

SCOMM

101A:35

To: Brian

CONFIDENTIAL

Fm: Jim

February 25, 1997

Re: HB 58: Possible Constitutional challenges

As we discussed a few days ago, there may be some asserted unconstitutional claims on HB 58 in the future, assuming it becomes law.

In order to avoid a future constitutional challenge, you may want to consider a constitutional amendment in a form unlikely to cause a political problem. Perhaps a simple constitutional amendment restating the legislature's inherent authority to make laws reforming the tort system would do.

This type of simple constitutional amendment might get through this session, although time seems very limited. If the attempt is made in the next session, the Governor would be hard pressed to veto a constitutional amendment which is consistent with HB 58, especially in an election year a year after he signed HB 58 into law.

If the constitutional amendment is enacted next year, after HB 58 is enacted into law this year, there is a legal issue which the tort lawyers may still try to assert: whether an unconstitutional statute is validated by a subsequent constitutional amendment. The attached page from a legal encyclopedia (Am Jur) establishes that this indeed is an issue, but is inconclusive as to whether it is necessary to reenact the statute after the constitutional amendment is passed.

My recommendation is that if it is doable, that we take a swing at it now. If not doable, take a swing at the constitutional amendment next session [using the Am Jur approach of incorporating by reference the statute passed this session].

4/97
for phone
my + wife
des HB 58
texts Supreme
CT - judges
got removed?

repugnant to constitutional limitations, a court cannot cure such invalidity merely by striking such limiting language where the elimination of that language would substantially extend the operation of the enactment beyond the scope contemplated by all of its language.⁸⁵

It is axiomatic that an act in violation of the provisions of the organic law may not be validated by popular vote,⁸⁶ apart from any amendment to the constitution.⁸⁷

§ 259. —By amendment of constitution.

Various principles are applicable to the question whether an unconstitutional statute may be validated by amendment of the constitution (as contrasted with amendment of the statute). An unconstitutional statute has been held not validated by a subsequent constitutional amendment which does not ratify and confirm the statute, but merely authorizes the enactment of such a statute.⁸⁸ And it has been held that a law, originally void as in contravention of prohibitions contained in the constitution, is not made valid by the repeal of such constitutional limitations.⁸⁹ But in some jurisdictions the view has been taken that a constitutional amendment may have the effect of ratifying as of their respective dates legislative acts which have been declared void as inconsistent with the constitution prior to such amendment.⁹⁰ Thus, where a statute, at the time of its passage, is incapable of application to certain cases within its general scope and policy by reason of the existence of a conflicting provision of the constitution, the modification of the latter will permit the

85. *Allied Stores of Ohio, Inc. v. Bowers*, 166 Ohio St 116, 1 Ohio Ops 2d 342, 140 NE2d 411, aff'd 358 US 522, 3 L Ed 2d 480, 79 S Ct 437, 9 Ohio Ops 2d 321, 82 Ohio L Abs 512.

86. An unconstitutional act relating to road improvements cannot be made lawful by a vote in favor thereof by the people to be affected thereby. *Hixson v. Burson*, 54 Ohio St 470, 43 NE 1000.

87. As to validation by constitutional amendment, see § 259, infra.

88. *Fleming v. Hance*, 153 Cal 162, 94 P 620; *Norris v. Union City*, 184 Ga 283, 191 SE 105; *Etchison Drilling Co. v. Flournoy*, 131 La 442, 59 So 867; *People v. Frencavage*, 233 Mich 369, 206 NW 567; *Seneca Min. Co. v. Secretary of State*, 82 Mich 573, 47 NW 25; *State ex rel. Miller v. O'Malley*, 342 Mo 641, 117 SW2d 319; *State v. Safeway Stores, Inc.*, 106 Mont 182, 76 P2d 81; *Whetstone v. Slonaker*, 110 Neb 343, 193 NW 749; *State ex rel. Stevenson v. Tully*, 20 Nev 427, 22 P 1054; *Trustees of Phillips Exeter Academy v. Exeter*, 90 NH 472, 27 A2d 569, later on 92 NH 473, 33 A2d 665; *Woodall v. Western Wake Highway Com.*, 176 NC 377, 97 SE 226; *Ursuline Academy v. Board of Tax Appeals*, 141 Ohio St 563, 26 Ohio Ops 152, 49 NE2d 674 (ovrld Denison University v. Board of Tax Appeals 2 Ohio St 2d 17, 31 Ohio Ops 2d 10, 205 NE2d 896); *Board of Elections v. State*, 128 Ohio St 273, 191 NE 115, 97 ALR 1417; *Smith v. Cameron*, 123 Or

501, 262 P 946; *State v. Ellis*, 22 Wash 129, 60 P 136 (ovrld *State v. Lane* 40 Wash 2d 734, 246 P2d 474); *Fellows v. Shultz*, 81 NM 496, 469 P2d 141.

A constitutional amendment does not validate or enlarge any previously enacted legislation for which there was no constitutional authority at the time of enactment. *Ursuline Academy v. Board of Tax Appeals*, 141 Ohio St 563, 26 Ohio Ops 152, 49 NE2d 674 (ovrld on other grounds *Denison University v. Board of Tax Appeals* 2 Ohio St 2d 17, 31 Ohio Ops 2d 10, 205 NE2d 896).

An unconstitutional statute is not validated by a subsequent constitutional amendment, except, possibly, where the latter ratifies and confirms the statute. *State ex rel. Miller v. O'Malley*, 342 Mo 641, 117 SW2d 319.

89. *Mt. Pleasant v. Vansice*, 43 Mich 361, 5 NW 378.

90. *State ex rel. Hoffman v. Powell*, 118 Fla 296, 159 So 508; *Hammond v. Clark*, 136 Ga 313, 71 SE 479; *Fontenot v. Young*, 128 La 2d 20, 54 So 408 (holding that where a statute attacked as unconstitutional is ratified and affirmed by a constitutional amendment, there remains no basis for further constitutional attack).

As to revival of a municipal ordinance by a constitutional amendment, see *Housh v. Anderson*, 128 Fla 713, 175 So 521.

statute to operate upon cases formerly so excepted without further legislation.⁹¹ And, in the case of a constitutional amendment having prospective effect, a statute antedating the amendment, and in violation of it, may be consolidated and recodified, and, as consolidated and recodified, be constitutional.⁹² On the other hand, it seems clear that statutes in conflict with the constitution are validated by a constitutional amendment which expressly or impliedly ratifies and confirms them, provided such validation does not impair the obligations of a contract or divest vested rights.⁹³ But it has also been held that a statute inconsistent with the constitution at the time the statute was enacted can, following the adoption of a constitutional amendment which, although obviating the inconsistency, is not self-executing, be given life only by re-enactment.⁹⁴

There is authority to the effect that a legislature has power to enact a statute not authorized by the present constitution where the statute is passed in anticipation of a constitutional amendment authorizing it or provides that it shall take effect upon the adoption of such a constitutional amendment.⁹⁵

2. PARTIAL UNCONSTITUTIONALITY

a. RULE OF SEVERABILITY; IN GENERAL

§ 260. Generally.

Although it is manifest that an unconstitutional provision in a statute is not cured because included in the same act with valid provisions,⁹⁶ and that there are no degrees of constitutionality, so that an act is either constitutional or it is unconstitutional,⁹⁷ nonetheless it is a fundamental principle that a statute may be constitutional in one part and unconstitutional in another⁹⁸ and that if

91. *People ex rel. McClelland v. Roberts*, 148 NY 360, 42 NE 1082.

92. *Robinson v. Broome County*, 276 App Div 69, 93 NYS2d 662, aff'd 301 NY 524, 93 NE2d 7.

93. *Red Rover Copper Co. v. Industrial Com.*, 58 Ariz 203, 118 P2d 1102, 137 ALR 740; *Lee v. Superior Court of California*, 191 Cal 46, 214 P 972; *Golden v. People*, 101 Colo 381, 74 P2d 715; *Peck v. Tugwell*, 199 La 125, 5 So 2d 524; *Peck v. New Orleans*, 199 La 76, 5 So 2d 508; *State ex rel. Faust v. Thomas*, 313 Mo 160, 282 SW 34; *People ex rel. McClelland v. Roberts*, 148 NY 360, 42 NE 1082; *Boyd v. Olcott*, 102 Or 327, 202 P 431; *Hutchinson v. Patching*, 103 Tex 497, 129 SW 603, reh overr 103 Tex 502, 131 SW 400.

94. *Jelm v. Jelm*, 155 Ohio St 226, 44 Ohio Ops 246, 98 NE2d 401, 22 ALR2d 1500; *Board of Elections v. State*, 128 Ohio St 273, 191 NE 115, 97 ALR 1417.

95. *Druggan v. Anderson*, 269 US 36, 70 L Ed 151, 46 S Ct 14 (holding the National Prohibition Act, which was enacted after ratification of the Eighteenth Amendment to the Federal Constitution, not invalid because enacted before the time when the amendment's prohibi-

tory provisions became effective); *Re Opinions of Justices*, 227 Ala 291, 149 So 776; *Re Opinions of Justices*, 227 Ala 296, 149 So 781; *Alabama's Freight Co. v. Hunt*, 29 Ariz 419, 242 P 658; *Busch v. Turner*, 26 Cal 2d 817, 161 P2d 456, 171 ALR 1063; *Neisel v. Moran*, 80 Fla 98, 85 So 346; *Peck v. Tugwell*, 199 La 125, 5 So 2d 524; *State ex rel. State Bldg. Com. v. Smith*, 335 Mo 840, 74 SW2d 27; *State v. Hecker*, 109 Or 520, 221 P 808.

96. *Philadelphia & Southern Mail S. S. Co. v. Pennsylvania*, 122 US 326, 30 L Ed 1200, 7 S Ct 1118.

97. *St. Petersburg v. Pfeiffer*, 4 Fla Supp 146.

98. It is a general rule supported by an unbroken line of decisions that a provision in, or a part of, an act may be unconstitutional without necessarily invalidating the entire act. *People v. Lewis*, 13 Cal 2d 280, 89 P2d 388; *Danskin v. San Diego Unified School Dist.*, 28 Cal 2d 536, 171 P2d 885; *McSweeney v. State Live Stock Sanitary Board*, 97 Fla 750, 122 So 239, 65 ALR 508; *Purdy v. Erie R. Co.*, 162 NY 42, 56 NE 508, reh den 162 NY 663, 57 NE 1122 and writ dismissed 185 US 148, 46 L Ed 847, 22 S Ct 605; *Geiger v. Geiger*, 117 Ohio St 451, 5 Ohio L Abs 829, 160 NE 28; *Board of*



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SUMMARY OF CONSTITUTIONAL CHALLENGES TO GENERIC TORT REFORM ENACTMENTS

1986-Present

As of December 31, 1996

CONSTITUTIONAL

Non-Economic Damages

Kansas--\$250,000 limit on pain and suffering (not other non-economic losses)

Samsel v. Wheeler Transport Services Inc., No. 62,930, May 30, 1989, Kansas Supreme Court (limit of \$250,000 on non-economic damages in personal injury cases other than medical malpractice cases). 7289 A.2d 541 // 771 A.2d 71

Maryland--\$350,000 limit on non-economic damages

558 A.2d 768 Potomac Electric Power Co. v. Smith, 79 Md. App. 591, 558 A.2d 768 (1989) (limit of \$350,000 on non-economic damages in personal injury and wrongful death cases). *shorten?*

Franklin v. Mazda Motor Corp., 704 F. Supp. 1325 (D. Md. 1989) (Limit of \$350,000 on non-economic damages in personal injury cases), appeal denied, (No. PN 87-2203, March 28, 1989, 4th Cir.).

Sara Murphy v. Richard Andre Edmonds, No.99, Md. App. Ct., February 7, 1992.

Punitive Damages

Florida--award may not exceed three times compensatories unless plaintiff can demonstrate by "clear and convincing" evidence that a higher award would not be excessive

Smith v. Department of Insurance, 507 So. 2d 1080 (Fla. 1987).

Florida--60% of any punitive damage award must be paid to the Public Assistance Trust Fund or the state's General Revenue fund.

Harvey Gordon v. State of Florida, K-Mart Corp. et al., 608 So. 2d 800 (Fla.1992).

Georgia--the total amount of punitive damages awarded in one case may not exceed the state's \$250,000 limit on punitive damages.

Bagley, et al. v. Shortt, et al. and vice versa, Nos. S91X0662, S91X0663, September 5 1991, Georgia Supreme Court (reduced punitive damage award to comply with state limit).

Mack Trucks Inc. v. David J. Conkle, et. al. and vice versa, Nos. S93A0725, S93A0726, Ga. Supreme Court., Nov. 22, 1993.

Virginia--\$350,000 limit on punitive damage awards

Wackenhut Applied Technologies Center Inc. v. Syngetron Protections Systems, No. 91-1655, Virginia Court of Appeals, 4th Circuit, November 1992.

Joint and Several Liability

Florida--abolished joint and several liability for non-economic damage recoveries; also eliminated joint liability for economic damages for defendants less at fault than the plaintiff

Smith v. Department of Insurance, 507 So. 2d 1080 (Fla. 1987).

Allied Signal Inc. v. Kevin Fox, Case No. 80818, Florida Supreme Court, Aug. 26, 1993.

Maria G. Fabre v. Ann Marin, case No. 76869, Florida Supreme Court, Aug. 26, 1993

Arizona--abolished joint and several liability except in cases of intentional torts or hazardous waste.

Church v. Rawson Drug & Sundry Co., No. 1 CA-CV 90-0357, Ariz. App. Ct., Div. I, October 1, 1992.

Collateral Sources

Florida--mandatory offset (excluding benefits paid for by plaintiff)

Smith v. Department of Insurance, 507 So. 2d 1080 (Fla. 1987).

UNCONSTITUTIONAL**Non-Economic Damages**

Florida--\$450,000 limit

Smith v. Department of Insurance, 507 So. 2d 1080 (Fla. 1987).

New Hampshire--\$875,000 limit

Brannigan v. Usitalo, No. 90-377, N.H. Sup. Ct. (March 13, 1991).

Ohio--\$250,000 limit

Gladon v. Greater Regional Transit Authority, No. 64029, Ohio App. Ct., 8th Dist., Cuyahoga County, March 1994.

* Oregon--\$500,000 limit

Tenold v. Weyerhaeuser Co., 873 P.2d 413 (Or. App. 1994)

review denied, 901 P.2d.859 (Or. 1995).

* Washington--variable limit

Sofie v. Fibreboard Corp., 112 Wash. 2d 636, 771 P.2d 711 (1989)

Punitive Damages

Alabama--trial and appellate judicial review of all punitive damage awards, reducing those that are excessive

Armstrong v. Roger's Outdoor Sports, Inc., petition for rehearing *per curiam* denied May 10, 1991.

Alabama -- \$250,000 limit on punitive damages

* Craig Henderson v. Alabama Power Company, Supreme Court of Alabama Case No. 1901875, June 25, 1993. 61750, 878

Colorado -- one third of award goes to state's general fund

✱

Kirk v. The Denver Publishing Company, 15 Brief Times Reporter, No. 88SA405, September 23, 1991. 818 P.2d 262.

Georgia--one award against a defendant, 75% of the award paid to a state fund

McBride v. General Motors Corp., ____ F. Supp. ____ (M.D. Ga., No. 89-110-COL, April 10, 1990).

Moseley v. General Motors Corp., No. 90V6276 (Ga., Fulton County State Ct. Feb 26, 1993)(order granting post-trial motion).

Ohio--amount of punitive damages to be determined by the court

Zoppo v. Homestead Insurance Co., 644 N.E.2d 397 (Ohio 1994)

cert. denied, 116 S. Ct. 56 (1995).

Periodic Payments

Alabama--structured payment for personal injury awards over \$150,000

✱ Billy Ray Clark and Halliburton Industrial Services Division v. Container Corp. of America, Inc., 589 So. 2d 184 (Ala. 1991), No. 1900325, decided, September 27, 1991.

Collateral Sources

Alabama--evidence of collateral source payments

✱ American Legion Post Number 57 v. Leahy, -- So. 2d --, 1996 WL 390622 (Ala. July 12, 1996). 681 So.2d 1337

Georgia--evidence of collateral sources of payment, reduction not mandated

Georgia Power Co. v. Falagan, et al., No. S90A1245, Ga. Sup. Ct. (April, 1991).

Kansas--allows a collateral source offset for claims of \$150,000 or more

Thompson v. KFB Insurance Company, Case No. 68,452 (1993), Ks. Sup. Ct.

Kentucky--evidence of collateral sources of payment

O'Bryan v. Hedgespeth, 892 S.W.2d 571 (Ky. 1995).

Ohio--mandatory offset of any benefits received less the total of any costs paid for benefit

Schenk v. The Cleveland Electric Illuminating Company, No. 92-L-161, Ohio App. Ct.,
11th Dist., Lake Co., March 4, 1994.

reduction of damage awards in personal injury cases
Sorrell v. Thevenir, Ohio Sup. Ct., 3rd Dist

utable to Haas or Simpson. Brief of Respondent, at 67.

A careful review of Clallam's request for attorney fees (Clerk's Papers, at 707-20) reveals no specific time attributable to the representation of Haas or Simpson. Nor does WPUDUS identify any other part of the record supporting its suggestion that Haas and Simpson were responsible for one-half of the requested fees. WPUDUS has cited no factual basis in the record nor any precedent to support its argument on attorney fees. Therefore, we find that the trial court's award of fees was reasonable.

The order of the trial court in this declaratory action is affirmed and reversed in part. We remand the case for a determination of costs and attorney fees on appeal to be awarded respondents pursuant to the parties' agreement.

CALLOW, C.J., and PEARSON,
ANDERSEN, UTTER, DORE,
DURHAM, DOLLIVER and SMITH,
JJ., concur.



Austin SOFIE and Marcia Sofie,
husband and wife, Appellants,

v.

FIBREBOARD CORP.; The Celotex
Corp.; Eagle-Picher Industries, Inc.;
Keene Corp.; Raymark Industries, Inc.;
Owens-Illinois, Inc., Respondents.

No. 54610-0.

Supreme Court of Washington,
En Banc.

April 27, 1989.

Husband and wife brought tort action against asbestos manufacturers. The Superior Court, Kitsap County, James I. Maddock, J., entered judgment and reduced jury award of noneconomic damages pursu-

ant to statute placing limit on noneconomic damages recoverable by personal injury or wrongful death plaintiff. Plaintiffs appealed. The Supreme Court, Utter, J., held that statute violates state constitutional right to trial by jury.

Jury award of damages reinstated.

Andersen, J., concurred on basis that statute violated Constitution.

Callow, C.J., filed a dissenting opinion in which Dolliver, J., joined.

Dolliver, J., filed a dissenting opinion in which Callow, C.J., joined.

Durham, J., filed a dissenting opinion in which Callow, C.J., and Dolliver, J., joined.

1. Constitutional Law §48(4)

Municipal Corporations §122(2)

In matters of economic legislation, Supreme Court follows rule giving every reasonable presumption in favor of constitutionality of law or ordinance.

2. Jury §11(5)

Seventh Amendment to Constitution does not apply through Fourteenth Amendment to the states in civil trials. U.S.C.A. Const. Amends. 7, 14.

3. Jury §12(1)

State constitutional article governing right to jury trial protects jury's role to determine damages. West's RCWA Const. Art. 1, § 21.

4. Jury §14(1)

Right to trial by jury attached to products liability action. West's RCWA Const. Art. 1, § 21.

5. Jury §10

Because of constitutional nature of right to jury trial, litigants have continued interest in right and it simply cannot be removed by legislative action. West's RCWA Const. Art. 1, § 21.

6. Jury §34(1)

Statute placing limit on noneconomic damages recoverable by personal injury or wrongful death plaintiff violates state con-

3 dissents

stitutional right to trial by jury. West's RCWA 4.56.250; West's RCWA Const. Art. 1, § 21.

7. Constitutional Law ⚖55

It is entirely within legislature's power to define parameters of cause of action and prescribe factors to take into consideration in determining liability.

8. Appeal and Error ⚖970(2), 975, 979(5)

Matters of juror misconduct, cumulative testimony, witness exclusion and motions for remittitur are committed to trial court's discretion, and the Supreme Court will not reverse trial court's rulings in those areas unless there is a clear abuse of discretion.

9. Courts ⚖26

A judge abuses his discretion when no reasonable judge would have reached same conclusion.

10. New Trial ⚖162(1)

With regard to remittitur, not only is that a matter within trial judge's discretion, but judge must give great deference to jury's findings of fact, including determination of damages.

11. Health and Environment ⚖25.5(5.5)

Statute excepting from restriction on joint and several liability causes of action relating to hazardous wastes or substances or solid waste disposal sites does not apply only to problems relating to hazardous wastes and environmental pollution. West's RCWA 4.22.070(3)(a).

Schroeter, Goldmark & Bender, Janet L. Rice, Kirk I. Mortensen, William Rutzick, Seattle, Stritmatter, Kessler & McCauley, Paul Stritmatter, Hoquiam, for appellants.

Gibson, Dunn & Crutcher, Gary C. Grotz, Kent T. Van den Berg, Mark Hughes, Steven T. Johnson, Seattle, for respondents Fibreboard, Celotex, Owens-Illinois and Keene Corp.

Williams, Kastner & Gibbs, Elizabeth A. Christianson, Mary H. Spillane, Seattle, Williams, Kastner & Gibbs, William H. Mays, Tacoma, for respondent Eagle-Picher Industries.

McKay & Gaitan, Linda E. Blohm, Bellevue, for respondent Raymark Industries.

Bryan P. Harnetiaux, Spokane, Winston & Cashatt, Robert H. Whaley, Spokane, for amicus curiae on behalf of Washington Trial Lawyers Ass'n.

Jeffrey R. White, Washington, D.C., Sullivan & Golden, Daniel F. Sullivan, Seattle, for amicus curiae on behalf of Ass'n of Trial Lawyers of America.

Richard H. Robblee, Seattle, for amicus curiae on behalf of United Ass'n of Journeymen and Apprentices.

Kenneth Eikenberry, Atty. Gen., Michael E. Tardif, Asst., Olympia, Kenneth Eikenberry, Atty. Gen., Michael Madden, Asst., Seattle, Bertha B. Fitzer, Tacoma, Burgess, Kennedy, Fitzer & Strombom, P.S., F. Ross Burgess, Tacoma, for amicus curiae on behalf of Respondent Washington Defense Trial Lawyers Ass'n and Defense Research Institute.

Jeffrey I. Tilden, Rex C. Browning, Seattle, for amicus curiae on behalf of Respondent Liability Reform Coalition.

UTTER, Justice.

Austin and Marcia Sofie challenge the constitutionality of RCW 4.56.250. This statute, part of the 1986 tort reform act, places a limit on the noneconomic damages recoverable by a personal injury or wrongful death plaintiff. The Sofies brought a direct appeal to this court after the trial judge in their tort action, under the direction of the statute, reduced the jury's award of noneconomic damages. The respondents subsequently cross-appealed to the Court of Appeals, raising several issues of trial court error, issues we consider here.

The Sofies argue that RCW 4.56.250 violates their constitutional rights to trial by jury, equal protection, and due process. We find that the statute's damages limit interferes with the jury's traditional function to determine damages. Therefore, RCW 4.56.250 violates article 1, section 21 of the Washington Constitution, which protects as inviolate the right to a jury. Be-

cause the statute is unconstitutional on this basis, we do not consider its constitutionality under the latter two doctrines raised by appellants, although we briefly survey the equal protection issues. Respondents' arguments concerning trial court error are without merit.

The Washington Legislature passed RCW 4.56.250 in 1986 partly as a response to rising insurance premiums for liability coverage. The damages limit that the statute creates operates on a formula based upon the age of the plaintiff.¹ As a result, the older a plaintiff is, the less he or she will be able to recover in noneconomic damages. The trial judge applies the limit to the damages found by the trier of fact. If the case is tried before a jury, the jury determines the amount of noneconomic damages without knowledge of the limit. The jury goes about its normal business and the judge reduces, according to the statute's formula and without notifying the jury, any damage verdicts that exceed the limit.

In September 1987, the Sofies sued Fibreboard Corporation and other asbestos manufacturers for the harm caused to Mr. Sofie by their asbestos products. Mr. Sofie, then aged 67, was suffering from a form of lung cancer—mesothelioma—caused by exposure to asbestos during his

career as a pipefitter. At trial, Mr. Sofie's attorneys presented evidence of the extreme pain he experienced as a result of the disease. The testimony indicated that Mr. Sofie spent what remained of his life waiting for the next "morphine cocktail," for the next hot bath, for anything that would lessen his consuming physical agony.

At the end of the trial, the jury found the defendants at fault for Mr. Sofie's disease. They returned a verdict of \$1,345,833 in favor of the Sofies. Of this amount, \$1,154,592 went to compensate noneconomic damages: \$477,200 for Mr. Sofie's pain and suffering and \$677,392 for Mrs. Sofie's loss of consortium. While the trial judge specifically found the jury's finding of damages reasonable, he indicated he was compelled under the damages limit to reduce the noneconomic portion of the verdict to \$125,136.45, resulting in a total judgment of \$316,377.45.

I

Appellants argue that RCW 4.56.250 violates their right to equal protection under the law as guaranteed by Washington Constitution article 1, section 12. This constitutional provision states:

No law shall be passed granting to any citizen, class of citizens, or corporation

1. RCW 4.56.250 states:

"(1) As used in this section, the following terms have the meanings indicated unless the context clearly requires otherwise.

"(a) 'Economic damages' means objectively verifiable monetary losses, including medical expenses, loss of earnings, burial costs, loss of use of property, cost of replacement or repair, cost of obtaining substitute domestic services, loss of employment, and loss of business or employment opportunities.

"(b) 'Noneconomic damages' means subjective, nonmonetary losses, including, but not limited to pain, suffering, inconvenience, mental anguish, disability or disfigurement incurred by the injured party, emotional distress, loss of society and companionship, loss of consortium, injury to reputation and humiliation, and destruction of the parent-child relationship.

"(c) 'Bodily injury' means physical injury, sickness, or disease, including death.

"(d) 'Average annual wage' means the average annual wage in the state of Washington as determined under RCW 50.04.355.

"(2) In no action seeking damages for personal injury or death may a claimant recover a judgment for noneconomic damages exceeding an amount determined by multiplying 0.43 by the average annual wage and by the life expectancy of the person incurring noneconomic damages, as the life expectancy is determined by the life expectancy tables adopted by the insurance commissioner. For purposes of determining the maximum amount allowable for noneconomic damages, a claimant's life expectancy shall not be less than fifteen years. The limitation contained in this subsection applies to all claims for noneconomic damages made by a claimant who incurred bodily injury. Claims for loss of consortium, loss of society and companionship, destruction of the parent-child relationship, and all other derivative claims asserted by persons who did not sustain bodily injury are to be included within the limitation on claims for noneconomic damages arising from the same bodily injury.

"(3) If a case is tried to a jury, the jury shall not be informed of the limitation contained in subsection (2) of this section."

other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.

