

Nuclear Verdicts: Countering Social Influence, Corporate Mistrust, Humanizing Corporate Defendant

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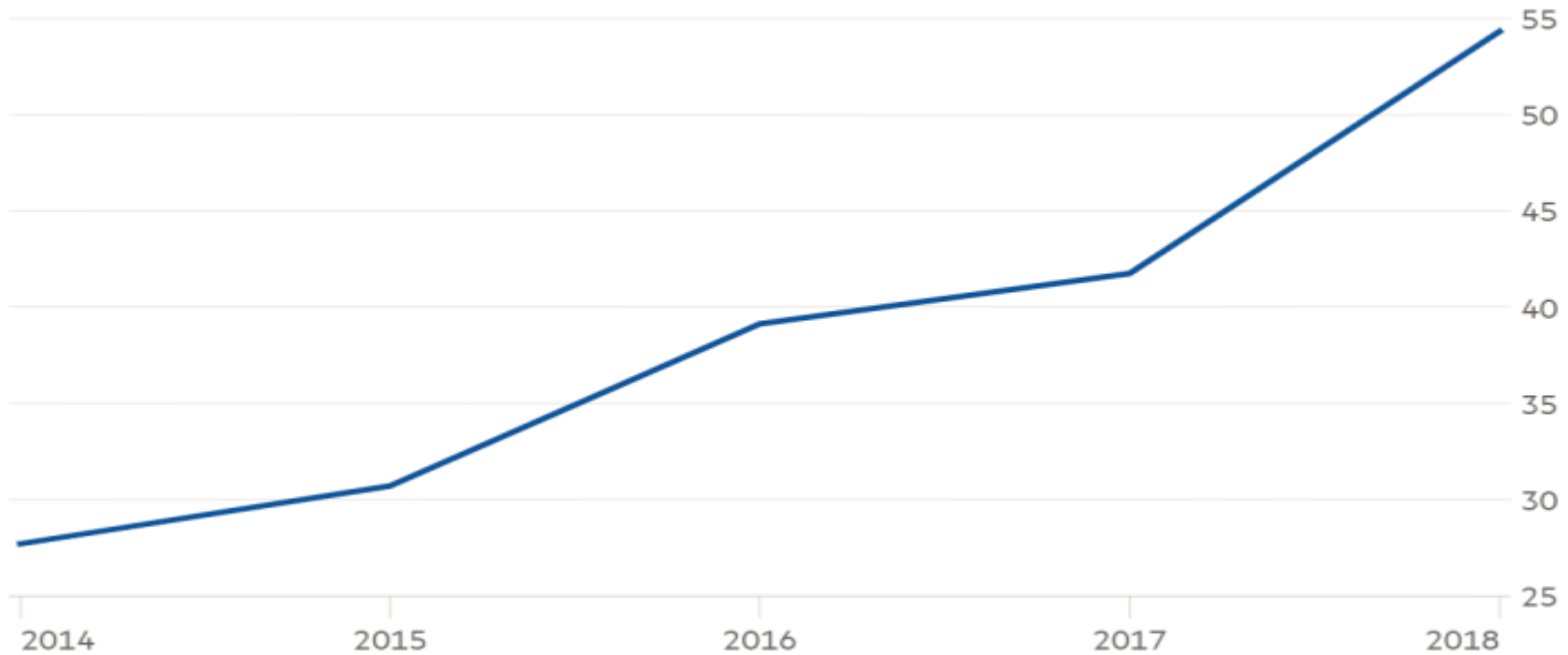
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Some Nuclear Verdicts Across Industries

- Roundup Weed Killer
- Talc
- Pharmaceutical/Medical
- Asbestos
- Insurance

Increase in Damage Awards against Insurers

Median of top 50 single plaintiff bodily injury verdicts in the US (\$m)



Source: Swiss Re
© FT

What factors contribute to nuclear verdicts?

