

A Look Into How Jurors Reach High Damages Awards

By **Richard Gabriel and Emily Shaw** (February 8, 2024)

On an icy road near Amarillo, Texas, an 18-wheeler driven by Sarah Gregory jackknifed across the road and killed four people in November 2013.

One of those killed was a truck driver whose family sued Gregory and her employer, New Prime Inc. At trial, the jury awarded \$16.8 million to the truck driver's family, of which \$15 million was for noneconomic damages.

In reversing the award in the case of Sarah Gregory and New Prime v. Jaswinder Chohan in June 2023, the Texas Supreme Court stated that, "to guard against arbitrary outcomes and to ensure that damage awards are genuinely compensatory, the plaintiff in a wrongful death case should be required to demonstrate a rational connection, grounded in evidence between the injuries suffered and the dollar amount awarded."^[1]

Whether it's the \$83 million verdict against Donald Trump last month, the \$148 million verdict against Rudy Giuliani, the \$1.56 billion verdict against Monsanto Co. in a Roundup case, the \$980 million verdict against Mitsubishi, or the \$261 million verdict against Johns Hopkins All Children's Hospital in the "Take Care of Maya" case, there is no shortage of news these days about the size and frequency of large jury awards with weekly inventories of product, patent or personal injury verdicts.

In fact, there is evidence that jury verdicts have increased.^[2] In this article, we will explore the challenges that jurors have in deciding damage awards, the nonevidentiary and extra-legal methods they use to award damages, and what new research tells us about the themes and jury characteristics of high-damages jurors.

Challenges Jurors Face in Deciding Noneconomic Damages Awards

California's jury instruction language on noneconomic damages states that "[n]o fixed standard exists for deciding the amount of these noneconomic damages. You must use your judgment to decide a reasonable amount based on the evidence and your common sense."^[3] This illustrates a damages conundrum and some of the most challenging questions that attorneys and jurors struggle to answer.

How do you provide evidence of something as inherently subjective as emotional distress or pain and suffering? How does a plaintiff provide evidence of pain and suffering or emotional distress that they are reasonably likely to incur in the future when no one can really predict a future emotional state? And what is a "reasonable amount"?

In the Gregory case, the attorneys made a number of arguments that have become common for plaintiff attorneys in personal injury cases.

In referencing the value of a human life, they discussed the cost of a fighter jet, priceless artworks, and the number of miles that New Prime's trucks had driven that year. This is



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called anchoring,[4] a psychological principle in jury research that describes how jurors, if they have little tangible evidence like medical bills or lost wages, will gravitate toward any number to decide on a "reasonable amount" of noneconomic damages.

To encourage jurors to award higher damages, plaintiff attorneys sometimes discuss the salaries of star athletes, pop stars and CEOs, hourly or daily labor rates, the size or revenue of a company they are suing, or the number of products the defendant company has sold in a given year. These numbers are used to anchor jurors to a high request for damages.

Another way plaintiff attorneys justify high noneconomic damage award requests is by expanding jurors' perception of the array of award categories. Plaintiffs break down the components of noneconomic damages and ask jurors to award specific amounts for each category of care, comfort, loss of enjoyment of life, disfigurement, loss of household services and other categories described in the jury instructions.

Plaintiff attorneys who are aware of the effect of anchoring will often dismiss smaller economic claims such as a plaintiff's low-paying job or small medical bills, fearing that jurors will use that low economic damage anchor to base their noneconomic figures.

In addition to anchoring and category splitting, which primarily take advantage of the challenges jurors have in applying specific numerical values to abstract concepts, another key aspect to understanding high damage awards is recognizing the various motivations that can drive jurors to reach such high awards.

What Drives Large Damage Awards?

There are five main nonevidentiary, extra-legal components to large damage jury awards: (1) anger, (2) fear, (3) empathy or sympathy, (4) uncertainty and (5) activism.

