

AAJ TRUCKING LITIGATION GROUP

— IMPROVING PUBLIC SAFETY —

JOURNAL OF TRUCKING LITIGATION

In This Issue

Getting Punitive Damages Evidence to the Jury!.....Page 3

Punitive Damages Permitted
Based Upon Failure To Maintain
Documents Required By FMCSR.....Page 15

Identifying and Litigating the Brain
Injury Case in a Trucking Case.....Page 21

Maximizing Damages
in Bus and Truck Cases.....Page 26

Posttraumatic Stress Disorder is
Real and Often Overlooked.....Page 30

It's Not About The Money.....Page 36

OFFICERS

CHAIR:

PETER J. KESTNER

CHAIR-ELECT:

MARION MUNLEY

VICE-CHAIR:

JEANMARIE WHALEN

SECRETARY:

TIMOTHY D. LANGE

TREASURER:

KEN LEVINSON

JOURNAL EDITOR:

MATTHEW E. WRIGHT

PAST CHAIRS

JOSEPH A. FRIED – 2016

JEFFREY A. BURNS – 2015

LAWRENCE M. SIMON – 2014

ROBERT COLLINS – 2013

DANIEL J. BUBA – 2012

DANIEL W. MUNLEY – 2011

BRADLEY BRADSHAW – 2010

MORGAN ADAMS – 2009

JOHN FEROLETO – 2008

STEVE GURSTEN – 2007

ANDREW CHASEN 2006

RON STITES – 2005

DANIEL RAMSDELL – 2004

RICHARD TRAUlsen – 2003

MICHAEL LEIZERMAN – 2002



Formerly the Association of Trial Lawyers of America (ATLA®)



SUMMER/FALL 2018



From The Chair

Peter J. Kestner

McEwen & Kestner, PLLC

5854 Blackshire Path

Saint Paul, MN 55076

(651) 888-7937 | pkestner@mcewenlaw.com

2017-2018 has been a tremendous year for the Trucking Litigation Group. With nearly 400 members, we enter the next year on solid ground and ready to face the challenges of the current safety and regulatory environments.

We held the Trucking Litigation College in Scottsdale, Arizona earlier this year. Many of the attendees said it was one of the best programs they have ever participated in. Participants were well-represented in different experience levels and small group workshops allowed those participants to focus on developing their trial skills at different levels.

The Trial College fact pattern was developed from real cases and wasn't watered down. It was designed to show how complex handling cases at the highest levels can be with multiple party defendants.

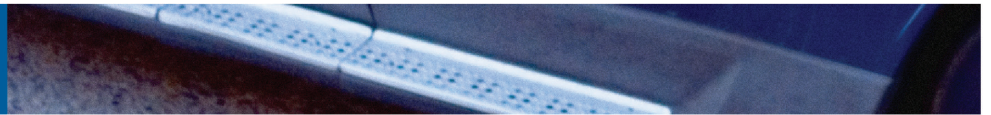
Culminating with the development of trial themes and demonstrative aids, a focus group deliberated in real-time after hearing presentations from some of our most seasoned trial lawyers. The focus group provided valuable insights into the juror critical decision-making process.

We also held a November Members Only Seminar at the beautiful Breakers Resort in Palm Beach,



Image credit: David Broad

Continued on page 2.



IT'S NOT ABOUT THE MONEY

Edward Ciarimboli
Fellerman & Ciarimboli Law, PC
183 Market St., Suite 200
Kingston, PA 18704
(507) 718-1444
ejc@fclawpc.com




Has anyone ever heard a client utter these words? For many years all I thought about when I heard a client say these words was, "Of course it's about the money." I was wrong; it's not about the money, it's about the damage to our clients and their families. In trial, if our sole focus is "about the money", we are doing an injustice to our clients. Our clients' lives and the lives of their families have been forever altered by the actions or inactions of the truck driver, company, broker, shipper etc... This article is by no means a silver bullet for presenting damages in a trucking case, but rather my hope is to talk about some concepts. Some you may know and some you may be hearing for the first time, in order to develop what works best for you in your case.

