Practice Tips: Closing Argument in *Stone v. MiTek Industries*

by Bruce R. Pfaff

The case in which this argument was given was tried in eight days in Pekin, IL (Tazewell Co.) in August 2011. The jury awarded $13.54 million, the amount requested in the argument. Tazewell County had never had a personal injury verdict more than $960,000 until *Stone v. Mitek*. Plaintiff worked for Central Illinois Truss in a factory making roof trusses. His leg was trapped by the gantry of the roof truss press machine manufactured by MiTek Industries The plaintiff was found zero percent at fault on the claim he assumed the risk of his injuries. Post-verdict, the employer, which was found twenty-nine percent at fault, waived its worker's compensation lien on past and future benefits owed and was dismissed from the case. Defendant's post-trial motion was denied in January 2012. The case is on appeal to the Illinois Third District Appellate Court.

CLOSING ARGUMENT

Mr. Pfaff: Thank you, your Honor Good morning, ladies and gentlemen. If it please the court, Mr. Ports, counsel, the Stones.

Ladies and gentlemen, I am humbled to be part of this experience that you have been kind enough to share with us. We have a great system. You have been kind enough to volunteer to be part of this legal process. As I'm sure you know, there are magic words that people can say that might get them off a jury like this and none of you said them. All of you stood up and did your civic duty and volunteered to participate to decide this very important case. On behalf of all the parties, for that, we thank you.

We believe in the jury system and that's part of why we're here. Many countries don't even allow juries to decide lawsuits or lawsuits like this. It's a shame. We wanted to be beneficiaries of your life experiences. From *voir dire*, when we met with you a week ago Monday, I did a little totaling, and your life experiences total more than 550 years. And together, as a jury, you will bring that collective judgment and wisdom to decide the fact issues in this case.

No matter how wonderful a judge is, or any one person is, that one person cannot compare to the wisdom and judgment that you will bring to this case. So we thank you for your dedication to this cause.

The role of the court is vital and it's really important at this stage of the case. You have heard all of the evidence. I will remind you of a few facts here today. But, mostly, I will be talking to you about the law. The lawyers don't decide the law applicable to the case. Judge Gilfillan does. He takes that from the common law of the state of Illinois and from statutes. And it's Judge Gilfillan's responsibility, which he has done during the course of this trial, yesterday afternoon, and this morning as well, to determine exactly what the jury instructions are that you should follow in deciding this case.

Each of you promised on the first day that you would follow the court's instructions even if you didn't agree with them. It's vital that you made that promise. If you hadn't promised that, you wouldn't be sitting in those thirteen seats. If you hadn't made that promise, or if you break that promise, think of what a charade what we've done the last two-and-a-half years that this lawsuit has been pending is about.

We have had countless pretrial hearings and rulings from judges that shape how this case goes and that shape the issues. Judge Gilfillan has probably made more than a hundred rulings in the last two weeks on issues in this case. And if you didn't follow the court's rulings, and if you didn't follow the instructions, it would be a waste of time, and it would be just a charade, and the lawyers might as well pack up their briefcases and go home. We don't want to do that. We thank you kindly for your promise. I know you will keep it and I ask you to do so.

You're only to rely on the evidence that you heard in this courtroom to decide the case. The law applies to it. You will take the facts as you know them, as you will decide them. The evidence consists of what people said from that stand, photographs, videos, documents, and things received in evidence. Period. Whatever happens outside that door is not evidence. You should not rely on that.

All of the evidence that you've heard has been carefully screened by his Honor. It's been discussed by the lawyers. The lawyers have all reviewed it. And his Honor has decided what is admissible, and we follow those rulings. That's our oath as a lawyer. We follow the judge's rulings. But don't look at anything outside of this courtroom because, again, that would make this whole process a charade. What happened here is what counts.

On Dustin's behalf, a week ago Monday, I asked each of you if we

proved our case would you be able to award him all the damages that we have proven. Each of you said yes. And that's why you're here. If you had not said yes, if you said you had some preconceived ideas or limits in mind that you could not go above in awarding damages, I promise you that you would not be sitting in those thirteen seats. I remind you of that promise and ask you to keep it. It's a promise that's important to each of us. It upholds the sanctity of a jury process in this courtroom.

In my opening statement, I told you it took five seconds for an unsafe design of a machine to take my client's leg. I told you that the pivot arms had to be rigidly, firmly affixed to the safety bar for this system to work. I said that the purpose of the guard is to provide necessary point of operation guarding so that workers don't get their bodies crushed. Point of operation guarding must be reliable to be effective. It must work under conditions exactly like Dustin encountered. That's why you have that kind of guard.

Workers get themselves in the point of operation through no fault of their own. He had to be within the tables to do the hammering that he was doing. Workers have to be there. You have to have a guard to protect them.

I also told you in opening statement that we would present well-qualified expert testimony to establish that this design sold by MiTek, the one they delivered and installed to CIT in the Spring of 2005, was unreasonably dangerous. And I told you we would prove that that unreasonably dangerous condition was a proximate cause or legal cause of his injuries. Those were all things I told you a week ago Tuesday morning, and I respectfully suggest that we proved every one of those things by a mile. By a mile.

