Best's Insurance Law Podcast

Nuclear Containment: How Insurers and Insureds Can Avoid Excessive Verdicts - Episode #163

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Hosted by: John Czuba, Managing Editor

Guest Experts: Dr. Bill Kanasky and Dr. George Speckart of Courtroom Sciences, Inc.

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John Czuba: Welcome to "Best's Insurance Law Podcast," the broadcast about timely and important legal issues affecting the insurance industry. I'm John Czuba, Managing Editor of *Best's Insurance Professional Resources*.

We're pleased to have with us today two representatives from expert service provider Courtroom Sciences in Irving, Texas. Courtroom Sciences partners with corporate legal departments and law firms throughout the entire litigation process, from the moment a crisis occurs through discovery, trial preparation, jury selection, and the trial itself.

What makes CSI unique is the focus on empirical research and scientific methodology in the evaluation of litigation risk, and focus groups, and mock trials, and in jury selection, all of which provides data and analysis to improve decision making and outcome.

Joining us for a discussion are Dr. Bill Kanasky and Dr. George Speckart. Dr. Bill Kanasky is senior vice president of litigation psychology for Courtroom Sciences, and a nationally recognized expert, author, and speaker in the areas of advanced witness training, and jury psychology, and civil litigation.

He consults on more than 200 cases annually in the areas of defendant witness training, jury decision-making process, and jury selection strategy. He earned his PhD in clinical and health psychology from the University of Florida.

Dr. George Speckart is director of research and consulting for Courtroom Sciences, where he oversees the design and implementation of psychological research for corporate clients facing imminent litigation with significant exposure.

He has been active in the jury consulting field since 1983 and has conducted hundreds of mock trials, and focus groups, and pretrial research for numerous types of litigation. Dr. Speckart received his Ph.D. in psychology from UCLA in 1984, with a specialization in personality measurement.

Gentlemen, we're very pleased to have you both with us today.

Dr. Bill Kanasky: Thank you.

Dr. George Speckart: Thanks, John.

John: Today we're going to be discussing nuclear verdicts. For our first question, Dr. Kanasky, we'll start with you. Can you define for us what a nuclear verdict is?

Dr. Kanasky: It's a very difficult definition because I think it's relative to each particular industry and client. I think a general definition, and I'd love George's input on this too, is just a verdict that is absurd. That level of absurdity, I think is going to change from client to client.

We've seen several recent verdicts that are in the hundreds of millions of dollars, and then sometimes you have a verdict that's $20 million. To that particular client, that may be a nuclear verdict. I think really, the nuclear verdict is in the eye of the beholder. I think each client sees it differently.

If you're a multibillion-dollar company, and you get hit for $100 million, that may not be nuclear to them, but to other companies, it very well may be.

Dr. Speckart: Some people say the three-million-dollar coffee burn case is a nuclear verdict.

Dr. Kanasky: Yeah.

Dr. Speckart: There's no formal definition that's really universally accepted yet. It's like when you see it is when you know it.

Dr. Kanasky: Yes. Last month, Johnson & Johnson got hit with a $750 million verdict on their baby powder case. I think the judge is planning on reducing that to like $200 million to be more fair. I think that's a great example of how a verdict can get...we're talking about ridiculous types of numbers here.

At the same time, in February, a trucking company got hit for $25 million. That company ended up going out of business because of that. Those are two very different verdicts, but I think you could define both of those as nuclear, relative to each of those companies.

John: Dr. Speckart, can you talk about what is actually driving the increase in the number and size of the nuclear verdicts?

Dr. Speckart: Sure. First of all, I would note that this phenomenon has really been around since the '90s when it was called the runaway jury. Now the new term is nuclear verdicts. This has been a source of concern for a long time. People most often say that it seems like juror alienation, jurors are fed up, the desire to redistribute wealth, etc.

