



**2016 CLM Annual Conference
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Same-Sex Marriage, Open Carry and Weed

How Changes in the Law Impact Claim Evaluations, Case Value and Defense Strategies

Over the past year or two, through legislation, court decisions and a shift in public sentiment, we have seen significant changes in areas of the law that might have been hard to imagine just a decade or so in the past.

Not only has the use of medical marijuana become a mainstream concept, but several states have effectively decriminalized the use of it, while at least four states have legalized the recreational use of a drug that was, in the not too distant past, used in secret and behind locked (and blocked) doors. Likewise, while homosexuality was also once a status that many kept to themselves, the Supreme Court's recognition of the legality of same-sex marriage dramatically changes the landscape, and has given many gay men and women the courage to declare themselves publicly. Vocal gun advocates across the country have had their voices heard as many states have enacted vastly more liberal gun laws, allowing "open carry" of firearms. When walking down the street with an assault rifle on your back might have once attracted the immediate attention of law enforcement officers, we may find that will become commonplace in some states.

How will these changes in the law impact tort claims, litigation and the insurance industry in general? What should we anticipate as the potential import of these changes to once firmly-established issues? How should claims personnel prepare for potential new theories of liability?

1) Same-Sex Marriage

When the United States Supreme Court decided, in Obergefell v. Hodges, that same-sex marriage is a legal right and that such marriages are valid and must be recognized by all states, they immediately opened up a new class of potential plaintiffs...same-sex spouses in wrongful death matters or consortium plaintiffs in personal injury cases.

In a rather high profile case in Missouri, a State Trooper was killed Christmas Day 2009 in an on-the-job accident. His domestic partner sought the \$28,000 annual pension benefits that would otherwise have been paid to a “surviving spouse”. Ultimately, the state Supreme Court upheld the denial of his benefit claim since they were not a married couple, avoiding debate about the legality of same-sex marriage for that reason. No wrongful death suit was filed by the trooper’s partner (under Missouri law, like most states, the class of plaintiffs would include spouse, children, parents and siblings of the decedent, none of which applied to his domestic partner). If this same accident were to have occurred this past Christmas, the trooper’s spouse, male or female, could bring a wrongful death claim, and would be entitled to the pension benefits.

What other issues do same-sex marriages potentially raise from the standpoint of tort litigation or claims handling? Just as may be necessary in tort claims brought by heterosexual spouses, investigation of “consortium” losses claimed by same-sex partners may still necessitate:

- Questions about intimate relations
- Questions about affairs
- Questions about sexually-transmitted diseases
- Questions about dating practices

We can envision how questions such as those above can be viewed by same-sex plaintiffs or counsel as pandering or nothing more than an insulting attempt to embarrass the plaintiffs by highlighting their homosexuality. Yet, aren’t these areas of inquiry legitimate, if not necessary in such a tort claim for substantial damages?

2) Legalization of Marijuana

In the past year Oregon joined Alaska, Washington and Colorado as states that have legalized the right to “recreational” use of marijuana. What remains a felony in Alabama (personal use, 2nd offense) is perfectly legal in four other states. What is criminal on the north side of the Colorado/Wyoming border is perfectly legal south of that line.

The expectation is that additional states will join the list making recreational use legal, while the list of states that allow medicinal use expands even faster as well.

With the likelihood of expanding use of marijuana in those states allowing its consumption, what are the potential liability issues that face employers, businesses, and individuals?

Personal tort liability

One can easily foresee negligence claims against automobile drivers, pilots, boaters, etc., who are found to have THC in their systems following any type of accident or collision. Issues and defenses might include:

- How is level of the drug in one’s system quantified?
- What subjectively constitutes “under the influence”?
- Is it negligent per se to operate a motor vehicle after having consumed marijuana?
- Can the same level of the drug affect different people in different manners?
- How long after one ceases using it would one expect to be no longer affected by it?
- Blood test vs. Urine test?¹

¹ Trace evidence of marijuana can be detected in urine days after one last consumed it, so for an accurate concurrent assessment of the level of THC in one’s system, a blood test should be performed, since a urine test has no value as a measuring tool. In one case, it was unfortunate for an Oregon news anchor who lost her job after being involved in a fender-bender, when she was forced to give a urine sample, showing trace evidence of marijuana that she states she had smoked several days earlier. See <http://www.nydailynews.com/news/national/tv-anchor-fired-positive-pot-test-weed-activist-article-1.2303226>

Negligent supervision/negligent entrustment.

What are the potential liability risks for commercial carriers, taxi or trucking companies? Would their liability be less if the driver was violating the law (consuming marijuana) – and therefore company policy -- when in an accident under the influence? Especially if his use was unknown to the company? Does their responsibility change if marijuana is now legalized? Must they assess drivers for possible intoxication with marijuana each day before allowing them to drive? How is that different than the use of alcohol?

