

Governmental Immunities

BEN MILLER
ASSISTANT CITY ATTORNEY
CITY OF EUGENE

Outline

- Sovereign Immunity
- Oregon Tort Claims Act Immunities
- Recreational Immunity
- Emergency Care Immunity
- Judicial Immunity
- Prosecutorial Immunity
- Quasi-judicial Immunity
- Legislative Immunity
- Miscellaneous Immunities



Sovereign Immunity

Sovereign immunity has constitutional underpinnings. Article IV, section 24, of the Oregon Constitution assumes that the state is immune from liability for its torts, and it authorizes the state to waive that immunity by general law. Without a valid waiver, the state may not be sued.

Sovereign immunity does not extend to the state's employees.

Oregon Tort Claims Act

The Tort Claims Act waives a public body's sovereign immunity for tort claims, ORS 30.265(1), and limits the tort liability of the public body and its employees. ORS 30.271, ORS 30.272.

The act, therefore, imposes a legal limit on the amount of damages that a plaintiff may recover against the public body and its employees.

Horton v. OHSU, 359 Or 168 (2016)

Oregon Tort Claims Act

ORS 30.265(5) - Every public body is immune from liability for any claim for injury to or death of any person or injury to property resulting from an act or omission of an officer, employee or agent of a public body when such officer, employee or agent is immune from liability.

Oregon Tort Claims Act – Exclusive Remedy

ORS 30.265(2) "The sole cause of action for a tort committed by officers, employees or agents of a public body acting within the scope of their employment or duties and eligible for representation and indemnification under ORS 30.285 or 30.287 is an action under ORS 30.260."

"The remedy provided by ORS 30.260 to 30.300 is **exclusive** of any other action against any such officer, employee or agent of a public body whose act or omission within the scope of the officers, employees or agents employment or duties gives rise to the action."

Oregon Tort Claims Act – Exclusive Remedy

ORS 30.265(2) - “No other form of civil action is permitted.”

Exclusivity operates as a type of immunity

Example of ORS 20.080

Oregon Tort Claims Act

ORS 30.265(6) Every public body and its officers, employees and agents acting within the scope of their employment or duties, or while operating a motor vehicle in a ridesharing arrangement authorized under ORS 276.598, are immune from liability for [Six Categories].

Workers’ Compensation Immunity

ORS 30.265(6)(a) Any claim for injury to or death of any person covered by any workers’ compensation law.

Applies to claims of individuals who were working when injured by acts attributable to the public body but not as employees of the defendant public body.

The public body is immune from liability to these nonemployees as long as the legal injuries claimed are covered by workers’ compensation law.

Workers' Compensation Immunity

Coverage is determined by the nature of the legal injury at issue. I.e. did the legislature intend to replace with a workers' compensation remedy.

Moustachetti v. State, 319 Or 319, 877 P2d 66 (1994)

Stone v. Finnerty, 182 Or App 452, modified, 184 Or App 111 (2002)

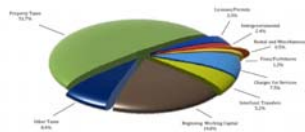
Upheld against several constitutional challenges - *Gunn v. Lane County*, 173 Or App 97, 20 P3d 247 (2001)

Tax Immunity

ORS 30.265(6)(b) Any claim in connection with the assessment and collection of taxes.

Anderson v. Department of Revenue, 313 Or 1, 828 P2d 1001 (1992)

Hall v. Hillsboro, 29 Or App 161, 562 P2d 597 (1977)



Discretionary Immunity

ORS 30.265(6)(c) Any claim based upon the performance of or the failure to exercise or perform a discretionary function or duty, whether or not the discretion is abused.

Governmental conduct amounts to performance of a "discretionary function or duty" if it "is the result of a choice among competing policy considerations, made at the appropriate level of government."
Garrison v. Deschutes County, 334 Or 264, 273, 48 P3d 807 (2002)

Discretionary Immunity

Not all decisions by governmental actors involve such policy choices.

Discretionary-function immunity does not extend to “routine decisions made by employees in the course of their day-to-day activities, even though the decision involves a choice among two or more courses of action.” *Lowrimore v. Dimmitt*, 310 Or 291, 296, 797 P2d 1027 (1990)

Discretionary Immunity

A governmental actor performs discretionary functions and duties when exercising **delegated responsibility** for making decisions committed to the authority of that particular branch of government that are **based on assessments of policy factors**, such as the social, political, financial, or economic effects of implementing a particular plan or of taking no action.

Discretionary Immunity

Turner v. Dept. of Transportation, 359 Or 644 (2016)



Statutory Immunity

ORS 30.265(6)(d) Any claim that is limited or barred by the provisions of any other statute, including but not limited to any statute of ultimate repose.

Incorporates non-OTCA statutory limits and bars to specific tort claims, such as recreational immunity, into the OTCA

Riot Immunity

ORS 30.265(6)(e) Any claim arising out of riot, civil commotion or mob action or out of any act or omission in connection with the prevention of any of the foregoing.



