

Oregon’s History on Caps and the Outlook after *Horton*

I.	The Insurance Crisis of the 1980s	623
II.	Governor’s Task Force of 1986.....	624
III.	The Joint Interim Legislative Task Force of 1987	628
IV.	The Noneconomic Damages Cap	631
V.	Status of Tort Reform Since 1987	633

Only in recent years have I wondered about the future of the law reviews.

Just a few years ago I was Editor in Chief of this law review, so I believe in what they have to offer. During law school, I believed that law reviews existed to provide a space for inquiry, discussion, discourse, and disagreement, and that law reviews provided a place to uncover the intricacies in the law that practicing lawyers don’t have the time to uncover themselves before, during, or after a trial. Law review articles are made available to attorneys, judges, and other authors, who, together, can vet ideas, test the limits of those ideas, and help the ones that make sense become standards for American governance into both practice and formal law. In law school, we associated law review work with journal volumes containing seventy-five-page articles, often seeming esoteric and out of touch. We joined the law review and edited the articles to get clerkships, regardless how difficult it was to see their relevance.

In practice, however, law reviews tend to fill another space. Now, as a young practicing attorney, I still struggle to find the articles that

* Nadia Dahab is an attorney practicing trial and appellate litigation in Portland, Oregon. She currently serves as a member and cochair of the Amicus Committee for the Oregon Trial Lawyers Association. Nadia graduated from the University of Oregon School of Law in 2012.

tell me, in a succinct way, what I should do to protect a client from physician-patient privilege? Or the article explaining whom I should name as defendants to ensure not only a favorable judgment, but also one on which I can collect? Or the article telling me how to stabilize the cyclical nature of the insurance industry? And whether or not comprehensive tort reform legislation will serve the ends it's intended to? Most importantly, though, I want a source to explain, without forcing me to wade through the state of English common law during the Founding era, whether an individual will be compensated for the injuries she suffered that are more difficult to calculate, such as emotional distress, pain and suffering, and loss of consortium to her loved ones.

As it turns out, such articles are harder to find in law reviews, but that doesn't mean law reviews are irrelevant to my practice. Indeed, participating in this symposium revealed quite the contrary; it proved to me, at least, that law reviews made, and continue to make, a huge difference in the state of a law, especially an area that's very important to me—the Oregon Constitution.

Law reviews, as it turns out, for decades have been fleshing out the issues that this symposium covers. Since the Oregon legislature passed its comprehensive tort reform bill in the summer of 1987, law reviews have been the primary forum for an important and substantive discussion about whether and how Oregon's Constitution limits the scope of the tort reform bill. The law review articles vetted, tested the limits of, and packaged ideas for our courts and legislators to consider and, in many cases, adopt. Indeed, many of those law review articles are part of the reason we're here today.

But that is not the point of this Article. The point of this Article actually is fairly straightforward—to examine how tort reform happened in Oregon. This Article will take us back to the early part of 1986, when the cyclical nature of the insurance industry was starting to take a toll on both Oregon and the rest of the country. At the time, insured individuals and entities were in a tough spot; insurance companies were either raising rates for, declining to renew, or canceling outright, many types of insurance policies. Nationwide, individuals, small businesses, and local and state governments simply could not find the insurance they needed to operate. The insurance companies placed the blame on the civil justice system.

I

THE INSURANCE CRISIS OF THE 1980S

In the mid-1980s, the insurance industry was going through a crisis regarding both the affordability and availability of liability insurance. Times were tough, as insurance premiums skyrocketed across the country and throughout many sectors of the American economy.¹ Coverage was no longer affordable for many products and services, and some insurers refused altogether to offer coverage at any premium level.² In some sectors, insureds became unable to buy as much insurance as they needed, which proved to be especially true for providers of products or services with a significant amount of excess insurance coverage or higher limits policies.³ As mentioned above, the crisis was not only of affordability, but also of adequacy and availability.⁴

At the state and national level, working groups and task forces were formed to study the cause and extent of, as well as potential solutions to, this crisis. In February 1986, the U.S. Department of Justice, under the direction of the Attorney General, formed an interagency Tort Policy Working Group tasked with “examin[ing] the rapidly expanding crisis in liability insurance availability and affordability” and to recommend potential reforms.⁵ Similar task forces were convened across the states; industry groups, including the American Bar Association, also studied the issues.⁶

