



2015 Section Annual Conference

April 15 – 17, 2015

Hyatt Regency / New Orleans, LA



Snakes and Lizards and Crocodiles (Oh my!): A Primer on the Reptile Theory of Trial Strategy

A Brief Primer on the Reptile Theory of Trial Strategy: Plaintiff Psychology and the Defense Response

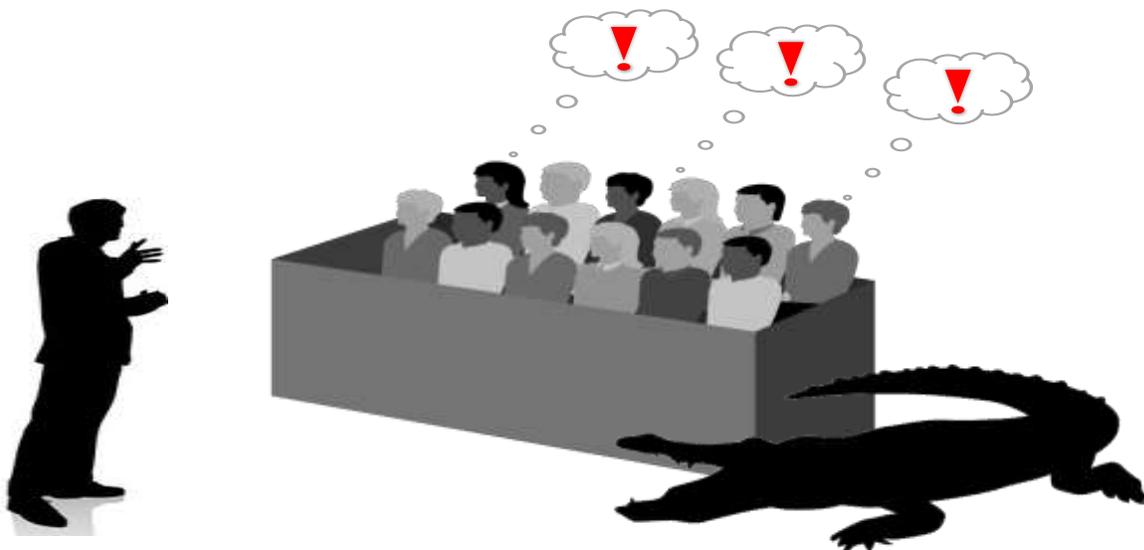
Ann T. Greeley, Ph.D.
DecisionQuest Association Here
State College, PA

A Brief Primer on the Reptile Theory of Trial Strategy: Plaintiff Psychology and the Defense Response

Introduction

The typical plaintiff's opening used to begin with a sympathetic explanation of the plaintiff's ordeal and injuries, and this emotional plea was followed by a Day in the Life tape making the jurors want to give a damage award—right? Not anymore. Plaintiff attorneys have discovered that there is an approach that gets a better reception than the traditional pull for sympathy. The "Reptile Theory" (Ball and Keenan, 2009) is here and is flourishing in trial courts across the country. These plaintiff techniques focus on the defendants' behavior rather than attempting to engender sympathy for the plaintiff. The focus is on anger, and the idea is to make jurors believe the worst about a defendant, typically a company, and its record of safety.

This sounds like a simple concept, “Just get the jury mad,” and one that has been around in trial advocacy for a long time. In fact, it may be a repackaging of old school trial wisdom, but it is also a carefully crafted and creatively taught strategy that is changing the way that plaintiffs, and the defendants they face, are trying cases. This theory is much more successful than previous plaintiff approaches, and according to the authors of the theory, Ball and Keenan (2009), the Reptile Theory has become the defense bar’s new nemesis.



The Reptile Theory can be conceptualized as a planning strategy that gets plaintiff attorneys to focus early in the case on crafting the themes that will be honed through deposition, voir dire, and eventually the opening. This process focuses on utilizing the eventual juror’s desire to expose and punish the existence of danger when it exists in the community around them and to place blame on a defendant large enough and powerful enough to “eliminate” that danger. This is a strategic *process* – it takes place from the beginning to the end of a case—often with the goal of getting a case to settle, but also with plenty of strategy for trial. The focus is on three main sections of the process: the deposition as the key to getting admissions from the company; the voir dire to prime the jurors with the themes before the opening, and the opening to capitalize on the groundwork set in each previous stage in steering jurors’ responses to the case.

