THE WILLAMETTE VALLEY AMERICAN INNS OF COURT

IN

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A REMEDY WITH A CLAUSE: EVALUATING *CLARKE V. OREGON HEALTH SCIENCES UNIV. ET. AL.,* 343 OR. 581, 175 P.3d 418 (2007).

THURSDAY NOVEMBER 20, 2008*

Featuring the Distinguished Panel of Kathryn H. Clarke, Bill Blair and Representative Greg Macpherson

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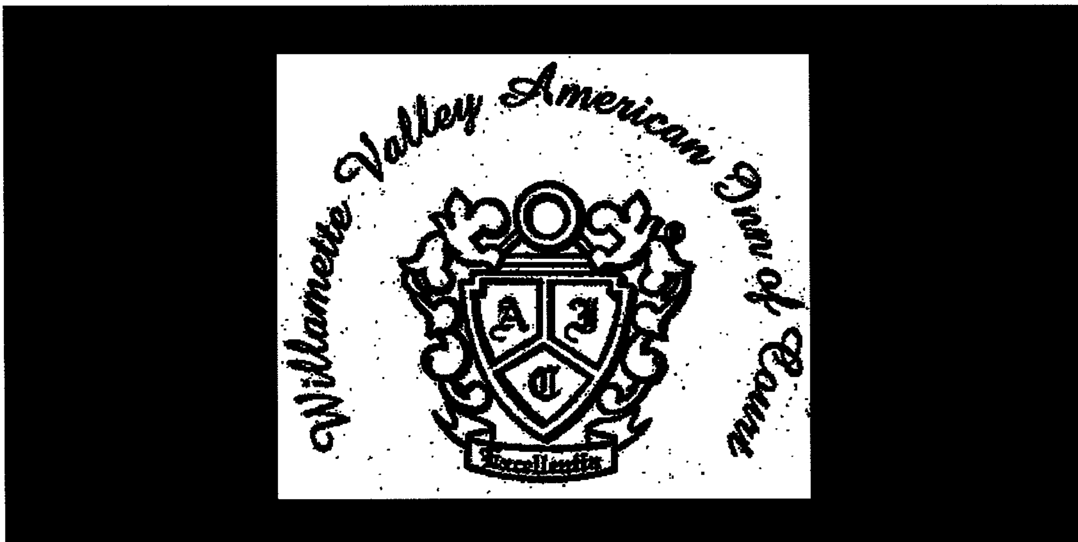

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SPEAKERS CURRICULUM VITAE

Kathryn H. Clarke, *sole practitioner, Portland.* Ms. Clarke has an appellate and consultation practice in tort law, civil procedure, punitive damages, evidentiary issues, insurance law, and constitutional law. She is a member of the Oregon Trial Lawyers Association, and has been a member of its Board of Governors for almost 20 years, serving as President from 1995 to 1996. She is currently one of Oregon's two governors on the Board of Governors of the American Association for Justice, and has served as a co-chair of that organization's Amicus Curiae Committee and Legal Affairs committee, and a member of its Law Firm Advisory Committee, and is a trustee of the Civil Justice Foundation. She is a member of the adjunct faculty at Lewis and Clark Law School, and taught a seminar in advanced torts for several years. She is currently serving as a member of a work group on Tort Conflicts of Law for the Oregon Law Commission. She has served as a member and Chair of the Council on Court Procedures, and a member of the Oregon State Bar's Uniform Civil Jury Instructions Committee. She was also a member of the Supreme Court Task Force on Racial/ Ethnic Bias in the Judicial System from 1992 to 1994. In 2006 she was honored as Distinguished Trial Lawyer by the Oregon Trial Lawyers Association. Ms. Clarke has presented at state, federal and local seminars and workshops.

Greg Macpherson is a three-term State Representative from Oregon's House District 38. Born in Corvallis, and raised on a dairy farm in rural Linn County, Greg is a third-generation Oregonian.

A Democrat, Greg was first elected to the Oregon House of Representatives in 2002, and currently serves as Co-Chair of the Joint Interim Task Force on Tort Reform, Chair of the House Judiciary Committee, and as a member of the House Agriculture and Natural Resources Committee.

In the House of Representatives, Greg helped develop and pass the country's toughest restrictions on the raw material used to make meth. As a result, home meth labs in Oregon have been nearly eliminated. He passed legislation cracking down on internet sex predators. In 2003, he helped develop legislation to stabilize the state PERS system, ensuring that public employees have a secure retirement. More recently, he worked on several major bills promoting renewable energy, and crafted Measure 49, to protect farm lands and open space.

In addition to serving in the legislature, Greg has spent over 30 years as an employee benefits attorney, helping to provide health and retirement benefits to Oregon workers. His work has been recognized for excellence in the Best Lawyers in America and Oregon Super Lawyers.

Bill Blair. Since 1997 Bill Blair has been a Senior Assistant County Counsel for Washington County, primarily involved in self-insurance defense for the County and its employees. Bill holds BA (1966) and JD (1969) degrees from Willamette Univsrsity and Willamette University College of Law. From 1969 to 1997 he was employed as an Assistant City Attorney for the City of Salem, and began defending Salem under its first self-insured program in 1977. Since then he has been primarily focused on local government self-insurance and self-insured defense. He has written and presented for various CLE programs, and is a regular faculty presenter at the Oregon State Sheriffs' Association Command College. He has served on the Oregon State Bar's Legal Ethics and Uniform Jury Instructions Committees, and currently serves on the OSB Disciplinary Board. Bill was an organizer and first Chair of the Board of Directors of City-County Insurance Services, serving in that capacity from 1981 to 1984, and has represented both the League of Oregon Cities, Association of Oregon Counties and the Oregon State Bar in dealing with pending legislation of various sorts since 1971. In 2005 he served on the Attorney General's Task Force on Police Use of Deadly Force, and currently serves as one of four non-legislator members of the Joint Interim Task Force on the Oregon Tort Claims Act.

FILED: December 28, 2007

IN THE SUPREME COURT OF THE STATE OF OREGON

JORDAAN MICHAEL CLARKE,
a minor,
by his guardian ad litem,
Sari Clarke,

Respondent on Review,

v.

OREGON HEALTH SCIENCES UNIVERSITY,
a public corporation;
MUSTAFA ADNAN COBANOGLU, M.D.; JOHN DAVID BLIZZARD, M.D.;
SANJEEV K. SHARMA, M.D.; STEVEN A. FIAMENGO, M.D.;
BETSY E. SOIFER, M.D.; JENNIFER STEWART, R.R.T.,
and ANA WILSON, R.N.,

Petitioners on Review,

and

VEERAPPA K. M. REDDY, M.D.,

Defendant,

and

STATE OF OREGON,

Intervenor on Review.

(CC 0005-05116; CA A124560; SC S053868)

On review from the Court of Appeals.*

Argued and submitted January 9, 2007.

William F. Gary, Harrang Long Gary Rudnick PC, argued the cause for petitioners on review. With him on the briefs were Sharon A. Rudnick, Jerome Lidz, and Susan D. Marmaduke, Portland.

Kathryn H. Clarke, argued the cause for respondent on review. With her on the briefs were William A. Gaylord, Linda K. Eyerman, Todd A. Bradley, and Gaylord Eyerman Bradley, P.C., Portland.

Janet A. Metcalf, Assistant Attorney General, filed a brief on behalf of intervenor on

review, State of Oregon. With her on the brief were Hardy Myers, Attorney General, and Mary H. Williams, Solicitor General, Salem.

Roy Pulvers, Lindsay, Hart, Neil & Weigler, LLP, Portland, filed briefs on behalf of *amicus curiae* Port of Portland.

Janet A. Metcalf, Assistant Attorney General, filed a brief in support of petition for review on behalf of *amicus curiae* State of Oregon.

Thomas E. Cooney, Paul A. Cooney, and David J. Madigan, filed a brief in support of petition for review on behalf of *amicus curiae* Oregon Medical Association.

David C. Landis, Portland, filed a brief on behalf of *amicus curiae* Oregon Medical Association.

Linda Meng, Harry Auerbach, Paul Snider, Agnes Sowle, Dori M. Brattain, Mark B. Comstock, James M. Brown, and Ronald W. Downs, filed briefs on behalf of *amici curiae* League of Oregon Cities, Association of Oregon Counties, Multnomah County, Oregon School Boards Association, Oregon Small Schools Association, Oregon Association of School Business Officials, Inc., Confederation of Oregon School Administrators, and Special Districts Association of Oregon.

Mark S. Rauch, Salem, filed a brief on behalf of *amicus curiae* City County Insurance Services.

Robyn E. Ridler, Barbee B.Lyon, Tonkon Torp LLP, Portland, filed a brief on behalf of *amicus curiae* Oregon Business Association.

Maureen Leonard, Portland, filed a brief on behalf of *amicus curiae* Oregon Trial Lawyers Association.

Lawrence Wobbrock, Portland, and Jeffrey R. White, Washington D.C., filed a brief on behalf of *amicus curiae* American Association for Justice.

Before De Muniz, Chief Justice, Gillette, Durham, Balmer, Kistler and Walters, Justices.**

DE MUNIZ, C. J.

The decision of the Court of Appeals is affirmed. The judgment of the circuit court is reversed and the case is remanded to the circuit court for further proceedings.

Balmer, J., concurred and filed an opinion in which Kistler, J., joined.

*Appeal from Multnomah County Circuit Court, Henry Kantor, Judge. 206 Or App 610, 138 P3d 900 (2006).

**Linder, J., did not participate in the consideration or decision of this case.

DE MUNIZ, C. J.

In this case, we address whether the Oregon Tort Claims Act (OTCA), specifically ORS 30.265(1) and ORS 30.270(1), as applied to this case, violates the Remedy Clause of Article I, section 10, of the Oregon Constitution. ORS 30.265(1) provides, in part:

> "The sole cause of action for any tort of officers, employees or agents of a public body acting within the scope of their employment or duties and eligible for representation and indemnification under ORS 30.285 or 30.287 *shall be an action against the public body only*. The remedy provided by ORS 30.260 to 30.300 is exclusive of any other action or suit against any such officer, employee or agent of a public body whose act or omission within the scope of the officer's, employee's or agent's employment or duties gives rise to the action or suit. No other form of civil action or suit shall be permitted. *If an action or suit is filed against an officer, employee or agent of a public body, on appropriate motion the public body shall be substituted as the only defendant*."

ORS 30.265(1) (emphasis added). ORS 30.270(1), in turn, limits the damages recoverable against any public body to:

> "(a) $50,000 to any claimant for any number of claims for damage to or destruction of property, including consequential damages, arising out of a single accident or occurrence.
>
> "(b) $100,000 to any claimant as general and special damages for all other claims arising out of a single accident or occurrence unless those damages exceed $100,000, in which case the claimant may recover additional special damages, *but in no event shall the total award of special damages exceed $100,000.*
>
> "(c) $500,000 for any number of claims arising out of a single accident or occurrence."

ORS 30.270(1) (emphasis added). Article I, section 10, of the Oregon Constitution states:

> "No court shall be secret, but justice shall be administered, openly and without purchase, completely and without delay, and every man shall have remedy by due course of law for injury done him in his person, property, or reputation."

In the recent case of *Jensen v. Whitlow*, 334 Or 412, 51 P3d 599 (2002), this court rejected a facial challenge to ORS 30.265(1) under Article I, section 10, *id.* at 421, but declined to decide an "as-applied" challenge, *id.* at 415-16. We now address such an "as-applied" challenge and hold that the application of ORS 30.265(1) and ORS 30.270(1) in this case violates Article I, section 10.

I. BACKGROUND AND PROCEDURAL HISTORY

We take the following facts from the pleadings. Because the trial court granted judgment on the pleadings pursuant to ORCP 21 B,[1] this court assumes the facts in the pleadings to be true. *Sager v. McClendon*, 296 Or 33, 35, 672 P2d 697 (1983).

Plaintiff Jordaan Clarke was born in February 1998 at Oregon Health and Science University (OHSU) with a congenital heart defect. He was admitted to OHSU in May 1998 for the surgical repair of that condition. Following surgery, plaintiff was placed in a surgical intensive care unit. While in that unit, plaintiff suffered prolonged oxygen deprivation causing him permanent brain damage.

Plaintiff's brain damage was a direct result of the negligence of OHSU and certain of its employees and agents. Plaintiff is totally and permanently disabled. His expenses for total life and health care will amount to $11,073,506, the loss of his future earning capacity is $1,200,000, and his noneconomic damages are $5,000,000.

In 2001, plaintiff brought this action against OHSU and against the individuals who treated him.[(2)] Pursuant to ORS 30.265(1), defendants moved to substitute OHSU as the sole defendant in the action. The trial court granted the motion, and plaintiff filed a second amended complaint naming only OHSU as defendant. In its answer, OHSU admitted that it was negligent in one or more of the ways alleged by plaintiff and that its negligence resulted in permanent injury to plaintiff. OHSU also admitted that "plaintiff sustained economic and noneconomic damages in excess of the monetary limitations of the Oregon Tort Claims Act as a result of the injuries caused by the negligence of OHSU."

OHSU moved for judgment on the pleadings pursuant to ORCP 21 B, contending that the trial court should enter judgment in favor of plaintiff and against OHSU in the amount of $200,000, OHSU's maximum liability under ORS 30.270(1). The trial court granted OHSU's motion and entered judgment against OHSU in the amount of $200,000.

Plaintiff appealed, challenging the substitution of OHSU for the individual defendants and arguing that the trial court's entry of judgment in the amount of $200,000 denied him the right to a remedy in violation of Article I, section 10, of the Oregon Constitution, as well as the right to a jury trial under Article I, section 17.[(3)] The Court of Appeals rejected plaintiff's Article I, section 10, argument as to his claim against OHSU because, it concluded, OHSU would have been immune from liability at common law. *Clarke v. OHSU*, 206 Or App 610, 615-22, 138 P3d 900 (2006). That court, for the same reason, rejected plaintiff's Article I, section 17, argument as to OHSU. *Id.* at 622-23.

The Court of Appeals, however, accepted plaintiff's Article I, section 10, argument with respect to the substitution of OHSU as the sole defendant under ORS 30.265(1). *Id.* at 623-34. Plaintiff argued that, because, at common law in 1857, he would have had a cause of action against the employees of OHSU, Article I, section 10, permits the legislature to abolish that remedy only if it provides an adequate substitute remedy. *Id.* at 623-24. Plaintiff further argued that, because the limited recovery against OHSU was not an adequate substitute remedy in this case, ORS 30.265(1) violated Article I, section 10. *Id.* at 624. The court agreed that the OTCA did not provide a constitutionally adequate remedy in this case, explaining that "recovery of less than two percent of one's economic damages -- particularly given the nature of the injuries alleged -- is a remedy 'incapable of restoring the right that has been injured.'" *Id.* at 626 (quoting *Smothers v. Gresham Transfer, Inc.*, 332 Or 83, 119-20, 23 P3d 333 (2001)). The court concluded that, as applied to this case, ORS 30.265(1) violated Article I, section 10. *Clarke*, 206 Or App at 633. The court reversed the trial court's judgment and remanded with instructions to reinstate the claims against the individual defendants.[(4)] *Id.* at 634.

Defendants sought review in this court, challenging the Court of Appeals' conclusion that in this case the OTCA does not provide a constitutionally adequate substitute remedy as required under Article I, section 10. For his part, plaintiff also challenges the Court of Appeals' conclusion regarding his Article I, section 10, claims against OHSU; specifically, plaintiff takes issue with the Court of Appeals' conclusion that OHSU would have been entitled to sovereign immunity at common law. We allowed review to address the important issues concerning the adequacy of the OTCA remedy under Article I, section 10. (5)

II. DISCUSSION

As noted earlier, the primary issue in this case is whether ORS 30.265(1) and ORS 30.270(1), as applied to facts of this case, violate Article I, section 10. We begin with an overview of the OTCA, then turn to an overview of Article I, section 10, and then analyze the issue at hand.

A. *Overview of the OTCA*

Before 1967, public bodies were immune from tort liability. *Smith v. Pernoll*, 291 Or 67, 69, 628 P2d 729 (1981). A person injured by the negligence of a public employee acting within the scope of his or her employment could pursue an action against the employee, but not against the public employer. *See Krieger v. Just*, 319 Or 328, 331-32, 876 P2d 754 (1994) (citing *Ogle v. Billick*, 253 Or 92, 453 P2d 677 (1969)). In 1967, the legislature enacted the OTCA, which partially waived immunity for public bodies. *Jensen*, 334 Or at 416-17. The 1967 version of the OTCA included a monetary limitation on the state's liability, Or Laws 1967, ch 627, § 4, but did not alter the liability of public officers, employees, or agents. *Jensen*, 334 Or at 417. Those individuals, therefore, remained personally liable for torts committed within the course and scope of their employment. *Id.*

In 1975, the legislature amended the OTCA. The 1975 version required that public bodies indemnify officers, employees, and agents against tort claims "arising out of an alleged act or omission occurring in the performance of duty." *Jensen*, 334 Or at 417 (internal quotation marks and citations omitted); Or Laws 1975, ch 609, § 16(1). Additionally, the legislature extended the limitation on damages to claims against officers, employees, and agents of all public bodies. *Jensen*, 334 Or at 417; Or Laws 1975, ch 609, § 13.

In 1991, the legislature again revised the OTCA. Or Laws 1991, ch 861, § 1. That revision added language to ORS 30.265(1) that eliminated entirely any claim against any officer, employee, or agent for their work-related torts. *Jensen*, 334 Or at 417. Pursuant to the 1991 amendments, the sole cause of action available for torts committed by public officers, employees, or agents is an action against the public body. Or Laws 1991, ch 861, § 1. After that amendment, ORS 30.265(1) now requires that, if an action is filed against a public officer, employee, or agent, the public body "shall be substituted as the only defendant." That substituted claim against the public body is subject to the OTCA's damages limitations. ORS 30.265(1); ORS 30.270(1); *Jensen*, 334 Or at 417. The 1991 amendments were added at the request of the state, which asserted three reasons for the requested change. Testimony, House Judiciary Committee, HB 3520, May 13, 1991, Ex E (statement of Jack Landau, Deputy Attorney General). First, because the law provided indemnification for state officers, naming the officers as parties "serve[d] no purpose."

Id. Second, some claimants had argued that the limitation on the liability of the state did not apply to the liability of individuals; therefore, the state sought to "plug that loophole." *Id.* Finally, the state noted that "a lot of resources were spent" litigating which state officials are properly named in any given lawsuit. *Id.* Here, as in *Jensen*, the 1991 revision frames the issues in this case.

B.*Overview of Article I, section 10*

We begin our overview by again quoting the text of Article I, section 10:

> "No court shall be secret, but justice shall be administered, openly and without purchase, completely and without delay, and *every man shall have remedy by due course of law for injury done him in his person, property, or reputation*."

(Emphasis added.) In *Priest v. Pearce*, 314 Or 411, 415-16, 840 P2d 65 (1992), this court set forth a methodology for interpreting provisions of the Oregon Constitution. That methodology requires an examination of the text of the provision, the history of the provision, and the case law concerning the provision. *Id.* This court applied that methodology to the second clause of Article I, section 10, in *Smothers v. Gresham Transfer, Inc.*, 332 Or 83, 23 P3d 333 (2001).

In *Smothers*, the court first examined the text of Article I, section 10. *Smothers*, 332 Or at 91-94. The court noted that the second clause of Article I, section 10, by using the word "shall," affirmatively mandated that a remedy by due course of law be available in the event of injury to rights respecting person, property, and reputation. *Id.* at 91. The court also noted that contemporaneous dictionaries indicated that "remedy" referred "both to a process through which a person may seek redress for injury and to what is required to restore a person who has been injured." *Id.* at 92. However, the court concluded that "no definitive picture of the scope or effect of the remedy clause emerges" from examining only the text of the clause. *Id.* at 94.

