

BIG TRUCKS: AN AVOIDABLE PUBLIC SAFETY CRISIS

Introduction and Summary (November 2022)

On a clear July morning in 2016, 58-year-old grandmother Judy Madere, her twin sister Trudy, her daughter Carrie and Carrie's children — seven-year-old Trinity and four-year-old Jaxson — were traveling in Carrie's SUV on Alabama's U.S. 80, returning to Louisiana after visiting relatives. A large Schnitzer Steel Industries truck pulling scrap metal was traveling on the opposite side of the road when it crossed the center line and smashed head-on, at highway speed, into the SUV. Never breaking as the driver was apparently asleep, the truck hit the car with the force of half a million pounds.¹ Trudy, Carrie and the children were all instantly killed. Judy lived for only a short time, struggling for life in that car surrounded by her dead daughter, grandchildren and twin sister.

The fatigued truck driver, Kenneth Cathey, was charged with five counts of criminally negligent homicide. Turns out Schnitzer had asked him to drive despite his long record of unsafe driving for the company, including prior crashes (which is one of the strongest predictors for future crashes²). In fact, in the previous three years, Cathey had four serious wrecks, not to mention numerous traffic and Federal Motor Carrier Safety Regulation violations.³ The company had already settled a lawsuit after Cathey's near fatal crash three years earlier, while keeping him driving and taking no corrective training or safety steps in violation of its own company rules and safety regulations. In other words, for Schnitzer, the settlement was a mere cost of doing business. Nothing was remedied.

This story reflects a number of themes explored in this report. First, the crash, which killed three generations of family members, is the nightmare scenario we all fear when it comes to sharing the road with large trucks. The trucking industry's own studies show that crashes are increasing⁴ while government oversight is weakening.⁵ Surveys show that most people have real safety concerns driving past large commercial trucks because of their size, their blind spots and other visibility restrictions and their tendency to drift out of their lane.⁶ But safety concerns would undoubtedly grow if the public were aware of the extent to which trucking companies are knowingly disregarding public safety, as in this case, and using their economic clout to weaken critical safety standards. This leads to the second point.

Sometimes lawsuits, which are extremely rare following truck crashes (less than 2% of trucking insurance claims turn into lawsuits⁷), and large jury verdicts, which are rarer still, are necessary

to get a bad company’s attention and sometimes to alert an entire industry. Prior incidents and lawsuits against Schnitzer obviously had not worked. While the trucking company responsible for hiring Kenneth Cathey, Schnitzer Southeast, admitted liability, publicly-traded Schnitzer Steel Industries — which operated as a joint venture with Schnitzer Southeast and controlled it⁸ — denied responsibility. This forced remaining family members to sue. On August 23, 2019, a Georgia jury rendered its verdict: \$280 million, which included \$30 million for Judy’s pain and suffering and \$100 million in punitive damages. Clearly, this local jury was trying to send a message to the company and to the industry: Reckless disregard for public safety will not be tolerated in their community. Rendering verdicts after hearing both sides of a case is the jury’s role. Awarding punitive damages in cases of egregious misconduct is also their long-standing role, “to serve as a means for punishing the defendant and deterring others from committing similar actions.”⁹ This leads to the third theme of this study.

Four decades ago, corporate PR operations and “tort reform” groups¹⁰ created the trope of the “out of control,” irrational or “runaway” jury verdict (today referred to as “nuclear verdict”). In the early 2000s, there was much grumbling within the “tort reform” community about large verdicts against tobacco and pharmaceutical companies.¹¹ In the 1980s and 1990s, the complaints were about other kinds of cases.¹² Sometimes, their complaints were about cases that never even existed.¹³ As explained by authors William Haltom and Michael McCann in their 2004 book, *Distorting the Law: Politics, Media and the Litigation Crisis*, the “tort reform” community’s playbook is always the same¹⁴:

- Point to some extraordinary occurrence – some exaggerated or fabricated “horror story” – to symbolize what is “ordinary” about the tort system.
- Discuss the outcome of the case in a way to violate notions of common sense.
- Highlight large compensatory and punitive awards with exaggerated frequency.
- Ignore any post-trial discussion, where the majority of verdicts are reduced or never paid.

In this case, for example, Georgia lawmakers had already largely stripped juries of their power to award punitive damages (irrespective of any verdict) when they capped them at \$250,000, a fact rarely if ever mentioned in coverage of the case. Thus an observer, whose only knowledge of litigation is gleaned from industry articles and reports, would wrongly believe that the trucking industry — or the nation as a whole — is being besieged by runaway juries doling out “nuclear verdicts” to plaintiffs regardless of the merits of a case.

