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Horton: The Remedy Clause and the Right to Jury Trial Provisions of the Oregon Constitution

INTRODUCTION

On May 5, 2016, the Oregon Supreme Court issued its decision in *Horton v. Oregon Health & Science University*.[1] In *Horton*, the court reinterpreted the Oregon Constitution's remedy clause of article I, section 10, and its provisions on the right to jury trial, article I, section 17, and article VII (amended), section 3.[2] After a comprehensive review of the text and history of those provisions, the court overruled earlier decisions interpreting those provisions and

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

2 *Id.* at 168, 376 P.3d at 998.

changed the way courts evaluate the constitutionality of legislative enactments, including statutory limits on damages.

The *Horton* decision, its meaning, and its significance for statutes that eliminate causes of action or curtail the recoverable damages for various torts have been the subject of much debate and litigation. The Oregon Court of Appeals recently issued several decisions applying *Horton*, at least some of which may be reviewed by the Oregon Supreme Court.[3]

In *Horton*, the seven-member Oregon Supreme Court was divided in its interpretation of the remedy clause and the jury trial provisions of the Oregon Constitution. Justice Kistler wrote the opinion for the majority, joined by Justice Brewer, Chief Justice Balmer, and Senior Justice *pro tempore* Linder; Justice Landau concurred. Justices Walters and Baldwin dissented.

Since May 5, 2016, the membership of the Oregon Supreme Court has changed in ways that may presage further reinterpretation of the remedy clause and the jury trial provisions. Only two members of the *Horton* majority remain, Justice Kistler and Chief Justice Balmer. Justices Brewer, Linder, and Landau have retired from the court, as has one of the two dissenters, Justice Baldwin. They have been replaced by Justices Nakamoto, Flynn, Duncan, and Nelson. Justice Walters has been an outspoken critic of the *Horton* majority's views, particularly regarding the jury trial provisions. If the court changes course, it is likely to do so under the intellectual leadership of Justice Walters. For that reason, the views Justice Walters expressed in her dissenting opinion in *Horton* deserve close attention. What follows is a discussion of the *Horton* court's analysis of the remedy clause and the jury trial provisions from the perspectives of the majority and the dissent.

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[3] *See e.g.*, Vasquez v. Double Press Mfg., Inc., 288 Or. App. 503, 406 P.3d 225 (Or. App. 2017) (holding that the $500,000 noneconomic damages cap under ORS 31.710(1) violates the remedy clause when applied to a jury verdict of $6,199,090.20, of which $4,860,000 are noneconomic damages); Schutz v. La Costita III, Inc., 288 Or. App. 476, 406 P.3d 66 (Or. App. 2017) (holding that ORS 471.565(1), eliminating claims against servers of alcohol to a person who is injured by his or her own voluntary consumption of alcohol, violates the remedy clause); Rains v. Stayton Builders Mart, Inc., 289 Or. App. 672,—P.3d—(Or. App. 2018) (holding that the $500,000 noneconomic damages cap under ORS 31.710(1) violates the remedy clause when applied to an injured construction worker's jury award of $2,343,750 in noneconomic damages and when applied to the spouse's jury award of $759,375 in noneconomic damages for loss of consortium).

I
THE REMEDY CLAUSE OF ARTICLE I, SECTION 10

In 1857, the Oregon Constitutional Convention adopted the Bill of Rights of the Oregon Constitution, including article I, section 10. That provision 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.[4]

As the *Horton* court recognized, each of the three independent clauses that comprise article I, section 10, addresses the administration of justice.[5] The first prohibits secret courts. The second provides that justice shall be administered "openly and without purchase, completely and without delay." The third provides that "every man shall have remedy by due course of law for injury done him in his person, property, or reputation." It is the meaning of that third clause, the so-called "remedy clause," that has proved to be the great enigma.

The Oregon Supreme Court has interpreted the remedy clause in a variety of ways over the decades since it was written in 1857. The result has been a body of case law that, as former Justice Landau put it, "lacks anything resembling doctrinal coherence."[6] The *Horton* court grappled with that body of case law and tried to identify some unifying themes. But the cases cannot be reconciled because they represent two fundamentally inconsistent views of what the remedy clause prescribes for the roles of the legislature and of the courts with respect to the law of torts.

On one hand, the remedy clause can be read to mean that every person shall have access to the courts to find remedy for such substantive rights as the law may recognize at that time. Under that view, the authority to create, eliminate, or modify substantive claims resides with the legislature, subject only to review by the courts for violation of other constitutional provisions. The role of the courts is to serve as an open, effective, and impartial forum to which all persons, regardless of their station in life, have access for the purpose of vindicating such substantive rights as the law may provide at that

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4 OR. CONST. art. I, § 10.

5 *Horton*, 359 Or. at 179, 376 P.3d at 1006.

6 *Id.* at 255, 376 P.3d at 1047 (Landau, J., concurring).

time. That view is consistent with the provision's ancient historical roots. The *Horton* majority analyzed its English antecedents, including Lord Coke's discussion of this textually resonant part of Magna Carta:

> And therefore, every subject of this realme [sic], for injury done to him in *bonis* [goods], *terres* [lands], *vel persona* [or in person], by any other be he eccleasiasticall [sic], or temporall [sic], free, or bond, man, or woman, old, or young, or be he outlawed, excommunicated, or any other without exception, may take his remedy by the course of the law, and have justice, and right for the injury done to him, freely without sale, fully without any denial, and speedily without delay.[7]

The *Horton* majority observed that the goal of that ancient provision was to prevent royal interference with the common law courts, not to limit parliament's authority to alter the substantive law.[8] At times, the Oregon Supreme Court has adopted a similar interpretation of article I, section 10.[9]

On the other hand, the remedy clause can be read as limiting the legislature's authority to determine substantive rights and remedies, including its authority to limit the type or amount of damages that may be recovered. Under that view, the remedy clause gives the courts authority to second-guess the legislature's policy judgments as to what claims are actionable and the types and amounts of recoverable damages for those claims, and to evaluate whether, in the court's view, the resulting legislation departs too radically from the common law in light of the legislature's purposes in enacting it, or results in the recovery of damages that the court regards as too low.