The Reptile Theory can be used to focus on the defendant’s failures in any threatening situation which has allegedly caused the plaintiff’s injury in any type of case, but most often, personal

injury, product liability, medical malpractice and transportation cases. More recently, commercial and banking cases have been the focus. The theory shifts the jury's thinking to a much broader concept of injury, beyond the injury sustained by the plaintiff, to possible injury to the jurors themselves or the public. The strategy, as defined by the authors, is based on scaring the primitive part of jurors' brains and utilizing (or manipulating, depending on your perspective) jurors' fears. The theory posits that this gut reaction leads to a tendency to give damages based on a violation of a broader perception of safety.

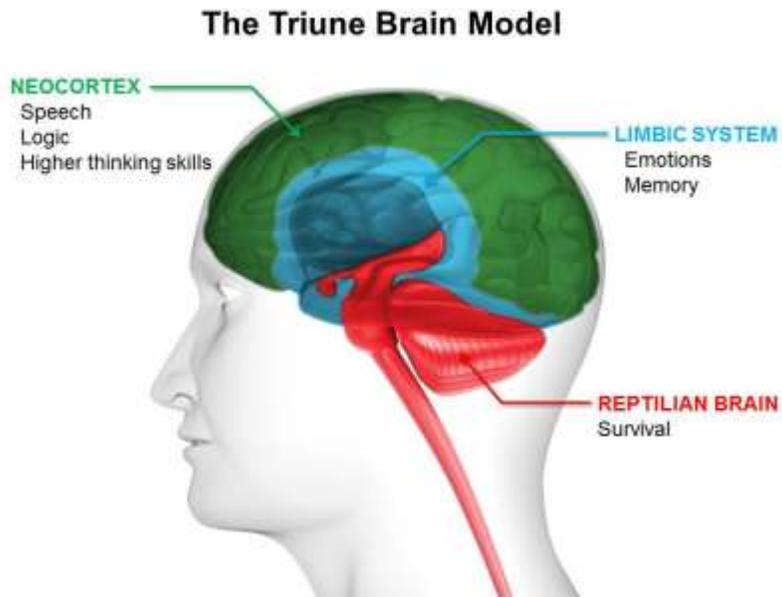
From the defense perspective, the Reptile Theory is attempting to manipulate jurors by fostering fears that are broader than the confines of the case (an individual with a specific injury, for example) and are not part of the case. The defense bar has come up with numerous ways to counter this theory, the most common of which is to dispel the physiological basis for its effectiveness. Defense attorneys believe that the "gut reaction" that is based on the reptilian brain and its primitive responses to fear and pain is not a physiological reality. In addition to being critical of the biological basis for jurors' reactions, defense lawyers and jury psychologists have learned to prepare for and defend against these strategies in a variety of psychological ways, as well as through legal means. For example, attorneys have argued that many of the plays to the jurors' own emotions violate the golden rule constraints of the law, and are not ethical. As such, the defense against the reptile movement is also alive and well.

The authors, Ball and Keenan, have written numerous books and articles, and many other authors have discussed the strengths and weaknesses of this theory, which makes summarizing all of the concepts beyond the scope of this article. This article will, however, provide a brief summary of the Reptile Theory's proposed biological bases, as well as provide observations about the practice of the theory, why it works with jurors, and the basic stages of planning for and executing the processes involved in the theory and the methods for defending against the techniques.

Reptile Theory basics

The Reptile Theory itself got its name from the physiological underpinnings of the theory, which made it famous, but these theoretical underpinnings have created the backdrop for its biggest critics. The theory is based on the work of neuroscientist Paul MacLean, who theorized in the 1960s that there are three discrete parts to the brain reflecting the stages of evolution. (MacLean, 1949; Newman & Harris, 2009).

The Reptile brain. The theory is based on getting to the Reptile part of the brain in the normal human (see diagram below). The authors call it the “Triune Brain,” and this model suggests that there is a part called the **reptile brain** at the core. This part of the brain contains the primitive and survival instincts that every person has. The **Paleomammalian complex (limbic system)** involves the mid-brain; emotion, reproduction, parenting. The **Neomammalian complex (neocortex)** is made up of the cerebral cortex; this part is capable of language, logic, planning.



Plaintiff perspective. As a part of accessing the primitive brain, the theory suggests that upon sensing danger (hearing about an accident or injury) the jurors move into “survival mode.” Jurors, as guardians of the community’s safety, respond to the threat to their own safety and to the safety of others. According to the theory, the jurors believe that awarding damages will enhance safety and decrease danger. When a safety rule is broken, and jurors sense danger, in essence they experience a Reptile response to the case.

At the center of this theory is the idea that safety is important to jurors, and that there are safety rules involved in the case which must prevent danger. These rules have a variety of dimensions: they must protect people in a wide number of situations, must be in clear English, the rule must say what the person must do, it has to be easy to follow, must be agreed with and most importantly, not to agree with this rule is would be perceived as careless or stupid. (Kanasky, 2014).

