

# THE NUCLEAR AGE

## COMBATTING THE GROWING PROBLEM OF RUNAWAY JURY VERDICTS

*By Robert F. Tyson Jr.*

**I**n October 2019, a Philadelphia jury delivered an \$8 billion verdict against Johnson & Johnson for its improper marketing of the antipsychotic drug Risperdal as a treatment for some mental-health disorders in children. The enormous punitive damages award—in a case where compensatory damages were less than \$1 million—was not an anomaly.

In May 2019, a California jury issued a \$2 billion verdict against Monsanto after finding that its Roundup weed killer caused a couple's cancer. Though the Monsanto verdict was later slashed significantly by a judge, the initial award was yet another striking example of the type of runaway jury verdicts that are becoming commonplace across the nation.



This trend is a major problem for corporate America and the attorneys who defend claims brought against businesses large and small. This very real issue is not going away anytime soon and is much broader than just the high-profile cases that make it to trial and get reported in mainstream media.

#### WHAT HAS CHANGED?

These increasingly large verdicts raise an important question: What has changed to spark such outsized jury awards? The answer is the plaintiffs' bar.

Over the last 10 or 15 years, the plaintiffs' bar has completely changed how they try lawsuits in front of a jury. They have studied psychology and applied it to their jury trials, and they share these new methods with each other constantly. For instance, previously, plaintiffs' lawyers would seek the jury's sympathy in hopes of obtaining a large verdict. In many cases, they would not even put forward a damages number that they were seeking. However, things have changed rapidly on both fronts.

Now, the plaintiffs' bar has realized that tapping into a jury's anger is a much more effective approach at trial than appealing to sympathy. In recent years, plaintiffs' attorneys have primarily

leveraged the so-called "reptile theory," which involves utilizing strategies to spark the fight-or-flight mentality among jurors, which pushes them to decide cases based on their emotions rather than the facts in play.

Plaintiffs' attorneys often generate such strong feelings among juries by repeatedly attacking the corporate defendant and portraying them as only caring about profits. In turn, this type of offensive against a defendant can prompt an emotional reaction from jurors when they are trying to reach a verdict or determine the amount of damages to award plaintiffs.

Plaintiffs' attorneys also have begun asking juries for astronomical awards instead of hoping that they will reach an outsized figure on their own. While both sides used to shy away from addressing money in a jury trial, plaintiffs' attorneys have discovered that the best way to get a big verdict is to ask for it.

#### HOW HAVE YOU CHANGED?

Now we know how the plaintiffs' attorneys have changed. But what has the defense industry done to counteract these evolving approaches? The answer is, little to nothing.

Stop for a moment and think: How have you or your defense counsel tried

cases in the last 10 years? What are you doing differently? Anything? From my experience, the defense industry has continued to use the same traditional strategies of fighting liability at all costs, avoiding the worst facts of their cases, and hoping that the jury does not reach the issue of damages.

While there is comfort in the status quo, it is a very dangerous place to stay and can result in nuclear verdicts. Plaintiffs' attorneys are counting on the defense to do nothing differently at trial. They have created a whole new approach to jury trials that assumes the defense will continue to do the same things it always has. So far, they have been right.

Therefore, it is time for the defense industry to change its approach to jury trials and adopt new strategies to reduce nuclear verdicts, and insurance carriers should demand that they do so. Here are a few key tools all defense lawyers can implement; we will delve into these in more detail throughout 2020.

#### TAKE RESPONSIBILITY

This recommendation may be anathema to many corporate defense lawyers, but it is wise for the defense to accept responsibility for something. However, this does not mean admitting full liability,

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or even any liability, for that matter.

For example, the defense can accept responsibility for its employee-training practices, following traffic laws, or putting a safe product into the stream of commerce. While the type of responsibility will vary depending on the facts in play, some semblance of this approach must be implemented in every trial.

When done properly, accepting responsibility for something makes the defense look like the most reasonable party in the room and defuses the type of anger that typically results in large jury verdicts.

#### GIVE A NUMBER

Defense lawyers also may be reluctant to provide the jury with a damages number, especially when fighting liability. However, it has proven to be a helpful strategy amid the changing legal landscape. Certainly, we know that plaintiffs' lawyers will be speaking about damages from start to finish at a trial, so

defense counsel should do the same.

However, a number can be presented while still seeking a defense verdict for your client on the merits. In fact, there is a law review study that found a jury is more likely to give a defense verdict when the defense gives a number. But if the jury does find the defendant liable, having provided them with a defense figure can significantly reduce the ultimate jury award.

