

STORAGE NAME: h0025c.cjcl

DATE: February 13, 1997

**HOUSE OF REPRESENTATIVES
COMMITTEE ON
CIVIL JUSTICE AND CLAIMS
BILL RESEARCH & ECONOMIC IMPACT STATEMENT**

BILL #: HB 25

RELATING TO: Wrongful death

SPONSOR(S): Rep. Brennan

STATUTE(S) AFFECTED: s. 768.21, F.S.

COMPANION BILL(S): SB 40

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

- (1) COMMITTEE ON CIVIL JUSTICE AND CLAIMS YEAS 8 NAYS 1
- (2) COMMITTEE ON HEALTH CARE SERVICES
- (3)
- (4)
- (5)

I. SUMMARY:

HB 25 repeals section 768.21 (8), Florida Statutes. This section prevents two classes of plaintiffs from recovering non-economic damages in wrongful death cases resulting from medical malpractice: adult children of deceased parents and parents of deceased adult children.

Three amendments to HB 25 passed in the March 11, 1997, Civil Justice and Claims Committee. Claimants referenced in s. 768.21 (8), Florida Statutes, are not allowed a civil remedy for wrongful death. Instead, claimants would be allowed to play an active role in the disciplinary proceedings pursuant to s. 455.225, Florida Statutes.

The amended bill also includes a new section, s. 455.226, Florida Statutes, relating to probable cause hearings and formal complaint hearings pursuant to chapter 120. Complainants shall have the right to convene a probable cause hearing and formal complaint hearing pursuant to chapter 120, if the Agency for Health Care Administration or the Department of Health fails to execute the duties outlined in HB 25.

If probable cause is found in any case in which a complainant has initiated a probable cause hearing, AHCA or DBPR shall compensate the complainant for reasonable attorneys fees and costs including investigatory costs, and expert witness fees. Complainants will also be compensated for time and effort.

Licensed medical facilities shall also follow the administrative procedures set forth in HB 25 for wrongful death resulting from medical malpractice. If a determination of violation is found against a licensed medical facility, complainants may recover the above mentioned damages.

Chapter 766, Florida Statutes, shall apply to all wrongful death actions pursuant to s. 768.16-s. 767.27, Florida Statutes. Chapter 766 shall apply to medical malpractice claims which result in a wrongful death. It shall also apply if injured persons would have been entitled to recover damages if death had not ensued. Persons who would have been liable

STORAGE NAME: h0025c.cjcl

DATE: February 13, 1997

PAGE 2

for damages if death had not ensued shall be liable for damages regardless of the death of the injured person.

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

Recovery of Wrongful Death Damages in Florida

Damages for wrongful death may be awarded to survivors of the decedent for loss of support and services from the date of the decedent's injury until death. Such damages are also available for future loss of support and services. s. 768.21 (1), Florida Statutes. Survivors are defined as the decedent's spouse, children, and parents; blood relatives and adoptive siblings who were wholly or partially dependent on the decedent for support or services; and children born out of wedlock, under specific circumstances. s. 768.18 (1), .F.S.

Section 768.21 (3), F.S., allows for the recovery of damages for wrongful death by minor children of deceased parents and by all children of deceased parents, if there is no surviving spouse. Damages are awarded for lost parental companionship, instruction, and guidance and for mental pain and suffering from the date of injury.

Section 768.21 (4), F.S., allows for the recovery of damages for wrongful death by each parent of a deceased minor child for mental pain and suffering from the date of injury and by each parent of a deceased adult child for mental pain and suffering if there are no other survivors. An adult child is defined as anyone 25 years of age or older, s. 768.21 (8), F.S.

However, in wrongful death cases involving medical malpractice, neither adult children of deceased parents nor parents of deceased adult children may recover damages. s. 768.21 (8), F.S.

Recovery of Wrongful Death Damages in Other States

Each state treats the recovery of damages for wrongful death differently.

Parents of Deceased Adult Children

1. Can parents of adult children recover for wrongful death resulting from medical malpractice if there are no other survivors? Parents of adult children may recover damages in 17 states.¹ Thirteen states allow recovery despite the existence of a surviving spouse or children.²

2. What types of damages may parents of adult children recover? The types of losses for which parents may seek damages are unique to each state, but in general, parents may recover for mental pain and suffering. They may also recover for non-economic

¹ The 17 states are CA, CO, GA, IL, IN, IA, KY, LA, ME, MS, MO, NM, RI, SD, VT, WA, and WI. Some states allow recovery of damages pursuant to the rules of intestate succession.

