

SHADOW TORT LAW: LESSONS FROM THE *REPTILE*

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*For over a decade, a battle has been raging in the trial courts of this country over something called the “reptile theory,” often simply referred to by insiders as “the reptile.” The term comes from Reptile: The 2009 Manual of the Plaintiff’s Revolution.<sup>1</sup> The book’s thesis is that the way for plaintiffs to win tort cases and secure large verdicts is to appeal to the reptilian part of jurors’ brains, which (like threatened snakes) reacts with anger at threats to their security.<sup>2</sup> The authors urge plaintiffs’ attorneys to focus on generating anger at the defendant, as distinguished from sympathy for plaintiffs, so that jurors will perceive the defendant’s conduct as a threat to their own security and the security of their community. Opponents of the reptile contend that plaintiffs’ attorneys unjustifiably create this reaction by subtly modifying the applicable standard of care in negligence cases.<sup>3</sup> At the core of the reptile battle, then, is a dispute about the meaning of negligence. And that battle is taking place largely outside the purview of the appellate courts. It is governed by what I will call “shadow” tort law.<sup>4</sup>*

## INTRODUCTION

The reptile has been invisible or barely visible to torts scholars.<sup>5</sup> This is largely because its use is governed by a body of trial-level substantive tort

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1. David Ball & Don Keenan, *Reptile: The 2009 Manual of the Plaintiff’s Revolution* (2009) [hereinafter Ball & Keenan, *Reptile*].

2. See *id.* at 17–18 (“So in trial, your goal is to get the juror’s brain out of fritter mode and into survival mode. You do this by framing the case in terms of Reptilian survival.”).

3. See Tyler J. Derr, *Recognizing and Defeating the Reptile: A Step-by-Step Guide*, 3 *Stetson J. Advoc. & L.* 29, 32 (2016) (explaining how the reptile privileges appeals to emotion over arguments establishing a breach of the standard of care).

4. The term is, of course, derived from references to the United States Supreme Court’s “shadow docket,” but in this instance the shadows are at the trial, not the appellate, level. See Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 *Harv. L. Rev.* 123, 125 (2019) (describing the United States Supreme Court’s “shadow docket” as “the significant volume of orders and summary decisions that the Court issues without full briefing and oral argument”).

5. Although it is impossible to know the state of torts scholars’ awareness with certainty, what they publish is some, and arguably pretty probative, evidence. A recent Westlaw

law that is unreviewed—and for practical purposes unreviewable—by the appellate courts.<sup>6</sup> I have found only a single conventional law review article that actually discusses the reptile.<sup>7</sup> But in the world of tort law practice, the reptile has considerable prominence. There are hundreds of articles about it in tort practitioners' literature.<sup>8</sup> One practitioner who represents plaintiffs in major tort suits has said that he routinely receives motions in limine from defendants seeking to prevent him from employing the reptile at trial.

Given the reptile's purpose, the nomenclature that the inventors of the reptile theory chose may seem perplexing. Snakes, surely the most prominent example of a reptile in the public mind, are regarded by many people with revulsion and fear. Recommending that plaintiffs' attorneys treat jurors as if they were snakes even while they are courting jurors' favor seems strange. It is true that nothing in the reptile theory suggests that jurors are to *know* that they are being conceived as and manipulated to behave like the human equivalent of snakes. Nonetheless, one could more easily imagine a theory directing plaintiffs' attorneys to characterize *defendants* as reptiles, in order to play on jurors' revulsion and fear of snakes. But plaintiffs' attorneys apparently have not been put off by the name "reptile" theory, and judging from its notoriety and acceptance, the name has not been counterproductive.

Quite the opposite; the book appears to be in high demand, a signal of continuing interest in the reptile theory. How many copies of *Reptile* have been sold is unclear, in part because its publisher seems to have published only that single work, or that and one other.<sup>9</sup> An Amazon search for the book in November 2021 revealed that the paperback version was

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search found citations to the reptile in only three conventional law review articles written by law school faculty members, and as nearly as I can tell, none of the authors are or were a torts scholar. See Louis J. Sirico, Jr., *The Trial Lawyer and the Reptilian Brain: A Critique*, 65 *Clev. St. L. Rev.* 411, 411 (2017) ("For many trial lawyers, one theory of the moment advances 'the reptilian strategy.'"); Jean R. Sternlight, *Psychology and Lawyering: Coalescing the Field*, 15 *Nev. L.J.* 431, 432 n.17 (2015) (citing Ball & Keenan, *Reptile*, supra note 1, as an example of legal commentators focusing on neuroscience); Jonathan K. Van Patten, *On Editing*, 60 *S.D. L. Rev.* 1, 19 n.61 (2015) (citing Ball & Keenan, *Reptile*, supra note 1, as an example of a work emphasizing "the defendant and what the defendant has done before introducing the plaintiff"). In my view, the absence of any writing about, or even citation to, the reptile by torts scholars supports the inference that most are not aware of it.

6. See infra Part III.

7. See Sirico, supra note 5, at 411.

8. See, e.g., infra note 27.

9. A Google search for "Balloon Press," which Amazon lists as the publisher, leads to a webpage listing only one book. Balloon Press, Baker & Taylor Publisher Servs., <http://shop.btpubservices.com/Publisher/balloon-press> [<https://perma.cc/9PKX-DEMS>] (last visited July 27, 2022). The webpage did not include any information about *Reptile*. See id. Why the authors have allowed the book to stay out of print is not clear. But it could be that doing so is more profitable, in light of one of the authors' operation of a Keenan "trial institute" that holds classes and seminars and sells related clothing. See Keenan Trial Institute, <https://keenantrialinstitute.com/> [<https://perma.cc/F7P5-AQPE>] (last visited July 27, 2022).

selling for \$600. As of January 2022, it was no longer available on Amazon, but as of July 2022, it was selling for \$1,232 on another site, “Thrift Books.”<sup>10</sup> Perhaps unsurprisingly given these market conditions, the copy in the University of Virginia Law School’s library’s collection is missing from the open shelves. Borrowing a copy was itself difficult.<sup>11</sup>

I first heard the reptile mentioned in a webcast entitled “Big, Nasty Claims” sponsored by an insurance consulting firm.<sup>12</sup> Informal conversations with tort law colleagues at both my own and other law schools revealed that most have never heard of the reptile. There are any number of reasons that torts scholars could have gone so long without even hearing of the reptile. The most likely reason is that the details of trial strategy and evidentiary contentions in tort trials lie outside the concerns of most torts scholars.<sup>13</sup> Unless they make it a practice to monitor practitioners’ publications, the reptile would not come to torts scholars’ attention. But there are other possible reasons as well. This Piece focuses on a reason that involves a particular feature of the way tort law is made and applied that is obscured by the overly simple distinction between the law on the books and the law in practice.

