintiff failed to recover properly due to menopause or other conditions); *Lunt v. Lunt*, 121 S.W.2d 445, 446 (Tex. App. 1938) (divorcing husband filed lunacy charges against wife). *But see* *Shilling v. State Accident Ins. Fund*, 610 P.2d 845 (Or. App. 1980) (stating menopause not related to plaintiff's emotional disability). See also discussion *infra* Part III.

25. See *Alderman v. Kelly*, 32 A.2d 66, 67 (Conn. 1943) (referring to the defendant's claim that the plaintiff's physical injury was related to menopause rather than the collision of their automobiles); see also discussion *infra* notes 151-57.

26. *Leasman v. Beech Aircraft Corp.*, 121 Cal. Rptr. 768, 769 (Ct. App. 1975).

27. *Day v. Rains*, 220 S.W.2d 575, 576 (Ky. 1949). See also *Hollis v. Ouachita Coca-Cola Bottling Co.* 196 So. 376, 378 (La. Ct. App. 1940) (testifying doctor stated that woman who swallowed parts and poison of Black Widow spider found in bottle of Coca-Cola had symptoms due to menopause, and that "a normal individual should be over the effects in a week"); *Laurel Coca Cola Bottling Co. v. Hankins*, 75 So. 2d 731, 733 (Miss. 1954) (testifying expert stated that plaintiff was ill from menopause not from drinking sulfuric acid in a bottle of Coke.).

wife's menopause.²⁸ While the appeals court did not disturb the decree of divorce granted by the lower court to the husband, it did modify the property division in favor of the wife because: "It is evident from the record, and it is common knowledge, that women who are passing through the menopause require the most kindly and considerate treatment and that at times they are petulant, act irrationally and in an immoderate manner."²⁹

As recently as 1984, a defendant attempted to benefit from the negative stereotypes associated with middle aged women. A female plaintiff who suffered severe headaches, muscle spasms, elevated blood pressure, cardiac problems and back pain after she was trapped inside her automobile after it was demolished by the defendant's truck, found the defendant asserting that the plaintiff's injuries were due to menopause related depression, not the trauma she experienced from the accident.³⁰ These cases typify how the denormalization of menopause enabled lawyers to use menopause as a strategy to devalue women, reduce damage awards or otherwise affect case outcomes.

B. The Menopause Defense as a Manifestation of Gender Discrimination

The history of gender based discrimination, particularly in the courtroom, is not new, and others have told aspects of that story.³¹ Recent feminist legal writings, although diverse in approach and perspective, share the general

28. *Pearson v. Pearson*, 41 N.E.2d 725 (Ohio Ct. App. 1941).

29. *Id.* at 727.

30. *Hayes v. Commercial Union Assurance Co.*, 459 So. 2d 1245 (La. Ct. App. 1984). *See also* *Devillier v. Traders & General Ins. Co.*, 321 So. 2d 55 (La. Ct. App. 1975) (attributing plaintiff's emotional and physical injuries to menopause rather than automobile accident); *McCommon v. Hennings*, 283 N.W.2d 166 (N.D. 1979) (finding plaintiff's injuries resulting from a rear end collision were related to menopausal melancholia).

31. *See generally* Deborah R. Hensler, *Studying Gender Bias in the Courts: Stories and Statistics*, 45 STAN. L. REV. 2187, 2192 (1993) (reporting, based upon responses to the Ninth Circuit Gender Bias Task Force Report, among other things, that men will refer to a woman attorney as "bitch" when she takes a position that would be termed as aggressive and positive in a male, and that female attorneys reported being called menopausal or asked if they were suffering from pre-menstrual syndrome when they objected to judges' rulings); *see also* Mark Hansen, *9th Circuit Studies Gender Bias—Survey Finds 60 Percent of Female Lawyers Sexually Harassed in Last Five Years*, 78 A.B.A. J. 30 (1992); Judith Resnik, *Ambivalence: The Resiliency of Legal Culture in the United States*, 45 STAN. L. REV. 1525, 1532-33 (1993) (concluding from various task force conclusions that "[w]omen uniquely, disproportionately, and with unacceptable frequency must endure a climate of condescension, indifference, and hostility . . . [and t]here is evidence that bias does occur with disturbing frequency at every level"); Judith Resnik, *"Naturally" Without Gender: Women, Jurisdiction, and the Federal Courts*, 66 N.Y.U. L. REV. 1682 (1991) (reporting on the conclusions of the New York Task Force on Women in the Courts that gender bias against women is a pervasive problem that has grave consequences including daily distortions in courts' application of substantive law and that it is unlikely that the federal judiciary is totally exempt from instances of this general societal problem).

objective of raising questions about women's relationship to law and legal institutions.³² Much of the literature explores the many aspects of the role that law plays and has played in subordinating women in our society.³³ For example, Professor Martha Chamallas has documented how the hidden biases of tort law have created an inequality in damage awards for women and plaintiffs of color. In particular, she reveals how reliance upon statistical data premised explicitly on race and sex to calculate loss of earnings capacity creates a financially neutral yet practically discriminatory basis for damages.³⁴

Other studies also have explored less overt forms of legally sanctioned devaluation of women.³⁵ The menopause defense, however, was neither subtle nor subconscious. It was an overt, bold and accepted means to devalue women's injuries, damages, and life worth. The impressive body of legal discourse on differential treatment of women includes virtually nothing about the disturbing history of how this defense was used in legal proceedings to perpetuate differences and promote discrimination against women. This Article documents the development and use of this unique defense in American courts.

The first recorded attempt to use menopause as a defense to limit or deny recovery to a female plaintiff occurred in 1900.³⁶ For the next eighty or so years, the defense waxed and waned.³⁷ In 1980, the American Psychological

32. For good compilations of recent feminist legal thought, see generally, *AT THE BOUNDARIES OF LAW: FEMINISM AND LEGAL THOUGHT* (Martha Albertson Fineman & Nancy Sweet Thomadsen eds., 1991) [hereinafter *BOUNDARIES OF LAW*]; *FEMINIST LEGAL THEORY: READINGS IN LAW AND GENDER* (Katherine T. Bartlett & Roseann Kennedy eds., 1991); *FOUNDATIONS: FEMINIST LEGAL THEORY* (D. Kelly Weisberg ed., 1993); Christine A. Littleton, *Whose Law is this Anyway?*, 95 MICH. L. REV. 1560 (1997) (reviewing cited casebooks on women and law).

33. See, e.g., Christine A. Littleton, *Reconstruction Sexual Equality*, 75 CALIF. L. REV. 1279 (1987) (discussing different sexual equality models and whether any of them meet the goal of ending women's subordination); Heather Ruth Wishik, *To Question Everything: The Inquiries of Feminist Jurisprudence*, 1 BERKELEY WOMEN'S L.J. 64 (1985) (discussing the types of inquiries that comprise what is loosely called feminist jurisprudence or legal scholarship about women).

34. 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). See also Martha Chamallas & Linda K. Kerber, *Women, Mothers, and the Law of Fright: A History*, 88 MICH. L. REV. 814 (1990) (documenting the legal tendency to connect women to emotional injury, even when the injuries have severe physical consequences).

35. See, e.g., Martha Chamallas, *The Architecture of Bias: Deep Structures in Tort Law*, 146 U. PA. L. REV. 463 (1998) (revealing how inherent social structures, such as privileging physical harm over relational harm, devalues women and minorities); Barbara Y. Welke, *Unreasonable Women: Gender and the Law of Accidental Injury 1870-1920*, 19 L. & SOC. INQUIRY 369 (1994) (assessing the role of gender in shaping the law of accidental injury).

36. *San Antonio Gas Co. v. Singleton*, 59 S.W. 920 (Tex. Civ. App. 1900). See *infra* notes 102-03 and accompanying text.

37. The greatest number of cases is found in the 1940s, with 16 reported appellate decisions. Because our research was limited only to appellate records, these numbers do not reflect the actual number of times the defense was asserted at the trial level.

Association dropped involuntional melancholia (the diagnostic label given the body of symptoms commonly associated with menopause) as a diagnosis from its *Diagnostic and Statistical Manual* ("DSM"),³⁸ and without the benefit of easily admissible medical testimony about the emotional and psychological ills of menopause, the defense essentially disappeared from the legal scene.³⁹

In chronicling actual stories of the usage of the menopause defense, this Article unveils a part of the history of our American judicial system that has not yet been told. The Article also highlights an integral connection between the medical community's interest in menopause as a disease and the legal community's success with the defense. Further, the cases discussed raise the question of whether the perception of women is constructed by the legal gavel, or whether law, like a mirror, reflects the conceptualizations and conclusions of the dominant culture. We tell these stories as an effort to present richly detailed encounters between women and the law, and document by concrete example the extent to which our legal system participated in perpetuating a culture that undermined and devalued older women.

I. THE MENOPAUSE TABOO

Until recently almost no one talked about menopause—or so we were led to believe. The term itself first was coined in 1821. Prior to that the more correct expression "climacteric" from the Greek work *klimacter* meaning "critical period" was used.⁴⁰ Regardless of the term, however, women⁴¹ generally did not

38. AMERICAN PSYCHIATRIC ASSOC., *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* (3d ed. 1987).

39. Modern critics of the medical establishment suggest that involuntional melancholia is a condition that never existed. The diagnosis was so broad that it "was possible to interpret virtually any emotional or physical complaint made by a midlife woman as stemming from the menopausal neurosis she was suffering." SANDRA CONEY, *THE MENOPAUSE INDUSTRY: HOW THE MEDICAL ESTABLISHMENT EXPLOITS WOMEN* 68 (1994). Older medical sources are firm in viewing a connection between involuntional melancholia from menopause and mental and emotional dysfunction. See, e.g., Richard P. Brown et al., *Involuntional Melancholia Revisited*, 141:1 AM. J. PSYCHIATRY 24 (1984); August Hoch & John T. MacCurdy, *The Prognosis of Involuntional Melancholia*, 7 ARCHIVES OF NEUROLOGY & PSYCHIATRY 1 (1922); Myrna M. Weissman, *The Myth of Involuntional Melancholia*, 242 JAMA 742 (1979). See also discussion *infra* at note 48.

40. See GERMAINE GREER, *THE CHANGE* 22-23 (1992). Climacteric and menopause were defined at the First International Congress on the Menopause held in France in 1976. According to the consensus at the conference, climacteric refers to the phase of the aging process in women that marks a transition from reproductive to non-reproductive life. Menopause marks the final menstrual period, and takes place during the climacteric. See Elizabeth Henrik, *Neuroendocrine Mechanisms of Reproductive Aging in Women and Female Rats*, in *CHANGING PERSPECTIVES ON MENOPAUSE* 100, 102 (Ann M. Voda et al. eds., 1982).

41. Throughout the Article, we discuss women and men generically for lack of a better and less cumbersome way to make the distinctions we must. Our goal is not to reduce all women to one trait, viewpoint, stereotype or medical model, and we recognize that at times we may be susceptible

discuss this phase of life with their families or friends for fear that they would be perceived as unhealthy, crazy, or worst of all—old.⁴² Menopause was, as author Gail Sheehy terms it, *The Silent Passage*—“one of the most misunderstood passages in a woman’s life.”⁴³ Feminist Germaine Greer speculates that women may not speak of menopause for one of two reasons: 1) cultural perceptions have forced them into denial; or 2) for most it is a non-event, with none of the significance attributed to it by men.⁴⁴ But, while most women shunned the topic, it did not elude others—particularly defendants in personal injury actions. Moreover, following its implicit acceptance in *Laskowski v. People’s Ice Co.*,⁴⁵ lawyers, judges, spouses and even employers learned to talk openly about menopause when it was to their advantage as a means to limit and control the

to “essentialism”—that is reducing the many different races, classes, ethnicities, religions and other qualities that make the groups “women” and “men” into one universal. With our broad oversimplification of the categories “women and men,” certainly we do not intend to suggest that all women experience climacteric the same nor that all were “passive victims” and remained silent about menopause, nor that all men did or would use menopause to demean women or deny them certain rights. For a fuller discussion of the definition of essentialism and the dangers of reductionist thinking, see generally, MARTHA MINNOW, NOT ONLY FOR MYSELF 34 (1997); Martha Minnow, *Feminist Reason: Getting It and Losing It*, 38 J. LEGAL EDUC. 47 (1988).

42. Women’s fear of aging is pervasive in popular Western society. Denial of age is reflected in everything from advertisements for face lifts, to breast implants and cosmetics, to television shows and movies that depict older people as helpless, sexless and mindless. Feminist author Betty Friedan writes: “[T]he mystique of age was much more deadly than the feminine mystique, more terrifying to confront, harder to break through.” BETTY FRIEDAN, *THE FOUNTAIN OF AGE* 42 (1993).

43. GAIL SHEEHY, *THE SILENT PASSAGE: MENOPAUSE* 8 (1991).

Menopause must be one of the most misunderstood passages in a woman’s life. One study showed that two thirds of all American women say nothing to anybody as they approach what may be a distressing and even fearsome Change. But who can blame us? Menopause is inextricably linked with middle age. In the youth-oriented societies of North America and Europe, even the mention of middle age has a stigma about it. Shame, fear, and misinformation are the vague demons that have kept us silent about a passage that *could not be more universal among females*.

Id.

44. GREER, *supra* note 40, at 19.

Women are not given spontaneously to describing their own menopause experiences; women writers, memorists, belletrists, diarists, novelists, poets, rarely so much as hint at menopause as an event. In the vast majority of cases women do not see the climacteric as a factor in their development. It seems unlikely that what we are up against is lack of awareness or lack of insight, and only slightly more likely that we are contemplating the more sinister phenomenon of denial. If the denial is simply denial of a male construction of a female event, it is only proper; if it is denial of the event itself, it is neurotic.

Id.

45. 157 N.W. 6 (Mich. 1916).

recovery of damages by injured female plaintiffs.

A. Myths, Mystery and Misinformation: Historical Overview

Menopause, literally the time when menstruation ceases, is the term that loosely categorizes the hormonal changes that a woman's body undergoes from about thirty-five until the early to mid-fifties.⁴⁶ It may occur as a part of the normal aging process or result from the surgical removal of the ovaries, the uterus or both of these reproductive organs.⁴⁷ Menopause also may be pharmacologically induced or result from irradiation.⁴⁸ It has been a fact of life from the time the first woman's life span extended past the age of forty.⁴⁹ Yet, what menopause is and how it should be treated has been cloaked in silence, myth, mystery, and misinformation.⁵⁰

46. See DORLAND'S DICTIONARY, *supra* note 8, at 1006. In the Nineteenth Century menstruation was seen as a pathological change, a manifestation of a general systemic disturbance with local histological changes. And so "menstruation was consistently seen as pathological, menopause, another function which by this time was regarded as without analogue in men, often was too[and] many nineteenth-century medical accounts of menopause saw it as a crisis likely to bring on an increase of disease." MARTIN, *supra* note 22, at 35 (citing Carol Smith-Rosenberg, *Puberty to Menopause: The Cycle of Femininity in Nineteenth-Century America*, in CLIO'S CONSCIOUSNESS RAISED 23, 30-31 (1974)).

47. See DORLAND'S DICTIONARY, *supra* note 8, at 1006.

48. See Alan E. Treloar, *Predicting the Close of Menstrual Life*, in CHANGING PERSPECTIVES ON MENOPAUSE, *supra* note 40, at 289. As late as the 1988 edition of *Dorland's Illustrated Medical Dictionary*, published eight years after the American Psychiatric Association removed involuntional melancholia occurring at menopause from its list of recognized psychiatric disorders, referenced psychiatric changes occurring at menopause. However, our research has uncovered no scientific foundation for the inclusion of psychiatric changes in the definition of menopause or climacteric.

49. In the Twentieth Century, life expectancy moved from 46 to nearly 80. The fastest growing segment of the population is now people over 80, most of them women. While all members of the population are living longer due to better nutrition, disease control and advances in medicine, older women are outliving older men. See KEVIN KINSELLA & CYNTHIA M. TAEUBER, U.S. DEP'T OF COMMERCE, AN AGING WORLD II 22 (1993). A recent study of African hunter-gatherers led to a "grandmother hypothesis" for why women are living longer. According to the study, natural selection favors menopause so that grandmothers can ensure the survival of their grandchildren. Grandmothers have the time to provide for grandchildren, while their daughters have the time to have more offspring and take care of infants. See Ann Gibbons, *Ideas on Human Origins Evolve at Anthropology Gathering*, 276 SCIENCE 535, 536 (1997).

50. For example, in the early Twentieth Century the following treatments for menopause were commonly employed:

Treatment [for menopause].—1. . . . Above all keep the bowels open. For the sediment in the urine it is well to drink Vichy or Seltzer water freely during the day; or to take half a teaspoonful of bicarbonate of soda in a tumblerful of water in the course of the day.

At times, everything from congestion of the liver to trembling of limbs was attributed to this natural womanly function.⁵¹ At worst, menopause is labeled a disease and shrouded in fear. At best, menopause becomes a catch-all for all the physical and emotional problems of women between the ages of forty and fifty-

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2. The congestion of the head and the disturbances of vision are relieved by hot foot baths, with or without mustard, and of the cold water eye douche five minutes three times daily.
 3. Lukewarm general baths taken three times a week will keep the skin in good condition
 4. Those women who have a tendency to stoutness should adhere to a restricted diet Milk and beer are prohibited.
 5. The few women who lose flesh must be well fed, and have chocolate and plenty of milk to drink
 6. A sudden suppression of the flow during this period is particularly dangerous, hence she should avoid getting the feet wet, wet skin, and should not take a cold bath nor wash the privates with cold water. . . .
 7. If hemorrhages occur employ the remedies advocated for the treatment of menorrhagia and metrorrhagia.
 8. If the bleeding is quite profuse, pack clean pieces of linen tightly in the vagina, and allow them to remain until a physician is consulted, which should be immediately. This method of packing the vagina will control the bleeding until the physician arrives and institutes more radical measures. A good uterine tonic such as the *pil viburnum comp.* often does much to relieve the nervous condition and allay pain and distress.

LIBRARY OF HEALTH, COMPLETE GUIDE TO PREVENTION AND CURE OF DISEASE 680-81 (B. Frank Scholl ed., 1916).

These relatively moderate remedies for menopause were replaced by the early 1920s. Electro shock therapy consisting of six to nine treatments, forced tube feedings, drug therapy, occupational therapy, hydro-therapeutic measures and confinement to asylums all found favor with, and were used by, the medical establishment. *See, e.g.,* SIR DAVID KENNEDY HENDERSON & R.D. GILLESPIE, A TEXT-BOOK OF PSYCHIATRY FOR STUDENTS AND PRACTITIONERS 295, 298 (1956) (describing forms of treatment widely considered appropriate in 1956).

In 1997, prescription drugs to treat menopause were predicted to constitute the largest market among the baby boomer generation. The hormone replacement drug market generated \$1.2 billion in 1996 and is projected to increase to \$5.04 billion in 2006. *See Aging Boomers Provide Facelift*, INDUS. IN TRANSITION, June 1, 1997, available in 1997 WL 9285841.

