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Applying Oregon's Abuse of a Vulnerable Person Statute to Date Rape Cases: Defendants Are in Treble

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* J.D. Candidate 2020, University of Oregon School of Law; B.A., University of Oregon. This Comment is dedicated to the memory of the Honorable David Schuman whose jurisprudence on incapacity and treble damages inspired my analysis. I would like to thank Professor Merle Weiner for bringing out my best work with her wisdom and guidance. Tim Williams also deserves my thanks for his mentorship and for employing me as a law clerk during both of my law school summers, thereby exposing me to this area of the law. And, of course, my thanks go out to the *Oregon Law Review* staff and all others who gave me thoughtful feedback along the way.

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INTRODUCTION

The common-law "apparent consent" standard has been criticized for allowing offenders to escape liability for sexual assault when the victim was too intoxicated or scared to say "no."[1] This Comment analyzes how Oregon's "abuse of a vulnerable person" statute could apply to such cases[2]—namely, civil cases in which the plaintiff was sexually assaulted by an acquaintance, and she was unable to express her nonconsent or consciously perceive the assault, due to intoxication or underlying trauma (i.e., "date rape" cases).[3] Herein I argue the

1 *See, e.g.*, *Our Demands*, OUR HARVARD CAN DO BETTER, https://ourharvardcandobetter.wordpress.com/our-demands/ [https://perma.cc/4JQR-KSZV] (last visited Dec. 27, 2018) (listing the first two of six demands in the organization's effort to dismantle "rape culture at Harvard" as (1) Harvard must adopt an "affirmative consent" policy, and (2) "mental incapacitation" as used in Harvard's current policy must be clarified); Noah J. Delwiche & Andrew M. Duehren, *Caught Between Criticisms*, CRIMSON (May 28, 2015), https://www.thecrimson.com/article/2015/5/28/caught-between-criticisms-title-ix/ [https://perma.cc/63M3-KPP5] (calling for affirmative consent policy to replace existing implied consent policy); Sexual Harassment & Rape Prevention Program, *Wildcats Get Consent*, UNIV. OF N.H., https://www.unh.edu/sharpp/wildcats-get-consent [https://perma.cc/2RLK-ZZCX] (last visited Dec. 28, 2018) (implementing expressed consent policy) [hereinafter UNIV. OF N.H.]. *See generally* Charlene Y. Senn et al., *Efficacy of a Sexual Assault Resistance Program for University Women*, 372 NEW ENG. J. MED. 2326, 2326–27 (2015) (developing an acquaintance-rape reduction program that partly focuses on teaching women to express nonconsent); Emily Bazelon, *The Return of the Sex Wars*, N.Y. TIMES (Sept. 10, 2015), https://www.nytimes.com/2015/09/13/magazine/the-return-of-the-sex-wars.html [https://perma.cc/6PTG-Y23Q] (quoting Jessica Fournier of the survivor group Our Harvard Can Do Better) (decrying such programs' focus on women's behavior as failing to address men's behavior: namely, having sex with women "so incapacitated they can't stand up or use their words"). *But see* RESTATEMENT (THIRD) OF TORTS § 16 cmt. g (AM. LAW. INST., Preliminary Draft No. 5, 2018) ("No cases have been found that consider whether the affirmative-consent standard that some jurisdictions apply in criminal law and student-disciplinary cases applies in tort law. Moreover, there are plausible arguments on both sides of this debate. Accordingly, this restatement takes no official position on whether affirmative consent should be the standard for consent to sexual intercourse or penetration.").

2 *See generally* OR. REV. STAT. §§ 124.100–40 (2018) (Oregon's "abuse of a vulnerable person" statute).

3 This Comment focuses on date rape because of the legal issues survivors face and argues that Oregon statutory law can be used to avoid some of these legal issues and find a

statute is useful for these plaintiffs who face obstacles to recovery under the common-law rules. The statute offers several advantages over the common law:

- a potentially easier path when the perpetrator claims he did not realize the plaintiff's lack of consent;
- a more generous damages award with mandatory treble damages;
- a potentially more expansive theory for holding third parties liable; and
- a longer statute of limitations (seven years instead of two years).

The differences between the common law and the statutory cause of action are explored in Part I, which compares the statute's rules to the rules for common-law battery in the date rape context. Part II argues that the statute should be interpreted to apply to date rape claims. Finally, Part III considers some of the statute's potential limitations in the context of governmental liability.

I
LIVING IN A DUAL INTENT STATE

A. Why Battery Fails Survivors: Dual Intent

Plaintiffs pursuing date rape claims in Oregon may be unable to recover in tort law for battery. In Oregon, a defendant commits battery when he (1) intentionally (2) causes (3) an unconsented (4) sexual

civil remedy. Although this Comment does focus on legal remedies, the author recognizes that legal remedies alone, whether civil or criminal, are an insufficient response to the current issues surrounding sexual assault.

Furthermore, the hypothetical illustrations employed in this Comment place the actors in a variety of gender roles. Likewise, the rule statements in this Comment will employ a variety of gender pronouns to bring attention to the fact that neither victims nor offenders are limited to one gender. At the same time, the evenly balanced gender roles reflected in the hypotheticals and rule statements do not reflect the statistical reality that 90% of victims are women. *See* OR. ATT'Y GEN.'S SEXUAL ASSAULT TASK FORCE, SEXUAL ASSAULT RESPONSE TEAM (SART) HANDBOOK 1 (3d version 2009) [hereinafter SART HANDBOOK]. The literary device is merely a function of the author's attempt to be inclusive. Relatedly, note that the hypothetical actors are not necessarily cisgender or transgender.

Finally, the discussion below, with its illustrations of sexual assault, may trigger some readers. If such a discussion might trigger you, please consider discussing your plans to read this Comment with a therapist or trusted friend before you read it. With that being said, the hypotheticals below somewhat euphemistically employ "fervent kissing" in place of more graphic sexual assaults to minimize triggering readers. This literary device, therefore, is not employed to make light of sexual assaults.

contact with the plaintiff.[4] Oregon is a dual intent state.[5] Therefore, the defendant must desire harm or offense or know that the contact will occur and is substantially certain to be harmful or offensive.[6]

The dual intent rule can make a battery action difficult for some plaintiffs who are injured by date rape.[7] Indeed, courts and scholars have widely criticized the dual intent rule for this very reason. Prosser, in his famous "kissing man" illustration,[8] spelled out how the dual intent rule protects the defendant who is oblivious or delusional about the victim's lack of consent. The Restatement (Third) of Torts offers the following illustration in support of the critique: "Sexual boor Boris, on his first date with Pauline, suddenly kisses her fervently, and continues to do so despite her verbal protests. Boris hears her protests but ignores them because he subjectively believes that her protests are insincere and that she actually consents."[9] Here, Boris honestly (though very unreasonably) did not realize the offensive nature of his actions.[10]

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4 *See* OR. UNIF. CIVIL JURY INSTRUCTIONS § 40.02 (2017).

5 *See* McGanty v. Staudenraus, 321 Or. 532, 550–51, 901 P.2d 841, 852–53 (1995) (analyzing intentional infliction of emotional distress and adopting Restatement (Second) of Torts § 8A's definition of intent); *see also* Cook v. Kinzua Pine Mills Co., 207 Or. 34, 48–49, 293 P.2d 717, 723–24 (1956); Johnson v. Jones, 269 Or. App. 12, 17, 344 P.3d 89, 92 (2015). As to the defendant's intent, some states have a "single intent rule"; other states have a "dual intent rule." DAN B. DOBBS ET AL., THE LAW OF TORTS § 35 (2d ed. 2015), Westlaw (database updated June 2019) [hereinafter DOBBS].

6 *See Staudenraus*, 321 Or. at 550–51, 901 P.2d at 852–53 ("The word 'intent' is used throughout the Restatement of this Subject to denote that the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it.") (quoting RESTATEMENT (SECOND) OF TORTS § 8A (AM. LAW. INST. 1965)); OR. UNIF. CIVIL JURY INSTRUCTIONS § 40.06.

7 *See* OR. UNIF. CIVIL JURY INSTRUCTIONS § 40.06; DOBBS, *supra* note 5, § 35.

8 PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 9, 41–42 (5th ed. 1984). "[A] man who decides to flatter a woman he spots in a crowd with an unpetitioned-for kiss, one of the examples of battery Prosser provides, would find no objection under the Wagners' proposed [dual intent] rule so long as his intentional contact was initiated with no intent to injure or offend. He would be held civilly liable for his conduct only if he intended to harm or offend her through his kiss. A woman in such circumstances would not enjoy the presumption of the law in favor of preserving her bodily integrity; instead, her right to be free from physical contact with strangers would depend upon whether she could prove that the stranger hoped to harm or offend her through his contact. So long as he could show that he meant only flattery and the communication of positive feelings toward her in stroking her, kissing her, or hugging her, she must be subjected to it and will find no protection for her bodily integrity in our civil law." Wagner v. State, 122 P.3d 599, 608 (Utah 2005) (citation omitted).

9 RESTATEMENT (THIRD) OF TORTS § 16 cmt. b, illus. 3 (AM. LAW. INST., Preliminary Draft No. 5, 2018).

10 *Id.*

The dual intent rule would shield Boris from liability because he intended the contact but not the offense.[11]

Boris's boorish behavior is potentially insulated under Oregon law's apparent consent standard. The apparent consent standard says that a defendant is protected if a reasonable person would have thought the plaintiff was consenting unless the defendant's purpose was to harm or offend. Although plaintiffs like Pauline (who expressed their nonconsent) can argue that their lack of consent was obvious, if the social cues are ambiguous in the culture, then defendants like Boris can argue they honestly thought *no* meant *yes*. However, Boris will have a tough time arguing apparent consent because, under *any* U.S. community's standards, Boris's belief was unreasonable.[12] And it is likely a jury would infer Boris had knowledge of Pauline's nonconsent. Even under the dual intent rule, Boris is likely liable for his actions.

In contrast, this protection for the defendant becomes meaningful when the victim doesn't say no but acquiesces. Consider the following illustration:

> Six months after her traumatic encounter with Boris, Pauline decides to reenter the dating scene. Pauline's first date, Oblivious Octavia, suddenly kisses Pauline fervently. Pauline, who does not consent, is frozen in shock to find herself in this situation again. Because of her shock and trauma, Pauline is unable to physically stop Octavia or tell her to stop. Octavia, focused on her own pleasure, continues kissing Pauline despite Pauline's complete lack of enthusiasm or expression. Octavia believes Pauline consents.

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[11] *Id.* These critiques have been ably rebutted by Dobbs, who argues that (1) the dual intent rule is preferable because without the intent to harm or offend the defendant has no tortious intention, and (2) the oblivious or delusional defendant issue can be corrected with an objective intent standard. DOBBS, *supra* note 5, § 35. Under an objective intent standard, Dobbs argues, an oblivious or delusional defendant is unlikely to convince a fact finder that his unconsented touchings were consensual, whatever he subjectively believed. *Id.* The Restatement (Third) of Torts calls this approach the "apparent consent" standard. RESTATEMENT (THIRD) OF TORTS § 16 cmt. b (AM. LAW. INST., Preliminary Draft No. 5, 2018). Here, Boris is liable if his belief—that Pauline's lack of consent wasn't substantially certain—was unreasonable based upon the facts he knew. *See id.* Based upon Pauline's verbal protests, which Boris heard and ignored, a reasonable person would have been substantially certain that Pauline did not consent. Accordingly, the apparent consent standard holds defendants like Boris liable.

[12] *See* RESTATEMENT (THIRD) OF TORTS § 16 cmt. g (AM. LAW. INST., Preliminary Draft No. 5, 2018) ("No means no" standard, that a clear refusal to consent negates any apparent consent, and an actor who nevertheless proceeds is subject to liability, is clearly in line with current social norms.).

Under the common law for battery, Pauline must show that Octavia knew it was substantially certain that Pauline did not consent to her kissing;[13] neither recklessness nor negligence will suffice.[14] The fact finder will infer Octavia's knowledge of whether Pauline consented based on objective facts like Octavia's relationship with Pauline, the nature of the contact, and the standards in the relevant community.[15]

Octavia will be able to argue, perhaps more convincingly than Boris, that the standards of the relevant community suggest Pauline consented. According to the Restatement (Third) of Torts' latest draft rule, very few community standards related to consent are widely recognized.[16] Those propositions that are widely recognized but do not really illuminate the Octavia-Pauline scenario include:

- "a clear refusal to consent negates any apparent consent, and an actor who nevertheless proceeds is subject to liability";
- "[a]ctual consent to a modest degree of sexual intimacy, such as a kiss, does not entail consent to a much greater degree of intimacy, such as sexual intercourse";
- "[n]either verbal nor physical resistance is required to demonstrate the absence of actual or apparent consent";
- "[c]onsent may be revoked at any time before or during the sexual act [but] may be overridden by subsequent consent[,] [and] if [the] plaintiff expresses . . . his or her objection to any sexual act, the actor must not proceed."[17]

Unlike Boris, who proceeded with his kissing in the face of Pauline's clear refusal to consent, Octavia did not violate any of the widely recognized community standards.[18] Accordingly, Octavia is less likely than Boris to be held liable. Pauline truly did not consent, and she was silent because she was unable to verbally express her nonconsent.[19]

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13 *See* OR. UNIF. CIVIL JURY INSTRUCTIONS § 40.06.

14 *See* Denton v. Arnstein, 197 Or. 28, 47–48, 250 P.2d 407, 416 (1952) (holding negligence is an insufficient intent for tortious battery); Hunter v. Farmers Ins. of Or., 135 Or. App. 125, 137–38, 898 P.2d 201, 208 (1995) (holding recklessness is an insufficient intent for tort battery).

15 Johnson v. Jones, 269 Or. App. 12, 18–19, 344 P.3d 89, 93 (2015).

16 *See* RESTATEMENT (THIRD) OF TORTS § 16 cmt. g (AM. LAW. INST., Preliminary Draft No. 5, 2018).

17 *Id.*

18 *See id.* ("Only yes means yes" standard, that affirmative consent—a clear willingness to engage in sexual conduct—is always required, is not clearly the current social norm, and an actor who nevertheless proceeds may or may not be subject to liability.).

19 For empirical support for the concept that Pauline's silence could have resulted from an inability to express her nonconsent rather than a choice not to, see generally Bessel Van

Nonetheless, Octavia thought Pauline consented because Octavia was oblivious. In a case where the victim stays silent, the community standards are particularly relevant to determining consent but may vary within the *same* community.[20] Moreover, body language, such as being frozen, supplies relevant facts too. If a reasonable person in the community would know with substantial certainty that Pauline did not consent based on her body language, a jury can infer that Octavia knew as well.[21] But a jury may or may not make that inference.

Furthermore, Pauline's claim isn't likely any stronger because her silence was the product of prior trauma. Even though the incident with Boris left her paralyzed and unable to ward off Octavia's kissing or to express her nonconsent, Octavia can act on the reasonable appearance of capacity just like she could act on the reasonable appearance of consent.[22] Octavia had no reason to know about Pauline's incapacity. Therefore, she would not have been substantially certain that Pauline was incapable of consenting.[23]

In another date rape fact pattern, the victim's intoxication—rather than the victim's prior trauma—causes incapacity. Although the plaintiff's intoxication is more plausibly apparent to the offender than prior trauma, the defendant may still be protected from liability. Imagine this hypothetical first date between Andy and Delusional Dudley:

> Andy takes the occasion of his first date with Delusional Dudley to become overly intoxicated. It's a free country, and he is of age. Having repeatedly "shotgunned" beers for the first half hour of their date (and for an hour and a half beforehand), Andy finds himself in a drunken stupor. Andy, dehydrated, looks uncomfortable and covers his eyes from the sun. Dudley, wanting to appear empathetic to his date, asks Andy what is bothering him. Andy says, "This sun is killing me," while pointing skyward. Dudley directs Andy to the shade of a nearby tree. Andy puts his arm around Dudley for support, which Dudley interprets as a blossoming romance. When the pair reach the tree, Andy collapses in the shade for a rest. Dudley lays down next to him and proceeds to suddenly and fervently kiss Andy.

