

Going Viral or Going Nuclear: Social Inflation's Impact on Jury Verdicts and How to Safeguard Against It

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Abstract: A juror's perception of companies and healthcare providers is increasingly colored by television and social media. The same is true for their understanding of the practice of law or medicine, which may be as wrong as it is immovable. "Social inflation" refers to rising litigation costs and the resulting higher insurance payouts that drive up the cost of insurance. In this article the authors, each of whom represents parties in the healthcare industry, discuss the evolving social trends that lead jurors to render "nuclear verdicts," and what attorneys should consider in mitigating the effects of this phenomenon.

Social media feeds today are crammed with flashy advertisements from lawyers promising big-dollar settlements against "rich insurance companies." The number of these commercials has spiked since the 1970s¹ as the phenomenon known as "social inflation" has taken root in the legal system.

Social inflation is a term of art that refers to rising litigation costs, the impact those costs have on insurance claim payouts, and how much the average policyholder is expected to pay for basic coverage.² Recently, the phrase "social inflation" has taken on a new meaning as it has become more widely used in the general press. The phrase has come to be associated with tort reform rollbacks, litigation funding, and is most seen in references to "nuclear" jury verdicts, that is, a jury award that exceeds \$10 million.

But the question remains: What factors contribute to these exorbitantly high jury verdicts? These outsize awards are often

driven by myriad factors including sympathetic jurors, societal conceptions about income and wealth of corporations, the use of emotion-driven “Reptile Theory” tactics by plaintiff attorneys, the media spotlight on “bad apple” physicians, and numerous other social factors. A new factor that influences elevated jury verdicts is the increasing volume of information—whether true or false—that is exchanged on social media platforms.

One of the lines most affected by this form of social inflation is the healthcare industry and the soaring costs of medical malpractice litigation. This includes lawsuits involving hospital systems, pharmaceutical companies, and their insurers.

Another issue driving social inflation on litigation is the continued concern over the extended COVID-19 pandemic and related issues such as rationed care, overwhelmed hospitals and healthcare systems, the policies and choices by aging care and long-term care facilities administrators who are trying to minimize the spread at their facilities, and vaccine administration and efforts to circumvent the protections of the Public Readiness and Emerging Preparedness Act, or the PREP Act.

Social Inflation Is a Driver of Nuclear Jury Verdicts

Imagine you are picked to be a juror in a case brought by an elderly woman who fell while under the care of a skilled nursing facility. Her daughter testifies about how her mother’s quality of life is not the same, the granddaughter testifies that she can no longer sit on grandma’s lap, and, meanwhile, the attorneys on either side ponder whether you as a juror are thinking about your own loved ones and how much money the facility can afford to give away.

Social factors have conditioned jurors to believe that excessively large verdicts are the only answer to making plaintiffs whole, especially in cases considered to be sympathetically charged. Such cases tug at the reptilian parts of jurors’ brains, prompting them to award plaintiffs higher verdicts in an effort to hold the defendant accountable to society for any dangerous or unsafe condition or practice—and not just accountable to the plaintiff in that particular case at that moment in the courtroom.

More and more, attorneys are finding that jurors are influenced *before* they even set foot in court. Their biases are driven by social media and news agencies leading them to believe that corporations are rich business machines that focus on profits over the people they serve. As such, they enter the courtroom believing that the corporate defendant is the enemy of the “average Joe” plaintiff and should be held accountable for what they perceive to be the shortcomings of an industry or system they don’t trust in the first place. Jurors place themselves in the shoes of the plaintiff on a human level and bring their empathetic imagination to their jury service, viewing the defendant negatively from the start of the trial.

In 2021, a survey by the Pew Research Center found that more than eight in ten U.S. adults (86%) said they obtain their news from a smartphone, computer, or tablet.³ Alarmingly, about half of respondents (53%) said they get their news from social media specifically.⁴ While mainstream media such as newspapers and news websites are run by professionally trained journalists and editors who must abide by a code of ethics, honesty, fact checking, unbiased reporting, and writing principles, social media is flooded with countless sources that present themselves as legitimate news outlets when in fact many of them don’t follow or meet the standards of fact-based journalism.

With social media increasingly serving as a primary news source for more Americans who will fill future jury boxes, attorneys and their clients must be more aware of how social media is influencing members of the jury panel who may make multimillion dollar decisions.

In addition to influencing *where* people consume news, social media and streaming entertainment services are also influencing juror preconceptions before they enter a courtroom to serve their 6th and 7th amendment civil duties. Jury pools are flooded with people who watch “real life” medical dramas or shows that purport to be based on medical and scientific investigations. That information is top of mind when jurors come to serve, and some may think that the medical terms, health conditions, and other “facts” that they learned about from television give them the knowledge and expertise needed to assess a medical malpractice case.

