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Damage Anchors on Real Juries

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Experiments reveal anchoring as a powerful force, even when participants see the anchor as irrelevant. Here, we examine the reactions of real deliberating jurors to attorney damage requests and concessions in 31 cases involving 33 plaintiffs in which the jury awarded damages. Jurors were critical consumers of attorney suggestions. They reacted more negatively to, and were less influenced by, plaintiff ad damnums for pain and suffering than to damage requests in categories grounded in more objective evidence. Deliberations revealed that jurors often perceive plaintiff ad damnums not only as irrelevant, but also as outrageous, impressions reflected in their verdicts. These findings suggest that extreme plaintiff ad damnums, including those without grounding in quantitative evidence from trial, may not exert substantial undue influence.

I. Introduction

When the jury in an ordinary civil trial finds the defendant liable, the jury's next task is to determine the amount of damage caused by the defendant's acts. Most commentators agree that this is a difficult assignment,[1] and jurors as well seem to recognize that they have a challenging task.[2] In part, the challenge arises from the minimal guidance the law provides

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[1]See, e.g., Edie Greene & Brian H. Bornstein, Precious Little Guidance: Jury Instruction on Damage Awards, 6 Psychol. Pub. Pol'y & L. 743 (2000); Michael J. Saks, Lisa A. Hollinger, Roselle L. Wissler, David Lee Evans & Allen J. Hart, Reducing Variability in Civil Jury Awards, 21 Law & Hum. Behav. 243 (1997); Roselle L. Wissler, Patricia F. Kuehn & Michael J. Saks, Instructing Jurors on General Damages in Personal Injury Cases: Problems and Possibilities, 6 Psychol. Pub. Pol'y. & L. 712 (2000).

[2]See generally Shari Seidman Diamond, What Jurors Think: Expectations and Reactions of Citizens Who Serve as Jurors, in Verdict: Assessing the Civil Jury(R. Litan ed., 1993).

in the determination of damages.[3] In part, the difficulty stems from the inherent uncertainty of the projections that jurors are asked to make concerning, for example, likely future medical expenses. In part, ambiguity arises as jurors must try to assess the value of the more intangible losses associated with pain and suffering that have no ascertainable market value.[4]

Faced with the difficult task of determining damages by assessing the injury done to the plaintiff and then translating the injury into an amount that will reasonably compensate the plaintiff, jurors look for appropriate cues. A similar search occurs in many judgment situations, and there is good evidence that decisionmakers commonly employ the cognitive heuristic of anchoring and adjustment to assist them in simplifying their task.[5] That is, they often identify an anchor that provides a starting point and, ultimately, although subject to adjustment, the anchor influences their judgment.

In legal settings, jurors generally have access to a potentially potent anchor: attorney damage recommendations. Attorneys in most jurisdictions are permitted to recommend damage awards, with few limitations imposed on the way an attorney arrives at or presents those suggested amounts.[6] Yet although most jurisdictions permit these attorney suggestions, that permission is not without controversy, and the practice is forbidden in several states. Here, for the first time, we are able to examine the role these potential anchors from the attorneys play during the deliberations of real civil juries. We find evidence that jurors are eager for input from the attorneys as they search for guideposts in determining awards to appropriately compensate injured parties, but they are also critical consumers of that attorney advice.

We begin Section II with a discussion of the task of determining damages and the arguments for and against permitting attorneys to offer damage recommendations at trial. The tension is between the benefits of providing useful guidance and the risk of distorting jury judgments with undue influence. In Section III we examine research on anchoring inside and outside the legal domain, a body of empirical research that suggests the potential power of attorney damage suggestions. In Section IV, we outline our hypotheses about how

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[3]Edie Greene & Brian H. Bornstein, Determining Damages: The Psychology of Jury Awards 20 (2003).

[4]See, e.g., Oscar G. Chase, Helping Jurors Determine Pain and Suffering Awards, 23 Hofstra L. Rev. 763, 765 (1995) ("[pain and suffering] requires the monetization of a 'product' for which there is no market and therefore no market price").

[5]See, e.g., Thomas Mussweiler, The Malleability of Anchoring Effects, 49 Experimental Psychol. 67 (2002) (citing results from a variety of domains: general knowledge, probability estimates, legal judgment, pricing decisions, and negotiation).

[6]The one general exception is the generally forbidden so-called golden rule in which jurors are asked to put themselves in the injured person's place and render the verdict they would want to receive if they were in that person's position. See, e.g., Edwards v. City of Phila., 860 F.2d 568, 574 (3d Cir. 1988); Spray-Rite Serv. Corp. v. Monsanto Co., 684 F.2d 1226, 1246 (7th Cir. 1982), *aff'd*, 465 U.S. 752 (1984); Loose v. Offshore Navigation, Inc., 670 F.2d 493, 496 (5th Cir. 1982). The argument against the use of the "golden rule" is that jurors are supposed to be impartial and determine fair compensation. It is thus improper to attempt to draw them into a direct relationship with the plaintiff, encouraging sympathy or bias. L.R. James, Annotation, Instructions in a Personal Injury Action Which, in Effect, Tell Jurors that in Assessing Damages They Should Put Themselves in Injured Person's Place, 96 A.L.R.2d 760 (2008).

jurors are likely to react to the various types of potential anchors they encounter in the courtroom. In Section V, we describe results from the Arizona Jury Project, a unique set of real civil jury deliberations that enabled us to examine how jurors discuss these potential anchors as they talk about damages during deliberations. In Section VI, we consider what these results suggest about an optimal response from the legal system to the specter of overinfluence from attorney anchors. Our conclusion is that fears about undue influence from attorney damage 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. Although the potential influence of an extreme claim warrants some effort by the legal system to highlight the self-interested nature of attorney recommendations, the evidence does not warrant prohibiting damage estimates from opposing parties in a system in which the jury is given great discretion and little guidance from the court.

II. Determining Damages and the Case For and Against Permitting Counsel to Offer Damage Recommendations

Jurors report that determining damages is a more difficult task than deciding liability.[7] One explanation for the difference is that the legal system offers fewer guideposts to jurors in determining the dollar amount that will be required to compensate the plaintiff than it does to jurors in deciding liability. Typically, jurors are simply given a list of damage categories and told that if they find the defendant liable, they should use the list to decide the amount it will take to compensate the plaintiff. For example:

> If you find Defendant liable to Plaintiff, you must then decide the full amount of money that will reasonably and fairly compensate Plaintiff for each of the following elements of damages proved by the evidence to have resulted from the fault of any Defendant:
>
> (1) The nature, extent, and duration of the injury.
> (2) The pain, discomfort, suffering, disability, disfigurement, and anxiety already experienced, and reasonably probable to be experienced in the future as a result of the injury.
> (3) Reasonable expenses of the necessary medical care, treatment, and services rendered, and reasonably probable to be incurred in the future.
> (4) Lost earnings to date, and any decrease in earning power or capacity in the future.
> (5) Loss of love, care, affection, companionship, and other pleasures of the [marital] [family] relationship.
> (6) Loss of enjoyment of life, that is, the participation in life's activities to the quality and extent normally enjoyed before the injury.[8]

Moreover, the judgments that jurors are required to make may include difficult assessments about uncertain future expenses and likely future employment, and may call on them to make subjective assessments of pain and suffering that have no agreed-upon

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[7]Diamond, supra note 2, at 282–305.

[8]RAJI (Civil) 4th (2005) (Rev. Ariz. Jury Instructions (Civil)). Personal Injury Damages 1 Measure of Damages.

monetary value. Such assessments challenge any decisionmaker attempting to reach a reasoned decision based on the evidence presented at trial because no set method or formula is available to apply to the task. Attorneys' damage suggestions are one source the legal system may permit to help fill this void. However, because they are not part of the evidence, the danger is that these damage suggestions will unduly influence decisions.

The primary argument in favor of permitting attorneys to weigh in on the matter is that the attorneys, based on their familiarity with the evidence in the case, may be in a position to assist the jury in evaluating the evidence on damages. The jury is then free to accept or reject the attorneys' estimates and, indeed, the court generally instructs jurors that what the attorneys say is not evidence.[9] Thus, according to this perspective, the extent to which an attorney's recommendation is consistent with the evidence will determine its influence, and if the jury finds a recommendation to be overreaching or inadequate as an estimate of damages, the jury can theoretically modify or simply totally reject the recommended amount. The argument permitting attorney recommendations is consistent with the general approach to closing arguments—when damage recommendations are typically presented—that gives counsel reasonable latitude to summarize the evidence and to persuade the jury to reach an outcome favorable to their client.[10]

The danger that a damage recommendation from the plaintiff's attorney will be too influential is countered by the claim that the defense is free to respond with its own evaluation of an appropriate damage level, providing a balance that the adversary system relies on to achieve fair outcomes on other issues. This reliance on balancing influences is visible in the response of some courts that permit plaintiffs to make damage recommendations to circumstances that undermine the ability of the defense to respond adequately. For example, courts have overturned judgments when the plaintiff did not introduce damage recommendations until the rebuttal argument so that the defense had no opportunity to respond.[11]

In a more extreme reaction to the concern that jurors will uncritically accept or at least inappropriately weight an attorney's suggestion, a few jurisdictions simply prohibit damages recommendations, focusing primarily on the more intangible elements of compensation for an injured plaintiff's pain and suffering. Characterizing an attorney's discussion of a specific monetary amount as nothing more than "sheer speculation" and raising the concern that it would possess a serious capacity for misleading the jury by "instill[ing] in the minds of the jurors impressions, figures and amounts not founded or appearing in the evidence," New Jersey bars attorneys from suggesting a specific dollar amount as a

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[9]For example, in all the cases from the Arizona Jury Project, discussed in Section V, the juries were instructed: "In the opening statement and closing arguments, the lawyers have talked to you about the law and the evidence. What the lawyers said is not evidence, but it may help you to understand the law and the evidence."

[10]See Debus v. Grand Union Stores, 621 A.2d 1288 (Vt. 1993) (*citing* Scrizzi v. Baraw, 248 A.2d 725, 729–30 (1968)).

