WISCONSIN STATE LEGISLATURE COMMITTEE HEARING RECORDS

2005-06

(session year)

Senate

(Assembly, Senate or Joint)

Committee on Agriculture and Insurance (SC-AI)

File Naming Example:

Record of Comm. Proceedings … RCP
- 05hr_AC-Ed_RCP_pt01a
- 05hr_AC-Ed_RCP_pt01b
- 05hr_AC-Ed_RCP_pt02

COMMITTEE NOTICES …

- *Committee Hearings … CH* *(Public Hearing Announcements)*
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- *Committee Reports … CR*
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- *Record of Comm. Proceedings … RCP*
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INFORMATION COLLECTED BY COMMITTEE CLERK FOR AND AGAINST PROPOSAL

- *Appointments … Appt*
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- **05hr_ab1073_SC-AI_pt01**

- *Miscellaneous … Misc*
- **

February 24, 2006

Mr. Stephen F. Brenton
President
Wisconsin Hospital Association
5510 Research Park Drive
P.O. Box 259038
Madison, WI 53725-8554

Susan L. Turney, M.D.
Executive Vice President and CEO
Wisconsin Medical Society
330 E. Lakeside Street
Madison, WI 53715

Re: Opinion on Constitutionality of New Legislation to Restore Caps on Noneconomic Damages in Certain Instances

Dear Mr. Brenton and Dr. Turney:

At the request of the Wisconsin Hospital Association and the Wisconsin Medical Society, I have reviewed the attached draft legislation which I understand will be introduced into the Wisconsin Legislature. The bill seeks to restore limitations on noneconomic damages in medical malpractice actions. A summary follows of my conclusions on the constitutionality of such a measure, together with a legal analysis of the relevant constitutional provisions.

I. SUMMARY

In *Ferdon v. Wisconsin Patients Compensation Fund*, 2005 WI 125, 284 Wis. 2d 573, 701 N.W.2d 440, all of the Justices of the Wisconsin Supreme Court agreed that the legitimacy of caps on noneconomic damages depends on whether the caps fulfill the test of rationality. Two Justices (Chief Justice Abrahamson and Justice Bradley) produced new doctrine in Wisconsin, "rationality with a bite."

Two concurring Justices (Crooks and Butler), without writing about "rationality with a bite," invalidated a $350,000 cap even when adjusted for inflation. Notably neither Justices Crooks nor Butler explained why they struck the statutory cap other than concluding that the cap was "too low." *Ferdon*, 248 Wis. 2d 573, ¶ 189 (Crooks, J., concurring). These two Justices agreed that reasonable caps would pass judicial review. *Id.* ("Statutory caps on noneconomic damages in medical malpractice cases ... can be constitutional".)

Three Justices (Prosser, Wilcox and Roggensack) in their dissents found the statutory cap reasonable and sustainable as applied. Hence the whole Court, for differing reasons, applied a reasonableness test. No Justice favored a higher level of judicial scrutiny than reasonableness.

In my opinion, the proposed legislation is constitutional and will cure the defects associated with the present cap on noneconomic damages found by the *Ferdon* court. There is more than an adequate basis to find that legislative enactment of a cap of $750,000 on noneconomic damages in medical malpractice cases is rational and reasonable and will overcome objections on equal protection or right to jury trial grounds. The proposed legislation passes a rationality test for the following reasons:

1. A $750,000 cap on noneconomic damages should satisfy the doubts of Justices Crooks and Butler who flunked the $350,000 cap even after adjustments for inflation. Neither of the Justices indicated that an automatic adjustment of the amount of a cap was necessary to meet their constitutional concerns.

2. Legislation seeking to maintain access to health care and to minimize health care costs which takes "one step at a time" passes a rationality test. The "one step at a time" test has well established judicial support, but no opinion in the *Ferdon* litigation focused on that doctrine.

3. A legislative setting of caps on noneconomic damages rests on more rational grounds than an award by a judge or jury where the sight and plight of a victim can dominate judgment. One cannot escape an obligation to set a figure on noneconomic damages, but one should seek to avoid judgments infected by emotion.

4. In particular cases where courts award noneconomic damages those damages lack comparability with awards in other settings because of highly subjective factors. Pain and suffering awards do not lend themselves to useful comparisons.

II. ANALYSIS

Legislation Must Pass the Rationality Test

In *Ferdon v. Wisconsin Patients Compensation Fund*, the entire Court agreed that the constitutionality of a cap on noneconomic damages must fulfill the rationality test. *See Ferdon*, 284 Wis. 2d 573, ¶¶ 64-65 (Abrahamson, C.J. and Bradley, J.); *id.*, ¶ 196 (Crooks, J. and Butler, J.); *id.*, ¶ 227 (Prosser, J.); *id.*, ¶ 320 (Roggensack, J.). No higher level of judicial scrutiny received support, as the opinion of Chief Justice Abrahamson states:

> Neither party in the present case has argued that we should apply the intermediate level of review. We agree ... that rational basis, not strict scrutiny, is the appropriate level of scrutiny in the present case. ... The rational basis level of scrutiny is therefore applied in the present case.

Ferdon, 284 Wis. 2d 573, ¶¶ 64-66.

The three dissenting Justices agreed that caps on noneconomic damages must satisfy rationality, although they chastise the Abrahamson-Bradley "rationality with teeth" doctrine as innovative if not unprecedented. Not a word appears in the Crooks/Butler concurrence that commits them to support the "rationality with a bite" doctrine. Hence they appear willing to accept better arguments for rationality which surely includes a higher cap.

The higher level of scrutiny triggered by rationality with a bite (or with teeth) receives mixed reviews by courts and other scholars. *See Ferdon*, 284 Wis. 2d 573, ¶ 78 n.90 (citing Justice Thurgood Marshall's critique in *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 478 (1985)). Indeed that test appears unique, if not unprecedented, in Wisconsin. Notably Professor Lawrence Tribe's treatise on constitutional law concludes that this framework of analysis presents significant dangers of reviving the repudiated doctrines of economic due process discarded in the wake of disapproval of *Lochner v. New York*, 198 U.S. 45 (1905). *See Ferdon*, 284 Wis. 2d 573, ¶¶ 218-220 (Prosser, J., dissenting) (citing 2 Lawrence H. Tribe, *American Constitutional Law* § 16.3 (2d ed. 1988)); *see also id.*, ¶ 79 n 95 (Abrahamson, C.J.) (citing Tribe, *supra*).

Noneconomic Damages Differ from Economic Damages

The fundamental error in *Ferdon* lies in its confusion of noneconomic damages with economic, truly compensable, damages. The former lies in a fiction that money can pay for pain and suffering. The latter rests on solid economics - identifiable expenses must be paid. Money will not cure pain and suffering - it can pay for out of pocket expenses.

Caps on economic damages are harder to sustain than caps on noneconomic damages. *See* John C. P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for Redress of Wrongs*, 115 Yale L.J. 524, 622 (2005). The Yale article has arguments that one finds in the Abrahamson/Bradley opinions in *Ferdon*, but unlike the *Ferdon* opinions, the writer distinguishes economic and noneconomic injuries.

A $750,000 Cap Rests on Rational Principles

The *Ferdon* case came to the Wisconsin Supreme Court only after a challenge to a $700,000 pain and suffering award. Hence, if there had been no appeal that amount would have satisfied the victims. Data suggests that a $700,000 cap would embrace most noneconomic damage awards, and hence the reasonableness of that figure. The proposed higher limit of $750,000 requires Justices Crooks and Butler to refine and explain their views, and it demands an explanation from Chief Justice Abrahamson and Justice Bradley who also opined that the $350,000 limit was "too low". *Ferdon*, 284 Wis. 2d 573, ¶ 111 (Abrahamson, C.J.) ("We have said that a statutory limit on tort recoveries may violate equal protection guarantees if the limitation is harsh and unreasonable, that is, if the limitation is too low when considered in relation to the damages sustained."); *id.*, ¶¶ 180, 195 (Crooks, J., concurring). They opened the door to arguments that they must sustain a higher limit:

> Wisconsin can have a constitutional cap on noneconomic damages in medical malpractice actions... and the cap must not be set so low as to defeat the rights of Wisconsin citizens to jury trials and to legal remedies for wrongs inflicted for which there should be redress.