#### PERSONALIZE THE CORPORATE DEFENDANT

Too often, defense attorneys have allowed plaintiffs' lawyers to paint a horrible picture of a corporate defendant without presenting an alternative view. Therefore, it behooves defense lawyers to try and humanize a corporate client by telling the jury the company's backstory, including meaningful details about the people who make up the corporation. Personalizing the corporate defendant

also involves highlighting the company's standing in the community and its values. This approach, which should be used throughout a trial, can help defuse juror anger and raise the likelihood of a defense verdict.

#### ARGUE NON-ECONOMIC DAMAGES

What is the number-one way the defense argues non-economic damages in a runaway jury verdict? They don't! Typically, the largest component of any runaway jury verdict is non-economic or general damages, more colloquially referred to as "pain and suffering." This can be a sensitive subject for the defense to raise at trial, but counsel should not be afraid to broach the topic. In coming articles, strategies will be provided on how exactly the defense should argue non-economic damages. This could be career changing. To quote "Seinfeld," "That's gold! Jerry! Gold!"

Nuclear verdicts are real, and they are increasing. The good news is that you can do something about it. We'll give you the tools in 2020 to do just that. ■

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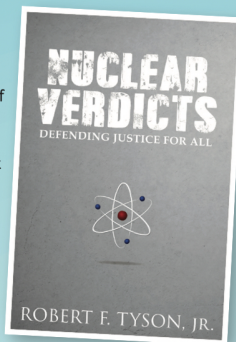
## A Playbook for Justice

**Tyson's recently released book, "Nuclear Verdicts: Defending Justice For All," doesn't bill itself as a study of trial theory—its goal is to provide the how-to strategies needed by defense attorneys to beat plaintiffs' attorneys at their own game. Here's an excerpt from the book.**

#### Shadows in the Dark

Being a trial lawyer is a tough job. It is hard for both sides. It is a battle. You feel as if you are at odds with everyone. The plaintiffs' attorneys, whom I do admire and respect, often only get paid if they win. That pressure is tremendous and should never be underestimated. I live in fear. Fear of losing, or what 12 strangers are going to think of me or my case. There is plenty to feel insecure about as a trial lawyer. And the day you aren't worried about losing could very well be the day you do!

Trial lawyers make many sacrifices. We spend a considerable amount of time away from our families. We often stare at the popcorn ceilings of rundown motel rooms that happen to be within walking distance of far-away courthouses. I still see the dark shadow of my young son waving to me from his bedroom window as I was getting into a van for an early morning flight to an out-of-town trial. It was awful and heart-wrenching. As I rubbed away my tears, there was nothing I wanted to do more than go back into my house and lay in bed with him. He was only awake in the darkness of the morning because he heard me, heard my luggage wheeling out the door again. He was only waving to me because he missed me and wanted me to stay home.



So why ever leave the silhouette in the window of my beautiful son longingly waving goodbye when it would be so easy to walk back into my home with my loving wife and two other daughters? What makes one routinely confront their own fears and insecurities? The answer is not always crystal clear or easy to remember in these lonely moments. But upon reflection, sometimes there is something in the world more important than you. Something that is bigger than just you or what you want at a particular moment in time. In the case of a trial attorney, that something is truth and justice.

#### Just Do It!

So let's get going! You are going to have to do some things that you have never done before. You are going to have to ask your defense attorneys some tough questions, such as, "What is the theme of your case?" or "How much are you going to ask the jury to award in damages?" even if they are seeking a defense verdict. Other questions include, "What are we going to accept responsibility for in this trial?" even though we think that we may

have done nothing wrong, and "What is the good news, and has anything positive come out of this whole lawsuit?" You should also ask, "How are you going to argue pain and suffering, or emotional distress?" Or really importantly, "Who am I? Do you even know me or my business? What is my story? I have heard plaintiff's story for the last several years, but what are you going to tell the jury about me?"

Again, this book will discuss at least 10 concepts that must be learned and used to avoid nuclear jury verdicts. Of course, these methods are in addition to the typical defense approach of punching holes in a plaintiff's case. That must always be done. But if you are also able to adopt these techniques, I promise they will give you solace. As you wait for that jury to return a verdict in the hallway outside the courtroom, you will know that you and your attorneys have done everything you could to restore justice to the jury system. You are the solution to what has been wrong with our legal system. You will have taken back justice, justice for all.