The court then turned to the historical circumstances of the provision. *Id.* The Remedy Clause, the court explained, can be traced to Edward Coke's commentary on the second sentence of Chapter 29 of the Magna Carta of 1225. *Id.* The translation of Chapter 29 provides:

> "No freeman shall be taken, or imprisoned, or be disseised of his freehold, or liberties, or free customs, or be outlawed, or exiled, or any otherwise destroyed; nor will we not pass upon him, nor condemn him, but by lawful judgment of his peers, or by the law of the land. We will sell to no man, we will not deny or defer to any man either justice or right."

Id. at 95 (quoting Edward Coke, *The Second Part of the Institutes of the Laws of England*, 45 (1797)) (internal quotation marks omitted). According to Coke's commentary on that chapter, the second sentence evolved to a guarantee that every subject had a remedy by the course of law for injury to goods, land, or person. *Smothers*, 332 Or at 96-97. That guarantee made its way to the American colonies through, among other things, Coke's commentary on the English common law. *Id.* at 103-04. The court summarized the results of its historical inquiry:

> "In sum, when the Oregon Constitutional Convention convened in 1857, courts and commentators had provided considerable insight into the background and meaning of remedy clauses in state declarations or bills of rights. Those cases and commentaries revealed that the purpose of remedy clauses was to protect 'absolute' common-law rights. For injuries to those rights, the remedial side of the common law had provided causes of action that were intended to restore right or justice. Remedy clauses mandated the continued availability of remedy for injury to absolute rights."

Id. at 112.

Finally, the court examined the case law surrounding Article I, section 10. *Id.* at 115-124. Early cases, *Smothers* explained, held that "the purpose of the remedy clause is to save from legislative abolishment those jural rights which had become well established prior to the enactment of our Constitution." *Id.* at 116 (internal quotation marks and citation omitted). This court's jurisprudence changed course, however, following a United State Supreme Court decision that upheld a guest passenger statute facing an Equal Protection Clause challenge. *Id.* at 116-17 (discussing *Silver v. Silver*, 280 US 117, 50 S Ct 57, 74 L Ed 221 (1929)). Thereafter, this court relied on *Silver* to hold that the Remedy Clause does not prohibit the legislature from abolishing common-law rights that existed when the Oregon Constitution was drafted. *Smothers*, 332 Or at 117 (discussing *Perozzi v. Ganiere*, 149 Or 330, 345, 40 P2d 1009 (1935)). This court followed *Silver* and *Perozzi* in subsequent decisions. *Smothers*, 332 Or at 117-19. In *Smothers*, however, this court disavowed the line of cases beginning with *Perozzi*. It do so because of *Perozzi*'s erroneous reliance on *Silver*'s interpretation of the Equal Protection Clause in deciding a Remedy Clause claim, to the extent that those cases held that the legislature could abolish absolute rights respecting person, property, or reputation without violating the Remedy Clause. *Id.* at 118-19.

Instead, *Smothers* cited with approval cases predating *Perozzi*. *Id.* at 119. Those cases included *Mattson v. Astoria*, 39 Or 577, 580, 65 P 1066 (1901), which held that

> "[the Remedy Clause] was intended to preserve the common-law right of action for injury to person or property, and while the legislature may change the remedy or the form of procedure, attach conditions precedent to its exercise, and perhaps abolish old and substitute new remedies, * * * it cannot deny a remedy entirely."

(internal citations omitted), and *Batdorff v. Oregon City*, 53 Or 402, 408-09, 100 P 937 (1909), which held unconstitutional a city ordinance that took away a remedy from those injured by negligent failure to maintain the city streets. *Smothers* also looked to an early federal court opinion written by Judge Matthew Deady, who had been president of the Oregon Constitutional Convention in 1857, that explained the meaning of the Remedy Clause as follows:

> "[T]he remedy guarantied by [Article I, section 10] is not intended for the redress of any novel, indefinite, or remote injury that was not then regarded as within the pale of legal redress. But whatever injury the law, as it then stood, took cognizance of and furnished a remedy for, every man shall continue to have a remedy for by due course of law. * * * If [a] then known and accustomed remedy can be taken away in the face of this constitutional

> provision, what other may not? Can the legislature, in some spasm of novel opinion, take away every man's remedy for slander, assault and battery, or the recovery of a debt?"

Eastman v. County of Clackamas, 32 F 24, 32 (D Or 1887). Based on those, and other early cases, *Smothers* concluded that (1) the Remedy Clause mandates that remedy by due course of law shall be available to every person in the event of injury; (2) "remedy" includes both the remedial process as well as what is required to restore a right that has been injured; and (3) "injury" is a wrong or harm for which a cause of action existed when the drafters wrote the Oregon Constitution in 1857. *Smothers*, 332 Or at 124.

After reviewing the text, history, and case law as outlined above, the court in *Smothers* set forth the following analysis to be applied to Remedy Clause claims:

> "[T]he first question is whether the plaintiff has alleged an injury to one of the absolute rights that Article I, section 10 protects. Stated differently, when the drafters wrote the Oregon Constitution in 1857, did the common law of Oregon recognize a cause of action for the alleged injury? If the answer to that question is yes, and if the legislature has abolished the common-law cause of action for injury to rights that are protected by the remedy clause, then the second question is whether it has provided a constitutionally adequate substitute remedy for the common-law cause of action for that injury."

Id. at 124. We now apply the *Smothers* analysis to plaintiff's arguments under Article I, section 10.

C. *Plaintiff's claim against OHSU*

Under *Smothers*, the first issue we must address is whether the common law would have recognized plaintiff's negligence claim against OHSU. OHSU contends that plaintiff would not have had a claim against it, because OHSU would have been entitled to sovereign immunity under the common law of Oregon. If OHSU would have been entitled to sovereign immunity at common law, then the OTCA's limitation of a claim against OHSU would not violate Article I, section 10, because the common law would not have recognized a cause of action against OHSU for the injury alleged. *See Hale v. Port of Portland*, 308 Or 508, 518, 783 P2d 506 (1989) (holding that a statute that abolishes or limits a claim against a public entity does not violate Article I, section 10). We conclude that OHSU would have been entitled to sovereign immunity at common law because, among other reasons, OHSU is a state-created entity that performs functions traditionally performed by the state.

As previously noted, the Court of Appeals concluded that OHSU would have been immune from liability at common law and therefore rejected plaintiff's Article I, section 10, argument regarding OHSU. *Clarke*, 206 Or App at 622. The court reasoned that "a plaintiff's remedies against a public body created by the state to perform functions on behalf of the state would have been understood by the drafters [of the Oregon Constitution] to have been entirely dependent on the will of the legislature." *Id.* at 618. The Court of Appeals concluded that OHSU was such a public body because, according to the text of the statute creating it, OHSU is a state-created public corporation, which

performs governmental functions. *Id.* at 621-22. The court therefore held that, because plaintiff would have had no absolute right to a common-law action against OHSU, plaintiff's claim against OHSU was not protected by Article I, section 10. *Id.* at 622. We now address plaintiff's challenge to that conclusion.

"Our Constitution is framed on the premise that the state is immune from suit * * *." *Vendrell v. School District No. 26C et al*, 226 Or 263, 278, 360 P2d 282 (1961). That premise is embodied in Article IV, section 24, of the Oregon Constitution, which provides in relevant part, "Provision may be made by general law, for bringing suit against the State, as to all liabilities originating after, or existing at the time of the adoption of this Constitution[.]" Because the doctrine of sovereign immunity is implicit in the Constitution, this court may not abolish the doctrine; instead, the doctrine may only be waived or altered by the legislature pursuant to a general law. *Vendrell*, 226 Or at 278-79. Although the doctrine is constitutionally protected, this court interprets the doctrine of sovereign immunity "within the narrowest possible bounds consistent with the constitutional provision." *State v. Shinkle*, 231 Or 528, 539, 373 P2d 674 (1962). With those principles in mind, we now analyze whether OHSU would have enjoyed sovereign immunity at common law.

Article IV, section 24, presumes that the "State" is immune from liability, but does not specify what entities are encompassed by that term. This court has said that, in addition to the state itself and its agencies, entities that are "instrumentalities" of the state enjoy full immunity from suit. *Hale*, 308 Or at 518. An instrumentality of the state "perform[s] state functions," *id.* at 518. *See also James & Yost v. Board of Higher Edu.*, 216 Or 598, 600, 340 P2d 577 (1959) (an instrument of the state is "charged with carrying out one of the functions of government").(6) Additionally, an instrumentality of the state "has such powers and duties only as the state entrusts to [it] and these powers and duties are set forth by statutory enactment." *James & Yost*, 216 Or at 600-01.

Our previous cases provide some guidance as to what constitutes an instrumentality of the state. In *Hale*, this court concluded that the Port of Portland was an instrumentality of the state entitled to immunity from civil liability. *Hale*, 308 Or at 517-518. The court noted that the Port was created by the legislature to "have full control of [the Willamette and Columbia Rivers] at [Portland, East Portland and Albina], and between said cities and the sea, so far and to the full extent that this State can grant the same." *Id.* at 517 (internal quotation marks and citation omitted). Although the Port's functions had expanded since its creation to include serving the greater Pacific Northwest, the court concluded that the Port remained an instrumentality of the state because the Port continued to promote the shipping and maritime interests of the Portland area. *Id.* at 518.

This court also has used the term "instrument[s] * * * of the state" in a case which determined that the State Board of Higher Education enjoyed sovereign immunity. *James & Yost*, 216 Or at 600-01. Noting that the State Board of Education was "not a separate and distinct entity" from the state, the court also described it as "an *instrument or arm of the state*, charged with carrying out one of the functions of government, to-wit, the education of the peoples of the state." *Id.* at 600 (emphasis added). The court explained that the State Board of Higher Education had only those powers and duties as outlined by the legislature. *Id.* at 600-01. The court concluded that "[t]here can be little question but that the action is one against the state." *Id.* at 600.

This court has also illuminated the concept of an instrument of state government in the context of a challenge to the creation of public corporations under Article XI, section 2, of the Oregon Constitution, which provides that "[c]orporations may be formed under general laws, but shall not be created by the Legislative Assembly by special laws." In *State ex rel Eckles v. Woolley*, 302 Or 37, 726 P2d 918 (1986), the court evaluated whether the legislature's creation of the State Accident Insurance Fund Corporation violated Article XI, section 2. The court explained that Article XI, section 2,

> "allows the creation of a corporation for a public purpose, 'whose members are citizens, not stockholders; an *instrument of the government* with certain delegated powers, subject to the control of the legislature, and its members officers or agents of the government for the administration or discharge of public duties.'"

Woolley, 302 Or at 47 (quoting *Cook v. The Port of Portland*, 20 Or 580, 583, 27 P 264 (1891) (emphasis added)). The court concluded that SAIF Corporation's "exclusively governmental management and the absence of private investment or objective to operate for private profit" excluded it from the prohibition of Article XI, section 2. *Woolley*, 302 Or at 49.[(7)]

From those cases, we glean certain attributes generally possessed by instrumentalities of the state. An instrumentality of the state performs a function traditionally performed by the state. Additionally, the state generally outlines the powers and duties of its instrumentalities, either via statutory enactment or some other method. An instrumentality of the state is subject, at least in part, to the control of the state in some way.

We now examine whether OHSU is an instrumentality of the state and would have, therefore, been immune at common law. Plaintiff concedes that, prior to 1995, OHSU was an instrumentality of the state, but asserts that since 1995, when the legislature recreated OHSU as a public corporation, OHSU no longer is an instrumentality of the state. On the limited record before us in this proceeding we disagree with plaintiff's contention.

Prior to 1995, OHSU was part of the Oregon State System of Higher Education. Since 1995, OHSU has been a "public corporation" under ORS 353.020; that term is defined as

> "an entity that is created by the state to carry out public missions and services. In order to carry out these public missions and services, a public corporation participates in activities or provides services that are also provided by private enterprise. A public corporation is granted increased operating flexibility in order to best ensure its success, while retaining principles of public accountability and fundamental public policy. The board of directors of a public corporation is appointed by the Governor and confirmed by the Senate but is otherwise delegated the authority to set policy and manage the operations of the public corporation."

ORS 353.010(2). The legislature also decreed that OHSU "shall be a governmental entity performing governmental functions and exercising governmental powers" and "shall be an independent public corporation with statewide purposes and missions." ORS 353.020.

Thus, the statute explicitly states that OHSU shares the first attribute of an instrumentality of the state -- performing functions or providing services that the government has traditionally performed or provided.

The legislature also stated, however, that OHSU "shall not be considered a unit of local or municipal government or a state agency for purposes of state statutes or constitutional provisions." ORS 353.020. In our view, this statement does not alter our conclusion that OHSU would have been considered immune at common law. Whether OHSU is to be considered a "unit of local or municipal government" or a "state agency" is not the end of inquiry for determining if OHSU would have enjoyed immunity at common law. An entity can be an "instrumentality of the state" even if it is neither a unit of municipal government or a state agency. To make the determination of whether OHSU is an instrumentality of the state, we must examine the entire context of the statutes creating OHSU as a public corporation. That statutory context, as examined below, demonstrates that OHSU is an instrumentality of the state that would have been entitled to immunity at common law. (8)

In those statutes, the legislature specified some of OHSU's public services and functions, in describing the missions and purposes of OHSU. Specifically:

> "(1) It shall be the public policy of the Oregon Health and Science University in carrying out its missions as a public corporation:
>
> "(a) To serve the people of the State of Oregon by providing education in health, science, engineering and their management for students of the state and region.
>
> "* * * * *
>
> "(3) The university is designated to carry out the following public purposes and missions on behalf of the State of Oregon:
>
> "(a) Provide high quality educational programs appropriate for a health and science university;
>
> "(b) Conduct research in health care, engineering, biomedical sciences and general sciences;
>
> "(c) Engage in the provision of inpatient and outpatient clinical care and health care delivery systems throughout the state;
>
> "(d) Provide outreach programs in education, research and health care;
>
> "(e) Serve as a local, regional and statewide resource for health care providers; and
>
> "(f) Continue a commitment to provide health care to the underserved patient population of Oregon.
>
> "(4) The university shall carry out the public purposes and missions of this

> section in the manner that, in the determination of the Oregon Health and Science University Board of Directors, best promotes the public welfare of the people of the State of Oregon."

ORS 353.030. OHSU's purposes, therefore, include "promot[ing] the public welfare of the people of the State of Oregon[,]" in part through providing education and health care to the people of the State. ORS 353.030(4). Without question, the particular combination of education and health care in the form of a research and teaching hospital is traditionally a function performed by the state, at least for the last century. *See, e.g.*, *James & Yost*, 216 Or at 600 (one of the functions of the state government is "the education of the peoples of the state"). OHSU's functions, as outlined by statute, demonstrate that it possesses the first attribute of an instrumentality of the state.

OHSU also possesses the second attribute of an instrumentality of the state. In *James & Yost*, this court described an instrument of the state as possessing those powers "as the state entrusts to [it]." *Id.* at 600. In ORS 353.050, the legislature outlined more than 20 "[p]owers and duties of board and university officials," including setting policies for the university, entering into contracts, including partnerships and joint ventures, entering into real estate transactions, suing and being sued in its own name, investing funds, borrowing funds, and developing academic programs. The legislature also granted to the board or OHSU the power to "[p]erform any other acts that in the judgment of the board or university are requisite, necessary or appropriate in accomplishing the purposes described in or carrying out the powers granted by this chapter." ORS 353.050(25). This list of powers outlined by the legislature, though broad, suggests that OHSU is an instrumentality of the state.

The governance structure of OHSU also is an important indicator that OHSU is an instrumentality of the state. OHSU's board of directors consists of 10 members who, except for OHSU's president, are appointed by the Governor and confirmed by the Senate. ORS 353.040(1). Except for OHSU's president and a student member of the board of directors, each member serves a four-year term. ORS 353.040(2). The Governor has the authority to remove any board member for cause, after notice and public hearing. ORS 353.040(7). The board is charged with "exercis[ing] all the powers of the Oregon Health and Sciences University" and "govern[ing] the university." ORS 353.050. In carrying out those powers, "the university shall be a governmental entity performing governmental functions and exercising governmental powers." *Id.*

Based on the entirety of the statutes discussed above, we conclude that OHSU is an instrumentality of the state performing state functions. We therefore agree with the Court of Appeals' conclusion that OHSU would have been entitled to immunity at common law. When an entity would have been immune from liability at common law, the legislature's choice to limit that entity's liability does not violate Article I, section 10. *Hale*, 308 Or at 518. Therefore, the OTCA's damages limitation, as applied to plaintiff's claim against OHSU, does not violate Article I, section 10. [(9)]

D. *Plaintiff's claim against the individual defendants*

Having concluded that the common law in Oregon in 1857 would not have recognized a cause of action for negligence against OHSU, we now address whether the OTCA's elimination of a cause of action against the individual defendants, combined with its

damages limitation, survives scrutiny under Article I, section 10. As we noted earlier, the Oregon Constitution guarantees that "every man shall have remedy by due course of law for injury done him in his person, property, or reputation." Or Const, Art I, § 10.

On review, defendants offer several arguments supporting their assertion that the Court of Appeals erred in holding that the application of the OTCA in this case violated the remedy clause. First, defendants contend that Article I, section 10, guarantees only that a remedy of some kind be available, not that the remedy be of any certain type or amount. Therefore, in defendants' view, because plaintiff here has a remedy available to him in the form of an action against OHSU, there is no Article I, section 10, infirmity. Second, defendants assert that the Court of Appeals erred in comparing the amount of damages available under the OTCA to the amount of damages claimed by plaintiff. Defendants argue that "substantial," as that term had been used in this court's Remedy Clause jurisprudence, does not call for such a comparison; instead, defendants contend that "substantial" refers to the remedial *process* or, at the very most, that a substitute remedy need only be one that is not illusory or the practical equivalent of no remedy at all.[(10)]

From the foregoing, the state contends that the court should review a legislatively substituted remedy on a categorical basis only. Put another way, the state suggests that the determination of whether a substitute remedy is adequate should not focus on the facts of an individual case, but instead should focus on the balance struck by the legislature in creating a substitute remedy. The state asserts that, unless a category of potential plaintiffs is left without a remedy, the legislative policy choice is conclusive.On the other hand, plaintiff contends that the Remedy Clause protects both the procedure for seeking redress as well as the substance of that redress. Plaintiff argues further that, when the legislature abolishes a common-law remedy, it must provide a remedy that is "substantially equivalent" to the common-law remedy.

This court has addressed Article I, section 10, challenges to the OTCA on three prior occasions. In *Hale*, this court rejected an Article I, section 10, challenge to the OTCA as applied to an action brought against the City of Portland (City) and the Port of Portland (Port). *Hale*, 308 Or at 517-24. The plaintiff in that case suffered injuries stemming from an alleged failure of the City and the Port to maintain a road. *Id.* at 511. The plaintiff's medical expenses totaled more than $600,000; however, upon motion by the City and Port, the trial court struck the plaintiff's claim for damages in excess of the $100,000 damages limitation in effect at the time and entered judgment against the City and the Port for $100,000. *Id.* On review, the plaintiff challenged the constitutionality of that damages limitation. *Id.*

The court in *Hale* first concluded that the Port would have been immune from liability at common law; therefore, the damages limitation did not "deny plaintiff any right he ha[d] against the Port by virtue of the guarantee in Oregon Constitution Article I, section 10, because there never was such a right." *Id.* at 518. The court reached a different conclusion regarding the City, and therefore went on to analyze the damages limitation as to the plaintiff's claim against the City. *Id.* at 521-24. The court explained that Article I, section 10, permits the legislature to alter a common-law remedy, "so long as the party injured is not left entirely without a remedy. * * * [T]he remedy need not be precisely of the same type or extent; it is enough that the remedy is a *substantial one*." *Id.* at 523 (emphasis added). In upholding the OTCA's damages limitation, *Hale* emphasized that the legislature had struck a new balance between municipal corporations and potential

plaintiffs. *Id.* The court concluded that the remedy available to plaintiff was "substantial" because, although the OTCA reduced the size of the potential recovery, it also expanded the class of plaintiffs that could recover by not requiring a plaintiff to demonstrate that the municipal corporation was engaged in a proprietary activity when it injured that plaintiff. *Id.* The court described that *quid pro quo* as follows:

> "A benefit has been conferred, but a counterbalancing burden has been imposed. This may work to the disadvantage of some, while it will work to the advantage of others. But all who had a remedy continue to have one. This may not be what plaintiff wants. It may not even be what this court, if it were in the business of making substantive law on this subject, would choose to enact. But it is within the legislature's authority to enact in spite of the limitations of the Oregon Constitution, Article I, section 10."

