Washington State
House of Representatives
Office of Program Research

BILL ANALYSIS

Judiciary Committee

HB 2804

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 Summary of Bill

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

- Provides that a hospital in a medical malpractice action is not jointly and severally liable for non-economic damages;
- 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;
- 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.

Hearing Date: 1/27/04

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.

Joint and Several Liability

As a general rule, a defendant in a tort case is responsible only for his or her own percentage of fault in causing the plaintiff's harm. In some instances, however, multiple defendants may be "jointly and severally" liable for the whole of the plaintiff's damages. 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 plaintiff was not at fault in causing his or her own injuries.

The damages that may be awarded to a plaintiff in a tort action include both "economic" and "non-economic" damages. "Economic" damages are "objectively verifiable monetary losses" such as lost earnings, medical expenses, and out-of-pocket expenses required to deal with the harm done. "Non-economic" damages, on the other hand, are defined as "subjective, non-monetary losses" and include: pain and suffering; disability or disfigurement; emotional distress; loss of society and companionship or consortium; humiliation; and destruction of the parent-child relationship.

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." However, the eight-year statute of repose was found unconstitutional by the Washington Supreme Court on equal protection grounds.

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 Bill:

Numerous changes are made to the law relating to medical malpractice actions in the areas of: Joint and several liability; allocation of fault; vicarious liability of hospitals; statute of limitations for minors; 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.

Joint and Several Liability

A hospital in a medical malpractice action is not jointly and severally liable for the plaintiff's non-economic damages award. The hospital is responsible for paying only that portion of a non-economic damage award that represents the hospital's percentage of fault in causing the harm.

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.

Expert Witnesses

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 a reasonable 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 lead 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 or contributed 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 whose license, certification, or registration is substantially the same as the defendant's. 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 implementation plan must identify necessary changes to statutory law, administrative rules, or court rules; identify the forms or documents necessary for implementation; and develop a timetable for implementation. 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 2 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.

Appropriation: None.

Fiscal Note: Requested on January 21, 2004.

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