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After *Horton*—Damages Caps and the Remedy Clause

I
SCOPE

The cap on noneconomic damages of ORS 31.710(1) was declared unconstitutional in 1999 as a violation of the right to a jury trial under article I, section 17, of the Oregon Constitution.[1] *Lakin*, in turn, was overruled by *Horton v. Oregon Health & Science University*.[2]

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1 Lakin v. Senco Prods., Inc., 329 Or. 62, 987 P.2d 463, *modified*, 329 Or. 369, 987 P.2d 476 (1999), *overruled by* Horton v. Or. Health & Sci. Univ., 359 Or. 168, 250, 376 P.3d 998, 1044 (2016).

2 *Horton*, 359 Or. at 250, 376 P.3d at 1044.

With the removal of the jury trial underpinnings of *Lakin*, the constitutionality of noneconomic damages caps is again in play.

Horton left open the question of whether damages caps—other than those found as part of a broader statutory plan involving sovereign immunity or a quid pro quo—comply with the article I, section 10, remedy clause of the Oregon Constitution. This Article discusses the constitutionality of those caps under article I, section 10. It concludes that caps, such as found in ORS 31.710(1), which are not a part of a larger substituted remedy or quid pro quo, are unconstitutional.

II
THE *HORTON* DECISION

In *Horton v. Oregon Health & Science University* the plaintiff's six-year-old son suffered catastrophic injuries during a botched surgery.[3] Both the doctor who performed the surgery and hospital where the surgery was performed admitted liability. The question of damages was submitted to a jury. The jury returned a verdict, finding that the plaintiff's son suffered over $12 million in economic and noneconomic damages.

Pursuant to the damages cap in the Oregon Tort Claims Act,[4] the trial court reduced the jury's verdict against the hospital to $3 million.[5] However, the trial court denied the reduction as to the doctor, a state employee covered by the Oregon Tort Claims Act, and he appealed. On direct appeal, the Oregon Supreme Court considered the constitutionality of the damages cap under ORS 30.265(1), which limited tort liability of the state and its employees to $3 million.[6]

The court upheld the constitutionality of the damages cap under the Oregon Tort Claims Act. In so holding, it rejected the argument that the cap under ORS 30.265(1) violated the right to a jury trial under article I, section 17, of the Oregon Constitution. To reach that holding, it overruled *Lakin*.[7]

The court, limiting its holding to the Oregon Tort Claims Act, held that the damages cap under that statutory scheme did not violate

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[3] *Id.* at 171, 376 P.3d at 1027.

[4] OR. REV. STAT. § 30.265(1) (2015).

[5] *Horton*, 359 Or. at 172, 376 P.3d at 1002.

[6] *Id.* at 172–73, 376 P.3d at 1002.

[7] *Id.* at 250, 376 P.3d at 1044 (specifically overruling the holding in *Lakin* that a damages cap violates article I, section 17, the jury trial clause, of the Oregon Constitution).

article I, section 10—the remedy clause.[8] It specifically left open the question of whether damages caps that are not part of a larger substituted remedy or quid pro quo[9]—such as those found in ORS 31.710(1)—violate the constitutional guarantee of a remedy under article I, section 10.

> Our holding today is limited to the circumstances that this case presents, and it turns on the presence of the state's constitutionally recognized interest in sovereign immunity, the quid pro quo that the Tort Claims Act provides, and the tort claims limits in this case. *We express no opinion on whether other types of damages caps, which do not implicate the state's constitutionally recognized interest in sovereign immunity and which are not part of a similar quid pro quo, comply with Article I, section 10.*[10]

III
DAMAGES CAP WHICH IS NOT A PART OF A SUBSTITUTED REMEDY OR QUID PRO QUO VIOLATES THE REMEDY CLAUSE

A damages cap such as that found in ORS 31.710(1) is unqualified by any substituted remedy or quid pro quo—it merely reduces the recovery of the most seriously injured plaintiffs to an arbitrary number without regard to the extent of their injuries. As such, it violates article I, section 10, of the Oregon Constitution.

