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SENATE BILL 6704

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State of Washington

58th Legislature

2004 Regular Session

By Senators Kline, Franklin, Winsley, Brown, McAuliffe, Keiser, Shin, Spanel, Prentice, Thibaudeau and Kohl-Welles

Read first time 02/02/2004. Referred to Committee on Judiciary.

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) If the trier of fact determines that the claimant or party  
29 suffering bodily injury or incurring property damages was not at fault,  
30 the defendants against whom judgment is entered shall be jointly and  
31 severally liable for the sum of their proportionate shares of the  
32 (~~claimants~~ ~~claimant's~~) claimant's total damages.

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

1       (3) If a defendant is jointly and severally liable under one of the  
2 exceptions listed in subsections (1)(a) or (1)(b) of this section, such  
3 defendant's rights to contribution against another jointly and  
4 severally liable defendant, and the effect of settlement by either such  
5 defendant, shall be determined under RCW 4.22.040, 4.22.050, and  
6 4.22.060.

7       (~~(3)~~) (4)(a) Nothing in this section affects any cause of action  
8 relating to hazardous wastes or substances or solid waste disposal  
9 sites.

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

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

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

27       NEW SECTION. **Sec. 4.** A new section is added to chapter 7.70 RCW  
28 to read as follows:

29       A public or private hospital is liable for an act or omission of a  
30 health care provider granted privileges to provide health care at the  
31 hospital only if the health care provider is an agent or employee of  
32 the hospital and the act or omission of the health care provider  
33 occurred while the health care provider was acting within the course  
34 and scope of the health care provider's agency or employment with the  
35 hospital, or if the health care provider is fulfilling an essential  
36 function of the hospital. A hospital is not ostensibly liable for any

1 act of negligence committed on the hospital's premises by a health care  
2 provider who is properly credentialed and acting as an independent  
3 contractor. A public or private hospital may be liable for failing to  
4 exercise reasonable care in granting credentials and practice  
5 privileges to a health care provider, or in failing to revoke such  
6 credentials and privileges when the hospital knew or reasonably should  
7 have known such revocation was appropriate.

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

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

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

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

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

28 +1)) a person or entity identified in subsection (2) of this  
29 section, shall:

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

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

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

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

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

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

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

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

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

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

31 ~~based upon alleged professional negligence shall be commenced within~~  
32 ~~three years of the act or omission alleged to have caused the injury or~~  
33 ~~condition, or one year of the time the patient or his representative~~  
34 ~~discovered or reasonably should have discovered that the injury or~~  
35 ~~condition was caused by said act or omission, whichever period expires~~  
36 ~~later, except that in no event shall an action be commenced more than~~  
37 ~~eight years after said act or omission: PROVIDED, That)).~~

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

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

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

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

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

25       In any action under this chapter, each side shall presumptively be  
26 entitled to only two independent experts on an issue and only two  
27 standard-of-care experts, except upon a showing of good cause. Where  
28 there are multiple parties on a side and the parties cannot agree as to  
29 which independent experts or standard-of-care experts will be called on  
30 an issue, the court, upon a showing of good cause, shall allow  
31 additional experts on an issue or additional standard-of-care experts  
32 to be called as the court deems appropriate.

33       NEW SECTION.   **Sec. 8.** A new section is added to chapter 7.70 RCW  
34 to read as follows:

35       In an action under this chapter, all parties shall submit a  
36 pretrial expert report pursuant to time frames provided in court rules.

1 The expert report must disclose the identity of all expert witnesses  
2 and state the nature of the opinions the expert witnesses will present  
3 as testimony at trial. Further depositions of these expert witnesses  
4 is prohibited. The testimony that an expert witness may present at  
5 trial is limited in nature to the opinions disclosed to the court as  
6 part of the pretrial expert report. The supreme court shall adopt  
7 rules to implement the provisions of this section.

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

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

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

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

26 ~~((+2))~~ (4) The supreme court shall by rule adopt procedures to  
27 implement mandatory mediation of actions under this chapter. The rules  
28 shall require mandatory mediation without exception unless subsection  
29 (6) of this section applies. The rules on mandatory mediation shall  
30 address, at a minimum:

31 (a) Procedures for the appointment of, and qualifications of,  
32 mediators. A mediator shall have experience or expertise related to  
33 actions arising from injury occurring as a result of health care, and  
34 be a member of the state bar association who has been admitted to the  
35 bar for a minimum of five years or who is a retired judge. The parties  
36 may stipulate to a nonlawyer mediator. The court may prescribe  
37 additional qualifications of mediators;

1 (b) Appropriate limits on the amount or manner of compensation of  
2 mediators;

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

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

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

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

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

14 ~~((+3))~~ (5) Mediators shall not impose discovery schedules upon the  
15 parties.

16 (6) The mandatory mediation requirement of subsection (4) of this  
17 section does not apply to an action subject to mandatory arbitration  
18 under chapter 7.06 RCW or to an action in which the parties have  
19 agreed, subsequent to the arisal of the claim, to submit the claim to  
20 arbitration under chapter 7.04 RCW.

21 (7) 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. 10.** RCW 5.64.010 and 1975-'76 2nd ex.s. c 56 s 3 are each  
25 amended to read as follows:

26 (1) In any civil action against a health care provider for personal  
27 injuries which is based upon alleged professional negligence ((and  
28 which is against:

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



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

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

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

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

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

36       Any party may present evidence to the trier of fact that the  
37 ~~((patient))~~ plaintiff has already been compensated for the injury

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

16 NEW SECTION. Sec. 12. A new section is added to chapter 7.70 RCW  
17 to read as follows:

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

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

28 (3) The certificate of merit must contain a statement that the  
29 person executing the certificate of merit believes there is a  
30 reasonable probability that the defendant's conduct did not follow the  
31 accepted standard of care required to be exercised by the defendant.

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

35 NEW SECTION. Sec. 13. (1) A commission on noneconomic damages is  
36 established. The commission shall study the feasibility of developing

1 and implementing an advisory schedule of noneconomic damages in actions  
2 for injuries resulting from health care under chapter 7.70 RCW. The  
3 commission shall present the results of the feasibility study and an  
4 implementation plan, if appropriate, to the relevant policy committees  
5 of the legislature by October 31, 2005.

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

12 (a) The information that can most appropriately be used to provide  
13 guidance to the trier of fact regarding noneconomic damage awards,  
14 giving consideration to: (i) Past noneconomic damage awards for  
15 similar injuries, considering severity and duration of the injuries;  
16 (ii) past noneconomic damage awards for similar claims for damages; and  
17 (iii) such other information or methodologies the commission finds  
18 appropriate;

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

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

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

27 (a) Identification of changes to statutory law, administrative  
28 rules, or court rules that would be necessary to implement the advisory  
29 schedule;

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

32 (c) A proposed timetable for implementation of the advisory  
33 schedule; and

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

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

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

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

15        (3) Legislative members of the commission shall be reimbursed for  
16 travel expenses under RCW 44.04.120.    Nonlegislative members of the  
17 commission shall be reimbursed for travel expenses as provided in RCW  
18 43.03.050 and 43.03.060.    Travel expenses of nonlegislative members of  
19 the commission shall be paid jointly by the house of representatives  
20 and senate.

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

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

26        This chapter does not apply to special incinerator ash regulated  
27 under chapter 70.138 RCW except that, for purposes of RCW  
28 4.22.070(~~(+3)~~) (4)(a), special incinerator ash shall be considered  
29 hazardous waste.

30        NEW SECTION.    **Sec. 16.**    Sections 13 and 14 of this act expire July  
31 1, 2006.

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