

# *Trial Lawyer*



**T**rial Lawyer: Larry, it would be hard to believe that there are Oregonians who don't know the background of this case, but in case there are, give us a brief recap.

**Baron:** Anne Kirkwood's case arose from terrible injuries she received on August 14, 1994, when, through no fault of her own, her vehicle collided with a 1976 General Motors pickup truck with side-

saddle gas tanks. The pickup truck had crossed the center line of a two-way highway in Central Oregon, directly in front of Mrs. Kirkwood's vehicle. There was a t-bone collision, in which the truck's right sidesaddle tank ruptured, spewing gasoline directly into Mrs. Kirkwood's vehicle, and erupting into a giant fireball. Mrs. Kirkwood was burned over 30% of her body; her granddaughter in the right front passenger seat burned to death, and her grandson suffered burns in the back

seat. It was only because of the heroism of two farm workers that Mrs. Kirkwood was pulled from the car alive. As a result of her injuries, Mrs. Kirkwood was hospitalized in a burn unit for five months. She ultimately underwent 23 surgeries, with others projected for the future. She lost sight in her left eye and her right leg was amputated due to burns. In the 850 days prior to the scheduled trial date, she was under active treatment for 425 days. Her medical bills totaled over

# er of the Year

**O**n July 22, 1997, Trial Lawyers for Public Justice announced that Oregon's own Larry Baron was the 1997 recipient of the annual Trial Lawyer of the Year Award, a nationally prestigious award bestowed annually upon the trial lawyer or lawyers who have made the greatest contribution to the public interest by trying or settling a precedent-setting case. In its announcement of Baron's nomination, TLPJ stated:

*"Lawrence Baron took on a case that virtually no one else would have pursued, persuaded the Oregon State Legislature to change the law so it could be brought, and then fought off over 150 motions by the defendant to win justice for his client in Kirkwood v. General Motors. Plaintiff Anne Kirkwood was horribly burned and disfigured when, through no fault of her own, her car collided with a 1976 General Motors (GM) pickup truck with sidesaddle gas tanks. Her granddaughter burned to death, and her grandson suffered serious burns in the crash. But Oregon's statute of repose — which banned any lawsuit against a manufacturer whose product was more than eight years old — simply precluded any suit. Baron took the case anyway and launched an effort to have the law changed — even though the Oregon state legislature was in the midst of passing tort reform measures. GM hired eight lobbyists to fight the effort, but Baron hired a lobbyist, effectively tried the case to the legislature, and prevailed. He then engaged in a knockdown, drag-out litigation battle with GM. Finally, on the eve of trial, GM agreed to settle the case on terms that are confidential (but that plainly make sure that all of Ms. Kirkwood's needs have been cared for). Baron's legislative and legal victories pave the way for other suits based on injuries sustained from exploding sidesaddle gas tanks and also prompted the introduction of a bill to revise Oregon's statute of repose into a statute of useful life."*

*The following is an interview of Larry Baron by OTLA Executive Director Chuck Tauman, conducted after Baron's nomination for TLPJ Trial Lawyer of the Year, but before the announcement of his selection for the award.*

\$700,000.00, and it was projected that an additional \$2.1 million dollars was needed for future medical costs.

**Trial Lawyer:** One of the unique aspects of this case was the pre-litigation legislative battle to change Oregon's unfair ultimate repose statute. Fill us in on how that happened.

**Baron:** Mrs. Kirkwood's case literally rose from the ashes. At the time, Oregon had

in place a statute of repose, barring any action against a manufacturer whose product was more than eight years old at the time of injury. In this case, the General Motors truck was 18 years old; as a matter of legal fiction, any legal action Mrs. Kirkwood had against General Motors was extinguished 10 years before she was burned. In general, the public was largely unaware of Oregon's statute of repose.

When Mrs. Kirkwood's son visited

me, I had to give him the unhappy news about the statute of repose. However, it occurred to me that it might be worthwhile approaching the legislature for an exception to the statute as three other exceptions had been created for asbestos, breast implants, and IUD victims. It certainly made no sense that this product should receive the benefit of such a statute, as it was not the sort that became defective over time; it was defective from

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the day it was designed. Moreover, General Motors publicly advertised that more than 50% of its trucks would be expected to be on the road 18 years after the date of manufacture. How could a company that advertised at least an 18-year life expectancy justifiably claim the benefit of an 8-year statute of repose? Further, looking at the terrible consequences of these trucks — literally, putting a human face on this issue — I wondered who could be so heartless as to deny her a day in court.

