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Arms Control: Demilitarizing Nuclear Verdicts

I. The Rise of Nuclear Verdicts

The “Reptile Theory” – named after the book *Reptile: The 2009 Manual of the Plaintiff’s Revolution* by David Ball and Don Keenan – is a relatively new tactic deployed by plaintiffs’ attorneys, particularly in trucking and transportation cases, that is partially to blame for the rise of “nuclear verdicts.”¹ The theory assumes that the only way to truly engage jurors is to “demonstrate how the defendant’s conduct endangers the jurors and their families,” as opposed to focusing on the plaintiff’s injuries.² In order to do so, the plaintiff’s lawyer will create broad safety rules, instead of legal standards of care, and show that the defendant violated these rules, thus subjecting the plaintiff and the greater community to needless danger.³ For example, even though most reasonable people would drink water while they drive, it is not the safest course of action. So, if a truck driver causes an accident while drinking water, a plaintiff’s attorney using reptilian tactics will try to convince the jury that the driver violated this much higher standard of care.⁴ This brief essay will show how the Reptile is often used during each stage of litigation, and how a defense attorney can attempt to circumvent the tactic.

¹ <http://www.kopkalaw.com/reptile-theory-case-summary/>.

² <https://www.lexology.com/library/detail.aspx?g=ad754e6a-c50c-4570-8990-71900cdf6795>.

³ *Id.*

⁴ <https://www.righilaw.com/news-events/2021/march/understanding-reptilian-theory/>.

The Reptile is often born early on in the pleadings phase.⁵ The plaintiff will utilize the complaint as her de facto first discovery request because usually the scope of discovery is dictated by the claims and defenses of the parties. These pleadings will often reference “violations of safety rules” or “unnecessarily endangering the public or community.” Claims brought by the plaintiff will often include negligent hiring, retention, training, supervision, or entrustment. This is because if these claims are permitted to stand, they often render evidence of prior incidents discoverable, and sometimes admissible.

II. How is the Reptilian Theory Utilized in Litigation

The Reptile becomes even more prominent during the discovery phase. This is when the plaintiff’s attorney begins establishing safety rules that will later serve as the basis for invoking fear into the jurors. In depositions of witnesses, the plaintiff’s attorney will ask broad hypotheticals that include words like “needlessly” or “unnecessarily.” Examples include: “Would you say a doctor has a duty to perform the safest surgery possible?” and “You would agree that failing to look both ways before pulling into an intersection needlessly endangers the public and community?”⁶ These simple questions are meant to trap a witness into saying “yes,” thus establishing an unreasonably high standard of care for the defendant.

The best way for a defendant to handle these questions is to anticipate and prepare for them. When these questions are being asked to lay- and fact-witnesses, a defense attorney should immediately object and sometimes instruct the witness not to answer, as only expert witnesses are supposed to offer opinions. In the case that the witness does reply, though, the answer should never be a simple “yes” or “no.” Instead, the witness should be prepared to respond in a way that qualifies the answer and limits

⁵ If not indicated otherwise, all future information is from <https://www2.stetson.edu/advocacy-journal/recognizing-and-defeating-the-reptile-a-step-by-step-guide/>.

⁶ See <https://www.lommen.com/wp-content/uploads/2017/04/Strategies-for-Responding-to-Reptile-Theory-Questions.pdf> for more examples of questions and tips on how to respond to them.

the use of the question, rendering it meaningless.⁷ The same applies to expert witnesses. While experts are generally allowed to opine, they should be prepared to respond in a way that does not give credibility to the plaintiff's overly broad question and that paints the defendant's actions as reasonable. Additionally, experts are only allowed to offer opinions based on facts on data, so many overbroad hypotheticals are improper and inadmissible. Defense experts should be prepared to respond to overbroad hypotheticals with answers like "I am not comfortable providing opinions in the absence of facts or data." Similarly, if a question involves the company's safety manual, the witness should state exactly what the purpose of the manual is and that it is not the relevant standard of care – "never separate a rule from the danger it was designed to prevent."⁸ If a plaintiff's expert offers opinions not based on facts or data, the defense may be able to bar their testimony. Some courts have even granted motions prohibiting these types of questions. For example, in the recent case of *McNamara v. Navar*, the U.S. District Court for the Northern District of Indiana agreed that reptilian questions "create confusion around the defendants' applicable duty of care by attempting to replace it with safety rules" and lack "any tangible connection to the scope of permissible discovery"; thus, the court granted defendants' Motion for a Protective Order prohibiting plaintiff's counsel from asking such questions during the depositions of the trucking defendants, who were designated as lay witnesses.⁹

III. Defending Against the Reptile Theory at Trial.

Before trial fully begins, the defense attorney should to use motions in limine. A motion in limine can object to reptilian tactics on the basis that they will attempt to inflame the jury and are nothing more than an attack on the defendant's character. The Federal Rules of Evidence and caselaw generally prohibit character evidence to prove liability in civil cases – specifically, "a corporate defendant's character trait has no

⁷ See above and <https://www2.stetson.edu/advocacy-journal/recognizing-and-defeating-the-reptile-a-step-by-step-guide/> at 38 for examples.