Der Kolk, THE BODY KEEPS THE SCORE: BRAIN, MIND, AND BODY IN THE HEALING OF TRAUMA chs. 4–5 (2014).

20 *See* RESTATEMENT (THIRD) OF TORTS § 16 cmt. b (AM. LAW. INST., Preliminary Draft No. 5, 2018). Indeed, even focusing on a community as myopic in scope as "American college campuses" yields ambiguous and contentious results. *See* sources cited *supra* note 1.

21 *See Jones*, 269 Or. App. at 18, 344 P.3d at 93; *see also* DOBBS, *supra* note 5, § 106.

22 *See* DOBBS, *supra* note 5, § 109.

23 *See Jones*, 269 Or. App. at 18, 344 P.3d at 93.

> Andy does not consent, but he is too intoxicated to communicate it. Dudley continues his kissing despite Andy's utter lack of participation, but Dudley believes that Andy consents and has the capacity to consent.

Here, the defendant's knowledge of the plaintiff's incapacity is more plausible than it was with the trauma fact pattern, but that conclusion is not ironclad. Although Dudley was aware that Andy had just spent a half hour "shotgunning" beers, Dudley didn't know about Andy's hour and a half of drinking before he arrived, so he didn't know Andy was *that* intoxicated. A jury could decide that Dudley reasonably assumed that the drinking he saw caused the smell of alcohol and wouldn't be enough to cause incapacity. Furthermore, from Dudley's perspective, helping Andy to the shade was a chivalrous and romantic gesture; Dudley didn't know that Andy was dehydrated or that Andy's arm around Dudley's shoulder meant Andy needed help walking.

The question again becomes whether a reasonable person would know that Andy was incapable of consenting at the time Dudley kissed him. If so, the jury can infer that Dudley knew too. A jury is more likely to find in Andy's favor than in Pauline's on a battery claim because Dudley was aware of some of Andy's drinking, while Octavia wasn't aware of Pauline's prior trauma. Again, however, it may be difficult to convince a jury that Dudley knew with substantial certainty that Andy was incapable of consenting because of a half hour of drinking.

B. Abuse of a Vulnerable Person

In addition to battery, Pauline or Andy can also plead abuse of a vulnerable person, which could be helpful because doing so would avoid some of the doctrinal difficulties already discussed. Abuse of a vulnerable person has two elements:[24] (1) incapacity and (2) abuse.[25]

1. Incapacity

The types of incapacity seen in date rape cases (i.e., voluntary intoxication or prior trauma) likely fall within the statutory definition

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24 *See* OR. REV. STAT. § 124.100 (2018) (creating a civil cause of action for the physical abuse of a vulnerable person).

25 *Id.* A person is vulnerable if she is either elderly, financially incapable, incapacitated, or disabled. *Id.* § 124.100(1)(e). Incapacity is most relevant because "disability" has a durational element that most date rape victims will not meet, *see id.* § 124.100(1)(d)(A) (requiring that the disability "[i]s likely to continue without substantial improvement for no fewer than 12 months or to result in death"), and neither "elderly age" nor "financial incapability" are necessarily relevant in date rape cases.

of incapacity. An incapacitated person presently lacks the ability to protect and maintain his own physical health and safety because of "severely impaired perception or communication skills."[26] Importantly, the person's lack of communication cannot result from his conscious decision not to communicate—it must result from his inability to communicate his nonconsent or to make a conscious decision as to whether he consents.[27] Our date rape survivors, Pauline and Andy, should fall within this definition.

Pauline was unable to communicate her lack of consent to Octavia because her prior trauma left her frozen and unable to communicate at all. Pauline did not decide to remain silent because, for example, she feared how Octavia would react. Instead, she was simply unable to communicate her nonconsent. Because of her inability to communicate, Pauline was unable to protect herself from Octavia's unwanted kissing; she was unable to protect her bodily integrity. In sum, she lacked the ability to protect her own physical health and safety because of severely impaired communication skills—she was incapacitated within the statutory definition.

Andy was so drunk that he was unable to decide whether or not to consent. In other words, his perception was severely impaired. Because he was unable to perceive Dudley's unwanted kisses, Andy was unable to decide whether or not to consent. Accordingly, Andy was unable to protect himself from Dudley's unwanted kisses. Andy lacked the ability to protect and maintain his own physical health and safety because of severely impaired perception skills—he was incapacitated within the statutory definition.

Even "fleeting" incapacity falls within the statutory definition of incapacity, so Pauline and Andy could both fall within the definition

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26 Schaefer v. Schaefer, 183 Or. App. 513, 516–17, 52 P.3d 1125, 1127–28 (2002); *see* Wyers v. Am. Med. Response Nw., Inc., 268 Or. App. 232, 235–36, 342 P.3d 129, 130–31 (2014), *aff'd*, 360 Or. 211, 377 P.3d 570 (2016) (finding evidence was enough to show incapacity when three plaintiffs were "ill or injured, with an impaired ability to evaluate information, communicate decisions, and protect their physical safety" during some or all of the abuse); Herring v. Am. Med. Response Nw., Inc., 255 Or. App. 315, 321, 297 P.3d 9, 13–14 (2013); OR. REV. STAT. § 125.005(5) (2017) (defining incapacity as "a condition in which a person's ability to receive and evaluate information effectively or to communicate decisions is impaired to such an extent that the person presently lacks the capacity to meet the essential requirements for the person's physical health or safety. 'Meeting the essential requirements for physical health and safety' means those actions necessary to provide the health care, food, shelter, clothing, personal hygiene and other care without which serious physical injury or illness is likely to occur").

27 *Schaefer*, 183 Or. App. at 518–19, 52 P.3d at 1128–29.

even though their incapacity was only temporary.[28] For example, the plaintiff in *Herring* "was unable to see, move, or speak" during one of three unconsented-to sexual contacts that occurred over the course of fifteen minutes.[29] In other words, she was incapacitated only for one-third of the abuse. On appeal, the defendant argued that such fleeting incapacity was insufficient to meet the statutory definition because (1) the statute requires severity, (2) the statute uses the definition applicable in protective proceedings, and (3) the legislature had not intended the statute to apply to fleeting incapacity.[30] The court held that the plaintiff was incapacitated even though her perception and communications skills were only temporarily and fleetingly impaired.[31]

The defendant's first argument failed.[32] The court found that "severe" impairment doesn't necessarily mean the impairment must endure after, or precede, the abuse.[33] The court noted, "People completely but briefly lose consciousness in any number of situations."[34] According to *Herring*, duration is not a necessary component of severity.[35]

The *Herring* defendant's second argument also failed.[36] Even though the vulnerable person statute borrows the definition of incapacity from the protective proceedings statute, the definition's location within the protective proceedings statute did not create a durational requirement.[37] The court found "that the provisions in the protective proceedings statute are relevant—if remote—context."[38] But, the court continued, requiring that incapacity not be "so temporary that it could not endure for the time necessary to establish a protective order" would "be unworkable, far-fetched, and unsupported by anything in the statutory text."[39] Indeed, the legislature recognized that a protective order would be appropriate for even temporary incapacity

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28 *Herring*, 255 Or. App. at 319–20, 297 P.3d at 13.

29 *Id.* at 318, 297 P.3d at 12.

30 *Id.* at 319–21, 297 P.3d at 13.

31 *Id.* at 319–20, 297 P.3d at 13.

32 *Id.* at 319–21, 297 P.3d at 13 ("*severely* impaired perception or communication skills") (emphasis added) (quoting *Schaefer*, 183 Or. App. at 516–17, 52 P.3d at 1125).

33 *Id.*

34 *Id.* at 319–20, 297 P.3d at 13.

35 *Id.*

36 *Id.* at 320, 297 P.3d at 13.

37 *Id.*

38 *Id.*

39 *Id.*

by enacting a provision for revoking a protective order once the incapacitation ends.[40] Therefore, the statutory text expressly rejected a durational requirement.[41]

Moreover, the court reflected that the protective order context was weak evidence of the legislature's intent for the vulnerable person statute.[42] Instead, the court looked to the vulnerable person statute itself for context and found contextual evidence that even fleeting incapacity will suffice.[43] For one thing, the actionable conduct, defined by the vulnerable person statute's abuse element, can almost invariably take place "during a 'fleeting' period of" incapacity.[44] In this context, the inference that the legislature intended to require a greater duration for incapacity didn't make sense to the court.[45] Furthermore, the statutory definition of incapacity says a person who "*presently* lacks the capacity to meet the essential requirements for the person's physical health or safety" is incapacitated.[46] In the protective order context, presently could (theoretically) mean "when the proceeding is before the court."[47] In the abuse of a vulnerable person context, however, the court found that "presently" must mean "while being abused" because the statute "focuses on an incident of abuse, not a judicial proceeding."[48] Accordingly, no durational requirement could be found in the vulnerable person statute's context.

Finally, the defendant's third argument—that the legislative history excluded temporary incapacity from the statutory definition—was unsupported and accordingly rejected.[49] The defendant argued that testimony before the legislative committee discussing elder abuse and not incapacitated person abuse was evidence that the legislature did not intend for the statute to apply to temporary incapacity.[50] However, both the legislative testimony and the statutory text mentioned vulnerability from old age and incapacity.[51] Accordingly, the court concluded,

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40 *Id.*
41 *Id.*
42 *Id.*
43 *Id.*
44 *Id.*
45 *Id.*
46 *Id.* at 321–22, 297 P.3d at 14 (emphasis added) (quoting ORS 125.005(5) (2017)).
47 *Id.*
48 *Id.*
49 *Id.* at 320–21, 297 P.3d at 13–14.
50 *Id.*
51 *Id.*

neither source indicates that the statute protects only elderly persons.[52] Indeed, both elderly persons and incapacitated persons are explicitly protected by the statute.[53]

Ultimately, the *Herring* court held that plaintiffs "who are only temporarily and fleetingly unable to protect" themselves from abuse, even for only part of the abuse, are still incapacitated.[54] Accordingly, the court upheld the jury award for the plaintiff even though she was incapacitated during only part of the abuse.[55] Accordingly, Octavia and Dudley will not be able to escape liability by arguing that Pauline and Andy were not incapacitated within the meaning of the statute because their incapacity was only temporary.

Perhaps more importantly, Octavia and Dudley probably couldn't escape liability by arguing that they relied on the appearance of capacity like they could under the common law. Unlike with the common law, a defendant's awareness of a plaintiff's incapacity may be irrelevant under the vulnerable person statute. This question is still open, but a court should find that there is no mental state requirement for incapacity. The vulnerable person statute's definition of incapacity does not express a mental state requirement in its text.[56] The statutory context also implies that the legislature did not intend a mental state requirement for incapacity. Incapacity is defined by reference to protective order provisions.[57] Because protective orders are granted based upon the applicant's condition, incapacity is defined by the condition of incapacity itself and not by a defendant's mental state.[58]

Even though the *Herring* court was not persuaded by the defendant's arguments for a durational requirement based upon the definition's protective order context, the court did concede that this context was

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52 *Id.*

53 *Id.*; OR. REV. STAT. § 124.100(1)(e) (2018) ("'Vulnerable person' means: (A) An elderly person; . . . (C) An incapacitated person.").

54 *Herring*, 255 Or. App. at 321–22, 297 P.3d at 14.

55 *Id.*

56 OR. REV. STAT. § 125.005(5) (defining incapacity).

57 *Id.* § 124.100.

58 'Incapacitated' means a condition in which a person's ability to receive and evaluate information effectively or to communicate decisions is impaired to such an extent that the person presently lacks the capacity to meet the essential requirements for the person's physical health or safety. 'Meeting the essential requirements for physical health and safety' means those actions necessary to provide the health care, food, shelter, clothing, personal hygiene and other care without which serious physical injury or illness is likely to occur.

Id. § 125.005(5).

"relevant—if remote."[59] Accordingly, the court found it necessary to make its own textual argument to further support its rejection of the defendant's contextual argument.[60] Unlike the durational requirement in *Herring*, a mental state requirement lacks support in either the text or context of the statute. Unlike the court in *Herring*, a court should find the protective order context more relevant than remote in this instance. Indeed, even if a court were motivated to find a mental state requirement for incapacity, it is unclear where the court would find it or what it would be. Therefore, a court shouldn't, and probably wouldn't, find a mental state requirement for incapacity.

2. Abuse

The vulnerable person statute's abuse element raises two immediate questions: (1) what standard applies, and (2) how does that standard compare to the standard for common-law battery? Both questions are deceptively difficult to answer because the legislature chose to define abuse by reference to criminal offenses, and a court confronted with these questions may reach a range of conclusions. The first question is difficult because the legislature did not specify whether it intended ancillary criminal statutes and criminal case law to color the definitions of abuse. The second question is difficult because of the inherent difficulty of comparing common-law tort standards to statutory criminal law standards, as the Oregon Supreme Court recently noted in *State v. Gutierrez-Medina*.[61]

Turning first to the question of which standard applies, the vulnerable person statute defines abuse as "conduct . . . that would constitute any of the" various listed criminal offenses,[62] including

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59 *Herring*, 255 Or. App. at 320, 297 P.3d at 13.

60 *Id.*

61 State v. Gutierrez-Medina, 365 Or. 79, 92–93, 442 P.3d 183, 190 (2019) ("The alignment between the criminal culpability and the classifications of civil fault is not seamless, in part because the former consists of specific elements while the latter involves a range of culpability.").

62 The complete list of criminal statutes referenced for defining actionable abuse follows:

(a) Assault, under the provisions of ORS 163.160, 163.165, 163.175, and 163.185.

(b) Menacing, under the provisions of ORS 163.190.

(c) Recklessly endangering another person, under the provisions of ORS 163.195.

(d) Criminal mistreatment, under the provisions of ORS 163.200 and 163.205.

(e) Rape, under the provisions of ORS 163.355, 163.365, and 163.375.

(f) Sodomy, under the provisions of ORS 163.385, 163.395, and 163.405.

sexual abuse in the third degree (hereafter, "sexual abuse").[63] The legislature did not explicitly indicate whether it intended to incorporate the applicable ancillary criminal provisions and criminal case law with these definitions. Accordingly, it is unclear what legal standards could apply to the different definitions of abuse. Looking at the definition for sexual abuse, the definition requires unconsented-to sexual contact just like common-law battery requires.[64] The sexual abuse statute's text doesn't express a mental state requirement.[65] However, an ancillary provision in the Oregon Criminal Code provides that "a person is not guilty of an offense unless the person acts with a culpable mental state with respect to each material element of the offense that necessarily requires a culpable mental state."[66] Oregon criminal case law interpreting the sexual abuse statute has clarified that the victim's lack of consent is a material element of sexual abuse that necessarily requires a culpable mental state.[67] Oregon has four culpable mental states: intentionally, knowingly, recklessly, and with criminal negligence.[68] A criminal defendant would be found criminally negligent if he

> fails to be aware of a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that the failure to be aware of it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.[69]

(g) Unlawful sexual penetration, under the provisions of ORS 163.408 and 163.411.

(h) Sexual abuse, under the provisions of ORS 163.415, 163.425, and 163.427.

(i) Strangulation, under ORS 163.187.

