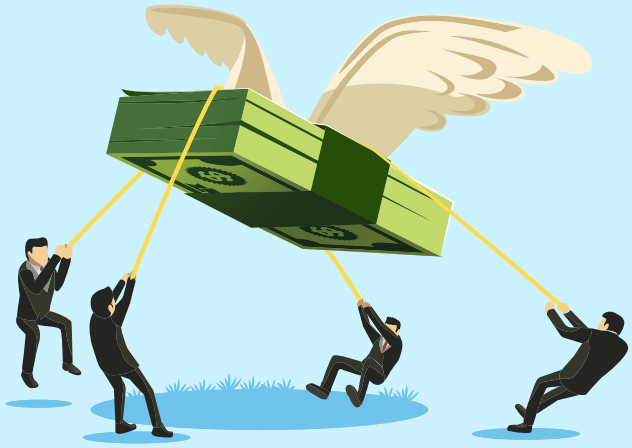

What Is Causing Today's Massive Verdicts—and What Can We Do About It?

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Data compiled by the American Transportation Research Institute shows that lawsuits targeting the trucking industry have increased at an exponential pace, seen in both the volume of cases and the size of verdict awards. When evaluating verdicts in excess of $1 million, the average award increased from $2,305,736 to $22,288,000 (a 967% growth) between 2010 and 2018. Although the data has not been compiled so cleanly, similar trends have been observed in other areas of litigation, including asbestos and product liability trials.

A number of psychological factors and social trends—leveraged by savvy plaintiff attorneys—seem to explain this troubling upsurge. Luckily, understanding the underlying problems also offers some solutions for defendants looking to fight back.

Factor 1: Plaintiffs' "Reptile Strategy"

What It Is

To understand perhaps the most important element of today's massive verdicts, we must examine a plaintiff tactic dubbed the "Reptile Strategy." This strategy attempts to appeal to the baser, "reptile" portion of jurors' brains—the area associated with the fight-or-flight response to perceived danger. That is, plaintiffs hope to override jurors' rational thought processes and encourage verdicts based instead on fear and anger.

In a trial application, there are three major components to this strategy: First, plaintiffs establish a "safety rule"—a universal of operating in society that is seemingly impossible not to acknowledge, such as, "*Safety should always be a top priority*." Plaintiffs get jurors to agree to this rule in voir dire and get witnesses to agree in depositions and trial testimony.

Second, they claim the defendant's behavior violated this rule, and as such, the defendant presents a threat to the community at large, not merely this plaintiff. Finally, plaintiffs convince jurors that they—and they alone—can prevent harm to the community by assessing a damage award significant enough to eliminate the present threat and deter the defendant, and others, from such behaviors in the future.

When we account for additional juror trends, such as increasing anti-corporate bias and a growing sense of social responsibility and victimization (particularly among younger generations), it becomes evident why jurors have proven so vulnerable to the Reptile Strategy.

What We Can Do

Due to its potency, the Reptile Strategy should be repelled at every stage of litigation. While examining such techniques in depth is beyond the scope of this article, there are a number of key areas defense counsel should focus on:

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First, counsel should be prepared to defend against Reptile tactics during discovery and in motions. For instance, ask the judge to prevent plaintiffs from asking "safety rule" questions in depositions. As one Indiana judge recently noted when giving such an order, these "generalized hypotheticals…are designed to obtain opinions and are beyond the scope of the deposition of a lay witness."

If the defense is unable to obtain such an order, it will be crucial to prepare drivers, safety directors, and corporate designees for Reptile-style questions in deposition. Teach them to avoid answering in absolutes, and make sure that they expand upon their answers to hypotheticals to account for exceptions and for the specifics of the case at hand—e.g., "Sometimes, but not always," "It depends on the circumstances," "That is one of the things we consider," "If that were the situation, that might be true, but in this case…." These techniques are equally relevant to witnesses testifying at trial. And, when fault of the driver is clear, consider stipulating to liability to decrease feelings of anger among the jurors. Doing so can even prevent the admission of facts that tend to inflame juries.

In voir dire, counsel's strategy for identifying and striking the worst jurors should include those most likely to be susceptible to the Reptile Strategy, such as those with anti-corporate sentiments and a strong desire to enact social change. Further, because plaintiffs try to plant the seeds of the Reptile in voir dire, *do not hesitate to object.* The more we can do to thwart plaintiffs' attempt to frame the case as a vital chance to protect the community, the better. (Tip: even if the objection is overruled, be sure to kindly thank the judge each time; jurors will not always realize it was not successful!)

One final tactic is to consider "fighting fire with fire" and turning the Reptile against plaintiffs. Rather than letting jurors see themselves as "guardians of the community," help them identify with the "wrongfully accused." Remind them that defending the rule of law and the burden of proof is a courageous and just thing to do. Use terms that humanize the defendant and phrases like "being dragged into court" to accentuate your point. By subtly implying that jurors may one day find themselves among the wrongfully accused, we can evoke the same reptilian fear for our own benefit.

