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can win a case
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Normal Genius

Malcolm Wheeler can win a case just by showing up

by JESSICA GLYNN photography by RAY NG

How good is Malcolm Wheeler? Since 1980, when he helped convince a jury the Ford Pinto wasn't a death trap, Wheeler, now 66, has been the preeminent products liability defense attorney in the country. He helped write the law on punitive damages. He saved the auto industry billions by quashing no-airbag claims before the U.S. Supreme Court. He's been the national trial counsel for Ford, Pfizer and Whirlpool, and has made several appearances on CNN, *20/20* and *Dateline* to speak on behalf of Fortune 500 company clients embroiled in major litigation.

And sometimes he can win just by showing up.

In 2007, Whirlpool was facing a nationwide claim that more than a million of its products were defective. "It was a filed class action," says David Grumbine, Whirlpool's senior counsel for dispute resolution. "When the [opposing] firm saw his name, they said, 'No, no, we don't want to go to nuclear war on this, it's not that big of a case,' and dismissed it. They literally dismissed the case because Wheeler was on it.

"He's one of the renaissance attorneys in the U.S. in how he addresses product liability and punitive damages," adds Grumbine. "He helped change the laws. He's an absolute brilliant strategist. And he's humble. He's the most normal genius I've ever met in my life—and he is a genius, a genius who wears jeans and flannel and talks about baseball."

Wheeler, who insists on being called Mal, takes issue with the genius label. To the contrary, he says he only became a lawyer because, as an aspiring theoretical physicist at the Massachusetts Institute of Technology, he realized he was no Einstein. He was a junior in college with a B average. "I decided that's not me, I'm not smart enough," he says. "I couldn't think of what else to do, so I decided to go to law school.

"It was really more default than anything else."

Malcolm Wheeler

- ▶ **Wheeler Trigg O'Donnell**
- ▶ **Colorado Super Lawyers: 2006-2011**
- ▶ **No. 1 Colorado Super Lawyers: 2010-2011**
- ▶ **Has served as national trial counsel for: Ford Motor, Pfizer, Whirlpool**
- ▶ **Cases include: *Wirsz v. Nissan North America, Inc.*; *Geier v. Honda North America Co., Inc.*; and *Hudgins v. Southwest Airlines Co.***

IN 1978, nine years after graduating from Stanford Law School, and one year after making partner at Hughes Hubbard & Reed in Los Angeles, Wheeler was contemplating a return to academia. When The University of Iowa offered him a faculty position, he decided to accept, and called his partner Jerome Shapiro to let him know he was resigning.

There was a hitch. The firm had just received a call from Ford, and the motor company wanted Wheeler to handle all of its Pinto cases, 41 of them, nationwide.

It couldn't get much bigger. A California jury had recently awarded \$125 million in punitive damages to the plaintiff in the Pinto case, *Grimshaw v. Ford Motor Co.* The jury had determined that a defective fuel system was responsible for the fiery crash that killed Lily Gray and caused her passenger, 13-year-old Richard Grimshaw, to suffer horrific injuries. Though the trial judge would reduce the damages to \$3.5 million, the award was still a watershed moment for products liability claims in the United States.

"The largest punitive damages verdict that had been affirmed by appeal was something like \$375,000," Wheeler says. "This was a whole new ballgame, no longer old-style insurance defense tort law. This was a whole new field where the numbers in play are numbers like antitrust or securities litigation."

The offer was made in May and Wheeler decided to accept the challenge—splitting his time between Detroit and his teaching commitment in Iowa.

Then on Aug. 10, three teenage girls in a Pinto were rear-ended by a Chevy van in Elkhart County, Ind. The Pinto caught fire and all three died. The tragedy attracted national attention and the local prosecutor filed a criminal case against Ford for reckless homicide. Wheeler's first products liability case was now part of a homicide trial under national scrutiny. The defense team was led by legendary litigator and Watergate prosecutor, James Neal, who became Wheeler's mentor, and who passed away last October at age 81. Wheeler approached his role as if it were a homicide investigation: "I had to find out what were the facts," he says.

Even before the criminal case, Wheeler had begun research on the who and how: Who designed the car and fuel system, and how did the Pinto compare to other cars in similar crashes? If the facts revealed a problem with the Pinto that the company knew and ignored, he would have advised settling.

"Fortunately, once we knew the facts, we didn't have to consider that," he says. "One of the first things I found out: the chief engineer drove one and gave his daughter one. If he knew that this car was a firetrap, forget about driving one himself—maybe he was suicidal—but would he give his daughter one? That was a no-brainer for me. That made me so comfortable right from the outset that even if it



"He is a genius," Whirlpool Senior Counsel David Grumbine says about Wheeler, "a genius who wears jeans and flannel and talks about baseball."

was a mistake, this was not something that was done intentionally for which a criminal prosecution was appropriate."

