HOUSE BILL REPORT
HB 2804

As Reported by House Committee On:
Judiciary

Title: An act relating to actions against health care providers under chapter 7.70 RCW.

Brief Description: Changing provisions relating to actions against health care providers.

Sponsors: Representatives Lantz, Rockefeller, Clibborn, Moeller, Kirby, Cody, Morrell, Flannigan, Sommers, Campbell, Lovick, Kagi, Miloscia, O'Brien, Hunt, Simpson, G., Conway, Haigh, Linville, Edwards, Kenney and Chase.

Brief History:
Committee Activity:
Judiciary: 1/27/04, 1/29/04 [DPS].

Brief Summary of Substitute Bill

Makes the following changes relating to actions based on medical malpractice:

- Changes how fault for a plaintiff's injuries is allocated;
- Limits the vicarious liability of a hospital for the acts of ostensible agents;
- Limits the statute of limitations and tolling provision with respect to minors, and re-establishes an eight-year statute of repose;
- Establishes expert qualifications, limits the number of expert witnesses that may be used in an action, requires pre-trial expert reports, and limits expert depositions;
- Requires the plaintiff to provide pre-suit notice of an intent to file a claim and a certificate of merit upon filing a claim;
- Requires mandatory mediation without exception, unless subject to arbitration;
- Provides for early offers of settlement, which are not discoverable or admissible in a suit;
- Changes the rules relating to admissibility of collateral source payments; and
- Establishes a commission to study the feasability of establishing an advisory schedule of non-economic damages.

HOUSE COMMITTEE ON JUDICIARY

Majority Report: The substitute bill be substituted therefor and the substitute bill do

pass. Signed by 6 members: Representatives Lantz, Chair; Moeller, Vice Chair; Campbell, Flannigan, Kirby and Lovick.

Minority Report: Do not pass. Signed by 3 members: Representatives Carrell, Ranking Minority Member; McMahan, Assistant Ranking Minority Member; and Newhouse.

Staff: Edie Adams (786-7180).

Background:

Medical Malpractice

Medical malpractice actions are civil tort actions for the recovery of damages for injury or death resulting from the provision of health care. There are three grounds on which a health care provider may be found liable in a medical malpractice action:

- The health care provider failed to follow the required standard of care;
- The health care provider promised that the injury suffered would not occur; or
- The injury resulted from health care to which the patient did not consent.

Failure to follow the standard of care means that the health care provider failed to exercise the degree of care expected of a reasonably prudent provider of the same field at that time, and acting in the same or similar circumstances.

Allocation of Fault

In a civil action involving the fault of more than one entity, the trier of fact must determine the percentage of the total fault which is attributable to every entity which caused the plaintiff's damages, except entities immune under the Industrial Insurance law. The entities to whom fault must be assigned are: the plaintiff; defendants; entities released by the plaintiff; entities who are immune; and entities who have an individual defense against the plaintiff.

The list of entities to whom fault is assigned is potentially longer than the list of defendants against whom judgment may be entered. The plaintiff may recover damages only from those defendants who were parties to the suit and against whom judgment was entered. Defendants pay damages in proportion to their percentage of the fault. If joint and several liability applies, the defendants are responsible only for their combined proportionate shares of the plaintiff's damages, not for any share of the fault that is attributed to an entity that is not a party to the suit.

Vicarious Liability

A person is generally not responsible for the negligent acts of third persons. In some cases, however, a person may be responsible for a third person's act under a theory of agency or other doctrines. This type of liability is called vicarious liability. One form of vicarious liability, called "respondeat superior," is that of an employer for the acts of its employees. An employer may be held responsible for the negligent act of an employee if the employee was acting within the scope of his or her employment. It is not necessary to show that the employer was negligent in any way.

While employers are liable for the torts of their employees under the doctrine of respondeat superior, generally they are not liable for torts committed by their independent contractors. Hospitals, unlike other corporate entities, typically do not have traditional employer/employee relationships with the health care providers performing services at the hospital. Rather, hospitals have developed a practice of granting physicians "privileges" to practice at the hospital and provide services through providers who are characterized as independent contractors.

A 1978 court of appeals decision, *Adamski v. Tacoma General Hospital*, applied two theories under which a hospital could be held liable for negligence of a non-employee practitioner: "ostensible agency" and "inherent function." Under the doctrine of "ostensible agency," a hospital may be held liable for the malpractice of a physician if the hospital "holds out" the physician as an agent of the hospital, and the patient reasonably relies on this information in forming a belief that the hospital was the provider of the medical care. Under the "inherent function" doctrine, a hospital is liable for care provided by a non-employee provider if the service provided is an inherent function of the hospital, a function that is necessary for the hospital to achieve its purpose.

