6 Factors That Can Make For A 'Nuclear' Juror

By **Ken Broda-Bahm** (August 13, 2024)

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In addition to making their views known at the ballot box, citizens can similarly broadcast their sentiments in the civil jury box.

While they're asked to merely make a factual finding limited to a specific dispute, the verdicts can read as a more generalized message about their feelings on the state of the country and the world.

This is part of the thinking surrounding so-called nuclear verdicts — a term businesses and insurers use to describe civil awards of $10 million or greater — which are increasing, experts say, due to a broadly felt dissatisfaction driven by a large number of factors.

A Wall Street Journal article published on July 8 points out that such awards are increasing — up 27% in 2023, with mega-nuclear verdicts (those over $100 million) reaching a record in 2023, a level four times greater than what they were in 2013.[1]

In talking with attorneys, executives, consultants and insurers, the article notes that these verdicts seem to be driven by social inflation,[2] or a desensitization toward larger numbers, but also, and more specifically, by anger and a desire for accountability directed at corporations and other perceived elites.

Plaintiffs attorney Gary Dordick, who recently won a $900 million verdict against entertainment billionaire Alki David, is quoted in the Wall Street Journal piece, saying, "Lawsuits and the right to hold corporations accountable are what make them do the right thing. Left to their own devices, they would not."

Enough jurors seem to agree with Dordick, and that squares with the often punitive purpose I see in mock trial discussions, even when punitive damages are not being sought.

An April report out of Illinois State University seeks to dig into the socioeconomic and legal factors that are driving these nuclear verdicts.[3] The authors did not look at individual jurors, but rather at venue characteristics that separate counties with a higher number of nuclear verdicts and those with a lower number. The study focuses on two poster-child jurisdictions for nuclear verdicts: Cook County, Illinois, and Gwinnett County, Georgia.

In drawing from this work, I focus on those factors most likely to matter in selection and case assessment, and I will divide these factors into categories: the long-known "likely suspect" factors, and the more novel "new normal" factors that are emerging post-pandemic.

The Likely-Suspect Factors

Age

The Illinois State University researchers note that the median age for jurors is getting older because fertility rates have declined by nearly a quarter in just the past 20 years.

At the same time, slowly but surely, younger individuals — millennials and Generation Z — are progressively entering the jury box, and those younger jurors are somewhat more likely to favor a plaintiff and to favor higher damages.

Race

It should come as no surprise that the experience of being a racial minority in the U.S. often changes the way that the narratives of the powerful are perceived.

The authors observe that counties returning fewer nuclear verdicts tend to be mostly white, while the counties returning more nuclear verdicts tend to be more balanced with white and Black residents.

While a potential juror's race is not a proper consideration for jury selection, the composition of your venue is a factor to consider in assessing your risk and case value.

Politics

The perceptions that liberals are more likely to be prolitigation and prodamages are borne out in this research. Counties with a higher proportion of Democratic voters are more likely to find for plaintiffs and to return higher verdicts than counties with a higher proportion of Republican voters.

The New-Normal Factors

Anti-Corporate Sentiment

Distrust and other negative views of corporations have been traditionally high in this country, but they have increased and become more of a bipartisan phenomenon in the wake of the COVID-19 pandemic.[4]

The researchers focus on a survey of potential jurors conducted in 2023 by Orrick Herrington & Sutcliffe LLP showing that 62% of respondents said that an important function of a jury is to "send messages to corporations to improve their behavior," and 77% believed that "punitive damages should be used to punish a corporation."[5]

Prolitigation Sentiment

The old disparagement of ambulance-chasing attorneys has been turned on its head. The same Orrick research shows that more than three-quarters of respondents (77%) had either a neutral or negative impression of lawyers who represent corporate defendants. This compares to a clear majority, 58% of respondents, who had a positive view of lawyers who represent injured plaintiffs.

As noted above, clear majorities also support the use of the legal system in order to police the bad acts of powerful entities.

Economic Grievance and Hopelessness

If you mention that the U.S. is enjoying a pretty good economy right now, you'll often get a sharp reaction: A sometimes-rising tide has not been lifting all boats, at least not equally.

The researchers note that areas with higher income inequality, higher layoff rates, a greater

proportion of low-wage workers and a general lack of opportunity are likely to produce higher rates of nuclear verdicts.

Across all levels of education, nuclear-verdict counties have higher rates of poverty, with individuals often having little access to healthcare and other social support services.

In that context, the mentality can be that one is on the losing side of class warfare, with the trial providing an opportunity to even the scales a bit.

Takeaways

It is these new-normal factors that really call for additional attention from attorneys assessing case risk and preparing for jury selection.

Given this, attorneys should assess attitudes in the community and on the jury panel regarding the kind of entity or corporation that the attorney represents. Dig beneath the now broadly held anti-corporate sentiment, and look into perceptions of the specific industry, as well as the company itself, if it is a familiar name.

Attorneys should also measure relevant attitudes on litigation. Beyond just asking whether jurors feel there are "too many lawsuits" or not, inquire as to whether potential jurors see lawsuits and damages as serving positive or negative social roles. Look at what members of the locale and the panel believe to be the work that is done by lawsuits and damages.

Finally, attorneys should understand the economic and political profile of their venue. In addition to understanding the liberal and conservative split, counsel should also closely evaluate the measures of economic strength and weakness, as well as the degrees of equality and inequality.

In the context of a specific case, there are likely to be other juror characteristics that can increase the chances of a nuclear result. Specifically, anything that invokes juror anger or conveys dishonesty and a lack of accountability on the part of the parties can trigger more extreme results.

There are also other factors — attorney advertising, reptile tactics,[6] third-party litigation funding and simple anchoring[7] — that can lead to more nuclear results.

What defendants and insurers need to do is try to assess and control the constellation of factors that will matter in the specific context of their own case and venue.

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[1] https://www.wsj.com/articles/nuclear-jury-verdicts-rise-alongside-american-anger-f63b94b3.

[2] https://yourtrialmessage.com/account-for-social-inflation-in-damages-awards/.

[3] Brune et al., 2024. https://business.illinoisstate.edu/downloads/centers/katie/papers/ICC%20Nuclear%20Verdicts.pdf.

[4] https://yourtrialmessage.com/treat-anti-corporatism-as-a-bipartisan-bias/.

[5] https://www.orrick.com/en/Insights/Groundbreaking-Jury-Research-Reveals-US-Jury-Attitudes-in-a-Polarized-Society.

[6] https://yourtrialmessage.com/as-the-reptile-evolves-update-your-understanding-of-duty/.

[7] https://yourtrialmessage.com/damages-know-your-anchor/.