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The Stuff of Good Jury Trial Lawyers

By William A. Barton
Barton & Strever, PC

INTRODUCTION

What stands in our way, or more properly, what stands "most in the way of most of us" from being an effective jury advocate? At the deepest levels of psychology, it is fear. This fear expresses itself behaviorally in dry, rote presentations devoid of passion and creativity.

When I asked Peter Richter of Miller Nash "What is the stuff of great trial lawyers?" he said it is "preparation, imagination and passion." I, too, think it is three qualities. I say it is "Hard work, creativity and passion." It is obvious Peter and I are in agreement.

William Barton

This paper doesn't rate the three attributes in terms of importance, but I do submit there is a dearth of creativity and passion in the courtroom. I offer my thoughts on why that is, and suggest how any lawyer can acquire these attributes. The bottom line is, in order to be an effective trial lawyer, you must be persuasive. That's what this paper is about.

FEAR IS YOUR GREATEST LIMITATION

Fear is the primary impediment to lawyers becoming "more than the facts," or more than simply competent technicians. This results in inexperienced lawyers being driven more negatively than positively. Rather than giving their best pitch with gusto, their primary motivation is to not "screw it up." To say it is

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FROM THE EDITOR

DON'T GIVE A SPEECH... TALK TO THE JURY

BY
DENNIS RAWLINSON
MILLER NASH LLP

Most of us from time to time have heard the advice, "Don't give a speech . . . talk to the jury." But what does it really mean?

Well, most of us finally figure it out after 20 trials or so, but I have always been puzzled why it seems to be such a secret.

The simple explanation is that we use our eyes differently when we give a speech from the way we do when we talk to a jury.

When you give a speech on a stage behind a podium to a large group in an auditorium or a concert hall or a ballroom, your eyes go from one end of the audience to the other and back and forth. You are giving a speech. This is the way we have been taught to give speeches. This is the way politicians do it.

Dennis Rawlinson

When we are talking to a panel of jurors, however, if our eyes dart from one end of the room to the other and back and forth, the power of our eyes is diluted. Moreover, we give the impression that we are "giving a speech" or that our remarks are simply memorized.

How do we transform this "speech giving" into "plain talk" to the panel?

Really, it's quite simple. Concentrate on speaking with one juror at a time. Create a relationship. Look at one juror while you make a single point, then think to yourself "thank you," and then move on to the next juror and make your next point.

As you can see, this will cause your eyes to go from one juror to the next but to move only after you've completed the point you are making.

Needless to say, this doesn't mean that you start with juror number 1 and end with juror number 12. It may well be that the first juror who is looking up and makes eye contact with you is juror number 4. After you finish making your point with juror number 4, you may find that the next natural juror to make eye contact with is juror number 8 . . . and so on.

Inevitably, some jurors are less comfortable with full eye contact than others. If you have a juror who is not comfortable with the eye contact, simply look at that juror pleasantly and then move away a little bit more quickly than you would with the others until the juror gets more comfortable with your gaze.

Don't give a speech; talk to the jury. Now that the secret is out, most of us can understand why most politicians do not make good jury-trial lawyers.

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Reflections/Observations from a Jury Trial

By Stephen F. English
Bullivant Houser Bailey, PC

1. Juries expect professionalism. A lack of it hurts everyone. Therefore, be courteous to the judge, to the jury, to opposing counsel, and witnesses. Many years ago, I tried a case against one of the consummate gentlemen in the profession, Chuck Paulson. After the case ended, the court allowed the jury to be interviewed by a jury consultant. What struck the jury most significantly and has stuck with me all these years is that the jury cited the professionalism between counsel as one of the primary reasons their experience was a good one. I recently completed a lengthy jury trial, which had the same degree of professionalism among counsel and toward the judge and witnesses. Once again, the jury commented extremely favorably on this fact. Think of it this way: when we observe individuals verbally sparring or fighting, our visceral sense is one of discomfort. In a trial, this discomfort translates into a distraction for the jury from the real issues in the case and can be an embarrassment to the professional.

Stephen English

2. Technology and multimedia presentations are here to stay. Juries are comprised of 20 somethings, 30 somethings and others who assume this is the norm and expect it. Master it sufficiently so that your lack of mastery doesn't become a distraction.

3. Experts who are truly qualified don't have to be local. Attacking someone either directly or indirectly because they are out of state or speak with an accent from another part of the country doesn't diminish their credibility, it simply implies that you don't have anything to attack them with on the merits.

4. Some modifications of our "trial by ambush" are useful and the jury will appreciate

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Reflections from a Jury Trial

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them. For example, consider agreeing on identifying experts sufficiently in advance of their testimony to allow each side a meaningful opportunity to develop a legitimate cross-examination. In this regard, agreeing to produce the file of the expert at least two trial days in advance gives both sides a rational opportunity to review the file so that the jury doesn't have to waste extra time as you are doing that between direct and cross-examination. It also allows for legitimate use and advance notice of a Rule 104 hearing where necessary.

5. When you make an objection, make it clean, make it clear, get a ruling, and sit down. Don't whine. Juries and judges don't appreciate that.

6. If you have a case in which you have spent the money to have a jury consultant help you select a jury, have the consultant sit with you at counsel table as the jury selection is being conducted. It allows you to be more efficient in jury selection and keeps an important but somewhat stressful time to a minimum.

7. Each trial has a number of unplanned and unexpected breaks, which leaves the jury sitting for longer than we would like, either in the jury box or in the jury room. Therefore, to the extent you can avoid these unnecessary delays, it is helpful to identify to the other side the witnesses you intend to call the next day. In addition, having deposition testimony or a witness that you can use to fill a gap with is useful as well. Juries, judges, and our clients want to keep things moving forward as efficiently as possible without sacrificing the integrity of your presentation.

8. Before examining a witness, show the other side the exhibits that you intend to use with that witness which have not yet been admitted. If you are on the receiving end of these exhibits, then make a good faith effort to pre-admit as many of the exhibits as possible. Both sides, when operating professionally, can speed up direct examination of their witnesses and again, make the case more meaningful for a jury. If the list is long enough, then this is the kind of task that a judge and the lawyers can go over in advance of trial.

9. Don't attack the opposing lawyer. Attack the theories, attack the credibility of witnesses where appropriate, but leave the lawyers alone (see #1).

10. Finally, don't play cheap tricks. It is unbecoming to the profession and embarrassing to you and works to the detriment of your client. To the judges: to the extent that you reward good behavior and penalize bad behavior with respect to the above, it can't help but ultimately make your job easier and more enjoyable, and continue to improve the quality of the members of our Bar.

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Articles are welcome from any Oregon attorney. If you or your law firm has produced materials that would be of interest to the 1,200 members of the Litigation Section, please consider publishing in the Oregon Litigation Journal. We welcome both new articles and articles that have been prepared or published for a firm newsletter or other publication. We are looking for timely, practical, and informational articles.

The Diminishing Viability of Wrongful Discharge Claims

By Scott Seidman & Anna Sortun
Tonkin Torp, LLP

Anyone practicing employment law in Oregon has inevitably noticed the uptick in number of claims brought by plaintiffs for both retaliation under the Oregon statute[1] and the common law tort of wrongful discharge. What practitioners might not realize is that 2007 amendments to the Oregon statute, providing additional remedies for retaliation claims, likely abrogated the continued viability of most wrongful discharge claims alleging that the employee was terminated in retaliation for opposing discrimination. Put simply, lawyers practicing employment law defense should move against wrongful discharge claims that are based on alleged retaliation.

Scott Seidman

Anna Sortun

This article provides background on the statutory development of retaliation claims in Oregon and a brief history on the tort of wrongful discharge and its availability to plaintiffs. It then proposes that, because the retaliation statute now offers plaintiffs adequate statutory remedies, wrongful discharge claims should no longer be available for plaintiffs alleging most, if not all, forms of retaliation.

I. Development of Oregon Retaliation Statute and Available Remedies

The Oregon retaliation statute, ORS 659A.030(1)(f), provides that it is an unlawful employment practice for an employer to "discharge, expel or otherwise discriminate against any other person because that other person has opposed any unlawful practice, or because that other person has filed a complaint, testified or assisted in any proceeding under this chapter or has attempted to do so." Prior to 2007, plaintiffs bringing claims under this statute were entitled to the possible remedies of (1) injunctive relief, (2) "such other equitable relief as may be appropriate, including but not limited to reinstatement or the hiring of employees with or without back pay," and (3) the possibility of attorney fees and costs upon prevailing.[2]

In 2007, however, the Oregon legislature amended ORS 659A.885, adding to the possible remedies available for plaintiffs claiming retaliation. In addition to those remedies listed above, plaintiffs can now recover compensatory and punitive damages.[3] There is no cap on the amount of compensatory or punitive damages available to plaintiffs.

