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BEWARE THE REPTILE: ANECDOTAL EVIDENCE THAT THE REPTILE THEORY IS "ALIVE AND WELL"

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INTRODUCTION

A not-so-new but still dangerous theory of liability against defendants has developed over the last several years called "The Reptile Theory." There have been numerous articles written explaining the theory, its effect on tort litigation and, in turn, offering conceptual and specific responses and defenses.[1] This paper is not presented in that vein, as an exhaustive analysis of the Reptile Theory and how to beat it. Rather, this paper attempts to concisely outline the theory and then provide some actual case-specific examples of how the Reptile Theory is presented and developed throughout a case, as here, in a medical malpractice case. *Smith v. Yasim,* DeKalb County, Illinois: Case No. 2011 L 25, tried to verdict in 2016. (Deposition and trial passages below in quotes are case specific to the *Smith* case.)

I. OVERVIEW OF "THE REPTILE THEORY"

The defense bar has been battling what is known as "the Reptile Theory" since David Ball (a jury research specialist and trial consultant) and Don Keenan (a highly skilled plaintiffs' attorney) authored *Reptile: The 2009 Manual of the Plaintiff's Revolution*. The theory is based on the belief in what the authors describe as:

> **Major Axiom:** When the Reptile sees a survival danger, even a small one, she protects her genes by impelling the juror to protect himself and the community.

David Ball & Don Keenan, REPTILE: THE 2009 MANUAL OF THE PLAINTIFF'S REVOLUTION, 17 (Balloon Press 2009).

This trial tactic is an attempt to manipulate jurors by playing on their fears.[2] In essence, the theory works to trigger survival instincts of a juror who will then view evidence in such a manner as to promote community safety as a whole and, therefore, their own safety and survival.

This theory pushes the jury to focus on the acts of the defendant rather than the specific facts surrounding the plaintiff's injury or on sympathy. As such, plaintiff's counsel works to demonstrate to a juror that the alleged negligence in question could happen to the juror or a loved one next time. Likewise, counsel claims the negligence at hand may even result in a larger harm in the future. To play up this strategy, Ball and Keenan have written an entire chapter devoted to

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[1] Bill Kanasky, Jr. & Ryan A. Malphurs, *Derailing the Reptile Safety Rule Attack: A Neurocognitive Analysis and Solution*, COURTROOM SCIENCES 3 (2015), http://www.iadclaw.org/assets/1/7/Reptile_Theory_2015_Trial_Academy.pdf.

[2] *See* Stephanie West Allen, Jeffrey M. Schwartz & Diane Wyzga, *Atticus Finch Would Not Approve: Why a Courtroom Full of Reptiles Is a Bad Idea*, THE JURY EXPERT (May 1, 2010), www.thejuryexpert.com/2010/05/atticus-finch-would-not-approvewhy-a-courtroom-full-of-reptiles-is-a-bad-idea/.

the "small case" asserting that "[t]o the Reptile, the smallest case is not small, because whatever harm the violation caused can cause massive harm next time. The difference between a minor injury and a fatality is just luck." Ball*,* at 225.

This philosophy seems like overreaching when looking from the outside in, but it certainly seems to be working. Currently, Keenan and Ball's website claims that this strategy has resulted in $7.3 billion in verdicts and settlements. http://reptilekeenanball.

II. THE REPTILE THEORY – WHAT IS IT?

The theory grew out of the 1960's work of neuroscientist Paul MacLean, who believed there were three parts of the brain which reflect various stages of evolution. *See* Ann Greeley, *A Brief Primer on the Reptile Theory of Trial Strategy: Plaintiff Psychology and the Defense Response*, 2015 Section Annual Conference, American Bar Association. The brain consists of:

(a) The Reptile complex which is concerned with survival instincts;
(b) The paleomammalian complex (limbic system) which involves emotion and reproduction; and
(c) The neomammalian complex (neocortex) which involves logic and planning.