In *Horton*, the plaintiff's son suffered personal injuries as a result of medical negligence.[10] The court held that the remedy clause was not violated when the trial court reduced a verdict for economic damages of $6,071,190.38 and noneconomic damages of $6,000,000 to a total of $3,000,000 based on the Oregon Tort Claims Act.[11] In explaining its holding, the *Horton* court adopted the latter view of the

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[7] *Id.* at 200, 376 P.3d at 1017 (quoting 1 EDWARD COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 55 (W. Clarke & Sons 1809)).

[8] *Id.* at 201–02, 376 P.3d at 1017–18.

[9] *See, e.g.*, Perozzi v. Ganiere, 149 Or. 330, 40 P.2d 1009 (1935) (holding that article I, section 10, does not deny the legislature the authority to enact a guest passenger statute eliminating a guest's right to bring a claim for personal injuries caused by the driver's simple negligence).

[10] *Horton*, 359 Or. at 171, 376 P.3d at 1001–02.

[11] *Id.*

remedy clause. Only Justice Landau, in his concurring opinion, took the view that the remedy clause "protects against executive and legislative interference with judicial independence and access to the courts, but does not impose a limitation on the otherwise plenary authority of the legislature to determine rights and remedies."[12] The majority and the dissent concluded that the remedy clause imposes substantive limits on the legislature's authority to alter or eliminate claims and to limit the types and amounts of recoverable damages, but disagreed on what those limits are and left unanswered many questions about how those limits are to be determined.

Because the *Horton* majority expressly overruled only one of the often contradictory cases that comprise the Oregon Supreme Court's body of work on the remedy clause, *Smothers v. Gresham Transfer, Inc.*,[13] some familiarity with the court's pre-*Horton* remedy clause cases is necessary in order to understand *Horton*. The following survey is not exhaustive, but provides some of the main landmarks along the court's way from 1857 to the 2016 *Horton* decision.

II
OREGON REMEDY CLAUSE CASES BEFORE *HORTON*

As the *Horton* majority explained in some detail, a number of the early remedy clause cases involved persons who were injured by defects in city streets.[14] Generally, the cases adhered to the principle first announced in *Mattson v. Astoria*,[15] that, as long as legislation left the injured person with a cause of action against either the city or a city employee, it did not violate article I, section 10.[16] In *West v. Jaloff*,[17] the court considered whether to construe a statute as immunizing drivers of emergency vehicles from liability for simple negligence in certain circumstances. Rejecting that construction, the court cited the "settled law of this state that the common-law remedy for negligently inflicted injuries cannot be taken away without providing some other efficient remedy in its place."[18]

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[12] *Id.* at 286, 376 P.3d at 1064 (Landau, J., concurring).

[13] Smothers v. Gresham Transfer, Inc., 332 Or. 83, 23 P.3d 333 (2001), *overruled by Horton*, 359 Or. at 188, 376 P.3d at 1010.

[14] *See, e.g.*, *Horton*, 359 Or. at 189–90, 376 P.3d at 1011–12 (citing several examples).

[15] Mattson v. City of Astoria, 39 Or. 577, 65 P. 1066 (1901).

[16] *Horton*, 359 Or. at 190, 376 P.3d at 1012.

[17] West v. Jaloff, 113 Or. 184, 232 P. 642 (1925).

[18] *Id*. at 195, 232 P. at 645.

But in *Perozzi v. Ganiere*, the court held that article I, section 10, does not deny the legislature the authority to enact a statute eliminating a guest passenger's cause of action for personal injury caused by the driver's simple negligence.[19] The court observed that, in *West v. Jaloff*, the evidence failed to show that the defendant's ambulance was within the coverage of the challenged statute.[20] More fundamentally, the court stated that "[t]he right to alter all laws in force in the territory of Oregon when the constitution was adopted, whether the same were of common-law or legislative origin, was reserved to the people of the state by article 18, [section] 7."[21] The court commented,

> Moreover, had it been the intention of the framers of the Constitution to adopt and preserve the remedy for all injuries to person or property which the common law afforded, they undoubtedly would have signified that intention by exact and specific wording, rather than the language used in article 1, [section] 10.[22]

In *Sealey v. Hicks*, the court again concluded that the remedy clause does not prohibit the legislature from eliminating a common law claim, so long as it acts for a legitimate legislative purpose.[23] The plaintiff was injured when the roof of the vehicle in which he was riding came off during a rollover.[24] His claim was barred by the statute of repose applicable to product liability claims, ORS 30.905(1), because the accident occurred more than eight years after the vehicle was originally sold.[25] On appeal, the plaintiff contended that the statute of repose violated the remedy clause by denying him a cause of action for what would otherwise be a legally cognizable injury.[26]

The *Sealey* court disagreed. It expressed the view that, as long as the legislature acted for "legitimate legislative purposes"—that is, "for the purpose of protecting a recognized public interest"—then the court will not inquire into the reasonableness or efficacy of the legislature's enactment in accomplishing that purpose.[27] As for

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19 Perozzi v. Ganiere, 149 Or. 330, 350, 40 P.2d 1009, 1016 (1935).

20 *Id.* at 343, 40 P.2d at 1014.

21 *Id.* at 346, 40 P.2d at 1015.

22 *Id.*

23 Sealey v. Hicks, 309 Or. 387, 788 P.2d 435 (1990).

24 *Id.* at 390, 788 P.2d at 436.

25 *Id.*

26 *Id.* at 393, 788 P.2d at 438.