This distinction implies that there is a difference between the substance of the law as it is stated in appellate opinions, treatises, and law review articles, and the way things actually work in practice. Without doubt, the distinction is perfectly valid. Rules on the books aren’t always followed, enforcing rights is sometimes more costly than it is worth, compromises and settlements occur, and so forth.<sup>14</sup> But study of the reptile

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10. Collectibles: Reptile: The 2009 Manual of the Plaintiff’s Revolution, Thrift Books, [https://www.thriftbooks.com/w/reptile-the-2009-manual-of-the-plaintiffs-revolution\\_david-a-ball\\_don-c-keenan/1106739/vintage/?resultid=80cff381-c91a-4996-a96a-28ccbfcfe2058](https://www.thriftbooks.com/w/reptile-the-2009-manual-of-the-plaintiffs-revolution_david-a-ball_don-c-keenan/1106739/vintage/?resultid=80cff381-c91a-4996-a96a-28ccbfcfe2058) [<https://perma.cc/CNF7-QZTW>] (last visited July 27, 2022).

11. It took seven weeks for an interlibrary loan request to produce a copy from the collection of the Clinical and Research Library of The Children’s Hospital in Aurora, Colorado.

12. Big Nasty Claims, Advisen (Dec. 1, 2021), <https://www.advisenltd.com/big-nasty-claims> [<https://perma.cc/XD26-5Z6J>].

13. One need only quickly review the leading torts casebooks, which are populated almost exclusively with appellate opinions and questions about them, to see how little discussion they contain about trial strategy or evidentiary considerations. As for torts scholarship, all torts scholars would recognize that one of the main preoccupations of the last few decades has been the nature of tort law, not the intricacies of trials. Confirmation can be found in the example of the recent, highly prominent debate about the nature of tort law between Professor Catherine Sharkey, on the one hand, and Professors John Goldberg and Benjamin Zipursky, on the other, which virtually exclusively references appellate case law and tort theory, with no discussion of trial strategy or evidentiary contentions. See John C.P. Goldberg & Benjamin C. Zipursky, *Thoroughly Modern Tort Theory*, 134 Harv. L. Rev. Forum 184 (2021); Catherine M. Sharkey, *Modern Tort Law: Preventing Harms, Not Recognizing Wrongs*, 134 Harv. L. Rev. 1413 (2021).

14. The distinction between law on the books and law in action has long been recognized. See, e.g., Roscoe Pound, *Law in Books and Law in Action*, 44 Am. L. Rev. 12 (1910). See generally Laurence H. Ross, *Settled Out of Court: The Social Process of Insurance Claims Adjustment* (1970).

reveals that there is a third category of law—in this instance the substantive law of torts—that is not written in the books, or only rarely makes an appearance. This category is shadow tort law and consists of applications of tort law to such matters as objections made in depositions, questions posed in voir dire (the pretrial questioning of potential jurors), and rulings about what counsel are and are not permitted to say in opening and closing statements.

There is nothing exceptional about the fact that shadow tort law is made in applications of the law in particular procedural settings. Most of tort law is made in precisely such applications. The salient applications that make most of the tort law on the books, however, are rulings on the admissibility of evidence; on motions for directed verdicts, summary judgment, or (in the federal system) judgment as a matter of law; and in formulating instructions to the jury.<sup>15</sup> Indeed, it is not an exaggeration to say that rulings on applications are virtually the only sources of tort law. There is nowhere else that tort law is created. The “rules” of tort law are the general or abstract premises from which applications follow, but we look to its applications for what the rules consist of when it matters. It is the applications that then render the rules more particular and concrete. For example, the objective standard of reasonableness that is applied in negligence cases emerges from rulings on whether subjective evidence is relevant and from rulings on how the jury is to be instructed about the issue.<sup>16</sup> If there were a difference between an application and the “rule” purportedly being applied, then the application would actually be the source of law and the rule would have to be reformulated to accord with the application.

Applications of rules to particular fact situations that arise in a case comprise shadow tort law too, but these applications are made in more obscure settings. Unlike the typical applications that generate tort law, issues associated with shadow tort law rarely seem to be the subject of appeal and therefore rarely to be the subject of appellate opinions addressing the application of tort law in these settings. We do not have a well-developed, dense body of law about application of the law of torts to deposition testimony, voir dire, or counsels’ closing statements, for example. What law of this sort there is exists outside of appellate opinions.

And that is where the reptile enters the picture, because it is mainly in obscure settings that the legal issues the reptile poses arise. To uncover how the reptile figures in the development of shadow tort law, Part I describes what the reptile is and how its proponents and opponents deal with it in depositions, voir dire, evidentiary objections, and opening and closing statements. Part II turns to the meaning of negligence as applied

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15. See Kenneth S. Abraham, *The Forms and Functions of Tort Law* 9–15 (6th ed. 2022).

16. The seminal case on the issue is *Vaughan v. Menlove* (1837) 132 Eng. Rep. 490, 493; 3 Bing. (N.C.) 468, 474–75 (ruling that the objective standard is to be part of jury instructions).

in these settings, analyzing the arguable gap between what the reptile strategy prescribes and what the law of torts provides, as well as the significance of that gap. Part III reflects on the jurisprudential implications of the analysis. It turns out that the reptile controversy teaches us that the law of torts (and arguably other bodies of law as well) is not always a single, continuous body of doctrine running from the filing of a complaint through to a final appeal. Rather, some tort law is, to a meaningful extent, partly discontinuous, often operating in different, largely autonomous domains.

