Symposium Panel Discussions

The Jury Trial Right

Panelists: Robert S. Peck,[*] Hon. Christine Durham,[†] Hon. Michael Wolff,[‡] Paula Hannaford-Agor[§]

[*] Founder and president of the Center for Constitutional Litigation. He is among the most sought-after appellate litigators within the plaintiffs' bar. He is credited with having developed groundbreaking constitutional challenges to laws impeding access to courts. He regularly appears before the U.S. Supreme Court and state supreme courts, litigating cases on the merits as well as at the petition stage. Robert's diverse practice includes state and federal constitutional law, complex civil litigation, federal preemption, punitive damages, products liability, mass torts, consumer protection, Section 1983, and ERISA and Medicare/Medicaid reimbursement. He previously litigated election law and First Amendment issues. Robert taught advanced constitutional law and state constitutional law at The George Washington University Law School and American University Washington College of Law as a member of the adjunct faculty. He is chair of the Board of Overseers of the RAND Corporation's Institute for Civil Justice; Of Counsel to Herman Herman & Katz in New Orleans; co-chair of the Lawyers Committee of the National Center for State Courts; secretary and member of the executive committee of the Board of Directors of Justice at Stake; a member of the steering committee of the Sedona Conference's working group on mass torts and punitive damages; and a delegate in the American Bar Association's House of Delegates. Robert is a past president of the U.S. Supreme Court Fellows Alumni Association and the Freedom to Read Foundation, and a past national chair of Lawyers for Libraries.

[†] Hon. Christine M. Durham of the Utah Supreme Court received her A.B. with honors from Wellesley College and her J.D. from Duke University, where she is now an emeritus member of the Board of Trustees. After a number of years in private practice, she served as a trial court judge before moving to the Utah Supreme Court in 1982; she was Chief Justice and Chair of the Utah Judicial Council from 2002 to 2012. She is the past president of the Conference of Chief Justices of the United States, and also the past-chair of the American Bar Association's Council on Legal Education and Admissions to the Bar, the entity that accredits American law schools. She is a member of the Council of the American Law Institute, the Board of Overseers for the Rand Corporation's Institute for Civil Justice and is a Fellow of the American Bar Association. Past professional service includes the governing boards of the American Inns of Court Foundation, the Appellate Judges Conference of the ABA, the ABA's Commission on Women in the Profession, and the Federal Judicial Conference's Advisory Committee on the Rules of Civil Procedure. She is also a past president of the National Association of Women Judges and was that organization's Honoree of the Year in 1997. Justice Durham has been active in judicial education and was a founder of the Leadership Institute in Judicial Education. She helped create and lead the Utah Coalition for Civic Character and Service Education and served

PAULA HANNAFORD-AGOR: I just wanted to start out thinking a little bit about the *Horton* case. When I first heard of it and first started reading it, I have to say I was disappointed. I am the director of the Center for Jury Studies. I believe in the right to trial by jury—and especially the civil jury. But I was not overly surprised. And this was coming out of some research that we had done at the National Center for State Courts looking at what happens to judgments and verdicts from bench and jury trials on appeal. The National Center had some periodic research that we've done, called our Civil Justice Survey of State Courts that typically has gone out and looked at bench and jury trials across a broad swath. You know, the study I'm

---

on the Utah Commission on Civic Education. She was an adjunct professor for many years at the University of Utah College of Law, teaching state constitutional law, and served for twelve years on the Utah Constitutional Revision Commission. She has received honorary degrees from four Utah universities and has been recognized nationally for her work in judicial education and efforts to improve the administration of justice. In 2007 she received the William H. Rehnquist Award for Judicial Excellence; in 2008 she received the Transparent Courthouse Award for contributions to judicial accountability and administration from the Institute for the Advancement of the Legal System at the University of Denver. In September 2012, Justice Durham received the Eighth Annual Dwight D. Opperman Award for Judicial Excellence from the American Judicature Society. Justice Durham recently served on the ABA's President's Task Force on the Future of Legal Education and served on the Advisory Board for the Educating Tomorrow's Lawyers Project of the Institute for the Advancement of the American Legal System at Denver University, and on the Board of Trustees of University of the People, an accredited tuition-free online institution.

