WISCONSIN STATE LEGISLATURE COMMITTEE HEARING RECORDS

2005-06
(session year)

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Committee on Insurance (AC-In)

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STATE OF WISCONSIN
IN THE SUPREME COURT

MATTHEW FERDON, by his Guardian Ad Litem, VINCENT R. PETRUCELLI, CYNTHIA FERDON, and DENNIS FERDON,

Plaintiffs-Appellants-Petitioners,

v.

WISCONSIN PATIENTS COMPENSATION FUND, MEDICAL PROTECTIVE COMPANY, MICHAEL J. BROCKMAN, M.D., and AURORA HEALTH CARE, INC., d/b/a BAY WEST GYNECOLOGY & OBSTETRICS, LTD.,

Case No.: 03-0988

Circuit Court Case No.: 01-CV-001897

Defendants-Respondents,

and

CONNECTICUT GENERAL LIFE INSURANCE COMPANY, a/k/a CIGNA INSURANCE, f/k/a HEALTHSOURCE PROVIDENT ADMINISTRATORS, INC., a/k/a HEALTHSOURCE PROVIDENT, and COUNTY OF OCONTO,

Nominal-Defendants.

AMICUS CURIAE BRIEF AND APPENDIX OF WISCONSIN ACADEMY OF TRIAL LAWYERS

Habush Habush & Rottier, S.C.
Counsel for the Amicus, Wisconsin Academy of Trial Lawyers
By: D. James Weis (#1006471)
Robert L. Jaskulski (1000561)
777 East Wisconsin Avenue, Suite 2300
Milwaukee, WI 53202-5381
(414) 271-0900

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The Wisconsin Academy of Trial Attorneys ("WATL") submits this *amicus curiae* brief and asks that the court reverse the holding of the court of appeals and remand the case to the trial court to enforce the jury verdict.[1] WATL agrees with the plaintiffs-appellants-petitioners that §§ 655.017, 893.55(4), and 655.015 Wis. Stats., are unconstitutional. The purpose of this brief is to address several issues raised by the parties, but not to repeat previous briefs filed.

I. SECTION 893.55(4) VIOLATES THE RIGHT TO A JURY TRIAL.

Section 893.55(4), Wis. Stats., violates the right to a jury trial. *See* Art. I, §5 of the Wisconsin Constitution. (Because §655.0017, Wis. Stats., relies on §893.55(4) it too must be rendered unconstitutional).

Article I, §5 guarantees that the right to a jury trial shall remain inviolate. "The public policy of the state ... is determined by the constitution so far as jury trials are concerned, and *the legislature is not permitted to circumvent the constitutional provision in order to even secure a better public policy.* That can only be done by constitutional amendment." *La Bowe v. Balthazor*, 180 Wis. 419, 423, 193 N.W. 244 (1923).

When the legislature mandated a cap on noneconomic damages without regard to the facts of the case or the findings of the jury, the legislature infringed

[1]WATL is a voluntary bar organization of trial lawyers set up for the purpose of securing and protecting the rights of individuals. It is dedicated to the promotion of the fair, prompt and efficient administration of justice in the State of Wisconsin.

on and impaired the right of trial by jury.[2] In *State ex. rel. Strykowski v. Wilkie*, 81 Wis. 2d 491, 522-31, 261 N.W.2d 434 (1978), a medical malpractice case, the supreme court made clear that the jury is the ultimate decision maker on the issue of damages. The court held that the mediation panel system did not violate the right to a jury trial because "[t]he medical review panel does not decide the case; the ultimate arbiter of all questions of fact is the jury." *Id.* at 526. Medical malpractice plaintiffs are entitled to a jury trial on the issue of damages.

A. Article XIV, sec. 13 does not allow the Legislature to Violate the Constitutional Right to a Jury Trial.

Article XIV, §13 of the Wisconsin Constitution does not give the legislature the power to alter the constitutional right to a jury trial, as suggested both by the Fund here and the court of appeals in *Guzman*. *See* Fund's brief at 14-15; *Guzman v. St. Francis Hospital Inc.*, 2001 WI App. 21 at ¶8, 240 Wis. 2d 599, 623 N.W.2d 776. . "Although the legislature has authority to alter Wisconsin's common law, it may not do so contrary to the provisions set forth in the Wisconsin Constitution." *State v. Hansford*, 219 Wis. 2d 226, 235 n. 10, 580 N.W.2d 171 (1998). "[W]henever ... the operation of the statute must cause a deprivation of a right secured by the Constitution, the courts have no alternative---the statue must yield." *Id.* (quoting *Norval v. Rice*, 2 Wis. 17, 23 (1853)). If a cause of action exists, and the parties are entitled to a jury trial, the legislature may not violate the

