A Century of Service

MULTNOMAH BAR ASSOCIATION

100TH ANNIVERSARY

1906 - 2006

IP Law – A Retrospective

Marger Johnson & McCollom attorneys Graciela Cowger, Alex Johnson, Jerry Marger and Alan McCollom contributed to this article.

Alex Johnson

Patent law attempts to harness the power of the idea to promote the country's world wide competitive leadership. It balances rewarding the idea's creator with a limited property right while providing the public with access to the idea.

The US Constitution in article 1, section 8, grants Congress the power "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." On April 10, 1790, President George Washington signed the bill that codified the US patent system and gave inventors exclusive rights to their ideas.

In the 19th Century, patent law became very important, underpinning much of the innovation and investment that made the Industrial Age. By the mid-20th century, antitrust law was in vogue and patents were impugned as monopolies. Circuit Courts of Appeals applied disparate standards of patentability that undermined patents.

The Patent Act of 1952 dramatically changed the patent laws. Major changes included a codification of modern patentability requirements (i.e., an invention must be novel and nonobvious to be patentable) and of infringement. But still, courts usually decided patent cases against the patent owner. Patents simply were not considered important to a company's survival.

"Patents simply were not considered important to a company's survival."

Recognizing the need to unify patent law across the nation, Congress formed the Court of Appeals for Federal Circuit in 1982, combining the Court of Claims and the Court of Customs and Patent Appeals (CAFC). The CAFC, as it has come to be known, has nationwide appellate jurisdiction for patent cases and other cases of exclusive federal jurisdiction. Practically speaking, the CAFC is the court of last resort since few patent cases are taken up by the Supreme Court. Those cases taken up by the Supreme Court typically deal with critical issues affecting patent law such as determining what constitutes obviousness, clarifying the doctrine of equivalents, and establishing claim construction principles. (The latter two concepts are explained below.)

Formation of the CAFC represented a gigantic shift in patent law. It meant that the tenets of patent law were more uniformly applied on a national scale with no inter-circuit disagreements. Patent owners were suddenly treated as if patents really meant something and they benefited from common law created in a circuit that was more effectively able to understand and deal with complex law and technologies.

As a result, patents became more recognized as important to a company's survival and success. Companies began policing and proactively enforcing their patents, which brought an almost immediate and substantial increase in patent owners' success in litigation. Patent filings increased and spread into new areas of technology, such as computer software and biotechnology.

"By the early 1990s, there weren't enough patent lawyers..."

By the early 1990s, there weren't enough patent lawyers to handle the ever-increasing patent legal needs. Companies responded by growing their own. Many set up incentive programs to funnel their own engineers to law school, often requiring them to serve the company as lawyers for a predetermined amount of time after finishing law school. That began the slow and steady increase, now an explosion, in the number of patent practitioners. Shortly thereafter, the litigation fires were fueled further by the dot-com boom when companies' entire values were held in their patent portfolios.

By 1997, another substantial change began to impact patent law, patent owners and patent applicants, when the Supreme Court clarified – and, many would say, limited – the doctrine of equivalents. The doctrine of equivalents holds that a product or process that does not literally infringe upon the literal terms of a patent claim may nonetheless be found to infringe if there is "equivalence" between the elements of the accused product or process and the claimed elements of the patented invention.

The doctrine of equivalents is intended to apply to situations where there is no literal infringement, but liability is nevertheless appropriate to prevent what is, in essence, a pirating of the patentee's invention through minor changes. The classical test for equivalence is whether the accused device "performs substantially the same function in substantially the same way to obtain substantially the same result." In recent years, the CAFC has been trending toward ever-narrower claim scope. There are also people who are advocating for narrowing, or even eliminating, the doctrine of equivalents.

