

FRIDAY, MARCH 6, 2020

PERSPECTIVE

## Is the defense bar being out-lawyered?

By Robert F. Tyson, Jr.

**N**uclear verdicts — often those in which damages exceed \$10 million — are increasingly commonplace in this country, presenting major challenges for corporate America.

It raises an important question: Why? What has changed to cause such excessive jury awards?

While there are many reasons being espoused, one answer is quite simple: The defense industry is getting out-lawyered. This is not an explanation that will make me many friends in my defense organizations, but we must be honest with ourselves. The plaintiffs' bar has evolved in jury trials and we have not.

Since the Great Recession, we defense lawyers have done exactly what our clients have asked us to do: focus on costs! Corporate America was hit hard, and clients made a big push for outside counsel to address expenses and measure all types of litigation spend. Defense lawyers learned an entire new area of expertise — cost containment — that had nothing to do with trying lawsuits.

### Jury Trials Have Changed

At that same time, while the defense bar was focusing on

lowering defense costs, what was the plaintiffs' bar doing? Essentially, completely changing the way they try cases! In 2009, "The Reptile Theory" was published and has purportedly resulted in billions

of dollars in jury verdicts. More importantly, sophisticated plaintiffs' attorneys honed their trial skills, implementing new and creative ways to achieve exorbitant jury awards. They now understand that tapping into a jury's anger is a much more effective approach at trial than appealing to sympathy.

Twenty years ago, it was rare a plaintiff's lawyer ever asked the jury for a specific damages number, let alone one in the millions of dollars range. The common belief was to ask for a bunch of money would be off-putting to a jury. Today? Plaintiffs' attorneys ask juries for astronomical awards, every day. While both sides used to shy away from addressing money in a jury trial, plaintiffs' lawyers have discovered the best way to get a big verdict is ... to ask for it.

### The Defense Needs to Change

Meanwhile, the defense industry has done next to nothing to counteract the evolving approaches of plaintiffs' lawyers. Instead, defense lawyers

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continue to use the same traditional strategies of fighting liability at all costs, avoiding the worst facts of their case, and hoping the jury does not reach the issue of damages.

While there is comfort in the status quo, it is also very dangerous and is resulting in more and more nuclear verdicts. Remember: plaintiffs' attorneys are counting on the defense to do nothing differently in trial. They have created a whole new approach to jury trials that assumes the defense will continue to do the same things we have always done. Unfortunately, so far, they have been right.

It is time for a change. It is time for a defense revolution. It is time for the defense to become more creative, more imaginative, more educated on the psychology of group decision making and jury behavior

— and maybe, just maybe — take losing a little more personally and get angry about it. A jury trial is a competition, it is about winning and losing. You don't "win some and you lose some." You try to win them all! You fight for justice! It's time to fight back.

As outlined in my new book, "Nuclear Verdicts: Defending Justice for All," there are many things the defense can do to achieve justice for all and avoid nuclear verdicts. Here are a few examples.

### Take Responsibility

This recommendation may be an anathema to many corporate defense lawyers, but it is wise for the defense to accept responsibility for something. This does not mean admitting full liability, or even any liability. We are defense lawyers after all, we want defense verdicts. For example, the defense can accept responsibility for their employee training practices, following traffic laws, or putting a safe product into the stream of commerce. While the type of responsibility will vary depending on the facts in play, some semblance of this approach must be implemented in every trial.

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### **Give a Number**

Defense lawyers also may be reluctant to provide the jury with a damages number, especially when fighting liability. However, it has proven to be a helpful strategy amid the changing legal landscape. Plaintiffs' lawyers will certainly be speaking about damages from start to finish of a trial, so defense counsel should do the same.

A number can be presented while still seeking a defense verdict for your client on the merits. In fact, there is a law review study that found a jury is *more likely* to give a defense verdict when the defense gives a number. But if the jury does find the defendant liable, having provided them with a defense figure can significantly reduce the ultimate jury award.

### **Personalize the Corporate Defendant**

Too often defense attorneys have allowed plaintiffs' lawyers to paint a horrible picture of a corporate defendant without presenting an alternative view. Defense lawyers must try to humanize a corporate client by telling the jury the company's backstory, including meaningful details about the people who make up the corporation. Personalizing the corporate defendant also involves highlighting the company's standing in the community and its values. This approach, which should be used throughout a trial, can help defuse juror anger and raise the likelihood of a defense verdict.

### **Argue Noneconomic Damages**

What is the number one way the defense argues noneconomic damages in a runaway jury verdict? They don't! Typically, the largest component of any nuclear verdict is noneconomic or general

damages, more colloquially referred to as "pain and suffering." In most nuclear verdicts, the defense doesn't even address noneconomic damages. The defense will hire all types of experts to fight economic damages and cross-examine plaintiff's experts for weeks. But when it comes to the biggest component of any nuclear verdict, nothing.

There are two ways to argue noneconomic damages. The first is to explain the real impact of the accident or incident in question on the plaintiff's life. The second is to explain to the jury the impact of money on plaintiff's life. This is complicated. You might say you could write a book on this subject! The defense needs to address noneconomic damages to stop nuclear verdicts, in every case.

Nuclear verdicts are real and increasing every day. It is time to eradicate these large, unsubstantiated jury awards, which come from anger —

not evidence or the law. The defense industry must stop being outlawed and take charge by utilizing new and more strategic approaches for jury trials. This will help ensure justice for both the plaintiff *and* the defendant. ■

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