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HarrisMartin published our article, *The Big Problems With Mini-Openings* in the April 2023 edition of *COLUMNS-Asbestos*. The article focused on the problems presented by mini-opening statements and included an example in which asbestos plaintiffs' counsel sought to ask potential jurors in *voir dire* if they were open to awarding non-economic damages of "**over 34 million dollars**" to the adult heirs of a sixty-seven-year-old man who "**had various medical issues such as being severely obese and having two heart attacks**" prior to his death. (*Wennerholm v DAP Products Inc.*, JCCP4674, Los Angeles Superior Court, Case No. 19STCV15874 [1/31/23].)

In response, counsel for plaintiffs in the *Wennerholm* case defended their claimed right to mention particular dollar amounts in *voir dire* in a Commentary entitled "The Right to Liberal and Probing Examination of Jurors for Bias Against Large Verdicts," which was published in the June 2023 edition of *COLUMNS-Asbestos*. In their own words, the authors state:

> *Plaintiffs in California courts have been granted the right, on request, to mention particular dollar amounts in voir dire for the purpose of identifying biased jurors and empaneling an impartial jury. The Wennerholm case, cited in the April 2023 article, is one example of Plaintiffs' counsel having been granted such a request.*

Glaringly, plaintiffs' counsel omitted any mention of the results of their "liberal and probing examination of jurors for bias against large verdicts." So, what happened? Did plaintiffs' counsel swear a jury that was "open to" awarding large verdicts? Again, in their own words:

> ***When Plaintiffs' counsel engaged in voir dire...The venire commenced a series of disrespectful comments, including profanities, directed at Plaintiffs, their counsel, and the Plaintiffs' case in general. Several potential jurors engaged in these dismissive and disrespectful comments. A polite word would be bull-feathers, but more profane words were used. These comments were uttered behind counsel's table, within the hearing of counsel and other members of the venire. (Frost Decl P21-28).***[1]

Plaintiffs' counsel moved for a mistrial in *Wennerholm* as a result of the venire's response to their own *voir dire*. That motion was granted before *voir dire* was completed and their trial date was lost.

Their Commentary also completely fails to address the reality that there can be a limit to damages. Per Civil Code section 3359, "[d]amages must, in all cases, be reasonable, and where an obligation of any kind appears to create a right to unconscionable and grossly oppressive damages, contrary to substantial justice, no more than reasonable damages can be recovered."[2] (*See, e.g.*, *Postal Instant Press v. Sealy* (1996) 43 Cal.App.4th 1704, 1723 [award to franchisor of lost future royalty and advertising fees after termination of franchise agreement for franchisee's failure to timely pay past royalty and advertising fees would result in unreasonable, unconscionable, and oppressive damages]; *Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th 541, 555 [a plaintiff's medical expenses must be both incurred and reasonable].

Not only are the arguments of counsel not evidence of damages (CACI 3925), but, per the notes to CACI 3925, "[c]ourts have held that 'attempts to suggest matters of an evidentiary nature to a jury other than by the legitimate introduction into evidence is misconduct whether by questions on cross-examination, argument or other means.'" (CACI 3925 (citing *Smith v. Covell* (1980) 100 Cal.App.3d 947, 960).) Federal courts have recognized the danger of an attorney seeking astronomical damages untethered to the evidence: "A jury is likely to infer that counsel's choice of a particular number is backed by some authority or legal precedent. Specific proposals have a real potential to sway the jury unduly." (*Consorti v. Armstrong World Indus., Inc.*, 72 F.3d 1003, 1016 (2d Cir. 1995) (judgment vacated on other grounds by *Consorti v. Owens-Corning Fiberglas Corp.* (1996) 518 U.S. 1031).) Indeed, such improper tactics by plaintiffs' counsel were held in the federal case of *Waldorf v. Shuta* to constitute reversible error:

"[The] Commentary also completely fails to address the reality that there can be a limit to damages."