II. The Tort of Wrongful Discharge

The Oregon Court of Appeals and the United States District Court for the District of Oregon have spent a considerable amount of time explaining the parameters of wrongful discharge claims and the rationale courts use to determine whether the claim is allowed.

The Oregon Supreme Court first recognized the tort of wrongful discharge in *Nees v. Hocks*, a 1975 opinion.[4] The *Nees* court began its analysis by stating the general rule of at-will employment as follows:

> "In the absence of a contract or legislation to the contrary, an employer can discharge an employee at any time and for any cause. . . . Such termination by the employer . . . is not a breach of contract and ordinarily does not create a tortious cause of action."[5]

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Wrongful Discharge Claims

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Despite reiterating the general at-will employment rule, the Court went on to recognize an exception to the general rule in instances where the "motive for discharging harms or interferes with an important interest of the community."[6] The *Nees* Court concluded that the defendants were liable for terminating the plaintiff because she had served on a jury.

Since *Nees*, Oregon courts have recognized two circumstances in which the tort of wrongful discharge is implicated: "(1) discharge for exercising a job-related right of important public interest," such as filing a worker's compensation claim or resisting sexual harassment in the workplace, and "(2) discharge for complying with a public duty," such as serving on a jury, reporting patient abuse at a nursing home, or reporting violations of record-keeping requirements at a pharmacy.[7]

III. Unavailability of Wrongful Discharge in Certain Circumstances

All courts in Oregon accept that wrongful discharge was never intended to be a tort of general application. As many have noted, wrongful discharge is an "interstitial tort" designed to provide a remedy where an employee's termination violates some public policy and no other remedy is available.[8] It has therefore been cast as a "narrow exception to the at-will employment doctrine."[9] Although all courts agree on that principle, there has been some confusion regarding when, exactly, the tort is available.

Most Oregon cases have held that courts will not "recognize an additional common law remedy of wrongful discharge" if "existing remedies adequately protect the employment related right" implicated by the plaintiff.[10] In addition to adequacy of available remedies, courts examine "legislative intent to abrogate or supersede any common law remedy for damages."[11] Such intent can be implied from the legislature's decision to provide via statute all remedies that would be available to a plaintiff at common law.[12]

> *To date, courts have been divided on the availability of wrongful discharge claims when plaintiffs also allege retaliation.*

Drawing from these basic principles, the United States District Court has articulated a two-part, disjunctive test for determining whether wrongful discharge is available as a remedy: The wrongful discharge tort is not available in Oregon if "(1) an existing remedy adequately protects the public interest in question, **or** (2) the legislature has intentionally abrogated the common law remedies by establishing an exclusive remedy (regardless of whether the courts perceive that remedy to be adequate)."[13]

The Oregon Court of Appeals created some potential confusion when it stated in *Olsen v. Deschutes County*[14] that, for wrongful discharge to be unavailable, the statutory remedy must be adequate, **and** the legislature must have intended that remedy to be exclusive. Any perceived difference between the federal courts' disjunctive approach and the conjunctive approach by the Court of Appeals may be illusory, however, as the *Olsen* court recognized that, when the legislature provides for a complete statutory remedy, that generally shows an implied legislative intent that the remedy be exclusive. But the legislature specifically stated in the whistleblower statute at issue in *Olsen* that it did not intend to displace common law remedies.[15] Thus, the *Olsen* court may better be understood as holding that an adequate statutory remedy pre-empts common law claims, unless the legislature specifically says otherwise. In the absence of a controlling Oregon Supreme Court opinion, federal courts continue to follow the "either/or" test as the one it believes the Oregon Supreme Court would endorse.[16]

Courts have found that plaintiffs have adequate statutory remedies, and therefore no wrongful discharge claims, for opposing workers' compensation or disability discrimination, because the statutory remedies (now found in ORS 659A.885(1) and (3)) have long provided for all of the relief available under a wrongful discharge claim—the right to a jury trial, the equitable remedies of injunction and reinstatement with back pay, compensatory damages and punitive damages.[17]

IV. Wrongful Discharge Claims Should be Unavailable When Retaliation is Alleged

To date, courts have been divided on the availability of wrongful discharge claims when plaintiffs also allege retaliation. The Ninth Circuit faced the

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issue in a case where a plaintiff alleged retaliatory discharge for resisting race discrimination against another employee.[18] Without much analysis, the court held that summary judgment on the wrongful discharge claim was appropriate because, "[e]ven assuming [defendant] terminated [plaintiff] in retaliation for her opposition to retaliation against [an African American employee, plaintiff] did not suffer the kind of personal injury that would warrant providing a common law remedy of wrongful discharge in addition to the existing state and federal statutory remedies for retaliation."[19] Following this Ninth Circuit decision, however, other Oregon federal courts have held that wrongful discharge claims *are* available to plaintiffs claiming retaliation for opposition to other kinds of discrimination besides workers' compensation or disability discrimination.[20]

All of these cases were decided prior to the Oregon legislature's decision to amend the available remedies for plaintiffs bringing retaliation claims under ORS 659A.030. As discussed above, subsection (1)(f) of that statute provides that it is an unlawful employment practice "[f]or any person to discharge, expel or otherwise discriminate against any other person because that other person has opposed any unlawful practice, or because that other person has filed a complaint, testified or assisted in any proceeding under this chapter or has attempted to do so."

Prior to 2007, a plaintiff claiming race, religion, color, sex, national origin, marital status or age discrimination in violation of ORS 659A.030 was limited to injunctive relief or other equitable relief such as reinstatement and back pay.[21] Federal law included a $300,000 cap on compensatory and punitive damages that might not be adequate if a plaintiff sought greater relief.[22] For those reasons, it was understandable that courts examining the adequacy of available remedies and legislative intent to abrogate wrongful discharge claims would have concluded that wrongful discharge for opposing such discrimination was available to these plaintiffs. Wrongful discharge offered plaintiffs an opportunity to collect compensatory and punitive damages from defendants whereas the retaliation statute offered only back pay and other equitable remedies. Because the statute contained no direct statement of the legislature's intent to abrogate (or not to abrogate) the wrongful discharge remedy, courts would naturally conclude that wrongful discharge claims were available to plaintiffs because of the possibility to collect damages on top of injunctive or equitable relief.

> ***…wrongful discharge claims are available to plaintiffs claiming retaliation for opposition to other kinds of discrimination besides workers' compensation or disability discrimination.***

That analytic landscape has changed. Because plaintiffs claiming violation of ORS 659A.030 can now collect compensatory and punitive damages under ORS 659A.885(3), as well as injunctive and other equitable relief under ORS 659A.885(1), the statutory remedies are adequate, and wrongful discharge claims for these plaintiffs should be unavailable.[23] There is no cap on compensatory and punitive damages in the Oregon statute. As set forth in *Olsen*, "in the absence of an explicit statement [by the legislature], the existence of adequate remedies can be seen implicitly to establish exclusivity" of the statutory remedy.[24]

There are still some retaliation claims where this conclusion is less certain. For example, the Oregon Family Leave Act ("OFLA")[25] has its own retaliation provision.[26] But OFLA's retaliation statute is not one of the laws specifically listed as eligible for compensatory or punitive damages under ORS 659A.885(3). An argument can be made that such a claim is nevertheless pre-empted on the ground that ORS 659A.030(1)(f) is a general anti-retaliation provision that covers employees who have opposed any kind of employment practice made unlawful by ORS Chapter 659A, not just retaliation for opposition to the kinds of discrimination specifically covered by the rest of ORS 659A.030. Subsection (1)(f) says that it applies to persons who have opposed any unlawful practice "under this chapter." Does that refer to the entire Chapter 659A, or is this retaliation provision limited to race, religion, color, sex, national origin, marital status and age discrimination? If subsection (1)(f) does cover any kind of retaliation under ORS Chapter 659A, then OFLA retaliation claims would be eligible for the full range of remedies provided by ORS 659A.885. Wrongful discharge claims would therefore be pre-empted.[27]

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V. Conclusion

It will be interesting to see how the courts resolve the continuing validity of wrongful discharge claims based on opposition to different kinds of discrimination. It will also be interesting to see whether federal and state courts rule differently, at least until the Oregon Supreme Court provides a definitive answer. Stay tuned. ❐

It will be interesting to see how the courts resolve the continuing validity of wrongful discharge claims based on opposition to different kinds of discrimination.

Endnotes

1 ORS 659A.030(1)(f) (2007).

2 ORS 659A.885(1) (2005).

3 ORS 659A.885(3)(a) (2007).

4 272 Or. 210, 536 P.2d 512 (1975).