Factor 2: Anchoring & Adjustment

What It Is

"Anchoring and Adjustment" is a psychological heuristic—a "cognitive shortcut"—that influences the way people assess numerical estimates. When asked to come up with an appraisal or estimate, people will start with a suggested reference point (i.e., "anchor") and then make incremental adjustments based on additional information or assumptions. However, these adjustments are usually insufficient, giving that initial anchor undue influence.

In a jury deliberation setting, we see this all the time. A plaintiff might ask for $50 million, and jurors might decide that amount is exorbitant. However, the solution jurors propose might be to cut that number in half—after all, a 50% decrease seems to them like they are being tough on the plaintiff. So, while the jurors finish deliberations feeling they have awarded "a lot less" than what the plaintiff asked for, the defense finds their pockets $25 million dollars lighter.

What We Can Do

We have a couple of options when it comes to anchors:

First, we can try to *remove* the anchor altogether. Inform jurors that they are not bound by the plaintiffs' numbers, which are arbitrary, and that the jury need not give deference to figures that are merely requests. As a supplement, we can expose the anchor itself. Explain to jurors what an anchor is and how the plaintiff is attempting to profit by offering them that high anchor; psychological research has shown that people are less likely to fall prey to heuristics when those heuristics are brought to their attention.

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But while trying to remove an anchor can have a positive effect, in the absence of competing values to compare against, jurors will often still use the plaintiffs' figures as the starting point for negotiations. Therefore, counsel might consider offering a *counter*-anchor. This strategy entails suggesting that, *if* there is a finding of liability, the plaintiff should be compensated for specific

damages (and at specific amounts), such that the plaintiff's needs are met without providing them a windfall. Contrary to what many believe, multiple research studies have found that offering a counter-anchor does not decrease your chances of obtaining a defense verdict but is highly effective at lowering damage awards.

Factor 3: Large Number Bias

What We Can Do

The fact is that humans are terrible at understanding large numbers. This psychological principle is known formally as "scalar variability," i.e., our ability to comprehend numbers decreases as the number increases. It is easy to imagine why this is a problem when jurors deliberate. Too often, jurors will suggest "tacking on another million" to help with attorneys' fees or to cover any "unforeseens"—after all, when you are awarding a few million, what is another million on top?

What We Can Do

This is a tough one to overcome, but defendants may gain some traction by demonstrating to jurors what the plaintiffs' request for damages translates to. If a plaintiff requests $8 million, the attorney could visually demonstrate that a plaintiff's median annual income is, say, $41,000, and then extrapolate for what this typical person would earn in a lifetime. Doing so allows counsel to point out that the plaintiff is requesting, for example, *five times* that amount. Ostensibly, this will drive home the point that the plaintiff is claiming their injuries are worth X years (or lifetimes) of a typical person's hard work.

Factor 4: Availability Heuristic

What We Can Do

If you consider the verdicts you have heard about in the news, massive verdicts are probably what come to mind. Jurors tend to hear more about plaintiff verdicts with large damage awards, so these numbers are top of mind when they think about damages. This psychological phenomenon is known as the "Availability Heuristic," whereby people rely on readily available examples when evaluating a topic.

The "Availability Heuristic" occurs when people rely on readily available examples when evaluating a topic.

Worse, this heuristic works hand in hand with the anchoring and scalar variability factors discussed above. The verdicts jurors recall from the media act as a high anchor, and because jurors cannot distinguish between large numbers, those amounts are not viewed as unreasonable. Thus, at the end of the day, the focus on massive verdicts in the media can

perpetuate a cycle: jurors see them in the news, use them as reference points in their own high verdicts, and then those verdicts become headlines.

For this reason, when permitted by a state's ethics rules, shrewd plaintiffs' attorneys will launch a campaign advertising large verdicts in the hopes of influencing future juries. Many of these advertisements are disguised as news segments.

What We Can Do

Defendants are beginning to appreciate the need to launch their own PR campaigns, but we must become better at beating plaintiffs to the punch rather than reacting long after the damage has been done. While an advertising campaign may not be in your budget, consider contacting the local news to report heroic efforts or positive stories involving your company and its employees, and think about using your trucks, buildings, and project packaging as billboards to advertise safe track records or practices.

In voir dire, it will be critical to ask jurors whether they have heard about recent high-award lawsuits and encourage them to ponder why they might tend to hear only about those types of verdicts. For potential striking purposes, make sure also to gauge the extent to which jurors disbelieve that plaintiff firms would engage in advertising designed to influence juries or disguised as news.

Conclusion

Because the above factors work in tandem to bring about today's massive verdicts, developing a trial strategy built around combating them at every stage—even as early as discovery—represents counsel's best chance to stay out of jurors' crosshairs.

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