# Shifting defence tactics for US nuclear verdicts

Michael Bradford • December 23, 2021

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The soaring costs of nuclear verdicts have reached a point where transportation companies, product makers and other defendants are more likely to accept responsibility early, hoping to sway juries with their own suggestions of damage amounts and avoid the headline-grabbing awards that have put some in financial straits.

"The definition of nuclear verdicts is in the eye of the beholder," said Robert Blasio, managing director of Gallagher Bassett Specialty. A $10m award "is becoming less and less nuclear than the $50m-and-above award", he added.

"These are all outrageous awards to a large degree," he continued, but "$10m is becoming almost routine".

"The jury is just playing with Monopoly money," when reaching nuclear verdicts, said Rob Moseley, a partner with Moseley Marcinak Law Group. "I think they've completely lost track of what a dollar really is."

"A nuclear verdict is one that is obtained because the non-economic damages are disproportionate to the actual economic damage sustained by the plaintiff," said Sheila Baker, senior counsel at law firm Tyson & Mendes. "Verdicts are getting larger and larger, and exorbitant awards are given based on a jury's fear and not the evidence or the law."

Defence attorneys point to the 'reptile theory' used by plaintiffs' attorneys to stir anger and sympathy in jurors, as a big reason that awards of hundreds of millions of dollars have become more common. After years of skyrocketing verdicts, defendants are now more willing to accept responsibility as part of a strategy to limit their losses, attorneys contend.

"The main cause of nuclear verdicts is that plaintiffs' lawyers changed the way they try lawsuits," said Robert Tyson, a partner at Tyson & Mendes. "It used to be they were trying to get sympathy from a jury, now they're trying to get a jury angry."

Defence attorneys, however, haven't moved quickly to counter the tactics aimed at jurors' emotions, he said.

**Shifting defence tactics**

There are patterns in cases with nuclear verdicts that can reveal where defence attorneys need to shift their approach, according to Tyson. For example, plaintiffs routinely argue that defendants failed to take responsibility for their actions, he noted, and it is an argument that works.

"Accept responsibility," said Tyson, who authored the book, *Nuclear Verdicts: Defending Justice for All*, on how attorneys can take on the plaintiffs' bar. He also urged defence lawyers to

suggest an award "that is reasonable and can be justified" early in a trial.

The defence also has to "personalise the corporate defendant", Tyson continued. "Tell the corporate story. You learn everything there is to know about the injured plaintiff, and yet, in a nuclear verdict you know nothing about the corporation."

"We need to fight fire with fire," agreed Daniel Murray, senior vice-president at the American Transportation Research Institute. Arguments about logical braking distance don't create the same empathetic reaction as an accident victim's sibling who is asked by a plaintiff's attorney: 'What's it like to never see your brother again?' We need to start making the defendant human again."

"Learn how to argue pain and suffering," which is "the biggest component of most nuclear verdicts", Tyson advised. "The plaintiffs' bar knows how to successfully argue for large non-economic damages," he said, "and the defence bar doesn't."

While such tactics might sound counterintuitive, Tyson said defendants who have made mistakes and appear to be heading for a loss in court should accept responsibility and "argue for fairness", adding: "But we don't do that as a defence industry. We fight everything and the plaintiffs' bar wants us to do that because it plays right into their hands."

Defence attorneys who don't take that advice better have an airtight approach, Moseley advised, or jurors aren't likely to respond well. "You can't defend one of these cases with a C-minus liability argument," he said. "If you're going to argue liability, you better have a B-plus or better argument."

**Poor communications hinder defence**

Tyson and other experts said that insurers and defence attorneys don't communicate among themselves as they should,

failing to share information that could help them counter the courtroom tactics of the plaintiffs' bar.

Insurers in some cases worry about potential antitrust violations when sharing information with each other, Tyson said. "But at a minimum, insurance companies should be sharing information with their own defence counsel," he noted. "If you're seeing things that are working and you're getting a good result, at least share that with the other counsel that you use."

Defence attorneys can sometimes derail their own efforts, sources said.

"The plaintiff's bar is coordinated, but on the defence side, they fight, I think, sometimes harder among each other than they do with the plaintiffs," said Anthony DeFelice, managing director with Aon Risk Services. Defence attorneys have been known to charge each other with bad faith, "and that's really not good for the industry", he added.

"Risk managers need to do a proper selection of their insurance partners to ensure that they are all completely aligned on how they are going to handle potentially large claims when in fact they do come in," DeFelice advised.

"The attacks on nuclear verdicts have to be at a grassroots level," Blasio said. Insurers and their lawyers have to be thorough in evaluating cases and develop, for example, ways to defend against the reptile theory and the plaintiffs' attorneys' tactics to convince jurors that they are responsible for accomplishing social change, he added. "It's easy to say, but the implementation of these efforts is very, very complicated."

**Little hope for tort reform**

Recent tort reform that could limit nuclear verdicts has been limited to a few states, notably Texas and Louisiana. And on the federal level, sources said a Democrat-controlled Congress is

unlikely to show enthusiasm for legislative proposals that would potentially limit awards.

"I don't see any kind of meaningful tort reform that's going to reverse this trend," said DeFelice.

In Texas, legislation signed earlier this year provides some protection for motor carriers. It splits a trial into two phases, requiring a jury to find a driver liable before a trucking company can be sued for punitive damages, thereby denting the so-called reptile theory used by plaintiffs' attorneys to play on jurors' emotions.

The Texas legislation does not apply to lawsuits filed before the effective date of 1 September 2021, which meant it did not affect a jury's decision in November to award a family $730m after the death of a 73-year-old woman who died when her car was struck by a truck carrying an oversized load of military equipment. The award is said to be the largest ever in a single-fatality truck crash case in the US.

Louisiana's Civil Justice Reform Act, which went into effect this year, changes the kind of medical expenses that can be included in awards from those that were billed to those that were actually paid. In addition, the threshold to file for a jury trial was lowered to $10,000 from $50,000. A prior law was repealed that barred attorneys from mentioning that accident victims were not wearing seatbelts.

**Insurers cut back**

Trucking companies, often targeted for large awards, saw the average size of verdicts increase to $22.3m in 2018, from $2.3m in 2010, an increase of 967%, according to research by ATRI.

Some small trucking firms have gone out of business because "they just can't afford the insurance" that is required to cover the exposure, said DeFelice. And insurers are looking to remove

volatility from their books by cutting down on the limits they offer, a practice that raises concerns, he noted.

Rather than providing limits of $25m, for example, some insurers may only offer as much as $5m, DeFelice pointed out. "You have to wonder how aggressively they will defend some of these cases as opposed to just settling, which in and of itself could contribute to claims inflation."

Insurers can't ignore the potential for settlements, as well as verdicts, to reach nuclear levels, Blasio pointed out. "Everyone talks about nuclear verdicts; to me the real concern is that these nuclear verdicts produce nuclear settlements… If cases are getting resolved because of concerns over the potential for nuclear verdicts, resolutions are going to be high. That's where the insurance industry has to stand up and take notice."