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How To Counter Jury Reliance On Plaintiff's Damages Ask

By **Christina Marinakis** (August 12, 2019, 10:36 PM EDT)

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In just the last few weeks, we've seen juries award noneconomic damages of $1.25 million to a woman on an insurance bad faith claim (Momeni-Kuric v. Metropolitan Property and Casualty Insurance Co., et al.), $1.3 million to a phlebotomist who experienced racial harassment (Birden v. The Regents of the University of California), $1.9 million to a cyclist who broke her hip and wrist after being struck by a car (Mitchell v. Anderson), $3 million to a teen who fell 30 feet from a ski lift (Hache v Wachusett Mountain Ski Area Inc.) and $7.6 million to a man who alleged chronic pain from a defective implant device (Kline v. Zimmer Holdings Inc.).

Without any concrete guidelines from the courts, how do jurors arrive at such subjective figures? King Solomon would be disappointed. Indeed, jurors in the ski lift case appeared to merely "split the baby," issuing an award that fell between the $6 million requested by plaintiff's counsel and $700,000 suggested by the defense. Would the result have been any different had counsel from either side not provided a number at all? Consider the following exchange:

> Question: How did the jury arrive at the decision to award the plaintiff $20 million in damages?
>
> Actual Juror #1: We came up with a percentage approach, and that's what we all discussed. We started with what the plaintiff was asking for — $80 million, which seemed like a very high amount, and went down and down from there.
>
> Actual Juror #2: None of us had been on a jury before, so we had no idea where to start. What's a life worth? It would have been nice to have some precedent to go by, but we didn't. So, we started with what they gave us, and then took off a percentage.

These conversations, which I had with two jurors following a surprisingly large plaintiff's verdict, are not unlike what we often hear when observing jury deliberations following mock trial presentations or when interviewing other jurors post-verdict. Jurors are often at a loss when it comes to determining what constitutes fair and reasonable noneconomic damages.

Lawyers, who are constantly privy to plaintiff demands, settlement values and jury verdicts, sometimes forget that most jurors have no references aside from the jaw-dropping figures they hear in the news. Indeed, in another post-verdict interview, a third

juror commented, "Since trial, I've learned there are many lawsuits related to this product, and our damages award was on the high side — to say the least — but we didn't know what the norm was. All we had to go by is what the plaintiff was asking for."

Anchoring and Adjustment

Years of experience talking to jurors and watching them deliberate have taught us that the amount they award in damages, after finding for a plaintiff, is almost always influenced by the amount of the demand. In psychological terms, we call that "anchoring." Anchoring and adjustment is a psychological heuristic that influences the way people intuitively assess numerical estimates. That is, when asked to come up with an appraisal or estimate, people will start with a suggested reference point (i.e., "anchor") and then make incremental adjustments based on additional information or assumptions.

Academic research shows that these adjustments are usually insufficient, giving the initial anchor a great deal of influence over future assessments. In a jury deliberation setting, we see this all the time. Consider this exchange between mock jurors:

> Juror A: What was it they were asking for — 50 million? That's ridiculous. No way.
>
> Juror B: What's fair then? Half of that? 25?
>
> Juror A: That still seems a little high. I'd cut that in half — make it an even 13.
>
> Juror C: Yeah, but you have to figure the lawyers are going to take at least a third of it, and another third will probably go to taxes, so you need to bump that up. I'd say $30 million, that way he'll end up with 10.
>
> Juror A: $30 million still seems a bit high to me.
>
> Juror B: But that's still a lot less than what he's asking for.
>
> Juror A: Okay, I can go with $30 million.

These jurors, who thought they were being tough on the plaintiff by only awarding "a lot less than what he's asking for," still rendered a verdict that would be eye-popping for many of us. Had the plaintiff's attorney only requested $30 million, it is very likely the jury would have made similar adjustments and ultimately settled on a figure far less than $30 million. Most plaintiff lawyers realize this and "shoot for the moon," knowing that they'll end up among the stars even if they miss the mark. So how can defense counsel prevent jurors from using the plaintiff's request as an anchor? While there are many strategies, we suggest three methods that have been effective in our experience:

1. Removing the Anchor

Jurors assume that the lawyers know everything about the law and the same applies when it comes to damages. Why would a plaintiff lawyer ask for an amount that is beyond the realm of possibility? Surely, if that's an amount he or she is comfortable asking for, it's because some jury in the past has given it. These faulty assumptions lead jurors to defer to the lawyers. In fact, some jurors assume assessing damages is an "all or nothing" determination; we've had jurors submit questions in actual trials asking whether they're permitted to award amounts different from what the parties suggested and we've seen jurors make similar remarks in mock jury simulations.

