



# BHH Bulletin

## Fighting the "Reptile" By: Jaclyn S. Wanemaker

For the past decade, jury consultant David Ball and plaintiff's attorney Don Keenan have promoted their Reptile: The 2009 Manual of the Plaintiff's Revolution to help plaintiff's attorneys win high jury verdicts in personal injury cases. Countless plaintiff's firms now use this technique in a variety of cases, including motor vehicle negligence, medical malpractice, products liability, premises liability and even environmental cases, with reported results exceeding \$7.5 billion. Defendants and their representatives should be on the lookout for this slithering strategy from the onset of each case to avoid being bitten by the Reptile at trial.

The Reptile tactic seeks to scare the jury about the danger of unchecked safety violations to empower them to prevent danger in their community by awarding high verdicts to the plaintiff. The jury is manipulated into using the primitive, "reptilian" part of the brain, known as the R-complex, which is concerned only with survival instincts, rather than the "ape brain," which is thoughtful, discerning and rational.

I read the Reptile book when I did plaintiff's work years ago and used this tactic. It is a powerful way to get jurors to return large verdicts. It works like this. First, plaintiff's counsel identifies a simple safety rule that the defendant supposedly violated, such as a regulation governing how many hours a truck driver may drive during a given time period. Plaintiff's counsel expands that simple rule into an "umbrella rule," such as, "truck drivers cannot needlessly endanger the public by driving without sufficient rest" because that puts the community at risk for injury or even death. Then the attorney seeks to empower jurors to prevent such harms in their community by returning a high verdict to stop people like the defendant from endangering the public. Plaintiff's counsel stresses the potential "harms and losses," rather than the actual harm alleged in the case, particularly in smaller cases. This way, the jury can feel justified in awarding a large sum as a way to deter unsafe conduct - dangers in their community - and to keep the public safe. A plaintiff's attorney skilled in this tactic can turn a small case into a considerable one, even without punitive damages.

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How can defendants and their representatives prevent this? Identifying use of the Reptile program early is key. Warnings can come as early as in the Complaint. Allegations that the defendant "unnecessarily endangered the public or community" or "violated safety rules" are a sign that plaintiff's counsel may be setting up the case for the Reptile. Denials to such allegations and Motions to Dismiss punitive damages are the first steps to fighting the Reptile.

In discovery, a plaintiff's attorney seeking to apply the Reptile strategy may make broad demands that cover situations other than those at issue in the case. For example, they may request information about other accidents or previous "violations of safety rules." Objections should be made and motion practice may be necessary to limit discovery to the facts at hand. It will be worth it later to prevent the plaintiff's attorney from laying the groundwork to unleash the Reptile at trial.

At depositions, the plaintiff's attorney may ask the defendant to agree to general safety rules and to agree that such rules exist to prevent harm. Plaintiff's counsel may use the buzzwords "needlessly," "unnecessarily," "community," "the public," "endanger" and "harms and losses," as the book instructs. The witness may be asked questions to the effect of, "would you agree that failing to look both ways before turning left unnecessarily endangers the public?" and "would you agree that safety rules are designed to prevent harm?" If the witness responds in the negative, he risks appearing defensive, dishonest or stupid. To prevent this, witnesses should be educated about the Reptile tactic well in advance of depositions. This way, they will understand why it is important to not simply agree to such questions and they will be on the alert for the buzzwords. For more sophisticated witnesses, a good approach to responding to questions like this is to limit the response with something like "while I do not agree with your characterization of 'unnecessarily endangering the public,' I look both ways before turning left and make every effort to ensure it is clear, as I did here." An easy rule of thumb for all witnesses is to answer by saying, "it depends." This will provide defense counsel with some latitude, while keeping the deponent from appearing disagreeable or insincere. Also, defense counsel will object to limit questions to the factual scenario of the case and to avoid hypotheticals that can be later misconstrued.

When defense counsel anticipates that plaintiff's counsel will use the Reptile, a Motion in Limine can be an effective preemptive measure. Include a transcript from a previous trial to show the Court that this plaintiff's attorney has used the Reptile before. If defense counsel has no prior experience against the plaintiff's attorney at trial, she should consult with other members of the local defense bar to find out if the plaintiff's firm is known to use the Reptile. Limiting proof to the case at issue is essential. Insist on jury instructions that prohibit jurors from basing their determinations on sympathy.

Volumes could be written about ways to keep the Reptile from rearing its ugly head during trial and this will be discussed in future newsletters. Generally, defense counsel should address it during opening and closing statements. Defense counsel may warn jurors that the plaintiff's attorney is trying to manipulate them by using psychology and invoking fear to keep them from relying on their rational thoughts. Reminding jurors to limit determinations to the facts of the case and the actual loss can prevent a high verdict for the potential "harms and losses" that a safety violation could cause to their own community. It is not the jury's job to keep their community safe. They are there to rule on one case and should be clearly instructed on that.