‡ Hon. Michael A. Wolff is an attorney, a former Missouri Supreme Court judge and chief justice, and a former professor and dean emeritus of Saint Louis University Law School. His current practice involves select matters related to litigation, governmental affairs, and public interest law.Wolff served for thirteen years on the Supreme Court of Missouri, from 1998 to 2011, including two years as chief justice. He returned to the faculty of Saint Louis University in 2011 and became dean of the law school in 2013, serving until 2017. His honors include Lawyer of the Year (*Missouri Lawyers Weekly*), the Missouri Bar's Theodore McMillian Judicial Excellence Award; the William J. Brennan Jr. Memorial Lecture on State Courts and Social Justice, New York University; Benjamin N. Cardozo Award for Judicial Courage and Excellence (Missouri Association of Criminal Defense Lawyers), and the Donald P. Lay Champion for Justice Award from the National Employment Lawyers Association, Eighth Circuit.

§ Paula L. Hannaford-Agor is Director of the Center for Juries Studies, at the National Center for State Courts (NCSC). She joined the NCSC in 1993 and regularly conducts research and provides technical assistance and education on the topics of jury system management and trial procedure, civil litigation, and complex and mass tort litigation. She authored or contributed to numerous books and articles on the American jury, including *Jury Trial Innovations* (2d ed. 2006), *The Promise and Challenges of Jury System Technology* (NCSC 2003), and *Managing Notorious Trials* (1998). She is also an adjunct faculty member at William & Mary Law School, where she teaches a seminar on the American jury. She received her J.D. and a Master's in Public Policy from the College of William & Mary in 1995 and her B.A. from George Mason University in 1991.

thinking about was forty-six large urban courts. It's since been expanded to about 122 courts across the country. And the study that we looked at—there were about 8000 jury trials, about fifteen percent of which ended up going up on appeal.

And interesting, looking at this, this is on appeal in twenty-two states—thirty-three individual intermediate appellate courts and courts of last resort across the country. And the rate of appealing bench and jury trials was about equal, about fifteen percent. But there was some interesting divergence there. Plaintiffs were significantly more likely to appeal from a bench judgment (a judgment in a bench trial), while the defendants were significantly more likely to appeal from a jury verdict. So we have that sort of interesting divergence going on.

About forty-three percent of these cases that went up on appeal ended up not going forward. They were either withdrawn or they were dismissed for some type of procedural reason. But we had fifty-seven percent of those cases, 1200 cases, that ended up being decided on the merits. And you see some very interesting trends there.

The first one was that these intermediate appellate courts—and this is probably where most of the work is going because [these courts] actually had mandatory jurisdiction over appeals from civil cases in most of these states—these intermediate appellate courts were three times more likely to reverse or modify a jury verdict than they were a bench judgment. And they were two times more likely to reverse or modify the judgment or the verdict when the defendant was the appellant. So at the trial court level, you had a plaintiff who had prevailed—at the trial court level. And when I first saw that (I mean these were like really obvious trends from the data), and I was at first a little surprised, and that this curious thing that in this bench trial, you've got some type of an opinion that has the explanation for what the decision was and how the judge applied the law and what the evidence was that he or she found persuasive, so you've actually got a much broader basis on which to disagree. (And so, as opposed to a jury trial, [where] a verdict would just be either liability or no liability, and damages—kind of that absence of an explanation for how the jury actually did that.)

Now, traditionally we think . . . one of the strengths of a jury verdict is that they don't have to explain—you don't have a basis, as I've seen in other countries, to be able to go in and say, "well they were clearly wrong in how they approached their decision making." That's been one of the big criticisms, for example, of special

interrogatories in civil verdicts. That it just creates an opportunity for mucking around after the fact. But I think that may be part of the explanation for why the appellate courts—the appellate bench—seems so willing to substitute its judgment or to second guess that there is no explanation. So they're willing to give some discretion to their colleagues on the trial court bench because they said, "well, I probably wouldn't have gone that way, but I at least recognize the logic of the reasoning." So there's that piece of it, of how the appellate bench is second guessing some of these jury verdicts.

