

Explaining damages to jurors
and knowing how to ask them to return a
certain verdict can be challenging. Understanding how
jurors process this information can help you guide
them to do what is right for your injured client.

By The Numbers

By || GREGORY S. CUSIMANO

“Ladies and gentlemen of the jury, have you reached a verdict?” I stand in the courtroom, palms sweating and heart pounding, my eyes searching each juror’s face, hoping to glean something that will ease the tightness in my chest. It feels as though everyone in the courtroom is holding their breath. The only discernable sounds are the bailiff’s steps slowly walking the verdict to the judge. As the judge reads the verdict to himself, I see no expression on his face that alleviates my anxiety. “Bailiff, please return the verdict to the foreperson.” The bailiff walks back to the jury box and hands the folded verdict to the foreperson. “Will the foreperson please read the verdict?” The foreperson unfolds the verdict and holds it at a distance in front of her, as if she’s having difficulty reading it and doesn’t know what it says. The words echo through the courtroom, “We, the jury, find the issues in favor of the . . .”

This scene repeats itself daily in courtrooms all over the country. There is no question that art, skill, and experience weigh heavily in the courtroom. But it also is critical to understand the existing research into decision-making and how to apply it in your cases.

Once jurors decide liability, they embark on a difficult journey—deciding damages. They are asked to assess values, with little to no experience. Jury verdicts often seem unpredictable and erratic, especially when jurors are judging noneconomic damages. But research indicates that verdicts are more consistent than we think.¹

There are some questions that we consistently hear from jurors in focus groups and posttrial interviews: How do we know what is fair? Will the money do any good? What are other juries doing in cases with injuries like these? Jurors want help to do the right thing, and it is our job to help them.

Be Specific

Research indicates that when requesting damages from a jury, you should use precise numbers, which are perceived to be lower and more reasonable than comparable round numbers.² For example, \$51,132 may be perceived as lower than \$51,000. In commercial marketing, research has shown that determined buyers were willing to pay more for products or even real estate when the sales price was precise.³ If you are allowed to and choose to ask the jury for an amount, make it precise!

But what is the best way to argue noneconomic damages? Consider this recent study: Researchers used a case in which an 18-year-old pedestrian was hit by a car and suffered spinal compression fractures.⁴ The plaintiff spent two nights in intensive care. The jurors in the study heard four different arguments for pain and suffering damages: requesting a certain amount per month for two years, a certain lump sum, a certain amount per day for two years, and a certain amount per hour for two years. The researchers referred to the monthly, daily, and hourly arguments as “per diem.” In each argument, the total sum ultimately requested was \$175,000. Jurors also heard an argument that did not request a specific amount.

On average, the results were:

- No sum requested: \$61,000
- Monthly basis: \$66,000
- Daily basis: \$99,000
- Hourly basis: \$150,000
- Lump sum: \$152,000

Although requesting a specific dollar amount per hour seemingly results in the highest per diem damages award on average, or basically equal to the lump

sum argument, jurors show more award variability in per diem arguments.

Assuming equal persuasive ability, a well-structured lump sum argument may work just as well as the best per diem argument with less award variability.

Although lawyers often ask trial consultants to have focus group participants decide damages, it is generally not very valuable or accurate. Asking if damages are “small, medium, or large” may be more helpful.

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The Anchoring Effect

Anchoring can be a powerful tool. It’s the use of information or numbers that are irrelevant as a reference point for assessing or valuing something that does matter but has an unknown price or value. The anchoring effect causes people to base decisions or estimates on things or values known to them, even

though they may have no relevant bearing on the actual value.

For example, in one study, people were asked to estimate the percentage of African countries in the United Nations. But before they answered, they watched a “wheel of fortune” spin. The wheel was fixed to land on “65” or “10.”⁵ Neither number had any connection with anything.

When estimating the percentage of African countries, the participants who saw the wheel land on “65” had a median estimate of 45 percent; those who saw the wheel land on “10” had a median estimate of 25 percent.⁶ There are many experiments mirroring this one with similar results.⁷

The theory for this and other similar experiments is that we take the initial, meaningless number as our starting point or *anchor*, and then we *adjust* up or down from that number until we reach an answer that seems about right. We generally over-adjust or under-adjust from the number. If we perceive the number to be too high, we under-adjust, and if we perceive it to be too low, we over-adjust. If a lawyer requests a sum that jurors perceive to be unreasonable, they are likely to under-adjust more severely.⁸

Anchoring also affects our daily lives. Have you ever gone into a clothing store and noticed a beautiful jacket? The color, the feel, and the cut seem just right, so you slip it on and look in the mirror—it fits perfectly. Then you notice the price tag: \$1,000. As you take it off, a salesperson comes over and says, “That is a really nice jacket, and it’s still on sale. Today is the last day. It’s quite a buy at \$600.” Wow, you think, \$600 is a great deal. You have just been “anchored.”

Is there a way to frame our damages arguments using anchoring? Try to anchor large numbers based on your client's needs during the course of the trial and, hopefully, they will relate to your damages request.

