

SENATE BILL REPORT

Initiative 330

As of February 21, 2005

Title: An act relating to health care liability reform.

Sponsors: People of the State of Washington.

Brief History:

Committee Activity: Health & Long-Term Care: 1/17/05, 1/26/05 [w/oRec-JUD].
Judiciary: 2/15/05.

SENATE COMMITTEE ON JUDICIARY

Staff: Lilah Amos (786-7429)

Background: Currently juries in Washington can award both actual damages and non-economic damages to plaintiffs in medical malpractice actions. Noneconomic damages are subjective losses such as pain and suffering, while economic damages are objectively verifiable monetary losses such as medical expenses and loss of earnings. Washington law does not limit the amount of the damage awards in any personal injury action, including medical malpractice. In 1986 the Legislature enacted a cap on noneconomic damages that could be awarded in cases of personal injury or death. This cap was subsequently held to be unconstitutional by the Washington Supreme Court.

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

The time period during which a medical malpractice action may be brought is limited by statutes of limitations. A statute of limitations allows a claim to be brought during a specific time period after an injury occurs, after which any claim is barred. Currently, Washington's statute of limitations requires that an action for medical malpractice must be brought within three years of the act or omission alleged to have caused the injury, or one year after the injury was discovered or reasonably should have been discovered, whichever period is longer. The time for bringing an action is tolled if there is proof of fraud, intentional concealment, or the presence of a foreign body not intended to have a therapeutic purpose. In such circumstances, an action must be brought within one year of actual knowledge.

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

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

Washington law authorizes parties to contract to submit controversies to arbitration. Washington law also authorizes periodic payments of future economic damages when awards exceed \$100,000. When periodic payments are authorized, an award is paid over a period of time in installments rather than a single lump-sum payment.

Summary of Bill: Limit on damages. A \$350,000 limit is placed on noneconomic damages such as pain and suffering for injuries occurring as a result of a wrongful act or omission by a health care professional. The cap will apply regardless of the number of health professionals, providers, or institutions involved. Additionally, a limit of \$350,000 per institution and a limit of \$700,000 on total combined civil liability is placed on noneconomic damages for injuries caused by a wrongful act or omission by persons other than health care professionals.

A claimant bringing a medical malpractice claim is only allowed to recover noneconomic damages once, and cannot bring multiple actions based on one injury. If this limitation on noneconomic damages is ruled unconstitutional, it will take effect after a state constitutional amendment or a federal law is passed empowering the Legislature to place limits on noneconomic damages in civil actions.

Attorney Fees. Contingent attorney fees cannot exceed 40 percent of the first \$50,000 recovered, 33 1/3 percent of the next \$50,000 recovered, 25 percent of the next \$500,000 recovered, and 15 percent of any recovery exceeding \$600,000.

Time limits on actions. No medical malpractice action may be commenced unless the defendant has been given at least 90 days' notice, and the action must initially undergo mediation.

The time period in which to bring a medical malpractice action is shortened to within three years of the act or omission alleged to have caused the injury, or one year from the time the patient discovered or reasonably should have discovered the injury, whichever occurs first. Generally, an action may not be commenced more than three years after the act or omission unless there is proof of fraud, intentional concealment, or the presence of a foreign body not intended to have a therapeutic purpose. However, filings of any claims which would have been allowed under previous law are still allowed if the claim is brought within one year of the effective date of the proposed law. Children under six years of age must file a lawsuit within three years or before their eighth birthday, whichever is later.

Collateral Source Rule. The collateral source rule is fully abolished. Any party may present evidence of compensation from another source. If the evidence is admitted, then the other party may present evidence of any amount paid for the right of compensation.

Arbitration. Arbitration clauses are permitted in contracts for medical services. The arbitration provision must be the first article of the contract and must also appear in bold red type immediately before the signature line. A contract for health care services containing an arbitration provision is not a contract of adhesion, unconscionable, or otherwise improper. Such a contract may be rescinded by written notice within 30 days of signature.

Liability provisions. Each party found to be liable in a medical malpractice claim will only be responsible for the percentage the party is at fault. "Joint and several" liability is eliminated. Any liability is "several" except when multiple parties act in concert or if an agency or supervisory relationship existed.

A hospital is liable for an act or omission of a health care provider only if the provider is an actual agent or employee of the hospital and was acting within the course and scope of his or her position. Similarly, an individual health care provider is not liable for negligent or wrongful acts of others unless they were acting under the provider's direct control or supervision.

Periodic payments for future damages. A court's authority to award periodic payments of future damages is expanded to include noneconomic damages. The amount of the award necessary for periodic payments to be ordered is also lowered to \$50,000. If the claimant dies before the total judgment is paid, the court must, upon request, modify the judgment to eliminate payments of future damages such as medical treatment and pain and suffering, but cannot eliminate payments for loss of future earnings.

Appropriation: None.

Fiscal Note: Available.

Committee/Commission/Task Force Created: No.

Effective Date: If submitted to the people at the next general election and passed, 30 days after the election.

Testimony For: The medical care system in Washington is in crisis. Doctors with specialties such as obstetrics are leaving the state, and trauma services and hospitals are closing. Access-to-care issues will be greatly improved by this tort reform legislation. Currently it is difficult to recruit doctors to practice in Washington due to lack of meaningful tort reform and what is viewed as an unfriendly practice climate. While opponents claim otherwise, this initiative is not about insurance rates. Its effects will include holding entities and individuals liable only for the percentage each is at fault. It will allow patients to receive a greater portion of damages and will strengthen mediation and arbitration practices.

Testimony Against: The proposed legislation is too broad and covers much more than medical malpractice claims. It is unfair to ask a patient to waive a constitutional right to a jury trial in order to receive medical care. The number of medical malpractice claims has decreased and Washington physicians pay lower insurance premiums than in most other states. The number of doctors in Washington has increased. The language limiting noneconomic damage amounts has previously been held unconstitutional in Washington. This initiative shields doctors who cause harm from being held accountable.

Who Testified: PRO: Cliff Webster, Ken Isaacs, M.D., Washington State Medical Association; Marriann Tefft; Bob Appel, Washington State Hospital Association.

CON: Larry Shannon, Reed Schifferman, Washington State Trial Lawyers Association; Bill Daley, Washington Citizen Action.