JUSTLAW
VOL. 5 ISSUE 1 THE BINDING WORD OF THE SOUTHERN TRIAL LAWYERS ASSOCIATION FIRST QUARTER • 2013

# Defining "Capacity"

## Maximizing Economic Damages for Clients Unemployed at the Time of Injury

***By Preston "PJ" Scheiner***

When faced with a case involving catastrophic injuries, economic damages are often thought of as the most "straightforward" elements of the injured party's losses. Certainly the creative and dedicated advocate will work tirelessly to identify and capture every last cent of the Plaintiff's future losses, often with the assistance of highly qualified, skilled and experienced expert witnesses, but economic losses are, by their nature, discernable, objective and quantifiable. Past medical expenses are incontrovertible — from the Plaintiff's perspective — and future care requirements are established by qualified medical experts and reduced to present value with the help of an economist. Likewise, lost earnings are objective and established, and loss of earning capacity is usually calculated by a vocational rehabilitation expert, in conjunction with the economist, who projects forward the career-path of the working, or temporarily unemployed Plaintiff from the time of the injury-causing event. While the retained experts of the parties are likely to disagree, it is often a nuanced dispute of numbers at the margins rather than a wholesale dismissal of the Plaintiff's medical or vocational claims. The exception, in a case involving a truly catastrophically injured Plaintiff, often lies with the plaintiff who has voluntarily removed himself or herself from the workplace for an extended period of time with no definite plans to return to work at the time of the incident, such as a homemaker or an injured wife who left (or never entered) the workforce because she stayed home to raise children. In such a case, even the most experienced and accomplished lawyer may be lulled into a defense-created-complacency that such a Plaintiff has no credible claim for loss of future earning capacity. While it is true that a Plaintiff who was unemployed for an extended period of time with no definite plans to return to the workforce at the time of the incident usually may not recover for loss of wages or earnings, s/he is nevertheless entitled to recover for impairment of future earning capacity: merely because a spouse has chosen not to obtain employment does not mean that s/he lacks the capacity to earn money in the future. And where the future employment capability of a homemaker has been destroyed or impaired by the negligent act of another, damages should not be denied merely because she lacks a past history of earnings.[9]

Appellants misconceive the principles underlying an award of damages for impairment of earning capacity. Such an award is based upon the determination that the capacity to labor has been diminished as a result of the injuries sustained, and is not dependent upon the injured party's earnings either prior to or following the accident.[10]

*Preston "PJ" Scheiner*
*Associates & Bruce L. Scheiner*
*4020 Evans Avenue*
*Fort Myers, FL 33901*
*239.939.2900*
*239.939.7079 (fax)*
*pjs@blslawyers.com*
*www.blslawyers.com*

Under the law of many jurisdictions, an award of damages for loss of future earning capacity is not made on the basis of actual past earnings, and so is not dependent on the Plaintiff's past income or work experience. A Plaintiff who earned no income prior to the injury may nevertheless recover for loss of future earning capacity.[11] Accordingly, even if the Plaintiff has never been employed and has no history of past earnings, that fact alone should not prevent a recovery for loss of earning capacity where the Plaintiff is a married woman who has not been employed outside the home, just as it would not bar a Plaintiff who was injured when he was a 16 year old student.[12] Although an injured homemaker may not have been employed at the time of her injury, her circumstances can change and, but for the injury, she might have chosen or been compelled to later seek employment outside the home at some time in the future. For example, a woman who has remained at home to care for her husband and children and has never earned income may suddenly be

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# A Knee Injury & The Jones Act

## The Secret To Recovering $250,000 vs. $25,000

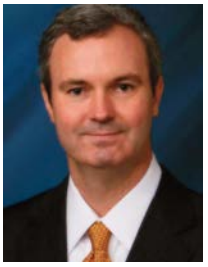
***By Tim Young***

As members of STLA, many of us have heard of 'Jones Act' claims. And the term maritime law is familiar to most of us, as well. Nine of the thirteen states in the STLA border either the Atlantic Ocean or the Gulf of Mexico. But who is this Mr. Jones and why does he get so much money for his cases?!

An individual working on an oil rig or vessel in the Gulf of Mexico, Mississippi River or overseas generally seeks protection under two separate laws. While everyone hears the claims referred to as 'Jones Act' claims, almost all claims seeking damages under two separate laws, joined in the same suit. The first law is the Jones Act which is a federal statute.[1] Additionally, an injured rig or vessel worker typically will also file claims under general maritime law, a body of law which has come about over many years through jurisprudence.

Under the Jones Act, the threshold question is whether or not the individual qualifies as a "seaman." If the worker does not meet the definition of a 'seaman' under the Jones Act, then the Act does not apply to him. Every attorney screening a potential Jones Act case focuses on this issue first, for obvious reasons.

In order to qualify as a seaman and therefore fall under the Jones Act, there are two general tests which are discussed at length in the most cited cases. These are not two different tests, but rather articulations of the same test, simply stated differently. The first statement of the test requires that the individual be "more or less permanently assigned to a



*Timothy J. Young*
*The Young Firm*
*400 Poydras St, Ste 2090*
*New Orleans, LA 70130*
*504.680.4100*
*504.680.4010 (fax)*
*tjy@theyoungfirm.com*
*www.TheYoungFirm.com*
*www.JonesActLaw.com*

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# STLA Executive Board Members

**PRESIDENT**
Maria Glorioso
815 Baronne St
New Orleans, LA 70130
phone: 504.569.9999
email: maria@gtorts.com

**PRESIDENT ELECT**
Randy Hall
1001 LaHarpe Blvd
Little Rock, AR 72201
phone: 501.224.7400
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phone: 704.376.1911
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424 Washington Ave
Ocean Springs, MS 39564
phone: 228.875.1234
email: earl@denhamlaw.com

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Pamela R. Mullis
PO Box 7757
Columbia, SC 29201
phone: 803.799.9577
email: prmullis@mullislawfirm.com

**PARLIAMENTARIAN**
Mark Zamora
PO Box 660216
Atlanta, GA 30366
phone: 404.451.7781
email: mzamoralaw@yahoo.com

**EXECUTIVE DIRECTOR**
Jody Campbell
PO Box 1207
Crawfordville, FL 32327
phone/fax: 850.926.4599
email: stla@talweb.com

**EDITOR**
Eric Romano
PO Box 21349
West Palm Beach, FL 33416
phone: 561.533.6700
email: eric@romanolawgroup.com



# A Message from Our President

What a privilege it is to reign as STLA President during its 25th convention anniversary in New Orleans. How fortunate I am as a New Orleanian to mark the last 25 years of the beginning of Lent with, not only Mardi Gras, but with STLA folks being in my town. My earliest convention memories began even before I was an attorney while I was attending the Bards of Bohemia King's Ball. Back then, the president of STLA was also the king of this royal affair. Complete with black ties and ball gowns, we danced the night away, while being entertained by New Orleanian, Larry Smith, our first president and one of STLA's founding fathers. Larry performed his magic tricks tableside. Somehow my table was always shown the "pull the tablecloth without moving the plates" trick. While Larry Smith has passed on, his memory and the revelry he instilled in us remains. I remember a particular year when our 1994 president, Howard Nations, reigned as king. I remember this particular convention for many reasons. I was finishing law school and my father wanted me there so I could understand more about who this family of his was and why he loved them so much. It was my first convention during which I viewed members as colleagues and friends, not just "dad's crazy friends who are back in town to party for Mardi Gras." It was especially memorable because I got to spend time with the legendary Scotty Baldwin and his family. Prior to that I had only heard war stories, and I wasn't allowed around the "Baldwin boys." I'm still not sure I am. Yet this family is just one of many STLA families I have come to know and love as my own. I remember the dynamic speakers, the camaraderie, the stories of past conventions, the history, the members, the masks worn at the King's ball, the dancing, and yes, I remember King Howard in full regalia—crown, tights and all.

I would like for us all to take a special moment to remember our STLA family members who passed away this year. They include: past STLA presidents and War Horse recipients, Scotty Baldwin and Bo Mullis. Past War Horse recipient Jerry McKernan and one of our newer members, Trey Phillips. I was fortunate to know these fine folks, and they are all missed.

As a "next generation" STLA member, I would like to thank my father, Vince (President 1995) for showing me the way and bringing me into this STLA family. I would not be the lawyer, person, friend or mother I am today without his huge presence and influence. Thanks Daddy.

Not surprisingly, I am not the only "next generation" president. I also would like to thank other Past Presidents for bringing us our next generation leaders. They include: John Romano (1991) father of Eric Romano (2009), Tommy Malone ((1997), father of Adam Malone (2006), Bo Mullis (2010) father of President-in-waiting Pam Mullis (2016).

