Symposium Articles

KATHRYN H. CLARKE*

Foreword: Fundamental Rights or Paper Tigers?

Why arrange a symposium in the wake of the Oregon Supreme Court's decision in *Horton v. Oregon Health & Science University*?[1] To some of us, the answer may seem so obvious that the question borders on the inane, but the process of answering it helped clarify for me the assistance that such a discussion can provide to the litigants who address, and the courts that resolve, the issues presented by *Horton*.

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* Kathryn Clarke received a BA from Whitman College in 1966, an MA in English from Portland State University in 1975, and her JD from Northwestern School of Law at Lewis and Clarke College in 1979. Since then she has been a solo practitioner representing injured people in the appellate courts and consulting with trial court practitioners regarding legal issues. She has been a member of the board of governors of the Oregon Trial Lawyers Association (OTLA) for almost twenty-eight years, serving as president of the organization in 1995–96; she is currently one of OTLA's representatives to the board of governors of the American Association for Justice. She is a trustee and past president of the Roscoe Pound Civil Justice Institute, and since 1998 has served as a discussion group leader or panel participant in the Institute's annual Forum for State Court Appellate Judges. In 2006 she was honored as Distinguished Trial Lawyer by the Oregon Trial Lawyers Association. In 2016 she was honored by the Pound Civil Justice Institute for her achievements as an appellate advocate.

The author acknowledges a personal component to the comments that follow; she was appellate counsel on *Greist v. Phillips* and *Lakin v. Senco Prods., Inc.*, as well as many of the cases that followed. She is now preparing the response to the first petition for Oregon Supreme Court review of a post-*Horton* decision.

[1] Horton v. Or. Health & Sci. Univ., 359 Or. 168, 376 P.3d 998 (2016).

FROM "TORT REFORM" TO *LAKIN V. SENCO PRODUCTS, INC.*

It is necessary to begin by summarizing how we got to *Horton*. In 1987, the Oregon legislature enacted a package of "tort reforms" that included a $500,000 limit on the recovery of noneconomic damages in a civil action for personal injury, death, or property damage.[2]

Seven years later, in an action for malicious prosecution, intentional infliction of emotional distress, and defamation, a jury awarded the plaintiff in *Tenold v. Weyerhaeuser Co.* $900,000 in noneconomic damages and $2566 in economic damages.[3] Despite ORS 31.710, the trial judge denied the defendant's motion to reduce the noneconomic damages award to $500,000 when entering judgment.[4] The court of appeals, in a decision en banc, affirmed the judgment of the trial court, holding that the Oregon Constitution's reexamination clause[5] prohibited the court from reexamining and setting aside a verdict that is supported by the evidence. The case was then settled, and defendant's petition for review by the Supreme Court was dismissed.[6]

Two months later, that same year, the court of appeals applied *Tenold* and article VII (amended), section 3, to a wrongful death action, holding that reducing the jury's award of noneconomic damages from $1.5 million to one-third that amount violated the state constitution.[7] In 1995, the Oregon Supreme Court reversed that decision.[8] The supreme court rejected arguments that the reduction violated the remedy clause (because one-third of the verdict was nonetheless "substantial"), or offended the right to jury trial (because in 1857, a judge could apply remittitur to an "excessive" verdict). The supreme court also disagreed with the court of appeals' application of the reexamination clause because that provision limited the power of

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2 1987 Or. Laws ch. 774, § 6 (now codified at OR. REV. STAT. § 31.710). See Nadia Dahab, *Oregon's History on Caps and the Outlook after* Horton, 96 OR. L. REV. 621 (2018), for a summary of the legislative history of the enactment.

3 Tenold v. Weyerhaeuser Co., 127 Or. App. 511, 513, 873 P.2d 413, 415 (1994).

4 *Id.* at 518, 873 P.2d at 418.

5 Article VII (amended), section 3, of the Oregon Constitution provides, in relevant part: "In actions at law, where the value in controversy exceeds $750, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of this state, unless the court can affirmatively say there is no evidence to support the verdict." OR. CONST. art. VII, §3 (amended 1996).

6 Tenold v. Weyerhaeuser Co., 321 Or. 561, 901 P.2d 859 (1995).

7 Greist v. Phillips, 128 Or. App. 390, 875 P.2d 1199 (1994), *rev'd*, 322 Or. 281, 906 P.2d 789 (1995).

8 Greist v. Phillips, 322 Or. 281, 906 P.2d 789 (1995).

the court, not the power of the legislature, and because wrongful death was a statutory cause of action that originally had been created with a limitation on recovery.[9]