Article I, section 10, of the Oregon Constitution, commonly known as the remedy clause, provides, in relevant part: "every man shall have a remedy by due course of law for injury done to him in his person, property, or reputation."[11]

The remedy clause "limits the legislature's substantive authority to alter or adjust a person's remedy for injuries to person, property, and reputation."[12] It "substantively ensures a remedy for persons injured in their person, property, or reputation."[13]

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[8] *Id.* at 224, 376 P.3d at 1030.

[9] "Quid pro quo" is literally "this for that." Kan. Malpractice Victims Coal. v. Bell, 757 P.2d 251, 259 (Kan. 1988). In evaluating a "quid pro quo" it is important to keep in mind what the "this" is for the "that." Howell v. Boyle, 353 Or. 359, 400, 298 P.3d 1, 24 (2013) (De Muniz, J., dissenting).

[10] *Horton*, 359 Or. at 225, 376 P.3d at 1030 (emphasis added).

[11] OR. CONST. art. I, § 10.

[12] *Horton*, 359 Or. at 173, 376 P.3d at 1002.

[13] Rains v. Stayton Builders Mart, Inc., 359 Or. 610, 639 n.10, 375 P.3d 490, 506 n.10 (2016).

The requirement of a quid pro quo to satisfy the remedy clause is found in prior case law and in well-reasoned authorities from other jurisdictions.

A. Oregon Case Law

In determining the limits the remedy clause places on the legislature, the court in *Horton* noted that the reason for the legislature's action can matter.

> For example, the legislature has sought to "adjust" a person's rights and remedies as part of a larger statutory scheme that extends benefits to some while limiting benefits to others, we have considered that "quid pro quo" in determining whether the reduced benefit that the legislature has provided an individual plaintiff is "substantial" in light of the overall statutory scheme.[14]

Oregon courts have had limited opportunity to evaluate the caps of ORS 31.710(1) with regard to the remedy clause. The statute was fully in effect for only a limited period of time.[15] It was declared unconstitutional as violating both the reexamination clause[16] in 1994[17] and the right to a jury trial in 1999.[18] With one exception,[19] Oregon courts have evaluated damages caps in relation to the caps contained in the Oregon Tort Claims Act.[20]

In each case, the court considered the existence of an adequate remedy—in relation to the damages cap—as a part of a larger remedy or quid pro quo that conferred certain benefits in exchange for the remedy taken away.[21] In some cases the substituted remedy was

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

[15] ORS 31.710(1) remained in effect with regard to claims other than those which existed at common law in 1857. *See* Smothers v. Gresham Transfer, Inc., 332 Or. 83, 23 P.3d 333 (2001), *overruled by Horton*, 359 Or. at 188, 376 P.3d at 1010.

[16] OR. CONST. art. VII, § 3 (amended 1996).

[17] *See* Tenold v. Weyerhaeuser Co., 127 Or. App. 511, 529, 873 P.2d 413, 424 (1994), *rev. dismissed*, 321 Or. 561, 901 P.2d 859 (1995).

[18] *See* Lakin v. Senco Prods., Inc., 329 Or. 62, 67, 987 P.2d 463, 467, *modified*, 329 Or. 369, 987 P.2d 476 (1999), *overruled by Horton*, 359 Or. at 250, 376 P.3d at 1044.

[19] *See* Greist v. Phillips, 322 Or. 281, 906 P.2d 789 (1995).

[20] *See Horton*, 359 Or. 168, 376 P.3d 998; Howell v. Boyle, 353 Or. 359, 298 P.3d 1 (2013); Clarke v. Or. Health Scis. Univ., 343 Or. 581, 175 P.3d 418 (2007); Hale v. Port of Portland, 308 Or. 508, 783 P.2d 506 (1989); Ackerman v. OHSU Med. Grp., 233 Or. App. 511, 227 P.3d 744 (2010).