Id. at 523. Justice Linde concurred separately, asserting that "the court has allowed legislative immunization of cities from tort liability only on condition that the individuals who are personally responsible for harm qualifying as a legal injury remain liable." *Id.* at 530. Because *Hale* included no claim against individual public officers, Justice Linde agreed with the court's conclusion. *Id.*

The court next addressed the OTCA's constitutionality under Article I, section 10, in *Neher v. Chartier*, 319 Or 417, 879 P2d 156 (1994). In that case, the plaintiff's adult daughter was struck and killed by a bus operated by Tri-County Metropolitan Transportation District of Oregon (TriMet). *Id.* at 420. The plaintiff brought a wrongful death action against TriMet and the bus driver. *Id.* at 420-21. The defendants moved for judgment on the pleadings, arguing that they were immune from liability under ORS 30.265(3)(a), [(11)] because the decedent was covered by the workers' compensation law at the time of her death. *Id.* at 421. The trial court granted the defendants' motion. *Id.* The Court of Appeals affirmed. *Id.* at 421-22. On review, the plaintiff argued that the $3,000 burial benefit available to a decedent's estate under the workers' compensation scheme, if it is the only remedy available for wrongful death at the hands of a public employee, is a denial of a "substantial" remedy, in violation of Article I, section 10. *Id.* at 422. The court agreed, explaining that ORS 30.265(3)(a) denied the decedent's surviving parents a remedy that they would have been entitled to under the wrongful death statutes. *Id.* at 426-27. The court emphasized that ORS 30.265(3)(a) abolished the parents' remedy against both the municipality and the allegedly negligent employees of the municipality. *Id.* at 428. Therefore, the court concluded that ORS 30.265(3)(a) violated Article I, section 10. *Id.* [(12)]

Most recently, in *Jensen*, 334 Or at 417-21, this court addressed whether ORS 30.265(1), on its face, violated Article I, section 10. *Jensen* was a case involving certified questions from the United States District Court for the District of Oregon. *Id.* at 415. The plaintiff in that case alleged that a foster parent abused her daughter while she was in the custody of the Children Services Division of the State of Oregon (CSD). *Id.* at 416. The plaintiff alleged that individual agents and employees of CSD were negligent. *Id.* The individual defendants moved to strike and dismiss the claims against them and to substitute the state as the sole defendant pursuant to ORS 30.265(1). *Id.* While that motion was pending, the plaintiff moved the district court to certify questions to this court as to the constitutionality of ORS 30.265(1). *Id.* This court declined to consider any of the certified questions presented as "as-applied" challenges to ORS 30.265(1); instead, the

court considered only facial challenges to that statute. *Id.* at 415-16. Addressing the facial challenge under Article I, section 10, this court applied the two-step analysis governing Article I, section 10, claims set forth in *Smothers*, 332 Or at 124:

> "[O]ur first step is to determine whether the injury that plaintiff has alleged is one for which the remedy clause guarantees a remedy. If we answer that question affirmatively, and if the legislature has abolished that common-law claim, then our second step is to determine whether the legislature has provided a constitutionally adequate substitute remedy for that abolished common-law claim."

Jensen, 334 Or at 418 (internal citation omitted). The court assumed, without deciding, that the injury alleged was one for which Article I, section 10, guarantees a remedy. *Id.* The court then analyzed whether ORS 30.265(1), which required the plaintiff to bring an action against the public body alone, provided a constitutionally adequate substitute remedy. *Id.* at 418-21. The court concluded that the OTCA was capable of constitutional application. *Id.* at 421. The court reasoned:

> "Because the damages 'cap' is not implicated in every case, and because a damages award has yet to be determined in this case, the damages 'cap' does not render the remedy available to plaintiff 'incapable of restoring the right that has been injured.'"

Id. at 421 (quoting *Smothers*, 332 Or at 119-20). This court therefore held that ORS 30.265(1) does not, on its face, violate Article I, section 10. *Jensen*, 334 Or at 421.

Article I, section 10, cases outside of the OTCA context also provide guidance. For example, in *Greist v. Phillips*, 322 Or 281, 291, 906 P2d 789 (1995), this court held a statutory substitute remedy to be "substantial." In that case, the court reviewed the application of the damages limitation set forth in ORS 18.560[(13)] to a wrongful death claim. *Id.* at 284.[(14)] Following a trial, the jury awarded economic damages of $100,000 and noneconomic damages of $1.5 million to the decedent's personal representative. *Id.* at 286. Pursuant to ORS 18.560, the trial court reduced the noneconomic damages to $500,000. *Id.* On review, the plaintiff argued that, among other things, the trial court's application of ORS 18.560 to reduce her noneconomic damages award violated Article I, section 10. *Id.* at 290. The court rejected that argument, citing *Hale* and *Neher* for the proposition that Article I, section 10, is not violated so long as the party injured is not left without a substantial remedy. *Id.* at 290-91. The court concluded that the $600,000 total remedy that plaintiff received under ORS 18.560 was "substantial," emphasizing that statutory wrongful death actions in Oregon historically had been subject to low limits of recovery and that the statute contained no limit on economic damages. *Id.* at 291.

In *Smothers*, the court addressed whether "the legislature ha[d] deprived plaintiff of a *means* for seeking redress for [his] injury * * *." *Smothers*, 332 Or at 120 n 19 (emphasis in original). Although *Smothers* did not illuminate the contours of what constitutes a remedy under Article I, section 10, and, in fact, did not address the restorative aspect of the Remedy Clause at all, *Smothers* did observe that Article I, section 10, does not "freeze[] in place common-law remedies." *Id.* at 119. Instead, the legislature may alter common-law remedies, but "may not substitute an 'emasculated remedy' that is incapable of restoring the right that has been injured." *Id.* at 119-20 (quoting *West v. Jaloff*, 113 Or

184, 195, 232 P 642 (1925)).[(15)]

In sum, this court consistently has held that Article I, section 10, is not merely an aspirational statement, but was intended by the framers of the Oregon Constitution to preserve for future generations, against legislative or other encroachment, the right to obtain a remedy for injury to interests in person, property, and reputation under circumstances in which Oregon law provided a remedy for those injuries when Oregon ratified its constitution. *See, e.g.*, *Smothers*, 332 Or at 124 ("At a minimum, to be remedy by due course of law, the statutory remedy must be available for the same wrongs or harms for which the common-law cause of action existed in 1857."). However, as our review of the cases demonstrates, 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 the injured party with an "emasculated" version of the remedy that was available at common law.

The Constitution's terms do not identify what would constitute an impermissible deprivation of a "remedy by due course of law for injury done * * *." Or Const, Art I, § 10. That phrase embodying (as it does) an affirmative guarantee of government action rather than a more familiar restraint on particular lawmaking or a procedural mandate, has produced some degree of inconsistency in our cases. It may be that some of the inconsistency stems from an erroneous consideration of Article I, section 10, as a "due process of law" clause. *See Perozzi*, 149 Or at 350 (so holding).[(16)] Other problems arise when, understandably, litigants advocate for modes of analysis and formulas without regard to the context in which this court has discussed them. For example, in *Hale*, the court determined that a limited remedy against public bodies for personal injury was permissible. However, the court in *Hale* had no occasion to consider the constitutionality of a liability scheme that altered the common-law right of a personal injury victim to bring an action against any individual tortfeasor for the full damage amount. *Hale*, 308 Or at 530 (Linde, J., concurring) ("this case presents no claim against public 'officers or employees or agents,'" ORS 30.265"). Similarly, *Greist* involved the special context of a statutory limitation on a remedy that the legislature itself had created for wrongful death and, like *Hale*, did not consider a limit on a common-law remedy against an individual tortfeasor. *See Greist*, 322 Or at 290-91 (describing context of dispute).

Smothers represents a more recent effort by this court to identify the substance of the remedy guarantee in the context of a personal injury incurred by a plaintiff while working for a private employer. This court, citing earlier cases, acknowledged the legislature's reservoir of lawmaking authority to adjust remedial processes and substantive remedies to satisfy the constitutional command to provide "remedy by due course of law for injury * * *." *Smothers*, 332 Or at 119. However, in focusing on that authority, this court stated that any alteration may not substitute an "emasculated" version of the remedy that was available at common law. *Id.* at 119-20.

Our assessment of the "injury done [plaintiff] in his person" is relatively simple in the context of this case. Plaintiff alleges, and defendants admit for purposes of this proceeding, that, due to the personal injury suffered here as a consequence of defendants' negligence, plaintiff has suffered economic damages in the sum of $11,073, 506, for anticipated life and health care expenses, and $1,200,000 for lost future earning capacity, for total economic damages of $12,273,506. Plaintiff also alleges, and defendants admit, that plaintiff has suffered noneconomic damages in the sum of $5,000,000. There is no

dispute that, when Oregon adopted its remedy guarantee, plaintiff would have been entitled to seek and, if successful, to recover both types of damages from the individual defendants.

With the 1991 amendment to the OTCA, the legislature eliminated a plaintiff's right to seek a full recovery for torts committed by public officers, employees, or agents. That amendment left any injured person, in those circumstances, with a capped remedy of $100,000 in economic damages and $100,000 in noneconomic damages against the public body only.(17) The statute also eliminates entirely any claim against the individual tortfeasors by requiring substitution of those individual defendants by the public body as the sole defendant.

The individual defendants attempt to justify the complete statutory elimination of their liability by contending that the damage awards against a public body that ORS 30.270(1) allows constitute an adequate "remedy by due course of law." In so arguing, they rely on this court's opinion in *Hale*, however, as our discussion above indicates, *Hale* is distinguishable. *Hale* examined the adequacy of a statutorily capped monetary remedy in a claim against public bodies. *Hale*, 308 Or at 511-12, 521-24. In that case, with respect to the municipal defendant that did not enjoy sovereign immunity, the court's analysis did not address the injured plaintiff's traditional right to seek full relief from an individual tortfeasor. *Id.* at 521-24. The statutory scheme at issue here, in contrast, eliminates any claim against an individual tortfeasor. *Hale* does not assist the defendants in this case.

Neither does *Greist* support the individual defendants. As explained above, the statutory damage limitation at issue in *Greist* allowed recovery of 100 percent of any economic damages and up to $500,000 in noneconomic damages. *Greist*, 322 Or at 291. Placing no limit on recovery of economic damages allowed plaintiffs to recover fully their out-of-pocket losses, including expenses for medical, burial, and memorial services. *Id.* The court also explained that the wrongful death claim, at issue in that case, "came into existence with a limitation" and that, historically, recovery for wrongful death had been low. *Id.* Considered in that context, the court concluded that the legislative choice did not violate Article I, section 10. *Id.* In contrast, the legislation under review here does not merely adjust the recovery for a legislatively created remedial scheme; instead, it eliminates a common-law remedy against an individual tortfeasor.

We view plaintiff's economic damages of over $12 million as representative of the enormous cost of lifetime medical care currently associated with permanent and severe personal injuries caused by the medical negligence of a state officer, agent, or employee. Defendants do not argue that those damages do not constitute an "injury" within the meaning of the constitution. Nor does anything in the legislation suggest such a conclusion by the legislature. Yet, the legislature has completely eliminated an injured person's preexisting right to obtain a full recovery for those damages from the individual tortfeasors who negligently caused the injuries.

As we have explained, the legislature is authorized under Article I, section 10, to vary or modify the nature, the form, or the amount of recovery for a common-law remedy. However, that authority is not unlimited. To be clear, we respect the legislature's goal in amending the OTCA in 1991 -- the legislature was entitled to conclude that the goal of encouraging public employment of qualified health care professionals by protecting them from the demands of litigation and the threat of personal liability is an important one.(18)

However, there is simply nothing that we can discern from our state's history, or from the nature, the form, or the amount of recovery available for the preexisting common-law claim, that would permit this court to conclude that the limited remedy for permanent and severe injury caused by medical negligence that is now available under the OTCA meets the Article I, section 10, remedy requirement.

In sum, we hold that (1) OHSU would have been entitled to sovereign immunity at common law and, therefore, plaintiff would have had no common-law claim against OHSU that is entitled to protection under Article I, section 10; (2) because OHSU is entitled to sovereign immunity, the legislature can limit damages recoverable against OHSU to any amount it chooses, unfettered by Article I, section 10's Remedy Clause; however, (3) the elimination of a cause of action against public employees or agents in ORS 30.265(1), as applied to plaintiff's claim against the individual defendants, violates the Remedy Clause of Article I, section 10, because the substituted remedy against the public body, as specified in ORS 30.270(1), is an emasculated version of the remedy that was available at common law.(19)

The decision of the Court of Appeals is affirmed. The judgment of the circuit court is reversed and the case is remanded to the circuit court for further proceedings.

BALMER, J., concurring.

Plaintiff was injured by the medical negligence of employees of Oregon Health and Science University (OHSU). Plaintiff suffered damages (which OHSU, for present purposes, does not dispute) of at least $11 million, primarily for the cost of his past and future medical care. Oregon's current statutes limit plaintiff's recovery to $100,000 for economic damages (medical costs, lost wages, and similar losses) and another $100,000 for noneconomic damages, such as pain and suffering. I agree with the majority's analysis and with its conclusion that the statutes that lead to that result deprive plaintiff of a remedy that he had at common law without providing an adequate substitute remedy, in violation of the "Remedy Clause" of Article I, section 10, of the Oregon Constitution.

I write separately to make two points. First, the limit on the remedy available to plaintiff here should have been increased long ago by the legislature -- and the legislature should take this opportunity to reconsider the appropriate tort claims act limits for medical malpractice claims against OHSU. Second, the majority correctly states that the Remedy Clause does not prevent the legislature from modifying the form or amount of recovery -- or even from eliminating -- common-law claims, as long as it provides an adequate substitute remedy. I would add that, under this court's cases, a legislatively imposed limit on the damages that an injured patient may recover against OHSU and its employees would not violate the Remedy Clause as long as that limit does not deprive the patient of a "substantial" remedy. Those cases also demonstrate that the majority's decision does not threaten existing statutes in which the legislature has altered or eliminated common-law causes of action, such as the workers' compensation system.

I begin with a point that should be apparent to all the parties and *amici* in this case: The arbitrarily low cap on damages for medical malpractice claims against OHSU and its employees is a problem that has long called for a legislative solution. The present tort claims act imposes a cap of $100,000 for economic damages and another $100,000 for noneconomic damages for torts committed by public agencies and their employees

without regard to the nature of the tort. ORS 30.270. Those limits may well be appropriate for most torts committed by public employees. Car accidents in which a public employee is at fault; the failure to clear ice from a public sidewalk leading to an injury -- the damages from those kinds of injuries may occasionally exceed the cap, but ordinarily they will not. It is for that reason that drivers and homeowners often carry insurance of $100,000 per person and $300,000 per accident. But, as this case so tragically illustrates, the nature of medical malpractice claims is such that damages in the form of future medical expenses and lost wages often can be hundreds of thousands or millions of dollars. For that reason, doctors don't have malpractice insurance of $100,000 or $300,000; rather, virtually every doctor in Oregon has medical malpractice insurance coverage of at least $1 million, with many doctors maintaining coverage of $3 million or $5 million per occurrence.[(20)]

The insurance obtained by individuals for claims arising from their driving and homeownership -- and by doctors for malpractice claims -- does not necessarily determine the limits of liability that the legislature should set for purposes of the Oregon Tort Claims Act, let alone the level that is required by the Remedy Clause. At the very least, however, the decisions of private individuals and institutions regarding their insurance coverage provide some indication of the kinds of claims those private actors ordinarily face and, indirectly, of what kind of remedy for those claims likely would be "substantial" or "adequate" for purposes of the Remedy Clause. In any event, the fact that virtually every Oregon doctor carries malpractice insurance that far exceeds the caps applicable to OHSU and its employees suggests that those limits need to be changed. In my view, the legislature should, at least for medical malpractice claims, increase the existing claims limit substantially and immediately and, perhaps, retroactively.

My second point relates to the standards by which this court reviews legislative modifications of common-law causes of action to determine whether they are consistent with the Remedy Clause. This court's Remedy Clause cases allow the legislature to adjust Oregon law to changing circumstances by creating, eliminating, or altering causes of action or providing defenses or immunities to the cause of action; however, if those changes eliminate a common-law remedy that existed in 1857, the legislature must provide an adequate substitute remedy. *See* Smothers v. Gresham Transfer, Inc., 332 Or 83, 124, 23 P3d 333 (2001). The majority recognizes that flexibility: "[T]the legislature is authorized, under Article I, section 10, to vary or modify the nature, the form or the amount of recovery for a common-law remedy," as long as an injured person has an adequate substitute remedy. ___Or at ___ (slip op at 34); *see also* ___Or at ___ (slip op at 30) (Remedy Clause "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 the injured party with an 'emasculated' version of the remedy that was available at common-law.").

The difficulty, of course, in this as in other Remedy Clause cases, is determining whether a substituted remedy is constitutionally adequate. This court has not articulated a precise test, and it probably is not possible to do so. As the majority notes, we have used different words to try to identify what kind of remedy is required. Many cases simply have held that the legislature may not leave a plaintiff "without remedy," *Mattson v. Astoria*, 39 Or 577, 579, 65 P 1066 (1901), or with only an "emasculated" remedy. *West v. Jaloff*, 113 Or 184, 195, 232 P 642 (1925). In *Hale v. Port of Portland*, 308 Or 508, 523, 783 P2d 506 (1989), the court reviewed the earlier Remedy Clause decisions and stated that the Remedy Clause "is not violated when the legislature alters (or even

abolishes) a cause of action, so long as the injured party is not left entirely without a remedy. Under those cases, *the remedy need not be precisely of the same type or extent*; it is enough that the remedy is a substantial one." (Emphasis added.) In *Hale*, this court upheld a cap on damages that the legislature had enacted as part of an expansion of the class of plaintiffs who could sue a public body: "A benefit has been conferred, but a counterbalancing burden has been imposed. This may work to the disadvantage of some, while it will work to the advantage of others." *Id.*

Plaintiff argues that any statute that imposes a limit on the damages that a plaintiff could have recovered at common law violates the Remedy Clause. From plaintiff's perspective -- which I respect, but disagree with -- the Remedy Clause prevents the legislature from eliminating plaintiff's cause of action against the individual defendants in this case and substituting OHSU as the sole defendant, as long as there is any limit on OHSU's liability. Plaintiff asserts that even if the legislature set a limit of $1 million or $10 million on OHSU's liability, that limit would be unconstitutional as applied to any plaintiff whose damages exceeded whatever the limit happened to be. (21) Plaintiff takes that position because, at common law, plaintiff had a cause of action against the individual defendants for all his damages, without any limit whatsoever.

