Disconnecting Injury from Emotion

How to Prepare Witnesses for, and Protect Them from, the Reptile During Trial

By Heidi E. Ruckman

The reptile theory is something that the defense must be prepared to battle through defense witnesses. Here's how to do it.

"Snakes. Why'd it have to be snakes?"
—*Indiana Jones*

The defense bar has been battling the reptile theory since David Ball and Don Keenan authored *Reptile: The 2009 Manual of the Plaintiff's Revolution* (Balloon Press, 2009). The theory is based on the belief that "when a Reptile sees a survival danger, even a small one, she protects her genes by impelling the jury to protect himself and his community." *Id.* at 17. The strategy is based on a formula that requires a plaintiff to create rules and demonstrate that the defendant violated those rules, which, in turn, subjected the plaintiff and his or her surrounding community to needless danger. This strategy of developing a set of basic safety rules allows plaintiff's counsel to argue that a defendant's negligent acts violated the rules and broadens the safety threat to a jury's community as a whole.

According to the theory, the safely rule must prevent danger, must protect people in a wide variety of situations (not just a plaintiff), must be clear, must state what a defendant shall or shall not do, must be easy for the defendant to follow, and must be easy for the defendant to "agree with or reveal himself as stupid, careless, or dishonest for disagreeing with." *Id.* at 52–53. To determine whether a defendant's act was negligent, Ball and Keenan claim three questions need to be asked: "1) how likely was it that the act or omission would hurt someone; 2) how much harm could it have caused; and 3) how much harm could it cause in other kinds of situations?" *Id.* at 31.

The theory pushes a jury to focus on the acts of a defendant rather than the specific facts surrounding a plaintiff's injury. To that end, a plaintiff's counsel works to demonstrate to a juror that what happened to the plaintiff could happen to the juror or a loved one the next time. Likewise, coun-

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sel claims that it may even result in a larger harm in the future. To play up this strategy, Ball and Keenan have a whole chapter devoted to the "small case," asserting that "[t]o the Reptile, the smallest case it not small, because whatever harm the violation caused can cause massive harm next time… [t]he difference between a minor injury and a fatality is just luck" *Id.* at 225. The philosophy seems overreaching when looking from the outside in, but it is certainly working based on recent verdict trends and Ball and Keenan's website advertising results.

In essence, the reptile theory is a version of the "golden rule" argument, which asks a juror to place him- or herself in the shoes of the plaintiff. Obviously, golden rule arguments are not allowed during trial because those arguments would destroy the neutrality of a jury and allow a verdict to be rendered based on a personal interest and bias rather than the evidence presented in the case.

The Reptile: You See It Coming, So Be Ready to Take the Torch and Waive It at Anything that Slithers

The reptile strategy starts early and is developed throughout a case. Many times, it follows the outline presented in Ball and Keenan's manual step-by-step. It is first seen in discovery requests, and in requests to admit, which attempt to establish various safety rules and that the rules are designed to protect the safety of the community as a whole, which happens to include the plaintiff.

It then rears its head again during the depositions of witnesses. Plaintiff's counsel will use the depositions to establish and frame the safety rules as the "law of the case." Frequently, the reptile theory is weaved into a line of questions. For example, in a case tried in Illinois, the reptile strategy was used as follows:

Q: Would you agree…that medical errors can be done away with by rules of care?
A: No.
Q: Would you agree rules of care are based on protecting the safety of patients?
A: Yes.
Q: Would you agree that safety is integral to the care of all physicians?
A: Yes.
Q: Do you agree that a physician or doctor is not allowed to cause unnecessary or needless danger to a patient under his care?
A: Yes.
Q: The reason for this is a patient's safety and physical well being?
A: Yes.
Q: And the reason the standard of care exists is for a patient's safety, true?
A: The standard of care isn't just for patient's safety, it's for—it's much more than safety, it's for improving one's health.
Q: Yes. Which is paramount to the standard of care includes the patient's safety, true?
A: Yes.
Q: A prime responsibility of a doctor is the safety of his patient, true?
A: Yes.

