So you are defending an automobile wreck case, and you have spent hours preparing your client for deposition. Everyone sits down, and the questioning begins:

You’ve been driving for a long time, correct?

You understand there are certain rules that you must follow while driving?

One of the rules for driving is that you must pay attention at all times, right?

You must maintain control of your vehicle, right?

Why are these rules important?

Because people can get hurt if these rules aren’t followed?

People can get killed, right?

And you’ve known that since you were licensed to drive?

These rules are in place to protect everyone on the roadway, right?

They protect you when you’re driving?

They protect your family members?

They protect everyone in the community, right?

And you agree that if a driver fails to follow these rules and causes an accident, then the driver is responsible for any harms and losses caused as a result?

Based upon this line of questioning, your opposing counsel is implementing a particular trial strategy that will be sure to dominate the remainder of discovery and trial. Would your client be prepared to answer these questions? Would you be prepared to recognize the strategy?

In 2009, attorney Don Keenan and jury consultant David Ball authored a book on this particular trial strategy entitled Reptile: The 2009 Manual of the Plaintiff’s Revolution. Since then, the authors have promoted the book and the underlying strategy to plaintiffs’ lawyers across the country through their website, trial blog, seminars, DVD sets, and workshops. A subsequent book authored by Keenan, entitled The Keenan Edge, provides additional insight for plaintiffs’ lawyers implementing the “reptile” strategy. Generally, it consists of the first two years of Keenan’s trial blog, before it went private, and offers dozens of additional examples for incorporating the “reptile” into all phases of litigation. Currently, Keenan and Ball’s Reptile website claims the strategy has resulted in more than $4.6 billion in verdicts and settlements across the country.

The Strategy

The “reptile” strategy is premised upon the theory that the human brain consists of three parts, developed through evolution. 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. According to Keenan and Ball, the reptilian brain controls our basic life functions, such as breathing, hunger, and survival, and instinctively overpowers the cognitive and emotional parts of the brain when those life functions become threatened. It thrives on evolution and therefore maximizes “survival advantages” and minimizes “survival dangers.” 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. 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.” Not surprisingly, some opponents of the strategy believe it to be a model of advocacy that features manipulating jurors by fostering fear.

Individual and community safety is the theme of the “reptile” strategy, as Keenan and Ball believe jurors will prefer a verdict that enhances safety. To determine if a defendant’s actions involved negli-
gent 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?\(^{13}\)

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 “the tentacles of danger” extend beyond the single plaintiff and throughout the entire community.\(^{14}\) The authors argue 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.\(^{15}\)

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.\(^{16}\) Reducing danger in the community facilitates survival, which awakens the reptilian part of the brain in each juror and overcomes logic or emotion.\(^{17}\) 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.

Drawing from Patrick Malone and Rick Friedman’s book, *Rules of the Road*,\(^ {18}\) Keenan and Ball reduce the “reptile” strategy into a simple formula: Safety Rule + Danger = Reptile.\(^ {19}\) Thus, to employ the strategy, plaintiffs’ lawyers must create “safety rules” and demonstrate the danger to the community in order to appeal to the reptilian part of each juror’s brain. The book urges plaintiffs’ lawyers to frame cases so it appears every defendant chose to violate a safety rule.\(^ {20}\) Additionally, Keenan and Ball outline six “must have” characteristics for each safety rule:

- 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.\(^ {21}\)

Keenan and Ball state that implementing the “reptile” strategy begins in discovery by seeking admissions from a defendant either in written discovery or depositions.\(^ {22}\) The admissions establish first that a defendant agrees with the safety rule and second that it controls the verdict because a violation endangers everyone.\(^ {23}\)

The ultimate goal during a trial involving the “reptile” is to have the jury (1) 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 his or her conduct and unwillingness to accept responsibility.\(^ {24}\)

To spread the “tentacles of danger” as widely as possible, the authors believe 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.\(^ {25}\) The classic example provided by Keenan and Ball is the rule that “a [_______] is not allowed to needlessly endanger the public.”\(^ {26}\) 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.\(^ {27}\)

A case-specific rule in a commercial trucking accident 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.\(^ {28}\) Moreover, the authors suggest attempting to elicit the same admissions and analogies from the defense experts.\(^ {29}\)

Overall, the strategy works downward from the general umbrella rule to the case-specific rules to awaken “the reptile” in each juror. 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 if evidence is presented that the defendant truck driver violated one of the “rules,” thereby needlessly endangering the public and subjecting the community to extremely serious potential harm (no matter the amount of actual harm caused to the plaintiff).