Apparent-Authority Immunity

ORS 30.265(6)(f) - Any claim arising out of an act done or omitted under apparent authority of a law, resolution, rule or regulation that is **unconstitutional, invalid or inapplicable** except to the extent that they would have been liable had the law, resolution, rule or regulation been constitutional, valid and applicable, unless such act was done or omitted in bad faith or with malice.

Apparent-Authority Immunity

Cruz v. Multnomah County, 279 Or App 1 (2016) (Apparent-authority immunity applies to misinterpretations of otherwise valid laws.)

Elvrum v. Fish Commission, 14 Or App 1, 510 P2d 593 (1973)

Recreational Immunity

ORS 105.682(1) – With certain exceptions “**an owner of land** is not liable in contract or tort for any personal injury, death or property damage that arises out of the use of the land for **recreational purposes**, gardening, woodcutting or the harvest of special forest products when the owner of land either directly or indirectly permits any person to use the land for [those purposes].”

ORS 105.682(1)– Does not limit the liability of an owner of land for intentional injury or damage.

Recreational Immunity

ORS 105.688(3) - Recreational immunity statutes do not apply if the owner “makes any charge for permission to use the land[.]”

This does not include “the fee for a winter recreation parking permit or any other parking fee of \$15 or less per day.” ORS 105.672(1)(c).

Coleman v. Oregon Parks and Rec. Department, 347 Or 94, 217 P3d 651 (2009)



Recreational Immunity

Johnson v. Gibson, 358 Or 624 (2016)



Recreational Immunity – Current Status

- A public employee is not “an owner of land” protected from tort liability under the Recreational Immunity statutes.
- Public bodies retain all their other defenses: tort claim notice, tort claims caps, contributory negligence, etc.
- Legislative fix?



Emergency Care Immunity

ORS 30.805(1) No person may maintain an action for damages for injury, death or loss that results from acts or omissions in rendering **emergency medical assistance** unless it is alleged and proved by the complaining party that the acts or omissions **violate the standards of reasonable care** under the circumstances in which the emergency medical assistance was rendered, if the action is against:

- (a) The staff person of a governmental agency or other entity if the staff person and the agency or entity are authorized within the scope of their official duties or licenses to provide emergency medical care; or
- (b) A governmental agency or other entity that employs, trains, supervises or sponsors the staff person.

Judicial Immunity

"The common law recognized that there is a public good to be gained from the principled and fearless decision-making of judicial officers freed from concerns over suits by disappointed litigants. To gain this good, it is necessary to cloak judicial officers with immunity from civil liability for their acts, so long as these acts are within the jurisdiction of the officer.

Praggastis v. Clackamas County, 305 Or 419, 426, 752 P2d 302 (1988).

Prosecutorial Immunity

A prosecutor is absolutely immune with respect to his or her decision as to "when, how, and against whom to proceed." *Watts v. Gerking et al.*, 111 Or 641, 222 P 318, *rev'd on other grounds on reh'g* 111 Or 654, 657, 228 P 135 (1924).

Rogers v. Hill, 281 Or 491, 499 n 8, 576 P2d 328 (1978) (noting that public prosecutors enjoy "absolute privilege" with respect to initiation of criminal prosecutions).

Prosecutorial Immunity

Compare Beason v. Harcleroad, 105 Or App 376, 805 P2d 700 (1991)

Reversed judgment against claims based on prosecutors' issuance of press release because pleadings did not permit determination of whether, given content and timing of prosecutors' statements to media, those statements "ha[d] a sufficient relationship to afford a prosecutor a quasi-judicial immunity."

Quasi-Judicial Immunity

Where a public official or employee performs acts “under a court order or directive,” that person will have “absolute immunity” as long as (1) the order or directive is a permissible exercise of judicial authority, and (2) the acts comply with the order or directive.

Fay v. City of Portland, 311 Or 68, 73, 804 P2d 1155 (1991).

Legislative Immunity

Extends absolute privilege to communications of members of legislative bodies

Noble v. Ternyik, 273 Or 39, 539 P2d 658 (1975)

Shearer v. Lambert, 274 Or 449, 547 P2d 98 (1976)

Adamson v. Bonesteel, 295 Or 815, 671 P2d 693 (1983)



Miscellaneous Immunities

Government References

ORS 30.178(1) An employer who discloses information about a former employee’s job performance to a prospective employer of the former employee upon request of the prospective employer or of the former employee is presumed to be acting in good faith and, unless lack of good faith is shown by a preponderance of the evidence, is immune from civil liability for such disclosure or its consequences.

Miscellaneous Immunities

Government Reports of Child Abuse

ORS 419B.025 Anyone participating in good faith in the making of a report of child abuse and who has reasonable grounds for the making thereof shall have immunity from any liability, civil or criminal, that might otherwise be incurred or imposed with respect to the making or content of such report.

Miscellaneous Immunities

Emergency Activities

ORS 401.178(4), 401.940 (state of emergency and structural collapse activities)

ORS 476.600 Neither the state nor any county, city or fire district or other political subdivision nor any firefighter acting as the agent of any of the foregoing is liable for any injury to person or property resulting from the performance of any duty imposed by the authority of the Emergency Conflagration Act.

Questions?

Ben Miller
Assistant City Attorney, City of Eugene
Ph: 541.682.8447
Email: ben.j.miller@ci.eugene.or.us