

SENATE BILL REPORT

ESSB 5605

As Passed Senate, March 7, 2011

Title: An act relating to government liability.

Brief Description: Limiting governmental liability for various activities.

Sponsors: Senate Committee on Human Services & Corrections (originally sponsored by Senator Hargrove).

Brief History:

Committee Activity: Human Services & Corrections: 2/10/11, 2/17/11 [DPS, w/oRec].
Passed Senate: 3/07/11, 40-9.

SENATE COMMITTEE ON HUMAN SERVICES & CORRECTIONS

Majority Report: That Substitute Senate Bill No. 5605 be substituted therefor, and the substitute bill do pass.

Signed by Senators Hargrove, Chair; Stevens, Ranking Minority Member; Baxter, Carrell and McAuliffe.

Minority Report: That it be referred without recommendation.

Signed by Senators Regala, Vice Chair; Harper.

Staff: Jennifer Strus (786-7316)

Background: Under RCW 4.92.090, the state of Washington is liable for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation. The state acts through its officers, elected officials, employees, and volunteers. In negligence cases against the state, certain legal principles remain that shield the state from liability. These principles include discretionary immunity, qualified immunity, and the public duty doctrine. The law also recognizes certain exceptions to these legal principles, which have been the legal basis for jury verdicts and settlements against the state.

The Department of Corrections (DOC) and the Department of Social and Health Services (DSHS) operate programs which require employees to choose a course of action under conditions where the outcome from either choice could have a negative impact. These agencies operate supervision programs for criminal offenders released from incarceration or detention; DSHS investigates child and adult cases of abuse and neglect. Agency employees

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must rely upon their training, education, and experience to make decisions often based upon circumstantial evidence. Sometimes the decision the employee makes results in a bad outcome, despite the employee exercising reasonable care in making the decision.

In tort cases, there may be more than one party who is responsible for an injury. This state follows the law of comparative negligence (also called comparative fault). This term means that more than one party may be responsible for a person's injuries and damages according to each party's percentage of negligence. Under Washington law there is an exception to the rule of comparative fault. This exception occurs when the injured person is considered fault-free. In this situation, if there are multiple negligent parties who have caused injury to a person, then each negligent party is jointly and severally liable for all damages. This means that each negligent party is also individually responsible for 100 percent of the damages and not just limited to his or her respective share of fault.

In the past several years, the state has been found liable or has agreed to settle cases related to programs at DOC and DSHS. The verdicts and settlements in these cases range in the millions of dollars.

Summary of Engrossed Substitute Bill: The Legislature intends that when a child's interests of basic nurture, physical and mental health and safety conflict with the parents' interests, the interests of the child should prevail. When deciding whether a parent and child should be separated during or immediately following an investigation of alleged child abuse or neglect, the safety of the child must be DSHS's paramount concern.

No governmental entity or its officers, agents, employees, or volunteers is criminally or civilly liable for investigating allegations of child abuse or neglect if the investigation was performed without gross negligence. The duty to conduct a reasonable investigation runs only to the children who are subject to the abuse or neglect referral. DSHS and its employees must comply with court orders, including shelter care and other dependency court orders, and are not liable for acts performed to comply with those orders. Caseworkers are entitled to the same witness immunity when providing reports and recommendations to the court as would be provided to any other witness.

No governmental entity or its officers, agents, employees, or volunteers is criminally or civilly liable for supervising offenders as long as the supervision was performed without gross negligence. Supervision includes any type of community-based supervision.

Appropriation: None.

Fiscal Note: Available.

Committee/Commission/Task Force Created: No.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Staff Summary of Public Testimony on Original Bill: PRO: Between 2006-2010, the state paid out \$32 million in 27 claims; this is money that could be spent in protecting vulnerable people in our communities. Community correctional officers are forced to make

decisions about rehabilitation services vs. protecting the public. They have to make the decision knowing there is liability if they make a decision that does not turn out the way they had hoped. It interferes with recidivism effort and that is where the real cost savings come – lowering the recidivism rate. Should strike the language that a course of action results in poor outcomes because outcomes should not enter into this.

CON: This bill takes a discretionary decision down to the ministerial level. The effect of this bill is that in cases where there is a failure to supervise, there would be an affirmative defense about decisions. There would then be an advantage to finding an excuse about why the decision was made. The affirmative defense will become a jury instruction and will confuse the jury. Takes away the focus of whether DOC or DSHS did their jobs and followed the law. It will cause delay in completing cases. Both DSHS and DOC staff need clarity in what their jobs are. This bill fosters ambiguity. In medical cases where this error in judgment idea comes from, People with legitimate claims being denied any damages.

OTHER: The fiscal note is indeterminate because the AGO said the bill would not result in shifting any responsibility – it would not change things from the way they are now.

Persons Testifying: PRO: Tom Johnson, Washington Federation of State Employees (WFSE); Michael Wiseman, WFSE.

CON: Larry Shannon, Washington State Association for Justice; Jack Connelly, WSAJ.

OTHER: Anna Aylward, DOC.