

## Oregon Supreme Court Declines to Apply \$500,000 Cap on Non-Economic Damages to Birth Injuries Claim

In *Klutschkowski v. Peacehealth, et al.*, No. 160615518 (Ore., Sept. 26, 2013), the Oregon State Supreme Court unanimously held that an Oregon statute capping non-economic damages at \$500,000 was unconstitutional as applied to a case asserting common law claims for injuries sustained by an infant during labor and delivery.

The case involved infant Braedon Klutschkowski, whose right arm was “substantially impaired” by complications during his 2004 birth. Braedon’s parents filed a medical malpractice action against the delivering physician, their obstetrician (who provided all prenatal care for Braedon, but was unavailable at the time of his birth), and both doctors’ employers. After a lengthy trial, the jury found that the defendants “were negligent in one or more ways alleged by the plaintiffs,” and awarded the Klutchkowskis economic damages of \$557,881 and \$1.375 million in noneconomic damages.

Defendants immediately asked the trial court to cap the non-economic award at \$500,000 in accordance with ORS 31.710, which states in pertinent part:

. . . in any civil action seeking damages arising out of bodily injury, including emotional injury or distress, death or property damage of any one person including claims for loss of care, comfort, companionship and society and loss of consortium, the amount awarded for noneconomic damages shall not exceed \$500,000.

Plaintiffs objected, and argued that applying the cap would violate their right to a remedy under Article I, section 10, of the Oregon Constitution, as well as their right to a jury trial under Article I, section 17, and Article VII, section 3. The trial court agreed, and denied defendants’ request. Defendants then appealed, and the Court of Appeals imposed the statutory cap, reducing the noneconomic damages to \$500,000. Plaintiffs then appealed to the Oregon State Supreme Court.

On review, the Oregon Supreme Court held that the statutory cap was unconstitutional as applied to plaintiffs’ claims. In doing so, the court applied the formula for analyzing claims that implicate the right to a remedy clause of the Oregon Constitution, originally adopted in *Smothers v. Gresham Transfer, Inc.*, 332 Ore. 83 (2001). The court started by considering whether the plaintiff alleged an injury to one of the absolute rights protected by Article I, section 10, i.e., the rights recognized when the constitution was drafted in 1857. The court reasoned that if one could file a claim for the alleged injury under Oregon common law, the remedy clause would apply and the legislature would be barred from abrogating that right, absent a provision for a “constitutionally adequate substitute remedy for the common-law cause of action for that injury.” If one could not file the claim at common law, the analysis would end, and the statutory damages cap would apply.

The Oregon Supreme Court found that Braedon’s injuries occurred after Braedon’s head had been delivered, i.e., after he was no longer in his mother’s womb. The court noted that the common law in 1857 did not acknowledge a cause of action for a child who was injured during the course of the mother’s pregnancy, while in the womb. However, in Braedon’s case, he was no longer in the womb, and accordingly, could recover damages for the physical injuries he suffered during delivery. Stated differently, at the time of his injury Braedon was “born” and should be treated as any other person for the purposes of this type of cause of action. Therefore, the Oregon legislature could not limit Braedon’s remedy unless a “constitutionally adequate substitute” was given. Because no substitute was given, the cap was held unconstitutional as applied to plaintiff’s recovery.

A secondary issue was also briefed and discussed, regarding whether an instruction on informed consent was properly administered to the jury before deliberations. Defendants argued that



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plaintiffs' claim for "lack of informed consent" was not viable in this case, and no instruction should have been given to the jury on this point. Defendants took the position that a vaginal delivery is not a "procedure or treatment" that requires consent within the meaning of Oregon's informed consent statute. However, as the court noted, defendants failed to show any prejudice arising from the instruction. Because no special verdict form<sup>1</sup> was submitted to the jury, there was no way to ascertain whether the jury found in plaintiffs' favor on the issue of informed consent, particularly given that the plaintiffs asserted multiple specifications of negligence for which they received one award. Accordingly, the court held that any potential error in instructing the jury was harmless.

Based upon this ruling, we can expect further constitutional challenges to the \$500,000 non-economic damages cap in Oregon under the theory that the legislature is not authorized to limit non-economic damages awarded for claims recognized at common law. Moreover, given the lengths to which the Oregon Supreme Court went to find that Braedon's claim would have been recognized at common law, this ruling has the potential to substantially erode the availability of the cap for other types of bodily injury claims.

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**Please feel free to contact Shauna Martin Ehlert in Cozen O'Connor 's Seattle office if you have any questions or need assistance with this issue. Contact Shauna at [sehlert@cozen.com](mailto:sehlert@cozen.com) or 206-224-1251.**

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<sup>1</sup> A Special Verdict Form is a tool used to itemize the verdict, and asks the jury to identify the exact amount of damages that are awarded as to each specific claim asserted.