Another variable is age. On average, the younger the consumer, the more likely they are to obtain their news from a digital outlet of some sort,⁵ and as more digital natives reach adulthood and become eligible for jury duty, it would behoove attorneys to take media aspects into consideration when preparing for trial.

Medical Malpractice Claims in the Wake of a Growing Social Platform

The cost of nuclear verdicts has a direct impact on the costs of healthcare. The higher the verdict, the more future malpractice insurance premiums will increase. This, in turn, increases the cost of healthcare services.

Many people think that higher healthcare insurance premiums, deductibles, and co-pays are making big insurance corporations and hospital systems uber wealthy. That perception leads to the belief that, if one is paying this much for a service, there must be severe repercussions if an individual feels that the service was sub-par or that mistakes were made. This mind-set manifests both in the number of lawsuits filed and during deliberation. Jurors draw from their interpretation of the news they consume on social media regarding high treatment costs and assume that corporations and their insurers have bottomless pockets.

While the standard of care for medical providers should not be anything less than what a reasonably prudent provider would have provided under the same or similar circumstances, social inflation has led to an ever-evolving definition of what the standard of care is. People increasingly expect perfection, which has nearly usurped the traditional definition and the idea of “clinical judgment” falls by the wayside. This is especially true when social media outlets make it easier for jurors to use anecdotal evidence of an opinion post they read “somewhere” involving another individual in another case when making such significant decisions in medical malpractice cases.

In the wake of COVID, jurors are coming into the courtroom after nearly two years of working from home in a dramatically polarized world where a culture of favoring opinion over fact reigns supreme. This culture and climate is most evident in the verdicts

and awards that place an economic value on injuries many have been exposed to over the course of the past few years.

Fighting Fire With Fire

Healthcare professionals, hospital systems, administrators, and insurers must be proactive, purposeful, and aggressive in defending against social inflation and misinformation before litigation occurs.

Get Ahead of the News

When handling an emotionally charged case, healthcare providers should work with experienced counsel to address issues in the media, especially when factually untrue information is spread. For every “healthcare heroes” story that got media attention, there were also numerous articles on issues such as nursing homes running out of space to place the bodies of deceased residents or patients denied admittance to a hospital that had no empty beds—and many of these stories went viral and became exaggerated over time.

Work closely with your legal counsel, risk management, and corporate communications teams to develop a media strategy prior to the commencement of litigation. Consider sharing key facts of the event in question that will form the basis of your case theme, which can also help sway public sentiment and untether people from misinformation or neighborhood gossip they may gather elsewhere.

Know Your Audience

Triggering emotions at trial is common practice in medical malpractice cases. To even the playing field, attack these issues prior to entering jury selection in the form of motions in limine.

Once you have arrived at jury selection, it is essential to provide a presentation that will elicit the opinions of jurors on key social issues and biases they may have. On cases with particularly emotional fact patterns, it can be beneficial to retain a jury consultant

to provide you with statistical correlations between seemingly innocuous viewpoints and social biases.

The key thing to remember during jury selection is that a juror may have already made up his or her mind and you are not going to be able to change it. As such, jury questions should be targeted to bring out points of views that may or may not agree with the facts of your case so that you can better decide who to keep and who to strike.

As part of the regular preparation of an effective voir dire, do extensive research on social media posts and news coverage surrounding your key issues—including any viral posts, memes, or other derivative content that might have risen to the top of public perception about your case. This will give you a more complete picture of what potential jurors might have seen or read, and more importantly, it may help your defense team uncover misinformation that some jurors might believe is true.

This is a major departure from 30 years ago when there were only a handful of potential ways a story could be reported by television networks and newspapers that dominated the news cycle.

Finally, jury selection is the time for truly listening to the points of view jurors bring into the courtroom, even when those views contradict your strategy, misconstrue the science or facts of the case, or misunderstand the ethics of the healthcare profession. The views and biases of each juror are their reality, and that becomes your reality if you choose to seat them. Is that the person who should have the power to determine a nuclear verdict?

Notes

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1. https://www.namic.org/pdf/publicpolicy/210920_socialinflation_full.pdf.
2. <https://www.iii.org/article/social-inflation-hard-to-measure-important-to-understand>.
3. <https://www.pewresearch.org/fact-tank/2021/01/12/more-than-eight-in-ten-americans-get-news-from-digital-devices/>.
4. <https://www.pewresearch.org/fact-tank/2021/01/12/more-than-eight-in-ten-americans-get-news-from-digital-devices/>. Social media is measured separately from news obtained from podcasts, which about 22% of U.S. adults obtain their news from “sometimes.”
5. *Id.*