Legal Arguments for Your Pretrial Motions

Keep Reptile Theory out of the Courtroom

By David R. Kott, Natalie H. Mantell, and Meghan McSkimming

As defense attorneys, we need to expose the reptile theory. We need to educate the judiciary as to why these tactics are improper before trial so that jurors decide cases based on facts, not fear.

To attorneys who defend personal injury or product liability claims, reptile theory is all too familiar. Plaintiffs' counsel across the country have used this tactic during trial to elicit an emotional "fight or flight" response from jurors to invite them to decide cases based on their desire to protect themselves, their loved ones, or the larger community from danger, instead of the evidence presented and the law governing the claims at issue. Put another way, reptilian tactics cause jurors to make decisions using the part of the brain used to survive, rather than the part used for intelligent thought.

Much has been written about defending against this strategy during opening statements and closing arguments, and through witness examination, but little has been written about using legal arguments to prevent these tactics from entering the courtroom in the first place. As defense attorneys, we need to expose the reptile theory. We need to educate the judiciary why these tactics are improper *before trial* so that jurors decide cases based on facts, not fear. This article offers some legal arguments that defense attorneys can include in pretrial motion practice to keep reptile theory out of our courts of law. Because these arguments are based on state law, and reading a fifty-state survey is a drag, we have provided key *American Law Reports* articles, federal rules, and a few cases as resources for you to make the same arguments using the applicable law

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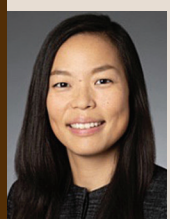

from your own jurisdiction.

Reptile Theory in a "Nutshell"

The reptile theory, first articulated by David Ball and Don C. Keenan in their book, *Reptile: The 2009 Manual of the Plaintiff's Revolution*, is based on the idea that humans have a primitive portion of the brain, similar to reptiles, that is conditioned to pursue safety and survival. Plaintiffs' attorneys attempt to influence the jury's decisions, and hopefully achieve a successful verdict, by speaking to that "reptilian" portion of the jurors' brains. Some reptilian arguments paint the defendant as hazardous, dangerous, or as a menace to society. Others are more subtle, but they can still affect the jury's ability to remain impartial. For example, plaintiffs' counsel may argue that a defendant failed to heed a "red light" or "stop sign" during product development. Counsel may also use "we" or "us" to connect the jury with the plaintiff (or even counsel), and to distance themselves from the impliedly dangerous defendant.

Some trial courts have resisted precluding the use of reptile tactics pretrial because this theory can be viewed as obscure. *See, e.g.*, *Phillips v. Dull*, No. 2:13-cv-384-PMW, 2017 U.S. Dist. Lexis 90020, at *7 (D. Utah June 12, 2017) ("With regard to arguments based on the 'reptilian brain,' the court finds that Defendants have not shown with sufficient particularity what Plaintiff's counsel should be precluded from saying at trial."); *Dorman v. Anne Arundel Med. Ctr.*, No. MJG-15-1102, 2018 U.S. Dist. Lexis 89627, at *17 (D. Md. May 30, 2018) (denying the defendant's motion because it "is premature and presents vague challenges to Plaintiffs' style of argument rather than to any evidence that Plaintiffs intend to introduce").

However, in a recent decision in the Northern District of Indiana in a wrongful death case, after a fatal trucking accident, the defendants successfully moved for a protective order to prohibit the plaintiff's attorneys from asking reptilian questions ("i.e., questions about the existence of and purpose for alleged 'safety rules'") during the company witness deposition. *Estate of Richard McNamara v. Navar*, No. 2:19-cv-109, 2020 U.S. Dist. Lexis 70813, at *1–2, *5 (N.D. Ind. Apr. 22, 2020). The defendants argued that such questioning would be used to "create confusion around the defendants' applicable duty of care by attempting to replace it with safety rules" and that it lacked "any tangible connection to the scope of permissible discovery." *Id*. at *2, *5. In granting the defendants' motion, the court observed that the plaintiff merely made conclusory assertions that the line of questioning could yield discoverable information without indicating what evidence was sought and that the plaintiff failed to address issues raised in the defendants' motion, such as how reptile theory questions or questions that the plaintiff's counsel previously asked in a related deposition would lead to discoverable information.

Nevertheless, in light of the general dearth of precedent explicitly addressing reptilian arguments and some courts' unfamiliarity with the theory, invoking familiar legal arguments, such as seeking the exclusion of "golden-rule" arguments, speculation, evidence that will lead to juror confusion, and character evidence, may be helpful in a motion to bar reptilian tactics.

Golden-Rule Arguments

"Golden-rule" arguments ask jurors to imagine themselves, a loved one, or members of the community in the plaintiff's shoes and to render a verdict from that personal, emotionally driven perspective.