Dram Shop Laws

Will states enact dram shop-type statutes that apply to stores that sell marijuana? What guidance or advice can you give to such clients?

Issues:

- Consumed on site?
- Purchased for later use?
- How to measure (obvious intoxication)?

Product Liability

In Colorado last year, a class action lawsuit (Flores and Larrabee v. LivWell, Inc.) was filed against a facility that grows and cultivates marijuana, called LivWell, alleging that it used a dangerous fungicide on the plants that, when burned (in the manner one would expect a consumer to use marijuana), generates hydrogen cyanide. The plaintiffs claim failure to warn, breach of contract, breach of warranty, etc.

3) Open Carry of Firearms

With legislation in many states now making it more likely that we will see an increase in the number of guns being carried, the potential for injury or death caused by intentional or accidental shootings is likely to start to rise. Under the discussion scenarios below, who might be at risk for liability?

- Two men are in line at Starbucks waiting to place their orders. One becomes agitated by the length of their wait. He starts cursing and acting out, while the other attempts to calm him down. A fight breaks out and one pulls a gun (legal in the state they are in) and fires at the other, killing a patron behind him. Who is liable for wrongful death?
 - A. Is Starbucks liable for failing to protect the customer?
 - B. Does it matter if they posted a “No Guns” sticker in their window?
 - C. Are both of the men in the altercation liable?
 - D. Is the store which sold the gun liable?
 - E. Is the store liable if they did not do the required background check?

- A proud NRA member, living in a state with liberal “open carry” laws, who is duly licensed and prominently carries his holstered firearm, is denied admission with his gun to a Chuck-E-Cheese, which has a “No Guns Allowed” notice posted. There to pick up his young daughter from a birthday party, he leaves his gun in the car and goes in. Moments later a deranged man walks in with a gun and starts wildly firing. Although only a few feet away, and in a position where he could have easily taken out the shooter, the man has no weapon and has to hide behind a table, only to see his daughter then shot and injured.

- A. Is Chuck-E-Cheese liable for preventing him from exercising his 2nd amendment right to carry, when he could have prevented his daughter's injury?
 - B. Does he have a Constitutional deprivation claim against the establishment? A tort cause of action?

- The police are called because of a report of two men walking down a city street with large weapons prominently appearing over their shoulders. The police drive by, but since it is an "open carry" state, and they see no other immediately suspicious conduct, and they only see them walking on the sidewalk without approaching any business, they do not stop the men. 15 minutes later the men enter a business and start shooting randomly, ultimately killing some patrons and wounding others.
 - A. Do any of the injured patrons or surviving family members have a cause of action against the police, who clearly had knowledge of the two men before they entered the establishment?
 - B. If they had stopped the two men on the street, without having observed any other conduct besides walking with their guns, what rights do the police have? If they detain the men, do they have any cause of action against the police?

- See Colorado Springs shooting incident of October 31, 2015. Before Noah Harpham went on his shooting spree, a local resident called police to report seeing a man carrying a gun (see attached Colorado Springs Police Department Policy related to "Open Carry" issues).

COLORADO SPRINGS POLICE DEPARTMENT COMMUNICATIONS CENTER

Subject: <u>Open Carry</u>	Number: <u>2011-02</u>
Date: <u>3/16/2011</u>	Issued By: <u>Renee Henshaw</u>

Scheduled for Evaluation		Date of Evaluation:	
Training Bulletin	X	SOP(s) affected:	
Operational Update		G.O.(s) affected:	
Effective Immediately:	X	Date Effective:	

The Colorado Constitution generally supports the right to bear arms and there is no law that serves as a blanket prohibition on the open carrying of firearms. However, there are several restrictions on this right:

1. The person must be 18 years of age or older.
2. The person has never been convicted of a felony, or has never been convicted of a misdemeanor domestic violence charge.
3. The person is **not** under the influence of alcohol or any controlled substance.
4. The firearm is not a rifle with a barrel under 16 inches or an overall length under 26 inches; or a shotgun with a barrel under 18 inches and overall length under 26 inches. (e.g. sawed off shotgun)

State law and local ordinances also define where it is unlawful to possess a gun:

1. Any place prohibited by federal law (e.g. federal offices, courthouses)
2. Any public or private elementary, middle, junior high, high, or vocational school or any public or private college, university, or seminary.
3. Any public building that prohibits weapons. (Must be posted)
4. Any private business or residence that prohibits weapons.

The mere act of openly carrying a gun in a non-threatening manner is not automatically to be considered suspicious behavior. Therefore, if we get a call from a citizen about a person who has a firearm in plain sight and they are not acting in a suspicious manner, they have not brandished it, discharged it, or violated any of the previous conditions; CSPD will not respond.