Medical Liability Reform in Oregon:

A Legal Analysis of Several Alternatives Under Oregon Law

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Executive Summary

The Oregon Health Authority (OHA) is conducting a study about and developing recommendations for reducing costs attributable to defensive medicine and the over-utilization of health services. *See* Or Laws 2011, ch 602, § 16 (HB 3650) (assigning task). OHA's recommendations must allow OHA clients to seek redress for harms caused by medical malpractice. *Id.* As part of these efforts, the OHA has asked the Oregon Department of Justice (DOJ) for a legal analysis of four issues under Oregon law.

Those issues and DOJ's summary conclusions are as follows:

1. *Extending agent status and corresponding liability coverage through the Oregon Tort Claims Act to those who serve OHA's clients:*

A "tort" is a civil breach of a non-contractual duty. Medical malpractice is a type of tort. By statute, the legislature may declare that, at least for Oregon Tort Claims Act purposes, those who provide medical services to OHA clients, (including a coordinated care organization (CCO)) act as agents of the state when they provide those services. The legislature may promise to indemnify these agents against tort claims brought by OHA clients. Unless that promise is conditioned upon the availability of future discretionary appropriations, however, the legislature must appropriate or otherwise provide for funds sufficient either to purchase insurance or to establish and maintain an actuarially sound self-insurance fund that covers the claims.

2. *A path, if possible, for capping malpractice damages awarded against those who provide medical services to OHA's or other public agencies' clients:*

The term "damages" refers to money claimed by or ordered to be paid to a person as compensation for an injury. Damages caps potentially run afoul of three sections of Article I of the Oregon Constitution: the jury trial (section 17), remedy (section 10), and privileges and immunities clauses (section 20). An amendment to the Oregon Constitution is the only way to insure that a cap on damages will be upheld in *all* medical negligence cases (or in *all* cases where the medical care is publicly-funded).

If a tort claim did not exist at common law in 1857, the year the people adopted the original Oregon Constitution, then the legislature may impose a damages cap on that type of claim. Examples of claims that did not exist as common law claims in 1857, according to the Oregon appellate courts, include those for wrongful death and for prenatal injuries.

A statute that substitutes the state for its agent as a defendant in a lawsuit and that caps the damages in that suit, as does the OTCA, does not violate the jury trial provision or the privileges and immunities clause and does not *facially* violate the remedy clause. But such a statute may violate the remedy clause when it is applied to certain situations, such as when the damages incurred are especially large and the cap results in an "emasculated" remedy for the injury.

3. *Whether the joint and several liability statutes need to be amended so that CCOs assume the risk of their actions but are not liable for the actions of others*:

"Joint and several liability" generally refers to the responsibility of each defendant who is found to be at fault to pay the entire judgment owed to the plaintiff, regardless of his or her degree of fault relative to that of the other defendants. The Oregon legislature eliminated joint and several liability in 1995. Now, under ORS 31.610, defendants are responsible only for their own percentage of fault (except in certain circumstances when the award from one defendant is deemed uncollectible and proportionally reallocated to the remaining defendants). In light of ORS 31.610, there probably is no need for joint and several liability *per se* to be clarified in Oregon.

But CCOs may potentially be held responsible for the torts of their providers on a theory of vicarious liability, which holds principals responsible for the torts of their agents or apparent agents. No Oregon case addresses vicarious liability of HMOs or other managed care organizations. But Oregon courts have held hospitals and other entities to be vicariously liable for the torts of physicians, even when the physicians were independent contractors. If a CCO

holds out a provider as its agent and the patient relies on that holding out in seeking care, Oregon courts may determine that CCOs are vicariously liable for any harm that arises from the provider's medical negligence.

4. *The possibility of implementing an administrative system for compensating harm resulting from medical malpractice:*

We consider two types of administrative systems. Under the first type, a medical panel acts as a pretrial screening forum for malpractice claims. If the panels are mandatory and purport to issue binding medical negligence decisions, they violate the jury trial provision of the Oregon Constitution. But if the parties voluntarily participate in a medical panel process, the panel may issue a binding medical negligence decision. If the panels are mandatory but issue only non-binding decisions (either subsequently admissible or non-admissible in evidence), they likely are constitutional. If the medical panels are mandatory only for OHA clients and issue non-binding decisions, then they likely do not violate the Oregon Constitution.

The second type is an administrative compensation system (ACS) that is the exclusive forum for the adjudication of medical malpractice claims. The compensability standard is lower than negligence. While the compensation awards are substantial, they are either limited, subject to schedules, or issued pursuant to guidelines. The ACS may provide a constitutionally inadequate remedy in certain cases and is subject to "as-applied" challenges on that basis. The ACS does not violate the jury trial provision and should survive a challenge that it is *facially* invalid under the remedy clause.

Scope of Report

This report addresses Oregon law only. Oregon's medical assistance program is administered in accordance with federal standards applicable to the state's receipt of federal funds under Title XIX of the Social Security Act (Medicaid) and Title XX (State Children's Health Insurance Program) as well as state laws. HB 3650 also affects individuals who are eligible for both Medicaid and Medicare. This report does not evaluate whether any of the legal issues discussed herein (including those related to the potentially differential treatment of medical assistance recipients) might also involve issues raised by these federal regulatory contexts.

Report

I. Extension of Oregon Tort Claims Act (OTCA) Agent Status

OHA first asks about conferring agent status for OTCA purposes upon medical providers when those providers are serving OHA's clients. This is possible. But there are several legal and practical hurdles that must be overcome before implementing such a scheme.

A. OTCA Claims Against the State and Its Agents

For purposes of this discussion, the OTCA, ORS 30.260 to 30.300, contains four principal elements:

1. The state consents to be sued "for its torts and those of its officers, employees and agents acting within the scope of their employment or duties * * *." ORS 30.265(1).

2. In a claim against a state's agent, the state is substituted for the agent as the sole defendant in many cases.[1]

3. The damages awarded in an OTCA claim against the state or its agents may not exceed certain amounts. ORS 30.271(2)-(4). For example, for such claims that arise after July 1, 2011 and before July 1, 2012, the damages are capped at $1.7 million per claimant and $3.4 million for all claimants on that claim. ORS 30.271(2)(c), (3)(c).[2]

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[1] The 2011 legislature amended 30.265, effective January 1, 2012. Or Laws 2011, ch 270, § 1. The prior version of the statute required the substitution of the state as defendant for a state officer, employee, or agent in every case. ORS 30.265 (2009). The amended version mandates substitution only when the damages alleged do not exceed the limits established by ORS 30.271. As discussed in greater detail below, in 2007 the Oregon Supreme Court found the prior version of ORS 30.265(1), which required substitution in every case, "to violate "the Remedy Clause of Article I, section 10" as "applied to plaintiff's claim against the individual defendants" due to the elimination of the cause of action against public employees or agents. *Clarke v. Oregon Health Sciences University*, 343 Or 581, 610, 175 P3d 418, 434 (2007). While an agent continues to be a named defendant in any case where the amount of alleged damages exceeds the ORS 30.271 cap, a qualifying agent is still fully indemnified (*i.e.*, the state pays the full judgment on behalf of the agent) even when the judgment exceeds the ORS 30.271 cap. ORS 30.285(1) (3). *See* Letter of Advice to Richard Peterson, Director, Department of Corrections, January 26, 1989 (OP-6229), 1989 WL 439798, 1 (even if damages exceeding the OTCA limits are assessed in a 42 USC § 1983 civil rights case, the state is "responsible for payment of the damages so long as a physician-agent was "acting within the scope of [his or her] employment or duties," ORS 30.265(1), and was not guilty of "malfeasance in office or willful or wanton neglect of duty," ORS 30.285(2).").

[2] The per claimant and all claimants per claim caps rise $100,000 and $300,000 a year, respectively, until they reach $2 million and $4 million, respectively, for claims arising during the 2014-2015 fiscal year. ORS 30.271(2)(d)-(f), (3)(d)-(f). Thereafter, the State Court Administrator determines annual changes in the caps, based upon the corresponding changes in the Portland-Salem consumer price index. ORS 30.271(2)(g), (3)(g), and (4).