5 *Id.* at 216.

6 *Id.*

7 *Draper v. Astoria Sch. Dist. No. 1C,* 995 F. Supp. 1122, 1127 (D. Or. 1998) *(abrogated in part on other grounds, Rabkin v. Or. Health Science Univ.,* 350 F.3d 967 (9th Cir. 2003)) (setting forth two circumstances and examples); *Brown v. Transcon Lines,* 284 Or. 597, 588 P.2d 1087 (1978) (discharge for filing workers' compensation claim); *Holien v. Sears, Roebuck & Co.,* 298 Or. 76, 689 P.2d 1292 (1984) (discharge for resisting sexual harassment); *Nees,* 272 Or. 210 (discharge for serving on jury); *McQuary v. Bel Air Convalescent Home, Inc.,* 69 Or. App. 107, 684 P.2d 21 (1984) (discharge for reporting abuse at nursing home); *Dalby v. Sisters of Providence in Or.,* 125 Or. App. 149, 865 P.2d 391 (1993) (discharge for reporting violations of drug inventory and record-keeping requirements at a pharmacy).

8 *Draper,* 995 F. Supp. at 1130-131; *Dunwoody v. Handskill Corp.,* 185 Or. App. 605, 612, 60 P.3d 1135 (2003).

9 *Draper,* 995 F. Supp. at 1127.

10 *Carlson v. Crater Lake Lumber Co.,* 103 Or. App. 190, 193, 796 P.2d 1216 (1990).

11 *See Holien v. Sears, Roebuck & Co.,* 298 Or. 76, 689 P.2d 1292 (1984).

12 *Farimond v. Louisiana-Pacific Corp.,* 103 Or. App. 563, 567, 798 P.2d 697 (1990).

13 *Minter v. Multnomah County,* 2002 WL 31496404, *14 (D. Or. May 10, 2002) (emphasis added); *Draper,* 995 F. Supp. at 1130-131.

14 204 Or. App. 7, 14-15, 127 P.2d 655, *rev. den.,* 341 Or. 80, 136 P.2d 1123 (2006).

15 *Id.* at 16.

16 *See Walters v. Roll'n Oilfield Industries, Ltd.,* 2008 WL 450382, *4 (D. Or. February 15, 2008).

17 *See, e.g., Farimond,* 103 Or. App. at 567 (workers' compensation).

18 *Thomas v. City of Beaverton,* 379 F.3d 802, 813 (9th Cir. 2004).

19 *Id.*

20 *See, e.g., Cox v. Vanport Paving, Inc.,* 2006 WL 1582302, *6 (D. Or. 2006); *Shepherd v. City of Salem,* 320 F. Supp. 2d 1049, 1059-060 (D. Or. 2004).

21 ORS 659A.885 (2005).

22 *See Cantley v. DSMF, Inc.,* 422 F. Supp. 2d 1214 (D. Or. 2006).

23 *See* Or. Laws 2007, ch. 280, § 1.

24 *Olsen*, 204 Or. App. at 16.

25 ORS 659A.150 *et seq.*

26 ORS 659A.183(2) makes it unlawful for an employer to "[r]etaliate or discriminate in any way against an individual…because the individual has" attempted to invoke OFLA rights.

27 On the other side, that this retaliation provision is part of ORS 659A.030 rather than a stand alone statute and that OFLA has its own retaliation provision argue against such a broad reading of subsection (1)(f).

Contributory Negligence(!) in Economic Loss Cases

By Erick J. Haynie & Calvin TerBeek
Perkins Coie LLP

The doctrine of contributory negligence brings to mind Blackstone, the common law, and (sometimes) harsh results. Contributory negligence, it might be said, is an antiquated doctrine that perhaps is only useful, for the plaintiff who is 1% at fault for his injury, to be aware of as a point in the evolution of tort law. And if you thought this, you'd be mostly right. But in Oregon, contributory negligence may still be alive and well in one important corner of tort law: economic loss cases.


Erick Haynie


Calvin TerBeek

In *Synetic Ventures et al. v. Berkman*, a recent case that received some media attention in and beyond Oregon,[1] the trial court allowed jury instructions as to the plaintiffs' contributory negligence, if any, for their claimed economic loss damages. The possible repercussions of a contributory negligence finding were avoided in the *Synectic* case because the jury found that the plaintiffs were not negligent to any degree. However, the trial court's ruling stands as fair warning to attorneys who litigate economic loss cases in Oregon: beware the dead hand of contributory negligence arising from its putative grave.

Perhaps reasonable people can disagree on the public policy value of continuing to utilize the contributory negligence doctrine in economic loss cases (though there is little doubt that the doctrine as a whole is largely an anachronism). And they might also disagree about the persuasiveness of the legal arguments that can be marshaled in support of or against applying the contributory negligence doctrine in this context. Below, following a brief overview of the key issue of statutory interpretation, we summarize the arguments that cut both for and against the continued vitality of contributory negligence in Oregon economic loss cases.[2]

Statutory Analysis

The beginning point in the analysis is this: whether the Oregon Legislature, when it codified, modified, or excised various common law principles of tort law, intended to abolish the contributory negligence doctrine in all types of tort cases. Put differently, did the Oregon

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Contributory Negligence

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legislature intend to carve out an exception for economic loss cases where the contributory negligence defense would be retained?

The governing statute on this issue is ORS 31.600 *et seq.*, which is Oregon's comparative negligence statute—a statute thought by many to have eliminated contributory negligence from Oregon law. Looking to the statutory text, ORS 31.600(1) states that "[c]ontributory negligence shall not bar recovery in an action by any person . . . to recover damages for death or *injury to person or property* if the fault attributable to the claimant was not greater than the combined fault [of the defendants] . . . ."[3] Thus, the key question is whether the phrase "injury to person or property" includes circumstances where the loss alleged is purely economic. In other words, is "injury to person or property" broad enough to include financial losses, as opposed to damages limited to body and physical property?

The Argument For

Not surprisingly, the argument in support of applying the contributory negligence doctrine in economic loss cases relies heavily on Oregon's economic loss doctrine. Under that doctrine, one is generally not liable for negligently causing another's purely economic losses in the absence of some source of duty, such as a special relationship or status, that imposes a duty on the defendant beyond the common-law duty to exercise reasonable care to prevent foreseeable harm.[4]

The language of Oregon's economic loss doctrine cases has repeatedly drawn distinctions between an "injury to person or property" and economic loss. For example, just this spring, the Oregon Supreme Court reiterated that Oregon courts have used "the term 'economic losses' to describe 'financial losses' such as indebtedness incurred and return of monies paid, *as distinguished from damages for injury to person or property*."[5] Other Oregon cases say the same thing.[6]

In light of the clear language and distinctions set forth in these cases, so the argument goes, contributory negligence must apply in economic loss cases. The Legislature's abolition of contributory negligence in ORS 30.600(1), after all, only goes as far as it goes. If the abolition extends only to cases involving "injury to person or property," and if economic loss cases are not those kinds of cases, then the abolition does not reach economic loss cases.

The Argument Against

There are two basic arguments against the application of contributory negligence in economic loss cases. One is statutory. The other is from case law.

With respect to the statutory arguments, they posit that the phrase "injury to person or property" encompasses a broader scope of injuries than simply to body and physical property. The first is contextual and relies on certain language in ORS 31.610(1), which is another provision of Oregon's comparative negligence statute. That section addresses allocation of liability between defendants under circumstances involving "bodily injury, death or property damage."[7] Arguably, if the Legislature really intended to keep contributory negligence as a defense in economic loss cases, it would have used this bolder language in ORS 31.600(1) to clearly exclude economic loss cases from the comparative fault regime. Why be subtle?

A second statutory argument makes creative use of the word "person" in ORS 31.600(1). That argument relies on ORS 174.100(5), which states that where the term "person" is used in the text of an Oregon statute, the term includes "individuals, corporations, associations, firms, partnerships, limited liability companies and joint stock companies."[8] Because all of these entities (save for individuals) can suffer *only* economic harms, the legislature could not have intended, by using the term "person" in the comparative negligence statutory scheme, to bar economic loss cases from the realm of comparative negligence.

The argument from case law looks beyond the statutes and contends that, as a matter of Oregon common law, contributory negligence is (or should be) fully dead letter. For starters, research reveals not a single Oregon case since the Legislature enacted the comparative fault regime in which contributory negligence operated as an absolute bar to recovery, whether involving economic loss or otherwise.