The results from the studies identified a number of potential causes for the crisis, some of which were taken more seriously than others. Many of the potential causes focused on the insurance industry itself—either the economic decisions and actions of industry participants or the state laws under which the industry was regulated.⁷

¹ U.S. DEP'T OF JUSTICE, REPORT OF THE TORT POLICY WORKING GROUP ON THE CAUSES, EXTENT AND POLICY IMPLICATIONS OF THE CURRENT CRISIS IN INSURANCE AVAILABILITY AND AFFORDABILITY 6–7 (1986).

² *Id.*

³ *Id.* at 15.

⁴ *Id.*

⁵ *Id.* at 1.

⁶ See generally AMERICAN BAR ASS'N, REPORT OF THE ACTION COMMISSION TO IMPROVE THE TORT LIABILITY SYSTEM (1987).

⁷ See also *id.* at 3 (“[A]nalysis of the need for tort reform is complicated by the fact that the business practices of the liability insurance industry reflect a wide range of economic factors in addition to the performance of the tort system.”); *id.* (“[C]ritics of the insurance industry contend that tight regulation of industry competition and insurers’ ratemaking practices is the only way to bring the costs of liability insurance under control.”).

Other causes, however, focused on the civil justice system and the expansion of tort law in the years preceding the crisis. Industry participants, in particular, blamed the issues of affordability and availability of insurance on recent increases in frivolous tort lawsuits, high litigation costs, and dramatic increases in the sizes of jury verdicts.⁸ As one study explained,

when critics point out that tort doctrine has steadily evolved towards a more expansive system of compensation, they are clearly correct Traditional immunities to tort liability have been abolished, doctrinal bars to recovery of emotional distress and economic loss have been lifted, absolute defenses (such as contributory negligence) have been qualified, and entire areas of injury-generating activity, such as defective products and medical malpractice, have experienced major doctrinal change.⁹

And so began what we now know as the tort reform movement of the 1980s. Across the United States, state legislatures began to draft comprehensive legislation aimed at rolling back, or at least curtailing, the expansive scope of compensation that tort law afforded to insureds. State legislatures set out to abolish the collateral source rule, place limits on a plaintiff's ability to seek or be awarded punitive damages, and create statutory caps on awards of noneconomic damages, among many other reforms.

The tort reform movement in Oregon mirrors that of many other states. Early inquiries into the causes of, and potential solutions to, the insurance crisis were documented by various independent groups—the most notable of which was a task force formed by then-Governor Viktor Atiyeh.¹⁰ Although the official report and recommendations formulated by that task force were not considered by the legislative task force convened the following year, many of the ideas were considered and, in some cases, implemented.

II

GOVERNOR'S TASK FORCE OF 1986

In January 1986, while the national insurance crisis played out in the background, Governor Atiyeh appointed nineteen individuals—all

⁸ *Id.* (“Those concerned about the performance of the tort system argue that large legal fees and other administrative costs, sharp rises in the magnitude of tort claims, and the unpredictable nature of the system, require drastic revisions in tort law.”).

⁹ *Id.* at 4.

¹⁰ GOVERNOR'S TASK FORCE ON LIAB., FINAL REPORT ON RECOMMENDATIONS TO EASE THE LIABILITY INSURANCE STRAIN IN OREGON (1986) [hereinafter GOVERNOR'S TASK FORCE].

members of insurance, legal, medical, science, or business industries—to what was termed the “Task Force on Liability Insurance.”¹¹ Notably, no legislators were on the Governor’s Task Force.¹² The Executive Order establishing the Task Force directed it to study and provide recommendations to:

- [d]etermine a means of controlling the cost of liability coverage for businesses, professional persons and other citizens;
- [d]etermine a means of assuring availability of such liability coverage; [and]
- [d]etermine a means of reducing the cost of insuring, while assuring that legitimate claimants are compensated fairly and equitably.¹³

After a series of work sessions, the Governor’s Task Force issued the report and recommendations.¹⁴ The report explained that the Governor’s Task Force “undertook examination of the liability insurance problem with the resolve that the legal profession, the insurance profession, and the private sector equally shared in the responsibility of providing effective solutions to ease the liability insurance strain on Oregonians.”¹⁵ The recommendation identified one primary problem contributing to rate hikes for insurance premiums as “[h]igh awards for non-economic (pain and suffering) damages.”¹⁶ It explained:

Under the present system, juries have unlimited discretion in awarding damages for “pain and suffering.” These awards are classified as non-economic and are intended to compensate the victim for mental, physical, or emotional distress related to an injury. However, as noted in case examples, such an award can more often reflect a jury’s “sympathy” for the victim rather than its actual evaluation of the “loss.” This has resulted in volatile and unpredictable awards that directly affect the cost and availability of liability insurance.¹⁷

As a potential solution, the Governor’s Task Force proposed to “[l]imit awards for non-economic (pain and suffering) damages,”

¹¹ *Id.*

¹² *See id.* at 1–2. It’s notable, indeed, that the Governor’s Task Force did not involve any members of the Oregon legislature, representatives from sections of the bar, or other representatives outside of the insurance and small business industries.

¹³ *Id.* at 1.

¹⁴ *See generally id.*

¹⁵ *Id.* at 2.

¹⁶ *Id.* at 4.

¹⁷ *Id.*

noting that “[n]on-economic damages are those subjective injuries suffered as a result of bodily injury, death, loss of consortium, loss of care, comfort, companionship or society and interference with a person’s usual day-to-day activities apart from gainful employment.”¹⁸ The Task Force proposed “[t]hat in any civil action seeking damages arising out of bodily injury, including emotional injury or distress, death, loss of care, comfort, companionship and society and loss of consortium, non-economic damages shall not exceed \$100,000 in the aggregate for all plaintiffs.”¹⁹

However, noneconomic damage awards were not the only problem the Governor’s Task Force identified. It also identified a number of other problems—both with the civil justice system and the insurance industry—that it believed were contributing to the insurance crisis.²⁰ Those included:

Areas for Reform in the Civil Justice System:

- Problem: Large “lump sum” payments to victims
Solution: Develop a system to allow periodic payment of damages.
- Problem: Joint and several liability
Solution: Abolish the doctrine of joint and several liability.
- Problem: Abuse of the application of punitive damages
Solution: Eliminate punitive damages from civil action except where permitted by statute.
- Problem: Abuse of the contingency fee system by attorneys
Solution: Limit attorney contingency fees to certain percentages.
- Problem: The collateral source rule
Solution: Repeal the collateral source rule in a manner that requires offsets for all nonreimbursable collateral benefits against damages awards.
- Problem: Frivolous lawsuits
Solution: Increase sanctions to deter the filing of frivolous lawsuits.

¹⁸ *Id.* at 4.

¹⁹ *Id.* at 5.

²⁰ *Id.* at 5–19.

- Problem: The absence of a mechanism for a plaintiff to determine the “technical” merits of his or her case before filing a claim
Solution: Require affidavits of qualified experts to be filed with the complaint.
- Problem: The physician-patient privilege
Solution: Require waiver of the privilege within ninety days of filing a civil complaint in order to present evidence of physical injury or damages.
- Problem: The availability of recovery to those injured in the course of committing a felony
Solution: Prohibit individuals from recovering for injuries sustained during the commission of a felony.
- Problem: The unavailability and unaffordability of D&O insurance for charitable and non-profit organizations
Solution: Limit the liability of directors and officers for charitable and non-profit organizations.
- Problem: Product liability
Solution: Study and “vigorously suppor[t]” national proposal to limit liability for product defects.²¹

Areas for Reform in the Insurance Industry:

- Problem: Lack of competition
Solution: Adopt a temporary rule calling for prior approval of rate filings showing a deviation of more than twenty-five percent.
- Problem: Unavailability of coverage
Solution: Take initial steps to inaugurate a voluntary Market Assistance Plan (MAP) to establish availability of insurance for citizens, businesses, and local governments.
- Problem: Insufficient funding and staff to the State’s Insurance Division to conduct compliance reviews of rate filings
Solution: Allocate additional resources to the Insurance Division and streamline the rate review and filing process.

²¹ *Id.* at 5–15.

