

OPINION NO. 80-093**Syllabus:**

1. The reasonably necessary entry of a boater upon land adjacent to a dam obstructing a navigable watercourse in order to portage his boat around the dam by the nearest practical route and in a reasonable manner constitutes a privileged intrusion on the property of the landowner.
2. The Department of Natural Resources' Division of Watercraft may, with the approval of the Director of Natural Resources and the consent of the owner of a dam on a navigable watercourse, expend funds to remove the dam, and may award contracts to effect such removal.
3. The Department of Natural Resources' Division of Watercraft may, without the consent of the owner of a dam on a navigable watercourse, summarily remove the dam as a public nuisance, and may award contracts to effect such removal.

To: Robert W. Teater, Director, Department of Natural Resources, Columbus, Ohio
By: William J. Brown, Attorney General, December 23, 1980

You have requested my opinion on various issues arising out of the construction, by private parties, of dams which obstruct navigable watercourses. With an eye toward eliminating the dangers to boaters created by such dams, you inquire as follows:

1. Whether the entry of a boater upon the adjacent land in order to portage his boat around such a dam by the nearest practical route constitutes a lawful intrusion on the property of the adjacent landowner.
2. Whether the Department of Natural Resources' Division of Watercraft may, with the consent of the owners of such dams, expend funds under R.C. 1547.72 for the removal of such dams, and whether the Department may award contracts to effect such removal.
3. Whether the Department of Natural Resources' Division of Watercraft may, without the consent of the owners of such dams, expend funds under R.C. 1547.72, for the removal of such dams, and whether the Department may award contracts to effect such removal.

Your first question concerns the entry of a boater upon privately-owned land adjacent to a dam obstructing a navigable watercourse in order to portage his boat around the dam. The underlying issue of this question is whether such portage may constitute a trespass for which a civil and/or criminal action may lie against the boater. Within the hypothetical context of your question, and for the reasons set forth below, it is my conclusion that a boater confronted with a dam obstructing a navigable watercourse is privileged to enter privately-owned land to portage his boat around the dam so long as he takes the nearest practical route and, while upon such land, conducts himself in a reasonable manner so as to avoid actual injury to the land upon which he travels.

Addressing first the potential civil liability of the boater for the acts you describe, it is necessary to discuss what constitutes a trespass, and what defenses are available thereto. It has been said in Ohio that "[a] trespasser on land is one, who having no title to or right. . . makes entry thereon without consent, permission or license." Jones v. Keck, 79 Ohio App. 549, 552-53, 74 N.E.2d 644, 646 (Muskingum County 1946). Since the common law presumes nominal damages in every unlawful entry upon land so as to enable a plaintiff to state a cause of action, Pearl v. Pic Walsh Freight Co., 112 Ohio App. 11, 168 N.E.2d 571 (Hamilton County 1960), a boater named as a defendant to a charge of unlawful entry upon privately-owned land would need to show a right, or privilege, to engage in conduct which would otherwise constitute tortious trespass. It is my conclusion that such a privilege exists for entry on land for portage due to the necessity which dictates the otherwise tortious conduct.

Ohio law recognizes the proposition that navigable watercourses are public highways. Hickok v. Hine, 23 Ohio St. 523 (1872). A navigable watercourse is one which is navigable in fact. Mentor Harbor Yachting Club v. Mentor Lagoons, Inc., 170 Ohio St. 193, 163 N.E.2d 373 (1959). As was said in State ex rel. Brown v. Newport Concrete Co., 44 Ohio App. 2d 121, 336 N.E.2d 453 (Hamilton County 1975):

[A] division of watercourses into navigable and nonnavigable is merely a method of dividing them into public and private, which is a more natural classification. A naturally navigable watercourse is navigable in law and is a public watercourse.

