

Product Liability Law in the Farm Equipment Industry

- George Vernon
- Law Offices of George Vernon
- Monroe WI 53566

SUMMARY

- 1. Brief History of Product Liability Law
- 2. Case Study: Gonzales
 - a. Typical Claims Related to Product Design
 - b. How Legal Doctrines Affect Allocation of Liability
 - c. Elements of Damages
- 3. Case Study: Smith
 - a. Damages in a Catastrophic Injury Case
 - b. Interplay between Damages and Other Benefits
 - Insurance
 - Public Benefits: Medicare/Medicaid

Liability Law in the “Dark Ages”

- Liability Could be TORT-based:
 - I run over you with my horse and buggy
- Liability Could be CONTRACT-based:
 - I sell you a new car and the brakes fail
 - I sell you a gallon of milk and it kills your Aunt Tilly who comes over to your house for tea

Weird Doctrines Protected Defendants

- Plaintiff's Claim Would Fail if there was:
- Contributory Negligence
- Assumption of Risk
- No "Privity of Contract"
 - I sold that milk to YOU, not to your Aunt Tilly
- Each of these Doctrines Kept a Plaintiff's Case from Going to a Jury

1960s: The Product Liability “Revolution”

- A decades-long evolution of case law in most states recognizing that the Liability-Limiting Doctrines were too Restrictive and.....well, **WEIRD**
- Influence of the DARK SCIENCE: **ECONOMICS**

The cost of injuries in an industrialized society should be spread across all users of a product, not borne by the individual.

The most “efficient” way to spread the costs is to impose them on the manufacturer of the product.

“Strict Liability”

[so-called Liability without Fault]

- A manufacturer is liable for injury caused by an “unreasonably dangerous product”
 - A products whose “risks” exceed its benefits
 - A product that is dangerous beyond the ordinary contemplation of an experienced user.

Is Liability “*Without Fault*” Gibberish?

- **YES!**
- In most cases there is no meaningful difference between a manufacturer’s “failure to exercise reasonable care” (the Negligence Standard) and a manufacturer’s failure to design a “reasonably safe product” (the Strict Liability Standard)
- But the WEIRD Defenses Melted Away in State Legislatures and Courts

Initial Results of the “Revolution”

- Almost Every Case is for the Jury to Decide
- Almost Anyone Can be a Design Expert
- The Merit of the Design is Always Judged in the Context of a Grievously Injured Plaintiff
 - Is that Fair? Is it Unfair?
 - A design that would seem burdensome and impractical to most users may look appealing to inexperienced jurors

The Counter-Revolution

1993 - Present

- Composition of State Judiciary
- Public Opinion: the McDonald's Coffee Case
- Key Decisions by U.S. Supreme Court
 - Finding a Constitutional Cap on Punitive Damages – *BMW v. Gore*
 - Scrutinizing Expert Testimony - *Daubert v. Merrill Dow*
- Pro-Business State “Tort Reform”
 - Statutes of Repose
 - Caps on “Non-economic” Damages

Farm Equipment

- Can a Company be Confident it has Designed a “Reasonably Safe” Product?
 - No
- The Merit of the Design is Always Judged in the Context of a Grievously Injured Plaintiff
- Unlike Other Industries (e.g. Drugs; Cars) in the Farm Equipment Industry there are no “safe havens”
 - Compliance with Industry Standards
 - Compliance with “State of the Art”
 - Compliance with the Designs of Competitors
 - ISO Certification

Case Study #1

LIABILITY & ALLOCATION OF FAULT

GONZALES

48-Year Old Farm Worker Injured by a Tractor-Powered Rotary Mower while Mulching Tree Prunings in an Orchard

2001 Accident

- Gonzales: Born & Raised in Mexico-48 Y.O.
- 3rd grade education
- Came to U.S. in 1990
- Has worked as a fruit picker and farm laborer at Johnson Farm since 1991
- Earns \$5.15 per hour
- 4 children ages 21-26; three live in U.S.
- Wife lived with him in U.S. for only 14 months: 8/00 to 10/01

Massey Ferguson Tractor Manufactured in 1989



How the Tractor “Power Takeoff” Works

- The PTO is turned ON and OFF by a lever next to the Tractor seat.
- When the PTO lever is turned “ON” the PTO shaft at rear of Tractor spins at speeds up to 540 r.p.m.



