

OREGON

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1. Identify the venues/areas in your State that are considered dangerous or liberal.

Multnomah County (Portland) and Lane County (Eugene) are considered the most liberal counties in Oregon, and tend to see larger jury verdicts for plaintiffs.

2. Identify any significant trucking verdicts in your State during 2017-2018, both favorable and unfavorable from the trucking company's perspective.

There were no significant traditional trucking verdicts in 2017-2018, but there were three significant trucking-related verdicts:

In December, 2018, a Multnomah County jury awarded a plaintiff \$972,870 arising out of a worksite injury case. The plaintiff was a forklift operator whose primary job was unloading scrap metal from semi-truck trailers and shipping containers. The defendant was a trucking company that transported scrap metal to the plaintiff's worksite. The plaintiff claimed that the defendant failed to maintain the 22-year-old "dry van" trailer properly, and as a result, the wooden floor failed when plaintiff was unloading a crate of scrap metal and his forklift fell through. Plaintiff asked the jury for \$437,500-\$615,000 in economic damages and \$450,000 in non-economic damages, and the defendant asked the jury for a defense verdict. *James Perry v. Phase II Transportation, Inc.*, 17-cv-14005 (Dec. 3, 2018).

In October, 2018, after a two-day trial in federal court, an Oregon jury returned a \$1.9 million verdict for the plaintiff in a wrongful death case involving a truck driver killed while installing chains on the shoulder of a highway. The case also involved an under-insured motorist coverage claim against the decedent's insurer. The jury rejected the insurer's comparative fault defense, and awarded \$10,732 in pecuniary loss to the decedent's estate, \$656,000 in pecuniary loss to plaintiff's wife, and \$1.2 million for loss of consortium to plaintiff and decedent's three children. *Yelena Nikolaychuk, Personal Representative of the Estate of Igor Nikolaychuk v. National Casualty Company*, 3:17-cv-00921-JE (Oct. 15, 2018).

Following a March, 2017 trial in federal court, a truck repair company obtained a defense verdict on a negligent supervision and training case when the plaintiff, a commercial truck driver, alleged injury from exiting the truck and walking into a wall access panel that had swung open because the defendant's employee had failed to latch it closed. The plaintiff claimed the defendant negligently failed to supervise and train its employee on the proper procedure for

securing the truck's access panel, and also failed to warn drivers regarding unlatched access panels. The defendant both denied liability and alleged contributory negligence, and the jury sided with defendant. *O'Donnell v. Ben's Truck Repair, LLC*, 2:15-cv-02112 (D. Or. Mar. 27, 2017).

3. Are accident animations and/or computer-generated evidence admissible in your State?

Oregon has no specific authority regarding accident animations and/or computer-generated evidence. As a general rule, visual exhibits – including animations and computer-generated evidence – are admissible so long as authentication and relevance are properly established.

4. Identify any significant decisions or trends in your State in the past two (2) years regarding (a) retention and spoliation of in-cab videos and (b) admissibility of in-cab videos.

Oregon has no significant written decisions regarding retention and spoliation of in-cab videos, or admissibility of in-cab videos.

5. What is your state's applicable law and/or regulation regarding retention of telematics data, including but not limited to, and identification of the time frames and/or scope for retention of telematics data and any requirement that third party vendors be placed on notice of spoliation/retention letters.

Oregon has no laws or regulations that specifically mandate the scope or retention period for telematics data, or that require sending preservation notice to telematics vendors. That being said, Oregon does require litigants to make reasonable efforts to preserve relevant evidence. As a result, clients would be well served to not only voluntarily send such notices, but also to preserve this data through the expiration of the applicable statute of limitations.

6. Is a positive post-accident toxicology result admissible in a civil action?

There is no statute or case law barring the admissibility of post-accident toxicology results, provided a proper foundation is established.

7. Is post-accident investigation discoverable by adverse counsel?

Generally speaking, post-accident investigations are immune from discovery as work-product. However, post-accident investigations prepared in anticipation of litigation or for trial by or for another party or by or for the other party's representative (including an attorney, consultant, surety, indemnitor, insurer, or agent), do become discoverable "on a showing that the party seeking discovery has substantial need of the materials in preparation of such party's case and is unable without undue hardship to obtain substantial equivalent of the materials by other means." Or. R. Civ. Pro. 36 B(3)(a). Even if the required showing is made, the court shall protect against disclosure the "mental impressions, conclusions, opinions, or legal authorities of

an attorney or other representative of a party concerning the litigation." Or. R. Civ. Pro. 36 B(3)(a).

8. Describe any laws in your State which regulate automatic driving systems (autonomous vehicles) or platooning.

Oregon currently has no laws regulating autonomous vehicles or platooning. That being said, in April 2018, the Oregon legislature passed a bill both naming the Oregon Department of Transportation (ODOT) as the state's lead agency on automatic vehicle policy, and directing the agency to create a task force to report back to the legislature with recommendations on this subject in 2019.

