

Proactive with a Purpose: Reptile Theory and How to Help Prevent It

When it comes to handling claims in the modern world, do facts still matter? Of course, they do. However, when it comes to claims involving the Reptile Theory, a jury's reliance on the basic facts of the accident begin to diminish. Should these basic facts, like who had the green light, who made the left turn and who received a citation not be the only factors considered when it comes to determining fault and returning a verdict? The Reptile Theory seeks to render all of these basic facts irrelevant and instead appeal to the jury's primitive, "Reptilian Brain".

In the 1960s, Paul MacLean, an American neuroscientist, created the "Triune Brain" model, which divided the human brain into three regions and organized into a hierarchy. The three regions are the Reptilian Brain (Primal), the Paleomammalian (Emotional) Brain and the Neomammalian (Rational) Brain.¹ Now, the human brain is obviously a complex organ and dividing it into three regions may be overly simplistic. That said, when it comes to the Reptile Theory, awakening the Reptilian Brain in the jury can lead to potential serious consequences for the defense.

The Reptilian Brain is responsible for our primitive survival instincts. When that survival is threatened, the Reptilian Brain takes over and can overpower logic and reason. Plaintiff attorneys may seek to awaken these primitive instincts by attempting to show that the motor carrier or their driver is a danger to the jury, their families and the community. They further attempt to convince the jury that they are the only ones with the power to eliminate this danger and should do so by awarding excessive monetary damages.

The formula is a simple one: Safety Rule + Danger = Reptile. The concept of the "Safety Rule" is paramount to the Reptile Theory. A plaintiff attorney will point out the safety rule to the jury, get the defendant to agree with that rule, and then demonstrate to the jury that the defendant broke the rule, thereby needlessly putting the entire community at risk. The semantics of Reptile Theory are also important. For instance, according to Reptile Theory, it would be improper to say, "The truck driver ran the red light", but rather "The trucker violated the public safety-rule to watch where he was going and obey traffic signals".

These rules also come from a variety of credible sources. Some of the most common are:

• Driver/employee manuals

• Company policies and procedures

• Training materials

• Federal Motor Carrier Safety Regulations (FCMSRs)

• Truck driver school books

• Defensive driver courses

• Preventable accident manuals

As an easy example, let us focus on the Federal Motor Carrier Safety Regulations. Specifically, §382.303, Post-Accident Testing. If it was required that the driver submit to post accident drug and alcohol testing and failed, the plaintiff attorney has a clear path to establishing the Reptile Theory. The claim becomes less about what actually occurred or who was at fault and more about the company's hiring practices and the unnecessary danger they created by placing an unsafe driver on the road.

After establishing the rules, the next step would be getting the defendant to agree with the rule. This is generally accomplished through the deposition of the driver or safety director. The following demonstrates a typical line of questioning in a driver's deposition:

Q. You would agree with me that if you followed at such a speed or at such a short distance that you couldn't stop your vehicle, then that would be disregarding the safety of other people on the roadway; wouldn't it?

Q. You should never, as a commercial driver, needlessly endanger other members of the public that are using the roadway with you; right?

Q. And if you did and you hurt someone, you would be responsible; correct?

This pattern of questioning demonstrates the reptilian tactics of the plaintiff's attorney. Once the driver agrees to one of these questions, the attorney will then attempt to influence the jury to believe that their responsibility is larger than the case at hand. This is about making the community a safer place and the jury must do something about it.

WHAT STEPS CAN WE TAKE TO PREVENT THE REPTILE?

As discussed above, the claimant attorney's main objective here is to enhance the value of a case, sometimes exponentially, by appealing to the simplest and oldest area of the human brain. While often involving complex issues and technicalities, the strategy is really quite simple. A claimant attorney using the reptile approach is trying to: 1) frame the case in such a way that helps jurors make their decision;

2) present what the jurors can agree are fair rules of conduct; 3) present a violation as one that needlessly endangers the public; and 4) give the jurors a reason to care. When deployment of this strategy is successful, it can be hard for defendants to overcome the effects even when the relevant facts and logic are on their side. In this case, the best defense is a good offense. There are several ways that you can help stop the reptile in its tracks before an accident occurs.