Another piece of that, though, if you started really digging into the data, we had either it was affirmed in whole, or it was reversed in part, or whole, or modified, or remanded or something like that, and so, looking at these cases that got reversed, we started digging in a little bit on what [the alleged error was.] What is it that it was actually looking at? And interestingly enough on the jury trials, the ones that were being reversed, [they] were actually comparatively rare to see the appellate bench overturning verdicts that had to do with the actual liability. So if the alleged error was just the insufficiency of the evidence supporting liability, that one was being reversed only about thirteen percent of the time. It was money—on damages. The sufficiency of the evidence on damages that was being overturned about thirty-one percent of the time, so almost three times the rate. Or, [it was] a proxy. Sometimes it was not actually after the jury's verdict. It was after there had been a post-judgment motion for remittitur that had been denied. And so the actual appeal, alleged error, was that the trial judge was wrong in not granting the remittitur. And so we saw some of that going on.

So we get this really curious focus that the appellate bench really doesn't trust juries on money. OK on liability, but [the appellate bench] really doesn't trust juries on money. And I wonder how much of that is coming out of the research. We know in terms of just the instructions that we give jurors about damages, and particularly noneconomic damages, that almost everywhere across the country there is very little direction. It's a completely subjective make-the-plaintiff-whole [instruction]. Make the injured person whole. But we don't really have a common metric for what that means monetarily. It's very subjective. The pain and suffering is worth $25,000? Half a million? If we're looking at punitive damages, which by definition means we want to punish someone, do you punish them with $10,000? Do we punish them with $10 million? So it's a very subjective decision that we ask juries to do, and so I wonder if some

of the ambivalence that Dean Chemerinsky was talking about is the fact that as a society we really don't know how to deal with this amorphous thing. How do we convert restitution and/or punishment into monetary terms? I think that may be part of what is going on.

The study that we did at the National Center was actually prompted by an earlier one that Ted Eisenberg, and I think it was Michael Claremont at Cornell Law School, had done on federal court appeals from bench and jury trials a number of years ago. And one of their conclusions—because they had exactly the same types of trends in their data—was that the appellate bench was actually biased against juries. And in fact, they justified their own bias because they actually suspected that the trial bench was biased for juries and for plaintiffs. And so they were just compensating so that you would actually have an even playing field there. Now that's kind of curious because when we look at judge-jury agreements—which is a fairly common metric that's used in jury research—how often does the trial judge say that, had it been a bench trial, it would have agreed with the verdict that the jury came out with? And that is traditionally very high. It typically runs between seventy-five and eighty-five percent, and it's been that way since the 1950s when we first started using this metric. So there's a lot of agreement there. And so part of me . . . think[s] that maybe the appellate bench is just too far away—too far removed—that they don't trust juries because they don't actually have the day-to-day experience of the wisdom that comes from the juries.

And I do want to make one last point and then pass it on. One of the things that we see in terms of juror decision making—particularly when jurors are given a lot of discretion and not a lot of guidance on how they're to decide—is that they will fundamentally interpret the evidence and interpret the law that they're given to apply in a way that results in what is an objectively fair verdict according to those community norms, wherever that trial is taking place. And this is one of the fundamental rationales on why we have jury trials. This idea that this is an opportunity for the community to inject the judicial process with community values. And it means that the judicial branch actually stays really firmly grounded in sort of what are the norms of what we consider justice—what we consider fair. And so one of the things that concerns me about *Horton*, and concerns me about the decisions of the Supreme Court and the decision not to incorporate the Seventh Amendment (and to take the Seventh Amendment as seriously as it does the Sixth Amendment), is that it allows the courts to develop law that is not necessarily grounded in where our

communities are and what our communities think is fair. And I don't think we have to look very far, if you're paying attention to current events right now, to be able to see some of the implications in terms of public distrust of our government[al] institutions, including our courts. [There is] a sense that those institutions are rigged, that they are protecting the elites, and [there are] very entrenched government interests. And so a lot of this implication, the failure to take the Seventh Amendment seriously, to allow the judgments of juries to be maintained, and to be respected is really undermining, in a very real sense, the judicial branch to its detriment.

HON. MICHAEL WOLFF: Justice Christine Durham and I are going to have a little conversation. We started last night talking about the study done of U.S. Supreme Court arguments that found that women Justices were much more likely to be interrupted by male justices. So I take the conversation invitation with a bit of a warning. [Audience laughter.]