4. The state commits to "defend, hold harmless, and indemnify any of its * * * agents" against any tort claim arising out of an "alleged act or omission occurring in the performance of duty," except when the alleged "act or omission amounts to malfeasance in office or willful or wanton neglect of duty," regardless of whether a judgment in the case exceeds the exceeds the limits stated in ORS 30.271. ORS 30.285(1), (3).

The Department of Administrative Services (DAS) "has exclusive authority to manage [OTCA] claims against * * * agents of the state * * *." ORS 278.120(1). DAS also "direct[s] and manage[s] all risk management and insurance programs of state government," subject to exceptions not relevant here. ORS 278.405. DAS may purchase insurance or develop self-insurance programs, or a combination thereof, to carry out this responsibility. ORS 278.405(2).

DAS also administers the state's "Insurance Fund, a separate fund in the State Treasury, separate and distinct from the General Fund." ORS 278.425(1). The Insurance Fund is used to provide "insurance and self-insurance" for the state and participating local public bodies. *Id.* The legislature intends that the Insurance Fund "operate on an actuarially sound basis" and that "assessments and charges [to agencies] shall reflect this policy." ORS 278.435(1).

B. Plenary Power of Legislative Assembly

The legislature may enact any law it wishes so long as the law does not conflict with the Oregon Constitution, the United States Constitution, or superseding federal statutes or regulations. *See MacPherson v. Department of Administrative Services*, 340 Or 117, 127-28, 130 P3d 308 (2006) (so stating). As discussed at length below, a damages cap or mandatory administrative compensation scheme may, in certain circumstances, run afoul of the jury trial or remedy clauses of the Oregon Constitution, regardless of whether the provider is or is not a state agent. The legislature may extend state agent status under the OTCA to medical providers, including CCOs, while they are treating OHA clients, without otherwise violating the Oregon Constitution, provided that the costs of that extension are fully funded or the General Fund is protected from any funding shortfall.[3]

C. Public Purpose Doctrine

We have observed in the past that, "[a]s a general rule, under the express or implied restrictions of state constitutions, public funds may be used only for public purposes." 37 Op Atty Gen 911, 926 (1975). To the extent that this so-called "public purpose doctrine" continues

[3] In their January 2, 2012, report to OHA, consultants Dr. Michelle Mello and Dr. Allen Kachalia address the empirical and policy aspects of such a statutory change (benefits "may be quite limited"). *See* Mello and Kachalia, "Medical Liability Reform in Oregon: Possibilities, Costs, and Benefits," at 5-6 and 45-50.

to exist as a viable concern for state expenditures, we can dispose of it quickly for purposes of this discussion.

In Oregon, the question of whether an adequate public purpose exists has largely arisen when a local government's expenditure benefits a private party. *See, e.g., Carruthers v. Port of Astoria*, 249 Or 329, 438 P2d 725 (1968) (unsuccessful challenge to Port's issuance of revenue bonds to support construction of an aluminum plant). The Oregon Supreme Court has characterized the following as "sensible tests" to use in determining whether an adequate public purpose exists in such a situation:

> Much has been written in the cases and law reviews already cited about public purpose. The cases generally hold that if there is a substantial public benefit, the plan is not defeated if a private purpose also is served. "The grounds for deciding such cases * * * are seldom articulated clearly. * * * [T]he relevant inquiry would seem to be whether the proposed project will augment the community's total value position." 70 Yale L.J., supra at 791 and 796.
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> "The only valid criterion would seem to be whether the expenditures are sufficiently beneficial to the community as a whole to justify governmental involvement; but such a judgment is more appropriate for legislative than judicial action. The judiciary should invalidate expenditures only where reasonable men could not differ as to their lack of social utility." Note, 66 Harv.L.Rev. 898 at 903 (1953).

Carruthers, 249 Or at 341.

The extension of state agent status to individuals who otherwise would be treated as private medical providers obviously benefits those individuals. But the legislature can easily articulate what it perceives as the public benefits that flow from such a decision. For example, the public benefits may include inducing more providers to treat OHA patients, reducing the incidence of defensive medicine, reducing overall costs to the system, and so on.[4]

[4] The legislature has previously decided to extend agent status by statute to individuals who otherwise may not be deemed state or public officers, employees, or agents. For example, if commercial insurance is not available to cover higher education students involved in student teaching, internships, clinical experiences, capstone projects and related activities, then such students "shall be considered to be acting within the course and scope of state employment duties for purposes of ORS 30.260 to 30.300." ORS 30.264(2). And a retired physician who provides medical care as a volunteer without compensation to persons referred from a county health officer "shall be considered to be an agent of a public body for purposes of ORS 30.260 to 30.300." ORS 30.302(2). Finally, "nonsalaried or courtesy physicians or dentists" who are "affiliated" with Oregon Health and Science University (OHSU) and receive a fee for

D. Article XI, Section 7 and Funding Issues

Article XI, section 7, of the Oregon Constitution is the debt limitation clause of the Oregon Constitution. It limits the power of the state to create debt in excess of $50,000, except in limited circumstances.[5] "Dubbed the 'pay as you go' provision by the members of the Constitutional Convention of 1857, [the provision] was adopted by the people in 1859." *State ex rel. Kane v. Goldschmidt*, 308 Or 573, 579-80, 783 P2d 988 (1989). We have long concluded that an unqualified promise by the state to indemnify another party against a contingent liability violates Article XI, section 7. *See, e.g.*, 28 Op Atty Gen 50 (1956) (an agreement to indemnify the United States from damages due to river project construction violates Article XI, § 7). Every "contract of indebtedness entered into or assumed by or on behalf of the state" in violation of this debt limitation provision "shall be void and of no effect." Or Const, Art XI, § 7.

There essentially are two ways for an indemnity promise to avoid violating Article XI, section 7. The first is to fully fund the obligations created by that promise on an ongoing basis with current appropriations or other funding. *See Oregon State Police Officers' Ass'n v. State*, 323 Or 356, 377, 918 P2d 765 (1996) ("[The Public Employees Retirement Fund] is fully funded on a pay-as-you-go basis by employer and employee contributions and interest on its investments. Because full payment is made in the present, the pension benefits at issue in these cases do not create a future debt obligation."). In the case of a promise to indemnify a state agent, the ongoing funding could be used to purchase insurance or to fund an actuarially sound[6] self-insurance fund, separate from the General Fund.

The second option is to make the indemnity obligation conditional. One example would be for the legislature to expressly declare that the indemnity promise is subject to the legislature appropriating funds to support that promise. If the legislature retains discretion as to whether to enact such an appropriation, there is no violation. *See, e.g.*, *State ex rel. Kane*, 308 Or 573 at 586 (upholding certificates of participation with a "nonappropriation clause": "The state's promise of repayment is conditioned on the willingness of future legislative assemblies to appropriate the funds. The state does not promise that future legislatures will appropriate any funds.").

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treating patients at the campus of OHSU are deemed to be "within the scope of their state employment or duties" for OTCA purposes when they provide such patient services. ORS 30.267(1)(b), (2)(a).

[5] The exceptions include war debts and highway debts authorized by Article XI, section 7, as well as the bonded indebtedness authorized by other articles of the constitution.

[6] ORS 278.005(1) defines "actuarially sound" for purposes of ORS chapter 278 to mean "funding and insurance sufficient to pay those losses and their related costs which are known by the Oregon Department of Administrative Services from analyses of claims, loss experiences and risk factors." In this report, we accord a similar meaning to the term.