[2] The threat that striking the cap in medical malpractice cases will somehow affect other caps outside chap. 655 does not make sense. *See* Amicus brief of Wisconsin Insurance Alliance, et. al. at 13. The caps cited in that brief involve claims against the government, which, unlike medical malpractice, were not available at common law.

constitutional right to a jury trial. The cause of action for medical malpractice remains and so does the right to a trial by jury.

B. The Legislature Cannot Control the Jury's Decision on Damages.

This court has also held that "[t]he parties to an action are entitled to a jury trial, on all issues of fact, including that of damages." *Jennings v. Safeguard Ins. Co.*, 13 Wis. 2d 427, 431, 109 N.W.2d 90 (1961); *Borowicz v. Hamann*, 193 Wis. 324, 214 N.W. 431 (1927). The *Guzman* court claimed that plaintiffs "retain their 'right to' a trial by a jury" since the jury does decide damages, even though the legislature controls the actual damages awarded for non-economic damages. *Guzman*, at ¶9. "Such an argument pays lip service to the form of the jury but robs the institution of its function." *Sofie v. Fibreboard Corp.*, 771 P. 2d 711, 721 (Wash. 1989). "The constitution deals with substance, not shadows." *Id. See also Lakin v. Senco Products, Inc.*, 987 P.2d 463, 470-473 (Or. 1999).

The assessment of damages was the function of a jury at common law when the constitution was signed.[3] If the legislature may simply apply arbitrary

[3] Wisconsin had two constitutional conventions. The first in 1846 had an extensive discussion of trial by jury. Initially drafters had language stating, The inhabitants of this state shall be entitled to ... trial by jury. See, JOURNAL AND DEBATES OF THE CONVENTION OF 1846, ed. Milo M. Quaife (Madison, 1919), Wisconsin Historical Collections, XXVII (Constitutional Series ii) 301. An effort was made at the convention to impose a restriction on the right to a jury trial by limiting the right to only those cases where the amount in controversy exceeded $20. Id. at 367. The delegates to the convention emphatically rejected this monetary limit.

caps, unrelated to the facts of the case, the right to a jury trial and jury's determination of damages becomes an empty guarantee.[4]

C. The Comparative Negligence Statute is Not an Example.

Reliance on the comparative negligence law to argue that the legislature may change the common law in a way that affects the right to a jury is flawed.[5] When a case involves comparative negligence, the jury decides the allocation of negligence based upon the facts of the case, and the jury awards damages. The judge then applies the decision of the jury. The cap on noneconomic damages in medical malpractice cases applies without regard to the facts of the case or the decision of the jury.[6]

II. THE CERTAIN REMEDIES CLAUSE IS ALSO VIOLATED ESPECIALLY WHEN LINKED TO THE RIGHT TO THE JURY TRIAL.

In *Maurin v. Hall*, 2004 WI 100, ¶ 197, 274 Wis. 2d 28, 111, 682 N.W.2d 866, 907, Justices Abrahamson and Crooks, in their concurring opinion, noted the link between the certain remedies clause, Article I, §9 of the Wisconsin

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[4] A jury determination of damages is always subject to the court offering remittur or a new trial on damages if the jury awards damages not consistent with the facts. *See Powers v. Allstate Co.*, 10 Wis. 2d 78, 90-91, 102 N.W.2d 393 (1960). The court had such a power at common law, and it is based upon the facts of the case.

[5] *See also Guzman*, 2001 WI App at ¶54 (Shudson, J., dissenting).

[6] The *Guzman* court's reference to the statute of repose also is inappropriate. First, the right to a jury trial, as the *Guzman* court points out, was never raised in *Aicher*. *See Guzman*, at ¶ 12. Second, the right to a jury trial applies to claims that exist, and not those that have been barred by a statute of limitations or a statute of repose.

