

## The Runaway Jury—Avoiding the Nuclear Verdict

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According to one study of 600 trucking verdicts, between 2006 and 2011, there were 26 verdicts over one million dollars.<sup>1</sup> Between 2015 and 2019, there were almost 300.<sup>2</sup> In 2006, the average verdict in the National Law Review’s Top 100 Verdicts was 64 million.<sup>3</sup> By 2019, it rose to 214 million.<sup>4</sup> What was once a 10-million-dollar verdict, is now a 30-million-dollar verdict. What was once a 30-million-dollar verdict, is now 90.

It should then be no surprise that the past few years have seen many record-breaking verdicts. In 2019, a jury awarded a 110-million-dollar-verdict, what was the highest non-medical malpractice personal injury verdict in New York history, against New York City Transit Authority.<sup>5</sup> In 2021, an 81-million-dollar verdict, the largest verdict in the state of Washington, was rendered against a convenience store after a robber attacked a bystander in the store’s parking lot.<sup>6</sup> A California jury delivered a 137-million-dollar verdict against Tesla in 2021, the largest single-plaintiff discrimination verdict in history.<sup>7</sup> In 2022, one of the largest employment-law verdicts in U.S. history was rendered in the amount of 464-million-dollars.<sup>8</sup> The past few years also saw juries hand down several billion-dollar verdicts in automotive accident cases, including a record-setting 301 billion-dollar dramshop lawsuit against a local sports bar.<sup>9</sup>

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<sup>1</sup> Understanding the Impact of Nuclear Verdicts on the Trucking Industry, *available at* <https://truckingresearch.org/wp-content/uploads/2020/08/ATRI-Nuclear-Verdicts-One-Page-Summary-07-2020.pdf> (Last visited October 13, 2022).

<sup>2</sup> Understanding the Impact of Nuclear Verdicts on the Trucking Industry, *available at* <https://truckingresearch.org/wp-content/uploads/2020/08/ATRI-Nuclear-Verdicts-One-Page-Summary-07-2020.pdf> (Last visited October 13, 2022).

<sup>3</sup> The Exponential Rise of Nuclear Verdicts, *available at* <https://www.travelers.com/travelers-institute/webinar-series/symposia-series/nuclear-verdicts> (Last visited October 13, 2022).

<sup>4</sup> The Exponential Rise of Nuclear Verdicts, *available at* <https://www.travelers.com/travelers-institute/webinar-series/symposia-series/nuclear-verdicts> (Last visited October 13, 2022).

<sup>5</sup> Jury Awards 110M to Bicyclist Whose Spinal Cord was Severed by 10-Foot Railroad Tie, *available at* <https://www.law.com/newyorklawjournal/2019/04/10/jury-awards-110m-to-bicyclist-whose-spinal-cord-was-severed-by-10-foot-railroad-tie/> (Last visited October 18, 2022).

<sup>6</sup> Top Premises Liability Judgments, Travelers Insurance, <https://www.travelers.com/business-insurance/commercial-umbrella/excess-liability/top100verdicts/toppremieliasibility> (Last visited, October 18, 2022).

<sup>7</sup> Tesla Must Pay 137 Million to a Black Employee Who Sued for Racial Discrimination, *available at* <https://www.npr.org/2021/10/05/1043336212/tesla-racial-discrimination-lawsuit> (Last visited October 14, 2022).

<sup>8</sup> L.A. Jury Delivers the Mother of All Verdicts – 464 Million to Two Employees! The National Law Review, *available at* <https://www.natlawreview.com/article/la-jury-delivers-mother-all-verdicts-464-million-to-two-employees>.

<sup>9</sup> North Dakota Jury Awards \$1 Billion in Damages in 2015 Drunk Driving Crash, <https://www.expertinstitute.com/resources/insights/a-north-dakota-jury-awards-1-billion-in-damages-in-2015-drunk-driving-crash/> (Last visited October 13, 2022). Ford Hit With 1.7 Billion Verdict for F-Series Pickup Roof Collapse That Killed Couple, Chris Isidore, *available at* <https://www.cnn.com/2022/08/22/business/ford-1-7-billion-dollar-verdict/index.html> (Last visited October 13, 2022) A Jury Awarded the Family of Two Drunk Driving Victims More Than 301 Billion

One thing is certain: nuclear verdicts<sup>10</sup> are on the rise. With loss of limb cases receiving verdicts between 15 and 25-million-dollars,<sup>11</sup> the railroad industry is being hit as hard as every other transportation industry.

This is part of an overall trend of juries awarding larger verdicts. This is caused in large part by three “social influencers.” First, the plaintiffs’ bar has inundated potential jurors by advertising high verdicts on social media, search engines, outdoor advertising, and every other medium imaginable. Second, the advance in what is commonly referred to as the “reptile theory,” a method that emphasizes attacking the safety mechanisms of the company over the facts of the case to get jurors to put themselves in the shoes of the plaintiff and tap into the juror’s fight or flight instincts.<sup>12</sup> Third, drawn in by the wave of nuclear verdicts, litigation financing has grown exponentially as an industry and has enabled plaintiff’s firms take more cases to trial.

There are several steps that corporate defendants can take to prevent the nuclear verdict. For instance, defendants can take steps to limit the effectiveness of the reptile theory through extensive preparation prior to depositions, trial, and through motions in limine. Defendants should carefully weigh admitting fault and need to react swiftly getting accident reconstruction experts and investigators on the ground immediately. Finally, Defendants need to understand their forum and need to know when to settle. But perhaps the most important aspect in building a defense occurs even before the litigation event happens: the steps taken to prevent the injury itself. That will be the focus of this article.

