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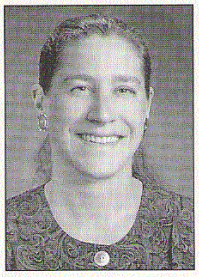
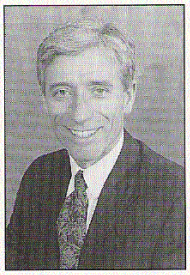
Ignorance of the Law May Well Be an Excuse, at Least When It Comes to Punitive Damages for Employment Discrimination

By Amy Joseph Pederson & Scott Seidman
Tonkon Torp LLP

The United States Supreme Court decides that punitive damages may be imposed against an employer without a showing of outrageous discriminatory conduct. The Court rules that punitive damages turn on whether the employer discriminated with knowledge, or at least in reckless disregard of a perceived risk, that its actions may violate federal law.





The United States Supreme Court has recently decided when an employer may be liable for punitive damages for employment discrimination. When Congress passed the first employment discrimination laws in 1964, it provided for limited relief, primarily in the form of back pay. Congress greatly expanded discrimination remedies when it passed the Civil Rights Act of 1991, which now provides for compensatory and punitive damages.[1] The lower federal courts disagreed about when an employer might be liable for punitive damages. Some courts said that a plaintiff must prove the employer engaged in "egregious misconduct" while other courts rejected such a standard. The Supreme Court resolved this dispute in *Kolstad v. American Dental Association*, 1999 WL 407481 (U.S.) (June 22, 1999), with a holding that probably lowers the hurdle for employees to recover punitive damages but at the same time provides important guidance for how employers can lessen the risk of punitive damages.

Kolstad was a sex discrimination in promotions case in which a female employee won a jury verdict against her employer for choosing to promote a male rival instead of her. The trial court refused to send the question of punitive damages to the jury. The Court of Appeals for the District of Columbia Circuit affirmed, holding that there was no evidence of the kind of "egregious misconduct" the court considered necessary to justify a punitive damages award. *Kolstad*, 139 F.3d 958 (D.C. Cir 1998).

The Supreme Court rejected the "egregious misconduct" standard. By enacting

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Comments From the Editor

Practice Being Persuasive Every Chance You Get

Dennis P. Rawlinson
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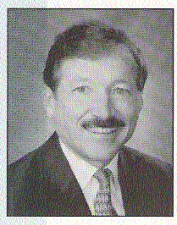


These days we all recognize that there are fewer and fewer opportunities to try cases. As a result, some law firms are encouraging their young litigation lawyers to become involved in public prosecution and public defense programs to gain trial experience. Other law firms are encouraging their young lawyers to attend trial-techniques seminars, such as those put on by the National Institute for Trial Advocacy, where each attendee is given extensive practice in the art of trying a case. Still other lawyers (realizing the value of trial experience) design their careers so that they will work in the office of a public prosecutor or public defender for a number of years to gain the necessary trial experience.

What most of us overlook, however, is that we have the opportunity every day to develop our skills of persuasion, which ultimately are the skills that are most important (more than technical legal objections, for instance) in persuading the fact-finder.

Everyday opportunities to practice persuasion. Each of us has numerous opportunities each day to practice persuasion.

Persuasion techniques such as brevity, clarity, choice of themes, telling a story, personalizing a client, painting a word picture, using analogies, and appealing to emotions can be used in a number of everyday settings.

Seek public-speaking opportunities. Numerous organizations, including a substantial number of nonprofit organizations, offer opportunities to lawyers to speak publicly regularly. Those of us who wish to hone our skills of persuasion should take advantage of these opportunities to develop our skills.

Employ persuasion skills in everyday discussions. Each day brings numerous opportunities to practice persuasion techniques. Stop and think of some examples. The next time you discuss with one of your children why he should not have his body tattooed or why she should dress appropriately for a particular event, don't just issue an order—practice your skills of persuasion.

The next time you are mistreated by a retail-product or service provider, consciously think about using your skills of persuasion to obtain the outcome you want. Think about whom you need to persuade, what you want him or her to do, and what will be the best approach to get him or her to do that. All your persuasive skills and techniques should be considered and used.

Create opportunities for persuasion. Each of us can create additional opportunities to use our skills of persuasion every day. We can test our case themes, arguments, and approaches.

The next time you take a cab, ask the cab driver's opinion of one of your legal themes or legal theories. Think about it in advance. Develop persuasive arguments on both sides of the issue and listen to the feedback.

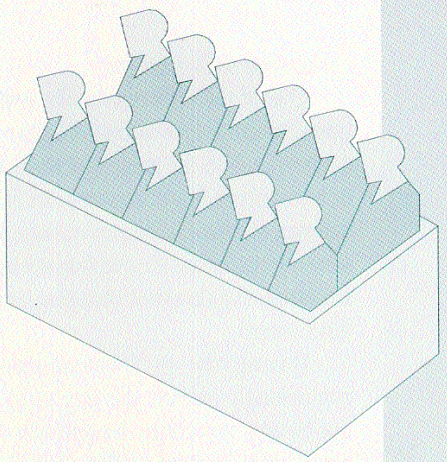
The next time you are at the gas station, get out of the car and stand next to the gas station attendant while he or she is pumping gas and test your case theme, theory, or argument. You will be surprised what you learn.

Develop friendships with folks who have different backgrounds from yours but seem to have insight and wisdom. Often a hairdresser or a barber is an excellent target on which you can try your skills of persuasion.

Yes, there are fewer opportunities to try cases these days. But each day that the sun rises there are innumerable opportunities to persuade. Don't miss the opportunities you do have to develop your skills. ❐

A Pursuit for the Truth

The Informed Juror



By Robert P. Jones, Circuit Judge
4th Judicial Court

While most lawyers hold the belief that a trial is a search for the truth, they reserve the exclusive right to determine what truths the jury shall be told. Allowing jurors the opportunity to ask questions gives the jurors the groundwork to make more informed decisions. Why shouldn't we give our jurors all the tools they need to do their job? As early as 1907, the Supreme Court of North Carolina held, "There is no reason that occurs to us why this [questions from the jury] should not be allowed in the sound legal discretion of the court. . . ." *State v. Kendall, et al.*, 57 S.E. 340, 341 (N.C. 1907).

This is the third year that I have permitted jurors to ask *oral* questions of the witnesses during trial. Initially I was apprehensive. I was fearful that something would occur that would cause a mistrial. Now I permit questions as a matter of course, and I've yet to have a mishap.

There are currently five states, as well as some Oregon judges, that permit *written* jury instructions. Their procedure requires the jurors to ask written questions *after* the witness has testified. The judge then reviews the questions in chambers with the attorneys or holds a bench conference. Because of impaired hearing and my courtroom design, my personal options were limited to either sending the jury out or adjourning to chambers. Either option was an unwieldy and time-consuming process. Moreover, in my experience, written questions lessen the spontaneity of jury participation. Oral questions asked at *any time* during the testimony create a relaxed and participatory ambience in the courtroom.

While encouraging jurors to withhold their questions until the direct and cross-examination is finished, depending on the nature of the question, I will put it to the witness immediately. Those types of questions are normally uncomplicated, such as explaining a technical term.

Written vs. Oral Questions

In a bench trial, judges ask the witness oral questions without restriction. As a fact finder, why should a judge have the right to ask questions but deprive jurors of that privilege? What is the distinction? We know that jurors often raise questions among themselves during deliberations. Why not hear those questions in open court? If the question is improper, it can be answered appropriately.

In December, 1998, I had the opportunity to spend a week in Phoenix, Arizona, studying their jury reform procedures. I was impressed. I listened to panels composed of trial attorneys, judges and former jurors. While other jury reform procedures were discussed, *written* jury questions were by far the most favored.

When I brought up the use of oral questions in Phoenix, the reaction was circumspect. No one identified a specific concern but felt it was "venturesome." I'm not aware of any other court, in or out of Oregon, that permits oral questions from the jurors at any time.

Electronic Objections

I returned to Portland somewhat subdued, but continued with my *oral* question procedures. I was revitalized by the enthusiasm shown by the attorneys who attended the OSB Litigation Seminar in March of this year where I discussed jury reform, including oral questions.

My method of instant electronic objections, while not flawless, permits a juror to ask oral questions at any time a witness is on the stand, yet preserves counsel's right to object. Here is how I do it:

Installed in my courtroom underneath each counsel table is a concealed toggle switch, each of which is connected to two small battery-sized lights on my bench. The jurors cannot see either the toggle switches or the lights. At the instant the toggle switch light is illuminated by counsel, I immediately interrupt the question, then explain to the jury why that question was not germane. I remain vigilant to stop a juror's question the moment I sense a problem, even though no objection is made. Without fail, the jurors accept my

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Pursuit for Truth

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explanation with good grace.

One of the criticisms of the written question procedure is that whether the conference with the judge is at the bench or in chambers, litigators worry that jurors will suspect that the lawyers in some way were responsible for the question not being answered. The electronic objection lessens this concern.

During the jury orientation, I painstakingly instruct the jury as to the questioning procedure. I emphasize that not all jurors' questions will be allowed and that I will be the one making that determination.

At the pretrial conference, I discuss the jury question process with the attorneys. I assure them that, as responsible officers of my court, I will accept their electronic objection without question. While I have occasionally disagreed with an objection, I have not witnessed any abuse.

Jurors' Reactions

While I routinely ask jurors to make written evaluations of the attorneys' performances post-verdict, the questionnaire *does not* include or solicit comments on the jury question procedure. For this article, I've arbitrarily selected the questionnaires from my most recent jury trial. Seven of the twelve jurors *volunteered* these written comments:

"I sincerely appreciate that the judge allowed us to ask questions during the trial. It seemed much more a participatory democracy, and I think a much more effective procedure."

"I liked the idea that we were able to ask questions. Thank you."

"Being able to ask questions was very helpful and much appreciated. Thank you for the opportunity to be on jury duty."

"Thank you for allowing the jurors to ask questions. It helped make clear several key points."

"Thank you for the opportunity to ask questions as a juror. It made my experience as a juror much more interesting and rich, and I believe we arrived at a better decision as a result."

"Thank you for allowing the jury to ask questions."

"The ability of the jurors to ask questions made the deliberation much more clear."

These specific jurors' comments mirror the sweeping approval I have received from my jurors over the years. The only criticism that I have heard from the jurors are occasional complaints about the juror who other jurors feel asks too many questions. That is irritating, but tolerable.

Attorneys' Reactions

First-time lawyers in my court are quite wary of the concept but, when they understand how the electronic objection works, most are reassured. Litigators who regularly try jury cases in my court seem to be comfortable with the concept. The most common litigator reaction is chagrin that they had not asked the question posed by the juror.

Litigators and judges who have not used jury questions have difficulty in accepting that this jury reform procedure is designed for jurors, not judges or lawyers. They expect jurors to remain silent, to digest and comprehend in a few days what the attorneys have spent months scrupulously studying. "It may sometimes be that counsel are so familiar with a case that they fail to see problems that would naturally bother a juror who is presented with the facts for the first time."

The expected evils of juror questioning have proved to be myths. There have been no significant reported incidents of juror misconduct, and there have been no episodes of substantial interference with the orderly process of trials.

Clients' Reactions

While specific data has not been collected, the reactions from the parties that I am aware of have been favorable. It has been reported to me by several lawyers that their clients felt the jurors' questions indicated that the jury was paying close attention to the evidence.

Advantages

1. The nature of juror questions often alerts the trial judge and the attorneys when the jurors have misunderstood an important point of the evidence or testimony, thus giving them the opportunity to correct the misunderstanding with new witness testimony, closing arguments, or jury instructions on the issue.
2. Permitting jurors to ask questions increases the likelihood that the jury will understand the witness testimony and give it appropriate weight during deliberations.
3. Permitting jurors to ask questions helps keep them alert and engaged in the trial proceedings, thus increasing satisfaction with jury service.

Judges' Reactions

I'm not a spokesperson for judges, nor am I aware of any poll that's been conducted as to their position on *oral* jury questions. In Multnomah County the Multnomah Bar Association did a survey this year which included a question about the use of *written* questions from the jury. Nineteen judges responded that they did not permit them; ten said that they did, although some of those ten judges did not inform jurors that they could submit written questions. My reading of my colleagues' views is that there would be little enthusiasm for *oral* questions.

