

## SEMINAR PAPER

### I. APPRAISING YOUR CHANCES: THE INITIAL INTERVIEW

#### *It's all about finding the truth*

Do you remember the exchange that occurred between Pontius Pilate and Jesus in John 18: 30-40: *"If he were not a criminal," they replied, "we would not have handed him over to you." Pilate said, "take him yourselves and judge him by your own law." "But we have no right to execute anyone," the Jews objected. This happened so that the words Jesus had spoken indicating the kind of death he was going to die would be fulfilled. Pilate then went back inside the palace, summoned Jesus and asked him, "Are you the king of the Jews?" "Is that your own idea," Jesus asked, "or did others talk to you about me?" "Am I a Jew?" Pilate replied. "It was your people and your chief priests who handed you over to me. What is it you have done?" Jesus said, "My kingdom is not of this world. If it were, my servants would fight to prevent my arrest by the Jews. But now my kingdom is from another place." "You are a king, then!" said Pilate. Jesus answered, "You are right in saying I am a king. In fact, for this reason I was born, and for this I came into the world, to testify to the truth. Everyone on the side of truth listens to me." "What is truth?" Pilate asked. With this, he went out again to the Jews and said, "I find no basis for a charge against him. But it is your custom for me to release to you one prisoner at the time of the Passover. Do you want me to release 'the king of the Jews'?" They shouted back, "No, not him! Give us Barabbas!" Now Barabbas had taken part in a rebellion. (Emphasis added)*

**"What is truth?"** Isn't that the most important question to have answered in evaluating your chances of winning a case or settling it? No matter whether you are a lawyer, doctor, engineer or a scientist, if you're going to be successful, you seek the answer to that question. If you are going to understand what your chances are in civil litigation, you have got to be involved in a *truth-finding* mission. As a lawyer, your primary mission in life could well be put in terms of: *I am a seeker of truth.*

History and science have proven the truth under many and various circumstances. Our knowledge through the centuries has grown with respect to certain truths that exist as universal laws related to physics and many other of nature's laws.

Our country's founding fathers boldly declared: "*We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness.*" Much of our law has been embodied to protect the rights identified by those *self-evident truths* and there are those today who would not hold even those truths to be self-evident.

So it goes that the *truth* is not often *so self-evident* when it comes to evaluating a lawsuit. What is the truth about the sequence of events causing the potential plaintiff's injury? What is the truth about your potential client? What do we need to know about the circumstances and the client in order to properly evaluate the existence of a cause of action? The categories of inquiry can be identified and investigated for such a determination. After years of practicing law, including a time serving on the bench as a fact-finder, I can attest to the truth that it is not often easy to find.

#### **A. Facts Necessary to Evaluation**

The search begins with the initial interview with the prospective plaintiff in an attempt to identify all relevant facts concerning liability and damages in order to assess your chances for winning a trial and/or settling a personal injury case. In our profession, judges in non-jury trials and jurors are described as the "fact finders". During trial, their duty is to find the facts from the evidence and make the evidence speak the truth in arriving at a verdict.

As a lawyer investigating and evaluating the case, you are the initial "fact finder" in the legal process. It is up to you to marshal together the evidence to present to judge and jury. As an advocate of the evidence you present, it is your mission to persuade each and every juror to find that your evidence is believable, credible and thus speaks the truth. You want the jury to "speak the truth" at the end of the day using your evidence as

the basis for a verdict in favor of your client. Evaluating your chances in front of an impartial jury is a helpful measure for determining whether this case can be settled with the opposing party.

The *initial interview* is the point of beginning in your assessment of the facts of your case.

**(a) *Attorney-Client Relationship and Creating Good Rapport***

The creation of good rapport early during the client interview is one of the most important things you can do to get to the truth. This is the start of the investigation. This seminar focuses on a personal injury or death case. You are going to be meeting with folks that have suffered significant injury or have experienced an unexpected death in their family. They are physically, mentally and emotionally harmed. In most instances, you have just met these people. Why should they pour out their life story to you? They don't even know who you are. You have got to build trust and confidence early in the relationship. Teach them about the confidential nature of the attorney-client relationship. Make sure the potential client understands that even if you don't take their case that anything they say to you and your staff is confidential. Be concerned. Be friendly and be loving. This is the only way they are likely to open up completely to you.

It is usually a good idea to have your paralegal and investigator attend the initial interview. This affords them an opportunity to learn the facts at the same time as you do. The client will also have the opportunity to get acquainted with staff members that are likely to have an appreciable amount of contact with them during the process of preparing the case. The development of an early things-to-do list can be accomplished in a time-efficient manner by including staff members in the initial interview.

**(b) *Economic Considerations and Damages***

Any analysis of facts and circumstances that are potentially the basis of a lawsuit includes an assessment of both liability and damages. In this day of specialization, one must consider whether the case needs to be referred to counsel experienced in the legal area under consideration. This seminar is targeted across the board of personal injury as the later segment demonstrates by the legal review of causes of action, including

automobile accidents, slip and fall accidents, products liability, medical negligence and other causes.

All personal injury litigation is relatively expensive to pursue in terms of handling the discovery process and engagement of necessary expert witnesses. This is particularly true with regards to products liability and medical malpractice. Therefore, the evaluation of any case is largely influenced by economic considerations. For any firm, and for any case, there should be economic thresholds beyond which the case must measure in terms of potential recovery before risk of time and out-of-pocket expenses are feasible for acceptance of representation.

Thus, the subject of damages (discussed in more detail later in this presentation) is often the first consideration in evaluating the viability of a potential case. If the injury is not *severe enough* and *economic* damage is not *large enough*, the investigation need go no further for the case is not economically feasible. You have got to know when to accept a case and when to turn one down. This is not always easy to do when you want to help. Therefore, damage inquiries are first on the list and most important to your evaluation. Development of proper expert testimony, related to enhancing the economic value of the case, when facts supporting liability and damages lead you to accept representation will come later.

***(c) Personal History and History of the Event***

The factual development of your case usually starts with the history of the event causing injury. Something bad has happened. Someone has been injured or killed. Is it a case? This is what you want to find out. And, if it is a case, is it winnable? Is it a case that can be settled? The initial client interview will help you identify the various sources of information necessary for fact development.

You should take time to learn about your client. Development of a checklist and/or forms can be utilized for development of general information. It is important to find out everything that can be *recalled* by the client about the accident details. Therefore, your examination of the client during the initial interview must be sifting and thorough as it relates to minute details.

For example, in an automobile products liability case, you can anticipate the traditional defense of blaming *driver error* for the cause of the accident where the issue is instability and handling defects of the vehicle. In such a case, it will be important to develop early and reinforce often with the client detailed testimony concerning the occurrence of the event. It is not unusual to be focusing on time intervals related to seconds before, during and after the accident. Most drivers faced with sudden emergency circumstances do not remember details such as steering inputs and other driver behaviors during the accident. Often witnesses have difficulty describing what they saw, heard or felt just before and during an accident sequence.

Nevertheless, it is important to develop what is remembered and examine the accident sequence for purposes of your evaluation. You must keep in mind what information may be needed by your expert witnesses in the event the case goes beyond the initial interview. So, it can't be overemphasized that the details that can be obtained during the initial interview should be reduced to writing and some aspects of the events should be recorded in a way that are reviewable by the client later in anticipation of depositions.

**(d) *Is the Client Likeable?***

During the initial interview, you must evaluate some intangibles important to your assessment of the case. Acceptance of the representation may depend on such things. Ask yourself. Is the client likable? Do *you* like the client? These are important questions that usually can be answered during the initial interview. Think about this for a few minutes. You are going to be involved in a case that may last as long three years or more. You will be dealing with the client throughout that period. Depending on the client's personality and the circumstances of the case, your role may include counseling beyond the law as your client looks to you to help them face the hardships of severe personal injury.

For example, clients and families experiencing serious brain injury or spinal cord injury will be suffering serious consequences accompanying the permanent impairment caused by the defendant's conduct. Depending on the nature of the injury, you will be

engaging experts to develop life care plans as discussed later in this presentation. You will be dealing with the treating physicians. You will be talking to their pastors, Sunday school teachers, friends, brothers, sisters, mamas and daddies as you develop your client's story. The long and the short of it is that you really do need to like your client. If you don't like your client, it will be a long and miserable case for you to handle. If you don't find your client likable, how do you expect a jury to find them likable? A likeable plaintiff is like a cool drink of water on a hot day. You can win with them and the *right* story to tell. Take that case provided you are satisfied with the answer to the next question.

(e) ***Is the Client Believable?***

Have you ever had a client lie to you or just leave out some important details that you later wished you had known *before* the unwanted surprise? “*And in my dismay I said, all men are liars.*” (Psalms 116:11 (NIV)) Well, to be sure, it is biblical and has happened to us all!

Jesus said: “*If thou canst believe, all things are possible to him that believeth.*” (Mark 9:23) Winston Churchill said, “What the people really want to hear is the truth- it is the exciting thing- to speak the truth.” In fact as lawyers, we often tell the jury that the word *verdict* actually means “*to speak the truth*”. We will argue to the jury that they should *consider* all of the evidence and *weigh the credibility* of each of the witnesses and view the evidence in a manner *to make it all speak the truth*. Jerry Spence instructs that, “*To win, we must be believed. To be believed, we must be believable. To be believable, we must tell the truth, the truth about ourselves -- the whole truth.*”

Early on you are the truth finder. Thus, your inquiry into the facts involves an evaluation of the totality of the circumstances. You must measure what the client is telling you happened *against* any motivations for the client to be *less than candid*. Find out if he or she is *holding back* something that you *need to know and understand*. You must *test* what is being said against the sound logic and reason that consideration of other facts leads you to conclude.

For example, client and witness testimony about speed of travel must be compared to what the accident report contains concerning the existence and length of skid marks. At some point, the potential plaintiff needs to know that expert witnesses will appear in the case. They should understand that these experts can often calculate from physical evidence such things as speed. They should understand the opinions of the experts based on scientific principles may be *more believable* than their personal testimony about such matters. All testimony must be measured against all physical evidence and an effort made to make sense of it all. Ask yourself: “How does all of this speak the truth?”

In evaluating the client’s believability and credibility, it is important to understand that human memory is not perfect, nor do jurors expect perfect recall of certain events. So, there is something intuitive about sizing up the believability of your potential client. Over time and with experience, you develop an instinct (albeit imperfect) for discerning whether there is truth in what you are hearing. Just remember all testimony should be evaluated against the Biblical truth that “*all men are liars*”. As Jerry Spence puts it, “*I have never met a man who professes to be an expert on truth-telling, and if I ever meet a man who tells me he always tells the truth, I most likely will turn and run*”. The whole truth and nothing but the truth rarely presents itself in the courtroom or the law office. So, the question is: “Do you have a believable client?”

