Legal Herpetology

Lizards and Snakes in the Courtroom

By David C. Marshall

What every defense attorney needs to know about the emerging plaintiff's reptile strategy.

In 2009, attorney Don Keenan and jury consultant David Ball authored a book on trial strategy for the revolutionary plaintiff's lawyer, entitled *Reptile: The 2009 Manual of the Plaintiff's Revolution*. Since then, the authors have promoted the book and the underlying trial strategy to plaintiffs' lawyers across the country through their website, trial blog, seminars, and workshops offered exclusively to plaintiffs' lawyers. Additionally, the authors now offer more books and informative DVD sets explaining how to incorporate the "reptile" strategy into witness preparation, voir dire, opening statements, and trials. Currently, the website claims that the "reptile" strategy has resulted in more than $4.4 billion in verdicts and settlements across the country.

As time passes, more and more plaintiffs' attorneys have begun incorporating the "reptile" strategy in depositions and trials. Personally, I have seen "the reptile" at work, and perhaps you have too, although you may not have realized it at the time. I also recently attended a seminar in which Keenan spoke of "the reptile" and offered insight to plaintiffs' lawyers on how to use it to defeat "the black hat" defense attorneys. This article will provide a general overview of the "reptile" strategy as described by Keenan and Ball, discuss some scenarios under which opponents may use it in your cases, and possible ways to counteract this new wave strategy.

What Is the Reptile?

In the 1960s, neuroscientist Paul MacLean formulated a model of the brain consisting of three parts: the reptilian complex, the paleomammalian complex, and the neomammalian complex. MacLean proposed that the three parts developed through evolution, and he coined the phrase "triune brain." The reptilian complex, also known as the R-complex or reptilian brain, includes the brain stem and the cerebellum and is the oldest part of the brain. It also serves as the starting point for the "reptile" trial strategy. *See* David Ball & Don Keenan, *Reptile: The 2009 Manual of the Plaintiff's Revolution*, 13–14 (Balloon Press, 2009).

According to Keenan and Ball, the reptilian brain controls our basic life functions, such as breathing, hunger, and

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survival, and instinctively overpowers the cognitive and emotional parts of the brain when those life functions become threatened. *Id.* at 17. It thrives on evolution and therefore maximizes "survival advantages" and minimizes "survival dangers." *Id.* One stated goal of the "reptile" trial strategy is to frame each case in a way to shift each juror's brain into survival mode when he or she decides a case. *Id.* Thus, the "major axiom" repeated throughout *Reptile* is "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." *Id.* at 17, 19, 73.

Keenan and Ball argue that "the reptile" has been a defense attorney's tool for years, referring to the alleged chilling effect of tort reform on juries in recent times, from a plaintiff's perspective. Specifically, they posit that our society's increase in litigation makes jurors instinctively believe that their own survival is threatened—beliefs that lawsuits undermine the quality and availability of health care, make products more expensive but less safe, and negatively affect the economy. Ball & Keenan, *supra*, at 25. To overcome those obstacles, Keenan and Ball cite individual and community safety as the antidote, reasoning that jurors will prefer a verdict that enhances safety despite any tort reform bias they may have. *Id.* at 27–30. Thus, to employ the "reptile" strategy, a plaintiff's attorney must show "the immediate danger of the kind of thing the defendant did, and how fair compensation can diminish that danger within the community." *Id.* at 30.

To determine if a defendant's actions involved negligent conduct or community danger, Keenan and Ball outline three questions in *Reptile* that a plaintiff's attorney should answer for a jury:

- How likely was it that the act or omission would hurt someone?
- How much harm could it have caused?
- How much harm could it cause in other kinds of situations?

Ball & Keenan, *supra*, at 31–34, 38. The "reptile" strategy proponents believe the answers to these three questions give a jury the necessary information to determine if a defendant acted negligently because they show that "the tentacles of danger" extend beyond the single plaintiff and throughout the entire community. *Id.* at 35. The authors argue that the valid measure of damages is not the amount of harm actually caused in a case, but instead the maximum harm that a defendant's conduct could have caused. *Id.* at 33, 225, 232.