Take the telling of the *Madere* case by the U.S. Chamber of Commerce’s “tort reform” branch in its new report on so-called “nuclear verdicts.” Here’s how the organization describes the case¹⁵:

[I]n August 2019, a Muscogee County [GA] jury returned a \$280 million verdict against a trucking company in just 45 minutes. The plaintiffs claimed the driver, who swerved across the center lane, fell asleep at the wheel, while his employer claimed the driver swerved to avoid a dog on the road. Whatever the cause, the amount of wrongful death damages awarded can only be viewed as extraordinary: \$150 million for economic damages, \$30 million for pain and suffering, and \$100 million in punitive damages.

It's a callous and cynical description. It omits mention of a single victim let alone five victims, including two children, or their gruesome deaths. There is no mention of the driver's unsafe driving history, or the company's decision to keep putting him on the road despite several earlier crashes and numerous violations, or its settling of an earlier near fatal case with no change in safety practices. On the other hand, the Chamber somehow found it important to mention the company's "dog" defense, which was disproven in court.

Also omitted is what trucking industry attorneys actually believe about verdicts like this: They are entirely of the industry's own making. A recent report on "nuclear verdicts" from the industry's research arm, the American Transportation Research Institute (ATRI), made the obvious point¹⁶:

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.

This theme was repeated throughout ATRI's report. For example,¹⁷

Multiple interviewees prefaced remarks with variations of "the only way to prevent nuclear verdicts is to prevent the crash from happening in the first place."... Interviewees generally concurred that the more safety activities motor carriers engaged in to prevent crashes the lower the likelihood that a nuclear verdict would result. *It was also commonly noted that motor carriers typically do not allocate enough resources toward safety and crash prevention* [emphasis added].

Similar observations came from leading trucking journalist Deborah Lockridge, who published an article following a large 2021 trucking verdict with similarly horrific facts,¹⁸ noting that the way to avoid such verdicts is by "defusing" what she called "Nuclear-Verdict Detonators." That's a gimmicky way of identifying preventable safety problems, calling on companies to address safety issues "long before there's a crash." She writes about the 2021 verdict,¹⁹

[As to the driver], there was no background check, no verification of a [Commercial Driver's License] or prior violations, and the other driver ... allegedly was not able to read road signs and was apparently over hours of service. As one attorney put it, "These are all vulnerabilities, systemic and individual, that companies need to identify and rectify before the accidents. And nuclear verdicts rarely, if ever, occur absent such correctable detonators."

She also observed, "[T]he overwhelming amount of this verdict was reported to be for punitive damages ... 'The purpose of those damages are to punish outrageous conduct that has occurred and deter such in the future.'" And, she wrote, "Bad Actors Are Bad for Trucking."

So are bad lawyers apparently. Parts of the ATRI and U.S. Chamber reports try to explain large verdicts by insisting that jurors are manipulated by plaintiffs' lawyers.²⁰ These groups make

jurors sound like blubbing idiots who don't listen to evidence from both sides of a case but are rather enchanted by bewitching plaintiffs' lawyers, suggesting that judges are irresponsible for allowing victims' lawyers (never corporate or insurance lawyers) to flood jurors' minds with misleading information. Of course, this is ridiculous and untrue. The real explanation for large verdicts isn't plaintiffs' lawyers. It's rather the horrific nature and avoidable causes of these crashes combined with the apparent incompetence of the companies' own attorneys. In some fairly embarrassing admissions to ATRI, defense lawyers confess that they're just not very good.²¹ According to a survey of both plaintiff and defense lawyers, "73.3 percent said that plaintiff attorneys were doing better, 20.0 percent said both, 6.7 percent said neither, with no one saying defense attorneys did better."²² As the saying goes, perhaps they should clean up their own house before pointing the finger at others.

Finally, while corporate and defense lawyers have long complained about jury verdicts when they lose significant cases, the term "nuclear verdict" is a relatively new PR term. It began appearing often in insurance industry publications in late 2019 along with the term "social inflation," an umbrella PR term to describe an amalgam of disconnected complaints that the insurance industry and corporate lawyers have always had about juries, lawsuits and plaintiffs' lawyers who win cases.²³ Most complaints have little to do with trucking lawsuits.²⁴

Frequent use of these terms began towards the end of 2019 as the insurance industry decided to flip the nation into a "hard" insurance market, burdening businesses with premium hikes after years of stable rates. According to the *Wall Street Journal*, they made this move for two main reasons: "several years of large catastrophe [e.g., weather, wildfire] losses and continued low interest rates, which have weighed on their investment returns."²⁵ Analysts said that the industry's "record levels of policyholder surplus" were "sufficient to absorb" such catastrophes without raising rates.²⁶ But one thing was clear — these unnecessary rate hikes were not caused by anything to do with lawsuits or juries. Nonetheless, as they had at the start of prior hard markets, insurance executives and consultants began focusing all of their blame on the legal system.

