

Oregon

Are preventability determinations and internal accident reports discoverable or admissible in your state? What factors determine discoverability or admissibility?

There is no current statute or case law in Oregon that recognizes the self-critical analysis privilege. Companies and practitioners should be aware that materials that might otherwise fall under a self-critical analysis privilege are discoverable in Oregon and may be admissible in court so long as foundation and relevance are properly established.

However, when such reports are generated in anticipation of litigation, they will be immune from discovery under the work product privilege. See Oregon Rule of Civil Procedure 36 B(3)(a). Even so, to the extent that the materials contain factual information, e.g., witness interviews, they will be discoverable upon a showing of substantial need. *Id.* The work product privilege will only fully immunize from discovery “the mental impressions, conclusions, opinions, [and] legal theories of an attorney or other representative of a party concerning the litigation.” *Id.*

Does your state permit discovery of 3rd party litigation funding files and, if so, what are the rules and regulations governing 3rd party litigation funding?

Oregon law does not prohibit discovery of 3rd Party Litigation Funding files, nor does it have any statutes that regulate 3rd Party Litigation Funding. Accordingly, there are several considerations that the parties and practitioners must consider when 3rd Party Litigation is involved, including the discoverability of 3rd party files and the potential waiver of the attorney-client privilege with regard to disclosures to 3rd parties.

What is the procedure for the resolution of a claim for injuries to a minor in your state? Does the minor’s age affect the statute of limitations for a personal injury claim?

A parent with custody may maintain an action for a minor. ORS 30.010(1). That person may enter a settlement agreement without court approval if the settlement, exclusive of medical expense reimbursements, attorney fees, liens, and costs, is \$25,000 or less. See ORS 126.725. If it’s over \$25K, a conservator must be appointed, and the court needs to approve the settlement.

The statute of limitations for a minor’s personal injury claim tolls for five years or until one year after the minor attains 18 years of age, whichever occurs first. ORS 12.160(1)-(2).

What are the advantages or disadvantages in your State of admitting that a motor carrier is vicariously liable for the fault of its driver in the context of direct negligence claims?

Under Oregon law, admitting a driver was acting in the “course and scope” of his employment will ordinarily make the motor carrier vicariously liable for the negligent acts of the employee. *Stanfield v. Laccoarce*, 284 Or. 651, 654-55, 588 P.2d 1271 (1978). Thus, a plaintiff can establish liability without having to prove the distinct elements of a direct negligence claim against the motor carrier for negligent hiring, supervision, retention, or entrustment. Without such an admission, each case must be decided upon its own facts to determine whether the employee was acting within the “course and scope” of employment. *Heide v. T.C.I. Inc.*, 264 Or 535, 540, 506 P.2d 486, 488 (1973). Thus, it is often prudent to not admit course and scope until discovery has sufficiently progressed. However, a party must have an objectively reasonable basis to deny “course and scope.” If they do not, they open themselves up to potential attorney fee exposure. ORS 20.105(1).

What is the standard applied for spoliation of physical and/or documentary evidence in your state?

Evidence willfully suppressed creates a presumption that the evidence would be averse to the suppressing party. Or. R. Evid. 311(1)(c).

Is the amount of medical expenses actually paid by insurance or others (as opposed the amounts billed) discoverable or admissible in your State?

The amounts actually paid are discoverable but not admissible at trial. Plaintiffs are entitled to recover damages for reasonable medical expenses incurred for treatment, regardless of whether they have actually paid for or become obligated to pay these expenses. *White v. Jubitz Corp.*, 347 Or. 212, 234, 219 P.3d 566 (2009). In *White*, the court held that, in a personal injury action to recover medical expenses, the plaintiff could recover “the reasonable value of the medical expenses for which he was billed and which were necessary to treat his injuries.” *Id.* at 243.

What is the legal standard in your state for obtaining event data recorder (“EDR”) data from a vehicle not owned by your client?

In Oregon, ORS 105.925 to .948 details the privacy laws surrounding event data recorders (“black box”). The owner of the data is exclusively the owner of the motor vehicle. ORS 105.928. The download of data is prohibited unless the owner consents, there is a court order, it is for the diagnosing, servicing, or repairing of the vehicle, it is for medical or vehicle safety research, it is for the dispatch of emergency medical personnel, or there is probable cause to suspect the occurrence of a criminal offense. ORS 105.925 to .948. Permission to download the data cannot be a condition of payment or settlement of an insurance claim or of a lease or insurance agreement. *Id.*

What is your state’s current standard to prove punitive or exemplary damages against a motor carrier or broker and is there any cap on same?

There are no statutory limits on punitive damages in Oregon. Punitive damages are recoverable in Oregon where a defendant is proven by clear and convincing evidence to have “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.” ORS 31.730.

