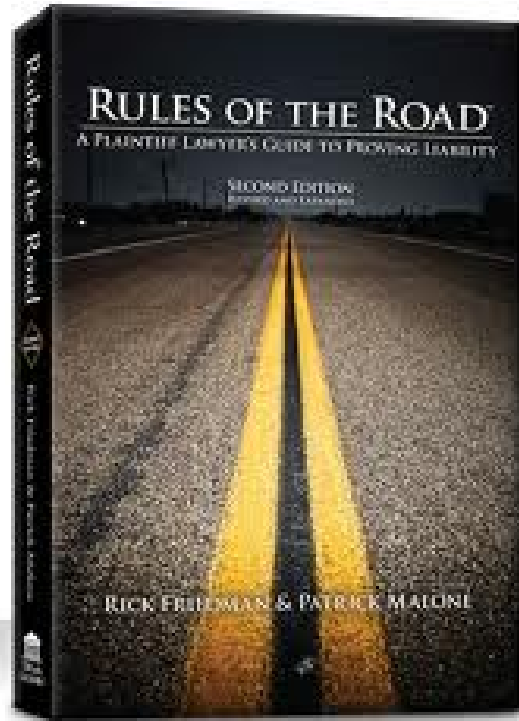


Reptile and Rules of the Road
Debating the Issues

Gerald R. Powell & James E. Wren

Professors of Law, Baylor University School of Law

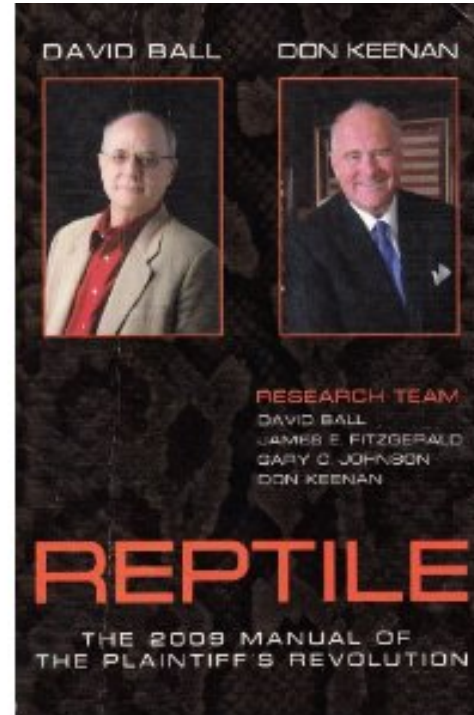


Rules of the Road

by Rick Friedman and Patrick Malone

Reptile

by David Ball and Don Keenan



The Idea Behind the Theory



Subconscious question: How does this affect me (and those I love)?



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❑ Natural discomfort with blame for “mere inadvertence”



“I didn’t
mean to . . .”

Mere inadvertence . . .

=



“Ambiguity favors the defense”

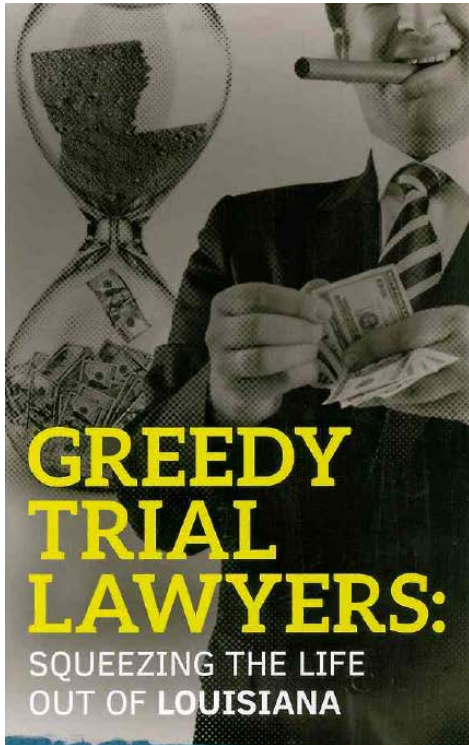
Subconscious question: How does this affect me (and those I love)?



