HOUSE BILL REPORT
HB 1928

As Reported by House Committee On:
Judiciary

Title: An act relating to parties liable for damages in actions under chapter 7.70 RCW.

Brief Description: Changing provisions relating to parties liable for damages in actions under chapter 7.70 RCW.

Sponsors: Representatives Lantz, Carrell, McMahan, Clibborn, Campbell, Moeller, Schual-Berke, Cody, Newhouse, Morrell, Rockefeller, Kirby, Lovick, Kenney, Linville, Veloria, Conway, Simpson, Sommers and Haigh.

Brief History:
Committee Activity:
Judiciary: 2/21/03, 2/27/03 [DPS].

Brief Summary of Substitute Bill

- Eliminates, with respect to medical malpractice cases, the requirement that *any* entity causing a claimant's damages, including entities who are *not* parties to the lawsuit, must be assigned a percentage of the total fault for a claimant's damages, and requires that 100 percent of the fault be assigned only to entities who *are* parties to the action or who have been released by the claimant.
- Eliminates a hospital's joint liability for noneconomic damages in a medical malpractice case if the hospital is less than 25 percent at fault.
- Limits the vicarious liability of hospitals and health care providers for the acts or omissions of their agents.

HOUSE COMMITTEE ON JUDICIARY

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 9 members: Representatives Lantz, Chair; Moeller, Vice Chair; Carrell, Ranking Minority Member; McMahan, Assistant Ranking Minority Member; Campbell, Flannigan, Kirby, Lovick and Newhouse.

Staff: Bill Perry (786-7123).

Background:

Determination of Percentages of Fault in Tort Cases.
In a tort case based on fault, the trier of facts is required to assign a percentage of the fault to "every entity which caused the claimant's damages." (An exception is provided for entities who are immune under the state's Industrial Insurance Law.) These assigned percentages must add up to 100 percent. The "entities" to whom fault must be assigned include:

- the claimant;
- defendants;
- entities released by the claimant;
- entities who are immune from liability; and
- entities who have an individual defense against the claimant.

This list of entities to whom fault may be assigned is potentially longer than the list of defendants against whom judgment may be entered in a given case. Only defendants who are parties to the case and against whom judgment is entered are responsible for paying the claimant's damages. Defendants pay damages in proportion to their percentages of fault.

Joint and Several Liability.
With some exceptions, a defendant in a tort case is responsible only for his or her own percentage of fault in causing the claimant's harm. In some instances, however, multiple defendants may be "jointly and severally" liable for the whole of the claimant's damages. This joint and several liability means that any one defendant can be required to pay all of the damages. (The paying defendant then has a "right of contribution" against any other defendant to recover shares of the damages based on each defendant's fault.)

One of the instances in which joint and several liability applies is when the claimant was not at fault in causing his or her own harm.

The damages that may be awarded to a claimant include payments for a variety of harms. Some of these are "economic" damages which are defined as "objectively verifiable monetary losses" such as lost earnings and out-of-pocket expenses required to deal with the harm done. "Noneconomic damages," on the other hand, are defined as "subjective, nonmonetary losses" and include:

- pain, suffering, inconvenience, mental anguish, disability or disfigurement;
- emotional distress;
- loss of society and companionship;
- loss of consortium;
- injury to reputation;
- humiliation; and
- destruction of the parent-child relationship.

Vicarious Liability.
Generally, persons and entities are not responsible for the actions or omissions of others. In some cases, however, principles of "agency" or other doctrines may create what is known as vicarious liability. One such principle is that of "respondeat superior" which, for example, allows an employer to be held liable for the tort of an employee. This vicarious liability is different from other forms of potential employer liability, such as liability for negligently

failing to supervise an employee. Under the notion of respondeat superior, an employer does not have to be shown to have acted negligently, but the employee must be shown to have done so during the course of his or her employment.

In the development of case law in this area, one distinction that courts have employed is between situations in which a person is an "employee" of an entity (in which case respondeat superior will apply) and situations in which a person is an "independent contractor" of an entity (in which case respondeat superior will not apply). Historically, medical malpractice cases have presented challenges for courts in applying respondeat superior principles. The granting of "privileges" to practice at a hospital may create a relationship that is hard to characterize as one of either employment or of independent contracting.