We kept our promises, Mr. Ports and I, in presenting the evidence I said we would present. We presented it. There was nothing to take away from that evidence. Under the law, if we prove our case by the legal standard, we are entitled to a judgment for our client. That legal standard is called a preponderance of the evidence.

Older lawyers use words that don't make a lot of sense to everyday people. And preponderance of the evidence is one of those phrases. Unfortunately, it's still in our jury instructions and that's what we have. His Honor will give that you instruction.

Preponderance of the evidence simply means more probably true than not. If it were a basketball game, you win by a preponderance if it's 100 to 99. It's percentages. If we proved any fact that we need to prove by 50.1 percent, we have proven that fact. Simple standard, it's the standard of proof applicable to this case.

What must we prove? Among other things Mr. Ports, will you call up the screen. This is something Dr. Mroszczyk discussed with you. We must prove that the design was unreasonably dangerous or that the product was unreasonably dangerous. Again, a lawyer term of art.

The court defines it. The risk of danger inherent in the design

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outweighs the benefits of the design when the product is put to a reasonably foreseeable use.

Who did you hear talk about the risks of the design and the benefits of the design? Dr. Mroszczyk. By the way, the only expert in this courtroom who was a certified safety professional. The only expert in this courtroom who was a certified forensic engineer. The only expert in this courtroom who has won the Safety Professional of the Year twice within the last sixteen years from the American Society of Safety Engineering.

He said there are really no benefits to this design. This safety bar with the collars and screws, as you all know, is a redesign of the earlier design. He said there's no benefit to having the C-collars and screws because the natural environment for use of this is going to ruin it. As we heard yesterday, I think from Dr. Meyer, they designed in a hazard by using the screws because it vibrates. We all saw the video a number of times. That's an environment where that product is going to vibrate up and down the aisles. The screws are going to vibrate loose. It gets to the end, it hits the bars, it's going to add more vibration. The screws are going to come out. That creates a risk. That creates a significant risk, as Dr. Mroszczyk explained to you, that the bar is going to fail. Those screws get loose, that bar fails, that kid gets hurt. That's what happened here.

Risks inherent in the design, you bet. There are risks that safety bar, which is essential point of operation guarding, is going to fail when it's needed most and it did.

Benefits of the design on the other side of the balance, we didn't hear much about that. We didn't hear much about that. They had a welded bar design. Mr. McNeelege said Mr. LePoire, you know, had told him to redesign it. Mr. LePoire didn't know why it got redesigned. Who knows. Don't know. They didn't say why he redesigned it. We didn't get an answer to that question. But they did redesign it.

Well, we heard the story that, oh, you know, the safety bars were getting damaged, the customers with welded bars they were getting damaged, we wanted to make it easier for them to replace it.

Now, if you're a thinking person you don't have to believe that what Mr. McNeelege said, but let's give the devil his due though. Let's go with him for a minute on that story. Wouldn't you think, as an engineer responsible for the design as this, that if your safety device that's protecting people from getting their bodies crushed are getting damaged, that they might not work, and that you should be thinking why are they getting damaged, what can we do to make sure our machine is safe? Mr. McNeelege did he do that? Not a chance. Not a chance. He didn't think about why those bars were getting damaged.

Well, what's the evidence? Every time you use these there's vibration and when they get to the end they're going to hit those safety bars, the vertical bars. Well, I don't know if there were a lot of welded bars getting damaged. I don't think you know either. We didn't hear from MiTek if any customers actually had to have them replaced, if they paid for replacement of bars. When I asked Mr. LePoire that question, oh, it didn't happen very often. That was the only answer. No quantification. We don't know.

So I would submit to you that there's no benefit to the redesign. The one proffered by Mr. McNeelege was probably untrue. There's no evidence to back up that these bars were getting damaged. But if there were, that guy had a whole other reason to think about making this machine safe. He didn't do it.

Let's talk about our issues on liability. We make three claims in this case about why this design is unreasonably dangerous. I touched on a couple this morning. But, number one, it did not have effective point of operation guarding. Couldn't be more plain. They had a point of operation guard, it stank. It didn't work. It foreseeably didn't work. It's in an environment of use where it's going to vibrate and get hit and it's going to loosen and it wasn't effective. One should have known that.

The emergency stop bar oh, by the way, there's an "or" after each of these claims. We're not required to prove all of them. You just have to be persuaded for one of those three reasons that this machine was unreasonably dangerous. I think it's a landslide on all three. It's up to you. You need to make a conclusion as to any one of these if this was unreasonably dangerous, the product's unreasonably dangerous, and you go on to the next step of your analysis.

Number two, the emergency stop bar was prone to fail because its components were attached by C-collars and screws. That's the specific design that was awful.

