

HOUSE BILL REPORT

E2SSB 5155

As Reported by House Committee On:

Civil Rights & Judiciary
Appropriations

Title: An act relating to prejudgment interest.

Brief Description: Concerning prejudgment interest.

Sponsors: Senate Committee on Ways & Means (originally sponsored by Senators Kuderer, Wellman, Das and Pedersen).

Brief History:

Committee Activity:

Civil Rights & Judiciary: 2/18/22, 2/22/22 [DPA];

Appropriations: 2/25/22, 2/28/22 [DPA(APP w/o CRJ)].

Brief Summary of Engrossed Second Substitute Bill (As Amended By Committee)

- Applies prejudgment interest to judgments founded on the tortious conduct of public agencies, individuals, and other entities by modifying interest accrual date from the date of entry of judgment to the date the cause of action accrues.
- Provides that judgments founded on tortious conduct that occurred while plaintiff was a minor bear interest from the date the action is commenced or the date the minor turns 18 years old, whichever is earlier.
- Limits prejudgment interest to arbitration awards and judgments entered following trial of the matter.

HOUSE COMMITTEE ON CIVIL RIGHTS & JUDICIARY

Majority Report: Do pass as amended. Signed by 11 members: Representatives Hansen,

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not part of the legislation nor does it constitute a statement of legislative intent.

Chair; Simmons, Vice Chair; Davis, Entenman, Goodman, Kirby, Orwall, Peterson, Thai, Valdez and Walen.

Minority Report: Do not pass. Signed by 6 members: Representatives Walsh, Ranking Minority Member; Gilday, Assistant Ranking Minority Member; Graham, Assistant Ranking Minority Member; Abbarno, Klippert and Ybarra.

Staff: Yelena Baker (786-7301).

Background:

Torts Generally and Accrual of a Tort Cause of Action.

A tort is a civil wrong in which a plaintiff seeks monetary compensation for harm to the plaintiff's person or property. Tort law includes actions based on negligence, intentional conduct, and strict liability. Damages that may be awarded to an injured plaintiff include both economic damages, such as lost earnings and medical expenses, and noneconomic damages, such as pain and suffering and emotional distress.

At common law, states were immune from tort liability under a doctrine known as sovereign immunity. The Washington Constitution, in Article 2, section 26, provides that the Legislature shall direct in statute the manner in which the state may be sued. The Legislature adopted a broad waiver of state governmental immunity in 1961 and local governmental immunity in 1967. These statutes provide that a governmental entity can be sued "to the same extent as if it were a private person or corporation."

For purposes of applying the statute of limitations and determining damages, a tort cause of action accrues at the time the injurious act or omission occurs, but there is an exception to this general rule when a plaintiff does not or cannot immediately know of an injury or the cause of an injury. Under the discovery rule, a cause of action accrues at the time when the plaintiff knows or should know all of the essential elements of the cause of action.

Post Judgment Interest.

Under state law, interest on tort judgments accrues from the date of entry of the judgment at a rate specified in the statute. In a case where a court is directed on review to enter judgment on a verdict or where a judgment entered on a verdict is wholly or partly affirmed on review, interest on the judgment or on that portion of the judgment affirmed dates back and accrues from the date the verdict was rendered.

For the tortious conduct of a public agency, the post judgment interest rate is 2 percent above the equivalent coupon issue yield of the average bill rate for 26 weeks of Treasury bills. A public agency is defined as: (a) any state board, commission, committee, department, educational institution, or other state agency which is created by statute, other than courts and the Legislature; (b) any county, city, school district, special purpose district, or other municipal corporation or political subdivision of the State of Washington; (c) any

subagency of a public agency which is created by statute, ordinance, or other legislative act, including but not limited to planning commissions, library or park boards, commissions, and agencies; or (d) any policy group whose membership includes representatives of publicly owned utilities.

For the tortious conduct of individuals and entities, the post judgment interest rate is 2 percent above the prime rate.

Prejudgment Interest.

Prejudgment interest is intended to make a plaintiff whole by compensating for the use value of damages incurred from the time of the loss until the date of judgment.

At the discretion of the court, a prejudgment award may be made on liquidated damages, i.e., damages that can be exactly computed based on the evidence provided. A prejudgment award is not available where the exact amount of damages to be allowed cannot be definitely fixed from the data or facts provided, but depends upon the opinion or discretion of the trier of fact.

Washington courts have held that the state cannot be held to interest on its debts without its consent. While the state has explicitly consented to post judgment interest on tort claims against it when the Legislature enacted the post judgment interest statute, in *Norris v. State*, the court held that because the statute did not mention prejudgment interest, the state has not consented to prejudgment interest on tort claims against it.