Constitution, and the right to a jury trial.[7] *See also id.* at ¶¶ 198-209, and n. 100. Quoting *Smith v. Department of Insurance*, 507 So. 2d 1080, 1083 (Fla. 1987), which invalidated a cap on non-economic damages, Justices Abrahamson and Crooks made their point:

> The reasoning focuses on the titled ... "Access to Courts," and overlooks the contents which must be read in conjunction with ... "Trial by jury." Access to courts is granted for the purpose of redressing injuries. A plaintiff who receives a jury verdict for , e.g., $1,000,000 has not received a constitutional redress of injuries if the legislature statutorily, and arbitrarily, caps the recovery at $450,000. Nor, we add, because the jury verdict is being arbitrarily capped, is the plaintiff receiving the constitutional benefit of a jury trial as we have heretofore understood that right. Further, if the legislature may constitutionally cap recovery at $450,000, there is no discernible reason why it could not cap the recovery at some other figure, perhaps $50,000, or $1,000, or even $1.

See Maurin, 2004 WI at ¶¶ 198-209, and n. 100.

The true effect of the cap is that otherwise meritorious cases cannot be brought, because the costs of bringing the action often outweigh the recovery by the plaintiff. Severely injured plaintiffs who have no economic damages such as wage loss (e.g., a stay at home parent or a retired person), or future care needs, suffer the most.[8] For example, a stay at home mother who is rendered brain injured because of malpractice must suffer for the rest of her life with that injury, and yet all that she can recover is the cap, which she must share with her family (her spouse and minor children). "It is clear, however, that a tort victim 'gains' nothing from the jury's award for economic loss, since that money replaces that

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[7] *Maurin*, despite the Wisconsin Patients Compensation Fund's comments to the contrary, is not dispositive here because that case dealt with the constitutionality of the wrongful death cap. A claim for wrongful death, unlike medical malpractice, did not exist at common law.

[8] Additionally, the tactic taken by the defense in refusing to settle cases increases the costs of these cases. *See* WATL Appendix A at A-4. Some insurance companies even market the promise that they will not settle cases. *Id.*. Cases do not settle early on.

which he has actually lost. It is only the award above the out-of-pocket loss that is available to compensate in some way for the pain, suffering, physical impairment or disfigurement that the victim must endure until death." *Maurin*, at ¶ 211, (Abrahamson, J., and Crooks, J. dissenting)(quoting *Carson v. Maurer*, 120 N.H. 925, 424 A.2d 825, 837 (1980)). *See also* §893.55(7), which allows the admission into evidence of certain previously excluded collateral source evidence. (The constitutionality of that provision is currently on appeal in the Wisconsin Supreme Court in *Lagerstrom v. Myrtle Werth Hosp.-Mayo Health System*, 2004 WI 114, 684 N.W.2d 140.)) Therefore, many plaintiffs with economic losses cannot reach the courthouse steps. *See also Maurin*, 2004 WI at n. 100 (Abrahamson, J., and Crooks, J., dissenting).

III. EQUAL PROTECTION CLAUSE

Section 893.55(4) also violates the equal protection clauses of both the United States and Wisconsin Constitutions because the statute "treats members of a similarly situated class differently." *Aicher v. Wisconsin Patients Compensation Fund*, 2000 WI 98, ¶ 56, 237 Wis. 2d 99, 128, 613 N.W.2d 849. WATL agrees with the plaintiffs-appellants-petitioner's argument that a strict scrutiny review should be used. However, §893.55(4) does not even pass constitutional muster using the rational basis test.

A legislative classification satisfies the rational basis test only if it meets five criteria:

(1) All classification[s] must be based upon substantive distinctions which make one class really different from another.

(2) The classification adopted must be germane to the purpose of the law

(3) The classification must not be based upon existing circumstances only. [It must not be so constituted as to preclude addition to the number included within a class].

(4) To whatever class a law may apply, it must apply equally to each member thereof.

(5) That the characteristics of each class should be so far different from those of other classes as to reasonably suggest at least the propriety, having regard to public good, of substantially different legislation.

Aicher, 2000 WI at ¶ 58. All five factors cannot be satisfied.[9]

A. The law does not apply equally to the class.

The fourth criterion cannot be satisfied. Section 893.55 does not apply equally to each member of the class it creates. Section 893.55(4) creates a class of medical malpractice victims who suffer non-economic damages greater than the cap. The statute, however, does not apply equally to that class. Members of that class are treated differently depending upon their marital status, whether they are parents or whether they are minors.

A single cap applies to all claims for non-economic damages, regardless of the number of claimants or the number of non-economic damage claims. *See*

[9] The plaintiffs in *Guzman* did not address the five factors. *See Guzman*, at ¶ 21. "The Guzman's silence on the rational-basis test is a concession that the cap passes that test."

