# The Defense Line

S.C. Defense Trial Attorneys' Association

Winter, 1994
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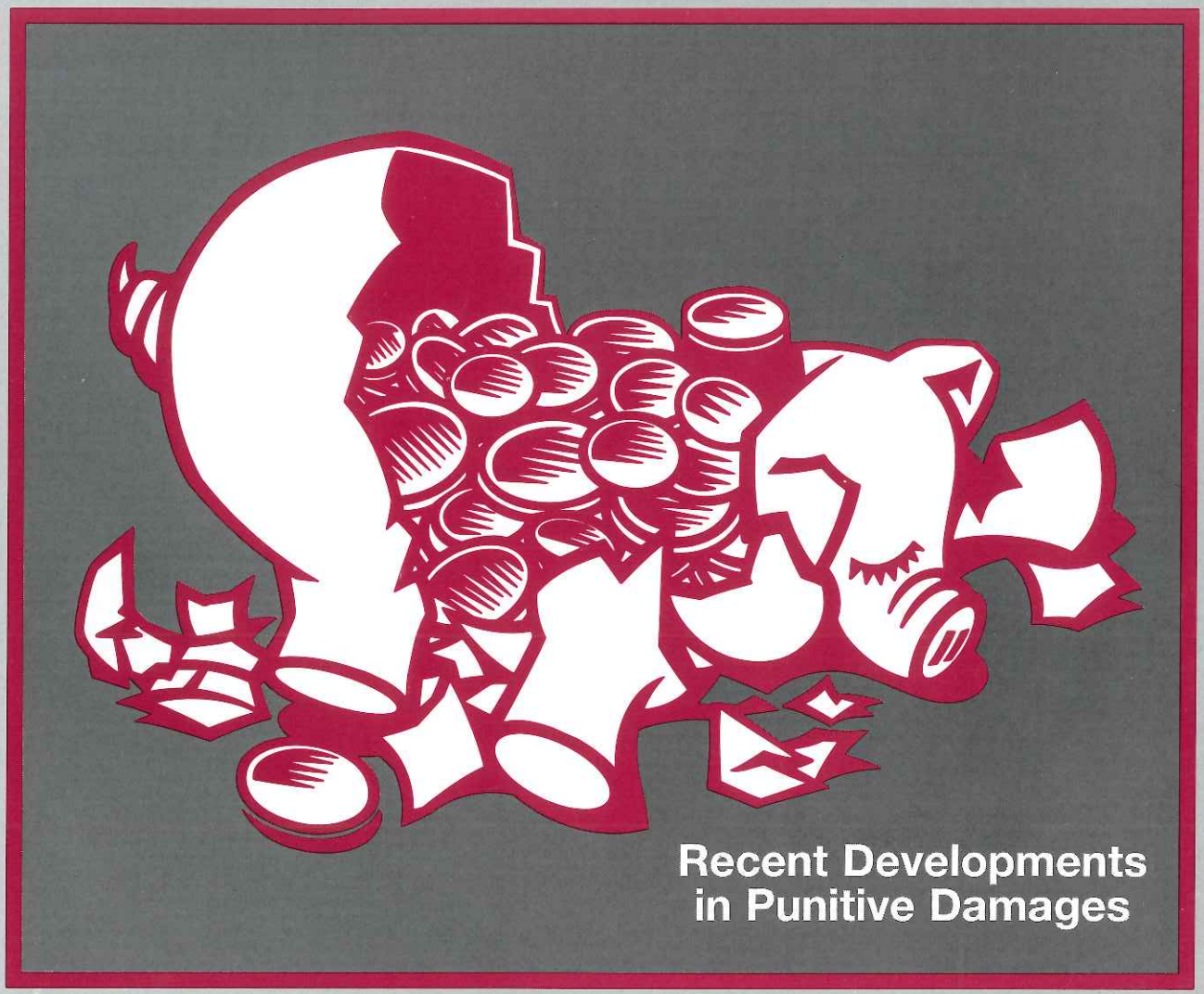


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Address Correction Requested

**VOLUME 22, NO. 1 Winter 1994**

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### TEN YEARS AGO

At the Sixteenth Annual Meeting of our Association at Kiawah Island, October, 1983, SAUNDERS M. BRIDGES, of Florence, was elected President, WADE H. LOGAN, III, of Charleston, President-Elect, T. EUGENE ALLEN, of Columbia, Treasurer, and THERON G. COCHRAN, of Greenville, Secretary. ERNEST J. NAUFUL, JR., of Columbia, was immediate Past-President. There were over 150 members attending along with 30 State and Federal Judges, who were guests or on the program. Tort reform measures were being pushed by the Medical Association and BRAD WARING, from Charleston, was appointed to chair the Recent Decisions Committee for 1984. ED MULLINS (President in 1973) was elected Vice-President of Administration, and President-Elect of the DRI.