Natural discomfort with blame for “mere inadvertence”

External tort reform messaging

Tort reform messaging



GIVE GREEDY TRIAL LAWYERS THE BOOT

A few money-grabbing trial lawyers are abusing the legal system and severely damaging Louisiana. These unfair and outlandish lawsuits are hurting our economy, families and communities. The trial lawyers are making millions, and Louisiana is paying the price.

FACTS

Greedy trial lawyers make millions and Louisiana pays the price.

GOODBYE INDUSTRY
As the number of lawsuits soars, the rig count plummets.
2006: 106 suits = 39 rigs
2013: 342 suits = 14 rigs

FLOOD OF LAWSUITS
3,000 different companies and individuals have been sued.

LOST JOBS
Louisiana lost 30,000 oil & gas jobs.

BUSINESS SUPPORT VANISHES
Decreased tax revenues to fund our schools, hospitals and roads.

GREEDY TRIAL LAWYERS: SQUEEZING THE LIFE OUT OF LOUISIANA

TAKE A STAND

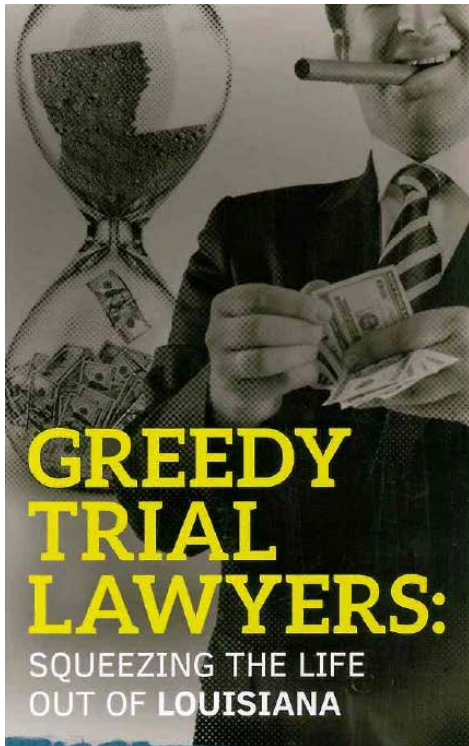
We need boots on the ground to defend Louisiana! Our economy and jobs are under attack. Join us in giving greedy trial lawyers the boot!

Give em the Boot

JOIN THE FIGHT!
GiveEmTheBoot.org

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Tort reform messaging



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“Frivolous lawsuits”

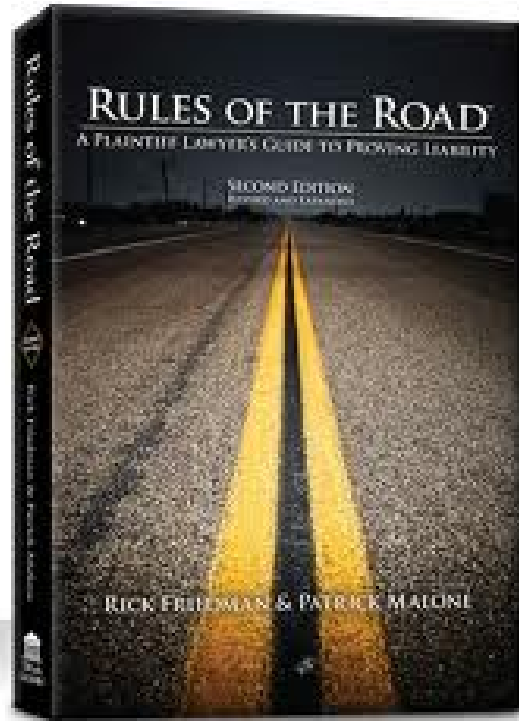
“Driving up healthcare costs”

“Driving up insurance premiums”

“Playing on sympathy”

Blame for “mere inadvertence”
+
“Play” for “sympathy”

