

# OREGON CASE UPDATE

## Oregon Court of Appeals Takes a Swipe at the Statutory Cap on Non-Economic Damages

case in point...

**From the desk of Jeff Eberhard:** In 1987, the Oregon legislature enacted a limit of \$500,000 for noneconomic damages. In a number of court decisions over a 15-year time period, the Oregon Supreme Court held that this limitation violated the Oregon Constitution. Then, in May 2016, in *Horton v. OHSU* the Oregon Supreme Court held that two “linchpin” cases were decided incorrectly, and breathed new life into Oregon’s \$500,000 limit on noneconomic damages. In the following case, the Oregon Court of Appeals finds that in certain situations the damages cap is unconstitutional under the remedies clause in Article I, Section 10. Read on for a discussion on the Court’s analysis and to learn how courts evaluate whether legislation violates the remedy clause.

**Claims Pointer:** In 2016, the Oregon Court of Appeals held that the \$500,000 noneconomic damages cap in ORS 31.710(1) violates a plaintiff’s right to a jury trial under Article I, section 17 of the Oregon Constitution. In support of its decision, the court relied extensively on *Lakin v. Senco Products, Inc.*, a case decided by the Oregon Supreme Court in 1999. Interestingly, just one day after the Court of Appeals issued its decision, the Oregon Supreme Court in *Horton v. OHSU* overruled *Lakin*. In their opinion the Oregon Supreme Court in *Horton* eliminated any argument that the cap violated Article I, Section 17.

On reconsideration, the Oregon Court of Appeals held that the noneconomic damages cap in ORS 31.710(1) violates the remedy clause of Article I, section 10. The court explained that the noneconomic damages cap in ORS 31.710(1) does not violate the remedy clause in all cases. Instead, where the noneconomic damages cap leaves plaintiffs with a “paltry fraction” of the original noneconomic damage award, the reduction will be found to leave plaintiffs with an unconstitutionally insubstantial remedy. The court found that reducing an award of economic and non-economics that total \$6,199,090 to \$1,839,090 if the cap was applied was an unconstitutionally insubstantial remedy.

Vasquez v. Double Press Mfg., Inc., 288 Or App (2017).

One of the job duties of Zaferino Vasquez (“Plaintiff”) was to operate and clean hay out of a bale cutting machine. One day, while cleaning the machine, he forgot to first turn off and lock-out the machine. While he was removing jammed material, Plaintiff was crushed by a “pinch point” created by the hydraulic ram in the machine. The incident rendered Plaintiff paraplegic. Plaintiff filed suit against the manufacturer and seller of the equipment (“Defendant”).

The jury returned a verdict in favor of Plaintiff for \$2,231,817 in economic damages, \$8,100,000 in noneconomic damages, and found that Plaintiff was 40 percent at

fault. Defendant asked the court to reduce noneconomic damages to \$500,000 based on ORS 37.710(1). The trial court denied Defendant’s request and entered a judgment for the amount the jury found the Defendant at fault: \$1,339,090 in economic damages and \$4,860,000 in non-economic damages. Defendant appealed.

On May 4, 2016, the Oregon Court of Appeals issued its original opinion. The court held that pursuant to *Lakin*, the noneconomic damages cap in ORS 31.710(1) violated the right to a jury trial under Article I, Section 17. A day after the decision came down, the Oregon Supreme Court issued its opinion in *Horton v. OHSU*, and overruled *Lakin*. [See our prior Case Updates on *Horton v. OHSU* here: [part 1](#) and [part 2](#).] In addition, in *Horton* the court overruled

Contact: Jeff Eberhard | [www.smithfreed.com](http://www.smithfreed.com) | email: [jeberhard@smithfreed.com](mailto:jeberhard@smithfreed.com)

Ph: 503.227.2424 | Fax: 503.227.2535 | 111 SW 5th Ave, Suite 4300 | Portland | OR | 97204

This article is to inform our clients and others about legal matters of current interest. It is not intended as legal advice. Readers should not act upon the information contained in this email without seeking professional counsel.



# OREGON CASE UPDATE

## Oregon Court of Appeals Takes a Swipe at the Statutory Cap on Non-Economic Damages

case in point...

*Smothers v. Gresham Transfer* (2001) which found the \$500,000 tort cap violated Article I, section 10 of the Oregon constitution.