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Pursuit for Truth
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How Many Questions and How Much Time is Involved?

A recent study found that:

- Only 16 percent of the questions asked were objected to.
- The average was about five questions per trial.
- That amounts to about one question per day.
- There was about one question for every two hours of trial time.
- It added about one hour to a one-week trial.

Insurance

There are few instances of inquiries relating to the old bugaboo of insurance. I can only recall several cases where jurors asked about worker's compensation or collateral source medical coverage, and only one flat-out question about liability insurance. In those rare situations I respond by saying to the jury, *"I'm glad you asked that question because it now gives me the opportunity to instruct you on this issue."* A lawyer has yet to object to my response, move for a mistrial or seek further cautionary instructions on those occasions.

In a way, I welcome those infrequent questions about insurance. Many of us suspect that insurance is on occasion discussed by jurors in the jury room; giving that cautionary instruction to a jury early on should discourage that topic from being raised during deliberations.

What Types of Questions Do Jurors Ask?

They range from the very simple to the complex. Most are intelligent and sensible, often demonstrating a keen mind and perception. They are not pejorative. Frequently, jurors refer to their individual notes when asking questions. The testimony of expert witnesses, especially physicians, generates many of the questions. Jurors commonly ask experts to define technical terms. Most expert witnesses, many of whom have held teaching roles, respond comfortably to fielding jurors' questions.

Lawyers who listen to jurors' questions have an unsurpassed opportunity to discern the areas of jurors' interests. Skilled litigators recognize the advantage of this advance insight into the jurors' thinking. It can be a distinct plus. When requested, I usually permit the lawyers to pursue the line of questions raised by the jurors.

What Types of Cases?

I detect a notable correlation between the simplicity of the case and the number of questions. In many "routine" cases there are few questions; frequently there are none. In a complex case there can be many questions. There is no doubt in my mind that jurors focus more closely on the presentation of the evidence when they are allowed to ask questions.

The Risk Factor

President Roosevelt's well-known saying, "The only thing that we have to fear is fear itself," illustrates the feelings of anxiety that some lawyers and judges suffer when this procedure is broached.

While it is conceivable that a juror could blurt out a question that is inappropriate before the judge could intervene — this has yet to happen to me — what could be the real damage? That juror's question would not be answered and, if warranted, the jury could be cautioned. A mistrial is a possibility, yet the hazard of a mistrial would not be as great as other juror misconduct, such as talking to a party or a witness.

Reflections

I plan to continue to permit oral questions. It is popular with my jurors and accepted by all but a few of the lawyers who litigate civil jury trials in my court. I appreciate that continual judicial supervision is required to respond promptly to an electronic objection or to halt a juror's question that appears to be headed into a prohibited area. I would not expect many trial judges would encounter much difficulty in monitoring the questions.

Implementing jury reforms in every jurisdiction is critical to the survival of the jury system as we know it today. Traditional jury procedures have largely failed to take into account how juries process information and make decisions, and have forced jurors to act contrary to their natural tendencies.

I was a trial lawyer for twenty-seven years and have been a trial judge for over twenty years. I'm convinced that *oral* questioning is the most significant and stimulating procedural change that I have experienced!

It is a unique experience in a jury trial — regardless of the verdict you obtain, you will have the satisfaction of knowing that your jurors were well focused and that likely you tried a better case having had the opportunity to hear the jurors' concerns as the trial progressed.

Arizona Superior Court Judge Michael Dann, a national leader in jury reform, has a simple response to lawyers who oppose jury questions: "'Have you ever tried it?'" he says. "Inevitably, they haven't. So I say, 'Try it, then let's talk.'"

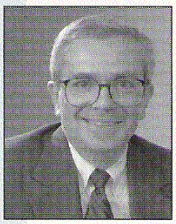
Whether you are a lawyer or a judge, I say if you try it, you will like it! ❐

Oregon Condemnation Procedure

By Mark J. Fucile
Stoel Rives LLP

Condemnation procedure in Oregon varies significantly in several key respects from other civil actions. This article highlights those differences from the pre-filing stage through trial for the general practitioner who handles an occasional condemnation case.

There are two principal statutory sources of condemnation procedure applicable to public agencies[1] in Oregon.



The first is ORS Chapter 35, which creates the basic procedural framework governing condemnation cases. It is important to note at the outset that ORS Chapter 35 governs *direct* condemnation actions—where the government acts affirmatively under the power of eminent domain to acquire property. *Inverse* condemnation, by contrast, occurs where the government has taken property without invoking the power of eminent domain and the property owner affected brings an action against the government to recover compensation. Inverse condemnation actions in state court are governed solely by the Oregon Rules of Civil Procedure and not the specialized procedures applicable to direct condemnations. *See generally Suess Builders v. City of Beaverton*, 294 Or 254, 656 P2d 306 (1982) (discussing inverse condemnation procedure).

The second statutory source is the federal Uniform Relocation Assistance and Real Property Acquisition Policy Act of 1970, which is found at 42 USC § 4601, et seq. and which has been adopted in pertinent part as "guidance" for Oregon public agencies in their property acquisitions by ORS 281.060(3). Neither 42 USC § 4601 nor ORS 281.060(3), however, create rights enforceable against a public agency in a condemnation action. *See State Dept. of Trans. v. Hewett Professional Group*, 321 Or 118, 129, 895 P2d 755 (1995).

1. Pre-Filing Procedure

When it becomes apparent during the planning of a public project that an agency will need to acquire property for the project, the public agency involved will typically have a surveyed legal description of the property prepared and a title search performed to identify the owner and other interest holders.

After the property needed has been identified and the owner located, the public agency must satisfy a number of procedural prerequisites before it can file a condemnation complaint.

First, under ORS 35.235(1)-(2) and *Highway Com. v. Hurliman*, 230 Or 98, 113, 368 P2d 724 (1962), the public agency's governing body must adopt a resolution or ordinance authorizing the acquisition of the property concerned before moving forward with a condemnation action. The resolution must declare generally that there is a need to acquire the property involved for a public project that the public agency is authorized to carry out. The public agency's resolution is "presumptive evidence of the public necessity of the proposed use, that the property is necessary therefor and that the proposed use, improvement or project is planned or located in a manner which will be most compatible with the greatest public good and the least private injury." ORS 35.235(2). The public agency need not, however, have obtained all of the necessary land use permits required for the project before adopting its resolution or moving forward with condemnation. *See State Dept. of Trans. v. Schrock Farms*, 140 Or App 140, 144-46, 914 P2d 1116, *rev den*, 324 Or 176 (1996); *Powder Valley Water Control District v. Hart Estate Investment Company*, 146 Or App 327, 332, 932 P2d 101 (1997).

Second, under ORS 35.346(2) and 42 USC § 4651(2), the public agency must appraise the property it plans to acquire before beginning negotiations with the owner. The public agency's appraiser must generally

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inspect the property under ORS 35.346(2) and must provide the owner with at least 15 days' advance written notice of the inspection and the opportunity to accompany the appraiser on the inspection.

Third, under ORS 35.235(1) and 42 USC § 4651(1), the public agency must attempt to acquire the property through negotiations before pursuing litigation. *See generally State Hwy. Comm. v. Freeman*, 11 Or App 513, 519-20, 504 P2d 133 (1972). ORS 35.346(2) and 42 USC § 4651(3), in turn, generally prevent an agency from offering the property owner anything less than the agency's appraised value.

Fourth, ORS 35.346(1)-(4) require the public agency to make a written offer to the property owner at least 20 days before filing a condemnation complaint.[2] Under ORS 35.346(2), the public agency's initial written offer must be "accompanied by any written appraisal upon which the condemner relied in establishing the amount of compensation offered" if the amount involved is $20,000 or more. If it is less, then the agency is simply required to provide the owner with a written explanation of how it arrived at the compensation offered. In either event, the public agency must leave the initial written offer open for at least 40 days under ORS 35.346(4). Unlike a condemnation resolution, the Court of Appeals held in *Urban Renewal Agency of Salem v. Caughell*, 35 Or App 145, 148, 581 P2d 98 (1978), that the "20-day offer letter" requirement is waived if the property owner does not object in its initial response.

*A property owner challenging a public agency's need for the property must show that the public agency's decision was "clearly erroneous," which both the Oregon Supreme Court and the Court of Appeals have equated with having "'no basis in reason and * * * without any economic justification.'"*

2. Initial Pleadings and Early Possession

Under ORS 35.245(1), all condemnation actions—regardless of the amount involved—are generally handled throughout in circuit court. If the amount involved is $20,000 or less, however, the owner may elect to have the compensation determined by court-sponsored binding arbitration under ORS 35.346(6)(a)-(b). If the amount at issue is between $20,000 and $50,000, then the owner may elect court-sponsored nonbinding arbitration under ORS 35.346(6)(c).

Venue lies in the county where the property—or the greatest portion of it—is located under ORS 35.245(1).

ORS 35.245 and ORS 35.255 outline the elements the public agency must include in its complaint. The express statutory requirements only include a description of the property, a statement of ownership, the amount alleged to be the value of the property taken and any associated severance damages to the defendant's remaining property from the taking. *See generally Powder Valley Water Control District v. Hart Estate Investment Company*, *supra*, 146 Or App at 330-32. In practice, however, public agencies usually also include a general description of the project for which the property is being acquired, the statutory authority for the taking, a reference to the condemnation resolution and an allegation that the agency has attempted to negotiate with the owner before filing the complaint. ORS 35.245(2) permits the public agency to join any person claiming an interest in the property as a defendant.

Of special note, ORS 35.346(2) makes it very difficult to reduce the agency's allegation of the compensation by later amendment of the complaint. Any such amendment must be by court order entered not later than 60 days before trial. Further, the court must find by clear and convincing evidence that the appraisal upon which the agency's original offer was based "was the result of a mistake of material fact that was not known and could not reasonably have been known at the time of the original appraisal or was based on a mistake of law." *Id.*

ORS 35.295 governs the matters that must be included in the defendant's response. If a defendant has a legal defense to the taking, it must be raised by either a motion to dismiss or an affirmative defense. Defenses to the taking, which in practice are rare, usually focus on defects in the public agency's pre-filing procedures or the public agency's need for the property. On this last point, a property owner challenging a public agency's need for the property must show that the public agency's decision was "clearly erroneous," which both the Oregon Supreme Court and the Court of Appeals have equated with having "'no basis in reason and * * *

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without any economic justification.'" *See Emerald PUD v. PacifiCorp*, 100 Or App 79, 83-87, 784 P2d 1112, *on reh'g*, 101 Or App 48, 788 P2d 1034, *rev den*, 310 Or 121 (1990). The defendant's answer must also allege the value of the property being taken and any associated damages to the defendant's remaining property as a result of the taking.

If applicable, a property owner may also bring related counterclaims against the public agency within the context of the condemnation case. *See State ex rel Nagel v. Crookham*, 297 Or 20, 22-24, 680 P2d 652 (1984). In *Nagel*, for example, the property owners asserted by way of a counterclaim that the value of their property had been diminished—or "blighted"—by the eight-year delay between the time that the public agency had initially announced its project and the point the agency actually filed its condemnation action.

In many instances, a public agency may wish to obtain possession of the property before the eventual trial on valuation so that its project can go forward in the interim. If so, it must deposit the alleged value of the property into the court under ORS 35.265. ORS 35.265 is silent on whether simply depositing the alleged value of the property is, in and of itself, sufficient to entitle the public agency to possession without a court order, and practices vary among agencies in this regard. But, the Court of Appeals in *Harder v. Dept. of Fin. and Admin.*, 1 Or App 26, 27-29, 458 P2d 947 (1969), noted that due process requires a hearing and judicial approval of early possession at least in those cases where the party in possession of the property refuses to vacate. If a hearing is held, the focus is on the agency's need for early possession to meet, for example, the project's construction schedule. If early possession is granted, the property owner may withdraw the public agency's deposit under ORS 35.285 without prejudice to any later argument the owner may make on value.