How do we begin to listen and truly understand the harms and losses to our clients? Two words: "Focus Groups". And not just any type of Focus Groups but groups specifically designed and constructed to talk about how jurors react instinctively, intuitively and emotionally to what our clients have endured and will endure in the future. Let me give you an example. We were trying a case where our client was a chef and lost his sense of taste. We thought the fact that he was a chef and owned his own restaurant would be the most important fact to the jury. We were dead wrong. What we learned was that taste was an intimate sense that evoked memories and images for everyone differently, but no less important to each person because they weren't in the food and restaurant industry. We had no economic damages to speak of in the case. So, the frame for the case became about what taste represents to each of us, rather than what taste does for us. This was the instinctive, intuitive and emotional information we gathered from the Focus Groups that carried the day.

We typically run separate liability and damage focus groups before exploring both together. This is done to gain insight and information that will move the needle on liability and damage issues separately. Once we have done this, we then move onto groups testing both issues together, in order to determine how the liability and damages will impact each other, if at all. People always ask how many Focus Groups we do or should do on a case. My advice is always the same: do as many as you can until you start to develop reliable data on liability and damage issues. This could be a handful or as many as fifteen to twenty. One of the things we look for in determining how many Focus Groups to do is consistent repeatable images that the participants start to talk about, especially on the issue of damages.



An example of this comes from a trucking case that we tried in Philadelphia in November of 2017. Our client was a thirty-year-old HVAC installer. He was rapidly advancing through his company to the position of team leader when the crash occurred. His injuries prevented him from being able to work in the HVAC field again. His wife worked in the health care field and was rapidly advancing in her profession as well. The image that our Focus Groups kept coming up with when talking about the paths their lives were taking was two arrows going in opposite directions. These



images became a central part of our damage presentation to easily show the impact that the crash had and would continue to have on the family. I cannot stress enough how important “images” are to any presentation on damages. When I say “images” I am talking beyond images of broken bones, surgeries, etc. Our clients’ stories have metaphors and images that are extremely powerful if we really listen and uncover them. These will be the images that the jurors remember and form a baseline for their decisions during deliberations.

How do the images and metaphors that we uncover from active listening translate into dollars during deliberations? This is where the concept of “Anchoring” has become so essential for damages in our trucking cases. Wikipedia defines anchoring or focalism as “a cognitive bias that describes the tendency for an individual to rely too heavily on an initial piece of information offered (known as the ‘anchor’) when making decisions..... Once the value of this anchor is set, all future negotiations, arguments, estimates, etc.... are discussed in relation to the anchor. This bias occurs when interpreting future information using this anchor. For example, the initial price offered for a used car, set either before or at the start of negotiations, sets an arbitrary focal point for all following discussions.” There have been countless articles written on the concept of anchoring and I strongly encourage diving into the research further, but for purposes of this article I wanted everyone to have a basic understanding of the concept.

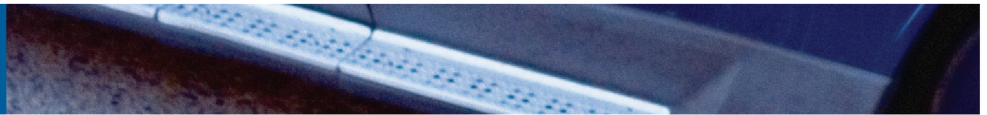
Anchoring can have an extremely powerful effect on your case, both from a positive and negative standpoint. The following are a few examples of how anchoring works from some recent cases. I practice primarily in Pennsylvania, where we are not allowed to ask for a specific number for non-economic damages and can tell you that the concept of anchoring is essential in jurisdictions like Pennsylvania. However, in those jurisdictions where you are allowed to ask for a number, doing so without an anchor that bears a direct relation to an aspect of your case can be a death blow.

