Preventing Nuclear Verdicts: Workshop & Trial Academy
Chicago, IL
Session One: *Preventing Nuclear Verdicts*

I. Recap of Virtual Session One—Nuclear Verdicts™: Problems and Solutions

Defining a Nuclear Verdict

Astronomically large jury verdicts are commonly referred to as "Nuclear Verdicts™" or "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. Unfortunately, jurors in this situation are behaving in a way plaintiffs' attorneys want them to. Plaintiffs' attorneys use tactics and strategies throughout trial to intentionally steer jurors towards handing down unreasonable Nuclear Verdicts™.

Nuclear Verdicts™ are multi-million-dollar awards with a disproportionate amount of noneconomic damages, usually to compensate for a person's subjective and immeasurable pain and suffering that cannot be justified as compensating a person for an injury.

Recent Astronomical Verdicts

In the last year alone, dozens of corporations have shelled out hundreds of millions of dollars in damages after unsuccessful attempts to defend their products in court. Juries have hammered companies with hundreds of millions of dollars in verdicts, and sometimes billions of dollars in verdicts. These verdicts sometimes trickle down to consumers in the form of higher costs.

What Causes Nuclear Verdicts™?

These awards typically result from plaintiffs' lawyers urging the jury to return a specific, extraordinary amount and misleading them to think that amount is the norm. It can also result from plaintiffs' lawyers' inflaming the jury to punish defendant for conduct that would not qualify for punitive damages.

Why Nuclear Verdicts™ Are a Problem

It may seem like nuclear jury verdicts are the new normal. These verdicts make national news, and many applaud the courage and strength of the injured plaintiff and their 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 foundation of "Justice for All" established the American civil justice system. Its laws and rules of civil procedure are meant to set up 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 defendants. 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 does reflect justice for both parties. However, the increasing frequency of large jury awards raises the question of whether justice is skewed in favor of plaintiff in these verdicts. We believe the defense is entitled to the same justice as an injured plaintiff in the eyes of a jury.

Traditionally, a "runaway verdict" means the jury failed to follow instructions. Most "runaway" jurors behave exactly as one side persuades them. The primary motivator of a runaway jury verdict of any kind is juror anger – not sympathy.

How to Spot and Stop Nuclear Verdicts™

Outrageous Nuclear Verdicts™ have become the norm. "Nuclear Verdicts™ (and routinely excessive verdicts) drive insurers from the market and increase premiums. The twin pressures of decreasing competition and increased insurance costs are ultimately passed through to the consumer. This is the same consumer and taxpayer who was leaving New York at a higher rate than any of the 50 states even before COVID-19."[i]

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, which has resulted in an increase in nuclear verdicts. The solution to the problem is to defuse anger and mitigate damages, which requires a new approach.

First, defense attorneys must begin sharing with one another. Plaintiff attorneys share everything while defense attorneys share almost nothing. The reason is plaintiff attorneys rarely, if ever, have repeat clients, so they are not in competition with one another. Insurance defense attorneys operate on volume; they are competing for the same clients. Thus, on one level it is understandable they would not wish to share secrets or tricks of the trade.

However, claims professionals should encourage and insist their counsel openly share tools and strategies with one another for the good of the industry and the sake of justice. Sharing information is crucial to preventing unjust jury verdicts and achieving justice for all. This panel of seasoned defense attorneys and top claims professionals seeks to educate claims

professionals and their defense counsel as to concrete tactics they may use to combat Nuclear Verdicts™.

As plaintiffs' arguments constantly evolve, so too must the defense arguments in order to beat them. In light of the Nuclear Verdicts™ in just the last year, the question really is: can you afford *not* to argue noneconomic damages?[ii] The panel will delve into various strategic methods and tactics in detail in three additional upcoming sessions. When fully employed, these techniques will achieve justice for the defense.

II. Recap of Virtual Session Two—Slay the Reptile

What Motivates Jurors

Anger motivates juries to punish the defendant. The reptile theory, which focuses on instilling fear in the jurors by focusing on the defendant's harmful and dangerous conduct, leads juries to find liability in the defendant, but also to award plaintiff's large sums of damages. The reptile theory hijacks the standard of care. For example, in a negligence claim, the objective standard of what a reasonable person of ordinary care would do in similar circumstances, is redefined, and heightened and effectively turned into a strict liability standard by the reptile theory. This activates the reptile portion of the brain in the jurors and the angry emotion often motivates them to seek a verdict for the plaintiff and against the defendant.

