

**Committee Name:**  
**Senate Committee –**  
**Judiciary, Corrections and Privacy**  
**(SC–JCP)**

**Appointments**

03hr\_SC–JCP\_Appt\_pt00

**Committee Hearings**

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**Committee Reports**

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**Clearinghouse Rules**

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**Executive Sessions**

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# Hearing Records

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## 03hr\_sb0187a\_pt01

**Misc.**

03hr\_SC–JCP\_Misc\_pt00

**Record of Committee Proceedings**

03hr\_SC–JCP\_RCP\_pt00



Family  
Justice  
Network



SB-187

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**FOR IMMEDIATE RELEASE**  
Feb. 16, 2004

## Families of malpractice victims to make plea: equal justice for all

Families who suffered the loss of a member due to medical malpractice in Wisconsin will gather from several states on **Tuesday, Feb. 17** to testify and lobby for passage of the Family Justice Bill (SB 467), aimed at restoring equal treatment of all families in malpractice cases that resulted in death.

Under current law, families that lose a child over age 18 or a widowed or divorced parent cannot sue for medical malpractice over the loss of society and companionship.

"Wisconsin now has a very unfair double standard in how it treats families who lose someone due to malpractice," explained Sherry Ellis of Oak Creek, whose mother died during a routine medical procedure. "We believe that all Wisconsin families deserve the same treatment under the law. Love and companionship don't stop at age 17."

Ellis and other Family Justice Network members from across the state, Minnesota, and Indiana will be coming to Madison Tuesday to testify before the Senate Judiciary Committee hearing at 10 a.m. in Room 201 Southeast of the State Capitol.

"We have suffered the death of dearly-loved family members, and then found that the courthouse doors were slammed in our faces," said Eric Rice, a business executive from Middleton who lost his 20-year-old daughter Erin. "We simply want the right to seek justice and accountability in the deaths of our loved ones.

"Wisconsin is one of just 6 states that makes an artificial distinction in who can sue for loss of companionship resulting from medical malpractice," explained Rice. "Wisconsin's double standard is based on age--children over age 18 are excluded--and marital status --no legal action can be taken in the case of widowed or divorced parents.

An earlier version of the Family Justice Bill passed the State Senate last session, but never came to a vote in the Assembly.

"Along with reminding legislators of why the current double standard must be ended, we will also be letting them know that we are not going away until we win justice for all Wisconsin families," said Rice firmly.

##30##

*Pending state legislation, the Family Justice Bill (Senate Bill 187) will restore the remedies of adult children and the parents of adult children, allowing them to once again bring a claim for wrongful death when the death is caused by medical malpractice.*



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## MEMORANDUM

**To:** Members of the Senate Committee on Judiciary, Corrections and Privacy  
**From:** State Bar of Wisconsin  
**Date:** February 17, 2004  
**Re:** Senate Bill 187, relating to claims for loss of society and companionship in medical malpractice cases - SUPPORT

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Thank you, Chairman Zien, for holding a hearing on SB 187, the "Family Justice Bill."

The State Bar of Wisconsin supports SB 187 because it would open our civil justice system to families whose loved ones die at the hands of negligent medical professionals.

Current law does not allow a parent to recover for loss of society and companionship if the parent's adult child dies as the result of medical malpractice. Similarly, an adult child cannot recover for loss of society and companionship if the adult child's parent dies as the result of medical malpractice. Under SB 187, both the parent and the adult child would be allowed to recover in these situations.

Oddly enough, current law allows an adult child to bring a claim for loss of society and companionship when a parent is killed by a driver who failed to yield the right of way under the wrongful death statute, § 895.04 (4), Wis. Stats. However, that same adult child would not be able to sue for loss of society and companionship if a parent dies on the operating table because a physician botches a surgery.

SB 187 is about fairness and accountability. It will make the law more consistent as to who can recover and will ensure that a negligent health care provider can be held accountable when a family loses a loved one due to that provider's negligence.

For these reasons, the State Bar of Wisconsin urges committee members to support SB 187.

*If you have any questions, please feel free to contact Deb Sybell, Government Relations Coordinator for the State Bar of Wisconsin, at (608) 250-6128.*

**State Bar of Wisconsin**

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(800) 728-7788 ♦ (608) 257-3838 ♦ Fax (608) 257-5502 ♦ Internet: [www.wisbar.org](http://www.wisbar.org) ♦ Email: [service@wisbar.org](mailto:service@wisbar.org)



TO: Members, Senate Committee on Judiciary

FROM: Jim Hough, on behalf of  
Civil Trial Counsel of Wisconsin

DATE: February 17, 2004

RE: **OPPOSITION TO SENATE BILL 187**

The Civil Trial Counsel of Wisconsin respectfully urges your opposition to Senate Bill 187 relating to allowing recovery between adult children and their parents for loss of society and companionship in wrongful death cases.

**Loss of society and companionship was never part of the common law but is a creature of the legislature which has very carefully and thoughtfully limited recovery to spouses, minor siblings and minor children and their parents. Wisconsin law allows plaintiffs to be compensated for all expenses that can be measured by objective standards. For example, families can be paid for medical bills, lost wages, loss of earning capacity, funeral expenses, pain and suffering and punitive damages.**

Members of the Wisconsin Legislature are being told that this legislation is necessary because, among other reasons, of a misinterpretation (by the Supreme Court) of the statute and not because of a "conscious decision" made by the Legislature. During the 1997-1998 legislative debate, the issue was openly discussed and debated. Further, the Supreme Court pointed out in *Czapinski v. St. Francis Hospital, Inc.*, 236 Wis.2d 316 (*Wis.2000*), that the Senate rejected an amendment which would have defined "child" in s.655.007 to include adult or minor child.

Loss of society and companionship is impossible to measure objectively. No amount of money can replace the joy and companionship that could have been shared with a loved one. The State of Wisconsin has, however, chosen to allow such recovery in the limited circumstances referred to above. While the entire concept of allowing recovery for loss of society and companionship is debatable, the legislature should be commended for limiting those eligible to recover. Where might we go next? (Grandparents, cousins, significant-others, close friends, associates?)

Again, we respectfully urge you to oppose this legislation and avoid encouraging additional difficult and costly litigation.