Ferdon, 284 Wis. 2d 573, ¶ 196 (Crooks, J., concurring). Data suggests that a $750,000 cap would embrace most noneconomic data awards, and hence the reasonableness of that figure. The legislative record and hearing testimony received on 2005 Assembly Bill 766, which included a lower cap but provided support for rationality and reasonableness of certain other caps underline the conclusion that a $750,000 cap allows compensation for a large number of pain and suffering victims.

Maintaining Access to Health Care and Containing Medical Malpractice Costs is Rational

The focus of new legislation rests on maintaining access to health care in part by containing total medical costs - the cost of malpractice insurance coverage does not immediately follow a reduction of costs.

The United States has the largest health care costs of any nation, and spends a larger portion of its gross domestic product on health care than any other nation. *See America's Health-Care Crisis: Desperate Measures*, The Economist, January 26, 2006, at 12 and 25 (U.S. Edition). "America's health system is a monster," reports The Economist. *Id.* at 24. Legislation designed to contain or control such costs are commonplace. Wisconsin's legislature identified a health care crisis as early as 1975. *Ferdon*, 284 Wis. 2d 573, ¶ 229 (Prosser, J., dissenting). It is beyond belief to find that an attempt to contain health care costs by limiting damages is "unreasonable." The questions are whether the attempt to limit damages rests on arbitrary or reasoned grounds. The question does not turn on the efficiency of the proposed remedy, only on the reasonableness of the attempt.

Justice Prosser's dissent in *Ferdon* reviews justifications for the cap on noneconomic damages. Those justifications remain in play today, but require updating. The legislature's 2005 Task Force on this issue as well as hearings on 2005 Assembly Bill 766 brought those justifications up to date. Those hearings emphasized (and any additional hearings should emphasize) the following:

1. Caps on damages ensure adequate compensation at reasonable cost - the caps on noneconomic damages provide the necessary balance to the costs needed to ensure that the extraordinary guarantee of all economic damages provided by the Wisconsin medical liability system created by law can continue;

2. The cap helps to reduce the size of malpractice awards and the cost of insurance by promoting predictability;

3. A predictable medical malpractice insurance market is necessary to attract and retain health care practitioners in Wisconsin and, thus, is necessary to maintain access to health care particularly for vulnerable populations most at risk for losing their practitioners; and

4. The cap protects the assets of the injured patients and families compensation fund.

Saving Costs and Maintaining Access One Step at a Time

The United States Supreme Court has sustained, against due process and equal protection challenges, economic and social legislation that addresses large problems "one step at a time." A legislature can undertake "reform ... one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." *McConnell v. Federal Election Commission*, 540 U.S. 93, 207-08 (2003). Notably this standard was applied even where legislation limited speech and hence required a higher degree of judicial scrutiny. The standard citation for the one step at a time doctrine is *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 489 (1955) wherein the Court stated:.

> The problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting the others.

Williamson, 348 U.S. at 489 (citations omitted).

Medical costs and the concomitant access problems generate large problems that a realistic legislative approach cannot solve all at once. Cost problems are commonly addressed piecemeal.

The Chief Justice's opinion in *Ferdon* concluded that the cap on noneconomic damages did not lower medical malpractice insurance premiums and hence failed as unreasonable and arbitrary. 284 Wis. 2d 573, ¶ 113. The focus on the costs of malpractice insurance misleads. Costs are the problem, and when costs become smaller the insurance to cover them will eventually, but not quickly, drop. Insurance premiums do not, and cannot, be traced immediately to costs. Insurance always has to cover losses incurred in the past, but which are not immediately reported. Malpractice events may not be revealed for years, but insurance purchased today must cover future claims unknown now.

The Chief Justice's opinion in *Ferdon* concedes that one dollar out of every $100 of health care costs can be traced to malpractice related costs. 284 Wis. 2d 573, ¶ 164. Small to be sure, but the one step at a time doctrine does not flunk a law which impacts costs. Chief Justice Abrahamson and Justice Bradley failed to honor the one step rule. New legislation can repair that failure.

Three Justices sharply contest the trivial impact reported in the Abrahamson-Bradley opinion. Neither Justices Crooks nor Butler addresses the conclusion that caps have little or no impact. Hence five Wisconsin Justices (these two plus the dissenters) appear open to a showing that caps have an impact on malpractice insurance costs and premiums. Such a showing was made by the 2005 Legislative Task Force on medical malpractice issues and at the hearings on 2005 Assembly Bill 766. The economies may turn out very small, but any amount, even a 1% cost savings, satisfies the one step at a time doctrine.

It is important to note that the cost savings and stability in the medical malpractice insurance market created by a cap also helps to stabilize the employment market, directly impacting access to health care. Again, such an impact does not need to address the access issue in its entirety, but can be part of a "one step at a time" approach to addressing a significant problem.

Evidence of recent high awards for noneconomic damages punctuates the dissenting opinion in *Ferdon*. *See* 284 Wis. 2d 573, ¶¶ 250-55 (Prosser, J., dissenting). The 2005 Legislative Task Force on medical malpractice issues and hearings on 2005 Assembly Bill 766 supplemented those data. President Bush's State of the Union address on January 31, 2006, included references to unjustified damage awards - they are part of a national problem. A Dane County jury award of more than $4 million in noneconomic damages coupled with the same amount of economic damages was recently reported in The Wisconsin State Journal, February 3, 2006, at B-1.

Comparing Noneconomic Damages Awards Misleads

It is not rational to evaluate all awards for noneconomic damages as comparable. This error by the *Ferdon* majority demands refutation. It requires a subjective judgment to quantify worry, anguish and grief in a specific case, but it is impossible to compare those awards as they appear in different settings and in different people. Indeed the justice and utility of pain and suffering awards has long been debated, *see* Jaffe, *Damages for Personal Injury: The Impact of Insurance*, 18 Law & Contemporary Problems 219, 224-225 (1953), but it remains settled law. People differ in their feelings of pain.

The discrimination which triggered two Justices to find a violation of equal protection in *Ferdon* lies in the distinction between caps on compensation for the most seriously hurt and no caps for those less seriously hurt. This led Chief Justice Abrahamson and Justice Bradley to conclude that the "cap limits the claims of those who can least afford it...". *Ferdon*, 284 Wis. 2d 573, ¶ 40. Here the Chief Justice refers to noneconomic damages as "unaffordable." She thus confuses noneconomic damages with economic damages. She continues to say that caps produce diminished damages for the most serious pain and suffering, while fully compensating the less seriously hurt. An award for economic damages compensates - that is the proper measure. It offends reality to say that money compensates for pain and suffering - money does not eliminate (i.e. compensate for) pain.

Noneconomic Damage Awards Rest on Many Variables

Even if two people have similar pain and suffering their compensation inevitably differs. The perceptions of the decision maker (jury or judge), the advocacy of counsel, the appearance of the victims, the manner in which counsel presents a case, etc., all affect the outcome of suits for noneconomic damages and the compensation awarded by juries. *See* Melvin M. Belli, *The Use of Demonstrative Evidence in Achieving the More Adequate Award* 33-35 (1952). No objective guidelines measure the money equivalent of pain and suffering. "[I]t is impossible to make an exact evaluation of the value of pain and suffering." Epstein, *Cases & Materials on Torts* 871 (6th ed. 1995).

Noneconomic Damage Awards Suffer from Arbitrariness

Despite flaws, our tort system uses money to recognize the worth of a victim's suffering even where the calculation defies economic analysis or logic. Caps appear the only alternative to unrestricted, and less predictable, arbitrary awards. The subjective element in setting damages makes it impossible, if not irrational to compare awards, let alone conclude that the more severely injured get more than the less-injured. Pain and suffering damages depend more on the fact finders perceptions than upon any objective factor. Awards for pain and suffering therefore rest on significant subjectivity by decision makers, and hence the inaccuracy of comparing awards. Objectively, a more

seriously injured person may receive less than a less seriously injured counterpart simply because of the manner of presentation, the ability of counsel to persuade, etc. Caps set in legislation have the merit of predictability. Caps rest on legislative debate and review where emotional considerations can be muted by time, by temperament, and by the legislative process. When a judge or jury assesses noneconomic damages the resulting award rests more on subjective factors than awards limited by a legislature.

Wisconsin Law Sets the Scope of Noneconomic Damages

Awards for noneconomic damages rest on state law and are not constitutionally required. Some health care programs do not allow noneconomic damages. For example, Medicare & Medicaid eliminate damages for pain & suffering. Commonly, however, states award unquantifiable damages for loss of enjoyment in life. *See, e.g., McDougal v. Garber*, 536 N.E.2d 372 (N.Y. 1989). The enjoyment of life stands as an equivalent of an award for pain and suffering.

