Negligence Per Se

J. Richard Caldwell, Jr.
Joseph A. Regalado

I.
Introduction

The concept of negligence per se has become well entrenched in the tort law of most jurisdictions in the United States. The doctrine involves the substitution of a statutory or regulatory provision for the common law "reasonable person" criteria in negligence actions for determining the extent of a duty, and whether there has been a breach of that duty.[1]

Negligence per se was first applied in courts across the country over 100 years ago, as legislatures and courts grappled with the difficulty of addressing the increasing number of accidents spawned by industrial and urban growth.[2] In its most elementary context, the doctrine holds that violation of an applicable statute or regulation constitutes negligence as a matter of law. The statutory or regulatory provision creates a standard of care to be applied by the finder of fact, as opposed to the normal "reasonableness" standard in negligence cases.[3]

---

[1] Schlimmer v. Poverty Hunt Club, 597 S.E. 2d 43, 46 (Va. 2004) (explaining that the doctrine of negligence per se consists of "the adoption of the requirements of a legislative enactment [in place of the] standard of conduct of a reasonable person.").

[2] *See* Paul Yowell, Judicial Discretion in Adopting Legislative Standards: Texas's Solution to the Problem of Negligence Per Se?, 49 Baylor L. Rev. 109 (1997).

[3] Carter v. William Sommerville & Son, Inc., 584 S.W. 2d 274, 278 (Tex. 1979); *see also* Aaron D. Twerski, *Negligence Per Se and Res Ipsa Loquitur,* 44 Wake Forest L. Rev. 997 (2009).



J. Richard Caldwell, Jr. is of counsel to Rumberger, Kirk and Caldwell, P.A. He is a founding member of the firm, residing in the firm's Tampa FL office. He has been board certified by the Florida Bar in Civil Trial Practice since 1983. His practice focuses on products liability, commercial litigation and professional negligence cases. He is admitted to practice in Florida, Texas and Alabama, as well as all U.S. District Courts in Florida, the 5th, 6th and 11th U.S. Circuit Courts of Appeals, and the U.S. Supreme Court.

Over the last century, as our society has grown increasingly complex, opportunities for application of the negligence per se principle have multiplied. The statement will come as no surprise to experienced practitioners, particularly those engaged in the representation of manufacturers, interstate motor carriers or other transportation entities. Although the doctrine of negligence per se can, in its broadest context, be stated fairly simply (as set forth above), courts across the United States have seen fit to apply it in a variety of ways, some of which will be addressed below. Any lawyer engaged in the defense of a case in which a statutory or regulatory violation is alleged as the basis for a plaintiff's cause of action must thoroughly familiarize himself or herself with all of the intricacies of the particular jurisdiction's application of the doctrine. It must be conceded, however, that in at least some instances, familiarization can lead to further confusion. For example, the Supreme Court of Florida once acknowledged that the state's law on negligence per se was ". . . hardly crystal-clear."[4]

Some years ago, one economist estimated that the presence of a claim of violation of statute or regulation, giving rise to a negligence per se allegation, results in a statistically significant increase in the success rate of plaintiffs' cases, as well as the average payout in different types of cases.[5] In light of the doctrine's growing complexity and the frequency with which it is asserted, this article underscores the basic principles of negligence *per se* and the varying differences of its application in a number of jurisdictions. The article utilizes hypotheticals and facts from case law to help explain this occasionally complicated legal doctrine. Finally, the article concludes with a discussion of the Reptile Theory, its popularity and success within the plaintiffs' bar, and offers advice on how to successfully "battle

---

[4] deJesus v. Seaboard Coast Line RR. Co., 281 So. 2d 198, 200 (Fla. 1973). Florida's law in this regard was not clarified to any extent by that decision or following cases.

[5] W.K. Viscusi, *Products Liability and Regulation: Establishing the Appropriate Institutional Division of Labor,* 78 The Am. Econ. Rev. 300-304 (1988).



