SENATE BILL REPORT

SB 5733

As of February 27, 1997

Title: An act relating to civil actions.

Brief Description: Concerning contingency fees, liability reform, and other issues related to civil actions.

Sponsors: Senators Newhouse, Rasmussen, Anderson and Haugen.

Brief History:
Committee Activity: Law & Justice: 3/4/97.

SENATE COMMITTEE ON LAW & JUSTICE

Staff: Dick Armstrong (786-7460)

Background: A tort– is a wrong done by one person to another. The wrong may consist of physical harm, such as injury caused by an assault, a car accident, or medical malpractice. The wrong may also consist of monetary loss, property damage, injury to reputation, or other harm. Generally, a person is liable to another for harm done if a duty was owed to the injured party and a breach of that duty caused the injury. A wide variety of statutes, court rules, and court decisions govern the civil (*i.e.,* noncriminal) resolution of tort claims.

1. EARLY DISPUTE RESOLUTION - CONTINGENT ATTORNEY FEES

Once a case has been filed, a variety of rules and procedures exist to allow the parties to prepare for trial. Many of these rules and procedures are also designed to facilitate the settlement of a case before it actually gets to trial, thereby saving the time and expense of trial litigation.

Generally, each party to a legal dispute bears the cost of his or her own legal expenses, and a party and his or her legal counsel are free to negotiate a fee for legal services. Under some statutes, however, the prevailing party in a lawsuit may be entitled to have the losing side pay his or her attorney fees. Sometimes a fee may be contingent– on the outcome of the lawsuit. That is, for instance, a claimant's attorney's payment for a case may be calculated as a percentage of whatever his or her client recovers.

Statutes and court rules provide tests of the reasonableness of attorney fees in some cases. In any tort action, for instance, a party who has to pay attorney fees may petition the court for a determination of reasonableness. The court is to consider several factors including the time, labor and skill required of the attorney, the experience, reputation, and ability of the attorney, the novelty and difficulty of the question involved, customary fees, the amount involved in the case, and the outcome, possible loss of other work involved in taking the case, time limits imposed by the client, the nature and length of the client and attorney relationship, whether the fee is fixed or contingent, and the terms of the fee agreement. In

the case of a medical malpractice lawsuit, the court is to make such a reasonableness determination with respect to all parties, whether or not any party requests such a determination. Court decisions have also held that, with respect to a fee agreement for an attorney handling an estate, for instance, the attorney has a fiduciary responsibility, and the reasonableness of a fee will be judged in light of the obligation to exercise the utmost good faith and diligence.

Under the Consumer Protection Act, the Attorney General or an individual may bring an action against a person who commits an unfair or deceptive act or practice in trade or commerce. An individual may recover three times the actual damages caused by the act or practice, up to $10,000, plus reasonable attorney fees. In order to recover, a plaintiff must show that an unfair or deceptive act in trade or commerce affecting the public interest caused the injury. A legislative declaration that a particular act or practice is unfair or deceptive in trade or commerce affecting the public interest relieves a plaintiff of having to prove these elements.

2. CERTIFICATE OF MERIT

Concern over the number of lawsuits that are filed apparently without merit has led to suggestions that before a suit may be filed it should be certified in some manner as having a reasonable basis.

Generally under current Washington law, bringing a "frivolous" lawsuit subjects a person to possible sanctions. Sanctions may apply to parties to such an action and to the attorneys who represent them.

With respect to a *party* to an action, a statute provides that upon findings that the action, counterclaim, cross-claim, third-party claim, or defense was frivolous and advanced without reasonable cause, the non-prevailing *party* may be ordered to pay the prevailing party the reasonable expenses, including attorney fees, incurred in opposing the action. (RCW 4.84.185)

These sanctions against a party may be imposed after a voluntary or involuntary order of dismissal, order on summary judgment, final judgment after trial, or other final order terminating the action as to the prevailing party.

With respect to *attorneys*, a court rule prohibits bringing or defending an issue unless there is a basis for doing so that is not frivolous. Non-frivolous reasons include a good faith argument for an extension, modification, or reversal of existing law. (RPC 3.1)

Courts have awarded attorney fees and other costs under these provisions. The duties imposed on an attorney by these provisions have been described as:

- The duty to conduct a reasonable inquiry into the facts supporting an action;
- The duty to conduct a reasonable inquiry into the law, such that an action embodies existing legal principles or a good faith argument for the extension, modification, or reversal of existing law; and
- The duty not to use an action for purposes of delay, harassment, or increasing the costs of litigation. (*Watson v. Maier*, 64 Wn. App. 889 (1992).)

