

# THE JURY BOX

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Last month, I attended the annual conference of the [American Society of Trial Consultants](#) in Long Beach, CA. The program was excellent. In particular, there was a fascinating and important session on ethical dilemmas in trial consulting. ASTC now has a complete set of ratified [practice standards](#). As the discipline continues to mature, we are wrestling with how to interpret these standards. I plan to devote a future issue of [THE JURY BOX](#) to the ethics of trial consulting.

I always look forward to the conference session on new research in jury behavior and this year's session did not disappoint. In this issue, I report on two particularly interesting studies: one on per diem arguments about damages and the other on how jurors react to apologies by defendants. This second topic has received a lot of attention recently. We know that apologies can reduce the likelihood of a suit being filed and can facilitate settlement, but we know less about how juries will respond to them at trial.

Finally, I am pleased to announce that I have been recruited by the [Board of ASTC](#) to serve as project manager for a complete overhaul and updating of the ASTC website. A major goal of this upgrade is to improve the ease of use and educational value of the website for the attorneys who form our primary client base. So, if there is any particular type of information or service that you would like to see provided on the new ASTC website, please just let me know.

– Edward P. Schwartz

Any of you who have attended one of my presentations on jury decision-making or trial strategies has heard my spiel about my being, **first and foremost, a social scientist**. As such, I believe in data and I look first to empirical studies for guidance when advising clients. As such, it is important for me to keep up with mock jury studies as their results are made available. The ASTC conference is one good place to catch up on such research, but I plan to include a regularly updated bibliography of jury research on the new ASTC website. This will help all ASTC member consultants apply the latest cutting-edge research to all their future trials.

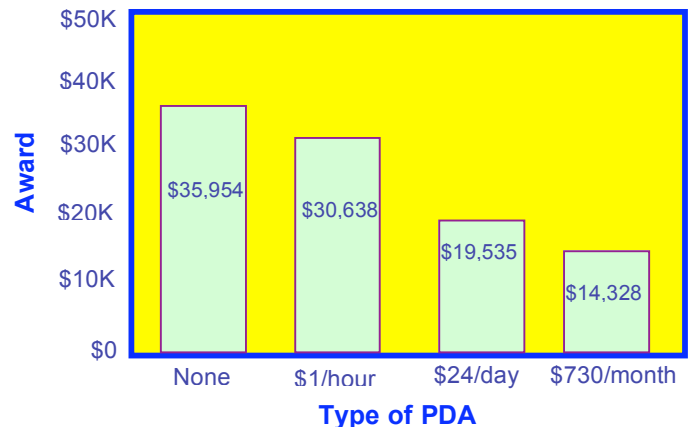
## Taking it day by day

Attorneys are often faced with the dilemma of how to present arguments about non-economic damages to jurors. Most juries are left to their own devices, creating great anxiety about where to even begin such calculations. The foreignness of this exercise is the main reason why *ad damnum* requests are so influential on damage awards. In some jurisdictions, attorneys are also permitted to make per diem arguments about such damages. Where courts have rejected this practice, the

rationale is usually that per diem arguments are likely to generate excessive damage awards.

Bradley McAuliff, of CalState Northridge, recently conducted research to test the conjecture that per diem arguments generate excessive awards. His first study provided subjects with a written account of an automobile accident torts case, where the plaintiff suffered non-economic harm in the form of severe back pain and reduced mobility. Subjects read versions of plaintiff's closing arguments with either no per diem argument, or one of three with identical monetary value (\$1/hour, \$24/day or \$730/month).

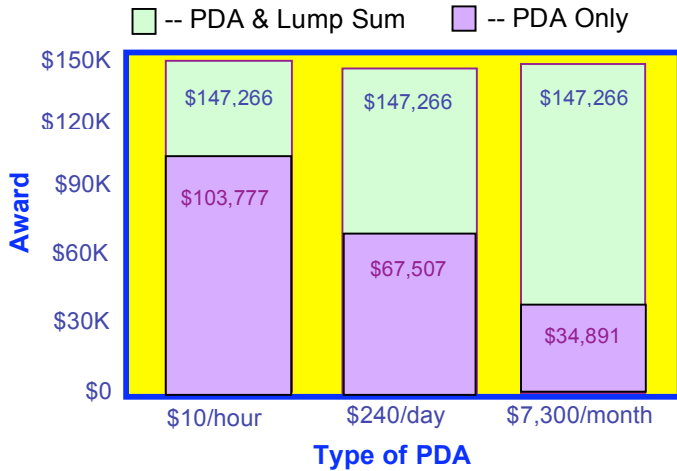
As the table below shows, per diem arguments (PDA) actually reduced the size of average damage awards. This result is consistent with prior research on the effects of breaking damage awards into component parts. When jurors are asked to calculate awards for specific harms and then add them up, the resulting total damage award is typically smaller than had the jury just calculated a total award in the first place. While the component parts are temporal, rather than substantive in McAuliff's study, the subjects were still forced to add up smaller amounts to reach a total.



