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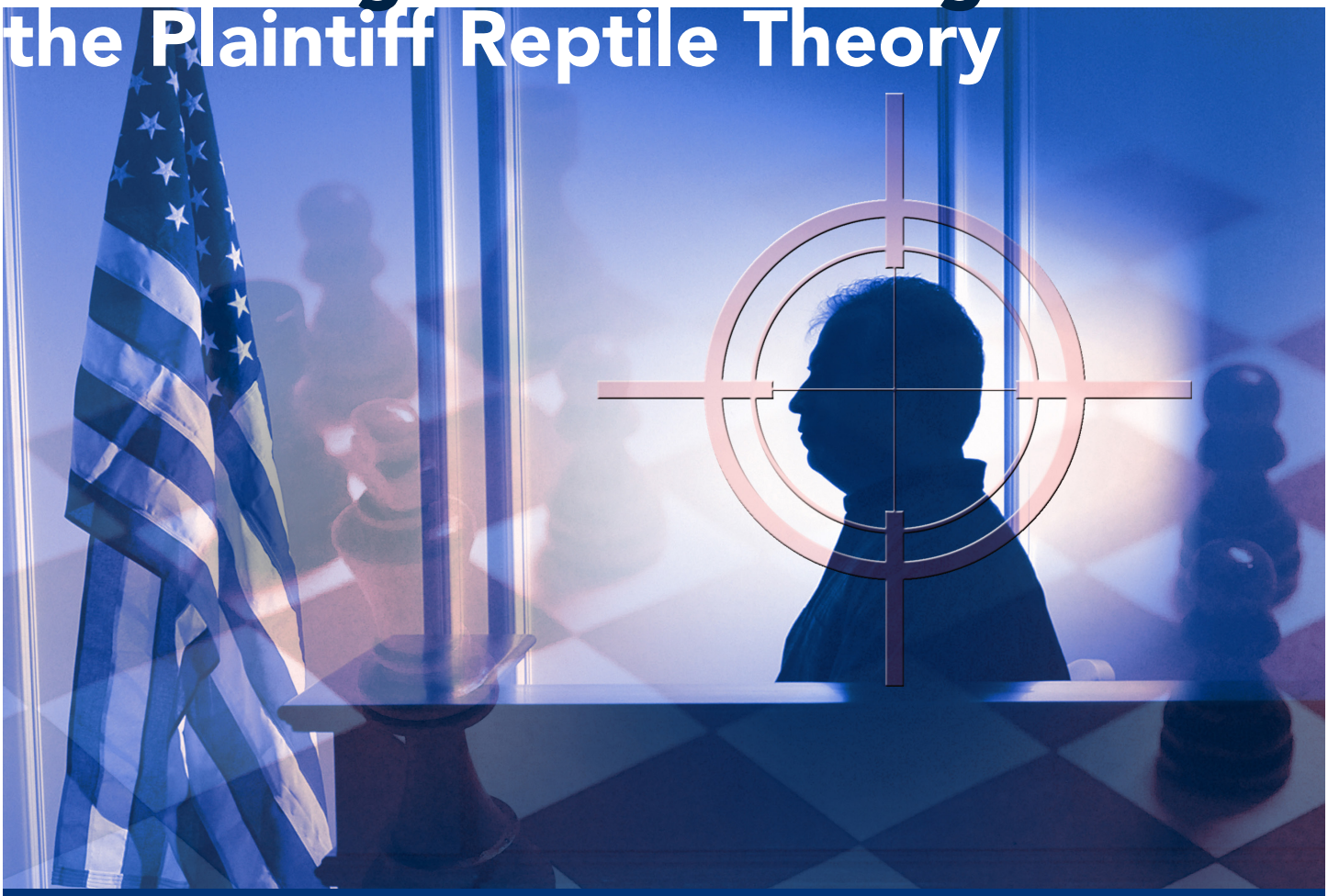
Debunking and Redefining the Plaintiff Reptile Theory



Bill Kanasky, Ph.D.

Invalid, Yet Potentially Effective

Debunking and Redefining the Plaintiff Reptile Theory

By Bill Kanasky

Defense attorneys need a clearer understanding of how the reptile tactics really work and a blueprint of how to counter attack, rather than defend, at all points on the litigation timeline.

The well-known "reptile revolution" spearheaded by attorney Don Keenan and jury consultant Dr. David Ball is now an ubiquitous threat to defendants across the nation. It is advertised as the most powerful guide available to plaintiff attorneys seeking to attain favorable verdicts and high damage awards in the age of tort reform. Reptile books, DVDs, and seminars instruct plaintiff attorneys on how to implement these strategies during an entire litigation timeline, from discovery to closing argument. Most papers about the reptile theory merely define the theory itself, describe the various tactics, and provide rudimentary advice to defense counsel on how to "tame" or "beat" the reptile. However, few authors have attempted to directly challenge the reptile theory's validity or have attempted to provide alternative explanations to why these reptile tactics often work. This article aims to accomplish both goals, as well as to provide scientifically based solutions for defense attorneys to use at all points of the litigation timeline.