OR. REV. STAT. § 124.105(1).

63 *Id.* § 124.105(1)(h). "(1) A person commits the crime of sexual abuse in the third degree if: (a) The person subjects another person to sexual contact and: (A) The victim does not consent to the sexual contact." *Id.* § 163.415 (defining sexual abuse in the third degree). Sexual abuse is the most applicable prong with Pauline and Andy's cases, so the subsequent discussion will illustrate the statute's application using sexual abuse. However, attorneys should reference the other actionable provisions to determine which prong works best with the unique facts of a case.

64 *Id.* § 163.415 (defining sexual abuse in the third degree).

65 *See id.*

66 *Id.* § 161.095(2).

67 State v. Wier, 260 Or. App. 341, 354, 317 P.3d 330, 337 (2013) (finding that sexual abuse "requires the state to prove that a defendant acted knowingly, recklessly, or with criminal negligence with respect to a victim's lack of consent").

68 OR. REV. STAT. § 161.085(6).

69 *Id*. § 161.085(10).

At the very least, then, a prosecutor must show that a criminal defendant failed to perceive a substantial and unjustifiable risk that the victim did not consent to convict the defendant of sexual abuse. The vulnerable person statute doesn't say whether a civil plaintiff's attorney would need to make the same showing to get a verdict for abuse of a vulnerable person.

A court could very well infer that the legislature intended the same culpable mental state requirement to apply in cases of abuse of a vulnerable person as in sexual abuse prosecutions. Oregon courts consider essentially anything the legislature could have been aware of at the time of enactment as relevant context in interpreting a statute.[70] The ancillary criminal statute requiring proof of a culpable mental state for all criminal offenses was enacted before abuse of a vulnerable person,[71] so the legislature could have been aware of it when enacting the vulnerable person statute. A court could infer from the legislature's use of criminal offenses to define abuse that the legislature intended that the ancillary criminal statute would apply and require proof of a culpable mental state in cases of abuse of a vulnerable person.

Furthermore, the vulnerable person statute defines abuse as "*conduct . . . that would constitute* any of the" listed criminal offenses.[72] Another ancillary criminal statute defines "conduct" as "an act or omission and its accompanying mental state."[73] Again, this provision was enacted before the vulnerable person statute,[74] so the legislature could have been aware of it when it enacted the vulnerable person statute. The vulnerable person statute's use of the word "conduct," then, could imply that the legislature intended to require proof of both the act or omission and its accompanying mental state for the abuse.

However, there is yet another ancillary criminal statute worth considering: ORS 163.315, which was enacted before the vulnerable

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70 Holcomb v. Sunderland, 321 Or. 99, 105, 894 P.2d 457, 460 (1995); *see also* State v. Gaines, 346 Or. 160, 177 n.16, 206 P.3d 1042, 1054 n.16 (2009); *and* Stull v. Hoke, 326 Or. 72, 79–80, 326 P.2d 722, 725–26 (1997).

71 *Compare* Act of Feb. 13, 1971, ch. 743, § 7, 1971 Or. Laws 32 (codified at ORS 161.085(10)), *with* Act of May 30, 1995, ch. 671, § 2, 1995 Or. Laws 2–3 (codified as amended at ORS 124.105).

72 *Id.* § 124.105(1) (emphasis added).

73 *Id.* § 161.085(4).

74 *Compare* Act of Feb. 13, 1971, ch. 743, § 7, 1971 Or. Laws 32 (codified at ORS 161.085(4)), *with* Act of May 30, 1995, ch. 671, § 2, 1995 Or. Laws 2–3 (codified as amended at ORS 124.105).

person statute,[75] states that "[a] person is considered incapable of consenting to a sexual act if the person is . . . [among other conditions,] [p]hysically helpless."[76] According to the Oregon Criminal Code, a physically helpless "person is unconscious or for any other reason is physically unable to communicate unwillingness to an act."[77] That definition should sound vaguely familiar because a person is incapacitated within the meaning of the vulnerable person statute if the "person's ability to receive and evaluate information effectively or to communicate decisions is impaired."[78] The similarities between the two definitions could mean that a person who is incapacitated is often also physically helpless because both conditions stem from an impaired perception or communicative ability. The definition for incapacity does, however, go on to introduce a severity requirement,[79] so a court would probably find a per se application of ORS 163.315 to date rape cases inappropriate. But, as long as a court is applying the ancillary criminal statutes to the definition of abuse in a vulnerable person claim and requiring the plaintiff to meet the mental state requirements, the court should also apply ORS 163.315 and allow the plaintiff to defeat the mental state requirement by using the same facts to show her physical helplessness as she used to show her incapacity.[80] Accordingly, in many date rape cases, the plaintiff shouldn't have to prove the defendant's mental state.[81]

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75 *Compare* Act of Feb. 13, 1971, ch. 743, § 105, 1971 Or. Laws 32 (codified at ORS 163.315(1)), *with* Act of May 30, 1995, ch. 671, § 2, 1995 Or. Laws 2–3 (codified as amended at ORS 124.105).

76 OR. REV. STAT. § 163.315(1) (2017).

77 *Id.* § 163.305(5).

78 *Id.* § 125.005(5).

79 *Id.* (requiring impairment "to such an extent that the person presently lacks the capacity to meet the essential requirements for the person's physical health or safety").

80 *Cf.* State v. Gutierrez-Medina, 365 Or. 79, 84, 442 P.3d 183, 185 (2019) ("Thus, even if we assume that the legislature intended to incorporate the civil law defense of comparative fault into the calculation of criminal restitution under ORS 137.106, the defense would be unavailable to a defendant who commits third-degree assault in the manner that defendant did.").

81 There are also good arguments that a court should decide to interpret the requirements of the abuse definitions de novo rather than relying on the ancillary criminal statutes and criminal case law. The court in *Herring* concluded that the prior restraint protective orders were "relevant—if remote—context" for the vulnerable person statute. Herring v. Am. Med. Response Nw., Inc., 255 Or. App. 315, 320, 297 P.3d 9, 13 (2013). More relevant, the court said, was the vulnerable person statute itself. *Id.* A court could reach a similar conclusion with the abuse definitions. In such a case, the sexual abuse provision's lack of a textual mental state requirement could lead the court to conclude that the plaintiff does not need to prove the defendant's mental state at all. The American Law Institute (ALI) contends that "if criminal law does classify a species of conduct as nonconsensual, it is very likely that

In any case, even if the court does require proof of the defendant's mental state, proving nonconsent here is potentially easier than it is for battery. All criminal mental states must fall into one of four categories. In order from least to most culpable, those categories are criminally negligent, reckless, knowing, and intentional.[82] Likewise, all tortious mental states must fall into one of four categories. In order from least to most tortious, those categories are: simply negligent, grossly negligent, wanton, and intentional.[83] For sexual abuse, the plaintiff needs to show only that the defendant *negligently* caused an unconsented contact with her.[84] In other words, to hold the defendant liable for abuse of a vulnerable person, the plaintiff must meet the lowest mental state requirement to impose criminal liability. For battery, the plaintiff must show the defendant *intentionally* meant to harm or offend her.[85] In other words, to hold a defendant liable for battery, a plaintiff must meet the highest mental state requirement for tort liability. However, the comparison is not one-to-one because criminal mental states are made up of specific elements while tortious

tort law should treat that conduct as nonconsensual as well." RESTATEMENT (THIRD) OF TORTS § 16 cmt. g (AM. LAW. INST., Preliminary Draft No. 5, 2018). The ALI's theory is that criminal liability is much more severe than tort liability, so criminal liability should be more cautious. *Id.* Both the statute's text and public policy could allow a court to justifiably conclude that a lesser showing is required for tort liability under the vulnerable person statute than for is required for criminal liability under the sexual abuse statute. Although some may argue that this interpretation would lead to an absurd result (namely, strict liability for a sexual abuse victim's lack of consent), the ALI also recognizes that community standards related to consent have been changing over the past fifty years to become much more protective of victims. *Id.* Accordingly, a more victim-protective interpretation of the vulnerable person statute may not be absurd at all. Indeed, it may simply track changing community standards related to consent.

82 OR. REV. STAT. § 161.085(6)–(10) (2017).

83 Cook v. Kinzua Pine Mills Co., 207 Or. 34, 58–59, 293 P.2d 717.

84 *Compare* OR. REV. STAT. § 124.105(1)(h) (2018) (stating "conduct against a vulnerable person that would constitute" sexual abuse in the third degree meets the abuse element of abuse of a vulnerable person), *and* OR. REV. STAT. § 163.415(1)(a) (stating sexual contact and nonconsent are the elements of sexual abuse in the third degree), *with* State v. Wier, 260 Or. App. 341, 354, 317 P.3d 330, 337 (2013) (stating sexual abuse in the third degree "requires the state to prove that a defendant acted knowingly, recklessly, or with criminal negligence with respect to a victim's lack of consent"). *See Wier*, 260 Or. App. at 354, 317 P.3d at 337; *accord* OR. REV. STAT. § 161.085(10) ("'Criminal negligence' or 'criminally negligent,' when used with respect to a result or to a circumstance described by a statute defining an offense, means that a person fails to be aware of a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that the failure to be aware of it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.").

85 OR. UNIF. CIVIL JURY INSTRUCTIONS § 40.06.

mental states encompass a range of culpability.[86] The Oregon Supreme Court recently created a three-step analytical framework comparing criminal and tortious mental state requirements based on the (1) nature of the risk, (2) degree of the risk, and (3) degree of awareness with which the person acts in the face of that risk.[87]

First, the nature of the risk for both claims is the same—in both cases the defendant risks that the plaintiff did not consent to the sexual contact.[88] Second, the degree of the risk is lower for abuse than for battery. For abuse, the plaintiff must show that there was a "substantial and unjustifiable risk."[89] For battery, the plaintiff must show that the defendant was "substantially certain" of the risk.[90] In case there is still any confusion that the nature and degree of risk required for battery is higher than the "substantial and unjustifiable risk" required for abuse, the Restatement (Second) of Torts states that "[a]s the probability that the consequences will follow decreases, and becomes less than *substantial certainty*, the actor's conduct loses the character of intent, and becomes mere recklessness . . . [a]s the probability decreases further, and amounts only to a *risk* that the result will follow, it becomes ordinary negligence."[91]

Third, the degree of awareness is also lower for abuse than for battery. For abuse, the plaintiff must show the defendant unreasonably failed to be aware of the risk that she did not consent.[92] For battery, the

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86 State v. Gutierrez-Medina, 365 Or. 79, 92–93, 442 P.3d 183, 190 (2019).

87 *Id.*

88 *Compare* OR. REV. STAT. § 161.085(10), *with* OR. UNIF. CIVIL JURY INSTRUCTIONS § 40.06.

89 *See* sources cited *supra* note 84.

90 OR. UNIF. CIVIL JURY INSTRUCTIONS § 40.06(2). Somewhat incongruously, the criminal negligence standard of abuse further requires that "[t]he risk must be of such nature and degree that the failure to be aware of it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation." OR. REV. STAT. § 161.085(10).

91 RESTATEMENT (SECOND) OF TORTS § 8A cmt. b (AM. LAW. INST. 1965) (emphasis added).

92 OR. REV. STAT. § 161.085(10). The failure to be aware must constitute a gross departure from the standard of care that a reasonable person would observe based on the nature and degree of the risk. *Id.* The standard, according to the statute's text, is met by the weight of the nature and degree of the risk, not the awareness itself. Here, the nature and degree of the risk is a substantial and unjustifiable risk of sexual assault. A defendant probably would not escape liability by arguing that her failure to perceive a substantial and unjustifiable risk that she was committing sexual assault was not a gross departure from the standard of care that a reasonable person would observe. In any case, it is possible that a defendant could make the argument, but I find the argument too unlikely to succeed to address more substantively.

plaintiff must show that the defendant desired for or knew of the risk that she did not consent.[93] Furthermore, the defendant can escape liability for battery if she can show that she reasonably relied on the plaintiff's apparent consent. Of course, even if the defendant claims she relied on apparent consent, the jury can infer that the defendant did know that the plaintiff did not consent if a reasonable person in the relevant community would have known it with substantial certainty.[94]

Applying those standards to the "Oblivious Octavia" hypothetical from the previous Section, Pauline is more likely to prevail against Oblivious Octavia under the abuse standard than under the battery standard. Pauline, because of her prior trauma, did not communicate her lack of consent to Octavia. Therefore, Octavia may be protected by apparent consent when sued for battery because Octavia can plausibly show that she did not know of the substantial certainty that Pauline did not consent. Contrastingly, under the abuse standard, Pauline need only prove that Octavia should have known of a substantial and unjustifiable risk that Pauline did not consent. Pauline may meet that standard because she was frozen and completely unenthusiastic; Octavia's continued kissing was probably unreasonable without an affirmative manifestation of Pauline's consent because Pauline's body language probably indicated there was a substantial and unjustifiable risk that Pauline did not consent. Octavia's obliviousness does not help her because the vulnerable person claim makes Octavia liable for her unreasonable failure to perceive Pauline's nonconsent.

In sum, incapacity and abuse make up the substance of an abuse of a vulnerable person claim. As explored, the vulnerable person statute may provide plaintiffs with substantive advantages compared to the common law.

Other provisions of the vulnerable person statute provide distinct advantages to plaintiffs too. For example, the statute procedurally advantages vulnerable plaintiffs with a seven-year statute of limitations for abuse of a vulnerable person claims,[95] which is obviously much more pro-plaintiff than the two-year statute of limitations for battery.[96] The vulnerable person statute also provides plaintiffs with remedial

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93 OR. UNIF. CIVIL JURY INSTRUCTIONS § 40.06.

94 *See* Johnson v. Jones, 269 Or. App. 12, 18, 344 P.3d 89, 93 (2015); *see also* DOBBS, *supra* note 5, § 106.

95 OR. REV. STAT. § 124.130 (defining abuse of a vulnerable person statute of limitations).

96 *See id.* § 12.110(1) (defining battery statute of limitations).

advantages through the damages provision[97] and the third-party liability provision.[98] These two provisions and the remedial advantages they provide are explored in the next two Sections.

3. The Damages Provision

Oregon law severely limits civil damages awards, so the treble damages provision in the vulnerable person statute is especially useful. Ordinarily, noneconomic damage awards cannot exceed $500,000.[99] Furthermore, because Oregon follows the American rule, attorney fees are not a component of a damages award.[100] In contrast, the damages provision of the vulnerable person statute requires courts to triple the sum of any judgment for nonpunitive damages and to award reasonable attorney fees.[101] Further, the court must award reasonable attorney fees.[102]

Oregon law also has special statutory rules on punitive damages, but the vulnerable person statute may get around them.[103] Oregon law requires that the plaintiff must state her intent to seek punitive damages in her original complaint. Otherwise, she must subsequently file a motion to amend her complaint to seek them.[104] The plaintiff must meet a higher evidentiary standard ("clear and convincing evidence") and establish a higher level of culpability ("malice" or "reckless and outrageous indifference to a highly unreasonable risk of harm").[105] If awarded, the punitive damages are subject to judicial review for excessiveness.[106] Furthermore, only 30% of the award goes to the plaintiff and her attorney; the other 70% goes to the Attorney General.[107]

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97 *Id.* § 124.100(2).

98 *Id.* § 124.100(5).

99 *Id.* § 31.710(1). Although ORS 31.710 purports to limit noneconomic damages claims, a trio of recent cases bring the statute's constitutionality into question. Rains v. Stayton Builders Mart, Inc., 289 Or. App. 672, 691, 410 P.3d 336, 347 (2018); Busch v. McInnis Waste Syst., 292 Or. App. 820, 824, 426 P.3d 235, 237–38 (2018); Vasquez v. Double Press Mfg., 288 Or. App. 503, 525–26, 406 P.3d 225, 237 (2017).

