SENATE BILL REPORT
ESSB 5209

As Passed Senate, March 13, 2003

Title: An act relating to actions against health care providers.

Brief Description: Concerning actions for injury or damage against a health care provider based upon professional negligence.

Sponsors: Senate Committee on Health & Long-Term Care (originally sponsored by Senators Deccio, Rasmussen, Winsley, Hewitt, T. Sheldon, Morton, Parlette, Stevens, Hale, Brandland, Mulliken, McCaslin and Oke).

Brief History:
Committee Activity: Health & Long-Term Care: 1/23/03, 2/4/03 [w/oRec-JUD].
Judiciary: 2/12/03 [w/oRec-HEA].
Health & Long-Term Care: 3/4/03 [DPS, DNP].
Passed Senate: 3/13/03, 30-19.

SENATE COMMITTEE ON HEALTH & LONG-TERM CARE

Majority Report: That Substitute Senate Bill No. 5209 be substituted therefor, and the substitute bill do pass.
Signed by Senators Deccio, Chair; Winsley, Vice Chair; Brandland and Parlette.

Minority Report: Do not pass.
Signed by Senators Franklin and Keiser.

Staff: Tanya Karwaki (786-7447)

Background: There is concern that rising medical malpractice insurance costs may impact the viability of the health care system. Concern also exists over the amount juries award plaintiffs in medical malpractice lawsuits. A number of other states, including California, have adopted tort reforms targeting the way medical malpractice claims are processed through the court system.

In 1986 the Legislature enacted a cap on noneconomic damages that could be awarded in cases of personal injury or death. This cap was subsequently held to be unconstitutional by the Washington Supreme Court. Noneconomic damages are subjective losses such as pain and suffering, while economic damages are objectively verifiable monetary losses such as medical expenses and loss of earnings. Thus, under current law, there is no cap on damages of any kind awarded in personal injury actions, including medical malpractice.

Washington law permits attorneys' fees in actions for injuries resulting from health care to be either fixed or contingent. The court is authorized to determine the reasonableness of attorneys' fees taking into consideration certain factors such as the time and labor required and the customary fee for such services.

The time period during which a medical malpractice action may be brought is limited by statutes of limitations and repose. A statute of limitations provides that a claim may be brought during a specified time period after an injury occurs, after which any claim is barred from being brought. A statute of repose terminates the right to bring an action after a specified time period even if the injury has not yet occurred. Pursuant to Washington's statute of limitations, an action for medical malpractice must be brought within three years of the act or omission alleged to have caused the injury, or one year after the injury was discovered, or reasonably should have been discovered, whichever period is longer. Washington's statute of repose prohibiting actions from being brought more than eight years after the injury has been held to be unconstitutional by the Washington Supreme Court. The time for bringing an action is tolled if there is proof of fraud, intentional concealment, or the presence of a foreign body not intended to have a therapeutic purpose. In such circumstances, an action must be brought within one year of actual knowledge.

Washington law permits any party to present evidence in a medical malpractice action that the patient has been compensated for the injury from other sources, except for the patient's assets or insurance. Thus, Washington has partially abolished the collateral source rule, which prohibits defendants from introducing at trial any evidence that the plaintiff has been reimbursed from another source for their damages.

Each defendant in a medical malpractice case is liable for the plaintiff's total damages, regardless of that defendant's proportion of fault for the damage done. This type of liability is referred to as joint and several liability.

The plaintiff must establish each essential fact of a medical malpractice action by a preponderance of the evidence. A preponderance of the evidence means that each fact is more probable than not, or is more convincing than the evidence which is offered in opposition to it. This same standard of proof applies to patients rebutting evidence that they gave informed consent to treatment.

Washington has a statutory chapter authorizing that parties may contract to submit controversies to arbitration. Washington law also authorizes periodic payments of future economic damages when awards exceed $100,000. Periodic payments provide that an award is paid over a period of time in installments rather than a single lump-sum payment.