A variation on the conditional indemnity promise approach is for the legislature to make the funds to fulfill that promise payable only from a special fund that is separate from the General Fund.[7] *See, e.g.*, *Moses v. Meier*, 148 Or 185, 35 P2d 981 (1934) (no debt limitation violation because repayment of certificates limited to liquor revenues deposited in special fund; the state had no legal obligation to replenish the fund if it was insufficient; and the certificate holders could not look beyond the special fund for repayment). Again, the state must have no obligation to replenish the special fund with General Fund appropriations if it becomes depleted. As a practical matter, a medical provider may not find much comfort in a conditional promise to defend and indemnify.

In sum, if the legislature extends OTCA agent status to certain medical providers, it must not violate Article XI, section 7. Accordingly, if the legislature makes a new indemnity promise, it must (1) make clear that the state's obligation is a conditional one; or (2) appropriate, or otherwise provide for, on an ongoing basis moneys sufficient to purchase adequate insurance or to create and maintain an actuarially sound self-insurance fund.[8]

II. Statutory Damages Caps

As part of its section 16 study, OHA is considering a cap on the amount of damages that an OHA client may recover for injuries caused by medical negligence. OHA asks us to review how Oregon courts have approached challenges to legislatively-imposed damages caps. Based on that review, OHA further asks for advice as to the cap options that are most likely to survive legal challenges and to recommend a "path" for imposing them.[9]

Statutory damages caps already have been challenged under several provisions of the Oregon Constitution. Oregon courts have found the caps as applied in particular cases to violate two Oregon constitutional provisions, the "remedy clause" in Article I, section 10, and the right

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[7] We have previously concluded that the predecessor to the current Insurance Fund established by ORS 278.425 (the Liability Fund within the former Restoration Fund) was such a special fund. 37 Op Atty Gen at 929. As the state's OTCA indemnity obligations were fulfilled solely at that time from the moneys in that special fund, we concluded that the "the indemnity promised by ORS 30.285" did not "violate Article XI, Section 7, of the Oregon Constitution." *Id.* at 913, 929. We have not had occasion to analyze the special fund status of the current Insurance Fund in a formal Attorney General's opinion.

[8] We recommend that OHA confer with the Department of Administrative Services as to the projected costs of acquiring insurance or maintaining an actuarially sound fund in order to cover the liabilities associated with an extension of OTCA agent status to additional medical providers.

[9] From an empirical and policy standpoint, Dr. Mello and Dr. Kachalia conclude that the "benefits of non-economic damages caps can be characterized as statistically significant, but modest in size. Mello and Kachalia report, at 5.

to a jury trial in Article I, section 17. The right to a jury trial poses the most significant barrier to imposing damages caps in medical negligence cases, so we begin with it.

A. Right to a Jury Trial - Article I, Section 17

1. The provision

Article I, section 17, guarantees that, "[i]n all civil cases the right of Trial by Jury shall remain inviolate." The provision was part of the original Oregon Constitution, which was adopted by the people in 1857. In *Molodyh v. Truck Insurance Exchange*, 304 Or 290, 295, 744 P2d 992 (1987), the Oregon Supreme Court explained that Article I, section 17 guarantees a jury trial "in those classes of cases in which the right was customary at the time the [Oregon] constitution was adopted or in cases of like nature." The right "includes having a jury determine all issues of fact, not just those issues that remain after the legislature has narrowed the claims process." *Id.* at 297-98.

2. *Lakin v. Senco Products, Inc.*

In *Lakin v. Senco Products, Inc.*, 329 Or 62, 987 P2d 463 (1999), the court considered a claim that a statutory damages cap violated Article I, section 17. The challenged statute, ORS 18.560, capped noneconomic damages at $500,000. The plaintiffs challenged the trial court's post-trial application of the statutory cap to reduce their noneconomic damages jury awards. No party in that case questioned whether the plaintiffs had a right to a jury trial. *Id.* at 69. The question, instead, was whether the determination of damages was a question of fact for the jury such that Article I, section 17, prevented legislative interference with its decision. The court concluded that it was, holding:

> The determination of damages in a personal injury case is a question of fact. The damages available in a personal injury action include compensation for noneconomic damages resulting from the injury. The legislature may not interfere with the full effect of a jury's assessment of noneconomic damages, at least as to civil cases in which the right to jury trial was customary in 1857, or in cases of like nature. It follows, therefore, that, in this context, ORS 18.560(1) violates Article I, section 17.

Id. at 82 (citations omitted).

Significantly, the court rejected the defendants' argument that application of the cap complied with Article I, section 17, because the capped amount was substantial. The court explained that:

> [W]e do not assess the constitutionality of ORS 18.560(1) under Article I, section 17, based on the amount of the statutory cap; rather *we assess its constitutionality because it is a cap on the jury's determination of noneconomic damages*.

Id. at 81 (emphasis added).

3. Summary – caps and jury trial provision

In sum, any legislatively-imposed noneconomic damages cap, no matter how high the capped amount, will violate Article I, section 17, in the cases to which the provision applies. The court's analysis applies equally to prohibit caps on economic damages. The provision will apply to most, but not all, claims based on injuries caused by medical negligence, and, therefore, prohibits the legislature from imposing damages caps in those cases. We next briefly review the situations in which Oregon courts have concluded that Article I, section 17, does not apply to bar statutory caps.

4. Article I, section 17, does not apply to causes of action that did not exist in 1857

The Oregon Supreme Court has held the provision to be inapplicable in three types of cases that may involve medical negligence. First, the court has held Article I, section 17, to be inapplicable to a wrongful death claim, including one seeking redress for injury resulting from medical negligence. *See Hughes v. PeaceHealth*, 344 Or 142, 154-56, 178 P3d 225 (2008) (holding that application of statutory damages cap in a wrongful death case did not violate Article I, section 17); *see also, Greist v. Phillips*, 322 Or 281, 294, 906 P3d 789 (1995) ("[T]he right of action for wrongful death is statutory. '[A]t common law no remedy by way of a civil action for wrongful death existed.' * * * * *. Because wrongful death actions are 'purely statutory, they 'exist only in the form and with the limitations chosen by the legislature.'").

The plaintiff in *Hughes* argued that a wrongful death claim based on medical negligence is of "like nature" to a personal injury claim based on medical negligence and, therefore, Article I, section 17, should apply. The *Hughes* court rejected the plaintiff's contention, stating that it clearly conflicted with the principle that Article I, section 17, "is not a source of law that creates or retains a substantive claim or theory of recovery in favor of any party." 344 Or at 142, 156 (citations omitted).

The Oregon Court of Appeals recently held that Article I, section 17, does not apply to a second type of claim based on medical negligence – a claim for prenatal injuries:

> [A] claim for prenatal injuries – including those that occur during birth – did not exist at the time the Oregon Constitution was adopted * * * [which] necessarily forecloses plaintiffs' contention that the jury trial provision[] of Article I, section 17 * * * preclude[s] the application of ORS 31.710 [the current statutory cap on noneconomic damages].

Klutschkowski v. PeaceHealth, 245 Or App 524, 546-47, 263 P3d 1130 (2011), 2011 WL 4376727 at 13. The court rejected the plaintiff's contention that his claim for prenatal injuries was "of like nature" to a negligence claim that existed in 1857, and, therefore, Article I, section 17, should apply. *Id.* (citing the analysis in *Hughes v. PeaceHealth*).