**Trial Lawyer:** What were the obstacles you faced in undertaking this legislative effort?

**Baron:** Although well-intended, the idea of seeking a legislative exception faced obvious practical problems. Oregon has biennial legislative sessions and the 1995 session, in particular, was targeting tort reform. The business lobby proposed (and ultimately partially succeeded) to deny citizens access to the courthouse. Statutes under consideration included “loser pay” attorney fee statutes and the abolition of punitive damages and joint and several liability. I found, therefore, that there was less than unanimous support within even my own office about funding a legislative battle. Nevertheless, there was at least enough interest to interview lobbyists, provided funds could somehow be raised.

Mrs. Kirkwood had worked hard her entire life, but she was a 64 year old widow and had only modest means. However, within her community of Madras, Oregon she was much beloved. She had worked as a cashier at the local grocery for years and was also widely known for her acts of charity through her church. Therefore, with the help of Mrs. Kirkwood’s family, and in particular her daughter, Annie, it was proposed that

funds be generated from the community itself.

The legislative fight was both exciting and time consuming. Initially, we hired a lobbyist, Brad Higbee, who proved to be enormously talented. With Brad’s assistance, it was decided that the family itself would make an initial approach to Mrs. Kirkwood’s own elected



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representatives. As a matter of pure fortune, Mrs. Kirkwood’s senator was Neil Bryant, the chair of a joint legislative committee overseeing tort reform issues, and her representative was Bev Clarno, the Speaker of the House. The only problem was that both were Republicans and dedicated to the cause of tort reform.

Nonetheless, our lobbyist knew both and thought that there might be some value to them in drafting legislation to protect one of their own constituents, who was involved in a terrible tragedy that had received extensive press coverage. To everyone’s delight, both legislators agreed to assist, the only catch being that they wanted a statute to be drawn as narrowly as possible. Thus, a statute was proposed that excepted from

Oregon’s statute of repose only cases involving a claim against “a manufacturer of pickup trucks from injury for damage resulting from a fire caused by rupture of a sidesaddle gas tank in a vehicle collision...”

**Trial Lawyer:** To me, legislative battles have some similarities to jury trials except (1) the voters choose the juries and (2) there’s no hearsay rule. How did things proceed in the 1995 legislature?

**Baron:** Senate Bill 447, as the legislation was known, wound its way slowly through the legislature. It was first presented at a Joint Senate-House Subcommittee on tort reform, when General Motors was asleep at the switch. Although General Motors had on duty three permanent lobbyists, none noticed SB 447’s initial docketing. Mrs. Kirkwood was unable to appear, but her daughter,

Annie, appeared on her behalf, and so did the parents of the children in the vehicle. Emotional speeches were made, leaving not one dry eye in the house, and although one Republican thought something was not right about such a bill in the middle of tort reform, it ultimately passed the Subcommittee by a 9-0 vote. At that point, General Motors woke up, and considerable pressure was brought to bear to kill the bill. General Motors hired eight lobbyists, personally prevailing on each and every legislator to see the injustice of singling out a single manufacturer. However, General Motors could not derail the bill, which ultimately passed through all the committees and then the Senate by a 20 to 8 vote. It had only to pass in the House of Representa-

tives.

As SB 447 made its way through the legislature, fund raising efforts picked up momentum. Mrs. Kirkwood's daughter, Annie, rose before the congregation in her church one Saturday evening and spoke about her mother's plight. She indicated that she was forming the Justice for Anne Kirkwood Committee and asked for volunteers. There was overwhelming support and a committee was formed, which then planned a series of fund raising events, including a karaoke contest and auction. Flyers were distributed and the community was prodded into action. In the course of a single weekend, the small town of Madras, Oregon raised over \$20,000 to fund the lobbying effort. Through the media, word spread about the success of this effort and Brad Higbee was quickly labeled the "bake sale lobbyist."

On March 30, 1995, SB 447 faced its final vote in the House of Representatives. By this time, General Motors' lobbyists were working overtime. On the morning of the vote, the Oregonian published two editorials, urging the House to kill the bill. Without mentioning the obvious influence General Motors' advertisement dollars carried, the Oregonian repeated GM's themes about unfairness. However, GM's efforts backfired, as legislators were offended by the hardball tactics, publicly decrying them on the House floor. One memorable comment objected to GM's lobbyists, with their Gucci shoes, coming into Oregon to tell Oregon what to do. Moreover, by this time, Speaker of the House Clarno had taken control of the bill. To stir up support, she drafted House Joint Memorial 8, a resolution declaring the farm workers who saved Mrs. Kirkwood to be "Heroes of the State of Oregon". She then scheduled HJM 8 for a vote immediately before the debate on SB 447. Speaker Clarno also strategically placed Mrs. Kirkwood herself in the gal-

ley, looking down on the proceedings. HJM 8 passed unanimously and then SB 447 passed 53 to 6. Mrs. Kirkwood was to have her day in court.

