

# Combating Nuclear Verdicts in Plaintiff-Friendly Jurisdictions

**Attorneys address best defense methods against runaway nuclear verdicts.**

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## EPISODE NOTES

Attorneys John “Jack” Delany, Gary Samms and John Hare, from Qualified Member law firm Marshall Dennehey discuss the best approaches for attorneys to prevent nuclear verdicts in the courtroom.

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## Transcript

**Narrator:** This is the “Best’s Insurance Law Podcast,” brought to you by Best recommended insurance attorneys.

**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**, manager of Best’s Insurance Professional Resources.

We’re very pleased to have with us today three attorneys from the Marshall Dennehey law firm, John “Jack” Delany, Gary Samms, and John Hare.

Jack Delany leads the Catastrophic Claims Litigation Practice Group at Marshall Dennehey, where he defends some of the toughest high-stakes cases in the country. Based in Philadelphia, Jack has taken more than 60 jury trials to verdict and handled hundreds of other proceedings.

His work spans catastrophic fire and explosion claims, sexual assaults, negligence security, hospitality, and other high-risk cases, including amusements, entertainment, and sports. Gary Samms is arguably the most winning professional liability and medical malpractice defense attorney in Pennsylvania, if not the entire country.

At a time when plaintiff’s attorneys are securing nuclear verdicts, and these are awards exceeding \$10 million, Gary consistently delivers defense verdicts in complex, high-stakes medical malpractice cases.

He has tried more than 210 medical malpractice cases over the course of his career, and he is known for masterful abilities in the courtroom and his cross-examination prowess. He is the go-to attorney for his clients’ most high-exposure and catastrophic cases.

John Hare leads Marshall Dennehey’s award-winning appellate advocacy and post-trial practice group, and he is a member of the firm’s board of directors. He has litigated more than 500 appeals in state and federal appellate courts, and has been retained as appellate

counsel in more than half of the nuclear verdicts rendered in Pennsylvania in the past two years.

John has co-authored and edited two books on the Pennsylvania appellate courts. He was a lead organizer and speaker at the Pennsylvania Supreme Court's Tricentennial Anniversary Symposium at the National Constitution Center.

Gentlemen, we're very pleased to have you with us this morning.

**Gary Samms:** Thank you very much, John.

**John:** Today's podcast discussion is combating nuclear verdicts and plaintiff-friendly jurisdictions. Gary, we're going to start our questions off with you today. When you walk into a courtroom in a jurisdiction known for being plaintiff-friendly, what is the very first thing you're thinking of in terms of preventing a nuclear verdict?

**Gary Samms:** Terrific question, and thanks again for having me, John. We are actually thinking about ways to prevent a nuclear verdict long before we get to the courtroom. If I'm waiting to get to the courtroom before I start thinking about it, then we're in trouble, quite frankly.

It is extremely important from the time we get the case to do a thorough investigation obviously into all the claims, prepare the medicine, know the literature on the medicine, and for instance, in my case where they're largely medical malpractice cases, so that we can avoid it.

There's a number of items that are particularly nuanced based on the actual case facts, but in general, we want to make sure that we know the medicine, we can communicate the medicine, we have retained experts that can explain it, and we want to personalize it so that the jury likes us and our clients.

We want to have them look favorably upon us. Regardless of whether it's a bad outcome, we need to make sure we can express to them that a bad outcome does not equal negligence in and of itself.

Again, the biggest thing is controlling the eventual composition of the jury as well as your narrative. We want to make our narrative one where we want the plaintiffs, even though we're not the injured person, to be rooting for us or to like us and be comfortable with the story we're telling.

**John:** Terrific points, Gary. Jack Delany, from your experience, what mistakes or oversights in case preparation most often open up the door to a runaway verdict, and how do you guard against that?

**John "Jack" Delany:** Sure. Thank you for the opportunity and privilege to be able to speak with two very distinguished attorneys like Gary and John Hare. When I see them in a courtroom, I'm always learning from them.

The biggest mistake is basically not doing what Gary just talked about. We preach this all the time, especially in catastrophic cases where there's many moving parts, there's emotionally charged issues, there's real-life horrible consequences that both the plaintiffs or groups of plaintiffs, or your client, and the public sometimes in general experience.

We preach that you have to assemble the A-team upfront, and you basically have to do five things. Number one, critical analytical thinking. That is what is your case assessment and your strategy from the beginning.

We assemble the A-team upfront when a case just comes, if there's an explosion at a chocolate plant, or a grain mill, or a building collapse. We already have a plan in place, and we're there with things that the typical defense firm does at the end of the case, we do it upfront when we get the case.