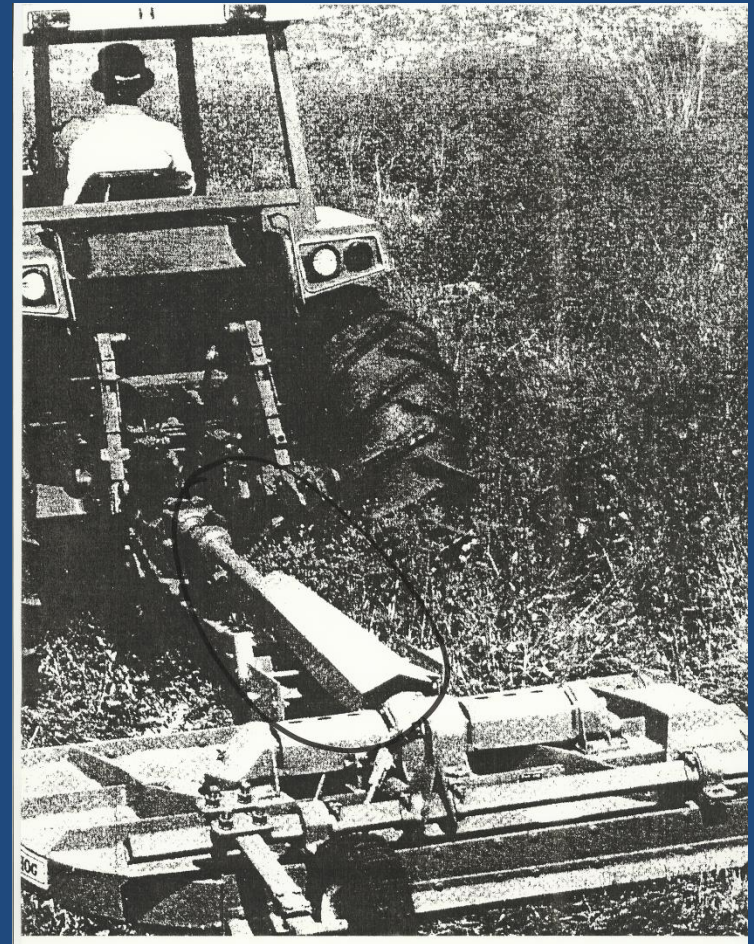
Purpose of the Tractor PTO

- The PTO provides Power to many kinds of farm implements pulled behind tractors: mowers, hay balers, sprayers, manure spreaders, etc.
- If the Tractor engine is on, the PTO can be “ON” and spinning even if the tractor is in NEUTRAL and STANDING STILL

The Bush Hog Mower

Drive Shaft Attaches to the PTO

- Mower has a 10 ½ foot cutting width, and takes its power from the tractor PTO
- Capable of cutting limbs 3" in diameter
- Manufactured in 1978
- PTO spins; Driveshaft spins; Blades spin



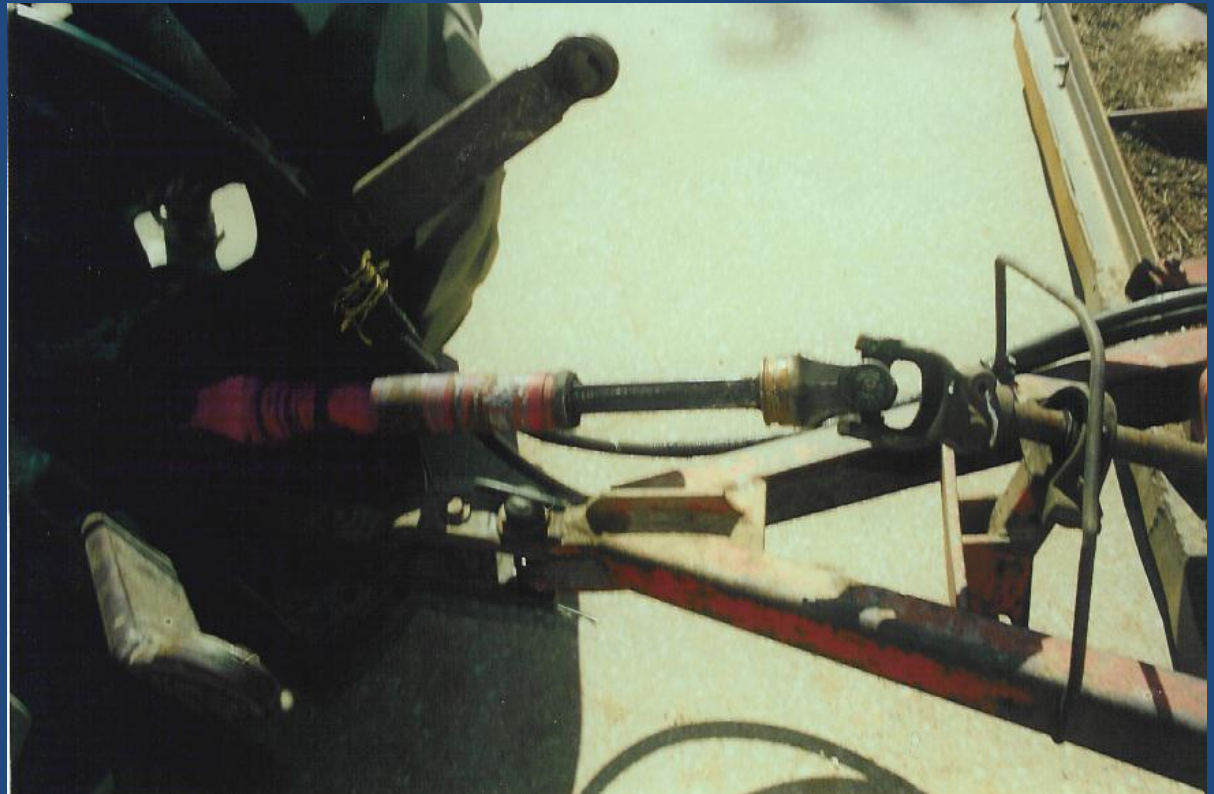
When it was New the Driveline was Fully Covered by a 2-part Shield