**Trial Lawyer:** Back to the legal front, what were the guts of the case against General Motors?

**Baron:** This was basically a design-defect case. As a result of General Motors' conduct, more than 650 innocent people have burned to death and many more have suffered grievous burns. Clarence Ditlow, the Director for the Center of Auto Safety, testified before the legislature that the sidesaddle gas tank represents the worst defect in automotive history. Its consequences far exceed those of the infamous Pinto defect which killed 29 people.

From the beginning, General Motors knew its vehicles posed an unreasonable risk of injury. The problem was obvious: with the gas tanks outside the frame rails, they were protected only by the thin layer of sheet metal and were subject to crush, much like a potato chip bag that is blown up and then popped. Hydrostatic forces literally push the fuel out of the tank, as it ruptures, enveloping the striking vehicle, or the truck itself, in a gasoline cloud of atomized particles, which explodes as it is exposed to any source of heat.

One of General Motors' basic design directives, as far back as the 1930s, was to place gasoline tanks between the frame rails and as near to the center of the vehicle as possible. However, in 1973, GM wanted to achieve a marketing advantage over Dodge and Ford: they wanted to advertise that their vehicles had the largest fuel capacity, capable of carrying 40 gallons, whereas Ford and Dodge could carry only 18 to 20 gallons. Unfortunately, GM's engineers were unable to place a 40-gallon gas tank between the frame rails and thus the idea was born to

place two 20-gallon tanks outside the frame rails. Despite crash testing which proved the sidesaddle gas tanks to leak, GM pushed ahead with their design and manufacture.

When one of their own engineers designed a shield to place over the tank, which proved to prevent a leak in a crash test, GM refused to use it, claiming that the shield presented the wrong image to its customers. Over the years, GM's own studies proved that its vehicles were burning occupants at rates far higher than Dodge and Ford. As litigation ensued, General Motors crash-tested 22 vehicles with the result that all leaked. When the gasoline tanks, which were described as having holes as big as melons, were shown to GM executives, it was decided that the tests would be kept secret, but that a new generation of trucks would be designed. Ultimately, in 1988, General Motors introduced its new C/K pickup trucks with a perimeter frame rail and a gasoline tank inside it. As far as we have been able to learn, not one person has burned to death in the new truck.

**Trial Lawyer:** Give us an insider's view of the litigation - in particular, what it was like litigating with General Motors on the other side.

**Baron:** I was well aware that General Motors was one of the world's largest corporations, with revenues equaling \$160 billion dollars per year and that I, personally, did not have the resources to prosecute the case. After attending a conference concerning GM sidesaddle pickup trucks, I introduced myself to Paul Whelan and Mike Withey at Schroeter, Goldmark & Bender in Seattle, Washington. Paul and Mike had successfully represented two plaintiffs, who had been burned by the trucks, and volunteered to provide any assistance needed without any charge or fee. I was

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so impressed with their talent and resourcefulness that I asked them to join me in the case.

From the beginning, the case was vigorously contested. By the time it concluded, 18 lawyers had formally appeared on behalf of General Motors, representing four different law firms from Washington, D.C., California, Portland and Bend. Nearly 100 motions were filed, mostly by General Motors, including two emergency appeals to the Oregon Supreme Court by GM.

Their first attack was to move against SB 447, claiming it to be unconstitutional. There was no doubt we were concerned about this, especially the provision that made the statute retroactive, and which thus allowed Mrs. Kirkwood to file her suit. Our preliminary research was favorable, but I thought it best to hire a recognized constitutional scholar to present our argument. The person that fit this bill best in Oregon was Professor David Schuman of the University of Oregon Law School, a frequently cited authority by Oregon appellate courts. He agreed to join the team and proved to be a most valuable asset. He participated in the briefing and successfully presented the argument in the Deschutes County Circuit Court. He also appeared for a motion for reconsideration and again joined in the briefing when General Motors filed a *writ of mandamus* with the Oregon Supreme Court, which was denied.

Throughout the course of the case,



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General Motors repeatedly stonewalled, refusing to turn over documents. Paul Whelan and Mike Withey pursued General Motors relentlessly. Ultimately, the trial court was convinced that General Motors needed prodding and agreed to two innovative discovery orders: First, the judge, using the inherent powers of the court, fashioned an order requiring General Motors to conduct thorough searches for records, to explain the reasons records may have been destroyed, to describe records that had been redacted, and to provide the basis for claims of privilege. To put teeth into the order, the trial judge required that General Motors' representatives personally sign discovery responses and that General Motors' lawyers do the same, attesting to a good faith participation in the discovery search. Second, an order was entered to prevent recurring

abuses at managing agent depositions. General Motors typically was appearing with representatives who claimed not to have knowledge of subjects identified by the deposition notice. Based on our research, the trial court ordered that even if General Motors could find no witnesses personally knowledgeable about disputed subjects, so long as General Motors attorneys had knowledge of pertinent documents, it was incumbent upon the attorneys to provide such information to the witness, who could then testify about them.