For example, in a road construction case involving two deaths, I provided mock jurors with information that the construction contract involved \$50 million. There was no request for damages. During deliberations, in several focus groups and mock trials, one or more of the participants mentioned the \$50 million contract during damages discussions.

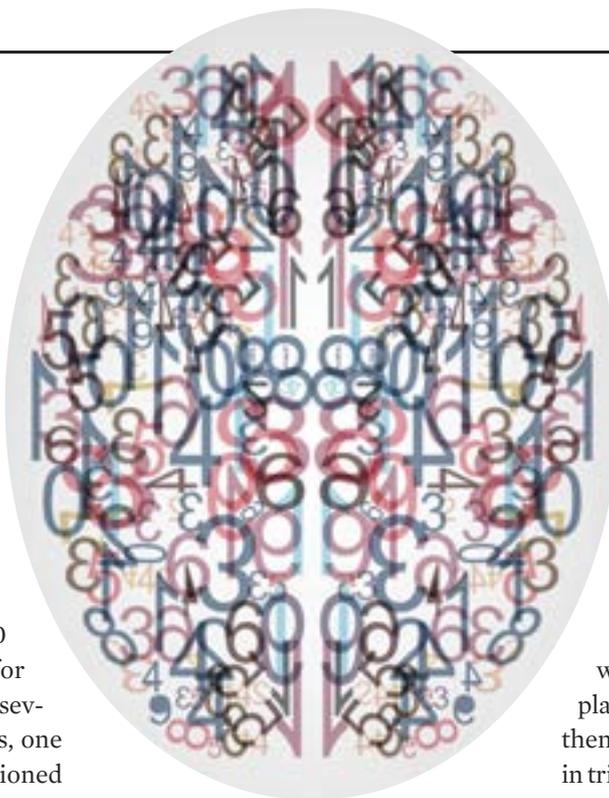
In a wrongful termination case, a witness mentioned that the employer plant netted \$5 million for one month's productivity, yet only gave the employees a steak dinner. In posttrial juror interviews after a substantial verdict, jurors stated that the \$5 million monthly profit influenced their verdict.⁹

Starting the Money Conversation

It seems clear that providing a high, reasonable anchor should help your case. However, activating jurors' thoughts about money can have negative effects. Even subtle thoughts about money cause some people to socially disengage.

Studies show that people interact differently with others when thinking about money. Money may cause a person to feel more self-sustaining and independent of others, motivating them to achieve their own goals rather than help others.¹⁰

In a study at the University of Minnesota, participants were primed with visuals of money: They saw play money from a board game in the background, they read something about money, or some may have noticed a computer screensaver with pictures of floating money. They were unaware that they were being primed.¹¹



Then, each participant sat in a lab filling out a questionnaire when a supposed student walked in and said, "Can you come over here and help me?" The fake student explained that she was an undergraduate who needed help coding data sheets, each taking five minutes. The control group that was not primed with money visuals offered an average of 42.5 minutes of their time; the money-primed group volunteered about 25 minutes. Some participants didn't help at all.

In another experiment, the researchers gave participants an opportunity to help in a situation that required no skills. They staged an accident, in which a random person spilled pencils while walking through a room where participants were completing a questionnaire. The participants who were primed with money visuals picked up far fewer pencils than the controls.¹²

The study further concluded that cooperation drops when money is an issue.¹³ Priming with money affects behavior consistently but in many different ways. Small reminders of money cause large changes in behavior. The "why" is speculated—some believe money causes people to distrust others.

Others think it makes people selfish. However, the research concluded that a money prime helps personal performance on challenging work.¹⁴

Considering this research, when should we raise the issue of damages with jurors? Should we tell them how much we plan to ask for in voir dire? Or should we tell them that this is an important case, and that at the end, we will be asking them to compensate the plaintiff for the harms and losses? How then should we frame a money anchor in trial? Successful lawyers answer these questions differently. There is no single best way. We each must be comfortable in the approach we select.

I'm more comfortable sharing the importance of the case in jury selection and voir dire. I ask if anyone has a fixed sum in his or her mind that is so large or so small that he or she would never award regardless of the law and facts. If no hands go up, I say, "If the law and facts justify a verdict of \$1, you would be comfortable with that?" If they all agree, then I say the same thing using a large figure such as \$50 million. Often, I get hands up and strikes for cause. After completing the money discussion, I generally say, "Well, we will not be requesting \$50 million in this case." Ultimately, it's wise to think about your approach very carefully to obtain the best outcome for your injured client.

The Jury Project

What if we could examine the decisions and reactions of jurors in real civil cases? The Arizona Jury Project did just that—filming jury deliberations in 31 cases involving 33 plaintiffs for an experiment in anchoring.¹⁵

The project concluded: "Fears about undue influence from attorney damage[s] proposals are inflated both because attorneys tend to tailor their

demands to the evidence and because juries are critical consumers of the demands the attorneys make and heavily discount them.”¹⁶ Jurors agreed that deciding damages was harder than deciding liability because there is no available yardstick, method, or formula.

Jurors look for cues, and the researchers determined that jurors generally and unconsciously apply anchoring and adjustment. This research concluded that jurors are anxious for help and input as they try to do the right thing in awarding damages.