The reasonableness of conduct by an attorney under these provisions is judged on an objective basis. It is not enough that the person taking the frivolous action personally believed, even after exhaustive research, that a claim or other action was meritorious. (*Harrington v. Pailthorp*, 67 Wn. App. 901 (1992).) On the other hand, a prevailing party cannot recover attorney fees or costs under the statute unless the action of the non-prevailing party is frivolous as a whole. A court may not award fees and costs for parts of an action or defense that are frivolous. (*Rettkowski v. Ecology*, 76 Wn. App. 384 (1994).)

It has been argued that these after-the-fact sanctions are an inefficient way to prevent frivolous lawsuits. Some states have instituted procedures for evaluating the merits of a lawsuit before it is filed.

3. JOINT AND SEVERAL LIABILITY

With certain exceptions, Washington has abolished joint and several liability in cases involving the fault– of multiple parties. One of those exceptions is where the injured plaintiff in a case is without fault– for his or her own injuries. That is, joint and several liability is possible if there was no contributory fault– on the part of the plaintiff.

In an action based on fault,– any contributory fault of the plaintiff will not only eliminate joint and several liability if there are multiple defendants, it will also proportionately reduce each defendant's liability for the plaintiff's injuries.

Fault– is defined to include acts that are negligent or reckless.–

Under the doctrine of joint and several liability, multiple defendants whose negligent acts combine to cause a plaintiff's indivisible– injury are each individually liable for all of the injured party's damages. Jointly and severally liable defendants may have rights of contribution as among themselves. That is, a defendant who pays more than his or her fair share,– based on the comparative faults of all the defendants, can seek reimbursement from those defendants who have paid less than their shares. However, the plaintiff may seek all of the damages from any one of the defendants.

In any lawsuit involving more than one at-fault party, the trier of fact is to determine the percentage of the total fault attributable to each party, including the plaintiff. This percentage of fault will determine the percentage of damages for which an entity will be liable. In some instances, a potential defendant may be missing– from the trial because the plaintiff has settled with that entity or otherwise released the entity. The amount of any such settlement reduces the plaintiff's claim against remaining defendants, so long as the court determines that the settlement is reasonable. Obviously, the greater the number of entities among whom the total fault is to be apportioned, the smaller the percentage of fault attributable to any one entity. The statute requiring the determination of reasonableness of a settlement specifically refers to a release, covenant not to sue, covenant not to enforce judgment, or similar agreement.– The statute calling for apportionment of fault, however, refers only to a released– entity as one of those whose fault must be determined.

4. MEDICAL WITNESSES

With certain exceptions, a patient's communications with his or her doctor are privileged.– That is, without the consent of the patient, the doctor may not be questioned in a civil action about information acquired in treating the patient. That privilege is deemed waived, however, 90 days after the patient files an action for personal injuries or wrongful death. The state Supreme Court has held that this waiver does not allow the defendant (or defendant's attorney) to have ex parte– contact with the patient's doctor. Rather, the doctor may be interviewed by the defendant only through the normal rules of discovery, which include the presence of the patient's attorney when the doctor is being questioned.

The court has held that expert witnesses in general may not be examined ex parte. The court has stated that the plain language– of CR 26(b)(5) means ex parte contact with an opposing party's expert is prohibited. (*In re Firestorm*, 129 Wn.2d 130 (1996).) Specifically, with respect to doctors, the court has said that the automatic privilege waiver does not eliminate the requirement for formal discovery procedures. The court stated that the danger of ex parte interviews is that they may disclose irrelevant but confidential information and that there is no adequate subsequent remedy for such a disclosure. (*Loudon v. Mhyre*, 110 Wn.2d 675 (1988).)

With respect to injured workers' claims under the industrial insurance laws, however, the court has distinguished *Loudon* and has held that no doctor and patient privilege exist and, therefore, that ex parte interviews are permissible. (*Holbrook v. Weyerhaeuser*, 118 Wn.2d 306 (1992).)

5. HEALTH CARE LIMITATIONS OF ACTIONS

The statute of limitations for bringing most health care-related lawsuits has three time periods. Generally, an action must be brought within the later of *three* years after the act that caused the harm, or *one* year after discovering the cause of the harm, but never more than *eight* years after the act. However, the statute is tolled– (*i.e.*, the period of limitation does not run) while the claimant is a minor, is incompetent, or is imprisoned before sentencing on a criminal charge.

Another section of law says that notwithstanding– the tolling provision, the knowledge of a parent regarding a claim is to be imputed to a minor child. The imputed knowledge can act to bar a claim. The state Supreme Court has ruled, however, that the one-, three-, and eight-year periods of limitation commence when a minor child reaches majority. That is, even though the knowledge of the parent may be imputed before the child reaches age 18, that imputed knowledge takes effect only after the child reaches age 18. (*Gilbert v. Sacred Heart*, 127 Wn.2d 370 (1995).)