27 *Id.* at 394, 788 P.2d at 438–39 (citation omitted).

statutes of repose, the court concluded that "[i]t is a permissible constitutional legislative function to balance the possibility of outlawing legitimate claims against the public need that at some definite time there be an end to potential litigation."[28] In short, the law did not violate the plaintiff's rights under the remedy clause because "[t]he legislature has the authority to determine what constitutes a legally cognizable injury."[29]

Particularly significant was the *Sealey* court's rejection of the plaintiff's invitation to evaluate the reasonableness and efficacy of the statute in accomplishing its legislative purpose. The plaintiff relied on a case in which the Supreme Court of New Hampshire struck down a statute of repose under its constitution's remedy clause.[30] Applying that clause, the New Hampshire court concluded that the twelve-year statute of repose was unreasonable because it could deprive persons of a remedy before their claim accrued and was, "in that court's view, unrelated to the underlying purpose of holding down insurance rates, primarily because 'the crisis in products liability insurance had abated nationwide independent of [this law].'"[31] A report by a New Hampshire Legislative Commission to Study Product Injury Reparations supported the court's conclusion.[32]

The *Sealey* court rejected that approach, stating, "[s]uch statements reflect a fundamental difference between the powers and duties of the Supreme Court of New Hampshire and of this court . . . . We are not empowered to strike down a duly enacted law simply because we believe it is unwise, unnecessary, or unsuccessful."[33] The *Sealey* court understood the legislature to have the authority to decide the injuries for which a plaintiff may state a claim, and it understood the judiciary not to have the authority to strike down a legitimate exercise of that authority on policy grounds.

The court has upheld the application of statutory caps on damages several times. For example, in *Hale v. Port of Portland*,[34] the court upheld a tort claims damage limit of $100,000 on a claim against the

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[28] *Id.* (citation omitted).

[29] *Id.* at 394, 788 P.2d at 439.

[30] Heath v. Sears, Roebuck & Co., 464 A.2d 288 (1983).

[31] *Sealey*, 309 Or. at 395–96, 788 P.2d at 439 (alteration in original).

[32] *Id.* at 396 n.10, 788 P.2d at 439 n.10.

[33] *Id.* at 396, 788 P.2d at 439.

[34] Hale v. Port of Portland, 308 Or. 508, 783 P.2d 506 (1989), *abrogated by* Smothers v. Gresham Transfer, Inc., 332 Or. 83, 23 P.3d 333 (2001).

City of Portland, even though the plaintiff's claim would have been unlimited at common law because the city was acting in a proprietary capacity, and even though the plaintiff's alleged economic damages exceeded $600,000.[35] The court invoked the principle 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."[36]

In 2001, the court decided *Smothers v. Gresham Transfer, Inc*.[37] and gave article I, section 10, precisely the interpretation that the *Perozzi* court found so implausible based on its text. The *Smothers* court expressly abrogated *Sealey*, stating, "[w]e disavow the holding in *Sealey* that the legislature constitutionally is authorized to define what constitutes an injury to absolute rights respecting person, property, and reputation that are protected by Article I, section 10."[38]

While the *Smothers* court took that power away from the legislature, it did not vest it solely in itself. Instead, the *Smothers* court attempted to establish an alternate point of reference outside of itself by which the constitutionality of legislation should be measured: the common law at the time the Oregon Constitution was adopted. As Justice Landau put it, "*Smothers*, for all its faults, at least supplied a point of reference in defining the constitutionally irreducible minimum of rights in terms of common-law claims that existed at the time of the state's founding."[39]

In *Smothers*, the plaintiff alleged that his employer negligently exposed him to dangerous fumes that were *a* contributing cause of his injuries.[40] The workers' compensation law required injured workers to prove that their employer's negligence was the *major* contributing cause of their injury; the plaintiff in *Smothers* could not make that

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[35] *Id.* at 526, 783 P.2d at 516.

[36] *Id.* at 523, 783 P.2d at 514; *see also* Greist v. Phillips, 322 Or. 281, 291, 906 P.2d 789, 795 (1995) (holding that "100 percent of economic damages plus up to $500,000 in [capped] noneconomic damages is a substantial amount, but also because the statutory wrongful death action in Oregon has had a low limit on recovery for 133 years of its 133-year history").

[37] Smothers v. Gresham Transfer, Inc., 332 Or. 83, 23 P.3d 333 (2001), *overruled by* Horton v. Or. Health & Sci. Univ., 359 Or. 168, 376 P.3d 998 (2016).

[38] *Id.* at 123, 23 P.3d at 356 (2001).

[39] *Horton*, 359 Or. at 284, 376 P.3d at 1062 (Landau, J., concurring).

[40] *Smothers*, 332 Or. at 126, 23 P.3d at 357.

more onerous showing.[41] Unable to obtain compensation under the workers' compensation law, the plaintiff then filed a negligence claim against his employer.[42] The trial court dismissed his claim on the basis of a 1995 amendment to the workers' compensation law that made workers' compensation benefits the exclusive remedy for work-related injuries.[43] The court of appeals affirmed that result, relying on earlier remedy clause decisions by the Oregon Supreme Court.[44]

The Oregon Supreme Court reversed, holding that "[h]aving alleged an injury of the kind that the remedy clause protects, and having demonstrated that there was no remedial process available under present workers' compensation laws, plaintiff should have been allowed to proceed with his negligence action."[45] The court based that holding on its conclusion that the meaning of the remedy clause is tied to Oregon's common law in 1857, when the Oregon Constitution was adopted.[46] The court concluded that the remedy clause protects the availability of a cause of action for any injury to "absolute" rights respecting person, property, and reputation that was available at common law when the Oregon Constitution was drafted in 1857.[47] If the common law in 1857 provided a cause of action for a particular injury to person, property, or reputation, then the law must continue to provide a cause of action for that historically defined injury. In so holding, the court abrogated *Perozzi* and *Sealey*, among other previous decisions.[48]

In 2007, a unanimous Oregon Supreme Court decided *Clarke v. Oregon Health Sciences University*.[49] In *Clarke*, the court held that the Oregon Tort Claims Act's (OTCA) statutory damages cap ($200,000 at the time) was unconstitutional as applied. The court started with the *Smothers* analysis to decide whether the common law

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41 *Id.* at 133–35, 23 P.3d at 361–62 (citing OR. REV. STAT. § 656.802(2)(a) (2017)).

42 *Id.* at 126, 23 P.3d at 357.

43 *Id.*, at 127, 23 P.3d at 357–58.