For our 25th Anniversary, we will be bringing dancing and ballroom revelry back. I hope that you will join us on Friday night to honor the late, great Bo Mullis, as his wife, Bonnie and daughter, Pam accept on his behalf, our esteemed War Horse Award. The black tie affair will be held at the beautiful Windsor Court Hotel and following the awards dinner, we will be entertained by the sounds of the Wise Guys, an eleven member band from the birthplace of jazz, which includes a five piece horn section. Masks and dancing shoes are encouraged!

Our CLE program will bring you some of the best "Wise Guys" around. Be prepared to be charmed, educated and entertained. You may even be made an offer you can't refuse.

One of the most unique features of our convention is the option to ride on a float in a parade. While our members once filled the floats in the Bards of Bohemia parade, we now ride with the ever popular Krewe of Tucks. Riding on a float in new Orleans during Mardi Gras is a one-of-a-kind experience and has even become known as a line item which should be on everyone's "bucket list." If you want to truly say you have experienced Mardi Gras, sign up quickly for the

# Past Presidents

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Ward Wagner, Jr., FL .....1990
John F. Romano, FL.....1991
Sam Svalina, SC .....1992
Monty L. Preiser, WV.....1993
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floats. With the help and generosity of local attorney and Krewe of Tucks Captain, Lloyd Frithurts, we have been able to provide STLA convention-goers with this once-in-a-lifetime opportunity. You are assured to leave New Orleans with "throw me something mister" ringing in your ears.

Saturday night, we gather on a balcony overlooking the amazing and crazy people on Bourbon Street. You will see sights you have never seen before. Mardi Gras just isn't Mardi Gras without costumes. STLA has always kept in line with these traditions, and this year plan on wearing your best roaring 20s costumes. The crowd on Bourbon Street will be screaming for beads from our balcony full of flappers, gangsters and other creative 20s-era inspired costumes.

# STLA News, Updates & Events

### It's Almost Here! 2013 Southern Trial Lawyers Mardi Gras Conference

It's that time again. Mardi Gras time—and time to join your colleagues at the 2013 Southern Trial Lawyers Mardi Gras Conference! This year the conference will start on Wednesday, February 6, 2013 with a reception sponsored by the J.W. Marriott Hotel, beginning at 6pm. CLE will start at 9am Thursday morning and conclude at noon on Saturday February 9. This year, we have an impressive list of speakers with some dynamite topics. Thirteen hours of general CLE is anticipated. On Thursday night, you are on your own to dine at one of New Orleans' many acclaimed restaurants or take a stroll down Bourbon Street before the crowds arrive. On Friday night, we have scheduled the prestigious War Horse Dinner and Banquet. This is a black tie affair and will be held at the elegant Windsor Court Hotel, which is just a few blocks from the J.W. Marriott. When the awards ceremony is over, Instead of heading back to the hotel, we hope you'll join us for an event new to the itinerary this year. We've booked one of New Orleans' famed dance and party bands to entertain us until midnight. Saturday morning is parade time. If you want to ride on one of the floats in what is one of the country's largest daytime parades, we can help arrange that for you. Afterward, you won't want to miss a popular tradition. Starting at 1pm, MediVisuals and several other exhibitors are sponsoring the delicious crawfish boil at the House of Blues. This is one event you won't want to miss! Rain or shine, it will be fantastic. As if that isn't enough, at 7pm, we have reserved a balcony on Bourbon Street until 1am Sunday morning. Beads, drinks and finger foods will be served. This is a costume party and costumes are recommended. The theme this year is the Roaring 20's. So make your plans, pack your bags and join us in New Orleans.

### Fall Retreat Report

This year's fall retreat was held at the Hermitage Hotel in Nashville, Tennessee with 78 people in attendance. We kicked off the event with a reception in the hotel hosted by Gary and Diane Gober from Nashville. Gary is a past president, War Horse recipient and recipient of the W. McKinley Smiley Lighthouse Award. The food and specialty drinks Diane selected were outstanding. Thanks again to Gary and Diane who were great hosts that evening. The next morning, we had a buffet breakfast sponsored by Deana Dean and Magna L S followed by a CLE program and board meeting. The afternoon was spent either playing golf, relaxing or touring Nashville.On Friday night, our good friends from Forge Consulting helped sponsor a party at the Wildhorse Saloon in Nashville. We enjoyed great food and drink and plenty of entertainment. Saturday night ended a wonderful retreat with a delicious dinner at the hotel.

## DEFINING CAPACITY from page 1

faced with the loss or disability of her husband, and the necessity to obtain employment in order to maintain her home and support her family. Moreover, an increasing number of married women are reentering the labor market after their children are grown to augment family income or for reasons of personal satisfaction. Since the injured homemaker has but one day in court, s/he must be compensated at the time of trial if her injury has deprived her of the option of obtaining employment in the future.[13] As one court Louisiana has stated:

The loss of the ability to work is in itself a compensable element of damages. Earning capacity is not measured by actual loss; even an unemployed, or sporadically employed, Plaintiff is entitled to recover for the deprivation of what he could have earned. Plaintiff testified that she needed to work, and intended to work. We believe that the fact that Plaintiff is a woman who has chosen to stay at home to take care of her children, as she testified she had done, rather than work full time, should not be held against her. Defendant's argument would, in effect, penalize women who do not or are not able to establish a stable work history because of other responsibilities.[14]

As a practical matter, when a homemaker-spouse is claiming a diminished future earning capacity due to an injury but has no significant past work experience (or "history of gainful employment"), the Plaintiff should testify regarding her pre-injury education, interests, skills, talents, volunteer activities and future work-plans. The Plaintiff must further affirm that s/he did intend to return to the workforce in the future, for example after a dependent child had reached high school. Needless to say, since the Plaintiff in such cases cannot produce an earnings history, the calculation of damages may be difficult and somewhat arbitrary, which underscores the need for expert testimony by an employment expert, such as a vocational rehabilitation expert, confirming that but for Plaintiff's injury s/he would have been able to return to work in some specified field and enjoy earnings of some specified amount.[15]

As an ongoing and continuously accruing element of the Plaintiff's financial loss caused by the incident, restitution for a Plaintiff's loss of earning capacity should be pursued equally vigorously for homemakers as for bricklayers. A wrongdoer must not only be held to account for who the Plaintiff was, but also for who and what she had the capacity to become.

***Preston (PJ) Scheiner represents the second generation of his family dedicated to seeking justice for injured persons and suffering families. Since the firm's founding in 1971, Associates and Bruce L. Scheiner, Attorneys for the Injured, has been dedicated to assisting individuals injured or killed by the negligence of others. Today, Preston Scheiner is responsible for taking the firm's most difficult and complex cases to trial where he faces some of the nation's largest insurance companies and the area's best defense firms. Together with co-counsel John Romano, he secured a record Lee County jury verdict of $44.9 million, won $13.8 million for parents who lost a child in a tragic drunk driving wreck and obtained $9 million for a husband and wife whose lives were irreparably damaged in a major automobile collision. When not in the office, PJ is an avid golfer, fisher and aviator. He is a licensed multi-engine commercial pilot with single and multi-engine instrument privileges and is trained and licensed to fly the Citation Jet series of turbofan aircraft.***

*9 "As a general rule, the fact that the Plaintiff was not employed at the moment of injury does not preclude recovery for diminished earning capacity. Merely because a person is not employed does not necessarily mean that he is unemployable. Where the defendant's tortious conduct has reduced a Plaintiff's chances for future employment, the resulting diminution of earning capacity is a compensable element of damages." 2-10 Damages in Tort Actions §10.04. The crucial difference between a claim for "lost future earnings" and "lost earning capacity" is illustrated in the ruling in Truelove v. Blount, 954 So. 2d 1284 (Fla. 2d DCA 2007), explaining that even if an injured party earns more after the injury, s/he is not precluded from recovering damages for impairment of future earning capacity. 10 Allstate Ins. Co. v. Shilling, 374 So. 2d 611, 613 (Fla. 4th DCA 1979).11 See Florida Greyhound Lines v. Jones, 60 So. 2d 396, 398 (Fla. 1952) (homemaker had no prior income but could recover for loss of earning capacity because, as Court held, "we are not primarily concerned with loss of earnings but with loss of power to earn."). Florida law is well established and consistent with general law in the United States. See Goldstein v. Walters, 126 So. 2d 759 (Fla. 2d DCA 1961); Earl v. Bouchard Transp. Co., 735 F. Supp. 1167, 1172 (E.D.N.Y. 1990) (applying federal law); Grimes v. Haslett, 641 P.2d 813 (Ala. 1982); Morrison v. State, 516 P.2d 402 (Alaska 1973); Ball Corp. v. George, 556 P.2d 1143 (1976) ; Wilson v. Sorge, 97 N.W.2d 477 (Minn. 1959); Hilliard v. A.H. Robins Co., 148 Cal. App. 3d 374, 196 Cal. Rptr. 117 (1983); Rieth-Riley Constr. Co. v. McCarrell, 325 N.E.2d 844 (Ind. Ct. App. 1975); Jensen v. Osburn, 701 P.2d 790 (Or. App.1985); Ward v. Epting,351 S.E.2d 867 (S.C. App. 1986).12It is, of course, a different matter if the Plaintiff is "unemployable" at the time of injury, rather than merely unemployed. See, e.g., Sellers v. Skarda, 71 N.M. 383, 378 P.2d 617 (1963) (Plaintiff unemployable alcoholic for some time prior to injury); Espana v. United States 616 F.2d 41 (2d Cir. 1980) (Plaintiff for years prior to injury had been unable to find job). 13 "A person who sustains personal injuries that result from the wrongful act of another is entitled to recover compensation for loss or diminution of earning capacity during his or her entire life expectancy. Lost earning capacity compensates a Plaintiff for loss of capacity to earn income as opposed to actual loss of future earnings.*

