Products Liability NEWSLETTER

OSB Products Liability Section

A section newsletter of the Oregon State Bar

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Notes from the Chair

Todd A. Bradley, Gaylord Eyerman Bradley, PC

Thanks to David Rocker for outstanding service as Chair of the Section for the past year, and welcome to new executive committee member Matthew Clarke. Volunteering for OSB committees and sections is a great way to meet other practitioners in your field and help to maintain the high level of competence and professionalism among our Bar members.

At last count, the OSB Product Liability Section had 167 paid members, down slightly from 2009. Those of us who are active in the section believe that it offers good value for a modest fee, including a well-priced annual CLE and this newsletter. I hope you will feel free to share this newsletter with your colleagues and to encourage them to become members of the section, which remains a bargain at only $20. The annual fee subsidizes the CLE program and written materials, and pays for mailing and printing the newsletter.

Speaking of the newsletter, I'd like to thank our contributors to this issue. It may be that not too many people will ever notice the changes made to ORS 30.900 to 30.920 by the 2009 legislature, but as Linda Eyerman makes clear in her account of the process that led to the passage of SB 284-B, the extension of Oregon's Statute of Ultimate Repose has the potential to profoundly affect the lives of injured users of products with long useful lives. It is also a story that underscores the important work we do as lawyers in informing the legislators who ultimately decide whether the law needs changing.

Evan Schechter describes how an Oregon patent lawyer changed careers to promote a safer table saw, utilizing a product he invented. It turns out to be a classic example of the civil justice system influencing the adoption of new technology to advance the public interest in safer products.

On the other hand, some products can't be made safe. This is explicitly recognized in comment k of section 402A of the Restatement (Second), which is part of Oregon law by virtue of ORS 30.920(3). Andrew Lee discusses the implications of comment k in cases involving prescription drugs, and explains why litigants might want to pay more attention to how it affects the application of the learned intermediary defense.

All members of the section are invited to submit their articles, news items, or suggestions for topics to be published in the newsletter. If you are so inclined, feel free to contact me at todd@gaylordeyerman.com.

Oregon's New Statute of Ultimate Repose

Linda K. Eyerman is a shareholder in Gaylord Eyerman Bradley, PC, in Portland, where she represents plaintiffs only in product liability and medical malpractice claims. She was actively involved in the effort to persuade the legislature to change ORS 30.905.

The compromise bill balances access to justice and protecting Oregon manufacturers

The work to increase the statute of ultimate repose for products liability cases began long before the 2009 legislative session. For decades advocates for change had brought to legislators real-life stories showing how the law denied injured Oregonians their day in court. The legislature dealt with these injustices by carving out exceptions for certain notorious products such as asbestos (1987), intrauterine devices (1989), silicone breast implants (1993), sidesaddle gas tanks (1995), and extendable power equipment (1999). But eventually the piecemeal approach lost favor, and for the past several sessions, proponents for change had directed their efforts at finding a vehicle that could garner enough votes to pass.

The bill language submitted to Legislative Counsel for the 2009 session was simple: extend the current 8 year statute of ultimate repose to 25 years. But to get the votes needed for passage, the bill had to be amended many times. The final bill, SB 284-B, was a compromise intended to provide access to justice for Oregon consumers while still protecting Oregon manufacturers. The new law is not without complexity, and it might be years before we know how well it works, but the legislature deserves credit for trying to craft a solution that would address the issue with some degree of satisfaction for all parties.

SB 284-B amended the product liability statutes, ORS 30.900 to 30.920, in several ways, the most notable being the new statute of ultimate repose. The bill also included provisions which exempt physicians from the definition of product seller, and clarify the time limits for actions involving manufactured homes. These amendments went into effect January 1, 2010, and apply to all causes of action arising on or after the effective date.

10 Years or "Look Away"

The former statute of ultimate repose, ORS 30.905(1), prohibited the bringing of a product liability action if the death, injury or property damage occurred more than 8 years after the date on which the product was first purchased for use or consumption. The new law extends this statute of repose from 8 years to 10 years for all products manufactured in Oregon. For products manufactured outside Oregon, the statute of repose is the greater of 10 years or the applicable statute of repose in the jurisdiction in which the product was manufactured, or for foreign products the state into which the product was imported. Thus, if the state of manufacture or importation has a 15 year statute of repose, then the statute of repose applicable to the Oregon action is 15 years. If the state of manufacture or importation has no statute of repose, then there is no statute of repose applicable to the Oregon action.