Joseph A. Regalado is an associate at Rumberger, Kirk and Caldwell, P.A.'s Tampa, Florida office. He focuses the majority of his practice on products liability, commercial litigation and casualty defense. He recently earned his law degree from Stetson University College of Law and is admitted to practice in all Florida state courts, as well as the United States Middle District of Florida. Mr. Regalado is currently a member of the Florida Bar's Young Lawyers Division and plans to become more involved in the Tampa legal community in the near future.

the reptiles." The discussion concerning the Reptile Theory is included because plaintiffs seek through utilization of this tactic to substitute a jury's reaction to a perceived threat for the reasonable person standard, in what is essentially a perversion of the negligence per se principle.

II.
Negligence per se: What Is It?

Most jurisdictions recognize that certain elements must be proven in order to prove a claim sounding in negligence per se. These are:

(1) that the defendant[6] violated a certain statute or regulation;

(2) that the plaintiff is of the class which the statute or regulation was intended to protect;

(3) that the plaintiff suffered injury of the type the statute or regulation was designed to prevent; and

(4) that the violation of the statute or regulation was the proximate cause of the injury.[7]

---

[6] This principle applies equally to plaintiffs who may have violated some statute or regulation. *See, e.g.,* Rex Utils., Inc. v. Gaddy, 413 So. 2d 1232 (Fla. Dist. Ct. App. 1982), plaintiff failed to wear a helmet while operating a motorcycle, in violation of the then applicable Florida statute. The court agreed that the principle of negligence per se applied to plaintiff, but found defendant's proof lacking on the issue of proximate cause. *Id.* at 1234.

[7] *See, e.g., id.;* Davis v. Marathon Oil Co., 356 N.E. 2d 93, 97 (Ill. 1976); Cal. Evid. Code § 669 & CACI § 48; *see also* Restatement (second) of Torts, § 286; Restatement (third) of Torts §§ 14, 15.

The second and third factors are arguably the most important when determining whether negligence per se applies. Pursuant to these two factors, even when those plaintiffs and injuries are foreseeable to the defendant, plaintiffs who were not intended to benefit from the statute's protection cannot recover.[8] For example:

> A statute requires employers to install hand railings alongside stairways at the workplace if they have five or more disabled employees. An employer failed to install such a railing, and an able-bodied employee is injured in a fall that would have been prevented by a railing. Should the employer be found liable for the employee's injury under negligence per se?[9]

Most courts would likely not impose liability on the employer in the example above.[10] But there are also instances in which courts have interpreted the relevant statute as encompassing a broad range of victims, even when a narrower reading could have been given. In *Cappa v. Oscar C. Holmes, Inc.,*[11] the trial court ruled in favor of a boy who was injured while crossing an area of a parking lot being constructed by the defendant and found the defendant liable for breach of the duty imposed by the construction safety order.[12] In affirming the trial court's decision, the appellate court noted that, although it has been held that safety orders are primarily intended for the benefit and protection of workers, as long as a safety order does not indicate to the contrary, persons consensually on the premises to which the safety order applies also fall within its protection.[13]

Based on this example, the real difficulty encountered in wading through the thicket of case law in this area involves the various gradations of the principle applied by the courts. Most courts, for example, hold that violation of a speed limit or other traffic ordinance by a motorist is *not* negligence per se. Rather, it is viewed as evidence of negligence which can be taken into account by a jury, along with all the other facts and circumstances of the

---

[8] Ariel Porat, *Expanding Liability for Negligence Per Se,* 44 Wake Forest L. Rev. 979, 979 (2009).

[9] *Id.* 982; *see also* Restatement (Third) of Torts § 14 cmt. g (2010).

