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**OREGON SUPREME COURT RULES TORT REFORM
CAP AS APPLIED TO PUBLIC EMPLOYEES
IS UNCONSTITUTIONAL**

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The Oregon Supreme Court recently held that a plaintiff could pursue liability claims against individual public employees of public entities. The Court further stated that the damages cap in the Oregon Tort Claims Act (OTCA) violated the Remedy Clause of the Oregon Constitution. *Jordaan Michael Clarke v. Oregon Health Sciences University*, No. SC S053868, (Ore. Sup., December 28, 2007).

In February 1998, Jordaan Michael Clarke (Clarke) was born at Oregon Health & Science University (OHSU) with a congenital heart defect. In May 1998, Clarke returned to OHSU for surgical repair of his heart defect. After a successful surgery, Clarke was placed in a surgical intensive care unit, where he suffered permanent brain damage from oxygen deprivation.

In 2001, Clarke sued OHSU and the medical staff personnel who treated Clarke for more than \$17 million to pay for his lifetime care, loss and future wages and non-economic damages. Pursuant to provisions in the OTCA, defendants moved to substitute OHSU as the sole defendant in the action. The trial court granted defendants' motion. Clarke then filed a second amended complaint, naming OHSU as the sole defendant. In its answer, OHSU admitted negligence and subsequently moved for judgment on the pleadings, contending that the trial court should enter judgment in favor of Clarke against OHSU in the amount of \$200,000 (\$100,000 in economic damages and \$100,000 in noneconomic damage), which was OHSU's maximum liability under the OTCA. The trial court granted OHSU's motion and entered judgment against OHSU in the amount of \$200,000.

Clarke appealed, arguing that the substitution of OHSU for the individual defendants was improper. Clarke further argued that the entry of judgment of \$200,000 denied him the right to a remedy in violation of Article I, section 10 of the Oregon Constitution, as well as the right to a jury trial under Article I, section 17. The Court of Appeals rejected Clarke's arguments as to his claim against OHSU because OHSU would have been immune from liability at common law. *Clarke v. OHSU*, 206 Or.

App. 610, 615-623, 138 P.3d 900 (2006). However, the Court of Appeals accepted Clarke's argument with respect to the substitution of OHSU as the sole defendant under the OTCA. *Id.* at 623-34. The Court of Appeals agreed that the OTCA did not provide a constitutionally adequate remedy in this case, explaining that "recovery of less than two percent of one's economic damages – particularly given the nature of the injuries alleged – is a remedy 'incapable of restoring the right that has been injured.'" *Id.* at 626 (quoting *Smothers v. Gresham Transfer, Inc.*, 332 Or. 83, 119-20, 23 P.3d 333 (2001)). The Court of Appeals concluded that, as applied to this case, the OTCA violated the Remedy Clause of the Oregon Constitution and reversed and remanded with instructions to reinstate the claims against the individual defendants. *Id.* at 634. Both parties appealed.

The Court affirmed the ruling of the Court of Appeals as to Clarke's claim against OHSU. The Court found that OHSU was a state-created entity that performs functions traditionally performed by the state. As a result, the Court agreed with the Court of Appeals' conclusion that OHSU would have been entitled to immunity at common law. When an entity would have been immune from liability at common law, the legislature's choice to limit that entity's liability does not violate the Remedy Clause of the Oregon Constitution. *Hale v. Port of Portland*, 308 Or. 508, 518, 783 P.2d 506 (1989). Therefore, the OTCA damage limitation, as applied to Clarke's claim against OHSU, did not violate the Remedy Clause.

The Court also affirmed the ruling of the Court of Appeals as to Clarke's claim against the individuals. The Court held that the elimination of a cause of action against public employees or agents in the OTCA, as applied to Clarke's claim against the individual defendants, violated the Remedy Clause because the substituted remedy (the suit against OHSU with damages capped at \$200,000), was an emasculated version of the remedy that was available at common law. The Court observed that that the Remedy Clause was intended by the framers of the Oregon Constitution to preserve the right to obtain a remedy for injury to interests in person, property, and reputation under circumstances in which Oregon law provided a remedy for those injuries when Oregon ratified the Constitution. *See Smothers*, 332 Or. at 124. However, the Court noted that the Remedy Clause does not eliminate the power of the legislature to vary and modify both the form and the measure of recovery for an injury, as long as it does not leave the injured party with an "emasculated" version of the remedy that was available at common law.

Applying this rationale, Clarke alleged (and defendants admitted for purposes of this proceeding) that Clarke suffered economic and noneconomic damages in excess of \$17 million. The Court noted that when Oregon adopted its remedy guarantee, Clarke would have been entitled to seek, and if successful, to recover, both types of damages from the individual defendants. The 1991 amendment to the OTCA capped a remedy of \$100,000 in economic damages and \$100,000 in noneconomic damage against the public body only, and entirely eliminated any claim against the individual tortfeasors by requiring substitution of those individual defendants by the public body as the sole defendant. The Court found that there was nothing discernable from Oregon's history, or from the

nature, form, or the amount of recovery available for the preexisting common-law claim, that “would permit the Court to conclude that the limited remedy for permanent and severe injury caused by medical negligence that is now available under the OTCA meets [the Remedy Clause] requirement” of the Oregon Constitution.

The *Clarke* decision does not affect the amount of recovery available to plaintiffs in direct actions against public entities/agencies. In those instances, the public entity can invoke the damage limitations available to them under the OTCA. However, the *Clarke* decision will certainly open public employees to many more liability claims and if, as in *Clarke*, there is no adequate replacement remedy, there would be no monetary cap on the individual claims. This may lead to a significant increase in defense costs, particularly in defending the individual claims, significant increases in indemnity exposure for the insurer if the individuals are insured under the policy, and significant increases in exposure for the entity/agency to the extent the individual is acting within the scope of their employment. In addition, since Oregon law provides employees must be provided insurance coverage (indemnified) against allegations of negligence, and since the *Clarke* decision essentially eliminates the OTCA monetary limits, public entities may have to insure their employees for unlimited damages. Numerous new coverage questions, such as who is an insured, will lead to an increase in secondary coverage cases.

Also, the *Clarke* decision will almost certainly be addressed in the February session of the Oregon Legislature. Any modification of common law remedies by the legislature must be “adequate” when compared to the common law remedy available when the Oregon Constitution was drafted (in 1857). Currently, the maximum amount of jury awards under the OTCA are \$50,000 for property damage, \$100,000 for economic and noneconomic damages, and a total of \$500,000 for all claims arising out of a single incident.

To discuss any questions you may have regarding the opinion discussed in this Alert, or how it may apply to your particular circumstances, please contact William Knowles in Seattle at 206-224-1289 or wknowles@cozen.com.