REPTILE MOTIONS IN PERSONAL INJURY CASES

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Reptile is a trial advocacy book written by trial lawyer Don Keenan and jury consultant David Ball. The book claims to be aimed at combatting the effects of the tort reform movement. Its authors make no secret of the fact that the publication is for plaintiff attorneys, its full title being *Reptile: The 2009 Manual of the Plaintiff's Revolution*. Since its publication, *Reptile* has been a hotbed of dispute between the plaintiff bar and the defense bar, resulting in motions filed to preclude *Reptile* strategies, tactics and scripts at trial.

The effectiveness of *Reptile* and the science behind it has been addressed in many articles by both sides. This article will not address the science of *Reptile* or how or why it works or does not work (depending on whom you ask). Instead, this article focuses on the common arguments made by defendants in motions against the use of *Reptile* and the common responses by plaintiffs.

Most defense motions argue that *Reptile* encourages the violation of the golden rule and/or jury nullification by telling plaintiff's counsel to use the words "safety rules," to make reference to the jury being the conscience of the

community and to ask the jury to "send a message." *Black's Law Dictionary* defines golden rule arguments as those "in which a lawyer asks the jurors to reach a verdict by imagining themselves or someone they care about in the place of the injured plaintiff…" *Black's Law Dictionary* 700 (7th ed. 1999). Jury nullification is "a jury's knowing and deliberate rejection of the evidence or refusal to apply the law either because the jury wants to send a message about some issue that is larger than the case itself or because the result dictated by law is contrary to the jury's sense of justice, morality, or fairness." *Lioce v. Cohen*, 124 Nev. 1, 20, 174 P.3d 970, 982-83 (2008). In *Lioce*, the Nevada Supreme Court addressed golden rule arguments and jury nullification, and found the following arguments to be improper:

1. Stating, "At some point, we must say, enough is enough;"
2. Stating, "People must stop wasting taxpayer money and jurors' valuable time on cases like this;"
3. Stating that a case was frivolous and was responsible for the decline of the legal profession's reputation;
4. Stating, "This is a case where the plaintiffs are trying to get something for nothing;"
5. Stating, "It's cases like this that make people skeptical and distrustful of lawyers;"
6. Stating, "The only way that people and their chiropractors will stop bringing these cases is if juries start saying no, enough is enough;"
7. Stating a personal opinion as to the justness of a cause;
8. Violating the "golden rule" by inviting jurors to consider a hypothetical situation involving the jurors' children and asking whether the jurors would file a lawsuit in that situation; and
9. Stating it was his personal crusade to defend his clients because of the sheer frivolity of the cases.

Safety and Safety Rules

Defendants generally argue that the plaintiff should not be allowed to discuss safety or safety rules, or even use the phrase during trial. Negligence cases, argue the defense, are not about safety or safety rules, but the violation of a standard established by the law. The argument generally frames the application of safety rules as being improper argument or contrary to the law.

Plaintiffs counter that negligence cases are inherently about safety. The Nevada Supreme Court has noted that the "overriding policy of tort law, [is] to promote safety" and to "enforce the standards of conduct" which are "imposed by society." *Calloway v. City of Reno*, 116 Nev. 250, 260, 993 P.2d 1259, 1265 (2000), *superseded by statute on other grounds as stated in Olson v. Richard*, 120 Nev. 240, 89 P.3d 31 (2004). Negligence is the failure to exercise the care necessary to avoid injury to others. NEV. J.I. 4.03. The role of the jury is to determine whether reasonable care was exercised. *Solen v. Virginia & T.R.R.*, 13 Nev. 106, 123 (1878).

Reference to Jury as Conscience of the Community

Defendants argue that conscience of the community arguments are improper, and largely cite to criminal cases or cases from other jurisdictions.[1] The defense also generally argues that referring to the jury as the conscience of the community is a golden rule argument and/or promotes jury nullification, both of which are improper under *Lioce*.