While the trend toward narrower claim interpretation has continued, the court has become less likely to invalidate claims based on prior art. In other words, decisions since the 1980s have strengthened the presumption that an issued patent is valid. Companies began to appreciate the value of their patent portfolios, and the potential value of acquiring more. In addition, they began to wake up to the defensive reasons for putting together patent portfolios - cross-licensing to reduce the chances that they would infringe patents of others, as well as to generate a revenue stream. On the whole, the rise in patent infringement litigation helped the business world appreciate a patent as both sword and shield.

Technicalities aside, the ultimate question is this: does the patent process - inclusive of the Patent and Trademark Office (PTO) and Court of Appeals for the Federal Circuit - promote innovation and help the US to maintain a leadership position in an increasingly competitive and innovative world?

"Many think the PTO is producing poor quality patents..."

Some critics question whether the PTO has really promoted innovation. Many think the PTO is producing poor quality patents although many patent experts would dispute such a generalization. From an inventor's perspective, the process has become overly expensive and complicated. And patent attorneys and clients alike agree that patent litigation - including enforcement and defense - has become prohibitively expensive.

Looking forward, the Patent Reform Act of 2006 is currently pending before Congress. Simultaneously, the PTO is working to change its own procedures. These are important first steps but the jury is still out on the ultimate value and impact these changes - if enacted and implemented - will have on promoting the progress of science and useful arts.

MBA Meeting Announcement for December, 1909

On invitation of the Entertainment Committee, Judge Thomas O'Day adressed the Association on 'Ethics of Personal Damage Cases.'

A Century of Service Historic Pullout: More on the Evolution of Law Practice Areas

By Judy A. C. Edwards, Executive Director.

The November *Multnomah Lawyer* historic pullout continues the focus on specific practice areas and how they have evolved over the years. In this issue, you will find an article of purely historic nature, while others present point and counterpoint viewpoints. Articles cover the areas of intellectual property, criminal law and product liability. We look forward to hearing from readers who would be willing to write about other practice areas.

Personal injury was already a topic of discussion early in the MBA's history, as evidenced by the title of the talk given to the membership in 1909. Unknown to us however, is the content of that talk. Our imaginations likely could take us in divergent directions if we speculate on how the talk and subsequent discussion proceeded.

We thank all who contributed to this issue and we hope our readers enjoy reading it. If you would like to share your thoughts on any part of this pullout, we welcome your comments and suggestions.

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The Evolution of Oregon Criminal Law: A Prosecutor's View

By Norman Frink, Multnomah County Senior Deputy District Attorney.

The Multnomah County deputy district attorney leaned across counsel table, and, shaking his fist within inches of the defendant's face, concluded his closing argument by shouting:

"It's a lucky thing for you, Ed Brune, that it was not my wife or son whose life you snuffed out that night during your drunken automobile ride…For had it been my child…I would have killed you myself, you despicable cur…."

The defense attorney's objection was cut off with judge saying, "I will not tolerate any further interruptions when counsel is making his argument and if there is any more of it somebody is going to get hurt."

The jury verdict was guilty of involuntary manslaughter.

Thus, in 1916 in the newly opened Multnomah County Courthouse, the first case of vehicular manslaughter in Oregon, *State v Brune*, ended.

A lot has changed in the years since then.

The time between Brume's conviction and today has been a turbulent one from the perspective of Oregon prosecutors. None of us today would defend the early prosecutor's argument or the judge's response. Most of the developments in Oregon's criminal law in general and for prosecutors in particular (even when they curtailed the power of the prosecution) have been extremely positive. No one would want to return to some of the events and types of prosecutions outlined below. Yet, it has been a rollercoaster ride that in relatively recent times threatened to elevate the rights of the criminal defendant above all other policy goals of the criminal justice system.

"...it has been a rollercoaster ride..."

