Fly with the Eagles: DEFEAT THE REPTILE

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In 2009, Don Keenan and David Ball authored a book entitled Reptile: The 2009 Manual of the Plaintiff’s Revolution, which arguably glamorized jury nullification and created a “new” trial strategy for plaintiffs’ lawyers across the country known as the “Reptile Theory.” It is based on a plaintiff’s attorney generalizing the defendant’s conduct so that the jury members feel personally threatened by the alleged dangerous actions. The theory is that the “reptilian,” or fundamental part of jury members’ brains responds to the fear of danger and will find the defendant liable in an attempt to eliminate danger from the community and to protect him or herself. The strategy has been especially conducive for cases involving trucking accidents.1

The Reptile Theory In Practice

The Reptile strategy is now a “ubiquitous threat to defendants across the nation.”2 Plaintiffs’ firms are self-proclaimed “strong believers” of the Reptile Theory.3 Currently, the Reptile Theory’s official website claims that the strategy has resulted in more than $6.1 billion in verdicts and settlements across the country.4 In 2014 alone, there have been almost 50 notable cases where the Reptile strategy was implemented.

Of those cases, John Phillips of The Law Office of John M. Phillips (Florida) received a $2,600,000 verdict for his client who was run over by beach patrol truck while sunbathing, Paul Barber of Barber & Borg, LLC (New Mexico) settled a deadly car accident involving a semi-truck for $2,500,000, and Akim Anastopoulo, Eric Poulin, and Roy Willey of Anastopoulo Law Firm LLC (South Carolina) received a record $50,000,000 verdict for a motor vehicle death case.5

It is crucial that defense attorneys recognize and respond to their opponent’s use of the Reptile approach early in the litigation process in order to disarm the strategy and execute their counter-attack.

Plaintiffs’ attorneys representing clients injured in motor vehicle accidents involving trucking companies have employed a strategy, from discovery to closing argument, of attacking the company itself as opposed to focusing on the accident. If the plaintiff could find one relevant and admissible thing that the company did improperly, then the plaintiff could try the “out of control” company and instill fear in the jurors. Plaintiffs’ attorneys also attempt to leverage the jurors’ fear of the sheer size of trucks as a means to scare their way to victory. The two avenues taken together have helped plaintiffs’ counsel motivate jurors to issue enormous awards to plaintiffs in trucking accident cases.

The science behind the Reptile Theory, namely that the “reptilian complex” in the brain focuses on personal safety and controls the rest of the brain, has been largely refuted.5 Nonetheless, the Reptile trial strategy (often coupled with strategies outlined in Rules of the Road by Rick Friedman and Patrick Malone) has been an effective method of impressioning jurors to give pro-plaintiff verdicts and should therefore, be recognized and addressed by defense counsel.

Attorneys using the Reptile approach generally develop and substantiate one primary theme through the use of a broad “safety rule” that the defendant allegedly violated and thereby caused plaintiff’s injury. Each safety rule generally contains six characteristics:

1. The rule must prevent danger;
2. The rule must protect people in a wide variety of situations, not just the plaintiff;
3. The rule must be in clear English;
4. The rule must explicitly state what a person must or must not do;
5. The rule must be practical and easy for someone in the defendant’s position to have followed; and
6. The rule must be one that the defendant will either agree with or seem stupid, careless, or dishonest.7

An example of a safety rule is “A truck driver is not allowed to needlessly endanger the public.”8 Such safety rules are more rigid and pro-plaintiff than the “reasonable person” standard that generally governs these cases. If plaintiff attorneys are allowed to impose their

safety rule during trial ir. lieu of the reasonable person standard, it is more likely that the plaintiff will prevail.

Recognizing the Reptile Strategy throughout the Progression of a Case

In practice, the implementation of the Reptile Theory is simple and straight forward. Counsel for the plaintiff will expose a violation of a safety rule that the defendant will ultimately concede it was supposed to follow and, in turn, the jury will view this violation as a societal safety concern. The application of the Reptile approach does not begin at trial, but instead is usually introduced early and developed throughout the entire course of litigation.

Discovery

At the outset of litigation, plaintiffs’ attorneys set out to develop the Reptile Theory principles. Defense attorneys may recognize the Reptile approach at this stage because discovery requests are tailored to acquire as much information as possible pertaining to a corporate defendant’s safety polices, protocols and records. This is noticeable in the commercial transportation world as plaintiffs’ attorneys are requesting documents that are arguably irrelevant and/or have nothing to do with how an accident or incident occurred. Common requests might include:

- Company handbooks
- Safety policies, procedures and protocols
- Document retention policies
- Accident investigation policies
- SafeStat and CSA records
- DOT audit results
- Other prior unrelated accidents

The purpose of acquiring this information is to establish broad safety rules the commercial transportation company was supposed to follow. After the initial information is secured in written discovery, the plaintiff’s counsel will attempt to obtain an admission that the rule was violated from the driver or corporate defendant(s) during both the written and oral discovery stage. If counsel for the plaintiff can establish that a safety rule existed, and that the commercial transportation company violated the rule, then the attorney for the plaintiff has obtained the necessary facts to use in arguments that are expected to motivate jurors to protect the community.

Voir Dire

Even before a jury has been selected and the opening statements begin, plaintiffs’ attorneys utilizing the Reptile Theory will aggressively target jurors that they believe will litigate from the jury box and be willing to protect society from an unsafe defendant. Instead of asking the typical questions asked to jurors during voir dire, plaintiffs’ attorneys will narrow their questions to further their reptilian goals. Examples of reptilian voir dire questions include:

- Do you believe that trucking companies and their drivers have a responsibility to protect other drivers on the road?
- Do you believe that a company with its own safety standards and policies has an obligation to the general public to follow those standards and policies?
- Do you believe that a trucking company with a history of accidents and safety violations is a danger to the general public?
- Are you a person who is willing to decide whether a trucking company and its driver acted in a safe and proper manner?