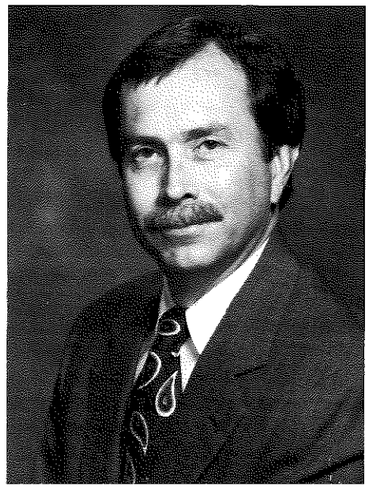
### TWENTY YEARS AGO

Our Association's Annual Meeting took place at Hilton Head. DEWEY OXNER, of Greenville, was elected President, JAMES W. ALFORD, of Columbia, President-Elect, and C. DEXTER POWERS, Secretary-Treasurer. Executive Committeemen elected were ISADORE BOGOSLOW, of Walterboro, JACKSON L. BARWICK, JR., of Columbia, and PLEDGER M. BISHOP, JR., of Charleston.

The program at our Annual Meeting was most informative and stimulating, VERNON BROWN, of St. Paul Insurance Company, discussed professional liability claims from the insurance company's standpoint. BURR MARKHAM, of Minneapolis, discussed professional claims from the defense attorney's standpoint, and South Carolina's own MORRIS D. ROSEN, of Charleston, discussed professional liability claims from the plaintiff's standpoint. Comparative negligence and strict liability was given extensive treatment by the beloved ROBERT M. FIGG, former Dean of USC Law School. And finally, general discussion was held on products liability cases with panel members, HONORABLE JULIUS B. NIX, then Resident Judge of the Second Judicial Circuit, and HONORABLE SOLOMON BLATT, JR., United States District Court Judge. The panel was moderated by our own J.E. TODD, of Greenville. The ladies were treated with a tour of Savannah and our golf tournament was at the courses at Harbour Town and Sea Pines.

*The Defense Line is a regular publication of the South Carolina Defense Trial Attorneys' Association. All inquiries, articles, and black and white photos should be directed to Nancy H. Cooper, 3008 Millwood Avenue, Columbia, SC 29205, 1-800-445-8629.*

# THE PRESIDENT'S PAGE



## William A. Coates

Under the leadership of Hugh McAngus our Association enjoyed a stellar year. The results are obvious. Membership increased and both conventions were outstanding. Our Association continues to rank at the top nationally. Hugh has worked long and hard this past year and deserves our thanks for his outstanding service.

The convention at the Grove Park in Asheville reached a new high in attendance. Mills Gallivan provided a wonderful social agenda, while Charlie Ridley and Tom Wills put together an outstanding program. Our annual meeting, with the social events chaired by Susan Lipscomb and the program by Mike Bowers was equally as outstanding. Judging by the comments I have received, each of you enjoyed the program, and as always, Sea Island provides an atmosphere conducive to fellowship and learning.

The trial academy, now in its third year, continued to build on its record of success under the leadership of Frankie Marion and Joel Collins. Frankie and Joel were assisted by a team of experienced volunteer practitioners/teachers and several judges of our federal and state bench. Once again the academy received excellent reviews, and will be directed this year by Joel and Steve Darling. As always, the success of this endeavor depends upon the participation of experienced trial attorneys. I urge you to volunteer your time, as the academy cannot succeed without the support and experience of our members. Please call Joel or Steve to volunteer in this effort.

As most of you know, the Hemphill Award, given for distinguished and meritorious service to the legal profession and the public, was presented to Bruce Shaw at the annual meeting. Few individuals have worked as long and as hard for this Association and for the Defense Bar of this state as Bruce. This is an honor well deserved, and I hope each of you will take the opportunity to congratulate Bruce upon this most noteworthy achievement.

We anticipate a very active legislative session. Susan Lipscomb is chairing our Legislative Committee this year. Workers' compensation reform, interest on judgments, and judicial salaries are all anticipated to be hot topics this year. Of particular importance to our Association is legislation (H3691-S517) proposing a constitutional amendment to abolish the twelve member petit jury and provide that the number of jurors would be set by the legislature. Every empirical study of this issue concludes that decreasing the number of jurors only increases the size of the jury award. Additionally, this bill would allow the legislature to set the jury size at any number. Obviously, the defeat of this legislation is important not only to you but to your clients. I urge each of you to: (1) Contact any legislator you know and express your opposition to this bill, (2) Contact your clients and ask them to express their opposition, and (3) Be available to Susan and her committee throughout the year to assist them with this and other issues of importance to our Association.

Will Davidson and Larry Orr have agreed to chair the Defense Line Committee again this year. This is an excellent publication, one of the best in the country. One of the reasons for its success is the input of our membership. In order to continue this success, we need your continued participation. If you are aware of a recent decision of interest to our members, or if you are interested in writing an article on a timely topic, please contact Will or Larry.

Every other year your Association co-sponsors a continuing education seminar with the South Carolina Bar. We hope to present this seminar in late November or early December. Mills Gallivan and Sid Connor will be co-chairing this committee. Please be willing to cooperate with them when they ask for your assistance. If you have any ideas for topics which would be of particular interest to our membership, as well as the bar as a whole, please do not hesitate to contact Mills or Sid.

The Joint Meeting with Claims Managers is scheduled for July 28-30 at the Grove Park Inn. The Annual Meeting will be October 20-24 at Kiawah Island. Your attendance is vital for the success of these meetings, so please mark your calendars!