- Problem: Insurance Commissioner lacks authority to initiate immediate actions against insurance companies acting in violation of state law
Solution: Enact legislation providing such authority to the Commissioner.
- Problem: Use of investment income in rate structuring
Solution: Disclosure by insurance companies using investment income as a factor in pricing.²²

Ultimately, the Oregon legislature considered problems related to those identified by the Governor's Task Force, but those recommendations were never submitted to the legislature for full consideration. Instead, the Oregon legislature convened its own legislative task force on liability insurance, which took on a similar scope of work.

III

THE JOINT INTERIM LEGISLATIVE TASK FORCE OF 1987

In January 1987, the Joint Interim Task Force on Liability Insurance issued a final action report, which was then submitted to the legislature's Senate Judiciary Committee for consideration.²³ Its recommendations, while similar to those of the Governor's Task Force, differed in the following ways:

- Caps on Damages: The Joint Interim Task Force proposed a \$500,000 cap on noneconomic damages with an exclusion for cases of serious physical impairment and serious disfigurement.
- Joint and Several Liability: Rather than abolish the doctrine entirely, the Joint Interim Task Force proposed to limit joint liability by making defendants who are less than twenty percent liable not responsible for other solvent defendants' shares of the judgment.
- Punitive Damages: The Joint Interim Task Force recommended making punitive damages uninsurable as a matter of public policy; requiring half of any punitive damages award to go to

²² *Id.* at 15–19.

²³ See JOINT INTERIM TASK FORCE ON LIABILITY INSURANCE, FINAL ACTIONS TAKEN: TORT ISSUES (1987). Members of Joint Interim Task Force were Senator Mike Thorne (Cochair), Representative Bob Shiprack (Cochair), Senators Bill Frye and Tony Meeker, Representatives Stan Bunn, Darlene Hooley, and Dick Springer, as well as Phil Bogue, Wendell E. Gronso, Joan Mazo, Don McClave, Roy Skoglund, M.D., and Dominick Vetri. *Id.* at 1.

the state general fund or other public entity; placing a twenty-five percent limit on attorney contingency fees for punitive damages awards; requiring a plaintiff to make a case for punitive damages before evidence of the defendant's net worth could be introduced at trial; and requiring clear and convincing evidence of malice or wanton and reckless disregard of the health, safety, and welfare of others.

- Collateral Source Rule: Requiring that collateral sources be used to reduce the judgment except with respect to life insurance, privately purchased insurance policies, retirement or pension plan benefits, or any payment the plaintiff is obligated to repay.
- Immunity for Directors and Officers: Adopting a Delaware statute that allows shareholders of for-profit corporations to immunize their directors for ordinary negligence under the business judgment rule.
- Cap on Attorneys' Fees: The Joint Interim Task Force recommended not capping attorneys' fees in contingent-fee arrangements, leaving in place the one-third cap on contingent fees in medical malpractice cases.
- Period Payments of Damages Awards: The Joint Interim Task Force rejected this proposal.
- Frivolous Lawsuits: The Joint Interim Task Force recommended adopting Federal Rule of Civil Procedure 11, which would allow courts to impose costs, attorneys' fees, or other expenses against an attorney (personally) for filing a frivolous complaint.
- Mandatory Arbitration: The Joint Interim Task Force recommended a mandatory arbitration program for all cases up to \$25,000.
- Abolishing Discovery and Motions Practice: the Joint Interim Task Force recommended doing away with discovery, third-party practice, and the use of summary judgments in tort cases. It also recommended making sanctions against parties abusing discovery motions mandatory.²⁴

The Joint Interim Legislative Task Force also recommended a number of changes to industry regulations and practices, including:

²⁴ *Id.* at 1–4.

- Permitting the Insurance Commissioner to create a Market Assistance Plan (MAP) and a Joint Underwriting Association (JUA) to assist with assessing the availability of coverage throughout the state.
- Permitting the Board of Architects to establish its own insurance fund modeled after the lawyers' professional liability fund.
- Repeal of a statute prohibiting formation of groups for the purposes of purchasing group liability insurance.
- Disclosure of profit and loss data by insurance companies to the Oregon Insurance Division.
- Changes to the report laws for medical malpractice and liquor liability claims.
- A law requiring prior approval of all rates that either increase or decrease by more than twenty percent.
- A law requiring notice and an explanation for the cancellation or nonrenewal of both individual policies or entire lines of insurance by insurance companies.
- A law requiring that Oregon insurance rates be set using Oregon data whenever such data is available and sufficient.
- Creation of the Department of Insurance, to replace the Insurance Division, and allocation of funds for staff and support services.
- Creation of a board to advise the Insurance Commissioner on liability insurance issues.
- Creation of an interim legislative committee to oversee substantive and organizational changes to the Oregon Insurance Code.²⁵