After establishing the danger to the community, the next step of the "reptile" strategy is to demonstrate to a jury that it has the power to improve everyone's safety by rendering a verdict that will reduce or eliminate the dangerous conduct. *Id.* at 38–39. Reducing danger in the community facilitates survival, which awakens the reptilian part of the brain in each juror and overcomes logic or emotion. *Id.* at 45. Theoretically, implementing this strategy gives jurors a compelling reason to rule in favor of a plaintiff over the defendant despite what their logic might tell them.

How Is the Reptile Strategy Used in Litigation?

Drawing from Patrick Malone and Rick Friedman's book, *Rules of the Road*, Keenan and Ball create the following formula for employing the "reptile" strategy:

Safety Rule + Danger = Reptile

Ball & Keenan, *supra*, at 51. In addition to demonstrating the danger to the community, the "reptile" strategy also requires the use of "safety rules" and urges plaintiffs' lawyers to frame cases so it appears that every defendant *chose* to violate a safety rule. *Id.* at 51–53. Indeed, the book stresses that "[e]very wrongful defendant act derives from a choice to violate a safety rule." *Id.* at 54. Keenan and Ball outline six characteristics that each safety rule must have to promote the "reptile" strategy:

- It must prevent danger.
- It must protect people in a wide variety of situations, not just someone in the plaintiff's position.
- It must be in clear English.
- It must explicitly state what a person must or must not do.
- It must be practical and easy for someone in the defendant's position to have followed.
- It must be one that the defendant will either agree with or reveal him or herself as stupid, careless, or dishonest for disagreeing with.

Id. at 52–53.

Keenan and Ball state that implementing the "reptile" strategy begins in discovery by seeking admissions from a defendant either in written discovery or depositions. Ball & Keenan, *supra*, at 54–55. The admissions establish first that a defendant agrees with the safety rule and second that it controls the verdict because a violation endangers everyone. *Id.* Again, the ultimate goal during a trial involving the "reptile" is to (1) have the jury go beyond the level of harm or damages caused in the case at hand, (2) consider the maximum potential harm the conduct could have caused within the community, and (3) believe the defendant has endangered the community by its conduct and unwillingness to accept responsibility. *Id.*

One stated goal of the "reptile" trial strategy is to frame each case in a way to shift each juror's brain into survival mode when he or she decides a case.

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. Ball & Keenan, *supra*, at 55. The classic example provided by Keenan and Ball is the rule that "a [_____] is not allowed to needlessly endanger the public." *Id.* A plaintiff's attorney can fill in the blank with whatever best suits his or her case—a company, doctor, manufacturer, truck driver, or anyone applicable to the specific type of case. After establishing the umbrella rule, the next step for implementing the "reptile" strategy is to create case-specific rules directly applicable to the conduct attributed to a defendant. *Id.* at 58.

For instance, a case-specific rule in a trucking case could be that a truck driver must adhere to the federal motor carrier safety regulations, or he or she needlessly endangers the motoring public. From there, Keenan and Ball recommend having

the plaintiff's experts analogize the case-specific rules to other familiar situations to demonstrate how violations can affect everyone in the community, including the members of the jury who have no knowledge of the trucking industry. *Id.* at 58–59. Moreover, the authors suggest attempting to elicit the same admissions and analogies from the defense experts. *Id.* at 59. Overall, the strategy works downward from the general umbrella rule to the case-specific rules to awaken "the reptile" in the jury. In the above trucking example, rules flowing from the case-specific rule could include the multitude of ways that a truck driver can violate the applicable federal regulations. This primes the jury to return a verdict for the plaintiff when the plaintiff's attorney presents evidence that the defendant truck driver violated one of the rules, thereby needlessly endangering the public and subjecting the community to extremely serious potential harm.

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Keenan and Ball also endorse the "reptile" strategy in cases that turn on the standard of care applicable to the defendant. Indeed, *Reptile* devotes an entire chapter specifically to medical malpractice cases. Ball & Keenan, *supra*, at 243–59. Because everyone agrees with the general rule that "doctors are never allowed to needlessly endanger their patients," the "reptile" strategy frames medical malpractice cases so that any medical decision other than the absolute safest choice for a patient constitutes negligence. *Id.* at 62–63. It boils the entire case down to the simple theory that "the only allowable choice is the safest available choice" because any other choice needlessly endangers a patient. *Id.* at 64–66. In other negligence cases, the book suggests that the level of danger should dictate the required level of care, meaning the more dangerous the conduct, the more care that is required. *Id.* at 66–67.