[21] *See Horton*, 359 Or. at 221, 376 P.3d at 1028; *Howell*, 353 Or. at 376, 298 P.3d at 10; *Clarke*, 343 Or. at 601, 175 P.3d 429; *Hale*, 308 Or. at 523, 783 P.2d at 514–15; *Ackerman*, 233 Or. App. at 527, 227 P.3d at 753–54.

deemed adequate.[22] In others, even with the quid pro quo, the resulting remedy was inadequate and violated article I, section 10.[23]

In his dissent in *Howell*, Justice De Muniz took issue with the adequacy of the substitute remedy. However, he agreed that an essential requirement of a "substantial remedy" under the majority opinion is the presence of a quid pro quo. "[S]ome benefit must be conferred as a 'quid pro quo' in exchange for the remedy taken away."[24]

As noted above, the one exception is *Greist v. Phillips*.[25] In *Greist*, the court upheld the application of the cap found in ORS 31.710, formerly ORS 18.560, and reduced an award of noneconomic damages from $1.5 million to $500,000—or one-third of the jury's award.[26] The court was careful to limit its holding to statutory wrongful death cases.[27] In so holding, the court pointed out the special history of wrongful death actions, which had a cap that, from the time of inception to 1967, never exceeded $25,000.[28] That unique history was cited in distinguishing *Greist* in *Clarke*.[29] The court in *Greist* concluded that the $600,000 total remedy that plaintiff received under ORS 18.560 was "substantial," emphasizing that statutory wrongful death actions in Oregon historically had been subject to low limits of recovery and that the statute contained no limit on economic damages.[30]

In *Hughes v. PeaceHealth* and *Storm v. McClung*, the court took the wrongful death cases out of the remedy analysis altogether, holding there was no cause of action for wrongful death in 1857 (the

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[22] *See Howell*, 353 Or. at 388, 298 P.3d at 17; *Hale*, 308 Or. at 529–30, 783 P.2d at 518–19.

[23] *Horton*, 359 Or. at 224–25, 376 P.3d at 1030; *Clarke*, 343 Or. at 608, 175 P.3d at 433–34; *Ackerman*, 233 Or. App. at 531–33, 227 P.3d at 756–57.

[24] *Howell*, 353 Or. at 406, 298 P.3d at 27 (De Muniz, J., dissenting).

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

[26] *Id.* at 291, 906 P.2d at 795. As noted above, application of the cap in the instant case reduces the noneconomic damages to just under five percent of the jury's award.

[27] *Id.* at 284, 906 P.2d at 791.

[28] *Id.* at 291, 906 P.2d at 795 ("In relation to that history, the present remedy is substantial.").

[29] Clarke v. Or. Health Scis. Univ., 343 Or. 581, 605, 175 P.3d 418, 431 (2007).

[30] *Greist*, 322 Or. at 291, 906 P.2d at 795.

date of the Oregon Constitution).[31] Therefore, article I, section 10, was inapplicable.[32]

With the abandonment of the 1857 "bright line" remedy clause protection, statutory wrongful death cases also fall within the protective cover of article I, section 10.

B. Other Jurisdictions

The court in *Horton* cited to Kansas cases *Kansas Malpractice Victims Coal. v. Bell*[33] and *Miller v. Johnson*,[34] noting the necessity of an adequate quid pro quo to satisfy the state's remedy clause.[35]

In *Kansas Malpractice Victims*, the court held that the Kansas medical malpractice legislation simply limited the plaintiff's remedy with no substitute benefit.[36] Without that quid pro quo, the statute violated the remedy clause.

> The cap and annuity provisions of HB 2661 infringe upon a medical malpractice victim's constitutional right to a remedy by due course of law and no quid pro quo is provided in return. The trial court was correct in holding the caps and the annuity provisions unconstitutional as a violation of [s]ection 18.[37]

In *Miller*, the court further explained a two-step analysis for meeting the remedy clause's quid pro quo requirements.