² The states are AK, AR, HI, IS, MD, MI, OH, OK, OR, PA, TX, VA, WV. Virginia allows for recovery of damages if there is a spouse but no child or grandchildren or if there is no surviving spouse or child or grandchild.

damages such as loss of companionship or loss to society. Thirty-four states allow for the recovery of either one or both of the above mentioned losses.³

3. How many states limit recovery? Currently, sixteen states cap the recovery of non-economic damages between \$250,000 and \$1,500,000.⁴

Adult Children of Deceased Parents

1. Can adult children of deceased parents who died from medical malpractice recover damages if there is no surviving spouse? Over half (35) of all states allow for recovery of damages whether or not the deceased left a surviving spouse or minor child.⁵ Some states allow recovery only if the child could recover under the rules of intestate succession, as a lineal heir or distributee of the estate or as the next of kin.⁶ The State of Indiana allows the recovery of damages by adult children if they can establish dependency on the deceased parent.

2. What types of damages may children of deceased parents recover? Adult children can recover for mental pain and suffering and other non-economic damages such as loss of companionship and loss to society. Recoverable losses are more broad or more restrictive, depending on individual states. Unpublished survey, *Summary of Recovery Under the Wrongful Death Statutes*, Academy of Florida Trial Lawyers (1997).

Disciplinary Procedure of Physicians

Presently, parents of deceased adult children and adult children of deceased parents may take disciplinary action through the Agency for Health Care Administration (AHCA). AHCA regulates the licensure, regulation and discipline of physicians. The department utilizes 139 positions and operates on a budget of \$8,319,120, (Health Care Trust Fund) to fulfill the requirements set out in Chapter 458, F.S.⁷

³ The following states allow for the recovery of non-economic damages: AK, AZ, AR, CA, CO, GA, HI, IS, IL, IN, LA, ME, MA, MI, MN, MS, MO, MT, NV, NY, ND, OH, OK, OR, PA, SC, SD, TX, VT, VA, WA, WV, WI, and WY.

⁴ Listed are the states which impose limitations on non-economic damages: CA, CO, MI, MO, MT, ND, WV, and WI. States which limit recovery for *total* (economic and non-economic) damages are CO, IN, LA, NE, NM, SD, and VA.

⁵ AK, AZ, AR, CO, GA, HI, ID, IL, IA, KY, LA, MD, MA, MI, MS, MO, MN, NY, ND, OH, OK, OR, PA, RI, SC, SD, TN, TX, VT, VA, WA, WV, and WY.

⁶ Seven states allow recovery only if the child is entitled to recover under the rules of intestate succession: AL, CT, MT, NV, NH, NJ, and NC. Maine and Wisconsin award damages to lineal heirs if there is no surviving spouse or minor child. Minnesota and Nebraska award damages to the next of kin.

⁷ Ten field offices are located throughout the state: Fort Walton Beach, Jacksonville, Gainesville, Orlando, Tampa, Clearwater, Fort Myers, Palm Beach Gardens, Fort Lauderdale and Miami. AHCA Annual Disciplinary REP. 1995.

Patients may call AHCA's Consumer Call Center for Health Care Practitioners to file a complaint. A 1-800 number should be operational by April 1997. Agency representatives screen all calls for legal sufficiency. If a valid complaint is received, consumers must submit details of the allegations in writing. The Consumer Services Unit receives approximately 1400 calls and reports per month.

As long as a complaint is under investigation, the disciplinary process is confidential. Confidentiality may be waived by the licensee or is waived automatically if probable cause is found.

Forty-three field investigators pursue all legally sufficient complaints. The average investigation takes 5.9 months. Field staff forward completed investigations to the legal division for further legal and medical review. Most complaints are dismissed after this review process. A three-member panel of the Board of Medicine hears all cases which are not dismissed to determine probable cause. This determination takes approximately 6.7 months.

The panel may institute disciplinary action. Should the panel determine such action is necessary, an administrative complaint is submitted detailing factual allegations and specific violations of practice. The licensee may opt to resolve the matter through a formal hearing, informal hearing or by a consent agreement. On average, administrative complaints reach final agency action in 14.3 months. This time period varies with the type of resolution selected by the licensee, the type of violation, and the availability of resources. The following charts provide numerical details of disciplinary action:

A. Disciplinary Actions: Type of Violation:

	1991	1992	1993	1994	1995
Patient Care ⁸	80	108	91	131	135
Fraud in Billing/Patient Records	16	22	25	17	38
Alcohol/Drug Impairment ⁹	11	19	23	16	25
Violation of Board Rule or Order	99	44	77	48	22
Citation Offense	--	--	46	16	14
Sexual Misconduct	12	12	7	12	13

⁸ Of the total patient care cases, six involved wrong site surgery; 48 involved allegations of inappropriate proscribing; and eight concerned pain management.

⁹The Physician's Recovery Network (PRN) plays an integral part in the regulation and rehabilitation of impaired practitioners. AHCA is not required to take action in all impairment cases. Florida Statutes provide that practitioners facing impairment violations only, will not be investigated by AHCA as long as PRN requirements are met.

