

## 2005 DRAFTING REQUEST

### Bill

Received: 10/10/2005

Received By: rnelson2

Wanted: As time permits

Identical to LRB:

For: John Gard (608) 266-3387

By/Representing: Ellen

This file may be shown to any legislator: NO

Drafter: rnelson2

May Contact:

Addl. Drafters:

Subject: Courts - immunity liability

Extra Copies:

Submit via email: YES

Requester's email: Rep.Gard@legis.state.wi.us

Carbon copy (CC:) to: richard.sweet@legis.state.wi.us

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### Pre Topic:

No specific pre topic given

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### Topic:

Medical malpractice cap

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### Instructions:

See Attached

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### Drafting History:

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/?							
/P1	rnelson2 10/12/2005 pkahler 10/12/2005	lkunkel 10/13/2005	pgreensl 10/13/2005	_____	_____	_____	_____
/P2	rnelson2 10/14/2005	rschluet 10/14/2005	rschluet 10/14/2005	_____	_____	_____	_____
/1	rnelson2	lkunkel	rschluet	_____	lnorthro	lnorthro	_____

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
	10/14/2005	10/14/2005	10/14/2005	_____	10/14/2005	10/14/2005	

FE Sent For:

*None  
needed*

<END>

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Requester's email: Rep.Gard@legis.state.wi.us

Carbon copy (CC:) to: richard.sweet@legis.state.wi.us

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**Pre Topic:**

No specific pre topic given

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**Topic:**

Medical malpractice cap

---

**Instructions:**

See Attached

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**Drafting History:**

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/?							
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/P2	rnelson2 10/14/2005	rschluet 10/14/2005	rschluet 10/14/2005	_____	_____	_____	_____
/1	rnelson2	lkunkel	rschluet	_____	lnorthro	_____	_____

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
	10/14/2005	10/14/2005	10/14/2005	_____	10/14/2005		

FE Sent For:

**<END>**

2005 DRAFTING REQUEST

Bill

Received: 10/10/2005

Received By: rnelson2

Wanted: As time permits

Identical to LRB:

For: John Gard (608) 266-3387

By/Representing: Ellen

This file may be shown to any legislator: NO

Drafter: rnelson2

May Contact:

Addl. Drafters: PJK

Subject: Courts - immunity liability

Extra Copies: Dick Sweet, LC  
~~Rep. [unclear]~~  
~~Rep. [unclear]~~

Submit via email: YES

X

Requester's email: Rep.Gard@legis.state.wi.us

Carbon copy (CC:) to:

Pre Topic:

No specific pre topic given

Topic:

Medical malpractice cap

Instructions:

10/14 Ellen: cap of \$550,000 for children, \$150,000 for adults.

See Attached

Drafting History:

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/?	rnelson2	/p1/mk 10/13	1/3 ps	10/13/ll			
FE Sent For:		/p2/mk 10/14					
		1/mk 10/14					

<END>

**Nelson, Robert P.**

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**From:** Nowak, Ellen  
**Sent:** Monday, October 10, 2005 3:05 PM  
**To:** Nelson, Robert P.  
**Cc:** Sweet, Richard  
**Subject:** Med Mal drafting instructions

**Attachments:** Med-Mal drafting instructions.doc



Med-Mal drafting  
instructions....

Following are drafting instructions for legislation establishing a new cap on noneconomic damage awards in medical malpractice actions. It is in response to *Ferdon v. Wisconsin Patients Compensation Fund*, 2005 WI 125 (2005) which found the existing cap unconstitutional.

In its decision, the court indicated that damage caps are not per se unconstitutional and noted that *Ferdon* "was not about whether all caps or even all caps on noneconomic damages are constitutionally permissible."

By recognizing that caps are constitutional, the court has recognized that adequate compensation does not require full compensation in every case. This legislation will establish a cap that provides full compensation of noneconomic damages for a majority of victims of medical malpractice while also continuing to provide full and unlimited compensation of economic damages in all cases.

The instructions are based on the recommendations I received from the Speaker's Task Force on Medical Malpractice on October 10, 2005.

- Establish a two-tiered cap for noneconomic damage awards for medical malpractice under which injured minors have a higher cap than injured adults. This is intended to follow the two-tiered approach to damages in wrongful death cases. Once I complete my research into an appropriate monetary limit for the cap, I will provide that information.
- Require the Injured Patients and Families Compensation Fund Board to report to the Legislature by January 1 of every odd numbered year of any recommended change to the monetary limit on noneconomic damages for medical malpractice awards. Any such recommendation shall include the reasons why a change is necessary to meet the intent of the Legislative Findings included in this act.
- The new cap should take effect upon the effective date of this act.
- As recommended by the Task Force, following are legislative findings regarding the rationale for reestablishing a cap.