[10] *See, e.g.,* Anderson v. Turton Dev., Inc., 483 S.E. 2d 597 (Ga. Ct. App. 1997) (rejecting plaintiff's claim that the negligent design of the handicap ramp, which was the cause of plaintiff's fall, constituted a violation of the Georgia Handicap Act, because plaintiff was not handicapped or elderly, while defendant was found liable for plaintiff's damages on grounds of common law negligence); *see also* Carman v. Dunaway Timber Co., 949 S.W. 2d 569 (Ky. 1997) (refusing to define defendant's violation of the safety act as negligence per se, because the purpose of the act was to protect employees only, and appellant did not belong to this group).

[11] 102 Cal. Rptr. 207 (Cal. Ct. App. 1972).

[12] *Id.* at 208-209.

[13] *Id.* at 209; *see also* Porter v. Montgomery Ward & Co., 48 Cal. 2d 846 (Cal. 1957) (holding the safety orders and the provisions of the California Labor Code are intended not only to protect employees but also as safeguards for the public generally against injury).

case.[14] Likewise, allowing a puddle to exist at a gasoline station, which theoretically violated the statute governing the general operation of such stations, and violations of an ordinance requiring handrails on staircases, have been held to be merely evidence of negligence and not negligence per se.[15]

Some statutes and regulations do create a cause of action sounding in true negligence per se. This occurs when the statute or regulation is penal in nature, designed to protect a particular class of persons, of which the plaintiff is a member, against a particular type of harm.[16] One example was discussed in *Golden Shoreline Ltd. Partnership v. McGowan,*[17] in which an elevator fell down its shaft for some distance, injuring the occupant plaintiffs. The court held that the Florida statute which provided that the elevator owner was responsible for the safe operation and proper maintenance of the elevator established a duty to protect those persons using elevators from injury resulting from poor maintenance of the elevator.[18] Likewise, in *Delfino v. Sloan,*[19] the court held that a county ordinance which prohibited domestic animals such as dogs from running loose unleashed mandated a negligence per se jury instruction where the defendant owner's dog (which had apparently broken or unfastened its chain) chased plaintiff bicyclist and knocked her from the bicycle. It is important to note that, even in these types of cases, in addition to the statutory violation, plaintiffs must still prove that they are of the class the statute was intended to protect, that they suffered injury of the type that the statute was designed to prevent, and that the violation of the statute was the proximate cause of injury.[20]

Most draconian of all are statutes or ordinances which are said to create a species of strict liability. In this context, the term "strict liability" approaches absolute liability, especially in the sense that contributory or comparative negligence on the part of plaintiff is not a defense. These circumstances are presented when the statute is designed to protect a particular class of persons from their inability to protect themselves. For example, early

---

[14] *See* deJesus v. Seaboard Coastline R.R. Co., 281 So. 2d 198, 200 (Fla. 1973); Fla. Dep't of Corrs. v. Abril, 969 So. 2d 201, 209 (Fla. 2007) (Cantero, J. dissenting); *see also*, Tex. Transp. Code Ann. § 542.206 (2015).

[15] *See* Chevron U.S.A., Inc. v. Forbes, 783 So. 2d 1215 (Fla. Dist. Ct. App. 2001); Lindsey v. Bill Arflin Bonding Agency, Inc., 645 So. 2d 565 (Fla. Dist. Ct. App. 1994).

[16] Newsome v. Haffner, 710 So. 2d 184, 186 (Fla. Dist. Ct. App. 1998), rev. den. 722 So. 2d 193 (1998); El Chico Corp. v. Poole, 732 S.W. 2d 306, 312 (Tex. 1987).

[17] 787 So. 2d 109 (Fla. Dist. Ct. App. 2001).

[18] *Id.* at 111.

[19] 25 Cal. Rptr. 2d 265 (Cal. Ct. App. 1993).

