

# RECENT CASE NOTES



## *No Cap on Damage Claim Against OHSU Employees*

In *Clarke v. Oregon Health Sciences University*, A124560 (July 5, 2006), the court of appeals held that the Oregon Tort Claims Act's exclusive remedy provision deprived plaintiff of his remedy against Oregon Health and Science University (OHSU) employees in violation of Article I, Section 10 of the Oregon Constitution. The court upheld the \$200,000 cap with respect to OHSU.

As an infant, plaintiff suffered brain damage while under the care of OHSU. He sued OHSU and seven OHSU employees for medical malpractice, alleging over \$12 million in economic damages. On motion of OHSU, the trial court substituted OHSU as the only defendant in place of the individual defendants pursuant to ORS 30.265(1). On OHSU's motion for judgment on the pleadings, the court entered judgment against it for \$200,000—the maximum recoverable against a public body.

The primary question for the appellate court was whether plaintiff would have had an uncapped remedy against OHSU and the individual defendants at common law in 1857. The court found that the claims against OHSU would have been barred. Sovereign immunity at common law extended to "instrumentalities of the state government." OHSU, created by statute with core functions as a provider of educational and health care services on behalf of the state of Oregon, falls within that definition. As a result, OHSU would have been protected by sovereign immunity in 1857, and the \$200,000 cap did not deprive plaintiff of

a remedy against OHSU.

The court of appeals resolved the issue differently with respect to the liability of OHSU employees under the exclusive remedy provision of ORS 30.265(1). Sovereign immunity did not extend to the employees of state instrumentalities in 1857. Thus, at common law, plaintiff would have had an uncapped remedy against those defendants. And, distinguishing a prior supreme court holding that a \$100,000 recovery against the City of Portland was an adequate substitute remedy on a \$600,000 economic damage claim, the court rejected the notion that \$200,000 was an adequate or "substantial" substitute remedy. Taking the allegations of more than \$12 million in economic damages as true, the court found that a recovery of only \$200,000 "emasculated" plaintiffs' remedy against the OHSU employees. The court of appeals did not specifically hold that the constitutional issue boils down to the size of plaintiffs' prayer for economic damages. However, the court did find that, depending upon the facts presented at trial in support of plaintiffs' actual economic damages, the constitutional issue of ORS 30.265(1) might not be implicated.

In sum, the court of appeals affirmed in part and reversed in part the decision of the trial court. The case was remanded with instructions to reinstate the judgment against OHSU for \$200,000 and to reinstate the claims against the individually named OHSU employees. ♦

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