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"Reptile" under attack

Responding to defense motions to foreclose plaintiffs' counsel from making "Reptile" arguments to the jury

[*This article is drawn from an amicus brief drafted by Steven B. Stevens. Jeff Ehrlich edited the document to fit within the* Advocate's *space limitations.*]

Many skilled trial lawyers on the plaintiffs' side have embraced David Ball and Don Keenan's "Reptile" approach to presenting their cases to the jury. (See D. Ball and D. Keenan, *Reptile: The 2009 Manual of the Plaintiff's Revolution*.) The defense bar has noticed, and has been pushing back. We now regularly see defense motions in limine, new-trial motions, and appeals, which argue that "Reptile" arguments are either improper "Golden Rule" arguments, improper appeals to emotion, or that they improperly ask the jury to punish the defendant through their compensatory-damage awards.

In this article we explain why the defense attempts to limit the use of Reptile arguments are flawed. In a nutshell, Reptile arguments focus on the need for the defendants to behave in a safe, reasonable manner; and on the consequences to the community when they fail to do so.

The public policy of tort law

Applying theories of persuasion to tort cases requires, in a sense, trial attorneys to return to law school. These theories are grounded in fundamental principles of law, embodied in statutes and cases that counsel might not have considered in years or even decades. This understanding of the relationship between the public policy underlying tort law and principles of persuasion is vital, because adversaries will attack arguments based on safety and community standards of reasonableness as something new and untested.

In fact, they are quite the opposite. The legal principles are deeply rooted in

common law and repeatedly written, cited, endorsed, and applied by courts across the Nation.

Tort law, in its broadest sense, defines the obligations that individuals and entities owe to each other in society. "[T]ort law is primarily designed to vindicate social policy." (*Foley v. Interactive Data Corp*. (1988) 47 Cal.3d 654, 683, 254 Cal.Rptr. 211, 227.) Social policy promotes safety and deters unreasonable conduct. "One of the purposes of tort law is to deter future harm." (*Burgess v. Superior Court* (1992) 2 Cal.4th 1064, 1081, 9 Cal.Rptr.2d 615, 624.)

It is a public policy to promote safety, deter unnecessary dangerous conduct, and to compensate people who are injured by others who acted unreasonably. Evidence and arguments that rest on this principle are completely consistent with the fundamental principles of tort law.

Duty

The concept of duty as a function of foreseeability of harm is centuries old. In *Mitchil v. Alestree*, 86 Eng.Rep. 190 (1676), the defendant brought a wild horse to a place frequented by pedestrians. The horse became unruly and injured the plaintiff. After a verdict for the plaintiff, the defendant contended he could not be liable because he intended no harm. The court affirmed, finding that the defendant was at fault for bringing a wild horse "into such a place where mischief might probably be done, by reason of the concourse of people."

California's Civil Code provides, at section 1714, that, "Everyone is responsible, not only for the result of his or her willful acts, but also for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself or herself."

The California Supreme Court has recognized this principle as the foundation of the law of negligence. (*Rowland v. Christian* (1968) 69 Cal.2d 108, 112, 70 Cal.Rptr. 97, 100.)

Foreseeability as an element of duty

"[L]egal duties are not discoverable facts of nature, but merely conclusory expressions that, in cases of a particular type, liability should be imposed for damage done." (*Tarasoff v. Regents of University of California* (1976) 17 Cal.3d 425, 434, 131 Cal.Rptr. 14, 22.) In California, the touchstone of liability for injuries to others is foreseeability. "[T]he law of torts holds defendant amenable only for injuries to others which to defendant at the time were reasonably foreseeable." (*Dillon v. Legg* (1968) 68 Cal.2d 728, 739, 69 Cal.Rptr. 72, 79.)

Whether, in a particular type of case, a court should depart from Section 1714's articulation of a duty of care depends on several factors, which the Supreme Court articulated in *Rowland*.

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"[T]he major ones are the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved." (*Rowland*, 69 Cal.2d at 113, 70 Cal.Rptr. at 100.)

The most important of these considerations in establishing duty is foreseeability.

> As a general principle, a defendant owes a duty of care to all persons who are foreseeably endangered by his conduct, with respect to all risks which make the conduct unreasonably dangerous.

(*Tarasoff*, 17 Cal.3d at 434-435, 131 Cal.Rptr. at 22.)