But then in 1999, the Oregon Supreme Court issued its decision in *Lakin v. Senco Products, Inc.*[10] There, the Oregon Supreme Court ruled that the constitutional right to a jury trial prohibited application of the cap on noneconomic damages to a verdict for personal injury and loss of consortium arising out of negligent failure to warn and strict product liability in the design and manufacture of a nail gun.[11] Quoting a 1987 opinion that invalidated a statute requiring a binding appraisal of an insurance policy dispute, the court said that article I, section 17, "guarantees a jury trial 'in those classes of cases in which the right was customary at the time the [Oregon] constitution was adopted or in cases of like nature.'"[12] That proposition was reiterated in its summary of the rationale for its conclusion:

> In summary, 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 and in cases of like nature. In any such case, the trial of all issues of fact must be by jury. The determination of damages in a personal injury case is a question of fact. The damages available in a personal injury action include compensation for noneconomic damages resulting from the injury. The legislature may not interfere with the full effect of a jury's assessment of noneconomic damages, at least as to civil cases in which the right to jury trial was customary in 1857, or in cases of like nature.[13]

Lakin was a huge victory for injured Oregonians. At least as to common law injury actions, it seemed settled that the noneconomic damages cap would not interfere between verdict and judgment.

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[9] *Id.* at 297, 906 P.2d at 798.

[10] Lakin v. Senco Prods., Inc., 329 Or. 62, 987 P.2d 463 (1999), *overruled by* Horton v. Or. Health & Sci. Univ., 359 Or 168, 376 P.3d 998 (2016).

[11] The court of appeals applied the rationale of *Tenold*, taking the position that the supreme court in *Greist* "carefully and specifically limited its analysis [under Article VII (amended), section 3,] to 'wholly statutory' rights of action" such as wrongful death, and therefore *Tenold* was still good law in a common law action. Lakin v. Senco Prods., Inc., 144 Or. App. 52, 79, 925 P.2d 107, 123 (1996).

[12] *Lakin*, 329 Or. at 69, 987 P.2d at 468 (quoting Molodyh v. Truck Ins. Exch., 304 Or. 290, 295, 744 P.2d 992, 996 (1987)).

[13] *Id.* at 82, 987 P.2d at 475 (citations omitted).

THEN CAME *SMOTHERS V. GRESHAM TRANSFER*

Two years later, in 2001, the supreme court held, in *Smothers v. Gresham Transfer, Inc.*, that where the workers' compensation statute imposed a heightened causation requirement (a claimant had to establish that the work exposure was the "major contributing cause" of an occupational disease, not simply a substantial contributing cause), the workers' common law claim against his employer was not barred by the "exclusive remedy" provision of the workers' compensation statute.[14] Because the plaintiff "would have had a common law cause of action when the drafters wrote the Oregon Constitution in 1857," and because there was no remedy available under the workers' compensation law, the plaintiff's negligence action must be allowed to proceed.[15]

Smothers appeared to be a breakthrough in establishing an effective limitation on lobbyists' and legislators' efforts to confine, or foreclose, common law remedies. But the opinion unfortunately focused on "absolute rights" as they existed in 1857, when the Oregon Constitution was enacted, and not on the concept of the common law as capable of evolving to meet new conditions. Thus, it was equipped with an escape clause: if a plaintiff could not establish that a claim of the precise nature alleged was available 150 years ago, then perhaps no remedy was constitutionally guaranteed.

Unfortunately, *Lakin's* articulation of the jury trial right had language capable of raising the same difficulties. *Lakin*, as quoted above, spoke of "actions for which the common law provided a jury trial when the Oregon Constitution was adopted in 1857,"[16] instead of reiterating its earlier reference to "*classes* of cases in which the right was customary in 1857"[17] and making the precise historical lineage of a particular claim appear critical to the existence of a right to a jury trial. The tagalong reference to cases "of like nature," which appeared in both the *Lakin* and the *Molodyh* formulations, could easily be overlooked or found ambiguous.

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[14] Smothers v. Gresham Transfer, Inc., 332 Or. 83, 89, 23 P.3d 333, 337 (2001), *overruled by Horton* 359 Or. at 376 P.3d at 998.

[15] *Id.* at 135, 23 P.3d at 362.

[16] *Lakin*, 329 Or. at 82, 987 P.2d at 475.

[17] Molodyh v. Truck Ins. Exch., 304 Or. 290, 295, 744 P.2d 992, 996 (1987) (emphasis added).

SUBSEQUENT LITIGATION

Indeed, these problems were reflected in the appellate opinions in subsequent litigation. In *Lawson v. Hoke*,[18] the Oregon Supreme Court held that a statute eliminating any recovery of noneconomic damages by a person who was driving without insurance when he was injured by the negligence of another driver did not violate the remedy clause because "no 'absolute common right' that existed when the Oregon Constitution was drafted in 1857 would have guaranteed plaintiff a remedy for her injuries–either economic or noneconomic–under the circumstances of this case."[19] That statement ignored, of course, the fact that the law recognized such a right in 1999, when the statute was enacted.

