

**BALDWIN & LYONS, INC.
CLAIMS + SAFETY SEMINAR
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PUNITIVE DAMAGES AND "REPTILE" THEMES**

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NEGLIGENCE – DEFINITION

- Failure to use **reasonable care** to prevent harm.
- Failure to act as a **reasonably prudent person** would act under **the same or similar circumstances**.

REASONABLE PERSON – DEFINITION

- A hypothetical person who acts sensibly.
- Takes **reasonable precautions**.
- Same or similar circumstances.

BURDEN OF PROOF

- Preponderance of the Evidence.
- 51%
- More likely than not.
- Tipping the scales.

DAMAGES

- Compensatory Only

- ❖ Out of Pocket/Economic Expenses

- Past and Future

- ❖ Non-Economic

- Pain and Suffering/Emotional Distress

PUNITIVE DAMAGES

- Punish the defendant's past conduct.
- Deter/Discourage the defendant and others in future.
- Protect the Public.

PUNITIVE CLAIMS/CAUSES OF ACTION

- Fraud
- Malice (intent)
- **Wantonness**
- Oppression

WANTONNESS - DEFINITIONS

- **Conscious** action or inaction.
- Reckless or **conscious** disregard for safety/rights of others.
- **Aware** harm is probable.

RECKLESS DISREGARD – THE STANDARD

- Conscious indifference to the consequences of the act.
- Conduct whereby the actor does not desire harmful consequences but nonetheless foresees the possibility and consciously takes the risk.
- More fault than negligence, less fault than intentional wrongdoing.
- A high degree of carelessness.
- State of mind where the actor does not care about the consequences of his actions.
- Failure to give thought to an obvious risk that harm can occur.

- When does an action go beyond mere inadvertence and rise to the level of conscious or reckless disregard?
 - ❖ "Depends"*
- When is the probability of injury (that the wrongdoer was conscious of) sufficient to justify a finding of wantonness?
 - ❖ It "elude(s) effective definition." *Salter v. M. Westra*, 904 F.2d 1517 (11th Cir. 1990).*

BURDEN OF PROOF

- Preponderance of the Evidence (51%)
- **Clear and Convince** (Wantonness/Punitive)
- Beyond a Reasonable Doubt (criminal)

PRACTICAL CONSIDERATIONS

- Evidence of knowledge.
- The Professional Truck Driver.
- Example – Cell Phone.

ATTRIBUTES OF A PUNITIVE DAMAGES

- A tort requiring "clear and convincing" proof.
- Punitive Damages **MAY** be awarded.
- Requires unanimous Verdict.
- Caps.
- Stringent post-trial review.*
- No presumption of correctness.
- No presumption of correctness on appeal.*

VICARIOUS LIABILITY FOR PUNITIVE DAMAGES

Typically not, unless:

- a. knew or should have known of employee's unfitness/incompetence and **recklessly** employed, entrusted, instructed;
- b. authorized the conduct **before**;
- c. ratified the conduct **after**;
- d. acts were intended to or did benefit employer or the employer participated.

THE NEW PUNITIVE DAMAGES

- Ambiguous Cause of Action.
- Burden of Proof – Pro and Con.
- Judicial scrutiny of award.
- Noneconomic Damage vs. Punitive Damage.

What is the Reptile Theory?

- **Don Keenan and David Ball Book -- 2009**
 - ❖ **Reptile: The 2009 Manual of the Plaintiff's Revolution**
 - ❖ **See: reptilekeenandball.com**
 - ❖ **Website: Over \$5 Billion in Settlements/Verdicts**
 - ❖ **Being Used in More and More Cases**

- **What is it?**
 - ❖ **Humans Share Primitive Brain with Reptiles**
 - ❖ **Part of Brain that Responds to Fear – Flight or Fight**
 - ❖ **At Trial – Activate the reptile brain → fear → damages**
 - ❖ **Anger is a key component**



How is Reptile Theory Used?

- **ESTABLISH SAFETY RULE**
- **ESTABLISH THAT VIOLATION OF RULE INCREASES DANGER**
- **ESTABLISH THAT DANGER CAN BE AVOIDED BY FOLLOWING RULES**
- **ESTABLISH THAT RULES WERE VIOLATED IN THIS CASE**
- **ESTABLISH THAT VIOLATIONS INCREASED DANGER TO PLAINTIFF AND ALL OTHER MOTORISTS**
- **ARGUE THAT DANGER CAN BE DECREASED BY PUNISHING WRONGDOERS**
- **ASK JURY TO ACT AS CONSCIENCE AND PROTECTOR OF COMMUNITY IN ELIMINATING DANGER BY PUNISHING WRONGDOER**

Why Rules?