HON. CHRISTINE DURHAM: We decided we're both chronic interrupters so it should go fine.

WOLFF: It goes with the territory of being an appellate judge. And what I found remarkable about that, by the way, and this is a little practice tip—there are a lot of people who are advocates who are interrupting women justices of the United States Supreme Court. Think about that.

DURHAM: Don't ever do that. [Audience laughter.]

WOLFF: Anyway, I wanted to start with, from my perspective, a couple of things. We have similar provisions in our constitution to the ones that were interpreted in the *Horton* case. And the first of the modern cases on jury trials is one that I wrote. There was a statute, the Missouri Human Rights Act, which gave remedies for employment discrimination. The statute was passed with a right to jury trial in it. Governor Ashcroft—remember him?—vetoed it, saying there shouldn't be a jury. So the legislature passed it without reference to a jury. A couple of court of appeal[s] decisions along the way, over the last several years, said that was OK. And then in 2000 or so, when I was on the court, we took a writ case and made this applicable because—and the analogy that's applied—in an action for damages that's what the statute provided for, to go back and analyze whether this was the kind of remedy available at the common law. Well obviously the common law availability in 1820, which is when our state came into the Union—remember the Missouri Compromise, that's a little history quiz—there wasn't any law against employment

discrimination, but there were actions for damages for intentional wrongs, which is essentially what we're talking about. Now, so we decided, and it was unanimous, and there were people from both sides of the aisle that joined in this.

The next issue of course is caps. And that is, does a cap on damages interfere with the right to a jury trial because it's, in effect, a reexamination of what the jury has found? And we now have kind of a situation where—and I'll get into this a little bit, but I'll let Justice Durham talk a little bit about this before—we struck down the caps, or the court did after I left, but they used the concurrence that I wrote, so I'm happy about that. That if you have a jury that awards this much [holds up hands], and the statutory cap takes it down this much [moves upper hand], you're taking away, you're legislating away, part of the jury's determination. So that was fine for personal injury cases. What about wrongful death? Wrongful death is a statutory cause of action, and our jurisprudence says that it is something that did not exist at common law. So, low and behold, this is again after I left, there's a decision that says wrongful death is subject to the cap on noneconomic damages. I have some advice for you tortfeasors: make sure they're dead because if they're still alive the damages are not capped.

One other thing, just in terms of the language of the constitutional provision, what we're talking about is something that is always subject to the historical analysis because in our constitution and in the constitution of Oregon it says that the right to jury trial shall remain inviolate. That says, "let's go back and look and see what's remaining inviolate"—some say shall be preserved, some say shall not be infringed—it's always an invitation to go back and look at what the history was in terms of actions at common law.

I made the point in the *Diehl* case,[1] one of the employment discrimination cases, that "remain inviolate" is like an exclamation point, as opposed to just preserved or shall not be infringed. I mean, "remain inviolate" sounds a hell of a lot more serious, you know, to those of us who are language fanatics.

[Turns to Justice Durham] Thank you for not interrupting.

DURHAM: I was good! I am delighted to be here in Oregon. I have to say that, for many years, I have cited opinions out of the Oregon Supreme Court with favor. I'm not going to be citing this one. And I wanted to thank particularly Dean Chemerinsky for his excellent

[1] State *ex rel.* Diehl v. O'Malley, 95 S.W.3d 82, 84 (Mo. 2003).

contextual look at sort of what's happened historically in this country vis-à-vis jury trials in particular. I'm not at all certain that the ambivalence—that has grown up around the federal system—is entirely reflective of the state system. I think the states have, from the beginning, taken the notion of the jury in civil cases a little bit more seriously than our federal counterparts, although I think we are at a junction and a crossroads in that respect because of the elements that he described—in terms of the attacks on the jury system [and] the rise of [alternative dispute resolution] clauses in the most minute places, in the most minute contracts. [It] is a very serious problem.