Anger

Anger is an emotion jurors may feel toward a defendant's actions or inactions, behavior or attitude. The angrier a jury gets at the conduct of the defendant, the more money they are likely to award. Jurors in mock trial deliberations often speak about punishing a defendant for their conduct, even in cases where no punitive damages are alleged. Jurors may also inflate their damage awards if they become angry with the trial presentations or perceived attitude of defense counsel or defense witnesses.

Fear

Fear is typically at the center of the often-discussed "reptile theory." [5] Testimony and evidence about safety and community prompts jurors to place themselves in the shoes of the plaintiffs. While not explicitly a golden rule violation, witness examinations and experts that highlight the dangers in a product, premises or behavior can both encourage jurors to worry about how they would feel at risk in a similar situation. Jurors are motivated by this fear to take action to protect themselves and their community through their award.

Empathy or Sympathy

Empathy or sympathy encourages jurors to understand how devastating the defendant's conduct was to the plaintiff or to actually feel the plaintiff's pain, with the intent of increasing the awarded damages.

Uncertainty

Uncertainty is when a jury wants to award money to an injured plaintiff "just in case" they experience problems or need additional medical or psychological care in the future. Modern jurors are keenly aware of the high cost of living and medical care and anticipate those costs will continue to rise. Uncertainty about the stability of medical costs drives jurors to lean toward more generous estimates of future care costs.

Activism

Activism is where a jury believes that its verdict should have a social message above the actual evidence in a case. This is closely related to a jury's punitive impulse, except their desire to send a message with their verdict may be directed toward the specific defendant or an industry such as trucking, healthcare, pharmaceutical, government agency or product manufacturer.

Risks for Plaintiff Attorneys

Please note that each of these emotional constructs also poses a risk for plaintiff attorneys.

Juries can grow angry if they feel the plaintiff is overreaching or the attorney is trying to manipulate their emotions. They can fear that a large damage award will drive up insurance rates or product costs or be sympathetic to a doctor that tried to save a patient but failed. Their uncertainty can make them feel that a plaintiff has not met their burden, and some jurors may refuse to award higher damages because of tort reform activism.

All of these nonevidentiary and extra-legal reactions can be used by juries to either increase or decrease damages.

