
Factors Affecting Jury Damages Awards Decisions

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The use of experts in federal trials has remained fairly consistent across time. In a 1998 survey of 303 United States District Court judges by the Federal Judicial Center, 92 percent of reported trials involved expert testimony for the plaintiffs, 79 percent involved expert testimony for the defendants, and 73 percent involved expert testimony for both sides. A key finding: experts were more likely to be used in jury trials than in bench trials.

According to the same survey, testimony on damages was the third most frequently addressed issue by experts. In order, the issues were: the existence, nature, or extent of injury/damage (68 percent); the cause of injury/damage (64 percent); amount of recovery to which the plaintiff was entitled (44 percent); the reasonableness of a party's actions (34 percent); industry standards or state-of-the-art (30 percent); standard of care owed by a professional (25 percent); and knowledge or intent of a party (13 percent).

In other surveys based on juror interviews, one of their most frequent complaints was insufficient guidance regarding the award of damages. See Greene & Bornstein, "Precious Little Guidance: Jury Instruction on Damages Awards," 6 *Psychology, Public Policy, & Law* 743 (2000); Vidmar, "The Performance of the American Civil Jury," 40 *Ariz.L.Rev.* 849 (1998). Researchers have noted that jurors seek anchors, i.e., amounts or information they can use as reference points in determining an appropriate amount

for damages awards. The most common anchor, because it is often the only dollar amount proffered, was the damages award suggested by the plaintiffs' attorneys. This "suggestion" from the plaintiff of a specific dollar award is usually known as the ad damnum clause.

This article reviews the psychological research literature on the effect of ad damnum on jury damages awards, and then reviews the effect of expert testimony on damages on jurors' damages awards.

Impact of Ad Damnum

Post-trial interviews indicate that jurors often use ad damnum as an "anchor" in determining their damages awards. From that anchor they can go up or down in their final determination of an amount to award. See Raitz, "Determining Damages: The Influence of Experts on Jurors' Decision Making," 14 *Law & Human Behavior* 385 (1990). In an unpublished study by Zuehl, reported by Raitz, mock jurors were presented with a personal injury case with varying damages requested by the plaintiff: \$10,000; \$75,000; \$150,000; or a request for "substantial compensation." The study did not include expert testimony. The mean awards by the mock jurors in testimony. The mean awards by the mock jurors in the respective requested-damages conditions were: \$18,000; \$62,800; \$101,400; and \$74,000. The results indicated influence of ad damnum, downward in two of three hypothetical scenarios.

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In another study, research participants were presented with summaries of two personal injury cases. See Malouff & Schutte, "Shaping Juror Attitudes: Effects of Requesting Different Damages Amounts in Personal Injury Trials," 129 *J. Social Psychology* 491 (1989). The ad damnum amounts requested by plaintiffs' attorneys were varied, while the counter amounts suggested by the defense attorneys were held constant. In one case, the higher the ad damnum, the higher the damages awards. In the other case, the most extreme plaintiff's request resulted in an average damages award lower than the damages award for the more moderate plaintiff requests.

The jurors were willing to use the ad damnum clause as an anchoring point for their damages awards. Compared with the dollar amount they would have arrived at if left to their own devices, the ad damnum tended to increase the jurors' damages awards, but was not accepted as is. The jurors appeared to take into consideration the source of the information and adjusted the amount downward, especially if they judged that the requested amount was exorbitant, based on their assessment of the trial evidence. There may then be a boomerang effect, in that the damages awards may be lower than they would have been had a more reasonable ad damnum been requested.

Impact of Expert Testimony On Damages

The Raitz study cited above examined the influence of expert testimony on jurors' damages awards. The research participants were 150 prospective jurors awaiting service in a Colorado state court. The research case was an age discrimination dispute that was presented as bifurcated – the mock jurors were informed that liability had been determined, and that their task was to determine damages. Three separate combinations of damages expert witnesses were presented: an economist for the plaintiff, an economist from each side, and no expert testimony. The plaintiff requested \$719,354 for lost wages; the defense counter amount was \$321,000. The researchers measured jury awards for lost wages and pain and suffering (involving no expert testimony).

The plaintiff's-expert-only scenario resulted in the highest mean damages awarded for lost wages (\$573,560), followed by the both-experts condition (\$544,729), and then the no-expert condition (\$429,582). The same pattern held true for the mean total compensatory damages awards – respectively \$644,382; \$628,116; \$502,582. Thus, one can conclude that the presence of expert testimony influenced damages awards in an upward direction.