51.

There may be catarrh of the stomach and intestines; congestion of the liver, rendering it torpid; the kidney disturbances generally appear in the form of a sediment in the urine The heart is often affected in the form of palpitations and shortness of breath. The nervous system also shows evidences of a general upset. Sometimes the limbs become very trembly. . . she may become delirious, or even go insane.

LIBRARY OF HEALTH, *supra* note 50, at 680.

five. Even today, some doctors, therapists, and healthcare givers are woefully uninformed about menopause and are neither interested in nor motivated in researching this area. “‘You’re just in the menopause’ is often the answer given to a patient who comes to a doctor reporting depression, anxiety, headaches, loss of libido, etc.”⁵²

In the Sixteenth Century, the ending of the menstrual cycle was viewed as a negative process whereby evil humors remained present in the body, capable of adding to that complex of female wickedness that could turn aging women into witches. According to one French physician: “‘When seed and menstrual blood are retained in women besides [beyond] the intent of nature, they putrefie and are corrupted, and attain a malignant and venomous quality.’”⁵³

In a treatise on witchcraft, Reginald Scot traced witchery’s origin among women to the operation of melancholy in the blood. “He reasoned that the end of women’s monthly bleeding, which had regularly relieved them of this malevolent bodily humor, made it almost impossible for aging women not to be susceptible to witchcraft.”⁵⁴

As sexualized beings, aging women were malevolent creatures, the devil’s “go-betweens” to the human world. So an old German proverb expressed it: “Where the Devil cannot go, he sends an old woman.” These women themselves were supposedly engaged in a vast conspiracy of secret prostitution, as they controlled those young female devils (the succubi) and the young male devils (the incubi) whom they sent to seduce others and to enlist them in their satanic worship.⁵⁵

These remarkably negative attributes ascribed to women are perhaps a result of the confusion presented by women’s monthly cycles. Men’s bodies do not have obvious cycles; and because early commentators such as Scot used male physiology as a reference point, women were considered “different.” Women’s physiological difference was confusing to men and led to the fear and misapprehension evident in so many early sources that speak of women as impure or defective.⁵⁶ Indeed, the connection between menstrual discharge,

52. JUDITH GOLDEN, *A FEMINIST DICTIONARY* 267 (Cheris Kramarae & Paula A. Treichler eds., 1991).

53. LOIS W. BANNER, *IN FULL FLOWER: AGING WOMEN, POWER, AND SEXUALITY* 192 (1992) (quoting REGINALD SCOT, *THE DISCOVERIE OF WITCHCRAFT* (1972)) (alteration in original).

54. *Id.*

55. *Id.* at 193. See also SCOT, *supra* note 53, at 42-43 (Scot further contended that “old witches are shown to procure as many virgins for Incubus as they can, whereby in time they grow to be excellent bawds”).

56. Apart from the physical and mental changes that have always attended what we perceive as the normal aging process, puberty is the only change or cycle that is recognized in men. However, outside the medical mainstream questions have arisen about the possibility of a male menopause, and if it in fact exists, how and whether this cycle should be treated. See, e.g., Tom Hodgkinson & Anna Selby, *Health: And When He Suffers From the Menopause*, *DAILY TELEGRAPH*, Aug. 10, 1993, at 13; Gail Vines, *Science: Mixing a Mean Testosterone*, *INDEP.*, Sept.

uncleanliness, impurity and death is demonstrated and reinforced as far back as the Old Testament, which states the Jewish law that a woman must be avoided by her husband during her bleeding and for seven days after her bleeding stops.⁵⁷ The Romans and even Aristotle considered female infants as suffering "from some sort of birth defect."⁵⁸ Men bleed only if they are cut, or if a serious disease is about to take their life. A woman bleeds, unless pregnant, every month for thirty-five to forty years, if she lives that long.⁵⁹ Therefore, it seemed

26, 1993, at 68. *But see*, John B. McKinley et al., *The Questionable Physiologic and Epidemiologic Basis for a Male Climacteric Syndrome: Preliminary Results from the Massachusetts Male Aging Study*, *MATURITAS*, June 11, 1989, at 103 (reporting preliminary findings by John B. McKinley, Director of the New England Research Institute, examining physiological and epidemiologic evidence of "male menopause").

57.

When a woman has a discharge, her discharge being blood from her body, she shall remain in her impurity seven days; whoever touches her shall be unclean until evening. Anything that she lies on during her impurity shall be unclean; and anything she sits on shall be unclean And if a man lies with her, her impurity is communicated to him; he shall be unclean seven days, and any bedding on which he lies shall become unclean.

When a woman has had a discharge of blood for many days, not at the time of her impurity, or when she has a discharge beyond her period of impurity, she shall be unclean, as though at the time of her impurity, as long as her discharge lasts. . . .

When she becomes clean of her discharge, she shall count off seven days, and after that she shall be clean. On the eighth day she shall take two turtledoves or two pigeons, and bring them to the priest at the entrance of the Tent of Meeting. The priest shall offer one as a sin offering and the other as a burnt offering; and the priest shall make expiation on her behalf, for her unclean discharge, before the LORD.

You shall put the Israelites on guard against their uncleanness, lest they die through their uncleanness by defiling My Tabernacle which is among them.

Leviticus 15:19-31, reprinted in TANAKH, A NEW TRANSLATION OF THE HOLY SCRIPTURES ACCORDING TO THE TRADITIONAL HEBREW TEXT (1985)).

58. THOMAS HARDY LEAHEY, *A HISTORY OF PSYCHOLOGY: MAIN CURRENTS IN PSYCHOLOGICAL THOUGHT* 6, 214 (2d ed. 1987).

St. Thomas Aquinas codified in *Summa Theologica* the concept of women as defective when he wrote:

Reply Obj. 1. As regards the individual nature, woman is defective and misbegotten, for the active force in the male seed tends to the production of a perfect likeness in the masculine sex; while the production of woman comes from a defect in the active force or from some material indisposition, or even from some external influence; such as that of the south wind, which is moist, as the Philosopher observes (*De Gener Animal.* iv 2). One the other hand, as regards human nature in general, woman is not misbegotten, is but included in nature's intention as directed to the work of generation.

ST. THOMAS AQUINAS, *SUMMA THEOLOGICA*, Part I, ques. 92, art. 1, 466 (Fathers of the English Dominican Province trans., First Am. ed. 1947).

59. "Before the [Twentieth C]entury, shorter life spans meant that menopause was usually followed in fairly short order by death." Jean Seligmann et al., *Not Past Their Prime*, *NEWSWEEK*,

apparent to men that women were either injured, very ill, or for those women who exhibited no other signs of disease, that they suffered from some dire defect that only afflicted females.⁶⁰

Further, because of their bleeding illness, it followed that women must need care and protection to live with their defect.⁶¹ Under this theory, women are not able to fully participate in public life and make rational decisions.⁶² Taking the syllogism to its logical conclusion, however, observers should have concluded that: If a woman who bleeds is ill, one who permanently stops bleeding is well, and thus able to achieve greater or at least equal status to men. That was not the case. In fact, as these early writings demonstrate, women were captive to their physiology. This presented a dual problem: Women had a bleeding defect when fertile, and a fertility defect when they stopped bleeding. Or from another perspective: "Women before menopause are scary because of the magic of fertility; women after menopause are scary because they are exempt from sexual taboos."⁶³

Aug. 6, 1990, at 66.

[As late as] the turn of the [Twentieth C]entury many women never reached menopause. Their average life expectancy was 48 years. The ones still alive probably had children at home during menopause because they gave birth to more children and at a later age than today's women. . . .

* * *

Human females are the only mammals who continue to live long after their ovaries cease to function. Some medical scientists have raised the question of whether it's some kind of a mistake that women now live so many years without estrogen.

SALLY CONWAY, *MENOPAUSE: HELP AND HOPE FOR THIS PASSAGE* 46-48 (1990).

60. Ancient Greek physicians attributed disease for which they could find no physiological basis to a diseased uterus. From this usage arose the condition known as hysteria. Even up to the time of Freud, hysteria was still widely considered to be the most widespread psychological disorder and it was, of course, believed to be a disease exclusive to woman. See LEAHEY, *supra* note 58, at 214-15.

61. Care and protection for the "weaker sex" was a view espoused well into the Twentieth Century and enforced in law. See, e.g., *Bradwell v. Illinois*, 83 U.S. 130, 139 (1872) (upholding an Illinois statute prohibiting a woman from becoming a lawyer); *Nephew v. Liquor Control Comm'n*, 57 N.W.2d 466, 468 (Mich. 1953) (upholding a statute prohibiting a woman from working as a bartender).

62. See *Bradwell*, 83 U.S. at 130; *Nephew*, 57 N.W.2d at 466. Freud couched the concept differently as revealed in a letter written by him to his fiancée:

It seems a completely unrealistic notion to send women into the struggle for existence in the same way as men. Am I to think of my delicate, sweet girl as a competitor? . . . Women's delicate natures . . . are so much in need of protection. [Emancipation would take away] the most lovely thing the world has to offer us: our ideal of womanhood . . . the position of woman cannot be other than what it is: to be an adored sweetheart in youth and a beloved wife in maturity.

LEAHEY, *supra* note 58, at 213 (alteration in original).

63. Elizabeth Kincaid-Ehlers, *Bad Maps for an Unknown Region: Menopause from a*

Until the early 1900s, a woman's ability to serve her primary function of childbearing and her life span were about equal.⁶⁴ Because so few women reached the age of menopause, and even fewer lived beyond these years, there is little historical reference to the menopausal woman. Extrapolating from the limited references available, we reasonably can conclude that the older woman was not greatly esteemed by a western society that valued women primarily for their childbearing ability.⁶⁵ As St. Thomas Aquinas said:

It was necessary for woman to be made, as the Scripture says, as a helper to man; not, indeed, as a helpmate in other works, as some say, since man can be more efficiently helped by another man in other works; but as a helper in the work of generation.⁶⁶

This utilitarian view of woman solely as procreator, however, is not universal. In some non-western cultures the difference is quite stark. Older women are revered and their status actually improves with age. For example, Indian women's status improves at menopause⁶⁷ and in "some southern African cultures, women at menopause are relieved of household chores and invited to sit with the men on tribal councils."⁶⁸

Mischaracterization of menopause may result not only from fear and misunderstanding of menstruation, but also from lack of information and positive role models. The scarcity of literary representations of menopause or the process of female aging, for example, also contributes to the misapprehension.⁶⁹ One probably could count on one's fingers the number of positive representations of older women.⁷⁰ One literature critic writes that "women of the ages from forty-five to sixty are literary missing persons."⁷¹ Even modern literature does not offer a model for an easy understanding of this part of women's lives, and does

Literary Perspective, in CHANGING PERSPECTIVES ON MENOPAUSE, *supra* note 40, at 24, 28 (pointing out many double binds in which women are caught, with menopause as the classic one).

64. See J.A. Harper, Letter, *HRT is a Valid Response to Hormone Failure*, INDEP., Oct. 27, 1991, at 23 ("In the animal kingdom it is usual for the female of the species to die off after the fertile period has passed. It is only comparatively recently that mankind has lived beyond this point.").

65. Plato, for example, considered the prime of a woman's life to be a period of only 20 years, but a man's was 30. PLATO, THE REPUBLIC, PART IV, 242.

66. ST. THOMAS AQUINAS, *supra* note 58, at 466.

67. See Ann Lloyd, *Health: Dismantling the Myth of the Menopause*, INDEP., Oct. 15, 1991, at 17.

68. Michele Ingrassia, *The Last Taboo*, NEWSDAY (Nassau Edition), May 11, 1992, at 44.

69. See, e.g., Kincaid-Ehlers, *supra* note 63, at 24-38.

70. See, e.g., JUNE ARNOLD, *SISTER GIN* (1975) (a guerilla band of older women use menopause as a weapon in their mission to avenge wrongs done to women); RITA MAE BROWN, *SIX OF ONE* (1978) (covering three generations of women, their love and sexuality); DORIS LESSING, *THE SUMMER BEFORE THE DARK* (1973) (a 45-year-old woman no longer needed as wife and mother confronts her life, old age and death).

71. Kincaid-Ehlers, *supra* note 63, at 27.

little to debunk menopause myths.

B. Nineteenth and Twentieth Century Mystery and Misinformation

1. *The Denormalization of Menopause.*—As the life span of women and their economic value began to increase and more women lived into and beyond menopause, western society grappled with the physical and cognitive abilities of post-menstrual women. Before long, a host of disease pathologies, both mental and physical, that perpetuate the myth of the incapacity of women were attributed to menopause. Western society and western medicine adopted and expanded upon the ancient concept of *hysteria*, a disorder of women that Greeks ascribed to a nonfunctional or diseased uterus.⁷² Health problems such as irritability, blurred vision, weight changes, emotional and psychiatric disorders all were blamed on menopause.⁷³ These views were reinforced by an authoritative medical community that, with little or no research, developed a well received and widely accepted theory that menopause was the cause of a behavioral syndrome they labeled “involuntional melancholia.”⁷⁴

72. Hysteria is from the Greek word for uterus, *hysteria*. It was “used to refer to . . . a disease of females characterized by multiple somatic complaints that do not appear to result from physical illness and by a chronic fluctuating course . . . which once was considered a physical disorder (it was attributed by the ancient Greeks to displacement of the uterus . . .).” DORLAND’S DICTIONARY, *supra* note 8, at 811. See also *supra* note 60.

73. See Jean Latz Griffin, *Time For A Change: An Enlightened Generation Buries the Myth of Menopause*, CHI. TRIB., Oct. 8, 1989, at 61; see also *Armour v. Tomlin*, 42 S.W.2d 634, 636 (Tex. App. 1931) (testifying expert stated that the “change of life affects the nervous system and produces organic disturbances; that such a nervous condition sometimes creates vomiting and a lack of appetite, or on the other hand, an abnormal appetite; that fluctuations in temperature and loss of weight under such conditions are not infrequent”).

74. Sandy Rovner, *Menopause and Mysterious Moods*, WASH. POST, Feb. 14, 1989, at Z20. 296.0 Involuntional melancholia[:]

This is a disorder occurring during the involuntional period and characterized by worry, anxiety, agitation, and severe insomnia. Feelings of guilt and somatic preoccupations are frequently present and may be of delusional proportions. This disorder is distinguishable from Manic-depressive illness (q.v.) by the absence of previous episodes; it is distinguished from Schizophrenia (q.v.) in that impaired reality testing is due to a disorder of mood; and it is distinguished from Psychotic depressive reaction (q.v.) in that depression is not due to some life experience. Opinion is divided as to whether this psychosis can be distinguished from the other affective disorders. It is, therefore recommended that involuntional patients not be given this diagnosis unless all other affective disorders have been ruled out. (In DSM-I this disorder was considered one of two subtypes of “Involuntional Psychotic Reaction.”[D])

AMERICAN PSYCHIATRIC ASSOC., DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 36 (2d ed. 1968).

“Involuntional melancholia [was] a term formerly used to describe an agitated depression in a person of climacteric age. Currently, such persons are not distinguished from depressed patients

2. *The Medical "Menopause as Disease" Model.*—With influence from the medical community, society clung to a pervasive attitude that a menopausal woman was a fragile creature given to raging emotional peaks and valleys and better kept at home where she could do the least damage.⁷⁵ In 1899, author Charlotte Perkins Gilman observed the travails of women's domestic subordination when she wrote about her own personal despair with the so-called rest cure in *The Yellow Wallpaper*,⁷⁶ a slim volume that has become a classic. While she, in fact, was going mad from domestic boredom, her husband and brother—physicians both—were quite sure of the wisdom of their treatment for her hysteria or female melancholia.

John laughs at me, of course, but one expects that.

John is practical in the extreme. He has no patience with faith, an intense horror of superstition, and he scoffs openly at any talk of things not to be felt and seen and put down in figures.

John is a physician and *perhaps*—(I would not say it to a living soul, of course, but this is dead paper and a great relief to my mind)—*perhaps* that is one reason I do not get well faster.

You see he does not believe I am sick!

And what can one do?

If a physician of high standing, and one's own husband, assures friends and relatives that there is really nothing the matter with one but temporary nervous depression—a slight hysterical tendency—what is one to do?

My brother is also a physician, and also of high standing, and he says the same thing.

So I take phosphates or phosphites—whichever it is—and tonics,

of other age groups." THE AMERICAN PSYCHIATRIC ASSOCIATION'S PSYCHIATRIC GLOSSARY 54 (1984). Another term commonly used was the "climacteric [m]enopausal period in women. Sometimes used to refer to the corresponding age period in men." *Id.* at 19. Involutional melancholia was described in 1896 in the fifth edition of *PSYCHIATRIE* by Kraepelin:

Melancholia . . . sets in principally, or perhaps exclusively . . . in women from the period of the menopause onwards About a third of the patients make a complete recovery. In severe and protracted cases, emotional dullness may remain, with faint traces of the apprehensive tendency. Judgement and memory may also undergo considerable deterioration. The course of the disease is always tedious, and usually continues, with many fluctuations, for from one to two years or even longer, according to the severity of the case.

EMIL KRAEPELIN, *PSYCHIATRIE: EIN LEHRBUCH FÜR STUDIERENDE UND AERTZE* (5th ed. 1896).

75. See, e.g., CONEY, *supra* note 39, at 67; MARY CRAWFORD & RHODA UNGER, *WOMEN AND GENDER; A FEMINIST PSYCHOLOGY* 487 (1992).

76. CHARLOTTE PERKINS GILMAN, *THE YELLOW WALLPAPER AND OTHER FICTION* (1973). This chilling story about a woman's mental breakdown as a result of the isolation imposed upon her by her physician husband, enlightens and reflects a woman's views of the medical profession in the late 1800s.

and air, and exercise, and journeys and am absolutely forbidden to "work" until I am well again.

Personally I disagree with their ideas.⁷⁷

Involitional melancholia, a syndrome with such an impressive name, required equally impressive therapy. For the treatment of any woman so labeled, it was considered proper to rely upon powerful sedatives⁷⁸ and massive doses of hormones.⁷⁹ These were administered, in some cases, over a period of many years. A woman also might be treated with harsher means, such as shock therapy, in an effort to "cure" this disease.⁸⁰ In more extreme cases women were confined to mental institutions⁸¹ for long periods, even years. If a woman who was emotionally stable sought care for any of the symptoms of menopause from the medical community, there was always a chance that the treatment itself would lead to permanent incapacity.⁸²

Medical professionals developed careers around the physical and emotional disorders of menopause.⁸³ When called to the courtroom, their testimony was

77. *Id.* at 3-4.

78. Kraepelin described the pharmacotherapy employed in the treatment of menopause around the turn of this century: "Paraldehyde is generally to be recommended, or, under some circumstances, alcohol, or occasional doses or trional. Opium is employed to combat the apprehension, in gradually increasing doses." EMIL KRAEPELIN, LECTURES ON CLINICAL PSYCHIATRY 9-10 (1904) [hereinafter LECTURES ON CLINICAL PSYCHIATRY].

