

Some Juror Rules For Determining Damages

by David Davis

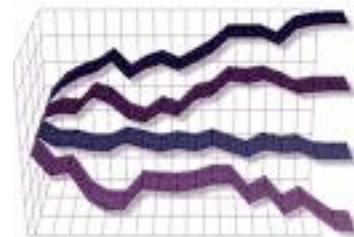
Ever tried a case in which a jury has awarded damages? If so, you probably know that the model of the jury as a group of rational decision makers who evaluate all the available evidence to make an informed damage award is not a useful or accurate one. Instead many lawyers come away from the experience believing that jurors are entirely irrational and that the damages awarded bear no relationship to the damage theories presented. These lawyers see the damage awards as entirely unpredictable and uncontrollable.

A more measured and accurate model views jurors as people who try to maximize the quality of their decisions by relying on the cues of others, utilizing heuristics (or short hand rules of reasoning to deal with uncertainty), making comparative judgments, and being influenced by subjective emotions. Significantly, many of the damage decisions jurors make may not be rational in the traditional sense but they may still follow predictable patterns and systematic rules of reasoning.

The new field of economics called behavioral pricing looks at these factors in understanding how consumers make pricing decisions in deciding whether or not to purchase a product. Analogously, jurors determining a damage amount are making a pricing decision. They are deciding what the appropriate “price” is for the damages that have been caused. Studies in behavioral pricing show that consumers have systematic biases that come into play in evaluating the magnitude of prices and pricing differentials. The following review summarizes some of the findings and implications for jurors’ damage awards.

1. Jurors’ evaluation of the magnitude of a damages figure can be affected by how precise the number is.

Consumers have a propensity to judge precise amounts of money to be lower in magnitude than similar round prices (Thomas, Simon, & Kadiyali, 2007). In research conducted by Cornell University economists, consumers were found to pay higher prices for real estate when the list prices were more precise. Because we tend to use precise numbers for small amounts and round numbers for large amounts, sellers can make buyers perceive a price is smaller by replacing zeros with other digits. A precise price like \$325,425 is seen as lower than a round one like \$325,000 even though the latter is, in fact, lower. This has implications for the presentation of damage awards. The more precise the damage request, the lower (and perhaps more reasonable) the request will be seen. Most requests for punitive damages are given in round numbers. It may be more effective to give a precise number for a punitive damages reward request. Counter to this, in offering an alternative damages figure it may be more effective to suggest a round number as this will be perceived to have a greater magnitude. To take a hypothetical example, a defendant in a personal injury case may calculate medical expenses to be \$27,225. If the defendant presents the jury with a figure of \$27,000 it may be perceived to be more generous than \$27,225.



2. **Jurors' assessment of the difference between the plaintiff's damage request and the defense's alternative damages number can be influenced by the left digits in the two numbers.** Research has shown what is called a left digit anchoring effect (Thomas & Morwitz, 2007). People tend to focus on the left digit of a number in judging its magnitude in comparison to another number. People will tend to judge the magnitude of difference between \$4.00 and \$2.99 to be greater than the difference between \$4.01 and \$3.00 because of this anchoring effect. This has implications for alternative damages theories where the perceived difference with the plaintiff's damage request may be magnified by this effect under certain circumstances. In this instance, if the evidence justifies it, it may help if the alternative damage award figure has a left digit that is as close as possible to the plaintiff's damages figure. This may lead to a greater probability of the jurors using the defendant's damage figure as it will appear to be more reasonable and less likely to be seen as a "low ball" figure even if it is not substantially different from what the defendant might otherwise have presented.
3. **Jurors may evaluate damages figures differently depending on numbers they may have already heard even if those numbers are completely unrelated to damages.** Another anchoring effect that is found among consumers is that they will judge the magnitude of a price based on a number they heard or saw prior to seeing the price. Exposing a consumer to a high number can make the price of a product seem less expensive. This is true even when the information is presented subliminally and is not even a price (Thomas & Menon, 2007). When consumers were told the weight of something in grams and the number of grams was high, this made the price of a product subsequently presented to them seem less expensive than when the weight had not been told to them. Plaintiff lawyers may intuitively know this when they discuss a corporation's annual revenue when asking for punitive damages. But this research would argue for lawyers to find a context for presenting any large number before introducing their damage request.
4. **The way in which damages numbers are presented in demonstrative exhibits can affect how jurors evaluate the magnitude of those numbers.** It turns out that the size of the font used affects how high or low a price is perceived to be (Coulter & Coulter, 2005). Consumers were more likely to perceive the price of a product to be lower when the price was represented in smaller as compared to larger font. This was especially true when two prices were next to each other. Following the idea that jurors will be more inclined to award what they perceive to be lower damage requests as opposed to higher ones and combining it with the use of demonstrative exhibits in the courtroom, the implications of this research are obvious for both plaintiff and defense lawyers.
5. **Even how easily the names of the litigants can be pronounced can have an effect on the damages that jurors award.** Many damage request rest on "but for" theories where juries are asked to listen to evidence of what future worth might be. While there is little that can be done about it, the research of Alter and Oppenheimer (2006) shows that stocks with easily pronounceable names either do or will be predicted to do better than those with hard to pronounce names. Students predicted that stocks with hard to pronounce names would perform more badly than other stocks and the authors' review of actual stock market performance bore this finding out. As we said there is little the lawyer can do about this other than in his or her choice of clients. Although this finding may affect the way in which a lawyer chooses to refer to his or her client.