I've been fighting a bit of a rear guard action on my own court in my own state. We have a jury clause provision that's somewhat interesting in that it does say that the right to jury trial in capital cases shall be inviolate; it doesn't go on to say anything about the right to jury trial otherwise except that it goes on to provide, in significant detail, what the legislature can do with the size of juries. In other words you need a jury of twelve persons for this, no fewer than eight persons for this, and so on. And then the last sentence of our clause says a jury trial in civil case shall be waived unless demanded. So the right to jury trial is clearly there by inference, but what's interesting to me about that is that we have never taken account of any distinction in our case law relating to the fact that in capital cases it's overt and in civil cases it's by inference. We have always held that the jury trial, in civil cases, is a fundamental right. We actually just upended part of our system recently in that we've had a series of statutes going back about ten [to] fifteen years trying to reform the small claims courts and the justice courts and to eliminate the permit for small claims to get de novo review in the trial court but without juries. And somebody finally came along and challenged it, and we said, "[we] can't do it, the constitution will not permit you to deprive [someone], even one who is in small claims court, of a jury trial if they don't waive it." So we've taken it very seriously, except with respect to damage caps.

In a case decided about thirteen years ago, wherein I dissented, the court upheld a challenge to our damage caps. And let me preface that by saying Utah—you know, you talk about black holes for defendants around the country—is a black hole for plaintiffs. We have, I think, the lowest damage cap in medical malpractice cases in the nation. Want to guess? $450,000. $450,000 in medical malpractice cases.

WOLFF: For everything?

DURHAM: For everything. Well, I'm sorry, for noneconomic damages. I beg your pardon. Not economic damages, [there] you get what you get. But noneconomic damages [the cap is] $450,000. Not only that, but Utah, the last time a study was done, which was I think about five years ago, we had the lowest median jury verdicts in the nation. Is this still true, Bob?

ROBERT PECK: Umm, I think it is.

DURHAM: Yeah.

PECK: But California and several other states have a $250,000 cap.

DURHAM: Oh, I did not know that. Well, OK, I feel a little better then. The majority in our case held under equal protection that—part of what I dissented against was the extreme deference that the court in that case gave to the open courts provision—the remedy provision of our open courts clause afforded extreme deference to legislative fact finding. This is something that Bob has, and others have, looked at extensively. And decided that reducing healthcare costs required some kind of action in the forum of medical malpractice cases. Now there are a number of problems. I've actually wondered, in some respects, why the equal protection arguments in state courts have not had more legs, in the sense that you have causes of action that are severely limited particularly in terms where you have high damages and quality of life scenarios. I think it's in an article that Bob wrote a number of years ago. He cites the research [that] demonstrates the invidious impact of those damages in cases involving certain kinds of injuries and certain kinds of plaintiffs—not surprisingly, women.

In assault cases, sexual assault cases, infertility [cases], and damages associated with quality of life, [the damages] are regarded—and certainly regarded by the majority in our case—as being soft damages, as being not worth much in a pecuniary sense. Now it's very interesting. We don't have the wrongful death problem in our state because wrongful death is actually enshrined—damages for wrongful death are actually enshrined—in our constitution. So they're protected, but we recently had a case in which we had to decide whether noneconomic damages in wrongful death cases were "pecuniary" damages within the meaning of the constitution and the subsequent statutes. We decided they were. We decided that because juries were asked to reduce those damages to monetary amounts they qualify as pecuniary damages. But I think one of the things that underlies this whole debate is the profound disrespect for quality-of-life damages. And yet every single one of us who have experienced a blow in our own personal lives, with respect to quality of life, know

how painful that can be and know that the results for an individual who has experienced this are extreme.

One of the things that has concerned me in this arena is—what's been going on to a significant extent, it seems to be—what I regard as the impermissible shifting of the burden of dealing with the so-called medical malpractice crisis; the rising costs of health care, to one of the most voiceless and burdened segments of our society. Now I suspect this is a room with some plaintiffs' lawyers in it, and I know I'm preaching to the choir in that respect, but it strikes me that they are the ones who are being deprived of the massive—the most severely injured victim is the one who is going to get the least percentage of recovery. And therein I think lies a very interesting equal protection problem.