At the time of Brune's trial, criminal law in Oregon was governed by state criminal laws drafted by Matthew Deady, the president of Oregon's 1857 constitutional conventional and Oregon's first federal judge. Those basic statutes, with amendments, remained in effect until the complete revision of the criminal code in 1971. There was no mandatory state bar association (that came over prolonged opposition in 1935) and the voluntary Multnomah Bar Association had only been in existence for 10 years. The Oregon Constitution did contain a bill of rights that was separate from that contained in the United States Constitution, yet no one dreamed that that document contained generalized expansive rights for criminal defendants - indeed it would be almost 50 years before most federal criminal constitutional rights were even held to apply in Multnomah County's criminal courts. In 1914, in part as a result of efforts by a former Multnomah County deputy district attorney, a fledgling public defender's office had been created in Portland, but it was snuffed out within a year and a half with the Mayor of Portland remarking, "The purpose is to give these people justice. That is work to be performed by the judge it seems to me." Although there were other measures to provide court appointed attorneys over the years, it was not until 1970 that the ACLU and MBA worked to establish a private, not-for-profit corporation called the Metropolitan Public Defender Services, Inc., headed by another former Multnomah County deputy district attorney, to provide counsel for criminal cases in Multnomah County.

Perhaps, an early Multnomah County death penalty case with a special connection to the MBA best illustrates the changes when compared with today's procedures. On November 28, 1908. Portland lawyer James Finch walked into the office of his fellow Portland attorney Ralph Fisher, a volunteer ethics prosecutor for the fledgling MBA. Fisher had prosecuted Finch for a matter that resulted in his disbarment and had recommended against reinstatement. Two shots to Fisher's head were Finch's answer that November afternoon. Finch went on trial eight days after indictment and was hung at the Oregon State Penitentiary 13 months later.

"Today an average death penalty murder case takes about two years to go to trial..."

Today, an average death penalty murder case takes about two years to go to trial in Multnomah County. A defendant in such a case usually has two lawyers, an investigator and often a "mitigation specialist." Most such defendants have access to public funds for expert witnesses far beyond what is available to the prosecution. When convicted, they get a direct appeal to the Oregon Supreme Court, a state and a federal post-conviction relief action with appointed counsel and investigators again. Other than those defendants who have given up their right to continued litigation, a death sentence has not been carried out in Oregon since the penalty was reinstated 20 years ago.

It is not only procedural aspects of criminal law that are different. During the first half of the 20th century criminal prosecution was used in ways that we would find untoward today to enforce the moral, political, and, even, racial order. In 1916, the founder of Planned Parenthood was convicted in Portland's court of obscenity based on the photograph and descriptions in a family planning pamphlet, although the fine was suspended. In 1934, a communist-backed meeting to protest Portland police conduct led to a speaker being convicted of criminal syndicalism. In 1942, a lawyer was convicted in Portland of violating laws governing the curfew and internment of Japanese aliens and Americans of Japanese descent. Interestingly, two of these cases led to landmark United States Supreme Court decisions voiding criminal syndicalism laws under certain circumstances, but sustaining the forced movement of persons of Japanese descent during World War II.

As the county and the state moved into the second half of the century, the major events of local prosecution took a more traditional turn, but one with, once again, some national implications. Additionally, these developments reflected badly on the abilities and professionalism of prosecution in Multnomah County.

In the early 1950s, Portland had at least some degree of corruption in its local law enforcement. Exactly what degree may have been is debatable, but what is not debatable is that it led to John and Bobby Kennedy shining the spotlight on Portland through Senate committee hearings that purported to show that Portland was the center of Teamster connected organized crime. *The Oregonian* ran a series of articles that, although they may have distorted or exaggerated the problem, won the paper the Pulitzer Prize and brought the State Attorney General's Office to town - presenting and getting 114 indictments against 41 defendants for alleged corruption. Most of the prosecutions ultimately fizzled, but District Attorney William Langley was convicted of a minor charge and removed from office. The state bar's later failure to sustain disciplinary proceeding against him together with the failure of most of prosecutions struck a seemingly ambiguous note to the whole affair.