100 Deras v. Myers, 272 Or. 47, 65, 535 P.2d 541, 550 (1975) (en banc).

101 OR. REV. STAT. § 124.100(2).

102 *Id.* § 124.100(2)(c).

103 *Id.* § 31.725.

104 *Id.*

105 *Id.* § 31.730(1).

106 *Id.* § 31.730(2).

107 *Id.* § 31.735(1). Sixty percent of the Attorney General's portion is "for deposit in the Criminal Injuries Compensation Account of the Department of Justice Crime Victims' Assistance Section" (or, if the prevailing party is a public entity, the general fund of the

The treble damage award mandated by Oregon's vulnerable person statute, on the other hand, has no such limits or heightened standards because it is not punitive in nature.[108] The *Herring* plaintiff won $500,000 in noneconomic damages in a jury trial.[109] The trial court then entered judgment in favor of the plaintiff for $1,500,000 (the trebled award) and awarded the plaintiff $600,000 in attorney fees.[110] The appellate court rejected the defendant's argument that the enhanced award violated the statutory noneconomic damages cap, the heightened punitive damages requirements, and the Due Process Clause of the Fourteenth Amendment.[111]

First, the court rejected the application of the statutory damages cap to the trebled award.[112] The court reasoned that the trebled portion of the damages was not itself an award of economic or noneconomic damages, but was rather "more in the nature of a fine" than compensation for "subjective, nonmonetary losses."[113]

Next, the court rejected the defendant's argument that the trebled portion was functionally equivalent to punitive damages that "trigger[] the procedural and substantive protections that are provided when punitive damages are awarded."[114] The court found no mental state requirement in the text of the damages provision. Accordingly, the court refused to insert the higher culpability requirement for punitive damages because the legislature omitted such a requirement.[115] Furthermore, the court found no reason that the legislature would have intended the trebled award to apply in only particularly egregious abuses of a vulnerable person.[116] Instead, the court reasoned that the legislature "properly concluded that violations [of the statute] were *per se* sufficiently egregious to justify the enhanced award."[117] Indeed, the legislature enacted the treble damages provision, in part, to remedy the

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public entity); *id.* § 31.735(1)(b); and 10% of the Attorney General's portion is "for deposit in the State Court Facilities and Security Account"; *id.* § 31.735(1)(c).

108 Herring v. Am. Med. Response Nw., Inc., 255 Or. App. 315, 326–27, 297 P.3d 9, 16–17 (2013).

109 *Id.* at 317, 297 P.3d at 11–12.

110 *Id.* at 317, 297 P.3d at 12.

111 *Id.* at 322–24, 297 P.3d at 14–15.

112 *Id.* at 323, 297 P.3d at 14–15.

113 *Id.*

114 *Id.* at 324, 297 P.3d at 15.

115 *Id.* at 325, 297 P.3d at 16; *accord* OR. REV. STAT. § 174.010 (2017).

116 *Herring*, 255 Or. App. at 325, 297 P.3d at 16.

117 *Id.*

failings of punitive damages in Oregon.[118] The threat of punitive damages did not encourage pretrial settlement.[119] Punitive damages are not assured whereas the statutory trebling is mandatory, if the plaintiff prevails.[120] Punitive damages were also insufficient because juries erroneously awarded them to compensate plaintiffs without realizing that the plaintiff would receive only 30% of those damages.[121]

Finally, the court rejected the defendant's argument that the trebled award must be reviewed for excessiveness under the Due Process Clause of the Fourteenth Amendment.[122]

Just like the jury did in *Herring*, a jury could award Pauline and Andy each up to $500,000 in noneconomic damages—assuming the evidence supported it. The statute would then require the trial court to enter an award for up to $1,500,000 in each case.[123] Unlike an award of punitive damages, their awards would not be subject to review for excessiveness under the Due Process Clause.[124] The court would also have to award reasonable attorney's fees.[125] With the combination of the treble damages and attorney fees provisions, Pauline and Andy would get to keep 100% of their award for themselves.

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118 *Hearings on H.B. 2449 Before the H. Comm. on Judiciary*, 72d Or. Legis. Assemb. (Mar. 25, 2003), audio recording at 15:40 [hereinafter *H. Hearings on H.B. 2449*] (testimony of Virginia Mitchell, attorney who represents seniors); *Hearings on H.B. 2449 Before the S. Comm. on Judiciary*, 72d Or. Legis. Assemb. (May 12, 2003), audio recording at 10:30 [hereinafter *S. Hearings on H.B. 2449*] (comments of Senator Charles Ringo, one of the bill's sponsors). All legislative materials cited in this Comment are located in the Oregon State Archives, Salem, Oregon.

119 *H. Hearings on H.B. 2449*, *supra* note 118; *S. Hearings on H.B. 2449*, *supra* note 118.

120 *H. Hearings on H.B. 2449*, *supra* note 118; *S. Hearings on H.B. 2449*, *supra* note 118.

121 *H. Hearings on H.B. 2449*, *supra* note 118; *S. Hearings on H.B. 2449*, *supra* note 118.

122 Analyzing the facts of the case under the "three guideposts" used to determine the validity of punitive damages awards ("the reprehensibility of the conduct, the disparity between the harm and the punitive award, and the difference between the punitive award and 'civil penalties' imposed in comparable cases"), the court concluded that, even if the trebled award were punitive, the award did not meet these elements. *Herring*, 255 Or. App. at 326, 297 P.3d at 16.

123 *See* OR. REV. STAT. § 124.100(2)(a)–(b) (2017); *Herring*, 255 Or. App. at 322–24, 297 P.3d at 14–15.

124 *Herring*, 255 Or. App. at 322–24, 297 P.3d at 14–15.

125 *See* OR. REV. STAT. § 124.100(2)(c).

4. The Third-Party Liability Provision

The vulnerable person statute includes a theory of direct third-party liability against those who permit the abuse of a vulnerable person to occur.[126] The Oregon Supreme Court analyzed this provision and its requirements extensively in *Wyers*.[127]

Wyers was a consolidated appeal.[128] The six plaintiffs were suing an ambulance company for permitting its employee-paramedic to sexually abuse them during their transport by ambulance to a hospital.[129] The ambulance company did not actually know of any prior abuse until pretrial discovery for the *Herring* case.[130] The trial court granted summary judgment because the defendant didn't know of its employee's acts of abuse when the defendant's indirect acts permitted its employee to abuse the plaintiffs.[131] The Oregon Court of Appeals reversed summary judgment,[132] and the Oregon Supreme Court affirmed the court of appeals' decision.[133]

Two aspects of the supreme court's analysis in *Wyers* are worth exploring in detail, namely, the court's analysis of whether a business can be liable for permission and what mental state requirements are necessary to show permission. The first interesting aspect of the court's analysis addresses the question of who can be liable for permitting the abuse. In short, the court held that any individual or institution other than those specifically exempted by the vulnerable person statute could potentially be liable for permitting the abuse of a vulnerable person.[134] The defendant in *Wyers* argued that employers and other institutions could not be liable for permission.[135] The court held that businesses

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126 *Id.* § 124.100(5); Am. Med. Response Nw., Inc. v. Ace Am. Ins., 526 Fed. App'x 754 (9th Cir. 2013) (unpublished table decision) (reversing the district court's grant of summary judgment in favor of insurer in declaratory action for insurance coverage for permitting abuse of a vulnerable person when the insurance policy had an intentional-acts exclusion).

127 Wyers v. Am. Med. Response Nw., Inc., 360 Or. 211, 227–28, 377 P.3d 570, 579–80 (2016).

128 *Id.* at 214, 377 P.3d at 572.

129 *Id.*

130 *Id.* at 215, 377 P.3d at 573.

131 *Id.* at 214, 377 P.3d at 572.

132 Wyers v. Am. Med. Response Nw., Inc., 268 Or. App. 232, 255, 342 P.3d 129, 141 (2014), *aff'd*, 360 Or. 211, 377 P.3d 570 (2016).

133 *Wyers*, 360 Or. at 214, 377 P.3d at 572.

134 *Id.* at 228–29, 377 P.3d at 580.

135 *Id.* at 230, 377 P.3d at 581.

like the defendant are, indeed, potentially liable for permission.[136] In reaching this holding, the court noted that the vulnerable person statute enumerates specific entities not subject to action, and businesses are not included among them.[137]

Drawing upon the legislative history, the *Wyers* court explained that the bill's drafter drafted it to provide a specific remedy for the abuse of elders and incapacitated people to protect those vulnerable populations.[138] The drafter explained that she was focused on individual abusers and entities with fewer regulations rather than nursing homes, which, she said, "[were] already . . . heavily regulated."[139] Amendments were introduced to exempt these certain "heavily regulated" entities, and the amended bill passed unanimously.[140] Accordingly, the vulnerable person statute exempts certain specified entities from liability.[141] Consistent with the rule of *expressio unius* and the legislative history for the vulnerable person statute, the *Wyers* court held that unless legally exempted from liability,[142] employers and other institutions can be liable for permitting abuse.[143] In other words, the permission provision doesn't require a special relationship to impose liability; the relationship between the third-party and abuser is immaterial as long as the other elements are met and the defendant isn't explicitly exempted from liability by the statute.[144]

The second interesting aspect of the court's analysis addressed the mental states requirements. The court concluded that ORS 124.100(5) applied when a defendant knowingly acts or fails to act "under

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136 *Id.*

137 OR. REV. STAT. § 124.115(1) (an action may not be brought against financial institutions, health care facilities, facilities licensed under ORS chapter 443,—i.e., nursing, residential care, and assisted living facilities—or broker-dealers.).

138 *Wyers*, 360 Or. at 228, 377 P.3d at 580; *Hearings on S.B. 943 Before the S. Comm. on Judiciary*, 68th Or. Legis. Assemb. (Mar. 23, 1995), exhibits at R (statement of Bertalan); *see also Hearings on S.B. 943 Before the H. Comm. on Judiciary*, 68th Or. Legis. Assemb. (May 12, 1995), exhibits at D (statement of Bertalan).

139 *Wyers*, 360 Or. at 228, 377 P.3d at 580; *Hearings on S.B. 943 Before the S. Comm. on Judiciary*, 68th Or. Legis. Assemb. (Apr. 12, 1995), tape 102, side B (statement of Bertalan).

140 *Wyers*, 360 Or. at 228, 377 P.3d at 580.

141 OR. REV. STAT. § 124.115 (enumerating "persons not subject to action").

142 Nursing, residential care, assisted living, and healthcare facilities are exempted from civil liability unless criminally convicted of the underlying sexual abuse. OR. REV. STAT. § 124.115.

143 *Wyers*, 360 Or. at 228, 377 P.3d at 580 (citing Crimson Trace Corp. v. Davis Wright Tremaine LLP, 355 Or. 476, 497, 326 P.3d 1181, 1193 (2014) for *expressio unius* rule).

144 *Id.* at 227–28, 377 P.3d at 580.

circumstances in which a reasonable person should have known that the same sort of abuse of a vulnerable person that occurred would, in fact, occur," and that defendant is liable for permitting that abuse.[145] According to *Wyers*, then, a defendant can be liable for permission without having knowledge (actual or constructive) of the particular plaintiff or the particular abuse.[146] Rather, the court concluded, the permission provision applies when the defendant should have known, "in light of information known or available to a reasonable person," of the kind of abuse that the plaintiff suffered.[147]

In reaching these conclusions, the court grappled with what it described as "awkwardly phrased" mental state requirements in the text of the permission provision.[148] To help unpack the *Wyers* interpretation, let us first consider the provision itself with annotated information from *Wyers*:

> An action may be brought under this section against a person for permitting another person to engage in physical or financial abuse [(result)] if the person *knowingly* [(actual knowledge)] acts or fails to act [(conduct)] under circumstances in which *a reasonable person should have known* [(constructive knowledge)] of the physical or financial abuse [(circumstances)].[149]

According to the *Wyers* court, mental state requirements (like the two emphasized in italics above) always refer to another element in the statute—either result, conduct, or circumstances.[150] Further, the court stated that statutes must be construed to give each of its elements effect, if possible.[151] The two mental state requirements in the permission provision would be impossible to reconcile if they both refer to the same element because one mental state requires actual knowledge and the other requires only constructive knowledge.[152] Accordingly, the

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145 *Id.* at 230, 377 P.3d at 581.

146 *Id.* at 230, 377 P.3d at 580–81.

147 *Id.* at 229, 377 P.3d at 581.

148 *Id.* at 221, 377 P.3d at 576.

149 OR. REV. STAT. § 124.100(5) (2017) (emphasis added) (annotations glossed from the Oregon Supreme Court's analysis in *Wyers*, 360 Or. at 227–28, 377 P.3d at 580).

150 *Wyers*, 360 Or. at 221, 377 P.3d at 576 (citing State v. Gaines, 346 Or. 160, 171–72, 206 P.3d 1042 (2009)).

151 *Id.* (citing Force v. Dep't of Rev., 350 Or. 179, 190, 252 P.3d 306 (2011); *see also* OR. REV. STAT. § 174.010 ("[W]here there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all.").

152 *See Wyers*, 360 Or. at 221, 377 P.3d at 576 ("It is an awkwardly phrased bit of drafting, to say the least. And the parties' difficulty in reconciling the two is understandable.").

court observed, one of the provision's elements must require actual knowledge, and another element must require constructive knowledge.[153]

Wyers held that the actual knowledge requirement refers to the conduct (i.e., acting or failing to act), and the constructive knowledge refers to the circumstances (i.e., physical or financial abuse).[154] Furthermore, the result element—permitting "another person to engage in physical . . . abuse"—has no mental state requirement.[155] The court held permitting, as used here, is defined as "making something [(i.e., physical abuse)] possible," regardless of whether the actor intended to make the abuse possible.[156]

The court illustrated its holding with an example of an employer who "knowingly (as opposed to, say, inadvertently) schedules an employee to work on an ambulance run under circumstances in which a reasonable person should have known that the sort of abuse inflicted on the plaintiff would occur."[157] Thus, permitting date rape within the meaning of the statute means (1) knowingly ("as opposed to, say, inadvertently") acting or failing to act (conduct), (2) when a reasonable person should have known sexual abuse would occur (circumstances), and (3) date rape occurs (result).[158] The *Wyers* court left an open question—whether a defendant could also be liable under ORS 124.100(5) "under circumstances in which a reasonable person should have known that such abuse as did occur was merely foreseeable."[159] The court didn't reach this question of interpretation because the

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153 *See id.*

154 *Id.* at 231, 377 P.3d at 581–82.

155 *Id.* at 231, 377 P.3d at 578.

156 *Id.* at 222, 377 P.3d at 577.

157 *Id.* at 230, 377 P.3d at 581.

158 *See id.* The underlying abuse is an element of the permission cause of action. Although an individual defendant who was criminally convicted of the underlying abuse would be precluded from denying the conduct, OR. REV. STAT. § 124.140 (2017), a defendant being sued for permission can likely deny the underlying abuse occurred and require the plaintiff to prove it, Nelson v. Emerald People's Util. Dist., 318 Or. 99, 104, 862 P.2d 1293, 1296–97 (1993) (holding issue preclusion requires (1) "[t]he issue in the two proceedings is identical." (2) "The issue was actually litigated and was essential to a final decision on the merits in the prior proceeding." (3) "The party sought to be precluded has had a full and fair opportunity to be heard on that issue." (4) "The party sought to be precluded was a party or was in privity with a party to the prior proceeding." (5) "The prior proceeding was the type of proceeding to which [the] court will give preclusive effect.") (internal citations omitted).