Social Inflation

- Social Inflation is the name given to recent increases in tort severity across several lines of business.
- There are a variety of factors driving this changing environment, including legal and regulatory changes as well as wider social changes in moral standards and values.
- Attitudes toward corporations and perceived corporate greed are at play in many of these verdicts, as are the “reptile tactics” of plaintiffs’ lawyers.

Social Inflation: What about the impact of COVID-19?

It is still early to tell, but here are some predictions of how COVID-19 may impact jurors' verdict decisions:

- The impact of COVID-19 will vary by individual and is just one of many variables that may influence jurors' evaluations of cases.
- Jurors are likely to make their decisions primarily based on case-specific facts and evidence rather than automatically side with plaintiffs out of sympathy.
- Relevance will likely be case dependent, but it may be relevant to jurors' perceptions in insurance litigation.
- Vulnerable jurors will feel even more vulnerable, and more jurors may identify themselves as vulnerable.

What factors contribute to nuclear verdicts?

Changes in Demographics

Jury demographics have shifted.

- More Millennials are in jury pool than Baby Boomers:
 - Value the experience rather than dedication in careers.
 - Demand far more perks from employers.
 - They often have a different cultural context for evaluating corporate conduct than Baby Boomer and Generation X jurors.
 - Shorter attention spans; less attention to complex defenses.

But even more important than age and other demographics on jury verdicts is...

What factors contribute to nuclear verdicts?

Jurors' Attitudes, Beliefs and Experiences

- **Attitudes are central to jurors' decision-making process.**
 - ❖ They are important because they define people to the world and to themselves; and they drive how jurors attend to and interpret information.
 - ❖ Attitudes/beliefs/experiences develop the “reptile brain” and drive jurors who buy into the “reptile theory”.

Some recent survey results

Have you ever had a bad experience with an insurance company?

<i>Yes, and it still bothers me</i>	0%
<i>Yes, but it no longer bothers me</i>	13%
No	87%

When errors occur in handling insurance claims, whom do the errors usually benefit?

<i>The policyholder</i>	13%
<i>The insurance company</i>	87%

If there is a dispute between a policyholder and his/her insurance company about whether a claim is covered, who should get the benefit of the doubt?

<i>The policyholder</i>	92%
<i>The insurance company</i>	8%

What factors contribute to nuclear verdicts?

Jurors' Attitudes, Beliefs and Experiences

- Distrust of science and regulatory agencies.
- Culture of blame and automatic liability.
- Desire to target and punish big and/or unpopular businesses.

What factors contribute to nuclear verdicts?

Forum Shopping

- It's not just who is sued, but where the lawsuit is filed.
- Plaintiffs like to file in judicial “Hellholes,” places with reputation for unfairness to corporate defendants and a significant percentages of jurors who have high rates of poverty and a history of negative experiences with corporations.
- For example:
 - San Francisco Bay Area
 - Broward County, Florida
 - Madison County, Illinois
 - St. Louis, Missouri
 - New York City
 - Philadelphia, Pennsylvania (State Court)

What factors contribute to nuclear verdicts?

Changes in the Value of Money

- Jurors are increasingly numb to high dollar figures as they are increasingly aware of big lottery payouts, celebrity salaries, CEO salaries, etc.
 - *Perhaps corporations should change the structure for compensating top management?*
- Exposure to social media adverts pushing awareness of large awards which acts to desensitize jurors.
 - Personal injury lawyers' normalizing litigation through relentless multi-media advertising.

What factors contribute to nuclear verdicts?

Two important emotions drive jurors' thinking in insurance cases:

1. Fear

- No coverage when I need it.
- Reluctantly dependent on insurance companies.

2. Anger

- Motivated to protect the vulnerable.
- Unwilling to forgive companies for their mistakes.

What case elements increase jurors' fear?

- Significant delay in managing the claim.
- Downplaying the mistake.
- Attacking the plaintiff's character.
- Minimizing the damage to the plaintiff.
- Singling out an employee for blame.
- Failing to show how the mistake has been corrected.

