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Improper Summation Anchoring Is Turning the New York Court System on Its Head and Contributing to the Demise of New York State

The problem is clear, the consequences are acute, but the solution is simple. The courts must act today to protect New York from the upward spiral of pain and suffering awards by putting an end to improper anchoring before it causes further damage.

By **Timothy R. Capowski and Jonathan P. Shaub** | April 28, 2020



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Ask and you shall receive. The plaintiffs' bar's now-ubiquitous use of anchoring, a summation tactic of asking juries to return unreasonably excessive verdicts for pain and suffering, bears further truth to this maxim.

We previously wrote on the topic of how improper anchoring exploits a tension in the CPLR to undermine the Legislature's efforts to inject stability and fairness into New York's tort system. See Capowski & Watkins, "CPLR 5501(c) Review In the Age of Summation 'Anchoring' Abuse (<https://www.law.com/newyorklawjournal/2019/06/26/cplr-5501c-review-in-the-age-of-summation-anchoring-abuse/>)," NYLJ (June 26, 2019). As the plaintiffs' bar is apt to note, CPLR 4016(b) explicitly affords them the right to request "a specific dollar amount" for pain and suffering. Nevertheless, CPLR 5501(c), a statute designed to curb the upward spiral of verdicts, only permits plaintiffs to receive "reasonable compensation" as measured through a comparable case analysis. The plaintiffs' bar, with increasing frequency, exploits the right to seek a specific dollar amount to undermine CPLR 5501(c)'s goal of checking the unsustainable explosion of damages awards.

The results are in, and the plaintiffs' bar has scored a resounding victory through this strategy. Anecdotally, the defense bar long appreciated that improper anchoring manufactures wildly unsustainable, or "nuclear", pain and suffering verdicts. This article demonstrates through publicly available data the extent to which plaintiffs' efforts succeeded. First, we collected runaway pain and suffering compensatory verdicts from 2010-2020 where either the summation transcript or information regarding the improper anchor was available.^[1] Second, we compared these verdicts with the summation anchor utilized by the plaintiff. Third, where available, we provided the final disposition of the pain and suffering component (i.e., remittitur or settlement).^[2] See Top NYS Court Pain & Suffering Personal Injury Verdicts & Improper Anchoring (2010-Present) (<http://www.sacsclaw.com/publications/760/>).

The data is telling even though perfect empirical precision is not attainable due to the unavailability of every transcript or settlement, undifferentiated settlements that do not distinguish between economic and non-economic damages, and still-pending matters.^[3] At a high level, every improper anchor in our data set produced a runaway verdict of \$15 million or more for pain and suffering with awards ranging as high as \$90 million. The value of these pain and suffering awards totaled a staggering \$1.5 billion, and this figure does not tell the full story. As we continue to obtain additional data on runaway verdicts since 2010, we anticipate that the absolute dollar value of nuclear pain and suffering awards obtained through improper anchoring will balloon to well over \$2 billion.

While the publicly available data reveals that 23 of these 31 nuclear pain and suffering verdicts were already reduced by more than \$650 million, it is safe to say that this is merely the tip of the iceberg. For example, even if every single case involved an injury sustainable at \$10 million for pain and suffering (and they clearly do not), it would only support a grand total of \$310 million of sustainable high value compared to the \$1.5 billion in actual initial verdicts. In other words, improper anchoring creates a greater than 80% inflation beyond appellate-court-determined highs for "reasonable compensation."^[4] These results should make the courts and legislature cringe, take notice, and finally address this massive but solvable problem.

The Baseline

The Appellate Division's application of CPLR 5501(c) effectively imposes a \$10 million cap on awards for pain and suffering. During the entire 34-year history of the statute, the Appellate Division held that an award above \$10 million constitutes "reasonable compensation" on just two occasions. The First Department approved an award of \$16 million for a plaintiff who suffered horrific third degree burns over 50% of his body and the Fourth Department held that \$12 million was the highest amount sustainable as reasonable compensation for a young quadriplegia victim suffering from unremitting pain.^[5] Indeed, the Appellate Division repeatedly grants remittiturs reserving \$10 million pain and suffering damages as the highest amount sustainable as reasonable compensation for the most catastrophic cases: paralysis injuries (including loss of ambulatory, bowel, urinary and sexual functions) combined with unremitting physical pain or similar sequelae.^[6] All lesser injuries are slotted below this de facto cap.^[7] Against this backdrop, any demand for \$20 million or more for a catastrophic injury^[8] is, prima facie, an improper anchor as it rests substantially above any previously sustained award.