- **Your Reptile does not care when you break a rule that protects others. But when someone else breaks a safety rule that protects you, your Reptile takes over - usually by infuriating you at the rule-breaker, trying to impel you to do something about it. This is why you'll curse at a passing speeder (80 mph) on the highway, even when you're speeding at 70 in that 55 mph zone.**

❖ From Reptile: The 2009 Manual of the Plaintiff's Revolution

One The Science



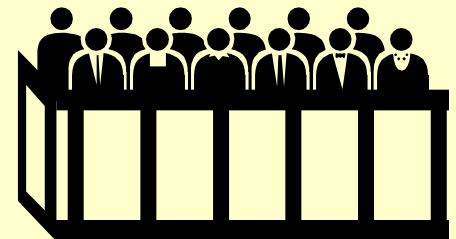
- **Major axiom:** When the Reptile sees a survival danger, even a small one, she protects her genes by impelling the juror to protect himself and the community.
- ❖ **Show the Reptile how this can happen to her.** Use defense depositions to develop the major theme that the result of violating these rules can hurt *anyone*, not just someone who was in your client's particular situation.
- ❖ **From Reptile: The 2009 Manual of the Plaintiff's Revolution**

Sample Voir Dire

...This case is an important case. It's the most important case that's going to be heard, in my opinion, in this courtroom this year, maybe for several years to come. Because of that, there may be publicity about it. You may be asked questions about it.

Other people may want to know about the verdict or what happens here in the courtroom after it's done. It will affect the way patient safety is treated and viewed.

And I don't know what type of inquiry may come, but there certainly may be some. People, patients, doctors, hospitals, and folks in the community will be interested in this verdict. ...



Sample Closing Argument

- **A death that was needless and could have been avoided simply by following the patient safety rules was not.**
- **Now this continues to threaten everybody.**
- **This is a community problem, a state problem, and a national problem.**
- **That's how the law works. Money communicates the message of what you and this community will tolerate or will not for safety and for patient safety.**

Where Do You Find the Reptile?

- **ANY CASES INVOLVING RULES**
- **IN CASUALTY CASES – RULES OF THE ROAD**
- **IN TRUCKING CASES - FMCSR_s - FERTILE GROUND TO PLOW**
- **DOES IT APPLY TO OTHER CASES?**
 - ❖ **Yes – Medical Malpractice**
 - ❖ **Now – Commercial Cases**
 - **Employment Discrimination**
 - **Contract Disputes**
 - **Unfair Competition**



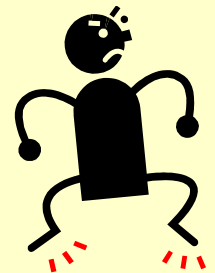
DOES IT WORK? HOW?

➤ ARGUABLY, YES

- ❖ Not necessarily for Reasons Advanced
- ❖ Goal of Awakening Reptile – Fear
- ❖ Controversial – Many Jury Consultants Dispute
- ❖ BUT -- If Anger, All Agree Effective

➤ WHY DOES ANGER WORK?

- ❖ Jury Consultants Agree: Anger Overwhelms All Other Emotions
- ❖ Sometimes “Sympathy” – But Really Anger
- ❖ Case Examples



Sample Deposition Questions

- **I'd like to ask you about some general principles about the trucking industry now, is that okay?**
- **I'm sure you're familiar with the Federal Motor Carrier Safety Regulations?**
- **Do you believe that trucking companies must follow those regulations?**
- **Do you believe that the Federal Motor Carrier Safety Regulations were created to make sure tractor-trailers run safe?**



Sample Deposition Questions

- **Do you believe that trucking companies want their tractor-trailers to run safe in order to prevent harm to the public?**
- **Do you believe that if a trucking company violates the Federal Motor Carrier Safety Regulations that innocent people can be hurt?**
- **And do you believe that if a trucking company violates the Federal Motor Carrier Safety Regulations that innocent people can be killed?**
- **And when we say “innocent people,” I mean, that can be just about anybody that’s out on the highways, true?**

Sample Deposition Questions

- Do you believe the public has the right to rely on trucking companies to follow the rules in the Federal Motor Carrier Safety regs?
- To kind of sum that up, trucking companies must supervise their drivers to prevent harm, true?
- Having safety policies and procedures in place, you know, having them written down, that's -- that's not necessarily enough really. The only way that safety policies and procedures are effective is if they are enforced. Is that true?