This Association is one of the best of its kind in the country. It will remain so only through the continued involvement of all of the members. Listed (on the back cover) are the names and addresses of the committee chairs. Committee service is vital to this Association's success, and I urge you to contact the committee chair of your choice and volunteer your services.

Please welcome new members Clarke McCants, Steve Darling and George James to the Executive Committee. Susan Lipscomb, Mills Gallivan, and John Wilkerson were all reappointed to a second term. Your officers and the Executive Committee look forward to serving you this year. Please do not hesitate to contact us with your ideas.

I am honored by the opportunity to serve as your president, and I look forward to working with each of you during the coming year.

## IMMEDIATE PAST PRESIDENT

### W. Hugh McAngus

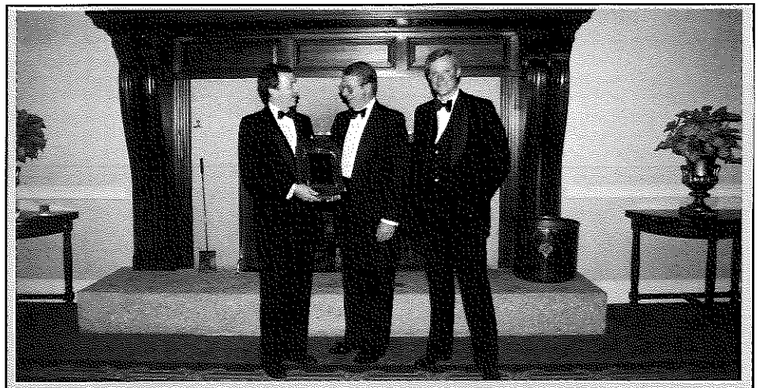
Before I fade back into obscurity, I must correct a mistake. I reported that a Bill was passed which reduced the interest rate on judgments. I was wrong! That Bill is still pending and needs to be strongly supported.

Now on to more important things. The opportunity to serve as President of this organization has been the high point of my career. Ours is a dynamic organization which is the benchmark by which others are measured. I am truly proud to say I am a member.

I wish to thank all of those who made my year as President possible and pleasant. The Officers, Executive Committee and Administrative Staff are to be commended. A special thanks goes to Bill Coates. Without Bill's help and wise counsel, I would not have made it. I consider myself to have been a caretaker President. Bill will lead our organization to greater things. I wish him luck.

Thank you for the opportunity to serve.





## 1993 Hemphill Award
# R. Bruce Shaw

The fifth recipient of the Hemphill Award, R. Bruce Shaw, of Columbia, South Carolina, received the award at the annual meeting of the Association at Sea Island, Georgia. Bruce is a resident of Columbia, South Carolina, and a partner in the law firm of Nelson, Mullins, Riley and Scarborough. He is a graduate of the University of South Carolina and the University of South Carolina School of Law where he graduated cum laude. During law school he was inducted into the Order of Wig and Robe and served as law notes' editor and law survey editor. He was admitted to the Bar in 1965 and has practiced with the Nelson Mullins firm since that time.

He has served on numerous committees within the South Carolina Bar. He served on the Executive Committee and as an officer of this Association and served as its president in 1979.

Bruce has always been available as a mentor to young lawyers as well as some lawyers not-so-young. He is constantly sought out for his advice, not only on advocacy skills but on ethical matters and the practice of law in general.

Since 1976, he has been intimately involved in the defense of toxic tort litigation throughout the country. At the present time he serves as senior litigation counsel to Owens-Illinois, Inc. He has represented Owens-Illinois and other clients not only throughout the southeast but in New York, California, Mississippi, Illinois, Missouri, West Virginia and Texas.

Through his leadership, members of the Defense Bar in South Carolina have litigated cases throughout the country. As a result, the Defense Bar in this state has earned a reputation of being proud, prepared, and professional in their advocacy. This speaks highly of our Association, the Bar in this state as a whole, and reflects credit upon the judiciary before whom we all practice.

Throughout his career, Bruce has maintained a unique and irreverent sense of humor which has delighted all those who have the privilege of knowing him. Indeed, Frederick Wilhelm Nietzche might well have been thinking of Bruce when he wrote the following lines:

"Is not life a hundred times too short for us to bore ourselves?"

For his distinguished service and dedication to this Association, to the public, and to the profession, as well as his wit, his wisdom, and his winning ways, our Association is proud to have presented the 1993 Hemphill Award to Bruce Shaw.



# RECENT DEVELOPMENTS IN PUNITIVE DAMAGES AND EXPERT WITNESS TESTIMONY

**Jean H. Toal,**
*Associate Justice, South Carolina Supreme Court,*
and
**Jennifer Aldrich,**
*Associate with Nexsen, Pruet, Jacobs and Pollard and former law clerk of Justice Toal*

In the past year, there have been several opinions decided by the United States and South Carolina Supreme Courts in the evidence and damages area which collectively may have a great impact on tort litigation nationwide, and particularly in South Carolina. The United States Supreme Court decisions in TXO Production Corp. v. Alliance Resources Corp.[1] and Daubert v. Merrell Dow Pharmaceuticals, Inc.[2] address the constitutionality of punitive damages and the admission of novel scientific evidence, respectively. In Wise v. Broadway[3], the South Carolina Supreme Court addressed the legal effect of a violation of a statute on the submission of punitive damages to a jury. This article reviews these opinions and poses some questions which remain unresolved.

