THE JURY BOX
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Welcome to the Independence Issue of The Jury Box. The American Society of Trial Consultants (ASTC) Annual Meeting was held in Philadelphia last month. Jeffrey Abramson, author of *We, The Jury*, spoke about the importance of American juries during the colonial and founding eras. During that period, the independence of juries was under attack from a tyrannical ruler named George, who was desperately trying to maintain order while raising public and financial support for a costly war ... hmmm. As a proud resident of Lexington, MA, "birthplace of liberty," I wish you all a Happy Independence Day.

– Edward P. Schwartz

Sometimes it feels like getting a **defense attorney to talk about damages** is a little like conducting an intervention. After the kicking and screaming comes the complete disbelief that I might actually believe what I'm saying. It must be a trick! Finally, after a few months of careful deprogramming comes recognition, understanding and relief.

The cult-like dogma is that a defense attorney should never argue damages at trial. There is just enough logic to the position to make it credible. "If you talk about damages," the argument goes, "the jury will conclude that the defendant must have done something wrong. It's a recipe for disaster! It's litigation suicide!" As with all dogma, so long as it remains untested, followers feel safe so long as they stick to the party line.

The difference here is that the premise has been tested and it has been found wanting. The studies on the subject are virtually unanimous in their recommendation: As a general rule, defense attorneys should argue damages at trial. Now that your heart has started up again, I want to review briefly what we know about how juries decide on damages. This will go a long way in explaining why it is so important for defense attorneys to discuss damages at trial.

Anchors Away!

Research has shown that juries typically employ what is known as an "anchor and adjust" strategy to determine damage awards. Since most jurors are inexperienced with large sums of money and unfamiliar with most of the financial transactions discussed at trial, they desperately need help even getting started with the damages calculation. Jurors typically latch on to the most accessible estimate of damages as an "anchor." The deliberations then revolve around on how to "adjust" this amount to reach a final figure. In jurisdictions in which it is permitted, the plaintiff's *ad damnum* serves as the primary anchor.

Several studies have demonstrated the profound influence of the *ad damnum* on final damage awards. In one study by Zuhl (1982), involving a personal injury case, respondents all saw the exact same version of the case except for the size of the *ad damnum*. The study's results, presented in the table below, are quite striking. A plaintiff's attorney can substantially increase a damage award just by asking for more.

Ad Damnum	Ever Exceeded?	Awarded Exactly	Average Award
$10,000	3 times	70%	$18,000
$75,000	no	51%	$62,800
$150,000	no	29%	$101,400
Substantial Compensation	N/a	N/a	$74,600

Ask And Ye Shall Receive

It was initially believed that an anchor would only be used by a jury if the jury believed it were credible. In a 1996 study by Chapman and Bornstein, however, employing an ovarian cancer case, the plaintiff received a higher award when she requested $1 billion than when she requested $5 million, despite the fact that the jury characterized the plaintiff as selfish and dishonorable in the $1 billion *ad damnum* treatment. Even though the jurors rejected the request as unreasonable, it still affected their calculations, in part because they had no way of knowing just how unreasonable it was. There have been a couple of studies, however, in which an excessive *ad damnum* has produced a "boomerang effect," where jurors seem to be punishing a plaintiff for being greedy.

When an *ad damnum* is not permitted, the jury must look elsewhere for its anchor. The most common anchor in this environment is the damages estimate of the plaintiff's expert economist. Such an expert almost always generates a report, which is available to the jury during deliberations. Many juries open the report to the last page, circle the final figure, and begin their deliberations there. In a series of related studies based on an employment discrimination suit, Raitz, et al. (1990) and Greene, et al. (1999) have shown the efficacy of expert testimony for providing a damages anchor.

A related plaintiff tactic involves punitive damages. A request for punitive damages increases the size of the compensatory award, regardless of whether the jury believes punitive damages are warranted (Hastie, et al. 1999).