Ball and Keenan further suggest that there are two roads to information processing. The low road involves the sensory thalamus, the amygdala, which involves “survival mode.” “Classic” plaintiff jurors focus on this level of information, which is the simplest answer, perhaps the first answer that comes to them. Those jurors who respond with a startle response (perhaps seen as a hand covering the mouth, or shock at injuries), are responding from a pure reptile perspective. High road processing involves the sensory cortex and involves a rational response to the evidence being presented. Those who use this type of processing are “classic” defense jurors—detail-oriented, thoughtful, patient and even skeptical.

Defense perspective: First of all, defense advocates believe that the neuroanatomical assumptions involved in the theory are wrong (Allen, Schwartz, and Wyzga, 2010) and frankly this author doesn’t disagree. Without going into a college-level vertebrate physiology class, suffice to say that Reptiles can’t experience **fear**, which is the linchpin of the reptile aspect of the theory (the reptile lacks a limbic system which is the emotional center of mammalian brain). Further, it has been pointed out that Ball and Keenan are actually selling danger not fear. Fear is an emotion, whereas danger is a threat. Defense advocates suggest that plaintiff attorneys are just suggesting threat (**not real danger**) which cannot awaken the reptile in a juror. (Kanasky, 2010).

Humans are not just flight or fight responders, they in fact process information. And, the fear responses that humans experience are not predictable, in part because higher level functions often intervene in fear responses. Some authors have suggested that jurors recoil when disrespected or threatened (Allen, Schwartz, and Wyzga, 2010). In reality, for example, fear can backfire if jurors believe they are being treated like “reptiles” as in a DeKalb County, Georgia, courtroom in 2014. Representing a movie theater and a security company accused of not doing enough to prevent a fatal gang shooting in the theater parking lot, defense attorneys read from the book and referred to it during closing arguments. One of their PowerPoint slides read, “Let’s see if we can scare them/It could have been anyone killed out there ... because it’s a public danger there ... but if you give us \$ that will somehow eliminate this danger/ They call this their ‘Reptile’ strategy.” We do not know for sure what factors went into their decision, but after two weeks of testimony and three-and-a-half hours of deliberation, the jury found for the defense.

Some authors have suggested that the “reptile brain” concept is really more figurative than literal and that this is really is a practical theory that is as good as its results (Broda-Bahm,

2013). While the biological theory behind the reptile theory may have been discredited or ultimately shown to be invalid (Kanasky and Malphurs, 2014), the tactics have been shown to be incredibly powerful. But why?

Why the theory works: Misperceptions of how jurors think

The Reptile Theory works, in this author's mind, because of previous misinterpretations about how jurors think by both plaintiffs and defendants.

Less sympathy. As alluded to in the introduction, plaintiff attorneys have typically focused on sympathy: getting jurors to feel sorry for the victim through a detailed description of the pain and suffering they experienced during the incident (described by EMTs or witnesses who watched the accident unfold) and amplified by a "Day in the Life" video or stories about their and their family's suffering. We learned long ago that the more the plaintiff attorney focuses on the plaintiff, the more the plaintiff will be scrutinized by jurors as to what they could have done to prevent the incident. Further, moving away from sympathy is important because sometimes the emotional discomfort caused by viewing graphic videos often creates distance between the plaintiff and the jurors rather than engendering empathy and compassion. Sometimes the vicarious experience of "giving someone money" doesn't feel right if the juror him or herself has experienced difficulties; in fact the difficulties that jurors have experienced with job loss and the economy have made it less palatable to make large awards which will "make someone [the plaintiff] rich." The emphasis on frivolous lawsuits over the last two decades has made it difficult to generate sympathy from jurors in many cases.

Community safety. The Reptile Theory works because it takes the emphasis off sympathy for the plaintiff and puts the focus on the failures of the defendant. And, importantly, it also works because it moves the emphasis from the individual to the community—jurors are not just protecting the safety of the individual plaintiff (again there is resistance to making one person rich), they are protecting the community's safety, a much nobler motivation. Just like in Maslow's hierarchy (1943), the first two needs that must be met are physiological (food, water, sleep, excretion) and safety (security of body, employment, resources, the family, health, property). These needs must be satisfied before anyone is able to move to higher order needs like self-esteem or self-actualization. So it makes sense that jurors would focus on their own and others' safety as the plaintiff presents the "safety gone awry" case. We are indeed creatures who need to feel safe in our lives, and this part of the theory is very effective.