- The FRONT shield was a yellow plastic tube that attaches to the driveline.
- The rear shield was a u-shaped steel hood that attaches ABOVE the driveline



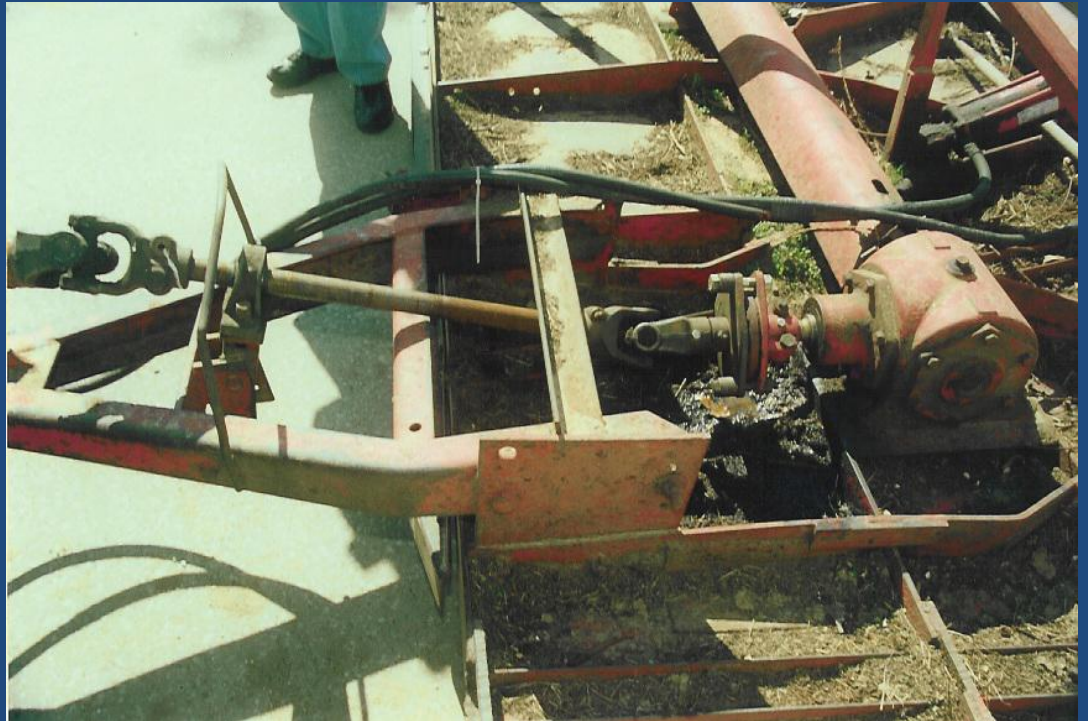
At the Time of the Accident in 2001

- All Front Shielding Removed



At the Time of the Accident n 2001

- All Rear Shielding Removed



In February Gonzalez was mulching tree prunings at Johnson Peach Orchard

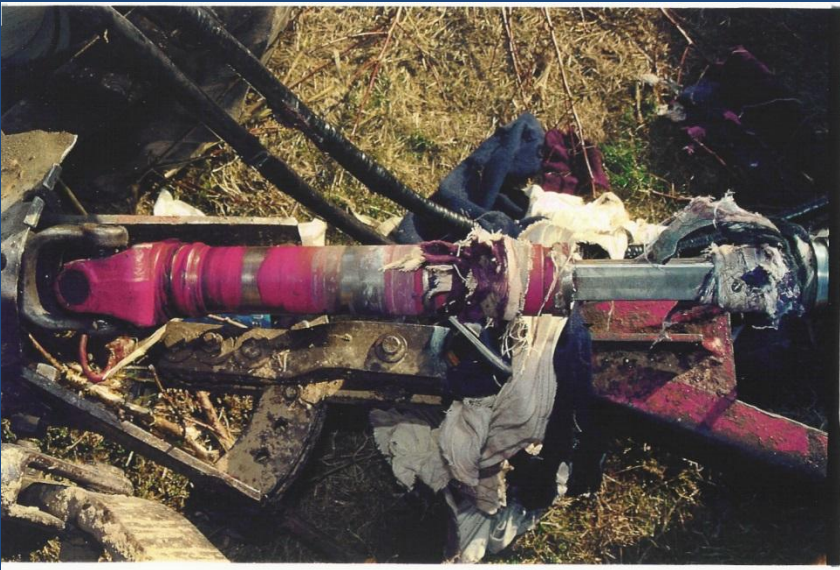


How the Accident Happened

- Mr. Gonzales got off the tractor to pull out branches trapped between the tractor and mower.
- He left the tractor engine running
- PTO and mower were under power and spinning.
- While pulling backwards on limb, his foot slipped and he fell forward onto the drive shaft.



Police photos taken at the scene
show clothing wrapped on Front part of