This "look away" approach was modeled on a Nebraska law enacted in 2001 without significant opposition, which so far has avoided any meaningful legal or political challenges. In adopting this approach, the Oregon legislature sought to accomplish three goals. The first goal was to satisfy the desire of Oregon businesses to have a short statute of repose. The second goal was to provide injured Oregonians with access to justice in their own courts. And the third goal was to make out-of-state manufacturers responsible for the products they sell in Oregon, to the same extent they are responsible for those products in their home state.

Note that the new law separates death actions from personal injury and property damage actions for statute of ultimate repose purposes, although the provisions for each are similar. The statute of repose for personal injury and property damages actions is now found at ORS 30.905(2) and provides:

A product liability civil action for personal injury or property damage must be commenced before the later of:

(a) Ten years after the date on which the product was first purchased for use or consumption; or

(b) The expiration of any statute of repose for an equivalent civil action in the state in which the product was manufactured, or, if the product was manufactured in a foreign country, the expiration of any statute of repose for an equivalent civil action in the state into which the product was imported.

The statute of repose for death actions is now found at ORS 30.905(4) and provides:

A product liability civil action for death must be commenced before the earlier of:

(a) Three years after the death of the decedent;

(b) Ten years after the date on which the product was first purchased for use or consumption; or

(c) The expiration of any statute of repose for an equivalent civil action in the state in which the product was manufactured, or, if the product was manufactured in a foreign country, the expiration of any statute of repose for an equivalent civil action in the state into which the product was imported.

Arguments of the Proponents

A number of injured Oregonians shared their stories at hearings and in individual meetings with legislators, but the story that made the point most clearly involved Steven Sharp from Baker County. When he was 17 years old, he was working on a farm, baling hay to make money over the summer. One day wet hay jammed the baler, so he did as he had been instructed to do: put the power takeoff into neutral and manually unclog the baler. But this time, the power takeoff popped back into gear and self-started the baler. Both of Steven's arms became caught in the baler, and it started to drag his whole body into the machine. It took him 40 minutes to finally break free, and he had to leave both arms behind to survive.

As Steven told the Senate Judiciary Committee, the months of pain and surgeries and rehabilitation were bad. But what most upset him was finding out that he was not the first person to encounter the design defect in this tractor. After his accident, he learned that several other people had been seriously hurt or killed when the power take-off had caused the tractor to self-start. He consulted a lawyer but learned there was no way he could

pursue a lawsuit, because the tractor was 20 years old and Oregon had an 8 year statute of repose. But eventually he got lucky and found an attorney who had the idea to bring a lawsuit in Wisconsin. Wisconsin is the state where the tractor was manufactured, and it has no statute of ultimate repose.

The jury found in Steven's favor, but the manufacturer took the case all the way to the Wisconsin Supreme Court, arguing that Oregon's statute of repose should bar the claim. The court ruled in Steven's favor. *Sharp ex rel Gordon v. Case Corp.*, 227 Wis 2d 1, 595 NW 2d 380 (1999). He has since bought his own farm in Eastern Oregon and is raising cattle and growing wheat. But if he had not gone to Wisconsin and won his case, he probably would be forever dependent on Oregon taxpayers for his prosthetics and his income. Why, he asked the legislators, should an Oregon citizen, injured in Oregon by a defective product sold in Oregon, have to go to another state to get his day in court?

Arguments of the Opponents

For most of the legislative session, opponents to the bill made the same arguments as in prior sessions, including that it was anti-business, that the climate was not right for change, and that businesses need predictability in order to set insurance rates. But when legislators asked, it was not easy for the bill's opponents to explain why a person injured by the same product in California or Washington would have access to the courts in their state, but not if the injury occurred in Oregon. If manufacturers had to defend themselves in other states, why not our state?

The opposition quieted temporarily after the bill was amended to provide for a 10 year statute of ultimate repose for Oregon manufacturers, distributors and sellers. But then the "look away" provision created new issues, with opponents arguing that it violated the Oregon Constitution. Citing Article I, Section 20 (privileges and immunities), the opponents argued that the new law would be granting "special privileges" to one citizen which are not available to any citizen in identical circumstances, without any rational basis for doing so. The proponents responded to this argument by pointing out that all the new law does is permit a person to bring an action in Oregon, if that person has a right to bring the same action elsewhere. The opponents also argued against the "look away" provision based on Article I, Section 21 (prohibition on delegation). The proponents responded that Oregon has a right to specify its statute of repose, and it is not an improper delegation of legislative authority to say that Oregon will not bar an action if the action would not be barred in another state.