No Oregon case supports plaintiff's position that any tort claims limit would be unconstitutional when applied to a plaintiff whose damages exceeded that limit. *Hale* is almost directly on point. There, this court *upheld* a tort claims damage limits of $100,000 on a claim against the City of Portland, even though (1) the plaintiff's alleged economic damages exceeded $600,000, and (2) at common law, the plaintiff would have had a claim against the city for an unlimited amount (because the claim was against the city acting in a proprietary capacity). This court rejected the plaintiff's argument that the $100,000 limit on damages that could be recovered against the city violated the remedy clause because the plaintiff's damages exceeded that amount. As this court concluded in upholding the cap, although "a limit has been placed on the size of the award that may be recovered," all persons "who had a remedy continue to have one." *Hale*, 308 Or at 523. More relevant to this case, the court in *Hale* recognized that when the legislature modifies a common-law claim, that change may "work to the disadvantage of some, while it will work to the advantage of others." *Id.*

Plaintiff asserts that *Hale* is distinguishable because that case, unlike this one, did not involve a claim against individual defendants that the legislature had eliminated. Although Justice Linde relied upon that fact in his concurring opinion, 308 Or at 527 (Linde, J., concurring), it played no role in the majority's analysis. Rather, the majority in *Hale* viewed the statutory scheme there as adjusting the liability of public defendants by making the city liable for torts committed in its governmental capacity that it would not have been liable for at common law. Similarly, in this case, the statutory scheme adjusted the liability of public defendants by eliminating the common-law claim against the individual defendants and making OHSU liable for their torts -- liability from which it would have been immune at common law. (22) In both cases, those adjustments were accompanied by the imposition of a limit on the amount of damages that, without the statutory limit, could have been recovered at common law.

Greist v. Phillips, 322 Or 281, 906 P2d 789 (1995), also rejected the argument that plaintiff makes here. In that wrongful death case, a jury had awarded the plaintiff noneconomic damages of $1.5 million, but the trial court had reduced the award to

$500,000 pursuant to *former* ORS 18.560(1) *renumbered as* ORS 31.710 (2003). The plaintiff in *Greist* made the same argument that plaintiff makes here: that the cap "wholly denies a remedy for legitimate losses *that exceed $500,000.*" *Greist*, 322 Or at 290 (quoting the plaintiff's brief). This court, however, concluded that plaintiff's recovery of $500,000 in noneconomic damages, in addition to $100,000 in economic damages, was a "substantial remedy," even though it was a fraction of the amount that the jury had awarded.

The majority distinguishes *Hale* and *Greist* from this case on grounds that I find persuasive. However, nothing in the majority opinion undermines the holdings in those cases that the Remedy Clause does not prohibit the legislature from imposing caps on tort damages as long as those caps do not deprive a plaintiff of a "substantial remedy." *Hale* and *Greist* both hold that the legislature may act with regard to *classes* of claims or plaintiffs and that a statutory limit on certain kinds of claims does not violate the remedy clause, even though it may limit the damages that can be recovered by a particular plaintiff for a particular claim. In my view, the problem with the statutory scheme at issue in this case is not the fact that OHSU's liability is capped, but rather that a cap of $100,000 for economic damages and $100,000 for noneconomic damages is not a substantial remedy for medical malpractice claims.

To summarize, Article I, section 10, does not "freeze in place common-law causes of action that existed when the drafters wrote the Oregon Constitution in 1857." *Smothers,* 332 Or at 124. Rather, the legislature may modify those remedies by changing the nature of the plaintiff's claim, the available defenses, or the amount of damages that the plaintiff may recover, as long as the plaintiff retains a substantial remedy "for injury done him in his person, property, or reputation." Here, the modification made by the legislature -- the elimination of the claims against the individual defendants and the substitution of OHSU as the only defendant, with the caps on OHSU's liability described above -- did not leave plaintiff with a substantial remedy for his malpractice claim.

That understanding of the issue in this case also demonstrates that nothing in the majority's opinion undermines other statutes in which the legislature has adjusted common law rights and liabilities. The most obvious example is the workers' compensation system. In *Smothers*, this court stated that the court's earlier decisions "implicitly * * * recognized the legislature's constitutional authority to substitute workers' compensation for the common-law negligence cause of action for work-related injuries." 332 Or at 125. The workers' compensation scheme provides an injured worker with compensation for work-related injuries without the necessity of proving the employer's negligence; however, the amounts that a particular injured worker may receive may well be less than he or she could recover in a successful negligence action against the employer. In a sense, an injured worker's damages are capped at the level of benefits that the worker receives under the workers' compensation program. However, because of the trade off of not having to prove the employer's negligence (and other procedural advantages) and because injured workers' benefits are related to the severity of the injury, the workers' compensation scheme provides workers generally with a "substantial remedy" for remedy clause purposes.

In other statutes, the legislature has determined that important public policies will be advanced by encouraging certain activities and has modified common-law causes of action involving those who participate in such activities. "Good Samaritan" statutes limit the circumstances in which a person injured by another person who provides emergency

medical assistance, transportation, or defibrillator treatment can recover damages. *See* ORS 30.800; ORS 30.807; ORS 30.802. Other statutes provide individuals with limited immunity for reporting child abuse, ORS 419B.025, and for disclosing information about a former employee to a new employer. ORS 30.178. In those and similar statutes, the legislature has modified the plaintiff's common-law cause of action by, for example, requiring the plaintiff to prove "gross negligence" rather than "negligence," or by providing limited immunity to defendants for some kinds of conduct. The majority's decision, like this court's earlier Remedy Clause cases, allows the legislature to respond to what it perceives to be important public policy needs, as long as it does not eliminate a common-law cause of action without providing an adequate substitute remedy.

Kistler, J., joins in this concurring opinion.

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1. ORCP 21 B states: "After the pleadings are closed, but within such time as not to delay the trial, any party may move for judgment on the pleadings."

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2. The "individual defendants" are Mustafa Cobanuglu, MD; John Blizzard, MD; Sanjeev Sharma, MD; Steven Fiamengo, MD; Betsy Soifer, MD; Jennifer Stewart, RRT; and Ana Wilson, RN. "Defendants," in this opinion, includes the individual defendants. "OHSU" refers only to Oregon Health and Science University.

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3. Article I, section 17, of the Oregon Constitution, provides: "In all civil case, the right of Trial by Jury shall remain inviolate."

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4. Because the court agreed with plaintiff's Article I, section 10, argument, the court declined to reach plaintiff's Article I, section 17, argument regarding the claims against the individual defendants. *Clarke*, 206 Or App at 634.

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5. This court permitted the state to intervene on review.

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6. Other public bodies, such as municipal corporations, enjoyed immunity from suit only when engaged in "governmental" functions, but not when engaged in "proprietary" functions. *Hale*, 308 Or at 518. The distinction between governmental and proprietary functions, however, is not entirely clear from our previous cases. *See id.* at 518-19) (noting this court's inconsistent conclusions concerning whether street maintenance, for example, was governmental or proprietary). Because we conclude that OHSU is an instrumentality of the state, we do not address whether OHSU was engaged in a governmental or proprietary function when it treated plaintiff.

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7. We note that this court recently concluded that SAIF was not an arm of the state for purposes of Eleventh Amendment immunity. *Johnson v. SAIF*, 343 Or 139, 156, 164 P3d 278 (2007). As we noted in that case, however, the test for Eleventh Amendment immunity is different than the analysis required to determine whether an entity is an "instrumentality" of the state for state immunity purposes. *Id.* at 147-48, 151 (outlining factors of Eleventh Amendment analysis).

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8. We note also that the OTCA is specifically made applicable to OHSU, under ORS 353.100(1).

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9. We briefly address plaintiff's argument that the damages limitation of the OTCA violates his right to a jury trial under Article I, section 17. Article I, section 17, is not the source of any substantive claim or theory of recovery. *Jensen*, 332 Or at 422. Instead, as this court summarized in *Lakin v. Senco Products, Inc.*, 329 Or 62, 82, 987 P2d 463 (1999), Article I, section 17, "guarantees a jury trial in civil actions for which the common law provided a jury trial when the Oregon Constitution was adopted in 1857 * * *." *See also Jensen*, 334 Or at 422 (quoting same). Here, we have concluded that plaintiff would not have had a civil action against OHSU under the common law. Therefore, the OTCA's damages cap as against OHSU does not violate plaintiff's right to a jury trial under Article I, section 17.

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10. Defendants' contention that the "remedy" guaranteed by Article I, section 10, refers only to the process of administering justice, and not to the substance of the remedy afforded, is contradicted by our

decision in *Smothers*, 332 Or at 124, as we noted earlier: "The word 'remedy' refers both to a remedial process for seeking redress for injury and to what is required to restore a right that has been injured."

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11. ORS 30.265(3)(a) provided, in part:

> "Every public body and its officers, employees and agents acting within the scope of their employment or duties, * * * are immune from liability for:
>
> "(a) Any claim for injury to or death of any person covered by any workers' compensation law."

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12. In *Storm v. McClung*, 334 Or 210, 222-23, 47 P3d 476 (2002), this court disavowed *Neher*, to the extent that it concluded that ORS 30.265 (3)(a) violated Article I, section 10, because, contrary to the holding in *Neher*, Article I, section 10, affords protection only to injuries for which a cause of action existed in 1857.

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13. ORS 18.560 placed a limitation on noneconomic damage awards of $500,000 in all civil actions except for those brought pursuant to the Oregon Tort Claims Act and the Oregon Workers' Compensation Act. *Greist*, 322 Or at 284 n 1. That statute was later held unconstitutional under Article I, section 17, in *Lakin*, 329 Or at 82.

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14. *Greist* assumed that the Remedy Clause applied to a statutory wrongful death action. We note that, in accordance with our decision in *Storm*, 334 Or at 222-23, limits on legislatively created causes of action are not subject to Article I, section 10.

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15. *Smothers*'s use of the phrase "emasculated remedy" has its origins in this court's decision in *West*. *Smothers*, 332 Or at 119-20. In *West*, 113 Or at 195, this court held that ambulance drivers would remain

liable for negligently inflicted injuries, despite a statute that could have been construed to limit such liability, because such a construction took away "from an injured person a good common-law remedy for a private injury committed by a private citizen and gives him an *emasculated remedy wholly inadequate under many conditions.*" (Emphasis added.) The court also explained that such a remedy "could not be taken away without providing some other *efficient remedy* in its place." *Id.* (emphasis added). *West*, however, did not involve -- and therefore did not provide -- an analysis of a statutory limitation on recoverable damages.

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16. We need not revisit the "due process of law" question to decide this case. This court disavowed that reasoning in *Smothers*, 332 Or at 121-22.

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17. ORS 30.270(1)(b) states that damages recoverable against a public body shall not exceed:

> "$100,000 to any claimant as general and special damages for all other claims arising out of a single accident or occurrence unless those damages exceed $100,000, in which case the claimant may recover additional special damages, but in no event shall the total award of special damages exceed $100,000."

General damages, as noted above, now are described as noneconomic damages and encompass nonmonetary losses, including damages for pain and suffering, emotional distress, injury to reputation, and loss of companionship. *See, e.g.*, ORS 31.710(2)(b) (defining noneconomic damages in the context of a statute limiting recovery for noneconomic damages in civil cases). Special damages now are described as economic damages and refer to the verifiable out-of-pocket losses, including medical expenses, loss of income and future impairment of earning capacity, and costs to repair damaged property. *See, e.g.*, ORS 31.710 (2)(a) (defining economic damages).

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18. We note, however, that OHSU health care professionals who provide patient care outside of the OHSU system, pursuant to a private relationship between the patient and the professional, are not protected by the OTCA. *See* ORS 30.268(2) (noting that "services constituting patient care that are provided at a location other than the [OHSU campus or clinics] are not within the scope of state employment or duties" when those services are provided pursuant to "an exclusively private relationship").

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19. Because we have concluded that the OTCA, in this case, violates Article I, section 10, we need not address plaintiff's argument that the damages limitation of the OTCA violates his right to a jury trial under Article I, section 17.

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20. According to one comprehensive survey, for 2003, 34.9 percent of Oregon doctors had malpractice insurance with a per occurrence limit of $1 million (a decline from 45 percent in 1996), while 26.8 percent had a per occurrence limit of $5 million (up from 22.2 percent in 1996). Oregon Professional Panel for Analysis of Medical Professional Liability Insurance, A Report on Factors Impacting Medical Malpractice Insurance Availability and Affordability p 65 (2004).

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21. Plaintiff's challenge to the existing tort claims limit -- or to any such limit -- necessarily would be an "as applied" challenge available only to plaintiff (or a similarly situated plaintiff) whose damages actually exceeded the limit. In *Jensen v. Whitlow*, 334 Or 412, 51 P3d 599 (2002), this court rejected a facial challenge to the tort claims act limit. Plaintiff does not ask us to overrule *Jensen*, and the majority does not do sc.

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22. Indeed, the majority reaffirms OHSU's status as part of the state and therefore partaking of the state's sovereign immunity, except to the extent waived by statute.

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FILED: July 5, 2006

IN THE COURT OF APPEALS OF THE STATE OF OREGON

JORDAAN MICHAEL CLARKE,
a minor, by his guardian ad litem,
Sari Clarke,

Appellant,

v.

OREGON HEALTH SCIENCES UNIVERSITY,
a public corporation;
MUSTAFA ADNAN COBANOGLU, M.D.;
JOHN DAVID BLIZZARD, M.D.;
SANJEEV K. SHARMA, M.D.;
STEVEN A. FIAMENGO, M.D.;
BETSY E. SOIFER, M.D.;
JENNIFER STEWART, R.R.T.;
and ANA WILSON, R.N.,

Respondents,

and

VEERAPPA K. M. REDDY, M.D.,

Defendant.

0005-05116; A124560

Appeal from Circuit Court, Multnomah County.

Henry Kantor, Judge.

Argued and submitted October 26, 2005.

Kathryn H. Clarke argued the cause for appellant. With her on the briefs were William A. Gaylord, Linda K. Eyerman, Todd A. Bradley, and Gaylord Eyerman Bradley, PC.

William F. Gary argued the cause for respondents. With him the brief were Sharon A. Rudnick, C. Robert Steringer, Karla Alderman, and Harrang Long Gary Rudnick P.C.

Before Edmonds, Presiding Judge, and Linder and Wollheim,* Judges.

EDMONDS, P. J.

Reversed and remanded with instructions to reinstate judgment against OHSU in the

amount of $200,000 and to reinstate claims against the individual defendants.

*Wollheim, J., *vice* Richardson, S. J.

EDMONDS, P. J.

This case presents the issue whether the Oregon legislature can constitutionally limit the amount of damages that a person injured by medical malpractice at defendant Oregon Health and Science University (OHSU) can receive from OHSU and the individuals who treated him there. Plaintiff, through his guardian ad litem, appeals after the trial court substituted OHSU as the sole defendant and entered judgment on the pleadings under ORCP 21 B against OHSU in the amount of $200,000, the limit under the Oregon Tort Claims Act (OTCA), ORS 30.260 to 30.300. We affirm in part and reverse in part and remand on plaintiff's claims against the individuals who treated him.

I. BACKGROUND

Plaintiff was born at OHSU in February 1998 with a congenital heart defect. The heart defect was diagnosed prior to his birth, and plaintiff was readmitted to OHSU in May 1998 for surgical repair of the defect. Surgery was performed, and the heart defect was successfully repaired. Plaintiff was then placed in a surgical intensive care unit at OHSU. While in the surgical intensive care unit, plaintiff suffered prolonged oxygen deprivation causing permanent and profound brain damage. According to plaintiff, the brain damage was the direct result of negligence on the part of OHSU and the individuals treating plaintiff in failing to recognize problems with the endotracheal tube that was supplying plaintiff with oxygen, in failing to remedy those problems in a reasonable time, in failing to provide an appropriately trained pediatric specialist to diagnose the cause of oxygen starvation and correct the problem, and in placing plaintiff in a surgical intensive care unit rather than a pediatric or other intensive care setting with staff who could have recognized and responded to the oxygen deprivation.

Plaintiff further alleged that, as a result of negligence on the part of OHSU and the individuals treating him, he is "totally and permanently disabled, essentially unaware of his surroundings, permanently unable to communicate with other persons, probably cortically blind, quadriplegic, epileptic, spastic, uneducable, and totally permanently dependent on care-givers for all aspects of daily activities and life care * * *." He sought damages for permanent total life and health care in the amount of $11,073,506, damages for lost earning capacity in the amount of $1,200,000, and noneconomic damages in the amount of $5,000,000.

Initially, plaintiff brought claims against OHSU and against the individuals who treated him (the "individual defendants").[(1)] OHSU then moved to substitute itself as the sole defendant in place of the individual defendants, pursuant to ORS 30.265(1).[(2)] Plaintiff opposed the substitution, arguing that the elimination of a remedy against individual public employees and agents would violate the Oregon Constitution. The trial court granted the motion to substitute, and plaintiff filed a second amended complaint naming only OHSU as a defendant. In its answer to the second amended complaint, OHSU admitted that it was negligent in one or more of the particulars alleged by plaintiff and that such negligence resulted in permanent injury to him. OHSU further admitted that "plaintiff sustained economic and noneconomic damages in excess of the monetary

limitations of the Oregon Tort Claims Act as a result of the injuries caused by the negligence of OHSU."

At the same time that it filed its answer, OHSU moved for judgment on the pleadings pursuant to ORCP 21 B.[(3)] OHSU argued that, because it had admitted its negligence, as well as its maximum liability under the Oregon Tort Claims Act, all matters in controversy could be resolved on the pleadings. Plaintiff opposed the motion and petitioned the court to reconsider its ruling regarding the substitution of OHSU for the individual defendants, arguing that a judgment limiting plaintiff's recovery under the OTCA to a claim against OHSU would violate his constitutional rights. The trial court rejected plaintiff's arguments, granted OHSU's motion, and entered judgment in favor of plaintiff and against OHSU in the amount of $200,000, the maximum award under the limits of the OTCA. Plaintiff appeals that judgment.

On appeal, plaintiff argues that, by entering judgment against OHSU in the amount of $200,000, the trial court denied him the right to a remedy under Article I, section 10, of the Oregon Constitution, and the right to a jury trial under Article I, section 17.[(4)] He makes separate arguments as to the application of the OTCA to his claim against OHSU and his claim against the individuals who treated him. We begin with plaintiff's arguments regarding the application of the OTCA to his claim against OHSU.

II. PLAINTIFF'S CLAIM AGAINST OHSU

Plaintiff raises two separate constitutional challenges to the application of the OTCA damages limitation, ORS 30.270, to his claim against OHSU. First, he argues that the entry of judgment on the pleadings under the OTCA--which capped his damages at $200,000--deprived him of a remedy against OHSU in violation of Article I, section 10. Second, he argues that the entry of judgment pursuant to the OTCA damages limitation deprived him of the right to a jury trial on his claim against OHSU in violation of Article I, section 17. We begin by addressing plaintiff's Article I, section 10, argument because, as will become apparent, the resolution of that issue determines the scope of plaintiff's right to a jury trial against OHSU.

A. *Article I, section 10*

Plaintiff argues that, at common law, he would have had an uncapped claim for damages against OHSU. By imposing a cap on his damages, he contends, the OTCA violates his constitutional right to a remedy by due process of law under Article I, section 10. OHSU responds that it would have been immune at common law and, therefore, the application of the damages cap to plaintiff's claims against OHSU does not implicate Article I, section 10. Because we agree with OHSU that, at common law, it would have been immune from liability for the negligent acts that injured plaintiff, we reject plaintiff's argument under Article I, section 10.

The "remedy clause" of Article I, section 10, as it is commonly known, provides that "every man shall have remedy by due course of law for injury done him in his person, property, or reputation." In *Smothers v. Gresham Transfer, Inc.*, 332 Or 83, 124, 23 P3d 333 (2001), the Supreme Court explained the purpose of that clause:

> "The drafters of the Oregon remedy clause identified absolute rights

> respecting person, property, and reputation as meriting constitutional protection under the remedy clause. As to those rights, the remedy clause provides, in mandatory terms, that remedy by due course of law shall be available to every person in the event of injury."

As a result of the remedy clause, "[t]he legislature lacks authority to deny a remedy for injury to absolute rights that existed when the Oregon Constitution was adopted in 1857." *Id.* at 119. However, the remedy clause does not "freeze in place common-law causes of action that existed when the drafters wrote the Oregon Constitution in 1857." *Id.* at 124. That is, "[t]he legislature may abolish a common-law cause of action, *so long as it provides a substitute remedial process in the event of injury to the absolute rights that the remedy clause protects*." *Id.* (emphasis added).

