Nuclear Verdicts: Defending Justice for All

By Robert F. Tyson, Jr.

INTRODUCTION

- Time to take back justice.
- Hijacked by runaway verdicts.
- Refers to McDonald's hot coffee case and the Hulk Hogan case.
- Any lawsuit where people fail to take personal responsibility for their actions and are still awarded millions of dollars is the basis for many people to believe the jury system is broken.
- It does go both ways. There are inexplicable defense verdicts, just like plaintiff verdicts.
- Injured people should be compensated. Fair and reasonable compensation.
- This book is about fighting those individuals who are trying to take advantage of the legal system.
    - They make false and exaggerated claims to get a windfall of cash.
- There are two reasons we have outrageous jury verdicts.
    - #1: Greed
    - #2: Bad lawyering
- Greed is not good, at least not in front of juries. A greedy lawyer will get slaughtered. And it goes both ways. A defense lawyer who goes for a defense verdict in the face of all odds and jury research or gives the jury no defense damages number to consider, may learn a very difficult lesson.
- For nuclear jury verdicts, this usually means the plaintiff's lawyer was a lot better.
    - Many plaintiff's lawyers study psychology, they study their trade more, they experiment, they push the envelope in trial and come up with novel damages arguments.
- Almost all defense lawyers are rule followers. There is nothing wrong with that. Being defense lawyers suits us. There is comfort in knowing the parameters and staying within them. It can give you comfort in an otherwise extremely adversarial profession. Follow the rules and everything will be okay.
    - Use your fouls! Defense lawyers are afraid to foul. We would much rather complain about the plaintiff "fouling" all the time or how the referee is not being fair to both sides. Use your fouls! Don't "foul out" of a trial, of course.
- Sometimes, for me, there is something more important than having a successful law practice. More important than even winning, which is pretty darn important to me. That something is fairness.

1: MR. HOWELL

- The focus of my career, and, in turn, this book, has been achieving reasonable damage awards and avoiding runaway jury verdicts.
- Have you ever heard of a runaway jury verdict where the jury award was so outrageous because the jury gave the plaintiff all of her medical expenses? Can you believe the jury awarded $10 million to take care of a severely injured plaintiff who cannot care for herself, who is hospitalized for the rest of her life, and will need 24/7 care? No, of course not! Economic damages can be large, but generally they make sense to us. An innocent injured plaintiff should be made whole; they should receive money for medical treatment and lost wages.
- The shake-your-head, how-could-this-have-happened jury verdicts are when non-economic damages are huge.
- So what was I going to say? The law was against me, the facts were against me, and the brand-new chief justice wrote an opinion against me! I needed to come up with a theme!
- A theme is critical in any trial and will be explored further in the next chapter. But would a theme work with seven really smart justices when you only have a half hour, not weeks of trial? Yes, a good theme works with anyone! A good theme works with a politician (like it or hate it, think ”Make America Great Again”), a company (“Just Do It,” “The Happiest Place on Earth”), your personal life (“Happy wife, happy life!”), and many others.

2: ACCEPT RESPONSIBILITY

- In every jury trial, you must accept responsibility for something.
    - Even if you’re trying to obtain a defense verdict, you must accept responsibility.
    - Not necessarily liability or negligence, but responsibility.
    - In every single jury trial, no excuses. Why?
    - Because you must defuse the number one source of runaway jury verdicts: anger.
- Guess who else doesn’t want you to accept responsibility? Plaintiff’s counsel!
    - I recently had a $7 million brain injury jury trial in Ventura, California, where the plaintiff’s counsel refused to accept our stipulation to liability.
- The answer is simple: Plaintiff’s attorneys want to prove liability so they can get the jury angry. They do not want the defense to accept responsibility. They do not want the defense to seem reasonable, to seem like we care. No, a good plaintiff’s attorney wants to get the jury angry.
- Why does accepting responsibility work? There are three main reasons
    - #1: It makes the defense team seem reasonable.
    - #2: It defuses anger.
    - #3: It shifts the focus to other culpable parties.

- First and foremost, taking responsibility makes anyone seem reasonable, not just a defendant. Generally, people are more inclined to listen to reasonable, agreeable people, as opposed to unreasonable people.
- Benjamin Franklin knew this hundreds of years ago when he wrote in his autobiography:
    - “When another asserted something that I thought was an error, I denied myself the pleasure of contradicting him abruptly, and of showing him immediately some absurdity in his proposition. In answering, I began by observing that in certain cases or circumstances his opinion would be right, but in the present case there appeared or seemed to me some difference, etc. I soon found the advantage of this change in my manner; the conversations I engaged in went on more pleasantly. The modest way in which I proposed my opinions procured them a readier reception and less contradiction. I had less mortification when I was found to be in the wrong, and I more easily prevailed with others to give up their mistakes and join with me when I happened to be in the right.”
- Strive to be the most reasonable person in the room.
    - Begin every argument by conceding something or appearing to be in agreement. It’s a more pleasant approach for a judge or jury to listen to, and it’s also more persuasive.
- Another advantage to accepting responsibility is it allows you to blame everyone else.
    - After accepting responsibility for your client’s actions, you are able to shift the jury’s focus to the other party’s potential comparative fault.
- The first type of case, where you are completely at fault, no excuses, no one else to blame, is the easiest.
    - Your client made a mistake, they hurt someone, were inattentive, or misunderstood something. Accept full responsibility. 100 percent. There is no one else to blame; it’s all you.
    - Another basic but critical point in this regard: Never tell the jury you ”stipulate to liability.” Your client accepts responsibility.
    - Well, if you’re going to be attributed some small share of fault no matter what, then own it! If there is no escaping that your client will have 5 percent, 10 percent, or 20 percent of fault, why not accept liability? Why not stipulate to liability? Why not tell the jury you accept responsibility?
    - Remember what you are trying to do. You are trying to avoid a runaway jury verdict. You want to minimize damages. You are trying to defuse juror anger. You must seem like the most reasonable person in the room.
    - We accept responsibility in this case. My client was negligent. You will not have to decide if we were at fault. We were. You will not have to answer any juror questions on the special verdict form at the end of this case as to whether we have responsibility in this case. We do. We accept liability for our actions. We are here for you to hold us accountable.