Even before the enactment of the 14th Amendment, courts limited awards in tort suits if they were found excessive. In 1822, Justice Joseph Story, sitting as Circuit Justice, ordered a new trial unless the plaintiff agreed to a reduction in his damages. He stated 184 years ago:

> As to the question of excessive damages, I agree that the court may grant a new trial for excessive damages. . . . It is indeed an exercise of discretion full of delicacy and difficulty. But, if it should clearly appear that the jury have committed a gross error, or have acted from improper motives, or have given damages excessive in relation to the person or the injury, it is as much the duty of the court to interfere, to prevent the wrong, as in any other case.

Blunt v. Little, 3 F. Cas. 760, 761-62 (C.C. Mass. 1822).

If a judge holds power to limit damages it should follow that so also does a legislature in enacting statutes. Courts outside Wisconsin have deferred to state legislation designed to protect due process and check excessive awards based on nonquantifiable data. *See Ferdon*, 284 Wis. 2d 573, ¶ 17; *id.*, ¶ 311-312 (Prosser, J., dissenting). Due process can impose a substantive limit on the size an award of noneconomic damages just as due process limits punitive damages awards. *See Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1990); *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993); *BMW of N. Am. v. Gore, 517 U.S. 559, 615* (1996) (Ginsburg, J., dissenting) (table of state law limits on punitive damages).

Wisconsin's Equal Protection Doctrine

The Wisconsin Constitution has no explicit equal protection language, but relies on a construction of Article I, section 1 of the Wisconsin Constitution. For many years, Wisconsin equal protection law advanced in lock step with U.S. Supreme Court interpretations. The influence of an article by Justice William Brennan, *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489 (1977), has led some state courts to interpret their own state constitution as affording more than required by the United States Constitution. *Ferdon* illustrates this.

The Majority in *Ferdon* Relied on Opinion not Law

A critical weakness in the *Ferdon* opinion lies in WHY the severity of pain and suffering justifies caps. One harbors the suspicion that two of the Justices rest on their moral or emotional disapproval of the classification. However, as Justice Sandra Day O'Connor observed, the United States Supreme Court has "never held that moral disapproval, without any other asserted state interest, is a sufficient rationale under the Equal Protection Clause to justify a law that discriminates among groups of persons." *Lawrence v. Texas* 539 U.S. 558, 582 (2003) (O'Connor, J., concurring).

Wisconsin's Right to Jury Trial Provisions

Wisconsin's Constitution specifies that "the right of trial by jury shall remain inviolate" but does not define *when* that right exists. All of the Justices in *Ferdon* would sustain a proper legislative cap on noneconomic damages, and hence new legislation need only satisfy the four justices who found the cap "too low." Statutes such as the Federal Employers Liability Act (FELA) allow a jury to make awards for pain and suffering. *See Norfolk & Western Ry. v. Ayers*, 538 U.S. 135 (2003). No decision of any federal court holds that the 7th Amendment requires a jury to specify the dollar amount of a pain and suffering award. Indeed a law review article, cited in Chief Justice Abrahamson's opinion in *Ferdon* concludes that "constitutional challenges ... against a national cap on noneconomic damages ... are of questionable validity...". Kevin J. Gfell, Note, *The Constitutional and Econmic Implications of a National Cap on Noneconomic Damages in Medical Malpractice Actions*, 37 Ind. L. Rev. 773, 798 (2004) (cited in *Ferdon*, 284 Wis. 2d 573, ¶ 17 n.12).

The right to a jury trial does not necessarily embrace the right to a particular remedy, see *Scholz v. Metropolitan Pathologists, P.C.*, 851 P.2d 901, 907 (Colo. 1993) (where the Colorado Supreme Court upheld a medical malpractice award limitation); *see also Pulliam v. Coastal Emergency Servs. of Richmond, Inc.*, 509 S.E.2d 307 (Va. 1999).

Legislation must comply with the jury trial rights conferred by the 7th Amendment as applicable to states because of the 14th Amendment. The Supreme Court of the United States has not ruled on whether the 7th Amendment embraces a jury's right to determine damages for pain and suffering.

Legislatures commonly specify the nature of remedies, and can assign their calculation to a jury. *See Norfolk & Western Ry. v. Ayers*, 538 U.S. 135 (2003). Thus a federal district court ruled: "Particularly in the area of damages for pain and suffering, the legislature acts within its power in creating reasonable limits on the causes of action and recoverable damages it chooses to allow in the courts of law." *Franklin v. Mazda Motor Corp.*, 704 F. Supp 1325, 1331-32 (D. Md. 1989).

Even if the 7th Amendment required a jury to evaluate medical malpractice awards, the jury could only decide that damages for pain and suffering would be appropriate. The amount of that remedy is *not* a jury issue because the scope of the remedy is an issue of law, not an issue of fact. Thus if the 7th Amendment required a jury to evaluate medical malpractice awards [a big *if*], the jury could only decide that damages for pain and suffering would be appropriate. The amount of that remedy is *not* a jury issue because the scope of the remedy is an issue of law, not an issue of fact. In *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001), the Supreme Court ruled that a jury award of punitive damages did not constitute a finding of "fact" within the meaning of the 7th Amendment. The same principle applies to the similarly subjective calculation of a pain and suffering award.

Sincerely,

Gordon B. Baldwin
Evjue-Bascom Emeritus Professor of Law
University of Wisconsin Law School

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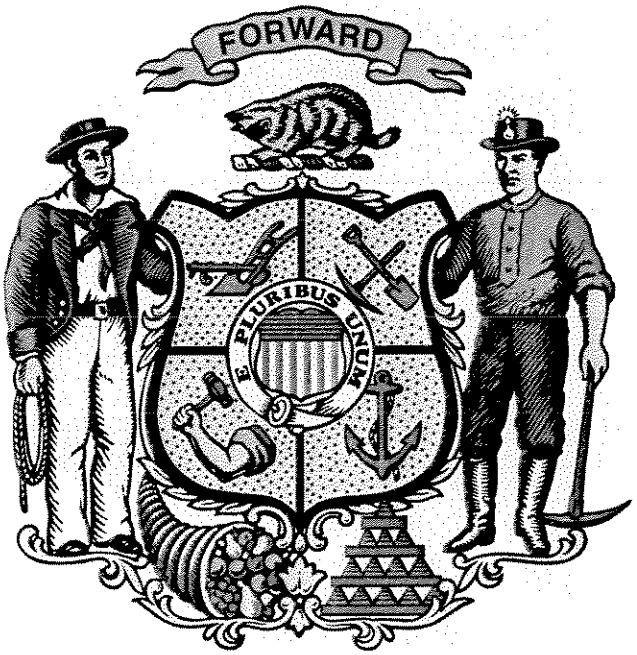
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State Representative

Testimony on AB 1073

Caps on Noneconomic Damages in Medical Malpractice

Senate Committee on Agriculture and Insurance – March 6th, 2006

Mr. Chair and members: Thank you for hearing this proposal this morning.

As you know, until recently Wisconsin had one of the fairest and most envied medical liability systems in the country. The goal of our medical liability system was to address the basic need for affordable and accessible health care while providing adequate compensation for parties injured by medical malpractice. This goal was advanced by providing unlimited economic damages to parties injured by medical malpractice, by guaranteeing that injured parties would receive all amounts awarded to them by establishing the mandatory Injured Patients and Families Compensation Fund, and by limiting awards of noneconomic damages (such as awards for pain and suffering).

This bill seeks to reestablish our balanced medical liability system by reestablishing a limit on noneconomic damages while addressing the Wisconsin Supreme Court decision that found the limit on noneconomic damages unconstitutional.

This bill reestablishes a limit on noneconomic damages, but increases the limit to $750,000, a 67 percent increase over the approximately $450,000 limit struck down by the Supreme Court. In addition, this bill would require the Board of Governors of the Injured Patients and Families Compensation Fund to submit a report to the Legislature every other year recommending any changes that should be made to the limit on noneconomic damages, including reasons for any recommended change to ensure that there is a rational basis for any change.

This bill explicitly outlines the Legislative purpose, findings, and conclusions that are the basis for a balanced medical liability system that includes a reasonable limit on noneconomic damages. The limit in this bill is based on strong documentary evidence and compelling

More . . .

