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Beyond the Reptile: Emerging Strategies of the Plaintiff's Bar in Catastrophic Injury Claims

I. Reptile Theory Overview and Basics

What is the Reptile Theory?

The Reptile Theory is now a commonly used technique where Plaintiff attorneys appeal to the instinctive or primal portion of jurors' brains to solicit higher verdicts at trial. It was developed by Don Keenan, Esq. and Dr. David Ball—a jury consultant—and while it had its origin in medical malpractice cases, it is used across all types of injury claims.

Understanding the Science Behind the Theory

The Reptile Theory is based off the theory that the human brain has three different levels of function. The paleomammalian part of the brain controls higher-level human emotions and social abilities. The nonmammalian part of the brain controls human logic and advanced reasoning; for instance, the ability to do math to solve problems falls under the portion. Finally, the reptilian part of the brain is the earliest-developed portion of the brain and govern the most basic survival instincts and functions, such as hunger and perception of danger.

How Do Plaintiffs Use the Reptile Theory in Practice?

According to the theory, when survival or safety becomes threatened, the reptilian part of the brain takes control and can overpower logic and other functions, putting safety and survival foremost. Plaintiff attorneys use this to appeal to jurors by invoking fear and aligning the size of a verdict with their response to such fear. This is commonly done by overplaying a violation of a safety rule or regulation, and then cautioning the jury that a message must be sent to a defendant that society will not stand for such violations that risk others' safety and well-being.

II. New Techniques Employed by the Plaintiff's Bar Beyond the Reptile Theory

Pre-Suit Policy Demands

Plaintiff attorneys are forcing defendants and insurance companies into full stakes litigation right from the start by issuing policy limit demands early in the litigation or, in some cases, prior to suit being filed. Such demands are rarely warranted. It places counsel and the adjuster in a spot where an immediate and thorough outlook is necessary to evaluate the merits of such a demand, including whether counsel is willing to negotiate off that amount and, if so, by how much. These demands also thwart other defendants into discussions early on, where strategic positioning begins amongst the co-defendants.

New Types of Damages Claimed

Plaintiff attorneys have recognized that using certain buzz-words in injuries can draw the jurors' attention to larger awards. For instance, traumatic brain injuries are becoming more common in pleadings without much regard as to the extent of such injury. A plaintiff's testimony alluding to a sudden impact on short term memory is now sufficient to support a brain injury claim. A plaintiff who returns to his construction career but who testifies as to his fear in doing so, perhaps with an element of post traumatic stress disorder, will also help satisfy an attorney's pleading allegations of a brain injury.

A Change in Discovery Tactics

Beyond the types of damages Plaintiff attorneys are now claiming, the Plaintiff's bar is also utilizing new techniques in the discovery process. One example includes opting not to take a defense expert witness's deposition. In doing so, Plaintiff attorneys are trying to limit the opinions of the expert. In disclosure states like Illinois, parties are required to disclose "all" opinions of any experts. While most attorneys have traditionally taken the depositions of these experts to help limit or define the scope of their opinions, there is a trend now where more Plaintiff attorneys are opting to not depose these experts and are instead choosing to live with the extent of their disclosures for trial. The intent on the plaintiff's end is that there is some gap in the disclosure or some other problem that is otherwise overlooked or unknown until it is rooted out at the deposition—or, in when it works in a plaintiff's favor, at trial. Specifically, if there is a such a gap in the disclosed opinions, an expert can clean up or supplement her opinion at her discovery deposition. However, when it comes to trial, it is an entirely different story, and the opinion is likely to be barred.

Plaintiff attorneys are also increasing their attention to actual products, devices, or materials used in or involved with the mechanism of injury in the hopes that the absence of same will give them a solid leg to stand on for spoliation. For example, a missing clamp in a scaffold collapse where a plaintiff was injured may not have had any real import on the actual collapse, but the fact that it is missing will help put the plaintiff in a position to have the benefit of a missing evidence instruction at trial.

Social media is also continually evolving, and there is an uptick in occurrences where social media posts of a plaintiff or her family members have gaps. This not only helps a plaintiff avoid having to defend or explain the extent, language, or timing of certain posts, but plaintiff attorneys are far better off having to contest a motion to compel deleted posts—or even the inference of same—where they have the chance at prevailing altogether, as opposed to simply

offering up the content of those posts from the start and having to then live with the consequences.

Pushing More Cases to Trial

Because verdicts are getting larger and larger (except for medical malpractice claims), plaintiff firms are finding themselves pushing more and more cases to trial. Some of this success can no doubt be attributed to the emergence of the reptile theory, but plaintiffs are also finding that juries are becoming more accustomed to larger awards. Often, the hardline stance taken by defense counsel and insurance companies helps fuel a plaintiff's desire to try the case, where the risk is greater, but it is greater for both sides.

III. Counter-tactics by the Defense

The Best Defense is a Good Offense

It is often said in sports that offense sells tickets, but defense wins championships, and while that certainly has some merit, it was Mike Tyson who once said, "Everyone has a plan until they get punched in the mouth." In other words, sometimes going on the offensive can be the best way to posture your defense. One means is pushing traditional discovery tactics to the extent of overkill, such as motions to compel (on missing social media posts, for instance), bringing motions to transfer venue in higher-exposure claims where there still may be a decreased chance of success, and utilizing requests to admit more frequently.

Education of Clients

Construction injury claims always involve an inspection into a defendant's safety and policies and procedures manuals, and sometimes the standards or requirements that a company holds itself to on paper are unrealistic or, quite simply, not followed in practice. This can be problematic in litigation and can be a source of easy blame to help bolster a plaintiff's contention that the defendant was not following rules, including its own. Reformatting of safety manuals and a company's policies and procedures can help limit or altogether eliminate a plaintiff's potential use of these guidelines. Post-incident communications can also be problematic, and clients should be trained and educated on the proper use and best ways to communicate.