Practice Tips

Product liability actions make up a very small percentage of the civil cases filed in courts in any given year, and only a handful of these cases have injuries serious enough to justify the work which will have to go into determining the applicable statute of repose for an older product made by an out-of-state manufacturer. It has always been that one of the first tasks an attorney had to tackle was finding out when the product was first purchased for use or consumption. But the purchase date usually is known by the injured person, or can be located within the files of the product owner or seller. Now attorneys will need to learn not only when the product was purchased, but also when and where it was manufactured or imported. This type of information is generally not public and may require that a lawsuit be filed in order to obtain the necessary information through discovery. Courts may need to be patient and defer ruling on motions to dismiss based on the statute of repose until discovery has been completed.

It also will be important to file lawsuits well before the statute of limitations date in order to obtain discovery about a product's component parts. If a component part was defectively designed, or lacked adequate instructions or warnings, there may be another potential defendant, and another jurisdiction with a less onerous statute of repose. There is potential for unhappiness among defendants if it turns out the action is barred as to one defendant but not the other. This could lead to more third-party practice and fault allocation, as well as an increase in indemnity and contribution actions among co-defendants.

Finally, it is worth keeping in mind that the new law, unlike the old law, does not explicitly say that a plaintiff has two years from the date of discovery to file a lawsuit, provided the claim is discovered within the statutory repose period. The safe answer for plaintiffs is file any lawsuit within the 10 years or other applicable time limit, if possible, and not become a test case unless there is no other alternative.

Other Changes in Products Liability Law

The legislators in favor of changing the statute of ultimate repose wanted to help Oregon consumers, but some also wanted to protect Oregon manufacturers, Oregon doctors, and other interest groups. To that end, several of the bill amendments were to add new provisions unrelated to the statute of ultimate repose.

One new provision is ORS 30.902 which excludes licensed physicians from the definition of product manufacturer, distributor or seller, provided (a) the product was provided by the physician to a patient as part of a medical procedure, and (b) the physician was not involved in the design or manufacture of the product. A similar provision enacted in 1993 excluded physicians as manufacturers, distributors or sellers of breast implants; that exclusion now has been expanded to all medical products. The breast implant statute, ORS 30.908, also excludes healthcare facilities from the definition of product manufacturer, distributor or seller, but the new law does not include such an exclusion. Healthcare facilities remain potential defendants in strict liability and other product liability actions.

Keep in mind that, while ORS 30.902 prevents physicians from being held strictly liable for product defects, it does not prevent plaintiffs from holding physicians liable for their negligent product-related acts and omissions. Physicians still may be sued for errors in implanting a medical device, prescribing a drug, and not informing the patient about warnings. Allegations of negligence against a physician should be set forth in a separate claim, but may be joined with product liability claims in one action.

The other new provision, ORS 30.905(5), excludes manufactured or prefabricated homes from the product liability statutes of limitations and ultimate repose. Actions against manufacturers, distributors, seller or lessors of this type of product must be filed within the time limits set forth in ORS 12.135 (governing actions for damages from construction, alteration or repair of improvements to real property).

Comment k – Implications and Applications

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Whereas many products liability suits proceed along parallel theories of strict products liability and negligence, the Oregon Legislature long ago recognized that strict products liability claims were improper for a certain class of products. In 1979, the Legislature enacted Oregon's products liability statutory scheme, which remains largely unchanged more than 30 years later. The strict products liability provisions proscribe that Oregon's strict products liability claim "shall be construed in accordance with the Restatement (Second) of Torts sec. 402A, Comments a to m (1965)." ORS 30.920(3).

This article begins with an overview of comment k to the Restatement, which precludes strict products liability claims where the product cannot be made safe (*e.g.*, certain prescription pharmaceuticals and medical devices). Next, the article turns to two consequences under Oregon law that derive from the unavailability of a strict products liability claim (1) important distinctions between a *prima facie* case of negligence versus proof of a strict products liability claim; (2) application of comment k removes any questions about whether the learned intermediary doctrine applies.

An overview of comment k

It is axiomatic that not all products may be made safe nor all material risks and warnings communicated to a lay consumer.