Once these admissions are obtained, the reptile theory is further developed when a plaintiff makes his or her own expert witness disclosures, as in this example:

> Dr. XXX agrees that a physician or doctor is not allowed to cause needless or unnecessary danger to a patient under his care. The reason for this is the patient's safety and well-being. The reason the standard of care exists is for patient's safety and a prime responsibility of a doctor is the safety of his patient. When there are two diagnoses that explain a patient's illness a doctor is required to rule out the most dangerous treatable potential first…all things occurred with the patient as a result of the failure of the defendants to make the patient's safety their primary responsibility under the standard of care. The safer option here was…over the more dangerous option of…exposing the patient to needless danger by the defendants was a violation of the standard of care and lead to the patient's death.

Defense counsel must move to attack disclosures such as this one well in advance of trial. For example, the defense may file a motion for protective order and/or motion to strike the plaintiff's 213(f)(3) disclosures concerning safety rules, patient's safety, "protecting the patient," and related "safety issues." Defense counsel can argue that a disclosure such as the one above is nothing more than a sophisticated golden rule argument seeking to appeal to the sympathy of a jury.

Once the case gets to trial, the defense would argue the defendant's motions in limine, in an effort to keep the reptile theory out of the trial, and questions will also be asked during voir dire. Plaintiff's counsel will seek to trigger the "reptile" portion of the jurors' brains by asking them to reflect on their own experiences or that of a family member. He or she may ask a juror if the juror agrees that accountability is important in patient care or that a truck driver should be held accountable for his or her actions when someone is injured.

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Despite best efforts, often you are left with the difficult task of defeating the reptile during your trial and attempting to focus the jury back on the specific facts of the case before them. The opening statement is used by plaintiff's counsel to define the case and outline how important the safety rules are and all of the potential harms that exist, and then these are used to enlarge the theory to include the umbrella of community safety. Opening statements in reptile cases are typically kept simple so that a jury can easily relate rather than create a defense chronology that focuses on the "technical science" of the accident or the medicine.

As plaintiff's counsel puts on a case, the reptile theory continues to unfold. Preparation is the key to defending against this theory and cannot be stressed enough. Defense witnesses must be ready to hold their ground on the plaintiff's cross-examination, and they must be ready to shine during the defense's rehabilitation of the witness after

having survived the reptile attack cross-examination. For example, a defense witness must be comfortable knowing that a plaintiff will attempt to establish general safety rules that seem so basic that to disagree with them would be difficult. He or she must also be aware that the plaintiff will relate the general safety rules to specific safety rules and will connect the specific violation to the general rules. *See* Ball & Keenan, *supra*, at 209–13. The witness must be prepared to counter questions that attempt to demonstrate to the jury that the defendant's violation of the rules can hurt anyone when the witness is pushed to agree that the plaintiff was acting just as anyone else would have when he or she was hurt. Furthermore, defense witnesses must be prepped so that they do not appear defensive when plaintiff's counsel emphasizes that the defendant should not get "a pass" for making a choice that was anything less than the safest, and the defendant's choice demonstrated that the defendant must not have cared about the community members' safety. *See Id.* at. 213–18. Lastly, defense witnesses must be able to respond to claims that the defendant clearly did not care about the person that he or she hurt, the defendant has not learned anything from the accident, the defendant lacked the knowledge and training to safely do the job, and in fact did not do his job, and the defendant was a liar. *Id.* at 219–22.

Once a defense witness survives the reptile cross-examination, he or she must be careful not to let his or her guard down. It is at that time that he or she gets a chance to tell the rest of the story through rehabilitation testimony.

Ball and Keenan suggest that an attorney should wait until the trial to expose the dishonesty of the questioned witness: "You don't want the witness to know before trial that you have them in a lie." *Id.* at 222. That way the witness won't "have time to dream up a way around it." *Id.* These "lies" consist of gaps in record keeping, prior bad acts, failure to preserve evidence, or inconsistencies between the testimony provided and the information contained in various documents (which in trucking cases might be bills of lading, driver's logs, or maintenance records, to name a few).