The Anchor Is Extraordinarily Effective

Despite the wealth of CPLR 5501(c) precedent, seasoned plaintiff attorneys, fully aware of the defined range of reasonable compensation for pain and suffering under the statute (\$0 to \$10 million), routinely and improperly advise juries to return verdicts for pain and suffering for anywhere from \$20 million to \$130 million. Treating \$10 million as the cap and \$20 million as an improper anchor draws into sharp relief just how effectively plaintiffs employ this technique. First, in 90% of the instances where the plaintiff engages in improper anchoring (requesting \$20 million or more), he or she obtains a pain and suffering verdict that is at least double the \$10 million cap. Second, in almost two-thirds of the instances where the plaintiff employs an improper anchor, he or she obtains a verdict that is at least three times the unofficial cap. Third, in almost a third of the verdicts surveyed, an improper anchor produces a verdict exceeding \$50 million. Finally, the median pain and suffering verdict achieved through an improper anchor is \$35 million, three and a half times New York's \$10 million de facto cap, while the average is \$40 million.

Tellingly, in nearly half the cases involving an improper anchor, the jury award mirrors or exceeds the plaintiff's ask, leading to some of the most absurd verdicts in the State. Last year, one plaintiff requested and was awarded \$85 million, while another sought and received \$69 million. The latter was already remitted to \$16 million by the Supreme Court and the defendant is seeking a full remittitur on appeal.

The Plaintiffs' Bar Is Handsomely Rewarded for Anchoring

The goal behind the practice of anchoring is multifaceted. First, a runaway verdict, and the attendant additional litigation costs, interest, delays, and risks, creates leverage for the plaintiff to extract an overvalued settlement from a defendant.

Second, eye-popping verdicts are a powerful marketing tool for prevailing counsel via misleading newspaper headlines and banners on websites proclaiming "recovery" of hundreds of millions of dollars or, in several cases, over \$1 billion in victories. Conveniently, these banners often omit the subsequent court reduction or lower settlement figure.

Third, these runaway verdicts are a self-fulfilling prophecy that, through social inflation, spawn other astronomical awards. Simply stated, when large awards splash across the headlines, it leads to a jury pool that is more receptive to larger and larger verdicts—the public infrequently follows remittiturs. As one example, most know of the notorious \$3 million McDonald's scalding coffee case verdict, but few non-lawyers know of the subsequent remittitur to 1/6 this amount.

'We're Killing the Golden Goose'

As more than one successful but semi-retired plaintiff attorney conceded to us, "we're killing the golden goose." They were, of course, referring to the concern that these nuclear verdicts occasioned by anchoring would make some of their colleagues wealthy in the short term, but likely lead to tort reform in the form of statutory caps to the detriment of the greater plaintiffs' bar. In our view, the more apt description is that they're killing New York state.

The consequences of improper anchoring ripple across a wide array of stakeholders including individual litigants, the court, and the general public. The defendant that wishes to avoid rewarding a plaintiff for anchoring has no choice but to incur litigation costs on post-trial motions, bonding motions, complex Article 50 structured judgments, and appeals in order to obtain relief from the improper tactic. Improper anchoring also places intolerable burdens on an already overworked, underfunded, and backlogged court system. After a grossly excessive verdict, the defendant must return to the court system to obtain relief from the plaintiff's improper anchor, leading to a crush of post-trial motions and appeals.

Finally, irrespective of whether a defendant overpays by settling at a premium or engages in costly litigation just to obtain a remittitur to the highest sustainable figure (reflexively awarded by the courts), these costs are invariably borne by all New Yorkers. First, premiums are increasing in New York to account for the risk of nuclear verdicts produced through improper anchoring and the litigation costs associated with challenging this pernicious practice.^[9] Second, insurers are quietly abandoning the New York market, leading to a reduction in competition. A number of property and casualty insurers either no longer write construction risk in New York or have reduced their exposure because underwriting this type of work is no longer viable when Labor Law 240(1)'s strict liability provisions are supercharged by nuclear verdicts.^[10] Ultimately, the average New Yorker shoulders the burden of increased premiums and reduced competition in the form of higher prices for goods and services, as well as automotive and health care insurance.

