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***The New and Improved Defense Playbook: A Fresh Look to Combat Nuclear Verdicts***

**I. The Problem**

**Are runaway jury verdicts a problem?**

It may seem like astronomical jury verdicts are the new normal. Runaway verdicts make national news and many applaud the courage and strength of the injured plaintiff and his or her counsel for holding wrongdoers accountable. When a jury awards an injured plaintiff tens or hundreds of millions of dollars, is it a problem?

We believe the American civil justice system was established on the foundation of “**Justice for All.**” Our laws and rules of civil procedure are meant to establish an equal playing field when determining if someone is at fault when someone suffers a loss. When someone is at fault for an injury, the civil justice system is structured to achieve justice. We believe this means justice for all – not only justice for an injured plaintiff, but also justice for the defendant. Everyone deserves equal treatment in the eyes of the law.

The term “runaway” implies a final verdict may not reflect justice or fairness. Perhaps in rare cases, a jury verdict of tens or hundreds of millions of dollars is justice for both parties. However, the increasing frequency of large jury awards raises the question whether justice is skewed in favor of the plaintiff in these verdicts.

We believe the defense is entitled to the same justice as an injured plaintiff in the eyes of a jury.

**What causes runaway jury verdicts?**

Large jury verdicts are commonly referred to as “runaway” jury verdicts. This indicates the jury “ran away” by failing to follow the instructions of the court or consider the evidence presented at trial. However, most “runaway jurors are behaving exactly as one side's lawyers have been carefully grooming and preparing them to do. They are, in most cases, ‘running’ toward a goal that trial advocates have portrayed to them as attractive.”<sup>1</sup>

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<sup>1</sup> Walter Olson, The Art of the Runaway Jury, Del. Law., Fall 2005, at 24, 26.

Accordingly, when analyzing large jury awards, “the most relevant question to ask is usually not, ‘How could these jurors have been so irrational?’ but rather, ‘How did the lawyers manage to make this outcome look reasonable?’”<sup>2</sup> Indeed, the plaintiffs’ bar utilizes creative techniques to frame large jury awards as reasonable and required and drive runaway jury verdicts.

### 1. Anger

The primary motivator of a runaway jury verdict of any kind is juror anger – not sympathy. Juror anger is the most dangerous of all emotions to the defense. Leveraging sympathy for an injured plaintiff at trial can certainly result in a favorable verdict for the plaintiff. However, when a jury runs away with a verdict or awards an astronomical figure, it is due to juror anger.<sup>3</sup> A juror experiencing anger is much more likely to make punitive attributions towards a defendant compared to a juror who is not.<sup>4</sup> When a juror feels angry, his or her ability to empathize with a defendant is greatly hindered.<sup>5</sup>

### **Creative Themes to Inflare Juries and Support Astronomical Asks**

The plaintiffs’ bar has found four main themes to be especially useful in their arguments to get the jury angry. These themes include:

- The defendant was careless
- The defendant placed profits over safety
- The defense refuses to accept responsibility
- The defense is trying to “get a discount”

These themes are prevalent in plaintiffs’ closing arguments in many runaway jury verdicts, and they have proven to work across jurisdictions and practice areas.

In addition, the plaintiffs’ bar has increasingly developed new, creative arguments to frame and justify requests of the jury for high damage awards. The plaintiffs’ bar knows the largest component of any runaway jury verdict is noneconomic damages, the “human element” of the case. Accordingly, plaintiffs’ attorneys are motivated to tap into this segment of the case to drive large awards.

Creative arguments include: itemizing each element of damages available under the applicable jury instruction, proposing an “answer an ad” scenario with respect to plaintiff’s loss, and tying money to time such as the minutes, hours, and days plaintiff will live with these injuries in the future. Plaintiff’s counsel’s latest creative arguments discuss the value of “priceless” inanimate objects such as artwork or advanced machinery and large salaries earned by famous athletes

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Walter Olson, The Art of the Runaway Jury, Del. Law., Fall 2005, at 24, 26.

<sup>2</sup>Lerner, J.S., Goldberg, J.H., & Tetlock, P.E., (1998) Sober second thought: the effect of accountability, anger, and authoritarianism on attributions of responsibility. *Personality and Social Psychology Bulletin*, 24, 563-574.

<sup>3</sup> Winterich, K.P., Han, S. & Lerner, J.S. (2010) Now that I’m Sad, It’s Hard to Be Mad: The Role of Cognitive Appraisals in Emotional Blunting. *Personality and Social Psychology Bulletin*, 36, 1467-1483.

and celebrities. While these methods may seem unorthodox, they are working for the plaintiffs' bar throughout many different practice areas.

### **Typical Defense Approach**

In addition to the creative and ever evolving techniques of the plaintiffs' bar, the failure of the defense bar to adapt has contributed to the rise of runaway verdicts.

#### **1. Fight liability and poke holes**

We find the defense often fails to effectively defuse juror anger. The case studies revealed traditional defense approaches to trial in which the defense fights liability at all cost, focuses on the medicine and scientific evidence, pokes holes in plaintiff's case, and attacks the credibility of plaintiff and plaintiff's experts. These traditional defense methods do not defuse juror anger.