The Defense Strikes Back

Given the power of the plaintiff to control the deliberative agenda in this way, what is a defense lawyer to do? The defense can provide a counter-anchor, which has the power to mitigate the influence of either an *ad damnum* or an economist's estimate. Defense counsel should provide an

"I never would have dreamed of arguing damages at trial. Then Edward convinced us to run this mock trial and I saw it with my own eyes. Now, I'm a believer. I would certainly consider it for the right case." – Defense Counsel in a Medical Malpractice Case

alternative damages calculation during closing (where permitted) or should hire her own economist to testify on damages. For instance, in the Greene, et al. study, having a defense expert testify about damages reduced average awards 26% from $719 k to $529 k.

When a jury is given two anchors, they typically adopt one of two approaches. They either choose some midpoint between the two anchors and begin their deliberations there, or they decide which anchor is more reasonable and adjust from there (see also Marti and Wissler, 2000). In either case, the defense team does better by offering a counter-anchor than by letting the plaintiff control things.

Defense lawyers' initial concerns that arguing damages at trial will amount to a concession on liability have proved to be unfounded. The studies on the subject have shown only a very modest increase (if any) in the likelihood of liability being attached as a result of defense counsel arguing damages at trial.

I recently ran a mock trial with two juries, with two different closing arguments. To one jury, defense counsel argued damages in closing and offered a counter-anchor. The other jury received the exact same closing except that defense made no mention of damages. Both juries returned the same liability verdicts (there were three defendants) but the first jury settled on a much lower award. *Not once during the liability deliberations did any juror even mention that the defense lawyer had argued damages in closing*. It was a complete non-issue.

Be Careful What You Wish For

Research has shown that damage caps can also operate as anchors. While caps are normally recommended to keep damage awards in check, they can actually result in higher average awards. This is because juries who become aware of damage caps often adopt the cap number as an anchor and then adjust the award down from there. So, while a cap will reduce the size of the largest awards, it may perversely increase the size of awards that would not otherwise bump against the cap, which is true in most cases.

Hinsz and Indahl (1995) designed a study around a double wrongful-death case. Without any mention of a cap, the median jury award was $37,500. When a $2 million cap was imposed, the median award rose to $775,000. A $20 million cap resulted in a median award of $1 million! Tort reformers beware!

In the News

Can the mock trial be patented?

As I previewed in the May issue, there was a discussion of business practice patents for mock trial procedures, at June's meeting of the American Society of Trial Consultants (ASTC). Wendy Haller, of Wilmer, Cutler, Pickering, Hale and Dorr in Boston, gave a very enlightening presentation about the patents that had been obtained by Louis Genevie for a particular method of mock trial. The punch line seemed to be that the research into "prior art" before issuing the patents was severely lacking.

The patent was issued for a procedure whereby an attorney first conducts *voir dire* on a panel of potential mock jurors. After she determines which ones she would normally challenge, the panel is separated into a "good" group and a "bad" group. Both groups watch the mock trial and then deliberate separately. By examining the deliberations and verdicts, the attorney is then able to evaluate the wisdom of her jury selection strategies.

Some of the more experienced consultants at the meeting discussed how they had been employing procedures very similar to this for many years. In addition, a few published mock jury studies tested jury selection strategies in this way. How, then, did all of this prior art escape the attention of the patent examiner?

A patent examiner will typically only search the U.S. Patent Office's own archives of patents. Since the business practice patent is a fairly recent phenomenon, and since no one had ever applied for one for a mock trial procedure, the patent examiner found nothing. The ASTC has started an initiative to collect an archive of experimental techniques and practices, with the goal of keeping these standard methods in the public domain.

I bring this to your attention because such patents could, in the future, interfere with a lawyer's ability to hire the trial consultant of her choice to perform the studies that are most appropriate for her case. A monopoly over an investigative technique will also result in higher prices for employing that technique, because either one would have to hire the patent-holder or pay licensing fees to use the technique. Such patents might also restrict the ability of a law firm to carry out basic in-house jury studies.

The best things in life are free!

I know that many of you, or others at your firms, are handling *pro bono* cases. The ASTC has a very active *pro bono* initiative. We are encouraged to work *pro bono* for indigent defendants and I am certainly willing to provide my services for appropriate cases. I have quite a bit of expertise in criminal law and procedure, having written and taught in the area. In addition, I am quite knowledgeable about the death penalty and I am eager to assist in capital cases. So, if you know of a *pro bono* case that could use the services of a good jury consultant, please feel free to contact me.

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