Example one: a thirty-two-year-old man, unmarried and with no children, suffocated and died as a result of his injuries. His future lost economics were in the range of \$2,000,000. To say that this young man died a horrific death is an understatement. He left behind an amazing family who were and continue to be devastated by the loss of their son and brother. During our damage groups, whenever we brought up the lost economic number that the family was seeking, there was a consistent visceral reaction which was not positive for the family. The groups were offended that the mom and dad would ask for the money that their son would have earned had he been alive. Thus the \$2,000,000 became the anchor that no participant was willing to talk about because of the underlying emotional attachment of what the number represented. So instead of \$2,000,000 becoming a starting point for the damage discussion, it became an endpoint that no one was willing to go above.

Armed with this knowledge, we set out to find a new anchor which would unite, rather than divide the jury, around the family. After many groups, a consistent image started to develop, which was of this young man suffocating to death alone. The image of our client taking his last breath alone instead of surrounded by his family became a tremendously powerful image that evoked strong positive emotions towards our family. However, the image did not have an economic number. To find an economic anchor for this image we looked long and hard and then did what all the

Continued on page 38.

“Anchoring can have an extremely powerful effect on your case, both from a positive and negative standpoint.”



“The law recognizes that not only is there dignity in the way we live but also dignity in the way we die.”

It's Not About The Money, Continued from page 37.

top trial lawyers in the country do when presented with a problem they can't solve: WE WENT TO GOOGLE! We simply asked Google how many breaths the average person takes in a single year. The number is 8,000,000. We tested this anchor through a number of additional groups and it was a number that resonated whenever the participants started talking about money. Here is part of my opening where we introduced the number.

“We take 8 million breaths a year. Each and every one of them is precious.

You will have to decide what Ron went through those last moments before his death. The terror knowing that you are suffocating and dying and there is no one that can help. The experts will tell you that Ron drowned above the water and you will hear about what Ron's body and mind went through in those final moments.

Why does the law allow for damages for this?

The law recognizes that not only is there dignity in the way we live but also dignity in the way we die. For Ron, his death was not a peaceful death. You will hear that he left this world fighting to live, fighting for each and every last one of the 8 million breaths we take a year.”

The case did not go to verdict, but we were able to achieve a great result for this very deserving family beyond what the initial groups were willing to give.

Example 2: this is the case I mentioned earlier which was tried in Philadelphia. The challenge for the damage anchor in this case was that our client, although he could not return to his position in the field of HVAC, was still able to work. Additionally, the lost wages and future medical bills were slightly less than \$1,000,000 which, pre-trial, was the number that the trucking company focused solely on when talking about settlement. Liability was very strong both against the driver and the company, and we were able to show a number of systemic problems in the company that led to this crash. However, what we witnessed in our groups was that no matter how bad the liability, the groups gravitated towards this \$1,000,000 mark as the anchor for their discussion about non-economic damages. Our challenge was how to get the groups, and ultimately the jury, to think about a far bigger number as the anchor for their discussion on non-economic damages. This was especially critical given that punitive damages were very much in the case, so we needed a significant compensatory award. As with all cases, we had to find an anchor that bore some relation to the case and could be easily woven into the case from liability through damages. The beauty of a great anchor is, in my opinion, the subtlety of it as well. Done correctly there is nothing the defense can do to combat the power of a properly crafted and well-placed anchor.

The trucking company in our case drove approximately 5,000,000 miles a year and this 5,000,000 was a number that we introduced in our Focus Groups. What we quickly realized was that, absent any lower numbers for wage and medical bills, the participants used this number as an anchor for the compensatory damages. The overwhelming sentiment from the groups was that a company that drives 5,000,000 miles a year should not drive one mile with a driver who they know is fatigued and falsifying his logs. With our client's consent we dropped the wage and medical from the case and instead went with the 5,000,000 anchor.