Plaintiffs respond that the Nevada Supreme Court has expressly referred to the jury in a negligence case as being the "conscience of the community." *El Dorado Hotel, Inc. v. Brown*, 100 Nev. 622, 629, 691 P.2d 436, 442 (1984), *overruled on other grounds by Vinci v. Las Vegas Sands, Inc.*, 115 Nev. 243, 984 P.2d 750 (1999) ("The jury, acting as the conscience of the community, determined that Brown is entitled to $25,000 as compensation for the indignities he has suffered"). Additionally, in *Lioce*, the Supreme Court had the opportunity to address statements in closing argument about the jury acting as the "conscience of society" and the jury speaking through its verdict as being "a reflection of society's values and beliefs and what justice is or should be." *Lioce*, 124 Nev. at 9-10, 174 P.3d at

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975-76. The Supreme Court did not address these arguments, despite addressing all the improper statements surrounding this argument. Plaintiffs also point out that the role of the jury is to determine whether the conduct of the defendant has or has not conformed to what "the community requires." *Lee v. GNLV Corp.*, 117 Nev. 291, 296-97, 22 P.3d 209, 212-13 (2001). Plaintiffs argue that asking a jury to speak on behalf of the community in determining what is or is not reasonable in their community under a given set of facts is not improper, but the very role of the jury.

Sending a Message Outside of a Punitive Damage Case

The defense typically argues that *Lioce* and *DeJesus v. Flick*, 116 Nev. 812, 7 P.3d 459 (2000), *overruled in part on other grounds by Lioce*, 124 Nev. 1, 174 p.3d 970, bar the use of the phrase "send a message," because the phrase necessarily requires jurors to punish the defendant. Defendants argue that the use of this phrase is improper in a non-punitive damages negligence case and constitutes an improper attempt to either inflame the passions or invoke the sympathy of jurors. In *Lioce*, the Supreme Court found the use of this phrase to be improper when asking jurors to send a message about broader social issues, like frivolous lawsuits.

Plaintiffs respond that since *Lioce*, the Supreme Court has clarified that "send a message" is not improper in all circumstances. In *Gunderson v. D.R. Horton, Inc.*, 130 Nev. Adv. Rep. 9, 319 P.3d 606, 614 (2014) (en banc), the Supreme Court held that a defense attorney in a construction defect case did not engage in misconduct when he asked jurors to send a message that the plaintiffs' homes were safe. The court explained that this argument differed from *Lioce* because the attorney in *Gunderson* did not ask jurors to reject the evidence or law and, instead, asked jurors to find the defendant not liable based on the evidence presented. So long as counsel asks the jury to send a message based on the evidence, the phrase is not necessarily improper.

Conclusion

It is difficult to characterize a strategy like *Reptile* as improper, because it is just that, a strategy. As with any litigation or trial strategy in the adversary process, there is bound to be debate, disagreement and discussion about whether the strategy is proper or improper. Hopefully this article has outlined some of the common arguments made by both sides. Whether any of the specific arguments addressed in this article are proper or improper, you be the judge. **NL**

1. *See, e.g.*, *Williams v. State*, 113 Nev. 1008, 945 P.2d 438 (1998) (noting that reference to jury as conscience of the community has been found to be prosecutorial misconduct, but in this case no misconduct occurred because prosecutor was simply arguing the purposes behind punishment); *Westbrook v. General Tire & Rubber Co.*, 754 F.2d 1233, 1268 (5th Cir. 1985) (holding that conscience of the community argument constitutes an improper distraction from jury's sworn duty to reach a fair honest and just verdict according to the facts and evidence presented at trial); *United States v. Johnson*, 968 F.2d 768 (8th Cir. 1992) (prosecutor may not ask jury to convict criminal defendant in order to protect community values); *United States v. Solivan*, 937 F.2d 1146 (6th Cir. 1991) ("Unless calculated to incite the passions and prejudices of the jurors, appeals to the jury to act as the community conscience are not per se impermissible").

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