

Product Liability

Effective Litigation Tools & Techniques

Paul Wojcicki & Dan Ahasay

Segal McCambridge Singer & Mahoney, Ltd.

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What We'll Be Covering

- Telling your client's story
- Rule 702 and the *Daubert* Trilogy
- Overview of the Reptile Theory

Why Tell Your Client's Story

- Everyone loves a good story
- Storytelling is an artform as old as language itself
- Objective: communicate to an audience the occurrence of an event in a way that affects a desired result.
 - Gerald Reading Powell, *Opening Statements: The Art of Story Telling*, 31 Stet. Law Rev. 89-104, 90 (2001), citing James W. McElhaney, *Hit Themes: Weaver Your Facts into a Story the Jury Can Follow*, 84 ABA J. 88 (Aug. 1998).
- Provides context and a frame of reference for the jury

Key Story Elements

In Products Liability Cases

- Build around legal theories and standards
- Negligence
 - Reasonable care
- Strict liability in tort/warranty
 - Reasonably safe/not unreasonable dangerous product
 - Consumer expectation test
 - Risk/utility standard

Humanize or De-corporatize the Company

- A company is its people

Humanize or De-corporatize the Company

Particularly Important For Millennial & Younger Jurors

- **High value** placed on social responsibility and transparency
 - Expect corporations to do more than maximize profits
 - Expect corporations to “do good”
- **75%** believe corporations should create economic value for society by addressing society’s needs
- **40%** see corporations as a source of fear
- **49%** view even good deeds as looking for a tax break
- **71%** agree that most large companies put profit ahead of concerns for safety
- **84%** expect corporations to take every precaution to ensure safety, regardless of practicality or cost

Build Your Story Pre-trial

- Effective storytelling requires:
 - careful thought
 - detailed planning
 - thorough preparation
- Involve your client in:
 - Developing the story
 - Planning to tell it at trial
 - Assign story elements to proper people in the company – if possible

Build Your Story Pre-trial *(cont.)*

- Beware the “limit-disclosure-as-much-as-possible” mindset
 - Ensure that you produce the materials and data you need to tell your client’s story effectively
 - But don’t do opposing counsel’s job for them
 - Carefully consider and fairly and adequately respond to each discovery request

Trial: Don't Just Tell Me, *Show Me*

- Create a multi-sensory experience for the jury
- Know your audience
 - Millennial audiences react better to presentations with more stimulus
 - Shorter bursts of information resonate more powerfully
 - True crime documentary-style and popularity
- Make extensive use of demonstrative evidence
 - Graphs, charts, illustrations, etc.
 - Audio and visual

Rule 702 & “The Daubert Trilogy”

1. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)
 - Rule 702’s relevance and reliability standard controls over *Frye* general acceptance test
 - Rule 702 “requires a valid scientific connection to the pertinent inquiry as a precondition of admissibility.”
 - Casts district judges as gatekeeping who must exercise control over experts

“The *Daubert* Trilogy” *Cont.*

2. *General Electric Co. v. Joiner*, 522 U.S. 136 (1997)

- Reliability may be applied to reasoning process, not just methodology
- Review **all** “*Daubert*” rulings under abuse of discretion standard

3. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999)

- Reliability standard applies to all expert evidence, not just “scientific evidence”

SCOTUS: Just to be Clear...

“Since *Daubert*, ... parties relying on expert evidence have had notice of the exacting standards of reliability such evidence must meet.”

– *Weisgram v. Marley Co.*, 528 U.S. 440, 455 (2000).

Why an Exacting Reliability Standard?

- Experts permitted wide latitude to offer opinions
- Need not be based on firsthand knowledge or observations
- Difficult for a jury to evaluate; easy to be misled
- Adversarial bias
 - hired guns
 - produces “junk science” in the courtroom

2000 Amendment to Rule 702

- Reliability standard established by the *Daubert* trilogy not being applied consistently
- Rule amended for the express purpose of resolving conflicts in the courts about the meaning of *Daubert*.
- Amendment codifies a “more rigorous and structured approach” to the scrutiny of expert evidence than was being done.
 - *See* May 1, 1999 Report of the Advisory Committee on Evidence Rules to the Standing Committee on Practice and Procedure 5-7

Amended Rule 702

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- b) the testimony is based on sufficient facts or data;
- c) the testimony is the product of reliable principles and methods; and
- d) the expert has reliably applied the principles and methods to the facts of the case.

Gatekeeping

- **Scientific Validity** = evidentiary relevance + reliability
- Opinion evidence that is connected to existing data only by the *ipse dixit* of the expert is inadmissible
- Think bridge ...

Rigor & Structure

- Witness must possess “scientific, technical or other specialized knowledge” in a field relevant to the inquiry
- Reliable testimony is more than subjective belief or unsupported speculation
 - Inference or assertion must be derived by the scientific method or from the methods and principles of the witness’ discipline
 - Supported by appropriate validation

Rigor & Structure

Factors For Assessing Reliability Include:

- Whether the theory or technique has been or can be tested
- Whether it has been subject to peer review and publication
- Whether it have a known or potential error rate
- Whither it is “generally accepted”
- Other (case by case)

Rigor & Structure

Additional Reliability Factors :

- Whether experts are “proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying.”
 - *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1317 (9th Cir. 1995).
- Whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion.
 - *See General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997)
 - Noting that in some cases a trial court “may conclude that there is simply too great an analytical gap between the data and the opinion proffered”.