Famous psychologist William James put it like this: “*Our belief at the beginning of a doubtful undertaking is the one thing that insures the successful outcome of your venture.*”

**(f) Can you tell the true story?**

In a sense, good lawyering may be thought of as simply revealing the truth. Consider the similarity to the professional character actor who accepts a role in a play or movie. The good actor is able to reveal the true nature of the character described in the script. He or she gives life to the character and reveals the character to viewers. The Academy Award winner is the actor who successfully reveals the true character of the role. It is the credibility of the actor’s performance that engages the audience and pleases

the critic. Recently, Nicole Kidman was interviewed on the NBC Today Show and was questioned by Matt Lauer about her role in the movie “The Human Stain”. The movie had been completed and was being edited to final form when Kidman called the director and wanted to re-shoot a particular scene in the movie. The scene involved a role of sexual intimacy with actor Anthony Hopkins. Oddly it seemed, Nicole Kidman requested that the director re-shoot the scene with more nudity than originally filmed. In response to Matt Lauer’s questioning of her motivation for requesting more nudity, Nicole Kidman indicated it was necessary to remain true to the character for which she had been cast. In other words, the character that she played in the movie deserved a true-to-life performance to bring the character reality, credibility and believability. Such professionalism by Nicole Kidman explains why she is an Academy Award winner and is now mentioned as a possible nominee for an Oscar in *Human Stain*.

A lawyer has a similar task. Lawyers are charged with revealing truthfully the real-life circumstances to judge and jury on the stage of justice. In developing the case, the lawyer is the producer and director of how the story will be told. The lawyer must have credible testimony and physical evidence to tell the story like an Academy Award winner.

The first legal seminar I attended was the 1981 Alabama Trial Lawyers Mid-Winter conference. One of America’s very fine trial lawyers, Stanley Prieser, made an inspiring presentation. Among the many enlightening points made by Mr. Prieser was his instruction to develop your closing argument during the initial client interview. As a young lawyer, I had never heard such advice. He also recommended preparing jury charges after the initial interview. I thought closing arguments and jury charges were for the very end of trial preparation. I learned differently early, although I have not always applied the concept in case preparation.

Now, I believe it is important to understand that in revealing the truth and developing your case, or even deciding to accept the representation, you must be thinking in terms of whether there is a story here to tell. In giving consideration to your early evaluation, it is a good idea and necessary to begin developing the theme of your case.

As you learn about the event causing injury, look for a theme to arise from the facts. Build the facts around the theme and let the story advance the point of view providing persuasive argument to the jury, claims adjuster and/or your opposition.

There are some simple questions of structure that can be kept in mind during the initial interview to guide you in your evaluation as the facts unfold. Ask yourself: What does the client want? What result does the client expect? What do you expect? How do we tell the jury what we want? Are the facts present supportive of an identifiable theme for the case? What story is best to successfully reveal the truth and win? What legal causes of action are supported by the facts? What are the provable damages in this case?

If you learn how to do these things by telling the story to the jury, you will win your case.

(g) *Development of Facts Unrelated to the Accident Event to Formulate the Story*

During the initial interview, you will want to discover detailed information about the background of your potential client, to help develop knowledge of the intangibles mentioned above as well as provide yourself with material sufficient to understand the development of the story. Thus, it is important to develop the life experiences of your client. Obviously, depending upon the age of your client, this could be substantial as it may relate to the education level, military service history, and occupation which are important to development of the case thesis. Naturally, you are thinking about the legal causes of action and measuring the facts against the elements necessary to prove them.

For example, if you happen to be representing a retired general who was a former U.S. ambassador to a foreign country and assistant secretary of the Army at the Pentagon, it is easy to develop a flag-waving theme to almost any factual circumstance involved in the case. Other inquiries that are important to answering many of the intangible questions include civic duties performed, social activities engaged in, hobbies and even good habits and bad habits should be discovered. Why not ask about the bumper stickers on the family vehicles? Many lawyers ask about such things in voir dire. You better find out about your client and know your client in order to evaluate your case. There are some

sensitive issues which you may wish to include in your inquiry. What about race issues? I had a recent death case in a rural county in Alabama where a substantial part of the population is African-American. The death involved a Caucasian teenager. It was a products liability case with some difficult liability issues. I was not involved in any initial interview as this case was one that I inherited. During the course of my later contacts with the client, I visited the gravesite only to immediately identify a problem. There was etched or embossed on the gravestone of my decedent, a replica of the confederate flag. Photographs of the funeral services revealed a rebel flag on the decedent's pickup truck. Obviously, this is an important issue to know about and understand in terms of intangibles that would affect the value of the case. I heard of another case where the client being videotaped for A Day in the Life presentation was wearing an item of clothing displaying the rebel flag. Obviously, these things you would expect some folks to already know and understand would be adverse to case presentation. You can never take anything for granted in this business.

In any personal injury case, you must inquire about client use of prescriptive and/or illegal drugs. You must know and understand client's use of alcohol. You must discover any health issues of your potential client.

It is necessary to inquire about any criminal history of the client, including felonies and misdemeanors. This information should be developed regardless of the nature of the personal injury case. You will want to obtain the driving records from the Department of Public Safety for your client. Stress to your client the necessity of receiving a totally candid picture and understanding of any past problems.

In a products liability case which involves products that are owned and possessed by the potential client, you will want to secure possession and ownership of the product. You should identify the entire purchase history, the service to which the product has been put, and the maintenance history of the product. In other words, secure the physical evidence and learn all that you can about that evidence.

You will want to obtain any and all photographs and documents that may be relevant to the case. Your clients may have photographed the accident scene, the vehicle,

the condition of the client immediately following the accident or other relevant items. You should obtain all paper evidence that is in the possession of the client including owner's manuals, purchase invoices, maintenance invoices and such other documentation that may relate to the case. Perhaps, the injury involves a particular defect for which a manufacturer has issued a recall. You should inquire whether a recall letter has been received by the client. In all such cases, relevant government agencies, consumer groups and other scientific resources should be contacted.

Other documentation that is important would be any medical information that is in the possession of the client. You will need to obtain a medical release form from the client to obtain necessary treatment records for your evaluation of the case. This should be done during the initial interview so that there is no delay in obtaining this information. To the extent possible, you should learn what the medical insurance situation is with the client and what medical bills have been incurred to date at the time of the interview.

#### **B. Investigation**

The investigation of any significant personal injury case will be continued from the initial interview or before depending upon how the information is received into your law office. It is essential that all witnesses are contacted and that written statements be taken from the witnesses. All physical evidence must be gathered and properly collected and stored, maintaining the chain of the evidence to avoid any pitfalls in the use of the evidence at trial. Potential plaintiffs and plaintiffs' counsel have the advantage of learning about the potential for litigation of a claim long before the defendants or defense counsel. It is important to take advantage of this circumstance by statemitizing the witnesses early in the investigation prior to filing a lawsuit. A written statement is no guarantee that the memory of a witness will stay the same over time. However, utilization of a prior written statement is useful to refresh a witness's recollection, and to maintain the integrity of a witness's testimony during the entire course of discovery and into trial.

The investigation should include a gathering of any evidence of photographs which preserve the scene of an accident, physical attributes of any vehicle or machinery

involved in the accident, and photographs of the accident victim. The point is to preserve visually all information that can be and will be utilized in presenting the case to a jury. For instance, it is very important to have photographic evidence of horrible injuries that have occurred to the potential plaintiff. It is one thing to be able to tell a jury through oral testimony about an injury and quite another thing to be able to show a photograph of a fractured skull with brain matter oozing from the nose and ears of the victim. Usually, a court will allow graphic photographs to be presented to the jury when a useful purpose is demonstrated to the court. It is essential to at least have the photographs so that they can be offered as a means of persuading the jury.

A summary statement on investigation is to follow all leads in order that any relevant facts are uncovered and that the evidence be preserved physically and visually, if possible. All evidence should be photographed and preserved through photography in order to assure evidence is visually available at the time of trial.

### III. TARGETING POTENTIAL DAMAGES

#### A. Elements of Economic Loss

In targeting potential damages, we start with the general concept of compensation, which is the underlying principle for fixing damages. The compensatory concept is found in the following Alabama Pattern Jury Instructions:

**Compensatory or actual damages are allowed and should be awarded where the plaintiff reasonably satisfies the jury from the evidence that the plaintiff has been injured, or damaged, as a proximate result of an act of negligence on the part of the defendant, [or where the plaintiff reasonably satisfies the jury from the evidence that plaintiff has been (willfully or) wantonly injured by the defendant].**

**The purpose of awarding compensatory damages is to fairly and reasonably compensate the injured party for the loss, or injury, sustained. Compensatory damages are intended as money compensation to the party wronged, to compensate for injury and other damages which have been inflicted as a proximate result of the wrong.<sup>i</sup>**

In targeting potential damages for your case, it is essential then to identify all damages resulting as a natural flow from the injury caused by the defendant. This concept reflects the rule that a man is said to intend the natural and probable consequences of his act. Thus, in connecting the dots between the wrongful act of the defendant and the resulting injury, it is important to analyze whether the damages claimed, as a result of the injury, are the legal and natural consequences of the act. The law recognizes that certain results from a wrongful act may be too remote and contingent to be recoverable under the law. If damages are only imaginary or the possible result of a tortious act, they are too remote to be the basis of recovery. Additionally, in evaluating the facts concerning damages, one should determine whether there exists any intervening cause apart from the defendant's conduct, which have caused injury and damage to the plaintiff. An intervening independent cause may result in the damage which would absolve the defendant from liability. The wrongful conduct of the defendant, therefore,

must have been the proximate cause of the injury sustained in order to charge that defendant with the damages. Thus, the summary statement under Alabama law is that, in torts, all damages foreseeable as a result of the negligent act and connected therewith as an unbroken sequence are recoverable.<sup>ii</sup>

In determining whether an independent intervening cause exists in connection with the fact situation being evaluated, consider *Henderson v United States*, 328 F.2d 502 (5<sup>th</sup> Cir. 1964), where the court held, generally, that the tortfeasor is liable for the entire damage if subsequent injury is the natural result of the original injury, but if the subsequent injury is attributable to distinct intervening causes, the wrongdoer is liable only for the original injury. See, also, *Gilmore v Shell Oil Company*, 613 S.2d 1272 (Ala. 1993). One circumstance that does arise in evaluating personal injury cases is the situation where a plaintiff is injured in an accident and subsequent thereto receives medical treatment for which there is some question of medical malpractice. Does the medical malpractice, which aggravates the injury, constitute an intervening cause eliminating liability from the original defendant tortfeasor? Alabama courts have held that subsequent aggravation of an injury by a negligent physician subject to a malpractice action could not stand as an efficient intervening cause.<sup>iii</sup>

Alabama law also recognizes the concept of combining and concurring negligence of two tortfeasors in contributing to a plaintiff's accident and damages. This concept allows suit to proceed against an individual operator of a vehicle while, at the same time, maintaining a products liability action against a manufacturer of the vehicle under circumstances where the operator of the vehicle may have contributed to the accident and injury while, at the same time, the product failure also was responsible for damage to the plaintiff. See, *Bush v Alabama Power Company*, 457 S.2d 350 (Ala. 1984); and *Youngblood v Thornton*, 576 S.2d 229 (Ala. 1991).