*Illustration: An award for the loss of earning capacity was supported by evidence of what the Plaintiff could have earned on the open market, despite fact that she worked unpaid for her husband in their industrial cleaning business, where an expert testified that based on the Plaintiff's education and skills she could be employed as an administrative assistant, secretary, or clerk; the purpose of the award for lost future earning capacity was to compensate the Plaintiff for loss of capacity to earn income, not the actual loss of future earnings.*

*On the theory that the loss of earning capacity is considered an injury to her personal rights, a housewife may recover damages for loss of earning power, regardless of whether she was previously engaged in household duties only or has received earnings from commercial employment in the past." 17 Fla. Jur. 2d Damages §51 (2010), citing inter alia Townsend v. Gibson, 67 So. 2d 225 (Fla. 1953); Benjamin v. Diel, 831 So. 2d 1227 (Fla. 4th DCA 2002); W.R. Grace v. Pyke, 661 So. 2d 1301 (Fla. 3d DCA 1995); McElhaney v. Uebrich, 699 So. 2d 1033 (Fla. 4th DCA 1997).14Landry v. Melancon, 558 So. 2d 1143 (La. App. 1989) (citations omitted).15The expert should perform a comprehensive vocational assessment of the Plaintiff to determine what fields or positions the Plaintiff was qualified to fill in the open, competitive labor market. Depending on the nature of the Plaintiff's injuries, the expert should then explain that the Plaintiff's injuries and physical limitations will result in a lowering of such potential future earnings by some specified amount, connecting the diminished earning capacity to the Plaintiff's post-incident physical condition, etc. If a foundation cannot be established for the Plaintiff's general intent or desire to return to gainful employment at the time of the incident, the Plaintiff's earning capacity has also been calculated by assessing the value of her services to her family. See, e.g. Hassan v. U.S. Postal Service, 842 F. 2d 260 (11th Cir. 1988), in which the Court confirmed that under Florida law a parent injured in a car crash was entitled to recover, as an element of damages, the value of care and household services which the injured Plaintiff could no longer perform and which were then being gratuitously performed by hired help or other family members.*

## JONES ACT CLAIMS from page 1

vessel or a fleet of vessels under common ownership or control." Within this definition, there are three main subparts. First, the "more or less permanently assigned" has been broadly interpreted in many cases to mean that 30 percent or more of the employee's time is spent aboard the vessel or rig.[2] In 2005 the definition of a "vessel" under the test was addressed by the United States Supreme Court in Stewart v. Dutra.[3] The Supreme Court essentially expanded what was then the commonly accepted definition of a vessel, with the expanded definition to include anything that was "practically capable" of navigation. Finally, the vessel or fleet of vessels must be under common ownership or control. This issue often arises with third-party service hands who are randomly assigned to numerous vessels throughout the Gulf of Mexico and elsewhere. From contract to contract, their work assignments will change and, thus too, will their vessel assignments. Often the greatest challenge these individuals face in seeking protection under the Jones Act is showing common ownership, in that they spent at least 30 percent of their time aboard a vessel or fleet of vessels 'owned or controlled' by the same entity.[4]

Another articulation of the test for Jones Act seaman status which appears throughout cases focuses on the "duration and nature" of the employee's assignment to the vessel.[5] Duration is satisfied, again, if the employee spends 30 percent or more of his time aboard the vessel. Nature is a much more complicated, and contested, element. Individuals who typically work dockside and spend 30 percent or more of their time servicing vessels, but then return dockside for the main focus of their employment, often have trouble showing that the "nature" of their work constituted true vessel work. Similarly, there are hundreds of 'work over' or 'plug and abandon' workers in the Gulf of Mexico. These individuals work on fixed platforms or satellite well heads servicing or plugging these already drilled wells. However, in most cases a vessel is brought alongside the platform to serve as living quarters for the employees. If the employee does not engage in any vessel type activities, but rather describes his position simply as a platform worker who happened to sleep aboard a vessel next to a platform, chances are he has described himself out of Jones Act coverage. On the other hand, this type of worker needs to be prepared to discuss all the vessel type activities he may have taken part in while aboard the vessel itself. Such traditional vessel activities can include mooring of the lines, cleaning of the vessel and decks, assisting in the loading and offloading of supplies and/or cargo, riding on the vessel to and from the job location and other vessel crewmember type duties.[6]

Before we leave the seaman status test, you must know about the most important case available to fight for Jones Act status. The 5th Circuit itself has recognized that summary judgment on the question of seaman status is proper only in rare circumstances, and that even marginal claims should be left to the jury's determination.[7] This citation is front and center in any good opposition to the defense motions for summary judgment on marginal seaman status cases.

In addition to the Jones Act, an injured vessel worker typically files claims under general maritime law. This is perhaps the most common misunderstanding about an injured offshore or vessel worker's claims. He does not have claims under 'Jones Act maritime law.' There is no such body of law. The Jones Act and general maritime law are two separate bodies of law, one being a statute and the other jurisprudence set forth in cases.

The general maritime law claims asserted by an injured vessel or offshore worker typically involve: (1) a claim of unseaworthiness and (2) a claim for maintenance and cure benefits. An unseaworthiness claim is simply a challenge to the equipment or the physical vessel itself. The vessel will generally be found unseaworthy if any of its equipment or parts caused or contributed to the accident. Interestingly, unseaworthiness is also performing a task in an unsafe manner, failing to assign sufficient crew members to a particular task, or having a dangerous or unsafe crew member performing a task. Thus, while the term unseaworthiness has traditionally focused on the equipment and physical aspects of the vessel itself, unseaworthiness can often be shown through improper procedures or improperly trained crew members.

In regard to maintenance and cure, this claim can be

thought of as a very general workers' compensation element to an injured vessel worker's claim. Maintenance is defined as the amount of money necessary to allow the seaman to live on land as he lived aboard the vessel. This amount typically includes money for food, lodging and other necessities. Unfortunately the industry refuses to recognize any variable, individualized rate of maintenance and typically pays a standard rate ranging from $15.00 per day up to $40.00 per day, depending upon the company. Cure is reasonable and necessary medical expenses for an injured seaman by a physician who he chooses. The biggest limitation with maintenance and cure is that the employer need only pay maintenance and cure until the seaman reaches the point of "maximum cure". The standard practice in defending Jones Act claims involves the employer requesting a defense medical examination from a chosen company physician. Once this physician issues an opinion that the injured seaman is no longer in need of medical care, the company will typically terminate maintenance and cure benefits. This is true despite the fact that the treating physician may be recommending further treatment including surgeries. Fortunately, the U.S. Supreme Court recently clarified that punitive damages are available under a maintenance and cure claim if the employer intentionally and unreasonably refuses to pay maintenance or cure.[8] Also, maintenance and cure do not have any "final payment" component to them, as do many workers' compensation statutes. When the seaman reaches maximum cure, benefits are simply terminated, with no final payment or disability entitlement regardless of whether the plaintiff still has a significant physical impairment due to his injury.

## Why Are Jones Act Claims So Valuable?

Now that we have the basics behind us (and plenty of supportive citations!), let's talk about the value of the cases. There are several reasons why Jones Act cases have a deserved reputation for being valuable claims.

First, the injured seaman is entitled to seek all of his proven damages including wage loss. Many vessel workers have limited education. They are typically making excellent money working offshore or on vessels and if they suffer even a relatively minor injury which in any way restricts them from returning to full, very heavy manual labor, their loss of wage claim is significant. Vocational experts and economists are involved in every Jones Act claim to fully develop the loss of wages and earning capacity claim. Pain and suffering damages are also allowed under the Jones Act, as are future medical expenses.

Additionally, the Jones Act is a pure comparative fault statute. The injured employee need not prove that the company was completely at fault, nor does he have to successfully avoid any aspect of contributory fault on his part. Instead, the company owes the employee that percentage of his total damages for which the company is held at fault. A finding of 20% fault on the company but 80% fault on the employee still results in collecting 20% of the employee's total damages.