Moreover, as the Oregon Court of Appeals boldly stated within the past two years, the Oregon Legislature "long ago abandoned contributory negligence . . . as [a] complete defense[]".[9] The Oregon Court of Appeals has also recently said that "when the legislature changed 'negligence' to 'fault' in the comparative fault statutes in 1975, it intended to extend comparative fault to tortious conduct to which contributory negligence was a valid defense at common law."[10] And in 1988, the Oregon Court of Appeals stated in a purely economic loss case (without analyzing these issues) that "comparative fault . . . was properly submitted to the jury."[11]

In light of these cases, so the argument goes, our Oregon courts have declared contributory negligence to be dead. Therefore, as a matter of Oregon common law, it is dead.[12]

The Steroids Kicker

Making matters worse (or perhaps better) is that, if the contributory negligence doctrine is alive in Oregon, it is a doctrine on steroids. That's because another section in the comparative neg-

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Contributory Negligence

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ligence statute ~~O~~RS 31.620(1) ~~c~~learly and unambiguously abolishes the doctrine of last clear chance.[13] That dusty old doctrine tamed contributory negligence by allowing even negligent plaintiffs to recover where the defendant had the last clear chance to avoid the loss.[14]

So, with contributory negligence still in play, but last clear chance clearly out the window, Oregon could be left with a contributory negligence doctrine on steroids. Plaintiffs recover nothing if they are 1% negligent in economic loss cases, regardless of whether the defendant had the last clear chance to avoid the loss. Sounds wonderfully medieval.

Conclusion

As the Oregon Supreme Court has noted, there is some tension in the logic of the economic loss doctrine.[15] Nonetheless, at least one respected trial court judge in Oregon has furthered the doctrine by allowing contributory negligence instructions in economic loss cases.[16] In any event, this article is not intended to be normative—though the continued viability of contributory negligence in economic loss cases would be a fascinating appellate issue. Our goal is only to provide fair warning to Oregon's civil litigators: the contributory negligence doctrine might very well be in play in your next economic loss case. Forewarned is forearmed.[17] ❐

Endnotes

1 Full disclosure: one of the authors (Haynie) served as trial counsel to one group of plaintiffs in that case.

2 Those interested in a full discussion of these issues should consult relevant briefing in the *Synectic* matter.

3 ORS 31.600(1) (emphasis added).

4 *Harris v. Suniga,* 344 Or 301, 307-09, 180 P3d 12, 12-16 (2008) (tracing history of economic loss doctrine).

5 *Harris,* 344 Or at 310 (emphasis in original) (citing *Onita Pacific Corp. v. Trustees of Bronson,* 315 Or 149, 159 n6, 843 P2d 890 (1992)).

6 *See, e.g.,* Portland *Trailer & Equipment, Inc. v. A-1 Freeman Moving & Storage, Inc.,* 166 Or App 651, 655, 5 P3d 604, 607 (2000) ("The term 'economic loss' describes financial losses such as indebtedness incurred and return of monies paid, as distinguished from damages for injury to person or property.").

7 ORS 31.610(1).

8 ORS 174.100(5).

9 *Bunnell v. Dalton Constr., Inc.,* 210 Or App 138, 144, 149 P3d 1240, 1242 (2006).

10 *Shin v. Sunriver Preparatory School, Inc.,* 199 Or App 352, 379, 111 P3d 762, 778 (2005).

11 *Becker v. Port Dock Four, Inc.,* 90 Or App 384, 389-90 & n6, 752 P2d 1235, 1239 & n6 (1988).

12 *See, e.g., Clark v. Rowe,* 428 Mass 339, 701 NE2d 624 (1998) (adopting a common law rule that comparative fault shall apply in certain economic loss cases despite conflicting language of a comparative fault statute).

13 ORS 31.620(1) ("The doctrine of last clear chance is abolished.").

14 *See, e.g., Walker v. Spokane,* P. & S. Ry. Co., 262 Or 606, 607, 500 P2d 1039, 1040 (1972).

15 *Harris,* 344 Or at 310, n 4.

16 Notably, courts in other jurisdictions have reached similar conclusions. *See, e.g., Gorksi v. Smith,* 812 A2d 683 (Pa Super Ct 2003) (applying contributory negligence in economic loss case because of language of comparative fault statute) (collecting cases).

17 Special thanks to Stephen Deatherage of Bullivant Houser Bailey for his comments on this article. Mr. Deatherage played a leading role in analyzing this issue in the *Synectic* matter.

Oregon State Bar

The Litigation Section

The Oregon State Bar Litigation Section includes civil, criminal and specialty practice litigators within the Oregon State Bar. The Section is the largest within the Bar, and provides services to its members through periodic CLE presentations (including the annual Litigation Institute and Retreat at Skamania Lodge and the biennial practical skills CLE, Fundamentals of Oregon Civil Trial Procedure), as well as publication of the Litigation Journal three times a year. The Litigation Journal provides timely articles and case notes of interest to Oregon litigators. The Litigation Section is committed to professional education, development and collegiality. An annual highlight is presentation of the Owen M. Panner Professionalism Award at the Institute and Retreat. This award is given to a member of the bench or bar who exemplifies the highest professional standards and values. Membership in the Section is open to any Bar member with an interest in litigation. Annual dues are $35.

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"Laws provide against injury from others, but not from ourselves."[1]

—*Thomas Jefferson*

By Brian Campf
Brian S. Campf PC

June 13, 2008: "For the third time in four years, the Supreme Court has rebuked the Bush administration for denying due process of law to inmates at Guantanamo Bay Naval Base. In ruling Thursday that suspected terrorists may avail themselves of the protection of the ancient writ of habeas corpus, the justices also undid a compliant Congress' collusion with the administration's refusal to give the inmates a meaningful day in court. Instead of doing the minimum to comply with the court's decision—as it has done in the past—the administration should enlist Congress' cooperation in improving the flawed Military Commissions Act and cooperate in expedited judicial hearings for inmates who have filed habeas actions in federal court."[2]

Brian Campf

I. "The United States is committed to the world-wide elimination of torture and we are leading this fight by example."[3] *George Bush, 2003.*

"Amir is in his late twenties and grew up in a Middle Eastern country. He was a salesman before being arrested by US forces in August 2003 in Iraq. After his arrest, he was forced, while shackled, to stand naked for at least five hours. For the next three days, he and other detainees were deprived of sleep and forced to run for long periods, during which time he injured his foot. After Amir notified a soldier of the injury, the soldier threw him against a wall and Amir lost consciousness. Ultimately, he was taken to another location, where he was kept in a small, dark room for almost a month while being subjected to interrogations that involved shackling, blindfolding, and humiliation. Approximately one month later, he was transferred to Abu Ghraib. At first he was not mistreated, but then was subjected to religious and sexual humiliation, hooding, sleep deprivation, restraint for hours while naked, and dousing with cold water. In the most horrific incident Amir recalled experiencing, he was placed in a foul-smelling room and forced to lay face down in urine, while he was hit and kicked on his back and side. Amir was then sodomized with a broomstick and forced to howl like a dog while a soldier urinated on him. After a soldier stepped on his genitals, he fainted. In July 2004, he was transferred to the prison at Camp Bucca, where he reported no abuse. He was returned to Abu Ghraib in November 2004 and released two days later."[4]

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II. "At its core, the right to due process reflects a fundamental value in our American constitutional system." *Boddie v. Connecticut,* 401 U.S. 371, 374 (1971).

- "Do you have concerns they're not getting justice, the people detained there [in Guantanamo Bay]?

  "PRESIDENT BUSH: No, the only thing I know for certain is that these are bad people[.]"[5]

- "[Former Secretary of State Donald] Rumsfeld also approved placing detainees in 'stress positions,' such as standing for up to 4 hours, though he apparently found this approach unimpressive. Rumsfeld, who works at a stand-up desk, scrawled on the memo, 'I stand for 8-10 hours a day. Why is standing limited to four hours? D.R.'"[6]

- "When Sen. Sheldon Whitehouse (D-RI) asked directly whether [now-Attorney General, then Attorney General nominee Michael] Mukasey thought a technique that simulates drowning, known as waterboarding, is constitutional, the nominee was equivocal. He danced around the issue of whether waterboarding actually is torture and stopped short of saying that it is. 'If it amounts to torture,' Mukasey said carefully, 'then it is not constitutional.' Whitehouse said the answer amounted to pure semantics. 'I am very disappointed in that answer,' Whitehouse said. 'Sorry,' Mukasey responded quietly."[7]

III. "The past does not repeat itself, but it rhymes."[8] *Mark Twain.*

Excerpts from *In re Birdsong*, 39 F. 599 (S.D.Ga. Jun 29, 1889):

Syllabus by the Court

❖ ❖ ❖

It is cruel and unusual as disciplinary punishment, and unwarranted by law, to chain a prisoner by the neck with a trace chain and padlock so that he can neither lie down not sit down, and leave him so chained in darkness alone for several hours of the night; and it is the duty of the court by appropriate action to protect prisoners from such arbitrary oppression.