We introduced the number in the very beginning of my opening. We repeated the 5,000,000 number through the trucking company's representatives, their expert trucking witness and even their defense medical expert who agreed that he had made about \$5,000,000 doing defense medical work. Our client, as I mentioned, was an HVAC worker who also was required to drive and keep logs. In talking about what he did for work he simply stated that his company didn't drive 5,000,000 per year but he was required to follow the same rules as the truck driver. The 5,000,000 number bore a rational relationship to the case and was consistently and subtly conveyed to the jury throughout our liability and damage presentation. The case settled after eight days of trial. However, we talked to a number of the jurors after and when asked what number they had in their head for damages the majority of them said \$5,000,000 as a starting point.



While images, metaphors and anchoring are not new concepts, I am excited about the tremendous work being done by trial lawyers all over the country on these important topics. These concepts can and have brought tremendous results not only in trucking cases, but in personal injury cases of all kind. In closing, I will not wish you luck in pursuing your trucking cases. Luck is reserved for those that are not prepared. Trucking cases take time, energy and resources to be successful, and when we commit all three, not only do our clients win, but the motoring public does as well.

Ed Ciarimboli is a partner at the Kingston, PA firm Fellerman & Ciarimboli. His practice focuses on representing the victims of trucking and automobile collisions and medical malpractice. He is a member of the AAJ, PAJ, Pennsylvania Bar Association and Luzerne County Bar Association. Mr. Ciarimboli has been named as a Pennsylvania Super Lawyer "Rising Star" every year since 2005 and in 2012 and 2013 he was selected to the "Top 40 under 40" by the National Trial Lawyers association.

Mr. Ciarimboli obtained his undergraduate degree from Wilkes University and his law Degree from Duquesne University. In addition to his law practice, Mr. Ciarimboli serves on the boards of the ARC and the Fallen Officers Association and along with his partner Greg Fellerman has spoken to over 20,000 high school students in the last two years as part of the Fellerman & Ciarimboli Safe Prom Pledge.

**"Luck is reserved
for those that are
not prepared."**

Interstate Trucking Litigation Group
c/o Matthew E. Wright
Wright Law, PLC
840 Crescent Center Drive, Suite 310
Franklin, TN 37067

AAJ TLG JOURNAL OF TRUCKING LITIGATION

CHAIR

PETER J. KESTNER
MCEWEN & KESTNER, PLLC
5854 BLACKSHIRE PATH
INVER GROVE HEIGHTS, MN 55076
PHONE: (651) 224-3833
FAX: (651) 223-5790
PETE@CRAWFORDKESTNER.COM

CHAIR-ELECT

MARION MUNLEY
MUNLEY LAW, PC
227 PENN AVENUE
SCRANTON, PA 18503
PHONE: (570) 983-3846
FAX: (570) 346-3452
MMUNLEY@MUNLEY.COM

VICE-CHAIR

JEANMARIE WHALEN
DOMNICK CUNNINGHAM & WHALEN
HARBOUR FINANCIAL CENTER
2401 PGA BOULEVARD
SUITE 140
PALM BEACH GARDENS, FL 33410
PHONE: (561) 625-6260
FAX: (561) 625-6269
JW@DCWLAW.COM

SECRETARY

TIMOTHY D. LANGE
BENSON, RISCH & LANGE, PLLC
2150 ONE RIVERFRONT PLAZA
401 WEST MAIN STREET
LOUISVILLE, KY 40202
PHONE: (502) 583-8373
FAX: (502) 584-8929
TLANGE@TIMLANGE.COM

TREASURER

KEN LEVINSON
LEVINSON & STEFANI
230 WEST MONROE
SUITE 2210
CHICAGO, IL 60606
PHONE: (312) 376-3817
KEN@LEVINSONSTEFANI.COM

JOURNAL EDITOR

MATTHEW E. WRIGHT
WRIGHT LAW, PLC
840 CRESCENT CENTRE DRIVE
SUITE 310
FRANKLIN, TN 37067
PHONE: (615) 455-3588
FAX: (615) 468-4540
MWRIGHT@WRIGHTLAWPLC.COM