Although the jurors welcomed help, they viewed the lawyers’ requests with a critical eye. To counteract this, be sincere and credible in your demeanor and conduct. Admit your mistakes, fears, and enormous sense of responsibility.

Other conclusions from the Jury Project research include:

- The median jury awarded only 22 percent of the whole sum the lawyer requested for the 25 plaintiffs who made a total damages request.
- Juries awarded a lower percentage of the amount the plaintiff requested for pain and suffering compared to more objective special economic damages such as medical bills and lost wages.
- Suggested damages for pain and suffering logged a greater percentage of negative comments by jurors than objective special damages. When the amount requested for pain and suffering was merged with other damages requests, even more comments were negative. Many outright rejected the plaintiff’s request and ridiculed the amount requested.
- Jurors were more receptive to damages requested by the defense than the plaintiff. They were more likely to reject the sum suggested by the plaintiff than they were to reject the defense’s suggestions. The

researchers hypothesized this result was from tort reform efforts.

It is your job to be a strong advocate for your client. Every lawyer will have his or her own comfort zone in raising the issue of damages with jurors. But consider the research in making your decision. 



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NOTES

1. Valerie P. Hans & Valerie F. Reyna, *To Dollars From Sense: Qualitative to Quantitative Translation in Jury Damage Awards*, Cornell Legal Studies Res. Paper No. 11-25 (July 1, 2011). The study concluded that, generally, more serious injuries result in larger awards and less severe injuries result in lower awards.
2. Manoj Thomas & Vicki Morwitz, *Heuristics in Numerical Cognition: Implications for Pricing*, in *Handbook of Pricing Research in Marketing* 132 (Vithala Rau ed., 2009); David Davis, *Some Juror Rules for Determining Damages*, 20 *The Jury Expert* 24 (2008).
3. Manoj Thomas, Daniel H. Simon & Vrinda Kadiyali, *The Price Precision Effect: Evidence From Laboratory and Market Data*, 29 *J. Marketing Sci.* 175–90 (2010).
4. Bradley D. McAuliff & Brian H. Bornstein, *All Anchors are Not Created Equal: the Effects of Per Diem Versus Lump Sum Requests on Pain and Suffering Awards*, 34 *Law & Hum. Behav.* 164–74 (2010).
5. *Judgment Under Uncertainty: Heuristics and Biases* (eds. Daniel Kahneman, Paul Slovic, & Amos Tversky, 1982).
6. *Id.* In another study, the participants were asked how old Mahatma Gandhi was when he died. Half were asked, “Did he die before or after the age of 9?” and the other half were asked, “Did he die before or after the age of 140?” The first group guessed on average 50 years old and the second group guessed 67. Fritz Strack & Thomas Mussweiler, *Explaining the Enigmatic*

Anchoring Effect: Mechanisms of Selective Accessibility, 73 *J. Personality & Soc. Psychol.* 437–46 (1997).

7. Edward Teach, *Avoiding Decision Traps*, CFO Magazine (June 17, 2004), ww2.cfo.com/human-capital-careers/2004/06/avoiding-decision-traps/; David McRaney, *Anchoring Effect, You Are Not So Smart Blog* (July 27, 2010), <https://youarenotso smart.com/2010/07/27/anchoring-effect/>; Dan Ariely, *Predictably Irrational: The Hidden Forces That Shape Our Decisions* (2008); Amos Tversky & Daniel Kahneman, *Advances in Prospect Theory: Cumulative Representation of Uncertainty*, 5 *J. Risk & Uncertainty* 297–323 (1992).
8. McAuliff & Bornstein, *supra* note 4.
9. Keep anchoring in mind for pretrial issues as well. Anchoring instructs that you should start negotiation by making a demand rather than waiting for the defendant to make an offer.
10. At the May 26, 2013, annual meeting of the Association for Psychological Science, a panel of researchers discussed how money impacts social relationships. Nathan DeWall, an associate professor of psychology at the University of Kentucky, said: “When you prime people with money, they approach their social interaction in a fundamentally different way than they normally would.” He added that priming people with money results in a socially disengaged interaction with others. Denise Chow, *Thought of Money Makes You Less Social, Study Suggests*, Live Science (May 28, 2013), www.livescience.com/34764-money-psychology-social-relationships.html.
11. Jeanna Bryner, *Mere Thought of Money Makes People Selfish*, Live Science (Nov. 16, 2006), www.livescience.com/1128-mere-thought-money-people-selfish.html.
12. *Id.*
13. *Id.*
14. Kathleen D. Vohs, Nicole L. Mead & Miranda R. Goode, *Merely Activating the Concept of Money Changes Personal and Interpersonal Behavior*, 17 *Current Directions in Psychol. Sci.* 208–12 (2008). An article published in July 2012 related new research suggesting more money makes people act less human. Lisa Miller, *The Money-Empathy Gap*, New York Mag. (July 1, 2012), www.nymag.com/news/features/money-brain-2012-7/.
15. Shari Seidman Diamond et al., *Damage Anchors on Real Juries*, 8 *J. Empirical Legal Studies* 148 (2011).
16. *Id.*