
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, 4.16.350, and 7.70.080; adding new sections to
3 chapter 4.56 RCW; adding a new section to chapter 4.28 RCW; adding a
4 new section to chapter 7.04 RCW; adding new sections to chapter 7.70
5 RCW; and creating new sections.

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

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

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

27 (a) For claims filed on or after the effective date of this
28 section, but before July 1, 2011, the sum of three hundred fifty
29 thousand dollars;

30 (b) For claims for causes of action filed on or after July 1, 2011,
31 but before July 1, 2017, the sum of five hundred fifty thousand
32 dollars;

33 (c) For claims for causes of action filed on or after July 1, 2017,
34 the sum of seven hundred fifty thousand dollars.

35 (2) The limitation on noneconomic damages contained in subsection
36 (1) of this section includes all noneconomic damages claimed by or on
37 behalf of the person whose injury or death occurred as a result of

1 health care or arranging for the provision of health care, as well as
2 all claims for loss of consortium, loss of society and companionship,
3 destruction of the parent-child relationship, and other derivative
4 claims asserted by or on behalf of others arising from the same injury
5 or death. If the jury's assessment of noneconomic damages exceeds the
6 limitation contained in subsection (1) of this section, nothing in RCW
7 4.44.450 precludes the court from entering a judgment that limits the
8 total amount of noneconomic damages to those limits provided in
9 subsection (1) of this section.

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

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

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

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

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

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

25 ~~((5))~~ (e) The time limitations imposed by the client or by the
26 circumstances;

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

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

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

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

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

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

3 (iii) Twenty-five percent of the next five hundred thousand dollars
4 recovered;

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

7 (b) The limitations in this section apply regardless of whether the
8 recovery is by judgment, settlement, arbitration, mediation, or other
9 form of alternative dispute resolution.

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

14 (d) For purposes of this subsection, "recovered" means the net sum
15 recovered after deducting any disbursements or costs incurred in
16 connection with prosecution or settlement of the claim. Costs of
17 medical care incurred by the plaintiff and the attorneys' office
18 overhead costs or charges are not deductible disbursements or costs for
19 such purposes.

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

22 NEW SECTION. Sec. 5. A new section is added to chapter 4.28 RCW
23 to read as follows:

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

30 (2) The provisions of this section are not applicable with respect
31 to any defendant whose name is unknown to the plaintiff at the time of
32 filing the complaint and who is identified therein by a fictitious
33 name.

34 (3) Failure to comply with this section does not invalidate any
35 proceedings of any court of this state, nor does it affect the
36 jurisdiction of the court to render a judgment therein. However,
37 failure by an attorney at law to comply with the provisions of this

1 section is grounds for professional discipline and the Washington state
2 bar association shall investigate and take appropriate action in any
3 such cases brought to its attention.

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

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

8 ~~((1))~~ (a) A person licensed by this state to provide health care
9 or related services, including, but not limited to, a physician,
10 osteopathic physician, dentist, nurse, optometrist, podiatric physician
11 and surgeon, chiropractor, physical therapist, psychologist,
12 pharmacist, optician, physician's assistant, osteopathic physician's
13 assistant, nurse practitioner, or physician's trained mobile intensive
14 care paramedic, including, in the event such person is deceased, his
15 estate or personal representative;

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

20 ~~((3))~~ (c) An entity, whether or not incorporated, facility, or
21 institution employing one or more persons described in (a) of this
22 subsection ~~((1) of this section)~~, including, but not limited to, a
23 hospital, clinic, health maintenance organization, or nursing home; or
24 an officer, director, employee, or agent thereof acting in the course
25 and scope of his or her employment, including, in the event such
26 officer, director, employee, or agent is deceased, his or her estate or
27 personal representative;

28 based upon alleged professional negligence shall be commenced within
29 three years of the act or omission alleged to have caused the injury or
30 condition, or one year of the time the patient or his or her
31 representative or custodial parent or guardian discovered or reasonably
32 should have discovered that the injury or condition was caused by said
33 act or omission, whichever period ~~((expires later, except that in no
34 event shall an action be commenced more than eight years after said act
35 or omission: PROVIDED, That the time for commencement of an action is
36 tolled upon proof of fraud, intentional concealment, or the presence of
37 a foreign body not intended to have a therapeutic or diagnostic purpose~~

1 ~~or effect, until the date the patient or the patient's representative~~
2 ~~has actual knowledge of the act of fraud or concealment, or of the~~
3 ~~presence of the foreign body; the patient or the patient's~~
4 ~~representative has one year from the date of the actual knowledge in~~
5 ~~which to commence a civil action for damages.~~

6 ~~For purposes of this section, notwithstanding RCW 4.16.190, the~~
7 ~~knowledge of a custodial parent or guardian shall be imputed to a~~
8 ~~person under the age of eighteen years, and such imputed knowledge~~
9 ~~shall operate to bar the claim of such minor to the same extent that~~
10 ~~the claim of an adult would be barred under this section. Any action~~
11 ~~not commenced in accordance with this section shall be barred.~~

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

16 (2) In no event may an action be commenced more than three years
17 after the act or omission alleged to have caused the injury or
18 condition except:

19 (a) Upon proof of fraud, intentional concealment, or the presence
20 of a foreign body not intended to have a therapeutic or diagnostic
21 purpose or effect, in which case the patient or the patient's
22 representative has one year from the date the patient or the patient's
23 representative or custodial parent or guardian has actual knowledge of
24 the act of fraud or concealment or of the presence of the foreign body
25 in which to commence a civil action for damages.