**Recent History of the Constitutionality of Punitive Damages.**

In this year's TXO decision, the United States Supreme Court addressed the constitutionality of punitive damages for the third time in recent history. In 1989, the Court held in Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposable, Inc.[4] that the Excessive Fines Clause of the Eighth Amendment does not apply to punitive damages in civil actions. The Court avoided a direct ruling on the challenge of the award as violation of due process, but all nine justices expressed concern that due process imposes some limits on jury awards of punitive damages.[5]

In 1991, the Supreme Court upheld the constitutionality of a punitive damage award against a due process challenge in Pacific Mutual Life Ins. Co. v. Haslip.[6] In Haslip the Court held that imposing punitive liability on an insurance company under the doctrine of respondeat superior was not "fundamentally unfair," thus not violative of due process.[7] The Court further found the common law method of assessing punitive damages is not per se violative of due process.[8] Specifically, the Court held Alabama's procedure for assessing and reviewing punitive damages awards was consistent with due process.[9] The Haslip Court recognized, however, that unlimited jury discretion may invite extreme results offensive to the Constitution.[10] The Court declared no bright line rule could be established to evaluate awards for constitutionality; however, "general concerns of reasonableness and adequate guidance from the court when a case is tried to a jury properly enter into the constitutional calculus."[11] The Haslip award, which was four times the compensatory damages and more than two hundred times the plaintiff's out-of-pocket expenses, was found to be close to the line but did not cross into the area of constitutional impropriety.[12]

The South Carolina Supreme Court considered the constitutionality of South Carolina's system of jury-assessed punitive damage law in Gamble v. Stevenson.[13] The court held the South Carolina procedure for awarding punitive damages, which entailed first a proper instruction to the jury on the degree of recklessness required and the purpose of punitive damages, and second a meaningful and adequate review of award conducted by the trial court, ensured the plaintiff's due process rights were not infringed.[14] However, using the factors noted in Haslip as a predicate, the South Carolina Supreme Court dictated that in future cases the trial court shall conduct a post-trial review of the propriety and amount of the award and may utilize the following factors: (1) the defendant's degree of culpability; (2) duration of the conduct; (3) the defendant's awareness or concealment; (4) the likelihood the award will deter the defendant or others from like conduct; (5) whether the award is reasonably related to the harm likely to result from such conduct; (6) the defendant's ability to pay; and (7) other factors deemed appropriate.[15] The court further held the trial court shall set forth the facts and its findings on the record.[16] Unlike the Alabama procedure in Haslip, appellate review in South Carolina is limited to a determination whether there has been an abuse of discretion in the review conducted by the trial court.[17]

In Mattison v. Dallas Carrier Corp.,[18] the Fourth Circuit Court of Appeals reviewed South Carolina's law for assessing punitive damages. The trial of Mattison was before Gamble but the Fourth Circuit opinion was issued after the Gamble decision was announced. The Fourth Circuit found the South Carolina procedure pre-

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Gamble violated due process because of its vagueness and lack of meaningful standards allowed the jury unconstrained discretion. The Fourth Circuit further found the Gamble post-verdict standards are not applicable in federal court but rather Rule 50(b) and Rule 59 of the Federal Rules of Civil Procedure control. These rules allow a trial court to interfere with a verdict only where no substantial evidence is offered on which the jury can base the award. Accordingly, in federal cases governed by South Carolina law, the Fourth Circuit held, the jury must be instructed to consider the Gamble factors plus additional factors including: (1) the actual harm caused; (2) related penalties available to punish the defendant; (3) the profits resulting from the wrongdoing; and (4) the plaintiff's cost of litigation. In addition, the amount awarded must be limited by the defendant's ability to pay and cannot cause bankruptcy.[19] The Fourth Circuit reiterated its holding of Mattison in Johnson v. Hugo's Skateway.[20] In Johnson the Fourth Circuit found Virginia law on the standards given to the jury for assessing punitive damages lacked the necessary due process safeguards. Since the Virginia post-verdict review could not be performed in federal court, the Fourth Circuit instructed the trial court to include the Mattison factors in its jury charge on remand.

In Winant v. Bostic,[21] the Fourth Circuit upheld a punitive damage award against a due process challenged when the jury was charged that punitive damages could be awarded only within reasonable limits and in such an amount as serves to punish the defendants and to deter others from committing like offenses. The court noted the jury awarded punitive damages in an amount less than three times the compensatory damages and rejected the due process argument "in the overall circumstances."[22]