[11]Cortz v. Macias, 167 Cal. Rptr. 905 (Cal. Dist. Ct. App., 1980); Shaw v. Terminal R.R., 344 S.W.2d 32 (Mo. 1961).

measure of damages for pain and suffering.[12] In Pennsylvania, the leading case is *Joyce v. Smith* (1921), in which the Pennsylvania Supreme Court held that "the amount of damages claimed is not to be determined by an estimate of counsel, but by the jury from the evidence before them, and any suggestion to the jury of an arbitrary amount is highly improper."[13]

Suggested formulas for arriving at damages for pain and suffering have generally attracted more criticism than suggested totals.[14] Sometimes referred to as "per-diem" arguments, the attorney suggests to the jury that a certain amount be awarded for each day or other time period of the injured party's suffering.[15] Although permitted in many jurisdictions on the same grounds as other attorney recommendations,[16] many judges and commentators have raised objections to arguments based on per diems, suggesting that they provide an illusion of guidance and tend to produce excessive awards.[17]

III. Anchoring and Adjustment Inside and Outside the Legal Domain

Concerns about undue influence from attorney damage recommendations find support in the experimental research on the anchoring heuristic. The strength of the anchoring influence on judgment was demonstrated in a classic study by Tversky and Kahneman.[18] In that study, the authors asked participants to estimate the percentage of African countries in the United Nations, after first guessing whether the percentage was higher or lower than an arbitrary number that ostensibly had been selected by spinning a wheel of fortune. When the wheel of fortune landed on 65 percent, the estimates by participants averaged 45 percent; when the wheel value (the anchor) landed on 10 percent, the average estimate was 25 percent. Thus, even this arbitrary and irrelevant anchor had a substantial impact on estimates, despite the fact that the participants could see that the spinner produced an

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[12]Botta v. Brunner, 138 A.2d 713, 722 (N.J. 1958) (New Jersey Court Rule 1:17-1(b) now permits a closing statement to "suggest to the trier of fact, with respect to any element of damages, that unliquidated damages be calculated on a time-unit basis without reference to a specific sum.").

[13]112 A. 549, 551 (Pa. 1921); see Stein v. Meyer, 150 F. Supp 365 (E.D. Pa. 1958) (applying Pennsylvania law to avoid widening federal diversity jurisdiction).

[14]Joseph H. King, Jr., Counting Angels and Weighing Anchors: Per Diem Arguments for Noneconomic Personal Injury Tort Damages, 71 Tenn. L. Rev. 1 (2003).

[15]See, e.g., Ramirez v. City of Chi., 740 N.E.2d 1190, 1198 (Ill. App. Ct. 2000).

[16]See, e.g., Beagle v. Vasold, 417 P.2d 673, 681 (Cal. 1966) ("[T]he concept of pain and suffering may become more meaningful when it is measured in short periods of time than over a span of many years.").

[17]King, supra note 14, at 27 (collecting cases and citing Chief Justice Traynor: "Since there is no mathematical formula for such a conversion. . . . an argument that the jury should use such a formula is suspect, and . . . so misleading that it should never be allowed" (*Beagle*, 417 P.2d at 683 (concurring in judgment and dissenting in part)).).

[18]Amos Tversky & Daniel Kahneman, Judgment Under Uncertainty: Heuristics and Biases, 185 Sci. 1124 (1974).

arbitrary value. Other research on anchoring has demonstrated that the anchoring effect is extremely robust. Although anchors are more influential when decisionmakers are not confident in their judgments,[19] anchoring operates even when participants are experts in the judgment domain[20] and occurs even when participants are forewarned and highly motivated to remain uninfluenced.[21]

In the real world, potential anchors frequently are a composite of grounded and ungrounded estimates. For example, the asking price for a house reflects the characteristics of the property and the wishful thinking of the prospective seller (and realtor). In the legal domain, the potential anchors that attorneys offer to the jury in a civil trial can also be derived from relevant information grounded in case facts and from ungrounded wishful thinking and unabashed attempts to affect awards. The primary forms of damages that the jury may be asked to consider in a civil trial—past medical damages and lost wages, future medical damages and lost wages, and pain and suffering—vary in the degree to which objective indicators embodied in the evidence presented at trial provide grounding for attorney requests and reduce the uncertainty of the jury or judge in assessing the appropriate level of damages. The focus on those evidentiary indicators is emphasized during jury instructions in which jurors are asked to decide the case based on the evidence presented at trial.

The evidence that provides the background for attorney requests may include testimony from medical experts who both describe past medical tests and treatments and offer predictions about future medical needs (e.g., the likelihood that the plaintiff will require further surgery). Bills for medical treatment may be presented as exhibits. Economists and job counselors may offer predictions of the plaintiff's likely future earnings, grounding those predictions in knowledge about labor markets and rehabilitation programs, as well as in more subjective assessments of what the plaintiff may be capable of doing. Other sources in the trial also provide potential guideposts. Thus, the jury instructions may give the average life expectancy for a person who is the same age as the plaintiff, providing a context for assessing future damages. The least objectively grounded form of damages—pain and suffering—receives no potential numerical value during testimony, from exhibits, or during instructions. It is only in attorney arguments (typically in closing arguments) that the jurors hear about a potential anchor for pain and suffering from the plaintiff's attorney, the defense, or both, as the attorneys attempt to persuade the jury what would be required to compensate the plaintiff for the damages in each category, including pain and suffering.

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[19]Karen E. Jacowitz & Daniel Kahneman, Measures of Anchoring in Estimation Tasks, 21 Personality & Soc. Psychol. Bull. 1161 (1995).

[20]See, e.g., Birte Englich et al., Playing Dice with Criminal Sentences: The Influence of Irrelevant Anchors on Experts' Judicial Decision Making, 32 Personality & Soc. Psychol. Bull. 188 (2006) (judges deciding on a criminal sentence); Gregory B. Northcraft & Margaret A. Neale, Experts, Amateurs, and Real Estate: An Anchoring-and-Adjustment Perspective on Property Pricing Decision, 39 Organizational Behav. & Hum. Decision Process 84 (1987) (real estate agents estimating the value of a house).

[21]See, e.g., Timothy D. Wilson et al., A New Look at Anchoring Effects: Basic Anchoring and its Antecedents, 125 J. Experimental Psychol.: Gen. 387 (1996).

This lack of quantitative evidentiary grounding may make pain and suffering damage requests particularly potent potential anchors if jurors are less confident in making decisions about pain and suffering.[22]

It would be reasonable for jurors receiving these suggestions in the adversary setting of the courtroom to be particularly wary about figures whose only source is one of the attorneys, recognizing that an attorney's suggestions are likely to be influenced by the attorney's interest in providing an anchor to the jurors that is favorable to the attorney's client. Yet a number of laboratory experiments have shown that participants presented with identical trial evidence are influenced by variations in proposed awards of all types. An early study by James Zuehl found that variations in ad damnums produced variations in the amounts that mock jurors awarded when other facts in the trial were held constant.[23] Research by Greene and her colleagues[24] showed that both experts and attorneys who offered predictions about future lost earnings influenced awards. Similarly, Chapman and Bornstein found that amounts awarded for pain and suffering rose significantly with increases in the amount requested by the plaintiff.[25] Marti and Wissler found that awards for pain and suffering were influenced by both plaintiffs' requests and defense rebuttal amounts.[26] Punitive damages, too, appear to be susceptible to anchoring effects. Hastie and his colleagues found that the size of the plaintiff's request for punitive damages influenced the amount that jurors awarded.[27] All these results were foreshadowed by posttrial interviews with real jurors as part of the University of Chicago Jury Project that led Dale Broeder to conclude that the ad damnum does "yeoman service as a kind of jumping-off place."[28]

The existing literature on anchoring by civil juries has three major limitations, which we address in this study. Prior research has tended to focus on a single form of damages, typically pain and suffering or punitive damages, making it difficult to examine whether greater evidentiary support for an anchor (e.g., actual medical bills for treatment) changes

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[22]Jacowitz & Kahneman, supra note 19.

[23]James J. Zuehl, The Ad Damnum, Jury Instructions, and Personal Injury Damage Awards (1982) (unpublished manuscript) (on file with authors).

[24]Edie Greene et al., Juror Decisions About Damages in Employment Discrimination Cases, 17 Behav. Sci. & L. 107 (1999); Allan Raitz et al., Determining Damages: The Influence of Expert Testimony on Jurors' Decision Making, 14 Law & Hum. Behav. 385 (1990).

[25]Gretchen B. Chapman & Brian H. Bornstein, The More You Ask for, the More You Get: Anchoring in Personal Injury Verdicts, 10 Applied Cognitive Psychol. 519 (1996). See also 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 (2010).

[26]Mollie W. Marti & Roselle L. Wissler, Be Careful What You Ask For: The Effect of Anchors on Personal Injury Damages Awards, 6 J. Experimental Psychol.: Applied 91 (2000).

[27]Reid Hastie et al., Juror Judgments in Civil Cases: Effects of Plaintiff's Requests and Plaintiff's Identity on Punitive Damage Awards, 23 Law & Hum. Behav. 445 (1999).

[28]Dale W. Broeder, The University of Chicago Jury Project, 38 Neb. Law Rev. 744, 756 (1959).

the way an attorney recommendation is received. In addition, experiments examining the impact of anchoring by jurors faced with determining civil damages have generally focused on reactions to simulated trials presented via limited stimulus materials. For example, the classic Chapman and Bornstein stimulus consisted of a one-page case summary.[29] A real trial, in contrast, provides a myriad of sources jurors might focus on to assist them in arriving at a decision on the appropriate level of damages. Further, with one exception,[30] the studies have focused on individual juror judgments, rather than deliberating juries who have an opportunity to share and compare evaluations.

Here, we examine reactions to a variety of potential anchors by real deliberating juries. There are reasons why these juries might be expected to make either more or less use of attorney recommendations than respondents do in the typical mock jury experiment. On the one hand, the jurors are facing a difficult task, one that they do not regularly encounter in their everyday lives and one that provides them with little trustworthy guidance. The potential feelings of uncertainty they are likely to experience in the context of a real trial in which they are anxious to "get it right" should make them particularly susceptible to the influence of an available anchor. On the other hand, the attorney suggestions offered to the jury are clearly being offered by interested parties, thus inviting the jurors to be suspicious of the values the attorneys advocate. It is unclear whether perceptions of attorney partisanship are equally activated in the laboratory and field settings.

