The psychology of asking a jury for a damage award

How should you ask for an award?

By Sonia Chopra

How do jurors decide on the amount of damages to award? What amount can you ask for without selling your client short on the one hand and losing credibility on the other? Should you give a number at all or just let the jury decide? Talking to jurors about damages can be one of the most challenging aspects of trial for even experienced litigators. There is plenty of folklore and anecdotal advice about what works and what doesn't, but what many litigators are unaware of is that there is also a body of social science research that specifically addresses the question of how jurors come up with damage amounts, and factors that increase or decrease the size of awards. By the time you finish this article you should have a grasp of what the research says, and more importantly, you will gain practical advice about how you can use this information in your next case.

"Anchoring and adjusting"

One of the most robust findings in the damages literature is that jurors use a process known as "anchoring and adjusting" when coming up with amounts. What this means is that jurors will latch on to numbers – either those provided to them during the trial or generated on their own – and make incremental adjustments to that number to reach a final amount. It is believed that anchoring and adjusting occurs in many estimation tasks outside of trial, and is particularly prevalent in tasks where the decision maker has little confidence in their ability to assess the situation – which is certainly characteristic of damages decision making in many cases. In the psychological literature, the process of anchoring and adjusting is considered a cognitive bias or shortcut, because once an anchor number has been provided, the number exerts undue influence on the final figure. Anchoring can sway decisions even when the anchor provided is completely arbitrary. For example, one classic study on anchoring involved the use of a roulette wheel that was fixed to land on either a high or low number. After spinning the wheel, people were asked to estimate the number of African countries in the UN. Peo-ple who spun the high number gave higher estimates, and people who spun the lower number gave lower estimates.[1]

Early research looking at the way jurors used anchoring in the context of jury damage awards suggested that the larger the lump sum request made by plaintiff's counsel, the larger the average award. More recent research, however, suggests that asking for too much can backfire and lead to a rejection of the offer.[2] Marti and Wissler found that when mock jurors were asked to award $1.5 million, $15 million, or $25 million for pain and suffering, average awards were lowest in the $1.5 million condition, but were higher in the mid-range, $15 million condition, because people responded negatively to the $25 million request which was seen as overreaching.[3] This research suggests that moderately high anchors result in the most favorable result – too low and you will get what you ask for, but too high and the number will be rejected and deeply discounted.

The appropriate amount

Perhaps nothing is more challenging than talking to juries about how much is an appropriate amount to award for pain and suffering, emotional distress, and other categories of so called non-economic damages. Some plaintiff attorneys – in jurisdictions where they are allowed to do so – sometimes come up with a "per diem" formula to calculate what amount of money would be appropriate to compensate the injured party. This could be X amount per hour, per day, per year, and so on. Until recently, there had been no systematic research examining how jurors react to per-diem arguments for noneconomic damages and how this formula approach to damages works in conjunction with decision makers' use of anchoring and adjusting.

McAuliff and Bornstein had 180 jury-eligible community members from Southern California read a case summary based on a real trial.[4] The case involved a driver striking an 18-year-old pedestrian when swerving to avoid a rear-end collision. The plaintiff had a lumbar injury, spent two nights in the ICU, had intense back pain and limited physical mobility, and severe headaches. It took two years to heal. Mock jurors were told that liability had been conceded, and their only task was to determine how much should be awarded for past pain and suffering.

While designing the study, the authors pre-tested the case scenario to determine what award amounts people generated on their own with no guidance, and from that they decided to use $175,000 as the lump-sum amount that plaintiff's attorney was seeking. This amount represented a moderately high anchor based on the pretest, which should result in jurors using the anchor instead of rejecting it as unreasonable. From this lump-sum amount the researchers created three per-diem conditions: $10/hour, $240/day, or $7300/month. During closing argument the plaintiff's counsel incorporated one of the three per-diem calculations, the lump sum, or provided no specific request for an amount. The defense closing was the

same: "Justice is not served by awarding plaintiff the excessive amount she is seeking in this action."

Initially the authors were just interested in learning whether or not the use of a per-diem argument resulted in a larger damage award than the use of a lump sum alone. They did not expect to see any differences in the three per-diem conditions as they all resulted in the exact same anchor amount of $175,000. The results were surprising.

The largest awards were given in the $10/hour and the $175,000 lump sum conditions.

