

STRATEGIES FOR COMBATING THE REPTILE APPROACH

866.624.6221 | MAGNALS.COM



2019 EXTREME VERDICTS

\$89M Verdict

- (TX) Pickup loses control, crosses into incoming lanes and hits Defendant's truck. Jurors found truck driver should have exercised more caution due to adverse weather conditions.

\$229M Verdict

- (MD) Negligent care during labor and delivery of 16-year-old mother with Preeclampsia resulting in Plaintiff's CP.

\$102M Verdict

- (NY) Plaintiff injured on the job after employee drove forklift into truss causing him to fall.

\$50M Verdict

- (OH) Excessive force by police officers resulting in Plaintiff's personal injuries.

\$114M Verdict

- (CA) Department of Children and Family Services failed to perform duties resulting in abuse and permanent injury to Plaintiff.

- Extreme verdicts are popping up all over the country in personal injury and wrongful death matters across industries. We've all seen large verdicts in the opioid, asbestos and tobacco litigation in the hundreds of millions to even billions of dollars, but what's notable about these extreme verdicts is that they are for a singular plaintiff. If you'd asked any seasoned defense attorney / insurance adjuster what they'd value the case to be when it first came across their desk, it's doubtful any would believe they were worth \$50m, \$100M or even \$200M dollars. Some because of the fact pattern, take the \$89M dollar verdict in TX, for example, or because the verdict would exceed any other verdict in a similar case type in the venue and even the country.
- **What about extreme settlements?**

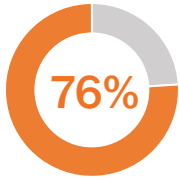


What is the reptile and how is it driving these extreme numbers?

Generally, the reptile approach seeks to focus on a particular safety rule / policy which if not followed, equates to danger for the plaintiff, jurors, their loved ones, and the community in which the defendant operates. If a given defendant violates said rule / policy, the tactic is intended to evoke fear and anxiety in jurors and empower them to protect their community through a large verdict. It is effective against defendant's typical "standard of care" arguments. The reptile theory always demands "more" or the "the safest option", for example, regardless of what the law requires. The tactic puts jurors at risk for burden shifting, leading with emotion, and in some cases, taking a punitive tone in their assessment of damages where no punitive claim exists. Ultimately, the reptile approach drives damages.

According to K&B—over \$6 Billion in verdicts and settlements can be credited to the Reptile since its introduction in 2009.

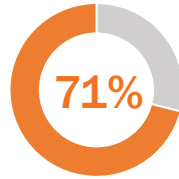
Juror PREDISPOSITIONS – a growing trend in corporate distrust



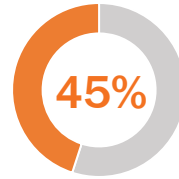
Believe corporate executives lie and cover up



Believe it takes "billions" to send a message to corporations



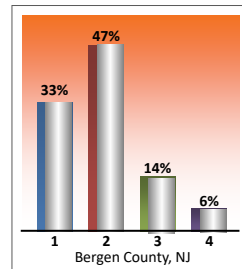
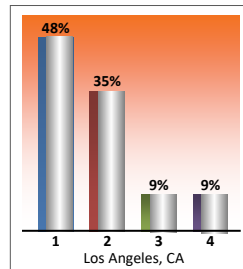
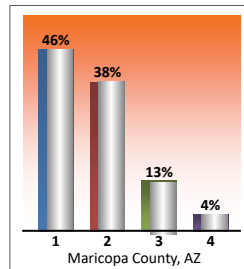
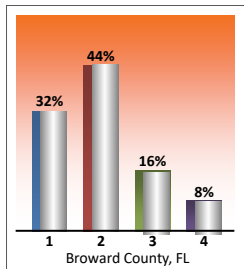
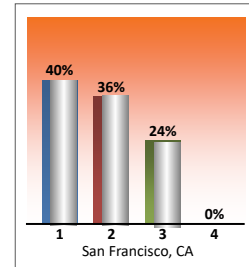
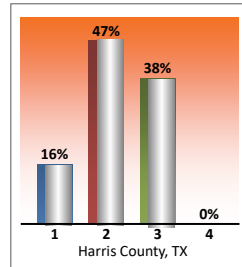
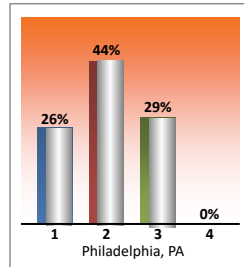
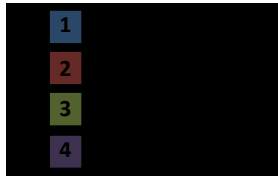
Do not believe there should be caps on jury awards



