

The Doctors Company

Analysis of Oregon Supreme Court's Article I, Section 10 Cases

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Introduction

You recently contacted me on behalf of your organization, expressing concern that there was some confusion in the Oregon legal/judicial community, and Oregon's legislative branch, regarding the extent to which Article I, section 10 of the Oregon Constitution (containing the so-called remedy clause) circumscribes the legislative branch's substantive authority to alter or adjust a person's remedy for injuries to person, property, and reputation. In particular, you have indicated confusion exists whether in light of the Oregon Supreme Court's recent decision in *Busch v. McInnis Waste Systems, Inc.*, 366 Or 628 (2020), the legislature must repeal much of ORS 37.710(1), as apparently contemplated in SB 193.

Remedy clause issues have been before the Oregon Supreme Court almost from statehood, and it is not uncharitable to describe the court's jurisprudential approach throughout the decades as deciding those cases on a case-by-case basis or as a form of judicial incrementalism, resulting in lines of cases that have been difficult to reconcile and remain so today. Over the last 20 years almost all of the "remedy" clause cases have involved the constitutionality of statutorily imposed damages caps. Because I wrote and voted on many of the "modern" Article I, section 10 cases during my tenure as an Oregon Supreme Court justice and chief justice, you have asked me to provide an independent analysis of those modern cases. I have agreed to provide that independent analysis, with the understanding that I take no position regarding the legality or the merits of any pending legislation or proposed legislation regarding damage caps that might be before the 2021 Oregon legislative session.¹

¹ In the analysis that follows, I have not addressed Article I, section 17 of the Oregon Constitution as a limitation on legislative authority to enact damage caps because in *Horton v. OHSU*, 359 Or 168, 250-251 (2016) the Oregon Supreme Court concluded that Article I, section 17 of the Oregon Constitution does not impose a substantive limit on the legislature's authority to define the elements of a claim or the extent of damages available for a claim. *Horton* overruled *Lakin v. Senco Products, Inc.*, 329 Or 62, 71, *modified*, 329 Or 369 (1999) holding that because the plaintiffs had the right to bring a civil action to which the right to a jury trial was attached, Article I, section 17,

Oregon Supreme Court's Article I, Section 10 Cases

Article I, section 10, of the Oregon Constitution consists of three independent clauses. The third clause, the so-called remedy clause provides that “every man shall have a remedy by due course of law for injury done him in his person, property, or reputation.” Although this analysis focuses on what I have described as the Oregon Supreme Court’s “modern remedy clause cases,” it must be pointed out that for more than a century the court’s remedy clause cases can be described as inconsistent at best. For example, in *Templeton v. Linn County*, 22 Or 313, 316, (1892) the court concluded that the remedy clause did not circumscribe legislative authority in any manner. However, in *Mattson v. Astoria*, 39 Or 577, 580 (1901) the court concluded that the remedy clause did constrain legislative authority. Nevertheless, in *Perozzi v. Ganiere*, 149 Or 330, 345, (1935) the court reached a contrary conclusion. That said, the modern remedy clause cases begin with *Smothers v. Gresham Transfer, Inc.*, 332 Or 83 (2001) in which the court undertook a thorough historical and substantive review of the court’s remedy clause cases.

In *Smothers*, the court acknowledged that its cases interpreting the Article I, section 10 remedy clause had not been consistent, and sought to provide a definitive interpretation of that constitutional provision. Providing that kind of definitive interpretation required the court to consider the text of Article I, section 10, its history, and the court’s cases interpreting the remedy clause. In addition, the court surveyed historical writings such as the Magna Carta, Blackstone’s *Commentaries*, and decisions for the highest courts of other states interpreting their constitutions’ remedy clauses. Based on the foregoing, the court in *Smothers* determined that the historical purpose of the remedy clause was “to mandate the availability of a remedy by due course of law for injury to absolute rights respecting person, property, and reputation.” 332 Or 114. Because the court determined that an injury as that term is used in the remedy clause meant a wrong or harm for which a cause of action existed when the Oregon Constitution was drafted in 1857, it concluded that to give effect to the remedy clause, Oregon courts should decide two questions. *Id* at 124. First, “[w]hen the drafters wrote the Oregon Constitution in 1857 did the common law of Oregon recognize a cause of action for the alleged injury?” *Id*. If the answer to the first question is “yes,” then Article I, section 10 requires that a “constitutionally adequate

prohibited the legislature from interfering with or interrupting that right by imposing a cap on the amount of noneconomic damages that a jury could award.

