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## Medical Malpractice and State Medical Centers: Clarke v. Oregon Health Sciences University

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**MEDICAL MALPRACTICE AND STATE  
MEDICAL CENTERS: *CLARKE v. OREGON*  
*HEALTH SCIENCES UNIVERSITY***

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Laramie, Wyoming  
April 2, 2008

Before I get started what I do want to say is that it's a real pleasure to be back here in Laramie. I taught Bioethics here last semester. I loved the students, I loved the school and I had a chance to participate in some of the earlier discussions of this conference. Most of my suggestions I'm pleased to report were ignored and as a consequence what we have here is a huge success; national caliber speakers, somewhere around 200 people in the room, information which I think is both theoretical and also of immediate value, and none of that comes easily. It takes a huge amount of work and so I hope you'll join me in congratulating Darci Arsene and give her a round of applause but until she stands we can't do that and Aaron Bieber, is Aaron here, well, Darci will tell Aaron that your round of applause extended to Aaron as well and then I particularly wanted to extend my congratulations to Assistant Dean Denise Burke who is over here; I'll ask her to rise because this has been a lot of work for a long time and a round of applause is well deserved.

Now what I propose to do is to talk about medical malpractice and state medical centers. I don't suggest that this has immediate relevance to many of you in this room although as I go along I think some of the analysis will come clear in ways which I hope you will find useful and interesting. I'm talking about this subject chiefly because I tell my students, and I've told them for decades, that you need to bring passion to your work, whether it be law practice or medical practice, and when you see something that seems wrong, that in your gut you find upsetting maybe even outrageous, you need to understand what is going on with it and perhaps change it, or at least challenge it.

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We as professionals are privileged with our licenses to bring to bear resources of society not only in the routine medical or legal practice which we enjoy but also in our civic lives, to confront and defeat outrageous injustices. I am speaking about one of those.

In December of this past year *The Oregonian*, our Portland newspaper, reported on a case which caught my attention. It was *Clarke v. Oregon Health Sciences University*.<sup>1</sup> It had caught my attention because some of its dimensions were news to me. I've been teaching about health law and health care delivery for well over twenty years and I've seen health care systems at work in a number of countries and what was happening here was new and in my experience different.

Jordaan Clarke was born in February and a couple of months later in May he went back to Oregon Health Sciences University to have heart repair surgery. As we heard earlier from our speakers, at Johns Hopkins it's not unusual for vents to be misplaced and the vent was misplaced with Jordaan Clarke. My medical degree, as I tell my students, is still in the mail and so I won't get more sophisticated than simply to say that the vent should have gone where the windpipe was and instead it went to where the food goes into the stomach. Perhaps, I shouldn't put it as frivolously as that because as a consequence Jordaan Clarke is brain damaged and for the rest of his life will need extensive medical and custodial and therapeutic care; devastating for him and devastating for his parents.

So far all this is just a routine story and it could be leading into a routine discussion of medical malpractice but it's not because what is different here is that the parties agree there was approximately \$17 million dollars in damages that had been inflicted upon the Clarke family. Moreover they agreed that this was a product of negligence. Moreover they agreed on who had engaged in the negligence. So none of the criticisms of our medical malpractice system would apply in this case: that our torts system frequently excludes those needing relief, awards relief against those who are not at fault, provides inadequate relief, fails to get at the root causes of medical error.<sup>2</sup>

Those are criticisms with which by and large I agree, but they simply would not apply here. This was a case where a wrong had been done, everybody agreed not only on that fact but also on the consequences of it. But Oregon statutes provide that damages against a state agency cannot exceed \$200 thousand dollars,<sup>3</sup>

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<sup>1</sup> *Clarke v. OHSU*, 206 Or. App. 610, 138 P.3d 900 (Or. App. 2006).

<sup>2</sup> There are abundant sources criticizing our existing tort system's approach in medical malpractice. These will be cited at a later time in the article which will follow this speech. At present, let me say simply that I agree with the critics who say a better system is needed to ensure improved safety in health care, and, at the same time, to assure full care and compensation of those injured by adverse events.