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(Continued)

testimony received at multiple legislative hearings. This evidence is the basis for the legislative finding that a limit of $750,000 on noneconomic damages as part of a balanced medical liability system represents an appropriate balance between providing reasonable compensation to persons injured by medical malpractice and advancing affordable and accessible health care for all Wisconsin citizens.

As you know, AB 1073 passed the State Assembly last week. The bill picked up one amendment en route to passage: AA1 was a technical amendment to insert a forgotten word at the end of a sentence. AB 1073 passed the Assembly (as amended) on a final vote of 77-22 with 2 paired. This compelling and bi-partisan result indicates the support for AB 1073 in the Assembly.

We ask you to support protecting access to health care throughout Wisconsin and to support reasonable compensation for persons injured by medical malpractice by joining us in sponsoring this bill reestablishing Wisconsin's balanced medical liability system that worked so well for so many years.

I hope the committee will recommend AB 1073 for passage. Thank you.

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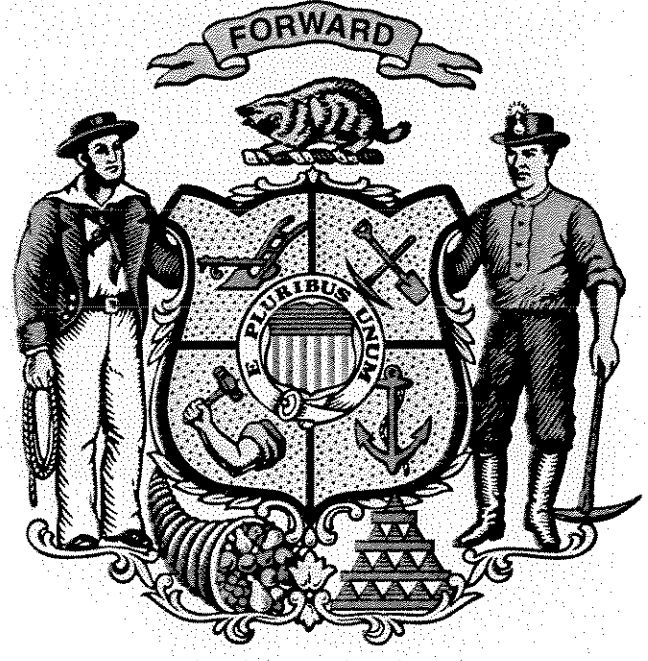
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Testimony of Daniel A. Rottier

on behalf of the

Wisconsin Academy of Trial Lawyers

before the

Senate Agriculture and Insurance Committee

Senator Dan Kapanke, Chair

March 6, 2006

2005 Assembly Bill 1073

Good morning, Senator Kapanke and committee members. My name is Daniel A. Rottier. I am the managing partner of Habush, Habush & Rottier, in Madison, WI. I serve as the President of the Wisconsin Academy of Trial Lawyers (WATL). On behalf of WATL, I thank you for the opportunity to appear to testify today against AB 1073, which caps noneconomic damages in medical malpractice cases at $750,000.

Our Wisconsin Constitution grants citizens several rights – the right to trial by jury, the right to remedy, the right to due process and the right to be treated equally under the law. WATL is dedicated to preserving these very important rights for our clients. Every day our members represent people in the state of Wisconsin who need these rights protected. Courts are places where people can go to have these rights vindicated. Not the Legislative or Executive branches. Courts then serve uniquely different functions than the Legislature or Executive branches. As Senator Lindsay Graham recently remarked while discussing judicial independence, courts are places people can go that politics often won't give them access to, where the unpopular can be heard, the poor can take on the

rich and the weak can take on the strong. That is why WATL opposes any cap on damage. It is fundamentally unfair to those injured through no fault of their own.

The proponents of this legislation have sought to portray Wisconsin when it had a cap, so having a fair and just system medical liability system. It did not. The Supreme Court said it discriminated against the most seriously injured. The Court said, "when the legislature shifts the economic burden of medical malpractice from insurance companies and negligent health care providers to a small group of vulnerable, injured patients, the legislative action does not appear rational. … No rational basis exists for forcing the most severely injured patients to provide monetary relief to health care providers and their insurers." This legislation does the same thing, it forces the most severely injured patients to provide monetary relief to negligent health care providers and their insurers. There is no rational basis for doing so.

The Legislature is manufacturing a number. The Legislature started out with $450,000/$550,000. Now based on the same findings, the number is $750,000. What work was done at the legislative level between the time of the last bill and this bill to come up with findings for this cap? It is clearly an arbitrary number that is designed for political palatability, not for any rational basis. As Justice Crooks, opined, "The caps changed from nothing, to $1,000,000, back to nothing, and finally to $350,000 over the course of 20 years. … It appears quite clear that the legislature settled on an amount for the noneconomic damage cap without a rational basis for doing so. It seems as if the $350,000 figure was plucked out of thin air. … If $1,000,000 was the appropriate figure for the cap in 1986, how can a $350,000 cap satisfy the constitutional requirements nine years later?" So, if the cap of $1 million was appropriate in 1986, how can $750,000 satisfy the constitutional requirements, 20 years later?

The Supreme Court gave the Legislature some very clear signals — if they are going to restrict the rights of Wisconsin citizens, it had better show some very good reasons and a rationale that justifies taking this extreme step. The evidence presented to the Legislature to date does not present any clear rationale that justifies a cap.

The proposed legislation has a number of incorrect "findings," in our opinion. One of the findings in the bill is that a cap on noneconomic damages *"... ensures adequate compensation for victims of medical malpractice."* If one of the

members of the Assembly were to have a family member who is rendered quadriplegic for life as a result of medical negligence, and if the person had a life expectancy of fifty years, would that member of the Senate really think that a maximum award of $750,000 noneconomic damages would be adequate compensation? It is a patently ridiculous "finding."

The bill states that the medical liability system should *limit disincentives for physicians to practice medicine in Wisconsin such as the unavailability of professional liability insurance coverage* ... The drafter of the bill has apparently forgotten that in 1975 the legislature created Wisconsin Health Care Liability Insurance Plan, a statutorily-created insurer that was created to provide insurance to any doctor in the state, no matter what the claims experience of that doctor has been. There is no possibility that doctors will be unable to obtain liability insurance coverage in Wisconsin.

The bill also suggests that the law *help contain health care costs by limiting the incentive to practice defensive medicine.* The notion that a cap in Wisconsin would have any impact upon the hypothetical risk of defensive medicine is misplaced. Unlike some other states, a doctor in Wisconsin who complies with the statutory requirements of having primary insurance coverage and coverage with the Injured Patients and Families Compensation Fund will never have to pay a penny out of his or her pocket, either by way of settlement or judgment. Wisconsin law does not allow that to occur. The primary carrier and the fund provide first dollar coverage, up to the extent of the fund assets, now about $758 million. What difference, then, would a cap make in whether a doctor does or does not order a certain diagnostic procedure? If the patient is injured and may obtain a maximum of $750,000 in noneconomic damages, will the doctor forego ordering the diagnostic test, but if the patient might recover $1 million, the doctor would order the test? It does not make sense.

Further, the whole notion of defensive medicine is misplaced. Are doctors really saying that they order unnecessary tests because caps are not in place? The fact is that insurance companies and Medicare look over bills to make sure that diagnostic tests are indicated. If not, the bills do not get paid. The notion that doctors are dishonestly performing unnecessary tests does not say a lot for the integrity of medical professionals.

The reality regarding defensive medicine is that it does not happen, in my experience. The Shay Maurin case exemplifies that. The evidence was that the cost to Hartford Hospital of performing a finger-stick blood sugar test would have been something like 57 cents. The test was not ordered. Five-year-old Shay Maurin died.

Or the case of a man who died at age 32 from a pulmonary embolism. He went to the clinic three times in twelve days complaining of the classic signs of a pulmonary embolism, including significant and worsening shortness of breath. He told the nurse practitioner who saw him that people thought that he had a blood clot in his leg, which the autopsy showed that he had. That blood clot, called a deep vein thrombosis, was the precursor to the pulmonary embolism. No diagnostic tests were ordered, other than a chest x-ray and blood work. The man is survived by a widow and three young children. What the people in Wisconsin need is a little more diagnostic testing, when indicated, not less.