❖ ❖ ❖

SPEER, J.

An investigation, which resulted in the issuance of the rule in this case, was made in consequence of a publication in a local paper reciting that a United States prisoner, Joe Warren, had been guilty of disorderly conduct in jail; that the jailer had called in policemen, and with their aid had inflicted disciplinary punishment upon the prisoner. The publication contained this clause:

'He (the prisoner) was chained by the neck to the grating of the cell, and by the time he stands up until this morning, and lives a day or two on bread and water, he will probably be willing to be disciplined.'

Unwilling that a statement so suggestive of cruelty in the punishment of a prisoner, so repugnant to the well-ordered methods of discipline, tempered with humanity, which characterize the treatment of prisoners in this day of Christian civilization, should escape investigation, the court did not doubt its duty to direct an immediate inquiry into the occurrence thus brought to its attention. …

❖ ❖ ❖

The arbitrary power in a prison-keeper to iron a prisoner, or indeed, to select at his pleasure a penalty which he thinks adequate as a disciplinary measure for real or fancied misconduct, is intolerable among a free and enlightened people. It has no place among English-speaking nations. It is as repugnant … to the law of Georgia, as to the laws of the United States. It is as worthy of condemnation in the light of the state and the federal constitution, as in the benignant and merciful spirit of Christian civilization. … Had any judge of America done with the most degraded convict what this jailer admits he did with the person of this prisoner, his impeachment would be inevitable. Well, may a jailer arrogate to himself powers which are withheld from the courts? Is it competent for the jailer in his discretion to inflict penalties and to exercise arbitrary powers which are not deemed safe or appropriate to be intrusted to the judges? The proposition is unworthy of any intelligent mind trained in the letter or the philosophy of the law. ...

❖ ❖ ❖

… [T]o chain a prisoner around the neck with a trace chain and padlock, in a position where he can neither lie down nor sit down, and thus to leave him chained in solitude, in the night, in the darkness of his cell, for more than three hours, is to inflict a degree of torture which has no warrant in the law, either state or federal, and to expose him to danger to health and to life, from which

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Laws Against Injury

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it is the duty of society to protect him. … It was, in fact, punishment by the pillory, but a pillory where the links of the trace chain and the padlock encircling the bare neck of the prisoner were substituted for the wooden frame. This punishment was abolished in England in 1837. 7 Wm. IV., and 1 Vict.c. 23. It was done away with in France in 1832, and in this land of humanity and lawful methods it was forbidden by the act of congress of February 28, 1839, (5 St.at Large, 322;) and yet the jailer testified that this was his usual method for the punishment of refractory prisoners,- a method which called imperatively for the ruling of the court declaring it illegal.

❖ ❖ ❖

Much has been said as to the character of the individual who was punished. This is not a question of individuals. If the jailer is intrusted with arbitrary power to chain prisoners in a standing position to punish them, what guaranty is there that he will not misuse it? Hundreds of citizens of this state are yearly consigned by the United States courts to the custody of this and other jailers for offenses which are mala prohibita simply. If the jailer is judge, jury, and executioner, can it be predicted with certainty what will be the character or color of the next victim of the chain and padlock? It is a rule we are considering,- a rule for the protection of the unfortunate as well as of the vicious. The constitution forbids a cruel or unusual punishment, and there is no syllable relative to the character or color of the victim in that matchless charter for the preservation of right and the prohibition of wrong. …

CONCLUSION

"Common Article III [of the Geneva Convention] says that there will be no outrages upon human dignity. It's very vague. What does that mean, 'outrages upon human dignity'?"[9] *George Bush, 2006.* ❐

Endnotes

1 Quotation of Thomas Jefferson, http://etext.virginia.edu/jefferson/quotations/jeff0900.htm

2 Los Angeles Times Editorial, 6/13/08, http://www.latimes.com/news/opinion/editorials/la-ed-gitmo13-2008jun13,0,2798636.story

3 White House Press Release, 6/26/03, http://www.whitehouse.gov/news/releases/2003/06/20030626-3.html

4 Excerpt from the Executive Summary of "Broken Laws, Broken Lives: Medical Evidence of Torture by the U.S." published in June 2008 by Physicians for Human Rights. http://brokenlives.info/?page_id=69

5 White House Press Release, 7/17/03, http://www.whitehouse.gov/news/releases/2003/07/20030717-9.html

6 USA Today news article, 6/22/04, http://www.usatoday.com/news/washington/2004-06-22-rumsfeld-abuse-usat_x.htm (the memo is at http://www.defenselink.mil/news/Jun2004/d20040622doc5.pdf)

7 NPR News Report, 10/18/07, http://www.npr.org/templates/story/story.php?storyId=15413635

8 Quotation of Mark Twain, http://www.online-literature.com/twain/

9 White House Press Release, 9/15/06, http://www.whitehouse.gov/news/releases/2006/09/20060915-2.html

Oregon State Bar

Upcoming CLEs

The information listed is subject to change. Please check the CLE Seminars web calendar at www.osbarcle.org for updates for seminars shown here or scheduled after the publication of this calendar.

Friday, October 31, 2008
9 a.m.–4:30 p.m.
Municipal Sustainability Projects—The Harnassing of Sun, Wind, Surf, and Water
Salem Conference Center
Salem, OR
6 General CLE credits

Thurs, November 6, 2008
9 a.m.–12:30 p.m.
Secrets of the Great Briefwriters
Oregon Convention Center
Portland, OR
3.5 General CLE or Practical Skills credits

Thurs, November 6, 2008
1:30 p.m.–4 p.m.
Advanced Transactional Drafting
Oregon Convention Center
Portland, OR
2.5 General CLE or Practical Skills credits

Good Jury Trial Lawyers

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the fear of failure is a bit trite.

Begin by trying to taste your own fear. What is its essence? By incrementally peeling away the emotional varnish, you will probably find that it is really a fear of embarrassing yourself. In other words, what you are really afraid of is being vulnerable. Now we are getting close to the core of fear.

The irony is that the problem is also the answer. With reflection, you will come to understand that your fear is also a gift; a gift from you, to yourself. All you have to do is be honest enough to unwrap your own present; i.e., be honest with yourself.

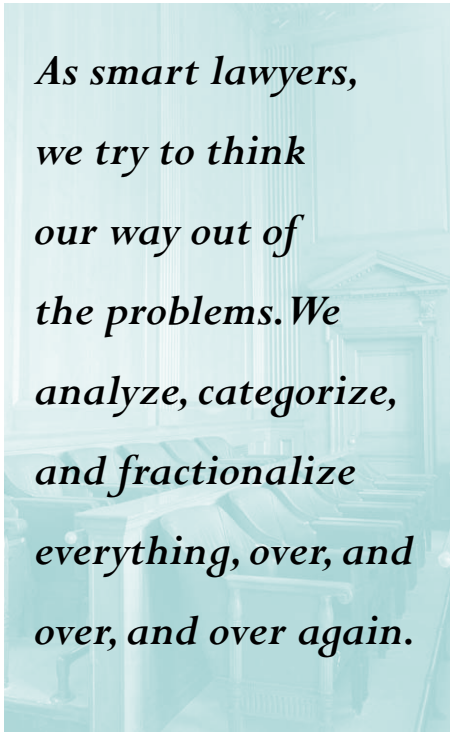
This kind of honesty requires you go to the very place you don't want to go. You must embrace your own fear. By being really honest with yourself you will then have the ability to be really honest with others, meaning the jurors.

Why is this kind of honesty so difficult to access? Because it requires a vulnerability that is the precise opposite of not only how we want to know ourselves, but more important, how we want others to view us. We want others to see us as competent, strong and confident; yet down deep, we rarely think of ourselves that way.

"STACK-A-FACT"

Most of us are scared when we go to court. We feel weak and impotent. Every fiber of our being is at risk. What do we, as lawyers, do when threatened at such a primitive level? What everyone else does. We marshal all our resources to protect us from the threat. We defend ourselves. As smart lawyers, we try to think our way out of the problems. We analyze, categorize, and fractionalize everything, over, and over, and over again. I call this kind of behavior "stack-a-fact."

No surprises here. After all, "stack-a-fact" is an integral part of every lawyer's training. Much of the work young associates do, and must do well, requires



behavior and skills that are in direct opposition to the principles of persuasion. For example, when responding to motions for summary judgment, a lawyer's job is to identify fact questions that must be resolved by the jury. "Any question will do, just find me a fact question. Defeat that damn motion!" shouts the boss. More theories and more facts surely increase the chance that the judge will agree there is a fact question somewhere. This behavior is the opposite of simplification.