<sup>3</sup> OR. REV. STAT. ANN. § 30.270 (West 2007).

so Oregon Health Sciences University said we are a state agency and Clarke family you need to come up with \$16 million, \$800 thousand dollars to cover the mistakes that we admit we made. One very troubling dimension to this, with which I was totally unfamiliar, is this; Oregon in 1991 modified its statutes to provide that when state employees are sued the agency is substituted<sup>4</sup> so that the doctors and the nurses who were involved in Jordaan Clarke's case could not be held individually liable for their errors and their negligence, and most importantly it meant that whatever malpractice insurance they carried would not be available to the Clarke family. So put these two together and the Clarkes get only \$200 thousand dollars, because the State of Oregon like the majority of states has provided that a state medical center is immune from liability and responsibility for its errors and moreover in about half of those states, employees of the state medical center are totally relieved from responsibility for their misconduct.

So a couple of background comments about medical malpractice damages. I think it's all common knowledge for all of us that our medical malpractice system for compensating for error requires that negligence be found. Damages are usually economic. They can be non-economic as in pain and suffering, sometimes they can go to punitive damages as well. The purpose is to compensate, or to deter future errors, and to distribute costs across society.<sup>5</sup> My point here is not to rehearse or discuss the criticisms of that system, I would join in most of them, it's an awful way to provide reserves and compensation for families that need those reserves to compensate for errors which they'll have to live with for the rest of their lives. It's also an awful way to try to improve safety in health care when the finding must, as a predicate, be negligence. A number of states have therefore set caps on the damages that can be rewarded; some of those state courts have held caps to be unconstitutional as unfair and unequal,<sup>6</sup> but it's not unusual to find that a state has said economic damages in med mal cases may surely be awarded but noneconomic damages beyond that will be limited to let's say \$250,000 or \$300,000 dollars.

In Oregon several years ago a \$500,000 dollar cap had been invalidated as too rigid: denying equal protection, not tailoring remedies to the needs of a particular case. Significantly in Jordaan Clarke's case the cap remains because Oregon Health Sciences University (OHSU) maintains that it is a state medical center, as a result of which patients are specially disabled in ways which would not be true for patients going to any other medical center in that state or other states as well.

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<sup>4</sup> OR. REV. STAT. ANN. § 30.270 (West 2007).

<sup>5</sup> Again, these considerations are common knowledge for those in attendance at the conference. For those needing references, they will be provided in the article presently being drafted.

<sup>6</sup> Indeed, Oregon has invalidated a \$500,000 cap on damages generally. And so the limitation of the *Clarke* case, where the limitation to \$200,000 is solely because of state sovereignty, is doubly invidious: first, because it is so low and inadequate and discriminatory, but, second, because if the wrongdoers have been in the private sector, they would be fully responsible there would be no limitation at all.

What did the Supreme Court in Oregon say in the Clarke case? First of all, it said OHSU is a state instrument and a state agency and therefore immune from liability. Its functions are a public function, it has public powers, it educates, it provides health care, and the governor appoints the Board. According to the 1856 Constitution of the State of Oregon, this is a state agency; it is like the Port of Portland, it's like the Board of Higher Education, it's like SAIF, which is our State Accident Insurance Fund or workers comp. fund. And so when the State decided it would waive its immunity, but only to the amount of \$200,000 dollars, OHSU, like the Department of Transportation or any other agency, could commit wrongs and deny responsibility beyond \$200,000 dollars.

The Oregon Supreme Court then separately addressed the issue of the liability of employees, the doctors, the nurses, and the like, and said that setting the cap at \$200,000 dollars was not valid because in 1856 they would have been liable, they did not have immunity and under the Oregon Constitution, if you take away a remedy you've got to give compensation, you've got to give a substantially equivalent remedy. Two hundred thousand dollars, the last time I ran the math, was not equivalent to \$17 million dollars, especially when a family faces the horrific future that the Clarke family is facing.