Yes, that's true, but it was also true in the '90s when people first started talking about the runaway jury. What is it that's going on more recently that's causing this observed trend of just more and more crazy, ridiculous verdicts?

I would say the leading cause is that plaintiff attorney tactics have become more and more sophisticated and aggressive, while at the same time defense and insurance company trial preparation tactics are geared toward cost control and being more reactive than proactive.

It involves approaches that are more concerned with protecting relationships and protecting record for appeal, as opposed to winning. Some of the more recent plaintiff's tactics include a whole spectrum of approaches, including this new reptile approach for destroying witnesses, third-party litigation funding, anchoring damages, and clever venue shopping to get cases into what the American Tort Reform Association calls, judicial hellholes.

There's a myriad of different tricks specific to each situation and case that plaintiff's attorneys are more likely to use, just because it's more likely to be more aggressive and more creative. They have skin in the game, and defense attorneys have a different set of motivations, I think.

John: Dr. Speckart, can you elaborate on how the jurors evaluate evidence and go through their decision-making process?

Dr. Speckart: Sure. That's an interesting story. When I first started in Litigation Sciences back in 1983, and that was a firm that was operative at the very beginning of the jury research industry, it was led by two marketing professors from USC, who used to tell people that jurors make up their minds during opening statements.

That sent a tsunami through the whole litigation community because people were really shocked that jurors would make up their minds that early. We started doing post-trial jury interviews, which is the gold standard for determining how verdict decisions are actually met.

When we talked to the actual jurors, they told us that they made up their minds while watching the witnesses. Since then, at Courtroom Sciences, we've developed what we call the cognitive map, which is, the first thing jurors do is they essentially sniff out the witnesses.

It's a very primitive process, like dogs sniffing. They want to know what kind of person is this, and they evaluate mostly based on nonverbal behavior. Eye contact, facial expressions, body language, mannerisms, vocal intonations, may determine, what are these people like? Are they credible? Are they likable? Are they trustworthy?

After that first evaluation, the second evaluation they make is, what are their duties and responsibilities? What is it they should have done that they failed to do? What is it that they did that they should not have done?

From the answers to those two questions, the rest of the case arguments, themes, evidence, documents, are all filtered through the lenses of those decisions about the witnesses, to create a final verdict in damages decision. It's really the witnesses that drive everything.

Dr. Kanasky: I'd like to add to that. Unless you disagree, George, I think your case, as a defendant, is only as good as the witnesses involved. You could have a very good case, factually, but if your witnesses stink, I think that you're open for a lot of exposure and vice versa.

You may have a very difficult case factually, but if you have properly trained witnesses that perform well, you have a good shot of winning.

John: Interesting. I always heard, when you're interviewing someone, you know within the first minute if you're going to hire them. That first impression seems pretty important in this process.

Dr. Kanasky: Very much so.

Dr. Speckart: Litigators routinely talk about how the witnesses are needed to cash the checks that they write in their opening statements. The witnesses are therefore the bank, psychologically.

Dr. Kanasky: Let me add one more point to this. I've got two cases right now...the demand on one of them in Chicago is $50 million, and there's one out in the Los Angeles area, with a demand of $100 million. These clients called me specifically to fix these witnesses for trial.

The problem is, their depositions are on videotape, and they are terrible, and they look and sound awful. Another one of these plaintiff attorney tactics, which is highly, highly effective, is to play these videotapes usually during opening statements so that they see the worst side of that witness upfront.

By the time the defense calls their witnesses, even if they perform well at trial, they're stuck with that videotape. Much of what we do at Courtroom Sciences is preparing witnesses for those depositions so that they're effective, and that videotape doesn't come back to bite you.

John: Dr. Kanasky, what mistakes do you see companies making that expose them to a potential nuclear verdict?

Dr. Kanasky: I call it not throwing the first punch like Dr. Speckart was talking about it. Many companies, particularly insurance companies, are very reactive in litigation. The plaintiff's bar has figured this out, so they've figured out the system.