Notice also that the average award dropped as jurors were asked to calculate in larger time increments. Supported by subjects' self-reporting of cognitive effort, the author speculates that many were overwhelmed by the prospect of calculating damages hour-by-hour or day-by-day. As a result, many of the subjects in those treatments essentially gave up on actually calculating the award and picked what they believed to be an appropriately sized total. By comparison, multiplying the monthly amount by 12 or 18 is a fairly simple arithmetic operation.

McAuliff then conducted a follow-up study, in which all jurors heard a per diem argument and half of them also heard a lump sum *ad damnum* request. As the table below clearly illustrates, when jurors had access to an *ad damnum*, they quickly abandoned any pretense of calculating damages from the hourly, daily or monthly figures. Notice that average awards were virtually identical when an *ad damnum* was available, regardless of what kind of per diem argument the

subjects heard. Only in the absence of a lump sum request did the form of the per diem argument matter.



Contrary to the concerns of courts that have prohibited per diem arguments, plaintiffs actually did better when per diem arguments were avoided. Ideally, a plaintiff's attorney should make a lump sum request. Where an *ad damnum* is not permitted, plaintiff's counsel is probably better off leaving jurors to think about damage awards in gross terms, rather than trying to support a particular outcome with incremental logic. By contrast, defense counsel would be wise to try to convince the jury to think about damages in incremental terms. Such a strategy, however, can backfire if the resulting calculations overly tax the cognitive abilities (or patience) of the jurors. Where possible, stick to monthly or annual figures so that the math remains fairly simple.

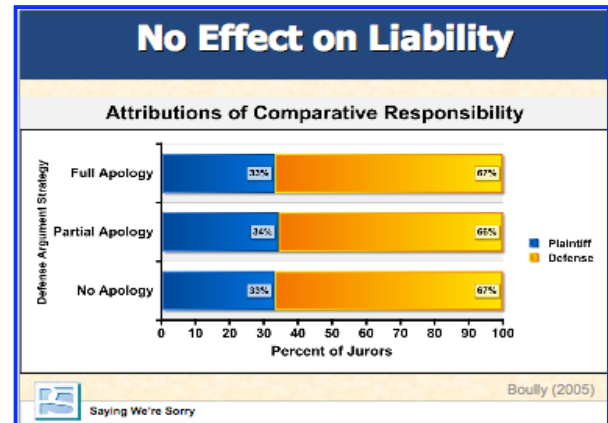
**Better to seek forgiveness than permission?**

Given the amount of stonewalling and denial we see in both the corporate and political arena, one would never guess that a growing body of research supports the notion that an apology is often the most effective strategy in response to a mistake. Studies have shown that an apology can reduce the likelihood that an injured party will file suit and it can make settlement easier, as well. The concern among attorneys (and their clients) was that an apology would serve as an admission of negligence, hampering the defendant's efforts at trial.

Kevin Pouly studied this very problem in his doctoral thesis at the University of Kansas, entitled "Mea Culpa in the Courtroom: Juror Perceptions of Defendant Apology at Trial." Pouly ran a mock trial study involving a summary of a nursing home negligence case. All subjects saw exactly the same version of the trial, except that some saw no apology by the defendant, some saw a partial apology (in the form of an expression of remorse) and the final group saw the defendant offer a full apology.

Respondents were then asked to decide whether or not the defendant was negligent. Contrary to conventional wisdom (or attorneys' fears) on the topic, an apology had no discernable impact on the inclination of mock jurors to find the defendant negligent. Respondents were then asked to calculate damage

awards. Again, the presence of an apology (or its form) had no significant impact on jurors' decisions. The average awards (economic, non-economic and punitive) were essentially the same, regardless of whether the defendant apologized at trial.



This is one of those cases where a non-result is actually a very strong result. While an apology was seen to offer no real benefit or cost with respect to verdict choice, it is important to remember that past studies did demonstrate the advantages of apology at prior stages of the litigation process. The lesson to be learned from the present study is that defendants should feel comfortable apologizing for other reasons (strategic, ethical, psychological or otherwise), knowing that an apology is unlikely to affect them adversely at trial.

I know that Dr. Pouly is currently working on distilling his results into articles for publication. I'll be sure to alert readers of THE JURY BOX as those articles become publicly available.

**In The News...**

**Juror Shortage Hits Boston**

Despite ongoing reports of the demise of jury trials, Suffolk County, MA appears to be running out of jurors. Massachusetts has a "one day or one trial" policy for jury duty, which quickly cycles through the eligible jury population. Those who have served cannot be called again for three years. Massachusetts is also the only state that relies on an annual town census to create jury rolls. This is a particularly error-prone process in communities with large student, transient, poor and/or immigrant populations. As such, Boston has a rather poor response rate for jury summonses (25%). This shortage lends additional support to the proposal of State Senator Stanley Rosenberg (D-Northhampton) to switch from the census method to one relying on voter registration, welfare rolls and other public records.

I am curious to see how this juror shortage dovetails with the expressed willingness of many judges in the Commonwealth to allow individualized, attorney-conducted *voir dire* in some cases. Will these judges reconsider if such *voir dire* threatens to stretch the jury pool even thinner? Only time will tell.

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