



**Preventing Nuclear Verdicts: Identify Potential Problem Cases  
Session 1: April 7, 2021**

**I. What is 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. 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>i</sup>

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. 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.<sup>ii</sup>

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. Philadelphia juries have hammered Johnson & Johnson subsidiary Ethicon with more than \$345 million in verdicts.<sup>iii</sup> Another Johnson & Johnson subsidiary, Janssen Pharmaceuticals, was hit with an \$8 billion single plaintiff Risperdal case.<sup>iv</sup> Excessive tort costs in California led to an annual estimated \$15.1 billion lost in direct costs, amounting to each California resident paying a \$594.74 “tort tax.”<sup>v</sup>

**Why are Nuclear Verdicts 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 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 foundation of “**Justice for All**” established the American civil justice system. Its 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 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.

### **What Causes Nuclear Verdicts?**

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.

### **Anger Drives Nuclear Verdicts:**

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>vi</sup> A juror experiencing anger is much more likely to make punitive attributions towards a defendant compared to a juror who is not.<sup>vii</sup> A juror’s ability to empathize with a defendant is greatly hindered when a juror feels angry.<sup>viii</sup>

### **Creative Themes to Inflame 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 are 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 also discuss the value of “priceless” inanimate objects such as artwork or advanced machinery and large salaries earned by famous athletes and celebrities. While these methods may seem unorthodox, they are working for the plaintiffs' bar throughout many different practice areas.

## **II. Spotting a Nuclear Verdict**

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.”<sup>ix</sup>

### **Judicial Hellholes**

Traditionally, “judicial hellholes” have been considered jurisdictions where judges systematically apply laws and court procedures in an unbalanced manner. The individuals who are victims to this unfair and unbalanced application of laws and court procedures are defendants in civil lawsuits. Judicial hellholes do not reflect the criminal justice system as a whole.<sup>x</sup>

Claims professionals with cases in any of the following jurisdictions should take caution when handling cases headed to trial:

- i. Florida
- ii. California

- iii. New York
- iv. Texas
- v. Washington
- vi. New Jersey

Now, as both technology and the liability-expanding strategies of the nation's formidable litigation industry evolve, different jurisdictions are attempting to implement various pro-plaintiff rules, regulations, and precedents.

When considering what makes a jurisdiction a judicial hellhole, the answer is most likely the judges. Of course, most judges do a diligent and fair job. Even in judicial hellhole jurisdictions, including some that have received national attention, the clear majority of judges are fair. Nonetheless, it may only take one or two judges who stray from the law to sully the reputation of an entire jurisdiction.

What judicial hellholes have in common is they systematically fail to adhere to core judicial tenets or principles of the law. They have strayed from the mission of providing legitimate victims a forum in which to seek just compensation from those whose wrongful acts caused their injuries. Rulings in judicial hellholes often have national implications because they involve parties from across the country, can result in excessive awards that wrongfully bankrupt businesses and destroy jobs, and can leave a local judge to regulate an entire industry.<sup>xi</sup>

### **III. The Good News: YOU have the power to stop nuclear verdicts!**

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; defense attorneys share almost nothing. The reason is plaintiff attorneys rarely, if ever, have repeat clients, so that 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?<sup>xii</sup> 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.

---

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

<sup>iii</sup> [https://www.judicialhellholes.org/wp-content/uploads/2020/12/ATRA\\_JH20\\_layout\\_08.pdf](https://www.judicialhellholes.org/wp-content/uploads/2020/12/ATRA_JH20_layout_08.pdf)

<sup>iii</sup> [https://www.judicialhellholes.org/wp-content/uploads/2020/12/ATRA\\_JH20\\_layout\\_08.pdf](https://www.judicialhellholes.org/wp-content/uploads/2020/12/ATRA_JH20_layout_08.pdf)

<sup>iv</sup> <https://www.reuters.com/article/us-johnson-johnson-risperdal-verdict/jury-says-jj-must-pay-8-billion-in-case-over-male-breast-growth-linked-to-risperdal-idUSKBN1WN2HK>

<sup>v</sup> [https://d3n8a8pro7vnm.cloudfront.net/cala/pages/67/attachments/original/1582657298/CALA\\_Tort\\_Reform\\_Impact\\_CA\\_Report.pdf?1582657298](https://d3n8a8pro7vnm.cloudfront.net/cala/pages/67/attachments/original/1582657298/CALA_Tort_Reform_Impact_CA_Report.pdf?1582657298)

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

<sup>vii</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>viii</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.

<sup>ix</sup> [https://www.judicialhellholes.org/wp-content/uploads/2020/12/ATRA\\_JH20\\_layout\\_08.pdf](https://www.judicialhellholes.org/wp-content/uploads/2020/12/ATRA_JH20_layout_08.pdf)

<sup>x</sup> *Id.*

<sup>xi</sup> *Id.*

<sup>xii</sup> <https://www.law360.com/articles/1133149/a-defense-attorney-s-guide-to-successfully-arguing-damages>