Driveline



Claims Against Massey Ferguson



Plaintiff Says:

- Massey Ferguson FAILED TO INSTALL a SAFETY SWITCH in the tractor seat to SHUT OFF the tractor engine when the operator leaves the seat with the PTO lever “ON”
- Shutting off the engine STOPS the PTO

Plaintiff Says:

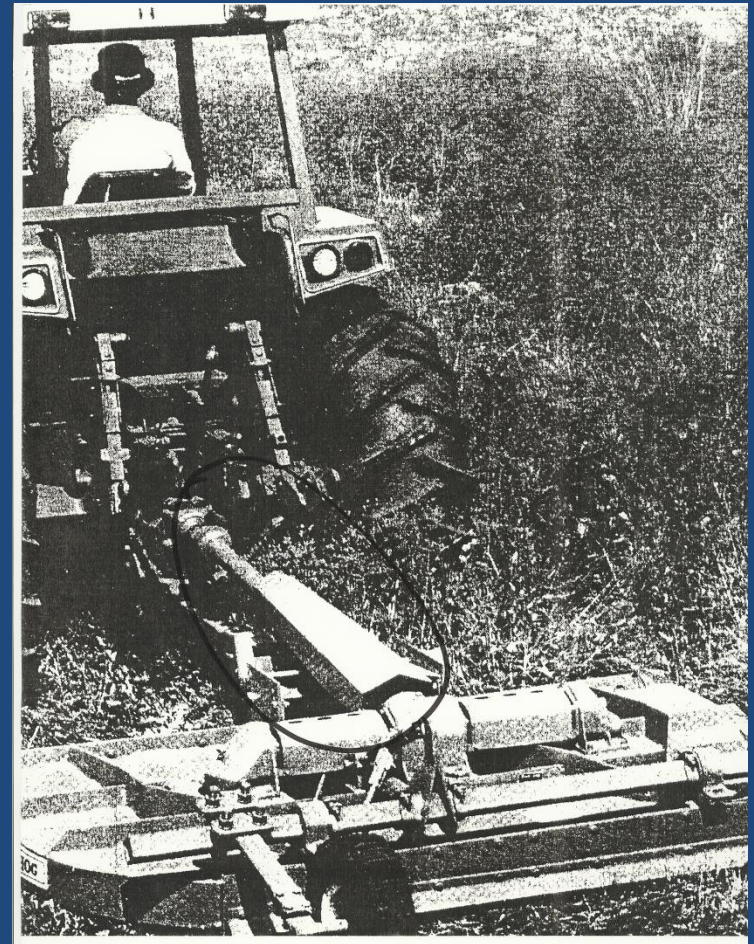
- Consumer Lawn and Garden Tractors have been designed for many years with an engine “kill” switch in the seat.
- On these tractors, when you leave the seat, the engine automatically SHUTS OFF
- This could easily be done on Farm Tractors

Massey Ferguson Says:

- Consumer Mower Industry Standards REQUIRE shut-off switches. Agriculture Industry Standards DID NOT IN 1989 AND DO NOT TODAY.
- FARMERS often work on Tractors 8-10 hours a day. Sometimes they need to STAND UP.

