**Washington State**
**House of Representatives**
**Office of Program Research**

# BILL ANALYSIS

# Judiciary Committee

# ESSB 5728

**Title:** An act relating to civil liability reform.

**Brief Description:** Providing for omnibus civil liability reform.

**Sponsors:** Senate Committee on Judiciary (originally sponsored by Senators Brandland, McCaslin, T. Sheldon, Deccio, Schmidt, Parlette and Hale).

**Brief Summary of Engrossed Substitute Bill**

- Makes a number of changes to the law relating to medical malpractice in the areas of: limitations on damages; statute of limitations; pre-suit notice; mandatory mediation and binding arbitration; collateral sources; burden of proof; periodic payments of future damages; and hospital quality improvement programs;
- Limits a defendant's joint and several liability in a civil action to no more than two times the defendant's percentage of fault;
- Provides immunity to employers for good faith job references;
- Changes the tort judgment interest rate to four points above the 26-week T-bill rate;
- Establishes affirmative defenses against construction-related actions;
- Provides that failure to wear a seatbelt may be admissible as evidence of negligence in a civil action;
- Limits governmental liability for non-economic damages awards; eliminates joint and several liability for governmental entities; and places limits on the amount of attorneys' fees in actions against governmental entities; and
- Requires a plaintiff to provide an affidavit of merit in a civil action involving the breach of the standard of care for a person licensed, certified, or registered under state law.

**Hearing Date:** 2/26/04
**Staff:** Edie Adams (786-7180).

**Background:**

**1. 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 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 in the same field at that time, and acting in the same or similar circumstances.

A. Limitations on Damages: In 1986 the Legislature placed limitations on the amount of non-economic damages that may be awarded in any civil action for personal injury or death. The limitation was based on a formula tied to the age of the victim and the average annual wage in the state. The maximum award for non-economic damages was limited to 43 percent of the average annual wage multiplied by the victim's life expectancy. "Non-economic damages" are defined as subjective, non-monetary losses such as pain and suffering, mental anguish or emotional distress, disability or disfigurement, loss of consortium, loss of companionship, and destruction of the parent-child relationship. In contrast, "economic damages" are defined as monetary losses such as medical expenses and loss of earnings or employment.

This limitation on the amount of non-economic damages recoverable in a civil action was struck down by the Washington Supreme Court as a violation of the constitutional right to trial by jury contained in Article I, Section 21 of the Washington Constitution. *Sofie v. Fibreboard*. The Court found that the jury's fact-finding role is the essence of the right to a trial by jury contained in the Constitution. In addition, the court held that the determination of damages, especially non-economic damages, is a factual issue within the province of the jury's fact-finding role.

B. Pre-Suit Notice and Mandatory Mediation: Generally, a plaintiff does not have to provide a defendant with prior notice of his or her intent to institute a civil suit. In suits against the state or a local government, however, a plaintiff must first file a claim with the governmental entity that provides notice of specified information relating to the claim. The plaintiff may not file suit until 60 days after the claim is filed with the governmental entity. The statute of limitations for the action is tolled during the sixty day period.

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.

C. 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 of limitations is tolled for minors and during any period of incompetency, disability or imprisonment. 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.

The statute governing the time period for bringing a medical malpractice action also provides that an action may never be commenced more than eight years after the act or omission. This eight-year outside time limit for bringing an action is called a "statute of repose." In the 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.

D. Collateral Source Payments: In the context of civil tort actions, "collateral sources" are sources of payments or benefits available to an injured person that are totally independent of the tortfeasor. Examples of collateral sources are health insurance coverage or disability insurance. Under the common law "collateral source rule," a defendant is barred from introducing evidence that the plaintiff has received collateral source compensation for the injury. The courts have supported this rule, despite the potential that an injured person may receive a "windfall," under several rationales, including: (1) that the wrongdoer should not benefit from collateral payments made by third parties to the person he or she has wronged and thereby escape responsibility for the harm; and (2) to prevent the possibility that evidence of collateral sources will prejudice the fact finder in determining the injured person's damages.

The Legislature modified the traditional collateral source rule for medical malpractice actions to allow introduction of evidence of collateral source payments. In a medical malpractice action, 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, however, may present evidence of an obligation to repay the collateral source compensation.

E. Burden of Proof - Informed Consent: A health care provider may be liable to a patient for an injury that resulted from health care to which the patient did not consent. If a patient signs an informed consent form that complies with certain statutory requirements, the signed consent form is prima facie evidence that the patient consented to the medical treatment. The patient then has the burden of showing, by a preponderance of the evidence, that the patient did not consent to the health care provided.

