Keeping Snakes Out of the Jury Box: An Analysis of the 'Reptile Method' and Tips to Defeat It

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"Does everybody agree that manufacturers should do everything reasonably possible to make sure that their product is safe for the consumer? If so, raise your paddle please."

A plaintiffs attorney recently posed this exact question to a panel of potential jurors in a case where the plaintiff brought claims against the tire and seat belt manufacturers after he sustained injuries during a car accident. On its face this question seems innocuous—what person wouldn't agree that manufacturers have a duty to make their products as safe as reasonably possible? However, this type of question, paradigmatic of the "reptile method," is frequently used by plaintiffs attorneys to prey on jurors' fears and biases. This approach essentially paints a "black/white; good/bad" world, which can present a distorted picture of the facts and often attempts to displace the law in favor of idealistic standards that are more difficult to meet. It is for this reason that this approach can be both effective and dangerous.

Below, we provide an overview of the "reptile method," why it can be successful if not rebutted, and some ideas on how a defendant can present a more fulsome story about its good conduct, actual legal obligations and the facts to the jury.

The 'Reptile Method' Deconstructed

Historically, plaintiffs lawyers have based their case on two main themes—compassion for their client's alleged injuries and punishment for the defendant's alleged negligence. While the main components of the plaintiffs' case have remained constant, over the last several years, plaintiffs' lawyers have added another thematic layer to their cases. Beyond merely advocating that a plaintiff should be compensated for the defendant's alleged "bad" actions in a specific instance, plaintiffs lawyers now employ a technique to broaden their arguments, so that they appeal to the jury's basic animalistic instincts (fear and self-preservation). Their pitch is that the defendant's alleged actions create an unsafe, uncertain, and threatening world, creating a narrative in which the only way that the jury can protect itself and the community is by rendering a large verdict in plaintiff's favor.

This technique, known as the "reptile method," has been popularized by jury consultant David Ball and attorney Don Keenan. Ball and Keenan's method of litigating cases is based on an old (and outdated) concept that the human brain is composed of three parts that reflect stages of human evolution. Ball and Keenan's techniques are designed to activate the "reptilian brain" of jurors—that is, the section of the brain responsible for protection and survival. As Ball and Keenan have described it, "when the reptile sees a survival danger, even a small one, she protects her genes." By

exploiting the “dangerous actions” of the defendants, plaintiffs attorneys activate the “reptile brain” of jurors, which leads them to protect themselves and the community—by awarding a large verdict to the plaintiff.

While the scientific underpinnings of Ball and Keenan’s philosophy are tenuous at best, their method can work because it taps into other, more psychologically robust, phenomena (e.g. availability and confirmation bias). Human psychology has long posited that people are apt to make decisions based on certain “quick and dirty” thought processes. For example, when persons (here, jurors) rely on whatever examples that first come to mind when evaluating a specific topic, concept, method or decision, they are acting “heuristically,” relying on their “availability” bias. Confirmation bias similarly affects decision-making, in that people have a tendency to search for, interpret, favor and recall information in a way that confirms their existing beliefs or hypotheses, while giving disproportionately less consideration to alternatives contrary to what they believe.

Ball and Keenan’s reptile method utilizes both of these cognitive short-cuts. The central tenant of “Safety Rule + Danger = Reptile” helps a plaintiffs attorney distill the central features of an injury case into an easy-to-digest formula that resonates well with the jury. The singular focus of a reptile case makes information regarding safety issues prominent and easily available to jurors (tapping into their availability bias) and allows jurors to make a decision that confirms their belief that the world is inherently safe and good, so when bad things happen, it must be because someone else did something wrong (confirmation bias).