Defining the Reptile Theory

The reptile theory was first articulated by David Ball and Don C. Keenan in their book, *Reptile: The 2009 Manual of the Plaintiff's Revolution.*[iii] The reptile theory is the notion succeeding at trial includes the plaintiff's attorney's ability to tap into the primitive part of jurors' brains to evoke a fight or flight response, the "reptilian" portion of the brain.[iv] In activating the fight or flight response, the jurors view the case through the lens of survival, danger, and need to protect their genes by protecting themselves and the community. This tactic tends to lead to significant damages to the plaintiff, because the higher the damages, the higher the likelihood the community will remain protected from similar harm. The theory is used to shift the jury's focus from the standard of care to absolute safety from danger.

Reptile trial tactics include framing trail arguments in terms of absolute safety. Plaintiff's arguments also maintain their focus on the defendant's conduct and their potential threat to the community. First, plaintiff's attorneys focus on accident frequency, downplaying the occurrence of freak accidents. More frequent accidents and a higher risk of danger should lead to higher precautions. Second, plaintiff's counsel focuses on the amount of harm the defendant's conduct could have caused. Third, plaintiff's counsel utilizes the reptile theory by analogizing the harm the defendant's actions could cause in different circumstances to show the jury the defendant is dangerous in a variety of situations. These three tactics help to show that the danger is a threat to everyone in the community.

How the COVID-19 Pandemic Affects Verdicts

Conducting jury trials remotely has been very difficult during COVID-19. Technological challenges include jurors losing connection to their online platforms which resulted in delays or jury instructions and parts of opening statements needing to be reread. The Zoom screens also displayed jurors being distracted (e.g, using other computers, resting in bed, or exercising). This has resulted in jury verdicts that may not have been as accurate had all participants been together in the courtroom.[v]

Pre-Litigation Preparation

Filing pretrial motions to limit or exclude reptile arguments can be of great benefit to defense counsel and help in securing a defense verdict. *Turner v. Salem and U.S.A. Logistics, Inc.* resulted in a wrongful death cause of action because of a trucking accident.[vi] The plaintiff operated a vehicle and an agent for defendant operated a semi-tractor were involved in a collision. The main dispute was who crossed into the other's lane to cause the accident. The defense successfully filed pre-trial motions in limine to exclude "the golden rule" or reptile theory arguments. The court favorably ruled for the defense when the plaintiff's counsel continued to propose reptile theory arguments. Similarly, in *Hensley v. Methodist,* it was alleged medical malpractice contributed to the death of the plaintiff.[vii] The defense filed a motion in limine to exclude reptilian arguments, while also educating the courts about why it is not the law. The court denied the motion, however, but also stated "any attempt by either party to appeal to prejudice or sympathy of the jury will not be condoned." A defense verdict was also issued.

Depositions

Being prepared to face a reptile theory line of questioning is important. Reptile theory questions are not about the specific facts of the particular case. The questions are about "the safety rule." In slaying the reptile, it is important for the defense to prevent the creation of the reptile safety rule.[viii] The reptile theory includes the safety rule in addition to "danger." For example, safety rule questions focus on persuading a witness to agree general safety is important and a top priority and agree danger should always be prevented. In the discovery phase, defense counsel should notice words such as "always, never, risk, danger, community, safety or public safety, and needlessly endanger." These priming words create a variety of umbrella questioning easy for a witness to agree to, for example, "Safety is the top priority of your company, right?" Preparation of defense witnesses for deposition should include all-day training sessions to spot priming words and hypothetical setups.[ix] Below are tactics and rules to prepare witnesses and spoil a plaintiff's attorneys questioning based in the reptile theory.

Witness Preparation

Four rules can help combat witnesses falling into the trap of reptilian questioning. First, never say "yes." Plaintiff's counsels' line of questioning is designed to provoke "yes" answers to easy questions. Instead of answering yes, the witness should respond with a complete sentence that

at least restates the questions. Second, the safety rule is never simple. Few safety rules are simple, and almost all decisions a person makes involves some safety risk. The correct answer is almost always, "it depends." Third, the defendant's conduct was reasonable. In their line of questioning, it is important for the witness to relay how their conduct was reasonable. Know the message, and work it into every answer (e.g., commercial truck drivers are trained and tested, generalized regulations do not always apply to each situation). Four, do not answer damages questions. If plaintiff's counsel asks whether a person who causes damage should pay for that damage, instead of saying yes or no, the witness should respond the question sounds like one that should be answered by lawyers.[x]