Wheeler's team learned that a paramedic had talked to one of the girls before she died but had since moved to a wilderness area in Northern Michigan; they sent a young lawyer to find him and interview him. "He had in fact talked to one of the girls before she died," Wheeler says, "and she told him she had forgotten to put the gas cap back on her car. She realized the gas cap wasn't on because she saw it fall off the car and she stopped to get it. That's when the van hit her. The guy driving the Chevy van admitted that he had been leaning down to pick something up off the floor. He had a wooden 2x4 on the front of his bumper, going 50 mph, and the gas cap was off so fuel spewed out. That's what caused the fire. It wasn't caused by the gas tank at all. It was caused by the fact that a young girl had made a tragic mistake.

"Once we were able to show that, we began to confirm in the incidents where there had been these fires, they were all huge hits where there were some kind of circumstance like that."

Ford's not guilty verdict was front-page news in *The New York Times* on March 14, 1980.

Theodore V.H. Mayer, a partner at Hughes Hubbard & Reed, worked with Wheeler on that case and many cases since. "He's brilliant," Mayer says. "He just absolutely loves his work, thrives on it and inspires the people around him. He challenges them, and he's a lot of fun to work with. It's great for the client because he gets his whole team working at a level above even what they knew they could work at, because everybody's trying to meet his standard and having fun doing it. You get a highly motivated, highly charged team when you get Malcolm in charge."

Wheeler had found his niche, products liability, which suited his scientific intellect and curiosity.

"To me, the fun part about litigation, about being a lawyer, frankly, is to be on a high learning curve," he says. "You get to be an historian to dig at facts. You have to be something of a psychologist to figure out how to get people to tell you how they're feeling and

separate facts from distorted memory. You have to be an economist to figure out how to approach damages. You have to be something of a mathematician—statistics are becoming so important, especially in drug and device cases. You really get to, not just dabble, but dive into a lot of different fields; if it's a big case—and most of my cases are big cases—and learn really interesting information about the oil, car, airline, carpet, drug industries. That's pretty terrific. A large number of people do one thing for their whole career. When you get to do what I get to do, you just get to learn stuff all the time."

WHEELER SAYS HIS deep thinking on punitive damages began in 1971 when he was an associate professor at the University of Kansas School of Law and started pro bono work for prisoners in the Kansas State Penitentiary. He took on several Eighth Amendment, cruel-and-unusual punishment cases. In one, he got the federal court in Kansas City, Kan., to declare strip cells at the prison unconstitutional. He is still proud of that.

Part of his argument, there and elsewhere, is that the fundamental intent of the Eighth Amendment is avoiding arbitrary punishment. "When I went back into private practice, a lot of the analysis I had done seemed to apply to punitive damages," he says. "A lot of the awards were completely arbitrary."

Wheeler's first opportunity to make that argument came in 1974. Wheeler joined Hughes Hubbard & Reed just after the firm lost the first phase of the Howard Hughes defamation case. By that time, Hughes was a recluse. The Nevada Gaming Commission had threatened to shut down his casinos if he couldn't prove he was still alive, so he agreed to a telephone news conference, during which he called Robert Maheu, the recently fired head of Hughes' casino empire, a "no-good dishonest son of a bitch" who "stole me blind." Maheu sued for defamation and won the liability phase when Hughes wouldn't appear for the trial. There was a separate trial for punitive damages.

At the time, Hughes' net worth exceeded \$300 million, and Wheeler,

who got the assignment, was told to keep punitive damages down. Wheeler used a Supreme Court decision that said, under the First Amendment, the burden of proof for defamation of a public figure plaintiff is clear and convincing evidence. Since the California punitive damages statute did not apply a clear and convincing standard, he argued the state law was unconstitutional as applied to Hughes' case. The court agreed and knocked out the case's punitive damages altogether.

That decision led Wheeler to start defending punitive damages cases. In 1983, he wrote a *Virginia Law Review* article that made a number of suggestions about standards—including clear and convincing evidence—that he believed ought to apply to punitive damages. He has been on amicus briefs ever since. "There was a time for several years after my *Virginia Law Review* article," he says, "when clients had me write an amicus brief in every punitive damages case being reviewed by the Supreme Court. The last time I did so was the Exxon Valdez case, which I think was decided three years ago."

Through these cases, his recommendations have shaped punitive damage law throughout the country. His activity before the high court isn't restricted to filing amicus briefs, either.

In the 1980s, a flood of personal injury lawsuits was filed over the lack of airbags in automobiles. Plaintiffs' attorneys were arguing that cars without airbags were defective. Wheeler realized the enormity of the charge. "If that kind of claim had validity," he says, "we would be talking about every frontal collision that occurred anywhere in the country being the subject of liability. We would be talking about millions of cases."