Claims Against Bush Hog

- 1. WARNINGS
- 2. GUARDING

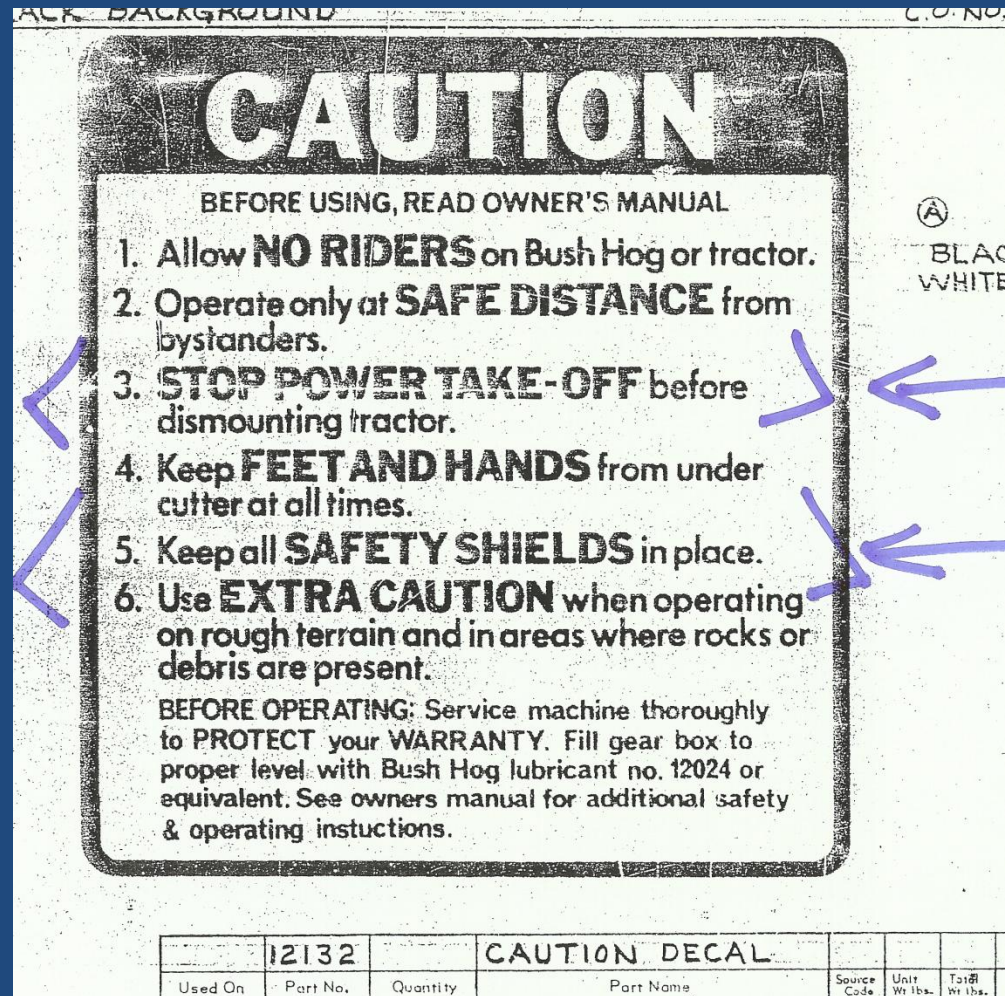


Warnings Claim

- Bush Hog failed to warn that the PTO Driveline shield was missing.
- Bush Hog's warnings about the hazard of the drive line were inadequate

Bush Hog Says:

- In 1978 Bush Hog installed a “CAUTION” decal on the top of the mower.
 - This decal WAS NOT on the mower at the time of the Accident.



1985 WARNINGS

Beginning in 1985 the companies that supply Bush Hog with drivelines and shielding began installing a pictorial decal on the driveline shield itself:



Bush Hog Says:

- Both Mr. Gonzales and Farmer Johnson admit they knew the driveline was dangerous, and the danger is OBVIOUS.
 - For this reason NO WARNING was needed, and No Warning Decal would have been EFFECTIVE.
- It is Farmer Johnson's job to maintain the shielding. Farmer Johnson reads English.