The Fund is not jeopardy. The bill discusses the "financial integrity of the Injured Patients and Families Compensation Fund." The Fund assets have been growing by leaps and bounds. In the thirty years of fund existence, the Fund has grown to $758 million, exceeding, by far, the total compensation that has been paid to injured patients during the thirty years of Fund's existence. The Commissioner of Insurance, Jorge Gomez, testified that, "Wisconsin, ... probably has the most sound and functional malpractice environment in the country. ... Wisconsin is by far in a much better position than any other state that has a non-problem at the moment with their malpractice environments. ... And Wisconsin will not be [in a state in crisis] any time in the future, regardless of what your committee or the legislature decides on the issues of caps.... The reality is that the marketplace is competitive, the Fund is solvent, and we'll likely make adjustments based on the court's decision on assessment in the future."

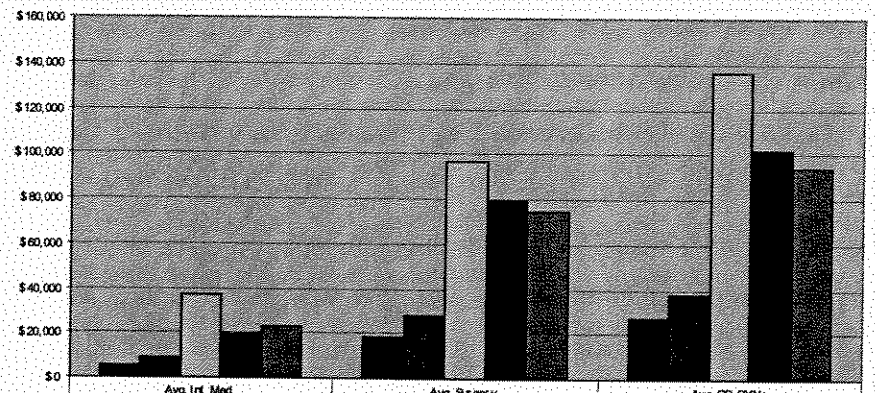
That hardly appears like justification for a cap.

The testimony from Physicians Insurance Company of Wisconsin (PIC), the state's largest medical malpractice insurer, indicated there was no impending crisis and that the worst-case scenario resulting from the cap's repeal would be "single-digit" premium increases for Wisconsin doctors. In addition, PIC spoke of Wisconsin's

"common sense" exercised by juries. Again we had only nine cases that were affected by the cap from 1995-2005, hardly a pressing problem.

Yes, I heard much hand wringing about "potential" problems, particularly access to physicians in rural areas. That problem existed before 1995. If the 1995 cap did not solve this problem, what evidence is there that a new cap will solve it?

Physicians in Wisconsin have the best insurance in the country – unlimited coverage at affordable rates. Unlike physicians elsewhere in the country, physicians here never have any of their personal assets at stake. The Wisconsin Hospital Association has had a radio ad that the doctors are fleeing to Missouri and Texas, all states with caps. For the to claim that doctors are leaving Wisconsin to practice in Missouri and Texas would mean the average doctor's malpractice premium would increase two times what they currently pay in Wisconsin. So, for an extra $56,515 to $64,039 OB-GYN's could leave Wisconsin for Missouri and Texas, states with a cap, while having to give up unlimited coverage for their personal assets. Is that a wise financial trade-off?



	Avg. Int. Med.	Avg. Surgery	Avg. OB-GYNs
Minnesota	$5,540	$18,406	$26,941
Wisconsin	$8,666	$27,883	$37,557
Illinois	$37,149	$86,633	$136,047
Missouri	$19,504	$79,172	$101,596
Texas	$22,639	$74,718	$94,072

Minnesota: No cap on noneconomic damages.
Wisconsin: Previous cap on noneconomic damages declared unconstitutional in *Ferdon v. Wisconsin Patients Compensation Fund*, 2005 WI 125.
Illinois: Signed 8/25/05, $500,000 cap for physicians and $1 million for hospitals, per defendant. $500,000 cap on noneconomic damages. Previous declared unconstitutional.
Missouri: Cap on noneconomic damages of $350,000 per defendant per occurrence of personal injury or wrongful death. (2005)
Texas: Cap of $250,000 for each claimant in action v. physician or health care provider other than health care institution, regardless of number of Doctors; cap of $250,000 for each claimant where final judgment is rendered v. single health care institution; where judgment is v. > 1 institution, cap for each institution is $250K for each claimant & limit of liability for all institutions is $500K for each claimant. (2003 Constitutional amendment)

Minnesota, on the other hand, has no cap on noneconomic damages, yet has malpractice costs lower than Wisconsin. Caps don't guarantee low malpractice insurance premiums just as not having a cap guarantees higher insurance premiums.

Whatever the objective is for a cap, the evidence — doctors fleeing or lower malpractice insurance premiums —is merely "speculative," which the Court held could not support the constitutionality of the cap.

I would like to highlight the evidence against the caps.

Case filings. Last year only 223 cases were reported filed with the Medical Mediation Panels, which must be done before pursing a malpractice claim. That is down by 7% from 2004, when 240 requests for mediation were filed. In fact, there were fewer requests filed in the final six months of the year, than the first six months. There was no corresponding explosion of claims from 1991-1995, when the previous $1 million cap sunset. In fact, there was a decline in filings.

There has been raised concern about rural health care access. If you review the filings by county in 2004, 26 counties had *no* medical malpractice cases filed, 29 counties had 1-3 cases filed, and 12 counties had 4-9 cases filed. Only four counties had more than 10 medical malpractice cases filed. Most of the counties with zero malpractice filings are in rural counties. If you correlate the places with doctor shortages, it would also be the same places where no malpractice cases were filed. So if these rural counties have no malpractice cases, how can that be a reason why doctors are not practicing medicine in rural areas?

Medical Malpractice filings by County:

Zero Cases: Bayfield, Buffalo, Dunn, Florence, Forest, Green Lake, Iowa, Jackson, Kewaunee, Lafayette, Langlade, Menominee, Monroe, Ozaukee, Pepin, Price, Richland, Rusk, Sawyer, Shawno, Sheboygan, Trempeleau, Vilas, Washburn, Waupaca, Waushara. (26)

1-3 Cases: Adams, Ashland, Barron, Burnett, Calumet, Chippewa, Clark, Crawford, Columbia, Douglas, Eau Claire, Grant, Green, Iron, Jefferson, Juneau, La Crosse, Lincoln, Manitowoc, Marathon, Marinette, Marquette, Oconto, Oneida, Pierce, Polk, Sauk, Taylor, Vernon. (29)

4-9 Cases: Dodge, Door, Fond du Lac, Kenosha, Outagamie, Racine, Rock, St. Croix, Walworth, Washington, Winnebago, Wood. (12)

Over 10: Brown (11), Dane (29), Milwaukee (49) and Waukesha (25). (4)

Medical malpractice insurance premiums are an exceedingly small portion of overall health care costs. In Wisconsin, they are now less than 40 cents out of every $100 dollars spent on health care and it is a declining proportion. *Expansion Magazine* has rated Wisconsin's malpractice costs as the lowest in the nation. Meanwhile, Wisconsin health insurance premiums are rated second highest in the nation. There is no correlation between malpractice costs and health care costs.

The Court found that "even if the $350,000 cap on noneconomic damages would reduce medical malpractice insurance premiums, this reduction would have no effect on consumer's health care costs." That certainly proved true under the $350,000 cap. Did anyone experience lower health care costs since 1995? The Court concluded, "Accordingly, there is no objectively reasonable basis to conclude that the $350,000 cap justifies placing such a harsh burden on the most severely injured medical malpractice victims, many of whom are children."

With a cap, the Fund's enormous assets are denied to patients for whom juries have awarded compensation above the cap. In the last 10 years, the Fund's assets have almost tripled, increasing an average of $44.3 million a year to $758 million. During the same period, the Fund was only drawn upon an average of 18 times per year and payments made to families averaged only $27.7 million per year. *That amounts to $16.6 million less than the average annual increase in Fund assets.* Meanwhile, the Fund's assets, while barely tapped by injured patients, have been utilized to reduce Fund malpractice fees for doctors. Fund fees were reduced approximately 70% from 1997-2006.