6. CONSTRUCTION CLAIMS

A. Construction Claims Statute of Repose. Washington has a "statute of repose" relating to the construction of buildings and other improvements to real property. A statute of repose is similar to a statute of limitations in some respects. The statute prevents lawsuits from being brought beyond some point following the completion of a construction project. A suit against parties protected by the statute is barred unless the right to bring the action accrues within six years after substantial completion of construction or after termination of specified construction-related services, whichever is later.

One provision in the statute of repose identifies whom the statute protects. The statute applies to all claims involving the construction, alteration, or repair of any improvement upon real property, or performing or furnishing design, planning, surveying, architectural, construction, or engineering services. It also applies to the supervision of construction, or administration of construction contracts, for any construction, alteration or repair of any improvement upon real property. The provision states that it is intended to benefit only those persons referenced in it and that it does apply to claims against manufacturers.–

The language excluding "manufacturers" from the statute's protection was added by a 1986 amendment. Before this 1986 amendment, the statute of repose was construed as applying to parties "who work on structural aspects of building, but not manufacturers of heavy equipment or nonintegral systems within the building." (*Condit v. Lewis Refrigeration Co.*, 101 Wn.2d 106 (1984).)

After the 1986 amendments excluding "manufacturers," there have been several lawsuits in which plaintiffs have successfully argued that construction contractors are also "manufacturers" and, therefore, not protected by the statute of repose. (For example, *Washburn v. Beatt Equipment Co.*, 120 Wn. 2d 246 (1992).)

As noted above, the statute of repose is similar to a statute of limitations in preventing lawsuits after a certain time. However, while the statute of repose provides a time period during which a right of action must accrue, the statute of limitations provides a time period during which legal action must be commenced after the right of action has accrued. The statute of limitations time periods vary according to the nature of the legal action.

In tort actions, Washington follows the discovery rule. This rule means that the three-year limitations period applicable generally to tort cases accrues at the later of the time of the tortuous conduct or of the time the injured party discovers it or should have discovered it. (See: RCW 4.16.080; and, for example, *Gazija v. Nicholas Jerns Co.*, 86 Wn.2d 215 (1975).)

One effect of the statute of repose is to provide a time limit on the discovery rule that applies to the statute of limitations in tort cases. The statute of repose does not necessarily bar all lawsuits outside its six-year period; rather, it bars lawsuits where the cause of action accrues outside the six-year period. For example, the statute of repose might operate in either of two ways in the case of a building destroyed by fire as a result of the negligent installation of wiring, the existence of which was reasonably discovered only after the fire. If the negligent installation was reasonably discovered in the sixth year following the installation, the building owner would have three years after the discovery to sue the contractor. The statute of repose would not bar the suit because the action accrued within the six years after installation. If, however, the negligent installation was reasonably discovered in the seventh year following installation, then the statute of repose would bar the suit.

B. Third-party Liability Under Industrial Insurance. Injured workers covered by industrial insurance, or their beneficiaries, are compensated for their injuries under the industrial insurance statutes and generally are not permitted to sue their employers for damages. However, a worker may file a damage suit against a "third party," if the third party is not the injured worker's co-worker. Workers who are working on the same job site, but who are employed by different employers, are not considered to be co-workers.

Third-party immunity is granted to design professionals who perform professional services for a construction project, unless the professional assumes responsibility for safety by contract or actually exercised control over that part of the premises where the worker was injured. Design professionals include licensed or authorized architects, engineers, land surveyors, or landscape architects.

7. MOTOR VEHICLE SAFETY BELTS

It is a traffic infraction for anyone 16 or older to drive or ride in a motor vehicle without wearing a seatbelt. It is also an infraction for anyone to drive a car with a passenger who is not wearing a seatbelt or not in an approved child restraint device. However, failure to comply with these requirements is specifically declared by statute not to constitute negligence, and the same statute provides that evidence of such failure is not admissible in a civil trial.

With certain exceptions, violation of a statutory mandate or prohibition is not per se negligence, but the fact of such a violation may be introduced as evidence of negligence. (RCW 5.40.050)

Summary of Bill:

1. EARLY DISPUTE RESOLUTION - CONTINGENT ATTORNEY FEES

Procedures are created for early settlement offers,– and for limiting contingent attorney fees, in lawsuits for personal injury or wrongful death.

An attorney representing a claimant on a contingent fee basis must demand compensation simultaneously from all known allegedly responsible parties. The demand must include certain information, including information about the alleged injury or loss, known witnesses, photographic evidence, basis of the claim, medical records, and economic and noneconomic losses suffered. If a defendant makes a settlement offer within 60 days of receiving a claimant's demand for compensation, procedures are triggered that may limit the claimant's attorney's contingent fees.