Will ignore the judge's instructions

The reptile is successful in part, because it plays on jurors pre-existing views and attitudes about corporate defendants.

How Jurors Feel About Corporations—Profits Over Safety



Magna's jury research has shown this sentiment is seen in just about every venue across the country.

WHEN DOES THE REPTILE APPEAR?

- > Pre-Suit
- > Pleadings
- > Written Discovery
- > Depositions
- > Voir Dire
- > Opening Statement
- > Witnesses
- > Closing Arguments

Plaintiff's attorneys skilled at employing the reptile begin doing so long before trial. For that reason, it is imperative to begin countering the reptile early on in the defense as well...from discovery through closing arguments.

STRATEGIES TO COMBAT THE REPTILE

WHAT THE JURY RESEARCH SHOWS

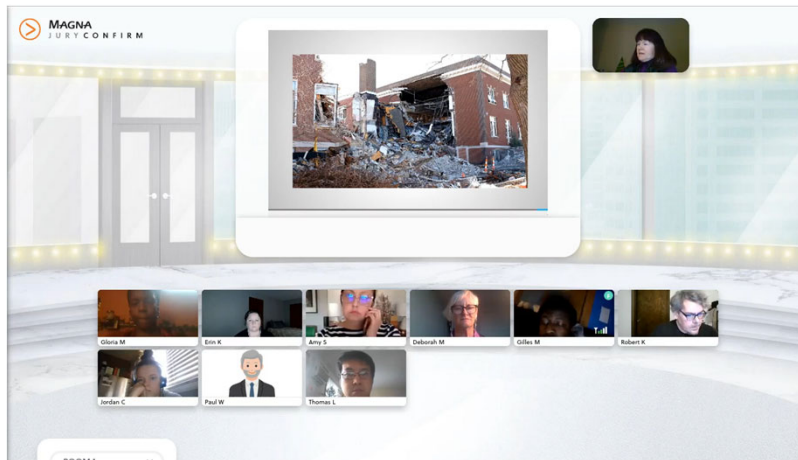
- > Condition the Venire and De-select High-Risk Jurors
- > Lead with Compassion
- > Take Responsibility (Not Concede Liability)
- > Humanize the Defendant
- > Prepare the Storytellers
- > Reset Expectations and Extinguish Fear
- > Give a Number
- > Focus on the Positive

STRATEGIES TO COMBAT THE REPTILE

WHAT THE JURY RESEARCH SHOWS

- > Condition the Venire and De-select High-Risk Jurors

WHO ARE HIGH-RISK JURORS?



MAGNA
LEGAL SERVICES

Describe typical Pro-Plaintiff, reptile-prone jurors and offer examples of voir questions to help identify and de-select these jurors so that they do not end up in the jury box.

When it comes to the issue of awarding damages in a case such as this [describe specific type], would you be more concerned about awarding too little damages or too much? Why?

Does uncertainty and “not knowing” scare you or make you feel uncomfortable? Please explain.

Who here believes that their verdict in this case will affect corporations’ behavior, generally?

Who here is highly concerned about their own community’s/family’s (depending) safety as it relates to [trucks on the roads, etc.,]?

Who here believes that corporations routinely put profits over safety? Or routinely violate safety policies and guidelines?

How many of you believe that corporations’ practices are different from their policies?

