

What Steps Should Defense Counsel Be Taking to Fend Off Nuclear Verdicts?

Bob Tyson of insurance defense firm Tyson & Mendes, who penned a book about defending against nuclear verdicts, recently shared his thoughts on the topic at a trial academy for defense lawyers in San Diego.

By Ross Todd
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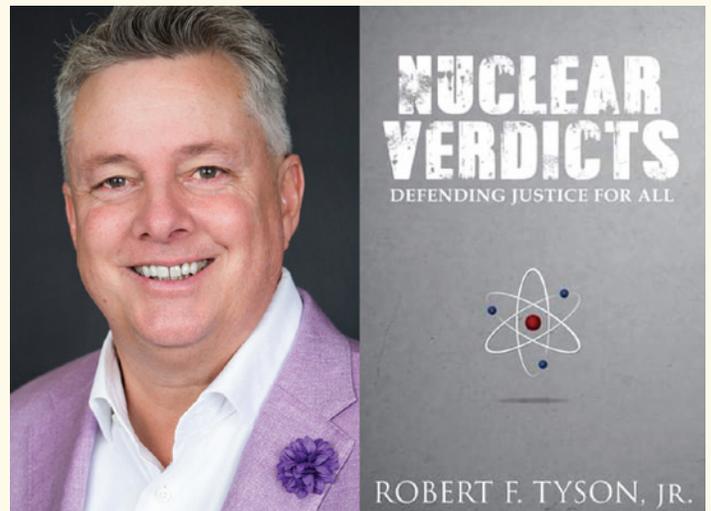
Tyson & Mendes name partner Bob Tyson says that defense lawyers need to “embrace the awkward” to fight back against the growing number of nuclear verdicts.

Take responsibility. Say you’re sorry and mean it. Calculate reasonable damages and get them before the jury early and often. These are just a few of the techniques Tyson embraces in his book on nuclear verdicts aimed at a defense-side audience. These were also topics up for discussion during the inaugural Nuclear Verdicts Defense Institute last month, where 18 defense-side trial lawyers, including four who practice in-house at insurance companies, came together in San Diego to learn the techniques discussed in Tyson’s book for avoiding eight-digit verdicts. “There were no clients, and there were no sponsors,” said Tyson when we caught up with him earlier this week to discuss the workshop and his book. “We want it to be this safe space where defense lawyers can just come and learn and ask questions and not have to worry about whether they seem super smart.”

Tyson gave credit to Pat Mendes, his fellow name partner in the 200-lawyer insurance defense firm headquartered in San Diego, for the “embrace the awkward” phrase. But he also gave credit to the plaintiffs bar for being the source of some of his techniques. Today we’re going to dig into the basics of Tyson’s approach. Tomorrow, we’ll follow up with Tyson’s thoughts on how defendants should approach non-economic damages, the place where many verdicts transform from notable to nuclear. The following has been edited for length and clarity.

Lit Daily: Despite the increase in the number of nuclear verdicts, you don’t believe the civil justice system is broken. You also say in your book defense lawyers hold the keys to stopping nuclear verdicts. How did you reach those conclusions?

Bob Tyson: I think it’s true. I think it also comes to be because of my worldview. In a way, I’ve got a narrow



Courtesy photos

Bob Tyson of Tyson & Mendes, left, author of Nuclear Verdicts, right.

worldview. I’m just a simple trial lawyer. I don’t work for the government. I am not involved in litigation finance or tort reform. I’ve got a limited view and what I’ve seen over the last 10 to 15 years is that plaintiffs lawyers have changed the way they’re trying lawsuits and the defense industry has not. We’re getting out-lawyered. That’s the source of nuclear verdicts. That’s the main driver.

Two caveats: That doesn’t mean plaintiffs lawyers are better than us. They’ve just evolved. And they’ve evolved over the last 15 years. So, we’re moving pretty darn slowly to be frank. You know, the reptile theory came out in 2009. That’s 13 years ago, and they’re still using it and still getting away with it and they’re still getting juries angry with it. And what are we doing different?

Then the second caveat would be it’s not just defense lawyers’ faults. A lot of the things I talked about in the book involve insurance companies and defendants changing their strategy to make changes to deal with the way

plaintiffs lawyers are now trying lawsuits. So, it's slightly more complicated than just getting out the word. But we are getting out the word.