Third, Oregon courts have held that Article I, section 17, does not apply in actions against the state or an instrumentality of the state performing state functions. Because those entities would have had sovereign immunity in 1857 and a plaintiff would not have had a civil action against them under common law, the legislature may impose damages caps in those actions without running afoul of Article I, section 17. *Clarke v. OHSU*, 343 Or 581, 600 n 9, 175 P3d 418 (2007); *Ackerman v. OHSU*, 233 Or App 511, 526 n 8, 227 P3d 744 (2010).[10]

5. Article I, section 17, does not create or retain a substantive claim or theory of recovery

As discussed above, one of the actions that OHA is considering is asking the legislature to add providers of publicly-funded medical assistance to those protected by the substitution and

[10] The Oregon Constitution contains another provision concerning the right to trial by jury. Article VII (Amended), section 3 provides that "[i]n all actions at law, where the value in controversy shall exceed $750, the right to trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any court of this state, unless the court can affirmatively say there is no evidence to support the verdict." This provision was adopted by the voters of Oregon by initiative petition in 1910. *Greist v. Phillips*, 322 Or at 293. Oregon courts thus far have held that provision to be inapplicable to the same claims that Article I, section 17 is inapplicable to. *See Id* at 297 (holding that the provision did not restrict the legislature's authority to set a maximum recovery for statutory wrongful death actions); *Voth v. State of Oregon*, 190 Or App 154, 161-62, 78 P3d 565 (2003), *rev den*, 336 Or 377, 84 P3d 1081 (2004) (holding that the provision did not apply on the same ground that Article I, section 17 did not apply, because the common law did not provide a jury trial for a claim against the state in 1857); and *Klutschkowski*, 245 Or App 546-47 (holding the provision did not apply to claims for prenatal injuries, because no common law claim for those injuries existed in 1857). Accordingly, we do not separately address this provision in this report.

cap provisions of the OTCA. If that were to be done, Article I, section 17, would not apply to invalidate the substitute and cap provisions.

In *Jensen v. Whitlow*, 334 Or 412, 51 P3d 599 (2002), the Oregon Supreme Court considered a claim that the OTCA substitution and cap provisions violated Article I, section 17. In rejecting that claim, the court distinguished *Lakin*:

> [I]n this case, the legislature has eliminated plaintiff's right to bring her claim against the individual employees and has substituted a different remedy against the state. Article I, section 17, is not a source of law that creates or retains a substantive claim or theory of recovery in favor of any party. * * *. The right to pursue a "civil action," if it exists, must arise from some source other than Article I, section 17, because that provision "is not an independent guarantee of the existence of a cognizable claim."

Id. at 422. In other words, if the legislature eliminates a cause of action against the individual provider under the substitution and cap provisions of the OTCA, Article I, section 17, will not apply. On the other hand, legislative elimination of a cause of action implicates the remedy clause of the Oregon Constitution. We turn to that provision.

B. Remedy Clause, Article I, Section 10

1. The provision

Article I, section 10, of the Oregon Constitution, includes a "remedy clause," which provides that "every man shall have a remedy by due course of law for injury done him in his person, property or reputation." In *Smothers v. Gresham Transfer, Inc.*, 332 Or 83, 124, 23 P3d 333 (2001), the Oregon Supreme Court concluded that, because Article I, section 10, guarantees a remedy for injuries to "absolute common-law rights" respecting person, property or reputation, the legislature does not have plenary authority to extinguish a remedy for such injuries. The legislature may abolish a remedy that existed at common law only if it provides a "constitutionally adequate substitute remedy." *Id.* In determining whether legislative action has violated Article I, section 10:

> [T]he first question is whether the plaintiff has alleged an injury to one of the absolute rights that Article I, section 10 protects. Stated differently, when the drafters wrote the Oregon Constitution in 1857, did the common law of Oregon recognize a cause of action for the alleged injury? If the answer to that question is yes, and if the legislature has abolished the common-law cause of action for injury

> to rights that are protected by the remedy clause, then the second question is whether it has provided a constitutionally adequate substitute remedy for the common-law cause of action for that injury.

Id.

2. The OTCA substitution and cap provisions are facially constitutional

In *Jensen*, the Oregon Supreme Court upheld the facial constitutionality of the OTCA substitution and cap provisions against an Article I, section 10, challenge. A "facial challenge" asserts that the statute violates the constitution on its face and is void, rather than violating the constitution as applied in a particular case. A statute is not facially unconstitutional unless it is incapable of constitutional application in any circumstance. *Jensen*, 334 Or at 421. The court declared that the statute did not violate Article I, section 10, on its face, because the provisions could be applied constitutionally in some circumstances (*i.e.*, when the damages award did not exceed the statutory cap). *Id.*

3. Application of the sub and cap provisions may be unconstitutional in particular cases

Oregon courts subsequently have held the substitution and cap provisions to violate the remedy clause as applied in individual cases. In *Clarke*, 343 Or 581, the plaintiff (a severely brain damaged infant) alleged that he had sustained over $17,000,000 in damages caused by the medical negligence of medical personnel who were OHSU employees, officers or agents. The question for the court was whether the application of the substitution and cap provisions, which eliminated a cause of action against the individual doctor and substituted a remedy against OHSU, capped at $200,000, violated the remedy clause in that particular case. The court concluded that the elimination of the cause of action against the individual doctor violated the remedy clause in that case, because the substituted capped remedy against the public body was an emasculated version of the remedy available at common law. *Id.* at 610.

In reaching its decision, the court made several important observations about the remedy clause. First, it clarified that the clause protects the substance of the redress as well as the procedure for seeking redress for injury. *Id.* at 601 n 10. Second, the court refused the defendants' invitation to analyze whether the substitute remedy was constitutionally adequate "on a categorical basis only" that "should not focus on the facts of the individual case, but instead should focus on the balance struck by the legislature in creating a substitute remedy[]" and which should hold the legislative policy choice constitutional "unless a category of potential plaintiffs is left without a remedy." *Id.* at 601. The court, instead, focused on the facts of the individual case without regard to any balance struck by the OTCA.

In doing so, the court distinguished an earlier case, *Hale v. Port of Portland*, 308 Or 508, 783 P2d 506 (1989), in which the court had balanced the OTCA's expansion of the class of plaintiffs who could recover against municipalities (who had a limited form of sovereign immunity) against the limits on the amount that could be recovered, to conclude that the OTCA caps as applied to a municipality did not violate the remedy clause. *Clarke*, 343 Or at 602 (summarizing the rationale in *Hale*). The court in *Clarke* distinguished *Hale* on the ground that "*Hale examined the adequacy* of a statutorily capped monetary remedy in a claim *against public bodies* * * * *not* the sub and cap provisions that eliminated any claim *against the individual tortfeasor*." *Id.* at 608 (emphasis added).

The Oregon Court of Appeals also has held that, as applied in a particular case, the OTCA's substitution and cap provisions violates the remedy clause. In *Ackerman*, another medical negligence case, the OTCA's substitution and cap provisions limited the plaintiff's remedy to a recovery of only $400,000 from two public bodies ($200,000 each, under the former, much lower cap), when the plaintiff had incurred $1,412,000 in damages. Again the question was whether that recovery was a constitutionally adequate substitute remedy for the uncapped remedy against the individual doctors. 233 Or App at 526-27. The court concluded that it was not. *Id.* at 533. Drawing from *Clarke*, the court affirmed that "the adequacy of a legislatively created substitute remedy is gauged on a case-by-case basis." *Id.* at 527. It further observed that "we cannot gauge the constitutionality of a legislatively created damages cap wholesale, that is, by determining whether the legislature has compensated for abolishing or limiting an individual plaintiff's damages by expanding the availability of a limited remedy to additional plaintiffs." *Id.*

4. Summary – caps and remedy clause

In sum, if a plaintiff alleges an injury to an "absolute common-law right" and the legislature has abolished or limited the plaintiff's substantive remedy against a tortfeasor (such as a public agent or employee) that is not himself or herself a public body, it must provide a constitutionally adequate substitute remedy. Adequacy will be judged on a case-by-case basis, rather than by a "wholesale" balancing of benefits and burdens imposed by the legislation. Oregon courts recently have been receptive to "as-applied" challenges, although, given the recent, significant increases in the OTCA damages caps, the number of cases where future challenges are brought or are successful may be limited.

