# *PREVENTING A NUCLEAR ATTACK: RECOMMENDED STRATEGIES IN RESPONDING TO NUCLEAR VERDICT TACTICS*

By Rylee Retzer and Shannon Nelson

Now that we are nearing the end of the COVID-19 pandemic, courts are returning to normal proceedings, including by conducting more civil jury trials. Looking through the Twin Cities Jury Verdict Reporters 2021 for Quarters 2, 3, and 4, these authors noticed several jury verdicts that seemed disproportionally high in proportion to the last offers and demands in automobile accident cases. When we spoke with mediators, plaintiff attorneys, and defense colleagues, we discovered that many of them agreed: jury verdicts are on the rise in Minnesota, at least anecdotally. Attorneys and legal professionals in other states have also noticed this trend.

What explains this rise in jury verdicts? Theories include growing sympathy for fellow citizens in hard economic times, increased animosity toward large institutions that profited from the hard times, socio-economic unrest from publicized police actions, social-media trumpeting of large verdicts, and the changing view of the value of the dollar as people are exposed to multi-million-dollar payments to sports figures and movie stars.

These excessively large verdicts are known as "nuclear verdicts" or "runaway jury verdicts." In these situations, the general damages are often grossly disproportionate to the special damages. In his book, *Nuclear Verdicts, Defending Justice for All*, California trial lawyer Robert F. Tyson, Jr. discusses this relatively new phenomenon, and how defense attorneys can approach and diffuse a plaintiff attorney's attempts to prime a jury to return a nuclear verdict.

The purpose of this article is to discuss the plaintiff bar's nuclear-verdict tactics, and how to defeat them using Tyson's trial strategies. We give full credit and special thanks to Mr. Tyson for sharing his thoughts and strategies and we encourage defense attorneys to read his book.

Tyson sets forth ten core principles in defending against plaintiff-side nuclear-verdict strategies. Following is a summary of each principle:

**1. ACCEPT RESPONSIBILITY:**

Anger is the most common cause of a runaway jury, and plaintiff attorneys routinely use anger or emotion to influence the jury. The best way to diffuse that anger, per Tyson, is to accept responsibility and show you care about the plaintiff. By accepting responsibility, the defense will look more reasonable and likable to a jury. And the jury will be less likely to be angry, allowing them to use reason rather than emotion to reach a reasonable verdict. Accepting responsibility does not necessarily mean accepting liability.

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Rather, accepting responsibility allows a jury to focus their attention on the actions and fault of the other parties, including the plaintiff. If a defendant denies responsibility altogether, the jury will be looking for things that the defendant could have done to avoid the incident.

At trial, there will are three potential scenarios for the defense: 1) Your client is 100% at fault—there is no dispute; 2) Your client shares fault with other parties, possibly including the plaintiff—(comparative fault); 3) Your client is not at fault, or at least, that is what your client is arguing. If your client is 100% at fault for the incident, Tyson advocates that you refrain from telling a jury that "We stipulate to liability." Rather he advocates stating something like "We accept responsibility for our actions, and we are here for you to hold us accountable." These are words a jury will understand. This will also help diffuse the anger. In a comparative fault situation in which other parties may also be at fault, when accepting responsibility, do not specifically identify to the jury what your client did wrong—if a jury agrees with you, and they also find other things that your client did wrong, they may start tallying up the percentage of fault against your client. Rather, Tyson recommends saying something like "We accept responsibility for our actions, and we are here for you to decide how much liability we have and who else is responsible." If the defense is denying liability altogether, accept responsibility for something—highlight all of the things your client did right. For example, accept responsibility for your client meeting the duty of care, maintaining a safe workplace, or putting a safe product into the stream of commerce.

