SB1308

TESTIMONY

TESTIMONY OF ROBERT TOYOFUKU ON BEHALF OF THE HAWAII ASSOCIATION FOR JUSTICE (HAJ) IN OPPOSITION TO S.B. NO. 1308

DATE: Monday, February 4, 2013
TIME: 1:15 pm

To: Chairman Josh Green and Members of the Senate Committee on Health:

My name is Bob Toyofuku and I am presenting this testimony on behalf of the Hawaii Association for Justice (HAJ) in OPPOSITION to S.B. No. 1308, relating to Health Care Providers.

The purpose of this measure is to create a new section in the Evidence Code to make admissions of negligence by doctors inadmissible in court. HAJ opposes this measure because: 1) this measure should first be submitted to the Judiciary's Standing Committee on Evidence which exists for the purpose of reviewing proposals for changes to the Evidence Code; 2) the stated basis that this measure is needed because of "the rising number of medical malpractice lawsuits and increasing medical malpractice insurance premiums" is false and unsupported by the data; and 3) HAJ members voluntarily met with representatives of the medical community to review potential legislative measures and offered to consider changes to the apology law in a collaborative manner but we have not received any proposal for consideration and discussion.

The Legislature enacted Act 88 in 2007 which addressed the admissibility of admissions of negligence in the Evidence Code. That measure was originally drafted to cover only doctors, but was amended to cover all admissions on the recommendation of the Judiciary's Standing Committee on Evidence. Rule 409.5 presently covers admissions and expressions of sympathy or condolence.

The Evidence Committee is comprised of Judges and experience lawyers who practice in different fields of law. It is preferable that proposed changes to the Evidence Code be first submitted to the Evidence Committee because it is that body which possesses the expertise, responsibility and institutional knowledge needed for consideration of such changes. Because the Evidence Committee is composed of judges and attorneys who practice in other areas of the law (and therefore have no vested interest in this proposal) it is able to fairly and objectively consider the merits of this proposal as well as its integration within the entirety of the Evidence Code. It is requested that the changes requested in this measure be first submitted to the Judiciary's Standing Committee on Evidence for an unbiased evaluation and consideration by judges and experience attorneys whose function and responsibility is to consider proposed changes like this one.

This committee has received actual data on the numbers of malpractice lawsuits and cost of malpractice premiums and is already aware that both lawsuits and premiums have declined significantly since this legislature passed the requirement in 2003 that an attorney or a pro se claimant consult with a doctor to verify that a claim has merit before filing a claim. The unsupported assertion that this measure is needed because lawsuits and premiums are increasing is not true.

HAJ representatives (including myself), at the urging of this committee, met with representatives of the medical community, including the HMA, defense attorneys and medical school (JABSOM) professors, to collaboratively work on legislation. The consensus amendments to the Medical Claims and Conciliation Panel (MCCP) law passed last session was a result of attorneys agreeing to significant changes without any

corresponding benefits. All of the changes were to the benefit of the doctors and none were for the benefit of the lawyers. As the doctors found out at a recent training session on the new law, many HAJ lawyers were not in favor of the changes. Nonetheless those changes were agreed to in the spirit of mutual cooperation and respect.

HAJ representatives specifically offered to consider changes to the apology provision of the Evidence Code during the course of these meetings with the doctors. The doctors chose to focus instead on the MCCP. HAJ wishes that the doctors and the medical community would have presented these proposed changes to HAJ earlier so they could have been considered privately in a collegial setting as in the recent past.

For these reasons, it is respectfully requested that this measure be held and that the proposed changes to the Evidence Code be first submitted to the Judiciary's Standing Committee on Evidence.

Thank you for the opportunity to testify on this measure. Please feel free to contact me should there be any questions.

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Monday February 4, 2013
1:15 p.m.
Conference Room 229

To: COMMITTEE ON HEALTH
Sen. Josh Green, Chair
Sen. Rosalyn H. Baker, Vice Chair

From: Hawaii Medical Association
Dr. Steven Kemble, MD, President
Dr. Linda Rasmussen, MD, Legislative Co-Chair
Dr. Joseph Zobian, MD, Legislative Co-Chair
Dr. Christopher Flanders, DO, Executive Director
Lauren Zirbel, Community and Government Relations

Re: SB 1308 RELATING TO HEALTH CARE PROVIDERS

In Support.

The Hawaii Medical Association supports this effort to codify public policy which would allow expressions of apology or compassion and other benevolent acts by health care providers without fear of it being used as evidence of liability when a patient experiences an adverse medical outcome.

The logic of the public policy of "sorry works" is that, when there is an adverse outcome of a medical procedure or treatment, compassion and benevolence is warranted regardless of fault. By keeping open the lines of communication between a patient and his or her doctors and hospital during that difficult time, and adversarial relationship and potentially costly lawsuits can be avoided. Doctors will not need to wait for legal counsel to advise them, or for fault to be investigated, before they can freely express compassion to their patients.

This policy limits evidence if a case goes to trial. If fault is clear – such as a wrong limb being operated on, or something left inside a patient – we assert that evidence of an apology statement isn't needed and what is gained far outweighs what is lost.

Anecdotally, we all know some patients would be understanding when things do not go as anticipated, but sue only because the doctor never said he or she was sorry

or even talked to the patient about what happened. Quite likely doctors fail to do that because their lawyers counsel them not to say anything, even when what happened was not anyone's fault.

Thirty-four states have apology laws in statute. Much has been written about the success of these laws, and studies have confirmed their effectiveness for patients and health care providers.

The University of Michigan Health System reduced malpractice claims by 55 percent between 1999 and 2006, and reduced average litigation costs by greater than 50 percent. Average claims processing time dropped from 20 months to about 8 months.

An empirical study on "*The Impact of Apology Laws on Medical Malpractice"* by economists Benjamin Ho PhD of Cornell University and Elaine Liu PhD of University of Houston was released in December 2009, with follow-up in 2010. They found:

> When doctors apologize for adverse medical outcomes, patients are less likely to litigate. However, doctors are socialized to avoid apologies because apologies admit guilt and invite lawsuits. Apology laws specify that a physician's apology is inadmissible in court, in order to encourage apologies and reduce litigation. Using a difference-in-differences estimation, we find that the State-level apology laws expedite time to resolution and increase the closed claim frequency by 15% at the State level. Using individual level data, we also find such laws have reduced malpractice payments in cases with the most severe outcomes by nearly 20%. Such analysis allows us to qualify the effect of apologies in medical malpractice litigation.

An article in the *New York Times* in 2008 discusses cases where "sorry" worked to avoid costly litigation. The New York Times investigator reports that even trial lawyers are realizing they like the "sorry works" approach because injured clients are compensated quickly.

Hawaii's current apology law does nothing to improve communication or reduce unnecessary litigation. Under the current law, doctors follow their lawyers' advice not to communicate with patients or acknowledge an adverse event. This does nothing to reduce medical liability litigation.

An apology law is necessary because not only do we want doctors to know they can apologize, but we also want to make their lawyers comfortable with their clients communicating with the patient and apologizing.

This is a common sense reform policy, which would reduce health care costs and has no cost to the state.

Thank you for introducing this bill and for the opportunity to provide testimony.