The "Reptile complex" of the brain is where Ball and Keenan focus in order to develop the Reptile Theory. This part of the brain controls life functions, such as breathing and hunger, or, in other words, functions of survival, and it overpowers the cognitive and emotional parts of the brain when one's life becomes threatened. The theory attempts to "maximize 'survival advantages' and minimize 'survival dangers'." *See* David C. Marshall, *Lizards and Snakes in the Courtroom*, FOR THE DEFENSE, April 2013, at 64, 65.

To accomplish this, the plaintiff, using the Reptile Theory, creates safety rules to measure the conduct of the defendant in an effort to demonstrate that the defendant violated those rules, which, in turn, subjected the plaintiff and his surrounding community to needless danger. Ball and Keenan tell "those who wear the white hats" or, in other words, "plaintiffs' attorneys" that the safety rules that they develop must prevent danger, must protect people (not just the plaintiff) in a wide variety of situations, 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 a defendant to "agree with – or reveal himself as stupid, careless, or dishonest for disagreeing with." Ball, pp. 52-53. To determine whether or not a defendant's act was negligent, 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.

Keenan and Ball's Reptile Theory allows the plaintiff's counsel to argue that a doctor, company, manufacturer, truck driver, or any defendant is not allowed to needlessly endanger the public. "To spread the 'tentacles of danger' as widely as possible, the authors believe that every case must have an 'umbrella rule,' which is the widest general rule violated by the defendant and one to which every juror can relate." Marshall, at 65. After the umbrella is opened, the theory is used to develop specific safety rules that are directly tied to the defendant's conduct. *Id.*

In essence, the Reptile Theory is a version of the Golden Rule argument which asks a juror to put himself in the shoes of the plaintiff. Obviously, Golden Rule arguments are typically not admissible at trial, as those arguments would destroy the neutrality of the jury and allow a verdict to be rendered based on personal interest and bias rather than the specific evidence at hand. The theory also plays on the passion and fear of the jury. Similar to the Golden Rule, the Reptile Theory attempts to have a jury decide a case based on the potential harms or losses that could have occurred in the community rather than the specific injury or loss the plaintiff sustained. This "community" includes the juror himself and his family members. Ball and Keenan remind their readers that "[t]he juror's decision rests on the Reptilian question of which verdict will make her safer." Ball, at 72. Likewise, "[t]he Reptile ignores tragedy because she can't do anything about it. Instead, the trial . . . is an *opportunity* for jurors to use the horror of [the plaintiff's case] as a way to make their offspring safer." *Id.* at 86.

There are experts who have responded in great detail to the underpinnings of the Reptile Theory and have challenged it aggressively. *See Debunking and Redefining the Plaintiff Reptile Theory*, an article by Bill Kanasky, Jr., Ph.D. (a neuropsychologist, jury consultant, and national expert on the Reptile Theory). In his article, Dr. Kanasky summarizes the Reptile Theory as follows:

> The Reptile theory is now well-known to the defense bar. The highlights of the theory include the following:
>
> - The "Reptile" or "Reptile brain" is a primitive, subcortical region of brain that houses survival instincts.
> - When the Reptile brain senses danger it goes into survival mode to protect itself and the community.
> - The courtroom is a safety arena.
> - Damages enhance safety and decrease danger.
> - Jurors are the guardians of community safety.
> - "[S]afety rule + danger = Reptile" is the core formula.

Bill Kanasky, Jr., *Debunking and Redefining the Plaintiff Reptile Theory*, FOR THE DEFENSE, April 2014, at 14, 16.

Dr. Kanasky goes on to explain:

> The "safety rule + danger = Reptile formula states that the Reptile brain "awakens" once jurors perceive that a safety rule has been broken by a defendant, awakening survival instincts, which results in jurors awarding damages to a plaintiff to protect themselves and society.

Kanasky, at 16.