    - You may want to say exactly what you did wrong. Fight this urge! Don't!
        - You do not want to tell the jury what your client did wrong. You do not want to pick one or two things the plaintiff says your client failed to do and agree. Why do you not want to tell the jury exactly what your client did wrong? The reason is fairly simple logic. What happens if the jury agrees with you but also believes your client was at fault for other reasons as well? For instance, if you tell the jury your client could have done X and ask the jury to hold him only 10 percent at fault, what happens if they also find he was at fault for Y and Z? Does his liability go up? Is your exposure greater now because you gave them something specific? Yes, it is!
- The final scenario is no liability. Yes, you will accept responsibility even when you have no liability.
    - You must accept responsibility in every single case, even if you have no liability. No exceptions. Remember, you must defuse juror anger to avoid a runaway jury verdict. Accepting responsibility is the best way to do this.
    - Accept responsibility for putting a safe product in the stream of commerce.
    - These examples provide the groundwork to defuse juror anger and highlight everything the defendant did right. For example, after accepting responsibility for putting a safe product in the stream of commerce, defense counsel should then highlight everything done to produce a safe product: thousands of hours of research and development, engineering, safety testing, drafting the instruction manual, independent certification, and training. In this specific example, defense counsel is not accepting any portion of liability, yet you are still accepting responsibility for something.
    - Accepting responsibility does not mean accepting full liability for the incident, or wrongful termination, or falling below the standard of care.

3: ALWAYS GIVE A NUMBER

- Give the jury a number of what you think is a reasonable award.
    - This is probably the most controversial chapter in this book.
    - Everyone pushes back when it comes to giving a damages number to a jury, especially if we want a defense verdict. How on earth can you give the jury a number to award and still get a defense verdict? It makes no sense. You should not do it. You cannot ask the jury to award a defense damages amount and still get a defense verdict.
- What is the best way to get a large jury verdict? Ask for it! No potential juror leaves for jury duty one day and tells her husband, "I'm off to jury duty, honey. We will probably award someone $50 million today." No, the only way a jury comes up with these astronomical numbers is that some plaintiff's lawyer asked for it. And who knows this is the best way to get a large jury verdict? That's right, plaintiff's attorneys.

- The best plaintiff's lawyers in the country know asking for a large verdict starting at the beginning of trial can get them big results: $25 million, $50 million, or even over $100 million.
    - It's almost unheard of for a jury to award a large "runaway" verdict without hearing a proposed dollar amount from plaintiff's counsel.
    - Most jurors never walk into a courtroom thinking anything is worth $20 million or more.
    - But after plaintiff's counsel starts talking about a huge number in voir dire, and then for the next few weeks through closing arguments, it doesn't seem so outrageous.
- A number must be given early in a trial.
    - Ideally during voir dire, but no later than your opening statement. Who knows this to be true? You guessed it: plaintiff's counsel. Good plaintiff's counsel will tell a jury their number as early as they can. Why? It's called priming.
    - Plaintiff's counsel will "prime" the jury by starting early and repeating a large number they are asking the jury to award.
    - The psychology of "priming" is explained as follows: Priming is a technique used to influence (i.e., control) attention and memory, and it can have significant impacts on decision-making.
    - Specifically, priming is an implicit memory effect in which exposure to a stimulus influences a response to a later stimulus. This means that later experiences of the stimulus will be processed more quickly by the brain.
    - For instance, if a juror is asked on day one of a trial how he feels about awarding $35 million if the evidence supports it, and on day two he is told by plaintiff's counsel the evidence will show this is a $35 million case, and then the number $35 million is worked into most days of the trial, and, finally, the juror is told a month later in plaintiff's counsel's closing argument that the evidence did show this was a $35 million case—what do you think the jury is going to do with this repeated information? Especially if defense counsel, in closing argument, says this case is not worth $35 million and maybe gives jurors a much smaller number for the first time a month later?
- The primacy and recency effect is the concept that people tend to remember information presented in the beginning (primacy) and the end (recency) of a learning episode. This is true in a jury trial. You must at least give the jury your defense number in the beginning and the end of every jury trial.
- The good plaintiff's attorneys work their numbers into their presentation of the evidence as often as they can. They are getting their number in front of the jury by asking questions of their witnesses that either include their number, or elicit their number. If some is good, more is better.
- Don't stop there. Try getting your economic damages number in with other plaintiff witnesses as well.