44 *Id.* at 127, 23 P.3d at 358.

45 *Id.* at 136, 23 P.3d at 362.

46 *See id.* at 114, 23 P.3d at 351.

47 *See id.*

48 *See id.* at 118–23, 23 P.3d at 353–56. *See generally* Noonan v. City of Portland, 161 Or. 213, 249, 88 P.2d 808, 822 (1938) ("Article I, §10, Oregon Constitution, was not intended to give anyone a vested right in the law either statutory or common; nor was it intended to render the law static."); and all other cases recognizing that the Oregon Constitution authorizes the legislature to define legally cognizable injuries, including injuries to person, property, or reputation.

49 Clarke v. Or. Health Scis. Univ., 343 Or. 581, 175 P.3d 418 (2007).

would have recognized the plaintiff's negligence claim against Oregon Health & Science University (OHSU).[50] The court determined that OHSU was an instrumentality of the state and therefore would have been immune from liability under the common law in 1857.[51] Thus, the court concluded that application of the OTCA's damages limitation to the plaintiff's negligence claim against OHSU does not violate article I, section 10.[52] The court proceeded to conclude that the plaintiff would have had a negligence claim against OHSU's employees in 1857, but the OTCA eliminated any cause of action against OHSU's employees or agents.[53] Instead, the OTCA provided a substitute cause of action against OHSU with damages capped at $200,000.[54] The court concluded that the damages cap violated the remedy clause because that amount was paltry in comparison to the plaintiff's damages.[55] The court stated:

> 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.[56]

The parties in *Clarke* stipulated that the plaintiff's economic damages were $12,273,506 and his noneconomic damages were $5 million.[57] The court concluded that the OTCA's $200,000 damages limit, as applied to the plaintiff, was unconstitutionally inadequate.[58] Chief Justice Balmer wrote a dissent, joined by Justice Kistler, advising the legislature to increase the amount of the OTCA damages limit.[59] He wrote, in part, "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."[60]The legislature subsequently took Chief Justice Balmer's advice and increased the OTCA damages cap.

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50 *Id.* at 593, 175 P.3d at 425.

51 *Id.* at 600, 175 P.3d at 428.

52 *Id.* at 600, 175 P.3d at 428–29.

53 *See Id.* at 608, 175 P.3d at 433.

54 *Id*.

55 *Id.* at 610, 175 P.3d at 434.

56 *Id*. at 606, 175 P.3d at 432.

57 *Id.* at 608, 175 P.3d at 433.

58 *Id.* at 609–10, 175 P.3d at 434.

59 *Clarke*, 343 Or. at 610–17, 175 P.3d at 434–38 (Balmer, C.J., dissenting).

60 *Id.* at 612, 175 P.3d at 435 (Balmer, C.J., dissenting).

The *Clarke* court was particularly concerned about the effect of the OTCA's cap on the plaintiff's ability to recover his economic damages. In *Greist v. Phillips*, the court rejected an article I, section 10, challenge to the damages cap in *former* 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, was a constitutionally adequate substitute remedy. The *Clarke* court explained *Greist* by emphasizing that—unlike the OTCA's statutory limit on all damages—the statutory cap in *Greist* placed no limit on economic damages:

> [T]he statutory damage limitation at issue in *Greist* allowed recovery of 100 percent of any economic damages and up to $500,000 in noneconomic damages. 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.[61]

In *State v. Rodriguez*, the court explained its ruling in *Clarke* by again emphasizing the effect of the OTCA on the plaintiff's recovery of his economic damages:

> *Clarke* . . . illustrate[s] the specific, limited circumstances in which we may conclude that a statute that is constitutional on its face nevertheless may be unconstitutional as applied to particular facts. In *Clarke*, we recognized that a legislatively imposed limit on injury claims against the state did not, on its face, violate Article I, section 10. However, considering the facts of that case, where the plaintiff's actual damages exceeded $11 million, and the legislature imposed a cap of $200,000, we held that application of the legislative cap to that plaintiff was unconstitutional.[62]

Then, in 2013, the court decided *Howell v. Boyle*.[63] The OTCA's $200,000 cap still applied in *Howell*, but the court held that it did *not* violate the remedy clause when applied to a plaintiff who sustained $507,000 in total damages.[64] This precipitated a rush among lawyers to try to determine what ratio the court would deem "substantial" and whether economic damages are on a different footing than noneconomic damages for purposes of evaluating the constitutional sufficiency of a statutorily capped damages award.

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61 *Id.* at 609, 175 P.3d at 434 (citation omitted).

62 State v. Rodriguez, 347 Or. 46, 80, 217 P.3d 659, 680 (2009) (citations omitted).

63 Howell v. Boyle, 353 Or. 359, 298 P.3d 1 (2013).

64 *Id.* at 388, 298 P.3d at 17.

III
THE REMEDY CLAUSE ACCORDING TO THE *HORTON* MAJORITY

In *Horton v. Oregon Health & Science University*,[65] the plaintiff's son suffered personal injuries as a result of negligence by OHSU and a doctor at OHSU.[66] The jury awarded economic damages of $6,071,190.38 and noneconomic damages of $6,000,000. [67] By that time, the OTCA's cap on all damages was $3,000,000, and the trial judge reduced the verdict to that amount.[68] The Oregon Supreme Court held that application of the OTCA's damages limit did not violate the remedy clause.[69] While *Horton* is a scholarly *tour de force*, it did not eliminate the confusion that has marked the court's remedy clause cases.

In grappling with the remedy clause, the *Horton* court was united with respect to one point: whatever the remedy clause means, its meaning "is *not* tied to its meaning in 1857."[70] Thus, the court overruled *Smothers*.[71] But exactly what the remedy clause *does* mean is less clear. By expressly overruling only *Smothers* and reaffirming the remedy clause cases that preceded it (many of which were contradictory), the *Horton* court left unanswered a host of questions about the clause's meaning. The court extended the fog of uncertainty to the remedy clause cases that came after *Smothers*, as well. The court stated only that, to the extent those cases relied on the part of *Smothers*' reasoning that *Horton* disavowed, "those cases must be taken with a grain of salt."[72]

The result is that the bench and bar are left to wonder—and litigate over—the extent to which the competing interpretations announced in the court's earlier remedy clause decisions remain viable. Just what does the remedy clause prohibit the legislature from doing? The *Horton* majority's response was essentially a well-researched and thoughtful version of, "It's complicated."