79. See GREER, *supra* note 40, at 13-16.

80. The following quote of medical expert testimony from a 1966 case provides insight into what was at that time considered appropriate medical treatment for menopause. "[S]he had received shock therapy during the period of her hospitalization as part of the treatment for involitional melancholia which he defined as mental depression, occurring with the menopause and that in February 1961 she had undergone a hysterectomy." *In re St. John*, 272 N.Y.S.2d 817, 823 (N.Y. Fam. Ct.) (emphasis added), *rev'd*, 274 N.Y.S. 2d 798 (1966).

81. Kraepelin recommended institutionalization of women as a superior form of treatment for this malady: "The treatment of the malady cannot, as a rule, be carried out, except in an asylum, as thoughts of suicide are almost always present. Patients who show such tendencies require the closest watching day and night." LECTURES ON CLINICAL PSYCHIATRY, *supra* note 78, at 9.

Anecdotal evidence from cases in the early 1920s reveals that institutionalization was, in fact, a treatment option. See, e.g., *Lunt v. Lunt*, 121 S.W.2d 445 (Tex. App. 1938). "[I]n 1928 appellant was undergoing her menopause, and during a 'severe paroxysm of her ailment' appellee filed lunacy charges against her. . . . Appellant was returned home within about six weeks. She was still suffering from her menopause, however, and was returned to the asylum, where she was desperately ill." *Id.* at 446.

82. Incapacity might be physical, mental or legal, or all three combined.

83. Medical professionals served as expert witnesses, and operated public and private institutions for the treatment of the mental disorders they believed to be caused by menopause. Surgery was regularly performed to cure the mental and physical symptoms of the disease. See Mary Lou Logothetis, *Our Legacy: Medical Views of the Menopausal Woman*, in WOMAN OF THE 14TH MOON: WRITINGS ON MENOPAUSE 40-46 (Dena Taylor & Amber Coverdale Sumrall eds.

replete with scientific sounding jargon that the court frequently asked them to translate into lay terms.⁸⁴ When this was done, the records reveal that their testimony amounted to little more than stereotyped, folkloric conclusions.⁸⁵

Medical opinions and expert testimony also included condescending language of misplaced compassion and understanding for women they held to be disabled by the unavoidable condition of menopause. One physician testifying about injuries sustained by a woman who was run over by a taxi stated: "[T]here is no question in my mind but that probably she was suffering at the time she came to me. The question in my mind is the cause of the suffering."⁸⁶ Saying further that in his opinion the symptoms she told him of were "due entirely to the menopause, the change of life in this case."⁸⁷ Another physician testifying about the debilitating "stated effects" of menopause even went so far as to suggest that testimony of a woman was not truthful due to menopause. In his words: "[T]he woman was suffering from hysteria and . . . in her physical and mental state *due to having recently passed through the menopause her testimony was not to be believed.*"⁸⁸ Concurrently, courts developed a pattern of paternalistically patting women on the head while reducing or limiting damage awards.⁸⁹

Thus, like mirrors, many courts reflected the prevailing medico/social view that women at or about the age of menopause were subject to various physical, emotional and mental maladies. Supported by seemingly reasonable and rarely contested medical testimony, courts would: 1) allow juries to consider effects of menopause;⁹⁰ 2) allow themselves to consider the effects, even when not raised

1991).

In 1967, Wolf H. Utian, M.D., set up the first menopause clinic in Groote Schurr, South Africa and worked closely with the pharmaceutical industry on studies and trials of hormone replacement drugs. See GREER, *supra* note 40, at 13-14.

84. See *infra* notes 86-88 and accompanying text.

85. Stephanie Dallam, author of *Men and Menopause: A Survey of Knowledge and Attitudes*, stated that "most of what health professionals were taught about menopause arose out of our belief system, which views events connected with women and ageing as negative, but was not based on any research." *Men's Knowledge of Menopause Examined*, available in LEXIS, NEXIS Library, UPI File.

86. *Oliver v. Detroit Taxicab Co*, 177 N.W. 235, 237 (Mich. 1920).

87. *Id.*

88. *Mayor of Beverly v. First Dist. Court of Essex*, 97 N.E.2d 181 (Mass. 1951) (emphasis added).

89. See, e.g., *Tate v. Western Union Tel. Co.*, 96 S.W.2d 364 (Mo. 1936) (reducing jury award by \$5000).

90. See *Oliver*, 177 N.W. at 235 (stating that lower court properly allowed jury to weigh testimony of doctor who stated that plaintiff's condition was due to menopause); *City of Beaumont v. Wiggins*, 136 S.W. 260 (Tex. App. 1940) (finding that lower court erred in not instructing jury of plaintiff's prior disability of menopause for purposes of damage award); *but see Hirsh v. Manley*, 300 P.2d 588 (Ariz. 1956) (upholding the lower court, the Supreme Court of Arizona rejected defendant's instruction that would have advised the jury that it could not award any damages for plaintiff's preexisting condition of menopause).

in the trial court; and 3) allow reduced awards to women because menopause was partly responsible for their complaints and therefore not compensable by the tortfeasor.⁹¹

Moreover, while the success of this defense was heavily dependent upon medical opinion evidence, the recorded opinions we found are remarkably silent with respect to the admissibility of such expert testimony. In 1923, in *Frye v. United States*⁹² the defense wished to present expert testimony that deception could cause a rise in systolic blood pressure. The court prohibited this evidence because it found the deduction of truthfulness with respect to blood pressure was not "sufficiently established to have gained general acceptance" in its field.⁹³ Thus, the "general acceptance in the medical or scientific community" standard was born, and soon became the test of admissibility in almost all jurisdictions. A few menopause defense cases pre-date the general acceptance standard, yet, even after the *Frye* test gained in national recognition, the admissibility of expert testimony on menopause seemed to go unchallenged. With all the documented ailments of the menopausal woman and a host of medical experts able and willing to testify to her ills, it is perhaps not unusual that creative members of the legal community seized upon this condition. Thus, we can see the menopause defense as a metaphor of societal perceptions of middle-aged women and a manifestation of how cultural assumptions become accepted and embedded in the legal and the medical communities.

II. TALES FROM THE COURTROOM—MENOPAUSE AS A LEGAL DEFENSE

Menopause as a legal defense has a checkered past. From 1900, when the defense made its first appearance through its last usage in 1985, it was invoked in over fifty reported appellate decisions.⁹⁴ Because most trial court opinions are unreported and, for the most part inaccessible, the actual usage of the defense is unknown. From the 1900s to the late 1920s we found six decisions. The pace picked up in the 1930s with eight cases, doubled to sixteen in the 1940s, and then dropped back to eight, eight, and six in each of the next three decades that preceded its demise.⁹⁵ It is telling that the menopause defense experienced its greatest usage during the World War II years, concurrently with the era that women encountered their first enfranchisement as full-fledged members of the American work force.⁹⁶

The three general categories of cases where the defense appeared were:

91. See, e.g., *Lee v. Lincoln Cleaning & Dye Works*, 15 N.W.2d 330 (Neb. 1944) (reducing worker's compensation award because of conflicting medical testimony on the impact of menopause on plaintiff's injury).

92. 293 F. 1013 (D.C. Cir. 1923).

93. *Id.* at 1014.

94. In our research we were unable to access trial records in cases that never went to appeal. Thus, the actual number of times the defense was asserted is likely much greater.

95. See Appendix.

96. See *infra* notes 134-39 and accompanying text (discussing *Rosie the Riveter*).

negligence/personal injury matters; divorce; and worker's compensation cases. Additionally, we found three remarkable product liability decisions involving foreign substances in beverage bottles.⁹⁷ After the 1960s, all cases were accident matters. By the 1980s, the use of menopause as an affirmative defense slowed to a trickle.

After *Laskowski*, if a female plaintiff was over age thirty-five, some defendants had no qualms about raising her "menopausal or pre-menopausal condition" as a defense to a host of claims.⁹⁸ Defendants would allege that the ailments or afflictions of the plaintiff were related to menopause rather than the negligence of the defendant,⁹⁹ or that menopause somehow exaggerated or extended an injury.¹⁰⁰ In divorce actions, menopause sufficed for cause

97. *Day v. Rains*, 220 S.W.2d 575 (Ky. 1949) (allowing defendant's claim that plaintiff's digestive problems and vomiting were due to her menopause rather than to the rusty, used razor blade that was in the Pepsi-Cola she ingested); *Hollis v. Ouachita Coca-Cola Bottling Co.*, 196 So. 376, 378 (La. Ct. App. 1940) (allowing doctor's statement that the woman who swallowed pieces and poison of a Black Widow spider found in bottle of Coca-Cola had symptoms due to menopause, and that "a normal individual should be over the effects in a week"); *Laurel Coca Cola Bottling Co. v. Hankins*, 75 So. 2d 731 (Miss. 1954) (allowing defendant's argument that plaintiff's menopause was responsible for exaggerating her injury caused by foreign substance known as "Acid Iron Earth Water" in her Coca-Cola).

98. *See, e.g., Cimijotti v. Cimijotti*, 121 N.W.2d 537 (Iowa 1937) (defending a divorce action); *Maroun v. New Orleans Public Serv. Inc.*, 83 So. 2d 397 (La. Ct. App. 1955) (defending a negligence action involving an automobile accident); *Laurel Coca Cola Bottling*, 75 So. 2d at 731 (defending a products liability case).

99. *See Montgomery v. Manos*, 440 P.2d 629 (Kan. 1968) (introducing defendant's expert testimony of plaintiff's history of menopausal complaints to defeat her claim in an automobile related negligence action); *Oliver v. Detroit Taxicab Co.*, 177 N.W. 235 (Mich. 1920) (arguing defendant's attribution of all plaintiff's symptoms to her menopause rather than to her having been hit by the defendant's taxi cab); *Johnson v. Gulfport Laundry & Cleaning Co.*, 162 So. 2d 859 (Miss. 1964) (holding involuntarily psychotic reaction without psychosis as a result of menopause caused the plaintiff's illness); *Brown v. Payne*, 264 S.W.2d 341 (Miss. 1954) (showing a drunk driver defendant's attempt to prove that plaintiff's complaints were related to her menopause); *Airline Motor Coaches v. Green*, 217 S.W.2d 70 (Tex. App. 1949) (involving a doctor's opinion that plaintiff's condition was a result of menopause rather than a brain injury resulting from a bus accident).

100. *See, e.g., Four Branches, Inc. v. Oechesner*, 73 So. 2d 222 (Fla. 1954) (agreeing that the claimant was in the "throes" of menopause); *Merritt v. Hemstead*, 206 So. 2d 718 (La. Ct. App. 1968) (ascribing defendant's argument concerning plaintiff's symptoms to delayed menopause, even though plaintiff testified that she passed through menopause several years prior to the accident); *Maroun*, 83 So. 2d at 397 (finding that the plaintiff's pain and personality change were related to her menopause and not a result of being thrown to the floor of a suddenly stopped bus); *Richey v. Service Dry Cleaners*, 28 So. 2d 284 (La. Ct. App. 1946) (asserting the claim that treatment required by the plaintiff was a result of a nervous condition related to menopause); *Laurel Coca Cola Bottling*, 75 So. 2d at 731 (Miss. 1954) (maintaining defense's argument that plaintiff's menopause was responsible for exaggerating her injury); *Vogrin v. Forum Cafeterias of Am., Inc.*,

necessary for divorce. It conveniently was introduced to support everything from a wife's insanity, to frigidity, to infidelity.¹⁰¹ Menopausal syndrome was used by both men and women as a defense to almost any ground for divorce from adultery to desertion.¹⁰² While the menopause defense found its most prolific usage in negligence and divorce actions, employers on several occasions used the plaintiff's menopause to limit or deny recovery in workman's compensation cases.¹⁰³ As long as a woman was thirty-five or over, efforts were made to blame

308 S.W.2d 617 (Mo. 1957) (stating menopausal condition of plaintiff prolonged her complaints related to her injury); *Croll v. Miller* 2 A.2d 527 (Pa. Super. 1938) (reducing workman's compensation awarded for loss of use of an arm because court found that her disability was contributed to by the fact that she had recently gone through menopause); *Yellow Cab & Baggage Co. v. Green*, 277 S.W.2d 92 (Tex. 1955) (describing defendant's assertion that plaintiff's "female troubles" should reduce the amount of award for her injury); *City of Beaumont v. Wiggins*, 136 S.W.2d 260 (Tex. App. 1940) (alleging that plaintiff failed to properly recover due to menopause or other conditions).

101. See, e.g., *Sisson v. Sisson*, 36 Haw. 606 (1944) (arguing that the wife was undergoing menopause at time of marital discord); *English v. English*, 12 N.J. Misc. 239 (1934) (offering menopause as an excuse for wife's behavior that was found to be extreme cruelty); *Pearson v. Pearson*, 41 N.E.2d 725 (Ohio Ct. App. 1941) (asserting that wife's conduct may have been explained by menopause, but still supported divorce by husband on grounds of extreme cruelty); *Wiley v. Wiley*, 190 A. 363 (Pa. 1937) (using menopause to explain irritable and argumentative behavior during marriage in a divorce action); *Glass v. Glass*, 63 A.2d 696 (Pa. Super. Ct. 1949) (allowing expert testimony that when dealing with women, menopause must be considered).

102. The menopause defense was also used to explain the circumstances that caused a spouse to commit adultery, or otherwise act cruelly. See, e.g., *Danner v. Danner*, 206 So. 2d 650 (Fla. Ct. App. 1968) (asserting that wife's grievances were related to her menopause rather than to husband's maltreatment); *Cimijotti*, 121 N.W.2d at 537 (attributing plaintiff's condition to her menopause rather than to her husband's abuse throughout the course of their marriage); *King v. King*, 152 So. 2d 889 (Miss. 1963) (relating menopause to poor health); *Whinney v. Whinney*, 58 A.2d 183 (Pa. Super. Ct. 1948) (asserting that nervous ailment was produced by menopause); *Urffer v. Urffer*, 58 A.2d 580 (Pa. Super. Ct. 1944) (offering menopausal disturbance as an excuse for conduct); *Worthen v. Worthen*, 374 S.W.2d 935 (Tex. App. 1964) (discussing defendant's assertion that plaintiff's menopause caused her conduct to be erratic and withdrawn); *Gray v. Gray*, 24 S.E.2d 444 (Va. 1943) (alleging that menopause made defendant too sick to commit adultery). For further discussion, see *infra* Part II.D.

103. See, e.g., *Olin Indus., Inc. v. Industrial Comm'n*, 68 N.E.2d 259 (Ill. 1946) (describing defendant employer's assertion that claimant's pain in her right breast was related to her menopause rather than to the injury she sustained when a machine guard weighing 75 pounds fell on her chest during the course of her employment); *Johnson*, 162 So. 2d at 859 (asserting that woman's involuntarily psychotic reaction was not work related but rather was a result of menopause); *Lee v. Lincoln Cleaning & Dye Works*, 15 N.W.2d 330 (Neb. 1944) (rejecting defendant's argument that plaintiff's condition was due to menopause); *Maryland Cas. Co. v. Davis*, 464 S.W.2d 433 (Tex. App. 1971) (limiting damages in a workman's compensation action); *American Employees' Ins. Co. v. Kellum*, 185 S.W.2d 113 (Tex. App. 1945) (remanding case for new trial because lower court erred in not allowing medical testimony as to plaintiff's menopause as a factor in her injury).

whatever complaint she had on menopause.

A. *The Early Years*

The first documented reference to menopause in a reported legal decision is found at the turn of the century, in a Texas case where the San Antonio Gas Company (the "Gas Company") unsuccessfully alleged that injuries sustained by a woman who fell into an uncovered trench were due to her menstrual difficulties, not her physical injuries.¹⁰⁴ On appeal, the Gas Company's claims of unfairness because the trial court refused to consider evidence of the plaintiff's age or her menstrual condition, were flatly denied.¹⁰⁵ A brief hiatus in assertion of this defense followed, and the next documented appearance occurs eleven years later in a New Jersey case quaintly titled *The Little Silver*.¹⁰⁶ This case involved a forty-four-year-old woman passenger on a boat (The Little Silver) traveling from New York to Long Branch, New Jersey.¹⁰⁷ The plaintiff, Borrea Johnson, was injured when The Little Silver ran into the starboard side of another boat.¹⁰⁸ When Ms. Johnson sued for negligence seeking damages, the defendants introduced a dramatic case about Ms. Johnson's reproductive condition—her "transition state from a woman's normal (reproductive) functions to the cessation of the same."¹⁰⁹ One physician, testifying for the insurance company, stated in response to a question about what symptoms are found during menopause:

You find all sorts of symptoms, particularly you are apt to find nervous symptoms, hallucinations, dizziness, pain, fear of impending death, fear of going insane; in fact, women at that period do go insane, sometimes temporary, and sometimes it is permanent.¹¹⁰

But, unswayed by opinions and comments of the insurance company physicians, the court discredited the defendants' attempts to devalue Ms. Johnson and concluded that:

A woman, passing through the physical transition peculiar to her sex, is entitled to as safe passage as any other person, and is not barred of a full recovery for injuries sustained through another's negligence because that condition makes such injuries more painful, or renders her less capable

104. *San Antonio Gas Co. v. Singleton*, 59 S.W. 920 (Tex. Civ. App. 1900).

105. *Id.* at 921.

106. 189 F. 980 (D.N.J. 1911).

107. *Id.* at 981.

108. *See id.*

109. *Id.* at 985. The record is silent with respect to objections made to preclude such testimony and evidence, and the trial court seemed very willing to accept this evidence as true. On appeal, as well, there is no discussion of the admissibility of this evidence.

110. *Id.* This conclusion is consistent with the speculative and uninformed opinions of the medical profession at this time. See *supra* note 15 discussing that sex hormones were not discovered until the 1920s.

of a prompt recovery.¹¹¹

Just a few short years later, the judicial climate showed signs of change. And, the rise of the menopause defense truly began with Anna Laskowski's case in Michigan in 1916.

The use of the menopause defense in *Laskowski v. People's Ice Co.*,¹¹² is the third reported case that uses menopause to deflect blame and limit recovery in a negligence action.¹¹³ However, unlike the earlier decisions in Texas and New Jersey, the Michigan Supreme Court did not reject the defense outright as a legal matter. Rather, it based its ruling on a factual finding. While the court simply may have been attempting to finesse this uncharted issue, its deliberate statements that it found no factual basis in the record that the plaintiff was in menopause¹¹⁴ unambiguously signaled to others that had the defense proved Ms. Laskowski was "going through" menopause, the court would have considered and weighed that evidence. But, given no factual basis, it denied the appeal.¹¹⁵ This first implicit recognition of the validity of such a defense opened the door for other defendants to assert it.