One of the things I was most struck with in the *Horton* opinion was where—and this goes back to the jury trial issue, and then I'll stop, and we can see where we are—the *Horton* majority says that they're talking about the right of

> legal limits on a jury's assessment of civil damages have been and remain an accepted feature of our law. To be sure, statutory damages caps differ from other types of legal limitations . . . . They specify, as a matter of law, a numerical limit on the amount of damages that a party can recover instead of describing that limit generically by using a phrase such as foreseeable damages or damages proximately caused . . . . However, the two types of limitations do not differ in principle. Each limits, as a matter of law, the extent of the damages that a jury can award.[2]

So what they're conflating is the notion of the definition of a claim, the elements of a claim for recovery, and a limitation on the damages that can be restored. I think, of course, those are different and should not be conflated. Fact finding regarding what the damages are is not a jury determination of whether the elements of the claim has been met. And to the extent that—and the other thing that struck me about the *Horton* decision was the conflation of the idea—the jury can find damages of X amount but can only award damages of Y amount. Well, there's a degree of which, or the sense in which the jury doesn't award anything, it's the court's order of judgment that reduces the jury's verdict to an award. And so therein, of course, lies the separation of powers argument that what the legislature has done is to constrain the court's entry of an award based on the jury's judgment.

---

[2] Horton v. Or. Health & Sci. Univ., 359 Or. 168, 245, 376 P.3d 998, 1041 (2016).

And I'd just say to Paula [Hannaford-Agor], by the way, some of us appellate judges used to be trial judges. We like juries a lot, but apparently, we're not in the majority. Thank you.

WOLFF: And you have to remember, the learning in my state is that the function of the appellate court [is] to enter the battlefield after the battle has been fought and shoot the wounded.

One of the things that occurred to me just as you were ending with your last point is, do you tell the jury about the caps? Or do you just say to the jury, "determine the damages and then the judge applies." In our state, the judge applies the caps. So it is, I think overtly, a separation of powers problem because it's the legislature taking the judicial function upon itself. Now, the Supreme Court of Missouri has rejected that point. I'm happy to say that my successor on the court wrote a dissent, in which he picked up on that, and I think it was appropriately said.

PECK: Erwin [Chemerinksy] invoked Alexis de Tocqueville's *Democracy in America*.[3] And in the final edition of that book during his lifetime, de Tocqueville added a preface in which he wrote that if the lights that guide us are to fade, they will dim as if of their own accord because wise procedures and rights that we think are important will fade from memory, and we will not apply them. That kind of diminishment of our understanding of the right to trial by jury is quite evident and, really, are part of what Erwin's remarks were about.

It is something that Hugo Black, before he was Chief Justice, as a Justice, [and] William Rehnquist, both noted. They noted that increasingly there is a judicial invasion of the province of the jury that needs to be worried about because if any right were more important to those who framed the Constitution and founded our country, it was the civil jury right. It was contained in more petitions from the states to the Congress about what ought to be in the Bill of Rights. And as Justice Story said, it was the most salient of the arguments against the ratification of the Constitution—so much so that Hamilton wrote that if there was one thing that friends and opponents of the Constitution agreed on, it was the importance of the right to trial by jury in civil cases.[4]

With that background, it is hard to look at the right to trial by jury as a mere procedural right, as the *Horton* court concluded. It took a

---

[3] ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA (Daniel C. Gilman ed., 1898) (1835).

[4] THE FEDERALIST NO. 83 (Alexander Hamilton).

fractured version of history and of the array [of cases] within the country in order to reach that conclusion. I'd like to start somewhat backwards from the majority opinion by looking a little at the federal cases that it did not cite. And what it did is it looked at a bunch of federal courts of appeals decisions, which upheld caps often in light of the fact that the Seventh Amendment was not incorporated to apply to the states. (As an aside, I will mention that in January I argued a case in the Eighth Circuit on that point precisely, and we're still awaiting a decision on that issue.) But if you look at the *McDonald* case,[5] written by Justice Scalia, which incorporated the Second Amendment, all the criteria he cited—on why the Second Amendment was fundamental and deserved, under the *Duncan v. Louisiana* criteria,[6] to be incorporated—applies even more so to the Seventh Amendment. So, what the *Horton* court ignored was the debate that came out of *Tull v. United States*, a 1987 decision under the Clean Water Act.[7] And in that case the Court decided that because this statutory cause of action set the damages that are collectible that indeed the jury could come to its own conclusion about damages, but, applying the law to it, the court could come to a decision consistent with the statutory mandate. As a result, a number of cases that were cited by the *Horton* majority relied on *Tull* to come to the conclusion that the jury simply is deciding facts, and the legal import of those facts were being then imposed by the judge.