Other states have taken a position similar to Oregon's as to their state medical centers, and they continue to immunize totally the medical center employees.

I file a dissenting view. My students will tell you that I do this often, and I can do it because I'm not on the court and when this case will go back up to the Oregon Supreme Court I will probably do an amicus brief if I can find some group in the community that will let me do it for them. My wife has noted that if she had known my entire legal career would consist of pro bono activity she might have considered another line of marriage.

My view in the amicus brief would be first of all that OHSU is not a state agency by 1856 Constitution standards or indeed by any present time meaning of the term and that this would be true of many other state medical centers as well. The modern medical school wasn't really even conceived until 1917, some of you will know about the Flexner Report. Medical centers are a part of the 1980s. Also the ways in which medical centers are funded and operated changed in the 1980s with Medicare and Medicaid. Most modern medical centers are, really, federal in nature, and at least when viewed from the perspective of their funding: not only is much of it from Medicare or Medicaid, but in OHSU's case,<sup>7</sup> \$300 million a year for research comes mostly from NIH, a federal agency. Finally not only is the

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<sup>7</sup> The figures discussed below concerning OHSU's operations and finances, come from OHSU's annual reports or business plan or website. An interested reader can readily find the relevant documents, either through the website or by request directly to the president's office of OHSU. No effort will be made here to provide the detailed footnoting found in scholarly articles.

modern medical center a new entity, and unlike any other state agency, but it is very much like its private competitors, so if you download from OHSU's website their 20/20 Vision Plan it reads like a business plan for any hospital in Colorado or Wyoming, Nebraska or Montana.

As for the employees, my view is basically they should be responsible for their torts and wrongs just as if they were working for any other health care entity. For one thing to say that all employees of OHSU or a state medical center shall be immune from suit ignores the tremendous variety among their statuses and relationships. There are attending physicians, there are hospitalists, the folks from Johns Hopkins this morning were talking about residents and interns and that's just looking at the medical staff. There are in addition at OHSU janitors, and there are people who work in the cafeteria, there are groundskeepers, and all of them are immunized by relationship to OHSU.

And then, of course, there is the medical staff, comprised, as with all medical centers, principally of private practitioners in the community, who place their patients in a hospital, and sometimes provide the services there, raising the question of whether that very limited relationship should immunize them as well. Most importantly, OHSU has a number of clinics around the state. Most medical centers do. It also has developed recently a couple of research facilities in Florida and I must say those are looking very good about this time of year. I don't know if the state immunity extends to the people in Florida but I would expect that's part of the bargain.

One other point about the employees, those of you have experienced CMS and Medicare provisions, and several people spoke about these this morning, will know that as a part of CMS's reimbursement formulas for physicians, malpractice expenses are factored in. Now it's a relatively small factor but that means that for the employees who are being immunized at OHSU, there has already been a factor payment in their Medicare reimbursement formula for medical malpractice insurance, which they're not buying! But presumably they nevertheless keep the heightened Medicare reimbursement.

Two other points about my dissenting view; one is, quite apart from all of this, protecting OHSU and its employees is a very discriminatory process. It means that OHSU, in competing against other hospitals and other medical centers, has a huge economic advantage. They are discriminated against because they do not have blanket immunity and their expenses are therefore heightened. It's also discriminatory against patients who go to OHSU who do not have the benefit of knowing that if OHSU errs, they will not be compensated. There will be no care for them after care has gone wrong. They are not told if they go to other hospitals, they have the benefit, however inefficient, of care and compensation for medical error.

Separately, in terms of unfairness, the common law claim against the doctors has been taken without a quid pro quo and that is what the Oregon Supreme Court has reversed and remanded; that issue is now before the trial court. This is not an easy case. If \$200,000 is too little when the cost is \$17 million dollars, the trial court has got to come up with a formula which is somehow going to be fair. How they will do that is beyond me and the inability to do that is a fundamental flaw in this system of immunizing state medical centers and their employees. The Supreme Court has seemed to imply in the *Clarke* case that a flat rate can and might be permissible, but if the validity of the flat rate has got to be tested in the context of each case, on a case-by-case basis, then a flat rate simply does not work. At the same time, a patient as a litigant can never know whether limitations are going to be imposed, at some level. Obviously, this is unworkable. The only feasible approach is simply to say, as with private malpractice litigation, there should be no cap at all.