To use the "reptile" strategy to connect with a jury, Keenan and Ball also explain that plaintiffs' lawyers need to know and to use "codes" without actually referring to them in the presence of a jury. Ball & Keenan, *supra*, at 75. The codes referred to in the book do not relate to the cognitive understanding of what something is; rather, they relate to "the way in which the Reptile relates to it." *Id.* at 75. In personal injury cases, the primary code postulated in *Reptile* is "Good Health = Mobility" because the "lack of mobility vastly outweighs the other consequences of injury, such as pain." *Id.* at 78. Because "reptiles," similar to humans, associate the ability to move with survival, it is the code for employing the "reptile" strategy in personal injury cases. *Id.* The authors suggest additional codes based on their own jury research, such as "Hospital = Processing Plant," "Nurse = Caregiver," and "Humiliation = Outcast." *Id.* at 79–92, 98. By implicitly persuading jurors to make these associations on their own, the "reptile" strategy takes full effect.

Additionally, Keenan and Ball recognize that jurors may have conflicting codes. For instance, the code for some jurors may be "Doctor = Hero," yet for others it may be "Doctor = Assembly-line Worker." Ball & Keenan, *supra*, at 92–93. Thus, the authors encourage using both codes when possible to appeal to the maximum number of jurors. *Id.* at 93.

Coming full circle, the "reptile" strategy requires creating safety rules and demonstrating that a defendant violated the rules, subjecting a plaintiff and the surrounding community to needless danger. To accomplish the objectives of the strategy, Keenan and Ball encourage plaintiffs' lawyers to make the theme of each case about "harms and losses" to keep the reptilian brain awake so it will influence the verdict and its size. Ball & Keenan, *supra*, at 101–12. Further, they argue that the proper measure of damages is the *maximum* "harms and losses" that a defendant *could* have caused rather than the actual damages in the case, which may be significantly less. *Id.* at 33, 225, 232. The ultimate goal of implementing the strategy is to obtain a verdict that a jury believes will be the safest decision for the community, including each individual juror. *Id.* at 99. Thus, in closing, the lawyer using this strategy must show a jury how the dangers presented by a defendant extend beyond the facts of a case and affect the surrounding community so the entire case boils down to community safety versus danger. *Id.* at 145.

Watch Out for Lizards and Snakes

Obviously, opening statements and closing arguments are critical to implementing the "reptile" strategy. Indeed, they are the lawyer's chance to define the theme of a case and link every aspect of a trial back to the safety rules, codes, potential harms and losses, and overriding theme of community safety versus danger. I first encountered the "reptile" strategy while hearing the following opening statement:

> Cases like this examine harms and losses. Harms and losses. If somebody breaks a rule, that can cause harm. Harm leads to losses. We can talk about it in dollars and medical bills and therapies. At the end of the day that's what we're talking about. When a company like [the defendant] breaks the rules, it's no different. They break the rules, people get hurt.
>
> I can tell you, ladies and gentlemen, one of the things I've been instructed to tell you is we don't want sympathy. You see, this case is about hope and faith. It's not about sympathy. [The plaintiffs have] gotten this far. They're strong. It's about justice. All too often we ignore or easily forget other people's problems. Not this time. This is going to be a very large verdict because this community is going to recognize—[sustained objection]
>
> We're going to present the facts, and at the end of this case, you're going to recognize that a verdict at the end of this case will speak to the resilience of hope and faith. You're going to recognize that the harm caused by broken rules is real,

and they are deserving of our time and attention.