[CTCW is a statewide association of over 500 trial lawyers who engage primarily in the defense of civil litigation.]

*Wisconsin Coalition  
for Civil Justice*

TO: Members of the Senate Committee on Judiciary  
FROM: Bill G. Smith, Chairman & Jim Hough, Legislative Counsel  
DATE: February 17, 2004  
RE: Senate Bill 187

The Wisconsin Coalition for Civil Justice is a broad-based coalition that includes small business, large corporations, professional societies, trade associations and non-profit organizations. Although the membership of the coalition is diverse, coalition members are in strong agreement about the role of **medical malpractice reform as a key component of reducing the cost of health care in Wisconsin.**

The American Medical Association estimates that for every \$1 spent on medical malpractice insurance premiums, doctors spend \$2.70 performing unnecessary tests and beefing up record keeping in order to avoid litigation. These costs are, of course, passed through to those who purchase medical services, **increasing their medical bills by \$36-billion a year**, according to a study by the Lewin-VHI, Inc. research firm.

This unnecessary add-on to the cost of health care takes us in the wrong direction to reducing the cost of health insurance.

WCCJ also believes that the current caps for loss of companionship provide fairness, predictability and equal treatment regardless of income or status. Removing or increasing these caps will encourage excessive litigation or legal fees.

The members of the Wisconsin Coalition for Civil Justice, thereby, respectfully urge your opposition to passage of Senate Bill 187.

Thank you for your consideration.



**Wisconsin Economic Development Association Inc.**

TO: Members, Senate Committee on Judiciary

FROM: Jim Hough, on behalf of  
Wisconsin Economic Development Association

DATE: February 17, 2004

RE: **OPPOSITION TO SENATE BILL 187**

A rational, fair and equitable civil justice system has been and continues to be a priority for Wisconsin's economic development community. For many years, WEDA has supported legislation which has sought to achieve these goals.

Unfortunately, Senate Bill 187 represents a change in direction that would promote litigation in an area where there is no objective way to measure damages. The legislative determination of limiting recovery for loss of society and companionship to spouses and parents and minor children is appropriate and should not be expanded.

We respectfully urge your opposition to SB 187.

[WEDA is a statewide association of approximately 500 individual members.]



WISCONSIN

## Memorandum

**TO: Members of the Senate Committee on Judiciary,  
Corrections and Privacy**

**FROM: Bill G. Smith  
State Director**

**DATE: February 17, 2004**

**RE: Senate Bill 187**

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Health care reform is at the top of the legislative agenda for small business owners at both the state and federal level. Here in Wisconsin you can help to address the high cost of health care for small business by opposing passage of Senate Bill 187.

Small business owners understand how the direct costs of insurance, litigation, and settlements, and the indirect costs of defensive medicine play a significant role in the rapid growth of health care spending. **In fact, only 43% of every dollar spent on medical liability litigation reaches injured patients as compensation, according to estimates of the Rand Corporation. The rest is spent on attorneys' fees for both sides, litigation expenses and insurance administration costs. In this era of escalating health care costs, we cannot afford such an inefficient compensation system.**

While some will argue the cost of lawsuit abuse has little or no impact on the cost of health care, the facts indicate the mere threat of malpractice claims adds billions of dollars to the cost of health care every year.

**By opposing passage of Senate Bill 187, you will help meet the challenge of the high cost of health care, lower the cost of health care – a top legislative issue for small business owners throughout Wisconsin.**

Thank you.



# Wisconsin Medical Society

Your Doctor. Your Health.

TO: Members, Senate Committee on Judiciary, Corrections and Privacy

FROM: Mark L. Adams, JD, General Counsel

DATE: February 17, 2004

RE: OPPOSE Senate Bill 187

On behalf of more than 10,000 members statewide, the Wisconsin Medical Society thanks you for this opportunity to provide testimony opposing Senate Bill 187.

Negligence in the practice of medicine, or any other health care profession, that causes injury or death is a heartbreaking and regrettable event whenever it occurs. Medical malpractice does occasionally occur, and when it does, those injured should be reasonably compensated for their loss. Wisconsin has created a special system to govern compensation of those injured by medical malpractice through the wisdom of open public debate and bipartisan legislative compromise. It is a system that balances two important and competing interests: reasonable recovery for the few injured by medical malpractice versus affordability of health care for the many.

For any business, law firm or other enterprise, insurance premiums are a “cost of doing business” that are reflected in the prices consumers pay for the product or service. If costs rise, so do prices. Though many other businesses or professionals pay for liability coverage for their own financial protection, few are required to do so by state law. Unique among the 50 states, Wisconsin has decided that physicians must pay for both private liability coverage *and* unlimited “umbrella” coverage via the Injured Patients and Families Compensation Fund – formerly known as the Patients Compensation Fund. This ensures that injured patients and their families can always recover compensation to which they are legally entitled. But this protection comes at a cost – these insurance premiums are expensive, and like the costs for any other business or profession they are borne by consumers: patients, employers and taxpayers.

If this proposed legislation is enacted, liability insurance rates for physicians, hospitals, clinics and many other health care professionals will rise. This bill will upset the delicate balance achieved through bipartisan legislative efforts over the past three decades.

This balance has been very effective in keeping Wisconsin off the list of “crisis” or “near-crisis” states, as described by the American Medical Association. The map accompanying this testimony shows how dire the medical liability insurance crisis is around the country – a sea of “red” and “yellow” states surround Wisconsin. Taking this national crisis into account, legislation like SB 187 is exactly the wrong thing to do at this time.



Proponents of SB 187 often claim that the legislation is designed simply to correct a loophole in the law. In fact, current law is the result of our legislature's conscious decision not to adopt such a change. Under general wrongful death law in Wisconsin (wrongful death not involving medical malpractice), these individuals may be entitled to sue for "loss of society and companionship," but under our medical malpractice recovery law, Chapter 655, Stats., they are not. Our legislature determined years ago that medical malpractice recovery, and its associated costs for all consumers of health care, required a separate system with limitations on who can recover and what they can recover.