Perceptions of companies. On the other hand, defendants have also traditionally used defenses based on misinterpretations of how jurors think. Defendants believe they must use the “good company story” to humanize their companies without realizing that this strategy has little persuasive value. Defendants tout that their companies are made up of people and are thus “human” and worthy of the same consideration as an individual. Of course the law says this also, but is just as unlikely to persuade. This is a hard fact to swallow for defense attorneys or their clients: companies are not people in the eyes of most jurors and will never be seen as being made up of human beings who are just like the people on the jury. A large company or corporation is considered just that, a business entity run by over-paid executives and distant boards. The “good company” type of appeal typically falls on deaf ears since jurors already have beliefs about what a company is all about—making money. Further any attempt to make jurors feel threatened that a company may eliminate jobs or leave the community if an award is made is more likely to anger jurors than engender good feelings about that company.

A slightly different version of the “good company” story involves the fact that the company makes a well-known or reliable product, or provides important services. Seeing popular products is not enough to keep the focus on the plaintiff and the product in this case. That being said, it is possible to have limited success with a reputation of charitable work or being available in a crisis (the theory is that a utility company is only as good as its response providing service in the most recent ice storm or hurricane), but that is different than the “we’re good people” story and cannot be offered directly. Thus, the “good company story” has limited usefulness and may even turn some jurors off.

Filtering cases. Further, we know that jurors often think the defendant has done something wrong before the case starts because there is a “filtration” system at work in the court system. Jurors often believe that bad cases are settled or the judge grants a summary judgment motion; thus, the only cases left are those that actually have some merit. This kind of thinking is often underestimated by defendants in jury trials.

Breaking your own rules. The Reptile Theory also fits with the jurors’ frequent assumptions that the defendant should do more to ensure customer or user’s safety, even if more is not required of them. In fact, even if the defendant has met the required regulations, jurors often believe that the regulations are the minimum that a company has to follow. It is particularly compelling when a Plaintiff attorney can show that a company has violated its own safety rules or the industry standards which it helped to create. The jury appeal is particularly strong when

someone at the company has failed to follow the manual or policy that it established as the final word on safe practice. A company, due to the perception of more resources, more knowledge and more control over its products and environments, is held to a higher standard of safety and responsibility than an individual. In a recent survey, 85% of those jury-eligible people polled said that corporations should be held to a level of responsibility that is somewhat more or much more than individuals (K&B/Persuasion Strategies national survey, 2015). This perception leads jurors to find fault when it has violated its own policies, since a company it is supposed to know to follow its own manual as well as the laws in that community, and is supposed to know about government regulations and industry standards. Attempts to prompt the theme of personal responsibility on the part of the plaintiff take a back seat to the obviousness of “breaking your own rules.” Attempting to blame the plaintiff in this context is a set up for the very anger and emotion that the defendant wants to avoid.

Rational motivation. The Reptile Theory works because it avoids doing what plaintiffs have traditionally done, and takes advantage of what defendants have failed to realize about how jurors think. Further, it works, not because it directly affects the fact finders’ primitive reptile brains, but simply because jurors are motivated to make decisions based on what they care about first (safety), and what is logical second (the plaintiff could have done more to secure his or her own safety). Instead of applying the rational-legal model of reasoning, jurors find their way to a conclusion in a different way (Broda-Bahm,2010). The principle of motivated reasoning is that once jurors, or any other decision maker, know what decision they *want* to reach, (like finding for a plaintiff or a defendant), they collect support for finding that way. Thus, hitting jurors early and hitting them hard with the motivation of protecting safety means that the primacy of that message is hard to ignore. The Reptile Theory focuses heavily on this concept: define the motivation (safety) and the rest will follow.

But how does the theory actually get implemented? The next section summarizes briefly how the attorney can use the reptile strategy and defend against it through the process of deposition, voir dire, and opening.

Depositions

Introduction. Most authors agree that Reptile plaintiff attorneys need to get damaging admissions or contradictions in testimony from key witnesses in order to force settlement early. The biggest reason for the success of this “focus on the deposition” strategy is that most

witnesses are poorly prepared to answer deposition questions posed in the manner taught in the Reptile Theory books. Further, witnesses are attacked at both an emotional and conceptual level, as well as a case specific level, which means that they are typically unprepared to defend themselves, the basis for their testimony, and their very self-esteem.

Defendant witnesses (based on basic training from their attorneys) are often lulled into believing that their best strategy is just to “listen to the question, answer the question, and don’t volunteer anything unnecessary.” This strategy leads to a series of yes and no answers, with no explanation or caveats provided until the witness is boxed into a corner which he or she cannot escape. Not only is the Reptile strategy of aggressive questioning good practice on the part of plaintiff attorneys, it takes advantage of the failure to prepare witnesses for video depositions that set the tone of the case. During video depositions, the witness’ answers, and typically their damning non-verbal behavior, are memorialized for the potential jury to see. While it is well known that the more “key” the witness is, the less time he or she will probably make him or herself available for proper preparation, it is a crucial part of the defense to the reptile process to spend adequate time in preparation for deposition.