Sample Deposition Questions

- **And knowing what is safe is different than enforcing what is safe, true?**
- **And knowing what is safe is different than following the safety rules, true?**
- **From reviewing policies and procedures and visiting with you today, it appears that [the Company] knows the safety rules that need to be enforced to protect their drivers, the equipment, their loads, and the people on the highways, true?**
- **Do you believe if a truck driver is doing -- allegedly doing a pretrip inspection and does not see an obvious safety defect that that truck driver either doesn't know what they're looking for or doesn't care?**

Can You Defend Against the Reptile?

- **YES (IN MOST CASES)**
 - ❖ **Deposition Preparation**
 - ❖ **Motions in Limine**
 - ❖ **Voir Dire**
 - ❖ **Opening Statement**
 - ❖ **Presentation of Trial Evidence**
 - ❖ **Closing Argument**

Can You Defend Against the Reptile?

- **HOW DO YOU KNOW THE REPTILE IS PRESENT?**
- **KEY – SMOTHER THE ANGER AND FORCE A TRIAL OF THIS PLAINTIFF’S CASE**
- **SOME CASES – ANGER WINS (MEDIATE AND SETTLE THOSE CASES)**



IADC - Countering the “Reptile” Strategy A Defense Attorney’s Checklist - Excerpts

Pre-Trial

- **Deposition Preparation -- As part of the “Reptile” strategy, the plaintiff’s attorney will try to get an admission from the defense witness as to the existence of a broad safety rule or that a certain act exposes people to “unnecessary danger.”**
- **Plaintiff’s Expert Witnesses -- When deposing the opposing experts, question whether they are familiar with specific pages from the “Reptile” book.**
- **Discovery Requests - Objections and Motions for Protective Orders**

IADC - Countering the “Reptile” Strategy A Defense Attorney’s Checklist - Excerpts

- **Motions in Limine -- The Golden Rule**
 - ❖ **Golden Rule:** *An attorney is not allowed to use an argument asking jurors to put themselves in the shoes of the party.*
 - ❖ **The “Reptile” strategy violates the golden rule because it essentially asks jurors to make a decision not on the evidence, but on what they would do if faced with the same circumstance.**
 - ❖ **Draft a motion in limine to exclude use of the “Reptile” strategy as a violation of the Golden Rule, using terms such as “Community Standards” and “Unfair Prejudice.”**
 - **The intent of the strategy is to have jurors decide the case based on fear for their families and the community and to view the danger to the plaintiff as potential danger to themselves.**

IADC - Countering the “Reptile” Strategy A Defense Attorney’s Checklist - Excerpts

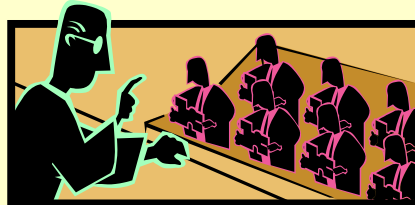
- **Motions in Limine**
 - ❖ **Due Process**
 - ❖ **Relevancy/Unfair Prejudice**
- **Voir Dire**



IADC - Countering the “Reptile” Strategy A Defense Attorney’s Checklist - Excerpts

Trial Jury Instructions

- **By focusing on “safety rules,” the Reptile strategy attempts to create a new standard of care that is greater than the standard of care the law provides.**
- **Must bring the court’s attention to the fact that the plaintiff is attempting to introduce a new standard to the jury. The relevant jury instruction does not contain safety rules.**



IADC - Countering the “Reptile” Strategy A Defense Attorney’s Checklist - Excerpts

Trial

Opening/Closing Statements

- **Immediately giving jurors something else to blame (besides your client) is imperative to derailing the Reptile attack.**
- **It is essential to emphasize key themes related to plaintiff’s culpability and/or alternative causation immediately, as this is the time when jurors’ brains are most malleable.**
- **Mention the jury instructions and the fact that they do not include “safety rules.” Suggest that the plaintiff emphasized these “safety rules” because she could not meet her burden of proof for standard of care, deviation, and proximate causation.**

QUESTIONS?