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Case Study

Premises Liability: Recreational Land Use & Trespassing

— by Jeffrey D. Eberhard

Claims Pointer: The Oregon Court of Appeals holds that when a plaintiff is injured on private property adjacent to recreational land, the adjacent landowner is immune from liability for that injury either because (1) there is no liability for injury incurred on land open for recreational purposes; or (2) plaintiff is a trespasser to whom the landowner owes no duty.

Under Oregon law, a landowner's duty to persons on the land is dependent on the person's "status." For example, to an "invitee" – someone who has been invited on the land for a business purpose – the landowner owes a duty to inspect the premises and make it safe for the invitee's visit. And with regard to a "licensee," i.e. a person who has permission to be on the land, the landowner must warn them of any hidden dangerous conditions. Finally, a landowner owes no duty to a "trespasser," who has no permission to be on the land.

An exception to these general rules lies in ORS 105.682, Oregon's Recreational Land Use Statute. Oregon's Recreational Land Use Statute was enacted in light of Oregon's vast amount of undeveloped land and natural resources, much of which has scenic and recreational use. Recognizing the economic and societal benefits of opening up certain private land to the public, the legislature enacted ORS 105.682 to encourage landowners to make their land available to the public for recreational purposes. The statute basically "trades" public access in exchange for landowner immunity from any liability that might result from the use of the property. Recently, in *Stewart v. Kralman*, 2011 WL 310339 (February 2, 2011), the Oregon Court of Appeals reexamined the Recreational Land Use Statute and considered what happens when a recreational land user is injured on an adjacent landowner's property.

Plaintiff Randall Stewart was riding his snowmobile along a recreational snowmobile trail that inter-

sected defendant Norman Kralman's driveway. Plaintiff suffered severe injuries when he turned off the snowmobile trail onto Kralman's driveway and collided with a cable that was stretched across the driveway to prevent vehicle access. Plaintiff filed a claim against Kralman, arguing that he was liable in negligence for plaintiff's injuries. Kralman then filed a third-party complaint seeking contribution and indemnity from the Oregon State Snowmobile Association and Tollgate Trailfinders Association.

The defendants moved for summary judgment, all arguing that Kralman was immune from liability pursuant to ORS 105.682, Oregon's Recreational Use Statute. The statute states that a landowner "is not liable for any personal injury, death or property damage that arises out of the use of land for recreational purposes...when the owner, either directly or indirectly, permits the land to be used for recreational purposes." Plaintiff countered that, in this case, ORS 105.682 did not apply to protect Kralman because the location where he was injured – Kralman's driveway – was not open to the public. The defendants responded, arguing that if this were true, Kralman was still immune to suit either because (1) the injury "arose out of" plaintiff's use of the land for recreational purposes, or (2) plaintiff was a trespasser to whom Kralman owed no duty of care. The trial court agreed with defendants and dismissed the suit. Plaintiff appealed.

On appeal, both parties reiterated their arguments. The Oregon Court of Appeals began by noting that Oregon follows the traditional rules governing landowner liability. And, although the Recreational Use Statute was created to encourage landowners to open their land for recreational purposes, it does not change the common-law liability to trespassers – that is, landowners owe no duty to trespassers. Looking to the facts, the Court stated, quite simply, that Kralman's driveway was either open to the public, or it wasn't. And, if the driveway was closed to the public, then plaintiff was trespasser to whom Kralman owed no duty. And, if it were open to the public for recreational use, then Kralman was entitled to immunity under ORS 105.682(1). Either way, the Court held, plaintiff's claims failed as a matter of law. The lower court's dismissal was affirmed. ❖

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Post Traumatic Stress Disorder

By Landy Sparr, MD, Psychiatrist

The term post-traumatic stress disorder (PTSD) has been embraced by the legal community. It has pulled together a previously diverse and heterogeneous nomenclature dating back more than one hundred years. In 1980 there was an attempt in the psychiatric diagnostic and statistical manual (DSM-III) to bring the varied stress syndromes under one generic medical heading: PTSD. Thus, criteria were developed, and traumatic stress came back into the medical-psychiatric realm. The definition highlighted the theory that there was a single post-traumatic syndrome that is a final common pathway reached through a wide variety of relatively severe stressors. Several reports containing data about symptoms in survivors of extreme trauma had been published by the mid-1970's and were available to guide those who formulated the DSM-III PTSD diagnostic criteria.

The major unifying features of PTSD as described in the DSM are:

- 1) occurrence of a severe stressor;
- 2) re-experiencing of the traumatic event;
- 3) numbing of responsiveness and/or persistent avoidance of stimuli associated with the trauma;
- 4) cognitive dysfunctions; and
- 5) autonomic reactions to reminders of the traumatic event.

The criteria for the severe stressor have undergone an evolution from DSM-III to DSM-III-R to DSM-IV. The current definition in DSM-IV states that a person must have been exposed to a traumatic event in which both of the following are present:

- 1) The person experienced, witnessed, or was confronted with an event or events that involve actual or threatened death or serious injury or a threat to the physical integrity of self or others.
- 2) The person's response involved intense fear, helplessness, or horror.

This latest manifestation of the stressor criteria expanded the allowable scope of traumatic exposure.

This in effect opened the door for PTSD claims based on common occurrences such as motor vehicle accidents, which had previously been mostly excluded because they were not "outside the range of usual human experience" (DSM-III-R). PTSD has remained a favorite diagnosis by claimants because it is incident specific. It tends to rule out other factors important to causation determination. Thus a claimant can argue that all his or her psychological problems issue from the alleged traumatic event and not from myriad other sources encountered in life. A diagnosis of depression, for example, opens the causation issue to many factors other than the stated cause of action.

Widespread job instability often leads to increased disability claims. At the same time, however, payers have tightened the concept of causation. Workers' compensation and other mental disability claims often require percentages of causation to be assigned to the primary stressor as well as other factors in the claimant's life. Psychiatric symptoms never exist in a vacuum. It is known, for example, that PTSD symptoms are associated with both pre-existing obsessive-compulsive personality traits and/or with pre-existing traumatic experiences. These then are seen as contributory factors but without the primary trauma one could argue that such pre-existing conditions may well have remained quiescent. In such circumstances, it is difficult to assign definitive causation percentages. It has also been shown that person-to-person trauma, particularly when moral issues are involved, results in a higher incidence of PTSD. Examples are rape and combat trauma.

Trauma related to natural disasters and motor vehicle accidents may have a much lower PTSD incidence. Empirical PTSD percentages assigned to severe motor vehicle accidents vary from 5% to 15% in exposed individuals. This then, is the conundrum: what constitutes sufficient trauma to stimulate a PTSD reaction? Multiple factors are characteristically involved including the personality traits and personal history of the affected individual. Many providers take a simplistic approach by assigning a PTSD diagnosis to anyone who has been traumatized without consideration of either the severity or significance of the trauma. This knee-jerk response results in individuals acquiring a PTSD

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

diagnosis who do not meet DSM-IV criteria. Scheduled PTSD interview instruments are readily available and clinical experience can help an examiner make the diagnosis.

Unfortunately, PTSD criteria are also available to claimants and malingering is a persistent problem. PTSD should be diagnosed if the facts fit, but only if they fit. To do otherwise dilutes and trivializes the diagnosis. When mental stress due to a minor auto accident is termed PTSD, one has to wonder whether or not human beings are expected to be

able adapt to anything. Individuals often experience psychic stress due to trauma without meeting DSM-IV criteria for PTSD. In this context, the precise diagnosis is less important than a thorough description of symptoms. At times, clinicians stretch and pull the DSM-IV PTSD diagnosis beyond justifiable limits to try to fit square pegs of psychiatric diagnosis into round holes of justifiable claims. In these instances, casual diagnosticians may fail to apply the requisite symptomatic criteria or do so only superficially. Examiners may guard against misuse of a PTSD diagnosis by paying strict attention to criteria and by placing emphasis on outside information as well as claimants' self-reports. ❖