Now I'm going to take a couple of minutes and take a closer look at OHSU, not necessarily because anybody here will ever be a patient there (but if you are, make sure you have good insurance), but because some of these observations about governance, finance and the like apply to medical centers around the country.

For one thing the modern medical center did not exist as I said in 1856. The Flexner Report invented med schools in 1917 and cut by two-thirds the med schools that were in existence then. As a result of the Flexner Report, we invented the four-year med school, invented the notion of clinical medical education, invented the notion of the connection to hospitals in 1917, and so this is something new, familiar to us, but new to the state constitution. OHSU moved from Willamette University to the University of Oregon and then on to the State Board of Education and in 1995 separated itself from the Board and the University of Oregon and Oregon State and other such entities precisely so it could compete in the private market place with private entities.

Yet it claims state immunity! It is similar to competitors and centers in other states. As I've mentioned, the governor does in fact appoint the Board, but the only contribution the state makes now is \$45 million dollars a year in a \$1.3 billion dollar a year budget; small potatoes. The legislative purposes were declared in severing OHSU as being education, research, a delivery resource to the people of the state. Those are important purposes, OHSU performs them well, but so do a dozen other hospitals in the Portland area.

If we take a closer look at organization of the modern medical center, OHSU as an example, has a med school, a dental school, a nursing school, a grad school, a bunch of research units, including toxicology and bioinfo. We have a primate center, which every few months gets into the newspapers because of PETA finding more horrendous misconduct and then the primate center defends itself, plus a neurological sciences center, and two hospitals each at about 450 beds.

There are 150 primary or specialty clinics around the state, and some interesting developments in Florida!

None of this was imaginable in 1856 or 1956 or even perhaps 25 or 30 years ago. And how it can be said that a single, crude concept like sovereign immunity attaches equally to all these things or in what ways it will play out, boggles the imagination. Add two other considerations. OHSU has formed its own medical group. This is a standard practice for large hospitals around the country and these medical groups may have hundreds of docs rendering health care. The question then becomes: are all of them immune from liability by dint of some gossamer connection to OHSU?

And then the final point that I'll mention is the so-called "captive" insurance company. On the plane here I was reading OHSU's annual report. You have to be committed, maybe even obsessed, about an issue and a case to pore through annual reports, but I do. I started life as a public utilities attorney, fortunately I escaped that, but I retain the capacity to review financials for the items barely hidden, and I stumbled across in the annual report a reference to a "captive" insurance company which OHSU is maintaining even while it's wrapping itself in immunity from liability. If they are insured, and can insure themselves, why do they need immunity? And why do they maintain that the *Clarke* case is financially beyond their ability to bear?

And finally as a part of the organization, not only is OHSU a corporation but its foundation, hundreds of millions of dollars, are separate and its children's hospital, at least tens of millions of dollars, is also separate. Are they nevertheless immune, although separate from OHSU, as part of a state agency?

When the Oregon Supreme Court decided the *Clarke* case, the president was quoted, this is the president of OHSU, was quoted in the newspaper as saying that this was an utter disaster.<sup>8</sup> It would cost between \$30 and \$50 million a year.<sup>9</sup> It would mean that OHSU would have to shut down clinics, rural services, it would have to raise tuition, delay repairs, reduce enrollment, it would be taking in fewer students in the med school, they have about 2500 students all told. So on the plane I took a look at the annual financial statements. In 2007, revenues of \$1.37 billion were up from \$1.25 billion. Patient revenue was up 8%. The return in 2007 on endowment was 17%. They reported \$34 million dollars in profits as a not-for-profit public service entity, \$34 million dollars in net profits that could have paid for Jordaan Clarke for the rest of his life and had \$11 million dollars left over in 2007 alone.