§893.55(4)(b) ("The total noneconomic damages recoverable for bodily injury or death ... may not exceed the limit under par. (d) for each occurrence ... from all health care providers ... ." (emphasis added)). This is true even though the patient has a claim for pain, suffering and disability, and his or spouse, minor children, or parents all have derivative claims for loss of society and companionship. *See* §§655.007 and 893.55(5).

In the class, a malpractice victim who is single recovers the full amount of the cap. A malpractice victim who is married must share the cap with his or her spouse. A malpractice victim who is single but has children must share the cap with his or her children. A malpractice victim who is married and has children must share the cap with his or her spouse and children. Of course, the more children a plaintiff has, the higher the punitive affect of the cap on that person. A malpractice victim who is a minor child must share the cap with his or her parents. A minor with only one parent suffers less than a minor with two parents.

B. The Classification is Not Germane to the Law.

Preventing the most seriously injured victims of medical malpractice from being made whole is not germane to the law. In the last 10 years, only 8 cases have involved verdicts above the cap. *See* WATL Appendix B. In the vast majority of cases taken to trial (more than 70%), the defense wins on liability. *Id.* That is true today, and it was true when the cap was enacted in 1994. Spending on

health care costs in the United States exceeds $1 trillion annually.[10] The direct cost of medical malpractice insurance is less than one percent of health care costs in Wisconsin.[11]. Various studies conducted to analyze health care spending have concluded that if all direct spending on malpractice were eliminated, there would be a minimal impact on total health care spending. [12]

The insurance industry itself has admitted that limitations on non-economic damages are only a small percentage of total losses paid, and according to one insurer only result in a savings of 1%. *See* WATL Appendix D at D-1 & WATL Appendix A at A-2. The cost of liability insurance rises because many factors including medical cost inflation, a decline in investment income, and doctors' aversion to settlement. *See* WATL Appendix E at E-10 and WATL Appendix A at A-4. Even in Wisconsin, where there are caps, malpractice insurers are seeking significant increases in premiums. *See* WATL Appendix F.

Finally, the Fund, which is the defendant-respondent in this case, is now sitting on a surplus of $24.6 million with assets of over $741 million. *See* WATL Appendix G. The Fund is responsible for all sums above the health care provider's primary liability insurance policy. *See* §655.27 and 655.23(4). When the Legislature enacted the cap, Rep. Mark Green (4th Assembly District), the

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[10] Health care spending in the United States has increased by $621 billion since 2000 to $1.9 trillion this year. Alan Sager & Deborah Socolar, "Health Costs Absorb One-Quarter of Economic Growth, 2000 – 2005," Boston University School of Public Health, February 9, 2005.

[11] Wisconsin's malpractice costs account for just 40 cents out of each $100 spent on health care. From the Wisconsin Insurance Report, Office of the Commissioner of Insurance, Years 1987-2002. (WATL Appendix C.)

[12] *Limiting Tort Liability for Medical Malpractice,* U.S. Congressional Budget Office, January 8, 2004.

bill's main author, said that the Fund had a $67.9 million actuarial deficit.[13] (WATL Appendix H.) With hindsight, rather than a deficit, actuaries now estimate there was a *$120.03 million actuarial surplus.* This means that Fund's actuaries were off by $188.2 million. (WATL Appendix J) In addition, Governor Jim Doyle announced in his most recent budget speech, "*An independent analysis recently showed that the fund has at least $200 million more than it needs to cover any imaginable claims.*" The Fund has an incredible surplus, and consumers, like Matthew Ferdon, are deprived of a full recovery by a needless cap on noneconomic damages, restrictions on future medical expenses and the requirement of periodic payments.

Additionally, the cap does nothing to affect doctor shortages in rural areas because premiums, and Fund fees, are not different for rural doctors or city doctors. The problems with attracting rural doctors have more to do with whether a doctor wants to live in a rural community along with stagnant growth in the physician work force and an aging population of patients.[14]

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[13] This statement contradicts the written testimony provided by Fund administrators at the Office of the Commissioner of Insurance (OCI) in 1994, which provided, "Enactment of a cap to be applied prospectively, as proposed .... would result in no impact on the PCF's current deficit position." (WATL Appendix I.)