**2. ALWAYS GIVE A NUMBER:**

Defense attorneys tend to shy away from giving a damages number early on in trial. We may wait until closing argument to tell the jury the value of economic and non-economic damages. However, Tyson recommends that defense attorneys give a number, give it early, and give it often. Plaintiffs, according to Tyson, have in the past 10-15 years been utilizing a tactic called "priming," a strategy to introduce damages numbers early and often in an attempt to persuade the jury to be comfortable with their numbers. In nuclear verdict outcomes, these numbers are significant and disproportionate to the actual value of the case. Even awarding half of the plaintiff's attorney's proposed amount may result in a significant windfall for the plaintiff.

So, what to do when faced with a plaintiff's damages number early on in trial? Tyson advocates countering that number by giving a defense number. He urges defense counsel to give a number early, and give it often. Tyson cites a study reported in the *Iowa Law Review*. The study concluded that juries that heard a defense lawyer give a damages number throughout a trial were more likely to award a defense verdict than those who do not. Jurors who heard the defense merely attack the plaintiff's number, or ignore the plaintiff's number altogether, were less effective.

When giving the early number, an exact amount is not required. In fact, according to Tyson, the appropriate time to give an exact amount is during closing argument. Before then, he recommends presenting a range. For example, "We believe the evidence will show the plaintiff is entitled to an award of $500,000 or less." Additionally, the dollar amount should never go up in trial, as you can lose credibility with the jury.

Tyson's view may be somewhat controversial. Some may view giving an early number as a concession of weakness if one is seeking a defense verdict. However, he explains—with support from the same *Iowa Law Review* study—that a defense verdict can be achieved even when the defense attorney suggests a reasonable damages number. Especially when it comes to non-economic damages (discussed further later), giving the jury a defense number provides jurors with an alternative to a potential nuclear-verdict amount sought by the plaintiff.

**3. PAIN AND SUFFERING:**

According to Tyson, non-economic damages are generally the biggest component of a nuclear verdict. Ironically, research has shown that in a large majority of runaway trials, defense attorneys have not argued non-economic damages at all. Tyson advocates framing non-economic damages through two questions (also known as the Tyson & Mendes method of arguing):

- What is the impact of the injury on the plaintiff's life?; and
- What is the impact of money on the plaintiff's life?

A. What is the impact of the injury on the plaintiff's life? Tyson urges defense counsel to talk about how the accident impacted the plaintiff. The goal is to show that the plaintiff's life is not truly as bad as the plaintiff's lawyer portrays it. Talk about the good news and tell the other side of the story.

Developing and fleshing out this evidence in discovery is the key. Find out what the plaintiff's life was like before and after the accident. Get to know the plaintiff. Proper deposition inquiries may include hobbies, vacations, travel, who a plaintiff shares these experiences with, the cost of these hobbies and experiences, and how these experiences look post-loss. Examine practical aspects of a plaintiff's life before and after the accident. Examples include employment, housework/chores, mobility and transportation, any economic or financial hardships, and

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worries about the future. Be certain to discover the good, bad, and ugly so there are no surprises at trial. Importantly, this information can be used to tell the story of the positive aspects of the plaintiff's life after the accident. Tyson states that a positive perspective on a plaintiff's life after the accident can support the lower pain and suffering number presented by the defense to a jury. Further, this story can support the argument that the defense's number will reasonably support the plaintiff's lifestyle.

B. What is the impact of money on the plaintiff's life? The second and most important element to arguing pain and suffering, according to Tyson is to show the jury what the real impact of the money will be on the plaintiff's life. In other words, what is the value of money to the plaintiff? Tyson states in his book, "Any dollar amount the jury awards must be fair and reasonable to this plaintiff based on the impact the money will have on the plaintiff's life." The amount should be proportionate to the plaintiff's lifestyle. Again, understanding the impact of money on a particular plaintiff requires getting to know that plaintiff and his or her unique situation in discovery. Questions discussed supra, and questions related to the employment income pre- and post-accident, assets, and other financials help to understand how a plaintiff values money. Tyson advises using this information to ground the jury in reality, and to come up with a number that is fair and reasonable to the specific plaintiff. Use creativity and show how that money can improve a plaintiff's life post-accident.