[20] *Id*. For another phrasing of negligence per se criteria, *see* Tierney v. Black Bros. Co., 852 F. Supp. 994, 999-1000 (M.D. Fla. 1994).

cases involving allegations of violations of child labor laws, or sales of firearms to minors in violation of a statute prohibiting such, have held that these types of statutes impose this type of strict liability.[21]

Adding to the complexity of this area of the law is the fact that statutory and case law in many jurisdictions speak of "unexcused" violations of the statute, ordinance or regulation in question. In these jurisdictions, if the defendant violated the statute and the violation was a cause-in-fact of some injury to the plaintiff, the defendant's only out is to prove, by a preponderance of the evidence, that the violation was excused.[22] The mere fact that the defendant was exercising due care in violating the statute is irrelevant unless that due care rises to the level of an excuse.[23]

California Civil Jury Instruction (CACI) 418 discusses negligence per se, and CACI 420 provides an example of how one jurisdiction addresses possible circumstances, which the defendant may present in an attempt to excuse the statutory violation. CACI 420 establishes certain excuses for statutory violations if (1) the violation was reasonable in light of all the circumstances; (2) despite using reasonable care, defendant was unable to obey the law in question; (3) defendant faced an emergency that was not the result of his or her own misconduct; (4) obeying the law would have caused a greater risk of harm to defendant or others; or (5) some other reason which would validate defendant's conduct and excuse the violation.[24] Likewise, Vermont Civil Jury Instruction 3.1,[25] Connecticut Civil Jury Instruction 3.6-14[26] and New Mexico Civil Uniform Jury Instruction 13-1501[27] provide similar excuses for a defendant's statutory violation.

---

[21] J. Ray Arnold Corp v. Richardson, 141 So. 133 (Fla. 1932); Tamiami Gun Shop v. Klein, 109 So. 2d 189 (Fla. Dist. Ct. App. 1959).

[22] Thomas C. Galligan, Jr., *A Primer on the Patterns of Negligence,* 53 La. L. Rev. 1509, 1519 (1993).

[23] *Id.*

[24] CACI 420 undoubtedly finds its roots in Restatement (Second) of Torts § 288A (1965). This section lists the generally accepted excuses for statutory violations giving rise to a negligence per se action. These excuses are: (a) the violation is reasonable because of the actor's incapacity; (b) he neither knows nor should know of the occasion for compliance; (c) he is unable after reasonable diligence or care to comply; (d) he is confronted by an emergency not due to his own misconduct; and (e) compliance would involve a greater risk of harm to the actor or to others.

[25] Vermont Civil Jury Instruction 3.1 provides the following as valid excuses for statutory violations: (a) a health condition which made it impossible to follow the law; (b) lack of opportunity to know of the violation; (c) impossibility of obeying the law despite every possible effort; (d) an emergency; and (e) a greater hazard if the defendant obeyed the law than if not.

[26] Connecticut Civil Jury Instruction 3.6-14 Excused or Justified Violation of Statute provides "[a] defendant who has violated a statutory duty is negligent as a matter of law, unless there is a valid excuse or justification for the violation." The valid excuses listed in the instruction include: the defendant's reasonable efforts to comply with the statutory requirements, the defendant was unaware of the violation, a sudden emergency and compliance with the statute would have resulted in greater risk to the defendant or others.

[27] NMRA 13-1501 instructs juries that "[t]o legally justify or excuse a violation of a statute, the violator must sustain the burden of showing that [s]he did that which might reasonably be expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law."

Professor Aaron D. Twerski in an article illustrates the ambiguity created by these types of "excuses." He postulates a young mother-to-be who goes into labor unexpectedly.[28] The prospective father, frantic to get his wife to the hospital, cannot bring his vehicle to stop at an intersection and is involved in a crash with a car having the right-of-way.[29] Twerski contends that the father should not be held negligent per se.[30] Specifically, he argues that, although whether the father acted as a reasonable person under the circumstances is perhaps a jury question, the statutory "standard of care" has no place in that controversy. The excuse set forth in (3) above would seem to be logically limited to road-related emergency situations rather than the facts in Twerski's hypothetical.[31] Thus, neither the statutory standard of care nor the argument for excusing a violation of that standard are really of much help in assisting the finder of fact to arrive at a just determination of the controversy.

