



DEPARTMENT OF JUSTICE
GENERAL COUNSEL DIVISION

MEMORANDUM

DATE: January 2, 2008

TO: Agency Directors

CC: General Counsel Division AAGs

FROM: Donald C. Arnold, Chief Counsel
General Counsel Division, by Dave Hicks, Deputy

SUBJECT: *Clark v. Oregon Health Sciences University*
DOJ File No. 107-130-GA0083-06

Dave Hicks

On December 28, 2007, the Oregon Supreme Court issued its decision in *Clarke v. Oregon Health Sciences University*. In my July 14, 2006 memorandum, I alerted you that this decision could significantly alter the application of the Oregon Tort Claims Act, ORS 30.260 to 30.300.

The Oregon Tort Claims Act ("OTCA" or "the Act") imposes a trade-off, or "substituted remedy," on persons with tort claims against the state: The Act waives the state's historic sovereign immunity and thereby allows a tort victim to recover damages from state instrumentalities (like Oregon Health Sciences University) *up to a specified amount*, but prohibits a victim from recovering *any* damages from the individual employee or employees whose negligence caused his or her injury.

At common law, the victim of most kinds of torts would have a right to recover damages from the wrongdoer personally, and the elimination of that right by the OTCA and other statutory schemes has been challenged several times under Article I, section 10, of the Oregon Constitution, commonly known as the "Remedy Clause." In those cases, the Supreme Court has declared that a substituted remedy is constitutional if it is "substantial," but not if it "emasculates" the original remedy and is "incapable of restoring the right that has been injured." In *Jensen v. Whitlow*, 334 Or 412 (2002), the Court upheld the OTCA's substituted remedy as a general proposition, but declined to decide whether it might violate the Remedy Clause in particular cases or types of cases, known as an "as-applied" challenge.

Clarke is such a challenge, and the Court of Appeals held that application of the Act's substituted remedy under the circumstances of that case would be unconstitutional. *Clarke v.*

Oregon Health Sciences University, 206 Or App 610 (2006). OHSU appealed to the Supreme Court.

The state and other Oregon public bodies have eagerly awaited the Supreme Court's decision, less for the outcome of *Clarke* itself as for the decision's rationale and thus the continued viability of substituted remedies in other cases. As discussed below, the Supreme Court came to the same conclusion as the Court of Appeals. Unfortunately, however, the decision provides no clear guidance for other cases.

The Supreme Court Decision

Jordaan Clarke was born at OHSU and soon had surgery to repair a heart defect. Although the heart surgery was successful, the baby suffered tragic and profound brain damage while in intensive care due to lack of oxygen. The baby's guardian sued OHSU, five doctors and two others on the baby's behalf, claiming that their negligence caused the baby's injuries. The suit asked for over \$11 million to cover the estimated cost of caring for the child for the rest of his life and over \$6 million in other damages.

Pursuant to the OTCA, the trial court dismissed the individuals and substituted OHSU as the sole defendant. OHSU then admitted negligence and agreed that damages were at least equal to \$200,000, the child's maximum potential recovery under the Act. The trial court entered judgment against OHSU for that amount. The plaintiff appealed, contending that in this circumstance the Remedy Clause does not permit elimination of the right to recover from the individual defendants, even in exchange for substituting OHSU as defendant.

The Court of Appeals agreed, focusing on the huge disparity between the victim's maximum recovery under the Act and potential damages claim against OHSU doctors and other staff: "By any reasonable measure, 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.'" 206 Or at 626.

The Supreme Court has now come to the same conclusion for what appears to be essentially the same reason. The opinion states:

We view plaintiff's economic damages of over \$12 million as representative of the enormous cost of lifetime medical care currently associated with permanent and severe personal injuries caused by the *medical* negligence of a state officer, agent, or employee. * * * Yet, the legislature has completely eliminated an injured person's preexisting right to obtain a full recovery for those damages from the individual tortfeasors who negligently caused the injuries.

As we have explained, the legislature is authorized under Article I, section 10, to vary or modify the nature, the form, or the amount of recovery for a common-law remedy. * * * However, there is simply nothing that we can discern from our

state's history, or from the nature, the form, or the amount of recovery available for the preexisting common-law claim, that would permit this 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 Article I, section 10, remedy requirement.

* * * [t]he elimination of a cause of action against public employees or agents in ORS 30.265(1), as applied to plaintiff's claim against the individual defendants, violates the Remedy Clause of Article I, section 10, because the substituted remedy against the public body, as specified in ORS 30.270(1), is an *emasculated* version of the remedy that was available at common law. (Slip opinion at 34-36.) (Emphasis added.)

The difficulty for state government and others is that the Supreme Court opinion does little to clarify when a substituted remedy will or will not be constitutional. To say that a substituted remedy is unconstitutional if it "emasculates" the historic remedy implies that a substituted remedy may lawfully provide less than an historic remedy so long as it is not too much less, but provides no insight on where to draw the line. The opinion simply confirms that which was predictable from *Jensen* and had in fact been predicted by the Court of Appeals: A potential \$17 million claim against doctors for medical malpractice cannot be extinguished on the basis of a \$200,000 claim against OHSU.