Before a trial, deposing a defendant offers a plaintiff's counsel a prime opportunity to obtain agreement by the defendant to the safety rules that will ultimately dominate the plaintiff's attorney's trial strategy. Indeed, shortly after hearing the above opening statement, I sat through a Rule 30(b)(6) deposition of a co-defendant car dealership in another case and witnessed a different plaintiff's attorney use the "reptile" strategy:

- Does [the defendant] agree that a car dealership, through its employees, must follow the manufacturer's policies and procedures when repairing a vehicle under warranty?
- Does [the defendant] agree with the statement that if a dealership, through its employees, fails to follow the car manufacturer's policies and procedures when repairing a vehicle, and that failure to do so causes injury to a customer, then the dealership is responsible for harms and losses caused?
- Does [the defendant] also agree with the statement that, as an authorized dealership, it must follow the policies and procedures set out in the manufacturer's warranty and policy manual when a customer comes in with a vehicle under warranty and the dealership undertakes to repair the vehicle?
- And does [the defendant] agree with the statement that if it fails to follow those policies and procedures set out in the warranty and policy manual, and that failure contributes to the cause of a person's injury, then the dealership should be responsible for the harms and losses caused to that individual?
- Does [the defendant] agree with the statement that the dealership must follow the procedure set out in the workshop manual for the vehicle when attempting to perform repairs on a vehicle under warranty?
- And [the defendant] agrees that if the dealership fails to follow the procedures set out in the workshop manual for the vehicle in attempting to repair it, and that failure causes harms or losses to the customer, then the dealership is responsible for the harms and losses caused, correct?

Upon hearing these questions, I immediately knew that I needed to prepare my client, the automotive manufacturer, for similar questions, and sure enough, the following questions were asked of my client in its corporate deposition as well:

- Does [the defendant] agree that car manufacturers must make vehicles that are free from defects in materials and workmanship?
- So [the defendant] agrees that if a car manufacturer makes a vehicle that has a defect in materials or workmanship, and someone is injured because of that defect, then the car manufacturer is responsible for the harms and losses caused?
- Does [the defendant] agree with the statement that car manufacturers must make their vehicles so they operate the way the manufacturer represents they will operate?
- And if a vehicle does not operate the way in which it is represented it will operate and a person is injured, then the car manufacturer is responsible for the harm caused to that person, isn't it?

Having the benefit of hearing the reptilian styled questions to the co-defendant before my client's deposition, I was able to prepare my witness for these types of questions and have him review the earlier transcript. Ultimately, my witness answered many of the questions, "Not necessarily. That is why we have a legal system, to allow the jury to consider all of the facts and decide what caused the injury and who is responsible." Implicit in that answer is the fact that other proximate causes could account for the alleged injuries, such as the plaintiff's comparative negligence, discovery of defect and voluntary assumption of risk, improper use, misuse, or other intervening causes such as modifications, alterations, or conduct of other third-parties. After all, jurors do not decide cases in a vacuum. Rather, a jury will consider all of these other factors if they are present in the case.

Another opportunity for a plaintiff's lawyer to appeal to "the reptile" is during depositions of the retained defense experts. Indeed, another plaintiff's lawyer pursued the following questions with multiple doctors in a recent medical malpractice case:

- A doctor must not needlessly expose a patient to an unnecessary danger, true?
- A doctor should never expose a patient to such unnecessary danger, true?
- It would not be reasonable for any physician to expose a patient to unnecessary harm, true?
- That would be completely unreasonable, true?
- It would violate the Hippocratic Oath, true?
- It would violate standards of care, true?
- You learned a long time ago that doctors should not needlessly endanger a patient, true?
- It's an important rule, true?
- It should be followed by all doctors, true?
- And it is a safety rule to protect patients' interests, true?
- It protected you when you were a patient, true?
- You, as a doctor, must follow this rule, true?
- You expect other doctors to follow that rule, true?
- The rule, when enforced, ensures public safety, true?
- The rule, when enforced, prevents harm to the public, true?
- Violation of safety rules by physicians can hurt anybody, true?
- They can be hurt seriously, true?
- They can even be killed or brain-damaged, true?
- If a safety rule is broken and a patient is harmed thereby, do you believe the rule breaker should be held responsible for the harm that was caused?
- Can you give me even a single example of a situation where a physician violates a safety rule, thereby causing harm to the patient, where you believe the physician should not be held responsible for the harm?
- Safety rules should be enforced, true?
- If safety rules are not enforced, those rules lose their value as a rule, true?
- If a doctor has more than one course of action to choose between, the doctor should choose the one that is safest for the patient, true?

- A doctor must not choose a dangerous course of conduct if a safer choice exists, true?
- If 50 percent of the doctors in a given town needlessly endanger the patient that they are caring for, does that make it reasonable and prudent for other doctors in that community to needlessly endanger their patients?