(1) The legislature finds that:

(a) Affordable and accessible health care benefits patients and the public in general.

(b) A cap on noneconomic damages is one factor necessary to maintain affordability and accessibility.

(c) A cap on noneconomic damages, together with mandatory liability insurance coverage for health care providers, mandatory participation in the Injured Patients and Families Compensation Fund (Fund) by health care providers, and unlimited economic damage awards, ensures adequate compensation for victims of medical malpractice.

(2) The legislature further finds that a medical liability system should promote the following objectives:

(a) To provide adequate compensation to victims of medical malpractice through economic and noneconomic damages.

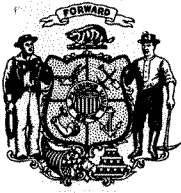
(b) To protect access to health care services across the state and across medical specialties by limiting disincentives for physicians to practice medicine in Wisconsin such as the unavailability of professional liability insurance coverage, high cost of insurance premiums, large Fund assessments, or unpredictable or large noneconomic damage awards as recognized by a 2003 United States Congress Joint Economic Committee report, 2003 United States Department of Health and Human Services study, and 2004 Office of the Commissioner of Insurance report.

(c) To help contain health care costs by limiting the incentive to practice defensive medicine which increases the cost of patient care as recognized by a 2002 United States Department of Health and Human Services study and a 2003 United States Congress Joint Economic Committee report.

(d) To help contain health care costs by providing more predictability in noneconomic damage awards allowing insurers to set insurance premiums that better reflect their financial risk as recognized by a 2003 United States Department of Health and Human Services study, 2003 United States Government Accounting Office study, and 2005 Office of the Commissioner of Insurance report.

(e) To help contain health care costs by providing more predictability in noneconomic damage awards in order to protect the financial integrity of the Fund and allow the Fund Board to set reasonable assessments for health care providers as recognized by a 2005 Legislative Fiscal Bureau memo, 2001 Legislative Audit Bureau Report, and 2005 Office of the Commissioner of Insurance report.





State of Wisconsin  
2005 - 2006 LEGISLATURE

LRB-3824/P1

RPN:.....  
↑ mk  
2 PJK

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

Thurs.  
10-13

1 AN ACT ...; relating to: ???

---

*Analysis by the Legislative Reference Bureau*

---

*The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:*

2

(END)



PK

Keep

# 2005 BILL



LPS: P/s re-sort

reger

1 AN ACT *to repeal* 893.55 (4) (d); *to renumber and amend* 893.55 (4) (b); *to*  
 2 *amend* 655.017, 893.55 (4) (c) and 893.55 (5) (intro.); and *to create* 893.55 (4)  
 3 (b) 1. of the statutes; **relating to:** recovery of noneconomic damages in medical  
 4 malpractice cases. ✓

### *Analysis by the Legislative Reference Bureau*

Under current law, if a defendant in a medical malpractice case is required to pay noneconomic damages, such as for pain and suffering or for loss of society and companionship, the amount of those damages are limited. The current limit on those damages for each occurrence of medical malpractice is \$445,755, and that limit is adjusted annually for inflation. In *Ferdon v. Wisconsin Patients Compensation Fund*, 2005 WI 125 (2005), the Wisconsin supreme court found that limit to be unconstitutional because the limit violated the equal protection provision of the Wisconsin constitution. (T)

This bill creates a limit on noneconomic damages for each occurrence of medical malpractice of ~~\$550,000~~ plus \$5,000 for each year that the injured person is expected to live, adjusted annually for inflation. The bill requires the board of governors that administers the injured patients and families compensation fund (formerly the

**BILL**

patients compensation fund) to adopt a life expectancy table to be used to determine the life expectancy of the injured party. *..... (LPS... Bob will complete later)*

*The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:*

1 SECTION 1. 655.017 of the statutes is amended to read:

2 **655.017 Limitation on noneconomic damages.** The amount of  
3 noneconomic damages recoverable by a claimant or plaintiff under this chapter for  
4 acts or omissions of a health care provider if the act or omission occurs on or after May  
5 25, 1995 the effective date of this section .... [revisor inserts date], and for acts or  
6 omissions of an employee of a health care provider, acting within the scope of his or  
her employment and providing health care services, for acts or omissions occurring  
on or after May 25, 1995 the effective date of this section .... [revisor inserts date],  
is subject to the limits under s. 893.55 (4) (d) *(b) 2* and (f). *plain text*