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<sup>8</sup> There are a number of such articles in the *Oregonian*, elaborating OHSU's pain.

<sup>9</sup> How this figure was determined has never been stated. The financial statements, to say that OHS unit has increased name and set aside against probable incidents.



Now I could go on; cash and short-term investments were up 44% in 2007 alone. But in some ways the most significant figures I saw in the annual report, and I've got to double check this and I hope I'm wrong, but I do believe I saw it: in 2007 OHSU, a public service entity, claiming to be serving the state as a state agency, reported a paltry \$34 thousand dollars in charity care. That is somewhere near .002% of revenues. If they were a not-for-profit corporation like half of the hospitals in this country, the IRS, as some of you know, would be beating on them right now with newly processed regs to assure that not for profit hospitals really do charity care. Say, 3%, not .002%! I hope I'm wrong but the figure I saw against gross revenues of \$1.3 billion—they did \$34 thousand dollars in charity care.

The point of all this is; they can afford to pay for Jordaan Clarke and all of the Jordaan Clarkes and they should do so. Error is inevitable; it's a part of care. The pattern of services at OHSU is not as big as at John Hopkins, which we have heard about today, but it's pretty big, 184,000 patients annually, educating 2500 students, and \$300 million dollars a year in research funding. As far as I can tell the pattern of service is standard. They have a category called Other Adults—about 57,000 a year, orthopedics and gastrointestinal about 10,000 each year, and then they have a category called Women, the women here will enjoy this, it's just called Women and they're about 35,000 a year, and somewhere in there is pediatrics and somewhere in pediatrics comes Jordaan Clarke. Let's look at it this way: if there are 184,000 patients, and the speakers at this conference have largely agreed that error is one adverse event for every ten patients, then approximately 18,000 patients a year are erred on. How can OHSU, or any provider, solicit such people to come for care, indeed charge for care, while refusing to accept responsibility for the harm inflicted as part of such care?

So my position is that OHSU and most other state medical centers should be viewed like any provider of care. It should have the same responsibilities. It competes with Legacy, with Providence, with small community hospitals like Tuality. Its own business statement says that it competes with community hospitals. It talks about market share, about 8–12% in varying markets around the state of Oregon. If it is in the market, they should play by the market rules.

Look at this from a somewhat different perspective. Immunity gives OHSU an unfair edge in service, in hiring, and in competition. This is a point that ought to be a concern to everybody in the community. We need all of those other hospitals to form the safety net of which OHSU's view is only a part. Immunity tends to harm the safety net.

Realistically, OHSU is far more federal than it is state, by a wide margin. Focusing on the funding, the federal funding for OHSU is chiefly through Medicare and Medicaid. About 60% of its funding is from patient revenues: that would be Medicare, Medicaid, Blue Cross Blue Shield, and some other private programs. 30% is through gifts and contracts, including \$300 million in research

funds—\$200 million from NIH. Now if you were to take the balance sheet of any other hospital or medical center in the country, I think it would look pretty much the same. A 60/30 distribution, which has almost nothing to do with the state of Oregon. The research component of OHSU was certainly performing a public function, and it is—I hope all of it—important research, but it's not state research, that money doesn't come from the State of Oregon and it doesn't necessarily benefit the people of Oregon.

But they moved to the structure of multiple subsidiaries which I mentioned, the clinics, the doctors groups and the like, along which are in medical school, nursing school. These schools are an important consideration which does tend to distinguish a medical center from even a large hospital in a metropolitan area, unless one stops to reflect upon the composition and the missions of large urban hospitals. They have residents, they have interns, many of them have their own nursing schools, many of them have their own paraprofessional schools. It is important that they contribute those educational products and missions to the community. When so viewed, even a major medical center like OHSU is not very different in terms of its public mission from any large metropolitan hospital.

The difference is OHSU has state sovereign immunity and doesn't have to pay for its mistakes.

