



## Civil Justice is Much More Than Compensation

There is a commonly held but narrow and deeply flawed view that the civil justice system is solely about providing compensation to those who are harmed by wrongful conduct. In fact, compensating survivors and victims is but one important function of the civil justice system. It's worth reflecting a moment on some of the other benefits of a court system that allows people to hold wrongdoers accountable.

Several thousand years ago, the prophet Isaiah wrote, "*my people thirst for justice.*" Those words are etched into stone in the federal courthouse in Portland because peoples' thirst for justice is just as important today. We need justice for reasons that go far beyond an accounting perspective that the civil justice system merely assesses money damages for harms.

### What the Civil Justice System Does for Us

#### Setting Things Right

People need justice in part for psychic reasons. A wrong that has not been righted in some way is, well, wrong. There is a moral dimension to seeking justice, of restoring balance to things so that they are again set right. Doing so reaffirms who we are and how we as a community want things to be. The moral dimension of the law is shared by both the criminal and the civil justice systems.

(continued on page 2)

#### DECEMBER 2018

##### RECENT CASES

- Hodges v. Oak Tree Realtors, Inc.*,  
363 Or. 601 (Sept. 13, 2018) . . . . . 2
- Gist v. Zoan Management, Inc.*,  
363 Or 729 (Oct. 25, 2018) . . . . . 3



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## Civil Justice is Much More Than Compensation *(continued)*

One key difference between the two is that the state has a monopoly on criminal prosecutions. Only in the civil justice system do we allow individuals to seek justice for the wrongs done to them or their families.

### Social Stability

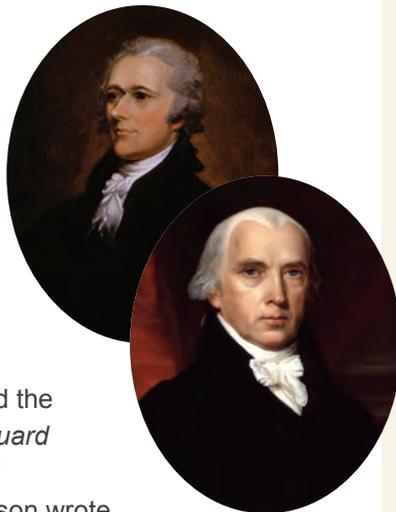
There is also a social stability benefit to the civil justice system. Our need to restore balance can be addressed either through institutional processes or individual action. There have been (and are) times and places where injustices are settled outside of a formal legal system, often by direct action involving force or violence. Violence can beget more violence. A civil justice system channels those individual needs into institutionalized forms that seek to avoid interpersonal violence.

### Avoiding Oppression

There is another social benefit to a civil justice system that allows individuals to assert and enforce their rights: avoiding oppression. That was recognized by the framers of the United States Constitution, who were deeply concerned with establishing checks and balances to assure *“a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty.”*

To allow individuals to have access to justice, to help ensure that domestic tranquility, and to promote the general welfare, the framers wrote the Seventh Amendment. Part of the Bill of Rights, the Seventh Amendment guarantees that *“In Suits at common law... the right of trial by jury shall be preserved...”*

Protecting the right of trial by jury in civil cases was and is a critical check on the risk of oppression. Juries predate our country by centuries. The framers deeply appreciated that juries are independent: jurors cannot be lobbied, their “election” cannot be bought. Alexander Hamilton wrote that the participants of the Constitutional Convention recognized the right to jury trial as *“a valuable safeguard to liberty,”* and *“the very palladium of government.”* President James Madison wrote



(continued on page 3)

## Cases of Interest

### *Hodges v. Oak Tree Realtors, Inc.*, 363 Or. 601 (Sept. 13, 2018)

During depositions of plaintiff in this serious injury case, and over her objections, defendants obtained an order from the trial court compelling plaintiff to answer questions regarding communications with her doctor during treatment for her injuries. Plaintiff petitioned the Supreme Court for a preematory writ of mandamus, which the Supreme Court granted.