To date, the best attempt at debunking the reptile theory is Allen, Schwartz, and Wyzga's (2010) article "Atticus Finch Would Not Approve: Why a Courtroom Full of Rep-

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tiles is a Bad Idea." First, the authors immediately attack the reptile theory, stating that Ball and Keenan's neuroanatomical assumptions are incorrect. They claim that reptiles can't experience fear, as the reptile brain lacks a limbic system, the emotional center of the mammalian brain. Second, the authors state that fear responses in humans are unpredictable, thus using fear in the courtroom is a risky gamble at best. Finally, they claim that jurors "recoil" when they are treated disrespectfully, that is, as if they are reptiles, and using fear in the courtroom ultimately backfires. They go on to offer a solution to the reptile formula that focuses on constructing an effective narrative to persuade jurors.

This article is important because it is the first to challenge the neuroanatomical foundation of the reptile theory. The authors quickly point out that fear responses in humans are controlled by the higher-level limbic system, not the more primitive "reptile brain." As mentioned, specifically, they state that reptiles cannot respond to fear because they lack a limbic system, which eliminates emotion from the equation. Since the limbic system actually controls survival responses in humans, not the "reptile brain," the authors believe that the theory is fundamentally flawed. While they are partially correct in this analysis, the authors fail to recognize that danger is a threat, while fear is a complex emotion in response to danger. In other words, danger is a stimulus, while fear is an emotion. Ball and Keenan clearly sell danger, not fear. Their goal is to tap into the deepest part of the brain where danger is detected, and the instinctive aspects, often referred to as the "reptile brain." Interestingly, their goal may be to bypass fear altogether and simply go directly to jurors' automatic survival instincts because a juror has the cognitive capacity to decrease a fear, whereas it is impossible for a juror to deactivate an instinct. In sum, Ball and Keenan's neuroanatomical assumptions are accurate as they relate to the arguments that they make about danger, and would only be inaccurate if they made a similar argument about a fear response. As such, the authors' attack on the reptile theory is minimally effective because they have compared apples to oranges to some degree.

Allen, Schwartz, and Wyzga's (2010) article also provides a strategic solution to the reptile approach that is fairly inadequate: the use of narrative. While it is well-known that a persuasive narrative is an effective way to educate and influence jurors in any type of case, it only addresses one of the multiple areas that the reptile approach attacks. Ball and Keenan's tactics begin very early in the litigation timeline with deposition testimony, and extend to other parts of a trial in which narrative is irrelevant, such as voir dire and jury selection. Additionally, while the authors generally define why narratives are so effective, they fail to inform a reader how best to construct the story to derail the reptile story provided by a plaintiff's counsel specifically. Generalized "tips" on how to tell a better story are no match for Ball and Keenan's precision attack methods.

For defense attorneys to succeed persistently against the reptile approach, they need a clearer understanding of how the

reptile tactics really work and a blueprint of how to counter attack, rather than defend, at all points on the litigation timeline. Therefore, this article will focus on three areas: (1) why the overall reptile theory is invalid, (2) why the specific reptile tactics work, despite the invalidity of the overall theory, and (3) scientifically based solutions to defuse these tactics.

While "reptile" is somewhat of a misnomer, it is important for defense attorneys to comprehend how and why the tactics are effective.

Debunking Ball and Keenan's Reptile Theory

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.
- "safety rule + danger = reptile" is the core formula.

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. Ball and Keenan claim that use of their reptile strategy has resulted in nearly $5 billion in settlements and damage awards since 2009.

To debunk any theory, someone must show that the theory's core principles and formulas are flawed. The linchpin of Ball and Keenan's reptile theory is the brain's stimulus-response reaction to danger. They claim that exposing a safety rule violation (stimulus = danger) triggers jurors' automatic survival instincts to protect themselves and the community (response = award damages). The fatal flaws of the reptile theory are two-fold. First, a plaintiff's counsel can only "suggest" danger to jurors, rather than actually exposing them to a true threatening stimulus that would trigger survival instincts. In other words, the core foundation of the reptile theory is that danger triggers survival responses, but in reality, jurors are never exposed to any direct danger. Therefore, without an immediate threat, awakening the reptile brain in the manner in which Ball and Keenan describe is physiologically impossible.

Secondly, Ball and Keenan fail to mention that the reptile brain, called the "brainstem" in modern science and medicine, is not the sole brain region responsible for survival behaviors in humans. In fact, the reptile brain only plays a limited role in human survival instincts, whereas higher-level brain structures play a much larger role. Specifically, the reptile brain or brain stem is responsible for multiple automatic and involuntary functions that are necessary for basic physiological survival such as cardiac function, respiration, blood pressure, digestion, and swallowing. It is also responsible for alertness and arousal, key factors for protective survival from dangers. While the reptile brain or brain stem in humans plays a key role in detecting danger, the limbic system actually processes the dangerous information and can activate the sympathetic nervous system to trigger the fight or flight survival response. As such, Ball and Kennan's theory is invalid because true protective survival responses are not even triggered by the human reptile brain or brain stem, but rather by the more advanced limbic system.

Now, Ball and Keenan claim that even a mild threat can trigger the survival reaction. They claim that exposing a safety rule violation is an adequate stimulus powerful enough to shift jurors into survival mode. Again, the suggestion of a danger or potential threat is never enough to activate the brain's survival instincts because the nature of the threat must be intense and immediate. If survival instincts could be tapped so easily, our behavior would be totally irrational throughout the day, which explains why an intense, immediate threat is required to activate these strong instincts. To understand survival responses, it is important to comprehend the different classifications of threats and the types of subsequent survival reactions. Consider the examples below.