In the Raitz study, there was little indication of an aver-

aging effect of conflicting expert testimony. In the both-experts condition, jurors tended to endorse one or the other of the expert's figures, as judged by the clustering in the distribution of individual jurors' damages awards. The plaintiff's expert seemed to have more influence than did the defense expert in that there was more adjustment of the defense expert's figures. Jurors who endorsed the defense expert's figures nevertheless tended to adjust the amount upward by \$100,000, indicating that they believed the expert's estimate was on the low side.

The presence or absence of expert testimony seems not to have an influence on awards for pain and suffering, i.e., there were no carryover effects of expert testimony on damages not addressed by any expert. Jurors in the no-expert scenario anchored on the plaintiff's annual salary figure at the time of termination: the plaintiff's salary multiplied by four (the number of years from termination to trial) or multiplied by 11 (the number of years from termination to age 65). Factors other than expert testimony that the jury reported as having influenced their damages awards were: possible raises or promotions; inflation; possible career changes; and attorney's fees.

Inconsistency with jurors' own perceptions of and experiences with the same subject matter may reduce the influence of the expert testimony. For example, in interviews with actual Delaware jurors, a damages expert made generous assumptions concerning the pension that a plaintiff.

For example, in interviews with actual Delaware jurors, a damages expert made generous assumptions concerning the pension that a plaintiff would have earned had he remained healthy and worked until old age. His assumptions contradicted jurors' perceptions of pensions in the state, and they adjusted his estimates downward accordingly. See Hans & Ivkovich, "Jurors and Experts," 16 *Advocate: The Magazine for Delaware Trial Lawyers* 17 (1994).

The review of published research literature described below indicates that the effect of expert testimony on damages parallels the effect of ad damnum clauses on damages. The presence of expert testimony on damages increased awards when compared with damages awards in the absence of expert testimony. This should not be surprising. In explaining how they reached their dollar amounts, the experts undoubtedly introduced new information that the jury had not taken into account in its naive inclinations towards damages. The new information was likely to increase awards. Jurors relied more on the plaintiffs' damages expert than they did the defense expert. They took into account the possible partisanship of the experts and adjusted their estimates accordingly

Table 1. Sample Damages Assessment Study

Defendant's Negligence	Plaintiff's Negligence	Probability	Plaintiff's Responsibility	Damages Award	Actual Risk
Yes	Yes	.42	38%	\$9,250,000	\$5,735,000
Yes	No	.39	—	\$11,682,483	\$11,682,483
No	Yes	.19	—	—	\$0
No	No	—	—	—	\$0

Estimated Risk = \$6,964,868

– downward for the plaintiff and upward for the defense. They did not appear to be overawed by the damages experts. There were no carryover effects of the expert on damages not addressed by the expert. When expert testimony contradicted the jury's opinions on familiar subject matter, it adjusted the expert's estimates in line with its perceptions.

Damages Assessment Studies

A damages assessment study is designed to make reasonable predictions about the amount of damages a jury may award. One approach is to conduct a mock trial. A jury research consulting group can work with attorneys and financial experts in organizing such mock trials, can help understand how the jury processes information about compensatory and punitive damages, and can show an attorney how he or she can effectively communicate with the jury.

The basic research procedure for a damages assessment study starts with a questionnaire to be completed by each of the mock jurors. The procedure adheres to principles of accurate and reliable empirical research: (a) representative sampling; (b) balanced and comprehensive case presentations; and (c) individual juror assessment. Representative sampling is achieved by recruiting residents of the trial venue who are demographically similar to the real jury pool. The mock jurors hear and make their decisions on the basis of attorney presentations that reflect as closely as possible the strengths of each side's expected case. Representative sampling and realistic attorney presentations are essential factors in achieving the most accurate prediction of damages amounts. The third factor in predictive accuracy is individual juror assessment, made possible by a sufficient sample size.

One approach to damages assessment derives from economic valuations incorporating the possible verdict outcomes. It offers an immediate, bottom-line answer to the client's question, "How risky is this case as it currently stands?" A second approach is based on probabilities of

damages awards associated with different compositions of the jury. This information provides the trial team with a means of assessing the risk posed by the actual empanelled jury (assuming an accurate assessment of those jurors' verdict orientation).

Damages Assessment Based On Verdict-Form Items

A valuation of the damages that might be awarded can be made using the probabilities associated with favorable and unfavorable verdict decisions and damages awards. This damages assessment is more reliable than a priori decision modeling approaches that rely on intuitive estimates of probabilities and dollar amounts. It is also superior to actuarial approaches since the likelihood of finding resolved matters that have similar characteristics is low.