Our firm recently handled a trial wherein the plaintiff suffered serious personal injury that resulted in the amputation of his leg in a personal watercraft accident. The plaintiff in the case sued both the operator of the personal watercraft for his reckless operation, and the manufacturer for a design defect in the personal watercraft, which

contributed to the accident. The case was successfully handled on the basis of a combined and concurring negligence. During the trial, the manufacturer of the product settled the case, while the plaintiff continued prosecution against the operator of the watercraft. The jury understood the concept that two tortfeasors' conduct could combine and concur to cause injury and awarded damages to the plaintiff with knowledge that the manufacturer had settled. In the appropriate fact situation, identifying multiple defendants can obviously enhance the potential value of the case.

Another concept that is important in targeting potential damages is a consideration of whether the damages are too remote or speculative to be considered the proximate cause of the defendant's wrongful conduct. In order to obtain a full and fair recovery on behalf of the plaintiff, it is necessary to prove to the fullest extent possible future damages and consequences in the future that are the result of the defendant's conduct. It is in this context that you will often be confronted with determining whether damages are too speculative or can you provide the necessary proof under the law to have such damages submitted to the fact finder. Oftentimes, there is a need to distinguish between direct damages and those that are considered consequential damages. Direct damages may be thought of as those which immediately follow an act such as expenses for medical treatment, lost wages and other expenses that immediately result to the plaintiff. Consequential damages may be thought of as more the long-term effect of an injury such as lost earning capacity, lost profits of a business where the personal efforts of the plaintiff contributes substantially to the business's profits, future medical expenses for surgeries or elements of a lifecare plan for the predicted needs of a plaintiff some twenty years or more beyond the date of injury, and other potential effects of the wrongdoer's conduct that go beyond what is immediately seen in the way of injury.<sup>iv</sup>

A related concept in determining the damages related to the potential defendant's conduct is the degree of certainty with which the amount of damages can be calculated. Sometimes, facts related to predicting future damages such as estimated lost profits or allowable future medical expenses are associated with consequences that are uncertain to develop. The fact that damages cannot be proven with absolute certainty is no hindrance

to a plaintiff's proof of such damages. It is sufficient for a plaintiff to present evidence which reasonably may be expected to be available under the circumstances. Approximate estimates of damage amounts are acceptable if the evidence furnishes data from which the estimates can be supported.<sup>v</sup> Thus, it is important for a plaintiff to make a substantial showing as to the extent and permanence of the injuries sustained, pain and suffering, so that the jury can observe firsthand the results of the accident. This will support a jury award for compensatory damages, including future prospects for the existence of those damages related to the permanence of the injury.<sup>vi</sup>

The amount allowable for future lost profits and/or future medical expenses sometimes is calculated for many years into the future. Under such circumstances, the amount of damage claimed is usually presented in present values but the adjustment for inflation can be taken into consideration by the economist computing the damages.

As indicated above, if profits are the product of a plaintiff's personal efforts and the plaintiff is able to prove that such profits are diminished because of his disability from the injury, then such losses are recoverable. When profits of a business are the product of the personal effort, skill or ability of the plaintiff, and if the plaintiff proves by competent evidence that the profits are diminished as a result of the plaintiff's inability to render such personal effort, such losses may be recovered.<sup>vii</sup>

Against the backdrop of these general considerations, a good starting point to keep your focus on the jury box is to consider what the court is going to tell the jury at the end of the case. In other words, as mentioned in an earlier segment, the jury charge should be considered in early determination of what damages you will be able to prove for the jury's consideration. Alabama Pattern Jury Instructions are helpful for this purpose:

## INTRODUCTION

**Ladies and gentlemen of the jury, the court will now instruct you on the law of damages. The burden is on the plaintiff to reasonably satisfy you from the evidence of the truthfulness of (his) (her) (its) claim. If after a**

consideration of all of the evidence in this case, you are not reasonably satisfied of the truthfulness of the plaintiff's claim, your verdict should be for the defendant(s). In this event, you would go no further. This would end your deliberations. On the other hand, if after a consideration of all of the evidence in the case you are reasonably satisfied of the truthfulness of the plaintiff's claim, your verdict should be for the plaintiff. In this event, it will be necessary for you to arrive at an amount to be awarded in the verdict from which I will read to you and describe later in my charge. I now give you the following rules of law to assist you in your deliberations in arriving at an amount in the event you find for the plaintiff. Plaintiff makes two statements of his claim. By these statements, he claims (compensatory) (punitive) damages.<sup>viii</sup>

#### **PERSONAL INJURY- -ELEMENTS**

The plaintiff claims compensation for the following items or elements of damages:

(Medical Expenses)  
(Loss of Earnings)  
(The impairment of the plaintiff's ability to earn)  
(Physical pain and suffering) (Mental anguish)  
(Permanent injuries and disabilities)  
(Disfigurement)  
(Aggravation of pre-existing condition)  
(Injury aggravated by disease or other cause)  
[Others as claimed]<sup>ix</sup>

#### **OTHER THAN PERSONAL INJURY- -ELEMENTS**

The plaintiff [also] claims compensation for the following items, or elements, of damages:

Loss of consortium and services of his wife  
Loss of services of minor child  
Medical expenses, incurred (or to be incurred, by this (wife, and/or minor child)  
Property damages  
Loss of use of motor vehicle  
Others as claimed<sup>x</sup>

The medical expenses incurred, as a result of the defendant's wrongful conduct, are generally easy to identify. All reasonable and necessary medical expenses incurred for treatment of the plaintiff's injuries are allowable under Alabama law. The credibility of the plaintiff and the obviousness of the degree and extent of injury sometimes dictate whether reasonableness and necessity of medical expenses is subject to much litigation. In the good case, frequently, you will encounter defendants who are not challenging the reasonableness and necessity of medical expenses. At any rate, the determination of the expenses can be easily proven through the treating physician or an appropriate hospital employee familiar with the reasonableness of the charges involved in extending the medical services to the plaintiff as well as the necessity for the plaintiff to have such treatments as a result of the wrongful conduct of the defendant. In fact, the law in Alabama requires a plaintiff to mitigate damages, including obtaining necessary medical treatment.<sup>xi</sup>

It should be noted that the Alabama Medical Liability Act of 1987 allows defendants, in a medical malpractice action, to show that the plaintiff's medical or hospital expenses have been, or will be, paid or reimbursed. The plaintiff may also introduce evidence showing the cost of any related insurance premiums for obtaining coverage from the insurer as an offset.<sup>xii</sup>

Future medical expenses of the permanently injured plaintiff are allowable under Alabama law.<sup>xiii</sup> Future medical expenses related to the catastrophically injured plaintiff always deserve substantial care and attention from plaintiff's counsel. Plaintiffs who sustain amputations, spinal cord injury and severe brain injury will have substantial future impairments as well as future medical expenses associated with providing necessary care in the future. In maximizing the damages related to such future medical care, it is important to coordinate the treating medical care providers with expert witnesses engaged to evaluate and access the needs of the catastrophically injured plaintiff. It is important to engage credible and competent experts engaged in the discipline of developing lifecare plans suited to the particular long-term needs of the plaintiff. This is a specialized discipline that is usually occupied by a professional nurse

or someone who has qualified themselves through special training for determination of particular needs of injured plaintiffs.

For example, in a recent personal injury case handled by our firm involving an amputation of the plaintiff's right leg below the knee, a lifecare planner was selected who, himself, had a below-the-knee amputation. As you can imagine, when the lifecare planner has personal experience with the same injury that your plaintiff does, they make an effective witness in front of a jury. We were able to ask the lifecare planner, during the trial, to come down from the witness stand and, in front of the jury box, demonstrate the appearance of a below-the-knee prosthesis as well as how the device worked. This approach gave particular credibility to the witness' testimony about the lifecare plan and its reasonableness. Obviously, you cannot always find such an expert witness. It would be particularly hard to find a paraplegic, quadriplegic or seriously brain-injured lifecare planner. The point is that you should obtain an expert witness with significant qualifications and communication skills to help the jury understand why the future medical expenses are necessary.

The lifecare planner will be responsible for reviewing the plaintiff's needs which will involve an interview with the plaintiff, if possible, and the plaintiff's family. The lifecare planner should personally visit with all major treating physicians and rehabilitation service providers in order to establish a sound foundation for the lifecare plan. The lifecare planner will establish through acceptable and authoritative resources the cost data for anticipated medical devices, medical services and anticipated drug therapies that may be needed by the plaintiff. No effort is made here to outline all of the items considered by a lifecare planner. The point is, you want to get a skilled person who can tell you what items of damages should be included in the lifecare plan.<sup>xiv</sup>

Generally, you will also need an expert economist to calculate the total future medical expenses related to funding the lifecare plan. This witness will be able to calculate the present value of such medical needs and take into consideration any appropriate inflation considerations.

Lost earnings should be proven by specific evidence related to the amount of time lost from work due to the injury and the rate of compensation that he would have been paid for the lost time. Such evidence is not particularly challenging to produce by plaintiff's counsel. However, when considering the compensation of commissioned employees or professionals, it is necessary to formulate the average earnings for a period of time from which reasonable estimates can be made for the lost earnings claimed during the time of disability of the plaintiff.<sup>xv</sup>

Another area, which requires particular attention of plaintiff's counsel seeking to enhance the recovery for a permanently injured plaintiff, is the area of lost earning capacity. In many cases involving permanently injured plaintiffs, there is a permanent disability which prevents the plaintiff from pursuing the same occupation or employment subsequent to the accident. In this event, damages may arise if the employment or occupation of the plaintiff is less because the injury to the plaintiff has rendered him incapable of performing the tasks of his former occupation or employment. In order to prove the diminished earning capacity of the plaintiff, it is necessary to engage a vocational expert who can address the disability and transferable skills of the plaintiff. The vocational expert will often coordinate with the treating physician or other medical and rehabilitation providers in ascertaining the permanent nature of the disability. Again, the background and communication skills of this expert are important to establishing the credibility of the damages claim. The difference between the former earning capacity and the post-accident earning capacity are the measure of damages, which should be calculated over the work life of the plaintiff. Usually, a separate expert economist is needed to perform the calculation of the present value of the damages claimed as a result of the lost earning capacity.<sup>xvi</sup>

The jury may receive "mortality tables" as a means of ascertaining the probable number of years that a person, of a given age and ordinary health, will live.<sup>xvii</sup> It is not uncommon for an economist to calculate the lost earning capacity damages by reference to authoritative "work-life" tables that are available through United States Department of Labor or other agencies of the Federal, and, perhaps, State government. A good

economist experienced in testifying in such cases will have all of the authoritative resources at his command to provide accurate and credible testimony regarding the calculations of these lost earnings. This will include all relevant future economic factors, such as prospective wage increases or promotions of the plaintiff, as well as the inflationary effects on any present value calculation.