There is a selection mechanism that excludes anyone from being a lawyer who is not adept at the skills tested on the LSAT. Your ability to perform a multifactorial analysis will reward you with a fine test score, but what does that have to do with your compassion, creativity or common sense?

My trial lawyer friends from the big firms tell me that the best students from the best schools do not necessarily make the best jury trial lawyers. Why? Because they're not comfortable making quick decisions on their feet. They always need to be in control and tend to overanalyze everything. After all, their analytical prowess serves them well, both as students and lawyers. While much can be anticipated and briefed pretrial, something always harkens unbidden. Do I object? If I ask this question, will it "open the door" to evidence that wouldn't otherwise be admissible? My friend from Salem, Ralph Spooner, reminds us that "Trials are live action, baby!"

THE THREE INTANGIBLES

Now let's talk about the three attributes of persuasion and the stuff of great trial lawyers: hard work, creativity and passion.

1. HARD WORK

This is what we do best. We generate lots and lots of billable hours. There is no need to belabor this. You already know too much. Two thousand-plus billable hours a year. I rest my case.

2. CREATIVITY

This is in short supply among lawyers for many reasons. First, we intellectually worship logic, and emotionally we want structure and order in everything. Some of what we do in our own work is generating legal syllogisms, which has everything to do with classic deductive thinking, and nothing to do with inductive thinking. We need and demand lots of 90 degree angles. The big news here is that jurors think inductively, not deductively. This is important.

Bill Wheatley's Thoughts

Here I include some comments from my longtime friend, Eugene lawyer Bill Wheatley. He practices in the areas of defense of personal injury and commercial claims. I quote from a recent letter he wrote me:

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Good Jury Trial Lawyers

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"I've been wanting to talk to you or drop you a line concerning our last conversation. You put forth the proposition that the three keys to effective trial advocacy are:

1. Passion
2. Hard work
3. Creativity

Persuasive as you are, I thoughtlessly accepted the proposition and agreed with you. However, it has been haunting me ever since.

"I believe you've got it right with hard work and passion, but I'm a bit concerned about your message of 'creativity.' In my experience, more cases are lost because someone is trying to be creative (when it really isn't necessary), than cases lost because of a need for creativity. Obviously, there are those rare cases, and where talents like yours can capture the soul of a case with a creative approach. In most cases, however, the concept exceeds the ability of most trial attorneys and, thus, becomes a vice rather than a virtue.

"If I were to look for a third link in your trifecta, I would probably adopt the concept of CREDIBILITY. Credibility of the cause, credibility of the attorney, credibility of the client and credibility of the approach to the trial is essential. Obviously, that concept can overlap with other concepts such as passion, etc., but I think it is deserving of being incorporated into your trifecta. With hard work and passion, 'creativity' will either naturally occur or simply become unnecessary because someone else already thought of the idea and your hard work allowed you to make good use of it."

I suspect Bill Wheatley's concerns about the importance of creativity reflect the view of many accomplished defense attorneys. Plaintiffs' lawyers face the burden of proof, are temperamentally inclined to be a bit more passionate and risk-taking, and creatively challenge the edges of the common law when necessary. For obvious reasons, defense attorneys tend to stick with the facts . . .

Credibility of the cause, credibility of the attorney, credibility of the client and credibility of the approach to the trial is essential.

How to Be More Creative

It isn't necessary to jettison your ability to "think like a lawyer." I only ask that you attempt to recapture your lost ability to understand legal questions through the eyes of ordinary folks. People just like you used to be . . . The best jury trial lawyers I know are legally and psychologically ambidextrous. They deftly tiptoe between the mandates of positive law [the court's instructions] and the jurors' sense of sidewalk justice [common sense]. When this occurs, a legal symphony is afoot.

Drop the Legal Jargon

Think about all the synonyms the word *contract* has. How about "bargain, deal, understanding or agreement?" This is what your case is about. Lawyers talk about a "breach of contract." Jurors understand a deal, or someone not keeping their word. Instead of discussing damages, consider talking about lost hopes and stolen dreams.

Tell a Story

When presenting your case, it's kind of like the country-western song, "Somebody done somebody wrong . . ." It is the jury's responsibility to right that wrong. Show them why and how. Don't just give the jurors a timeline on a big laminated board. Focus on the key disagreements and explain why your client is being honest. You needn't call the opponents liars, but you can discuss human nature, choices and profit motives. Leave ultimate conclusions about an opponent's honesty to the jury. They know what to do. Judging is their job, not yours. Winning the motive battle puts you squarely in the driver's seat.

Keep It Simple Stupid

It is your job to make every case you try simple. I don't care if it isn't. Harry Truman, the only President to serve in the 20th century never to attend college, was fond of saying, "I make complex things simple, and refuse to make simple things complex." Easy to say, tough to do.

It is difficult to "be" creative, or "be" passionate. Maybe it just isn't your nature. I appreciate that. It takes a few trials to get the basic mechanics down. Once you are comfortable with the procedure, it then becomes easier to shift your focus to the more sophisticated aspects of advocacy. In the beginning, you are consumed with not embarrassing yourself by doing something stupid. You go to advocacy seminars and are told "Don't do this," and "Don't do that." It seems difficult to do anything right, particularly when you are focused on avoiding every-

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thing you shouldn't do.

Academics and judges are really good at telling you what not to do. They are O.K. when it comes to telling you what to do; however, they often don't do well when it comes to actually showing or demonstrating. Why? Think about it . . .

Start at the End

Begin your case at the end, meaning the jury instructions. Good lawyers build their cases teleologically, meaning everything is constructed with the final instructions in mind. What are the phrases that capture the key legal concepts? Build your case theme around those phrases and ideas. Do this and the judge's instructions will be a chorus for your closing. You are not a thief when foreshadowing the exact words of the judge's instructions, although your opponent might think so.

Consider requesting written instructions. [ORCP 59B]. If you file a written request then the judge must instruct the jury in writing. Prepare a separate set of instructions for each juror. This is discretionary with the court, but if you don't prepare them, and ask for them, you know you won't get them.

Use the Verdict Form

It is the framework around which to construct your closing. Enlarge it (with an overhead projector) and then during your closing, write the answers you are arguing for in the proper spaces on the special verdict form. You're not telling the jurors what to think, you're a guide, you're teaching. When arguing money, fill in the amount you claim the proof supports. Psychologists call your prayer an "anchoring number." Jurors can't agree with you if you don't explain to them what you think is fair, i.e., why the defendant should pay large sums of money, and thus, why your client deserves large sums of money.

Jim says "write to the ear and speak to the eye." When people read what I write, I want them to hear me talking, and when I talk, I want them to see what I'm saying.

Closings Should Explain Why, Not What

The closing for average lawyers is a verbal rock fight wherein they continuously repeat, with increasing volume, their three to five best facts. This is of no assistance to the jury. (Closings should explain why, not what, and then argue the reasonable inferences.) Here is where all the witnesses' biases and interests are discussed under the heading of motives. Jurors will remember the proof. It is your job to explain what the evidence means, not what it was.

McElhaney on Creativity

My friend, Jim McElhaney, who writes the monthly "Trial Tips" column in the *American Bar Association Journal*, advocates gastronomical jurisprudence. Your facts should provoke a visceral response that tells the story of an injustice. Arguments appeal to the intellect. Lead with a punch. Lead with facts. ("Balance Persuasion," *American Bar Association Journal*, March 2002.)

Tension is the product of conflict. If the listener doesn't care what might happen next, then the dialogue isn't working. Start with a crisis. Speak in the first person rather than a chronological third person narrative. Use literary techniques like foreshadowing in your opening statement: "This is a case about a woman's eyes." Explain what happened, why it happened, and who's responsible.

Jim says "write to the ear and speak to the eye." When people read what I write, I want them to hear me talking, and when I talk, I want them to see what I'm saying. ("Empty Words," *American Bar Association Journal*, December 2001.)

3. PASSION

Most trials are mechanical presentations long on "stack-a-facts." Passion may abound in life; however, I don't see much in the courtroom. Maybe it is there, but it is certainly well hidden, and when spotted, is easily mistaken for virtuosity and overt appeals to sympathy.

What I often see from lawyers in trial are well-organized presentations that could be faxed to the jury with little loss of enthusiasm, energy or passion. Representing a client's interests isn't just another day at the office. What we do is really important, at least it is to our clients . . .

