

**WRESTLING WITH REPTILES:
Recognizing and Responding to the “Plaintiffs Revolution”**

By

Daniel J. Ripper

Luther-Anderson, PLLP

Chattanooga, TN

In 2009, trial lawyer Don Keenan and consultant David Ball wrote what they deemed to be a response to the forces of tort reform. Called “Reptile: The 2009 Manual of Plaintiff Revolution”, this minimally annotated work presents an allegedly scientific approach to presenting plaintiff’s cases in order to appeal to the base and primal areas of the human brain in order to maximize jury verdicts in favor of plaintiffs. [Reptile: The 2009 Manual of the Plaintiff Revolution](http://reptilekeenanball.com/), Ball and Keenan (2009). They have turned this “manual” into a massive web based marketing campaign allowing them to sell CDs, DVDs and books espousing the greatness of their theory, as well as driving attendance to seminars touting the “science” behind the “Revolution”. <http://reptilekeenanball.com/>

Having been widely adopted, in whole or in part, by legions of plaintiff’s lawyers, and having proven to be an effective tool for the maximization of verdicts in favor of plaintiffs when used against unsuspecting defendants, the “Reptile Theory” as it is often referred to, cannot be ignored. For the defense lawyer who has unsuspectingly run into the buzz saw of a plaintiff lawyer building a case attempting to appeal to the Reptile brain, the potential danger quickly becomes clear and palpable, even though defense counsel may not recognize the tactics being used. This leaves the defendant and the defendant’s witnesses at risk of unwittingly making harmful admissions that will destroy the ability to successfully defend the case. Given the potential effectiveness of a plaintiff’s presentation based on the “Reptile Theory”, it is incumbent on defense lawyers to be able to recognize the “Reptile” and to have effective strategies for dealing with it.

I. What is the Reptile Theory?

The Reptile technique of discovery and trial is a way of preparing and trying cases that attempts to “invoke the reptilian brain of jurors, which thrives on evolution, and therefore maximizes ‘survival advantages’ and minimizes ‘survival dangers’.” “Preparing Your Witness for a Reptile Deposition”, [At Counsel Table](#), Alex Craigie, May 22, 2013. The “Reptile Theory” is

based upon the idea that all humans have a three part “triune” brain. Reptile: The 2009 manual of the Plaintiffs Revolution, Keenan and Ball; p. 13. The concept of the triune brain derive’s from Freud’s postulate that most of what human beings do is driven by parts of the mind that are not conscious. Id. Keenan and Ball focus on the portion of the brain they refer to as the “Reptilian brain”. Id. The “Reptilian brain” is so-called because it is identical in function to the brain of other reptiles. Id.

The underlying premise of the Reptile Theory is the idea that the reptilian brain houses basic life functions, such as breathing, balance, hunger, the sex drive and the fundamental life force: survival. From this comes the “Major axiom”: when the reptile sees a survival danger, even a small one, she protects her genes by impelling the juror to protect himself and the community. Id. at 17.

The primary goal of the reptile technique when used at trial is to show the immediate danger of the *kind of thing* that the defendant did – and how fair compensation can diminish that danger within the community. Id. at 30. To gauge the extent of the community danger, jurors need answers to three questions:

1. How likely was it that the act or omission would hurt someone?
2. How much harm could it have caused?
3. How much harm could it cause in other kinds of situations?

Id. at 31. It is believed that answers to these three questions show jurors the width and depth of the act’s potential to harm. Id.

II. Recognize when the Reptile Theory is being used.

The Reptile Theory uses the formula “safety rule + danger = reptile”. Reptile, p.51. The reptile strategy requires creating safety rules and then demonstrating that there was a violation of those rules by the defendant which subjected the plaintiff, and potentially the surrounding community, to needless danger. The reptile attorney attempts to demonstrate that every type of negligent conduct violates some basic safety rule and, and then to show the immediate danger of the defendant’s actions and how a large verdict would diminish danger in the community. The reptile focuses the presentation of the case on the conduct of the defendant, not the injuries

of the plaintiff with the idea in mind that the reptile will be more likely to render a verdict in favor of the plaintiff if it believes that the actions of the defendant endanger the community and that a verdict must be rendered in order to change the defendant's behavior. "Plaintiff's Bar Embraces Reptile Strategy and Defense Bar Responds", Toxic Tort Litigation Blog, William A. Ruskin, October 4, 2013. Some of the most common signs of the reptile technique include:

1. Plaintiff is seeking information that is ridiculously irrelevant (i.e., plaintiff's expert spends an enormous amount of time at a site inspection reviewing signs, when the allegations have nothing to do with signage).
2. Plaintiff is focusing on information that is remotely relevant (i.e., the case is without a specific action, but the plaintiff's focus is on broad notions of safety that seem relevant only in a vague and general sense).
3. Plaintiff is attempting to get the defendant to agree that the defendant must guarantee absolute safety (i.e., suggesting doctors must guarantee patient's safety, rather than imposing standards of reasonableness).
4. Plaintiff is concentrating on the concepts of potential harm as opposed to actual harm.

"How to Tell If You Are Getting Reptiled Prior to Trial", DRI Today, Teresa M. Beck, September 24, 2013.

Reptile themes can often be found in depositions and discovery including the following:

1. Questions relating to general standards concerning policies or procedures in which the plaintiff tries to get a witness to agree that such policies or procedures must be followed for safety purposes.
2. Questions seeking agreement that failure to follow policies and procedures can cause injury.
3. Questions seeking confirmation that a failure to follow policies and procedures results in injury than those not following the procedures are responsible for the injury.
4. Reference to the defendant's family or community as potential victims.
5. Use of words like good health, mobility, endanger, safety, policy, procedure, potential harm, community safety and similar terms.

Id.

The reptile strategy is essentially an effort to engage in Golden Rule arguments which are typically impermissible. Throughout the Reptile, there are numerous suggestions on how to avoid laws against Golden Rule arguments. In fact, the appendix to the book contains the law as it pertains to "Golden Rule" argument for every state in the nation as well as suggestions to circumvent those laws. Reptile, pp. 267-326. Consequently, repeated reference to Golden Rule concepts throughout discovery are a sure sign the Reptile is being used. Likewise, reference to community standards, another typically impermissible argument, is a hallmark of the Reptile. Reptile, pp. 328-330.

III. Is the Reptile real?

The triune brain theory based on the work of the neuroscientist Paul McClain is essential to the reptile approach. McClain theorized in the 1960's that there are three discreet parts to the brain reflecting the stages of evolution: a reptilian complex at the core of the brain (primitive and survival based), a paleomammalian complex located in the mid-brain (focused on emotion, reproduction and parenting), and a neomammalian complex located at the top of the brain (capable of language, logic and planning). It is further posited that at the basic reptile level is what drives our behavior. Even when we think we are acting based on the language and logic of our neomammalian brains, we are unknowingly responding to the commands of the reptilian brain. Clearly, according to the perspective of Keenan and Ball, persuasion needs to tap into the only things that awaken and motivate the reptile: safety, security and freedom from threats. "Respond to the Reptile", Persuasive Litigator, Dr. Ken Broda-Bahm, December 17, 2012.

The problem with this is that the idea of the reptile brain is more figurative than literal. The theory has proven "outright insane" in light of the latest scientific research according to science writer Ben Thomas in the Scientific American. "Revenge of the Lizard Brain", Scientific American, Ben Thomas, September 7, 2012. "The Triune Brain idea holds a certain allegorical appeal: The primal lizard – a sort of ancestral trickster god – lurking within each of us," Thomas writes, "But today, writers and speakers are dredging up the corpse of this old theory, dressing it with some smart-sounding jargon, and parading it around as if it's scientific fact." Looking at MacLean's "reptilian complex" referring to the bundle of nerves at the base of the brain called

the basal ganglia, for example, Thomas notes that this was only called "reptilian" because biologists in the 1960s believed that the forebrains of birds and reptiles were made of basal ganglia. But it turns out they aren't. In addition, the idea that these sections of the brain could operate more or less independently like three brains, also hasn't held up in the face of modern neuroscience, because the brain tends to operate as a unified whole. "Respond to the Reptile", Broda-Bahm, 2012; "Revenge of the Lizard Brain", Thomas, 2012.