remedy for that injury be available.” *Id.* According to the *Smothers* court, Article I, section 10 does not prevent the legislature from modifying a remedy for protected injuries, so long as the remedy is a substantial one. Thus, under *Smothers*, when the legislature abolished a common-law cause of action for a protected injury, the court was required to decide a second question, whether the legislature “provided a constitutionally adequate substitute remedy for the common-law cause of action for that injury?” *Id.*

Applying that analysis, the court in *Smothers* concluded that the workers’ compensation statute at issue in that case was unconstitutional as applied because an actionable injury under that statute (bodily harm for which the employer’s negligence was the major contributing cause) was different from and more narrow than the injury for which a cause of action existed in 1857 (bodily harm for which the employer’s negligence was a contributing cause). *Id. Smothers*, however, did not involve a damages cap, and the court noted that the constitutionality of such caps was reserved for later decision. *Id.* at 129 n.19. That decision came in *Clarke v. OHSU*, 343 Or 581 (2007).

In *Clarke*, the court considered whether the capped damages that the Oregon Tort Claims Act (OTCA) provided were sufficiently restorative to satisfy the requirements of Article I, section 10. The legislature had eliminated a cause of action against state employees for injuries resulting from their negligence and substituted a cause of action solely against the state with a damages limitation of \$200,000. The court viewed the plaintiff’s economic damages of more than \$12 million as “representative of the enormous cost of lifetime medical care currently associated with [the] permanent and severe personal injuries” that the defendants had caused, and held that the capped damages available under the OTCA were insufficient and violated the Article I, section 10 remedy clause. *See Clarke*, 343 Or at 610 (describing the OTCA remedy as a paltry fraction of the damages the plaintiff sustained). Although the court in *Clarke* concluded that the capped damages available under the OTCA violated the remedy clause, the court nevertheless observed that “Article I, section 10, does not eliminate the power of the legislature to vary and modify both the form and the measure of recovery for an injury, as long as it does not leave an injured party” with a remedy “that is incapable of restoring the right that has been injured.” *Id.* at 606.

In *Howell v. Boyle*, 353 Or 359 (2013) the plaintiff was injured when she was struck by a police car driven by Boyle, a Beaverton city police officer. The plaintiff filed a civil action against Boyle and the city of Beaverton. At trial, the jury found that the plaintiff and Boyle were equally at fault and that the plaintiff's economic damages were \$765,000 and her noneconomic damages were \$250,000, for a total of \$1,015,000. Under Oregon's comparative fault statute, the plaintiff's damages award was reduced by 50 percent to \$507,500. At that time, like in *Clarke*, the OTCA damages cap was \$200,000. Answering two certified questions from the Ninth Circuit Court of Appeals, the court concluded that in 1857 the common-law defense of contributory negligence would have denied the plaintiff any recovery, and that the plaintiff's remedy of \$200,000 under the OTCA was constitutionally adequate because the damage limitation did not leave the plaintiff's "wholly without a remedy" and was "a far more substantial remedy than the paltry fraction that remained after the imposition of the limitation in *Clarke*." 353 Or at 376. Three years after *Howell*, the court decided *Horton v. OHSU*, 359 Or 168 (2016).

In *Horton* the plaintiff, on behalf of her son, brought a civil action against OHSU and Harrison, a specialist in pediatric surgery and an employee of OHSU. During surgery, OHSU doctors had negligently transected blood vessels going to the child's liver causing severe and permanent injury to the child. At trial, the jury awarded the plaintiff, on behalf of her son, \$6,071,190.38 in economic damages and \$6,000,000 in noneconomic damages.

In 2009, in response to the court's decision in *Clarke*, the legislature, based on a studied and data driven decision, increased the OTCA damage cap to \$3,000,000. On appeal, Harrison argued that the \$3,000,000 OTCA damage cap was a constitutionally adequate remedy and the OTCA's limitation on the plaintiff's damages did not violate the Article 1, section 10 remedy clause. Again, the court engaged in a thorough review of the court's earlier remedy clause cases and the same historical sources that the court had reviewed in *Smothers*. Based on that review the court determine that the *Smothers*' court had misinterpreted the court's earlier cases and historical sources, and overruled *Smothers*, disavowing the Article I, section 10 remedy clause precepts established in *Smothers*.

Based on that review, the court in *Horton* reached the following conclusions regarding the Article I, section 10 remedy clause. First, the Article I, section 10 remedy clause does not lock courts and the legislature into a static conception of the common-law as it existed in 1857.