An example of a damages assessment study is presented in Table 1. The case involved issues of comparative negligence. The values were taken by measuring the mock jurors' reactions after they heard both sides of the case, but before they engaged in deliberations.

The damages assessment study creates a composite jury outcome by taking the probability of each verdict combination (the actual number of mock jurors who voted that particular verdict combination) and the associated median damages award for that scenario. Some mock jurors awarded damages for verdict combinations that would not sustain damages awards at trial. The assessment study valued these juror's damage awards as \$0.

The overall expected risk for the comparative negligence case was the sum-total of these weighted median damages awards (about \$7 million). This prediction provides the client with pre-trial options: (a) continue to trial, but revise the case presentation based on the jury research findings and strategic recommendations; or (b) negotiate to a reasonable settlement outcome.

Table 2. Plaintiff/Defense Juror Composition Odds

Jury Composition	Probability
6 Plaintiff/0 Defense	.2084
5 Plaintiff/1 Defense	.3735
4 Plaintiff/2 Defense	.2789
3 Plaintiff/3 Defense	.1111
2 Plaintiff/4 Defense	.0249
1 Plaintiff/5 Defense	.0030
0 Plaintiff/6 Defense	.0001

Damages Assessment Based On The Psychological Verdict

This damages assessment provides probability estimates of likely total damages awards associated with various jury compositions. Such information will enable the trial team to reassess its risk level after voir dire has been completed and it knows what type of jury it will face.

This assessment can be done for any jury size. Suppose a six-member jury. The proportion of plaintiff jurors and the distribution of their median damages awards has been used as the baseline indicator. In this actual jury research project, 77 percent of the research participants favored the plaintiff after hearing the case presentations. The expected odds of a particular plaintiff/defense juror composition in a six-member jury are presented in Table 2.

Note that in this example the likelihood of ending up with a jury that would award some amount of damages was 97 percent (i.e., the likelihood of ending up with a jury composed of at least three plaintiff-oriented jurors).

The probability distribution of jury damage awards risked in this example is shown in Table 3.

This study provided the defense with post-voir dire options based on the attorneys' and jury consultants' assessment of the pro-plaintiff orientation of the jury. If they estimated it to be predominantly pro-plaintiff and the client regarded the damages award expected from such a jury composition to be prohibitive in amount, the attorneys could continue to negotiate a pre-deliberations settlement. If the attorneys and jury consultants estimated the jury to include a comfortable number of defense-oriented jurors, the attorneys could adjust their planned case presentation accordingly (e.g., call or not call a problematic witness, stress versus play down a specific defense or damages argument, take a tougher or more accommodating stance if settlement negotiations continue).

In one damages assessment study, a company was confronted with a personal injury action brought by a contract worker who claimed permanent and total disability resulting from his workplace fall. The results of the study (low damages and strategic recommendations to exploit juror emotions to defensible points uncovered by the research) gave the client the confidence to press forward to trial. Apparently, the plaintiff was completely demoralized by the client's tough stance throughout settlement negotiations and its all-guns-loaded approach to trial preparation (the client paid for graphic exhibits to buttress defense strengths identified during the jury research, and also funded juror profiling and voir dire preparation efforts). They capitulated just before voir dire, accepting the client's settlement offer.

In another study, an employee claimed wrongful termination based on retaliation for an earlier complaint of sexual harassment. The jury research came forth with an estimated jury award of about \$1 million in total compensatory and punitive damages. It also uncovered promising areas in which to improve the defense case, such that

Table 3. Probability Distribution of Jury Damages Awards

Plaintiff-Oriented Jurors on Jury	Likely Total Damages	Probability
5-6	Median Total Award for All Plaintiff Jurors	.58
4	Average of the Median Total Awards for Plaintiff Jurors and for All Jurors	.28
3	Median Total Award for All Jurors	.11
2	Median Compensatory Damages Award for All Jurors	.02
0-1	\$0	<.01

the corporate client decided to fund a second round of research to test the impact of the revised defense presentation on a different sample of mock jurors. In this second round of research, the estimated compensatory and punitive damages awards dropped to about \$100,000. Based on additional strategic recommendations for defense arguments and for supporting graphics exhibits, the client decided to reject settlement and proceed to trial. The trial resulted in a plaintiff verdict, but a damages award of only about \$50,000, which the client regarded as a successful outcome.

Conclusion

To accurately reflect trial outcome, damages award estimates must be based on attorney presentations that accurately reflect the relative strengths of the plaintiff and defense cases at trial. In other words, estimates of awards can only be as accurate as the estimates of each side's actual case arguments, themes, and damage theory. Determining how best to present the case dispute requires careful consultation between the attorneys, financial experts, and jury research consultants.

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