The next use of the menopause defense in 1920 was no more successful than its previous assertions. In *Oliver v. Detroit Taxicab Co.*,¹¹⁶ the plaintiff, Ms. Oliver, sustained a brain concussion, a crushed right foot, and other injuries, when she was struck by a speeding taxicab that jumped the curb and hit her as she was standing on the sidewalk.¹¹⁷ The defendant, Detroit Taxicab, did not question its liability for the accident caused by the negligent operation of the taxicab by its employee; but, rather, the defendant sought to limit the recovery of damages by Ms. Oliver.¹¹⁸ Defense counsel presented expert medical witnesses who testified that the woman's physical complaints and mental symptoms were "*due entirely to the menopause, the change of life in this case.*"¹¹⁹ Ms. Oliver presented testimony by her own medical expert who labeled her condition to be "traumatic neurasthenia."¹²⁰ The jury found for Ms. Oliver and this judgment was affirmed by the Michigan Supreme Court.¹²¹

111. *Id.* at 986. Without actually saying so, this court seemingly applied the eggshell plaintiff doctrine—that a defendant takes a victim as he finds her. *See infra* notes 147-50 and accompanying text (discussing how the eggshell plaintiff doctrine was not applied with consistency in menopause cases).

112. 157 N.W. 6 (Mich. 1916).

113. *See supra* notes 1-6 and accompanying text.

114. *Laskowski*, 157 N.W. at 8.

115. *Id.*

116. 177 N.W. 235 (Mich. 1920).

117. *Id.* at 236.

118. *See id.*

119. *Id.* at 237 (emphasis added).

120. *Id.* This is the same condition that Ms. Laskowski suffered from. For a definition of traumatic neurasthenia, see *supra* note 8.

121. *Oliver*, 177 N.W. at 239.

Having met with no success on at least four prior occasions, it might be reasonable to expect the menopause defense was dead and gone forever. But, deeply ingrained in the collective mind of society was the idea that menopause was a physical and mental disability that could cause nervous conditions, and the challenge for acceptance of menopause as a defense was far from over. Rather, its cause was advanced in 1936 when the Missouri Supreme Court, of its own initiative, used menopause as an excuse to reduce an award to a female plaintiff.¹²² Interestingly, this first full endorsement of the menopause defense coincided with the medical community's increased attention to menopause as a disease.¹²³

In *Tate v. Western Union Telegraph Co.*,¹²⁴ Lena Tate was cleaning her kitchen linoleum with a wet mop when a Western Union message wire, designed to carry 110 volts of electricity, fell upon a 13,200 volt power line.¹²⁵ The fallen message line came in contact with a metal rail on Ms. Tate's porch, creating an explosion, and sending a flash of flame into Ms. Tate's kitchen.¹²⁶ She received a shock and fell to the floor. Medical experts testified that Ms. Tate suffered from multiple injuries including a partial left side anesthesia, nervousness, and a disabling, painful, and permanent arthritis of the spine, which limited her mobility.¹²⁷ A physician who examined Ms. Tate six years after the accident concluded that Ms. Tate's condition had improved, but found it unlikely that she would completely recover from her injuries.¹²⁸ Lena Tate sued Western Union. The jury found in her favor and returned a verdict of \$25,000, which was reduced by the trial judge upon forced remitter to \$17,500.¹²⁹ Contrary to the jury verdict, the Missouri Supreme Court concluded that Ms. Tate's injuries were not sufficiently disabling to warrant the verdict and further reduced her award to \$12,500, half of what the jury originally awarded.¹³⁰ The only apparent basis for this reduction is found in one paragraph near the end of the opinion, where the court wrote that the woman suffered no bone fractures, and "was at the age when the menopause condition sets in and nervousness accompanies that condition."¹³¹

In fact, Lena Tate was thirty-nine and in excellent health at the time of the accident. She was forty-five by the time the case went to trial.¹³² The trial record is devoid of any reference to menopause, and the Missouri Supreme Court had

122. See *Tate v. Western Union Tel. Co.*, 96 S.W.2d 364 (Mo. 1936).

123. See *supra* notes 75-93 and accompanying text.

124. 96 S.W.2d 364 (Mo. 1936).

125. See *id.* at 367.

126. See *id.* at 366-67.

127. See *id.* at 368.

128. See *id.*

129. See *id.* The judgment was further reduced by \$5000. See *id.*

130. *Id.* The court found that Ms. Tate's injuries were not as disabling as other cases where plaintiffs received awards of \$15,000 to \$18,000. It stated that the case would be reversed and remanded unless Ms. Tate accepted the lesser amount. *Id.* at 369.

131. *Id.* at 368.

132. See *id.* at 367.

no medical or other testimony to consider relating to Ms. Tate's estrogen levels and menstrual status.¹³³ Moreover, it was undisputed that Ms. Tate's injuries were the result of the defendant's negligence. Yet, the one senior and two middle-aged male judges (born in the late 1800s) concluded, on some apparent form of judicial notice, that because the plaintiff was in her mid-forties, her nervousness was caused by menopause.¹³⁴ And because she was so affected, her already reduced damage award was further cut by \$5000, representing the court's valuation of her injuries, and justifying this reduction by noting that a portion of her ailment was attributable to menopause.¹³⁵ *Tate* is one of the clearest examples of how misguided and misinformed lay attitudes and beliefs surrounding menopause in the 1930s yielded unfounded opinions and unfair legal results.

Not surprisingly, *Tate* was the harbinger of the golden age of the menopause defense. Litigants found just the encouragement they were looking for, and quickly pursued the path opened by this Missouri Supreme Court decision. The chauvinistic conclusion of the Missouri court was enough to give the menopause defense an aura of legitimacy, and for attorneys who used it, a hope of successful limitation of damages for their clients.

B. Pre and Post World War II—Women Enter the Workplace

The 1940s saw the emergence of the modern technological age in the United States. Communication was greatly improved. Most homes had telephones, and televisions began to appear, first in public places and then in private residences, across the country. As a result of the Second World War, the United States manufactured bigger, better, and faster airplanes. An atom bomb was used to dispatch its enemies and penicillin was used to fight infections. America also had the largest female industrial workforce in her history. As men left factory jobs to fight the war, women stepped into their place.¹³⁶

For the first time women were doing jobs that formerly only men were thought fit to perform.¹³⁷ They worked as welders, riveters, stevedores, and truck drivers, and helped transform America's peacetime industry to tool the war

133. *Id.*

134. *Id.* The members of the Missouri Supreme Court who decided *Tate* were Henry J. Westhues, age 48, born 1888; James A. Cooley, age 64, born 1872; and Walter H. Bohling, age 48, born 1888. The fact that each of them was older than Ms. Tate and perhaps beset with their own age related frailties seemed to escape their notice.

135. *Tate*, 96 S.W.2d at 368-69.

136. "Women comprised 37[%] of the workforce by war's end, compared with 27.6[%] before Pearl Harbor, and women in factory work increased 460[%] during the war." Deborah Zabarenko, *Rosie the Riveter Symbolized Wartime Changes for Women, Blacks*, REUTERS N. AM. WIRE, Dec. 1, 1991, available in LEXIS, News Library, Reuna File.

137. *Id.* See also Howard Hayghe, *Two-Income Families*, AM. DEMOGRAPHICS, Sept. 1981, at 35, 35 (stating that economic and technological factors increased the demand for women in the workforce).

effort.¹³⁸ For the first time many women experienced a sense of financial worth and social involvement, and found new and more rewarding places for themselves. Although African American women were assigned the harshest, most hazardous, and least desirable factory jobs, they too relished the opportunity to forego domestic labor for the chance to work in a factory.¹³⁹ Women managed and supported their households, and their children, while they simultaneously did a "man's" job in the workplace.¹⁴⁰

The foundation of the myth that women could only survive if they had the protection of a man was showing signs of instability. Even worse, most women liked their jobs and new public personas.¹⁴¹ When the soldiers returned from their posts, expecting to reclaim their jobs and their former dominant position, many women were reluctant to step aside and go back to the role of docile homemaker. Ironically, in this historical moment of women's strength and independence—the era of the mythological "Rosie the Riveter"—the menopause defense was asserted with its most significant frequency.

From 1941 through 1949, sixteen cases reviewed by various higher state courts involved the assertion of menopause as a defense.¹⁴² Of these cases, ten

138. See, e.g., DORIS KEARNS GOODWIN, *NO ORDINARY TIME* 364-65, 368-70, 373, 392, 393 (1994).

139. *Id.* at 369-70.

140. Nancy Nichols described "Rosie" for a generation of women who may not have been aware that she existed. Nancy A. Nichols, *Whatever Happened to Rosie the Riveter*, *HARV. BUS. REV.* July-Aug. 1993, at 54.

Rosie the Riveter is both a romantic and a heroic figure from the World War II era. A former housewife turned war hero, Rosie emerged from the kitchen and built the machinery necessary to fight and win World War II. Posters emblazoned with her picture became a symbol of wartime courage and patriotism. Her motto "We can do it!" stirred countless women.

And not only did Rosie do it, she did it better than anyone had ever done it before. Rosie was a key player in the retooling of U.S. industry from peacetime to wartime production. During the five years she was on the shop floor, from 1942 to 1947, productivity rose, product cycle time dropped, and quality improved.

Yet despite her success, Rosie was forced off the factory floor when the war ended, her achievements buried in books, all her accomplishments wiped out of our consciousness. She had proven her abilities, but she remained that cultural enigma: a woman in a man's job. Rosie's skills, which had helped win world War II, were deemed unnecessary in the fight for competitiveness that began about the time she left the factory. Rosie, it seemed, would have to spend the rest of her time baking cookies, not building machinery.

Id.

141. See GOODWIN, *supra* note 138, at 364-70.

142. See *Willbanks v. Laster*, 199 S.W.2d 602 (Ark. 1947); *Wuest v. Wuest*, 164 P.2d 32 (Cal. Dist. Ct. App. 1945); *Alderman v. Kelly*, 32 A.2d 66 (Conn. 1943); *Olin Indus., Inc. v. Industrial Comm'n*, 68 N.E.2d 259 (Ill. 1946); *Eils v. Works*, 55 N.E.2d 408 (Ill. App. Ct. 1944); *Day v. Rains*, 220 S.W.2d 575 (Ky. Ct. App. 1949); *Richey v. Service Dry Cleaners*, 28 So. 2d 284

were decided by appellate level courts, and six were reviewed by state supreme courts. Of the four automobile negligence cases reviewed during this period, the appellants claimed that verdicts were excessive because injuries should be attributed to menopause rather than negligence;¹⁴³ even low verdicts.¹⁴⁴ In one case the defendant prevailed, and a \$15,000 award was reduced to \$8500 because the court found that the plaintiff's nervous troubles were due to menopause.¹⁴⁵ In the other opinions, the respective courts often felt obliged to note that the defense failed for a factual reason, not for its illegitimacy.

Most remarkable, however, is the continued silence about and absence of any challenge to the introduction and use of expert testimony on menopause. After 1923, the need for expert testimony generally was evaluated by the factors enunciated in *Frye v. United States*.¹⁴⁶ These included whether: 1) there was a need for such testimony; 2) the observer was qualified to testify because of first hand knowledge of the situation at issue; 3) the expert opinion was admissible only if grounded in particular facts and; 4) whether the conclusions of the expert were grounded in scientific techniques recognized by the relevant scientific/medical community.¹⁴⁷ Testimony about menopausal syndrome seemed to come in unchallenged.

In almost all the cases medical opinion should have been disallowed for failure to meet one or more of the *Frye* factors. But, the challenges apparently were not raised, and courts were not forced to grapple with the admissibility of menopausal syndrome testimony. Either the lay assumptions and inherent stereotypes shared by all parties in the courtroom seemed to preclude any effective challenge; or, the cases were litigated by less than competent counsel. This failure to challenge the use of expert testimony with respect to the effects of menopause is particularly revealing when contrasted, for example, against the formidable opposition to expert testimony with respect to modern syndrome defenses, such as battered woman's syndrome, post traumatic stress disorders, and rape trauma syndrome.¹⁴⁸

(La. Ct. App. 1946); *Hanson v. City Light & Traction Co.*, 178 So. 2d 804 (Mo. Ct. App. 1944); *Lee v. Lincoln Cleaning & Dye Works*, 15 N.W.2d 330 (Neb. 1944); *Schwarz v. Loew's Theatre & Realty Corp.*, 273 A.D. 898 (N.Y. App. Div. 1948); *Pearson v. Pearson*, 41 N.E.2d 725 (Ohio Ct. App. 1941); *Glass v. Glass*, 63 A.2d 696 (Pa. Super. Ct. 1949); *Whinney v. Whinney*, 58 A.2d 183 (Pa. Super. Ct. 1948); *Urffer v. Urffer*, 35 A.2d 580 (Pa. Super. Ct. 1944); *Airline Motor Coaches v. Green*, 217 S.W.2d 70 (Tex. App. 1949); *Gray v. Gray*, 24 S.E.2d 444 (Va. 1943).

143. See *Alderman*, 32 A.2d at 67 (awarding approximately \$7700); *Richey*, 28 So. 2d at 287 (amending judgment for \$1500); *Schwarz*, 273 A.D. at 898 (reducing verdict by \$10,000 total); *Airline Motor Coaches*, 217 S.W.2d at 74 (finding that \$10,000 is not excessive).

144. See, e.g., *Richey*, 28 So. 2d at 287 (awarding only \$850 to plaintiff).

145. See *Schwarz*, 273 A.D. at 898-99.

146. 293 F. 1013 (D.C. Cir. 1923). See *supra* note 93 and accompanying text.

147. See *id.* at 1014.

148. See, e.g., *People v. Bledsoe*, 189 Cal. Rptr. 726, 729, 733 (Cal. Ct. App. 1983) (questioning the validity of "rape trauma syndrome" asserted by an appellant defendant convicted of forcible rape; in dissent, Judge Wiener stated that the trial court incorrectly assumed the validity

Another remarkable silence in the cases of the 1940s, as well as almost all other cases, is the continued absence of any application or even discussion of the "eggshell plaintiff doctrine." This doctrine articulates the basic rule of defendant liability for unforeseeable consequences—that a defendant takes a plaintiff as he finds her and is responsible for damages resulting from his negligent conduct regardless of any pre-existing condition.¹⁴⁹ A common refrain in the menopause defense cases is that the plaintiff was already damaged due to menopause, or she was not getting better because she was a malingerer as a result of her pre-existing or ongoing menopausal condition. If, however, a plaintiff had a pre-existing injury to his heart, arm, or head, that was exacerbated by defendant's negligence, that alone would not prevent recovery.¹⁵⁰ Yet, defendants in the menopause cases brazenly challenged liability by raising a female plaintiff's pre-existing emotional and medical state and shifted blame from the defendant's own negligent behavior to the plaintiff's physiological state. Rather than directly challenge the legality of invoking a pre-existing condition defense, some plaintiffs chose to attack the facts and attempt to disprove that they were in menopause.¹⁵¹ The lack of any mention of the eggshell plaintiff rule in the menopause defense cases suggests that either: 1) the eggshell plaintiff rule was not being uniformly applied; or 2) the courts were treating menopause primarily as an emotional or psychological illness and were unwilling to apply the eggshell plaintiff doctrine to emotional

of rape trauma syndrome and would have reversed the conviction); *Ibn-Tamas v. United States*, 407 A.2d 626 (D.C. 1979) (finding that the trial court erred in not allowing expert testimony on "battered women's syndrome" in a murder trial; the prosecution argued that the evidence of "battered women's syndrome" was not valid because the normal reaction for a woman in the defendant's position would be one of flight, not murder); *Smith v. State*, 277 S.E.2d 678 (Ga. 1981) (overruling appeals court finding that expert testimony on "battered women's syndrome" was inadmissible).

149. See, e.g., W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* § 43, at 290 (5th ed. 1984). See also *Sumpter v. City of Moulton*, 519 N.W.2d 427, 434 (Iowa Ct. App. 1994) (finding a tortfeasor liable for damages to eggshell plaintiff even though the plaintiff inevitably may suffer similar injuries from pre-existing condition); *Packard v. Whitten*, 274 A.2d 169, 177-78 (Me. 1971) (ruling that a defendant takes plaintiff as he finds her and is responsible for damages resulting from his negligent conduct even though injuries are more severe because of plaintiff's pre-existing condition).

150. See, e.g., *Finkelstein v. Michigan Ry.*, 163 N.W. 973 (Mich. 1917) (ruling that a plaintiff can recover for impaired vision even though his eye was impaired before the accident, so long as the additional injury is directly attributable to the accident); *Schwingschlegl v. City of Monroe*, 72 N.W. 7 (Mich. 1897) (ruling that a plaintiff suffering from a previously injured ankle and from tuberculosis is entitled to recover for increased pain, disability and expense). *Finkelstein* was decided one year after *Laskowski*, by the very same Michigan Supreme Court that stated that Anna Laskowski's pre-existing menopausal condition could limit her recovery.

151. See, e.g., *Merritt v. Hemstead*, 206 So. 2d 718 (La. Ct. App. 1968); *Hanson v. City Light & Traction Co.*, 178 S.W.2d 804 (Mo. Ct. App. 1944); *Yellow Cab & Baggage Co. v. Green*, 277 S.W.2d 92 (Tex. 1955).

conditions.¹⁵²

For example, on a rainy night in Connecticut in 1941, James Kelly collided with a car driven by plaintiff's husband, Samuel Alderman.¹⁵³ As a result, Lillian Alderman spent thirty-one days in the hospital recovering from a brain concussion, headaches, dizziness, nausea, a severe contusion of her elbow, a fractured ulna, and contusions of her shoulder, hip, and hand.¹⁵⁴ She had surgery for her fractured bones, and a spinal tap revealed swelling of her brain.¹⁵⁵ The fact finder ruled and the intermediate appellate court affirmed that the defendant was negligent, and Mrs. Alderman was awarded \$6000 for pain and suffering, \$655.10 for domestic assistance and \$1114.35 for medical and hospital services.¹⁵⁶

The defendant, Kelly, appealed to the Connecticut Supreme Court. His principal claim was that many of Mrs. Alderman's "troubles were due to menopause."¹⁵⁷ Rather than flatly reject this implausible assertion, the Connecticut Supreme Court did not credit it because "the plaintiff had already passed through most of that condition."¹⁵⁸ It found sufficient medical evidence that her injuries must be attributable to the accident and not to menopause.¹⁵⁹ The court made no mention whatsoever of the eggshell plaintiff doctrine. Thus, even a ruling denying the menopause defense sent the unmistakable message that menopause, if factually proven, is a viable defense.

*Richey v. Service Dry Cleaners*¹⁶⁰ presented a similar case. Mrs. Louisa Richey was in the back seat of her automobile when her car was struck by a truck owned by Service Dry Cleaners.¹⁶¹

By the impact of the collision [Mrs. Richey] was violently thrown against the back of the front seat, rebounded against the back seat and fell to the floor in a semiconscious condition. She was immediately removed from the car and placed upon the ground beside the road. Witnesses who were then present testified that she was groaning and complaining loudly of pain in the back and chest. That she was suffering intensely was obvious to these witnesses, one of whom said: "You could see it in her face."¹⁶²

152. For a complete discussion of the legal tendency to connect women to emotional injury, even when the injuries have severe physical consequences, see Martha Chamallas & Linda K. Kerber, *Women, Mothers and the Law of Fright: A History*, 88 MICH L. REV. 814 (1990).