Cross-Examination of Defense Witnesses

By the time that a case goes to trial, most likely the essential defense witnesses, such as a driver, a safety director, or a doctor, will have provided testimony during their depositions that must be dealt with or further explained. Although the witness was thoroughly prepared for his or her deposition, the strategy may need to be adjusted for trial. It may be that a witness' testimony will need to be clarified. During trial, a witness should be ready to explain why no rule can be applied 100 percent of the time; why some of the witness' answers were "it depends" or "most of the time"; or why "safety is definitely one of the company's concerns, along with several others." Furthermore, trial testimony is an opportunity to tell a jury why this case has unique facts and considerations that cannot be generalized.

For example, when answering the following questions, a safety director must be prepared either to frame the answer, rather than simply answer "yes" or "no," or to offer the caveat, "generally in many cases, but not all," or to say, "that is one of the many issues which are a priority at this company."

Q: Your company trains its drivers in order to ensure they are safe and all of the people in the community are safe, correct?

Q: Ensuring safety of community members is your number one goal, correct?

Q: In fact, your company has policies in place which require every one of your drivers to complete the required safety training needed in order to protect members of the community, correct?

Q: And because your company emphasizes safety of all community members, it has a policy of continuous improvement when it comes to their safety program?

Q: But on March 1, 2009, the date of this accident, your company's driver had in fact never completed the revised safety training offered by your company?

Here is another example provided by Ball and Keenan that is often used:

Q: The truck driver needlessly endangers the public when he does not get enough rest between shifts?

Q: The truck driver needlessly endangers the public when he does not have his brakes inspected after every 24 hours of operation?

Q: The truck driver is needlessly dangerous when he skips his pre-run safety inspection?

Q: The trucking company is needlessly dangerous when they do not screen the records of job applicants:

Q: Needless danger is never allowed?

Q: Needless danger is never the standard of care?

Ball & Keenan, *supra*, at 214–15.

Depending on the expertise of an expert witness called to testify on behalf of the defense at trial, the expert should be prepared to answer questions that may attempt to impose duties on trucking companies or a medical facility that do not actually exist. An expert should be prepared so that he or she does not fall into the trap of admitting that a duty or law is a "safety rule" or that an "immediate danger" is the result of a violation of the safety rule. Furthermore, an expert witness should be prepared in such a way that he or she doesn't become frustrated with the reptile line of questioning. For example, after being asked numerous questions about safety, the company's emphasis on safety, and his opinions about the company's policies as they relate to safety, one expert witness was asked if safety should be an important aspect of the company's core values when placing its drivers on the road. Over objection, he answered:

A: Safety, yes. The company is concerned about everyone's safety in all respects. That includes everything. I mean safety of its drivers, safety of other drivers on the road, safety of

the driver's family members, safety of other driver's family members, everyone's safety is of paramount importance to the company at all times, even including yours.

Direct Examination of Defense Witnesses

Once a defense witness survives the reptile cross-examination, he or she must be careful not to let his or her guard down. It is at that time that he or she gets a chance to tell the rest of the story through rehabilitation testimony. Most likely, the focus up to this point in trial preparation will be preparing a witness for plaintiff's cross-examination. But just as much time should be spent on preparing the witness to offer testimony that will combat the plaintiff's safety rules in a way that does not make the witness seem ridiculous, unsafe, or uncaring.

In their recent article, jury consultant experts Bill Kansasky, Jr., and Melissa Loberg opine, "Witnesses can make dangerous cognitive, emotional, and communication mistakes that can severely hurt their credibility with the jury." *Rehabilitating the Defendant in the Reptilian Era*, For The Defense, Jan. 2017, at 16. The article reminds defense counsel that there are three main errors committed during the rehabilitation of a witness. *Id*. at 18. The first error is juror cognitive saturation. Due to the fact that jurors struggle to maintain their focus, the goal must be to break down answers into "digestible chunks" of information consisting of five seconds or less rather than saturating and overwhelming jurors' cognitive functioning. *Id*. The second error is emotionally volunteering information, which a defense witness must not do. *Id*. at 19. If a witness does, this creates the sense that he or she is over advocating his or her position, and the defense is not organized, which may confuse the jurors so that they are not able to focus on what is important in the case. *Id*. The third error is the failure to use the primacy effect and ensure that the most important information is delivered in the first three minutes of a witness' testimony. *Id*. at 20. As the article reminds its readers that "[f]rom the jurors' perspective, rehabilitation of a defendant witness is arguably the most important part of a trial, as the party being accused of negligence or causing harm has the opportunity to explain their conduct and decisions." *Id*.

