
Judiciary Committee

ESSB 5209

Title: An act relating to actions against health care providers.

Brief Description: Concerning actions for injury or damage against a health care provider based upon professional negligence.

Sponsors: Senate Committee on Health & Long-Term Care (originally sponsored by Senators Deccio, Rasmussen, Winsley, Hewitt, T. Sheldon, Morton, Parlette, Stevens, Hale, Brandland, Mulliken, McCaslin and Oke).

Brief Summary of Engrossed Substitute Bill

- Makes the following changes relating to medical malpractice actions:
 - Caps non-economic damages at \$350,000;
 - Limits contingency fees on a sliding scale basis;
 - Changes the applicable statute of limitations and tolling provisions;
 - Requires mandatory mediation without exception, unless subject to binding arbitration, and specifies the form of valid binding arbitration clauses;
 - Changes the rules relating to admissibility of collateral source payments;
 - Allows periodic payment of future damages of \$50,000 or more; and
 - Requires the plaintiff to provide pre-suit notice and a standard of care affidavit.

Hearing Date: 4/1/03

Staff: Edie Adams (786-7180).

Background:

Medical Malpractice Actions

Medical malpractice actions are civil tort actions for the recovery of damages for injury or death resulting from the provision of health care. There are three grounds on which a health care provider may be found liable in a medical malpractice action:

- The health care provider failed to follow the required standard of care;
- The health care provider promised that the injury suffered would not occur; or
- The injury resulted from health care to which the patient did not consent.

Failure to follow the standard of care means that the health care provider failed to exercise the degree of care expected of a reasonably prudent provider of the same field at that time, and acting in the same or similar circumstances.

Limitations on Damages

In 1986 the Legislature placed limitations on the amount of non-economic damages that may be awarded in any civil action for personal injury or death. The limitation was based on a formula tied to the age of the victim and the average annual wage in the state. The maximum award for non-economic damages was limited to 43 percent of the average annual wage multiplied by the victim's life expectancy. "Non-economic damages" are defined as subjective, non-monetary losses such as pain and suffering, mental anguish or emotional distress, disability or disfigurement, loss of consortium, loss of companionship, and destruction of the parent-child relationship. In contrast, "economic damages" are defined as monetary losses such as medical expenses and loss of earnings or employment.

This limitation on the amount of non-economic damages recoverable in a civil action was struck down by the Washington Supreme Court (Court) as a violation of the constitutional right to trial by jury contained in Article I, Section 21 of the Washington Constitution. *Sofie v. Fibreboard*. The Court found that the jury's fact-finding role is the essence of the right to a trial by jury contained in the Constitution. In addition, the Court held that the determination of damages, especially non-economic damages, is a factual issue within the province of the jury's fact-finding role.

Limitations on Attorneys' Fees

In medical malpractice actions, a statutory provision requires the court to determine the reasonableness of each party's attorneys' fees considering a number of factors. These factors include: time and labor required; novelty and difficulty of issues; customary fee for the area; nature and length of the relationship with the client; amount involved and the results obtained; experience, reputation and ability of the attorney; and whether the fee is fixed or contingent.

Statute of Limitations

A medical malpractice action must be brought within three years of the act or omission or within one year of when the claimant discovered or reasonably should have discovered that the injury was caused by the act or omission, *whichever period is longer*. The statute also provides an eight-year statute of repose, but this provision was found unconstitutional by the Washington Supreme Court on equal protection grounds.

The statute of limitations is tolled for minors and for any period of incompetency, disability or imprisonment. Knowledge of a parent or guardian is imputed to a minor, but the imputed knowledge does not take effect until the minor reaches age 18. In addition, the statute is tolled for fraud, intentional concealment or the presence of a foreign body. In those cases, the person has one year from actual knowledge of the fraud, concealment or presence of a foreign body to bring suit.

Mandatory Mediation and Binding Arbitration

Medical malpractice claims are subject to mandatory mediation in accordance with court rules adopted by the Washington Supreme Court. The court rule, Civil Rule 53.4, provides deadlines for commencing mediation proceedings, the process for appointing a mediator, and the procedure for conducting mediation proceedings. The rule allows mandatory mediation to be waived upon petition of any party that mediation is not appropriate.