Proving fault in a Jones Act claim is a relatively easy task in comparison to other statutes. The earliest realization I had of this was during openings and closings in my first jury tried cases many years ago. How easy was it to rhetorically question, "Why didn't this company simply give our client the effort and respect that he gave them as he worked hard making money for them for years before this avoidable accident?" The Reptile provides excellent opportunities in Jones Act cases since the claims are against the worker's employer and every juror has been employed and dealt with an employer in the past. (Obviously, owners of small businesses are typically not great jurors in such cases, especially small vessel companies as we have down here in Southeast Louisiana—those are easy first strikes!) On top of the built in 'employee versus employer' struggle which helps to frame the case to a jury, the Jones Act imposes numerous obligations upon the employer including a duty to provide a "safe place to work," a duty to properly instruct the employee as well as all of his co-employees and a duty to supervise the employee. Also, the nature of the dangerous, hard work and slippery surfaces upon which the individuals are working typically give rise to accidents which could be avoided.

Another very favorable aspect of many Jones Act claims is that there is usually no limitation on recovery due to a lack of insurance or solvency of the defendant. Typically, even small vessel companies which only own a vessel or two are still required to provide minimum coverage of at least $1 million in order to contract their services. In the sequence of determining the value and potential of a Jones Act claim, the possibility of limited insurance proceeds is usually not a concern. In Louisiana, our minimum auto policy is now 15/30 (up from just 10/20 a year ago). It takes a whole lot of 15/30 cases to add up to one halfway decent Jones Act case.

Finally, another aspect of injured vessel and rig worker claims which greatly increases the likelihood of recovery involves the maintenance and cure aspect of the injured employee's claim. Even in cases in which proving liability on the part of the company is difficult, typically the injured employee will still have future, additional medical treatment including surgeries which the company refuses to authorize or approve. As trial approaches, a settlement is often reached which involves paying all or a significant portion of the contested surgery costs. Intentionally, maintenance and cure laws are extremely liberal in favor of the seaman and the recent clarification that punitive damages are available for wrongful denial of such claims has helped keep the offshore and vessel industry in check.

For more than 20 years I have focused my practice on handling Jones Act and maritime law claims. On the rare occasion when we pursue automobile accident claims, I am reminded of how beneficial the Jones Act can be to injured vessel workers. While it is far from perfect, and many judges seeks to limit the intentionally liberal and remedial nature of the Jones Act, it is a statute that allows full recovery of all proven damages with the only requirement being that the employee prove fault, and it provides a fair scheme under which to do so.

Now you can see how if a 25 year old walks into your office and explains that he got hurt on an oil rig and has had a knee surgery which still limits him, his sought after damages are likely to be $500,000 or more. Even proving 50% fault will recover $250,000 for the client. On the other hand, if that same young man is hurt at Wal-Mart while loading boxes, his scoped knee with a 5% impairment rating and continuing pain may net him $25,000 under a state compensation statute.

***Tim Young graduated Tulane Law School in 1993 and is owner of The Young Firm in New Orleans, Louisiana. His three attorney practice focuses on Jones Act and maritime claims throughout the Southeast. He has litigated in the States of Louisiana, Texas, Mississippi, Alabama and Florida. He provides a robust website with helpful videos and articles explaining the Jones Act and maritime law at www.JonesActLaw.com. He also provides a free screening kit for other attorneys explaining the best practices to evaluating a potential Jones Act case. To receive a screening kit, simply contact Tim by email or phone.***

*1 46 U.S.C. § 30104 (formally 46 § 688. The Jones Act was passed in 1920 and was sponsored by a Senator Jones form Washington State, hence the name)2 Chandris, Inc., v. Latsis, 515 U.S. 347, 115 S.Ct. 2172 (1995)3 Stewart v. Dutra Constr. Co. (03-814) 543 U.S. 481 (2005)4 For an excellent summary of the nature and duration test and how to establish common ownership for multiple vessel assignments see Johnson v. TETRA Applied Technologies, L.L.C., 2012 WL 3253184 (E.D.La.,2012), Alex v. Wild Well Control, Inc., 2009 WL 1507359, (E.D.La.2009) and Jenkins v. Aries Marine Corp., 554 F.Supp.2d 635, 641 (E.D.La.2008).5 Chandris, 515 U.S. 347, 368 (1995).6 For cases discussing the 'nature' requirement, see Phillips v. Tidewater Barge Lines, Inc., 2006 W.L. 1724542 (D.Or.); Vowell v. G & H Towing Company, 870 F. Sup. 162 (S.D.Tex. 1994); Bozeman v. Ensco Drilling Company, 1991 W.L. 216911 (S.D.Tex.); Navarre v. Kostmayer Construction Company, 52 So. 3d 92, 2010-0490 (La.App. 4 Cir. 11/24/10); and Cavazzo v. Gray Insurance Company, 15 So. 3d 1105, 2008-1407 (La. App. 3 Cir. 6/3/09). 7 Bernard v. Binnings Construction Company, Inc., 741 F.2d 824, 827 (5th Cir. 1984) (citing Leonard v. Exxon Corporation, 581 F.2d 522 (5th Cir. 1978)).*

# How to Obtain Punitive Damages in the Interstate Trucking Unsafe Equipment Case

***By Dan Ramsdell***

## Introduction

The amount of time and space available for this article does not permit an extensive and detailed outline of all that is necessary for you to do to obtain punitive damages in an unsafe equipment/interstate trucking case. Much of what is required will be, of necessity, case specific. However, it is the hope of this author that some of the concepts and ideas set forth herein will point you in the right direction. Additionally, should you have any follow-up questions regarding this type of litigation, you're welcome to call my office or send me an e-mail.

## Preliminary Matters

First things first.

My good friend David Bossart, who is a very experienced and excellent trial lawyer from North Dakota and one of our APITLA National Advisory Board members, always says that, when it comes to your cases, you, as a lawyers should, "Know what you are doing, and why you are doing it." David's remarks are correct. He has set forth a very simple, pure and commonsense rule for us all to follow in each of our cases.

The key to obtaining evidence of punitive damages in an unsafe equipment interstate trucking case is to know what you are doing and why you are doing it. That means that you should learn all you can about interstate trucking. Interstate trucking litigation is a very complex, unique and specialized area of the law. An otherwise excellent trial lawyer, (who is inexperienced in interstate trucking litigation), can make a number of very serious and prejudicial errors that may come back to haunt him/her and his/her client later. It may also have very serious and permanent adverse repercussions upon the ultimate type and amount of recovery obtained.

This is a very highly specialized area of the law, just as environmental law, tax law and criminal law are very highly specialized areas of law. These cases are not simple "car crash" cases. The effective and competent prosecution of interstate trucking cases involves an in-depth knowledge of hundreds of very unique and special rules, regulations and procedures. There are also very specialized methods that need to be employed by plaintiff lawyers in each one of these cases. If you are not familiar with all of them, please beware.

## General Advice

Engage in very specific, very detailed, well planned out depositions and paper discovery, hitting very hard on all of the F.M.C.S.R., the OOS regulations, CDL manuals, company safety manuals, internal company maintenance policies and procedures, all relevant maintenance records, leasing agreements, pre and post trip vehicle inspections and related documents and all DOT annual inspections. Also, bring with you a basic knowledge of mechanics, know which experts to use, what to ask them and how to use them in your case.

Who should have known or done what, when and where, and how should they have known it to prevent this incident from occurring? Who should have done what, and when and where? What did they actually do about it when they found out about it? When and where did they do it? Did they do enough? Why didn't they? Which rules were broken and why? Were the rules that were broken important? Why? What is the time and cost involved in making the situation or condition safe rather than unsafe? Who will it affect? How many will it affect? Could it be cured by proper training? Is this problem systemic within the entire company? Is the problem with safety one that involves thousands of vehicles belonging to this company or just this one vehicle in an isolated circumstance? What was the root cause or causes of this unsafe condition? How much did greed play into it? What are the potential dangers of this unsafe condition?

## Suggested Areas of Discovery

Iin this type of interstate trucking case, the prudent plaintiff lawyer would fully explore all issues relating to spoliation, log book violations, vehicle inspections, wheels and tires, brakes, tire tread, brake drums, bearings, the loads being transported, manufacturer's specifications, communications by and between the driver and his employee and outbound inspections of the vehicle, investigate all of their various interactions between all of the wheel end components with each other and their respective roles in the circumstances surrounding and contributing to cause the wheels to become separated from the semi-trailer and all documents generated and required to be generated in the course of business.

You should always also consider doing a very thorough background check into each of the defendants, and utilize the West Expert Services to conduct background checks on each defense expert. You may be surprised by what you can find out. These types of cases also require that you work very closely with your experts, and that you come to this case already having an excellent grasp of the subject matter and the applicable laws.

Your very first deposition, and each one thereafter, should leave absolutely no question in the minds of the defense regarding your total command of this situation and your expertise in this case and all of the applicable F.M.C.S.R. As my good friend and Florida lawyer John Romano says, "Let them know that you mean business."