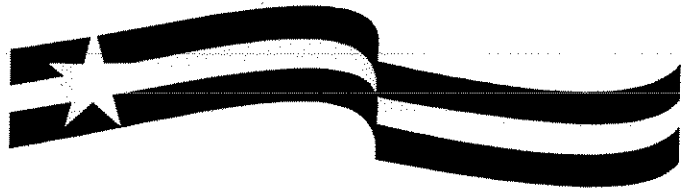
The stories of those who have lost loved ones as a result of medical malpractice are heart wrenching. But good social policy is sometimes difficult. The creation of Chapter 655 and its subsequent amendments reflect the conscious decisions of a legislature seeking a balance between the desires of the few who are injured by medical negligence and the many who need affordable health care. This balance has worked well since the creation of Chapter 655 and should not be disrupted.

Physicians recognize and appreciate that no amount of money can ever adequately compensate someone for the loss of, or serious injury to, a loved one. Physicians also recognize and appreciate the tremendous impact on families when a loved one is disabled or dies from an illness that could have been prevented by medical treatment. Statistics tell us that patients are more likely to seek preventative or curative medical care when they have health care coverage, and if health care costs continue to rise, fewer and fewer people will be able to afford coverage. This bill will only exacerbate the current health cost situation.

Health care resources in our country and in Wisconsin are limited. The State Legislature and our courts have recognized the necessity of reasonable limits for non-economic damage recovery in medical malpractice actions. In Wisconsin, we have done this in a bipartisan fashion and the result is Chapter 655. We urge you to continue to appropriately balance the desires of the few against the needs of the many by opposing SB 187.

Thank you again for this opportunity. If you have any questions, please feel free to contact Mark Adams ([marka@wismed.org](mailto:marka@wismed.org)), Alice O'Connor ([aliceo@wismed.org](mailto:aliceo@wismed.org)) or Mark Grapentine ([marke@wismed.org](mailto:marke@wismed.org)) at 608.442.3800.

# WISCONSIN CITIZEN ACTION



## Senate Judiciary Committee

February 17, 2004

SB 187 and SB 70

By  
Carolyn Castore  
Wisconsin Citizen Action

Thank you for holding this hearing. Wisconsin Citizen Action is the state's largest citizen advocacy organization with over 75,000 individual members and over 200 affiliated organizations. We strongly support SB 187 and SB 70.

Our court system is designed to provide remedies to those who believe that they have suffered an injustice. A person can present evidence and have their case heard before an impartial judge. Our system of justice may not be perfect, but it has at its core the notion that everyone is treated fairly.

There can be no greater pain than believing that a loved one has died as the result of medical negligence or incompetence. To then find out that you can take no action against the doctor because you live in one of only six states that prohibit such action is a great injustice. To find out that the only reason that you cannot seek justice in our court system is because your child is over 18 denies the ties of family and sets aside the concept of equality before the law.

We support SB 187 and SB 70 because how or where a person dies needlessly should not be the basis for determining whether a lawsuit can be brought. The age should not be the critical factor. A parent who loses an adult child does not feel less pain nor do they feel less pain if the child dies in the University Hospital.

Making our system of justice work for all families will not unduly burden our court system. The actual number of wrongful death claims is very small, with minimal overall cost impact. But passage of these two bills would send a very important message to families and to the medical profession. Families would understand that the state of Wisconsin values the life of each family member. The small portion of the medical profession that needs reminding will understand that each patient is valued and the trust that the patient puts in a doctor must be honored.

Wisconsin Citizen Action urges passage of these two bills.

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**Testimony**  
**of**  
**Robert L. Jaskulski**  
**on behalf of the**  
**Wisconsin Academy of Trial Lawyers**  
**Before the**  
**Senate Judiciary, Corrections and Privacy Committee**  
**On**  
**Senate Bill 187**  
**February 17, 2004**

Senator Zien and members of the Committee, my name is Robert L. Jaskulski. I am a partner in the Milwaukee law firm, Domnitz, Mawicke and Goisman, S.C. Today I appear on behalf of the Wisconsin Academy of Trial Lawyers (WATL), where I currently serve as Secretary of the organization. I will speak in favor of Senate Bill 187, also referred to as "The Family Justice Bill." Thank you for this opportunity to testify.

The Wisconsin Academy of Trial Lawyers (WATL) is a voluntary, statewide bar association whose 1,000 members are attorneys who practice in the area of personal injury litigation. As lawyers who represent injured consumers, our members are often the ones who must tell families Wisconsin law does not recognize the right of an adult child or a parent of an adult child that they can bring a claim for wrongful death in a medical malpractice case. Family members are incredulous. It is inconceivable to them that a death

caused by a clear case of medical malpractice can go unpunished. Unfortunately, there is nothing I can do to ease their pain and provide justice for the family.

WATL believes this is a moral issue. Wisconsin is one of only six states that deprive adult children the right to bring a wrongful death claim for the death of a parent in a medical malpractice case. In fact, if the doctor had killed the person in an automobile accident, a wrongful death claim could be filed. This is absolutely nonsensical.

This issue raises several frequently asked questions about the Family Justice Bill. The questions posed often raise "red herrings." This is not an issue that brings into play rising health care costs or so-called "frivolous" lawsuits. It is an issue about justice and fairness and whether all Wisconsin families will be treated equally in the eyes of the law.

**QUESTION: "What about family members filing claims when they have little or no relationship with the parent or child killed? Where do we draw the line?"**

Wisconsin's wrongful death statute is very clear on who can recover for loss of society and companionship: a spouse, parents, children and minor siblings. Wis. Stats. § 845.04(4). The Family Justice Bill simply does *not* expand who can file a claim to more members of the same family—it simply ensures that all families are treated the same way, with the *same access to the courts*. They want to have the same rights as a person who had a parent or adult child die in a car accident.

Under current Wisconsin law, if a parent of an adult child or an adult child with no dependents dies on the operating table, the health care provider cannot be sued for loss of society and companionship. If, however, the same health care provider driving a car runs over and kills that same person in the hospital parking lot, the parents or children would be able to sue to recover damages for loss of society and companionship. What a double standard!

The law would continue to require proof that family members show they have suffered a loss of society and companionship. A jury would make the final decision of whether damages should be awarded.

**QUESTION: “Wait a minute. Isn’t it true that the person’s estate can sue for pain and suffering even when a child over age 18 or a single parent dies as a result of medical malpractice?”**

That legal option route is open only in very rare cases. The patient must be shown to have been *conscious* while the pain and suffering was inflicted. If the person was *unconscious* or under the effects of anesthesia, there is no grounds for such a legal action.