The plaintiff’s questioning process, as proposed by Ball and Keenan, and as interpreted by numerous authors, is detailed below. The witness preparation process proposed by a number of authors (including this one) for educating and essentially reprogramming witnesses for success against this process follows.

Plaintiff deposition process. The key to the plaintiff process is exhibiting control over witnesses. The “safety rule” is central to this process, and the idea is to trap witnesses first into agreeing with general safety principles and danger avoidance/risk avoidance principles, then move into more specific safety rules and danger avoidance rules, and finally pinning witnesses down on specific safety rules or danger avoidance concepts that were broken by this particular witness or company (applies not only to 30(b)(6) witnesses, but also to other fact witnesses and experts). Inconsistencies are key, and the more inconsistencies within the policies of the company or of the industry (e.g., standard of care, construction rules, gas line practices), the more focus that will be placed on those inconsistencies.

The process can be friendly or aggressive, and is often both. There is an attempt by the attorney to unnerve or create a sense of imbalance for the witness. This creation of imbalance takes place both with regard to the emotional content of the questioning, as well as the content. Vulnerability to the attacks is created by the false belief that the deposition is an attempt to get

at the truth of the matter, rather than a “game;” that the attorney will play by reasonable communication rules; and by a lack of understanding of reptile questioning.

The plaintiff attorney’s job is to create an environment in which the witness will agree with what the plaintiff proposes. The witness’ compliance is often dependent on creating the right kind of emotional roller-coaster that will support the proper response. The ability of the attorney to detect what will work is key—is it best to be friendly to lull an unsuspecting witness to agree or to disclose too much? Or is an aggressive stance most likely to get a reaction? And combining both by switching from friendly to aggressive is a very common strategy. It is also best to gauge which of the two most common reactions the witness will display: 1) is the witness likely to withdraw from the questioning or 2) become angry and aggressive in response. The evaluation of the witness’ style can take place during the process, but the extent that the personality of the witness (and its potential interaction with the attorney’s personality and style) can be known in advance is an important consideration for success.

Humiliation and “shaming” are important secondary techniques. While common in many types of depositions, the emotional tenor of this process is highly important to achieving admissions and creating contradictions. Insulting and belittling the witness are key techniques. Witnesses are asked, “You want the jury to believe that?!” or “You have been working there for 10 years and you don’t know anything about the safety manual!?” These types of questions get witnesses to feel ashamed about their responses when they contradict general safety rules or specific rules involved in the case.

Individuals who have been conditioned to respond to questions about safety consistently in the affirmative (construction, utilities, quality assurance fields are examples of those who receive heavy safety training) are particularly vulnerable to having their ways of thinking and their conditioned responses challenged. The Reptile attorney’s questioning is intended to move from agreement with general safety and danger avoidance rules (confirming these rules) to more specific safety and danger avoidance concepts applicable to best practice in a particular field or with regard to a particular product. General questions suggest that: “Safety is always a top priority, right?” “Any level of danger is never appropriate, correct?” “Reducing risk is always a top priority, wouldn’t you agree?” The plaintiff lawyer ties the general agreement to more specific rules that were violated in the case by the individual or the company.

Perhaps the most dangerous questions are about those hypothetical “safety errors,” such as those that are characterized by, “Wouldn’t it have been safer if X had happened?” or “The

Company could always do more to protect safety and prevent dangerous situations, right?" The inevitable answers to these questions fit neatly into jurors' predispositions that accidents are always preventable, and companies can always do more to prevent incidents from occurring. These questions also bank on both witnesses' (and jurors') use of hindsight, which is the tendency to believe that if something has happened it was probably predictable, just by virtue of it happening.

Cognitive dissonance experienced by the witness is essential to this process. Cognitive dissonance represents the psychological discomfort experienced when one is confronted with information or behavior that is in contradiction with their internal beliefs or attitudes. The more strongly held the belief or attitude, the more intense is the experience of dissonance when confronted with the new contradictory information. When a witness whose whole life is based on safe practice, ingrained through early training and company indoctrination, is confronted with their or someone else's decision or behavior, which the plaintiff attorney suggests does not comport with safe practice, is it overwhelming for him or her. The struggles that most witnesses have with the deposition comes from this intense dissonance, particularly when they have "gone on the record" agreeing with very broad principle of ideal safety practices. When a witness advocates a safety rule that they believe in and it also seems to be obvious, but with which they do not always comply, this situation creates the maximum amount of dissonance, or psychological discomfort for the witness.