That is we retain appellate counsel right away. We retain a jury consultant right away. We have a visual persuasion expert right away. We make sure that we get client buy-in, and we look at the case that we are about to tell a persuasive story. In order to tell a persuasive story, you need to have a strategic plan of how do you get that content for your story.

As you're at an explosion site, that story is right in front of you, and you should be looking at it, what do I need to capture at this catastrophic event that eventually, I'll be standing in a courtroom and want to talk about?

You have to preserve the evidence. You have to create evidence. You have to make sure that your client doesn't do anything that jeopardizes their position. It's that kind of mistakes that people eventually see why we have runaway verdicts because they haven't done that upfront.

We make sure that we know exactly what the jury charge is going to be, the verdict sheet is going to look like, and what a jury is ultimately going to be asked to decide. At the end of the day, we're persuasive storytellers, and it's important that we develop the content for that persuasive story.

Just summing everything up, it's making sure that you have the right team assembled upfront to tell your persuasive story. That you have a strategic plan to develop content for that story once the incident occurs all the way through discovery.

Then to make sure that you ultimately have a plan to deal with your bad facts, a way to neutralize emotionally-charged issues in the case, and to ensure that you know exactly what the courtroom dynamics are going to be. I think if you avoid those pitfalls, you're halfway there to making sure you do what you need to do on behalf of your client.

**John:** Terrific stuff, Jack. Gary, back to you. Gary, in high-stakes cases, the plaintiff story can sometimes be emotionally powerful. How do you make sure the jury also sees humanity and credibility of your client?

**Gary Samms:** That's one of the biggest hurdles that I think trial lawyers like Jack and I face, and it is a great question because obviously, juries typically come back with big verdicts or

runaway verdicts when they are either A, mad at the party, or overly sympathetic in an emotionally-charged case.

I think it all begins with preparation, as Jack has repeatedly said, because obviously, you can't just accept what is a sad story. You need to be able to address it on all fronts. One of the ways that we address it is in preparing our client to humanize them as much as possible, which is telling stories about why they became physicians, for instance.

If they have a personal backstory where they had a family member that had cancer or that inspired them to become a physician and help heal others, we want to make them likable. We want the jury to root for them as well. We make sure that sympathy or empathy is a two-way street.

You can be sad for the victims or somebody who's had a bad outcome from either treatment or a catastrophic event, but it's incredibly important to make sure that you explain how professional these physicians are, how much time hospitals and health care providers have put into treating people, the effort they make, and recognize that they're in a difficult position as well.

We talk about their background, their hard work, their dedication, and I think a big part of it is selecting the jury. I like to refer to it as jury deselection rather than jury selection because I am frequently trying to get rid of the people who I don't think can separate sympathy from empathy.

We, in our practice, spend a lot of time in the individual voir dire section of the trial to focus on these issues and filter out the people that will not be able to separate the case and listen to the medicine facts in the law, but would be prejudiced by passion or prejudice that could affect the defendants negatively in an emotionally-charged case.

I think it is just humanizing and making your people personable and likable. You have to be careful not to attack the plaintiffs too hard. It's OK to challenge them on facts, but you don't want to be the guy who's perceived by the jury as beating up or being unfair to somebody who was already a victim in their eyes to begin with.

It's a balancing act, and as Jack said, it begins all with preparation and approach. Then you've got to pay attention to the people you are selecting on your jury without a doubt.

**John:** Jack, we've heard the term radical empathy used quite a bit this morning. Can you explain how you can utilize radical empathy as a means to minimize the chance of nuclear verdicts and explain how it's used in high-exposure trials?

**Jack Delany:** Sure. It's doing exactly what Gary just talked about with a little twist, and I'll explain that. It's something that I had been doing, I think throughout my career, but just didn't realize I was doing it.

The thing that made me crystallize this whole concept and made me think about what I was doing, how I was doing it, and why I was having good effects from doing it all came about when I went to the Philadelphia Library in one of their book presentations, and it was for "American Mother."

On the stage, it was just an hour presentation. It was Diane Foley, Colum McCann, the coauthor of the book *American Mother*, and Sting, who had recorded a song that actually had a nomination for an Academy Award for the documentary of the book.

If you remember that story, it is the journalist who was a freelance journalist that often would publish in “The Wall Street Journal” or “The New York Times,” and he would cover the war in the Mideast. He was captured by ISIS, held by them, tortured by them for a year and a half. His mom and his family tried to get him released.

Ultimately, he was beheaded. He was the first one beheaded on live on YouTube. Eventually, Dennis Fitzgerald, who was working for the US attorney’s office, was part of securing a plea bargain from him where he admitted to the murder and his participation in the murder.