153. See *Alderman v. Kelly*, 32 A.2d 66, 66-67 (Conn. 1943).

154. See *id.* at 67.

155. See *id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. 28 So. 2d 284 (La. Ct. App. 1946).

161. See *id.*

162. *Id.* at 285.

After the accident, Mrs. Richey had problems breathing, had redness and swelling on the left side of her chest, and was in great pain.¹⁶³ Within a few days, she was coughing up blood and showing discoloration of tissue, and immobility in her left arm.¹⁶⁴ Over a period of four months, she was hospitalized repeatedly, the last hospitalization lasting almost three weeks.¹⁶⁵

Under questioning from defense counsel, Mrs. Richey's own physician, Dr. Brian, testified:

Q. In the case of Mrs. Richey, you have testified you were treating her for menopause condition prior to this accident. Had that nervous disposition manifested itself already?

A. Oh, yes, very much so.

Q. She was of an extremely nervous state then prior to this accident?

A. That is right.

Q. What was that condition after that accident?

A. Exaggerated that much more. Any complaint or symptom she would get in the beginning would be immediately attributed to her previous accident. The actual amount of mental upset she had along with that, I think, had a great deal to do with her other symptoms following.

* * *

Q. It is natural that a person in that condition would form an exaggerated picture of a condition that would not be true in a normal person?

A. That is true. Anything that might happen to her, regardless of what it might be, during that time would, in her own mind, as far as her nervous condition is concerned and the fact that she was already nervous and upset, exaggerate anything she might have. This increase in nervousness she would have from anything like that could bring on other symptoms.

Q. Isn't that condition sometimes referred to as hysteria?

A. That is right.¹⁶⁶

A defense expert, Dr. Texada, found that:

After examining the hospital records and charts pertaining to Mrs. Richey's case, he was of the opinion that the greater part of the treatment administered to her was necessary on account of nervousness brought about by the transition through which she was passing, commonly called a "change of life."¹⁶⁷

163. *See id.*

164. *See id.*

165. *See id.*

166. *Id.* at 286.

167. *Id.*

Thus, while Mrs. Richey had clear, definable physical injuries resulting from a documented traumatic accident, her own physician testified in a manner that distorted the nature and degree of her compensable injury by attributing her continued suffering to a pre-existing "nervousness." By counting this testimony against Mrs. Richey, the court either was ignoring the eggshell plaintiff doctrine, or implying that it did not apply to pre-existing emotional conditions.

In a 1948 New York case, Mabel Schwarz was injured when she was struck by the defendant's automobile.¹⁶⁸ She sued for personal injury damages and her husband sued for loss of services. The proof as to the nature and extent of Mrs. Schwarz's injuries was uncontradicted.¹⁶⁹ At the close of the case, the jury returned a verdict of \$15,000 for Mabel Schwarz, and \$2500 for her husband.¹⁷⁰ The trial court reduced the verdict to \$8500 and \$1500 respectively.¹⁷¹ In a split opinion that affirmed a lower court ruling favoring the plaintiffs, two judges of the New York Supreme Court, Appellate Division, felt compelled to separately state that the case should have been reversed because the verdict "was contrary to the weight of the credible evidence to find that [Mrs. Schwarz's] emotional and nervous troubles were caused by this accident, particularly since her physical condition concededly is normal, and she is suffering from disturbances associated with the menopause."¹⁷²

In a Texas case decided a year later, the pattern continued. In *Airline Motor Coaches v. Green*,¹⁷³ Lillie Mae Green was a passenger on an Airline Motor Coach bus when the bus suddenly left the highway, crossed a ditch, and went through two fences before coming to a halt.¹⁷⁴ Injury to her head was extensive. Nash, a Dallas brain surgeon, testified that the pressure in Mrs. Green's brain was twice as high as it should be.¹⁷⁵ Doctor Nash also testified

that he found a difference in the reflexes of her right leg and arm as compared with her left leg and arm; that the grip in her right hand was much weaker than the left; that she had a depression in her head which he thought was in the scalp; that he examined her on two subsequent occasions with the same findings except that on the last time her right hand was weaker than it had been, going into details with reference to the examinations made and the result thereof, and stated that his

168. Schwarz v. Loew's Theatre & Realty Corp., 273 A.D. 898, 898 (N.Y. App. Div. 1948). The plaintiff was injured when she was hit by an automobile owned by the manager of a Loew's Theatre. The jury awarded her \$15,000. See *id.* The trial court reduced the award to \$8500. See *id.* On appeal, the reduction was affirmed by a majority of the court. *Id.* at 899. Nothing in the record reveals the reason for the \$7000 reduction.

169. See *id.*

170. See *id.* at 898.

171. See *id.*

172. *Id.* (Adel, Wenzel, JJ., concurring).

173. 217 S.W.2d 70 (Tex. App. 1949).

174. *Id.* at 71.

175. See *id.* at 72.

diagnosis was that she had a lesion in the left half portion of the brain due to trauma or injury.¹⁷⁶

With little regard to these concrete findings, the defendant attempted to blame Mrs. Green's troubles on menopause.¹⁷⁷ Mrs. Green, however, testified that she had gone through menopause, with no trouble, two years earlier.¹⁷⁸ She unequivocally stated that she

had always been able to do her housework, farm work and to do outside work for White people and that she earned from her farm or gardening work and in selling chickens, eggs and produce which she raised about \$500 per year; that since her injuries she had been unable to do any of that kind of work; that she had suffered much pain and still suffers with her head, neck, leg, arm and shoulder as the result of her injuries; sometimes feels crazy and her head and neck hurts; that she has a sink in the top of her head which was not there before the injuries, and that while at times she feels better the pain in her side and head never leaves her.¹⁷⁹

The Texas Court of Appeals ultimately held that: "Taking into consideration the devalued state of the dollar and its greatly decreased purchasing power, we are unwilling to say that the award of \$10,000 as damages was so excessive as to shock the conscience of the court."¹⁸⁰ The court basically sidestepped the menopause issue.

Finally, a divorce case of this period is noteworthy for its medical testimony. While some physicians favored a kindly, "stay at home" approach for the menopausal woman, others advocated far more interventionist treatment. Like the treatment of Dr. Gilman in *The Yellow Wallpaper*,¹⁸¹ the medical expert in *Glass v. Glass*¹⁸² testified that confinement to a sanitarium was a reasonable and appropriate treatment for the symptoms of menopause.¹⁸³ As the medical

176. *Id.* at 74.

177. *See id.*

178. *See id.*

179. *Id.* Mrs. Green's attorney appealed to the jury to "[d]o unto others as you would have them do unto you. You must give the same consideration to the Negro woman that you do to all the other evidence." *Id.* at 71.

180. *Id.* at 74.

181. *See GILMAN*, *supra* note 76.

182. 63 A.2d 696 (Pa. Super. Ct. 1949).

183. Rebuttal witness, Dr. Jones, testified as follows:

A. In dealing with women we must consider the menopause.

Q. It is not unusual is it, Doctor, as a woman approaches that period of her life and during it that she sometimes does things she never did before in her married life and sometimes the association toward the other spouse changes entirely?

A. That's right.

Q. Wasn't this a rather drastic treatment of this woman to submit her to various

establishment saw fit to isolate older women, so the legal establishment justified their devaluation.

Thus, although in the 1940s women were critical to American business and the war effort, and newspapers and magazines praised the industry and patriotism of *Rosie the Riveter* and the women she represented, the entrenched stereotypes of female physical and emotional instability did not die. On the contrary, they blossomed and were easily available for use against women in legal actions. Indeed, the menopause defense was raised with considerable frequency in this decade. Perhaps because women achieved some independence and status in the workplace, they were threatening to the social order, and the menopause defense became a vehicle to ensure that things did not change too much.

C. The 1950s—Back to the Home

In the 1950s, the menopause defense was litigated at the appellate level with half as much frequency as the previous decade. No clear usage pattern is apparent. The defense appeared in everything from basic negligence and workman's compensation cases to product liability actions.¹⁸⁴ Defendants fared well with the defense, with low monetary awards upheld or reduced on appeal frequently.¹⁸⁵ Although about fifty percent of the courts were not swayed by the allegations of menopausal syndrome, not one of those courts discredited the use of menopause as a defense.

The eggshell plaintiff rule continued to be ignored, and expert testimony basically still went unchallenged. A particularly unsupportable result and equally unsupportable language appears in a bus accident case from Louisiana, *Maroun*

sanitariums. Would that tend to eliminate the condition in any way?

A. Sure, that was the sort of treatment she required

Id. at 700. See also LECTURES ON CLINICAL PSYCHIATRY, *supra* note 78.

184. See, e.g., *Hirsh v. Manley*, 300 P.2d 588 (Ariz. 1956) (negligence, auto accident); *Four Branches, Inc. v. Oechsner*, 73 So. 2d 222 (Fla. 1954) (worker's compensation); *Laurel Coca Cola Bottling Co. v. Hankins*, 75 So. 2d 731 (Miss. 1954) (poisoned Coca-Cola); *Vogrin v. Forum Cafeterias of Am., Inc.*, 308 S.W.2d 617 (Mo. 1957) (slip and fall); *Brown v. Payne*, 264 S.W.2d 341 (Mo. 1954) (negligence, auto accident); *Pfautz v. Sterling Ins. Co.*, 135 A.2d 806 (Pa. Super. Ct. 1957) (insurance disability); *Yellow Cab & Baggage Co. v. Green*, 277 S.W.2d 92 (Tex. 1955) (negligence, auto accident).

185. See, e.g., *Maroun v. New Orleans Pub. Serv., Inc.*, 83 So. 2d 397 (La. Ct. App. 1955) (finding verdict of \$1000 appropriate when accident could have aggravated pre-existing conditions and caused personality change); *Laurel Coca Cola Bottling*, 75 S.W.2d at 731 (upholding decision of \$12,000 damages awarded to plaintiff who drank poisoned Coca-Cola when she was passing through the menopause); *Vogrin*, 308 S.W.2d at 617 (finding verdict of \$1000, when plaintiff requested \$20,000, adequate because injuries plaintiff complained of could be attributed to other causes); *Brown*, 264 S.W.2d at 341 (finding verdict of \$10,000 excessive and reducing to \$7000 because plaintiff's chronic pain, lack of appetite, nervousness, and irritability could be attributed to other causes).

*v. New Orleans Public Service, Inc.*¹⁸⁶ When a New Orleans Public Service bus stopped abruptly to avoid hitting a pedestrian, Adele Maroun, a passenger, was thrown from her seat across the aisle where she hit her head on a steel stanchion.¹⁸⁷ She sustained multiple documented injuries to her teeth and mouth, abrasions, and contusions of her head, face, neck, body, knees, ankles and spine, as well as a change in her personality.¹⁸⁸ Ms. Maroun sued the city and asked for almost \$80,000 in damages.¹⁸⁹ The trial court awarded her \$1000.¹⁹⁰ In the face of overwhelming evidence supporting Mrs. Maroun's tangible injuries, the Louisiana Court of Appeals, nevertheless, found that the nominal award did substantial justice because: "[T]he record reveals a reasonable medical explanation for the personality change and innumerable aches and pains . . . in that her menopause occurred shortly after the accident, the endocrinological ramifications of which we deem it unnecessary to discuss here."¹⁹¹

It seems that by the 1950s attorneys for insurers found a receptive audience for the menopause defense, particularly among jurists who found the effects of menopause so "generally accepted" that it was within the court's own range of common experience and knowledge. In this favorable legal climate, attorneys for civil defendants would litigate these cases to the highest state courts in their efforts to eliminate, or reduce, the amounts that the insurers would have to pay to female plaintiffs who were at or about the age of menopause. To defendants' great benefit there was no shortage of medical experts ready and willing to testify to the connection between menopause and psychogenic disease.¹⁹²

One of the boldest and most shocking assertions of the menopause defense is found in a contaminated cola case. In *Laurel Coca Cola Bottling Co. v. Hankins*,¹⁹³ Ms. Gladys Hankins bought a bottle of Coke from the local store, and became violently ill upon her first sip. Some of the substance she "expelled" landed on her dress and a rug and "made holes in those articles."¹⁹⁴ The bottle of Coca-Cola was contaminated with sulfuric acid.¹⁹⁵ Ms. Hankins' mouth, tongue, and stomach were burned.¹⁹⁶ Ms. Hankins' doctor opined that Hankins

186. 83 So. 2d 397 (La. Ct. App. 1955).

187. *See id.* at 398-99.

188. *See id.* at 399.

189. *See id.* at 398.

190. *See id.* at 399-400.

191. *Id.* at 399.

192. *See, e.g.,* Mayor of Beverly v. First Dist. Court of Essex, 97 N.E.2d 181, 183 (Mass. 1951) (testifying medical expert stated that witness was not to be believed because she suffered from hysteria related to having recently passed through menopause); Vogrin v. Forum Cafeterias of Am., Inc., 308 S.W.2d 617, 623 (Mo. 1957) (testifying doctor found that plaintiff's "menopausal symptoms . . . are serving to aggravate and prolong [plaintiff's] complaints").

193. 75 So. 2d 731 (Miss. 1954).

194. *Id.* at 732.

195. *See id.* at 733.

196. *See id.* at 732.

had "acute gastritis with neurasthenia."¹⁹⁷ When his treatment failed, the doctor concluded that the patient "was somewhat psychotic."¹⁹⁸ A gastroscopic exam and exploratory surgery performed by a consulting physician revealed that the upper third of Ms. Hankins' stomach was inflamed.¹⁹⁹ Contrary to his colleague, this doctor found that Ms. Hankins "was not psychotic, but . . . sustained a physical injury."²⁰⁰

At trial, the Coca-Cola defense team presented expert testimony that because Ms. Hankins was menopausal and receiving estrogen injections every two weeks, her symptoms were attributable to her menopause and to the estrogen she was taking.²⁰¹ Thus, the company attempted to shift the blame while brazenly asserting that the poison contaminated Coca-Cola that Ms. Hankins had ingested should not be blamed for her injury.²⁰² The defense failed, but the courtroom climate that allowed it to be raised remained.

D. *The 1960s and Beyond—Changing Times*

Of the ten cases to reach appellate courts²⁰³ during the 1960s, there was much of the same pleading, the same unchallenged medical testimony, and the same absence of discussion of the eggshell plaintiff doctrine found earlier. One case, however, is exceptional for the court's edified reaction to the defendant's claim that the plaintiff's complaints were related to menopause—*Merritt v. Hemstead*.²⁰⁴ The trial judge ruled that "'unproved theories' about the neurosis being caused by such factors as the menopause" could not result in a holding for the defendant.²⁰⁵ This late 1960s decision, which interestingly was upheld by the Louisiana Court of Appeals (the same jurisdiction that thirteen years earlier decided *Maroun v. City of New Orleans*²⁰⁶), marks the first sign of change in

197. *Id.*

198. *Id.*

199. *See id.* at 733.

200. *Id.*

201. *See id.* at 734. The Mississippi Supreme Court upheld the judgment for Ms. Hankins, finding that she suffered a substantial and painful injury. *Id.* at 736.

202. *See id.* at 733.

203. *See Appendix; see also Scroggins v. United States*, 397 F.2d 295 (Cl. Ct.), *cert denied*, 393 U.S. 952 (1968); *Beyer v. City of Dubuque*, 139 N.W.2d 428 (Iowa 1966); *Shepherd v. McGinnis*, 131 N.W.2d 475 (Iowa 1964); *Cimijotti v. Cimijotti*, 121 N.W.2d 537 (Iowa 1963); *Montgomery v. Manos*, 440 P.2d 629 (Kan. 1968); *Merritt v. Hemstead*, 206 So. 2d 718 (La. Ct. App. 1968); *Glass v. Flowers*, 149 So. 2d 747 (La. Ct. App.), *cert. denied*, 151 So. 2d 690 (La. 1963); *Johnson v. Gulfport Laundry & Cleaning Co.*, 162 So. 2d 859 (Miss. 1964); *Fielder v. Production Credit Ass'n*, 429 S.W.2d 307 (Mo. Ct. App. 1968); *Worthen v. Worthen*, 374 S.W.2d 935 (Tex. App. 1964).

204. 206 So. 2d 718 (La. Ct. App. 1968).

205. *Id.* at 721 (emphasis added).

206. 83 So. 2d 397 (La. Ct. App. 1955) (awarding nominal damages to a woman injured in a bus accident because "her menopause occurred shortly after the accident"). *See supra* notes 179-

judicial attitude with reference to the effects of menopause upon women. The defendant's primary assertion was that "plaintiff's neurosis was caused by the menopause, years of hard work, financial problems and worry over her husband's illness and various disappointments in connection with her children."²⁰⁷ Supporting the trial judge, the appellate court wrote: "[W]e find that the trial judge's interpretation of the medical evidence is correct and led him to the proper conclusion that the traumatic neurosis was caused by the accident."²⁰⁸

Accident related negligence actions that relied on the menopause defense that reached the appellate level in the 1970s were met with mixed reception. However, more often than not, even in this decade, the defense achieved moderate, limited success. Although societal and judicial attitudes towards women slowly were changing, the record of these cases, nonetheless, is replete with references to emotional problems attributable to menopause,²⁰⁹ nervous conditions related to menopause,²¹⁰ menopausal melancholia,²¹¹ and keratoconjunctivitis caused by menopause.²¹²

The defense appeared in product liability, workman's compensation, and other negligence actions. It was raised, with varying degrees of success in different states, including Illinois,²¹³ Kentucky,²¹⁴ and Missouri.²¹⁵ However, in the 1960s and 1970s the menopause defense found some of its most fertile ground in divorce courts.

Until the early to mid-1970s, in most states to be granted a divorce one of the parties had to be found guilty of some misconduct.²¹⁶ In the rare case of a proceeding in which both parties were found to be guilty of misconduct, a

83 and accompanying text.

207. *Merritt*, 206 So. 2d at 720.

208. *Id.* at 721.

209. *Braun v. Ford Motor Co.*, 363 A.2d 562, 565 (Md. Ct. Spec. App. 1976) (referring to a newspaper article related to the "emotional [stress] of women during menopause").

210. *Devillier v. Traders & Gen. Ins. Co.*, 321 So. 2d 55, 57 (La. Ct. App. 1975) (stating that menopause caused plaintiff to be nervous).

211. *McCommon v. Hennings*, 283 N.W.2d 166, 169-70 (N.D. 1979) (establishing that menopausal melancholia could be the cause of plaintiff's complaints, making her irritable).

212. *Maryland Cas. Co. v. Davis*, 464 S.W.2d 433, 436-37 (Tex. App. 1971) (attributing keratoconjunctivitis to hormone changes in women over the age of forty).

213. *Olin Indus., Inc. v. Industrial Comm'n*, 68 N.E.2d 259, 262 (Ill. 1946) (stating that an injury sustained after being hit by a four-foot long 75 metal guardrail, caused plaintiff's injury, not "change of life").

214. *Day v. Rains*, 220 S.W.2d 575, 575-76 (Ky. Ct. App. 1949) (finding that rusty, used, razor blade in Pepsi-Cola that plaintiff drank caused injury, not menopause).