Id. at 123, 336 N.E.2d at 455. See East Bay Sporting Club v. Miller, 118 Ohio St. 360, 161 N.E. 12 (1928); cf. United States v. Appalachian Electric Power Co., 311 U.S. 377 (1940). It matters not that a riparian owner is shown to own the subaqueous soil, for "if such stream is determined to be a 'navigable' stream, such title and ownership is subject to the use the public may make for the purpose of navigation." State ex rel. Brown v. Newport Concrete Co., 44 Ohio App. 2d at 124, 336 N.E.2d at 455; see Walker v. Bd. of Public Works, 16 Ohio 540 (1847); Lamb v. Rickets, 11 Ohio 311 (1842); Adm'rs of Gavit v. Chambers, 3 Ohio 496 (1828). Further, and of particular significance to your question, the definition of navigability includes the

availability of the watercourse for boating and recreation. Coleman v. Schaeffer, 163 Ohio St. 202, 126 N.E.2d 444 (1955). Therefore, the appearance of a boater upon a watercourse, coupled with his factual ability to navigate his boat thereon, would appear to compel the conclusion that the watercourse he navigates is, in law, a navigable watercourse.

The common law with respect to public highways (which, by the foregoing, include navigable watercourses) recognizes that a traveler has a limited right to deviate from a highway to avoid dangerous conditions. The Ohio Supreme Court has held that necessity may justify intrusion upon private land if a public highway is out of repair, or is hazardous. Fulton v. Monahan, 4 Ohio 427 (1831). This right, styled as a privilege, is also recognized by the Restatement (Second) of Torts §195 (1965):

(1) A traveler on a public highway who reasonably believes that such highway is impassable, is privileged, when he reasonably believes it to be necessary in order to continue his journey, to enter, to a reasonable extent and in a reasonable manner, upon neighboring land in the possession of another. . . .

Once upon the privately-owned land the boater must, of course, conduct himself in a reasonable manner so as to avoid actual injury to the interests of the legal possessor of the property. As was said in Radcliffe v. Kostanden: "A party is not answerable in damages for the reasonable exercise of a right. A liability arises only where it is shown that the right was exercised negligently, unskillfully or maliciously." 79 Ohio L. Abs. 220, 222, 154 N.E.2d 671, 673 (C.P. Madison County 1958). Therefore, although a boater is privileged to enter privately-owned land to portage his boat around a dam obstructing a navigable watercourse, the privilege is limited by his duty, while on such land, to avoid injury arising from his negligent, careless, or willful conduct.

The foregoing principles, applicable to the civil liability of a boater portaging his boat upon private land, apply with equal force to the boater's criminal liability for the same conduct. The crime of trespass is defined in Ohio by R.C. 2911.21, which states, in pertinent part: "(A) No person, without privilege to do so, shall. . . (1) Knowingly enter or remain on the land or premises of another. . ." (emphasis added). The statutory definition of privilege includes any "immunity, license, or right conferred by law. . . or growing out of necessity." R.C. 2901.01(L). As discussed earlier, a factual necessity to portage a boat over private land to avoid a dam obstructing a navigable watercourse confers, by law, a privilege upon the boater for the conduct. Assuming, therefore, that the boater does not remain upon the land for other purposes, his necessity for being there would clothe him with an immunity against a prosecution for criminal trespass.

Therefore, in specific answer to your first question, and as discussed above, it is my opinion that the reasonably necessary entry of a boater upon land adjacent to a dam obstructing a navigable watercourse in order to portage his boat around the dam by the nearest practical route constitutes a privileged intrusion on the property of the landowner.

Your second question concerns the authority of the Department of Natural Resources' Division of Watercraft to expend funds, under the provisions of R.C. 1547.72, for the removal of a dam obstructing a navigable watercourse where such removal is approved by the owner of the dam. It is my conclusion that the General Assembly clearly expressed its intent, as evidenced by the wording of R.C. 1547.72, that the Division of Watercraft be permitted to expend funds for such purposes.

R.C. 1547.72 provides, in pertinent part: "The division of watercraft, with the consent and approval of the director of natural resources, may expend [funds]. . . for the improvement of harbors, channels, and waterways to foster watercraft safety. . . ." In construing this statute relative to the application about which you inquire, I am guided by the rule that "the words of a statute must