**4. THE VALUE OF LIFE: IN A WRONGFUL DEATH TRIAL, TYSON DOES NOT SHY AWAY FROM PLACING A NUMBER ON HUMAN LIFE.**

In addition to the aforementioned strategies, he advises recognizing, acknowledging, and showing compassion for all involved in the case. Caring and compassion must be sincere. The loss should be acknowledged. "If a jury sees you are truly emotionally invested in this case, they will be more receptive to what you have to say," writes Tyson. Again, consider the impact of the incident on the plaintiff, and the impact of money on that plaintiff. Get to know the plaintiff. The best opportunity to get to know the plaintiff is at the deposition, when similar questions discussed supra may be deployed. Additionally, deposition questions like, "What is your fondest memory of the decedent", "What do you miss most about the decedent", "What made the decedent happy or sad?", and "What is your biggest disappointment now that the decedent is gone?" go to the heart of the loss and provide a factual basis for what the loss meant to the plaintiff. This must be understood, says Tyson, before you can place a number on the loss.

Tyson also emphasizes humanizing your client and, if necessary, acknowledging difficult truths about your client's behavior. Show that the defendant cares, take responsibility for the facts, and apologize if appropriate. And if an apology is appropriate, it should be communicated humanely and effectively, or not at all.

**5. HAVE A THEME:**

Develop a theme that cannot be derailed by a rogue ruling by a judge or bad witness testimony. The plaintiff will certainly have a theme that will appeal to the emotions of a jury, and will likely have the upper hand in terms of sympathy. The defense needs to develop a theme that appeals to a jury's higher values, such as justice, honesty, responsibility, home, family, peace, and country. Jurors want to do what is right and want the defendant to do what is right. The theme should take into consideration responsibility, reasonableness, and common sense. Start with voir dire and continue through the opening statement, witness testimony, and closing argument. Developing a theme can also help overcome bad facts.

In his book, Tyson tells the story of one of his cases in which a Mexican immigrant who had been working as a housekeeper for a wealthy Southern California family sued for wrongful termination, harassment, and racial discrimination. Very briefly, the housekeeper was terminated after an argument with the family's German house manager. One evening the family returned home to a very heated argument between the German house manager and Mexican housekeeper. Near the end of the argument, the housekeeper went into the laundry room and started kicking and punching the washing machine. That evening the family decided to terminate the housekeeper the following day. When the housekeeper arrived, she gave the family a letter explaining how the German housekeeper had been abusing her, including by insisting that she learn to speak English. The family terminated her that day anyway. The housekeeper's allegations were supported by facts learned through discovery. The facts for the defense were bad and got worse throughout the trial with unexpected witness testimony. But, the defense had developed a theme focused on the universal aim of living in a safe and peaceful home. In voir dire, Tyson asked the jury about the importance of having a safe and peaceful home, and he reminded them of their words in his closing arguments. It worked. The jury returned a defense verdict.

**6. PERSONALIZE THE CORPORATE DEFENDANT:**

Although the defense wants to argue facts, it must understand that emotions help a jury decide what to do with those facts. A jury will know all about the plaintiff on a personal level; they need to know about the defendant on a personal level, too. Tell the jury who works for the company, the company's values, and its mission. If the company is

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a third generation family business, tell their story. If it is a big corporation, tell the jury what good the corporation has done for the community, such as volunteering and fundraising. Choose a good corporate representative who will be the face of the company. Make sure it is someone who loves their job, and ask them about it. A jury will be less likely to issue a big award if the company is humanized.