215. *Hanson v. City Light & Traction Co.*, 178 S.W.2d 804, 811-12 (Mo. Ct. App. 1944) (alleging that plaintiff's symptoms were due to menopause and gall bladder trouble, not escaping gas from recently installed gas furnace).

216. See HOMER H. CLARK, *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 350 (1968); Walter Wadlington, *Divorce Without Fault Without Perjury*, 52 VA. L. REV. 32 (1966).

divorce could be denied by the court and the parties forced to remain married.²¹⁷ Presenting grounds for which a divorce would be granted was a problem in many states. This was further complicated by the fact that the guilty party in a divorce was punished. The husband, if found guilty of adultery or other serious offenses, might be required to pay expensive alimony for the rest of his life.²¹⁸ On the other hand, a wife found guilty of misconduct could be denied alimony altogether,²¹⁹ and face losing custody of any children. Divorce required fault grounds; and because a divorce based on fault grounds could lead to a financial windfall for one party and financial ruin for the other, and because child custody also could be at stake, the menopause defense was used on both sides of the aisle in the divorce courtroom.²²⁰

Parties asserted and courts entertained sundry arguments attributing discontent and even abuse to menopause—regardless of whether it was supported by expert medical testimony.²²¹ Defendants claimed, and courts admitted testimony such as: her menopause caused her to question her husband's fidelity,²²² her menopause made him physically abuse his wife.²²³ Although in the 1960s America was in the midst of a great social upheaval and so-called enlightenment, little of this change was reflected in the divorce courts. Only with the move away from fault to no-fault divorce in the early 1970s did the menopause defense finally find its demise in the divorce arena.²²⁴ However, the legacy of the menopause divorce cases lived on.

217. See, e.g., *Clark v. Clark*, 225 P.2d 147 (N.M. 1950), *overruled by Garner v. Garner*, 512 P.2d 84 (N.M. 1973).

218. See Lenore J. Weitzman & Ruth B. Dixon, *The Alimony Myth: Does No-Fault Divorce Make A Difference?*, 14 FAM. L.Q. 141, 146 (1980).

219. See *id.*

220. See, e.g., *Danner v. Danner*, 206 So. 2d 650, 651 (Fla. Dist. Ct. App. 1968) (asserting that his wife's grievances were related to her menopause); *Cimijotti v. Cimijotti*, 121 N.W.2d 537, 541-42 (Iowa 1963) (attempting to attribute wife's nervous condition and fear to her menopause rather than to abuse by her husband throughout the course of their marriage); *Gray v. Gray*, 24 S.E.2d 444, 445 (Va. 1943) (defending wife stated that menopause made her so ill that adultery was impossible).

221. See, e.g., *King v. King*, 152 So. 2d 889 (Miss. 1963) (denying wife separate maintenance after she left the marital home subsequent to her husband striking her; wife's menopause was placed at issue and the court held that husband's treatment of her was not cruel under the circumstances and denied award to the wife by reversing the holding of the lower court); *Worthen v. Worthen*, 374 S.W.2d 935, 936 (Tex. App. 1964) (recounting that the defendant husband denied the conduct the plaintiff attributed to him and argued that his wife's menopause caused her to "become withdrawn and erratic in her conduct").

222. See *King*, 152 So. 2d at 890.

223. See *Worthen*, 374 S.W.2d at 936.

224. See Henry H. Foster, Jr., *Divorce Reform and the Uniform Act*, 18 S.D. L. REV. 572 (1973); Hon. Ralph T. Podell, *The Case for Revision of the Uniform Marriage and Divorce Act*, 18 S.D. L. REV. 601, 603 (1973).

E. It's Her Hormones

Courts, with guidance and acquiescence of the medical profession, came to find menopause a reasonable defense for almost anything, including aberrant behavior, physical and/or mental illness, and emotional hardship. If a woman brought suit to redress some injury, her hormones could become the issue.

In 1964, the Iowa Supreme Court reversed and remanded a medical malpractice action where the jury awarded \$20,000 to the female plaintiff.²²⁵ The defendant physician used contaminated sutures to repair a surgical incision after removing an ovarian cyst.²²⁶ As a result of the subsequent infection, the plaintiff's operative wound ruptured and remained open and draining for about a year after the surgery.²²⁷ Nevertheless, the court found merit in the defendant's contention that the \$20,000 award to the plaintiff was so large that it shocked the conscience of the court.²²⁸

Relying upon the defendant's medical witnesses, the court concluded that the plaintiff's symptoms were related to a host of other causes including "menopausal syndrome."

There is no evidence that the plaintiff was permanently injured. She did suffer annoyance, discomfort and pain for some time following the . . . operation. How much of this was caused by infection from the sutures rests wholly in speculation and conjecture. Much of her disability must be attributed to other causes—weakness that would have followed the operation in any event, bleeding hemorrhoids, cerebral hemorrhage, *menopausal syndrome*, and diseased gall bladder.²²⁹

Employers who sought to deny workman's compensation claims of female workers utilized menopause to limit or eliminate recovery of damages by claimants who were at or near the age of menopause.²³⁰ In *Shilling v. State Accident Insurance Fund*, when Ms. Shilling, an overworked fifty-four-year-old employee for the Oregon Department of Motor Vehicles, began experiencing stress, chest pains, and other associated complaints while at work, she sought compensation for an emotional disability.²³¹ The compensation board argued that the emotional disability did not arise out of the course of her employment.²³² Rather, they claimed that her work stress was no different from other employees, and that Ms. Shilling's real stress occurred because "[s]he was concerned with

225. *Shepard v. McGinnis*, 131 N.W.2d 475 (Iowa 1964).

226. *See id.* at 476.

227. *See id.* at 477.

228. *Id.* at 479.

229. *Id.* (emphasis added).

230. *See, e.g., Shilling v. State Accident Ins. Fund*, 610 P.2d 845, 846 (Or. Ct. App. 1980); *see also Olin Indus., Inc. v. Industrial Comm'n*, 68 N.E.2d 259 (Ill. 1946).

231. *Shilling*, 610 P.2d at 846-47.

232. *See id.* at 846.

menopause, obesity and bronchitis.²³³ The 1980 Oregon Court of Appeals disagreed and found that Ms. Shilling's stress arose from her job, not her physiology or anatomy.²³⁴

Insurance companies utilized menopause as a defense when sued as a consequence of denial of benefits payments to, or on behalf of, their insured. Noteworthy among these cases is one in which a company claimed bad faith on the part of its insured because she failed to list her treatment for menopause on her application for insurance.²³⁵ In another insurance benefits case, the insurer denied life insurance proceeds to a common law wife. The insurer contended that because the claimant was menopausal, she and the insured could not have been living as husband and wife; therefore the plaintiff could not qualify as the recipient of the proceeds of a policy that named the decedent's "wife" as the beneficiary.²³⁶

The menopause defense even found its way into custody actions. There were two reported cases during the 1960s.²³⁷ One of these cases is remarkable, not for the custody determination, but rather for the insight it yields into the still sanctioned treatment for menopause. In medical testimony we learn that just thirty years ago, shock therapy and hysterectomy to cure the "involutional melancholia" of menopause were routinely employed treatments.²³⁸

233. *Id.*

234. *Id.*

235. *See Pfautz v. Sterling Ins. Co.*, 135 A.2d 806, 808 (Pa. Super. Ct. 1957) (holding that the plaintiff's failure to report occasional visits to her doctor for treatment of menopause on her insurance application did not rise to the level of bad faith, and affirming the jury verdict in favor of the plaintiff).

236. *See Stewart Co. v. Christmas*, 79 So. 2d 526, 527 (Miss. 1955). The issue in this case was whether the plaintiff was living with the insured at the time of his death and therefore qualified as a dependent widow under the Workman's Compensation Act. The Mississippi Supreme Court, holding for the plaintiff, ruled that:

Although [the] appellee said that she and her husband for the past several years had not had a sexual relationship in their marriage, she stated that this was because she was passing through the menopause period of life. Although that type of relationship in a marriage is unusual, it is not essential to establish the requirement that the husband and wife are "living with" each other, where the other conditions and circumstances of a marriage relationship exist.

Id. at 528.

237. *See In re Hicks v. Deer*, 222 So. 2d 82, 84 (La. Ct. App. 1969); *In re St. John*, 272 N.Y.S.2d 817, 823 (N.Y. Fam. Ct. 1966), *rev'd by Fitzsimmons v. Luini*, 274 N.Y.S.2d 798 (N.Y. App. Div. 1966).

238. *See In re St. John*, 272 N.Y.S.2d at 823.

III. THE DEMISE OF THE MENOPAUSE DEFENSE

A. *Putting Socio/Cultural Foundations for the Menopause Defense in Historical Context*

In the universal consciousness of western society, from prehistoric times through most of the Twentieth Century, a woman's mind and the function of her body were closely linked.²³⁹ Hippocrates believed that women were of a colder and less active disposition than men and could not sweat enough to remove impurities from their blood. Thus, menstruation was a female way of purification.²⁴⁰ That view was also common in the Sixteenth Century.²⁴¹ As Twentieth Century legal cases indicate, vestige of this ancient perception persisted to modern times.²⁴² To account for the rise and then virtual demise of the menopause defense, its socio/cultural context is elucidating.

Women in western society historically have been in a place apart. With home and hearth traditionally their only proper domain, most women were denied the life choices, options, education, and opportunities that were available to men. The birth of a female child was usually not greeted with the same celebration attendant with the birth of a son.²⁴³ From birth on, the position and role of a female was stratified.²⁴⁴ She was relegated to the home where she was considered fit for the performance of domestic tasks. She started life as the property of her father, who in some cultures had the power to choose whether she would live or die.²⁴⁵ She was valued within her family primarily for her father's ability to form an alliance with another family through an advantageous marriage,

239. Anthropologist Emily Martin discusses the underlying metaphors of production, laborer, and product found in medical and scientific discourse. She notes the impact of these dominant metaphors in medical discourse that portray a woman's body as a hierarchical, bureaucratically organized system under control of the cerebral cortex and a manufacturing plant designed for production of babies. To the extent the female body was like a machine designed to produce something, it, and therefore her mind, were broken or diseased when production ceased. See MARTIN, *supra* note 22, at 51-52.

240. See *id.* at 31.

241. See *supra* notes 53-54 and accompanying text.

242. See, e.g., Ingrassa, *supra* note 68, at 44. See also Deborah W. Denno, Comment, *Human Biology and Criminal Responsibility: Free Will or Free Ride?*, 137 U. PA. L. REV. 615, 632 (1988) (questioning whether hormonal disorders should establish a legal defense).

243. For example, the period of purification required for a woman after the birth of a daughter was twice as long as that required after the birth of a son. *Leviticus* 12:2-5, *supra* note 57.

244. Systems of primogeniture evolved, giving to the eldest son the exclusive or superior right to succeed to the estate of his ancestor. See BLACK'S LAW DICTIONARY 1072 (5th ed. 1979).

245. Roman law gave the father power to kill his daughter if he thought it fit. A Roman husband wrote his wife, Alis, in Egypt in 1 B.C. "If—good luck to you!—you bear offspring, if it is a male let it live; if it is a female, expose it." BONNIE S. ANDERSON & JUDITH P. ZINSSER, A HISTORY OF THEIR OWN, WOMEN IN EUROPE FROM PREHISTORY TO THE PRESENT 30, 34 (1st ed. 1988).

and for the possibility that she might one day bring forth sons. Even today, in parts of the world male babies are so preferred that female infanticide is a common problem.²⁴⁶

As recently as the mid-1800s, females went from a child in the possession and control of her father, to a *femme-couvert*—a woman under the protection and influence of her husband.²⁴⁷ Women's legal status throughout life was similar to that of a simple-minded child. They could not enter into contracts, nor exercise control over their bodies, destiny, or possessions. They were not educated because they were considered to be intellectually inferior.²⁴⁸

However, the Nineteenth Century saw significant change in American laws pertaining to women. In the early part of the century, a single American woman might have trusts, marriage settlements, contracts, business agreements, and wills, but when she married, her husband came into possession of all that she owned including any money that she might have had.²⁴⁹ It was possible for a single woman to arrange an antenuptial agreement prior to marriage that would place her premarital assets in trust during her coverture,²⁵⁰ but this only could be accomplished with full disclosure and complete consent of her prospective husband.²⁵¹ With this exception there were few, if any, devices available to a

246. See, e.g., Sharon K. Hom, *Female Infanticide in China: The Human Rights Specter and Thoughts Towards (An) Other Vision*, 23 COLUM. HUM. RTS. L. REV. 249 (1992).

247. Blackstone writes:

By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least incorporated and consolidated into that of the husband; under whose wing, protection, and cover she performs everything; and is therefore called in our law—french a femme-couvert . . .

WILLIAM BLACKSTONE, 1 COMMENTARIES ON THE LAWS OF ENGLAND: A FACSIMILE OF THE FIRST EDITION OF 1765-1769, at 430 (Univ. of Chicago Press, 1979).

The powers of the father . . . vary from one society to another Whether tyrannical or liberal, however, the father decides, controls, and sees that his law is enforced. . . .

[F]athers exchange their daughters for daughters-in-law (or brothers exchange their sisters for wives), with or without the consent of the parties concerned. Gradually, women became commodities. They were bought and sold, and were the property of their husband. . . . [T]he patriarchal society in its most absolute form . . . strict[ly] control[s] female sexuality. Female adultery is an obsession with the men. The idea of bequeathing their name and property to a child of alien blood so appalls them that they will commit the worst extremities on the person of their wives to avoid such an outrage.

ELISABETH BADINTER, *THE UNOPPOSITE SEX: THE END OF THE GENDER BATTLE* 59 (Barbara Wright trans., Harper & Row Publ., 1989).

248. See generally BADINTER, *supra* note 247, at 88-102 (describing biblical and other early historical views of women).

249. See LEO KANOWITZ, *WOMEN AND THE LAW: THE UNFINISHED REVOLUTION* 36-37 (1969); John D. Johnston, *Sex and Property: The Common Law Tradition, The Law School Curriculum, and Developments Toward Equity*, 47 N.Y.U. L. REV. 1033 (1972).

250. See KANOWITZ, *supra* note 249, at 38-40.

251. See *id.*

married woman to protect her property prior to the Married Women's Property Acts.²⁵² With the passage of the first Married Women's Property Act,²⁵³ American women began to have some measure of control over their property. Beginning around 1840, married women went from *being* property to being able to hold property after marriage.²⁵⁴ This period also saw major changes in divorce, custody, and probate laws that gave greater rights to women.²⁵⁵

By the early 1920s, women had better access to education and more women were employed in occupations outside the home than ever before.²⁵⁶ Aside from their roles²⁵⁷ as wife and mother, by virtue of their employment in business and industry, they became an economic force. Women progressed from being legally incompetent to being able to contract, sue, or testify in their own behalf and gained some control over these and other aspects of their lives. Nevertheless, the way in which women and their function were perceived by society changed very little.²⁵⁸

252. See Joan Hoff Wilson, *The Legal Status of Women in the Late Nineteenth and Early Twentieth Century*, 6 HUMAN RIGHTS 125, 131 (1976-1977).

253. The first Married Woman's Property Act was passed in Mississippi in 1839 and other states followed by 1850. Act of Feb. 15, 1839, ch. 46, 1839 Miss. Laws 72. See, e.g., also Act of June 10, 1845, ch. XXXIX, 1845 Conn. Acts 36; Act of Jan. 2, 1846, ch. 53, 1845 Iowa Terr. Acts 40 (1846); Act of Feb. 23, 1846, ch. 368, 1845 Ky. Acts 42 (1846); Act of Mar. 1, 1842, ch. 161, 1841 Md. Laws (1842). See generally Richard H. Chused, *Married Women's Property Law: 1800-1850*, 71 GEO. L.J. 1359, 1398-1400 & nn.200-09 (1983).

254. See, e.g., TEX. CONST. of 1845 (stating that "laws shall also be passed providing for the registration of the wife's separate property"). The Married Woman's Property Acts, enacted first in Mississippi then followed by New York and other states gave wives the right to sue and be sued and included their wages as part of their separate estate. Act of Feb. 15, 1839, ch. 46, 1839 Miss. Laws 72, 72-73; 1848 N.Y. Laws ch. 200, 1848 N.Y. Laws 307, 307-08.

255. See generally KANOWITZ, *supra* note 249.

256. Wilson, *supra* note 252, at 133.

257. "Role" or "social role" is a term taken over from anthropology and sociology, where it referred primarily to the behavior prescribed as appropriate for persons of specified age and sex. Ralph Linton identified seven such roles in all societies: infant, boy, girl, adult man, adult woman, old man, old woman. See S. STANSFELD SARGENT & KENNETH R. STAFFORD, *BASIC TEACHINGS OF THE GREAT PSYCHOLOGISTS* 297-98 (1965).

258. See *Muller v. Oregon*, 208 U.S. 412 (1908) (determining the constitutionality of a 1903 Oregon statute that limited the number of hours that a woman would be allowed to work to 10 hours per day). This opinion, is remarkable for the insight that it provides about the societal perception of women of that time in general, and about perceptions of a woman's proper function as part of the labor force as it might affect her "natural" function as a producer of children.

That [a] woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her. Even when they are not, by abundant testimony of the medical fraternity continuance for a long time on her feet at work . . . tends to injurious effects upon the body, and as healthy mothers are essential to vigorous offspring, the physical well-being of [a] woman becomes an object of public interest and

A woman's mind was still thought to be controlled and limited by the functions of her body, which was related to her ability to conceive and bring forth children.²⁵⁹ Ironically, during this period of dramatic legal and economic improvement restrictive abortion laws were first enacted.²⁶⁰ Thus, women found themselves in greater control of their property, but with less control over their bodies. Because men, up to this time, always had legal control over women perhaps it is not surprising that as women gained legal rights to property other rules to control and dominate women arose.²⁶¹ Laws banning abortion, for example, are one manifestation of society's reluctance to fully relinquish control over women.²⁶² The emergence of the menopause defense in the early Twentieth Century perhaps is another.

In effect, women went from being legally incompetent, to a condition where value and compensation could depend upon whether they were pre-menopausal, menopausal, or post-menopausal.²⁶³ However, as medical views on women's hormonal function became more enlightened, the societal perception that a women's mind was controlled predominantly by her physical functions also slowly began to change.

care in order to preserve the strength and vigor of the race.

. . . [H]istory discloses the fact that woman has always been dependent upon man. He established his control at the outset by superior physical strength, and this control in various forms . . . has continued to the present. As minors [are,] . . . she has been looked upon in the courts as needing especial care . . . [and] in the struggle for subsistence she is not an equal competitor with her brother . . . [L]ooking at it from the viewpoint of the effort to maintain an independent position in life, she is not upon an equality. Differentiated by these matters from the other sex, she is properly placed in a class by herself It is impossible to close one's eyes to the fact that she still looks to her brother and depends upon him.

Id. at 421-22.

259. *See id.* at 421.