Moreover, only the estate of the victim—not the surviving family members—can bring a legal action. Attorneys frequently conclude that surviving family members would actually lose money even if they won a claim, because the costs of pursuing the legal action would be larger than any likely award. Once again the amount of noneconomic damages is capped under § 893.55(d), which is currently \$422,632.

A wrongful death claim belongs to the survivors—the spouse, parents or children of the deceased. Most adult children are not dependent on a parent for their livelihood nor are adult children generally responsible for their parents — all compensable economic damages. Generally their injuries are limited to the loss of society and companionship they have suffered as a result of the death of their spouse, parent or child. Current Wisconsin law states it is **only** parents of children over age 18 or parents without a spouse or minor children who die as a result of medical malpractice who cannot recover loss of society and companionship damages.

As evidenced by testimony today, the current law discriminates against unmarried, divorced and widowed individuals. Many adult children have close, personal relationships with parents. In fact as many parents know, the most rewarding part of a child/parent relationships often takes place after a child is an adult.

**QUESTION: “Other families suffer tragic losses of family members, perhaps by murder, and they do not sue for monetary damages. So why should one family be compensated for its loss, but another family not be allowed to go to court?”**

Unequal access to justice is precisely our concern—all Wisconsin families should have the same access to the courtroom when they lose a family member due to the improper action of another person. But under the

current law, a family does not have the right to seek justice when they lose a child over age 18 due to medical malpractice. The family can take the case to court when a doctor causes the death of a married parent, but not a widowed or divorced parent. This double standard makes no moral or logical sense.

In a murder case, all families have the assurance the legal system is committed to insuring equal justice for all, and to protecting society from repeated wrongdoing by the same person. Families of murder victims actually *do* have the right to resort to civil courts for monetary damages, as in the O.J. Simpson case.

In the same way, a malpractice case that results in death should also protect society by taking steps to prevent the doctor from making the same act of negligence, and should also give the family a sense of justice.

**QUESTION: "Will health care costs rise as a result of the passage of the Family Justice Bill?"**

This issue is actually about equal rights for all families, not economics. But because so many people are worried about soaring health-care costs in Wisconsin and the loss of insurance coverage, this claim is calculated to set off a panic that will obscure the real issue of equal access to justice.

However, opponents of Family Justice cannot run away from this inconvenient truth: medical malpractice costs, as a percentage of national health care expenditures, are at an all time low, 0.55 of one percent.

J. Robert Hunter, an actuary and Director of Insurance for the Consumer Federation of America, examined year 2000 insurance data, the most recent available from the National Association of Insurance Commissioners and A.M. Best and Company. Hunter, former Texas Insurance Commissioner and Federal Insurance Administrator, concludes, in a report for the Center for Justice & Democracy, "Medical malpractice insurance is an amazing value, considering that it covers all medical injuries for about one-half of one percent of health system costs."

The claim that "higher health costs" will result, simply diverts attention away from a fundamental injustice. The whole malpractice system costs 55 cents of every \$100 spent on health care. This translates into 36

cents of a \$65 office visit, "savings" so small it is not noticeable by patients, if it is passed on to patients at all. In a state of 5.4 million people, the small number of cases in Wisconsin affected by this bill would be microscopic and could not possibly have any measurable impact on malpractice costs as a percentage of health care.

**QUESTION: How does Wisconsin rank with other states on the issue of allowing adult children to bring a wrongful death claim?"**

Wisconsin is one of only 6 states that limit adult children's right to recover in wrongful death actions of the 50 states, and *is the most restrictive in the nation.*

Only 6 states and the District of Columbia distinguish minors from adult children in their wrongful death statutes and consequently bar or limit adult children's right to recover in wrongful death action. **Wisconsin** is the *only state* to limit recovery by adult children in two tiers, prioritizing minor children over adult children in its general wrongful death statute, while barring recovery completely in medical malpractice wrongful death cases. **Indiana** and **Maryland**, generally bar recovery by adult children, but allow an exception for dependent children. Finally, **Washington D.C.** and three other states, **Florida, Maine** and **New Jersey**, differentiate between minor and adult children under inheritance laws, prioritizing minors over adults in allocating wrongful death damages.

Even with the passage of the Family Justice Bill, Wisconsin will still be one of seven jurisdictions to differentiate between minor and adult children under inheritance laws, prioritizing minor over adult children.

**QUESTION: "Will passage of the Family Justice Bill cause doctors to do less risky medical procedures?"**

Unfortunately we are not talking about "risky medical procedures." We are talking about individuals who went to the doctor for medical procedures family members were told were routine and not regarded as "risky." For example, individuals died during the following procedures:

- Pace maker implantation: punctured lung and aorta during procedure while patient was awake

- Kidney biopsy: artery cut
- Implantation of a Meda-port device: lung punctured
- Chest biopsy: pulmonary artery trunk punctured
- Dialysis treatment: vein punctured
- Surgery: pulmonary artery stapled
- Chest tube placement: aorta punctured

In addition, individuals have been misdiagnosed for heart attacks, cancer, bowel obstructions and bad drug reactions despite obvious indicators.

**QUESTION: “What about the claims that passage of the Family Justice Bill will lead to a malpractice crisis and doctors practicing more defensive medicine?”**

The latest report of the non-partisan General Accounting Office, the research arm of Congress, proves that the supposed “crisis” of access to medical care as a result of medical malpractice insurance premium increases—as alleged by the American Medical Association (AMA), the insurance industry, and some politicians—doesn’t exist, or has been extremely overblown. *Medical Malpractice: Implications of Rising Premiums on Access to Health Care*, GAO-03-836, August 28, which can be found online at: <http://www.gao.gov/cgi-bin/getrpt?GAO-03-836>.

The GAO is extremely skeptical of the claim that the tort system encourages unnecessary defensive medicine. The report takes the offense against the AMA position by noting that (1) some defensive medicine is good medicine, (2) managed care discourages bad defensive medicine, and (3) doctors practice some excessive defensive medicine because they make money from defensive medicine (p. 26-27). It also found that state tort laws have *no impact* on medical spending (p. 29).