Raymond v. Paradise Unified Sch. Dist. of Butte County (1963) 218 Cal.App.2d 1, 31 Cal.Rptr. 847 (1963), expounded on the nature of "duty" in a case holding that a school district had a duty to supervise young children who were waiting for a school bus, despite denials that it was aware that they were using a bus stop usually frequented by older students. The court explained:

> An affirmative declaration of duty simply amounts to a statement that two parties stand in such relationship that the law will impose on one a responsibility for the exercise of care toward the other. Inherent in this simple description are various and sometimes delicate policy judgments. *The social utility of the activity* out of which the injury arises, *compared with the risks* involved in its conduct; the kind of person with whom the actor is dealing; the workability of a rule of care, especially in terms of the parties' relative *ability to adopt practical means of preventing injury*; the relative ability of the parties to bear the financial burden of injury and the availability of means by which the loss may be shifted or spread; the body of statutes and judicial precedents which color the parties' relationship; *the prophylactic effect of a rule of liability*; in the case of a public agency defendant, the extent of its powers, the role imposed upon it by law and the limitations imposed upon it by budget; and finally, *the moral imperatives which judges share with their fellow citizens* such are the factors which play a role in the determination of duty.

(*Id.*, at 218 Cal.App.2d at 8, emphasis added.)

"The prophylactic effect of a rule of liability" is the very consideration of what the law should encourage, what types of conduct and decision-making, the law should encourage. It is a recognition that the law should encourage safe choices when danger is foreseeable. As *Dillon* explained, quoting *Palsgraf v. Long Island R.R. Co.* (1928) 248 N.Y. 339, 344, 162 N.E. 99, 100, "The risk reasonably to be perceived defines the duty to be obeyed." Hence, a defendant owes a duty, in the sense of a potential liability for damages, only with respect to those risks or hazards whose likelihood made the conduct unreasonably dangerous, and hence negligent, in the first instance. (*Dillon*, 68 Cal.2d at 739.)

Palsgraf crafted a distinction between the inability to foresee an injury in general and the inability to foresee the manner in which a particular injury occurred. "This does not mean, of course, that one who launches a destructive force is always relieved of liability, if the force, though known to be destructive, pursues an unexpected path. It was not necessary that the defendant should have had notice of the particular method in which an accident would occur, if the possibility of an accident was clear to the ordinarily prudent eye." (*Palsgraf*, 248 N.Y. at 344, 162 N.E. at 100.)

Distinction: Foreseeability as an element of negligence

Employing the word "foreseeability" often creates confusion because it is invoked in duty analysis as well as in proximate-cause analysis. "Foreseeability with respect to the analysis of duty must be distinguished from foreseeability in the context of determining negligence (i.e., breach of duty) or causation. The failure to distinguish the variety of roles played by the concept of foreseeability in tort has caused confusion." (*Laabs v. S. California Edison Co.* (2009) 175 Cal.App.4th 1260, 1272-1273, 97 Cal.Rptr.3d 241, 250 (2009).)

"The confusion may stem, at least in part, from the fact that the 'foreseeability' concept plays a variety of roles in tort doctrine generally; in some contexts it is a question of fact for the jury, whereas in other contexts it is part of the calculus to which a court looks in defining the boundaries of 'duty.'" (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 573 n.6; 224 Cal.Rptr. 664, 669 n.6.)

Proximate cause

In *Bigbee v. Pacific Tel. & Tel. Co.* (1983) 34 Cal.3d 49, 56 n.8, 57, 192 Cal.Rptr. 857, 860 n.8, 861, the plaintiff was inside a telephone booth located fifteen feet away from the curb. An intoxicated driver veered off the street and crashed into the booth, injuring the plaintiff. The defendants – the phone company and the company that placed the phone booth – moved for summary judgment, contending that they had no duty to the plaintiff and that they were not the proximate cause of the plaintiff's injuries. On both points, the defendants argued that the risk of injury was unforeseeable.

Bigbee disposed of the duty question in a footnote, finding that companies that place, install and maintain telephone booths have a duty to exercise due care in carrying out those activities. (*Bigbee*, 34 Cal.3d at 56 n.8, 192 Cal.Rptr. at 860 n.8.) The problematic issue was whether the particular injury that the plaintiff suffered was foreseeable – that is, proximate cause. The Supreme Court's discussion about foreseeability in the context of proximate cause emphasized the role that safety concerns – and the policy of encouraging thoughtfulness about safety – play in this analysis. An injury does not have to be probable in order to be foreseeable. The Court explained,

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> In pursuing this inquiry, it is well to remember that foreseeability is not to be measured by what is more probable than not, but includes whatever is likely enough in the setting of modern life that a reasonably thoughtful [person] would take account of it in guiding practical conduct. . . . *One may be held accountable for creating even the risk of a slight possibility of injury if a reasonably prudent [person] would not do so*. . . . Moreover, it is settled that what is required to be foreseeable is the general character of the event or harm – e.g., being struck by a car while standing in a phone booth – not its precise nature or manner of occurrence.