If a hearing is held, the focus is on the agency's need for early possession to meet, for example, the project's construction schedule. If early possession is granted, the property owner may withdraw the public agency's deposit under ORS 35.285 without prejudice to any later argument the owner may make on value.

3. Discovery

Discovery in condemnation cases is, at one and the same time, more confined than a typical commercial case and more expansive.

It is more confined in the sense that the focus of most condemnation cases (absent a challenge to the taking itself) is solely on valuation. Discovery, therefore, typically involves an investigation of the possible uses of the property, the owner's plans for the property, any environmental or other permitting issues affecting the property and past sales or efforts to sell the property. Under a limited exception to OEC 701, a noncorporate owner of property can generally offer an opinion on the property's value. *Highway Com. v. Assembly of God*, 230 Or 167, 177, 368 P2d 937 (1962). Public agencies, therefore, often take property owners' depositions on this point.

Discovery is more expansive than in a typical commercial case because the parties are now required to exchange appraisal reports before trial. Until 1997, there was generally no expert discovery in Oregon condemnation cases—just as in other civil cases. *See Brink v. Multnomah County*, 224 Or 507, 516-18, 356 P2d 536 (1960) (cloaking appraisal reports within the attorney-client privilege); *City of Portland v. Nudelman*, 45 Or App 425, 432-34, 608 P2d 1190, *rev den*, 289 Or 275 (1980) (noting that the work product rule would protect appraisal reports prepared in anticipation of litigation). Because expert appraisal testimony is usually *the* key element of a condemnation trial, the limitation on expert discovery gave the phrase "trial by ambush" real meaning in a condemnation case.

In 1997, however, the Legislature brought expert discovery to Oregon condemnation cases when it enacted Senate Bill 1036. *See* Or Laws 1997, ch 797, § 1. Under revisions to ORS 35.346, the parties to a condemnation case are now required to disclose appraisal reports at three distinct points:

- As noted earlier, the public agency's pre-litigation offer in acquisitions valued at $20,000 or more must now be accompanied under ORS 35.346(2) by the appraisal report upon which the agency based its offer.

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- If the property owner rejects the agency's offer and the acquisition proceeds into litigation, the property owner must provide the agency with its appraisal report at least 60 days before trial or arbitration under ORS 35.346(4).

- At 60 days before trial or arbitration, ORS 35.346(5)(b) requires each side to provide the other with all other appraisal reports obtained "as a part of the condemnation action"—whether they will be used at trial or not.

The penalty under ORS 35.346(5)(a) for the failure to follow these exchange requirements is that the appraisal involved cannot be used at trial.

The full contours of Senate Bill 1036 remain to be defined. It is not completely clear, for example, whether an agency must disclose pre-filing appraisals it did not ultimately use in formulating its initial offer or in the subsequent litigation itself. Similarly, Senate Bill 1036 was silent on the extent to which, if at all, an expert appraisal witness is now subject to a deposition. *See generally State v. Riddle*, 155 Or App 526, 536-41, 964 P2d 1056, *adhered to as modified*, 156 Or App 606, 969 P2d 1032 (1998) (*in banc*) (holding in a non-condemnation setting that an expert consultant who was not called as a trial witness by the retaining party could not be subpoenaed by the adverse party as a trial witness).

4. Trial

Several facets of condemnation procedure vary significantly from other civil cases at trial.

Once the jury has determined the overall compensation the public agency must pay as a result of the taking, any disputes among the defendants concerning their respective shares of the overall award are determined by the court in a supplemental proceeding under ORS 35.285(1).

First, ORS 35.265 and the Court of Appeals' decision in *Emerald PUD v. PacifiCorp*, *supra*, 100 Or App 79, in effect bifurcate the trial if the defendant challenges the public agency's right to take the property concerned. In that event, the trial court determines the issue of the right to take in a preliminary evidentiary proceeding. This preliminary hearing usually—but not necessarily—coincides with any hearing on early possession. *See NW Natural Gas v. Georgia-Pacific*, 53 Or App 89, 98, 630 P2d 1326, *rev den*, 291 Or 893 (1981). If the public agency prevails on the right to take, then the question of value is reserved for the jury under ORS 35.305(1).

Second, under ORS 35.305(2), neither party bears the burden of proof on the issue of value.

Third, because neither party bears the burden of proof on value, the defendant can elect under ORS 35.305(1) to proceed first with the presentation of evidence during the valuation phase and can present both opening statement and closing argument first as well. This election, however, must be made at least seven days prior to trial.

Fourth, ORS 35.315 permits either side to request a jury view of the property involved. If requested, the view is mandatory. The jury view typically follows opening statements.

Fifth, ORS 35.346(7)(a) provides for a defendant's recovery of both attorney and expert witness fees if the amount awarded at trial exceeds the public agency's final written offer made at least 30 days before trial.

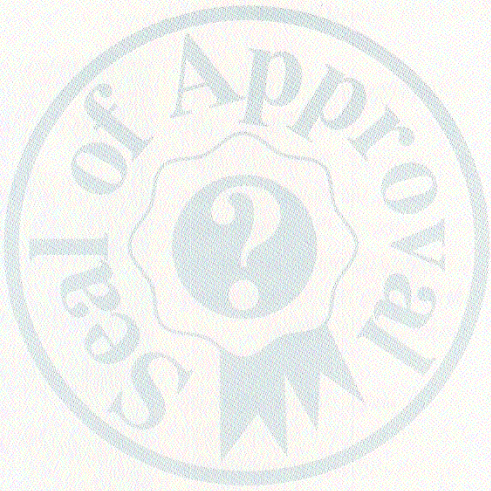
Finally, once the jury has determined the overall compensation the public agency must pay as a result of the taking, any disputes among the defendants concerning their respective shares of the overall award are determined by the court in a supplemental proceeding under ORS 35.285(1). ❐

1 Some private corporations, such as utilities and railroads, have also been given condemnation authority by statute. The procedures applicable to private condemners are generally similar to, but not precisely the same as, those governing public condemners. *See, e.g.*, ORS 35.235(3) (effect of condemnation resolutions) and ORS 35.275 (early possession requirements).

2 Owners and others having possessory interests in the property involved may also be eligible for relocation benefits and other related assistance under 42 USC § 4601, et seq., and ORS 281.045-.105.

PRODUCTS Liability

Where Are We Now?

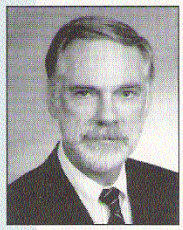


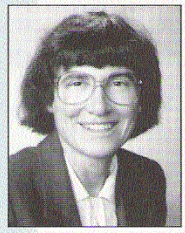
By Ronald E. Bailey and Linda M. Bolduan
Bullivant Houser Bailey

Fishbowls and prescription drugs. SUVs and silicone breast implants. Products liability cases are making their way through the Oregon courts. Where are we now? This article will look at some recent developments in Oregon products liability law.

I. A PRODUCT LIABILITY CIVIL ACTION

First enacted in 1977, Oregon products liability law is set forth at ORS 30.900-ORS 30.927. ORS 30.900 defines a product liability civil action as





> a civil action brought against a manufacturer, distributor, seller or lessor of a product for damages for personal injury, death or property damage arising out of :
>
> (1) Any design, inspection, testing, manufacturing or other defect in a product;
>
> (2) Any failure to warn regarding a product; or
>
> (3) Any failure to properly instruct in the use of a product. [1]

II. THEORIES OF RECOVERY

A products liability action is generally based upon theories of strict liability in tort and/or negligence.[2]

A. Strict Liability In Tort

Under ORS 30.920,

> [o]ne who sells or leases any product in a defective condition unreasonably dangerous to the user or consumer or to the property of the user or consumer is subject to liability for physical harm or damage to property caused by that condition, if:
>
> (a) The seller or lessor is engaged in the business of selling or leasing such a product; and
>
> (b) The product is expected to and does reach the user or consumer without substantial change in the condition in which it is sold or leased.[3]

1. Defective Product Cases

The consumer expectation test is currently the standard for determining strict products liability in manufacturing and design defect cases. In April, 1999, for the first time in thirty years, an Oregon appellate court outlined the parameters of the test.

In *McCathern v. Toyota Motor Corp.*,[4] the Oregon Court of Appeals noted that Oregon's consumer expectation test is derived from Comment i of section 402A of the Restatement (Second) of Torts, which defines an "unreasonably dangerous" product as one that is

> dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with ordinary knowledge common to the community as to its characteristics.

Comment i thus requires a plaintiff establishing a defective design to prove:

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(1) what an ordinary consumer would expect from the allegedly defective product, and (2) that the product failed to meet those expectations.[5]

According to *McCathern*, courts in other jurisdictions have generally recognized two distinct ways to meet that burden of proof: 1) the "representational" approach and 2) the "consumer risk-utility" approach.

The "Representational" Approach

Under this approach, plaintiff must prove that the product did not perform in accordance with specific representations made by the manufacturer to the consuming public. If plaintiff was injured because the product did not function as represented, causation has been established. Based upon common law principles of warranty, the representational approach endeavors to protect consumer expectations reasonably flowing from the manufacturer's representations.[6] Considerations of cost and utility are *immaterial* to the representational approach. [7]

The "Consumer Risk-Utility" Approach

In contrast to the representational approach, the "consumer risk-utility" approach is grounded on considerations of product cost and benefit, as determined from the perspective of the reasonable consumer. The premise underlying this approach is that "ordinary consumers reasonably expect products to be designed in the safest feasible and practicable manner."[8] Under this approach, a plaintiff must prove that the manufacturer could have "feasibly and practicably"[9] designed a safer alternative design, which, in effect, establishes that the existing product failed to meet the consumer's reasonable expectations.

After reviewing the history of the consumer expectation test in Oregon, the McCathern court concluded that both approaches are viable in this state. In a defective design case, McCathern holds that a plaintiff "with sufficient proof" can proceed under either the representational approach, the consumer risk-utility approach, or both.

Causation is more difficult to prove than under the representational approach. The consumer risk-utility approach requires a comparison between the existing product and the alleged safer, practicable alternative. As explained by the court:

> . . . [W]as the difference in design between the actual product and the alleged alternative a material cause of the plaintiff's injuries—or, conversely (from the defense perspective), would the plaintiff have been injured even if she had been using the alleged safer alternative?[10]

However, "particular evidence" is not required to prove causation. An inference from other probative evidence is sufficient.

Oregon's Approach

After reviewing the history of the consumer expectation test in Oregon, the *McCathern* court concluded that both approaches are viable in this state. In a defective design case, *McCathern* holds that a plaintiff "with sufficient proof" can proceed under either the representational approach, the consumer risk-utility approach, or both.

Application to the Case

In *McCathern*, plaintiff was severely injured when the 1994 Toyota 4Runner in which she was a passenger rolled over. The roll-over resulted from the driver's attempts to avoid a head-on collision on a two-lane paved highway and involved a series of sharp turns and evasive maneuvers. Plaintiff brought a products liability action against Toyota Motor Corporation and others, alleging, *inter alia*, that the vehicle was "dangerously defective and unreasonably dangerous in that it was unstable and prone to rollover" as designed and sold. A jury found for plaintiff, awarding more than $7.6 million in economic and noneconomic damages.

The Oregon Court of Appeals affirmed. The court found that the *McCathern* plaintiff had met her burden of proof under both approaches to consumer expectation. With respect to the representational approach, the court looked to Toyota's print and television advertising for the 1994 4Runner, concluding that Toyota specifically marketed the vehicle as appropriate for highway driving, including the "sharp turns and evasive maneuvers" that allegedly resulted in the vehicle in the instant case rolling over. The court held that, given Toyota's representations, a jury

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could conclude that "an ordinary consumer would reasonably expect a 1994 4Runner traveling at legal speed *not* to roll over following foreseeable evasive maneuvers, such as three sharp turns on a flat, dry, paved highway."[11] The court further held that plaintiff established causation under the representational approach by merely showing that she was injured because the vehicle did not perform as represented.

