

The State-of-the-Art Defense

BY LOUIS GENEVIE

State-of-the-art is an important defense in many products liability and toxic tort cases. The logic is simple enough: since little or no knowledge of the hazard in question existed at the time, the manufacturer or other defendant responsible for the alleged hazard should not be held liable.

While the argument is often effective in limiting both compensatory and punitive damages, the state-of-the-art argument usually fails to persuade jurors to find against liability. Repeatedly, in mock jury deliberations across the country, state-of-the-art is rarely brought up in deliberations as a key point, even when it plays a major role in the defense case. When the subject is raised for consideration, it is usually dismissed by the majority of jurors, and the group quickly goes on to other aspects of the case. The topic fails to gain momentum in the discussion and thus rarely has a substantial impact on jurors' decision.

Why aren't juries influenced by the state-of-the-art argument? The difficulty lies in the fact that in everyday life outside the courtroom people rarely have any reason to apply yesterday's standards to today's problems. Most people live and think in the present, and make judgements and decisions based on today's knowledge. To do otherwise violates common sense and stretches jurors' imagination.

Since thinking about the present in terms of the past is a novel experience for most people, even under the best of circumstances jurors' minds can be focused on the past for only a short time. Then, like a rubberband stretched to its limit, their minds snap back to the present, with negative ramifications for the defense.

This psychological inability to measure present-day products by past standards is intensified by the fact that the average person tends to hold big companies to very high standards. Most believe that a manufacturer is the first to know if its product presents any danger to the people who use it; if the company did not know, most jurors believe it should have known.

To further complicate the problem, state-of-the-art is usually presented as technical information, which is difficult for most jurors to understand, remember, and incorporate into their decision-making process. This difficulty leads jurors to either ignore the argument or use it against the defense, referring to it as an "excuse" or a "technical loophole" the defense is trying to use to avoid taking responsibility for plaintiff's injury. In such circumstances, the state-of-the-art argument can actually do more harm than good.

Evaluating the usefulness of the state-of-the-art defense involves a complete assessment of the key facts and issues in the case. These include the credibility of witnesses, the seriousness of the injury, whether the risk was assumed voluntarily, and whether there was adequate warning of the risks involved. If an analysis of the facts leads counsel to believe that state-of-the-art is an important element of the defense, the argument should not be viewed as an isolated set of facts in your presentation, but rather as one of the

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central themes, integrated throughout the case and mentioned in as many ways and whenever possible. Integrate the fact that “no one knew” into opening and closing statements. Weave the idea into the testimony of as many fact and expert witnesses as possible. Present it from different angles and tie it graphically to well-known events that took place in the relevant time period.

Reaffirming the state-of-the-art argument throughout trial will provide jurors predisposed to the defense with the best possible foundation for persuading other jurors to join them during deliberations. Each time the topic is mentioned, jurors’ minds will be stretched back to the past. If jurors hear the message consistently, in a variety of ways, their minds will, like a rubberband, lose their resistance and ultimately snap back to the present more slowly and less forcefully, providing the defense with an opportunity to persuade jurors against liability.

To be most effective, the state-of-the-art theme should be integrated into as much testimony as possible. Focus attention on the motivations and emotions of the people who were actually involved in the situation, rather than on the technical details of the product’s design or how the accident may have occurred. Knowledge, or the lack of it, is much more believable and acceptable to jurors when the witness is able to personalize his or her involvement in the situation. The witness can do this by demonstrating his personal knowledge of the state-of-the-art and the strength and sincerity of his motivation to seek better solutions.

By developing the human side of the story, the jury’s focus is shifted away from the often abstruse technical story to a more memorable and more easily understood story about real people. When a witness reveals his emotional connection to the problem by sharing his motivations, earnest intentions and effort, jurors tend to accept shortcomings and failures based on an absence of knowledge much more readily, creating positive results for the defense. 