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

66 *Id.* at 171, 376 P.3d at 1001–02.

67 *Id.*

68 *Id.* at 171, 376 P.3d at 1002.

69 *Id.* at 221, 376 P.3d at 1028.

70 *See id.* at 187, 288, 376 P.3d at 1016, 1064 (Kistler, J., for the majority and Walters, J., for the dissent).

71 *Id.* at 177–78, 376 P.3d at 1005.

72 *Id.* at 220, 376 P.3d at 1028.

The *Horton* majority began by scrutinizing the text, but concluded that it "does not provide a clear answer as to the clause's meaning."[73] Without a clear answer from the text, the *Horton* majority proceeded to conduct a comprehensive review of the remedy clause's historical antecedents,[74] but concluded that the historical sources also "[did] not yield a clear answer regarding the clause's meaning."[75] On the one hand, the remedy clause's English antecedents were intended to prevent royal interference with the common law courts, not to limit parliament's authority to alter the substantive law.[76] On the other hand, the decisions from other states that preceded the adoption of Oregon's Constitution "consistently viewed their state remedy clauses as placing some substantive limit on legislative authority,"[77] although the nature of those limits varied widely. Some viewed their remedy clauses as "prohibitions on retroactive legislation," and others as permitting the legislature to "substitute a less-protective remedy for the common-law one"[78]or prohibiting "a complete denial of a common-law remedy."[79]

Faced with conflicting information about the meaning of the remedy clause, the *Horton* majority decided it could not conclude that the court's previous interpretations were clearly wrong:

> Given the cases that preceded and were contemporaneous with the adoption of Oregon's remedy clause cases, we cannot say that our decisions, with the exception of *Smothers*, find no support in the text and history of that provision and should be overruled. In reaching that conclusion, we need not decide how we would interpret Oregon's remedy clause if we were considering it for the first time. Rather, for over 100 years, this court has debated the meaning of the clause, the latitude it gives the legislature, and the rights it protects . . . . We may not toss that considered body of decisions aside . . . . Although we overrule *Smothers*, we reaffirm our remedy clause decisions that preceded *Smothers*, including the cases that *Smothers* disavowed.[80]

The majority concluded that the remedy clause does impose limits on the legislature's authority to curtail or eliminate common law

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[73] *Id.* at 198, 376 P.3d at 1016.

[74] *See id.* at 198–218, 376 P.3d at 1016–27.

[75] *Id.* at 217, 376 P.3d at 1026.

[76] *Id.* at 201–02, 376 P.3d at 1017–18.

[77] *Id.* at 217, 376 P.3d at 1026.

[78] *Id.* at 217–18, 376 P.3d at 1026.

[79] *Id.* at 218, 376 P.3d at 1026.

[80] *Id.* at 218, 376 P.3d at 1027.

claims and the amount and types of damages recoverable for those claims. In deciding whether legislation violates the remedy clause, "we must consider the extent to which the legislature has departed from the common-law model measured against its reason for doing so."[81] The court explained:

> It is difficult to reduce [the answer] to a simple formula, as *Smothers* sought to do, in part because the statutes that have given rise to [our prior] decisions do not reflect a single legislative goal or method of achieving that goal . . . . Attempts to articulate a single unifying principle fail to comprehend the varied ways that the legislature can and has gone about achieving its goals.[82]

Instead, the court sought to draw a collection of underlying principles from the disparate body of remedy clause cases. The court began its summary of those underlying principles with this: "First, when the legislature has not altered a duty but has denied a person injured as a result of a breach of that duty any remedy, our cases have held that the complete denial of a remedy violates the remedy clause."[83]

But, the court observed that, in some cases:

> [T]he legislature has modified common-law duties and, on occasion, has eliminated common-law causes of action when the premises underlying those duties and causes of action have changed. In those instances, what has mattered in determining the constitutionality of the legislature's action is the reason for the legislative change measured against the extent to which the legislature has departed from the common law. That is, we have considered, among other things, whether the common-law cause of action that was modified continues to protect core interests against injury to persons, property, or reputation or whether, in light of changed conditions, the legislature permissibly could conclude that those interests no longer require the protection formerly afforded them.[84]

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[81] *Id.* at 220, 376 P.3d at 1028.

[82] *Id.*

[83] *Id.* at 219, 376 P.3d at 1027. While that statement is, of course, correct, it is noteworthy that the *Horton* majority did not only disavow *Smothers*' analytical approach, but expressly overruled *Smothers*' holding that the Workers' Compensation Law's denial of any remedy to a worker injured by his employer's negligence violates the remedy clause. Specifically, the *Horton* majority said, "[b]ecause we overrule *Smothers*, it follows that its conclusion—that the workers' compensation statute was unconstitutional as applied—cannot stand. We express no opinion on whether our remedy clause cases that preceded *Smothers*, which we reaffirm today, would lead to the same conclusion." *Id.* at 188 n.9, 376 P.3d at 1010 n.9.

[84] *Id.* at 219–20, 376 P.3d at 1027.

To ask whether times have changed such that certain interests are no longer important enough to require legal protection is to engage in an essentially legislative judgment. And, if the court decides that we still have a "core interest" in, for example, protecting against personal injury, would the court now decide that a guest passenger statute, as in *Perozzi*, violates the remedy clause? What about a statute of ultimate repose that has the effect, as in *Sealey*, of denying an injured person any opportunity to bring a claim? Is the determination as to whether a common law cause of action "continues to protect core interests" properly within the province of the courts or the legislature? The *Horton* majority was careful to limit its decision to the facts before it.[85] Still, *Horton* seems to suggest that such quintessentially policy-driven questions are ultimately within the province of the courts, not the legislature, to decide.

