
HOUSE BILL 2804

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By 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

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1 AN ACT Relating to actions against health care providers under
2 chapter 7.70 RCW; amending RCW 4.22.070, 4.16.190, 4.16.350, 7.70.100,
3 5.64.010, 7.70.080, and 70.105.112; adding new sections to chapter 7.70
4 RCW; creating new sections; and providing an expiration date.

5 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

6 NEW SECTION. **Sec. 1.** The legislature finds that the
7 unavailability or unaffordability of malpractice insurance has caused
8 hardship to health care providers. The legislature further finds that
9 this hardship has the potential to result in impaired access to
10 critical health care services, especially in high risk areas of
11 practice, for Washington state citizens. The legislature further finds
12 that factors contributing to increasing malpractice insurance rates and
13 restrictions in coverage are numerous and complex. No single solution
14 can address these multiple factors, but changes in the civil liability
15 system can significantly address some of these factors. The
16 legislature intends to improve the performance of the civil liability
17 system with respect to the process by which actions alleging negligence
18 by a health care provider are processed and resolved. These changes

1 are designed to ensure that the legal system functions as fairly as
2 possible and that it appropriately addresses concerns that a bad
3 outcome is too often considered the equivalent of malpractice.

4 **Sec. 2.** RCW 4.22.070 and 1993 c 496 s 1 are each amended to read
5 as follows:

6 (1) In all actions involving fault of more than one entity, the
7 trier of fact shall determine the percentage of the total fault which
8 is attributable to every entity which caused the claimant's damages
9 except entities immune from liability to the claimant under Title 51
10 RCW. The sum of the percentages of the total fault attributed to at-
11 fault entities shall equal one hundred percent. The entities whose
12 fault shall be determined include the claimant or person suffering
13 personal injury or incurring property damage, defendants, third-party
14 defendants, entities released by the claimant, entities with any other
15 individual defense against the claimant, and entities immune from
16 liability to the claimant, but shall not include those entities immune
17 from liability to the claimant under Title 51 RCW. Judgment shall be
18 entered against each defendant except those who have been released by
19 the claimant or are immune from liability to the claimant or have
20 prevailed on any other individual defense against the claimant in an
21 amount which represents that party's proportionate share of the
22 claimant's total damages. The liability of each defendant shall be
23 several only and shall not be joint except:

24 (a) A party shall be responsible for the fault of another person or
25 for payment of the proportionate share of another party where both were
26 acting in concert or when a person was acting as an agent or servant of
27 the party.

28 (b)(i) Except as provided in (b)(ii) of this subsection, if the
29 trier of fact determines that the claimant or party suffering bodily
30 injury or incurring property damages was not at fault, the defendants
31 against whom judgment is entered shall be jointly and severally liable
32 for the sum of their proportionate shares of the ~~((claimants~~
33 ~~{claimant's})~~) claimant's total damages.

34 (ii) Subsection (b)(i) of this subsection does not apply to a
35 hospital, as defined in RCW 70.41.020, in all cases governed by chapter
36 7.70 RCW with respect to judgments for noneconomic damages. In all

1 cases governed by chapter 7.70 RCW, the liability of a hospital for
2 noneconomic damages is several only. For the purposes of this section,
3 "noneconomic damages" has the meaning given in RCW 4.56.250.

4 (2) In all actions for damages under chapter 7.70 RCW, the entities
5 to whom fault may be attributed shall be limited to the claimants,
6 defendants, and third-party defendants who are parties to the action
7 and any entities released by the claimant.

8 (3) If a defendant is jointly and severally liable under one of the
9 exceptions listed in subsections (1)(a) or (1)(b) of this section, such
10 defendant's rights to contribution against another jointly and
11 severally liable defendant, and the effect of settlement by either such
12 defendant, shall be determined under RCW 4.22.040, 4.22.050, and
13 4.22.060.

14 ~~((3))~~ (4)(a) Nothing in this section affects any cause of action
15 relating to hazardous wastes or substances or solid waste disposal
16 sites.

17 (b) Nothing in this section shall affect a cause of action arising
18 from the tortious interference with contracts or business relations.

19 (c) Nothing in this section shall affect any cause of action
20 arising from the manufacture or marketing of a fungible product in a
21 generic form which contains no clearly identifiable shape, color, or
22 marking.

23 NEW SECTION. Sec. 3. It is the intent of the legislature in
24 enacting section 4 of this act that a hospital not be held liable for
25 a health care provider's acts or omissions under so-called "apparent
26 agency" or "ostensible agency" theories as long as the health care
27 provider is properly credentialed by the hospital and does not perform
28 services that are an essential function of the hospital. It is further
29 the intent of the legislature that, notwithstanding any generally
30 applicable principle of vicarious liability to the contrary, individual
31 health care providers will not be liable for the negligent or wrongful
32 acts of others, except those who were acting under their supervision
33 and control.

