

# The Tort Caps – They are A-Changin’... But Your Personal Liability Stays the Same

At this writing, the Oregon Senate was poised to pass SB 311, which proposes to increase the maximum amount a person can recover for injuries caused by government negligence; actions also known as torts. Although the change will increase the city’s potential liability, nothing about the proposed change in the tort limits suddenly makes councilors individually liable for their city’s torts. No employee, officer, or agent of the city is individually “on the hook” for lawsuits that result from their work for the city.

In other words, as long as a city official is acting within the scope of their authority, the law still requires that a public body pay for their legal fees and any court judgment. The official’s home equity is NOT at risk because they serve the city as a councilor. City officials invest long hours serving their communities, and they are protected.

That said, why are reforms necessary and what do they mean to a city and other governmental bodies?

## Why Reform?

Fifty-thousand dollars could fix a lot of dents in the late 1980s when the Oregon Tort Claims Act (OTCA) caps on recoverable damages were established. If a government employee accidentally totaled a Ferrari, the mandated \$50,000 tort cap for property damage covered the price of a new one. Inflation pressed a heavy thumb on the scale of balance over time, however. Forget a Ferrari. Nowadays, the current \$50,000 cap could easily run short of replacement costs for a good pick-up truck.

Similarly, medical costs have skyrocketed in the last couple of decades. The current cap of \$200,000 per claim is but a few drips in the IV of long-term hospitalization, lengthy rehabilitation or other catastrophic case.

It is this inflation—and the outdated remedy offered by Oregon tort caps—that prompted recent reevaluation of the cap on damages in claims against the state or local governments in Oregon.

The case of *Clarke vs. OHSU* brought to court the argument that OTCA caps were inadequate and unconstitutional, a violation of the Article I, Section 10 of the Oregon Constitution (“Remedy Clause”).

Attorneys for the Clarke family successfully argued that the \$200,000 cap on claims against OHSU doctors and medical staff—who, as public employees, were protected by the OTCA from claims arising out of their negligent acts in the scope of their employment—was an indefensibly inadequate amount compared to the estimated costs of life-long medical care for their son. The infant had suffered brain damage from admitted negligence while under care at OHSU. The court agreed with the Clarke family’s argument and found that the \$200,000 cap on damages was unconstitutional in that case because it did not provide a “substantial substitute

remedy” compared to the claimed damages of \$14 million. The *Clarke* decision blew a big hole in the ceiling for liability damages, leaving government bodies and their insurers wondering if the sky was the new limit.

Oregon Governor Ted Kulongoski and the legislative leadership created a joint interim task force to address the implications of the *Clarke vs. OHSU* decision. The task force proposed new caps and suggested means to increase the limits over time, in accordance with inflation. The proposal also recommends legislative review of the caps in 2015.

The task force recommended that the caps for local government

be lower than for OHSU and the state, recognizing the financial structure and risk profile of cities, counties, schools and special districts differ from the state’s. Separate legislation is under consideration that would clarify when state or local governments can contract with private parties to perform government services without the public body being required to defend and indemnify the private party against its own negligent acts.

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# Tort Caps

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Following is a summary of task force recommendations moving forward as part of SB 311:

Current OTCA for General and Special Damages –All Public Bodies	Proposed OTCA for Liability State Government (including OHSU) SB 311	Proposed OTCA for Liability All Other Governmental Entities (including cities) SB 311
<ul style="list-style-type: none"> <li>• \$100,000 per claim and \$500,000 per occurrence up to additional \$100,000 for special damages exceeding \$100,000.</li> <li>• No provision for increasing tort cap limits.</li> <li>• Current limits in effect since 1987.</li> </ul>	<ul style="list-style-type: none"> <li>• \$1.5 million per claim and \$3 million per occurrence.</li> <li>• Increase per claim limit by \$100,000 per year and increase per occurrence limit by \$200,000 per year (starting 7/1/2010) for five years up to \$2 million and \$4 million respectively.</li> <li>• After caps reach the \$2/\$4 million level, adjust caps annually by 3 percent or the Portland - Salem Consumer Price Index, whichever is lower.</li> <li>• Implement new limits on July 1, 2009, applicable to injuries occurring on or after December 28, 2007.</li> </ul>	<ul style="list-style-type: none"> <li>• \$500,000 per claim and \$1 million per occurrence.</li> <li>• Increase per claim by \$33,333 per year; increase per-occurrence by \$66,666 per year beginning 7/1/2010 for five years until limits reach \$666,666 and \$1,333,333 respectively.</li> <li>• After caps reach \$666,666/\$1,333,333 level, adjust caps annually by 3 percent or the Portland -Salem Consumer Price Index, whichever is lower.</li> <li>• Implement new limits on July 1, 2009, applicable to injuries occurring on or after July 1, 2009.</li> </ul>

Current OTCA for Property Damage All Public Bodies ORS 30.270 (1) (a)	Proposed OTCA State Government, OHSU and All Other Governmental Entities
<ul style="list-style-type: none"> <li>• \$50,000 per claim and \$500,000 per occurrence.</li> </ul>	<ul style="list-style-type: none"> <li>• \$100,000 per claim and \$500,000 per occurrence.</li> <li>• Starting in 2015, adjust caps annually by 3 percent or the Portland-Salem Consumer Price Index, whichever is lower.</li> </ul>

Here are some further points worth remembering when considering the *Clarke* ruling, and the proposed legislative increases in tort caps: first, there has always been an uncapped exposure for local governments in the federal civil rights area, including most police liability claims and many employment related claims. So this is not entirely new ground.

Second, even with these higher tort caps, there is still the potential under the *Clarke* ruling for the caps to be found unconstitutional in a case of very high damages. Following the *Clarke* decision, City County Insurance Services (CIS) increased the minimum liability limits for all of its members to \$5 million.

Higher limits are available. While CIS does not anticipate a significant increase in liability exposures (or premiums) for local governments as a result of either the *Clarke* decision or the proposed increase in tort caps, the potential for very high liability claims still exists.

Risk management that prevents claims from ever happening is still the best way to protect a city against liability costs. All local governments should take this opportunity to review not only their liability insurance limits, but also their risk management policies and practices in light of these developments.