159 *Wyers*, 360 Or. at 230 n.5, 377 P.3d at 581.

evidence in the record permitted a reasonable juror to find the defendant liable under the court's "would, in fact, occur" standard.[160]

a. Hypothetical Illustration

To help digest the *Wyers* holding, imagine the following hypothetical:

> Common-Law Bob owns and runs a local bar where young people like to drink and dance to country music on a Friday night. After thirty years in the bar business, he realized that talking to customers with complaints was a waste of time because, ultimately, the complainers just wanted to vent their frustrations. Accordingly, he set up a voice mailbox for all customer complaints that he never checked. The voice mailbox would give customers with complaints their cathartic release, and he wouldn't have to listen to it. Everybody wins, he thought. Six months ago, Bob hired his niece, Bethany, as a bouncer (after she had been fired from several other jobs for sexual harassment). After hiring her, Bob checked in with his other employees regularly to make sure her sexually harassing behavior didn't continue with his employees. There was no sign of trouble until one busy Friday night when Victor, a patron, got overly intoxicated at the bar. After last call, Victor was in no state to drive. He was in no state to hail an Uber either. Bethany clocked out for the night, and, on her way out the front door, she picked up Victor and placed him on her motorcycle, which was parked in front of the bar. When they arrived at Bethany's house, she began kissing Victor fervently, which he did not consciously perceive because of his intoxication. As it turns out, Bob's customer complaint voice mailbox had five unheard voicemails from different callers claiming Bethany had sexually assaulted the caller while she was working at the bar.

If Common-Law Bob's knowing act or omission made the date rape possible, and Bob should have known abuse of the same type would occur, then Bob is liable for permission.[161]

The conduct element (i.e., "acts or fails to act") sets a low threshold in the employer liability context. Relevant conduct could be as simple as scheduling or hiring an employee who commits the underlying abuse on the job.[162] Presumably, Bob knowingly (rather than, say, inadvertently) scheduled Bethany on the night she abused Victor. This same conduct was enough to meet the conduct element in *Wyers*.[163]

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160 *Id.*

161 *Id.* at 228–30, 377 P.3d at 580–81.

162 *Id.* at 229–30, 377 P.3d at 581.

163 *Id.* ("[Defendant-employer] does not suggest that it had not knowingly assigned [defendant-employee] to work as a paramedic during each of the six alleged incidents of

The key, from *Wyers*, is that the employer knows what he is doing; he does not need to know, however, that what he is doing will permit abuse.[164]

Consequently, permission claims for failure to act are the least likely to meet the actual knowledge requirement. Although a third party could knowingly fail to act or unknowingly act, each of those situations is less likely than its inverse. Seemingly, then, the actual knowledge requirement would most often limit permission liability when the third party unknowingly fails to act. When the third party acts affirmatively, though, she likely does so knowingly. Accordingly, satisfaction of the conduct element is least likely when a third party's failure to act permits the abuse of a vulnerable person. For example, a permission claim for a third party's failure to properly supervise her employee would likely fail unless the employer actually knew she was not supervising her employee. As for Common-Law Bob, he thought he was supervising Bethany properly, but he was wrong; still, he did not have actual knowledge of his failure to act, so he probably would not be liable for permission for this conduct.

Claims for affirmative conduct beyond those discussed could probably meet the actual knowledge requirement in most cases. For example, the conduct element might also be met by knowingly adopting policies. Even if Bob inadvertently scheduled Bethany on the night she assaulted Victor, Bob knowingly funneled customer complaints to a voice mailbox that he did not check. This policy could probably be used to meet the conduct element of a permission claim against Bob.

The result element (i.e., the abuse) requires the plaintiff to show that the employer's scheduling, or other knowing conduct, made it possible for the employee to sexually assault her. Accordingly, this element could be met if the abuse occurs during the time an employee was scheduled,[165] on the employer's premises,[166] in the employer's vehicle,[167] or is otherwise made possible by the employer's conduct.[168] Note, however, that permission liability is not limited to abuse that

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abuse. That means, then, that a genuine issue of material fact exists about whether [defendant-employer] did so under circumstances in which a reasonable person should have known that the same type of abuse that occurred would in fact occur.").

164 *Id.*

165 *Id.* at 216, 377 P.3d at 573.

166 *Id.*

167 *Id.* at 214–17, 377 P.3d at 573–74.

168 *Id.*

occurs within the scope of employment and could extend beyond it. In other words, the result element is limited by the chain of causation rather than by the scope of employment.

In the Common-Law Bob hypothetical, Bethany's employment put her in a position to take advantage of patrons like Victor who were overly intoxicated. If Bob had not scheduled Bethany on the night she assaulted Victor, then she wouldn't have had the opportunity to use her employment to take advantage of Victor's vulnerability. Therefore, Bob's act of scheduling Bethany for that night made the abuse possible, which would probably meet the result element.

The circumstances element (i.e., the abuse) could be met, for example, if an employer fails to investigate previous, similar claims;[169] fails to conduct an adequate investigation into a new employee's background;[170] or retains an employee despite previous, similar incidents.[171] Even though Bob did not actually know of the previous similar claims, he could have known by simply checking his voicemail. Indeed, a reasonable person likely would have checked his customer complaint voicemails regularly—especially considering his new hire, Bethany, who had been fired for sexual harassment before. If Bob had kept an adequate system of responding to customer complaints or used the system he had in place, he could have known that Bethany was doing this before she assaulted Victor. He could have fired Bethany or at least taken measures to prevent her from doing it again. Instead, even though he could have reasonably discovered circumstances indicating that abuse like the abuse that Victor suffered would occur, Bob continued scheduling Bethany without adequate supervision. Accordingly, Bob would likely be liable for permitting Bethany to abuse Victor.

b. Comparing Permission Liability to Common-Law Theories of Third-Party Liability

Third-party liability for permission is at least equivalent (and probably better) for Victor (and other plaintiffs with similar claims) compared to the common-law theories of third-party battery liability. Consider the limitations of several of the common-law claims to see the potential roadblocks for plaintiffs in date rape cases:

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169 *Id.* at 231–34, 377 P.3d at 582–83.

170 *See id.* at 230, 377 P.3d at 581 (stating a constructive knowledge standard).

171 *Id.* at 211, 377 P.3d at 582–83.

- *Negligent hiring and retention* requires a special relationship between the plaintiff and the third party.[172]
- *Respondeat superior* is limited to the employment relationship between the third party and the abuser, and it requires that the underlying abuse occur within the scope of employment.[173]
- *Aiding and assisting* requires a tortious intention or knowledge of the particular abuse to the particular plaintiff.[174]

Permission liability, on the other hand, creates liability against anybody whose knowing conduct (by act or omission) has the effect of permitting the underlying abuse to occur (whether the abuse is within the scope of employment or not) if a reasonable person would have known similar abuse would occur. For example, Victor might sue Bob for the common-law tort of negligent hiring and retention of Bethany.[175] Indeed, employers in Oregon owe a duty to invitees that can make employers liable for negligent retention of an employee with a propensity to commit battery when that employee commits the battery.[176] The employer must have known, or should have known, of the employee's propensity to commit battery.[177]

But for several reasons, the common-law claim may fail to hold employers liable. First, the attack may not have been foreseeable. Bethany's known propensity for sexual harassment isn't the same as a propensity for sexually abusing vulnerable customers. Indeed, in *Kelley*, an employer's knowledge of his employee's "quarrelsome" propensities was insufficient to make the employer liable for that employee's battery.[178] Furthermore, Bob could argue that he was not negligent because he was in regular contact with all his employees

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172 OREGON STATE BAR, 2 TORTS § 1.4-1(b) (2012) [hereinafter TORTS].

173 *Id.* § 1.4-1(a).

174 *Id.* § 1.4-7.

175 *Id.* § 1.4-1(b) ("Evidence that an employer failed to fire an employee after a co-worker complained of a sexual battery created a question for the jury as to whether the employer was liable for a second sexual battery by the employee against the co-worker due to negligent retention of the offending employee. Gresham v. Safeway, Inc., No. 08-6241-AA, 2010 WL 437982 (D. Or. 2010). In Hoke v. May Dep't Stores Co., 133 Or. App. 410, 891 P.2d 686 (1995), the plaintiff was sexually assaulted by a security guard after being detained by the guard for shoplifting. The court of appeals held that questions of fact remained as to whether the defendant failed to reasonably investigate a prior sexual misconduct complaint against the guard and failed to ensure that its employees complied with security policies, thus rendering it reasonably foreseeable that 'the harm that befell plaintiff would occur.' *Hoke*, 133 Or. App. at 421.").

176 Hansen v. Cohen, 203 Or. 157, 160–61, 276 P.2d 391, 393 (1955).

177 Cain v. Rijken, 300 Or. 706, 714–15, 717 P.2d 140, 145–46 (1986).

178 Kelley v. Oregon Shipbuilding Corp., 183 Or. 1, 8, 189 P.2d 105 (1948).

throughout Bethany's employment to make sure that Bethany was not sexually harassing them. His failure to check the customer complaint voicemail was not unreasonable because he expected the voice mailbox to give customers only a cathartic outlet for their grievances; he never expected to receive such grave complaints there.

Finally, Bob may escape liability for negligently hiring or retaining Bethany because he didn't owe Victor a duty of care for Bethany's behavior after hours and off the premises. The special duty element, too, could likely help Bob escape liability because Oregon courts have construed that requirement narrowly. This special duty is based upon the victim's invitee status, which extends only as far as the invitation itself.[179] In *Napier*, for example, a plaintiff who fell down the stairs on his way to the restroom was not an invitee even though he was an invitee before he made his way to the restroom.[180] The plaintiff had gone to the church to talk to a minister and asked the minister if he could use the restroom.[181] His trip to the restroom was outside the scope of his invitation.[182]

Here, Bob's bar had made last call, Victor had left the bar and was finding his way home, and Bethany had clocked out for the night before she ever laid eyes on Victor. Furthermore, the battery occurred at Bethany's house after hours. If a trip to the restroom on the premises is outside the scope of an invitation, like it was in *Napier*, then it seems absurd that Bethany's house would be within the scope of Victor's invitation to Bob's bar that night. Victor wouldn't have this issue with a permission claim, which has no special relationship requirement.

Victor might also sue Bob under a vicarious liability theory, but he will likely be unsuccessful here as well. The doctrine of *respondeat superior* makes employers liable for battery committed by employees in the scope of their employment.[183] Scope of employment has three elements: (1) the battery "occurred substantially within the time and space limits authorized by the employment"; (2) "the employee was motivated, at least partially, by a purpose to serve the employer"; and (3) "the act is of a kind which the employee was hired to perform."[184] This theory of liability is mostly limited to employers whose employees

179 *Hansen*, 203 Or. at 162, 276 P.2d at 393–94.

180 Napier v. First Congregational Church, 157 Or. 110, 113, 70 P.2d 43, 44 (1937).

181 *Id.*

182 *Id.*

183 Chesterman v. Barmon, 305 Or. 439, 442, 753 P.2d 404, 406 (1988).

184 *Id.*

use force as part of their job.[185] As a bouncer, Bethany's job description arguably includes force, but the act of kissing patrons like Victor is not the kind of force Bob hired her to perform; nor was it done to serve the employer's purpose; nor did it occur within the time and space limits of employment. Accordingly, it is very unlikely Bob would be liable under the doctrine of *respondeat superior*.

Finally, Bob is also unlikely to be liable for aiding and assisting the battery.[186] This form of liability requires that the third party intentionally assist the offender with the knowledge that the battery was occurring or would occur.[187] Bob did not intend for Bethany to sexually batter Victor when he scheduled her or when he failed to supervise her. Further, unlike permission—which requires only negligence that abuse of the same type was occurring or would occur[188]—the aiding and assisting theory of liability would likely fail against Bob because he did not have *actual* knowledge of *this* battery.

II
INTERPRETING ABUSE OF A VULNERABLE PERSON TO APPLY TO DATE RAPE

In this Part, I will analyze the vulnerable person statute's provisions to show how an Oregon court could interpret those provisions to apply to date rape. I will return to the hypothetical date rape survivors—Andy, Victor, and Pauline—throughout this Part to help illustrate how a court could find that they were incapacitated within the meaning of the statute.

Oregon statutes are interpreted using a distinct methodology prescribed by the Oregon Legislature in chapter 174 of the Oregon Revised Statutes.[189] The interpreting court's goal is to ascertain the legislature's actual intent.[190] Courts use a two-step methodology to achieve that goal: (a) the court examines the text and context of the

185 TORTS, *supra* note 172, § 1.4-1(a).

186 Walthers v. Gossett, 148 Or. App. 548, 553–54, 941 P.2d 575, 578–79 (1997).

187 *Id.*; *see also* TORTS, *supra* note 172, § 1.4-7 (offering a further discussion of the aiding and assisting theory of battery).

188 Wyers v. Am. Med. Response Nw., Inc., 360 Or. 211, 228–30, 377 P.3d 570, 580–81.

189 *See* OR. REV. STAT. §§ 174.010–590 (2017); State v. Gaines, 346 Or. 160, 170–74, 206 P.3d 1042, 1050–51 (2009); *see also* Powell's Books, Inc. v. Kroger, 622 F.3d 1202, 1209 (9th Cir. 2010) (citing Planned Parenthood, Inc. v. Wasden, 376 F.3d 908, 925 (9th Cir. 2004)). (stating the rule that federal courts must interpret state statutes as that state's highest court would interpret the statute).

190 OR. REV. STAT. § 174.020.

statute using the relevant rules of statutory construction and legislative history to determine if the legislature's intent has been unambiguously expressed, and (b) if the legislature's intent remains ambiguous, the court resolves the ambiguity using the general maxims of statutory construction.[191]

A. First-Level Analysis

In pursuing the Oregon Legislature's actual intent, Oregon courts give the most weight to the statute's text and context.[192] The legislature used the statute's text and context to give expression to its intent; therefore, the courts reason, the statute's text and context is the most persuasive evidence of legislative intent.[193]

1. Text

The vulnerable person statute's text supports its progressive application to date rape claims. When the legislature defines a term, that meaning controls.[194] Here, the legislature defined both "abuse" and "vulnerable person."[195]

The statute defines abuse as "conduct . . . that would constitute" sexual abuse (and various other crimes) as defined by the criminal provisions referenced within the statute.[196] Sexual contact without the victim's consent constitutes sexual abuse.[197] Date rape includes sexual contact without the victim's consent, so date rape very likely falls within the definition of abuse.

A vulnerable person is a person who is elderly, financially incapable, *incapacitated*, or disabled.[198] A person is incapacitated when "[his] ability to *receive and evaluate information* effectively or to *communicate decisions* is *impaired to such an extent* that [he] presently lacks the capacity to meet the essential requirements for [his] physical health or safety."[199] According to this text, the victim must have either

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191 *Gaines*, 346 Or. at 164, 206 P.3d at 1046.

192 *Id.* at 171, 206 P.3d at 1050.

193 *Id.*

194 *See, e.g.*, Patton v. Target Corp., 349 Or. 230, 239, 242 P.3d 611, 616 (2010).

195 OR. REV. STAT. § 124.105(1) (defining abuse); *Id.* § 124.100(1) (defining vulnerable person).

196 *Id.* § 124.105(1).

197 *Id.* § 163.415.

198 *Id.* § 124.100(1)(e) (emphasis added).

199 *Id.* § 125.005(5) (emphasis added).

an impaired ability to receive and evaluate information or an impaired ability to communicate decisions.