Example A: You hear reports of a recent robbery in your neighborhood. This is indeed a potential threat, but survival functions do not take over because the threat is not direct or imminent. Instead, when a potential threat is suggested, people actually become more logical and make an action plan, such as having a family meeting to discuss what occurred, making a plan to check door and window locks, to be more vigilant, and to speak with neighbors. This type of survival reaction is known as "high road" cognitive processing, in which someone carefully assesses many options and makes a careful choice.

Example B: You hear an intruder entering your house. This constitutes a direct threat, which triggers the fight or flight instinctual survival response. In other words, you will either quickly attack the intruder to protect yourself and your family, or you will run and call for help because there is no time to make a logical plan due to the imminent threat. This type of survival reaction is known as "low road" cognitive processing, processing in which cognition is very limited.

Example C: You walk around the corner and your five-year-old jumps out of nowhere and screams "boo!", resulting in you automatically jumping back and dropping the glass that you were holding. This constitutes an intense, immediate threat, which triggers a brain stem reflex that includes jumping backwards, muscle tension, causing the drop of the glass, dilated pupils, and increased heart and respiratory rate. This type of survival reaction is known as a "brain stem reflex" or "startle response," which is automatic, involving no cognition.

In humans, the reptile brain or brainstem only detects danger via attentiveness and alertness, and then the thalamus, the brain's "switchboard," usually takes over

and decides whether the danger is worthy of a survival response or a more thoughtful response. Thus, Example A illustrates high road cognitive processing, which is a slower road because it also travels through the cortical parts of the brain before a thoughtful and logical response is formed. Example B illustrates low road cognitive processing because a neural pathway transmits a signal from a dangerous stimulus to the thalamus, and then directly to the amygdala, triggering the fight or flight response, which then activates a quick survival response. Example C is more of a survival reflex from the reptile brain because the response is almost instantaneous from such an intense and direct threat.

As you can see above, suggested or potential threats simply cannot activate the survival responses in the reptile brain the way that Ball and Keenan suggest. If they could, society would be in survival mode nearly constantly, making logic extinct. The "safety rule + danger = reptile" formula is erroneous and should be replaced with "imminent danger + intensity = reptile" or "suggested danger + logic = planning." In conclusion, Ball and Keenan's reptile theory is invalid because the courtroom is not conducive to the type of threat necessary to awaken the reptile brain. However, disproving the reptile theory in its entirety does not necessarily eliminate the effectiveness of the theory's individual tools and methods. Ball and Keenan's reptile tactics can be very effective, but for a much different theoretical reason than they claim.

Redefining the Reptile Theory

The reptile methodology can indeed influence juror decision making, yet in a different way than advertised by Ball and Keenan. While "reptile" is somewhat of a misnomer, it is important for defense attorneys to comprehend how and why the tactics are effective. Without understanding those reasons, defense attorneys can be outmaneuvered in four primary areas when facing a reptile plaintiff attorney.

Defendant's Deposition Testimony

Plaintiff attorneys have figured out that the fastest way to a profit is to settle a case for much more than its actual economic value. They accomplish this by manipulating defendants into providing damaging testimony, specifically by cajoling them into agreeing with multiple safety rules. Once these admissions are on the record, often on video tape, the defense must either settle the case for an amount over its true value or go to trial with dangerous impeachment vulnerabilities that can severely damage the defendant's credibility. This problem is caused by inadequate pre-deposition witness preparation that focuses exclusively on substance and ignores the intricacies of the reptile strategy. In other words, if defendants are not specifically trained to deal with reptile questions and tactics, the odds of them delivering damaging testimony is high.

Voir Dire

Plaintiff attorneys use a psychological technique called "priming" during voir dire by establishing terms, language, and definitions early in the process, resulting in those stimuli being processed more quickly by jurors throughout a trial. Rather than fight fire with fire, defense attorneys instead tend to ask questions to identify stereotypical plaintiff jurors. By the end of jury selection, a plaintiff's counsel has "primed" a jury for his or her opening statement, resulting in easier cognitive digestion and acceptance of the plaintiff's story. Asking key questions to identify pro-plaintiff jurors is critically important during voir dire; however, not taking the time to "strip and re-prime" jurors with defense terms, language, and definitions can give a plaintiff a sizable advantage entering opening statements.