Lastly, this process focuses on an admission of fault which decreases the dissonance. "Wouldn't you agree that if someone had violated that rule and an accident occurred, that person would be responsible for the accident?" When a witness admits fault he or she is really using the "withdrawal" technique and is hoping to simply be left alone after being psychologically beaten up. This reaction can also be seen in other withdrawal strategies such as feigning lack of understanding or questions or asking the attorney to repeat the question over and over as a delay. The alternative of aggressively attacking the plaintiff attorney by denying the conclusions he is drawing is usually only a temporary fix and only serves to dig a deeper hole out of which the witness must crawl.

The witness has been forced into a corner and only has two main choices. The choice to get out of the corner involves "backing up" by offering context to what was previously offered, which automatically decreases credibility. The second choice (if the plaintiff gets his or her way) is to simply admit that the plaintiff attorney is right and thus the company could have done more and

could have been responsible. Here is a sample sequence in an asbestos case after a long series of safety questions intended to wear the witness down:

“So, Mr. Jones this is the list of protective equipment which the workers were required to wear.”

“Yes. “

“Well so you were in charge of them wearing this equipment.”

“Well this is the list, but they didn’t necessarily wear it....”

“Well, if you were the supervisor and you were there, wasn’t it your job to make them wear the equipment?”

“Yes, and I was negligent...”

The case is over at this point, and the company will have to settle.

Defense Response: Defense responses to this questioning process primarily involve training. Breaking witnesses of the habit of agreeing with general safety questions, without reservation, involves literally reprogramming years of training. Educating witnesses about the pitfalls of answering every global question in the affirmative is a first step, along with many practice sessions intended to 1) demonstrate how the safety trap is set and 2) to teach how to come up with alternative answers. The biggest hurdle in this process is that safety rules just seem so obvious that no one could disagree with them! Teaching witnesses to recognize a dangerous global safety question is job one. Convincing them they are not lying or betraying their professional identity and training when they offer an answer that provides a caveat is crucial to the process.

Next, witnesses need to be trained to think in terms of longer and more effective answers to yes and no questions. In some cases, witnesses can agree with safety questions, but many times they are better off offering caveats or parenthetical phrases, such as “in many cases,” “to a great extent,” or “that is *one* of the things that is a priority at the company.” Of course there have to be logical reasons for these caveats. Recognizing and using caution when answering questions that involve phrases like, “Wouldn’t you agree with me that...” or “Wouldn’t it be fair to say” is eye opening for many witnesses. In many cases the best strategy is to help witnesses think like politicians, who offer what is important or relevant when asked a difficult question. For example, a witness can say, “Yes, that is sometimes true, but importantly, that was not necessary in this case.” Detecting trap questions and recognizing the appropriate timing for a better, more thorough explanation is a key to reprogramming witnesses.

As is obvious from the above description, defense witnesses also need to be on the lookout for emotional attacks and to learn to ignore them. Simply put, these attacks are often intended to make the witness respond from the “child” part of themselves, that part that was embarrassed or felt insecure in the face of chastising from a teacher or parent. Teaching witnesses that the attacks are unfounded (“You are not incompetent if you disagree with this attorney”), training them that this attorney will never be a source of approval (“This attorney will NEVER agree with you), and that the attacks are not personal, even if it sounds like they are (“It is his or her job to attack you in this adversarial context”) are all very important in helping the witness remain solid in the face of personal attacks. In fact, many witnesses we have trained have felt an internal “smile” when they realized that the more the attorney attacked, the more he or she is probably frustrated with answers that do not satisfy the deposition agenda.

Voir dire

Plaintiff perspective. Importantly, voir dire has multiple goals. It is an opportunity to expose and eliminate those jurors who would likely be biased against your client. In this regard questioners use the opportunity to ask questions about which they really want answers. (“Do any of you have any connection to the parties in this case?” “Does anyone here have strong feelings about or negative experiences with Bank X?”). It is also a first opportunity to expose the jurors to the themes of your case, which takes advantage of the concept of priming. While we generally consider eliminating your worst jurors to be the most important goal of voir dire (after all, this is a de-selection process and you want to get rid of those with predispositions against your client), plaintiff attorneys in the Reptile mode use voir dire mainly for priming. In this regard, they ask questions that are intended to inculcate the jurors with the themes of the case.

Priming is a technique used to influence attention. Specifically, priming is an implicit memory effect in which exposure to a stimulus influences a response to a later stimulus. This means that later experiences of the stimulus will be processed more quickly by the brain. For example, if the word “sloppy” is used to describe an investigation, that word tends to be automatically associated with the company’s behavior. In voir dire, plaintiff’s counsel begins the priming process with the goal of exposing jurors to the trigger words that will evoke themes of safety, danger, risk, etc., so that those themes will resonate with jurors during their opening statement.