> "The risks associated with pharmaceuticals are a large part of the reason why a doctor's prescription is required for these medications. A drug often can affect different patients differently, causing adverse side effects in one but not another. * * * [E]ven in their intended and ordinary use, prescription drugs may nonetheless cause harmful side effects in some patients. A drug manufacturer cannot say with complete certainty that its product, when used as intended, will be reasonably safe for all patients."

De Bouse v. Bayer AG, 235 Ill 2d 544, 558 (2009). See also *Oksenholt v. Lederle Laboratories*, 294 Or 213, 219-20, 656 P2d 293, 297-98 (1982) ("By law, a prescription drug manufacturer cannot sell its products to the consumer without the physician's approval. The patient must rely on the physician to sift through the relevant literature, to match a medicine's indications and contraindications with the patient's ailment and to prescribe the appropriate drug."); *McEwen v. Ortho Pharmaceutical*, 270 Or 375, 386-87, 528 P2d 522, 529 (1974) ("[T]he duty of the ethical drug manufacturer is to warn the doctor, rather than the patient.").

Comment k addresses this tension—*i.e.*, that despite their usefulness, some products may carry risks—by exempting manufacturers of such products from strict products liability for harm caused by the products. As comment k describes:

> "There are some products which, in the present state of human knowledge, are quite incapable of being made safe for their intended and ordinary use. These are especially common in the field of drugs. Such a product, properly prepared, and accompanied by proper directions and warning, is not defective, nor is it *unreasonably* dangerous. The same is true of many other drugs, vaccines, and the like, many of which for this very reason cannot legally be sold except to physicians, or under the prescription of a physician. It is also true in particular of many new or experimental drugs as to which, because of lack of time and opportunity for sufficient medical experience, there can be no assurance of safety, or perhaps even of purity of ingredients, but such experience as there is justifies the marketing and use of the drug notwithstanding a medically recognizable risk. The seller of such products [where] they are properly prepared and marketed, and proper warning is given is not to be held to strict liability for unfortunate consequences attending their use, merely because he has undertaken to supply the public with an apparently useful and desirable product, attended with a known but apparently reasonable risk."

Restatement (Second) of Torts § 402A cmt k (emphasis in original).

Like Oregon, many jurisdictions have adopted comment k for public policy reasons, concluding that shielding manufacturers of important but inherently risk-carrying prescription treatments encourages the continued development and availability of products that reduce human pain and suffering or prevent death. *See, e.g., Young v. Key Pharmaceuticals, Inc.*, 130 Wn2d 160, 169, 922 P2d 59, 64 (1996) ("Comment k focus[es] on the product and its relative value to society, rather than on the manufacturer's position in the stream of commerce. Some products are necessary regardless of the risks involved to the user. The alternative would be that a product, essential to sustain the life of some individuals, would not be available—thus resulting in a greater harm to the individual than that risked through use of the product."); *Artiglio v. Superior Court*, 22 Cal App 4th 1388, 1397 (1994) ("[T]he entire category of medical implants available only by resort to the services of a physician [is] immune from design defect strict liability."); *Brown v. Superior Court*, 44 Cal 3d 1049, 1061, 751 P2d 470, 477 (1988) (strict liability design defect claims for prescription drugs barred under comment k); *Lareau v. Page*, 840 F Supp 920, 933 (D Mass 1993) (interpreting Massachusetts law to create a bar against strict liability claims with respect to prescription products under comment k).

Although comment k is widely adopted, the threshold showing for its application varies by state. Some states—such as Idaho, Colorado, and Kansas among them—have applied the comment k defense on a case-by-case basis, notwithstanding FDA approval of a product. These courts, pointing to qualifications on comment k protection articulated by the comment itself, conclude that particularized showings must be made in a full evidentiary hearing. *See generally Toner v. Lederle Laboratories*, 112 Idaho 328, 732 P2d 297 (1987). Among these jurisdictions, some treat the case-by-case determination as one for a jury, *see, e.g., Ortho Pharmaceutical Corp. v. Heath*, 722 P2d 410, 416 (Colo 1986), *overruled in part on other grounds by Armentrout v. FMC Corp.*, 842 P2d 175 (Colo 1992), while

others reserve that determination for the judge based on concerns about the policy implications of the decision, *see, e.g.*, *Johnson v. American Cyanamid Co.*, 239 Kan 279, 285-86, 718 P2d 1318, 1323-24 (1986). Other states—Washington, California, and Utah among them—treat the FDA's approval of a prescription pharmaceutical or medical device as a *de facto* determination that the product is incapable of being made reasonably safe but that the product, by virtue of the FDA's approval, should be considered useful, desirable, and accompanied by an adequate warning. As the Utah Supreme Court concluded:

