
ENGROSSED SUBSTITUTE SENATE BILL 5209

State of Washington

58th Legislature

2003 Regular Session

By 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)

READ FIRST TIME 03/05/03.

1 AN ACT Relating to actions against health care providers; amending
2 RCW 4.56.250, 7.70.070, 7.70.100, 4.16.350, and 7.70.080; adding new
3 sections to chapter 4.56 RCW; adding a new section to chapter 7.04 RCW;
4 adding new sections to chapter 7.70 RCW; and creating new sections.

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

6 NEW SECTION. **Sec. 1.** The legislature finds that it is in the best
7 interest of the people of the state of Washington to contain the
8 significantly increasing costs of malpractice insurance for licensed
9 health care professionals and institutions and to ensure the continued
10 availability and affordability of health care services in this state by
11 enacting further reforms to the health care tort liability system.

12 The legislature finds that, notwithstanding the tort reform
13 measures it has enacted in the past, the amounts being paid out in
14 judgments and settlements have continued to increase inordinately, and
15 that as a result there have been dramatic increases in the cost of
16 health care professional liability insurance coverage. The legislature
17 further finds that the upward pressures on already high malpractice

1 insurance premiums threaten the publics' health by discouraging
2 physicians and other health care professionals from initiating or
3 continuing their practice in this state.

4 The legislature further finds that the state of California, largely
5 as a result of its enactment of the "medical injury compensation reform
6 act" in 1975, has been able to successfully stabilize the health care
7 professional liability insurance market, maintain access to affordable
8 quality health care services, and avert the kind of crisis now facing
9 the residents of Washington.

10 The legislature finds that such reforms are rationally related to
11 the legitimate goals of reducing the costs associated with the health
12 care tort liability system while ensuring adequate and appropriate
13 compensation for persons injured as a result of health care, ensuring
14 the continued availability and affordability of health care services in
15 this state, preventing the curtailment of health care services in this
16 state, stabilizing insurance and health care costs, preventing stale
17 health care liability claims, and protecting and preserving the public
18 health, safety, and welfare as a whole.

19 **Sec. 2.** RCW 4.56.250 and 1986 c 305 s 301 are each amended to read
20 as follows:

21 (1) As used in this section, the following terms have the meanings
22 indicated unless the context clearly requires otherwise.

23 (a) "Economic damages" means objectively verifiable monetary
24 losses, including medical expenses, loss of earnings, burial costs,
25 loss of use of property, cost of replacement or repair, cost of
26 obtaining substitute domestic services, loss of employment, and loss of
27 business or employment opportunities.

28 (b) "Noneconomic damages" means subjective, nonmonetary losses,
29 including(~~(7)~~) but not limited to pain, suffering, inconvenience,
30 mental anguish, disability or disfigurement incurred by the injured
31 party, loss of ability to enjoy life, emotional distress, loss of
32 society and companionship, loss of consortium, injury to reputation and
33 humiliation, (~~and~~) destruction of the parent-child relationship, and
34 other nonpecuniary damages of any type.

35 (c) "Bodily injury" means physical injury, sickness, or disease,
36 including death.

1 (d) "Average annual wage" means the average annual wage in the
2 state of Washington as determined under RCW 50.04.355.

3 (2) In no action seeking damages for personal injury or death may
4 a claimant recover a judgment for noneconomic damages exceeding an
5 amount determined by multiplying 0.43 by the average annual wage and by
6 the life expectancy of the person incurring noneconomic damages, as the
7 life expectancy is determined by the life expectancy tables adopted by
8 the insurance commissioner. For purposes of determining the maximum
9 amount allowable for noneconomic damages, a claimant's life expectancy
10 shall not be less than fifteen years. The limitation contained in this
11 subsection applies to all claims for noneconomic damages made by a
12 claimant who incurred bodily injury. Claims for loss of consortium,
13 loss of society and companionship, destruction of the parent-child
14 relationship, and all other derivative claims asserted by persons who
15 did not sustain bodily injury are to be included within the limitation
16 on claims for noneconomic damages arising from the same bodily injury.

17 (3) If a case is tried to a jury, the jury shall not be informed of
18 the limitation contained in subsection (2) of this section.

19 NEW SECTION. **Sec. 3.** A new section is added to chapter 4.56 RCW
20 to read as follows:

21 (1) In an action or arbitration for damages for injury or death
22 occurring as a result of health care, or arranging for the provision of
23 health care, whether brought under chapter 7.70 RCW, or under RCW
24 4.20.010, 4.20.020, 4.20.046, 4.20.060, 4.24.010, or 48.43.545(1), or
25 any combination thereof, the total amount of noneconomic damages may
26 not exceed three hundred fifty thousand dollars.