Defendants Can Defeat the Reptile With Preparation and the Facts

This paradigm shift in many plaintiffs’ approach to litigation has left defendants, well, on the defensive. While the concepts underlying the reptile method are not anything new or earth shattering, the best manner of presenting the defense has in fact changed When faced with these instinctual arguments, it is important for defendants—particularly defense witnesses—first, to identify them, and then to be ready with a strong and well-supported case narrative, showing not only the positive benefits their products contribute to society, but presenting a compelling story to show why plaintiff’s all-or-nothing approach to safety is not only impossible in the real world, but also goes beyond the requirements of the law.

Part of the defense response is legal: to convince the court, and ultimately the jury, that plaintiffs’ reptilian propositions are contrary to law. The law recognizes that it is impossible to make every product absolutely safe for every individual who uses it. This is reflected by the legal standard in most products liability cases, which require a balancing of the risks and benefits of the product. The law thus acknowledges that there are acceptable levels of risk, given the benefits a particular product provides. Indeed, in certain circumstances, the law goes even further, preventing some types of liability claims against specific classes of products. For example, in California, claims for strict liability design-defect are barred against prescription medical products because, while these products may be “unavoidably unsafe,” there is a strong public interest in the development, availability and reasonable

price of these types of products, given their overarching benefits to society. (See *Brown v. Superior Court*, 44 Cal. 3d 1049 (1988).) Likewise, most jurisdictions prohibit evidence of post-injury measures (usually warning or design changes) intended to prevent recurrences in order to encourage the taking of "remedial measures" that increase product safety. "Reptile method" techniques employed by the plaintiffs bar misrepresent these clear legal principles when they implore juries to find liability because defendants have "failed" to make their products absolutely safe in every circumstance.

Just as the reptile method is employed throughout the litigation, the defense narrative needs to be shaped that way as well—through depositions, voir dire, and trial itself.

A defendant's first opportunity to shape its case narrative is at a deposition. The typical "reptile method" deposition focuses on establishing "safety rules" (or some similar phrase) relevant to the case, eliciting testimony that makes it appear that defendants violated the safety rule, and that this apparent dereliction of duty caused injury to the plaintiff. For example, in a products liability case, plaintiffs counsel may employ the following series of leading questions, moving from general to the more specific:

• "Safety is your top priority, right?"

•"So you would agree that it would be dangerous to manufacturer a product that exposes someone to an unnecessary risk?"

• "As a product manufacturer you have an obligation to make your products safe and free of defects, correct?

• "And it would be dangerous to continue selling a product when you know that it is unsafe and defective, right?

The first key is recognition. The responses to these questions—particularly the first ones—seem obvious and innocuous: What product manufacturer wouldn't agree that safety is its top priority or that it should make products that are safe and free of defect? However, the purpose of these questions is to get the defendant's witness to "buy in" and agree that a general safety rule exists and is important. A defense witness will quickly be trapped by more case-specific follow-up questions that seek to build on the earlier answers to demand concessions that because the plaintiff suffered an injury, the defendant must have violated the safety rule by making an "unsafe" or "defective" product, which as explained above is not necessarily consistent with the law. Almost every jurisdiction recognizes the principle that an injury alone does not establish defect, and defense lawyers should object on this basis as soon as reptile questions are asked at depositions.

Defense-side witnesses must also be prepared to challenge these questions. The first way to do that is to address the complex and nuanced issues that the law recognizes are inherent in developing products. Start early. For example, rather than simply responding "yes" to the first question above, about whether safety is the "number one priority," give a more complete answer: stressing that safety is an important goal, along with other priorities of similar importance, such as making products that work

and that are affordable. Such answers will better serve to support the defendant's case, and to avoid the reptile trap. Similarly, deponents should, to the extent possible under applicable rules, push back on the question that is asked, particularly by identifying and challenging the adjectives used in reptile questions. For example, "reptile" safety questions often include phrases like "unnecessary risk," "compromise consumer safety" and "needlessly endanger." These descriptions are vague, overly broad, and open to interpretation. Well-prepared defense witness (and counsel, by objection) should avoid buying in to the other side's world view.

