

OREGON LAW UPDATE

Tort Cap May Apply if a Person is Negligent

case in point...

From the desk of Jeff Eberhard: Many years ago, the legislature passed the Oregon Tort Claims Act (OTCA) to limit a plaintiff's recovery to \$200,000 per occurrence, when suing a public body (the amount since then has changed). Like all things in the law, the application of the cap is not cut and dry. Over the years, the Oregon Supreme Court has interpreted the OTCA cap so that it does not always apply. Read on to see how the Court applied the cap when the plaintiff was negligent.

Claims Pointer: If a plaintiff is partially at fault for their injury or harm, the OTCA cap is likely enforceable. If the plaintiff is without fault, the OTCA cap is enforceable so long as it provides a "substantial" remedy (See Part I of the case update). As such, plaintiffs who are injured due to their own negligence may not cry constitutional foul when a tort cap limits their recovery.

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

In Part I of this case update, we examined the Court's analysis of whether, in light of the damages awarded by the jury, \$200,000 was a constitutionally adequate remedy. This week, we address the argument that because contributorily negligent plaintiffs would not have been able to recover anything at common law, a damages cap that allows any recovery is constitutionally sufficient.

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 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. They also argued that the Oregon Tort Claims Act ("OTCA") applied and would limit the plaintiff's remedy to \$200,000, which was the maximum damages cap at the time of the accident in 2007.

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. Thus, the award was for \$507,500. The defendants then moved to have

the award reduced to \$200,000 pursuant to the OTCA. The trial court held that amount was insufficient and denied the motion.

The defendants appealed to the United States Court of Appeals for the Ninth Circuit. In the Ninth Circuit, the defendants argued that \$200,000 was an adequate remedy. The Ninth Circuit, as allowed by court rules, submitted the question of whether the remedy was adequate to the Oregon Supreme Court.

The Oregon Supreme Court held that \$200,000 was a constitutionally adequate remedy. In addressing whether the remedy was constitutionally adequate, the Court noted that the applicable test is whether in 1857, the law would have recognized a remedy for a contributorily negligent plaintiff. The Court explained that the prevailing law in 1857 required the plaintiff to prove that (1) his or her injuries were caused by the defendant's negligence and (2) that the plaintiff's own negligence did not contribute to his or her injuries. The Court also noted that assuming that the plaintiff was entitled to be made whole, an argument which the Court explicitly rejected, the plaintiff was found to be fifty-percent at fault, and at common law would have been entitled to recover nothing. In light of the plaintiff's contributory negligence, the Court failed to see how allowing the plaintiff to recover \$200,000, as opposed to nothing, was not offering her a substantial remedy.

Our next case update will address how this case, as well as other cases, affects the application of the \$500,000 noneconomic damages cap, which applies in all personal injury claims that are brought against defendants who are not public bodies.



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