- Many of these questions may be objected to. Maybe not. Some objections may be sustained, maybe not. But add up the number of times you mentioned your defense number. If the jury could hear your number this many times, you are winning.
- The number you give the jury at the beginning of trial can never go up.
    - I thought this was common sense, but we learned the hard way it apparently isn't.
- Remember, the rule is you must give a number early and often. You cannot give your number for the first time in closing argument and expect a jury to take you or your number seriously.

4: PAIN & SUFFERING

- Even as a defense attorney, you should argue pain and suffering.
    - Well, you do something defense lawyers across America almost never do: you argue pain and suffering! And you better be good at it, because you have nothing else! You have no experts, no witnesses, no evidence of any kind. All you have is argument—argument about the only thing in dispute: non-economic damages.
    - Most defense attorneys, they literally make no arguments about non-economic damages at all. Non-economic damages are generally the biggest component of any runaway jury verdict.
    - Think about it. Does anyone ever scratch their head in wonderment when a jury awards all of the medical treatment a severely injured plaintiff needs to recover and live their lives? Does anyone question why someone who was wrongfully terminated from her job is awarded all of her lost earnings? No, of course not.
    - We all agree an injured person should get the medical care they need and should be compensated for their lost wages.
    - The shocking jury verdicts are when a plaintiff is awarded a relatively small amount of economic damages, but then an astronomical amount in pain and suffering. For example, $1 million for all of the plaintiff's past and future medical care and then $10 million or more in pain and suffering: that is a runaway jury verdict.
- How to argue non-economic damages:
    - There are two ways, I believe, you should look at non-economic damages, or pain and suffering. They are:
        - #1: What is the impact of this accident on the plaintiff's life?
        - #2: What is the impact of money on the plaintiff's life?
- This is what we say to the jury in every single jury trial. What is the plaintiff's life really like after the incident and what is the value of money to the plaintiff?
- **First, you must talk to the jury about how the accident has impacted the plaintiff.**
    - Is the plaintiff's life really as bad as portrayed by counsel? Tell the other side of the story.

- **Second—and this is the crux of arguing non-economic damages—talk about the impact of money on the plaintiff's life.**
    - How will the money you are asking the jury to award have a real and meaningful impact on the plaintiff's life?
    - First, defense counsel must paint a picture for the jury detailing what the plaintiff's life is really like now and what it may realistically look like in the future.
    - In every case, look at what the plaintiff could do before the accident versus what she's unable to do after the accident.
    - Or the plaintiff's life before and after she was terminated from her job, or before and after she received our alleged negligent advice, or whatever the wrongdoing may have been. The defense must find a way to paint a positive picture of the plaintiff's life. Defense counsel must analyze the plaintiff's post-accident life and tie in any defense number for pain and suffering.
    - And don't worry if you failed to ask the plaintiff in her deposition what her passion is. You can rest assured that during the trial every good plaintiff's attorney will let the jury know what his client's passion was before the accident.
    - All good plaintiff's lawyers will make their case about their client's inability to follow their dreams or live their passion. The trial will be about the loss of the true essence of who that plaintiff was before this terrible incident. That loss of true self is much, much greater than any economic loss.
    - Unless you want to get killed with a nuclear non-economic damages verdict, you better find out who that plaintiff truly is.
    - Figure out how to get the plaintiff this pleasure, this joy, back in her life.
    - Examine what the plaintiff has lost. What has she really lost by not being able to camp because of this accident? At the core of it, what does she miss about it today? What is it about camping or hiking or many other activities a plaintiff will mention that she truly misses?
    - <u>No matter what they tell you the activity was, at the heart of it, what is missing is a shared experience with loved ones.</u>
    - Get to know your plaintiff. Where does she live? Where did she used to vacation? Where are her family and friends now? Who are her family and friends? What did they like to do for fun with the plaintiff? If she can no longer camp, what kind of shared experiences can she do? How can she spend time with family and friends? If she can't travel to her loved ones, bring her loved ones to her. Your number could pay for family gatherings, for instance. If the plaintiff can't get on a plane to go camping in Yellowstone National Park with family anymore, then bring her family to her. Every year. Maybe more than once a year. Family is important to the plaintiff. She should be with her family, and we should pay for it.

- We typically look at the plaintiff's income to understand the value of money to the plaintiff.
    - What is the plaintiff's profession? What was plaintiff's last job? How much money did the plaintiff make per year?
    - I asked the jury to think about how long it would take a teacher to make $100,000. Perhaps several years? Next, I urged the jury to consider how long it would take a teacher to personally save $100,000. Perhaps decades? Perhaps never? I explained to the jury I was not passing judgment on the plaintiff—my mother was a New York City schoolteacher who never earned, let alone saved, $100,000. No, we take the plaintiffs as we find them. One hundred thousand dollars was real money to this plaintiff and would have a meaningful impact on her life.