In the current study, we examine juror talk during real jury deliberations about the damages suggestions from attorneys in 31 cases involving 33 plaintiffs. These 31 cases constitute all of the cases from the Arizona Jury Project,[31] described below, in which the jury found the defendant liable for the injury to at least one plaintiff and was faced with the task of determining damages. These cases provide the first opportunity to assess what jurors say during real deliberations about attorney ad damnums and rebuttal amounts (defense concessions on amount, assuming liability). Moreover, because Arizona is a jurisdiction in which the trial court may permit a per-diem argument, we can examine juror response to this controversial method of describing a pain and suffering ad damnum.[32] We use these jury deliberations to compare juror reactions to categories of damages both more and less grounded in trial evidence and to assess the reaction to both plaintiff ad damnums and defense rebuttals. Due to the small number of cases and the substantial variability of the cases on a variety of dimensions, the behavior and patterns we observe should be seen as tentative estimates of what occurs during deliberations, but they provide insights on behavior typically not available for study. Within those limits, we offer several hypotheses about how jurors are likely to react to the potential anchors offered by attorneys in these trials.

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[29]Chapman & Bornstein, supra note 25, at 523.

[30]The exception is Greene et al., supra note 24.

[31]Shari Seidman Diamond, Neil Vidmar, Mary Rose, Leslie Ellis & Beth Murphy, Jury Discussions During Civil Trials: Studying an Arizona Innovation, 45 Ariz. L. Rev. 1 (2003).

[32]O'Reilly Motor Co. v. Rich, 411 P.2d 194 (Ariz. App. Ct. 1966).

IV. Our Hypotheses

A. Hypothesis 1: Suggested Awards for Special Damages from the Attorneys Produce Less Discussion During Deliberations than Potential Anchors for General Damages

Decisions about special damages (those arising from medical expenses, lost wages, and property loss) have more concrete references in the testimony and exhibits (e.g., from medical bills), grounding ad damnums in the evidence, than do decisions about general damages (those described in jury instructions as arising from pain, suffering, disability, disfigurement, and anxiety, which we refer to in this article as damages for "pain and suffering"). On that basis, the jurors should be less inclined to turn to the attorneys for advice on special damages. Although the jury on occasion may consider whether the doctor's bills for the treatment a plaintiff received following an accident were reasonable, the amount of treatment the plaintiff received and the bill for it are typically useful, albeit not determinative, cues as to the reasonable past medical expenses for the damages experienced by the plaintiff. The physicians' account of the plaintiff's condition and expenses should also reduce the need to rely on the claims of the attorney. Similarly, a physician or economist may be helpful in predicting future medical or economic costs flowing from an accident, aiding the jury in making a reasonable prediction about the likely future medical expenses or the potential earnings that were lost. In contrast, decisions about general damages have less grounding, with suggested dollar amounts derived only from the attorneys during their closing arguments. Therefore, when jurors talk about plaintiff ad damnums and defense rebuttal amounts, they should be more likely to focus their talk on those values that are less grounded in the evidence (i.e., pain and suffering as opposed to past expenses). Future expenses should produce an intermediate level of talk about attorney-recommended amounts because those expenses they tend to be partially grounded in objective evidence, but subject to the uncertainties associated with predicting the future (e.g., prognosis by a physician on the likely need for future surgery).

These predictions are based on the assumption that jurors will not simply ignore pain and suffering ad damnums in light of their absence of grounding in quantitative evidence. Thus, we will also look at evidence for how many juries and how many jurors comment on these different types of ad damnums.

B. Hypothesis 2: Plaintiff Ad Damnums that are Less Grounded in Objective Evidence are Likely to Draw a Higher Percentage of Comments Rejecting the Suggested Amount than are Potential Anchors from the Plaintiff that are More Grounded in the Evidence

By virtue of being less objectively grounded, general damages are likely to be more controversial. This may be particularly true for the pain and suffering ad damnums offered by plaintiff's attorneys who follow the advice that it is wise to exaggerate injury, rather than to attempt to determine how much to ask for based on an unbiased estimate of the extent of the injury.[33]

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[33]See, e.g., John A. DeMay, The Plaintiff's Personal Injury Case: Its Preparation, Trial and Settlement (1977).

C. Hypothesis 3: Juries Will Award a Lower Proportion of the Amount the Plaintiff Requests for Pain and Suffering than of the Amount Requested for the More Objectively Grounded Special Damages

This prediction follows from Hypothesis 2. If jurors make a higher percentage of negative comments about pain and suffering ad damnums than about ad damnums for special damages, that more negative response should also be reflected in jury verdicts.

D. Hypothesis 4 Rejection of Pain and Suffering Ad Damnums is Likely to Increase as Their Index of Implausibility Rises

The challenge in testing this hypothesis was to develop an index of implausibility for pain and suffering ad damnums that could be applied to these cases. A common approach sometimes used by insurance adjusters treats special damages as a reference point, multiplying that amount by a factor of three or more to arrive at an acceptable settlement amount.[34] Indeed, three of the Arizona attorneys mentioned a standard of "three times specials" during their closing arguments. Although this relationship between pain and suffering and special damages can be imperfect, as, for example, when a plaintiff experiences few medical expenses, but is permanently disfigured by an injury, the reference point of special damages provides a contextual proxy that we were able to use across cases with varying damage claims. Thus, to compute an index of implausibility, we divided the plaintiff's ad damnum for pain and suffering[35] by the ad damnum for special damages. According to the hypothesis, we predicted that as this index of implausibility rose, jurors would be more inclined to reject the plaintiff's ad damnum.

E. Hypothesis 5: Jurors are More Likely to Endorse the Damage Suggestions of Defendants than to Endorse the Plaintiff's Ad damnums; Jurors are Less Likely to Reject the Defense-Suggested Amounts than to Reject the Plaintiff's Ad Damnums

We predicted this systematic difference in reaction to plaintiff and defense suggestions based on two factors: the possibility that plaintiffs may overreach by claiming unrealistic damages and the success of the insurance industry in persuading jurors that plaintiffs are often greedy.[36] We also expected that the difference would be reduced for special, as opposed to general, damages because special damages tend to be more grounded in the exhibits and the testimony of experts.

We test these hypotheses using data from the Arizona Jury Project. One caveat is worth repeating: the small number of cases available for the comparisons and the potential

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[34]See, e.g., 1 Jeffrey W. Stempel, Stempel on Insurance Contracts § 9.13 (3d ed. 2007).

[35]In three cases, the pain and suffering ad damnum was computed by subtracting special damages from the total ad damnum for this analysis.

[36]See, e.g., Stephen Daniels & Joanne Martin, Civil Juries and the Politics of Reform 34–35, 42–43 (1995); William Haltom & Michael McCann, Distorting the Law: Politics, Media, and the Litigation Crisis (2004).

differences between the cases being compared on dimensions other than the attorney recommendations left us without sufficient power and controls to stringently test the reliability of the comparisons we examined. Despite this drawback, these results are extremely valuable in providing an analysis of the previously unstudied processes of real deliberabing jurors as they talk about potential anchors.

V. Response to Potential Attorney Anchors in the Arizona Jury Project

A. The Background of the Project

The Arizona Jury Project, in which we were permitted to videotape and analyze actual jury deliberations, presents a unique occasion to observe how juries deliberate.[37] The opportunity to study these jury deliberations arose because an innovative group of judges and attorneys in Arizona, encouraged by the Arizona Supreme Court, took a close look at the state's jury system. As a result, Arizona decided to make some changes aimed at facilitating jury performance, including a controversial innovation instructing jurors that they were permitted to discuss the case among themselves during breaks in the trial. To evaluate the effect of allowing discussions, the Arizona Supreme Court issued an order permitting a team of researchers to conduct a randomized experiment in which some jurors in some cases were instructed that they could discuss the case and others were given the traditional admonition not to discuss the case.[38] The court order also permitted us to videotape the jury discussions and deliberations.[39]

B. Selection of Jurors and Cases

The jurors, attorneys, and parties were promised that the tapes would be viewed only by the researchers and only for research purposes. Jurors were told about the videotaping project

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[37]See Diamond et al., supra note 31. Other published articles drawing on data from the Arizona Project include: Shari Seidman Diamond & Neil Vidmar, Jury Room Ruminations on Forbidden Topics, 87 Va. L. Rev. 1857 (2001); Shari Seidman Diamond, Neil Vidmar, Mary Rose, Leslie Ellis & Beth Murphy, Inside the Jury Room: Evaluating Juror Discussions During Trial, 87 Judicature 54 (2003); Shari Seidman Diamond, Mary R. Rose & Beth Murphy, Jurors' Unanswered Questions, 41 Ct. Rev. 20 (2004); Shari Seidman Diamond, Mary R. Rose & Beth Murphy, Revising the Unanimity Requirement: The Behavior of the Non-Unanimous Civil Jury, 100 Nw. U.L. Rev. 201 (2006); Shari Seidman Diamond, Mary R. Rose, Beth Murphy & Sven Smith, Juror Questions During Trial: A Window into Juror Thinking, 59 Vand. L. Rev. 1927 (2006); Shari Seidman Diamond, Juror Response to Scientific and Other Expert Testimony and How Judges Can Help, 16 J. Law & Pol'y 47 (2007); Mary R. Rose & Shari Seidman Diamond, Offstage Behavior: Real Jurors' Scrutiny of Non-Testimonial Conduct, 58 DePaul L. Rev. 311 (2009); Mary R. Rose, Shari S. Diamond & Kimberly M. Baker, Goffman on the Jury: Real Jurors' Attention to the "Offstage" of Trials, 34 Law & Hum. Behav. 310 (2010).

[38]See Diamond et al., supra note 31.

[39]For a detailed report on the permissions and security measures the project required, and the results of the evaluation, see id. at 17. As part of their obligations of confidentiality under the Supreme Court order, as well as additional assurances to parties and jurors undertaken by the principal investigators, the authors of this article have changed certain details to disguise individual cases. The changes do not, however, affect the substantive nature of the findings that are reported.

when they arrived at court for their jury service. If they preferred not to participate, they were assigned to cases not involved in the project. The juror participation rate was over 95 percent.[40] Attorneys and litigants were less willing to take part in the study. Some attorneys were generally willing to participate when they had a case before one of the participating judges; others consistently refused. The result was a 22 percent yield among otherwise eligible trials.