Because the Court of Appeal relied on *Lakin*, and *Lakin* was overruled by the Oregon Supreme Court, Defendant asked for reconsideration. The court granted reconsideration. The *Horton* court held that Section 17 provided for a procedural right to a jury trial-but did not impose a substantive limit on the legislature's authority to define the limits of a claim or the extent of damages available. As a result, on reconsideration the court requested briefing on whether the noneconomic damages cap violated the remedy clause of Article I, section 10. This section provides that "...every man shall have remedy by due course of law for injury done to his person, property, or reputation."

The court first considered the legislature's reason for enacting ORS 31.710(1); because, under *Horton*, the reason for enacting the statute is important when considering the impact of Article I, section 10. The court found that while the legislature enacted ORS 31.710(1) as part of a larger effort to reform tort law, the "cap itself was labeled as a stand-alone provision within this bill." The "general effort" included amendments to existing statutes and additional ORS chapters relating to various aspects of tort law and liability insurance. Ultimately, the court stated the legislature added ORS 31.710(1) to "stabilize insurance premiums and to decrease costs associated with tort litigation."

Once the court categorized the cap as a "stand alone provision", the court explained that when analyzing legislation under the remedy clause, there are three categories of legislation. The first category is legislation that does not alter a duty, but denies or limits the person remedies. If the legislation completely denies a remedy for a recognized duty, it will be facially invalid. Alternatively, if the legislation limits a person's remedy and by doing so, leaves him with a

"paltry fraction" of his damages, courts will find that the legislation is an unconstitutionally insubstantial remedy. The second category of legislation is quid quo pro, which is when the legislature adjusts a person's remedies as part of an overall scheme; extending benefits to some while limiting benefits to others. In the second category, courts consider whether the reduced benefit is substantial compared to the overall statutory scheme. The third category of legislation is where the court either modified or limited the cause of action when the premises underlying the duties and causes of actions have changed. In that category, courts look to see whether modified cause of action continues to protect the "core interest" of people, property and reputation, or whether, in light of changed conditions, such interests no longer require the protections previously afforded to them. (As discussed in the 53-page concurrence opinion in *Horton*, these tests are vague and difficult to apply because they do no "offer any real doctrinal clarity." *Horton* at 283.)

Defendant argued that the legislation fell within the second category, the quid quo pro legislation. Defendant argued that while there was a limitation on noneconomic damages, insurance was more affordable, and thus, more Oregonians could recover when injured. The court disagreed, explaining that a quid quo pro occurs when both sides obtain a real benefit conferred in the statute itself. The court reasoned that the benefit of affordable insurance giving plaintiffs a higher chance of recovery might be a "hoped-for consequence of the damages cap, but it is not a quid quo pro that is conferred by the statute itself." Accordingly, the court decided that ORS 31.710(1) fell into the first category. Of note, as discussed above, the court "boxed out" the cap from the larger tort reform bill by stating it was a "stand alone provision"--thus the court did not address whether there was a quid quo in the larger statutory scheme.

The court then discussed whether ORS

Contact: Jeff Eberhard | [www.smithfreed.com](http://www.smithfreed.com) | email: [jeberhard@smithfreed.com](mailto:jeberhard@smithfreed.com)

Ph: 503.227.2424 | Fax: 503.227.2535 | 111 SW 5th Ave, Suite 4300 | Portland | OR | 97204

This article is to inform our clients and others about legal matters of current interest. It is not intended as legal advice. Readers should not act upon the information contained in this email without seeking professional counsel.



# OREGON CASE UPDATE

## Oregon Court of Appeals Takes a Swipe at the Statutory Cap on Non-Economic Damages

case in point...

31.710(1) was facially unconstitutional. The court explained that legislation in the first category is facially invalid only if it completely denies a remedy for the breach of the recognized duty. Here, Plaintiff was not facing a complete denial, as he could recover unlimited economic damages and up to \$500,000 in noneconomic damages. As such, the court held that ORS 31.710(1) was not facially unconstitutional.