260. In 1821, Connecticut became the first state to enact a law that restricted abortion after quickening. Conn. Stat., tit. 20, § 14 (1821) (revised by Conn. Pub. Acts, c. 71, § 1 (1860)). *See generally* Reva Siegal, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261 (1992) (discussing history and context of abortion laws).

261. A giant step forward in the creation of laws that granted certain rights to women may easily be modified and diminished by the mind set of the courts, the professionals upon whom the courts must rely, and by the perception of the public. *See, e.g.,* Chused, *supra* note 253, at 236-43 nn.1404-05.

262. *See generally* MARVIN GLASKY, *ABORTION RITES: A SOCIAL HISTORY OF ABORTION IN AMERICA* (Regnery Pub. 1995) (1992) (describing, generally, the history of abortion in the United States).

263. Perimenopausal is the "term used to designate the transition phase between regular periods and no periods at all." Flora Johnson Skelly, *Millions in Menopause*, AM. MED. NEWS, July 27, 1992, at 29, 29 (quoting SHEEHY, *supra* note 43).

B. Shifting Medical Views

Assertion of menopause as a defense inextricably was linked with the prevalent views of the medical community with respect to older women's physical and emotional functioning. During the period when the denormalization and disease/deficiency model of menopause was generally accepted, courts admitted and credited evidence of menopausal syndrome. A California case from the early 1970s involving a hospital resident's claim for unjust dismissal from a psychiatric residency program foreshadowed changing views of the medical community with respect to menopause as illness.

In *Walker v. State Personnel Board*,²⁶⁴ Dr. Sidney Walker, a psychiatry student, was dismissed from his residency program apparently for overly relying upon views of women's emotional nature commonly accepted at the time. He was cited for inefficiency because of his "tendency to over-emphasize physical factors and under-emphasize psychological dynamic environmental factors."²⁶⁵ Dr. Walker's evaluators specifically found that he focused too much upon a female patient's menstrual status to the exclusion of environmental circumstances and emotional distress. His supervisor wrote:

[His] discussion focused not upon the traumatic environmental circumstances of the patient, her overt emotional distress, nor the dynamic understanding of her situation, but rather [his] discussion entirely focused upon the issue of whether she was currently menopausal or menstruating and if menopausal [he] wondered if there was sufficient emphasis on steroid replacement therapy in order to cure this patient's distress.²⁶⁶

Dr. Walker brought suit challenging his dismissal. The California Court of Appeals reinstated him to the residency program. While making no overt evaluation on the quality of Dr. Walker's medical skill, it did say: "We find it intolerable that Dr. Walker's dismissal should be upheld because his views failed to conform to current theoretical dogma on the causes of mental illness."²⁶⁷

The precedential value of the ruling to reinstate Dr. Walker is modestly significant; however, the insight it provides into shifting perspectives within the medical profession (at least the psychiatric specialty) is notable. Unlike their predecessors who created the diagnosis of and treatment for involuntal melancholia, Dr. Walker's supervisors were unsatisfied to subsume psychological and biological causes of illness to menopause. Moreover, they refused to tolerate a student who attributed somatic and emotional complaints solely to endocrine function. The courts, traditionally slow to react to change, failed to get the message in the *Walker* case, but that was forced to change.

264. 94 Cal. Rptr. 132 (Cal. Ct. App. 1971).

265. *Id.* at 135.

266. *Id.*

267. *Id.*

C. The Medical Connection Between Menopause and Mental Capacity is Severed

“In 1980, the American Psychiatric Association [(“APA”)] removed ‘involitional melancholia,’ a mental disease that supposedly struck at menopause, from its list of psychiatric diagnoses.”²⁶⁸ Although this action did not immediately erase the denormalization of menopause or the cultural stereotype and negative perception of the menopausal woman, it had a major impact upon litigation. Litigants could no longer assert the menopause defense with relative ease. Once “involitional melancholia” was eliminated from the APA list of recognized psychiatric pathology, medical witnesses could no longer automatically testify about menopausal syndrome.

After this medical development in 1980, menopause figured prominently as a defense in only two appellate level cases—a workman’s compensation case,²⁶⁹ and a negligence action related to an automobile accident.²⁷⁰ In each, the menopause defense was used in a very tentative fashion, almost as an afterthought.

The connection between menopause and mental incapacity was severed. No longer could a negligent defendant successfully claim that menopause was the cause of a mental condition that made women at or near a certain age subject to a host of imaginary emotional and physical disorders. Without information gleaned from expert witness testimony on medical matters, litigants could no longer rely on the menopause defense.

D. Contextual Socio/Cultural Factors—“Baby Boomers” Go To College

Along with the deletion of “involitional melancholia” from psychiatric diagnosis, a variety of social and cultural factors also worked to bring about the demise of the menopause defense. Perhaps the most prominent among these was that after *Rosie the Riveter* left the workplace at the end of World War II, she went back to the home and had children. These children constituted what we now refer to as the “Baby Boomer Generation.” As would be expected, at least half of these children were female. These children grew up in a very different world, with different expectations from that of their mothers. Thanks to the

268. Griffin, *supra* note 73, at 61.

Depressions occurring in the menopausal years do not fit the description in the American Psychiatric Association’s *Diagnostic and Statistical Manual of Mental Disorders*, Edition 2. Depressed patients who are in the menopausal years do not have a distinct symptom pattern, an absence of previous episodes, or an absence of life-stress precipitants. The evidence thus far supports the decision to exclude involitional melancholia, as currently defined, from the forthcoming *Diagnostic and Statistical Manual of Mental Disorders*, Edition 3.

Myrna M. Weissman, *The Myth of Involitional Melancholia*, 242 JAMA 742, 742 (1979).

269. Shilling v. State Accident Ins. Fund, 610 P.2d 845 (Or. Ct. App. 1980).

270. Hayes v. Commercial Union Assurance Co., 459 So. 2d 1245 (La. Ct. App. 1984).

Servicemen's Readjustment Act of 1944, popularly known as the G.I. Bill,²⁷¹ colleges and universities greatly expanded their facilities to accommodate the educational requirements of the men returning from the war. When the returning soldiers completed their educations, these institutions found themselves with empty seats, and for the first time actively recruited female students to fill them. Thus, women of the Baby Boom had greater access to higher education, and grew into better educated, more assertive women.²⁷² Their horizons expanded, and these educated women were less likely to settle for an answer of "that's the way it is, because that's the way it has always been." Educated women asked questions, and expected sound, rational answers. As might be expected, as these women went through different stages of their lives their questions changed.

When they completed their college educations, many went on to professional school.²⁷³ As a result of their growing education and willingness to discuss their bodies,²⁷⁴ women began to take control. They rejected the doctrine that father, husband, and physician knew what was best for them. They chose to be awake and active, rather than anesthetized and passive, during childbirth. Also, they generally demanded what they considered best for themselves and for their babies.²⁷⁵ Physician's views of women also began to change, particularly as more women entered the medical profession.

By the end of the 1970s, women, who may have heard their mother's stories about menopause, began to realize that one day they would experience this biological change. This group, which expected to lead productive lives well past the age of menopause, set out to dispel the age-old myths that were associated with menopause. They were not going to dry out, dry up, or go away. They would refuse to wear the mantle of the useless crone.²⁷⁶ Certainly they were not

271. 58 Stat. 284 (1944).

272. See Ingrassa, *supra* note 68, at 44 (describing, generally, women of the baby boomer generation).

273. Prior to, and even in the early years after the war, very few women were admitted to post graduate education. See Deborah L. Rhode, *Perspectives on Professional Women*, 40 STAN. L. REV. 1163, 1173 (1988) ("Many professional schools retained rigid quotas on female applicants and some institutions (including, for example, Harvard Law School and most hospital internship programs) remained totally inviolate as late as 1950.").

274. See, e.g., RUTH BELL ET AL., *CHANGING BODIES, CHANGING LIVES* (rev. & updated ed. 1987) (1981); THE BOSTON WOMEN'S HEALTH COLLECTIVE, *OUR BODIES, OURSELVES* (2d ed. 1976).

275. An interesting aside is that beginning in the early 1970s husbands were allowed into labor and delivery rooms. The ostensible reason for men being permitted this privilege was to comfort their wives and bond with their newborn children by participating in the birthing process. This great advance may have had much more to do with the fact that a woman who is awake during labor and delivery, is a woman who is a problem for her physician because she asks questions. The real point of the presence of the father may be to keep the mothers quiet.

276. Germaine Greer titled one chapter in her book *The Change, Sex and the Single Crone*. GREER, *supra* note 40, at 280. One critic wrote: "As for Greer . . . she must have had some pretty bitter experiences even to consider writing a chapter entitled "Sex and the Single Crone: . . . poor

going to be considered crazy as they passed through one of the normal stages of life.²⁷⁷

Women organized into women's interest groups, and for the first time possessed the power to demand and get action on issues that were of importance to them.²⁷⁸ While equal educational and employment opportunities were at the forefront of the issues that brought women together, child care, abortion rights, and women's health concerns, including menopause also were addressed. Menopause support groups formed, and helped to dislodge the old menopause myths from the minds of women.²⁷⁹ These newly empowered women then reached out to the rest of society in an effort to create a new image for the menopausal woman.²⁸⁰

Menopause does not occur completely without symptoms. Symptoms of menopause, which are many and varied, run the gamut from mild to severe.²⁸¹ But, as the psychiatric community recognized in 1980, there is no distinct symptom pattern. Moreover, only in the rarest of cases do these symptoms have a major lasting and debilitating influence upon a woman's life.²⁸²

Today, menopause is in the embryonic stages of being recognized for the passage that it is.²⁸³ Although elements of the medical community, with significant encouragement from the pharmaceutical industry,²⁸⁴ still treat menopause as a disease that needs to be cured, differing views of menopause are

Germaine!" Kiki Olson, *Hot Flashes*, INSIDE, Fall 1993.

277. See Logothetis, *supra* note 83, at 45-46.

278. See, e.g., Campaign for Women's Health, Washington, D.C. (a political action committee devoted to women's health issues); 1 in 9 Breast Cancer Group (a political action group devoted to lobbying for more money and attention to breast cancer); National Organization for Women ("NOW") (a lobbying group dedicated to establishing equal treatment for women); National Abortion Rights Action League ("NARAL") (a lobbying for abortion safety, legality, and equal access).

279. See PAULA B. DORESS-WORTERS & DIANA LASKIN SIEGAL, *OURSELVES, GROWING OLDER: WOMEN AGING WITH KNOWLEDGE AND POWER* 127 (1994).

280. See generally *id.*

281. Changes just before menopause include: deviations in duration of menstrual cycle; periods may be longer or shorter; flow can be heavier or lighter. See Griffin, *supra* note 73, at 61. Changes during menopause include: menstrual periods stop; the average age is 51; up to 75% of all women experience hot flashes, these may begin up to 18 months prior to menopause, they last for up to a few minutes and occur from several times a day to a few times a month; night sweats sometimes accompany hot flashes, which are most common in the first year or two of menopause and are related to estrogen withdrawal; some research has connected the loss of estrogen to a decrease in REM sleep. See *id.*

282. See DORESS-WORTERS & SIEGAL, *supra* note 279, at 118-32.

283. "Menopause is not something women need to be afraid of. It is a perfectly normal and natural part of life: like puberty, like childbirth." Phyllis J. Sturges, Letter to the Editor, *Menopause: A Normal, Natural Part of Life*, N.Y. TIMES, June 1, 1992, at A16.

284. See, e.g., CONEY, *supra* note 39, at 185-86.

accepted.²⁸⁵ One school of thought is that even though menopause does not make women insane, it does have significant physical, emotional, and behavioral symptoms that require aggressive hormone replacement treatment.²⁸⁶ Another view is that there is “nothing unique about menopause that may result in particular types of behavior or mood syndromes.”²⁸⁷ This later view is supported by a five-year epidemiological study that followed 2500 Massachusetts women at the age of menopause. The New England researchers found that menopause had no major impact on health or behavior.²⁸⁸ However, one study is insufficient to reverse eras of misunderstanding. Since no serious systematic studies of menopause were undertaken until 1980, the National Institute of Health urged additional research.²⁸⁹

Those “Baby Boom” era women, now peri-menopausal, unable to obtain higher education when they were young, are returning to school in record numbers now that their families are grown. Among those who had the advantage of an education earlier in life, many have gone on to have successful careers in professions, business and industry. Women at the age of menopause today occupy high profile positions in television broadcasting and publishing.²⁹⁰ Also, women at the age of menopause serve as judges at every level from municipal

285. See Nicola Tyler, *Health: Mind Over Menopause*, DAILY TELEGRAPH, May 22, 1990, at 13; see also CRAWFORD & UNGER, *supra* note 75, at 236 (discussing the medicalization of menopause to the neglect of the positives as well as negatives (emotional and financial) involved in women’s middle and old age).

286. Aggressive treatment no longer means shock therapy, institutionalization, or massive doses of mind altering drugs. Today, it is more likely to mean small doses of estrogen, calcium supplements to ward off osteoporosis, and recommendations for regular exercise. See, e.g., MARIAN VAN EYK MCCAIN, *TRANSFORMATION THROUGH MENOPAUSE* 118-19 (1991). See also N.E. Avis & S.M. McKinlay, *A Longitudinal Analysis of Women’s Attitudes Toward the Menopause: Results from the Massachusetts Women’s Health Study*, MATURITAS, Mar. 13, 1991 at 65.

287. Rovner, *supra* note 74, at Z20 (quoting Dr. David R. Rubinow, Clinical Dir. of the Nat’l Institute of Mental Health).

288. The results of various components this ongoing study have been reported from 1986 through 1992 by the New England Research Institute. See Sonja M. McKinlay et al., *The Normal Menopause Transition*, MATURITAS, Jan. 14, 1992, at 103; see also Avis & McKinlay, *supra* note 286, at 65; John B. McKinlay et al., *Health Status and Utilization Behavior Associated with Menopause*, 125 AM. J. EPIDEMIOLOGY 110, 116-20 (1987); Sonja M. McKinlay & John B. McKinlay, *Aging in a “Healthy” Population*, 23 SOC. SCI. MED. 531 (1986).

289. For example, the National Institutes of Health announced in April 1991 that it would conduct a 10-year, \$500 million nationwide study primarily on the health of postmenopausal women. See Joseph Palca, *NIH: Unveils Plan for Women’s Health Project*, 254 SCIENCE 792 (1991).

290. However, women in high profile positions on television have suffered discrimination when their physical profiles begin to show signs of decline or no longer meet management’s standards. These standards are not always applied equally to men and women and focus on what is pleasing to the public. See, e.g., *Craft v. Metromedia*, 766 F.2d 1205 (8th Cir. 1985).

courts to the United States Supreme Court. Women are practicing physicians, surgeons, and attorneys. Women at the age of menopause serve at the highest levels of government, private industry, and as presidents of coeducational colleges and universities.²⁹¹ Politically active middle age women in this country have run for, and been elected to, almost every political office, and menopause now is the focus of websites, informational organizations and even the theme of a comic strip.²⁹²

IV. POSTSCRIPT

The history that unfolds from the legal stories of middle aged American women is cause for concern and celebration. Once the aged *femme couverte*—a legally incompetent, secondary citizen, valued solely for her anatomy—she is now a dynamic force in public society. Where women were once told they were useless, sick, worn out, or of unsound mind, now they are encouraged to view themselves in a stage of life that has been labeled “P.M.F. or Post Menstrual Freedom.”²⁹³ The shield of silence that surrounded the natural physiological process of menopause and shrouded it in mystery and misinformation has been pierced. In the 1990s, women are talking more openly about menopause and other bodily changes.²⁹⁴

The menopause defense resulted from a confluence of factors: a social climate that embraced menopause as illness; medical professionals eager to create and substantiate the perilous and evil manifestations of hormonal change; essentially unchallenged admission of expert testimony on menopausal syndrome; and unequal application of the eggshell plaintiff doctrine. The defense should have died in 1916 with the failed attempt to use it against Anna Laskowski. The stories of the women (and men) who followed Anna Laskowski reveal the misconstructions and inequalities that can result when negative social and cultural stereotypes supplant neutral decision-making. The stories also show

291. *E.g.*, Madelyn Albright (United States Secretary of State); Barbara Boxer (United States Senator); Judith Rodin (President of the University of Pennsylvania).

292. *See, e.g., Menopause and Beyond* (visited June 14, 1999) <<http://www.oxford.net/~tishy/beyond.html>>; *Menopause Online* (visited June 14, 1999) <<http://www.menopause-online.com>>. *See also* The North American Menopause Society c/o University Hospitals Department of OB/GYN Cleveland, OH 44106; Susan Dewar, *Us and Them* (Universal Press Syndicate).

293. Carol Travis, *Old Age Is Not What It Used To Be*, N.Y. TIMES, Sept. 27, 1987 § 6, at 24.

294. With the enormous power of pharmaceutical companies to influence views of disease and cure through their advertising budgets and the recent trend to market directly to the consumer, today even men's bodily functions have become a topic for common discussion. For example, the release of the drug Viagra, which enhances penile function, has made this intimate aspect of men's physiology a topic of conversation at office water coolers, and the subject of endless jokes on late night television. *See, e.g., NOVA: The Truth About Impotence* (PBS television broadcast, May 12, 1998), available in <<http://www.pbs.org/wgbh/nova/transcripts/2510impotence.html>>; *Viagra Talk* (visited June 14, 1999) <<http://www.bigv.com>>.

when the intimate circumstances of women's lives become the source of public review and analysis by eager lawyers and acquiescent judges.

Law develops over time in the context of theories and institutions that are controlled by the dominant political group.²⁹⁵ For the greater part of the Twentieth Century women had little role and no power in the American judicial system. As law is a manifestation of the socio/cultural values of dominant political groups, the development, usage, acceptance, and decline of menopause as a legal defense is an example of power and perspective as law. Thus, the menopause defense, like a mirror, reflects prevalent societal attitudes toward women. Similarly, it symbolizes how, with the strike of a gavel, law can give voice to prejudice and stereotype. It took eighty years for the gavel to crack the social mirror that reflected a mad, diseased, and useless menopausal woman.²⁹⁶ It remains for society to erase the image totally.

295. See BOUNDARIES OF LAW *supra* note 32, at xiii.

296. "Law can reflect social change, even facilitate it, but can seldom if ever initiate it." *Id.* at xiv.

**APPENDIX
CHRONOLOGICAL SUMMARY OF MENOPAUSE DEFENSE CASES**

Case name	Year	Jurisdiction	Woman's Age	Type of Case	Trial Court Result & Damages	Reason for Appeal & Result	Comments
San Antonio Gas Co. v. Singleton 59 S.W. 920	1900	Tex. App.	Plaintiff stated 35	slip & fall	verdict for Plaintiff \$2500	excessive damages & new evidence to support new trial— Affirmed	Appellant alleged Plaintiff was 45, not 35, and that menopause affected her menstruation—not the accident in question
The Little Silver 189 F. 980	1911	Dist. Ct. N.J.	45	boat accident	verdict for Plaintiff \$4000	Federal District Court case—not an appeal	Defendant contended that Plaintiff was undergoing menopause (a change of life) and that pain & suffering were due to that condition, not from injuries received in accident.
Laskowski v. People's Ice Co. 157 N.W. 6	1916	Mich.		horse accident	verdict for Plaintiff \$3500	excessive verdict & court erred in jury instructions Affirmed	doctor testified that Plaintiff's condition was result of menopause—which comes to all women of certain age (which Plaintiff was)—court found no evidence to suggest Plaintiff was not experiencing menopause—but even if she were, the jury instructions safe-guarded Defendant's rights.