Further, the impairment must be severe enough that the victim "presently lacks the capacity to meet the essential requirements for [his] physical health or safety."[200] The capacity to meet the essential requirements for a person's physical health or safety is the capacity to take "those actions necessary to provide the health care, food, shelter, clothing, personal hygiene and other care without which serious physical injury or illness is likely to occur."[201] A person whose perception or communication abilities prevent him from taking those necessary actions is incapacitated. *Herring* held that severity did not imply a durational requirement,[202] but other aspects of severity could be subject to judicial interpretation.

For example, a court might need to interpret the statute to determine whether the hypothetical survivors—Andy, Victor, and Pauline—were incapacitated within the meaning of the statute. Pauline and Andy were both unable to communicate their lack of consent when they were assaulted.[203] In other words, their ability to communicate this decision was impaired. Victor was so intoxicated that he was unable to perceive the abuse or make a conscious decision about whether to consent when he was assaulted.[204] In other words, his ability to receive and evaluate information was impaired. The question could become whether the survivors' abilities were impaired severely enough at the time of their abuse.

a. Ejusdem Generis

According to Oregon case law, the rule of *ejusdem generis* can be applied to interpret the scope of a general catchall term that appends a list of specific terms.[205] The definition of incapacity employs a list of

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200 *Herring* interpreted "presently" to mean "at the time of the abuse." Herring v. Am. Med. Response Nw., Inc., 255 Or. App. 315, 321–22, 297 P.3d 9, 14 (2013); *see also infra* Part I. Oregon courts consider prior judicial construction in the analysis of a statute's text. State v. Bryan, 221 Or. App. 455, 459, 190 P.3d 470, 472 (2008). However, because *Herring* was decided by the Oregon Court of Appeals, the precedential effect of its interpretation will not bind the Oregon Supreme Court—there, its interpretation will have to stand upon the strength of its own reasoning.

201 OR. REV. STAT. § 125.005(5).

202 *Herring*, 255 Or. App. at 319–20, 297 P.3d at 13.

203 *See supra* Part I.

204 *See supra* Part I.

205 Daniel N. Gordon, P.C. v. Rosenblum, 361 Or. 352, 64–65, 393 P.3d 1122, 1129 (2017).

specific terms ("health care, food, shelter, clothing, personal hygiene") followed by a general catchall term ("and other care without which serious physical injury or illness is likely to occur") to explain what it means to be able to meet the essential requirements for physical health or safety.[206] Therefore, a court could apply *ejusdem generis* to interpret the severity with which a person's ability to evaluate information or communicate decisions must be impaired.[207]

Under *ejusdem generis*, the common characteristics of the specific terms in the list define the scope of the general term.[208] A court applying *ejusdem generis* will have some flexibility with which to describe the scope of the common characteristics;[209] however, the rule cannot be applied to lead to a result at odds with the legislature's intentions.[210]

The specific terms that the vulnerable person statute lists are "health care, food, shelter, clothing, [and] personal hygiene."[211] Without health care, food, or personal hygiene care, a person's health is at risk. Without shelter or clothing, a person's bodily safety is at risk. Each of these items, then, is essential to the integrity of either a person's health or a person's bodily safety.[212] This description of the specific terms' common characteristics is consistent with the legislature's intentions because, according to the statute's text, the listed terms are employed to help define the essential requirements for "a person's physical health and safety."[213] The integrity of a person's health and bodily safety fall

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206 OR. REV. STAT. § 125.005(5).

207 *See id.* § 125.005(5).

208 *See, e.g.*, Bellikka v. Green, 306 Or. 630, 636, 762 P.2d 997, 1001 (1988) ("[W]hen the legislature chooses to state both a general standard and a list of specifics, the specifics do more than place their particular subjects beyond the dispute; they also refer the scope of the general standard to matters of the same kind, often phrased in Latin as '*ejusdem generis*.'").

209 Jack L. Landau, *Oregon Statutory Construction*, 97 OR. L. REV. 583, 684–85 (2019).

210 *See, e.g.*, Clinical Research Inst. of S. Or., P.C. v. Kemper Ins. Cos., 191 Or. App. 595, 603, 84 P.3d 147, 152 (2004); State v. Mayorga, 186 Or. App. 175, 181–82, 62 P.3d 818, 822 (2003) (stating that the rule "does not apply when its application would lead to redundancy or to a construction that otherwise is at odds with the legislature's apparent intentions.").

211 OR. REV. STAT. § 125.005(5).

212 Interestingly, these two categories are perfectly in line with the two most basic categories in Maslow's "hierarchy of needs," *see* A.H. Maslow, *A Theory of Human Motivation*, 50 PSYCHOL. REV. 370, 372–80 (1943), which makes sense because these are the categories of need "without which serious physical injury or illness is most likely to occur," *accord* OR. REV. STAT. § 125.005(5).

213 *See* OR. REV. STAT. § 125.005(5).

within the scope of that intention. Therefore, using *ejusdem generis*, a court could interpret the definition to mean that a person's evaluative or communicative abilities must be impaired to such an extent that he is unable to protect his bodily integrity.

Andy, Victor, and Pauline would probably fall under this interpretation of the statute's definition of incapacity. Because of either prior trauma or voluntary intoxication, neither Andy, Victor, nor Pauline was able to take the necessary actions to ward off their dates' unwanted kissing.[214] Pauline and Andy were both unable to communicate their lack of consent when they were assaulted.[215] Victor was unable to perceive and evaluate information effectively enough to express or make a conscious decision about whether to consent when he was assaulted.[216] Because each of them was unable to prevent the assault because of their impairment at the time of abuse, their individual impairments were each sufficient to impair their ability to maintain bodily integrity. Accordingly, under this interpretation of the statute, Andy, Victor, and Pauline were probably vulnerable persons at the time of their abuse.

b. Noscitur a Sociis

Oregon courts also use *noscitur a sociis* to interpret statutes at the first level of analysis.[217] *Noscitur a sociis* is used to interpret a disputed statutory term by inferring its meaning from the surrounding words.[218]

A court could find *noscitur a sociis* useful in construing the definition of incapacity. To be incapacitated, a person's communication or perception must be impaired to such an extent that they are unable to take the "care without which serious physical injury or illness is likely to occur."[219] Applying *noscitur a sociis*, the statute says that the person must be unable to render the care necessary to prevent serious physical injury or illness.

Using this interpretation, the question becomes whether the ability to communicate a person's lack of consent to sexual contact or to perceive the contact prevents him from taking the care necessary to prevent serious physical injury or illness. A court could construe this necessary care requirement narrowly or broadly.

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214 *See supra* Part I.

215 *See supra* Part I.

216 *See supra* Part I.

217 Landau, *supra* note 209, at 688 n.584 (collecting cases).

218 *Id.*

219 OR. REV. STAT. § 125.005(5) (2017).

In the broadest construction, the care to be taken does not need to be closely related to the facts of the case. Victor's perception, for example, was impaired to such an extent that he was unable to drive himself home without putting himself at significant risk of physical injury from a drunk driving accident. He didn't drive himself home, but for the same reason—impaired perception—he was unable to prevent himself from being assaulted. So, because Victor was unable to drive without risking serious physical injury, a court could consider him incapacitated under the definition because the necessary care requirement doesn't need to be closely related to the facts of the case under the broad construction.

In the narrowest construction, only the facts of the case could be considered, and the court will have to decide whether the assault was likely to lead to serious physical injury or illness. Because Victor's assault consisted only of fervent kissing, Victor's claim may fail under a narrow construction. However, even under the narrowest construction, a court could decide in Victor's favor because even a relatively mild sexual assault, like the one Victor sustained, could lead to serious mental illness like PTSD. Furthermore, a court could consider the assault itself to be a serious physical injury under the theory that any breach of a person's bodily integrity is a serious injury.

Alternatively, a court could construe the statute somewhat less narrowly and ask whether any assault could have led to a serious physical injury because of Victor's inability to ward off this assault. After all, the terms of the statute don't require the serious physical injury to have actually occurred; the statute requires only that serious physical injury or illness is *likely to occur* because of the inability. Under this construction, a court could decide that serious physical injury or illness is likely to occur from an inability to prevent assault.

c. Expressio Unius Est Exclusio Alterius

Oregon courts can also apply *expressio unius* to interpret statutes at the first level of analysis.[220] The rule states that when a statute lists terms without a general catchall term, the legislature intended the list to be exhaustive.[221] The strength of the inference created by the rule

220 Landau, *supra* note 209, at 689 n.588 (collecting cases).

221 *Id.* at 689.

increases with the length of the list and with the specificity with which the terms are stated.[222]

The definition of incapacity seems to employ an exhaustive list when it states that the requisite impairment must result from a diminished ability "to receive and evaluate information effectively or to communicate decisions."[223] Although the statute lists only two terms, the terms are sufficiently specific to support the inference that the legislature intended it to be exhaustive. Indeed, courts have interpreted this list to be exhaustive.[224] Accordingly, a plaintiff's incapacity must result from either a diminished ability to receive and evaluate information effectively or a diminished ability to communicate decisions.

2. Context

The statute's context, like the statute's text, is considered at the first level of analysis. Under Oregon case law, prior versions of the same statute provide relevant context for interpreting the present version of the statute.[225] Courts look at the history of changes to infer the meaning of the present version.[226] For example, when a dissolution of marriage statute authorized spousal support as compensation when a spouse had contributed to the other's earning capacity, the Oregon Supreme Court turned to the history of the statute's changes to infer its meaning in the case of *In re Marriage of Harris*.[227] The legislature had amended the statute about a decade before this case was decided.[228] The amendment had added more types of contributions that will qualify for compensation in a dissolution.[229] By broadening the types of qualifying contributions, the court concluded, the legislature intended the statute to apply more often.[230] Accordingly, the supreme court applied a liberal construction of the statute.[231]

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222 Crimson Trace Corp. v. Davis Wright Tremaine LLP, 355 Or. 476, 497, 326 P.3d 1181, 1195 (2014).

223 OR. REV. STAT. § 125.005(5).

224 *See, e.g.*, Schaefer v. Schaefer, 183 Or. App. 513, 518–19, 52 P.3d 1125, 1128–29 (2002).

225 Landau, *supra* note 209, at 645 n.342 (collecting cases).

226 *Id.*

227 *In re* Marriage of Harris, 349 Or. 393, 244 P.3d 801 (2010).

228 *See id.* at 404–05, 244 P.3d at 808–10.

229 *Id.* at 408, 244 P.3d at 810.

230 *Id.*

231 *Id.*

Like the dissolution of marriage statute, the vulnerable person statute has been amended to broaden its application since its original enactment in 1995. In fact, the vulnerable person statute has been amended repeatedly since its original enactment, and each amendment has broadened its application. Moreover, the Oregon legislature has expanded the vulnerable person statute's scope in every imaginable way since its original enactment in 1995 by expanding: (1) the class of protected individuals, (2) the definition of abuse, and (3) the available remedies. Importantly, the legislature has never narrowed the statute's scope; the modifications have only enhanced the statute's usefulness.

First, the class of protected individuals who can seek redress through an abuse of a vulnerable person claim has expanded significantly since the statute's original enactment. The legislature extended the statute's protections to incapacitated and financially incapable persons in 1997,[232] and again to disabled persons in 2005.[233] The legislature also loosened the standing requirements twice, thereby allowing more people to bring abuse of a vulnerable person claims on behalf of the survivor.[234] The 2001 amendment conferred standing upon the "personal representative for the estate of a decedent who was incapacitated or [elderly] at the time of death."[235] The 2005 amendment conferred standing upon trustees because the survivor's trustee likely has familiarity with the dealings of the survivor.[236] In 2003, the legislature also authorized district attorneys and the Attorney General to issue investigative demands in cases of abuse of a vulnerable person.[237] In sum, the legislature has expanded the class of protected individuals by adding new groups to the class, conferring standing upon more representative parties, and authorizing the Attorney General and district attorneys to issue investigative demands.

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232 Act of May 7, 1997, ch. 249, § 41, 1997 Or. Laws 44–45 (codified at OR. REV. STAT. § 125.005).

233 Act of June 17, 2005, ch. 386, §§ 1–2, 2005 Or. Laws 3–4 (codified at OR. REV. STAT. §§ 124.100 and 124.110).

234 Act of July 2, 2001, ch. 843, § 3, 2001 Or. Laws 1–2 (codified at OR. REV. STAT. § 124.100); Act of May 6, 2005, ch. 87, § 1, 2005 Or. Laws 1–2 (codified at OR. REV. STAT. § 124.100).

235 Act of Apr. 18, 2001, ch. 84, 2001 Or. Laws 1–2 (codified at OR. REV. STAT. § 673.685).

236 2005 Or. Laws 1–2, *supra* note 233; *Hearings on H.B. 2291 Before the H. Comm. on Judiciary Civ. L. Subcomm.*, 73d Or. Legis. Assemb. (Jan. 31, 2005), audio recording at 26:00 [hereinafter *H. Hearings on H.B. 2291*].

237 Act of May 19, 2003, ch. 265, § 1, 2003 Or. Laws 1–2 (codified at OR. REV. STAT. § 124.125).

Second, the statutory definition of abuse has been expanded twice. First, in 1999, the legislature expanded the definition to include sending sweepstakes promotions to elderly or incapacitated persons.[238] Then, in 2003, it expanded the definition of abuse again to include strangulation.[239]

Third and finally, the available remedies were expanded significantly in 2003. Specifically, the 2003 amendments require courts to award treble economic and noneconomic damages (and reasonable attorney's fees).[240] The legislature sought to increase the likelihood that vulnerable survivors could recover in a civil action pragmatically by enacting the treble damages provision.[241]

According to the supreme court's logic in *Harris*, the vulnerable person statute's consistent expansion implies that the legislature intended for the statute to apply more often, and a court should apply a broad construction and application to the vulnerable person statute.[242] According to case law, the statute certainly applies to some sexual assault survivors who were temporarily incapacitated at the time of their abuse. Although it could be argued that the legislature didn't intend for the statute to apply as far as date rape, the consistent broadening of the statute's application suggests otherwise. A court interpreting whether the vulnerable person statute applies to redress date rape should infer that the legislature intended the statute to apply

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238 Act of July 8, 1999, ch. 875, § 6, 1999 Or. Laws 4 (codified at OR. REV. STAT. § 124.005).

239 Act of July 1, 2003, ch. 577, § 4, 2003 Or. Laws 2–3 (codified at OR. REV. STAT. § 124.105).

240 Act of May 15, 2003, ch. 211, § 1, 2003 Or. Laws 1 (codified at OR. REV. STAT. § 124.100).

241 *See H. Hearings on H.B. 2449*, *supra* note 118, at 35:55 (comments of Rep. M. Williams, Chair); *S. Hearings on H.B. 2449*, *supra* note 118, at 10:30 (testimony of Senator Charles Ringo, one of the bill's sponsors).

242 Oregon appellate courts have been consistently unwilling to accept arguments for narrow statutory interpretations of incapacity based on the legislative intent in sexual assault cases. Wyers v. Am. Med. Response Nw., Inc., 360 Or. 211, 214, 377 P.3d 570, 572 (2016) (affirming appellate court's decision that third-party liability for permission does not require actual knowledge of the plaintiff's abuse); *id.* at 226, 579 (rejecting defendant's argument that the legislature did not intend to create liability for institutional care or service providers); Herring v. Am. Med. Response Nw., Inc., 255 Or. App. 315, 317, 297 P.3d 9, 12 (2013) (rejecting defendant's arguments that (1) "because plaintiff was not incapacitated for an extended period of time, she was not a 'vulnerable person' as that term is defined by statute"; and (2) the trial court "erred in tripling [plaintiff's] noneconomic damages [because] doing so resulted in an award that exceeded a statutorily mandated $500,000 cap on noneconomic damages, or was excessively punitive, or both."), *cert. denied*, 353 Or. 867 (2013).

broadly. Therefore, a court should find that the statute applies to date rape claims.

