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Background Brief on ...

Tort Reform

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A tort is defined as a civil wrong, other than a breach of contract, for which a court provides a remedy in the form of damages, usually money. A tort action is not a criminal proceeding. In a tort action, one party (the plaintiff) sues another party (the defendant), alleging that the defendant owed a duty to the plaintiff, the defendant violated that duty, and the plaintiff suffered a loss as a result of that breach of duty. Tort actions may involve a lawsuit to recover for injuries in a car accident, to recover against a doctor or lawyer for injuries caused by negligence (malpractice), or to recover against the manufacturer or seller of a product for injuries caused by the product (products liability).

The phrase "tort reform" refers to recent efforts to modify the system of determining fault and setting damages. Historically, this system was created through court decisions and was called common law. It has its roots in England and was adopted and modified by early American state and federal courts. It is this system that Oregon inherited at the time of statehood. Since then, Oregon, like all other states, has modified this system either through legislation or court decision.

Tort Reform in Oregon

The Oregon Legislature has undertaken extensive efforts to change tort law in Oregon twice in the last 20 years. The first effort was during the 1987 Legislative Session and the last during the 1995 Legislative Session.

The 1987 effort included:

- Requiring that half of all punitive damages be paid to the Criminal Injuries Compensation Account
- Protecting drug manufacturers from punitive damages if a drug is properly manufactured and labeled
- Placing a cap on non-economic damages (later declared unconstitutional)
- Placing limitations on joint and several liability (determining damages when two or more persons are at fault)
- A defense in a civil action based on ordinary negligence that the injured party was engaged in criminal conduct that would constitute at least a Class B felony
- Increasing the plaintiff's burden of proof to clear and convincing evidence that a person was served alcoholic beverages when

visibly intoxicated

- Increasing the per-occurrence State Tort Claims Limitations to \$500,000

The 1995 effort included:

- Mandating arbitration in most cases involving less than \$50,000
- Encouraging settlement conferences
- Penalizing a wide variety of frivolous lawsuits and poorly prepared court documents and motions
- Mandating attorney fee and court cost awards in certain cases
- Providing criteria for the discretionary award of court costs and attorney fees in a wide variety of other cases
- Modifying punitive damage awards, limiting attorney shares to 20 percent of punitive damage awards
- Modifying private rights of action under racketeering statutes and a number of other court procedures and evidentiary rules

Ballot Measure 81

In July 1999, the Oregon Supreme Court decision of *Lakin v. Senco Products Inc.* found ORS 18.560 (1), a provision from the 1987 Legislative Assembly's efforts to change Oregon's tort system by capping non-economic damages, to be unconstitutional. In doing so, the court held that the Legislature did not have the authority to cap damages under one of the original provisions of the Oregon Constitution, Article I, section 17 that provides, "In all civil cases the right of a Trial by jury shall remain inviolate." The court said that this constitutional provision guaranteed a jury trial in those civil actions for which the common law provided a jury trial at the time the Oregon Constitution was adopted in 1857. The provision, therefore, prohibited the Legislature from interfering in a jury's assessment of non-economic damages.

The 1999 Legislative Assembly responded to the court's decision by passing House Joint Resolution 2, a referral to the voters that, if passed, would have allowed the Legislature to impose limits on damage awards. House Joint

Resolution 2 appeared on the ballot as Measure 81 during the May 2000 primary and was defeated.

Clarke v. OHSU

In December 2007, the Oregon Supreme Court found in *Clarke v. OHSU* the cap on liability for employees of Oregon Health & Science University unconstitutional under the circumstances. ORS 30.270 capped the liability for public bodies including their employees. In *Clarke*, damages were in excess of \$17 million and ORS 30.270 capped damages at \$200,000. The Oregon Supreme Court found the cap, as applied in *Clarke*, in violation of the Remedy Clause of Article I, section 10 of the Oregon Constitution.

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