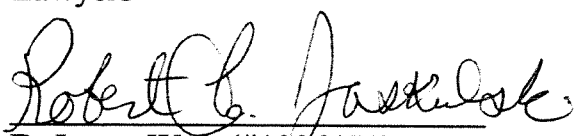
[14] In 2004, the Wisconsin Hospital Association and Wisconsin Medical Society issued a report entitled, "Who Will Care for Our Patients?", which showed a continuing shortage of doctors, especially in impoverished rural and urban areas. Paul Nannis of Aurora Health Care recently commented on the shortage of primary care doctors in Milwaukee, "We have a storage that's far more acute than 10 years ago." *Milwaukee Journal Sentinel*, Section G, page 1, November 15, 2004. (WATL Appendix K)

CONCLUSION

WATL respectfully requests that the court of appeals' decision be reversed and the case remanded to the trial court to enter judgment based upon the jury verdict.

Respectfully submitted this 14th day of February, 2005.

HABUSH HABUSH & ROTTIER S.C.
Counsel for the Amicus,
Wisconsin Academy of Trial
Lawyers

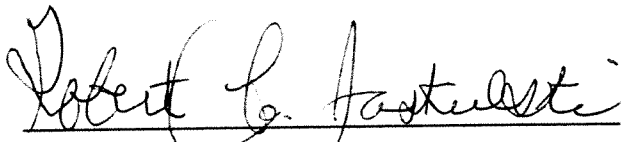
By: 
D. James Weis (#1006471)
Robert L. Jaskulski (#1000561)

P.O. ADDRESS:
777 East Wisconsin Avenue
Suite 2300
Milwaukee, Wisconsin 53202
(414) 271-0900

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,975 words.

Dated this 14th day of February 2005.



Robert L. Jaskulski (#1000561)
777 East Wisconsin Avenue
Suite 2300
Milwaukee, Wisconsin 53202
(414) 271-0900

WATL APPENDIX

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[1] For a full copy of the report, go to http://www.citizen.org/documents/FinalBRIEFING%20BOOK--MISDIAGNOSIS.pdf

Medical Misdiagnosis:
Challenging the Malpractice Claims of the Doctors' Lobby

Congress Watch
January 2003

Insurance Companies and Their Lobbyists Admit It: Caps on Damages Won't Lower Insurance Premiums

Caps on damages for pain and suffering will significantly lower awards to catastrophically injured patients. But because those truly severe cases make up a small percentage of medical malpractice claims, and because the portion of the medical liability premium dollar that pays for compensation is dwarfed by the portion that pays for defense lawyer fees, caps do not lead to lower premiums. Insurance companies and their lobbyists understand this—so don't take our word for it, take theirs.

A Premium on the Truth

"Insurers never promised that tort reform would achieve specific savings." – American Insurance Association[1]

"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[2]

"Many tort reform advocates do not contend that restricting litigation will lower insurance rates, and I've never said that in 30 years." – Victor Schwartz, general counsel to the American Tort Reform Association[3]

Mississippi

"Regardless of what may result from the ongoing tort reform debate, please remember that such proposed public policy changes are critical for the long-term, but do not provide a magical 'silver-bullet' that will immediately affect medical malpractice insurance rates ... The 2003 rate change [a 45 percent increase] would happen regardless of the special session outcome." – Medical Assurance Company of Mississippi[4]

Nevada

"The primary insurer for Las Vegas obstetricians, American Physicians Assurance, has no plans to lower premiums for several years, if ever, said broker Dennis Coffin." – The Las Vegas Review-Journal[5]

"[John Cotton of the Nevada Physicians' Task Force] noted that even if the bill reflected a cap of $5, there would not be an immediate impact on premiums." – Minutes of the Nevada Assembly Committee on Medical Malpractice Issues[6]

New Jersey

During a hearing on medical malpractice issues, New Jersey Assemblyman Paul D'Amato asked Patricia Costante, Chairwoman and CEO of MIIX Group of Companies, "[A]re you telling the insured physicians in New Jersey that if this State Legislature passes caps that you'll guarantee that you won't raise your premiums, in fact, you'll reduce them?" Costante replied: "No, I'm not telling you [or them] that."[7]