EDUCATE PERSONNEL

Educate all drivers, safety personnel and operations managers on the importance of understanding basic safety regulations such as federal and state regulations, CDL manuals, truck driver

school books, defensive driver courses and company policies and procedures. Develop and stick to a plan for ongoing training to keep up with new regulations, new avenues for exposure and new technology. Practice what to do in an accident, and do it often. Pro tip: the National Interstate Risk Management team is a great resource.

DON'T CREATE STANDARDS YOU CAN'T ENFORCE

You should establish company policies and procedures that are clear, concise and consistent. Examine those policies closely and regularly. Do your policies contain higher standards than those required by law? If so, consider whether those policies are essential. Unnecessarily stringent policies may be hard to enforce consistently, and failure to consistently enforce your policies is an open invitation for scrutiny by a claimant's attorney.

PROACTIVELY ENFORCE YOUR POLICIES

Don't wait until an accident occurs to question whether policies have been followed. You should have a system in place to help ensure the investment you have made in education and training is paying off. How often are you looking at driver logs? How often are you reviewing AER or GPS data? Are you taking corrective action when violations are discovered? Identifying and addressing issues before they become issues will make you safer on the road and better equipped to defend a claim when an accident occurs.

TIMELY REPORTING – HELP US HELP YOU!

Unfortunately, accidents are never convenient. They can occur at odd hours and in unfamiliar places. Don't wait for Monday morning. Contact your insurance carrier immediately. National Interstate has a 24-hour response hotline available. CALL IT! Claims don't typically get better over time, and even claims involving favorable liability scenarios can develop adversely overnight. Our catastrophic "CAT" loss handling process identifies claims that require immediate escalation, and ensures they are handled immediately by our most senior claim professionals.

A CAT loss is typically a claim involving a fatality, pedestrian or motorcycle accidents, serious injury, substantial cargo damage, fire, a multi-vehicle accident, substantial property damage or a fuel spill. When a CAT loss is identified, the handling adjuster will act quickly to assess the situation and determine an appropriate response.

This often includes retaining local defense counsel. The reasons to retain defense counsel are numerous and include:

- Securing the best independent adjusters and accident reconstruction experts
- Getting "boots to the ground" quickly
- Serving as a conduit between the insured driver and the investigating agency
- Ensuring compliance with post-accident testing
- Identifying witnesses
- Preserving evidence
- Obtaining relevant information weeks or sometimes even months before an official report is released.

Most importantly, having defense counsel involved early also maintains the legal privilege of the investigation and provides easy access to invaluable guidance and advice in those vital early stages of the claim.

WHY IS IT IMPORTANT TO BE PROACTIVE?

As noted above, being proactive with safety and loss control can be a huge investment of time and resources. Being proactive in accident investigations can also involve significant time and expense. We understand this can sometimes be frustrating when you are focused on your business. While the aim is to prevent a claimant's attorney from even having the opportunity to use the reptile theory, it is equally important to recognize even the slightest potential early in an accident investigation, even in cases where your driver does not appear to be at fault or the other party may not be seriously injured.

Recently, a jury in a neutral Texas venue awarded a claimant with a neck and back injury more than \$101 million dollars in a lawsuit against a trucking company. Liability was not disputed, and the claimant sought chiropractic treatment and underwent one surgery. His total medical expenses were no more than \$250,000. So, what happened? The insured driver had a poor driving record (three moving violations within three months of hire and was on company probation for three other accidents while employed by the trucking company). He also tested positive for both marijuana and methamphetamines.² This information was used by the claimant's attorney in a reptile fashion to inflate the award.

The scary thing is that this verdict is no longer an outlier. In some venues, large verdicts like this are a regular occurrence. Obviously, if this driver was not on the road in the first place, this accident would not have occurred. Would your policies with respect to accidents and drug testing have worked here? Hopefully yes, but even the most proactive policies and enforcement strategy don't always work. When faced with adverse facts, it is important to recognize them early so that we can properly evaluate the potential exposure and position the claim for resolution as soon as possible - ideally before the adverse facts have to be disclosed to the other party.

1 "The Triune Brain in Evolution: Role in Paleocerebral Functions" – Paul D. MacLean, National Institute of Mental Health, Bethesda, Maryland

2 https://www.news-journal.com/news/local/avenger-man-awarded-million-verdict-from-fort-worth-trucking-company/article_6d3af6