This case differs from *Smothers* in one key respect: here, no statute denies plaintiff a common-law cause of action; indeed, ORS 30.265 and 30.270 provide him with a substituted remedy for the injuries he suffered at OHSU, albeit a limited one. However, as noted in *Smothers*, the court "has suggested that, in addition to being a means for seeking redress for injury, the word 'remedy' also refers to the amount of damages that a person is entitled to recover for an injury." 332 Or at 120 n 19. Accordingly, in analyzing plaintiff's challenge under Article I, section 10, we apply the two-step approach outlined by the Supreme Court. First, we determine whether the injury that plaintiff has alleged is one for which the remedy clause guarantees a remedy. If we answer that question affirmatively, and if the legislature has abolished that common-law remedy, then the second step of the analysis is to determine whether the legislature has provided a constitutionally adequate substitute remedy. *Jensen v. Whitlow*, 334 Or 412, 418, 51 P3d 599 (2002).

The first step of our inquiry requires us to determine whether, at the time that the Oregon Constitution was enacted, the common law of Oregon would have recognized a claim for damages against OHSU under the circumstances of this case. The parties, appropriately, focus their arguments on whether OHSU would have been immune at common law. Plaintiff contends that OHSU is a "non-state public corporation" and that, at common law, such corporations did not enjoy the full immunity of the sovereign. Rather, those types of corporations were immune from suit only when engaged in so-called "governmental" functions; when performing "proprietary" acts, they were liable just like a private corporation. OHSU, in response, argues that it is a state-created entity, performing state functions, and would thereby have enjoyed full immunity at common law.

1. *Governmental immunity at common law*

The principle of sovereign immunity originated in the English rule that the king could not be sued in his own courts. *Hale v. City of Portland*, 308 Or 508, 513, 783 P2d 506 (1989) (citing, among other authorities, Sir Frederick Pollock and Frederic William Maitland, I *History of English Law* 518 (2d ed 1898)). "Although arguably not justified in a democracy, the sovereign immunity of the American states was universally accepted." *Hale*, 308 at 513 (footnote omitted). The doctrine was adopted in the Oregon Territory and was not modified; thus, "sovereign immunity was a part of this state's law at the time of statehood." *Id.* at 514.

When they adopted Article IV, section 24, of the Oregon Constitution--at the same time

that they adopted Article I, section 10--its drafters ensured that "[p]rovision may be made by general law, for bringing suit against the State, as to all liabilities originating after, or existing at the time of the adoption of this Constitution[.]" Thus, "[o]ur Constitution is framed on the premise that the state is immune from suit and that if immunity is lifted it shall be done so by the action of the legislature." *Vendrell v. School District No. 26C et al*, 226 Or 263, 278, 360 P2d 282 (1961).

In that historical context, it is clear that a plaintiff's remedies against a public body created by the state to perform functions on behalf of the state would have been understood by the drafters to have been entirely dependent on the will of the legislature. That is, in 1857, a plaintiff would not have had any *absolute* rights against such a body; rather, the legislature would have had the ability, when creating a public body to operate as an instrumentality of the state, to determine the scope of the public body's liability. *See Hale*, 308 Or at 518 (at the time of statehood, instrumentalities of the state government, performing state government functions, partook "fully of the state's immunity from suit") (citing *Vendrell*, 226 Or 263 (recognizing application of sovereign immunity to school districts), and *Templeton v. Linn County*, 22 Or 313, 29 P 795 (1892) (recognizing the immunity of counties unless an action is authorized by the legislature)).

Hale illustrates this principle. In *Hale*, the court addressed an Article I, section 10, challenge to the damages cap of the OTCA in an action against the Port of Portland and the City of Portland. The court first examined whether the port would have been liable at common law. The port, the court noted, was established by Oregon Laws 1891, chapter 791, as "a separate district, to be known as The Port of Portland[.]" *Hale*, 308 Or at 517. The port was to have control of the Willamette and Columbia Rivers at Portland, East Portland, and Albina, and between those cities and the sea. *Id.* While its functions have been "expanded to reflect the changed commercial focus of the Pacific Northwest due to the passage of nearly a century, the Port continues to promote, *inter alia*, the maritime and shipping interests of the greater Portland area." *Id.* at 518. After so describing the port, the court stated that, "[u]nlike cities, but like other port districts, *see generally*, ORS ch 777, the Port is an instrumentality of the state government, performing state functions." *Id.* Because, as noted above, "[o]ther state instrumentalities, including some in the form of municipal corporations, partake fully of the state's immunity from suit," the court concluded that the port would have been immune at common law. *Id.* "It follow[ed] that, contrary to the contention of [the plaintiff in *Hale*], ORS 30.270(1)(b) does not deny plaintiff any right he has against the Port by virtue of the guarantee in Oregon Constitution Article I, section 10, because there never was such a right." *Id.* [(5)]

OHSU, like the Port of Portland, is a state-created public corporation, performing governmental functions on behalf of the state. OHSU was established in 1995 as an "independent public corporation": [(6)]

> "Oregon Health and Science University is established as a public corporation and shall exercise and carry out all powers, rights and privileges that are expressly conferred upon it, are implied by law or are incident to such powers. The university shall be a governmental entity performing governmental functions and exercising governmental powers. The university shall be an independent public corporation with statewide purposes and missions and without territorial boundaries. The university shall be a governmental entity but shall not be considered a unit of local or municipal

> government or a state agency for purposes of state statutes or constitutional provisions."

ORS 353.030.[7]

In establishing OHSU as a public corporation, the legislature specifically identified the public policy of OHSU in carrying out its mission:

> "(1) It shall be the public policy of the Oregon Health and Science University in carrying out its mission as a public corporation:
>
> "(a) To serve the people of the State of Oregon by providing education in health, science, engineering and their management for students of the state and region;
>
> "(b) To provide:
>
> "(A) An environment that stimulates the spirit of inquiry, initiative and cooperation between and among students, faculty and staff;
>
> "(B) Research in health care, engineering, biomedical sciences and general sciences; and
>
> "(C) The delivery of health care to contribute to the development and dissemination of new knowledge."

ORS 353.030. The legislature also enumerated "the following public purposes and missions on behalf of the State of Oregon" for OHSU:

> "(a) Provide high quality educational programs appropriate for a health and science university;
>
> "(b) Conduct research in health care, engineering, biomedical sciences and general sciences;
>
> "(c) Engage in the provision of inpatient and outpatient clinical care and health care delivery systems throughout the state;
>
> "(d) Provide outreach programs in education, research and health care;
>
> "(e) Serve as a local, regional and statewide resource for health care providers; and
>
> "(f) Continue a commitment to provide health care to the underserved patient population of Oregon."

ORS 353.030(3). Those "public purposes and missions" are to be carried out by OHSU in the manner that "best promotes the public welfare of the people of the State of Oregon." ORS 353.030(4).[8]

Despite the above expressions of legislative intent, plaintiff argues that OHSU would not have been immune at common law because the legislature "intended to make OHSU as independent as possible of the state and its processes." According to plaintiff, "[u]ntil 1995, OHSU was a state agency and the state's sovereign immunity applied to it. However, the language of ORS 353.020 now makes clear that OHSU is not a state agency[.]" (Underscoring in original.) Thus, plaintiff contends, OHSU is now separate from the state and therefore would not have enjoyed immunity at common law.

Initially, we disagree with plaintiff's premise that, simply because the legislature intended for OHSU to be independent of the state for certain purposes, it should no longer be considered a state instrumentality performing state functions. As discussed above, governmental immunity at common law extended to "instrumentalities of the state government." *Hale*, 308 Or at 518. We agree with plaintiff's characterization of OHSU in one respect: the 1995 legislation made OHSU more independent of state government than it was before. That independence was intended to give OHSU more operational flexibility to better carry out its statewide mission. In fact, the independence created by the legislature essentially was from the statutes and constitutional provisions concerning state *agencies*, such as state personnel rules, state contracting procedures, and state centralized services. Testimony, Senate Committee on Education, SB 2, February 28, 1995, Ex C, p 1 (written explanation of Janet Billups, OHSU Legal Policy Advisor) ("Its autonomy will be similar to the Port of Portland, Tri-Met and other public bodies that are independent of state administrative provisions."); *id.* at p 2 (explaining that the independent nature of the university must be clearly defined to avoid the result in *Frohnmeyer v. SAIF*, 294 Or 570, 660 P2d 1061 (1983), in which the court held that SAIF, though labeled an "independent public corporation," was simply an agency with certain delegated powers).

Nonetheless, OHSU continued to perform its core functions as a provider of educational and health care services "on behalf of the State of Oregon" after 1995. ORS 353.030. Although an "independent public corporation," OHSU's purposes and missions identify matters of statewide concern, and it clearly performs the statewide functions of education, research, and delivery of healthcare. And, though not a state "agency" for purposes of statutes and constitutional provisions, OHSU certainly is a part of the state government. *See* ORS 353.020; *see also* ORS 353.350 (OHSU revenue bonds "shall be considered to be bonds or obligations of *a political subdivision of the State of Oregon* for the purposes of all laws of the state" (emphasis added)). For those reasons, we conclude that, like the Port of Portland, OHSU continues to be an instrumentality of the state, created by the state to perform state functions, and would have been immune in 1857 from suit to the extent provided by the legislature and the common law.(9) *See Hale*, 308 Or at 518. Because plaintiff would not have had an absolute right to a common-law action against OHSU in 1857 in light of the immunity provided to state instrumentalities at that time, we do not reach the second step of the analysis under Article I, section 10. Accordingly, we reject plaintiff's argument that the damages cap of the OTCA deprives him of a remedy against OHSU in violation of Article I, section 10, of the Oregon Constitution. (10)

B. *Article I, section 17*

Alternatively, plaintiff argues that the damages cap of the OTCA violates his constitutional right to a jury trial against OHSU under Article I, section 17, of the Oregon Constitution, because it infringes on the jury's ability to award damages. In Lakin v.

Senco Products, Inc., 329 Or 62, 82, 987 P2d 463 (1999), the Supreme Court held that Article I, section 17, only "guarantees a jury trial in civil actions for which the common law provided a jury trial when the Oregon Constitution was adopted in 1857[.]" We already have determined that, in 1857, plaintiff would not have had a claim against OHSU, let alone a right to a jury trial. Accordingly, Article I, section 17, does not prohibit the legislature from interfering with the full effect of a jury's assessment of damages in these circumstances. *See Lawson v. Hoke*, 339 Or 253, 267, 119 P3d 210 (2005) (where plaintiff's Article I, section 10, argument failed for lack of an absolute common-law remedy, plaintiff's Article I, section 17, argument necessarily failed as well). For that reason, we reject plaintiff's argument that the OTCA damages cap violates his right to a jury trial against OHSU.

III. PLAINTIFF'S CLAIMS AGAINST THE INDIVIDUAL DEFENDANTS

We turn now to plaintiff's assignment of error regarding the substitution of OHSU for the individual defendants pursuant to ORS 30.265(1).[(11)] As noted above, plaintiff makes two separate constitutional challenges under this assignment of error. Initially, plaintiff argues that the substitution of OHSU for the individual defendants deprives him of a remedy in violation of Article I, section 10. Second, he argues that the substitution of a capped remedy against OHSU in place of his claims against the individual defendants deprives him of the right to trial by jury in violation of Article I, section 17. We address both arguments in turn.

A. *Article I, section 10*

With respect to the substitution of OHSU as the sole defendant in this case, plaintiff's argument under Article I, section 10, is relatively straightforward: At common law in 1857, a plaintiff in Oregon would have had a cause of action for medical malpractice against public employees. The remedy clause of Article I, section 10, of the Oregon Constitution does not permit the legislature to abolish that common-law remedy unless it provides an adequate substitute remedy. Because a limited recovery from OHSU is not an adequate substitute remedy, the application of ORS 30.265(1) in this case violates Article I, section 10.

Defendants agree that plaintiff would have had a claim at common law against the individual defendants. Defendants state in their brief that, "At common law, plaintiff would have had a claim against the individual defendants in this case--health care professionals working at OHSU." We agree and accept that concession. *See Smothers*, 332 Or at 129 ("It is undisputed that, at the time of the American Revolution, the common law recognized a cause of action for negligence."); *cf. Antin v. Union High School Dist. No. 2*, 130 Or 461, 478, 280 P 664 (1929) ("[I]f the duty is one which the officer owes both to the public and to a private individual, and the private individual is injuriously affected specially, and not as a member of the public, then for such violation the injured party may sue [the officer] for the wrong done."); *Mattson v. City of Astoria*, 39 Or 577, 579, 65 P 1066 (1901) (citing authority for the proposition that it is settled law that public officers are liable to an individual who sustains special damage as a result of negligence in the ministerial performance of delegated public duties).

Defendants also agree that, under ORS 30.265(1), plaintiff's common-law remedy against the individual defendants has been abolished by the legislature and that a claim against

OHSU has been substituted in its place. The parties disagree, however, on whether the substitution of a capped remedy against OHSU is a constitutionally adequate substitute remedy. The Supreme Court provided the framework for our inquiry in this case in *Jensen*, a case that involved an Article I, section 10, challenge to the same version of ORS 30.265(1) at issue here. In *Jensen*, the plaintiff filed a complaint in United States District Court on behalf of her minor daughter, Gurkin. She alleged that Gurkin had been abused by a male foster parent while she was in the custody of what was then Children Services Division of the State of Oregon (CSD). She brought claims against the individual agents and employees of CSD, and the defendants moved to dismiss the claims against them and to substitute the state as the sole defendant in the action, pursuant to ORS 30.265(1). The district court certified the following questions to the Oregon Supreme Court:

"(1) Does the limitation of causes of action for a tort committed by an agent of a public body to a cause of action against only the public body violate Article I, section 10, of the Oregon Constitution?

"(2) Does the limitation of causes of action for a tort committed by an agent of a public body to a cause of action against the public body violate Article I, section 17, of the Oregon Constitution?

"(3) Does the limitation of causes of action for a tort committed by an agent of a public body to a cause of action against only the public body violate Article I, section 20, of the Oregon Constitution?"

334 Or at 415.

As to the question involving Article I, section 10, the Supreme Court framed the relevant inquiry as follows: "[T]he question in this case is whether, on its face, the damages cap renders the substitute remedy provided in ORS 30.265(1) an 'emasculated' remedy in violation of Article I, section 10." *Id.* at 420. The court answered that question in the negative, holding that the OTCA is not *facially* unconstitutional because it is at least capable of constitutional application; in fact, the "cap" is not even implicated in every case. *Id.* at 421.

This case picks up where *Jensen* left off. It comes to us after judgment on the pleadings under ORCP 21 B. Plaintiff alleges that the cost of his health care for the rest of his life will amount to $11,073,506, apart from claims for noneconomic damages and for damages for lost earning capacity. In turn, OHSU concedes that plaintiff's damages will exceed $200,000. Significantly, no trial has occurred yet in this case, and plaintiff's actual damages have not been determined. Thus, for purposes of the issues before us, we accept as true the factual allegations in plaintiff's complaint. Curtis v. MRI Imaging Services II, 327 Or 9, 16, 956 P2d 960 (1998). The question before us, then, is slightly different than that in *Jensen.* We must determine whether, *as applied in this case to plaintiff's complaint*, "the damages cap renders the substitute remedy provided in ORS 30.265(1) an 'emasculated' remedy in violation of Article I, section 10." 334 Or at 420.

In *Smothers*, the court used the term "emasculated" to describe a remedy that is "incapable of restoring the right that has been injured." *Smothers*, 332 Or at 119-20. As the court noted in *Smothers*, the word "remedy" refers not only to the remedial process

for seeking redress, but "*to what is required to restore a right that has been injured*." *Id.* at 124 (emphasis added). Based on that understanding of the remedy clause, and as applied in this case at the pleading stage, we are unable to conclude that the OTCA would provide a constitutionally adequate substitute remedy under Article I, section 10, in the event that plaintiff were able to prove an entitlement to his damages as alleged. Taking plaintiff's allegations as true, his economic damages alone exceed $12 million. Recovery of $200,000 from only OHSU would provide plaintiff with less than two percent of his economic damages. By any reasonable measure, recovery of less than two percent of one's economic damages--particularly given the nature of the injuries alleged--is a remedy "incapable of restoring the right that has been injured." 332 Or at 119-20.(12) In our view, the drafters of Article I, section 10, would have considered that kind of recovery to constitute an "emasculated remedy" for the right that has been injured.

Significantly, defendants do not argue that a remedy of $200,000 is capable of restoring the right that has been injured in this case. Rather, they argue that a substitute remedy need only be "substantial," and that the "substantiality of a substitute remedy is determined categorically, not on a case-by-case or as-applied basis." Specifically, defendants rely on *Hale* for the proposition that the OTCA "strikes a new balance" between individuals injured by employees of public bodies and those who formerly would have been liable and argue that, under *Hale*, that new balance is constitutionally permissible. For the reasons that follow, we disagree with defendants' reasoning and their assertion that the result in *Hale* controls the outcome in this case.

Hale involved a challenge to the damages cap in the OTCA, albeit under an earlier version of the OTCA. The plaintiff in *Hale* was injured when the vehicle in which he was riding collided with an obstacle in the road, and his medical bills alone were alleged to exceed $600,000. He brought claims against several defendants, including the City of Portland and the Port of Portland, for negligently maintaining the road. The city and the port, both "public bodies" under ORS 30.270(1)(b), confessed judgment, each in the amount of $100,000, the statutory cap.

On appeal, the plaintiff in *Hale* argued that, by limiting his damages against the city and the port, the OTCA deprived him of his remedy in violation of Article I, section 10. As we discussed in greater detail above, ___ Or App at ___ (slip op at 8-9), the Supreme Court held that the port, had it existed in 1857, would have enjoyed full immunity at common law and, therefore, Article I, section 10, was not implicated as to the port. *Hale,* 308 Or at 518. Yet the city, the court concluded, would not have enjoyed that same immunity. *Id.* Rather, at common law, a city would have been immune only when engaged in "governmental" functions. *Id.* (citing *Noonan v. City of Portland*, 161 Or 213, 221, 88 P2d 808 (1939)). Thus, the court proceeded to determine whether the limitation on damages in the OTCA denied the plaintiff an adequate remedy when applied to his claims against the city.

Ultimately, the *Hale* court upheld the OTCA limitation on damages on the record before it. The court first summarized its earlier Article I, section 10, jurisprudence, focusing particularly on two cases, *Noonan* and *Evanhoff v. State Industrial Acc. Com.*, 78 Or 503, 154 P 106 (1915):

> "[Those two cases] held only that Article I, section 10, is not violated when the legislature alters (or even abolishes) a cause of action, so long as the

> party injured is not left entirely without a remedy. *Under those cases, the remedy need not be precisely of the same type or extent; it is enough that the remedy is a substantial one."*

Hale, 308 Or at 523 (emphasis added). Next, the court described the effect of the OTCA:

> "The statute specifically identifies the new balance it strikes between municipal corporations and those to whom certain of those corporations could, under limited circumstances, formerly have been liable:
>
> " 'Subject to the limitations of ORS 30.260 to 30.300, every public body is subject to action or suit for its torts and those of its officers, employees and agents acting within the scope of their employment or duties, *whether arising out of a governmental or proprietary function* * * *.' "

308 Or at 514-15 (emphasis in *Hale*). The court determined that, although a limit had been placed on the size of an award under the OTCA by the legislature, "[t]he class of plaintiffs has been widened by the legislature by removing the requirement that the injured party show that the municipal corporation's activity that led to the injury was a proprietary one." *Id.* at 523. The fact that the OTCA conferred a benefit and imposed a "counterbalancing burden" was significant in the court's view:

> "This may work to the disadvantage of some, while it will work to the advantage of others. But all who had a remedy continue to have one. This may not be what plaintiff wants. It may not even be what this court, if it were in the business of making substantive law on this subject, would choose to enact. *But it is within the legislature's authority to enact in spite of the limitations of Oregon Constitution, Article I, section 10."*

Id. at 523 (emphasis added).