The Oregon Supreme Court has suggested that *Clarke* is an outlier case. *See State v. Rodriguez/Buck*, 347 Or 46, 80, 217 P3d 659 (2009) (cases such [as this one] and *Clarke* "illustrate the specific, limited circumstances in which we may conclude that a statute that is constitutional on its face nevertheless may be unconstitutional as applied to particular facts.)" Despite that admonition, as just discussed, the court of appeals in *Ackerman* held that a much smaller discrepancy than was present in the *Clarke* case between the full amount awarded and

the capped recovery constituted a constitutionally inadequate substitute remedy. And, while defendants in individual cases may litigate whether the plaintiff would have had an "absolute common-law right" to recovery, that litigation will be expensive. In short, the protections provided to individual medical providers under the OTCA substitution and cap provisions (or any other legislative action that abolishes or limits a cause of action against them) are not absolute, and are potentially vulnerable to an as-applied remedy clause challenge.

C. Article I, Section 20 – Equal Privileges and Immunities

1. The provision

Although several plaintiffs have claimed that statutory damages caps violate Article I, section 20, of the Oregon Constitution, none of those claims have succeeded. Article I, section 20, provides that "No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens." That provision scrutinizes benefits given to, rather than discrimination against, a particular class. *Crocker and Crocker*, 332 Or 42, 54, 22 P3d 759 (2001). This provision prohibits granting of privileges or immunities to any class of citizens which are not available on the same terms equally to all citizens. *Hale*, 308 Or at 524. The target of the "provision was the abuse of governmental authority to provide special privileges or immunities for favored individuals or classes, not discrimination against disfavored ones." *Id.* (Emphasis in original.)

2. Article I, section 20, challenges to capped damages

The Oregon Supreme Court has explained that classes created by the challenged law itself are not considered to be classes at all for purposes of Article I, section 20. *Sealey v. Hicks*, 309 Or 387, 397, 788 P2d 435, *cert den* 498 US 819 (1990), *overruled in part on other grounds by Smothers*. 332 Or 83. The court has also held that the classes created by the statutory noneconomic damages cap "clearly are 'classes created by the challenged law itself.'" *Greist v. Phillips*, 322 Or at 292.

The court has further reasoned that, even if a law creates a favored class, the law will survive scrutiny under Article I, section 20, if the legislature has a rational basis for distinguishing between the classes involved. *Crocker*, 332 Or at 55. In *Jensen*, the plaintiff argued that the OTCA substitution and cap provisions extended an immunity to government employees that was unavailable to other citizens. 334 Or at 423. In rejecting that argument, the court reasoned that, even assuming that the OTCA created a class of public employees, that classification was based on public employment, not an immutable characteristic (personal or social characteristics of the asserted class). Therefore, the statute would survived an Article I, section 20, challenge if the legislature had a rational basis for making the distinction. *Id.* at 424 (citing *Crocker*, 332 Or at 55). The court concluded that the provisions satisfied the rational-basis test, because public bodies must attract people to provide public services and the legislature

may reasonably have concluded that providing public employees with personal immunity for torts committed in the scope of their public employment would help recruitment efforts. *Id.*

3. Summary – privileges and immunities

The Oregon courts have concluded that general statutory damages caps do not violate Article I, section 20, because the law itself creates the classification. If the legislature were to enact a statute that applied the caps in a more selective manner to claims against providers whose medical services are publicly-funded, the courts would be likely to conclude either that the legislation created the class or that the class was not based on immutable characteristics and the legislature had a rational basis for making the distinction. Similar to *Jensen*, the court likely would hold that the legislature reasonably could conclude that it is necessary to attract health care providers to serve persons receiving publicly-funded medical assistance and that providing some form of tort relief for torts committed in the scope of providing those services would help the recruitment effort (the analysis would likely be similar for any immunity extended to the providers under the OTCA).

D. A Path for Imposing Damages Caps

In light of *Lakin*, Oregon courts likely will hold that any economic or noneconomic statutory damages cap violates Article I, section 17, when applied to a case in which the right to a jury trial existed in 1857. That would include most personal injury claims based on medical negligence, with the specific exceptions discussed above. More exceptions may be carved out, but that is difficult to predict. It is even difficult to predict whether the Oregon Supreme Court, if given the opportunity, will agree with the Oregon Court of Appeals that Article I, section 17, is inapplicable to prenatal injuries.

The only path to a constitutional damages cap that would apply in all cases of personal injury based on medical negligence (or in all cases where the medical care was publicly-funded) is to amend the Oregon Constitution specifically to permit a cap. Such an amendment would eliminate other constitutional challenges as well. But a constitutional amendment is no small undertaking and, ultimately, must be approved by a majority of Oregon voters. Or Const Art IV, § 1 (authorizing citizen initiatives to amend the Oregon Constitution and specifying process); Or Const Art VIII, §§ 1, 2 (establishing legislative referral processes for constitutional amendments).

The history of attempts to adopt precisely this type of amendment is not encouraging. Oregon voters have had two opportunities to approve a constitutional amendment to allow noneconomic damages caps in the wake of *Lakin* and have rejected them both. In 2000, one year after *Lakin* was decided, Measure 81, which proposed to amend the Oregon Constitution to allow caps on noneconomic damages, was placed on the ballot. Oregon State Measure 81,

Primary Election, May 16, 2000 at http://www.sos.state.or/electionsmay162000/m81.htm. The measure failed by a landslide, garnering only 219,009 Yes votes to 650,348 No votes. *Id.*

In 2004, Measure 35, which proposed an Oregon constitutional amendment imposing a $500,000 cap on non-economic damages, was submitted to Oregon voters. Oregon State Measure 35, General Election, Nov. 2, 2004 at http://www.sos.state.or.us/elections/nov22004/abstract/m35.pdf. This time, the measure was narrowly defeated, garnering 896,857 No votes to 869,054 Yes votes. *Id.* The measure failed despite its proponents (spearheaded by physicians) significantly outspending its opponents (spending over five million dollars to the opponents' two million dollars). *See* "Comments, The Current Medical Malpractice Crisis: The Need for Reform to Ensure a Tomorrow for Oregon's Obstetricians," Lindsay J. Stamm, 84 Or Law Rev 284 (2005); "Friends, Foes of Oregon Ballot Measures Pull Out Wallets to Influence Outcome," The Register Guard, (Eugene, Or), Oct. 22, 2004 at A1.

If the OTCA is amended to extend the substitution and cap provisions to physicians providing publicly-funded medical services, Article I, section 17, would not apply to those caps. But, as discussed, there are numerous other problems with that proposition as well. In conclusion, under current Oregon law, the path to imposing damages caps that apply in all cases may be too steep and rocky to warrant serious pursuit.

III. Joint and Several Liability

As required by HB 3650, section 16, OHA next asks us to examine "the possible clarifications and limitations regarding joint and several liability requirements for coordinated care organizations so that these organizations can assume the risk of their actions but are not liable for the actions of others within the coordinated care organization or its contracted services."[11]

A. Coordinated Care Organizations

HB 3650 proposes a statewide system of Coordinated Care Organizations (CCOs). "These organizations would manage all of the care for Oregon Health Plan members in their communities." Oregon Health Authority, Coordinated Care Organizations, Frequently Asked Questions, OHA 9565 at 1 (August 9, 2011). The CCO model differs from the current managed care organization model in two significant ways: (1) CCOs "would be responsible for coordinating all of the mental, physical and dental care for OHP members through collaborative relationships"; and (2) CCOs "also would be paid differently * * *. There would be a global

[11] From an empirical and policy standpoint, Dr. Mello and Dr. Kachalia conclude that "further JSL reform is likely to be of only limited financial benefit to providers and because nearly all providers in Oregon purchase liability insurance with limits that are rarely exceeded." Mello and Kachalia report, at 6.

budget for all care, rather than a set rate or a 'capitated rate' for each type of care. At the same time, the CCO would have more flexibility to manage dollars in a way that pays for improved health rather than having to rely on approved billing services." *Id.* at 1-2.

HB 3650, § 4(1) requires the OHA to adopt criteria for CCOs and to integrate the criteria into each contract, but the bill does not dictate their organizational structure:

> [CCOs] may be local, community-based organizations or statewide organizations with community-based participation in governance; they may be single corporate structures or networks of providers organized through contractual relationships. * * * * *. [CCOs] would be charged with developing a comprehensive service delivery network with patient-centered primary care homes at the core.