The legislative history of a statute also provides relevant context for interpreting the legislature's intent under Oregon case law.[243] The legislature had pragmatic intentions when it enacted the treble damages provision.[244] Testimony before the judiciary committee offered that financial abuse of senior citizens was underreported, underprosecuted, and had become more prevalent.[245] Accordingly, the legislature sought to make recovery easier for vulnerable survivors.[246] Specifically, the legislature hoped the treble damages provision would encourage pretrial settlement and encourage vulnerable survivors to pursue these claims.[247] This approach was warranted for several reasons: senior citizens were often poor witnesses to their own abuse at trial because of memory issues;[248] they were often too embarrassed to testify about being abused;[249] and they were common targets of such abuse.[250]

The legislature's pragmatic intention to encourage survivors to step forward and sue their abusers and defendants to settle before trial extends easily to date rape claims.[251] Indeed, date rape—like the other forms of abuse covered by the statute—is underreported, underprosecuted, and extremely prevalent.[252] Offenders often leave little or no physical evidence and seek victims who are vulnerable,

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243 State v. Gaines, 346 Or. at 160, 172, 206 P.3d 1042, 1050–51 (2009) "[A] party is free to proffer legislative history to the court, and the court will consult it after examining text and context, even if the court does not perceive an ambiguity in the statute's text, where that legislative history appears useful to the court's analysis.").

244 *See H. Hearings on H.B. 2449*, *supra* note 118, at 35:55 (comments of Rep. M. Williams, Chair); *S. Hearings on H.B. 2449*, *supra* note 118, at 10:30 (testimony by Senator Charles Ringo, one of the bill's sponsors).

245 *H. Hearings on H.B. 2449*, *supra* note 118, at 22:00 (testimony of Steven Schneider, Deputy Chief of Staff for Government Kulongoski); *S. Hearings on H.B. 2449*, *supra* note 118, at 11:15 (testimony by Senator Charles Ringo, one of the bill's sponsors).

246 *H. Hearings on H.B. 2449*, *supra* note 118, at 35:55 (comments of Rep. M. Williams, Chair); *S. Hearings on H.B. 2449*, *supra* note 118, at 10:30 (testimony by Senator Charles Ringo, one of the bill's sponsors).

247 *S. Hearings on H.B. 2449*, *supra* note 118, at 11:35 (testimony by Senator Charles Ringo, one of the bill's sponsors).

248 *Id.* at 18:28 (testimony of Virginia Mitchell, attorney who represents seniors).

249 *Id.*

250 *Id.* at 23:45 (testimony of Steven Schneider, Deputy Chief of Staff for Government Kulongoski).

251 In any case, the statutory language clearly applies to both situations, which is likely dispositive regardless of silence on the matter in the legislative history. *See, e.g.*, Lake Oswego Pres. Soc'y v. City of Lake Oswego, 360 Or. 115, 129, 379 P.3d 462, 471 (2016).

252 SART HANDBOOK, *supra* note 3, at 1.

isolated, and easily discredited.[253] Furthermore, survivors who were incapacitated make poor witnesses to their own abuse. Survivors may have been unable to perceive the abuse, their trauma might cause memory issues, and they are often too embarrassed to testify about being abused.[254]

The *Whalen* case illustrates how those issues could prevent sexual assault survivors who were incapacitated at the time of their abuse from stepping forward or from succeeding at trial. In *Whalen*, the plaintiff had no recollection of being sexually abused while she was incapacitated.[255] However, circumstantial evidence suggested that she had been abused by the defendant: the defendant had acted aroused while watching her undress; she had a great sense of uncleanliness afterwards; she became hypervigilant; she experienced nightmares of the defendant hovering over her; and the defendant had been found guilty of sexually abusing other incapacitated women at his job, which was where he had abused the plaintiff.[256]

Because the plaintiff had no recollection of the abuse itself due to her incapacity at the time of the abuse, she was unsure it had occurred until almost four years later. She became aware of the abuse when her symptoms of trauma had continued, and the other women had come forward in a highly publicized procession.[257] Only under these exceptional circumstances did she file her claim.[258]

At the summary judgment stage, the plaintiff's attorney proffered a sworn affidavit stating that he had retained an expert who would testify that the plaintiff was subjected to traumatic sexual abuse while she was under the defendant's care. The affidavit also stated that the retained expert would testify that the reason the plaintiff could not remember the abuse was because of amnesia induced by the trauma of the abuse.[259] Nevertheless, the trial court granted summary judgment in favor of the defendant, ruling that there was no genuine issue of

253 *Id.* at 48.

254 *See id.* at 8 n.vi ("Instrumental violence—the amount of violence or threat of violence used by the offender is only as much as is needed to commit the sexual assault. For example, an offender will use little or no violence to perpetrate against someone who is incapacitated by alcohol or drugs, which is why alcohol and drugs are so often used by an offender to create vulnerability in a potential victim.").

255 Whalen v. Am. Med. Response Nw., Inc., 256 Or. App. 278, 280, 300 P.3d 247, 249 (2013).

256 *Id.* at 280–81, 300 P.3d at 249–50.

257 *Id.* at 281, 300 P.3d at 250.

258 *Id.*

259 *Id.*

material fact because the plaintiff herself could not credibly testify that the abuse had occurred.[260]

The Oregon Supreme Court reversed, holding that there was enough evidence in the record to create a genuine issue of material fact.[261] The court reasoned that some survivors won't recall their injury, but that such survivors could rely on evidence other than their own testimony.[262] Accordingly, the issue was a jury question and summary judgment was inappropriate.[263]

However, the plaintiff would still need to prove her case, and her lack of memory would certainly put her at a disadvantage at trial. Furthermore, although the attorney's affidavit was enough to defeat summary judgment, the expert's testimony still may have been inadmissible at trial.[264] If the expert's testimony were not admitted, the *Whalen* plaintiff would be left with evidence that the defendant acted aroused while watching her undress, that the defendant had sexually abused other incapacitated women at his job, and that the plaintiff experienced hypervigilance, nightmares, and feelings of uncleanliness afterwards.[265] The jury might have attributed the plaintiff's subsequent feelings to the defendant's behavior while she was undressing. The jury might also have attributed the plaintiff's claims of abuse to the publicity about the other women's abuse. Without the expert's testimony, these theories could seem more credible to the jury.

The issues exhibited by *Whalen* are the same issues the legislature intended to address by enacting the treble damages provision. Because of her incapacity at the time of her abuse, the *Whalen* plaintiff did not report or prosecute her abuse until much later when exceptional circumstances prompted her to do so. Even then, her incapacity posed evidentiary issues for her claim because she could not recall her own abuse. Accordingly, the pragmatic intention of encouraging plaintiffs to bring claims and encouraging defendants to settle before trials applies to survivors of date rape.

The legislature also hoped the mandatory treble damages award would discourage the abuse of vulnerable persons because the abuse

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260 *Id.* at 280–81, 300 P.3d at 250–51.

261 *Id.* at 292–93, 300 P.3d at 255–56.

262 *Id.* at 289, 300 P.3d at 254.

263 *Id.*

264 *Id.* at 291 n.9, 300 P.3d at 255.

265 *See id.* at 288–89, 300 P.3d at 254.

also tended to have significant effects on the survivors' health.[266] The legislature was concerned about the detrimental effects of abuse on vulnerable survivors themselves as well as on society as a whole.[267] Survivors of date rape experience many symptoms ranging from lost work productivity, substance abuse, trauma, disrupted relationships, and significant personality changes.[268] These symptoms have detrimental effects on the survivors themselves and on society as a whole. Accordingly, the effects of abuse on date rape survivors' health are the same effects the legislature intended to prevent by discouraging such abuse with the treble damages provision.

In conclusion, the statutory provisions were intended to create a solid legal remedy for a broad class of vulnerable victims of a broad range of abuse because of deficiencies in the existing law. There is no reason the law should not benefit date rape survivors—another class of vulnerable victims.

B. Second-Level Analysis

After the first-level analysis, an interpreting court may still find the legislature's intent ambiguous as to the vulnerable person statute's applicability to date rape claims. If so, the court will use general maxims of construction to resolve the ambiguity. One maxim that Oregon courts use at the second level of analysis is the rule that remedial statutes are broadly construed.[269] This rule permits the court to choose the more liberal construction when more than one reasonable construction is possible and the statute's purpose is remedial.[270] Under this rule's narrowest definition, the statute's purpose is remedial when the statute was enacted to address inadequacies of the common law.[271] Oregon courts have applied this rule even more broadly and found that

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266 *H. Hearings on H.B. 2449*, *supra* note 118, at 24:00.

267 *See* SART HANDBOOK, *supra* note 3, at 1. ("The effects of sexual assault are far-reaching and may include financial consequences in the form of low work productivity or missed time, health consequences in the form of substance abuse or depression, and social consequences in the form of broken relationships, fear, trauma, and a changed world view. The discrepancy between incidence and reporting has significant consequences on community safety, particularly when combined with the small number of cases that result in criminal charges and the even smaller number of sex offenders who are ultimately convicted.").

268 *Id.* at 1.

269 Landau, *supra* note 209, at 724.

270 *Id.* at 725.

271 *Id.* at 724 (citing WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 86 (1768)).

"[s]tatutes pertaining to garnishment of wages to satisfy a debt, workers' compensation benefits, interest and penalties for delinquent taxpayers, the rights and property of married women, unemployment compensation, relief from judgment, professionalization of fire fighters, mechanics' liens, civil procedure, and stray animals—to pick a handful of examples—all" had remedial purposes.[272] Indeed, the Oregon Court of Appeals even found that the permission provision of the vulnerable person statute itself had a remedial purpose.[273]

The vulnerable person statute's purpose is remedial because the legislature wanted to provide a remedy for certain survivors of abuse.[274] Specifically, the original 1995 statute was designed to protect elderly and incapacitated individuals in all environments, beyond the then existing laws that (the legislature believed) already protected them from abuse in nursing homes, residential care facilities, and banks or brokerage houses.[275] Today, it is well recognized that some sexual assault survivors qualify as vulnerable persons.[276] The statute should provide a remedy to date rape survivors, too, because the common law provides an inadequate remedy,[277] and the statute is meant to fill gaps in legal remedies.[278] Given the rule that remedial statutes are broadly

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272 *Id.* at 724–25.

273 Wyers v. Am. Med. Response Nw., Inc., 268 Or. App. 232, 251, 342 P.3d 129, 139 (2014), *aff'd* on other grounds, 360 Or. 211 (2016).

274 *See id.*; *Hearings on S.B. 943 Before the S. Comm. on Judiciary*, 68th Or. Legis. Assemb. (Apr. 23, 1995), minutes at 4.

275 *Hearings on S.B. 943 Before the H. Comm. on Judiciary*, 68th Or. Legis. Assemb. (May 12, 1995), exhibit D (statement of Lisa Bertalan, Attorney at Law) ("The Bill is not meant to target institutional providers such as nursing homes and foster care homes. As the above statistics show, this most often is not where the problem lies and other remedies exist to resolve those abuses.") [hereinafter *H. Hearings on S.B. 943*]. Ms. Bertalan makes two arguments for the exemptions, both of which are worthy of criticism. Her first argument is that the exempted institutions are "not where the problem lies." *Id.* However, even if that is the case, it is no reason to specifically exempt them because they would not be subject to liability for something that doesn't occur there. Her second argument is that there are other remedies against these institutions to resolve such abuses. *Id.* This argument is incongruous with the first—it concedes that abuses do occur within these institutions. Furthermore, if an adequate remedy already exists in these contexts, why would the institutions need to be specifically exempted from the abuse of a vulnerable person remedy? Or, more accurately, why should they care? Indeed, the statistics Ms. Bertalan refers to that purportedly show the problem doesn't lie with institutional care providers tell a different story—namely, that 13% of elder abuse perpetrators are service providers! *Id.* at 4.

276 *Wyers*, 360 Or. at 227–28, 377 P.3d at 580; *Herring*, 255 Or. App. at 319–320, 297 P.3d at 13; Am. Med. Response Nw., Inc. v. Ace Am. Ins., 526 Fed. App'x 754 (9th Cir. 2013) (unpublished table decision).

277 *See supra* Part I.

278 *H. Hearings on S.B. 943*, *supra* note 275, at 4.

construed, if a court reaches the second level of analysis when interpreting the vulnerable person statute's application to date rape, then it should give the statute a liberal construction and find that the statute applies to date rape claims.

III
SPECIAL CONSIDERATIONS: GOVERNMENTAL LIABILITY FOR "PERMISSION"

Because permission claims are a direct liability theory of third-party liability, most third parties will be liable in a similar fashion as employers. The vulnerable person statute itself does not require any special relationship to create liability. Therefore, permission claims can likely be brought against homeowners, vehicle owners, common carriers, and other entities or individuals without the extra requirements found at common law. Permission claims against state and federal governmental institutions, however, would create extra requirements. Both types of institutions could be liable for permission, but attorneys must consider major procedural limitations before filing such a claim. The following Sections explore some of those considerations.

A. Oregon Tort Claims Act (OTCA)

As employers, state governmental institutions could be liable for permission claims through the Oregon Tort Claims Act (OTCA) in a similar, albeit more limited, fashion than other employers.[279] Generally, the Eleventh Amendment of the United States Constitution immunizes states, state agencies, and state officials against lawsuits seeking money damages in federal court.[280] Governmental entities that are not "an arm of the [s]tate," such as municipal corporations, are not immune under the Eleventh Amendment.[281] The OTCA waived the state's Eleventh Amendment immunity by stating that "every public body is subject to civil action for its torts and those of its officers, employees and agents acting within the scope of their employment or duties, whether arising out of a governmental or proprietary function."[282] The OTCA is the "sole cause of action" authorized against the state for the acts of state officers, employees, or agents of

279 *See* OR. REV. STAT. §§ 30.260–300 (2018) (OTCA).

280 *See* TORTS, *supra* note 172, § 28.2-10 for further discussion of the interaction of Eleventh Amendment immunity and the OTCA.

281 Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 280 (1977).

282 OR. REV. STAT. § 30.265(1).

the state or of a public body (collectively, "state actors") acting within the scope of employment.[283]

Claims for abuse of a vulnerable person against the state are precluded from being brought in federal court because of the OTCA's "sole cause of action" provision and the state's Eleventh Amendment immunity.[284] Furthermore, some lower federal courts have extended the OTCA's preclusive effect to abuse of a vulnerable person claims against municipal corporations where no Eleventh Amendment immunity exists.[285] Importantly, these decisions seem to assume the abuse of a vulnerable person claims are seeking to hold the state liable for the abuse itself, and not for permitting the abuse.[286] In which case, it may be reasonable to assume that abuse was not within the course and scope of the state official's employment (as the OTCA requires). Even though there is no backdrop of Eleventh Amendment immunity for municipal corporations,[287] they do fall within the OTCA's definition of public body.[288] Because the OTCA and the vulnerable person statute are both state law, the OTCA may be able to have a preclusive effect over the vulnerable person statute.[289] These lower courts thereby seem to assume that the course and scope requirement of the sole cause of action provision in the OTCA precludes abuse of a vulnerable person claims against any public body, irrespective of Eleventh Amendment immunity.

However, a municipal employee's *permission* of abuse of a vulnerable person could very well be within her scope of employment.[290] The OTCA waives the state's sovereign immunity

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283 *Id.* § 30.265(2).