Again, the statutory standards and case law in any particular jurisdiction are likely to vary in one or more respects from the general principles discussed above. It is therefore of utmost importance that a practitioner delving into this particular area of law become thoroughly cognizant of all of the particularities of the relevant jurisdiction. This applies with equal force whether the lawyer is setting up a defense to a negligence per se claim, or framing an attack on plaintiff's own conduct.

III.
What Keeps Defense and Corporate Counsel Up at Night?

As mentioned above, as our society has become more complex over the years, our statutory and regulatory framework has become increasingly dense and intricate. Opportunities for exposure to claims sounding in negligence per se have therefore increased exponentially. Environmental statutes and regulations, Federal Motor Vehicle Safety Standards, regulations and procedures of the Consumer Product Safety Commission and federal motor carrier requirements, among many other regulatory schemes at both the federal and state level, have raised the level of risk to an unprecedented level for virtually all companies.

In the context of the transportation industry, there are large numbers of potential causes of action which could be asserted based on alleged violations of one or more Federal Motor Carrier Safety Regulations. For example, claims involving allegations of negligent vehicle operation (failure to place or provide warning signals for a disabled vehicle, improper placard placement, improper securing of loads, fatigued driver, dangerous driving, etc.), negligent inspection and maintenance (improper brake calibration, tire tread issues, light and reflector placement, etc.), or negligent hiring and retention (failure to perform proper

---

[28] Twerski, *supra* note 3, at 1001.

[29] *Id.*

[30] *Id.*

[31] *Id.*

background check, prior repeated violations by driver, log book violations, fatigue, etc.) can all be fertile grounds for the assertion of negligence per se allegations. A number of cases across the country have held that violations of Federal Motor Carrier Safety Regulations can form the basis of negligence per se claims.[32] In addition, a number of states have adopted portions of these regulations, making violations a matter of state law as well as federal.[33]

Allegations of OSHA violations are always troublesome. Again, counsel responsible for the defense of these types of claims must be keenly aware of the law in the particular jurisdiction, as consideration of OSHA violations as negligence differs from state to state. Some states view evidence of such violations as requiring a negligence per se instruction, while others consider such violations as merely evidence of negligence, which may be rebutted by the defendant. In California, evidence of violation of CalOSHA rules may warrant a negligence per se jury instruction.[34] Connecticut and Maine, on the other hand, treat OSHA violations as evidence of negligence, not negligence per se.[35] Even still, some jurisdictions have not taken a position on whether an OSHA violation is conclusive evidence of negligence.[36]

Consider the following hypothetical: you are in-house counsel for a company which operates "big-box" retail outlets; among the items sold at these stores are firearms. In the latest case to cross your desk, the company has been accused of having sold a rifle to a minor, in violation of state law. After the sale, the weapon accidentally discharged, the bul-

---

[32] *See, e.g.*, Inland Steel Corp. v. Pequingnot, 608 N.E. 2d 1378, 1383 (Ind. Ct. App. 1993); Carroll v. Deaton, Inc., 555 So. 2d 140 (Ala. 1989). 49 C.F.R. § 390.9 specifically provides that the Federal Motor Carrier Safety Regulations do not preclude or pre-empt state or local laws pertaining to transportation safety, which leaves plaintiffs a wide scope for attempts to invoke the negligence per se principles. The National Traffic and Motor Vehicle Safety Act, 49 U.S.C. § 30103, contains a similar savings clause.

[33] *See, e.g.*, Connecticut Motor Vehicle Safety Regulations § 14-163c-1 *et seq.* As if all this were not scary enough, the Consumer Product Safety Commission (CPSC) filed a complaint against Craig Zucker, former CEO of Maxfield & Oberton Holdings (M & O), which imported and sold "Buckyballs," which were magnetic "executive desk toys." The CPSC sought to force a recall of these items on the grounds that they were ingestion hazards for children. After M & O went out of business, the CPSC added Mr. Zucker individually to its cause of action, seeking to hold him criminally liable, and force him to personally pay for the recall. Mr. Zucker then filed an action against the CPSC, alleging gross abuse of regulatory power. Zucker v. U.S. Consumer Prods. Safety Comm'n, No. 8:13-CV-03355-DKC (D. Md. 2013). A settlement was reached on May 9, 2014, which ended the CPSC's administrative action against Zucker as well as the civil action he filed in federal court.