[1] "AIA Cites Fatal Flaws In Critic's Report On Tort Reform," American Insurance Association press release, March 13, 2002.
[2] "Study Finds No Link Between Tort Reforms And Insurance Rates," *Liability Week*, July 19, 1999.
[3] Michael Prince, "Tort Reforms Don't Cut Liability Rates, Study Says," *Business Insurance*, July 19, 1999
[4] Julie Goodman, "Premiums Rise by 45 Percent; Insurance Group's Hike Comes as Doctors Seek Relief," *Clarion-Ledger* (Jackson, Miss.), September 22, 2002.
[5] Joelle Babula, "Obstetricians Say Problems Remain," *The Las Vegas Review-Journal*, October 1, 2002.
[6] "Testimony on Assembly Bill 1: To Make Various Changes Related to Medical and Dental Malpractice," Nevada Assembly Committee on Medical Malpractice Issues, July 30, 2002.
[7] "Testimony Concerning the Affordability of Medical Malpractice Insurance for Physicians Practicing in New Jersey," Public Hearing Before the Assembly Health and Human Services Committee and Banking and Insurance Committee, June 3, 2002.

Doctors' Aversion to Settlements May Increase Malpractice Insurance Costs

- **Medical malpractice insurers market their product based on aggressive defenses, not on low costs.** The Doctors Company, a leading doctor-owned insurer, states on its website: "When litigation is necessary, we dedicate more resources than our competitors to defend your good name. Our claims representatives and defense attorneys combine their knowledge of regional laws and jury experience to develop *aggressive, successful, defense strategies... We will not consent to settle without your written permission."* (emphasis theirs)[1] In other lines of insurance coverage, claims managers dispassionately evaluate the insured's exposure and make an objective decision as to whether to settle the claim. This rational calculation takes a back seat to pride and other emotional considerations when medical malpractice insurance is involved.

- **The result is that defense attorney fees are higher and verdicts are higher, pushing malpractice premiums higher.** According to A.M. Best figures cited on The Doctors Company website, the average doctor-owned medical malpractice insurer spends 32 percent of premiums on defense costs. The Doctors Company entices customers by boasting that 49 percent of its premiums are spent on defense costs.[2] A study by the West Virginia Insurance Commissioner found that one company spends 88 cents of each premium dollar on defense lawyers.

- **Malpractice insurance defense costs far exceed defense costs in other lines of insurance.** According to NAIC figures, defense costs incurred as a portion of direct premiums written amount to 4.8 percent for passenger auto liability, 7.1 percent for commercial auto liability, 16.5 for commercial general liability, and 28.9 percent for product liability.[3] Malpractice insurers seldom settle a case before the eve of trial, waiting until discovery is complete. They also take three times more cases to trial than other civil defendants. In 2000, the overall percentage of federal civil cases going to trial was 2.2, but 6.8 percent of medical malpractice cases went to trial.[4]

- **In reality, the liability insurance purchased by doctors is not just for risk management; it is also a public relations tool.** The Doctors Company and Medical Assurance both use the motto "Defending your reputation" in marketing themselves.[5] Kansas Medical Mutual Insurance Company (KaMMCO) cites "the existence of the National Practitioner Data Bank" as a reason that it is "more important than ever for health care professionals... to defend themselves against allegations of wrongdoing."[6] Doctors' complaints about high premiums must be viewed skeptically when much of the price quoted may pay for services entirely unrelated to managing risks of patient care.[7]

- **Evidence indicates that the negotiation process in medical malpractice cases fails, directly leading to the high verdicts that doctors complain about.** Pursuing a hardball defense strategy guided by emotion rather than reason will also affect the parties' ability to negotiate rational settlements. An Ohio State study compared medical and product liability negotiations. It found that product liability defense attorneys "correctly" predicted

jury outcomes (i.e. rejected plaintiff demands that were higher than the jury's eventual verdict) in 12 of the 14 cases studied. By contrast, defense attorneys made the correct settlement decision in only eight of 17 medical malpractice cases in the study. In one case, the defendant rejected a demand of $2 million only to be hit with a judgment for more than $8 million. The authors concluded that, "In malpractice cases, plaintiffs gained more than defendants from rejecting settlement offers and proceeding to trial. In product liability cases, defendants gained more than plaintiffs from eschewing settlement and defending claims in court... It appears that malpractice defendants—rather than plaintiffs—may be somewhat too inclined to resist settlement and push cases to trial."[8]

[1] http://www.thedoctors.com/resources/I-27/DocBrochure/Protectdoc4-5.html

[2] Id.

[3] National Association of Insurance Commissioners, *Statistical Compilation of Annual Statement Information for Property/Casualty Insurance Companies in 2000* (2001).