34 NEW SECTION. Sec. 4. A new section is added to chapter 7.70 RCW
35 to read as follows:

36 A public or private hospital is liable for an act or omission of a

1 health care provider granted privileges to provide health care at the
2 hospital only if the health care provider is an agent or employee of
3 the hospital and the act or omission of the health care provider
4 occurred while the health care provider was acting within the course
5 and scope of the health care provider's agency or employment with the
6 hospital, or if the health care provider is fulfilling an essential
7 function of the hospital. A hospital is not ostensibly liable for any
8 act of negligence committed on the hospital's premises by a health care
9 provider who is properly credentialed and acting as an independent
10 contractor. A public or private hospital may be liable for failing to
11 exercise reasonable care in granting credentials and practice
12 privileges to a health care provider, or in failing to revoke such
13 credentials and privileges when the hospital knew or reasonably should
14 have known such revocation was appropriate.

15 **Sec. 5.** RCW 4.16.190 and 1993 c 232 s 1 are each amended to read
16 as follows:

17 (1) Unless otherwise provided in this section, if a person entitled
18 to bring an action mentioned in this chapter, except for a penalty or
19 forfeiture, or against a sheriff or other officer, for an escape, be at
20 the time the cause of action accrued either under the age of eighteen
21 years, or incompetent or disabled to such a degree that he or she
22 cannot understand the nature of the proceedings, such incompetency or
23 disability as determined according to chapter 11.88 RCW, or imprisoned
24 on a criminal charge prior to sentencing, the time of such disability
25 shall not be a part of the time limited for the commencement of action.

26 (2) Subsection (1) of this section with respect to a person under
27 the age of eighteen years does not apply to the time limited for the
28 commencement of an action under RCW 4.16.350.

29 **Sec. 6.** RCW 4.16.350 and 1998 c 147 s 1 are each amended to read
30 as follows:

31 (1) Any civil action for damages that is based upon alleged
32 professional negligence, that is for an injury or condition occurring
33 as a result of health care which is provided after June 25, 1976, and
34 that is brought against(+(

35 (+)) a person or entity identified in subsection (2) of this
36 section, shall:

1 (a) With respect to a patient who was eighteen years old or older
2 at the time of the act or omission alleged to have caused the injury or
3 condition, be commenced by the later of:

4 (i) Three years from the act or omission; or

5 (ii) One year from the time the patient or his or her
6 representative discovered or reasonably should have discovered that the
7 injury or condition was caused by the act or omission; and

8 (b) With respect to a patient who was under the age of eighteen
9 years at the time of the act or omission alleged to have caused the
10 injury or condition, be commenced by the later of:

11 (i) When the patient reaches age twenty-one or eight years from the
12 act or omission, whichever occurs first; or

13 (ii) One year from the time the patient or his or her
14 representative discovered or reasonably should have discovered that the
15 injury or condition was caused by the act or omission.

16 (2) Persons or entities against whom an action is brought under
17 subsection (1) of this section include:

18 (a) A person licensed by this state to provide health care or
19 related services, including, but not limited to, a physician,
20 osteopathic physician, dentist, nurse, optometrist, podiatric physician
21 and surgeon, chiropractor, physical therapist, psychologist,
22 pharmacist, optician, physician's assistant, osteopathic physician's
23 assistant, nurse practitioner, or physician's trained mobile intensive
24 care paramedic, including, in the event such person is deceased, his or
25 her estate or personal representative;

26 ~~((2))~~ (b) An employee or agent of a person described in (a) of
27 this subsection (~~((1) of this section)~~), acting in the course and scope
28 of his or her employment, including, in the event such employee or
29 agent is deceased, his or her estate or personal representative; or

30 ~~((3))~~ (c) An entity, whether or not incorporated, facility, or
31 institution employing one or more persons described in (a) of this
32 subsection (~~((1) of this section)~~), including, but not limited to, a
33 hospital, clinic, health maintenance organization, or nursing home; or
34 an officer, director, employee, or agent thereof acting in the course
35 and scope of his or her employment, including, in the event such
36 officer, director, employee, or agent is deceased, his or her estate or
37 personal representative(~~(+~~

38 ~~based upon alleged professional negligence shall be commenced within~~

1 ~~three years of the act or omission alleged to have caused the injury or~~
2 ~~condition, or one year of the time the patient or his representative~~
3 ~~discovered or reasonably should have discovered that the injury or~~
4 ~~condition was caused by said act or omission, whichever period expires~~
5 ~~later, except that in no event shall an action be commenced more than~~
6 ~~eight years after said act or omission: PROVIDED, That)).~~

7 (3) The time for commencement of an action is tolled upon proof of
8 fraud, intentional concealment, or the presence of a foreign body not
9 intended to have a therapeutic or diagnostic purpose or effect, until
10 the date the patient or the patient's representative has actual
11 knowledge of the act of fraud or concealment, or of the presence of the
12 foreign body; the patient or the patient's representative has one year
13 from the date of the actual knowledge in which to commence a civil
14 action for damages.