Injured Patients & Families Compensation Fund

Year	Number of Cases Paid	Losses Paid to Injured Patient & Families
1994-95	25	$24,098,896
1995-96	28	$51,456,670
1996-97	16	$34,679,277
1997-98	24	$18,718,458
1998-99	28	$19,929,978
1999-2000	12	$19,657,326
2000-01	22	$39,636,276
2001-02	14	$35,304,773
2002-03	11	$22,074,552
2003-04	13	$19,496,969
2004-05	6	$20,300,000
Total	**199**	**$305,353,175.00**
Average	**18**	**$27,759,359**

Now the proponents are complaining about the 25% increase in fees for 2006-07. *Fund fees are still 45% lower than they were in 1986.* That is in actual dollars. How many people can say that their insurance is 45% lower than 1986 levels. Imposing a new cap will not change the Fund fees for next year and the Fund actuaries don't want to see a decrease in the fees.

The Fund Board has not actually based its rates on actuarial projections for a long time. In 2003, before the cap was declared unconstitutional, the Fund actuaries assumed it was going to pay out $114,817,208 for the year 2004-05. If the Fund Board was going to collect fees to cover that amount, it would need to take in approximately $71 million in Fund fees to cover those losses. The Board was currently taking in $31.6 million in Fund fees, so this would mean a *124.5% increase* to break even. *The Board chose to reduce fees 20%.* Why? Since 1997, Fund actuaries recommended reserve changes of over $375.5 million, a significant reduction. At the same time, the Fund has grown to over $758 million. Because of the tremendous assets in the Fund, the Fund Board has chosen to reduce fees for doctors because of the overestimation of the actuarial projections and the fact they don't want a Fund "surplus." It really doesn't have much to do with caps.

WATL believes that grossly inaccurate actuarial projections fueled the need for a previous cap. In 1995, sponsors of the cap legislation used the inaccurate projections by actuaries as a reason to impose the noneconomic damages cap. Legislators were told there was a *$67.9 million projected actuarial deficit* as of June 30, 1994. Instead, the actuaries now estimate there was a *$167.5 million actuarial surplus*. ***It shows that when the Legislature acted in 1995, it was given estimates that were off by almost $235.4 million!!*** As the Supreme Court said it didn't seem to make any difference if there was or wasn't a cap because the Fund has flourished both with and without a cap.

One of the most persistent assertions about caps is that they would hold down malpractice premiums for doctors. The Court analyzed several studies and found that "according to a General Accounting Office report, differences in both premiums and claims payments are affected by multiple factors in addition to damage caps, including state premium rate regulation, level of competition among insurers, and interest rates and income returns that affect insurers' investment returns. Thus, the

General Accounting Office concluded that it could not determine the extent to which differences among states in premium rates and claims payments were attributed to damage caps or to additional factors. For example, Minnesota, which has no caps on damages, has relatively low growth in premium rates and claims payments. "

In fact if you listened to the insurance companies own executives, they would not promise any savings from caps. This was recently highlighted in Illinois. In a recent news article it was reported, "As for caps on awards resulting in reduced rates for malpractice insurance premiums that doctors must pay, supporters of caps say they can't promise the new caps will significantly lower insurance rates.

Ed Murnane, the leading tort reform advocate in Illinois, said at a tort reform summit in mid-May, 'No, we've never promised that caps will lower insurance premiums.'"

Insurance execs speak up

"We wouldn't tell you or anyone that the reason to pass tort reform would be to reduce insurance rates." Sherman Joyce, President of the American Tort Reform Association, (Source: "Study Finds No Link Between Tort Reforms and Insurance Rates," *Liability Week*, July 19, 1999.)

"Insurers never promised that tort reform would achieve specific premium savings . . ." (Source: March 13, 2002 press release by the American Insurance Association (AIA).)

"[A]ny limitations placed on the judicial system will have no immediate effect on the cost of liability insurance for health care providers." (Source: "Final Report of the Insurance Availability and Medical Malpractice Industry Committee," a bi-partisan committee of the West Virginia Legislature, issued January 7, 2003.)

An internal document citing a study written by Florida insurers regarding that state's omnibus tort "reform" law of 1986 said that ***"The conclusion of the study is that the noneconomic cap . . . [and other tort 'reforms'] will produce little or no savings to the tort system as it pertains to medical malpractice."*** (Source: "Medical Professional Liability, State of Florida," St. Paul Fire and Marine Insurance Company, St. Paul Mercury Insurance Company.)

Now a December 2005 report issued by the Foundation for Taxpayer and Consumer Rights (FTCR) shows that insurers have been engaged in questionable accounting practices. The report reviews the loss projections of medical malpractice insurance companies, beginning with the "insurance crisis" of the mid-1980s. The data show that medical malpractice insurers have historically inflated their loss projections and then revised their reported losses downward in subsequent years. The "incurred losses" that medical malpractice insurance companies initially reported for policies in effect in each of the years examined were, on average, ***46% higher*** than the amount the insurers actually paid out on those policies.

Based on the analysis, FTCR concludes that the "incurred loss" data reported by medical malpractice insurers do not represent, or even approximate, the actual losses a

company will sustain as a result of claims against its policyholders. If historical loss inflation is any indicator of current trends, insurance companies overstated loss projections by $15 billion between 1995 and 2003.

The study concludes that the insurance industry is in need of stringent regulatory and accounting reforms. Until such reforms are enacted, FTCR believes a moratorium is necessary on both rate increases and legislatively enacted limits on legal rights known as "tort reform." http://www.consumerwatchdog.org/malpractice/rp/

This theme was further bolstered by a rate filing by GE Medical Protective, which sought a 19% rate increase just one year after Texas voters narrowly approved a $250,000 cap on non-economic damages in medical malpractice cases. After claiming that caps would reduce malpractice premiums, the insurer admitted in its rate-filing request that "capping non-economic damages will show loss savings of 1%."

Further, we must agree with the Supreme Court that, "Victims of medical malpractice with valid and substantial claims do not seem to be the source of increased premiums for medical malpractice insurance, yet the $350,000 cap on noneconomic damages requires that they bear the burden by being deprived of full tort compensation."

Various new studies have been released to bolster this statement. In Texas, researchers looking at Texas found that soaring malpractice premiums were not correlated with malpractice lawsuits and settlements. A team of legal scholars from the University of Texas, Illinois, and Columbia examined all closed claim cases from 1988 to 2002. The law professors found that claims rates, payments and jury verdicts were roughly constant after adjusting for inflation and concluded that the premium increases starting in 1999 "were not driven primarily by increases in claims, jury verdicts, or payouts. In the future, malpractice reform advocates should consider whether insurance market dynamics are responsible for premium hikes."

A second comprehensive study of medical malpractice claims, this time in Florida, also shows no sharp increase in lawsuits relative to population growth and a modest increase in the size of settlements. "When we compared the number of malpractice cases to the population in Florida," said Neil Vidmar, one of the study's authors and professor at Duke's School of Law, "there has been no (large) increase in

medical malpractice lawsuits in Florida." Vidmar said rising health-care costs and more serious injuries resulting in larger claims or litigated payments caused the increase in the claim total. Finally, the report concludes the "vast majority of million-dollar awards were settled around the negotiation table rather than in the jury room." Of the 831 million-dollar awards reported since 1990, 63 were awarded by juries. The rest occurred as settlements.

The National Bureau of Economic Research study reviewed the relationship between the growth of malpractice costs and the delivery of health care in three areas: (1) the effect of malpractice payments on medical malpractice premiums, (2) the effect of increases in malpractice liability to physicians closing their practices or moving and (3) defensive medicine. The study found a weak relationship between medical malpractice payments and malpractice premium increases.

Conclusion

The ominous implications for the Constitutional rights of Wisconsin citizens—particularly injured patients—were minimized during the legislative debate in 1995 that imposed the cap on pain and suffering in medical malpractice cases. Instead, advocates of the cap argued that this loss of legal access for a relative few would be far outweighed through a tradeoff for broader public benefits — lower health care costs, more doctors in underserved areas and a solvent and stabilized Fund for injured patients and their families.