[4] Query to database of Federal District Court Civil Cases, maintained by Professors Theodore Eisenberg and Kevin Clermont of Cornell University. http://teddy.law.cornell.edu:8090/questata.htm

[5] See http://www.thedoctors.com/resources/I-27/DocBrochure/Protectdoc4-5.html, http://www.medicalassurance.com

[6] http://www.kammco-msc.com

[7] Other "extras" that may be included in the price of malpractice insurance include Defendant Reimbursement Coverage, that pays a doctor $500 per day to attend a trial, offered by ISMIE; and "defense coverage associated with the investigation of Medicare and Medicaid billing errors, regulatory agency actions, and... an initial consultation with an attorney to discuss potential countersuits," offered by KaMMCO.

[8] Merritt and Barry, "Is the Tort System in Crisis? New Empirical Evidence," 60 Ohio St. L. J. 315 (1999).

Medical Malpractice Verdicts in Wisconsin 1989-2004

Year	Claims Filed*	Number of Verdicts**	Plaintiff Verdicts	Defense Verdicts	Percentage of Defense Verdicts
1989	339	32	13	19	59%
1990	348	31	9	22	71%
1991	338	28	10	18	64%
1992	313	60	15	45	75%
1993	276	40	7	33	80%
1994	292	37	5	32	86%
1995	324	42	18	24	57%
1996	244	41	11	30	73%
1997	240	34	12	22	65%
1998	305	21	8	13	62%
1999	309	25	11	14	56%
2000	280	23	6	17	74%
2001	249	21	8	13	62%
2002	264	26	7	19	73%
2003	247	15	4	11	73%
2004	240	23	4	19	83%
Total	4,608	499***	148***	351***	70%

*Medical malpractice cases must file a request for mediation with the Medical Mediation Panel System prior to or simultaneously with filing a court action.

**The verdict statistics do not reflect whether the verdict was reduced, vacated, or reversed by an appellate court.

***These are tentative numbers and may not be complete.

Source: Randy Sproule, Administrator, Medical Mediation Panels.

Jury Verdicts Above the Noneconomic Cap

Since the noneconomic damage cap passed in 1995, WATL is aware of eight Wisconsin verdicts that have exceeded the cap.[1]

- In May 2004, a Marinette jury found the health care providers negligent for not treating a suspicious infection of 37-year-old Larry Zak, a husband and father. The jury awarded Mr. Zak and his wife $1 million in noneconomic damages, which was reduced by 57% because of the cap. *Zak v. Zifferblatt, et al,* Marinette County, 02-CV-0060.

- Helen Bartholomew died five years after suffering a debilitating heart attack. In April 2004, a Kenosha County jury found that the heart attack could have been prevented and doctor negligence contributed to her incapacitation and death. The jury awarded her estate and family $1.2 million for noneconomic damages, which was reduced by over 70%. *Batholomew v. Shah, et al.,* Kenosha County, 01-CV-1261.

- An Ozaukee County jury held health care providers negligent for failure to provide timely and proper treatment for hypoglyceminia and hypovolemia that developed shortly after the birth of Sean Kaul. As a result of this negligence, Sean is catastrophically brain damaged. In December 2003, the jury awarded $930,000 in noneconomic damages to Sean and his parents. With the cap, Sean and his family will receive over $500,000 less in noneconomic damages than a jury said the family deserved — a reduction of 55 percent. *Kaul v. Cedar Mills Medical Group, et al.,* Ozaukee County, 99 CV 0360.

- On December 20, 2002, a Brown County jury found a doctor negligent in the delivery of Matthew Ferdon. Matthew's right arm is deformed and partially paralyzed as a result of the negligence. The jury awarded Matthew $700,000 for past and future injuries, which was reduced over 40 percent by the cap. *Ferdon v. Wisconsin Patients Compensation Fund,* Brown County, 01 CV 1897.

- A Dane County jury found health care providers were negligent in treating Scott Dickinson, who was rendered a quadriplegic during a psychotic episode. The jury awarded $6.5 million for past and future pain, suffering, disability and disfigurement. With the cap, Scott received only 6.3% of his noneconomic damages — a reduction of almost 94% of what the jury said he deserved. *Dickinson v. St. Mary's Hospital, et al.,* Dane County 00 CV 1715.