In other words, when you're a company and you're reacting to the plaintiff, by the time you figure out you're in trouble, it's too late to fix anything. We advise our clients to throw that first punch, be very aggressive early and often in that litigation, so that you never fall behind, number one.

Number two, I think it's the failure to really respect the plaintiff reptile attack. This is 10 years. It's not really new, George. It's been around for 10 years, but I still see defendants getting hurt by it very, very badly because they're not adequately prepared for it.

Again, if you're being reactive, you're waiting too long. By the time you figure out I've got a problem, there is really no time and no way to fix it. Therefore, you're going to have a nuclear verdict, or what we haven't talked about which really deserves discussion, the nuclear settlements.

I think there are a lot of nuclear settlements happening that nobody's talking about, because the defense falls so far behind, the only way to take care of that case is to get rid of it.

John: Now, Dr. Kanasky, you work with a lot of clients. Do you find them experiencing a lot of nuclear verdicts, and why or why not?

Dr. Kanasky: Not at all. The number one reason why is that they've woken up, they have smartened up, and they have figured out they have to be proactive in litigation. That requires a lot of aggressive work being done early on in the case, very early in discovery, so that they never fall behind, and they never end up getting trapped by plaintiff's counsel.

Now the plaintiff's bar has fully taken advantage of a lot of other companies, because of that reactive nature that we were talking about. Most of the reptile strategy is really focused on that attack early, attack often, and the defense won't be able to catch up, and they'll end up settling the case.

When they go to trial, they'll be unprepared, and you'll have a nuclear verdict. We convince our clients to be aggressive, be aggressive early, train these witnesses appropriately, so they come across very well at depositions, and those deposition videos don't come back to bite you.

By the time you get to a negotiation and mediation, you will have most of the leverage, and there won't be a nuclear settlement. It will be reasonable. If you do go to trial, it's not going to be a nuclear verdict. It's going to be a defense verdict. If it is a plaintiff verdict, it's going to be very low damages.

John: Dr. Speckart, why is a scientific approach to litigation so important?

Dr. Speckart: When you think about it, science is society's preferred means for separating clever from correct, or determining truth, or obtaining reality checks on hunches and intuition. It's quite simply how we verify truth. Litigation teams, as you watch them, are characterized by a river of opinions.

It flows by all day long. I think this juror is believing X. I think this witness will create the impression Y. I think this jury will do Z. Wouldn't you like to know whether what we're talking about actually happens to be true? Is there anywhere where this is more important than litigation?

Let me give you an example. We had a heavy equipment case, where our research showed that the average damages award was going to be about $500 million. This was in one of the judicial hellholes. It actually turned out to be Philadelphia.

We knew that we were looking at a potential nuclear verdict. We went to the plaintiff, who had no idea what the case is worth, and he needed the money and settled the case for two million dollars. He had no idea what the case was worth. His hunch was about two million.

We knew the case was a nuclear verdict in the making, but we shut it off. We headed it off because we had science on our side. I have examples working in the other direction, where we're on the plaintiff's side, and the proposal came in while the jury is deliberating from the defense. It was $20 million. This is as high as this jury is going to go.

We went back to the mock trial research and found out that $20 million was the lowest damage award that was provided by the mock trials, mock jurors in that trial. In that mock trial, the highest award was something like $83 million.

We did not take the $20 million check. Knowing science and having science on our side, the jury came back at $73 million. We use science to either suppress a nuclear verdict or create a nuclear verdict, depending on which side we're working for.

John: Dr. Kanasky, what can insurance companies and their insurers do, to prevent or limit nuclear verdicts?

Dr. Kanasky: I think again, back to that early aggression and beyond the witness training...I want to get George's comments on this because I see a trend that's shifting an industry. Doing research early on in a case, mock jury research, focus group research, mock trials, we know that the plaintiff's bar, they are mock trying these cases.