Bush Hog Claims Against Farmer Johnson

- Bush Hog Says:
- ALL farmers know about the need to shield PTO Drivelines. It's a basic farm safety rule.
- Farmer Johnson had MANY shielded drivelines on his farm.

Farmer Johnson

- Farmer Johnson grew up on his father's peach orchard. He is 68 years old and has operated the farm all his life.
- First rode on a tractor when 4 years old
- His father bought the Bush Hog mower in the early 1980s.

Bush Hog Says:

- Farmers learn about PTO safety from the time they are kids.
- Farmer Johnson had shields or remnants of shields on every PTO implement on his farm except the Bush Hog mower
- Farmer Johnson KNEW the Bush Hog driveline was dangerous and should have been shielded
- **MORE OR DIFFERENT DECALS WOULD NOT HAVE MATTERED.**

GUARDING CLAIMS

- PLAINTIFF SAYS:
- Industry studies have shown that MANY farmers remove PTO shields. The shields are not durable enough to last. Bush Hog KNOWS that shields need to be replaced.
- Thousands of Farmers Have Been injured and killed in unshielded PTO drivelines, including two other people in the last 10 years on Bush Hog mowers.

Plaintiff Says:

- Bush Hog has done NOTHING to try to improve shield design.
- Bush Hog has never even TRIED to design an “interlocked” shield that would prevent the driveline from operating if the shield was missing.

Bush Hog Says:

- Bush Hog does NOT design drivelines and shields. It buys them from other companies. Bush Hog buys the best shields available. No one makes “interlocked” shields for farm implement drivelines.
- Shields need to be maintained. If broken, they need to be replaced. This mower was 22 years old, poorly maintained, and worn out.

Mr. Gonzales' conduct

- Mr. Gonzales had been using the mower for 10 years.
- Farmer Johnson says:
 - I trained Mr. Gonzales to ALWAYS shut off the PTO before getting off the tractor.
 - Before the accident I had caught Mr. Gonzales several times off the tractor taking a break with the PTO and mower running. I made him shut the tractor off and sternly warned him.

Mr. Gonzales says:

- I knew the driveline could hurt me but I was much more worried about the blades.
- Nobody ever told me to shut off the PTO before getting off the tractor.
- It's true I had been using the mower for 10 years, but this is the first time that branches ever bunched up like they did on the day of the accident. I was trying to stand clear, but I slipped.

INJURIES

- Left arm Ripped off at the Shoulder.
- Parts of the arm were strewn about. His left hand was severed above the wrist and lying on the ground near the mower.
- Large wound in his left chest.
- Broken right upper arm and broken ribs.
- Permanent Disfigurement.

SURGERIES/THERAPY

- FOUR surgeries in the first 3 weeks to clean out the wounds, do skin grafts and control infection.
- Rod inserted in right upper arm to repair fracture.
- Ten months of Physical Therapy to regain motion in shoulders and to adapt to artificial arm, which he received in September 2001.

Parties' Damages Positions: Wages/Earnings Capacity

- Mr. Gonzales was unable to work for 11 months following the accident. Has returned to work for Farmer Johnson at same pay rate.
- Plaintiff's Expert asserts that Mr. Gonzales will likely NOT be able to continue in this type of physical work to age 65.
- Defendants say Farmer Johnson promises he will always have a job, so there is no future wage loss

Personal Assistance/Care

- Mr. Gonzales lives in an apartment with his son (age 23), daughter (age 20) and another married couple.
- Cooking, shopping and household chores are shared; Mr. Gonzales does his share. He can dress and care for himself.

Parties' Damages Positions:

Personal Assistance/Care

- Plaintiff: Mr. Gonzales will potentially need between 4 hours and 12 hours a day of assistance and care with personal and household tasks for the rest of his life. The cost of such care is \$20 per hour. Projected lifetime cost: \$1.0 million to \$3.0 million.
- Defendants: He's been doing fine without this for 3 years. At most 8 hours per week of care for life, which will cost \$250,000 if he stays in the US and 1/10th of that amount if he returns to Mexico.