> "[A]ll prescription drugs should be classified as unavoidably dangerous in design because of their unique nature and value, the elaborate regulatory system overseen by the FDA, the difficulties of relying on individual lawsuits as a forum in which to review a prescription drug's design, and the significant public policy considerations"

Grundberg v. Upjohn Co., 813 P2d 89, 95 (Utah 1991) (describing case-by-case approach as "unworkable").

In *Senn v. Merrell-Dow Pharmaceuticals*, 305 Or 256, 751 P2d 215 (1988), the sole Oregon appellate case to comment on the application of comment k, it appears the defendant did not seek protection under comment k until appeal. The Oregon Supreme Court, relying on *Toner*, declined to address application of the defense without the benefit of a full evidentiary hearing, which was unavailable at that procedural juncture. *Id.* at 263 n 4. While the court in *dicta* noted that issues associated with efficacy, risk, whether the risk is mitigable, as well as the existence and sufficiency of warnings necessitate a hearing, *see id.*, the court did not address whether the FDA's evaluations of such issues in its regulatory capacity were subject to challenge in such a hearing. Moreover, even if the FDA's determinations were subject to challenge, the Oregon Supreme Court did not address whether such issues were to be determined by the jury or judge as a matter of law.

Although the existence of the comment k defense cannot be disputed, *see* ORS 30.920(3), the contours of its application are likely an open issue.

Implications of being left to a negligence claim

While the similarities between a plaintiff's *prima facie* proof of a strict products liability claim and his or her proof of a negligence claim may be greater than the differences in those proofs, restricting a plaintiff to a negligence claim does have at least two important implications. First, as the Oregon Supreme Court has held, the "essential difference" between strict products liability and negligence is that in the latter the plaintiff must present some actual proof of "the foreseeability of the harm by the manufacturer." *Newman v. Utility Trailer & Equipment Co.*, 278 Or 395, 397, 564 P2d 674, 676 (1977) (contrasting negligence with situation in strict liability where "the knowledge of the article's propensity to inflict harm as it did is assumed"). Thus, shorn of a strict products liability claim (and, in particular, a design defect claim), plaintiff's claim fails unless there is proof that the warning failed to contain information relating to dangerous propensities of which the manufacturer knows or reasonably should know. *McEwen*, 270 Or at 389.

Second, the issues before the jury are framed differently in a strict products liability claim and a negligence claim. The jury's focus in a strict products liability claim is on the consumer's reasonable expectations. *See McCathern v. Toyota Motor Corp.*, 332 Or 59, 75, 82, 23 P3d 320, 329, 333 (2001) ("a jury in a design-defect case focus[es] on what extent of risk an ordinary consumer would contemplate when purchasing a product with the knowledge of its characteristics common to the relevant community"). In contrast, a negligence claim frames the issue for the jury from the manufacturer's perspective: "whether [the manufacturer's] conduct unreasonably created a foreseeable risk to the protected interest of the kind of harm that befell the plaintiff." *Fazzolari v. Portland School Dist. No. 1J*, 303 Or 1, 17, 734 P2d 1326, 1336 (1987).

Learned intermediary issue

Application of comment k also forestalls questions about the scope of the Oregon Supreme Court's decision in *Griffith v. Blatt*, 334 Or 456, 459, 51 P3d 1256 (2002). In that case, plaintiff was allegedly injured by a prescription lotion, Lindane. When plaintiff purchased the

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Lindane, it contained the generic labels for "For external use only" and "Shake well," as well the prescribing physician's instructions to the pharmacist that the medication be used "As directed." *Id.* at 459-60. Plaintiff misused the Lindane and sued the manufacturer and the pharmacist, making claims lying in strict liability and negligence. *Id.* at 459. The trial court granted summary judgment for the manufacturer on a statute of limitations defense. *Id.* Summary judgment was similarly granted as to the claims against the pharmacist based on its learned intermediary affirmative defense. *Id.* The pharmacist argued successfully to the trial court and the Court of Appeals that the pharmacist could rely on the prescribing physician as a learned intermediary. Plaintiff appealed. *Id.*

