

Why “anchoring” practices that push up jury awards must end

MAR 3, 2021

Tanya Albert Henry

Contributing News Writer

A dangerous precedent will be set if a New York appellate court doesn't reduce a \$30 million award for noneconomic damages, physicians tell the court.

The sum is nearly double the highest ever awarded to a plaintiff for noneconomic damages in a New York court and will only lead plaintiffs to demand ever-higher awards in court through a practice called “anchoring.” That is when plaintiffs' attorneys request an unjustifiably large award that then serves as a baseline for the jury's damages calculation, the Litigation Center of the American Medical Association and State Medical Societies says in an amicus brief it filed jointly with the Medical Society of the State of New York and several other organizations.

Allowing the excessive award to stand will push insurance costs higher for physicians and other businesses. It also will frustrate settlements, result in more trials and appeals—which will exacerbate any COVID-19 backlog—and ultimately increase what New Yorkers pay for goods and services, the AMA Litigation Center and others tell the court.

“The cost of excessive liability is passed on to New Yorkers in increased costs of housing, products and services, most notably health care, operating as a hidden tax almost of the magnitude of New York's personal income tax. And unlike New York's personal income tax, this tax is not progressive, but disproportionately borne by those who pay the highest share of their income to rent, health care and auto insurance,” according to the brief filed in the New York Supreme Court, Appellate Division in the case, *Redish v. Adler*.

The amicus brief asks the court to find that the use of an anchor that vastly exceeded the permissible range for noneconomic damages was improper and prejudicial, and to find that the \$30 million award exceeds the range allowed under law.

Typically, noneconomic damage awards for those who experience brain injuries has ranged from about \$2 million to \$6.5 million, the brief notes.

Find out more about the cases in which the AMA Litigation Center is providing assistance and learn

about the Litigation Center’s case-selection criteria.

How does anchoring happen?

The case before the appellate court stems from a medical liability claim from a woman admitted to St. Barnabas Hospital for asthma treatment. She alleges physicians didn’t properly manage her condition, leading to a neurological injury that left her without full use of her limbs and requiring permanent home care.

At the trial, anchoring occurred when the plaintiff’s counsel advised jurors that \$40 million or more was fair and reasonable for the woman’s past and future noneconomic damages, based on his legal experience. It’s “an amount eclipsing all prior approved awards to individuals with similar or even more substantial injuries,” the brief tells the court.

The jury awarded \$90 million. After trial, the court reduced the noneconomic damages award to \$30 million. Recognizing the appellate court had never approved an award larger than \$16 million, the court said it held the jury’s voice in high regard.

Why trend needs to stop

The brief tells the court that at least one study shows that juries are more likely to award higher amounts when anchoring is involved.

A 2017 study published in the *Washington University Law Review*, “Time is Money: An Empirical Assessment of Non-Economic Damages Arguments,” had participants watch one of two medical malpractice mock trial videos. In one video, mock jurors decided the noneconomic damage award without influence. In the other, the plaintiff’s counsel asked for \$5 million in noneconomic damages. The first group awarded an average \$473,489; the second group’s award averaged \$1.9 million, the brief tells the court.

Increasingly, juries in New York are handing out noneconomic damage awards “that dwarf prior awards,” the brief says. “Injuries are not becoming more extreme. Rather, plaintiffs’ attorneys are aggressively asking jurors to award extraordinary sums. ... Attorneys know that ‘anchoring’—setting an unjustifiably high amount as a baseline—is highly effective, particularly when sympathetic jurors lack objective means to determine compensation for unqualifiable pain.”

And, the brief notes, defense counsel is often reluctant to counter anchoring because they say jurors

could view suggesting a lower amount for noneconomic damages to be a concession of liability.