

IT'S A DAMAGES CASE, NOW WHAT?



Transportation Lawyers Association

Established 1937



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Pre-COVID “Nuclear Verdicts”

Average verdicts
were \$10-\$20 million

Post-COVID “Thermonuclear Verdicts”

Average verdicts
now \$25-\$45
million



- ▶ Pre-death pain and suffering
- ▶ Pre-death fright
- ▶ Emotional distress
- ▶ Loss of consortium
- ▶ Beneficiary claims

CLAIMS THAT LEAD TO
THERMONUCLEAR VERDICTS

South Carolina statute: “Causes of action for and in respect to any and all injuries and trespasses to and upon real estate and any and all injuries to the person or to personal property shall survive both to and against the personal or real representative, as the case may be, of a deceased person and the legal representative of an insolvent person or a defunct or insolvent corporation, any law or rule to the contrary notwithstanding.” S.C. Code § 15-5-90.

STATUTORY LANGUAGE - EXAMPLES

District of Columbia Code §12-101:
“On the death of a person in whose favor or against whom a right of action has accrued for any cause prior to his death, the right of action, for all such cases, survives in favor of or against the legal representative of the deceased.”

STATUTORY LANGUAGE - EXAMPLES

California Code of Civil Procedure § 377.34(b), recently amended, states “in an action or proceeding by a decedent's personal representative or successor in interest on the decedent's cause of action, the damages recoverable may include damages for pain, suffering, or disfigurement if the action or proceeding was granted a preference pursuant to Section 36 before January 1, 2022, or was filed on or after January 1, 2022, and before January 1, 2026.”

STATUTORY LANGUAGE - EXAMPLES



Requisite proof will vary by jurisdiction



Typically requires proof of consciousness after impact



What constitutes consciousness becomes a very gray area when the only “proof” comes from lay witnesses.

PRE-DEATH PAIN AND SUFFERING/PRE-IMPACT FRIGHT

Emotional distress - When is it a viable claim?

- You know it when you see it?
- Limiting and questioning the proof
 - Thorough background on claimant
 - Other events in the Plaintiff's life may contribute to the claimed emotional distress
- Evaluate what Plaintiff has done to mitigate damages
 - There is always something someone can do to improve their state
 - Do not be afraid to question why certain actions were not taken



Mitigation strategies

Pre-Death Emotional Distress

- Expert testimony designed to:
 - Educate jury on levels of consciousness
 - What is needed to experience emotions
 - Extent of consciousness
- Detailed cross examination of lay witnesses
 - Undermine facts of consciousness

Sympathy factor is difficult to contend with

- ▶ Natural human instinct to sympathize
- ▶ Plaintiff's attorneys emphasize sympathy in many ways

Artful ways to counter the sympathy factor exist

- ▶ Continue to ask hard questions
- ▶ Proceed cautiously, professionally
- ▶ Options when there appear to be no options?

LOSS OF CONSORTIUM AND BENEFICIARY CLAIMS



Dealing with a child's loss of consortium

If the child is doing better - in a safer living situation discuss why

If the child is arguably doing worse - in a worse living situation, use the decedent's background to the client's benefit

Options when there appear to be no options?

IS ANCHORING THE CAUSE OF
THE THERMONUCLEAR
VERDICT?



What is Anchoring?



A photograph of Steve Jobs on a stage during an Apple event. He is standing in the center, wearing a black turtleneck and blue jeans, looking down at a device in his hands. Behind him is a large screen displaying the price "\$999" in white text. To the left of the screen, there is a black leather armchair and a small white side table with a glass of water. The stage is dimly lit with purple spotlights. The background is a solid blue gradient with white diagonal lines on the right side.

\$999

Steve Jobs
releasing
the iPad

But, wait....



Most jurors have been “anchored”
most of, if not, their entire lives.

Several thin, parallel white lines of varying lengths are positioned in the bottom right corner of the slide, angled diagonally upwards from left to right.

30 YEARS

BILLIONS OF DOLLARS RECOVERED




**MILLION DOLLAR
VERDICT CLUB**

VERDICT/JUDGMENT

\$1.25 BILLION

SEXUAL ASSAULT
INJURY TO A MINOR

AUSTIN • CORPUS CHRISTI • DALLAS • SAN ANTONIO

THOMAS J HENRY



Recent Settlements & Verdicts

\$1,000,000

Recovery to compensate a client for emotional distress after witnessing a tragic car accident

MN MARASCO NESSELBUSH LLP
LAW OFFICES



VERDICT

ATTORNEYS:
KEITH MITNIK
ALICIA SMITH
ADRIENN TOTH

**\$200,000
VERDICT.**

\$2,900,000.00



BATTING \$15 BILLION

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MORGAN & MORGAN
AMERICA'S LARGEST INJURY LAW FIRM



SETTLEMENT



ATTORNEY:
LAUREN MARLEY

LAST OFFER:
~~\$150,000~~

SETTLEMENT:

\$2,000,000.00

SETTLEMENT



ATTORNEYS:
MARTIN STARK
JOSEPH SANDEFUR

SETTLEMENT:

\$10,000,000.00

HOW ANCHORING EFFECTS JURORS

Plaintiff's attorneys use anchoring:

Capitalizes on jurors not being well informed on damages

Automatically places the defense in a weaker position

Drives up awarded damages from juries



HOW DO WE FIX IT?

