



The Water's Fine? Navigating Water Contamination Litigation

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Perhaps one of the most quintessential concerns for corporate defendants in the last decade is that of nuclear verdicts. In just a decade, from 2013 to 2022, there were 115 verdicts of \$100 million or more. The Institute for Legal Reform showed record-breaking years for verdicts in 2022 and 2023.¹

With the end of 2024 in sight, it is key to examine nuclear verdicts as they pertain to water contamination litigation. After all, several high-profile cases have awarded astronomical amounts, including a \$750 million settlement in Pennsylvania² and an astounding \$3 billion in punitive damages in Las Vegas.³ In a world where product liability cases involving serious or fatal injuries seem omnipresent, what was it about *these* cases that led to such high verdicts—and seemingly created such juror vitriol?

Perhaps even more than most toxic tort litigation, it is water contamination cases that seem capable of provoking such high emotions and high damages. For fair reason: water is universal and it is essential. The idea that it could be tainted is frightening, and the thought that a company could be responsible for that tainting is infuriating.

With such elevated emotional stakes, corporate defendants and attorneys must navigate all stages of water contamination litigation with particular care if they seek to limit their exposure.

Problematic Juror Attitudes

Every juror, in every case type, comes in with preexisting attitudes and experiences that cause them to filter information in a way that comports with those sensibilities. However, it is safetyist

beliefs among jurors—the belief that corporations should eliminate all possible risks—that present the most significant defense challenge in toxic tort litigation.⁴ Jurors with safetyist beliefs are increasingly intolerant of even minimal risk, especially in matters involving consumer products, environmental hazards, and water contamination.

Of course, defense attorneys representing corporate defendants also must navigate a jury pool influenced by anti-corporate attitudes and related distrust. Though these opinions are usually formed in response to media coverage of corporate wrongdoing among the largest institutions, the effects of these opinions are often felt by any company defendant bigger than a mom-and-pop shop.

Even beyond affecting jurors' evaluations of duty and causation, safetyist and anti-corporate attitudes can intertwine when jurors consider damages awards, often to shocking effect. Upon hearing about defendants' conduct, those jurors who are primed to believe the worst (and who extrapolate plaintiffs' risk and harm to themselves and their communities) may experience intense fear and anger—a combination that can result in extreme damages. This is especially true when jurors are led to believe that punishing a defendant will send a loud, preventative message to an industry or to corporations in general. Massive verdicts like those in recent news make it clear: today's jurors are willing to deliver nuclear verdicts.



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As defense attorneys develop their case strategy, they must address these interconnected issues. Doing so will require a departure from solely relying on the defense that the corporation abided by applicable government standards, particularly given jurors' declining trust in regulatory agencies (e.g., EPA, FDA, NHTSA, etc.).⁵ Instead, counsel can effectively advocate for their clients and mitigate the impact of adverse juror attitudes in water contamination cases by imbuing thematic frameworks that confront anti-corporate biases, combat safetyism, acknowledge and address safety concerns, and navigate the terrain of diminished trust in government agencies.

Optimizing the Outcome

Gone are the days when certain jurisdictions were the only source of nuclear verdicts. The potential for punitive damages further underscores the need for a comprehensive approach to mitigate exposure.

Beyond developing a narrative and case framing to bring down the temperature and humanize the corporate entity, defendants in water contamination and other high-risk product liability/ personal injury cases must approach jury selection with an eye toward leveling the playing field. This includes tailoring voir dire and jury selection strategies to be proactive about achieving a favorable outcome and/or minimizing potential damages. Below are four key steps in this process.

1. Control Damages from the Outset

It is important to deploy pre-trial strategies aimed at limiting discussions on specific damage amounts during voir dire. This may involve filing motions *in limine* to narrow the scope of damages explored in jury selection. By controlling the damages narrative early on, defendants can mitigate the risk of inflated jury awards by restricting plaintiffs' ability to eliminate for cause or use peremptory strikes on jurors who are hesitant to give a pre-commitment before hearing any evidence.

2. Develop a Juror Profile

Among other things, a juror profile highlights predictive characteristics held by pro-plaintiff and high-damages jurors. Generally speaking, the defense should watch out for jurors who: 1) strongly avoid risk, 2) endorse the tenets of safetyism, 3) rely on emotional thinking, 4) have experienced illness shared by plaintiffs as a result of any type of contamination (or are close to someone who has), and 5) harbor anti-corporate sentiments.



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A supplemental jury questionnaire can reveal these risky attitudes in advance of voir dire. Questions should focus on identifying the most dangerous potential plaintiff supporters. Analyzing jurors' responses will help counsel prepare for voir dire with a targeted approach, which is crucial given potential time constraints.

3. Maximize Cause Challenges

Counsel should also develop voir dire questions that encourage jurors to freely and openly discuss their beliefs, experiences, and potential biases. Through strategic questioning, defendants can uncover prejudices early, informing cause challenges and subsequent peremptory strikes. For example:

- *"By a show of hands, who here has a negative opinion of companies that bottle and sell water?"*
- *"Please raise your hand if you or a loved one is currently caring for someone who is under medical care or treatment for a serious illness or disease."*

- *“Have you, or has anyone close to you, ever been seriously injured because of exposure to chemicals, toxins, or any other hazardous substance?”*

Depending on the jurisdiction, defendants—particularly in water contamination cases—should obtain at least two to three times the number of cause challenges as plaintiffs. On a basic level, anti-corporate sentiment, sympathy for those experiencing serious health issues, and general human empathy mean that there are generally more jurors biased against corporate defendants than there are jurors biased against plaintiff individuals. Obtaining more cause challenges requires practice, asking the right questions, savvy cause sequencing, and, of course, a judge willing to grant your requests—but with precious few peremptory strikes, reaching a good result in cases like these demands plentiful challenges.

4. Research Jurors’ Social Media and Internet Presence

Consider examining jurors’ online presence for additional insights into their interests, affiliations, and potential biases. Attorneys can glean information through this approach that may not be readily apparent during voir dire due to time constraints or jurors’ reluctance to disclose their true attitudes. For instance, if you find that a juror posted about a family member’s illness from a few years ago, has volunteered for organizations that help those suffering from terminal diseases, or holds strong negative views about corporate entities in the water industry, those social media postings can inform the need to compose general questions asking the panel about those who have had such experiences.



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In Conclusion

Water contamination cases pose significant challenges for corporate defendants due to prevailing beliefs that go hand-in-hand with traditional plaintiff themes and tactics. Pre-existing biases can start the defense at a disadvantage, underscoring the need for effective themes and strategies to counteract them. To navigate today’s litigation environment, counsel must understand how jurors perceive these types of cases and know which questions will uncover their most problematic attitudes.

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