Don't talk about a "breach of a duty," or some other legal incantation. Talk about "choice." This is what $350-an-hour jury consultants will tell you, whether it is the defendant's negligence, the plaintiff's comparative fault or any other affirmative defense. Turn fault into choice. With choice comes responsibility, and with responsibility comes culpability. Get indignant when explaining why your opponent made the wrong choices. Motive is the key.

Being passionate doesn't mean you

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need to raise your voice. In fact, it is more effective to lower it. Silence can be deafening! For women litigators who are worried about striking the difficult balance between being assertive, but not too aggressive, it is gender congruent to lower your voice, while concurrently reducing the space between you and the jury. This fosters a powerful intimacy.

Let's not forget about the money, and yes, I know the legal term is "damages." This is my leading criticism of most trial advocacy teachers, colleges and institutes. Neither the faculty nor the students appear comfortable when talking money. Think about the character Jerry Maguire, from the movie by the same name, when he said, "Show me the money!" After all, that's why we are here!

You ask, "What is there to get passionate about in a simple negligence action, or a garden variety contract case?" Try putting yourself in your client's shoes. What really hurts? Start there. The case you end up trying says as much about you, as the core facts you work with. Search until you find the human story within the facts, then emphasize the moral imperative. Where is the wrong that demands correction?

Lawyers want to talk, talk, and talk about liability. More "stack-a-fact." Everyone seems so much more comfortable when NOT talking about pain and suffering, and the money owed because of it. Why shouldn't you be sharing with the jury why every dime you have asked for is reasonable? Ask yourself, "Why are we here?" The answer for the jury is "To right a wrong, and deliver justice. Ladies and Gentlemen of the jury, in our legal system justice can only be expressed in dollars."

One of the rules inexperienced lawyers have difficulty learning is not to express their personal opinions. The reason isn't a rule of evidence. It's one of ethics. See Oregon Rule of Professional Conduct 3.4 (e), which states in part that

"[a] lawyer shall not . . . state a personal opinion as to justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused." A simple way to address this, is to drop the "I, me and lie" from your closings. When your arguments contain tempered passion, you don't need to state your personal opinions. It will be obvious what you think! Why give your opponents the opportunity to state that the basis for their objection is a lack of ethics on your part, and then have the judge agree, and all this happens in front of the jury. How embarrassing! Not knowing your evidence is one thing, acting unethically is quite another . . .

There are clear economic incentives to being passionate. When you fight for your clients, and lose [as you will about half of the time], your clients won't blame you. They will blame the judge, or jury! This means they will write you a check that doesn't bounce, will hire you in the future, and will send all their friends and relatives to you. The greatest compliment is when jurors from one of your past trials want to hire you. Why all the new and repeat business? It's because you are a fighter. I promise you, if you lose without passion, the clients will blame you. It really doesn't matter whether this is fair, because we can agree losing without passion is simply bad business. All lawyers lose their share of cases. What I am talking here is how you lose. Clients ask, nay, demand, that you lose mightily, with enthusiasm and great heart.

You needn't act maudlin, shrill or wear the constitution on your sleeve. Nor am I talking about sympathy or pandering to the jurors' emotions. What I am talking about is representing your clients with a commitment and earnestness that shows you care. Everyone can do that. After all, if you don't care, why should the jurors?

PARTING THOUGHTS

Take a Speech Class

Read some books on public speaking. Yes, I know you were on the debate team in high school, took a speech class as an undergrad, and did moot court in law school. That was for credits and a grade. Now it's real. It's for money! It's for the client.

Don't be Afraid of a Video Camera

In our office, even though I have tried more than 500 jury trials to verdict, we still practice and practice our opening statements and closing arguments. By the time my partner Kevin gives the opening, it has been videotaped and critiqued at least a half dozen times.

Credibility

Think of jury trials as a gestalt involving the generation, acquisition, consolidation, and utilization of credibility. (This

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is what Bill Wheatley was talking about.) Yes, there is a process going on as you wade through the mechanics of jury selection, opening, evidence, closing, and the instructions. However, underneath this elaborate process is another game, one that's much more primitive and visceral. It's lawyers competing to win the battle of trust. You may not be able to see credibility, but you certainly know when someone doesn't have it. Without credibility, it doesn't matter what you think or if you and your client are right. Why? Because unless you are believable, nobody cares what you think, and if nobody cares what you think or say, then it really doesn't much matter whether you're right or wrong, does it?

Quit Whining

Judges can be heavy-handed and intimidating. When you hear a judge say "Well, that would never be allowed in my courtroom," or worse, "That would never happen in my courtroom," at least you know who you're in front of.

Respectfully make your record and then do what you're told to do. A good portion of the time, they're right, and when they aren't, well . . . , they're still right! Now you know what the saying "Equity is the length of the chancellor's foot" really means. Being a trial lawyer is not for the faint of heart. You have to be hardy, strong and adaptable. Try to use the judge's abrasive attributes to your advantage. View every problem as an opportunity. In my experience, tough, mean judges treat you much better when: a) you show up early; b) you correctly pronounce the judge's name; c) you are completely prepared; d) you are familiar with their courtroom procedures; and, e) perhaps most important, you are respectful to their staff. So maybe the judge is having a bad day. Generally, I find they are equally hard on everyone, but particularly so to those who deserve it the most. If the judge is giving you a little extra, ask yourself what you may have done to earn it, then quit whining and go to work. Stick your butt up, your head down, and start picking grapes as fast as you can. Try and do better. Draw a deep breath and try to stand back from your feelings. Remember, this too will pass.

...unless you are believable, nobody cares what you think, and if nobody cares what you think or say, then it really doesn't much matter whether you're right or wrong, does it?

TO THE BYRDS AND MR. RINGO

Let me close by sharing with you two experiences that continue to inspire me years later. Once, while in Bend during the mid-eighties, I saw a sign advertising The Byrds in concert on a Thursday night. They were between shows on their way North to the Tacoma Dome. I couldn't believe it. The Byrds! In Bend, Oregon!

There were 26 people in the audience that night. I counted them. The band came out. The house was all but empty. The lead singer, Roger McGuinn, began the show by saying "We are the Byrds. Every night, we do a better show than we have ever done before." They rocked, they rolled and they dripped sweat. It was fantastic. In a small town, with barely two dozen paying customers, they put on a show I will never forget. They taught me something about what it meant to be a real professional, irrespective of the size of my case.

If I have trouble getting motivated when doing a smaller case, I think of the Byrds. I might even pause, and play one of their CDs. When I am through, it is easy to remember that I too am a professional, and therefore in every one of my trials, no matter what the size of the prayer, I will always bring my "A" game and do my best.

My last story is about my longtime friend and mentor Bob Ringo of Corvallis. Bob retired a few years ago. This trial occurred back in the mid-seventies. I had been out of law school 2-3 years. Things came pretty easy for me. I was winning most of my drunk driving defenses. I didn't need to prepare much. One afternoon I was sitting in the back of the Corvallis Municipal Court waiting for the arraignment of one of my clients. I was reading a sports page below the benches so the judge wouldn't see me.

There was a shoplifting ticket being tried to the bench. The defense attorney was a little guy. I looked up in the middle of his cross examination of the store manager. The cross was so intense the store manager actually had a heart attack. They stopped the trial, declared a mistrial, and packed him out to a waiting ambulance. With the siren of the ambulance fading into the background, I approached the clerk and asked who the lawyer was. She said "Bob Ringo." Whoa! I had heard of him, and now I had seen him. He was a big time lawyer. What was he doing here in a municipal court, defending a misdemeanor shoplifting ticket? I don't know, but one thing was obvious: Mr. Ringo was giving it everything he had.

I think of Bob often, with much fondness and respect.

Thank you. ❐

Recent Significant Oregon Cases

Stephen K. Bushong
Multnomah County
Circuit Court Judge

Claims and Defenses

- *Boyer v. Salomon Smith Barney*, 344 Or 583 (2008)
- *Bjorndal v. Weitman*, 344 Or 470 (2008)
- *Magnuson v. Toth Corp.*, 221 Or App 262 (2008)

The plaintiff in *Boyer* alleged that defendants' negligent handling of certain commodity transactions in plaintiff's investment account caused him significant financial losses. Defendants responded that they could only be liable in contract, not in tort, because "the extent of any duty of care that they owed to plaintiff was that prescribed by the contract" (a commodity client agreement). 344 Or at 589. The trial court agreed with defendants and granted judgment on the pleadings as to the negligence claim. The Supreme Court affirmed. The court acknowledged that the principal-agent relationship involved "is one type of special relationship" previously recognized by the court, so the defendant "may be liable in negligence for breach of the agent's duties." *Id*. at 592. Determining liability required the court to consider "whether the specific breaches of duty asserted by plaintiff… are within the scope of the relationship shown here." *Id.* Where plaintiff alleges that defendants failed to provide him with timely information, "the issue is whether an agent has a duty under an agreement such as the one between the present parties, to provide to a principal information of the kinds described." *Id.* at 592-93. The court concluded that, under the terms of the agreement at issue in this case, the parties had agreed that "defendants were not 'subject to a duty to use reasonable efforts to give plaintiff information which was relevant to affairs entrusted to defendants.'" *Id.* at 594 (quoting *Restatement (Second) of Agency* § 381).

