

**PRODUCTS LIABILITY LAW:
COMPARING THE APPROACH IN
OREGON AND WASHINGTON**

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This article compares products liability in Oregon and Washington in a form that may be useful for a practitioner licensed in both states. This overview is not intended to be exhaustive; rather, it is intended to provide a brief outline of the similarities and differences.

In one important respect, Oregon and Washington have followed similar paths. Prior to 1977, Oregon product liability law was the end result of common law decisions in the areas of negligence, strict liability and warranty. After 1977 and 1979 legislation, Oregon law has defined a "product liability civil action,"¹ codified Section 402A,² and otherwise modified the law of products liability in Oregon. Similarly, the Washington Legislature adopted RCW 7.72.010 to 7.72.060 in 1981 for the express purpose of "treating] the consuming public, the product seller, the manufacturer, and the product liability insurer in a balanced fashion in order to deal with problems." Preamble to Tort Reform Act of 1981. But the paths diverge from time to time because of the different policy choices made by the Oregon and Washington Legislatures.

A. Dangerously Defective Product

To recover in a strict products liability claim, both Oregon and Washington require the user or consumer to show the product was dangerously defective.³ The way in which a plaintiff may establish defectiveness, however, differs in Oregon and Washington.

Oregon

Under the Oregon approach, the controlling standard for an unreasonably dangerous defect in a strict product liability claim is the consumer expectations test.⁴ Under that test, a plaintiff must show the product was defective and dangerous beyond that which the ordinary consumer would have expected.⁵ The consumer expectations test is used in Oregon because the Legislature codified comment i to Restatement (Second) Torts § 402A. ORS 30.920(3).

¹ ORS 30.900.

² ORS 30.920.

³ See ORS 30.900; RCW 7.72.030(1).

⁴ *McCathern v. Toyota Motor Corp.*, 332 Or 59, 23 P.3d 320 (2001).

⁵ *Id.*

Washington

Prior to 1981, Washington's products liability law was based on the Restatement (Second) of Torts, §402A.⁶ Under that law, the consumer expectations test was used to determine if a product was defective.

The 1981 Tort Reform Act, however, changed the controlling standard. The current standard under Washington's Product Liability Act adopts two alternative tests to establish that a product was defective: the risk-utility test and the consumer expectations test.⁷

Under the risk-utility test, liability because a product was not reasonably safe as designed can be established by showing that, at the time of manufacture, the likelihood the product would cause the plaintiffs harm and the seriousness of that harm outweighed the manufacturer's burden to design a product that would have prevented the harm, and any adverse effect a practical, feasible alternative would have on the product's usefulness.⁸

Washington, therefore, provides an alternative means by which a plaintiff may establish a defect if the consumer expectations test cannot be satisfied. As a practical matter, however, the difference is not always significant as evidence related to risk-utility is normally considered in applying the consumer expectations test.⁹

B. Who Is Liable?

Oregon

Under Oregon law, anyone that "sells or leases" any product in a defective condition can be strictly liable. ORS 30.920(1). For that reason, a product retailer can be held liable. Of course, under appropriate circumstances, a retailer may be entitled to indemnity from an upstream manufacturer.

Washington

Washington law, in contrast, has separate rules for the liability of a manufacturer (RCW 7.72.030) and for the liability of a seller (RCW 7.72.040). The broadest liability attaches to the manufacturer. A seller is not liable as if it were a manufacturer if its role is limited to performing "minor assembly in accordance with the instructions of the manufacturer," and if it did not participate in the design of the product. RCW 7.72.010(2). Separate from that rule, a seller is liable only for its own negligence, breach of express warranty, and intentional misrepresentation, unless "no solvent manufacturer" is subject to service, the court determines that it is highly probable that the claimant would be unable to collect a judgment, the seller is a controlled subsidiary, or the seller provided the plans and specifications for the product. RCW 7.72.040.

⁶ See *Ulmer v. Ford Motor Co.*, 75 Wn2d 522,452 P.2d 729 (1969).

⁷ RCW 7.72.030; *Thongchoom v. Graco Children's Products, Inc.*, 71 P3d 214, 117 Wn. App. 299 (Wash. App. Div. Three 2003).

⁸ *Id.*; RCW 7.72.030.

⁹ See *McCathern v. Toyota Motor Corp.*, 332 Or at 78.