III. HOW IS IT USED: ANECDOTES FROM THE REPTILE'S DEN

Plaintiff develops the Reptile Theory throughout the case beginning in the early stages of the case and extending all along the litigation timetable. What follows are actual anecdotal examples of how the Reptile developed her theory in a medical malpractice lawsuit where it is more difficult to prosecute a case against a doctor or hospital where "reasonable care" is the standard of conduct. In comparison to a medical malpractice action, it appears easier to prove up a Reptile case in a products liability or transportation situation where "safety" and safety rules are in existence.

In developing the Reptile Theory, plaintiff's counsel throughout the case (and as is seen in the anecdotes below) will use and continue to use the same "Reptile words":

- Safety
- Needless danger
- Unreasonable risk
- Safer conduct
- A more dangerous vs. safer option
- Accountability
- Protection
- Community

Witnesses see red flags waved when Reptile words are used. Defense counsel being alert to recognize Reptile words from the get-go and to have witnesses see red flags waving when Reptile words are used is the key in the first instance to defeating a Reptile claim.

A. The Reptile in Written Discovery/Deposition

Initially, plaintiff's counsel will attempt to develop safety rules and themes in written discovery, which would include requests to admit and at deposition. The discovery requests will be very broad and attempt to establish safety rules. Next, plaintiff's counsel will use the depositions of witnesses to establish and lock in the safety rules as the "law of the case." As such, a witness must be adequately prepared to address these lines of questioning during his or her deposition and later at trial. Plaintiff's counsel will attempt to obtain admissions from defense witnesses which agree there are broad safety rules and that certain acts expose the community to "unnecessary dangers." These questions are used to develop themes in plaintiff's case such as that (1) safety is a top priority, (2) danger and unnecessary risk are never appropriate, and (3) reducing risk is always or should always be primary goal of a defendant's conduct.

Actual questioning of a defendant (or as here, a defense expert witness) introduces Reptile questioning without warning, perhaps at the beginning or suddenly towards the end of a deposition, to wit:

BY PLAINTIFF'S ATTORNEY:

"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 safety is integral to 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 the patient's safety and physical well-being?
A. Yes.
Q. And the reason the standard of care exists is for patient safety, true?

THE WITNESS: 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.

BY PLAINTIFF'S ATTORNEY:

Q. Yes. Which is paramount that 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."

If the defense witness is not ready to defend these Reptile questions, as with the witness in the above questioning, admissions and agreement will come easily by the deponent, to the later detriment of the defense.

B. The Reptile in Expert Witness Disclosures

Once the admissions to Reptile questions are obtained in deposition, the Reptile plaintiff is now ready to release the Reptile Theory in expert disclosures:

"Dr. XXX: The plaintiff discloses Dr. XXX as an expert witness who holds the following opinion:

(a) 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 physical well-being. The reason the standard of care exists is for patients' safety, and a prime responsibility of a doctor is the safety of his patient;

(b) 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 led to the patient's death."

Note: As stated below, challenges to the patient's use of the Reptile Theory will have to be made on a legal basis. One such challenge might come at the time of the plaintiff's disclosure of expert witnesses rather than waiting to making a pretrial Motion in Limine just before trial. Such a motion would challenge the theory early and head-on, and would allow for better trial planning. An example would be entitled:

> Defendant's Motion for Protective Order and/or Motion to Strike Plaintiff's 213(f)(3) Disclosure Concerning Safety Rules, Patient's Safety, "Protecting the Patient," and Related "Safety Issues."

A Motion for Protective Order and/or to Strike would take on the plaintiff's disclosure by first outlining the essence of the Reptile Theory with specific references as to its purpose, perhaps even to quote and show examples from the Ball and Keenan publication. Specific challenges to the theory would be outlined and would include that the disclosure was:

- Nothing more than a sophisticated golden rule argument
- Was inaccurate and misleading as to the concepts of standard of care and conduct
- The purpose was to appeal to the sympathy and passions of the jury
- Causing undue prejudice

C. The Reptile in Pretrial Motions

In states where certain causes of action allow only compensatory damages and/or where there is an onerous burden to establish a claim for punitive damages, the plaintiff pursuing a Reptile Theory may file a bench brief requesting the court to allow "punitive-type" argument in the context of compensatory damages. Plaintiff's brief would look like:

> "Plaintiff's Bench Brief on the Deterrence Function of Compensatory Damages in Tort Law
>
> NOW COMES the Plaintiff and for his Bench Brief on the Deterrent Effect of Compensatory Damages in Tort Law, states as follows:
>
> PREFATORY NOTE
>
> Many attorneys and judges mistakenly believe deterrence and punishment are the same thing. This mistake comes from the common assumption that 'deterrence' only applies to punitive damages, because punitive damages are designed to both deter and punish conduct. Illinois case law is clear deterrence is not the same as punishment, and that compensatory damages are also designed for deterrence."

In such a bench brief, the plaintiff will argue that deterrence is one of the primary purposes of tort law and is not merely limited to principles of punitive damages. The plaintiff will cite to the Restatement (Second of Torts) and argue that the rules of determining the measure of damages in tort are based upon the purposes for which those actions in tort are maintainable. Those purposes are: "(a) to give compensation, indemnity or restitution for harm; (b) to determine rights; (c) to punish wrongdoers and deter wrongful conduct; and (d) to vindicate parties and deter retaliation or violent and unlawful self-help." Restatement (Second) of Torts, § 901 (1979).

The plaintiff's bench brief on deterrence will highlight that in products liability actions, the purpose of products liability law is to promote "safety" and to "deter" the manufacture and sale of unsafe products. The Reptile plaintiff will argue that "[t]he general purposes behind strict products liability are (1) to protect consumers, (2) to provide an incentive for safer products, (3) to hold manufacturers responsible for putting in the stream of commerce unreasonably dangerous products that cause injury." Hon. Michael A. Bilandic*, Workers' Compensation, Strict Liability, and Contribution in Illinois: A Century of Legal Progress?* 83 ILL. B. J. 292, 295 (1995).

Finally, the plaintiff advocating the Reptile theory will cite to case law which emphasizes, "A[n] underlying purpose of tort law is to provide for public safety through deterrence." *Madden v. F.H. Paschen*, 395 Ill. App. 3d 362, 378 (1st Dist. 2009); that in negligence actions, the primary justification for imposing liability "is to give actors appropriate incentives to engage in safe conduct." *Zokhrabov v. Park*, 2011 IL App (1st) 102672, ¶ 8. In the plaintiff's bench brief on deterrence, counsel will finally suggest he should have opportunities during trial, whether it be in jury selection, in opening statement, or in closing arguments, to question and/or argue throughout these aspects of the trial the concept that a defendant must not only respond in damages to the plaintiff if the proof is made but, in addition, should be deterred from further exercising unsafe or dangerous conduct.

In essence, by this approach, the plaintiff wants to suggest to the jury yet another improper argument, that the jury, as a keeper of the community safety, should "send a message" to the defendant with their verdict.

D. The Reptile in Jury Selection and at Trial

Plaintiff's counsel will use prejudicial *voir dire* questions in selecting a jury to trigger the Reptile portion of the brain in the jury by asking them to reflect on their own experience or that of their family members. For example, they may ask a juror what bothers them about the practice of medicine in hospitals today or whether they believe medicine is safer today with the technological advances or safer ten years ago when there was more time spent with the patient. Plaintiff's counsel uses this technique to prime the jury for his or her opening statement and trial proof.

For example, the Reptile plaintiff's attorney will set up his potential jury selection questions at the deposition of the defendant and/or the defense expert, to wit:

> "Q. Do you agree that accountability is important in patient care when a doctor does not follow the rules of care and causes harm to a patient?

A. Yes."

And then at jury selection . . . to each juror:

"Q. Do you believe a person should be accountable for his actions?"

This question to jurors is out of context without factual circumstances and is objectionable. Nevertheless, the court will usually allow it, and every juror, without question, will answer "yes." Note: In a case where plaintiff's conduct and comparative fault are obvious, the issue of "accountability" may be turned by the defense against the plaintiff.