**TXO Production Corp. v. Alliance Resources Corp.**

On June 25, 1993, the United States Supreme Court released TXO Production Corp. v. Alliance Resources Corp.[23] In this slander of title action, Alliance owned the rights to develop oil and gas resources on a tract of land. TXO contracted to purchase these rights. Although TXO knew Alliance had good title to the oil and gas resources, TXO advanced a claim against those rights based on a worthless quit-claim deed from a previous assignee of the other mineral rights in the property. TXO also attempted to induce the assignee of the other mineral rights to execute a false affidavit indicating his deed may have also conveyed oil and gas rights. TXO attempted to use the cloud in the title which they created as leverage in their negotiations with Alliance. There was evidence of similar fraudulent conduct on the part of TXO in other unrelated transactions. The jury awarded ten million dollars in punitive damages, which exceeded the plaintiff's actual damages of $19,000 by a ratio of 526 to 1. Justice Neely, writing for the majority of the West Virginia Supreme Court, upheld the award.[24] The West Virginia court colorfully and quite accurately distinguished three types of defendants for which punitive damages are appropriate: "1) really stupid defendants, 2) really mean defendants, and 3) really stupid defendants who could have caused a great deal of harm by their actions but actually caused minimum harm."[25] In the case of "really mean" defendants, who were defined as those who intentionally commit mean-spirited and harmful acts, the state court noted punitive damages 500 times greater than the compensatory damages are not unconstitutional, especially when the provable compensatory damages are small, but potential harm is great.[26]

The United States Supreme Court affirmed the punitive judgment award in a plurality opinion.[27] On appeal TXO maintained that the award was so excessive, particularly as compared to the actual damages, it should be deemed arbitrary deprivation of property without due process. TXO advocated that the punitive damages award should be scrutinized more strictly than legislative financial penalties[28] because of the lack of legislative guidance in a jury judgment.[29] TXO posited the first step of its proposed heightened scrutiny analysis should be to compare the award to other punitive damage awards in the same jurisdiction, awards for similar conduct in other jurisdictions, legislative penalties with respect to similar conduct, and the relationship of prior punitive awards and the compensatory awards. The plurality rejected the comparative approach offered by TXO as unworkable as meaningful comparison in complex fact-specific punitive damages awards by juries. However, the Court did not rule out the possibility that the fact that an award is significantly larger than those in other similar circumstances may be one of the relevant considerations in determining whether or not a punitive damage award is so excessive as to be arbitrary. The plurality opinion noted that assuming fair procedures are followed, a judgment that is a product of the process is entitled to a strong presumption of validity.

The plurality opinion reiterated that a bright line between constitutionally acceptable and constitutionally unaccepted awards cannot be made, but noted that reasonableness does enter into the constitutional analysis.[30] In considering the reasonableness of this award, the Court found the jury could properly assess an award of punitive damages based on the recognition of the potential harm that could have occurred as a result of the defendants' conduct. The plurality opinion found the jury could have perceived the potential harm to be in the millions of dollars. The Court speculated that even if the actual value of a potential harm were only one million dollars, the disparity between it and the punitive award of ten million dollars would not "jar one's constitutional sensibilities."[31] Justice Stevens declared, "we do not consider the disparity between the actual damages and the punitive award controlling in a case of this character."[32] By "case of this character" Justice Stevens impliedly referenced the potential for greater financial harm than was actual suffered, the extreme bad faith of the defendants, the fact that the scheme was part of a larger on-going pattern of fraud, trickery, and deceit, and the defendants' considerable wealth.

Justice Kennedy concurred in the Court's results but noted Justice

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Steven's analysis came close to relying on nothing more than the reviewing court's own subjective reaction to a particular punitive damage award.[33] Justice Kennedy would focus the constitutional inquiry not on the amount of the award but on whether the award reflects bias, passion, or prejudice on the part of the jury. The amount of the award, therefore, would be relevant only to the extent it reflects bias, passion, or prejudice. Justice Kennedy affirmed the award finding the jury may have been properly responding to the malice in the defendants' conduct.[34]

Justice Scalia, joined by Justice Thomas, also concurred in the judgment. According to Justice Scalia, no due process violation occurred because the jury was properly instructed on the purpose of punitive damages under West Virginia law and the award was reviewed for reasonableness by the trial court and the Virginia Supreme Court, there was no procedural due process violation. Justice Scalia opined that procedural due process requires judicial review of punitive damages for reasonableness but there is no federal constitutional right to have substantively correct reasonableness determination.[35]

Justice O'Connor, joined by Justice White and joined in part by Justice Souter, dissented. Justice O'Connor concluded that the TXO punitive damages likely resulted from jury prejudice against a large out-of-state corporation. Justice O'Connor referenced counsel arguments which repeatedly highlighted the defendants' wealth and blatantly referred to the defendants as "Texas high rollers" and the "greedy bunch from down in Texas." The dissent found the post-verdict review inadequate under Haslip.[36]

**Daubert v. Merrell Dow Pharmaceutical, Inc.**

Three days after the Supreme Court affirmed the punitive damage award in TXO, it relaxed the threshold for admissibility of novel scientific evidence. In Daubert v. Merrell Dow Pharmaceutical, Inc.,[37] the Supreme Court repudiated the Frye[38] test for determining the admissibility of novel scientific evidence at trial. Under the Frye test, the touchstone of admissibility of evidence derived from scientific tests or processes is whether the process is sufficiently established to gain general acceptance in a general field in which it belongs. The Court held the Frye test, or general acceptance test, was superseded by the adoption of the Federal Rules of Evidence. However, the Court held that the Federal Rules, particularly Rule 701, mandates that "scientific" knowledge be grounded in the methods and procedures of science. Thus, in order to qualify as scientific knowledge, an inference or assertion must be derived from the scientific method. Further, because Rule 702 dictates the scientific knowledge assists the trier of fact to understand the evidence or determine a fact in issue, the testimony must be relevant. The Court interpreted this requirement to mean that scientific knowledge must "provide a valid scientific connection to the pertinent inquiry as a precondition to admissibility."[39]

The Daubert Court offered the trial courts some general observations to guide their determination whether scientific testimony should be admitted. The first inquiry is whether or not the theory or technique has been tested. The second consideration is whether the theory or technique has been subjected to peer review and publication. The known or potential rate of error also should be considered. Finally, the Court observed that general acceptance can have a bearing on the reliability assessment.