Opening Statement

Perhaps the most apparent area of defense attorney weakness is opening statement construction. Know thy enemy: Dr. Ball is a professional story teller with a Ph.D. in Communications and Theater. He is a master of words and themes. Dr. Ball uses strategic ordering of information within a story to place a defendant in the spotlight of blame from the start. Dr. Ball understands that the better story wins, not necessarily the better science or medicine. Defense attorneys don't have Dr. Ball's training, and often resist seeking the assistance of jury consultants to develop their opening statements. The result is often a sim-

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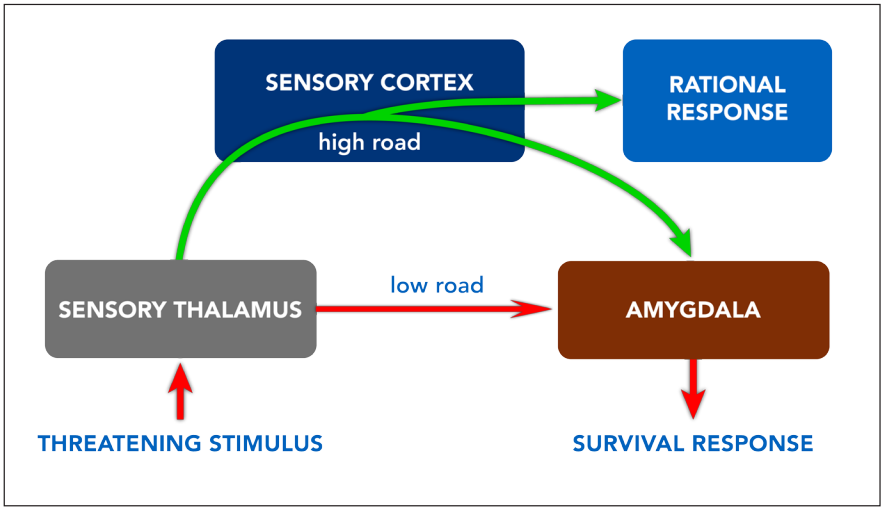

ple, understandable plaintiff's story that immediately connects with a jury against a complex, confusing defense chronology that focuses on science rather than jury friendly themes.

Defense Trial Testimony

When a defendant or a defense witness agrees to a safety rule on the witness stand, gets trapped, and then tries to weasel out of it, the obvious contradiction quickly leads to juror dislike and distrust that is often incurable. Again, the main mistake is insufficient witness preparation that focuses on the science or medicine more than the manipulative reptile process. The "gotcha moment," when a defense witness gets boxed in by a plaintiff's counsel and begins to respond emotionally (argumentatively, defensively, or anxiously) typically results in a severe mess that is difficult to clean up during a defense counsel's rehabilitation efforts. The irony here is that it is a *witness* goes into survival mode cognitively, *not a jury*. Ball and Keenan claim that jurors award damages to protect themselves and the community from the dangers posed by the defendant. In reality, jurors award damages to punish a defendant that breaks safety rules, not to protect themselves or the community.

Instead of truly activating jurors' survival instincts, the reptile approach is actually designed to "bait" defense counsel into fighting on a plaintiff's battleground.

These tactics do not work because the jurors' reptile brains are awakened and they strive to protect themselves and the community. Rather, these tactics work because plaintiff attorneys have taken a new strategic approach focusing on defendant conduct rather than sympathy and severity of injuries, and the defense bar has not yet adjusted. What at first appeared to be an innovative neuroscientific plaintiff "revolution" is simply a more aggressive plaintiff strategy that uses reliable and fundamental psychological tools to put defendants truly on trial.

The Solutions

So what solutions does a defense attorney have? A defense attorney can defeat a reptile attack in three ways: defusing a plaintiff's attorney's voir dire priming, delivering a more effective opening statement, and preparing defense witnesses differently.

Defusing Priming in Voir Dire

Priming is a technique used to influence or control attention and memory, and it can affect decision making significantly. Specifically, priming is an implicit memory effect in which exposure to a stimulus influences a response to a later stimulus. This means that later experiences of the stimulus will be processed more quickly by the brain. For example, if the trait description of "careless" is frequently used, that description tends to be automatically attributed to someone's behavior. In voir dire, a plaintiff's counsel begins the priming process with the goal of exposing jurors to stimuli such as danger, risk, safety, and protection so that those themes will resonate with jurors during the plaintiff's attorney's opening statement. Repetition is a form of priming that can make themes more believable. Therefore, the more jurors are primed with safety claims such as danger, risk, or violation of rules, among others, in voir dire through repetition, the odds of jurors believing those claims during opening statement significantly increases. This occurs because priming creates selective attention, causing jurors to reduce future information intake so they can focus on the safety claims. Priming can essentially blind jurors from processing new information, which can spell deep trouble for defense counsel since they always follow a plaintiff's counsel during a trial.

Defense counsel can defuse plaintiff attorney priming efforts by indoctrinating jurors during voir dire with a cognitive "plan" that can spoil a plaintiff's counsel's priming efforts. For example, a plaintiff attorney may attempt to prime jurors during voir dire with the notion that safety = priority with statements, such as "Who here feels that physicians should always put safety as their top priority? Who feels the community deserves that?", in an effort to later convey in an opening statement that the only way that a physician can be safe is to follow the safety rules of medicine strictly. Many defense attorneys counter with the ineffective response of asking jurors to focus on the law or the science. The more effective strategy would be to strip the original priming and "re-prime" jurors with a different cognitive plan. In a case using the physician example, the plan would focus on the following question: "Who here feels that a physician's *real* priority needs to be to treat every patient as a unique individual?" This tactic would weaken a plaintiff attorney's priming efforts and potentially create a defense priming effect that a defense attorney could build on during an opening statement.