Know where you want to go in discovery, make a plan to get ther, and then follow that plan. When a crash is caused by equipment failure or equipment failure contributed to the cause, make it one of your very important goals in discovery to look for and to find the evidence of recklessness and of a conscious disregard for safety on behalf of all persons and companies who have ever come into contact with that vehicle. There will most likely be a very sound basis for punitive damages if you dig long enough, deep enough and hard enough. It is not easy to do, but this type of case is not for the faint of heart or for those lawyers unwilling or unable to sacrifice substantial time in the pursuit of justice on behalf of their clients.

***Dan Ramsdell***
***Ramsdell Law Firm***
***1304 West Battlefield Road, Ste B***
***Springfield, MO 65807***
***417.887.3434***
***417.887.3507 (fax)***
***800.557.5570 (toll free)***
***dan@ramsdelllaw.com***
***dan@apitlamerica.com***
***www.ramsdelllaw.com***

Did your unsafe equipment case involve a reckless or nearly non-existent "safety" and "maintenance" or "repair" program that involved no follow-up checking on any inspections or maintenance allegedly performed on this company's fleet of semi-trailers? Why didn't they do that? How much money would it have cost them to do that? How much time would it have taken for them to do that? Was there a complete lack of F.M.C.S.R. training programs being provided to its employees and agents who performed annual DOT equipment inspections on the trailers? Were the mechanics who were performing the maintenance work and inspections on the semi-trailers properly qualified to do so? What records were and were not generated? Were there any records generated that should have been sending alarms to management that the work was not being properly performed? Was there a pattern and practice of a complete disregard for the law and for safety?

Locate and become familiar with trade journals and published safety documents considered authoritative in the industry. What journals and trade publications did the defendant subscribe to and consider authoritative in the industry? Which of them establish conclusions that are totally contrary to and opposite from the position being taken by the defense experts in your case?

Are the F.M.C.S.R. and the company standards considered by the defense to be important? Why were they implemented? Is it important to follow them? What bad things can happen when they are not followed? Did the defendant have their own individual company standards regarding the relevant issue, and if not, why not? If the defendant did have their own company standards regarding the relevant issue, were they followed here? If not, why not?

It is very important to remember that the Federal Motor Carrier Safety Regulations are only minimum safety standards. Motor carriers are free to establish their own safety standards and safety policies which are more stringent than those minimum ones set forth in the F.M.C.S.R. Are those company safety standards and safety policies simply window dressing for when the company becomes a defendant or are the company safety standards and policies actually implemented, followed and enforced?

It is also absolutely critical to remember to make the violations of the F.M.C.S.R. the foundation of your liability case, and the gateway for the imposition of punitive damages against each defendant. This is "Interstate Trucking Litigation 101", but it is extremely important to the success of any interstate trucking case and, therefore, worth repeating here.

## "Case Specific" Targeted Attacks

Recently, I was retained by two plaintiff law firms in another state to handle the liability and punitive damages portion of an unsafe equipment interstate trucking semi-trailer case. At the time I entered my appearance, the case had been already been pending for roughly three years with no resolution in sight.

The case was well and aggressively defended by numerous lawyers from various states all across the country. They each presented multiple competent, professional, challenging, interesting and sometimes novel legal arguments and defenses and did a terrific job. (However, at the end of the long and hard fight, and in spite of the coordinated and relentless efforts of the several defense attorneys involved, the plaintiffs prevailed.)

The equipment leasing company defendant was the owner and lessor of nearly one hundred thousand semi-trailers across our great nation. One of its semi-trailers that was leased out to another entity had two wheels and tires come off as the semi rolled down the road at highway speeds. The separated tires and wheels then crossed a median and, much like an unguided stealth missile, crashed violently into a pick-up truck coming from the opposite direction, tragically killing its driver and injuring his front seat passenger. The semi-trailer was arguably in an unsafe condition when it was leased to a semi-driver and the company he worked for just 2,300 miles prior to the wheel-off incident. But why didn't the driver of the semi notice the problems, and why didn't he do anything to correct them?

Also, why didn't he notice all of the other unsafe conditions on the trailer, and why didn't he do anything to correct those? Why did he continue to drive the unsafe vehicle when he did, in fact, note other safety problems with it? Who was responsible for the incident since the lease agreement shifted responsibility under the law from the lessor to the lessee?

Under the regulations and by operation of law, the lease agreement provided that once the vehicle was leased by the lessee, the lessee driver and his motor carrier company was responsible for all of the maintenance and repairs necessary through the lease period while the semi-trailer was in their possession. After much discovery in the numerous depositions that I took all across the country, the equipment leasing company filed a very novel defense in their Motion for Summary Judgment. They claimed that they were not a motor carrier under the Federal Motor Carrier Safety Regulations, (F.M.C.S.R.). This equipment leasing company had no commercial motor vehicle operator/driver employees. They also claimed to "transport" no property in "interstate" commerce. All they claimed to be was an equipment leasing company that simply leased semi-trailers to motor carriers and their drivers.

The equipment leasing company claimed that for the reasons above stated, and pursuant to their lease agreement, and since they were not in fact a "motor carrier" under the F.M.C.S.R., they had absolutely no duty to comply with any of the F.M.C.S.R. and that this incident was not their responsibility; that's right, None, Zip, Zero.

Their defense also specifically included no duty to comply with those regulations that they had allegedly violated and which involved a duty under federal law to inspect, repair and maintain their fleet of approximately 100,000 semi-trailers. This failure was perhaps, systemic in the company, and Frank Branson always says to look for systemic issues. By the way, Frank let me take a safety director's deposition at his law office in Dallas. If you ever get a chance to see Frank's office, do it. It is awesome and Frank has one of the most truly amazing gun collections you will ever see.

Well, justice was eventually served. The Court found in favor of plaintiffs and over ruled the defense Motion for Summary Judgment. The case now involved a conscious and reckless disregard for the law, and not only punitive damages, but a systemic failure and violations into the several hundred. The punitive damages threat and amount was now quite a substantial number. This was the "back breaker" decision against the Defendant Equipment Leasing Company that I had been working so hard to get. Their experts even opined that they were not a motor carrier. This was extremely hard fought.

After a mediation involving lawyers, defendants and claims supervisors from multiple states had terminated without having reached a settlement, the matter was later resolved in post mediation negotiations roughly three weeks before trial. The amount of the eventual settlement is confidential, but is believed to be a record amount for an interstate trucking settlement in that particular state.

## The Key

The key to this large recovery was very specific, very detailed and pointed discovery hitting extremely hard and over and over on all of the F.M.C.S.R., the OOS regulations, CDL manuals, company safety manuals, internal company maintenance policies and procedures, literally thousands of maintenance records, leasing agreements, pre and post trip vehicle inspections and all related documents, DOT Inspectors and inspections, metallurgy issues, mechanical engineering issues, spoliation, log book violations, numerous vehicle inspections, wheels and tires, brakes, tire tread depths, lug nuts, studs, wheel end inspections, the loads being transported and all of their various applications and contributions to the circumstances surrounding the actual cause of the wheels becoming separated from the semi-trailer.

You had to know where you wanted to go in discovery, make a plan to get there, and then follow that plan. Otherwise, the record would not have supported the near record settlement that was achieved. My good friend David Bossart always says "Know what you are doing, and why you are doing it." I followed his sage advice, and also the terrific advice of Frank Branson, a stalwart member of our APITLA National Advisory Board from Texas.

This case involved a reckless safety and maintenance program that involved no follow-up checking on any inspections or maintenance allegedly performed on this company's fleet of semi-trailers. Why didn't they do that? Well … because they "had no duty to do that" and because it would have cost them a lot of money to do it, and do it right.

There was also some substantial evidence that the required inspections and maintenance were never performed at all. Keep in mind that this equipment leasing company had a fleet of over 100,000 trailers traveling on our interstate highways. As Frank Branson says, "Always look to see if the problem is systemic."

It was, and these trailers are now most certainly traveling in your state as well, right alongside you, right alongside your family and right alongside your clients. We were assured that this company "got the message" and hopefully they and their insurance companies will now work together to implement the much needed safety changes this case revealed needed to be done to in order to make their fleet a safe one.

### Partial List of Federal Motor Carrier Safety Regulations to Consider In Any Unsafe Equipment Interstate Trucking Case

At a minimum please be sure to look at each of the following F.M.C.S.R.s and all of their individual subparts for guidance as to the particular facts and issues present in your unsafe equipment cases.

49 C.F.R. § 376 – Lease and interchange of vehicles;

49 C.F.R. § 383 – Subpart G – Required knowledge and skills;

49 C.F.R. § 390 – General applicability and definitions;

49 C.F.R. § 392 – Driving of commercial motor vehicles;

49 C.F.R. § 393 – Parts and accessories necessary for safe operation;

49 C.F.R. § 396 – Inspection, repair and maintenance;

Appendix G TO Subchapter B – Minimum periodic inspection standards;

## Conclusion

It is critical in any interstate trucking case to have an excellent command of the special rules and regulations that apply to your particular case so that you can point out and discover the multiple violations of them. It is also essential that you use those violations and the deposition admissions that you are able to obtain as the foundation of your discovery plan to obtain a basis for punitive damages.

