

OREGON LAW UPDATE

When Plaintiff's Can't Cry Constitutional Foul (Even If They Want To)

case in point...

From the desk of Jeff Eberhard: When public bodies are sued, the Oregon Tort Claims Act states that the amount that can be recovered is limited. Plaintiffs often argue that the cap violates the Remedies Clause of the Oregon Constitution. Courts have not created a formulaic approach to determining the constitutionality of the cap. Rather, each case is evaluated on a case by case basis to determine if the remedy that remains after the imposition of a recovery cap is "substantial." A recent Oregon Supreme Court case demonstrates the extent to which it is permissible for a recovery cap to limit the damages that would have otherwise been awarded to the plaintiff in the absence of a recovery cap.

Claims Pointer: A plaintiff's limited recovery of less than half of the amount of recovery that the plaintiff would have otherwise recovered in the absence of the cap under the OTCA was constitutional. According to the Oregon Supreme Court, less than half of the pie can still constitute a "substantial" remedy.

Howell v. Boyle, 353 Or. 359, 298 P.3d 1 (2013).

The defendant, Boyle, a City of Beaverton police officer, drove his vehicle along the Tualatin Highway and struck the plaintiff as she attempted to cross the highway at an unmarked crosswalk. As a result, the plaintiff suffered serious injuries. The plaintiff brought an action in the U.S. District Court for the District of Oregon naming Boyle, and his employer, the City of Beaverton. The plaintiff alleged \$4,779,529.25 in economic damages and up to \$1 million in noneconomic damages.

The defendants argued that the plaintiff was comparatively negligent because she darted across the highway at night while wearing dark clothes, and that the Oregon Tort Claims Act ("OTCA") applied to limit the plaintiff's remedy to \$200,000, which was the maximum damage cap at the time of the accident in 2007. The defendants further moved to dismiss Boyle from the action; however the court agreed with the plaintiff that to do so would violate the plaintiff's right to a constitutional remedy under Article 1, section 10 of the Oregon Constitution.

The jury returned a verdict in which it determined that the plaintiff and defendant Boyle were each fifty percent at fault. The jury also found that the plaintiff suffered \$765,000 in economic damages and \$250,000 in noneconomic damages. However, because the jury found the plaintiff to be fifty percent at fault, the court reduced the damages by half. The defendants then moved to have the award reduced to \$200,000 pursuant to the OTCA, but the trial court held that amount was an emasculated remedy and denied the motion. The defendants appealed to the United States Court of Appeals for the Ninth Circuit, arguing that the trial court erred in denying their motion to reduce the damages.

In the Ninth Circuit, the defendants argued that \$200,000 was an adequate remedy. The Ninth Circuit certified the question of whether \$200,000 was an unconstitutionally emasculated remedy despite the jury's finding of comparative negligence, by submitting the question to the Oregon Supreme Court.

The Oregon Supreme Court held that \$200,000 was a constitutionally adequate remedy. In doing so, it noted that the constitutional adequacy of a modern remedy may be established by the fact that the modern remedy is "substantial," and does not leave the plaintiff "wholly without remedy." The Court explained that, at common law the City of Beaverton would have had immunity from suit because the alleged negligent act was the result of a "government function." Thus, the plaintiff would not have been able to sue the city at common law. In exchange for allowing plaintiffs to reach the "deep pockets of the ultimate payor," the legislature permissibly imposed a cap on the total amount of damages that a plaintiff could recover. The Court further explained that but for the damages cap, the plaintiff would have recovered a total of \$507,500 in damages and, though it is impossible to take a formulaic approach to determining the constitutionality of a remedy, the \$200,000 recoverable in this case left the plaintiff with an adequate remedy.

The Court also explicitly rejected the notion, espoused by the plaintiff and the dissent, that the plaintiff, at common law had a right to be made whole.



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