#### **2. Shy away from discussing damages**

Defense attorneys also tend to be reluctant to address damages in closing argument. Most defense counsel typically go no further than arguing the jury should not decide the case based on sympathy and any award must be fair and reasonable. When defense attorneys do not discuss damages, the only damages framework the jurors hear is that told by plaintiffs' counsel. Shying away from damages gives far too much power to plaintiffs' counsel over what could become the largest component of a jury's verdict.

### **II. The Solution – Defuse Anger**

The best way for the defense to defuse juror anger at trial is (1) personalize the corporate client, (2) show the defense cares about plaintiff, (3) address the most difficult facts for the defense with the jury, and (4) accept responsibility, not necessarily liability, for something in the case.

#### **Personalize the corporate client**

Personalizing the corporate defendant is crucial in a jury trial. In conjunction with the company and claims representative, defense counsel should craft a compelling narrative regarding positive things the company does for its community. Counsel should discuss this narrative with the jury in voir dire and weave this story throughout trial, including opening statement, with witness testimony, and in closing argument. This allows the jury to form a connection with the company and makes it more difficult to award a runaway verdict.

#### **Demonstrate Empathy**

The second, and equally important, method for defense counsel to defuse juror anger is to care about the plaintiff. Often, the underlying incident in a high-exposure jury trial involves catastrophic, permanent injuries. Regardless of the defense's liability concessions, the defense must demonstrate to the jury it cares about and feels compassion for what happened to plaintiff.

### **Address bad facts**

One of the most challenging – but essential – aspects of defending any case is embracing the case’s worst facts and addressing them with grace and tact.

In addition to assessing which facts in the case will incite juror anger, proper trial preparation includes searching through the case for the worst facts plaintiff can possibly reveal to the jury. Often times, these analyses point to the same set of facts.

At trial, the defense must employ a strategy to embrace these bad facts and change the narrative in order to defuse any anger that can possibly stem from them. If the defense shies away from the ugliest parts of the case, plaintiff will exploit that weakness to further enrage the jury in rebuttal. When the defense fails to address the worst parts of its case with a jury, the jury deliberates with only one narrative or framework to view these facts – the framework presented by plaintiff’s counsel.

### **Accept responsibility for something**

The defendant should show the jury it is accountable for its actions/inactions related to the incident (again, not necessarily liability). By taking responsibility for something and communicating compassion for the plaintiff, defense counsel dramatically reduces juror anger in the face of plaintiff’s Reptile Theory tactics. This allows the defendant hospital to seem like the most reasonable party in the courtroom, whose stories, themes, and defense should be adopted.

## **III. The Solution: Mitigate Damages**

### **Give a defense number**

We believe defense counsel should sponsor a defense number for damages in every trial, even when the defense is seeking a defense verdict. The best way to avoid a runaway jury verdict is to give a defense number, and to give it early and often. It is simply the converse of the best way for a plaintiff’s attorney to get a large jury verdict: ask for it.

Jurors are conditioned by arguments and evidence presented throughout trial. The jury grows comfortable with a number over time, no matter how outrageous it may seem when first introduced by plaintiff’s counsel. This is especially true as skilled plaintiff’s counsel repeat their large damages numbers over the course of multi-week or month trials. It is imperative the jury get comfortable with a defense number, as well. This is why in all cases, even cases where the defense is asking for a defense verdict, we recommend giving the jury a number.

In essentially every case, the defense is comfortable with a case resolving for some number by the time the case approaches trial. Trial carries a risk of loss as well as substantial cost for both parties. The defense number presented to the jury must be developed by defense counsel, the claims professional, and the defendant hospital. The defense team must be comfortable with the number. Often, the defense can develop a number based on prior settlement offers or

mediator proposals. Of course, the number must be supported by evidence and must include amounts for both economic and noneconomic damages. But the number ultimately presented should be a figure the defense will be comfortable paying in the event the jury finds liability.

a) Juror Psychology: Priming and Anchoring

Plaintiff's counsel routinely "prime" the jury by repeating a large number they are asking the jury to award. The psychology of "priming" is explained as follows:

Priming is a technique used to influence (*i.e.*, control) attention and memory, and it can have significant impacts on decision-making. Specifically, priming is an implicit memory effect in which exposure to a stimulus influences a response to a later stimulus. This means that later experiences of the stimulus will be processed more quickly by the brain.<sup>6</sup>

Psychologists have also studied the concept of the "anchoring effect" of giving a number at trial.<sup>7</sup> Anchoring refers to when numerical judgments are influenced by an arbitrary number. Humans rely on an anchor as a starting point for deliberations "because we typically make decisions by comparing one thing to another, we then search for additional clues to help us adjust our decision as needed."<sup>8</sup> Jurors with higher anchor numbers tend to award larger damage amounts. Conversely, jurors with lower anchor numbers tend to award smaller damage amounts. Studies have shown anchoring effects have extremely powerful effects on juries.<sup>9</sup> In other words, anchoring matters.