- An Eau Claire County jury unanimously found that health care providers were careless in their 1998 treatment of 16-year-old Kristopher Brown, whose left foot was amputated. The jury said Kristopher should receive $1.25 million for past and future pain and suffering, and his parents should receive $100,000 for

[1] Additional cases may impact the Fund, but the cases listed specifically deal with the cap under Wis. Stats. § 893.55(4)(d). Not included are those cases subject to the wrongful death cap or whether first year residents are subject to the cap, *Phelps v. Physicians Ins. Co. of Wisconsin, Inc.*, Appeal No. 03-0580 and *Estate of Sarah Hegarty v. Beauchaine,* Appeal No., 04-3252.

their noneconomic damages. With the cap, Kristopher and his family received less than a third of what the jury said he deserved. *Brown v. Wright, et al.*, Eau Claire County, 00 CV 120.

- Candace Sheppard had surgery to remove a cyst from her vaginal area. It was described to her as a simple and routine gynecological procedure but it had tragic permanent results. She has extreme and permanent pain in her vaginal area. A Portage County jury set her damages for past and future pain and suffering at $700,000, which was reduced approximately 44% because of the cap. *Sheppard v. Starkey, et al.*, Portage County, 98 CV 0169.
- Bonnie Richards had her common bile clipped during gall bladder surgery. It was not immediately diagnosed and repaired, leading to extensive medical care —over $160,000— and physical pain and mental suffering. An Eau Claire County jury calculated her damages for past and future pain and suffering at $660,000. It was reduced because of the cap by approximately 41%. *Richards v. Herzog, et al.*, Eau Claire County, 98 CV 0508.

These eight show a reduction of approximately $10.1 million from what the juries determined the damages to be after hearing all the evidence compared to the damages available under the cap enacted in 1995.[2]

[2] This is less money than the Injured Patients and Families Compensation Fund lost when WorldCom collapsed, which was approximately $14 million.

2004 Medical Malpractice Jury Trials

1. Hegarty vs Beauchine et al Milwaukee 98 CV 009906 99 MMP 1003	Jury found negligence and awarded $17,000,000
2. Estate of Olson vs Harpenau et al La Crosse 02 CV 0507 02 MMP 1165	Jury found negligence and awarded $2,587,392
3. Bartholomew vs Shah et al Kenosha 01 CV 1261 01 MMP 1227	Jury found negligence and awarded $2,500,000
4. Zak vs Zifferblatt et al Marinette 02 CV 0060 01 MMP 1210	Jury found negligence and awarded $2,247,639
5. Oster vs Bowman et al Rock 01 CV 0988 01 MMP 1149	Jury found negligence but no causation
6. Linder vs Graboyes Ozaukee 03 CV 0208 03 MMP 1013	Jury found no negligence
7. Brandt vs Reimer et al Milwaukee 02 CV 006616 02 MMP 1151	Jury found no negligence
8. Mortensen vs Stitgen Dane 02 CV 3388 02 MMP 1141	Jury found no negligence
9. Korth vs Strebel Winnebago 02 CV 0962 02 MMP 1117	Jury found no negligence
10. Estate of Rice vs Block et al Dane 02 CV 1095 02 MMP 1081	Jury found no negligence

11. Rolfe vs Bonebrake et al — Jury found no negligence
Dane 01 CV 0622
00 MMP 1255

12. McHugh vs Lyon et al — Jury found no negligence
Milwaukee 00 CV 003538
00 MMP 1039

13. Macnab vs Garde et al — Jury found no negligence
Wood 02 CV 0007
01 MMP 1087

14. Collen vs McHenry et al — Jury found no negligence
Brown 02 CV 0249
02 MMP 1059

15. Mahoney vs Culen — Jury found no negligence
Racine 03 CV 1010
03 MMP 1075

16. Schmidt vs Advanced Healthcare — Jury found no negligence
Milwaukee 03 CV 004308
03 MMP 1003

17. Estate of Ball vs Sierra et al — Jury found no negligence
Racine 02 CV 1399
02 MMP 1147

18. Lenss vs Bressler et al — Jury found no negligence
Brown 00 CV 0907
00 MMP 1178

19. Boyance vs Clouse et al — Jury found no negligence
Wood 02 CV 0244
02 MMP 1140

20. Hundley/Ross vs Carroll et al — Jury found no negligence
Milwaukee 01 CV 007273
01 MMP 1159

21. Rimmert vs Sunby et al — Jury found no negligence
La Crosse 01 CV 0142
01 MMP 1054

22. Jezwinski vs Rozum
Winnebago 02 CV 0277
02 MMP 1082

Jury found no negligence

23. Gebhard vs Clayton et al
Pierce 03 CV 0057
03 MMP 1080

Jury found no negligence