

SENATE BILL REPORT

SSB 5271

As Passed Senate, February 23, 2021

Title: An act relating to amending the necessary elements of proof of injury during the state of emergency declared due to the COVID-19 pandemic.

Brief Description: Amending the necessary elements of proof of injury during the state of emergency declared due to the COVID-19 pandemic.

Sponsors: Senate Committee on Law & Justice (originally sponsored by Senators Wagoner, Pedersen and Dhingra).

Brief History:

Committee Activity: Law & Justice: 2/09/21, 2/11/21 [DPS].

Floor Activity: Passed Senate: 2/23/21, 49-0.

Brief Summary of First Substitute Bill

- Provides a method for determining the standard of care during the state of emergency in response to the COVID-19 pandemic.

SENATE COMMITTEE ON LAW & JUSTICE

Majority Report: That Substitute Senate Bill No. 5271 be substituted therefor, and the substitute bill do pass.

Signed by Senators Pedersen, Chair; Dhingra, Vice Chair; Padden, Ranking Member; McCune, Assistant Ranking Member; Darneille, Holy, Kuderer, Salomon and Wagoner.

Staff: Alicia Kinne-Clawson (786-7407)

Background: The standard of care established under current law is the level and types of care of a reasonably prudent practitioner possessing the degree of skill, care, and learning possessed by other members of the same profession.

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.

As a result of the COVID-19 pandemic, some states have begun enacting liability protections for physicians for changes in the provision of care. Throughout the course of the COVID-19 pandemic, the governor has issued executive orders imposing restrictions on non-urgent medical procedures, personal protective equipment use, and other services and practices as they relate to the provision of care by healthcare providers.

Summary of First Substitute Bill: The necessary elements of proof that an injury resulted from the failure of a health care provider to follow the accepted standard of care during the state of emergency enacted by the Governor in response to the COVID-19 pandemic include:

- The health care provider failed to exercise the degree of care, skill, and learning expected of a reasonably prudent practitioner in the profession, in the state of Washington, acting in similar circumstances and at the same time; and
- such a failure to exercise the standard of care was the primary cause of the injury.

In determining whether or not a health care provider failed to follow the accepted standard of care during the state of emergency, the court must consider if:

- the health care provider was acting in good faith based on guidance, direction, or recommendations from federal, state, or local officials in response to the pandemic and applicable to the health care provider; or
- the injury was due to a lack of resources directly attributable to the COVID-19 pandemic.

The necessary elements for determining proof of injury during the pandemic only apply if they are relevant to the determination of whether the health care provider followed the standard of care.

Appropriation: None.

Fiscal Note: Not requested.

Creates Committee/Commission/Task Force that includes Legislative members: No.

Effective Date: The bill contains an emergency clause and takes effect immediately.

Staff Summary of Public Testimony on Original Bill: *The committee recommended a different version of the bill than what was heard.* PRO: The hospital associations requested this bill to provide them limited liability in the execution in their duties so they are not held liable for changes in our understanding of the disease. This will allow them to do their job in an efficient and effective manner without risk of liability. The bill reflects a negotiated agreement between the hospital association and the Washington State association of justice. We were on the leading edge of an emergency response that would soon overwhelm the nation. Providers were frightened as clinical protocols changed daily. Those treatment

protocols have continued to change and there were a lot of questions about the providers liability. Then the Governor issued an executive orders suspending non-emergency procedures and clinicians had to navigate what non-emergent meant. We have delayed general screening and health maintenance in response to public health guidance but without assurance that clinicians would not be legally liable. Any injuries created because of state orders should be paid for by the state. Washington remains on a short list of states to not shield medical providers from liability as they have responded to the pandemic over the last year. This bill recognizes the standard of care during COVID-19 has been disrupted and that physicians acting in good faith should not be held liable for conditions beyond their control.

Persons Testifying: PRO: Senator Keith Wagoner, Prime Sponsor; Bernadette Pajer; Pam Kohlmeier; Taya Briley, Washington State Hospital Association; Timothy Dellit, UW Medicine/MD; Roman Daniels-Brown, Washington State Medical Association.

Persons Signed In To Testify But Not Testifying: No one.