Number three, the emergency stop bar had only one interlocked limit switch instead of two. Again, giving the devil his due. You have this assume you have this lousy safety bar that's got screws in it that loosen. What happens if you put a second limit switch? If you put one on the top cord side so that where Dustin's pushing, where he's pushing that bar through 45 degrees, what happens? The switch goes pop. The machine stops. That young man's got his leg and his life.

Even the defense expert, Mr. Brickman, even he had nothing to say about this. Mr. Brickman, by the way I would suggest, avoided even talking about the safety bar or point of operation design. He had a whole pitterpat going for about three pages when he was asked about why this was such a safe machine. I think you might recall the answer, I was having a hard time focusing, but he never said it was a good safety bar design. He talked about the Deadman's switch. He talked about

the gray. He talked about the beacon. He talked about the buzzer. He talked about everything that's all lower level on the safety hierarchy.

He knows about the safety hierarchy. He knows about it. Mr. Hansen brought out on direct exam he wrote a paper about it in 1986. He knows about the safety hierarchy. Did he discuss it with you? No. Why it's not convenient in this case to remind you about the safety hierarchy. You design out the hazard. That's the top good for an engineer of a product. If you can't do that, and only if you can't do that, you effectively guard against the hazard. That's what you've got to do.

This case stops at that second level. They didn't effectively guard against the hazard. Only if you can't effectively guard against the hazard, then you worry about warnings and instructions and those other things that are fallible. They're all fallible. Warnings are given every day in life. No one is a hundred percent. No operator of a machine is a hundred percent. No worker is a hundred percent. That's why you have point of operation guarding required by OSHA. It's got to work.

Did Mr. Brickman say this wasn't feasible? Did he say it wasn't a good idea? Did he say that having this would have caused some problem? No. How much did this machine cost? Two hundred and fifteen grand. Fifty bucks, put one on each side, a hundred bucks. We have proven our case of unreasonably dangerous.

The court's instructions that you will get make it crystal clear that MiTek's ignorance, and I use that word very carefully, is no excuse and no defense. Everyone who testified here, and I'm not being critical of Mr. Struttman. Mr. Struttman was just the installer. He didn't design this machine. He wasn't supposed to test this machine. He was supposed to do the hard work of getting it put in, getting it set up, and getting it working. And he was only following the instructions he was given. So I exclude Mr. Struttman from that. He was a nice man. No one at MiTek told Mr. Struttman, though, make sure the people know to keep those screws tight, make sure the people know that if those screws loosen, you might have a 19-year-old get his leg chopped off, make sure they know that. MiTek didn't tell Mr. Struttman that. Mr. Struttman didn't tell Mr. Erwin that. Mr. Struttman didn't know that. I don't blame him. I blame the people upstairs. I blame the people upstairs. Fish stinks from the head and that's where we start with here.

Mr. LePoire has been in the truss business since 1982. He was the president of a corporation from '82 to '94 that built truss machines. He got bought out and came to MiTek. He's now a senior vice president, praise the Lord. He supervises 600 people. Holy cow. He sure didn't supervise Mr. McNeelege. He came down here and seemed to be a little put out that I had the impertinence to cross-examine him for twenty-five minutes. Wow, twenty-five minutes. A kid loses his leg. Can you spare it?

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He was discourteous to the truth at least five times by my count. He saw his mug up there on the screen where we played back to him contrary statements he made under oath in his deposition. He told you one thing on that witness stand. He told you another thing from the video screen. We clearly impeached his credibility. You would think a smart guy like that in the position he's in after the first or second time that we're all watching his mug up there telling an untruth, or telling an untruth here on the stand, take your pick, after the first or second time he might have gotten it. But he didn't. Five or six times we embarrassed him. We should have. You need to know the truth. People can't come to court and say things that aren't true.

If I have a personal flaw, the biggest one is probably I'm intolerant of people who don't tell the truth. And if I went too far in picking on him, I apologize to you, not to him, but I apologize to you. I ask you not to hold it against my client. You don't come to court and say things that aren't true.

Mr. Ports, special interrogatory.

You will evaluate those claims of defect. I am confident you will decide the machine was unreasonably dangerous. That is part of your job. You fill out two pieces of paper in this case. One is a verdict form where you come up with your findings for damages, hopefully, if you find our way. The other form you must fill out is called a special interrogatory. Again, lawyers use funny words. It's a question. A question you have to answer. It is with the same solemnity of your verdict that you must answer this question. All twelve of you must agree on the answer. It must be from a fair assessment of the evidence. Yes. When the RoofGlider left the control of was MiTek was it in an unreasonably dangerous condition? Absolutely for the three reasons we said. The design was off. It did not have effective point of operation guarding. It did not. The C-collar design was abysmal. It lacked this.

You know we're not required, by the way, to prove that there were any feasible ways for them to fix this lousy design, but we did. We're not required to prove that. Your Honor won't instruct you about that. But we did. Feasibly how do you fix this? How do you prevent Dustin from getting hurt? Second switch, right? Welded bar, right? Credible witnesses said, sure, there's a welded bar there, that kid doesn't get hurt.