The Daubert opinion brings the federal evidentiary law in line with South Carolina law. South Carolina never expressly adopted the Frye test but has required that the scientific evidence be established through scientific and professional techniques rather than untested methods or unproven hypothesis.[40]

**Wise v. Broadway**

In Wise v. Broadway,[41] the South Carolina Supreme Court held that a violation of a statute which is causally related to an injury is negligence per se, and further is, as a matter of law, sufficient evidence of recklessness, willfulness, or wantonness so as to warrant the submission of punitive damages to the jury. The dissent contended that every case in which there is evidence of even the slightest violation of statute which is causally connected to the injury may require the submission of punitive damages to the jury.[42]

**Conclusions and Questions Unanswered**

There are a number of questions that remain after the decisions in 1993. Between the Haslip and TXO cases, it is clear that the majority of the United States Supreme Court agrees there is a point at which a punitive damage award may be deemed too excessive to withstand a due process challenge, notwithstanding procedures by which the award is assessed and reviewed by the trial and appellate courts. That point necessarily varies depending on the specific facts of the case. From Haslip it is clear that for a vicariously liable defendant, an award four times greater than the actual damages comes close but does not cross the line. From TXO a wealthy, malicious defendant who has engaged in a series of fraudulent acts may be liable for punitive damages in excess of 526 times the actual award, or 10 times the potential harm that could have been caused.

Under Wise, any violation of a statute which causes an injury constitutes evidence of recklessness, willfulness, and wantonness. A question arises as to whether the Wise rule applies to the violation of a statute which imposes strict or absolute liability also, as a matter of law, evidences recklessness, wilfulness and wantonness.

Further, under the Wise opinion, it is unclear how the Gamble post-verdict analysis is to be performed when the jury has awarded punitive damages based solely on the violation of a statute as the evidence of recklessness, willfulness, and wantonness. Under Gamble the trial court's post-trial review is "dedicated to the postulate that no award be grossly disproportionate to the severity of the offense."[43] The first Gamble factor to be considered by the trial court is the defendant's degree of culpability. The third factor is the defendant's awareness. At least outside the negligence per se context, the test for determin-

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ing whether a tort may be deemed reckless, willful, or wanton is whether there is a conscious awareness of the misconduct or the circumstances are such that a reasonable person would have been aware.[44] Citizens can be charged with knowledge of the law, but it is hard to accept one is presumed to be consciously aware of any violation of a statute no matter how slight. Especially in light of contrary evidence showing the violation was, in fact, inadvertent and at the most negligence. Under Wise, whether the evidence of a violation of statute binds the trial court in its independent determination of the degree of culpability and the defendant's awareness is unclear. If the trial court believes, under the facts presented, a reasonable jury could not have found the violation of the statute constituted recklessness, can the trial court strike or reduce the award as dictated by Gamble? If the trial court is not free to strike the award, due process may then be compromised. As noted above South Carolina procedure for assuring due process in the award of punitive damages relies heavily on the trial court's liberal post verdict-review.

Further, it is unclear how a statute enacted in 1988 which requires a higher burden of proof in punitive damages cases fits into the Gamble and Wise analyses. The statute provides:

In any civil action where punitive damages are claimed, the plaintiff has the burden of proving such damages by clear and convincing evidence.[45]

Precisely what facts must be proven by the higher standard of proof is not immediately apparent. Most statutes which raise the standard of proof for punitive damages expressly provide that it is the level of culpability which must be proven by the enhanced standard.[46] The South Carolina provision, however, is not so specific. It merely provides that "such damages" must be proven by the enhanced standard. If the statute is interpreted to mean the defendant's degree of culpability must be proven by the heightened standard, then difficulty may arise in reconciling the statute with the Wise decision.[47] Further, since a finding of some actual damages is required to support an award of punitive damages,[48] it could be argued that the facts supporting actual damages must be proven by clear and convincing evidence. If the Gamble factors are considered part of the proof of "such damages," then perhaps the factors must be established by the higher standard, or at least enough of the factors to justify the punitive damages award. North Dakota's punitive damages statute expressly provides that it must be proven by clear and convincing evidence that the award is consistent with North Dakota's version of the Gamble factors, at least where there is evidence to support any of the factors.[49] If the South Carolina statute is interpreted this broadly, a question arises as to whether the jury should be charged with the factors as well as the purpose of punitive damages.

Regardless of the answers to these and other questions, 1993 has been a significant year in the area of in tort law. Interestingly these cases which liberalize tort law were decided at a time of a growing movement advocating reforming tort law to narrow its scope.