In the context of determining a damages award, a jury who has been anchored early by plaintiff and primed by repeatedly hearing plaintiff's requested verdict will be more likely to arrive at a number close to plaintiff's number. Thus, it is psychologically important to give the jury another number to consider. Then, if jurors are deliberating damages, they will be equally primed and their anchor will be balanced by defendant's number.

**Argue pain and suffering**

Once the defense has given a jury a number in closing, the same number she presented in the beginning of and throughout trial, counsel must convince the jury the defense number is the just result if they determine liability in the case. Even when seeking a defense verdict, defense counsel must argue noneconomic damages.

In the face of plaintiff's counsel's creative arguments, defense counsel must provide a new analytical framework for the jury to assess noneconomic damages in order to avoid a runaway

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<sup>6</sup> Kanasky, Bill, Jr., Ph.D. (April 2014). Debunking and Redefining the Plaintiff Reptile Theory. *For the Defense*, 18.

<sup>7</sup> Miller, K. (2017). Anchoring Your Argument: How to Use The 'Anchoring Effect' to Persuade. Retrieved from <https://courtroomlogic.com/2017/11/08/anchoring-effect/>

<sup>8</sup> Miller, K. (2017). Anchoring Your Argument: How to Use The 'Anchoring Effect' to Persuade. Retrieved from <https://courtroomlogic.com/2017/11/08/anchoring-effect/>

<sup>9</sup> Campbell, J., Chao, B., Robertson, C., & Yokum, D. (2016). Countering the Plaintiff's Anchor: Jury Simulations to Evaluate Damages Arguments. Retrieved from <https://ilr.law.uiowa.edu/print/volume-101-issue-2/countering-the-plaintiffs-anchor-jury-simulations-to-evaluate-damages-arguments/>

jury verdict. Specifically, the defense should suggest jurors consider two things when awarding damages for noneconomic damages:

- 1) The impact of the accident on plaintiff's life – what is plaintiff's life really like after the accident?
- 2) The impact of money on plaintiff's life - what is the value of money to this plaintiff?

a) Impact of the Accident

First, defense counsel must paint a picture for the jury detailing what plaintiff's life is really like now and what it may realistically look like in the future. In every case, counsel should look at what plaintiff could do before the incident versus what she cannot do after the incident. The defense must find a way to paint a positive story of plaintiff's life. Defense counsel must analyze plaintiff's post-accident life and tie in any defense number for pain and suffering.

The defense should argue the defense number takes into account the activities plaintiff still has available to him and can enjoy. Additionally, the defense should draw upon the strength of the plaintiff to show the jury that humans have an enormous capacity to adapt to changed circumstances. A positive perspective on plaintiff's life after the accident allows the defense to argue to the jury why a much lower defense number for pain and suffering is fair and reasonable based on plaintiff's current lifestyle.

b) Impact of Money

The second element of arguing pain and suffering is the most important. What is the impact of money on plaintiff's life? What is the value of money to plaintiff?

Defendants commonly hear plaintiff's counsel argue we "take the plaintiff as we find them" when arguing the defense is responsible for injuries sustained by an "unusually susceptible plaintiff."<sup>10</sup> While this is true with respect to medical damages, it is also true when it comes to a jury awarding pain and suffering. Specifically, any dollar amount the jury awards must be fair and reasonable to this plaintiff based on the impact of money on plaintiff's life. The focus here is on this plaintiff in this lawsuit, not famous athletes' salaries or "priceless" works of art.

When defense counsel ties a potential award for noneconomic damages to something meaningful in plaintiff's life, it illustrates how a specific dollar amount will make plaintiff whole after experiencing pain, suffering, grief, embarrassment, emotional distress, and loss of enjoyment of life. Ultimately, when a patient experiences a physical and emotional injury, she has lost joy, satisfaction, pride, and perhaps the ability to pursue her passions in life. Defense counsel should present argument to support the defense number in a way that proves it will restore plaintiff's passions to the fullest extent possible. For example, it would be impossible for any amount of money for pain and suffering to restore a lost limb to an amputee. However, based on the impact of money on the injured patient's life, \$500,000 for pain and suffering may have a life changing effect and may restore plaintiff just as much as an award of \$20 million.

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<sup>10</sup> CACI 3928.

#### **IV. Conclusion**

The problem of rising jury verdicts is real. The cause is juror anger, exploited by plaintiffs' attorneys taking a formulaic approach to these cases. Defense attorneys are failing to adapt and have failed to respond to these new approaches by the plaintiffs' bar. This has resulted in an increase in runaway verdicts.

The solution to the problem is to defuse anger and mitigate damages, which requires a new approach. The defense must accept responsibility for something, not necessarily liability, and must show the jury we care. Defense counsel must also give a defense damages number at trial and must aggressively argue damages, including pain and suffering damages, in every case. When fully employed, these techniques will achieve justice for the defense in medical malpractice cases.