**7. SLAY THE REPTILE:**

What is the reptile theory? It is a method plaintiff attorneys use to appeal to jurors' primal ("lizard brain") instincts of preservation and survival. Classically, the plaintiff's attorney tries to show that a defendant broke a safety rule and that the defendant's behavior was dangerous to the entire community, including the jurors and their loved ones. Jurors, the theory goes, can be primed to react like reptiles and instinctually seek to protect themselves and their community. The tactic also appeals to emotions, including anger. This leads to juries sending a message by awarding higher damages to protect the community from the likelihood of the same incident being repeated. The method was developed by David Ball and Dan Keegan, who wrote the book Reptile: *The 2009 Manual of the Plaintiff's Revolution*. There have been many seminars and articles written on the method, and how to combat it from the defense side. We encourage you to perform your own research on the topic.

Reptile tactics are typically used in personal injury, products liability, medical malpractice, and construction defect cases. They start with written discovery and continue through depositions and trial, including voir dire, opening statements, witness testimony, and closing arguments. It's important to be able to identify it when you see it and be prepared to respond effectively. This includes preparing your client witness to respond to reptile tactics during their deposition and trial. The plaintiff's attorney will start by asking the defendant questions about general safety rules and then become more specific, ending with a question essentially asking the defendant to agree to liability. Your client should be advised never to say "yes" and to qualify any answers. As attorneys, it's also important to know how to object during testimony. It may also be prudent to prepare motions in limine ahead of trial to prepare the court to address the reptile tactics. Similarly, Tyson proposes that the defense can use "reverse reptile" tactics, especially in instances of comparative fault. The same line of questioning plaintiffs use against defendants can be used by defendants against plaintiffs and other defendants.

In one of Tyson's cases, the plaintiff was driving on a mountain road when a 6-foot-long white PVC pipe that had fallen off of Defendant's truck was bouncing on the road toward her windshield. To her right was a steep cliff, and to her left was oncoming traffic and a large rocky embankment. The plaintiff could avoid the pipe by either turning right (which would mean certain death) or turning left. She turned left, striking the embankment, and sustained significant injuries. Tyson asked her questions, utilizing the "reverse reptile theory" to ask if she made the safety of the community a priority:

Q: A double yellow line separated the lanes of traffic on that section of the road, correct?
A: Yes.

Q: What does a double yellow line on the road mean?
A: It means you should not cross the line.

Q: Why is that the law, if you know?
A: For safety.

Q: This is to protect people, so people don't get hurt, right?
A: Yes, of course.

Q: How about the safety of others, is that a priority of yours when you are driving?
A: Absolutely.

Q: You understand if you drive over a double yellow line, you can hurt someone, correct?
A: Yes.

Q: In fact, you could even kill someone in a head-on collision, right?
A: Yes.

Q: And you understand there was traffic coming the other way—right at you—that morning because you saw my client's truck, right?
A: Yes, I did.

Q: Fortunately, no one died when you crossed over the double yellow line, correct?
A: Yes.

Q: You will agree you had a duty to maintain control of your vehicle at all times during this accident, right?
A: Yes.

Q: But when you saw that piece of plastic, you didn't drive right over it, did you?
A: No.

Q: You also didn't just come to a stop, correct?
A: No, I didn't stop.

Q: No, instead you turned your Jeep into oncoming traffic and lost control of your Jeep, didn't you?

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A: I don't think I lost control.

Q: Well, you drove into an embankment, right?
A: Yes, that's right.

The jury found the plaintiff to be 40% at fault for her injuries.

**8. SPREAD THE GOOD NEWS:**

Plaintiff attorneys will undoubtedly tell a doom and gloom story of how the plaintiff was damaged so that a big damages number can be suggested. But, people as a whole are generally hopeful and want to hear good news—they want to hear the story of how a person overcame adversity. So, tell a better story—acknowledge the plaintiff's challenges, but focus on the positive changes in his life. If supported by the facts, tell the jury how the plaintiff got a better job, became stronger, or realized how much his wife loved him when she cared for him afterward. Talk about all of the things he can still do despite the injury like spending time with his family, walking his dog, going to the gym, or vacationing with his family (even if they are different types of vacations). Tyson warns that the defense cannot be cavalier or dispassionate; the "good news" must be presented sincerely and supported by truth and evidence, or the argument may backfire. Tie the good news with a defense verdict number.