Again, the reptile tactics that plaintiff attorneys use during voir dire have little to do with activating survival instincts. Instead, priming jurors to accept a plaintiff's terms, definitions, and language later on in a trial is the key psychological goal. Ball and Keenan would tell you that the safety language introduced during voir dire would awaken jurors' reptile brain. That claim is inaccurate because this priming effect is more about using fundamental cognitive principles successfully than about triggering survival instincts. Defense attorneys can neutralize these priming tactics by stripping an original primer's power and applying their own.

Delivering the Right Opening Statement

Before 2009, the majority of plaintiff attorneys heavily relied on sympathy-based stories to strike an emotional chord with a jury and drive them toward a high damages award. The classic defense response to such a strategy was to show how a defendant acted reasonably and to defend a defendant's conduct. This plaintiff strategy became ineffective over time as sympathy became a less potent variable as newer, desensitized generations started to fill the jury box, particularly Generation X and Y jurors. In response, the reptile revolution has generated a new story format that is far more effective with today's jurors: immediately putting a defendant's conduct on trial and *not* focusing on injuries and sympathy.

This is where many defense attorneys have fallen behind and have failed to make the proper adjustments to their strategy. The origin of this failure is simple: you must know thy enemy.

Dr. David Ball, co-developer of the reptile theory, is a brilliant scientist of storytelling. When he assists a plaintiff counsel in developing an opening statement, he masterfully uses the tools of emphasis, information ordering and repetition to create a masterpiece of persuasion for a jury. Not only is he an elite expert in opening statement construction, he is also an expert at luring his adversary—defense counsel—into telling an ineffective story to a jury. Specifically, the organization of his reptilian story ironically forces many defense attorneys into "survival" mode rather than adhering to effective defense strategy. As such, the top strategic mistake in response to a reptile opening statement is to go on the defensive immediately, and to deny each of a plaintiff's allegations. This instinctual response makes psychological sense: a plaintiff's counsel has bludgeoned a defendant with safety rules and danger threats for 45 minutes, resulting in great temptation to deny each allegation immediately one-by-one. However, this strategy is notoriously ineffective and is known as the "Hey, we didn't do anything wrong and we are a good or safe person or company" approach. Addressing each claim immediately is a deadly mistake because it highlights and repeats the reptile safety themes, thus validating them.

Instead of truly activating jurors' survival instincts, the reptile approach is actually designed to "bait" defense counsel into fighting on a plaintiff's battleground. By reacting to a plaintiff's story immediately, the defense plays right into the Dr. Ball's hands and actually reinforces the plaintiff's arguments to the jury. This effect is called the "availability bias," meaning that jurors tend to blame the party that is most "available" or in the spotlight. If defense counsel takes the bait and illuminates safety issues relating to a client early in an opening statement, the reptile attorney has won the opening round. Avoiding this tempting "availability bias" trap is essential to developing a persuasive opening statement that will neutralize the reptile opening. Jurors only care about one thing: assigning blame. Therefore, immediately giving jurors something else to blame besides your client is imperative to derailing the reptile attack. Defense counsel needs to arm jurors with the "real" story and immediately put a plaintiff or alternative causation on trial.

During the "opening" of an opening statement, meaning the first three minutes, jurors form a working hypothesis that affects how they interpret the rest of the information presented to them. Therefore, attorneys can inadvertently stack the deck against themselves by beginning their opening statement with the wrong information, such as information highlighting safety issues, which will taint a jury's perceptions from that point forward. Information presented early in an opening statement acts as a cognitive "lens" of sorts through which all subsequent information flows. This cognitive lens can drastically affect how jurors perceive information as a presentation progresses, so one must choose this lens very carefully. Dr. Ball specializes in creating a safety-danger lens through which jurors perceive a case, so defense counsel must provide jurors with an alternative lens immediately. Without this alternative lens, then an entire case will revolve around safety and danger, which drastically increases the odds of a plaintiff verdict with damages.

It is essential to emphasize key themes related to a plaintiff's culpability, alternative causation, or both, depending on the case, immediately because this is the time when jurors' brains are the most malleable. The defense story should only proceed after the "lens" has been placed, which should significantly influence jurors' perceptions and working hypotheses of a case. As Dr. Ball knows, this powerful starting strategy was adopted from the cinema big screen and is referred to as the "flash forward" start. Many movies don't begin at the "start" of a story, but rather begin at some other point in the story that no one expects. This creates immediate curiosity, suspense, and intrigue. This technique is often used by Dr. Ball to illuminate safety issues early in an opening statement. Unfortunately, few defense attorneys know the proper way to defuse it and to counterattack.

The best way to counterattack is by flash-forwarding immediately to culpability, alternative causation or both in an opening statement, and then to begin to tell the defense story. However, many defense attorneys are inclined to start their opening statement by introducing themselves, the legal team, and their client, followed by reminding jurors how important their civic duty is to the judicial system and how much they appreciate the jurors' time. Then, many succumb to the temptation to tell the defense story in chronological order or, even worse, come out of the gate defending a client against each of a plaintiff's allegations. Both methodologies are weak and ineffective, and they certainly won't create any intrigue or curiosity. Instead, it represents a monumental missed opportunity because jurors will value that first three minutes of information more than any other part of an opening statement. Remember, jurors only care about one thing: assigning blame. Therefore, immediately giving jurors something else to blame is imperative to derailing the reptile approach.

Behavioral consistency is highly correlated with honesty and truthfulness, so a reptile plaintiff attorney's top motivation is creating and fueling the perception of inconsistency.