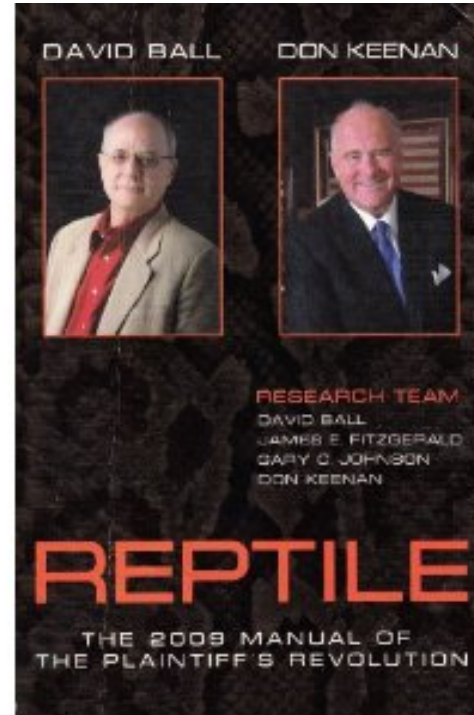
= Bad for community



Rules of the Road
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Malone

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Don Keenan



First and foremost, plaintiff must focus on:

- Defendant's conduct
- "Needless danger"
- Safety rules to protect against danger
- Knowing violation of safety rules

Powell for the Defense

Prof. Gerald R. Powell

Baylor University School of Law

Defense Perspectives

Taming the Reptile: A Defendant's Response to the Plaintiff's Revolution, by Ken Broda-Rahm, Ph.D., November 5, 2013

Atticus Finch Would Not Approve: Why a Courtroom Full of Reptiles Is a Bad Idea, by Allen, Schwartz and Wyzga, May 1, 2010

THE HAT ADVANTAGE; STANDARD OF CARE OR STANDARD OF FEAR? by Rebecca Adelman, July 2013

Alex Craigie, *Preparing Your Witness for a "Reptile" Deposition*, At Counsel Table, (May 22, 2013)

Cliff Harrison, *Keeping A Lid On Damages*

Defense Lawyers:

- Educate yourself – read the book
- Prepare a thoughtful response

Defense *Motion in Limine* Strategy

- Watch for snakes: the rattle
- Take preventative measures: anti-venom motions

The Rattle

“When you take depositions, one of your main tasks is to establish your Reptilian themes. They will infuse the entire trial. Here’s how to proceed:”

Reptile, p. 209

Anti-Venom Motions

- Bare their fangs, and prevent a strike
- Restate their objective: call a snake a snake
 - Quote the Reptilian Bible & its Literature
 - Cite deposition examples
- Object to:
 - Statements by counsel:
 - Evidence of “harm in other contexts”

Statements by Counsel

- Appeals to Juror Self-interest
- The Golden Rule
- Conscience of the Community
- Sending a Message

Appeals to Juror Self-Interest

- *Robards v. State of Texas*, 285 S.W. 2d 247,249 (Tex. App. – Austin 1955, writ ref'd n.r.e.)
- *City of Wichita Falls v. Jones*, 456 S.W. 2d 148, 155-6 (Tex. App. Fort Worth, 1970, no writ)
- *Waddell v. Charter Oak Fire Insurance Company*, 473 S.W. 2d 660, 661-2 (Tex. App. – Fort Worth 1971, no writ)

Juror Self-Interest

“ONE

THE SCIENCE

(**Major axiom:** When the Reptile sees a survival danger, even a small one, she protects her genes by **impelling the juror to protect himself** and the community.)”

Reptile, p. 17

Example: “there will be consequences” arguments

“... we can embed into closing arguments what we call the ‘there will be consequences’ argument: At the end of the closing argument the lawyer says, ‘Ladies and gentlemen, should you render a defense verdict, let me tell you now clearly there will be consequences. You know what those consequences will be and I shall not disrespect you by going over all of the things that will happen.’ ...

Obviously this is a consequence they don’t want to occur, because in the future **they could be on the receiving end of that consequence**. So for **self-protection**, they know a **defense verdict will hurt them**.”