In *Hughes v. Peacehealth*,[20] a wrongful death action, the supreme court carved out an exception to *Lakin*'s invalidation of the cap. Because the common law does not, and did not in 1857, "recognize a right to unlimited damages in wrongful death actions," any constitutional "right to a jury trial that plaintiff might have . . . cannot confer a right to a jury award of a kind or amount of damages that is contrary to that *statutory* law."[21] The same reasoning disposed of the remedy clause challenge: plaintiff failed to establish "that the statutory damages cap . . . abolishes a remedy that was available at common law"[22] when the constitution was enacted, and therefore plaintiff had no right to a remedy under article I, section 10.

In *Christiansen v. Providence Health System*,[23] the court of appeals held that a child who suffered prenatal injuries was not denied a constitutionally protected remedy by a provision that radically reduced minority tolling of the statute of limitations for medical negligence claims, because no claim for prenatal injuries caused by medical negligence was recognized by the common law of Oregon when the Oregon Constitution was adopted. That case raised the specter that constitutional protections could simply disappear as human knowledge advanced.

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18 Lawson v. Hoke, 339 Or. 253, 265, 119 P.3d 210, 216 (2005).

19 *Id.*

20 Hughes v. Peacehealth, 344 Or. 142, 178 P.3d 225 (2008).

21 *Id.* at 157, 178 P.3d at 234.

22 *Id.* at 152, 178 P.3d at 231.

23 Christiansen v. Providence Health Sys. of Or. Corp., 210 Or. App. 290, 150 P.3d 50 (2006), *aff'd on other grounds*, Christiansen v. Providence Health Sys. of Or. Corp., 344 Or. 445, 184 P.3d 1121 (2008).

And indeed, in 2011, the court of appeals relied on *Christiansen* to hold that because an action for prenatal injuries caused by medical negligence had not been recognized by the common law in 1857 and was not "of like nature" to other medical negligence claims, applying the cap on noneconomic damages did not violate the plaintiff's right to a jury trial.[24] A few years later, the supreme court reversed that decision.[25] But it did so after framing the constitutional question, for both the remedy clause and the jury trial right, as "reduce[d] to whether, in 1987, the common law recognized a claim for the type of injuries that occurred in this case."[26] The court began with the proposition that the common law "has recognized a cause of action for negligence since at least the adoption of the American Revolution," and that "a cause of action for medical malpractice preexisted the adoption of the Oregon Constitution."[27] But it took a fairly lengthy discussion for the court to conclude that the plaintiff's claim did not fall within any recognized "exception" to those propositions before ruling that "[b]ecause an action for medical malpractice is one for which 'the right to jury trial was customary in 1857,'" the limitation on the jury's determination of damages could not be enforced.[28] The analysis that the opinion used seemed to make future litigation, focused primarily on whether constitutional protections even applied, inevitable.

But the year before gave us *M.K.F. v. Miramontes*,[29] a statutory action for a stalking protective order and compensatory money damages, where the court held that the parties were entitled to a jury trial on the damages claim. The reasoning? Article I, section 17, and article VII (amended), section 3, both "preserve the right to jury trial for claims that are properly categorized as 'civil' or 'at law;'" plaintiff's statutory claim "seeking monetary damage for injury inflicted fits within those terms, even if it does not have a precise historical analog."[30] Therefore, the parties had a right to a jury determination on the damages issue.[31] The *Miramontes* opinion,

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[24] Klutschkowski v. Peacehealth, 245 Or. App. 524, 263 P.3d 1130 (2010), *rev'd en banc*, 354 Or. 150, 311 P.3d 461 (2013).

[25] Klutschkowski v. Peacehealth, 354 Or. 150, 311 P.3d 461 (2013).

[26] *Id.* at 169, 311 P.3d at 472.

[27] *Id.* at 171, 311 P.3d at 472.

[28] *Id.* at 176–77, 311 P.3d at 476.

[29] M.F.K. v. Miramontes, 352 Or. 401, 287 P.3d 1045 (2012).

[30] *Id.* at 426, 287 P.3d at 1058.

[31] *Id.*

issued after briefing and argument in *Klutschkowski*, was not mentioned in the majority opinion.

Both cases affected a court of appeals' opinion rejecting complaints that *Lakin*'s principles could not be applied to a plaintiff's verdict on a product liability claim because contributory fault and the lack of privity would have prevented common law recovery in 1857. In *Vasquez v. Double Press Manufacturing, Inc.*, the court said that "*Miramontes* and *Klutschkowski* confirm that the Supreme Court rejected 'precise historical analogs' from 1857 to determine a party's right to jury trial."[32] Finally, seventeen years after the *Lakin* opinion, we had some assurance that there was an end in sight to the ongoing battles about which cases could rely on *Lakin* to abrogate the cap on noneconomic damages as violating the right to jury trial.