Oregon Courts and the United States Supreme Court have held large awards of punitive damages to be

unconstitutional when the amount of punitive damages awarded greatly exceeds the amount of economic and non-economic damages awarded. Oregon courts have used the excessiveness review used by the federal Supreme Court. The Oregon Court of Appeals held that a \$22.5 million award of punitive damages was unconstitutional under the due process clause when the jury only awarded \$500,000 in compensatory damages. *See Bocci v. Key-Pharmaceuticals, Inc.*, 189 Or. App. 349, 76 P.3d 669 (2003). The court held that an award of 7 times as many punitive damages as compensatory damages would be constitutional and reduced the verdict to \$3.5 million in punitive damages and \$500,000 in compensatory damages. *Id.* However, in 2015 the Oregon Court of Appeals reduced an award of \$125 million in punitive damages to \$25 million even though the jury had awarded only \$168,514 in compensatory damages. *See Schwarz v. Philip-Morris-USA, Inc.*, 272 Or. App. 268, 355 P.2d 931 (2015). The court probably allowed a large punitive damage award because the conduct of Philip Morris was especially outrageous.

However, the Oregon Constitution prohibits state court judges from reviewing jury decisions for any factual findings. Article VII (Amended) 3. A review for excessiveness of a punitive damages award must inherently review the factual basis. It's possible that in the future, the Oregon Supreme Court will determine that no punitive damages can be constitutional because the federal Supreme Court requires an excessiveness review of punitive damages while the Oregon State Constitution does not allow for excessiveness review.

Seventy percent of the punitive damages awarded must be paid to the State of Oregon. *See* ORS 31.735. This is because punitive damages are not awarded to compensate the injured party but rather to punish the at fault party.

Has your state had any noteworthy recent punitive damages verdicts? If so, what evidence was admitted supporting issuance of a punitive damages instruction? Finally, are any such verdicts currently on appeal?

In December 2019, an Oregon district court jury awarded \$9.65 million, including \$4 million in punitive damages, to two bicyclists who were struck by an 18-wheeler while traveling westbound on Interstate 84 in *Moutal et al. v. Exel, Inc.*, Case No. 3:17-cv-01444, 2018 WL 1876267 (D. Or. April 19, 2018). The collision resulted in one of the cyclists nearly losing his leg and the other with injuries. The plaintiffs presented evidence that the truck had crossed the fog line into the shoulder at an area where the road curved left, was traveling four miles over the speed limit, and failed to provide care after the crash. The case settled with the verdict intact.

Does your state permit an expert to testify as to content of the FMCSRs or the applicability of the FMCSRs to a certain set of facts?

In Oregon, an expert may testify as to the content of regulations but may not testify as to whether the statutory elements are met by the relevant facts. *See Yeatts v. Polygon Nw. Co.*, 313 Or. App. 220, 237-38, 46 P.3d 1060 (2021). Expert testimony that embraces the ultimate facts at issue is not in itself objectionable. ORE 704; *see Madrid v. Robinson*, 324 Or. 561, 931 P.2d 791 (1997). But an opinion that "merely tells the jury which conclusion to reach" is not admissible because it is not helpful to the jury and may cause confusion or delay violative of ORE 701 and 702, respectively. *See French v. Barrett*, 84 Or. App. 52, 54, 733 P.2d 89 (1987).

Does your state consider a broker or shipper to be in a "joint venture" or similar agency relationship with a motor carrier for purposes of personal injury or wrongful death claims?

Whether two entities form a joint venture is a factual inquiry that examines the same factors as an inquiry into

whether a partnership exists, although a joint venture is typically a one-off arrangement rather than ongoing. *Hayes v. Killinger*, 235 Or. 465, 471-72, 385 P.2d 747 (1963). The primary factors are whether each party has a right to share in the profits, the obligation to share in the losses, and the right to exert control over the business. *Id.* Ultimately, “a mere community of interest” is not enough; “a right to share profits must result from part ownership of the business.” *Wirth v. Sierra Cascade, LLC*, 234 Or. App. 740, 757, 230 P.3d 29 (2010) (quoting *Oshatz v. Goltz*, 55 Or. App. 173, 176, 637 P.2d 628 (1981)). For these reasons, a broker/shipper is not likely to be considered a joint venturer with a motor carrier for the purposes of personal injury or wrongful death claims in Oregon.

Provide your state’s comparative/contributory/pure negligence rule.

Oregon is a modified comparative negligence state created by statute. See ORS 18.242, 31.800-31.820. A plaintiff can recover as long as the fault attributed to him or her is less than 51% of the total fault. Plaintiff’s fault proportionally diminishes his or her right to recovery but does not bar the action. ORS 31.600; see also *Bjorndal v. Weitman*, 344 Or. 470, 184 P.3d 1115 (2008).