Who here believes that safety should be a company’s number one priority over

everything else?

DE-SELECT HIGH-RISK JURORS

- > Ask questions that presume prejudices exist in some jurors.
- > Normalize prejudices and encourage openness and honesty.
- > Ask open-ended questions and give plenty of rope for a response.
- > Commit high-risk juror to answer and avoid rehabilitation.

EDUCATE JURORS ABOUT THE REPTILE

- > Defense counsel should bring the Reptile to the forefront.

Counsel may also expose the reptile theory to the jury and demonstrate precisely what the plaintiff has done / will do. Briefly walk jurors through the plaintiff's recipe. Point out that the Plaintiff will attempt to 1) oversimplify the case, 2) cloud the evidence with sympathy and emotion, 3) dehumanize the defendants, and 4) potentially try to anger the jury in an attempt to punish the defendants / drive damages.

CONDITION THE VENIRE

- Safety
- Danger
- Unreasonable Risk
- Safer
- Protection
- Community

Give prospective jurors the heads up that the Reptile Approach is an attempt to manipulate them, to get them fired up, by plaintiff counsel. Empower jurors not to be fooled by such tactics. Provide them with red flag “Reptile Buzz Words” and phrases to look out for.

STRATEGIES TO COMBAT THE REPTILE

WHAT THE JURY RESEARCH SHOWS

- > Condition the Venire and De-select High-Risk Jurors
- > Lead with Compassion
 - Jurors sometimes voice issue with the Defendant “coming out of the gate hot” before acknowledge what they are feeling.
 - Jurors express appreciation for defense counsel acknowledging the tragedy and plaintiff’s unfortunate injuries - “He gets it.”

LEAD WITH COMPASSION

- > Appreciate jurors' emotional status following the Plaintiff's opening.
- > Prepare them for the other side of the story.
- > Empower jurors to take the next step.

Following the plaintiff's opening, jurors will likely feel a great deal of sympathy and be struck by the emotional pull of the case. Some will even be hesitant to listen to the other side of the story. For that reason, it is important to lead with compassion to garner trust and credibility with the jurors, to show you can relate to what they've just heard. Everyone (the jurors, defendants, lawyers, etc.) feel for the plaintiff and the sad situation for the plaintiff. No one here disagrees. However, jurors must be empowered to take the next step, to look beyond the natural and understandable emotional pull and to look at the evidence in the case.

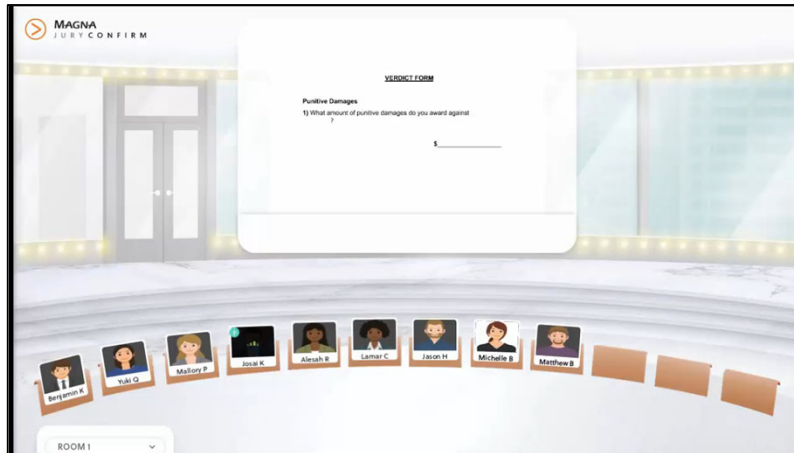
Give jurors a reason to put emotion aside. Is it fairness? Justice?

