

SB 737 A STAFF MEASURE SUMMARY**Carrier:** Sen. Prozanski**Senate Committee On Judiciary**

Action Date: 04/06/17
Action: Do pass with amendments. (Printed A-Eng.)
Vote: 3-2-0-0
Yeas: 3 - Dembrow, Manning Jr, Prozanski
Nays: 2 - Linthicum, Thatcher
Fiscal: Has minimal fiscal impact
Revenue: No revenue impact
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WHAT THE MEASURE DOES:

Eliminates statutory cap on noneconomic damages awarded in civil action involving property damage or personal injury. Excludes wrongful death cases and claims subject to Tort Claims Act or Workers' Compensation system. Applies to cases in which final judgment not entered on effective date of Act. Declares emergency, effective on passage.

ISSUES DISCUSSED:

- Senate Bill 487 (2017)
- Catastrophic physical injuries caused by others, including traumatic brain injury and paralysis, sexual assault and child abuse
- Permanent physical, psychological and financial challenges of injured persons and their families
- Effectuating jury determination of noneconomic damages
- Economic damages vs. noneconomic damages
- Increased litigation and insurance costs; affordability and availability of medical care
- Predictability for business; application to pending cases
- Difficulty of quantifying pain and suffering; availability of punitive damages

EFFECT OF AMENDMENT:

Replaces the measure.

BACKGROUND:

ORS 31.710 was adopted in 1987 and has not been amended. The statute divides the available damages in a civil action into two categories - economic damages and noneconomic damages - and creates a \$500,000 cap on noneconomic damages in certain cases, excluding claims subject to Oregon Tort Claims Act (OTCA) or the Workers' Compensation system. Economic damages are "objectively verifiable losses," including health care costs and lost wages. Noneconomic damages are "subjective, non-monetary losses," including pain and suffering, emotional distress and the loss of other activities apart from gainful employment. The statute prohibits advising the jury of the existence of the cap and, as a result, juries may return a verdict in excess of the cap that may subsequently be reduced to \$500,000 by the trial court.

In 1999, the Oregon Supreme Court held that the cap on noneconomic damages violated the "remedy clause" of Article I, section 10 of the Oregon Constitution, which provides, in part, that "...every man shall have remedy by due course of law for injury done him in his person, property, or reputation." See *Lakin v. Senco Products, Inc.*, 329 Or. 62 (1999). In 2014, the Oregon Supreme Court overruled this decision. *Horton v. Oregon Health and Sciences University*, 359 Or. 168 (2014). While *Horton* overruled *Lakin*, it held that the remedy clause "limits the legislature's substantive authority to alter or adjust a person's remedy for injuries to person, property, and reputation." *Horton* at 173. The Supreme Court rejected bright line rules and simple formulas in its remedy clause analysis, but did identify at least

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three guiding principles.

First, the Court noted that the existence of a remedy, and its size compared to the damages incurred, are important considerations. Second, the Court recognized that "the reasons for the legislature's actions can matter." *Id.* Horton ultimately upheld damage caps under the OTCA, in part, because OTCA represents a legislative trade off: the state indemnifies a state employee for injuries caused to a person but waives its sovereign immunity to allow the person to sue the state, a solvent defendant, for damages up to a certain amount. See *Id.* at 223-224. Finally, the Court noted that eliminating common law actions, thereby completely depriving a plaintiff of a remedy, is not necessarily constitutionally infirm when the decision is based on changing circumstances. One example provided by the Court was the elimination of the common law tort of alienation of affection.

Against this constitutional backdrop, Senate Bill 737-A eliminates the \$500,000 cap on noneconomic damages awarded in certain civil actions involving personal injury or property damage. SB 737-A does not apply to wrongful death cases or claims brought under the Tort Claims Act or Workers' Compensation system.