Parties' Damages Positions: Pain, Suffering and Disfigurement

- Mr. Gonzales has suffered a grievous injury; he is physically and mentally scarred for life.
- He is depressed about his appearance and limitations. No longer plays soccer, swims or goes to the ocean beaches. Ongoing phantom pain.
- Plaintiff: \$5.0 for Lifetime PS&D
- Defendants: \$250,000 for Lifetime PS&D

Summary of Plaintiff's Damages Claims

- \$195,000 Past medical costs.
- \$11,000 Past lost wages.
- \$130,000 Regular replacement (every 3-4 years) of his artificial arm.
- \$40,000 Future medical care, counseling and therapy.
- \$1-3 million Personal care and household support.
- \$5 million Pain, Suffering & Disfigurement.
- **\$6.376 to 8.376 Million TOTAL**

Defendants Response RE Damages

1. Uncontested Damages

- If liability is found, Defendants agree plaintiff has proved \$316,000 for Temporary Past Wage Loss, Future Prosthesis Replacements, Medications, Counseling and Therapy

- 2. Contested Damages

- \$0 to \$262,000 in Personal Care (1/10th of that if you believe he will return to Mexico)
- \$250,000 in Pain, Suffering and Disfigurement
- ***\$566,000 to \$828,000 TOTAL***

Damages Claims Comparison

- Plaintiff: \$6.376 Million to 8.376 Million
- Defendants: \$566,000 to \$828,000

Apportionment of Damages: Quirks of Applicable State Law

- Comparative Negligence/Third Party Liability/Joint & Several Liability
- Farmer/Employer Protected by Workers Comp
- Gonzales fault is irrelevant because Employer “provided the equipment”
- If Farmer is not a Party his negligence is irrelevant unless jury finds it 100% responsible
- Any defendant more than 60% at fault can be responsible to pay 100% of verdict

Lessons of Gonzales Case

- Farmer, arguably the person most at fault, is essentially immune from liability. This would be true in most states due to Workers Comp
- Jury cannot attribute % of fault to Gonzales because he used Employer's equipment. This would not be true in most states.
- Jury wishing to give Gonzales "something" has only Bush Hog and Massey Ferguson to fault. Cannot do a % reduction for fault of Farmer or Gonzales

Lessons of Gonzales Case

- Some Damages Categories Lend Themselves to Wildly Different Estimates: e.g. Home Care for an Amputee; Pain and Suffering; Future Wage Loss
 - Can He Return to Work at Same Earnings?
 - If Not, How Long Would He Have Worked?
- Impact of Mr. Gonzales' ethnicity
 - Real & Economic-His Earnings History Very Low
 - Subjective & Perceived-Is there Prejudice?

Case Study #2

DAMAGES ANALYSIS in

CATASTROPHIC INJURY CASE - SMITH

- 18-year old Entangled in Driveline of a Post Hole Digger while “Assisting” an Experienced farmer who instructed Smith to stand next to the operating post hole digger and “guide” the auger into the ground while Farmer Operated the Tractor
- Farmer Had only \$350,000 in Insurance

Post Hole Digger



Replacement Bolt Shield Destroyed/Not Replaced



Injury Summary

- Closed fractures of C7/T1 vertebrae
- Paraplegic
- Left arm amputated at shoulder
- Paralyzed from the nipples down
- Incontinent of bowel and bladder
- Limited to one-hand sedentary activities

Incurred Damages

- Hospitalizations \$650,000
- Doctors/Surgeons \$ 95,000 (some donated)
- Myo-electric arm \$127,000
- Meds/Misc \$ 80,000

Future Damages

- Lifetime Loss/Reduction of Earnings
- Lifetime of Managed Care
- Rehabilitative and Adaptive Equipment and Suppliers
- Therapy and Possible Surgeries
- Pain and Suffering

Vocational Assessment

Prepared by Voc Rehab Expert

- Administer Tests to Assess physical, emotional and intellectual capacities and interests
- Survey Employment Opportunities in Relevant Geographic Area
- Survey Retraining Opportunities
- Survey Available Wage Levels
- Analyze and Compare Pre-Injury v. Post-Injury Earnings Capacity

Life Care Plan-Annualized

Prepared By Certified Rehab Counselor

• Personal Mobility	\$7,650
• Housing	\$1,500
• Prosthesis	\$40,000
• Personal Aids	\$2,000
• Med/Rehab/Therapy	\$134,000
• Transportation (net)	\$5,000
• Medications	\$8,000
• <u>TOTAL PER YEAR</u> :	\$198,150

Additional One-Time Costs

- College \$50,000
- Possible Future Surgeries \$250,000

Presenting the Medical Evidence with Maximum Impact

- First Responders
- ER Personnel
- Surgeon(s)
- Treating Rehab Specialists-PT, OT, to describe and visually document Rehab regimen
- Family members
- Psychologists/Counselors/Social Workers
- Pain Management Team