*Insert 7  
2-9*

9 SECTION 2. 893.55 (4) (b) of the statutes is renumbered 893.55 (4) (b) 2. and  
10 amended to read:

*move  
stuff  
from p 3 and  
insert A*

11 893.55 (4) (b) 2. The total noneconomic damages recoverable for bodily injury  
12 or death, including any action or proceeding based on contribution or  
13 indemnification and any action for a claim by a person other than the injured person  
14 for noneconomic damages resulting in bodily injury, may not exceed the limit under  
15 par. (d) \$550,000, plus \$5,000 for each year that the injured person is expected to live  
16 after the date of his or her injury, for each occurrence on or after May 25, 1995 the  
17 effective date of this paragraph .... [revisor inserts date], from all health care  
18 providers and all employees of health care providers acting within the scope of their  
19 employment and providing health care services who are found negligent and from  
20 the injured patients and families compensation fund. The limit on total noneconomic  
21

*↓ placate*

*plain text*

*If the injured person is under the age of 18*

**BILL**

**SECTION 2**

*893.55 (1d) (a) In this subsection, "fund" means the injured patients and families compensation fund under s. 655.27.*

1 damages and the \$5,000 annual life expectancy increase for each occurrence under  
2 this paragraph shall be adjusted by the director of state courts to reflect changes in  
3 the consumer price index for all urban consumers, U.S. city average, as determined  
4 by the U.S. department of labor, at least annually after the effective date of this  
5 paragraph .... [revisor inserts date], with the adjusted amounts to apply to awards  
6 subsequent to such adjustments. The board of governors administering the injured  
7 patients and families compensation fund under ch. 655 shall adopt a life expectancy  
8 table that shall be used to determine the life expectancy of the injured person under  
9 this paragraph.

10 **SECTION 3.** 893.55 (4) (b) 1. of the statutes is created to read:

11 ~~893.55 (4) (b) 1.~~ *the following related to* The legislature finds that *sub. (4)(d)* the limitation on noneconomic  
12 damages in *sub. 2.* accomplishes the following objectives: *(insert A)*

*Move before 893.55 (4)(b)*

- 13 a. Ensures adequate compensation for victims.
- 14 b. Enables insurers to charge lower malpractice premiums by reducing the size
- 15 of awards.
- 16 c. Keeps the injured patients and families compensation fund's annual
- 17 assessment to health care providers at a low rate and protects the fund's financial
- 18 status.
- 19 d. Reduces overall health care costs for consumers of health care by lowering
- 20 malpractice premiums.
- 21 e. Encourages health care providers to practice in Wisconsin, including the
- 22 related objectives of avoiding the practice of defensive medicine and retaining
- 23 malpractice insurers in Wisconsin.

24 **SECTION 4.** 893.55 (4) (c) of the statutes is amended to read:

**BILL**

**SECTION 4**

1 893.55 (4) (c) A court in an action tried without a jury shall make a finding as  
 2 to noneconomic damages without regard to the limit under par. (d) (b) 2. If  
 3 noneconomic damages in excess of the limit are found, the court shall make any  
 4 reduction required under s. 895.045 and shall award as noneconomic damages the  
 5 lesser of the reduced amount or the limit. If an action is before a jury, the jury shall  
 6 make a finding as to noneconomic damages without regard to the limit under par. (d)  
 7 (b) 2. If the jury finds that noneconomic damages exceed the limit, the jury shall  
 8 make any reduction required under s. 895.045 and the court shall award as  
 9 noneconomic damages the lesser of the reduced amount or the limit.

10 **SECTION 5.** 893.55 (4) (d) of the statutes is repealed.

11 **SECTION 6.** 893.55 (5) (intro.) of the statutes is amended to read:

12 893.55 (5) (intro.) Every award of damages under ch. 655 shall specify the sum  
 13 of money, if any, awarded for each of the following for each claimant for the period  
 14 from the date of injury to the date of award and for the period after the date of award,  
 15 without regard to the limit under sub. (4) (d) (b) 2.:

16 (END)

*Inserts 4-15A 15 A  
 4-15 B 15 B*

*insert 4*

Insert A

Following are drafting instructions for legislation establishing a new cap on noneconomic damage awards in medical malpractice actions. It is in response to *Ferdon v. Wisconsin Patients Compensation Fund*, 2005 WI 125 (2005) which found the existing cap unconstitutional.