F. Arbitration: Parties to a dispute may voluntarily agree in writing to enter into arbitration to resolve the dispute. A procedural framework for conducting an arbitration proceeding is provided in statute, including provisions relating to appointment of an arbitrator, attorney representation, witnesses, depositions, and awards. A party that agrees to arbitration waives the right to a jury trial on the issue. Arbitration decisions are binding on the parties but may be reviewed by the courts. Courts have authority to confirm arbitration awards, and limited authority to modify or vacate arbitration awards under certain circumstances.

G. Periodic Payment of Damages: In any civil action for personal injury or property damage, if the future economic damages award is at least $100,000, the court must order periodic payments of the future economic damages upon the request of any party. The court must enter an order that best provides for the future needs of the claimant and that specifies the recipient of the payments,

the interval and amount of the payments, and the number of payments. The order may include provisions for the modification of the order for hardship or unforeseen circumstances and may require posting of adequate security by the judgment debtor.

If the judgment creditor dies, the court may modify the periodic payment judgment, but may not reduce or waive money damages awarded for loss of future earnings. If a judgment debtor fails to make timely payments, the court may order a lump sum payment of the outstanding payments.

H. Quality Improvement: Hospitals are required to maintain coordinated quality improvement programs designed to improve the quality of health care services and prevent medical malpractice. Other health institutions and medical facilities are authorized to maintain coordinated quality improvement programs.

Coordinated quality improvement programs are overseen and coordinated by quality improvement committees. The programs must include: A medical staff privileges sanction procedure; periodic review of employee credentials and competency in the delivery of health care services; a procedure for prompt resolution of patient grievances; collection of information relating to negative outcomes, patient grievances, settlements and awards, and safety improvement activities; and quality improvement education programs.

## 2. 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. Joint and several liability applies in actions where the defendants were acting in concert, or in cases where the plaintiff is entirely free from fault in causing his or her own injuries.

## 3. EMPLOYER REFERENCES

The Washington Supreme Court has held that an employer is generally protected by a common-law qualified privilege to provide job reference information to other employers. A qualified privilege allows the employer to disclose potentially defamatory information about an employee if the employer reasonably believes that the information is true and the employer is not acting out of malice toward the employee. To overcome the qualified privilege, an employee must prove by a preponderance of the evidence that the employer acted out of ill will, with a design to "causelessly or wantonly" injure the employee.

## 4. TORT JUDGMENT INTEREST

Interest accrues on a tort judgment from the date of entry of the judgment at a rate determined in statute. That rate is the higher of the two following rates:

- 12 percent; or
- Four points above the 26-week T-bill rate established by the Federal Reserve Board.

This method of determining the rate was enacted in 1983 and applies to tort judgments against defendants who are government entities or private entities. In 1983, the 26-week T-bill rate

averaged 8.75 percent. Adding four percent to this amount made the two alternative methods of computing the interest rate for judgments roughly equivalent. Since 1991, the T-bill rate has been no higher than 5.59 percent. As a result of these low T-bill rates, 12 percent has been the interest rate on judgments for the past decade or more.

## 5. CONSTRUCTION LIABILITY

A statute relating to claims of any kind against builders, or other construction-related professionals, sets out special rules regarding the time during which a suit may be filed. This statute is called the construction claims statute of repose and covers claims arising from activities with respect to improvements to real property, including surveying, planning, designing, engineering, constructing, altering, or repairing. Any claim arising out of these activities must "accrue" within six years of the later of substantial completion of construction or the termination of the construction-related service. This six-year period is known as a statute of "repose."

In the 2003 session, the Legislature passed SHB 2039, which established seven affirmative defenses that builders may assert in an action based on any of the activities covered by the construction claims statute of repose. Successful assertion of any of these defenses may excuse, in whole or in part, a builder from any obligation, damage, loss, or liability:

- to the extent it is caused by an unforeseen act of nature that prevented compliance with codes, regulations or ordinances;
- to the extent it is caused by a homeowner's unreasonable failure to minimize damages;
- to the extent it is caused by the homeowner's substantial failure to follow written maintenance recommendations;
- to the extent it is caused by the homeowner's alteration, use, misuse, abuse, or neglect;
- to the extent barred by the construction statute of repose or applicable statute of limitations;
- with respect to a violation for which the builder has obtained a release; or
- to the extent that the builder has repaired the violation or defect.

## 6. SEATBELT DEFENSE

Any person 16 or older driving or riding in a car is required to wear a seat belt. A person may not drive a car unless every child passenger under 16 is wearing a seat belt or is in an appropriate car seat. A person who fails to comply with the seat belt laws may be issued a traffic infraction.

With certain exceptions, a violation of a statutory mandate is not per se negligence, but the fact of such a violation may be introduced as evidence of negligence. However, the seat belt statute specifically declares that a person's failure to comply with the seat belt requirement does not constitute negligence. In addition, the same statute provides that the failure to wear a seat belt is not admissible as evidence of negligence in any civil action.

