Symposium Introduction

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Setting the Stage

Thank you; I always wanted to be an emcee. Almost exactly one year ago today, the Oregon Supreme Court issued its decision in *Horton vs. Oregon Health & Science University*.[1] It's that case that inspires today's symposium, although inspires may not be the appropriate word. It's like saying that Pearl Harbor inspired World War II. I think a more appropriate word would be "provoked."

In *Horton*, the plaintiff's son suffered serious injuries as a result of conceded negligence on the part of two state employee physicians who worked at Oregon Health and Sciences University (OHSU).[2] The jury returned a verdict for the plaintiff, finding economic damages of $6,071,190.38 and noneconomic damages in the amount of $6 million.[3] OHSU filed a motion asking the court to apply a provision of the Oregon Tort Claims Act that caps damages in actions against the state and its agencies and employees at $3 million.[4] The court granted that motion with respect to OHSU on the ground that it has

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

2 *Id.* at 171, 376 P.3d at 1001.

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

4 *Id.*

sovereign immunity.[5] But, with respect to one of the doctors, the court held that applying the damage cap to the plaintiff denied her right to a jury trial,[6] as well as her right to a remedy in due course of law.[7] Jury trials are guaranteed under two provisions of the Oregon Constitution: article I, section 17, "In all civil cases, the right to Trial by Jury shall remain inviolate",[8] and article VII (amended), section 3, "In actions at law, where the value in controversy shall exceed $750, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court in this state, unless the court can affirmatively say there is no evidence to support the verdict."[9] Article I, section 10, the relevant provision in article I, section 10, the remedy clause, provides that "[j]ustice shall be administered . . . completely"—a phrase that's notably absent from all of the case law on article I, section 10, ("[j]ustice shall be administered . . . completely . . . and every man shall have remedy by due course of law for injury done him in his person, property, or reputation").[10]

In the process of deciding *Horton*, the court overruled two relatively recent precedents: *Lakin v Senco Products*,[11] a 1999 case regarding the right to jury trial, and *Smothers v. Gresham Transfer*,[12] a 2001 case about article I, section 10. To justify overruling these two cases, the court states, "We do not overrule our precedents lightly."[13] Nobody who's been paying attention to what the Oregon Supreme Court has been doing recently can take that statement seriously. Off the top of my head, I can think of the *Stranahan* case,[14] the *Savastano* case,[15] the *Couey* case,[16] the *Hall* case,[17] *Ashbaugh* case,[18] the *Unger* case,[19] and that's just scratching the surface.

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

6 *Id.* at 247, 376 P.3d at 1042.

7 *Horton*, 359 Or. at 218–19, 376 P.3d at 1027; OR. CONST. art. I, § 10.

8 OR. CONST. art. I, § 17.

9 OR. CONST. art. VII, § 3 (1910, amended 1996).

10 OR. CONST. art. I, § 10.

11 Lakin v. Senco Prods., Inc., 329 Or. 62, 987 P.2d 463, *modified*, 329 Or. 369, 987 P.2d 476 (1999), *overruled by Horton*, 359 Or. at 250, 276 P.3d at 1044 (2016).

12 Smothers v. Gresham Transfer, Inc., 332 Or. 83, 23 P.3d 333 (2001).

13 *Horton*, 359 Or. at 186, 376 P.3d at 1009.

14 Stranahan v. Fred Meyer, Inc., 331 Or. 38, 11 P.3d 228 (2000) (overruling Lloyd Corp. v. Whiffen, 315 Or. 500, 849 P.3d 446 (1993)).

15 State v. Savastano, 354 Or. 64, 309 P.3d 1083 (2013) (overruling State v. Freeland, 295 Or. 367, 667 P.2d 509 (1983)).

16 Couey v. Atkins, 357 Or. 460, 355 P.3d 866 (2015) (overruling Yancy v. Shatzer, 337 Or. 345, 97 P.3d 1161 (2004)).

The court does spell out in *Horton* a number of factors that it will take into consideration in deciding whether or not to overrule precedent.[20] They specify that these factors are not exclusive: Was the earlier case dictum? Did the earlier case lack analysis? Was the earlier case clearly wrong? Was the earlier case inconsistent with other earlier cases? Have people relied on the earlier case? How old is the earlier case?