You should prepare your client and experts to handle these types of questions designed to create testimony that will appeal to the reptilian brain, perhaps by invoking a risk-benefit analysis.

You should prepare your client and experts to handle these types of questions designed to create testimony that will appeal to the reptilian brain, perhaps by invoking a risk-benefit analysis. After all, that analysis is the core of all medical decision making: will the potential benefit to my patient from this treatment, drug, or procedure outweigh the potential harm? For this analysis, "absolute safety" is not the criterion; rather, it is "standard of care." Have your experts explain this to debunk the plaintiff's attorney's theory that anything other than the absolute safest decision constitutes negligence. If the opposing attorney refers to the Hippocratic Oath, have your experts explain that "First do no harm" is an incomplete, and perhaps inaccurate, perversion of the oath. When surgeons make incisions, they do harm. When doctors prescribe medication, the medication can have potential harmful side effects. But doctors make those decisions for the greater good of the patient because they believe the benefits outweigh the risks. That conduct is always judged by a reasonableness standard.

Of course, attorneys can easily implement the "reptile" strategy in the simplest of automobile wreck cases as well. Similar to medical malpractice, *Reptile* devotes an entire chapter to "small cases," and much of it focuses on the maximum potential harm that a defendant could have caused. Ball & Keenan, *supra*, at 225–32. I've seen the following line of questioning in a deposition of a defendant driver in a routine automobile negligence case:

- You made a conscious decision to make the left turn when you did, correct?
- You've been driving for a long time, correct?
- You understand there are certain rules that you must follow while driving?
- What are some of the things you are supposed to do in making a left turn?
- One of the rules for driving is that you must pay attention at all times, right?
- Why are these things important?
- Could people get hurt if these rules aren't followed?
- Could people get killed?
- And you've known that since you were licensed to drive?

Hopefully, these examples demonstrate how preparing your clients, witnesses, and experts for these types of questions is critical as *Reptile* provides skeleton outlines of questions, opening statements, and closing arguments that even the least skilled plaintiff's attorney can adapt for almost any type of case. Whatever your standard witness preparation repertoire may include, add the "reptile" topic and prepare yourself and your witnesses!

You also may encounter the "reptile" strategy when you depose the plaintiff and the plaintiff's experts. According to Keenan and Ball, using the strategy to prepare witnesses for depositions gives them confidence in answering difficult questions from defense lawyers, educates them on the ultimate trial theme, and lays the foundation for the plaintiff's lawyer to implement the strategy in the opening statements. Indeed, *Reptile* devotes an entire chapter to witness preparation. Ball & Keenan, *supra*, at 189–208. The authors even offer a 6-disc DVD set outlining the seven phases of "reptile witness preparation."

Lastly, Keenan and Ball indicate in *Reptile* that attorneys can use the strategy with insurance adjusters, mediators, and even judges. *Id.* at 173–87. Likewise, they suggest using the strategy during voir dire. *Id.* at 102–08, 119–27.

How to Handle the Reptile

Every jurisdiction recognizes some version of the golden rule, which disallows any argument asking jurors to put themselves in the shoes of a party. Such arguments destroy the impartiality of the jurors and encourage them to depart from neutrality and decide a case based on personal interest and bias rather than on the evidence. Additionally, the golden rule should disallow any argument that arouses the passion or prejudice of a jury.

The "reptile" strategy appears to be a veiled golden rule argument because it seeks to have jurors decide a case not on the actual damages sustained by a plaintiff but rather on the potential harms and losses that could have occurred within the community, which includes each juror and his or her family members. Indeed, the book directly or indirectly invokes the underpinnings of the golden rule on multiple occasions by appealing to the reptilian brain of each juror:

> 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. Ball & Keenan, *supra*, at 17, 19, 73.
>
> It gives jurors personal reason to want to see causation and dollar amount come out justly, because a defense verdict will further imperil them. Only a verdict [for the plaintiff] can make them safer. *Id.* at 39.
>
> The juror's decision rests on the Reptilian question of which verdict will make her safer. *Id.* at 72.
>
> Just remember that the Reptile does not get involved unless she sees that the danger is to her, and can be meliorated. *Id.* at 80.
>
> The 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.
>
> So as with all things Reptilian, you show that the safer decision for the community (and thus the individual juror) is a fair verdict for your client. *Id.* at 99.