Courts preclude these arguments due to their prejudicial effect on a defendant's right to a fair trial because such tactics may persuade jurors to decide the case based on sympathy for the plaintiff, or prejudice or bias against the defendant, rather than based on the evidence and the law. *See* 33 Fed. Proc., L. Ed. §77:268 (2019). *See also* Stein Closing Arguments, *Golden Rule*, §1:83 (2018–19 ed.); L.S. Tellier, Annotation, *Prejudicial Effect of Counsel's Argument, in Civil Case, Urging Jurors to Place Themselves in the Position of Litigant or to Allow Such Recovery as They Would Wish if in the Same Position*, 70 A.L.R.2d 935 §§3[a] & 3[b] (1960 & Supp. 2019); 75A Am. Jur. 2d, *Trial,* §540 (2019); Kevin W. Brown, Annotation, *Propriety and Prejudicial Effect of Attorney's "Golden Rule" Argument to Jury in Federal Civil Case*, 68 A.L.R. Fed. 333 (1984 & Supp. 2019).

Similar to the Golden Rule arguments, sometimes plaintiffs' attorneys attempt to admit evidence or make comments regarding other members of the community who may have been injured by the defendant's product. Defense counsel can move in limine to preclude reference to such hypothetical nonparties.

Many reptilian arguments are improper golden-rule arguments, and as such, defense attorneys can, based on that ground, preclude some common reptile tactics, such as referring to a large group of people who are similarly situated to the plaintiff, or arguing that the defendant's product was used to treat a common illness that the jurors or their loved ones may easily suffer from, thereby triggering an emotional reaction. For example, in one recent trial, the plaintiff's counsel argued that the defendant was "deliberately putting [people] in danger, deliberately not telling the truth to doctors and patients when they knew" that the product would harm people, and the jury should deter the defendant "from doing that in the future." In essence, the plaintiff's counsel improperly alluded to the larger community who received the defendant's product, and implied that the jury should protect all of those people rather than focusing only on the plaintiff. Such statements not only tempt jurors to disregard the evidence presented and render a verdict based on their emotional ties to the community, they also trigger the jurors' reptilian brains because they instill a sense of imminent danger or harm. Because many reptilian arguments violate the golden rule, defense attorneys can rely on that legal principle to preclude them from trial.

Speculation and Hypothetical Nonparties

Similar to the Golden Rule arguments, sometimes plaintiffs' attorneys attempt to admit evidence or make comments regarding other members of the community who may have been injured by the defendant's product. Defense counsel can move in limine to preclude reference to such hypothetical nonparties. Although, as mentioned above, there is little case law addressing reptile theory directly, there is law supporting the contention that the jury's role as fact finder requires the jurors to analyze the evidence presented, determine the credibility of the witnesses, and reach a decision on liability and damages for the specific case at bar. *See, e.g.*, Model Civ. Jury Instr. 3d Cir. 1.1, 1.5, 1.6, 1.7, 1.10, & 3.1. Furthermore, defense counsel can emphasize that a plaintiff has the burden to prove his or her claim based on the facts and evidence at issue in the case, and not based on mere speculation and conjecture. *See* Fed. R. Evid. 602 (requiring witness testimony to be based on personal knowledge). To that end, a jury should not be permitted to speculate about hypothetical injuries to anyone, particularly an unknown, unnamed person other than the plaintiff.

There are also constitutional grounds that support preclusion of such improper reptilian tactics, particularly if plaintiffs' counsel claim that such "evidence" is relevant to punitive damages. Indeed, the due process clause of the Fourteenth Amendment, which provides a check on punitive damages awards, forbids plaintiffs from suggesting at trial that other hypothetical, nonparty plaintiffs be considered. The due process clause "prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003). To ensure that a defendant is not deprived of that constitutional right, the United States Supreme Court established three guideposts under which all punitive damages awards must be analyzed: (1) the reprehensibility of the defendant's conduct; (2) the punitive-to-compensatory damages ratio; and (3) the civil penalties that are authorized for similar misconduct. *Id.* at 418 (citing *BMW of North Am., Inc. v. Gore*, 517 U.S. 559, 575 (1996)). Courts must "ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the *plaintiff* and to the general damages recovered." *Id.* at 426 (emphasis added).

These cases require that the evidence presented to the jury must have a nexus to the plaintiff's injuries. In *State Farm*, the Supreme Court explicitly forbade counsel from arguing to the jury that a defendant should be punished based on harm to the community at large. It noted,

> A defendant should be punished for the conduct that harmed the Plaintiff, not for being an unsavory individual or business. Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis.

State Farm, 538 U.S. at 423.

Similarly, in *Philip Morris USA v. Williams*, the Supreme Court held that a punitive damages award based on the jury's desire to punish the defendant for potentially harming other individuals in the community (not parties to the suit) violated the defendant's due process rights. 549 U.S. 346, 349, 353 (2007). It explained, "a defendant threatened with punishment for

injuring a nonparty victim has no opportunity to defend against the charge." *Id.* at 353–54. Furthermore, permitting punishment for potentially injuring nonparty victims will force the jury to speculate. *Id.* at 354 ("How many victims are there? How seriously are they injured? Under what circumstances did injury occur?"). Critically, "[e]vidence of actual harm to nonparties" is relevant to reprehensibility because it "can help show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public." *Id.* at 355. However, "a jury cannot go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties." *Id.*

In sum, defense attorneys can move in limine to preclude reptilian tactics by relying on law prohibiting references to hypothetical nonparties.