In its decision, the court indicated that damage caps are not per se unconstitutional and noted that *Ferdon* "was not about whether all caps or even all caps on noneconomic damages are constitutionally permissible."

By recognizing that caps are constitutional, the court has recognized that adequate compensation does not require full compensation in every case. This legislation will establish a cap that provides full compensation of noneconomic damages for a majority of victims of medical malpractice while also continuing to provide full and unlimited compensation of economic damages in all cases.

The instructions are based on the recommendations I received from the Speaker's Task Force on Medical Malpractice on October 10, 2005.

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- Require the Injured Patients and Families Compensation Fund Board to report to the Legislature by January 1 of every odd numbered year of any recommended change to the monetary limit on noneconomic damages for medical malpractice awards. Any such recommendation shall include the reasons why a change is necessary to meet the intent of the Legislative Findings included in this act.
- The new cap should take effect upon the effective date of this act.
- As recommended by the Task Force, following are legislative findings regarding the rationale for reestablishing a cap.

(1) The legislature finds that:

(a) Affordable and accessible health care benefits patients and the public in general.

Insert A

insert  
A cont

unfund. 623.27

2.

(b) A cap on noneconomic damages is one factor necessary to maintain affordability and accessibility.

3.

~~(c) A cap on noneconomic damages, together with mandatory liability insurance coverage for health care providers, mandatory participation in the Injured Patients and Families Compensation Fund (Fund) by health care providers, and unlimited economic damage awards, ensures adequate compensation for victims of medical malpractice.~~

~~(c)~~

(2) The legislature further finds that a medical liability system should promote the following objectives:

1.

(a) ~~To~~ provide adequate compensation to victims of medical malpractice through economic and noneconomic damages.

2.

(b) ~~To~~ protect access to health care services across the state and across medical specialties by limiting disincentives for physicians to practice medicine in Wisconsin such as the unavailability of professional liability insurance coverage, high cost of insurance premiums, large Fund assessments, or unpredictable or large noneconomic damage awards as recognized by a 2003 United States Congress Joint Economic Committee report, 2003 United States Department of Health and Human Services study, and 2004 Office of the Commissioner of Insurance report.

(use 2x)  
a

Federal use 2x

U.S.

Use 3x

3.

(c) ~~To~~ help contain health care costs by limiting the incentive to practice defensive medicine, which increases the cost of patient care as recognized by a 2002 United States Department of Health and Human Services study and a 2003 United States Congress Joint Economic Committee report.

Federal A

4.

(d) ~~To~~ help contain health care costs by providing more predictability in noneconomic damage awards allowing insurers to set insurance premiums that better reflect their financial risk as recognized by a 2003 United States Department of Health and Human Services study, 2003 United States Government Accounting Office study, and 2005 Office of the Commissioner of Insurance report.

a use 2x

5.

(e) ~~To~~ help contain health care costs by providing more predictability in noneconomic damage awards in order to protect the financial integrity of the Fund and allow the Fund Board to set reasonable assessments for health care providers as recognized by a 2005 Legislative Fiscal Bureau memo, 2001 Legislative Audit Bureau Report, and 2005 Office of the Commissioner of Insurance report.

a (use 2x)

end of insert A

2005-2006 DRAFTING INSERT  
FROM THE  
LEGISLATIVE REFERENCE BUREAU

LRB-3824/Plins  
RPN:.....

*LPS: insert B  
out of order*

1 insert 2-9: ✓

2 SECTION 1. 893.55 (1) of the statutes is renumbered 893.55 (1m).

3 insert 4-15: <sup>B</sup> ✓

4 SECTION 2. 893.55 (4) (d) of the statutes is amended to read:

5 893.55 (4) (d) The limit on total noneconomic damages for each occurrence  
6 under par. (b) on or after ~~May 25, 1995~~ <sup>set</sup> the effective date of this paragraph ... [revisor  
7 inserts date], shall be \$350,000 and ~~\$100,000~~ <sup>set</sup> for an injured party who is under the age  
8 of 18, and shall be ~~\$100,000~~ <sup>set</sup> for an injured party who is age 18 or over. These amounts ✓  
9 shall be adjusted by the director of state courts to reflect changes in the consumer  
10 price index for all urban consumers, U.S. city average, as determined by the U.S.  
11 department of labor, at least annually thereafter, with the adjusted limit to apply to  
12 awards subsequent to such adjustments.