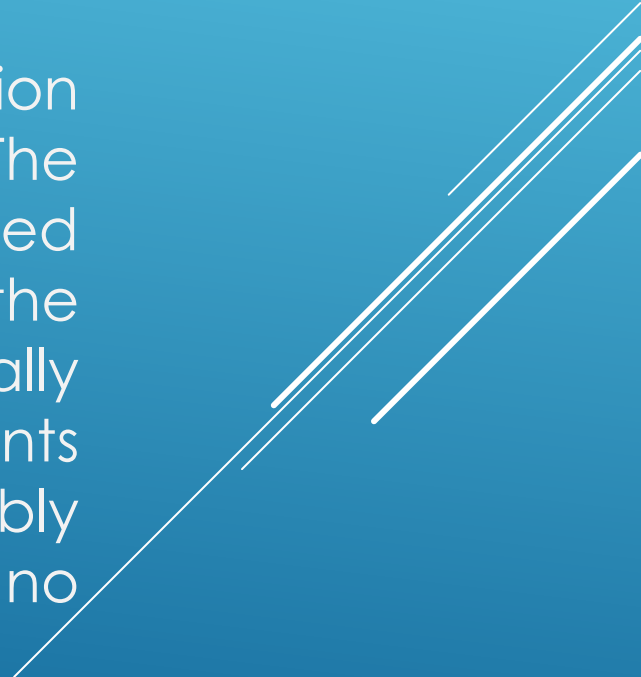


GREGORY V. CHOCHAN

66 TEX. SUP. CT. J. 1086

“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 the lack of any rational connection between reasonable compensation and the anchors suggested.”

“...nothing in the record ... 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 [decedent's] family.

Three white lines of varying lengths and slopes are positioned on the right side of the slide, extending from the middle to the bottom right corner.

What do we do now?

A New Look at Anchoring Effects:

Basic Anchoring and Its Antecedents

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Countering the Plaintiff's Anchor:

Jury Simulations to Evaluate Damages Arguments

Mock jury participating in a shortened medical malpractice trial

- ▶ Changed closing arguments:
 - ▶ Plaintiff asked for either: (1) \$250,000 or (2) \$5 Million in damages
- ▶ Defendant responded by either:
 - (1) offering a counter-anchor;
 - (2) ignoring the plaintiff's anchor; or
 - (3) attacking the plaintiff's demand as outrageous

Conclusions:

- The higher anchor resulted in a **430%** increase in awarded damages
- Providing a counter-anchor did not influence the jury's liability decision
- This was the best defense to a plaintiff's anchor in this study
- No defense completely negated the plaintiff's anchor

We must recognize the tremendous impact of a plaintiff's anchor

Identify the plaintiff's anchor to the jury

Provide a counter-anchor

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Providing a counter-anchor is a must when defending against the anchor.



Put a number on it.



And, remember zero is a number!

TORT REFORM IS THE LONG-TERM SOLUTION

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Justifications for Capping Non-Economic Damages

- Reduce frivolous litigation
 - Increase predictability of the judicial system
 - Reduce insurance costs for the entire community
 - Promote business and innovation
 - Protect jobs
 - Judicial economy
- 
- Three parallel white lines of varying lengths are positioned in the bottom right corner of the slide, slanted diagonally upwards from left to right.

The Lay of the Land

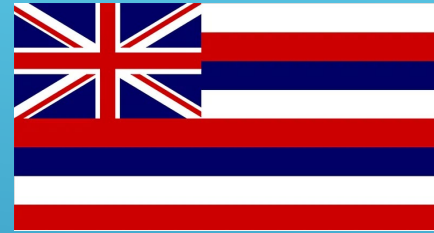
Currently, Eight States Cap Noneconomic Damages in Personal Injury and General Tort Cases:



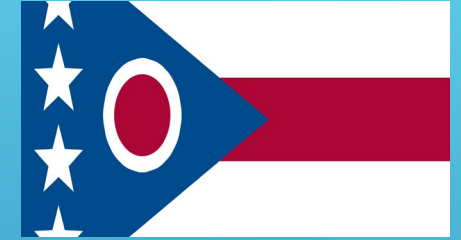
Alaska



Colorado



Hawaii



Ohio



Idaho



Maryland



Mississippi



Tennessee

The Anti-Cap Counterstrike

Courts in three states recently struck down their noneconomic damage caps

Kansas:

- Pre-2019 Cap: \$325k
- Case: *Hilburn v. Enerpipe Ltd.*, 442 P.3d 509 (Kan. 2019) (holding the cap violated the right to a jury trial).