[34] Cal. Labor Code § 6304.5; Elsner v. Uveges, 22 Cal. Rptr. 3d 530 (2004).

[35] Wendland v. Ridgefield Constr. Servs., Inc., 439 A. 2d 954 (1981); Elliott v. S.D. Warren Co., 134 F. 3d 1, 5 (1st Cir. 1998) ("At best, an OSHA regulation is on par with a statute, and under Maine's common law the violation of a safety statute is *merely evidence of negligence*, not negligence per se."). *See also*, Canape v. Peterson, 878 P. 2d 83 (Co. 1994), *citing* 29 U.S.C. § 653(b)(4).

[36] *See* Ellis v. Chase Communications, Inc., 63 F. 3d 473 (6th Cir. 1995) (applying Tennessee law) (finding "under certain circumstances, an OSHA violation may be conclusive evidence of negligence or negligence per se").

let striking the minor in the head, resulting in severe permanent brain damage. The police investigation of the incident reflects that the minor was over 6 feet tall, wore a scraggly beard, and was very familiar with firearms. The file information is conflicting over whether the minor presented false identification (or any identification at all) at the time of sale.

Among the issues which you must first analyze is the extent to which negligence per se applies to this case. The hypothetical is roughly based on *Tamiami Gun Shop v. Klein.*[37] There, the court held that not only did the statute and a local ordinance set up the applicable duty, the violation thereof itself supplied causation, without need for further proof. Plaintiff's own negligence was not a defense.[38] This holding was based at least in part on the plaintiff's minority status, as one of tender years is presumed to be incapable of exercising self-protective care.[39]

Obviously, the mature appearance of the injured minor, as well as his possible deception in purchasing the weapon, are circumstances which may or may not be important elements of the defense, depending on the law of the particular jurisdiction. The result in Florida might not obtain in, for example, California, Connecticut, Maine or Illinois.

Or, consider the in-house counsel of a pharmaceutical company who walks into her office one morning to discover a claim on her desk alleging that the patient package insert mandated by the FDA was omitted from the medication as delivered to the patient, who died as a result of misdosage. Whether the patient had prior experience with the medication and was aware of the correct dosage levels could obviously be of vital interest in evaluating such a claim, but counsel should be aware of the possibility of a negligence per se claim in such an instance. For example, in *Lukaszewicz v. Ortho Pharmaceutical Corp.,*[40] the court held that, despite the general rule that warning the physician satisfies a manufacturer's duty to warn the patient (since the patient cannot obtain the drug except through a physician), the defendant's failure to include warnings in the form of package inserts still violated 21 C.F.R. § 310.501 and, as a result, constituted negligence per se.

In automotive product liability litigation, there has been little effort by the plaintiff's bar to utilize negligence per se as a weapon. This is hardly surprising, as strict liability is available to plaintiffs as a theory of action in almost every jurisdiction. California, along with a few other jurisdictions, has gone even further, requiring only that plaintiff show usage of the product and an injury or damage resulting from such use. The burden then shifts to the defendant to prove that the design of the product is not defective.[41] In today's climate, counsel for automotive manufacturers would seem to have enough to keep them up at night, even without negligence per se claims.

---

[37] 109 So. 2d 189 (Fla. Dist. Ct. App.), *cert. disch*. 116 So. 2d 421 (Fla. 1959).

[38] Tamiami Gun Shop, *supra* note 16.

[39] *Id.* at 190.

[40] 510 F. Supp. 961 (E.D. Wis. 1981), *amended by*, 532 F. Supp. 211 (E.D. Wis. 1981).