A Dangerous Juror Deliberation Testimonial



- “Everybody’s dealt with insurance companies before.”
- They’re scary. They’re really mean.”
- “It was not even worth the mental abuse.”

What factors contribute to nuclear verdicts?

Legal and Political Factors

- Plaintiffs' grassroots influence and significant money spent on state-based elected judgeships vs insurance industry influence and spend.
- Reversal and rollback of tort reform in many jurisdictions.
- Courts expanding theories of liability .
- Failure by courts to exercise their gatekeeping function re unpersuasive expert evidence in robust or consistent manner.
- Inaction by appellate courts to overrule excessive verdicts.
- Political shifts occurring in some state legislatures, too.

What factors contribute to nuclear verdicts?

Aggressive and Organized Plaintiff's Bar

- Plaintiffs seeking excessive, subjective non-economic damages (pain and suffering, loss of life).
- Use of “anchoring” tactic to influence jury to award huge awards.
- Plaintiffs building better injury cases.
- Exploitation of the Reptile Theory.
- Increase in allegations of permanent and/or complex injuries – even in minor accidents.
- Value of fatalities have significantly increased across jurisdictions.
- Social media pushing awareness of large awards which acts to desensitize jurors.
- Multi-media advertising—Billboards, TV, internet, class action notices—normalize litigation, especially against insurance companies.

What factors contribute to nuclear verdicts?

Impact of Litigation Funding and Advertising

- Investment in litigation v. payday loan model.
- Investment in a lawsuit or portfolio of cases.
- By an investor not related to the litigation.
- In exchange for an agreed-upon portion of any recovery.
- Financing is non-recourse.
- Funder is not repaid if litigation produces no recovery.
- Funder often receives first dollars.
- To proponents:
 - Means to fund operating expenses, ability to “go the distance” against deep pocket defendants, spreads risk of litigation.
- To skeptics:
 - Encourages speculative suits, complicates settlements, increases settlement costs, creates legal and professional dilemmas.

Actions to Mitigate the Impact: Defense Bar Strategies

Defending against the “reptile theory”

- Defense lawyers’ tactics now must prominently feature strategies to diffuse anger, accept responsibility, empathize, personalize defendant, address bad facts, address pain and suffering, give a suggested number for damages.
- Tell a story that matches or exceeds jurors’ expectations.

Storytelling: What Today's Jurors Expect

- Tightly packaged messages.
- Good visuals that send a message.
- Clear links between the evidence and the verdict questions jurors need to decide.

What about “humanizing” the company?

A few common strategies

- “The use of plain-spoken language, folksy and conversational ... will assist in humanizing the corporate defendant.”
- “Your demonstratives should inform the jury about the positive public and civic acts that your defendant has performed and the charities in which it is involved. Discuss the number of jobs the corporate client has created.”
- The “opening statement should include ... a discussion of the ties the company has to the local community ... numbers of employees, kinds of employees and the economic benefits and the human benefit the company’s business and services or products have provided.” A slideshow of employees at work was also suggested.
- “Defense counsel is recommended to stay at a Marriott rather than a Four Seasons,” and should buy their “attire at [Walmart and JC Penny]” rather than Armani.

But do these tactics work?

The better way to “humanize” the company and decrease jurors’ fear and anger

- Be human and speak directly to jurors’ fears and concerns
 - Embrace the responsibility jurors will automatically assign to the company (e.g., the company is responsible for the representations made by its employees and agents).
 - Express empathy.
- Show jurors that:
 - The company accepts responsibility for representations made by its employees and agents.
 - The claim in question is actively managed.
 - Policies and procedures make sense and are relatively easy to understand.
 - Valid claims are paid in a timely manner without hassle.
 - Unhappy customers have recourse – a way to be heard.
 - The policyholder had control.

Case Risk Analysis: Three Key Questions to Consider

- How likely is it that the company's conduct will make jurors fearful?
- How reassuring are my company witnesses?
- How much control did the plaintiff have over case events?