1. __ U.S. __, 113 S. Ct. 2711, 125 L. Ed. 2d 366 (1993).
2. __ U.S. __, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993).
3. Op. No. 23083 (S.C.Sup.Ct. filed July 19, 1993) (Davis Adv.Sh. No. 20 at 14).
4. 492 U.S. 257, 109 S. Ct. 2909, 106 L. Ed. 2d 219 (1989).
5. Id.
6. 499 U.S. 1, 111 S. Ct. 1032, 113 L. Ed. 1 (1991).
7. Id. at 15, 111 S. Ct. at 1041, 113 L. Ed. 2d at 18.
8. Id. at 17, 111 S. Ct. at 1043, 113 L. Ed. 2d at 19.
9. Id. at 23, 111 S. Ct. at 1046, 113 L. Ed. 2d at 33. Pursuant to Alabama law, the trial court instructed the jury on the purpose of punitive damages, which was to punish and deter. The jury was further instructed to take into consideration the character and degree of the wrong, as shown by the evidence, and the necessity of preventing a similar wrong. The trial court and the appellate court reviewed the punitive damages award for excessiveness. Id. at 19-20, 111 S. Ct. 1044-5, 113 L. Ed. 2d at 20-21.
10. Id. at 18, 111 S. Ct. at 1043, 113 L. Ed. 2d at 20.
11. Id.
12. Id. at 23-24, 111 S. Ct. at 1046, 113 L. Ed. 2d at 23.
13. 305 S.C. 104, 406 S.E.2d 350 (1991).
14. 305 S.C. at 111, 406 S.E.2d at 354 (1991).
15. Id.
16. Id. The court's holding in Weir v. Citicorp Nat'l Servs., Inc., Op. No. 23935 (S.C.Sup.Ct. filed Sept. 20, 1993) (Davis Adv.Sh. No. 24 at 13), clarified this post-trial review does not necessitate a separate hearing, nor must the trial court make findings of fact for each of the Gamble factors.
17. Id.
18. 947 F.2d 95 (4th Cir. 1991).
19. Id. at 110.
20. 974 F.2d. 1408 (4th Cir. 1992).
21. 5 F.3d 767 (4th Cir. 1993).
22. Id. at 775. Treble damages were available under the North Carolina statute.
23. __ U.S. __, 113 S. Ct. 2711, 125 L. Ed. 2d 366 (1993).
24. 187 W. Va. 457, 419 S.E.2d 870 (1992).
25. Two justices of the West Virginia Supreme Court concurred taking exception to Justice Neely's entertaining categorization of the defendants as "really stupid" or "really mean." Id. Justices O'Connor, White, and Souter also were offended by this analysis, which is described in Justice O'Connor's dissent as cursory, cavalier, lacking in verifiable criteria, and productive of a monstrous award. TXO, __ U.S. at __, 113 S. Ct. at 2728, 125 L. Ed. 2d at 389.
26. TXO, 419 S.E.2d at 889.
27. Justice Stevens wrote the opinion of the Court, which was joined by Chief Justice Rehnquist and Justice Blackmun. Justices Kennedy, Scalia, and Thomas concurred. Justices O'Connor, White, and Souter dissented.
28. Such as double or treble damages for violations of Unfair Trade Practices Acts.
29. In contrast, Alliance maintained that the standard of review should be a rational basis scrutiny that is used in reviewing state economic legislation.

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In rejecting this standard, the Court noted that any award would serve a legitimate state interest in deterring or punishing wrongful conduct, no matter how large the award.

30. Id. at __, 113 S. Ct. at 2720, 125 L. Ed. 2d at 379.
31. Id. at __, 113 S. Ct. at 2722, 125 L. Ed. 2d at 382.
32. Id.
33. Id. at __, 113 S. Ct. at 2725, 125 L. Ed. 2d at 385.
34. Id. at __, 113 S. Ct. at 2726, 125 L. Ed. 2d at 386.
35. Id. at __, 113 S. Ct. at 2727, 125 L. Ed. 2d at 388.
36. Id. at __, 113 S. Ct. at 2739-40, 125 L. Ed. 2d at 403.
37. __ U.S. __, 113 S. Ct. 2786, 125 L. Ed. 2d at 469 (1993).
38. Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).
39. Daubert, __ U.S. at __, 113 S. Ct. at 2796, 125 L. Ed. 2d at 482.
40. State v. Ford, 301 S.C. 485, 392 S.E.2d 781 (1990).
41. The specific statute allegedly violated in Wise was S.C. Code Ann. § 56-5-1930(a) (1976) which prohibits a driver from following another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicle and the traffic upon and the condition of the highway. The facts in Wise were that the defendant was driving a pick-up truck with a half-full 40 gallon fuel tank, and was following the plaintiff's automobile at a distance of 3 to 4 car lengths traveling at 20 to 25 miles per hour on wet roads.
42. Id. at 21 (Toal dissenting).
43. Gamble, 305 S.C. at 112, 406 S.E.2d at 354.
44. Martin v. Martin, 262 S.C. 168, 203 S.E.2d 385 (1974).
45. S.C.Code Ann. § 15-33-135 (Supp.1993).
46. See, e.g., Ga. Code Ann. § 51-12-5.1 (Supp. 1993); Ky. Rev. Stat. Ann. § 411.184 (1992).
47. Wise, at 21.
48. Dowling v. Home Buyers Warranty Corp., __ S.C. __, 428 S.E.2d 709 (1993).
49. N.D. Cent. Code § 32-03.2-11 (Supp. 1993).