The *Horton* majority also observed that:

> the court has recognized that the reasons for the legislature's actions can matter. For example, when the legislature has sought to adjust a person's rights and remedies as part of a larger statutory scheme that extends benefits to some while limiting benefits to others, we have considered that quid pro quo in determining whether the reduced benefit that the legislature has provided an individual plaintiff is "substantial" in light of the overall statutory scheme.[86]

Again, those are distinctly questions of policy. In *Sealey*, the court viewed its role as a limited one: the court focused on whether the legislature acted with a legitimate legislative purpose.[87] Once the court answered that legal question in the affirmative, the court refrained from second-guessing the wisdom or efficacy of the legislative action or weighing the inevitable trade-offs attendant upon virtually all such actions. To engage in balancing a law's negative effects on an individual's rights against its other positive effects may not be so much a question of constitutional validity, but instead a question of whether the law is a good idea. The *Horton* court recognized simply that "the reasons for the legislature's actions can matter."[88] But one wonders how far the court will wander beyond that inquiry—where it will draw the line between the exercise of judicial

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[85] *Id.* at 225, 376 P.3d at 1030.

[86] *Id.* at 219, 376 P.3d at 1027.

[87] Sealey v. Hicks, 309 Or. 387, 395, 788 P.2d 435, 439 (1990).

[88] *Horton*, 359 Or. at 219, 376 P.3d at 1027.

and legislative powers—after *Horton*. While the legislature may not be limited in the same historically fixed manner that it had been under *Smothers*, the remedy clause under *Horton* continues to limit the legislature's authority to determine substantive rights—except to the extent the court may agree with the legislature's policy choices

The *Horton* court observed, "our cases have held that providing an insubstantial remedy for a breach of a recognized duty also violates the remedy clause."[89] That observation invites this question: If the remedy clause permits the legislature to eliminate a cause of action entirely, why does it not authorize the legislature to preserve the cause of action, but limit the recoverable damages?

The *Horton* leaves many questions unresolved. The *Horton* majority concluded its remedy clause analysis this way:

> Our holding today is limited to the circumstances that this case presents, and it turns on the presence of the state's constitutionally recognized interest in sovereign immunity, the quid pro quo that the Tort Claims Act provides, and the tort claims limits in this case. We express no opinion on whether other types of damages caps, which do not implicate the state's constitutionally recognized interest in sovereign immunity and which are not part of a similar quid pro quo, comply with article I, section 10. Those cases are not before us, and we leave their resolution to the customary process of case-by-case adjudication.[90]

IV
THE REMEDY CLAUSE ACCORDING TO THE *HORTON* DISSENT

The dissent agreed with the majority that "the meaning of the remedy clause is not tied to its meaning in 1857."[91] The dissent disavowed *Smothers* to the extent that decision has been understood to require a court to

> ascertain the damages that the plaintiff would have received at common law [and] then compare those damages to the damages that the plaintiff received at trial. If the plaintiff would have received less at common law than the plaintiff received at trial, then . . . capped damages can be considered "fully restorative" of a common-law negligence claim.[92]

The dissent observed, however, that *Smothers* did not involve a damages cap. Therefore, the dissent commented, "the majority should

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89 *Id.* at 219, 376 P.3d at 1027.

90 *Id.* at 225, 376 P.3d at 1030.

91 *Id.* at 288, 376 P.3d at 1064 (Walters, J., dissenting).

92 *Id*. at 288, 376 P.3d at 1065 (Walters, J., dissenting).

have used *Clarke* to resolve this case."[93] *Clarke* was decided by a unanimous court that included Justice Walters. But Justice Walters seems not to share the *Horton* majority's understanding of what *Clarke* means.

Clarke started from the premise that the OTCA's damages cap did not violate article I, section 10, on its face. As Chief Justice Balmer stated in his concurring opinion in *Clarke*:

> "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 at limit. Plaintiff does not ask us to overrule *Jensen*, and the majority does not do so."[94]

In *Clarke*, the court emphasized that "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."[95] In Justice Balmer's concurrence, he observed that "[n]o Oregon case supports plaintiff's position that any tort claims limit would be unconstitutional when applied to a plaintiff whose damages exceeded that limit."[96] Thus, the focus in *Clarke* was on whether the capped damages were "substantial" (and therefore sufficient under article I, section 10) or only an "emasculated version of the remedy that was available at common law" (and therefore unconstitutionally insufficient).[97]

But in Justice Walters' *Horton* dissent, she expressed disagreement with the majority's view of *Clarke*, *Hale*, and article I, section 10. First, she characterized *Clarke* as having unanimously interpreted *Hale*, as upholding the OTCA's damages cap because the statute then in effect "did not limit a plaintiff's right to obtain a fully compensatory award from municipal employees."[98] Chief Justice Balmer and Justice Kistler expressly rejected that interpretation of *Hale* in their *Clarke* concurrence, commenting,

> 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

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93 *Id.* at 288, 376 P.3d at 1064 (Walters, J., dissenting).

94 *Id.* 343 Or 581, 614 n. 2 (Balmer, CJ, concurring).

95 *Clarke*, 343 Or. at 434.

96 *Clarke*, 343 Or. at 614 (Balmer, C.J., concurring).

97 *Clarke*, 343 Or at 606.

98 *Horton*, at 291, 376 P.3d at 1066 (Walters, J., dissenting).