As the Reptile continues to spread, defendants and their representatives should be on the lookout early on to prevent its use at trial. Defense counsel should call it out for what it is before and at trial and should warn the jury that the plaintiff's attorney is trying to manipulate them. Since most people find manipulation insulting, a properly informed jury can resist it and may even fight the Reptile to its death by returning a no-cause.

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<sup>1</sup> Reptile: The 2009 Manual of the Plaintiff's Revolution, David A. Ball and Don Keenan (2009).

[www.reptilekeenanball.com](http://www.reptilekeenanball.com).

[www.psycheducation.org](http://www.psycheducation.org).

To purchase Reptile materials from the website, the purchaser must verify that she is a "Plaintiff's lawyer" or "member of a Plaintiff's firm" ([www.reptilekeenanball.com](http://www.reptilekeenanball.com)).

## Uber Confusing? Insurance Coverage in the Age of Ridesharing

By: Liesel A. Zimmerman

In many respects, the days of hailing a taxi are nearly over. Rather than catching a ride with the wave of a hand, now a rider can summon a driver with the push of a button. Companies like Uber and Lyft have changed the landscape of modern transportation in the smartphone era. These and other Transportation Network Company services (“TNCs”), colloquially known as ridesharing services, use digital networks via smartphone applications to connect passengers to TNC drivers for prearranged trips.

Some of the most attractive aspects of driving for a TNC are that drivers can use their personal vehicles and can determine their own work schedules. With this level of autonomy, TNC drivers are considered independent contractors, rather than employees of the ridesharing companies. This independence, however, can come at a high price when it comes to liability for motor vehicle accidents.

Unlike TNC drivers, traditional taxi cab drivers are employees of their taxi companies, and typically drive cars owned by their employers. Taxi companies heavily insure their vehicles, and offer coverage from the time a driver starts his shift to when he returns the company vehicle at the end of the workday. If a taxi driver is involved in a fender bender, he can know that his employer’s insurance will cover the damages. For TNC drivers, the case is not nearly as clear-cut. If a TNC driver is an independent contractor, whose insurance is responsible when a rideshare driver is involved in a motor vehicle accident?

A tragic case in California brought this question into the limelight. On December 31, 2013, an Uber driver struck and killed a six-year-old girl while he was logged into the Uber app and looking for rides. Uber originally disclaimed liability, stating that the driver was not providing an Uber ride at the time of the accident. Despite this stance, Uber subsequently changed its insurance policy to provide coverage for drivers who have the app open, but have not yet picked up passengers. This time frame, sometimes referred to as “Period 1,” is now part of broader classification system that determines who is liable – the TNC driver, or the TNC – in the event of an accident.

The amount of insurance coverage, and the party responsible for the insurance coverage, depends on the stage of the transaction between TNC drivers and their potential passengers. The periods of coverage range from: **Offline**; to **Period 1**: an online driver waiting for a trip; to **Period 2**: an active ride request without a passenger in the vehicle; to **Period 3**: an active ride request with a passenger in the vehicle.

### *Offline Driver*

In order to apply to drive for either Uber or Lyft, prospective TNC drivers must provide proof of insurance for their vehicles. Under both company policies, any damages incurred while drivers are offline will fall under drivers’ personal insurance coverage. Offline drivers are not acting in their capacities as agents of the rideshare companies when the apps are not activated.

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### ***Period 1: Online Driver Waiting for a Trip***

Once a TNC driver is logged into an app and waiting for a ride request, both Uber and Lyft provide at least some level of insurance coverage to the driver for liability to third parties. Although Uber's coverage limits differ from state to state, drivers will enjoy coverage for at least: "\$50,000 per person / \$100,000 per accident for bodily injury, [and] \$25,000 per accident for property damage." Lyft offers the same coverage on a contingency basis, and will only cover the damages if the driver's personal insurance will not.

The logistics of Period 1 pose an interesting question when it comes to dual drivers who use both Uber *and* Lyft. Some serious drivers will leverage their drive time by opening both apps at once and waiting to see which app will connect them with a passenger sooner. If a driver is in Period 1 for both apps and is involved in an accident, which TNC would be responsible? Questions such as this will undoubtedly become more highly litigated as the ridesharing industry continues to expand.

### ***Periods 2 & 3: Active Ride Request With or Without Passenger in the Vehicle***

For both Uber and Lyft, primary coverage kicks in once the driver has accepted a ride (Period 2), and carries through the trip until the passenger has been dropped off at his or her destination (end of Period 3). Both TNCs boast \$1 million coverage policies per accident for drivers who have accepted rides.

During Periods 2 and 3, Uber covers drivers for a range of scenarios. For third party liability coverage, Uber will cover for at least \$1 million. If an uninsured or underinsured motorist is at fault and causes bodily injury to the driver or passenger, the Uber driver will be covered for at least \$250,000 per accident. Uber will also provide contingent collision and comprehensive coverage, but drivers can only take advantage of this policy after surpassing the \$1,000 deductible.

Lyft's policy, although similar, has a deductible of up to \$2,500. Notably, in the event that the driver's personal insurance includes specific ridesharing coverage, Lyft's coverage will only apply on a contingent basis. For accidents with uninsured or underinsured motorists who are at fault for bodily injury to the TNC driver or passengers, Lyft's coverage varies by state.