Defense Trial Testimony

Black box analyses of how and why reptile plaintiffs defeat defendants during depositions and trials reveals that frequently a defense witness is ultimately trapped by an agreement to one or more safety rules, which creates a clear contradiction between a rule and a defendant's conduct in the specific case at hand. The perceptual effect of this dramatic "gotcha moment" is devastating, especially during a trial. A trial is not a battle of science or medicine; it is a battle of *perception*. The party that looks

and sounds correct is usually perceived as being more correct by a jury, regardless of the substance of a case. Therefore, when a defendant's witness is on the stand and it appears that a defendant broke safety rules in relation to the plaintiff, the perception of behavioral inconsistency has a powerful effect on jurors' decision making. Behavioral consistency is highly correlated with honesty and truthfulness, so a reptile plaintiff attorney's top motivation is creating and fueling the perception of inconsistency. For this reason, witnesses require special cognitive training to prevent the "gotcha moment" from ever occurring.

The very best way to respond to reptile plaintiff attorney safety rule or hypothetical safety questions is quite simple on the surface: be honest.

To create the perception of inconsistency, a reptile attorney has two tiers of attack against defendants during adverse examination: (1) the safety rule attack and (2) the emotional attack. The safety rule attack is a "word game" in which a witness needs to decide whether to accept or to reject the plaintiff attorney's language. Baseball provides an excellent analogy to illustrate this process. An effective hitter carefully analyses each pitch coming in and classifies it, and that classification—fastball, curveball, off-speed, too high, too low—determines the timing of the hitter's swing or whether he even swings at all. A defense witness is the hitter in this analogy, while the plaintiff attorney is the pitcher. In the safety rule attack, the plaintiff attorney (pitcher) attempts to get a defendant's witness (hitter) to swing at a bad pitch that is out of the strike zone. Therefore, a defendant's witnesses need special training to learn how to classify questions properly as they are delivered because their baseline cognitive processing ability is too scattered to be able to detect the elusive "curveballs" effectively without it. Keeping with the analogy, a reptile plaintiff attorney (pitcher) will cleverly set up a defendant's witness (hitter) by repeatedly delivering questions (pitches) that are benign and easy to answer (hit). The repetitive exposure to benign stimuli leads to "cognitive momentum," in which a witness' brain begins to assume that subsequent questions will also be benign, and a tendency of automatic, rhythmic agreement begins to form. At this point a defendant's witness (hitter) has been cognitively "set up" for the safety questions (curve balls), which usually results in continued automatic, rhythmic agreement. Once this occurs, a reptile plaintiff attorney goes in for the kill: he or she begins to ask case-specific questions that are factual and must be agreed with and dramatically points out the contradiction between the agreed upon safety rule and a defendant's conduct in the case. Hence, the "gotcha moment" is brilliantly set up by using a witness' own cognitive patterns against him or her. Advances in technology have caused the brain to evolve so that it can process several stimuli simultaneously rather than isolating attention and concentration on a single stimulus. This cognitive pattern is hardwired and very difficult to reverse and is the top reason why a defendant's witness is highly vulnerable to reptile attorney precision attacks during adverse examination. In society, cognitive multitasking and quick thinking is very important because it leads to effective problem solving and productivity. When testifying, it is a fatal flaw that can result in a defendant's witness becoming trapped in a dangerous contradiction. Therefore, advanced cognitive training in the areas of attention, concentration, focus, and information processing are required so that a witness can avoid being defeated by the survival rule attack.

If a defendant's witness can develop the cognitive skills to survive the safety rule attack, a reptile plaintiff attorney must proceed with the emotional attack strategy. When a witness learns to detect and reject safety rules consistently, it puts a reptile plaintiff attorney in a difficult position because he or she cannot show any contradictions or inconsistencies. Then a reptile plaintiff attorney must use a different strategy to establish the safety rule, otherwise the dramatic contraction is not possible and the case cannot be won. The emotional attack reptile strategy attempts to force a defendant's witness out of patient, thoughtful, meticulous high road cognitive processing and into instinctual, spontaneous, survival low road cognitive processing. By forcing low road cognition, the reptile plaintiff attorney can generate a response that will likely be negatively perceived by jurors, thus hurting a defendant's witness' credibility.

Three emotional attack methods can force a defendant's witnesses into low road cognitive processing: aggression, humiliation, and confusion. All three can represent direct threats to a witness, causing him or her to depart high road cognition and regress into low road cognition, which will result in emotional and protective responses. Aggression occurs when a reptile plaintiff attorney turns hostile towards a defendant's witness and is characterized by a dramatic negative shift in volume, tone, and body language. This tactic is specifically designed to shock a defendant's witness and to activate low road cognitive processing and fight or flight, turning the witness hostile (fight) or instinctually to agree or become passive(flight). Either response will significantly undermine a witness' credibility and believability and will create the perception that a reptile plaintiff attorney is correct. A reptile plaintiff attorney then humiliates a witness by displaying shock, disbelief, and even laughter towards the witness' answers. Low road cognitive processing in this circumstance results in a defensive, survival response, characterized by "wait, wait… let me explain" types of responses that ultimately appear weak excuses in the eyes of a jury. Again, responding in a defensive manner creates the perception that a reptile plaintiff attorney is correct and that a defendant's witness has backpedaled and tried to talk his or her way out of a question. Finally, a reptile plaintiff attorney can attack with a display of confusion or lack of understanding, which threatens a defendant's witness by suggesting that his or her answers do not make sense. This is a very powerful emotional attack because it makes a defendant's witness feel like an inadequate communicator who struggles

to answer questions in a straightforward manner. This type of attack can force low road cognitive processing because a witness fears that his or her answers are insufficient and that he or she should explain more to a reptile plaintiff attorney in an effort to help him or her understand. This results in a jury perceiving a witness as disorganized and unsure of him or herself. Even worse, it allows a reptile plaintiff attorney to extend his or her adverse examination and emotional attack methods.

