

PREVENT RUNAWAY JURY VERDICTS BY NEUTRALIZING THE REPTILE THEORY

BY ROBERT F. TYSON, ESQ.

CLAIMS JOURNAL

THIS ARTICLE ORIGINALLY APPEARED ON CLAIMS JOURNAL

<https://www.claimsjournal.com/news/national/2019/05/10/290858.htm>

We see the frequent headlines: A plaintiff is awarded millions of dollars in damages for a physical or emotional injury purportedly sustained at the hands of a small business or large corporation.

While many applaud an injured plaintiff for holding wrongdoers accountable, it is clear the frequency of outrageous jury verdicts is on the rise, and something needs to be done.

The American civil justice system was established on the foundation of “justice for all,” not just injured plaintiffs. Our laws are meant to establish an equal playing field to determine whether and how to compensate someone who suffers a loss. When an individual or company are held liable for an injury, the award should be fair and reasonable for everyone.

But the new reality is that justice has been hijacked by creative plaintiffs’ lawyers throughout the country. To be direct, plaintiffs’ lawyers are better at jury trials than defense lawyers and their clients. The plaintiffs’ bar has studied human psychology and implemented new strategies with juries over the last 10+ years, and freely shares these advances among themselves. The defense bar has not evolved and shares almost no strategy with each other. It is time for change.

HOW RUNAWAY JURY VERDICTS HAPPEN

The number one emotional motivator of a nuclear jury verdict is anger, not sympathy. Because of this, plaintiffs’ attorneys employ a number of tactics to incite juror anger at the corporate defendant. Unfortunately, the typical defense approach of deny, deny, deny does nothing to combat this strategy.

One approach plaintiffs’ counsel uses to leverage anger is the “Reptile Theory,” which involves tapping into the primitive part of jurors’ brains and evoking a fight or flight mentality. In effect, the Reptile Theory is designed to shift the jury’s focus from the law – or standard of care – to absolute safety at all cost and total absence of danger. As of May 2019, plaintiffs’ attorneys have attributed over \$8 billion in verdicts and settlements to the Reptile Theory, which appeals to deep-seated survival instincts.

Another method in which plaintiffs’ attorneys convince a jury to award astronomical verdicts: They simply ask for them. The best plaintiffs’ attorneys know asking for a large verdict from the beginning of trial can result in a significant award. Most jurors never walk into a courtroom thinking

anything is worth \$20+ million. But after plaintiff's counsel discusses astronomical numbers in *voir dire* and then repeats these figures for weeks through trial and in closing argument, the amount does not seem outrageous to jurors when deliberation begins.

Plaintiffs' attorneys are also getting more creative with their arguments and how they frame requests of the jury for high damage awards. The largest component of any runaway jury verdict is noneconomic damages – the “human loss” element. Arguments used by the plaintiffs' bar to support multi-million-dollar “pain and suffering” awards have become more emotional and, frankly, more outlandish. But they work!

It is clear the traditional defense methods are no longer working to avoid runaway jury verdicts. Here are some other ideas.

DEFUSE JUROR ANGER

As Aristotle suggested, human emotions affect human judgment. Emotions have a substantial impact on decision making, often sidelining the ability to make rational and cognitive judgments. This is especially true during high-stakes products liability or personal injury litigation, when a jury must decide how much to award a catastrophically injured plaintiff or a deceased victim's loved ones.

To defuse juror anger, the defense must first determine what about the case could anger a jury. This often has nothing to do with the accident itself or the product in question, but rather the defendant's actions, which plaintiff's counsel will argue shows they do not care about plaintiff, the community, or the jury itself. To combat this, it is imperative to show compassion for plaintiff and highlight the ways in which the defendant acts as a force for good in the community.

Then, at trial, the defense must

1. accept responsibility, not necessarily liability, for something in the case,
2. personalize the corporate defendant, and
3. address the most difficult parts of the case with the jury. Doing so can dramatically reduce juror anger and effectively neutralize the Reptile Theory and other plaintiffs' tactics.