Summary of Bill: A cap of $350,000 is placed on noneconomic damages for injuries occurring as a result of health care or arranging for the provision of health care. This cap also applies to carriers. If the state Supreme Court rules that the new cap on noneconomic damages is unconstitutional, then it will take effect after a state constitutional amendment is passed empowering the Legislature to place limits on noneconomic damages in any or all civil actions. All attorney contingency fee arrangements for medical malpractice actions are limited based on the amount recovered.

The time period in which to bring a medical malpractice action is shortened to within three years of the act or omission alleged to have caused the injury, or one year of the time the patient discovered, or reasonably should have discovered that the injury was caused by the act or omission, whichever occurs first. In no event may an action be commenced more than three years after the act or omission unless there is proof of fraud, intentional concealment, or the presence of a foreign body not intended to have a therapeutic purpose.

The collateral source rule is fully abolished; any party may present evidence of compensation from another source. If the evidence is admitted, then the other party may present evidence of any amount paid for the right of compensation. Absent statutory authority, there is no right of reimbursement from a plaintiff's recovery with respect to collateral sources.

Arbitration clauses are permitted in contracts for medical services. A contract for health care services containing an arbitration provision shall not be a contract of adhesion, nor unconscionable, nor otherwise improper. Such a contract may be rescinded by written notice within 30 days of signature.

A court's authority to award periodic payments of future damages is expanded to include noneconomic damages. The amount of the award necessary for periodic payments to be ordered is also lowered to that in excess of $50,000.

No medical malpractice action may be commenced unless the defendant has been given at least 90 days' notice. The Washington State Supreme Court rules implementing mandatory mediation may not provide any exception to the mandatory mediation requirement.

The plaintiff in a medical malpractice action alleging a violation of the standard of care shall serve each defendant with an affidavit within 90 days of initiating the action. The affidavit must state that there is a reasonable probability that the defendant's conduct did not meet the required standard of care and be signed by a person with the same license, certification, or registration as the defendant.

Appropriation: None.

Fiscal Note: Available.

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

Testimony For: Large jury awards and settlements cause malpractice insurance premiums to rise to where access to, and availability of, health care is threatened. Over 50 percent of physicians insured by Physician's Insurance are experiencing rate increases of 25 percent or more for 2003. The frequency of negligence claims is stable, but the size of settlements and jury awards is increasing. California's legislation, commonly referred to as "MICRA" (Medical Injury Compensation Reform Act) has lowered malpractice insurance premiums and is a proven solution. This bill will decrease the costs of liability insurance in Washington and simultaneously assure availability of health care. A key provision of the bill is changing the joint and several liability law to several but not joint. The medical profession should be able to practice without fear of going broke because of one lawsuit. Carriers are being brought into lawsuits increasingly more often and would like similar protections.

Testimony Against: The preponderance of evidence standard is a tough burden to meet. Doctors set the standard by which they are judged. This bill is not like MICRA because of the burden of proof. No part of our civil justice system has as high a burden as clear, cogent, and convincing. The net effect will be immunity for doctors. The arbitration section would remove almost all cases from the jury. A plaintiff would not win unless a wrong leg was removed, or a similar event occurred. Ninety-eight thousand Americans die each year

because of medical malpractice. If this bill were passed, no victims could win this type of lawsuit.

Testified: PRO: Cliff Webster, Liability Reform Coalition; Maureen Callaghan, MD, WA State Medical Assn.; Jean Roberts, WA State Hospital Assn.; Sally Yates, Group Health Cooperative; Gary Morse, Physicians Insurance; James McMahon, WA Casualty Co.; Phil Dyer, The Doctors Co.; Dr. Dan Brzusek, WA Osteopathic Medical Assn.; Daryl Vogel, MD; Bill Moore, Assn. of WA Healthcare Plans; Mel Sorenson, Employee Healthcare Coalition; Amber Balch, AWB; CON: Karen Nelson; Nancy Mead; David and Christine Malone, Carole Johnston, Larry Shannon, Reed Schifferman, Joel Cunningham, WSTLA; Anne and Don Griffin; Robert Guile; Danny O'Keefe; Bill Monto, WA Citizen Action.