15 (4) For purposes of this section, (~~notwithstanding RCW 4.16.190,~~)
16 the knowledge of a custodial parent or guardian shall be imputed to a
17 person under the age of eighteen years, and such imputed knowledge
18 shall operate to bar the claim of such minor to the same extent that
19 the claim of an adult would be barred under this section. Any action
20 not commenced in accordance with this section shall be barred.

21 For purposes of this section, with respect to care provided after
22 June 25, 1976, and before August 1, 1986, the knowledge of a custodial
23 parent or guardian shall be imputed as of April 29, 1987, to persons
24 under the age of eighteen years.

25 This section does not apply to a civil action based on intentional
26 conduct brought against those individuals or entities specified in this
27 section by a person for recovery of damages for injury occurring as a
28 result of childhood sexual abuse as defined in RCW 4.16.340(5).

29 NEW SECTION. **Sec. 7.** A new section is added to chapter 7.70 RCW
30 to read as follows:

31 In any action under this chapter, each side shall presumptively be
32 entitled to only two independent experts on an issue and only two
33 standard-of-care experts, except upon a showing of good cause. Where
34 there are multiple parties on a side and the parties cannot agree as to
35 which independent experts or standard-of-care experts will be called on
36 an issue, the court, upon a showing of good cause, shall allow

1 additional experts on an issue or additional standard-of-care experts
2 to be called as the court deems appropriate.

3 NEW SECTION. Sec. 8. A new section is added to chapter 7.70 RCW
4 to read as follows:

5 In an action under this chapter, all parties shall submit a
6 pretrial expert report pursuant to time frames provided in court rules.
7 The expert report must disclose the identity of all expert witnesses
8 and state the nature of the opinions the expert witnesses will present
9 as testimony at trial. Further depositions of these expert witnesses
10 is prohibited. The testimony that an expert witness may present at
11 trial is limited in nature to the opinions disclosed to the court as
12 part of the pretrial expert report. The supreme court shall adopt
13 rules to implement the provisions of this section.

14 **Sec. 9.** RCW 7.70.100 and 1993 c 492 s 419 are each amended to read
15 as follows:

16 (1) No action based upon a health care provider's professional
17 negligence may be commenced unless the defendant has been given at
18 least ninety days' notice of the intention to commence the action. If
19 the notice is served within ninety days of the expiration of the
20 applicable statute of limitations, the time for the commencement of the
21 action must be extended ninety days from the service of the notice.

22 (2) The provisions of subsection (1) of this section are not
23 applicable with respect to any defendant whose name is unknown to the
24 plaintiff at the time of filing the complaint and who is identified
25 therein by a fictitious name.

26 (3) After the filing of the ninety-day presuit notice, and before
27 a superior court trial, all causes of action, whether based in tort,
28 contract, or otherwise, for damages arising from injury occurring as a
29 result of health care provided after July 1, 1993, shall be subject to
30 mandatory mediation prior to trial except as provided in subsection (6)
31 of this section.

32 ((+2)) (4) The supreme court shall by rule adopt procedures to
33 implement mandatory mediation of actions under this chapter. The rules
34 shall require mandatory mediation without exception unless subsection
35 (6) of this section applies. The rules on mandatory mediation shall
36 address, at a minimum:

1 (a) Procedures for the appointment of, and qualifications of,
2 mediators. A mediator shall have experience or expertise related to
3 actions arising from injury occurring as a result of health care, and
4 be a member of the state bar association who has been admitted to the
5 bar for a minimum of five years or who is a retired judge. The parties
6 may stipulate to a nonlawyer mediator. The court may prescribe
7 additional qualifications of mediators;

8 (b) Appropriate limits on the amount or manner of compensation of
9 mediators;

10 (c) The number of days following the filing of a claim under this
11 chapter within which a mediator must be selected;

12 (d) The method by which a mediator is selected. The rule shall
13 provide for designation of a mediator by the superior court if the
14 parties are unable to agree upon a mediator;

15 (e) The number of days following the selection of a mediator within
16 which a mediation conference must be held;

17 (f) A means by which mediation of an action under this chapter may
18 be waived by a mediator who has determined that the claim is not
19 appropriate for mediation; and

20 (g) Any other matters deemed necessary by the court.