What was not ambiguous was that Langley's office lost both major murder trials of the decade, one in which a lawyer's wife may well have been behind the dynamite that killed him in his car at the Columbia Edgewater Golf Club parking lot. That woman, Marjorie Smith (known in the local press as the "Black Widow"), got a change of venue and walked away a free woman.

In 1962 Multnomah County voters finally laid the basis for a professional, stable and competent prosecutor's office by electing George Van Hoomissen district attorney. Together with his successors (Des Connell, Harl Haas and Mike Schrunk) Van Hoomissen built an honest, professional and competent office.

Unfortunately, during those same years the criminal justice system in Multnomah County and Oregon as a whole was taking a darker turn. From the point of view of Oregon prosecutors, the 60s, 70s, early 1980s witnessed several disturbing developments: the effective deincarceration of the penal system until, for example, murderers were serving six or seven years; the unprincipled reading of unintended expansive constitutional privileges into the state bill of rights (a bill of rights drafted by the same civil libertarians that voted to exclude blacks from Oregon); the creation of biased evidentiary rules like the one that allowed a defendant to bring up a witness's prior criminal convictions, but not the prosecution.

It took 20 years of work in both the legislative and initiative arenas and the development of a working relationship between prosecutors and new crime victims' groups to rebalance the system.

In this regard, I note that the *Willamette Law Review* has just sponsored a symposium entitled "Unparalleled Justice: The Legacy of Hans Linde." From a review of the schedule it does not appear that the perspective of most crime victims and prosecutors was presented.

In concluding, let me express a special thanks to Fred Leeson, Phil Stanford and Carolyn Buan, whose books, respectively, *Rose City Justice*, *Portland Confidential*, and *The First Duty* allowed me to reach back beyond my own personal 29 years of experience with the history of the criminal law in Multnomah County and Oregon. Needless to say, my views and mistakes are not theirs.

MBA 100th Anniversary Community Gift Fund

MBA 100th Anniversary Community Gift Fund Donors will be listed on a beautiful bronze plaque which will be displayed at the Multnomah County Courthouse, just outside the Presiding Judges' courtroom. To learn more, please contact the MBA at 503.222.3275.

The purpose of the fund is to increase civics education and participation and it will be administered by the newly formed Multnomah Bar Foundation. The MBA kicked off the fundraising campaign by committing $50,000 to the fund. Listed below are those who have already made their generous donations or pledges.

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The Fog of War An Historical Perspective on the Oregon Criminal Justice System

By Stephen Houze, Attorney at Law.

This article represents one person's view of the criminal justice system from the perspective of a long-time criminal defense attorney. The author's 34 years of criminal practice encompass many of the signal achievements and pervasive failures evident in the search for justice in the state courts of Oregon. This review necessarily touches on matters of philosophical approach and the setting of fiscal priorities. Winston Churchill once said that the true measure of a civilized society is how it treats persons accused of crimes.

> ***"...the true measure of a civilized society is how it treats persons accused of crimes..."***

In order to sensibly frame the discussion, a few facts are useful. At the risk of oversimplification, certain dates and statistics are noteworthy.

- The Constitution of Oregon was adopted nearly 150 years ago in 1859. Article I, section 15, of the original constitution provided: "Laws for the punishment of crime shall be founded on the principles of reformation, and not of vindictive justice."
- In 1963 the United States Supreme Court for the first time recognized a fundamental constitutional right to appointed counsel for indigents facing criminal charges. *Gideon v. Wainright*, 372 US 335, 83 S Ct 792, 9 LEd2d 799 (1963). Prior to the *Gideon* decision, Oregon had, by statute, provided for court-appointed counsel for felony crimes. As discussed below, the actual practice of appointment of counsel in Oregon came under increased scrutiny post-*Gideon*.
- In 1984 the voters of Oregon re-enacted the death penalty.
- In 1989 sentencing guidelines became part of the criminal laws of Oregon, setting out rules which inhibit the sentencing discretion of courts on felony crimes generally.
- In 1995 the voters of Oregon adopted Ballot Measure 11, which provides for mandatory minimum sentencing for a host of felony crimes.
- In 1996, Article I, section 15, of the Constitution of Oregon was amended to reflect a changed public sentiment: "Laws for the punishment of crime shall be founded on these principles: protection of society, personal responsibility, accountability for one's actions and reformation."
- In 1999, Article, I, section 43, of the Oregon Constitution enshrined a Victim's Bill of Rights * * * "To ensure that a fair balance is struck between the rights of crime victims and the rights of criminal defendants * * *."