# DEFENSE RESEARCH INSTITUTE OPPORTUNITIES FOR YOUNGER LAWYERS

As we move into a new year, it's an appropriate time to focus on professional development. This is particularly true for younger lawyers in the defense practice who must balance workload requirements, training, and practice development. Younger defense lawyers are also facing a challenging client environment in which many "firm" clients who have been passed down from one generation of lawyers to the next are "adjusting" their relationships with outside defense counsel.

Many of the issues that will determine the course of the younger defense lawyer's career are being driven by national, not local, trends. Alternative dispute resolution, junk science, ERISA, corporate criminal liability, changes to federal rules, and mass tort litigation are just a few of the growing number of areas that impact the younger defense lawyer. DRI offers the younger defense lawyer the opportunity to quickly and inexpensively keep abreast of national developments that impact the practice of law in South Carolina.

DRI's monthly magazine, **FOR THE DEFENSE,** contains short, practical articles written by practicing defense lawyers. The latest (December 1993) issue included articles on cross-examination of expert witnesses in depositions, ERISA reporting and disclosure requirements, joint and several liability for non-economic damages, limiting damages in employment discrimination cases, and the duty to defend intentional torts. DRI also has substantive seminars in every area of the defense practice including insurance defense, professional malpractice, products liability, environmental, drug and medical device, worker's compensation, civil rights, asbestos, and corporate criminal liability. These seminars are presented by nationally prominent defense attorneys and consulting experts.

DRI has an active Young Lawyers Committee that focuses on improving ways to educate younger defense lawyers and to encourage their particpation in DRI activities. Recently the Drug and Medical Device Committee presented a one-day program entitled Defending Drug and Medical Device Litigation: A Primer for "Young Lawyers." the program dealt with the basics of defending drug and medical device litigation. Similar programs in other areas are being planned by the DRI Young Lawyers Committee.

Whether you are a younger defense lawyer or a partner who has training and practice development responsibilities for younger defense lawyers, DRI should be part of your 1994 professional development plan. Membership is only $75 for lawyers in practice less than 5 years and includes a waiver of registration fee to one DRI seminar. For lawyers practicing more than 5 years, membership is only $110. Please contact David Dukes at (803) 733-9451 for more information or to receive a membership application.

*David Dukes is State Chairman for the Defense Research Institute (DRI).*

# 1994 Committee Chair Appointments

**Membership**
George James, Jr.
P.O. Box 1716
Sumter, SC 29151
775-5381

**Legislative Committee**
Susan Lipscomb
P.O. Drawer 2426
Columbia, SC 29202
771-8900

**Defense Line Committee**
William H. Davidson, II
P.O. Box 2285
Columbia, SC 29202
254-4190

Lawrence B. Orr
318 W. Palmetto St.
Florence, SC 29501
662-1418

**Amicus Curie**
Clarke W. McCants
P.O. Box 519
Aiken, SC 29802
643-4110

**Conventions Joint Meeting**
H. Michael Bowers
P.O. Box 993
Charleston, SC 29402
577-4000

**Conventions Annual Meeting**
W. Frances Marion, Jr.
P.O. Box 2048
Greenville, SC 29602
240-3200

**Joint Meeting Program**
William S. Davies, Jr.
P.O. Box 11070
Columbia, SC 29211
799-2000

John M. O'Rourke
P.O. Box 2125
Anderson, SC 29622
224-7111

**Annual Meeting Program**
John S. Wilkerson, III
P.O. Box 5478
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662-9008

Clarke W. McCants
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**Judiciary**
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324-4291

**Long Range Planning**
Michael B. T. Wilkes
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**Trial Academy Committee**
Joel W. Collins, Jr.
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**Ethics Committee**
John M. O'Rourke
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H. Mills Galivan
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Greenville, SC 29603
271-9580

L Sidney Connor, IV
P.O. Box 3939
Myrtle Beach, SC 29578-3939
448-3500

# Joint Meeting

## July 28-30, 1994

***Grove Park Inn***
***Asheville, NC***

# Annual Meeting

## October 20-23, 1994

***Kiawah Island***
***South Carolina***

## ONLY ONE TRIAL

Judge LOGAN E. BLECKLEY, in Nolan v. State, 55 Ga. 521, *Opinion:* One trial, and only one, for each crime, is a fundamental principle in criminal procedure, and must be the general rule practically administered in all free countries. For the public authority, whether king or commonwealth, to try the same person over and over again for the same offense, would be rank tyranny. It would amount, in capital cases, to cruelty not unlike that of keeping a loaded repeater pointed at the prisoner's head, and, with deadly purpose, but bad aim, discharging slowly one cartridge after another.

Courts are not fully agreed where jeopardy begins, or how far the defense of once in jeopardy differs, if at all, under our American constitutions, from that of *autrefois convict* or *autrefois acquit,* under the English common law. In the view of some judges jeopardy arises not out of the trial but out of the verdict; as if, in a combat intended to be mortal, there was no danger of being slain until you are hit.