Reptile Theory: Bad Science, Good Results

By Deborah Johnson, MC

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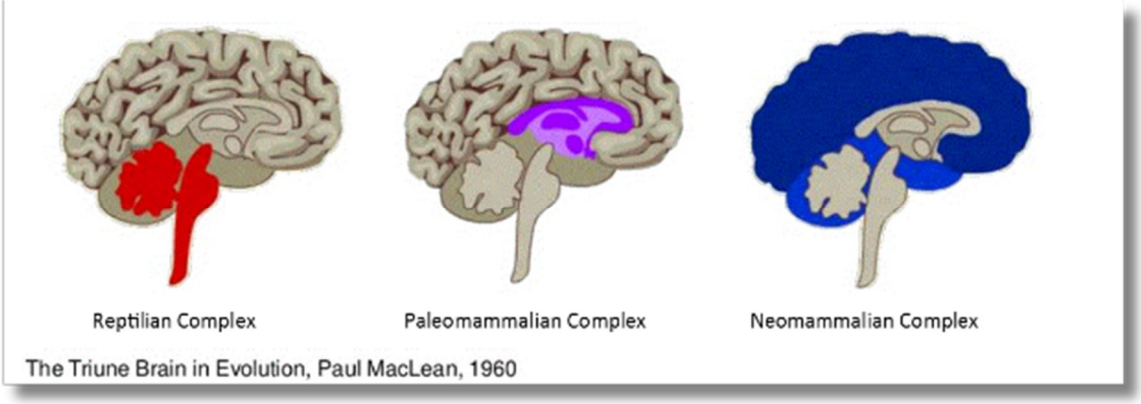
There are more than six billion reasons to take a close look at what's happening with Reptile Theory in the courtroom right now. Because that's how many dollars have been awarded in verdicts and settlements, according to David Ball and Don Keenan's boast back in 2015.

Like it. Hate it. Believe in it. Don't believe in it. What you think doesn't matter. Because something powerful is happening. Plaintiffs are hammering defendants in the courtroom. They're eviscerating witnesses in deposition and the case is effectively over before it barely begins. This article will peel back the curtain of this plaintiff's theory and show you the key elements to enable you to turn the tables. There are basically four elements to look at: 1) the science Reptile Theory is based on, 2) how it's alleged to work, 3) why it doesn't work *that* way, and the final and most important part, 4) the actual psychology and neurophysiology that does work.

The Science Behind Reptile Theory

In the 1960s Paul MacLean, physician and neuroscientist, theorized that our brain had three separate "complexes" or parts. He called it the Triune Brain. These three complexes are a result of evolution from simple to complex, each with distinct capabilities and capacities. This view of our brain is the foundation of the Reptile Theory.



The most primitive part of our brain is called the reptilian complex. It rests at the base of the skull and is the lowest level of brain functioning. This is the instinctual and survival part of your brain, running on autopilot.

The next level of evolution is our paleomammalian complex, also referred to as the limbic system. This is the emotional center of our brain. It supports a variety of functions including behavior, motivation, and long-term memory. Part of it is responsible for learning and decision-making.

The third, and by far the largest and most evolved part of our brain, is the neomammalian complex. This is our grey matter where higher-order brain functions like sensory perception, cognition, spatial reasoning, and language occur.

How the Reptile Theory Allegedly Works: "Danger, Will Robinson!"

The organizing principle is simple: tap into the deepest or most primitive part of the brain where instinct and our need to survive resides. Since this part of the brain is automatically scanning for danger, the plaintiff attorney only has to evoke danger to activate it. Then, according to the theory, when the jury senses this danger they will unconsciously drop into survival mode, letting their reptilian instincts take over.

The Reptilian attorney develops his or her case to trigger these primordial, autopilot reactions: the truck driver didn't follow the safety rules and then smashed into the plaintiff, the doctor was negligent in not

running more tests, the train engineer should have done everything he could to protect the car full of first graders at the railroad crossing, etc.

The insidious extension of this is to take that initial reaction to danger and s-t-r-e-t-c-h it, not just to encompass the plaintiff, but to include everyone on the jury and *their* family and *their* entire community, thus, stimulating the jurors' other primitive instinct to protect their own.

Why it Doesn't Really Work that Way

When the Reptile Theory first appeared on the plaintiff landscape in 2009, experts were quick to debunk it; shredding the science behind the theory.