As David Bossart says: "Know what you are doing, and why you are doing it." Also, as Frank Branson says, "Find out if the failures are systemic." Then, just keep on fighting, and fighting, and fighting until justice is finally served for your deserving clients. That is the only way to bring about changes in the unsafe interstate trucking industry. See if you can make your case bring about a positive safety change and result for us all. Until that happens more often…no one is safe.

# How To Spot A Products Liability Case A Method for Analyzing Accidents

***By Henry "Hank" Didier, Jr.***

As zealous advocates for our clients, we strive to identify and pursue any and all viable claims that may provide compensation and relief to our clients or their families seeking justice after a tragedy. The task of identifying claims can be difficult when we are continually tasked with reviewing the facts in accident after accident. Further, a product defect and the role it may have played in our client's injuries can be especially difficult to recognize. This is particularly true in severe accidents which result in multiple complex injuries, or when the client is deceased and unable to help us uncover the truth.

Unfortunately, because of such realities, and the fact that many types of product defects are simply difficult to identify, valid product liability cases are often missed and never pursued. Even the best of us can miss a viable products liability case, but, by being conscious of the ways and reasons such cases are missed every day, we can all improve.

Because product defect claims can take on many forms, it is necessary for us as attorneys to have the ability to quickly and efficiently analyze accident facts to determine whether a potential product defect case may exist. While the claims will ultimately require expert analysis, we can effectively investigate the potential that a defect claim exists by applying a methodical analysis centered around two basic questions: 1) What caused the accident; and 2) Did the vehicle and its safety systems adequately protect the occupant? If the answer to either of these questions suggests a defect may have played a role, then the necessary secondary analysis can proceed.

With a basic understanding of traditional vehicle defect claims and current trends, it is possible for practitioners from all areas of practice to effectively and efficiently serve the interest of their clients and preserve all of their potential claims.

## Ask the Question

With the prevalence of SUVs in today's marketplace, and the disproportionate number of serious injuries and deaths attributed to SUV rollover accidents relative to other types of accidents, a discussion of how to evaluate a "rollover" accident provides us with a good example of how a methodical and analytical approach can be applied to a broad range of accidents for the benefit of our clients.

As addressed above, when looking at the facts and circumstances of an accident involving catastrophic injuries or death, you first must ask the question: What caused the accident? In answering this question, making the following inquires will help you determine if a product defect claim potentially played a role:

***Did a tire failure or tread separation cause the accident?***

***Did a mechanical failure cause the accident?***

***Did the vehicle's driver lose control on-road?***

***Did the accident result because of roadway or weather conditions?***

***Did the towing of a trailer contribute to the accident?***

If the answer to any of these questions is "yes," you may have a tire defect claim, manufacturing defect or design claim, stability claim, failure to incorporate ESC type system claim or a trailer sway claim.

> ***With a basic understanding of traditional vehicle defect claims and current trends, it is possible for practitioners from all areas of practice to effectively and efficiently serve the interest of their clients and preserve all of their potential claims.***

The second question you must ask is: Did the vehicle and its safety systems adequately protect the occupant?

In answering this question, staying focused on how the occupant was injured and whether the vehicle's design and reasonable safety features could have prevented the serious injuries or death is critical. In answering the question, stay focused on what could have prevented the injuries or death, and consider the following:

***Did the roof crush into the occupant compartment causing injury?***

***Did the engine or other components intrude into the passenger compartment?***

***Did the airbags in the vehicle fail to deploy properly?***

***Did the vehicle fail to incorporate side impact or rollover curtain airbags?***

***Did the airbags themselves cause the injury?***

***Did the seatbelt fail to keep the occupant secured to the seat?***

***Did the vehicle fail to incorporate seatbelt pretensioners?***

***Did the seatbelt system itself cause the injury?***

***Did the seat fail to remain in an upright position?***

***Did the vehicle fail to incorporate ABTS or similar type seats?***

***Did the doors or hatches fail to remain closed?***

***Did the vehicle's side windows break?***

***Did the client suffer injuries outside of the vehicle while belted?***

***Did the client get ejected through a broken window?***

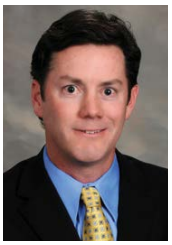
***Did the vehicle ignite after the crash?***

If the answer to any of these questions is "yes" you may have a roof crush claim, crashworthiness claim, airbag claim, seatbelt claim, seatback claim, glass claim or fuel system defect claim. By asking these simple questions in a methodical fashion, it is possible for practitioners, their staff and even consumers to investigate effectively the potential that a defect claim exists.

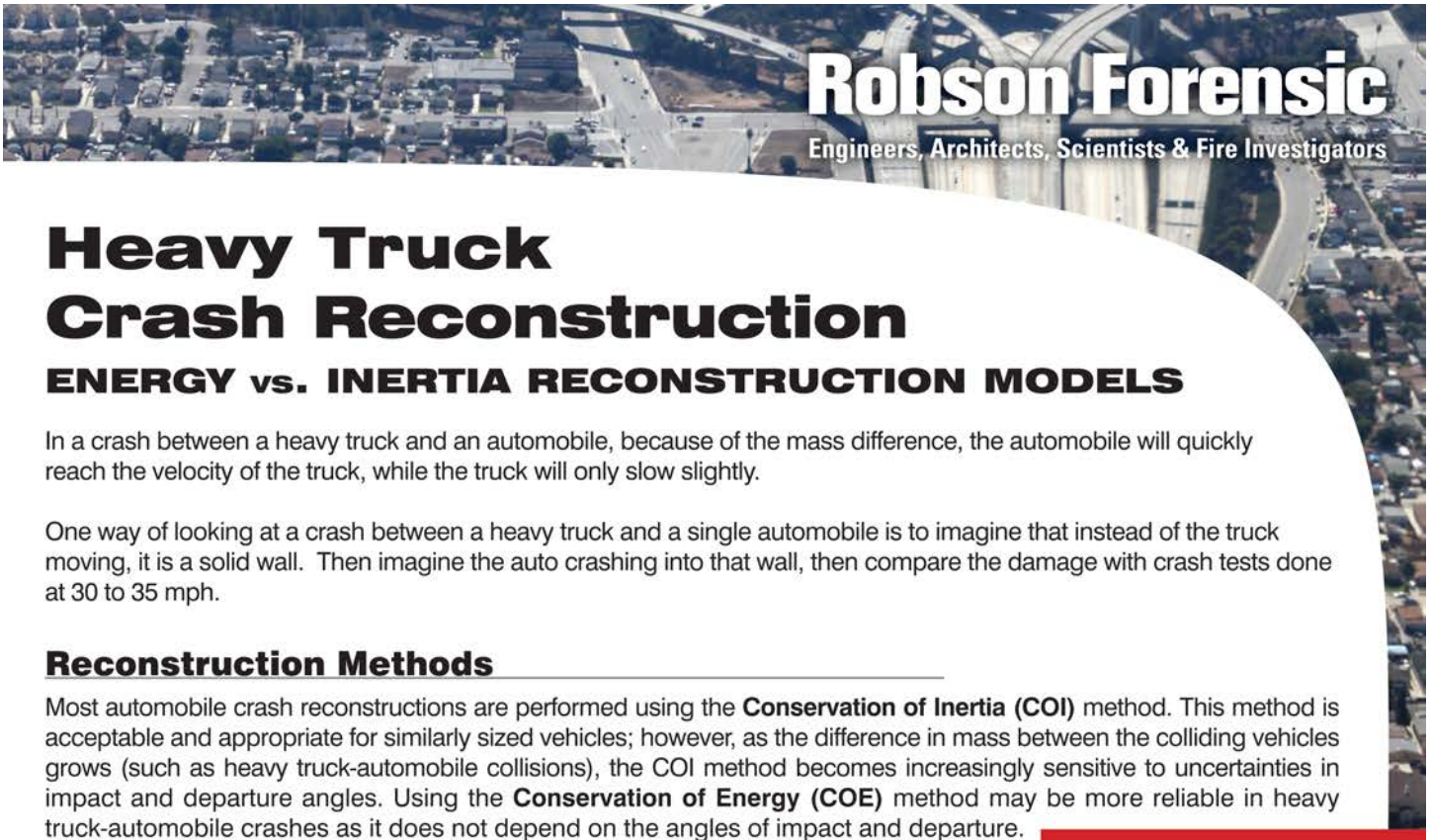
If a potential claim does exist, then it is critical to preserve the vehicle(s), the scene and witness testimony to provide your experts with the best possible opportunity to assist you and your clients in prosecuting an automotive defect claim. The fact is that product liability cases are time and expense intensive, and, only if the injuries or damages can support such costs, can they be viably pursued.