It is also important to keep in mind that during the rehabilitation of a defense witness, it may be possible to use the witness to refute a plaintiff's emphasis on a negative perception of a defendant, such as a large trucking company, by humanizing the company through the witness. A safety director or corporate representative can offer testimony that a company is made up of friends and fellow community members who work to support their families. Many times company mission statements or value statements demonstrate that trucking companies are concerned with the safety and success of the community as a whole.

Despite the Court's Prior Rulings Continue to Make Objections During Trial

> "You lost today kid, but that doesn't mean you have to like it."
>
> —Indiana Jones

To continue defending against the reptile theory at trial, defense counsel must make appropriate, timely objections during a defense witness' testimony to preserve errors for appeal. Although these objections will also be made during voir dire, opening statements, and closing statements, a bulk of them will be made during the examination of the defense witnesses.

In addition to the golden rule objections, other objections can be formulated around the understanding that defendants are not to be punished based on conjecture or speculation about what may have occurred. D. Marshall, *Lizards and Snakes in the Courtroom*, For The Defense, Apr. 2003. Rather, the burden rests on a plaintiff to prove that damages were proximately caused by a defendant's conduct with a reasonable degree of certainty. *Id*. at 69. Any arguments that reach outside of this should be objected to as irrelevant and unfairly prejudicial under the Federal Rules of Evidence 401 and 403. Likewise, depending on the jurisdiction, it may be possible to attempt to exclude the reptile theory by arguing that a plaintiff is not allowed to attempt to have a jury act as the community's conscience. *Id*. at 74. The basis of the objection grows out of the fact that a defendant is to be afforded certain due process rights under the law. As explained elsewhere, "[a] defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages. A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business." *Id*. (citing *State Farm Mut. Auto. Ins. Co. v. Campbell,* 538 U.S. 408 (2003)).

Conclusion

The key to defending against the reptile during a trial is to prepare the witnesses before their depositions, before they give their trial testimony, and before they are rehabilitated. It certainly helps to break down the safety rules for each witness during the preparation sessions to determine how they can be addressed head-on so that a witness or a defendant does not appear to have acted unsafely or seem uncaring and to ensure that a jury hears and understands that these safety rules do not replace existing regulations or duties.

Witnesses must be prepared to expose the fallacies of the reptile theory and to disconnect a plaintiff's injury from a jury's emotions. A witness should offer testimony that will explain why the safety rules did not apply in this instance, explain that the rules have to be interpreted in the correct context, and remind a jury of the cons of a plaintiff, or of the case, or of the plaintiff's possible comparative fault. A well-prepared witness can counter the reptile-invoking attorney during the attorney's cross-examination of that witness, clarify and explain it during the witness' rehabilitation, and keep a jury's focus on the specific facts of the case at hand. A witness' testimony should also be used to demonstrate a defendant's commitment to safety and humanize the company.

As the reptile theory continues to bolster the size of verdicts and plays on the fears of jurors, defense counsel can expect to see that it will continue to be used in "small cases" as well as in catastrophic loss cases. The reptile theory is something that the defense must be prepared to battle, starting in the initial discovery phases and all the way through closing arguments. If pretrial motions fail and the reptile is able to slither its way into the trial, the focus must be on ensuring that defense witnesses are prepared to deal with a plaintiff's cross-examination and then the defense's rehabilitation. After all, that is the testimony that a jury will hear and consider when rendering the verdict. FD