Similar to the safety rule attack, advanced cognitive training is required to desensitize a defense witness to these emotional attacks and to train him or her to remain in high road cognitive processing at all times. High road cognitive processing allows a witness to shoot down safety rule questions persistently, as well as calmly and confidently to repeat effective answers that will become the cornerstones of a subsequent examination by defense counsel. It is important to note that after a defendant's witness persistently rejects safety rule questions, jurors begin starving for information, deeply craving questions that begin with the words "what, why, and how." However, a reptile plaintiff attorney would never ask such questions since they would allow a well-prepared witness to deliver a persuasive narrative answer to a jury. Therefore, it is important that defense witnesses learn the proper responses to reptile plaintiff attorney questions and not force in their explanations during adverse examination.

There are two reasons why defense witnesses agree with safety rule questions: cognitive momentum, as described earlier, and the brain's preprogrammed acceptance that safety is good and danger is bad. Specifically, the brain is preprogrammed to embrace safety and to avoid danger, resulting in instinctual acceptance of these principles when presented in testimony. Safety rule questions are highly manipulative and come in all shapes and sizes. However, effective answers to safety questions are pre-planned and very limited in nature. Before discussing the most effective responses to safety rule questions, it is important to first classify the various types of safety rule questions that exist. There are two general types of safety rule questions: big picture safety questions and hypothetical safety questions. A reptile plaintiff attorney has become an expert at cleverly planting big picture safety questions that on the surface appear to be "no-brainers" in nature. This is precisely why the brain's innate acceptance of safety principles becomes a major vulnerability for a defense witness. These questions focus on the following big picture principles:

- Safety is always top priority.
- Danger is never appropriate.
- Protection is always top priority.
- Reducing risk is always top priority.
- Sooner is always better.
- More is always better.

Hypothetical safety questions are more specific and often take the form of an if-then statement such as "Doctor, you would agree that if you see A, B, and C symptoms, then the standard of care requires you to order tests X and Y, correct?" These questions are especially dangerous because a reptile plaintiff attorney skillfully can cherry-pick symptoms or factors and then suggest the safest course of action to a witness. These deceptive questions are effective because they provide just enough

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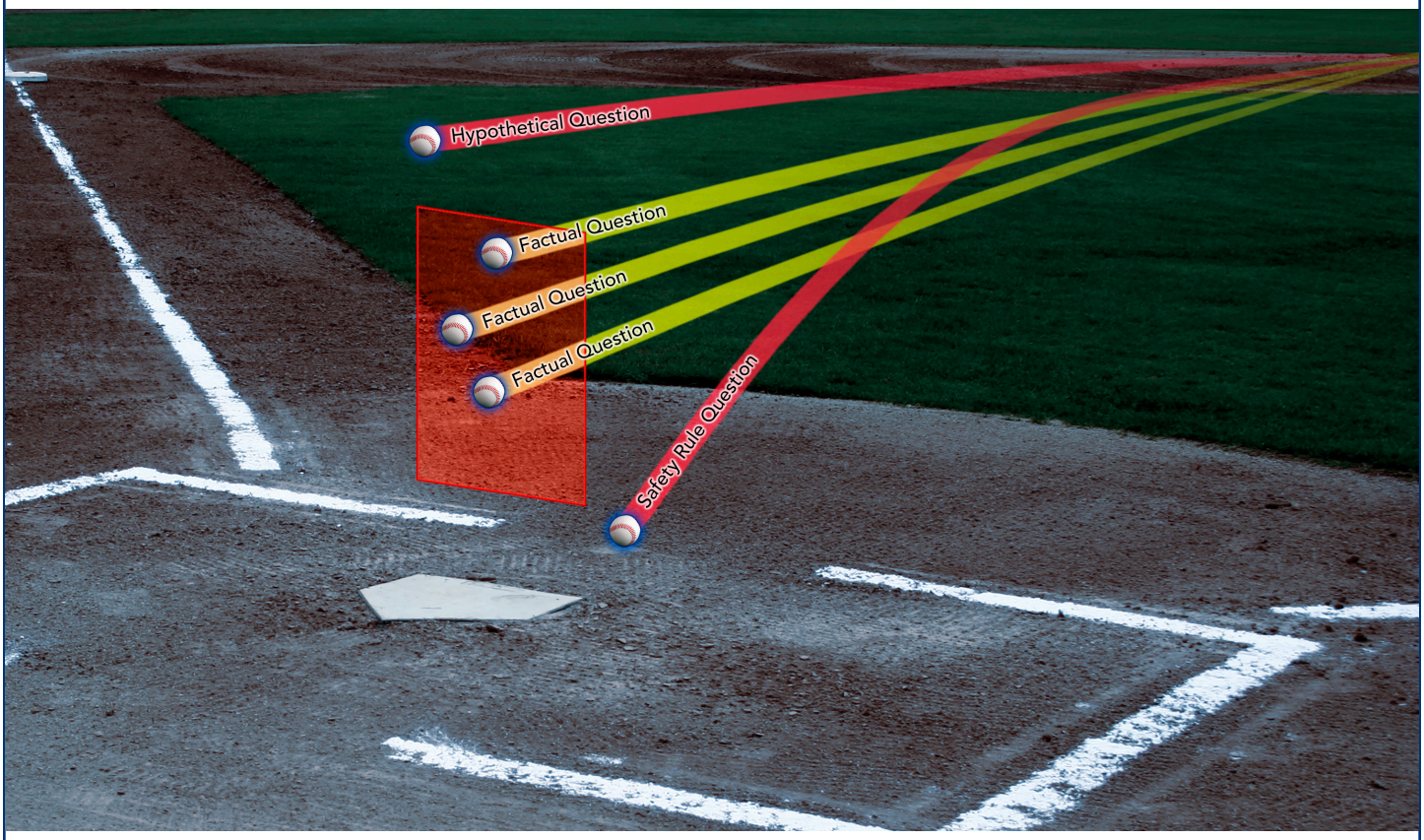