> A two-step analysis is required for the quid pro quo test. For step one, we determine whether the modification to the common-law remedy or the right to jury trial is reasonably necessary in the public interest to promote the public welfare. This first step is similar to the analysis used to decide equal protection questions under the rational basis standard. For step two, we determine whether the legislature substituted an adequate statutory remedy for the modification to the individual right at issue. This step is more stringent than the first because *even if a statute is consistent with public policy, there still must be an adequate substitute remedy*

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31 *See* Hughes v. PeaceHealth, 344 Or. 142, 152, 178 P.3d 225, 231 (2008), *overruled by* Horton v. Or. Health & Sci. Univ., 359 Or. 168, 227, 376 P.3d 998, 1032 (2016); Storm v. McClung, 334 Or. 210, 222, 47 P.3d 476, 482 (2002).

32 *See Hughes*, 344 Or. at 152, 178 P.3d at 231.

33 Kan. Malpractice Victims Coal. v. Bell, 757 P.2d 251, 264 (Kan. 1988).

34 Miller v. Johnson, 289 P.3d 1098 (Kan. 2012).

35 *Horton*, 359 Or. at 249 n.47, 376 P.3d at 1043 n.47.

36 *Kan. Malpractice Victims Coal.*, 757 P.2d at 264.

37 *Id.* Several years later, the Kansas court held that a later version of the act, which did provide a quid pro quo substitute remedy, did not violate the remedy clause. *See* Bair v. Peck, 811 P.2d 1176, 1191 (Kan. 1991); *see also Miller*, 289 P.3d at 1118.

> *conferred on those individuals whose rights are adversely impacted.*[38]

Likewise, in *Lucas v. United States*, the Texas Supreme Court noted the requirement for some substitute remedy.

It is significant to note that in two of the jurisdictions in which damages caps were upheld, the fact that alternative remedies were provided weighed heavily in the decisions. In *Johnson v. St. Vincent Hospital*, the court stated "[t]he [Indiana] legislature responded by creating the patient compensation fund." Louisiana enacted a statute with a patient compensation fund identical to the Indiana statute.[39]

In *Smith v. Department of Ins.*, the Florida court held that a cap on noneconomic damages of $450,000 violated that state's open courts guarantee because it failed to provide "a reasonable alternative remedy or commensurate benefit[.]"[40]

C. A Quid Pro Quo Is Necessary

Justice De Muniz correctly summarized the state of the law with regard to legislative action altering remedies. "[S]ome benefit must be conferred as a 'quid pro quo' in exchange for the remedy taken away . . . ."[41] The cap of ORS 31.710 provides no quid pro quo and violates the right to a remedy.

IV
THE BENEFITS OF THE REQUIRED QUID PRO QUO MUST FLOW TO THOSE DIRECTLY AFFECTED

When the legislature enacted the cap, the benefits identified were reduced insurance premiums, better rates, predictability in reinsurance markets, and a reduction of the cost of goods.[42] As questionable as those goals may be, they do not satisfy the requirement that the quid pro quo limit benefits to some while extending them to others.[43] As shown in *Horton*, *Howell*, *Clarke*, and *Hale*, the "others" referred to

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[38] *Miller*, 289 P.3d at 1114 (emphasis added) (citations omitted).

[39] Lucas v. United States, 757 S.W.2d 687, 691 (Tex. 1988) (first quoting Johnson v. St. Vincent Hosp., 404 N.E.2d 585, 601 (Ind. 1980); then citing Sibley v. Bd. of Supervisors of La., 462 So. 2d 149, 156, *modified*, 477 So. 2d 1094 (La. 1985)).

[40] Smith v. Dep't of Ins., 507 So. 2d 1080, 1088 (Fla. 1987).

[41] Howell v. Boyle, 353 Or. 359, 406, 298 P.3d 1, 27 (2013) (De Muniz, J., dissenting).

[42] *See* Greist v. Phillips, 322 Or. 281, 299, 906 P.2d 789, 799 (1995) **(**quoting the legislative testimony in support).

[43] Horton v. Or. Health & Sci. Univ., 359 Or. 168, 219, 376 P.3d 998, 1027 (2016).

persons who would benefit from the change rather than to society generally.[44]

In declaring the wrongful death cap in medical malpractice cases unconstitutional, the Florida Supreme Court accurately described "tort reform" caps.