In plaintiff's opening statement, an attempt will be made to tell a simple story to the jury that they can easily relate to rather than what the defendant typically paints as a complex defense chronology that focuses on technical science and/or medicine. Plaintiff will go so far as to establish safety rules as if "written in stone" and then argue, in closing argument, that the defendant has violated at least one of those safety rules.

Certain plaintiff's attorneys advancing the Reptile theory will subtly weave Reptile words and concepts throughout an opening statement. To the contrary, in another example, other plaintiff's attorneys blatantly set forth the Reptile theory before the jury, echoing the deposition admissions made by the defendant and/or the defense expert, to wit:

BY PLAINTIFF'S ATTORNEY:

"Q. Now, the reason that we're here today is the rules of care, the safety rules, for what apply to any physician or surgeon . . . and I'll tell you what those are . . .

Safety Rule #1: A medical doctor must never cause unnecessary danger to his patient.

Safety Rule #2: All doctors seeing a patient admitted for an infection must diagnose all possible causes to rule out the most dangerous cause for the safety of us all.

Safety Rule #3: All doctors seeing a patient admitted for an infection must take a thorough history, including reading the chart, before making a diagnosis.

Safety Rule #4: All doctors seeing a patient admitted for an infection must do a differential diagnosis before treating the patient.

Safety Rule #5: All doctors seeing a patient admitted for an infection must rule out the most dangerous cause first in doing a differential diagnosis.

> Safety Rule #6: All doctors seeing a patient admitted for an infection, when choosing a treatment plan, must choose the safest option to the patient over a more dangerous option unless there is a compelling need for the more dangerous option.
>
> Safety Rule #7: When a safer treatment option is available, a doctor must choose the safer option unless there is a compelling need to choose the more dangerous option.
>
> Safety Rule #8: All doctors seeing a patient admitted for an infection, who choose a more dangerous option over a safer one when there is no compelling need, expose the patient to needless danger.
>
> Safety Rule #9: Any doctor seeing a patient admitted for an infection, who exposes a patient to needless danger, violates the standard of care."

To preserve trial error for appeal, defense counsel must make an objection to each of these statements of "safety rules" at the risk of there being undue interruption of the plaintiff's opening statement.

And finally, in plaintiff's closing argument, the plaintiff's attorney advancing the Reptile theory attempts to bring it all together, talking about concepts of safety, rules, and protection of the community. An example of such closing argument follows:

> BY PLAINTIFF'S ATTORNEY:
>
> "So as we take a look at the two things that are presented to you for the standard of care, you have one that is the standard of care based upon the safety of the patient. That comes first. When a patient is admitted for an infection, he must be kept under the standard of care. . . . So you are the ones who are going to decide what standard of care you want for your community at XXXXX Hospital. Because you're the –
>
> DEFENSE ATTORNEY: Objection. Improper argument.
>
> THE COURT: Objection will be sustained. The jury will disregard the last comment about the community.
>
> PLAINTIFF'S ATTORNEY: You are here as the representatives to the community.
>
> DEFENSE ATTORNEY: Show my objection, Your Honor.
>
> THE COURT: Objection sustained. Counsel, move on."

As in the closing argument example here, defense counsel needs to be vigilant and ready to object to the Reptile references and argument to continue to prevent the plaintiff's attorney from "going there" (if the trial judge has granted defense motions barring Reptile references at trial) or, to make the best appellate record preserving trial error and argument for appeal (if the court has allowed Reptile comments and arguments).

IV. DEFENDING AGAINST THE REPTILE

The defense must anticipate and then battle the Reptile Theory from the beginning of the case, throughout discovery, and at trial, from pretrial motions until closing arguments.