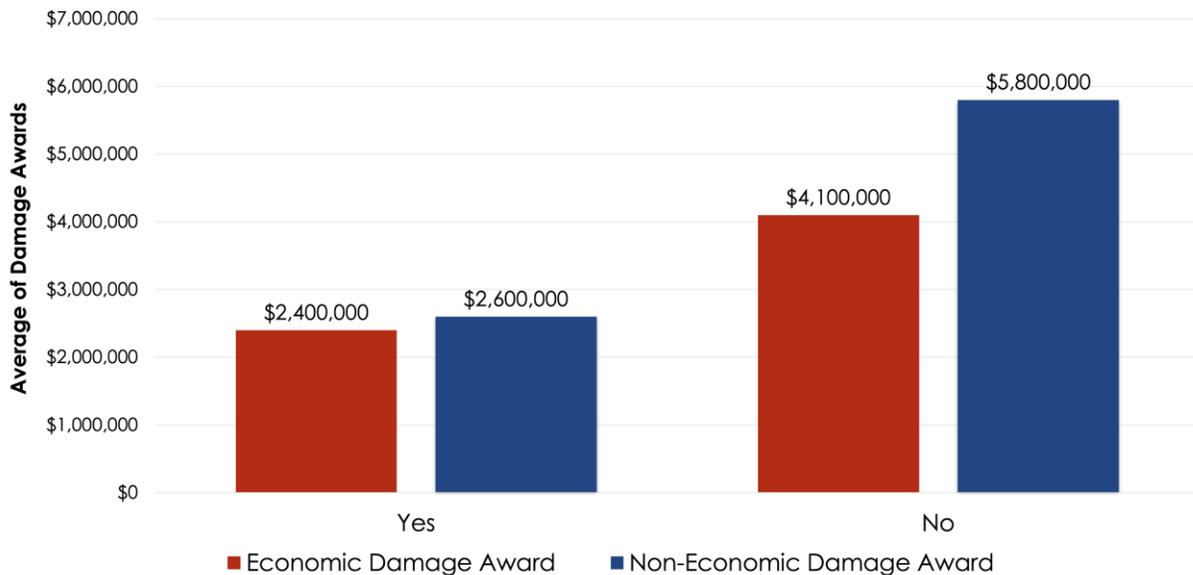
Research Findings

Considering the challenges that jurors have in precisely calculating the value of noneconomic harms, we conducted a study with 164 participants between Oct. 23 and Nov. 15, 2023, to better understand what types of information jurors used to decide damages.

The online research study involved a hypothetical admitted liability case where a woman lost a leg after a serious car accident. Our mock jurors viewed plaintiff and defense presentations and were asked a series of questions after viewing the presentations. We noted several interesting results from the research.

Within this admitted liability case, jurors who felt the defense genuinely accepted accountability awarded less damages. This shows that if jurors feel that a defendant is truly accepting responsibility for their actions, even in a disputed liability case, it greatly reduces a jury's motivation to send a message with a higher-damage award.

Do you feel like the Defense is genuinely trying to take accountability for the actions of the Defense, Mr. Williams?"

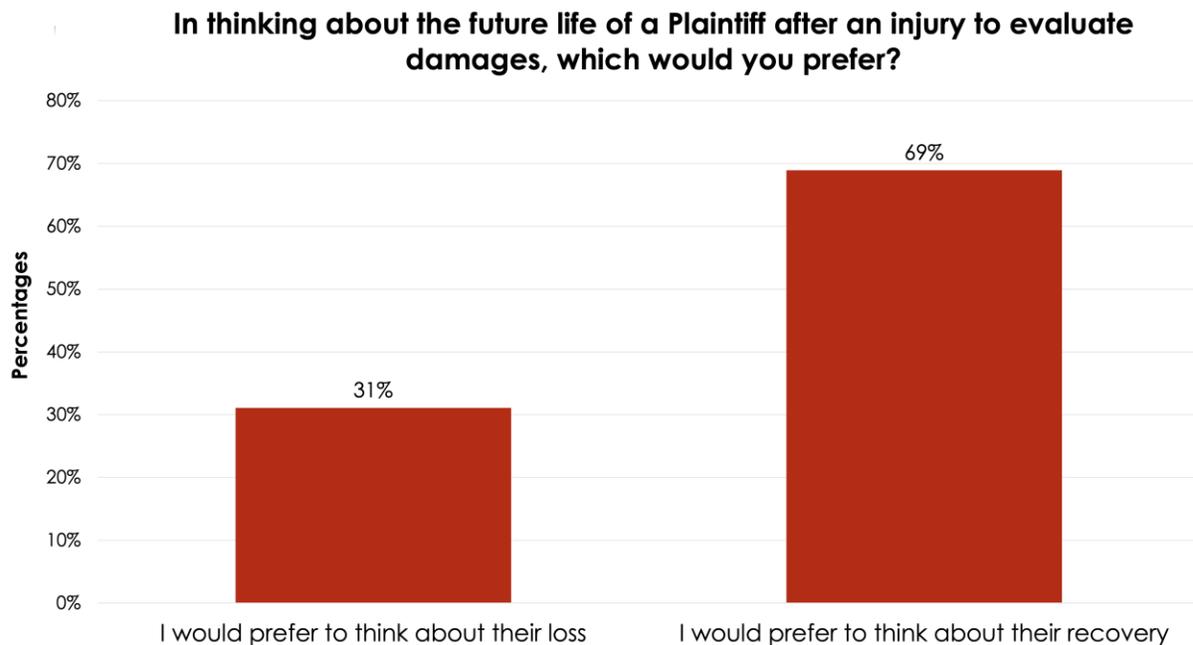


To test the hypothesis that juror anger increased damages, we tested whether an empathetic tone from the defense would reduce this inclination. Our respondents stated they wanted the defense to show greater sympathy for an injured plaintiff, but we found that too much expressed sympathy can emphasize the suffering of a plaintiff and prompt jurors to award higher damages.