> [S]ection 766.118, Florida Statutes, has the effect of saving a modest amount for many by imposing devastating costs on a few – those who are most grievously injured, those who sustain the greatest damage and loss, and multiple claimants for whom judicially determined noneconomic damages are subject to division and reduction simply based upon the existence of the cap.[45]

In *Best v. Taylor Mach. Works*, the Illinois court described the cap "arbitrarily and automatically reduces the jury's award for a lifetime of pain and disability, without regard to whether or not the verdict, before reduction, was reasonable and fair."[46]

In *Smith v. Department of Ins.*, Justice Overton, in his concurring opinion, argued that a cap of $450,000 was justified on the basis that it would keep premiums down and ensure available and affordable insurance for everyone.[47] The majority rejected that argument in holding the cap violated the remedy clause.

> This reasoning fails to recognize that we are dealing with a constitutional right which may not be restricted simply because the legislature deems it rational to do so. Rationality only becomes relevant if the legislature provides an alternative remedy or abrogates or restricts the right based on a showing of overpowering public necessity and that no alternative method of meeting that necessity exists. Here, however, the legislature has provided nothing in the way of an alternative remedy or commensurate benefit and one can only speculate, in an act of faith, that somehow the legislative scheme will benefit the tort victim.[48]

In *Kansas Malpractice Victims Coal. v. Bell*, the court held that the legislature must provide an adequate substitute remedy "for the right infringed or abolished."[49] The court rejected the argument that the

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[44] *Horton*, 359 Or. 168, 376 P.3d 998; *Howell*, 353 Or. 359, 298 P.3d 1; Clarke v. Or. Health Scis. Univ., 343 Or. 581, 175 P.3d 418 (2007); Hale v. Port of Portland, 308 Or. 508, 783 P.2d 506 (1989).

[45] Estate of McCall v. United States, 134 So. 3d 894, 903 (Fla. 2014). Because the court held the cap violated equal protection, it did not reach the open courts argument. *Id.* at 897. *But see Smith*, 507 So. 2d at 1088 (holding that the cap violated the remedy clause).

[46] Best v. Taylor Mach. Works, 689 N.E.2d 1057, 1075 (Ill. 1997).

[47] *Smith*, 507 So. 2d at 1089, 1096 (Overton, J., concurring).

[48] *Id*. at 1089.

[49] Kan. Malpractice Victims Coal. v. Bell, 757 P.2d 251, 263 (Kan. 1988).

"removal of a remedy can be justified any time by public need."[50] This requirement was reaffirmed in *Miller v. Johnson*, where the court held that a substitute remedy must be "conferred on those individuals whose rights are adversely impacted."[51]

Even if the benefit to the public was considered a permissible justification, several courts and scholars have pointed out that those benefits, as a part of "tort reform"—are illusory. In *Estate of McCall v. United States*, the court questioned whether a legitimate relationship existed between the cap on noneconomic wrongful death damages and the lowering of medical malpractice insurance premiums.[52] The court said,

> even if there had been a medical malpractice crisis in Florida at the turn of the century, the current data reflects that it has subsided. No rational basis currently exists (if it ever existed) between the cap imposed by section 766.118 and any legitimate state purpose. At the present time, the cap on noneconomic damages serves no purpose other than to arbitrarily punish the most grievously injured or their surviving family members.[53]

In *North Broward Hospital District v. Kalitan*, the court declared the cap on noneconomic damages in medical malpractice cases unconstitutional as a violation of equal protection.[54] The court noted that there was no evidence of a continuing medical malpractice insurance crisis.