Let me turn to the employees. I suggest they ought to be viewed the same way as private providers. There's no need to relieve them of liability. If they were connected with any other entity, and indeed in their own private practices, they would have liability insurance. The concurring opinion in the *Clarke* case notes that most providers in Oregon carry one to \$3 million dollars in liability insurance and those in the higher liability practices, \$5–\$10 million dollars, obstetrics, pediatrics, and a couple other specialties, perhaps neurology. I've already mentioned that Medicare covers some insurance and already reimburses for it.

And so there is no need to immunize the employees. Probably the points most compelling to me are this—every entity which writes about patient safety with which I am familiar—CMS' National Health Safety Office, Kaiser, the Commonwealth Fund, Robert Wood Johnson, Institute for Health Improvement, Institute of Medicine, even OMB and the Congressional Budget Office, has done studies on patient safety. All of them are clear: you avoid injury and mishaps to the extent that you affix individual liability within, as our speakers this morning were saying, an institutional matrix which brings about sharing of responsibility.

We need to improve both processes and people. If we immunize people, they can simply skate; they don't need to pay attention. Why should they care? It isn't that they'll be irresponsible. It isn't that they set out in the morning to say "Today

I will hurt people.” It is that some of the impetus is not there; but emphatically it is on other providers working with institutions which are not immunized.

And so immunity is contrary to the public interest. In addition, the state immunity umbrella, as I’ve already suggested, is simply too broad. There are a huge variety of relationships between physicians and other providers and hospitals or medical centers and to immunize all of them to the same degree simply doesn’t make sense. And of course it isn’t only the doctors who are immunized, or the nurses, it is as well, the groundskeepers, the painters, and cafeteria workers, and the drivers. So this immunity umbrella is, I think, even if it has a public purpose, far too crude an instrument.

Now when I do my amicus brief, if I do my amicus brief, I’ll develop constitutional considerations and try to persuade the Oregon Supreme Court—which will probably be unpersuaded—that the present arrangement is unconstitutional, either under state law or federal law. Of course, in arguing that OHSU is not a state agency, I have been arguing an interpretation of the state constitution. But here, I am turning to a different level of constitutional argument. It is that if the state legislature extends immunity to OHSU, or its employees, it is violating the individual rights of patients. For our purposes today, I will make only three points quickly.

One is this: under most state constitutions and also somewhere in the federal constitution there is a right to trial, a right to a hearing, a right to procedural due process. And the cap of \$200,000 in Oregon, and the absolute cloak of immunity in Oregon, cut off any meaningful right to trial. I mean you could bring a lawsuit. Negligence declared, but you would not get damages, that’s justice for you. There would be really no way or reason to bring the lawsuit. Financially, it simply would not be feasible. In a simplistic sense, the right remains, but it has been subjected to an undue burden. Effectively, it is a denial of a right to trial.

Secondly, I already suggested in several different ways that immunizing OHSU, or immunizing its employees, is discriminatory. It discriminates against other hospitals, since they must pay for errors and bear an economic burden, which is not also equally borne by OHSU. It is also discriminatory against patients, against patients that go to OHSU. They do not have a resource in the event of injury, a resource available to patients at other hospitals provided through other hospitals. It is as though the State of Oregon has passed legislation that says, of all of the patients in the state of Oregon, 184,000, the number growing annually to OHSU will have less protection, less care, less coverage.

And then finally, due process, not only is it that immunity cuts people off from a right to trial or a right to a hearing, it is that the right is taken without compensation. If we were taking somebody’s land, if we were taking somebody’s home or business for a public purpose, there would have to be compensation.

There is none with the total cloak for OHSU: there's a limit of \$200,000, and there is no compensation for taking the common law cause of action against the physicians. They get lumped in with OHSU, but under common-law the liability was joint and several.

And of course, the figure of \$200,000 is woefully inadequate. That is a different due process issue, not only one of taking, but one of rationality. Given the escalating cost of health care, no prior limitation, no matter how large, will prove to be rational, if the purpose is compensation. But if the purpose is to free physicians and providers of responsibility and accountability, the connection is unmistakable, but no one can justify such a purpose. It is simply irrational in any meaningful public purpose sense.

