House Judiciary Committee
Proponent Testimony - H.B. 7
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My name is Bobbie Sprader. I am now and have been throughout my entire legal career a medical negligence defense attorney. I am currently a partner at Bricker & Eckler LLP here in the Columbus office where I have practiced for the last nineteen years.

I am here today speaking on behalf of the Ohio Hospital Association and the Ohio State Medical Association in support of H.B. 7, which proposes several statutory changes that will individually and collectively benefit both recipients of medical care in the State of Ohio and the providers of medical care.

The Apology Statute (R.C. § 2317.43)

R.C. § 2317.43 in its current form was intended to permit physicians to communicate with their patients following unintended outcomes by providing that their statements of empathy could not be admitted as evidence against them in any medical negligence lawsuit. It was hoped that this statute would allow providers to be part of the coping/healing process by freely expressing their empathy to their patients during these difficult times. However, because what is intended as a statement of empathy by a provider can so easily (and often innocently) be perceived as a statement of fault when heard by a patient, the statute is all but meaningless in its current form.

> For example: When Dr. Michael Knapic told the family of Barbara Davis in 2004 that he "had nicked an artery [during surgery] and took full responsibility for it," he was satisfying his duty to explain what had happened and took responsibility for his own actions. He did NOT believe that his actions constituted medical negligence and never intended to say otherwise. Nonetheless, he spent years disputing the meaning of his statement all the way to the Ohio Supreme Court.

Litigation of this nature that dissects and defines the words used during a conversation held between a medical provider and a patient or patient's family during an emotionally difficult time in all of their lives looking to determine whether the provider was intending to communicate empathy or fault is an unintended consequence of R.C. § 2317.43 in its current form. This fear of misperception and everything that may follow creates a strong disincentive for medical providers to even attempt to express empathy.

The proposed change to R.C. § 2317.43 includes statements of error and fault among those that can be made without fear that they will be shared with a jury in a medical negligence lawsuit. This change would eliminate the fear of misperception that currently interferes with the expression of empathy by providers. Without this change, R.C. § 2317.43 will never achieve its original purpose of encouraging medical providers to be able to freely and openly express their feelings of empathy to patients and their families, thereby providing much needed emotional support.

The proposed changes go beyond simply clearing the obstacles that stand in the way of expressions of empathy and creates a real opportunity to provide patients and their families with answers. This will completely eliminate the need to file a lawsuit in the pursuit of an explanation and will create an environment favorable to an out-of-court resolution where appropriate.

When an unexpected or undesired outcome occurs, everyone wants answers. Unfortunately, it is not always possible to provide reliable answers immediately after the event has occurred. This is because emotions are often running high, for everyone involved, and information may not yet be available that will shed needed light on what happened and why. To address this situation, R.C. § 2317.43 also adds a new process in section (B).

Section (B) allows a hospital to conduct an investigation into medical care that results in an unexpected outcome and then share information learned as part of that investigation with the patient. Like statements of empathy and fault, any information shared from the investigation cannot be admitted as evidence in a future lawsuit. This goes a step further than encouraging open discussions between the patient and provider and gives the patient some reliable answers.

As previously noted, giving patients better answers will reduce the number of lawsuits that are brought just to find out what "really" happened. If the investigation concludes that the unexpected outcome could and should have been avoided with appropriate medical care, sharing this conclusion with the patient invites further conversation geared towards compensation. This would avoid the need for litigation that just diverts the settlement or judgment proceeds away from the injured patient. In fact, hospital experience in other states, show that this kind of transparent good faith investigatory process following an unintended and adverse outcome, results in providers and patients who are more satisfied and there are fewer lawsuits.

As it stands today, there are significant impediments that prevent or interfere with expressions of empathy and there is no out-of-court process that can provide patients and their families with both answers and an opportunity to resolve claims early and without the need for a lawsuit. These benefits are achieved by the proposed changes in HB 7 and, I need to really emphasize this last point, without taking anything from them that they have today. Nothing in the proposed version of the statute prevents the filing of a lawsuit or the conducting of discovery. Although the communications at issue cannot be made part of the litigation process and cannot be shared with a jury, they would nonetheless leave the patient with an invaluable treasure map that they could use to guide their discovery efforts. This represents yet another benefit, just one with some limitations.

A couple of concerns have been raised that I want to address at this time. One concern raised is that the proposed changes invite providers to commit perjury. Keep in mind that when a provider is deposed, under oath, during a discovery deposition, he or she is obligated to tell the truth. If asked for their opinion as to whether they were negligent, they must give their honest opinion. This is the case under both the current and proposed versions of the statute, so the risk of perjury in that regard is unaffected by the statute. Notably, under the new version of the statute, providers will not be permitted to testify regarding prior statements that satisfy the parameters of the new language. If the patient's attorney believes that the opinion expressed at

that time is inconsistent with a statement the provider made previously, they may fully explore the basis for the current opinion as they do today. All of the tests for truthfulness remain available. While they are not permitted to use applicable prior statements, those statements do not exist today. Therefore, the risk of perjury is unaffected and nothing has been taken from the discovery process that is available today.

Another concern raised was that the proposed statute would conflict with the Rules of Evidence. That is not the case. There is no Rule of Evidence that affirmatively states that either an admission or a statement against interest is admissible as evidence. Instead, Rule 801(D)(2) merely provides that admissions by a party-opponent are not hearsay. Similarly, Rule 804(B)(3) merely provides that statements against interest are not excluded by the hearsay rule if the declarant is unavailable. By establishing that they are not inadmissible by the hearsay rule, the Rules of Evidence do not provide that they are, therefore, admissible. It is well within the purview of the legislature to make statements otherwise inadmissible, i.e . statements made to an attorney for purposes of seeking legal advice. R.C. § 2317.02(A).