> We conclude that the caps on noneconomic damages in sections 766.118(2) and (3) arbitrarily reduce damage awards for plaintiffs who suffer the most drastic injuries. We further conclude that because there is no evidence of a continuing medical malpractice insurance crisis justifying the arbitrary and invidious discrimination between medical malpractice victims, there is no rational relationship between the personal injury noneconomic damage caps in section 766.118 and alleviating this purported crisis. Therefore, we hold that the caps on personal injury noneconomic damages provided in section 766.118 violate the Equal Protection Clause of the Florida Constitution.[55]

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[50] *Id.*; *see also* Shannon M. Roesler, Comment, *The Kansas Remedy by Due Course of Law Provision: Defining a Right to a Remedy*, 47 U. KAN. L. REV. 655, 679 (1999).

[51] Miller v. Johnson, 289 P.3d 1098, 1114 (Kan. 2012).

[52] Estate of McCall v. United States, 134 So. 3d 894, 914–15 (Fla. 2014).

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

[54] N. Broward Hosp. Dist. v. Kalitan, 219 So. 3d 49, 59 (Fla. 2017).

[55] *Id.*

Likewise, it is clear from two Wisconsin court opinions, *Mayo v. Wisconsin Injured Patients and Families Compensation Fund*[56] and *Ferdon v. Wisconsin Patients Compensation Fund*,[57] that in a current and previous caps statute, there is no relationship between caps and insurance premiums, doctor retention, or the practice of defensive medicine.[58]

Evaluating the application of caps under an equal protection analysis, in *Arneson v. Olson*, the North Dakota Supreme Court found there was no insurance crisis supporting a $300,000 cap in malpractice cases.[59] The court went further to note that any possible lowered insurance premiums and medical care costs do not form a legitimate quid pro quo. "This *Quid pro quo* does not extend to the seriously injured medical malpractice victim and does not serve to bring the limited recovery provision within the rationale of the cases upholding the constitutionality of the Workmen's Compensation Act."[60]

In *Lucas v. United States*, the Texas Supreme Court answered a certified question from the federal court, holding that the cap on medical malpractice awards of $500,000 was unconstitutional based on a violation of the remedy clause.[61] The court rejected the proffered justification based on insurance rates. "In the context of persons catastrophically injured by medical negligence, we believe it is unreasonable *and* arbitrary to limit their recovery in a speculative experiment to determine whether liability insurance rates will decrease."[62]

The cap in ORS 31.710 (previously ORS 18.560) was declared unconstitutional in 1994 in *Tenold v. Weyerhaeuser Co.*, on the grounds that it violated the reexamination clause of article VII (amended), section 3 of the Oregon Constitution.[63] The statute's

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56 Mayo v. Wis. Injured Patients & Families Comp. Fund, 901 N.W.2d 782, 791–92 (Wis. Ct. App. 2017).

57 Ferdon v. Wis. Patients Comp. Fund, 701 N.W.2d 440, 485–89 (Wis. 2005).

58 For an exhaustive review of scholarly literature showing the lack of connection between caps and the supposed benefits of "tort reform" such as the availability of insurance, lower premiums and doctor retention, see the dissenting opinion of Chief Justice Durham, listing research sources in appendices A and B in *Judd v. Drezga*, 103 P.3d 135, 152–53 (Utah 2004) (Durham, C.J., dissenting).

59 Arneson v. Olson, 270 N.W.2d 125, 136 (N.D. 1978).

60 *Id.* (quoting Wright v. Cent. Du Page Hosp. Ass'n, 347 N.E.2d 736, 742 (Ill. 1976)).

61 Lucas v. United States, 757 S.W.2d 687, 691 (Tex. 1988).

62 *Id.*

63 Tenold v. Weyerhaeuser Co., 127 Or. App. 511, 529, 873 P.2d 413, 424 (1994), *rev. dismissed*, 321 Or. 561, 901 P.2d 859 (1995).

unconstitutionality was affirmed on the alternative ground that, as held by the court in *Lakin v. Senco Products, Inc*., the statute violated the jury trial clause of article I, section 17.[64] There is no showing that the "parade of horribles," which was predicted to occur if caps were not enacted, came to pass in the decades that the caps statute was not applied.

Under ORS 31.170, unlike the worker's compensation system, no-fault auto insurance or the Oregon Tort Claims Act, there is no substituted remedy which extends benefits to the parties affected.[65] Without such a remedy, the statute fails.