Although the language of article 1, section 12 differs from the fourteenth amendment of the federal Constitution, this court has generally followed the federal ' tiered scrutiny model of equal protection analysis originally developed by the United States Supreme Court. See, e.g., *Daggs v. Seattle*, 110 Wash.2d 49, 55, 750 P.2d 626 (1988). We have followed this approach because a separate analysis focusing on the language and history of our state constitution has not been urged. In one of their briefs, appellants point out that this court initially used an analysis based upon the different language of our own constitution. See, e.g., *State v. Carey*, 4 Wash. 424, 30 P. 729 (1892). They argue that it is appropriate to consider both the tiered scrutiny model of equal protection analysis as well as a language-specific analysis similar to the one developed by the Oregon Supreme Court. See, e.g., *State v. Clark*, 291 Or. 231, 630 P.2d 810 (1981); *State v. Edmonson*, 291 Or. 251, 630 P.2d 822 (1981).

In the context of tiered scrutiny, appellants argue that this court should review the noneconomic damages limit under the mid-level scrutiny followed in *State v. Phelan*, 100 Wash.2d 508, 671 P.2d 1212 (1983) and *Hunter v. North Mason High School & School Dist.* 403, 85 Wash.2d 810, 539 P.2d 845 (1975). They contend that Mr. Sofie belongs to a "semi-suspect class"—discrete but not suspect—of severely injured plaintiffs. Citing *Hunter*, they also claim that the damages limit affects an important right: the right to be indemnified for personal injuries. Under such a mid-tier analysis, this court generally requires that the challenged law further a

2. Article 1, section 20 of the Oregon Constitution states: "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."

Under the Oregon court's analysis, no statute can survive merely by showing a rational relationship between the classification and the purpose; it must leave legal entry to a class open

substantial state interest. *Daggs*, 110 Wash.2d at 55, 750 P.2d 626.

Respondents contend that intermediate scrutiny should not apply because the damages limit amounts to economic legislation. Such legislation, they maintain, is reviewed under the deferential rational basis test. In support of this they cite, among other cases, *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 98 S.Ct. 2620, 57 L.Ed.2d 595 (1978) (upholding the Price-Anderson Act).

Courts in some other states have struck down similar tort damage limits on equal protection grounds. See, e.g., *Carson v. Maurer*, 120 N.H. 925, 424 A.2d 825, 830 (1980) (striking limit on noneconomic damages after finding right to recover for personal injuries an "important substantive right," citing *Hunter*); *Arneson v. Olson*, 270 N.W.2d 125, 132 (N.D.1978) (applying heightened scrutiny to flat damages limit); see also Comment, *Constitutional Challenges to Washington's Limit on Noneconomic Damages in Cases of Personal Injury and Death*, 63 Wash.L.Rev. 653 (1988); *Development in the Law: The 1986 Washington Tort Reform Act*, 23 Willamette L.Rev. 211 (1987). Other courts, however, have upheld limits, analyzing the legislation under the rational basis test. See, e.g., *Fein v. Permanente Medical Group*, 38 Cal.3d 137, 695 P.2d 665, 211 Cal.Rptr. 368, appeal dismissed, 474 U.S. 892, 106 S.Ct. 214, 88 L.Ed.2d 215 (1985); see also *Boyd v. Bulala*, 647 F.Supp. 781 (W.D.Va.1986) (finding that damages limit passes the rational basis test under equal protection analysis but violates the right to a jury trial).

As for the analysis based on the language of our privileges and immunities clause, this question must wait for another case.²

and must operate with consistently applied objective criteria. See *State v. Clark*, 291 Or. 231, 630 P.2d 810 (1981); *State v. Edmonson*, 291 Or. 251, 630 P.2d 822 (1981). The court inquires into whether the challenged state action affects a "privilege or immunity"—that is, "some advantage" to which a person "would be entitled but for a choice made by a government authority." *Salem v. Bruner*, 299 Or. 262, 702 P.2d 70, 74

The dispositive right to a jury trial

[1] This court review of legislative care. The wisdom is questionable; our only legislative's consent, *Inc. v. Cou* 144, 151, 459 P.2d *Bolen v. Seattle*, P.2d 454 (1963), Wash. 573, 576, matters of economic rule giving ever in favor of the corporation or ordinance. See 143, 152, 53 P. (1936).³ We emphasize substituting our judgment of the Legislature *Employees' Bd.* 206, 559 P.2d 99

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8 U.S. 59, 98 S.Ct. 2620,
378) (upholding the Price-

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925, 424 A.2d 825, 830
mit on noneconomic dam-
; right to recover for per-
"important substantive
iter); *Arneson v. Olson*,
132 (N.D.1978) (applying
y to flat damages limit);
it, *Constitutional Chal-*
gton's Limit on Noneco-
n Cases of Personal In-
l, 63 Wash.L.Rev. 653
ient in the Law: The
Tort Reform Act, 23 Wil-
11 (1987). Other courts,
held limits, analyzing the
the rational basis test.
2. *Permanente Medical*
137, 695 P.2d 665, 211
oeal dismissed, 474 U.S.
1, 88 L.Ed.2d 215 (1985);
Bulala, 647 F.Supp. 781
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; *State v. Edmonson*, 291 Or.
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by a government authority."
99 Or. 262, 702 P.2d 70, 74

Cite as 771 P.2d 711 (Wash. 1989)

II

The dispositive issue of this case is the
right to a jury trial.

[1] This court has long approached the
review of legislative enactments with great
care. The wisdom of legislation is not jus-
tifiable; our only power is to determine the
legislation's constitutional validity. *Pet-*
stel, Inc. v. County of King, 77 Wash.2d
144, 151, 459 P.2d 937 (1969); *State ex rel.*
Bolen v. Seattle, 61 Wash.2d 196, 198, 377
P.2d 454 (1963), *Smith v. Centralia*, 55
Wash. 573, 576, 104 P. 797 (1909). In mat-
ters of economic legislation, we follow the
rule giving every reasonable presumption
in favor of the constitutionality of the law
or ordinance. *Shea v. Olson*, 185 Wash.
143, 152, 53 P.2d 615, 111 A.L.R. 998
(1936).³ We employ this caution to avoid
substituting our judgment for the judg-
ment of the Legislature. See *State Public*
Employees' Bd. v. Cook, 88 Wash.2d 200,
206, 559 P.2d 991 (1977), *aff'd on rehear-*

(1985). The next step is to determine whether
the action or statute was performed under law-
ful authority. The court then considers whether
the statute or action affects a true class (one
with characteristics that set it apart regardless
of the statute), or a pseudo-class (one created by
the statute), or an individual. To determine
whether the statute represents impermissible
discrimination, the court has devised different
tests for each of these classifications.

For an in-depth analysis of the Oregon court's
method for construing its privileges and immu-
nities clause, see Schuman, *The Right to "Equal*
Privileges and Immunities": A State's Version of
"Equal Protection", 13 Vt.L.Rev. 221 (1988).
For a privileges and immunities analysis of non-
economic tort damage cap legislation, see Note,
Challenging the Constitutionality of Noneconom-
ic Damage Caps: Boyd v. Bulala and the Right to
a Trial by Jury, 24 Willamette L.Rev. 821, 836-
38 (1988).

3. The dissent of Dolliver, J. is correct in point-
ing out, at page 732, that *Shea* contains lan-
guage setting a reasonable doubt standard in
favor of the constitutionality of a statute. By
citing *Shea*, we incorporate the burden of proof
stated in that opinion. In the final analysis, the
language quoted by the dissent is merely a dif-
ferent way of stating the rule we cite above.
One need only to look at the many cases in
which this principle is enunciated to see the
different combinations of words used to express
it. *State v. Ida*, 35 Wash. 576, 77 P. 961 (1904),
which *Shea* cites for authority, puts it this way:

[I]t is settled by the highest authority that a
legislative enactment is presumed to be con-

ing, 90 Wash.2d 89, 579 P.2d 359 (1978);
Fritz v. Gorton, 83 Wash.2d 275, 283, 517
P.2d 911 (1974); *Jones v. Jones*, 48 Wn.2d
862, 868, 296 P.2d 1010, 54 A.L.R.2d 1408
(1956); see also Utter, *Freedom and Di-*
versity in a Federal System: Perspectives
on State Constitutions and the Washing-
ton Declaration of Rights, 7 U. Puget
Sound L.Rev. 491, 522-23 (1984).

Other courts, faced with unconstitutional
tort damage limits, have adhered to similar
principles when reviewing those legislative
actions. The Kansas Supreme Court put it
well:

"This court is by the Constitution not
made the critic of the legislature, but
rather, the guardian of the Constitution."
The constitutionality of a statute is pre-
sumed, and all doubts must be resolved
in favor of its validity. Before a statute
may be stricken down, it must clearly
appear the statute violates the Constitu-
tion. Moreover, it is the court's duty to
uphold the statute under attack, if possi-

stitutional and valid until the contrary clearly
appears. In other words, the courts will pre-
sume that an act regularly passed by the legis-
lative body of the government is a valid law,
and will entertain no presumptions again [sic]
its validity. And, when the constitutionality
of an act of the legislature is drawn in ques-
tion, the court will not declare it void unless
its invalidity is so apparent as to leave no
reasonable doubt upon the subject....

35 Wash. at 581, 77 P. 961; see also *Litchman v.*
Shannon, 90 Wash. 186, 189, 155 P. 783 (1916);
Chas. Uhden, Inc. v. Greenough, 181 Wash. 412,
420-21, 43 P.2d 983 (1935) ("an act of the legis-
lature will be presumed to be valid unless there
is no reasonable doubt as to its validity");
McDermott v. State, 197 Wash. 79, 83, 84 P.2d
372 (1938) ("Every reasonable presumption
must be indulged in favor of the constitutionali-
ty of this statute, and the burden rests upon
appellant to establish clearly its invalidity");
Spokane v. Coon, 3 Wash.2d 243, 246, 100 P.2d
36 (1940) ("every presumption is in favor of the
constitutionality of a law or ordinance"). *Brew-*
er v. Copeland, 86 Wash.2d 58, 542 P.2d 445
(1975), describes the standard twice, each time
with different words. At page 61, 542 P.2d 445
this court stated that the plaintiff "must over-
come the presumption of constitutionality be-
yond a reasonable doubt"; at page 69, 542 P.2d
445, we put it another way: "if any state of facts
can reasonably be conceived to uphold the legis-
lation including the classification made therein,
the legislation will be upheld."

ble, rather than defeat it, and if there is any reasonable way to construe the statute as constitutionally valid, that should be done.

(Citations omitted.) *Kansas Malpractice Victims Coalition v. Bell*, 243 Kan. 333, 757 P.2d 251, 256-57 (1988).

[2] To determine the extent of the right to trial by jury as it applies here, we must first identify the source of the constitutional protection. The seventh amendment to the United States Constitution does not apply through the Fourteenth Amendment to the states in civil trials. *Minneapolis & St. L. R. v. Bombolis*, 241 U.S. 211, 36 S.Ct. 595, 60 L.Ed. 961 (1916); *Walker v. Sauvinet*, 92 U.S. (2 Otto) 90, 23 L.Ed. 678 (1876). The right to jury trial in civil proceedings is protected solely by the Washington Constitution in article 1, section 21. Therefore, the relevant analysis must follow state doctrine; our result is based entirely on adequate and independent state grounds.⁴

Article 1, section 21 states:

The right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases in any court of record, and for waiving of the jury in civil cases where the consent of the parties interested is given thereto.

Our basic rule in interpreting article 1, section 21 is to look to the right as it existed at the time of the constitution's adoption in 1889. *State ex rel. Goodner v. Speed*, 96 Wash.2d 838, 840, 640 P.2d 13 (1982); *In re Ellern*, 23 Wash.2d 219, 224, 160 P.2d 639 (1945); *State ex rel. Mullen v. Doherty*, 16 Wash. 382, 384-85, 47 P. 958 (1897). We have used this historical standard to determine the scope of the right as well as the causes of action to which it applies. These two issues, scope and the applicable causes of action, merit separate discussion.

State ex rel. Mullen v. Doherty, *supra*, being close in time to 1889, provides some

4. Even if the federal constitution were to apply in this case, following the nonexclusive criteria set out in *State v. Gunwall*, 106 Wash.2d 54, 720

contemporary insight on the scope issue. In *Mullen*, we cited section 248 of the Code of 1881, in force at the time of the constitution's passage, to determine the jury's role in the constitutional scheme: "either party shall have the right in an action at law, upon an issue of fact, to demand a trial by jury." *Mullen*, 16 Wash. at 385, 47 P. 58. Subsequent cases underscore the jury's fact finding province as the essence of the right's scope. See, e.g., *State v. Strasburg*, 60 Wash. 106, 110 P. 1020 (1910); *In re Ellern*, *supra*.

[3] At issue in the present case is whether the measure of damages is a question of fact within the jury's province. Our past decisions show that it is indeed. The constitutional nature of the jury's damage-finding function is underscored by *Baker v. Prewitt*, 3 Wash.Terr. 595, 19 P. 149 (1888). In that case, the territorial Supreme Court stated:

Sections 204 and 289 of the [territorial] Code seem to require that in all actions for the assessment of damages the intervention of a jury must be had, save where a long account may authorize a referee, etc. This statute is mandatory, and we are satisfied that where the amount of damages is not fixed, agreed upon, or in some way liquidated, a jury must be called, unless expressly waived.

Baker, at 597-98, 19 P. 149. If our state constitution is to protect as inviolate the right to a jury trial at least to the extent as it existed in 1889, then *Baker's* holding provides clear evidence that the jury's fact-finding function included the determination of damages. This evidence can only lead to the conclusion that our constitution, in article 1, section 21, protects the jury's role to determine damages.

The present case is not the first time we have recognized the constitutional nature of the jury's damage-determining role. In *James v. Robeck*, 79 Wash.2d 864, 869, 490 P.2d 878 (1971), we stated: "To the jury is consigned under the constitution the ulti-

P.2d 808 (1986), we would still base our decision on the Washington Constitution.

mate power to we termine the facts-ages in a partic fact." See also *1 Nav. Co.*, 1 Wash. (Act of 1883, crea mining the value appraisers, was ur denied the right to *ton v. Caldwell*, 6 P.2d 797 (1964) (should be decided *v. Dalton*, 40 Wa 853, 35 A.L.R.2d : *Porter*, 29 Wash. (1948); *Walker v.* 592-95, 50 P. 518

The jury's role nomic damages is sential. In *Binga Comm'ty Hosp.*, 10 P.2d 1230 (1985), t who died painfully birth, the result brought a wrongfu tion. The only issu whether the trial duced the jury's di 000 for the woman In resolving the iss vor, we stated: "Th amount of damage tions of this natur liarily within the pro proper instructions 103 Wash.2d at 83. also *Lyster v. Met* 224-25, 412 P.2d 34 ages, here primarily the jury's province); *R.R.*, 655 F.2d 138 (under Washington of companionship d fact).

United States Su dence on the Seven in civil trials, while states, also provide *Dimick v. Schiedt*, 296, 79 L.Ed. 603 (historical analysis the Seventh Amend Citing cases and tre.

the scope issue. n 248 of the Code ne of the constitu- ne the jury's role ne: "either party in action at law, lemand a trial by at 385, 47 P. 58. score the jury's ne essence of the *State v. Stras-* . 1020 (1910); *In*

present case is images is a ques- 's province. Our t is indeed. The e jury's damage- ored by *Baker v.* 19 P. 149 (1888). l Supreme Court

the [territorial] at in all actions images the inter- it be had, save nay authorize a te is mandatory, that where the ot fixed, agreed quidated, a jury xpressly waived.

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"To the jury is titution the ulti-

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mate power to weigh the evidence and determine the facts—and the amount of damages in a particular case is an ultimate fact." See also *Dacres v. Oregon Ry. & Nav. Co.*, 1 Wash. 525, 20 P. 601 (1889) (Act of 1883, creating a scheme for determining the value of train-killed animals by appraisers, was unconstitutional because it denied the right to a jury trial); *Worthington v. Caldwell*, 65 Wash.2d 269, 273, 396 P.2d 797 (1964) ("Questions of damages should be decided by the jury"); *Anderson v. Dalton*, 40 Wash.2d 894, 897, 246 P.2d 853, 35 A.L.R.2d 302 (1952); *Kellerher v. Porter*, 29 Wash.2d 650, 189 P.2d 223 (1948); *Walker v. McNeill*, 17 Wash. 582, 592-95, 50 P. 518 (1897).

The jury's role in determining noneconomic damages is perhaps even more essential. In *Bingaman v. Grays Harbor Comm'ty Hosp.*, 103 Wash.2d 831, 835, 699 P.2d 1230 (1985), the husband of a woman who died painfully 35 hours after giving birth, the result of medical malpractice, brought a wrongful death and survival action. The only issue before this court was whether the trial judge had properly reduced the jury's damage verdict of \$412,000 for the woman's pain and suffering. In resolving the issue in the plaintiff's favor, we stated: "The determination of the amount of damages, particularly in actions of this nature, is primarily and peculiarly within the province of the jury, under proper instructions ..." (Italics ours.) 103 Wash.2d at 835, 699 P.2d 1230. See also *Lyster v. Metzger*, 68 Wash.2d 216, 224-25, 412 P.2d 340 (1966) (issue of damages, here primarily noneconomic, is within the jury's province); *Power v. Union Pac. R.R.*, 655 F.2d 1380, 1388 (9th Cir.1981) (under Washington law, damages for loss of companionship determined by trier of fact).

United States Supreme Court jurisprudence on the Seventh Amendment's scope in civil trials, while not binding on the states, also provides some insight. In *Dimick v. Schiedt*, 293 U.S. 474, 55 S.Ct. 296, 79 L.Ed. 603 (1935), the Court used historical analysis to determine whether the Seventh Amendment allowed additur. Citing cases and treatises dating from the

time of the amendment's adoption, the Court found that determining damages, as an issue of fact, was very much within the jury's province and therefore protected by the Seventh Amendment. The Court also indicated that a judge should give more deference to a jury's verdict when the damages at issue concern a noneconomic loss. The Court quoted the English case of *Beardmore v. Carrington*, 2 Wils. 244, 248:

"There is great difference between cases of damages which [may] be certainly seen, and such as are ideal, as between *assumpsit*, *trespass for goods* where the sum and value may be measured, and actions of *imprisonment*, *malicious prosecution*, *slander and other personal torts*, where the damages are matter of opinion, speculation, ideal ..."

293 U.S. at 479, 55 S.Ct. at 298. The Court clarified the implications of the difference between these two classes of actions by quoting from Mayne's *Treatise on Damages*, at 571: "in cases where the amount of damages was uncertain their assessment was a matter so peculiarly within the province of the jury that the Court should not alter it." 293 U.S. at 480, 55 S.Ct. at 298.

Respondents and certain amici contend that *Tull v. United States*, 481 U.S. 412, 107 S.Ct. 1831, 95 L.Ed.2d 365 (1987), renders null the above analysis from *Dimick*. Using historical analysis, the *Tull* Court found that a defendant in an enforcement proceeding under the federal clean water act had the right to a jury trial but not to have the jury determine the amount of the civil penalty. The distinction, however, between damages in a tort action and a civil penalty in a regulatory enforcement case is fundamental. Therefore, *Tull* is irrelevant on the issue before the court. Ultimately, however, because the Supreme Court's civil trial Seventh Amendment jurisprudence is not binding on the states, state courts can look on this area as educational rather than coercive: the federal cases may assist us, but they do not compel the result we reach. We find the noneconomic damages limit unconstitutional on adequate and independent state grounds. While we do this, we

will examine federal cases which provide the most informative analysis on the issues we must decide. *Dimick* provides that analysis; *Tull* does not.

As our past decisions have shown, Washington has consistently looked to the jury to determine damages as a factual issue, especially in the area of noneconomic damages. This jury function receives constitutional protection from article 1, section 21.

The second issue we must address is the determination of which causes of action the right to trial by jury attaches to. We have held in the past that the right attaches to actions in which a jury was available at common law as of 1889 and to actions created by statutes in force at this same time allowing for a jury. See, e.g., *State ex rel. Mullen v. Doherty*, *supra* (as of 1889, quo warranto proceedings were not heard by a jury, therefore right did not attach); *In re Ellern*, *supra*; see also Trautman, *Right to Jury Trial in Washington—Present and Future*, 34 Wash.L.Rev. 401 (1959).

Amici in favor of respondents' position suggest that the right to a jury does not apply to causes of action that did not exist at the time of the constitution's adoption. A fundamental problem exists with this argument. If the right to a jury trial applies only to those theories of recovery accepted in 1889—rather than the types of actions that, at common law, were heard by a jury at that time—then the constitutional right to a jury will diminish over time. As a method of construing a lasting constitutional right, this makes little sense.

As respondents themselves point out, this court stated in *Hunter v. North Mason High School & School Dist.* 403, 85 Wash.2d 810, 539 P.2d 845 (1975), that constitutional analysis is not completely frozen in time. It would defeat the intention of our constitution's framers to interpret an essential right so that it slowly withers away. An interpretation more consistent with the intended longevity of a constitutional right adapts the application of that right according to developments in the law over time. As long as the scope and nature of the right are adequately defined—

and for that we can turn to a stricter historical analysis—a more flexible historical approach for determining when the right attaches will better achieve the intent of the framers.

A method of historical analysis used by the United States Supreme Court in *Tull v. United States*, *supra*, provides further insight. The *Tull* Court looked for proceedings analogous to the enforcement action under the federal clean water act which were contemporary with the Seventh Amendment's adoption. Finding that the common law proceeding of debt, in which the litigants had a right to a jury, was analogous to the clean water act enforcement action, the Court applied the Seventh Amendment right to the modern action. Without stretching the analogy as far as the Supreme Court did, it is logical to apply the more recent tort theories by analogy to the common law tort actions that existed in 1889. We note again that we reach our result today on adequate and independent state grounds. The holding in *Tull*, like all United States Supreme Court precedent in the civil trial area of the Seventh Amendment, is not binding on the states and merely serves as an example to us. It does not compel the result we reach.

[4] Ultimately, there is not even an issue whether the right to a jury attaches to the *Sofies'* case. While they asserted "newer" tort theories in their complaint, the heart of the appellants' cause of action centered on negligence and willful or wanton misconduct resulting in personal injury. See Plaintiff's Summons and Complaint, at 4-5. These basic tort theories are the same as those that existed at common law in 1889. See, e.g., *Columbia & Puget Sound R.R. v. Hawthorne*, 3 Wash.Terr. 353, 19 P. 25 (1888) (worker injured by falling pulley, defect known to employer); *Sayward v. Carlson*, 1 Wash. 29, 23 P. 830 (1890) (plaintiff, injured at work due to employer's negligence while on the way to the bathroom, was not contributorily negligent). Subsequent cases and statutes have recognized newer theories of recovery within the framework of these basic tort actions, but the basic cause of action re-

mains the same trial by jury—v historical analy:

Respondents has the power t trials, such alte role of the jury cases in which o changes agains right to trial by *Mountain Tim* P. 645 (1913), a 260, 61 L.Ed. workers' compe rel. *Clark v. Ne* 668 (1903) (up fees and time li *Bellingham v. i* P.2d 895 (1950) may be tried wit is right to jury *Lambert Van & Wash.App. 298*, holding mandat Respondents ar may, in fact, do altogether, repla such as workers the initial stage jury at all. In si the Legislature c recovery."

The Legislatu ration. Such po it must not enci protections. In t gants an essentia Legislature has

A review of the dents provides i legislative power that the Legislatu jury's fact-finding including the dete of damages.

In the case of this court in *Sta*

5. We note here th the power to abo *Mountain Timber*

mains the same. Therefore, the right to trial by jury—with its scope as defined by historical analysis—remains attached here.

III

Respondents argue that the Legislature has the power to alter the functions of civil trials, such alterations often affecting the role of the jury. They cite a number of cases in which our courts have upheld such changes against challenges based on the right to trial by jury. See, e.g., *State v. Mountain Timber Co.*, 75 Wash. 581, 135 P. 645 (1913), *aff'd*, 243 U.S. 219, 37 S.Ct. 260, 61 L.Ed. 685 (1917) (upholding the workers' compensation statute); *State ex rel. Clark v. Neterer*, 33 Wash. 535, 74 P. 668 (1903) (upholding constitutionality of fees and time limits for requesting jury); *Bellingham v. Hite*, 37 Wash.2d 652, 225 P.2d 895 (1950) (certain municipal cases may be tried without a jury provided there is right to jury trial on appeal); *Christie-Lambert Van & Storage Co. v. McLeod*, 39 Wash.App. 298, 693 P.2d 161 (1984) (upholding mandatory arbitration statute). Respondents argue that the Legislature may, in fact, do away with causes of action altogether, replacing them with procedures such as workers' compensation which, at the initial stage at least, do not allow for a jury at all. In short, respondents contend, the Legislature can determine the "law of recovery."

The Legislature has power to shape litigation. Such power, however, has limits: it must not encroach upon constitutional protections. In this case, by denying litigants an essential function of the jury, the Legislature has exceeded those limits.

A review of the decisions cited by respondents provides insight into the limits of legislative power. These decisions show that the Legislature cannot intrude into the jury's fact-finding function in civil actions, including the determination of the amount of damages.

In the case of workers' compensation, this court in *State v. Mountain Timber*

5. We note here that while the Legislature has the power to abolish a civil cause of action, *Mountain Timber* establishes that such a legisla-

Co., supra, did not engage in the historical analysis regarding the right to a jury trial. Our analysis instead centered on the state's police power to abolish causes of action and replace them with a mandatory industrial insurance scheme. Because the use of such power was done for the public health and welfare and a comprehensive scheme of compensation was inserted in its place, the abolition of the cause of action was not unconstitutional.⁵ 75 Wash. at 583, 135 P. 645.

The United States Supreme Court, in affirming our decision, found that the statute did not violate the Seventh Amendment as it would apply to trials in federal court. The Court stated:

So far as private rights of action are preserved, [the Seventh Amendment applies]; but with respect to those we find nothing in the act that excludes a trial by jury. As between employee and employer, the act abolishes all right of recovery in ordinary cases, and therefore leaves nothing to be tried by jury.

Mountain Timber, 243 U.S. at 235, 37 S.Ct. at 264. In other words, if the cause of action is completely done away with, then the right to trial by jury becomes irrelevant. Since the right attaches to civil trials, there can be no right—and no constitutional violation—if no civil trial is available.

Respondents Eagle-Picher imply, without direct authority, that the Legislature's greater power to abolish causes of action includes the lesser power to alter jury functions, including that of determining damages. They cite the workers' compensation scheme as an example of the greater power. As part of this assertion, respondents refer to *Shea v. Olson*, 185 Wash. 143, 53 P.2d 615, 111 A.L.R. 998 (1936)—which upheld the automobile "guest statute"—for the proposition that "[a] person has no vested interest in any rule of the common law." 185 Wash. at 156, 53 P.2d 615.

[5, 6] While respondents cite *Shea* correctly, its holding is not applicable here.

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provides further in- t looked for proceed- enforcement action an water act which with the Seventh 1. Finding that the ig of debt, in which ght to a jury, was 1 water act enforce- applied the Seventh the modern action.