The lowest awards came when there was no anchor provided at all – which is consistent with what we see in our mock trial research, and when the anchor was the $7300/month per diem. These differences occurred *even though all three per diems resulted in the exact same amount as the lump sum.* Why did this happen? It could be that participants didn't do the calculations, but that would not explain why the $10/hour per diem resulted in similar awards as the lump sum. Another explanation is that the $7300 a month was seen to be excessive compared to either what the damage was perceived to be or to participant's own internal anchor – two factors we know lead to movement away from an anchor. Thinking about $10 an hour may seem reasonable – most people probably make at least that much, compared to thinking about bringing home $7300 a month, which could have been perceived as excessive, biasing or unfair, all of which we know leads to rejection of an anchor amount.

In trying to figure out what was going on, the researchers did a follow-up study to test whether or not $7300/month was in fact seen as a larger and more extreme amount than the other per-diem requests. They asked people to simply look at the three per-diem amount requests on a sheet of paper and circle the one they thought would result in the largest damage award for two years. They then asked them to turn over the sheet and indicate if they focused more on the dollar amount or the time unit when answering. As expected, 73 percent of participants thought the $7300/month amount was the highest and 27 percent chose $240/day – no one selected $10/hr. As to how they decided, 70 percent of respondents said they focused on the dollar amount instead of the time unit. The bottom line from this study is that jurors focus more on the dollar amount of the per diem and less on the time unit, so they think the larger amounts are larger, even though the time elapsed is longer. Rejecting the perceived largest amount is consistent with the tendency to go with a moderately high anchor and adjusting awards down from an amount that is perceived as excessive.

Take-away lessons

The general consensus in the literature is that using a medium-high anchor for your damage request results in a greater likelihood that jurors will work with the amount you suggest and lessens the chance that they will reject the number outright. You do, however, want to aim a little higher than what you can live with. Social science research and real-world experience gained from listening to jurors in mock trials and post-trial interviews demonstrates that jurors expect that plaintiff attorneys are inflating damages to some extent, and they will discount your request accordingly. In this study, for example, mock jurors gave an average of $25,000 less than what was requested, a discount of about 14 to 15 percent.

What might be going on in this particular study with these per-diem amounts is that people are comparing the per-diem anchor to their own lives, their own anchors. Ten dollars an hour probably doesn't seem like an exorbitant amount to most employed people, particularly in California where the study was conducted. It's important to consider your audience whenever you are asking for damages, but especially when seek-ing elements of damages that are less tangible, like pain and suffering and emotional distress, or more speculative, like future wage loss. Ask yourself, what do your jurors make in a year? Will they say to themselves, "I'd never make that in my lifetime – $7300 a month, I'd gladly go through a little pain for that kind of money"? If so, you may need to adjust your anchor to be more in line with what your jurors will reference in their own lives.

Use a lower dollar amount and greater length of time when coming up with the per diem. People focus on the dollar amount, not the time. The authors say a lump sum may be better than a per diem, because use of a per diem drove damages down, not up. Our real-world experience tells us that jurors do like "a formula" when it comes to non-economic damages. If you don't provide one, they will use their own, which may not be to your advantage.

That said, a per diem alone is probably not enough, you still want to do the calculations out for them. That satisfies a need for justification (a formula) and shows you didn't pick the number out of the air, but also ensures that they will "do the math."

You can also be creative with your per-diem calculations. Why not mark time in terms of what the defendant did, i.e., the number of days they ratified the discriminatory practices of the manager by refusing to investigate, or the number of cars they let leave the factory knowing they were putting out a defective product in addition to or instead of the standard "number of hours/days/months of plaintiffs' suffering"?

This research design was different from most trials in that jurors were only asked to determine non-economic, pain and suffering damages. When left to their own devices, jurors will almost always use economic damages in their "formula" for how much to award for general damages. Sometimes that's wage loss or medical bills, for emotional distress damages they will often speculate about the costs of therapy and how much the plaintiff will need over the years. If you can come up with a formula for noneconomic

damages that appeals to jurors' natural desire to use "hard" "objective" numbers you increase the chances of them accepting your amount.