A. At Defense Witness Depositions

Defense witnesses must be ready to hold their ground on the plaintiff's cross-examination without appearing defensive, reckless, or uncaring about safety. Of equal importance, these witnesses must be ready to "overcome" during the defense rehabilitation question after having survived the Reptile attack. While preparing for a defense witness deposition, counsel must work with a witness so that he is comfortable with questions the plaintiff will utilize to establish general safety rules which seems so basic that to disagree with them would be difficult to do. The defense witness must also be prepared to respond to plaintiff's questions which (1) establish general safety rules and then; (2) attempt to connect the defendant's specific violation to that general rule. Ball, at 209-213. To refute the Reptile, a witness must be prepped so he can be ready to explain why no rule can be applied 100 percent of the time; that while safety is always important, that the best answer to Reptile questions regarding safety is that "it depends," or that "it is important most of the time," or that "safety is definitely one of the company's concerns, along with several others." Kanasky & Malphurs. Furthermore, the defense witness must be prepared to use his deposition testimony or trial testimony to tell the jury why this case has unique facts and considerations which cannot be generalized about from a safety perspective.

Unprepared defense witnesses or those prepared who refuse to listen (those witnesses do exist) will not handle Reptile questions well, leading to admissions against interest which, if by a party, can be read directly to the jury at trial or otherwise used for impeachment on cross-examination. Examples of good and bad deposition responses to Reptile questioning might be as follows:

<u>"Bad" deposition answer</u>

BY PLAINTIFF'S ATTORNEY:

"Q. Is patient safety for you as a clinician or any other physician, an important aspect of patient's care?

DEFENSE ATTORNEY: Objection: Very general. Vague. Form. Foundation. Relevance in this context.

THE WITNESS: Safety of the patient, safety of their family, safety of my family, safety of everybody in the hospital is of paramount importance to me.

BY PLAINTIFF'S ATTORNEY:

Q. During the course of care and treatment by you as a physician, are you concerned about the patient's safety, your own patient, as to the care and treatment rendered?

DEFENSE ATTORNEY: Objection. Form. Vague. Overly broad. Irrelevant in this context.

THE WITNESS: I'm concerned about their safety in all respects.

BY PLAINTIFF'S ATTORNEY:

Q. Including their medical care, true?
A. Including everything.
Q. Including their medical care, true?"

To the contrary, the prepared defense witness who is a good listener and follows directions might better respond as follows:

"Good" deposition answer

BY PLAINTIFF'S ATTORNEY:

"Q. And you want to be as careful as possible in diagnosing a patient with lupus in light of the fact that they will receive a certain treatment regimen that they might otherwise not, correct?
A. Yes.
Q. And ACR's guideline or criteria for the diagnosis of lupus is a reasonable, reasonably safe guideline to use when attempting to diagnose or confirm the diagnosis of lupus in a patient, correct?

DEFENSE ATTORNEY: Objection. Form. Foundation. Relevance.

THE WITNESS: So I'm not sure of the word safe. It's reasonable. Absolutely reasonable. I don't know what you mean — I don't understand the word safe. If you are telling me before a patient — treats a patient with lupus you want to be as sure as you can for the diagnosis, then this is a good thing to use but there [are] again lots of exceptions."

B. At Trial

Pretrial *in limine* motions and follow-up objections at trial by defense counsel must be made that any Reptile Theory or claim is a violation of the Golden Rule, that it is a due process violation that attempts to punish a defendant for what harm he could have caused (punitive damages) rather than

the harm he actually caused the plaintiff (compensatory damages only); that it is a prejudicial argument, as plaintiff appeals to a juror's emotion or prejudice.

Echoing any defense pretrial motion challenging the plaintiff's expert witness disclosures, the defendant should again meet the Reptile issue head-on with a defense motion in limine:

> "Defendant XXXX, M.D.'s, motion in limine regarding description of standard of care with the concepts of safety, danger, needless or unnecessary risk, and similar terms."

