



06/16/2021

Timothy G. Sekerak

Chief Clerk of the House

State Capitol Building, H271

Salem, OR 97301

RE: Vote Explanation on SB 193

Dear Chief Clerk Sekerak,

On June 15th, 2021 I voted no on SB 193 and I wish to explain for the record why this is the case.

SB 193 combined two critical and unrelated issues:

Noneconomic damages

Jury decisions

I stand in enthusiastic support of the bill's requirement for jury unanimity in the setting of a guilty verdict. Oregon is the only state in the country who still allow non-unanimous guilty verdicts - a rule traced back to the 1930s and per Justice Gorsuch in the *Ramos v Louisiana* decision, it comes from the Ku Klux Klan's "efforts to dilute 'the influence of racial, ethnic, and religious minorities on Oregon juries.'"

We absolutely must address this remnant of our white supremacist past, and I do not support doing it in combination with the lifting of noneconomic damage caps in the setting of medical malpractice cases. Data below show caps on noneconomic damages are associated with a decrease in healthcare spending, an increase in physician supply, and no impact on quality of care. These are outcomes I would guess most of us support.

A physician's duty is to protect and promote the health of every patient we are entrusted to care for. Sometimes however, due to circumstance, obstacles or negligence, that duty is insufficiently maintained and patients or their loved ones seek damages for adverse medical outcomes.

Physicians are taught early in their training the importance of listening to a patient's story and earning their trust. This is fundamental to fully caring for them. When an adverse outcome occurs, as it will in the imperfect profession we have chosen, many clinicians are encouraged to do exactly the opposite of their "healer" instincts -- they are taught to avoid discussing the injury further, to not "admit fault" and in this, they may abandon their patients at the time they are needed most.

This is totally unacceptable. It isn't how the majority of physicians nor patients wish to deal with a bad outcome. We need opportunities to proactively address the issues in a trauma-informed, restorative way and there are successful examples of such programs across the country. I am convinced the medical liability component of SB 193 as it currently stands will exacerbate the challenges of our current system and there are significant data that brings me to this conclusion.

Half of US states have placed limits on noneconomic damages for medical malpractice, while 11 states have caps for all general tort and personal liability.¹ In the setting of medical liability, a 2019 comprehensive survey of 37 studies on tort reform's impact on medical practice revealed the following:²

Noneconomic damage caps are associated with a decrease in "defensive spending" in health care. When caps are in place, we see lower rates of surgeries, hospital admissions, and imaging studies. This leads to lower per capita healthcare expenditures.

They improve physician supply, especially in rural areas. Six of eight studies that addressed this in the survey show an increase in physician supply when noneconomic damage caps are in place. Furthermore, states without caps see a reduction in physician supply when neighboring states pass caps on noneconomic damages.³

Caps have not been shown to impact a system's quality of care. In analyzing 8 studies that looked at caps and quality of care, six studies showed no difference, one study showed improved care, and one showed a decrease in quality of care (adverse outcomes in labor).

Once again, caps on noneconomic damages are associated with a decrease in health care spending, an increase in physician supply, and no impact on quality of care.

As a state dedicated to increasing the affordability and accessibility of our healthcare system, I am unable to rationalize our move to remove noneconomic damage caps without offering an intervention that will allow us to avoid the need for all cases but the most egregious to get to the courtroom. Very few patients harmed by our healthcare system have the resources and time to pursue a court-facilitated course of action. **Those most marginalized are least likely to obtain relief.** We can and must do better and in 2013 Oregon established the Early Discussion and Resolution program to do just that. The program has yet to be broadly applied, however it is absolutely an alternative and has the potential to be a superior path that we as a body should invest in making substantially more robust and effective.

¹ Aaron Larson, "Medical Malpractice Law By State," ExpertLaw, April 11, 2018, https://www.expertlaw.com/library/malpractice_by_state/index.html.

² Rajender Agarwal, Ashutosh Gupta, and Shweta Gupta, "The Impact of Tort Reform on Defensive Medicine, Quality of Care, and Physician Supply: A Systematic Review," Health Services Research, 2019, <https://doi.org/10.1111/1475-6773.13157>.

³ ID and CA have caps and WA has a formula to calculate maximum damages awarded.

As many of you know, SB 193 has piqued the interest of the Oregon Trial Lawyers Association and the Oregon Medical Association who have spent decades lobbying for and against caps. I have spoken with both at length regarding this bill and I sincerely believe we can use this opportunity to work together toward a patient-centered, trauma-informed process for addressing adverse medical outcomes. I am confident we can adopt restorative justice practices that will help more people who have been injured, incentivize physician engagement and accountability and will lead to systemic changes that will prevent future injuries from occurring. This is a vision all parties can support and even share and we will be working toward this through the interim in a workgroup which will include, among others, the OTLA, OMA, Representative Reynolds, Senator Steiner Hayward and myself.

While I voted no, I'm optimistic that regardless of passage of SB 193, we will follow "the Oregon Way" and establish a bipartisan policy to address the medical liability component that will be better for all.

Sincerely,

A handwritten signature in blue ink, appearing to read "Maxine Dexter". The signature is fluid and cursive, with a large initial "M" and "D".

Representative Maxine Dexter, M.D.
House District 33 (NW Portland and NE Washington County)