What else? You've got the light tracker. Holy cow, you've got in March of 2001, just before Mr. McNeelege gets his job, you've got the document that is Exhibit 841. One of my personal favorites. This is, by the way, a stack of exhibits that you've seen on the screen that you will get back in the jury room. We have printed up the exhibits you have seen up there.

The purpose description, to replace, upgrade the safety bar, push bar system to a light curtain. Light curtain, RoofTracker, bumper, a million ways to make this safe. They did none of them. Do you know why? Mr. McNeelege didn't do the right thing. Fault tree analysis, failure mode of analysis, things that engineers who design things do all the time.

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What are the conceivable ways it could fail and what could happen? Dr. Mroszczyk's fault tree analysis, he said, three conditions have to happen for this kid to get hurt, for anyone to get hurt like Dustin got hurt. Gantry's moving, worker in the aisle, safety bar doesn't work. First two are foreseeable. Mr. Brickman agreed with that, that's certainly foreseeable, that can happen. MiTek's got to know that. So they have to know the importance of having a reliable, effective safety guard.

I would respectfully submit to you the only fair answer in the evidence to the special interrogatory is yes.

The next part of your analysis we will go to is what's called proximate cause. The law requires that for us, for Dustin, to be entitled to compensation that we establish that an unreasonably dangerous condition of the machine was a proximate cause of his injuries.

The court defines it for you. A cause which in natural or probable sequence produced the injury complained of. That's fairly common sense. And it is. It goes broader, just to clarify, that it need not be the only cause. There could be multiple causes leading to this event and Dustin's injury. If you find that one those causes is the machine designed in an unreasonably dangerous way by MiTek, we win. It need not be the only cause nor the last or the nearest cause. It's sufficient if it concurs with some other cause acting at the same time which produces the injury.

So, for example, anything else that Mr. Hansen and his witnesses have had to say I think Mr. Brickman told you about fifteen things that caused this occurrence. Naturally he left out the design of the machine. But if you were to conclude that any of those was a cause of the occurrence, that doesn't diminish MiTek's liability if you find that MiTek's unsafe design was a cause. Clearly it was. You don't need engineering expert testimony to tell you that. It's common sense. But we brought you that expert testimony.

Dr. Mroszczyk explained to you very clearly what a manufacturer's supposed to be thinking of and what they're suppose to know. And it was fairly well conceded, even by the end of the case, although not at the beginning, that MiTek's got to know and it's foreseeable to a manufacturer that people can be in the aisle when the machine starts up. It can. I mean that's the nature of the beast.

They put out 40, 50, 60 of these trusses in a shift. It's a lot of work. You can't all just, you know, let's all step back. They're pressing at one side. They're working on another. Clearly this day, you know, Skyler started when he was too close to Dustin. And I think you could tell how bad he must have felt about it. But that's foreseeable. That is foreseeable to a manufacturer. They've got to know it. They have got to take it into consideration. And they just can't sit back and blame somebody else. Can't do it. They've got to accept responsibility for their bad decisions, for their lack of work, for their lack of analysis to figure out how do we protect kids who've got to be in the aisle working.

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Mr. Brickman on this subject, I couldn't get him to give it up. He wouldn't concede that the machine on the day it took Dustin's leg was in an unsafe condition. He wouldn't give that up. How crazy is that? How crazy is that? How could anyone think having a machine with the bar loose, and the kid pushes on it, and loses his leg, it's not unsafe? I will give him this, he's a team player, but don't believe him. His credibility is challenged.

I would like to show you what the court's going to instruct you about credibility. You are the only judges of the credibility of witnesses. You will decide the weight to be given to the testimony of each of them. You may consider their ability and opportunity to observe, their memory, their manner while testifying, interest, bias, et cetera, any previous inconsistent statement or act by the witness.

Well, Mr. Brickman, I tried to make it clear to him that I do not quibble with experts charging. Of course not. Of course not. People have got to get paid. It's only fair. People put in the time. They deserve to get paid.

I do quarrel with the idea that the man is going to tell you from the stand that in the week before his deposition he did one to two days of work to prepare. I quarrel with the man who bills twenty-eight hours for that time period of work preparing for his deposition. I don't care if he prepares twenty-eight hours. More power to him. I take that as a compliment that he's worried about my questions. But he either told a fat one here in the courtroom where he said "I prepared for one to two days" or he told a fat one when he sent the bill to his client for twenty-eight hours. People shouldn't pad their bills. That's a lie.

Don't also forget that it took him 6.7 hours to review and summarize his deposition in the case. Give me a break. Bill padders don't deserve credibility.

I respectfully suggest to you, as the credible evidence in this case establishes, that we have proven the machine was unreasonably dangerous, it was a proximate cause of Dustin's injuries, Dustin is legally entitled to compensation. Compensatory damages.

Before I get to that, I would like to address what I consider MiTek's remarkable claim that somehow you should either diminish or throw out Dustin's right to compensation because MiTek has claimed that Dustin has assumed the risk of his injuries from the unsafe condition of this product.