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.\(^ {30}\) Further, they stress that the proper measure of damages is the maximum “harms and losses” a defendant could
have caused rather than the actual damages in the case, which may be significantly less.\textsuperscript{34} 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.\textsuperscript{32} Thus, in closing, the lawyer using this strategy must show a jury how the dangers presented by a defendant’s conduct extend beyond the facts of a case and affect the surrounding community so the entire case boils down to community safety versus danger.\textsuperscript{31}

**Preparation is Critical**

Opening statements and closing arguments are critical to implementing the “reptile” strategy. Indeed, they are a plaintiff’s lawyer’s chance to define the theme of a case and link every aspect of a trial back to the safety rules, potential harms and losses, and the overriding theme of community safety versus danger. However, a good lawyer will likely implement the “reptile” strategy long before trial.

For instance, defense attorneys may first encounter the “reptile” strategy when deposing a plaintiff or a 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.\textsuperscript{35} The authors even offer a 6-disc DVD set outlining the seven phases of “reptile witness preparation.”

Additionally, deposing a defendant offers a prime opportunity for a plaintiff’s lawyer to obtain agreement by the defendant to the safety rules that will ultimately dominate the plaintiff’s trial strategy. Likewise, depositions of defense experts offer more opportunities for plaintiffs’ lawyers to utilize the “reptile” strategy. Not surprisingly, Keenan boasts a “new deposition template” for implementing the strategy, provided exclusively to his seminar attendees.\textsuperscript{35} Therefore, recognizing the “reptile” strategy in discovery and preparing witnesses to handle reptilian-styled questions is an increasingly important consideration for defense lawyers. Both Reptile and The Keenan Edge provide 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.

**Commercial Trucking Accident Cases**

According to Keenan, he has conducted numerous two-day seminars, offered exclusively for plaintiffs’ lawyers and specialized for certain topics. One such seminar is entitled, “Tractor Trailer and the Reptile.”\textsuperscript{36} Because of the numerous regulations governing commercial motor carriers, commercial truck accident litigation is fertile ground for plaintiffs’ lawyers to implement the “reptile” strategy to inflame juries into large verdicts. Indeed, it is low-hanging fruit to equate FMCSA regulations to “safety rules” and argue that all violations, no matter if causative to the issues in dispute, “needlessly endanger the community” and create automatic liability based upon potential harm resulting therefrom.

In one trucking example from The Keenan Edge, Keenan boils an opening statement into a succinct rule: A driver … is required … to watch the road … and see what’s there to be seen … If the driver does not … even for an instant … and as a result hurts someone … the driver is responsible for the harm … Now let me tell you what happened in this case …”\textsuperscript{37}

From this umbrella rule, Keenan provides ideas for presenting case specific information to a jury in order to appeal to “the reptile” and obtain favorable results for a plaintiff.\textsuperscript{38} Keenan also provides the reader with a completed set of “safety rules” for use in a commercial trucking accident case:

1. Tractor trailer drivers must be qualified to drive their rigs, so as to protect all in the community.
2. Owners must be trained to drive their rigs in order to protect all in the community.
3. Tractor trailer drivers must be supervised in order to protect all in the community.
4. Tractor trailer rigs must be safe in order to protect all in the community.
5. Tractor trailer drivers must follow the traffic safety laws in order to protect all in the community.\textsuperscript{39}

Defense attorneys handling commercial trucking accident cases must prepare defense witnesses early in discovery to respond to reptilian-styled questions, including the truck driver, safety manager, corporate representative, and expert witnesses. Some examples of questions that might be asked include:

As a commercial truck driver, there are specific rules you must follow, correct?

Like the federal rules governing hours of service?

And you agree the hours of service rules are in place to ensure the safety of everyone on the roadway, right?

They are intended to prevent fatigued drivers from operating commercial vehicles?

Because fatigued drivers operating commercial motor vehicles is a safety concern, right?

Another rule requires preventative maintenance of commercial motor vehicles, correct?

Continued on next page
The rules require daily inspections of the truck and trailer, right?

Inspections of things like brakes?

These rules help identify equipment that needs attention or repair, right?

Because all equipment wears out over time?

And commercial trucking equipment can be especially dangerous if not properly maintained, correct?

These rules protect your safety, don’t they?

They protect people like the plaintiff, right?

And you agree that if someone violates those rules and causes an accident, then they should be held responsible for their actions?

***

There are certain rules commercial truck drivers must follow, correct?

All drivers are required to pay attention at all times, correct?