Rigor & Structure

Additional Reliability Factors :

- Whether the expert has adequately accounted for obvious alternative explanations.
 - *See Claar v. Burlington N.R.R.*, 29 F.3d 499 (9th Cir. 1994)
Testimony excluded where the expert failed to consider other obvious causes for the plaintiff's condition.
 - *Compare Ambrosini v. Labarraque*, 101 F.3d 129 (D.C.Cir. 1996)
The possibility of some uneliminated causes presents a question of weight, so long as the most obvious causes have been considered and reasonably ruled out by the expert.

Rigor & Structure

Additional Reliability Factors :

- Whether the expert “is being as careful as he would be in his regular professional work outside his paid litigation consulting.”
 - *Sheehan v. Daily Racing Form, Inc.*, 104 F.3d 940, 942 (7th Cir. 1997).
 - *See Kumho Tire Co. v. Carmichael*, 119 S.Ct. 1167, 1176 (1999)
 - *Daubert* requires the trial court to assure itself that the expert “employs in the courtroom the same level of **intellectual rigor** that characterizes the practice of an expert in the relevant field”.

Rigor & Structure

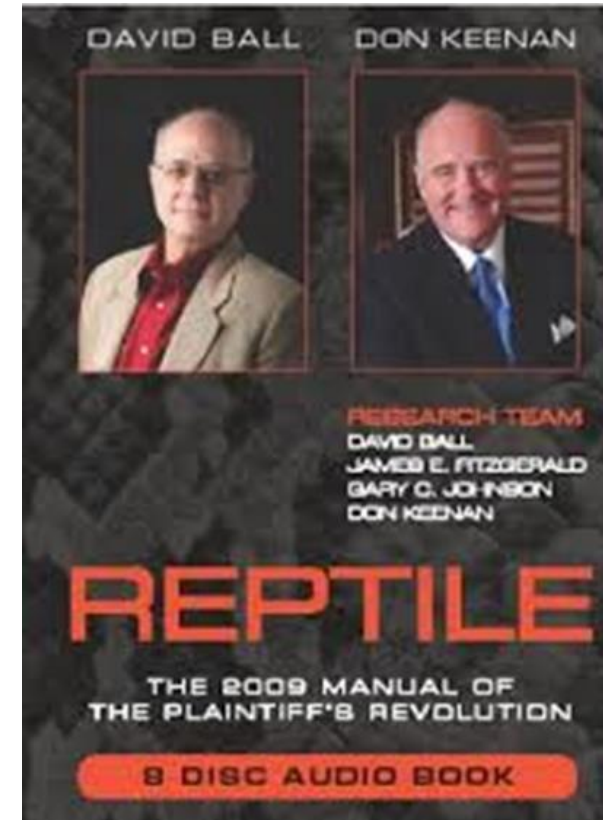
Additional Reliability Factors :

- Whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give. See *Kumho*, 119 S.Ct. at 1175
 - *Daubert's* general acceptance factor does not “help show that an expert's testimony is reliable where the discipline itself lacks reliability, as, for example, do theories grounded in any so-called generally accepted principles of astrology or necromancy.”
 - *Moore v. Ashland Chemical, Inc.*, 151 F.3d 269 (5th Cir. 1998) (en banc)
Clinical doctor was properly precluded from testifying to the toxicological cause of the plaintiff's respiratory problem, where the opinion was not sufficiently grounded in scientific methodology.
 - *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188 (6th Cir. 1988)
Rejecting testimony based on “clinical ecology” as unfounded and unreliable.

Beware the Reptile

Word on the Street

- An aggressive plaintiff strategy that is packaged in neuroscientific wrapping...”
- “*Manipulating* jurors by fostering fear”
- “Techniques work because they focus on the defendant’s behavior rather than sympathy for the plaintiff”
- “A theory that is as good as its results!”



Science or Savvy?