Initially, defendants argue that "[t]his case poses the same issue as that addressed in *Hale*, which controls here." We disagree with that premise. As the Supreme Court later held in *Jensen*, the *Hale* court did not address the issue whether the OTCA is constitutional under Article I, section 10, as applied to the individuals whose negligence resulted in damages to the plaintiff:

> "In other words, the OTCA, at [the time that *Hale* was decided[(13)]], allowed a plaintiff to pursue a cause of action against an individual employee-defendant. By contrast, since 1991, the OTCA has limited a plaintiff's cause of action to one against the employing public body only. For that reason, the issue presented here differs from that presented in *Hale* and *does not resolve the question whether ORS 30.265(1), on its face, provides a constitutionally adequate substitute remedy for the claim plaintiffs once had against individual employees of a public body."*

Jensen, 334 Or at 420 (emphasis added).

Indeed, the concurring opinion by Justice Linde in *Hale* specifically pointed out that

> "the court has allowed legislative immunization of cities from tort liability only on condition that the individuals who are personally responsible for harm qualifying as a legal injury remain liable. *Batdorff v. Oregon City*, 53 Or 402, 100 P 937 (1909); *Mattson v. Astoria*, 39 Or 577, 65 P 1066 (1901). This is analogous to altering or limiting the scope of *respondeat superior* rather than wholly depriving a plaintiff of a remedy in due course of law for harm that no one has declared not to be a legal injury when caused by public rather than private negligence. *Because this case presents no claim against individual public 'officers or employees, or agents,' ORS 30.265, I concur with the court."*

308 Or at 530 (Linde, J., concurring) (emphasis added). Thus, *Hale* did not involve a claim against individual tortfeasors who then sought protection under the OTCA, and there was no occasion in that case for the court to consider the issue here--*i.e.*, the constitutionality of the substitution of a capped claim against a public body where a plaintiff is barred from proceeding against individual tortfeasors.

Next, defendants argue that, even if the issue before us was not addressed in *Hale*, the reasoning in *Hale* requires this court to analyze the substantiality of a substitute remedy on a categorical rather than on an "as-applied" basis to an individual plaintiff.(14) We reject that argument for three related reasons. First, we observe that defendant's argument appears inconsistent with the plain language of Article I, section 10, which guarantees a remedy to "every man * * * done *him* in *his* person, property, or reputation." (Emphasis added.) Article I, section 10, refers to remedies guaranteed to individuals, not remedies guaranteed to classes or groups of individuals. Second, the *Smothers* court specifically held--consistently with the plain language of Article I, section 10--that a proper inquiry as to the constitutionality of a legislatively substituted remedy involves a "case-by-case analysis." *Smothers*, 332 Or at 135 (concluding that "determining whether the exclusive remedy provisions of ORS 656.018 (1995) violate [the remedy clause of Article I, section 10,] *involves a case-by-case analysis*." (emphasis added)).

And finally, *Hale* did not hold that the legislature's decision to provide counterbalancing benefits and burdens to a particular category of plaintiffs in a statutory scheme is the sole criterion by which the constitutional adequacy of a substitute remedy is determined. Rather, that was the method the court used under the circumstances of that case to determine whether the remedy provided by the OTCA was an adequate substitute for claims against a public body.(15) Moreover, the intrinsic nature of an as-applied challenge under Article I, section 10, requires an assessment of a particular plaintiff's circumstances. *Smothers*, 332 Or at 135. Whatever methodology is selected to evaluate those circumstances must lead to a result that comports with the fundamental requirement for substitute remedies as stated in *Smothers*: that the remedy be capable of restoring the right that has been injured. 332 Or at 124. In light of *Smothers*, we do not believe that the *Hale* court created a test under Article I, section 10, that would permit the legislature, through a balancing of benefits and burdens, to constitutionally substitute, for some plaintiffs, a remedy that is incapable of restoring the right that has been injured.(16)

At the most basic level of analysis, a recovery of two percent of out-of-pocket loss or economic damages is simply not a "substantial" substitute remedy as required by Article I, section 10. Indeed, in that respect, *Hale* and *Smothers* are reconcilable. In *Hale*, the court opined that a substitute remedy "need not be precisely of the same type or extent; it

is enough that the remedy is a substantial one." 308 Or at 523. In *Smothers*, the court stated that a substitute remedy cannot be an "emasculated" remedy that is "incapable of restoring the right that has been injured." *Smothers*, 332 Or at 119-20. Those formulations, in our view, describe opposite sides of the same concept. If, as the Supreme Court held in *Smothers*, the drafters of the Oregon Constitution intended to guarantee a remedy for injury to absolute rights, it is inconceivable that the drafters simultaneously would have granted the legislature the power to substitute a remedy that is "substantial" and yet wholly incapable of restoring the right that has been injured. For all of the above reasons, we reject defendants' arguments concerning the import of *Hale*.

Defendants also rely on two other Supreme Court cases, *Caviness v. City of Vale*, 86 Or 554, 565, 169 P 95 (1917), and *Evanhoff*, 78 Or at 523-24. They argue that, under those cases, the legislature constitutionally may substitute a limited remedy against a public body for a common-law claim against the individual agents and employees of that body. Defendants rely on a statement in *Caviness* that, "while not always perfect and complete, [the remedy] will be found sufficient in many cases." 86 Or at 565. But when that statement is read in context, it provides little help to defendants. In *Caviness*, the court held that the legislature may absolve a city of liability for the repair of defective streets or sidewalks, but that, in order to do so, "an *equivalent* remedy must be provided." *Id.* (emphasis in original). It further held that the absolution of a city from liability for injuries arising from defective streets or sidewalks is permissible under Article I, section 10, because the legislative authority "*has not attempted to take away the remedy that always existed against the officers of the city for failure to cause repair of defects coming to their knowledge*, which latter remedy, while not always perfect and complete, will be found sufficient in many cases." 86 Or at 565 (emphasis added). In other words, *Caviness* emphasizes the importance of the availability of a common-law remedy against a negligent employee or agent of a public body--the very remedy that the OTCA makes unavailable in this case. What *Caviness* does not do is comment on whether the legislature can, by providing a benefit to some, leave others with an emasculated remedy. (17)

Defendants' reliance on *Evanhoff* is similarly unavailing. In *Evanhoff*, the Supreme Court rejected a challenge to the newly enacted workers' compensation scheme. The court observed:

> "Before its enactment one workman out of three received a large compensation for his injuries by an action at law, while the remaining two were defeated and got nothing. Now every workman accepting its provisions receives some compensation if injured; and, taken as a whole, it will be found that more money in the way of compensation is received by the whole body of injured workmen than by the inadequate remedies afforded in the courts."

78 Or at 523. At the time that *Evanhoff* was decided, Oregon's workers' compensation scheme was voluntary, not compulsory. Every worker accepting its provisions received some compensation when injured on the job; but a worker was free to decline to participate under the act and to proceed to court with "every constitutional remedy intact." *Id.* at 518-19. Plaintiff is in a different position than injured workers under that scheme because he is unable to elect his common-law remedy against the individual tortfeasors. Thus, it cannot be said that his remedies at common law, recognized by

Article I, section 10, are left "intact" by the legislature's enactments.

In summary, we conclude that, as applied to plaintiff's claims against individual tortfeasors at this stage of the proceedings and based on his allegations of injuries and damages, the provision of the OTCA that makes a remedy against OHSU "the sole cause of action for any tort of officers, employees or agents of a public body" violates Article I, section 10. It may be that, after plaintiff's damages are actually determined at trial, the constitutionality of the OTCA's exclusive remedy provision under Article I, section 10, will not be implicated. However, based on the record before us, if plaintiff is limited to a $200,000 recovery against OHSU and has no remedy against the individual defendants, and if plaintiff has suffered the damages he alleges, then he has been denied a substantial substitute remedy in violation of Article I, section 10. Accordingly, the trial court erred by entering judgment on the pleadings disposing of plaintiff's claims against the individual defendants.

B. *Article I, section 17*

Plaintiff also argues that the substitution of a capped remedy against OHSU violates his constitutional right to a jury trial against the individual defendants. According to plaintiff, "[a]s applied to the negligent physicians in this case, the [substitution of OHSU] simply becomes a mechanism for applying a damages cap, limiting the issues that a jury can determine." Thus, plaintiff argues, the application of the OTCA as to the individual defendants violates the mandate of Article I, section 17, of the Oregon Constitution that, "[i]n all civil cases the right of Trial by Jury shall remain inviolate." Because we reverse and remand as to the substitution of the individual defendants under Article I, section 10, we need not reach this issue.[(18)]

IV. CONCLUSION

For all of the reasons stated above, the trial court correctly determined that OHSU's liability is limited by the damages cap of the OTCA. However, given the damages alleged, judgment on the pleadings disposing of plaintiff's claims against the individual defendants was error.

Reversed and remanded with instructions to reinstate judgment against OHSU in the amount of $200,000 and to reinstate claims against the individual defendants.

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1. One of the individual defendants below, Dr. Reddy, was not served with a notice of appeal and is not a party to this appeal.

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2. ORS 30.265(1) provides in part that, "[i]f an action or suit is filed against an officer, employee or agent of a public body, on appropriate motion the public body shall be substituted as the only defendant."

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3. ORCP 21 B provides, "After the pleadings are closed, but within such time as not to delay the trial, any party may move for judgment on the pleadings."

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4. In the trial court, plaintiff advanced an argument under Article I, section 20, of the Oregon Constitution. In a footnote in his opening brief on appeal, plaintiff states that the "argument merges with the contention that the application of [the] OTCA deprives plaintiff of a complete remedy for an injury, and plaintiff therefore will not separately address Article I, section 20." Because plaintiff does not offer any independent argument under Article I, section 20, we do not discuss it further.

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5. However, the court in *Hale* reached a different conclusion as to the City of Portland. The city, the court concluded, would have been immune for "governmental" activities but would have been liable for "proprietary" activities. 308 Or at 518. The maintenance of roads and streets--the source of the negligence claim in *Hale*--had, at common law, been "somewhat arbitrarily classified as this second, 'proprietary' type of activity." *Id.* at 518-19. The city, therefore, would have been exposed at common law to liability under the circumstances of that case. *Id.* at 519.

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6. Before 1995, OHSU was a division of the Oregon State System of Higher Education.

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7. Unless otherwise noted, our citations to statutes within ORS chapter 353 are to the current versions of the statutes. Although the statutes have been amended since 1995, those amendments are not material to our analysis.

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8. Although OHSU was separated as a university from the Oregon State System of Higher Education, the legislature considered the newly established OHSU to be a "continuation of the former university with respect to its duties, functions and powers, and not a new authority, for the purpose of succession to all rights and obligations of the former university * * *." 1995 Or Laws ch 162, § 38.

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9. In his reply brief, plaintiff relies on *Takle v. University of Wisconsin Hospital and Clinics Authority*, 402 F3d 768 (7th Cir 2005), in which the court held that an institution similar to OHSU was not an "arm of the state" for purposes of sovereign immunity under the 11th Amendment to the United States Constitution. As plaintiff concedes, the test for whether a state governmental entity can be sued in federal court under the 11th Amendment, though using related terminology, involves a different inquiry from one concerning governmental immunity from suit at common law. We do not find that decision persuasive as to the issues in this case.

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10. In effect, the OTCA constitutes a partial waiver of the governmental immunity enjoyed by the state and its instrumentalities in 1857. *Hale*, 308 Or at 517. OHSU, however, still retains that immunity for claims in excess of the OTCA damages cap.

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11. ORS 30.265(1) provides, in part, that the

> "sole cause of action for any tort of officers, employees or agents of a public body acting within the scope of their employment or duties and eligible for representation and indemnification under ORS 30.285 or 30.287 shall be an action against the public body only. The remedy provided by ORS 30.260 to 30.300 is exclusive of any other action or suit against any such officer, employee or agent of a public body whose act or omission within the scope of the officer's, employee's or agent's employment or duties gives rise to the action or suit. No other form of civil action or suit shall be permitted."

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12. *Cf. Greist v. Phillips*, 322 Or 281, 906 P2d 789 (1995) (rejecting Article I, section 10, challenge to the damages cap in *former* ORS 18.560, *renumbered as* ORS 31.710 (2003), on the ground that the capped

amount of $500,000 in noneconomic damages, plus an *uncapped* award of $100,000 in economic damages, was a constitutionally adequate substitute remedy).

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13. *See* ORS 30.265 (1989), *amended by* Or Laws 1991, ch 861, § 1.

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14. The state made a similar argument in *Jensen* to the effect that "in determining whether a substitute remedial process is substantial and therefore constitutionally adequate, the court must analyze the remedy categorically, by examining whether potential plaintiffs as a group, not as individuals, retain a substantial remedy." The court declined to reach that issue "[b]ecause of the manner in which [it] resolve[d] plaintiff's Article I, section 10, challenge * * *." 334 Or at 419 n 5.

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15. We note that one of the principles underlying the court's analysis in *Hale* of the legislature's prerogative to provide counterbalancing benefits and burdens appears to have been that

> "the Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative objective * * *. Article I, [section] 10, Oregon Constitution, was not intended to give anyone a vested right in the law either statutory or common [.]"

308 Or at 521 (quoting *Noonan*, 161 Or at 248-50). That principle was expressly disavowed in *Smothers*. 332 Or at 118-19. Thus, to the extent that *Hale*'s emphasis on the legislature's ability to counterbalance the remedial scheme had, as a predicate, the notion that the legislature could even *abolish* common-law rights, that predicate was repudiated by *Smothers*.

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16. Moreover, even if we were to conclude that the adequacy of a substitute remedy must be determined in every case by the class of plaintiffs, our result would be the same. In *Hale*, the court held that the OTCA, as applied to a city, was constitutional because it provided a remedy to parties who, prior to the OTCA, would not have had one. 308 Or at 523 (the legislature "widened" the class of plaintiffs who could sue a municipal corporation by removing the requirement that the

municipal corporation's activity be a "proprietary" one). As applied to individual tortfeasors, the OTCA strikes no such similar balance. At common law, a plaintiff would have had a common-law cause of action against the individual tortfeasor regardless of whether the action was proprietary or governmental. *See Mattson* , 39 Or at 579. Thus, as applied to claims against individual tortfeasors, the only benefit provided by the OTCA's exclusive, capped remedy is, as defendants describe it, a judgment that is "virtually guaranteed to be paid" because it is backed "by the full faith and credit of the state." Categorically speaking, we do not believe that the "certainty" of an emasculated recovery for some plaintiffs, in exchange for their uncapped common-law claims, satisfies the requirements of Article I, section 10, as to those plaintiffs.

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17. In fact, the court in *Caviness* noted that it had previously

> "intimated a doubt as to the constitutionality of a charter provision which took away from a citizen a perfectly plain and efficacious remedy, and left in its place a partial and unsubstantial one; and this conviction has grown stronger in the mind of the writer from further consideration of the subject and examination of the authorities * * *."

Id. at 563-64 (referring to *Colby v. City of Portland*, 85 Or 359, 166 P 537 (1917)).

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18. We express no opinion as to whether Article I, section 17, would be violated by application of the OTCA damages cap to the claims against the individual defendants--an issue that does not present itself given the procedural posture of this case and the substitution of OHSU as the lone defendant. We observe, however, that plaintiff's Article I, section 17, right to a jury trial may be intertwined with his right to a remedy under Article I, section 10. *See Jensen*, 334 Or at 422 (Article I, section 17, "is not a source of law that creates or retains a substantive claim or a theory of recovery in favor of any party"; instead, "[t]he right to pursue a 'civil action,' if it exists, must arise from some source other than Article I, section 17, because, that provision 'is not an independent guarantee of the existence of a cognizable claim'" (quoting *Sealey v. Hicks*, 309 Or 387, 396, 788 P2d 435 (1990), *overruled in part on other grounds by Smothers*, 332 Or at 123)). In the event that the issue whether the OTCA cap applies to the individual defendants arises on remand, the trial court should consider the implications of both Article I, section 10, and Article I, section 17, as they apply to plaintiff's claims.

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Questions and follow up discussion ideas for OTCA Remedies Clause Panelists

1. What are the differing opinions among panelists regarding what the actual holding is in Clarke?
2. Was there a particularly important position taken in a particular *Amicus* Brief that we should be aware of, but that wasn't discussed in the Clarke opinion?
3. How does the case affect litigation strategy from each side's perspective?
   a. Does Clarke revise common law defenses?
   b. Are statutorily abolished defenses back in play? Is comparative negligence still the standard? What about assumption of the risk?
4. What types of entities are subject to inclusion or exclusion from the statutory definition of "Public body" as found in the Oregon Tort Claim Act?
   a. What qualifies as an "instrumentality of government"?
   b. What analysis is applied? How is it applied?
   c. Specifically, how should non-profit organizations that take all or part of their funding from government sources be treated?
5. Following Clarke, what is an adequate substitute remedy?
   a. What approach should courts use to determine that substitute remedies are adequate?
   b. How is "substantial" defined?
   c. Can a percentage amount be determined as adequate?
   d. Why are workman's compensation remedies adequate? Consider that injured workers may forgo potentially substantial monetary damages in exchange for no-fault certainty, but still a statutorily limited recovery. Why is that not an "emasculated" remedy?
6. What are the next frontiers after OTCA for Remedies Clause issues?
7. What is the economic impact of this decision? Has a number or range of the expected costs been yet determined?
8. What is the Oregon Legislature considering or evaluating as a response to the Clarke case?
   a. Can some scheme of segregating risk pools among various instrumentalities be devised, and if so, how might that work?
   b. Has there been any thought to amending or abolishing the current rules that allow governing bodies to self- insure against risk of tort liability?
9. Is there a particular question that you think we should have asked you, but didn't?
   a. What additional information about these issues, should members of the Inn consider or look for?

June 2008

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Legislative Committee Services
State Capitol Building
Salem, Oregon 97301
(503) 986-1813

Background Brief on ...

Tort Reform

Prepared by: Bill Taylor

A tort is defined as a civil wrong, other than a breach of contract, for which a court provides a remedy in the form of damages, usually money. A tort action is not a criminal proceeding. In a tort action, one party (the plaintiff) sues another party (the defendant), alleging that the defendant owed a duty to the plaintiff, the defendant violated that duty, and the plaintiff suffered a loss as a result of that breach of duty. Tort actions may involve a lawsuit to recover for injuries in a car accident, to recover against a doctor or lawyer for injuries caused by negligence (malpractice), or to recover against the manufacturer or seller of a product for injuries caused by the product (products liability).

The phrase "tort reform" refers to recent efforts to modify the system of determining fault and setting damages. Historically, this system was created through court decisions and was called common law. It has its roots in England and was adopted and modified by early American state and federal courts. It is this system that Oregon inherited at the time of statehood. Since then, Oregon, like all other states, has modified this system either through legislation or court decision.

Tort Reform in Oregon

The Oregon Legislature has undertaken extensive efforts to change tort law in Oregon twice in the last 20 years. The first effort was during the 1987 Legislative Session and the last during the 1995 Legislative Session.

The 1987 effort included:

- Requiring that half of all punitive damages be paid to the Criminal Injuries Compensation Account
- Protecting drug manufacturers from punitive damages if a drug is properly manufactured and labeled
- Placing a cap on non-economic damages (later declared unconstitutional)
- Placing limitations on joint and several liability (determining damages when two or more persons are at fault)
- A defense in a civil action based on ordinary negligence that the injured party was engaged in criminal conduct that would constitute at least a Class B felony
- Increasing the plaintiff's burden of proof to clear and convincing evidence that a person was served alcoholic beverages when

visibly intoxicated
- Increasing the per-occurrence State Tort Claims Limitations to $500,000

The 1995 effort included:

- Mandating arbitration in most cases involving less than $50,000
- Encouraging settlement conferences
- Penalizing a wide variety of frivolous lawsuits and poorly prepared court documents and motions
- Mandating attorney fee and court cost awards in certain cases
- Providing criteria for the discretionary award of court costs and attorney fees in a wide variety of other cases
- Modifying punitive damage awards, limiting attorney shares to 20 percent of punitive damage awards
- Modifying private rights of action under racketeering statutes and a number of other court procedures and evidentiary rules

Ballot Measure 81

In July 1999, the Oregon Supreme Court decision of *Lakin v. Senco Products Inc.* found ORS 18.560 (1), a provision from the 1987 Legislative Assembly's efforts to change Oregon's tort system by capping non-economic damages, to be unconstitutional. In doing so, the court held that the Legislature did not have the authority to cap damages under one of the original provisions of the Oregon Constitution, Article I, section 17 that provides, "In all civil cases the right of a Trial by jury shall remain inviolate." The court said that this constitutional provision guaranteed a jury trial in those civil actions for which the common law provided a jury trial at the time the Oregon Constitution was adopted in 1857. The provision, therefore, prohibited the Legislature from interfering in a jury's assessment of non-economic damages.