[41] *See*, CACI 1204; *see also*, Montero Saldana v. American Motors Corp., 107 DPR 452 (P.R. 1978).

IV.
Battling the Reptiles

As most defense practitioners are aware, the plaintiffs' bar has, over the last few years, increasingly utilized the so-called "reptile theory."[42] This theory focuses on the "reptile brain," the primitive, subcortical region of the brain, which houses survival instincts. In a variety of ways, starting with discovery, plaintiffs' lawyers attempt to convince the jury that the conduct of the defendant is a danger, not just to the individual plaintiff but also to the community, and the jurors themselves. The theory provides that, when the reptile brain senses danger, it goes into survival mode to protect itself and the community.

The Reptile Theory starts with a simple formula: Safety Rule + Danger = Reptile.[43] The theory requires creating "safety rules" and demonstrating that the defendant violated the rules, subjecting the plaintiff and the surrounding community to needless danger.[44] The main focus of plaintiff's case is the conduct of the defendant, *not* the injuries to the plaintiff. Thus the primary focus of the Reptile Plaintiff is to convince the jury that the defendant endangers the community, not just the individual plaintiff, by its conduct and only a sizable verdict can deter the defendant's behavior.[45] Many defense lawyers urge their colleagues to view the Reptile Theory for what it is: "an attempt to resurrect Golden Rule arguments, which are usually impermissible."[46] Despite such evidentiary challenges, plaintiffs continue to make arguments, and judges still permit such arguments, that appeal to the "reptilian" brains of jurors, "asking them to put themselves in the same position as the plaintiff – a position of jeopardy that calls upon survival instincts."[47] Thus, defense counsel must enlist alternative tactics to counteract the Reptile Theory's affect on juror's minds, particularly with cases involving negligence per se.

---

[42] This reptile theory was popularized by plaintiffs' counsel Don Keenan and jury consultant Dr. David Ball, and has been utilized extensively by plaintiffs over the last several years. David Ball & Don Keenan, Reptile: The 2009 Manual of the Plaintiff's Revolution (2009); *see also Reptile*, http://www.reptile-keenanball.com (last visited June 5, 2015).

[43] B. Kanasky, *Debunking and Redefining the Plaintiff Reptile Theory, For the Defense* at 14, available at http://www.courtroomsciences.com/media/5d12203f-f4a5-4f6a-a43e-5372bb18bb22/-1374158006/BK RM - Derailing the Reptile Safety Rule Attack.pdf; *see also*, S. Allen, J. Schwartz and D. Wyzga, *Atticus Finch Would Not Approve: Why a Court Room Full of Reptiles Is a Bad Idea*, The Jury Expert (May 1, 2010), http://www.thejuryexpert.com/2010/05/atticus-finch-would-not-approvewhy-a-courtroom-full-of-reptiles-is-a-bad-idea/; Minton Mayer, *Make Boots Out of That Lizard – Defense Strategies to Beat the Reptile*, The Voice (Sept. 25, 2013), http://www.ettdefenseinsight.com/wp-content/uploads/2014/06/3374_001.pdf.

[44] Mayer, *supra* note 42.

[45] *Id.*

[46] Kathy Cochran, *Reptiles in the Courtroom,* dritoday (January 12, 2010 7:41 AM), http://www.dritoday.org/post/Reptiles-in-the-Courtroom.aspx.

[47] *Id.*

In other types of litigation, one of the difficulties sometimes encountered by plaintiffs' lawyers seeking to utilize this theory is convincing a jury that there is actually a safety "rule" which defendant has violated. In the context of the types of actions under discussion here, involving claims of negligence per se because of statutory or regulatory violations, such an issue is not even a consideration, as the rule is usually promulgated in black and white. In these cases, plaintiffs' counsel can focus on whether defendant in fact violated the rule, and then emphasize that such actions created a danger to the community, including the individual jurors, which can only be remedied by the imposition of substantial damages. The successful creation of fear of this danger on the part of the jurors typically leads to a verdict in favor of plaintiffs.