A real-world example of jurors' desire for justification of damage amounts comes from a mock trial in a wrongful-death case where there was a surviving husband who had witnessed his wife's death and had three grown children. While the plaintiffs' attorney did provide the mock jury with anchors in the form of requests for different elements of damages, he did not try to explain how he came up with the numbers, particularly those for noneconomic loss. The attorney playing the defense, however, did present damages formulas – this was a case where liability was conceded.

Using formulas

We know that deciding on noneconomic damages for the death of a loved one is an extremely difficult task for jurors. There was a general perception among the mock jurors that the defense made the job easier by providing "formulas" to calculate damages which were based on "evidence" as opposed to "emotion" or the mere whim of the plaintiff's attorney. Mock jurors went so far as to conclude that the defense provided them with what the "normal" figures were for compensation, then generously suggested slightly more as an acknowledgement of how wonderful the deceased was and how special her relationships with her family were.

Another recent damages study with real-world application looked at whether or not having more discrete categories of noneconomic damages on a verdict form results in higher overall awards.[5] In this study, participants read a vignette of an auto-accident case where the plaintiff suffered cuts to the face resulting in scarring (disfigurement), loss of enjoyment of life (nerve impingement to hand which prevented him from playing piano), PTSD symptoms and prescription medication (mental anguish) and three surgeries for back injuries, physical therapy, partial disability, and chronic back pain (physical disability/impairment). Mock jurors were told that liability had been decided, along with medical bills and lost wages and this trial was for pain and suffering damages only. An instruction was given that defined the elements they should consider when determining their pain and suffering damages award.[6]

There were three award conditions: 1) the four-award condition where people were asked to give an amount for each category – disability/physical impairment, disfigurement, mental anguish, and loss of enjoyment of life, 2) the two-award condition where respondents were asked to give one amount for physical pain and suffering (to include both disability/ impairment and disfigurement) and another for mental pain and suffering (to include mental anguish and loss of enjoyment of life) and 3) the one-award condition where participants were asked to consider damages awards for all four elements and to make one overall award.

Awards increased based on the number of discrete categories jurors were asked to consider. The average award in the one-amount condition was $169,990, in the two-amount condition it was $277,573, and in the four-award condition the average award was $405,483. Further analysis led researchers to conclude that it was the loss of enjoyment of life category of damages being separated out that was the reason for the increased awards.

How can you apply this research to your practice?

The most important thing to have jurors consider separately according to this study as well as previous research, is the plaintiff's loss of enjoyment of life. Making loss of enjoyment of life salient increases the overall noneconomic damage award by boosting the amount given for emotional distress and mental suffering.

Asking jurors to actually make awards for each separate element of the instruction increased the overall amount. If you can get a judge to agree, list as many categories of damages that you can on the verdict form to increase the overall amount. Even if you can't get the judge to give you separate lines on the verdict form, why not make suggestions to the jury about awarding different amounts for each element of the pain and suffering/emotional distress damages instruction in your jurisdiction? Do a graphic with a line for each category of damage in your closing and highlight the instructions that show each is an element to be considered.

One of the things we've seen in our own research is that, in general, people want more guidance about how to come up with noneconomic award amounts. They are primed to think these damage categories are speculative, arbitrary, and driven by emotion. By focusing on the jury instructions and each element they are *required* to consider under the *legal instructions* you can make the damage decision seem as objective as the liability decision.

Along the same lines, when talking about noneconomic damages and what amounts should be awarded, point to specific examples supporting each element of the damages instruction and use the word *evidence* to describe factors in the case that support a damage award for each category of non-economic loss. For example, "You heard the *evidence* about how Brian can no longer attend his son's baseball games because of his depression." This approach demonstrates that this is an *evidence-based*, not emotional or arbitrary decision.

The most difficult question

Finally, on to that most difficult of all questions. How do you decide how much to ask the jury for? The research says if you are too high your request will be rejected outright. But, on the other hand, if you are too conservative and your request gets discounted by the jury because they assume you're inflating the number, you end up leaving money on the table. The prevailing wisdom is that you want to come in with what is a moderate-to-high, as opposed to too high, or moderate-to-low anchor as a starting point. I also suggest that you give jurors a range of numbers or a couple of options. That way you give them a sense of autonomy,

but more importantly, they may end up using your range as the floor and ceiling amounts, instead of using the defense numbers as one end of the spectrum and yours as the other. Providing different scenarios allows for jurors to reject numbers they perceive as "too high" but compromise with something you are still OK with.