⁸ <https://www.lexology.com/library/detail.aspx?g=ad754e6a-c50c-4570-8990-71900cdf6795>.

⁹ USDC IN/ND case 2:19-cv-00109-APR (2020). See also <http://www.kopkalaw.com/reptile-theory-case-summary/>.

bearing on the claims and can only serve to confuse the jury and prejudice the defendant.”¹⁰ As such, motions can argue that the Reptile will confuse the juror. Another basis is that the Reptile requests the jury to act as the “conscience of the community,” which is generally prohibited. The most popular basis for motions in limine is that the Reptile is merely a way to circumvent the “Golden Rule.”¹¹ Some defense attorneys have had more success simply labeling the plaintiff’s tactics as Golden Rule arguments, instead of Reptile arguments.¹² Other bases exist for motions in limine, and it is important for defense attorneys to be creative as many courts may not be familiar with the Reptile yet. It is for this reason that attorneys should also attempt to educate the court early on about the Reptile and paint it as nothing more than a new adaptation of other tactics that have been banned historically. One may even point to the *Reptile* book and how it discusses the Golden Rule at length.¹³ Defense attorneys will want to provide judges with specific details about what to look for, including evidence of the plaintiff’s attorney using the tactics in the past if possible, as some courts have been reluctant to prohibit a particular trial strategy before trial without specific evidence of its impropriety.¹⁴ Even if the court rejects the motion, it will put the judge on alert for the tactics during trial, and could prove to be important on appeal.

Lastly, the Reptile is used at various parts of the trial. If the judge allows lawyers to conduct their own *voir dire*, the plaintiff’s attorney may try to find jurors that will be sympathetic to the Reptile. Questions the attorney asks may include ones like “Who feels that the potential harm and possibility of future harm must be considered in this case?” During the testimonial phase of trial, the plaintiff will attempt to plant themes

¹⁰ <https://www.americanbar.org/groups/litigation/committees/trial-evidence/articles/2021/preventing-reptile-theory-jury-trial/>. See also Fed. R. Evid. 404; *Am. Nat’l Watermattress Corp. v. Manville*, 642 P.2d 1330, 1336 (Ak. 1982); *In re Testosterone Replacement Therapy Prods. Liab. Litig. Coordinated Pretrial Proceedings*, MDL No. 2545, No. 14 C 1748, 2017 U.S. Dist. LEXIS 81614, at *2–3 (N.D. Ill. May 29, 2017) (citing Fed. R. Evid. 404(b) (excluding “evidence of [the defendant’s] alleged improper conduct with respect to . . . another of its drugs [as] inadmissible evidence of [the defendant’s] corporate character”).

¹¹ A Golden Rule argument is one that asks the jurors to place themselves in the plaintiff’s shoes.

¹² <https://namwolf.org/combating-reptile-tactics-litigation/>.

¹³ *Id.*

¹⁴ <https://www.jdsupra.com/legalnews/challenging-use-of-reptile-theory-28528/>.

that do little more than attack the defendant's character, such as a theme that the defendant prioritizes profits over safety. The closing argument stage is where the plaintiff's attorney will try to compile everything and instill fear into the jurors.

The defense should also use *voir dire* to their advantage and strike jurors that may be sympathetic to Reptile Theory. Once the testimonial phase begins, the defense attorney should try to embrace the plaintiff's tactics and use them to their advantage by presenting strong rebuttal evidence. For example, having past customers testify about their positive experiences with the defendant or having experts testify about how the defendant has the proper procedures in place to make the company as safe as possible. Opinions differ on whether defense attorneys should respond to the Reptile with reptilian tactics of their own, such as arguing that if the jury returns a high verdict it will cause product prices to rise; some say that such tactics may harm the defense attorney's credibility, while others say advocate for it based on research regarding tort reform.¹⁵ Lastly, during closing arguments, defense counsel may want to tell the jury about the Reptile and inform them that the plaintiff is using psychological methods in an effort to obtain a higher verdict.

It is also worth noting that there may be Due Process concerns that accompany the use of the Reptile. This is because "[t]he evidence presented to a jury on punitive damages must have a nexus to the plaintiff and the plaintiff's alleged injuries." Per Supreme Court precedent, defendants cannot be punished based on potential harm to the community because it forces a jury to improperly speculate and "a defendant threatened with punishment for injuring a nonparty victim has no opportunity to defend against the charge."¹⁶ While the language is not as direct, this is exactly what Reptile Theory attempts to have the jury do.

IV. Conclusion

¹⁵ https://www.ettdefenseinsight.com/wp-content/uploads/2014/06/3374_001.pdf.

¹⁶ <https://www.americanbar.org/groups/litigation/committees/trial-evidence/articles/2021/preventing-reptile-theory-jury-trial/>; *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003).

Unfortunately, nuclear verdicts are on the rise across the country. There are many environmental, political and societal factors that Plaintiff attorneys are taking advantage of at this time to increase the chances of a runaway verdict. It is incumbent on defense counsel to protect against this. Themes must be developed at the onset of litigation and through the end of the trial. Carriers and their attorneys cannot allow the system to not provide confidence in taking a case to trial for a fear of the nuclear verdict or the extraordinary costs will be borne by the Carriers, their attorneys and insureds.