No Reptile can protect herself alone. She protects herself by protecting the community. The concept of "No man is an island" shows the Reptile that what's good for the community connects directly to her, individually—and is good for her. *Id.* at 149.

But the Reptile is not particularly concerned with your client. Our research revealed a different picture: the Reptile is concerned with *the Reptile*—meaning the individual juror—his world and family, their survival, and little else. *Id.* at 169 (emphasis in original).

A case framed in terms of community endangerment is Reptilian. A hospital-acquired infection case turns Reptilian when jurors see that the victim could have been anyone who walked through the doors. "Anyone" means the community. "Community" includes Juror #3 and her children. *Id.* at 170.

Jurors will do what they can to keep their communities (*i.e.*, themselves) safe when they think their efforts will work. *Id.* at 227.

Likely in recognition of this, and anticipating objections from defense attorneys, Keenan and Ball conveniently include an appendix in *Reptile* outlining golden rule law by jurisdiction. *Id.* at 267–326. Additionally, the appendix describes the boundaries of "community safety" arguments in some venues. *Id.* at 328–30.

Despite Keenan and Ball's contention that the "reptile" strategy does not constitute improper golden rule arguments or appeal to jurors' emotions, a starting point for excluding an argument or testimony drawn from the strategy is to object on the basis that it is tantamount to making an improper golden rule argument. Although the "reptile" trial strategy may not specifically ask jurors to put themselves in the shoes of a plaintiff, the intent is the same: to have jurors base their verdict not on the evidence of the case but rather on the fear that they or other members of their family or community could be injured, just as the plaintiff was, by the immediate danger of other similar conduct by the defendant, and to have them view compensating the plaintiff as diminishing that danger within the community and to themselves.

Further, using the reptilian strategy in negligence cases by boiling the issues down to community safety versus danger, as opposed to the damages actually sustained by a plaintiff, arguably deprives a defendant of the constitutional right to a fair trial. The prejudice to a defendant is compounded when a plaintiff also asserts a claim for punitive damages because allowing a plaintiff to recover for conduct that did not harm him or her significantly implicates due process. Indeed, the Supreme Court of the United States in *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003), reaffirmed the due process rights afforded to all defendants:

> A defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages. 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…. Punishment on these bases creates the possibility of multiple punitive damages awards for the same conduct; for in the usual case nonparties are not bound by the judgment some other plaintiff obtains.

Id. at 422–23. Additionally, in *Philip Morris USA v. Williams*, 549 U.S. 346 (2007), the Supreme Court again held:

> In our view, the Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation.
>
> …
>
> For another, to permit punishment for injuring a nonparty victim would add a near standardless dimension to the punitive damages equation. How many such victims are there? How seriously were they injured? Under what circumstances did injury occur? The trial will not likely answer such questions as to nonparty victims. The jury will be left to speculate. And the fundamental due process concerns to which our punitive damages cases refer—risks of arbitrariness, uncertainty, and lack of notice—will be magnified.
>
> Finally, we can find no authority supporting the use of punitive damages awards for the purpose of punishing a defendant for harming others. We have said that it may be appropriate to consider the reasonableness of a punitive damages award in light of the *potential* harm the defendant's conduct could have caused. But we have made clear that the potential harm at issue was harm potentially caused to *the plaintiff*.

Id. at 353–54 (citations omitted) (emphasis in original).

Thus, the Due Process Clause specifically prohibits punitive damage awards based on *potential* injuries that *could have been* inflicted on *other* members of the community. These cases may provide additional arguments for excluding the arguments that opponents make using the "reptile" strategy.

Litigants in product liability cases often dispute the admissibility of evidence of "other similar incidents." Such evidence can be highly prejudicial because other incidents are typically used in this context to prove or to disprove some fact in dispute in a case. Accordingly, most jurisdictions have specific standards governing the admissibility of such evidence. It logically follows that evidence of or arguments about *hypothetical* "other similar incidents," and the *potential* harms and losses posed to *other* members of the community, must likewise meet a stringent standard for admissibility, if they are admissible at all. This may provide an additional basis for excluding "reptile" strategy evidence or arguments.