STRATEGIES TO COMBAT THE REPTILE

WHAT THE JURY RESEARCH SHOWS

- > Condition the Venire and De-select High-Risk Jurors
- > Lead with Compassion
- > Take Responsibility (Not Concede Liability)

DEFENDANT'S POSITION "BACKFIRED"



MAGNA >
LEGAL SERVICES

16

In cases where there is the potential for comparative fault, or fault to a non-party, It's important to own up to any small mistakes or errors made so that jurors can see that the defendant is being reasonable. The notion is we are owning up to our part, now let's take a closer look at what the plaintiff doesn't want you to focus on.

TAKE RESPONSIBILITY

- > Don't fight the obvious.
- > Take the steam out of bad facts.
- > Own up before highlighting other's failures.
- > Taking responsibility early on allows jurors to shift focus to the plaintiff, or some other party.

By showing a willingness to accept some responsibility for minor mistakes or errors, it sets the stage for defendant's themes of fairness and reasonableness. Taking some responsibility deflates plaintiff's case and helps defuse jurors' anger. This is key given anger is one emotion that reliably drives damages up. It also allows a defendant to more easily shift part of the blame onto others, allowing the jury to assess the culpability of all other parties, including the plaintiff, who have likely failed to take any personal responsibility for anything. When the focus is shifted early, the jury will more closely scrutinize their arguments and identify more problems with their evidence and credibility.

Caveat – there are instances when this is not advised – birth injury cases, for example, where no blame can be shifted to those with no knowledge or control over the situation.

STRATEGIES TO COMBAT THE REPTILE

WHAT THE JURY RESEARCH SHOWS

- > Condition the Venire and De-select High-Risk Jurors
- > Lead with Compassion
- > Take Responsibility (Not Concede Liability)
- > Humanize the Defendant



18

The Defendant will start behind the eight ball with jurors simply due to the fact that we are a company/companies rather than individuals, and jurors enter the courtroom with predisposed biases against corporations, as shown in the earlier data. The defense should seek to establish their own, positive storyline during the opening statement and through relevant witnesses. If jurors believe that a company is generally responsible and cares about what they do, jurors are less likely to assess fault from a place of hostility or anger.

This also goes along with preparing witnesses – who will jurors relate to most? Who is going to help advance the ball for the defense and humanize the company? The people are generally more important than the broader company storyline but there is a time and place for that information too – it just needs to be inserted at a time when jurors are ready and open to hearing it – this is case-by-case basis.

HUMANIZE THE DEFENDANT

- > Introduce jurors to the people who make up the corporation.
- > Educate and alert jurors to hindsight bias.
- > Put jurors on notice when assessing conduct: reasonable care vs. perfect care.

Who are the people behind the corporate name? The plaintiff wants to focus on the corporate name and profits but who are the employees making decisions in real-time. What is reasonable based on the information they had in front of them?

REAL PEOPLE MAKING REAL-TIME DECISIONS

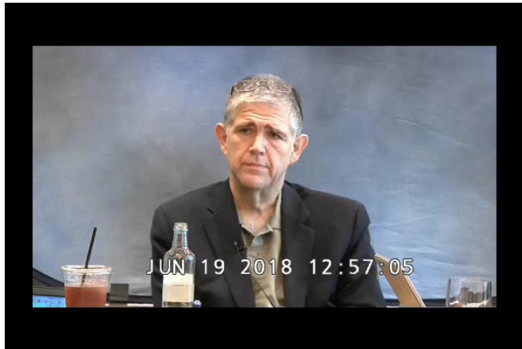
- > Thinking about hindsight bias can make jurors take a step back and assess whether they are viewing the case objectively or with emotion.
- > Encourage jurors to judge the defendants based on the information they had at the time vs. what we know now.
 - Juror quote: “The tragedy of this is impacting my ability to look at what these people did.”

STRATEGIES TO COMBAT THE REPTILE

WHAT THE JURY RESEARCH SHOWS

- > Condition the Venire and De-select High-Risk Jurors
- > Lead with Compassion
- > Take Responsibility (Not Concede Liability)
- > Humanize the Defendant
- > Prepare the Storytellers

“THAT WAS NOT THE PROPER PERSON”



MAGNA 
LEGAL SERVICES
22

Identifying and presenting the most appropriate corporate representative *for this case* is key. Just because someone presents well does not mean they will advance the ball for the company. Jurors want to hear from corporate witnesses who were directly involved or whom have direct knowledge relevant to the issues in the case. Putting on a corporate rep who does not actually know anything pertinent to the case can anger jurors and achieves the opposite of the intended effect.