(*Bigbee*, 34 Cal.3d at 57-58, 192 Cal.Rptr. at 862.)

California Civil Instruction (CACI) 401 articulates this principle:

> Negligence is the failure to use reasonable care to prevent harm to oneself or to others. A person can be negligent by acting or by failing to act. A person is negligent if he or she does something that a reasonably careful person would not do in the same situation or fails to do something that a reasonably careful person would do in the same situation. You must decide how a reasonably careful person would have acted in [name of plaintiff/defendant]'s situation.

Damages as integral to the purpose of tort law

"The overall policy of preventing future harm is ordinarily served, in tort law, by imposing the costs of negligent conduct upon those responsible." (*Cabral v. Ralphs Grocery Co*. (2010) 51 Cal.4th 764, 781, 122 Cal.Rptr.3d 313, 327.) Because the goal of tort law is to compensate for harm caused by breach of duty, argument for full compensation is consistent with that goal. Civil Code section 3281 embodies this principle: "Every person who suffers detriment from the unlawful act or omission of another, may recover from the person in fault a compensation therefor in money, which is called damages."

This rule is also embodied in CACI 3902, which tells juries that it is their role, if they decide in favor of the plaintiff on liability, to determine the amount of damages, and that in doing so, "The amount of damages must include an award for each item of harm that was caused by [Defendant's] wrongful conduct, even if the particular harm could not have been anticipated."

Arguments to the jury

Counsel have wide latitude to persuade a jury about the virtue and reasonableness of their clients. As the Supreme Court explained in *Cassim v. Allstate Ins. Co*. (2004) 33 Cal.4th 780, 795, 16 Cal.Rptr.3d 374, 383-384:

> In conducting closing argument, attorneys for both sides have wide latitude to discuss the case. The right of counsel to discuss the merits of a case, both as to the law and facts, is very wide, and he has the right to state fully his views as to what the evidence shows, and as to the conclusions to be fairly drawn therefrom. The adverse party cannot complain if the reasoning be faulty and the deductions illogical, as such matters are ultimately for the consideration of the jury. . . . Counsel may vigorously argue his case and is not limited to "Chesterfieldian politeness." . . . An attorney is permitted to argue all reasonable inferences from the evidence. . . . Only the most persuasive reasons justify handcuffing attorneys in the exercise of their advocacy within the bounds of propriety.

Advocating for the safest conduct as reasonable care is not a "Golden Rule" argument

A Golden Rule argument asks the jurors to place themselves in the position of the plaintiff and ask themselves how much money they would want to be willing to suffer the injuries that she has suffered. The argument is improper because "[h]ow others would feel if placed in the plaintiff's position is irrelevant."(*Cassim*, 33 Cal.4th at 797 n.4, 16 Cal.Rptr.3d at 385 n.4.)

Defendants often insist that evidence or arguments that emphasize safety and community standards of reasonable care are Golden Rule arguments, and ask the trial court to ban them. Asking for a consensus about what conduct is reasonable to expect from other members of the community, however, is nothing like a Golden Rule argument.

The genius of the jury system is that it brings together people of diverse backgrounds and experiences and, together, they determine whether a defendant's (or a plaintiff's) conduct was reasonable. It is a determination of whether the conduct was reasonable by the standards expected of members of the community and, if unreasonable, that the defendant should be accountable for the harm it caused.

Over 140 years ago, the United States Supreme Court recognized that the jury is the conscience of the community. Although it did not use that phrase, it adopted the philosophy that the jury is in the best position to determine what members of that community should expect from each other. In *Railroad Co. v. Stout* (1873) 84 U.S. (17 Wall.) 657, 21 L.Ed. 745, the Court affirmed a judgment finding that a railroad was negligent in its maintenance of a turntable that injured a child. The Court reposed its trust in the jury to determine what safety it expects from the companies operating in the community:

> Twelve men of the average of the community, comprising men of education and men of little education, men of learning and men whose learning consists only in what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer; these sit together, consult, apply their separate experience of the affairs of life to the facts proven, and draw a unanimous conclusion. This average judgment thus given it is the great effort of the law to obtain. It is assumed that twelve men know more of the common affairs of life than does one man, *that they can draw wiser and safer conclusions* from admitted facts thus occurring than can a single judge.

