WINSTON & STRAWN LLP

BLOG

Combating Reptilian Tactics

NOVEMBER 26, 2024

“Reptile theory” is a litigation tactic used by plaintiffs’ lawyers to appeal to a jury’s survival instincts by casting defendants as threats to community safety. Popularized by Don C. Keenan and David Ball in their book, *Reptile: The 2009 Manual of the Plaintiff’s Revolution*, it builds on the “triune brain” neuroscience theory, which posits that the human brain is made up of three regions of increasing evolutionary complexity. The first, and most primitive, is the reptilian brain, which governs instinct and survival. Second is the paleomammalian brain, which governs emotion and socialization. Third, and most advanced, is the neomammalian brain, governing language, logic, planning, and reasoning.

Reptile-theory tactics target the first—jurors’ reptile brain self-preservation instincts—and encourage them to see the courtroom as a “safety arena,” safety as the “purpose of the civil justice system,” and “fair compensation” as the best means to diminish “danger within the community.” *Estate of Richard McNamara v. Navar*, 2020 U.S. Dist. LEXIS 70813, at *4 (N.D. Ind. Apr. 22, 2020) (quoting *Reptile* at 27, 29-30). This framing primes juries to view a defense verdict as “further imperil[ing] them,” and a verdict for plaintiffs as “mak[ing] them safer.” *Id.* at *4-5 (quoting *Reptile* at 39). Plaintiffs’ lawyers do this by first establishing general safety rules, different from the legal standard of care, then attempting to show that the defendant’s actions violated those rules. They argue that, in doing so, defendants endangered the entire community, not plaintiffs alone.

One of the earliest judicial discussions of reptile theory came in the California case *Regalado v. Callaghan*, a negligence and premises liability action stemming from a propane pool heater explosion. After a jury verdict for the plaintiff, the defendant argued on appeal that plaintiff’s counsel had inappropriately “urg[ed] the jury to base its verdict on protecting the community.” 207 Cal. Rptr. 3d 712, 725 (Ct. App. 2016). In his closing argument, plaintiff’s counsel told jurors: “You are the conscience of this community. . . . You are going to make a decision [about] what is right and what is wrong; what is acceptable, what is not acceptable; what is safe, and what is not safe.” *Id.* He told them, “[t]hese courtrooms, these courthouses, exist for one reason: It’s to keep the community safe. Period. That is the sole function of courtrooms. . . . [I]n the civil end, you, the jury, tells the wrongdoer, ‘You are going to compensate the person you hurt . . . . If you do this stuff in our community, you are going to pay.’” *Id.* The Court of Appeal concluded that these comments were improper, but too brief to be prejudicial.

A couple of years after *Regalado*, the Kansas Court of Appeals addressed reptile theory in a negligence case involving a car accident. The court ultimately found the record on appeal insufficient to allow proper consideration of

the plaintiff's argument that the trial court erroneously excluded reptile-theory evidence. *Perez v. Ramos*, 2018 Kan. App. Unpub. LEXIS 825, at *27 (Kan. Ct. App. Oct. 26, 2018). However, it provided a helpful summary of the tactic:

> [T]his theory begins with the premise that neither reason (application of the law) nor sympathy (pity for the plaintiff) will motivate jurors to award a larger verdict. The only way to return such a favorable verdict is to appeal to jurors' survival instincts (coined as their "reptilian brains"). The goal is to persuade jurors that their own safety is at risk and that a larger plaintiff's verdict will make them safer by making their community safer. When employing the reptile theory, ... a plaintiff's lawyer tries to establish several generic "safety rules"—such as rules of the road—which may or may not have anything to do with the specific facts of the case. Reliance on these safety rules then activates the survival instinct of the jurors and prompts the jury to return a higher verdict.

Id. at *25-26.