ACCEPT RESPONSIBILITY

The defense must accept responsibility in every single case. No exceptions. The degree and manner of responsibility accepted depends on each individual case, but the strategy must be applied in some variation.

Accepting responsibility will position the defense as the most reasonable party in the room. It will disarm plaintiff's attorney and allow the defense to blame parties who are really at fault: those who misused their product, did not read the warnings, or did not follow instructions. By accepting responsibility, the defense may shift the jury's focus to truly culpable parties.

In practice, defense attorneys, insured clients, and insurance professionals often find it difficult to embrace the strategy of accepting responsibility while also vigorously defending a case and asking the jury to award a defense verdict. In many cases, the defense has strong evidence it complied with the standard of care. Counsel must fight the kneejerk, typical defense reaction to deny having any responsibility! Remember, it is time for the defense to evolve and respond to the new psychological tactics of the plaintiffs' bar. The defense must accept responsibility for *something* in every single case.

Examples of accepting responsibility, without accepting liability, include:

- Accept responsibility for having a safe product that underwent rigorous testing and complies with all applicable industry standards;
- Accept responsibility for maintaining a safe premises;
- Accept responsibility for defendant's response to alleged harassment in compliance with its own employee handbook; or
- Accept responsibility for providing sound professional advice.

As in life outside of the courtroom, taking responsibility is the first step toward disarming anger and alleviating heated feelings.

PERSONALIZE THE CORPORATE DEFENDANT

Learning to personalize – or humanize – the corporate client is essential to defusing juror anger and minimizing the likelihood of a runaway jury verdict. This is especially critical when it comes to damages, as jurors will impose higher awards against defendants they view as faceless brand names with big bank accounts. The defense can, of course, request the jury be instructed that a corporation is “entitled to the same fair and impartial treatment” as a human being – but it is unwise to rely on that instruction alone.

To turn a business or brand into a relatable entity with whom a jury can connect, the defense must begin by telling their story – the employees and officers, the company's values and visions, and how such businesses care about their communities – and weaving that story throughout the entire trial.

A jury that can identify with the defendant is much less likely to satiate its anger and bias with astronomical damages than a jury that has only been provided enough information to simply view the case as an example of the “little guy” versus “Corporate America.”

ACKNOWLEDGE EMOTION, ADDRESS DIFFICULT FACTS

Proactively addressing the jury's emotions is key to managing their reactions. In *voir dire*, counsel should ask jurors how the case makes them feel. Specifically, the defense should discuss the details of the case, and ask the jury how they feel about potentially determining the value of a life or injury. This is also the time to ask whether any juror feels that just because the defendant may have injured someone, or acted negligently, or terminated an employee, the plaintiff should be awarded whatever amount they are demanding.

If the case is particularly trying, defense should also acknowledge their own emotions. It is important to remind the jury that defense counsel – whom plaintiffs' attorneys often try to paint as the “bad men in dark suits” – are human, too. When discussing an extreme injury or loss of life, it is more than okay to acknowledge the emotional burden the defense and their client carries as a result, regardless of liability. Doing so further instills the defense cares and has compassion for the plaintiff, and helps defuse a jury's anger toward the defendant.

CONCLUSION

As the number of exorbitant jury verdicts continues to mount, it has become increasingly important for defense counsel to be strategic and proactive. Most significantly – regardless of who the plaintiff is, or how contentious trial becomes – defense counsel must always proceed with respect and compassion. The defense must decisively and strategically accept responsibility for something, personalize the corporate defendant, and acknowledge difficult aspects of the case in order to defuse anger and minimize their client's exposure.

ABOUT ROBERT F. TYSON

Robert F. Tyson Jr. is a founding partner and the strategic managing partner of Tyson & Mendes LLP, a litigation firm specializing in insurance defense with offices in California, Arizona, Colorado, Nevada, Washington and Florida. Tyson is based in the firm's San Diego headquarters.