A good deposition can keep a case contained and promote early, favorable settlement.

A bad deposition can turn a decent case into a nightmare – now you’re headed for trial, or are paying much more to settle.

PREPARE THE STORYTELLERS

- > Identify the most appropriate corporate representative for *this* case.
- > Preparation is not memorization.
- > Effective witnesses learn to spot the reptile and are prepared with safe harbors.

Prepared Witnesses = Case Containment



23

Identifying and presenting the most appropriate corporate representative *for this case* is key. Just because someone presents well does not mean they will advance the ball for the company. Jurors want to hear from corporate witnesses who were directly involved or whom have direct knowledge relevant to the issues in the case. Putting on a corporate rep who does not actually know anything pertinent to the case can anger jurors and achieves the opposite of the intended effect.

Deposition Witness Training: The witness must learn to spot the reptile, never absolutely agree to hypothetical questions, be prepared with safe harbors (“safety is an important goal”, “we strive for safety.”) always seek clarification (“Safety in what regard? Can you please be more specific?”)

A good deposition can keep a case contained and promote early, favorable settlement. A bad deposition can turn a decent case into a nightmare – now you’re headed for trial or are paying much more to settle.

STRATEGIES TO COMBAT THE REPTILE

WHAT THE JURY RESEARCH SHOWS

- > Condition the Venire and De-select High-Risk Jurors
- > Lead with Compassion
- > Take Responsibility (Not Concede Liability)
- > Humanize the Defendant
- > Prepare the Storytellers
- > Reset Expectations and Extinguish Fear

EXPECTATIONS SET BY THE REPTILE

- > “*More*” could have been done.
- > The defendant could have made it “*safer.*”
- > This would have prevented plaintiff’s injuries.

RESET EXPECTATIONS & EXTINGUISH FEAR

- > Focus on Reasonableness
- > Inform Jurors about what others would have done – Industry Standards
- > Put the situation into context.
- > Juror quotes: “Sure, they could have made it safer, but...”
“When you put it that way, it doesn’t seem so bad.”



26

The cornerstone of the reptile strategy is a safety rule and violation of said rule equals danger and that creates fear—jurors fear for themselves and their community. For the plaintiff, the more general the safety rule, the easier it is for them to evoke anxiety or anger in the jury with which to motivate them to correct the or extinguish the danger through a large verdict. To the extent possible, reframe the plaintiff’s allegations into something much more manageable and prevent the plaintiff from over generalizing the case.

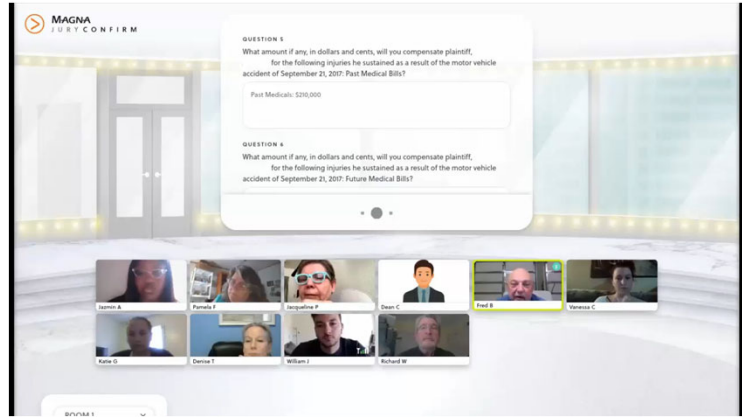
- What was reasonable for the defendant to have done in a given situation – tie to the jury instructions when possible.
- Educate jurors about industry standards – if a defendant did or did not do what any other similar defendant would have done, the allegations lose steam.
- Putting the numbers into context almost always diminishes anger and fear – one tragic accident due to speeding is a safety violation yes but one accident after operating a commercial vehicle safely for 10 years and over 500,000 miles on the road is an impressive safety record.