Moreover, reptile questioning assumes that the law requires that a product be absolutely risk free, which is inaccurate. The law does not require that manufacturers effectively become insurers of their product, and thus, a product's benefits make certain levels of risk acceptable. Counsel may object to such assumptions as contrary to law. A prepared defense witness' response will address this important balancing of risks and benefits, explaining how manufacturers work to provide safe and effective products, but that some risks may always be present, depending on the nature of the product at issue. Further, a reptile deposition may call for defense counsel to be prepared to conduct a direct examination of the witness, something many counsel ordinarily do not do. The reptile method, however, may warrant an exception—direct questioning of the defense witness to elicit these important explanations, if the witness is not permitted to give such testimony during the cross examination. Many times these depositions are videotaped and could be used for years to come in many different litigation contexts, so it is especially important to make sure that the testimony clearly and fully presents the actual facts and considerations at issue.

A second possible way to neutralize the "reptile" is for a deponent to introduce concepts of comparative fault, third-party actions, or alternative cause. For example, in a consumer products liability case, the plaintiff's actions may be relevant to the safety question. In a medical device or pharmaceutical case, the physician's actions in choosing a particular product for the plaintiff may come in to play. Where appropriate, a defense-side witness should introduce these concepts into their responses. These responses help to shape the defense-side narrative by providing additional information about possible causes for the injuries the plaintiff experienced and diffusing the plaintiff's singular focus on the defendant.

For example, assume that the plaintiffs utilize the reptile method in questioning the engineer who designed an appliance for consumer in-home use. Consider this possible exchange compared to the one cited above:

Q: You would agree that the greater the risk of injury, the greater duty an appliance engineer owes to the consumer to provide a safe and effective product?

A: Yes and I would add that both engineers and consumers can play a role in preventing injuries. Engineers have an obligation to use their training and expertise to design safe and effective products, and that is what I/we did here. And, consumers have an obligation to use the product responsibly.

Q: You agree the engineer has the duty to be trained and qualified to design equipment that safeguards the end-users?

A: Yes, of course the qualified engineer must take into account many unknowns when making decisions to minimize risks—there is no way to eliminate all risks, unfortunately, because you just don't know how any one accident is going to happen or how any particular customer is going to use the product.

Moving Beyond Depositions: Framing the Defense Narrative at Trial

Clearly the first and foremost rule is that every deponent must testify truthfully. But, the key point here is that the "whole truth" is necessary, and not just the "yes" or "no" that the plaintiffs attorneys seek to elicit. Each witness should be prepared to tell the whole truth—the full story. Beyond witness preparation, defendants need to prepare their cases with strong narratives that both frame defect issues in their favor and diffuse the reptile tactics of plaintiffs counsel. A compelling company story is essential. A successful counter to the reptile method is to show the jurors the steps the defendant has taken to ensure that the product is safe and effective and that while there may still be some risks associated with the product for some individuals, the benefits of the product to society as a whole are substantial.

Defendants should highlight how many people at the company, in different functions and levels, are involved in making sure the product is safe in design, manufacture and use. Specifically, defendants should show that scientists, engineers, regulatory experts, and outside consultants may all be involved in developing and manufacturing a safe and effective product. Presenting the testing and research record to the jury to demonstrate all that went into the design of the product is key. Again, some of this seems very basic, but it is worth reiterating. These facts (and others depending on case-specific issues) weave together both the importance to society of the defendant's beneficial product, and reinforce that the law does not require that defendants produce a product that meets impossible standards of absolute safety for every individual.

Ultimately, the defense-side techniques used to "defeat the reptile" are not so different that what defense lawyers normally do—preparing witnesses to provide thoughtful, accurate, and limited responses and work to shape a compelling case narrative, and objecting to improper questioning. However, these small tweaks to the standard preparation techniques to specifically address "reptile tactics" can make a significant difference in how a case actually plays to a jury. When used throughout the entire life of a case, these defense-side techniques unravel the plaintiffs' ability to paint the defendant as the sole bad actor in a black-and-white world.