

# OREGON LAW UPDATE

## Plaintiff Comparatively Negligent? Violate a Statute? Noneconomic Damages Cap of \$500,000 May Apply

case in point...

**From the desk of Jeff Eberhard:** In 1987, the Oregon legislature adopted a \$500,000 noneconomic damages cap for a plaintiff's recovery for intangible damages, such as pain and suffering. Initially, Oregon courts determined that the application of the \$500,000 noneconomic damages cap to personal injury cases violated the Remedies Clause of the Oregon Constitution. As a result, many believe that as to personal injury claims the cap is dead. However, a new line of cases provides a glimmer of hope for its application.

**Claims Pointer:** As applied to negligent plaintiffs or plaintiffs that violate a statute, the noneconomic damages cap may be constitutional on the grounds that recovery would have been barred at common law. This may open the door for defendants to argue the cap applies to a wide range of cases.

Since its inception in 1987, plaintiffs have argued that the \$500,000 noneconomic damages cap violates the Remedies Clause of the Oregon Constitution. Oregon courts fashioned the following test in order to determine, on a case by case basis, whether the cap violated the Remedies Clause: (1) in 1857, would the plaintiff have a cause of action, and if the answer is yes, (2) is the remedy currently offered substantial? Case law has consistently held that when a plaintiff did not have a cause of action in 1857, the application of the cap did not violate the Remedies Clause.

One of the first cases of impact was Greist v. Phillips, 322 Or. 281 (1995), where the Oregon Supreme Court held that, in an action for wrongful death, the application of the \$500,000 cap did not violate the Remedies Clause. In coming to this conclusion, the Court explained that traditionally, the limits on recovery in wrongful death actions were low and that the highest previous recovery was \$25,000. Moreover, there was no cap on economic damages. In light of these factors, the application of the cap gave the plaintiff a substantial remedy.

The Griest Court also addressed the plaintiff's claim that the application of the cap violated the plaintiff's right to a trial by jury. The Court held that since the cause of action for wrongful death was not recognized in 1857, the legislature was free to impose limits on a plaintiff's recovery of damages. As such, the application of the \$500,000 noneconomic damages cap did not violate the Oregon Constitution's right to trial by jury.

The Oregon Supreme Court next considered whether a plaintiff who did not follow the law could have recovered at common law in Lawson v. Hoke, 339 Or. 253 (2005). There, the plaintiff was

injured in a car accident. The defendant raised the defense that the plaintiff did not have car insurance at the time of the accident, and was barred from recovering noneconomic damages by a statute denying recovery in such a situation. (O.R.S. § 471.565 adopted in 2001). The Oregon Supreme Court held that in this situation, the noneconomic damages cap did not violate the Remedies Clause of the Oregon Constitution. In order to show that the right to bring an action could be limited at common law, the Court noted that negligent plaintiffs were barred from recovery. Following the same logic, the Court explained that in 1857, courts did not recognize recovery for plaintiffs who were injured while violating a statute. As such, the application of the \$500,000 noneconomic damages cap was constitutional.

In 2006, the court in Hughes v. PeaceHealth, 204 Or. App. 614 (2006), reaffirmed Griest's logic in a wrongful death claim against a hospital. The Oregon Court of Appeals explained that it was bound by Griest's holding that the application of the noneconomic damages cap in wrongful death cases did not violate the Remedies clause. The Hughes Court followed suit, holding that the application of the noneconomic damages cap to wrongful death claims did not violate the Remedies Clause.

In 2007, the Oregon Supreme Court continued to recognize that a plaintiff who did not have a cause of action at common law could not argue that the \$500,000 cap violated the Remedies Clause. In Clarke v. OHSU, 175 P.3d 418 (2007), the Court recognized that at common law, a plaintiff would not have had a claim against a government entity. As such, the application of the cap to such recovery did not violate the Remedies Clause.



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More recently the court revisited the issue in Howell v. Boyle, 353 Or. 359 (March 13, 2013), a personal injury claim in which a police car ran over a woman who darted into the street in the middle of the night. The Oregon Supreme Court held that the application of the \$200,000 tort cap for claims against public bodies was constitutional because in 1857, Oregon law would not have recognized a remedy for a contributorily negligent plaintiff. The Court explained that, since at common law the plaintiff would have recovered nothing, allowing her to recover \$200,000 offered her a substantial remedy. Thus, Howell represents yet another Oregon Supreme Court case allowing the application of either the Oregon Tort Claims Act Cap or the \$500,000 noneconomic damages cap in cases where a plaintiff was contributorily negligent and would have been barred from recovery at common law. (The claim limit has since been substantially increased based on the type of governmental body involved).

Most recently, the court addressed the issue of a contributorily negligent plaintiff in Schutz v. La Costita, III, 256 Or. App. 573 (May 15, 2013), where the plaintiff collided with another vehicle while intoxicated. The plaintiff sued the bar, alleging that the bar was negligent in allowing her to drive when she was visibly intoxicated. The Oregon Court of Appeals held that the statute preventing claims by patrons against the bars did not violate the Remedies Clause because in 1857, a plaintiff who operated a vehicle under the influence would have been unable to recover because of his or her own contributory negligence.

As determined in Clark v. OHSU, and last week's featured case, Howell v. Boyle, the reasoning for upholding the OTCA cap, which applies to public bodies, can be analogized to uphold the application of the noneconomic damages cap which applies in all actions against private parties.

Plaintiffs who were negligent at common law were barred from recovering for their personal injuries. Consequently, when applied to negligent plaintiffs, the \$500,000 noneconomic damages cap is likely constitutional. The same analysis applies if the plaintiff violated a statute. In short, these cases breathe new life into the 1987 tort cap limit.



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