If the claimant accepts the early settlement offer, the claimant's attorney may collect a fee no greater than 10 percent of the offer. If the claimant rejects the offer, the attorney may collect a fee no greater than 10 percent of the offer, plus the percentage of the amount recovered in excess of the offer as agreed to by the claimant and the attorney. Reasonable costs incurred by a claimant's attorney before receipt of an early settlement offer are not subject to these 10 percent limits. A claimant's attorney who fails to make the required demand for compensation in a materially complete fashion, or who fails to provide the claimant with a copy of an early settlement offer, may collect a fee no greater than 10 percent of the amount the claimant recovers.
If an attorney proposes to represent a claimant on a contingent fee basis, the attorney must inform the claimant of the statutory provisions just described, and that the fee limitations in these provisions are maximum limits, and that the claimant may negotiate a lower fee.

An alleged responsible party need not respond to a demand for compensation by making an offer. The lack of an offer, or the amount of any offer that was made, may not be admitted as evidence at trial.

A violation of any of these provisions is declared to be an unfair or deceptive act in trade or commerce affecting the public interest under the Consumer Protection Act. A contingent fee agreement is declared to be subject to the rules of a fiduciary relationship.

2. CERTIFICATE OF MERIT

A certificate of merit is required in certain civil actions. The claimant in these actions must file a certificate indicating that:

- The claimant's attorney has reviewed the facts of the case;
- The attorney has consulted with an expert in the particular kind of lawsuit;
- The expert is willing and able to testify in the case; and
- The attorney has concluded the claim is reasonable and meritorious.

The certificate of merit must be filed within 90 days of the filing of the action. Failure to file such a certificate is grounds for dismissal of the action or for sanctions against the claimant's attorney at the discretion of the court. A court may, for good cause shown, extend the 90-day period for filing a certificate.

The certificate is required in actions for damages based on the negligence of a licensed, registered, or certified business person or professional, or of a health care facility, or based on a product liability claim. There are many state-licensed, registered, or certified businesses and professions, including: accountants, architects, building contractors, cosmetologists, health care professionals, real estate brokers, plumbers, art dealers, security guards, and athlete agents.

The requirement for a certificate applies to actions filed on or after July 1, 1997.

3. JOINT AND SEVERAL LIABILITY

The statute on apportionment of fault among parties to a lawsuit is amended to expressly include specific entities among those whose fault is to be counted. Reference to entities released– is replaced by reference to entities who have entered into a release, covenant not to sue, covenant not to enforce judgement, or similar agreement. This broadened coverage is the same as the coverage of entities found in the statute requiring a court determination of reasonableness when a plaintiff releases a defendant.

Lack of fault on the part of a plaintiff no longer results in joint and several liability among multiple at-fault defendants.

Fault– is redefined to include not only negligent and reckless acts, but also intentional acts as well.

4. MEDICAL WITNESSES

The timing of the automatic waiver of the doctor and patient privilege is changed. The privilege is waived 90 days after the patient makes a demand for compensation, rather than after the patient files an action.

Once the waiver has occurred, ex parte interviews with the doctor may be conducted in the same manner as with any other witness.

The doctor and patient privilege does not apply to claims, hearings, appeals, or any other proceedings under the industrial insurance laws.

5. HEALTH CARE LIMITATIONS OF ACTIONS

The tolling provisions of the health care statute of limitations relating to minority, incompetence, and pre-sentence imprisonment are eliminated. No longer does minority, incompetence or imprisonment prevent the three-year, one-year, or eight-year periods from running.

Provisions imputing knowledge of a parent to a minor child are eliminated.

6. CONSTRUCTION CLAIMS

A. Construction Claims Statute of Repose. Language in the statute of repose excluding "manufacturers" from the statute's protection is deleted. The coverage of the statute of repose is extended specifically to cover persons licensed or registered as contractors, architects, engineers, land surveyors, landscape architects, and electricians.

B. Third-party Liability under Industrial Insurance. The immunity from liability for workplace injuries for third parties performing services at a construction site is modified.

An injured worker or the worker's beneficiary is not permitted to seek damages for industrial injuries or occupational diseases occurring in the course of employment at a construction project from the owner or developer of the project, or any person performing work, furnishing materials, or providing services for the project, including design professionals, construction managers, general or prime contractors, suppliers, subcontractors of any tier, or their employees. This prohibition applies whether the work is performed at the site under a single contract or multiple contracts.

This immunity does not apply to:

- A person or entity that injures a worker by deliberate intention. It is declared to be against public policy to attempt by contract to indemnify against this liability, and any such contract is void.

- Manufacturers and product sellers for product liability actions.

- Negligent preparation of design plans by a design professional.

7. MOTOR VEHICLE SAFETY BELTS

The provision stating that noncompliance with the seatbelt law is not negligence is removed. Also removed is the prohibition against the admissibility of such noncompliance as evidence in a civil trial.

Appropriation: None.

Fiscal Note: Requested on February 27, 1997.

Effective Date: Ninety days after adjournment of session in which bill is passed.