

Medical Liability: New Ideas
for Making the System Work Better for Patients

A Hearing before the
U.S. Senate Health, Education, Labor and Pensions
Committee
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Oral Statement of
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Good Morning.

I would like to begin by thanking Senators Enzi and Baucus for their courage and foresight in developing S.1337, the “Fair and Reliable Medical Justice Act.” It is my pleasure to be here today to share with you the experiences of my family with the medical litigation system, and those of other consumers who I have come to know.

My name is Susan Sheridan. I live in Boise, Idaho. I am a mother and a widow. I also am the President of a non-profit organization called Consumers Advancing Patient Safety – or CAPS – which was established in 2003 by healthcare consumers and providers working together to create a healthcare system that is safe, compassionate and just. I also serve as the chair of a World Health Organization (WHO) initiative called Patients for Patient Safety, one of six programs launched in 2004 that together make up

the WHO's World Alliance for Patient Safety. Our program recruits consumers from around the world to bring their wisdom and experience to health ministers and policymakers interested in the real interests of patients and families. In the past six months, we have convened workshops for proactive, partner-oriented consumers and healthcare leaders in the United States and the United Kingdom, with similar events planned in the next six months in Canada, Argentina, Africa and the Middle East.

Through my own experience and my interaction with others I have become acutely aware of the importance of aligning the signals and incentives of the tort system with patient safety goals. We will not achieve safer, more compassionate health care if our legal systems continue to tolerate and encourage behaviors that hide lessons learned from medical error, that convert patients and their providers into enemies when they need to heal, and that reduce trials into jousting matches between exorbitantly paid medical experts. Tort reform, as it is usually understood, remedies none of these problems. For these reasons, we applaud the fresh, forward-looking, bipartisan approach represented by S. 1337.

My family has experienced two medical errors with devastating impact. My husband, Pat, died in 2002 due to the failure to communicate a malignant cancer of the spine. His pathology tests showed an aggressive cancer, but they seem to have been lost between the hospital and his surgeon's office for a few weeks, and then inserted in my husband's medical record without being reviewed. When the tumor recurred six months later, it had grown into his spinal cord and it was too late to save his life.

In 1995, our first child, Cal, suffered permanent brain damage during his first week of life from the failure to test and treat newborn jaundice. This condition, known as kernicterus, is highly preventable by exposure to a spectrum of light, a process known as phototherapy. Today Cal has cerebral palsy, is hearing and speech impaired and has uncontrollable movements of his body.

My family has learned from experience that the legal system does not serve the needs of families who have been harmed, and I say that even though in the end many would say we "won" our malpractice cases.

In Cal's case, we sued because we believed in the legal system...and because we had no other choice but to seek compensation. Cal's lifetime medical, rehabilitative and special needs costs are estimated to be in the

millions of dollars. As parents we had the responsibility to care for our son who, despite extreme physical disabilities, is not cognitively impaired. In fact, Cal is a bright, creative boy with both great potential and an extraordinarily challenging future.

From the beginning, the hospital and doctor defendants pursued a two part strategy in Cal's case: vilify Pat and me by suggesting that we were trying to get rich off our son's injury and challenge Cal's diagnosis. Although we produced national experts who testified that Cal had classic kernicterus, the defense got past a summary judgment motion by producing an expert who said he was only 49% sure that Cal had kernicterus. Another stated that perhaps I had passed a virus to Cal through the placenta. After a 7 week trial, the jury found for the defense, a verdict that was subsequently set aside by the trial court judge based on his determination that the expert testimony offered was unsound. In his memorandum opinion, the judge wrote:

The syntactical contortions which counsel and the witnesses wound through to deliver these opinions were wondrous to observe. One expert conceded that he was only 49% sure that the collection of symptoms established kernicterus, this therefore justified his opinion that more probably than not, Cal did not have kernicterus, although he could not identify through differential diagnosis any other condition or disease with the same constellation of symptoms which might exist.

He went on to observe,

I have great difficulty when the expert appears to be straining an opinion to meet the requirement of advocacy. Unfortunately in my experience, this latter spectre occurs far too frequently in medical malpractice cases, where it appears to me that medical witnesses are willing to bend their testimony...

All of the experts, on both sides, viewed this case as a competition – a verbal jousting match between lawyer and witnesses. The thrust and parry between witness and examiner was wondrous to behold...

Although technically superb, the cross examination of these experts truly offered little opportunity for the jury to plumb the depths of the expert's opinion, and measure the technical differences between the views offered.

(Sheridan vs. Jambura et al, Memorandum Decision, District Court of the Fourth Judicial District of the State of Idaho, in and for the County of ADA,

Case No. CV-PI 97-00266-D, July 19, 1999, attached as Exhibit 1.) The judge's order setting aside the jury verdict was appealed, ultimately to the Idaho Supreme Court, which affirmed and ordered a new trial. Discovery started again, but this time the hospital's defense strategy completely changed. They no longer challenged the diagnosis; the theory this time was that Cal had kernicterus, but it was completely his pediatrician's fault.