In 1967 an ACLU task force, headed by attorney Barnes Ellis (newly admitted to practice in Oregon in 1964), along with Carl Neil and Millard Becker, sought to review the actual court practices of the appointment of counsel and found it to be appalling. For the most part judges were appointing attorneys from a coterie of lawyers of variable competence, who would gather at the city municipal court each morning, hoping to get a case. According to Barnes Ellis, in an interview for this article, an illustrative and egregious example of the poor quality of the representation provided was a case in which a court-appointed attorney pled his client guilty without ever having met the individual. Fortunately, Ellis was successful in his efforts as an ACLU volunteer lawyer in having the conviction overturned.

> ***"...decision to create a professional public defender organization..."***

The upshot of the ACLU study was a decision to create a professional public defender organization for the provision of indigent defense services in Multnomah County. The ACLU group obtained a $15,000 LEAA Crime in the Streets federal grant and hired as the first public defender, Jim Hennings, in 1970. In 1971, funding came from Multnomah County under the enlightened leadership of County Chairperson Don Clark, which continued until 1983 when the State of Oregon assumed the responsibility for the provision of all indigent defense services through the Oregon Supreme Court.

This author began his career in criminal defense as a trial attorney in the newly formed Metropolitan Public Defender in 1972. Over the years, hundreds of other young and dedicated attorneys have worked there as well. That tiny office of a handful of lawyers in 1972 has now grown to more than 60 attorneys with offices in Portland and Hillsboro. Presently, public defender organizations and indigent defense consortia of attorneys now exist throughout the state and provide highly skilled criminal defense representation to indigent clients throughout Oregon.

The past three-plus decades of criminal justice in Oregon and the United States as a whole have been marked by what has been referred to as a "war on crime." As illustrated by changes to the Oregon Constitution and criminal code, various "tough-on-crime" measures have become fixtures in the criminal justice landscape of Oregon.

Oregon's population was 2 million in 1970; 2.6 million in 1980; 2.8 million in 1990; 3.4 million in 2000; and 3.6 million in 2005, less than doubling in 35 years. In the last three and one-half decades, however, Oregon's prison population has increased dramatically. That number has swelled from 3,000 inmates in 1980 to 13,000 in 2006, more than a four-fold increase. In 1985, for example, only 155 women were in prison in Oregon. In 2006, the number is over 1,000. In 1970, Oregon had two prisons. Oregon now has 13 prisons, most constructed in the last decade. More than 30 prisoners are on death row in Oregon. Recidivism, nonetheless, remains high with 30 percent of Oregon prison inmates returning to prison within three years of date of release for new crimes or serious release violations.

The citizens of Oregon have put enormous financial resources into its tough-on-crime measures. Nearly $400 million went for new prison construction, largely to house Ballot Measure 11 inmates, with additional tens of millions of dollars in annual operating budgets. If only these measures and expenditures could be shown to have yielded commensurate benefits. Instead, the crime rate in Oregon, like the nation as a whole, is seemingly unaffected by these draconian measures. Our criminal justice system has simply become an incarceration system, the population of which remains the marginalized citizens of our society. Thousands are warehoused for years with little discernible impact on crime and its underlying causes.