And, in 2019, the Massachusetts Appeals Court held that plaintiff's counsel could not argue in closing "that the jury through their verdict could protect the community from . . . dangers" by asking: "Are these important rules in our community? . . . Are you going to enforce them? If the rules that we talked about here, the safety rules, if those are important you need to speak to that and your verdict needs to speak to that." *Fitzpatrick v. Wendy's Old Fashioned Hamburgers of N.Y., Inc.*, 136 N.E.3d 355, 373 & n.15 (Mass. Ct. App. 2019).

Rulings on motions in limine seeking to prevent reptile-theory tactics in more recent cases have varied. Some courts have shown willingness to grant motions precluding plaintiffs from utilizing reptile theory. In *Griffin v. Pet Sense, LLC*, for example, an Arkansas district court granted defendants' motion in limine, holding that plaintiffs' counsel could "not make any improper 'reptile' argument that jurors must protect themselves and the community by punishing Defendants" without much analysis. 2024 U.S. Dist. LEXIS 67284, at *13 (E.D. Ark. Apr. 12, 2024). In their motion, defendants extensively quoted *Reptile* to spell out how plaintiff's counsel might try to redirect the jury's focus from the applicable standard of care or level of proof to legally unmoored concepts of safety. They argued that any questions or statements employing these tactics would be irrelevant, unfairly prejudicial, and misleading to the jury, and therefore impermissible under the rules of evidence.

Similarly, in a short ruling, a Florida trial court prohibited plaintiff's counsel "from posing 'Reptile Theory' questions and submitting 'Reptile Theory' evidence and argument, including questions, evidence and argument about the general safety of the community." *Scardasis v. Wal-Mart Stores E., L.P.*, 2023 Fla. Cir. LEXIS 4411, at *1 (Fla. Cir. Ct. Apr. 6, 2023). The *Scardasis* defendants pointed to a pattern of deposition questions by plaintiff's counsel focused on safety to demonstrate that the plaintiff would likely rely on reptile theory at trial and cited the growing body of caselaw finding these tactics impermissible. Additionally, they argued that reptile-theory arguments would encourage the jury to disregard Florida's standard jury instructions, which direct juries to reach a verdict based solely on the evidence and the law, and not on bias or fear.

However, other courts have declined to preemptively rule on reptile theory in pretrial motions. In *Tijerina v. Alaska Airlines, Inc.*, the plaintiff argued that defendant's reptile-theory motion in limine was "broad and vague," and that she could not pursue her hostile-work-environment claim without necessarily referencing concepts of workplace safety. 2024 U.S. Dist. LEXIS 12952, at *27 (S.D. Cal. Jan. 23, 2024). The court concluded that the issue was better addressed through trial objections, as the motion was broadly targeted and left unclear "exactly what arguments might fall" within its scope. *Id.* at *27-28.

***

A decade and a half after publication of the book on reptile strategy, the tactic is as popular as ever, but the balance of recent court decisions favors exclusion. To combat reptile tactics, defendants should identify them early in the litigation to build a strong record for exclusion at trial.

DISCOVERY:

- Identify and resist document requests seeking information on irrelevant adverse events, products, policies, and procedures

- Carefully analyze the scope/timeframe of plaintiffs' requests, including requests for documents after the incident, and flag the plaintiffs' tactics early in the case
- Identify and produce documents that support the company's safety story

DEPOSITIONS:

- Prepare witnesses for vague, broad, leading questions on safety "rules" and "duties"
- Witnesses should also be armed with the facts so that they can identify misleading questions

MOTIONS (USUALLY MOTIONS IN LIMINE):

- Motions should be specific, targeted, and reference concrete examples of reptile tactics from depositions

TRIAL:

- Object, request curative instructions, and otherwise be sure to preserve the appellate record
- Early in the case identify the company witness that can address plaintiffs' reptile safety themes at trial

5 Min Read

Authors

Matthew Saxon

Lily Klein-Evans

Related Capabilities

Litigation/Trials

Product Liability & Mass Torts

Related Professionals

Matthew Saxon

Lily Klein-Evans

This entry has been created for information and planning purposes. It is not intended to be, nor should it be substituted for, legal advice, which turns on specific facts.

© 2024 Winston & Strawn LLP.