III. Recap of Virtual Session Three—Personalize the Corporate Client and Accept Responsibility

The Importance of Personalizing a Corporate Client

Jurors are more likely to view conflicting evidence most favorable to the party they most identify.[xi] Opening statements are important in making a good impression that carries throughout the trial. Studies have demonstrated the importance of personalization. Participants who initially believe a party is innocent will seek evidence to confirm innocence can impact the ultimate decision. Personalizing a corporate defendant is important because jurors have feelings and compassion for one party or another, and it is nearly impossible to keep these from entering the court room.[xii] Forming a connection with the jury with a corporate client is also fair in seeking justice, because plaintiff's attorneys utilize personalization very well, so the jury knows the plaintiff's story to garner sympathy.[xiii]

How to Personalize a Corporate Client at Trial

To personalize a corporate defendant, it is important to get to know the client.[xiv] Every company is made of people who have created something of value to society. What is shared about the client to the jury should be what would be the most impactful and relatable to the particular jury. The defense attorney's job is to share the value they provide to society. It is compelling to show a representative who represents the best aspects of the company who will testify at trial. Defense counsel should demonstrate the representative's personal character to demonstrate large corporations are comprised of good, hard-working human beings who will be impacted by the final verdict. Telling a story helps illustrate and humanize a client. Simply stating the law or the facts of the case may not be compelling to a jury, as it is inevitable jurors do decide on some level based on emotion. Personalizing the corporate defendant encourages jurors to understand the value and importance the client brings to society, how damaging an unreasonably high award would impact them.

Questions for Claims Adjusters to Ask Defense Counsel

Claims adjusters must ask defense counsel about the details of the case. Particularly, claims adjusters should work closely with defense counsel to examine their defense number. Claims

adjusters should also ask the defense counsel about the experts they plan to use at trial, especially regarding a plaintiff claiming pain and suffering.

Accept Responsibility

Accepting responsibility, not necessarily liability or negligence, is important to defuse jury anger, the leading cause of runaway jury verdicts. The defense must genuinely care about what happened to the plaintiff. Responsibility consists of acceptance and accountability. Plaintiff's attorneys want to prove liability to get the jury anger, thereby increasing the likelihood of a higher reward. When defense counsel accepts responsibility, this diminishes the plaintiff's goal of angering the jury. Accepting responsibility works because it makes the defense appear reasonable, it defuses jury anger, and it places the focus on other parties that may be culpable.

The Difference Between "Accepting Responsibility" and "Admitting Liability"
Impact of Denying All Responsibility

Accepting responsibility is not the same as admitting liability. Responsibility should be accepted in every case, even when the defendant is not at fault. Accepting responsibility, even though not admitting liability sounds reasonable to the juror. The defense can accept responsibility for maintaining a safe workplace, for the defendant's response to alleged harassment that is in accordance with the employee handbook, for providing sound professional advice, and for meeting the legal standard of care. The defense accepts responsibility while not admitting liability in all of the above situations.

How to Effectively Accept Responsibility at Trial

The defense has three ways to accept responsibility. First, they can accept 100% liability. If the company made a mistake, owning the mistake is important because it is effective in defusing anger and can help in securing a lower award. Second, the defense may argue their client is only partially at fault. If it is inescapable the defense's client is responsible for some portion of liability, it is important to accept liability, even if the plaintiff was mostly at fault. When defense counsel fails to accept responsibility, the plaintiff counsel has much more ammunition to obtain a runaway verdict. In the opening statement, begin with accepting responsibility, and then discuss the other parties responsible. It is important to not accept responsibility for specific actions. Accepting responsibility for certain acts and not others may backfire because the jury may agree, but they also may agree the company should have done more that the defense did not accept responsibility for. Rather, defense counsel should accept partial responsibility in a general sense. For example, defense counsel can acknowledge defendant could have done something different or acknowledge defendant did have some fault for something minor. Third, the defense could accept responsibility but not liability. Defense counsel should accept responsibility in every case, even those with no liability. Some examples include accepting responsibility for putting a safe product in the stream of commerce and for maintaining a safe workplace. After providing one of these statements, defense counsel should expound on examples and research of how the company developed a safe product.

IV. Recap of Virtual Session Four

Always Give a Number

It is possible to ask the jury for a specific amount in damages and still obtain a defense verdict. The number must be given early, repeatedly, and must never increase in value. Jurors have no way of knowing what a reasonable award in damages is unless they are told by either the plaintiff or defense counsel's attorney. When the jurors have been repeatedly hearing a $53-million-dollar award being a reasonable award from the plaintiffs, the jurors will likely throw out a much smaller number offered by the defense when it comes at the end of the trial.