Why? They want to find their lottery ticket. The only way to do that is to mock try the case. I'd say now, maybe 6 or 7 out of 10 mock trials I'm doing are before mediation because the clients want to know, "Hey, if I've got a problem, I want to know now. I can't wait till six months before trial."

George, you want to talk a little bit about the timing of mock trials, and why it's so important to get your answers early?

Dr. Speckart: I could give an example here, which is really interesting. We had a case where it could have been settled in the first few years for a couple million. The defense, which was a bank, resisted doing jury research because of cost-cutting.

They finally chose our group six months from trial to do some jury research, because they said the plane tickets would be cheaper. We were actually closer than our competition. Once we finally did the research a few months before trial, we found out we were handcuffed on a freight train to hell with poor witness depositions.

The jury actually awarded $238 million in that case. If we had been retained at the outset, we could have worked with those witnesses, and helped with those depositions, and made them much better, and almost certainly have headed off that nuclear verdict.

There are two problems. One of them is being reactive rather than being proactive. The other problem is that the people who make the hiring decisions don't insist on scientific method. They use jury research from practitioners who have not been vetted, in terms of qualifications for conducting scientific research.

A lot of that research is better off not to have it at all because it points in the wrong direction when you get the final results in because it's not scientifically conducted.

John: Dr. Speckart, why do you think they are not already taking these measures to prevent nuclear verdicts?

Dr. Speckart: John, I think the best way to answer that is, let me give you some examples. I was talking to one attorney who was getting ready to go to trial down in the Rio Grande Valley, which is one of the American Tort Reform Association's judicial hellholes. I told him, "You really should do a mock trial and test this case ahead of time."

He said, "A mock trial is a luxury." He went down to the Rio Grande Valley and got hit for $60 million. Another time I was talking to an attorney, and she says to me, "You know, if they can settle the case for $10 million, they're going to do that." I said, "What if the jury would only award five million? What if they would only award two million? What if the jury would only give a defense verdict?"

Her answer to me was, "They don't care." The reason, I guess, is because it's not their money that's being paid out. The people who make the decisions as to whether to insist on science, do not have skin in the game. They get paid the same whether they lose or not.

Contrast that to the plaintiffs. It's their skin in the game, every step of the way. There has to be more to it than that because obviously these people still do not want to lose. There are institutional reasons, I think.

If you just look at the insurance industry, you have a claims department on one hand who make the decisions on budget issues, how to defend the case, and who to hire, how much to settle for. They're evaluated on how well they cut costs.

The indemnity side of the house, on the other hand, is responsible for actual verdict payments. These two sides of the house have separate budgets. One insurance insider told me a lot of people in claims do not want to spend $50,000 from their budgets, say for scientific research or something like that, to save half a million in the indemnity budget.

The use of the scientific research might help one side, but it doesn't help the other side who has to pay for it, so it doesn't get done. Now, if we dig a little deeper, there are emotional reasons.

If you Google, 7th Circuit excoriates legal professions for fear and loathing of science, Justice Posner in the 7th Circuit actually said that the legal industry has a fear and loathing of science. You can take that how you will, but I have encountered a lot of resistance about scientific methods.

I think people are just suspicious of it or maybe that they're just more comfortable with hunches and intuition. The fact of the matter is, the track record for scientific method, just beat hunches and intuition up one side of the yard and back down the other.

I think if you take the prerogative of hunches and intuition away from big players in corporate defense in insurance, you're usurping a big piece of the influence. I don't think that goes over well, in a lot of cases.

John: Dr. Kanasky and Dr. Speckart, thank you both for joining us today.

Dr. Kanasky: Outstanding. Thanks, John.

Dr. Speckart: Thank you.

John: You've just listened to Dr. Bill Kanasky and Dr. George Speckart from Courtroom Sciences in Irving, Texas, and special thanks to today's producer, Frank Vowinkle.

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I'm John Czuba, and now this message.

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