NOTE: NOTE: The supreme court in *Ferdon v. Wisconsin Patients Compensation Fund*, 2005 WI 125, Case # 2003AP988 held that the \$350,000 cap (adjusted for inflation) on noneconomic medical malpractice damages set forth in Wis. Stat. ss. 655.017 and 893.55(4)(d) violates the equal protection guarantees of the Wisconsin Constitution. NOTE:

History: 1979 c. 323; 1985 a. 340; 1995 a. 10; 2003 a. 111.

13

14



2005-2006 DRAFTING INSERT  
FROM THE  
LEGISLATIVE REFERENCE BUREAU

LRB-3824/P1ins  
RPN:.....

Insert 4-15(A)

1

2           **SECTION 1.** 893.55 (2) of the statutes is amended to read:

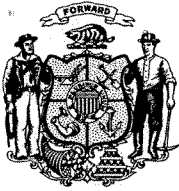
3           893.55 (2) If a health care provider conceals from a patient a prior act or  
4           omission of the provider which has resulted in injury to the patient, an action shall  
5           be commenced within one year from the date the patient discovers the concealment  
6           or, in the exercise of reasonable diligence, should have discovered the concealment  
7           or within the time limitation provided by sub. ~~(1)~~ (1m), whichever is later.

8           History: 1979 c. 323; 1985 a. 340; 1995 a. 10; 2003 a. 111.

8           **SECTION 2.** 893.55 (3) of the statutes is amended to read:

9           893.55 (3) When a foreign object which has no therapeutic or diagnostic  
10          purpose or effect has been left in a patient's body, an action shall be commenced  
11          within one year after the patient is aware or, in the exercise of reasonable care,  
12          should have been aware of the presence of the object or within the time limitation  
13          provided by sub. ~~(1)~~ (1m), whichever is later.

History: 1979 c. 323; 1985 a. 340; 1995 a. 10; 2003 a. 111.



10/14 11 am  
State of Wisconsin  
2005 - 2006 LEGISLATURE

LRB-3824/P1  
RPN&PJK:lmk&cs:pg

keep

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

regen

1 AN ACT *to renumber* 893.55 (1); ~~to renumber and amend~~ 893.55 (4) (b); *to*  
2 *amend* 655.017, 893.55 (2), 893.55 (3) and 893.55 (4) (d); and *to create* 893.55  
3 (1d) of the statutes; **relating to:** recovery of noneconomic damages in medical  
4 malpractice cases.

***Analysis by the Legislative Reference Bureau***

Under current law, if a defendant in a medical malpractice case is required to pay noneconomic damages, such as for pain and suffering or for loss of society and companionship, the amount of those damages are limited. The current limit on those damages for each occurrence of medical malpractice is \$445,755, and that limit is adjusted annually for inflation. In *Ferdon v. Wisconsin Patients Compensation Fund*, 2005 WI 125 (2005), the Wisconsin Supreme Court found that limit to be unconstitutional because the limit violated the equal protection provision of the Wisconsin Constitution.

This bill creates a limit on noneconomic damages for each occurrence of medical malpractice of ~~...~~ (insert a.c.)

***The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:***

5 SECTION 1. 655.017 of the statutes is amended to read:

1           **655.017 Limitation on noneconomic damages.** The amount of  
2 noneconomic damages recoverable by a claimant or plaintiff under this chapter for  
3 acts or omissions of a health care provider if the act or omission occurs on or after May  
4 ~~25, 1995~~ the effective date of this section .... [revisor inserts date], and for acts or  
5 omissions of an employee of a health care provider, acting within the scope of his or  
6 her employment and providing health care services, for acts or omissions occurring  
7 on or after ~~May 25, 1995~~ the effective date of this section .... [revisor inserts date],  
8 is subject to the limits under s. 893.55 (4) (d) and (f).

9           **SECTION 2.** 893.55 (1) of the statutes is renumbered 893.55 (1m).

10           **SECTION 3.** 893.55 (1d) of the statutes is created to read:

11           **893.55 (1d) (a)** In this subsection, “fund” means the injured patients and  
12 families compensation fund under s. 655.27.

13           (b) The legislature finds the following related to the limitation on noneconomic  
14 damages in sub. (4) (d):

15           1. Affordable and accessible health care benefits patients and the public in  
16 general.

17           2. A cap on noneconomic damages is one factor necessary to maintain  
18 affordability and accessibility.

