



SMITH FREED & EBERHARD P.C.
Your Litigation Partner

Case Study

Premises Liability: Who is Liable When Life Throws You Lemonade?

— by Jeffrey D. Eberhard

Claims Pointer: In limited circumstances, the doctrine of *res ipsa loquitur* allows a jury to find premises liability for a defective condition without any evidence that defendant knew or should have known of the condition.

Courts and attorneys love to use archaic Latin phrases like “*res ipsa loquitur*”. Translated to English, this phrase literally means “the thing speaks for itself”. In Hammer v. Fred Meyer Stores, Inc., In the Court of Appeals in the State of Oregon (Case No. 05CV0875, April 20, 2011), we see how the doctrine is applied to real-life facts and why the phrase might better be translated as “how the Plaintiff was hurt is unclear so the Defendant must pay.”

While Jacqueline Hammer was shopping at a Fred Meyer store, she removed a half-gallon carton of lemonade from an “end cap” refrigerated display. After she removed the carton, the shelf flipped back and ejected the remaining lemonade cartons at Hammer. Hammer attempted to dodge the falling cartons, but despite her best attempts, several of them struck her. In her attempts to get away, Hammer suffered injuries to her neck and shoulders, incurring significant medical costs. Hammer sued Fred Meyer alleging that the shelving display was defective and that Fred Meyer was negligent for failing to exercise reasonable care to protect her from, or warn her against, the danger posed by the defective shelf. Fred Meyer moved for a directed verdict arguing that Hammer could not prove that Fred Meyer knew or should have known that there was a problem with the shelf as required under general premises liability. The trial court denied Fred Meyer’s motions and instructed the jury on premises liability and *res ipsa loquitur* – a rule that allows a jury to infer both negligence and causation if the harm that occurs is “of a kind that more proba-

bly than not would not have occurred in the absence of negligence on the part of the defendant.” After deliberation, the jury found Fred Meyer negligent and awarded Hammer \$362,000 in total damages. Fred Meyer appealed the judgment to the Court of Appeals.

On appeal, Fred Meyer assigned error to the trial court’s *res ipsa loquitur* instruction, arguing that the case was analogous to a slip and fall involving a foreign substance spilled on the store floor and that Hammer must prove that that Fred Meyer had actual knowledge of the defective condition (i.e. defective shelf) or that in the exercise of reasonable care Fred Meyer should have discovered the defective condition. The Court of Appeals disagreed. Among other elements, the doctrine of *res ipsa loquitur* requires that the defendant had control of the harm producing force (i.e. the spilled liquid or defective shelf). The doctrine of *res ipsa loquitur* does not apply in slip and fall cases because a spill could have been caused by a party other than the defendant (for example, another customer could have spilled the liquid). However, in this case, the evidence showed that Fred Meyer was in charge of installing, handling, moving, and inspecting the end cap and the shelf within it. Moreover, there was no evidence that a third party altered, manipulated, damaged, or mishandled the defective shelf. Thus, the Court found the evidence presented by Hammer was sufficient to entitle her to the *res ipsa loquitur* instruction and that the jury could find Fred Meyer liable for Hammer’s injuries without any evidence that Fred Meyer was actually aware of the defect or even any evidence that Fred Meyer reasonably should have discovered the defect before the incident. ❖

— Full case available at: www.publications.ojd.state.or.us/A142677.htm

— If you would like to be notified of these new cases, please send an email to caseupdate@smithfreed.com.

This article is to inform our clients and others about legal matters of current interest. It is not intended as legal advice. Readers should not act upon the information without seeking professional counsel.

When is a Spinal MRI Reasonable and Necessary?

By William DeBolt, MD, Neurologist*

Exponential Use and Puzzling Interpretations

Most insurance policies require that the MRI test be both reasonable and necessary. Many physicians order a MRI if there is any persistent complaint of pain in the spine or following trauma. The test is necessary to:

- Assure the patient;
- Protect against maltreatment allegations;
- Provide guidance for any legal questions; and
- Provide insight for a treatment plan.

These prevailing practices are driving exponential use and growth of MRI imaging facilities.

Consistent with the trend of increased usage, the interpretive vocabulary of spinal MRIs have mushroomed. I am no longer certain of the meaning of the terms focal bulging, diffuse bulging, herniation, annular bulge, annular tear, disc degeneration, osteophytic disc complex, protrusion, spondylosis, arthrosis, sequestration, altered disc density, decreased disc space, to name only a few descriptive terms. This statement may be too critical as there have been efforts to codify and measure protrusions, bulges and sequestrations.

Even more puzzling are the differing interpretations of the images by the radiologist, the surgeon or the independent examiner. As experience of the clinician increases the MRI does not always provide a rational guide to treatment in the majority of patients. Many degenerative spinal changes are normal in an 80-year old who may or may not have any spine complaints. The role of MRI in evaluation of chronic back pain is important and is very sensitive to degenerative processes in the back and anatomical changes associated with aging usually responsible for minor symptoms.

The sensitivity of MRI for disc height narrowing or annular tears is felt to be poor and these findings alone are of limited clinical importance (Videman, 2003). Equivocal findings can lead to even more

controversial testing such as discograms. In the legal arena, minor interpretive changes can create major disagreement. I am impressed that the public has become more skeptical about what allopathic medicine can offer in regard to spinal pain.

Reasonable Spinal MRIs?

A different line of thought is needed if the “reasonable” criteria are used. A MRI is reasonable if it:

- Provides reassurance for investigation of minor symptoms;
- Examines non-response to continued conservative treatment;
- Concerns about future problems from a minor injury are present; or
- Evaluates changes from another injury when legal concerns are at issue or protection from maltreatment allegations.

For the practicing physician, the guidelines of the American College of Radiology (ACR) for necessary testing should provide insurance remuneration and protection from maltreatment allegations.

Necessary Spinal MRIs?

The definition of “necessary” has been variously defined as “whatever the treating physician feels is appropriate,” “treatment that is needed to prevent death, disability or prolonged incapacity,” “community practice standards” or “specialty board criteria.” There does not seem to be any clear consensus. The courts have defined necessary as “the practice of others in the community in your specialty.” In other words, the definition is established by peers and peer-reviewed standards.

The ACOEM (American College of Occupational and Environmental Medicine) guidelines, on the rational use of the MRI of the spine, state in Chapter 12:

“Unequivocal objective findings that identify specific nerve compromise on the neurological examination are sufficient evidence to warrant imaging in patients who do not respond to treatment and who would consider surgery an option. When the neurological examination is less clear, further evidence of

(Continued on next page)

Medical Notes... *(Continued from previous page)*

physiologic nerve dysfunction (EMG) should be obtained prior to the MRI study.”

Consequently, indiscriminant imaging may result in questionable false positive findings that are possibly, but not conclusively, the source of painful symptoms and do not warrant surgical treatment. If there is clear evidence of neurological dysfunction, a MRI is the study of choice. For bone pathology, a CT provides more sensitive and accurate images. The MRI is most sensitive for cauda equina integrity, tumors, infection, prior back surgery or fracture when x-ray or CT scan results are negative. Repeat MRI is the test of choice if there has been progression of the neurological deficit. MRI is very sensitive for spinal cord pathology and care must be taken to evaluate the study carefully in relation to the clinical picture.

Be Mindful of the Guidelines

The ACR criteria for appropriate thoraco-lumber MRI imaging are as follows:

- 1) Thoracic spine trauma with neurological deficit
- 2) Lumbar spine trauma with neurological deficit

- 3) Lumbar spine trauma: seat belt, fracture with radicular complaints or findings
- 4) Uncomplicated low back pain with suspicion of cancer or infection
- 5) Uncomplicated low back pain, radiculopathy after one month of conservative therapy, not radiculitis
- 6) Uncomplicated low back pain, prior lumbar surgery
- 7) Uncomplicated low back pain, cauda equina syndrome
- 8) Myelopathy, traumatic, painful, sudden onset, stepwise progressive, slowly progressive
- 9) Myelopathy, infectious disease patient.
- 10) Myelopathy, oncology patient.

These guidelines clearly spell out what is considered appropriate and necessary for MRI testing of the thoraco-lumber spine. For example, Medicare often rejects payment for second spine MRI studies or asks for additional documentation. Be mindful of these guidelines and the complexity of MRI imagery and diagnostics as the potential for wasteful spending diminishes. ❖

* The views expressed in this article are those of the author and do not necessarily represent the views of, and should not be attributed to, ExamWorks.