C Statutes of Limitations

Oregon

"Product liability civil actions," under Oregon law, are defined as actions brought against a manufacturer, distributor, seller, or lessor of a product for damages for personal injury, death, or property damage arising out of a design, manufacturing, or warning defect, or failure to instruct on the use of a product.¹⁰ This definition "embraces all theories a plaintiff can claim in an action based on a product defect," including, for example, negligence, strict liability, breach of warranty, and fraudulent misrepresentation.¹¹

The Oregon products liability statute provides for different statutes of limitations for personal injury or property damage and death.¹² Product liability civil actions for personal injury or property damage must be commenced not later than the earlier of (1) two years after the date on which the plaintiff discovers, or reasonably should have discovered, the personal injury or property damage and the causal relationship between the injury or damage and the product, or the causal relationship between the injury or damage and the conduct of the defendant; or (2) ten years after the date on which the product was first purchased for use or consumption.¹³

The legislature enacted certain exceptions for breast implants,¹⁴ asbestos-related disease,¹⁵ and sidesaddle gas tank ruptures on pickup trucks.¹⁶

A product liability civil action for death must be brought not later than the earlier of (1) three years after the injury causing the death is discovered or reasonable should have been discovered, but in no case may it be commenced later than the earliest of (a) three years after the death of the decedent; or (b) the longest of any other period for commencing an action under a statute of ultimate repose that applies to the act or omission causing the injury; or (2) ten years after the date on which the product was first purchased for use of consumption.¹⁷

The statute of repose for product liability civil actions requires that the injury or damage complained of must occur within eight years after the date on which the product was first purchased for use or consumption.¹⁸

Washington

The Washington Product Liability Act, similar to Oregon's products liability statute, includes a broad definition of a product liability claim, encompassing multiple theories of recovery.

¹⁰ ORS 30.900.

¹¹ *Kambury v. DaimlerChrysler Corp.*, 185 Or App 635, 639, 60 P3d 1103 (2003).

¹² Compare ORS 30.905(2) and (3).

¹³ ORS 30.905(2). In *Gladhart v. Oregon Vineyard Supply Co.*, 332 Or 226, 26 F3d 817 (2001), the Oregon Supreme Court held that the discovery rule no longer applies to the statute of limitations in products liability lawsuits. ORS 30.905, however, was subsequently amended by the Oregon legislature to provide for a statutory discovery rule.

¹⁴ ORS 30.908.

¹⁵ ORS 30.907.

¹⁶ ORS 12.278(2).

¹⁷ ORS 30.905(3) and ORS 30.020.

¹⁸ ORS 30.905(1) and *Border v. Indian Head Industries, Inc.*, 101 Or App 556, 792 P2d 111, rev. denied 310 Or 475 (1990).

The Washington statute, however, provides for a much simpler statute of limitations. The limitations period is codified in RCW 7.72.060(3), and provides that "no claim under the chapter may be brought more than three years from the time the claimant discovered or in the exercise of due diligence should have discovered the harm and its cause." Like the Oregon statute, Washington has codified the discovery rule in its product liability statute.¹⁹

Washington's ultimate statute of repose, adopted as part of the Tort Reform Act of 1981, provides a more consumer-friendly approach than Oregon. The time-period for bringing a product liability action under Washington's statute of repose is based upon a product's "useful safe life," which assumes that a product may be safely used for up to twelve years.²⁰ A claimant may rebut this presumption by a preponderance of the evidence that the useful life exceeded twelve years.²¹

An analysis of the respective statutes of limitations in Oregon and Washington reveals that Washington provides greater protection for persons injured by defective products by allowing a greater time frame in which to bring a products liability claim. As one Washington court has commented, Oregon's statute is concerned primarily with protecting Oregon businesses, while Washington's statute affords greater protection to consumers.²²

D. Punitive Damages

Oregon

In Oregon, punitive damages are governed by statutory, common law, and constitutional principles. An initial pleading in a civil action cannot request an award of punitive damages, but must be added by amendment after the initial pleading.²³ Punitive damages are not recoverable unless it is proven by clear and convincing evidence that the party against whom punitive damages are sought has acted with malice or has shown a reckless and outrageous indifference to a highly unreasonable risk of harm and has acted with a conscious indifference to the health, safety and welfare of others.²⁴ In a product liability civil action, the following factors must be considered in addition to the criteria stated above: (a) the likelihood at the time that serious harm would arise from the defendant's misconduct; (b) the degree of the defendant's awareness of that likelihood; (c) the profitability of the defendant's misconduct; (d) the duration of the misconduct and any concealment of it; (e) the attitude and conduct of the defendant upon discovery of the misconduct; (f) the financial condition of the defendant; and (g) the total deterrent effect of other punishment imposed upon the defendant as a result of the misconduct, including, but not limited to, punitive damage awards to persons in situations similar to the claimant's and the severity of criminal penalties to which the defendant has been or may be subjected.²⁵ Finally, drug manufacturers have limited liability for punitive damages.²⁶

¹⁹ RCW 7.72.010(4).

²⁰ RCW 7.72.060.

²¹ *Rice v. Dow Chem. Co.*, 124 Wn2d 205, 212, 875 P2d 1213(1994).

²² *Martin v. Goodyear Tire & Rubber Co.*, 114 Wn App 823,61 P3d 1196 (Wash. App. Div. One 2003).

²³ ORS 31.725(1).

²⁴ ORS 31.730.