The Keenan Edge, p. 19

Example: “Spreading the Tentacles of Danger”

- “1. How likely was it that the act or omission would hurt someone?”
2. How much harm **could** it have caused?
3. How much harm **could** it cause **in other kinds of situations?**”

Reptile, p. 31

Juror Self-Interest: Testimonial

“Read Bob Montgomery's victory report:

Don and David,

Once again Reptile and you guys saved me....

I was concerned that the jury would look at the case as limited to one dentist and one woman with a toothache in a small town....

Spreading the tentacles became really easy because the case became all healthcare professionals have a duty to keep abreast of medical knowledge for everyone's safety because we are all patients. Jury's verdict had far reaching ramifications and was about protecting all patients, grandmothers, small children who are risk etc. and their verdict would change and improve the way doctor's practice etc. and more likely than not save a child from a horrible injury. Some child who will never know your names but a child or grandmother who may be spared a life of pain or disability by your verdict etc.

The verdict was \$2.5 million. Probably largest dental malpractice verdict in Indiana....

Your grateful and devoted disciple,

Bob Montgomery

Law Offices of Robert Montgomery

Chicago, IL”

Subject: The Keenan Edge + The 2009 Reptile Manual = \$2.5 Million Verdict

Date: Tuesday, September 10, 2013 10:13:51 AM

Juror Self-Interest

“THE SAFETY RULES CHECKLIST

1. ...

2. ...

3. ...

4. ...

5. Did you awaken the Reptile in Bubba by making him believe he's 'protected?'

6. ...

7. ...”

The Keenan Edge, p. 105

Golden Rule

“The **one word** that does come closest to awakening the Reptile is a word I don’t advise you to use and it’s the word ‘**you**.’ I can just see the Black Hats and the trial judge thinking you have done the unpardonable and mentioned the Golden Rule. I’ve never used the word ‘you’ for that reason but there are 17 states which clearly say that the Golden Rule only applies to damages and does not apply to liability and therefore if you choose to use the word ‘you,’ you’re on solid ground (although you’re clearly going to have to argue that your state law permits it).”

The Keenan Edge, p. 105

Appendix B-1

“GOLDEN RULE LAW BY VENUE”

Hamlet, 1602

“The lady doth protest too much, methinks.”

The Golden Rule

“5. THE RULE MUST AWAKEN THE REPTILE

The ‘to protect’ portion has to use words that will come as close to individually identifying Bubba.... Is Bubba’s Reptile awakened when the rule states ‘to protect the public?’ Well, it’s a stretch. Bubba don’t think of himself as ‘the public.’ There are **other words we can choose** to get it more individual. Here are some choices:

1. To protect the community.
2. To protect everyone.
3. To protect all those driving on the highway.
4. To protect all of us.”

The Keenan Edge, p. 102

The Golden Rule: Putting the Jurors in the Place of the Parties

- *Fambrough v. Wagley*, 169 S.W. 2d 478, 480-2 (Tex. 1943)
- *Ravel v. Couravallos*, 245 S.W. 2d 731, 734 (Tex. App. – Austin 1952, no writ)
- *MAPCO, Inc. v. Farrington*, 476 S.W. 2d 50, 53-4 (Tex. App. – Amarillo 1971, writ ref'd n.r.e.)
- *World Wide Tire Company v. Brown*, 644 S.W. 2d 144, 145-6 (Tex. App. – Houston [14th Dist.] 1982, writ ref'd n.r.e.)
- *Arocha v. State Farm Mut. Auto Ins. Co*, 203 S.W.3d 443, 447 (Tex. App.—Houston [14th Dist.] 2006, no pet.)
- *Sanchez v. Espinoza*, 60 S.W.3d 392, 395 (Tex. App.—Amarillo, 2001, pet denied)
- *Ivy v. Security Barge Lines, Inc.*, 585 F.2d 732, 741 (5th Cir. 1978)