Many of the questions plaintiff attorneys ask are not intended to get any form of response, but are rather questions with which no one will disagree. “Would anyone disagree with the concept that patient safety is a hospital’s most important goal?” “How many of you think that some companies put profit before safety?” “Would anyone disagree that this community deserves a safe hospital?” Importantly, the questions are worded so that the answer will inevitably be to agree with the underlying premise of the question. Indeed, the attempt is made to structure many questions with “How many of you” when the attorney desires agreement rather than “Do any of you,” which signals that that one person would be alone in their disagreement. Similar to the witness examination process, no one would disagree that safety is important, and everyone would agree that avoiding harm is every organization’s ultimate goal.

Further, plaintiff attorneys anticipate that some jurors might have issues with lawsuits or even believe that frivolous lawsuits abound. In furtherance of their goal of priming the jury, they might ask, “Would anyone here disagree that if someone is injured by a product, that they have a right to sue that company that makes that product?” Most jurors will agree with this statement since it makes the assumption of causation and the right to sue. If someone does happen to disagree, then the juror’s biases are exposed and they can be eliminated either through a cause or a peremptory strike. This same sort of questioning is used to eliminate jurors who are reluctant to award damages or have limits as to the extent of awards. In this way the attorney not only eliminates biased jurors, but also conditions those remaining that safety rules have been violated, the violations caused the incident and lawsuits/damages are an appropriate response. Repetition is a form of priming which can make themes more believable. Jurors are often overwhelmed at the process of participating voir dire, and are listening intently to the themes so that they can understand the nature of the case. Since the plaintiff conducts voir dire first, this first opportunity to set the stage occurs when jurors are most impressionable.

The defense perspective. Defense counsel can defuse plaintiff attorney priming efforts by indoctrinating jurors in voir dire with opposing themes that can offset the plaintiff’s counsel’s priming efforts. Focusing on following the law or getting jurors to wait until all the evidence is in are appropriate, but weak attempts to inoculate jurors. Counter with some information that surprises jurors, for example, asking them if they assume that just because they are in court that the defendant must have done something wrong. This allows an opportunity to not only expose those jurors who believe that the defendant is already “guilty.” But allows the defendant to emphasize that the plaintiff’s injury may not have been caused by anything the defendant did or

didn't do. Further defense counsel can also find ways to inoculate against plaintiff themes, by asking, "Would anyone disagree that a doctor needs to look at each patient as an individual?" or "How many of you believe that sometimes things are just accidents, and not necessarily someone's fault?"

Reptile tactics are not really about survival instincts; the theory really focuses on utilizing negative predispositions about companies and positive leanings toward the underdog to view the case. Priming involves suggesting terms, definitions and language which are keys to interpreting the case in your favor. Will jurors interpret the case as one in which safety rules have been violated and the community is at risk, or, from a defense perspective, are there alternate explanations for the events in question?

Opening Statement

Plaintiff perspective. As was noted at the beginning of this paper, the plaintiff has traditionally relied on sympathy and emotion to drive verdicts and damages. The classic defense response to such a strategy was to show how the defendant acted reasonably and to offer various defenses for their conduct. This primarily defensive approach is one that has failed to keep up with the new Reptile strategy. The Reptile opening "story" is one that is constructed with very specific themes of broken safety rules. The premise is that jurors want to feel safe and will punish those who make them feel unsafe, and albeit this is not the same thing as triggering some kind of reptilian response, it is clear that jurors want to satisfy those basic "Maslovian" needs. The idea that the world has been made unsafe for even just one person is a compelling argument for many potential jurors, and if it is expanded to the community, the theme captures many other jurors. These very direct accusations are often met with what is perceived by jurors to be defense excuses, which reinforces their negative stereotypes of company defendants.

Importantly, the organization of the Reptilian story is a vortex into which many defense attorneys are drawn. The most frequent mistake in response to a Reptile opening statement is to immediately go on the defensive and deny each of the plaintiff's allegations. This knee-jerk response makes psychological sense since the plaintiff has accused the defendant with failures to follow its own safety procedures during both voir dire and then opening. The defendant wants to respond by denying each allegation one-by-one. However, this strategy is intended to

“bait” defense counsel into fighting on the plaintiff’s battleground and is very successful for plaintiffs.

Defense perspective. Defendants need to remember what doesn’t work. Most importantly, the repetition of all the things the plaintiff claims and a response to each just repeats all of the plaintiff’s themes. But let’s start with some other basics about the most important part of the opening—the first five minutes.