> Linde relied upon that fact in his concurring opinion, 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.[99]

In Justice Walters' *Horton* dissent, she sharply criticized the *Horton* majority's suggestion that the legislature may properly effect a quid pro quo, based on the majority's reason of *Hale*, by "extend[ing] an assurance of benefits to some while limiting benefits to others."[100] Justice Walters wrote, "[t]his court has never held, in this or any other context, that the legislature may bargain away an individual constitutional right for something of benefit to others, and the majority jeopardizes all individual rights by starting down that path."[101]

As for the proposition that damages caps have a salutary effect on premiums, enabling more defendants to carry liability insurance, and thereby enhancing judgment creditors' ability to collect their judgments, Justice Walters commented that "a plaintiff's ability to collect a judgment is not a benefit of constitutional dimension and can have no place in the court's constitutional analysis."[102]

Finally, Justice Walters seems to have acknowledged that article I, section 10, does not guarantee a right to recover unlimited damages, but she expressed doubt that any cap on all damages, such as the tort claims cap in *Clarke*, can ever be constitutional. She commented:

> [T]he majority's *post hoc* weighing is not the only way to give effect to the proposition that Article I, section 10, does not guarantee a perfect remedy. In *Clarke*, the court recognized that, although Article I, section 10, places limits on legislative authority, it also permits the exercise of that authority within constitutional bounds. If the legislature were to provide for a restorative, although imperfect, remedy in a way that would be equally restorative to all injured persons, it is possible that its exercise of authority would be upheld. But a monetary cap on damages does not have the same restorative effect for all persons regardless of the degree of injury, and it therefore does not meet the dictates of Article I, section 10, in instances in which it permits some a perfect remedy and others a pittance.[103]

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99 *Clarke*, at 615, 175 P.3d at 437 (citations omitted) (Balmer, C.J., concurring).

100 *Horton*, 359 Or. at 291, 376 P.3d at 1066 (Walters, J., dissenting).

101 *Id.*

102 *Id.* at 293, 376 P.3d at 1067 (Walters, J., dissenting).

103 *Id*. at 295–96, 376 P.3d at 1069 (Walters, J., dissenting).

To the extent that Justice Walters believes that article I, section 10, does not guarantee "a perfect remedy," one can infer that she continues to subscribe to the principle expressed in *Clarke* that "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."[104] But how much and in what ways the legislature may do so remains to be clarified.

V
THE JURY TRIAL PROVISIONS ACCORDING TO THE *HORTON* MAJORITY

Like the task of interpreting the remedy clause, the job of interpreting the Oregon Constitution's provisions on the right to jury trial raises big questions, including these: Do the jury trial provisions guarantee the right to have certain types of cases tried to a jury in accordance with the laws, including damages caps, then in effect, or do they ensure a right to a judgment for the full amount of such damages as the jury may award? Does it matter whether a court that reduces a jury verdict does so through the exercise of its own judgment that the award is excessive, or instead simply enforces a statutory limit on damages?

In grappling with the right to jury trial provisions, the *Horton* majority first analyzed the text of article I, section 17, which provides: "In all civil cases the right of Trial by Jury shall remain inviolate."[105] The court concluded that the words "remain inviolate" suggest that the framers intended to preserve the "right of Trial by Jury" as it existed in 1857.[106] The court also stated that the use of the phrase "by Jury" "suggests that the right that Article I, section 17, preserves is a right to a procedure (a trial by a jury as opposed to a trial by a judge) rather than a substantive result."[107] However, the court concluded that the text, standing alone, does not definitively answer the question of what that right encompasses.[108]

The court then analyzed the history surrounding the adoption of article I, section 17, and concluded that the relevant history "comes

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104 *Clarke*, 343 Or. at 609, 175 P.3d at 434.

105 *Horton*, 359 Or. at 226, 376 P.3d at 1031.

106 *Id.* at 234, 376 P.3d at 1036.

107 *Id.* at 235, 376 P.3d at 1036.

108 *Id.*

primarily from the English practice reflected in Blackstone's *Commentaries* and the history leading up to and surrounding the adoption of the Seventh Amendment" of the United States Constitution.[109] The court concluded that article I, section 17, guarantees only a right to a certain procedure, namely, the right to have facts decided by a jury, rather than by a judge.[110] The court stated, "the history does not suggest that Article I, section 17, limits 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."[111]

After wrestling with the doctrine of stare decisis (an aspect of *Horton* deserving of its own discussion),[112] the majority overruled *Lakin v. Senco Products, Inc.*,[113] which held that application of the OTCA's cap on damages to the jury's award violated article I, section 17.[114]

The court then considered article VII (amended), section 3, an initiated amendment that provides, in part:

> In actions at law, where the value in controversy shall exceed $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.[115]

The plaintiff in *Horton* did not argue that "the right of trial by jury shall be preserved" adds anything to article I, section 17.[116] Thus, the court focused on the provision that "no fact shall be otherwise re-examined in any court of this state, unless the court can affirmatively say that there is no evidence to support the verdict."[117] The majority concluded that the provision is directed to the courts, and not to the legislature. The court concluded that:

> [textually, article VII (amended), section 3,] places no restriction on the legislature's ability to limit, as a matter of law, the issues before the jury or the extent of the damages available for a cause of action.

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109 *Id.* at 243, 376 P.3d at 1040.

110 *Id.*

111 *Id.*

112 *Id.* at 225–34, 359 P.3d at 1031–35.

113 *Lakin v. Senco Prods., Inc*., 329 Or. 62, 987 P.2d 463 *modified*, 329 Or. 369, 987 P.2d 476 (1999), *overruled by Horton*, 359 Or. at 250, 376 P.3d at 1044 (2016).

114 *Horton*, 359 Or. at 249–50, 376 P.3d at 1044.

115 *Id.*

116 *Id.* at 251, 376 P.3d at 1045.

117 *Id.*

> Similarly, it does not limit a court's ability to set aside a jury's verdict that is inconsistent with the substantive law.[118]

The majority concluded that the history of the provision is consistent with the interpretation that the provision limits only the trial court's authority to second-guess a jury's fact findings, and does not limit the legislature's authority to establish the substantive law, including defining the elements of a cause of action or the type and extent of available damages.[119] The court concluded that to reduce the jury's verdict of economic damages of $6,072,190.38 and noneconomic damages of $6,000,000 to a total of $3,000,000 in accordance with the OTCA does not violate either article I, section 17, or article VII (amended), section 3, of the Oregon Constitution.[120]

VI
THE JURY TRIAL PROVISIONS ACCORDING TO THE *HORTON* DISSENT

The dissent agreed that article I, section 17, does not prohibit the legislature from limiting the types of recoverable damages. "Subject to constitutional limits other than Article I, section 17, both the court and the legislature have authority to define the elements of a tort claim and to determine the types of damages that are recoverable."[121] The dissent acknowledged that "the right that Article I, section 17, grants is . . . not a right to a particular common-law claim or to unlimited damages."[122]

The dissent also agreed that the purpose of article VII (amended), section 3, is "to eliminate, as an incident of a jury trial in this state, the common-law power of a trial court to re-examine the evidence and set aside a verdict *because it was excessive* or in any other respect opposed to the weight of the evidence."[123]

But the dissent and the majority did not agree on what that means. Under the *Horton* majority's view, the constitutional infirmity lies not in the act of reducing or setting aside a verdict, but in the court's exercise of its subjective judgment in doing so.[124] As the majority observed, the constitutional guarantees of the right to jury trial have

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118 *Id.* at 252, 376 P.3d at 1045.

