

LITIGATION SECTION

July 30, 2013

TO: Senator Glenn Grothman

FR: Litigation Section Board of Directors
State Bar of Wisconsin

RE: SB 129/AB 120 "medical apology" bill

The twelve members of the State Bar Litigation Section Board, split evenly between plaintiff-side practitioners and defense-side practitioners, unanimously oppose enactment of SB129, *as currently written*.

The entire section membership recognizes the importance of health care providers having the freedom to make compassionate expressions to sick and dying patients and their families without concern that such expressions will be turned against them. We wholeheartedly support that part of the proposed legislation and policy. However, the text of this bill goes far beyond that and would exclude expressions of "fault, liability and responsibility" made by just about any healthcare provider, as well as his or her "employee or agent" to the patient and any "relative" defined by 106.05 (1m)(q).

One of our members is the parent of a child with a disability. He expressed concern that if something happened to his child, the child would never be able to communicate what happened. In that case, a healthcare provider's admission of fault, liability or responsibility, may be the only available evidence of fault on his or her part. Because people with a disability are frequently unable to testify, the concern was expressed that this bill will protect negligent and even reckless healthcare providers from their substandard care and result in greater suffering by those patients who are least able to protect themselves.

A second concern raised is that excluding evidence of an admission of fault, liability and responsibility removes evidence that is part of the very core of the legal system. Section 908.01(4)(b) defines what constitutes an admission by an opponent. This definition applies to criminal and civil cases. In simple terms it says that a person's statement is admissible against him or her. This rule is founded on the most basic premise - that a person means what he or she says and says what he or she means. Thus, these statements have been uniformly admissible in civil and criminal cases for many years. The reason for the rule becomes more apparent when you consider the effects, if SB 129 were passed, on other contexts. For example:

- Imagine a criminal case in which a defendant tells a relative, "I shot the guy," or "I got rid of him and he had it coming", or "I took the money." If SB 129 were applied in a criminal case, it would exclude all of these statements because they fall within the definitions of fault, liability and responsibility. Confessions of a criminal defendant are compelling evidence routinely used to obtain convictions. It would be unthinkable to make this kind of evidence inadmissible in a criminal case.



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- Imagine a civil case in which a driver tells a relative after an accident, “I know I was drunk. I didn’t see the red light and I hit the guy. It was all my fault.” These statements would be barred because they are statements of “fault, liability and responsibility.” In civil cases, an admission by the perpetrator of bodily injury or property damage is of equal importance as it is in criminal cases.
- Imagine a civil case in which the injured person made a statement to a relative that he caused the accident and was lying about what really happened. That admission would be very important evidence in the defense of the case, but as an expression of liability, fault, or responsibility, it would not be admissible.

The general purpose of tort law in our state, as it applies to health care providers, is to hold them to a standard of ordinary care in the provision of health care services. By removing important evidence - the provider’s own admission that his or her care was below the standard - the playing field is tipped against the injured patients and their families and in favor of the health care provider who was admittedly at fault.

If the proposed bill were modified to remove the words, “fault, liability and responsibility” it would still prohibit the introduction of evidence of “apology, benevolence, compassion, condolence, remorse, or sympathy to a patient” which is exactly what the title of the section suggests.

The State Bar Litigation Section suggests the removal of the words “liability, fault and responsibility” from SB 129.

If you have any questions or need additional information, please feel free to contact Sandy Lonergan at 608-250-6045 or slonergan@wisbar.org. Thank you for your consideration of our comments.

The State Bar of Wisconsin establishes and maintains sections for carrying on the work of the association, each within its proper field of study defined in its bylaws. Each section consists of members who voluntarily enroll in the section because of a special interest in the particular field of law to which the section is dedicated. Section positions are taken on behalf of the section only.

The views expressed on this issue have not been approved by the Board of Governors of the State Bar of Wisconsin and are not the views of the State Bar as a whole. These views are those of the Section alone.

If you have questions about this memorandum, please contact Sandy Lonergan, Government Relations Coordinator, at slonergan@wisbar.org or (608) 250-6045.