C. Data Collection and the Final Sample

In addition to videotaping the discussions and deliberations, we also videotaped the trials themselves and collected the exhibits, juror questions submitted during trial, jury instructions, and verdict forms. In addition, the jurors, attorneys, and judges completed questionnaires at the end of the trial. The 50 cases in the study reflected the usual mix of cases dealt with by state courts: 26 motor vehicle cases (52 percent), four medical malpractice cases (8 percent), 17 other tort cases (34 percent), and three contract cases (6 percent).[41] The 47 tort cases in the sample varied from the common rear-end collision with a claim of soft-tissue injury to cases involving severe and permanent injury or death.

Our focus in this article is on the 33 plaintiffs who received damage awards in the 31 cases in which the defendant was found liable and the jury awarded damages to at least one plaintiff. In two cases, there were two plaintiffs who received awards. The mix of cases consisted of 20 motor vehicle cases, one medical malpractice case, nine other tort cases, and one contract case. Awards ranged from $1,000 to $2.8 million, with a median award of $25,500.

D. The Data

1. The Trials, Instructions, and Verdict Forms

We transcribed the opening and closing arguments in each case from the trial videotape, created a very detailed "roadmap" of the trial from the videotaped trial, and obtained the complete set of instructions the court delivered to the jury in each trial as well as the verdict forms used by the jury to report its verdict.

2. Data from the Deliberations

We created verbatim transcripts of all deliberations, producing 5,276 pages of deliberations transcripts for the 50 trials, with 3,822 pages from the 31 cases involved in this analysis. These 31 deliberations consisted of 57,566 comments by the jurors. A comment was defined

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[40]Although we cannot be certain that the cameras had no effect on their behavior during deliberations, the behavior during deliberations at times included comments that the jurors presumably would not have wanted the judges or attorneys to hear.

[41]This distribution is similar to the breakdown for civil jury trials for the Pima County Superior Court for the year 2001: 62 percent motor vehicle tort cases, 8 percent medical malpractice cases, 23 percent other tort cases, and 6 percent contract cases (figures provided by Nicole M. Waters of the National Center for State Courts).

as a statement or partial statement that continued until the speaker stopped talking or until another speaker's statement or partial statement began. If another speaker interrupted, but the original speaker continued talking, the continuation was treated as part of the initial comment. For example, here Juror #2 is in mid-sentence when Juror #4 interrupts to agree before Juror #2 completes his comment:

Juror #2: Negligence and cause of death . . . [are] also in the fact of what you don't do
Juror #4: I, I agree
Juror #2: to prevent it.

In this instance, Juror #2 was credited with one comment and Juror #4 was credited with one comment.

Our focus here is on the comments jurors made during deliberations about the ad damnum and rebuttal damage amounts proposed by the attorneys. As an initial matter, we examined the frequency of juror comments that mentioned attorney damage proposals. When jurors referred to a proposed amount, that reference revealed that the juror had—amid the variety of claims, evidence, and argument presented at trial—paid some attention to the attorney's proposed damage amount. Our conclusions are necessarily about the juries' explicit and observable behavior. Although individual jurors may have also been influenced by attorney proposals they did not mention during deliberations, when a juror did explicitly reference a proposal during deliberations, even by simply mentioning that the attorney proposed it, that juror injected the proposal into the jury's deliberation for attention from the other jurors. We followed up this analysis of how often jurors mentioned the proposed amounts with an examination of the nature of their discussion about the proposals, distinguishing simple mentions from comments revealing that the juror viewed the proposal as at least a starting point for arriving at an acceptable damage amount or expressed a more deferential reaction to a proposed damage amount by explicitly endorsing it.[42] We also identified instances in which a juror explicitly rejected a damage amount proposed by one of the attorneys. Jurors recognize the self-interested nature of these proposed awards and their comments rejecting these awards reflect resistance to these persuasive attempts.

3. Ad Damnums and Rebuttal Damages from Attorneys

Attorneys in Arizona are permitted to present a proposed ad damnum to the jury during arguments, if they choose.[43] Table 1 shows how often the plaintiffs' claims included the

[42]Lauren Edelman and her colleagues used a similar approach to measure the degree to which judicial opinions rely on institutionalized employment structures. Courts may refer to a structure, may go further and also express the view that the structure is relevant to their decision about the employment discrimination claim, or may go as far as deferring to the organizational structure by concluding that its presence provided protection from discrimination. Lauren B. Edelman, Linda H. Krieger, Scott R. Eliason, Catherine R. Albiston & Virginia Mellema, When Organizations Rule: Judicial Deference to Institutionalized Employment Structures (in press, Am. Soc. Rev.).

[43]In permitting ad damnums, Arizona follows the traditional practice of many states. See, e.g., Graham v. Mattoon City Ry., 84 N.E. 1070 (Ill. 1909); Maurizi v. W. Coal & Mining Co., 11 S.W.2d 268 (Mo. 1928).

primary types of damages, past and future special damages and pain and suffering, and how often the attorneys offered recommendations on the amount of those damages.

Table 1: Source and Nature of Ad Damnums and Concessions Across Plaintiffs*

Type of Damages *(Plaintiffs claiming this type of damage)*	*Past Special Damages* (33)	*Future Special Damages* (12)	*Pain and Suffering* (31)	*Total Damages* (33)
Source of Recommendation				
Ad damnums from plaintiff's attorneys	30	9	21	25
Concessions** from defense attorneys	19	1	15	22
Defense attorney rebuttals to plaintiff's attorney ad damnums	18	1	11	18

*Thirty-three plaintiffs from 31 cases.

**Contingent on finding of liability, except in seven cases in which some liability was conceded.

The detailed breakdown of the damage recommendations in these cases follows, beginning with the plaintiffs' ad damnums.

1. Claims for past special damages included medical expenses, past lost wages, and property damages. The attorneys for 30 plaintiffs named specific amounts for at least one of these past damages, including two who gave a figure that included past and future special damages.[44]
2. Claims for future special damages included projected medical expenses and expected lost earnings. The attorneys for nine plaintiffs requested specific amounts for at least one of these future damages, including two who gave a figure that included past and future special damages.[45]
3. Pain and suffering damages in the Arizona cases consist of: "The pain, discomfort, suffering, disability, disfigurement, and anxiety already experienced, and reasonably probable to be experienced in the future as a result of the injury."[46] The attorneys for 21 of the plaintiffs requested specific amounts for pain and suffering, generally not distinguishing between past and future injury.[47] The attorneys for the other 10 plaintiffs who claimed damages for pain and suffering in their closing arguments did not propose a particular figure or formula, instead referring to the judge's instructions, describing the magnitude and enduring nature of the injury

[44]In two additional cases, no past special damages were claimed; in the remaining case, the plaintiff's attorney did not offer any figures for compensatory damages at all.

[45]In 23 of the remaining cases, no future special damages were claimed. In the remaining case, no amount was given individually or as part of a composite ad damnum that included other damage categories.

[46]This specific language appeared in all the personal injury case instructions in which the plaintiff was claiming continuing injury.

[47]In one instance, the attorney suggested a daily rate for pain and suffering, but did not indicate a time frame or a total.

in detail, and explicitly telling the jurors it was up to them to determine what would be fair.[48]

4. The total damages claimed by the plaintiff constituted a fourth potential attorney anchor that jurors might use. For 20 plaintiffs, the plaintiff's attorney requested a specific total award. For an additional five plaintiffs, the attorneys gave the values of all the component awards being requested (e.g., past expenses plus pain and suffering), leaving the jury to compute the total. For the remaining eight plaintiffs, at least one component was unspecified or incomplete and the plaintiff's attorney did not provide a total.

Defendants, particularly those strenuously disputing liability, are often reluctant to propose an amount they would view as appropriate if their client were found liable, on the grounds that naming a figure may suggest that they are conceding liability. Consistent with that concern, there were fewer defense proposals than plaintiff proposals. The defense offered a rebuttal amount for 18 of the plaintiffs' 30 proposed amounts for past special damages, and also proposed amounts in one case in which the plaintiff did not give an ad damnum. For only one of the nine plaintiffs for whom a plaintiff's attorney offered an ad damnum for future damages did the defense offer a rebuttal amount for the future damages. While the plaintiff proposed an ad damnum for pain and suffering for 21 of the plaintiffs, the defendant offered a proposed amount for pain and suffering for 15 plaintiffs, 11 involving plaintiffs with a plaintiff's ad damnum and four involving plaintiffs for whom the plaintiff's attorney had not given an ad damnum.

Defense attorneys did seem more willing to characterize the total amount of damages appropriate for a plaintiff, offering a rebuttal proposal for 18 of the 25 plaintiffs that had a plaintiff total ad damnum. In four additional cases, the defense proposed a specific total damage award, although the plaintiff had not. Thus, the defense offered damage suggestions for over two-thirds (22 out of 32) of the plaintiffs who prevailed.[49] In contrast, they offered damage suggestions for less than one-third (5 out of 17) of the plaintiffs who did not ultimately obtain an award. The difference is partially attributable to the seven plaintiff victories on liability in cases in which some liability was conceded, but even if those seven plaintiffs are removed from the analysis, the win rate for liability when the defense named a damage amount was 60 percent (15/25), twice the win rate of 30 percent (5/17) that occurred when the defense did not. That difference supports the reluctance of some defense attorneys to name a damage estimate on the assumption that doing so might be understood as an admission that liability is warranted. As one of the defense attorneys in the Arizona Jury Project said in closing: "So, what I'm about to say [about a damage award], please don't misconstrue as any admission on my part that we owe [plaintiff] any money. It's not. It's simply the fact that I am compelled under the

[48]Attorneys for two of the plaintiffs did not claim damages for pain and suffering.