There's one claim in that regard, which MiTek has a burden of proving, that when you hear what they have to prove, I don't think I will need to say any more. On that claim, MiTek needs to prove that Dustin knew, knew, not should have known, actually knew in his head, that the safety bar mechanism did not work properly that day. They need to prove that Dustin knew that the safety bar mechanism would not stop the Gantry. They need to prove that he appreciated these risks and assumed the risk of injury by staying in the path of the RoofGlider. For what? The two to five seconds?

What are the facts? Dustin didn't know the screws were loose. It wasn't his job. He wasn't the maintenance guy. He was just a worker building trusses. No one said Dustin knew the screws were loose. Nobody. Almost nobody at CIT knew the screws were loose for crying out loud. And, guess what, none of the people at MiTek ever thought the screws could come loose. Mr. LePoire, Mr. McNeelege, the genius who designed it, he didn't know the screws could ever come loose on these until after Dustin lost his leg and he went out, and he went to CIT, did a little inspection, and loosened the screws, and said, holy cow, look at what happened when the screws are loose. That's the first time he knew that loose screws means safety bar's no good.

That's the first time LePoire knew that loose screws mean the safety bar doesn't work is after Dustin gets hurt. Yet MiTek is claiming Dustin knew the screws were loose, Dustin knew the bar was going to fail. Give me a break. Absurd. Absurd.

I'm sure that Mr. Hansen will point to the testimony of Mr. Goldsmith and Mr. Priest where they said they thought the machine was in poor condition. Well, great. That's that's their perception, that's their eyes, that's fine.

However, those guys did not say that they knew the screws were loose or that they knew the safety bar would fail. He didn't even get to that level with them, much less the legal level that he has to get to which is to say, oh, by the way, yeah, we talked about it with Dustin all the time, he knew the screws were loose, he knew the bar would fail. No evidence on that. Zero.

So on MiTek's affirmative defense, which there's a line for in the verdict form, zero. Dustin did not assume the risk of anything. He is not legally responsible as claimed in this case.

And, by the way, that is the only claim, that is the only claim, for you to address that Dustin did anything wrong in this case. In order to raise any defense, MiTek has to prove those things they can't. He knew the screws were loose, he knew the guard would fail, he assumed the risk in those five seconds when the machine is coming at him, and he's trying to do his job to get the plate in for two seconds so the truss doesn't get wrecked. Somehow they're positing in those five seconds, oh, my God, I'm thinking, yeah, I know the safety bar is not working and, what the heck, I'll just hang out here anyway. Give me a break.

This is also from the jury instruction dealing with the assumption of risk question showing among the things there's two different itemizations that you will have to look at about what he supposedly had to know to assume the risk. What I've highlighted, however, is important. The plaintiff's inattentive or ignorant failure to discover or guard against the unreasonably dangerous

condition does not constitute assumption of the risk. No defense. So even if for some reason you were to conclude, well, maybe Dustin should have known the guard wasn't going to work. No defense. Zippo. No defense. Got to follow the law as given to you. There's a reason for that law. There's a reason for it.

Now, I would like to show you the verdict form, if I can. You get to the point of agreeing with plaintiff's case, that Dustin was injured as a result of the unreasonably dangerous condition of the machine, you will be faced with the verdict form. This is a part of it that itemizes the types of damages that under the evidence you are entitled to award compensation for.

Five elements. There's the total. You do the total last. Each item is separate. Each item deserves your separate consideration. Once you finish the first one, the reasonable expense of necessary medical care, treatment, and services rendered, you're done with that, you go on to the next. Each of these is a separate element of damages. You decide them all. You add them up. That's the verdict.

The first item is undisputed. It is undisputed from Exhibit 98, that's in evidence, that Dustin has incurred certain medical expenses as a result of this occurring. $157,041.71. It would be wrong to award him a penny more or a penny less.

Present cash value of future care, medical care to be received. Dr. Linke gave you figures on that that are based on Mr. Michael's analysis. Mr. Michael, of course, based his analysis on meeting with Dustin and working with Mr. McAllister to come up with a good plan for Dustin.

As you know, Dustin has what's called a Cleg prosthesis that has a passive knee mechanism with a microprocessor. It's fine. It's not great. He deserves great. His function with the C-leg is not what it could be with the powered knee prosthesis. Mr. Michael believes that Dustin should have the powered knee prosthesis. Mr. McAllister agrees. Mr. Stone agrees. Dustin wants it. He has talked to them about it. They have recommended it to him. And he accepts their recommendation. It's expensive, $131,000 and change. The one he has now costs half that. So naturally you might imagine that the defense would rather Dustin keep the leg he has. We respectfully disagree.

The evidence is quite clear that the powered knee prosthesis is much better. It will require less physical effort for Dustin to walk. It will give him more stamina. It will give him more energy. It will allow him to keep up. At best now, he can walk briskly at best, according to the evidence. With the powered knee, he will likely be able to do more. 19-year-old kid in the prime of life. I barely remember being 19. He can't run, can't hop, can't skip, can't jump, can't play basketball, can't do all of those things he used to do. Give him a better knee, he has got a better shot to have a better life. It's certainly not going to be like his real leg, but he deserves that shot. He deserves that powered knee prosthesis.