In their article, "Atticus Finch Would Not Approve: Why a Room Full of Reptiles is a Bad Idea", American Society of Trial Consultants, Stephanie W. Allen, Jeffrey Schwartz and Diane Wyzcga, May 2010, the reptile theory is described as pop science which presents the brain anatomy incorrectly. Id. at 1. It is postulated that it is impossible to reduce the human body to a single body organ, even the brain, as it disregards the value of the reflective mind which the human being has. Id. The article goes on to state that the basic neuroanatomy presented in the reptile theory is incorrect because reptiles do not have fear but rely instead on pure habit and instinct. Fear emanates from the limbic system, which exists only in mammals. Id. at 3. It further goes on to show that a predictable fear response is not predictable at all. Id. The input of fear can present a variety of responses including, flight, freeze, or fight or one response followed by another. It is simply impossible to tell where the fear will go. Id. What these authors recommend instead is the use of persuasive narrative as an alternative. Id. at 5-7.

Finally, in a recent article, "Debunking and Redefining the Plaintiff Reptile Theory", DRI, For the Defense, Bill Kanasky, Jr., Ph.D., 2014, Dr. Kanasky debunks the reptile theory by postulating that as plaintiff's counsel can only suggest danger to jurors rather than actually exposing them to true threatening stimulus that would actually trigger survival instincts, there is never an immediate threat, and as such the reptile brain would never be awakened in the manner in which Ball and Keenan describe. Id. at 16. Dr. Kanasky goes on to point out that the reptile brain is not the sole brain region responsible for survival behavior in humans and points out that while the reptile brain in humans plays a key role in detecting danger, the limbic system actually processes the dangerous information and activates the sympathetic nervous system to trigger the flight or fight survival response. Id. As such, Ball and Keenan's theories are deemed to be invalid because true protective survival responses are not event triggered by the human reptile brain or brain stem, but rather by the more advanced limbic System. Id.

Therefore, while it seems clear that the reptile theory lacks a true scientific underpinning, it must be acknowledged that it is an effective manner of presentation and the theories individual tools and methods can be very effective. Defense lawyers must be effectively equipped with tools to effectively recognize and counter the Reptile.

IV. Skinning the Reptile

When effectively done, the reptile strategy confuses jurors and witnesses and results in detrimental admissions. It shifts the focus of the case from the injury to the plaintiff to the actions of the defendant and puts the defense on it's heels. When the signs of the reptile are recognized, defense counsel must bring into action to protect his client.

The first step in defending against the Reptile is in the adequate and early preparation of witnesses to ensure that they know how to deal with the reptile during depositions and subsequently during trial. It is important for your witness to understand that a safety rule is not a standard of care, nor is a safety rule indicative of ordinary care. Typically the law would not provide that the violation of a single rule would constitute a violation of the standard of care or ordinary care, and so it is important for defense witnesses not to create admissions during the course of their testimony wherein they agree with plaintiff's counsel that the violation of certain specific rules would constitute a violation of the duty of ordinary care or the standard of care applicable in a case.

It is also important to file motions in limine in cases involving the reptile. Motions in limine should be filed concerning Golden Rule arguments, which are a huge part of the Reptile presentation given the need to make the fear personal to the juror. Further, motions in limine would be necessary to eliminate arguments about danger to the community. In most states the only appropriate consideration is the harm caused in any particular accident to a particular individual and reference to community standards or community danger is impermissible argument.

One must also rely on jury instructions. Purveyors of the reptile theory will undoubtedly make arguments that the focus of the case should be on the conduct of the defendant not injury of the plaintiff. Further, they will argue that only a large verdict would diminish danger to the community. In fact, the extent of the danger claimed is not an element of damages. The jury

should be educated through the jury instructions that the damages relate solely to the harm caused to the plaintiff and the calculation of damages should not be related to the potential for harm in the actions of the defendant. Defense counsel should carefully discuss with the jury the jury instructions on standard of care and ordinary care. The defense lawyer should be certain that the jury understands the concept of standard of care and the concept of ordinary care, and that they are not necessarily boiled down to a single safety rule manufactured by plaintiff's counsel..

The use of voir dire to educate, not just to identify stereotypically plaintiff's favorable jury types is also critical. Too many times no effort is made by counsel for the defendant to educate jurors about his case. Jurors can be educated about what it takes to find a violation of the standard of care or a violation of ordinary or due care. Jurors can be educated about specific aspects of the case that will later serve to assist the jurors understanding of the reasons why the plaintiff's case does not have value. Jurors can be educated about the how likely it is that the claimants injury occurred as they claim. For instance, in a slip and fall case it is frequently educational to ask the jurors the following series of questions:

1. How many of you have ever fallen?
2. How many of you were not injured when you fell?
3. How many of you were injured when you fell?
3. For those of you were injured when you fell what was the treatment that was necessary?
5. For those of you who were injured, how many of you had injuries similar to those complained of by the plaintiff?
6. How many of you are still suffering the effect of any injury you received?