Therefore, it's important to inform jurors that they're not bound by the plaintiffs' numbers, that those numbers are completely arbitrary and to suggest that the jury give no weight to figures that are merely requests. We call that "removing the anchor." Here's an example of

how that can be implemented in closing:

> If a jury finds a defendant liable, the jury must then determine what is fair and reasonable compensation. That's what the judge will instruct you. It's about fair compensation. The plaintiff's attorney has asked you to award a specific amount, but that's just a request; it has no basis in fact — it's not based on anything other than what they want. So that doesn't mean that if you decide the plaintiff wins, then you must award what they're asking for. As the jury, you — and you alone — get to decide what is fair and reasonable if — and only if — you think the defendant is liable. Should you decide my client is liable, although we firmly believe it is not, then we ask that you come up with your own figure that is fair and reasonable, and give no deference whatsoever to a number that is merely a request without any basis.

2. Exposing the Anchor

Psychological research has shown that people are less likely to fall prey to mental processing errors when the tendency to engage in such thought is outwardly exposed. In other words, by drawing attention to the fact that the plaintiff's counsel is attempting to influence jurors with an anchor, jurors will be less likely to be persuaded by it. Here's an example of how this can be done in closing:

> Most people have heard the term, "Anchors aweigh!" When a ship is in the water, a heavy anchor tied to the boat keeps the ship in place so that it can't drift too far from the anchor. What you probably didn't know is that anchoring is a psychological persuasion tactic as well. Let me give you an example:
>
> I was at a business conference in Las Vegas and wanted to bring back something nice for my wife, so I walked into one of those high-end purse stores. The salesman brings over a bag he thinks my wife will like, and I take a look at the price tag — $11,000! I tell the salesman, "Hey, I love my wife, but that's just too high." "Ah! I have just the one for you, then," he says, and he brings over a different one. I check the tag, and this purse was $2,000. "Okay," I'm thinking, "This is much more reasonable. I'll take it." When I got home from the trip, my wife was VERY happy, but asked why I would spend so much. I realized I really didn't know anything about purses and asked her how much some of her other ones cost; they were a couple hundred dollars, at most. Then it hit me. If the salesman had never shown me that $11,000 one, there is no way I would have spent $2,000 on a purse. That's just too much, especially when there are many very nice purses out there for a few hundred dollars. But, by showing me the purse that was outrageously priced, the $2,000 one seemed reasonable in comparison.
>
> That's what anchoring is all about. And guess what? That's what the plaintiff's lawyer just tried to do to you: ask for an outrageously high amount and hope you'll agree to something that's maybe a bit little less, but still extraordinarily high. The plaintiff's lawyers are trying to drop that anchor far beyond an area of reasonableness, with the goal of keeping the jury tethered around it. That $10 million request was an anchor, aimed at keeping you from drifting too much lower. It can be easy to be lulled into believing that these numbers must have basis in fact, but they don't. They're just an ask, so it's important to keep that in mind. Only you, as jurors, ultimately decide where that anchor touches down; it's not for the plaintiffs to set it for you.

3. Lowering the Anchor

Although exposing and removing the anchor have some effect on minimizing damages, we know that in the absence of competing values for damages, jurors will still often use the plaintiffs' figures as the starting point for negotiations. Though somewhat controversial, we

sometimes recommend that defense counsel identify an alternative dollar amount that is fair and reasonable, without conceding responsibility. That is, in certain situations, the defense should suggest that if there is a finding of liability, the plaintiff should be compensated for specific damages (and specific amounts) that ensure the plaintiff's needs are met without providing a windfall from the tragedy.

By offering a counter-figure, the defense essentially "lowers the anchor" and gives the jury another starting figure to negotiate from. You can see how this can play out in the following exchange between mock jurors:

> Juror A: For noneconomic damages, what do you all think?
>
> Juror B: The plaintiff lawyer said $30 million, which seems like way too much.
>
> Juror C: I'm thinking closer to what the defense lawyer said, $2 million. The point is to put him whole, not put him up in a mansion.
>
> Juror B: I think he needs a little more than 2 — that doesn't last very long in this day and age.
>
> Juror C: Okay, what if we bump it up to 5?
>
> Juror A: Can everyone agree to $5 million? [all hands raise] Okay, we'll go with 5.

As you can see, offering an alternative figure gives defense supporters and conservative jurors something to argue from, effectively anchoring down the ultimate award.