The plan that Mr. Michael

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developed has him waiting for that until 2017 only because when he developed the plan, he was concerned about warranty issues with the powered knee. And the fact is that it's a second generation device. He wants to make sure that the manufacturer is going to warranty it for five years. So when he originally made his recommendation, saying, well, Dustin should get it in 2017, that was because of where the manufacturer was in the warranty.

Now he said, holy cow, the manufacturer is giving a five year warranty. We're not changing the plan. We will stick with the plan because that's what Mr. Michael had initially said. I'm not changing his opinions or his testimony, but realistically that's a good device. It would be much better for Dustin. It would be much easier for him to get up from sitting. Right now it's difficult with his leg. It should enable him to do a little bit better on uneven ground and on stairs.

Dr. Linke took that and made an economic analysis of present cash value. Dr. Linke gave a range, because it depends on which economic assumptions you make about future care costs. His range was $2,603,000.00, present cash value, to $3,387,000.00, again, depending on the economic assumptions.

You may recall, even though it was Friday afternoon, it was a beautiful sunny day and maybe we all weren't exactly focused on all his numbers, because I find when I look at his formula it's a little difficult, Dr. Linke did say anywhere in that range is fine. Anywhere in that range is fair for Dustin. Present cash value ought to be in that range. I'm going to suggest to you the midpoint, which is $3,000,000.00.

Next item. Pain and suffering and reasonably certain suffered to date and reasonably certain to be suffered in the future. Please remember that you are awarding damages for fifty-seven years, almost three years of life from the time of the accident plus the future, fifty-seven years of damage. Dustin can't come back to court three years, five years, ten years, and say, you know, that the jury didn't give me enough money, I need more money, I deserve more money. No. This is his one shot, his one day. He can't come back to court for more. So please be careful on each of these.

What's the evidence on pain and suffering? What did Skyler say? The first element of pain and suffering. He looks up. What did he say was in Dustin's face? A look of pure despair. What an amazing picture for a big strong guy to give a look of pure despair.

Shane Boyle, another coworker, said it was the worst thing I'd ever saw and I have been to war. Jackie Traw, the paramedic, his leg exploded. Officer Kim Jones, she's also been to war, she said he was white as a ghost five minutes later. She was afraid he was going to die on the spot. Todd Erwin saw him and he took one look and he knew the leg was gone and he thought Dustin was going to go. What did he do? Holy cow, he went and got the big scissors, was going to do the deal

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to save his life. Awful, awful, awful pain that Dustin had. Sixty minutes he's trapped in that machine. He's awake and conscious the whole time. Fortunately his dad was able to come and comfort him. His mom shouldn't have seen it. She didn't. They kept her away.

Dustin learned the inevitable at the hospital from Dr. Gupta. He saw his mom and all she could say to Dr. Gupta was why can't you sew it back on, why can't you put his leg back on. And all Dustin could say, mom, my leg is gone, my leg is gone. Incredible pain, incredible mental suffering that he's been through.

He has had horrible phantom pain. He has relived having his leg crushed. Thankfully not that often now. Now he has phantom pain, mostly it's a feeling like pins and needles, only worse, but he gets it every day and it's kind of a reminder. Just like every day he wakes up in the morning and he looks and sees he's missing three quarters of his leg. What does he think about? He thinks about November 10, 2008, 3:30 in the afternoon. He's got a reminder every day. Not even to mention the back pain that he's got from swinging his prosthesis around.

These are real damages. These are real losses. And no one said they weren't real. No one said they weren't enormous. fiftyj-seven years. I respectfully suggest the right number for Dustin's pain and suffering and damages is $5,000,000.00. A lot of money but an incredible loss.

Next item, separate element of damages, disability. Disability is what you don't do that you used to be able to do, what you can't do, what you don't do as well. He's not running. He's not skipping. He's not hopping. He's not playing basketball. He's not doing all of those things that he used to do. He's not going swimming. He can't get his prosthetic leg wet. I mean he can swim with one and a quarter legs, but he can't kick very well. Swimming is really hard. Fishing is hard. I mean he has got to be very careful. He can do it, but he has got to be exceptionally careful so he doesn't get his knee wet because you blowout the microprocessor and it's a $10,000 repair.

Dustin was very carefree before this happened. He was unlimited in everything he did. It may have been difficult for his mom to say but, since this happened, she sees Dustin with a lot of anger and frustration in things he can't do, the activities he can't enjoy. He can't keep up with his friends. He goes to hang out with his friends and he can't keep up. He gets worn out. He has to take a rest. Nobody wants that. Nobody wants to be with the guy that can't keep up. Dustin has got permanent disability. It's obvious, it's clear, it's large. I would respectfully suggest the right number for that is $4,000,000.00.

