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Newsletters

Medical Litigation Newsletter - April 2015

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Defending Against the *Reptile*

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.

Reptile: The 2009 Manual of the Plaintiff's Revolution, authored by David Ball and Don Keenan, presents a trial strategy for plaintiffs' attorneys with the goal to get the juror's brain into survival mode, a mode which is controlled by the "R Complex" or "Reptilian brain".[1] The major axiom of the Reptile strategy is: ***When the Reptile sees a survival danger, she protects her genes by impelling the juror to protect himself and the community.***[2]

Dr. Paul D. MacLean, Yale Medical School & National Institute Mental Health physician and neuro-scientist, submitted that there were three parts to the brain. The Reptile strategy focuses on the part called the "Reptilian brain," which is said to be the oldest part of the brain. The "Reptilian brain" is hypothesized to give rise to the rest of the brain, the parts that think and feel.[3] The major purpose of the "Reptilian brain" (hereinafter referred to as the Reptile) is to keep your genes alive and spread as many of them as possible into future generations. The Reptile strategy is premised on the notion that when the safety of our well-being or "genes" are in danger, the Reptile takes over.[4] An excellent example of this is "just as the fastest running occurs when running for one's life, so does the most powerful decision-making occur when survival is at stake." The plaintiff's presentation of the case is framed in terms of Reptilian survival.[5] Opponents of the Reptile strategy have stated that this strategy disregards the current legal standard for duty by creating a new standard and preys on jurors' inherent survival instinct. Further, it is the manipulation of the jury to make them think not about the facts of the case, but the impact the case could have on themselves and the community.[6]

A major principle of the Reptile strategy is that community safety is a legitimate concern for a jury. The Reptile strategy posits that by default, Americans believe that the purpose of the *criminal* justice system is to keep them safe. However, jurors do not automatically know that safety is also the purpose of the civil

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justice system.[7] Ball and Keenan point out that this is why mediocre criminal prosecutors with weak violent cases, despite a higher burden of proof, usually win while many of the best plaintiff's attorneys with the lower burden have trouble doing well even in strong cases.[8] The Reptile does not automatically get involved so the goal is to show the immediate danger of the kind of thing the defendant did and how fair compensation can diminish that danger within the community.[9]

The Reptile strategy focuses on three questions:

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

The purpose of these questions is to show the jury the gravity of the act's potential harm to the community. The Reptile is triggered when the jury believes that a bad outcome could happen to them and others in their community and that this bad outcome could have been avoided if the defendant had followed basic rules.[10]

The first question (How likely was it that the act or omission would hurt someone?) focuses on the frequency of the harm. For example, freak accidents rarely trigger the Reptile because they cannot be prevented, however, when something happens often, the Reptile gets concerned. Hence, the goal of the plaintiff's attorney is to present to the jury statistics that focus the juror on the actual danger.[11] For example, the plaintiff's attorney will counter the defense expert's argument that brain damage is a rare complication of carpal tunnel surgery by showing that there have been *blank* number of brain damage cases resulting from carpal tunnel surgery. This number awakens the Reptile because the jury perceives the danger of brain damage resulting from carpal tunnel surgery despite the rarity of this occurrence.

The second question (How much harm could have it have caused?) focuses on the maximum harm the act could have caused and not the harm that was actually caused.[12] The third question (How much harm could it cause in other kinds of situations?) attempts to explain how the harm in question can be analogized to other situations because the danger or the harm that is the subject of the specific case may be less familiar to the juror. The goal is to analogize the harm in question to other situations that may be more familiar to the juror in order to trigger the Reptile.