All of this came to a halt really with a 1998 case called *Feltner v. Columbia Pictures*.[8] It was a unanimous decision written by Justice Thomas, and the winning advocate in that case happened to be a fellow named John Roberts, who now, I think, is Chief Justice. Anyway, in that [case], what they argued is that *Tull* took some pains to distinguish between statutory causes of action because the legislature's creating something that did not exist before. The Clean Water Act was not a feature of the common law, and so they define the extent of liability. However, in those causes of action that were recognized at common law as of 1791, when the Bill of Rights was ratified, were within the province of the jury. And so therefore, you apply a historical test—the historical test that every state uses to define its jury right in its state constitution. And what were the types of cases that were submitted to juries at that time?

---

5 McDonald v. City of Chicago, 561 U.S. 742 (2010).

6 Duncan v. Louisiana, 391 U.S. 145 (1968).

7 Tull v. United States, 481 U.S. 412 (1987).

8 Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340 (1998).

But secondarily, the Constitution is more than just a traffic light. It's more than just a right to have an audience when you try your case. What was the province of the jury? What was the extent of their prerogatives and their authority? If you are to reflect and preserve the right to trial by jury as it existed, and it's that second part that the opinion spends a great deal of time on. And they cite a number of English common law cases saying that these are the cases that really ought to guide us, and those cases specifically say that the jury is the judge of damages. Any interference with that right really does not preserve the Constitution. So *Tull* may be correct with respect to statutory causes of action but not to those that were recognized under the common law of that time. And if you look at some of the federal cases, you can look at an 1851 decision, *Day v. Woodworth*,[9] in which the court does respect the jury's authority to make the decisions as a factual determination of what the damages are and what the compensation ought to be. And it says that, though the jury has been controversial for some time, many think that it ought not make it the standard practice, and the experience that we have had so far marks the damages decision a commitment to the jury.

You move up to 1915, and the Supreme Court again talks about how damages are the province of the jury. And so when, in 2001, the Supreme Court decided to take punitive damages and give them a different treatment than it gives to compensatory damages, in *Cooper Industries v. Leatherman*,[10] there is a footnote that says, of course to the extent that the jury makes factual decisions that relate to punitive damages, we have to respect it. And of course, that's what we're saying about punitive damages that does not apply to compensatory damages, again recognizing that those damage determinations are the province of the jury. In fact, the same year as they decided *Feltner*, they decided another case called *Hetzel v. Prince William County*,[11] in which the Fourth Circuit had made a determination that the damages were really too great. That came up from the trial court, and therefore, they ordered a remittitur. When it went up to the Supreme Court, on a per curiam decision using the reexamination clause,[12] they said no, you can't simply order remittitur without the offer of a new jury trial, otherwise you have not preserved the right to trial by jury as it is recognized in the Seventh Amendment.

---

9 Day v. Woodworth, 54 U.S. 363 (1851).

10 Copper Indus., Inc. v. Leatherman Toll Grp., Inc. 532 U.S. 424 (2001).

11 Hetzel v. Cty. of Prince William, 89 F.3d 169 (4th Cir. 1996).

12 Hetzel v. Prince William Cty., 523 U.S. 208 (1998).

So you can see how *Horton* doesn't at all dovetail with these federal decisions. It doesn't dovetail also with the kinds of issues that the other states grappled with in looking at damage caps. Now, *Horton* recites that twenty-two states have some form of damage cap. But let me say, as someone who has litigated many of these cases, not all damage caps are equal. There are some [damage caps]—one that was passed earlier this year in Iowa as well, which was based on a Massachusetts cap—which give entire discretion to the trial judge to allow the jury's verdict, rather than the cap, to prevail. And as Massachusetts lawyers often tell everyone, they know of no trial judge who has ever overruled the jury and applied the cap. So you have those sorts of things. You have damage caps like the one in Ohio, which allows for catastrophic as well as wrongful death cases not to be subject to the cap.[13] And you see very rare instances where the trial judge does not regard the injury as sufficiently catastrophic to allow the full jury verdict to apply. So no surprise that those caps have been upheld.

