Runaway Verdicts: Reversing The Trend

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Social inflation generally describes verdicts that exceed $10 million but can apply to any unreasonably large award given the facts of a case.

What happens when you mix major damages, a large corporation, a denial (or half acceptance) of fault, and an angry jury that wants to send a strong message? In the courtroom, the result just might be a colossal verdict. Such judgments that defy precedent and logic have been blamed for crippling business owners.

For industries most susceptible to these judgments (think: transportation), the threat of runaway verdicts is even more apparent. Add to this, eroding tort reform in several states which allows for unlimited non-economic damages, and the stage is set for more to come.

Social inflation verdicts are characterized as generally exceeding $10 million, but the term covers any verdict which is unreasonably large given the facts of the case. And such verdicts are more than just big awards. They are typically born from an emotional response that defies logical calculations of damages or injury impact.

Compensate

Anger is the number one factor for any runaway jury verdict. Colossal verdicts seek to make an example of the corporate defendant. Fueled by the so-called “Reptile Theory,” jurors use excessive damages awards to punish defendants and ostensibly send a message to the defendant and the community with the intent of preventing the type of harm in the case from recurring. These excessive verdicts are driven by juror anger at defendants and typically include a noneconomic damages award that is grossly disproportionate to the economic damages relative to the case.

Plaintiffs’ counsel has been increasingly successful in winning massive verdicts using a couple of simple strategies:

(1) Leveraging anger through the “Reptile Theory,” which involves tapping into the primitive part of jurors’ brains and evoking a fight-or-flight mentality. These tactics are designed to shift the jury’s focus from the law — or standard of care — to absolute safety at all cost and total absence of danger. “Safety is always the top priority,” and “Danger is never appropriate.” Phrases such as these are used to elicit a fight-or-flight response in the jury.

(2) They ask for the exorbitant amount they are looking for from the beginning. Such anchoring plants the reality and probability of a really high damages award into the minds of jurors and may give them an idea of how much punishment they can apply to match the level of their anger.

How are insurers coping?

The impact of runaway verdicts on the insurance industry is palpable. It is, after all, the insurance providers that help insureds transfer their risk. However, the rising price of losing big verdicts is putting a strain on both insureds and their insurers. Just a few years ago, the largest verdicts in the United States were measured in the millions of dollars, according to data compiled by TopVerdict.com. Today, it's in the billions.

This is an unsustainable trend for corporations and their insurance providers. It's a trend that will cause insurance rates to rise and capacity to shrink. Unless the defense bar changes its strategies, enormous verdicts will become the norm, and the fallout will be devastating.

How can we reverse the trend?

Understanding the impact of social inflation and working to reverse the trend requires an ability to manage both the logical and emotional sides of the equation. We often hear about big cases involving significant injuries and damages, and when we hear the verdict's size, we think, "Yes, that makes sense. In the case of a massive verdict though, the outcome is so much larger than what the facts or injury level would suggest.

We must acknowledge that people (this includes juries) do not process information with only one side of their brains. People react with both logic and emotion. In the case of a significant verdict, it is the emotional side that tips the scale.

Emotion: What we feel (anger, distrust, fear)

Logic: What we know and comprehend (the facts of the case, the law)

A typical defense strategy leading up to a massive verdict is to deny liability and not address damages. The denial is perceived as arrogant and unacceptable. Plaintiffs' counsel then uses the Reptile Theory to incite fear and anger. Finally, when the jury is provided with a runaway figure that would punish the corporation or person responsible for their anger, the jury will react to more than just the base facts of the case.

So, changing the trend of these verdicts requires defense counsel to reverse these concepts. Accept responsibility at a reasonable level. Support that level of responsibility with facts and calculations. Personalize the corporate defendant and show the jury the company comprises human beings who add value to their customers and communities. Give an alternate anchor number that lets the jury see a more reasonable value for the case, one based on the facts in the case, not emotion. Give the defense anchor number early and often to counter the plaintiff's demands. Use Reverse Reptile Theory to acknowledge that the same level of safety applies to both the plaintiff and the defendant, and show that the actions of each play a role in the final outcome. Finally, address damages appropriately by letting the jury know they have discretion in awarding damages, and they do not have to be what the plaintiff asked for in closing.

Avoiding litigation

There would not be a jury to return a massive verdict without a trial. So, insurers are also encouraged to get better at predicting when litigation could happen and working to settle claims before they reach this point. In practice, we see many cases where a claim becomes entangled in unnecessary back and forth, frustrating claimants and leading them to pursue litigation. At the same time, though, the plaintiffs' demands in social inflation claims are often so unreasonable that settlement is not an option.

Building a strong defense before a loss occurs

In 2021, the transportation industry awoke to an astounding, record-breaking $1 billion award against a trucking company. This was not the first colossal verdict against the transportation sector, but it was a wake-up call like no other. It was found that the transportation company never conducted background investigations or motor vehicle records checks on its driver. And they permitted an unqualified driver to get behind the wheel. That is a record-setting level of negligence, with gross negligence accounting for $900 million in punitive damages. Imagine what even a minor lapse in compliance or concern could yield.

Pre-event risk management practices can reduce the frequency and severity of accidents and demonstrate a company's duty of care, compliance and concern. Documented policies and procedures, regular screening of vehicles and drivers in the case of transportation, careful adherence to safety rules and best practices — all this upfront, ongoing risk mitigation can bolster the duty of care and demonstrate to a jury the company values concern and compassion.

Getting the facts straight

We mention people make decisions with both the emotional and logical sides of their brains. In the case of excessive verdicts, the emotional side takes the lead. But defense counsel can use strategies to reverse or temper those emotions and pave the way for logic to prevail. Sound loss calculations performed by experienced forensic accountants can help to level out the emotional side of the argument and support more reasonable verdicts.

An appeal to legislation

Finally, we contend that stopping social inflation will take a willingness on the part of state legislators to establish boundaries for these types of verdicts and enact reasonable tort reform measures to level the playing field. Corporations are being called to pressure legislators to put a stop to ever-expanding liability laws.

With courts resuming their activities after the COVID-19 pandemic shutdown, the threat of social inflation is heavy on the minds of corporations, insurers, and, of course, plaintiffs' attorneys. The increasing chasm between liability claims and damages awarded by juries will continue to widen without several factors in place: (1) A concerted and well-documented effort to do the right thing in terms of pre-loss risk mitigation; (2) Establishing a strong, logical, fact-based defense and loss calculation; (3) Compiling a defense team capable of deploying Reverse Reptile strategies; and (4) State legislation to aid in stopping these types of excessive verdicts.

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