119 *Id.* at 253–54, 376 P.3d at 1045–46.

120 *See id.*, 376 P.3d at 1046.

121 *Id.* at 297, 376 P.3d at 1070 (Walters, J., dissenting).

122 *Id.* at 306, 376 P.3d at 1074 (Walters, J., dissenting).

123 *Id.* at 298, 376 P.3d at 1070 (Walters, J., dissenting).

124 *See id.* at 251–53, 376 P.3d at 1045–46.

their origins, at least in part, in the concerns regarding class bias.[125] The majority quoted Blackstone, who wrote, if factual determinations were entrusted to judges, "a select body of men [chosen by the prince] . . . will have frequently an involuntary biass [sic] towards those of their own rank and dignity."[126] The risk of class bias by the judiciary is not in play when judges simply enforce a statutory damages cap established by the legislature, any more than when judges treat the amount of the prayer as a cap on damages and reduce any verdict that exceeds that sum, or when judges reduce the verdict to eliminate a category of damages that is unsupported by any evidence.

The dissent, in contrast, views judicial enforcement of a statutory cap on damages as "nothing more than an arbitrary decision that, although a plaintiff has sustained damages measured according to existing legal principles in an amount assessed by the jury, those damages are excessive and must be reduced."[127] Like the majority, the dissent alluded to the role of the jury as a safeguard against class bias, stating "[t]he procedural right to jury trial guarantees that plain people will decide the facts of a case."[128] But, rather than viewing civil jury trials as a check on class bias by constraining the authority of the judiciary, as the majority suggested, the dissent seemed to view civil jury trials as a check on the authority of the legislature, intended to "preclude[] the legislature from interfering with [a] verdict [that] was entered in accordance with existing common law."[129] In support of its position, the dissent referenced decisions in other jurisdictions with approval, stating,

> Courts in other jurisdictions . . . have held that, although a state legislature has authority to make or amend the common law, the constitutional right to jury trial precludes the legislature from interfering with a jury's fact-finding role by reducing a jury's factual determination of damages to a predetermined amount.[130]

In the dissent's view, article III (amended), section 7, precludes a court from reducing a verdict by enforcing the legislature's decision as the amount and type of damages recoverable for certain claims,

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125 *See id.* at 238–39, 376 P.3d at 1038.

126 *Id.* at 237, 376 P.3d at 1037 (alteration in original) (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 379 (Oxford 1768)).

127 *Id.* at 299, 376 P.3d at 1070 (Walters, J., dissenting).

128 *See id.* at 306, 376 P.3d at 1074 (Walters, J., dissenting).

129 *See id.* at 298, 376 P.3d at 1070 (Walters, J., dissenting).

130 *Id.* at 299, 376 P.3d at 1070–71 (Walters, J., dissenting).

even though that action requires no subjective assessment by the court of the appropriateness of the verdict.

CONCLUSION

The *Horton* opinion is rich with history and thoughtful analysis. It is a thorough and scholarly effort to synthesize what is ultimately an irreconcilable line of remedy clause cases. The court laid the groundwork for the next step, which this writer hopes will lead to an approach to the remedy clause that gives greater deference to the policy making role of the legislature. As long as the court continues to adopt a decision-making model that empowers each judge to decide such amorphous and subjective questions as whether a challenged statute effectuates a sufficiently important trade-off, whether the interests protected by common law causes of action are truly "core" interests anymore, and whether the damages allowed by the challenged statute are sufficiently "substantial," the scope and effect of Oregon's remedy clause will remain unpredictable by litigants and by the lower courts.

Justice Walters commented in her discussion of the right to jury trial provisions, "The rule of stare decisis is essential to the public's confidence that the law is more than a reflection of personal preference, and the public's confidence in the law is the fragile foundation on which our system of justice rests."[131] But stare decisis does not fulfill that goal when the precedents lack standards capable of yielding predictable results, independent of judges' personal preferences. Justice Landau's interpretation of the remedy clause as protecting against interference with judicial independence and access to the courts, but not limiting the legislature's authority to determine substantive rights,[132] would solve that problem. A return to that approach, as in *Perozzi* (holding that article I, section 10, does not deny the legislature authority to adjust the duties that one person owes another) and *Sealey* (recognizing the legislature's authority to determine what constitutes a legally cognizable injury), would restore the legislative and judicial branches to their proper roles.

As for article I, section 17, and article VII (amended), section 3, the *Horton* court has opened a new, but almost certainly not the last, chapter in our understanding of the Oregon Constitution's protections

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[131] *Id.* at 303, 376 P.3d at 1073 (Walters, J., dissenting).

[132] *Id.* at 286, 376 P.3d at 1064 (Landau, J., concurring).

of the right to jury trial. It is now well established that the jury trial provisions prohibit judges from "putting a judicial thumb on the scales of justice" by reducing a jury's award of economic and noneconomic damages simply because the judge views the award, according to the judge's subjective evaluation, as excessive. One of the primary functions of judges is to apply the laws that the legislature has enacted. But the dissent seems to view the jury trial provisions as prohibiting judges from performing that function when the law in question limits recoverable damages. Whether Justice Walters will be able to persuade a majority of that view remains to be seen. The meaning and effect of the jury trial provisions will undoubtedly be a subject of future opinions.