However, prior experience has also revealed that too little expressed sympathy for the plight of a plaintiff or a dismissive attitude toward their damages may anger jurors and cause them to award a higher amount.

We also wanted to evaluate how jurors look at future noneconomic damages, so we asked the following question: "In thinking about the future life of a Plaintiff after an injury to evaluate damages, which would you prefer?" The options were "I would prefer to think about their loss" or "I would prefer to think about their recovery."

Sixty-nine percent of respondents said they would prefer to think about an injured plaintiff's recovery. This is an interesting result, given that most future damages cases are focused on a seemingly pessimistic view of the future life of a plaintiff. Respondents that said they would prefer to think about an injured plaintiff's recovery tended to give lower awards than those that said they would prefer to think of their loss.



Similarly, we asked jurors which of the following statements they most believed: (1) "after a traumatic loss, people mainly suffer from their loss and do not adapt well to their new life," or (2) "after a traumatic loss, people may suffer from their loss but can adapt well to their new life." Jurors who gave lower awards were disproportionately more likely to say that people can adapt well to their new life.

Reinforcing the view that more jurors who appear pessimistic about the future tended to give higher awards, we also asked jurors: "In general, how strong or weak are people when recovering from a traumatic loss?" Jurors could respond on a scale with four options: "very strong," "somewhat strong," "somewhat weak" or "very weak." Jurors who said that people recovering from a traumatic loss are very weak gave higher awards.

These three findings are a signal to defense attorneys to focus more of their attention in discovery on the ability of the plaintiff to recover from a traumatic event.

Defense counsel often tends to shy away from offering a damages number in a disputed liability case. To test how this preference might affect jurors' awards, we asked respondents whether they, as jurors, would prefer a defense attorney to offer an alternative damage number to the plaintiff's number or not.

In our study, jurors who gave higher awards were disproportionately more likely to say that the defense should not give a number. This suggests that the instinctual desire of defendants to abstain from giving a number may be counterproductive. Even if jurors say they don't want a defense number, without one, they will increase their award by using the plaintiff's higher number as a reference.

Conclusion

In the Gregory case, the Texas Supreme Court concluded that the plaintiff attorneys encouraged the jury to use improper considerations that had no rational connection to the

evidence of damages in the case. Often, jurors feel like they have insufficient evidence to decide damages, yet they are charged with coming to a verdict on that very question. This is the damages paradox.

Deciding on appropriate damages is one of the most difficult challenges for a jury, especially in noneconomic cases. By better understanding the discreet components outside the law and evidence that jurors use to decide cases, counsel can plan better in the discovery process to provide jurors with more substantive methods to come to a reasonable number.

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[1] <https://www.txcourts.gov/media/1456667/210017.pdf>.

[2] https://institutelegalreform.com/wp-content/uploads/2022/09/NuclearVerdicts_RGB_FINAL.pdf.

<https://marathonstrategies.com/wp-content/uploads/2023/03/Corporate-Verdicts-Go-Thermonuclear-0313.pdf>.

<https://institutelegalreform.com/wp-content/uploads/2023/07/Roadblock-The-Trucking-Litigation-Problem-and-How-to-Fix-It-FINAL-WEB.pdf>.

[3] <https://www.justia.com/trials-litigation/docs/caci/3900/3905a/>.

[4] <https://www2.psych.ubc.ca/~schaller/Psyc590Readings/TverskyKahneman1974.pdf>.

[5] Reptile: The 2009 Manual of the Plaintiffs Revolution by David Ball and Don Keenan (Balloon Press 2009) The book includes trial strategies to put jurors into survival mode and to get them to consider how the lawsuit affects community safety.