### ***Property Damages***

Property damages are generally measured by determining the difference between the reasonable market value of the property immediately before it is damaged and the reasonable market value immediately after it is damaged. This is usually not an area that typically allows, or contributes, much to the overall value of the typical personal injury case. For this reason, no further discussion is included here.<sup>xviii</sup>

## **B. Pain, Suffering and Non-Economic Loss**

### ***Physical Pain and Suffering***

The plaintiff's physical pain and suffering, resulting from the injury caused by the wrongdoer's conduct, is a component of damages in almost every personal injury case. Under Alabama law, the plaintiff is allowed to claim both present and future pain and suffering that naturally flows from the injury caused by the defendant. The plaintiff may testify about his own pain and suffering and, as an exception to the hearsay rule, may produce testimony from witnesses who have observed his pain. There is no fixed amount for an award of pain and suffering damages. This is within the sound discretion of the jury to decide based upon the evidence presented. Consequently, it is important to focus on a good presentation of the extent and degree of pain and, where appropriate, to emphasize the long duration expected for the pain to persist in an effort to increase the damage awarded by the jury. It is also important to distinguish pain and suffering from mental anguish. Separate treatment of these two discretionary items of damage will likely enhance your case, especially under factual circumstances which are presented in a manner where the jury can easily distinguish that the two issues are separate matters for which the jury should award a worthy plaintiff damages.<sup>xix</sup> Obviously, it is incumbent upon any plaintiff claiming such damages to offer evidence to support his claim.

The presentation of evidence concerning the plaintiff's pain is not a simple issue if you expect the jury to give you a substantial award. You can rely on the plaintiff's testimony about his pain. This is rarely the most effective way to present such evidence. As indicated above, the plaintiff can show the existence of pain through other witnesses as an exception to the hearsay rule. The candidates for such testimony include husband, wife, children, parents, friends, pastors and medical providers. Treating physicians are often not your best source for providing evidence of the plaintiff's pain. The physician's role may be to help describe the types of pain encountered by the plaintiff and the treatments prescribed for pain management. However, many times the treating physician's testimony is less than colorful as it relates to pain. If you are relying on such a witness to provide testimony of the plaintiff's pain, it should be discussed with the doctor and carefully developed. With respect to medical providers, often the physical therapist is a better source for describing the pain experienced by the plaintiff and the pain management associated with the injury. The physical therapist can address both present pain and future pain reasonably to be expected from the plaintiff's condition in the future.

In order to develop the needed testimony concerning pain, it is necessary for plaintiff's counsel to acquaint himself, or herself, with specific knowledge. It is beyond the scope of this presentation to comprehensively treat this subject. However, a few things will be mentioned here for your consideration. It should be recognized that there are many types and causes of pain. Acute pain is related to short-term pain that is immediately associated with the accident event such as the pain immediately following a fracture of a bone, lacerations of the body, and other injuries to the body that produce immediate pain. There is also chronic pain which relates more to "long-term" pain. Plaintiff's counsel is likely to be dealing with both acute and chronic pain in presenting the plaintiff's case. The initial source for information concerning the pain is from the plaintiff and the nature and type of injury. Much can be learned in the initial interview and review of pertinent medical records, including physical therapy records.

It is important to understand how to communicate, or describe, pain. Pain management is a very important part of the care given to individuals and, usually, the medical records are replete with comments about the plaintiff's pain. Unfortunately, these notations are sometimes understated but much can be discerned from the drug therapy ordered and nurses' comments about the plaintiff's discomfort during a hospital stay. There are many ways in which pain can be discerned by a friend or family member to enhance the communication process about the pain experienced by the plaintiff.

For instance, you should explore with potential witnesses who will describe the plaintiff's pain, whether there were facial expressions such as grimacing, frowning, blinking, tightly closed eyes or wide-opened eyes. Another common indication of pain is the sounds that are made by the plaintiff. Did the plaintiff moan? Was there crying on the part of the plaintiff? How often did the witness hear the plaintiff groaning? Did the plaintiff call out in pain? Was there any screaming on the part of the plaintiff? Obviously, if these circumstances exist, the jury will be able to relate to the vivid testimony. The idea is to have the jury see, feel, and hear about the pain that your client has experienced. Human beings also exhibit pain through body motions. For instance, the plaintiff's counsel will want to develop any testimony concerning hitting, biting, rigid posture, increase in head movements, rocking, tugging legs, guarding parts of the body, change in walking and movements of the hands in rubbing or caressing parts of the body that need support due to the pain being experienced by the plaintiff. Also, focus attention on the activities of the plaintiff. Does the plaintiff require more rest periods? Is the plaintiff less involved in social activities? Has there been a sudden stop in the plaintiff's normal routines? Have there been any changes in sleep patterns as a result of pain? Oftentimes, pain persists at night and disrupts sleep.

A sifting and thorough inquiry during the initial interview is likely to discover many aspects of the plaintiff's pain. However, this should develop over time as the case continues through investigation, discovery and trial preparation.

Concerning future pain that the plaintiff is reasonably and likely to suffer, it's important to address the presence or absence of pain management therapy. Plaintiff's

counsel will want to inquire about the long-term affects of pain medication and the idea of addiction. The thoughts and feelings of the plaintiff himself should be evaluated as it relates to his participation in pain management. Many times plaintiffs will be enduring significant pain and fail to communicate appropriately to counsel.

Some key words are helpful in characterizing pain. So, in terms of finding out what kind of pain exists, you should consider such descriptive words as aching, stabbing, tender, tiring, numb, dull, crampy, throbbing, gnawing, burning, penetrating, miserable, radiating, deep, shooting, sharp, exhausting, nagging, unbearable, squeezing and pressure. Many pain managers also describe pain in terms of its intensity using a scale between zero and ten. Zero representing no pain while one through four represents mild-to-moderate pain; with five, six and seven classified as severe pain and between eight and ten representing very severe to the worst possible pain. You will also want to identify the location of the plaintiff's pain and present evidence of all of these things in order to enhance the damage figure that you argue should, in the jury's discretion, an amount for physical pain and suffering be awarded.

In an appropriate case, the same degree of effort should be made to enhance the presentation of mental anguish or emotional distress caused by the defendant's wrongful conduct. The obvious inquiry in many cases is whether there has been any treatments by psychologists or psychiatrists related to mental anguish or emotional distress derived from the accident. If such evidence is available, it obviously should be pursued. Sometimes the efforts on the part of the plaintiff to deal with emotional distress or mental anguish do not include seeking appropriate professional help. In this instance, it may be appropriate for counsel to engage a psychologist and/or psychiatrist to evaluate the mental or emotional problems that could be hidden or that may be exhibited but not recognized by the plaintiff. A psychological evaluation may open the door to an enhancement of such injury.

Other circumstances may speak for themselves, as in the catastrophically injured plaintiff who has suffered a paralyzing spinal cord injury, or a severe brain injury. The evidence related to the activities and conduct of such a plaintiff may speak volumes about

the mental anguish that can be proven. The change in the lifestyle of such a plaintiff regarding the absence of the ability to engage in activities of daily living will supply needed evidence for a jury to reasonably determine the mental anguish or emotional distress of the plaintiff. For example, the catastrophically brain injured plaintiff could present special circumstances. In addition to an injury that destroys motor skills, balance, short-term memory, brain processing speed and speech, there may exist severe emotional distress and mental anguish associated with the physical disability. This could include such things as delusions, paranoia, and behavioral issues that never existed before the accident. These examples are provable from observations made by family members and testimony about events that occur in and out of the home of the plaintiff. The issue, again, is to present believable and credible testimony concerning the anguish, or emotional distress, existing within the plaintiff.

It should generally be remembered that the plaintiff is entitled to be compensated for permanent injuries and disabilities which include disfigurement, aggravation of pre-existing conditions to the extent of permanency and injury aggravated by disease or other causes. In considering the permanency of injury, the jury is instructed as follows:

**It is for you to determine from the evidence the nature, extent and duration of the plaintiff's injuries. If you are reasonably satisfied from the evidence that the plaintiff has suffered permanent injuries (or disfigurement), and that such injuries proximately resulted from the wrongs complained of, then you should include in your verdict such sum as you determine to be reasonable compensation for such injuries.<sup>xx</sup>**

As indicated, a plaintiff may claim that a pre-existing condition has been aggravated or made worse by the accident. There is an Alabama Pattern Jury Instruction which deals directly with charging the jury on a plaintiff's claim for aggravation of injury.<sup>xxi</sup> Studying the jury charge will assist plaintiff's counsel in developing the evidence necessary to convince the jury that compensation is due the plaintiff because of such aggravation. Another aspect of plaintiff's compensatory damages relates to a recovery for a subsequent injury or disease that is developed or caused due to his

weakened condition resulting from the accident. This often overlooked aspect of recovery is stated in promulgation of the following Pattern Jury Instruction:

**The plaintiff in this case claims that, after the occurrence of his initial injury, he incurred, or suffered, an aggravation by way of increased discomfort, pain and disability [an entirely new injury] as a result or as an incident of a disease [his infirmed condition] which disease [new injury] was proximately caused by the initial injury made the basis of the plaintiff's complaint. If you are reasonably satisfied from the evidence of the truthfulness of the plaintiff's contention in this regard, you may award the plaintiff such damages as will reasonably compensate him for the whole of his damages with due regard for such aggravation [new or subsequent injury].<sup>xxii</sup>**

An example of such an injury is when a plaintiff in a weakened condition, caused by the defendant's wrongful conduct, later falls and breaks a leg. If the evidence of the fall and fracture can be causily related to the weakened condition caused by the defendant's wrongful conduct, such injury is compensable if proven by satisfactory evidence.

### **C. Punitive Damages, Generally, and Wrongful Death**

Punitive damages are allowed in certain cases within the discretion of the jury. However, recent U.S. Supreme Court rulings, and rulings by the Alabama Supreme Court, indicate a *de novo* appellate review as the appropriate standard for assuring that an award of punitive damages is not so excessive as to violate the due process clause of the United States Constitution. A comprehensive treatment of the development of punitive damage laws is not permitted by the time and space of this presentation. Accordingly, summary treatment of the subject is presented here.