To permit the legislature to simply abolish an established remedy, in "some spasm of novel opinion,"[66] would render the remedy clause meaningless and subject remedies to change or elimination based on the legislature's unfettered determination of public good.

V
THE SUBSTITUTED REMEDY MUST BE SUBSTANTIAL

A. Statutes with No Quid Pro Quo

As noted above, without an accompanying substitute remedy or quid pro quo, a cap on damages is not an adequate remedy satisfying article I, section 10, of the Oregon Constitution. This is true regardless of the amount of the cap.

In *Smith v. Department of Ins.*, the court held that a cap of $450,000, without a substituted remedy, violated the constitutional right to access to the courts without regard to the amount of the damages cap.

> Access to courts is granted for the purpose of redressing injuries. A plaintiff who receives a jury verdict for, e.g., $1,000,000, has not received a constitutional redress of injuries if the legislature statutorily, and arbitrarily, caps the recovery at $450,000. Nor, we add, because the jury verdict is being arbitrarily capped, is the

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64 Lakin v. Senco Prods., Inc., 329 Or. 62, 987 P.2d 463, *modified*, 329 Or. 369, 987 P.2d 476 (1999), *overruled by* Horton v. Or. Health & Sci. Univ., 359 Or. 168, 250, 376 P.3d 998, 1044 (2016).

65 Evanhoff v. State Indus. Accident Comm'n, 78 Or. 503, 523, 154 P. 106, 113 (1915) (holding that the worker's compensation system did not violate article I, section 10, of the Oregon Constitution).

66 Eastman v. Clackamas, 32 F. 24, 32 (D. Or. 1887) (Judge Matthew Deady, former president of the Oregon Constitutional Convention, stated, "If [a] then known and accustomed remedy can be taken away in the face of this constitutional provision, what other may not? Can the legislature, in some spasm of novel opinion, take away every man's remedy for slander, assault and battery, or the recovery of a debt?").

> plaintiff receiving the constitutional benefit of a jury trial as we have heretofore understood that right. Further, if the legislature may constitutionally cap recovery at $450,000, there is no discernible reason why it could not cap the recovery at some other figure, perhaps $50,000, or $1,000, or even $1.[67]

Likewise, in *Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt*—dealing with the right to jury trial—the court noted the fact that the cap constituted a "significant amount" cannot save the statute from a constitutional attack.[68]

B. Statutes Providing a Quid Pro Quo

For cases involving a substitute remedy, the court has mandated that the constitutional adequacy of the remedy be judged not merely by the dollar amount involved, but also by taking into account "other factors, such as the existence of a quid pro quo."[69] Unfortunately, except through *ad hoc* comparisons, the court does not give guidance on how to measure those "other factors" to determine if the remaining remedy is inadequate.

We know that a cap of $200,000 for damages exceeding $17 million constitutes a "paltry fraction"[70] and violates the remedy clause.[71] Moreover, we know that a cap of $3 million for damages exceeding $12 million does not violate the remedy clause.[72]

What is missing from the majority opinion is any discussion of the restorative nature of the substituted remedy. In her dissent, Justice Walters points out that the remedy provided must be substantially restorative to satisfy the requirements of article I, section 10.[73] This restorative requirement was applied in *Clarke*.[74]

This restorative requirement of the substituted remedy was further recognized by the court in both *Colby v. City of Portland*, holding that

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[67] Smith v. Dep't of Ins., 507 So. 2d 1080, 1088–89 (Fla. 1987).

[68] Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt, 691 S.E.2d 218, 223 (Ga. 2010).

[69] *Horton*, 359 Or. at 221, 376 P.3d at 1028.

[70] *Id.* ("[T]he legislative remedy need not restore all the damages that the plaintiff sustained to pass constitutional muster, but a remedy that is only a *paltry fraction* of the damages that the plaintiff sustained will unlikely be sufficient.") (emphasis added) (citations omitted).