Recent Oregon Department of Corrections data bears this out. African-Americans and Hispanics disproportionately comprise over 10 and 11 percent of the prison population respectively. Of the total population of 13,000, fully 6,000 inmates have mental health problems severe enough to require treatment that is essentially nonexistent in the Department of Corrections. Approximately 10,000 inmates suffer from moderate to severe drug abuse and addiction. Again, drug treatment is woefully inadequate in Oregon's prisons. Of the total prison population, nearly 20 percent are serving sentences for non-violent and property-related offenses. Two-thirds of the population ranges from 30 to more than 60 years of age. Nearly 5,300 men and women are serving mandatory minimum Ballot Measure 11 sentences, the shortest term of which is 70 months.

> ***"...fear of crime and new ineffectual tough-on-crime proposals..."***

Even the casual observer of the societal trends in our state can see the handwriting on the wall. Schools are failing to produce educated citizens. Alcohol and drug abuse are still with us in abundance. Mental health services are pitifully inadequate in our communities. Politicians continue to pander to the public by selling the fear of crime and new ineffectual tough-on-crime proposals when crime rates have, on their own, either declined nationally or remained the same. Through the fog of the war on crime over these many years we have managed to create a robust indigent defense structure that toils in an increasingly hostile incarceration-oriented criminal justice system, the end product of which has been to expend hundreds of millions of precious public dollars to build and maintain a flawed and failing solution to our state's endemic maladies of poor public education, many unskilled workers, rampant alcohol and drug abuse, a crisis in mental health services and the continual marginalization of the state's minorities. Unfortunately, it will take more than skilled and dedicated criminal defense attorneys to right the Oregon ship of state.

A Retrospective on Product Liability in Oregon

By Nancy Erfle, Schwabe Williamson & Wyatt.

As with the other areas of law previously discussed in this pullout section, the arena of product liability law has changed vastly in the past five decades. Prior to the late 1960s, claims against manufacturers of products were limited to negligence claims or under the then existing Sales Act. In fact, it was very difficult to recover from the manufacturer or original seller of a product for alleged defects in its products.

> ***"...unreasonably dangerous, the manufacturer is liable for the harms caused by such a defect."***

The 1967 Oregon Supreme Court in *Heaton v. Ford* changed that landscape dramatically by adopting *Restatement* (Second) of Torts Section 402A. The Court held that if a product "is in fact unreasonably dangerous, the manufacturer is liable for the harms caused by such a defect." For the first time, the plaintiff had a strict liability claim directly to the product manufacturer if it could prove that the product was "dangerously defective."

In 1977, the Oregon legislature addressed and adopted a number of statutes directly relating to product liability cases. Several were key to the defense of these claims, including an eight-year statute of ultimate repose and a disputed presumption that a product is not unreasonably dangerous. Two years later, the legislature passed the Product Liability Act adopting Section 402A, defining product liability claims for the future. (ORS 30.900-.920.) The act laid out the elements of strict liability in Oregon, incorporating both the terms of the *Restatement* and importantly, the corresponding comments.

In the 1970s and 1980s, courts struggled with whether to direct their focus on the conduct of the manufacturer or the expectation of the user to find liability. By 1985, the Oregon Supreme Court appeared to have adopted the consumer expectation test to evaluate a manufacturer's liability, although subsequent decisions showed the continued struggle in determining what test to apply. Finally, in the case of *McCathern v. Toyota Motor Corp*., the Oregon Supreme Court firmly stated that when a plaintiff alleges that a product is in a defective condition, unreasonably dangerous to the user or consumer, the plaintiff must prove that when the product left the defendant's hands the product was defective and dangerous to an extent beyond that which the ordinary consumer would have expected.

> ***"...to require such a claim be proven by clear and convincing evidence."***

As to punitive damages, often a major component of product liability lawsuits,

(Continues on next page)

Products Liability: The Path to a Safer Society

By Linda K. Eyerman, Gaylord Eyerman Bradley

Products liability means the liability in law of the engineer, designer, manufacturer, retailer and installer to respond in damages for the product-caused injury. Because of products liability law, we live in a safer society where preventable injury and death are no longer acceptable. Only when products liability law fails in its primary purpose, accident and injury prevention, does it move to its secondary purpose, compensation of the injured victim.