284 A.G. v. Or. Dep't of Human Servs., 2015 WL 5178707, 14 (D. Or. Sept. 3, 2015) ("The plain text of the OTCA is quite clear that a plaintiff may not pursue a state-law civil action against a state official unless the claim arises out of the OTCA.").

285 Estate of Sawyer v. Cent. Or. Cmty. Coll., 2018 WL 2946417, at *7 (D. Or. 2018) (dismissing abuse of a vulnerable person claim against community college as precluded by the OTCA); Slaughter v. Will, 2016 WL 4087278, at *2 (D. Or. 2016), *adopted sub nom.*, 2016 WL 4087107 (D. Or. 2016) (dismissing abuse of a vulnerable person claim against city police department as precluded by the OTCA).

286 *See Estate of Sawyer*, 2018 WL 2946417, at *7; *Slaughter*, WL 4087278, at *2.

287 Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 280 (1977).

288 OR. REV. STAT. § 30.260(4) (2018).

289 Sanok v. Grimes, 306 Or. 259, 262–63, 760 P.2d 228 (1988).

290 *See supra* Section I.B.4.

from torts, and a permission claim fits the OTCA's definition of tort.[291] The OTCA explicitly waives the state's sovereign immunity for "its *torts* and those of [state actors] acting within the scope of their employment or duties."[292] A "tort" is defined elsewhere within the OTCA as a "breach of a legal duty that is imposed by law . . . [resulting] in injury to a specific person or persons for which the law provides a civil right of action."[293] The permission provision of the vulnerable person statute provides a cause of action against actors who breach the statutorily imposed duty not to permit such abuse.[294] Therefore, permission claims should be considered torts within the meaning of the OTCA. Accordingly, permission claims against municipal corporations should not be precluded in the same per se manner that lower federal courts have applied to abuse of a vulnerable person claims against municipal corporations thus far.

Regardless, federal courts have so far precluded abuse of a vulnerable person claims against state public bodies based on some combination of the OTCA's sole cause of action provision and Eleventh Amendment immunity.[295] Accordingly, attorneys should carefully consider whether to pair an abuse of a vulnerable person claim against a state public body with a 42 U.S.C. § 1983 claim because § 1983 claims must be brought in federal court, and OTCA claims cannot be brought in federal court.[296]

In any case, vulnerable person claims against the state, whether for the abuse or the permission of it, will be subject to more limitations and more procedures than would the same claim against other third parties. For example, suing the state for permission, rather than a private third party, would almost certainly reduce the statute of limitations from seven years to two years.[297] Indeed, the OTCA's statute of limitations

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291 *See* OR. REV. STAT. §§ 30.260–300; *see also id.* § 30.260(8) (defining tort); *id.* § 30.265(1) (waiving sovereign immunity); TORTS, *supra* note 172, § 28.2-3 (defining "public body").

292 OR. REV. STAT. § 30.265(1) (emphasis added).

293 *Id.* § 30.260(8).

294 *Id.* § 124.100(5) ("An action may be brought under this section against a person for permitting another person to engage in physical or financial abuse if the person knowingly acts or fails to act under circumstances in which a reasonable person should have known of the physical or financial abuse.").

295 *See* cases cited *supra* notes 282–85.

296 *See, e.g.*, Estate of Sawyer v. Cent. Or. Cmty. Coll., 2018 WL 2946417, at *7 (D. Or. 2018).

297 OR. REV. STAT. § 30.275(9) (defining OTCA statute of limitations); TORTS, *supra* note 172, § 28.2-3 (defining "public body"); *see also* Dowers Farms, Inc. v. Lake Cty., 288

is two years "notwithstanding any other provision of ORS chapter 12 or other statute providing a limitation on the commencement of an action."[298] Case law confirms that the OTCA's two-year statute of limitations precludes any longer statute of limitations provided by the underlying claim.[299]

The OTCA's damages cap is worth considering independently,[300] because it differs in important ways from Oregon's general cap on noneconomic damages.[301] First, the OTCA's cap encompasses both economic and noneconomic damages.[302] Second, the OTCA allows plaintiffs to bring claims for damages in excess of the damages cap against the individual officer, employee, or agent to hold individually liable for the excess amount.[303] In that regard, the OTCA's damages cap is more like a limit on the state's liability in indemnity for its officers than a cap on damages. Third, the OTCA damages cap is dynamic: the limit that will apply in a particular case depends upon whether the claim is being brought against the state itself or a public body of the state,[304] the number of claimants,[305] and the date on which

Or. 669, 681, 607 P.2d 1361, 1367 (1980) (holding common-law tolling rule applies to OTCA statute of limitations).

298 OR. REV. STAT. § 30.275(9).

299 *See, e.g.*, Van Wormer v. City of Salem, 309 Or. 404, 408–09, 788 P.2d 443, 445–46 (1990) (holding OTCA's two-year statute of limitations applies in wrongful death cases, which otherwise have a three-year statute of limitations).

300 OR. REV. STAT. §§ 30.271–72.

301 *Compare id.* §§ 30.271–72 (listing the OTCA damages capping provisions), *with id.* § 31.710(1) (listing the general damages capping provision).

302 *Id.* §§ 30.271–72.

303 *Id.* § 30.265(4).

304 *Compare id.* § 30.271 (establishing limits for claims against the state), *with id.* § 30.272 (establishing limits for claims against public bodies of the state).

305 *See id.* §§ 30.271–72 (establishing limits for single-claimant awards and higher limits for multiple-claimant awards).

the cause of action arose.[306] In contrast, the general cap limits noneconomic damages awards to $500,000 for all claims.[307]

The *Herring* court held that the trebled award mandated by the vulnerable person statute can legally exceed the general cap.[308] Whether this same outcome is permissible in the context of the OTCA's damages cap is an undecided question. To be sure, *Herring*'s reasoning could apply just as well to OTCA's damages cap as it did to the general damages cap.[309] The trebling provision provides that the court "shall award . . . an amount equal to three times all noneconomic damages."[310] In *Herring*, the court reasoned that the trebled portion of the award was an amount *equal to* three times the noneconomic damages.[311] Therefore, the trebled portion was "more in the nature of a fine" than compensation for noneconomic damages and not subject to the general cap.[312] Because the trebling was not itself an award of noneconomic damages, the court held that it was not subject to the general cap.[313] Furthermore, because the vulnerable person statute was enacted by the legislature after the general damages cap provision, the court thought it was unlikely the legislature would have enacted the trebling provision knowing it would conflict with the damages cap in many cases.[314] A reviewing court may reach a similar conclusion with the OTCA's damages cap by using similar reasoning as the court applied in *Herring*.

But a reviewing court may instead reach the opposite conclusion with the OTCA damages cap because it can be distinguished from the general damages cap based upon statutory language and the date of

306 *See id.* § 30.271 (limiting the state's liability to a single claimant to amounts between $1.5–2 million (depending on the date the claim arose) and to all claimants to amounts between $3–4 million (depending on the date the claim arose) for claims arising on or after December 28, 2007, and before July 1, 2015; and outlining mechanisms for annual increases in the limits for claims arising on or after July 1, 2015); *id.* § 30.272 (limiting the state's liability to a single claimant to amounts between $500,000–666,700 (depending on the date the claim arose) and to all claimants to amounts between $1–1.33 million (depending on the date the claim arose) for claims arising on or after December 28, 2007, and before July 1, 2015; and outlining mechanisms for annual increases in the limits for claims arising on or after July 1, 2015).

307 *Id.* § 31.710(1).

308 Herring v. Am. Med. Response Nw., Inc., 255 Or. App. 315, 326–27, 297 P.3d 9, 16–17 (2013); *see also supra* Part II.

309 *See Herring*, 255 Or. App. at 323, 297 P.3d at 14–15; *see also supra* Part I.

310 OR. REV. STAT. § 124.100(2)(b).

311 *Herring*, 255 Or. App. at 323, 297 P.3d at 14–15.

312 *Id.*

313 *Id.*

314 *Id.*

enactment. The general cap, on the one hand, applies only to a portion of the award—the noneconomic portion.[315] The OTCA damages cap, on the other hand, applies to the entire award and limits the state's liability in a given case based on the number of claims and claimants.[316] Like the general damages cap, the trebling provision of the vulnerable person statute applies to specified portions of the award (e.g., an amount equal to all noneconomic damages) instead of applying to the entire award like the OTCA damages cap.[317] The *Herring* court's reasoning that the trebled portion was not itself an award of noneconomic damages and, accordingly, was not subject to the general damages cap does not apply as well to the OTCA damages cap.[318] Indeed, OTCA's damages cap limits the amount that can be awarded for an entire claim,[319] which could presumably include any trebled portion. Furthermore, unlike the general damages cap, the OTCA damages cap was enacted *after* the trebling provision in abuse of a vulnerable person.[320] It remains to be seen whether a reviewing court would find these distinctions meaningful enough to reach a different conclusion than the court did in *Herring*.

B. Federal Tort Claims Act (FTCA)

The Federal Tort Claims Act (FTCA) likely makes an institution of the United States liable for permission claims against federal government employees if the permission occurs in Oregon and is within the scope of the employee's office or employment.[321] However, there are procedural requirements and many exceptions to consider.

First turning to the FTCA's unique procedural requirements, the plaintiff must submit her claim to the government agency within two

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315 OR. REV. STAT. § 31.710(1).

316 *Id.* § 30.271(2)–(3).

317 *Id.* § 31.710(1).

318 *See Herring*, 255 Or. App. at 323, 297 P.3d at 14–15.

319 OR. REV. STAT. § 30.271(2)–(3).

320 *Compare* Act of Apr. 8, 2009, ch. 67, §§ 3–5, 2009 Or. Laws 1–4 (codified at OR. REV. STAT. §§ 30.271–73) (enacting OTCA damages cap provisions), *with* Act of May 15, 2003, ch. 211, § 1, 2003 Or. Laws 1 (codified at OR. REV. STAT. § 124.100) (enacting treble damages provision).

321 *See* 28 U.S.C. § 1346(b)(1) (2012) ("Claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.").

years after the claim's accrual.[322] That agency then has six months to respond before the plaintiff can file her complaint in court.[323] If the agency denies the claim, the plaintiff must file her complaint in court within six months of the denial notice's mailing.[324] If the agency fails to deny the claim, the plaintiff must file her complaint within six years after accrual begins.[325] Further, the plaintiff must bring her claim in federal court.[326] Finally, only bench trials are allowed.[327]

Next, the FTCA's many exceptions may prevent a permission claim against the federal government, depending upon the facts. For example, abuse in a foreign country is exempt, even if the permission occurs in Oregon.[328] The FTCA also has an exception for claims "arising out of" battery.[329] A court could apply this exception to bar an FTCA claim for permission because proving permission requires proof of abuse, and the permission claim could therefore arise out of battery. However, federal courts in Oregon might not apply the exception in this way because of precedent in the Ninth Circuit on an analogous issue—*viz.*, negligently permitting a battery.[330] When the batterer is a government employee, the Ninth Circuit doesn't apply the exception.[331] Moreover, when the batterer is not a government employee, the exception does not apply in any jurisdiction.[332] Therefore, in Oregon, whether the abuser is a government employee or not, the exception is unlikely to bar an FTCA claim for permitting abuse of a vulnerable person because of the precedent on negligently permitting battery claims. Jurisdictions outside the Ninth Circuit, on the other hand, could apply the exception when the underlying abuse is committed by a government employee because those jurisdictions are not bound by the Ninth Circuit precedent.[333] Therefore, to the extent that permission claims could be

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322 *Id.* § 2401(b).

323 *Id.*; DOBBS, *supra* note 5, § 335.

324 28 U.S.C. § 2401(b).

325 *Id.* § 2401.

326 DOBBS, *supra* note 5, § 335.

327 *Id.*

328 28 U.S.C. § 2680(k); *see also* Sosa v. Alvarez-Machain, 542 U.S. 692, 712 (2004) ("[T]he FTCA's foreign country exception bars all claims based on any injury suffered in a foreign country, regardless of where the tortious act or omission occurred.").

329 *See* 28 U.S.C. § 2680(h).

330 Brock v. United States, 64 F.3d 1421, 1425 (9th Cir. 1995); Bennett v. United States, 803 F.2d 1502, 1505 (9th Cir. 1986).

331 *Brock*, 64 F.3d at 1425; *Bennett*, 803 F.2d at 1505.

332 United States v. Muniz, 374 U.S. 150, 165–66 (1963).

333 DOBBS, *supra* note 5, § 341.

brought in another circuit, the government may be exempt from liability because of the battery exception.

The discretionary decisions exception could also be relevant to a permission claim against the federal government.[334] To oversimplify a complicated legal issue, the exception applies when the government employee's conduct is left to his judgment and the judgment itself is susceptible to policy analysis.[335] In other words, if the government employee could have balanced different decisions that he was authorized to make, the exception will apply and protect the government from FTCA liability. Therefore, the exception could bar a permission claim against the federal government when the conduct constituting permission was susceptible to policy analysis and committed by a government employee with the discretion to make such policy decisions.

The treble damages provision of the vulnerable person statute may or may not apply to a damages award against the federal government. The federal government is not liable for punitive damages.[336] The treble damages provision is not considered punitive for the purposes of Oregon law,[337] but the issue is still undecided for the purposes of the FTCA. For purposes of the FTCA, punitive damages are "damages recognized under traditional common law as punitive, which are generally damages that depend on proof of intentional or egregious misconduct and for which the purpose is to punish."[338] A federal court could find that an abuse of a vulnerable person claim requires proof of intentional or egregious misconduct because it requires proof of, well, abuse of a vulnerable person. But the treble damages award itself doesn't require a heightened level of culpability,[339] and the purpose of the award is not to punish.[340] Accordingly, a federal court should treble any award of economic or noneconomic damages against the federal

334 *See* 28 U.S.C. § 2680(a) (excepting FTCA claims based on a government employee's "exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused").

335 United States v. Gaubert, 499 U.S. 315, 322–25 (1991) (quoting Berkovitz v. United States, 486 U.S. 531, 536–37 (1988); United States v. Varig Airlines, 467 U.S. 797, 813 (1984)).

336 28 U.S.C. § 2674.

337 Herring v. Am. Med. Response Nw., Inc., 255 Or. App. 315, 324–27, 297 P.3d 9, 15–17 (2013).

338 TORTS, *supra* note 172, § 28.3-12.

339 *Herring*, 255 Or. App. at 324–25, 297 P.3d at 15–16.

340 *See supra* Section II.B.2.

court in accordance with the treble damages provision in the vulnerable person statute.[341]

CONCLUSION

Abuse of a vulnerable person is a powerful cause of action that attorneys should use to seek redress for their clients who have been injured by date rape. As explored throughout this Comment, the vulnerable person statute offers vulnerable victims, such as victims of date rape, more favorable standards than the common law offers. In many ways, though, these more favorable standards seem to simply modernize the standard of consent. In my opinion, the optimal standard of consent has changed since the days of Prosser, and rightfully so: modern science has shown that some victims may be physically unable to communicate their lack of consent. Accordingly, a legal standard that lets a potential abuser operate on assumptions when a victim fails to express his lack of consent is unfair and not sufficiently protective in these cases. With this Comment, I have attempted to show how the vulnerable person statute can remedy this situation. Attorneys should use the vulnerable person statute to find remedies for clients who have suffered date rape. Attorneys should also continue to innovate and argue for more clear, just, and efficient standards of consent to apply in more classes of cases.

341 *See* OR. REV. STAT. § 124.100(2) (2018) (explaining the treble damages provision in the abuse of a vulnerable person statute).