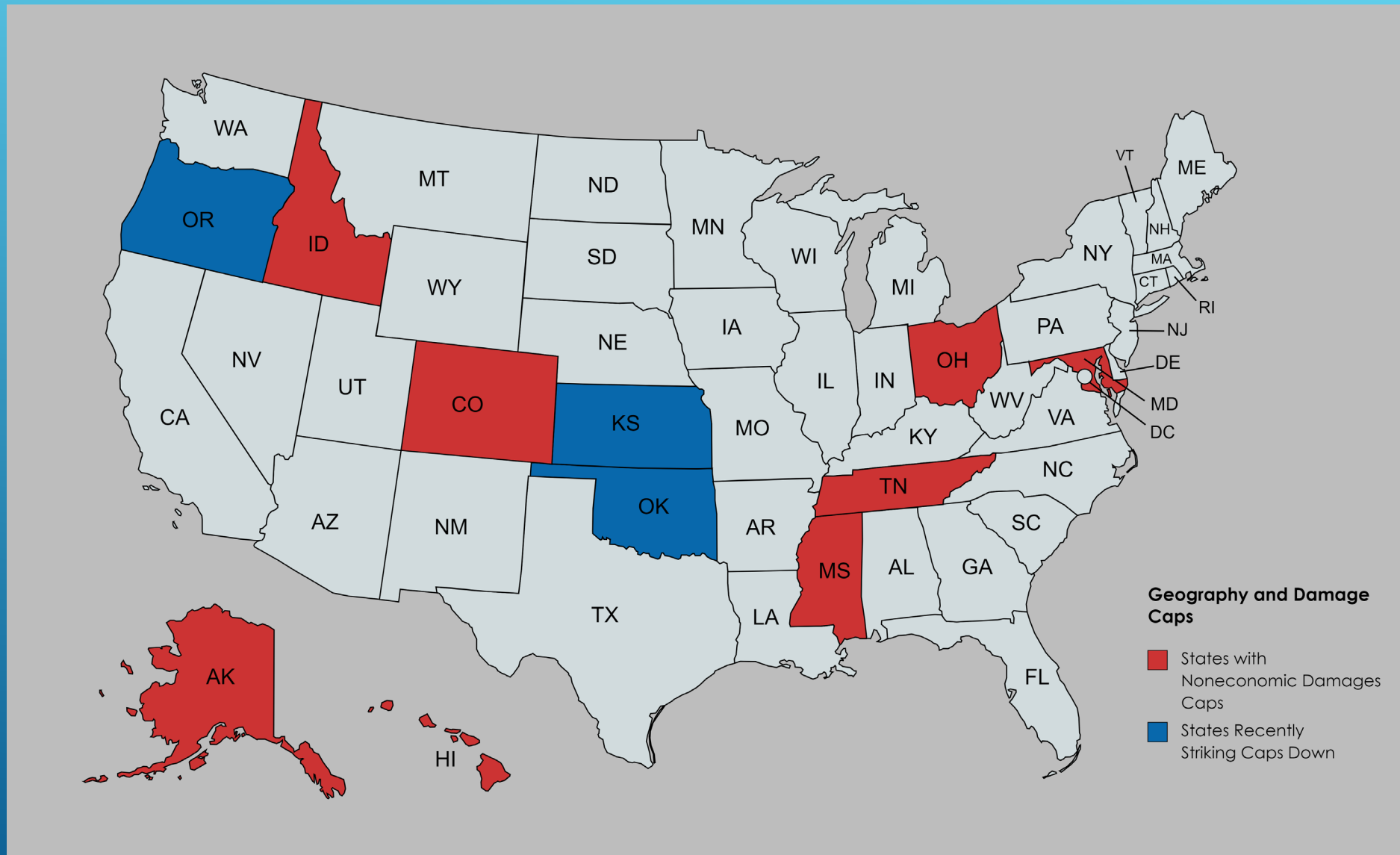
Oklahoma:

- Pre-2019 Cap: \$350k
- Case: *Beason v. I.E. Miller Servs., Inc.*, 441 P.3d 1107 (Okla. 2019) (holding the cap was an unconstitutional special law).

Oregon:

- Pre-2020 Cap: \$500k
- \$500k cap still applies to wrongful death claims.
- Case: *Busch v. McInnis Waste Sys., Inc.*, 468 P.3d 419 (2020) (holding the cap violates the state constitution's remedy clause for failing to give the plaintiffs a *quid pro quo* for this deprivation).

Geography and Damage Caps



Political Affiliation and Damage Caps

While more conservative states cap noneconomic damages than liberal states, these caps are not a neatly partisan issue.

States with Noneconomic Damage Caps	
Red/Conservative (only Republican presidential candidates since 2000)	Alaska, Idaho, Mississippi, Tennessee
Blue/Liberal (only Democratic presidential candidates since 2000)	Hawaii, Maryland
Purple/Swing States (both Democratic and Republican presidential candidates since 2000)	Colorado, Ohio

States Taking Anti-Cap Action	
Red/Conservative (only Republican presidential candidates since 2000)	Kansas, Oklahoma
Blue/Liberal (only Democratic presidential candidates since 2000)	Oregon
Purple/Swing States (both Democratic and Republican presidential candidates since 2000)	NA

#TLA

#TLI2023

QUESTIONS?



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