Anchoring thus effectively serves as an additional tax that increases the cost of doing business in New York. At this moment in its history, New York and its residents simply cannot afford any additional economic strain. Even before the arrival of COVID-19, New York was reeling from the exodus of its tax base as residents fled the state; it has long held the number one ranking out of fifty states for the highest resident exodus.^[11] Nor is it a secret why: New York is ranked number one out of 50 for the highest state and local tax burden,^[12] number one in the highest tort costs per household,^[13] and number four in highest cost of living index.^[14] As succinctly stated by Governor Andrew Cuomo "we have no money."^[15]

Even Its Proponents Know Anchoring Is a Bridge Too Far

The plaintiffs' bar knows exactly what they're doing. One counsel employs a tactic during summations of writing down the anchoring amount on an easel, showing it to the jury, and asking them, "Is this too much?", thereby placing the figure outside the record and creating an impediment to post-trial and appellate review. Another negotiated a pre-summation high-low agreement that incorporated a high for pain and suffering below \$10 million and followed it with an improper summation anchoring request many multiples of the high that, of course, worked. He subsequently conceded in an interview that no trial or appellate court would sustain as reasonable an amount higher than the sub-\$10 million settlement figure.^[16] Yet another conceded in an interview that he struggled, internally, with asking the jury for a ridiculous figure for pain and suffering, and later effectively conceded in his opposition to defendant's post-trial motion that the figure he requested exceeded reasonable compensation. Indeed, in every instance of a nuclear verdict obtained through improper anchoring, the plaintiff's opposition to the inevitable post-trial motion or appeal has no choice but to cite to appellate-approved pain and suffering awards for analogous injuries under CPLR 5501(c) that necessarily prove the improper, unreasonable and unjustifiable nature of the several-times higher anchor they employed.

The Solution

The problem is clear, the consequences are acute, but the solution is simple. The courts must act today to protect New York from the upward spiral of pain and suffering awards by putting an end to improper anchoring before it causes further damage. While plaintiffs are permitted to request a specific dollar figure, courts should scrupulously tether the demands to CPLR 5501(c)'s reasonable compensation requirement. In practice, this entails prohibiting plaintiffs from asking the jury to award pain and suffering damages that are well beyond the highest verdicts ever sustained in the state.

While protecting New York, the courts will also protect themselves from the unnecessary time and resource-wasting congestion caused by this improper practice, and will protect all litigants, including plaintiffs not engaging in this improper practice, by freeing up court time and resources. But, if the courts will not properly apply the statute, the Legislature will need to step in and finally fix this very real problem. Until such time, the defense bar must fight improper anchoring across the board. We offer three prescriptions: (1) the submission of pre-summation motions in limine detailing the existing sustainable range for the injury at issue and preemptively objecting to any improper anchoring; (2) contemporaneous objections to such

summation remarks; and (3) prompt mistrial motions immediately following summation. These actions will serve to preserve the issue for appeal and force the New York appellate courts to address this practice, while simultaneously educating the judiciary and promoting stricter adherence to the sustainable range.

For accompanying chart of data, please see Top NYS Court Pain & Suffering Personal Injury Verdicts & Improper Anchoring (2010-Present) (<http://www.sacslaw.com/publications/760/>).

Endnotes:

[1] For the sake of simplicity, this article defines a runaway or nuclear verdict as one where the jury awarded \$15 million or more in pain and suffering. Obviously, this is not always the case as a runaway verdict can, and often does, arise where the jury award is substantially more than the sustainable value of the plaintiff's claim under CPLR 5501(c).

[2] This was no easy task, as plaintiff counsel have no incentive to provide transcripts or information relating to settlements for an article documenting their anchoring figures, and defense counsel stung by nuclear verdicts are not keen on reliving the experience.

