

If You Spray, What Will You Pay?

— by Rudy Lachenmeier and Lori DeDobbelaere

One of the most important issues that arises in a pesticide spray case is how exactly should the claimant's damages, if any, be measured. As with many things in the law, the answer is "it depends." What it depends upon is the nature of the damage to claimant's property. If the damage is considered "permanent," there is one measure of damages. If the damages are only "temporary," the measure of damages is different. (This damages analysis applies in many situations involving damage to real property separate and apart from a pesticide spray case.)

However, just to throw a little uncertainty into the whole analysis, the court in *Oregon Mutual Fire Insurance Co. v. Mathis*, 215 Or. 218, 223, 334 P.2d 186 (1959), stated:

While the fundamental rule of law is to award compensation, yet rules for ascertaining the amount of compensation to be awarded are formed with reference to the just rights of both parties, and the standard fixed for estimating damages ought to be determined not only by what might be right for an injured person to receive in order to afford just compensation, but also by what is just to compel the other party to pay.

* * *

It appears that, since the allowance of damages is to award just compensation without enrichment, there is no universal test for determining the value of property injured or destroyed and that the mode and amount of proof must be adapted to the facts of each case.

The court went on to say that it is important to not only look at what is reasonable for the claimant to

receive by way of compensation but also to examine what is just to compel the other party to pay.

A good example of the equitable notion of the measure of damages would be in the pesticide spray arena. By way of example, let's say we have a nursery that grows ornamental shrubs and flowers and had been in business for 20 years. During the course of that 20 years, the nursery mostly operated at a loss. A neighbor sprays a pesticide which the nursery claims drifted and damaged most, if not all, the shrubs and flowers at the nursery. The nursery now wants to be compensated for the replacement of every single shrub and flower at the nursery. The amount to replace the shrubs and flowers, some of which are more than 10 years old, far exceeds the amount the nursery would ever earn. Should a nursery which made very little money be compensated hundreds of thousands of dollars because it claims its ornamental flowers and shrubs have been damaged? Or should the damages be limited to lost profits which would be minimal? Or should it receive lost profits and the diminution in value of the property as a whole versus the cost to replace all the plants on at the nursery? Based upon the *Oregon Mutual* case, the court should look at the equities involved. The claimant should not receive a windfall – all he is entitled to is to be made whole.

To help determine what would be fair compensation in the above scenario, we need to look at whether the damages are "permanent" or "temporary." Given the lack of case law addressing whether damages are permanent or temporary when property has been harmed due to pesticides, it is difficult to predict how a court would rule on this issue. However, the case law that exists provides us with some guidance.

The Measure of Damages When the Damage to Claimant's Property is "Permanent"

If the damage to a claimant's property is considered "permanent," the claimant is entitled to recover the diminution in value of his property. In *Hudson v. Peavey Oil Co.*, 279 Or. 3, 10, 566 P.2d 175 (1977), the court discussed what it takes for damage to property to be permanent:

Injury to real property need not be permanent in the sense that it will last forever in order to justify the use of the diminution of value measure of dam-

ages. It is enough that the injury be of a kind that makes it appropriate to consider the owner's loss in terms of the reduced value of the property rather than in terms of the cost of restoring it to its original condition. Thus, where a pipe line company has wrongfully allowed oil to escape into a field for a number of years until the oil evaporates, the owner is entitled to recover for the lessening of the value of the land. Such a condition though not permanent, would affect the offer of a reasonable purchaser.

In *Hudson*, the damage to plaintiffs' property was deemed to be permanent. The defendant's underground gasoline tank leaked and caused part of plaintiffs' property to become uninhabitable and an odor to permeate a portion of plaintiffs' office building. These problems would likely persist for an undetermined but significant period of time. In determining that the damage was permanent, the court also took into account the fact that "the property value to a prospective purchaser would be significantly affected."

In pesticide spray cases, the damages most likely will involve growing crops or vegetation of some sort. There are two cases in Oregon that address whether damage caused to growing crops is permanent or temporary- *Furrer v. Talent Irrigation Dist.*, 258 Or 494, 466 P2d 605 (1970) (pear orchard) and *Norwood v. Eastern Oregon Land Co*, 139 Or 25, 5 P2d 1057 (1931) (alfalfa and perennial grasses). In *Furrer*, the court concluded that the damage to the pear orchard was "permanent." The court did not provide any analysis as to why it came to that conclusion but simply held that the trial court was correct in determining that the proper measure of damages was the diminution of value. In *Norwood*, the court did not decide the issue but instead held that the court did not err when it accepted plaintiff's computation of damages (i.e. cost of replacement) because it was a lot less than if the damages were based on a diminution of value (it was not at all clear why defendant wanted to use diminution of value if it was more than what plaintiff's evidence supported).

Given the fact that the *Furrer* court determined that the damages to the pear orchard were permanent, a court may determine that property damaged by pesticides is permanent. However, many plants will

outgrow the effects of pesticide applications. In our above fact scenario involving the nursery, whether the damages are permanent may depend upon whether the shrubs can outgrow the damages. If not, then based upon *Furrer*, the damage will likely be deemed permanent. Accordingly, the proper measure of damages would be the diminution in value of the nursery.

So how do you measure the diminution of value of someone's property? Typically, it is determined by looking at the value of the property immediately before and the value of the property immediately after the damage causing event. However, if the damage to the property is on-going, such as when water continually is draining onto the property, the proper measure of damages would be to look at the value of the property before the damage causing event and the value of the property at the time of trial. In *Furrer*, defendant's canals leaked water causing many of plaintiff's pear trees to die. The court held that the proper measure of damages was the value of the property prior to when the water started leaking and the value of the property at the time of trial instead of immediately after the leaking began. In so holding, the court stated "the diminution in the value of the land was gradual and incremental, no part of which was readily measurable at any particular time."

Determining the value of the property will in almost all cases require you to hire the services of a certified appraiser. Make sure the appraiser you retain has experience with the type of property involved, e.g. farm, residential property, industrial property etc. However, remember that the courts do allow a landowner to testify as the value of his property and do not require expert testimony.

The Measure of Damages When the Damage to Claimant's Property is "Temporary"

If the damage to claimant's property is "temporary" or is "reasonably susceptible of repair," damages are measured by the loss of use or rental value during the period of time the property was damaged or the cost of restoration/repair. Depending upon the circumstances, a claimant may be able to recover both loss of use and the cost of restoration. However, the cost of restoration cannot be used where the cost of restoring the property exceeds the value of the property or where restoration is impracticable. For example, in *Olds v. Von Der Hellen*, 127

Or 276, 263 P 907 (1928), the issue was how much plaintiff should be compensated for the loss of a 10 year old railroad depot that was no longer being used by the railroad and there was no evidence that the depot would ever be used for railroad purposes again. The evidence was that it would cost \$5,000 to replace the depot (remember this is 1928 we are talking about). The court held that given the fact that prior to the depot's destruction it had limited uses, the value of the depot just prior to the time of the fire would be the proper measure of damages.

In the situation involving the nursery, if the plants can outgrow the effects of the pesticide application or if the damaged portions can be pruned out and the shrubs left alone for a few years to recover, the damages may well be considered to be "temporary." If so then the claimant should be allowed to recover for loss of use (which would be lost profits) and the extra cost incurred to take care of the damaged plants while they recover. If the parties cannot agree, the jury may have to determine what will happen to the

plants in the future (i.e. will they recover or not) before knowing which measure of damages to apply.

Always keep in mind the holding in the *Oregon Mutual* case. Based upon that holding, the claimant should not be able to recover more than the property was worth prior to the tortuous event no matter whether the damages are deemed to be permanent or temporary. In addition, do not forget that the claimant has a duty to mitigate his damages. A claimant is not entitled to recover for losses which could have been prevented by reasonable efforts on his part. ❖

Editor's Note: Be sure to attend the November 13 OCAA meeting for a presentation on this topic by Mr. Lachenmeier and Ms. DeDobbelaere.

— If you have any questions, please feel free to contact the authors: Rudy Lachenmeier (rudy@lerlaw.com); and, Lori DeDobbelaere (lori@lerlaw.com); or call 503/768-9600.

Case Study



Jury to Decide Whether Friend of Gunman was Negligent for Harm to Hostages

— by Jeffrey D. Eberhard

In Oregon, in order to prove negligence in the absence of some type of special relationship between the plaintiff and the defendant, the plaintiff must show that a defendant's conduct "unreasonably created a foreseeable risk to a protected interest of the kind of harm that befell the plaintiff." What is considered "foreseeable," however, has proven difficult to pin down. According to an opinion handed down by the Oregon Supreme Court last month, what is deemed foreseeable for the purposes of determining liability may be surprisingly broad.

In *Bailey v. Lewis Farm, Inc.*, --- P.3d ---, WL 2949159 (October 11, 2007), Jerome Bailey was injured when the rear axle assembly broke loose from a passing semi-truck, causing the dual wheels and tires to come off and collide with his vehicle. Bailey sued several parties, including May Trucking Company (May), who was the former owner of

the truck, alleging that it was negligent in driving the truck for more than 500,000 miles without performing necessary maintenance on the rear axle. May moved to dismiss the complaint against it for failure to state a claim, arguing that it was not liable in negligence as a matter of law because it had sold the truck more than a year before the accident and exercised no control over it since that time. The trial court agreed and granted May's motion to dismiss for failure to state a claim. Bailey appealed.

The Oregon Court of Appeals met *en banc* (i.e. all ten judges heard the case) and split 5 to 5 on whether the plaintiff stated a valid negligence claim under Oregon law. The effect of the split decision was that the trial court's de-

Claims Pointer: In order to support a claim for negligence in the absence of a "special relationship" between the plaintiff and the defendant, a plaintiff must show that the defendant's actions created a reasonably foreseeable risk of harm to the plaintiff. What is deemed "reasonably foreseeable" for the purposes of establishing liability is quite broad and may even extend to negligent maintenance by a prior vehicle owner.

cision was affirmed without producing a majority opinion to cite as authority in future cases. The Oregon Supreme Court allowed review to consider the issue.

Although the Court appeared to conclude that that it might be difficult for Bailey to actually prove that May was liable for his injuries given the known facts of this case, it nonetheless held that the allegations in Bailey's complaint did state a claim for negligence; namely, that May failed to clean and repack the truck's axle wheel bearings every 25,000 miles, and to perform a more detailed cleaning and inspection every 100,000 miles as recommended by the truck's manufacturer. In fact, Bailey's complaint alleged that May performed only one of the recommended 20 maintenance services to the axle bearings. Noting that if May had negligently maintained the axle when it owned the vehicle, and if that negligent maintenance was a

substantial contributing cause of Bailey's injury (as his complaint alleged), a reasonable jury could find the failure of the trailer's axle, the loss of its wheels, and the resulting injuries to be foreseeable. In short, the Court held that the mere fact that May had not owned the trailer for more than a year prior to the accident did not necessarily excuse it, as a matter of law, from the consequences of its alleged prior negligence.

While the full impact of the *Bailey* decision remains to be seen, at a minimum, you can expect plaintiff attorneys to begin bringing allegations of liability against prior owner parties that may not have previously been named. ❖

— *If you want to be notified of new cases, please send an email to caseupdate@smithfreed.com.*

This article is intended 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 contained in this article without seeking professional counsel.



Medical Notes

TMJ and MVA?

Article provided by Health Cost Management

— by **Thomas W. Albert, MD, DMD**

In [September], we discussed “What is TMJ?” and learned the basics about injuries to the Temporomandibular Joint and also about diagnosis and treatment. This month we are going to learn about TMJ and motor vehicle accidents. In this context, the letters are sometimes thought to stand for “The Money Joint,” since there has been so much litigation centered on these injuries that may or may not have anything to do with the accident in question.

The relationship between TMJ and MVA is controversial and can only be understood by digging into the following key elements:

- Direct trauma vs. no direct trauma
- Vectors of force
- Time relationship between the accident and onset of symptoms
- Litigation

In the case of an injury, the onset is unexpected and occurs in a discrete period of time. Disease of the joint is usually more gradual in onset.

Direct injury to the jaw is easy to recognize using historical and objective evidence, such as lacerations, bruising and swelling. The objective evidence is found by physical examination and documented in the following records:

- ER notes
- Ambulance records
- Timely physician and dental notes
- Imaging studies

Incidence of long term TMJ complaints is low in patients with significant trauma. A study by Kolbinson, et. al. in 1998 found that patients with direct trauma required less treatment than those with no direct trauma and minimal vehicular damage.

TMJ ‘Whiplash’, the question of whether it is real or not is a very controversial topic. Symptoms of facial and/or jaw soreness are commonly reported in patients with cervical whiplash. Are the facial and jaw complaints a separate entity? Is there a true extension/flexion injury within the temporomandibular joint itself? There are a lot of studies that support either point of view on the topic, too many to list in this short article.

My interpretation, based on a great deal of study and over thirty years of practice in the field, is that the following is needed in order to establish a 'more probable than not' relationship between an MVA and TMJ complaints:

- Direct trauma
- Discrete time relationship
- Clear objective findings
- Adequate management of cervical issues
- The 'it makes sense' rule

In order to perform a good file review or independent medical examination for an insurance claim that involves TMJ, the following information is needed:

- Analysis of MVA dynamics
- Legible records
- Previous dental treatment notes
- Pertinent imaging studies

Some relevant questions to be answered by the reviewing physician are:

1. What is your diagnosis of the current condition? Is this supported by objective findings?
2. In your opinion, on a more probable than

not basis, is the diagnosis related to the reported injury? Please explain.

3. Were there any pre-existing conditions identified? In your opinion, did these pre-existing conditions have a material (50% or less) or major (51% or more) effect on the diagnosis? Please explain.
4. Is the claimant medically stationary at the present time? At what point do you feel they became medically stationary?
5. Is the treatment delivered by the provider related to and reasonable for the diagnosis? Are there any parts of the treatment that you feel are not related or not reasonable?
6. If the claimant is not medically stationary, please explain why not. Also, what treatment do you feel would be reasonable to achieve a medically stationary status? What would be a reasonable time frame within which one would expect significant improvement?
7. Do you have any further comments or suggestions?

Each case is unique and requires careful evaluation.



RGL Forensic Accountants and Consultants	Key Elements of Business Income Loss Calculations Part I
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— by Russ Matheson, CPA, CFE

To properly evaluate a Business Income loss, one must gain an understanding of how the business operates and be comfortable working with business records. An added complexity in many Business Income loss evaluations is the inherent difference between accounting terms and the language included in the insurance policy. Through a series of articles over the next several months, I hope to provide some clarity to this subject by breaking down Business Income calculations into their basic elements. My goal is to provide knowledge that will assist you in the investigation of a Business Income loss and help you become more comfort-

able conversing with policyholders and more proficient in your adjustment of these types of claims.

First and foremost, it is imperative that you read the insurance policy, because they are not all alike. In my experience, Business Income coverage is always interpreted by carriers and then communicated to me through their adjusters or legal representatives. I then apply my accounting expertise to the specific coverage conveyed. Through the years, I have defined five key elements to be considered in an accounting review of Business Income losses. They are:

1. Loss Period

The loss period establishes the parameters (start and end dates) of a Business Income loss, and is defined in the insurance policy. Typically, loss periods begin on the date the property is physically damaged and end on the date that the property should have been

repaired or replaced. This is commonly referred to as the period of restoration. In some policies, the loss period ends on the date that business is back to normal.

2. Sales Projection

The sales projection is the most critical element of a Business Income loss calculation, and is often an area of disagreement and spirited debate between policyholders and insurance companies. Some key considerations in projecting sales include seasonality and trend analysis. To support a sales projection, it is important to present a forecast that falls within a reasonable range, as opposed to developing a sales projection that is merely “possible.”

3. Mitigation

Mitigation involves efforts by the insured that reduce the Business Income loss. For example, if a policyholder relocates to a temporary location to continue operating, this will likely mitigate (reduce) the Business Income loss. It is important to know how to identify, quantify and apply mitigating revenues and expenses when computing the loss.

4. Projecting Expenses

Another crucial component of calculating a Business Income loss is projecting expenses. Based primarily on historical information, this process involves identifying both fixed and variable expenses. Projected expenses are subtracted from

projected sales to determine the likely net income of the business, had the loss event not occurred. Expenses that actually continue during the loss period are then added to projected lost net income to compute the Business Income loss.

5. Continuing Expenses

Although continuing expenses can seem relatively straightforward, in actuality they can include a variety of fairly complex matters including cash/accrual accounting issues as well as identifying and extracting expenses that have been submitted as property damage claims, extra expenses, or other claims.

In Part II, I will provide further details related to these five key elements, including questions you should ask and documents you should request to assist in the resolution of these claims. ❖

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