The 1999 Legislative Assembly responded to the court's decision by passing House Joint Resolution 2, a referral to the voters that, if passed, would have allowed the Legislature to impose limits on damage awards. House Joint Resolution 2 appeared on the ballot as Measure 81 during the May 2000 primary and was defeated.

Clarke v. OHSU

In December 2007, the Oregon Supreme Court found in *Clarke v. OHSU* the cap on liability for employees of Oregon Health & Science University unconstitutional under the circumstances. ORS 30.270 capped the liability for public bodies including their employees. In *Clarke*, damages were in excess of $17 million and ORS 30.270 capped damages at $200,000. The Oregon Supreme Court found the cap, as applied in *Clarke*, in violation of the Remedy Clause of Article I, section 10 of the Oregon Constitution.

Staff and Agency Contacts

Oregon State Bar
503-620-0222

Oregon Trial Lawyers Association
503-223-5587

Oregon Association of Defense Counsel
503-253-0527

Bill Taylor
Judiciary Committee Counsel
Legislative Committee Services
503-986-1694

under this section, in an amount not to exceed $5,000. [Formerly 30.190]

30.200 Action by district attorney; effect on others. If any district attorney has reasonable cause to believe that any person or group of persons is engaged in violation of ORS 166.155 or 166.165, the district attorney may bring a civil claim for relief in the appropriate court, setting forth facts pertaining to such violation, and request such relief as may be necessary to restrain or prevent such violation. Any claim for relief under this section does not prevent any person from seeking any other remedy otherwise available under law. [1981 c.785 §4]

ACTIONS ON OFFICIAL BONDS

30.210 To whom official bonds are security. The official undertaking or other security of a public officer to the state, or to any county, city or other public corporation of like character therein, is a security to the state, county, city or public corporation, as the case may be, and also, to all persons severally for the official delinquencies against which it is intended to provide.

30.220 Parties. When a public officer by official misconduct or neglect of duty forfeits an official undertaking or other security of the public officer, or renders the sureties of the public officer liable thereon, any person injured by the misconduct or neglect, or who is by law entitled to the benefit of the security, may maintain an action thereon in the name of the person, against the officer and the sureties of the officer, to recover the amount to which the person may by reason thereof be entitled.

30.230 Leave to begin action. Before an action can be commenced by a plaintiff other than the state, or the public corporation named in the undertaking or security, leave shall be obtained of the court or judge thereof where the action is triable. Such leave shall be granted upon the production of a certified copy of the undertaking or security, and an affidavit of the plaintiff or some person on behalf of the plaintiff showing the delinquency; but if the matters set forth in the affidavit are such that, if true, the party applying would clearly not be entitled to recover in the action, the leave shall not be granted. If it does not appear from the complaint that leave has been granted, the defendant on motion shall be entitled to judgment of dismissal without prejudice; if it does, the defendant may controvert the allegation, and if the issue be found in favor of the defendant, judgment shall be given accordingly. [Amended by 1979 c.284 §63]

30.240 Subsequent delinquencies on same bond. A judgment in favor of a party for one delinquency shall not preclude the same or another party from maintaining another action on the same undertaking or security for another delinquency.

30.250 Amount of judgment. In an action upon an official undertaking or security, if judgments have already been recovered on the same undertaking or security against the surety therein, other than by confession, and if such recovery is established on the trial, judgment shall not be given against the surety for an amount exceeding the difference between the amount of the penalty and the amount that already has been recovered against the surety.

TORT ACTIONS AGAINST PUBLIC BODIES

(Generally)

30.260 Definitions for ORS 30.260 to 30.300. As used in ORS 30.260 to 30.300, unless the context requires otherwise:

(1) "Department" means the Oregon Department of Administrative Services.

(2) "Director" means the Director of the Oregon Department of Administrative Services.

(3) "Governing body" means the group or officer in which the controlling authority of any public body is vested.

(4) "Public body" means:

(a) The state and any department, agency, board or commission of the state;

(b) Any city, county, school district or other political subdivision or municipal or public corporation and any instrumentality thereof;

(c) Any intergovernmental agency, department, council, joint board of control created under ORS 190.125 or other like entity which is created under ORS 190.003 to 190.130, and which does not act under the direction and control of any single member government;

(d) Any nonprofit corporation that is organized and existing under ORS chapter 65 and that has only political subdivisions or municipal, quasi-municipal or public corporations in this state as members;

(e) A private child-caring agency, as defined in ORS 418.205, that meets the criteria specified in ORS 278.322 (1)(a) and that receives more than 50 percent of its funding from the state for the purpose of providing residential treatment to children who have been placed in the care and custody of the state or that provides residential treatment to children more than half of whom have

been placed in the care and custody of the state; or

(f) A private, nonprofit organization that provides public transportation services if more than 50 percent of the organization's funding for the purpose of providing public transportation services is received from governmental bodies.

(5) "State" means the state or any branch, department, agency, board or commission of the state.

(6) "Local public body" means any public body other than the state.

(7) "Nuclear incident" has the meaning given that term in 42 U.S.C. 2014(q).

(8) "Tort" means the breach of a legal duty that is imposed by law, other than a duty arising from contract or quasi-contract, the breach of which results in injury to a specific person or persons for which the law provides a civil right of action for damages or for a protective remedy. [1967 c.627 §1; 1975 c.609 §11; 1977 c.823 §1; 1981 c.109 §1; 1987 c.915 §9; subsections (7) and (8) enacted as 1987 c.705 §6; 1989 c.905 §1; 1989 c.1004 §2; 1993 c.500 §3; 1997 c.215 §4; 2005 c.684 §1; 2005 c.798 §2]

30.261 Limitation on applicability of ORS 30.260 to 30.300 to certain private, nonprofit organizations. A private, nonprofit organization described under ORS 30.260 (4)(f) is subject to ORS 30.260 to 30.300 only for the purposes of providing public transportation services. [2005 c.684 §4]

Note: 30.261 was added to and made a part of 30.260 to 30.300 by legislative action but was not added to any smaller series therein. See Preface to Oregon Revised Statutes for further explanation.

30.262 Certain nonprofit facilities and homes public bodies for purposes of ORS 30.260 to 30.300. (1) The following facilities and training homes are public bodies for the purposes of ORS 30.260 to 30.300:

(a) A nonprofit residential training facility as defined in ORS 443.400, nonprofit residential training home as defined in ORS 443.400 or nonprofit facility as defined in ORS 427.005, organized and existing under ORS chapter 65, that receives more than 50 percent of its funding from the state or a political subdivision of the state for the purpose of providing residential or vocational services to individuals with mental retardation or developmental disabilities.

(b) A nonprofit residential training facility as defined in ORS 443.400, nonprofit residential training home as defined in ORS 443.400 or nonprofit facility as defined in ORS 427.005, organized and existing under ORS chapter 65, that receives less than 50 percent of its funding from the state or a political subdivision of the state but that provides residential or vocational services to individuals with mental retardation or developmental disabilities, more than half of whom are eligible for funding for services by the Department of Human Services under criteria established by the department.

(2) The provisions of this section apply only to a nonprofit residential training facility, nonprofit residential training home or nonprofit facility that provides services to individuals with mental retardation or developmental disabilities under a contract with:

(a) The Department of Human Services; or

(b) A community mental health and developmental disabilities program established pursuant to ORS 430.620. [1997 c.579 §2; 2001 c.900 §9; 2007 c.70 §8]

Note: 30.262 was added to and made a part of 30.260 to 30.300 by legislative action but was not added to any smaller series therein. See Preface to Oregon Revised Statutes for further explanation.

30.264 Liability insurance for students involved in off-campus experiential activities; coverage under ORS 30.260 to 30.300. (1) The State Board of Higher Education may authorize higher education institutions under the control of the board to provide liability insurance coverage for students involved in off-campus experiential activities, including, but not limited to, student teaching, internships, clinical experiences, capstone projects and related activities.

(2) If commercial liability insurance coverage is not available to higher education institutions, students participating in the activities described in subsection (1) of this section shall be considered to be acting within the course and scope of state employment duties for purposes of ORS 30.260 to 30.300. [2001 c.370 §2]

30.265 Scope of liability of public body, officers, employees and agents; liability in nuclear incident. (1) Subject to the limitations of ORS 30.260 to 30.300, every public body is subject to action or suit for its torts and those of its officers, employees and agents acting within the scope of their employment or duties, whether arising out of a governmental or proprietary function or while operating a motor vehicle in a ridesharing arrangement authorized under ORS 276.598. The sole cause of action for any tort of officers, employees or agents of a public body acting within the scope of their employment or duties and eligible for representation and indemnification under ORS 30.285 or 30.287 shall be an action against the public body only. The remedy provided by ORS 30.260 to 30.300 is exclusive of any other action or suit against any such officer, employee or agent of a public body whose act or omission within the scope of the officer's, employee's or agent's employment or duties gives rise to the action or suit. No other

form of civil action or suit shall be permitted. If an action or suit is filed against an officer, employee or agent of a public body, on appropriate motion the public body shall be substituted as the only defendant. Substitution of the public body as the defendant does not exempt the public body from making any report required under ORS 742.400.

(2) Every public body is immune from liability for any claim for injury to or death of any person or injury to property resulting from an act or omission of an officer, employee or agent of a public body when such officer, employee or agent is immune from liability.

(3) Every public body and its officers, employees and agents acting within the scope of their employment or duties, or while operating a motor vehicle in a ridesharing arrangement authorized under ORS 276.598, are immune from liability for:

(a) Any claim for injury to or death of any person covered by any workers' compensation law.

(b) Any claim in connection with the assessment and collection of taxes.

(c) Any claim based upon the performance of or the failure to exercise or perform a discretionary function or duty, whether or not the discretion is abused.

(d) Any claim that is limited or barred by the provisions of any other statute, including but not limited to any statute of ultimate repose.

(e) Any claim arising out of riot, civil commotion or mob action or out of any act or omission in connection with the prevention of any of the foregoing.

(f) Any claim arising out of an act done or omitted under apparent authority of a law, resolution, rule or regulation that is unconstitutional, invalid or inapplicable except to the extent that they would have been liable had the law, resolution, rule or regulation been constitutional, valid and applicable, unless such act was done or omitted in bad faith or with malice.

(4) Subsection (1) of this section applies to any action of any officer, employee or agent of the state relating to a nuclear incident, whether or not the officer, employee or agent is acting within the scope of employment, and provided the nuclear incident is covered by an insurance or indemnity agreement under 42 U.S.C. 2210.

(5) Subsection (3)(c) of this section does not apply to any discretionary act that is found to be the cause or partial cause of a nuclear incident covered by an insurance or indemnity agreement under the provisions of 42 U.S.C. 2210, including but not limited to road design and route selection. [1967 c.627 §§2,3,10; 1969 c.429 §1; 1975 c.609 §12; 1977 c.823 §2; 1981 c.490 §4; 1985 c.731 §31; 1987 c.705 §7; 1991 c.861 §1; 2005 c.22 §19; 2007 c.803 §4]

30.266 [1977 c.781 §2; 1981 c.109 §2; 1985 c.731 §20; 1989 c.873 §1; repealed by 1991 c.756 §5]

30.267 Liability for certain medical treatment at Oregon Health and Science University facilities. (1) For the purposes of ORS 30.260 to 30.300, all services constituting patient care, including, but not limited to, inpatient care, outpatient care and all forms of consultation, that are provided on the Oregon Health and Science University campus or in any Oregon Health and Science University clinic are within the scope of their state employment or duties when performed by:

(a) Salaried physicians or dentists employed at any full-time equivalent by the Oregon Health and Science University;

(b) Nonsalaried or courtesy physicians or dentists affiliated with the Oregon Health and Science University;

(c) Medical, dental or nursing students or trainees affiliated with the Oregon Health and Science University;

(d) Volunteer physicians or dentists affiliated with the Oregon Health and Science University; or

(e) Any nurses, students, orderlies, volunteers, aides or employees of the Oregon Health and Science University.

(2) As used in this section:

(a) "Nonsalaried or courtesy physician or dentist" means a physician or dentist who receives a fee or other compensation for those services constituting patient care which are within the scope of state employment or duties under this section. The term does not include a physician or dentist described under subsection (1)(a) of this section.

(b) "Volunteer physician or dentist" means a physician or dentist who does not receive a salary, fee or other compensation for those services constituting patient care which are within the scope of state employment or duties under this section. [1977 c.851 §2]

30.268 Liability for certain medical treatment at facilities other than Oregon Health and Science University. (1) For the purposes of ORS 30.260 to 30.300, all services constituting patient care, including, but not limited to, inpatient care, outpatient care and all forms of consultation that are provided at a location other than the Oregon Health and Science University campus or one of the Oregon Health and Science University clinics are within the scope of state employment or duties when:

(a) Provided by members of the Oregon Health and Science University faculty or staff, Oregon Health and Science University students under prior written express authorization from the president of the Oregon Health and Science University or a representative of the president to provide those services at that location;

(b) The services provided are within the scope of the express authorization; and

(c) The Oregon Health and Science University:

(A) Derives revenue in a similar amount or percentage as it would for care rendered on the Oregon Health and Science University campus or at an Oregon Health and Science University clinic; or

(B) Is performing a salaried, nonfee-generating or volunteer public community or nonfee-generating educational service by providing the services.

(2) For the purposes of ORS 30.260 to 30.300, services constituting patient care that are provided at a location other than the Oregon Health and Science University campus or one of the Oregon Health and Science University clinics are not within the scope of state employment or duties when:

(a) Such services constitute an exclusively private relationship between the patient and a person described in subsection (1)(a) of this section; and

(b) The requirements of subsection (1)(b) and (c) of this section are not met. [1977 c.851 §3; 1995 c.84 §1]

30.270 Amount of liability. (1) Liability of any public body or its officers, employees or agents acting within the scope of their employment or duties on claims within the scope of ORS 30.260 to 30.300 shall not exceed:

(a) $50,000 to any claimant for any number of claims for damage to or destruction of property, including consequential damages, arising out of a single accident or occurrence.

(b) $100,000 to any claimant as general and special damages for all other claims arising out of a single accident or occurrence unless those damages exceed $100,000, in which case the claimant may recover additional special damages, but in no event shall the total award of special damages exceed $100,000.

(c) $500,000 for any number of claims arising out of a single accident or occurrence.

(2) No award for damages on any such claim shall include punitive damages. The limitation imposed by this section on individual claimants includes damages claimed for loss of services or loss of support arising out of the same tort.

(3) Where the amount awarded to or settled upon multiple claimants exceeds $500,000, any party may apply to any circuit court to apportion to each claimant the proper share of the total amount limited by subsection (1) of this section. The share apportioned each claimant shall be in the proportion that the ratio of the award or settlement made to the claimant bears to the aggregate awards and settlements for all claims arising out of the occurrence.

(4) Liability of any public body and one or more of its officers, employees or agents, or two or more officers, employees or agents of a public body, on claims arising out of a single accident or occurrence, shall not exceed in the aggregate the amounts limited by subsection (1) of this section.

(5) For any claim arising in connection with a nuclear incident, no provision of this section shall limit the amount of damages recoverable for injuries or death or loss of or damage to property, or loss of use of property as a result of a nuclear incident covered by an insurance or indemnity agreement under 42 U.S.C. 2210. [1967 c.627 §4; 1969 c.429 §2; 1975 c.609 §13; 1987 c.705 §8; 1987 c.915 §13]

30.275 Notice of claim; time of notice; time of action. (1) No action arising from any act or omission of a public body or an officer, employee or agent of a public body within the scope of ORS 30.260 to 30.300 shall be maintained unless notice of claim is given as required by this section.

(2) Notice of claim shall be given within the following applicable period of time, not including the period, not exceeding 90 days, during which the person injured is unable to give the notice because of the injury or because of minority, incompetency or other incapacity:

(a) For wrongful death, within one year after the alleged loss or injury.

(b) For all other claims, within 180 days after the alleged loss or injury.

(3) Notice of claim required by this section is satisfied by:

(a) Formal notice of claim as provided in subsections (4) and (5) of this section;

(b) Actual notice of claim as provided in subsection (6) of this section;

(c) Commencement of an action on the claim by or on behalf of the claimant within the applicable period of time provided in subsection (2) of this section; or

(d) Payment of all or any part of the claim by or on behalf of the public body at any time.

(4) Formal notice of claim is a written communication from a claimant or representative of a claimant containing:

(a) A statement that a claim for damages is or will be asserted against the public body or an officer, employee or agent of the public body;

(b) A description of the time, place and circumstances giving rise to the claim, so far as known to the claimant; and

(c) The name of the claimant and the mailing address to which correspondence concerning the claim may be sent.

(5) Formal notice of claim shall be given by mail or personal delivery:

(a) If the claim is against the state or an officer, employee or agent thereof, to the office of the Director of the Oregon Department of Administrative Services.

(b) If the claim is against a local public body or an officer, employee or agent thereof, to the public body at its principal administrative office, to any member of the governing body of the public body, or to an attorney designated by the governing body as its general counsel.

(6) Actual notice of claim is any communication by which any individual to whom notice may be given as provided in subsection (5) of this section or any person responsible for administering tort claims on behalf of the public body acquires actual knowledge of the time, place and circumstances giving rise to the claim, where the communication is such that a reasonable person would conclude that a particular person intends to assert a claim against the public body or an officer, employee or agent of the public body. A person responsible for administering tort claims on behalf of a public body is a person who, acting within the scope of the person's responsibility, as an officer, employee or agent of a public body or as an employee or agent of an insurance carrier insuring the public body for risks within the scope of ORS 30.260 to 30.300, engages in investigation, negotiation, adjustment or defense of claims within the scope of ORS 30.260 to 30.300, or in furnishing or accepting forms for claimants to provide claim information, or in supervising any of those activities.

(7) In an action arising from any act or omission of a public body or an officer, employee or agent of a public body within the scope of ORS 30.260 to 30.300, the plaintiff has the burden of proving that notice of claim was given as required by this section.

(8) The requirement that a notice of claim be given under subsections (1) to (7) of this section does not apply if:

(a)(A) The claimant was under the age of 18 years when the acts or omissions giving rise to a claim occurred;

(B) The claim is against the Department of Human Services or the Oregon Youth Authority; and

(C) The claimant was in the custody of the Department of Human Services pursuant to an order of a juvenile court under ORS 419B.150, 419B.185, 419B.337 or 419B.527, or was in the custody of the Oregon Youth Authority under the provisions of ORS 419C.478, 420.011 or 420A.040, when the acts or omissions giving rise to a claim occurred.

(b) The claim is against a private, nonprofit organization that provides public transportation services described under ORS 30.260 (4)(f).

