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Counter-Anchoring Damages is More Important than Ever

How to do it effectively

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INTRODUCTION

Jurors struggle with deciding a "fair" amount to award a plaintiff in damages. We know this because they say so—not only in research like mock trials, but in interviews after a verdict has been reached at trial. Jurors in both contexts tell us it's difficult to translate things like injury or loss of life into a monetary award. They also say they don't have a realistic concept of very large amounts of money, making statements like, "Let's give her $100 million. We want her to be taken care of and make sure her family has money for years to come." Additionally, jurors inadvertently demonstrate that they are not accustomed to working with such large numbers. When it is helpful in deliberations to determine multiples of a base amount, many will just as readily multiply $5 million as $5 hundred thousand, without the exponential difference between the two products occurring to them. These challenges to defense attorneys have existed for a long time, but because of recent economic changes, they are even more important to address now.

In determining what constitutes a fair award, jurors consider aspects of the current financial environment. Things like the value of the dollar in society, beliefs about corporations, and the prevalence of "jackpot justice," in which huge judgements disproportionate to actual damages are awarded, play strongly here. Unfortunately for the defense, these factors appear to be pointing jurors toward nuclear verdicts.

The annual U.S. inflation rate has been rising, leaping from 1.4% to 7% between the ends of 2020 and 2021, and to 8% for 2022 (usinflationcalculator.com).[i] Practically all Americans felt this leap, with those in the jury pool likely experiencing it even more keenly. In contrast, the population has concomitantly watched the richest corporate leaders, many in the tech industry, balloon in wealth. During the pandemic, the wealthiest Americans doubled their riches (MarketWatch, 2022).[ii] And while the net worth of the world's 5 richest people in 2000 totaled $181 billion (Forbes, Mar. 2001),[iii] the net worth of the world's 5 richest people in 2022 totaled $795 billion (Forbes, Jan. 2023),[iv] — perhaps the biggest jump in history.

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We know too, that research as far back as the 1980s shows juror indignation at CEO's salaries (Speckart & McLennan, 2002)[v] and we commonly see mock jurors reference Elon Musk, Jeff Bezos, or their likes. The only experience most jurors have involving very large amounts of money comes from hearing such figures in the media, often as they pertain to corporate wealth or sometimes, to nuclear verdicts. If indignation at CEO salaries has increased as much as the salaries themselves, it may be a big part of the post-COVID rise in anti-corporate sentiment.[vi] Further, the outsized numbers broadcast by the media may have a normalizing effect. For instance, even a generous damages award dims in comparison to earnings approaching hundreds of billions.

While the COVID pandemic engendered confidence in corporations for a time, this surge has died down. In addition, post-COVID juries are younger, on average. These younger individuals expect more from corporations, not only in compensation for working for them, but in how critically they evaluate defendants' behavior from the jury box. In our research, C-suite executives testifying on behalf of their company have been spared no judgement.

ADDRESSING THE CHALLENGES FOR THE DEFENSE

These aspects of juror sentiment pose formidable challenges to the defense. However, their impact at trial can be mitigated by a sound damages presentation, supported by a counter-anchor. There are many ways to suggest an effective counteroffer for damages, even when not admitting liability. Some tips that have been shown effective in our research include creating a counter-anchor early on, realistically appraising the other side's expert and their proposal, and exploiting a jury's appreciation for the bargaining process, which helps them to treat compensation in a grounded way, rather than as "Monopoly money".

The defense can be hesitant to offer an anchor in the first place. They fear that jurors will see it as an admission of liability. They worry that if their anchor is too low, jurors will think it insulting, to the detriment of their credibility and likeability. In contrast, a counter that is too high may do little to bring down excessive damages requested by a plaintiff. However, the behavior of jurors in our research has given only limited support for these fears.

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When the defense indicates at a mock trial that they are not liable but must suggest a damages amount in the event they are found to be, jurors take it to heart. Typically, one juror brings up the fact during deliberations and the group debates it. While it's true that in more extreme cases jurors will see a defense offer as an admission of liability, they generally find it reasonable for the defense to counter the plaintiff's offer even if they are not to blame. This practical consideration, as well as others, are front-of-mind for jurors. One will usually mention during deliberations that the defense amount is a necessary, expected, and smart means of bargaining down the plaintiff's unrealistic ask. This commonly elicits judgements of the plaintiff's request as "ridiculous," "exorbitant," or even "obnoxious." In response, another juror will usually opine that the requests are exaggerated because the plaintiffs, too, are bargaining smartly. That is, the plaintiffs never expect to receive an amount close to what they request. Jurors routinely personalize this process by likening it to their own experience of purchasing a car. This personalization is beneficial because it leads jurors to think in a grounded, rational way.

Of course, it is not ideal for a jury to view a defense offer as an admission of liability. But despite the plaintiff's anchor carrying more weight, counter-anchoring still pulls awards lower than other techniques (Campbell, 2014) [vii]. Academic research also shows that when people are not confident in their judgement, anchoring has a strong effect (Jacowitz & Kahneman, 1995),[viii] and as already discussed, jurors are generally not confident in their judgements about damages. Thus, having a low end to create a range is better than not having one at all. Without a counter-anchor, jurors have little more to go on than a massive plaintiff's request. Though they are told that the plaintiff bears the burden of proving their case, and they try to adhere to that guideline, jurors in our research more commonly revert to a "defense must defend" ideology. They routinely state that if the defense hasn't raised strong evidence showing they are not liable, it is because there is no such evidence. Jurors then fill in any missing information the defense hasn't provided, including dollar amounts, themselves. Here, they suffer from what we as litigation consultants describe as "errors of imagination." That is, their judgements are often outsized in proportion to actual damages. For these reasons, most defense arguments require a counter-anchor.