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at work due to nile on the way to 7 tributorially negli- and statutes have ries of recovery f these basic tort use of action re-

The scope of the right to trial by jury may be defined by the common law through a historical analysis, but the right itself is protected by the state constitution. As the United States Supreme Court stressed in *Dimick v. Schiedt*, 293 U.S. 474, 55 S.Ct. 296, 79 L.Ed. 603 (1935), the common law is a flexible body of doctrine, but fundamentally different from a constitutional provision which looks to the common law at a specific point in time for definition. 293 U.S. at 487, 55 S.Ct. at 301. Constitutional protections are not directly subject to common law changes. Because of the constitutional nature of the right to jury trial, litigants have a continued interest in it—it simply cannot be removed by legislative action. As long as the cause of action continues to exist and the litigants have access to a jury, that right of access remains as long as the cause of action does. Otherwise, article 1, section 21 means nothing.

The other cases cited by respondents affect access to the jury in procedural ways. They do not deprive the jury of any of its essential functions. Washington's mandatory arbitration law does not supplant the jury in civil litigation. Rather, it provides for proceedings under a certain jurisdictional amount to be disposed of at a lesser expense to the parties and to the state. As made clear by the Court of Appeals in *Christie-Lambert Van & Storage Co. v. McLeod*, *supra*, the availability of a jury trial de novo to redetermine the arbitrator's conclusions preserved the right protected by article 1, section 21. The court stated:

[a]ll that is required is that the right of appeal for the purpose of presenting the issue to a jury must not be burdened by the imposition of onerous conditions, restrictions or regulations which would make the right practically unavailable.

39 Wash.App. at 306, 693 P.2d 161, quoting *Smith Case*, 381 Pa. 223, 231, 112 A.2d 625 (1955). The court found that the procedures created in the Washington statute, notably placing on the losing party costs and fees in a frivolous appeal, were not an unreasonable burden on the parties and left the ultimate right to a jury intact.

The municipal trial at issue in *Bellingham v. Hite*, *supra*, was not unconstitutional for essentially the same reasons discussed in *Christie-Lambert*. The City of Bellingham gave a police judge jurisdiction to try certain municipal offenses—here driving while intoxicated. Like the mandatory arbitration plan, a jury trial de novo was available on appeal. Therefore, the scheme did not violate the right to trial by jury. *Bellingham v. Hite*, *supra* 37 Wash. 2d at 657, 225 P.2d 895.

The procedural directives at issue in *State ex rel. Clark v. Neterer*, *supra*, did not at all encroach upon the jury's province. In *Clark*, we found that article 1, section 21 allowed for waiver of a jury "where the consent of the parties interested is given thereto." Such consent could be express or implied; therefore filing fees and deadlines, not being unreasonable, could direct the expression of consent within the bounds of the constitution. 33 Wash. at 541, 74 P. 668.

The issues in the preceding cases are fundamentally different from the legislative damage limit. Respondents do not contend that these previous cases directly infringed upon the jury's role to find the facts. Rather, the Legislature directed parties' access to the jury, often providing for more streamlined procedures to fulfill a state interest. At issue in the Sofies' case is a statute that directly changes the outcome of a jury determination. The statute operates by taking a jury's finding of fact and altering it to conform to a predetermined formula. Such a statutory operation is beyond the scope of the cases that respondents cite.

Respondents also argue that the trial court has the power to lower a jury's damages finding under the doctrine of remittitur, setting a precedent applicable to the legislative damage limit. While trial judges do have this power, remittitur functions very differently from the tort reform act.

First, remittitur is wholly within the power of the trial judge. Within the guidelines of the doctrine, the judge makes the legal conclusion that the jury's damage finding

is too high. This is at with judicial character from a legislative "remittitur" that operates, indeed, argues, "remittitur" violation of powers. A. O'Brien, 85 Wash (1975), any determination conclusion is cons province of the judiciary. Any legislative legal conclusions violation of powers. 81 P.2d 114. The judge in effect, the result that the jury's finding supported by the evidence cannot make submissions. Therefore, the damages limit is fundamental doctrine of remittitur not decide the case may, indeed, violate as indicated by

Second, a judge can only under well developed guidelines. As discussed in *Metzger*, 68 V 340 (1966) and *Martinez Tug Co.*, 59 Wash.2 (1962), the jury's cons role is that of the find this role is to determine damages in a given matters are within there is a strong presumption of their validity. This principle in statute: RCW 4.7 only reduce a jury's tion when it is, in a presumption, wholly evidence, obviously not

6. If imposing a legislative violates the jury's province whether the concept of damages, as in the code does the same thing. method of analysis used these two operations are to determine damages in contemporaneous with litigation is protected by article negligence action, including

is too high. This judicial finding—arrived at with judicial care—is fundamentally different from a legislatively imposed “remit-titur” that operates automatically. Appel-lants, indeed, argue that this legislative “remittitur” violates the doctrine of separa-tion of powers. As we held in *Tacoma v. O'Brien*, 85 Wash.2d 266, 534 P.2d 114 (1975), any determination calling for a legal conclusion is constitutionally within the province of the judiciary, not the Legisla-ture. Any legislative attempt to mandate legal conclusions would violate the separa-tion of powers. 85 Wash.2d at 271, 534 P.2d 114. The judge’s use of remittitur is, in effect, the result of a legal conclusion that the jury’s finding of damages is un-supported by the evidence. The Legisla-ture cannot make such case-by-case deter-minations. Therefore, the legislative dam-ages limit is fundamentally different from the doctrine of remittitur. Although we do not decide the case on this basis, the limit may, indeed, violate the separation of pow-ers as indicated by *O'Brien*.

Second, a judge can implement remittitur only under well developed constitutional guidelines. As discussed in cases like *Ly-ster v. Metzger*, 68 Wash.2d 216, 412 P.2d 340 (1966) and *Martin v. Foss Launch & Tug Co.*, 59 Wash.2d 302, 367 P.2d 981 (1962), the jury’s constitutionally protected role is that of the finder of fact and part of this role is to determine the amount of damages in a given case. Because these matters are within the jury’s province, there is a strong presumption in favor of their validity. This presumption is codified in statute: RCW 4.76.030. A judge can only reduce a jury’s damages determina-tion when it is, in light of this strong presumption, wholly unsupported by the evidence, obviously motivated by passion or

prejudice, or shocking to the court’s con-science.

Third, the opposing party in cases of remittitur has the choice of accepting the reduction or seeking a new trial. RCW 4.76.030. The tort reform legislation does not allow parties this choice. All three of the discussed strictures surrounding the doctrine of remittitur are lacking in the tort reform act’s damages limit. Indeed, the former and the latter operations are fundamentally different.⁶

Respondents also contend that the dam-ages limit affects only the judgment as entered by the court, not the jur’y’s finding of fact. This argument ignores the consti-tutional magnitude of the jury’s fact-find-ing province, including its role to determine damages. Respondents essentially are say-ing that the right to trial by jury is not invaded if the jury is allowed to determine facts which go unheeded when the court issues its judgment. Such an argument pays lip service to the form of the jury but robs the institution of its function. This court will not construe constitutional rights in such a manner. As we once stated: “The constitution deals with substance, not shadows. Its inhibition was leveled at the thing, not the name. . . . If the inhibi-tion can be evaded by the form of the enactment, its insertion in the fundamental law was a vain and futile proceeding.” *State v. Strasburg*, 60 Wash. 106, 116, 110 P. 1020 (1910), quoting *Cummings v. Mis-souri*, 71 U.S. (4 Wall.) 277, 325, 18 L.Ed. 356 (1866).

Finally, the plain language of article 1, section 21 provides the most fundamental guidance: “The right of trial by jury shall remain inviolate.” The term “inviolate” connotes deserving of the highest protec-tion. *Webster’s Third New International*

recovery analogous to it, is such an action. The consumer protection act, on the other hand, is a cause of action specifically created by the legis-lature to fulfill a public policy. Part of that public policy is to allow treble damages where appropriate. But because the act is a legislative-ly created cause of action and was created well after 1889, under the historical analysis used by this court, it is outside of the strict purview of article 1, section 21.

6. If imposing a legislative limit on damages violates the jury’s province, one may wonder whether the concept of trebling a jury’s finding of damages, as in the consumer protection act, does the same thing. Within the historical method of analysis used by this court, however, these two operations are different. A jury’s role to determine damages in a common law action contemporaneous with the constitution’s adop-tion is protected by article 1, section 21. A negligence action, including the later theories of

Dictionary 1190 (1976), defines "inviolable" as "free from change or blemish: pure, unbroken ... free from assault or trespass: untouched, intact ..." Applied to the right to trial by jury, this language indicates that the right must remain the essential component of our legal system that it has always been. For such a right to remain inviolable, it must not diminish over time and must be protected from all assaults to its essential guarantees. In Washington, those guarantees include allowing the jury to determine the amount of damages in a civil case.

The potential impact of the constitution's language was not lost on the Legislature. During the floor debates on the Tort Reform Act, the legislators were warned of the possible constitutional problems with their new legislation. Senator Talmadge stated:

The Constitution of this state in Article I, Section 21, talks about the right to trial by jury being inviolable, not being something that we can invade as members of the Legislature, and when you start to put limitations on what juries can do, you have, in fact, invaded the province of the jury and have not preserved the right to a trial by jury inviolable.

Senate Journal, 49th Legislature (1986), at 449.

IV

A number of other jurisdictions have stricken tort reform legislation that places a limit on the jury's ability to determine damages in a given case. A smaller number of courts have upheld such legislation against right-to-jury based challenges. The methods all of these courts have used are instructive through their similarities and differences to the present case and in their modes of analysis.

In *Boyd v. Bulala*, 647 F.Supp. 781 (W.D.Va.1986), motion to reconsider denied, 672 F.Supp. 915 (W.D.Va.1987), a federal district court, applying both Virginia and federal constitutional law, determined that Virginia's legislative damage limit—which placed a flat limit on noneconomic

damages—was an unconstitutional violation of the right to trial by jury. The court developed insightful distinctions between what the Legislature can and cannot do:

Unquestionably, the legislature may pass measures which affect the way a jury determines factual issues. The legislature may prescribe rules of procedure and evidence, create legal presumptions, allocate burdens of proof, and the like. Just as certainly, the legislature may abolish a common law right of action and, if it desires, replace it with a compensation scheme. The legislature may even make rules concerning the type of damages recoverable and the way in which damages are paid. But the legislature may not preempt a jury's findings on a factual issue which has properly been submitted to the jury.

(Footnotes omitted.) 647 F.Supp. at 789-90. To make matters clear, the *Bulala* court held that both the Seventh Amendment and the Virginia State Constitution provided the right to have a jury determine the extent of damages as well as liability. 647 F.Supp. at 788.

In *Kansas Malpractice Victims Coalition v. Bell*, 243 Kan. 333, 757 P.2d 251 (1988), the Kansas Supreme Court struck down its state's noneconomic damages limit—another flat limit—as violative of the Kansas constitution's protection of the right to trial by jury. After determining that the jury's function to determine damages was constitutionally protected, the court stated: "It would be illogical for this court to find that a jury, empaneled because monetary damages are sought, could not then fully determine the amount of damages suffered." 757 P.2d at 258. See also *Duren v. Suburban Comm'ty Hosp.*, 495 N.E.2d 51 (Ohio C.P.1985) (striking limit on a number of constitutional grounds); *Smith v. Department of Ins.*, 507 So.2d 1080 (Fla.1987) (flat limit violates right to jury); *Lucas v. United States*, 757 S.W.2d 687 (Tex.1988) (citing *Smith* and *Boyd*, finds limit on damages invades jury's fact-finding province); Comment, *Challenging the Constitutionality of Noneconomic Damage Caps: Boyd v. Bulala and the*

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Respondents in the above cases, the one in the West, they generally limit the fixed amount. On the other hand, following the jury, however, the limit itself makes the limit is fixed. It restricts the jury's damages verdict, in essence.

It is highly peculiar in Texas, Ohio, and elsewhere, found the damage the operative language of the trial provisions in the constitution is nearly identical. Kan. Const. Bill of Rights, art. I, § 15: "The right of trial by jury shall remain inviolable." Fla. Const. art. I, § 5 ("The right of trial by jury shall remain inviolable").

Cases upholding the limit have not analyzed the matter or have not found it unconstitutional. Two cases from California are essentially on point. In *Feinberg v. Group, Inc.*, 38 Cal.3d 368 (1984), the California Supreme Court upheld the provision in medical malpractice. In that case, however, the limit infringed on the jury was not discussed. The limit on due process grounds. *Hoover Bank & Trust Co.*, 36 Cal.3d 359, 683 P.2d 671 (1984), the California Supreme Court's provision of "future damages" based on the right to

Right to a Trial by Jury, 24 Willamette L.Rev. 821 (1988).

Respondents contend that the limits in the above cases are distinguishable from the one in the Washington statute because they generally limited the damages to a fixed amount. Washington's limit, on the other hand, follows a formula based upon age. In terms of invading the province of the jury, however, the nature of the mechanism itself makes little difference. Whether the limit is fixed or follows a formula, if it restricts the jury's ability to reach its damages verdict, it invades the jury's province.

It is highly persuasive that in Kansas, Texas, Ohio, and Florida, states that have found the damages limit unconstitutional, the operative language of the right to jury trial provisions in those states' constitutions is nearly identical to our own. See Kan. Const. Bill of Rights § 5 ("The right of trial by jury shall be inviolate"); Tex. Const. art. I, § 15 ("The right of trial by jury shall remain inviolate"); Ohio Const. art. I, § 5 ("The right of trial by jury shall be inviolate"); Fla. Const. art. I § 22 ("The right of trial by jury shall be secure to all and remain inviolate").

Cases upholding damage limits either have not analyzed the jury's role in the matter or have not engaged in the historical constitutional analysis used by this court in construing the right to a jury. Two cases from California cited by respondents are essentially irrelevant to the jury issue here. In *Fein v. Permanente Medical Group*, 38 Cal.3d 137, 695 P.2d 665, 211 Cal.Rptr. 368 (1985), the California Supreme Court upheld its state's damage limit provision in medical malpractice cases. In that case, however, the issue of whether the limit infringed on the right to trial by jury was not discussed. The court upheld the limit on due process and equal protection grounds. However, in *American Bank & Trust Co. v. Community Hosp.*, 36 Cal.3d 359, 683 P.2d 670, 204 Cal.Rptr. 671 (1984), the California court upheld the same act's provision for periodic payment of "future damages" against a challenge based on the right to jury trial. Based on a

historical analysis much less detailed than the one employed by this court, the California court found that the periodic payment provision did not represent impairment of the substantial features of a jury trial. 683 P.2d at 680, 204 Cal.Rptr. at 681. The case, however, is fundamentally different from the one now before us. It did not deal with the ultimate issue of directly invading the jury's factfinding province.

In *Johnson v. St. Vincent Hosp., Inc.*, 273 Ind. 374, 404 N.E.2d 585 (1980), the Indiana Supreme Court upheld a flat limit on damages against challenges that it violated the right to a jury. In reaching its conclusion, the court cited the legislature's power to restrict causes of action through statutes of limitation and procedural rules. From these legislative powers, the court concluded: "It is the policy of this Act that recoveries be limited to \$500,000, and to this extent the right to have the jury assess the damages is available." 404 N.E.2d at 602. Essentially, although it gave no clear reasons, the Indiana court did not recognize the jury's role to determine damages. It is also notable that the court did not undertake any historical analysis to reach its conclusion. This lack of analysis minimizes the impact of the similarity between the Indiana constitution's jury provision and our own. See also *Prendergast v. Nelson*, 199 Neb. 97, 256 N.W.2d 657 (1977) (mandatory prerequisite submission of malpractice claims to panel does not violate right to jury because jury ultimately is the finder of fact).

The weight of authority from other states, both numerically and persuasively, supports the conclusion that Washington's damages limit violates the right to trial by jury.

V

The dissenters raise several points to which we now respond. Justice Dolliver's dissent, at page 732, states that "[a] moment's reflection" will reveal that the real issue in this case is not whether the determination of damages is a question of fact within the jury's province but whether this function "extends to the remedy phase."

constitutional violation by jury. The court distinguishes between can and cannot do: the legislature may not affect the way a jury decides legal issues. The legal rules of procedure, legal presumptions, proof, and the like, the legislature may not take away the right of action or place it with a committee. The legislature may not determine the type of evidence and the way in which it is presented. But the legislature may not restrict a jury's findings which has properly been the jury's.

47 F.Supp. at 789—clear, the *Bulala* case. The Seventh Amendment State Constitution give a jury determine as well as liability.

Victims Coalition, 333, 757 P.2d 251. The Supreme Court struck economic damages limit as violative of the protection of the right to a jury trial. After determining that to determine damages is not a jury's province, the limit is illogical for this jury, empaneled because damages are sought, could not determine the amount of damages. See 77 P.2d at 258. See *In Comm'ty Hosp.*, 333, 757 P.2d 251 (1985) (striking limit on damages on constitutional grounds); *of Ins.*, 507 So.2d 1111, 507 So.2d 1111 (1986) (limit violates right to a jury trial). *States*, 757 S.W.2d 1111, 757 S.W.2d 1111 (1986) (limit violates jury's fact-finding function, *Challenging of Noneconomic v. Bulala* and the

This statement simply recasts the formulation of a principle in an attempt to make it into something else. The issue must remain an inquiry into what is contained within the jury's fact-finding province. Because that province includes finding damages, as a matter of course the remedy phase is affected, just as any finding of fact can affect a trial's outcome.

Justice Dolliver cites with approval the recent case of *Etheridge v. Medical Center Hosps.*, 237 Va. 87, 376 S.E.2d 525 (1989), but ignores the greater number of cases from other jurisdictions that support our majority's position. In making this oversight, Justice Dolliver also omits the fact that four courts whose decisions support the majority's holding—Texas, Kansas, Ohio, and Florida—base their decisions on state constitutions with operative language nearly identical to our own. Moreover, the Virginia constitution, upon which *Etheridge* is based, contains language quite different from ours or of the other states mentioned above. The *Etheridge* opinion is also poorly reasoned. After conceding that the "jury's fact-finding function extends to the assessment of damages," the court finds that a "trial court applies the remedy's limitation only after the jury has fulfilled its factfinding function." *Etheridge*, at 96, 376 S.E.2d 525. Thus, supposedly, the limitation does not infringe on the jury's function. *Etheridge*, at 96, 376 S.E.2d 525.

As this court stated in *State v. Strasburg*, 60 Wash. 106, 110 P. 1020 (1910), a case which Justice Dolliver fails to mention: "The constitution deals with substance, not shadows. Its inhibition was leveled at the thing, not the name." 60 Wash. at 116, 110 P. 1020, quoting *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 325, 18 L.Ed. 356 (1866). In other words, a constitutional protection cannot be bypassed by allowing it to exist in form but letting it have no effect in function. The *Strasburg* principle is the undoing of *Etheridge*'s reasoning.

Strasburg also deflates Justice Dolliver's accusation, at pages 735-736, that this court's "entire analysis" boils down to a

few sentences "with no authority cited." We cite *Strasburg* plainly enough. The impact of *Strasburg* on this case is worth repeating: because the jury's province includes determining damages, this determination must affect the remedy. Otherwise, the constitutional protection is all shadow and no substance.

Justice Dolliver's dissent also attempts to construct an issue out of a trial judge's power to reduce the amount of a jury's award. As we state above, the remittitur doctrine is part and parcel of the constitutional right to a jury. Justice Dolliver's assertion at page 734 that the Code of 1881 contained no provision for remittitur—apparently implying that the doctrine did not apply to the right to a jury at the time of our constitution's adoption—ignores the fact that remittitur existed at common law. *Walker v. McNeill*, 17 Wash. 582, 50 P. 518 (1897), cited by Justice Dolliver for its act of reducing excessive damages, is a near-contemporary example. For a discussion of the common law roots of remittitur, see *Dimick v. Schiedt*, 293 U.S. 474, 55 S.Ct. 296, 79 L.Ed. 603 (1935). In his repeated reference to remittitur, Justice Dolliver fails to mention that this function is solely within the province of the trial judge—that it is entirely separate from a legislative operation which reduces a jury's damages finding. In so doing, he does not address the separation of powers problems implicit in his conclusion.

Contrary to the assertion in Chief Justice Callow's dissent at page 729, this court does not hold that today's juries are constitutionally bound to "determine the same issues which were determined by juries in 1889." Rather, we use historical evidence as an aid to determine what the drafters meant by keeping the right to a jury trial "inviolable." We agree with Chief Justice Callow, and held in *Hunter v. North Mason High Sch. & Sch. Dist.* 403, 85 Wash. 2d 810, 539 P.2d 845 (1975), that the construction of a constitutional protection is not frozen in time. The contemporary relevance of the provision in light of changes in the law, the construction given to it over time as well as the construction given to it immediately after its adoption—by jurists

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intimate with the drafting of the provision—are also tools to divine its contours. All of these factors point to the constitutional protection of the jury's function to determine damages. Thus, Chief Justice Callow's reference to "no authority" and "no sound policy reasons" applies to something that we do not hold.⁷

Perhaps the most serious problem with Chief Justice Callow's dissent is that it fails to address the constitutional language itself: "The right of trial by jury shall remain inviolate". While Chief Justice Callow agrees that the right does exist, he provides no mechanism for determining the content of the right and for protecting that content. His construction is open to the form-over-content problems this court identified in *State v. Strasburg*, *supra*. The word "inviolable" carries with it a strong command: the right—as it existed in the minds of the framers and as it is relevant today—must exist "free from assault or trespass: untouched, intact . . ." *Webster's Third New International Dictionary* 1190 (1976).

The dissenters make much out of their citation to *Tull v. United States*, 481 U.S. 412, 107 S.Ct. 1831, 95 L.Ed.2d 365 (1987). As we state above, the conclusion in *Tull* has no bearing on this court because we base our decision on adequate and independent state grounds. Since 1889, Washington's jurisprudence on the right to a jury in civil trials has always been based on the state constitution. *Tull* and *Dimick v. Schiedt*, *supra*, may provide material for our analysis, but they do not direct us.

Chief Justice Callow's advocacy of *Tull* conceptually distorts the rule we developed in *State v. Gunwall*, 106 Wash.2d 54, 720 P.2d 808 (1986), which in turn relied on the concurring opinion of Justice Handler in the New Jersey decision of *State v. Hunt*, 91 N.J. 338, 450 A.2d 952 (1982). Chief Justice Callow relies on *Gunwall* and *Hunt* to support his implication that this court

should defer to Supreme Court interpretation of a comparable federal provision unless an analysis of the six *Gunwall* criteria indicate that we should take an independent course. Callow, C.J., dissenting, at 730.

This implication is contrary to the reasoning of Justice Handler and was specifically rejected by him in *Hunt*. In footnote 3 of his opinion, he stated, "To the extent that Justice Pashman suggests in his concurring opinion that this approach establishes a presumption in favor of federal constitutional interpretations, *supra* at 355, 450 A.2d 952, no decision of this Court has recognized such a presumption, and nothing in this opinion or in the majority opinion, as I read it, calls for or encourages the establishment of such a presumption." *Hunt*, at 367 n. 3, 450 A.2d 952.

After criticism that the *Gunwall* criteria could be misinterpreted to support the view now espoused by the dissent,⁸ this court clarified the test in *State v. Wethered*, 110 Wash.2d 466, 472, 755 P.2d 797 (1988). In *Wethered*, we reemphasized the statement that the *Gunwall* factors were nonexclusive and added that they were to be used as interpretive principles of our state constitution.

At any rate, *Tull* does not even apply to civil damages actions. The second opinion in *Boyd v. Bulala*, 672 F.Supp. 915 (W.D. Va.1987), which the dissenters fail to cite, reaffirmed that court's previous holding that the Virginia damages limit violated the Seventh Amendment, stating: "Unlike the assessment of civil penalties discussed in *Tull*, *supra*, the assessment of damages has always been a matter 'peculiarly within the province of the jury.'" 672 F.Supp. at 920, quoting *Virginia Mid. R.R. v. White*, 84 Va. 498, 508, 5 S.E. 573 (1888). *Boyd* has not been overruled.

ing and foundational nature must be respected when we undertake the task of interpreting it.

7. Nowhere do we advocate a wholesale adoption of the Code of 1881. To make such a claim misconstrues the techniques of state constitutional interpretation. The legislative process of passing statutes differs markedly from that of drafting a constitution. The constitution's last-

8. See Note, *Federalism, Uniformity, and the State Constitution—State v. Gunwall*, 62 Wash. L.Rev. 569 (1987).

To his credit, Justice Dolliver concedes that our state's jurisprudence contains cases squarely stating that a jury's role to determine damages is of constitutional proportions. At page 734, he admits that *James v. Robeck*, 79 Wash.2d 864, 490 P.2d 878 (1971), "does describe damages determination as a constitutionally consigned jury function." Justice Dolliver makes this concession because he must. The principle in *James* is inescapable: that case has not been limited or overruled.

Justice Dolliver's treatment of other Washington precedent attempts to limit the cases to their facts and ignore the principle that underlies them. For example, *Baker v. Prewitt*, 3 Wash.Terr. 595, 19 P. 149 (1888), did hold, as his dissent suggests, that a jury determined damages in default judgments at the time our constitution was adopted. Nonetheless, the underlying principle in *Baker* is that a jury determines damages, period. *Baker* links sections 204 and 289 of the Code of 1881, which outline the jury's fact-finding function generally and its role in determining damages specifically in default actions, respectively. If the court had intended to limit its holding to its facts, it would not have cited to section 204 and it would not have stated: "in all actions for the assessment of damages the intervention of a jury must be had ..." (Italics ours.) 3 Wash.Terr. at 597, 19 P. 149. Although *Dacres v. Oregon Ry. & Nav. Co.*, 1 Wash. 525, 20 P. 601 (1889), does base its holding on the Seventh Amendment, that does not diminish that case's contemporary relevance for construing our state's constitutional provision. What we are concerned with is the conception of the scope of the right to a jury trial at the time of our constitution's adoption, not how United States Supreme Court precedent 98 years after that case affects the territorial court's conclusion.

On page 735, Justice Dolliver's dissent claims:

Contrary to the majority's bold conclusion, this court has never constitutionalized the jury's right to determine damages. Even conceding this point, however, there is no precedent for extending

the scope of this right to the remedy phase.

This statement ignores the plain language of *James* as well as the impact of *Strasburg*. Indeed, this argument can only be made by ignoring or mischaracterizing these cases.

Justice Dolliver also misconstrues the nature of the Legislature's power to create and eliminate causes of action and the attachment of the jury right to these actions. When the Legislature abolishes a cause of action, it does so explicitly, as it did when it created the worker's compensation scheme. Thus, Justice Dolliver's claim, on page 737, that the Legislature has "eliminated, in effect, any cause of action in which the damages are above the amount allowed in the act", cannot be taken seriously. If RCW 4.56.250 "partially" abolished a cause of action, then the Legislature certainly wasn't aware of it. Only if this court saw itself as a super-Legislature could we make up such legislative acts after the fact.