Loss of Chance (R.C. § 2323.40)

The four basic elements of any negligence claim, including medical negligence claims, are (1) duty, (2) breach, (3) proximate causation, and (4) damage. When the theory of loss of chance was introduced by the Ohio Supreme Court, it eliminated the critical element of proximate causation. Specifically, the Court recognized a cause of action where it is merely possible that the patient was harmed. HB 7 restores traditional tort principles to medical negligence actions in Ohio.

When we are talking about a "loss of chance," we are talking about a situation where the harm at issue was probably unavoidable. In other words, even where there is evidence of medical negligence, it did not cause any harm, to a reasonable degree of medical probability.

To demonstrate how this would work, assume that Ms. Smith had a pap smear in 2015 that Dr. Jones interpreted as negative. In 2016, Ms. Smith had another pap smear that was interpreted by another physician as showing evidence of cancer and that doctor went back and concluded that Dr. Jones had misread the 2015 slides as they also showed cancer. In other words, we have satisfied the elements of duty and breach. Ms. Smith then has an extensive work up and her physician believes, to a reasonable degree of medical probability, that she is terminal, with a statistical chance of dying from her cancer of 80%. Her physician also believes, to a reasonable degree of medical probability, that if she had been diagnosed in 2015, the number would be 70%. In other words, the one year delay in diagnosing her cancer probably did not change her prognosis, but her statistical chance of survival went from 30% to 20%. We cannot turn back the clock for Ms. Smith, so the only question before us is whether to recognize a compensable injury despite the evidence that she was probably not injured at all. In considering this issue, we need to remember that tort liability is premised on providing compensation for the patient and not about punishing the physician.

Under traditional principles of negligence, Ms. Smith would not be able to file a lawsuit against Dr. Jones because he did not proximately cause her any harm. To the contrary, the evidence

establishes that she probably was not harmed. Nonetheless, under a loss of chance theory, she could bring an action against Dr. Jones based upon the mere possibility that she may have been harmed. If successful, she would be entitled to recover 10% of the damages that would have been recoverable if she had been able to prove proximate causation.

Because of the reduced recovery available with loss of chance, it is relatively uncommon to see actions filed based upon this theory. It generally does not make financial sense to the patient. However, infrequency of use is a poor justification to leave bad law on the books, so to speak. Further, the greater concern is that the loss of chance theory will be used as a fallback position where the patient fails to satisfy her medical negligence claim, but is allowed some recovery nonetheless, possibly even based upon the evidence presented by the defense. Unfortunately, it is difficult to ever say that something is completely impossible.

Where the goal is compensating patients who have sustained injuries as a consequence of medical negligence, evidence that the medical negligence proximately caused harm should be required. It should not be sufficient to say that harm was merely possible.

Phantom Damages (R.C. § 2317.421 and R.C. § 2323.41)

We continue with the theme of compensation as we move on to the issue of phantom damages. In that regard, we start with the recognition that patients bringing a claim of medical negligence are entitled to seek compensation for both their economic and noneconomic losses. One component of economic losses is the cost of the medical care needed as a proximate result of the medical negligence. In order to fully compensate patients for this economic loss, the only relevant evidence is the actual cost of those expenses as reflected by what was accepted by the care provider as payment in full.

Despite the apparent simplicity of this concept, Ohio Courts have struggled over the years with respect to the type of evidence to admit relative to the cost of a patient's medical expenses. Most recently, the Ohio Supreme Court's decision in *Robinson v. Bates* held that evidence of both the amount billed by the provider and the amount actually paid could be presented to the jury for consideration. However, if the goal is to compensate the patient, the amount billed is both confusing and irrelevant. HB 7 is needed in order to add much needed clarification on this rather straightforward issue.

In order to make patients whole, juries need to fully compensate them for their actual medical expenses. Notably, the goal is not to compensate them for what they could possibly have paid or what someone else paid, but for their individual and actual economic losses. In that regard, the only thing the jury needs to know is the amount paid. What amount may be considered the "reasonable value" of the services received, the "billed amount" or even the "cost billed to others" is not only irrelevant, but it serves to confuse the issue of the patient's actual economic losses. HB 7 clears up the confusion over what should be a simple issue and establishes that the only relevant evidence of economic losses for medical care is the cost of that care to the patient.

Because the collateral source rule has always added confusion to the issue of medical expenses, it is important to note here that the source of the payment is immaterial. The relevant evidence is what was paid, not by whom. Where the payment was made by a third-party payor, such as a health insurance carrier, they may or may not have a subrogated interest and assert a lien. The most the patient would have to pay in order to fully satisfy any lien would be the amount paid by the lien holder. Notably, insurers frequently accept less than 100% reimbursement, so compensating the patient for the full amount of the payment will likely still result in over compensation, but would never undercompensate them.

Concern has been raised over the implication of HB 7 on future medical expenses. As they are now, they will continue to be addressed by various experts called by both sides who will collectively opine as to the nature of the future care needed and its cost. HB 7 does not directly impact future expenses, but does suggest that the relevant cost of future damages should be what will be accepted as payment in full.

As the Committee is aware, HB 7 proposes changes to address ten issues that each deserve attention. I have chosen to focus my testimony on only three of those provisions, but stand prepared to try to answer any questions that you may have on all of them.

The OHA and OSMA urge you to enact HB 7. Thank you.