[3] Global settlements below or near \$10 million necessarily confirm that the undifferentiated pain and suffering component was resolved for only a fraction of the original nuclear verdict. Global settlements that are appreciably higher than \$10 million involved verdicts that included especially large future medical expenses and wage components that drove the value of the settlement. See *Klupchak* (involving \$22 million claim for future medical expenses alone); *Applewhite* (involving \$106.6 million specials verdict); *Pope* (involving \$41 million specials verdict).

[4] This study, of course, only discusses the problem of improper anchoring at the unmistakably obvious level of nuclear verdicts to illustrate the problem; the problem also exists at the less obvious level of less-than-\$15 million verdicts, but is equally, if not more, destructive due to the far larger number of such impacted verdicts. The nuclear verdicts attack the \$10 million cap and the related stability of the CPLR 5501(c) system from the top down, while the verdicts impacted by improper anchoring at the lower level attack it from underneath and create instability and inconsistency in CPLR 5501(c) damages precedent.

[5] *Peat v. Fordham Hill Owners*, 110 A.D.3d 643, 645 (1st Dept. 2013); *Barnhard v. Cybex Intl.*, 89 A.D.3d 1554, 1557 (4th Dept. 2011).

[6] *Bissell v. Town of Amherst*, 56 A.D.3d 1144, 1147 (4th Dept. 2008); *Miraglia v. H & L Holding*, 36 A.D.3d 456, 457 (1st Dept. 2007); *Ruby v. Budget Rent A Car*, 23 A.D.3d 257, 258 (1st Dept. 2005); *Aguilar v. NYCTA*, 81 A.D.3d 509, 509 (1st Dept. 2011); see also *Aguilar v. NYCTA*, 81 A.D.3d 509, 509 (1st Dept. 2011) (functional paraplegia through amputation of one leg and degloving and loss of function of other leg); *Turturro v. City of N.Y.*, 127 A.D.3d 732, 739 (2d Dept. 2015) (horrific skull crush injuries to 12-year-old boy resulting in catastrophic brain and neurological and orthopedic injuries).

[7] It is, of course, imperative that the Courts maintain the cap, which has been jeopardized by improper anchoring, in order to foster the public policies underlying CPLR 5501(c) and, in turn, protect the courts, litigants, municipalities, businesses and citizens of New York.

[8] Obviously, in situations involving lesser injuries where the sustained awards are substantially lower, the improper anchor amount is significantly less than \$20 million.

[9] E.g., Bill Kenealy, "Outside of New York, General Liability Premium Increases Stay Relatively Flat," Business Insurance, July 6, 2014. See also Meg Green, "Mass Withdrawal of Construction Liability Writers in NY Traced Back to Scaffold Law," A.M. Best, Oct. 3, 2012.

[10] Id.

[11] <https://www.empirecenter.org/publications/ny-spent-2010s-in-demographic-doldrums/>
(<https://www.empirecenter.org/publications/ny-spent-2010s-in-demographic-doldrums/>)

<https://nypost.com/2019/12/30/new-york-is-losing-residents-at-an-alarming-rate-report/>
(<https://nypost.com/2019/12/30/new-york-is-losing-residents-at-an-alarming-rate-report/>)

[12] <https://wallethub.com/edu/states-with-highest-lowest-tax-burden/20494/#main-findings>
(<https://wallethub.com/edu/states-with-highest-lowest-tax-burden/20494/#main-findings>)

[13] https://www.instituteforlegalreform.com/uploads/sites/1/Tort_costs_paper_FINAL_WEB.pdf
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[14] <https://worldpopulationreview.com/states/cost-of-living-index-by-state/>
(<https://worldpopulationreview.com/states/cost-of-living-index-by-state/>)

[15] <https://nypost.com/2020/03/28/new-york-lawmakers-eye-distance-voting-amid-coronavirus-pandemic/>
(<https://nypost.com/2020/03/28/new-york-lawmakers-eye-distance-voting-amid-coronavirus-pandemic/>)

[16] This raises another interesting set of issues: if courts continue to permit improper anchoring, doesn't this completely eliminate the utility of high-low agreements (as the plaintiff will simply trigger the high through an improper anchor)? Or should the high-low agreement include the condition of a reasonable (or no) anchor?

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