With regard to plaintiff's claims against the manufacturer and plaintiff's negligence claim against the pharmacist, the Oregon Supreme Court affirmed the trial court's order granting summary judgment because the claims were time-barred. *Id.* at 463. Turning to the plaintiff's strict products liability claim against the pharmacist and pharmacist's learned intermediary affirmative defense, the court began by recognizing the learned intermediary doctrine's prior application in negligence cases. *Id.* at 465-66 (citing *Oksenholt*, 294 Or at 218; *McEwen*, 270 Or at 385-90). Because, however, a strict liability claim is statutory rather than arising under the common law, and having reviewed the pertinent language, the court concluded that "[n] either the text nor the context of those statutes indicates that the legislature intended to relieve a *seller* from potential strict product liability on the basis of the adequacy of a *manufacturer's* product warnings to another intermediary." *Id.* at 467 (emphasis added).

Plaintiffs and manufacturers may differ over whether *Griffith* has application beyond its unique factual setting and bears on cases in which a manufacturer relied on a true intermediary. Indeed, there is good reason to believe that the doctrine applies to manufacturers in strict liability claims. *See* ORS 30.920(3) (strict liability claims to be construed in accordance with Restatement (Second) of Torts § 402A comments a to m); Restatement (Second) of Torts § 402A comment j (not specifying that warning must be given to end user, but rather, stating that "[w]here warning is given, the seller may reasonably assume that it will be read and heeded"); *Schmeiser v. Trus Joist Corp.*, 273 Or 120, 137, 540 P2d 998, 1007 (1975) (interpreting comment j and holding in related context of sophisticated user doctrine that trial court should have granted directed verdict on strict liability claim in favor of manufacturer because warning provided to *employer* was adequate as a matter of law and knowledge of same should be imputed to injured *employee*). Comment k, however, obviates the need for a trial court to decide the scope of *Griffith*.

Conclusion

As noted, comment k has received limited treatment from Oregon's appellate courts, which likely reflects litigants giving it insufficient attention before the trial courts. Parties should be cognizant of the comment, as well as the open questions regarding the manner in which it is to be applied by the trial courts. Finally, in cases in which it is applied, parties should be cognizant of its implications both for a plaintiff's *prima facie* case, as well as its ability to bring the learned intermediary defense to the fore.

The SawStop: Product Liability Law Promoting Safety

Evan Schechter, formerly with Brayton Purcell LLP, has recently opened shop as a sole practitioner in Portland, and currently sits on the executive committee of the OSB Product Liability Section."

What makes an attorney of seven years practicing patent law quit his practice and develop a new revolutionary cabinet saw that has become the number one selling cabinet saw on the market? Stephen Gass is the mind behind SawStop, LLC located in Tualatin, Oregon. Mr. Gass had always been interested in woodworking since working in a woodshop with his father in Eastern Oregon. Mr. Gass has a doctorate in physics from UC San Diego and a law degree from UC at Berkeley as well. What makes SawStop different than any other cabinet saw manufacturer? Mr. Gass has developed a safety feature that makes it possible to stop a 4,000 rpm saw blade fast enough to prevent any serious injury.

After seeing his now famous "Hot Dog Demo," which illustrates the saw's ability to stop almost instantly when a hot dog is thrust into the jagged blade, leaving only the slightest nick on the hot dog, I had the opportunity to speak with him about this new technology and what inspired it. To see a demonstration of the SawStop technology, visit the SawStop website at www.sawstop.com/howitworks/how_overview.php.

I visited Mr. Gass at his shop located at 9564 SW Tualatin Rd., Tualatin, Oregon in late March. When I got there I saw what I expected to see – a relatively industrial building and inside a few offices and a large workshop littered with equipment, parts and all sorts of electronic creations.

Upon meeting Mr. Gass, I was struck by his pleasant demeanor and his eagerness to discuss his new technology.

Mr. Gass walked me to a small conference room where I got the general history of the development of SawStop technology. One day in 1999, Mr. Gass was working in his woodshop and wondered whether he could develop a technology to prevent significant injuries while using table saws with inadequate and/or unusable guards.

The obvious question was: Can you develop a table saw that can distinguish between cutting wood and cutting flesh? Thirty days after putting his mind to the task, Mr. Gass had built a prototype. The prototype used "contact detection" rather than optics or electronic systems. This is how "contact detection" works: The blade of the table saw is charged with a small amount of electric current, when flesh comes into contact with that current, the current is interrupted and the blade is stopped within .03 seconds. To give you an idea of the speed with which the blade stops, it is approximately ten times faster than an air bag deploys.[1]

1 Although the SawStop can differentiate between wood and flesh, it cannot differentiate between metal and flesh. Thus, foil clad materials, metals, and tools made of metal, cannot be detected.