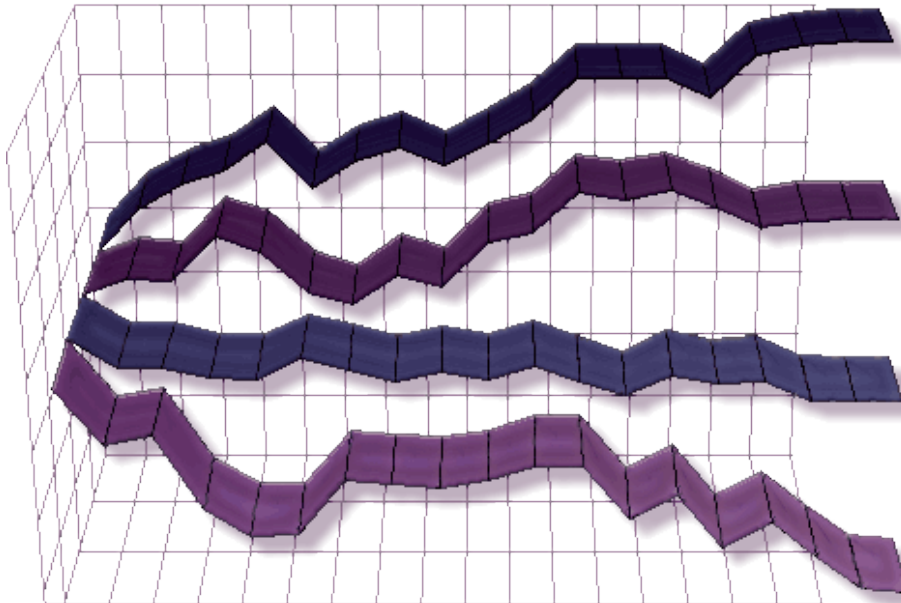
This was not designed to be an exhaustive list of findings from the field of behavioral pricing. But it does illustrate how jurors when deciding damage awards may be biased in very systematic ways; ways that can be controlled to some

extent. Many of these finding also have implications for settlement discussions and what numbers are proposed to the other side. One important caveat: these rules are only one part of the process by which jurors determine damages. Factors like the strength of jurors' belief in the liability of the defendant, anger at the defendant, a desire to set an example, and others are obviously critical.

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The September edition of *The Jury Expert* unveils several firsts: our first reader-requested feature (on preparation of narcissistic witnesses); our first law student author (Jason Miller on buffer statutes); our first author from the Netherlands (Fredrike Bannink on solution focused mediation); our first article on training law students (the DePaul program); and our first Favorite Things (we couldn't choose just one). Help us stay fresh--send in your wishes for upcoming issues--what would you like to see? Tell [me](#)...we'll see if we can make it happen.

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