A key component to the Reptile strategy is to establish an "umbrella rule" that is the widest general rule the defendant violated enough to encompass every juror's Reptile.[13] For instance, the plaintiff's counsel may ask a defendant doctor:

1. A professional, such as a doctor, lawyer or accountant is not allowed to needlessly endanger the person who hired him, correct?
2. So a doctor is not allowed to needlessly endanger a patient's interest?
3. In any circumstance?
4. Why not?[14]

Once the plaintiff establishes the "umbrella rule", he then establishes case specific rules. For example:

1. A doctor must obtain cardiac enzymes on a patient who has a history of heart attack and who is complaining of chest pain because, otherwise, she would be needlessly endangering the patient?
2. A doctor is never allowed to needlessly endanger a patient?
3. In other words, a prudent doctor does not needlessly endanger a patient?
4. A doctor is not allowed to forego obtaining cardiac enzymes on a patient who is complaining of chest pain who has a history of heart attack?
5. So a prudent doctor, in order to be safe and not endanger the public, must obtain cardiac enzymes on a patient who has a history of heart attack and who is complaining of chest pain?
6. If the doctor does not obtain cardiac enzymes on this patient, he is not prudent because he is allowing unnecessary danger.[15]

The first step in defending against the Reptile strategy is to recognize the setup. The plaintiff will begin to establish the Reptile strategy as early as the pleading stage. Be aware of buzz words and phrases such as *safety, needlessly endanger, safety rules, danger, unnecessary risk, safest available choice, responsibility, required* and *not allowed.* Be sure the plaintiff's complaint complies with the law of your jurisdiction and be prepared to file motions, such as motions to dismiss and motions to strike, to clearly frame the issues in the case based on the relevant law.

Once you have clearly identified and framed the issues in your case based on the law of your jurisdiction, you must properly prepare for discovery based on the issues framed and the allegations of the complaint. Remember, the plaintiff will attempt to establish new standards of care based on new "safety rules" to act as the new liability standard. Again, watch for the buzz words in both written and oral discovery. Be prepared to make objections to Interrogatories based on the law of your jurisdiction, objecting on grounds such as relevance, beyond the scope of discovery, vague, overbroad and unlikely to lead to admissible evidence at trial.

Generally prepare your client regarding the method and goal of the Reptile strategy for deposition. Remember, the focus will be on the allegations that your client violated the newly created "safety rules" which created a danger to the patient and to the community. It is your job to know and focus on the actual legal duty and applicable standard of care for your client. Be ready to properly object to any improper questions at deposition and avoid using standing objections. Further, be prepared to have the objections heard and ruled upon before trial. Be sure that your client understands the standard of care for duty in the case and have the client prepared to answer the questions that the plaintiff will potentially ask using the Reptile strategy. It may be a good idea to obtain transcripts of plaintiff's counsel using the Reptile strategy. Consider motions for protective orders to limit and restrict plaintiff counsel's questions prohibited by the law. This will begin the indoctrination of the Judge on the Reptile strategy in preparation for pre-trial motions, such as motions in limine, as well as for the trial.

The key is to focus the case and the court on the law and to prevent the plaintiff from "creating" new law in the form of "safety rules" and standards of care. Be very thorough in preparing your motions in limine. Be prepared to make appropriate objections at voir dire and at trial.

The Reptile strategy is a very creative strategy in awakening the fear of the juror in order to focus on safety rules that are not based on the law. In doing so, the hope is the Reptile will protect its community and stop or prevent further danger by compensating the plaintiff to deter the defendant and others from any such acts of danger. It is the due diligence of the defense attorney to be aware of the Reptile strategy or any strategy that is not based on the law. Proper preparation of the attorney, as well as the client, will ensure the case is litigated based on the law of the applicable jurisdiction. The defense attorney should recognize the strategy at every level of the litigation process and be properly prepared to defend the case based on valid law.

Civil Juries Size Reduced to Six in Illinois

By: Lisa R. Munch

On December 19, 2014, Governor Quinn signed into action SB 3075, an Illinois Bill that reduces the size of civil juries from 12 to six. It takes effect on June 1, 2015. The new law amends the Counties Code and the Code of Civil Procedure regarding jury service in Illinois. In addition to decreasing the size of civil juries, the Bill also does the following:

- Increases the minimum payment for jury service to $25 for the first day and $50 for subsequent days.
- Offsets the proposed increase in payment for jury service by removing the current requirement that counties pay for the travel expenses of jurors, and by cutting the number of jurors in civil cases from 12 to six. The amendment also requires the parties to pay for alternate jurors.
- Mirrors federal law and that of many states by reducing the size of civil juries from 12 to six in Illinois. The requirement of unanimous decision is unchanged.