I know among lawyers it is considered normal to plead alternative theories of causation. But I ask you to put yourself in the shoes of the injured party and look at that practice again. The hospital's "win at all costs" attempts to deny that Cal had kernicterus cost us hundreds of thousands of dollars and delayed justice for years. The costs of the first trial were expenses we owed to our attorneys, in addition to a 40% contingency fee. That is just not right, and as his mother I worry every day that Cal just will not be taken care of as he should be from the net award he received.

After more discovery and two mediations, we settled Cal's case. The process took eight years. In the settlement process, I came under enormous pressure from my lawyers as well as the defendants' to sign a confidentiality agreement. I couldn't bring myself to do it. From the time Cal was diagnosed, I had been writing letters to the public health leaders in our country, trying to alert them to the fact that my son suffered what was then thought to be a freak accident in a hospital that delivers more than five thousand babies a year. In the end, I promised not to name the hospital or discuss the amount of Cal's settlement in any communications, but retained the right to discuss his injury.

My husband's medical problems occurred after Cal's first trial. He had a tumor on his spine. We sought out one of the foremost spinal surgeons in the country to help us. After surgery, he gave us the good news that Pat's tumor was benign, congratulated us for dodging a bullet and told us to "Go home and live your lives." When another tumor grew, we returned to him immediately for a second surgery six months after the first. He was our hero; our hope and trust was in him.

As we prepared for the second surgery, we were met with strange questions about why Pat had not gotten follow up care for the first tumor. We explained our understanding that there was no need as Pat's tumor had been successfully removed and had been benign. In the conversations that ensued, we were led to believe that Pat's benign first tumor had somehow become cancerous. I am the one who discovered the pathology report that

said Pat's first tumor was a sarcoma.

When Pat came to, I explained all that had happened and assured him that we were not going to relive the same experience we had in our home town, where we had been shunned by the healthcare system once we'd filed suit. But the truth was that we never saw Pat's surgeon again. We were discharged by a nurse, who stuck her head in the door and said "You can go now."

When I called the pathologist who had signed the report to discuss what it meant, and why the pathology report was dated several weeks after the first surgery, he referred me to the patient ombudsman. I explained to this man that our family had been through litigation before, that we thought it was a dishonorable process and that whatever was to happen, we did not want to litigate. This approach was initially welcomed, and we agreed to continue to talk.

I believe the first response of this hospital to my request for open communication was sincere. However, after the insurance companies and legal counsel became involved communication came to a screeching halt. We think the hospital and the surgeons' group, which had different insurers, wanted to preserve the right to point the finger at one another. Perhaps they wanted to wait to see if Pat would die. After being told not to contact them anymore because they could not talk to us, we filed a lawsuit on the last day of the statute of limitations period and entered into a four year litigation process.

Pat was subsequently treated at University of Texas M. D. Anderson Cancer Center, where everything was done to save his life. He died feeling betrayed by a doctor who was once his hero – who disappeared instead of sitting down and talking with us.

Our claim against the hospital and surgeon also ended in settlement. Throughout the negotiation, I indicated that I would not sign a confidentiality agreement, and that I sincerely wanted to work with this hospital to prevent critical test care results from being lost for other patients. I think it is fair to say that my lawyers, and probably theirs, thought this was a naive request. From their point of view, this was about money. We were numbers, that was it.

I'm not sure that Pat's surgeon felt that way, however. As a condition of

settlement, I asked to meet with the surgeon and the hospital CEO. I wanted to renew my request that we work together to prevent failures like this one from happening again. At the beginning of our meeting, I was told the surgeon would not be attending. His wife had called the CEO to say that he was too upset to talk to me.

As a result of my letter writing, I was invited to testify here in Washington at the first Agency for Healthcare and Research and Quality National Summit on Medical Errors and Patient Safety Research in September 2000 (accessible at <http://www.quic.gov/summit/wsheridan.htm>). *USA Today* wrote a story about my family. Within days, I was hearing from parents around the country who also had children with kernicterus. We connected some dots and figured out something the public health authorities had not – that kernicterus had re-emerged in the US in the early 1990s after having been essentially eradicated. Public health officers at Centers for Disease Control and Prevention (CDC) were stunned. Hundreds of children had experienced kernicterus since the early 1990s, a function in part of early discharge and failure to education providers and parents alike about the dangers of jaundice. All but a few cases had been effectively buried by confidentiality agreements – a condition of settlement insisted upon by doctors and hospitals that didn't want the bad publicity.

Within weeks, other moms and I were working together with anyone we could recruit to build a campaign to educate parents, change practice guidelines, increase public health surveillance and put kernicterus back in the history books where it belongs. The Joint Commission on Accreditation of Healthcare Organizations (JCAHO) issued a Sentinel Event Alert in 2001, the first ever generated as the result of a consumer-identified problem, (Kernicterus threatens healthy newborns, *Sentinel Event Alert*, Issue 18, April 2001, accessible at www.jointcommission.org/SentinelEvents/SentinelEventAlert/sea_18.htm). CDC followed shortly thereafter with a report in *Morbidity & Mortality Weekly*, (Kernicterus in Full-Term Infants – United States, 1994 – 1998, *MMWR*, June 15, 2001 / 50(23);491-4, accessible at www.cdc.gov/mmwr/preview/mmwrhtml/mm5023a4.htm). CDC has now identified kernicterus as one the three most serious emerging risks to newborns in the United States (See, www.cdc.gov/ncbddd/dd/kernichome.htm).