In practice, Wisconsin has witnessed a number of cases where doctors failed to conduct presumably routine tests. To cite one case, a 26-year-old son had a bicycle accident and suffered internal injuries. Before releasing the patient, the doctors failed to run a test that would have disclosed a perforated bowel. The test should have been routinely run before the patient, in obvious pain, was released from the hospital. The son died just 4 hours later at home of massive internal bleeding. If this were your son, wouldn’t you have wanted the doctor to run the test?



**QUESTION: Will doctors refuse to treat elderly patients in nursing homes if the Family Justice Bill passes?"**

In 44 other states, doctors now routinely provide health treatments to elderly patients in accord with the Hippocratic Oath. Is it even remotely possible that any Wisconsin doctor would suddenly stop providing services to elderly patients in need?

Moreover, doctors in Wisconsin have the very best malpractice insurance in the country. They have *unlimited* coverage that starts at dollar one, with no deductible or co-payment. Premiums have been decreasing for Wisconsin doctors in recent years, coverage extends to every doctor, and the Patient Compensation Fund has a huge surplus.

Finally, under the current state law, doctors can be sued for malpractice by a surviving spouse. Are some doctors now claiming they won't treat any widowed elderly patient for fear that an adult child could bring a potential claim? Will doctors check the marital status of their patients before they treat a patient? It is a disservice to fellow doctors for any doctor to make the claim that doctors will go to this extreme to avoid treating patients.

**QUESTION: "Are medical malpractice cases burdening Wisconsin courts?"**

Tort claims – those arising out of automobile accidents, defective products or the negligence of a medical professional – make up only *1%* of all cases filed in Wisconsin state courts. Medical malpractice claims are a small portion of that number.

In Wisconsin, before a medical malpractice lawsuit can be filed, an injured party must make a request for mediation with the Medical Mediation Panel System.

The numbers below indicate the number of requests for mediation filed with Medical Mediation Panels in a given year, the number of requests that involved a claim for wrongful death and the percentage of requests that involve a claim for wrongful death.

Year	# Requests for Mediation	# of Wrongful Death Claims	Percentage
1997	240	39	16%
1998	302	57	19%
1999	309	77	25%
2000	280	59	21%
2001	249	39	16%
2002	264	55	21%
2003	247	45	18%

Source: Randy Sproule, Administrator, Medical Mediation Panels.

As you can see, wrongful death cases are a very small subset of all malpractice cases filed for mediation. Furthermore, not all requests for mediation result in the filing of a circuit court case. According to Randy Sproule's office between 16 and 33 percent are never filed in circuit court. Wrongful death medical malpractice cases will not increase litigation rates.

**QUESTION: "Won't the Family Justice Bill encourage the filing of so-called 'frivolous' lawsuits?"**

A growing body of research disputes the premise that patients file "frivolous" medical malpractice claims and supports the proposition that there are far more cases of medical negligence than there are malpractice cases. In late 1999, the National Academy of Sciences Institute of Medicine (IOM) published *To Err is Human; Building a Safer Health System*. The study makes some striking findings about the poor safety record of U.S. hospitals due to medical errors. The study found between 44,000 and 98,000 deaths occur each year in U.S. hospitals due to medical errors. Even using the lower figure, more people die due to medical errors than from motor vehicle accidents (43,458), breast cancer (42,297) or AIDS (16,516).

And let there be no doubt that deaths and injuries due to medical malpractice are substantial. The cost of medical errors is huge. A new article in the *American Medical Journal* found a handful of common medical complications kill more than 32,000 U.S. patients each year and add \$9.3 billion annually to hospital charges.

These sober estimates by leading medical experts suggest that medical negligence is not a "frivolous" invention but a major problem that must be addressed.

**QUESTION: "Well, isn't better doctor discipline the answer?"**

The civil justice system and the disciplinary system should be considered complementary and not duplicative. Each serves its own function.

The medical disciplinary process is designed to serve the public at large. A strong disciplinary system is necessary to set standards for licensure, hold providers accountable for other activities that may not come under the legal system, and protect the public from providers who pose a danger to society.

The civil justice system is needed to hold health care providers accountable for injuries caused by their carelessness. That accountability includes paying injured patients and their families for the harm done to them. This means individuals need access to the courts to uphold their rights. Right now access to the courts is being denied to numerous individuals and the Legislature needs to address that important issue through the Family Justice Bill.

In Wisconsin the Medical Examining Board has compiled a record that clearly indicates major improvement is needed before it can be considered fair or effective:

- According to Public Citizen, Wisconsin ranks **49<sup>th</sup>** in the rate of discipline for doctors in the US.
- The MEB actually imposes discipline in less than one out of 10 complaints; **over 90% are dismissed** without any sanctions.

Most recently, an adult son filed a complaint with the MEB after his father died of a heart attack because the hospital failed to transport him in a timely manner. The Department of Regulation and Licensing staff investigated the complaint and found there was a delay in transporting, but they also learned an even more disturbing fact. The father was given the wrong drug, which worsened his condition and may have played a part in his death. However, despite all this evidence, the MEB dismissed the complaint against the doctor. While the DRL investigator found the doctor acted carelessly, the MEB chose not to act; basically saying the doctor's conduct was acceptable even though someone died needlessly.

This is not an unusual occurrence. A March 2000, *New York Daily News* week-long investigative series found that "hundreds of New York State

doctors, dentists and podiatrists — ranging from modest practitioners to prominent surgeons — have amassed extensive hidden histories of malpractice yet continue to treat patients.” The story said, “Making even three malpractice payments is rare — only 1% of the nation’s doctors have crossed that line, according to the national database. But those doctors account for 24% — or \$5.6 billion — of the money paid to aggrieved patients.... The effect of failing to crackdown on the tiny percentage of doctors with the worst malpractice records is stunning, because they are a powerful driving force behind medical misfeasance nationwide.”

These conclusions are similar to those found by Public Citizen’s Health Research Group in its book *20,125 Questionable Doctors*. The group found that only one-half of 1 percent of 770,320 licensed medical doctors face any serious state sanctions each year. “Too little discipline is still being done,” the report said. Approximately 5% of doctors account for 54% of all malpractice payments.