5: DEFEAT PLAINTIFFS' PAIN & SUFFERING

- While plaintiffs have some very effective means for arguing damages, there are only a few ways they do it. The top three methods are:
    - #1: Answer a want ad.
    - #2: Break down the total pain and suffering number into days, hours, minutes, and seconds.
    - #3: Put a dollar amount on each element of the pain-and-suffering jury instruction.
- There is a new movement afoot as well. Plaintiff's attorneys across the country are using a fourth way to get large verdicts: by getting jurors to think about expensive things during deliberations.
    - This includes celebrities' incomes and priceless pieces of art. We will discuss how to respond when plaintiff's counsel tells the jury stories about million-dollar works of art or expensive machinery.
- The "answer an ad" approach to arguing pain and suffering can take many forms.
    - The basic premise is to try to get the jury to put themselves in the plaintiff's shoes. Of course, this is illegal in most states as it is a variation of the impermissible Golden Rule argument. Most states prohibit plaintiff's attorneys from asking the jury how much money they would want to suffer the same injuries as the plaintiff. It's not a fair question. The jury is there to put a value on the plaintiff's pain and suffering, not their own. It's extremely prejudicial to the defense, and that's why plaintiff's attorneys are always looking for a way around it. (Defense attorneys could learn a thing or two from this never-give-up approach.)
    - The traditional approach is to ask the jury to imagine a want ad in the newspaper. It's an ad for a job that reads: One day you are driving down the street, passing through an intersection, when all of a sudden, a meat truck blows through a red light and slams into your car. Your car is spun around, and you are thrown violently to and fro. The pain is immediate and life-changing. You will never be the same. You will need three back surgeries. You will be in pain every day for the rest of your life. Your

relationship with your loving husband will change. Your carefree, loving personality will be gone. You will not be as strong of a person as you used to be. Most importantly, you will not be able to follow your passion. Your dreams will be cut short because of debilitating pain and physical limitations. You will lose the very essence of who you are.

- The second approach is to get the jury to think about the pain and suffering the plaintiff has experienced in terms of minutes, hours, or days and then multiply that time by a small dollar amount.
    - For example, plaintiff's counsel will ask the jury whether being in the kind of pain the plaintiff is experiencing every day would be worth $100 an hour. What about $50 an hour? How about minimum wage? Would it be worth $12 an hour to have your life changed forever, be in constant pain, not be able to spend time with your family and friends, to be depressed and no longer able to follow your passion? Do you think you should at least get minimum wage for this tragic life? If so, that comes out to 20 cents a minute. Less than a penny a second to never be the person you were before this accident. When you add this up for the next forty years of the thirty-nine-year-old plaintiff's life, $12 an hour, times twenty-four hours a day, times 365 days a year, comes to $4,204,800. Sure, it's a big number, but is it worth less than a penny for even a second to have your life changed forever?
    - Now there's been a more recent twist to this argument by creative plaintiff's attorneys. Recently they have tried to equate a plaintiff's pain and suffering with the income of the defense experts.
        - Plaintiff's counsel will tell the jury how much defense experts charge by the hour. He will tell the jury how much your experts made on this case. He will try to get in front of the jury how much your expert made last year doing expert work—and, even better, how much the expert made in his career.
        - One radiologist in Los Angeles recently admitted in trial he has made about $30 million over the course of his career doing expert work.
        - Plaintiff's counsel argued, successfully, that his client's pain and suffering was at least worth what this defense expert was charging for his opinions about pain.
- Give an amount for each element of pain and suffering.
    - One column will be labeled "Past" and the other "Future." You could have a total of twenty numbers displayed to the jury. Counsel will go through each and admit some do not apply in the case, like maybe disfigurement, for instance, but most do apply. When you add up ten to twenty numbers, the total for non-economic damages can be substantial.
- Plaintiff's attorneys also try to get the jury thinking about big numbers by giving them examples of expensive pieces of artwork, or salaries of celebrities or sports stars, or expensive machinery like a stealth bomber.

    - They combine these big-ticket items with compelling stories. Like the Louvre is on fire in Paris and a security guard is told to run into the building and save the Mona Lisa. But when he runs into the burning, smoke-filled building, he sees a small child choking to death under the $150 million painting. Without hesitation, the security guard rushes past the priceless art and scoops up the dying child. Why? Because we as a society value human life even more than a $150 million painting. And this decedent was obviously much more important to her family than some old painting. This family deserves much more than a $150 million painting.
    - So what do you do? Ask the jury why on earth plaintiff's counsel would even bring this up. Did we hear any evidence of the Mona Lisa or Kobe Bryant in the trial? Tell them what he's doing. He wants them to get angry. He wants the jury to not think about what a dollar is worth outside the courthouse. He wants the jury to think it's fake money, like the kind of money the Kardashians or other social media influencers make.
- First of all, we're not telling the jury what the plaintiff will do with the money.
    - We have no idea. We are talking about the value of money to the plaintiff. What impact does money have on this plaintiff's life? We don't care how the plaintiff will spend the money; we are looking at what the plaintiff has used money for in the past. We take the plaintiff as we find her. How she spends money and enjoys her life is how we find her. It is relevant. It is certainly more relevant than the Mona Lisa!
- Try the following, if necessary, during closing argument:
    - Let me change gears here for a minute. Let's talk about money. The idea of money. Money itself does nothing for us, right? Putting a dollar bill in our hand or 500,000 of them doesn't make you better, right? The physical receipt of dollar bills in your hand does not help with physical pain or anxiety. No, it is what you can do with money that helps you get back some of that inconvenience and mental suffering you have experienced. I am in no way saying what the plaintiff will do with the money you decide is fair and reasonable in this case. What I am talking about is how $500,000 will have a real impact on the plaintiff's life. I am talking about how $500,000 will impact the plaintiff's physical pain, her mental suffering, her loss of enjoyment of life, and all of the other elements of non-economic damages plaintiff's counsel just wrote on the board for you. I am talking about how $500,000 will allow the plaintiff to spend time with her family, and how she misses that, and she needs that, and how we should pay for that. $500,000 is real money to this plaintiff. It will afford her real things to address the real harms she has suffered. It will fly her family to visit with her every year, for the rest of her life. It will pay for real hotels and real vacations. It will make a real difference in her life.
- You must find out who this plaintiff really is.
    - What is her passion? What makes her tick? What did she truly enjoy doing in life before this incident? What does she believe our client took from