Oregon Health Policy Board Agenda, October 11, 2011, Coordinated Care Organizations Attachment at 1. In short, CCOs will be responsible for the coordination of holistic patient medical care, which may require new types of relationships with doctors. We first address whether Oregon's current comparative fault statutes are adequate to protect CCOs from incurring the obligation to pay for judgments against the doctors and other health care professionals with whom they contract.

B. Oregon's Comparative Fault Statutes

"Joint and several liability" generally refers to the responsibility of each defendant in a case to pay the entire judgment owed to the plaintiff, regardless of their percentage of fault. Before 1995, Oregon law imposed joint and several liability. *Lasley v. Combined Transport, Inc.*, 351 Or 1, --- P3d --- (2011), 2011 WL 4389890 at 10. But in 1995,

> the legislature * * * changed the comparative negligence scheme. Or Laws 1995, ch 696, §§ 1-5 (Spec Sess). * * * [T]he legislature eliminated joint and several liability. Now, under ORS 31.610, liability is several only; a tortfeasor is responsible only for its percentage of fault as determined in the action brought by the plaintiff.

Id. (citations omitted). Oregon's current statute, ORS 30.610(1), provides that:

> Except as otherwise provided in this section, in any civil action arising out of bodily injury, death or property damage, including claims for emotional injury or distress, loss of care, comfort, companionship and society, and loss of consortium, the liability of each defendant for damages awarded to plaintiff shall be several only and shall not be joint.

A defendant's percentage of comparative fault is determined by the trier of fact, ORS 31.605, and the liability of each defendant is set out separately in the judgment, based on the percentages

of fault determined by the trier of fact. ORS 31.610(2). "The proportional shares of tortfeasors in the entire liability shall be based upon their relative degrees of fault or responsibility." ORS 31.805(1).

However, there is a caveat; if a judgment against one defendant is uncollectible, the court may reallocate that obligation to the other parties:

> Upon motion made not later than one year after judgment has become final by lapse of time for appeal or after appellate review, the court shall determine whether all or part of a party's share of the obligation determined under subsection (2) of this section is uncollectible. If the court determines that all or part of any party's share of the obligation is uncollectible, the court shall reallocate any uncollectible share among the other parties. The reallocation shall be made based on any percentage of fault determined to be attributable to the claimant by the trier of fact under ORS 31.605, plus any percentage of fault attributable to a person who has settled with the claimant. Reallocation of obligations under this subsection does not affect any right to contribution from the party whose share of the obligation is determined to be uncollectible. Unless the party has entered into a covenant not to sue or not to enforce a judgment with the claimant, reallocation under this subsection does not affect continuing liability on the judgment to the claimant by the party whose share of the obligation is determined to be uncollectible.

ORS 31.610(3).

But a defendant's share may not be increased by reallocation under ORS 31.610(3) if:

> (a) The percentage of fault of the claimant is equal to or greater than the percentage of fault of the party as determined by the trier of fact under ORS 31.605; or
>
> (b) The percentage of fault of the party is 25 percent or less as determined by the trier of fact under ORS 31.605.

ORS 31.610(4). On the other hand, if a defendant is exempted from reallocation under subsection (4), that defendant's share of the reallocation is deemed to be uncollectible and reallocated to the other defendants. ORS 31.610(5).

Under the reallocation statutes, a CCO whose fault exceeds both 25 percent and the percentage of fault attributed to the claimant could become liable to pay the reallocated amount of an uncollectible judgment against a provider. The reallocation statute appears to be premised on the notion that, as between an injured person and the tortfeasors, the tortfeasors should bear

the cost of uncollectible judgments, at least when the tortfeasor's own conduct contributed substantially to the injury and was greater than the injured party's own negligent conduct.

In sum, CCOs will not be held responsible to pay judgments against providers, except when those judgments are deemed to be uncollectible pursuant to ORS 31.601(3), in which case they may become liable for some portion of the judgment unless one of the exceptions applies. That is no different than for any other defendant. CCOs could seek a legislative amendment to exempt them from reallocation, but there is no reason that we can think of that would justify a different policy choice for CCOs. In fact, CCOs have more control than most defendants, as they can choose the providers with whom they contract and ensure that they are adequately insured.

C. Vicarious Liability

Another avenue through which CCOs potentially could be held responsible for damages resulting from the torts of their providers is through the theory of "vicarious liability." Under that theory, the damages caused by the torts of an agent are imputed to a "principal."[12] There are two theories for imposing vicarious liability on a principal: (1) actual agency; and, (2) "apparent" or "ostensible" agency. Oregon courts have not yet addressed whether HMOs could be held vicariously liable for the torts of providers in their networks. But Oregon cases do provide some guidance about how the courts will apply agency principals to physicians.

1. Actual agency

An actual agency relationship requires: (1) consent by the parties to an agency relationship in which one shall act on behalf of and subject to the control of the other; and (2) the principal's control over the agent. *Vaughn v. First Transit, Inc.*, 346 Or 128, 135, 206 P3d 181 (2009). An employment relationship is not the only type of consensual agency relationship. For example, a written agreement that provided that a physician would be deemed to be the "agent" of the county in performing medical services on behalf of a county Healthystart program established consent to an agency relationship. *Bridge v. Carver*, 148 Or App 503, 506, 941 P2d 1039, *rev den*, 326 Or 57, 944 P2d 947 (1997).

Moreover, Oregon courts have found physicians to be actual agents even though the principal did not control the manner in which the physician provided treatment. In *Bridge*, the court found it sufficient that a physician:

> [A]greed to provide prenatal services on an "on-call" basis to Healthystart patients * * * [and] did not control which patients he saw or when he saw them.

[12] You ask only about CCO liability that is based on the acts of providers, not about any theories of direct liability that may be applied to hold CCOs liable for their own acts.

> Healthystart administrators determined the criteria used to refer Healthystart patients to a doctor when necessary. * * *. Although the county did not exercise control over the manner in which [the doctor] treated [the patient], it did control which patients [the doctor] treated and the scope of his treatment as a Healthystart physician.

Id. at 509-10. It is not necessary for physicians to "abrogate their independent professional judgment" to act as agents. *Id.* at 508.

Hence, in Oregon, an agency relationship may be found to exist between a physician and a principal even though the principal does not control the manner in which the physician treats the patient. As we understand it, CCOs will have some control over referral criteria and the scope of treatment – both relevant factors to finding an agency relationship. We do not know what form or forms written agreements between CCOs and providers will take, but courts will examine the language in those agreements carefully when determining whether an agency relationship exists.

2. Apparent or ostensible agency

An "apparent" or "ostensible" agency theory is likely to be a more successful basis for plaintiffs to hold CCOs vicariously liable for the medical malpractice of contracted providers. That theory does not require an actual agency relationship; it requires only that the principal "engage in conduct that holds out another as its agent" and that the injured party "as a result of that 'holding out,' rel[ies] on the skill or care of the apparent agent." *Eads v. Borman*, 234 Or App 324, 333, 227 P3d 826 (2010). A mere "subjective belief" on the part of the injured party is insufficient to give rise to an apparent agency relationship; the principal must engage in some conduct or make some representation that holds out the physician as its agent that the patient relied on in seeking treatment from the physician. *Id.* at 334-35.

Oregon courts have examined apparent agency theories as applied to physicians in two contexts. The first is in the hospital context. But those cases expressly announce a rule that is specific to the hospital context, and, therefore, are not particularly helpful to predict how the courts will apply the theory to the CCO-provider relationship. *Id.* at 335 (cases finding physicians to be the apparent agents of hospitals "are specific to the hospital context"); *Shepard v. Sisters of Providence*, 89 Or App 579, 587, 750 P3d 500 (1988) (announcing rule that physicians who are nominally "independent contractors" may be treated as actual or ostensible hospital agents for purposes of vicarious liability when they perform professional services which are integral to hospital operations and which hospitals hold themselves out to the public to provide.). Outside the hospital context, the Oregon Court of Appeals applied the usual test for apparent agency in examining the relationship between a physician and a spine center in whose building the physician worked. *Eads*, 227 at 332-35.