(*Id*., 84 U.S. (17 Wall.) at 663-664, emphasis added).

Justice Mosk, in his concurring opinion in *Ballard v. Uribe*, expressed the same philosophy and characterized it

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with the now familiar shorthand, the "conscience of the community." "A jury has also been frequently described as 'the conscience of the community.' . . . In addition, courts have long recognized that 'in our heterogeneous society jurors will inevitably belong to diverse and often overlapping groups defined by race, religion, ethnic or national origin, sex, age, education, occupation, economic condition, place of residence, and political affiliation' . . . . The very purpose of the right to trial by a jury drawn from a representative cross-section of the community 'is to achieve an overall impartiality by allowing the interaction of the diverse beliefs and values the jurors bring from their group experiences.'" (*Ballard*, 41 Cal.3d at 577, 224 Cal.Rptr. at 672, J. Mosk, con.)

There are limits on what counsel can argue, of course. Appeals to bigotry or prejudice, *Kolaric v. Kaufman* (1968) 261 Cal.App.2d 20, 67 Cal.Rptr. 729, or direct appeals to self-interest of jurors as taxpayers, *Du Jardin v. Oxnard* (1995) 38 Cal.App.4th 174, 179, 45 Cal.Rptr.2d 48, 50, are unseemly and unprofessional. Such arguments are nothing like advocacy of safety as the reasonable standard of care to be expected of all people.

It is not improper to remind a jury of its role in the tort justice system

The wide latitude accorded to counsel in arguing a case includes the right to ask the jury to return a verdict that promotes the public policies of the law. In *Bell v. Farmers Ins. Exchange* (2004) 115 Cal.App.4th 715, 763-764, 9 Cal.Rptr.3d 544, for example, the plaintiff's counsel argued that overtime-compensation laws embody public policy and workers must be paid overtime at premium rates. The appellate court rejected a challenge to the propriety with this argument:

> *[C]ounsel simply appealed to the jury to vindicate the public policy* underlying the overtime laws by holding [the defendant] accountable for the full amount of overtime compensation owing to plaintiffs. We do not view this argument as suggesting that the jury should inflate the damage award or award the equivalent of punitive damages.

(*Id*., emphasis added.)

Hence, it is not improper argument to remind the jury, or even to implore it, to live up to a role that the law already acknowledges. The Golden Rule prohibition cannot be rationally stretched to include arguments about the unreasonableness of the defendant's choices, even if the implication of that argument is that, with different choices, the entire community will be safer.

Reminding the jury that it speaks for the community when it determines what is reasonable conduct is consistent with the public policy of tort law, including deterrence of future conduct by this particular defendant and preventing future harm by others. *Rowland* itself invokes community standards as a fundamental principle of tort law. Its often-cited passage about the factors that determine includes not only foreseeability of harm but, as also "the moral blame attached to the defendant's conduct" and "the . . . consequences to the community of imposing a duty to exercise care." (*Rowland*, 69 Cal.2d at 113, 70 Cal.Rptr. at 100.)

"Moral blame" and "consequences to the community" implicate judgments of reasonable people, assembled as a jury, to determine reasonable expectations of conduct and behavior of fellow members of the community.

Being held accountable is not being punished

Much has been written about the language of responsibility, with the defense taking issue with phrases (taken out of context) such as "hold them accountable" or "tell them" or "send a message." The contention is that using those words should be deemed misconduct as a matter of law and banned because, so the argument goes, they are the words of punitive damages. Like all words, however, they depend on the context.

"Accountable" means "responsible." To argue that a defendant should "account" for its acts is to argue that it needs to make amends for its acts. Webster's New World Collegiate Dictionary (3rd ed. 1998), p. 9. Hence, "accountable" or "account" carry no suggestion of punishment, except, perhaps, to the intransigent defendant who insists that it did nothing unreasonable even after the jury has told it otherwise and, thus, sees any compensation as punishment.

But trial counsel must be careful not to exhort the jury to inflate the award. Full compensation is one thing; asking for punishment, vengeance or retribution is quite another.