9. Describe any laws or Court decisions in your State which would preclude a commercial driver from using a hands-free device to have a conversation over a cell phone.

While Oregon prohibits all drivers from texting or traditionally talking on a cell phone while driving, there are no Oregon laws precluding a commercial driver from using a hands-free device to have a conversation on a cell phone. *See* Or. Rev. Stat. 811.507(2) (prohibiting texting and use of handheld devices for all drivers, subject to a list of exceptions).

10. Identify any Court decisions in your State precluding Golden Rule and/or Reptile style arguments by Plaintiffs' counsel.

Golden rule arguments, *i.e.*, asking the jurors to place themselves in plaintiff's shoes, are prohibited in Oregon. *Hovis v. City of Burns*, 415 P.2d 29, 32 (Or. 1966).

To date, no Oregon appellate court has addressed the use of Reptile arguments, but practitioners have had success in the trial courts with prohibiting such arguments through traditional relevance and undue prejudice arguments (particularly given the risk that such tactics invite the jury to depart from deciding the case under the applicable standard of care).

11. Compare and contrast the advantage and disadvantages of Federal Court versus State Court in your State.

The primary difference between the state and federal courts, is that Oregon state courts employ a true "trial by ambush" system, as pre-trial identification of witnesses is not required, and all forms of pre-trial expert discovery are categorically prohibited (including even disclosing the identity of a party's experts prior to trial). *See Stevens v. Czerniak*, 84 P.3d 140, 146 (Or. 2004) (concluding from the legislative history that the "legislature made a policy choice to continue the practice of not authorizing expert discovery in civil actions in state courts.").

Otherwise, state court proceedings are typically more informal, as the state courts usually do not employ formal case management deadlines addressing items like discovery cutoff dates (this informality also typically results in a cost savings). Moreover, federal juries are typically more conservative than their state court counterparts in Oregon's most populous counties, as federal jurors are also pulled from the typically more conservative surrounding counties.

12. How does your State handle the admissibility of traffic citations (guilty plea, pleas of no contest, etc.) in subsequent civil litigation?

Oregon law separates traffic offenses into two categories – “crimes,” defined as any traffic offense punishable by a jail sentence, and “violations,” defined as any traffic offense not punishable by a jail sentence. Or. Rev. Stat. 801.545; 153.008(1)(b).

Traffic violations are not admissible for any purpose. Evidence of a “plea, finding, or judgment in a violation proceeding, or the fact that a violation proceeding has been brought against a defendant, may not . . . be admitted as evidence in any civil proceeding.” Or. Rev. Stat. 153.108.

As for traffic crimes, a plea, conviction, or acquittal is “not admissible in the trial of a subsequent civil action arising out of the same accident or occurrence to prove or negate the facts upon which such judgment was rendered.” Or. Rev. Stat. 41.905. This statute does not prevent guilty or no contest pleas from being entered into evidence for other purposes, such as impeachment.

13. Describe the laws in your State which regulate whether medical bills stemming from an accident are recoupable. In other words, can a plaintiff seek to recover the amount charged by the medical provider or the amount paid to the medical provider? Is there a basis for post-verdict reductions or offsets?

A plaintiff may seek to recover the amount charged by a medical provider. *White v. Jubitz*, 219 P.3d 566, 572 (Or. 2009). Oregon’s codification of the collateral source rule (Or. Rev. Stat. 31.580(1)), does not provide for post-verdict reductions or offsets of charges written off by a provider. However, Oregon juries are also instructed to award only a “reasonable” amount for medical expenses. Or. Uniform Civil Jury Inst. § 70.03.

14. Describe any statutory caps in your State dealing with damages awards.

Or. Rev. Stat. 31.710 imposes a \$500,000 cap on non-economic damage awards, but the constitutionality of this statute is currently being challenged before the Oregon Supreme Court. Historically, Oregon courts construed this statutory cap as unconstitutional as applied to claims recognized at common law (as violating the Oregon Constitution’s recognition of the common law right to a jury trial on certain types of claims), but not as to statutory claims unrecognized at common law. Then, over a series of decisions in 2017-2018, including *Vasquez v. Double Press Mfg., Inc.*, 406 P.3d 255 (Or. App. 2017) and *Rains v. Stayton Builders Mart, Inc.*, 410 P.3d 336 (Or. App. 2018), the Oregon Court of Appeals shifted from assessing constitutionality under the jury trial clause, to the current approach of assessing constitutionality under the Oregon Constitution’s remedy clause. And under that approach, the cap was struck down in both *Vasquez* and *Rains* on the basis that the capped remedy was “insubstantial” as compared to the jury’s verdict. The Oregon Supreme Court is expected to shortly definitively resolve the issue and announce under what circumstances, if any, the cap may be constitutionally applied.

Additionally, there are three bills in the 2019 legislature that if passed would also resolve this issue by either partially or completely eliminating the statutory cap (including one version that would apply retroactively).