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Neutralizing Nuclear Verdicts: Sharing Best Practices to Limit our Clients' Exposure

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I. Introduction

With runaway jury verdicts in transportation cases continuing to rise, litigators need to think about how to curb nuclear verdicts. Robert Tyson's 2020 book "Nuclear Verdicts: Defending Justice for All" provides a framework for approaching trial to minimize runaway results. But litigators need to be focused on this issue from the moment the accident occurs and keep it top of mind throughout the accident response process. Moreover, since most cases resolve before trial, litigators need to consider best practices for curtailing nuclear settlements as well.

II. Best Practices in Accident Response to Minimize Nuclear Verdicts

Minimizing nuclear verdicts begins at the moment the driver calls advising of an accident. Prompt evidence preservation is critical. There are certain fact patterns most likely to give rise to nuclear verdicts. According to the American Trucking Research Institute (ATRI) report from June of 2020, the following factors led to plaintiff's verdicts 100% of the time:

- HOS violations
- Negative driver history
- Controlled substances
- Left the scene of the crash
- Health issues

Cases involving fatigue and cell phone use led to plaintiff's verdicts in 91% of the time. ATRI *Understanding the Impact of Nuclear Verdicts on the Trucking Industry*, June 2020. Analyzing these factors immediately during the initial accident response is important to identify which claims are at risk of becoming nuclear verdicts. A Rapid Response & Preservation Checklist is included as Attachment A setting out best practices for responding to an accident that will best situate the company to curtail nuclear results.

III. Minimizing Nuclear Settlements

While nuclear verdicts are a hot topic right now, nuclear settlements have not received the same amount of attention. Since most cases resolve in settlement, it is important to consider how excessive settlements can be curtailed as well. Deposition performance is critical to minimizing high settlement payout. Your corporate deponent needs to be well prepared and litigators need to do everything possible to avoid fatigue during the deposition. See, *Preventing Nuclear Settlements at Deposition*, IADC, Defense Counsel Journal, April 2021, as Attachment B.

IV. Minimizing Nuclear Verdicts

Runaway verdicts are increasing rapidly throughout the United States. Robert Tyson's book *Nuclear Verdicts* provides practical tips for handling all aspects of trial to minimize a runaway verdict. *Nuclear Verdicts, Defending Justice for All*, Robert F. Tyson, Jr., 2020. The book provides advice in the following areas:

Accept Responsibility: The jury needs to know that the defendant cares about the plaintiffs. The main ingredient of a runaway verdict is anger. Accepting responsibility can defuse juror anger. Acknowledging responsibility on smaller matters increases your credibility and makes it more likely that you will win on the bigger point.

Always Give a Number: Although it goes against many defense attorney's instincts, it is critical to provide a number to anchor the jury. Plaintiffs' attorneys provide pie in the sky numbers and if you do not provide an alternative option, jurors, who are inherently people pleasers, will follow the instructions given. While this may seem counterintuitive because suggesting a number may appear to be conceding liability, studies have shown that defendants prevail at a higher rate when a number is given. This allows the defense to score credibility points and further attack the believability of the plaintiff's story.

Pain & Suffering: Again, defense counsel are not inclined to respond to plaintiff's arguments on pain on suffering. But Robert Tyson believes it is important to tell the other side of the story of how the accident impacted plaintiff's life. A positive picture of plaintiff's life needs to be painted while acknowledging that the accident did have an impact on plaintiff's life

Defeat Plaintiff's Pain & Suffering: Defense counsel must be prepared to respond to all of the ways plaintiff's attorneys argue for non-economic damages. You must address each argument head on. Directly talk to the jurors about plaintiff's intention to play on their emotions. Confront plaintiff's approach. If plaintiff's counsel tries to break down small components in order to create larger numbers, explain what they are doing to the jury and let the jurors know plaintiff is doing so in order to manipulate them.

The Value of Life: Again here, defense counsel are better off to provide an actual number. And then you need a rationale to explain why your number is reasonable. Defense counsel should apologize if appropriate. Huge credibility will be gained. . If the plaintiff made \$50,000 a year and had \$5,000 in savings, do they really need \$10,000,000 following a successful surgery and recovery? Of course not, and rest assured none of the jurors have \$10,000,000 in the bank for their aches and pains. (caveat: defense counsel must be careful and adjust in the event of serious injury or death).

Have a Theme: Your case needs a theme that cannot be derailed by the unexpected things that happen at trial. A jury will resonate with a theme. The theme needs to paint a picture of what matters in the case. Identify what would move them and see the case from the defense perspective. And the themes that are identified should be introduced from the first day of trial. Sometimes responses to questions during voir dire will provide excellent soundbites to support your theme throughout the case. Common sense and reasonableness are your base themes and then you can develop something fact specific about your case to further develop the themes. A good theme is broad enough to endure the setbacks and surprises that occur in every trial.

Personalize the Corporate Defendant: It is important to put a face on a corporate defendant. In spite of the instruction that jurors should not allow bias or sympathy to affect their decision, that is not reality. Telling your client's story might help persuade them. You need to get to know your client and identify what they create of value in order to convey that to the jury. The corporate representative needs to be present every day of trial and the best time to tell your company story is right away during opening statements.

Slay the Reptile: Much has been written about the reptile theory which is plaintiff's attempt to increase fear in the jury by conveying that the defense does not care about safety. They try to tap into jurors' brains and evoke a fight or flight response. The key to slaying the reptile is to be aware of it during discovery and prevent safety rules from being created. A more advanced method is to shift the reptile back onto the plaintiff – the reverse reptile theory. This would require creating a safety rule to set up plaintiff's own negligence in the case.

Spread the Good News: The defense should tell the positive story of plaintiff's future. A story based on evidence that plaintiff will be able to get another job, will improve physically or emotionally. You can describe how the plaintiff overcame the adversity that plaintiff's counsel droned on and on about during the trial. People don't like negativity and jurors are the same. Telling a positive story and presenting a plan for the plaintiff to truly get better will encourage the jury to return a reasonable verdict.

Voir Dire: Robert Tyson describes the bottom line for the most critical aspect of voir dire is to have the jury like defense counsel better than plaintiff's counsel. Be friendly, courteous and appreciative of jurors. You can tell if the jurors like you better if they are smiling and sitting up and listening while you

talk. You will also be able to tell because plaintiff's counsel often becomes irritable if the jury prefers defense counsel.

Closing Argument: Use "silent witnesses" which are witnesses that did not testify and evidence that was not presented. Examples include a primary care physician who is not called to testify, or the number of days plaintiff went without treating his claimed injuries. They tell the story plaintiff does not want the jury to hear. Tyson believes closing arguments have a significant impact on the jury and provides the best chance to win your trial.

V. Conclusion

Verdicts are growing exponentially and plaintiff's counsel work hard to evoke anger in jurors toward the corporate defendant. Defense counsel need to adapt to new strategies to minimize excessive results. Nuclear verdicts should be top of mind from when the claim begins all the way from responding to an accident through verdict and implement tools to reduce excessive settlements as well. Robert Tyson's book Nuclear Verdicts, Defending Just for All provides an excellent guide along the way and should be read and re-read by all defense lawyers that try cases.