The dissenters' arguments regarding comparative negligence in product liability actions, punitive damages, and treble damages are unpersuasive. The absence of punitive damages in our state is a reflection of policies contemporary with our constitution's adoption. As with remittitur, this is incorporated into the jury right. *Spokane Truck & Dray Co. v. Hoefer*, 2 Wash. 45, 25 P. 1072 (1891), in abolishing punitive damages, did not discuss the impact of Const. art. 1, § 21. That the constitutional argument was neither made nor considered suggests a contemporary understanding that awarding punitive damages was not one of the essential jury functions envisioned by the framers to remain "inviolate." *Spokane Truck*'s treatment of the jury question contrasts markedly with the clear statements in cases such as *James v. Robeck*, *supra*. Therefore, it does not provide the constitutional evidence provided in the cases upon which we rely. Additionally, the nonconstitutional status of punitive damages may have been intimately understood by the judges on the court at that time, three of whom had served as drafters at the constitutional convention two years earlier. See *The Journal of the Washing-*

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ton State Constitutional Convention 1889, 465, 470, 485 (B. Rosenow ed. 1962); 2 Wash. iii (1892) (list of judges).

[7] Justice Dolliver's discussion, on page 736 of the effect of RCW 4.22.005 on *Seay v. Chrysler Corp.*, 93 Wash.2d 319, 609 P.2d 1382 (1980), focuses only on the results of the operation, not the process of it. It is entirely within the Legislature's power to define parameters of a cause of action and prescribe factors to take into consideration in determining liability. This is fundamentally different from directly predetermining the limits of a jury's fact-finding powers in relevant issues, which offends the constitution.

As for the "gratuitous holding" regarding the Consumer Protection Act discussed by Justice Dolliver's dissent at page 737, we have not reached such a fundamental conclusion. We are unable to because the Consumer Protection Act is not an issue in this case. We cannot decide cases not before us. Further, Chief Justice Callow's contrasting suggestion that our holding today renders the Consumer Protection Act unconstitutional shows again that this court is unable to speculate on cases not presented and which have not been adequately briefed.

While the dissenting opinions make interesting reading, they do not alter the fact that we have never overruled *James v. Robeck*, *supra*. *James*, quite simply, describes damages determination as a constitutionally-consigned jury function. As for other states faced with similar issues, all but one with constitutional provisions similar to ours have stricken damages limits as violative of the right to a jury.

VI

Respondents contend that the trial judge erred in the following ways: applying joint and several liability instead of apportionment of fault, allowing juror misconduct, permitting cumulative testimony, excluding a key witness, and refusing to grant motions for remittitur or a new trial. We find no merit in these arguments.

[8-10] As for the issues of juror misconduct, cumulative testimony, witness exclusion and motions for remittitur, these matters are committed to the trial court's discretion. This court will not reverse trial court rulings in these areas unless we see a clear abuse of discretion. *See, e.g., Gardner v. Malone*, 60 Wash.2d 836, 376 P.2d 651 (1962) (juror misconduct); *Braack v. Bailey*, 32 Wash.2d 60, 62, 200 P.2d 525 (1948) (cumulative testimony); *Maehren v. Seattle*, 92 Wash.2d 480, 488, 599 P.2d 1255 (1979) (admission or refusal of testimony). A judge abuses his discretion when no reasonable judge would have reached the same conclusion. *Byerly v. Madsen*, 41 Wash.App. 495, 704 P.2d 1236, *review denied*, 104 Wash.2d 1021 (1985). With regard to remittitur, not only is this matter within the trial judge's discretion, but the judge must, under our state constitution, give great deference to the jury's finding of fact, including the determination of damages. *See, e.g., Bingaman v. Grays Harbor Comm'ty Hosp.*, *supra*. Because the trial judge in the present case did not come close to abusing his discretion, petitioners' arguments here are without merit.

[11] Respondents point out that the trial judge instructed the jury, under RCW 4.22.070(3)(a), to apply joint and several liability to the defendants. This statutory provision operates as an exception to the Legislature's restriction of joint and several liability in the 1986 tort reform act. RCW 4.22.070(3) states:

Nothing in this section affects any cause of action relating to hazardous wastes or substances or solid waste disposal sites.

The trial judge interpreted the exception to include causes of action relating to asbestos because the judge found—and respondents conceded—that asbestos is a "hazardous substance."

Respondents argue that the trial judge read the term "substances" out of context. They contend that the statute, when read as a whole, applies only to problems relating to hazardous waste and environmental pollution. They further assert, through citations to floor debates in the Senate dur-

ing the bill's passage, that the exception was intended to avoid interference with the Legislature's proposed "superfund" toxic cleanup bill. In support of these assertions, they cite an early version of the exception:

The defendants shall be jointly and severally liable if the cause of action involves a violation of any state or local law relating to solid wastes, hazardous wastes or substances, air, water, or high or low level radioactive wastes or substances. If legislation is enacted in 1986 creating joint and several liability for causes of action relating to solid wastes or hazardous wastes or substances, then this subsection shall be null and void.

Senate Journal, 49th Legislature (1986), at 467. Respondents quote further remarks from the amendment's sponsor, Senator Talmadge, that the amendment was indeed intended to address environmental issues. Senate Journal, *supra*. In relation to their interpretation, respondents contend that the exception in Chapter 70.105 ("hazardous waste management act").

In interpreting a statute, this court looks first to the plain and ordinary meaning of the words used by the Legislature. *State v. Theilken*, 102 Wash.2d 271, 684 P.2d 709 (1984); *Hewson Constr., Inc. v. Reintree Corp.*, 101 Wash.2d 819, 685 P.2d 1062 (1984). Regardless of respondents' arguments about context, the simple use of the word "or" in the statute at issue indicates that the exception operates to each of the nouns in the sentence. That includes "hazardous substances," wherever they may be found. If the legislature intended the exception to be limited to environmental litigation, it would or should have stated so explicitly.

Respondents' reliance on legislative history only appears to show that the Legislature intended a broader application for RCW 4.22.070(3)(a). The remarkable differences between the early and final versions of the statute further indicate that the exception was not limited to environmental cases. In addition, the words "any cause of action" in section (3)(a) mean, in simple and plain terms, that the exception

is not limited to any specific RCW section. Based on the foregoing analysis, then, the trial judge properly interpreted this statute.

The real issue here, however, is not a choice between joint and several liability or apportionment of fault, as posited by respondents. It is, rather, a choice between joint and several liability for the named defendants alone or joint and several liability for named defendants along with possible liability for unnamed defendants as well. RCW 4.22.070(1)(b) retains joint and several liability against named defendants in cases where the plaintiff is not at fault:

If the trier of fact determines that the claimant or party suffering bodily injury or incurring property damages was not at fault, the defendants against whom judgment is entered shall be jointly and severally liable for the sum of their proportionate shares of the claimants total damages.

The special verdict form from the trial shows that the jury found the plaintiffs in this case not at fault. Clerk's Papers, at 393. Therefore, regardless of the fact that the "hazardous ... substance" language includes asbestos, the Legislature's restriction of joint and several liability does not even apply to the named defendants in the Sofies' claim.

VII

For the reasons we have developed above, the limit on noneconomic damages in RCW 4.56.250 is unconstitutional. This damages limit, then, is no longer operative. Because the trial court specifically found that the jury's award of damages was reasonable and supported by the evidence, we reinstate that award.

BRACHTENBACH, DORE, PEARSON
and SMITH, JJ., concur.

ANDERSEN, J., concurs on the basis that RCW 4.56.250 violates Const. Art.

CALLOW, Chief Justice (dissenting).

I disagree with the majority's determination that Const. art. 1, § 21 affords a tort

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The majority can be stated the majority as constitutional r respect to all a available at the adopted. See, v. Speed, 96 Wa cert. denied, 45 L.Ed.2d 119 (19 negligence action was adopte Carlson, 1 Wa. Because the pla marily in neglige a jury trial. I :

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litigant an absolute right to have a jury determine noneconomic damages in a tort action. This constitutional provision should be interpreted to require only that a jury determine such facts as the legislature may choose to incorporate into a cause of action.

The majority's right-to-jury argument can be stated as two propositions. First, the majority asserts that a litigant has a constitutional right to trial by jury with respect to all actions in which a jury was available at the time the constitution was adopted. *See, e.g., State ex rel. Goodner v. Speed*, 96 Wash.2d 838, 840, 640 P.2d 13, cert. denied, 459 U.S. 863, 103 S.Ct. 140, 74 L.Ed.2d 119 (1982). A jury was available in negligence actions at the time the constitution was adopted. *See, e.g., Sayward v. Carlson*, 1 Wash. 29, 23 P. 830 (1890). Because the plaintiff's action sounds primarily in negligence, plaintiff is entitled to a jury trial. I agree.

Second, the majority asserts that in such cases a litigant has the constitutional right to have the jury determine the same issues which were determined by juries in 1889. (Majority at 716.) Because juries determined the measure of damages, including noneconomic damages, in all civil actions in 1889, the majority concludes that a contemporary litigant has the constitutional right to have a jury determine the measure of noneconomic damages. (Majority at 716.) I disagree.

The majority offers *no authority* and *no sound policy reasons* in support of the premise that our constitution requires contemporary juries to determine all issues which juries determined in 1889. In fact, this court has never adopted a historical standard to determine the "scope" of the right to a jury trial, and there are good reasons why we should not do so now.

Most of the majority's cited authority and discussion focuses on the minor premise—that the amount of damages have historically been determined by a jury.¹ Thus, *Baker v. Prewitt*, 3 Wash.Terr. 595, 19 P. 149 (1888), does show that in 1889 "the

jury's fact-finding function included the determination of damages." Majority at 716. Similarly, the court in *James v. Robeck*, 79 Wash.2d 864, 869, 490 P.2d 878 (1971), spoke historical truth when it said that "the amount of damages in a particular case is an ultimate fact." Majority at 717. In *Bingaman v. Grays Harbor Comm'ty Hosp.*, 103 Wash.2d 831, 835, 699 P.2d 1230 (1985), we held that an appellate court could not alter the jury's determination of noneconomic damages, because the determination of noneconomic damages had been left to the discretion of the jury. *See also Dimick v. Schiedt*, 293 U.S. 474, 55 S.Ct. 296, 79 L.Ed. 603 (1935).

These cases prove that juries historically have determined the amount of damages, including noneconomic damages, in civil actions. But they only prove that juries *historically* have determined noneconomic damages, not that juries *constitutionally* must do so. The majority errs by equating historical fact with constitutional necessity.

No case cited by the majority shows that this court has ever used a strict historical standard for determining the scope of the right to a jury trial. For example, the majority states that *State ex rel. Mullen v. Doherty*, 16 Wash. 382, 384-85, 47 P. 958 (1897) provides "contemporary insight on the scope issue." Majority opinion at 716. In *Mullen*, the court cited section 248 of the Code of 1881 to show that at the time the constitution was adopted, the right to a jury trial extended only to "actions at law." Because a quo warranto proceeding is not an action at law, the court determined that the defendant had no right to a jury trial. *Mullen*, at 385, 47 P. 58. *Mullen* is merely an early example in which the court used a historical standard to determine whether the right to a jury trial attached *at all*. It simply does not address the "scope" issue. Similarly, the court in *In re Ellern*, 23 Wash.2d 219, 160 P.2d 639 (1945) held that the right to a jury trial attached to insanity commitment proceedings because a jury

1881 limited to \$5,000 the damages a jury could award in a wrongful death action.

1. I note that even in 1889, juries did not have unlimited discretion to award economic damages. Section 717 of the Territorial Code of

fic RCW section. analysis, then, the preterted this stat-

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heard such proceedings in 1889. *Ellern* does not address the "scope" issue.

The only case the majority cites which directly addresses the "scope" issue is *State v. Strasburg*, 60 Wash. 106, 110 P. 1020 (1910). In *Strasburg*, six judges held that a criminal defendant had a due process right to bring the question of his sanity before a jury. Because this right antedated the adoption of the constitution, three judges found that a statute which purported to deny the jury the opportunity to consider this issue also violated Const. art. 1, § 21. The plurality in *Strasburg* thus determined that the right to a jury trial included the right to have the jury determine the issue of the defendant's sanity.

Strasburg is distinguishable from the case before us. In *Strasburg*, the defendant had an independent constitutional right to have his sanity made a factual issue. Const. art. 1, § 21 therefore required that the factual issue be determined by the jury. In the present case, however, the plaintiff has no independent constitutional right to have the determination of noneconomic damages be a factual issue. Accordingly, the plaintiff has no Const. art. 1, § 21 right to have the amount of noneconomic damages determined by a jury.

The majority errs by summarily dismissing *Tull v. United States*, 481 U.S. 412, 107 S.Ct. 1831, 95 L.Ed.2d 365 (1987). The majority dismisses *Tull* on the grounds that the Seventh Amendment does not apply to the states. Majority p. 717. I agree that the federal supremacy clause does not compel us to apply *Tull* to this case. However, "[t]he opinions of the Supreme Court, while not controlling on state courts construing their own constitutions, are nevertheless important guides on the subjects which they squarely address." *State v.*

2. The majority cites *Boyd v. Bulala*, 672 F.Supp. 915 (W.D.Va.1987) for the proposition that "*Tull* does not even apply to civil damages actions" (majority at 725), as if the opinion of a single federal district judge were dispositive of the issue. Compare *Franklin v. Mazda Motor Corp.*, 704 F.Supp. 1325 (D.Md.1989), (Maryland cap on economic damages does not violate the Seventh Amendment).

In fact, the court in *Boyd* acknowledged that *Tull* "provides some guidance." 672 F.Supp. at

Gunwall, 106 Wash.2d 54, 720 P.2d 808 (1986), quoting *State v. Hunt*, 91 N.J. 338, 363, 450 A.2d 952 (1982) (Handler, J., concurring).

Before this court will determine whether our State constitution affords wider protection than the United States Constitution, a litigant must adequately present and argue the issues to us, using at a minimum the criteria set out in *Gunwall*. *State v. Wethered*, 110 Wash.2d 466, 472-73, 755 P.2d 797 (1988). However, the majority today interprets Const. art. 1, § 21 to afford wider protection than the Seventh Amendment without presenting any reasons for doing so. Majority, at 715-716 & n. 4. We articulated *Gunwall*'s interpretive criteria precisely in order to avoid this "all sail, no anchor" approach to state constitutional law. *Gunwall*, 106 Wash.2d at 60, 720 P.2d 808.

In *Tull*, the Court concluded that the common law right of trial by jury did not include the right to have a jury determine the amount of the remedy. Therefore, the Court held that the Seventh Amendment permitted Congress to assign the determination of the amount of a civil penalty to the trial judge. *Tull*, 481 U.S. at 426-27, 107 S.Ct. at 1840. The analysis set forth in *Tull* bears directly on the "scope" issue.² We should not ignore *Tull*, and we cannot legitimately do so.

Because the majority chooses to disregard *Tull*, the applicability of the tort reform act may now depend upon the forum, federal or state, in which an action is heard. The Seventh Amendment controls federal courts sitting in diversity cases. *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525, 78 S.Ct. 893, 2 L.Ed.2d 953 (1958). Because the Seventh Amend-

920. The court ultimately determined that the Seventh Amendment required juries to determine that the right to trial by jury guaranteed by the Virginia Constitution is stronger than the right secured by the Seventh Amendment. 672 F.Supp. at 922. The Virginia Supreme Court subsequently held that the Virginia Constitution does not require juries to determine the amount of damages. *Etheridge v. Medical Ctr. Hosps.*, 237 Va. 87, 376 S.E.2d 525 (1989). *Boyd*'s predictive value is weak.

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ment does not require that a jury deter-
 mine the amount of the remedy, *Tull*, the
 tort reform act does not violate federal
 right-to-jury guarantees and therefore may
 still apply to tort litigation in federal court.
Compare Boyd v. Bulala, 647 F.Supp. 781,
 788 (W.D.Va.1986) reconsideration denied
 672 F.Supp. 915 (W.D.Va.1987); *Etheridge*
v. Medical Ctr. Hosps., 237 Va. 87, 376
 S.E.2d 525 (1989). Even in our state
 courts, the act will still apply to litigants
 who waive their right to a jury trial, inten-
 tionally or otherwise. See CR 38(d).

Other absurd results will necessarily fol-
 low from the adoption of a historical stan-
 dard for determining the "scope" of the
 right to a jury trial. For example, the
 majority cites *Baker v. Prewitt*, 3 Wash.
 Terr. 595, 19 P. 149 (1888), to establish the
 fact that juries in 1889 determined the
 amount of damages in all civil actions. Ma-
 jority opinion at 716. However, *Baker* also
 holds that a jury must determine the
 amount of damages before a court can
 enter a default judgment. 3 Wash.Terr. at
 598, 19 P. 149. *Baker's* holding was in
 effect overruled by *Johanson v. United*
Truck Lines, 62 Wash.2d 437, 383 P.2d 512
 (1963). However, because the majority
 holds that a jury must determine all issues
 which juries determined in 1889, a default
 judgment entered at variance with this ob-
 solete procedure logically violates a defen-
 dant's Const. art. 1, § 21 right to a jury
 trial.

The majority's analysis also inexorably
 results in a Const. art. 1, § 21 right to have
 the jury assess punitive damages in wrong-
 ful death actions. The Territorial Code of
 1881, § 8, provides in part that: "In every
 [wrongful death] action the jury may give
 such damages, pecuniary or exemplary, as,
 under all the circumstances of the case
 may to them seem just." (Italics mine.)
See also Graetz v. McKenzie, 3 Wash. 194,
 28 P. 331 (1891). Because juries had the
 right to award punitive damages in wrong-
 ful death actions in 1889, Const. art. 1, § 21
 will now require that juries be permitted to

3. The majority attempts to distinguish the puni-
 tive damage issue by asserting that "the noncon-
 stitutional status of punitive damages may have
 been intimately understood by the judges on the

determine appropriate punitive damage
 awards in wrongful death actions today.

Indeed, this court did not generally pro-
 hibit punitive damage awards until 1891.
Spokane Truck & Dray Co. v. Hoefler, 2
 Wash. 45, 25 P. 1072 (1891). In *Spokane*
Truck, the court clearly indicated that it
 was rejecting the majority common law
 rule which permitted the jury to award
 such damages.³ 2 Wash. at 50-51, 25 P.
 1072. If the drafters of our state constitu-
 tion intended Const. art. 1, § 21 to perpetu-
 ate a litigant's common law right to have a
 jury determine the amount of noneconomic
 damages, surely they also intended to per-
 petuate a litigant's common law right to
 have the jury determine appropriate puni-
 tive damages.

While the majority's holding resurrects
 much obsolete remedy law (which I submit
 is ill advised), the holding (if consistent)
 should also eliminate other more recent
 provisions. For example, the majority as-
 serts that the Consumer Protection Act's
 damages provisions are not affected by its
 analysis because they are part of "a cause
 of action specifically created by the legisla-
 ture to fulfill a public policy." Majority at
 721, n. 6. However, the Legislature also
 specifically created the tort reform act's
 damage provisions to further a public poli-
 cy. Laws of 1986, ch. 305, § 100. Under
 the majority's "flexible historical ap-
 proach" (Majority at 718), the right to a
 jury trial would presumably attach to Con-
 sumer Protection Act actions because they
 are analogous to actions heard by a jury at
 common law, such as fraud, misrepresenta-
 tion, or deceit. Therefore, if consistently
 applied, the majority's analysis renders the
 CPA's treble damages provisions unconsti-
 tutional.

For these reasons, I believe the majority
 errs by adopting a historical standard for
 determining the "scope" of the right to a
 jury trial. As the majority acknowledges
 at page 718-719, the constitution is not a
 static document and constitutional analysis

court [in 1891], three of whom had served as
 drafters at the constitutional convention 2 years
 earlier." Majority, at 726. I submit that this is
 speculation.

should not be completely frozen in time. *Hunter v. North Mason High Sch. & Sch. Dist.* 403, 85 Wash.2d 810, 539 P.2d 845 (1975). This is *exactly* what the majority's historical standard does.

I would apply a more flexible standard to determine the scope of the right to trial by jury. I would hold that Const. art. 1, § 21 does not restrict the power of the Legislature to alter or amend the elements of a common law cause of action. *Tull*; see also *Shea v. Olson*, 185 Wash. 143, 53 P.2d 615 (1936). Rather, this provision serves to check the power of the judiciary, by preventing a judge from substituting his or her judgment for that of the jury. *Bingaman*; *James*. Compare Const. art. 4, § 16. Accordingly, I would hold that the challenged provisions of the tort reform act do not violate Const. art. 1, § 21.

DOLLIVER, J., concurs.

DOLLIVER, Justice (dissenting).

The majority finds RCW 4.56.250 violates Const. art. 1, § 21 ("[t]he right of trial by jury shall remain inviolate") and thus is unconstitutional. While I might agree with the public policy result crafted by the majority. I cannot agree the statute violates plaintiffs' right to trial by jury and, so, I dissent. The majority limits its discussion to the trial by jury question and refuses to consider the equal protection and due process issues raised by plaintiffs. Since I also believe the trial by jury issue is the most important issue before the court and further believe RCW 4.56.250 does not violate either equal protection or due process, I too confine my dissent to the issue of trial by jury.

I begin by referring to the test this court must use in determining whether a statute is constitutional. The majority correctly cites *Shea v. Olson*, 185 Wash. 143, 53 P.2d 615, 111 A.L.R. 998 (1936) in delineating the standard. Its paraphrase of the holding in *Shea*, however, tends to mislead. The majority states:

In matters of economic legislation [a limitation not expressed in *Shea*], we follow the rule giving every reasonable pre-

sumption in favor of the constitutionality of the law or ordinance.

Majority, at 715. The rule is not, however, as indicated by the majority, "every reasonable presumption". As the court in *Shea* goes on to state: "[T]he rule in this state is that the court will not declare a law unconstitutional unless its invalidity is so apparent as to leave no reasonable doubt on the subject." *Shea*, at 152, 53 P.2d 615. We affirmed this test in a recent case: "A statute should not be declared unconstitutional unless it appears unconstitutional beyond a reasonable doubt." *Haberman v. WPPSS*, 109 Wash.2d 107, 139, 744 P.2d 1032, 750 P.2d 254 (1987). The test is not that there is a reasonable presumption to uphold legislation against constitutional attack. Rather, any finding of unconstitutionality must be beyond a reasonable doubt. The burden is on the one attacking the statute, here the plaintiffs. I examine the statute in question with that test in mind. One of the difficulties with the approach of the majority is that it is not only a weak rendition of the test for constitutionality but it also implicitly shifts the burden to the defendants to show the statute is not unconstitutional.

The opinion of the majority rests on the proposition that "the measure of damages is a question of fact within the jury's province." Majority, at 716-717. A moment's reflection, however, will demonstrate that this statement is not the real issue. The real question, of course, is whether the jury's fact-finding function to measure damages extends to the remedy phase. In other words, is the jury's authorized measurement of damages necessarily translated, without limitation, into the legal remedy finally given. See *Etheridge v. Medical Center Hosps.*, 237 Va. 87, 376 S.E.2d 525 (1989) (statutory limit on damages in medical malpractice claims does not violate right to trial by jury—remedy is a matter of law, not a matter of fact).

The majority does not attempt to deny that the finding of damages by a jury may be subject to a legal determination as to the final award given by the court. It gives a number of examples to illustrate this point. While not denying this proposi-

tion, however, it appears to be the limitations on the by the defendant limitation under out its discussion does not challenge, accepts, the general is not plenary in the judgment. the majority den den before the jury is the sole fa tion of whether assessed. It clear tion is whether which stands betw er of the jury and is constitutional.

Parenthetically, "facts" a jury ma limited by the rule is not plenary in de be reviewed in det James, *Sufficiency Jury-Control De Verdict*, 47 Va.L.J. note that in the ear century it was thou and moral right to Juries continue, of er to decide the lav verdict. See Note, *the Jury in the N Yale L.J.* 170 (196 power of the jury i any American juris been the rule in ti serves to remind tha is made or remedy volves a question of determination of fa

The distinction be power of the jury ar by the court is well of *Tull v. United St S.Ct.* 1831, 95 L.Ed.2 ick v. Schiedt, 293 S.Ct. 296, 302-04, (Stone, J., dissenting) does not restrict the jury verdict—Hughes Cardozo, JJ., concur

tion, however, the position of the majority appears to be that the particular kinds of limitations on the jury finding pointed out by the defendants are different than the limitation under RCW 4.56.250. Throughout its discussion, however, the majority does not challenge, but indeed implicitly accepts, the general principle that the jury is not plenary in determining the amount of the judgment. Thus, in its own analysis the majority demonstrates that the question before the court is not whether the jury is the sole fact finder in the determination of whether *any* damages should be assessed. It clearly is. Rather, the question is whether the particular limitation which stands between the fact-finding power of the jury and the remedy of the court is constitutional.

Parenthetically, I observe that the "facts" a jury may consider are severely limited by the rules of evidence. The jury is not plenary in deciding what "facts" may be reviewed in determining damages. See James, *Sufficiency of the Evidence and Jury-Control Devices Available Before Verdict*, 47 Va.L.Rev. 218 (1961). I also note that in the early part of the nineteenth century it was thought juries had the legal and moral *right* to decide questions of law. Juries continue, of course, to have the *power* to decide the law in returning a general verdict. See Note, *The Changing Role of the Jury in the Nineteenth Century*, 74 Yale L.J. 170 (1964). This view of the power of the jury is no longer the rule in any American jurisdiction and has never been the rule in this state. Even so, it serves to remind that the final award which is made or remedy which is granted involves a question of law as well as simply a determination of facts.

The distinction between the fact-finding power of the jury and the remedy granted by the court is well illustrated by the case of *Tull v. United States*, 481 U.S. 412, 107 S.Ct. 1831, 95 L.Ed.2d 365 (1987); cf. *Dimick v. Schiedt*, 293 U.S. 474, 490-94, 55 S.Ct. 296, 302-04, 79 L.Ed. 603 (1935) (Stone, J., dissenting) (Seventh Amendment does not restrict the court's control of the jury verdict—Hughes, C.J., Brandeis, and Cardozo, JJ., concurring in the dissent).

The majority finds *Tull* "irrelevant on the issue before the court" because *Tull* involved a civil penalty in a regulatory case rather than damages in a tort action. Majority, at 717. However, by holding the right to jury trial extends to a clean water act regulatory enforcement action, did not the court say there is no distinction between tort actions and regulatory actions?

The real issue and the relevant issue is succinctly stated by the Court:

The Seventh Amendment is silent on the question whether a jury must determine the remedy in a trial in which it must determine liability. The answer must depend on whether the jury must shoulder this responsibility as necessary to preserve the "substance of the common-law right of trial by jury." Is a jury role necessary for that purpose? We do not think so.

(Footnote and citation omitted.) *Tull*, 481 U.S. at 425-26, 107 S.Ct. at 1839-40.

The Court goes on to explain in footnote 9:

Nothing in the Amendment's language suggests that the right to a jury trial extends to the remedy phase of a civil trial. Instead, the language "defines the kind of cases for which jury trial is preserved, namely 'suits at common law.'" *Colgrove v. Battin*, 413 U.S. 149, 152[, 93 S.Ct. 2448, 2450, 37 L.Ed.2d 522] (1973). Although "[w]e have almost no direct evidence concerning the intention of the framers of the seventh amendment itself," the historical setting in which the Seventh Amendment was adopted highlighted a controversy that was generated ... by fear that the civil jury itself would be abolished." *Ibid.* (footnote and citation omitted). We have been presented with no evidence that the Framers meant to extend the right to a jury to the remedy phase of a civil trial.