her? And, very often, it's not a plaintiff's job that defines her. It's being a mom, or an artist, or a volunteer, or a mentor, or a musician, or a shopper, or a crafter, or a technology nut, or a sports enthusiast, or churchgoer, or anything but her 9-to-5 job. You better know who the plaintiff really is, or you will get killed by the best plaintiff's lawyers.
    - And you better find this out before trial, because if you don't, you may get hit very hard.
    - The good plaintiff's lawyers will acknowledge their client's job loss but will say this case is about so much more than just not being able to work. The economic damages in this case are so much smaller than the plaintiff's true loss. This case is about the plaintiff losing the very essence of who she is. Well, you better know who that plaintiff is!
- Before you end the deposition, make sure you can answer these two questions in a favorable way:
    - #1: What is the impact of the accident on the plaintiff's life—what is the plaintiff's life really like after the accident?
    - #2: What is the impact of money on the plaintiff's life—what is the value of money to the plaintiff?
        - The questions
            - You are seeking monetary damages, correct? How much for: Medical bills? Pain and suffering/non-economic damages? Any other damages for which you are seeking money? Any other expenses related to the accident or treatment? List all the ways your life has changed since the accident. How did it affect you emotionally? Have you taken any vacations or trips since the accident? Have you gone to any amusement parks? Have you been to any live shows? Have you taken any weekend trips? Have you been to any sporting events? Where do you traditionally go for vacation? With whom? What is your passion? What are your hobbies? What do you like to do for fun? How much does this hobby, passion, or fun cost?
            - What do you spend money on for enjoyment? How much money do you make a year? Did the accident cause you any other financial hardships? Do you own your home? What worries you most about your recovery from this accident? (Kids' college tuition, car payment, mortgage payment, taking care of aging parents, retirement?) Does anything keep you up at night because of this accident? Why did you file the lawsuit? What do you hope to get out of this lawsuit? When did you first talk to a lawyer about this incident? Was there any particular change to your lifestyle that prompted you to get help from a lawyer? Do you believe any other party is liable for this accident? Do you feel like you have

been getting better since the accident? Do you feel like you will get better in the future?

- In a particular case, I also went a step further. It was a little dangerous. I told the jury I thought it would be unfair to award Mrs. Howell more than $100,000 in pain and suffering.
    - Yes, it would be unfair to her. Because if you did, you would be telling the plaintiff, as well as her friends and family, that you did not believe them—that when they all testified what a strong woman she was, you would be telling them no, she is not. That she really needs much more than a fair and reasonable number to be made whole.
    - We only had the Tyson & Mendes Method for arguing damages. And it worked!
    - Use the Tyson & Mendes Method of arguing (1) the real impact of the accident on the plaintiff's life and (2) the impact of money on the plaintiff's life. Show the jury you care about the plaintiff. Explain how your number will have a positive effect on her life. Use these methods in every jury trial, and I guarantee you will avoid runaway jury verdicts.

6: THE VALUE OF A LIFE

- So how do you even think of asking a jury to award no money at all to a mom who lost her sixteen-year-old daughter and unborn grandchild?
- First, let's talk about how you discuss the value of a life.
    - First, you must do everything we have discussed in this book, and more.
        - You must recognize, acknowledge, and show compassion for those involved in the case. You must be aware of what will make the jury angry towards your client and his actions. And you must embrace and defuse that anger by accepting sincere responsibility, and maybe liability, where appropriate.
    - <u>You cannot pretend to care—you must really care.</u>
        - Sincere compassion is critical. As a defense attorney, you must present the best possible defense for your client, but that does not mean you are void of sympathy or even disgust over what has happened. Loved ones have lost a family member.
        - This should unequivocally engender a conciliatory and humbled approach on your part. Humanize your client. If possible, show your client cares. Present the type of person he was before and after the incident. Share how this event has impacted him. What current and future value does this person offer to his own family and community? If your client is a business, why does it exist? What good does this business do? What value does it add to the community? Who makes up this company? Who are the people, the everyday fellow citizens, who are this company? Tell their story.