Your company wants its drivers to pay attention while driving, right?

And if one of your drivers is not paying attention and causes an accident, then he is responsible for any harms and losses caused, right?

Another rule is that commercial drivers must maintain daily log books, correct?

Those are used to ensure that drivers are following the hours of service rules, right?

There are also rules that trucking companies must follow, right?

Those rules require trucking companies to only allow qualified drivers to operate commercial motor vehicles, right?

And the rules require trucking companies to review each driver’s log books to make sure they are complying with the proper hours of service, correct?

The rules require trucking companies to maintain driver log books for six months, correct?

The company agrees those rules are in place to ensure safety, right?

And the company agrees that if a trucking company fails to follow these rules and one of its trucks is involved in an accident, then it is responsible for any harms and losses caused, right?

Depending on the facts of the case, these may be difficult questions to disagree with. Consideration of favorable facts, possible defenses, and trial theme early in discovery may allow defense counsel to prepare witnesses in a way to combat “the reptile” in depositions and trial. For instance, if there are facts supporting a claim of comparative negligence by the plaintiff, defense witnesses might ultimately agree to the plaintiff’s attorney’s questions, but also explain why certain “rules” apply equally to, and were violated by, the plaintiff, which in turn caused his or her own injuries.

**Product Liability Cases**

Product liability cases offer another opportunity for implementing the “reptile” strategy. Indeed, *The Keenan Edge* provides an example opening statement for implementing the strategy in a product liability case: “A manufacturer ... is never allowed ... to needlessly endanger the public ... If it does ... and as a result someone is hurt ... the manufacturer is responsible for the harm ... A manufacturer ... is never allowed ... to conceal a danger it knows about ... in its product ... because concealing the danger ... would needlessly endanger the public ... Now let me tell you the story of what happened in this case ...”

To set the stage for this type of opening statement, defense attorneys are likely to see reptilian-style questions in a Rule 30(b)(6) deposition of the manufacturer, distributor, supplier, or seller. Possible questions include:

Does [the defendant] agree that product manufacturers must make products that are free from defects?

Does [the defendant] agree that if a manufacturer makes a product that has a defect and someone is injured because of that defect, then the manufacturer is responsible for the harms and losses caused?

Does [the defendant] agree that manufacturers must make their products so they operate the way the manufacturer represents they will operate?

Does [the defendant] agree that if a product does not operate the way in which it is represented and a person is injured as a result, then the manufacturer is responsible for the harm caused to that person?

Does [the defendant] agree that an authorized dealer must follow the product manufacturer’s policies or recommendations when selling, servicing, or repairing a product?

Does [the defendant] agree that if an authorized dealer fails to follow the product
manufacturer’s policies, procedures, or recommendations and that failure causes injury to a customer, then the dealer is responsible for the harms and losses caused?

Despite the intent of the strategy, these questions might reasonably be answered, “Not necessarily.” After all, 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. 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. Jurors do not decide cases in a vacuum. Rather, a jury will consider all of these other factors if present in a case, and defense witnesses should be prepared to fully explain their responses.

**Medical Malpractice Cases**

Keenan and Ball fully 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. Because everyone likely agrees with the general rule that “doctors are never allowed to needlessly endanger their patients,” the “reptile” strategy frames medical malpractice cases so any medical decision other than the absolute safest choice for a patient constitutes negligence. 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.

Because medical malpractice cases offer such a good opportunity for plaintiffs’ lawyers to appeal to “the reptile,” preparation of both defendants and retained experts is critical, as they may face the following questions:

- 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?
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 fifty 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?

Witnesses facing this line of questioning might respond 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.” Defense experts can 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, defense experts might explain that “First do no

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Consider All Possible Objections

If it appears an opposing attorney will attempt to implement the “reptile” strategy at trial, defense counsel must be prepared to object. Anticipating such objections, The Keenan Edge explains that the key to the trial strategy is persistence:

If you can’t get it in through the front door, knock on the back door. If you can’t get through the back door, then try one of the windows. If that doesn’t work, try coming down the chimney. If the place ain’t got a chimney, then dig underground. Whatever it takes don’t give up until you get it in.44

In South Carolina, the golden rule disallows any argument asking jurors to put themselves in the shoes of a party or which arouses their passion or prejudice. 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. 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, both Reptile and The Keenan Edge directly or indirectly invoke the underpinnings of the golden rule on multiple occasions by appealing to the reptilian brain of each juror.45 Likely in recognition of this, Keenan and Ball conveniently include an appendix in Reptile outlining golden rule law by jurisdiction.46 Additionally, the appendix describes the boundaries of “community safety” arguments in some venues.47

Despite Keenan and Ball’s contention that the “reptile” strategy does not constitute improper golden rule arguments or appeal to jurors’ emotions, the first line of defense is objecting on the basis that it is tantamount to making an improper golden rule argument. Although the “reptile” 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.