[49]We were unable to obtain the closing argument transcript for one defendant, so we could not determine whether the defense suggested any damage figures.

circumstances [to do it] in case you decide to award damages."[50] There is some evidence that this fear is justified. In one study of mock juror responses to defense recommendations, Leslie Ellis found that when the evidence strongly favored liability or was balanced, there was no effect of defense damage recommendation on liability, but when the evidence for liability was weak, jurors were more likely to find the defendant liable when the defense offered a damage recommendation.[51]

4. Ad Damnums and Rebuttal Damages in Deliberations

We coded each time a juror referred to either a plaintiff's ad damnum or a defense rebuttal suggestion during deliberations. We included both specified amounts and nonamount descriptions that explicitly referred to the figures attorneys proposed. Specified dollar amount references included comments such as "We know just in wages there is the $[X][52] [he is asking for]" and "For future he [the plaintiff's attorney] predicted $[X]." We also coded instances when the jurors mentioned a formula offered by an attorney for the calculation of an amount. For example, "Yeah, he [plaintiff attorney] was looking for the pain and suffering damages based on $[X] an hour" and "Defense wants $[X] a week for eight weeks." If an attorney proposed that the jury make an award within a particular range, we coded all mentions of the top or bottom amount that the attorney proposed. For example, the following juror referred to the upper bound of the plaintiff's ad damnum for pain and suffering: "Didn't he also consider like another $[X] for pain and suffering?"

The nonamount references indicated that the attorney was the source of the suggested damage amount without explicitly naming the amount. For example, "Where did he come up with those numbers [for medical expenses]?"; "What was [defense attorney] asking for in total?"; and "Why don't we double it [defense pain and suffering rebuttal figure of $[X]?" In another case, a juror explained how she arrived at the figure she was discussing for pain and suffering: "That's what he [plaintiff's attorney] wrote up on the [board]."

We coded each juror mention of a proposed damage amount on three features.

1. The attorney who proposed the amount:
   a. plaintiff; or
   b. defense attorney.
2. The category of damages referred to by the referenced ad damnum:
   a. past medical expenses, lost wages, or property damage; or
   b. future medical expenses or lost wages; or

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[50]Arizona Jury Project case (defense closing argument). The jury in the case did find the defendant liable.

[51]Don't Find My Client Liable, But If You Do . . . : Defense Recommendations, Liability Verdicts, and General Damage Awards, Dissertation Abstracts (2002).

[52]In this and other quotes from deliberations, we omitted or modified dollar amounts to protect the anonymity of the case, consistent with our obligations to preserve confidentiality.

c. pain and suffering;[53] or
d. total damages; and

3. The juror's reaction to the amount proposed:
   a. accept the suggested amount; or
   b. use the suggested amount as a starting point; or
   c. recall or clarify the suggested amount; or
   d. reject the suggested amount.

The following coding rules were used to categorize juror reactions to the amounts that the attorneys proposed.

- ***Acceptance*** was coded only when a juror specifically endorsed an amount an attorney proposed. For example: "I have to agree with [plaintiff's attorney]. Whatever numbers he came up with sounded right with me."
- ***Use as a starting point*** was coded when a juror explicitly employed an attorney's suggested amount as a starting point: "Well, it gives us something to start with [defense pain and suffering]" or "Yeah, half of what he's asking [plaintiff medical ad damnum]. I think that would be fair."
- ***Recall*** comments took two primary forms. Either the juror was attempting to reconstruct what an attorney had suggested (e.g., "How much was he saying for pain and suffering?") or the juror was simply reciting that the attorney offered a particular figure. In this category, the juror gave no indication of approval or disapproval and did not indicate explicitly that the suggested amount should be used as a starting point. By mentioning it, however, the juror was indicating that the ad damnum or rebuttal suggestion was worth mentioning and was putting it on the table for attention from the jury. In several of these recall instances, the juror was interrupted in the course of saying something further, so the default was to code the comment as an instance merely of recall. For example, in one deliberation, Juror #1 said: "They [plaintiff's attorney] wanted $[X] for lost wages but that's . . . " before being interrupted by Juror #2 who chimed in: "Yeah, that's what [plaintiff's attorney] wanted." Juror #1 did not continue to complete his statement, so both comments were coded as recall.
- ***Rejection*** occurred when a juror expressed disagreement with the proposed amount. Typically, rejections involved complaints that the plaintiff's ad damnum was too high. For example, in response to a plaintiff's ad damnum: "I almost flipped when I saw that [plaintiff's total ad damnum]." On other occasions, a juror rejected the defendant's suggested award, either because it was too low (e.g.,"$[X] [defense suggested total amount] doesn't even cover the issue if she were never to work again"). A third type of rejection occurred in a few instances when a juror thought the defendant's suggested amount was *too* generous (e.g., "I think $[X]

[53]As described earlier, text at note 46, this category includes: "The pain, discomfort, suffering, disability, disfigurement, and anxiety already experienced, and reasonably probable to be experienced in the future as a result of the injury."

[defendant's suggested total] is way too much"). In our analyses (see Table 3), we treated these "rejections" as extreme acceptances because they favored the defense attorney's favored amount by overshooting it. In contrast, no juror expressed the view that the plaintiff's ad damnum was too low.

E. Reliability of Coding

To assess the reliability of the coding identifying whether a comment referred to an award suggestion, two coders independently coded each comment in three deliberations. The results were evaluated using the Smith index[54]—twice the number of agreements on a category divided by the sum of the frequency that each rater used that category. The reliability ranged from 0.76 to 1.00, averaging 0.87 across the three cases.

Further reliability analyses were conducted on the nature of the attorney damage references. The first, which referred to the type of damages referenced in the comment (e.g., past medical expenses), produced a kappa = 0.96. The second, which measured the jurors' responses to the amount (i.e., accept, use, recall, or reject), produced a kappa = 0.84.

F. The Results

1. Overall Description of Comments

The jurors made 1,624 comments about attorney recommendations and those discussions included most jurors: 86 percent of the jurors contributed at least one comment.[55] Although participation was widely distributed, these comments about attorney recommendations constituted only a small percentage—less than 5 percent—of the talk during deliberations about damages for those plaintiffs who received damage awards.

Two-thirds (68.8 percent) of the comments about attorney recommendations referred to plaintiff ad damnums (1,118) and the remaining 506 referred to defense recommendations. This difference in part reflects the greater frequency of recommendations from plaintiff's attorneys. The largest category of comments came in response to attorney suggestions about pain and suffering (33.4 percent), followed by past economic (medical costs, wages, and property) losses (29.4 percent), total awards (28.1 percent), and future economic losses (4.9 percent). Miscellaneous other ad damnums (e.g., loss of consortium) accounted for the remaining 4.2 percent.

Nearly half the references to attorney suggestions were neutral recall references (49.2 percent), in which the juror simply recounted or attempted to reconstruct the

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[54]C.P. Smith, Content Analysis and Narrative Analysis, in H.T. Reis & C.M. Judd (eds.), Handbook of Research Methods in Social and Personality Psychology 31–335 (2000).

[55]The sole jury on which fewer than half the jurors referred to an attorney recommendation occurred in a case in which the only amounts suggested by an attorney were the plaintiff's ad damnums for past wages and medical expenses. The jury found liability and swiftly accepted both figures.

figure an attorney had suggested as an appropriate damage amount. Jurors making other comments expressed endorsement of the specific attorney recommendation (9.8 percent) or used the recommendation as a starting point (21.2 percent). The remaining juror reactions, which accounted for nearly one in five comments (19.8 percent) explicitly rejected an attorney recommendation without giving any indication that the juror considered it to be a starting point for a more appropriate award. These comments included reactions that the plaintiff's ad damnum was too high (16.2 percent) or the defense recommendation was too low (1.7 percent), plus a small percentage (1.9 percent) in which jurors saw the defense suggestion as not low enough. Note that the cases in the sample varied substantially in the number and type of attorney suggestions. For example, plaintiffs tended to give more suggested awards than defense attorneys. Moreover, not all cases involved claims for all categories of potential damages. Thus, all these summary statistics must be viewed in the context of the number of cases in which the various types of attorney suggestions were made. That approach characterizes our analyses below.

2. Hypothesis 1: Suggested Awards for Special Damages Will Produce Less Discussion During Deliberations than Potential Anchors for General Damages

Tables 2 and 3 show the frequency and nature of talk about four types of damages: past special damages, future special damages, pain and suffering, and total amounts requested. The last column indicates the pattern for all comments. The difference in the frequency of discussion of the plaintiff's ad damnums involving pain and suffering and past losses was negligible (13.4 vs. 13.1 for all cases with either a pain and suffering or past losses ad damnum; see bottom row in Table 2). A similar result occurred when we compared the rate of comments in the 20 cases in which plaintiffs offered both pain and suffering ad

Table 2: Reactions to Amounts Suggested by the Plaintiff (Ad Damnums)

	Past Medical/Lost Earnings/Property	*Future Medical/Lost Earnings*	*Pain & Suffering*	*Total Damages*	*Total*
Juror Reactions					
Accept	12.5%	14.3%	1.8%	4.8%	7.1%
Use	22.4%	24.3%	26.9%	16.0%	21.8%
Recall	55.7%	42.8%	47.9%	42.9%	47.6%
Reject (too high)	9.4%	18.6%	23.4%	36.3%	23.5%
Total	100.0%	100.0%	100.0%	100.0%	100.0%
N of plaintiffs with plaintiff ad damnums	30	9	21*	25	33
N of plaintiffs with comments	26	7	17	24	33
Total comments	393	70	282	312	1,118**
Comments per plaintiff	13.1	7.7	13.4	12.5	33.8

*In one of these cases, the plaintiff did not give a total ad damnum for pain and suffering, but did indicate a rate per hour.

**The total percentages include 61 comments about ad damnums from categories not included in the past, future, and pain and suffering categories.

damnums and past special damages ad damnums (12.80 for pain and suffering vs. 14.4 for past special damages).[56]

Table 3: Reactions to Amounts Suggested by the Defendant

	Past Medical/Lost Earnings/Property	*Future Medical/Lost Earnings**	*Pain & Suffering*	*Total Damages*	*Total*
Juror Reactions					
Accept (high enough)	31.3%	(0.0%)	8.5%	21.5%	15.8%
+ view as *too* high	1.2%	(0.0%)	11.6%	0.0%	6.1%
Use	4.6%	(0.0%)	23.5%	24.3%	20.0%
Recall	56.0%	(100.0%)	52.9%	45.8%	52.8%
Reject (too low)	7.0%	(0.0%)	3.5%	8.3%	5.3%
Total	100.1%	(100.0%)	100.0%	100.0%	100.0%
N of plaintiffs with defense values	19	(1)	15	22	25
N of plaintiffs with comments	13	(1)	14	16	23
Total comments	86	(9)	259	144	506**
Comments per plaintiff	4.5	(9)	17.3	6.5	20.2

*The percentages are in parentheses because they are based on only one case.