    - What else do you do in a wrongful death case? You embrace the awkward.
        - Someone died. Whether it was your client's fault or not, it happened. And you better acknowledge it, in a real, considerate, and, yes, caring way. Acknowledge the loss. Acknowledge the raw emotion people are experiencing. Better yet, share the emotions you're personally experiencing about being tasked to address the unthinkable and put a value on a life. This is hard. Of course, it's nothing like what this family has gone through.
- Ultimately, you have to come up with a number.
    - And you have to give that number to the jury. And once you provide that number, you must own it.
    - Give jurors this number early and often. Let them know this is an extremely difficult thing for them to do. It is difficult for you to do. But you must share it with confidence and conviction.
    - Mention the number in voir dire, opening, and closing. Work it in with witnesses. Make it part of the theme of your defense.
- It's the goal of the plaintiff's attorney to assign the highest possible value to the decedent's life, often much higher than they believe any reasonable jury would award.
    - And they often have emotion and sympathy on their side. But that is not enough for them
    - Good plaintiff lawyers will tell the jury stories to get them thinking of large numbers.
        - They will often use the salaries of sports stars from the city where the case is tried. One such story is about Kobe Bryant.
        - A plaintiff's lawyer will tell the jury that Kobe Bryant earned $30 million a year to play basketball. And if you ask his teammates and the organization if he was worth it, they would say definitely. Kobe was so much more to his team than just a player who shot baskets or excelled at defense. Kobe was the glue that kept the team together. He raised everyone's game around him. He was the star of the team, and without him, they would not have won all of those championships.
        - To his teammates, Kobe was worth every dime of his salary.
        - Well, a plaintiff's attorney will argue, the decedent in this case was the father and husband. He was the Kobe Bryant of his family. He kept them together, he raised them up, he was their rock, he was their star. We as a society value a basketball player at $30 million for dribbling a ball. Isn't this father worth much, much more than $30 million to his family?
        - It is a moving argument. It has worked many times for plaintiff lawyers across the country. But it is not fair and should never be

used in a courtroom. It is not evidence, and it is not a reasonable inference from the evidence.
        - Kobe Bryant did not testify in this case; he was never even mentioned. His name is being referenced for one reason only: to stir up the emotions of the jury. You must respond to this argument by pointing out its intent and telling your own story.
- There are two things that must be considered when you evaluate non-economic damages in a wrongful death case:
    - First, what is the impact of this incident on the plaintiff?
    - Second, what is the impact of money on the plaintiff?
- Before trial ever begins, you must find out this information.
    - In depositions, you must ask questions to learn the following: What was the deceased's employment status before their passing? What role/impact did they have in the lives of their family? What is the financial impact of their loss on their family? How did the family bond and enjoy each other's company before the accident? What exactly did the family do together? How did they spend their time? Where did they vacation? What is their fondest memory of the decedent? What made them most proud about their dad/mom/son, etc.? What do they miss most about the decedent? What made the decedent happy? What made the decedent sad? What is the plaintiff's biggest disappointment now that the decedent has passed? Feel uncomfortable asking these questions? Good, you should.
- Apologize at trial.
    - There is no art to an apology. There is no orchestrated way to apologize. There is no perfect time to apologize. There is no strategy to an apology. There are no special words, coming from a particular witness or from you.
    - No, there is only one way to apologize in a jury trial: Only if you mean it. Let me be clear, only apologize in a trial if you really are sorry for what happened to the plaintiff. No exceptions.
- Your job is to be the most reasonable person in the room.
    - This is very important in a wrongful death case, especially the death of a child.

7: HAVE A THEME

- A theme tells the bigger story behind a case.
    - It goes beyond the facts and witnesses to paint a picture of what really matters. And when we talk about what matters, we are talking about what matters to the jury. What is important and will resonate with them? What will move them emotionally and rationally to consider the case from your perspective and the perspective of the person you are representing?
- Rarely have I seen plaintiff's counsel argue a case without a clear theme.
    - In most cases, the plaintiff's theme is focused more narrowly on the facts and witnesses of the case. And the theme they present is often intended to engender a very specific response.

    - Plaintiff's counsel wants jurors to be angry and to direct that frustration directly at the defendant and the defense counsel. This means they will focus on everything the defendant has done wrong. They will focus on every single misstep. And they will focus on how they are greedy and self-serving. While some of these things may be true and may be a good way to advance their theme, it certainly does not tell the entire story.
- The defense wants to address and, whenever possible, counter the plaintiff's accusations. But sometimes that's just not possible. Sometimes what the plaintiff is saying is absolutely true.
    - And remember it's always best to accept responsibility where appropriate. It demonstrates to the jury you are trying to be fair and reasonable.
    - However, even if you're accepting some or all responsibility, or a witness or unexpected facts arise that hurt your case, you should always present a broader theme. From the defense perspective, your theme must address broader issues in your case that strike a positive chord with jurors.
    - Does your client contribute to the community? Was your client acting in a forthright manner? Was your client acting in good faith to reasonably and responsibly pursue the same liberties and dreams afforded to all people and companies in this country, big or small, rich or poor? A theme gives meaning and context to your facts, to the evidence in a trial. It causes a jury to react in either an emotional way or a thoughtful way, consistent with their belief of the truth, of what really happened. As a defense attorney, it's your job to identify these themes and begin to introduce them from day one.
- As you will recall, the core principles I use in every trial are responsibility, reasonableness, and common sense.
    - When trying to introduce or further a theme in a trial, doing so when it is in contrast to one or more of these principles does not work well. Jurors want to do what's right.
    - The law says bias, sympathy, prejudice, or public opinion should not influence the jury's verdict. But this is virtually an impossible task.
    - So how does one make use of higher values? You do this by stating the values. Early. Often. Out loud.
    - It begins with voir dire. Ask jurors whether it is important to be honest, to be honorable, to accept responsibility, to contribute to society, to do the right thing. Ask them how they feel about these values. Are they important to them? Are these values they try to instill in their children? Can they ultimately return a verdict that is fair and reasonable and just?
- Values should be a central aspect of your closing argument.
    - Honesty. A plaintiff has one obligation when they come to court, to tell the truth. How did the plaintiff fail to meet that obligation in this case? Honor.
    - Honor is coming to court, accepting responsibility, saying, "Hold me accountable." Justice.
    - Justice is a reasonable verdict based on the evidence.