### ***The Impact of Ridesharing on Other Industries***

With the rising popularity of TNCs, the insurance industry has adapted by developing "Ridesharing Insurance". Many personal insurance policies feature business exclusions, which prevent drivers from recovering if they are involved in an accident while engaged in business activities (including ridesharing). Depending on the stage of the transaction, TNC drivers may be uncovered by both their personal policies and their TNC policies, meaning they would be personally responsible in the event of an accident. Many insurance companies now acknowledge the prevalence of ridesharing by offering coverage options specifically for TNC drivers. For an additional fee, TNC drivers can obtain policies to cover the "gap" between their personal insurance and their TNC insurance. To date, rideshare insurance has been made available in 39 states.

Certainly, the surge in ridesharing has significantly impacted the legal field as well. Many law firms are creating ridesharing practice groups, and some firms have even chosen to focus exclusively on legal matters involving TNCs. As ridesharing continues to gain momentum, we can hope that litigation on these newly posed issues will lend clarity in this expanding area of law.

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<sup>1</sup>Contingent collision coverage applies to physical damage to a driver's vehicle resulting from an accident. Contingent comprehensive coverage protects against damage caused by a non-collision event.

## News

- Burden, Hafner & Hansen, LLC welcomes new paralegals, Tyler M. Alspaugh, and Jenna M. Kuhnle.
- In February of 2019, Donna L. Burden, Esq. a partner at Burden, Hafner & Hansen, LLC presented on the topic of “Are you Ready for a Wallaby at the Watercooler” at the IADC mid-year meeting in Santa Barbara, California; and, on March 22, 2019, she presented on “Hot Topics in Damages” at the Transportation Megaconference XIV in New Orleans, Louisiana.
- Jaclyn S. Wanemaker, Esq., an attorney at Burden, Hafner & Hansen, LLC, spoke to the first year law school class at the University at Buffalo School of Law on April 8, 2019, as part of her committee work with the Erie County Bar Association to advise law students of the services provided by our local Bar Association to assist lawyers and law students in our community. She has done similar outreach work this year to remind solo practitioners and attorneys at smaller local law firms of the various resources available to them through the Erie County Bar Association.
- In March of 2019, Donna L. Burden, partner, and Jaclyn S. Wanemaker won an appeal at the Appellate Division, Fourth Department, resulting in the dismissal of the Plaintiffs’ Complaint. The Fourth Department reversed the Erie County Supreme Court’s denial of our Motion to Dismiss the Plaintiffs’ Complaint in an action against our municipal client. The Plaintiffs commenced their lawsuit prior to appearing for their noticed § 50-h hearings in order to comply with the 1 year and 90-day statute of limitations applicable to actions against municipalities. In addition, the Plaintiffs’ Notice of Claim contained numerous deficiencies and lacked information required by New York General Municipal Law. The Fourth Department ruled that our Motion to Dismiss the Plaintiffs’ Complaint should have been granted, resulting in a win for our client and set precedent that municipal Defendants in New York can rely on in the future.
- Phyliss A. Hafner, Esq., partner at Burden, Hafner & Hansen, LLC, was elected to the Board of Directors for the Ronald McDonald House Charities of Western New York.
- Burden, Hafner & Hansen, LLC celebrated its 12<sup>th</sup> anniversary on May 10, 2019.
- Burden, Hafner & Hansen, LLC is supporting diversity and inclusion by participating in the Say Yes internship program offered by the Erie County Bar Association.

## News continued

- The firm offered a team building axe throwing event in March 2019. Below is a photograph of Kathie P. Kirszenstein, who was the axe throwing champion for the evening.





## Community Involvement

- Phyliss Hafner, Esq. helped the Young Professionals Committee organize its first meat raffle to support the Ronald McDonald House Charities of WNY. The meat raffle was a huge success, and all of the proceeds benefited the Ronald McDonald House here in Buffalo, New York. Burden, Hafner & Hansen, LLC was a gold sponsor the meat raffle.
- Burden, Hafner & Hansen, LLC participated in the Rock Your Socks contest to raise awareness for the Ronald McDonald House Charities of WNY. While we did not win the photo contest, everyone had fun and enjoyed creating our submission for the photo contest as can be seen in the below photograph.



## U.S. Presidential Trivia

- 1) How many presidents were impeached?
- 2) How many Presidents died in office?
- 3) Who was the only President to serve two non-consecutive terms?
- 4) Who was the only President to be elected four times?
- 5) Who is the oldest person to be elected President?

Answers  
1 - 2: Andrew Johnson and Bill Clinton  
2 - 8: Four died from natural causes: William Henry Harrison; Zachary Taylor; Franklin Delano Roosevelt; and four were assassinated: Abraham Lincoln; James A. Garfield; William McKinley and John F. Kennedy.  
3 - Grover Cleveland  
4 - Franklin D. Roosevelt.  
5 - Donald Trump.