STRATEGIES TO COMBAT THE REPTILE

WHAT THE JURY RESEARCH SHOWS

- > Condition the Venire and De-select High-Risk Jurors
- > Lead with Compassion
- > Take Responsibility (Not Concede Liability)
- > Humanize the Defendant
- > Prepare the Storytellers
- > Reset Expectations and Extinguish Fear
- > Give a Number

**“IF
DEFENDANT
DOESN’T
AGREE,
WOULDN’T
THEY HAVE
PROPOSED A
NUMBER?”**



MAGNA 
LEGAL SERVICES

“LOW BALL OFFER”

MAGNA
JURY CONFIRM

QUESTION 14
What amount of money, if any, will fairly and adequately compensate for damages reasonably certain to occur in the future for loss of earning capacity?
GIBBONS FUTURE LOSS OF EARNING CAPACITY: \$420,000

QUESTION 17
What amount of money, if any, will fairly and adequately compensate or damages reasonably certain to occur in the future for pain, disability and emotional distress?

Grid of juror video feeds:
- Court M
- Eric K
- Amy S
- Deborah M
- Gillis M
- Robert K
- Jordan C
- Paul W
- Thomas L

MAGNA
LEGAL SERVICES

GIVE JURORS A NUMBER

- > Offer the jury another figure to consider in the deliberation room.
 - Economic vs. Non-Economic Damages
- > Show *and* Tell Jurors.
- > The figure must be meaningful.
- > Be Wary of trying to set the floor too low.
- > Special Considerations for Anchoring Punitive Damages.

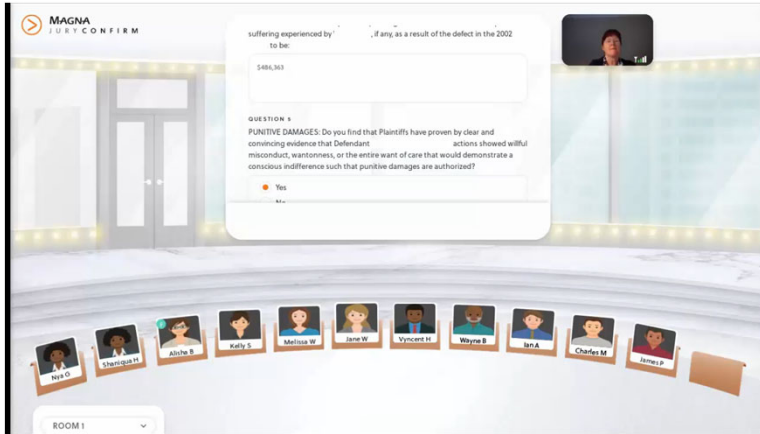


30

Plaintiff attorneys go to great lengths mention their damages number as early as voir dire in an effort to prime the jury. Defense attorneys should do the same, especially with the non-economic damages number.

Support proposed damages figures – each line item - with evidence; demonstrate why it absolutely makes the plaintiff whole, is even generous.

“THE STATS THEY BROUGHT LOWERED THE NUMBERS”



STRATEGIES TO COMBAT THE REPTILE

WHAT THE JURY RESEARCH SHOWS

- > Condition the Venire and De-select High-Risk Jurors
- > Lead with Compassion
- > Take Responsibility (Not Concede Liability)
- > Humanize the Defendant
- > Prepare the Storytellers
- > Reset Expectations and Extinguish Fear
- > Give a Number
- > Focus on the Positive

FOCUS ON THE POSITIVE

- > What can Plaintiff do?
- > How will this money impact their life?

Focus on the positive – what the plaintiff is able to do with their lives. Explain how money defendant suggests will provide the plaintiff will a good quality of life