27 (2) The limitation on noneconomic damages contained in subsection
28 (1) of this section includes all noneconomic damages claimed by or on
29 behalf of the person whose injury or death occurred as a result of
30 health care or arranging for the provision of health care, as well as
31 all claims for loss of consortium, loss of society and companionship,
32 destruction of the parent-child relationship, and other derivative
33 claims asserted by or on behalf of others arising from the same injury
34 or death. If the jury's assessment of noneconomic damages exceeds the
35 limitation contained in subsection (1) of this section, nothing in RCW
36 4.44.450 precludes the court from entering a judgment that limits the

1 total amount of noneconomic damages to those limits provided in
2 subsection (1) of this section.

3 **Sec. 4.** RCW 7.70.070 and 1975-'76 2nd ex.s. c 56 s 12 are each
4 amended to read as follows:

5 (1) Except as set forth in subsection (2) of this section, the
6 court shall, in any action under this chapter, determine the
7 reasonableness of each party's attorneys' fees. The court shall take
8 into consideration the following:

9 ~~((1))~~ (a) The time and labor required, the novelty and difficulty
10 of the questions involved, and the skill requisite to perform the legal
11 service properly;

12 ~~((2))~~ (b) The likelihood, if apparent to the client, that the
13 acceptance of the particular employment will preclude other employment
14 by the lawyer;

15 ~~((3))~~ (c) The fee customarily charged in the locality for similar
16 legal services;

17 ~~((4))~~ (d) The amount involved and the results obtained;

18 ~~((5))~~ (e) The time limitations imposed by the client or by the
19 circumstances;

20 ~~((6))~~ (f) The nature and length of the professional relationship
21 with the client;

22 ~~((7))~~ (g) The experience, reputation, and ability of the lawyer
23 or lawyers performing the services;

24 ~~((8))~~ (h) Whether the fee is fixed or contingent.

25 (2)(a) An attorney may not contract for or collect a contingency
26 fee for representing a person in connection with an action for damages
27 against a health care provider based upon professional negligence in
28 excess of the following limits:

29 (i) Forty percent of the first fifty thousand dollars recovered;

30 (ii) Thirty-three and one-third percent of the next fifty thousand
31 dollars recovered;

32 (iii) Twenty-five percent of the next five hundred thousand dollars
33 recovered;

34 (iv) Fifteen percent of any amount in which the recovery exceeds
35 six hundred thousand dollars.

36 (b) The limitations in this section apply regardless of whether the

1 recovery is by judgment, settlement, arbitration, mediation, or other
2 form of alternative dispute resolution.

3 (c) If periodic payments are awarded to the plaintiff, the court
4 shall place a total value on these payments and include this amount in
5 computing the total award from which attorneys' fees are calculated
6 under this subsection.

7 (d) For purposes of this subsection, "recovered" means the net sum
8 recovered after deducting any disbursements or costs incurred in
9 connection with prosecution or settlement of the claim. Costs of
10 medical care incurred by the plaintiff and the attorneys' office
11 overhead costs or charges are not deductible disbursements or costs for
12 such purposes.

13 (3) This section applies to all agreements for attorneys' fees
14 entered into or modified after the effective date of this section.

15 **Sec. 5.** RCW 7.70.100 and 1993 c 492 s 419 are each amended to read
16 as follows:

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

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

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

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 and address, at a
35 minimum:

36 (a) Procedures for the appointment of, and qualifications of,
37 mediators. A mediator shall have experience or expertise related to

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

6 (b) Appropriate limits on the amount or manner of compensation of
7 mediators;

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

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

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

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

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

19 ~~((+3))~~ (5) Mediators shall not impose discovery schedules upon the
20 parties.

21 (6) The supreme court shall by rule also adopt procedures for the
22 parties to certify to the court the manner of mediation used by the
23 parties to comply with this section.