Washington recognizes the concept of "comparative fault" in negligence actions. In an action based on "fault," any contributory fault of the plaintiff will proportionately reduce the defendant's liability for the plaintiff's injuries. "Fault" includes acts or omissions that are negligent or reckless. "Fault" also includes an unreasonable failure to avoid an injury or to mitigate damages.

Ruling on the seat belt statute, Washington courts have held that the term "negligence" incorporates the concept of "contributory fault." *Clark v. Payne*, 61 Wn. App. 189 (1991).

Therefore, the seat belt statute bars admitting evidence of the plaintiff's failure to wear a seat belt to show either negligence or contributory fault.

### 7. GOVERNMENTAL ACTIVITIES

Under common law, states were immune from tort liability under a doctrine known as sovereign immunity. The Washington Constitution, in Article 2, section 26, provides that the Legislature shall direct in statute the manner in which the state may be sued. The Legislature adopted a broad waiver of state governmental immunity in 1961 and local governmental immunity in 1967. These statutes provide that a governmental entity may be sued "to the same extent as if it were a private person or corporation."

### 8. AFFIDAVIT OF MERIT

A lawsuit is commenced either by filing a complaint or service of summons and a copy of the complaint on the defendant. The complaint is the plaintiff's statement of his or her claim against the defendant. The plaintiff is generally not required to plead detailed facts in the complaint; rather, the complaint may contain a short and plain statement that sets forth the basic nature of the claim and shows that the plaintiff is entitled to relief.

There is no requirement that a plaintiff instituting a civil action file an affidavit or other document stating that the action has merit. However, a court rule requires that the pleadings in a case be made in good faith. (Civil Rule 11). An attorney or party signing the pleading certifies that he or she has objectively reasonable grounds for asserting the facts and law. The court may assess attorneys' fees and costs against a party if the court finds that the pleading was made in bad faith, or to harass or cause unnecessary delay or needless expense.

**Summary of Bill:**

### 1. MEDICAL MALPRACTICE

A. Limitations on Damages: The amount of non-economic damages that may be awarded in a medical malpractice action is limited to $350,000. This limitation applies to all claims relating to injury or death, including claims for loss of consortium, loss of society and companionship, destruction of the parent-child relationship, and other derivative claims.

The definition of non-economic damages in current law is amended to specifically include "loss of ability to enjoy life" and "other non-pecuniary damages of any type."

If the limitation on non-economic damages is ruled unconstitutional, the provision will take effect upon passage of a constitutional amendment that authorizes limitations on non-economic damages in any or all civil actions.

B. Pre-Suit Notice and Mandatory Mediation: A medical malpractice action may not be commenced unless the plaintiff has provided 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.

The mandatory mediation statute is amended to require mandatory mediation of medical malpractice claims without exception. The Supreme Court must by rule adopt a procedure for the parties to certify the manner of mediation used by the parties.

C. Statute of Limitations: The statute of limitations for a medical malpractice action is changed to *the earlier of* within three years of the act or omission that caused the injury, or one year after discovery that the injury was caused by the act or omission. A medical malpractice action may never be brought more than three years after the act or omission except under the following circumstances:

- for fraud, concealment, or the presence of a foreign body, within one year from discovery;
- during any period of minority when the parent and defendant colluded in failing to bring an action for the minor; or
- for a minor under age six, within three years or prior to the minor's eighth birthday, whichever period is longer.

The statute of limitations is not tolled for minors. In addition, there is no tolling during any period of incompetency, disability, or imprisonment.

D. Collateral Sources: The restriction on presenting evidence of collateral source payments that come from the assets of the plaintiff or insurance purchased by the plaintiff is removed, so that collateral source payments of any kind may be introduced. The ability of the plaintiff to introduce evidence of an obligation to repay a collateral source payment is removed. The plaintiff may introduce evidence of amounts paid or contributed to secure the right to the collateral source payments (e.g., premiums).

An entity, such as an insurance company, that has paid collateral source compensation for the injuries does not have a right of subrogation or reimbursement from a plaintiff's tort recovery, unless otherwise provided by statute.

E. Burden of Proof - Informed Consent: The burden of proof necessary to overcome the presumption that a patient gave informed consent, where the patient signed a consent form that complies with statutory requirements, is changed from a preponderance of the evidence to clear, cogent, and convincing evidence.

F. Binding Arbitration: A binding arbitration clause in a health care services contract must be the first provision of the contract and must be expressed in language provided in the act. A disclosure concerning binding arbitration must be provided in bold type immediately preceding the signature line in the contract. A party may rescind the contract within 30 days of signing.