Through partnership with the Centers for Disease Control, the Joint Commission, the March of Dimes, National Institutes of Health (NIH),

Health Resources and Services Administration (HRSA) and leaders in other countries, I believe we can accomplish that soon.

The expert witness who had 51% doubt about the cause of Cal's injuries was paid \$34,000 for his half day of trial testimony. He was a member of the American Academy of Neurology, which is one of a handful of specialty medical societies that have a program to peer review its members' expert witness activities. I filed a grievance and was notified that I could attend as a silent observer the "non-adversarial" peer review process where this physician's conduct was to be reviewed. I did so, accompanied by another CAPS co-founder who was a former medical association attorney.

To our amazement, the physician brought as his counsel the hospital attorney who had hired him to be the expert in Cal's case. While I was prevented from saying a single word, the panel put no restrictions on the hospital attorney, who painted my family as calculating strategists trying to neutralize the doctor as a witness in Cal's new trial. Mind you, this was after the hospital had already dumped this expert's theory of the case and was preparing for the second trial on the assumption that Cal did have kernicterus. We could have brought out this duplicity if allowed to speak. Rather than being non-adversarial, this peer review process became a one-sided, duplicitous smear campaign unfolding before my eyes. It was a travesty. After the hearing, my colleague and I asked for a meeting with the American Academy of Neurology Board of Trustees to share with them our concerns about their peer review process. Numerous phone calls and three certified letters to their general counsel went unanswered.

I'm going to turn now from stories of the past to hopes for the future.

First, one of the mantra's of the patient safety movement is the need for transparency. It's ironic, but safety scientists refer to errors as "treasure" because they reveal the inherent weaknesses of our very complex healthcare delivery processes. As a mom, I cannot help but wonder whether Cal and many other kids like him could have been saved or can be still saved if our legal system was not so intent on burying its treasure. We must incentivize transparency. Finding a way to declare confidentiality agreements contrary to the public interest is an excellent place to start.

Second, we have done significant research and cannot find a single instance where medical societies or state licensing boards have disciplined an expert testifying on behalf of a defendant. The same financial incentives apply

whether a physician is bending science for a hefty fee from the plaintiff or the defense. Our expert witness oversight is patchy at best, and apparently extremely one-sided. This is wrong and needs to be investigated. If specialty societies are going to take on the role of peer reviewing experts, they should be held accountable for doing it fairly. In addition, I know some of the specialized medical courts proposals anticipate an approach whereby experts will be called by and paid by the court, not the parties. That is an approach worth investigating.

Third, one of the by-products of the hand to hand combat approach to medical malpractice litigation is the tremendous variation between awards for patients and families with similar needs. There has been a kernicterus verdict in this country for close to \$90 million dollars. Cal got a small fraction of that, and I know families who got a fraction of what Cal was awarded. Their children will inevitably become a burden to the Medicaid system. Justice should be equitable, and our case by case system does not work that way. So, whether it is a schedule of benefits or some other mechanism for giving juries or judges guidelines for reasonable awards, this fairness gap needs to be addressed.

If medical courts have rule-making power and if they are overseen by those focused on consumer interests, I believe we could see damages reform that is much fairer than an arbitrary cap on pain and suffering. Medical associations that advocate arbitrary damage caps know that they disproportionately impact those claimants with the most severe injuries. We can come up with better solutions if we approach damages reform in a patient-centered way.

Fourth, the trial judge in Cal's case characterized our trial as a competition. Our own lawyers repeatedly told us it a game. One of the mediators – a retired judge – referred to the jousting and sparring as a dance. At the mediation, several of the “dancers” were insurance actuaries and claims agents, complete with calculators. At every step, we were expected to go along, because this is the way it is done. As a mom...and a wife...and a citizen, I worry that too many people use these analogies to distance themselves from what is really supposed to be going on here: helping a family that has been harmed. To make justice a game is to dehumanize the people who seek it.

It is my understanding that the tort system was created for powerful, honorable, reasons...for the people. So I ask all of you involved in tort

reform to follow these guidelines as you reshape the future of our tort system:

- Do it for the right reasons.
- Do not compromise the real interests of injured patients, which are fair compensation and honest investigations of what happened
- Avoid the pressure to serve the interests of those professionals and organizations who are concerned more about their own finances than meeting the needs of the patients and clients they serve.
- Remember that people who experience medical error are not just dollar figures. We are your loved ones. We are you.

In closing, I ask you to use your power, your courage and your sense of justice to shape innovative programs that mark a return to integrity. Let's craft a system that uses our hard won treasure as a learning tool. Most importantly, let's truly serve the people who are relying on you, like daddies and babies.

Thank you.

Attachment:

Exhibit 1: Sheridan vs. Jambura et al, Memorandum Decision, District Court of the Fourth Judicial District of the State of Idaho, in and for the County of ADA, Case No. CV-PI 97-00266-D, July 19, 1999.