Second, common-law causes of action and remedies provide a baseline for measuring the extent to which subsequent legislation conforms to the basic principles of the remedy clause—ensuring the availability of a remedy for persons injured in their person, property, and reputation. Third, the court concluded that its prior remedy clause cases fall into three categories of legislation: (1) legislation that has left a common-law duty intact while eliminating a remedy for injuries caused by a breach of that duty; (2) legislation that has left a common-law duty intact and modified only the remedy; and (3) legislation that has eliminated or modified the common-law duty itself. For cases in those categories, in deciding whether the legislature’s actions impair a person’s right to a remedy under Article I, section 10, the court must consider the extent to which the legislature has departed from the common-law model measured against its reason for doing so. As relevant to the circumstances in *Horton*, the court observed that when the legislature does not limit the duty that defendant owes a plaintiff, but limits the size or nature of the remedy, the legislative remedy need not restore all the damages that the plaintiff has sustained, and that factors, such as the existence of a *quid pro quo*, matter when determining whether a limited remedy is constitutional.²

In *Horton*, the court concluded that application of the OTCA’s \$3,000,000 damage cap did not violate the Article I, section 10 remedy clause for the following reasons: (1) the OTCA was a comprehensive statutory scheme intended to extend benefits to some persons while adjusting the benefits to others; (2) the state has a constitutionally recognized interest in sovereign immunity, and the state acts through its employees who are not entitled to that immunity; (3) if the state chose to indemnify its employees for all liability incurred, the state’s interest in sovereign immunity would be eviscerated; (4) the OTCA accommodates the state’s constitutionally recognized interest in asserting its sovereign immunity with the need to indemnify its employees for liability they incur in carrying out state functions; (5) the OTCA gives plaintiffs a *quid pro quo*—the act ensures that a solvent defendant will be available to pay any damages up to \$3,000,000, an assurance that would not be present if the only person left to pay an injured person’s damages were an uninsured, judgment proof employee; (6) the legislature had made a studied and data driven decision to provide a complete recovery in many

² In *Hale v. Port of Portland*, 308 Or 508, 523 (1989) the court, in rejecting a remedy clause challenge used the terms *quid pro quo* as resulting when the legislature has sought to adjust a person’s rights and remedies as “part of a larger statutory scheme that extends benefits to some while limiting benefits to others.”

cases, and had greatly expanded the state’s liability in the most egregious cases—increasing the damage caps and providing for additional, annual, increases indexed to inflation; and (7) although the \$3,000,000 damages cap was not sufficient to compensate the plaintiff to the full extent of her son’s injuries, the cap nevertheless was constitutional because the remedy that the legislature provided was “a far more substantial remedy than [a] paltry fraction of the remedy that the jury had determined was appropriate.” 359 Or at 224.

In summary, the court in *Horton* concluded that the OTCA damages cap did not violate the Article I, section 10 remedy clause because of the state’s constitutionally recognized interest in sovereign immunity, the *quid pro quo* that the OTCA provides (assuring benefits to some while limiting benefits to others), and the significantly increased damages cap, indexed to inflation.

In 2020, in *Busch v. McInnis Waste Systems, Inc*, 366 Or 628 (2020) the Oregon Supreme Court addressed the constitutionality of the \$500,000 cap for noneconomic damages set out in ORS 31.710(1). In that case the plaintiff had the right-of-way and was walking in a crosswalk when the defendant’s garbage truck struck him. As a result, the plaintiff’s right leg was amputated just above the knee. A jury awarded the plaintiff economic damages of \$3,021,922 and noneconomic damages of \$10,500,000. Pursuant to ORS 31.710(1) the trial court reduced the plaintiff’s noneconomic damages award to \$500,000.

To determine whether the noneconomic damage cap in ORS 31.710(1) violated the Article I, section 10 remedy clause, as applied in that case, the court utilized the interpretive methodology established in *Horton*. The court began its analysis by first categorizing ORS 31.710(1), like the OTCA at issue in *Horton*, as a statute that does not modify the common-law duty that a defendant owes a plaintiff—to act with reasonable care. Instead, ORS 31.710(1) limits the remedy that an injured plaintiff may recover for injuries caused by a breach of that duty.

Next, the court rejected the defendant’s argument that ORS 31.710(1) did not violate Article I, section 10 because it does not limit a plaintiff’s recovery of economic damages. Rather, the court concluded that given the compensatory purpose of both economic and noneconomic damages, any difference in those damages was not significant in the court’s remedy clause analysis.

