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Testimony of Lara Johnson

Regarding Patient Safety, Constitutional Rights & Medical Immunity
Senate Committee on Judiciary

June 2, 2020

Thank you for the opportunity to address this Committee. You are considering whether to limit the rights of Oregonians to seek redress in the Courts for harms they suffered or may suffer as patients as a result of unnecessary, preventable harm.

The discussion of limits to patient rights have varied between broader and narrower limitations. Any abridgement of the right to trial by jury, any abridgement of the right to a remedy, is a drastic measure. Oregon's constitution says that the right to jury trial shall remain "inviolable." When asked at the ballot box whether that should change, Oregonians have said no. Jury trials are how ordinary citizens help enforce the safety rules that keep us all safe.

The discussion here impacts all Oregonians, as all of us are either under some sort of medical care now or will require medical care in the future.

However, there are communities who are disproportionately impacted by COVID-19 and who should be part of this discussion. Communities of color have been disproportionately impacted by Covid-19. If the Legislature wishes to limit their ability to receive good medical care, that community should be part of this discussion.

The same holds true for Oregon's seniors and other disproportionately affected populations, such as people whose pre-existing medical conditions make them more vulnerable to serious complications if they contract the virus.

If their health is taken away, will their civil right to a trial by jury now be limited? Their voices must be heard.

We are in a special situation governed by Executive Orders and new and changing public health guidelines. Patients, families, those involved in our third branch of government, the judiciary, and perhaps most importantly, jurors understand that what is reasonable medical care is different in these circumstances as compared to before or after the pandemic.

We are open-minded about narrow, specific, time-limited modifications to responsibility for injuries. We strongly believe that juries are not going to second-guess medical providers who follow the Executive Orders and medical guidelines. Jurors are always told to judge conduct in light of the circumstances. Our members – who are paid on a contingency fee basis – will be reluctant to prosecute COVID-19 cases except under the most egregious of circumstances involving violation of accepted medical standards in effect at the time.

Each patient-provider interaction is different and unique. The standard for all those interactions is whether they were reasonable under the circumstances that existed at the time. The provider is expected to exercise ordinary care under the circumstances. If there is an earthquake and the power goes out, it is reasonable that the surgery gets rescheduled. No special law needs to be written for that. If there is a shortage of personal protective equipment, it is reasonable that the surgery gets rescheduled. Again, no special legislation is needed. The existing law already takes those kinds of circumstances into account.

It is also important to recognize what is really being talked about when there are proposals for a gross negligence standard. Ordinary medical negligence is the failure to use the degree of care, skill, and diligence expected under the circumstances. Gross negligence is not a well-defined or understood term in Oregon law, but can be interpreted to mean that someone acted with conscious disregard for the rights of others, or wantonly.

Let me give you specific examples of cases. We have represented patients after a hospital left a forceps inside the patient's body, after a hospital left a surgical towel in a patient's body, after a disabled child was given 1000 times the dose of a medication he was prescribed, and after a patient was given 18 times the dose

of a powerful heart drug he needed, slowing his heart, and resulting in brain damage. Everyone agrees those should not have happened. They were terrible mistakes. All were unnecessary, preventable harms. All of those were the result of negligence. None of those were gross negligence. None of those things should happen with or without a pandemic. Do we want Oregon patients to be subjected to those harms?

Finally, medical providers are often employers. Workers' rights are a separate topic and workers' advocates need to be heard when their rights are being discussed.