At a minimum, Oregon courts will apply the usual apparent agency test when considering claims that physicians are the apparent agents of CCOs. Relevant factors for determining whether a physician is the apparent agent of a CCO likely will include whether:

- The CCO held out the physician to be competent and qualified;
- The CCO provides a list of approved physicians;
- CCO advertisements refer to physicians;
- The CCO selects or limits the choice of consultants;
- The physicians' office displays the CCO name;
- The physicians' forms contain the CCO name;
- The patient looked to the CCO, rather than the physician, as their health care services provider;
- There was any notice or disclaimer regarding the status of the physician's relationship to the CCO;
- The physician works in a clinic run by the CCO; and
- The CCO may overrule the physician's recommended care.

CCOs and providers may allocate the risk of liability between themselves by contract. Although that allocation will not be binding against a successful plaintiff, it will allow the CCO and providers to shift the liability between themselves if a plaintiff prevails. The most common way to do that is through contract clauses that: (1) require the provider to defend and indemnify the CCO against any liability arising out of the provider's negligence; and (2) require the provider to carry insurance that provides adequate coverage for the assumed third-party liability.

3. Dual agency

As discussed above, OHA is studying an extension of state "agent" status to certain medical providers. This raises the issue whether a physician who is an agent of the state could also be the agent of a CCO. The Oregon Court of Appeals has held that a physician can be a dual agent serving more than one principal. *Shepard,* 89 Or App at 585.

4. Vicarious liability and punitive damages

We point out one final issue relating to vicarious liability for the torts of licensed health care providers. ORS 18.550 prohibits an award of punitive damages against listed licensed health care practitioners who act within the scope of their practice and without malice. It is an open question whether that statute will protect a CCO that is being sued on a vicarious liability theory for the torts of licensed providers. *See Johannesen v. Salem Hospital,* 336 Or 211, 216, 82 P3d 139 (2003) (hospital's argument "assumes that [it] may invoke the standards in ORS 18.550 if plaintiff relies on a theory of vicarious liability arising from the conduct of

health practitioners that [hospital] employed." This question could be resolved by an amendment to ORS 18.550 that expressly extends the protection against punitive damages to those being sued on a vicarious liability theory.

IV. Medical Panels

For purposes of this discussion, a medical panel is an administrative forum that reviews a malpractice claim at an early stage and either offers an advisory opinion or issues a decision as to medical negligence and possibly as to damages. We understand that the goals of such a medical panel are to encourage an early resolution in meritorious cases and to deter plaintiffs from pursuing cases of no or questionable merit. Below, we address the interplay of the Oregon constitution and several alternative medical panel designs.[13]

A. Binding Medical Panels – Mandatory Participation

Under the first alternative, the legislature establishes a medical panel system to decide the question of liability in every case of alleged medical malpractice. Panel decisions as to liability are binding. If a panel finds the defendant liable, depending upon the legislature's policy choice, either the panel or a jury decides the question of damages. We conclude that this option would violate the jury trial provision of the Oregon Constitution.

As discussed above, because claims alleging medical malpractice generally are civil actions for which the common law historically provided a jury trial, litigants have an Article I, section 17, right to have "a jury determine all issues of fact." *Molodyh*, 304 Or at 297-98. Whether a provider was negligent, *i.e.*, breached the applicable standard of care, is factual, which means that the legislature generally may not compel participation in an administrative system whose decisions on liability are binding. *See Foltz v. State Farm Mut. Auto Ins. Co*, 326 Or 294, 299, 952 P2d 1012 (1998) (holding that a statute compelling arbitration did not violate Article I, section 17, but a companion statute that made the arbitration decision binding did), *Molodyh*, 304 at 299 (construing a statute that made an appraisal process permissive, but the results binding, to be non-binding as to the non-demanding party to avoid running afoul of Article I, section 17).

B. Binding Medical Panels – Voluntary Participation

Under the second alternative, the legislature creates a medical panel system to make binding decisions as to liability in a medical malpractice case only if the claimant and the medical provider agree to participate in the system. The legislature could also provide that (1)

[13] Dr. Mello and Dr. Kachalia describe medical panels and key design choices in greater detail in their report. *See* Mello and Kachalia report, at 33-34. From an empirical and policy standpoint, they conclude that "existing evidence does not suggest that medical panels would be effective in improving key liability-related outcomes for providers or patients." *Id.* at 5.

the medical panel decides damages; (2) a jury decides damages; or (3) damages presumptively go to either the panel or a jury, but permit the parties in each case to elect otherwise. We conclude that such a voluntary system, including all three alternatives as to damages, likely would not violate the Oregon Constitution.

It is possible to waive the constitutional right to a civil jury trial. The Oregon Court of Appeals recently stated:

> Article I, section 17, of the Oregon Constitution provides that "[i]n all civil cases the right of Trial by Jury shall remain inviolate." A party may not be compelled to give up that right, even by statute. [Citing *Molodyh*]. But a party may voluntarily waive the right by agreement. *Carrier v. Hicks*, 316 Or 341, 352, 851 P2d 581 (1993).

Hays Group, Inc. v. Biege, 222 Or App 347, 351, 193 P3d 1028 (2008) (rejecting argument that an arbitration provision in an employment agreement was unenforceable because it "did not contain an explicit waiver of [plaintiff's] right to a jury trial"); s*ee also, Barackman v. Anderson*, 338 Or 365, 371, 109 P3d 370 (2005) (holding that when a party agrees to arbitration the state has not deprived that party of the right to a jury trial).

But we caution that a waiver must be knowing and intentional:

> "Waiver is 'the intentional relinquishment of a known right, either in terms or by such conduct as clearly indicates an intention to renounce a known privilege or power.'" *Day–Towne v. Progressive Halcyon Ins. Co.*, 214 Or App. 372, 382, 164 P3d 1205 (2007) (quoting *Great American Ins. v. General Ins.*, 257 Or 62, 72, 475 P2d 415 (1970)).

Wright v. State Farm Mut. Auto. Ins. Co., 223 Or App 357, 367, 196 P3d 1000 (2008) (material factual question precluded summary judgment as to whether insurer waived right to rely upon statute of limitations).

The agreement should be clear about the consequences of using the medical panel to ensure that it will constitute a valid waiver of the right to a jury trial. Language expressly stating that the effect of the agreement is to waive the right to a jury trial is preferred, but not necessary. *See Hays*, 222 Or App at 351 (finding a waiver because "the agreement expressly provides that any claim relating to the employment relationship * * * 'shall be settled by final and binding arbitration.' Claims cannot be settled by 'final' and 'binding' arbitration except by a waiver of the right to a jury trial."); *see also Motsinger v. Lithia Rose-FT, Inc.*, 211 Or App 610, 617, 156 P3d 156 (2007) (finding that the plaintiff could not claim that he did not know the consequences of his agreement where the agreement stated in bold letters that by voluntarily agreeing to binding arbitration, he waived his right to a jury trial).

C. Non-binding and Subsequently Inadmissible Medical Panel Decisions – Mandatory Participation

Under the third alternative, the legislature creates a system that requires every medical malpractice case to be first reviewed by a medical panel as to the question of medical malpractice before the case may proceed to a court trial. The panel's decision is advisory only, however, and it is not admissible as evidence in any subsequent trial. We conclude that such a system would not violate the Oregon Constitution.[14]

As to Article I, section 17, as noted above, the Oregon Supreme Court has distinguished a statute that compelled arbitration from a companion statute that made the arbitration decision binding, upholding the former and striking down the latter. *Foltz* 326 at 303 (addressing 1995 versions of now-revised statutes that provided for arbitration of personal injury protection benefit disputes).