²⁵ ORS 30.925.

²⁶ *See* ORS 30.927.

Washington

Washington courts have consistently ruled that punitive damages are against public policy and may not be awarded in the absence of explicit statutory authority.²⁷ The legislature has not authorized punitive damages in product liability claims, and has authorized the recovery of damages other than compensatory in only a few limited cases.²⁸

E. Learned Intermediary Doctrine

The "learned intermediary" doctrine provides that there is no duty to warn the end user of a product when the supplier or manufacturer has produced adequate warnings to an intermediary upon whom it can reasonably rely to communicate the information to end users of the product.²⁹

Oregon

Oregon recognizes the doctrine, but has limited it to common law negligence claims.³⁰ The Oregon Supreme Court has expressly refused to apply the doctrine in a strict products liability action based on Oregon's product liability statute.³¹

Washington

Washington also recognizes the learned intermediary doctrine.³² It is unclear, however, whether Washington will follow Oregon's approach and limit the applicability of the doctrine to common law negligence claims. Washington case law is silent on the issue.

F. Economic Loss Doctrine

Oregon

Under Oregon law, strict liability is not an available theory to recover pure economic loss.³³ Oregon has, however, recognized the right to recover such damages in negligence actions.³⁴ The negligence claim must be predicated on some duty of the negligent actor to the injured party beyond the common law duty to exercise reasonable care in order to recover economic damages.³⁵ See *Jones v. Emerald Pacific Homes, Inc.*, 188 Or. App. 471, 71 P.3d 574 (2003) (owner for whom custom home was being built could not recover economic damages in tort). The Oregon Supreme Court has recognized the right to recover economic damages, in some circumstances, in a negligent failure-to-warn case.³⁶

²⁷ *Dailey v. North Coast Life Ins., Co.*, 129 Wn2d 572, 574, 919 P2d 589 (1996).

²⁸ See RCW 19.86.090, RCW 59.12.170, RCW 64.12.020; and RCW 64.12.030, awarding treble damages in various claims.

²⁹ See Restatement (Second) of Torts, §388, Comment n (1965).

³⁰ *Griffith v. Blatt*, 334 Or 456, 51 P3d 1256 (2002).

³¹ *Id.*

³² See *Washington State Physicians Ins. Exchange & Association v. Fisons Corp.*, 122 Wn2d 299, 858 P2d 1054(1993).

³³ *Brown v. Western Farmers Ass'n.*, 268 Or 470, 521 P2d 537(1974).

³⁴ *State ex rel Western Seed Production Corp. v. Campbell*, 250 Or 262,269,442 P2d 215 (1968), *cert. denied*, 393 U.S. 1096(1969).

³⁵ *Onita Pacific Corp. v. Trustees of Branson*, 315 Or 149, 159, 843 P2d 890 (1992).

³⁶ *Oksenholt v. Lederle Laboratories*, 294 Or 213, 223, 656 P2d 293 (1982).

In some circumstances, it is difficult to determine when economic loss is involved, and when damage to other property is involved. In *Gladhart v. Oregon Vineyard Supply Co.*, 164 Or App 438, 994 P2d 134 (1999), *rev'd on other grounds*, 332 Or 226, 233, 26 P3d 817 (2001), for example, the Court of Appeals found that some damage to agricultural property *could* be pursued in strict tort liability, and it is instructive. There, the Oregon Court of Appeals held that a vineyard owner that alleged damage to *other* (European) stock in the vineyard stated a claim for strict liability. The Court didn't decide whether the claim was for the newly purchased crop *and* the existing European stock, or *only* for the existing European stock. *See also, Russell v. Ford Motor Co.*, 281 Or 587, 575 P.2d 1383 (1978) (plaintiff could recover damages to vehicle because the defect was "man endangering" and created risk to something other than the product itself).

Washington

Oregon law is clearly not unique on this point. Under RCW 7.72.016(b), the Act expressly excludes economic loss from the definition of harm in a product liability claim.

On its face, the statute limits product liability claims to physical or property loss, and pure economic loss must be recovered under a breach of warranty or contract claim under the Uniform Commercial Code. However, in *Washington Water Power v. Graybar Elec. Co.*, 112 Wn2d 847 774 P2d 1199 (1989),³⁷ the Washington Supreme Court held that the plaintiff could recover for both types of loss (that is, damage to the product, and damage to other property) if there was a *risk* of property damage or personal injury.

Conclusion

Tort law differs significantly from state to state. As each state engages in tort reform from year to year, the gap can widen. This article was intended to draw attention to the different approaches Oregon and Washington have taken in crafting their respective products liability laws. It is by no means exhaustive. Rather, it is a general overview intended to highlight the significant differences between the two states and provide a useful starting point for those interested in products liability law in the Northwest.

³⁷ *See also, Hofstee v. Dow*, 109 Wn App 537, 36 P3d 1073 (2001).