**The total percentages include eight comments about suggested amounts from categories not included in the past, future, and pain and suffering categories.

In contrast, jurors did offer many more comments on average about defense award suggestions for pain and suffering (17.3) than for past losses (4.5) (see bottom row in Table 3). A comparison for the 11 cases with pain and suffering as well as past special damages rebuttal suggestions produced the same pattern (19.8 vs. 2.9).[57]

The results for future damages, which we predicted would attract an intermediate number of comments, involved too few plaintiffs with attorney recommendations (nine for plaintiff ad damnums and one for defense rebuttals) to permit a robust test.

In sum, the evidence supported Hypothesis 1 for the defense, but not for the plaintiff.

3. Hypothesis 2: Plaintiff Ad Damnums that are Less Grounded in the Evidence are Likely to Draw a Higher Percentage of Comments Rejecting the Suggested Amount than are Potential Anchors from the Plaintiff that are More Grounded in the Evidence

The percentage of negative comments rose from a low of 9.4 percent to a high of 23.3 percent across the three component types of plaintiff ad damnums (see Row 4 in Table 2). As predicted, pain and suffering ad damnums drew a significantly higher percentage of negative comments than did the more objectively grounded types of special damages.[58] The percentage of rejection comments for plaintiffs with total ad damnums, which included

[56] $t_{paired} = 0.35$; in one of the 20 cases, the ad damnum was a recommended per diem (per day) without a length of time specified.

[57] $t_{paired} = 2.70$, $p < 0.02$.

[58] $X^2 = 22.18$, $p < 0.0001$. In this analysis, and all the similar analyses that follow, we analyzed the overall percentages across cases. These comparisons did not vary substantively when we instead compared the statistically independent average case-level percentages.

cases in which the demand for pain and suffering was combined with other damage requests, was even higher (36.3 percent). Many of the outright rejections of the plaintiff's ad damnum revealed cynicism about attorney demands and ridicule of the amounts. This reaction may be different from the usual situation encountered in some anchoring studies when the potential anchor is perceived as simply irrelevant.[59]

Here are examples of negative responses to the plaintiff's ad damnum for pain and suffering (P&S) from nine different cases.

Case 1 Well, $[X] for pain and suffering. I don't think she suffered too much.

Case 2 [referring to plaintiff's P&S request] Definitely not $[X].

Another juror responds: [laughs] No, I don't think so.

A third juror reacts: Definitely not $[X].

Case 3 It's [the plaintiff's P&S request] stupid and it makes no sense.

Another juror responds: It's a lot of money for this type of . . .

A third juror reacts: Not a chance in hell . . .

Case 4 I think that that part there [plaintiff's P&S request] is a bit inflated . . . I don't see a reason to award him that much.

Case 5 . . . but I think the $[X] [plaintiff's P&S request] is a little ridiculous.

Case 6 [about plaintiff's calculations to determine P&S] This is something [plaintiff's attorney]'s cooked up.

Another juror responds: The guy pulled it out of his ass, huh?

Case 7 They just automatically assumed they would get $[X].

Another juror responds: It doesn't matter what they [plaintiff's attorney] expect to get—$[X], or he [defense attorney] expects to pay $[1/6 X]. That shouldn't have any bearing on it whatsoever.

Case 8 $[X]. I think this is a get rich quick scheme.

Case 9 She [the plaintiff] she wants a free ticket; she wants the lottery: $[X] [plaintiff's P&S request]

The jurors in Cases 1 and 4 reject the ad damnum, but appear relatively temperate in their rejection; however, the others are more aggressively hostile to the plaintiff's suggestion.

Jurors expressed negative reactions not only to demands for pain and suffering, but also to the totals advocated by the plaintiff. Here are examples from 14 different cases.

Case 1 Well, I think we have—What was proposed to us is an amount that was $[X] or something, and we obviously have said that that's too outrageous of an amount. . . .

Case 2 How much she is negligent for [ed: at fault for], say $[X], a ridiculous amount . . .

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[59]Because jury simulations on anchoring have typically not involved deliberations, we cannot compare how mock jurors viewed the ad damnums tested in those experiments.

Case 3 To go into court and ask for a $[X] dollars is criminal, it is criminal. It is criminal what they did here.

Case 4 That $[X] is just that lawyer's looking to get paid, anyway.

Case 5 He doesn't expect $[X] anyway. He'd die if we brought that back . . . I mean, we have to look at, we have to look at what she [the plaintiff] said.

Case 6 I think those numbers [the jury's tentative awards] are pretty low and we're pretty much sending him a message that you're not going to get away with this because I think, this is like, this is like you know, this is reasonable and this [plaintiff's ad damnum] was like a dreamland. And I still think this is a pretty hard message: you're full of crap you know.

Case 7 Yeah, they always do that, they shoot really high.

Case 8 Is it fair to say that everybody here is certainly in agreement that the numbers the plaintiff's attorney threw out, $[X] and $[Y] [ed: two plaintiff totals] is completely out of line?

Case 9 Oh yeah, he [plaintiff's attorney] wants to retire. He gets 30%, don't he?

Case 10 He's [plaintiff's attorney] overdoing it [referring to total ad damnum].

Case 11 I have a problem with the $[X].

Case 12 All of a sudden he comes out with this figure of $[X] [ed: total that includes a substantial amount for pain and suffering]. And I say "what the hell?"

Case 13 I almost flipped when I saw that $[X]

Another juror responds: Whoa. What planet do you live on?

Case 14 Forget it, forget it, $[X] [plaintiff's ad damnum].

Although the increased frequency of negative responses to the less grounded pain and suffering as well as to total awards, in contrast to the lower frequency of negative responses to the more grounded past damages ad damnums, is consistent with less influence for the less grounded ad damnums, we cannot directly measure that effect on jury verdicts. Jurors in Arizona are not required to reach verdicts on each component of damages, and consensus on the total award was achieved on a few juries with individual jurors endorsing different bases for their decisions, or leaving them unexpressed. Nonetheless, we can be certain that an extreme form of anchoring never occurred regarding the total ad damnums of the plaintiff: that is, no jury adopted precisely the amount the plaintiff requested.[60] In fact, the median jury awarded only 22 percent of the total amount the plaintiff requested for the 25 plaintiffs who made a specific total damage request.

4. Hypothesis 3: Juries Will Award a Lower Proportion of the Amount the Plaintiff Requests for Pain and Suffering than of the Amount Requested for the More Objectively Grounded Specific Damages

To more directly test the relative likely influence of plaintiff pain and suffering ad damnums versus ad damnums for the other more objectively grounded specific damages, we compared the pain and suffering damages the juries awarded as a percentage of the amount the plaintiff requested with the percentage of special damages they awarded as a

[60]The plaintiff's attorney in one instance offered an ad damnum of "more than $50,000 but less than $200,000." The actual award of $150,000 was more than $125,000, the mid-point between the ends of this suggested range.

percentage of the amount requested. In the 18 cases with plaintiff ad damnums for both types of damages and a deliberation that revealed the amount awarded for pain and suffering,[61] the contrast was dramatic: 15 percent of the pain and suffering request versus 68 percent of the special damages request,[62] suggesting that either the plaintiff attorneys' ad damnums are more extravagant in their pain and suffering requests or that the jurors are less likely to be substantially influenced by those requests, or some combination of the two. Our next hypothesis focuses on the plausibility of those pain and suffering ad damnums.

5. Hypothesis 4: Rejection of Pain and Suffering Ad Damnums is Likely to Increase as Their Index of Implausibility Rises

For the 19 plaintiffs whose attorneys included specific requests for pain and suffering[63] as well as specific requests for total special damages, we computed an index of the implausibility of the pain and suffering ad damnum by dividing the plaintiff's pain and suffering ad damnum by the total for special damages claimed in the form of past and future medical expenses, lost wages, and property loss. According to this measure, a rise in the index would reduce the plausibility of the claim. There was no significant relationship between the implausibility index and the proportion of the amount requested by the plaintiff that the jury awarded for pain and suffering ($r = 0.16$).[64] Moreover, there was no relationship between the index and the number of comments accepting the plaintiff's ad damnum ($r = 0.16$), using the ad damnum as a starting point ($r = 0.08$), or recalling the ad damnum ($r = 0.29$). The correlation between the implausibility index and the reject comments rose to 0.36, but was not significant in light of the small sample of cases.[65] Thus, Hypothesis 4 received little support.

The explanation may lie in the pain and suffering ad damnums chosen by the attorneys. While the index ranged from 0.28 to 11.27 (median = 2.65), it appears that the insurance rule of thumb for settlement of three times specials may provide a reference point, an anchor, for attorneys: for 14 of the 19 plaintiffs, the index value did not exceed 3.3. That generally modest approach may explain the lack of evidence supporting this hypothesis. Another explanation is that the jurors were generally quite hostile to plaintiffs' ad damnums for pain and suffering. Recall that they averaged awards of only 15 percent (median = 11 percent) of what the plaintiff requested for pain and suffering (while the corresponding rate for special damages averaged 68 percent).

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[61]For one plaintiff, the jury's decision on pain and suffering was not clear because the jurors agreed on an overall award that covered multiple categories of damages.

[62]t_{paired} 3.98, $p < 0.001$.

[63]This analysis includes the three plaintiffs for whom pain and suffering ad damnums were computed by subtraction. See note 35.

[64]$N = 18$, see note 61.

[65]$p < 0.15$. Note that the power of these tests was limited by the small number of cases with both an index value and a jury deliberation that revealed the amount, if any, for pain and suffering.