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information to lure witnesses into providing an absolute answer, thus setting the stage for the "gotcha moment." Therefore, a defense witness' ability to detect these precarious questions persistently is vital to defense counsel's ability to defend a client effectively later in the case.

The very best way to respond to reptile plaintiff attorney safety rule or hypothetical safety questions is quite simple on the surface: be honest. If a witness can first develop the cognitive skills to understand consistently the true meaning and motivation of a reptile plaintiff attorney's question, the honest answer will always be some form of "it depends on the circumstances." By definition, the safety rule and hypothetical safety questions are inherently flawed because they lack the proper specificity to allow a specific answer. Therefore, the only honest answer to a vague, general question is a vague, general answer such as the following:

- "It depends on the circumstances."
- "Not necessarily in every situation."
- "Not always."
- "Sometimes that is true, but not all the time."
- "It can be in certain situations."

These answers are highly effective for four reasons. First, they are honest and accurate answers. Again, questions that lack adequate specificity cannot be answered in absolute terms so these "sometimes" type of responses are truthful. Second, these responses put intense pressure on a reptile plaintiff attorney to ask a defendant's witness "what does it depend on?" As stated before, the last thing that a reptile plaintiff attorney wants is to give a defendant's witness an opportunity to deliver persuasive narrative to a jury. When the logical and expected "what" question does not follow these responses, jurors tend to become frustrated with and often suspicious of, a reptile plaintiff attorney if he or she proceeds with an emotional attack. Third, they provide an excellent opportunity for defense counsel to ask a witness to offer explanations to jurors, who are starving for information. This is when a defense witness can really shine, can become a persuasive educator to jurors. Finally, most importantly, jurors widely accept and understand these answers because they perceive them as authentic and reasonable, particularly if defense counsel has properly primed the jurors for these responses during voir dire and opening statement. On the face of it, persistently delivering these answers seems simple. However, it is a very difficult task for defense witnesses because of their multitasking brains, the phenomenon of cognitive momentum, and low road cognitive processing due to emotional attacks. As such, a defense witness must undergo advanced cognitive training to learn to detect trap questions consistently, respond effectively, detect emotional attacks, maintain high road cognitive processing, and repeat answers with emotional poise.

Conclusion

In the end, the reptile theory is simply an aggressive plaintiff strategy that is erroneously packaged in neuroscientific wrapping. The authors are a veteran plaintiff attorney (Don Keenan), and a jury consultant (David Ball),)who have no formal training in neuroscience or neuropsychology, yet take highly complex neuroscientific principles and conveniently apply them to jury decision making. One thing is clear: Ball and Keenan have created a *brilliant* marketing campaign to (1)persuade plaintiff attorneys nationwide to attend their seminars and buy their DVDs, and (2) generate enough angst within the defense bar to get them to start brainstorming solutions.

Despite the theory's invalidity, the individual reptile tools can certainly be effective at all points in the litigation timeline and can lead to increased economic exposure for your client. Defense counsel should do three things when facing a reptile plaintiff attorney. First, rethink your voir dire plan and develop a strategy to strip reptile plaintiff attorney priming and re-prime with defense language and definitions. Priming works, so learn to use it to your advantage during voir dire. Second, work with a qualified consultant to ensure that you will tell the right story in your opening statement, and not inadvertently reinforce a plaintiff's claims. Effectively reordering information can drastically affect jurors' perceptions. Finally, develop a new appreciation for training witnesses before deposition and trial appearances since this is the key area in which reptile plaintiff attorneys are sure to attack fiercely. Find a qualified consultant to provide your defense witnesses with the advanced cognitive training necessary to overcome both safety rule and emotional attacks. Such a consultant should have doctoral level training in cognitive and behavior science, and be intimately familiar with reptile tactics. FD

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