Summary of Amended Bill:

Interest on judgments for tortious conduct of public agencies, individuals, and other entities is modified to run from the date on which the cause of action accrues, rather than from the date judgment is entered, at the same rates as currently provided in the statute.

Judgments founded on tortious conduct that occurred while the plaintiff was a minor bear interest from the date of written notification to the defendant or the defendant's agent that an injury has occurred and that a claim may be brought or has been brought.

Amended Bill Compared to Engrossed Second Substitute Bill:

As compared to Engrossed Second Substitute Senate Bill 5155, the amended bill:

1. applies prejudgment interest to judgments founded on the tortious conduct of public agencies;
2. removes exemption from prejudgment interest for medical malpractice claims and thereby applies prejudgment interest to all judgments founded on the tortious conduct of individuals and other entities;
3. provides that judgments founded on tortious conduct that occurred while the plaintiff

- was a minor bear interest from the date of written notification to the defendant or defendant's agent that an injury has occurred and that a claim may be brought or has been brought; and
4. removes provisions that limit prejudgment interest to judgments entered following trial of the matter and arbitration awards and thereby applies prejudgment interest to all judgments.

Appropriation: None.

Fiscal Note: Available. New fiscal note requested on February 22, 2022.

Effective Date of Amended Bill: The bill takes effect 90 days after adjournment of the session in which the bill is passed.

Staff Summary of Public Testimony:

(In support) This is a modest proposal that is designed to bring Washington in line with roughly 46 other states that have permitted prejudgment interest for years. Prejudgment interest is an incentive to settle cases before trial. This bill incentivizes efficient handling of lawsuits and avoids inexcusable delays. Even before the pandemic, cases were stacking up in the court system. Because of strategic delays by insurance companies, cases can take 10 years to get to trial.

It is a common scheme in virtually every case against a public entity that behind the curtain there is some level of insurance or reinsurance. No wrongdoer, whether it's a public or private entity, or their insurance company is going to pay a single cent of prejudgment interest unless they hurt or kill someone wrongfully and then make a bad risk management decisions and take the case to trial.

All classes of tort victims should be covered by this bill, especially those who were injured as a result of medical malpractice. The majority of jurisdictions that have prejudgment interest do not see increased healthcare costs or practitioners leaving the states as a result of prejudgment interest. Prejudgment interest would apply to a limited number of medical malpractice claims and it would not apply to settlements.

(Opposed) The false premise to this bill is that defendants control anything with respect to the timing of filing of a lawsuit or have any control over the timing of the case. The plaintiff has complete control over when the lawsuit is filed, and this bill is going to encourage delayed filing of actions because prejudgment interest will be accruing, which will enlarge the size of the case.

This bill would apply prejudgment interest to all damages, including noneconomic damages, such as pain and suffering. The bill would also apply prejudgment interest to

future damages, which are damages that have not been incurred at the time of trial or entry of judgment. The prospect of paying prejudgment interest on all damages, including future damages and noneconomic damages, will inflate settlements.

Proponents of the bill suggest that this bill is an incentive to settle cases, and that the only defendants who are going to pay prejudgment interest are those who make a bad risk management decision and take the case to trial. However, both of these scenarios cannot be the case. Defendants who exercise their right to take the case to trial are going to be punished for doing so.

Washington already has prejudgment interest, but just like in those other 40 states, it does not apply to future damages. Washington should not impose this novel surcharge now.

Insurers estimate that, as a result of this bill, the annual increase in insurance costs for Washington consumers and businesses could potentially be between \$170 million and \$540 million, and these figures are based on historically low prime rates. Healthcare, trucking, and manufacturing sectors are expected to experience significant cost impacts from this proposal.

Cities are strongly opposed to this bill if it applies to public entities.

(Other) Schools are in strong opposition to this bill if it applies prejudgment interest to public entities. A safe learning environment for all students is a priority for schools, and Washington has a long-standing system in place for holding school districts accountable when harm occurs. The exemption for public entities, or at least for public schools, should be retained. Including schools in this bill has the potential to close local public school districts.

It is simply not true that counties, risk pools, and other government entities intentionally and strategically try to prevent settlements. There is no evidence school districts are delaying claims resolution. Schools share the goal of encouraging early settlement of cases and have no interest in engaging in prolonged litigation.

School cases often involve harm to children. Claims on behalf of injured minors do not have to be filed until the minor reaches the age of 21. If schools are included in this bill, prejudgment interest could be accruing for years without the district's knowledge of the injury or claim, and without opportunity to settle. Schools would face the choice of either paying higher settlements or taking more cases to trial, and neither outcome serves the purpose of this bill, but both would cost real money for K-12 education.