### I. THE REPTILE AND ITS CRITICS

Though recent in origin, the reptile appears to be frequently employed by plaintiffs' attorneys and is the subject of substantial defense literature and a set of tactics designed to counteract or defeat it. The central reptile principle hinges on the notion that safety is an all-important obligation and that the defendant has breached this obligation, although the reptile also involves secondary tactics designed to bolster its effect.

#### A. *Origins and Nature*

Beginning in 1952, neuroscientist Paul D. MacLean began developing the thesis that humans have a "triune" brain, a part of which consists of a "reptilian complex" that controls the instinctive behaviors involved in aggression, dominance, and territoriality.<sup>17</sup> Although the theory is open to question,<sup>18</sup> David Ball and Don Keenan adapted it to their purposes in their 2009 book *Reptile*, arguing that plaintiffs' attorneys should appeal to the reptilian part of the brains of jurors.<sup>19</sup> That approach, they argued, should consist of appealing to jurors' instinct to protect themselves, their families, and their community from the dangerous wrongdoing of defendants. Instead of curling up like a snake and biting their attacker,<sup>20</sup> jurors would react by getting angry at defendants and imposing huge liabilities on them.

The key feature of this strategy typically consists of showing the defendant's systematic violation of a safety rule—often its own rule—together with admissions by the defendant that safety comes first or is all-

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17. MacLean first began writing about the how the animal "limbic" system is involved in the elaboration of "emotional" expression in 1952. See Paul D. MacLean, Some Psychiatric Implications of Physiological Studies on Frontotemporal Portion of Limbic System (Visceral Brain), 4 *Electroencephalography & Clinical Neurophysiology* 407, 407–08 (1952). He formulated his full theory of the triune brain in Paul D. MacLean, *The Triune Brain in Evolution: Role in Paleocerebral Functions* 15–18 (1990).

18. See, e.g., Carl Sagan, *The Dragons of Eden* 52–77 (1977) (emphasizing the notion that humans are capable of using reason and logic to influence our behavior).

19. See Ball & Keenan, *Reptile*, supra note 1, at 27.

20. See Sirico, supra note 5, at 412.

important (or words to that effect).<sup>21</sup> The idea is to show that the defendant's "tentacles of danger extend throughout the community"<sup>22</sup> and that the kind of thing the defendant did "was a direct threat to everyone in the community."<sup>23</sup> The focus is on the maximum foreseeable harm that the defendant's conduct could have caused, even if the plaintiff did not suffer that degree of harm.<sup>24</sup> Expressly or by implication, plaintiffs' attorneys then argue that the community must be protected against the defendant's wrongdoing. Sometimes plaintiffs' attorneys ask the jury to act as the "conscience of the community," to send a message, or to apply the "Golden Rule," which demands that the plaintiff be treated as the jurors themselves would wish to be treated.<sup>25</sup>

This may all sound pretty mild and uncontroversial to torts and evidence professors, since we already tend to picture tort trials as sometimes being melodramatic, but plaintiffs' attorneys swear by the value that the reptile adds to their cases.<sup>26</sup> In response, defense attorneys have published a mass of advice about how to neutralize, counteract, or defeat the reptile.<sup>27</sup> It is impossible in an introductory study such as this to obtain data about exactly how much the reptile figures in depositions, motion practice, and trial court proceedings across the country, or exactly how influential the reptile is in practice. One of the main points of this Piece is that there is no easily available evidence about the operation of the reptile because that operation takes place in the "shadows," that is, in pretrial and trial settings that usually do not result in formal published opinions. The investment that would be necessary to obtain empirical evidence on the subject would be substantial; it is something that will have to await further study that this Piece may stimulate. So it is no surprise that there appears to be no reliable evidence, systematic or otherwise, that the reptile increases plaintiffs' success at any stage of a tort case.<sup>28</sup> Neither is there any

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21. Ball & Keenan, Reptile, *supra* note 1, at 53–55, 63 (showing how the reptilian approach assigns specific blame to actors in order to activate fear responses).

22. *Id.* at 35.

23. *Id.* at 36.

24. *Id.* at 33.

25. See Derr, *supra* note 3, at 43.

26. For example, plaintiffs' attorneys are quoted as saying, "If the Reptile is done right, defendants simply lose"; "Reptile strategy has taken the plaintiffs' bar by storm"; and "The Reptile always wins." Christian Stegmaier, Reptile Theory: What You Need to Know in 2016: Strategies for Counsel & Clients 2 (2016), <http://hospitalitylawyer.com/wp-content/uploads/2019/03/Reptile-Theory-What-You-Need-to-Know-in-2016-Strategies-for-Counsel-and-Claims-Professionals.pdf> [<https://perma.cc/9ZEZ-6NSF>].

27. See Search Results for "Defense against the Reptile Theory", Google.com, <https://www.google.com/search?channel=tus5&client=firefox-b-1-d&q=Defense+against+the+Reptile+Theory> [<https://perma.cc/6WRL-YGJT>] (last visited July 27, 2022) (revealing hundreds of "practitioner" articles and entries on websites).

28. A book written by a defense attorney says that "[p]laintiff's attorneys have attributed over \$8 billion in verdicts and settlements to the Reptile Theory," citing a website

evidence, however, that it does not. But *exactly* how widespread or productive the reptile is does not matter for the purposes of this Piece. Where there's this much smoke, there must be at least some fire.<sup>29</sup> So the question is, what's going on?

#### B. *Uses of the Reptile and Defenses Against It*

The first step in deploying the reptile occurs in depositions of defendant's witnesses, typically the key defense representative, or (in the federal system) the "30(b)(6)" witness.<sup>30</sup> Plaintiff's counsel seeks to gain agreement by the deponent with seemingly innocuous statements such as, "Wouldn't you agree with me that safety always comes first?" or, "Do you agree that a company should never needlessly endanger the public?"<sup>31</sup> The plaintiff can then show at trial that the defendant had adopted safety standards designed to protect the public but violated a standard when it injured the plaintiff and failed to comply with the "safety-first" principle.<sup>32</sup> When the defense representative testifies at trial and seeks to explain or justify the defendant's conduct—perhaps by indicating that safety always has a cost, that costs must be traded off against benefits, and that complete safety is an impossibility—plaintiff's counsel can impeach the defense witness with the prior admission (made in the deposition) that "safety always comes first."