With respect to the consumer risk-utility approach, the plaintiff presented evidence and expert testimony regarding the likelihood of rollover of a 1994 4Runner as compared to a 1996 4Runner. The court concluded it could be inferred from plaintiff's evidence that the 1996 4Runner design could have either prevented or "greatly reduced the likelihood" of a rollover in the accident. That is, the jury could properly infer that, had plaintiff been riding in a vehicle with the design of the 1996 4Runner, "the increased stability of the 1996 design would have either prevented or 'greatly reduced the likelihood' . . . of a rollover."[12]

The *McCathern* defendants filed a petition for review on July 23, 1999.

2. Failure-to-Warn Cases

Strict products liability claims are governed by statute, but the statute "shall be construed in accordance with the Restatement (Second) of Torts sec. 402A, Comments a to m (1965)."[13] Pertinent to a products liability action for failure to warn, Comment h provides, in part:

> A product is not in a defective condition when it is safe for normal handling . . . . If the injury results from abnormal handling . . . the seller is not liable. Where, however, [the seller] has reason to anticipate that danger may result from a particular use, . . . he may be required to give adequate warning of the danger . . . and a product sold without such a warning is in a defective condition.[14]

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In *Waddill v. Anchor Hocking, Inc.*, plaintiff was injured when a two-gallon glass fishbowl full of water shattered while she was carrying it. Apparently, due to normal use, the fishbowl had developed a small crack that could not be easily seen. Plaintiff brought an action against the manufacturer of the fishbowl, asserting, *inter alia*, a claim for strict liability failure to warn. The trial court denied defendant's motion to dismiss this claim.

At issue before the Oregon Court of Appeals was whether plaintiff's complaint made out her claim for strict liability failure to warn. In her complaint, plaintiff alleged that the fishbowl was dangerously defective because it explosively shattered when used in its intended manner, but did not contain "adequate instructions or warnings regarding its propensity to shatter explosively under normal and expected use, or the need to inspect the bowl for defects or fractures." Plaintiff asserted that, had she been warned not to carry the fishbowl when it was full of water, her injuries would not have occurred.

The court concluded that plaintiff had stated a claim for failure to warn under Comment h of the Restatement, commenting that

> a warning about the dangers of the water sloshing against the sides of the fishbowl while being carried could prevent the risk of harm arising from the internal pressure of the water in that it could have resulted in plaintiff not engaging in that particular use. In that light, we disagree with defendant's argument that liability in this case could be predicated only on a defect in the product when manufactured and not on the failure to warn.[16]

B. Negligence — The Fishbowl Revisited

The plaintiff's action in *Waddill v. Anchor Hocking, Inc.*,[17] *supra*, asserted not only a claim for strict liability failure to warn, but also a claim that defendant manufacturer negligently failed "to provide instructions or warnings regarding the propensity of the fishbowl to shatter."

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To state a claim for negligent failure to warn, a plaintiff must plead that "defendant knew or should have known of the danger of using the fishbowl in the particular manner alleged here."[18] The *Waddill* plaintiff alleged that "defendant knew or should have known [of the danger] because of prior complaints that this product had failed in this manner in the past causing injury and damage to other users of the product."[19] The court held these allegations sufficient to withstand a motion to dismiss, reasoning that "a warning about the dangers of the particular use involved in this case could have prevented that use and plaintiff's resulting injuries."[20]

It is important to note that the foreseeability standard for negligence set out in *Fazzolari*[21] does not govern the liability of a product supplier. In *Hoyt v. Vitek*,[22] the Oregon Court of Appeals held that Section 388 of Restatement (Second) of Torts sets the applicable standard of care. Section 388 provides, in pertinent part:

> One who supplies . . . a chattel for another to use is subject to liability . . . for physical harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier
>
> (a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied, and
>
> . . . .
>
> (c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous.[23]

Oregon is in the minority in limiting the use of the comparative fault defense to conduct constituting the unreasonable assumption of a known risk. The overwhelming majority of jurisdictions permit the application of comparative fault to all of plaintiff's conduct.

III. DEFENSES TO PRODUCTS LIABILITY CLAIMS

A. Comparative Fault

ORS 18.470 permits the comparison of a plaintiff's fault with the defendant's fault and reduces plaintiff's recovery accordingly. Under Oregon's statutory scheme, contributory negligence does not bar a plaintiff's recovery "if the fault attributable to the claimant was not greater than the combined fault of [defendants]," but any damages allowed "shall be diminished in the proportion to the percentage of fault attributable to the claimant."[24]

Clearly, ORS 18.470 permits a defendant to assert the affirmative defense of comparative fault in a products liability action sounding in negligence.

In *Hernandez v. Barbo Machinery Co.*,[25] the Oregon Supreme Court confirmed the long standing rule in Oregon that a defendant can assert comparative fault in a strict products liability action. However, relying on its earlier decision in *Sandford v. Chevrolet Div. Gen. Motors*,[26] the *Hernandez* court reiterated that *not* every type of act by the plaintiff can be raised as a comparative fault defense against a strict products liability action.

"[U]nreasonable misuse" of a product or "unreasonable use despite knowledge of a dangerous defect in the product and awareness of the risk posed by that defect" are defenses to a strict products liability action. But, assertions that plaintiff acted with "incidental carelessness or negligent failure to discover or guard against a product defect" will not sustain a comparative fault defense.[27]

Oregon is in the minority in limiting the use of the comparative fault defense to conduct constituting the unreasonable assumption of a known risk. The overwhelming majority of jurisdictions permit the application of comparative fault to all of plaintiff's conduct. California has led the trend. In *Daly v. General Motors Corp.*,[28] the California Supreme Court opined:

> We [will] not permit plaintiff's own conduct relative to the product to escape unexamined, and as to that share of plaintiff's damages which flows from his own fault we discern no reason of policy why it should...be borne by others. Such a result would directly contravene the principle . . . that loss should be assessed equitably in proportion to fault.[29]

In *Hernandez*, the court did hint it may be uncomfortable with Oregon's rule.

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Its opinion seems to suggest that the rule may be subject to challenge and reversal in the proper case.

B. The Learned Intermediary Doctrine

Under principles of strict products liability law, the manufacturer of a product has a duty to warn.[30] Typically, that duty extends to the consumer.

Restatement (Second) of Torts, § 388 sets forth the general rule. As noted above, for products known to be dangerous for their intended use, a supplier — which includes prescription drug manufacturers[31] — has a duty to exercise "reasonable care" to inform those for whose use the product is supplied "of the facts which make it likely to be dangerous."[32]

However, where prescription drugs and medical devices inserted by a physician are at issue,[33] the manufacturer's duty is generally limited to warning the prescribing physician of any potential danger that may result from use of the drug or device.[34] As explained by one court, this so-called "learned intermediary doctrine"

> provides that manufacturers of prescription drugs have a duty to warn prescribing physicians of a drug's known dangerous propensities and that physicians, in turn, using their medical judgment, have a duty to convey any relevant warnings to their patients. The learned intermediary doctrine, a rule of common law origin, is an exception to the general rule that a failure to warn of a product's dangerous propensities may serve as a basis for holding a manufacturer strictly liable in tort.[35]

... where prescription drugs and medical devices inserted by a physician are at issue, the manufacturer's duty is generally limited to warning the prescribing physician of any potential danger that may result from use of the drug or device.

Under the learned intermediary doctrine, once the manufacturer has adequately warned the physician, the manufacturer has fulfilled its duty to warn. Direct warnings to consumers are not required.[36]

Until 1999, only two Oregon cases had discussed the learned intermediary doctrine in detail, giving the doctrine their general endorsement.[37] In 1999, the Oregon Court of Appeals not only reaffirmed Oregon's recognition of the doctrine, but extended its application to pharmacists.

In *Griffith v. Blatt*,[38] plaintiff's physician prescribed Lindane, a lotion for plaintiff's skin condition. Plaintiff took her prescription to pharmacist William A. Stout. Following the instructions on the prescription, Stout typed the notation "As directed" on the prescription label and affixed that label to a plain prescription bottle. Also affixed to the bottle were generic "For external use only" and "Shake well" labels. The bottle bore no other labels. There was no evidence that Stout gave plaintiff verbal instructions or warnings concerning the lotion, particularly any warnings pertaining to the frequency or duration of use.

It was undisputed that plaintiff used the lotion improperly, applying it too often and leaving it on too long. A week or two after beginning to use the lotion, plaintiff began to suffer from medical problems. Some time later, plaintiff watched "Good Morning America," which featured a report about overexposure to Lindane; plaintiff immediately realized she was using "the same stuff." She consulted with a physician, who diagnosed her symptoms as due to Lindane toxicity.

Plaintiff brought a products liability action, *inter alia*, against pharmacist Stout, alleging failure to warn. She asserted claims in both strict liability and negligence. Stout contended that both claims were barred, as a matter of law, by the learned intermediary doctrine.

The Oregon Court of Appeals agreed, but only with respect to the strict products liability failure-to-warn claim.[39] Noting the "paucity" of Oregon law on the learned intermediary doctrine, the court looked to other jurisdictions that have considered whether pharmacists should be held "strictly liable for failure to warn of a prescription drug's dangerous propensities."[40] The court found that those courts "apparently without exception"[41] have declined to impose such liability, invoking the learned intermediary doctrine.

As one court reasoned:

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> "It would be illogical and unreasonable . . . to impose a greater duty on the pharmacist or druggist who properly fills the prescription than is imposed on the manufacturer. Holding that the pharmacist has a duty to warn the patients directly of the potential hazards when the manufacturer does not have that duty would be to impose that greater duty."[42]

Finding such reasoning persuasive, "and consistent with Oregon's endorsement of the 'learned intermediary' principle," the *Griffith* court affirmed the trial court's dismissal of plaintiff's strict liability claim against pharmacist Stout.[43]

"It would be illogical and unreasonable . . . to impose a greater duty on the pharmacist or druggist who properly fills the prescription than is imposed on the manufacturer. Holding that the pharmacist has a duty to warn the patients directly of the potential hazards when the manufacturer does not have that duty would be to impose that greater duty."

C. Statutes of Limitation

There are three different statutes of limitation applicable to a "product liability civil action." The general statute of limitations requires commencement of a product liability civil action "not later than two years after the date on which the death, injury or damage complained of occurs,"[44] subject to an eight-year statute of repose.[45] In addition, there are separate statutes of limitation for product liability civil actions involving asbestos-related disease[46] and breast implants.[47]

In *Purcell v. Asbestos Corp., Ltd.*,[48] a 1998 case, the Oregon Court of Appeals addressed the scope of the asbestos statute of limitations, ORS 30.907.[49] At issue in *Purcell* was whether ORS 30.907, a two-year statute of limitations, or ORS 12.135(1), the general ten-year statute of ultimate repose, applied to defendants who installed some of the asbestos-containing materials that they sold, manufactured, or distributed. ORS 30.907 applies to product liability civil actions, whereas ORS 12.135.1 applies to persons "having performed the construction, alteration or repair of any improvement to real property or the supervision or inspection thereof."

The court held that ORS 30.907 was the applicable statute of limitations even though defendants acted, in part, as asbestos installers. The court followed the reasoning in *State Farm v. W.R. Grace & Co. — Conn.*,[50] in which the Seventh Circuit Court of Appeals held that the Illinois ten-year statute of ultimate repose did not apply to an asbestos manufacturer who supplied asbestos materials that were subsequently installed.

Similar to ORS 12.135.1, the Illinois statute applies to acts or omissions of persons "in the design, planning, supervision, observation or management of construction, or construction of an improvement to real property." The *State Farm* court rejected defendant's argument that, because it supplied the asbestos materials that were installed, it was a designer or builder under the statute. Moreover, the *State Farm* court held that, even if defendant could be considered a "builder" under the statute, the statute did not apply because the basic problem was in the design of the asbestos-containing product, the failure to test the product, and the failure to provide adequate warnings — omissions "remote from building construction" and "not the sort of activities that the statute was intended to shield from late-filed products liability suits[.]"[51]

Applying the reasoning in *State Farm* to the instant case, the Oregon court held that,

> [t]he fact that defendants may also have acted as the installers of some of the products that they made or sold does not make ORS 12.135 applicable to plaintiff's claims against them, because the claims are based on their manufacturing, distribution and sales of the products.[52]

D. Preemption

Many federal statutes contain provisions preempting state tort claims. Preemption is an important defense to products liability claims because remedies available under federal statutes are typically more limited than those available pursuant to state tort law, particularly the availability of punitive damages.