The amazing story is that Diane Foley, as part of the plea bargain, sat across the table in the Virginia courtroom with her son’s killer for three days, and they had a discussion about who Foley was and what that was about.

I was so touched by that. I had just finished a very powerful, emotionally-charged case and had not that kind of experience, but it made me think about the human factors that we deal with in all these tragic situations.

Even though we are in an adversarial system, how we could have empathy for the other side as well as, like Gary said, empathy for our client, and how we could conduct ourselves in a way to minimize the chance of a nuclear verdict.

Since that presentation, I’ve had the privilege of speaking with Diane and Colum on radical empathy, and I’ve been talking about that for the past couple years now, how important that is.

Basically, the twist from what Gary said is he talked about it in the courtroom, what you do. My approach to this is have radical empathy from the beginning of the case. That is when you first meet plaintiff, whether it’s a deposition or a conference, that you develop a relationship.

You understand the emotionally charged, horrific situation that they’ve been through that has real-life consequences. You develop that relationship with that person, that person’s family, whether it’s at the mediation, during jury selection, during the courtroom every time that you’re in a courtroom, treating that person that you have empathy for.

Just to give you an example of that is a lot of times in my opening statement in those types of cases, I will have the jurors crying and understanding what the plaintiff went through and what their family went through.

The purpose of that is to show that we understand how tragic that is, but also, like Gary says, it’s important to have the empathy for your client and to humanize your client as well. You need empathy in order to tell their story.

We do all the same things that Gary talked about, and that is tell the backstory. We do something a little bit different than just the backstory. We find that person.

A lot of the cases I have, it's a big company, it's a corporation, and plaintiff wants to paint us as the bad guy, the bad corporation. We basically make it about this person versus that person. We want the jury to have empathy for our client as well, and as Gary said, potentially rooting for our client.

That's a way to neutralize the emotionally-charged issues that could lead to a runaway verdict.

**John:** Gary, jurors today often bring different expectations about corporations, insurers, or institutions than they did even 5 or 10 years ago. How do you adapt your trial strategy to account for those shifts?

**Gary Samms:** That is a really big problem, unfortunately. For some reason, merely because there's a large health care system, or corporation, or hospital involved, plaintiffs want to paint that as they are the bad guys necessarily just because they're large or just because they're a corporate entity.

I think it goes back to humanizing everything and making it personal because with respect to this, what we do is we take the opportunity to, as we said, emphasize that our physicians are humans and they're a victim in this process as well.

As I go through and I ask witnesses questions, I specifically will say something as if, "Oh, the hospital didn't do x, y, or z." I will say, "Dr. Jones did x, y, or z. Then did the doctor or nurse do x afterwards?"

What we want to do is highlight that while it's a corporation, while it's a health care system, the health care system are only the people that make it up. It's only as good as the people that make it up.

The people that are in this profession serving people that make up this large health care system or hospital are doing it because they care, because they want to help people. That's why they got into this calling and this profession.

What we want to do is never address it as the health care system. We refer to the individual actions of the health care providers and we let it be known that medicine is not a science. It is an art that involves science.

It is the people, based on their thought, training, and experience, that make these decisions as to how to treat. They're using their clinical judgment based on their experience, and they're considering all aspects of it.

We try to separate anything from what could be considered cold, calculating information or any financial decisions that are made out of the courtroom. That should not be part of the process at all. You need to make the trial about the people involved.

If you can explain in a calm, rational, reasonable basis what decisions were made and why they were made, you can defeat that constant attempt to paint any kind of corporation or health care system in a bad light just because they're not an individual.

We also do that by way of motions in limine to preclude the reference over and over to the corporate health system when they're asking about specific decisions made by individuals.

We have been successful in that, and that has played a large role in us being able to avoid any of that negative thought they're trying to just emphasize merely because it's a corporation, which is really not fair.

**John:** Jack, catastrophic cases require coordination between trial lawyers, clients, experts, and claims professionals. What does effective collaboration look like when the goal is to minimize a nuclear verdict risk?

**Jack Delany:** It goes back to my first response, and that is being prepared with your A-team upfront. Before a catastrophic case happens, I have a whole list and team of experts that I know I want to get involved.

A building collapse happens, I immediately will reach out to plaintiff's attorney. A lot of times, I will know them. We'll talk about the site and what we need to do, how we have to do our investigation jointly. We'll cooperate with the plaintiff.

We'll reach out and we'll cooperate with authorities, whether it's the NTSB involved, or OSHA's involved, or the local criminal element, whether it's a district attorney, the US attorney's office is involved, we'll start to open up the channels and work with those entities.

We talk to our clients right away. We make sure that they preserve all evidence that they need to preserve so they don't create any liability issues where none exist. We control the statements that they make to the public and what they may say to governmental officials because that could have negative consequences down the road.