- The good plaintiff's lawyers tell emotional stories about their lives and try to relate those stories to the case.
    - Plaintiff's attorney Gerry Spence is famous for telling moving stories. Others share a story of overcoming adversity. Some tell Biblical tales, like David and Goliath.
- Ultimately, jurors want to do the right thing. You just need to give them the justification.
    - In sample case, we went with the theme of a home.
    - Second, we embraced the awkward and went with the importance of immigration to our country. How did we do it? We did it the same way we always do, we started early and often.
    - In closing, I was able to use the jurors' own words to describe the importance of having a safe and calm home. A place of peace and quiet, if that is what you so choose. A place where corporate America does not dictate behavior.

8: PERSONALIZE THE CORPORATE DEFENDANT

- This chapter will address the importance of putting a face on your corporate client and how to do it.
    - But make no mistake. It's imperative the jury knows your client on a personal level in every single trial. No exceptions!
- A close colleague referred to civil litigation as a battle between opposing forces where the weapons of choice are facts and feelings. If argued properly, facts often steer the jury in the right direction. But emotions help them decide what to do with those facts. Consider the following scenario:
- "You must not allow bias, sympathy, or prejudice to enter into your deliberations."
    - That is the law. That is one of the basic tenants of any jury trial.
    - Emotion or feelings should have no place in a civil jury trial. We all agree, right? Of course. But is it realistic? Is that what juries do? Do they make decisions like robotic computers based purely on data in and laws applied? Of course not!
- Getting a jury to identify with your corporate client is critical, especially when it comes to damages.
    - Why? Jurors may impose higher damages awards against corporate defendants when they cannot relate to the corporation on a human level.
- How do you personalize your client?
    - First, you must do what the best plaintiff's lawyers in America do: They get to know their client.
    - Ultimately, a simple question must be asked in order to accomplish this: what do you wish the jury knew about your client?
    - Then it's about using every opportunity to personalize your corporate client throughout the trial-- even during the plaintiff's case.

    - Claims professionals, general counsel, risk managers, and defense counsel must partner to develop the corporate story and provide the jury with a basis to identify with the client
    - This story should include a corporate representative who is present for every day of trial. The storytelling itself will take place during jury selection, opening statement, witness examinations, and closing argument.
- Jury selection is the defense's opportunity to weed out prospective jurors who hold anti-corporate sentiments.
    - It's also the defense's first opportunity to begin telling its corporate story.
    - The questioning also should begin to incorporate background facts about your client's business.
    - This can set the stage for when the full corporate story comes out during trial. You want to begin to frame your client's story as early as possible because the earlier you do so, the more likely the jury will remember the information. By discussing potential voir dire questions in preparation for trial, claims professionals and defense counsel can ensure the insured client's story is presented effectively from the outset.
- The best time to tell the full corporate story is during opening statements. Plaintiff's attorneys typically focus on the defendant's conduct during their opening statements, not the actions of the plaintiff.
- If appropriate, tell the jury what an honor it has been to represent the company and how thankful you are for the attendance of the corporate representative.

9: SLAY THE REPTILE

- The Reptile Theory has changed the landscape for plaintiff lawyers and their approach to jury trials.
    - You must understand this theory, in detail. If you are already familiar with this approach, you may want to skip ahead to where we discuss how to slay the Reptile.
- The Reptile Theory says plaintiff's attorneys should seek to incite fear and anger in jurors.
    - This is described in the book *Reptile: The 2009 Manual of the Plaintiff's Revolution* by David Ball and Don Keenan.
    - The Reptile Theory accompanies the "bible" of the plaintiff's bar, David Ball on Damages.
    - To tap into jurors' "reptile" brains, plaintiff's attorneys frame trial arguments in terms of absolute safety. Plaintiff's counsel will also focus heavily on the defendant's conduct. Counsel will frame the defendant's negligence in terms of the defendant's potential threat to community safety. Plaintiff's counsel will ask jurors to consider three questions when determining whether the defendant's conduct was negligent:

        - 1. How likely was it that the defendant's conduct would hurt someone?
        - 2. How much harm could the defendant's conduct cause?
        - 3. How much harm could the defendant's conduct cause in other situations?
        - 4. Illustrate the "tentacles of danger" and the ability to "meliorate."
- Reptile tactics fuel some of the largest jury verdicts across the country.
    - In almost every closing argument, in cases where a jury awards an astronomical amount of damages, plaintiff's counsel has framed the case in terms of an arbitrary safety rule, asking the jury to serve as the conscience of the community, and empowering them to send a message with their verdict.
    - The greater the award, the louder the jury's message that it will not tolerate this kind of behavior in its community.
- An effective Reptile safety rule has six characteristics:
- A plaintiff's attorney's primary goal is to develop Reptile themes in discovery that she can then weave throughout the trial. The Reptile Theory provides the following roadmap:
    - #1: Establish general safety rules.
    - #2: Relate general safety rules to specific safety rules.
    - #3: Show the Reptile juror how this harm can happen to him.
    - #4: Emphasize "Safety First, Last, Always."
    - #5: Establish the defendant did not care about safety.
    - #6: Establish the defendant did not care about the person she hurt and does not care now.
    - #7: Establish the defendant learned nothing from what happened.
    - #8: Establish the defendant did not know how to complete the job safely.
    - #9: Expose the defendant as a liar.
    - #10: Show that the defendant did not do her job.
    - #11: Show that the plaintiff did her job.
- As discussed below, the defense must shut down the creation of the safety rule from the outset of discovery.
    - The Reptile Theory, however, is designed to redefine and heighten the standard of care in a negligence-based cause of action by effectively turning it into a strict liability standard.
    - To the Reptile, whether the defendant behaved reasonably under the circumstances is irrelevant because someone was harmed. The only standard raised is the "safest possible choice."
    - The most basic approach requires the defense to spot the Reptile in discovery and prevent the plaintiff's attorney from creating the Reptile safety rule.
    - A more advanced method involves shifting the Reptile's tactics back on the plaintiff—the Reverse Reptile Theory.