1. MDA

Of particular importance in product liability claims are the Medical Device Amendments of 1976 ("MDA") to the Food, Drug and Cosmetics Act.[53] The MDA contains a preemption provision

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precluding a state from enacting certain requirements with respect to a medical device intended for human use. Under that provision, states may not establish "any requirement" that is "different from, or in addition to, any requirement" applicable to medical devices under the MDA.[54]

In 1996, the U.S. Supreme Court decided *Medtronic, Inc. v. Lohr*,[55] in which plaintiff brought a products liability action against the manufacturer of a pacemaker lead, asserting claims of negligence and strict liability. The Court held the MDA's preemption did not preempt plaintiff's state tort claims.

In 1997, in *Mears v. Marshall*,[56] the Oregon Court of Appeals applied the *Medtronic* analysis to claims brought against the manufacturer of an anti-wrinkle claim. The court held that the MDA did not preempt plaintiff's claims of strict liability, negligence, breach of express warranties, and breach of the implied warranties of merchantability and fitness.

Brown establishes a two-part preemption test. There is federal preemption if 1) the federal law imposes specific manufacturing or labeling requirements on the product; and 2) state common-law requirements applicable to the product interfere with the federal requirements.

2. FIFRA

Product liability claims may also implicate the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"),[57] which comprehensively regulates the use, sale, and labeling of pesticides. Like the MDA, FIFRA contains a preemption provision. Although a state "may regulate the sale or use of any federally registered pesticide,"[58] a state may not impose labeling or packaging requirements "in addition to or different from those required" under the statute.[59]

As in *Mears, supra,* in *Brown v. Chas. H. Lilly Co.*,[60] a case decided in July 1999, the Oregon Court of Appeals also applied *Medtronic* to hold that FIFRA did not preempt any of plaintiffs' product liability claims. In *Brown*, plaintiff purchased some of defendant's "Weed and Feed" product and applied it to his lawn according to the product instructions and warnings. During application, some of the product soaked through plaintiff's boots. He developed burns on his feet, which eventually led to amputation of his left foot.

Plaintiff and his wife ("plaintiffs") filed a products liability action against defendant manufacturer, alleging negligence and strict liability based upon "failure to warn of the unreasonably dangerous nature of the product when used as directed."[61] The trial court granted defendant's motion for summary judgment on the ground of FIFRA preemption. Plaintiffs filed an amended complaint, alleging strict liability, negligent testing and manufacturing, and breach of warranty. The trial court again granted defendant's summary judgment motion, apparently on the same preemption ground. The court of appeals reversed.

Looking to its earlier decision in *Mears, supra,* the court set forth the following test for preemption:

> . . . [A] federal law will have preemptive effect . . . when the federal law imposes specific requirements on the manufacturing or labeling of a product *and* when the state common-law "requirement" has been specifically developed "with respect to" the product that is subject to the federal requirements in a way that would impede the ability of federal regulators to implement and enforce the specific federal requirements.[62]

Thus, *Brown* establishes a two-part preemption test. There is federal preemption if 1) the federal law imposes specific manufacturing or labeling requirements on the product; *and* 2) state common-law requirements applicable to the product interfere with the federal requirements. Applying this test, the court concluded that FIFRA did not preempt any of plaintiffs' claims.

The court actually looked at the second requirement first. After examining FIFRA, the court concluded that nothing in the general purposes of the statute

> suggests that Congress intended to preempt states from imposing liability for harm caused by the use of pesticides registered under federal law or that the imposition of common-law liability generally for harm caused by using such pesticides would interfere with the purposes of the federal law.[63]

With respect to the specificity requirement, the court found that FIFRA does

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impose specific labeling requirements for products like Weed and Feed. Nevertheless, the court concluded that the specificity of the federal requirements was not controlling. The key for the court was whether a state common-law claim for failure to warn was derived from the regulation of the particular product or derived from "a more general duty to inform users and purchasers of the risks involved in using potentially dangerous products."[64] In the case at bar, the court found that plaintiffs' claims were based upon a general obligation of manufacturers to warn of the risks of using a dangerous product.

In holding that FIFRA did not preempt plaintiffs' common-law failure to warn or breach of warranty claims, the court opined that

> the general obligations that flow from the imposition of liability for failure to warn and breach of warranty pose no threat to the regulatory requirements imposed by the federal law. [65]

... the court opined that the general obligations that flow from the imposition of liability for failure to warn and breach of warranty pose no threat to the regulatory requirements imposed by the federal law.

IV. DAMAGES

A. Economic & Noneconomic Damages

As noted above, ORS 30.900 permits a plaintiff to bring "a product liability civil action" for "damages" for personal injury, death or property damage arising out of design or manufacturing defects or failure to warn or instruct. ORS 18.560(1) permits the recovery "in any civil action seeking damages arising out of bodily injury . . . death or property damage" of economic damages ("objectively verifiable monetary losses"[66]) and noneconomic damages ("subjective, nonmonetary losses"[67]), subject to a statutory cap of $500,000.

On July 15, 1999, the Oregon Supreme Court held the statutory cap on noneconomic damages unconstitutional. In Lakin v. Senco Products, Inc.,[68] John Lakin was injured by a pneumatic nail gun. Lakin and his wife brought a products liability action against defendant manufacturer of the nail gun, alleging negligent failure to warn and strict products liability in the nail gun's design and manufacture. A jury found defendant liable in both strict liability and in negligence, fixing John Lakin's comparative fault at 5%. The jury awarded John Lakin $3,323,413 in economic damages and $2,000,000 in noneconomic damages and awarded his wife $876,000 in noneconomic damages for loss of consortium. The jury also awarded $4,000,000 in punitive damages. The trial court reduced each plaintiff's award for noneconomic damages to $500,000 pursuant to the statutory cap. The court of appeals held that the statutory cap was unconstitutional. The Supreme Court affirmed.

The court held that ORS 18.560(1) violated Article I, section 17, of the Oregon Constitution. That provision states: "In all civil cases the right of Trial by Jury shall remain inviolate." After reviewing case law and the history of the jury trial, the court concluded:

> In summary, Article I, section 17, guarantees a jury trial in civil actions for which the common law provided a jury trial when the Oregon Constitution was adopted in 1857 and in cases of like nature. . . . In any such case, the trial of all issues of fact must be by jury. The determination of damages in a personal injury case is a question of fact. . . . The damages available in a personal injury action include compensation for noneconomic damages resulting from the injury. . . . The legislature may not interfere with the full effect of a jury's assessment of noneconomic damages at least as to civil cases in which the right to jury trial was customary in 1857, or in cases of like nature . . . It follows, therefore, that, in this context, ORS 18.560(1) violates Article I, section 17.[69]

On July 23, 1999, just one day before adjournment, the 1999 Oregon Legislature approved House Joint Resolution 2, a proposed constitutional amendment that would allow the legislature to establish caps on damages awarded in civil actions. The measure will apparently appear on the May 2000 ballot.[70] Senate Bill 1340, which would have re-established the $500,000 cap on noneconomic damages if the voters approved HJR 2, was still in the Senate Ways and Means Committee upon the Senate's July 24 adjournment.

B. Punitive Damages

Punitive damages may be recoverable in a product liability civil action[71] only if plaintiff proves by clear and convincing evidence that defendant acted with malice or conscious, reckless, or outrageous indifference.[72] Under ORS 30.925(2), the

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amount of a punitive damages award is determined by:

(a) The likelihood at the time that serious harm would arise from the defendant's misconduct;

(b) The degree of the defendant's awareness of that likelihood;

(c) The profitability of the defendant's misconduct;

(d) The duration of the misconduct and any concealment of it;

(e) The attitude and conduct of the defendant upon discovery of the misconduct;

(f) The financial condition of the defendant; and

(g) The total deterrent effect of other punishment imposed upon the defendant as a result of the misconduct, including, but not limited to, punitive damage awards to persons in situations similar to the claimant's and the severity of criminal penalties to which the defendant has been or may be subjected.[73]

As noted above, in *Lakin*,[74] *supra*, in addition to economic and noneconomic damages, the jury awarded Lakin $4,000,000 in punitive damages. Following its independent review of the entire record, and considering the nature of the court's post-verdict review of a punitive damages award[75] and the factors listed under ORS 30.025(2), *supra*, the supreme court in *Lakin* concluded that the award was not unconstitutionally excessive.[76]

Under certain conditions, drug manufacturers may not be liable for punitive damages. Under ORS 30.927(2), compliance with FDA regulations exempts the drug manufacturer from punitive damages unless plaintiff establishes by clear and convincing evidence that defendant

> knowingly in violation of applicable Federal Food and Drug Administration regulations withheld from or misrepresented to the agency or prescribing physician information known to be material and relevant to the harm which the plaintiff allegedly suffered.[77]

In *Bocci v. Key Pharmaceuticals, Inc.*,[78] plaintiff was injured by the interaction of a prescription asthma drug manufactured by defendant Key Pharmaceuticals, Inc., ("Key") and a prescription antibiotic prescribed by one Dr. Frederick Edwards. Pursuant to Edwards' cross-claim against Key, the jury awarded him $500,000 in compensatory damages and $22.5 million in punitive damages.

On appeal, Key contended, *inter alia*, that the trial court should have dismissed Edwards' punitive damages claim because Edwards' was not the "prescribing physician" as required under ORS 30.927(2). The Oregon Court of Appeals declined to address the issue as to whether the term "prescribing physician" covered physicians like Edwards, who treated a patient taking drugs prescribed by other physicians. Noting the jury's finding of clear and convincing evidence that Key had withheld relevant information from the FDA regarding possible injury resulting from interactions with other drugs, the court concluded that

> Edwards was not required to prove both that the FDA had been misled and that a "prescribing physician" had been misled. Proof on the FDA question was sufficient for purposes of ORS 30.927(2).[79]

ENDNOTES

1 ORS 30.900. Unless otherwise noted, all references to ORS are to the 1997 edition.

2 *Marinelli v. Ford Motor Co.*, 72 Or.App. 268, 273, 696 P.2d 1, *rev. denied*, 299 Or. 251, 696 P.2d 1 (1985) (court's emphasis). *See also Bancorp Leasing & Financial Corp. v. Agusta Aviation Corp.*, 813 F.2d 272, 276 (9th Cir 1987) (Oregon law) (products liability claims may include strict liability, negligence, breach of warranty, fraudulent misrepresentations, and wanton and willful misconduct).

3 ORS 30.920(1). ORS 30.920 provides in full:

> (1) One who sells or leases any product in a defective condition unreasonably dangerous to the user or consumer or to the property of the user or consumer is subject to liability for physical harm or damage to property caused by that condition, if:
>
> (a) The seller or lessor is engaged in the business of selling or leasing such a product; and
>
> (b) The product is expected to and does reach the user or consumer without substantial change in the condition in which it is sold or leased.
>
> (2) The rule stated in subsection (1) of this section shall apply, even though:
>
> (a) The seller or lessor has exercised all possible care in the preparation and sale or lease of the product; and
>
> (b) The user, consumer or injured party has not purchased or leased the product from or entered into any contractual relations with the seller or lessor.
>
> (3) It is the intent of the Legislative Assembly that the rule stated in subsections (1) and (2) of this section shall be construed in accordance with the Restatement (Second) of Torts sec. 402A, Comments a to m (1965). All references in these comments to sale, sell, selling or seller shall be construed to include lease, leases, leasing and lessor.

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Products Liability *continued from page 18*

(4) Nothing in this section shall be construed to limit the rights and liabilities of sellers and lessors under principles of common law negligence or under ORS 72.1010 to 72.7250.

ORS 30.920.

4 *McCathern v. Toyota Motor Corp.*, 160 Or.App. 201, ____P.2d____ , No. A98578, 1999 WL 247404 (April 28, 1999), *petition for review filed* July 23, 1999.

5 *McCathern*, 160 Or.App. at 208.

6 *Id.* at 209.

7 *Id.* at 210 (emphasis added).