Calculus of Future Damages

Prepared by Economist

- Starting Point:
 - Annual Cost Estimate as Provided by Rehab Counselor
 - Estimated Life Span as Provided by Rehab Counselor
 - Earnings Impairment as Provided by Voc Rehab
- Apply Estimated Inflation Factor to Current cost of Meds & Services
- Calculate Total Lifetime Costs of Meds/Svces
- Calculate Future Lifetime Net Earnings Loss
- Reduce to Present Value

Defense Economist

- There Can Be a Vast Difference in Calculation of Future Costs:
- What items of Care are necessary and reasonable?
- What Assumptions about inflation rate; anticipated life span, etc.

Pain & Suffering Damages Presented/Argued by Plaintiff's Lawyer

- Impact of Rehab Witnesses
- Presence of Plaintiff in Courtroom
- “Day-in-the-Life Video
- Pre-Accident Photos/Video
- Post-Accident Photos/Video
- Teachers/Friends/Coaches
- Social Media

Settlement Strategies

- Arbitration
 - Alternative to Court
 - Seldom Used in Products Cases (Never in My Personal Experience)
 - Plaintiffs, Unlike Businesses, Are Not Seeking Alternatives to Jury Trial
- Mediation
 - Means to Reach Voluntary Agreement Facilitated by a Mediator
 - Now used in Virtually Every Case
 - High Success Rate
- Structured Settlements-
 - Create a Future Stream of Tax-Free Income
 - Low Interest Rates Diminish Their Utility

Medicare Set-Aside [“MSA”]

- Rationale: Where a lawsuit results in a recovery for past or future medical expenses paid or to be paid by Medicare, parties must “consider Medicare’s interests.” 42 C.F.R. 411.46-47.

Traditional Application: Workers Comp. Where claimant is eligible for reimbursement from “a liability insurance policy or self-insured plan,” Medicare is entitled to have its past and potential future expenditures reimbursed as part of the Settlement. The vehicle for reimbursement is the funding of a “Medicare Set-aside Arrangement” [“MSA”]

Do MSAs apply to Liability Cases?

- Center for Medicare Services (“CMS”) has asserted that they do.
- Little in the way of Guidance for what is extremely complex application
- Potentially draconian sanctions for non-compliance including double damages against insurers and (gasp!) attorneys who fail to take Medicare’s interests into account at time of settlement.

QUESTIONS/DISCUSSION

Application to Smith Case

- Assume a settlement of \$10.0 million
 - \$3.0 million goes to Plaintiff's Attorney
- Nearly \$1.0 million has been incurred for past medical paid for by Medicare and for which Medicare has a lien
- May the parties decide to allocate the remaining \$6.0 million to “loss of earnings” and “pain and suffering”?

Arkansas Dept of HHS v. Ahlborn 547 U.S. 268 (2006).

- Settlement of auto accident case for \$550,000. Incurred medical was \$215,000. Arkansas statute authorized state to recover entire \$215,000 from settlement proceeds. The parties stipulated that \$550,000 was 1/6 of total value of the case. HELD: Arkansas can only recover 1/6 of its \$215,000 medical lien.

WOS v. E.M.A.

568 U.S. – (March 20, 2013)

- Parents of child with 100 % disabling birth defects filed malpractice claim against O.B. doctor and hospital. Plaintiff's expert estimated lifetime care costs at \$42 million (mostly for 18-hr/day skilled nursing care. Case settled for insurance limits of \$2.8 million.
- Court overturned North Carolina statute creating an automatic right for state Medicare program to recover 1/3 of the total settlement proceeds.

MSA Problems-Delay

- CMS Backlog for “Approving” MSA Submissions. Parties and Court Can’t Wait
- May the Court (Rather than CMS) Approve a CMS Agreed to by all parties in order to implement settlement?
- Parties Cannot Agree on Terms of a CMS. Should Court resolve the Disputed Terms?
- Parties Cannot Agree whether a CMS is needed at all. Should Court decide?

MSA Problems - Enforcement

- CMS says only a specific jury verdict is conclusive as to what % of damages is for “medical care”
- 95% of cases settle without a verdict
- Stipulated allocations are suspect because all parties to settlement have an incentive to maximize pay-out to the settling plaintiff at the expense of the government.
- Will CMS seek to enforce double damages on attorneys and insurers? STAY TUNED.

For Help with Your MSA Problem

- EXCELLENT RESOURCE:
medicaresetasideblog.com