In a case in which the client has been accused of violating a statute, ordinance or regulatory provision, countering plaintiffs' use of the reptile theory can be challenging indeed. Allen, Schwarz and Wyzga suggest that one way to counter plaintiffs' tactics is better use of a good, cohesive storytelling narrative. According to the authors, the reptile theory "disrespects" jurors by "animalizing" them and could result in juror backlash. The fear-based tactics used by Reptile Theory disciples can "direct attention in an uncertain and unpredictable manner;" in contrast, "thoughtful narrative directs attention toward action grounded in the reflective mind."[48] The authors suggest the use of this "attention choreography" works to "direct the attention of the juror in ways we [as lawyers] suggest are consistent with the respectful aims of treating jurors as the human beings they are."[49] Storytelling narrative works to counter the fear-based reptilian approach by providing a pattern for juror understanding, focusing juror attention, generating group identity and motivating action.

Dr. Kanasky, however, suggests that use of narrative is inadequate in and of itself.[50] He states that what is necessary is a comprehensive understanding of how reptile tactics work, and a well-thought-out plan of how to attack the theory, rather than simply defending and reacting to it. He points out that one of plaintiff's favorite tactics is to cajole defense witnesses, especially corporate representatives, to agree in deposition with multiple safety "rules," rendering the defense with dangerous impeachment vulnerabilities, and recommends thoroughly educating these witnesses not fall into the trap.

Of course, in cases where the primary allegation revolves around an alleged statutory or regulatory violation, it becomes much more difficult to avoid agreement that such a "rule" exists. In these circumstances, particular care must be taken with company witnesses (1) to have them acknowledge the existence of the statute or regulation ("rule") to avoid appearing absurd and losing credibility, *but* (2) resist plaintiffs' counsel's invitations to extend agreement to various postulates which may amount to an unwarranted extension of the statutory or regulatory requirements. The witness must be thoroughly familiarized with the reptile

---

[48] Mayer, *supra* note 42, at 4.

[49] *Id.*

[50] B. Kanasky, *supra* note 42.

theory as it applies to the particular case, and armed with appropriate facts to be able to resist counsel's blandishments. For example, if the defendant is alleged to have violated a Federal Motor Carrier Safety Rule, the rule itself may have to be acknowledged, but questions along the line of "A violation of this rule presents a danger to the public, doesn't it?" or suggesting unwarranted extensions of the regulation in an attempt to bring plaintiff's allegation closer to its scope, should be resisted.

The cases cited above stand for the proposition that, in most cases, even if there was some sort of violation, plaintiffs still must prove that they are one of the class which the statute or regulation is designed to protect, and that the violation was the proximate cause of the incident and of the injury or damages. Plaintiffs' counsel seek to overcome evidentiary deficiencies by use of the reptile approach, and defense counsel should be ready to vigorously attack these evidentiary omissions. Of course, there is no bright line path to a successful attack on the reptile theory. Dr. Kanasky recommends strongly that attacks to debunk the theory be carried out at trial beginning with *voir dire*, opening statement, and continuing through cross and direct examination of witnesses, culminating with final argument. Each case will vary; however, the important lesson is to know the theory, recognize it when it rears its head, and plan a strategy to attack it rather than simply react.

V.
Conclusion

The opportunities for negligence per se allegations being raised against defendants in a variety of circumstances have multiplied in recent years, due at least in part to the expanding regulatory activities at all levels of government. The statistical findings that the presence of a claim of violation of statute or regulation, giving rise to a negligence per se allegation, results in a statistically significant increase in the success rate of plaintiffs' cases, as well as the average payout in different types of cases,[51] are hardly surprising, given the advantage provided to plaintiffs' counsel in such cases, and it would be even less surprising to find that plaintiffs' success rate and average recovery in these types of cases have risen even more in recent years. These are some of the most challenging cases to confront corporate and outside counsel, and call for thoughtful analysis and robust approaches to winning.

[51] Viscusi, *supra* note 5.