If you have the time, you can test damage requests in pre-trial jury research. While a full-blown mock trial is great and can provide the richest amount of data for damage decision making; smaller, shorter, more economical focus groups can also be tailored specifically to address the damages question. While they are by no means a crystal ball and should not be utilized to predict specific damage amounts, focus groups allow you to test whether or not the amount of damages you think the case is worth will be accepted or rejected. The range of damages given by the mock jurors on individual verdict forms can also help you decide what an appropriate medium-high anchor would be for a given case. Listening to mock jurors deliberate can also reveal personal anchors or damages formulas that may resonate with jurors in your venue.

Realizing that not every case will be appropriate for a focus group or mock trial, recent research suggests that something as simple as seeking a second opinion from a colleague can increase your accuracy in estimating case value – provided that you actually use the advice! Jacobson et. al had pairs of experienced trial attorneys review descriptions of six real, personal-injury cases that had been tried in California.[7] These included a low-damages auto case that resulted in a $35,000 verdict, up to a wrongful-death case of a child where the actual jury awarded $4.25 million. Participants were told that all cases had been decided in favor of the plaintiff with no comparative negligence, and were given information about the economic damages that were awarded. They were then asked to come up with an estimate of the non-economic damages for each case. There were four rounds of estimates made. The first was made by each individual alone. The second was made after they had a chance to see what their partner had awarded. The third round involved 15 minutes of discussion with the partner, after which they had to agree on a single figure, and the fourth round allowed them to submit their final, individual amount.

One of the main findings was that the opinion of one's partner did not do much to sway people off their own initial opinion. In the Round 2 estimates, 83 percent of the attorneys moved less than half way towards their partner's estimate, and over half (53 percent), completely disregarded their partner's number and did not move at all. Had the participants incorporated their partner's estimate into their own, accuracy would have increased. In fact, just averaging the two figures would have resulted in the most accurate figures compared to what jurors actually awarded in these cases. The Round 3 estimates where partners were forced to come to an agreed-upon number resulted in the lowest error rates in estimating damages. The tendency to value one's own opinion is strong, however, and accuracy rates decreased slightly with Round 4 where participants were allowed to make their own, final estimate.

The authors also wanted to test whether or not more estimates resulted in even greater accuracy. They looked at an aggregate of all the estimates and found that accuracy did in fact increase. However, the biggest jump in accuracy of estimates occurred with the addition of just one other opinion. The take away from this study is that asking a colleague – preferably not one in your office or with a vested interest in the outcome – for a "second opinion" can result in a more accurate assessment of case worth, provided that you actually adjust your estimate accordingly. And, the most effective way to increase your chances of getting close is as simple as averaging your two amounts.

There has been a recent revival in the social science literature in terms of how juries think about and decide damage awards. Keeping on top of the emerging research can help you gain an edge over your opponent at your next trial.

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Endnotes

[1] Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCI., 1124 (1974).
[2] M. W. Marti, & R.L Wissler (2000) *Be Careful What You Ask For: The Effect of Anchors in Personal Injury Damage Awards,* 6 J OF EXP. PSYCHOL. 91.
[3] *Ibid.*
[4] Bradley McAuliff & Brian Bornstein (2010) *All Anchors are Not Created Equal: The Effects of Per Diem Versus Lump Sum Requests on Pain and Suffering Awards*. 34 (2) LAW & HUMAN BEHAV. 164.
[5] A. Gregory & R. Winter (2011) *More than the Sum of its Parts? Itemizing Impairment in Civil Cases*. 16 LEGAL & CRIMINOLOGICAL PSYCHOL. 17
[6] "You should consider the following elements for your pain and suffering determination: Any bodily injury sustained by Holbern and any resulting pain and suffering, including: a) disability or physical impairment, b) disfigurement (an impairment or injury to the appearance of a person or thing), c) mental anguish (a highly unpleasant mental reaction such as anguish, grief, fright, humiliation or fury that results from another person's conduct), d) loss of capacity for the enjoyment of life experienced in the past or to be experienced in the future."
[7] J. Jacobson, J. Dobbs-Marsh, V. Liberman & J. Minson (2011) *Predicting Civil Jury Verdicts: How Attorneys Use (and Misuse) a Second Opinion*. 8 J. OF EMPIRICAL LEGAL STUDIES 99.