Case name	Year	Jurisdiction	Woman's Age	Type of Case	Trial Court Result & Damages	Reason for Appeal & Result	Comments
Oliver v. Detroit Taxicab Co. 177 N.W. 235	1920	Mich.	50	car accident	verdict for Plaintiff \$3500	excessive verdict Affirmed	expert testimony was in conflict concerning cause of Plaintiff's condition; defense expert stated "Plaintiff's symptoms were due entirely to <i>the menopause</i> , the change of life"
Armour v. Tomlin 42 S.W.2d 634	1931	Tex. App.		car accident	verdict for Plaintiff \$4987	refusal to submit special question to jury Affirmed	expert testified there was no evidence of injury to Plaintiff's nervous system, and that, in his opinion, Plaintiff was suffering from depression such as is sometimes manifested during <i>the menopause</i>
English v. English 170 A. 864	1934	N.J. Ch.		divorce	evidence established extreme cruelty, entitling husband to divorce	Court of Chancery trial for divorce—not an appeal	wife was movant, husband counterclaimed, alleging extreme cruelty—wife blamed her conduct on mental upset resulting from menopause
<i>In re Grant's Estate</i> 47 P.2d 508	1935	Cal. Dist. Ct. App.	69 (more likely around age 50)	contested will	jury found decedent of unsound mind & denied admission of probate of will	to determine sufficiency of evidence to justify verdict Reversed	contestants (testatrix estate daughters) alleged that she was of unsound mind due to a mental disturbance caused by menopause

Case name	Year	Jurisdiction	Woman's Age	Type of Case	Trial Court Result & Damages	Reason for Appeal & Result	Comments
Tate v. Western Union Tel. Co. 96 S.W.2d 365	1936	Mo.	39	electrical accident	judgment for Plaintiff \$17,500 award	excessive award Award reduced to \$12,500	court stated that Plaintiff was at the age the menopause condition sets in and nervousness comes with that condition
Wiley v. Wiley 190 A. 363	1937	Pa. Super. Ct.	49	divorce	divorce granted	to determine whether issues properly decided Affirmed	argumentative wife attempted to defend her conduct saying she was undergoing menopause
Croll v. Miller 2 A.2d 527	1938	Pa. Super. Ct.	50+	Workman's Compensation	judgment awarding total disability	total disability granted in error Reversed	Workman's Compensation referee found menopause a factor in Plaintiff current condition
Fox v. Capital Co. 96 F.2d 684	1938	3d. Cir. Ct. of App.		contempt	Plaintiff in contempt for failing to appear under subpoena	to determine whether failure to appear was wrongful Reversed	doctor testified that Plaintiff shouldn't testify at bankruptcy hearing because "she was suffering from <i>the menopause</i> and was bordering on a complete nervous breakdown"

Case name	Year	Jurisdiction	Woman's Age	Type of Case	Trial Court Result & Damages	Reason for Appeal & Result	Comments
Lunt v. Lunt 121 S.W.2d 445	1938	Tex. App.		annulment/ divorce	annulment granted	to determine if husband's perjury warranted reversal of annulment Affirmed	husband had wife jailed and committed to an asylum while she was in menopause by falsely claiming her menopause made her insane, and then obtained annulment in her absence
City of Beaumont v. Wiggins 136 S.W.2d 260	1940	Tex. App.		slip & fall	judgment for Plaintiff \$3500 damages	Defendant objected to jury instruction Reversed and remanded	Defendant alleged that part of Plaintiff's injuries were attributable to menopause
Hollis v. Ouachita Coca-Cola Bottling Co. 195 So.2d 376	1940	La. Ct. App.	45	Black Widow spider in Coca-Cola	judgment for Plaintiff \$600 damages	excessive damages Affirmed	Defendant attributed Plaintiff's symptoms to her menopause
Pearson v. Pearson 41 N.E.2d 725	1941	Ohio Ct. App.	50+	divorce	divorce granted	Plaintiff objected to amount of property awarded Affirmed	court stated it is "common knowledge" that women in menopause are at times "petulant, act irrationally and in an immoderate manner."
Alderman v. Kelly 32 A.2d 66	1943	Conn.		car accident	award to Plaintiff \$6,000 pain & suffering \$1,114 medical	excessive pain & suffering damages Affirmed	Defendant claimed Plaintiff's troubles were due to menopause

Case name	Year	Jurisdiction	Woman's Age	Type of Case	Trial Court Result & Damages	Reason for Appeal & Result	Comments
Gray v. Gray 24 S.E.2d 444	1943	Va.	54	divorce	\$50/month alimony	Affirmed	wife defended against adultery charge by claiming that at the time in question, she was going through menopause, was in almost constant pain and hemorrhaging and was too sick to engage in alleged acts
American Employer's Ins. Co. v. Kellum 185 S.W.2d 113	1944	Tex. App.	43	Workman's Compensation	permanent & total disability \$5271	disability finding against weight of evidence Reversed and remanded	Defendant's doctor testified that Plaintiffs condition may reasonably be expected in "women of her age, approaching menopause"
Lee v. Lincoln Cleaning & Dye Works 15 N.W.2d 330	1944	Neb.	41	Workman's Compensation	administrative law judge awarded \$14.67/week for 300 weeks + medical—district court set aside award	award unsupported by evidence contrary to law Reversed district court decision	Defendant claimed Plaintiff was malingering or that her disability was due to menopausal hysteria, not electrical shock received at work
Sisson v. Sisson 36 Haw. 606	1944	Haw.		divorce	divorce granted	sufficiency of evidence to sustain divorce Reversed	wife offered testimony of her menopause to excuse her conduct

Case name	Year	Jurisdiction	Woman's Age	Type of Case	Trial Court Result & Damages	Reason for Appeal & Result	Comments
Urffler v. Urffler 35 A.2d 580	1944	Pa. Super. Ct.		divorce	divorce denied	sufficiency of evidence to sustain charges Reversed	wife claimed "menopausal disturbance" to explain bad behavior
Hanson v. City Light & Traction Co. 178 S.W.2d 804	1944	Mo. Ct. App.	47	negligent installation of gas pipes	judgment for Plaintiff \$1750	erroneous admission of evidence Affirmed	doctors testified that Plaintiff's symptoms were subjective—due to menopause—Plaintiff claimed menopause occurred two years prior
Olin Indus., Inc. v. Industrial Comm'n 68 N.E.2d 259	1946	Ill.		Workman's Compensation	judgment for Plaintiff	judgment against weight of evidence Affirmed	company doctor testified that Plaintiff's condition was due to menopause but that he believed she was sincere and might be a traumatic neurotic
Richey v. Service Dry Cleaners 28 So. 2d 284	1946	La. Ct. App.		car accident	judgment for Plaintiff \$850	insufficient award Affirmed Damages increased to \$1500	Defendant argued that almost all medical treatment sought by Plaintiff was unnecessary or induced by nervousness caused by menopause

Case name	Year	Jurisdiction	Woman's Age	Type of Case	Trial Court Result & Damages	Reason for Appeal & Result	Comments
Whiney v. Whiney 58 A.2d 183	1948	Pa. Super. Ct.	36	divorce	divorce granted	Affirmed	wife charged with behavior that made husband's life intolerable attempted to attribute her actions to a nervous ailment caused by menopause, but she offered no proof that she was in menopause
Schwarz v. Loew's Theatre & Realty Corp. 77 N.Y.S.2d 95	1948	N.Y.S.C. App. Div.		struck by car	verdict for Plaintiff \$15,000 court reduced to \$8500	excessive award Affirmed	dissent said the finding that Plaintiff's emotional problems and nervousness were caused by accident was against the weight of evidence because Plaintiff was suffering from menopausal disturbances
Glass v. Glass 63 A.2d 696	1949	Pa. Super. Ct.	43	divorce	divorce granted	lack of clear and satisfactory proof Reversed	court held that, although wife abused husband, divorce could not be granted because she was in menopause and had mental illness and therefore could not form the requisite intent

Case name	Year	Jurisdiction	Woman's Age	Type of Case	Trial Court Result & Damages	Reason for Appeal & Result	Comments
Day v. Rains 220 S.W.2d 575	1949	Ky. Ct. App.	50	razor in Pepsi	judgment for Plaintiff \$2000	excessive award Affirmed	treating physician was questioned at length about possibility that Plaintiff's menopause caused or contributed to her condition.
Airline Motor Coaches v. Green 217 S.W.2d 70	1949	Tex. App.	47	bus accident	verdict for Plaintiff \$10,000	excessive verdict Affirmed	doctors testifying for Defendant said Plaintiff was suffering with menopause not head injury caused by accident
Mayor of Beverly v. First Dist. Court of Essex 97 N.E.2d 181	1951	Mass.		wrongful discharge	reinstated discharged police officer	Mayor's finding of wrongful conduct & discharge upheld	police officer accused of rape attempted to discredit victim by claiming she was suffering from hysteria due to menopause
Four Branches, Inc. v. Oechsner 73 So. 2d 222	1954	Fla.		Workman's Compensation elevator accident	Industrial Commission dismissed Plaintiff's claim	Commission findings were contrary to preponderance of evidence Affirmed	court said it was undisputed that at time of alleged accident Plaintiff was and had been in the throes of menopause

Case name	Year	Jurisdiction	Woman's Age	Type of Case	Trial Court Result & Damages	Reason for Appeal & Result	Comments
Laurel Coca Cola Bottling Co. v. Hankins 75 So. 2d 731	1954	Mo.		poisoned Coca-Cola	verdict of Plaintiff \$12,000	excessive verdict Affirmed	Defendant alleged Plaintiff was passing through menopause when she drank the cola, that the menopause, not the cola, caused her nausea and that menopause caused her to exaggerate her injury
Brown v. Payne 264 S.W.2d 341	1954	Mo.	41	Workman's Compensation	verdict for Plaintiff \$10,000	excessive verdict Award reduced to \$7,000	Defendant claimed Plaintiff's chronic pain in head and arms, lack of appetite, nervousness, and irritability were caused by menopause, not by the accident
Stewart Co. v. Christmas 79 So. 2d 526	1955	Miss.		Workman's Compensation	Workman's Commission found Plaintiff qualified as dependent widow	Affirmed	Plaintiff and husband had not had sexual relationship for several years before his death because Plaintiff was passing through menopause; Defendant claimed lack of sexual relationship disqualified Plaintiff from status of wife or widow

Case name	Year	Jurisdiction	Woman's Age	Type of Case	Trial Court Result & Damages	Reason for Appeal & Result	Comments
Yellow Cab & Baggage Co. v. Green 277 S.W.2d 92	1955	Tex.		cab accident	judgment for Plaintiff	inappropriate jury instructions Affirmed	prior infirmities, not accident, were cause of damages
Maroun v. New Orleans Public Serv., Inc. 83 So. 2d 397	1955	La. Ct. App.	54	bus accident	judgment for Plaintiff \$1000	insufficient award Affirmed	Plaintiff claimed accident aggravated pre-existing conditions and caused personality change; court said reasonable medical explanation for personality change and innumerable aches and pains was menopause
Hirsh v. Manley 300 P.2d 588	1956	Ariz.	52	car accident	judgment for Plaintiff \$11,250	excessive damages Remanded for new trial on issue of damages only	Defendant wanted jury instruction that no damages should be awarded to Plaintiff because of preexisting conditions of "obesity, menopause and/or poor posture," — denied due to lack of evidence
Pfautz v. Sterling Ins. Co. 135 A.2d 806	1957	Pa. Super. Ct.		insurance disability	judgment for Plaintiff	Affirmed	insurer attempted to avoid paying claim because Plaintiff had not reported treatment for menopause on application for insurance policy

Case name	Year	Jurisdiction	Woman's Age	Type of Case	Trial Court Result & Damages	Reason for Appeal & Result	Comments
Vogrin v. Forum Cafeterias of Am., Inc. 308 S.W.2d 617	1957	Mo.		slip & fall	verdict for Plaintiff \$1000 J.N.O.V. for Defendant	insufficiency of damage award Affirmed	Defendant's doctor said: there is a strong psychogenic overlay—Plaintiff is having menopausal symptoms which aggravate and prolong her symptoms
King v. King 152 So. 2d 889	1963	Miss.	53	suit for separate maintenance	\$80/month maintenance to wife	Reversed, No Maintenance	trial court observed that wife had not been in good health due to menopause
Cimijjotti v. Cimijjotti 121 N.W.2d 537	1963	Iowa	52	divorce	divorce granted	division of prop. inequitable Affirmed divorce; Modified property division	husband tried to show wife's physical and emotional condition was due to menopause, not his cruel treatment of her
Worthen v. Worthen 374 S.W.2d 935	1964	Tex. App.	60+	divorce	divorce denied	Reversed	wife allege cruel and inhumane treatment—husband asserted that ever since wife went through menopause 20 years ago she was withdrawn and erratic

Case name	Year	Jurisdiction	Woman's Age	Type of Case	Trial Court Result & Damages	Reason for Appeal & Result	Comments
Johnson v. Gulfport Laundry 162 So. 2d 859	1964	Miss.	44	Workman's Compensation	no damages	lack of substantial evidence to reverse order of attorney referee that awarded disability damages Affirmed	doctor testified that job was not the cause of Plaintiff's illness, rather she had an involuntarily depressive reaction as a result of menopause
Beyer v. City of Dubuque 139 N. W. 2d 428	1966	Iowa	70	slip & fall	judgment for Plaintiff \$25,000	verdict unsupported by evidence Affirmed	Defendant's expert testified that Plaintiff's back trouble was result of post-menopausal osteoporosis; Plaintiff's expert testified that she had undergone menopause 20 years earlier: osteoporosis would have developed earlier if caused by menopause
<i>In re</i> St. John 272 N. Y. S. 2d 817	1966	N. Y. Fam. Ct.	48	custody		habeas corpus proceeding to determine custody of child in foster care; Custody awarded to Department of Welfare	foster parents' request to adopt was rejected because Department of Welfare believed adoption of young child would be too stressful for menopausal foster mother

Case name	Year	Jurisdiction	Woman's Age	Type of Case	Trial Court Result & Damages	Reason for Appeal & Result	Comments
Reid v. Florida Real Estate Comm'n 181 So. 2d 846	1966	Fla. Dist. App.	49	Real Estate license revocation	license suspended	whether examiner's conclusions of law were correct Reversed	examiner concluded as a matter of law that Plaintiff's menopause and resulting "anxiety syndrome" rendered her unable to form the requisite intent with respect to alleged larceny.
Fielder v. Production Credit Ass'n 429 S.W.2d 307	1968	Mo. Ct. App.	65	Workman's Compensation	award to Plaintiff of \$818 plus \$16/week for 300 weeks + \$18/week for life	was award contrary to weight of evidence Affirmed	doctor stated Plaintiff had menopausal osteoporosis that predated the accident and that this was cause of disability
Danner v. Danner 206 So. 2d 650	1968	Fla. Dist. Ct. App.		divorce	Plaintiff wife's complaint reinstated	interlocutory appeal Affirmed	husband stated wife's alleged grievances and complaints were due to menopause
Merritt v. Hemstead 206 So. 2d 718	1968	La. Ct. App.		car accident	verdict for Plaintiff \$9000	excessive award Affirmed	Plaintiff doctors said menopause can cause anxiety & depression but it was not a factor here
Montgomery v. Manos 440 P.2d 629	1968	Kan.		car accident	judgment for Defendant on injuries	verdict contrary to evidence Affirmed	Plaintiff had history of menopausal and emotional complaints prior to accident

Case name	Year	Jurisdiction	Woman's Age	Type of Case	Trial Court Result & Damages	Reason for Appeal & Result	Comments
Hicks v. Deer 222 So. 2d 88	1969	La. Ct. App.		custody	custody given to mother	whether trial court's decision was in best interest of child Affirmed	Defendant's mother testified she over reacted to statements made by Defendant because she was going through menopause
Walker v. State Personnel Bd. 94 Cal Rptr 132	1971	Cal. Ct. App.		employment	doctor dismissed; trial court reversed	Reversed	resident doctor was disciplined for focusing on patients menopause rather than on underlying emotional problems
Maryland Cas. Co. v. Davis 464 S.W.2d 433	1971	Tex. App.	42	Workmen's Compensation	judgment for Plaintiff	Affirmed	doctor testified menopause did not cause conjunctivitis—injury did
Devillier v. Trader's & Gen. Ins. Co. 321 So. 2d 55	1975	La. Ct. App.		car accident	judgment for Plaintiff \$1000	inadequate award Affirmed	court found that at time of the accident Plaintiff was going through menopause causing her to be nervous and requiring medical treatment
Leasman v. Beech Aircraft Corp. 121 Cal. Rptr. 768	1975	Cal. Ct. App.		bad plane landing	summary judgment for Defendant	Affirmed	doctor attributed Plaintiff's emotional problems to marital problems, menopause, and alcohol consumption

Case name	Year	Jurisdiction	Woman's Age	Type of Case	Trial Court Result & Damages	Reason for Appeal & Result	Comments
Braun v. Ford Motor Co. 363 A.2d 562	1976	Md. Ct. Spec. App.		product liability —automobile	verdict for Defendant	improper jury conduct Affirmed	jurors had access to newspaper article on menopause; Plaintiff argued that similarity between her injuries and menopause symptoms described in article impaired the credibility of her evidence
McCommon v. Hennings 283 N.W.2d 166	1979	N.D.		car accident	jury found Defendant responsible for accident, but awarded no damages	lack of damage award was against the evidence at trial Affirmed	evidence showed Plaintiff could have been suffering from menopausal melancholia causing headaches, fatigue, irritability, and tension
Shilling v. State Accident Ins. Fund 610 P.2d 845	1980	Or. Ct. App.	54	Workman's Compensation	judgment for Plaintiff	whether Plaintiff's illness was caused by job Affirmed	Defendant claimed Plaintiff's emotional distress caused by concerns about menopause, obesity, bronchitis, and her father's health problems, not overwork
Hayes v. Commercial Union Assurance Co. 459 So. 2d 1245	1984	La. Ct. App.	46	car accident	judgment for Plaintiff \$20,000	excessive award Affirmed	doctor said depression from accident not menopause

Case name	Year	Jurisdiction	Woman's Age	Type of Case	Trial Court Result & Damages	Reason for Appeal & Result	Comments
Keene v. Cracker Barrel Old Country Store, Inc. No. 01-A-01- 9505-CV002211, 1995 WL 623070	Oct. 25, 1995	Tenn. Ct. App.		slip & fall	partial summary judgment for Defendant	whether genuine issue of material fact existed Reversed and Remanded	Defendant argued that injury common in post- menopausal women and Plaintiff was post- menopausal