Typically, what you will find is that the majority of the jurors have fallen, the majority were not hurt when they fell, and of the few who did suffer some injury when they fell, none suffered an injury remotely close to that claimed by the plaintiff. What you have done then is to educate the jurors on what the likely result of an accident similar to that claimed by the plaintiff would be, and the extent to which the plaintiff is overstating any claims the plaintiff may have.

In appropriate cases, admissions of liability can be a huge benefit. Admissions of liability remove issues from the trial of the case. For instance, while the judge is still certain to allow

plaintiff's counsel to go into the general facts of the incident in order to ensure the jury understands how the incident occurred and consequently, how the alleged injury occurred, a judge would be unlikely to allow jurors to hear in great detail about the conduct of the defendant that caused the incident knowing that there is no dispute about who caused the incident and that the only issue for the jury to determine is damages.

It is also important to limit the facts of the case you are trying to the present case. One of the Reptile strategies is to attempt to show jurors other accidents that have occurred or other similar instances involving the defendant. The reptile is interested in establishing danger to the community by showing a recurrence of incidents. Every effort must be made to ensure that the only accident the jury hears about is the current case.

Finally, defense counsel must ensure that they do not get caught playing defense. Defense counsel must eliminate every hurdle to attacking the plaintiff. Defense counsel cannot allow plaintiff's counsel to frame the case in the terminology of the Reptile theory. The presentation of opening statements in the defendant's case should not be an attempt to rebut the reptile theory and the terms used by the plaintiff's lawyer, but rather, it should be an effort on the part of defense counsel to reframe the narrative in terms more suitable to the defendant and which causes the jurors to focus more on the plaintiff and less on the defendant. Quite simply, the defense of the case should not be a rebuttable of the plaintiff's presentation. It should be an aggressive attack of the case of the plaintiff.

V. Using the Reptile to Your Advantage

Tort Reform generally appeals to jurors. Certainly, there can be underlying themes in the defendant's case that would allow the defendant to use the same forces of fear and persuasion that the plaintiff's lawyer would like to use. This is recognized by no less an authority than Keenan and Ball themselves. They state that the forces of tort reform have used the reptile to terrify the public by fraudulently portraying plaintiff's lawyers as a menace in the following ways:

1. Lawsuits undermine the quality and availability of health care for your family.

2. Lawsuits ruin the local economy, threatening jobs and thus endangering the ability to feed and house yourself and your family.
3. Lawsuits make everything more expensive taking money you need to care for your family.
4. Lawsuits suppress the development of new products that can keep you and your family safer.
5. Lawsuits endanger religion because plaintiff's lawyers donate money to get liberal politicians elected who in turn appoint liberal judges who in turn make rulings to take God out of public schools.

Reptile, p. 25.

In "Making Boots Out of That Lizard-Defense Strategies to Beat the Reptile", DRI, The Voice, Minton Mayer, September 25, 2013, it is argued that reptile code is not exclusive to plaintiffs terminology and that it should be used by defendants. For example:

Order = safety – prove your client follows the rules and adheres to policies and procedures.

Chaos = danger – limit any claims or arguments related to a chaotic environment paying close attention to former employees.

Health = mobility – defend cases keeping in mind that someone who already lacked mobility is not considered healthy. If a plaintiff has regained his or her mobility, focus on the recovery to deactivate this code.

Remorse = life – consider defusing the reptile by admitting liability or showing remorse for the loss, despite your liability to defend.

Id. Simply put, persuasion is not a one way street. As is frequently said, "what is good for the goose is good for the gander". Anything that can be made to work for the plaintiff can be made to work for the defendant.

CONCLUSION

The Reptile Theory is an attempt to unleash an army of plaintiff attorneys equipped with the tools necessary to sew fear in jurors and unlock the Reptile brain to get verdicts based on

defendant's conduct, not the plaintiff's damages. It is believed that by doing this, jurors can be encouraged to give greater rewards to plaintiffs than they would otherwise be entitled to. By emphasizing safety and a variety of impermissible legal arguments, Reptile attempts to encourage jurors to be inspired to make large awards to plaintiff. In reality, however, the Reptile theory is not a scientific theory, but rather a program for persuasive argumentation that must be recognized and dealt with by defense lawyers to protect their clients from unjustified high verdicts.