Tull, at 426 n. 9, 107 S.Ct. at 1840 n. 9.

Nor has any such evidence been presented regarding Const. art. 1, § 21. While the majority insists this is a case to be determined on state grounds, it does not indicate how the words of the Seventh Amendment,

"the right of trial by jury shall be preserved" differ in substance from Const. art. 1, § 21, "[t]he right of trial by jury shall remain inviolate". Furthermore, it gives no principled reason why this court ought to interpret Const. art. 1, § 21 differently from the Seventh Amendment. The historical dissertation by the majority of the power of the jury to determine damages, while informative, does not provide any analytical basis for extending this power to the remedy phase.

The judiciary and the Legislature have in the past made policy choices which have stood between the damages found by the jury and the ultimate remedy, i.e., punitive damages, immunity, and treble damages. The majority attempts to distinguish these examples through its 1889 analysis as to what causes of action the right attaches. Even conceding the application of this analysis to recent tort theories, it begs the question. Whether the right to trial by jury attaches to a cause of action does not determine whether this right extends to the remedy phase. Why is the alteration of the jury's determination of damages in this case different from other allowable alterations? The majority never says why; it simply says it is so.

Not only does the majority not address the real issue, the cases relied on by the majority do not even establish as a historical fact that the right to jury trial in 1889 extended to damages determinations. The court in *Baker v. Prewitt*, 3 Wash.Terr. 595, 19 P. 149 (1888) held that a jury should have determined the damages attendant to a default judgment. The court relied on sections 204 and 289 of the territorial code. Section 204 stated that "[a]n issue of fact shall be tried by a jury..." Section 289(2) provided that a trial court "may order the damages to be assessed by a jury" in actions in which "the defendant fail[ed] to answer to the complaint". Code of 1881, §§ 204, 289. What *Prewitt* held, therefore, was only that under the existing statutes, a right to have a jury determine damages existed in default judgments. The case has not been extended, before now, as authority for a right to a jury determination of damages in other contexts. Arguably,

Prewitt's interpretation of section 289 was incorrect in any event, as the provision uses the permissive "may" rather than the mandatory "shall". However, even if *Prewitt* correctly interpreted the territorial code and the *Prewitt* rule applies outside the default judgment context, are all of the more than 40 sections of the territorial code describing jury functions and procedures now to be accorded constitutional stature? Given the predilections of the majority, it would seem so.

The other cases the majority cites are equally unpersuasive as authority to derive the right to jury determined damages. *James v. Robeck*, 79 Wash.2d 864, 869-70, 490 P.2d 878 (1971), which leads off the majority's recitation, does describe damages determination as a constitutionally-consigned jury function. However, although *James* overturned a trial court's order reducing a jury-determined damage award, it noted that such a reduction would not be improper in all cases. *James*, at 871, 490 P.2d 878. In this respect, *James* refutes the majority's contention that the scope of the constitutional jury right is equivalent to the scope of jury powers under the territorial code. Section 276 of the Code of 1881 provided that when the jury returns "[e]xcessive damages, appearing to have been given under the influence of passion or prejudice", a new trial may be had. The provision does not authorize the trial court simply to reduce the damages as an alternative to a new trial, as *James* and the cases it cites allow.

Similarly, *Dacres v. Oregon Ry. & Nav. Co.*, 1 Wash. 525, 20 P. 601 (1889) is not persuasive to the majority's position. The statute at issue was held violative of the Seventh Amendment jury trial right, not the state constitutional provision. Moreover, *Dacres* did not say the statute offended the federal jury trial right because it prevented a jury determination of damages. Even if it had, it would have been proved wrong by *Tull*.

The remaining Washington cases the majority claims recognize "the constitutional nature of the jury's damage-determining role" (majority, at 716), ultimately rely

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either on *Walker v. McNeill*, 17 Wash. 582, 50 P. 518 (1897) or *Martin v. Foss Launch & Tug Co.*, 59 Wash.2d 302, 367 P.2d 981 (1962). The *Anderson* and *Kellerher* cases describe damages determinations simply as "a jury function", *Anderson v. Dalton*, 40 Wash.2d 894, 897, 246 P.2d 853 (1952), and "primarily the province of the jury", *Kellerher v. Porter*, 29 Wash.2d 650, 666, 189 P.2d 223 (1948), and both substantively rely only on *Walker v. McNeill*, *supra*. *Walker* noted the advantages of having a jury determine damages, but in the end reduces as excessive the damages the jury had determined in the case.

Worthington v. Caldwell, 65 Wash.2d 269, 273, 396 P.2d 797 (1964), *Bingaman v. Grays Harbor Comm'ty Hosp.*, 103 Wash. 2d 831, 835, 699 P.2d 1230 (1985), and *Lyster v. Metzger*, 68 Wash.2d 216, 224-25, 412 P.2d 340 (1966) all rely either directly on *Martin v. Foss Launch & Tug Co.*, *supra*, or on cases citing *Martin* as precedent. Interestingly, *Martin* first cites a legislative statute, RCW 4.76.030, for the proposition that there is a statutory presumption that the jury verdict is correct. *Martin*, 59 Wash.2d at 303, 367 P.2d 981. Next, *Martin* cites *Anderson v. Dalton*, *supra*, for the maxim that "the determination of damages is primarily a jury function." *Martin*, at 303, 367 P.2d 981. Finally, *Martin* cites *Scobba v. Seattle*, 31 Wash.2d 685, 198 P.2d 805 (1948), which states that the trial court has inherent discretion to relieve a party of an excessive verdict by giving the prevailing party the option to accept a smaller amount or submit to a new trial. See also *Ticknor v. Seattle-Renton Stage Line*, 139 Wash. 354, 358, 247 P. 1 (1926) ("[I]t is within the discretion of the trial judge to require an acceptance of a less amount than the verdict, or a new trial will be granted."). Whether the award is reduced by consent or a new trial is granted, there is an underlying power to limit the damages found by the jury. If the jury's determination of damages translated automatically, by constitutional fiat, into the legal remedy, how could such a common law rule be constitutional?

The majority also cites *Worthington v. Caldwell*, *supra*, for the proposition that "[q]uestions of damages should be decided by the jury". Majority, at 716. Following the line of cases cited by *Worthington* leads only to precedent which allows a trial judge to reform an irregular verdict in accordance with the jury's intent. See *Weihs v. Watson*, 32 Wash.2d 625, 630, 203 P.2d 350 (1949); *Richey & Gilbert Co. v. Northwestern Natural Gas Corp.*, 16 Wash.2d 631, 651, 134 P.2d 444 (1943); *Bobst v. Hardisty*, 199 Wash. 304, 306, 91 P.2d 567 (1939); *City Bond & Share, Inc. v. Klement*, 165 Wash. 408, 411, 5 P.2d 523 (1931); *Beglinger v. Shield*, 164 Wash. 147, 153, 2 P.2d 631 (1931); *Gosslee v. Seattle*, 132 Wash. 1, 2-4, 231 P. 4 (1924); *Buffington v. Henton*, 70 Wash. 44, 47-48, 126 P. 58 (1912); *Casety v. Jamison*, 35 Wash. 478, 480, 77 P. 800 (1904). Contrary to the majority's bold conclusion, this court has never constitutionalized the jury's right to determine damages. Even conceding this point, however, there is no precedent for extending the scope of this right to the remedy phase.

The entire analysis of the majority on the relevant issue, with no authority cited, is found on page 721 of its opinion:

Respondents also contend that the damages limit affects only the judgment as entered by the court, not the jury's finding of fact. This argument ignores the constitutional magnitude of the jury's fact-finding province, including its role to determine damages. Respondents essentially are saying that the right to trial by jury is not invaded if the jury is allowed to determine facts which go unheeded when the court issues its judgment. Such an argument pays lip service to the form of the jury but robs the institution of its function. This court will not construe constitutional rights in such a manner.

In essence this is the opinion of the majority. It is a conclusion with no support. Unasked by the majority and unanswered by its opinion is the question as to why this particular limitation in RCW 4.56.250 would rob the jury of its function if other limitations, such as treble damages and remit-

titur, do not? How does one know the jury is robbed of its function when the majority has not delineated the scope of that function?

Certainly, the jury is entitled to determine the facts which will lead to its assessment of damages and ultimately to the imposition of a remedy by the court. This is a constitutional right which is and must remain inviolate. This does not mean, nor has it ever meant, that the jury's determination of what it believes to be the damages is a constitutional absolute which may not be changed by action of law. It seems to me the majority, with its all or nothing analysis and its failure to distinguish between the damages a jury finds and the judgment which the court grants, *i.e.*, the remedy, needlessly, improperly, and harmfully puts the Legislature, and this court, in a doctrinal strait jacket. To say the Legislature may eliminate the cause of action but not limit the remedy neither accords with common sense nor does it necessarily flow from the constitutional right to trial by jury.

Not only are the facts which a jury may consider limited, it has never been the rule in this state that a jury may assess damages as it chooses from the facts which are presented to it. For example, we have long refused to allow juries to assess compensatory or punitive damages, regardless of whether the facts before the jury might persuade it otherwise. *Spokane Truck & Dray Co. v. Hoefer*, 2 Wash. 45, 25 P. 1072 (1891); *Barr v. Interbay Citizens Bank*, 96 Wash.2d 692, 649 P.2d 827 (1981). Although this is a common law limitation, other examples can be given where legislative action has altered the effect of a jury's determination of damages: RCW 4.22.005, reversing *Seay v. Chrysler Corp.*, 93 Wash.2d 319, 609 P.2d 1382 (1980) (see discussion of *Seay v. Chrysler Corp.*, *infra*); RCW 19.86.090 (authorization of treble damages by court in consumer protection action); RCW 79.01.756 (treble damages for cutting or manufacturing timber without authorization).

The most closely analogous legislative action, unmentioned by the majority, is con-

tained in *Seay v. Chrysler Corp.*, *supra*. In *Seay*, we refused to apply comparative negligence in product liability actions. Product liability actions were judicially created. See *Seay v. Chrysler Corp.*, at 325, 609 P.2d 1382 (Utter, C.J., dissenting). Thus, in product liability cases in which there was in fact negligence by the plaintiff, since comparative negligence would not apply, there would be higher verdicts and settlements. In *Seay* we held the comparative negligence statute (RCW 4.22.010) applied only to actions based on negligence and did not apply to causes of action for strict product liability which is based on a no-fault concept. The following year the Legislature enacted RCW 4.22.005, which reversed *Seay* and applied the doctrine of comparative negligence to strict liability cases.

The effect of this legislative action can be seen by taking two hypothetical cases where the facts were identical, the finding of damages by the jury was identical, and there was the same degree of contributory negligence by the plaintiff. Prior to RCW 4.22.005, the plaintiff would have received the *entire* amount of the jury determination of damages. Following RCW 4.22.005, the damages would be reduced by the percentage of the comparative negligence of plaintiff. The doctrine of strict liability would remain the same, the factual basis on which the jury measured damages would remain the same, and the damages for the injury would remain the same. But, by the operation of law, the *recovery* which, say yesterday would be \$1,000, would today be \$1,000 *minus* any contributory negligence by plaintiff. From an analytical standpoint, I fail to see any difference between my hypothetical case in which the finding of damages by the jury in a common law cause of action is reduced by statute so the *recovery* is less and the case before the court where by statute the *recovery* is also less even though the "damages" found by the jury would be a greater amount.

The Legislature has also consistently removed common law causes of action by providing immunity or defenses for the actions. RCW 4.24.200-.210 (immunity from

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liability of owner of land or water used for recreation), upheld in *Riksem v. Seattle*, 47 Wash.App. 506, 736 P.2d 275 (1987); RCW 4.24.300 (immunity from liability of persons rendering emergency care); RCW 4.24.400 (immunity from liability of building warden assisting evacuation or attempting to control hazard); RCW 4.24.410 (immunity from liability of dog handler using police dog in line of duty); RCW 5.40.060 (absolute defense to an action for personal injury or wrongful death when influence of liquor or drugs was a proximate cause of the injury or death); RCW 7.68 (crime victims' compensation act), upheld in *Haddenham v. State*, 87 Wash.2d 145, 550 P.2d 9 (1976); former RCW 46.08.080 (motor vehicle guest statute), upheld in *Shea v. Olson*, 185 Wash. 143, 53 P.2d 615, 111 A.L.R. 998 (1936), repealed, Laws of 1974, 1st Ex. Sess., ch. 3, at p. 2; RCW 68.50.400(3) (immunity from liability of person donating anatomical parts); RCW 70.136.050 (immunity from liability of persons in agencies rendering aid in hazardous materials incidents).

The majority agrees the Legislature has the power to remove causes of action altogether. If the statute is examined from this perspective, it appears the Legislature in enacting RCW 4.56.250 has eliminated, in effect, any cause of action in which the damages are above the amount allowed in the act. If, as the majority states, when a cause of action is "completely done away with, then the right to trial by jury becomes irrelevant" (majority, at 719) it is, in fact, describing the essence of the statute before the court. By operation of law there can be no cause of action which would have damages in excess of the statutory formula. Within the statutory amounts (i.e., the allowable causes of action) the jury may determine damages as it finds them under the facts of the case.

Rather than analyze why the lesser power to limit recovery is not included within the greater power to abolish causes of action, the majority proceeds with a talismanic incantation of the right of trial by jury. The majority essentially makes up arguments to distinguish the noneconomic loss situation from the workers' compensation

and treble damages situations which clearly illustrate limitations on the jury function in determining remedies. Most troublesome about the majority discussion on this question is the gratuitous holding that there is no right to trial by jury for consumer protection act claims. The reasoning behind this conclusion is woefully inadequate, especially when the majority lectures so strongly about applying a "flexible historical approach" (majority, at 718) to determine when the jury right attaches.

The Legislature perceived a problem in our tort law and believed reform was necessary. Laws of 1986, ch. 305, § 100, p. 1354. It enacted comprehensive tort law revisions which it stated were "to create a more equitable distribution of the cost and risk of injury and increase the availability and affordability of insurance." We may question the efficacy of the legislation (see Priest, *The Current Insurance Crisis*, 96 Yale L.J. 1521, 1587-90 (1987)). Nonetheless, the Legislature took action which it hoped and believed would remedy or partially remedy the problem. While we may wish it had acted otherwise, we are bound to uphold the statute unless it can be shown to be unconstitutional beyond a reasonable doubt. The plaintiffs have not met their burden. Therefore, I dissent.

CALLOW, C.J., concurs.

DURHAM, Justice (dissenting).

I concur in Justice Dolliver's dissent. There are a few additional comments that I feel should be made, however.

First, Section I of the majority opinion is pure dicta. The court does not decide in this case any issue requiring construction of Const. art. 1, § 12. Thus, the majority's gratuitous discussion of how the Oregon Supreme Court has interpreted a similarly worded provision of Oregon's constitution is irrelevant and inappropriate. A variety of forums is available to members of the court who have settled opinions on the meaning of our state constitution. This is not the time or the place.

Second, I am astonished to learn from the majority that the methodology we de-

veloped in *State v. Gunwall*, 106 Wash.2d 54, 720 P.2d 808 (1986), for ascertaining when a state constitutional provision may be relied upon as an independent source of right, was "clarified" in *State v. Wethered*, 110 Wash.2d 466, 755 P.2d 797 (1988). This simply is not so. In *Wethered*, we declined to engage in analysis of Const. art. 1, § 9, because counsel had not adequately addressed the *Gunwall* criteria. Far from altering *Gunwall*'s methodology, in *Wethered* we had no occasion even to consider it.

Not only is *Wethered* now called a "clarification" of *Gunwall*, it also is cast as a response to criticism in a Washington Law Review case note. This is again a mischaracterization. *Wethered* says nothing about the *Gunwall* criteria other than that any argument favoring independent analysis of a state constitutional provision must address them. Thus, *Wethered* expresses no opinion on, and is in no way responsive to, any criticisms of the analytic methodology we described in *Gunwall*.

More simple means are available to refute the "implication" by Chief Justice Callow that the majority finds troublesome. See *State v. Reece*, 110 Wash.2d 766, 778, 757 P.2d 947 (1988) ("There is no presumption of adherence to federal constitutional analysis."). The majority's distortion of *Wethered* for this purpose is unnecessary and inappropriate.

Third, the majority's discussion of how its ruling affects the trebling of damages in Consumer Protection Act actions is dangerously confusing. The majority attempts to save treble damages by a swift and discursive "historical analysis" which concludes that causes of action under the Consumer Protection Act are "outside of the strict purview of article 1, section 21." Majority, at 721 n. 6. Later, responding to Justice Dolliver's criticism of this conclusion as a "gratuitous holding" based on "woefully inadequate" reasoning, dissent of Dolliver, J., at 737, the majority recants:

As for the "gratuitous holding" regarding the Consumer Protection Act discussed by Justice Dolliver's dissent at page 737, we have not reached such a

fundamental conclusion. We are unable to because the Consumer Protection Act is not an issue in this case. We cannot decide cases not before us.

Majority, at 727.

This is rhetoric over reason. The majority's opinion leaves only two possibilities for the validity of the Consumer Protection Act's treble damages provisions. Either treble damages are unconstitutional, or there is no right to a jury trial in actions under the Consumer Protection Act. In light of the majority's gratuitous analysis on this issue, and notwithstanding its disclaimer, lower courts will feel constrained to choose the latter option. How sad that "such a fundamental conclusion" is so carelessly determined.

Finally, it is remarkable the way the majority skirts around a decision upholding the workers' compensation scheme. Though this decision was not supported by "historical analysis", the majority nevertheless affirms it, apparently on the basis that a competing constitutional concern justified the legislative action.

I cannot understand why the Legislature can remove damages determinations from the jury as part of the workers' compensation scheme, but it cannot do so in other actions. The "independent constitutional foundation" that the majority apparently believes saves the workers' compensation scheme was nothing other than the state's general police power. See *State v. Mountain Timber Co.*, 75 Wash. 581, 135 P. 645 (1913), *aff'd*, 243 U.S. 219, 37 S.Ct. 260, 61 L.Ed. 685 (1917). As described in *Mountain Timber*, this police power is broad enough to justify the noneconomic damages cap. Where's the distinction? And why is a "detailed historical analysis" not necessary for workers' compensation, when it is so essentially dispositive here?

The majority's only answer is to hold that the Legislature can eliminate the jury right by abolishing a common law cause of action, but it cannot do so merely by limiting or redefining causes of action. "Otherwise, article 1, section 21 means nothing." Majority, at 720. Otherwise, the majority says, the jury right is form but not sub-

stance. As serves, therefore the majority the legislative a cause of action it—is ultimately constitutional is stance.

CALLOW,
concur.

1419 STATE

Dennis Ricci

Supreme

Defendant or Court, King first-degree rape Court of Appeals P.2d 380, reversal, defendant degree rape, allowing certification the Supreme Court trial court could defendant's previous West German sentence defendant within standard rape.

Affirmed.

Criminal Law
Trial court
lying defendant's
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stance. As Justice Dolliver so well observes, there is just no sense in this. Under the majority's reasoning, the form of the legislative action—whether it supplants a cause of action, or merely imposes limits on it—is ultimately dispositive on the constitutional issue. *That* is form over substance.

CALLOW, C.J., and DOLLIVER, J.,
concur.



112 Wash.2d 419

141 STATE of Washington, Respondent,

v.

Dennis Richard HERZOG, Appellant.

No. 55873-6.

Supreme Court of Washington,
En Banc.

April 27, 1989.

Defendant was convicted in the Superior Court, King County, Warren Chan, J., of first-degree rape, and he appealed. The Court of Appeals, 48 Wash.App. 831, 740 P.2d 380, reversed and remanded. On remand, defendant was resentenced for first-degree rape, and he again appealed. Following certification by Court of Appeals, the Supreme Court, Pearson, J., held that trial court could consider facts underlying defendant's previous, constitutionally invalid West German rape conviction to sentence defendant to maximum sentence within standard range for first-degree rape.

Affirmed.

Criminal Law ¶986.2(4)

Trial court could consider facts underlying defendant's previous, constitutionally invalid West German rape conviction to sentence defendant to maximum sentence

within standard range for first-degree rape; sentencing court was aware that West German conviction was invalid because the trial was conducted before a panel of only two jurors, and defendant never denied his rape of the West German victim. West's RCWA 9.94A.010 et seq., 9.94A.210(1), 9.94A.360(2); West's RCWA Const. Art. 1, § 22.

Washington Appellate Defender Association, Dennis Benjamin, Seattle, for appellant.

Norm Maleng, King County Prosecutor, Peter Goldman, Deputy, Donna L. Wise, Deputy, Seattle, for respondent.

PEARSON, Justice.

Upon sentencing the defendant for first degree rape, the trial court considered the facts underlying a previous, constitutionally invalid, foreign conviction to sentence the defendant to the maximum sentence within the standard range. This case is before this court following certification of the following issue by the Court of Appeals, Division One, pursuant to RCW 2.06.030(d):

Did the trial court err in considering facts alleged in a foreign conviction which was determined to be constitutionally invalid in setting defendant's sentence within the standard range?

We answer this question in the negative and, accordingly, we affirm the trial court.

FACTS

On December 6, 1985, the defendant, Dennis Herzog, was convicted of rape in the first degree. The only account in the record before this court of the facts underlying that conviction is contained in the prosecutor's certification for determination of probable cause. That document provides:

On or about September 1, 1985, the victim ... met the defendant Dennis Richard Herzog through a mutual friend. The three of them went to the apartment occupied by the defendant. The defendant made a pass at [sic] the victim, but

"a critical question bearing on the third factor under the *Pickering* balance is the degree to which plaintiff's disagreement with his supervisors about the law was unfounded. Under that factor, if his view of the law was well founded, we would give less weight to defendants' competing interest in ensuring that plaintiff's ability to perform his duties is not diminished by having made unfounded statements. If plaintiff's view of the law was not well founded, then defendants' competing interest would have greater significance." 127 Or.App. at 501, 873 P.2d at 408.

Pickering holds that if a plaintiff knew or should have known that the statements were false, that speech would *not* be protected by the First Amendment and the discharge would not implicate constitutional considerations. 391 U.S. at 574 and n. 6, 88 S.Ct. at 1737-38 and n. 6; see also, *Shockey v. City of Portland*, *supra*, 313 Or. at 434, 837 P.2d 505 (Unis, J., dissenting). However, *Pickering* did not hold that if it is established that plaintiff's statements were true, they are automatically protected by the First Amendment. Defendants do not assert that plaintiff was fired for allegedly making false statements. It is immaterial in this case whether plaintiff's view of the law was right or wrong, because defendants are not asserting that plaintiff's ability to perform his job has been diminished by his having made unfounded statements. The issue is whether plaintiff had a First Amendment right to say what he said *when and where* he said it. In other words, we must determine if plaintiff's First Amendment interests in speaking on a matter of public concern outweigh defendants' interests in efficiently performing the public responsibilities entrusted to it. As long as plaintiff is speaking on a matter of public concern, his interest is the same whether he is right or wrong.³ See *Robson v. Klamath County Board of Health*, *supra*, 109 Or.App. at 250-252, 818 P.2d 990 (Warren, J., specially concurring).

¹ I am not unsympathetic to an employee's right, even obligation, to express views

3. If defendants sought to justify plaintiff's discharge on the ground that he could no longer perform his job duties because of his false statements, as in *Pickering v. Board of Education*,

regarding his or her job responsibilities. However, at some point, even a public employer must be entitled to protect the efficiency of its operations. Under these circumstances, defendants' interest in providing public services efficiently outweighed plaintiff's right to freedom of expression. I would affirm the trial court's grant of summary judgment to defendants on the section 1983 claim.

WARREN, RIGGS and EDMONDS, JJ., join in this opinion.



127 Or.App. 511

151 Thomas TENOLD, Respondent,

v.

WEYERHAEUSER COMPANY,
a corporation, and Larry
Hoff, Appellants.

89-2198 CV; CA A72816.

Court of Appeals of Oregon,
In Banc.*

Argued and Submitted April 19, 1993.

Resubmitted In Banc Nov. 3, 1993.

Decided April 20, 1994.

Employee brought suit against employer alleging malicious prosecution, intentional infliction of severe emotional distress, and defamation. Jury returned verdict in favor of plaintiff totaling more than \$2.5 million following trial in the Circuit Court, Klamath County, Rodger J. Isaacson, J. Appeal was taken. The Court of Appeals, Durham, J. pro tem., held that: (1) whether employer was vicariously liable for tortious conduct by deputy sheriff when conducting investigation

supra, then the truth or falsity of his statements would be a material consideration.

* Haselton, J., not participating.

was jury question; (2) firing plaintiff and triggering criminal investigation despite knowledge that plaintiff had permission to take employer's property and intended to pay for it supported claim for intentional infliction of severe emotional distress; (3) statute limiting recovery of noneconomic damages violated State Constitution; and (4) punitive damages award did not violate due process and was not excessive fine.

Affirmed.

Edmonds, J., concurred in part, dissented in part and filed opinion in which Richardson, C.J., and Deits and Landau, JJ., joined.

1. Appeal and Error ⚡927(1)

Evidence is reviewed in light most favorable to plaintiff to determine if there was sufficient evidence to submit issue to jury when reviewing denial of motion to withdraw issue from jury. Const. Art. 1, § 17.

2. Master and Servant ⚡332(1.1)

Whether company which contracted for deputy sheriff's investigatory services was vicariously liable for tortious conduct by deputy was jury question given ambiguity about whether company had right to exercise control over manner and means by which deputy performed duties.

3. Contracts ⚡176(2)

Meaning of ambiguous contract is an issue to be decided by trier of fact.

4. Contracts ⚡170(1)

Parties' intent under contract is often discernible by their conduct in carrying out terms of contract.

5. Damages ⚡208(6)

Whether defendant's conduct constitutes extraordinary conduct which reasonable jury could find beyond farthest reaches of socially tolerable behavior, as needed to support claim for intentional infliction of a severe emotional distress, is question of law.

6. Damages ⚡208(6)

Whether employer accused plaintiff of stealing property, despite having knowledge that plaintiff was given permission to take property and intended to pay for it, thereby

triggering unfounded criminal investigation and firing plaintiff was conduct needed to support claim for intentional infliction of severe emotional distress was jury question.

7. Statutes ⚡181(1)

Appellate court's task in construing statutes is to discern intent of legislature. ORS 174.010.

8. Statutes ⚡208, 217.2

When meaning of statute is not apparent on its face, appellate court looks to statute's context, and if it is not dispositive, then its legislative history. ORS 174.010.

9. Damages ⚡127

Statute limiting noneconomic damage recovery in any civil action, limited tort plaintiff's recovery to statutory limit of \$500,000, even though jury awarded plaintiff damages on more than one claim. ORS 18.560.