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

[72] *Horton*, 359 Or. at 225, 376 P.3d at 1030. The *Horton* court pointed out that, in *Clarke*, the court failed to take into consideration the additional interests addressed by the Tort Claims Act. However, the court expressed its agreement with the result in *Clarke*. *Id.* at 224 n.28, 376 P.3d at 1030 n.28.

[73] *Id.* at 288, 295, 376 P.3d at 1065, 1069 (Walters, J., dissenting).

[74] *Clarke*, 343 Or. at 606, 175 P.3d at 432.

an adequate remedy must be a complete remedy, rather than a partial and doubtful remedy,[75] and *Caviness v. City of Vale*, which described a constitutionally adequate remedy as being one that will "provide an equivalent remedy; one reasonably adequate to serve the purpose of the one taken away."[76]

More recently, in *Ackerman v. OHSU Medical Group*, the Oregon Court of Appeals held that capping the plaintiff's damages of roughly $1.4 million at $400,000 violates article I, section 10, because "[n]either the ratio of the capped remedy to the jury-determined remedy, nor the raw numerical difference between them, can be said to 'restor[e] the right that has been injured.'"[77]

Hopefully, in cases following *Horton*, courts will give more attention to the restorative nature of the substituted remedy because the *ad hoc* comparison method is inadequate.

VI
CONCLUSION

The $500,000 cap on noneconomic damages has gone through decades of judicially imposed slumber. Passed in 1987, the cap was first declared unconstitutional in 1994[78] and again in 1999.[79] During that time, case law and articles showed the justifications used to support the cap were largely illusory.

With one hand, *Horton* removed the constitutional underpinnings of the prior holdings that declared ORS 31.710 unconstitutional. With the other, *Horton* invited inquiry as to whether ORS 31.710 violates the remedy clause of article I, section 10—specifically with respect to the lack of a quid pro quo.

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[75] Colby v. City of Portland, 85 Or. 359, 374, 166 P. 537, 542 (1917).

[76] Caviness v. City of Vale, 86 Or. 554, 562–63, 169 P. 95, 98 (1917).

[77] Ackerman v. OHSU Med. Grp., 233 Or. App. 511, 533, 227 P.3d 744, 757 (2010) (quoting Smothers v. Gresham Transfer, Inc., 332 Or. 83, 120, 23 P.3d 333 (2001), *overruled by Horton*, 359 Or. at 188, 376 P.3d at 1010.). Although *Ackerman* is a court of appeals decision, the author, Judge David Schuman, is an authority on the remedy clause. *See* David Schuman, *Oregon's Remedy Guarantee: Article I, Section 10 of the Oregon Constitution*, 65 OR. L. REV. 35, 36 (1986); David Schuman, *The Right to a Reme*dy, 65 TEMPLE L. REV. 1197, 1201–02 (1992).

[78] Tenold v. Weyerhaeuser Co., 127 Or. App. 511, 524–25, 873 P.2d 413, 421 (1994), *rev. dismissed*, 321 Or. 561, 901 P.2d 859 (1995).

[79] Lakin v. Senco Prods., Inc., 329 Or. 62, 987 P.2d 463, *modified*, 329 Or. 369, 987 P.2d 476 (1999), *overruled by* Horton v. Or. Health & Sci. Univ., 359 Or. 168, 250, 376 P.3d 998, 1044 (2016).

A damages cap, such as that outlined in ORS 31.710, merely sets artificial limits on recovery. A damages cap is not a part of quid pro quo or substituted remedies that provide benefits to the affected group, ultimately violating the remedy clause.[80]

[80] After the submission of this article, the Oregon Court of Appeals issued opinions in *Vasquez v. Double Press Mfg., Inc.*, 288 Or. App. 503, 406 P.3d 205 (2017) and *Rains v. Stayton Builders Mart, Inc.*, 289 Or. App. 672, —P.3d— (2018), *on remand*, 359 Or. 610, 375 P.3d 490 (2016). In each case the court used an "as applied" analysis and held that ORS 31.710(1) was in violation of the remedy clause of the Oregon Constitution.