Here's a quick summary of why:

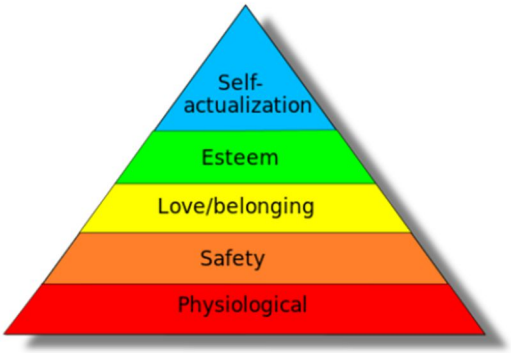
- First, we're not reptiles; we did evolve.
- Second, humans operate beyond their brainstem. A reaction to danger is not a stand-alone. We don't linger in that primordial part of our brain for long. When our brain engages the higher levels of operations in the limbic system (the paleomammalian complex), emotion is far more influential in how we react to danger than just the initial reptilian response.
- Third, simply *talking* about a danger may not always activate the survival instinct, because the danger is not imminent in the courtroom. But, even if jurors are triggered by some sense of danger, they don't stay in that state. When our brain is faced with threats or danger or fear, it immediately starts seeking a way to calm the fear. It is internally scanning for relief; it wants a solution that will relieve the fear-induced brain activity.

What <u>is</u> Working: The Real Psychology and Neurophysiology

If Ball and Keenan's theory doesn't hold up under scientific scrutiny, what *is* working? From my perspective, it's actually a little of this and a little of that, whipped together into a brilliantly developed blueprint to leverage human behavior to favor the plaintiff. Below are six principles of psychology, neuroscience, and subliminal messaging that plaintiff attorneys have seized on to work for them.

#1 Jurors' brains are Velcro for negative thoughts. The human brain evolved to focus on threats because our ancestors needed to avoid threats to survive. We are genetically wired for negativity; our brain is built more for negative thoughts than for positive. Our mind acutely focuses on the bad and can actually discard the good. According to neuropsychologist Rick D. Hanson, PhD, our brain is like "Velcro for negative experiences and Teflon for positive ones." The Reptile attorney amplifies this by calling up negative characterizations of your client.

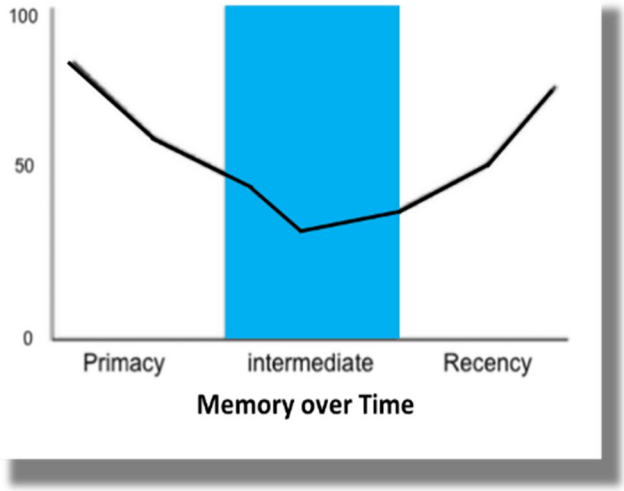
#2. The jurors are not reptiles. In 1943, Abraham Maslow developed a widely-accepted theory referred to as Maslow's Hierarchy of needs; what motivates humans from the most basic to the most evolved. As it relates to Reptile Theory, this addresses our need to feel safe. But this is *not* reptile nature – it's human nature.



Basically, Maslow proposed that motivation is the result of a person's attempt at fulfilling five basic needs: physiological, safety, social, esteem and self-actualization. We start at the bottom and work up as each level is satisfied. For example, if you need food or water you are not thinking about fulfilling your self-esteem needs. Apply Maslow's Hierarchy in the courtroom and if the jury is manipulated into focusing on danger or safety, they may not move into the higher levels. But satisfying that need for safety allows the jury to move to a higher level of thinking/processing.

#3 Make the jury think about bananas. There's a psychological concept known as priming. Research shows that exposure to one stimulus influences our response to another. It's basically selective attention. For example, if you are asked to think about the color yellow and then asked to name a fruit, you are more likely to say banana than to say strawberry.

In the courtroom, Reptile plaintiff attorneys are tutored to expose jurors to concepts like danger, safety, and risk beginning in voir dire and carrying throughout the trial. For example, asking potential jurors if they feel that a truck driver should always put safety first? With that simple question, the jury will see plaintiff and defense testimony through the lens of "putting safety first."



#4 Give the jury dessert first. Part and parcel of the brain's need for efficiency is a concept known as the primacy/recency theory of memory. The first things you tell the jury have the highest recall. The last things you say are next. And everything in the middle, frankly, becomes a muddle.