We've also learned over the years that anchors are most effective — and have the most "pull" — when they're tied to a factual figure, and the empirical research supports this observation.[1] For example, defense counsel might suggest "twice the amount of the hospital bills" or "$20,000 for each year since the accident." Jurors tend to give more weight to figures that appear to be tied to evidence than to numbers that seem completely arbitrary (this is true for both plaintiffs' requests as well as defense counter anchors).

Does Lowering the Anchor Admit Liability?

As I hinted at earlier, offering an alternative damages figure is a controversial technique, and we often see clients reluctant to do so in fear that jurors will misconstrue the offer as a concession of liability or use the suggestion as a damages "floor." Years of experience talking to hundreds — if not thousands — of jurors have convinced me this is usually not the case. This is especially true with a sophisticated jury and when counsel is clear that there is no liability, so there should be no damages, but he or she is providing an alternative calculation merely to give the jury some guidance in the event they disagree with the defense's position.

Rather than relying on anecdotal evidence, we can turn to the empirical research as support for this technique. Legal professors at the University of Denver and the University of Arizona studied this very issue.[2] Their 2016 published study was a randomized controlled experiment in which mock jurors were presented with a medical malpractice trial, manipulated with six different sets of damages arguments in a factorial design.

The plaintiff demanded either $250,000 or $5 million in noneconomic damages. The defendant responded in one of three ways: (1) offering the counter-anchor that, if any damages are awarded, they should only be $50,000; (2) ignoring the plaintiff's damage demand; or (3) attacking the plaintiff's demand as outrageous. Mock jurors were then asked to render a decision on both liability and damages.

The study confirmed that anchoring has a powerful effect on damages; damages were 823% higher when the plaintiff requested $5 million as opposed to $250,000. When the plaintiff's request for damages was low, the defense response had no effect on the amount awarded. However, when the plaintiff's demand was high, jurors awarded 41% less damages when the defendant offered a counter anchor than when the defense merely ignored the request or attacked it as unreasonable.

Since plaintiff attorneys are known for being overzealous, this supports our recommendations for defense counsel to offer a counter anchor in response to plaintiffs' requests. Most importantly, jurors were actually more likely to render a complete defense verdict when the defendant offered a counter anchor, suggesting that not only do most jurors not view the counteroffer as a concession of liability, but it may even enhance the defense's credibility.

For those who still aren't convinced, unpublished studies had similar results with respect to liability. In 2006, another researcher provided mock jurors with written case scenarios with four different defense strategies: no counter-anchor, or counter-anchors of $0, $80,000 or $200,000. Participants were asked to determine both liability and damages in what turned out to be a close case (i.e., overall, 52.7% returned a verdict for the plaintiff). While the various defense strategies had little influence on the average damage awards (likely because the damages request was relatively low to begin with), the counter-anchors nevertheless did not influence the percentage of jurors who found the defendant liable.[3]

In a more robust study using actual jurors, another researcher manipulated: (1) the strength of the defense case, and (2) the amount of the defendant's recommended damages (no anchor, $500, $14,000, or $21,000). This 2002 study found that counter-anchors significantly reduced overall awards and had no effect on findings of liability when the defendant's case was weak or moderately strong.[4] However, when the defense case was very strong, more jurors found the defendant liable when the defense offered a counter-anchor than when it did not.

The takeaway from this study is that in most cases, providing a counter anchor will not impede your chances of obtaining a defense verdict and will help reduce damages in the event of a plaintiff verdict. However, a counter-anchor may be ill-advised when the defense case is particularly strong. As a practical matter, a counter-anchor may also be problematic with an unsophisticated jury whose members are unable to comprehend the notion of alternative arguments.

Case by Case

If there's one thing we can all agree upon, it's that there's no one-size-fits-all approach to litigating a case, and what's good for the goose isn't necessarily good for the gander. The only way to be sure that an approach is the right one for your case is to test it — either at trial, or with jury research. We think the latter will cause fewer ulcers.

Christina Marinakis is a shareholder and director of jury research at Litigation Insights.

[1] Campbell, J., Chao, B. & Roberston C. Time is Money: An Empirical Assessment of Non-Economic Arguments. Washington University Law Review, 95 (2017).

[2] Campbell, J., Chao, B., Roberston C., & Yokum, D. Countering the Plaintiff's Anchor: Jury Simulations to Evaluate Damages Arguments, 101Iowa L. Rev.543 (2016)

[3] Decker, T.L. Effects of Counter-Anchoring Damages During Closing Argument (2006) (unpublished Ph.D. dissertation, University of Kansas)

[4] Ellis, L. Defense Recommendations, Verdicts and Awards: Don’t find my client liable, but if you do ... (2002) (unpublished Ph.D. dissertation, University of Illinois).
