

The Infestation of the Trucking Industry: Lawyers, Snakes, and Politicians

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Nearly everyone knows the fear. You are driving down the interstate and you find yourself caught between two semis pulling trailers. There is another one in front of you. Their imposing size and speed, combined with the feeling of being trapped, quickens your pulse. You grip the wheel a bit tighter and your eyes widen.

The fears we experience in this situation and the instinct to survive make trucking litigation particularly susceptible to the use of Reptile Theory-based tactics by Plaintiffs' attorneys. The Reptile Theory has been increasing in use since David Ball and Don Keenan wrote *Reptile: The 2009 Manual of the Plaintiff's Revolution* (Balloon Press, 2009). The theory, as applied to the trucking industry, aims to convince jurors that the trucking company and its drivers are a danger on the road and to society overall. Plaintiffs' attorneys create a threat that could cause harm to the juror, their family members, and everyone else on the roadways. They then rely on the primitive portions of the jurors' brains to instinctively react, ignoring all logic and reason, looking for a solution to the threat presented to them. The case becomes less about the facts of the accident at issue, and more about the unsafe practices of the company, its drivers, and the industry overall. In order to protect themselves and every other driver from these dangerous companies, the jurors are asked to send a message that unsafe practices will not be acceptable. The only message that will reach the companies? A large verdict.

The Reptile tactic begins early in the case, often with the Plaintiff's initial pleading. The Complaint will generally reference violations of safety rules or unnecessary dangers to society. It may contain allegations of negligent hiring, negligent supervision, or a lack of training. The Complaint may even list prior accidents of the driver or safety violations of the company. The goal at this stage is to expand the case beyond the accident, creating a narrative of systematic safety violations and danger to all, not just the Plaintiff.

The most crucial time in the creation of the Plaintiff's reptilian narrative is the discovery portion of the case. Beyond the deposition of the driver, the deposition of the company's safety director and/or corporate representative is used to set forth safety rules and establish the company's failure to abide by them. This is accomplished primarily through the asking of seemingly benign questions with "obvious" answers and broad hypotheticals. Taking this approach, the Plaintiff's attorney takes the abstract safety rules and, through the use of documents, the testimony of the defense's witnesses, experts, and other evidence, shows the jurors at trial that the company is unsafe and needs to be stopped. The worst part of the Reptile Theory is that it works, and more and more Plaintiffs' attorneys are utilizing it against the trucking industry.

Economics of the Reptile

A new study conducted by the American Transportation Research Institute (ATRI), *Understanding the Impact of Nuclear Verdicts on the Trucking Industry*, was released in June 2020. The study compiled "litigation data for 600 cases to statistically analyze the key metrics of large verdicts in the trucking industry." *Id.* at p. 14. In 2010, the year after Ball and Keenan were published, the study identified less than ten cases with verdicts over \$1 million. By 2011, that number exploded to sixty such cases, and in 2013, over seventy. *Id.* at p. 15. According to the research, from 2010 to 2018 the size of verdict awards increased 51.7% annually while the standard rate of inflation and healthcare costs grew only 1.7% and 2.9%, respectively. **The study found that the average size of a verdict increased from \$2,305,736 in 2010 to \$22,288,000 in 2018. *Id.* at p. 18.**

In an article published earlier this year, Don Keenan spoke to the increase in verdicts through the use of the Reptile. He stated:

"It's undeniable that the verdicts have gone through the roof...But in my humble opinion, the roof was too short for a number of years...Now we're getting all the damages. The cases haven't gotten any better; the lawyers have gotten far better at being able to persuade the jury what justice in this country is all about."
<https://www.law.com/dailyreportonline/2020/05/14/Reptile-co-author-don-keenan-says-big-verdicts-reflect-justice/>

Jurors are Awarding More Money, More Often

The Academy of Truck Accident Attorneys disputes the findings of the ATRI study. "The real problem is that insurance minimum limits haven't been updated in over 40 years. Taxpayers end up paying for the lifetime care of trucking victims when at-fault motor carriers should pay...Large truck companies don't have to pay the few \$10 million+ verdicts, they have insurance to cover this. But the trucking companies with only minimum insurance can't pay for the harm they cause," said Michael Leizerman, co-founder of the Academy of Truck Accident Attorneys, a non-profit with more than 700 members. This opinion appears to be shared by some legislators as well.