The point of this exercise is not merely to catch a key defense witness in a contradiction but also to show that the defendant endangered the

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that does not appear to exist and is merely reserved on GoDaddy: <http://reptilekeenanball.com>. Robert F. Tyson, Jr., *Nuclear Verdicts: Defending Justice for All* 129 (2020). There is other speculation as well. See, e.g., Cristina Commendatore, *Trucking Continues Battle Against Reptile Theory*, *Nuclear Verdicts*, FleetOwner (Aug. 3, 2021), <https://www.fleetowner.com/safety/article/21171311/trucking-continues-battle-against-reptile-theory-nuclear-verdicts> (on file with the *Columbia Law Review*) (attributing multiple verdicts involving truck accidents in excess of \$10 million at least in part to use of the reptile theory).

29. It seems, therefore, extremely unlikely that there would be such a mass of literature about the reptile authored by trial lawyers litigating tort cases if the reptile were not important and at least potentially influential in practice. The many hundreds of such pieces, in practitioners' journals and on law firm websites, are available online. See Search Results for "The Reptile Strategy", Google.com, [https://www.google.com/search?q=The+Reptile+Strategy&client=firefox-b-l-d&biw=978&bih=798&ei=NQnvYtWIItXBkPIPqZqGkAY&ved=0ahUKEwiV95WyrP5AhXVIEQIHSmNAWI4ChDh1QMIDg&uact=5&ooq=The+Reptile+Strategy&gs\\_lcp=Cgdnd3Mtd2l6EAMyBAGAEb4yBQgAEIYDMgUIABCCAzIFCAAQhgMyBQgAEIYDOgcIABBHELADogYIABAcEA1KBAhBGABKBAhGGABQ9gFYwhRggxZoAXABeACAAZEBiAGRb5IBAzMuNZgBAKABAcgBCMABAQ&sc=1&gws-wiz](https://www.google.com/search?q=The+Reptile+Strategy&client=firefox-b-l-d&biw=978&bih=798&ei=NQnvYtWIItXBkPIPqZqGkAY&ved=0ahUKEwiV95WyrP5AhXVIEQIHSmNAWI4ChDh1QMIDg&uact=5&ooq=The+Reptile+Strategy&gs_lcp=Cgdnd3Mtd2l6EAMyBAGAEb4yBQgAEIYDMgUIABCCAzIFCAAQhgMyBQgAEIYDOgcIABBHELADogYIABAcEA1KBAhBGABKBAhGGABQ9gFYwhRggxZoAXABeACAAZEBiAGRb5IBAzMuNZgBAKABAcgBCMABAQ&sc=1&gws-wiz) [<https://perma.cc/E5WB-ZBYY>] (last visited Aug. 6, 2022).

30. See Fed. R. Civ. P. 30(b)(6) (indicating that an organizational defendant must designate a particular witness to speak for the organization on specified matters).

31. Ball & Keenan, *Reptile*, supra note 1, at 54–57, 213–14 ("Show that the defendant, by trying to escape responsibility for choosing to violate a public-safety rule, is further endangering the community, and showing others that they too can get away with it."); Derr, supra note 3, at 35–36.

32. Ball & Keenan, *Reptile*, supra note 1, at 62.

plaintiff *and* the public at large. Plaintiff's counsel then argues that proposition in closing argument to the jury.<sup>33</sup> With the jury's reptile complex threatened and angered by this demonstration, it will strike out at the defendant to protect itself and the public.

At the substantive core of the reptile is a contention about the standard of care in negligence cases: Plaintiffs' attorneys are advised to argue that "no prudent person or company chooses to expose anyone to unnecessary danger. So second-safest is always negligent."<sup>34</sup> The reptile's strategy for persuading the jury is always to focus on both a safety rule and the danger that violation of the rule creates "[i]n paper and oral discovery, and then in trial."<sup>35</sup> As Ball and Keenan put it, "Show that violating the rule is related to violations that endanger everyone, not just someone in your client's situation. . . . Show that the more dangerous a violation can be, the more careful the defendant had to be to follow the rule."<sup>36</sup> Show that the violation spread "the tentacles of danger."<sup>37</sup> There are subsidiary recommendations about handling voir dire and jury instructions,<sup>38</sup> dealing with expert witnesses,<sup>39</sup> and quoting Scripture.<sup>40</sup>

The tactics that the defense literature recommends as a response to this reptile strategy begin at the deposition stage. First, on the basis of a position about what the standard of reasonable care in negligence cases does and does not make relevant, the defense objects to reptile-related questions.<sup>41</sup> Thus, defense counsel would object for the record to a question asking for agreement that safety always comes first. Given the rules that govern depositions, typically the witness must then answer, but the objection preserves a basis at trial for objecting to the later admission of the deponent's answer into evidence, or merely using it for impeachment.<sup>42</sup>

Second, and ideally, defense witnesses have been prepared for reptile-related questions before a deposition occurs. Instead of agreeing that safety always comes first, defense witnesses are counseled to answer that it is reasonable to make every *feasible* effort to be safe or to indicate that safety should not *needlessly* be sacrificed, but that safety is everyone's responsibility, including potential victims.<sup>43</sup> The ideal result is that witnesses have not

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33. See *id.* at 145 (showing how the reptile requires a closing argument that shows how the defendant's behavior could have harmed anyone in the jurors' community).

34. *Id.* at 63 (emphasis omitted).

35. *Id.* at 54.

36. *Id.* at 55.

37. *Id.* at 58.

38. *Id.* at 102–03.

39. *Id.* at 139–44.

40. *Id.* at 155.

41. Derr, *supra* note 3, at 33–35.

42. See Fed. R. Civ. P. 30(c)(2) (indicating that objections at the time of examination are noted in the record, but the examination proceeds despite and subject to the objection).

43. Derr, *supra* note 3, at 35–38.

made admissions in depositions that can be used as smoking-gun admissions against the defendant at trial.