As to the remedy clause, the Oregon Supreme Court implied approval of the legislature's imposition of reasonable conditions precedent in *Smothers*, declaring that "this court * * * never has held that the remedy clause prohibits the legislature from * * * attaching conditions precedent to invoking [a protected] remedy." 332 Or at 119. In keeping with that sentiment, the court would probably uphold a mandatory, non-binding administrative process if it were not overly burdensome.

D. Non-binding but Subsequently Admissible Medical Panel Decisions – Mandatory Participation

The fourth alternative differs from the third only in that panel decisions on negligence are admissible in subsequent trials. We conclude that this alternative likely would not violate the Oregon Constitution.

Although obviously intended to influence jurors' thinking on a fundamental factual question, the plaintiff or the defendant could introduce contrary expert opinions. The jurors would remain free to disregard the panel's conclusion and to decide the question of negligence as they saw fit. This should satisfy Article I, section 17.

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[14] Indeed, such a system would be somewhat similar to the mandatory arbitration program established in each circuit court by ORS 36.400(1). Among other items, that program directs every circuit court to "require arbitration under ORS 36.400 to 36.425 in matters involving $50,000 or less." ORS 36.400(3). A party against whom relief is granted in such a mandatory arbitration "may file a notice of appeal and request for trial de novo of the action in the court on all issues of law and fact." ORS 36.425(2)(a).

E. Non-binding but Subsequently Admissible Administrative Forum Decisions – Mandatory Participation only for OHA Patients and Providers

Under the fifth alternative, the legislature would require only OHA patients and providers to participate in a medical panel system whose conclusions are non-binding but admissible in any subsequent court trial. We conclude that this alternative likely would not violate the Oregon Constitution, although this conclusion is not free from doubt.

This alternative implicates Article I, section 20, because it would treat persons receiving OHA-funded services at the time of injury ("OHA patients") and their providers ("OHA providers") differently than non-OHA patients and providers. As discussed, Article I, section 20, limits the legislature's power both to grant privileges and immunities to or to impose burdens on one citizen or class of citizens and not others. While it is not certain that this medical panel alternative necessarily benefits or burdens OHA patients or providers, we assume for purposes of analysis that it would disadvantage (some) OHA patients and benefit (some) providers.

We first consider the analysis that would apply to a contention that the law imposed a burden on OHA patients:

> Although Article I, section 20 is textually and historically a leveling provision aimed at prohibiting laws that confer special benefits on an aristocratic or quasi-aristocratic "class," it has for many years served as the state constitutional analog to the federal Equal Protection Clause prohibiting legislation that imposes burdens on a historically oppressed minority. *See, e.g.*, *Tanner v. OHSU*, 157 Or App 502, 971 P2d 435 (1998).

State v. Borowski, 231 Or App 511, 520, 220 P3d 100 (2009). When considering whether a law discriminates against members of a minority class, the court first determines whether the burdened group is a "true class." *Id.* A "true class" is a "group that consists of individuals who would be considered as belonging to a distinctive group even if the statute that burdens them did not exist (for example, African Americans, Catholics, veterans, residents of Portland). *Id.* Such groups are defined by "antecedent personal or social characteristics or societal status." *Tanner*, 157 Or App at 521 (quoting *Hale*, 308 Or at 525). If the group does not fit that definition, Article I, section 20 simply does not apply. *Sealey*, 309 Or at 397.

OHA patients appear to be a class created by the statutes that provide for those services. Without those statutes, that particular group would not exist. Those statutes confer benefits on OHA patients and may define the conditions under which the benefits are conferred on all patients without running afoul of Article I, section 20.

Even assuming that OHA patients are a "true class," that is, a group that exists apart from the laws that treat them differently from non-OHA patients, for an Article I, section 20, challenge to succeed, the class would have to be "based on *immutable* traits or traits on the basis of which class members are subjected to adverse social or political stereotyping or prejudice" *and* the law would have to "in fact" discriminate "based on stereotype or prejudice and not some rational basis." *State v. Abbey*, 239 Or App 306, 311, 245 P3d 152 (2010) (citations omitted; emphasis in original). The fifth alternative would impose a condition on the receipt of OHA-funded services in an attempt to accomplish rational objectives, including providing a more efficient and less expensive process for separating meritorious from non-meritorious claims, not on the basis of stereotype or prejudice. We conclude that the fifth alternative would be unlikely to violate Article I, section 20, by imposing a burden on a true class on the basis of stereotype or prejudice.

Oregon courts would be similarly unlikely to conclude that the fifth alternative violates Article I, section 20 by conferring a special privilege on providers who provide services to patients paid with OHA funds. That claim would require the court to conclude that OHA providers are a "cohesive and societally recognized group" apart from the challenged law itself. *Borowski, 231* Or App *at 521*. As the doctors who accept OHA patients do not appear to be a societally-recognized group, such a claim should also fail.

V. Administrative compensation system

A. Attributes of System

In an administrative compensation system (ACS), claims concerning medical malpractice are adjudicated exclusively in an alternative, non-judicial process. The compensability threshold is lower than negligence. The process is more streamlined and less adversarial than traditional litigation.

An adjudicator like an administrative law judge who specializes in such matters makes the compensability and damages decisions. The adjudicator may be assisted by neutral experts, rather than hired medical experts. The adjudicator may be guided by formal decision guidelines concerning types of injuries that are presumptively compensable, as well as past precedent. If a live hearing is held, it is more limited in scope than a traditional trial.

The ACS may limit the amount of compensation that the adjudicator may award or prescribe compensation schedules for certain types of injuries or impairments. In the alternative, the adjudicator may just draw on a set of guidelines in awarding damages. In any event, while

the compensation awarded may be less in some cases than would a jury would award in a common law lawsuit, the compensation still would be substantial.[15]

B. Jury Trial and Remedy Clause Issues

The case law and legal principles that bear generally on the constitutionality of such an arrangement have been discussed already.

The ACS would create a new exclusive remedy and abolish the common law remedy for medical malpractice. As noted above, the elimination of a cause of action does not violate the jury trial provision, Article I, section 17, of the Oregon Constitution. *Jensen*, 334 Or at 422.

As to the remedy clause, however, as discussed above, the legislature may abolish a common law remedy only if it provides a "constitutionally adequate substitute remedy." *Smothers*, 332 Or at 124. Because the ACS may provide substantial compensation, the scheme likely would be upheld against a *facial* remedy clause challenge. *Jensen*, 334 Or at 421.

And, as with the OTCA, the adequacy of the substitute remedy would probably be judged on an individual, case-by-case basis. *Clarke*, 343 Or at 610; A*ckerman*, 233 Or App at 527. For those reasons, there is no assurance that the application of the ACS would be upheld as to every medical malpractice injury.[16] On the other hand, there would be no constitutional issue if participation in the ACS is voluntary, that is, if the parties waive their constitutional rights.

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[15] Dr. Mello and Dr. Kachalia describe administrative compensation systems and key design choices in greater detail in their report. *See* Mello and Kachalia report, at 57-69. From an empirical and policy standpoint, they conclude that "it is probably possible to design an ACS that achieves the key potential benefits of the ACS concept while not significantly increasing total costs or leaving patients worse off than they are under the tort system." *Id.* at 7.

[16] In making this assertion, we expressly do not address the constitutionality of Oregon's well-established Workers' Compensation Law, ORS chapter 656. As to that issue, in *Smothers*, the Oregon Supreme Court acknowledged its long-standing implicit recognition of the constitutionality of that system:

> [W]e note that, since *Evanhoff* in 1915, this court *implicitly* has recognized the legislature's constitutional authority to substitute workers' compensation for the common-law negligence cause of action for work-related injuries. *See, e.g.*, *Atkinson v. Fairview Dairy Farms*, 190 Or 1, 13, 222 P2d 732 (1950) ("The Workmen's Compensation Act has been held on a number of occasions to be constitutional.") Nothing in this case challenges those precepts. The constitutionality of the overall workers' compensation statutory program is not in question.

332 Or at 125 (emphasis added).