Jurors do not want to be pandered to, so defense attorneys (as well as their plaintiff counterparts) need to stop spending so much time thanking them for their jury service—jurors know that this is just a way to attempt to influence by flattery. We also know that offering that the defendant is a good company, whether it is made up of human beings, or that it makes good products, does not clear the defendant of responsibility in the instant case. Jurors want to know specifics. We also know that the more time you spend focusing on your own client (remember that the plaintiff used to fall in this trap and has now learned to focus on the defendant), the more jurors will focus on your client. This is sometimes called the “availability” heuristic, which means that the most available information is the focus of deliberations. Therefore, immediately giving jurors something else to blame (besides your client) is imperative for derailing the Reptile attack. Defense counsel needs to arm jurors with the “real” story and provide the context of what happened so that you immediately put the plaintiff, the situation and/or alternative causation on trial.

Defense counsel needs to counter themes about safety, with the sense that the plaintiff had ***more control*** and ***more or sufficient knowledge*** to deal with the situation in question. Some cases lend themselves better to this theory than others, of course, but in many cases the focus on the plaintiff failing to take what are considered to be ordinary actions to protect themselves (calling the gas company instead of checking on the pipe themselves, or reading the contract terms before signing) can help to counter what is a heavy burden on the defendant to protect the consumer/plaintiff from him or herself.

The beginning of an opening statement is the point at which jurors hear the reasons for why the defendant might not be, or is not “guilty” (jurors’ word, even in a civil case). Jurors figure out what is the “right answer” long before they even look at the verdict form. Defense attorneys

need to remember that jurors want to know what they should care about, and whether they are providing justice through their decision. The fact that the jury instructions come at the end of most trials, and the judge may not have allowed for much discussion with the jury about the law, means that the impact of legal definitions and instructions is minimized. If the defendant hopes that definitions of legal terms will be factored into a decision, then discussions with the judge about the need for preliminary instructions and/or the ability to describe the terms needs to be ironed out preferably before trial begins, not at the end.

Jurors care about how to make the decision about who was wrong in this “argument” between plaintiff and defendant, in other words, who is to blame, so the defendant cannot ignore the need to rebut the plaintiff’s attacks. However, falling into the trap of focusing on the plaintiff’s safety rules during opening is a sure way to play into the Reptile attorney’s framework. Defendants need to remember to offer an alternative explanation of the control and knowledge available to plaintiff, and if legal definitions (e.g., standard of care) are to have any weight, those terms must be defined early and often.

In Conclusion

Reptile Theory and its psychological techniques are here to stay. Plaintiff attorneys who utilize them are often successful at directing jurors’ attention to specific safety rules and concepts that have been broken, and for which the jurors must blame the defendant. Defendants need to stop bashing the “Reptile” part of the theory and worry more about the reasons that the theory works with jurors. The above techniques for both plaintiffs and defendants are an important starting point.

References

Allen, S., Schwartz, J., & Wyzga, D., “Atticus Finch would not Approve: Why a Courtroom full of Reptiles is a Bad Idea,” *The Jury Expert* v.22.3, 2010.

Ball, D. and Keenan, D. *Reptile: The 2009 Manual of the Plaintiff's Revolution*, 2009.

Biek, M. & Patterson, A., “Jurors Attitudes toward Corporate America: Implications for Voir Dire,” *DecisionQuest*, 2001.

Broda-Bahm, K., “Taming the Reptile: A Defendant’s Response to the Plaintiff’s Revolution,” *The Jury Expert* v.25.5, 2013.

Festinger, L., *A Theory of Cognitive Dissonance*. Stanford, CA, 1957.

Kanasky, Jr. B. & Malphurs, R., "Derailing the Reptile Safety Rule Attack: A Neurocognitive Analysis and Solution," *Courtroom Sciences*, 2014.

K &B National Research (2014). *Corporations, oil, & gas/energy, banks, medical devices products, and need for cognition*. Dallas, TX, 2015.

Kanasky, Jr. B., "Debunking and Redefining the Plaintiff Reptile Theory," *For the Defense*, April 2014.

Kanasky, Jr. B. & Malphurs, R., "Confronting the Plaintiff's Reptile Revolution: Defusing Reptile Tactics with Advanced Witness Training," *Georgia Defense Lawyer's Association*, Spring, 2014.

Maslow, A.H. (1943). A theory of human motivation. *Psychological Review*, 50(4), 370-396.

Marshall, D., "Lizards and Snakes in the Courtroom: What every Defense Attorney needs to know about the Emerging Plaintiff's Reptile Strategy," *For the Defense*, February, 2013.

Newman, J. D. & Harris, J. C. (2009). "The scientific contributions of Paul D. MacLean (1913-2007)," *Journal of Nervous and Mental Disabilities*. **197** (1), 3–5.

Patterson, A., "Don't Fear Voir Dire," *The Pennsylvania Lawyer*, 1990.