Many plaintiff’s lawyers do not come up with a theme as the facts reveal themselves in the case. These attorneys advertise and seek out cases that already fit their themes. Their narrative is already developed. Corporate defendants must do the same. And it starts with the company’s efforts to avoid litigation in the first place.

Often risk avoidance and litigation are thought of as separate. The larger the company, frequently, the larger the degree of separation between the two departments. But the two need to be thought of together to create a cohesive strategy at trial. This is true of all litigation, but it is particularly true for a case with the potential for a nuclear verdict. Nuclear verdicts happen most frequently in cases where the injury is preventable or results

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Dollars, But They Don’t Anticipate Seeing Any of it, Alisha Ebrahimji, *available at* <https://www.cnn.com/2021/12/10/us/drunk-driving-settlement-verdict-texas-trnd/index.html> (Last visited October 13, 2022).

<sup>10</sup> The term “nuclear verdict” is generally defined as an extreme verdict, usually over 10 million dollars. See, e.g. The Exponential Rise of Nuclear Verdicts, a Wednesdays with Woodward webinar series, available at <https://www.travelers.com/travelers-institute/webinar-series/symposia-series/nuclear-verdicts>.

<sup>11</sup> *Laing v. Tri-County Metro. Transportation District of Oregon*, No. 17 CV 36490 (Ore. Cir. Ct. Multnomah County) (15 million); *Parsons v. Norfolk Southern Railway Company*, 2017 IL APP (1st) 161384 Paragraph 27 (22.5 million, later reduced to 21.5 million).

<sup>12</sup> The Reptile Theory: A Game-Changing Strategy in Personal Injury Lawsuits, *available at* <https://www.lexisnexis.com/community/insights/legal/b/thought-leadership/posts/the-reptile-theory-a-game-changing-strategy-in-personal-injury-lawsuits> (Last visited October 13, 2022)

from a pattern of behavior. The nuclear verdict is often the juror’s way of telling the company that their business practices are unacceptable.

Take the Tesla discrimination verdict of 137 million dollars based on misconduct that occurred between 2015 and 2016 in Fremont, California. The plaintiff, an African American, alleged that he faced frequent use of racial slurs, as well as racist images during the nine months he worked as a temporary elevator operator.<sup>13</sup> Similar allegations during this time frame are now the subject of a lawsuit brought by the California Department of Fair Employment and Housing (“DFEH”).<sup>14</sup> The U.S. Equal Employment Opportunity Commission (“EEOC”) has subjected Tesla to a probe after issuing a cause finding that closely parallels the allegations in the DFEH lawsuit.<sup>15</sup> Among the numerous allegations that the DFEH raises, one of its allegations, citing EEOC data, is that the plant had few black or African American members in its leadership.<sup>16</sup>

While the nine-figure-verdict is astonishing—what is equally astonishing is that this verdict was entirely preventable. A simple look at the makeup of management and leadership could have shown that there were too few black or African American voices in leadership at the time. And with a more diverse leadership, the factory would likely have been quicker to clean up the swastikas and other racist graffiti. Perhaps too, it would have taken the complaints made by employees regarding racist language more seriously. Perhaps the plaintiff would be employed by Tesla today.

To take steps to proactively prevent lawsuits, corporate defendants must first collect data. In the transportation context, that means collecting data that resulted in an accident. But it also means collecting data like speeding or erratic driving even if that does not result in an accident. It also means instituting a compliance program to ensure that federal regulations are adhered to. In the employment law context, data would mean reports to the human resources department. But it also means audits to ensure that there is equity in promotion and assessing the quality of work given to employees of different races and sexes. Every industry faces unique forms of liability. Given the specter of nuclear verdicts, corporate defendants need to invest more in collecting, analyzing, and acting on that data.

But despite the right safety measures in place, accidents will happen and litigation will follow. Even if the added safety measures don’t prevent litigation altogether, they can be integrated into the trial strategy and reduce the possibility of a nuclear verdict. Nuclear verdicts occur most frequently when a jury is motivated to send a message to the corporate

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<sup>13</sup> Tesla Must Pay 137 Million to a Black Employee Who Sued for Racial Discrimination, *available at* <https://www.npr.org/2021/10/05/1043336212/tesla-racial-discrimination-lawsuit> (Last visited October 14, 2022).

<sup>14</sup> The Complaint can be found at this link: <https://calcivilrights.ca.gov/wp-content/uploads/sites/32/2022/02/DFEH-vs-Tesla.pdf> (Last visited, October 14, 2022)

<sup>15</sup> The allegations can be found on page 26 of Tesla’s 10Q filing, available at <https://www.sec.gov/Archives/edgar/data/1318605/000095017022012936/tsla-20220630.htm> (Last visited October 14, 2022).

<sup>16</sup> See footnote 14.

defendant. Here is what plaintiff's counsel in the Tesla discrimination lawsuit had to say after the verdict:

"I'm gratified that the jury saw the truth and that they sent a message to Tesla to clean up its workplace"

"Owen and I both hope that this sends a message to corporate America to look at your workplace and, if there are problems there, take proactive measures to protect employees against racist conduct."<sup>17</sup>

Statements like these are common. In nearly every verdict where there is the potential for large amounts of punitive damages, there is a plaintiff's lawyer telling the jury to send a message to the defendant. But a jury may be less receptive to that message if they see a defendant that takes a more proactive approach to managing risk.

Or, better yet, if the corporate defendant placed more emphasis on prevention, perhaps it could avoid the litigation.

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<sup>17</sup> Tesla Must Pay 137 Million to a Black Employee Who Sued for Racial Discrimination, *available at* <https://www.npr.org/2021/10/05/1043336212/tesla-racial-discrimination-lawsuit> (Last visited October 14, 2022).