In other words, I think what the court said was that they can pretty much overrule cases whenever they want to. The actual criterion seems to me to be that they can overrule when all of the justices who were on the case that they're overruling have retired.

In overruling *Smothers*, the court rejected a template that the court had set out in *Smothers*. The court in *Smothers* said that the first question was whether or not the plaintiff has suffered an injury to an "absolute common-law right" that was protected by the constitution when it was drafted in 1857;[21] if so, has the legislature provided a "constitutionally adequate substitute remedy"?[22] This obviously left a lot of unanswered questions: What exactly is an absolute common-law right? What is the appropriate level of generality to apply when trying to determine if the right was protected at common law in 1857? For example, is the appropriate inquiry: was there a remedy for negligence, or was there a right to remedy for unreasonably unsafe products, or was there a right to a remedy for injury inflicted by a defective nail gun? These questions are unanswered, and they allowed for a lot of flexibility, some would say, on the part of the court.

The new rule in *Horton*, under article I, section 10, cases, is that these cases seem to fall into three categories. Category one [cases occur when] the legislature continues to recognize a duty but provides no remedy or one that is "paltry."[23] These legislative initiatives are unconstitutional. Again, no definition of what might be "paltry." Paltry has substituted for insignificant, or actually, from some of the earlier case, emasculated. A second category of case, what I call "quid

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[17] State v. Hall, 339 Or. 7, 115 P.3d 908 (2005) (overruling State v. Quinn, 290 Or. 383, 623 P.2d 630 (1981)).

[18] State v. Ashbaugh, 349 Or. 297, 244 P.3d 360 (2010) (overruling State v. Holmes, 311 Or. 400, 813 P.2d 28 (1991)).

[19] State v. Unger, 356 Or. 59, 333 P.3d 1009 (2014) (overruling State v. Hall, 339 Or. 7, 115 P.3d 908 (2005)).

[20] Horton v. Or. Health & Sci. Univ., 359 Or. 168, 187, 376 P.3d 998, 1010 (2016).

[21] *Id.* at 216, 376 P.3d at 1026.

[22] *Id.* at 176, 376 P.3d at 1004.

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

pro quo" cases, occur when the legislature has tinkered with a remedy as part of a larger statutory scheme that gives benefits to some people while limiting them to others, in which case the court will weigh the reduced benefit and determine whether it is substantial in light of the overall statutory scheme.[24] I suspect that this category was described with workers' compensation statutes in mind. The third category occurs when the legislature has modified or eliminated common-law duties; then, the court must consider the reason for the legislative change measured against the extent to which the legislature has departed from the common law.[25] I believe that's a fancy way of talking about ad hoc balancing—what was the state's interest, what is the degree of harm inflicted upon the individual. *Horton* discarded the 1857 bright-line rule.

With respect to jury trial, the court simply overruled the earlier case, *Lakin v. Senco Products*.[26] *Lakin* had held that the amount of damages is a fact found by a fact finder—that the right to a jury trial is "inviolate." So, limiting noneconomic damages to $500,000 where plaintiffs had been awarded $2 million for one plaintiff and $876,000 for the other plaintiff deprived them of a right to a jury trial.[27] *Horton*, after an exhaustive review, and, I might say, exhausting review, of earlier cases in history going back to Blackstone and beyond, the court holds, "Neither the text nor the history of the jury trial right suggests that it was intended to place a substantive limitation on the legislature's authority to alter or adjust a party's rights and remedies."[28]

The result of *Horton* is that the plaintiff in that case eats, out of pocket, economic damages to the tune of $3 million—that's economic damages—and noneconomic damages to the tune of $6 million. As you can tell from the roster of today's program, the case has attracted a certain amount of attention around the country. The rest of the program today will examine these constitutional guarantees as they apply to damage caps in Oregon and elsewhere.

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[24] *Id.*

[25] *Id.*

[26] Lakin v. Senco Prods., Inc., 329 Or. 62, 987 P.2d 463, *modified*, 329 Or. 369, 987 P.2d 476 (1999), *overruled by Horton*, 359 Or. at 250, 276 P.3d at 1044 (2016).

[27] *Id.* at 79, 987 P.2d at 474.

[28] *Horton*, 359 Or. at 250, 376 P.3d at 1044.