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

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

35 (3) Any action not commenced in accordance with this section is
36 barred.

37 (4) For purposes of this section, the tolling provisions of RCW
38 4.16.190 do not apply.

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

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

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

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

28 NEW SECTION. **Sec. 8.** A new section is added to chapter 7.04 RCW
29 to read as follows:

30 (1) A contract for health care services that contains a provision
31 for arbitration of a dispute as to professional negligence of a health
32 care provider under chapter 7.70 RCW must have the provision as the
33 first article of the contract and must be expressed in the following
34 language:

35 "It is understood that any dispute as to medical malpractice that
36 is as to whether any medical services rendered under this contract were

1 unnecessary or unauthorized or were improperly, negligently, or
2 incompetently rendered, will be determined by submission to arbitration
3 as provided by Washington law, and not by a lawsuit or resort to court
4 process except as Washington law provides for judicial review of
5 arbitration proceedings. Both parties to this contract, by entering
6 into it, are giving up their constitutional right to have such a
7 dispute decided in a court of law before a jury, and instead are
8 accepting the use of arbitration."

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

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

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

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

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

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

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

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

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

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

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

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

10 (2) In any action for damages for injury occurring as a result of
11 health care, the court shall, at the request of either party, enter a
12 judgment ordering that money damages or its equivalent for future
13 damages of the judgment creditor be paid in whole or in part by
14 periodic payments rather than by a lump-sum payment if the award equals
15 or exceeds fifty thousand dollars in future damages. In entering a
16 judgment ordering the payment of future damages by periodic payments,
17 the court shall make a specific finding as to the dollar amount of
18 periodic payments which will compensate the judgment creditor for such
19 future damages. As a condition to authorizing periodic payments of
20 future damages, the court shall require the judgment debtor who is not
21 adequately insured to post security adequate to ensure full payment of
22 such damages awarded by the judgment. Upon termination of periodic
23 payments of future damages, the court shall order the return of this
24 security, or so much as remains, to the judgment debtor.

25 (3)(a) The judgment ordering the payment of future damages by
26 periodic payments must specify the recipient or recipients of the
27 payments, the dollar amount of the payments, the interval between
28 payments, and the number of payments or the period of time over which
29 payments must be made. The payments are only subject to modification
30 in the event of the death of the judgment creditor.

31 (b) In the event that the court finds that the judgment debtor has
32 exhibited a continuing pattern of failing to make the payments, as
33 specified in (a) of this subsection, the court shall find the judgment
34 debtor in contempt of court and, in addition to the required periodic
35 payments, shall order the judgment debtor to pay the judgment creditor
36 all damages caused by the failure to make such periodic payments,
37 including court costs and attorneys' fees.

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

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

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

15 (7) It is the intent of the legislature in enacting this section to
16 authorize, in actions for damages for injury occurring as a result of
17 health care, the entry of judgments that provide for the payment of
18 future damages through periodic payments rather than lump-sum payments.
19 By authorizing periodic payment judgments, it is the further intent of
20 the legislature that the courts will utilize such judgments to provide
21 compensation sufficient to meet the needs of an injured plaintiff and
22 those persons who are dependent on the plaintiff for whatever period is
23 necessary while eliminating the potential windfall from a lump-sum
24 recovery that was intended to provide for the care of an injured
25 plaintiff over an extended period who then dies shortly after the
26 judgment is paid, leaving the balance of the judgment award to persons
27 and purposes for which it was not intended. It is also the intent of
28 the legislature that all elements of the periodic payment program be
29 specified with certainty in the judgment ordering such payments and
30 that the judgment not be subject to modification at some future time
31 that might alter the specifications of the original judgment.

32 NEW SECTION. **Sec. 11.** A new section is added to chapter 4.56 RCW
33 to read as follows:

34 In the event that the Washington state supreme court or other court
35 of competent jurisdiction rules or affirms that section 3 of this act
36 is unconstitutional, then the prescribed cap on noneconomic damages

1 takes effect upon the ratification of a state constitutional amendment
2 that empowers the legislature to place limits on the amount of
3 noneconomic damages recoverable in any or all civil causes of action.

4 NEW SECTION. **Sec. 12.** Unless otherwise provided in this act, this
5 act applies to all causes of action filed on or after the effective
6 date of this section.

7 NEW SECTION. **Sec. 13.** If any provision of this act or its
8 application to any person or circumstance is held invalid, the
9 remainder of the act or the application of the provision to other
10 persons or circumstances is not affected.

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