19           3. A cap on noneconomic damages, together with mandatory liability insurance  
20 coverage for health care providers, mandatory participation in the fund by health  
21 care providers, and unlimited economic damage awards, ensures adequate  
22 compensation for victims of medical malpractice.

23           (c) The legislature further finds that a medical liability system should promote  
24 the following objectives:

1           1. Provide adequate compensation to victims of medical malpractice through  
2 economic and noneconomic damages.

3           2. Protect access to health care services across the state and across medical  
4 specialities by limiting disincentives for physicians to practice medicine in Wisconsin  
5 such as the unavailability of professional liability insurance coverage, high cost of  
6 insurance premiums, large fund assessments, or unpredictable or large noneconomic  
7 damage awards as recognized by a 2003 U.S. congress joint economic committee  
8 report, a 2003 federal department of health and human services study, and a 2004  
9 office of the commissioner of insurance report.

10          3. Help contain health care costs by limiting the incentive to practice defensive  
11 medicine, which increases the cost of patient care as recognized by a 2002 federal  
12 department of health and human services study and a 2003 U.S. congress joint  
13 economic committee report.

14          4. Help contain health care costs by providing more predictability in  
15 noneconomic damage awards allowing insurers to set insurance premiums that  
16 better reflect their financial risk as recognized by a 2003 U.S. federal department of  
17 health and human services study, a 2003 government accounting office study, and a  
18 2005 office of the commissioner of insurance report.

19          5. Help contain health care costs by providing more predictability in  
20 noneconomic damage awards in order to protect the financial integrity of the fund  
21 and allow the fund board <sup>vs</sup> ~~to set~~ of governors <sup>approve</sup> reasonable assessments for health care providers as  
22 recognized by a 2005 legislative fiscal bureau memo, a 2001 legislative audit bureau  
23 report, and a 2005 office of commissioner of insurance report.

24          **SECTION 4.** 893.55 (2) of the statutes is amended to read:

SECTION 4

1 893.55 (2) If a health care provider conceals from a patient a prior act or  
2 omission of the provider which has resulted in injury to the patient, an action shall  
3 be commenced within one year from the date the patient discovers the concealment  
4 or, in the exercise of reasonable diligence, should have discovered the concealment  
5 or within the time limitation provided by sub. (1) (1m), whichever is later.

6 SECTION 5. 893.55 (3) of the statutes is amended to read:

7 893.55 (3) When a foreign object which has no therapeutic or diagnostic  
8 purpose or effect has been left in a patient's body, an action shall be commenced  
9 within one year after the patient is aware or, in the exercise of reasonable care,  
10 should have been aware of the presence of the object or within the time limitation  
11 provided by sub. (1) (1m), whichever is later.

12 SECTION 6. 893.55 (4) (b) of the statutes is renumbered 893.55 (4) (b) 2. and  
13 amended to read:

14 893.55 (4) (b) 2. The total noneconomic damages recoverable for bodily injury  
15 ~~or death~~, including any action or proceeding based on contribution or  
16 indemnification and any action for a claim by a person other than the injured person  
17 for noneconomic damages resulting in bodily injury, may not exceed the limit under  
18 par. (d) for each occurrence on or after ~~May 25, 1995~~ the effective date of this  
19 paragraph .... [revisor inserts date], from all health care providers and all employees  
20 of health care providers acting within the scope of their employment and providing  
21 health care services who are found negligent and from the injured patients and  
22 families compensation fund.

*renumbered 893.55 (4)(d) 1. and*

23 SECTION 7. 893.55 (4) (d) of the statutes is amended to read:

24 893.55 (4) (d) <sup>1.</sup> The limit on total noneconomic damages for each occurrence  
25 under par. (b) on or after ~~May 25, 1995~~ the effective date of this paragraph ....[revisor

(23) LPS:  
PIS  
fix comp.

1 inserts date, shall be \$350,000 and \$ \_\_\_\_\_ for an injured party who is under the age  
2 of 18, and shall be \$ \_\_\_\_\_ for an injured party who is age 18 or over. ~~These amounts~~  
3 ~~shall be adjusted by the director of state courts to reflect changes in the consumer~~  
4 ~~price index for all urban consumers, U.S. city average, as determined by the U.S.~~  
5 ~~department of labor, at least annually thereafter, with the adjusted limit to apply to~~  
6 ~~awards subsequent to such adjustments.~~

7

(END)

*insert 5-6*

2005-2006 DRAFTING INSERT  
FROM THE  
LEGISLATIVE REFERENCE BUREAU

2  
LRB-3824/P/ins  
RPN&PJK:lmk&cs:pg

insert anl:

\$ for persons under the age of 18, and \$ for persons age 18 and over. The bill requires the board of governors that approves any fee changes to the injured patients and families compensation fund to report to the legislature every two years any suggested changes to these noneconomic damage limits and the reasons why the changes are necessary to meet the intent of the legislature.