...preventable injury and death are no longer acceptable.

Missing from the defense perspective is any recognition of the accident and injury prevention rationale behind the development of products liability law, and any acknowledgment that the restrictions added to Oregon's law in recent years are part of a tort "reform" agenda aimed at limiting the ability of courts and juries to hold wrongdoers accountable for injuries caused by unsafe products and other societal wrongs.

There is no more active battlefield in the war over civil justice than products liability litigation. As attacks on our tort liability system increase, it is important that lawyers, judges, elected representatives and ordinary people understand and fully appreciate the role of products liability law in accident prevention and the creation of a safer society.

...consumers expect manufacturers to use foresight and safety engineering principles...

Today, consumers expect manufacturers to use foresight and safety engineering principles to prevent accidental injuries. Compare this to 50 years ago, when industrial machines were sold without guards, fail safe switches or warning signs. There were millions of accidental injuries each year from lawn mowers, appliances, toys and other household products. Use of drugs such as thalidomide, pesticides such as DDT, industrial chemicals and food additives was widespread. Cars did not have seat belts or air bags; farm equipment did not have roll bars; and helmets had only minimal padding. Most consumer products were not subject to government safety regulation and American industry was protected from liability by a tort law which included immunities of every kind, privity requirements, limits on damages and a general unwillingness by courts to impose a duty of care on manufacturers in the design of their products. Professor Prosser's metaphor for these protective rules was a citadel.

Fortunately for consumers, tort law began to change in the late 1950s and early 1960s, thanks to a number of dedicated lawyers working on the side of injured people, including some great ones here in Oregon, who set about to dismantle this citadel. These lawyers worked tirelessly to eliminate protectionist tort laws and hold corporations, like other citizens, accountable for injuries and deaths which they could have prevented through the use of reasonable care. Change is never easy, but eventually many judges and legislators came to understand that it is socially desirable to have the cost of reasonable accident prevention measures be a part of the cost of manufacture. The industry answer to increasing liability should be safe design, adequate instructions and adequate warnings. Products liability law should make it more profitable to use foresight and safety engineering principles to prevent injuries, than to pay compensation to victims after the injuries have occurred.

And as jury verdicts came in, the accountability principle began to work and industry began to adopt safety measures. The practice of counting sponges at the end of surgery, the use of flash arresters on lighter fluid cans and child-proof caps on drain cleaners are all direct results of tort verdicts. The McDonald's case has been criticized, but after the verdict the company turned down the temperature of its coffee to a level more in line with what consumers expect. An Oregon verdict against a nail gun manufacturer led the defendant and its competitors to promote a safer alternative trigger design. An Oregon settlement included an

Tort lawsuits also promote safety by prompting government agencies to take action.

agreement by a major washing machine manufacturer to modify its design by adding an important safety feature. Tort lawsuits also promote safety by prompting government agencies to take action. After a number of jury verdicts and settlements, the government prohibited the use of non-retardant fabrics in sleepwear, banned importation of toxic chemicals and recalled dangerous products including Ford Pinto cars and Firestone tires.

Like other states, it was in the mid-1960s that Oregon courts recognized strict liability claims against product manufactures and sellers, in addition to negligence and other more traditional tort claims. The legislature codified this common law a decade later. Unfortunately, the path to a safer society is not a straight one, and Oregon law has always had its share of special protections for business and industry. The statute of ultimate repose prohibits Oregonians from bringing a products liability lawsuit if the product is more than eight years old. This is one of the most restrictive laws in the country and a great benefit to out-of-state manufacturers. A damages cap on personal injury cases was held to violate the right to jury trial under the

"Punitive damages are available in Oregon to punish the wrongdoer and deter future misconduct..."