Illinois currently utilizes 12-member juries in most civil cases. It uses six-person panels only when the claim for damages is $50,000 or less, unless one of the parties requests a 12-person jury.

Proponents of the bill, including Rep. Kelly McGuire Burke, who sponsored it in the House, argue that "[B]y utilizing six jurors, fewer citizens will be called for service, fewer families will have their routines disrupted, fewer businesses will lose productivity. By being called upon less often and being compensated better, jurors will be more willing to serve."

Opponents, including David H. Levitt, president of the Illinois Association of Defense Trial Counsel, argue that "[S]ome of the research suggests that when you have only six people, you have some different consequences. One is there's less debate. A strong personality among six has a lot more of a possibility of dominating a jury discussion than if you had 12. … It basically makes jury verdicts more likely to be erroneous and more likely to be swayed by more emotion (or) one dominant person."

Following is a link to the bill: http://www.ilga.gov/legislation/BillStatus.asp?DocNum=3075&GAID=12&DocTypeID=SB&LegId=79471&SessionID=85&GA=98

Hinshaw Representative Matters

Patrick F. Koenen, Matthew N. Kees and Lisa A. Zaddack, RN, successfully got a medical malpractice lawsuit dismissed against a physician client after their Daubert motion was granted by the trial court. The case involved an allegation that a medical doctor failed to timely diagnose kidney cancer in a middle-aged man leading to substantial damages. Hinshaw prepared a Daubert motion seeking to preclude the testimony of the plaintiffs' causation expert on the grounds his opinions were not the product of reliable principles and scientific methods required by Wis. Stat. § 907.02 (adopting Rule 702 of the Federal Rules of Evidence and the principles of U.S. Supreme Court case Daubert v. Merrill Dow). After making this ruling, the trial court judge determined the case could no longer proceed to a jury and the matter was dismissed on the merits. The parties aggressively litigated this case for almost two years and the case was dismissed approximately one week prior to trial.

Greg Snyder and Jennifer Johnson, successfully defended an internal medicine physician at trial in a wrongful death suit in McHenry County, Illinois. The decedent, a 49-year-old employed and married mother of two adult children, presented to the emergency department with shortness of breath, chest pain, hypertension, and tachycardia. Our client was the on-call attending physician who appropriately called in a cardiology consult. Routine thyroid testing was ordered and performed in advance of a cardiac catheterization procedure performed by a cardiologist. However, neither the cardiologist nor the attending reviewed or acted upon abnormal thyroid panel results that suggested hypothyroidism. The patient passed away two days after discharge. Our client presented very well at trial and made it clear that he had not ordered and was not provided the laboratory tests at issue. His testimony made it clear that the patient had been discharged prior to the test results becoming available. The testimony was so effective that our client was dismissed from the case with prejudice mid-trial.

Greg Snyder and Daniel Wiesch prevailed at jury trial in McHenry County, Illinois on a case where the plaintiff had alleged both medical battery and medical malpractice arising out of a laparoscopic cholecystectomy surgery. Our client had been called in to the surgical procedure when the original surgeon encountered difficulty with the patient's anatomy. Rather than converting the procedure to an open surgery, our client proceeded laparoscopically and inadvertently partially ligated the patient's common bile duct. The plaintiff contended our client did not have his permission to participate in the surgery and that severing the common bile duct constituted medical malpractice. We prevailed at jury trial after demonstrating that the patient's large body habitus made it appropriate for the case to proceed laparoscopically and that the surgeon and surgical consent form on the case adequately covered our client's participation in the procedure.