Improper Office Practice/Supervision Delegating/Reporting	--	--	--	10	13
Other Violations	69	26	14	38	20
Final Orders Filed:	287	231	283	288	280

B. Disciplinary Actions: Type of Proceeding:

	1991	1992	1993	1994	1995
Consent Agreement	148	123	130	163	148
Recommended Orders	30	36	20	33	49
Voluntary Relinquishment ¹⁰	16	17	12	25	26
Informal Hearings	79	44	18	23	25
Defaults	14	11	11	13	18
Citation Issued	--	--	46	16	14

C. Disciplinary Actions: Penalties Imposed

	1991	1992	1993	1994	1995
Revocation of License or Voluntary Relinquishment	30	32	26	34	37
Suspension of License	29	33	34	41	55
Probation	85	53	49	59	74
Reprimand	--	70	49	49	57
Total Fines Imposed:	\$469,000	\$406,950	\$390,750	\$605,500	\$517,555

AHCA 1995 Annual Disciplinary REP. 1995.

¹⁰ In most cases, if a physician voluntarily relinquishes his license, the Board only accepts such a relinquishment if the physician agrees never to apply for licensure in Florida again.

B. EFFECT OF PROPOSED CHANGES:

HB 25 would expand the number of plaintiffs who are permitted to bring wrongful death claims. It would allow adult children of deceased parents and parents of deceased adult children to recover non-economic damages for wrongful death resulting from medical malpractice.

HB 25 would cause some fiscal impact on the health care community. Should the current limitations on recovery be repealed, providers may be required to purchase additional medical malpractice insurance. As a result, consumers could experience higher health care costs. Letter from Elise M. Matthes, Attorney, Office of the Consumer Advocate, Department of Insurance, to Bridget Edmond, Legislative Research Specialist, Committee on Civil Justice and Claims, House of Representatives (January 24, 1997).

C. APPLICATION OF PRINCIPLES:

1. Less Government:

a. Does the bill create, increase or reduce, either directly or indirectly:

(1) any authority to make rules or adjudicate disputes?

Yes. It would allow the courts to adjudicate claims brought by a larger number of plaintiffs.

(2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

Yes. This bill could slightly increase the workload of the Judicial system.

(3) any entitlement to a government service or benefit?

No.

b. If an agency or program is eliminated or reduced:

(1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

NA.

(2) what is the cost of such responsibility at the new level/agency?

NA.

(3) how is the new agency accountable to the people governed?

NA.

2. Lower Taxes:

a. Does the bill increase anyone's taxes?

No.

b. Does the bill require or authorize an increase in any fees?

No.

c. Does the bill reduce total taxes, both rates and revenues?

No.

d. Does the bill reduce total fees, both rates and revenues?

No.

e. Does the bill authorize any fee or tax increase by any local government?

No.

3. Personal Responsibility:

a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

No.

b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

No. HB 25 would benefit adult children of deceased parents and parents of deceased adult children. However, the indirect costs would be borne by all citizens through increased health care costs and through increased Judicial costs.

4. Individual Freedom:

- a. Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?

Yes. Adult children of deceased parents or parents of deceased adult children would be allowed to recover damages in cases of wrongful death resulting from medical malpractice. Currently, state law expressly prohibits these groups from recovering non-economic damages.

- b. Does the bill prohibit, or create new government interference with, any presently lawful activity?

No.

5. Family Empowerment:

- a. If the bill purports to provide services to families or children:

- (1) Who evaluates the family's needs?

NA.

- (2) Who makes the decisions?

NA.

- (3) Are private alternatives permitted?

NA.

- (4) Are families required to participate in a program?

NA.

- (5) Are families penalized for not participating in a program?

NA.

- b. Does the bill directly affect the legal rights and obligations between family members?

Yes. Family members would be allowed to recover non-economic damages for the loss of a relative where such action was once prohibited.

- c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

(1) parents and guardians?

NA.

(2) service providers?

NA.

(3) government employees/agencies?

NA.

D. SECTION-BY-SECTION ANALYSIS:

This section need be completed only in the discretion of the Committee.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

None.

2. Recurring Effects:

Indeterminate.

3. Long Run Effects Other Than Normal Growth:

None.

4. Total Revenues and Expenditures:

NA.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

None.

2. Recurring Effects:

Indeterminate.

3. Long Run Effects Other Than Normal Growth:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

HB 25 may increase medical malpractice insurance premiums. It may also be concluded that any direct increase in judicial proceedings will be paid by taxpayers.

2. Direct Private Sector Benefits:

Adult children of deceased parents or parents of deceased adult children will be allowed to recover non-economic damages. Attorneys trying wrongful death cases would be entitled to applicable fees and related expenses.