Why Defense Counsel Should Give a Number

Giving a number, especially in the beginning during voir dire is important because the plaintiff's counsel typically does provide a number and sets the bar very high in the minds of the potential jurors. Defense counsel could say something like "If the evidence supported a much lower damages award, such as $500,000 or less, would you be comfortable awarding this amount?" The jurors now know that this is not the multi-million-dollar case presented by the plaintiffs. Runaway verdicts are almost always obtained when plaintiff counsel presents an astronomical number early in the stages of litigation.

The Importance of Anchoring

When only the plaintiff's counsel gives a number, the jury is now biased in favor of the plaintiff because they use this high number as the reference point. Plaintiff's counsel will suggest a large number, and still be happy if they receive half of that number. The jury has no way of comparing the number to any other award if the defense counsel does not offer their own number. The defense must give the jury their number in the beginning and end of every trial because of the primacy and recency effect. Psychological studies show people remember information presented at the beginning and end when learning or trying to recall information.

Argue Pain and Suffering

One way to argue a pain and suffering non-economic number is through the plaintiff or the plaintiff's family and friends. For example, in a case regarding severe burns to a plaintiff's body, one way to get the number to the jury is to ask the plaintiff's family member whether a specific amount would have a significant impact on his/her family? This way of framing the question and getting the number into the juries' ears can be effective, because this is still a significant amount of money.

How to Determine a Reasonable Defense Number

In determining a reasonable defense number, defense counsel should start by looking at the plaintiff's annual income. What was the plaintiff's profession, last job, their annual income, and their lifestyle? These questions help determine the amount of money reasonable to compensate the plaintiff and return them to as close to a lifestyle as they had before the

incident. This number will help ground the jury in reality. If such questions regarding their income are inadmissible as evidence, reasonable inferences can be drawn from their career or from where they worked. In determining reasonable non-economic damages, two elements should be considered: (1) the impact of the accident on the plaintiff's life, and (2) the impact of money on the plaintiff's life. Both elements will be considered below.

Impact of the Incident on Plaintiff

The defense counsel must illustrate to the jury what the plaintiff's life is like after the accident, and what it may look like in the future. This must be contrasted with what the plaintiff's life was like before the accident or incident. If the plaintiff's condition has been improving since the accident and their prognosis appears to be getting better, this supports a lower number in damages and is very compelling for a jury.

Impact of Money/Damages Award on Plaintiff's Life

When arguing the impact of money on the plaintiff's life, the defense counsel must examine the value of the plaintiff's activities and hobbies. The pain and suffering award should seek to give back the enjoyment they have lost due to their incident. It is important to discover who the plaintiff is when deposing them to learn the value of what they actually lost. Asking questions such as, "where does the plaintiff live, where did they vacation" or "what did they like to do for fun" helps defense counsel understand the proper dollar amount that will enable the plaintiff to share experiences that may not mirror their life before but can provide enough value to their life to compensate them.

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[i] https://www.judicialhellholes.org/wp-content/uploads/2020/12/ATRA_JH20_layout_08.pdf

[ii] https://www.law360.com/articles/1133149/a-defense-attorney-s-guide-to-successfully-arguing-damages

[iii] John R. Crawford, Benjamin A. Johnson, *Outsmarting the Lizard – Strategies for Responding to Reptile Theory Questions,* 57 No. 12 DRI For Def. 70 (2015).

[iv] Id.

[v] Id.

[vi] Id.

[vii] Id.

[viii] Robert F. Tyson, Jr., *Nuclear Verdicts,* 139 (2020)

[ix] Robert F. Tyson, Jr., *Nuclear Verdicts,* 143 (2020)

[x] John R. Crawford and Benjamin A. Johnson., *Outsmarting the Lizard – Strategies for Responding to Reptile Theory Questions,* 57 No. 12 DRI For Def. 70 (2015) at 70.

[xi] Harry Mitchell Caldwell, Deanne S. Elliot, *Hit The Ground Running: The Complete Opening Statement Supported By Empirical Research and Illustrations,* 24 Suffolk J. Trial & App. Advoc. 171, 181 (2018).

[xii] Id at 171.

[xiii] Id.

[xiv] Robert F. Tyson, Jr., *Nuclear Verdicts,* 119 (2020)