(9) Except as provided in ORS 12.120, 12.135 and 659A.875, but notwithstanding any other provision of ORS chapter 12 or other statute providing a limitation on the commencement of an action, an action arising from any act or omission of a public body or an officer, employee or agent of a public body within the scope of ORS 30.260 to 30.300 shall be commenced within two years after the alleged loss or injury. [1967 c.627 §5; 1969 c.429 §3; 1975 c.604 §1a; 1975 c.609 §14; 1977 c.823 §3; 1979 c.284 §64; 1981 c.350 §1; 1993 c.500 §4; 1993 c.515 §1; 2001 c.601 §1; 2001 c.621 §89; 2005 c.684 §2]

30.278 Reporting notice of claim of professional negligence to licensing board. When notice is received under ORS 30.275 of a claim of professional negligence against a physician, optometrist, dentist, dental hygienist or naturopath who is acting within the scope of employment by a public body or within the scope of duties as defined by ORS 30.267, the person receiving the notice shall report to the appropriate licensing board, in the same manner as required by ORS 742.400, the information required by ORS 742.400 to be reported by insurers or self-insured associations. [1987 c.774 §64]

Note: 30.278 was enacted into law by the Legislative Assembly but was not added to or made a part of ORS chapter 30 or any series therein by legislative action. See Preface to Oregon Revised Statutes for further explanation.

30.280 [1967 c.627 §6; repealed by 1975 c.609 §25]

30.282 Local public body insurance; self-insurance program; action against program. (1) The governing body of any local public body may procure insurance against:

(a) Tort liability of the public body and its officers, employees and agents acting within the scope of their employment or duties; or

(b) Property damage.

(2) In addition to, or in lieu of procuring insurance, the governing body may establish a self-insurance program against the tort liability of the public body and its officers, employees and agents or against property damage. If the public body has authority to levy taxes, it may include in its levy an amount sufficient to establish and maintain a self-insurance program on an actuarially sound basis.

(3) Notwithstanding any other provision of law, two or more local public bodies may jointly provide by intergovernmental agreement for anything that subsections (1) and (2) of this section authorize individually.

(4) As an alternative or in addition to establishment of a self-insurance program or purchase of insurance or both, the governing body of any local public body and the Oregon Department of Administrative Services may contract for payment by the public body to the department of assessments determined by the department to be sufficient, on an actuarially sound basis, to cover the potential liability of the public body and its officers, employees or agents acting within the scope of their employment or duties under ORS 30.260 to 30.300, and costs of administration, or to cover any portion of potential liability, and for payment by the department of valid claims against the public body and its officers, employees and agents acting within the scope of their employment or duties. The department may provide the public body evidence of insurance by issuance of a certificate or policy.

(5) Assessments paid to the department under subsection (4) of this section shall be paid into the Insurance Fund created under ORS 278.425, and claims paid and administrative costs incurred under subsection (4) of this section shall be paid out of the Insurance Fund, and moneys in the Insurance Fund are continuously appropriated for those purposes. When notice of any claim is furnished as provided in the agreement, the claim shall be handled and paid, if appropriate, in the same manner as a claim against a state agency, officer, employee or agent, without regard to the amount the local public body has been assessed.

(6) A self-insurance program established by three or more public bodies under subsections (2) and (3) of this section is subject to the following requirements:

(a) The annual contributions to the program must amount in the aggregate to at least $1 million.

(b) The program must provide documentation that defines program benefits and administration.

(c) Program contributions and reserves must be held in separate accounts and used for the exclusive benefit of the program.

(d) The program must maintain adequate reserves. Reserve adequacy shall be calculated annually with proper actuarial calculations including the following:

(A) Known claims, paid and outstanding;

(B) Estimate of incurred but not reported claims;

(C) Claims handling expenses;

(D) Unearned contributions; and

(E) A claims trend factor.

(e) The program must maintain an unallocated reserve account equal to 25 percent of annual contributions, or $250,000, whichever is greater. As used in this paragraph, "unallocated reserves" means the amount of funds determined by a licensed independent actuary to be greater than what is required to fund outstanding claim liabilities, including an estimate of claims incurred but not reported.

(f) The program must make an annual independently audited financial statement available to the participants of the program.

(g) The program must maintain adequate excess or reinsurance against the risk of economic loss.

(h) The program, a third party administrator or an owner of a third party administrator may not collect commissions or fees from an insurer.

(7) A program operated under subsection (6) of this section that fails to meet any of the listed requirements for a period longer than 30 consecutive days shall be dissolved and any unallocated reserves returned in proportional amounts based on the contributions of the public body to the public bodies that established the program within 90 days of the failure.

(8) A public body as defined in ORS 30.260 (4)(b), (c) or (d) may bring an action against a program operated under subsection (6) of this section if the program fails to comply with the requirements listed in subsection (6) of this section. [1975 c.609 §19; 1977 c.428 §1; 1981 c.109 §4; 1985 c.731 §21; 2005 c.175 §2]

30.285 Public body shall indemnify public officers; procedure for requesting counsel; extent of duty of state; obligation for judgment and attorney fees. (1) The governing body of any public body shall defend, save harmless and indemnify any of its officers, employees and agents, whether elective or appointive, against any tort claim or demand, whether groundless or otherwise, arising out of an alleged act or omission occurring in the performance of duty.

(2) The provisions of subsection (1) of this section do not apply in case of malfeasance in office or willful or wanton neglect of duty.

(3) If any civil action, suit or proceeding is brought against any state officer, employee or agent which on its face falls within the provisions of subsection (1) of this section, or which the state officer, employee or agent asserts to be based in fact upon an alleged act or omission in the performance of duty, the state officer, employee or agent may, after consulting with the Oregon Department of Administrative Services file a written request for counsel with the Attorney General. The Attorney General shall thereupon appear and defend the officer, employee or agent unless after investigation the Attorney General finds that the claim or demand does not arise out of an alleged act or omission occurring in the performance of duty, or that the act or omission complained of amounted to malfeasance in office or willful or wanton neglect of duty, in which case the Attorney General shall reject defense of the claim.

(4) Any officer, employee or agent of the state against whom a claim within the scope of this section is made shall cooperate fully with the Attorney General and the department in the defense of such claim. If the Attorney General after consulting with the department determines that such officer, employee or agent has not so cooperated or has otherwise acted to prejudice defense of the claim, the Attorney General may at any time reject the defense of the claim.

(5) If the Attorney General rejects defense of a claim under subsection (3) of this section or this subsection, no public funds shall be paid in settlement of said claim or in payment of any judgment against such officer, employee or agent. Such action by the Attorney General shall not prejudice the right of the officer, employee or agent to assert and establish an appropriate proceedings that the claim or demand in fact arose out of an alleged act or omission occurring in the performance of duty, or that the act or omission complained of did not amount to malfeasance in office or willful or wanton neglect of duty, in which case the officer, employee or agent shall be indemnified against liability and reasonable costs of defending the claim, cost of such indemnification to be a charge against the Insurance Fund established by ORS 278.425.

(6) Nothing in subsection (3), (4) or (5) of this section shall be deemed to increase the limits of liability of any public officer, agent or employee under ORS 30.270, or obviate the necessity of compliance with ORS 30.275 by any claimant, nor to affect the liability of the state itself or of any other public officer, agent or employee on any claim arising out of the same accident or occurrence.

(7) As used in this section, "state officer, employee or agent" includes district attorneys and deputy district attorneys, special prosecutors and law clerks of the office of district attorney who act in a prosecutorial capacity, but does not include any other employee of the office of district attorney or any employee of the justice or circuit courts whose salary is paid wholly or in part by the county. [1967 c.627 §7; 1975 c.609 §16; 1981 c.109 §5; 1981 c.913 §2; 1985 c.731 §22; 1987 c.763 §1]

30.287 Counsel for public officer; when public funds not to be paid in settlement; effect on liability limit; defense by insurer. (1) If any civil action, suit or proceeding is brought against any officer, employee or agent of a local public body other than the state which on its face falls within the provisions of ORS 30.285 (1), or which the officer, employee or agent asserts to be based in fact upon an alleged act or omission in the performance of duty, the officer, employee or agent may file a written request for counsel with the governing body of the public body. The governing body shall thereupon engage counsel to appear and defend the officer, employee or agent unless after investigation it is determined that the claim or demand does not arise out of an alleged act or omission occurring in the performance of duty, or that the act or omission complained of amounted to malfeasance in office or willful or wanton neglect of duty, in which case the governing body shall reject defense of the claim.

(2) Any officer, employee or agent of a local public body against whom a claim within the scope of this section is made shall cooperate fully with the governing body and counsel in the defense of such claim. If the counsel determines and certifies to the governing body that such officer, employee or agent has not so cooperated or has otherwise acted in prejudice of the defense of the claim, the governing body may at any time reject the defense of the claim.

(3) If the governing body rejects defense of a claim under subsection (1) of this section, no public funds shall be paid in settlement of the claim or in payment of any judgment against such officer, employee or agent. Such action by the governing body shall not prejudice the right of the officer, employee or agent to assert and establish in an appropriate proceedings that the claim or demand in fact arose out of an alleged act or omission occurring in the performance of duty, or that the act or omission complained of did not amount to malfeasance in office or willful or wanton neglect of duty, in which case the officer, employee or agent shall be

indemnified by the public body against liability and reasonable costs of defending the claim.

(4) Nothing in subsection (1), (2) or (3) of this section shall be deemed to increase the limits of liability of any public officer, agent or employee under ORS 30.270, or relieve any claimant of the necessity of compliance with ORS 30.275, nor to affect the liability of the local public body itself or of any other public officer, agent or employee on any claim arising out of the same accident or occurrence.

(5) The provisions of this section may be superseded to the extent that the claim against the public officer, employee or agent may be defended by any insurer, or may be subject under ORS 30.282 to agreement with the Oregon Department of Administrative Services, in which case the provisions of the policy of insurance or other agreement are applicable. [1975 c.609 §20; 1985 c.565 §3; 1989 c.1004 §1]

30.290 Settlement of claims by local public body. The governing body of any local public body may, subject to the provisions of any contract of liability insurance existing, compromise, adjust and settle tort claims against the public body or its officers, employees or agents acting within the scope of their employment for damages under ORS 30.260 to 30.300 and may, subject to procedural requirements imposed by law or other charter, appropriate money for the payment of amounts agreed upon. [1967 c.627 §8; 1975 c.609 §17; 1989 c.655 §1]

30.295 Payment of judgment or settlement; remedies for nonpayment; tax levy for payment; installment payments. (1) When a judgment is entered against or a settlement is made by a public body for a claim within the scope of ORS 30.260 to 30.300, including claims against officers, employees or agents required to be indemnified under ORS 30.285, payment shall be made and the same remedies shall apply in case of nonpayment as in the case of other judgments or settlements against the public body except as otherwise provided in this section.

(2) If the public body is authorized to levy taxes that could be used to satisfy a judgment or settlement within the scope of ORS 30.260 to 30.300, and it has, by resolution, declared that the following conditions exist, interest shall accrue on the judgment or settlement, but the same shall not be due and payable until after the canvass and certification of an election upon a special tax levy for purposes of satisfying the judgment or settlement:

(a) The amount of the judgment or settlement would exceed amounts budgeted for contingencies, tort claims and projected surplus in the current budget;

(b) The amount of the judgment or settlement would exceed 10 percent of the total of the next fiscal year's projected revenues that are not restricted as to use, including the maximum amount of general property tax that could be levied without election but excluding any levy for debt service;

(c) Payment of the judgment or settlement within less than a certain number of years would seriously impair the ability of the public body to carry out its responsibilities as a unit of government; and

(d) The public body has passed an appropriate ordinance or resolution calling a special election to submit to its electors a special levy in an amount sufficient to satisfy the judgment or settlement.

(3) A certified copy of the resolution provided for in subsection (2) of this section shall be filed with the clerk of the court in which an order permitting installment payments could be entered.

(4) If the public body is not authorized to levy taxes as provided in subsection (2) of this section, and it has, by resolution, declared that the applicable conditions specified in subsection (2)(a) to (c) of this section exist, it may petition for an order permitting installment payments as provided in subsection (6) of this section.

(5)(a) The provisions of subsections (2) and (4) of this section do not apply to the State of Oregon.

(b) Notwithstanding paragraph (a) of this subsection, if the conditions specified in subsection (4) of this section exist, the Secretary of State may, under Seal of the State of Oregon, attest thereto in lieu of a resolution, and the State of Oregon may thereafter petition for an order permitting installment payments as provided in subsection (6) of this section.

(6) If the procedure specified in subsections (2) to (5) of this section has been followed, and, with respect to public bodies subject to subsection (2) of this section, the tax levy failed, the public body may petition for an order permitting installment payments. The petition shall be filed in the court in which judgment was entered or, if no judgment has been entered, it shall be filed in the circuit court of the judicial district in which the public body has its legal situs. Petitions by the State of Oregon when no judgment has been entered shall be filed in Marion County Circuit Court.

(7) The court in which a petition is filed shall order that the judgment or settlement be paid in quarterly, semiannual or annual installments over a period of time not to exceed 10 years. The court shall determine the

term of years based upon the ability of the public body to effectively carry out its governmental responsibilities, and shall not allow a longer term than appears reasonably necessary to meet that need. The order permitting installment payments shall provide for annual interest at the judgment rate. [1967 c.627 §9; 1977 c.823 §4; 2005 c.22 §20]

30.297 Liability of certain state agencies for damages caused by foster child or youth offender; conditions; exceptions. (1) Notwithstanding ORS 125.235, the Department of Human Services is liable for damages resulting from the intentional torts of a foster child who is residing in:

(a) A foster home that has been certified by the department under the provisions of ORS 418.625 to 418.645, even though the child is temporarily absent from that home;

(b) An approved home that is receiving payment from the department under the provisions of ORS 418.027 or under the provisions of ORS 420.810 and 420.815, even though the child is temporarily absent from that home; or

(c) A developmental disability child foster home that has been certified by the department under the provisions of ORS 443.830 and 443.835, even though the foster child is temporarily absent from that home.

(2) Notwithstanding ORS 125.235, the Oregon Youth Authority is liable for damages resulting from the intentional torts of a youth offender who is residing in a youth offender foster home that has been certified by the authority under the provisions of ORS 420.888 to 420.892, even though the youth offender is temporarily absent from that home.

(3) Except as otherwise provided in this section, the liability of the department and the authority under this section is subject to the same requirements and limitations provided in ORS 30.260 to 30.300, and a claim under this section shall be treated as a claim for damages within the scope of ORS 30.260 to 30.300 for the purposes of ORS 278.120.

(4) Notwithstanding subsections (1) and (2) of this section:

(a) The department and the authority are not liable for any damages arising out of the operation of a motor vehicle by a foster child or youth offender; and

(b) The department and the authority are only liable for theft by a foster child or youth offender upon a showing by clear and convincing evidence that the foster child or youth offender committed the theft.

(5) For the purposes of this section:

(a) "Authority" means the Oregon Youth Authority.

(b) "Department" means the Department of Human Services.

(c) "Foster child" means:

(A) A minor child under the custody or guardianship of the department by reason of appointment pursuant to ORS chapter 125, 419A, 419B or 419C;

(B) A minor child under the physical custody of the department pursuant to a voluntary agreement with the parent under ORS 418.015 (1);

(C) A minor child placed in a certified foster home, pending hearing, by any person authorized by the department to make that placement;

(D) A person under 21 years of age who has been placed in an approved home that is receiving payment from the department under the provisions of ORS 418.027 or under the provisions of ORS 420.810 and 420.815; or

(E) A child residing in a developmental disability child foster home certified under ORS 443.830 and 443.835.

(d) "Youth offender" has the meaning given in ORS 419A.004. [1991 c.756 §2; 1993 c.33 §370; 1995 c.664 §76; 1997 c.130 §1; 1999 c.316 §6; 2001 c.900 §10; 2003 c.232 §1; 2005 c.374 §4]

Note: 30.297 and 30.298 were added to and made a part of 30.260 to 30.300 by legislative action but were not added to any smaller series therein. See Preface to Oregon Revised Statutes for further explanation.

30.298 Liability of certain state agencies to foster parents for injury or damage caused by foster child or youth offender; conditions; limitations. (1) Except as otherwise provided in this section, the Department of Human Services is liable, without regard to fault, for injury to the person of foster parents or damage to the property of foster parents caused by a foster child if the foster child is residing in:

(a) A foster home that is maintained by the foster parents and that has been certified by the department under the provisions of ORS 418.625 to 418.645;

(b) An approved home that is maintained by the foster parents and that is receiving payment from the department under the provisions of ORS 418.027 or under the provisions of ORS 420.810 and 420.815; or

(c) A developmental disability child foster home that has been certified by the department under the provisions of ORS 443.830 and 443.835.

(2) Except as otherwise provided in this section, the Oregon Youth Authority is liable, without regard to fault, for injury to the person of foster parents or damage to the property of foster parents caused by a youth offender if the youth offender resides in a youth offender foster home that is main-

tained by the foster parents and that has been certified by the authority under the provisions of ORS 420.888 to 420.892.

(3) Except as otherwise provided in this section, the liability of the department and of the authority under this section is subject to the same requirements and limitations provided in ORS 30.260 to 30.300, and a claim under this section shall be treated as a claim for damages within the scope of ORS 30.260 to 30.300 for the purposes of ORS 278.120.

(4) Notwithstanding ORS 30.260 to 30.300:

(a) In no event shall the liability of the department or the authority under this section exceed $5,000 for any number of claims arising out of a single occurrence;

(b) The liability of the department and the authority under this section is limited to economic damages, and in no event shall the department or the authority be liable for noneconomic damages;

(c) The department and the authority are liable under this section only to the extent the loss is not covered by other insurance; and

(d) No claim shall be allowed under this section unless written notice of the claim is delivered to the Oregon Department of Administrative Services within 90 days after the alleged loss or injury.

(5) The department and the authority are not liable under this section for:

(a) Damage to or destruction of currency, securities or any other intangible property;

(b) The unexplained disappearance of any property; or

(c) Loss or damage that is due to wear and tear, inherent vice or gradual deterioration.

(6) In no event does the liability of the department or the authority under this section for damage to property exceed the difference between the fair market value of the property immediately before its damage or destruction and its fair market value immediately thereafter. The department and the authority are not liable for the costs of any betterments to the property that may be required by code, statute or other law as a condition of repair, replacement or reconstruction.

(7) The liability imposed under this section is in addition to that imposed for the intentional torts of a foster child or youth offender under ORS 30.297, but any amounts paid under this section shall reduce any recovery that may be made under ORS 30.297.

(8) For the purposes of this section:

(a) "Authority" means the Oregon Youth Authority.

(b) "Department" means the Department of Human Services.

(c) "Economic damages" and "noneconomic damages" have those meanings given in ORS 31.710.

(d) "Foster child" has that meaning given in ORS 30.297.

(e) "Youth offender" has the meaning given in ORS 419A.004. [1991 c.756 §3; 1997 c.130 §2; 1999 c.316 §11; 2001 c.900 §11; 2003 c.232 §2; 2005 c.374 §5]

Note: See note under 30.297.

30.300 ORS 30.260 to 30.300 exclusive. ORS 30.260 to 30.300 are exclusive and supersede all home rule charter provisions and conflicting laws and ordinances on the same subject. [1967 c.627 §11]

(Certain Retired Physicians)

30.302 Certain retired physicians to be considered agents of public bodies. (1) As used in this section, "retired physician" means any person:

(a) Who holds a degree of Doctor of Medicine or Doctor of Osteopathy or has met the minimum educational requirements for licensure to practice naturopathic medicine;

(b) Who has been licensed and is currently retired in accordance with the provisions of ORS chapter 677 or 685;

(c) Who is registered with the Oregon Medical Board as a retired emeritus physician or who complies with the requirements of the Board of Naturopathic Examiners as a retired naturopath;

(d) Who registers with the county health officer in the county in which the physician or naturopath practices; and

(e) Who provides medical care as a volunteer without compensation solely through referrals from the county health officer specified in paragraph (d) of this subsection.

(2) Any retired physician who treats patients pursuant to this section shall be considered to be an agent of a public body for the purposes of ORS 30.260 to 30.300. [1991 c.952 §1]

ACTIONS AND SUITS BY AND AGAINST GOVERNMENTAL UNITS AND OFFICIALS

30.310 Actions and suits by governmental units. A suit or action may be maintained by the State of Oregon or any county, incorporated city, school district or other public corporation of like character in this state, in its corporate name, upon a cause of suit or action accruing to it in its corporate character, and not otherwise, in the following cases: