

HOW CAN THE DEFENSE USE THE “REPTILE APPROACH”?

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“This is a very important case, and by being a juror on a case like this, you're taking on a pretty big role; you're basically a guardian of the community. You're the ones that get to be the decider about when things are wrong or when they're right, or when some change needs to happen. In a civil case, you can send a message if you feel as though there's been wrongful conduct and something needs to be done about it. With your verdict, you can make that choice. You can decide whether a product should have a warning or not, or whether people should be left in the dark about what choices they can make about products that they buy. Your decision could determine whether people live or die. And that can be a very big burden.” If you've heard something like this at trial, you've probably heard it from a plaintiff attorney. Indeed, this was the introduction to a plaintiff counsel's voir dire in a case where the jury later returned a verdict of over \$100 million. Statements like these, which are meant to incite fear in jurors and motivate them to punish a defendant in order to protect their community, are a perfect example of what is known as the reptile approach.

The reptile approach is a case presentation strategy developed by Don C. Keenan and David Ball to provide plaintiff attorneys with a framework around which to build their case in a way that will most effectively tap into jurors' implicit fears in order to allow the plaintiff to prevail at trial and collect massive damage awards. Briefly, the reptile approach encourages plaintiff attorneys to try to make jurors fear the defendant by demonstrating: 1) the defendant violated a “safety rule” – a basic rule of operating in society that is impossible not to acknowledge; 2) that the defendant's behavior presents a threat to the entire community; and 3) that the only way to prevent harm to the entire community is to assess a large damage award against the defendant. (For more about the reptile approach, please see our previous blog on the reptile brain.)

Although this strategy was developed explicitly to assist plaintiff attorneys, it can also be used by the defense. There are many ways the defense can tap into jurors fears in a similar manner. One of the most notable things about the reptile approach is that it was developed to counter what its creators identify as an inherent disadvantage held by plaintiffs. According to Keenan and Ball, jurors automatically see plaintiff and plaintiff's counsel as a “menace to their survival” because they've been convinced by tort reform activists that “lawsuits undermine the quality and availability of healthcare for jurors and their families; lawsuits ruin the local economy, costing people jobs; lawsuits drive prices up on just about everything; lawsuits suppress product development and innovation; and lawsuits endanger religion because plaintiff's lawyers used the money they make to fund liberal, statist politicians who appoint liberal, statist judges who make

rulings contrary to religious traditions and beliefs.”¹ Thus, defense attorneys can use the reptile strategy in their favor by appealing to any of these fears the authors identify.

Furthermore, as defense cases tend to depend on context and nuance to a greater degree than plaintiff cases, there is an opportunity for the skillful defense attorney to paint the absence of context in the plaintiff case as evidence of deception on the part of the plaintiff attorney. For example, in a recent trial that Litigation Insights provided consultation for, the defense attorney reminded jurors in his closing argument that he warned them that the plaintiffs would “take a number of documents out of context” and then reviewed all of the times he believed the plaintiffs had done just that. Pointing out all of the plaintiffs’ deceptions drove home his point that plaintiffs’ credibility was highly questionable. Moreover, he enlarged these documents for the jurors and kept a list of each instance on an easel. Calling out specific exhibits was important, and writing them up on the easel encouraged jurors to write them down as well. In fact, the jurors in this case specifically asked for these exhibits during deliberations.

As previously mentioned, the reptile approach depends on making the jurors feel like the defendant’s actions are a threat to the entire community. As such, plaintiff attorneys ask the jurors to be the guardians of the community. This tactic can also be used by the defense by calling on the jurors to be the defenders of the community’s conscience. This can be especially effective in cases in which there is a lot of negative media attention about the defendant in a case. A skillful defense attorney can actually use this coverage to her advantage. In a previous case with significant media attention that we worked on, the plaintiff attorney called on the jurors to protect future generations by holding the defendant accountable. Our client, the lead attorney for the defendant, used this theme against the plaintiffs by arguing to jurors that the courageous action was actually for them to “defy the media hype and do the right thing.” He concluded his closing: “It takes a courageous jury to return a verdict for a large corporation that might be unpopular with some. It’s difficult to not listen to the sentiments outside the courthouse that are pounding on the pavement saying, ‘This is what you should do.’ It takes a lot of courage to ignore that and do the right thing. And that’s what we’re asking you to do.”

And it is true, if unsurprising, that a large corporation is often unpopular with jurors. Jurors naturally identify with plaintiffs. A plaintiff is a living, breathing person sitting at counsel table while a corporate defendant is often a faceless company. But there are also ways to mitigate this plaintiff advantage and increase jurors’ identification with the defense. Most notably, defense counsel can subtly imply that jurors may one day find themselves on the side of the wrongfully accused by using broad terms such as “property owners,” “business owners,” or “taxpayers” and expressions like “being dragged into court.” This will put jurors in the place of the defendant and invoke the reptilian fear mentioned by Keenan and Ball. Similarly, Jurors who own a business or dream of owning one will find it easier to identify with a “business owner” than a “corporation.”

The expression “what’s good for the goose is good for the gander” is a metaphor that applies to geese, humans, and reptiles alike. Though the reptile approach is a strategy that was originally

¹ Wojcicki, P. (2015, May 4). *The reptile’s in our midst – Defending against the “triune brain” trial strategy*. Retrieved from <https://drivingvalue.com/2015/05/04/the-reptiles-in-our-midst-defending-against-the-triune-brain-trial-strategy/>

conceived for use by plaintiffs, there's no reason it's underlying principles can't be implemented by the defense as well.