When Wheeler dug into the regulatory history, he found that government officials had been debating the safety of airbags for a decade and still had not determined if they were safe enough to be required in cars. "It just can't be right that the National Motor Vehicle Safety Administration has been examining this issue since the early 1970s and has not decided that airbags should be required, yet manufacturers can be held liable for not putting in airbags," he remembers thinking. "There was this huge movement by the plaintiff's bar, vitriolic attacks on companies and engineers and scientists, and I thought, 'We're going to defend these people. This is wrong. The last thing you want to do is put in something you call a safety device and have it injure people.'"

Wheeler started making his preemption argument, carefully picking cases with good facts. He won a preemption motion in federal court in Missouri in 1984. Fifteen years and several appellate court wins later, Wheeler argued *Geier v. American Honda Motor Co., Inc.* before the U.S. Supreme Court in December 1999.

"It was just a thrill," he says. "It just seemed like it was done in 30 seconds. It was so fast-paced. The justices step on each other. One asks a question. While you're answering, another one interrupts. It was terrific. I knew it. I knew the area. I knew the regulatory history. I had read literally every preemption decision of the U.S. Supreme Court. I had notes on every decision."

The decision in favor of preemption came down in May of 2000.

WHEELER'S PRACTICE IS national but he decided against the hubbubs of L.A. or New York City. Twenty years ago, he and his wife decided Denver would be the best place to raise their children, and since it's not uncommon for Wheeler to be needed in meetings on both coasts in the same week, an office in the center of the country actually made sense.

After serving as general counsel at a 31-lawyer general business firm, Wheeler and 18 other lawyers of the firm's litigation group split

off in 1998 to form what is now Wheeler Trigg O'Donnell. Jack Trigg, one of those 19 attorneys, had been a longtime admirer of Wheeler. "Number one, he is brilliant," Trigg says. "He is capable of handling everything from the beginning of a case through the Supreme Court appeal. Many lawyers don't have that range of talent. His style is extremely thorough. He personally reads every sheet of paper and researches every issue that could possibly come up. He is, without a doubt, the hardest working person I have ever practiced law with, and he is the ultimate professional, ethical lawyer. He never does anything or thinks about anything that is other than what is appropriate."

Their firm has grown from 19 lawyers to 60 over the last 13 years. Asked how he keeps it all together, Wheeler—on his lunch break during a seven-week trial in Los Angeles—says he regularly turns down cases if he doesn't think he can provide the quality of representation he wants to provide and thinks his clients deserve.

He's also looking for another U.S. Supreme Court case. He believes he has another strong argument for federal preemption—this time as it relates to the regulatory history behind a class of antidepressants, selective serotonin reuptake inhibitors (SSRIs), that have been the target of what Wheeler calls "pattern" litigation: when a manufacturer faces many similar claims in a mass-produced product.

His client, Pfizer, has been one of the targets of suits alleging that drug manufacturers failed to warn patients that antidepressants may increase the risk of suicide. "When I looked at the regulatory history, and how carefully these drugs had been regulated by the Food and Drug Administration—just as in the airbag area—the regulatory history was unique," he says. "The agency specifically considered whether it would be a good idea to add different labeling [and determined] you can do more harm than good with a warning. Depression is such a terrible illness; if you cause people to be fearful that taking an antidepressant will cause them to want to commit suicide, they just won't take it. Then they'll be suicidal because of their illness."

Wheeler thought his *Zolof* case, *McNellis v. Pfizer*, in New Jersey, might be the case to go before the high court. But the U.S. District Court for the District of New Jersey didn't decide the motion for almost a year, and in the meantime other, similar cases, *Colacicco v. Apotex* and *Wyeth v. Levine*, with facts that Wheeler felt were less favorable to the defense, emerged. Describing those cases winding their way through the court system, Wheeler almost seems to be calling a horse race.

"The time from filing the original motion to denial of the motion for reconsideration was 16 months," he says. "Now *McNellis* is behind *Colacicco* and *Wyeth*. I appealed to the 3rd Circuit. Glaxo [the *Colacicco* case] won its case in the Eastern District of Pennsylvania and the plaintiff appealed to the 3rd. We got those cases combined for oral argument. Meanwhile, *Wyeth* goes to the Supreme Court. We won in the 3rd Circuit. Plaintiff filed for [Supreme Court] petition. While that case was pending, the Supreme Court decided *Wyeth*, so both of our cases were remanded back to the 3rd Circuit, and those were resolved, and so that issue has never gotten to the Supreme Court. *Wyeth v. Levine* wasn't an SSRI. It had a totally different regulatory history. The circumstances, facts and regulatory history were nowhere near as complete and detailed, and the patient safety balancing nowhere near as transparent."

It was disappointing to Wheeler, but now he's got his eye on another preemption case that the 10th Circuit recently remanded to the Western District of Oklahoma. The subject is the drug Effexor. It's actually a Wyeth case, since Pfizer acquired Wyeth in 2009. "So maybe that's the case," Wheeler says hopefully. ◀