As a fiduciary of public money, cities have the responsibility to fully investigate all claims. Cities do not want to be penalized for the fact that they take time to do their fiduciary duty. Cities handle public money, and when they pay claims with public dollars, cities have to take away from other critical services that they need to provide to their citizens.

Nonprofit organizations should be exempt from the bill because prejudgment interest would raise insurance rates and make it harder for nonprofits to secure affordable insurance coverage, which would put them at risk for financial instability. Nonprofits often partner with the government to carry out critical public services, so it would be a public disservice to threaten their financial stability. Prejudgment interest would penalize nonprofits for timelines outside of their control.

Settlement awards are already based on the value of the case, including past damages. The point of post judgment interest is to make sure the award is not devalued by inflation and to incentivize prompt payment.

Washington courts already have the discretion to apply prejudgment interest to past liquidated damages. That discretion will remain for any exempt entities.

Medical professionals will be strongly opposed to the bill if the exemption for medical malpractice claims is not retained. Applying prejudgment interest to medical malpractice cases would increase premium rates and costs of insurance for healthcare providers and facilities.

Persons Testifying: (In support) Nathan Roberts, Darrell Cochran, and Colleen Durkin Peterson, Washington State Association for Justice.

(Opposed) Tyna Ek, Washington Schools Risk Management Pool; Karl Johanson; Robert Christie, Federation of Defense and Corporate Counsel; Madelyn Carlson; Jean Homan, City of Tacoma and Washington Defense Trial Lawyers; Cliff Webster, Liability Reform Coalition; and Mark Sektnan, American Property Casualty Insurance Association.

(Other) Grifan Cayce, Educational Service District 105 Schools Advocacy Coalition; Abigail Westbrook, Washington State School Directors' Association; Gregory Narver, Seattle Public Schools; Daniel Parkhurst; Anna Kelsey, Washington Nonprofits; Scott Emry, Lake Washington School District and School Alliance; Grace Yuan, School Alliance; Sharon Swanson, Association of Washington Cities; Mike Hoover, Washington State Association of Counties; Derek Bryan, Washington Counties Risk Pool; Cara Helmer, Washington State Hospital Association; Roman Daniels Brown, Washington State Medical Association; and Charlie Brown, Tacoma, Franklin Pierce, and Clover Park School Districts.

Persons Signed In To Testify But Not Testifying: None.

HOUSE COMMITTEE ON APPROPRIATIONS

Majority Report: Do pass as amended by Committee on Appropriations and without amendment by Committee on Civil Rights & Judiciary. Signed by 17 members:

Representatives Ormsby, Chair; Bergquist, Vice Chair; Gregerson, Vice Chair; Macri, Vice Chair; Chopp, Cody, Dolan, Fitzgibbon, Frame, Hansen, Johnson, J., Lekanoff, Pollet, Ryu, Senn, Stonier and Sullivan.

Minority Report: Do not pass. Signed by 15 members: Representatives Stokesbary, Ranking Minority Member; Chambers, Assistant Ranking Minority Member; Corry, Assistant Ranking Minority Member; MacEwen, Assistant Ranking Minority Member; Boehnke, Caldier, Chandler, Dye, Harris, Hoff, Jacobsen, Rude, Schmick, Springer and Steele.

Minority Report: Without recommendation. Signed by 1 member: Representative Tharinger.

Staff: Jessica Van Horne (786-7288).

Summary of Recommendation of Committee On Appropriations Compared to Recommendation of Committee On Civil Rights & Judiciary:

As compared to the striking amendment by the Civil Rights and Judiciary Committee, the striking amendment by the Appropriations Committee:

- provides that judgments founded on tortious conduct that occurred while the plaintiff was a minor bear interest from the date the action is commenced or the date the minor turns 18 years old, whichever is earlier, rather than from the date of written notification to the defendant that an injury has occurred and that a claim may be or has been filed; and
- limits prejudgment interest to arbitration awards and judgments entered following trial of the matter and provides that all other tort judgments bear interest from the date the judgment is entered.

Appropriation: None.

Fiscal Note: Available.

Effective Date of Amended Bill: The bill takes effect 90 days after adjournment of the session in which the bill is passed.

Staff Summary of Public Testimony:

(In support) Prejudgment interest in varying degree exists in 46 states. Prejudgment interest compensates people for the financial harm that was inflicted on them by someone else, and it creates an incentive to settle cases. Modifying the language related to claims by minors reduces the fiscal impact of this bill.

(Opposed) Courts already award prejudgment interest when the facts of a case merit that determination. Proponents of the bill have themselves indicated that the vast majority of

cases already settle, so this bill is completely unnecessary. The bill will prolong the resolution of civil cases because it creates a strong financial incentive for plaintiffs' attorneys to delay matters since prejudgment interest would grow with time.