The court then considered whether the remedy was substantial. Plaintiff argued that the cap left him with an unconstitutionally insubstantial remedy, because he would receive only 10 percent of his original noneconomic damages award, which was allegedly a “paltry fraction” of his damages. Defendant argued that the remedy was substantial. Defendant argued that Plaintiff would recover \$1,839,090, which would be 30 percent of his total damages, even with the noneconomic damages cap, and that was in line with cases upheld by the Oregon Supreme Court:

- *Horton*: \$3 million damages cap is a substantial remedy compared to a \$12,000,000 jury award. 359 Or at 224.
- *Howell v. Boyle*: damages cap of \$200,000 is a substantial remedy compared to a \$500,000 jury award. 353 Or 359 (2013).
- *Griest v. Phillips*: \$500,000 noneconomic damages cap is a substantial remedy compared to a jury’s award of \$100,000 in economic damages and \$1.5 million in noneconomic damages. 322 Or 281 (1995).
- *Hale v. Port of Portland*: \$100,000 damages cap is a substantial remedy in relation to over \$600,000 in plaintiff’s medical bills. 308 Or at 508 (1989).

The court refused to consider whether the damages cap in the case at hand was in line with the damages caps in *Horton*, *Howell*,

and *Hale*. The court differentiated itself from those decisions, because the three cases were centered on quid pro quo legislation and constitutional implications of the government’s waiver of sovereign immunity in the Oregon Tort Claims Act. Here, there was no public body and no waiver. The court also differentiated itself from *Griest v. Phillips*, an action for wrongful death, which will be addressed in a separate case update.

With this in mind, the court considered the “extent to which the legislature has departed from the common law . . . [compared] to the legislature’s reason for departing from the common law.” The court noted that the remedy does not need to restore all damages that the plaintiff sustained. However, a remedy that is only a “paltry fraction” of the damages the Plaintiff sustained is unlikely to be sufficient. The court noted that under case law, plaintiff would have been entitled to recover all his noneconomic damages, not subject to a cap. As such, the legislature “departed fairly dramatically from that model” by placing a hard cap on the noneconomic damages, with no mechanism to adjust for inflation or relative severity of the injuries. The court found that the legislature’s reason for the cap was to “put a lid on litigation costs,” which would help control rising insurance premium costs for Oregonians.

The court concluded that the reason for enacting the cap, could not compare against the “weight of the dramatic reduction in noneconomic damages” for the most grievously injured plaintiffs. Here, Plaintiff was severely injured and left permanently paraplegic. Plaintiff was awarded a total of \$6,199,090. If the cap were to apply, Plaintiff would receive a total of \$1,839,090 out of the \$6,199,090 he was awarded by the jury. The court said that this was a “paltry fraction” and declined to follow other cases because this would result in a “bare reduction” of non-economic damages without a quid pro quo or constitutional principle

Contact: Jeff Eberhard | [www.smithfreed.com](http://www.smithfreed.com) | email: [jeberhard@smithfreed.com](mailto:jeberhard@smithfreed.com)

Ph: 503.227.2424 | Fax: 503.227.2535 | 111 SW 5th Ave, Suite 4300 | Portland | OR | 97204

This article is to inform our clients and others about legal matters of current interest. It is not intended as legal advice. Readers should not act upon the information contained in this email without seeking professional counsel.



# OREGON CASE UPDATE

## Oregon Court of Appeals Takes a Swipe at the Statutory Cap on Non-Economic Damages

case in point...

identified. In light of such reduction, compared to Plaintiff's injuries, the Oregon Court of Appeals concluded that ORS 31.710(1) left Plaintiff with an unconstitutionally insubstantial remedy.

According to the court, the noneconomic damages cap is only unconstitutional if the remedy provided is not "substantial." Thus, it follows that in cases where the remedy is substantial, the cap in ORS 31.710(1) will apply to limit plaintiff's noneconomic damages to \$500,000. The court explained that whether a remedy is "substantial" is a question that we can answer only "on a case-by-case basis." The court did not provide any guide posts, and refused to discuss whether the remedies in *Horton*, *Howell*, and *Hale* were substantial, because those cases were centered on the Oregon Tort Claims Act.

View full opinion at: <http://www.publications.ojd.state.or.us/docs/A154774A.pdf>

*Case updates are intended to inform our clients and others about legal matters of current interest. They are not intended as legal advice. Readers should not act upon the information contained in this article without seeking professional counsel.*



Contact: Jeff Eberhard | [www.smithfreed.com](http://www.smithfreed.com) | email: [jeberhard@smithfreed.com](mailto:jeberhard@smithfreed.com)

Ph: 503.227.2424 | Fax: 503.227.2535 | 111 SW 5th Ave, Suite 4300 | Portland | OR | 97204

This article is to inform our clients and others about legal matters of current interest. It is not intended as legal advice. Readers should not act upon the information contained in this email without seeking professional counsel.