The *Vasquez* opinion issued on May 4, 2016.

AND THEN THERE WAS *HORTON*

The very next morning, on May 5, 2016, the Oregon Supreme Court issued its opinion in *Horton*, which overruled *Lakin* in its entirety.[33] Article I, section 17, the court said, "guarantees a procedural right, . . . the right to a trial by a jury (as opposed to trial by a judge) in civil actions."[34] But it does not limit "the legislature's authority to define, as a matter of law, the substantive elements of a cause of action or the extent to which damages will be available in that action."[35]

While it is true that legislatures can redefine the common law, article I, section 17, nonetheless guarantees the right to have a jury apply that law to the facts and resolve the differences between the parties. The court made no attempt to explain how a statute that tells a judge to enter a judgment that is inconsistent with the jury's application of the law to the facts leaves the jury trial right intact and meaningful. Under *Horton*, it would seem that the jury trial can become a mere formality without offending the constitutional guarantee.

Horton also overruled *Smothers*, the case that really dug us into the "1857 syndrome." It did so without reinterpreting the clause to

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[32] Vasquez v. Double Press Mfg., Inc., 278 Or. App. 77, 86, 372 P.3d 605, 610 (2016), *withdrawn and superseded on reconsideration by*, 288 Or. App. 503, 406 P.3d 225 (2017).

[33] Horton v. Or. Health & Sci. Univ., 359 Or. 168, 376 P.3d 998 (2016).

[34] *Id.* at 243, 376 P.3d at 1040.

[35] *Id.*

guarantee only access to the courts rather than a substantive remedy for injury. It did not suggest, as it had with the jury trial right, that the clause merely addressed procedure but did not guarantee it would have substantive meaning. However, *Horton* addressed a different statute, the Oregon Tort Claims Act, where a waiver of sovereign immunity can be understood to provide an offsetting benefit to a limitation on recovery. It left us with no clear roadmap of the analysis necessary to determine, on a case-by-case basis, whether the remedy clause is violated by applying the cap on noneconomic damages.

SO WHY THE SYMPOSIUM?

In the wake of this seismic event, it seemed appropriate, and even necessary, to take a second look at what happened over the past thirty years, since the cap on noneconomic damages became a feature of tort litigation. While it felt like starting over to those of us who represent injured persons, *Horton* provoked a determination to avoid the mistakes of the past. It was time, in other words, for a fresh look at the legal principles we are attempting to apply.

As critical as it is for any attorney to focus on the facts of the case at hand, that very approach may breed difficulties due to a limitation in perspective, or a choice in posturing issues, or a terminology and language selected for reasons of advocacy but lacking a clear view of their implications. In turn, this can affect the court's approach to the issue presented, and therefore, the arguments and approaches by advocates and the court in subsequent cases. A symposium such as this one offers a chance to step back and reevaluate the issues.

Ultimately, what we hoped for and gained from the symposium presentations and these law review articles is an approach to these critical constitutional questions that will avoid creating other conceptual difficulties like the ones we experienced over the last two decades.

SINCE THE *HORTON* SYMPOSIUM

Since we hosted this symposium, the court of appeals issued its first post-*Horton* ruling regarding the cap on noneconomic damages. In *Vasquez v. Double Press Manufacturing*,[36] the same court that ruled the day before *Horton* that applying the cap would violate the right to jury trial, held that applying the cap in that case violated the

[36] Vasquez v. Double Press Mfg., Inc., 288 Or. App. 503, 406 P.3d 225 (2017) (*Vasquez II*).

remedy clause. Mr. Vasquez, who was paraplegic as the result of his injury, had been awarded $8,100,000 in noneconomic damages, a figure that was reduced to $4,860,000 by his comparative fault. The court held that applying the cap and reducing his recovery to $500,000 would leave him with "only a 'paltry fraction' of the damages that he sustained and would otherwise recover," and therefore would deny him a substantial remedy.[37] In *Rains v. Stayton Builders Mart, Inc.*,[38] the court of appeals held that the cap could not be applied to reduce the injured husband's award from $2,343,750 in noneconomic damages to $500,000, or the wife's loss of consortium award from $759,375 to $500,000. The court explained that it could not see "a principled reason to conclude" that such a reduction would leave the plaintiffs with a "substantial" remedy.[39]

A petition for supreme court review was filed in *Vasquez* on January 8, 2018, and a petition in *Rains* will undoubtedly be filed as well. The constitutional litigation we anticipated when we read the *Horton* decision is already upon us. We believe we are much better prepared for that process as a result of the perspectives and insights provided by this symposium.

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[37] *Id.* at 525–26, 406 P.3d at 237.

[38] Rains v. Stayton Builders Mart, Inc., 289 Or. App. 672 (2018).

[39] *Id.* at 692.