Well, how much of your approach actually pulls from the concentration on human psychology that drives a lot of the modern plaintiffs bar techniques? I'm thinking in particular here about your suggestion that defendants address the priming that can go on with plaintiffs lawyers throwing out numbers early in a case by throwing out defense figures of their own.

Absolutely. I mean, look, the book and my experience and these methods to stop nuclear verdicts come from plaintiffs lawyers and psychology. So a lot of the ideas that have been proven to stop nuclear verdicts come from the plaintiffs lawyers themselves who, in turn, got it from psychological techniques and studies and evolution.

The interesting thing about psychology is it's the study of humans, not the study of plaintiffs. Yet the defense bar just ignores it. It's like, "Oh, we're not going to give a number." We have all these different reasons to not give a number or to not accept responsibility, but none of them are psychological reasons. They're all business reasons.

So a lot of the roadblocks put up to prevent defense lawyers from changing the way they try cases is for business reasons not because of psychological reasons. We know that priming and recency works. It works, yet the defense isn't doing it. We know that validating someone's feelings when they're angry works. The psychologists have studied it. There's methods to deal with it. Accepting responsibility is one way to defuse anger, and yet, the defense doesn't do it and the plaintiffs bar loves the fact we don't do it. The typical defense attorney is still trying cases the same way she always has.

Well, talking about the taking responsibility point of your message: How much convincing does it take with clients to get them to take responsibility, if just a slice of responsibility in these cases?

You know accepting responsibility doesn't necessarily mean you're accepting liability. So the concept is foreign to many of our clients, because they believe that they've done nothing wrong or that the insured has done nothing wrong. And I get it. I get it. But the reality is that plaintiff's lawyers have changed the way they try lawsuits. They used to try to go for sympathy. And plaintiff's lawyers will still take a sympathetic plaintiff of course. And they'll get paid for that. But what makes jurors go nuclear is anger—the emotion of anger. So the defense has to change the way they try lawsuits.

If the defense wants to win, they have to not shoot holes and deny, deny, deny. They have to defuse anger. And there's only so many tools that you can use to do that.

Accepting responsibility and trying to be the most reasonable person in the room will help defuse anger. But you're right. We get a lot of pushback from the defense side to doing it.

Well, you've encouraged defense counsel to take responsibility, but without saying exactly what it is the client did wrong. That's an interesting one to me. How do you do that without coming off mealy-mouthed and disingenuous and inflaming the anger you're trying to avoid?

This is what we went into in the Nuclear Verdict Defense Institutes to teach students how to actually accept responsibility and do it in a genuine way—one that you're comfortable with, one that fits your personal style and one that fits the evidence and the law. But the thing you have to remember is that trials aren't a sentence. They aren't a paragraph. They aren't a speech. These big trials that we're talking about will go on for over a month. So they'll know what you're accepting responsibility for and who you think is at fault for the accident over the course of a month. But I get what you're saying: If you just made this sentence, 'We accept responsibility, but we did nothing wrong': That sounds like lawyers speak to me, right? You talk out of both sides of your mouth. But that's not what we're talking about.

Accepting responsibility is an approach where you're validating people's feelings and beliefs and addressing the issue of anger, which is how a very skilled plaintiff's lawyer will leave these 12 people when he's done with his opening. The plaintiff's lawyers goal is to leave me 12 angry or on-the-verge-of-angry people. And what am I going to do with that? I've got to address it. What do most defense lawyers do with it? Ignore it and they start denying, denying, denying and then they end up getting killed with a nuclear verdict.

First of all, you've got to care. I mean, listen, I can show you transcript after transcript of defense lawyers who, to be blunt, deserve a nuclear verdict against them. Their client didn't deserve it, but they deserved it, because they didn't act like they cared at all. You want to stop nuclear verdicts? Hire a lawyer who's going to start off at least being a good human being. We forget all about that.

Defense lawyers get caught up in their cases. They get caught up in their science and a lot of them are frustrated. Look, stop all that. You've been working on the case for two or three years. You're about to give your opening. Why don't you just stop and be a good human being, right? What would 12 other people want to hear from me if I'm going to be a good human being? Is it "I did nothing wrong? They're all at fault and I did nothing wrong." Is that [being] a good human being? I don't think so.