

HOUSE BILL REPORT

HB 1669

As Reported by House Committee On: Judiciary

Title: An act relating to district and municipal court preconviction and postconviction probation and supervision services for persons charged with or convicted of misdemeanor crimes.

Brief Description: Concerning the district and municipal court's probation and supervision services.

Sponsors: Representatives Strow, Ericks, O'Brien, Rodne, Kirby, Haler, Eddy, Hinkle and Lantz.

Brief History:

Committee Activity:

Judiciary: 2/6/07, 2/23/07 [DPS].

Brief Summary of Substitute Bill

- Establishes a gross negligence standard of liability for a district or municipal court's provision of misdemeanor probation or supervision services, or monitoring of a misdemeanor defendant's compliance with a court order.

HOUSE COMMITTEE ON JUDICIARY

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 10 members: Representatives Lantz, Chair; Goodman, Vice Chair; Rodne, Ranking Minority Member; Warnick, Assistant Ranking Minority Member; Ahern, Kirby, Moeller, Pedersen, Ross and Williams.

Staff: Edie Adams (786-7180).

Background:

An offender convicted of a misdemeanor or gross misdemeanor offense serves his or her confinement in a local jail and may be subject to probation with court-ordered conditions after release. Under court rules applicable to courts of limited jurisdiction, a court has the authority

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to establish a misdemeanor probation department, and the method of providing probation services must be established by the presiding judge of the local court to meet the needs of the court.

Generally, a person does not have a duty to protect others from the criminal acts of third persons. Washington courts have recognized an exception to this general rule where a special relationship exists between the person and the third party. Under this exception, a governmental entity can be held liable for the acts of a criminal offender it is supervising if the governmental entity fails to adequately supervise the offender and that lack of supervision results in harm to another person. Government liability in this context is based on the premise that the government has a "take-charge" relationship with the offender, and therefore must exercise reasonable care to control the known dangerous propensities of the offender.

Under the doctrine of judicial immunity, judges are provided with absolute immunity from civil liability for acts performed within their judicial capacity. Judicial immunity may also extend to governmental agencies or executive branch officials while performing judicial functions. Quasi-judicial immunity applies to persons performing functions that are so comparable to those performed by judges that they should share the judge's absolute immunity while carrying out those functions. In the offender supervision context, court decisions have held that a probation or parole officer's duties in supervising an offender and monitoring the offender's compliance with conditions of release are not entitled to quasi-judicial immunity.

In a 2005 unpublished Court of Appeals decision, *Benskin v. Fife*, the Court addressed the issue of the liability of a city probation officer for the acts of an offender on probation for a DUI offense. The Court held that the relationship between the municipal court's probation department and the supervised probationer did give rise to a "take-charge" relationship, which imposes a duty on the probation department to protect the public from foreseeable behavior associated with the conditions of probation. The Court also found that judicial immunity, or quasi-judicial immunity, did not apply to the actions of the probation department, even though the judge was the head of the probation department. The Court found that a judge acting as a probation department head is acting in an administrative capacity, not a judicial capacity, and that the probation officer's monitoring of the probationer is not analogous to a judicial decision to place a defendant on probation or revoke probation.

When a superior court judge orders supervision of a misdemeanor or gross misdemeanor defendant placed on probation, responsibility for the supervision falls initially on the Department of Corrections (DOC), but a county may elect to assume responsibility for the supervision of these offenders by contract with the DOC. The DOC and any county probation department under contract with the DOC are not liable for civil damages resulting from an act or omission in conducting superior court misdemeanor probation activities unless the act or omission constitutes gross negligence.

Summary of Substitute Bill:

A limited jurisdiction court that provides misdemeanor supervision services is not liable for damages based on the inadequate supervision or monitoring of a misdemeanor defendant or probationer unless the inadequate supervision or monitoring constitutes gross negligence.

"Limited jurisdiction court" means a district court or a municipal court, and anyone acting or operating at the direction of such court, including but not limited to its officers, employees, agents, contractors, and volunteers.

"Misdemeanor supervision services" means pre-conviction or post-conviction misdemeanor probation or supervision services, or the monitoring of a misdemeanor defendant's compliance with a pre-conviction or post-conviction order of the court, including but not limited to community corrections programs, probation supervision, pretrial supervision, or pretrial release services.

The act shall not be construed to create a duty or affect judicial immunity.

Substitute Bill Compared to Original Bill:

The original bill provided limited immunity for damages arising from "any act or omission in the provision of probation, supervision, or monitoring services," whereas the substitute bill applies to damages arising from "inadequate supervision or monitoring." The original bill provided a clear, cogent, and convincing evidence standard of proof in actions alleging liability based on misdemeanor probation or supervision services. In addition, the original bill did not include the statement that the act does not affect judicial immunity.

Appropriation: None.

Fiscal Note: Not requested.

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

Staff Summary of Public Testimony:

(In support) This bill only applies to misdemeanor supervision and it provides district and municipal court probation departments with the same gross negligence standard that currently applies to the Department of Corrections when they supervise misdemeanants.

Accountability is the cornerstone of the criminal justice system. Having a probation department is one of the best ways to obtain that accountability and protection for our citizens. Under our current system, the more people we put on supervision, the greater our liability. We are always subject to the charge that we could do more, but it is not possible to get 100 percent compliance from this population of offenders. When an offender on supervision re-offends, we bear an unfair burden of liability. Cities are drastically changing how they deal with probation as a result of this liability exposure. They are doing less supervision, not more, which may actually increase the risk to public safety.

Probation officers are limited in their authority. They do not have arrest authority. They are limited to reporting violations to the court and gathering information to help the judge make a decision in the case. The primary supervision caseload for cities and counties are DUI offenders and domestic violence offenders. A majority of probationers are chemically dependent and many of them are repeatedly in and out of jail. There is a great benefit to society when we are able to succeed with an offender. However, because of the nature of the people that we work with, we can't always be successful.

(Opposed) We support the goals of effective supervision. However, there are important issues relating to how we get there and how we hold people responsible for providing effective supervision. We appreciate the willingness to remove the clear, cogent, and convincing evidence standard from the bill. There are two main concerns remaining. First, the bill extends the immunity to anything done by anybody involved in the supervision. This is too broad and could include the driving of a car to a meeting. The second concern is with the gross negligence standard. We shouldn't be immunizing situations where supervision is not taking place, as in the *Benskin* case where nothing was done for seven months for a repeat DUI offender.

Persons Testifying: (In support) Karen Lewis, Island County District Court Probation; James Docter, Bremerton Municipal Courts; and Tammy Fellin, Association of Washington Cities.

(Opposed) Larry Shannon, Washington State Trial Lawyers Association.

Persons Signed In To Testify But Not Testifying: None.