

**Testimony
of
Robert L. Jaskulski and Keith R. Clifford
on behalf of the
Wisconsin Academy of Trial Lawyers
Before the
Senate Health and Human Services Committee
On
Senate Bill 138
October 17, 2007**

Senator Erpenbach and members of the Committee, we are Robert L. Jaskulski and Keith R. Clifford representing the Wisconsin Academy of Trial Lawyers (WATL). Rob is a shareholder in the Milwaukee office of Habush Habush and Rottier and Keith is a partner in the Madison law firm of Clifford and Raihala. Rob is the current President and Keith is a Past President of WATL. We both appear to speak in favor of Senate Bill 138, also referred to as "The Family Justice Bill."

The Wisconsin Academy of Trial Lawyers 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 to bring a claim for wrongful death in medical malpractice cases. Family members are incredulous. It is inconceivable to them that a death caused by a alleged case of medical malpractice can go unpunished. Unfortunately, there is nothing I can do to ease their pain and provide justice for the family.

Wisconsin is one of only seven jurisdictions that deprive adult children of 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. Negligent health care providers in an operating room should not be treated differently than negligent car drivers.

WATL members believe this bill is a simple issue of fairness. The Legislature and the Courts in Wisconsin have created a confusing and tortured picture of who can sue for loss of society and companionship in medical malpractice wrongful death actions.

For most of Wisconsin's history, there was no distinction made between general wrongful death actions and medical malpractice wrongful death actions. The wrongful death statute, Wis. Stat. § 895.04(4), governed who could recover and for how much.¹ According to the Courts, that changed in 1975 when the Legislature created Chapter 655 of the statutes to deal with medical malpractice. However, nothing was changed regarding wrongful death until 1986 when the Legislature passed another medical malpractice bill, which included a \$1 million indexed cap on noneconomic damages and defined noneconomic damages to include loss of society and companionship. Wis. Stat. § 893.55(a) and (b).

In the early 1990s, the Wisconsin Supreme Court interpreted these statutes to mean that families of people who died because of medical malpractice should proceed under the medical malpractice statutes, not the general wrongful death statute. *Rineck v. Johnson*, 155 Wis.2d 659, 456 N.W.2d 336 (1990) and *Jelinek v. St. Paul Fire and Casualty Insurance Company*, 182 Wis. 2d 1, 512 N.W.2d 764 (1994).²

¹ Before 1986, § 895.04(4) read, "Judgment for damages for pecuniary injury from wrongful death may be awarded to any person entitled to bring a wrongful death action. Additional damages not to exceed \$50,000 for loss of society and companionship may be awarded to the spouse, or *unemancipated or dependent* children, or parents of the deceased." (Emphasis added.) In 1986 the Legislature amended § 895.04(4) eliminating the words "*unemancipated and dependent*" before the word "children" in the second sentence. This change allowed *all* children of the deceased to recover damages for loss of society and companionship, including adult children.

² The main thrust of *Rineck* was to increase the amount of recovery for loss of society and companionship in medical malpractice wrongful death cases to \$1 million, the then-existing noneconomic damage cap. The wrongful death limit in § 895.04(4) at the time was \$50,000 for loss of society and companionship.

One issue the Supreme addressed was “whether a minor child has a separate cause of action for loss of society and companionship when medical malpractice causes the death of one parent and the decedent is survived by his or her spouse.” *Id.* at 342. The court concluded ch. 655 did not recognize a distinction between injury and death claims, and, therefore, surviving children had a separate cause of action, but limited the right to recovery to a child’s minority based on the common law.

This interpretation in *Rineck* led the Court of Appeals to find the word “child” found in § 655.007³ only referred to minor children and therefore only minor children could bring an action for wrongful death in medical malpractice. *Dziadosz v. Zirneski*, 177 Wis. 2d 59, 501 N.W.2d 828 (Wis. App. 1993). The Court of Appeals held that because there was no specific reference to § 895.04, Wis. Stats. in chapter 655, the adult children of the person who died as a result of medical negligence did not have a cause of action as they would have under § 895.04. The *Dziadosz* Court reasoned that *Rineck* eliminated § 895.04 from consideration in any type of medical malpractice wrongful death. The same appears true in the case of a parent suing for wrongful death of an adult child in a medical malpractice action. *Estate of Wells by Jeske v. Mount Sinai Medical Center*, 174 Wis. 2d 503, 497 N.W.2d 779 (Wis. App. 1993) *affirmed* 183 Wis. 2d 666, 515 N.W.2d 705 (Wis.1994).