The problem here is that the ideal and the real are not always the same. Although not always the case, the more company responsibility a witness enjoys—that is, the higher in the corporate hierarchy they are—the less time they are likely to be willing to devote to deposition preparation and the more likely they are to regard lawsuits as nuisances and to react to the deposition questions of plaintiff’s attorneys with contempt, rather than with due consideration to the implications of their answers.<sup>44</sup> Moreover, often the lawyer representing the defense is not the defendant/company’s own lawyer, but defense counsel hired by the company’s liability insurer<sup>45</sup> and therefore in what the witness may regard (accurately or not) as an incompletely loyal position. The liability insurer may already have declined to settle the case, for example, aggravating a witness’s attitude toward that lawyer. Incomplete cooperation with the lawyer in the course of deposition preparation, with the failure to answer reptile questions at deposition in optimal fashion, may be the consequence.

Third, defense counsel attempts to use voir dire to weed out jurors who are likely to be sympathetic to the reptile strategy, as revealed by questions posed (or suggested to the court, when the court conducts the voir dire) by plaintiff’s counsel.<sup>46</sup> And the defense itself seeks to identify potentially favorable jurors and educate the jury pool as a whole about the limits of a wholly safety-oriented operation.

The final defense response to the reptile is to file a motion to preclude its use. Since the reptile is not a single thing, item of evidence, or phrase voiced by counsel, a motion (in limine or at trial) will consist of a request that the court rule inadmissible or otherwise preclude use of certain of these particulars, perhaps with the request or motion also including explicit reference to the reptile strategy that underlies them.<sup>47</sup> The core of the substantive basis for this anti-reptile strategy is that the reptile departs from the applicable standard of care in negligence cases.<sup>48</sup> Consequently,

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44. For discussion of the range of issues associated with preparing Rule 30(b)(6) witnesses for depositions, see generally Candace A. Blydenburgh, *Picking and Preparing Your Corporate Witnesses for Rule 30(b)(6) Depositions* [sic], 13 *Prac. Litigator* 7 (2002).

45. Most liability insurance policies give the insurer both the right and duty to defend the policyholder against suits potentially falling within coverage. See Kenneth S. Abraham & Daniel Schwarcz, *Insurance Law & Regulation* 632 (7th ed. 2020).

46. Ball & Keenan, *Reptile*, supra note 1, at 103 (discussing how to phrase jury instructions to make the defense seem like they are malignant actors if they oppose the instructions); Derr, supra note 3, at 48–49.

47. Ball & Keenan, *Reptile*, supra note 1, at 147.

48. See Tyson, supra note 28, at 136 (arguing that the reptile theory “hijacks the standard of care”).

the evidence and arguments on which the strategy relies are, the defense contends, irrelevant and therefore inadmissible or otherwise proscribed.<sup>49</sup>

Thus, answers to deposition questions acknowledging that safety is always a principal concern are asserted to be inadmissible, because the applicable standard is reasonable care, not safety-above-all-else.<sup>50</sup> Evidence of the defendant's conduct in general or over time is asserted to be inadmissible, because the issue is whether the plaintiff *in this case* was injured by the defendant's failure to exercise reasonable care *in this instance*.<sup>51</sup> Arguments to the jury by counsel in opening or closing to the effect that the jury is or should act as the conscience of the community are asserted to be improper. And defense counsel requests that the Golden Rule be applied to statements by plaintiff's counsel. This rule is the opposite of what it appears to be, for it is actually an "anti-Golden Rule." It precludes suggesting that jurors should find for the plaintiff if the defendant did not treat the plaintiff the way they would want to be treated.<sup>52</sup>

Note that virtually this entire defense strategy is aimed at combatting the reptile on the basis of the substantive rules of tort law and, in particular, the applicable standard of care in negligence actions. There is little case law, however, ruling directly on the merits of such efforts.<sup>53</sup> Judging from

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49. See Henry M. Hart, Jr. & John T. McNaughton, Evidence and Inference in the Law, *Daedalus*, Fall 1958, at 40, 43 ("It will be noticed in the first place that, while the issue to be decided is formally one of fact only, the rule of law is nevertheless functioning importantly. For it is the rule which makes the fact significant.")

50. See, e.g., Derr, *supra* note 3, at 32 (highlighting that the use of the reptile focuses on safety issues which differ from the norm of establishing a breach of the standard of care).

51. See, e.g., *Pressey ex rel. Pressey v. Child. 's Hosp. Colo.*, No. 2013CV72, 2015 WL 1583852, at \*1 (D. Colo. Mar. 15, 2015) (ruling on "Defendant Children's Hospital Colorado's Motion in Limine to preclude impermissible 'Golden Rule' evidence, any references to public safety threat, any implications that the jury can protect society through its verdict, or any similar references"), modified, 2015 WL 1583834 (D. Colo. Mar. 24, 2015). The proposition that negligence cases are about what the defendant did in the particular instance in question is well established. See generally Kim Lane Scheppele, *The Ground-Zero Theory of Evidence*, 49 *Hastings L.J.* 321 (1998) (discussing the theories of truth and evidence in the practice of law).

52. *Ermini v. Scott*, 937 F.3d 1329, 1339–41 (11th Cir. 2019) (discussing the impermissible use of the Golden Rule argument).

53. I have been able to identify only three appellate cases decided since 2009 (the year *Reptile* was published) that expressly and directly rule on the merits of reptile-related tactics. There may be a few more such cases, but my Westlaw search using the words "'Reptile' or 'reptile theory'" probably unearthed most of them. See *Seraphine v. Bulitt Ventures, Inc.*, No. 2019-CA-1040-MR, 2021 WL 68508, at \*9 (Ky. Ct. App. Jan. 8, 2021) (affirming the trial court's grant of the defendant's motion in limine to prohibit the introduction of "reptile, or fictitious, safety rules different from those legally applicable in a premises liability case"); *Fitzpatrick v. Wendy's Old Fashioned Hamburgers of N.Y., Inc.*, 136 N.E.2d 355, 368, 373 (Mass. App. Ct. 2019), rev'd on other grounds, 168 N.E.2d 356, 361 (Mass. 2021) (affirming the trial court's grant of a new trial based on what it termed the "reptile" closing argument that the jury should "protect the community" from the defendant); *Bryson v. Genesys Reg'l Med. Ctr.*, No. 333135, 2018 WL 1611438, at \*16 (Mich. Ct. App. Apr. 3, 2018) (ruling that

the few appellate court decisions about reptile tactics, trial courts do sometimes recognize the merits of defendants' anti-reptile motions; and some trial courts have taken the position that they will rule on defendants' objections, objection-by-objection, in the course of trial, rather than in response to an omnibus motion in limine. There certainly is not enough appellate or reported trial court case law for there to be an emerging trend or pattern. The reptile is a cluster of contentions, tactics, and practices that have been occurring out of the view of appellate courts and legal scholars.