- Safety rules vs. legal standards
- Emotion vs. reason

The Reptile Theory

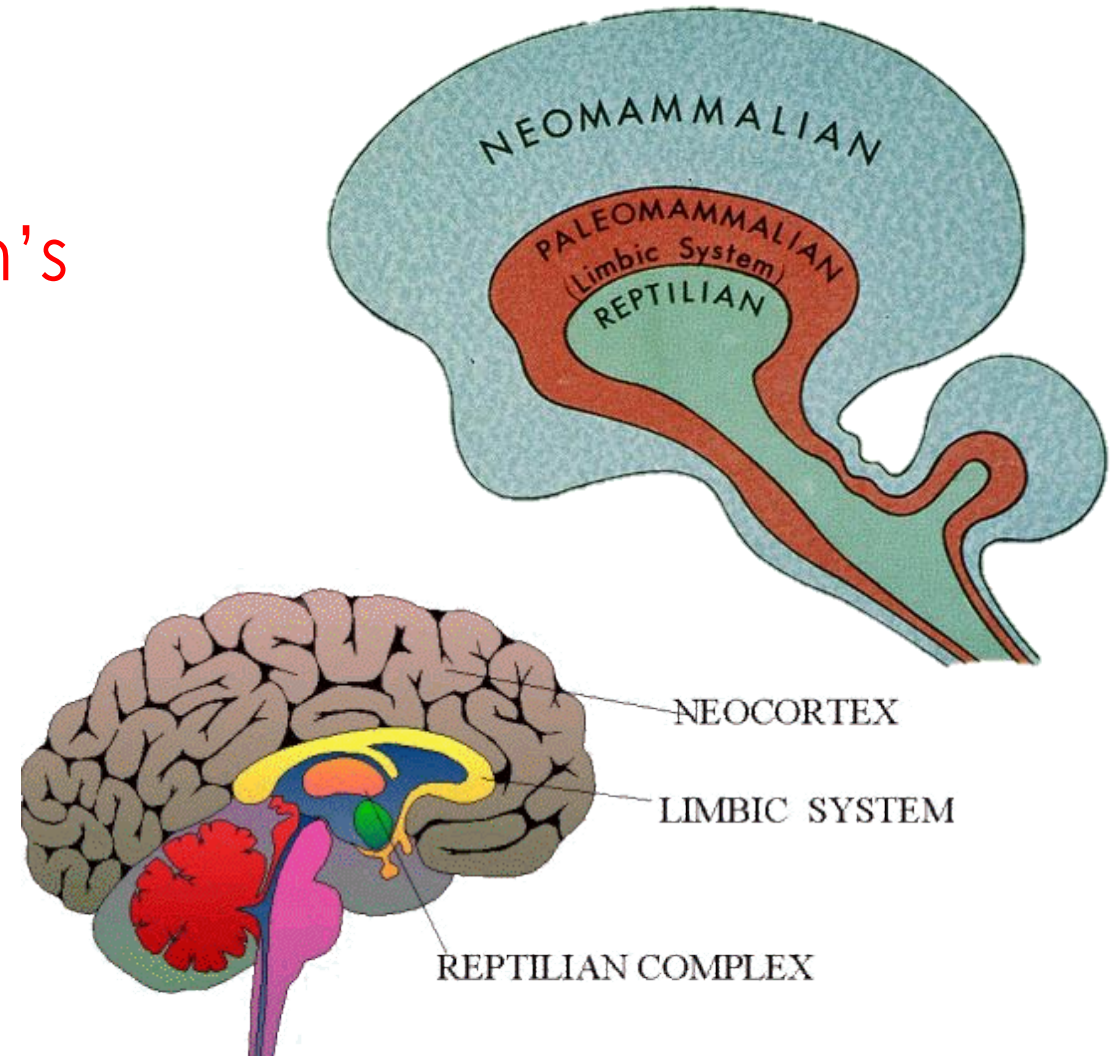
Based on Triune Brain Theory
by Neuroscientist Paul MacLean's

The "Reptilian brain" or R-Complex:
Oldest part of the brain

- Houses basic functions: breathing, balance, hunger, sex drive & **SURVIVAL**
- Gave rise to the parts of the brain that make you think and feel and runs them

Paleomammalian Complex:
mid-brain, emotion, parenting, survival

Neomammalian Complex: cerebral cortex, language, logic, planning



The Triune Brain Model

How The Theory Works...

Get jurors to react with the **Reptile Brain**

- Create a sense of **danger** to put jurors into **Survival Mode**
- Make jurors the guardians of community safety
- Make jurors hate the defendant
- High damages awards enhance safety and decrease **danger**

(Broken) Safety Rule + **Danger** = **Reptile Response**

Safety Rules & Violations

1. It must prevent **danger**
2. It must protect people in a wide variety of situations – not just someone in plaintiff's situation
3. Plain English
4. Must be specific: Drivers must drive at a safe speed
5. Practical and easy to follow
6. The defendant has to agree with it or bury himself by disagreeing with it

“Tentacles of Danger”

- Go beyond factual context of the case
 - Have expert explain dangers created by the truck driver by analogizing to other situations
- Pose questions designed to assess the magnitude of danger from defendant’s conduct.
- Answers should show that the “tentacles of danger” extend throughout the community.
- Defendant poses a threat to YOU (juror).

Don't Fall Into the Trap

- Prepare your witnesses
 - Listening is key
 - Practice under real conditions
 - Teach: No rule applies 100% of the time
 - Every circumstance presents unique concerns and considerations
 - Adding or changing a fact in any given scenario may drastically effect the outcome
 - “It depends ...” is sometimes truly the best, most honest answer
- Tell your story
 - Reasonably safe = balancing/trade-offs
- Reverse the Reptile

Thank you



Paul E. Wojcicki

Shareholder | Chicago, IL

pwojcicki@smsm.com



Dan Ahasay

Associate | Chicago, IL

dahasay@smsm.com