Turns out, this focus has done a terrible disservice to trucking owners and drivers seeking rate relief because the cause and solutions to their insurance problems lie squarely with the insurance industry, not the legal system. As this report will show, the insurance industry has seen some upward loss movement — *i.e.*, claims — for a decade due to increasing numbers of truck crashes, the growing "epidemic" of distracted driving and more drivers on the road.²⁷ While some gradual premium increases might be expected, the data show that the insurance industry has been over-correcting through excessive reserving and unnecessary rate hikes for years. Commercial auto liability policyholders are being price-gouged.

As ATRI put it, "Survey respondents generally agreed that nuclear verdicts are not common, and do not directly cause motor carriers to go out of business."²⁸ However, "increasing insurance costs" and price-gouging does.²⁹ In other words, there are two critical problems facing the trucking industry and "verdicts" is not one of them. One is the trucking industry's failure to prioritize safety, as is illustrated throughout this report. The second is the insurance industry's mismanaged underwriting practices. The solutions to that problem are better regulation, oversight and transparency of the insurance industry.

NOTES

¹ “Wrongful death trial begins in Columbus 3 years after an East Ala. vehicle accident,” *WTVM* (Columbus, Ga.), August 20, 2019, <https://www.wsfa.com/2019/08/21/wrongful-death-trial-begins-columbus-years-after-an-east-ala-vehicle-accident/>

² “[P]rior crash involvement had a 113 percent increased likelihood of a future crash.” American Transportation Research Institute, *Predicting Truck Crash Involvement: 2022 Update* (October 2022), <https://truckingresearch.org/wp-content/uploads/2022/10/ATRI-Predicting-Truck-Crash-Involvement-2022.pdf>

³ The Federal Motor Carrier Safety Administration (FMCSA) is the federal agency charged with regulating more than 500,000 commercial trucking companies. U.S. Department of Transportation, “Federal Motor Carrier Safety Administration,” <https://www.transportation.gov/briefing-room/safetyfirst/federal-motor-carrier-safety-administration> (last updated May 2, 2018).

⁴ “Since 2011, both fatal crashes involving large trucks and total truck [vehicle miles driven] have seen an increase.” American Transportation Research Institute, *Predicting Truck Crash Involvement: 2022 Update* (October 2022), <https://truckingresearch.org/wp-content/uploads/2022/10/ATRI-Predicting-Truck-Crash-Involvement-2022.pdf>

⁵ See, e.g., section entitled, “Other Ways The Trucking Industry Influences Government,” later in this paper. There are two federal agencies responsible for overseeing large truck safety, both housed within the U.S. Department of Transportation (DOT): the National Highway Traffic Safety Administration (NHTSA) and the Federal Motor Carrier Safety Administration (FMCSA).

⁶ AAA press release, “Truck Safety Technology Can Prevent 63,000 Crashes Each Year,” September 21, 2017, <https://newsroom.aaa.com/2017/09/truck-safety-technology-can-prevent-63000-crashes-year/>

⁷ American Transportation Research Institute, *The Impact of Small Verdicts and Settlements on the Trucking Industry* (November 2021), <https://truckingresearch.org/wp-content/uploads/2021/11/ATRI-Impact-of-Small-Verdicts-11-2021.pdf>

⁸ *Madere v. Greenwich Insurance Company*, 2017 WL 11424174 (Muscogee County Ct., Ga.) (complaint filed February 23, 2017).

⁹ U.S. Department of Justice, Bureau of Justice Statistics, “Punitive Damage Awards in State Courts, 2005,” NCJ 233094 (March 2011) (citing Black’s Law Dictionary, 1990), <http://bjs.ojp.usdoj.gov/content/pub/pdf/pdasc05.pdf>

¹⁰ “Tort reform” laws make it more difficult for injured people to sue in civil court or limit the power of judges and juries to make decisions in tort cases. The word “reform” is a complete misnomer. These laws take away people’s rights to access the courts and be properly compensated, and they undermine the constitutional right to jury trial. Major trade groups pushing these laws include the U.S. Chamber of Commerce Institute for Legal Reform, American Tort Reform Association, American Legislative Exchange Council, Citizens Against Lawsuit Abuse and insurance industry trade associations like the American Property Casualty Insurance Association and Medical Professional Liability Association.

¹¹ James H. Gordon and Michael E. Bonner, Ansa Assuncao LLP, “The Self-Fulfilling Prophecy of Social Inflation,” *Lexology*, February 5, 2020 <https://www.lexology.com/library/detail.aspx?g=f87055ad-b2df-4837-8d94-df5d3772775d> (“[N]uclear verdicts are nothing new. For example, in 2002, a Los Angeles jury awarded Betty Bullock, a 50-year smoker, \$28 billion against a tobacco company. That same year, a Missouri jury awarded more than \$2.25 billion to a plaintiff, Georgia Hayes, in her suit against a pharmacist who diluted cancer drugs. There have been massive and well-publicized jury verdicts for decades.”)