## II. MIND THE GAP, WHEN THERE IS ONE

Defendants clearly feel threatened by the reptile, or they would not have invested as much as they have in identifying and attempting to deploy strategies to combat it. But being disadvantaged by an opposing party's evidence and arguments is neither a defense nor a basis for precluding their use. So defendants need a substantive basis for combating the reptile. As Part I indicated, the core of their approach is to argue that there is a gap between the contentions that underlie the reptile and the applicable standard of care in negligence cases.<sup>54</sup> In addition, this strategy often relies on age-old rules against tactics that risk inflaming or prejudicing the jury.<sup>55</sup>

The notion that safety comes first or that a defendant should do all that is necessary to avoid risking injury is arguably inconsistent with the requirement that the defendant was required only to exercise reasonable care to avoid injuring the plaintiff. This is because the idea of reasonable care implies that safety is not all-important, at least not necessarily all-important in all instances. Under the negligence calculus famously articulated by Judge Learned Hand,<sup>56</sup> sometimes additional safety is not worth its costs. So a contention to the effect that safety is all-important

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the plaintiff's reptile argument that the defendant's employees did not act in the "safest" manner possible was improper).

My search yielded about a dozen other appellate decisions making express reference to "reptile" tactics but, for a variety of reasons, not ruling on the merits or validity of these tactics. See, e.g., *Regalado v. Callaghan*, 207 Cal. Rptr. 3d 712, 725–26 (Ct. App. 2016) (ruling that although using the "reptile" argument that the jury is the "conscience of [the] community" constituted attorney misconduct, defendant forfeited its objection to the argument); *Castleberry v. Debrot*, 424 P.3d 495, 501, 508–09 (Kan. 2018) (holding that although permitting plaintiff's counsel to use a "Reptile" tactic of asking the jury in closing argument whether it wanted "safe medicine or unsafe medicine" was improper, it constituted harmless error); *Giant of Md. LLC v. Webb*, 246 A.3d 664, 677 (Md. Ct. Spec. App. 2021) (holding that the defendant forfeited its objection to "Reptile Arguments" that were "similar to a Golden Rule argument").

54. See Tyson, *supra* note 28, at 136.

55. See *infra* note 61 and accompanying text.

56. See *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) ("[I]f the probability [of injury can] be called P; the injury, L; and the burden [of extra precautions], B; liability depends upon whether B is less than L multiplied by P."); see also Richard A. Posner, *A Theory of Negligence*, 1 J. Legal Stud. 29, 32–33 (1972) (arguing that Hand's negligence calculus was articulating an economic theory of negligence).

would be at least arguably irrelevant under this approach, because it would not be directed to the question whether the defendant exercised reasonable care.

But tort law does not dictate the Learned Hand approach. Although defendants are almost certainly permitted to introduce evidence relevant to this approach, and to argue it to the jury, pattern jury instructions do not employ it, using instead a standard of reasonable care or ordinary prudence.<sup>57</sup> It is less clear that a safety-is-all-important contention or admission is either irrelevant under this approach or flatly contradictory of it. When analyzing the issue, a jury could be permitted to conclude that, under particular circumstances, a reasonable person would have considered safety “all-important,” so to speak. To the extent that this is (at least sometimes) the case, a bright-line rule wholly precluding reptile tactics would be inconsistent with the reasonable care standard, although courts might nonetheless preclude reptile-based safety arguments on a case-by-case basis.

Indeed, some tactics and arguments recommended in *Reptile* seem to be consistent with the reasonable care standard. A prominent example is contending that, even if the defendant stops at a red light 364 days a year, if it runs the red light on the 365th day, that is negligence.<sup>58</sup> This “perfect compliance” standard is not literally required by the definition of reasonable care, but there is a strong argument that it would not be error for a trial court to instruct a jury that it is permitted to find a defendant negligent for failing to meet the perfect compliance standard.<sup>59</sup> This is because the argument is not that there must be perfect safety, but simply that reasonable care is required *all the time*. If that is the case, it would seem that arguments by counsel to that effect should not be automatically precluded.

As to the reptile arguments that the jury should serve as the conscience of the community, send a message to those in the defendant’s position, or apply the Golden Rule, there appear to be rules prohibiting some or all of these tactics, in some jurisdictions,<sup>60</sup> although the sparsity of

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57. See Benjamin C. Zipursky, *Sleight of Hand*, 48 Wm. & Mary L. Rev. 1999, 2013–17 (2007) (addressing the issue and surveying pattern jury instructions).

58. See, e.g., *Byrne v. White*, No. 2534, 2020 WL 5230470, at \*19–20 (Md. Ct. Spec. App. Sept. 2, 2020) (quoting argument of plaintiff’s counsel to this effect, using that very hypothetical).

59. See Abraham, *supra* note 15, at 70 (discussing the possibility that perfect compliance may be required); Mark F. Grady, *Res Ipsa Loquitur and Compliance Error*, 142 U. Pa. L. Rev. 887, 900 (1994) (asserting that perfect compliance with the reasonable care standard is required in certain cases).

60. See, e.g., *Berryhill v. Daly*, No. STCV1102180SA, 2015 WL 5167586, at \*2–3 (Ga. State Ct. May 8, 2015) (granting motion to prohibit plaintiff from arguing that the jury should “send a message with its award” and ruling that the parties may not “violate the ‘golden rule’”); *Palmer v. Va. Orthopaedic, P.C.*, No. CL14000665-00, 2015 WL 5311575, at \*1 (Va. Cir. Ct. June 19, 2015) (granting the defendant’s motion to prohibit use of “Reptile

case law implies that the rules may not be as well established as they could be. And some jurisdictions appear to leave questions regarding the permissibility of these tactics to the discretion of the trial court under the rule that arguments and evidence that risk inflaming or prejudicing the jury can be precluded, in the trial court's discretion.<sup>61</sup> Once an issue is left to the trial court's discretion, however, its resolution of the issue is typically not reviewable *de novo* on appeal but only under a highly deferential abuse of discretion standard.<sup>62</sup> The result, inevitably, is a reluctance to bother with an appeal.