1 insert 5-6:

2 SECTION 1. 893.55 (4) (d) 2. of the statutes is created to read:

3 893.55 (4) (d) 2. The board of governors created under s. 619.04 (3) shall submit  
4 a report to the legislature as provided under s. 13.172 (2) by January 1 of every odd  
5 numbered year of any recommended changes to the limits on noneconomic damages  
6 established in subd. 1. The report shall include the reasons why the changes are  
7 necessary to meet the intent of the legislative findings under sub. (1d).



State of Wisconsin  
2005 - 2006 LEGISLATURE

LRB-3824/P2  
RPN&PJK:lmk&cs/rs

a.m.

keep

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

Refer

✓ +

1 AN ACT to renumber 893.55 (1); to renumber and amend 893.55 (4) (b) and  
2 893.55 (4) (d); to amend 655.017, 893.55 (2) and 893.55 (3); and to create  
3 893.55 (1d) and 893.55 (4) (d) 2. of the statutes; relating to: recovery of  
4 noneconomic damages in medical malpractice cases.

**Analysis by the Legislative Reference Bureau**

Under current law, if a defendant in a medical malpractice case is required to pay noneconomic damages, such as for pain and suffering or for loss of society and companionship, the amount of those damages are limited. The current limit on those damages for each occurrence of medical malpractice is \$445,755, and that limit is adjusted annually for inflation. In *Ferdon v. Wisconsin Patients Compensation Fund*, 2005 WI 125 (2005), the Wisconsin Supreme Court found that limit to be unconstitutional because the limit violated the equal protection provision of the Wisconsin Constitution.

This bill creates a limit on noneconomic damages for each occurrence of medical malpractice of \$ for persons under the age of 18, and \$ for persons age 18 and over. The bill requires the board of governors that approves any fee changes to the Injured Patients and Families Compensation Fund to report to the legislature every

550,000

450,000



two years any suggested changes to these noneconomic damage limits and the reasons why the changes are necessary to meet the intent of the legislature.

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*The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:*

1           **SECTION 1.** 655.017 of the statutes is amended to read:

2           **655.017 Limitation on noneconomic damages.** The amount of  
3 noneconomic damages recoverable by a claimant or plaintiff under this chapter for  
4 acts or omissions of a health care provider if the act or omission occurs on or after May  
5 ~~25, 1995~~ the effective date of this section ... [revisor inserts date], and for acts or  
6 omissions of an employee of a health care provider, acting within the scope of his or  
7 her employment and providing health care services, for acts or omissions occurring  
8 on or after ~~May 25, 1995~~ the effective date of this section ... [revisor inserts date],  
9 is subject to the limits under s. 893.55 (4) (d) and (f).

10           **SECTION 2.** 893.55 (1) of the statutes is renumbered 893.55 (1m).

11           **SECTION 3.** 893.55 (1d) of the statutes is created to read:

12           **893.55 (1d) (a)** In this subsection, “fund” means the injured patients and  
13 families compensation fund under s. 655.27.

14           (b) The legislature finds the following related to the limitation on noneconomic  
15 damages in sub. (4) (d):

16           1. Affordable and accessible health care benefits patients and the public in  
17 general.

18           2. A cap on noneconomic damages is one factor necessary to maintain  
19 affordability and accessibility.

20           3. A cap on noneconomic damages, together with mandatory liability insurance  
21 coverage for health care providers, mandatory participation in the fund by health

1 care providers, and unlimited economic damage awards, ensures adequate  
2 compensation for victims of medical malpractice.

3 (c) The legislature further finds that a medical liability system should promote  
4 the following objectives:

5 1. Provide adequate compensation to victims of medical malpractice through  
6 economic and noneconomic damages.

7 2. Protect access to health care services across the state and across medical  
8 specialities by limiting disincentives for physicians to practice medicine in Wisconsin  
9 such as the unavailability of professional liability insurance coverage, high cost of  
10 insurance premiums, large fund assessments, or unpredictable or large noneconomic  
11 damage awards as recognized by a 2003 U.S. congress joint economic committee  
12 report, a 2003 federal department of health and human services study, and a 2004  
13 office of the commissioner of insurance report.