**Question: What effect will this bill have on medical malpractice insurers, including the Injured Patients and Families Compensation Fund?**

SB 187 will have a minimal effect on malpractice insurers. We need only look back six years to find what happened when 1997 Act 89 raised the wrongful death limit from \$150,000 to \$350,000 for adults and \$500,000 for children. Neither primary insurers nor the Patients Compensation Fund (the Fund) increased insurance rates for doctors. In fact, Physicians Insurance Company of Wisconsin, which covers about one-third of all the doctors in Wisconsin, decreased its rates by 2.8% on January 1, 1999 and another 8.6% on January 1, 2000. At the same time, the Fund, which all private health care providers must pay into, has lowered its fees over 50% over the last six years. *Fund rates are lower now than they were in 1986!*

Why is this so important? Because the Fund fees and the Fund’s actuarial deficit have been used in the past to justify changes in the rights of recovery for persons injured by health care providers. Fee increases were one of the major causes that led to a Legislative Council Special Committee on Medical Malpractice in 1994. The Fund’s actuarial deficit was used as a

primary reason for passing the \$350,000 cap on noneconomic damages in 1995. The clients we represent have had their legal rights restricted because of the concern over the Fund's actuarial deficit.

In June 2001 the Legislative Audit Bureau audit validated the concerns WATL expressed over the last ten years about the overreserving practices of the Fund. I have attached the most recent comparison of the published surplus/deficit with the hindsight surplus/deficit. Instead of a \$67.9 million actuarial deficit at June 30, 1994, there was a \$91 million actuarial surplus. *It shows that when the Legislature acted in 1995, it was given estimates that were off by more than \$159 million!!* Would the legal rights of citizens have been restricted if the Legislature had been made aware of the overreserving practices of the Fund?

### **Conclusion**

During past debates on medical malpractice "reform," proponents asked that limits be placed on what injured people could recover, promising lower health care costs. Limits were passed and malpractice insurance rates were lowered. Have consumers enjoyed lower health care costs? No. So while costs continue to rise, injured patients have lost significant rights to hold health care providers accountable.

Under the current law, families are left with no remedy when an unmarried family member dies as a result of medical malpractice. Too often, doctors and hospitals will not tell the families the full truth of what happened. Sometimes a lawsuit is needed to discover the truth. Families need to be able to go to court and find out what happened to cause a loved one's death. As strong advocates of the jury system, WATL believes community members – juries – should decide what's right. Families should have the right to their day in court.

The tragic and wrenching events of September 11, 2001 should make clear the importance of all familial relationships. The change in law would send an important message: The citizens of Wisconsin value the relationship between *all* adult children and their parents.

We urge passage of Senate Bill 187. Restore fairness to families who have suffered the ultimate loss of a loved one due to medical negligence.

**WISCONSIN PATIENTS COMPENSATION FUND**

**COMPARISON OF PUBLISHED SURPLUS / (DEFICIT)  
TO HINDSIGHT DEFICIT**

Financial Statement Date	Published Surplus/(Deficit)	Hindsight Surplus/(Deficit)
June 30, 2003	\$7,932,348	7,932,349 *
June 30, 2002	\$4,888,065	57,720,301
June 30, 2001	\$28,724,959	104,624,628
June 30, 2000	\$27,210,974	131,122,545
June 30, 1999	\$8,579,767	133,213,272
June 30, 1998	(\$19,383,934)	137,446,743
June 30, 1997	(\$44,094,214)	127,256,461
June 30, 1996	(\$41,795,496)	114,573,582
June 30, 1995	(\$57,722,772)	99,702,128
June 30, 1994	(\$67,903,761)	91,011,298
June 30, 1993	(\$71,613,641)	98,543,634
June 30, 1992	(\$78,982,681)	84,366,982
June 30, 1991	(\$71,679,588)	71,843,937
June 30, 1990	(\$73,597,992)	37,495,205
June 30, 1989	(\$108,256,349)	(1,410,765)
June 30, 1988	(\$122,722,600)	(33,680,059)
June 30, 1987	(\$112,101,947)	(38,707,665)
June 30, 1986	(\$100,555,257)	(74,159,319)
June 30, 1985	(\$79,624,322)	(62,861,010)
June 30, 1984	(\$49,623,089)	(84,466,291)
June 30, 1983	(\$19,826,057)	(75,681,404)
June 30, 1982	(\$8,954,431)	(64,456,642)
June 30, 1981	\$492,000	(45,211,308)
June 30, 1980	(\$1,919,872)	(34,731,339)
June 30, 1979	(\$728,759)	(15,715,408)
June 30, 1978	NA	NA
June 30, 1977	NA	NA
June 30, 1976	NA	NA

\* Estimated

"A Medical Misdiagnoses of a Mother"  
A Tragedy For her Daughter

It was 4:45 A.M. in the morning when my phone rang and my son in law said he could not wake up my daughter Melissa. I asked him if he called 911 and he said yes. I said I am on my way. Thinking that it was going to be like in the past when she was passing out at home and when I would get there they would have her hooked up to oxygen and everything would be ok, but it was the worse night mare of my life. My life was changed on September 1, 2002, forever. When I ran through the door of her home they had her lying on the floor and where doing CPR. I screamed at her to breathe and they kicked me out of the house. I waited outside the door yelling please Melissa breath don't leave me. Every thing felt like a fog and that things seemed to take forever. I knew it was not good but I never thought that I would lose my only child. The paramedics finally came out and I asked them if they had a pulse and they said no mam, I am sorry. I knew then that my daughter was gone.

After getting to the hospital the doctor came out and said if we do any more we are talking about brain damage. I knew my daughter would not want that and I told them to leave her alone. But when I got in the room they continued to do CPR and the doctor told me to look at the screen, and then he said watch and they stopped doing CPR, and she went flat line. He then told me "I know it may seem brutal but some people need to see this, it is not like on TV." I could not believe this Doctor would be so brutal. I told the doctor that she had a seizure and that she did this before and he got in my face and said "her heart stopped she didn't have a seizure", and he then walked away without saying he was sorry for our loss.