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

26 (1) Any civil action for damages for injury or death occurring as
27 a result of health care which is provided after June 25, 1976, against:

28 ~~((+1))~~ (a) A person licensed by this state to provide health care
29 or related services, including, but not limited to, a physician,
30 osteopathic physician, dentist, nurse, optometrist, podiatric physician
31 and surgeon, chiropractor, physical therapist, psychologist,
32 pharmacist, optician, physician's assistant, osteopathic physician's
33 assistant, nurse practitioner, or physician's trained mobile intensive
34 care paramedic, including, in the event such person is deceased, his
35 estate or personal representative;

36 ~~((+2))~~ (b) An employee or agent of a person described in (a) of

1 this subsection (~~((1) of this section~~)), acting in the course and scope
2 of his or her employment, including, in the event such employee or
3 agent is deceased, his or her estate or personal representative; or

4 ~~((3))~~ (c) An entity, whether or not incorporated, facility, or
5 institution employing one or more persons described in (a) of this
6 subsection (~~((1) of this section~~)), including, but not limited to, a
7 hospital, clinic, health maintenance organization, or nursing home; or
8 an officer, director, employee, or agent thereof acting in the course
9 and scope of his or her employment, including, in the event such
10 officer, director, employee, or agent is deceased, his or her estate or
11 personal representative;

12 based upon alleged professional negligence shall be commenced within
13 three years of the act or omission alleged to have caused the injury or
14 condition, or one year of the time the patient or his or her
15 representative or custodial parent or guardian discovered or reasonably
16 should have discovered that the injury or condition was caused by said
17 act or omission, whichever period (~~expires later, except that in no~~
18 ~~event shall an action be commenced more than eight years after said act~~
19 ~~or omission: PROVIDED, That the time for commencement of an action is~~
20 ~~tolled upon proof of fraud, intentional concealment, or the presence of~~
21 ~~a foreign body not intended to have a therapeutic or diagnostic purpose~~
22 ~~or effect, until the date the patient or the patient's representative~~
23 ~~has actual knowledge of the act of fraud or concealment, or of the~~
24 ~~presence of the foreign body; the patient or the patient's~~
25 ~~representative has one year from the date of the actual knowledge in~~
26 ~~which to commence a civil action for damages.~~

27 ~~For purposes of this section, notwithstanding RCW 4.16.190, the~~
28 ~~knowledge of a custodial parent or guardian shall be imputed to a~~
29 ~~person under the age of eighteen years, and such imputed knowledge~~
30 ~~shall operate to bar the claim of such minor to the same extent that~~
31 ~~the claim of an adult would be barred under this section. Any action~~
32 ~~not commenced in accordance with this section shall be barred.~~

33 ~~For purposes of this section, with respect to care provided after~~
34 ~~June 25, 1976, and before August 1, 1986, the knowledge of a custodial~~
35 ~~parent or guardian shall be imputed as of April 29, 1987, to persons~~
36 ~~under the age of eighteen years)) occurs first.~~

37 (2) In no event may an action be commenced more than three years

1 after the act or omission alleged to have caused the injury or
2 condition except:

3 (a) Upon proof of fraud, intentional concealment, or the presence
4 of a foreign body not intended to have a therapeutic or diagnostic
5 purpose or effect, in which case the patient or the patient's
6 representative has one year from the date the patient or the patient's
7 representative or custodial parent or guardian has actual knowledge of
8 the act of fraud or concealment or of the presence of the foreign body
9 in which to commence a civil action for damages.

10 (b) In the case of a minor, for any period during minority, but
11 only for such period during minority in which the minor's custodial
12 parent or guardian and the defendant or the defendant's insurer have
13 committed fraud or collusion in the failure to bring an action on
14 behalf of the minor.

15 (c) In the case of a minor under the full age of six years, in
16 which case the action on behalf of the minor must be commenced within
17 three years or prior to the minor's eighth birthday, whichever provides
18 a longer period.

19 (3) Any action not commenced in accordance with this section is
20 barred.

21 (4) For purposes of this section, the tolling provisions of RCW
22 4.16.190 do not apply.

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

28 **Sec. 7.** RCW 7.70.080 and 1975-'76 2nd ex.s. c 56 s 13 are each
29 amended to read as follows:

30 (1) Any party may present evidence to the trier of fact that the
31 ((patient)) plaintiff has already been, or will be, compensated for the
32 injury complained of from ((any source except the assets of the
33 patient, his representative, or his immediate family, or insurance
34 purchased with such assets. In the event such evidence is admitted,
35 the plaintiff may present evidence of an obligation to repay such
36 compensation. Insurance bargained for or provided on behalf of an
37 employee shall be considered insurance purchased with the assets of the

1 ~~employee~~) a collateral source. In the event the evidence is admitted,
2 the other party may present evidence of any amount that was paid or
3 contributed to secure the right to any compensation. Compensation as
4 used in this section shall mean payment of money or other property to
5 or on behalf of the patient, rendering of services to the patient free
6 of charge to the patient, or indemnification of expenses incurred by or
7 on behalf of the patient. Notwithstanding this section, evidence of
8 compensation by a defendant health care provider may be offered only by
9 that provider.