This bill would apply to settlements because settlement demands will include prejudgment interest. In order to settle a claim, an insurance company or a risk pool has to figure out what the damages are for lost wages, medical expenses, noneconomic damages, and future damages, and also what the value of prejudgment interest would be on all of these damages. Prejudgment interest becomes baked in as an element of damages.

Judges and juries already consider the present value of a cause when they award damages, and postjudgment interest ensures prompt payment of those awards. Defendants will be penalized for timelines outside of their control, such as when a lawsuit is filed, because defendants often do not know of an injury until a claim has been filed.

Plaintiffs alone control when a lawsuit is filed. This bill will incentivize delaying the filing of a claim until the statute of limitations almost runs out in order to increase the size of the case, which will in turn have an effect on every civil case, including cases that settle.

Very few states allow prejudgment interest on future damages or noneconomic damages, or allow prejudgment interest to begin accruing on the date of the injury rather than the date a lawsuit is filed. Under this bill, prejudgment interest would apply not only to lost wages and medical expenses, but also to all the uncertain damages in tort cases, such as pain and suffering, and future damages.

Insured entities have a responsibility to work with the insurer to investigate claims before a settlement can even be offered, so the bill will not help resolve cases quicker. Insurers estimate that, as a result of this bill, the annual increase in insurance costs for Washington consumers and businesses could potentially be between \$170 million and \$540 million, and these figures are based on historically low prime rates. Healthcare, trucking, and manufacturing sectors are expected to experience significant cost impacts from this proposal. Applying prejudgment interest in medical malpractice cases was never the intent behind the bill and will result in increased costs for healthcare providers who are already struggling through the pandemic.

This bill would cost school districts millions of dollars and has the potential to shutter some public schools. Minors have a longer time period within which to file a lawsuit. The language regarding claims by minors does not address schools' concerns because a written notice that claims may be brought later does not give school sufficient information to resolve or settle claims, and there is no requirement to file the claim in a timely manner. This means that prejudgment interest would still accrue between the time notice is provided and the actual claim is filed, but schools will not be able to resolve or settle cases during that time period.

Allowing prejudgment interest to accrue for years before a case is filed will have catastrophic financial impact on the cities. Cities operate with public money and have a fiduciary duty to fully investigate claims. At times, those claims need to be decided in court, and cities should not be penalized for availing themselves of the right to go to court.

Public entities should be excluded from prejudgment interest. The direct increase in the cost of claims against government entities will come directly from the taxpayers. The cost of this bill will be in the hundreds of millions of general fund dollars that will become unavailable for funding first responders and critical public services. Additionally, the bill will negatively impact the ability of public agencies to procure insurance coverage, which is already increasingly expensive and difficult to obtain. Current law already balances the interest to compensate plaintiffs properly with sound fiscal stewardship of public funds.

There are data to help identify the cause of the delays in resolving claims and cases, so the Legislature should conduct appropriate studies and look at alternative solutions instead of moving this bill forward.

(Other) Schools face unique issues when minors are injured, and simply providing notice does not solve the problem for schools. There may be good reasons to delay bringing a claim, such as to give medical professionals time to figure out the extent of a minor's injuries and potential future problems stemming from those injuries. In a recent example of an elementary student getting injured in gym class, all parties agreed to wait until the student turns 18 years old to help dentists accurately identify how that injury affects the growth of the student's teeth.

Persons Testifying: (In support) Colleen Durkin Peterson and Larry Shannon, Washington State Association for Justice.

(Opposed) Alex Hur, Schools Insurance Association of Washington and Washington Schools Risk Management Pool; Cliff Webster, Liability Reform Coalition; Sharon Swanson and Carol Rehnberg, Association of Washington Cities; Mike Hoover, Washington State Association of Counties; Derek Bryan, Washington Counties Risk Pool; Roman Daniels-Brown, Washington State Medical Association; Grifan Cayce, Educational Service District 105 Schools Advocacy Coalition; Marissa Rathbone, Washington State School Directors' Association; Tom Seigel, Bethel School District; Zosia Stanley, Washington State Hospital Association; Jean Homan, City of Tacoma; Washington Defense Trial Lawyers; Charlie Brown, School Alliance, Federal Way, Tacoma, Clover Park and Pierce County School Districts; Chris Hills, City of Kent; Robert Christie, Federation of Defense and Corporate Counsel; and Mark Sektnan, American Property Casualty Insurance Association.

(Other) Scott Emry, Lake Washington School District.

Persons Signed In To Testify But Not Testifying: None.