My daughter lay there lifeless with her arm hanging off the hospital bed and her eyes part way open with a breathing tub in her mouth. I closed her eyes and held her hand. I watch her skin change the colors of death. I thought to myself please wake up don't leave me. I can't live without you. I remember over that summer we got separated in a store and I panicked and when I found Melissa I said I thought you left me. Melissa said "Mom I would never leave you ". but now I think about it all the time that she has left me forever until it is my time to be with her in heaven. After leaving her room at the hospital I lost it. I screamed "no not my baby not my baby" and fell to the floor. Leaving the hospital was like being in a night mare and I kept saying please wake me up don't let any of this be true, I am supposed to go to my daughters house today for dinner. But instead I had to go make funeral arrangements. It was 4 days shi of her 23rd birthday. On September 1 2002, I lost my daughter, my best friend, and the right to be a mother all in a matter of minutes. Melissa and I where so close maybe closer then most mothers and daughters, and I think this was because I raised Melissa on my own as a single parent from the time she was born till she went out on her own.

When making all the arrangements for her funeral I asked if I could do her hair and makeup. My family couldn't believe I wanted to do this but I told them she is my daughter and I need to do this for the last time. This gave me time to sit with her alone and talk to her and tell her how much I loved her and how proud I was of her accomplishments in life and also to tell her how sorry I was that the doctors didn't listen to me. She looked as if she was sleeping but I new she wasn't. I thought why and all I

could think of is the Doctors didn't listen to me. If only they would have listened to me 5 years prior to this maybe my baby might still be alive.

My daughter Melissa was buried on September 4th 2002, the day before her 23rd birthday. This was the hardest time of my life to have to bury my only child. At the funeral I had them play her song she sang "Why They Call It Falling" Melissa had a beautiful voice and that was her dream one day to sing professional. Melissa had so many talents like singing, art, poetry and dancing. There where over 400 people that attended the funeral. In her short time she touched so many life's.

The next day after the funeral was my daughter's birthday, so I took all of the flowers that we received for the funeral and I placed the flowers on her grave like a blanket.

Two days after the funeral I had had 2 pass outs. I had not been eating or sleeping well at all and it finally caught up to me. My life now was torn up side down and was not sure how to fix it. The only thing I could think of doing was finding out why Melissa died

The autopsy report finally came back after a couple of months. It read Cardiac arrest due to a seizure, but they couldn't say why. I could not accept the autopsy report, so I did research on my own. I had to know why Melissa died. I brought her records and mine home and in a 1/2 hour I knew why my daughter died. We both passed out when answering a phone while sleeping or when startled while sleeping. I knew there had to be more to her death and it had to do something with me also. I thought she had epilepsy like I had been told for years, but when I came to our EKG'S they both read "abnormal EKG with prolong QT." Reading both records doctors stated in both that we might have some type of arrhythmia. But we where never told about this. Melissa was on a drug for an infection before she died, and she told the doctor it was making her dizzy, and he said to take it 10 more days to give it a chance to work and 4 days later she died. I then went to the Internet and typed in this Prolong QT and every symptom fit my daughter and I but one more fit Melissa and that was death. Also the drug my daughter was taking was a drug that causes the QT interval in your heart to become longer. So the drug she was on attributed her condition. I believe and so do a couple of doctors that this drug killed my daughter. I then called my doctor and told him what I had found in our records, and he sent me to a cardiologist. This cardiologist told me that he would be more concerned if I was passing out. I yelled at him and said you didn't read my chart cause if you would have you would have read that I have been passing out for 20 years. He then got up and called Madison to have me be seen by a specialist. I thought to myself even after my daughter died doctors still did not listen and do their job.

I went to Madison Wisconsin where this doctor confirmed that we had Long QT Syndrome a disease that I unfolded not doctors. Now all family members need to be tested to see if they have this disease. Finding out why my daughter died felt like losing her all over again but I finally new why she died. But this was so hard on me because they should have caught it and they didn't. Long QT can be hard to diagnose but in our case it was plane and simple and it was very clear and right there that we had Long QT Syndrome. I diagnosed it when it should have been doctors. They are the ones with the PhD.

My doctor in Madison who is a specialist told me that I need to have a defibrillator put in, but at the time I said no. I was so angry that I lived when my daughter should have been given the same chance. Life is just not the same without my daughter in it and I just wanted to be with her, so I took my chances with not having the defibrillator put in. I



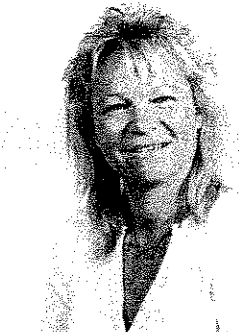
figured I had lived over 20 years with passing out that I would take my chances.

Then August of 2003 a week before my daughter's 1<sup>st</sup> anniversary of her death, I went into cardiac arrest during my sleep and was taken to the hospital by ambulance. They didn't know much about Long QT and they sent me home with a QTC reading of 670 that should be less than 450 in woman. The doctor said there is nothing we can do for her. I went home living minute by minute. I had received this depo shot for birth control that attributed my Long QT because a few weeks after getting this shot I did not feel good and was having heart racing, mostly during my sleep. That following Friday I woke up again coming out of a cardiac arrest. When the paramedics came they got an abnormal pulse. They admitted me to the hospital and kept me and the next day I fell asleep and went into torsades which if you are not shocked in a timely manner death can be the results as it was for my daughter Melissa. My pulse rate was 278 and I was in vfib for 3 minutes. Never being shocked my heart came out on its own. I was then taken to ICU until I could be transferred to Madison to have surgery. Doctors told my family the only thing that would save my life is to have a defibrillator put in. While I was in ICU I still educated the staff there in the hospital because no one was up on this Long QT. I had nurses coming to me for packets on this condition. These were packets that explained all about Long QT Syndrome that SADS (Sudden Arrhythmia Death Syndrome) foundation sent me for getting the word out there on this disease. I thought if I am going to die I want them to be educated so when the next person comes in they will know what to do.

