



# Wisconsin Medical Society

Your Doctor. Your Health.

TO: Senate Committee on Judiciary, Corrections, Insurance, Campaign Finance Reform and Housing

FROM: Mark Grapentine, JD – Senior Vice President, Government Relations

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RE: Opposition to Senate Bill 203

On behalf of nearly 12,500 members statewide, the Wisconsin Medical Society thanks you for this opportunity to register our opposition to Senate Bill 203.

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 negligence does occasionally occur; 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 negligence 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 negligence versus affordability of health care for the many.

#### Wisconsin's Medical Liability Climate Attracts Physicians

Wisconsin physicians are heralded for providing some of the nation's highest-quality health care – indeed, the most recent state rankings from the federal Agency for Healthcare Research and Quality (AHRQ) has Wisconsin ranked first in the nation. Despite our size, Wisconsin is a destination state for physicians; this is due in part to our relatively stable medical liability climate, which attracts physicians from other states. The American Medical Association consistently rated Wisconsin as one of just a handful of states considered not to be in a medical liability crisis or near-crisis. Affordable medical liability insurance is one factor in this ranking, and the umbrella insurance Injured Patients and Families Compensation Fund (Fund) undeniably helps make medical liability insurance affordable for Wisconsin physicians.

The Fund covers every dollar of unlimited economic damages above a physician's mandated primary insurance coverage of \$1 million per occurrence/\$3 million total per year, yet this costs taxpayers zero dollars. Every dollar awarded in a medical liability case – and even the costs the Office of the Commissioner of Insurance (OCI) bears to administer the Fund – are paid for via fees assessed on physicians, hospitals and certain nurses. The Fund is unique in the nation; no other state requires physicians to pay into an umbrella insurance coverage fund with the possibility of unlimited economic damages.

#### IPFCF Fiscal Status Jeopardized

Unfortunately, the Fund's fiscal stability is endangered. In October 2007 the long-delayed 2007-09 state biennial budget included a \$200 million "transfer" from the Fund to backfill General Purpose Revenue (GPR) for the state's Medicaid program. In our opinion, it is no coincidence that the Fund is now in an actuarial deficit, prompting the Office of the Commissioner of Insurance to propose increasing the fees for Fund participants. On July 1, 2009, a 9.9 percent Fund fee increase went into effect.

These deficits are due in part to the Supreme Court's 2005 action removing the cap on non-economic damages that had been in place – the LFB reports that the Fund calculated the Supreme Court's action as increasing potential loss liabilities by \$173,000,000 (according to Legislative Fiscal Bureau Paper 377 from the 2007-09 budget). While the Legislature enacted a new, higher \$750,000 cap on non-economic damages that took effect in 2006, it is indisputable that the Fund faces greater liabilities than was planned for in early 2005.

Because of this fiscal situation, it is not the time to further increase the Fund's liabilities by adding new potential claims as contained in Assembly Bill 291. If this proposed legislation is enacted, potential liability exposure will increase, and insurance rates for physicians, hospitals, clinics and many other health care professionals will therefore rise. This bill will upset the delicate balance achieved through bipartisan legislative efforts over the past three decades.

Alternative: Better Physician-Patient/Family Communication

Instead of increasing the Fund's potential liabilities, physicians wish to enact laws that will foster better communication between a physician and a patient's family when a negative outcome occurs. Physicians understand that sometimes family members feel driven to file a lawsuit when they feel that answers about "what happened" are not provided to their satisfaction. This is an unfortunate byproduct of the litigation environment – oftentimes, physicians are advised by their legal counsel not to communicate with patients or their families following a negative outcome due to the fear those conversations could become evidence in a future lawsuit. To remedy this problem, physicians supported so-called "I'm Sorry" legislation (2005 Assembly Bill 1021) to allow physicians to express sentiment of apology or condolence without fear of increasing liability exposure. Unfortunately, Governor Doyle vetoed the bill.

Alternative: "Peer Review"

Physicians also support stronger "peer review" laws, which would foster frank internal discussions at a hospital or clinic following a negative event and allow facilities to implement quality improvement activities that would be confidential and privileged. Peer review can prevent negative outcomes before they happen by identifying and improving individual or system procedures. Physicians supported a bill two sessions ago (2005 Senate Bill 578) that accomplished these goals, and the Legislature passed the bill by voice vote in the Assembly and a 29-3 Senate vote. Unfortunately, Governor Doyle vetoed the bill.

The stories of those who have lost loved ones as a result of medical negligence are heart wrenching. However, 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 those 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.

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 liability actions. In Wisconsin, we have done this in a bipartisan fashion and the result is Chapter 655. We urge you to continue to appropriately maintain this balance and oppose Senate Bill 203.

Thank you again for this opportunity. If you have any questions on this or any other issue, please feel free to contact me at any time.

## Senate Bill 203 – Relevant Cases

In re Wells v. Mt. Sinai Med. Ctr., 183 Wis. 2d 667, 515 N.W.2d 705 (1994)

Justice Jon Wilcox writing for a 6-1 majority, after citing a long line of case law where the courts have ruled that drawing a clear line regarding liability exposure is necessary:

Of these public policy considerations, those concerned with the imposition of excessive liability are particularly germane to claims for lost society and companionship. That is because the plaintiff's recovery in such cases is predicated upon the emotional ties he or she shares with the injured party. Consequently, the possible universe of claimants is limited only by the number of persons with whom the injured person has established personal relationships. Moreover, the negligent tortfeasor in such cases faces the considerable burden of disproving the existence and/or significance of any such relationships. As a result, courts generally recognize that this particular cause of action necessitates some degree of judicial guidance. (Wells at 675-76)

[S]ound public policy dictates that some limit be placed on the liability faced by negligent tortfeasors. . . . To hold that same tortfeasor potentially liable to the parents (both parents, when applicable, could presumably bring separate claims) for the loss of an adult victim's society and companionship is, we believe, excessive and contrary to public policy. (Wells at 677-78)

Limiting recovery for reasons of public policy always runs the risk of working harsh results in individual cases. For instance, people may question the logic which denies recovery to the parent of an 18 year old, but allows recovery for the parent of a 17 year old. . . . [Is] such line-drawing an indication by the legislature or this court that the parental relationships in the first instances are less significant than in the second? Of course not. But given the compelling public policy concerns in this area, a line at which liability ends must be drawn. We believe that the age of majority represents a rational place to draw that line. (Wells at 680-81)

Czapinski v. St. Francis Hospital, Inc., 236 Wis. 2d 316, 613 N.W.2d 120 (2000)

Justice Crooks, writing for a unanimous court, described a number of reasons why recovery in medical liability cases – including the ability for adult children to recover for loss of society and companionship of a parent – can be limited:

Possible justifications . . . include the prevention of, *inter alia*, a sudden increase in the number of malpractice suits, increased medical costs or decreased accessibility to health care. Furthermore, the distinction between the adult child and minor children could be the different degree of

dependency which each would be presumed to have on their parents for their continued financial and emotional support. Minor children rely much more heavily on their parents for financial and emotional support than do adult children, and this difference is substantial. Faced with the need to draw the line on who can collect for loss of society and companionship, we follow the view established by this, and other Wisconsin courts, that the availability of claims for loss of society and companionship should be limited to those who would suffer most severely from the loss of an intimate family relationship; adult children cannot be included in this classification. . . .

For the foregoing reasons, the classifications of tortfeasors and tort victims are not arbitrary or irrational, but are based on reasonable and rational criteria. (Czapinski at ¶¶ 31-32, citations and internal quotations removed)