For torts scholars, a particularly interesting implication of the rules precluding these kinds of reptile-related arguments is that various strains of tort theory have long suggested that at least part of the purpose of tort law is precisely to serve the aims that those prohibited arguments address. The point of tort law, tort theorists have argued, is to reflect the conscience of the community,<sup>63</sup> send a message to potential injurers that will deter unsafe conduct,<sup>64</sup> or ensure that potential injurers treat potential victims as they would wish to be treated.<sup>65</sup> In principle, it would not be contradictory to agree that tort law serves one or more of these purposes but also to take the position that arguments to juries should not make reference to those purposes. Jury verdicts, on this view, would simply be conducive to the achievement of these unstated purposes, operating almost like the equivalent of the invisible hand in economic theory.<sup>66</sup> But even if there is no outright contradiction operating here, there is considerable irony: Tort law prohibits one of its principal institutions, the jury, from even considering whether it is serving the purposes that tort scholars have been asserting for decades are central to tort law.

The upshot of all this is that some, and perhaps almost all, reptile tactics are potentially precluded by the substantive law of torts, by the

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Theory Tactics, Golden Rule references, or other 'safety rules'); *Glover v. State*, No. 10-2-35124-8 SEA, 2015 WL 7355966, at \*6 (Wash. Super. Ct. Sept. 9, 2015) (granting motion to preclude any attempt by plaintiff's counsel to use the "Reptile Strategy").

61. See, e.g., Fed. R. Civ. P. 403 (addressing "Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons"); *Bagailuk v. Weiss*, 494 N.Y.S.2d 205, 207 (App. Div. 1985) (holding that "grasping for the minds of the jury through these inflammatory, prejudicial and erroneous comments so contaminated the trial").

62. See Martha S. Davis, *A Basic Guide to Standards of Judicial Review*, 33 S.D. L. Rev. 469, 480-81 (1988).

63. See, e.g., Leon Green, *Jury Trial and Mr. Justice Black*, 65 Yale L.J. 482, 483 (1956); Gregory C. Keating, *Reasonableness and Rationality in Negligence Theory*, 48 Stan. L. Rev. 311, 380-81 (1996).

64. See Abraham, *supra* note 15, at 19-21 (discussing deterrence as one of the aims of imposing tort liability).

65. See, e.g., George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 Harv. L. Rev. 537, 543-46 (1972) (identifying reciprocity or nonreciprocity of risk as the basis for determining the applicable standard of care).

66. The metaphor originated in Adam Smith, *The Theory of Moral Sentiments* (Knud Haakonssen ed., Cambridge Univ. Press 2002) (1759).

exercise of discretion on the part of the trial court, or by a combination of these two sources of control. But whether and when reptile tactics are actually—rather than merely potentially—precluded is a separate question for which the answer is either indeterminate or dependent on the sporadic, obscure or hidden, and largely unreviewed decisions of trial courts. And for the reasons discussed in Part III, this uncertainty and indeterminacy will be with us for some time, perhaps even permanently.

### III. WHERE'S TORT LAW?

The reptile has been in existence for more than a decade, but we have almost no appellate case law about it.<sup>67</sup> Yet, in one way or another, trial courts are ruling about reptile tactics on what seems likely to be a frequent basis. The courts are applying tort law to the reptile, and inevitably in at least some cases they are making decisions on matters of first impression. If that is the case, then the question is, “where’s tort law?”<sup>68</sup>

The answer, obviously, is that in the case of the reptile and analogous situations, tort law resides in and remains in the trial courts. Tort law can be found in the applications of the substantive rules of torts to objections made in depositions, to questions permitted and not permitted in voir dire, to motions in limine, and to objections made to statements of counsel in opening and closing statements. Almost none of this is civil procedure, though it is procedurally implemented; it is substantive law, for logically the rulings are necessarily premised on what tort law makes relevant or irrelevant.<sup>69</sup>

This feature of the reptile is not unique. Applications of tort law are no doubt occurring in these pretrial and trial settings all the time. Because the applications applied to the reptile are all associated with a discrete, coherent approach that has been given a particular name, however, it is very easy to learn through a keyword search of an electronic database that there is no body of appellate cases addressing that approach. The absence of appellate case law governing the reptile is not hiding in the midst of a trackless sea of otherwise unrelated decisions.

If trial court decisions about the reptile matter to the parties, however, then why is there no emerging and growing body of appellate case law about them, let alone a set of reported decisions by trial courts? The most

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67. See cases cited *supra* note 53.

68. I am of course paraphrasing the popular Millennial–Gen Z puzzle book, in which the figure of “Waldo” is repeatedly hidden in plain sight. See Martin Handford, *Where’s Waldo?* (1987).

69. The first rule of evidence is that nothing irrelevant is admissible. But what constitutes the standard of care in a negligence case—a rule of tort law—determines what is and is not relevant when the issue is whether the defendant violated that standard of care. See Hart & McNaughton, *supra* note 49, at 46 (providing an example of when irrelevant evidence is impermissible in court).

persuasive answers lie in the publication norms of trial courts and in the practical economics of appeal.

Trial courts, especially state trial courts, do not issue written opinions about most of the issues they decide. The published response to a multi-pronged motion in limine seeking to preclude reptile tactics cited in Part I is a rare exception.<sup>70</sup> Certainly it would be extremely unusual for a trial court to write an opinion about a dispute over questions to be put in voir dire, an objection to the use of an admission made in a deposition to impeach a defense witness, or a decision about what counsel may or may not assert in an opening or closing statement. Without a written opinion regarding such a matter, there is obviously nothing preserved in a searchable database such as Westlaw or LexisNexis that future litigants can consult. And even in the exceptional instances in which a written opinion or order as to such issues is produced, the odds that it will be published in such a database are small.<sup>71</sup>

As for appeals from such decisions, several factors help to explain the scarcity of case law about reptile tactics. First, there is no point to appealing on an issue that does not have a strong probability of constituting reversible error.<sup>72</sup> Reversible error generally requires that a trial court error affected the outcome of a trial. Making such a showing is not easy, especially if the assignment of error involves a seemingly minor matter. Second, appeals are expensive, and plaintiffs' attorneys handling cases on the typical contingency basis must make a cost-benefit calculation in deciding whether to appeal. Third, defendants who have lost at trial are likely to be represented by liability insurers who must not only make such a cost-benefit calculation as applied to the case at hand<sup>73</sup> but also must weigh the prospects of success on appeal against the risk of establishing an unfavorable precedent that will affect outcomes in large numbers of future

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70. See *Pressey ex rel. Pressey v. Child.'s Hosp. Colo.*, No. 2013CV72, 2015 WL 1583852, at \*1 (D. Colo. Mar. 15, 2015), modified, 2015 WL 1583834 (D. Colo. Mar. 24, 2015).