8 *Id.*

9 The court uses the term "practicable" to mean both "practicable" and "feasible." *McCathern*, 160 Or.App. at 220 n.15.

10 *Id.* at 211.

11 *Id.* at 227 (court's emphasis).

12 *Id.* at 231 (citing and finding controlling *Austria v. Bike Athletic Co.*, 107 Or.App. 57, 61, 810 P.2d 1312, *rev. denied*, 312 Or. 80, 816 P.2d 610 (1991)).

13 ORS 30.920(3).

14 Restatement (Second) of Torts § 402A cmt. h (1965).

15 *Waddill v. Anchor Hocking, Inc.*, 149 Or.App. 464, 944 P.2d 957 (1997), *rev. allowed*, 328 Or. 40, 977 P.2d 1170 (Nov. 24, 1998).

16 *Waddill*, 149 Or.App. at 474, 944 P.2d 957.

17 *Waddill v. Anchor Hocking, Inc.*, 149 Or.App. 464, 944 P.2d 957 (1997), *rev. allowed*, 328 Or. 40, 977 P.2d 1170 (Nov. 24, 1998).

18 *Waddill*, 149 Or.App. at 475, 944 P.2d 957.

19 *Id.*, 944 P.2d 957.

20 *Id.*

21 *Fazzolari v. Portland School Dist. No. 1J*, 303 Or. 1, 17, 734 P.2d 1326 (1987).

22 *Hoyt v. Vitek*, 134 Or.App. 271, 894 P.2d 1225 (1995).

23 Restatement (Second) of Torts § 388 (1965).

24 ORS 18.470(1).

25 *Hernandez v. Barbo Machinery Co.*, 327 Or. 99, 957 P.2d 147 (1998).

26 *Sandford v. Chevrolet Div. Gen. Motors*, 292 Or. 590, 642 P.2d 624 (1982).

27 *Hernandez*, 327 Or. at 109, 957 P.2d 147.

28 *Daly v. General Motors Corp.*, 575 P.2d 1162 (Cal. 1978).

29 *Daly*, 575 P.2d at 1169. One court, rejecting a distinction between conduct which is mere negligence and that which constitutes a knowing assumption of the risk, opined that

> adhering to such artificial distinctions would result in a windfall for plaintiffs, in that their conduct, however culpable, could not be taken into account as long as it fell short of their assuming the risk.
>
> *Fiske v. MacGregor, Div. Of Brunswick*, 464 A.2d 719, 729 (R.I. 1983).

30 *Garside v. Osco Drug, Inc.*, 976 F.2d 77, 80 (1st Cir. 1992) (Massachusetts law).

31 *See Mazur v. Merck & Co., Inc.*, 964 F.2d 1348, 1365 (3d Cir.), *cert. denied*, 506 U.S. 974, 113 S.Ct. 463, 121 L.Ed.2d 371 (1992).

32 Restatement (Second) of Torts, § 388(c).

33 The Restatement (Third) of Torts: Products Liability, § 6(d) (1998) incorporates the learned intermediary doctrine and refers to both prescription drugs and medical devices. See *Taylor v. Danek Medical, Inc.*, No. CIV.A. 95-7232, 1998 WL 962062, at *9 (E.D.Pa. Dec. 29, 1998) (slip copy) (quoting § 6(d)).

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34 *See, e.g., Willett v. Baxter Int'l, Inc.*, 929 F.2d 1094, 1098 (5th Cir. 1991) ("Under this doctrine, the manufacturer has no duty to warn the patient, but need only warn the patient's physician.").

35 *Martin by Martin v. Ortho Pharmaceutical Corp.*, 661 N.E.2d 352, 354 (Ill. 1996).

36 *Gurski v. Wyeth-Ayerst Div. of American Home Products Corp.*, 953 F.Supp. 412, 415 (D.Mass. 1997); *McGowan v. Mehta*, No. CIV. A. 96-03067, 1997 WL 159519, at *1 (E.D.La. April 2, 1997) ("The manufacturer's duty is fulfilled when it reasonably informs the potentially prescribing physician of possible harms.").

37 *McEwen v. Ortho Pharmaceutical Corp.*, 270 Or. 375, 385-86, 528 P.2d 522 (1974); *Oksenholt v. Lederle Laboratories*, 51 Or.App. 419, 424-26, 625 P.2d 1357 (1981), *aff'd as modified*, 294 Or. 213, 656 P.2d 293 (1982).

38 *Griffith v. Blatt*, 158 Or.App. 204, 973 P.2d 385 (Feb. 3, 1999).

39 Plaintiff's negligent failure-to-warn claim failed not because of the learned intermediary doctrine, but because plaintiff failed to proffer expert testimony regarding the standard of care for pharmacists regarding warning of the dangers of a prescription drug. *Griffith*, 158 Or.App. at 214, 973 P.2d 385 (citing *Docken v. Ciba-Geigy*, 101 Or.App. 252, 256, 790 P.2d 45, *rev. denied*, 310 Or. 195, 795 P.2d 554 (1990)).

40 *Griffith*, 158 Or.App. at 213, 973 P.2d 385.

41 *Id.*, 973 P.2d 385 (citing cases).

42 *Id.*, 973 P.2d 385 (quoting *Ramirez v. Richardson-Merrill, Inc.*, 628 F.Supp. 85, 87 (E.D.Pa. 1986)).

43 *Id.* at 214, 973 P.2d 385.

44 ORS 30.905(2).

45 ORS 30.905(1).

46 ORS 30.907.

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47 ORS 30.908.

48 *Purcell v. Asbestos Corp., Ltd.*, 153 Or.App. 415, 959 P.2d 89, *adhered to in part on reh'g*, 155 Or.App.1, 963 P.2d 729 (1998).

49 ORS 30.907 provides:

> A product liability civil action for damages resulting from asbestos-related disease shall be commenced not later than two years after the date on which the plaintiff first discovered, or in the exercise of reasonable care should have discovered, the disease and the cause thereof.

50 *State Farm Mut. Auto. Ins. Co. v. W.R. Grace & Co.- Conn.*, 24 F.3d 955 (7th Cir.), *cert. denied*, 513 U.S. 919, 115 S.Ct. 298, 130 L.Ed.2d 212 (1994).

51 *State Farm*, 24 F.3d at 957.

52 *Purcell v. Asbestos Corp., Ltd.*, 153 Or.App. 415, 430, 959 P.2d 89, *adhered to in part on reh'g*, 155 Or.App.1, 963 P.2d 729 (1998).

53 21 U.S.C. § 301 *et seq.*

54 21 U.S.C. § 360k(1).

55 *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 116 S.Ct. 2240, 135 L.Ed.2d 700 (1996).

56 *Mears v. Marshall*, 149 Or.App. 641, 944 P.2d 984 (1997), *rev. denied*, 327 Or. 192, 961 P.2d 217 (1998).

57 7 U.S.C. § 136 *et seq.*

58 7 U.S.C. § 136v(a).

59 7 U.S.C. § 136v(b).

60 *Brown v. Chas. H. Lilly Co.*, 161 Or.App. 402, ____P.2d____, No. CA A98898, 1999 WL 460767 (July 7, 1999).

61 *Brown*, 161 Or.App. at 404.

62 *Id.* at 412-13 (court's emphasis).

63 *Id.* at 414.

64 *Id.*

65 *Id.* at 415.

66 ORS 18.560(2)(a).

67 ORS 18.560(2)(b).

68 *Lakin v. Senco Products, Inc.*, ____P.2d____, No. S44110, 1999 WL 498088 (Or. July 15, 1999).

69 *Lakin*, 1999 WL 498088, at *10 (citations omitted).

70 The text of HJR 2 states:

> Be It Resolved by the Legislative Assembly of the State of Oregon:
>
> PARAGRAPH 1. The Constitution of the State of Oregon is amended by creating a new section 34 to be added to and made a part of Article IV, such section to read:
>
> SECTION 34. Notwithstanding any other provision of this Constitution, the Legislative Assembly by law may impose limitations on the damages that may be recovered in civil actions.
>
> PARAGRAPH 2. The amendment proposed by this resolution shall be submitted to the people for their approval or rejection at a special election held throughout this state on the same date as the next biennial primary election.
>
> HJR 2 (adopted July 23, 1999).

71 ORS 30.925(1).

72 ORS 18.537(1). That provision states:

> Punitive damages are not recoverable in a civil action unless it is proven by clear and convincing evidence that the party against whom punitive damages are sought has acted with malice or has shown a reckless and outrageous indifference to a highly unreasonable risk of harm and has acted with a conscious indifference to the health, safety and welfare of others.
>
> ORS 18.537(1).

73 ORS 30.925(2)(a)-(g).

74 *Lakin v. Senco Products, Inc.*, ____P.2d____, No. S44110, 1999 WL 498088 (Or. July 15, 1999).

75 In *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415, 114 S.Ct. 2331, 129 L.Ed.2d 336 (1994), an Oregon case, the U.S. Supreme Court held that there must be a post-verdict judicial review of an award of punitive damages. On remand, *Oberg v. Honda Motor Co.*, 320 Or. 544, 888 P.2d 8 (1995), *cert. denied*, 517 U.S. 1219, 116 S.Ct. 1847, 134 L.Ed.2d 948 (1996), the Oregon Supreme Court stated the standard for that review:

> A jury's award of punitive damages shall not be disturbed when it is within the range that a rational juror would be entitled to award in the light of the record as a whole; the range that a rational juror would be entitled to award depends, in turn, on the statutory and common law factors that allow an award of punitive damages for the specific kind of claim at issue.
>
> *Oberg*, 329 Or. at 549, 888 P.2d 8 (footnote omitted).

76 *See also Axen v. American Home Products Corp. ex rel. Wyeth-Ayerst Laboratories*, 158 Or.App. 292, 318-24, 974 P.2d 224 (Feb. 10, 1999), *opinion adhered to as modified on reconsideration*, 160 Or.App. 19, ____P.2d____, No. CA A97249, 1999 WL 258390 (Or.Ct.App. April 21, 1999) (in products liability action involving permanent vision loss from heart medication, holding that $20 million punitive damages award was not unconstitutionally excessive).

77 ORS 30.927(2).

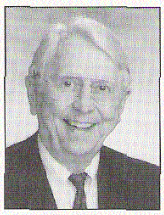
78 *Bocci v. Key Pharmaceuticals, Inc.*, 158 Or.App. 521, 974 P.2d 758 (Feb 17, 1999).

79 *Bocci*, 158 Or.App. at 545, 974 P.2d 758.

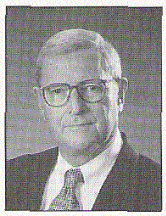
A Lawyer's Lawyer: *John H. Kottkamp*

By Edwin J. Peterson and Andrew L. Kottkamp

Many Oregon lawyers know John H. Kottkamp as a good Pendleton trial lawyer. He is also an excellent appellate lawyer. When asked to summarize the character and career of John Kottkamp, longtime friend, colleague and fellow Pendleton attorney, Alex Byler, stated:



Edwin J. Peterson



Andrew L. Kottkamp

I first met John Kottkamp in 1958 in Pendleton. At that time he had been practicing law for a year with John Kilkenny and Harold Fabre. I began practicing at that time. Our paths crossed frequently during the next 40 years. What kind of lawyer is he? In sports parlance, he is an all-star. In lawyers' lingo, he is a lawyer's lawyer. Wherever John appeared as a lawyer—before a judge or a jury or on appeal—he exuded integrity. As a result, he had a win-loss record like Sandy Koufax. Little wonder I tried to settle my cases against him!

On January 1, 1999, Kottkamp retired from the practice of law, ending a career that began nearly 42 years earlier when he was hired by John F. Kilkenny. Kilkenny gave Kottkamp training and opportunity. A few short years after hiring Kottkamp, John Kilkenny was appointed to the United States District Court for the District of Oregon. He later served on the Ninth Circuit Court of Appeals.

The purpose of this article is to commemorate the career of John Kottkamp by exploring some of his more important appellate cases in the State of Oregon. Those appellate cases began two months after he passed the bar and ended shortly before his retirement.