10. Jury ⚡37

Statute limiting recovery for noneconomic damages in tort action to \$500,000 violated provision of State Constitution prohibiting reexamination of fact tried by jury; statute compelled court to reexamine verdict by requiring court to nullify jury's factual determination if it exceeded legislature's damage cap. ORS 18.560; Const. Art. 7, § 3.

11. Constitutional Law ⚡303

Damages ⚡94

Punitive damages award did not violate due process in light of jury instruction that outlined objective criteria on which jury was required to base its decision and because of availability of postverdict review. U.S.C.A. Const.Amend. 5, 14.

12. Criminal Law ⚡1214

Malicious Prosecution ⚡68

Punitive damages award in malicious prosecution suit by private party against former employer and others did not violate Eighth Amendment prohibition against excessive fines, even though government had right to share in award after punitive damages verdict had been entered. ORS 18.540; U.S.C.A. Const.Amend. 8.

Next, Weyerhaeuser assigns as error the trial court's denial of its motion to modify the judgment to reduce the amount awarded to plaintiff for noneconomic damages to \$500,000 in accordance with ORS 18.560. The jury awarded plaintiff a total of \$900,000 in noneconomic damages on his three claims against Weyerhaeuser.³ Plaintiff argues that, although ORS 18.560 limits his recovery for noneconomic damages to \$500,000 per claim, he may recover more than \$500,000 in noneconomic damages, because he prevailed on more than one claim. Weyerhaeuser argues that the limitation on damages in the statute means that the total award of noneconomic damages for all tort claims arising out of the same operative facts cannot be more than \$500,000.

[7, 8] In construing statutes, our task is to discern the intent of the legislature. ORS 174.010; *Mattiza v. Foster*, 311 Or. 1, 4, 803 P.2d 723 (1990). We first look to the text of the statute to ascertain "what is * * * contained therein, not to insert what has been omitted, or to omit what has been inserted." ORS 174.010; *Sanders v. Oregon Pacific States Ins. Co.*, 314 Or. 521, 527, 840 P.2d 87 (1992). If the meaning of the statute is not apparent on its face, we look to the statute's context, and if that is not dispositive, then we examine its legislative history. *PGE v. Bureau of Labor and Industries*, 317 Or. 606, 859 P.2d 1143 (1993).

[9] ORS 18.560 provides, in part:

"Except for claims subject to ORS 30.260 to 30.300 and ORS chapter 656, in any civil action seeking damages arising out of bodily injury, including emotional injury or distress, death or property damage of any one person * * *, the amount awarded for noneconomic damages shall not exceed \$500,000." (Emphasis supplied.)

3. The jury awarded plaintiff \$250,000 in noneconomic damages on his claim for malicious prosecution, \$500,000 for his claim for intentional infliction of severe emotional distress, and \$150,000 for his claim of defamation.

4. A preliminary version of ORS 18.560 said that "the amount awarded for noneconomic damages shall not exceed \$500,000 per person in the aggregate." During its first work session, the

The language of ORS 18.560 limits noneconomic damages to \$500,000 in any "civil action." We cannot ascribe a plain meaning to the phrase "civil action," because "action" has been interpreted in a variety of ways. See *East Side Mill Co. v. SE Portland Co.*, 155 Or. 367, 372, 64 P.2d 625 (1937). Likewise, the statute's context is not dispositive and we find no express legislative history to indicate what the legislature meant by the phrase.⁴ In the absence of such evidence, we will consider the objective of the statute to determine the legislative intent. See *State v. Parker*, 299 Or. 534, 540, 704 P.2d 1144 (1985).

ORS 18.560 was enacted as part of the 1987 "Tort Reform Act." OrLaws 1987, ch 774, § 6. According to the legislative history, the purpose of imposing a cap on noneconomic damages was to stabilize insurance premiums and to decrease the costs associated with tort litigation. Minutes, House Judiciary Subcommittee, April 29, 1987, pp 11, 15. In the light of that purpose, we are persuaded that the modern definition of an "action," adopted by the Supreme Court in *Dean v. Exotic Veneers, Inc.*, 271 Or. 188, 193, 531 P.2d 266 (1975), best fulfills the objective of the statute:

¹⁶²⁰"The most convenient [definition] is to consider a cause of action as an aggregate of operative facts giving rise to a right or rights termed 'right' or 'rights of action' which will be enforced by the courts. The number and extent of operative facts included within a single cause of action are to be determined pragmatically, mainly by considerations of practical trial convenience." (Emphasis supplied.)

The relevant factors for determining what connotes an "aggregate of operative facts" are "their relatedness in time, space, origin, or motivation, and whether, taken together they form a convenient unit for trial purposes." *Troutman v. Erlandson*, 287 Or.

legislature deleted the phrase "per person in the aggregate," because it found the language to be confusing. Chairman Frye said that the committee's intention was to limit damages to \$500,000 per person and that the language that limits damages of any one person sufficiently reflected that intention. There was no discussion of multiple claims. Tape Recording, Senate Committee on Judiciary, March 23, 1987, Side A at 355-416.

187, 206, 598 P.2d 1211 (1979). In this case, plaintiff's factual allegations about Weyerhaeuser's course of conduct are an aggregate of operative facts that give rise to several "rights of action." We conclude that the statute directs the trial court to reduce the noneconomic damage award to \$500,000.

[10] However, plaintiff contends that ORS 18.560 violates Article VII (amended), section 3, of the Oregon Constitution, which provides, in part:

"In actions at law, where the value in controversy shall exceed \$200, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of this state, unless the court can affirmatively say there is no evidence to support the verdict."

"Reexamine" means to subject to "a second or new examination." *Websters Third New International Dictionary* 1907 (unabridged 1976). We cannot discern from the text and context of Article VII (amended), section 3, whether a court "re-examines" a "fact tried by a jury" when it reduces a damage award that exceeds the statutory limit. See *Comeaux v. Water Wonderland Improvement Dist.*, 315 Or. 562, 570, 847 P.2d 841 (1993). To resolve that question, we look for guidance to the circumstances surrounding the adoption of Article VII (amended), section 3. See *PGE v. Bureau of Labor and Industries*, *supra*, 317 Or. at 611, 859 P.2d 1143.

Van Lom v. Schneiderman, 187 Or. 89, 98, 210 P.2d 461 (1949), discusses the evolution of Article VII (amended), section 3. The framers of the United States Constitution preserved the right of trial by jury, as it was known at common law, in the Seventh Amendment, which provides:

1521 "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any

Court of the United States, than according to the rules of the common law."

That amendment protected the jury trial right as it had developed in England. At the time of the adoption of the Seventh Amendment, English common law reserved to the jury the determination of the amount of damages. 3 W. Blackstone, *Commentaries* 396. However, the English system authorized the court, in a damage action, to grant a new trial if the judge believed that the verdict awarded excessive damages. *Van Lom* says that

"the federal judges, like the English judges, have always exercised the prerogative of granting a new trial when the verdict was clearly against the weight of the evidence, whether it be because excessive damages were awarded or for any other reason." 187 Or. at 112, 210 P.2d 461.

Oregon preserved that federal jury trial right when it adopted Article I, section 17, as part of its Bill of Rights.⁵ That section provides:

"In all civil cases, the right of Trial by Jury shall remain inviolate."

Before 1910, Oregon also retained the tradition of allowing courts to set aside "excessive" verdicts. *Van Lom v. Schneiderman*, *supra*, 187 Or. at 105, 210 P.2d 461. For example, OCLA, § 5-802, authorized a new trial for:

"(5) Excessive damages, appearing to have been given under the influence of passion or prejudice; (6) Insufficiency of the evidence to justify the verdict or other decision[.]"

See 187 Or at 105.

In 1910, the people of Oregon adopted Article VII (amended), section 3. The amendment repeats the substance of Article I, section 17, but also creates a limitation on the 1522 authority of an Oregon court to reexamine a jury's determination of any fact, through the proscription: "no fact tried by a

not afford a jury trial right in a default proceeding. *Deane* is of limited utility here, because it was decided 18 years before the adoption of Article VII (amended), section 3, and this case does not concern rules applicable to default proceedings.

5. *Deane v. Willamette Bridge Co.*, 22 Or. 167, 29 P. 440 (1892), on which the dissent relies, 127 Or.App. at 534, 873 P.2d at 426, held that the plaintiff had no constitutional right under Article I, section 17, of the Oregon Constitution, to a jury determination of damages in a default proceeding, because the English common law did

jury shall be otherwise re-examined in any court of this State." *Buchanan v. Lewis A. Hicks Co.*, 66 Or. 503, 510, 133 P. 780, 134 P. 1191 (1913), describes the problem that the amendment was intended to correct:

"Pursuant to the provisions of that statute [Lord's Oregon Laws, § 174] it had been the practice of many trial courts in Oregon, prior to the amendment of the organic law * * * to set aside judgments and grant new trials, when, from a consideration of all the evidence given at the trial of an action, it was believed the verdict was excessive. In order to inhibit such practice and to uphold verdicts, the Constitution was amended so as to preclude a court from re-examining any fact that had been tried by a jury, when the verdict returned was based on any legal evidence * * *."

In *Van Lom v. Schneiderman*, *supra*, 187 Or. at 95, 210 P.2d 461, the court said:

"This last clause forbids re-examination of a fact found by a jury otherwise than by another jury * * *, and is transgressed every time that a court undertakes to revise or correct a jury's finding of fact (unless this be done by the Supreme Court where there is error in the record * * *). All that the court may do, so far as the facts are concerned, is to examine the record to determine whether it 'can affirmatively say there is no evidence to support the verdict.'"

The Supreme Court has held that the amendment was intended to prohibit courts from deciding that a jury's factual determination of the amount of damages is improper when measured against a statutory standard, such as "excessive," and nullifying the verdict.

"The purpose of this amendment [Article VII, section 3] was to prohibit courts from setting aside or modifying judgments founded upon verdicts of juries, where there is no prejudicial error in the record. In this case the jury was properly instruct-

6. The determination of the amount of punitive damages is likewise a question of fact. *Van Lom v. Schneiderman*, *supra*, 187 Or. at 111, 210 P.2d 461, discussing punitive damages, says:

"Under a system such as ours, where the court responds to the law and the jury to the facts, it would be difficult indeed to say that a question which for centuries has been submitted to the

ed, and there is no assignment of error except as to the amount of the verdict. Under such circumstances, it was for the jury only to fix the amount of plaintiff's damages, which it did by a unanimous verdict.

" * * * * "

"Although in the opinion of this court the amount of damages awarded might be deemed excessive, we cannot affirmatively say that there is no evidence to support it. Under the record in the case, this court is powerless to grant relief." *Malpica v. Cannery Supply Co.*, 95 Or. 242, 247, 187 P. 596 (1920).

Malpica v. Cannery Supply Co., *supra*, is but one of many cases that hold that Article VII (amended), section 3, is a limitation on the court's power to set aside or modify a jury's factual determination of damages, or a judgment that embodies that determination, following a fair trial. In *Sigel v. Portland Ry. L. & P. Co.*, 67 Or. 285, 291, 135 P. 866 (1913), the court held that, after the plaintiff presented the evidence of her injury,

"[i]t therefore became the duty of the jury to determine the amount of her damages. * * * The judgment on the verdict could not be set aside without the re-examination of a question of fact which had been tried by a jury upon legal evidence and under proper instructions as to the law." ⁶

Roach v. Mead, 301 Or. 383, 385, 722 P.2d 1229 (1986), states:

"In *Shepler v. Weyerhaeuser Company*, 279 Or. 477, 484, 569 P.2d 1040 (1977), which concerned a jury verdict for plaintiff in a negligence action, we defined our scope of review in civil actions at law:

" * * * Since the verdict was for plaintiff, we could not find error * * * unless we could affirmatively say there is no evidence to support the verdict. (Oregon Constitution, Amended Art. VII, § 3.)"

decision of a jury is other than a question of fact. And the reluctance of the courts, having power to do so, to interfere with the jury's decision, gives added weight to this conclusion."

See also *Hahn v. Mackay*, 63 Or. 100, 111, 126 P. 12, 126 P. 991 (1912).

The Supreme Court has applied that limitation on appellate review authority since the earliest cases construing Article VII (amended), section 3.

"[T]he Supreme Court, on appeal, is powerless to re-examine any fact tried by a jury, unless it, like the lower court, in passing upon a motion for a new trial, can affirmatively say there is no evidence to support the verdict. * * *

"[T]he right, upon appeal, to correct a judgment rests upon an error of law committed by the trial court and not upon the re-examination of any fact tried by a jury, except in cases where the Supreme Court can affirmatively say there is no evidence to support the verdict." *Buchanan v. Lewis A. Hicks Co.*, *supra*, 66 Or. at 511, 133 P. 780, 134 P. 1191.

Sullivan v. Wakefield, 65 Or. 528, 535, 133 P. 641 (1913), says:

"Under this section of the Constitution, a court cannot legally set aside the findings of the jury, where there has been no error of law, without affirmatively finding that there was no evidence to support the verdict." (Emphasis in original.)

In *Love v. Chambers Lumber Co.*, 64 Or. 129, 133, 129 P. 492 (1913), the court said:

"Where there is evidence to support a verdict, and the facts have been submitted to a jury under proper instructions, we are precluded from disturbing such verdict. Article VII, Section 3, of the constitution as amended November 8, 1910 * * *."

Similarly, the court said in *State v. Hill*, 63 Or. 451, 459, 128 P. 444 (1912):

"Under the recent amendment to our constitution (Article VII, section 3), if

there is any evidence to support the verdict, this court cannot disturb it. The jury are the exclusive judges of all questions of fact."

ORS 18.560 reinstitutes the practice of courts reducing excessive jury awards, except that it substitutes a statutory monetary standard, \$500,000, for statutory criteria controlling judicial discretion (e.g., "excessive damages," "passion or prejudice," and "insufficiency of the evidence"). It requires the court to apply the monetary standard in every case, whether or not the evidence supports the jury's higher damage award. Article VII (amended), section 3, was designed to prevent that practice, because the people chose to make jurors the exclusive judges of the facts regarding the extent of a plaintiff's damages. We have examined the context of the adoption of Article VII (amended), section 3, and the problem that it sought to remedy. From our examination, we conclude that a jury's verdict on damages, which is supported by the evidence, is a "fact tried by a jury" under that amendment, and that ORS 18.560 violates that amendment, because it ¹⁵²⁵compels the court to reexamine the verdict by requiring the court to nullify the jury's factual determination to the extent that it exceeds the legislature's damage cap.

Weyerhaeuser argues that its motion did not threaten any interference with the jury's factual determination on damages because ORS 18.560 operates as a limitation after the jury makes its award.⁷ We give the same response to that argument as the Washington Supreme Court gave to it in *Sofie v. Fibreboard Corp.*, 112 Wash.2d 636, 655, 771 P.2d 711, 780 P.2d 260 (1989):⁸

7. The dissent relies on *Wiebe v. Seely, Administrator*, 215 Or. 331, 335 P.2d 379 (1959), which interpreted a statutory limitation on wrongful death damages, for the proposition that, after the adoption of Article VII (amended), section 3, in 1910, "the legislature's authority to limit the amount of reasonable damages remained unfettered." 127 OrApp at 535, 873 P.2d at 427. *Wiebe* does not support that argument, because no party in *Wiebe* challenged the wrongful death statute under Article VII (amended), section 3. The court noted, "It is not suggested that such a statute is beyond the powers of the legislature." 215 Or. at 353, 335 P.2d 379. *Wiebe* construes a statute, not a constitutional provision.

8. *Sofie* held that a statutory limit on the noneconomic damages recoverable by a personal injury or wrongful death plaintiff infringed on the Washington state constitutional guarantee of the right to trial by jury. The court's opinion reports that that view reflects the weight of authority from other jurisdictions, particularly those states that have analyzed the history of the jury trial right. 112 Wash.2d at 659, 771 P.2d 711. On that point, Oregon's constitutional history is similar to that of Washington, except that Oregon, by enacting Article VII (amended), section 3, has expressed its constitutional policy on protecting jury verdicts from judicial reexamination more clearly than any other state.

"Respondents also contend that the damages limit affects only the judgment as entered by the court, not the jury's finding of fact. This argument ignores the constitutional magnitude of the jury's fact-finding province, including its role to determine damages. Respondents essentially are saying that the right to trial by jury is not invaded if the jury is allowed to determine facts which go unheeded when the court issues its judgment. Such an argument pays lip service to the form of the jury but robs the institution of its function. This court will not construe constitutional rights in such a manner. As we once stated:

"The constitution deals with substance, not shadows. Its inhibition was leveled at the thing, not the name * * *. If the inhibition can be evaded by the form of the enactment, its insertion in the fundamental law was a vain and futile proceeding. *State v. Strasburg*, 60 Wash. 106, 116, 110 P. 1020 (1910), quoting *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 325, 18 L.Ed. 356 (1866)"

¹⁵²⁶Weyerhaeuser also contends that, if the statute compels a reexamination of a fact found by the jury, courts are similarly barred

from applying the statutes that govern contributory negligence, ORS 18.470,⁹ and contribution, ORS 18.455.¹⁰ Those statutes are not analogous because, under them, the court gives effect to the jury's findings on damages. Under ORS 18.470, the court carries out the jury's findings on the amount of the plaintiff's damages and the plaintiff's proportionate fault. Under ORS 18.455, the court reduces the damage award by the amount that the plaintiff has already recovered from a co-defendant to ensure that the plaintiff receives only the amount of damages found by the jury. In contrast, ORS 18.560 directs the court to nullify the jury's verdict on damages to the extent that the verdict exceeds the amount that the legislature has determined is a fair award in all cases, regardless of the jury's contrary determination from the evidence in a particular case.

Weyerhaeuser's motion invited the trial court to set aside the jury's verdict, because it was too large when measured by the damage cap in ORS 18.560. Article VII (amended), section 3, forbids the court to reexamine the verdict unless no evidence supports it. Because evidence in ¹⁵²⁷the record supported the verdict, the court correctly refused to set it aside.¹¹

9. ORS 18.470 provides:

"Contributory negligence shall not bar recovery in an action by any person or the legal representative of the person to recover damages for death or injury to person or property if the fault attributable to the person seeking recovery was not greater than the combined fault of the person or persons against whom recovery is sought, but any damages allowed shall be diminished in the proportion to the percentage of fault attributable to the person recovering. This section is not intended to create or abolish any defense."

10. ORS 18.455 provides:

"(1) When a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death or claimed to be liable in tort for the same injury or the same wrongful death:

"(a) It does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide; but it reduces the claim against the others to the extent of any amount stipulated by the covenant, or in the amount of the consideration paid for it, whichever is the greater; and

"(b) It discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor."

"(2) When a covenant described in subsection (1) of this section is given, the claimant shall give notice of all of the terms of the covenant to all persons against whom the claimant makes claims."

11. In *Rogers v. Hill*, 281 Or. 491, 506, 576 P.2d 328 (1978), Justice Tongue, joined by Justice Lent, in a special concurring opinion, said:

"[A]lthough juries may sometimes make mistakes, so do judges, and the voters and legislature of Oregon, by the constitutional and statutory provisions adopted by them, made a deliberate choice to confer upon juries the exclusive and final authority to resolve such questions and to remove from the courts the power to either set aside such determinations by juries or to withhold such questions from juries for determination." (Emphasis supplied.)

We do not address whether Article VII (amended), section 3, forbids courts from withholding traditional factual issues, such as the amount of a plaintiff's damages in a tort action, from a jury and, if so, whether ORS 18.560 violates that obligation.

[11] Defendants' remaining assignments of error challenge the jury's punitive damages award. They assert that the award was excessive and, therefore, violated their rights under Article I, section 16, of the Oregon Constitution, the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment to the United States Constitution.¹² They assign as error the denial of their motion for a new trial on that basis. ORCP 64B. In *Oberg v. Honda Motor Co.*, 316 Or. 263, 275, 851 P.2d 1084 (1993), cert. granted — U.S. —, 114 S.Ct. 751, 127 L.Ed.2d 69 (1994), the Supreme Court held that Article I, section 16, applies only to criminal cases, and that the award in that case did not violate the Due Process Clause under the holding in *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991).¹³ Similarly, Article I, section 16, does not apply in this case and the punitive damages award does not violate defendants' due process rights in the light of the court's instruction that outlined objective criteria on which the jury was required to base its decision,¹⁴ and because of the availability of post-verdict review.

[12] ¹²Regarding the Eighth Amendment, the United States Supreme Court held in *Browning-Ferris v. Kelco Disposal*, 492 U.S. 257, 264, 109 S.Ct. 2909, 2914, 106

L.Ed.2d 219 (1989), that the clause does not apply to awards of punitive damages in cases between private parties "when the government neither has prosecuted the action nor has any right to receive a share of the damages awarded." The Court left open the question we must answer in this case: whether the amendment applies to a civil action when the government has a right to share in the award. In reviewing the purpose and the history of the Eighth Amendment, it said that the framers were concerned with "the potential for governmental abuse of its 'prosecutorial' power" and that the Excessive Fines Clause was "intended to limit only those fines *directly imposed by*, and payable to, the government." 492 U.S. at 266, 268, 109 S.Ct. at 2915, 2916. (Emphasis supplied.) Furthermore, it said that it

"has never held, or even intimated, that the Eighth Amendment serves as a check on the power of a jury to award damages in a civil case. Rather, our concerns in applying the Eighth Amendment have been with the criminal process and with *direct actions initiated by government* to inflict punishment. Awards of punitive damages do not implicate these concerns." 492 U.S. at 259, 109 S.Ct. at 2912. (Emphasis supplied.)

We also do not address other arguments concerning the constitutionality of ORS 18.560. For example, we do not address whether ORS 18.560 violates the duty of courts to administer justice "completely," within the meaning of Article I, section 10, because it compels the court to reduce a jury's damage award that the evidence supports.

12. Plaintiff argues that defendants did not preserve their argument that the punitive damages award violated the prohibition against excessive fines under both the federal and the state constitutions. We disagree.

13. See also *TXO Production Corp. v. Alliance Resources Corp.*, — U.S. —, 113 S.Ct. 2711, 125 L.Ed.2d 366 (1993).

14. The jury was instructed:

"If you have found that Plaintiff is entitled to general damages, you must then consider whether to award punitive damages. Punitive damages may be awarded to the Plaintiff, in addition to general damages, to punish the wrongdoer and to discourage the Defendant

and others from engaging in wanton misconduct. In considering punitive damages, you must first determine whether the Defendant was guilty of wanton misconduct that caused damage to Plaintiff. Wanton misconduct is conduct amounting to a particularly aggravated deliberate disregard of the rights of others. If you decide this issue against the Defendant, you may award punitive damages, although you are not required to do so, because punitive damages are discretionary. In the exercise of the discretion[,] you may consider the *importance to society of deterring similar misconduct* in the future. If you decide to award punitive damages, you may properly consider the following items in fixing the amount. First, the *character of the Defendant's conduct*. Second, the *Defendant's motive*. Third, the *sum of money that would be required to discourage* the Defendant and others from engaging in such conduct in the future. And fourth, the *income and assets* of the Defendant. The amount of punitive damages may not exceed the sum of \$2,000,000—\$1,000,000 on the malicious prosecution, and \$1,000,000 on the intentional infliction of emotional distress." (Emphasis supplied.)

Under ORS 18.540,¹⁵ the government becomes a beneficiary of a portion of a punitive damages award after a ¹⁵²⁹verdict has been entered. In this case, a private party brought an action against defendants, and the jury directly imposed the judgment against defendants to punish and to deter future misconduct. The government of Oregon did not initiate this action. Because the purpose of the Eighth Amendment would not be furthered if applied under the circumstances, we reject defendants' arguments. The trial court did not err in denying their motion for a new trial.

Affirmed.

EDMONDS Judge, concurring in part; dissenting in part.

I concur in the majority's opinion, except for the portion that holds that the limitation on noneconomic damages in ORS 18.560 is unconstitutional. The majority says that ORS 18.560 violates the prohibition in Article VII (amended), section 3, against the reexamination of a fact "tried by a jury," and thus, it invalidates the major component of the Oregon Tort Reform Law enacted in 1987. It rejects Weyerhaeuser's argument that the statute does not interfere with the jury's factual determination because the stat-

ute operates as a legal limitation after the jury makes its award on the basis of the reasoning of the court in *Sofie v. Fibreboard Corp.*, 112 Wash.2d 636, 771 P.2d 711. 780 P.2d 260 (1989). For the reasons that follow, the majority's reliance on that reasoning is ill-placed, and it errs when it declares the statute to be unconstitutional under section 3.

Sofie v. Fibreboard, *supra*, is about Article I, section 21, of the Washington Constitution, which provides that "the right of trial by jury shall remain inviolate."¹ Of course, ¹⁵³⁰Article VII (amended), section 3, has entirely different language. The *Sofie* court examined the right to trial by jury as it existed in Washington at the time of section 21's adoption in 1889. The court was persuaded by the decision in *Baker v. Prewitt*, 3 Wash.Terr. 595, 19 P. 149 (1888):

"*Baker's* holding provides clear evidence that the jury's fact-finding function included the determination of damages. This evidence can only lead to the conclusion that our constitution, in article 1, section 21, protects the jury's role to determine damages." *Sofie v. Fibreboard Corp.*, *supra*, 112 Wash.2d at 646, 771 P.2d 711. This court's adoption of the *Sofie* court's reasoning without regard to the discrete lan-

15. ORS 18.540 provides, in part:

"Upon the entry of a judgment including an award of punitive damages, the Department of Justice shall become a judgment creditor as to the punitive damages portion of the award to which the Criminal Injuries Compensation Account is entitled pursuant to paragraph (c) of this subsection * * *."

1. The language "the right to trial by jury shall remain inviolate," is found also in the Bill of Rights, Article I, section 17, as originally adopted in the Oregon Constitution. In Oregon, the provision has been interpreted to mean the "right [to have] a jury determine all issues of fact." *Molodyh v. Truck Insurance Exchange*, 304 Or. 290, 297, 744 P.2d 992 (1987). (Emphasis supplied.) There are differing interpretations of whether a statutory limitation on the amount of damages violates the "inviolable" right to trial by jury, depending on the jurisdiction. For instance, Article I, section 20 of the Indiana Constitution contains a provision identical to Article I, section 17 and Article I, section 21, of the Oregon Constitution. In *Johnson v. St. Vincent Hospital Inc.*, 273 Ind. 374, 404 N.E.2d 585 (1980), the appellants argued that an Indiana

statute which limited damages in medical malpractice cases violated section 20. The court disagreed.

"When a request is made to the trial court for an order to determine the amount due claimant from the patient's compensation fund after a trial by jury on the issue of damages has taken place and the trial court has rendered a judgment, no contest with regard to the total damages due claimant can or does exist. That issue has already been finally adjudicated by the trier of fact. * * * Furthermore, there is no indication in the cases relied upon by appellants that the right to have a jury assess the damages in a case properly tried by jury constitutes a limitation upon the authority of the Legislature to set limits upon damages. * * * It is the policy of this Act that recoveries be limited to \$500,000, and to this extent the right to have the jury assess the damages is available. No more is required by Art. I, § 20 of the Indiana Constitution in this context." 404 N.E.2d at 602.