Justice Balmer wrote a concurring opinion, joined by Justice Kistler, which emphasizes that medical negligence generally results in much greater damage than other types of public employee negligence; that physicians and other medical practitioners ordinarily carry malpractice insurance coverage in amounts considerably greater than \$200,000; and that nothing in the Remedy Clause would prohibit the OTCA from setting caps on recovery that differ in amount according to the type of claim. The concurring opinion also asserts that the workers' compensation system satisfies the Remedy Clause, because its caps on damages are offset by a lower threshold for recovery and other advantages for injured parties.

Likely practical effect of the opinion on tort coverage for state agencies

The *Clarke* decision does not increase the amounts that may be awarded as damages against state agencies, as agencies. See ORS 30.270 (setting a cap on amounts recoverable). Agencies continue to have the benefit of sovereign immunity as it existed in 1857, meaning that the sovereign state cannot be sued without its consent. The OTCA waives sovereign immunity only to the extent of the cap. The cap therefore remains in effect as to state agencies, and Risk Management will continue to provide coverage for agencies.

On the other hand, as discussed below, the state generally has a statutory duty to indemnify state employees acting within the course and scope of their employment. Therefore, Risk Management may need to increase its assessment for tort claim coverage until the ramifications of the *Clarke* decision become clearer.

Likely practical effect of the opinion on tort coverage for state employees

For over 30 years, Oregon law has stated that the state “shall” defend and indemnify employees for their torts. Therefore, even though the OTCA limits have never applied in federal civil rights suits, the state has nevertheless indemnified employees for all damages awarded. The *Clarke* decision does not alter the state’s obligation to defend and indemnify its employees. The Department of Justice will continue to defend, and the state will continue to indemnify, employees in tort claim litigation regardless of the amount of damages alleged or awarded. Of course, the state has never indemnified employees who were acting outside the course and scope of their employment, or whose actions constituted malfeasance in office or willful or wanton neglect of duty. That will not change.

What’s next?

The *Clarke* decision should have no effect on cases where the plaintiff’s damages are clearly less than, or very close to, the OTCA cap. In larger cases, however, the decision will cause uncertainty about when the OTCA’s substituted remedy is close enough to an historic remedy to be constitutional and when it is not. The legislature will almost certainly give consideration to raising the cap for at least some types of claims, such as medical malpractice, and perhaps for all claims. That would eliminate the uncertainty on some additional cases, but not all. However high the cap were set, plaintiffs with claims for which a jury could conceivably award a “significantly” greater amount as damages are likely to challenge the substituted remedy. Those cases will be more difficult to settle within OTCA limits, and, if a trial judge declines to dismiss the individual defendants, it may be necessary to try the case to a verdict in order to get the issue resolved on appeal.

The *Clarke* decision raises several other issues that will need to be sorted out absent a clarifying opinion from the Court. For example:

1. How are lower courts to deal with the fact that *Clarke* is based on a hypothetical? That is, both appellate courts assumed the amount of the child’s damages to be as alleged in the complaint, but Article I, section 10, protects remedies, not claims, and juries seldom award damages in the full amount alleged. Does *Clarke* mean that trial and appellate courts may need to do two Remedy Clause analyses, first deciding whether to dismiss the individual defendants based on the disparity between the cap and the damages alleged in the complaint; and, then, if the individuals are not dismissed or are reinstated by a successful appeal, deciding whether to uphold a verdict against the individuals based on the disparity between the cap and the damages that are actually awarded by the jury?

2. Can the constitutional adequacy of the OTCA’s substituted remedy be determined on any kind of a categorical basis, such as for all medical malpractice cases, negligent driving cases and so forth, or can it only be determined on an individualized, after-the-injury-is-known basis, i.e., by comparing an injured party’s actual damages with the relevant cap?

3. If constitutional adequacy can only be determined on an individualized basis, as the courts begin drawing lines for when a cap "emasculates" an historic remedy, will plaintiffs on one side of the line be entitled to recover all of their damages from individual defendants while plaintiffs on the other side recover none of theirs. That is, if a substituted remedy capped at \$200,000 is unconstitutional as applied to, say, \$600,000 (or more) in proven special damages, would a plaintiff with those damages be entitled to recover \$600,000 but a plaintiff with \$599,999 in damages be limited to \$200,000?

At this point, it is impossible to predict how the Supreme Court might go about clarifying those and other issues in a later decision. The concurring opinion's approval of the workers compensation system is a categorical determination and implies that a substituted remedy is constitutional if it provides the average injured party with a remedy that is equal to or better than his historic remedy, even if that is not so for some individuals. Its discussion of medical malpractice also suggests approval for that line of analysis, but we will have to wait to see whether anything comes of it. As we develop clearer answers to the questions raised by *Clarke*, we will provide you with additional information. In the meantime, if you have questions or comments, please contact your agency's assigned attorney or me.

DNH:DCA:naw/GEN324384