John Kottkamp's appellate baptism occurred before the Oregon Supreme Court on October 29, 1957, less than two months after he was sworn in as a member of the Oregon State Bar. With Kilkenny, he argued a condemnation case, *Port of Umatilla v. Richmond*, 212 Or. 596, 321 P.2d 338 (1958). They lost. Thus began Kottkamp's appellate legal career.

In 1958 Kottkamp briefed and argued his first tort case, *Keller v. Coca Cola Bottling Co.*, 214 Or. 654, 330 P.2d 346 (1958). Kottkamp represented the defendant. The plaintiff claimed injury after drinking from a Coke bottle containing a cigar stub. Plaintiff won in the trial court. (The trial judge was one of Oregon's finest, William W. Wells).

Defendant's primary assignment of error was one of first impression in the State of Oregon. The defendant offered evidence to show that the cigar stub could not have been placed in the bottle during the bottling process. Plaintiff was unable to show, by direct evidence, when the cigar stub got in the bottle. The issue was whether the plaintiff was required to affirmatively prove that the cigar stub was in the bottle when it left the defendant's bottling plant.

The Oregon Supreme Court, while recognizing that defendant's theory had been accepted in some jurisdictions, refused to adopt that theory in Oregon. It held:

> . . . [T]he delivery to the plaintiff in the usual and normal course of distribution of a bottle containing foreign substance without further elimination of the element of tampering, raised an inference of lack of care by the defendant sufficient to avoid a directed verdict.

214 Or. at 660.

The next case Kottkamp argued is a famous and often-cited case. Kottkamp was just 28 years old when he argued *Lamb-Weston v. Oregon Auto Ins. Co.*, 219 Or. 110, 341 P.2d 110, 346 P.2d 643 (1959). It is noteworthy for at least two reasons. First, it is one of the most well-known liability insurance decisions of the Oregon Supreme Court; it decided the question of how payment of a loss should be shared by two or more liability insurers when each has an applicable policy of valid and collectible liability insurance. Second, it is one of few cases—perhaps the only case—in which a litigant petitioned the Oregon Supreme Court for rehearing requesting that it be awarded *less!*

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The facts were these: Lamb-Weston, Inc. had a policy of liability insurance with St. Paul Fire and Marine Insurance Co. Lamb-Weston leased a truck from Dick Shafer. Defendant, Oregon Auto Ins. Co., had issued a policy of liability insurance to Shafer on the leased truck. A Lamb-Weston employee, while driving the truck, damaged a third person's property. Lamb-Weston paid the damage (actually St. Paul did; it got a loan receipt from Lamb-Weston), and then sued Oregon Auto claiming that the Oregon Auto policy was "primary." The trial judge agreed. Kottkamp appealed, claiming that both policies applied and that the loss should be shared by the two insurers.

The Oregon Supreme Court agreed with Kottkamp and held that the trial court erred in concluding that defendant was the "primary insurer" of the truck. The court remanded the case with instructions for the trial court to enter judgment for the plaintiffs, but for only one-half of the loss.

La Grande attorney Carl G. Helm, Jr., representing the plaintiffs, filed a petition for rehearing. With commendable candor, he requested that the opinion be modified to award his client not half of the loss but only one-sixth of the loss. On rehearing, the opinion was modified on this reasoning: The St. Paul policy limit was $25,000. Oregon Auto's policy limit was $5,000. The court held that the loss should be shared, not equally, but pro rata, in proportion to the applicable limits of coverage. Thus, plaintiffs' share of the loss was increased to five-sixths and defendant's share decreased to one-sixth. The opinion notes that "[t]he plaintiff company properly states that this position is against its monetary interest...but that in general the courts...have followed a rule of prorating the losses on the basis of the limits of liability...." 219 Or. at 131. *Lamb-Weston* continues to be the law in Oregon. It is repeatedly followed by insurers under similar facts.

John Kottkamp also wrote most of the brief in *York v. Stallings*, 217 Or. 13, 341 P.2d 529 (1959), which, at the time of its decision, was a leading decision setting forth the elements that must be considered in granting an injunction in a nuisance case.

The Oregon Supreme Court agreed with Kottkamp and held that the trial court erred in concluding that defendant was the "primary insurer" of the truck. The court remanded the case with instructions for the trial court to enter judgment for the plaintiffs, but for only one-half of the loss.

In 1959 Kottkamp also wrote the brief, which Kilkenny argued to the court, in *Seale v. McKennon*, 215 Or. 562, 336 P.2d 340 (1959). This case challenged the constitutionality of certain rules adopted by the Department of Agriculture.

Also in 1959, Kottkamp wrote the brief and argued to the Supreme Court in *Lessig v. Conboy*, 219 Or. 373, 347 P.2d 98 (1959). This case held, prior to the adoption of the new Rules of Civil Procedure, that in a tort case against multiple defendants one defendant could not bring a cross-claim against a co-defendant. Kottkamp lost the appeal and the Oregon Supreme Court remanded for a new trial. Kottkamp and Kilkenny obtained a defense verdict on the retrial.

One year later, in *Kendall v. Curl*, 222 Or. 329, 353 P.2d 227 (1960), Kottkamp briefed and argued a case near and dear to Eastern Oregon cattle ranchers. As Kottkamp has stated, "This [case] would run a close second if not actually beat the *Lamb-Weston* case as my most famous and most often-cited case." This case involved the liability of a Umatilla County rancher to the driver of a car who was injured when his car ran into a horse which had been allowed to run loose on an interstate highway. The trial court had sustained a demurrer and plaintiff appealed. The Supreme Court affirmed and held that there was no liability in open-range country upon an owner of livestock who had negligently allowed a horse to run loose and which ultimately caused injury to a driver. This continues to be the law in Oregon although now, highways, including federal interstate highways, have been declared to be livestock districts (as opposed to open range) and therefore the same facts tried today could lead to a different result.

Kottkamp's first criminal appeal was *State v. Krogness et al.*, 238 Or. 135, 388 P.2d 120 (1964). This case involved important constitutional search and seizure questions. Kottkamp tried the case and assisted a well-known Portland attorney, Howard Lonergan, on the appeal. Defendants' automobile was stopped for a traffic violation and the officers observed in clear view a military rifle with telescopic sight. They then searched the vehicle and found burglary tools and stolen money. Defendants moved to suppress this evidence on the ground that the search was unconstitutional. The trial court denied the motion, concluding that the weapon gave the officers probable cause to believe that contraband game animals and birds were being transported in the automobile. The defendants were convicted at trial and appealed. The Supreme Court held that there was sufficient evidence for the trial

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court to find that the search was proper. In a later post-conviction case, the United States District Court set aside the conviction.

By 1967 Kottkamp was partnered with Robert O'Rourke, who was Kottkamp's partner for the next 31 years. That year he briefed and argued *Macomber v. Cox*, 249 Or. 61, 435 P.2d 462 (1968). In this case, the plaintiff attempted to assert vicarious liability against a general contractor for the negligence of an electrician, who was a subcontractor. The Oregon Supreme Court agreed with Kottkamp that it could not and reversed the judgment against Kottkamp's client.

In 1969, Kottkamp obtained a directed verdict in *Leonard v. West Extension Irrigation District*, 254 Or. 281, 459 P.2d 549 (1970). The plaintiff appealed. The Oregon Supreme Court agreed that Kottkamp's client, an irrigation district, was not liable when plaintiff's cattle drowned in an irrigation canal.

In *Fullerton v. White*, 273 Or. 649, 542 P.2d 1017 (1975), Kottkamp represented a defendant in a wrongful death case involving the question of "payment" at a time when the "guest-passenger" statute was still in effect. The jury found in favor of the defendant, plaintiff appealed and the Supreme Court of Oregon affirmed.

Later in his career, Kottkamp's services were in demand by other lawyers who had been sued for malpractice. In *Knight v. Rew*, 79 Or. App. 694, 720 P.2d 397 (1986), Kottkamp obtained summary judgment in the trial court. The Court of Appeals reversed and held that the application of the statute of limitations was a jury question which should not have been decided by the trial court as a matter of law. Defendant's petition for review by the Oregon Supreme Court was denied. At the subsequent jury trial, the jury found that the defendant was not negligent. Ironically, the statute-of-limitations question played no part in the final determination of the case.

Throughout his career, John Kottkamp represented clients energetically, honestly and competently. As a trial lawyer, he tried a variety of different cases. His skill at trial was recognized by the American College of Trial Lawyers, which invited him to membership.

Kottkamp also obtained a successful decision in a disciplinary case, *In re Willard Carey*, 307 Or. 315, 767 P.2d 438 (1989). Carey, a La Grande attorney, had made errors in judgment in making loans from funds over which he was acting as trustee. The charges against Mr. Carey were numerous and generally founded upon violation of conflict-of-interest ethical rules. The trial committee recommended a reprimand and the Oregon State Bar appealed. Kottkamp argued to the Supreme Court that the accused was never motivated by self-interest or personal greed and indeed, suffered substantial personal financial losses as he repaid defaulted loans from his own personal funds. The Oregon Supreme Court agreed that a reprimand was a sufficient sanction stating, "The instant case involves a very experienced probate lawyer who simply tried to do too much for his clients and friends." 307 Or. at 321.

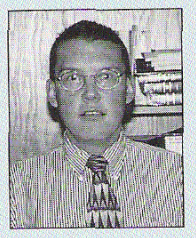
Kottkamp also handled *Klinger v. Morrow County Grain Growers*, 102 Or. App. 375, 794 P.2d 811 (1990), an emotionally-charged case involving defendant's dispensation of gasoline through its cardlock system to anyone who would apply for a cardlock pass. The plaintiff was the operator of a retail gasoline station who claimed that the cardlock operation was in violation of an Oregon law that prohibited self-service gasoline stations. Plaintiff's claims included intentional interference with business relationships and unfair competition. The trial court granted Kottkamp's motion for summary judgment and the plaintiff appealed. The Court of Appeals held that even if the applicable statute was violated, the violation gave rise to no claim for intentional interference with business relationships or unfair competition and affirmed the trial court.

Throughout his career, John Kottkamp represented clients energetically, honestly and competently. As a trial lawyer, he tried a variety of different cases. His skill at trial was recognized by the American College of Trial Lawyers, which invited him to membership. But contrary to the trend toward specialization so prevalent today, Kottkamp also handled his cases on appeal, and with the same diligence and competence with which he represented litigants at trial. Along the way he also was active in bar matters and civic affairs.

Resolving personal disputes is a lawyer's stock in trade. Sometimes disputes are resolved only by trial. For the most part, marks made by trial lawyers are soon forgotten, except by the litigants involved. It is fortunate that written appellate decisions provide a window into the appellate career of one such as John Kottkamp, revealing a career of ethical conduct, an example for others to follow. ❐

Edwin J. Peterson is former Chief Justice of the Supreme Court of Oregon and currently is the Distinguished Jurist in Residence at Willamette University College of Law. Andrew L. Kottkamp is a graduate of the University of Oregon School of Law and practices law in Wenatchee, Washington.

Recent Significant Oregon Cases



Stephen K. Bushong
Department of Justice

CLAIMS FOR RELIEF

Breach of Fiduciary Duty

Oregon courts addressed liability for breach of fiduciary duty in three recent cases involving internal corporate battles. In *Granewich v. Harding*, 329 Or. 47 (1999), the Supreme Court held that corporate counsel could be held liable for a breach of fiduciary duties committed by controlling shareholders as part of a corporate "squeeze-out" of a minority shareholder and director. The court concluded that "persons acting in concert may be liable jointly for one another's torts under any one of the three theories identified" in section 876 of the Restatement (Second) of Torts (1979). 329 Or. at 55. Contrary to the Court of Appeals, the Supreme Court held that, under section 876, the fact that no fiduciary duty flowed from corporate counsel to the plaintiff did not automatically defeat plaintiff's claim. Rather, the corporation's lawyers could be subject to joint liability for acting in concert with the majority shareholders' breach of fiduciary duties if the lawyers either "did a tortious act pursuant to an agreement with the others to breach their fiduciary duties or * * * knowingly provided substantial assistance in the breach of the others' fiduciary duties."

