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2024 Transportation Practice Group Seminar

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The Broadmoor

Colorado Springs, Colorado

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Hot Takes!

What do you mean Plaintiff is NOT seeking medical specials at trial ???

**Identifying and Combatting
Improper Tactics To Inflate
Damages**

PRESENTERS



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WHY ON EARTH WOULD PLAINTIFF COME TO TRIAL AND *NOT* PUT UP EVIDENCE OF MEDICAL SPECIALS AT TRIAL??

- Plaintiff's have been using anchors at trial for years to improperly inflate damages
- Now in smaller cases, they want to “*unanchor*” the verdict from the medical bills claiming they will undermine the impact of the injury on pain / suffering ...
- ... and “anchor” to something more substantial



WHAT IS ‘THE ANCHORING EFFECT’?

- Have to understand the “anchoring effect”
- A cognitive bias that causes us to rely on a reference point, or “anchor,” when making future decisions or evaluations
- Psychologists - “an effect where individuals’ numerical judgments are inordinately influenced by an *arbitrary* or *irrelevant* number”



WHAT IS 'THE ANCHORING EFFECT'?

- Well known sales technique –
 - \$1,000 Purse
 - \$300 Bottle of Wine
 - Top of the Line Automobile



WELCOME TO OUR WORLD!

- Plaintiff's attorneys asking jurors to award ever higher awards for pain and suffering ... and often getting it!
- Research shows, "*the more you ask for, the more you get*"
- The practice has greatest impact on non-economic damages / pain and suffering



WELCOME TO OUR WORLD!

- Why Focus On Noneconomic Damages / Pain and Suffering ?
 - These awards are highly subjective and not easily quantified by \$\$\$ amounts
 - “Anchor creates a psychologically powerful **baseline** for jurors struggling with a monetary value for pain and suffering ...”
 - Trial = cognitive overload
 - *An anchor is welcomed to reduce the cognitive effort to determine non-economic damages when worn out.*
 - Allows jury to compromise and negotiate up or down ... but key is that baseline is a **big** [arbitrary and irrelevant!] number



RECENT EXAMPLES OF TRIAL ANCHORS

Catastrophic Cases / Wrongful Death

- Sports Salaries
 - Ga \$22 million [Pete Law]
- CEO Compensation
 - Ga \$155 million [Jim Butler]
- Priceless Art
 - Texas - \$16.5 million [Gregory v. Cohan]
- *"Can't come back in 5 years ..."*



GROWING TREND – Exclude All Evidence of Economic Damages

What about *smaller cases* where special damages / medical bills are not that impressive?

- Exclude all evidence of medical specials / economic damages
- Anchor to something with more value ... it works in bigger cases why not try it in smaller cases!
- Focus only on **pain / suffering** –
“Medical expenses bear no relation to amount of suffering ...”
- Happening especially in locations where evidence is based on what is **paid** v. what is **billed**



RECENT EXAMPLE - \$1.6 million verdict

2024 Fulton County, GA

- Disputed liability bicycle v. bicycle collision
- Lower medical bills
- *“We did not want jury to feel tied to that number when determining pain and suffering ...”*
- Verdict - \$1.6 million [17X's meds]
- Anchors:
 - Had to give up something plaintiff loves [biking]
 - Treatment had good result but has lingering pain

IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

SEAN MCGAHA,
Plaintiff,

v.


ROBERT PEEK,
Defendants.

CIVIL ACTION
FILE NO.: 22EV005185

VERDICT

We, the jury, award damages to the Plaintiff Sean McGaha in the amount of
\$1,600,000.00.

This 25 day of January 2024.


FOREPERSON
Kenneth Young
Print Name

GOOD OPINION REGARDING IMPROPER ANCHORS

- Gregory v. Cohan – 2023 Texas Supreme Court
- Facts
 - 18-wheeler jack-knifed – icy, dark highway
 - \$16.5M verdict for one of the decedents – 90% non-economic damages
 - *Big case but the Court's reasoning as to improper anchors applies to smaller cases too ...*



RECENT EXAMPLES OF TRIAL ANCHORS

- In closing, counsel referenced a \$71 million cost of F-18 fighter jet ...