A good starting place is to review the jury instruction on punitive damages as follows:

**Punitive or exemplary damages are allowed to the plaintiff and may be awarded in the sound discretion of the jury in cases where the plaintiff proves by clear and convincing evidence that the defendant consciously or**

**deliberately engaged in oppression, fraud, wantonness or malice with regard to the plaintiff.<sup>xxiii</sup>**

**The purpose of awarding punitive or exemplary damages is to allow money recovery to the plaintiff by way of punishment to the defendant and for the added purpose of protecting the public by deterring the defendant, and others, from doing such wrong in the future. The imposition of punitive damages is entirely discretionary with the jury. Should you award punitive damages in fixing the amount, you must take into consideration the character and degree of the wrong as shown by the evidence in the case, and the necessity of preventing similar wrongs.<sup>xxiv</sup>**

As a result of the tort reform taking place in Alabama during 1987, legislation was adopted regarding punitive damages and placed some legislative limitations on punitive damage awards in cases other than wrongful death:

**Alabama Code §6-11-21. Punitive Damages Not to Exceed Certain Limits.**

**(a) Except as provided in subsections (b), (d), and (j), in all civil actions where an entitlement to punitive damages shall have been established under applicable laws, no award of punitive damages shall exceed three times the compensatory damages of the party claiming punitive damages or five hundred thousand dollars (\$500,000), whichever is greater.**

**(b) Except as provided in subsections (d) and (j), in all civil actions where entitlement to punitive damages shall have been established under applicable law against a defendant who is a small business, no award of punitive damages shall exceed fifty thousand dollars (\$50,000) or 10 percent of the business' net worth, whichever is greater.**

**(c) "Small business" for purposes of this section, means a business having a net worth of two million dollars (\$2,000,000) or less at the time of the occurrence made the basis of the suit.**

**(d) Except as provided in subsection (j), in all Civil actions for physical injury wherein entitlement to punitive damages shall have been established under applicable laws, no award of punitive damages shall exceed three times the compensatory damages of the party claiming punitive damages or one million, five hundred thousand dollars (\$1,500,000) whichever is greater.**

**(e) Except as provided in § 6-11-27, no defendant shall be liable for any punitive damages unless the defendant has been expressly found by the tryor of fact to have engaged in conduct, as defined in § 6-11-20, warranting punitive damages, and such defendant shall be liable only for punitive damages commensurate with the defendant's own conduct.**

**(f) As to all the fixed sums of punitive damage limitations set out herein in subsections (a), (b) and (d), those sums shall be adjusted as of January 1, 2003, and as of January 1 at three-year intervals thereafter, at an annual rate in accordance with the Consumer Price Index rate.**

**(g) The jury may neither be instructed or informed as to the provisions of this section.**

**(h) This section shall not apply to class actions.**

**(i) Nothing herein shall be construed as creating a right to an award of punitive damages or to limit the duty of the court, or the appellate courts, to scrutinize all punitive damage awards, insure that all punitive damage awards comply with applicable procedural, evidentiary, and constitutional requirements and to order remittature where appropriate.**

**(j) This section shall not apply to actions for wrongful death or for intentional infliction of physical injury.**

**(k) "Physical injury" for purposes of this section, means actual injury to the body of the claimant proximately caused by the act complained of and does**

**not include physical symptoms of the mental anguish or emotional distress for which recovery is sought when such symptoms are caused by, rather than the cause of, the pain, distress, or other mental suffering.**

**(l) No portion of a punitive damage award shall be allocated to the state or any agency or department of the state.**

**(Acts 1987, No. 87-185 p.251, §2; Acts 1999, No. 99-358, p. 563, §1.)**

**Alabama Code §6-11-20. Generally-Definitions.**

**(a) Punitive damages may not be awarded in any civil action, except civil actions for wrongful death pursuant to § 6-5-391 and 6-5-410, other than in a tort action where it is proven by clear and convincing evidence that the defendant consciously or deliberately engaged in oppression, fraud, wantonness, or malice with regard to the plaintiff. Nothing contained in this article is to be construed as creating any claim for punitive damages which is not now present under the law of the state of Alabama.**

**(b) As used in this article, the following definitions shall apply:**

**(1) FRAUD. An intentional misrepresentation, deceit, or concealment of a material fact the concealing party had a duty to disclose, which was gross, oppressive, or malicious and committed with the intention on the part of the defendant of thereby depriving a person or entity of property or legal rights or otherwise causing injury.**

**(2) MALICE. The intentional doing of a wrongful act without just cause or excuse, either:**

**a. with an intent to injure the person or property of another person or entity, or**

**b. under such circumstances that the law will imply an evil intent.**

**(3) WANTONNESS. Conduct which is carried on with a reckless or conscious disregard of the rights or safety of others.**

**(4) CLEAR AND CONVINCING EVIDENCE. Evidence that, when weighed against evidence in opposition, will produce in the mind of the trier of fact a firm conviction as to each essential element of the claim and a high probability as to the correctness of the conclusion. Proof by clear and convincing evidence requires a level of proof greater than a preponderance of the evidence or the substantial weight of the evidence, but less than beyond a reasonable doubt.**

**(5) OPPRESSION. Subjecting a person to cruel and unjust hardship in conscious disregard of that person's rights.**

The United States Supreme Court in *BMW of North America, Inc. v Gore*, and in *Cooper Industries, Inc. v Leatherman Tool Group, Inc.*, weighed in on the punitive damage issue in a significant way finding respectively that the award of punitive damages could be so excessive as to violate the due process rights of the defendant under the United States Constitution and articulating a *de novo* review of punitive damage awards.<sup>xxv</sup>

In *Cooper v Leatherman*, the court stressed that whether an award is grossly excessive and, thus, violates due process, is a question of law and, therefore, subject to plenary review (unlike questions of fact, which cannot be reviewed *de novo* without violating the seventh amendment's re-examination clause). The court explained that appellate review is both necessary and compulsory in the federal courts to insure that punitive damages award is based on an "application of law rather than a decision-maker's caprice."<sup>xxvi</sup>

The Alabama Supreme Court adopted the *Leatherman* standard for review in its decision *Horton Homes, Inc. v Brooks*, 2001 W.L. 792730 (Ala. Jul. 13, 2001). The court announced that it will apply the *de novo* standard to review punitive damage awards.

The due process review by trial courts and the appellate courts in the state of Alabama include the following factors:

- (1) The degree of reprehensibility of the defendant's conduct should be considered. The following factors are relevant in determining the degree of reprehensibility:**
  - (a) The duration of this conduct;**
  - (b) The degree of the defendant's awareness of any hazard which his conduct has caused or is likely to cause;**
  - (c) The quality and quantity of rights of others that were disregarded by the defendant;**
  - (d) The defendant's efforts to remedy the wrong;**
  - (e) The economic impact (past and future) of the defendant's action on the plaintiff;**
  - (f) Evidence of disregard for the health and safety of others;**
  - (g) Any concealment or "cover-up" of that hazard; and**
  - (h) The existence and frequency of similar conduct.**
- (2) Punitive damages should bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually has occurred. If the actual or likely harm is slight, the damages should be relatively small. If grievous, the damages should be much greater.**
- (3) The punitive damages award should be compared to the civil and criminal sanctions that could be imposed for comparable misconduct.**

- (4) If the wrongful conduct was profitable to the defendant, the punitive damage should remove the profit and should be in excess of the profit, so that the defendant recognizes a loss.**
- (5) The economic impact on the defendant and the plaintiff should be considered.**
- (6) All the cost of litigation should be included, so as to encourage plaintiffs to bring wrongdoers to trial.**
- (7) If there have been other civil actions against the same defendant based on the same conduct, this should be taken into account in mitigation of the punitive damages award.**
- (8) The court should consider whether criminal sanctions have been imposed on the defendant for his conduct or have been imposed in comparable cases.<sup>xxvii</sup>**

In the recent case of *State Farm Mutual Automobile Insurance Company v Campbell*, 123 S.Ct. 1513 (2003), the United States Supreme Court expressly affirmed, applied, and elaborated on the *BMW v Gore* three-part test. The following excerpt from the article *Punitive Damages After Campbell, Smith, and Romo*, by Ned Miltenberg and Erwin Chemerinsky, is reprinted with permission of TRIAL (Aug. 2003), © The Association of Trial Lawyers of America:

**It reiterated the first factor -- the reprehensibility of a defendant's conduct -- remains the "most important indicium of the reasonableness of a punitive damages award."<sup>xxviii</sup> In doing so, the court expanded from three to five, the number of criteria that lower courts must consider in accessing reprehensibility -- that is, whether**

- The harm caused was physical as opposed to economic**
- The tortious conduct evinced an indifference to or a reckless disregard for the health or safety of others**
- The target of the conduct was financially vulnerable**

- The conduct involved repeated actions or was an isolated incident
- The harm resulted from intentional malice, trickery, or deceit, or mere accident.<sup>xxix</sup>

Notably, although “the existence of any one of these [five] factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and [although] the absence of all of them renders any award suspect”.<sup>xxx</sup> The converse also is true; the fact that a defendant’s conduct triggers all five factors certainly should tip the scales in favor of a finding that a defendant’s actions were thoroughly opprobrious. In deed, the court -- by reiterating the first two and most important factors in assessing reprehensibility are physical harm and health or safety, and by repeatedly stressing that *Campbell* did not involve personal injuries or threats to health or safety<sup>xxxi</sup>

-- strongly suggested that lower courts should make a more generous allowance for punitive damages in tort cases that do involve injuries, deaths, or threats to public safety and health.

Applying these five criteria to State Farm’s conduct, the court concluded that the Utah Supreme Court’s analysis of reprehensibility was irredeemably flawed as the lower court had condemned State Farm for “dissimilar” and “nationwide” activities, rather than for the company’s wrongful conduct toward the Campbells and any conduct toward others that “replicated” State Farm’s actions toward the Campbells.<sup>xxxii</sup>

The court reaffirmed the broad principle that evidence of a defendant’s “other acts” may be used both to assess the reprehensibility of the defendant’s conduct and to measure the appropriate size of a punitive damages award. Because it is reasonable to “presume” that “a plaintiff has been made whole for his injuries by compensatory damages,” the court has long recognized that the only sound rationale for allowing a private litigant to seek and collect punitive damages is that such damages are often the only means by which the public at large can vindicate its legitimate interest in punishing

wrongdoing and deterring future misconduct by the defendant or others...

What *Campbell* does do is clarify what “other acts” evidence is constitutionally relevant and permissible in determining whether punitive damages should be awarded and, if so, in what amount.