A different point not argued in the Oregon Supreme Court is this, and it seems to me absolutely crucial, not as a lawyer or a doctor, but as a patient. And I tell most of my students that they're going to hear endless stories about my career as a patient. I've undertaken basic research on their behalf and so I bring it forth; my knees, my kidney stones, my colonoscopies, my pathetic athletic injuries, they hear about those in great detail. As a patient, if I go into Providence or Legacy or Tuality or Newport, all good hospitals, I assume if they make a mistake they'll stand behind their product, and they'll make good on their mistake. Now I know the tort system is flawed but it will be there and available to me and I assume they've got insurance.

There's nothing that tells me when I go to OHSU that that's not true there. There is no notice, you know Dante's seventh level of hell, "abandon hope all ye who enter." There's no notice when you go to OHSU as a patient that care stops at error, beyond error we don't care. Nothing says that to the 184,000 people, that for their money and their lives, OHSU only goes half way, and abandons them if they are harmed by OHSU. Yet due process requires a state agency to provide notice before inflicting harm. Then the final point is, and those who are lawyers will fully understand, that this comment is totally worthless as a legal proposition, yet as a common sense proposition I think it's compelling, and it is this: OHSU is shifting the cost of its mistakes to those least able to bear or avoid those costs, the Clarkes. I don't know them. I can tell you I don't have \$16.8 million dollars in my checking account. I don't expect over what remains of my lifetime to accumulate even one tenth of that amount.

As a cost-shifting device, this immunity is by far the most horrendous tool available. There are other alternatives. As a cost-shifting device, insurance works and insurance would be available and should be required simply by removing the immunity which is presently given to OHSU and to its employees. As a cost-shifting device, as well, having individual employees bear responsibility for the harms they inflict distributes the cost across employees, and makes their resources available to compensate for harm. So also, as a cost-shifting device, making

available the resources of the charitable foundation or the captive insurance company or the Florida enterprise, would go a long way towards lifting the burden off the Clarkes. So also, factoring into every research grant proposal a component to cover malpractice and the harm inflicted in research will provide a resource available to compensate for harm.

A few words on malpractice reform seem essential, because I'm talking about medical harm and safety to an audience comprised of significant portions of doctors and lawyers. Already today, there has been considerable talk about malpractice shortcomings and the tort systems failures, and I agree with almost all of those comments. I spent a lot of my legal career in the courtroom and I have a rush walking into a courtroom, I suppose the way a surgeon has a rush walking into an operating room. Although I love the courtroom, I think the torts system for malpractice purposes is an utter failure, tied to finding negligence, requiring that about a third of any recovery go to the lawyers when the patients are the ones who need it, screening out cases haphazardly that may have merit, screening in those which do have merit, it unfairly taints doctors and it doesn't help patients, and it drives up costs. Perhaps all of that is true, perhaps it's not, I mean the studies go both ways.

But denying healthcare and custodial care for the rest of his life to the Jordan Clarkes of this country will not change any of that, in a case in which everybody agreed there was negligence and everybody agreed on the cost and everybody agreed that right now OHSU can walk to the tune of a wholly inadequate \$200,000.

So my conclusion, state medical centers should not be immune from liability for their harms. They're out there playing in the marketplace against other people who will stand up and be responsible. Why shouldn't they?

Secondly, employees should also be individually liable for their misconduct. Why not? As the brief for the Clarkes said in the Oregon Supreme Court, "Prior to 1991 doctors in Oregon bought malpractice insurance and it covered them. In 2008 doctors working in some fashion at OHSU don't have to buy malpractice insurance." Where's the common sense or the necessity of public value in that?

And my final two points are simply this, paying for harm should be a part of care. I followed closely the excellent presentation by the representatives from Johns Hopkins this morning, and one thing that struck me was, I forget if it was their mission statement or a document that said "harm is untenable." I think it was under a heading of "Culture of Safety." Under the heading of "Culture of Safety" one of the lines was "harm is untenable." I think that's wrong. I think a culture of safety acknowledges that harm is inevitable, seeks to minimize it, and accepts responsibility when it happens. I think in a mass system of health care there will be harm.