Health care providers did not like being treated differently than other defendants in wrongful death cases, in that they faced unlimited damages after *Jelinek*. In other words, they wanted to undo the cases of *Rineck* and *Jelinek* and reapply the wrongful death cap under § 895.04(4) — at that time \$150,000 — to medical malpractice actions. In 1995, they incorporated this change into a broad medical malpractice bill, 1995 Act 10. It created § 893.55(4)(f) that provided that damages recoverable in medical

³ Wis. Stat. § 655.007 was adopted in 1975 when chapter 655 was created. It provided, “On and after July 24, 1975, any patient or the patient’s representative, having a claim for injury or death on account of malpractice is subject to this chapter.” The Legislature amended the statute in 1983 Wisconsin Act 253 by adding the words after the word claim, “or any spouse, parent or child of the patient having a derivative claim.” According to the drafting file the language was added to clarify “who constitutes a representative, stating that a patient’s spouse, parent or child who wishes to press a derivative claim concerning an act of malpractice that injured or caused the death of the patient must also seek relief before a panel.” There was no discussion of the meaning of the word “child.”

malpractice wrongful death cases were subject to the \$150,000 wrongful death limit on loss of society and companionship.⁴

After the change, the adult children of a single woman, who died as a result of alleged medical malpractice, brought a wrongful death claim for loss of society and companionship. They tried to convince the Court that the legislative change in 1995 also meant that *who could sue* should also be the same as the general wrongful death statute. The Court did not agree. They held adult children had *no cause of action* for a wrongful death claim when the death was caused by medical malpractice. *Czapinski v. St. Francis Hospital, et al.*, 2000 WI 80, 236 Wis.2d 316, 613 N.W.2d 120.

By this ruling, Wisconsin created a dual tract for wrongful death. One tract allows adult children to pursue a claim for loss of society and companionship under the § 895.04(4), the general wrongful death law. The second tract does not allow an adult child to pursue a claim for loss of society and companionship under the medical malpractice laws. We believe that is unfair.

As evidenced by testimony today, the current law discriminates against unmarried, divorced and widowed individuals. Most adult children are not dependent on a parent for their livelihood nor are adult children generally responsible for their parents. However, 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 grown.

Impact of SB 138

Because we are dealing with the subject of medical malpractice, we would like to dispel several concerns about the impact of SB 138.

Data indicate that there is a huge volume of deaths and serious injuries caused by medical errors. A recent HealthGrades study estimated that up to 250,000 Americans die

⁴ Wisconsin Stat. § 893.55(4)(f) provides in pertinent part, "Notwithstanding the limits on noneconomic damages under this subsection, damages recoverable against health care providers . . . acting within the scope of his or her employment and providing health care services, for wrongful death are subject to the limit under s. 895.04(4)."

each year due to hospital errors.⁵ That is like 478 jumbo jets full of people are dying each year because of preventable medical errors. At least 1.5 million Americans are sickened, injured and killed each year by avoidable errors in prescribing, dispensing and taking medications, according to the Institute of Medicine (IOM).⁶ The extra medical costs of treating drug-related injuries occurring only in hospitals was estimated conservatively to be \$3.5 billion a year.

Despite these numbers, only 236 medical negligence claims were filed in 2006 in Wisconsin with the Medical Mediation Panels and of that number and only 204 malpractice claims were filed in circuit courts. The number of filings was the lowest since 1997.

Wrongful death cases are a small subset of all medical malpractice cases filed. Below is a chart indicating the number of requests for mediation filed 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%
2004	240	33	14%
2005	223	46	21%
2006	236	42	18%
Total	2590	492	19%

Source: Randy Sproule, Administrator, Medical Mediation Panels.

In 2006, out of the 236 requests for mediation, 42 dealt with wrongful death claims. The numbers of requests for mediation in wrongful death cases are small and relatively stable — ranging from 14 percent to 25 percent and averaging 19 percent a year. Allowing adult children and the parents of adult children in medical malpractice cases to bring a wrongful death claim makes sure any person who is injured by the misconduct and negligence of others can get justice in the courtroom. We believe access to justice and accountability is an important right for all Wisconsin citizens.

⁵ HealthGrades Quality Study, Third Annual Patient Safety in American Hospitals Study, April 2006.

⁶ *Preventing Medication Errors*, Institute of Medicine, National Academy of Science, July 20, 2006.

Because of the limited number of claimants, allegations that SB 138 will lead to higher health care costs are speculative and against the great weight of evidence. Below is a chart that shows medical malpractice costs as a percentage of health care expenditures has decreased in Wisconsin from a high of 1.14 percent in 1989 to just .349 percent of health care expenditures in 2006. So, for 2006, malpractice expenses — paid losses, costs of defending claims, insurance company overhead and profits — amounted to 35 cents for every \$100 dollars spent on health care.