Oregon has a limited form of joint and several liability. Except for environmental torts, Oregon has several liability, but if part of the judgment is uncollectable, it may be reallocated. ORS 31.610(3). This reallocation is based on each party’s respective percentage of fault as determined by the trier of fact and cannot apply if the party’s fault is 25% or less, or the claimant’s percentage of fault is equal to or greater than the party’s percentage of fault. *Id.*

Where two or more persons become jointly or severally liable in tort for the same injury to person or property or for the same wrongful death, there is a right of contribution among them even though judgment has not been recovered against all or any of them. ORS 31.800(1). Tortfeasors who have paid more than a proportional share of the common liability, based on relative degrees of fault, have a right of contribution. ORS 31.800. If the person is not liable in tort to the claimant, there is no right of contribution. ORS 31.800(1). Regardless of whether a judgment has been entered in an action against two or more tortfeasors, contribution may be enforced by a separate action. ORS 31.800. Contribution may also be enforced in that action by motion. *Id.* An action for contribution must be commenced within two years of the final judgment or settlement. *Id.*

Provide your state’s statute of limitations for personal injury and wrongful death claims.

Personal injury claims have a two-year statute of limitations. ORS 12.110(1). Oregon’s negligence statute of limitations incorporates a discovery rule, so the two years begins to run from the time that a reasonable person knows or should know that harm occurred and that it was caused by the tortious conduct of another. *Doughton v. Morrow*, 255 Or. App. 422, 429, 298 P.3d 578 (2013). However, with most moving vehicle accidents, “the relevant facts [will be] so obvious to a reasonable person that they are said to be ‘inherently discoverable,’” so “that the discovery rule does not ‘apply.’” *Cole v. Sunnyside Marketplace, LLC*, 212 Or. App. 509, 519, 160 P.3d 1 (2007).

Wrongful death actions may be brought no later than the earliest of three years after the death of the decedent or the expiration of the statute of ultimate repose that applies to the injurious act. ORS 30.020.

In your state, who has the authority to file, negotiate, and settle a wrongful death claim and what must that person’s relationship to the decedent be?

The personal representative (“PR”) of the decedent’s estate may bring a wrongful death action. ORS 30.020. The PR brings the cause of action for the benefit of the decedent’s surviving spouse, surviving children, surviving

parents, and other individuals who under the law of intestate succession are entitled to inherit the personal property of the decedent. The PR is a nominal party and is not considered a claimant. *Christensen v. Epley*, 287 Or. 539, 548, 601 P.2d 1216 (1979). Although a PR has the power to initiate a wrongful death action, the court in *Haugh v. Kilmer*, 71 Or. App. 345, 692 P.2d 631 (1984), held that a decedent's sole statutory beneficiaries could settle the case before the PR was appointed.

Is a plaintiff's failure to wear a seatbelt admissible at trial?

Evidence of seatbelt nonuse is admissible as evidence of failure to mitigate damages, but that mitigation may not exceed 5% of damages to which the injured party would otherwise be entitled. ORS 31.760. The Oregon Court of Appeals has held that such evidence is not admissible to show comparative fault absent a showing that the failure to wear a seatbelt contributed to the cause of the accident. See *Madaris v. State of Oregon Highway Div.*, 80 Or. App. 662, 739 P.2d 570 (1987).

In your state, are there any limitations on damages recoverable for plaintiffs who do not have insurance coverage on the vehicle they were operating at the time of the accident? If so, describe the limitation.

In Oregon, a plaintiff who operates a vehicle without the statutorily required insurance is barred from recovering noneconomic damages. ORS 31.715.

How does your state determine applicable law/choice of law questions in motor vehicle accident cases?

When the injured person and the tortfeasor are domiciled in the same state, the law of that state governs but the law of the state where the injurious conduct occurred determines the standard of care applied. ORS 15.440(2)(a). If the parties live in different states but each states laws would have the same result, the parties are treated as if they live in the same state. ORS 15.440(2)(b).

If the parties live in different states and the states' laws would lead to different outcomes, then one of three constructions will apply. If the injurious conduct and the injury occurred in the same state and either party is domiciled there or neither party is domiciled there, the laws of the state where the conduct and injury occurred applies. ORS 15.440(3)(a)-(b).

If the injurious conduct occurs in one state but the injury in another, the state of the conduct governs. But the state of the injury will govern if it was foreseeable that the tortfeasor's conduct would cause injury in the other state, or the injured person formally requests that the law of the state where the conduct occurred apply. ORS 15.440(c).

Finally, if neither party lives there, and a party can show that the objective of a law on a disputed issue are not furthered by its application, then a court will resort to the general and residual approach. ORS 15.440(3)(b). This approach involves identifying states' relevant contacts with the dispute, the policies embodied by those laws, and the relative strength and pertinence of those policies. ORS 15.445.