When we ask the question about whether a defect case may exist, and we get even a hint that it may be possible in a significant injury or death case, then we must get investigators involved to run down facts that will help answer the myriad of detail questions that follow. It often means re-interviewing witnesses for details that were not necessarily important to the original auto negligence investigation or claim. Of course, this is why we save cars, identify and preserve evidence at the scene, collect witness testimony, and keep an open mind for other considerations. These claims by their very nature are significant undertakings, and knowing the facts – good or bad – is critical to success in the long-term.

In summary, we should constantly remind ourselves and our teams of the importance of looking at case facts with an inquisitive eye for why this accident or these injuries happened and "did they need to?" If we make it a normal practice in our offices to ask these questions, and we train and remind our people regularly of the importance to our clients of doing so, we can better identify when these cases may exist.



***Henry "Hank" N. Didier, Jr.***
***Didier Law Firm, P.A.***
***1203 N. Orange Avenue***
***Orlando, FL 32804-6408***
***407.895.3401 (phone)***
***407.895.3408 (fax)***
***didier@productsafetyattorneys.com***
***www.ProductSafetyAttorneys.com***
***www.vantagenow.com***




# Heavy Truck Crash Reconstruction

## ENERGY vs. INERTIA RECONSTRUCTION MODELS

In a crash between a heavy truck and an automobile, because of the mass difference, the automobile will quickly reach the velocity of the truck, while the truck will only slow slightly.

One way of looking at a crash between a heavy truck and a single automobile is to imagine that instead of the truck moving, it is a solid wall. Then imagine the auto crashing into that wall, then compare the damage with crash tests done at 30 to 35 mph.

### Reconstruction Methods

Most automobile crash reconstructions are performed using the **Conservation of Inertia (COI)** method. This method is acceptable and appropriate for similarly sized vehicles; however, as the difference in mass between the colliding vehicles grows (such as heavy truck-automobile collisions), the COI method becomes increasingly sensitive to uncertainties in impact and departure angles. Using the **Conservation of Energy (COE)** method may be more reliable in heavy truck-automobile crashes as it does not depend on the angles of impact and departure.

Energy calculations require a quantification of the energy used in the crush of the vehicles. There is usually little damage done to the heavy components of the truck; the plastic bumper and hood may be damaged, but the energy used for this is relatively low. The energy to crush the automobile can be calculated accurately by measuring crush on the vehicle. Most energy formulas for automobiles are developed for crashes below 35 mph into a solid barrier. Barrier tests commonly provide an acceptable model for measuring automobile crush against a heavy truck. As the relative speed of the truck increases beyond 35 mph, the calculations become less accurate, but a reasonable answer can be achieved at normal highway speeds.

**One way of looking at a crash between a heavy truck and a single automobile is to imagine that instead of the truck moving, it is a solid wall.**

### Author: Erin M. Shipp, P.E., NCEES

Erin is a Bus and Heavy Truck expert with Robson Forensic. She has more than 30 years of engineering experience in product design and development of heavy trucks, motor homes, buses, and passenger cars.

Erin worked at Chrysler for ten years in a variety of engineering roles. She also spent nearly a decade in engineering positions in the bus industry, where she had direct experience with many of the largest bus manufacturers, including BlueBird, Thomas, Spartan Chassis and US Bus. In addition to her experience designing and engineering buses and passenger cars, Erin also has 14 years in truck design and development, 12 years at Freightliner and 2 years at Marmon.

Erin joined Robson Forensic in 2009 where her practice focuses primarily on heavy truck and automotive crash investigations. Her experience as a vehicle engineer allows her to bring a uniquely valuable perspective to crash reconstruction and crashworthiness investigations.

eshipp@robsonforensic.com ☎ 843.722.0119

# A Military Expert's Approach

***By Dennis M. McCarthy and Sean V. McCarthy***

## The Military Plaintiff

In this era of a military composed entirely of volunteers, cases arise with increasing frequency in which a full- or part-time member of the nation's Armed Forces becomes a plaintiff in civil litigation because of injuries sustained in non-service connected incidents. Military personnel drive cars and motorcycles and are exposed to all of the same hazards encountered by their fellow citizens. But when military personnel are injured in these mishaps, those who represent them may be faced with an unexpected set of issues.

Did the service member lose pay as a result of his or her disability? If they were on active duty, their pay would be almost sure to continue without interruption despite temporary disability. However, if they served in the National Guard or Reserves, it is highly likely they would lose pay and a variety of "allowances."

Was the service member's career cut short because of disability? Did they lose opportunities for advancement? In many cases, physical injuries disqualify a service member for further military service. If they were not "career-oriented," they may lose only a year or so of military earnings, and those losses could conceivably be off-set by civilian earnings. However, if the service member was committed to a 20 or more year military career, their loss of future earnings, retirement benefits and medical insurance can quickly mount to millions of dollars.

## The Ultimate Question

As lawyers engaged in personal injury trial work know, the acceptance of a causal relationship between injury for past wage loss and loss of future earning potential is ultimately a question of fact. This premise is equally true when the question involves an individual's claimed reduction of his or her potential for future military service.

Sometimes, military records that order an end to a plaintiff's service for medical reasons are definitive on this issue. In other cases, a qualified witness can provide expert opinion based on a comparison of applicable Department of Defense policy and regulations with an individual service member's military record and with his or her branch of service's current policies governing retention. This comparison permits a well-informed expert opinion of whether the individual would have been allowed (or even encouraged) to continue to serve if physically capable.

Against that background, the fact finder might also consider the testimony of the service member (and perhaps family members and military colleagues) as to his or her specific plans and desires. Circumstantial evidence – the fact that one has already served for a significant period of time, for example – may also be considered. The trial lawyers involved must evaluate the persuasiveness of that testimony.

## Calculating Potential Earnings

The calculation of a service member's actual and potential lost earnings requires consideration of a number of specific benefit categories:

***Basic Pay and Allowances:*** The rates of annual pay, plus housing, subsistence and other allowances are all based on the service member's rank and longevity and are adjusted annually based on Congressional action. Current rates are published. To accurately project future earnings, one must use historic rates of growth in each area.

***Loss or Reduction of Retired Pay:*** Service members who achieve 20 or more years of service become vested in a fully-funded "defined benefits" system that pays the service member 50% or more of their base pay at the time of their retirement. This percentage rises in direct proportion to additional service beyond 20 years and can reach 100% of base pay. This pay continues for life and is periodically adjusted for inflation. A surviving family member benefit may also apply. If an injury that is not service-connected prevents the service member from reaching retirement eligibility or forces them to retire earlier than desired, an expert can calculate the loss or reduction in retired pay with mathematical certainty, and project those losses over an actuarially valid life expectancy. Again, these losses can easily reach into the millions of dollars.

***Medical Insurance:*** Service members on active duty and those eligible for retired pay are entitled to an extremely "rich" plan of hospital and medical coverage at no cost. A qualified expert can calculate a reasonable value for replacement coverage and project that cost over life expectancy.

***National Guard and Reserve Benefits:*** All of the above factors apply to our "Citizen Warriors" as well. However, because of their blend of full-time and part-time military service, the expert must make a number of slightly more complex calculations to determine their losses in pay and benefits. These calculations involve a sometimes confusing array of duty statuses, a different retirement system, different rules for medical insurance, and the necessity to determine how much of a future career would likely have been spent on full-time duty. It is not uncommon, however, for the loss of a full career in the Reserve or National Guard to result in lost earnings and benefits of a million dollars or more.

## Evaluating the report of a military expert witness

Even after plaintiff's counsel has retained an expert on military compensation issues, the lawyer must evaluate the expert's opinion to determine whether he or she will help the plaintiff's case and whether the witness can withstand the scrutiny that defense counsel will bring to bear. Here are some questions that a well-qualified expert will be able to answer:

***Did you review the plaintiff's whole military personnel record?***

***What is the basis upon which you conclude that plaintiff would have continued to serve but for the alleged injuries?***

***Upon what do you base your opinion about future promotions in rank? (Did you use the available service-specific promotion statistics?)***

***What assumptions did you use to support claims that military pay and housing allowances will increase at any given rate?***

***What assumptions did you rely on to calculate future military retired pay?***

***If the expert claims that the plaintiff incurred economic loss related to health insurance, how were those claims calculated?***

***If the plaintiff served in the Reserve or National Guard, what earnings assumptions were used for periods in which the plaintiff was not on full-time active duty?***

***If the plaintiff served in the Reserve or National Guard, what is the basis for the conclusions as to how much total service the plaintiff would have amassed?***

***If the plaintiff served in the Reserve or National Guard, did you take into account the varying costs for medical insurance under TRICARE, TRICARE Reserve Select, and TRICARE Reserve Retired?***

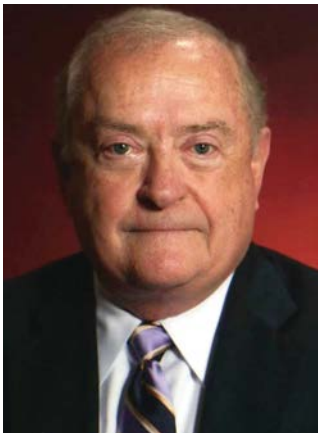
## Conclusion

Representing injured members of our Armed Forces can be both a privilege and an opportunity for plaintiff's counsel. Adequately representing them requires special knowledge and specific preparation so that the unique aspects of the military plaintiff's compensation and benefits are fully portrayed and accounted for. Doing anything less means short-changing the plaintiff and depriving the jury of the opportunity to do full justice.