Similar arguments as in pretrial motions would be made with respect to Reptile Theory being an end-run around the golden rule prohibition, as well as suggesting a standard of care that is vague and confusing, highly prejudicial, and contrary to established law. The motion in limine would likewise state:

> "The concepts of 'safety,' 'danger,' and 'risk' used in this fashion and out of context have no place in a medical malpractice action. The standard of care with respect to a case such as this would be defined by Illinois Pattern Jury Instruction I.P.I. 105.1 incorporating terms describing the conduct of a physician that is 'reasonably careful' under circumstances similar to these and without reference to the prejudicial terms in question. Likewise, Illinois case law suggests the possibility of a standard of care being described as how 'a reasonably well-qualified physician' would act under similar circumstances as these, again not using the prejudicial terms in question.
>
> • • •
>
> Moreover, to attempt to define the standard of care in this instance with terms such as 'needless or unnecessary danger to a patient,' or 'safer treatment option,' or 'safety of the patient,' is, in essence, injecting fear into the decision of the jury; attempting to characterize the standard of care in these prejudicial terms, in essence, attempts to put the jury in the shoes of the patient in order to decide the case on emotion and prejudice rather than on the evidence."

Plaintiff's counsel will use jury selection questions to frame the case for the jury. Therefore, the defense must be prepared to refocus the jury on the specific facts of the case they may be deciding. Furthermore, defense counsel must draft jury instructions to draw the court's attention to the fact that the plaintiff cannot be allowed to introduce a new standard of care, as the actual instructions do not contain the safety rules the plaintiff has attempted to develop throughout the case.

As with at deposition, defense witnesses must be prepared at trial to respond to the Reptile line of questioning. Witness consultants often should be used to assist in preparing a witness to ensure he or she is ready to withstand the Reptile attack.

In opening statement, with liability more likely than not to be established, one approach would be for the defense to start by emphasizing the specific facts of the case followed by defense themes

of plaintiff's own culpability and/or alternative causation which give the jurors someone or something else to blame and to rest their verdict on. But, in strong defense cases, in the case where the defense conduct is truly "reasonable," the defense opening statement should emphasize that reasonable conduct is conduct that is not written in stone or in a book of safety rules, but rather is based on judgment and discretion and years of experience and development over time. In the instance where the defendant's conduct is defensible as to its reasonableness, the defense can also focus on an alternative cause of injury while only carefully, with discretion, highlighting the plaintiff's own negligent conduct.

Focused case themes are emphasized throughout the defense examination of witnesses, leading to closing arguments, again emphasizing that: (1) The court, in its instructions, will determine the law that the jury should apply to the evidence at hand, not from some made-up set of rules orchestrated by the plaintiff's witnesses; (2) that the jury's job is to rule on the evidence and issues at hand without outside influence; and (3) that reasonable conduct, rather than safety or danger or unnecessary risk, is the measure by which the defendant's conduct is measured.

V. BOTTOM LINE: PREPARATION, PREPARATION, PREPARATION

The key to defending any Reptile attack is through detailed and repetitive preparation. The newness of the Reptile Theory and the simplicity of its presentation are typically unknown to defense witnesses and, as such, are awkward to respond to without having been prepared to do so. It is often considered that a qualified, well-spoken expert or a meticulous, thorough closing argument wins the day for the defense at every jury trial. While those aspects of a case are important in every trial, the key to the successful defense of a Reptile case is the totally prepared defendant ready to slay the advancing Reptile. Deposition preparation meetings (more than one), practice cross-examination sessions with the defendant, use of witness consultants, detailed repetitive trial preparation meetings with the defendant, and pretrial motions counteracting the Reptile Theory are essential tools to defeat the Reptile.

In summary then:

- Develop case themes early and incorporate themes into motion and discovery responses to the Reptile Theory.
- Be Ready and Anticipate Early: Anticipate objections at deposition and then and at trial; consider motions to preempt as early as plaintiff's expert witness disclosure.
- Be Proactive: File pretrial motions to bar reference and use of the Reptile Theory and Reptile words.
- Train: Have defense witnesses ready to respond to Reptile questions at deposition by educating and using the correct words, phraseology, and case themes.
- Practice: Make every deposition prep session include reference to Reptile questions; conduct mock cross-examinations of defense witnesses before deposition and trial.
- Get Help: Use witness consultants in the appropriate case to give insight into and train witnesses to respond to Reptile inquiries.