We realize that when that event happens, we are telling our story from the beginning. We make sure that we are capturing, as I talked about before, the evidence for our story, the content for that persuasive story because you get to a site, there are people that want to remediate the site, get the site back to normal, that's your chance.

It's like the two-minute drill. You are trying to acquire all the evidence and capture it because another hour may pass or a day may pass and that evidence no longer exists. We make sure that we're ready to capture the content for a persuasive story when a catastrophic event occurs.

The difficulty in catastrophic cases, to give you an example, is an Ultraman lift falls across 21st and Walnut Street and blocks one of the major artery routes coming outside of Philadelphia right before rush hour. Local authorities want to get that moved and get traffic flowing. I want to make sure that I'm preserving and documenting all the evidence.

A chocolate factory may explode. I want to make sure that we're doing everything that we can to preserve the evidence, make sure all potentially culpable people have an opportunity to examine the evidence.

The company may want to get back in business and get things going on a high stakes construction project. We have that all the time with multiple deaths, and they want the project to keep moving, but the project may have to close for an extended period so all the people have an opportunity to investigate and preserve evidence.

You're basically dealing with a situation where everyone has competing interests, and they're trying to protect their interests, and you're there ultimately to protect your client's interests and put together your persuasive story.

**John:** John Hare, you have the last word of the day. Our final question, how are appellate lawyers utilized in high-exposure trials to develop and preserve issues for appeal if the case has lost at trial?

**John Hare:** Thank you, John. It's a pleasure to be here, and I really appreciate the opportunity. I do think that appellate lawyers can be extremely useful in high-exposure trials for at least two reasons. The first, and it might not be the most obvious one, is to help trial counsel and the client win at trial.

We sometimes joke in the appellate world that the number one rule of winning on appeal is to be the appellee, meaning that we won in the trial court. Because appellate reversal rates are typically very small and low, it's important to win in the trial court.

We can help trial counsel by focusing on legal issues while trial counsel is focused on trying to win the case factually through the evidence, and with witnesses, and in opening and closing arguments, which are so fact-dependent.

We can focus on research and bench briefs and making dispositive motions that either eliminate the claim entirely or at least limit the opponent's claims that are asserted in the case. In really significant ways, by focusing on the law, we can help a trial counsel win at trial, but we also know that not all trials can be won.

The second reason that I think appellate counsel can be especially helpful is to develop and preserve issues and arguments in the record so that if the case cannot be won in a trial court, it can be won on appeal.

We all know that the waiver doctrine is alive and well in many jurisdictions. That is the finding that counsel didn't preserve an issue at trial, which can have really serious consequences, not only for clients, but lawyers.

While trial counsel is busy, again, trying to win the case on the facts, we can help with the arguments, the issues, and the record and make sure that trial counsel is presenting the correct arguments in a fully developed way and that the record supports those arguments.

I'll give you an example. If we're making evidentiary objections, for instance, we can help trial counsel make sure that the evidence is identified in the record so the appellate court

knows what it is, and that trial counsel's objection is on the record and that the trial court's ruling is on the record, all of which are requisites in many jurisdictions to preserving an issue for appeal.

We can make sure also that dispositive motions are made because in most jurisdictions, a request for judgment NOV on appeal, meaning that we're asking the appellate court to throw the case out entirely based on the law, may require a dispositive motion during trial, so we can help trial counsel make and develop those kinds of arguments.

Then there are the jury instructions and the verdict sheets, and all of the legal issues that arise toward the end of trial, where I think 50 percent of appellate issues arise probably from the last day or two of trial.

We can help trial counsel develop the jury instructions to hopefully convince the jury that our side of the case is correct based on the law, but at least preserve our request for those charges, and that the verdict sheet is set up correctly.

Depending on what the jury finds, we can go up to the appellate court and say that the findings were unsupported by the record or are contrary to the law. We make sure all of those very critical legal phases of trial are covered to protect the appeal.

In both of those ways, or maybe all of those ways, I do think appellate counsel adds significant value in trial courts and to trial counsel.

**John:** Thank you so much, John, and thank you, gentlemen, for joining us today.

**Gary Samms:** Thank you, guys. I appreciate it.

**John Hare:** Thank you.

**Jack Delany:** Thank you.

**John:** You've just listened to John "Jack" Delany, Gary Samms, and John Hare from the Marshall Dennehey Law Firm, and special thanks to today's producer, Patrick Keppel. Thank you all for joining us for Best's Insurance Law Podcast. To subscribe to this audio program, go to our Web page, [www.ambest.com/professionalresources](http://www.ambest.com/professionalresources).

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