One state court of appeals decision from 1978, *Adamski v. Tacoma General Hospital*, 20 Wn. App. 98, discussed the idea of "ostensible" or "apparent" agency as an expansion of traditional respondeat superior analysis. In that case an injured claimant sued an emergency room physician as well as the hospital where medical care was performed. The hospital argued that it should not be liable because the hospital did not and could not exercise any control over the physician's delivery of medical treatment in the emergency room. Under ordinary principals of respondeat superior, this issue of control is critical. The court in *Adamski*, however, noted among other things that the hospital offered emergency room services that were part of its business operation and for which it billed patients, and that the patient went to the hospital for those services and only after he was there was he referred to the physician. The court observed that the patient could have assumed that the physician was in fact the employee or agent of the hospital. The court stated the doctrine of ostensible agency as follows:

> One who represents that another is his servant or other agent and thereby causes a third person justifiably to rely upon the care or skill of such apparent agent is subject to liability to the third person for harm caused by the lack of care or skill of the one appearing to be a servant or other agent as if he were such. (*Adamski* at page 112, quoting from the Restatement (Second) of Agency § 267 at 578 (1958).)

The *Adamski* court reversed a lower court summary judgment in favor of the hospital and sent the case back for trial.

Summary of Substitute Bill:

The rules on several features of the tort law are changed with respect to medical malpractice cases. These changes include adjusting the way percentages of fault are assigned, limiting the application of joint and several liability with respect to a hospital's responsibility for noneconomic damages, and limiting the vicarious liability of hospitals and health care providers.

Determination of Percentages of Fault in Tort Cases.
In medical malpractice cases, fault is to be assigned only to claimants, defendants, and entities who have been released by the claimant.

Joint and Several Liability.
The liability of a hospital in a medical malpractice case in which a claimant is not at fault is joint and several with respect to noneconomic damages only if the hospital is less than 25 percent at fault.

Vicarious Liability.
The Legislature intends that *Adamski v. Tacoma General Hospital* be reversed with respect to the theory of ostensible agency.

A hospital is liable for the act or omission of a health care provider who has been granted privileges at the hospital only if the provider is the actual agent or employee of the hospital and the act or omission occurred during the course and scope of that agency or employment.

An individual health care provider is not liable for the act or omission of another who is not his or her actual agent or employee and who is not acting under his or her direct supervision and control.

Substitute Bill Compared to Original Bill:

The substitute bill makes the following changes:

- Explicitly states that an employer's immunity for vicarious liability does not include immunity for any act or omission of the employer that is the proximate cause of an injury.
- Explicitly states that a hospital's decisions regarding granting practice privileges to a health care professional are not covered by the hospital's immunity from vicarious liability.

Appropriation: None.

Fiscal Note: Not Requested.

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

Testimony For: (Original bill) There is a real crisis in medical malpractice coverage that is threatening to cause doctors to retire early, quit practicing, or leave the state. There has been a decline in reimbursement payments for health care services at the same time there has been a huge increase in insurance premiums. This bill is a step in the right direction.

Addressing the problem of assigning fault to non-parties is important. The current "empty-chair" just shifts the cost of injuries to the injured parties and to the public and away from those responsible for the harm. The number of defendants named on average in a suit has increased since the current law took effect because plaintiffs feel compelled to sue every conceivable at-fault party.

(With concerns, original bill) The provision regarding vicarious liability might be interpreted to cover situations where a hospital has been negligent in granting credentials or privileges to a health care professional.

Testimony Against: (Original bill) The bill will do nothing significant to reduce insurance costs. The cost of insurance is not a function of recent stock market trends. Most insurance company investments are in conservative bonds, and the stock market decline has not had a major impact on premium rate setting. It is substantial increases in reinsurance costs and the dramatic increase in very large tort awards that are the problem. Caps on excessive awards are the best answer to the problem.

It is important for defendants in medical malpractice cases to be able to point to someone not in the suit and assign fault to them.

Testified: (In support) Representative Lantz, prime sponsor; and Loren Finley.

(With concerns) Lisa Thatcher, Washington State Hospital Association; Mike Glenn, Olympic Medical Center; James McMahon, Washington Casualty Company; and Larry Shannon, Washington State Trial Lawyers Association.

(Opposed) Carol Johnston, Washington State Trial Lawyers Association; and Cliff Webster, Washington State Medical Association.