RECENT EXAMPLES OF TRIAL ANCHORS

- ... and a Rothko painting that sold for \$186M



RECENT EXAMPLES OF TRIAL ANCHORS

- Texas Supreme Court - Reversed

Here, the plaintiffs produced—and the court of appeals recounted—sufficient, even ample, evidence demonstrating the *existence* of compensable mental anguish and loss of companionship suffered by Deol's family. *But nothing in the record or in the plaintiffs' arguments demonstrates a rational connection between the injuries suffered and the amount awarded.* The arguments made to the jury regarding the proper amount included references to the price of fighter jets, the value of artwork, and the number of miles driven by New Prime's trucks. *Rather than rationally connect the evidence to an amount of damages, these arguments did just the opposite by encouraging the jury to base an ostensibly compensatory award on improper considerations that have no connection to the rational compensation of Deol's family.*

RECENT EXAMPLES OF TRIAL ANCHORS

- Texas Supreme Court – Reversed
- How to determine non-economic damages
 - Hard to do
 - This case example of how “not to do it”

We begin with a few examples of how not to do so. During closing argument, counsel for Vasquez and Perales (other decedents) attempted to support the large request for noneconomic damages using a tactic that some amici refer to as “unsubstantiated anchoring.”⁹ We understand unsubstantiated anchoring to be a tactic whereby attorneys suggest damages amounts by reference to objects or values with no rational connection to the facts of the case. Analogies employed by counsel in this case included a \$71 million Boeing F-18 fighter jet and a \$186 million painting by Mark Rothko.

Of course, the cost of a fighter jet, the auction price of a coveted painting, or any other expensive comparator are all equally flawed analogies. After learning that a particular aircraft or painting sells for many millions of dollars, jurors are no closer to gaining a sense of how to compensate the family for their injuries. The self-evident purpose of these anchors, however, is to get jurors to think about the appropriate damages award on a magnitude similar to the numbers offered, despite

RECENT EXAMPLES OF TRIAL ANCHORS

- So, in smaller cases, may not get anchors like fighter jets, or priceless paintings, but may get:
 - Per diem arguments – in pain every day, give \$___ for 8 hours a day, 5 days a week for life expectancy
 - Asking for a number or hourly rate for each component of pain and suffering
 - Can't do something I love .. riding bike, playing with child, walking pets
 - Not seeking medicals or lost wages to focus on *bigger* anchors . . .



DEFENSE STRATEGIES

So now that we know what anchoring is and what plaintiffs are doing ...

What can we do about it?



DEFENSE STRATEGIES FOR ANCHORING

Strategies *before trial*:

- Motions *in limine*
- *Voir Dire*



DEFENSE STRATEGIES FOR ANCHORING

Motions *in Limine*

1. Ask judge to exclude arguments based on

- *Different facts*
- *Different people* (e.g., celebrities, athletes)
- *Different injuries/damages*
- *Non-sequiturs* (e.g., lotto jackpots, CEO compensation, expensive things)
- *“Per diem” arguments*
- **Same arguments in Texas case apply to smaller cases**



DEFENSE STRATEGIES FOR ANCHORING

Motions *in Limine*

2. Ask judge to allow Defendants to put in evidence of medical expenses

[or challenge *Plaintiffs* motion to exclude such evidence when their recovery is not being sought]

Primary Argument -

- Medical bills *are* relevant to determine the nature and extent of the claimed injuries and it should not matter who puts in the evidence.