How does the blade stop so quickly? The SawStop cabinet saw comes equipped with a brake cartridge. The brake cartridge has all the "intelligence" or electronic data to activate the braking system. The intelligence stored in the brake cartridge is similar to the data stored in the black box of an airplane. This allows experts to gather electronic information about an accident should there be an injury while using the SawStop cabinet saw.

When the brake is employed and the blade is imbedded in the brake, you must replace both the brake cartridge and the blade. This replacement takes approximately 1-2 minutes to do, and the cartridges cost approximately $69 and blades between $30-$40. This expense has been cited as a concern by some critics of the new technology.

To illustrate the effectiveness of the SawStop cabinet saw, more than 20,000 SawStop cabinet saws have been purchased and placed in the field since late 2004. To date, there has never been a failure of a SawStop Cabinet saw. This is an incredible statistic considering that there are approximately 3,000 amputation injuries per year and approximately 30,000 emergency room visits a year due to Cabinet saw injuries according to Mr. Gass.

The majority of these table saws Mr. Gass markets are for commercial rather than residential use (75% to 25% respectively) with an initial cost of approximately $2,000-$3,000 per machine. The machines are currently purchased primarily by schools, factories, and furniture businesses; however, major manufacturers such as Boeing have purchased them.

How does this relate to products liability? You would think by now that Mr. Gass' technology would be incorporated into every cabinet saw available to the public. And yet, cabinet saw manufacturers such as Ryobi, Makita and Craftsman do not offer this technology on their respective saws. This may soon change. In August of 2000, Mr. Gass and two former attorneys, David Fanning and David Fulmer, attended the International Woodworking Machinery and Furniture Supply Fair in Atlanta, Georgia with SawStop. At that time, the "Hot Dog Demo" was displayed to the public and the response was incredible. In fact, David Fanning and David Fulmer both decided to leave their practices and work full-time developing SawStop. Soon after, Mr. Gass and his business partners, attempted to license the technology to other cabinet saw manufacturers. Although the manufacturers were "universally impressed" most manufacturers felt that the SawStop technology was too expensive to use in their commercial and residential saws. One manufacturer even went so far as to say that "safety doesn't sell." Mr. Gass was quick to point out that the cost of incorporating SawStop technology into the manufacturers' saws heavily outweighs the economic harm caused by table saw injuries.[2]

Mr. Gass wondered how he could reach the marketplace with his technology and, inevitably, force the manufacturers to adopt his technology to prevent cabinet saw injuries. Public opinion was one way and lawsuits another - thus our connection to products liability law.

SawStop, LLC has been selling its cabinet saws since 2004. In 2009, Mr. Gass was called as an expert witness in a case involving a near amputation injury called *Carlos Osorio v. One World Technologies, incorporated, et al.* (United States District Court of Massachusetts, CA No. 06-10725-NMG). Mr. Osorio's claims against Ryobi and Home Depot sounded in negligence (negligent design of the Ryobi BTS15 Table Saw) and a breach of the implied warranty of merchantability by selling a product, the Ryobi BTS15, that was defectively designed. The case went to trial in the end of March of 2010 and lasted 9 days. During that time, the various defendants, Home Depot USA, Inc., Ryobi and/or One World Technologies, put on various experts to explain why they had not adopted SawStop technology in 2004 - technology that would have prevented Mr. Osorio's injuries in April 2005.

For the purposes of this article, I will focus on strict liability design defect cases and the law that applies to them. 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 product;"

For the plaintiff to recover for strict liability in a design defect case, the plaintiff must plead and prove that the product was in an unreasonably dangerous condition when it left the manufacturer's hands. *See* ORS 30.120(1). The test for "unreasonably dangerous" is whether the product was "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics." *McCathern v. Toyota Motor Corp.*, 332 Or 59, 77, 23 P3d 320 (2001)

For the plaintiff to prevail, the plaintiff must show the probability and gravity of the potential harm, and that there is a safer, feasible alternative design that is not disproportionately expensive to the cost of the product and that would not unduly impair the overall utility of the product. *Wilson v. Piper Aircraft Corp.*, 282 Or 61, 67-68, 577 P2d 1322 (1978) quoting *Huddell v. Levin*, 537 F2d 726, 737 (3rd Cir 1976).