Actions to Mitigate the Impact: Defense Bar Strategies

Effective Jury Selection

- The goal of jury selection is two-fold:
 1. Identify your enemies .
 2. Hide/Protect your friends.
- Identify dangerous “enemy” jurors by:
 1. Knowing the right questions to ask during voir dire.
 2. Asking them the right way.
 3. Looking for patterns in juror responses.

Actions to Mitigate the Impact: Defense Strategies

Effective Jury Selection

Key Questions to Ask in Insurance Cases

- Do you believe most insurance companies simply don't care about the welfare of people who buy insurance?
- Do you believe most insurance companies simply can't be trusted to treat people fairly?
- Have you ever had to forego or give up having insurance because you could not afford it?
- Do you worry a great deal about not being able to afford insurance coverage when you need it?
- Have you ever had your insurance “dropped” (the insurance company no longer would offer you insurance) by your insurance company?

Actions to Mitigate the Impact: Defense Bar Strategies

Effective Jury Selection

Key Questions to Ask in Insurance Cases

- Do you believe a policyholder who is injured should always get the full amount of their policy, no matter what?
- Do you believe the executives who work for large insurance companies are basically dishonest?
- Have you ever felt unfairly treated by your insurance company?

Actions to Mitigate the Impact: Defense Bar Strategies

Effective Jury Selection: Addressing COVID-19 with two questions

- Were you negatively impacted by the COVID-19 pandemic? Please tell me about that.
- Is there anything about your experience, or any other reason, that would make it difficult for you to be a juror on this case for X days/weeks? Please tell me about that.

Note:

- In some venues, jurors who identify themselves “vulnerable” are automatically excused for hardship, so the defense can eliminate some of the riskiest jurors without having to use strikes.

Actions to Mitigate the Impact: Defense Bar Strategies

Techniques to use to get jurors talking during voir dire:

- Show empathy.
- Model juror authenticity by being yourself.
- Juror questionnaire.
- Open ended questions.
- Looping one juror's response to help other jurors open up.
- Asking range questions.

Actions to Mitigate the Impact: Defense Bar Strategies

Pay attention to key demographics/characteristics

- Demographics alone are not usually very predictive of verdict orientation, but there are some demographics that are correlated with plaintiff orientation in cases against corporate defendants:
 - Divorced women.
 - Financially disenfranchised.
 - Chronically underemployed.
 - Low paying caregiving occupations (CNAs, social workers, community affairs, etc.).
 - Politically liberal.
 - Angry/Fearful/Suffering.

Actions to Mitigate the Impact: Defense Bar Strategies

Cooperation and Collaboration Group

- Medical malpractice carriers and defense lawyer groups
 - Joint Defense programs.
 - But how will COVID-19 impact defense strategy and Juror perceptions?
 - Tort reform legislation.
 - New reforms to address plaintiff anchoring needed.

Actions to Mitigate the Impact: Defense Bar Strategies

Carrier strategies

- Investing in talent and training in the Claims organization.
- Staff Counsel training on understanding jurors' attitudes and expectations to defend against the Reptile Theory.
- Expanding our panel counsel defense firms at the high end/ "A"-listers. Prepare for increase in litigation spending.
- Increase training on coverage and contribution strategies, time limit demands and "hammer" letters. Prepare CP's for more infighting between defendants and carriers.
- Create a continuous feedback loop between Claims, Underwriting and Risk Engineering.

Defense Strategy Recap/Main Takeaways

- Pay attention to social inflation factors and key demographics.
- Understanding jurors' attitudes, beliefs and experiences is crucial.
- Address the two key emotions that drive nuclear verdicts: Fear and Anger.
- Humanize the company and meet jurors' expectations by telling a story that:
 - Has tightly packed messages.
 - Uses un-complicated demonstratives that deliver clear messages
 - Addresses/Allays jurors' concerns about the company's conduct
 - Clearly links evidence to verdict questions.
- Use effective jury selection strategy (identify enemies, hide allies).
- Utilize cooperation and collaboration groups.
- Employ carrier strategies to control risk.

Questions?