Defendant argued that, because plaintiff’s communications were “made in the course of a physical examination performed under ORCP 44,” OEC 504-1(4)(b) provides that the plaintiff had no physician-patient privilege to assert during her deposition. Defendant contended that plaintiff’s examination necessarily was “performed under ORCP 44” within the meaning of limitation on privilege set forth in that evidentiary rule. That was so, according to defendant, because ORCP 44 C requires plaintiff to provide defendants with records of physical examinations relating to her injuries. The Supreme Court disagreed, determining that “the legislature did not intend to limit the physician-patient privilege in the manner that defendants urge.”

Despite defendants having the ability to obtain medical records of the physical examinations of plaintiff under ORCP 44 C, the trial court did not exercise any authority under ORCP 44 A to order that those examinations be performed. The Supreme Court therefore concluded that plaintiff’s medical treatment in this case was not “performed under ORCP 44” such that the OEC 504-1(4)(b) limitation on the physician-patient privilege applied. Accordingly, the Court commanded the trial court to vacate its order compelling the plaintiff’s answers

(continued on page 3)

## Civil Justice is Much More Than Compensation *(continued)*

that “*trial by jury in civil cases is as essential to secure the liberty of the people as any one of the pre-existent rights of nature.*”

### Improving Safety

Perhaps the least well-recognized function of our civil justice system is the most important to our day-to-day lives: improving safety by avoiding unnecessary harm to individuals. A simple walk down the street in a country lacking an effective civil justice system is a visual reminder of how safety suffers when individuals cannot enforce safety rules: holes in sidewalks, rebar sticking out from uncompleted construction work, or poor lighting.

In our civil justice system, the fundamental principle is: what would a reasonable person (or corporation, or governmental agency) do to avoid foreseeable harm to others? The purpose of that principle is to deter unsafe behavior, that is, to make us all safer. That purpose has been expressly recognized by the Oregon Supreme Court in *Bagley v. Mt. Bachelor, Inc.*, 356 Or 543, 340 P3d 27 (2014) (quoting legal scholars that “*the ‘prophylactic’ factor of preventing future harm has been quite important in the field of torts,*” and the “*most commonly mentioned aims of tort law are compensation of injured persons and deterrence of undesirable behavior,*” 340 P3d at 34).

The civil justice system enforces community safety standards and rules through a democratic process in which both sides present their case about what is reasonable, and an independent body decides. Whether driving a car, maintaining a property, or organizing an activity, each of us is responsible for acting reasonably to protect the safety of our fellow citizens. If we do not, we face the financial consequences of unnecessarily putting others at risk of injury or death.



(continued on page 4)

## Cases of Interest *(continued)*

to questions invading the physician-patient privilege. ■

### *Gist v. Zoan Management, Inc.*, 363 Or 729 (Oct. 25, 2018)

In this proposed class action, plaintiff and similarly situated delivery drivers for defendants alleged claims under Oregon’s wage and hour statutes. The trial court granted defendants’ petition to compel arbitration under its “independent contractor” agreements with the drivers, which ultimately did not permit arbitrating any claims arising under Oregon’s employment law. Plaintiff unsuccessfully sought to obtain appellate review of the trial court’s order compelling arbitration, first, by seeking an interlocutory appeal under ORS 19.205(2), and, second, by moving the trial court to certify a controlling question of law for interlocutory review by the Court of Appeals. Finally, plaintiff requested that the trial court enter a general judgment of dismissal with prejudice from which plaintiff took his appeal. After plaintiff had filed his opening brief on appeal, defendants moved the Court of Appeals to dismiss the appeal under *Steenenson v. Robinson*, a 1963 case holding that certain judgments that were voluntarily entered were unappealable. The Court of Appeals granted defendants’ motion and further declined to reconsider that decision. Lisa T. Hunt represented plaintiff in petitioning the Oregon Supreme Court for review of that decision, and briefed and argued the case once review was allowed.

Plaintiff argued to the Court that the purpose of the 1963 *Steenenson* rule was solely to prevent a multiplicity of appeals. The Supreme Court agreed that it was aimed toward preventing “a plaintiff from both obtaining appellate review of a preliminary

(continued on page 4)

## Civil Justice is Much More Than Compensation *(continued)*

### Two Recent Examples of How the Civil Justice System Helped Improve Safety

A common refrain heard from injured people is: we don't want this to happen to others; no family should have to go through what we are going through.