**9. VOIR DIRE:**

Tyson's recommendations on handling voir dire are grounded in the common-sense principles that all defense attorneys likely know and understand. Voir dire is the first and only opportunity to get to know the jury. It is the only chance to make the first impression. Tyson advises first and foremost, get the jury to like you. Why is this important? Because a jury that likes the defense attorney is less likely to hurt or punish the defendant unfairly. Common sense recommendations include saying "please" and "thank you." Listen to potential jurors. Make eye contact. Use their names. Engage. Tyson notes that it is important to remember that jurors are not adversaries, so do not treat them as such. Do not act like you are entitled to personal information. Do not make them cry. Be aware of what you are asking potential jurors—and how you ask it—because other jurors are likely paying attention and judging you. Tyson states that potential jurors are forming initial opinions of you, so be cognizant of how you are treating potential jurors. According to Tyson, if a jury finds defense counsel genuine and there is mutual respect, jurors are more likely to listen attentively, receive your information with an open mind, and ultimately find for the defense if facts support it.

Voir dire is also the opportunity to advance the themes of responsibility, reasonableness, and common sense. Introduce and regularly touch on these themes throughout the jury selection process. For example: Ask a parent if she ever talks to her kids about the importance of taking responsibility for their actions. "Does your family value responsibility?" Ask a manager if he ever has to talk to any of his employees about taking responsibility for their actions. Ask whether common sense is something you leave at the steps of the courthouse. "Are you comfortable listening to technical evidence and experts and then applying your common sense?" Talk about reasonableness. "If the evidence supports it, are you comfortable telling a plaintiff and her lawyer that you do not feel what they are asking for is reasonable?" "You may hear emotional testimony and argument from the plaintiff's counsel—can you tell them 'no' if you do not think their requests are reasonable?"

**10. CLOSING ARGUMENT:**

Tyson emphasizes that closing argument is the last, and perhaps best, chance to persuade the jury to rule in favor of the defense. Tyson emphasizes the importance of the "silent witness." Often, the most important evidence is not what is presented in witness testimony or exhibits, but the evidence the jury does not hear or see. The silent witness, according to Tyson, often testifies the loudest because they appeal to a juror's common sense. Examples include a long-time physician who was not called to testify on behalf of the plaintiff, or gaps in treatment. According to Tyson, the silent witnesses tell a jury the story the plaintiff does not want to tell. "Simply stated, silent witnesses are the irrefutable facts that empower jurors to set aside complex testimony and apply common sense when rendering a verdict," writes Tyson. In closing argument, identify these silent witnesses and tell the jury precisely what each silent witness means. Naturally, the introduction and use of these silent witnesses must comply with rules of evidence. Nonetheless, Tyson writes that using silent witnesses is a powerful way to advance trial themes and tell a story. Closing arguments are powerful. They are the opportunity to tie the evidence together, advance themes, tell the story and give the numbers. Tyson encourages defense counsel to be real, be truthful, be sincere, and, importantly, to show that they care about the parties and the process.

Finally, Tyson emphasizes that defense attorneys must begin sharing. He notes that plaintiff attorneys share everything with each other. Indeed, the Minnesota plaintiffs' bar has a dedicated listserv for sharing information with each other about tactics, experts, and even defense attorneys. Tyson acknowledges that defense counsel may have business reasons for not sharing information, but still encourages doing so for the good of the whole defense bar, and their clients.

As you can see, Tyson's tactics are an integrative approach to defending damages, from discovery through the closing argument at trial. His approach is thoughtful, systematic, and sincere, appealing to a jury's sense of responsibility, reasonableness, and common sense. Give it a try!