In my assessment, the Indiana Supreme Court's opinion has no more relevance to the Oregon Constitution than the Washington Supreme Court's opinion.

guage and history of section 3 constitutes a "nonanalysis" of the issue. Moreover, as will be demonstrated later, the Washington court's construction of section 21 is inconsistent with our Supreme Court's construction of Article I, section 17, of the Oregon Constitution, although the language of the provisions is identical. Finally, the *Sofie* court's reasoning is flawed because it fails to recognize the difference between the jury's fact finding process and the imposition of a rule of law by a trial court subsequent to the jury's factual determination.

A proper analysis begins with the understanding that ORS 18.560 is presumptively constitutional, and that we cannot declare a law that the legislature has passed in the best interests of all of the citizens of Oregon unconstitutional except when the unconstitutionality is clearly shown. See *Bowden v. Davis et al*, 205 Or. 421, 289 P.2d 1100 (1955). The first step of the analysis is to examine the language of section 3. It is presumed that the language used in section 3 is sufficiently precise to convey the intent of its framers.

"To find the thought a given [constitutional provision] expresses, the first resort in all cases is to the natural signification of the words used * * *. If thus regarded the words embody a definite meaning, * * * there is no room for construction." *Monaghan v. School District No. 1, Clackamas County*, 211 Or. 360, 367, 315 P.2d 797 (1957).

The majority says that "reexamine" means to subject to a 'second or new examination,' but that it cannot discern "whether a court 're-examines' a 'fact tried by a jury' when it reduces a damage award that exceeds the statutory limit." 127 Or.App. at 520, 873 P.2d at 418. I disagree, because the meaning of section 3 is plain from the language of the provision. "Facts are actualities." See *Churchill v. Meade*, 92 Or. 626, 636, 182 P. 368 (1919). A determination of an ultimate fact is a determination of what took place based on the underlying evidentiary facts and the inferences drawn therefrom. See *Maeder Steel Products Co. v. Zanello*, 109 Or. 562, 570, 220 P. 155 (1924). In contrast, the imposition of a rule of law by a

court arises from a different source; from the mandate of a constitutional provision, a statute or the case law. Although a ruling of law by the court often "flows from the ultimate facts" as found by the trier of fact, it is uniquely within the province of the court and it does not involve the fact finding process. *State v. Cummings*, 205 Or. 500, 532, 288 P.2d 1036, (1955); see also *Can-Key v. Industrial Leasing*, 286 Or. 173, 183, 593 P.2d 1125 (1979).

Section 3 recognizes that difference. It prohibits the "reexamination of facts" tried by a jury but at the same time preserves the power of the court to set aside a verdict if there is no evidence to support it. That language demonstrates that the framers were cognizant of the difference between the fact finding process and the imposition of a rule of law dictated by the facts of a case. Section 3 does not prohibit the imposition of a rule of law that supersedes a determination of fact by a jury.

The next step is to determine whether the application of ORS 18.560 to a jury verdict constitutes "a reexamination of fact" or the imposition of a "rule of law." It is clear ¹⁵³²that the determination by a jury about the amount of damages that a plaintiff has incurred as a result of a defendant's conduct is a determination of ultimate fact and implicates section 3. See *Chance v. Alexander*, 255 Or. 136, 138, 465 P.2d 226 (1970). For instance, if a jury determines that the plaintiff has incurred \$600,000 in noneconomic damages, no court in Oregon could lawfully reexamine the evidence and substitute its finding that the plaintiff had incurred only \$450,000 in damages for the jury's determination.

However, ORS 18.560 does not require the trial court to make a reassessment of the amount of damages, but requires the court to perform a different function. It says, "the amount awarded for noneconomic damages shall not exceed \$500,000," and requires the trial court to enter judgment for not more than that amount. No reevaluation of the amount of damages incurred by the plaintiff occurs. The statute establishes a fixed ceiling on the amount of damages for which a judgment could be entered. The effect of

the statute is to impose a rule of law, a limit on "recoverable" damages on the jury's verdict. In that sense, the statute, in concept, is no different than other rules of law which require a trial court to enter a judgment that changes the decision of the jury, e.g., a directed verdict under ORCP 60, a judgment notwithstanding the verdict under ORCP 63, a reduction in an award of damages because of comparative negligence under ORS 18.470, or a judgment for treble damages for timber trespass under ORS 105.810. When the language of section 3 and ORS 18.560 are compared, logic tells us that the implementation of the statute does not involve the substitution of the court's determination of the amount of damages for that of the jury's.

Even if, because of an ambiguity in section 3, we are permitted to look further for the answer to the query, the majority's analysis is not helpful. None of the cases that it cites are about statutes that impose legal limitations on the amount of damages that are recoverable in a particular claim. All of them concern the setting aside of excessive verdicts on the basis that the trial judge did not agree with the jury's determination of the facts. We must keep in mind that section 3 is to be interpreted to give effect to the intent of the people adopting it in 1910. The majority is not permitted to rewrite ¹³³the constitution to outlaw ORS 18.560 unless the statute conflicts with what the people had in mind at that time. *Jones v. Hoss*, 132 Or. 175, 178, 285 P. 205 (1930). With those principles in mind, I examine the background underlying the adoption of section 3 and its historical relationship to Article I, section 17.

Inherent in the majority's holding is the belief that plaintiffs had a historical right to unlimited damages for personal injury at common law and that the legislature cannot constitutionally limit the amount of damages that could be awarded in a personal injury action. That belief is mistaken. At common law, the courts could control excessive verdicts. They could order a new trial "when the verdict was clearly against the weight of the evidence, whether it be because excessive damages were awarded or for any other reason." See *Van Lom v. Schneiderman*, 187 Or. 89, 112, 210 P.2d 461 (1949). When the

constitution was adopted, the founding fathers did not intend to create an enhanced right to trial by jury, but instead intended that the practice of the courts at the time continue. See *Tribou v. Stroubridge*, 7 Or. 156, 158 (1879).

If courts could control the award of damages under section 17, the legislature could also. For instance, in 1862, the legislature authorized courts to set aside verdicts and grant new trials because of "[e]xcessive damages * * * given under the influence of passion or prejudice." See General Laws of Oregon, ch 2, § 232(5), p 197 (Civ Code) (Deady 1845-1864). More importantly, also in 1862, the legislature enacted a statute which limited the amount of recoverable damages in a wrongful death action:

"When the death of a person is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action at law therefor against the latter, if the former might have maintained an action, had he lived, against the latter, for an injury caused by the same act or omission. Such action shall be commenced within two years after the death, and the damages therein shall not exceed five thousand dollars, and the amount recovered, if any, shall be administered as other personal property of the deceased person." General Laws of Oregon, ch 4, § 367, p 941 (Civ Code) (Deady 1845-1864).

¹³⁴There is more evidence that bears on the state of the law before section 3 was adopted. In *Deane v. Willamette Bridge Co.*, 22 Or. 167, 29 P. 440 (1892), the Supreme Court recognized the constitutional authority of the legislature to govern the procedure of awarding damages when it upheld the constitutionality of a statute that required the court without the intervention of a jury to assess damages when the defendant was in default. The court noted the common law power of courts to decide questions of law and distinguished those matters from questions of fact to be decided by a jury under section 17. 22 Or. at 173, 29 P. 440. It then held that the assessment of damages by a jury at common law when the defendant was in default was not a matter of right, but

could be decided by the court alone. Thus, the statute was held constitutional in the face of a challenge under section 17.

Presumably, the drafters of section 3 were aware of existing statutes and precedents when section 3 was enacted in 1910. It is uncontroverted that the "mischief" at which the constitutional provision was aimed was the multiplicity of new trials that were being granted by trial courts on the basis of excessive damages. *Van Lom v. Schneiderman*, *supra*, 187 Or. at 100, 210 P.2d 461. To remedy that problem, section 3 provides that a new trial cannot be ordered unless it can be said affirmatively that there is no evidence to support the verdict or that there was legal error committed during the initial trial. However, the authority of a trial court to grant a nonsuit or directed verdict on a point of law clearly remains unimpaired by the amendment. Lusk, "Forty Five Years of Article VII, section 3, Constitution of Oregon," 35 OrLRev 1, 4, (1955).

In 1907, the legislature passed a law which amended the limitations on wrongful death damages and increased it to \$7,500. See Lord's Oregon Laws § 380. There is no evidence that I can find that suggests that the drafters of section 3 intended to nullify that law and it continued in various forms until 1967. Or Laws 1967, ch 544, § 2. See also *Wiebe v. Seely, Administrator*, 215 Or. 331, 351, 335 P.2d 379 (1959).² Consequently, the authority of trial courts to set aside verdicts after 1910 for excessive damages was limited, but the legislature's authority to limit the amount of reasonable damages remained unfettered. Under the circumstances, the majority cannot reasonably hold that the drafters intended by section 3 to abrogate the authority of the legislature to enact a statute like ORS 18.560.

In summary, the majority forgets about the import of the presumption that ORS 18.560 is constitutional, relies on a decision

2. In *Wiebe v. Seely, Administrator*, *supra*, what the court said about the nature of a statutory limitation on damages is instructive:

"[T]he statute does not deal with the function of the jury at all, but with that of the court. The legislature has said, in effect, that regardless of

by the Washington Supreme Court about an unrelated provision of the Washington Constitution as the basis of its rationale, says that it cannot "discern" what "reexamination" of a fact means in the context of the plain language of section 3, and ignores the historical evidence about the objective of the framers of section 3. A philosophical difference with the legislature about the wisdom of the tort reform law is not a sufficient justification for declaring a statute unconstitutional. It is only when a statute violates the constitution expressly or implicitly that it is unconstitutional. ORS 18.560 does neither.

Because my analysis would result in holding that ORS 18.560 does not violate Article I, section 17, or Article VII (amended), section 3, I address plaintiff's alternative argument that the statute violates Article I, section 10, of the Oregon Constitution. Section 10 provides:

"No court shall be secret, but justice shall be administered, openly and without purchase, completely and without delay, and every man shall have remedy by due course of law for injury done him in his person, property, or reputation."

Plaintiff argues that "the statute prevents a plaintiff with noneconomic damages in excess of \$500,000 from receiving the 'remedy [* * *] for injury done him' which the constitution contemplates."

At common law, litigants had the right to recover damages for injury to their person or property and to have a jury assess those damages when the facts were in dispute. *Deane v. Willamette Bridge Co.*, *supra*, 22 Or. at 173, 29 P. 440. However, the right did not prevent the legislature from changing ¹⁹³⁶common law remedies, or "attach[ing] conditions precedent to [their] exercise, and perhaps abolish[ing] old and substitut[ing] new remedies." *Mattson v. Astoria*, 39 Or. 577,

the extent of the damages actually suffered by the plaintiff in an action against the estate of a deceased tort-feasor, recoverable damages may not exceed \$15,000. * * * It is not suggested that such a statute is beyond the powers of the

580, 65 P. 1066 (1901).³ Article XVIII, section 7, provides:

"All laws in force in the territory of Oregon when this constitution takes effect, and consistent therewith, shall continue in force *until altered or repealed*." (Emphasis supplied.)

Based on section 7, the Supreme Court in *Perozzi v. Ganiere*, 149 Or. 330, 40 P.2d 1009 (1935), rejected the plaintiff's contention that the legislature could not abolish or limit an automobile guest's remedy for negligent injury in an action brought against his host. The court said:

"The right to alter all laws in force in the territory of Oregon when the constitution was adopted, whether the same were of common-law or legislative origin, was reserved to the people of the state by article XVIII, § 7, *supra*. Indeed, that section of our organic act which adopted the common law of England clearly contemplated future changes in the common law, as evidenced in the condition expressed that the common law should continue in force '*until altered or repealed*'. Moreover, had it been the intention of the framers of the constitution to adopt and preserve the remedy for all injuries to person or property which the common law afforded, they undoubtedly would have signified that intention by exact and specific wording, rather than the language used in article I, § 10." 149 Or. at 346, 40 P.2d 1009. (Emphasis in original.)

As the Supreme Court said in *Davidson v. Rogers*, 281 Or. 219, 222, 574 P.2d 624 (1978):

"The language of the constitution does not specify that the remedy need be the same as was available at common law at the time of the adoption of the constitution; and the statute, *while restricting the remedy, does not abolish the cause of action*. Even though a retraction is not requested, the

legislature." 215 Or. at 352, 335 P.2d 379. (Emphasis supplied.)

3. The Supreme Court has acknowledged the authority of the legislature to limit remedies for common law causes of action on a number of occasions. For example, in *Holden v. Pioneer Broadcasting Co. et al*, 228 Or. 405, 365 P.2d 845 (1961), *cert. den.* 370 U.S. 157, 82 S.Ct. 1253, 8

right of action still exists for an intentional defamation and, in any event, for recovery of specific demonstrable economic loss. Such limitation is not violative of Art. I, § 10, for the reason that *it does not wholly deny the injured party a remedy* for the wrong suffered." (Citations omitted; emphasis supplied.)

ORS 18.560 does not "wholly" deny plaintiff a remedy for his injury; it merely limits his recovery to all proven economic damages and up to \$500,000 in noneconomic damages. Therefore, I would hold that ORS 18.560 is constitutional under section 10.

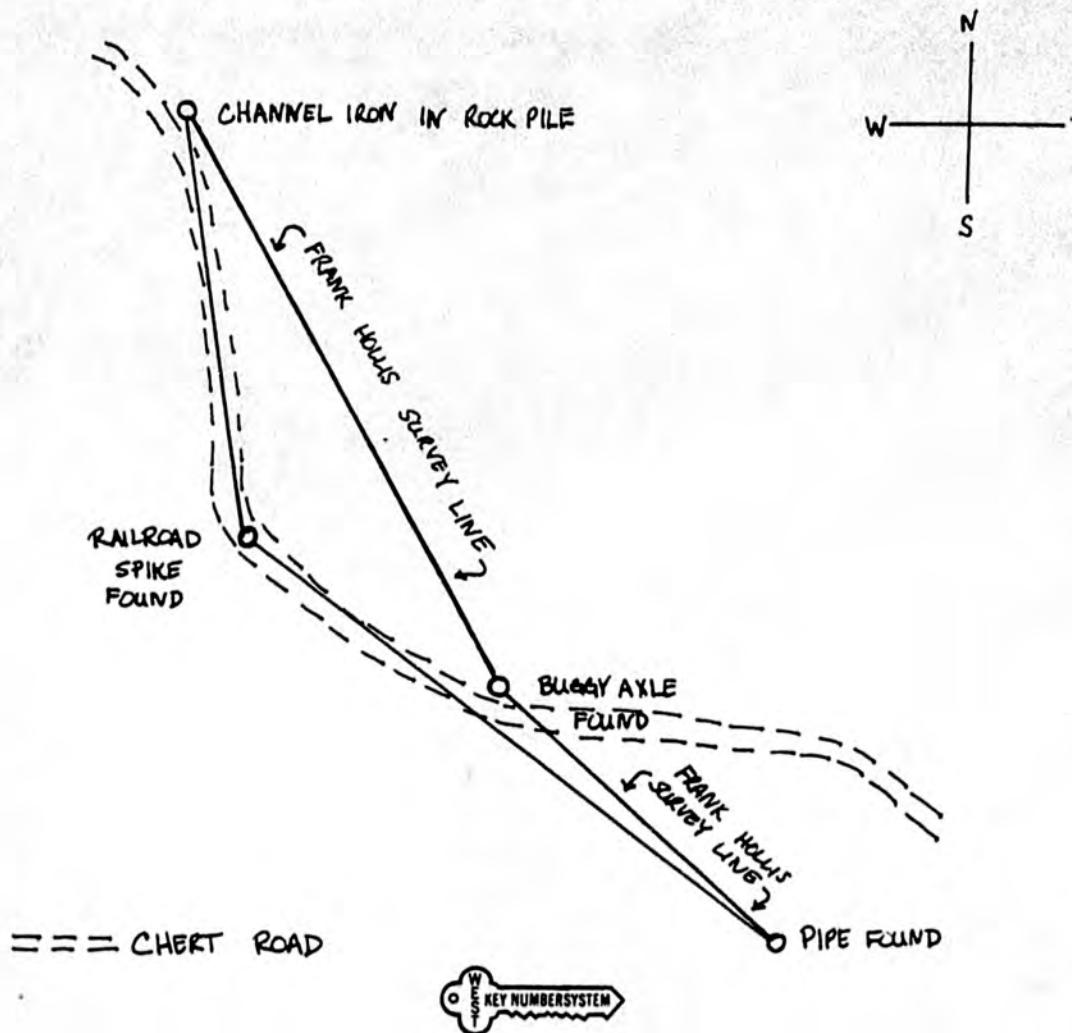
The call for judicial restraint in these kinds of matters was best expressed in 1882: "When there is nothing in the section of the constitution referred to inhibiting, expressly or impliedly, the power of the legislature to enact the law in question, * * * it is not therefore repugnant to that section." *Cresap v. Gray*, 10 Or. 345, 349 (1882). Article VII (amended), section 3, Article I, section 17, and Article I, section 10, do not expressly or impliedly inhibit the legislature from setting statutory limitations on the amount of damages for which judgment can be lawfully entered. We should uphold the constitutionality of ORS 18.560 against plaintiff's attacks.

RICHARDSON, C.J., and DEITS and LANDAU, JJ., join in this concurring in part and dissenting in part opinion.



L.Ed.2d 402 (1962), the court held that statutes eliminating the right of a defamed person to receive damages for an inadvertent libel when a retraction was made were constitutional under Article I, sections 8, 10 and 20, of the Oregon Constitution. See also *Noonan v. City of Portland*, 161 Or. 213, 248, 88 P.2d 808 (1939); *Evanhoff v. State Industrial Acc. Com.*, 78 Or. 503, 154 P. 106 (1915).

APPENDIX 1



Billy Ray CLARK and Halliburton
Industrial Services Division

v.

CONTAINER CORPORATION
OF AMERICA, INC.

1900325.

Supreme Court of Alabama.

Sept. 27, 1991.

The United States District Court
the Southern District of Alabama, Charles
R. Butler, Jr., J., certified question to Ala-
bama Supreme Court concerning whether
statute providing for structuring of dam-

ages in civil action violated Alabama consti-
tutional provisions guaranteeing trial by
jury. The Supreme Court, Houston, J.,
held that provisions providing for structur-
ing of damages and requiring that no re-
duction occur to present value on first
\$150,000 of damages, violated right to trial
by jury facially and as applied.

Certified question answered.

Shores, Adams, Steagall, Kennedy and
Ingram, JJ., concurred in result.

Maddox, J., dissented.

1. Statutes $\S$ 228

Appropriate office of proviso is to re-
strain or modify enacting clause. (Per

Cite as 589 So.2d 184 (Ala. 1991)

Houston, J., with two Justices concurring and five Justices concurring in the result.)

the result.) Code 1975, § 6-11-3; Const. Art. 1, § 11; Amend. 328, § 6.11.

2. Constitutional Law ¶12

Constitution is subject to same general rules of construction as are other laws. (Per Houston, J., with two Justices concurring and five Justices concurring in the result.)

3. Constitutional Law ¶12

Jury ¶10

Proviso to constitutional amendment providing that Supreme Court would make and promulgate rules governing practice and procedure in all courts, which added wording of Seventh Amendment to United States Constitution, restrained or modified only court's rule-making power with respect to right to trial by jury, because appropriate office of proviso was to restrain or modify only enacting clause; proviso could not enlarge enacting clause or confer power or right. (Per Houston, J., with two Justices concurring and five Justices concurring in the result.) Const. Amend. 328, § 6.11; U.S.C.A. Const. Amend. 7.

4. Constitutional Law ¶47

When constitutionality of duly enacted act is challenged, only question for Supreme Court is question of legislative power, which involved determination of whether constitution excepted that power from power given legislature. (Per Houston, J., with two Justices concurring and five Justices concurring in the result.)

5. Jury ¶10

Legislature may not impinge upon fact-finding function of jury. (Per Houston, J., with two Justices concurring and five Justices concurring in the result.) Const. Art. 1, §§ 11, 36.

6. Jury ¶9, 10, 31(1)

Right that individual, as party to civil litigation, has to have to trial by jury of 12 impartial persons who unanimously resolve disputed facts is protected by constitution from from infringement by legislative, executive and judicial departments of government. (Per Houston, J., with two Justices concurring and five Justices concurring in the result.)

7. Jury ¶10, 34(3)

Statute providing for structuring of damages by trial court, including provision requiring that first \$150,000 of future damages be paid without reduction to present value, violates right to trial by jury under Alabama Constitution; statute providing for structuring and periodic payments of future damages over \$150,000 removes from jury function of factually determining amount of plaintiff's remedy for injury done to plaintiff's person, and also requires all defendants to pay excessive amount on first \$150,000 of future damages when future damages are assessed, and by not requiring for reduction of those initial damages to present value, provides remedy in excess of that due plaintiff under common law. (Per Houston, J., with two Justices concurring and five Justices concurring in the result.) Code 1975, §§ 6-11-3, 6-11-4, 6-11-5; Const. Art. 1, §§ 11, 13.

Richard H. Taylor and Robert J. Hedge of Jackson & Taylor, P.C., Mobile, for appellants.

Carroll H. Sullivan of Clark, Scott & Sullivan, Mobile, for appellee.

Richard W. Vollmer III of Reams, Vollmer, Phillips, Killion, Brooks & Schell, P.C., Mobile, for intervenor.

Forrest S. Latta of Pierce, Carr & Alford, Mobile, for amicus curiae Alabama Defense Lawyers Ass'n.

Matthew C. McDonald of Miller, Hamilton, Snider & Odom, Mobile, for amicus curiae Alabama Civ. Justice Reform Committee.

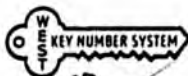
HOUSTON, Justice.

The following question was certified to this Court by the United States District Court for the Southern District of Alabama:

"Is Alabama Code 1975, § 6-11-3, either on its face or as applied to the above-styled case, violative of Alabama Constitution of 1901, Article I, § 11; Ar-

was that the additional wells issue was common to several actions, including the yet uncompleted actions.¹³ This common issue makes consolidated appellate review especially suitable. Interim appellate review creates the possibility of duplicative appellate review of this issue. Moreover, we see no urgent reason for immediate, separate appellate review. The presumption of nonappealability has not been overcome. Under these facts, we are persuaded that the judgments appealed from cannot be considered final in absence of a Rule 54(b) certification. We therefore dismiss the appeals for lack of appellate jurisdiction.

Appeals dismissed.



Dewayne C. KIRK, Plaintiff-Appellant,

v.

The DENVER PUBLISHING COMPANY, a Colorado corporation,
Defendant-Appellee.

No. 88SA405.

Supreme Court of Colorado,
En Banc.

Sept. 23, 1991.

Newspaper publisher sued its distributor for balance allegedly owed. Distributor counterclaimed for outrageous conduct and willful and wanton breach of contract. The District Court, City and County of Denver, Robert T. Kingsley, J., granted distributor's motion for directed verdict on publisher's claim for monies due on open account, directed verdict against distributor on his counterclaim for outrageous conduct and entered judgment for distributor on his claim for willful and wanton breach of contract. On appeal, the Court of Appeals, 729 P.2d 1004, remanded for new trial on

damages, but otherwise affirmed. On remand, the District Court, John W. Coughlin, J., awarded exemplary damages, but denied distributor's motion challenging constitutionality of statutory requirement that he pay one third of all such damages into state general fund. Distributor appealed. The Supreme Court, Quinn, J. held that statute requiring party receiving exemplary damages award to pay one third of such award into state general fund effected an unconstitutional taking of private property without just compensation.

Reversed and remanded.

Rovira, C.J., filed dissenting opinion in which Lohr, J., joined.

1. Constitutional Law ⇨277(1)

Judgment for exemplary damages qualifies as property interest subject to constitutional protection. West's C.R.S.A. §§ 13-21-102(4), 13-52-102(1); U.S.C.A. Const. Amends. 5, 14; West's C.R.S.A. Const. Art. 2, § 15.

2. Constitutional Law ⇨278(1)

Private property interest emanating directly from final judgment cannot be diminished by legislative fiat. U.S.C.A. Const. Amends. 5, 14; West's C.R.S.A. Const. Art. 2, § 15.

3. Eminent Domain ⇨2(1.1)

To withstand constitutional challenge to governmental appropriation of significant part of money judgment under taking clause of United States Constitution, governmental appropriation must bear reasonable relationship to governmental services provided to civil litigants in making use of judicial process for purpose of resolving civil claim resulting in the judgment. U.S.C.A. Const. Amend. 5.

4. Eminent Domain ⇨2(1.1)

Statute requiring party receiving exemplary damages award to pay one third of such award into state general fund effected an unconstitutional taking of private property without just compensation. West's C.R.S.A. § 13-21-102(4); U.S.C.A.

13. See *supra* note 6.

2 Dissents:
Punitive damages are not property interest.
A property interest in money judgment is not a property interest.
Punitive damages are not a property interest.

Filed in
Dissenting Opinion
1 Feb 1996
1519 requested
in 866 p2d 995
(KMS)
873 p2d 18
868 p2d 1108
887 p2d 999
884 FS 1421
848 FS 1421
923 P.2d 2A9
894 FS 1302

Const. Amends. 5, 14; West's C.R.S.A. Const. Art. 2, § 15.

5. Damages ⇐87(1)

Statute requiring party receiving exemplary damages award to pay one third of such award into state general fund did not qualify as valid penalty or forfeiture; placing burden of payment on judgment creditor who suffered wrong bore no reasonable relationship to any arguable goal of punishing wrongdoer or deterring others from engaging in similar conduct. West's C.R.S.A. § 13-21-102(4).

6. Taxation ⇐73

Statute requiring party receiving exemplary damages award to pay one third into state general fund did not satisfy criteria for ad valorem property tax; statute was designed to raise revenues for state general fund, but was limited only to personal property in form of judgment for exemplary damages and had no applicability at all to any other form of private property, real or personal. West's C.R.S.A. § 13-21-102(4).

7. Taxation ⇐40(1)

Where obvious purpose of statute is to produce revenue for state general fund, statute must conform to state constitutional requirement that all taxes upon each of the various classes of real and personal property be "uniform" and be levied under general laws prescribing such regulations as shall secure just and equal valuations of all property, whether real or personal. West's C.R.S.A. Const. Art. 10, § 3; West's C.R.S.A. § 13-21-102(4).

8. Constitutional Law ⇐229(1)

Damages ⇐87(1)

Taxation ⇐40(6)

Statute requiring party receiving exemplary damages award to pay one third into state general fund did not qualify as valid excise tax; excise tax imposed on limited class of persons exercising their rights to use courts, while other persons exercising same right were not subject to tax, would be so underinclusive as not to

withstand even rational-basis standard of review under equal protection analysis. West's C.R.S.A. § 13-21-102(4); U.S.C.A. Const. Amend. 14.

9. Licenses ⇐29

Valid user fee need not be designed with mathematical precision to defray cost of service for which fee is imposed, but must bear reasonable relationship to overall cost of that service.

10. Damages ⇐87(1)

Statute requiring party receiving exemplary damages award to pay one third of such award into state general fund failed to qualify as valid user fee; statute exacted a forced contribution in order to provide general governmental revenues and did so in a manner and to a degree not reasonably related to costs of using the courts. West's C.R.S.A. § 13-21-102(4).