Pending Legislation

The Moving Forward Act was introduced in the U.S. House of Representatives as a plan to spend more than \$1.5 trillion that would impact nearly every aspect of the American life. Part of the Act, the "Investing in a New Vision for the Environment and Surface Transportation in America Act," or the INVEST in America Act, is a proposed infrastructure bill that would invest \$500 billion to rebuild and improve the American infrastructure. For obvious reasons the standalone bill had the support of the trucking industry; however an amendment has been added that could have an adverse impact on that industry.

The Garcia Amendment, introduced by Representative Jesus "Chuy" Garcia, a Democrat from Illinois, increases current insurance liability requirements for commercial vehicle drivers from \$750,000 to \$2 million. Illinois Democrat Representative Mike Bost, who worked as a truck driver and manager of his family's company Bost Truck Service for 13 years prior to entering politics, countered with an Amendment of his own, attempting to remove the Garcia Amendment, believing that the Amendment would be detrimental to smaller carriers. The Bost Amendment was blocked by House Democrats without even a vote and the Act, including the Garcia Amendment, moved forward to a vote in the House on July 1, 2020.

The Moving Forward Act passed the House by a vote of 233-188, sending the Act to the Senate. Republicans currently hold 53 seats in the Senate, compared to the Democrats' 45 seats. An additional two Independents both caucus with the Democrats. Because of the Republican control, the Moving Forward Act has a rocky road ahead. Should the unlikely occur and the Move Forward Act pass a vote of the Senate, the White House has made it clear that it will never become law. It is expected that if the Senate passes the Act, President Trump would likely veto it.

Battling the Infestation

If the Moving Forward Act fails to become law, it is doubtful that Democrats will abandon their attempt to increase minimum insurance liability requirements for commercial vehicle drivers. It is likely to continue to be added to bills until it becomes law, particularly so if Joe Biden is elected President. Regardless of its fate, the Reptile tactics of Plaintiffs' lawyers will continue to drive up the value of accidents involving commercial vehicles. As these values continue to rise, it can be expected that the number of Plaintiffs' attorneys filing the cases will also increase, as will their quality. The majority of trucking cases present as relatively easy money for the Plaintiffs' Bar. They are cheaper to develop than many other areas of law, and as explained above, they present the ideal environment for the Reptile to thrive.

Hope is not lost. The trucking industry needs to seek counsel from attorneys who are not only experts in handling trucking litigation, but who also understand the proper way to handle this dangerous and complicated litigation strategy. This begins with the ability to recognize when the Reptile Theory is being deployed against them.

A review of the Complaint will generally signal to an attentive defense attorney that their client is being attacked with the Reptile technique. Such Complaints will involve counts that make issue of the company's safety standards, while minimizing the underlying accident to only a symptom of a much larger threat. These Complaints will often list any and all known incidents (accidents, citations, etc.) involving both the driver and the company, regardless of their relevance to the facts of the case. Consideration must be given to the preparation of motions to dismiss any portions of the Complaints that expand the issues involved. A successful Motion to Dismiss can destroy the Plaintiff's Reptile before it can develop.

The depositions of a company's corporate representative and its driver have the potential to either win or lose a case. Preparation of the witness is critical. The defense attorney must be willing and able to spend as much time as necessary to prepare these witnesses for their depositions. Prepare. Prepare. Prepare. These witnesses are generally not familiar at all with the litigation process, nor are they able to anticipate how their answers to seemingly easy questions can be used against them. These depositions take skill, experience, and patience to defend. The defense attorney cannot sit idly by while their witness is unknowingly turned against themselves. It is necessary that the attorney understands the techniques and goals of the Plaintiff's attorney, has a plan to protect the witness, is able to make the proper objections to the inappropriate hypotheticals their client will be asked, and can effectively limit the case to the relevant issues.

These depositions also provide the defense with the opportunity to humanize the company in the eyes of the juror. The Reptile strategy depends in large part on the painting of the company as an evil wrongdoer. Time and effort are required to establish that the company is one that is concerned with safety, contributes positively to their community, and is nothing to fear. It needs to be clear that safety is important. Defense of these cases is also greatly helped by making the driver of the vehicle relatable to the juror. The drivers work hard. Their job is hard. They have families and friends they care about and they recognize the importance of performing their jobs safely. By creating a connection between the drivers and the jurors, the Plaintiff will have a difficult time making the case about the juror and not the driver.

It is necessary that these cases be defended by attorneys that understand the trucking industry, enjoy the work, and have the ability to establish strong rapport with the truck drivers. Plaintiffs' attorneys are good story tellers. That skill wins them cases. It is time that defense attorneys become proactive and develop a narrative that stays with the case from the time of the accident through trial. Failure to adapt and appropriately respond to the techniques of Plaintiffs' attorneys will only result in ever-increasing values for cases small and large.