The touchstone of using “other acts” evidence is the *similarity* of those acts to the conduct that specifically harmed or threatened the plaintiff. On one hand, a court may not base a punitive damages award on the wholly unrelated, tangential,” or “hypothetical” claims of other parties, on a “defendant’s dissimilar acts,” or on a defendant’s status as “an unsavory individual or business.” On the other hand, however, due process does not require that “*other acts be identical*” to those that harmed the plaintiff “to have relevance in the calculation of punitive damages.”<sup>xxxiii</sup>

Applying these standards to the facts in *Campbell*, the court held that the “fundamental reason” the punitive damages awarded were unconstitutional was that the Utah courts “relied upon” grossly dissimilar conduct, going so far as to award punitive damages “to punish and deter conduct that bore *no relation* to the Campbell’s harm.” Thus, the Utah courts erred by punishing State Farm not only for its mistreatment of the Campbells or similarly situated insureds, but also for its mishandling of the insurance claims “that had *nothing to do with*” the kind of “third-party lawsuit” at issue in that case...<sup>xxxiv</sup>

In this light, whether a defendant’s similar misconduct happened to occur in one or more other states and whether such similar misconduct happened to be lawful or not in some or all of those states is of secondary importance. To be sure, the court cautioned that a “state cannot punish a defendant for conduct that may have been lawful where it occurred” and may not even “have a legitimate concern in imposing punitive damages to punish a defendant for *unlawful* acts committed outside of the state’s jurisdiction.”<sup>xxxv</sup> At the same time, though, the court emphasized that even

“lawful out-of-state conduct may be probative when it demonstrates the deliberateness and culpability of the defendant’s action in the state where it is tortious,” as long as “that conduct [has] a nexus to the specific harms suffered by the plaintiff.”<sup>xxxvi</sup>

The second *BMW* guidepost to be considered in assessing the constitutionality of a punitive damages award is the ratio between the compensatory and punitive damages. Although the court again “decline[d]...to impose a bright-line ratio which a punitive damages award cannot exceed,” it also observed that “in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.”<sup>xxxvii</sup> ...

*BMW*’s “third indicium of excessiveness” invites a comparison between “the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct” or between the award and “the civil penalties authorized for [actually] imposed in comparable cases.” Despite the fact that the *BMW* court declared that penalties can “take the form of legislatively authorized fines or judicially imposed punitive damages” -- and thus permitting lower courts to uphold punitive damages awards if they were close to awards previously rendered in similar cases -- many post-*BMW* litigants and courts have focused exclusively on “legislatively authorized” penalties rather than “judicially imposed” ones...

In this light, when plaintiffs try to satisfy *BMW*’s third guidepost, they should focus on how the defendant’s acts were substantially similar to misconduct that had triggered civil fines or criminal sanctions in the past, or could do so in the future. Alternatively, because judicially imposed punitive damages also provide “fair notice...of the severity of the penalty that a state may impose,” plaintiffs can invite comparisons to cases in the state in which “large,” “disproportionate” punitive damages have been awarded.<sup>xxxviii</sup>

Since *BMW*, the Alabama Supreme Court has addressed in a number of cases the analysis it will follow regarding the review of punitive damages. A recitation or synopsis of the relevant cases is beyond the scope of this presentation but relevant cases for study are referenced in the endnote for those interested in studying the court's expression of opinions concerning punitive damages following the lead of the United States Supreme Court.<sup>xxxix</sup>

### ***Wrongful Death in Alabama***

Alabama has two statutes generally setting forth the cause of action for wrongful death. Alabama Code § 6-5-410 (1975) generally sets forth that a personal representative may file suit for the “wrongful act, omission or negligence of any person, persons, or corporation, his or their servants or agents, whereby the death of his testator or intestate was caused, provided the testator or intestate could have commenced an action for such wrongful act, omission or negligence if it had not caused death.” Similarly, Alabama Code § 6-5-391 (1975) allows a wrongful death action for a minor child. Both of these statutes have been judicially determined for over one hundred and fifty years to permit only the recovery of punitive damages. Thus, where the wrongdoers’ conduct, whether it be negligence, wantonness, a products liability claim under AEMLD or other tort action which results in death, is controlled by Alabama’s wrongful death statute and only punitive damages are allowed.

The Alabama approach to wrongful death and punitive damages is a departure from the traditional purpose intended to be served by the imposition of punitive damages. The original purpose of forcing a defendant to pay punitive damages was to deter particularly aggravated conduct. Because of this purpose, the vast majority of jurisdictions require that the plaintiff prove that the defendant harbored a certain mental state as a prerequisite to the award of punitive damages. Courts have traditionally required proof of conduct that was malicious, reckless, oppressive, evil, wicked, wanton, or morally culpable. Even gross negligence will not, in the absence of one of the aforementioned states, provide a sufficient basis for the award of punitive damages in those jurisdictions.

Rather than adhering to the traditional requirement of a particular mental state, the rule in wrongful death cases in Alabama requires that the jury award punitive damages even if the defendant's conduct is only negligent.<sup>x1</sup>

Alabama has a survival statute – Alabama Code § 6-5-462 (1975). The Alabama Supreme Court has decided that this statute is applicable to a personal injury action even though the injury serves as a basis for a wrongful death claim. A personal injury action survives the death of the plaintiff. A personal representative may be substituted for the plaintiff, and the representative may amend the complaint to include a claim for wrongful death. This change in the law will allow the personal representative to seek both compensatory damages under the personal injury claim and punitive damages under the wrongful death claim. Punitive damages cannot, however, be recovered for the personal injury claim.<sup>xli</sup>

Accordingly, where no personal injury action was commenced prior to death, a plaintiff bringing a wrongful death action can only prove punitive damages. This, of course, eliminates any available recovery for pecuniary loss, loss of services, mental suffering of the decedent's beneficiaries, physical pain and suffering of the decedent, or mental suffering of the decedent. The punitive nature of the wrongful death recovery is set forth and described in the following pattern jury instruction:<sup>xlii</sup>

**In a suit brought for a wrongful act, omission, or negligence causing death the damages recoverable are punitive and not compensatory. Damages in this type of action are entirely punitive, imposed for the preservation of human life and as a deterrent to others to prevent similar wrongs. The amount of damages should be directly related to the amount of wrongdoing on the part of the defendant(s). In assessing damages you are not to consider the (pecuniary) (monetary) value of the life of the decedent, for damages in this type of action are not recoverable to compensate the family of the deceased from a (pecuniary) (monetary) standpoint on account of (his) (her) death, nor to compensate the plaintiff for any financial or pecuniary loss sustained by (him) (her) or the family of the deceased on account of (his) (her) death.**

**Your verdict should not be based on sympathy, prejudice, passion or bias, but should be directly related to the culpability of the defendant(s) and necessity for preventing similar wrongs in the future.<sup>xliii</sup>**

Even though under Alabama's Wrongful Death Act only punitive damages can be awarded, the Alabama Supreme Court will subject punitive damages awards in wrongful death cases to the *Gore*, *Hammond*, *Green Oil*, and *Johnston*, *Guidepost* for determining the excessiveness of a punitive damage award.<sup>xliiv</sup> The recent decision in *Mac Trucks, Inc. v Mary Witherspoon, as Administratrix of the Estate of Tommy Ray Witherspoon, Deceased*, 2003 WL 21246555 (Ala.), decided on May 30, 2003, seems to typify what the Alabama Supreme Court will do in reviewing the amount of a punitive damages award brought in connection with an AEMLD products liability claim under the wrongful death statute. This case was tried in Clarke County, Alabama, where the jury awarded punitive damages to the plaintiff in the amount of fifty million dollars. The trial court, thereafter, reduced the punitive damages award to twenty-five million dollars. On appeal, the Supreme Court affirmed the verdict but reduced the twenty-five million dollars to six million dollars finding as follows:

**Mac argues that the twenty-five million punitive damages award is excessive in light of the "guidepost" set forth in the *BMW of North America, Inc. v Gore*, 701 S.2d 507, 512-15 (Ala. 1997), and those factors recognized by this court in *Hammond v City of Gadsden*, 493 S.2d 1374 (Ala. 1986), and *Green Oil Company v Hornsby*, 539 S.2d 218 (Ala. 1989). We review the trial court's award of punitive damages *de novo*, with no presumption of correctness. *Acceptance Insurance Company v Brown*, 832 S.2d 1, 24 (Ala. 2001).**

**This court has not addressed a punitive damage award in a wrongful death action brought under the AEMLD of the magnitude of the twenty-five million damages award in this case. In *General Motors Corporation v Johnston*, 592 S.2d 1054, (Ala. 1992), the engine of a pickup truck stalled when the driver of the truck was attempting to drive through an intersection. A tractor-trailer truck struck the pickup truck, and the pickup-**

truck driver's seven-year-old grandson died as a result of the collision. The child's mother sued General Motors, alleging that the pickup truck was defective under AEMLD. After a trial, the jury returned a verdict in the mother's favor and awarded her fifteen million in punitive damages. On appeal, the court remitted the punitive damages award to seven point five million. *Id.* at 1064.

Our *de novo* review of the punitive damages award in this case, made in light of *Gore, Hammond, Green Oil, Johnston* and *Supra*, leads us to conclude that the trial court should have further reduced the jury's punitive damages award and that the punitive damages award should have amounted to no more than six million dollars. Therefore, we affirm the trial court's judgment on the condition that Mary file with this court, within twenty-one days of the date of this opinion, an acceptance of a remittance of the punitive-damages award in the amount of nineteen million dollars, which would result in a judgment for her of six million dollars in punitive damages. If Mary does not file the acceptance of the remittance as ordered herein, then the trial court's judgment will be reversed and the case remanded for a new trial.

As we can see from the results in *Witherspoon, supra*, the Alabama Supreme Court shows a complete willingness to, in summary fashion, announce that it has reviewed the guidepost applicable from *Gore, Hammond, Green Oil* in a *de novo* review without further explanation and reduce punitive damages in a wrongful death case.

#### **D. Venue and Damages**

Historically, it has been important for plaintiff's counsel to select the appropriate state court or federal court forum in which to file the plaintiff's complaint. Venue preference is usually determined from an assessment of whether a favorable jury can be selected and/or whether the judge in the prospective venue is viewed favorably from a plaintiff's viewpoint of the law. Venues and judges are sometimes generally labeled as liberal or conservative following popular political clichés. The usefulness of such labels or assessments of venues has been placed in substantial doubt in view of the

aforementioned *de novo* appellate review of punitive damage awards. For this reason, plaintiff's counsel may be wiser in taking into consideration the appellate venue of a particular trial court in determining where to file the lawsuit. For instance, a traditional assessment might be that plaintiff's counsel wanted to be in state court as opposed to federal court. One has to question under the current appellate court review whether the Alabama Supreme Court or the Eleventh U. S. Circuit Court of Appeals would be the better venue to review the case on appeal after a punitive damage verdict has been obtained.