Conscience of the Community

- *Westbrook v. General Tire and Rubber Co.*, 754 F. 2d 1233, 1238-9 (5th Cir. 1985) (en banc)
- *Missouri-Kansas-Texas R. Co. v. Hamilton*, 314 S.W. 2d 114, 119-20 (Tex. App. – Dallas 1958, writ ref'd n.r.e)
- *Missouri-Kansas-Texas R. Co. v. Huddleston*, 384 S.W. 2d 731, 735 (Tex. App. – Fort Worth 1964, writ ref'd n.r.e)
- *Levermann v. Cartall*, 393 S.W. 2d 931, 937 (Tex. App. – San Antonio 1965, writ ref'd n.r.e)

Community Conscience

“HOW WE USE THE REPTILE IN OUR CASES

By now you should see an analogy in our cases. Yes, the **jury should be fearful** of the conduct or omission and the intentional violation of the safety rules the defendant has engaged in; however, as a jury, they can **make their community safe....”**

The Keenan Edge, p. 16

Sending a Message – Compensatory Damage Cases

- *Phillips v. Bramlett*, 288 S.W. 3d 876, 882-3 (Tex. 2009)

Sending a Message – Exemplary Damage Cases

- *Stafford v. Steward*, 295 S.W. 2d 665, 667-8 (Tex. App. – Eastland 1956, writ dism'd by agr.)
- *Schindler Elevator Corporation v. Anderson*, 78 S.W. 3d 392, 404-7 (Tex. App. – Houston [14th Dist.] 2001, pet. granted, judgm't vacated w.r.m.)

Evidence of “Harm in Other Cases”

“From a Reptilian point of view, one of your expert’s most important tasks is to show how the rule violations in this case can cause harm in other contexts. For example, how can a shopping mall’s violation of the rule requiring sufficient security endanger students in an elementary school or people going to the movies?”

Reptile, p. 141

Objection – Rule 403

- “danger of unfair prejudice”
- Federal Advisory Committee Note: “ ‘Unfair prejudice’ ... means an undue tendency to suggest **decision on an improper basis**, commonly, though not necessarily, an emotional one.”

Rule 226b Instructions

4. You must not decide who you think should win, and then try to answer the questions accordingly. Simply answer the questions, and do not discuss nor concern yourselves with the effect of your answers.

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44% off any order BEYOND \$300

Wren for the Plaintiff

Prof. Jim Wren

Baylor University School of Law

Wren for the Plaintiff

Opposing needless danger

ordinary prudence

“Negligence” means failure to use ordinary care, that is, failing to do that which a person of ordinary prudence would have done under the same or similar circumstances or doing that which a person of ordinary prudence would not have done under the same or similar circumstances.

same or similar circumstances

ordinary prudence

“Ordinary care” means that degree of care that would be used by a person of ordinary prudence under the same or similar circumstances.

same or similar circumstances

In order to be a proximate cause, the act or omission complained of must be such that a person using *ordinary care* would have foreseen that the event, or some similar event, might reasonably result there from.

the event, or some similar event,
might reasonably result

Absolutely proper to focus on:

- Defendant's conduct
- "Needless danger"
- Safety rules to protect against danger
- Knowing violation of safety rules

The Reptile Violates Texas Law???

- Appeals to Juror Self-Interest
- The Golden Rule
- Conscience of the Community
- Sending a Message

The facts are relevant and admissible

Argument based on the facts is proper

Final Recommendations

Focus on:

- Defendant's conduct
- "Needless danger"
- Safety rules to protect against danger
- Knowing violation of safety rules

Final Recommendations

Present evidence to prove:

- Ordinary prudence (awareness of risks) in same or similar circumstances
- Ordinary care (safety rules) in same or similar circumstances
- Foreseeability of *the event*, or *some similar event*, resulting from violation of rules

Final Recommendations

Prove the safety rules and their importance to the protection of everyone. Simply give the jury the chance to say whether the rules really matter.

Final Recommendations

And know the rules of argument for:

- Appeals to Juror Self-Interest
- The Golden Rule
- Conscience of the Community
- Sending a Message