Stephen Bushong

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In *Bjorndal*, the Supreme Court held that the "emergency instruction" set forth in Oregon Uniform Civil Jury Instruction 20.08 "as used in ordinary vehicle negligence case, is an inaccurate and confusing supplement to the instructions on the law of negligence and, therefore, should not be given." 344 Or at 472. The instruction provides that people "who are suddenly placed in a position of peril through no negligence of their own, and who are compelled to act without opportunity for reflection, are not negligent if they make a choice as a reasonably careful person placed in such a position might make, even though they do not make the wisest choice." *Id.* at 473 (quoting UCJI 20.08). The court noted that the instruction "originated as a means to allow the jury to avoid the harsh result of finding that a defendant was negligent *per se* for violating a statute or ordinance,…or that a plaintiff was

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continued from page 21

contributorily negligent and therefore barred from recovering damages against a negligent defendant[.]" *Id.* at 476. Both rationales "have been superseded by other changes to the law." *Id.* at 477. And, the court concluded, in vehicle accident cases, the instruction "misstates the law of negligence by introducing an inquiry respecting whether a person has made the 'wisest choice,' rather than focusing on whether the person used reasonable care, given all the circumstances." *Id.* at 481.

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The plaintiff in *Magnuson* was injured "when she fell three or four feet to the ground from the front doorway of her manufactured home, into which she had moved before construction was completed." 221 Or App at 264. Plaintiff and her husband asked to move into the home before the permanent stairs to the front doorway were installed; defendants "warned them that the site was not a safe environment, but said that [they] had permission to move in." *Id.* at 265. Plaintiff and her husband "were aware of the fact that there were no temporary steps at the front door." *Id.* Plaintiff fell when she opened the inside front door to secure the front storm door, which was banging in the wind. She alleged that defendants were negligent "in failing either to secure the front door so that it would not open, or to provide or construct temporary steps or handrails and a landing." *Id.* Defendants moved for summary judgment, arguing that plaintiff "could not prove causation and that any duty they owed to plaintiff was limited by the contract between the parties, which did not include the obligation to install temporary steps." *Id.* at 264. The trial court granted the motion, but the Court of Appeals reversed, concluding (1) the evidence was sufficient to create a genuine issue of material fact on causation, because a jury "could infer…that it was reasonably probable that defendants' failure to secure the door or to have steps in place caused plaintiff's injuries" (*Id.* at 267); and (2) the contract did not shield defendants from liability, because plaintiff's claim "is not based on a breach of contract, and the existence of a contract between the parties does not necessarily insulate defendants from liability for negligent conduct not governed by the terms of the contract." *Id.* at 268-69.

■ *Christiansen v. Providence Health System*, 344 Or 445 (2008)

The Supreme Court held in *Christensen* that the Remedy Clause of Article I, section 10 of the Oregon Constitution does not preclude applying the five-year limitation period in ORS 12.110(4) to bar a medical negligence claim to recover for injuries sustained by an infant during childbirth. The court acknowledged that "the imposition of a five-year limitation period during minority can lead to harsh consequences in some cases." 344 Or at 455. The court also acknowledged that "statutes providing for the tolling of limitation periods due to disability, such as minority, existed before the Oregon Constitution was adopted, and more were adopted soon afterward." *Id.* However, the court concluded that there was "no authority to support plaintiff's contention that Oregon's constitutional framers intended the Remedy Clause to prevent legislative alteration of the 1854 tolling statute for minority." *Id.* at 455-56. Thus, the Remedy Clause "creates no barriers to the enactment of a statute that modifies the disability protection that minors enjoyed before 1859." *Id.* at 456.

■ *Handam v. Wilsonville Holiday Partners, LLC*, 221 Or App 493 (2008)

■ *Lemley v. Lemley*, 221 Or App 172 (2008)

In *Handam*, the plaintiff—a former hotel employee—obtained a default judgment on employment-related claims against the hotel's management company; plaintiff then brought an action against the hotel's owner and the principal of the management company to collect on the default judgment. The trial court dismissed the action; the Court of Appeals affirmed. The court held that, as to the principal, "the alleged conduct was not sufficiently improper to justify piercing the corporate veil[.]" 221 Or App at 497. The claim against the hotel's owner was barred by claim preclusion because plaintiff's "claim in this action is closely related to the facts at issue in the first proceeding—the occurrence of wrongful employment-related conduct and which defendant, if any, should compensate him for that conduct." *Id.* at 501-02. In *Lemley*, the Court of Appeals rejected defendant's argument that she was not bound by a

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settlement agreement because the agreement "had been entered into by her lawyer without actual or apparent authority from defendant." 221 Or App at 174. The court concluded, without addressing the authority issue, that defendant was bound by the settlement agreement because she "subsequently ratified it by her conduct." *Id.* at 181.

Evidence

- *State v. Rodriguez-Castillo*, 345 Or 39 (2008)
- *Landauer v. Landauer*, 221 Or App 19 (2008)
- *Perman v. C.H. Murphy/Clark-Ullman, Inc.*, 220 Or App 132 (2008)

In *Rodriguez-Castillo*, the Supreme Court held that a police detective could not testify about statements the victim made to a detective through an interpreter because the interpreter's statements "added another layer of hearsay" and would be admissible only if the interpreter's statements "came within some other exception to the rule against hearsay." 345 Or at 48-49. In *Landauer*, the Court of Appeals concluded that testimony regarding plaintiff's discovery of the alleged elder abuse and professional malpractice was relevant to the statute of limitations defense, but concluded that exclusion of the evidence was not reversible error because "the jury had substantially the same evidence before it when it decided that the statute of limitations expired before plaintiff commenced his action." 221 Or App at 28. In *Perman*, an asbestos exposure case, defendants contended that decedent's deposition testimony "that he used gloves that contained asbestos is inadmissible, because he was not an expert at identifying asbestos." 220 Or App at 139. The Court of Appeals disagreed, holding that the testimony was admissible under OEC 701 even though decedent was not an expert because "his testimony makes clear that, during his employment as a welder and sheet metal worker, he had seen asbestos before and, based on the combination of that experience and his perceptions, had substantial reason to believe" that the gloves contained asbestos. *Id.*

- *Wroncy v. Klemp*, 219 Or App 578 (2008)

The plaintiff in *Wroncy* brought claims for assault, battery, and intentional infliction of emotional distress after she was allegedly injured in a violent confrontation with her neighbor in a dispute over plaintiff's right to use the roadway on defendant's property. The trial court excluded testimony offered by plaintiff that, on another occasion, she "had actually observed defendant run over her neighbor Jolene Maurer with his pickup truck while they were having a verbal dispute about this road." 219 Or App at 581. The Court of Appeals reversed and remanded for a new trial, concluding that the excluded evidence was relevant because it "could make it more likely for a jury to believe plaintiff's account of the confrontation." *Id.* at 582. The error affected a substantial right, the court explained, because "[t]he jury's decision likely turned on whose account of the confrontation between plaintiff and defendant the jury believed." *Id.*

Procedure

- *Werbowski v. Red Shield Ins. Co.*, 221 Or App 271 (2008)
- *Johnson v. Elmore*, 221 Or App 166 (2008)
- *State ex rel Dewberry v. Kulongoski*, 220 Or App 345 (2008)

Attorney fees are recoverable under ORS 36.425 when a case is resolved on summary judgment after arbitration, the Court of Appeals held in *Werbowski*. The circuit court proceeding is a "trial de novo" for purposes of the statute "whether it ultimately resolves after a full trial or at some earlier stage, such as summary judgment." 221 Or App at 275. In *Johnson*, the Court of Appeals held that the trial court's "order setting aside the default judgment is appealable under ORS 19.205(3)." 221 Or App at 170. In *Dewberry*, the Court of Appeals held that (1) "ORCP 29 A does not apply in mandamus proceedings because the mandamus statutes specify 'a different procedure,' ORCP 1 A, for parties to a mandamus proceeding" (220 Or App at 352); and (2) where plaintiffs' ability to pursue and obtain declaratory relief "was completely controlled by an adverse party[,]…a declaratory judgment action afforded neither a 'plain' nor 'adequate' remedy" sufficient to preclude mandamus relief. 220 Or App at 359. ❐

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