#### Catastrophic Motorcycle Injury

"TC" was an adult student at an Oregon motorcycle safety class. As a person who had never driven a motorcycle before, she wanted to make sure she learned how to do it correctly—under the supervision of experts—so that she could safely become a qualified motorcycle driver.

On her very first day of operating a motorcycle at the state-sponsored program, TC was being supervised and trained by instructors at a motorcycle training range. Unfortunately, right next to the training area was a large concrete obstacle that was a hazard to inexperienced riders. During one of the maneuvers that required making a tight turn, an instructor waived for her to speed up. When TC did so, she went so fast that she ran into the concrete hazard. She suffered serious traumatic injuries to her leg that required hundreds of thousands of dollars of medical care, and put her at risk of leg amputation.

There was no legitimate reason to have the concrete hazard right next to where brand-new riders were trying to learn how to operate motorcycles. It was an "accident" waiting to happen. The harm was foreseeable: it was just a matter of time before someone was hurt. This was no random event, but the consequence of the training program violating established safety rules and guidelines.

Only after TC brought a lawsuit against the training program was the concrete hazard removed. As a consequence of her injury and her legal claim, other novice motorcyclists will be safer in the future.

#### Death of a Child

A second example involved a boy who accompanied his mother and his big brother to the grocery store. Upon leaving their car, the mother realized that she had forgotten her shopping bags, so she had the younger boy stay in the pedestrian refuge island while she went back to the car, just a few yards away.

*(continued on page 5)*

## Cases of Interest *(continued)*

issue and retaining the ability to refile the same claim, should the plaintiff lose on appeal." Because a dismissal of all claims with prejudice prevents a multiplicity of appeals, the Court further agreed with plaintiff that subsequent cases distinguishing *SteenSON* have made clear that "when there is a judgment on all claims and the voluntarily dismissed claims were dismissed with prejudice," *SteenSON* does not bar an appeal. The Supreme Court also rejected defendants' argument that ORS 36.730, by only permitting interlocutory appeals of either a denial of a petition to compel arbitration or a grant of a motion to stay arbitration, may be read to prohibit a plaintiff from pursuing an appeal. Because plaintiff's appeal was not interlocutory in nature, that statutory provision had no bearing on whether or not plaintiff could appeal from a final judgment.

#### Lisa T. Hunt, Of Counsel

A former clerk for two Oregon Supreme Court justices, Lisa is known for her aggressive pursuit of the proper outcome for clients who have suffered a personal, economic, or business injury.



Her practice areas include personal injury, wrongful death, product liability, medical negligence, pharmaceuticals, business litigation, and class actions. Lisa ensures that the trial court record for Corson & Johnson Law Firm's clients will withstand scrutiny on appeal and, in addition, continues her own independent appellate practice. ■

## Civil Justice is Much More Than Compensation *(continued)*

While the little boy was sitting in the pedestrian area, a large pickup truck pulled up alongside. The truck came up to the stop line, and the driver looked to his left. The parking rows to his left all ended in a line with the stop line, so he planned to turn right consistent with the position of the stop line and the visual cues. The driver, looking to his right before starting his right turn, could not see the little boy because the driver's view was obstructed by the truck door. In turning, the truck accidentally entered the pedestrian refuge area, ran over, and killed the little boy.

The stop line had not been placed in accordance with the construction plans for the parking lot. The parking rows had not been positioned as called for in the plans. This was another "accident" waiting to happen, and indeed both the multiple tire marks on the curb and the testimony of witnesses at the grocery store indicated that this had happened before. The harm was foreseeable; it was just a matter of time before someone was hurt here. As with the motorcycle training course, this was not a random event, but the consequence of a company violating established traffic safety practices.

After a lawsuit was brought against the grocery store, the mother of the boys insisted as a condition of settlement that the store move the stop line and install a stop sign so that drivers not only could see the correct place to start their turn, but there was a physical obstacle to prevent starting a turn too early.

Both of these recent cases were in part motivated by someone's desire to make sure that others would not be put through what they had; that things would be made safer. Both illustrate the silent role that the civil justice system plays every day in making places, practices, and products safer for everyone. ■