Jerrod Barenbaum represented DeKalb Clinic in a trial in DeKalb County. A 57 year old woman had a Nissen fundoplication/hiatal hernia repair performed by our client's employed physician at Kishwaukee Community Hospital. Following the procedure, while the patient was in a Post Anesthesia Care Unit (PACU) managed by the co-defendant anesthesiologist, the patient had internal bleeding and eventually died after being taken back to surgery. Plaintiff alleged failure to timely diagnose and treat the post-operative bleed by DeKalb Clinic (based on the conduct of our employed surgeon), the anesthesiologist group (for the conduct of its employed anesthesiologist) and the hospital. After two weeks of trial, the jury found our client not guilty, and entered a verdict of $4.3 million against the other two defendants.

Bill Roberts, Charles Schmadeke, lawyers in Hinshaw's Springfield office, and Kyle Oehmke of the Belleville office successfully represented The H Group, now known as Centerstone, in a lawsuit filed under the federal False Claims Act and Illinois False Claims Act in the Southern District of Illinois. The H Group provided mental health and substance abuse services throughout Southern Illinois. Relator's theories of liability included the following: 1) The H Group's crisis clinicians performed Mental Health Assessments and submitted them under a crisis code that billed at a higher, inapplicable rate; (2) claims for reimbursement relating to Mental Health Assessments were not properly reviewed or signed by a Licensed Practitioner of the Healing Arts prior to submission; (3) claims for reimbursement routinely contained inaccurate diagnoses of patients; and (4) The H Group conspired with Southern Illinois Hospital Services to render or receive improper remuneration in exchange for the referral of patients and to cause the submission of false claims to the Government. Relator sought all damages allowable under both False Claims Acts. Notably, the federal False Claims Act provides for damages in an amount equal to three times the amount of damages sustained by the federal government (due to any allegedly false claims), plus a civil penalty of not less than $5,500 and not more than $11,000 for each false claim. 31 U.S. C. § 3729(a)(1) (West 2014). The Illinois False Claims Act generally mirrors the damages/penalty provisions of the federal statute. See 740 ILCS 175/3(a)(1) (West 2014); 175/4(d)(2).

We held Relator's feet to the fire throughout the litigation, including filing of a detailed Motion to Dismiss (which the Court ultimately did not rule upon), exchange of voluminous discovery, and early noticing of Relator's deposition. On the morning of Relator's deposition, he agreed to dismiss all claims against The H Group and Co-Defendant Southern Illinois Hospital Services with prejudice. Following the consent of the federal and state governments, dismissal and judgment were entered accordingly. The H Group is very satisfied with the result.

Dawn Sallerson of Hinshaw's Belleville Office successfully defended a radiology group. The suit involved a patient who underwent a pacemaker replacement, during which a needle was broken and unknowingly left in the patient. Following the procedure, the cardiologist ordered a standard post-op x-ray, read by the radiologist as normal. The patient allegedly had complications, including a stroke, as a result of stopping anti-coagulation to remove the retained needle. The x-ray interpreted by our client showed the retained needle. The defense of the radiology group focused on the reasons the needle, despite being visible on the images, was not detected at the time of the read. Dawn was successful in obtaining a voluntary dismissal of the radiology group.

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[1] David Ball and Don Keenan, *Reptile the 2009 Manual of the Plaintiff's Revolution*, 17-18 (2009).
[2] *Id* at 19.
[3] *Id* at 13.
[4] *Id* at 17.
[5] *Id* at 18.
[6] Jill Bechtold and Marks Gray, *Reptile Tactics*, Association of Defense Trial Attorneys Presentation, June 2014.
[7] Reptile 2009 Manual of the Plaintiff's Revolution at 29.
[8] *Id*.
[9] *Id* at 30.
[10] Bechtold and Gray, June 2014.
[11] Ball and Keenan at 32.
[12] *Id* at 33.
[13] *Id* at 55.
[14] See *Id* at 56-57.
[15] See *Id* at 62-63.