

Defusing the Nuclear Bomb: How to Prevent Outsized Verdicts

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are defending on liability. Accepting responsibility allows the defense to be the most reasonable people in the room. Jurors are more likely to listen to, trust, and be persuaded by your position.

Accepting responsibility in an admitted liability case is easy. But we believe the defense must accept responsibility for something in every case, even when seeking a defense verdict. It may feel impossible, but there are ways to accept responsibility without admitting liability: remember that responsibility is not the same as liability! You can accept responsibility for meeting the applicable standard of care, maintaining a safe workplace, or following your employee handbook. Accept

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You have seen the headlines and the billboards: juries across the country are returning Nuclear Verdicts® in record numbers, and the plaintiffs' bar is capitalizing. Arizona is no exception. In November of 2023, a jury awarded \$31,550,825 for a cerebral palsy birth injury. In the June 2023 edition of the Arizona Attorney magazine, among the top civil verdicts were an \$18,791,000 verdict for malicious prosecution, intentional infliction of emotional distress, and other various torts.

At Tyson & Mendes, we believe justice is not just for plaintiffs but also for defendants. Compensation to an injured party should be fair and reasonable, but plaintiffs' lawyers have changed the way they try cases to capitalize on juror emotions and maximize awards with little regard for what is fair. They no longer target juror sympathy but rather focus on generating juror anger. The plaintiffs' bar uses tactics such as the reptile theory (now rebranded as "The Edge"), in conjunction with anchoring large numbers as early as voir dire. It is no longer enough for the defense to punch holes in plaintiffs' case. Defense strategies such as ignoring bad facts, fighting liability at all costs, or avoiding talking about money no longer work to prevent outsized awards. This article discusses some of the methods we use to defuse juror anger and stop Nuclear Verdicts®.

Accept Responsibility. Taking responsibility is critical for validating juror anger in order to defuse it, even when you

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responsibility for something you are proud of! As counsel, you can and should discuss responsibility during voir dire, opening and closing, and even during witness testimony. Telling a personal story about how you learned to accept responsibility as a child will help the jury connect with you. An added benefit to accepting responsibility: it also allows you to turn the tables and invite jurors to consider the plaintiff has not accepted responsibility and should be held accountable.

Give a Number. Plaintiff attorneys use the psychological concepts of primacy and recency to condition the jury to a large number before the jury has heard any evidence. They repeat their large numbers during voir dire and opening statements, and even during the examination of witnesses. If all the jury hears is that this is a \$20 million dollar case during all phases of a trial, they will believe it is a \$20 million dollar case when they deliberate, even if that number is unsupported by the evidence and wildly unjust. It is not enough to wait until closing arguments to give your defense number. Instead, the defense must use psychology to our clients' advantage and address the expensive elephant in the room; we must talk about money.

We believe you should give your number early and often, during voir dire if your judge allows it but certainly during your opening statement. You can even be creative and work your number into witness examinations, by talking about your economic numbers during doctor and expert witness examinations. It is not important whether the witness agrees with your number—what is important that the jury hears your number throughout the case. However, once you give a number, it should never go up or the jury will think you heard something during trial that caused you to lose confidence in your case. You will lose credibility.

It is also possible to give a number while asking for a defense verdict. You will spend significant time during trial on damages, even bringing in your own expert witnesses. If you explain to the jury you have an obligation to address all the evidence, it will make sense and, again, make you appear reasonable. Studies and our own experience have shown that your chances of getting a defense verdict actually increase when you give a number.

Argue Pain and Suffering. Pain and suffering are the largest component of most Nuclear Verdicts®. But most defense lawyers avoid arguing pain and suffering altogether. You can be assured plaintiff's counsel will focus extensively on her client's pain and suffering, comparing her client to Kobe Bryant or a Picasso painting. It is not enough for defense counsel to simply argue that non-economic damages must be fair and reasonable. You need to persuade the jury with real life examples that will resonate and allow them to feel they did the right thing.

So how should the defense argue pain and suffering? We look at pain and suffering two ways: 1) the impact of the accident on plaintiff's life, and 2) the impact of money on the plaintiff's life. As defense lawyers, you probably already argue about how the accident has impacted the plaintiff and her recovery. Even in bad injury cases, you can tell the good news about what plaintiff can do and dispel the dismal story plaintiff's counsel will tell. By focusing on the positive, you can credibly argue for a much lower number.

The impact of money on plaintiff's life can be shown by discussing the activities plaintiff and her family enjoy, such as camping, fishing, trips to Disneyland, or traveling, and the very real impact your number will have on plaintiff's life. You can talk about all the good things defense number pays for and what expenses that amount of money covers in the plaintiff's life. You can close by telling the jury that the amount of money you ask them to award will have a huge impact on plaintiff's life. Not only does this ground the jury in the actual value of a dollar, but it showcases your humanity and caring by demonstrating the specific ways in which your number will improve plaintiff's life.

Learning and using these methods in trial will allow you to defuse juror anger and avoid a Nuclear Verdict® by capitalizing on reasonableness and common sense.

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