

# Shouldering the Burden

Shoulder injuries are common in everyday life. Less so in accidents. However, accidents often can give rise to claims of shoulder injuries that are not related to the accident. Instead, the plaintiff tries to get you to pay for an injury at another time and place.

In several recent trials I obtained verdicts that rejected the claimed shoulder injuries. One trial was in Federal court in Cincinnati. The other was in Federal court in the Eastern District of Pennsylvania based in Philadelphia. One involved an alleged dislocation. The other an alleged torn rotator cuff.

Despite their geographic and physiological difference, they were similarly successfully defended. The lessons of those trials can provide insight into protecting yourself from such claims and defending against them.

In the Cincinnati trial, liability was admitted. Plaintiff demanded \$300,000 based upon \$18,000 in medical bills and allegations of \$60,000 in lost wages. The jury rejected the shoulder claim and awarded less than \$3,000 in medical bills—his ER visit and several doctor visits for his admitted soft tissue injuries. No award was made for lost wages or pain and suffering.

In the Pennsylvania trial, liability was also admitted. Plaintiff similarly demanded over \$300,000. The jury again rejected the claim of a shoulder injury. It awarded \$15,000 for the neck and back strain our doctor conceded that she suffered.

The shoulder is a complex and potentially vulnerable joint. We use it everyday in varying and means. We lift children and groceries. We throw football and slam doors. It is the shoulder that bears the burdens and strains of the activities of life.

Strains and tears can happen in one instance or cumulate over a lifetime. They can be the product of mundane, routine acts of which there is no direct evidence to prove its occurrence. It is possible that an accident can cause a shoulder injury. However, the potential is dependent upon the age of the individual and the nature of the accident.

Age is an important factor. In another trial, my medical expert described the aging of a rotator cuff as

being similar to a rubber band. With the passage of time, it loses elasticity. The decreased elasticity increases the potential for a tear in what appears to be the most innocuous of activities.

*So how do we defend against someone who claims a shoulder injury is related to the accident?*

First, research the plaintiff's medical history for indications of a pre-existing injury. All prior medical records and reports should be subpoenaed and combed for any indications of prior problems or trauma. The plaintiff should be "Indexed"—searched through a database of insurance claims.

In neither of the recent trials was such evidence uncovered. Instead, I was left to challenge the veracity of the plaintiff's claimed shoulder injuries by other means. EMT and ER records are the next key sources of information. Medical experts have indicated that if an individual suffers a traumatic shoulder injury, dislocation or torn rotator cuff, the pain will be immediate and significant. Weakness and limitation will become quickly evident. Thus, the absence of any immediate pain is a key fact for the defense of shoulder claim. In both cases, there was no indication of any injury to the shoulder claimed to be effected.

Absent immediate complaints, the plaintiffs in both trials asserted that they were distracted by their other injuries. Both pointed to later shoulder complaints to form a nexus to the accident.

The defense now shifts to undermining these claims with post-accident evidence. The strategy for doing so is to develop credible evidence of there being no nexus. The tactics vary with the case and the individual.

In the Cincinnati case, plaintiff claimed permanent problems with his shoulder limiting his future income. He was awaiting deferred entry into the Army at the time of the accident and was discharged when his shoulder came out during push ups.

Evidence of subsequent employment proved vital in the case. After his surgery, the plaintiff pursued a career as a commercial driver. Three times he applied for driving jobs.

Prior counsel defending the case did not obtain his DQ files, seeing it as unnecessary as he was not claiming lost income during these periods. As one who only handles trucking cases and having my CDL, I was familiar with the physical requirements of the job and subpoenaed the files after the case was transferred to our office.

The subpoenaed files produced three (3) DOT physicals. All indicated no limitation on the upper extremity, either by the doctor or, on page 1, by the plaintiff. We also benefited in that case from evidence provided by an unlikely and unsuspecting source-the plaintiff himself. The plaintiff's professed limitations were undermined by his own Myspace page.

For those of you without teenage children, Myspace is an internet social community. Participants create pages that detail their activities and interests. They often post photographs and videos.

The plaintiff claimed that, as a result, he could not engage in his favorite activities such as hunting and fishing as he could prior to the accident. He further claimed that the resulting pain had rendered him reclusive, rarely having social interaction with friends as he had done before the accident.

Shortly before trial I was able to locate his Myspace page. This was a valuable resource in undermining both claims. Despite claims to the contrary, his Myspace page included a post-accident listing of favorite activities that included hunting and fishing as well as MMA.

MMA, I learned from his roommates Myspace page, was Mixed Martial Arts combat involving punching, kicking, and wrestling. When confronted with this interest in MMA, the plaintiff claimed he meant that he would watch matches, but not participate. This story was undermined by his own words on his Myspace page that his interests included MMA if it was not too cold to train. Confronted with his own words, he conceded his writing.

Claims of reclusiveness were undermined by the serious of photos posted on his page as well as that of his "friends". "Friends" leave messages on each others page, leading you to their page, to their photographs, and ultimately to photos of the plaintiff.

The jury was shown photographs ranging from the plaintiff dining with friends to partying with others. The captions often provided a time reference, in identifying one series of photos as being from a post-accident New Years Eve party.

The cross examination was culminated by the Plaintiff's description of a video posted on his web page. It depicted the letter "J" being sprayed on his back in Raid and lit on fire, resulting in him running from the camera with his arms moving freely. The Plaintiff's own description of the film was more powerful and credible than any showing would have been.

The combing of medical and employment records and uncovering of the Myspace page produced a minimal verdict despite admitting liability and not presenting expert testimony to the contrary.

The Pennsylvania case took another course. There were no favorable employment records or online evidence. Instead, we were left to present the post-accident medical records and expert testimony by an orthoped. The doctor testified that the medical records did not support a shoulder injury emanating from the accident.

The medical expert's opinion was founded on the post-accident medical documentation. His logical opinion, supported by the evidence of record, persuaded the jury that the claimed shoulder injury did not result from this accident.

Shoulders can be a difficult joint, both medically and legally. Aggressive defense of claims can protect you from claims unrelated to your accident. It is just a matter of shouldering the burden.

*Written By:*  
*Douglas B. Marcello*  
*Marcello & Kivisto, LLC*  
*www.cdl-law.com*