If OHSU here is going to have \$300 million dollars of experimentation on 184,000 patients, by definition some of those experiments will go wrong. OHSU is experimenting on people; doesn't it owe them an obligation of caring, when harm is inflicted? And in routine care, from labor and delivery, to heart surgery to the ICU, not only will mistakes occur, but the risks inherent in the place and the system will play out, nosocomial infections and iatrogenic harms will occur. They are part of the system. Shouldn't those responsible step up, and be, well, how shall I put it, be responsible?

It doesn't mean that experiments are bad, or routine care is hazardous, it means that sometimes a vent will be misplaced four times, as we were told this morning at Johns Hopkins within the space of two years. It's not that that's a good thing. To say harm is untenable is to deny the reality that harm happens, and care may include inflicting harm and must include fixing harm. Care doesn't stop only when it goes well. The duty of care, the ethic of care, continues for the Jordaan Clarkes of this world even when, especially when, the caregivers inflict harm.

So let me end with this. There is a clear connection between our inadequate system for dealing with medical malpractice and our more broadly inadequate system of health care. Both have huge gaps, connected to the judgments of fault and failure. We should adopt universal health care, get out of this fault business. I saw it work in New Zealand. People receive universal health care, and people are not allowed to sue for medical error. I think it's terrific, and I think we should abolish fault-based malpractice and I think everybody should stand up for their mistakes and whenever possible finish early. Let me do my part, by doing exactly that.

I would welcome questions or reactions. The question is, she's sure this is happening elsewhere; has this issue been resolved elsewhere? I'm only starting to track that down. I have two wonderful research assistants hard at work for me even as we speak, I hope, and what we are doing is looking at the laws of other states and finding that many of them are quite similar to Oregon's. Trying to find out what the organizational structures of other state medical centers are and finding in varying ways that they are like OHSU's because they've all had to move into the market place to compete essentially for patients and dollars and practitioners.

The case law that I've found so far has not included a single incidence of what I'm advocating that is revoking the immunity for a state medical center. There is case law though that has held that some of the component units were not entitled to immunity, like the doctors groups or some of these clinics or who knows, possibly the entities in Florida.

There is a lot of case law on the separate issue of the immunity of the practitioners and it's very troubling case law because what it means is the courts have had to go case by case to look at whether a particular practitioner, when he

or she was making the error at issue, whether he or she was working within a state medical center role or agency such that they should be entitled to immunity. And there are two problems with that. One is the criteria are very, very confusing, but the other basic flaw which is my position shouldn't exist at all. So I'm still trying to find out.

Let me say that for anybody who has a continuing interest in this subject and wants to email me, I'd be happy to correspond with you and I'd also be happy to send along a set of these slides and if I do the amicus brief I'll send that along as well.

Comment from a member in the audience: In Colorado it's almost a mirror image of what you've just talked about. Maybe three things that are worse: when it's a \$150,000 rather than \$200,000 immunity and follows providers regardless of their site of practice. So if they're practicing in a private hospital, seeing a private patient as a university doctor they enjoy immunity and probably the most frustrating thing is they rarely if ever pay the total \$150,000 in settlement. They'll pay \$130,000 or \$120,000 recognizing that nobody's going to take the time to sue for the difference.

Thank you for those comments and maybe we can talk later and I can get some sources. It is the notion that immunity for the state medical center doc travels with that doc to other settings that I think is very troubling. Other questions?

What I didn't make clear enough was that in 1995 Oregon Health Sciences University, which had been under the aegis of the State Board of Education, became separately incorporated by a legislative act and so it sets all of its own policies, generates its own revenues, and makes all of its own expenditures. It just opened last year two 40,000 square foot buildings within the city of Portland and I might note finished constructing an overhead tram that would make Aspen or Vail's ski area proud, to move people from a lower parking lot to the hospital on the hill. I think the total cost was about twice what it would have cost to take care of Jordaan Clarke for the rest of his life.

Thank you.