The Joint Interim Task Force recommended a number of other changes, including changes to liability for liquor and the regulation of certain provisions in construction contracts; to insurance coverage for individuals convicted of DUII; and, more generally, to the insurance industry, on issues of reporting notice, claims settlement, and unfair trade practices.²⁶

²⁵ *Id.* at 4–5.

²⁶ *Id.* at 5–8.

IV THE NONECONOMIC DAMAGES CAP

The proposed cap on noneconomic damages that the Joint Interim Task Force presented to the legislature, which the legislature ultimately adopted, read as follows:

Except for claims subject to [the Oregon Tort Claims Act] and [the Oregon Workers' Compensation Act], in any civil action seeking damages arising out of bodily injury, including emotional injury or distress, death or property damages of any one person including claims for loss of care, comfort, companionship and society and loss of consortium the amount awarded for non-economic damages shall not exceed \$500,000.²⁷

The cap did not pass the legislature without question, however. Substantial debate in both houses focused on a number of issues, including the amount of the cap itself and what portion of damages awards would fall within, and thus be subject to, the cap. Witnesses testified that the cap would adversely affect settlements and would “have a big impact on negotiating for injured people,” because it would function as either a target for negotiation—vastly undervaluing some claims of injured Oregonians—or it would act as a disincentive to settle any case that was worth close to the dollar value of the cap.²⁸ To some, the cap was perceived as likely to “effectively prevent some clients from getting anything at all,” identifying young children and women as likely to be the most severely impacted by the legislation because both populations potentially lacked any, or at least sufficiently, predictable economic future or history.²⁹ And, of course, absent any provision making the cap subject to inflation, witnesses made clear that “it [would] ge[t] worse every year.”³⁰ Lyle Velure, representing the Oregon Trial Lawyers Association, explained:

[T]he cap proposal [is] the ultimate in a regressive tax because it puts the heaviest burden on those least able to handle it: the small handful of people most seriously injured . . . [T]his bill is also discriminatory toward women, homemakers because they have no job from which to predict economic loss. [Mr. Velure] cited a recent case he'd handled which, under the terms of this bill, would have resulted in a catastrophic loss for the family when a young housewife and mother was killed. . . . [The] bill would result in an

²⁷ OR. REV. STAT. § 31.710(1) (2015).

²⁸ *Hearing on S.B. 323 and S.B. 324 Before the H. Comm. on Judiciary Subcomm. 1*, 64th Leg. 12 (Or. May 5, 1987) (testimony of Charles Burt, Salem attorney).

²⁹ *Id.*

³⁰ *Id.*

increase in premiums because it will significantly raise the cost of litigation to both plaintiff and defendant. It has had that effect in California and Canada because in almost every case, it becomes a battle between experts to prove economic damages. Vocational experts, economists, etc., will need to be called in to give their varied opinions. This costs a great deal.³¹

Even Insurance Commissioner Ted Kulongoski³² could not support the cap. In his testimony before the House Committee on Judiciary, Commissioner Kulongoski “could not answer” the question posed by Representative Dave Dix—whether the cap “would . . . affect affordability and availability, and to what degree.”³³ The minutes of Subcommittee One of the House Judiciary Committee reflect Commissioner Kulongoski’s response:

COMMISSIONER KULONGOSKI said he could not answer that. He said this is a very complicated issue that needs to be addressed. He felt he had identified the problem. He did not think this was the way to resolve the problem; he understood that it was good politics, but whether in fact it will have any impact, he does not think it will.

COMMISSIONER KULONGOSKI said he wished that all the time and money that has been spent on the issue of tort reform had been spending sitting down and looking at the civil justice system, trying to figure out a way for the consumers of this state and this country to have the court system available to them at an affordable price and in a system that was not so complicated. He felt they were going to break the system down the way we are going with it – that needs to be addressed.

