

Clarke v. OHSU, 206 Or App 610, 138 P3d 900 (2006).
Clarke v. OHSU, 343 Or 581, 175 P3d 418 (2007).

Plaintiff Jordaan Clarke was born in February 1998 at Oregon Health Sciences University (OHSU) 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 that condition. Surgery was performed, and the heart defect was successfully repaired. Following surgery, plaintiff was 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. Plaintiff's brain damage was a direct result of the negligence of OHSU and certain employees and agents of OHSU. Plaintiff is totally and permanently disabled. His expenses living and health care expenses will total \$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 an action against OHSU and the individuals who treated him (the "individual defendants"). OHSU then moved to substitute itself as the sole defendant in place of the individual defendants, pursuant to ORS 30.265(1). Plaintiff opposed the substitution, and argued that the elimination of a remedy against individual public employees and agents would violate the Remedy Clause (Article I, section 10) of Oregon Constitution. The trial court granted the motion, and plaintiff filed a second amended complaint naming OHSU as the only defendant. In its answer, OHSU admitted: (a) that it was negligent; (b) that its negligence resulted in permanent injury to plaintiff; and (c) that, as a result, plaintiff sustained economic and noneconomic damages in excess of the monetary limitations of the Oregon Tort Claims Act (OTCA).

OHSU moved for judgment on the pleadings and argued 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). Plaintiff asked 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 granted OHSU's motion, and entered judgment in the amount of \$200,000.

Plaintiff appealed, challenging the substitution of OHSU for the individual defendants, and argued that the trial court's entry of judgment in the amount of \$200,000 violated the Remedy Clause, as well as the right to a jury trial under Article I, section 17 of the Oregon Constitution. The Court of Appeals rejected plaintiff's arguments with respect to his claim against OHSU because OHSU would have been immune from liability at common law.

With respect to the substitution of OHSU as the sole defendant, the Court of Appeals accepted plaintiff's Remedy Clause argument. Plaintiff argued that, at common law in 1857, a plaintiff in Oregon would have had a cause of action for medical malpractice against public employees individually, which the Remedy Clause does not permit the legislature to abolish unless it provides an adequate substitute remedy. Plaintiff further argued that, because the limited recovery against OHSU was not an adequate substitute remedy, the application of ORS 30.265(1) violates the Oregon Constitution.

The court agreed that the OTCA did not provide a constitutionally adequate remedy, 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.'" As applied, the court concluded that ORS 30.265(1) violated the Remedy Clause

and remanded with instructions to reinstate the claims against the individual defendants.

Defendants sought review, challenging the Court of Appeals' conclusion that the OTCA does not provide a constitutionally adequate substitute remedy. In return, plaintiff challenged the Court of Appeals' conclusion that OHSU would have been entitled to sovereign immunity at common law. The primary issue was "whether ORS 30.265(1) and ORS 30.270(1), as applied to the facts of this case, violate [the Remedy Clause]." *Id.*

After detailed discussion of case law and statutory context, the Supreme Court agreed that OHSU would have been entitled to immunity at common law. Therefore, the OTCA's damages limitation, as applied to plaintiff's claim against OHSU, was held not to violate the Remedy Clause.

Having concluded that the common law in Oregon in 1857 would not have recognized a cause of action for negligence against OHSU, the court then addressed "whether the OTCA's elimination of a cause of action against individual defendants, combined with its damage limitation, survives scrutiny under [the Remedy Clause]." *Id.* After examining prior challenges to the OTCA, the Court reiterated that the Remedy Clause 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." As the court's review of case law "demonstrate[d], [the 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 Court acknowledged that “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 goal. However, the Court opined that “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 [Remedy Clause] requirement.”