

## ***Oregon Court of Appeals Identifies Threshold Level of Evidence Required to Prove an Injury is Permanent***

**From the desk of Josh Hayward:** When bringing personal injury suits, plaintiffs often allege that the injuries they have suffered are permanent. What evidence is required for plaintiffs to prove that the alleged injuries are permanent? Read on to find out.

**Claims Pointer:** In this personal injury case, the Oregon Court of Appeals held that the plaintiff failed to provide sufficient evidence from which the jury could have found that the claimed injury was permanent. The court further held that the trial court's jury instruction on the plaintiff's alleged permanent injury "substantially affected defendant's rights" and warranted a reversal of the trial court's decision.

### ***[Elan v. Tate, 294 Or App 76 \(September 12, 2018\).](#)***

Plaintiff David Elan ("Plaintiff") was in his late seventies at the time of the accident. Plaintiff was walking on the side of the road when he was struck in the shoulder by the side-view mirror of a vehicle driven by Defendant Alana Lynn King Tate ("Defendant"). The impact caused Plaintiff to spin, fall over and suffer injuries serious enough to warrant an overnight stay at the hospital. Plaintiff filed suit, alleging he suffered a permanent head injury as a result of Defendant's negligence. The case went to trial eighteen months after the accident.

To prove the extent of his injuries, Plaintiff relied on the testimony from a retired emergency room physician (Barmanche), a physical therapist (Schaible), and himself. Plaintiff testified that, at the time of the trial, "he still had headaches, mood problems, and memory issues." Schaible testified that he treated Plaintiff a week after the accident for "symptoms of a concussion sustained during the crash" including "sensitivity to sound, shoulder pain and reduced range of motion in his neck, headaches, vision issues, and 'obvious memory and concentration issues.'" Barmanche testified that symptoms from a concussion "can last from days to weeks to months to years even following minor concussive events." Plaintiff utilized Barmanche's testimony in his attempt to prove the permanency of his head injury.

Near the end of trial, Plaintiff asked the court to instruct the jury "on permanent injury and plaintiff's life expectancy as reflected on mortality tables." The court granted Plaintiff's request over Defendant's objection. After deliberation, the jury apportioned 85 percent of the fault to Defendant and awarded Plaintiff damages.

Defendant appealed, arguing that the trial court erred in granting Plaintiff's requested jury instruction on permanent injury and life expectancy. Specifically, Defendant argued that Plaintiff presented insufficient evidence to establish that his head injury was permanent. Plaintiff responded by arguing that (1) he presented sufficient evidence from which a jury could have found that it was reasonably probable that his injury was permanent; (2) even if he did not present sufficient evidence of permanency, "common knowledge" allowed an inference that the injury was permanent; and lastly



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(3) even if he did not present sufficient evidence and/or common knowledge did not permit an inference of permanency, the court must assume that an injury that had lasted three years at the time of the appeal is permanent.

The Court of Appeals explained that Plaintiff was required to present “evidence from which the jury could find that it was reasonably probable that [his] head injury would last for his lifetime.” From this premise, the court analyzed the evidence that Plaintiff presented in support of his allegation of permanent injury. It noted that neither Plaintiff nor Schaible’s testimony established that his head injury was permanent. Plaintiff’s testimony did not touch on any potential future symptoms. Schaible’s testimony only described Plaintiff’s symptoms in the weeks and months after the accident and did not touch on any potential future symptoms. The court noted that Barmanche’s testimony did provide the “the jury with a basis on which to find that plaintiff would suffer symptoms ‘from days to weeks to months to years’ after the crash.” However, Barmanche’s testimony did not provide the jury with any way to “evaluate whether plaintiff’s injury would last for the rest of plaintiff’s life rather than for a more months or a few years.” Moreover, Barmanche himself testified that it was hard to predict how long Plaintiff’s symptoms would last.

Based on its analysis of the testimony, the court concluded that “the jury could not find that it was reasonably probable that plaintiff’s injury would persist for the rest of his life” and “any conclusion on that question would be purely speculative.”

Plaintiff also argued that Oregon Supreme Court case law supported his argument that “a jury can find that an injury is permanent...when common knowledge allows an inference that the injury will last for the plaintiff’s lifetime.” The court was not convinced. It quickly dispensed with this alternative argument, holding that it is not “common knowledge that symptoms of a head injury like plaintiff’s will last for any particular length of time.”

Finally, Plaintiff argued that Lewis v. Portland Ry. L & P, an Oregon Supreme Court case from 1911, supported his argument that a finding of permanent injury can be appropriate “based only on the persistence of symptoms that are not obviously permanent.” After a discussion of the *Lewis* and subsequent cases, the court noted that Plaintiff’s reliance on the case was misplaced, as subsequent cases limited or eliminated the possibility of such a finding.

The Oregon Court of Appeals held that the trial court’s error in giving Plaintiff’s requested instruction was a reversible error because it substantially affected Defendant’s rights. Accordingly, it reversed the trial court’s decision and remanded the case back to the trial court.

View full opinion at <https://cdm17027.contentdm.oclc.org/digital/pdf.js/web/viewer.html?file=/digital/api/collection/p17027coll5/id/17495/download#page=1&zoom=auto>



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