be given their common, ordinary and accepted meaning in the connection in which they are used. . . ." Kocsorak v. Cleveland Trust Co., 151 Ohio St. 212, 216, 85 N.E.2d 96, 98 (1949). See also R.C. 1.42. R.C. 1547.72 states that moneys may be expended for improvements of waterways which foster watercraft safety. "Improvement" involves making something better in quality or condition. Webster's New World Dictionary 707 (2d college ed. 1972). Dams obstructing navigable watercourses are a hazard to boaters; indeed, the General Assembly has declared obstructions to navigable watercourses to be nuisances. R.C. 3767.13. Removal of a dam obstructing a navigable watercourse is an improvement of the condition of the watercourse which fosters watercraft safety. Therefore, in my opinion, the Division of Watercraft, with the approval of the Director of Natural Resources and the consent of the owner of the dam, may expend funds to remove dams obstructing navigable watercourses. Similarly, by virtue of R.C. 1501.011, the Department may award contracts to private parties to effect this removal. This section provides: "The department of natural resources has the following powers in addition to its other powers: . . .to enter into contracts for, and to supervise the . . .repair, or maintenance of any projects, improvements, or buildings, on lands and waters under the control of the department. . . ."

Your third question concerns the authority of the Division of Watercraft, under R.C. 1547.72, to expend moneys for the removal of dams obstructing navigable watercourses without the approval of the owners of such dams. You also inquire by this question whether the Division of Watercraft, again without the approval of the owners, may award contracts to effect such removal.

As discussed in my response to your first question, navigable watercourses are held in Ohio to be public highways. With regard to property found on a public road, the common law stated that where such "property works an annoyance, hindrance or inconvenience to travelers, it becomes a public nuisance, and may be abated or removed by anyone who wants to use the road in a lawful way." Phifer v. Cox, 21 Ohio St. 248, 256 (1871). This declaration of nuisance is codified and, in fact, specifically applied to obstructions of navigable watercourses by R.C. 3767.13, which states that "[n]o person shall unlawfully obstruct or impede the passage of a navigable river. . .to the injury or prejudice of others."

Although R.C. 3767.13 does not expressly authorize summary abatement of public nuisances by government officials, the Ohio Supreme Court has held that such summary abatement is within the inherent police power of the state even in the absence of specific statutory authorization. Solly v. Toledo, 7 Ohio St. 2d 16, 218 N.E.2d 463 (1966) (quoting with approval 39 Am. Jur. 454, §183). It must be noted, however, that:

[a]nyone who destroys or injures private property in abating what legislative or administrative officials have determined to be a public nuisance does so at his peril, where there has been neither a previous judicial determination that such supposed nuisance is a public nuisance nor even an opportunity provided to the owner for an administrative hearing (with a judicial review thereof) on the question as to whether there is a public nuisance.

Solly v. Toledo, supra, paragraph three of the syllabus.

Despite the caveat of Solly v. Toledo, however, it is my opinion that the Division of Watercraft may, in the exercise of its spending powers under R.C. 1547.72, summarily remove a dam obstructing a navigable watercourse. As discussed above, obstructions of public highways in general, and navigable watercourses in particular, have been held in Ohio by case law and statute to be public nuisances. A suitor against the Division of Watercraft would need to show that, in fact, the dam alleged to have been wrongfully removed was not an obstruction of the watercourse. Cf. Solly v. Toledo, 9 Ohio St. 2d at 19-20, 218 N.E.2d at 466. Since dams are, by definition, obstructions of watercourses, a suit of this nature would fail upon a showing by the Division of the fact of the dam's obstruction of the watercourse. Therefore, it is my opinion that where the Division

of Watercraft finds a dam obstructing a navigable watercourse, it may expend funds for its removal. Further, and consistent with my answer to your second question, the Department of Natural Resources may, by virtue of R.C. 1501.011, award contracts to private parties to effect such removal.

In summary, it is my opinion, and you are so advised, that:

1. The reasonably necessary entry of a boater upon land adjacent to a dam obstructing a navigable watercourse in order to portage his boat around the dam by the nearest practical route and in a reasonable manner constitutes a privileged intrusion on the property of the landowner.
2. The Department of Natural Resources' Division of Watercraft may, with the approval of the Director of Natural Resources and the consent of the owner of a dam on a navigable watercourse, expend funds to remove the dam, and may award contracts to effect such removal.
3. The Department of Natural Resources Division of Watercraft may, without the consent of the owner of a dam on a navigable watercourse, summarily remove the dam as a public nuisance, and may award contracts to effect such removal.