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FORMULATING THE COUNTER-ANCHOR

An unnecessary detriment may come into play in the process of formulating a counter-anchor, simply because of where this process naturally falls in the trial timeline. Defense teams often delay the development of their damages presentation since it comes at the end and because they are refining their estimate of the plaintiff's total request. Further, experience may nudge the defense to subconsciously assume settlement. These factors lead to damages getting glossed over because time runs out. With a plan to counter-anchor, defense counsel can instead benefit from focusing on damages from the beginning of a case. This limits the chances that time constraints will shortchange the damages argument. If the case does not go to trial, the work done to establish a counter-anchor will still inform settlement strategy. Though it's ideal to approach damages armed with every number from the plaintiff, much valuable work can be done while anticipating them. For instance, the defense can use its own experts, or borrow the methods of such professionals to determine estimates themselves.

It is safe to assume that in catastrophic injury cases, the plaintiffs will have experts such as a life care planner. Employing such an expert early on can aid the defense. The team can decide as work proceeds if they will need to retain this expert to testify at trial, or use the expert only initially, as a consultant. If preparing estimates without a life care planner, remember that damages experts are usually not professionals in each area they consider. Rather, they use the input of physicians, PhDs, and other professionals to advise their own offers. Further, life care planners hired to testify for plaintiffs often do not have long-term, one-on-one relationships with them. Thus, a good attorney can adopt their methods and materials to create a life-care plan and other estimates similar to the way in which these experts do.

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Armed with this first-hand experience, an attorney might also probe costs from plaintiff experts that seem exaggerated. In catastrophic injury cases we routinely see total requests in the double-digit millions. Jurors can be willing to award that amount and more. However, even in cases of neurologic injury, average lifetime costs are significantly lower. In cases of cerebral palsy, for instance, they are usually about $1 million (Morbidity and Mortality Weekly Report, Jan. 2004).[ix] This includes medical, non-medical, and indirect costs. More recent estimates for profound neurological impairment at birth are higher but are still in the neighborhood of $3 million.

Defense-generated life-care plans project lower costs for lifetime care by utilizing less expensive, but well-regarded and effective options for treatment and care. While it is not always the case, jurors tend to value and accept these reasonable alternatives. For instance, if a patient needs none of the advanced care that an RN can provide, jurors appreciate the lower cost of employing a certified nursing assistant (CNA) instead. The same is true for the use of generic rather than brand-name medications. Additionally, if a neurologist recommends schooling, and the state offers it for free, jurors value the money this saves over private care. At times they even judge the state's offering superior to private options.

Presenting these practical elements of a counter-anchor may have an additional benefit. It may preempt the idealistic, theoretical mindset that we often see take over a jury, by eliciting the pragmatic reasoning of a few. Juries commonly contain a few people who are high in numeracy-- they think in amounts and calculations rather than in philosophical ideas. In laymen's terms, these are "numbers people." While they don't necessarily have the mathematical sophistication of say, a physicist, they automatically start to add, subtract, and multiply when approaching a dilemma. When asked to decide if an award to an individual is fair, they immediately break it down into more understandable pieces numerically. For instance, they might divide the total to determine what it translates to monthly or yearly. This allows them to understand the amount more realistically, because they can compare it to what they live on themselves. It then becomes obvious that the award is exorbitant, tending to lower the amount they consider fair.

However, many jurors don't think in this way unless guided to. Practically all jurors want to help a plaintiff who has suffered severe injury, of course. But with deep corporate pockets at their disposal and no practical ruler for how to compensate a person for loss of life or limb, this causes damages to soar. When the defense suggests a counter-anchor, substantiated with reasonable alternatives to an extreme award, it can prompt jurors headed for idealistic thinking to instead consider realistic factors. It can also provide those who are naturally practical with the material they need to persuade fellow jurors.

Defense attorneys know they must walk a thin line to argue damages down without perceived insult to the plaintiff. Some attempt to stay in the safe zone by sidestepping an explicit suggestion for total compensation. They instead offer the jury estimates for the major damages categories, hoping the group will sum them to determine the total award. The idea here is that the jury will not find the amount insulting since they arrived at it through their own calculation.

Another technique we have seen counsel use effectively is helping the jury to understand just how generous their estimate is—but without actually saying that, of course. When jurors are told, for example, that a plaintiff can no longer walk his favorite golf course due to loss of a foot, they can be astounded to learn that the defense's proposal would pay not only for the most advanced prosthetic foot but for tee times at the country's best resorts, for much of his life. Though it may seem like this would require an extremely large reward, it is usually a drop in the bucket compared to the plaintiff's ask, and that resonates with jurors. Precisely how the defense conceptualizes the worth of their estimate depends on the case, but the method of elaborating on the many specific benefits it will provide is the same.

Though our present climate of inflation in both the general economy and in nuclear verdicts create the opportunity for plaintiffs to win big, juries can still be persuaded by the grounded reasoning of the defense. Using counter-anchoring in this endeavor is one of the most effective ways to help juries adopt the realistic mindset from which equitable damages are awarded.

CITATIONS

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