21 ~~((+3))~~ (5) Mediators shall not impose discovery schedules upon the
22 parties.

23 (6) The mandatory mediation requirement of subsection (4) of this
24 section does not apply to an action subject to mandatory arbitration
25 under chapter 7.06 RCW or to an action in which the parties have
26 agreed, subsequent to the arisal of the claim, to submit the claim to
27 arbitration under chapter 7.04 RCW.

28 (7) The supreme court shall by rule also adopt procedures for the
29 parties to certify to the court the manner of mediation used by the
30 parties to comply with this section.

31 **Sec. 10.** RCW 5.64.010 and 1975-'76 2nd ex.s. c 56 s 3 are each
32 amended to read as follows:

33 (1) In any civil action against a health care provider for personal
34 injuries which is based upon alleged professional negligence (~~and~~
35 which is against:

36 ~~(1) A person licensed by this state to provide health care or~~
37 ~~related services, including, but not limited to, a physician,~~

1 osteopathic physician, dentist, nurse, optometrist, podiatrist,
2 chiropractor, physical therapist, psychologist, pharmacist, optician,
3 physician's assistant, osteopathic physician's assistant, nurse
4 practitioner, or physician's trained mobile intensive care paramedic,
5 including, in the event such person is deceased, his estate or personal
6 representative;

7 (2) An employee or agent of a person described in subsection (1) of
8 this section, acting in the course and scope of his employment,
9 including, in the event such employee or agent is deceased, his estate
10 or personal representative; or

11 (3) An entity, whether or not incorporated, facility, or
12 institution employing one or more persons described in subsection (1)
13 of this section, including, but not limited to, a hospital, clinic,
14 health maintenance organization, or nursing home; or an officer,
15 director, employee, or agent thereof acting in the course and scope of
16 his employment, including, in the event such officer, director,
17 employee, or agent is deceased, his estate or personal
18 representative;)), evidence of furnishing or offering or promising to
19 pay medical, hospital, or similar expenses occasioned by an injury is
20 not admissible to prove liability for the injury.

21 (2) In a civil action against a health care provider for personal
22 injuries which is based upon alleged professional negligence, evidence
23 of an early offer of settlement is inadmissible, not discoverable, and
24 otherwise unavailable for use in the action. An early offer of
25 settlement means an offer that is made before the filing of a claim and
26 that makes a reasonable offer of compensation for the injury suffered.
27 An early offer of settlement may include an apology or an admission of
28 fault on the part of the person making the offer, or a statement
29 regarding remedial actions that may be taken to address the act or
30 omission that is the basis for the allegation of negligence, and does
31 not become admissible, discoverable, or otherwise available for use in
32 the action because it contains an apology, admission of fault, or
33 statement of remedial actions that may be taken. Compensation means
34 payment of money or other property to or on behalf of the injured
35 party, rendering of services to the injured party free of charge, or
36 indemnification of expenses incurred by or on behalf of the injured
37 party.

1 (3) For the purposes of this section, "health care provider" has
2 the same meaning provided in RCW 7.70.020.

3 **Sec. 11.** RCW 7.70.080 and 1975-'76 2nd ex.s. c 56 s 13 are each
4 amended to read as follows:

5 Any party may present evidence to the trier of fact that the
6 ~~((patient))~~ plaintiff has already been compensated for the injury
7 complained of from any source except the assets of the ~~((patient, his))~~
8 plaintiff, the plaintiff's representative, or ((his)) the plaintiff's
9 immediate family~~((, or insurance purchased with such assets))~~. In the
10 event such evidence is admitted, the plaintiff may present evidence of
11 an obligation to repay such compensation and evidence of any amount
12 paid by the plaintiff, or his or her representative or immediate
13 family, to secure the right to the compensation. ~~((Insurance bargained~~
14 ~~for or provided on behalf of an employee shall be considered insurance~~
15 ~~purchased with the assets of the employee.))~~ Compensation as used in
16 this section shall mean payment of money or other property to or on
17 behalf of the patient, rendering of services to the patient free of
18 charge to the patient, or indemnification of expenses incurred by or on
19 behalf of the patient. Notwithstanding this section, evidence of
20 compensation by a defendant health care provider may be offered only by
21 that provider.