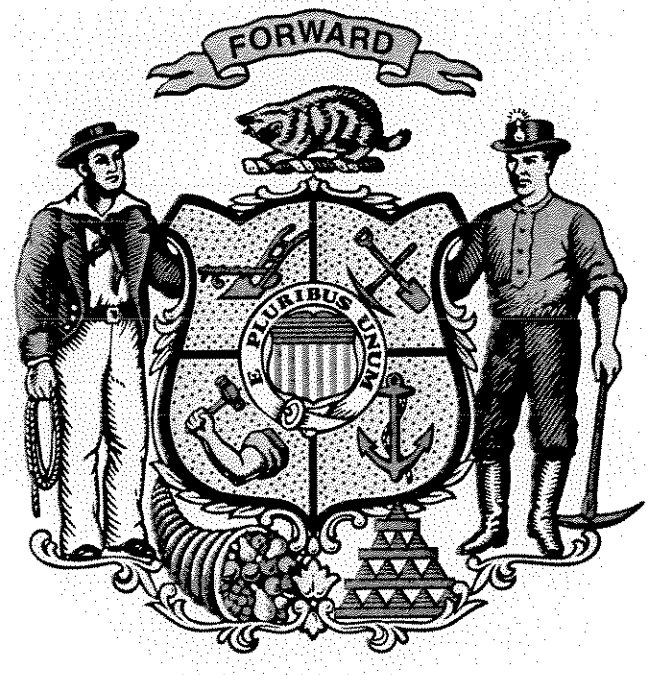
In practice over the past decade, the tradeoff of legal rights for public benefits proved to be disastrous. While our legal rights certainly were diminished, the promised benefits have never appeared. Wisconsin does not have lower health care costs, doctors are still not going to underserved areas and the Fund was never in jeopardy, it had been in surplus since 1990, the year the $1 million cap expired.

The Legislature is following down the same trail again to impose a cap the attempts to ask the most severely injured patients and their families of severely injured patients to bear the burden of "fixing" the legal malpractice system alone. That is neither fair nor just.

Furthermore, the proposal does nothing to address the concerns that the cap has a disparate effect on patients with families or that it makes no allowance for the age of an injured patient. It is these injured patients and their families who are bearing the total burden if medical malpractice occurs and a jury awards more than the cap. Why is it fair to burden the most seriously injured while providing monetary relief to health care providers and their insurers?

Caps are a barrier to the courthouse for injured patients and their families and strike at the very heart of the civil justice system. It deprives juries of their constitutional mandate to do *justice* in individual cases. You are once again tilting the scales of justice in Wisconsin against severely injured patients and their families in favor of health care providers and their insurance companies.

We believe that is not only immoral, but unconstitutional.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TESTIMONY OF JUSTICE WILLIAM A. BABLITCH (RET.),
March 6, 2006
SENATE AGRICULTURE AND INSURANCE COMMITTEE

Good morning. I am Justice William Bablitch, retired after 20 years as a justice on the Wisconsin Supreme Court. Prior to that, I served 11 years as a Wisconsin state senator, 7 of those years as the Senate majority leader. I am currently a partner at Michael Best & Friedrich, working part time primarily as an appellate and legislative consultant.

Recently, I was asked by the Wisconsin Hospital Association and the State Medical Society to assist in developing medical malpractice legislation that would pass constitutional muster in the Wisconsin Supreme Court, while keeping in mind and being sensitive to the concerns of the legislature and the governor.

I enlisted the aid of my good friend and colleague, Raymond Taffora, sitting beside me, a fellow partner at Michael Best & Friedrich and former legal counsel to Governor Tommy Thompson.

The bill you see before you today (AB 1073) is the result of a lot of work by a lot of people. I am confident it resolves the concerns of at least a majority of the Supreme Court if not all of them. It does, of course, involve compromises. Some wanted cola's, some did not. Some wanted caps on attorney fees, some did not. Some wanted age distinctions, some did not. In the end, it was decided a "clean bill" addressing only the cap on non economic damages was the best way to proceed. As a legislative veteran, I know as you do that it is possible to "love a bill to death" with amendments, substitutions, additions, and deletions. We have avoided that, other than to provide periodic review by the Injured Patients and Families Compensation Fund.

As I read and re-read and re-read the *Ferdon* opinion, which struck down the original cap set in 1995 of $350,000, I became convinced that the primary concern of the Court was the amount of the cap. Two of the justices who voted to strike down the cap, Justice Crooks and Justice Butler, mentioned only the size of the cap and indicated that some cap could be constitutional, but that the cap of $350,000 adjusted for inflation was irrational and arbitrary. We drafted this bill with those concerns in mind.

Let me begin at the beginning, which is always a good place to start.

By setting a cap of $750,000 on non-economic damages, the statute creates two separate classifications of victims: those with non-economic damages above the cap who recover only a part of their non-economic damages, and those with non-economic damages below the cap who recover all of their non-economic damages. In *Ferdon*, the Court concluded that the statute violated Wisconsin's constitutional guarantee to equal protection of the law because there was not a rational relationship between the cap and the objectives sought by the legislation. In other words, in *Ferdon* the court said the cap

did not accomplish any of the objectives sought by the legislation: the cap did not compensate victims fairly; the cap did not lead to reasonably priced medical malpractice insurance; the cap did not contribute to the stability of the Injured Patients and Families Compensation Fund; the cap did not lower health care costs to the consumer; the cap did not contribute to the attraction and retention of doctors.

This bill begins with an extensive introduction in Section 3, involving a declaration of legislative purpose, findings and conclusions. Given the importance of this Section, we recommend it be moved ahead of Section 1 and be given the title "Declaration of Legislative Purpose, Findings and Conclusions." This is an attempt to make as clear as possible to the Court the legislative goals in enacting this legislation, the rationales used in reaching those goals, and in some instances citing specific parts of the record to support its conclusions. And make no mistake, any bill involving caps will eventually reach the Court.

It is unusual to have such extensive findings as part of the statute, but the importance of the documents, testimony and studies must be pointed out and stressed to the Court. That is because in *Ferdon*, the court in addressing the issue of rational basis, paid little if any attention or discussion to the plethora of evidence in the record in support of a cap. Instead, the majority concentrated on the evidence in opposition to the cap. With all due respect, the majority inexplicably ignored or at least paid scant attention to the evidence in support of the cap. The majority paid great deference to the evidence opposing a cap, and little if any deference to the evidence in support of a cap. At the very least, the majority seemed to be engaged in a weighing process, which of course they should not do. This despite their oft stated rule that they must search for a rational basis. It's not a question of "greater weight" or "preponderance of the evidence." The legislature's policy choices are entitled to great deference, as has been said time after time by the Court. If after considering all the evidence the legislature took into account in support of their policy choice, and only after finding this evidence to be without any merit whatsoever, should the Court find the statute unconstitutional.

Thus, this introduction to the statute . It must be shown to the Court that there was a reasonable basis for your policy choices. The Court does not have to agree with the wisdom of your choices, the Court does not have to find that your rationales outweigh countervailing rationales. There may well be countervailing documents, such as those pointed out in the majority opinion in *Ferdon*. However, to strike down the bill, the Court must find there is NO rational basis for your choices. This legislation, in its Declaration of Purpose, Findings and Conclusions, directs the court to evidence supporting your policy choices.

As an example, a concern of the Court (or least two members of the Court) was the amount of the cap. This record will contain two actuarial studies that conclude that any cap above $750,000 is quickly approaching meaninglessness. This and other evidence in the record, in my judgment, more than justifies this figure of $750,000.. It is less than some would want, it is more than others would want. But the evidence before the legislature is overwhelming that at some point a cap becomes meaningless and

ineffective if it is set too high. In my judgment, the amount of this cap is like baby bear's porridge: not too high, not too low, just about right.

The Court in numerous cases has emphasized that it must be a court of law, not of will. It cannot substitute its judgment for that of the legislature; if they do, they become nothing more than a super legislature. The question is not whether the Court disagrees with the policy choices made by the legislature, the only question is whether the choices made by the legislators were reasonable. Some members of the Court may well disagree with the policy choices of the legislature, but that is not even a relevant inquiry. The only inquiry appropriately made by the Court is whether the legislature's choices were reasonable. And the Court must search for a reasonable basis, always presuming the statute is constitutional.

Is any cap necessary at all in order to have affordable and accessible health care for our citizens? This is of course the ultimate question debated by supporters and foes. Is there evidence to support both sides? Of course. But the question is not whether the opponents of this legislation have support for their position, the only question is whether the supporters of the cap have any reasonable support for their position. Only if the Court finds no reasonable basis, no rational relationship between the objectives sought and means to attain them, can they strike it down. The only question is whether there is any reasonable basis for a cap. In my judgment, this legislation passes that test.

That is not just my opinion. After drafting the bill, we submitted it to Professor Gordon Baldwin, emeritus professor of the University of Wisconsin Law School. Professor Baldwin is a noted constitutional lawyer, and taught that subject for many years at the law school. We asked him to review the legislation and give us his opinion on its constitutionality. Professor Baldwin concluded in a lengthy letter to be made part of this record: "In my opinion, the proposed legislation is constitutional and will cure the defects associated with the present cap on non-economic damages found by the *Ferdon* court. There is more than an adequate basis to find that legislative enactment of a cap of $750,000 on non-economic damages in medical malpractice cases is rational and reasonable and will overcome objections on equal protection or right to jury trial grounds."

