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CRIKEY!!!

WHERE'S STEVE IRWIN WHEN YOU NEED HIM?

Keeping Your Corporate Representatives

from Being Eaten Alive by the Reptile Theory

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SO, WHAT IS THIS “REPTILE THEORY” I KEEP HEARING ABOUT?

Introduction

The “Reptile Theory” is a relatively new litigation strategy used by plaintiffs’ lawyers, and typically applied in liability cases, to achieve large verdicts against corporate defendants. In a little more than a decade, the Reptile Theory allegedly has been used to obtain more than \$7.7 billion in verdicts and settlements.¹ The “Reptile” in Reptile Theory refers to the plaintiff’s attorney appealing to each juror’s “reptilian brain,” which can lead to emotional-based decisions opposed to applying the relevant legal standard for verdicts.² By using Reptile Theory tactics, the plaintiff’s lawyer can awaken the “inner-reptile” in the jurors by subtly influencing their brains to view the plaintiff’s situation as a danger to their community that needs to be eliminated.³

Where did the Reptile Theory come from?

The Reptile theory was first introduced in *Reptile: The 2009 Manual of the Plaintiff’s Revolution* by David Ball and Don Keenan.⁴ In the Manual, the two authors explain the science and application behind accessing a person’s “reptile brain.” The authors attribute their findings to neuroscientist Paul D. MacLean.⁵ MacLean’s work was the first to recognize the three distinct parts to the brain, known as the “triune brain theory”.⁶ Per the triune brain theory, the brain is divided into the reptilian complex (basal ganglia), the paleomammalian complex (limbic system), and the neomammalian complex (neocortex).⁷ The Reptile Theory strategy adopted its name from the basal ganglia, or reptilian cortex, what MacLean called the “Reptile” portion of our brain. Like it does in reptiles, the reptilian complex controls our primitive survival instincts.⁸ Even the slightest threat of danger can trigger our inner-reptile to take control of your body and decision making.⁹

The reptile complex played a major role in our evolution as our brains’ oldest and most influential part.¹⁰ Thus, when facing a threat, the reptile complex can control the brain’s logic and emotion because its primary concern is the survival of our genes.¹¹ Once “awake,” the reptile complex controls what we do and what we don’t do.¹² To get us to “obey,” the reptile complex will release a splash of dopamine, making us feel good for doing what it wants us to do for survival’s sake.¹³ On the other hand, through anxiety and fear, the reptile complex can also deter us from doing what may jeopardize our survival. The Manual explains that “our emotional systems evolved mostly so we could feel enough terror or pleasure for the ‘Reptile’ to control us.”¹⁴ The reptilian complex is the reason why we as humans are “Dopamine-tropic” (we like a dopamine hit) and “terror-phobic” (we fear and hate it).¹⁵ These emotions are the core of our obedience to the inner-reptile.¹⁶

Application of the Reptile Theory

According to the Manual, the juror’s inner-reptile equates justice with safety.¹⁷ Therefore, the plaintiff’s attorney “will bring jurors to figure out that community safety is enhanced by means of justice. You are not asking jurors to sacrifice justice for the sake of safety. You instead show that justice creates safety.”¹⁸ Remember, the inner-reptile’s absolute priority is the survival of our genes. Thus, “when the

[inner-reptile] sees a survival danger, she protects her genes by impelling the juror to protect himself and the community.”¹⁹ This is why when applying the Reptile Theory approach, it is essential for the plaintiff’s attorney to frame the case in terms of “reptilian survival” because success lies on getting the juror’s inner-reptile off auto pilot and into survival mode.²⁰

With this science as the background, the authors dive deeper into the inner-reptile’s influence over justice. When surrounded with the feeling of danger the “[inner-reptile] makes us feel stressed.”²¹ Therefore, the jurors will push for a verdict more favorable to the plaintiff if the jurors believe they can go home feeling less stressed than if they voted for a verdict in favor of the defendant.²²

The Manual suggests that a juror will be more inclined to support a verdict when they can feel “altruistic” in giving that verdict, such as where “...money in a verdict for someone else (i.e., makes a juror dopaminically altruistic) can help the inner-reptile protect herself by making the community safer.”²³ However, the plaintiff’s attorney should not directly appeal to altruism, but instead prove how awards that offer “full compensation” will help their client or society as a whole.