While venue has been diminished in importance by the new rules of appellate review, it is still essential that the plaintiff and plaintiff's counsel be able to obtain a high punitive damage verdict as the starting point on appeal. A case brought in a venue which is unlikely to return a punitive damage verdict is not the place you want to file your lawsuit. An appellate review will not be necessary for an insubstantial verdict as it will never reach the appellate court. Accordingly, the traditional concepts of choosing venue still play a major role in determining where the lawsuit will be filed.

The summary statement for venue is to know and understand the demographics of the jury venire from which you will select a jury, and to know and understand the judge or judges of the selected venue to the greatest extent possible. Review jury verdicts and settlements obtained, if possible, for the prospective venue when you have a venue choice to make.

## **V. SETTLEMENTS: A “HOW-TO” FOR YOUR PREFERRED OUTCOME**

### **A. Structured Settlements**

A structured settlement is one that involves the payment of damages over time to an injured party. Although, at least part of the settlement must be promised for payment at some future point, the payments may be scheduled for any length of time, including the lifetime of the plaintiff. Payment schedules should be designed to meet the plaintiff's needs. A combination of installment payments and a lump sum payment made in the future can be formulated to address anticipated future circumstances. Several different payment streams can be combined to achieve a more flexible settlement structure. Meeting the needs of the plaintiff is the most important guideline in developing such a settlement.

It is important to secure a structured settlement that can be properly and securely funded. The most common and efficient way of funding a structured settlement arrangement is through a fixed annuity purchased from an insurance company. The security of the fixed annuity payment stream is dependent upon the financial strength of the insurance company. Thus, plaintiff's counsel should look for an insurance company that has a history of issuing the necessary types of fixed annuities and who are familiar with funding structured settlements. Search for a company that has an outstanding record of meeting the obligations to its policyholders. It is desirable to select a company that has high ratings from the major independent rating agencies combined with a quality investment portfolio, which supports the company's structured settlement obligations.

Plaintiff's counsel should consult with insurers, accountants, and tax lawyers experienced in the development of structured settlements to determine the advantages and disadvantages. In some cases, there are compelling reasons for plaintiffs to agree to a structured arrangement for their settlement dollars. The structured settlement can provide a way to limit the risk of mismanagement of settlement dollars. A large percentage of accident victims are likely to waste their settlements within a short time of receiving them and a majority are likely to spend all of the money within a few years. Thus, a structured arrangement assures the plaintiff long-term benefits which may be needed in his

particular case. There are also some tax advantages to utilizing fixed annuity payments from a qualified structured settlement that are tax-free to the annuitant under current IRS rules. A tax professional should be consulted to fully understand the tax considerations. The structured settlement provides a steady, low risk source of money and eliminates the expense and worry of managing large sums. Structured settlements can offer more money over time than lump sum settlements in many cases. Certain plaintiffs will have special needs, which involve special circumstances related to their particular injury that can be addressed in the arrangement. In certain situations where the defendant has low insurance policy limits, a structured settlement can often provide a more generous overall settlement.

Structured settlements are generally governed by the Internal Revenue Code (IRC). Under §104(a)(2) of the IRC, compensation received because of a personal physical injury or sickness is not included in gross income and is, therefore, exempt from income tax. This is true whether the money is received as a lump sum or as periodic payments. Nevertheless, by entering into a structured settlement using a fixed annuity, the claimant gains a tax advantage. Since the benefits to be paid under a fixed annuity are calculated in advance, plaintiffs know the amount of their disposable income and the feeling of security without regard to the tax consequences.

Plaintiff's counsel are wise to consider structured settlements when the circumstances confronting the plaintiff indicate temporary or permanent disability, or when plaintiffs have limited investment or financial management skills. Structured arrangements for guardianships of minors or persons with diminished mental capacity are desirable, and under circumstances where a wrongful death has left a surviving spouse and/or children in need of monthly or annual income. In cases of severe injury that result in a shortened life expectancy of the plaintiff, structured settlements may be formulated if future needs can be determined today.

Plaintiff's counsel, in determining whether to recommend a structured settlement to his client, should also take into consideration the ongoing medical expenses, the need for rehabilitation or permanent care facility expenses, college tuition, retirement income,

the down payment on a home or a mortgage payment. If the replacement of monthly income or annual or supplemental income is important to the client, a structured settlement may be desirable.

There are some advantages to be evaluated by a defendant wishing to resolve a personal injury dispute. The structured settlement can provide the means for creatively advancing a life care proposal to the plaintiff demonstrating a concern and desire to meet the plaintiff's needs. This could effectively reduce litigation costs and avoid risk at trial. There may be a savings of twenty percent (20%) to fifty percent (50%) off the cost of what an equivalent lump sum settlement might cost.

A qualified assignment by a defendant of its structured settlement obligations is controlled by the Periodic Payment of Judgment Act of 1984 (IRC 130), which authorizes a "qualified assignment" of a defendant's obligations to make future periodic payments to a third-party assignee under a Structured Settlement Agreement. Once executed, an assignment removes the defendant, and/or the defendant's insurer, from the obligation to make future periodic payments. This obligation is then assumed by the assignee, which is usually a holding company or affiliated company of the structured settlement annuity issuer. Tax accountants and structured settlement advisers should be consulted in all such transactions.

Once the qualified assignment is executed, it removes the defendant, or the defendant insurer, from the obligation to make future periodic payments. This transaction may give the plaintiff greater protection by replacing a casualty insurer, or self-insured defendant, with a large life insurance company which is more financially secure, which is then obligated to make the payments.

### ***Special Needs Trust***

Another alternative for settlement consideration is a special needs trust which may preserve and upgrade the care provided by government agencies. This may be achievable by preserving the plaintiff's eligibility for Medicaid and supplemental security income (S.S.I.) by placing the settlement proceeds into a trust. The properly designed trust then may pay for a home, home improvements, a van, medical equipment, a limited

amount of household goods, and consumables other than food, clothing or shelter. The trust may provide significant services such as entertainment, travel, dentistry and medical services beyond those provided by the government. A tax or trust lawyer should be consulted to help determine the need for and establish such a trust.

The Social Security Administration has a policy established that recognizes that such a trust will not be counted for S.S.I. eligibility: “If the claimant’s/beneficiary’s access to the trust principal is restricted (e.g., only the trustee or court, etc., can invade the principal) the principal does not count as a resource to the claimant. The authority for discretion by the trustee in the use of trust funds, including invasion of the principal for support and maintenance of the beneficiary, does not mean that the principal is available to the claimant/beneficiary and, as such, is not a resource.”<sup>xlv</sup>

Under a structured settlement, the claimant may become ineligible for government benefits. S.S.I. and Medicaid are welfare programs requiring eligibility based on need. In the appropriate case, the plaintiff’s eligibility for such programs should be considered in the overall settlement plan. Using the special interest trust may preserve two of the most important Medicaid and S.S.I. benefits.

A special needs trust fund should be considered for a plaintiff whose family is toward the lower end of the economic spectrum and whose settlement is moderate, either because of policy limits or liability problems. The special needs trust cannot pay for the necessities of life, such as food, clothing or shelter. It also cannot pay for significant resources for the plaintiff such as televisions, computers, entertainment centers, and furniture without causing the low resource limitations to be exceeded. Thus, the lifestyle of the applicant and the applicant’s family will not be dramatically improved by the trust.

### ***Is Plaintiff’s Lawyer Liable for Not Offering Structured Settlement?***

This was the question that headlined an article published by Lawyer’s Weekly USA. Lawyers Weekly reported a legal malpractice case which was brought on behalf of a former client who alleged that failing to propose a structured settlement, rather than accepting a lump sum payment, constituted legal malpractice. The case involved a minor who was born with cerebral palsy, cortical blindness and a host of other medical

problems allegedly because of negligent medical care. The medical malpractice case settled for \$2,500,000. During the malpractice case, the defendant insurance company offered a structured settlement to the child and it was alleged that the settlement was not relayed to the parents of the minor child at the time of the offer. This was in significant dispute in the case.

However, the minor child also alleged that, upon lump sum settlement of the case, plaintiff's counsel failed to present a structured settlement plan of his own for the benefit of the child. The legal malpractice case settled for \$1,600,000. Lawyers for the minor child indicated that the failure of the child's original lawyers to develop a structured settlement proposal resulted in their client losing tax benefits, guaranteed life-time care, and protection from poor financial moves that would compromise the minor's future care.

In the legal malpractice case, the minor complained that, when her net settlement proceeds were deposited in the court's registry, it caused the funds to be subject to taxes on the interest earned. The criticism was that plaintiff's counsel should have set up a "special needs trust" for the child. It was pointed out that any money in such a trust is not considered under Medicaid eligibility guidelines and, therefore, can be used to supplement government benefits. In this case, the child had needs requiring twenty-four-hour care per day and has no government assistance to help pay for it. She got taxed on all the money she gained, which could have been avoided with a structured settlement inclusive of a special needs trust plan.

The lessons to be learned from this reported case are (1) communicate all offers of settlement in writing and have your client execute acceptance or rejection of the settlement, and (2) you should strongly consider whether a structured settlement offer is appropriate depending upon the circumstances surrounding the plaintiff's needs and the sophistication of the plaintiff for managing the settlement proceeds. This is especially true since structures cannot only help with Medicaid issues and avoid dissipation of assets but have tax advantages as well.

Any type of settlement that provides compensation for personal physical injury is not taxable, but interest gained on a lump sum is. However, under a structured settlement, any interest earned on the money is tax-free.

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<sup>i</sup> See, Alabama Pattern Jury Instructions -- Civil (2d ed) 11.01; 11.02; and *Youngblood v Bailey*, 459 S.2d 855 (Ala. 1984).

<sup>ii</sup> See, generally, Jenelle Mims Marsh & Charles W. Gamble, Alabama Law of Damages (4<sup>th</sup> ed. 1999), §2:3.

<sup>iii</sup> See, *Hall v Booth*, 423 S.2d 184 (Ala. 1982); *Williams v Woodman*, 424 S.2d 611 (Ala. 1982).

<sup>iv</sup> See, Jenelle Mims Marsh & Charles W. Gamble, Alabama Law of Damages (4<sup>th</sup> ed. 1999), §2:5; *Birmingham Waterworks Co. v Martini*, 2 Ala.App.652, 56 So.830 (1911); *Bigby Fertilizer Co., v Scott*, 3 Ala.App. 333, 56 So.834 (1911); *Fitness Equipment Co. v Pennsylvania General Insurance Co.*, 493 S.2d 1337 (Ala. 1985); *Henderson v United States*, 328 F.2d 502 (5<sup>th</sup> Cir. 1964); *W.F. Vandiver and Co., v Waller*, 143 Ala. 411, 39 So.136 (1905); *Seaboard Airline Railway v. Latham*, 23 Ala.App. 490, 127 So.679 (1930); *Beloit Corp. v Harrell*, 339 S.2d 992 (Ala. 1976); *Seals Piano and Organ Co., v Bell*, 17 Ala. App. 331, 84 So.779 (1920); and *American Life Insurance Co. v Shell*, 265 Ala. 306, 90 S.2d 719, 59 A.L.R. 2d 917 (1956).