Professor Baldwin goes on at length discussing the basis for his conclusions. He puts stress on the justifications for the cap on non-economic damages, and particularly the records of the legislature's 2005 Task Force and the hearings on AB 766. He pointed to the emphasis of those hearings with approval:

1. Caps on damages ensure adequate compensation at reasonable cost-the caps on non economic damages provide the necessary balance to the costs needed to ensure the extraordinary guarantee of all economic damages provided by the Wisconsin medical liability system created by law can continue;
2. The cap helps to reduce the size of malpractice awards and the cost of insurance by promoting predictability;

3. A predictable medical malpractice insurance market is necessary to attract and retain health care practitioners in Wisconsin and, thus, is necessary to maintain access to health care particularly for vulnerable populations most at risk for losing their practitioners; and
4. The cap protects the assets of the injured patients and families compensation fund.

One last word. The legislators who have been working on this bill, and those who will tackle it one more time, deserve commendation and respect. Again, as a member of the "has been's" club, I know from vast experience that our political system today, unfortunately, provides little political gain to those politicians who attempt to deal with problems before they become crises. It is unfortunate but true: the most political points come to those who deal successfully with problems or crises after they have become crises and are on everybody's radar screen. There is not a whole lot of political gain for those legislators who are coming to grips with the medical malpractice problem before it becomes a crisis. But it is the right thing to do. And that's what this bill does.

Thank you Members of the Committee. Ms Chairperson, I ask that my remarks be made part of this record.

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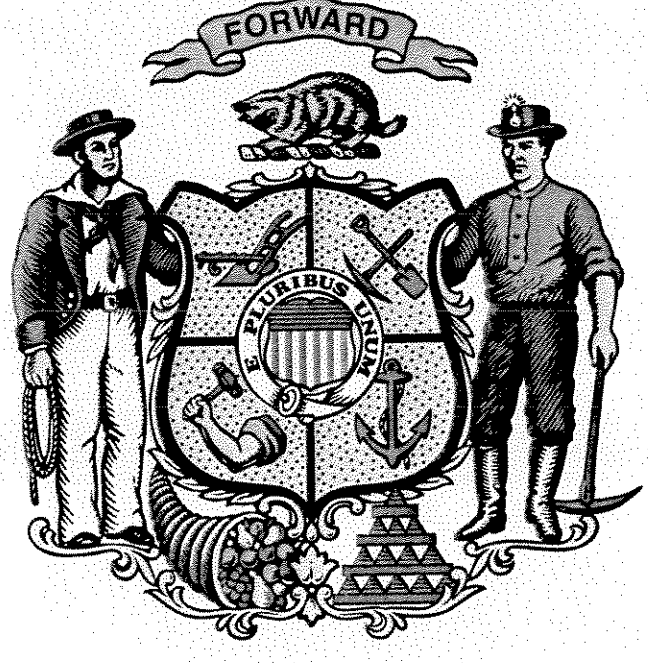
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BAY AREA
MEDICAL CENTER

Testimony in Support of AB 1073

David Olson
Bay Area Medical Center
March 6, 2006

Good morning Chairman Kapanke, Senator Hansen, who is my state senator, and the rest of the members of the committee. My name is David Olson, and I am the President and CEO of Bay Area Medical Center located in Marinette, Wisconsin.

This morning, I would like to share with you how the reforms of medical malpractice or lack thereof have shaped medical care in our community for decades.

Marinette, WI is a unique community because it sits on the border with Michigan. Our sister city of Menominee, MI is separated only by a river. It is nearly the same size as Marinette. People look the same; talk the same. Commerce travels back and forth easily between the bridges that cross the Menominee River. In fact, if you are not native to the area, you rarely could tell whether you are in Wisconsin or Michigan. But there are differences. Gas is a little cheaper in Michigan, but the roads are a little bumpier. Sales tax is lower in Michigan, but cigarettes are much more expensive.

Finally, healthcare is different between the two states. You see, in communities of nearly identical size, make up, and demographics, with a medical community of over seventy-five physicians, there are only two doctors who practice in Menominee, Michigan and the balance practice on the Wisconsin side. Why is that?

The reason is simple, as every physician in our area will tell. Medical liability in the state of Michigan is prohibitive to practice. When given a choice (in our community a choice of simply crossing a bridge) practicing in Wisconsin is the only logical decision.

As you can imagine, the bridges that cross the Menominee River mean a whole lot for healthcare to our community residents in Michigan. Bay Area Medical Center in Wisconsin is their only hospital, their only emergency room, their only access to medical specialists.

In the discussions and debates these last several months over medical malpractice in Wisconsin, there has been much said about the victims; victims of malpractice and negligence on the part of physicians. There are other victims that have not been discussed, but ones we see at Bay Area Medical Center far more often than we should.

(over)

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These patients have not seen a physician because of lack of access. This might be as simple as the diabetic patient who didn't manage their medications. But at its worst, is the young, pregnant mother who shows up in our emergency room ready to deliver, who has not received any pre-natal care. The victim is the baby, whose start in life is poor. This infant is not a victim of medical negligence or malpractice on the part of the physician. The child is a victim of lack of care, lack of access.

It happens. I see it. And for the three obstetricians who practice in our hospital, it is one of the worst nightmares.

And today and the last several months these physicians have an additional worry. When they see this young mother for the first time, who has not had previous access to prenatal care, they wonder, "What may happen when I deliver this high risk baby?" Their concern is legal now, when once their concern was primarily medical.

Of the three obstetricians who practice at Bay Area Medical Center, two are in their mid fifties. They both knew that the lifestyle of delivering babies around the clock would someday take its toll. But for both of them, Wisconsin's new malpractice climate has accelerated their discussions of limiting their practice to gynecology only. Our third obstetrician is in his mid-thirties. He is from Colorado. Today, Wisconsin is home to this young doctor, but it may not remain that way.

Many of you are aware that Wisconsin, like many states, faces physician shortages. This is much more acute in rural settings like Northeast Wisconsin.

Over the past five years, Bay Area has recruited numerous physicians to our medical center. The favorable malpractice climate in Wisconsin clearly had been one of our best tools. We have recruited physicians from Illinois, Pennsylvania, and Texas.

In fact, a year ago I successfully recruited an Orthopedic Surgeon. A Wisconsin native from LaCrosse, he trained in our state but was practicing in Louisiana. For a time, our community finally had three full time orthopedic surgeons.

Unfortunately, last fall, one of our long-term orthopedic surgeons returned to his home state of California after practicing in Wisconsin for over ten years. We need three surgeons to cover our Emergency Room. Needless to say, I am diligently recruiting for an additional Orthopedic Surgeon as our ER is covered by asking our existing doctors to take extra call.

In the three months we have been recruiting, I have spoken with a number of surgeons. All are keenly aware of the favorable malpractice history in Wisconsin, and more importantly, the precarious situation it is in today.

Two weeks ago, I was trying to convince a surgeon from Lake Charles, Louisiana to come for a visit to Marinette. As a native of Pennsylvania, he moved south to practice in a better medical environment, only to have his home and community devastated by a hurricane. Despite a successful medical practice, his family insists on moving to a safer environment.

Of course I could easily assure him of our lack of hurricanes on the east coast of Lake Michigan. However, he also asked about malpractice in Wisconsin. Could I give him assurances about Wisconsin not being the medical crisis it has in his home state of Pennsylvania? I could not.

I would like to call this orthopedic surgeon back and entice him to practice in our community; I want to make sure that our ER is always covered. Marinette needs your help to recruit good doctors. I ask that for the people of our community, for Northeast Wisconsin, in fact, for the entire state, that you support AB 1073. Thank you!

Bay Area Medical Center is a 99-bed general acute care hospital located in Northeast Wisconsin. It includes a community primary/secondary care hospital, a 71,100 sq.-ft. outpatient surgery center, a primary care physician joint venture, and a radiation oncology joint venture. BAMC offers select, advanced medical services, with an emphasis on diagnostic radiology, rehabilitation services, ambulatory surgery, obstetrics, cancer treatment and urgent care. In March of 2005, Bay Area Medical Center was named one of the nation's 100 Top Hospitals by Solucient, the leading source of healthcare business intelligence.