

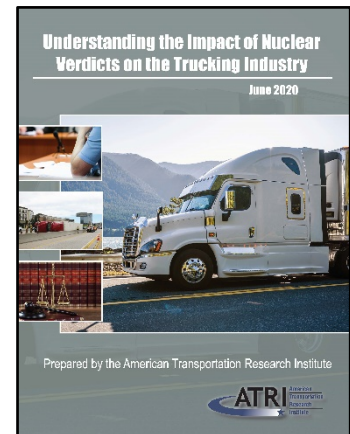
Understanding the Impact of Nuclear Verdicts on the Trucking Industry



The American Transportation Research Institute recently released comprehensive research that confirms that large verdicts against trucking fleets are increasing dramatically, both in number and in size of awards. ATRI's research is partially based on a newly created trucking litigation database that provides detailed information on 600 cases between 2006 and 2019. In the first five years of the data, there were 26 cases over \$1 million, and in the last five years of the data, there were nearly 300 cases. The number of verdicts over \$10 million nearly doubled in that time.

In response to arguments that nuclear verdicts reflect real-world cost increases, the research documents that from 2010 to 2018, the size of verdict awards grew 51.7 percent annually at the same time that standard inflation grew 1.7 percent annually and healthcare costs grew 2.9 percent annually.

The research also surveyed and interviewed dozens of defense and plaintiff attorneys as well as insurance and motor carrier experts, and generated a qualitative analysis for why the litigation landscape has changed, recommendations for modifying pre-trial preparations, litigation strategies and mediation approaches, and how large verdict awards impact both safety and insurance.



At 80+ pages, ATRI's report is a data-rich analysis with important findings that motor carriers, their defense attorneys and their insurers can implement to mitigate the frequency and size of large verdicts.

Pre-Crash Actions by Motor Carriers are Critical

- Both attorney bars emphasized that crash avoidance is everything and that strictly adhering to safety and operational policies is essential to staying out of court and/or reducing award sizes.
- Almost any failure to adhere to Federal Motor Carrier Safety Regulations (FMCSRs) or company safety policies will be the focus of plaintiff arguments.
- From a litigation standpoint, motor carriers should consider FMCSRs as minimum standards that can and should be exceeded. The ability of defense attorneys to document carrier or driver safety activities that exceed FMCSRs carries great weight with juries.

Litigation Preparation is – and should be – Both Complex and Costly

- Risk Assessments must be thorough and objective. Case vulnerabilities and potential liabilities must be acknowledged, and vetted against realistic financial damage projections.
- The ultimate strategy-driving question internally posed by most plaintiff attorneys and successful defense attorneys is: "what operational, safety or training factors could have prevented the crash in the first place?"
- Experience matters. Both defense and plaintiff attorney bars noted that attorneys inexperienced in trucking litigation are harmful to all parties.

When Mediation and Settling Makes Sense

- There was general agreement that mediation and settlements are missed opportunities, particularly by the defense when they do not believe that negligence by the carrier and/or driver exists.
- If mediation and settlements are pursued, initial offers should be realistic and equitable. Multiple plaintiff attorneys describe the frustration and consequence of initial "low-ball" offers.

- Settling early reduces costs. ATRI's quantitative analysis found that, on average, a 1 percent increase in time between crash and verdict increases verdict size by \$3 million (mean = 1,319 days between crash and verdict).

Expert Witnesses and Plaintiff Claims Matter

- When the defense uses expert witnesses and the plaintiff does not, awards decrease by 13 percent. When both use expert witnesses, the defense still benefits.
- There were five issues in ATRI's litigation database where the defense lost every case, including HOS and logbook violations.

Litigation Strategies and Models: Success versus Failure

- The defense and plaintiff bars have different underlying business models. The defense bar is party to an economic model focused on "cost minimization," as dictated by the client (e.g. motor carrier, insurance firm). Client efforts to reduce costs will often cut corners on detailed risk analyses, litigation preparation expenses and expanded legal representation. Alternatively, the plaintiff bar recognizes that litigation failure will generate little to no revenue, but with "high risk, can come high reward."
- Knowledge dictates good vs bad litigation outcomes, yet information-sharing models between defense and plaintiff attorneys are stark and disparate. Respondents generally described defense attorneys as being more secretive and competitive in their approaches and strategies. The result is minimal sharing of tactical and strategic information among defense attorneys and firms. Alternatively, every year the plaintiff bar holds dozens of open-door and closed-door conferences on successful litigation approaches and tactics.
- Several defense attorneys also described their own inability to obtain detailed and critical information from their own clients.
- While there was much discussion and debate on the existence and role of the "reptile theory," there was general consensus that emotion, egos, and sentiment play a crucial role in "winning over the jury." The defense often relies on logic, technical witnesses, compliance with FMCSRs and other rational arguments. Plaintiff attorneys oftentimes rely on emotional pleas and "heart string" stories to win over the jury with sympathy and empathy. The example provided was juxtaposing a mechanical engineer describing brake stopping distances vs a child testifying about the loss of a sibling.
- Multiple attorneys proffered a solution or response to this by noting that defense arguments should highlight the critical role of the trucking industry in the nation's economy, a fleet's role in the community as both an essential employer and corporate citizen, and stories about truck drivers being devoted family members who would never intentionally harm someone.
- In terms of expert witnesses, it was recommended to avoid "technical overkill." Since likeability plays a key role in believability, rely on a down-to-earth mechanic to discuss certain issues versus an automotive engineering professor.

Unfavorable Practices will Destroy Case Potential

- Any type or degree of spoliation, aka destroying evidence, when proven in court almost always ensures immediate jury sympathy for the plaintiff. If the credibility of the defendant is destroyed through documented proof that evidence was tampered with, "all hope is lost."

A copy of the full report – *Understanding the Impact of Nuclear Verdicts on the Trucking Industry* – is available for free from ATRI's website at TruckingResearch.com.

ATRI is the trucking industry's 501c3 not-for-profit research organization. It is engaged in critical research relating to freight transportation's essential role in maintaining a safe, secure and efficient transportation system.