***LtGen Dennis McCarthy***
***Military Experts, LLC***
***313 East Livingston Avenue***
***Columbus, OH 43215***
***614.484.1960***
***888.852.0317 (fax)***
***877.316.7215 (toll free)***
***dennis@themilitaryexperts.com***
***www.themilitaryexperts.com***

***Sean McCarthy***
***Military Experts, LLC***
***313 East Livingston Avenue***
***Columbus, OH 43215***
***614.484.1960***
***888.852.0317 (fax)***
***877.316.7215 (toll free)***
***sean@themilitaryexperts.com***
***www.themilitaryexperts.com***

# In Memoriam: J. Marvin "Bo' Mullis



*J. Marvin "Bo" Mullis*

***By Jody Campbell***

I have been the Executive Director of Southern Trial Lawyers Association since my wife, Gail, resigned in 2000. I have met so many great people and that is one of the big reasons I keep doing what I do. Over the years we have had quite a few members pass on. In October of this year, we lost J. Marvin "Bo" Mullis. I feel so fortunate to have gotten to know Mr. Mullis over the years, and he was truly a lawyer's lawyer. I don't recall a conference that he and his wife Bonnie didn't attend and, though he wasn't feeling his best, he and Bonnie were in Asheville at the 2012 Fall Retreat. We always got together at some time during the conference and talked. The one thing I really regret is that he never got down here to go fishing with me, which we had talked about doing numerous times. Mr. Mullis always had a smile on his face and kind words for everyone. He often mentioned that Southern Trial Lawyers was his favorite conference that he attended each year. He said he had met so many new friends, learned so much at the CLE's and loved coming to a conference where people weren't looking for some kind of donation. He will be missed by everyone that knew him, and I know I will always remember the time we spent together at STLA functions.

Born in Lancaster, South Carolina, February 24, 1940, Bo was the son of James Marvin Mullis, Sr. and Jimmy Wilson Mullis. He graduated from Lancaster High School, the University of South Carolina, and the University of South Carolina School of Law. He was a member of the Delta chapter of the Sigma Nu Fraternity where he most proudly helped plan and participated in "The Prank" where members of the fraternity posed as the Clemson football team prior to the Carolina-Clemson game of 1961.

Bo practiced law from 1966 until he passed, first in Darlington, South Carolina, then as a Judge Advocate in the U.S. Air Force, and later in private practice in Columbia, South Carolina. He established the Mullis Law Firm in 1971, where he mentored many of the state's leading legal advocates over the ensuing 40 years. He was an active member of the JOY Class of Shandon United Methodist Church, the Rotary Club of Five Points, the American Board of Trial Advocates, a founding member of the Palmetto Place Children's Shelter and a former President of the Columbia Jaycees. Bo was a past President of both the Southern Trial Lawyers Association and the South Carolina Association for Justice. For many years, he represented South Carolina on the Board of the American Association of Justice – the national organization of plaintiffs' trial attorneys. He was the driving force behind the Auto Torts program – which has long been considered one of the finest continuing legal education programs in the nation.

As a member of the United States Air Force as a Judge Advocate General officer during the Vietnam War, he tried more than one hundred courts-martial in a three year period at the Amarillo Air Force Base in Texas and at the Vandenberg Air Force Base in California. He then continued in the JAG Corps in the Air Force Reserve for 20 years. He also attained the rank of Brigadier General in the Joint Services Detachment of the South Carolina State Guard. He volunteered to write wills for troops deploying to Iraq and Afghanistan and worked vigorously to establish a civilian pilot emergency air wing for national disasters like Hurricane Katrina.

He was an Eagle Scout with the Boy Scouts of America and the head cheerleader for the University of South Carolina when he was a student there. He was selected for the Southern Trial Lawyers Association's American Eagle Award in 2011.

# Floridians Vote to Keep Politics Out of the Courts

***By Eric Romano***

On November 6th, Floridians voted to preserve the integrity of the courts by deciding to keep politics out. In an ambitious and dangerous power grab, various conservative special interest groups, with the support of Governor Rick Scott and other elected officials, sought to remove three Supreme Court Justices from office by commandeering the state's merit retention system for their own political gain. Florida Supreme Court Justices are appointed by the Governor. Since 1976, each Justice must be subjected to a statewide merit retention vote every 6 years. The ballot asks each voter simply "Shall Justice [Smith] of the Supreme Court be retained in office?" The voter then answers "Yes" or "No". The system was intended to give voters the ability to remove a Justice who is corrupt, unethical, inept or otherwise unfit for office. By design, politics were not to play a role. In the nearly 40 years that Florida has used the merit retention system, Justices have typically been retained in office with approximately two-thirds of the voters answering "Yes", and political pressures have rarely, if ever, been considered a significant factor.

2012 was remarkably different. Motivated by the success of a similar initiative in Iowa in 2010 which resulted in three Supreme Court Justices being voted out of office in their retention bids, various groups aggressively pushed to expel Justices Barbara Pariente, Fred Lewis, and Peggy Quince from the Supreme Court. Notably, the mission was not prompted by any misconduct by these Justices, as each Justice has been highly respected for their impeccable character and integrity. The attempt to remove them was fueled by one thing – a conservative agenda to control the judicial branch. With a Republican governor and Republican-controlled legislature, the Supreme Court provides a crucial check on the balance of power, just as our constitution requires. Because Justices Pariente, Lewis and Quince have written or joined opinions that, while well-reasoned and legally sound, disagreed with what certain conservative groups advocated, they were targeted for removal. The objective? To give Governor Scott three immediate appointments to the Supreme Court.

In an unprecedented move, the Republican Party of Florida voted to publicly oppose the three Justices, encouraging Floridians to vote No in the retention races. Millions of dollars were poured into the ouster effort by other conservative groups, with most of the money coming from outside Florida. The Justices were forced into the difficult position of having to raise substantial funds to defeat the effort. The problem: How can a Supreme Court Justice, who is ethically prohibited from partisan campaigning or allowing politics to influence her decisions, effectively defend against a political attack? Joined by The League of Women Voters of Florida, The Florida Education Association, the Florida police and firefighter unions, and many other groups, The Florida Bar and the Florida Justice Association worked to educate voters about the merit retention system and the importance of keeping politics out of the courts. On November 6th, all three Justices were retained by the voters, with each receiving more than 67% "yes" votes.

Although Florida voters recognized the remarkable service of these three justices and clearly understood the importance of keeping the Supreme Court a "politics-free" zone, the attack on the Supreme Court raises some concerns. Those seeking to remove the Justices spent considerable amounts of money on their campaign, and the Justices and their supporters raised and spent more than $5 million to defend against the assault. Notably, there were more than 2.3 million "No" votes, far more than in any previous merit retention election in Florida. While we can be proud that Floridians stood up to protect our Supreme Court and the fundamental principles of our democracy, we cannot relax our vigilance. The same effort will rear up again, in Florida or elsewhere, and we must be prepared when it does.

***Eric Romano***
***Romano Law Group***
***P.O. Box 21349***
***West Palm Beach, FL 33416***
***561.533.6700***
***561.533.1285 (fax)***
***eric@romanolawgroup.com***
***www.romanolawgroup.com***

# New STLA Members

Currently we have 496 members in our association. As you know, membership is by invitation only, and that is why we have such an outstanding group of Plaintiff Attorneys. If you know of someone who you think would make a good member and would like to get involved with Southern Trial Lawyers, let us know, and we will send them an application for membership. For a complete list of members, go to our Web site: www.southerntriallawyers.com.

***Kenneth R. Bernard, Jr.***, *Douglasville, GA*
***Clinton C. Carter***, *Montgomery, AL*
***Alex B. Cash***, *Charleston, SC*
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***Erin Gerstenzang***, *Atlanta, GA*
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***Christopher L. Marlowe***, *Coral Gables, FL*
***William Hugh McAngus, Jr.***, *Columbia, SC*
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***Joe Napiltonia***, *Franklin, TN*
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PO Box 1207, Crawfordville, FL

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# THE JUSTLAW JUROR'S BOX

WHAT HAPPENS HERE, STAYS HERE...UNLESS IT SHOULDN'T