



WHAT CAUSES NUCLEAR VERDICTS?

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Recent years have seen an unsettling increase in the number of “nuclear” trial verdicts – i.e., a plaintiff verdict with a damages award disproportionately larger than the harm caused – typically over \$10 million. This includes the largest award of the last two years: an eye-popping \$8 billion in a product liability case. For defendants, the trend has generated even more uncertainty and anxiety about taking a case to trial.

So, what is causing this uptick in massive verdicts? And who is most vulnerable to such outcomes?

THE “REPTILE STRATEGY”

Some people point to the increasing popularity of the plaintiffs’ “Reptile Strategy,” which seeks to maximize damage awards by instilling fear and anger among jurors, prompting a verdict based on instinct (i.e., fight or flight) rather than logic.

The strategy exploits the human response to threats by utilizing three key components: First, plaintiff’s counsel will focus on a universal “safety rule” that is impossible not to acknowledge, such as, “Safety should always be a top priority.” They will then claim the defendant violated this safety rule, and in doing so put everybody’s safety at risk,

not just the plaintiff’s. Finally, they convince jurors that the jury alone has the power to reduce or eliminate the danger posed by the defendant – by finding in favor of the plaintiff and awarding a large amount of monetary damages. The strategy suggests to jurors that awarding high damages will punish the defendant and deter it, and others, from similar behavior.

By focusing the case on the community rather than the specific plaintiff, and on the worst possible outcome rather than the plaintiff’s outcome, plaintiff attorneys make it easier for jurors to see themselves as the victim. In essence, the strategy serves as a crafty circumvention of the “Golden Rule” (that you cannot ask jurors to put themselves in the plaintiff’s shoes).

RECENT TRENDS THAT STRENGTHEN THE REPTILE STRATEGY

Increased Awareness of Corporate Misconduct

At one point, some of the biggest American companies were viewed as the backbone of the U.S. economy. For many, such views have shifted. Litigation Insights’ national survey from April 2020, for in-

stance, showed only 41.6% of respondents have a positive view of corporations, and 81.5% believe large corporations often manipulate government agencies.

With increased exposure to news stories via social media, news apps, and television in every room, there has been a great deal of publicity on corporate scandals, including Volkswagen emissions, Wells Fargo accounts, the opioid crisis, and price hikes on treatments like the EpiPen. Because of the increased awareness of corporate wrongdoings, many jurors come in with the idea that Big = Bad; coupled with the amount of money corporations have (or are perceived to have), these attitudes can make the Reptile Strategy more resonant.

People Feel Victimized

A 2019 Edelman poll found that only one fifth of the sample thought “the system” (i.e., society) is working for them, while over half said it is working against them. Part of this sentiment is likely due to the growing wealth gap that has received increased attention in recent years, especially given that 80% of people believe the wealthy have “too much power.”

When people feel like a victim of society,

they tend to sympathize with the plaintiff's perspective more easily and see the lawsuit as a way to assert power. If jurors already feel victimized, a defendant's conduct can seem more threatening and invite a stronger punishment.

Jurors Want to Make a Difference

People want to make a difference and sitting as a juror provides that opportunity. Many people, and millennials in particular, see jury service as a way to enact social change – lawsuits can right social wrongs, redistribute wealth, and challenge the status quo. Unfortunately for defendants, a verdict for the plaintiff is seen as a way to fulfill these goals.

The Reptile Strategy preys on this desire, because when jurors buy into the plaintiff arguments, they believe a plaintiff verdict and large damage award can make a lasting difference that will keep others safe. Plaintiff attorneys even try to empower jurors by telling them they are “guardians of the community.”

Recent social movements like Black Lives Matter and #MeToo have also highlighted this trend. As issues involving victimization and social injustice are salient to almost everyone, the desire to be a “guardian of the community” can be particularly strong.

Plaintiffs’ “Bad Company” Story

To boost the potency of their Reptile Strategy, plaintiff attorneys have become adept at crafting the “bad company” story, fraught with witness soundbites that either appear to admit the bad conduct or are easily extrapolated to imply it. And when the bad company story is peppered with bad documents, such as poorly worded emails (often taken out of context), plaintiff attorneys develop motive behind the behavior – that those involved were hiding the conduct to protect themselves or the company's reputation.

Focusing only on rebutting the plaintiff's claims can appear overly defensive and allows the plaintiff to control the narrative. A defendant must instead counter with a “good company” story: Who is the defendant, and how does it help people? How does it go “above and beyond?”

Perception of Corporate Representative

Whether jurors buy into a good or bad company story is often driven by their perception of the corporate representative. If the representative is perceived as arrogant, uncaring, cagey, etc., jurors tend to attribute that behavior to the defendant as a whole.

PSYCHOLOGICAL FACTORS THAT INCREASE DAMAGES AWARDS

Anchoring

The amount jurors award in damages, after finding for a plaintiff, is almost always influenced by the amount of the demand. In psychological terms, we call that “anchoring.”

Anchoring is a psychological heuristic, or shortcut, that influences how people assess numerical estimates. People will start with a suggested reference point (an “anchor”) and then adjust based on additional information or assumptions. Academic research shows that these adjustments are usually insufficient, giving the initial anchor a great deal of influence over the final number.

The most interesting part of this heuristic is that jurors can explicitly say the plaintiff asked for too much money and react negatively to the request, and yet still be affected implicitly by the anchor. For example, if a plaintiff requests \$50 million, jurors may think it is ridiculous and believe they are being tough on the plaintiff by awarding \$20 million. Of course, that is still a nuclear verdict in most cases. Had the plaintiff's attorney only requested \$20 million, jurors would have made similar adjustments and settled on a lower figure. Most plaintiff lawyers realize this effect and “shoot for the moon.”

Psychology of Large Numbers

Simply put, humans are terrible at fully comprehending the difference between large numbers, such as millions versus billions. This psychological principle is known as “scalar variability” – i.e., our ability to comprehend numbers decreases as the number increases. Unfortunately, people often lack the capacity to understand exactly how much money they are awarding when they reach a nuclear verdict.

Availability Heuristic

If you think about the verdicts you have heard about in the news, nuclear verdicts are probably what come to mind. Plaintiff verdicts with large damage awards tend to make headlines more than defense verdicts, so these numbers are top of mind in deliberations. This psychological phenomenon is known as the “availability heuristic” – a mental shortcut whereby people rely on what comes to mind when evaluating a topic.

Our mock jurors often cite lawsuits they have heard about when discussing damages. For example, we often hear them reference the McDonald's hot coffee verdict, saying, “We know what spilling hot coffee on yourself is worth, so this plaintiff's injury is worth at least that amount.” More recently, we have seen jurors mention current verdicts, too: “Well that lady got \$80 million from J&J for her cancer,” or “What's the going rate of lawsuits these days? \$50 million?” Essentially, these headlines become additional anchors.

CONCLUSION

Unfortunately for defendants, a variety of factors lead to nuclear verdicts – and many of them can work hand in hand. Defendants must therefore fight on multiple fronts to minimize the risk of a nuclear verdict. Such strategies include objecting to plaintiff Reptile tactics, crafting a “good company” story and themes to set your own trial narrative, carefully selecting and preparing your corporate representative, and performing an effective voir dire to identify jurors with a victim mentality and other characteristics that predispose them to a plaintiff verdict. Although the possibility of a high damage award can never be eliminated, it can be minimized through methodical preparation and research-backed strategies.



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