- Superficially, plaintiff's Reptile set-up often takes the following form:
    - Factual/ Easy (Agree) – General Safety Rule
    - Factual/ Easy (Agree) – General Safety Rule
    - Factual/ Easy (Agree) – General Danger Rule
    - Factual/ Easy (Agree) – General Danger Rule
    - Factual/ Easy (Agree) – Specific Safety Rule
    - Factual/ Easy (Agree) – Specific Danger Rule
    - Reptile Question (Safety Rule/Hypothetical)
    - Case-Specific Fact Case-Specific Fact
    - Case-Specific Negligence/Causation ($$$)
- The Reptile set-up plays out in the following deposition scenario:
    - Question 1: You would agree with me that as a property manager, the safety of your tenants is always a top priority? (GENERAL SAFETY RULE: SAFETY IS ALWAYS A TOP PRIORITY.)
    - Question 2: You would agree that you always do everything you can to ensure the safety of your tenants and your community? (GENERAL SAFETY RULE: MORE IS BETTER.)
    - Question 3: You would agree that a property manager should never needlessly endanger their tenants? (GENERAL DANGER RULE: DANGER IS NEVER APPROPRIATE.)
    - Question 4: You would agree that as part of your effort to protect your community, you ensure that you do everything you can to provide security? (SPECIFIC SAFETY RULE)
    - Question 5: You would agree that providing onsite security officers is one way to ensure your community is safe? (SPECIFIC SAFETY RULE)
    - Question 6: You would agree that as a property manager, you have a responsibility to keep gangs out of your community? (SPECIFIC DANGER RULE)
    - Question 7: You would agree that providing security in your community would have helped keep gang violence out of your community? (REPTILE QUESTION: SAFETY RULE/HYPOTHETICAL)
    - Question 8: But you did not provide security, did you? (CASE-SPECIFIC FACT)
    - Question 9: You did, in fact, know of gang activity in your community? (CASE-SPECIFIC FACT)
    - Question 10: You would agree that had you provided security services, your community would have been protected against gang violence? (CASE-SPECIFIC NEGLIGENCE/CAUSATION ($$$))
- The Reverse Reptile is most easily used when there's some element of comparative fault at issue against anyone other than the defendant.

10: SPREAD THE GOOD NEWS

11: VOIR DIRE

- Are they easily triggered emotionally? Do they think punitively? Are they analytic in their reasoning?
- Plaintiff's counsel wants emotionally driven jurors.
    - They want artists, caregivers, teachers, writers, creative people, people who have been wronged themselves, and others whom they feel they can manipulate into believing the defense is pure evil.
    - We defense lawyers want analytical, linear-thinking folks who manage people and take responsibility for their actions. These are often engineers, accountants, small business owners, law enforcement, and those in managerial positions. We want people who are detail-oriented and often driven to make decisions based on quantifiable analytics. We definitely want people who follow the law.
- But, if I had the time, I would throw all of that out the window.
    - I would have the conversations that reveal personalities and real beliefs. I want people who care. People who care about what is fair and just. I want those who appreciate the value of a dollar. I want people who are willing to listen with an open mind. I want people who want to help and do the right thing for all parties involved.

12: Closing Argument

- After six weeks of technical medical and forensic accounting testimony, I told the jury during closing argument that they did not need the experts to reach a verdict. Instead, they only needed to rely on their common sense to understand the plaintiff did not sustain a traumatic brain injury or lose millions of dollars of income because of the accident.
    - In appealing to the jury's common sense, I asked them to consider the following silent witnesses we did not hear from at trial: The three days the plaintiff waited to receive medical treatment following the accident. The fifty-three days the plaintiff waited to complain about his alleged shoulder injury. The fifty-nine days the plaintiff waited to report his alleged double vision to any healthcare provider. The 480 days the plaintiff went without receiving any treatment for his alleged traumatic brain injury. What do all of these silent witnesses tell us? What are these silent witnesses screaming out to us? "I'm not hurt!" Right? I mean, we knew this plaintiff sought treatment if he was injured, right? We spent six weeks hearing from all the doctors the plaintiff saw, so we know if he was not feeling well, he went to the doctor. But all of the days with no treatment and no follow-up after the accident were telling us one big thing: "I'm not hurt!"
- Second, keep it real. Whatever you believe, whatever you feel about your case, say it.
    - Be real. Share with the jury your truth. The truth is, in most cases, that you and your client care. You care about a plaintiff who lost her job, or lost a loved one, or was seriously injured using your product, or whatever the

loss may be. Regardless of what your defenses are, show the jury you care. If your last words to the jury are dynamic, persuasive, and caring, you will not be the victim of a nuclear verdict.