6. Hypothesis 5: Jurors are More Likely to Accept the Defense-Suggested Amounts than to Accept the Plaintiff's Ad Damnums; Jurors are Less Likely to Reject the Defense-Suggested Amounts than to Reject the Plaintiff's Ad Damnums

As predicted, jurors responded differently to the amounts conceded by the defendant than to the ad damnums proposed by the plaintiff. Jurors were substantially more likely to make comments accepting damage concession totals by defense attorneys (21.5 percent) than to make comments accepting plaintiff ad damnum totals (4.8 percent)[66] (Tables 2 and 3). They were also less likely to reject defense recommendation totals as too low (8.3 percent) than to reject plaintiff ad damnum totals (36.3 percent)[67] (Tables 2 and 3). Further, jurors were somewhat more likely to explicitly use the total defense recommendation than the plaintiff ad damnum as a starting point (24.3 percent vs. 16.0 percent):[68] "I think we should start with the $[X], because if the other attorney's agreed that this is fair, then you know, we're not going to give them less than what they think is even fair." The only jury verdict that matched an attorney recommendation was one that gave what the defense conceded. In a second case, the jury gave approximately what the defense conceded, explicitly adding only a modest additional amount for other incidental losses.

A similar difference occurred for pain and suffering. Jurors were more likely to indicate acceptance of the pain and suffering concessions by defense attorneys or even think that a concession was too high (20.1 percent) than to accept the plaintiff pain and suffering ad damnums (1.8 percent).[69] They were also less likely to reject defense pain and suffering recommendations as too low (3.5 percent) than to reject plaintiff pain and suffering ad damnums as too high (23.4 percent).[70] The more grounded past expenses recommendations showed greater acceptance for defense concessions than for plaintiff ad damnums (32.5 percent vs. 12.5 percent),[71] but showed little or no difference in rejections (7.0 percent vs. 9.4 percent).[72] Thus, the evidence strongly supports Hypothesis 5: the jurors were generally more receptive to the damage recommendations of the defense.

G. The Special Case of "Per-Diem" Proposals for Pain and Suffering

For eight of the plaintiffs, the plaintiff's attorney suggested a per-unit basis for deciding damages for pain and suffering. This approach implicitly recognizes the difficulty of

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[66] $X^2 = 30.37$, $p < 0.0001$.

[67] $X^2 = 38.5$, $p < 0.0001$.

[68] $X^2 = 4.45$, $p < 0.05$.

[69] $X^2 = 48.0$, $p < 0.0001$.

[70] $X^2 = 44.9$, $p < 0.0001$.

[71] $X^2 = 21.1$, $p < 0.0001$.

[72] $X^2 = 0.51$, $p > 0.40$.

assigning a value for those damages without some reference point, but most of these arguments offered only somewhat abstract assistance. In five of the cases, the attorney mentioned an amount per time unit and suggested that the jury use the life expectancy from the judge's instructions for an average person the plaintiff's age to arrive at a total. In general, the jurors used the life expectancy instruction as a starting point, but cut the per-diem amount suggested by the attorneys as well as the claimed expected duration of the injury, awarding 0.06, 0.08, 0.14, 0.33, and 0.56 of the amounts requested for pain and suffering.

In the remaining three per-diem cases, the plaintiff's attorney attempted to provide the jurors with a relevant standard on which to base their award. In two cases, the attorney suggested using a minimum wage standard. In one of them, the jury balked, rejecting the idea of basing its pain and suffering award on what it assumed was a 24-hour standard to explain the amount identified by the attorney as an appropriate monthly "wage" for pain and suffering, and awarding 0.12 of the amount requested for pain and suffering. In the second case, involving a more severe and long-term injury, the attorney discussed a "double shift" of work (16 hours a day) as a basis for computing compensation for pain and suffering. The jurors were somewhat less critical of this approach, but their ultimate pain and suffering award was less than a third of what the attorney requested. In the final per-diem case, the plaintiff's attorney proposed payment for pain and suffering by referencing the amount the plaintiff would have to pay for physical therapy to reduce the pain. The jurors began working with that amount, but they rejected the claimed duration of the plaintiff's injury, so that the award for pain and suffering was only 1 percent of the amount requested.

The small number of cases makes it difficult to draw any lessons from these results, apart from the continued evidence that the jurors were critical consumers of attorney claims.

H. Understanding the Effects of Attorney Recommendations

The juries we studied in Arizona, as in other jurisdictions, were instructed to base their decisions on "the evidence presented here in court. That evidence consists of testimony of witnesses, any documents and other things received into evidence as exhibits, and any facts stipulated or agreed to by the parties or which you are instructed to accept." They were also instructed explicitly that what the attorneys say in court is not evidence: "In the opening statements and closing arguments the lawyers have talked to you about the law and the evidence. What the lawyers said is not evidence, but it may help you to understand the law and the evidence." Thus, in Arizona as elsewhere, the attorney recommendations about damages should arguably play little or no independent role in the jury's deliberations, although they may assist in helping the jurors organize and recall the evidence on damages.

Although we cannot tell precisely what effect the attorney ad damnums had on the jurors we studied—or whether ad damnums affected the internal judgments of individual jurors—our analysis from these jury deliberations reveals that jurors do attend to what the attorneys say about potential damage awards and that their attention is often a starting point for discussions about appropriate damage levels. The attorneys offered 142 ad damnums in four categories (past special damages, future special damages, pain and suffering, and total amount requested) and jurors referred to 118 (83 percent) of them during their deliberations, producing 1,624 references, an average of 49 comments per plaintiff about the amounts suggested by the attorneys. Moreover, these references did not

come from a small subset of juries or jurors. In discussing these 33 plaintiffs, all juries specifically made some reference to attorney damage recommendations and 86 percent of the jurors referred at least once to an attorney recommendation. Our examination of juror talk during deliberations unambiguously showed pervasive interest among the jurors in what the attorneys recommended, even though the comments jurors made about the suggestions were often critical.

We did find some inconsistencies with the theoretical explanations of when and why anchoring occurs. We had anticipated a greater focus on the plaintiff attorneys' advice when the element was less grounded in the evidence, consistent with the larger anchoring effects found when the decisionmaker is less confident.[73] Yet the jurors did not talk more about the plaintiff attorneys' pain and suffering recommendations than about their recommendations for past expenses. This lack of difference is particularly striking in view of the fact that the jurors spent substantial time talking about the other sources for their decisions on special damages, that is, the testimony and exhibits presented at trial (e.g., medical bills). Yet attention may be necessary, but not sufficient, for influence. It may be that the jurors discussed the amounts requested for special damages precisely because they were able to refer to the evidence in discussing those ad damnums. In some cases, jurors were quite skeptical about the medical treatment the plaintiff had sought and the expenses that had been incurred, and in several cases they spent substantial time deciding how much treatment had actually been warranted. In no case did they simply adopt a figure presented by the plaintiff's attorney without discussing whether the amount was warranted unless both sides had agreed to it (e.g., paying for the ambulance that took the plaintiff to the hospital).

The nature of the juror talk in these deliberations signaled that the jurors may have reacted less favorably to the plaintiff's ad damnums than experimental jurors typically have done in the laboratory. One comment in five indicated an explicit rejection of the ad damnum being referred to by the juror, with the likelihood of a rejection higher for the less grounded demand for pain and suffering damages than for past expenses. No jury awarded precisely what the plaintiff requested. Although the implausibility of the pain and suffering award, measured as a multiple of special damages, was not a significant predictor of negative reactions, the correlation did reach 0.36 ($p < 0.15$ in the modest size sample of 18 cases with specific ad damnums for both special damage and pain and suffering), Moreover, the jurors as a whole were hardly generous. In fact, the median pain and suffering awards as a multiple of special damage awards for the 28 juries that awarded special damages was not close to the "three times specials" multiple sometimes cited as the insurance formula. Instead, it was 1.08. The mean was 0.51. Only two juries awarded more than three times special damages, with one awarding 3.64 times a special damages award that was less than 10 percent of the amount the plaintiff claimed for special damages and the other awarding 10 times the special damages in a case with modest special damages that resulted in permanent disfigurement. The plaintiff in this last case did not propose an amount for pain and suffering. Thus, these pain and suffering awards did not reveal evidence that extravagant anchors for the plaintiff were exerting a strong pull that substantially inflated awards.

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[73]Jacowitz & Kahneman, supra note 19.

Overall, these real jurors appeared more inclined to reject plaintiff ad damnums than defense recommendations, and they were more likely to approve of defense suggestions than plaintiff suggestions, particularly when the recommendation concerned pain and suffering. It is unclear what explains this pattern, other than the general suspicion about plaintiffs and their attorneys, and a skepticism about their claims that others have observed,[74] coupled with a common-sense notion that the defense concession is a floor from which to adjust (e.g., "Well, it gives us something to start with. He's willing to pay that.").

To give a more detailed sense of how the jurors grappled with attorney suggestions, we take a closer look at some of the conversations they engendered. We start with a jury discussing the plaintiff's modest ad damnum for past medical expenses (approximately $10,000) and lost wages (approximately $5,000) in a case in which the defense offered no rebuttal amounts. The jury found the expenses reasonable and swiftly adopted the amount as a floor before considering pain and suffering.

Juror #4: [referring to notes]: So, it's approximately $[10,000] for medical and wages were $[5,000], so we're talking . . .

Juror #6: [interrupting]: This guy's got it down. [laughs]

Juror #4: We're talking a total of, uh, what . . .

[Jurors #6, #7, & #8 flip through their notes]

Juror #4: $[10,000 + 5,000]?

Juror #8: [referring to her notes] Yeah. It was $[10,000] [for medical].

Juror #4: Yeah, round it off.

Juror #8: $[5,000] [for wages]. Yeah.

Juror #4: So, what, around $[10,000 + 5,000]?

Juror #9: That's not enough.

Juror #4: It's not enough.

Juror #6: No, that's not.

Juror #4: He should at least get this though, right?

Juror #9: Yes.

In other cases, the jurors had questions about whether the medical treatment had been excessive and balked at the amount being requested. For example, the plaintiff in the following case had visited a chiropractor following her accident and the jurors evaluated both the rate the chiropractor charged and the number of sessions included in the chiropractor's bill, drawing on their own experience to make that evaluation.

Juror #6: We said too many office calls, but I mean that's not a bad price for a chiropractor.

Juror #4: Yeah, but was it necessary? . . . I mean, sure it was a good price, but was it necessary?

Juror #2: But my visits [to the chiropractor] are less than half of that.

Juror #3: Should they, should the [defendants] be liable for that?

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[74]See, e.g., Valerie Hans, Business on Trial: The Civil Jury and Corporate Responsibility (2000).

Juror #4: Do the facts support that figure? That's what we have to look at.