Similarly, it is rudimentary that a jury cannot base its verdict on matters not in evidence, conjecture, or speculation. Rather, a plaintiff must prove damages to a reasonable degree of certainty, and only those damages proximately caused by a defendant's conduct can be recovered. Any evidence or argument that goes beyond the scope of a plaintiff's damages and includes potential harm posed to the community is irrelevant and unfairly prejudicial. To address it, evidentiary rules 401 and 403 may be helpful.

Additionally, some jurisdictions have prohibitions against arguments that ask a jury to "send a message to a defendant"

Reptile, continued on page 74

Reptile, from page 69
or to "act as the conscience of the community." These cases may offer additional arguments for excluding "reptile" tactics. For instance, the Fifth Circuit has held that a "conscience of the community" argument constitutes "improper distraction from the jury's sworn duty to reach a fair, honest and just verdict according to the facts and evidence presented at trial." *Westbrook v. General Tire & Rubber Co.*, 754 F.2d 1233, 1268 (5th Cir. 1985). The court continued:

> Our condemnation of a "community conscience" argument is not limited to the use of those specific words; it extends to all impassioned and prejudicial pleas intended to evoke a sense of community loyalty, duty and expectation. Such appeals serve no proper purpose and carry the potential of substantial injustice when invoked against outsiders.

Id. at 1538–39. *See also U.S. v. Johnson*, 968 F.2d 768 (8th Cir. 1992) (prohibiting unduly inflammatory and prejudicial "conscience of the community" arguments); *U.S. v. Solivan*, 937 F.2d 1146 (6th Cir. 1991) (recognizing as improper any "conscience of the community" argument that is designed to inflame or incite the jury, and reversing conviction based on prosecutor's closing argument urging jurors to "send a message" because it appealed to the jurors' emotions, passions and prejudices); *U.S. v. Monaghan*, 741 F.2d 1434 (D.C. Cir. 1984) ("A prosecutor may not urge jurors to convict a criminal defendant in order to protect community values, preserve civil order, or deter future lawbreaking."); *U.S. v. Barlin*, 686 F.2d 81 (2d Cir. 1982) (condemning this genre of comments and arguments as designed to divert, rather than focus, the jury upon the evidence).

Lastly, if you are unsuccessful in excluding these trial tactics, you might consider using your closing argument to counter the "reptile." For instance, if your opponent has used the "reptile" strategy during a trial, you could compliment the plaintiff's attorney in your closing and praise his or her ability and zeal in representing his or her client. Then you can explain the appeal to the reptilian brain, without ever mentioning the book, and inform the jury of the psychological "reptile" strategy that your opponent has used. Exposing to a jury that a plaintiff's attorney has based his or her strategy and trial theme on a desire for the jury to decide the case based on fear or matters not in evidence, as opposed to the facts of the case and actual damages, will allow you to explain why the jurors should disregard such arguments and decide the case based on the facts presented and the applicable law that the judge will charge. If Keenan and Ball are correct that today's jurors have "tort reform bias" or bias against plaintiffs' lawyers, the jury may appreciate this approach more than we will ever know. Indeed, this type of strategy was reportedly implemented by defense attorneys in a case against Keenan himself, resulting in a defense verdict.

These are just some of the many ways to deal with the "reptile" trial strategy. I am sure there are others. During the seminar that I attended in which Keenan spoke to the plaintiffs' bar of my state, he indicated that he has collected more than 85 motions filed by "black hat defense attorneys" seeking to exclude the strategy. He also indicated that at least one court has specifically excluded the "reptile" strategy, causing him some heartburn. However, Keenan remained steadfast in his faith about the propriety and effectiveness of the "reptile" strategy, and he criticized the plaintiff's attorney in that case for implementing the strategy incorrectly after simply reading the book and not attending any of the seminars or workshops. Nevertheless, with the growing number of resources available to plaintiffs' lawyers, one thing appears certain: the emerging "reptile" strategy is sure to remain at the forefront of the legal community for years to come.

Conclusion

The plaintiffs' bar is banding together to implement new trial strategies to frame cases in ways to obtain the best possible verdicts and maximum damages awards. As a defense bar, we must keep up with their efforts and confront them head-on. Be ready to recognize the "reptile" strategy in your cases, and prepare yourself and your witnesses to deal with it. FD