Statute of Limitations

A medical malpractice action must be brought within time limits specified in statute, called the statute of limitations. Generally, a medical malpractice action must be brought within three years of the act or omission or within one year of when the claimant discovered or reasonably should have discovered that the injury was caused by the act or omission, *whichever period is longer*. The statute also provides that a medical malpractice action may never be commenced more than eight years after the act or omission. This eight-year outside time limit is called a "statute of repose." In a 1998 Washington Supreme Court decision, *DeYoung v. Providence Medical Center*, this eight-year statute of repose was held unconstitutional on equal protection grounds. The Court found that the statute had no rational relationship to a legitimate legislative goal.

The statute of limitations is tolled for minors. This means that the three-year period does not begin to run until the minor reaches the age of 18. An injured minor will therefore always have until at least the age of 21 to bring a medical malpractice action. In addition, the statute is tolled for fraud, intentional concealment, or the presence of a foreign body. In those cases, the person has one year from actual knowledge of the

fraud, concealment, or presence of a foreign body to bring suit. Knowledge of a parent or guardian is imputed to a minor, but the imputed knowledge does not take effect until the minor reaches age 18.

Expert Witnesses

In a medical malpractice action, the plaintiff has the burden of proof to establish all necessary elements. Expert witnesses are generally required in a medical malpractice action to establish the standard of care of a reasonably prudent health care provider and to prove that the failure to exercise that standard of care was the proximate cause of the patient's injury. Expert witnesses are not required to establish the standard of care if the conduct in question is within the common knowledge of the jury. For example, unintentionally leaving a foreign object in a patient after surgery or amputating the wrong limb may not require expert testimony.

Statutory law dealing with medical malpractice actions does not establish qualifications for expert witnesses. However, court rule provides requirements for the use of expert witnesses in any trial, including medical malpractice cases. Under Evidence Rule 702, a person may be an expert if qualified by "knowledge, skill, experience, training, or education."

Under the Rules of Civil Procedure, courts have some discretion to limit the number of expert witnesses and can reject witnesses if they do not meet the standards of an expert. Prior to trial, the opposing party is entitled to depose any experts and other witnesses expected to testify.

Mandatory Mediation and Arbitration

Medical malpractice claims are subject to mandatory mediation in accordance with court rules adopted by the Supreme Court. The court rule, Civil Rule 53.4, provides deadlines for commencing mediation proceedings, the process for appointing a mediator, and the procedure for conducting mediation proceedings. The rule allows mandatory mediation to be waived upon petition of any party that mediation is not appropriate.

Some medical malpractice claims may be subject to mandatory arbitration under superior court mandatory arbitration provisions. In addition, parties to a dispute may voluntarily agree in writing to enter into arbitration to resolve the dispute.

Offers of Settlement

Under both a statute and a court rule, evidence of furnishing or offering to pay medical expenses needed as the result of an injury is not admissible in a civil action to prove liability for the injury. In addition, a court rule provides that evidence of offers of compromise are not admissible to prove liability for a claim. Evidence of conduct or

statements made in compromise negotiations are likewise not admissible.

In 2002, the Legislature passed legislation that makes inadmissible in a civil trial expressions of sympathy relating to the pain, suffering, or death of an injured person. However, a statement of fault is not made inadmissible under this provision.

Collateral Sources

In medical malpractice actions, any party may introduce evidence that the plaintiff has received compensation for the injury from collateral sources, except those purchased with the plaintiff's assets (e.g., insurance plan payments). The plaintiff may present evidence of an obligation to repay the collateral source compensation.

Pre-Suit Notice and Certificate of Merit

A plaintiff does not have to provide a defendant with prior notice of his or her intent to institute a medical malpractice suit. In addition, there is no requirement that a plaintiff provide a health care provider's affidavit or certificate attesting to the merits of the case prior to proceeding with the suit.

Non-economic Damage Awards

Non-economic damages are defined in statute as "subjective, non-monetary losses," including pain, suffering, disability or disfigurement, loss of companionship, loss of consortium or destruction of the parent-child relationship. Statutory law does not provide any fixed standards for a jury to use to measure non-economic damages. Juries are instructed that in determining a non-economic damage award, they must be guided by their own judgment, by the evidence in the case, and by the jury instructions. The jury is also instructed that the determination of non-economic damages must be based upon evidence presented at the trial and not upon speculation, guess, or conjecture.

Summary of Substitute Bill:

Numerous changes are made to the law relating to medical malpractice actions in the areas of: Allocation of fault; vicarious liability of hospitals; the statute of limitations for minors and the statute of repose; expert witnesses; pre-suit notice and certificate of merit requirements; mandatory mediation; early offers of settlement; collateral source payments; and advisory schedule of non-economic damages.