DEFENSE CASES FOR USING MEDICAL BILLS

- *Nestler v. Fields*, 824 S.E.2d 461 (SC App. 2021)
 - Jury awarded plaintiff \$7,117 in damages – the amount of his medical bills.
 - Plaintiff did not put up medical bills – *the Defense did*
 - Plaintiff’s strategy was to focus on pain & suffering
 - Objected to defense introducing bills which “bore no relation to the magnitude of his damages” and were misleading to the jury and unfairly prejudicial
 - Appellate Court upheld trial court:
 - “We see no reason [the jury] should be kept ignorant of the cost of [plaintiff’s] medical treatment in determining the facts. What they did with that evidence was largely up to them”



DEFENSE CASES FOR USING MEDICAL BILLS

Gladstone v West Bend Mutual, 166 N.E.2d 362 (Ind. App. 2021)

- Jury award of \$0.00 in damages.
- Plaintiff moved to exclude evidence of medical bills on the basis he was not seeking recovery of medical expenses.
- Defendant filed a motion in limine seeking to present the bills – granted by court
- Appellate Court upheld trial court:
 - *“We begin by rejecting [plaintiff’s] argument that evidence of medical bills is never relevant to the question of pain and suffering . Common sense and experience dictate that a more serious injury generally brings with it greater medical bills as well as pain and suffering.”*
 - *“ . . .we decline [plaintiff’s] invitation to adopt a bright-line rule that evidence of medical bills is always inadmissible on relevance grounds when their recovery is not sought.”*



DEFENSE CASES FOR USING MEDICAL BILLS

Barkley v. Wallace, 595 S.E.2d 271 (Va. 2004)

- Plaintiff sought to introduce medical bills at civil trial - even though they had been discharged in bankruptcy - and claimed they were relevant for proving pain and suffering.
- Trial Court agreed with defense that they were inadmissible under the circumstances.
- Virginia Supreme Court reversed, finding:
 - *“ . . . the medical bills before us were relevant because they tended to establish the probability of [plaintiff’s] claims that she experienced pain and suffering as a result of the accident.”*
- Same Argument Should Apply to Defendants Use of the Medical Bills
 - Not fair to only be admissible by plaintiffs to support the extent of the claimed pain and suffering.



DEFENSE STRATEGIES FOR ANCHORING

Voir Dire Questions

- Test jurors' willingness to listen to evidence
- Pre-try your case as much as judge/venue will allow
- Emphasize jurors' duty to
 - Follow the law
 - Consider the facts of *this case*



DEFENSE STRATEGIES FOR ANCHORING

Strategies During Trial

- “Reverse Reptile” techniques
- Timely objections
- Attacking support for plaintiff’s anchor
- Counter-Anchoring



DEFENSE STRATEGIES FOR ANCHORING

Reverse “Reptile” Techniques

- Goes hand-in-hand with countering verdict anchoring
- Humanize and create empathy for your client
- Emphasize fairness for *all* parties
- Make your client your biggest asset at trial



DEFENSE STRATEGIES FOR ANCHORING

OBJECT!

- During *voir dire*
- During opening statement
- During closing argument
- Be courteous and succinct—but be clear
- *Contemporaneous objection may be required to preserve issue for appeal*



DEFENSE STRATEGIES FOR ANCHORING

Attack/Erode Plaintiff's Anchor

- Fairness/reasonableness—continue your theme
- Just say it!
 - *“That’s just a number he made up!”*
 - *“What does LeBron’s salary have to do with anything?”*
 - *“Mrs. Plaintiff was never going to be a brain surgeon . . .”*
- Explain concept of anchoring to the jury
- Set this all up by showing jury **you** are the reasonable one



“I’m beginning to wonder if both you guys are lying.”



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DEFENSE STRATEGIES FOR ANCHORING

Counter-Anchoring

- Give jurors another choice or counterpoint for their discussions
- You can do this **even if you dispute fault or liability**
- You are simply providing information
- Tie anchor to **facts/figures in your case** – ex., medicals, job history/salary

-“Why didn’t you hear anything about medical expenses?””



DEFENSE STRATEGIES FOR ANCHORING

Post Trial

- Renew objections
- Make the Court rule on objections
- Preserve issues for appeal





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Thank You!

If you have any questions,
please contact the
presenters