It may also be sufficient to introduce evidence such as the objective features of the product relevant to an evaluation of its safety, how the plaintiff used the product, and the circumstances surrounding the injury. *See McCathern*, *supra*, 332 Or App 77-79; *Peterson v. Lebanon Machine Works*, 56 Or App 378, 641 P2d 1165 (1982) *modified on remand*, 61 Or App 258 (1983).

The plaintiff must also prove that his use of the product was reasonably foreseeable to recover in a design defect strict liability case. *Newman v. Utility Trailer*, 278 Or 395, 399-400, 564 P2d 674 (1977).

There are defenses to strict liability claims, such as contributory negligence. The defendant must allege and produce evidence showing that the plaintiff unreasonably misused the product or that the plaintiff had knowledge of a dangerous defect in the product and was aware of the risk posed by the defect but that, despite that knowledge and awareness, unreasonably used the product.

Abnormal/misuse of the product is also a defense to strict liability. The abnormal/misuses "must be a use or handling so

2 Mr. Gass estimates that the cost to our health system per year due to cabinet saw injuries is approximately 2 billion dollars.

unusual that the average consumer could not reasonably expect the product to be designed and manufactured to withstand it." *Findlay v. Copeland Lumber Company*, 265 Or 300, 304-305, 509 P2d 28 (1928).

In *Osorio v. One World Technologies*, the defendants employed and alleged each one of the defenses previously discussed. Mr. Osorio used the Ryobi table saw without its guard and without a fence (which prevents the board being cut from kicking back into the operator), and therefore contributed in causing his injuries, argued defendants. In addition, defendants alleged that Mr. Osorio was misusing the cabinet saw at the time of his injuries - he used the saw while kneeling on the floor.

The defendant also attacked the issue of whether there was a feasible alternative design, e.g., SawStop, arguing that installing SawStop technology was not feasible at the time the Ryobi table saw was placed into the market. Here the defendants argued both the cost and feasibility of the SawStop technology. The defendants claimed that by requiring the manufacturers to use the SawStop technology their residential table saws would be so expensive as to exclude residential purchasers.

With respect to the feasibility of the technology, the defendants argued that they decided to "go a different way" with respect to safety features on their table saw. Instead of adopting the SawStop technology, the manufacturers sought to develop a plastic guard that would better prevent these injuries. Their experts argued that having a brake engage after contact with flesh defeated the purpose of injury prevention. The manufacturers argued they wanted to prevent any injury.

In addition, the defendants asserted that the SawStop technology could not work in a small, gear driven table saw such as the Ryobi BTS15 Table Saw.

Plaintiff responded to defendants' assertions with an effective attack which damaged the credibility of the manufacturers' expert witnesses - the plaintiff made it clear that Mr. Gass had given manufacturers, including Ryobi, an opportunity to license SawStop technology with a royalty of only three percent going to Mr. Gass. Mr. Gass extended this opportunity to various manufacturers, including Ryobi, for the first time in 2000. Since the manufacturers refused to contract with Mr. Gass, in 2003, SawStop went to the Consumer Product and Safety Commission (CPSC) with SawStop. Mr. Gass sought to obtain an exclusive licensing agreement requiring SawStop technology on all cabinet saws. When the CPSC went to the manufacturers of cabinet saws and asked them to address the high incidence of cabinet saw related injuries, the manufacturers created a consortium in an effort to strengthen their position to the CPSC with a unified voice. The cabinet saw manufacturers decided that rather than fairly determine the feasibility of SawStop technology, it would be financially easier to simply reject the safety improvements.

In the end, the jury found against Ryobi Technologies and/or One World Technologies finding it was negligent in designing the Ryobi BTS15 Table Saw. Mr. Osorio was awarded $1.5 million in damages. Mr. Osorio was found to be negligent as well; thus, his award was reduced by thirty five (35) percent to $975,000.

Mr. Gass and those that work at SawStop, LLC, now 40 people strong, view *Osorio v. Ryobi, et al.* as a victory for the consumer against big business that looks to make money without any concern for public safety. Increased litigation costs related to cabinet saw injuries may have the desired effect of forcing manufacturers to incorporate SawStop technology into their cabinet saws - one example of how products liability law can have an impact on improving the world around us.

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