10 (2) Unless otherwise provided by statute, there is no right of
11 subrogation or reimbursement from a plaintiff's tort recovery with
12 respect to compensation covered in subsection (1) of this section.

13 NEW SECTION. Sec. 8. A new section is added to chapter 7.04 RCW
14 to read as follows:

15 (1) A contract for health care services that contains a provision
16 for arbitration of a dispute as to professional negligence of a health
17 care provider under chapter 7.70 RCW must have the provision as the
18 first article of the contract and must be expressed in the following
19 language:

20 "It is understood that any dispute as to medical malpractice that
21 is as to whether any medical services rendered under this contract were
22 unnecessary or unauthorized or were improperly, negligently, or
23 incompetently rendered, will be determined by submission to arbitration
24 as provided by Washington law, and not by a lawsuit or resort to court
25 process except as Washington law provides for judicial review of
26 arbitration proceedings. Both parties to this contract, by entering
27 into it, are giving up their constitutional right to have such a
28 dispute decided in a court of law before a jury, and instead are
29 accepting the use of arbitration."

30 (2) Immediately before the signature line provided for the
31 individual contracting for the medical services, there must appear the
32 following in at least ten-point bold red type:

33 "NOTICE: BY SIGNING THIS CONTRACT YOU ARE AGREEING TO HAVE ANY
34 ISSUE OF MEDICAL MALPRACTICE DECIDED BY NEUTRAL ARBITRATION AND YOU ARE
35 GIVING UP YOUR RIGHT TO A JURY OR COURT TRIAL. SEE ARTICLE ONE OF THIS
36 CONTRACT."

1 (3) Once signed, such a contract governs all subsequent open-book
2 account transactions for medical services for which the contract was
3 signed until or unless rescinded by written notice within thirty days
4 of signature. Written notice of such rescission may be given by a
5 guardian or other legal representative of the patient if the patient is
6 incapacitated or a minor.

7 (4) Where the contract is one for medical services to a minor, it
8 may not be disaffirmed if signed by the minor's parent or legal
9 guardian.

10 (5) Such a contract is not a contract of adhesion, nor
11 unconscionable, nor otherwise improper, where it complies with
12 subsections (1) through (3) of this section.

13 (6) Subsections (1) through (3) of this section do not apply to any
14 health benefit plan contract offered by an organization regulated under
15 Title 48 RCW that has been negotiated to contain an arbitration
16 agreement with subscribers and enrollees under such a contract.

17 NEW SECTION. **Sec. 9.** A new section is added to chapter 7.70 RCW
18 to read as follows:

19 RCW 7.70.100, 7.70.110, 7.70.120, and 7.70.130 do not apply if
20 there is a contract for binding arbitration under section 8 of this
21 act.

22 NEW SECTION. **Sec. 10.** A new section is added to chapter 7.70 RCW
23 to read as follows:

24 (1) The definitions in this subsection apply throughout this
25 section unless the context clearly requires otherwise.

26 (a) "Future damages" includes damages for future medical treatment,
27 care or custody, loss of future earnings, loss of bodily function, or
28 future pain and suffering of the judgment creditor.

29 (b) "Periodic payments" means the payment of money or delivery of
30 other property to the judgment creditor at regular intervals.

31 (2) In any action for damages for injury occurring as a result of
32 health care, the court shall, at the request of either party, enter a
33 judgment ordering that money damages or its equivalent for future
34 damages of the judgment creditor be paid in whole or in part by
35 periodic payments rather than by a lump-sum payment if the award equals
36 or exceeds fifty thousand dollars in future damages. In entering a

1 judgment ordering the payment of future damages by periodic payments,
2 the court shall make a specific finding as to the dollar amount of
3 periodic payments which will compensate the judgment creditor for such
4 future damages. As a condition to authorizing periodic payments of
5 future damages, the court shall require the judgment debtor who is not
6 adequately insured to post security adequate to ensure full payment of
7 such damages awarded by the judgment. Upon termination of periodic
8 payments of future damages, the court shall order the return of this
9 security, or so much as remains, to the judgment debtor.

10 (3)(a) The judgment ordering the payment of future damages by
11 periodic payments must specify the recipient or recipients of the
12 payments, the dollar amount of the payments, the interval between
13 payments, and the number of payments or the period of time over which
14 payments must be made. The payments are only subject to modification
15 in the event of the death of the judgment creditor.