Lastly is disfigurement. I'm not going to show you the pictures. You've got them in evidence. You're going to get all of those pictures in the back. Dustin has a very disfigured residual limb. Even when he's walking, everyone knows, everyone knows. You can see it. People observe and they see.

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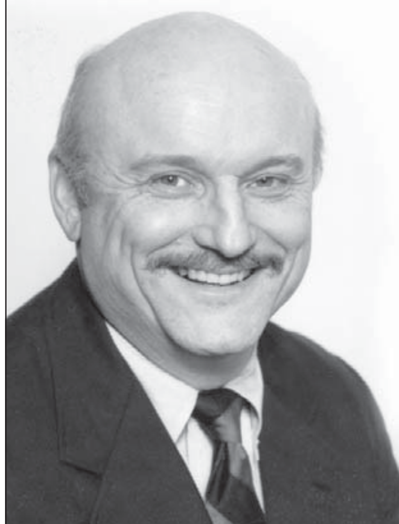
DETERMINATION OF:
Economic Loss, Lost Income, Loss of Earning Capacity
OF PRESENT & FUTURE VALUE OF DAMAGES



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He walks different, something is funny about him. Or, if he's on crutches with shorts on, with his leg tucked up with his pant leg tucked up, people know. People know.

Significant disfigurement. He's going to have it forever. I would respectfully suggest that's a dollar value for that should be $1,000,000.00. It's fair. It deals with his lifelong disfigurement that will never change.

It's up to you to decide the numbers. No one has said he hasn't had awful pain. No one has said he's not disabled. No one has said he's not disfigured. It's up to you to pick the numbers. That's why we rely on twelve people from the community to pick the numbers. Use your judgment, but remember no one contradicted it. If anyone suggests a lower figure, listen to their reasons why, what's the evidence they rely on to say $5,000,000.00 for what pain he has been through and suffering he's had and will have for the next fifty-five years. Learn why they think that's too low I mean too high. It's not but hear their answers.

A couple last items before I finish. Also, on the verdict form, you will have the opportunity and the duty to determine percentages of legal responsibility. Again, legal responsibility in this context for Dustin means that MiTek would have to prove he assumed the risk, which they cannot prove because he didn't know anything about this guard about to fail. That's a zero.

Legal responsibility of MiTek Industries, Inc. and CIT. I'm not here on CIT's behalf. I tell you that. I'm Dustin's guy. CIT has got their own lawyer. Let me tell you something about MiTek Industries. Their people have come into this courtroom from minute one and have blamed everyone else, everyone else. That's Skyler's fault. That's Dustin fault. You know, it's CIT's fault. It's Bob Fogal's fault. It's Todd Erwin's fault. Who designed the machine? Who wrote the crummy manual? Who wrote the manual that doesn't even tell them to check the screws to see if they're tight? Who wrote the crummy manual that says if the screws aren't tight, people are going to get squashed? MiTek did. They couldn't accept just a tiny even bit of legal responsibility and that's unreasonable. Unreasonable.

You could easily conclude MiTek's responsibility is a hundred percent. Easily. I will leave that for Mr. Hansen, Mr. O'Connor to discuss with you. But here's some facts. Who created the danger, the hidden danger in this design? MiTek. Who knew the machine vibrated in regular use? MiTek. Who was responsible for choosing to use the screws and the C-collars? MiTek. Who chose not to use locking bolts on the C-collars or Nylock screws? MiTek. Who created a hidden danger? MiTek. Who didn't bother to test it? Mr. LePoire: We didn't test it. Failure mode effects analysis, fault tree analysis, not our culture, culture. Culture guy, not truthful but culture.

MiTek didn't bother to test. Who didn't tell CIT about the dangers? MiTek. Who didn't tell CIT that if you didn't check the screws that the bar is

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going to fail and someone can get really hurt? MiTek.

At the conclusion of other counsels' arguments, I will have a few minutes to rebut what they have to say. And, hopefully, at that time persuade you that you should be signing a verdict form for Dustin Stone, that you should find zero percent fault for him, big number for MiTek percentagewise, if not all, a big number.

Thank you for your attention. I would appreciate you according the same courtesy to opposing counsel. Thank you.

REBUTTAL ARGUMENT

I will be as brief as I can because I think, ladies and gentlemen, you get the picture.

When a lawyer hires an expert, pays them over 50 grand to come to court and doesn't mention him in closing argument, doesn't that silence speak volumes? Doesn't that tell you Brickman is not deserving of a listen? He wasn't deserving of a mention from Mr. Hansen. Obviously, Mr. Brickman has no credibility in this room.

Mr. Brickman tried to create a smokescreen. He never addressed the C-collar design. He never said using C-collars and screws is a really good way to do it. He never said that. He said, oh, this machine has got a lot of other safety devices, et cetera, et cetera, et cetera. None of them qualified to be point of operation guarding. None of them. And he never said that they did. The throttle, the warnings, whatever, that doesn't qualify as point of operation guarding.