The court’s conclusion that, as applied in *Busch*, ORS 31.710(1) violated the Article I, section 10 remedy clause was based on the following: (1) Under *Horton*, although the legislature is entitled to modify common-law remedies, when it does so, it must act for a reason that is sufficient to counterbalance the substantive right that Article I, section 10 grants—that people who are injured in their person, property or reputation have a remedy for those injuries; (2) in ORS 31.710(1) the legislature did not provide injured persons with a *quid pro quo*—something they otherwise would not have had; and (3) when the legislature capped a plaintiff’s noneconomic damages in ORS 31.710(1) at \$500,000 it did not do so, as in the OTCA, with the goal of capping noneconomic damages at a sum capable of restoring the right that had been injured in many, if not all instances, and would remain capable of doing so over time.

Conclusion

Legislatively enacted damages caps are not facially unconstitutional under Article I, section 10 of the Oregon Constitution. Rather, in the cases discussed above, the constitutional challenge under Article I, section 10 was an “as applied” challenge—the damages cap as applied in the particular case violated the Article I, section 10 remedy clause. For example, in *Busch*, the court did not “overrule” *Greist v. Phillips*, 322 Or 281 (1995) in which the court had held that the \$500,000 damages cap for noneconomic damages did not violate the Article I, section 10 remedy clause, as applied to wrongful death claims. *Busch* at 366 Or 643. Accordingly, the damages cap in ORS 31.710(1) as applied to wrongful death claims remains constitutional, and ORS 31.710(1) may be constitutional as applied to other specific causes of action or where the size of the damages award in a specific case to which the damages cap is applied is, “a far more substantial remedy than [a] paltry fraction of the remedy that the jury had determined was appropriate.” *Horton* at 359 Or 224.

The Oregon Supreme Court’s two most recent cases to consider an Article I, section 10 remedy clause challenge to statutory damage caps, *Horton* and *Busch* came to different results, but applied the same Article I, section 10 interpretive paradigm. *Horton* established that the legislature is not constrained by Article I, section 10 of the Oregon Constitution from altering, or adjusting a person’s remedy for injuries to person, property and reputation. According to *Horton*, the legislature is entitled to modify common-law remedies, however, when it does so, it must act for a reason that is sufficient to counterbalance the substantive right that Article I, section 10

grants—that people who are injured in their person, property, or reputation have a remedy for those injuries. In *Horton*, the court observed that when the legislature does not limit the duty that a defendant owes a plaintiff, but limits the size or nature of the remedy, (as in the OTCA damage cap at issue in *Horton*) the legislative remedy need not restore all the damages that the plaintiff has sustained. In concluding that the OTCA damage cap did not violate Article I, section 10, the court in *Horton* considered factors, such as the existence of a *quid pro quo*, legislative factfinding regarding public policy interests or justifications for a damages limitation; a legislative assessment of the amount of damages necessary to fully compensate most injured plaintiffs; and, the amount of damages awarded by a jury compared to the statutory damage limit. The court in *Busch* concluded that the \$500,000 damages limit in ORS 31.710(1) was unconstitutional as applied in that case, because the legislature had not provided injured persons a *quid pro quo* of any kind (something they would not have otherwise had); the legislature had not demonstrated a sufficient public policy reason for imposing a damages cap; nor had the legislature engaged in any fact-finding regarding an amount necessary to compensate most injured plaintiffs.

The Oregon Supreme Court’s decisions in *Horton* and *Busch* establish that the Article I, section 10 remedy clause is not a substantive constraint of the legislature’s authority to enact statutory damages caps. However, those cases indicate that to constitutionally limit a remedy, the legislature must demonstrate that it has done so for a reason that is sufficient to counterbalance the substantive right that the Article I, section 10 remedy clause grants to injured persons. In assessing the sufficiency of the legislature’s reason for enacting a damages cap, the court will consider factors such as whether the legislature has provided a *quid pro quo* (e.g., adjusted or altered rights or remedies as part of a larger statutory scheme that extends benefits to some while limiting benefits to others); and, demonstrated that the amount of the damages cap is data-driven—i.e., the legislature has factually determined that the damages limitation is one that is nevertheless capable of providing an amount that will restore for most plaintiffs, the right that has been injured.

In other words, with regard to its statutory damages cap cases, the court is not determining whether statutory damages caps are a good idea or a bad idea. Rather, the court through its cases, has signaled that statutory damages caps can survive constitutional challenge

when the legislature employs its usual lawmaking processes—extensively and thoroughly considering policy interests and arguments for and against retaining a damages cap (e.g., the damages cap in ORS 31.710(1) currently at issue in SB 193); policy interests and arguments for and against damages caps for specific causes of actions; and determining by survey and data, what amount of damages will adequately compensate an injured person in the vast majority of cases for specific causes of action.