14 3. Help contain health care costs by limiting the incentive to practice defensive  
15 medicine, which increases the cost of patient care as recognized by a 2002 federal  
16 department of health and human services study and a 2003 U.S. congress joint  
17 economic committee report.

18 4. Help contain health care costs by providing more predictability in  
19 noneconomic damage awards allowing insurers to set insurance premiums that  
20 better reflect their financial risk as recognized by a 2003 U.S. federal department of  
21 health and human services study, a 2003 government accounting office study, and a  
22 2005 office of the commissioner of insurance report.

23 5. Help contain health care costs by providing more predictability in  
24 noneconomic damage awards in order to protect the financial integrity of the fund  
25 and allow the fund's board of governors to approve reasonable assessments for health

**SECTION 3**

1 care providers as recognized by a 2005 legislative fiscal bureau memo, a 2001  
2 legislative audit bureau report, and a 2005 office of commissioner of insurance  
3 report.

4 **SECTION 4.** 893.55 (2) of the statutes is amended to read:

5 893.55 (2) If a health care provider conceals from a patient a prior act or  
6 omission of the provider which has resulted in injury to the patient, an action shall  
7 be commenced within one year from the date the patient discovers the concealment  
8 or, in the exercise of reasonable diligence, should have discovered the concealment  
9 or within the time limitation provided by sub. (1) (1m), whichever is later.

10 **SECTION 5.** 893.55 (3) of the statutes is amended to read:

11 893.55 (3) When a foreign object which has no therapeutic or diagnostic  
12 purpose or effect has been left in a patient's body, an action shall be commenced  
13 within one year after the patient is aware or, in the exercise of reasonable care,  
14 should have been aware of the presence of the object or within the time limitation  
15 provided by sub. (1) (1m), whichever is later.

16 **SECTION 6.** 893.55 (4) (b) of the statutes is renumbered 893.55 (4) (b) 2. and  
17 amended to read:

18 893.55 (4) (b) 2. The total noneconomic damages recoverable for bodily injury  
19 ~~or death~~, including any action or proceeding based on contribution or  
20 indemnification and any action for a claim by a person other than the injured person  
21 for noneconomic damages resulting in bodily injury, may not exceed the limit under  
22 par. (d) for each occurrence on or after ~~May 25, 1995~~ the effective date of this  
23 paragraph .... [revisor inserts date], from all health care providers and all employees  
24 of health care providers acting within the scope of their employment and providing

1 health care services who are found negligent and from the injured patients and  
2 families compensation fund.

3 SECTION 7. 893.55 (4) (d) of the statutes is renumbered 893.55 (4) (d) 1. and  
4 amended to read:

5 893.55 (4) (d) 1. The limit on total noneconomic damages for each occurrence  
6 under par. (b) on or after ~~May 25, 1995~~ the effective date of this paragraph .... [revisor  
7 inserts date], shall be \$350,000 and shall be adjusted by the director of state courts  
8 to reflect changes in the consumer price index for all urban consumers, U.S. city  
9 average, as determined by the U.S. department of labor, at least annually thereafter,

10 with the adjusted limit to apply to awards subsequent to such adjustments \$ for  
11 ~~an injured party~~ <sup>a person</sup> who is under the age of 18, <sup>at the time of the injury</sup> and shall be \$ for an injured party  
12 ~~who is age 18 or over~~ <sup>a person</sup> <sup>at the time of the injury</sup>

450,000  
place underscored

550,000  
place underscored

13 SECTION 8. 893.55 (4) (d) 2. of the statutes is created to read:

14 893.55 (4) (d) 2. The board of governors created under s. 619.04 (3) shall submit  
15 a report to the legislature as provided under s. 13.172 (2) by January 1 of every odd  
16 numbered year of any recommended changes to the limits on noneconomic damages  
17 established in subd. 1. The report shall include the reasons why the changes are  
18 necessary to meet the intent of the legislative findings under sub. (1d).

19 (END)

## Northrop, Lori

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**From:** Nowak, Ellen  
**Sent:** Friday, October 14, 2005 1:11 PM  
**To:** LRB.Legal  
**Subject:** Draft review: LRB 05-3824/1 Topic: Medical malpractice cap

It has been requested by <Nowak, Ellen> that the following draft be jacketed for the ASSEMBLY:

Draft review: LRB 05-3824/1 Topic: Medical malpractice cap