Allocation of Fault

The method of allocating fault in a medical malpractice action is changed. Fault is to be assigned only to claimants, defendants, and entities who have been released by the

claimant, but not to entities who are immune, or entities who have an individual defense against the claimant.

Vicarious Liability

A hospital is not ostensibly liable for the negligence of a health care provider who is properly licensed and acting as an independent contractor. A hospital is liable for the negligence of a provider granted privileges to provide health care at the hospital only if:

- The provider is an agent or employee of the hospital and the negligence occurred while the provider was acting within the course and scope of the provider's agency or employment with the hospital; or
- The provider was fulfilling an essential function of the hospital.

Statute of Limitations

The statute of limitations for minors injured as the result of the provision of health care is shortened. An action based on injuries suffered by a minor must be commenced by the *later* of:

- Eight years from the act or omission or by the age of twenty-one, *whichever is earlier*; or
- One year from the time the plaintiff discovered or should have discovered that the injury was caused by the act or omission.

The tolling of the statute of limitations during any period of minority is eliminated with respect to medical malpractice actions. The eight-year statute of repose is re-established and legislative intent regarding the justification for a statute of repose is provided.

Expert Witnesses

An expert in a medical malpractice action must meet the following qualifications in order to testify at trial or execute a certificate of merit:

- Has a recognized expertise in any area of practice or specialty at issue in the action, as demonstrated by devotion of a substantial period of the expert's practice to that area of practice or specialty; and
- At the time of the incident, was either: (1) engaged in active practice in the same area of practice or specialty as the defendant; or (2) teaching in the same area of practice or specialty as the defendant, including instruction regarding the particular condition at issue in the action.

The court may waive the expert qualifications if the court finds that: (1) Extensive efforts were made to locate an expert meeting the qualifications, but none was willing and able

to testify; and (2) the proposed expert is qualified to be an expert by virtue of his or her training, experience, and knowledge.

An expert opinion provided during the course of a medical malpractice action must be corroborated by objective evidence. Examples of objective evidence are provided, including treatment or practice protocols or guidelines, objective academic research, or clinical trials.

The number of expert witnesses allowed per side in a medical malpractice action is limited to two per issue, and two for proving a standard of care, except upon a showing of good cause. In the event that multiple parties on the same side of an action cannot agree on the experts to be called, the court must allow additional experts upon a showing of good cause.

All parties to a medical malpractice action must file a pretrial expert report that discloses the identity of all expert witnesses and states the nature of the testimony the experts will present at trial. Further depositions of the experts are prohibited. The testimony presented by an expert at trial is limited in nature to the opinions presented in the pre-trial report.

Mandatory Mediation and Arbitration

Medical malpractice claims are subject to mandatory mediation unless the action is subject to mandatory arbitration or the parties agree to arbitration after the claim arises. The Supreme Court rules implementing the mandatory mediation requirement may not provide any other exceptions to the mandatory mediation requirement.

Offers of Settlement

Evidence of an "early offer of settlement" is inadmissible, not discoverable, and otherwise not available for use in a medical malpractice action. An early offer of settlement means an offer that is made prior to the filing of a claim and that makes an offer of compensation for the injury. An early offer of settlement is inadmissible and not discoverable in a civil action even if it contains an apology, admission of fault, or statement regarding remedial measures that might be taken to address the occurrence that led to the injury.

Collateral Sources

The restriction on presenting evidence of collateral source payments that come from insurance purchased by the plaintiff is removed. The plaintiff, however, may introduce evidence of amounts paid to secure the right to the collateral source payments (e.g., premiums), in addition to introducing evidence of an obligation to repay the collateral source compensation.

Pre-Suit Notice and Certificate of Merit

A medical malpractice action may not be commenced unless the plaintiff provides the defendant with 90 days prior notice of the intention to file a suit. The 90-day notice requirement does not apply if the defendant's name is unknown at the time of filing the complaint. If the notice is served within 90 days of the expiration of the statute of limitations, the time for commencing the action must be extended for 90 days from the date of service of the notice.

In medical malpractice actions involving a claim of a breach of the standard of care, the plaintiff must file a certificate of merit at the time of commencing the action. The certificate of merit must state that there is a reasonable probability that the defendant's conduct did not meet the required standard of care. The certificate of merit must be executed by a health care provider who meets the expert witness qualifications established in the act. The court may grant up to a 90-day extensive of time for filing the certificate if the court finds there is good cause to grant the extension.

Non-economic Damage Awards

A commission on non-economic damages is established to determine whether an advisory schedule of non-economic damages in medical malpractice cases could be developed to increase the predictability and proportionality of non-economic damage awards. The commission must consider the types of information appropriate for providing guidance to the trier of fact regarding non-economic damage awards, such as past non-economic damage awards for similar injuries or claims. The commission must also consider the appropriate format for an advisory schedule and how it would be presented to the trier of fact or utilized in alternative dispute resolution proceedings.