Juror #6: [to Juror #2] You said you paid $35.

Juror #2: Un-hmmm. And he's charging her [more than twice that amount], every time she comes. . . . but my doctor doesn't, every time I go.

The jurors ultimately cut both the number of sessions and the rate awarded for each session to reduce their estimate of the reasonable medical expenses required for compensation. Thus, they started with the amount proposed by the plaintiff, but reached an award for past medical expenses that was roughly two-thirds of the amount requested.

When it came to pain and suffering awards, the jurors found it more difficult to work with the suggested awards.

Juror #2: And along with pain and suffering, if anyone wants to dive into that.

Juror #6: That was my question. Are we supposed to go along with [plaintiff's ad damnum] and the [defense suggestion]?

Juror #3: No.

Juror #2: No.

Juror #9: No. No.

Juror #3: We can choose. We can say from zero . . .

Juror #2: We could give her a million if we wanted.

Juror #3: If we wanted.

After deciding that they had full discretion, however, the jurors turned their attention to the length of time they thought the injury had lasted to arrive at a modest award for pain and suffering.

The lack of receptivity to claims for pain and suffering is illustrated in the following case. The plaintiff claimed approximately $40,000 for past and future pain and suffering from an auto accident, with the future portion based on $1,000/year for the plaintiff's life expectancy. The defense argued for no more than $5,000 in total. The defense rebuttal became the floor for the jury's award for pain and suffering damages. There is no evidence that the plaintiff's ad damnum for pain and suffering had any impact.

Juror #1: I guess I still am not totally convinced that this accident caused $5,000 worth of pain and suffering.

Juror #7: And I agree with you.

Juror #2: I do, too.

Juror #6: I agree also. . . .

Juror #4: In other words, you're saying just add $5,000 to the medical and that'd be enough.

Juror #7: I don't even think you need to add $5,000. I'm what she said was, is it . . .

Juror #8: even worth $5,000 of pain and suffering.

Juror #3: Well, we can't, we can't. I'm sure he went through some pain in what.

Juror #8: Yeah, that's true.

Juror #3: But how do you evaluate how much does he get?

Juror #1: Well, that's what they were trying to get at . . .

Juror #3: [interrupts] Well, that's why I'm saying, the defense is willing to give $5,000 for the pain and suffering.

Juror #1: So go with it?

Juror #7: But, why should, I'm sorry, I'm thinking and I don't know if you're supposed to put yourself into the place of that person, but if I was [the defendant], I would yeah, if my lawyer told me I would have to pay someone because they decided to take me to court, then fine, I'd probably do what my lawyer said. But do I honestly believe that I caused $5,000 worth of pain and suffering?

The jury ultimately agreed to award $5,000 for pain and suffering.

These examples are consistent with aggregate figures we presented earlier: the greater willingness to compensate for special damages, but not without a close look at the extent to which they reflected needed treatment, and a struggle with assessing pain and suffering, accompanied by skepticism about attorney damage recommendations for those less tangible injuries.

Overall, our results are generally consistent with research on the anchoring heuristic, with a few important caveats. Consistent with the attractions of attorney recommendations as potential anchors, jurors turned to those recommendations in their search for a reference point in deciding on damages. Yet we also find evidence of potential limitations on the power of this anchoring pull. The jurors were especially critical of pain and suffering recommendations, even though they represented potential anchors for a value that had no supporting quantitative guideposts in the evidence. The general pattern of criticizing, often even ridiculing, the attorney damage recommendations, suggests that in the wake of publicity about outrageous jury verdicts and the tort reform movement, modern jurors may be less susceptible to assimilating potential anchors than laboratory studies have suggested. Note that we are not suggesting that attorney recommendations have no influence as anchors, but rather that they may be less influential reference points in a modern adversarial context than in the laboratory environment of earlier work. Other researchers have found evidence that the Arizona jurors we studied are not unique in their current reluctance to accept older formulas.[75] In a 1999–2000 survey, Texas attorneys reported that the multiplier for pain and suffering damages averaged 1.7, down from an average of 3.1–3.2 five years earlier.

To fully test the possibility that current juries resist to the pull of extreme damage recommendations due to their suspicions about the attorneys as potentially unreliable sources, experiments are needed that probe juror pre- and postdeliberation assessments of attorneys and their damage proposals, relating those assessments to the damages suggested and awards given. An additional approach, with real juries, would be to examine whether juries in New Jersey and Pennsylvania, where ad damnums are prohibited,[76] tend to give higher or more variable awards than juries in neighboring states that permit the attorneys to weigh in with recommended damage awards.

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[75]Stephen Daniels & Joanne Martin, It Was the Best of Times, it Was the Worst of Times: The Precarious Nature of Plaintiffs' Practice in Texas, 80 Tex. L. Rev. 1781, 1807 n.61 (2001–2002).

[76]See supra notes 12–13 and accompanying text.

VI. Responses for the Legal System

A mechanical view of the civil justice system would expect the ideal decisionmaker to reach a verdict on damages unaffected by anchoring. That is, attorney recommendations would exert no independent influence. To approximate this model by avoiding these influences, the legal system might prohibit all attorney recommendations, whether in the form of suggested totals or recommended methods of calculating pain and suffering awards. Before we take such radical steps, however, it is worth asking what we might be sacrificing.

Potential anchors in the form of attorney recommendations in real cases typically are not purely arbitrary. To the extent that attorney recommendations do tend to reflect relevant information about damages in the case, it is worth noting that there was a 0.77 correlation between the plaintiff and defense attorneys' recommendations. Although defense attorneys no doubt adjust their recommendations to reflect those presented by the plaintiff's attorney, it is also likely that this substantial correlation also reflects a tendency for both attorneys to tailor their recommendation to the evidence of injury in the case. Thus, eliminating attorney recommendations might deprive the jury of useful starting points for evaluation of damages during deliberations.

The potential value of these guideposts from the attorneys is particularly worth considering in light of the fact that the legal system has rejected nearly all other forms of advice.[77] Scholars have proposed a variety of ways to guide jury decisions about pain and suffering:[78] standardized awards based on age and severity of injury;[79] a distribution of the amounts awarded in comparable cases;[80] scenarios of prototypical injuries and their corresponding awards.[81] All of these approaches require judgments about the case characteristics that should be considered and the damage amounts that should be attached to them, or at least about how to identify "comparable cases" or "prototypical injuries." Even the most recent proposal, Ronen Shamir's creative suggestion for an age-adjusted multiplier of medical costs,[82] that the jury can consider, but need not adopt, in reaching a decision, would face challenges to operationalize. Although appealing as a way to reduce unwarranted variability across cases with low administrative costs, it too requires a normative judgment about the appropriate multiplier, or set of multipliers, to arrive at a recommended pain and suffering award.

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[77]The exception is the average life expectancy instruction that courts give when the plaintiff claims permanent injury.

[78]See generally Ronen Shamir, Putting a Price on Pain and Suffering Damages: A Critique of the Current Approaches and a Preliminary Proposal for Change, 100 Nw. U.L. Rev. 87 (2006).

[79]See, e.g., Randall R. Bovbjerg et al., Valuing Life and Limb in Tort.: Scheduling "Pain and Suffering," 83 Nw. U.L. Rev. 908, 941 (1989).

[80]See, e.g., Michael J. Saks et al., Reducing Variability in Civil Jury Awards, 21 Law & Hum. Behav. 243 (1997).

[81]Bovbjerg supra note 79, at 953–56.

[82]Shamir, supra note 78, at 114. He eliminates loss of income on the sensible ground that the legal system should not recognize differences in pain and suffering based on the earning capacity of the victim.

Perhaps not surprisingly, then, in view of both normative and practical obstacles, none of these approaches has been adopted. The real decision, at least for the present, is whether attorney recommendations, in the adversarial context of the trial, on balance assist or distort outcomes. To the extent that juries typically critically analyze the evidence on which the attorneys base their claims for special damages and heavily discount plaintiff ad damnums, as suggested in this study, the dangers of bias from these potential anchors offered by attorneys appear to be overstated as applied to the real world of deliberating juries. To the extent that any attorney recommendations are particularly well-received by the jurors, the case is stronger that the defense attorneys rather than the plaintiffs are offering them.

Note that we share the view that one goal of the tort system should be horizontal equity that treats like cases alike[83] and that the current structure does not optimally promote that goal. Moreover, we are not suggesting that award decisions are uninfluenced by irrelevant factors, including anchoring and other pervasive cognitive shortcuts. Instead, we are suggesting that the entanglement of valuable information and potential cognitive distortion does not, based on the empirical evidence, call for the surgical response of barring attorney ad damnums. There is no evidence that such a step would promote horizontal equity.

Even if undue influence from attorney recommendations inconsistent with the evidence is not a typical occurrence, as the results we have presented here suggest, the potential power of extreme anchors may justify limited prophylactic action. Some courts have suggested that a supplementary instruction about attorney damage recommendations be offered under particular circumstances,[84] but there is no reason to take such a limited approach and to dispense with a direct instruction in any case. Rather than simply relying on the general instruction that every jury receives telling the jurors that what the lawyers say is not evidence, courts can provide clear and direct guidance by providing a specific and targeted instruction in every trial in which damages are possible and any attorney offers a damage proposal: "The attorneys are permitted to make suggestions about damages on behalf of their clients, but you should know that those suggestions are not evidence. It is solely the jury's job to decide whether to award damages and if so, how much to award, based on the evidence presented at trial." In the context of the adversary system and in light of the evidence that jurors are already leery of attorney damage recommendations, this modest caution is a reasonable response that recognizes the dangers of anchoring, but avoids jettisoning the potentially useful guidance that attorneys may offer.

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[83]See Guido Calabresi, The Costs of Accidents (1970).

[84]See, e.g., Phillips v. Fulghum, 125 S.E.2d 835, 838 (Va. 1962) ("If counsel for the defendant feels that the rights of his client are likely to be prejudiced by the mention by opposing counsel of the amount sued for, he may ask to have the jury instructed that the mention of such amount is not evidence in the case and should not be considered by them in arriving at the amount, if any, of their award."); Jimmy's Cab, Inc. v. Isennock, 169 A.2d 426 (Md. 1961) (supplementary instruction approved where counsel mentioned the amount plaintiff was seeking in opening arguments).