



**2021 CLM Construction Conference**

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## Emerging & Alarming Trends in Construction Site Accident Claims: The Impact on Nuclear Verdicts & Social Inflation

### **I. What Makes a Nuclear Verdict?**

#### **Understanding the Impact and Trends of Nuclear Verdicts.**

Nuclear verdicts are comprised of verdicts in excess of \$10 million and they are on the rise. The average top fifty verdict in 2019 was \$86,202,991, which is up approximately 58% from the average top verdict in 2018. Since at least 2014 nuclear verdicts have consistently increased every year. These large verdicts are primarily caused by social inflation and pooled plaintiff tactics. Defense professionals need to employ best practices to combat these large verdict trials. Nuclear verdicts are predictable and defensible. The defense can combat nuclear verdicts by sharing best practices among trial teams, conducting intentional deposition preparation, minimizing risk through advance research tactics, and having a clear jury selection strategy.

### **II. The Effect of Social Inflation and Nuclear Verdicts on the Insurance Industry**

Social inflation is a term that describes how current legal and societal trends combine to cause increased litigation, and more generally, a resulting impact of more decisions favoring plaintiffs including larger verdicts and more sympathetic juries. This social inflation trend is contributing to rising insurance costs and claims as well as risk to insurance companies and other businesses. With the prevalence of social inflation in our current landscape, plaintiff attorneys are at an advantage using reptilian tactics to increase litigation and jury verdicts. This translates to increased risks and potential costs for insurance companies and other businesses.

#### **IV. Nuclear Verdicts are Predictable and Defensible**

***Plaintiff's counsel works together to deploy established best practices across jurisdictions.***

Plaintiff's counsel playbook makes their collective approach more effective. It is surprising to witness the level of coordination among plaintiff's counsel in wide-ranging jurisdictions. Fine-tuned reptile tactics activate jurors' desire to protect their community and equate awarding damages with safety. Plaintiff's counsel also consistently denigrates the defense of the case to direct juror anger towards the defendants and their attorneys. The aforementioned established best practices also allow plaintiffs to use discovery strategically. These consistent and effective approaches encourage the awarding of damages in oversized amounts.

##### ***Trial Strategy***

It is imperative that the defense orient trial strategy around jury-friendly arguments and be aware of known plaintiff tactics in this regard. Focus on issues that can be credibly defended. Be sure to use visually compelling presentations that are easy for the jurors to follow. Anticipate plaintiff's inappropriate tactics and respond calmly and professionally at all times. Finally, do not shy away from discussions addressing damages. A reasonable defense anchor is proven to reduce awards.

##### ***Preparing for Depositions***

When preparing for depositions, discuss strategies and advance tactics as to credibility and persuasiveness. Developing tools to withstand plaintiff counsel's reptilian questions and their related attempts to frustrate, confuse and bully defense witnesses is advisable before entering the deposition. Another good idea is to practice mock deposition and cross-examination type questioning and seek feedback. Multiple sessions and practice allow witnesses to build on progress over time and prepares them for potential questions that the plaintiff may present that they would otherwise have been unaware that they may encounter.

##### ***Jury Research Minimizes Risk***

Jury research before trial minimizes your risk. Conduct focus groups early in the discovery process. This will assist counsel in working up the case with the keys to success for trial in mind. Mock trial research may also be beneficial to inform mediation and provide a risk assessment. In this effort, identify a case and venue specific profile. Shadow jury research allows counsel to adjust effectively as the trial progresses.

### ***Jury Selection Strategy is Imperative***

Jury selection strategy must recognize sympathy, fear, and the threat of the current polarization of our society. Jury questionnaires are a valuable tool in cases involving sensitive political or personal issues. Online juror research is essential to probe values and ideals not revealed by juror questionnaires or voir dire.

### **III. Outlook for Tech/ Shared Economy Companies**

The plaintiff's bar is seeking creative ways to litigate against shared economy companies. Historically, the designation of rideshare and delivery drivers as independent contractors rather than employees has shielded these companies from litigation. Shared economy companies face an uphill battle on this front. TBC has collected data from over 7,000 respondents regarding UBER and similar shared economy companies. This data revealed several key takeaways. First, jurors have middling impressions of shared economy companies regardless of the services they provide. Most believe UBER drivers and similarly positioned drivers should have employee status and protections. As plaintiff's attorneys capitalize on this increased area of potential litigation, novel issues and strategies open the door to heightened risk for shared economy companies, and their insurance carriers. Direct claims regarding driver background checks and other security issues put shared economy companies in the crosshairs. California recently upheld drivers' independent contractor status, but new challenges are emerging on the horizon.