These sample questions illustrate the two goals plaintiffs’ attorneys seek to achieve during voir dire: 1) identify individuals who will protect the public from a dangerous defendant, and 2) prime the eventual jury for the reptilian theme the plaintiff will present throughout the trial.

Opening Statements, Witness Examinations and Closing Arguments

Once a jury has been selected, plaintiffs’ attorneys prime the jury during opening statements and exploit their reptilian responses throughout witness examinations and closing arguments. It is during these phases of the trial that plaintiffs establish the safety rule, expose the violation, and create a danger that the jury members feel compelled to protect against. Plaintiffs’ attorneys may very well spend little time discussing the actual facts of an accident, but instead focus on appealing to the jury’s sense of minimizing danger as a whole. For instance, during closing arguments, counsel for plaintiffs may focus on demonstrating how the defendants’ behavior can affect the community, state, and country, and follow up with statements that implore the jury to protect society.

The Eagles Fight Back

Once a defense attorney recognizes that the plaintiff is using the Reptile Theory, there are multiple ways for which the defense can counteract the technique. Defense attorneys should implement an aggressive approach at first sight of the strategy, which can be recognized as early as the discovery phase of litigation.

Readily Object to Discovery Requests

While the discovery rules throughout the country and in the federal court systems are becoming more relaxed in favor of disclosure, counsel for defendants should set a tone early that pulling at the heart strings of the jury is unacceptable and will be challenged at trial. For instance, if there appears to be no reason for producing SafeStat or CSA information, do not turn it over. If certain portions of a handbook or safety manual are irrelevant to the
specific issues contained in your case, seek to redact those portions.

Prepare Your Witnesses for “Reptilian” Style Deposition

Prepare your witnesses for the plaintiff’s questions at depositions and ultimately at trial. The best way for drivers and corporate representatives to respond to “reptilian” safety questions, which are typically vague and overbroad, is to be honest and say that the answer “depends on the circumstances.” It is paramount that defense counsel prepare witnesses to avoid agreeing to vague and overbroad hypotheticals.

File a Motion in Limine Barring Reptilian-Type Arguments

The first line of defense at the trial stage in minimizing the Reptile Theory is to file motions in limine barring any mention, comment, reference, testimony, or argument regarding the Golden Rule, personal safety, community safety, community fear, and community conscience. The argument should be made that the jurors should not be asked to step into the shoes of the plaintiff, decide the case as if they were faced with similar circumstances or to send a message to the defendant or society. It is arguable that these types of arguments are improper, the issues are irrelevant, and the probative value would be outweighed by prejudice to the defendant.

Prepare the Jury during Voir Dire

During voir dire, defense attorneys should take the opportunity to prime the jury for their trial themes. For example, if the plaintiff’s counsel primes the jury with the following question: “Do you believe that the top priority for a trucking company should be safety?” then the defense counsel should take the opportunity to re-prime the jury with its own defense themes such as, “Do you believe that the top priority for a trucking company is to move products for the benefit of the community from one location to the next in the most efficient and safe manner?” Doing so will enable the defense to rebut any attempt by the plaintiff to establish their reptilian themes.

Trial

Because reptilian safety rules are clear-cut and widely applicable rules, the plaintiff utilizing the Reptile approach will commit to a simplistic view of the law and facts of the case in order to make the case conform to the espoused rule. The plaintiff’s argument is vulnerable because truth is not on their side. Defense attorneys should shed light on the plaintiff’s simplifications, and appeal to the view that simple rules rarely exist, and complex rules with carve-outs and exceptions are the norm. Defense counsel can take this one step further by asserting that the plaintiff is attempting to cloud the judgment of jurors by tapping into their natural desire to simplify a complex situation.

Counsel may also expose the Reptile Theory to the jury and demonstrate what the plaintiff is intending on doing. These messages should be raised in the defense opening statement: or voir dire to prevent the plaintiff’s view from poisoning the jurors’ minds.

The defense should also present opening statements and closing arguments that refocus the story at trial. The defense should aggressively explain alternative liability, the standards of care that apply in the case, and how the standard of care applies to the facts. Defense attorneys should remind jurors that their purpose is to consider all of the evidence and reach a fair, honest and just verdict based upon the jury instructions they are provided. This can be an effective way to refocus the jury and reframe the defense theories so that societal concerns do not enter into the jury’s decision and the case is decided on its specific facts.

Conclusion

The Reptile Theory is a technique that plaintiffs’ attorneys are undoubtedly implementing with great success. Like any trial strategy, however, there are ways to defuse the intended results from the Reptile strategy plaintiffs’ attorneys seek to employ. It is imperative from the outset of any case where the plaintiff is utilizing the Reptile approach to proactively attack the strategy so that the jury can decide the specific issues at hand rather than the simplistic rules and broader societal questions plaintiffs’ attorneys seek to exploit.

Endnotes

2. Invalid, Yet Potentially Effective, Debunking and Redefining the Plaintiff Reptile Theory, Bill Kanasky, 56 No. 4 DRI For Def. 14 (2014).
9. See Invalid, Yet Potentially Effective, Debunking and Redefining the Plaintiff Reptile Theory, Bill Kanasky, 56 No. 4 DRI For Def. at 14 (2014).
10. See Invalid, Yet Potentially Effective, Debunking and Redefining the Plaintiff Reptile Theory, Bill Kanasky, 56 No. 4 DRI For Def. at 14 (2014).
11. See Invalid, Yet Potentially Effective, Debunking and Redefining the Plaintiff Reptile Theory, Bill Kanasky, 56 No. 4 DRI For Def. at 14 (2014).