

# Adding “Vulnerable Victim” to the Physical Injury Statute

ORS 161.015

# Physical Injury – the current law

- ORS 161.015 (7) – impairment of physical condition or substantial pain

# Physical Injury – the current law

- Substantial pain – “the degree and duration of pain suffered by the victim and that, to be ‘substantial’ the pain must be ‘ample’ or ‘considerable’” State v. Rennells
- Impairment of Physical Condition – harm to the body that results in a reduction in one’s ability to use the body or a bodily organ for less than a protracted period of time. State v. Higgins, 165 Or App 442 (2000)

# Physical Injury Case Law

# State v. Anderson, 221 Or App 193 (2008)

- The defendant was arguing with his girlfriend while his two-year-old son was sitting inside the car. The defendant punched the car window and shattered the glass. Pieces of glass struck the child. When officers arrived the child had some dried blood on his arm and a small cut as well as a puncture mark on his foot.
- The defendant was convicted of Assault 4. The Court of Appeals reversed and held the child did not suffer physical injury because the cuts did not impair his physical condition and despite the child saying “owie” when he pointed to the cuts, there was no evidence to suggest the child suffered substantial pain.

# State v. Rennells, 253 Or App 580 (2012)

- Police respond to 911 call reporting screams coming from the victim's apartment. Defendant was under a no contact order towards the victim at the time. The defendant kicked the victim multiple times leaving bruises on the victim's legs that lasted several days. At trial, the victim was uncooperative and testified that it didn't hurt when the defendant kicked her. The defendant was convicted of Assault 4.
- The Court of Appeals reversed and held that, "although the evidence—a bruise lasting several days—may be sufficient to infer that the victim suffered some pain as a consequence of the kicking incident, it is not sufficient to infer that she suffered substantial pain."

# State v. Wright, 253 Or App 401 (2012)

- The defendant spanked a sixteen-month-old child leaving a black and purple bruise that covered the child's entire left buttock. The child was seen by a doctor the next day and was observed to be very active and not exhibiting pain.
- The defendant was convicted at trial for Criminal Mistreatment. The Oregon Court of Appeals reversed the conviction and held that because the bruising did not diminish the child's bodily movement or ability to engage in everyday activities, there was insufficient evidence that the defendant impaired the child's physical condition or caused substantial pain.

# State v. Lewis, 266 Or App 523 (2014)

- Defendant was the wife of the defendant. The defendant pulled out clumps of the victim's hair. The victim was heard saying "Ouch" and "Stop it" at the time.
- The defendant was convicted at trial of Assault 4. The Court of Appeals held that the victim did not suffer a physical injury because there was no substantial pain or impairment of a physical condition. The court concluded that there was nothing to suggest the victim's pain was more than a fleeting sensation. The victim's physical condition was not impaired when she had clumps of her hair ripped out because it did not impair the ordinary function of the skin, which is to prevent infection.

# Proposal defines a Vulnerable Victim

- Creates a definition for “vulnerable victim”
- Vulnerable victims are those who are frequently unable to testify to the degree of pain or impairment that they have suffered
  - Lack the ability to communicate
  - Are likely to be intimidated, coerced or threatened
  - Are physically, emotionally or financially dependent upon their abuser

# Defines a Vulnerable Victim

- Dependent persons – ORS 163.205(2)(b)
  - A person because of age or a physical or mental disability is dependent upon another to provide for the person's physical needs
- Elderly persons – ORS 163.205(2)(c)
  - A person 65 or older
- Domestic violence victims – ORS 135.230(3)
  - Victims of abuse between family or household members

# Physical injury to a vulnerable victim

- Proposed language:
- “Physical trauma, impairment of physical condition, or substantial pain”
- Physical trauma – “includes, but is not limited to, fractures, cuts, punctures, bruises, burns or other wounds” – ORS 167.310 (11)
- Same definition used in the animal abuse statute currently for animals who are abused but cannot articulate pain or impairment

# Elder Abuse

- Any person 65 or older
- May have mental disabilities to include memory loss or dementia
- May be financially dependent on their abuser
- May be dependent on the abuser for caregiving, housing, companionship, and transportation
- Likely to be vulnerable to emotional manipulation by family and caregivers
- Likely to be intimidated, coerced or threatened

# Elder Abuse

- 2011 Washington County Case. Caregiver defendant charged with Criminal Mistreatment against victim – 65 years old, legally blind and has a prosthetic leg. Defendant hit the victim in the elbow and head causing bruising and intense pain that lasted several hours. Defendant spit on victim's face and hair. Defendant pushed victim down and threatened her.
- The case was dismissed because the victim became completely uncooperative and there was insufficient evidence to obtain an indictment by the grand jury.

# Dependent Persons

- May include physically or mentally disabled persons of any age
- May include dependent children

# Dependent Persons

- May be nonverbal because of age or physical disability
- Can be dependent upon abuser for physical housing, food, or medical care
- May be reliant on abuser for daily supervision and necessary daily provisions
- Still care for the abuser in spite of abuse
- Fear of retaliation

# Victims of domestic violence

- Are frequently intimidated, coerced and threatened to minimize or not testify
- Are often financially dependent on their abuser
- Are often emotionally manipulated by their abuser

# DV Acquittal at trial

- Marion County case
- Defendant is husband of the victim
- He has prior conviction for Harassment against her
- Defendant punches her in the head after grabbing her by the hair – he admits “popping” her in the head to police
- Victim reported pain of 8 out of 10 to officers
- Victim refused to appear at trial after receiving subpoena
- As a result, victim’s statements to police regarding pain were inadmissible
- Defendant found not guilty of Assault 4

# Intimidation of DV Victims

- First jail call by a defendant arrested for DV Assault 4 to his victim on October 12, 2015:
- Defendant: “So what did, what was said though, nothing?”
- Victim: “What?”
- Defendant: “Did they take pictures?”
- Victim: “I don’t know”
- Defendant: “You don’t know?”
- Continued....

# Intimidation of DV Victims

- Victim: “I don’t remember.”
- Defendant: “But you remember them not, you not telling them anything, right?”
- Victim: “I don’t know.”
- Defendant: “You don’t remember anything?”
- Victim: “No, not really.”
- .....
- Defendant: “You hear what I said though, about not coming? Because look, if you don’t show up they have no case, okay. Don’t show up at all.”

# Dependence on Abuser

- Defendants intentionally create dependence
  - Intimidation, threats and fear
  - Using family, friends and religion to apply pressure
  - Isolation from family, friends, and peers
  - Emotional abuse to demean and demoralize
  - Economic control by withholding funds

# Evidence to Prove Physical Injury

- Victim must affirmatively report that the injury caused substantial pain or impairment of physical condition
- Regardless of how serious the injury appears in photos or on videotape
- Regardless of how much pressure the victim is receiving from the defendant or others
- Regardless of the history of abuse by the defendant towards the victim
- Regardless of the victim's dependence on the defendant

Photo and video evidence alone may not be sufficient to prove injury under Oregon's definition of physical injury



# Summary

- The proposed amendment creates an objective basis to assess physical injury by a neutral fact finder
- Mirrors the language currently used in Oregon for abused animals
- Removes the requirement that the vulnerable victim report that the injury they received resulted in substantial pain or impairment