11. Constitutional Law ⇐55

Legislature may well abate or diminish pending civil action, but when that claim ripens into judgment, power of legislature to disturb the rights created thereby ceases.

Pryor, Carney and Johnson, P.C., W. Randolph Barnhart, Arlene V. Dykstra, Thomas L. Roberts, Richard V. Hess, Englewood, for plaintiff-appellant.

Gale A. Norton, Atty. Gen., Raymond T. Slaughter, Chief Deputy Atty. Gen., Timothy M. Tymkovich, Sol. Gen., Dianne Eret, First Asst. Atty. Gen., Denver, for amicus curiae State of Colo.

Justice QUINN delivered the Opinion of the Court.

This case involves a challenge to the constitutionality of section 13-21-102(4), 6A C.R.S. (1987), which was enacted in 1986 as part of tort-reform legislation and requires a party receiving an exemplary damages award to pay one-third of all such "damages collected . . . into the state general fund."¹ DeWayne C. Kirk filed a tort claim against Denver Publishing Company,

1. Appellate jurisdiction over this appeal lies in this court because the constitutionality of a statute is challenged. § 13-4-102(1)(b), 6A C.R.S. (1987).

3 Dissents!

AMERICAN LEGION POST NO. 57 v. LEAHEY

Ala. 1337

Cite as 681 So.2d 1337 (Ala. 1996)

AMERICAN LEGION POST
NUMBER 57

v.

Regenia LEAHEY.

1930990.

Supreme Court of Alabama.

July 12, 1996.

Patron who was injured in fall at American Legion post brought action against post, and moved for declaration that statute allowing introduction in personal injury actions of evidence that plaintiff's medical or hospital expenses have been or will be paid or reimbursed by collateral source is unconstitutional. The Calhoun Circuit Court, No. CV-93-395, Samuel H. Monk II, J., entered order holding statute unconstitutional, and post appealed. The Supreme Court, Almon, J., held that statute allowing admission of such evidence violated due process and equal protection guarantees of State Constitution.

Affirmed.

Houston, J., dissented and filed opinion in which Hooper, C.J., and Maddox, J., joined.

1. Constitutional Law $\S$ 245(1), 301(1)
Damages $\S$ 182

Statute allowing introduction in personal injury actions of evidence that plaintiff's medical or hospital expenses have been or will be paid or reimbursed by collateral source violated equal protection and due process guarantees of State Constitution. Const. Art. 1, $\S\S$ 6, 13; Code 1975, $\S$ 12-21-45.

2. Damages $\S$ 59, 182

While collateral source rule as a whole is rule of substantive law, partial abrogation of it by statute only as to admissibility of evidence affects only procedural component of collateral source rule, and not its substantive component. Code 1975, $\S$ 12-21-45.

3. Constitutional Law $\S$ 251.3, 251.4, 257,
305(1)

State Constitution guarantees due process of law in civil as well as criminal cases, and right is violated when statute or regulation is unduly vague, unreasonable, or overbroad. Const. Art. 1, $\S$ 6.

4. Damages $\S$ 221(7)

Jury is not free to disregard undisputed evidence of special damages and award amount inadequate to compensate plaintiff for injuries proximately caused by defendant's negligence or other wrongful conduct.

James J. Bushnell, Jr. of Gleissner, Bowron, Bushnell & Henderson, Birmingham, Forrest S. Latta and W. Pemble DeLashmet of Pierce, Carr & Alford, P.C., Mobile, for Appellant.

Lee A. Rudolph and Earl P. Underwood, Jr. of Underwood & Rudolph, Anniston, for Appellee.

Richard S. Manley of Manley, Traeger & Perry, Demopolis, J. Mark Hart and Sally A. Broatch of Spain, Gillon, Grooms, Blan & Nettles, Birmingham, for Amicus Curiae Alabama Defense Lawyers Ass'n in support of appellant.

Andrew T. Citrin and David G. Wirtes, Jr. of Cunningham, Bounds, Yance, Crowder & Brown, Mobile, for Amicus Curiae Alabama Trial Lawyers Ass'n in support of appellee.

ALMON, Justice.

This interlocutory appeal comes from an order holding unconstitutional Ala.Code 1975, $\S$ 12-21-45, which would allow the defendant in this personal injury action to introduce evidence that the plaintiff received from a collateral source payments for her medical or hospital expenses. Regenia Leahey was injured when she slipped and fell on the premises of American Legion Post Number 57 ("American Legion"); she brought an action against American Legion, alleging that it had negligently or wantonly caused her injuries. Leahey filed a motion to declare $\S$ 12-21-45 unconstitutional, and she served a copy of the motion on the attorney general of the State of Alabama. The attorney general acknowl-

edged service of the motion and waived further notice or participation in the action.¹ After proceedings on the motion, the circuit court entered an order granting it, and, pursuant to Rule 5, Ala. R.App. P., stated that the order involved a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal would be beneficial as provided in the rule. This Court granted American Legion's petition for permission to appeal, pursuant to Rule 5.

[1] Section 12-21-45 reads:

"(a) In all civil actions where damages for any medical or hospital expenses are claimed and are legally recoverable for personal injury or death, evidence that the plaintiff's medical or hospital expenses have been or will be paid or reimbursed shall be admissible as competent evidence. In such actions upon admission of evidence respecting reimbursement or payment of medical or hospital expenses, the plaintiff shall be entitled to introduce evidence of the cost of obtaining reimbursement or payment of medical or hospital expenses.

"(b) In such civil actions, information respecting such reimbursement or payment obtained or such reimbursement or payment which may be obtained by the plaintiff for medical or hospital expenses shall be subject to discovery.

"(c) Upon proof by the plaintiff to the court that the plaintiff is obligated to repay the medical or hospital expenses which have been or will be paid or reimbursed, evidence relating to such reimbursement or payment shall be admissible.

"(d) This section shall not apply to any civil action pending on June 11, 1987."

Against the constitutionality of § 12-21-45, Leahey argued, and the circuit court agreed, that it violates: the right to trial by jury as guaranteed by Ala. Const. 1901, § 11; the right to a remedy and to access to the courts as guaranteed by § 13; the constitutional guarantees of equal protection, see §§ 1, 6, and 22, and due process, §§ 6 and

13; and the principle of separation of powers as preserved by §§ 42 and 43.

The collateral source rule has been summarized as follows:

"In tort cases, the plaintiff may receive benefits from a third party who is in no way connected with the defendant, and receipt of these benefits from the source collateral to the defendant has the effect of lessening the financial losses which the plaintiff would otherwise have suffered. Thus, if the basic goal of tort law is only that of compensating plaintiff for his losses, evidence of these benefits should be admitted to reduce the total damages assessed against the defendant. At the same time, reducing recovery by the amount of the benefits received by the plaintiff would be, according to most courts, granting a 'windfall' to the defendant by allowing him a credit for the reasonable value of those benefits. Such a credit would result in the benefits being effectively directed to the tortfeasor and from the intended party—the injured plaintiff. If there must be a windfall, it is usually considered more just that the injured person should profit, rather than let the wrongdoer be relieved of full responsibility for his wrongdoing. Thus, the courts generally have held that benefits received by the plaintiff from a source wholly independent of and collateral to the wrongdoer will not diminish the damages otherwise recoverable from the wrongdoer. This is known as the 'collateral source rule.' Under it, the wrongdoer cannot take advantage of the contracts or other relation that may exist between the injured person and third persons. Thus, while a plaintiff's recovery under the ordinary negligence rule is limited to damages which will make him whole, the collateral source rule allows a plaintiff further recovery under certain circumstances even though he has suffered no loss."

22 Am.Jur.2d *Damages* § 566 (1988) (citations omitted).

This Court first articulated the collateral source rule in *Long v. Kansas City, M. & B.*

1. See Ala.Code 1975, § 6-6-227; *Terry v. City of Decatur*, 601 So.2d 949 (Ala.1992); *Wallace v.*

State, 507 So.2d 466 (Ala.1987); *Barger v. Barger*, 410 So.2d 17 (Ala.1982).

Cite as 681 So.2d 1337 (Ala. 1996)

able, or overbroad." *Ross Neely*, 437 So.2d at 84; *Friday v. Ethanol Corp.*, 539 So.2d 208, 215 (Ala.1988).

[4] We also agree with the point implied in *Killian* that the statute violates the due process guaranty by stating that collateral source evidence is "competent" without stating what it is competent to prove or what effect its admission will have. One approach to resolving this problem would be to hold simply that § 12-21-45 does not affect the law of damages, but only the law of evidence. Under such an approach, a court reviewing a verdict on a motion for new trial to determine whether the verdict was inadequate would simply apply the law as to special damages and set the verdict aside if the verdict was significantly below the undisputed amount of medical and hospital expenses. A jury is not free to disregard undisputed evidence of special damages and award an amount inadequate to compensate the plaintiff for injuries proximately caused by the defendant's negligence or other wrongful conduct. *Thompson v. Cooper*, 551 So.2d 1030 (Ala.1989); *Ex parte Patterson*, 459 So.2d 883 (Ala.1984); *McCain v. Redman Homes, Inc.*, 387 So.2d 809 (Ala.1980); *Cocke v. Edwards*, 215 Ala. 8, 108 So. 857 (1926); *Roland v. Krazy Glue, Inc.*, 342 So.2d 383 (Ala.Civ.App.1977). Such a construction would effectively eviscerate § 12-21-45 and worsen its confusing effect because it would decidedly make the "competent" collateral source evidence immaterial, prejudicial, and confusing to the jury. In such an application, the statute would violate the plaintiff's right under §§ 6 and 13 of the Constitution to a remedy by due process of law.

On the other hand, if the Court were to attempt to save the statute by holding that it gives the jury discretion whether to reduce its award by the amount of the collateral source recovery or some portion thereof, a due process violation would arise from a different direction: the standardless submission to the jury of a complaint for compensatory damages. This violation is made more obvious by the fact that medical and hospital damages are special damages.

Finally, if the Court were to try to save the statute by reading it to require the jury

to reduce its award by the amount of the collateral source payment, except to the extent that the plaintiff is required to reimburse the collateral payor, then § 12-21-45 would still violate the due process guaranty because of its introduction of evidence that the plaintiff is insured without allowing evidence that the defendant is insured, thereby inherently undermining the fairness of the proceeding. This reading would violate not only the plaintiff's right to due process, but also the right of the plaintiff's insurer not to be deprived of its contractual subrogation rights without due process of law, because, as explained above, the lopsided introduction of insurance evidence would tend to cause the jury not to require the defendant to reimburse the plaintiff's insurer for an indemnity that the insurer has contracted to provide and for which it has received premiums.

For the foregoing reasons, the circuit court correctly held that § 12-21-45 is unconstitutional. The order declaring the statute unconstitutional is therefore affirmed.

AFFIRMED.

SHORES, KENNEDY, INGRAM, and
COOK, JJ., concur.

HOOVER, C.J., and MADDOX and
HOUSTON, JJ., dissent.

HOUSTON, Justice (dissenting).

I dissent from the holding that Ala.Code 1975, § 12-21-45, violates the right to trial by jury guaranteed by the Constitution of Alabama of 1901, § 11. See *Henderson v. Alabama Power Co.*, 627 So.2d 878, 903-14 (Ala.1993) (Houston, J., dissenting); *Ex parte Giles*, 632 So.2d 577, 587-89 (Ala.1993) (Houston, J., concurring in the result), cert. denied, — U.S. —, 114 S.Ct. 2694, 129 L.Ed.2d 825 (1994); *Smith v. Schulte*, 671 So.2d 1334 (Ala.1995) (Houston, J., dissenting), cert. denied, U.S. (1996); *Ex parte Jackson*, 672 So.2d 810 (Ala.1995) (Houston, J., concurring in the result); *Ex parte Fosh-ee*, 246 Ala. 604, 606-07, 21 So.2d 827 (1945); and Amendment 328, § 6.11, Constitution of Alabama of 1901.

I dissent from the holding that Ala.Code 1975, § 12-21-45, violates the "phantom"

equal protection clause in the Constitution of Alabama of 1901. See *Moore v. Mobile Infirmary Association*, 592 So.2d 156, 174-77 (Ala.1991) (Houston, J., concurring in the result); *Pinto v. Alabama Coalition for Equity*, 662 So.2d 894 (Ala.1995) (Houston, J., concurring in the result); *Smith v. Schulte*, supra (Houston, J., dissenting).

The majority opinion states:

"Against the constitutionality of § 12-21-45, Leahey argued, and the circuit court agreed, that it violates: the right to trial by jury as guaranteed by Ala. Const. 1901, § 11; the right to a remedy and to access to the courts as guaranteed by § 13; the constitutional guaranties of equal protection, see §§ 1, 6, and 22, and due process, §§ 6 and 13; and the principle of separation of powers as preserved by §§ 42 and 43."

681 So.2d at 1338.

Apparently, the majority opinion affirms on the basis that § 12-21-45 violates "the right to trial by jury as guaranteed by Ala. Const. 1901, § 11" and "the constitutional guaranties of equal protection, see §§ 1, 6, and 22."

In my opinion, § 12-21-45 is not unconstitutional for any of the reasons offered by Leahey.

Section 6 of the Constitution relates to rights in criminal prosecutions ("That in all criminal prosecutions, the accused has a right to ..."). Section 12-21-45 has nothing to do with criminal prosecutions. Due process, which is guaranteed in civil trials by § 13 of the Constitution ("that every person, for any injury done him, in his lands, goods, person, or reputation, shall have a remedy by due process of law"), guarantees a person notice,⁹ a hearing according to that notice, and a judgment entered in accordance with the notice and hearing,¹⁰ *Ex parte Rice*, 265 Ala. 454, 92 So.2d 16 (1957), and restricts the legislature from making unreasonable, arbitrary, and oppressive modifications of fundamental rights. *Thompson v. Wiik, Reimer & Sweet*, 391 So.2d 1016 (Ala.1980). I fail to

see how § 12-21-45 violates the due process guaranty.

No remedy that Leahey had was curtailed after the injury had occurred and the right of action vested. Therefore, there was no violation of the right-to-a-remedy portion of § 13. *Pickett v. Matthews*, 238 Ala. 542, 192 So. 261 (1939); *Henley v. Rockett*, 243 Ala. 172, 8 So.2d 852 (1942).

Likewise, Ala.Code 1975, § 12-21-45, does not violate the separation of powers doctrine (§§ 42 and 43) of the Constitution of Alabama of 1901. See *Ex parte Foshee*, 246 Ala. 604, 606-07, 21 So.2d 827 (1945).

"The supreme court shall make and promulgate rules governing ... practice and procedure in all courts; provided, however, that such rules shall not abridge, enlarge or modify the substantive right of any party.... These rules may be changed by a general act of statewide application."

Amendment 328, § 6.11, Constitution of Alabama of 1901.

In my opinion, the legislature had the power to enact § 12-21-45. Whether it was expedient or wise for the legislature to enact this statute is not the judiciary's concern. *Alabama State Federation of Labor v. McDory*, 246 Ala. 1, 9-10, 18 So.2d 810, 815 (1944).

HOOPER, C.J., and MADDOX, J., concur.



Steve TRAVIS and Renee Travis

v.

Nelson ZITER, et al.

1941356.

Supreme Court of Alabama.

July 12, 1996.

Individual brought action along with his wife against priest, Catholic church, and diocese asserting sexual abuse of individual while defendants moved Circuit Court, 1 Jones, J., granted, and the Supreme Court that statutory to insanity which accrued does not statutory limitations alleged repression.

10. "[A]ll courts shall be open" (§ 13, Constitution) to assure such hearing and resolution.

9. See *BMW of North America, Inc. v. Gore*, — U.S. —, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996), discussing "notice" as a component of due process under the United States Constitution.

affirming. If court considers in ruling on dismissal, then motion for summary judgment was styled 12(b), 56(c).

Affirmed.

1. Limitation of

Dismissal based on proper only if, apparent that tolling course of the dismissing claims affidavits. Rules 56(c).

2. Judgment

If court considers in ruling on dismissal, then motion for summary judgment was styled 12(b), 56(c).

3. Appeal and Error

Grant by circuit court based on standard where circuit court consider defendants plaintiffs present show that limitation been tolled, and tolling course of the dismissing claims affidavits. Rules 56(c).

4. Judgment

If movant for prima facie showing issue of material entitled to judgment shifts to nonmovant presenting substantive issue of material Rule 56(c).

Morse 5th

Pg 560: Considers high tension electricity & blasting as abnormally dangerous things and activities which entail strict liability.

§ 561: But Rylands v. Fletcher not applies where dangerous electrical current caused electrical interference of telegraph comm.

But see privilege pg 568.

States Supreme Court held that, under the United States Constitution, a state's death penalty procedure must not preclude the consideration of relevant mitigating factors. *Lockett* provides that a state may not exclude evidence that the defendant claims to be mitigating. However, this does not mean that all evidence offered by the defendant as mitigating must be found to be mitigating and considered as such in the sentencing process. *Id.*

The testimony presented at trial indicated that Carroll acted intentionally and out of anger when he retrieved the sharpened instrument from his cell and returned to the exercise yard to stab Sanders in the heart. The evidence did not require a finding that Carroll acted out of fear of a homosexual assault. Therefore, the Court of Criminal Appeals did not err in this regard.

The Court of Criminal Appeals correctly held that the evidence supported the trial court's finding of no mitigating circumstances.

III.

[5] Did the Court of Criminal Appeals err in holding that the trial court had not erred in denying Carroll's motion for acquittal based on his claim that the State had failed to prove the elements of murder under § 13A-6-2(a)(1)?

[6-8] Carroll argues that the evidence in this case fails to support the finding of an intentional murder. Under § 13A-6-2(a)(1), a person commits the crime of murder if "[w]ith intent to cause the death of another person, he causes the death of that person or of another person." According to Carroll, the evidence supports a finding that a mentally ill individual killed another person after being provoked by a homosexual threat—but, he says, it does not support the finding of an intentional killing. The question whether a defendant intentionally caused the death of another person is a question of fact for the jury. *Carr v. State*, 551 So.2d 1169 (Ala. Cr. App. 1989). Intent may be inferred from the use of a deadly weapon or from other attendant circumstances. *Garrison v. State*, 521 So.2d 997 (Ala. Cr. App. 1986); *Fears v. State*,

451 So.2d 385 (Ala. Cr. App. 1984). Furthermore, circumstantial evidence, in conjunction with other evidence, may be sufficient to prove intent. *Id.*

The evidence would well support a factual conclusion that Carroll intentionally killed Sanders over a spilled cup of ice. There was evidence that as Carroll approached Sanders with the weapon he said, "I'll show you what an accident is," and that he then stabbed Sanders in the heart.

Based upon the evidence and issues discussed in this opinion, our careful review of all other issues raised but not discussed herein, and our search and review of the entire record, we conclude that the judgment of the Court of Criminal Appeals is due to be affirmed.

AFFIRMED.

HORNSBY, C.J., and SHORES, ADAMS, HOUSTON, STEAGALL and INGRAM, JJ., concur.

*3 Dissents be set of
legist to set \$250K
KEY NUMBER SYSTEM
limit on punitive
Dissents long & powerful*

Craig HENDERSON, a minor, By and
Through his mother and next friend,
Linda HARTSFIELD

v.

ALABAMA POWER COMPANY.

ALABAMA POWER COMPANY

v.

Craig HENDERSON, a minor, By and
Through his mother and next friend,
Linda HARTSFIELD.

1901875, 1901946.

Supreme Court of Alabama.

June 25, 1993.

Rehearing Denied Aug. 27, 1993.

Child who suffered burns while climbing
on transmission tower brought personal injury

ry action against electric utility. The Circuit Court, Tuscaloosa County, No. CV-88-992, Robert V. Wooldridge III, J., awarded child compensatory damages but reduced jury's punitive damages award from \$500,000 to \$250,000, and appeal was taken. The Supreme Court, Adams, J., held that: (1) evidence was sufficient to establish that utility acted wantonly, but (2) provision of Alabama Tort Reform Act limiting awards of punitive damages to \$250,000 violated provisions of Alabama Constitution guaranteeing right to trial by jury.

Affirmed in part, reversed in part, and remanded.

Maddox, J., filed opinion concurring in part and dissenting in part.

Houston, J., filed dissenting opinion.

Steagall, J., filed dissenting opinion.

1. Negligence ⇨33(3)

In context of provision of Restatement (Second) of Torts governing duty owed to trespassing children by individuals and entities maintaining artificial conditions on land, wantonness may be summarized as defendant's conscious acts or omissions in maintenance of artificial condition on place where defendant knows children will likely trespass, accompanied by defendant's awareness that children will thereby expose themselves to high probability of injury.

2. Electricity ⇨19(5)

Evidence was sufficient to establish that electric utility had knowledge that children were likely to trespass on transmission tower, as required to support finding of wantonness underlying punitive damages award in action arising when child was burned while climbing on tower; evidence indicated that propensity of children to climb such towers was generally known within utility industry and utility knew that tower was in residential neighborhood and had installed anticlimbing guard.

2. Electricity ⇨19(5)

Evidence that electric utility installed switching pole on transmission tower that allowed children to bypass anticlimbing

guard was sufficient to support finding that utility acted "wantonly" with regard to injuries sustained by child who was burned while climbing on tower, even if utility's precautions satisfied requirements of National Electrical Safety Code.

4. Damages ⇨94

Jury ⇨31, 34(1)

Provision of Alabama Tort Reform Act limiting awards of punitive damages to \$250,000 violated provision of Alabama Constitution guaranteeing right to trial by jury. Code 1975, § 6-11-21; Const. Art. 1, § 11.

5. Constitutional Law ⇨12

When two provisions of the Constitution are seen to conflict, and one of them is contained in the Declaration of Rights, Provision of Declaration of Rights will prevail. Const. Art. 1, § 1 et seq.

6. Jury ⇨31

Statutes ⇨67

Provision of Alabama Constitution prohibiting legislature from passing private acts on subject of fines, penalties and forfeitures did not conflict with constitutional provision guaranteeing right to jury trial. Const. Art. 1, § 11; Art. 4, §§ 104, 104(28).

Joseph G. Pierce and Jack Drake of Drake & Pierce, Tuscaloosa, and Ralph I. Knowles, Jr. of Doffermyre, Shields, Canfield & Knowles, Atlanta, GA, for appellant/cross-appellee.

S. Allen Baker, Jr. and James A. Bradford of Balch & Bingham, Birmingham, and William J. Hust, Jr. of Zeanah, Hust, Summerford, Davis & Frazier, Tuscaloosa, and Forrest S. Latta of Pierce, Carr & Alford, Mobile, for appellee/cross-appellant.

Bruce J. McKee of Hare, Wynn, Newell & Newton, Birmingham, for amicus curiae Alabama Trial Lawyers Ass'n.

ADAMS, Justice.

Craig Henderson and Alabama Power Company ("APCo") appeal and cross appeal, respectively, from a judgment awarding Henderson \$15,303.84 in compensatory dam-

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ages, but reducing to \$250,000 a jury's \$500,000 punitive damages award, in Henderson's personal injury action against APCo. We affirm in part, reverse in part, and remand.

In 1988, APCo owned and operated an "electrical transmission switching tower" near the Cedar Knoll and Idlewood residential subdivisions of Tuscaloosa, Alabama. The tower, which was constructed in 1957, supported a number of transmission lines carrying 44,000 volts of electricity. It was approximately 33 feet high and 5 feet square and was composed of vertical and horizontal steel bands reinforced by diagonal steel braces.

When initially constructed, the tower was fitted with an "anti-climbing guard"—a barbed wire latticework enclosed within a square steel frame. This framework was installed horizontally on the tower midway between the base of the tower and the first series of wires. The width of the frame exceeded the width of the tower; thus, the barbed wire extended slightly beyond the tower on all four sides. In 1967, APCo attached to the tower—outside the guard—a steel "switch operating rod," or pole, two inches in diameter.

On September 13, 1988, 12-year-old Craig Henderson and at least three other children climbed the tower, getting past the anti-climbing device by means of the switch operating pole. While Henderson was playing on the tower, his head contacted one of the power lines and the resulting electrical "flash" knocked him from the tower. He was transported by helicopter to the burn unit at the Children's Hospital in Birmingham, where he was treated for "deep second degree" burns to his face, thighs, and other parts of his upper body.

On November 23, 1988, Henderson, by and through his mother, sued APCo on counts alleging negligence and wantonness. The cause proceeded to trial, and, on May 23, 1991, the jury awarded Henderson \$15,303.84 in compensatory damages and \$500,000 in punitive damages. APCo moved for a judgment notwithstanding the verdict, or, in the alternative, for a new trial; and for a "remit-titur, or, in the alternative, [a vacation of] the punitive damage[s] award." Henderson, in a

"motion for [a] declaratory judgment and for entry of judgment in excess of \$250,000," challenged the constitutionality of Ala.Code 1975, § 6-11-21, which, subject to enumerated exceptions, limits to \$250,000 jury awards of punitive damages.

Following a post-verdict review of the damages award as required by *Hammond v. City of Gadsden*, 493 So.2d 1374 (Ala.1986), and *Green Oil Co. v. Hornsby*, 539 So.2d 218 (Ala.1989), the trial court entered an order expressly finding that the jury's award was supported by clear and convincing evidence of wantonness and was not excessive. Although "acknowledg[ing] its continuing questioning of the constitutional [validity] of § 6-11-21," the trial court, nevertheless, reduced the punitive damages award to the statutory limit—deferring to this Court a resolution of the plaintiff's challenge to the constitutionality of the statute.

Both parties appeal the judgment, which was based on the jury's verdict and the trial court's ruling on the post-verdict motions. The dispositive issues on appeal, broadly stated, are whether the punitive damages award, which was based on the wantonness count, was supported by the evidence, and, if so, whether § 6-11-21 violates the constitution of Alabama.

I. Wantonness (Case 1901946)

Section 6-11-21 was enacted as part of a "package of bills" collectively called "the Alabama Tort Reform Act." L. Nelson, *Tort Reform in Alabama: Are Damages Restrictions Unconstitutional?* 40 Ala.L.Rev. 533, 533 (1989); Act No. 87-185, § 2, 1987 Ala. Acts 251. The section provides:

"An award of punitive damages shall not exceed \$250,000.00, unless it is based upon one or more of the following:

"(1) A pattern or practice of intentional wrongful conduct, even though the damage or injury was inflicted only on the plaintiff; or,

"(2) Conduct involving actual malice other than fraud or bad faith not a part of a pattern or practice; or,

"(3) Libel, slander or defamation."

PT = need control over event that
puts limits on PT to jury trial
in civil cases: Act 1 § 16:

(e.g. cap on nonecon damages

(e.g. cap on punitive.

(e.g. paying 1/2 of punitive (w/o death for
att. fees) to state. (Win's due process cl)
cause of action & cl)

Q: Can Regist Amend the Constitution?

(e.g. structured damages

(e.g. collateral benefits

1. due process
2. search & seizure
3. PT to jury trial
4. ~~not a whole principle~~
4. not whole principle of separation of powers