22 NEW SECTION. **Sec. 12.** A new section is added to chapter 7.70 RCW
23 to read as follows:

24 (1) In an action against an individual health care provider under
25 this chapter for personal injury or wrongful death in which the injury
26 is alleged to have been caused by an act or omission that violates the
27 accepted standard of care, the plaintiff must file a certificate of
28 merit at the time of commencing the action.

29 (2) The certificate of merit must be executed by a health care
30 provider whose license, certification, or registration is substantially
31 the same as the defendant. If there is more than one defendant in the
32 action, the person commencing the action must file a certificate of
33 merit for each defendant.

34 (3) The certificate of merit must contain a statement that the
35 person executing the certificate of merit believes there is a

1 reasonable probability that the defendant's conduct did not follow the
2 accepted standard of care required to be exercised by the defendant.

3 (4) Upon motion of the plaintiff, the court may grant an additional
4 period of time to file the certificate of merit, not to exceed ninety
5 days, if the court finds there is good cause for the extension.

6 NEW SECTION. **Sec. 13.** (1) A commission on noneconomic damages is
7 established. The commission shall study the feasibility of developing
8 and implementing an advisory schedule of noneconomic damages in actions
9 for injuries resulting from health care under chapter 7.70 RCW. The
10 commission shall present the results of the feasibility study and an
11 implementation plan, if appropriate, to the relevant policy committees
12 of the legislature by October 31, 2005.

13 (2) The commission's goal is to determine whether an advisory
14 schedule could be developed to increase the predictability and
15 proportionality of settlements and awards for noneconomic damages in
16 actions for injuries resulting from health care and, if so, what steps
17 are necessary to implement such a schedule. In making its
18 determination, the commission shall consider:

19 (a) The information that can most appropriately be used to provide
20 guidance to the trier of fact regarding noneconomic damage awards,
21 giving consideration to: (i) Past noneconomic damage awards for
22 similar injuries, considering severity and duration of the injuries;
23 (ii) past noneconomic damage awards for similar claims for damages; and
24 (iii) such other information or methodologies the commission finds
25 appropriate;

26 (b) The most appropriate format in which to present the information
27 to the trier of fact; and

28 (c) When and under what circumstances an advisory schedule should
29 be utilized in alternative dispute resolution settings and presented to
30 the trier of fact at trial.

31 (3) If the commission determines that an advisory schedule for
32 noneconomic damages is feasible, the commission shall develop an
33 implementation plan for the schedule which shall include, at a minimum:

34 (a) Identification of changes to statutory law, administrative
35 rules, or court rules that would be necessary to implement the advisory
36 schedule;

1 (b) Identification of forms or other documents that would be
2 necessary or beneficial in implementing the advisory schedule;

3 (c) A proposed timetable for implementation of the advisory
4 schedule; and

5 (d) Any other information or considerations the commission finds
6 necessary or beneficial to implementation of the advisory schedule.

7 (4) For the purposes of this section, "noneconomic damages" has the
8 meaning given in RCW 4.56.250.

9 NEW SECTION. **Sec. 14.** (1) The commission is composed of fifteen
10 members, as follows: (a) One member from each of the two largest
11 caucuses in the senate, to be appointed by the secretary of the senate,
12 and one member from each of the two largest caucuses in the house of
13 representatives, to be appointed by the speaker of the house of
14 representatives; (b) one health care ethicist; (c) one economist; (d)
15 one actuary; (e) two attorneys, one representing the plaintiff's bar
16 and one representing the insurance defense bar; (f) two superior court
17 judges; (g) one hospital; (h) two physicians; and (i) one medical
18 malpractice insurer. The governor shall appoint the nonlegislative
19 members of the commission.

20 (2) The governor shall select a chair of the commission from among
21 those commission members that are not health care providers, medical
22 malpractice insurers, or attorneys.

23 (3) Legislative members of the commission shall be reimbursed for
24 travel expenses under RCW 44.04.120. Nonlegislative members of the
25 commission shall be reimbursed for travel expenses as provided in RCW
26 43.03.050 and 43.03.060. Travel expenses of nonlegislative members of
27 the commission shall be paid jointly by the house of representatives
28 and senate.

29 (4) The office of financial management shall provide support to the
30 commission to enable it to perform its functions, with the assistance
31 of staff from the administrative office of the courts.

32 **Sec. 15.** RCW 70.105.112 and 1987 c 528 s 9 are each amended to
33 read as follows:

34 This chapter does not apply to special incinerator ash regulated
35 under chapter 70.138 RCW except that, for purposes of RCW

1 4.22.070(~~(+3)~~) (4)(a), special incinerator ash shall be considered
2 hazardous waste.

3 NEW SECTION. **Sec. 16.** Sections 13 and 14 of this act expire July
4 1, 2006.

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