Oregon Constitution, but to date a similar cap on wrongful death cases has been upheld, making it difficult to bring an expensive products liability case where the harm caused is death. Punitive damages are available in Oregon to punish the wrongdoer and deter future misconduct, but the majority of any punitive damages award goes to the State of Oregon with no provision in the statute that the State pay its pro-rata share of attorney fees and costs. On the bright side, while *Daubert* may be the law in federal court, the Oregon courts take the traditional approach of determining the admissibility of scientific evidence using the Oregon Rules of Evidence.

The defense suggests that restrictions on the substantive law of products liability and procedural hurdles are helpful in "creatively and aggressively defend[ing] their manufacturing clients." This is one perspective, but it is important not to lose sight of the main issue: That consumers expect products to be safe, and products liability litigation is effective in keeping dangerous products off the market and out of the hands of unsuspecting consumers.

Linda K. Eyerman is a shareholder in the Portland law firm of Gaylord Eyerman Bradley, where she represents people who have been seriously injured by defective products and medical malpractice. She is a past Chair of the OSB Products Liability Section and a past President of OTLA. She can be reached at 503.222.3526 or linda@gaylordeyerman.com.

Product Liability

(Continued from previous page)

the 1995 legislature modified the product liability provision to require such a claim be proven by clear and convincing evidence. Moreover, the evidence had to establish that the defendant had acted with malice or shown a reckless and outrageous indifference to a highly unreasonable risk of harm.

The Product Liability Act also provides a "safe harbor" provision to the manufacturer of pharmaceutical products. This provision precludes punitive damages if the drug was "manufactured and labeled" in accordance with the requirements of the FDA and is generally recognized as safe and effective "pursuant to FDA guidelines." There are exceptions to this punitive damage safe harbor if it is determined the defendant manufacturer knowingly withheld or misrepresented relevant information about the harm actually suffered from either the FDA or the prescribing physician. While not a bar to claims, it certainly limits the inclusion of certain punitive damage claims against this limited type of manufacturer.

"...the federal courts took on the role of evidentiary gatekeeper for expert testimony."

Two of the major milestones for defending product liability cases came not in the substantive law, but in the procedural aspect of admitting expert testimony and proceeding with a claim for punitive damages. When the Ninth Circuit Court decided *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, the federal courts took on the role of evidentiary gatekeeper for expert testimony. Although many of those factors had been identified in the 1984 Oregon case of *State v. Brown*, it was not until the Oregon Supreme Court spoke again in *State v. O'Key* that defendants found authority to push trial courts into taking an active role in reviewing and potentially excluding expert testimony prior to its introduction to the jury. With our very unique Oregon way of trial by ambush, getting a court to address an expert's qualifications or untrustworthy opinion can be tricky, but most defense practitioners believe it is worth their best efforts.

Second, the mid-1990s amendments to the punitive damage statutes require that instead of a plaintiff being allowed to plead a punitive claim in her initial pleading, some proof must be developed before such a claim can be made. The plaintiff by motion must seek to amend to include punitive damages with sufficient admissible evidence to withstand a motion for directed verdict. This procedural requirement at the very least forces a plaintiff to produce some level of admissible evidence before simply stating a punitive claim, which by its nature opens the defendant up to expensive discovery and requires the defense of a claim which may have no basis.

"...forces a plaintiff to produce some level of admissible evidence..."

Product liability practitioners in Oregon will not likely again see the fundamental change to their practice similar to what occurred with the codification of Section 402A. However, changes to other substantive issues such as damage caps, summary judgment standards and procedural hurdles continue to allow defense counsel to creatively and aggressively defend their manufacturing clients.

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2006 MBA Awards Luncheon

MBA Board: Back Row L-R, Nancie Potter, Leslie Kay, Kelly Hagan, Christine Meadows, Catherine Brinkman.
Front Row L-R, Jeff Crawford, Peter Glade, Thom Brown, Michael Dwyer
Missing are David Ernst, Mike Bloom, Scott Howard, Agnes Sowle, Diana Stuart

YLS President Catherine Brinkman and Past President Eric Waxler