OSHA requires point of operation guarding. He didn't say otherwise. This machine didn't have any effective point of operation guarding. And even he wouldn't go that far to say this was an effective point of operation guarding. Even Mr. Brickman wouldn't go that far.

I don't want you to be misled into thinking that because Dustin didn't immediately run out of that aisle that somehow that negates his case or entitles MiTek to any damage reduction. Counsel tried to say that twice. There's no legal defense to that in this case, zero, none. Please follow the law.

I will show you what the jury instruction says on that point. A little different than the one I showed you before. This is more specific. This is actually what MiTek claims that Dustin knew and assumed the risk of. This is their claim. This is their only defense against Dustin. And look at what they have to prove.

All this thing is their one defense. Plaintiff worked for Central Illinois Truss and was aware that Central Illinois Truss had materially altered, modified, and/or failed to properly maintain the stop bar mechanism. Stop right there. Where is their evidence that CIT altered the stop bar? None. Modified it? None. Failed to properly maintain it? Properly maintain, what's the test of that? Isn't the test of that what MiTek told CIT to do to maintain it? They didn't tell them to do anything to maintain it.

Go further. Such that again

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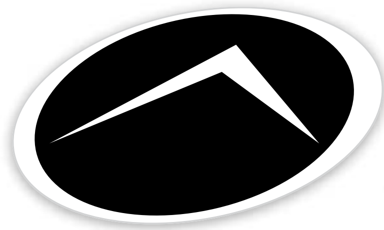

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they're having to show that plaintiff was aware Dustin knew, they've got to show he knew it such that the safety bar mechanism did not work properly. Zero proof. Even Mr. Hansen wouldn't go so far as to claim to you this morning that Dustin knew the bar wouldn't work properly. Those words never came out of his mouth. That's a concession that he can't prove - their only defense against Dustin. Even he didn't go that far.

They also need to prove that Dustin knew that the safety bar would not stop the Gantry in time to prevent an injury. Again, even he did not say those words to you. Even he doesn't believe that defense.

They also need to prove that Dustin knew, understood, and appreciated these risks, but continued to work in the path of the RoofGlider as it was moving toward him. He had five seconds, maybe five seconds, to get out before his leg was crushed. Are they telling you that in those five seconds he knew all this stuff was going on, and he just waited, that he delayed that two seconds to put that plate in so the truss didn't get wrecked? Are you kidding? That's not credible. It's not a defense.

Counsel suggests that we must prove that the screws were in the same condition in 2008 as they were in 2005. We don't have to do that. This is a design defect case. We proved that the design that they sold in 2005 was the same design that was on the machine when Dustin got hurt, had the same darn OEM parts. It's the same design. We don't have to prove that the screws were in the identical condition of looseness in 2005 as 2008. You will not find it in the instructions.

And, by the way, when we get done, his Honor is going to read the instructions to you. Then you each will be given set of them. Please take your time. Feel free to look through whichever ones you questioned so that you can understand that what I am telling you today is to follow the law - the law that fully supports Dustin's case. Any lawyer who distracts the jury from the legal requirements must not believe his defense.

Let's talk about candor and being honest about what a witness says. We heard Dr. Benckendorf didn't record that Dustin had phantom pain after January of 2009. Well, sure, but in truth everyone heard Dr. Benckendorf. We saw her. She was kind enough to give her deposition shortly a couple days before she's moving out of the state and going to New Hampshire. And she ended up apologizing at the end that, yes, he had phantom pain all through the time she saw him, but she just didn't record it. Remember my saying, well, we're not here to grade you on your recordkeeping? And she said, well, I grade myself, I'm sorry I didn't put it down. She's his family doctor. She knows him. She said he had that pain, he had that pain. She didn't need to write it down so we could quibble over it.

If I asked for too much money of you to be awarded to Dustin, somebody would have said it. Not a peep. No one suggested that $5 million

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for pain and suffering was too high. No one suggested what we have asked for future costs of $3 million was too high. No one suggested that damages we suggested for disability was too high or disfigurement. Not a peep. What does that tell you? That tells you those numbers are credible, they're real, and they're based on the evidence. Please follow them.

We, as lawyers, have had the responsibility of this case in representing our clients for two and a half years. We can do nothing more when I sit down and shut up and let you decide the case or we're giving this case to you. We give you our responsibilities. It's yours. Please do the right thing. Thank you.

***Bruce R. Pfaff** heads Pfaff & Gill, Ltd., a three-lawyer plaintiff's firm in Chicago. He and his partners, Michael Gill and Matthew Ports, focus their practice on trials and appeals in product liability, medical negligence actions, and general negligence claims. Bruce was named as one of the Top 10 Illinois lawyers for 2011 by Superlawyers. He was also named Chicago's Product Liability Litigator of the Year for 2011. Among his professional activities, Bruce is most proud to have served on the Supreme Court's IPI Committee from 1999 to 2010 and to have chaired the Amicus Curiae Committee of the Illinois Trial Lawyers Association since 1994. He has written more than 30 amicus briefs on tort law issues in appellate and supreme courts.*

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