No doubt there have been cases in which counsel have beseeched a jury to "send a message" to a defendant by imposing substantial punitive damages. Also, there have been some cases in which counsel have used the same phrase to convey a desire for the jury to add, improperly, a punitive component to compensatory damages. Defendants often point to *Nishihama v. City and County of San Francisco* (2001) 93 Cal.App.4th 298, 112 Cal.Rptr.2d 861, as authority that counsel's invitation to the jury to "send a message" renders a closing argument improper.

But *Nishihama* does *not* hold that "send a message" or "tell the defendant" are touchstones of misconduct. The improper conduct in *Nishihama* was not the use of that phrase; it was the entire context of the argument, in which the jury was invited to inflate the compensatory damages – in effect injecting a punitive component into the compensatory damages.

In the context of a debate about what is reasonable, counsel can justly entreat the jury to choose safety as reasonable care "to send a message" that safety is the standard of conduct that members of a community should expect from each other. To a defendant who argues (and perhaps even believes) that lackadaisical conduct is enough, or that half-hearted measures should be sufficient, it may seem that the message of safety is punitive. It is not.

The jury, through a verdict finding liability and awarding damages, tells a defendant and all others similarly situated in the community that the acts causing

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injuries were unreasonable and the injuries must be compensated. One of the "public policies underlying our tort system . . . [is] . . .as a general matter . . . to maintain or reinforce a reasonable standard of care in community life." (*City of Santa Barbara v. Superior Court* (2007) 41 Cal.4th 747, 755, 62 Cal.Rptr.3d 527, 532.)

A verdict that holds the defendant accountable for the injuries caused by its unreasonable choices will inherently carry an unspoken message that tells the defendant to change its behavior to correspond with the standard of care in the community. Accordingly, an argument to "tell the defendant" or to "send a message" implicates one of the fundamental public policies of the tort system. The common- sense judgment of the community holds true for a jury's determination of damages as well. The jury is uniquely qualified to determine which injuries are tolerable or intolerable and, as to the latter, what is fair compensation.

It is not a Golden Rule argument to call upon a jury to be the conscience of the community and set a value for a plaintiff's particular injury. "[T]he jury is the collective conscience of the community, and its assessment of damages must be given particular weight when intangible injuries are involved." (*Mary Beth G. v. City of Chicago* (7th Cir. 1983) 723 F.2d 1263, 1276); see also *Leather v. Ten Eyck* (SDNY 2000) 97 F.Supp.2d 482, 489 ("[T]he jury expresses the conscience of the community, and this court must refrain from placing unreasonable restrictions on its power to do so, or second guessing its conclusions"].)

Attacking the inspiration for closing arguments

Defendants often try to ban Reptile-based arguments by taking issue with consultants and commentators who have studied jury verdicts and the techniques of persuasion. These defense arguments – in particular, motions and objections to ban a plaintiff's arguments about safety, accountability, and the conscience of the community about what is reasonable – rest on a misguided notion that they are appeals to emotion. Experienced trial attorneys disclaim reliance upon emotion. They endeavor to persuade jurors that safety is the reasonable expectation of all members of the community.

An argument that a reasonable person should choose safety is an argument based on the law and evidence. California Civil Instruction 401 instructs the jury:

> A person is negligent if he or she does something that a reasonably careful person would not do in the same situation or fails to do something that a reasonably careful person would do in the same situation. You [the jury] must decide how a reasonably careful person would have acted in [defendant's] situation.

Advocating safety as the standard of care does nothing more than advocate holding a defendant liable for unreasonable conduct, just as the jury is instructed. "The right of counsel to discuss the merits of a case, *both as to the law and facts*, is very wide, and he has the right to state fully his views as to what the evidence shows, and as to the conclusions to be fairly drawn therefrom." (*Grimshaw v. Ford Motor Co.* (1981) 119 Cal.App.3d 757, 798-799, 174 Cal.Rptr. 348, 375 (1981). The argument does not foreclose a defense effort to argue that it chose the safest course, or that greater risk must be accepted and is reasonable, or that there is no safest course.

Avoid the debate about the science behind techniques of persuasion. Arguments to the jury do not invoke persuasion or psychological techniques by name, or even refer to such research. Do not be drawn into defending research or psychological principles. There is no legal principle that requires court approval of counsel's inspiration for an argument to the jury. The plaintiff's response to such objections is to advocate for the recognized wide latitude to persuade, as long as the arguments are supported by law and evidence.

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