<sup>v</sup> See, Jenelle Mims Marsh & Charles W. Gamble, Alabama Law of Damages (4<sup>th</sup> ed. 1999), §2:7; *Hubbard Bros. Construction Co. v Brackner* 390 S.2d 648 (Ala.Civ.App. 1980); *Cook v Brown*, 428 S.2d 59 (Ala. Civ. App. 1982); *Bigby Fertilizer Co. v Scott*, 3 Ala. App. 333, 56 So. 834 (1911); *Briggs v. Woodfin*, 388 S.2d 1221 (Ala. Civ. App. 1980).

<sup>vi</sup> See, Jenelle Mims Marsh & Charles W. Gamble, Alabama Law of Damages (4<sup>th</sup> ed. 1999), §2:7; *Riewil, Inc. v S.L. Pappas and Co.*, 599 S.2d 1126 (1992) and *Werner v Henderson*, 600 S.2d 1005 (Ala. 1992).

<sup>vii</sup> See, Jenelle Mims Marsh & Charles W. Gamble, Alabama Law of Damages (4<sup>th</sup> ed. 1999), §2:8 anticipated profits.

<sup>viii</sup> See, Alabama Pattern Jury Instructions -- Civil (2d ed.) 11.00.

<sup>ix</sup> See, Alabama Pattern Jury Instructions -- Civil (2d ed) 11.04 (Discharge should be given to conform to the allegations and proof in each particular case and should be given in connection with appropriate charges as to specific elements of damages claimed).

<sup>x</sup> See, Alabama Pattern Jury Instructions -- Civil (2d ed.) 11.12 (The elements in this charge should be given to conform to the allegations and proof in each particular case, and this charge should be given in connection with the appropriate charges as to specific elements of damages claimed).

<sup>xi</sup> See, Alabama Pattern Jury Instructions -- Civil (2d ed.) 11.09: The measure of damages for medical expenses is all reasonable expenses necessarily incurred for doctors and medical bills, which the plaintiff has paid or become obligated to pay [and the amount of the reasonable expenses of medical care, treatment and services reasonably certain to be required in the future]. The reasonableness of, and the necessity for, such expenses are matters for your determination from the evidence. See, also, Alabama Pattern Jury Instructions -- Civil (2d ed.) 11.14: if you are reasonably satisfied from the evidence that the plaintiff paid, or became obligated to pay medical expenses for the care and treatment of his (wife) (minor child) as a proximate consequence of the negligence of the defendant(s), then the plaintiff would be entitled to recover the reasonable expense for such care and treatment, as shown by the evidence, as being reasonably necessary.

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- <sup>xii</sup> See, Alabama Code §6-5-543(a) (1975); Alabama Code §12-21-45(a)(1975); Alabama Code §§6-5-545(b), 12-21-45(b)(1975)
- <sup>xiii</sup> See, *Elba Wood Products, Inc. v Brackin*, 356 S.2d 119 (Ala. 1978); *Posey v McCray*, 594 S.2d 152 (Ala. Civ. App. 1992); Jenelle Mims Marsh & Charles W. Gamble, Alabama Law of Damages (4<sup>th</sup> ed. 1999), §36:3.
- <sup>xiv</sup> This expert was Jack East, 700 South Pine Street, Little Rock, Arkansas, 72205, who is founder of the American Amputee Association, Inc.
- <sup>xv</sup> See, *Carnival Cruise Lines, Inc. v Snoddy*, 457 S.2d 379 (Ala. 1984); *Orr v Hammond*, 460 S.2d 1322, 1323 (Ala. Civ. App. 1984); *City of Birmingham v Levens*, 241 Ala. 47, 200 So. 888 (1941); See, also, Alabama Pattern Jury Instructions- -Civil (2d ed.) 11.10
- <sup>xvi</sup> See, *Carnival Cruise Lines, Inc. v Snoddy*, 457 S.2d 379 (Ala. 1984); Alabama Pattern Jury Instructions -- Civil (2d ed.)11.11
- <sup>xvii</sup> See, Alabama Pattern Jury Instructions -- Civil (2d ed.) 11.19
- <sup>xviii</sup> See, Alabama Pattern Jury Instructions -- Civil (2d ed.) 11.23
- <sup>xix</sup> See, Alabama Pattern Jury Instructions -- Civil (2d ed.) 11.05 where jury is told that plaintiff is claiming damages for physical pain and mental anguish with separate distinction. Charge also covers allowance of such damages for those plaintiff is reasonably certain to suffer in the future.
- <sup>xx</sup> See, Alabama Pattern Jury Instructions -- Civil (2d ed.) 11.06
- <sup>xxi</sup> See, Alabama Pattern Jury Instructions -- Civil (2d ed.) 11.07
- <sup>xxii</sup> See, Alabama Pattern Jury Instructions -- Civil (2d ed.) 11.08
- <sup>xxiii</sup> See, Alabama Pattern Jury Instructions -- Civil (2d ed.) 11.01
- <sup>xxiv</sup> See, Alabama Pattern Jury Instructions -- Civil (2d ed.) 11.03
- <sup>xxv</sup> See, *BMW of North America, Inc. v Gore*, 517 U.S.559, 116 S.Ct.1589, 134 L.Ed.2d 809 (1996), on remand to Alabama Supreme Court, 701 S.2d 507, (1997); *Cooper Industries, Inc. v Leatherman Tool Group, Inc.*, 532 U.S.424, (2001).
- <sup>xxvi</sup> See, *Cooper*, 532 U.S.424, 436.
- <sup>xxvii</sup> See, Jenelle Mims Marsh & Charles W. Gamble, Alabama Law of Damages (4<sup>th</sup> ed. 1999), §4:3, amount of punitive damages; *Hammond v City of Gadsden*, 493 S.2d. 1374 (Ala. 1986); *Green Oil Company v Hornsby*, 539 S.2d. 218 (Ala. 1989); *BMW of North American, Inc. v Gore*, 517 U.S.559, on remand, 701 S.2d 507, (Ala. 1997)
- <sup>xxviii</sup> See, *Campbell*, 123 S.Ct.1513, 1521.
- <sup>xxix</sup> *Id.* *BMW* had mentioned the first, second, and fifth of these five factors. See, also, 517 U.S.559, 576.
- <sup>xxx</sup> See, *Campbell*, 123 S.Ct.1513, 1521.
- <sup>xxxi</sup> *Id.* See, also, *BMW*, 517 U.S.559, 576.
- <sup>xxxii</sup> See, *Campbell*, 123 S.Ct.1513, 1522-1523
- <sup>xxxiii</sup> 123 S.Ct.1513, 1521-1523.
- <sup>xxxiv</sup> *Id.*(emphasis added). See, id. at 1519.
- <sup>xxxv</sup> *Id.* at 1522 (emphasis added), citing *BMW*, 517 U.S.559, 572.
- <sup>xxxvi</sup> *Id.* indeed, as the court noted in *TXO*, a defendant’s “wrongdoing in other parts of the country” is a factor “typically considered in assessing punitive damages.” 509 U.S.443, 46 n.8. See, also, Brief Amicus Curiae filed in *Campbell* by the attorneys general of Minnesota and eleven other states, 2002 W.L.31409928 at \*3, \*4 (October 18, 2002) (“States routinely use out-of-state conduct in the determination of criminal sentences” and in many “regulatory matters.”).
- <sup>xxxvii</sup> *Id.* at 1524 (emphasis added).
- <sup>xxxviii</sup> *Id.* at 1520, quoting *BMW*, 517 U.S.559, 574.
- <sup>xxxix</sup> See, *Life Insurance Company of Georgia v Johnson* , 701 S.2d 524 (Ala. 1997); *Life Insurance Company of Georgia v Smith*, 719 S.2d 797 (Ala. 1998); *Strickland v Liberty National Life Insurance Company*, 710 S.2d 423 (Ala. 1998); *Chrysler Corporation v Schiffer*, 736 S.2d 538 (Ala. Feb. 26, 1999); *Goodyear Tire and Rubber Company v Vinson*, 749 S.2d. 393 (Ala. 1999); *Prudential Ballard Realty Company v Weatherly*, 2000 WL 1038167 (Ala. 7/28/00); *Flagstar Ent., Inc. v Howard*, 2000 WL 739671 (Ala. 6/9/00); *K-Mart Corp. v West*, 2000 WL 869568 (Ala. 6/9/00); *Williams v Williams*, 2000 WL 1451637 (Ala. Sept. 29, 2000); *Sparks v Cash American International, Inc.*, 2000 WL 1603662 (Ala.

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10/27/00); *Tyson Foods, Inc. v Stevens*, 2000 WL 1716977 (Ala. 11/17/00); *Liberty National Life Insurance Company v Sanders*, 2000 WL 1716962 (Ala. 11/17/00); and *Employees Benefit Association v Grissett*, 732 S.2d 968 (Ala. 1998).

<sup>xi</sup> See, Jenelle Mims Marsh & Charles W. Gamble, *Alabama Law of Damages* (4<sup>th</sup> ed. 1999), §37:2, the Alabama Wrongful Death Act, FN4.

<sup>xii</sup> See, Jenelle Mims Marsh & Charles W. Gamble, *Alabama Law of Damages* (4<sup>th</sup> ed. 1999), §37:3; *King v National Spa and Pool Institute*, 607 S.2d 1241, 1246 (Ala. 1992); *Malcolm v King*, 686 S.2d 231, 236 (Ala. 1996).

<sup>xiii</sup> See, Jenelle Mims Marsh & Charles W. Gamble, *Alabama Law of Damages* (4<sup>th</sup> ed. 199), §37:9.

<sup>xiii</sup> See, *Alabama Pattern Jury Instructions -- Civil* (2d ed.) 11.18

<sup>xiv</sup> See, *BMW of North American, Inc. v Gore*, 701 S.2d 507, 512-15 (Ala. 1997); *Hammond v City of Gadsden*, 493 S.2d 1374 (Ala. 1986); *Green Oil v Hornsby*, 539 S.2d 218 (Ala. 1989); and *General Motors Corporation v Johnston*, 592 S.2d 1054 (Ala. 1992).

<sup>xv</sup> See, Social Security Administration, Program Operation Manual System, § SI 01120.105