The commission must develop an implementation plan if it determines that an advisory schedule for non-economic damages is feasible. The commission's report and implementation plan, if appropriate, must be submitted to the Legislature by October 31, 2005.

The commission is composed of the following 15 members: Four members of the Legislature, one from each of the two largest caucuses in the Senate and House of Representatives; one health care ethicist; one economist; one actuary; two attorneys, one representing the plaintiff's bar and one representing the insurance defense bar; two superior court judges; one hospital representative; two physicians; and one medical malpractice insurer representative.

The Governor appoints the non-legislative members of the commission and must select a chair of the commission from among the members who do not represent health care providers, medical malpractice insurers, or attorneys.

Substitute Bill Compared to Original Bill:

The original bill eliminated a hospital's joint and several liability for non-economic damages if the hospital was less then 25 percent at fault in causing the plaintiff's injuries. The original bill did not contain the eight-year statute of repose or expert witness qualifications. The original bill's provision regarding early offers of settlement contained a requirement that the offer be "reasonable." Language in the intent section regarding ostensible agency relating to individual health care providers was removed in the substitute bill. In addition, the substitute bill replaced language mandating the Supreme Court to adopt rules relating to mandatory mediation and expert witnesses with language requesting the Court to adopt rules.

Appropriation: None.

Fiscal Note: Available.

Effective Date of Substitute Bill: The bill takes effect 90 days after adjournment of session in which bill is passed.

Testimony For: There is a crisis in the medical delivery system that requires real answers for patients and doctors through reform in multiple aspects of the system. Improving the civil justice system is only one part of providing real answers. We have to look also at reforms to the insurance system and health care system to stabilize doctors' insurance costs. There are no winners in the medical malpractice system. We need to find a way to make the justice system work for all parties by avoiding the costly, burdensome, and psychologically damaging aspects of the litigation system. This is a comprehensive bill that will make a very big difference. This bill in combination with the insurance reforms and patient safety reforms will provide real answers.

(With concerns) The bill has made some significant improvements. Some of the concepts in the bill will result in lower transactional costs, reduce the number of defendants brought into an action, and increase the use of alternative dispute resolution. Limiting the number of experts and requiring pre-trial expert reports will have a significant impact on lowering transactional costs. There are concerns with the expert qualification provision's requirement that an expert be licensed in Washington. The best experts do not all live in Washington. In close medical communities, doctors may not want to testify against each other. The certificate of merit section should be amended to allow it to be filed up to six months after filing suit, since there needs to be some discovery before a certificate can be executed. In addition, the provision allowing admissions of fault to be inadmissible in a trial should be removed.

The changes to the liability system in this bill will not have much of an impact on medical malpractice insurance rates. There is a new report from Americans for

Insurance Reform that shows that insurance pay-outs are relatively stable. The crisis results from the fact that the insurance companies aren't making the profits from the stock market that they used to make. You would go a much longer way to solving the crisis if you adopt real insurance reform and patient safety measures.

Testimony Against: Health care providers in this state face a crisis in their ability to remain in practice. We need comprehensive liability reform like the reforms passed in California and Texas. That type of reform is the only answer to this issue. The bill does not accomplish what needs to be accomplished. It does not contain many of the important components of the California program which are critical to a successful program. This bill is not a measured response to the crisis facing our doctors and will actually make the situation worse.

Several provisions of the bill are unfair or will increase costs of litigation. The ostensible agency liability provision is unfair because it doesn't provide protection for physicians. In addition, it makes hospitals liable for providers who provide essential functions of the hospitals, even if those providers are not actual agents or employees of the hospital. Arguably it makes the hospital liable for every person providing services in the hospital. The expert witness provisions and the early offer of settlement provision will actually result in higher transactional costs. The allocation of fault provision is unfair, resulting in hospitals paying a greater share of the damages. It will not reduce the number of defendants. Hospitals will have to name each and every individual who may have contributed to the fault in order to have fault apportioned fairly. The collateral source provision does not deal with the issue of future collateral sources and leaves unanswered issues relating to insurance subrogation.

Persons Testifying: (In support) Representative Lantz, prime sponsor.

(With concerns) Larry Shannon, Washington State Trial Lawyers Association; John Budlong, Washington State Trial Lawyers Association; and Bob Cooper, Washington Citizen Action.

(Opposed) Gary Morse, Physicians Insurance; Barbara Shickich, Washington State Hospital Association; and Cliff Webster, Washington State Medical Association.

Persons Signed In To Testify But Not Testifying: None.