I was then transferred up to Madison on September 2nd to have surgery. On September 3rd I underwent surgery to have a pacemaker/defibrillator put in. When my doctor came in to see me before surgery he was not aware of what I had gone through that week. He thought I had just made my decision to have the surgery done. When I showed him the torsades readout he said that I should have been shocked and should not be alive. Many of the doctors there in Madison called me the walking miracle and that I was misdiagnosed with epilepsy for 20 years. So those doctors that told me I had epilepsy for 20 years were so wrong. I was on Phenobarbital for something I didn't even have. I was not treated for something I did have. I had Long QT all this time and that in my book is much worse than epilepsy because it affects the heart and your 1<sup>st</sup> symptom can be death. On September 3<sup>rd</sup> they put the pacemaker/defibrillator in me and I went home on my daughter's birthday. I was going home with a machine that is keeping me alive and it reminds me of why my daughter died. Every time I feel the machine or think about it I think of my daughter. My daughter's death should have not happened and it could have been prevented.

My life now is trying to cope with my daughter's death and to help others in preventing families from losing a loved one to Long QT Syndrome. Everyday for me is a struggle without my daughter. My life will never be the same but I hope one day to have a foundation for education on this disease in Wisconsin. I tell everyone out there about this disease that will listen and I hope I will save someone's life so it will all mean something and I will maybe know why I am still here. Until then I live every day without my daughter and some days are much harder than others but I keep hoping that one day I will be able to be happy again and proud of what I have done for others. I hate having long QT Syndrome because it is a constant reminder of why my daughter died and I hate

having this machine in me when my daughter should have been given the same chance but wasn't. What is hard for me is knowing there are family members out there that may have this but won't check to see. Plus I hate watching the one's that have found out they have it and seeing how scared they are. I don't want to see another loved one in my family die of this disease that I unfolded. I have put some family members in fear of this disease and so they don't want to know if they have it. Living with a Pacemaker Defibrillator is not fun for me. Going to bed at night is frightful because I am scared of getting shocked in the middle of my sleep since this is when I go into heart arrhythmia. And it is a constant reminder of why my daughter died. I hope doctors will learn from all this and that they will take their patients more serious when that patient tells them there is something wrong and not blame it on something else that they don't even have. . My blood and my daughters tissue is being studied at Mayo clinic for research. I will know in a couple of months what type we have and then other family members will be able to take a blood test to see if they carry the gene or have Long QT Syndrome. What I know is each generation with Long QT gets worse. I also hope the study will open a new door for research on this disease and they will get closer to helping those with Long QT Syndrome.

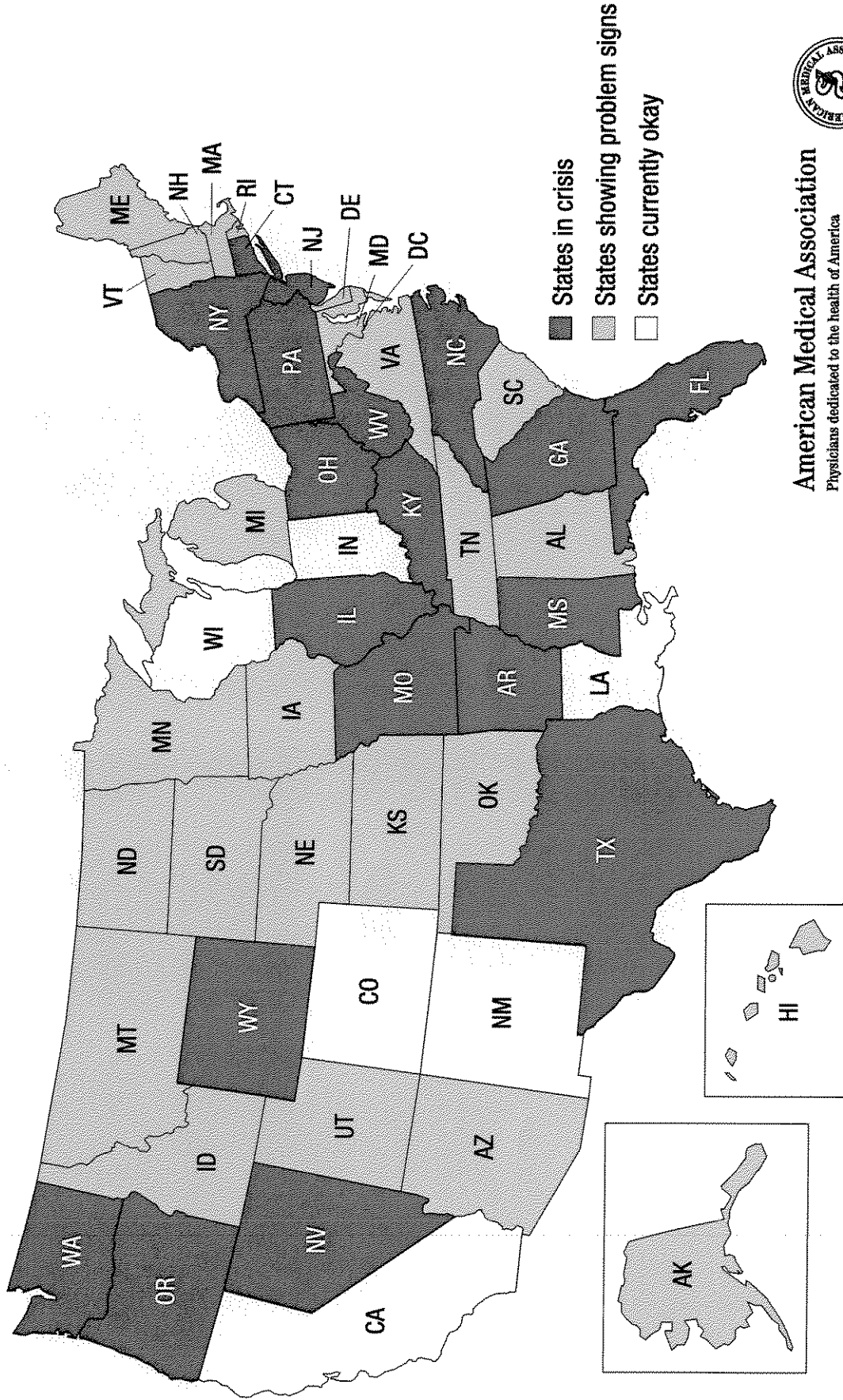


Daughter Melissa and Mother Victoria



Melissa 4 months before she died

# America's Medical Liability Crisis: A National View



American Medical Association  
Physicians dedicated to the health of America