Juror Confusion

Plaintiffs' attorneys often use reptilian tactics to confuse and mislead the jury regarding the proper legal standards that apply in any given case, which defense counsel can move to prevent before trial. Plaintiffs' attorneys may seek to introduce evidence of internal safety rules or standards, and even deposition testimony from corporate representatives that describe a more rigorous internal standard than the law requires. Such tactics improperly suggest that the defendant should be found liable because it violated its own internal safety protocols. However, a corporation's internal safety criteria may be more stringent than the applicable industry standards or the governing regulations, which provide the appropriate parameters for a jury to determine liability. Indeed, "liability is not predicated on a company's compliance with its own credos or rules; liability is instead predicated on the legal standards of the case." *In re Ethicon Inc. Pelvic Repair Sys. Prods. Liab. Litig.,* MDL No. 2327, 2016 WL 4493685, at *3 (S.D. W.Va. Aug. 25, 2016). In *In re Tylenol (Acetaminophen) Marketing, Sales Practices, and Prod. Liab. Litig.*, a federal district court rejected an attempt by an expert witness to rely on the defendant's credo because it exceeded the applicable legal standards of care. MDL No. 2436, 2016 WL 807377, at *8 n.22 (E.D. Pa. March 2, 2016). The court in that case explained:

> The defendants' own credo should not be held out as the legal standard by which it should conduct its affairs. *See Johnson v. Mountainside Hospital*, 239 N.J. Super. 312, 323 (App. Div. 1990) ("It was potentially misleading because it attempted to exalt the exhortatory statement in the by-laws of the Hospital into the legal standard for determining whether or not the defendant physicians committed malpractice. The relevant legal standard is defined by law.").

Plaintiffs' attorneys have also relied on overgeneralized safety rules as the threshold for proving a product-defect claim. For example, they may ask overgeneralized deposition questions, or argue before the jury that "a company should not disseminate a product that can put patients at risk." Attempting to ground their case in generalized "safety rules" that appeal to jurors' emotions and fears rather than the relevant legal standards is another reptilian tactic that courts should prevent. In seeking to preclude these arguments in their pretrial motions, defense counsel can rely on the above caselaw and law within their jurisdiction that gives trial judges discretion to exclude evidence that will confuse the jury. *See, e.g.*, Fed. R. Evid. 403 (giving courts discretion to exclude relevant evidence if its probative value is substantially outweighed by the risk of juror confusion).

Character Evidence

Plaintiffs' counsel often rely on the familiar "profits over safety" theme, which stems from basic reptile theory principles. Such statements target the reptilian portion of a juror's brain by creating a false sense that the defendant is driven solely by increasing profits and will sacrifice patient safety to make more money. Defense attorneys can assert in pretrial motions that such arguments amount to character evidence, which is typically inadmissible to prove liability under the Federal Rules of Evidence. *See* Fed. R. Evid. 404. Indeed, character evidence is not admissible to prove specific conduct, except when evidence of a person's character or trait of character is an element of a claim or defense. *See, e.g.*, *Am. Nat'l Watermattress Corp. v. Manville*, 642 P.2d 1330, 1336 (Alaska 1982) (citing Alaska R. Evid. 404 & 405(b)) (holding that the trial court erred when it admitted evidence of the defendant's postaccident conduct and rejecting the argument in support of admission as an improper "attempt to use character evidence to prove specific conduct"). Particularly in product liability cases, a corporate defendant's character trait has no bearing on the plaintiff's claims and thus would only serve to confuse the jury and prejudice the defendant. *See, e.g.*, *In re DePuy Orthopaedics, Inc., Pinnacle Hip Implant Prod. Liab. Litig.*, 888 F.3d 753, 784–86 (5th Cir. 2018); *In re Testosterone Replacement Therapy Prods. Liab. Litig. Coordinated Pretrial Proceedings*, MDL No. 2545, 2017 WL 2313201, at *2–3 (N.D. Ill. May 29, 2017) (citing Fed. R. Evid. 404(b)) (excluding "evidence of [the defendant's] alleged improper conduct with respect to… another of its drugs [as] inadmissible evidence of [the defendant's] corporate character").

Litigation Risk Mitigation: A Call to In-House Counsel

In-house counsel have a unique opportunity to prevent plaintiffs' attorneys from relying on reptilian arguments, particularly those that attempt to transform internal corporate policies and procedures, sales training materials, and other product-related materials into evidence of the applicable legal standards. Long before litigation ensues, in-house counsel have the ability to advise their business clients to track industry standards and governing regulations as closely as possible in those internal documents. If there is a desire to create more stringent requirements, as often occurs, language can be included to make clear that the company is going above and beyond what is required. Then, if litigation ensues and, despite defense counsel's efforts, a judge allows the plaintiff's counsel to rely on these documents to make reptilian arguments, defense counsel can rely on the very same evidence to assert that the company does care about safety and wants to do the right thing to help people. Having these types of statements in the documents themselves lends credibility to defense counsel's arguments, enabling jurors to feel safe, reject their emotional response, and use the intelligent portion of their brains to decide the case—hopefully in favor of the defendant. FD