A binding arbitration clause that complies with these requirements is declared not to be a contract of adhesion, unconscionable, or otherwise improper.

G. Periodic Payment of Damages: In a medical malpractice action, a future damages award of $50,000 or more must be paid in whole or in part by periodic payments at the request of any party. "Future damages" is defined to include both future economic damages and future pain and suffering damages. A judgment debtor who is not adequately insured must post security adequate to satisfy the judgment. A periodic payment judgment must specify the recipient, dollar amount

of payments, interval between payments, and the number of payments or period of time over which payments must be made.

The periodic payment judgment may not be modified except upon the death of the judgment creditor. Money damages for loss of future earnings may not be reduced or terminated upon the judgment creditor's death, but must be paid to persons to whom the judgment creditor owed a duty of support.

If the debtor has a continuing pattern of failing to make payments, the court must find the debtor in contempt of court and order the debtor to pay damages suffered as a result of the failure to make timely payments, including court costs and attorneys' fees.

H. Quality Improvement: The Department of Health must evaluate the effectiveness of the quality improvement and medical malpractice prevention programs implemented in state hospitals. The evaluation must be conducted in conjunction with the Medical Quality Assurance Commission and professional associations, including the Washington State Hospital Association, Washington State Nurses Association, Washington State Bar Association, and the Washington Medical Association.

**2. JOINT AND SEVERAL LIABILITY**

In an action where a defendant is liable for negligent or reckless acts or omissions, the defendant's joint and several liability is limited to no more than two times the percentage of fault allocated to that defendant, but not to exceed 100 percent of the sum of the proportionate shares of fault.

In an action where a defendant is liable for intentional acts or omissions, the defendant's joint and several liability is not limited, and the defendant is jointly liable for the sum of the proportionate shares of the claimant's total damages.

**3. EMPLOYER REFERENCES**

An employer who discloses information about a former or current employee's job performance to a prospective employer or employment agency is presumed to be acting in good faith and is immune from civil liability for the disclosure. The presumption of good faith may be rebutted by clear and convincing evidence that the information disclosed was knowingly false or deliberately misleading.

**4. TORT JUDGMENT INTEREST**

The interest rate on tort judgments is determined by adding two points to the 26-week T-bill rate. This new method of calculating the interest rate applies to judgments entered on or after the effective date of the act.

For judgments against the state or a local government, interest does not accrue on the portion of the judgment that is subject to appropriation until the appropriation has been made.

**5. CONSTRUCTION LIABILITY**

Eight affirmative defenses are established that a builder may assert in an action based on any of the activities covered by the construction claims statute of repose. *[Note: This provision is almost*

*identical to a provision enacted by the Legislature in 2003 in SHB 2039, codified as RCW 4.16.326].*

**6. SEATBELT DEFENSE**

The seat belt law is amended to remove the provision stating that non-compliance with the seat belt law is not negligence and may not be introduced into evidence in a civil action.

A person's failure to comply with the seat belt requirements may be admissible as evidence of negligence in any civil action.

**7. GOVERNMENTAL ACTIVITIES**

State and local governmental entities and their officers, employees and volunteers, are not liable to pay a claim for non-economic damages that exceed $1 million per person or $2 million per incident or occurrence. For rural public hospital districts, the limitation on damages is $500,000 per person and $1 million per incident. The portion of a judgment in excess of these amounts may be submitted to the state or local governmental authority and paid only upon further legislative action. These limitations do not apply to actions for damages resulting from negligence in offender supervision if the damages resulted from the commission of first or second degree rape, first or second degree rape of a child, or first or second degree homicide, and the offender has a prior conviction for one of these offenses.

Joint and several liability is eliminated for state and local governmental entities and their officers, employees, and volunteers. A governmental entity is liable for only that entity's proportionate share of the damages.

The fees that an attorney may charge in an action against a governmental entity are limited to no more than 25 percent of the judgment or settlement in the action.

**8. AFFIDAVIT OF MERIT**

An affidavit of merit must be served in a civil action based on an act that violates the appropriate standard of care to be exercised by a person who is licensed, certified, or registered by the state under Titles 18 or 19 RCW, or by the Supreme Court. The plaintiff must serve an affidavit on each defendant stating that there is a reasonable probability that the defendant's conduct did not meet the required standard of care. The affidavit must be executed by a person whose license, certification, or registration is identical to the defendant's and who has at least five years experience in the same vocation as the defendant. The affidavit must be served on the defendant within 90 days of instituting the lawsuit, and within 60 days of the defendant's answer to the original complaint. The affidavit requirement may be waived by the court if the court finds that the defendant has refused to provide information necessary for execution of the affidavit.

**Appropriation:** None.

**Fiscal Note:** Requested on February 18, 2004.

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