COMMISSIONER KULONGOSKI said people are always talking about statistics, and California is used as an example – that cases there increase so many here or there. But that is making an assumption that there was an adequate and proper number filed originally as the base. COMMISSIONER KULONGOSKI said he just knew, as a practitioner, a citizen, and a consumer, the process is too costly, too time consuming, and too complicated. He did not think that is the way justice is suppose[d] to be. And he felt it was having a very disastrous effect on this country’s development. COMMISSIONER KULONGOSKI said he wished there were another forum to look at this.³⁴

³¹ *Hearing on S.B. 323 Before the Senate Comm. on Judiciary*, 64th Leg. 9 (Or. Jan. 29, 1987) (testimony of Lyle Velure, Oregon Trial Lawyers Association).

³² Kulongoski later served as an Associate Justice of the Oregon Supreme Court and, later, Governor of the State of Oregon.

³³ *Hearing on S.B. 323 and S.B. 324 Before the H. Comm. on Judiciary Subcomm. 1*, 64th Leg. 20 (Or. Apr. 28, 1987).

³⁴ *Id.* at 21.

Both houses in the Oregon legislature voted for the cap. It became law and went into effect later that year. It contained no provision for a cost-of-living adjustment or any adjustment for inflation. Today, the noneconomic damages cap remains at \$500,000.³⁵

V

STATUS OF TORT REFORM SINCE 1987

Since 1987, law reviews have been airing the latest substantive discussion on the impacts, effects, and scope of Oregon's comprehensive tort reform law. Just one year after the noneconomic damages cap became law, the *Willamette Law Review* published an article authored by Kathy Graham, then-associate dean and law professor at Willamette University College of Law, titled, *1987 Oregon Tort Reform Legislation: True Reform or Mere Restatement?*³⁶ In the article, Professor Graham had the foresight to predict most of the issues facing us today—the extent to which various provisions of the Oregon Constitution limit the application of the cap on noneconomic damages to jury verdicts, the same with respect to awards of punitive damages, and the impact that products and liquor liability laws have on the availability and affordability of liability insurance.³⁷

In the early 1990s, David Schuman—University of Oregon professor and later court of appeals judge—authored an article published in the *Temple Law Review* entitled *The Right to a Remedy*, which detailed the historical origins of Oregon's remedy clause and ways in which similar provisions of other state constitutions have been construed.³⁸ On the proverbial heels of Professor Schuman's article came the Oregon Supreme Court's decision in *Lakin v. Senco Products, Inc.*, which invalidated Oregon's cap on noneconomic damages for the foreseeable future by holding that the cap violated the jury trial clause of article I, section 17, of the Oregon Constitution.³⁹ Today, under *Horton v. Oregon Health & Science*

³⁵ See OR. REV. STAT. § 31.710 (2015).

³⁶ Kathy T. Graham, *1987 Oregon Tort Reform Legislation: True Reform or Mere Restatement?*, 24 WILLAMETTE L. REV. 283 (1988).

³⁷ *Id.*

³⁸ David Schuman, *The Right to a Remedy*, 65 TEMPLE L. REV. 1197 (1992).

³⁹ *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).

University,⁴⁰ the Oregon Supreme Court rolled back, effectively overturning, its holding in *Lakin* and revived the Oregon Constitution's remedy clause⁴¹ as the only substantive protection on compensatory damages for injured Oregonians.

Notwithstanding efforts to change them, the terms of the law have stayed the same since it went into effect in 1987. The law's impact on injured Oregonians, however, has changed significantly over the years. Cases have made their way through the courts and the courts have considered, adopted, overruled, or departed from new ideas relating to the scope of our constitution's jury trial and remedy guarantees. Notably, many of these new ideas were developed in the space that law reviews have provided for academic discussion, highlighting the importance, even today, of law reviews in the practice and development of our state laws.

Absent future legislative change, we should let that discussion continue—let new ideas be vetted, limits tested, and new rules elevated to the status law. Allowing that process to continue through article publication in law reviews will serve the ends of American governance—to compensate those who are injured and to bring justice to those whose rights have been infringed.

⁴⁰ *Horton*, 359 Or. at 250, 376 P.3d at 1044.

⁴¹ OR. CONST. art. I, § 10.