Shareholders who individually held less than 50 percent of a corporation's stock could be considered "controlling" shareholders, giving rise to fiduciary duties, if they "combined for the purpose of controlling the acts of the corporation and * * * they actually controlled those acts[,]" the Court of Appeals held in *Locati v. Johnson*, 160 Or. App. 63, 70 (1999). Such a shareholder could be liable for breaching his fiduciary duties of loyalty and fair dealing to a minority shareholder only if "the controlling shareholder has placed his or her personal interests above those of the minority." 160 Or. App. at 71. The court expressly declined to decide whether breaches of *other* fiduciary duties required a showing that the controlling shareholder "act with the purpose of advancing his or her pecuniary interest." 160 Or. App. at 71.

In another case arising out of a tiff between corporate shareholders, the Court of Appeals took "a holistic approach to the claims of corporate oppression and breach of fiduciary duty," concluding that breach of fiduciary duty claims "are essentially subsumed under the oppression claim [pursuant to ORS 60.661], given the buyout remedy involved." *Tifft v. Stevens*, 162 Or. App. 62, 77-78 (1999).

CLAIMS FOR RELIEF

Negligence

A student has no legally protected interest to be called by her chosen nickname ("Boo") sufficient to give rise to liability for emotional distress on a negligence theory, the Court of Appeals held in *Phillips v. Lincoln County School District*, 161 Or. App. 429 (1999). Summary judgment was properly granted to defendant on a negligence claim based on a failure to warn theory, the Court of Appeals held in *Garrison v. Deschutes County*, 162 Or. App. 160 (1999), where the record was undisputed that plaintiffs were aware of the danger. The issue was not one of comparative negligence but of causation, i.e., "whether the presence of a warning would have had any additional effect on plaintiffs' knowledge of the risk." 162 Or. App. at 168.

The state cannot be held liable in contribution to a defendant/third-party plaintiff when the plaintiff in the underlying negligence action did not file a timely notice of intent to sue the state, the Court of Appeals held in *Mitchell v. Sherwood*, 161 Or. App. 376 (1999). That conclusion was compelled by the Supreme Court's decision in *Beaver v. Pellett*, 299 Or. 664 (1985), which remains good law despite subsequent changes in the statutes governing contribution (ORS 18.440) and tort liability of the state (ORS 30.260, 30.265, and 30.275). 161 Or. App. at 379-382.

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Vicarious Liability

The Court of Appeals continues to grapple with the issue of an employer's vicarious liability for the intentional torts of its employees. In *Minnis v. Oregon Mutual Ins. Co.*, 162 Or. App. 198 (1999), a female employee at a pizza restaurant alleged that the restaurant manager subjected her to a sexually hostile work environment, and then invited her to come over to his apartment at 3:45 a.m. "to help him grieve the death of his brother." Plaintiff went to the apartment and stayed for 4 1/2 hours, during which time she was subjected to sexually explicit and unwelcome comments and conduct from her supervisor. 162 Or. App. at 201. The Court of Appeals, in a 2-1 decision, held that the allegations were sufficient to state a claim against the restaurant for the conduct that occurred at the apartment because a jury could infer that "the sexual harassment at the job site was 'a necessary precursor' to the sexual abuse that occurred at [the] apartment and that the assaults at the apartment were 'a direct outgrowth of and were engendered by' the conduct that occurred on the job." 162 Or. App. at 207 (citing *Fearing v. Bucher*, 328 Or. 367, 377 (1999)).

Damages

The Supreme Court struck down the statute (ORS 18.560(1)) that limited noneconomic damage awards to $500,000 in *Lakin v. Senco Products, Inc.*, 329 Or. 62 (1999). In that case, plaintiff John Lakin suffered severe brain damage, leaving him partially paralyzed, when a nail gun manufactured by Senco misfired, causing a nail to be lodged in Lakin's brain. Lakin sued on theories of negligence and strict products liability. The jury awarded more than $4 million in noneconomic damages to Lakin and his wife. The trial court applied ORS 18.560(1) and entered judgment for each plaintiff in the amount of $500,000 in noneconomic damages (reduced by five percent for Lakin's comparative fault).

On appeal, the Court of Appeals held that ORS 18.560(1) violates Article VII (Amended), section 3, of the Oregon Constitution. The Supreme Court affirmed, but for a different reason, holding that the statute violates Article I, section 17, of the Oregon Constitution. The Court carefully examined the history of Article I, section 17 and the case law regarding judicial control of jury verdicts. The Court reasoned that, under Article I, section 17, in any case for which the common law provided a jury trial when the Constitution was adopted in 1857, all issues of fact must be by a jury. Because the determination of damages (including noneconomic damages) in a personal injury case is a question of fact, "[t]he legislature may not interfere with the full effect of a jury's assessment of noneconomic damages[.]" 329 Or. at 82.

Limitations of Actions

The exemption from statutes of limitation found in ORS chapter 12 for actions brought in the name of a public corporation (ORS 12.250), and the common law variation of this "governmental" exemption, do not prevent the statute of ultimate repose from running to bar a claim brought by a public corporation, the Supreme Court held in *Shasta View Irrigation Dist. v. Amoco Chemicals*, 329 Or. 151 (1999).

A cause of action for failing to make payments due under a monthly lease does not accrue for purposes of the four-year statute of limitations set forth in ORS 72A.5060 when the lessee defaulted on its payments, the Court of Appeals held in *Federal Recovery of Washington, Inc. v. Wingfield*, 162 Or. App. 150 (1999). Rather, the cause of action accrued when the lessor exercised its option to accelerate on the balance of the lease. In so holding, the Court of Appeals rejected the contrary view set forth in 18 *Williston on Contracts* § 2027 (3d ed 1978), concluding that Williston's approach was based on "an indefinite notion of *ex post facto* accrual" that "offers no principled or practical advantage" over the Court's approach. 162 Or. App. at 157.

Procedure

If a case becomes moot on appeal, Oregon courts should dismiss the appeal, vacate the trial court judgment, and remand with instructions to dismiss the case as moot, the Supreme Court held in *First Commerce of America v. Nimbus Center Assoc.*, 329 Or. 199 (1999). In so holding, the Court acknowledged that it had been "inconsistent" in the past but concluding "on reflection" that "the better practice when a case becomes moot on appeal or on review is to vacate both the decision of the Court of Appeals and the circuit court judgment." 329 Or. at 208.

A pretrial offer of judgment of $150,000 inclusive of costs and attorney fees incurred to the date of the offer, is sufficient to bar a claim for post-offer attorney fees and costs where the total recovery of damages and recoverable costs and attorney fees to the date

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Recent Developments
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of the offer did not exceed $150,000, the Supreme Court held in *For Counsel, Inc. v. Northwest Web Co.*, 329 Or. 246 (1999). In so holding, the court rejected plaintiff's argument that ORCP 54E did not authorize such an "inclusive" offer without the opposing party's agreement, but acknowledged that the Court's interpretation of ORCP 54E "may exacerbate potential conflicts between lawyer and client concerning whether to accept a pretrial offer of compromise or proceed to trial." 329 Or. at 255, n. 4.

A party may not appeal from a stipulated judgment even if the stipulation expressly reserves the right to appeal, the Supreme Court held in *Rauda v. Oregon Roses, Inc.*, 329 Or. 265 (1999). A release of one obligor on a note or contract does not automatically release other joint and several obligors, the Supreme Court held in *Schiffer v. United Grocers*, 329 Or. 86 (1999) (overruling the "release of one releases all" rule adopted in *Crawford v. Roberts*, 8 Or. 324 (1880)).

Evidence submitted in opposition to a motion for summary judgment, if sufficient to defeat the motion, effectively amends the pleadings to conform to the proof, even if the trial court denies leave to amend, the Court of Appeals held in *Keppinger v. Hanson Crushing, Inc.*, 161 Or. App. 424 (1999).

Finally, the Court of Appeals reaffirmed in *PGE v. Duncan, Weinberg, Miller & Pembroke, P.C.*, 162 Or. App. 265 (1999), that trial courts have no authority to enforce the Disciplinary Rules set forth in the Code of Professional Responsibility because "[o]nly the Supreme Court has the authority to enforce the rules." 162 Or. App. at 277. Disciplinary rules may be relevant in an action to enjoin a threatened breach of fiduciary duty "only to the extent that they tend to show the scope of [defendants'] fiduciary duties" to plaintiff. 162 Or. App. at 277. ❐

Punitive Damages
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punitive damage standards that require an employee to prove that the employer acted with "malice" or "reckless indifference," Congress made clear that it was not focused on how badly the employer behaved towards the employee but instead was focused solely on the employer's state of mind. *Kolstad*, 1999 WL 407481 at 6. There can be no punitive damages in disparate impact cases where an employer implements a neutral job requirement that turns out to discriminate by having a more negative effect on a protected class such as women or minorities. Punitive damages are available only in cases of intentional discrimination. But not all cases of intentional discrimination allow for punitive damages. Only in those cases where the employer knows or acts with reckless indifference that it may be violating federal law are punitive damages available. *Id.*

At first blush, this sounds like an invitation for employers to maintain a studied ignorance of the civil rights laws. If an employer does not know what the law requires, how can it act with the mental state necessary to justify punitive damages? The Supreme Court addressed this problem in a part of its decision that discussed employer liability for the acts of its agents. The Court held that an employer will not be liable for punitive damages for the discriminatory acts of managers that are contrary to the employer's good faith efforts to comply with the anti-discrimination laws. *Id.* at 12. Thus, an employer's liability for punitive damages will depend greatly on the efforts it takes to promote compliance with the law. The Supreme Court did not elaborate on what may constitute good faith efforts, but it seems likely that such efforts would include publishing anti-discrimination policies, conducting management training, and having multiple levels of review before important employment decisions are made such as hiring, discipline and termination (to screen out possible discrimination by a single individual).

Kolstad still leaves open a number of tactical decisions in defending charges of discrimination. For example, the law allows employers to discriminate in hiring decisions where religion, sex or national origin is a bona fide occupational qualification. Where this defense is an option, the employer may be faced with a choice to argue that an action was non-discriminatory or that it was discriminatory but was justified by the bona fide qualification rule. By arguing justification, the employer may be reducing the risk of punitive damages, because it lacked the required mental state even if it turned out to be wrong about the job qualification. On the other hand, an employer that adopts this tactic gives up the opportunity to argue that its action was non-discriminatory in the first instance.

Even apart from this bona fide qualification issue, there is potential danger lurking for the employer who argues that its actions were non-discriminatory. Is it evidence of malice for an employer to offer a non-discriminatory reason for its actions that a jury rejects and finds to be pretext? Justice Stevens' partial concurrence in *Kolstad* seems to suggest as much, when he notes as evidence of defendant's mental state the fact that defendant never disavowed the conduct of the decisionmakers and instead tried to justify its actions with explanations that the jury concluded were false. *Id.* at 16. In other words, trying to prove the employer didn't do it may ironically increase the risk of punitive damages.

In the end, plaintiffs and defendants will probably both find portions of *Kolstad* useful. On the one hand, the case provides a lesser hurdle for punitive damages by rejecting a standard that would require employees to prove egregious misconduct. On the other hand, it provides some cover for employers who engage in meaningful

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compliance efforts. This latter aspect of the decision may ultimately prove more important. After all, how likely is a jury to award substantial punitive damages against an employer that the jury does not get angry with over some ugly conduct? Egregious misconduct may not be an explicit legal requirement for punitive damages, but it will be an implicit jury consideration. The Court's recognition of the good faith efforts exception to punitive damages does create a legal standard that employers may effectively use to avoid punitive damages, if not with the jury then perhaps with the courts. ❐

1 The 1991 law sets limits on the combined amount of compensatory and punitive damages an employee can obtain, ranging from $50,000 for employers with 15-100 employees, up to $300,000 for employers with over 500 employees. *42 USC §1981a(b)(3).*

Norm Wiener Honored

Normal Wiener, who has practiced law for more than 50 years and was a partner at Miller Nash for 46 years, is the author of an article selected for publication in the 1999 edition of the Litigation Manual, published by the American Bar Association, Section of Litigation. This is a collection of the most useful articles published in the magazine over the last decade. He joins other preeminent trial lawyers and judges in this valuable reference book.