An issue that particularly threatened General Motors concerned prior settlements in sidesaddle gas tank cases. We knew that General Motors had had hundreds of claims and secret settlements, undoubtedly paying millions of dollars to keep the defect secret, while publicly

touting the safety of the trucks. It occurred to me that we probably could not obtain the individual settlements; however, the number of secret settlements and the total number of dollars General Motors had paid as a result of the settlements might be relevant, especially under Oregon's product liability punitive damages statute - ORS 30.925. That statute listed various factors for a jury's consideration, including a defendant's attempt to hide misconduct, as well as the profitability of misconduct. We therefore pursued the information and ultimately obtained an order requiring General Motors to provide it. This, in turn, generated yet another emergency appeal to the Oregon Supreme Court, but it, too, was denied.

Two weeks prior to the trial date, General Motors scheduled 56 motions in limine for hearing. This was GM's last gasp. The motions were heard over the course of a five-day period and, although General Motors won a few minor points, the vast majority of the motions were denied. GM's desperate efforts to have the case dismissed or to have various claims, including punitive damage claims, struck, were denied.

It was clear from the beginning that General Motors did not want to face Mrs. Kirkwood in the courtroom. However, it was equally clear that we were determined to hold GM accountable. Perhaps most representative of this were the tactics of General Motors' chief trial counsel, Art Greenfield, regarding the trial date and our response. Cleverly, or so Mr. Greenfield thought, he had scheduled three cases in three different jurisdictions to begin within seven days of each other. At scheduling conferences, he had failed to advise the judges of the potential conflicts, as he hoped to use them to his benefit. His thought was to wait until an appropriate point in time to delay whatever case he chose by claiming a conflict, which is exactly what he did. Unbe-

knownst to Mr. Greenfield, however, Paul Whelan had tailed him to the other courtrooms when those cases were set for trial. We thus had transcripts showing Mr. Greenfield's failure to advise the other judges of his conflicts. When Mr. Greenfield tried to use the conflicts to delay our case, he was met by both those transcripts and a scathing argument by Mike Withey about General Motor's complete disregard for the judicial system. GM did get a delay, but only because one of the other cases involved an older injury and only for three weeks instead of the two-month delay requested, which placed them in jeopardy of having to start the Kirkwood case while the trial of the other case was in progress. In the end, the message was clear for General Motors: nothing it could do could derail Mrs. Kirkwood's case.

GM requested that the trial judge order mediation and, after three sessions, the case ultimately settled on January 10, 1997 — 10 days before the trial was set to begin.

**Trial Lawyer:** I know the settlement terms are confidential, but can you comment on the process that led up to the settlement and its aftermath?

**Baron:** Yes, the Kirkwood settlement is confidential and, therefore, I can't discuss its term. Needless to say, we were chagrined to participate in such a process, but the interests of Mrs. Kirkwood had to come first. As many people know, TLPJ initiated an effort to get the settlement information made public and, of course, we had hoped this effort would be successful. Further, we publicly declared before the press our willingness to disclose the settlement, if General Motors would release us from the confidentiality requirement.

Although Mrs. Kirkwood's settlement remains confidential, it is apparent that her needs have been cared for. She has

had the financial ability to fund additional and specialized reconstructive plastic surgery. Additionally, she hired an architect and is constructing an innovative home to accommodate her impairments: the home largely has no walls throughout, so that there is easy access for Mrs. Kirkwood while using her wheelchair. Finally, Mrs. Kirkwood has not turned her back on others in her situation - victimized by defective products and then victimized a second time by Oregon's unfair statute of ultimate repose. She testified poignantly during the 1997 legislature in support of OTLA's bill to modify the ultimate repose law in favor of a "useful life" statute. I believe the legislators were impressed by her willingness to come back and ask for help for others when she had already achieved her own goals.

I wouldn't feel right concluding this interview without thanking the many people who were so instrumental in our success in this case. I've already mentioned Brad Higbee, our "bake sale lobbyist" and my "partners" in the litigation - Paul Whelan, Mike Withey and David Schuman. I'd also like to acknowledge the assistance of my associate, Dan Keppler and my secretary, Teresa McKemie. I'd also like to express my appreciation to Bill Gaylord who, on behalf of TLPJ, staged a valiant if unsuccessful attempt to get General Motors to make public the vital information regarding prior settlements. But the real credit for this case and what it will eventually mean to lawyers and clients across the country goes to Anne Kirkwood whose courage and determination - under the most adverse and threatening of circumstances - inspired all of us to keep up the fight and to persevere. And thanks to you and to OTLA for allowing me to tell this story.