> "The question whether plaintiff's counsel may request a specific dollar amount for pain and suffering in his closing remarks is a matter governed by federal law, and we now hold that he may not make such a request . . . . In the final analysis, a jury trial should be an appeal to the rational instincts of a jury rather than a masked attempt to 'import into the trial elements of sheer speculation on a matter which by universal understanding is not susceptible to evaluation on any such basis . . . .' We hold that the references by plaintiff's counsel in his closing remarks to a minimum dollar amount that plaintiff should be awarded for his pain and suffering could have irrationally inflated the damages award and, under the facts of this case, constituted reversible error."

(*Waldorf v. Shuta* (1990) 896 F.2d 723, 744 (citation omitted).)

Plaintiffs' counsel's Commentary failed to address any of the numerous studies regarding the psychological effects of anchoring on jurors.[3] Instead, they renamed anchoring "preconditioning," and attempted to sweep the associated science under the rug.

Rather than engaging in anchoring, Plaintiffs can conduct their "liberal and probing examination" guaranteed by Code of Civil Procedure section 222.5(b)(1) by (1) asking jurors if there is a certain dollar amount that the jurors feel would be too high to award even if the plaintiffs prove their case, or (2) using ballpark figures such as "millions" rather than a precise number to gauge the prospective jurors' reactions. Defendants, on the other hand, can inquire of jurors if they would be comfortable returning a defense verdict (i.e., awarding nothing) if plaintiffs do not prove their case.

By remaining alert against attempts at anchoring, counsel can seek to avoid situations like the one in *Wennerholm* where the venire was provoked to the extent of becoming "uncontrolled," using "unrestrained profanity," and "tainting all within earshot."[4]

Endnotes

[1] Plaintiffs' Motion for Mistrial, *Wennerholm vs. DAP Products, Inc.*, JCCP 4674, Los Angeles Superior Court, Case No. 19STCV15874 (1/30/23).

[2] To quote from Austin Powers: International Man of Mystery (1997):

> *Dr. Evil : [...] Here's the plan. We get the warhead and we hold the world ransom for... ONE MILLION DOLLARS!*
>
> *Number Two : Don't you think we should ask for more than a million dollars? A million dollars isn't exactly a lot of money these days. Virtucon alone makes over 9 billion dollars a year!*
>
> *Dr. Evil : Really? That's a lot of money.*
>
> *[pause]*
>
> *Dr. Evil : Okay then, we hold the world ransom for... One... Hundred... BILLION DOLLARS!*

[3] Hugo, Edward R. & Ghanaat, Bina, "*The Big Problem With Mini-Openings*," HarrisMartin COLUMNS-Asbestos (April 2023) (citing J. Campbell et al., *Countering the Plaintiff's Anchor: Jury Simulations to Evaluate Damages Arguments*, 101 Iowa L. Rev. (2016); *see also* Mollie W. Marti & Roselle L. Wissler, *Be Careful What You Ask For: Anchoring Effects in Personal Injury Damage Awards*, 6 J. EXPERIMENTAL PSYCHOL. APPLIED 91, 91–103 (2000); Gretchen B. Chapman & Brian H. Bornstein, *The More You Ask For, the More You Get: Anchoring in Personal Injury Verdicts*, 10 APPLIED COGNITIVE PSYCHOL. 519 (1996); Verlin B. Hinsz & Kristin E. Indahl, *Assimilating to Anchors for Damage Awards in a Mock Civil Trial*, 25 J. APPLIED SOC. PSYCHOL. 991 (1995); John Malouff & Nicola A. Schutte, *Shaping Juror Attitudes: Effects of Requesting Different Damage Amounts in Personal Injury Trials*, 129 J. SOC. PSYCHOL. 491 (1989); Edward (Ted) L. Sanders, et al., *Reptiles, Picassos, and Stealth Bombers: Combating Inflated Non-Economic Tort Damages*, MUNICIPAL LAWYER: THE JOURNAL OF LOCAL GOVERNMENT LAW, pp. 19-23 (Vol. 60, No. 6, Nov./Dec. 2019).)

[4] Plaintiffs' Motion for Mistrial, *Wennerholm vs. DAP Products, Inc.*, JCCP 4674, Los Angeles Superior Court, Case No. 19STCV15874 (1/30/23).

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