16 (b) In the event that the court finds that the judgment debtor has
17 exhibited a continuing pattern of failing to make the payments, as
18 specified in (a) of this subsection, the court shall find the judgment
19 debtor in contempt of court and, in addition to the required periodic
20 payments, shall order the judgment debtor to pay the judgment creditor
21 all damages caused by the failure to make such periodic payments,
22 including court costs and attorneys' fees.

23 (4) However, money damages awarded for loss of future earnings may
24 not be reduced or payments terminated by reason of the death of the
25 judgment creditor, but must be paid to persons to whom the judgment
26 creditor owed a duty of support, as provided by law, immediately prior
27 to his or her death. In such cases the court that rendered the
28 original judgment, may, upon petition of any party in interest, modify
29 the judgment to award and apportion the unpaid future damages in
30 accordance with this subsection (4).

31 (5) Following the occurrence or expiration of all obligations
32 specified in the periodic payment judgment, any obligation of the
33 judgment debtor to make further payments ceases and any security given
34 under subsection (2) of this section reverts to the judgment debtor.

35 (6) For purposes of this section, the provisions of RCW 4.56.250 do
36 not apply.

37 (7) It is the intent of the legislature in enacting this section to
38 authorize, in actions for damages for injury occurring as a result of

1 health care, the entry of judgments that provide for the payment of
2 future damages through periodic payments rather than lump-sum payments.
3 By authorizing periodic payment judgments, it is the further intent of
4 the legislature that the courts will utilize such judgments to provide
5 compensation sufficient to meet the needs of an injured plaintiff and
6 those persons who are dependent on the plaintiff for whatever period is
7 necessary while eliminating the potential windfall from a lump-sum
8 recovery that was intended to provide for the care of an injured
9 plaintiff over an extended period who then dies shortly after the
10 judgment is paid, leaving the balance of the judgment award to persons
11 and purposes for which it was not intended. It is also the intent of
12 the legislature that all elements of the periodic payment program be
13 specified with certainty in the judgment ordering such payments and
14 that the judgment not be subject to modification at some future time
15 that might alter the specifications of the original judgment.

16 NEW SECTION. **Sec. 11.** A new section is added to chapter 7.70 RCW
17 to read as follows:

18 In any action under this chapter for personal injuries, wrongful
19 deaths, or damage to property, in which the harm is alleged to have
20 been caused by an act which violates the appropriate standard of care
21 to be exercised by an individual licensed, certified, or registered
22 pursuant to chapter 18.120 RCW, the person initiating the action shall
23 serve upon each defendant an affidavit within ninety days of service of
24 process initiating the action. The affidavit shall be executed by a
25 person whose license, certification, or registration is identical to
26 the defendant. If there is more than one defendant, there shall be an
27 affidavit for each defendant. Each affidavit shall contain a statement
28 that the affiant believes there is a reasonable probability that the
29 defendant's conduct does not meet the standard of care required to be
30 exercised by the defendant. The affiant shall have no financial
31 interest in the outcome of the trial and have at least five years of
32 professional experience in the same vocation as the defendant who is
33 the subject of the affidavit. The affidavit shall be filed within
34 sixty days of the defendant answering the initial complaint.

35 In the event a defendant refuses to provide information necessary
36 to allow the execution of an affidavit, the court may, upon motion of
37 the plaintiff, waive the requirement following a hearing on the motion.

1 No hearing on the motion shall be held in fewer than forty-five days
2 following the receipt by the defendant of the request to provide the
3 information.

4 The court may, upon motion by the defendant and a showing of good
5 cause, grant only one additional period of forty-five days, following
6 the motion to waive the requirement of an affidavit, for the defendant
7 to provide the information required under this section.

8 NEW SECTION. **Sec. 12.** A new section is added to chapter 4.56 RCW
9 to read as follows:

10 In the event that the Washington state supreme court or other court
11 of competent jurisdiction rules or affirms that section 3 of this act
12 is unconstitutional, then the prescribed cap on noneconomic damages
13 takes effect upon the ratification of a state constitutional amendment
14 that empowers the legislature to place limits on the amount of
15 noneconomic damages recoverable in any or all civil causes of action.

16 NEW SECTION. **Sec. 13.** Unless otherwise provided in this act, this
17 act applies to all causes of action filed on or after the effective
18 date of this section.

19 NEW SECTION. **Sec. 14.** If any provision of this act or its
20 application to any person or circumstance is held invalid, the
21 remainder of the act or the application of the provision to other
22 persons or circumstances is not affected.

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