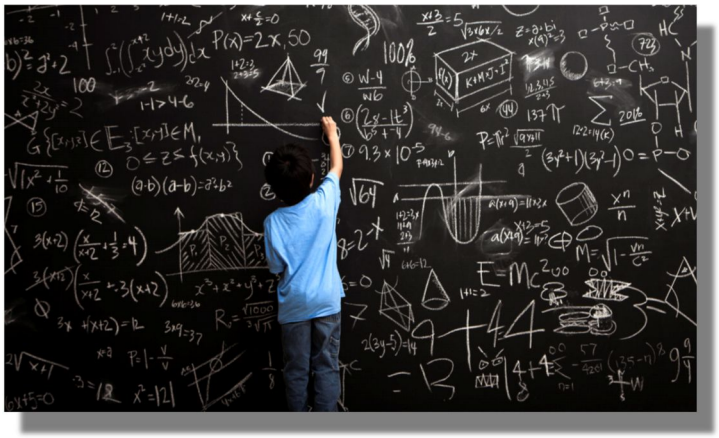
Knowing this to be true, Reptile attorneys shoot out of the gate with their key themes. They don't waste time with nonessentials that the jury neither cares about nor will remember.

#5 Make it simple, stupid. Ball and Keenan describe their relentless laser focus in litigation as "elegant simplicity." This is the linchpin of the psychological concepts that empower Reptile litigation. Our brain is built for efficiency so it is constantly packing, sorting, and condensing. It seeks ways to simplify what needs to be stored in memory. The more efficient the case and the narrower the focus, the easier it is for the jury to absorb. The simpler the path to a conclusion, the easier it is to get the jury on your side. In the manual, they are adamant about the role of focus in prevailing.

The maestros of Reptile Theory teach how to keep the jury laser-focused on one thing: safety rules. Your client's own safety rules! They say they awaken the reptile brain by showing the jury the danger of breaking those safety rules. Maybe it does and maybe it doesn't. Nevertheless, this relentless focus is working.

In their book, they focus on words like prudent, negligent, needless, and danger. They appear again and again and again. They don't stray. Right from the get-go they are implanting key concepts, in layman's language, focused on what they want the juror parroting back during deliberations.

The result of this unwavering focus is that jurors can articulate the entire case in a single sentence in deliberations: the defendant broke their own safety rules and endangered all of us.



#6. Forget about what you want the jurors to *know.* A substantial part of Reptile is not about what jurors know. It's about how they feel. Why? Because far more of our brain is dedicated to emotion than to logical/rational processes. The limbic system (paleomammalian) can hijack rational thought from the higher brain functions as well as override innate brain stem responses in the reptile brain.

Reptile Theory leverages this to the hilt. Reptile lawyers know that emotions are an integral part of attention, learning, and memory. Burgeoning brain research indicates that *no* learning occurs without emotion. You can have an emotion with no learning attached, but there is no learning that occurs without emotion.

The same is true for memory. Do you want the jury to remember the salient points of your case? Dry data, without an emotional component, will never get it done. Have you heard the old saw that the best story wins? Nope. It's the best story imbued with emotion that wins.

Emotions are also an essential part of decision-making. Reptile followers utilize what all marketing experts know; people buy with emotion and justify with facts. Jurors want to know what to care about – not what data to memorize. They want to make decisions that make them feel good, e.g., protecting their family and the community. When the plaintiff's attorney evokes emotion, it can eclipse those pesky facts the defense may want to present.

Conclusion

Forget about reptiles in the courtroom. Ball and Keenan have masterfully leveraged psychological and neurophysiological concepts into a nearly bulletproof roadmap for plaintiffs:

- Jurors are wired to focus on threats
- It's in our human nature to drop out of higher-order thinking when there is a threat
- Priming the jury gives them a lens through which to interpret the whole trial
- Forget linear – go with the most important information first and last
- Laser focus keeps the jury on track, easily
- It's all about how the jury feels… not what they know

While Reptile Theory may not do exactly what Ball and Keenan posit, it does work. Fortunately, none of the principles are secret; they are well-known. It's just a matter of unwinding them to understand how they affect human beings. Additionally, they are not the sole purview of plaintiff's attorneys. They can be used by the defense as powerful offensive measures against the Reptile attorney – from discovery to deposition to trial.

Deborah Johnson has consulted on a variety of divorces and civil and criminal cases, including: business disputes, contracts, SEC fraud, mortgage fraud, mail fraud, civic rights, workman's compensation, medical malpractice, personal injury, employment, rape, sexual assault, manslaughter, and divorce. One recent client won a multi-million dollar divorce settlement and another won a $5.3M award in a civil rights case.

She is a six-time EMMY Award-winning writer and producer. Her Masters Degree in Cognitive Psychology and Television Production from the University of Washington, combined with a rich history of experience, gives her unique insights into what highly diverse audiences perceive and how to communicate to them effectively. While at UW, she studied with nationally recognized expert on eyewitness testimony and memory, Dr. Elizabeth Loftus.