¹² See Center for Justice and Democracy, “FAQ About the McDonald’s Coffee Case and the Use of Fabricated Anecdotes,” https://centerjrd.org/system/files/FAQMcDonaldsEtc_0.pdf

¹³ *Ibid.*

¹⁴ William Haltom and Michael McCann, *Distorting the Law: Politics, Media and the Litigation Crisis*, University of Chicago Press, 2004.

¹⁵ U.S. Chamber of Commerce Institute for Legal Reform, *Nuclear Verdicts: Trends, Causes, and Solutions*, (September 2022), https://instituteforlegalreform.com/wp-content/uploads/2022/09/NuclearVerdicts_RGB_FINAL.pdf

¹⁶ American Transportation Research Institute, *Understanding the Impact of Nuclear Verdicts on the Trucking Industry* (June 2020), <https://truckingresearch.org/wp-content/uploads/2020/07/ATRI-Understanding-the-Impact-of-Nuclear-Verdicts-on-the-Trucking-Industry-06-2020-3.pdf>

¹⁷ *Ibid.*

¹⁸ See *Dzion v. ADJ Business Services, Inc.*, Case No. 2018-CA-000148 (Nassau County Cir. Ct., Fla.), discussed

later in this report.

¹⁹ Deborah Lockridge, “5 Takeaways From a Billion-Dollar Verdict,” *All That’s Trucking*, September 7, 2021, <https://www.truckinginfo.com/10150904/5-takeaways-from-a-billion-dollar-verdict>

²⁰ See, e.g., U.S. Chamber of Commerce Institute for Legal Reform, *Nuclear Verdicts: Trends, Causes, and Solutions* (September 2022), https://instituteforlegalreform.com/wp-content/uploads/2022/09/NuclearVerdicts_RGB_FINAL.pdf

²¹ They say they invest too little to win their cases, are too “secretive and competitive in their approaches and strategies — ostensibly a function of using a corporate business-oriented model,” are behind in the use of technology and are stuck with clients who keep information from them. American Transportation Research Institute, *Understanding the Impact of Nuclear Verdicts on the Trucking Industry* (June 2020), <https://truckingresearch.org/wp-content/uploads/2020/07/ATRI-Understanding-the-Impact-of-Nuclear-Verdicts-on-the-Trucking-Industry-06-2020-3.pdf>

²² Ibid.

²³ J. Robert Hunter, Joanne Doroshov and Douglas Heller, *How the Cash Rich Insurance Industry Fakes Crises and Invents Social Inflation*, Consumer Federation of America and Center for Justice and Democracy (2020), <http://centerjd.org/content/study-how-cash-rich-insurance-industry-fakes-crises-and-invents-social-inflation>

²⁴ Ibid.

²⁵ Nicole Friedman and Leslie Scism, “Insurers Drive Up Prices for U.S. Businesses; Large catastrophe losses and low interest rates force insurers’ hand after years of no increases,” *Wall Street Journal*, February 11, 2020, <https://www.wsj.com/articles/insurers-drive-up-prices-for-u-s-businesses-11581417009>

²⁶ See, e.g., Kroll Bond Rating Agency press release, “KBRA Releases Research — U.S. Property and Casualty Insurance 2020 Outlook: Bedrock Capital Underpins Stability,” January 28, 2020, <https://apnews.com/Business%20Wire/7398fd73bc3045e599d8d1dbecb890a0>

²⁷ The National Association of Insurance Commissioners, calling distracted driving an “epidemic,” said, “With advancements in mobile technology and increasing reliance on and heavy use of smart phones, distracted driving is intensifying.... The higher the accident rate, the more claims insurers have to pay. Insurers in turn transfer these costs to customers in the form of higher premiums, often based on information about traffic violations and accidents from driving records. *Nationally, auto insurance premiums have increased 16% since 2011, correlating with the increase in distracted driving accidents* (emphasis added).” National Association of Insurance Commissioners, “Distracted Driving,” September 22, 2021, <https://content.naic.org/cipr-topics/distracted-driving>

²⁸ American Transportation Research Institute, *Understanding the Impact of Nuclear Verdicts on the Trucking Industry* (June 2020), <https://truckingresearch.org/wp-content/uploads/2020/07/ATRI-Understanding-the-Impact-of-Nuclear-Verdicts-on-the-Trucking-Industry-06-2020-3.pdf>

²⁹ Ibid.