



2005 ASSEMBLY BILL 960

January 31, 2006 - Introduced by Representatives OWENS, SCHNEIDER and ZIEGELBAUER. Referred to Committee on Insurance.

1 **AN ACT** *to renumber* 893.55 (1); *to amend* 655.016, 655.017, 893.55 (2), 893.55
2 (3), 893.55 (4) (b), 893.55 (4) (c) and 893.55 (4) (d); and *to create* 655.018, 655.27
3 (4) (h), 893.55 (1d) and 893.55 (4) (dm) 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 is limited. The current limit in the statutes 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 \$750,000, 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 patients compensation fund) to adopt a life expectancy table to be used to determine the life expectancy of the injured party. The bill also establishes a separate limit on noneconomic damages recoverable by certain relatives of the injured person, such as parents, children, and siblings, equal to 25 percent of the injured person's limit on noneconomic damages.

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Current law requires certain health care providers to carry health care liability insurance with liability limits of at least \$1,000,000 for each occurrence and at least \$3,000,000 for all occurrences in a policy year. If a medical malpractice claim against a health care provider who is subject to the health care liability insurance requirements exceeds the limits of the provider's health care liability insurance, the injured patients and families compensation fund pays the portion of the claim that exceeds the limits. Moneys in the injured patients and families compensation fund (fund) come from assessments paid by the health care providers who are subject to the health care liability requirements.

This bill provides that, if the balance in the fund is ever reduced by 30 percent or more in a fiscal year from the balance in the fund at the beginning of that fiscal year, the board of governors that administers the fund must notify the commissioner of insurance (commissioner). The commissioner must then recommend an amount for the limit on noneconomic damages for an injured person that is lower than the amount established in the bill and submit that amount to the appropriate standing committees of the legislature and to the Joint Committee on Finance (JCF), which may either approve or disapprove the amount. If JCF approves the amount, that amount becomes the new limit on noneconomic damages for an injured person for each occurrence of medical malpractice on or after the date on which JCF approves the amount until the date on which the balance in the fund equals the amount that existed at the beginning of the fiscal year in which the fund's balance was reduced by 30 percent or more. For each occurrence of medical malpractice on or after the date on which the fund's balance returns to the amount at the beginning of the fiscal year in which the fund's balance was reduced by 30 percent or more, the noneconomic damages amount established in the bill applies.

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

1 **SECTION 1.** 655.016 of the statutes is amended to read:

2 **655.016 Claim by minor sibling for loss of society and companionship.**

3 Subject to s. ss. 655.017 and 655.018, a sibling of a person who dies as a result of
4 malpractice has a cause of action for damages for loss of society and companionship
5 if the sibling was a minor at the time of the deceased sibling's death. This section does
6 not affect any other claim available under this chapter.

7 **SECTION 2.** 655.017 of the statutes is amended to read:

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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), or to the limit under s. 655.27
9 (4) (h) and the limit under s. 893.55 (4) (f), whichever is applicable.

10 **SECTION 3.** 655.018 of the statutes is created to read:

11 **655.018 Limitation on noneconomic damages; derivative claims.** The
12 amount of noneconomic damages recoverable by a claimant or plaintiff; derivative
13 claims under this chapter for acts or omissions of a health care provider if the act or
14 omission occurs on or after the effective date of this section ... [revisor inserts date],
15 and for acts or omissions of an employee of a health care provider, acting within the
16 scope of his or her employment and providing health care services, for acts or
17 omissions occurring on or after the effective date of this section ... [revisor inserts
18 date], is subject to the limits under s. 893.55 (4) (dm).

19 **SECTION 4.** 655.27 (4) (h) of the statutes is created to read:

20 **655.27 (4) (h) 1.** The board of governors shall notify the commissioner if, during
21 any fiscal year, the balance of the fund is reduced by 30 percent or more from the
22 balance in the fund at the beginning of that fiscal year.

23 2. If the board of governors notifies the commissioner under subd. 1., the
24 commissioner shall submit to the appropriate standing committees of the
25 legislature, as determined by the speaker and president, under s. 13.172 (3) and to

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1 the joint committee on finance a report that recommends a limit on total
2 noneconomic damages under s. 893.55 (4) (d) that is different from and less than the
3 amount specified in s. 893.55 (4) (d). The joint committee on finance may approve
4 or disapprove the amount recommended by the commissioner in the report. If the
5 joint committee on finance approves the amount, that amount shall be the limit on
6 total noneconomic damages for each occurrence under s. 893.55 (4) (b) on or after the
7 day on which the amount is approved by the joint committee on finance and before
8 the day on which the fund balance returns to the balance in the fund at the beginning
9 of the fiscal year under subd. 1. If the fund balance returns to the balance in the fund
10 at the beginning of the fiscal year under subd. 1., the limit on total noneconomic
11 damages specified in s. 893.55 (4) (d) applies to each occurrence under s. 893.55 (4)
12 (b) on or after the day on which the fund balance returns to the balance at the
13 beginning of the fiscal year under subd. 1.

14 **SECTION 5.** 893.55 (1) of the statutes is renumbered 893.55 (1m).

15 **SECTION 6.** 893.55 (1d) of the statutes is created to read:

16 893.55 (1d) (a) In this subsection, “fund” means the injured patients and
17 families compensation fund under s. 655.27.

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

20 1. Affordable and accessible health care benefits patients and the public in
21 general.

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

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

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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

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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 7.** 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 8.** 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 9.** 893.55 (4) (b) of the statutes is amended to read:

17 893.55 (4) (b) The total noneconomic damages recoverable for bodily injury or
18 death, including any action or proceeding based on contribution or indemnification
19 and any action for a claim by a person other than the injured person for noneconomic
20 damages resulting in bodily injury, may not exceed the limit under par. (d) or the limit
21 under s. 655.27 (4) (h), whichever is applicable, or the limit under par. (dm) for each
22 occurrence on or after ~~May 25, 1995~~ the effective date of this paragraph [revisor
23 inserts date], from all health care providers and all employees of health care
24 providers acting within the scope of their employment and providing health care

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

3 **SECTION 10.** 893.55 (4) (c) of the statutes is amended to read:

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

13 **SECTION 11.** 893.55 (4) (d) of the statutes is amended to read:

14 893.55 (4) (d) The Except as provided in s. 655.27 (4) (h), the limit on total
15 noneconomic damages for each occurrence under par. (b) on or after May 25, 1995 the
16 effective date of this paragraph [revisor inserts date], shall be \$350,000 \$750,000,
17 plus \$5,000 for each year that the injured party is expected to live after the injury,
18 and that limit and the life expectance adjustment shall be adjusted by the director
19 of state courts to reflect changes in the consumer price index for all urban consumers,
20 U.S. city average, as determined by the U.S. department of labor, at least annually
21 thereafter, with the adjusted limit to apply to awards subsequent to such
22 adjustments. The board of governors administering the injured patients and
23 families compensation fund under ch. 655 shall adopt a life expectancy table that
24 shall be used to determine the life expectancy of the injured person under this
25 paragraph.