Year	Medical Malpractice Direct Premiums Earned (000s omitted)			Total Health Care Expenditures in Wisconsin (000s omitted)**	Medical Malpractice as a Percentage of Health Care Costs
	Private Insurers *	IPFC Fund*	Insurers & Fund		
2006	\$104,079	\$18,931	\$123,010	\$35,217,000	.349%
2005	\$103,060	\$26,545	\$129,605	\$32,975,000	.393%
2004	\$103,145	\$32,068	\$135,213	\$30,847,000	.438%
2003	\$83,085	\$29,464	\$112,549	\$29,105,000	.386%
2002	\$78,324	\$29,544	\$107,868	\$27,378,000	.393%
2001	\$66,841	\$36,807	\$103,648	\$25,027,000	.414%
2000	\$58,824	\$47,879	\$106,703	\$22,661,000	.470%
1999	\$60,291	\$50,622	\$110,913	\$20,898,000	.530%
1998	\$61,346	\$49,885	\$111,231	\$19,123,000	.581%
1997	\$63,596	\$58,271	\$121,867	\$18,336,000	.664%
1996	\$65,102	\$51,049	\$116,151	\$17,738,000	.654%
1995	\$70,344	\$55,506	\$125,850	\$16,273,000	.773%
1994	\$71,439	\$51,213	\$122,652	\$15,185,000	.807%
1993	\$75,001	\$51,213	\$126,214	\$14,385,000	.877%
1992	\$73,298	\$45,606	\$118,904	\$13,481,000	.877%
1991	\$73,177	\$42,350	\$115,527	\$12,437,000	.928%
1990	\$74,159	\$43,937	\$118,096	\$11,207,000	1.05%
1989	\$74,900	\$43,161	\$118,061	\$10,114,000	1.17%
1988	\$65,275	\$37,970	\$103,245	\$8,991,000	1.14%
1987	\$49,138	\$33,643	\$82,781	\$8,339,000	.992%

*From the Wisconsin Insurance Report, Office of the Commissioner of Insurance, years 1987-2006.

**From <http://www.cms.hhs.gov/NationalHealthExpendData/downloads/nhestatesummary2004.pdf>.

Year 2005 is estimated based on a 6.9% increase in national per capita expenditures, and Year 2006 is based on a projected rate of growth of 6.8%. <http://www.cms.hhs.gov/NationalHealthExpendData/downloads/proj2006.pdf>.

In addition, SB 138 bill does nothing to affect the current \$350,000 cap on loss of society and companionship in wrongful death cases.

Finally, the bill will have a minimal effect on malpractice insurers. We need only look back to 1998 when the wrongful death limit was raised from \$150,000 to \$350,000 for adults and \$500,000 for children.⁷ As the chart above shows, neither primary insurers nor the Injured Patients and Families Compensation Fund (the Fund) increased insurance rates for doctors. In fact, Physicians Insurance Company of Wisconsin, which covers about 40 percent 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, lowered its fees after the wrongful death change. The rates went down 7% on July 1, 1999, 25% on July 1, 2000 and another 20% on July 1, 2001. In fact, the enormous assets in the Fund — \$746 million as of June 30, 2006 — have caught the Governor and Legislature's attention, which now want to take \$175 million for purposes other than the Fund was intended — to compensate severely injured patients and their families for injuries caused by medical malpractice.

Under the current law, many families are left with no remedy when an unmarried, widowed or divorced family member dies as a result of medical malpractice. Why should individuals without minor children who die due to alleged medical negligence basically be told their loss has no value under the law? The changing demographics in the United States really show how demeaning this idea is. In the 2000 U.S. Census, 27.1 percent of all people were never married. Another 16.3 percent were widowed (6.6%) or divorced (9.7%). If one looks at particularly vulnerable age groups, like young adults ages 20-24 years, 94.1 percent of women and 95.8 percent of men are not married. For people from age 65-74 years, 8.3 percent of men and 30.8 percent of women are widowed. This only increased from ages 75-84 years when 18.2 percent of men and 54.6 percent of women are widowed. In addition, over 21 million adults live in a home with one or both parents.

⁷ The Legislature also amended § 895.04 (4), Wis. Stats., broadening who can bring a claim for wrongful death by including siblings of the deceased, if the siblings were minors at the time of the death.

There is simply no good reason the personal rights of companionship of the parent-child relationship are given less protection in cases involving adult children. If Wisconsin's wrongful death statute recognizes the valuable relationship parents can have with adult children, then it is time this concept be carried over to the medical malpractice arena. It makes no sense to tell adult children whose widowed parent dies in an automobile accident they have a claim, but if they die due to medical negligence they have no right to pursue justice. The law is absurd. Changing the law would send an important message: The citizens of Wisconsin value the relationship between *all* adult children and their parents.

In the case of medical malpractice, often there is a lot of uncertainty. 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 attorneys, we are committed to strengthening the civil justice system so that deserving individuals can get justice and wrongdoers are held accountable. All Americans benefit when the individuals have a fair chance to get justice through our civil justice system.

We urge passage of Senate Bill 138. Restore fairness to families who have suffered the ultimate loss of a loved one due to medical negligence.