71. For the federal courts, PACER provides some information about district court rulings. See Search by Specific Court, PACER: Public Access to Court Electronic Records, <https://pacer.uscourts.gov/find-case/search-specific-court> [<https://perma.cc/L9W7-3MJM>] (last visited July 28, 2022) (noting that most databases with case files provided cases that show the courts' reluctance to include irrelevant motions). But it is unlikely that counsel in other federal cases would very often search PACER for reptile-related rulings by district courts, since these decisions would have no stare decisis value. More importantly, in my experience, the state court systems, where most tort suits are brought, typically have nothing analogous to PACER.

72. See, e.g., Robert M. Tyler, Jr., *Practices and Strategies for a Successful Appeal*, 16 *Am. J. Trial Advoc.* 617, 621 (1993) (noting that the probability of success on appeal requires a showing that the trial court committed "prejudicial error").

73. For example, auto liability insurance is mandatory for auto owners in all states. Abraham & Schwarcz, *supra* note 45, at 713. Most liability insurance policies, including auto liability policies, require the insurer to defend policyholders in lawsuits brought against them. *Id.* at 615. And the costs "of an appeal are a critical element" of the decision whether to appeal. Tyler, *supra* note 72, at 630.

cases if the trial court is affirmed. Sometimes the result will be a decision not to risk creating an adverse precedent about reptile tactics through an appeal but to live to fight another day in future cases. Fourth, when a trial court makes a decision about an issue that is subject to its discretion, there is almost no point in appealing that decision, because it will be reviewed under the highly deferential abuse of discretion standard.

The last reason is perhaps the most mundane, but no less important than the others. Appellate courts—and especially the intermediate state appellate courts to which most appeals must first be directed—typically have page limits on briefs, some as little as thirty pages.<sup>74</sup> Issue prioritization is a zero-sum game: Devoting multiple pages to an extensive argument about a reptile tactic means that there are fewer pages available to address other, possibly more promising, assignments of error. For all these reasons, it should not be surprising that there is so little appellate case law that addresses the validity of reptile tactics and the substantive assumptions about tort liability that underlie them.

As this Piece suggests, the absence of appellate case law about the reptile also reflects something broader and more significant about tort law and, in all probability, the common law itself. We are accustomed to thinking that the substantive law of torts has a continuous character, with the appellate courts as ultimate arbiters of all that comprises tort law. We recognize that the trial courts do not always follow the law made by appellate courts because, in practice, the law “on the books” sometimes can be ignored. Such instances are seen to constitute departures from law, or even lawlessness. But this distinction between the law on the books and the law in practice misses the lesson of the reptile.

The lesson is that there is tort law at the trial court level that is discontinuous with and autonomous from the law as it is stated in appellate decisions. This shadow tort law also is law “on the books”; it is not mere lawless practice. But the books are not located in the place where most torts scholars are accustomed to looking for them. The glimpses of this law as described in this Piece do not appear to be wholly inconsistent with the appellate law of torts, but without a lot more looking, we cannot know for certain whether that is the case. These glimpses also reveal that concepts that torts scholars have for decades identified as being at the center of tort law—for example, that the jury is the conscience of the community and the notion that imposing tort liability promotes deterrence—are to a large extent banned from the discourse of tort litigation in the courtroom itself.

It is as if we have discovered a secret room in our house, but we can see into that room only through dark windows. Although all of this would probably come as no surprise to the lawyers who work in the trenches of

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74. See, e.g., Mich. Ct. R. 7.212(B) (providing for a fifty-page limit on the length of appellate briefs); Ohio R. App. P. 19(A) (providing that no initial brief of appellant will contain more than thirty pages).

the trial courts of this country every day, it is a phenomenon that torts scholars and teachers have rarely noted. A full portrait of tort law would have to take the existence of this body of shadow tort law into account. It would have to take account of the way that rulings about discovery, the selection of jurors, the admissibility of evidence, and the meaning of negligence that do not find their way into written opinions or appellate decisions influence the practice of tort law and the outcomes of tort cases. In the meantime, the fact that tort law is comprised in part by these rulings in the shadows must be recognized.

#### CONCLUSION

The reptile theory, the tactics it recommends, and the defenses that respond to it, have been operating in tort litigation for over a decade. The strategy has spawned a significant body of “practitioner” commentaries but has received virtually no acknowledgment, and certainly no analysis, in tort law scholarship. The explanation cannot be that the reptile involves practical issues that are not a respectable subject of tort law scholarship, for there are many practical issues that torts scholars consider to be respectable objects of attention and hundreds of torts scholars eager to take on projects that plow new ground. And in any event, as the analysis in this Piece suggests, the reptile poses issues that go to the heart of tort theory, such as the meaning of negligence.

Rather, the explanation is that the reptile operates in an area of substantive tort law that, by its nature, is unlikely to come to the attention of torts scholars, because the reptile rarely shows itself in appellate decisions. This Piece attempts to explain why this is the case and to suggest that there is a shadow tort law that exists in certain unreviewed and largely unreviewable decisions of trial courts. Those who tend to see tort law through the lens of appellate review of trial court decisionmaking would do well to recognize that a good deal of tort law may be made and applied through this different process that is more difficult to observe, but no less important in practice, than its more visible appellate counterparts. In short, once we recognize that tort law resides in a number of places and comes from a number of sources, a richer but more complicated picture of what tort law is begins to come into view.