[Turns to Justice Durham] I'm ready to be interrupted.

WOLFF TO DURHAM: And when you're done, I'll be interrupted.

DURHAM: OK. One of the things that puzzles me about the tactic by the *Horton* majority is this notion that it is the law that constrains the court in entering the judgment, and that the cap does not constrain the jury in its fact-finding function. What do you think that the Oregon Supreme Court's response would be to a statute that said, in causes for defamation, the court shall enter an order for $1 in damages? That fits within the logical framework, it seems to me, of the *Horton* analysis, but I don't understand what they'd do with that.

PECK: Well, paltry sums seem to be part of the difficulty here. But, you know, the Court this morning—the U.S. Supreme Court—accepted a case in which Congress directed the result of—now, many of us has thought that at least since the Civil War Era the court has said that Congress cannot do that—it's a violation of separation of powers. At the same time of course, we always look, in takings cases for example, for the jury to determine the value of the property that you've lost, and the cause of action is a form of property. So you would think that if the State is taking a part of your verdict, that determination of the value of your property for some sort of public purpose, that there also is some sort of takings violation, and so that also is part of it.

---

[13] OHIO REV. CODE ANN. § 2315.18 (West 2017).

Now one of the things that bothered me, one of the many things that bothered me about the *Horton* majority's decision, was the fact that it looked at each provision of the constitution in isolation. And the fact of the matter is that what we have there is a number of provisions that show that there's a greater whole than the sum of its parts. And that is a traditional canon of interpretation in constitutional law. And so therefore you have to consider, what is it that the framers were trying to accomplish? And [we can] look at that also in terms of the two jury trial provisions in the Oregon Constitution. You can't create the addition of a new provision of the constitution in 1910 as simply superfluous and doing nothing more than the constitution already did. As [Justice Wolff] said, the term "inviolate" is a very strong mandate; you can't think of anything else that's in a constitution that's subject to "inviolate" protection.

WOLFF: I think that one of things I picked up on in what you were just saying, and also Erwin's point about the arbitration clauses and the diminution of the right to a jury trial, is the idea that there could be a substitutionary remedy. You can take it entirely out of the court system. And the example that's sometimes given is workers' compensation. I remember—thirty years ago or so—there was a number of proposals that we should have a workers' compensation-type scheme for medical malpractice. And then somebody did a study that was published in the *New England Journal of Medicine* of incidents of harm that were done in hospitals by reviewing hospital records over a period of years.

DURHAM: The Harvard study, it was astonishing.

WOLFF: Yes, it was fabulous; it was astonishing—and all of a sudden, whoops, we're not going to do that. We can't afford it because what they found was that almost, very, very few people who are seriously injured in medical settings actually brought a lawsuit. And so, they would be digging up a whole lot of claims.

But the substitutionary remedy idea kind of baffles me a little bit, but, in part, because at common law there was a fellow servant rule. For those of you who remember way back in torts, you couldn't be liable to a fellow servant. So that was not a substitutionary thing but rather a remedy that was created to take that piece of the common law, which was missing and put it back in. Now, my court over time, and I never attempted to correct them, has always said that it was substitutionary. That there was a preexisting common law remedy for injuries on the job. I'm not so persuaded by that.

PECK: Well, much of the justification for workers' compensation as a substitute for a jury trial recognized that for the most part workers, while having a claim in negligence, would always lose it on the basis of contributory negligence. And so, therefore, this was a substitution. It used a quid pro quo analysis in almost every state that upheld it a century ago to say that employers got something, workers got something, and so therefore it works out, and so, again—due process or right to remedy types of analysis—it was upheld. But nowhere did anyone think that this was a violation of a right to trial by jury because it's not about where you get to put your case but respecting the fact-finding function of the jury. And in all the cases that the *Horton* court, for instance, said was out of step with *Lakin*,[14] none of them, except a case involving a damage cap, takes a fact finding by the jury and eviscerates in favor of something that the legislature has done, which I regard as acting as a super judiciary.

[14] Lakin v. Senco Prods., Inc., 329 Or. 62, 69, 987 P.2d 463, 468 (1999).