Additionally, a juror possessing knowledge that they can help “keep the community safe” with their verdict can present the feeling of importance. For a plaintiff’s lawyer it is essential to create this feeling of importance because, “the more important a juror feels in deciding your way, the more adamantly he will do so.”²⁴ In other words, for the inner-reptile to side with the plaintiff, the plaintiff’s attorney must establish that a plaintiff’s verdict will decrease a juror’s stress and increase the juror’s feelings of importance.²⁵

There are two steps a plaintiff’s attorney must accomplish in order to create a situation where the juror’s inner-reptile is making decisions. First, the plaintiff’s attorney establishes a set of safety rules for the jurors.²⁶ A safety rule is an expectation of how people should behave—e.g., “a doctor must not needlessly endanger a patient.”²⁷ The plaintiff’s attorney uses the safety rules to distinguish the defendant’s actions by focusing on his failure to enforce said rules.²⁸ The goal is to convince the jury that violating the safety rules not only put the plaintiff in danger but also created a danger to the community.²⁹ Focusing on safety and security, the Reptile Theory approach pitches the idea that the issue was not an isolated event, but could have easily affected any of the jurors.³⁰

Second, after establishing fear upon the jurors, the plaintiff attorney will try to convince them that they have the power to remove the danger and deter others from causing the same harm.³¹ Some attorneys will even say that the jurors are the “*only ones*” who can eliminate this behavior by making an example out of the defendant.³² Essentially, the tactic pushes the jurors to “punish” or give “the appropriate” verdict in favor of the plaintiff.³³ Some attorneys will suggest that without the significant monetary award from the jury, the said “danger” could potentially worsen.³⁴ This process of creating a danger to a community starts before trial and can even begin as early as depositions.³⁵ However, attorneys defending against Reptile Theory tactics have come up with ways to combat the approach during multiple stages of litigation.

Combatting the Reptile

Once a complaint is filed, defense attorneys should immediately file motions to dismiss or strike for any claims that are indications of Reptile theory-- e.g., references to “negligent hiring, supervision or training.”³⁶ Later during discovery/depositions, defense attorneys can object to hypotheticals used with witnesses to establish safety rules. Defense counsel can also help neutralize the Reptile Theory approach by preparing expert witnesses for those hypotheticals. After discovery, motions in limine are the most common approach to combat Reptile Theory tactics.

Motions in limine are beneficial for two reasons, (1) they can be made at any point, and (2) they resolve issues unbeknownst to the jury.³⁷ Usually, courts are hesitant in granting such motions because the motion is either considered premature or the court defers the ruling until the issue is raised at trial. The difficulty in pursuing motions in limine against a concept like the Reptile Theory is providing the court with the specific evidence the defense asks to be excluded. However, even if unsuccessful with the motion, filing one could still benefit the defense attorney because it puts the judge on notice of the tactic.³⁸

Another way to combat the theory is to emphasize the details of the case by illustrating that the complexity of the issue was oversimplified.³⁹ This could undermine the plaintiff's attorneys credibility with the jury.⁴⁰ Additionally, the defendant can show the jury that the alleged safety rules are not the legal standard of care, and that there are other factors to take into consideration for the appropriate action.⁴¹ Defending against the Reptile Theory relies on the defendant's proactiveness to slow the approach as early as possible. Since the increasing use of this tactic, courts have agreed that the theory is an attempt to circumvent the Golden rule argument.

The "Golden Rule" Argument

The Reptile Theory paved the way for plaintiff attorneys to sidestep the "Golden Rule" while still yielding the same results.⁴² A "Golden Rule" argument asks jurors to "depart from objective neutrality and decide the case on the basis of subjective personal interests and emotions."⁴³ Similarly, the Reptile Theory hinges on manipulating the jury's emotions. However, the difference is the subtleness to the Reptile Theory strategy. The authors of the Manual try to distinguish the theory from the "Golden Rule" and deny any violation of the Golden Rule itself.⁴⁴ However, "Golden Rule" arguments are already well-known and forbidden by judges. Therefore, when defending against the approach, the court may be more receptive if the defense attorney exposes the theory essentially as a "Golden Rule" argument.

The Reptile Theory In Practice

Hypothetical #1:

Pam Plaintiff was injured while walking down Michigan Avenue in Chicago. At the time of her injury, she was walking next to a construction site where a 60-story condo building was being constructed. While she lawfully walked on the sidewalk next to the site, she heard a loud noise and was then struck by an object seemingly out of nowhere. Other pedestrians ran to her aid, discovering a 12-inch screwdriver lying next to her. The screwdriver had been dropped by a worker while on an upper floor at the construction site. It then bounced on a canopy on its way down to the ground, and hit the sidewalk, flying into Pam as she was walking nearby.

Pam suffered injury, ultimately filing a lawsuit claiming negligence against the General Contractor at the construction project. Her personal injury lawsuit alleged that the General Contractor is responsible for the dropped screwdriver, as the General Contractor "controlled" the work and the site. Pam Plaintiff's attorney has now requested the deposition of the Corporate Representative for the General Contractor.

The Goals of the Attorney Using the Reptile Theory

Pam Plaintiff's attorney knows the facts: this incident was one that occurred without warning to the General Contractor and certainly did not involve anyone employed by them. But using the Reptile Theory, the goal of Plaintiff's Counsel will be to emphasize the frightening scenario Pam found herself in that day. The Reptile Theory will be used to take the focus *away* from Pam specifically and turn what happened to Pam into something that could happen to *anyone*.

Reptile Theory Questions:

"Ensuring safety on a construction site is your top priority, correct?"

"You agree that the sidewalk in front of the site would be travelled by hundreds of people every single day you were constructing this building, correct?"

"If you are needlessly endangering the general public, you are violating that principle, true?"

"So if there was no perimeter protection like netting on the edges of each floor, that endangers the public, doesn't it?"

"If there is no written policy for workers about hand tool use near the edge of the floor, that endangers the public, doesn't it?"

"So every single day, your company was failing to do exactly what you just said a minute ago was your top priority, which is ensuring safety?"

"Your company was needlessly endangering the public every single day, wasn't it?"

How to Slay the Reptile

The Corporate Representative from the General Contractor should be prepped to face specific questions, rather than vague ones, focusing on the specific situation involved in the case. Here, the Corporate Representative should always keep Pam Plaintiff in his mind and disagree with Pam's attorney when necessary. They need to be cautioned to avoid being led down a line of general questions that are vague, only to then be forced to admit the company was unsafe as to Pam.

Potential Answers that Combat the Reptile Theory:

"Your question is too general for me to answer."

"This question is very vague."

"Not necessarily."

"Sometimes that is true, but not always."

“It depends on the circumstances.”

“The company has policies, and we train on them.”

“Safety is controlled by everyone working there, not just our company.”

Hypothetical #2:

Owner, J.R. “Shorty” Peebles of JSP Recycling, owns and operates a recycling plant located in Harris County Texas. Due to a severe thunderstorm that included hail, JSP Recycling alleges they sustained structural damage to the roof and flashing, including damage to the building HVAC system due to hail. Mr. Peebles reported the claim to his insurance carrier, JYD Insurance Company.

After JYD Insurance Company’s investigation of the loss, the claims adjuster sent out a denial letter, advising that the hail splatters on the roof were old and not related to the recent storm. The denial also alleged that the hail splatters were cosmetic in nature and asserted the Cosmetic Exclusion in the policy. The denial also stated the damage was due to wear and tear and not due to an “occurrence”. The carrier did admit that there were some dents sustained to the HVAC system, but the damage was below the policy holder’s deductible. An Under Deductible clause was included in the denial.

The policy holder retained counsel, which filed a Petition in Harris County Texas, naming JYD Insurance Company as a direct defendant. The complaint alleges: 1. Failure to inspect; 2. Failure to properly adjust claim; 3. Improper denial of claim; and 4. Bad Faith. Plaintiff’s Counsel noticed the deposition of the insurance carrier corporate designee, along with other individuals involved in the handling of the claim, as well as the underwriter of the account.

Reptile Theory Questions:

“Your company is supposed to step up when a storm like this hits, right?”

“Your customers count on you to help them when they are in crisis and that’s why you take their money by way of premiums, right?”

“Here, you took the premium payments from Mr. Peebles for his building, correct?”

“So he satisfied his end of the agreement?”

“Your claim adjuster denied this claim despite the fact your own customer did *everything* he was supposed to do on his end?”

“Your company collects thousands and thousands of dollars in premiums from customers like JSP Recycling and you issue denials every day, right?”

The Goal of the Attorney Using the Reptile Theory

In deposing the corporate designee for the insurance carrier, Plaintiff's attorney wants to argue the insurance company took the premiums, had little to no basis upon which to issue a denial, and violated the agreement with its customer, Shorty Peebles. The attorney will strive to make the claim investigation appear to be scant, inept, and all done with the goal of denying the claim. By asking questions of the corporate designee, the attorney will attempt to extrapolate this situation to a history of the company taking premiums and denying coverage to their customers. To the attorney, if it can happen to Shorty, it can happen to *anyone!*

How to Slay the Reptile

The corporate designee from the insurer should be prepped so they understand the goal is to skip over details that formed the basis for the denial, and instead, talk about the amount of premiums they collect and the number of claims they deny each year. The deponent will need to steer back to the claim of JSP Recycling as much as possible, versus allowing the deposition to turn into one where corporate practices nationally are discussed. The representative will need to be prepared to discuss the policies that were followed here when evaluating the claim, and stand behind the employees that assessed the damage and ultimately provided the basis for the denial.

Potential Answers that Combat the Reptile Theory:

"Every claim is unique."

"In some cases, a denial of coverage is not readily apparent and sometimes, it is; it depends."

"I'm not certain of all the facts the adjuster had when they visited the scene, but we have policies regarding what should be assessed for an investigation like this, and we train our employees on that."

Conclusion

The underlying mechanics of the Reptile Theory approach are to place the jurors in a position where "they feel threatened, anxious, or potentially at risk of harm."⁴⁵ This, in turn, sways the jury to view the case emotionally and deliver to the plaintiff a more favorable award.⁴⁶ Many courts have recognized and will continue to address the use of the theory as it continues to produce major plaintiff verdicts at trial.⁴⁷ Defense attorneys must be prepared to fight back during discovery, depositions, and at trial. Starting with discovery depositions, defense attorneys can be prepared for the attack and teach their witnesses how to not be lulled down that path to the swamp where the reptile is waiting!

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⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at 17

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¹² *Id.* at 18

¹³ *Id.*

¹⁴ *Id.* at 19

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

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²² *Id.*

²³ *Id.*

²⁴ *Id.* at 47.

²⁵ *Id.* at 49.

²⁶ Christina Marinakis, *The Reptile Brain Strategy: Why Lawyers Use It and How to Counter It* The National Law Review 13 (2022), <https://www.natlawreview.com/article/reptile-brain-strategy-why-lawyers-use-it-and-how-to-counter-it/>.

²⁷ *Id.*

²⁸ *Id.*

²⁹ Mintzer et al.

³⁰ *Id.*

³¹ Christina Marinakis.

³² *Id.*

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³⁴ *Id.*

³⁵ *Id.*

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⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *The Reptile Theory: A Game-Changing Strategy in Personal injury Lawsuits*, Legal Insights (2023).

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