3. Effects on Competition, Private Enterprise and Employment Markets:

NA.

D. FISCAL COMMENTS:

None.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the percentage of a state tax shared with counties or municipalities. Therefore, it would not contravene the requirements of Article VII, Section 18 of the state constitution.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill would not reduce the percentage of state tax shared with counties or municipalities. Therefore, it would not contravene the requirements of Article VII, Section 18, of the state constitution.

V. COMMENTS:

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

Three amendments to HB 25 were adopted in the March 11, 1997, Civil Justice and Claims Committee meeting. Representatives Byrd and Clemons offered an amendment which deleted the previous language of the bill and substituted language for disciplinary procedures.

The Byrd-Clemons Amendment

- The Agency for Health Care Administration (AHCA) or the Department of Business and Professional Regulation (DBPR) cannot refuse to prosecute complaints if probable cause is found by the probable cause panel. In such cases AHCA and DBPR may not refer the matter to the board. Furthermore, the board may not file a formal complaint and prosecute the complaint pursuant to chapter 120.
- Parents of deceased adult children and adult children of deceased parents, if the decedents have no other survivors, will be considered substantially affected and may be included in formal disciplinary proceedings held pursuant to chapter 120, if the proceedings involve allegations of wrongful death.
- Parents of deceased adult children and adult children of deceased parents, if there are no other survivors of the decedents, will be considered substantially affected and may be included in disciplinary proceedings which involve allegations of wrongful death.
- The amendment creates section 455.226, F.S., relating to disciplinary proceedings involving allegations of wrongful death resulting from medical malpractice. This section defines agency as the Agency for Health Care Administration; complainant as adult children of deceased parents and parents of deceased adult children, if the decedents have no other survivors; and department as the Department of Health.
- AHCA will submit its completed investigation of any written complaint involving allegations of wrongful death resulting from medical malpractice to the probable cause panel within 90 days of receipt of the complaint. The probable cause panel has 45 days to convene and make a determination of probable cause. A 45 day extension will be granted for good cause. If the panel does not convene and make a determination within 45 days, the complainant may request a probable cause

hearing. If a complainant requests a hearing, it shall be his burden to establish probable cause.

- In cases where the complainant requests a probable cause hearing and there is a finding of probable cause, complainants may recover reasonable attorneys fees and costs, including expert witness fees and investigatory costs from the agency or department. Complainants may also be compensated for time and effort in pursuing the probable cause hearing. In addition, a formal hearing pursuant to chapter 120 will be instituted.
- In cases where the complainant requests a probable cause hearing and there is no finding of probable cause, complainants may not recover for the above mentioned fees and costs. All case proceedings will be closed.
- Complainants may request a formal complaint pursuant to chapter 120 if the agency, department or board does not file a complaint within 45 days after probable cause is found to exist. If the Department of Administrative Hearings makes a finding for disciplinary action, complainants may recover for the above mentioned fees and costs.

Representative Thrasher's amendment to the Byrd-Clemons amendment was adopted during the March 11, 1997, meeting. It includes hospitals in the complaint and disciplinary proceedings of s. 455.225 and s. 455.226.

- The Agency for Health Care Administration shall have 90 days to complete investigations and make determinations of violations for cases alleging wrongful death resulting from medical malpractice.
- If AHCA fails to make a determination of violation, complainants may petition AHCA to make a determination. Within 45 days after a petition is filed, AHCA shall issue a formal complaint if a violation is determined. Complainants may recover reasonable attorneys fees and costs, including expert witness fees and investigatory costs from the agency or department. Complainants may also be compensated for time and effort in pursuing the probable cause hearing.
- If a licensed facility appeals a formal complaint, complainants will be considered substantially affected and may participate in the formal hearing pursuant to chapter 120.

Representative Burroughs offered the third amendment which was adopted by the Committee. It applies chapter 766 to all wrongful death actions resulting from medical malpractice.

- Chapter 766 relating to medical malpractice shall apply to all wrongful death actions pursuant to s. 768.16-767.27, Florida Statutes, with respect to claims for medical malpractice if the death of a person is caused by a wrongful act, negligence, default, or breach of contract or warranty of any person, including those occurring or navigable waters and the event would have entitled the persons injured to maintain an action and recover damages if death had not ensued. The person or watercraft that would have been liable in damages if death had not ensued shall be liable for damages regardless of the death of the person injured, although death was caused under circumstances constituting a felony.

STORAGE NAME: h0025c.cjcl

DATE: February 13, 1997

PAGE 14

VII. SIGNATURES:

COMMITTEE ON COMMITTEE ON CIVIL JUSTICE AND CLAIMS:

Prepared by:

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Bridget Edmond