Evidentiary rules 401 and 403 may provide additional arguments for excluding the “reptile” strategy. 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.

There are additional evidence-based objections to the strategy. For instance, litigants 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, South Carolina has specific standards governing the admissibility of such evidence. Further, evidentiary rule 404 generally disallows evidence of prior bad acts. These may provide additional bases for excluding evidence or arguments based on the “reptile” approach.

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, may deprive 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. Arguments for exclusion on this basis should be given consideration.

Moreover, some jurisdictions have prohibitions against arguments that ask a jury to “send a message to a defendant” or to “act as the conscience of the community.” These cases may offer additional arguments for excluding “reptile” tactics from trial.

Lastly, if unsuccessful in excluding the trial strategy, defense attorneys might consider using their closing arguments to counter the “reptile.” For instance, if an opposing counsel has used the “reptile” strategy during a trial, consider complimenting and praising his or her ability and zeal in representing his or her client. Then explain the appeal to the reptilian brain and inform the jury of the psychological strategy being employed. 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 the facts of the case and actual damages, will allow defense counsel to explain why jurors should disregard such arguments and decide the case based on the facts presented and the applicable law charged by the judge. 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 possible objections to the “reptile” strategy. I am sure there are others. To increase the chance of success, fully preserve the issue for appeal, and educate the judge before trial, a motion in limine may be in order.

Conclusion

An increasing number of Plaintiffs' lawyers in South Carolina are relying on the “reptile” strategy to maximize damages awards, and it has been promoted at the South Carolina Association of Justice’s annual Auto Torts Seminar in recent years. In December 2012, I personally watched as a packed house of South Carolina trial lawyers hung onto every one of Keenan’s words promoting the strategy and criticizing “black hat” defense lawyers, despite the fact that he was the last speaker of the day and went almost an hour beyond the allotted time. Given the proponents’ steadfast belief in the propriety and effectiveness of the strategy, it is sure to remain prevalent in the South Carolina legal community for years to come. Accordingly, defense attorneys must be prepared to recognize the strategy, prepare for it in discovery, educate defense witnesses and judges, object, and seek to exclude it from the courtroom.

Footnotes

1 David C. Marshall practices in Turner Padget’s Columbia office. His practice focuses primarily on product liability and other complex litigation involving automotive, motorcycle and truck products, heavy equipment and machinery, drugs and medical devices, construction defects, and commercial trucking and transportation. He is scared of snakes and most other reptiles.
4 Notably, the glossary of The Keenan Edge defines “Black Hats” as “unsrupulous, emotionless, ethically devoid defense lawyers that torch justice” and “The Taliban” as “the evil insurance company that never plays fair, always waits to ambush you and has no shred of humanity or emotion.” Id. at 4–5.
5 http://reptilekeenanball.com/

As set out above, attorneys ultimately will need to fight zealously to defend any brain injury claim. However, while it remains to be seen how the Commission will apply the new rule set out in Sparks and Crisp, the defense, for the moment, will enjoy the thrill of victory.

Footnotes

1 Vernon Dunbar is a shareholder in the Greenville office of Turner Padget Graham & Laney, P.A. His practice is concentrated in business and commercial litigation matters and complex workers’ compensation claims. Vernon served as a commissioner and later as chairman of the South Carolina Workers’ Compensation Commission from 1989 to 1995. He represented SouthCo and Pennsylvania National Mutual Casualty Insurance Company in the Crisp v. SouthCo matter.
2 Ashley Forbes is an associate in the Greenville office of Turner Padget Graham & Laney, P.A. She is a graduate of Wake Forest University School of Law where she served as Managing Editor of the Wake Forest Journal of Business and Intellectual Property Law. She devotes her practice to defending employers and insurance carriers against workers’ compensation claims.
3 One of the Commissioners serving on the Full Commission Appellate Panel concurred in the affirmation of the Single Commissioner’s award but stated “I disagree with any physician’s statement that ceasing drug use (including, but not limited to meth and cocaine) will ‘undo’ any damage done by the drugs once the user ceases drug use. Claimant can ride (and does) a motorcycle and has cleared a lot. He has not sustained physical brain damage.”