Parties to a dispute may voluntarily agree in writing to enter into arbitration to resolve the dispute. A procedural framework for conducting the arbitration proceeding is provided in statute, including provisions relating to appointment of an arbitrator, attorney representation, witnesses, depositions, and awards. A party that agrees to arbitration waives the right to a jury trial on the issue. Arbitration decisions are binding on the parties but may be reviewed by the courts. Courts have authority to confirm arbitration awards, and limited authority to modify or vacate arbitration awards under certain circumstances.

Collateral Sources

In medical malpractice actions, any party may introduce evidence that the plaintiff has received compensation for the injury from collateral sources, except those purchased with the plaintiff's assets (e.g., insurance plan payments). The plaintiff may present evidence of an obligation to repay the compensation from a collateral source if the compensation is introduced into evidence.

Periodic Payment of Damages

In any civil action for personal injury or property damage, if the future economic damages award is at least \$100,000, the court must order periodic payments of the future damages upon the request of any party. The court may modify the periodic payment judgment upon the death of the judgment creditor, but cannot reduce or waive money damages awarded for loss of future earnings. If a judgment debtor fails to make timely payments, the court may order a lump sum payment of the outstanding payments.

Pre-Suit Notice and Standard of Care Affidavit

A plaintiff does not have to provide a defendant with prior notice of his or her intent to institute a medical malpractice suit. In addition, there is no requirement that a plaintiff provide to the defendant a health care provider's affidavit or certificate attesting to the merits of the case prior to proceeding with the suit.

Summary of Bill:

A number of changes are made with respect to medical malpractice actions in the areas of: limitations on damages and attorneys' fees; statute of limitations; mandatory mediation and binding arbitration clauses; collateral source payments; periodic payments of damages; and pre-suit notice and affidavit requirements.

Limitations on Damages

The amount of non-economic damages that may be awarded in medical malpractice actions is limited to \$350,000. The definition of non-economic damages in current law is amended to include "loss of ability to enjoy life" and "other non-pecuniary damages of any type."

If the Washington Supreme Court rules or reaffirms that the limitation on non-economic damages is unconstitutional, the provision will take effect upon passage of a constitutional amendment that authorizes limitations on non-economic damages in any or all civil actions.

Limitations on Attorneys' Fees

In medical malpractice actions, an attorney's contingency fees are limited as follows:

- 40 percent of the first \$50,000;
- 33.3 percent of the next \$50,000;
- 25 percent of the next \$500,000; and
- 15 percent of amounts over \$600,000.

These restrictions apply whether the recovery is by judgment, settlement, or alternative dispute resolution. The limitations apply to amounts "recovered," which means the net sum of the award less the costs of prosecuting or settling the claim. Costs of medical care or attorneys' office overhead costs are not deductible.

Statute of Limitations

A medical malpractice action must be brought within *the earlier of* three years of the act or omission that caused the injury, or one year after discovery that the injury was caused by the act or omission. A health care negligence action may never be brought more than three years after the act or omission except under the following circumstances:

- For fraud, concealment, or the presence of a foreign body, within one year from discovery;
- During any period of minority when the parent and defendant colluded in failing to bring an action for the minor; or
- For a minor under 6, within three years or prior to the minor's eighth birthday, whichever period is longer.

The statute of limitations is not tolled for minors. In addition, there is no tolling for any period of incompetency, disability, or imprisonment.

Mandatory Mediation and Binding Arbitration Clauses

Medical malpractice claims are subject to mandatory mediation without exception, unless the dispute is subject to binding arbitration under a health care services contract. The Court must by rule adopt a procedure for the parties to certify the manner of mediation used by the parties.

A binding arbitration clause in a health care services contract must be the first provision of the contract and must be expressed in language provided in the act. A disclosure concerning binding arbitration must be provided in bold type immediately preceding the signature line in

the contract and a party may rescind the contract within 30 days of signing. A binding arbitration clause that complies with these requirements is declared not to be a contract of adhesion, unconscionable or otherwise improper.

Collateral Sources

The restriction on presenting evidence of collateral source payments that come from the assets of the plaintiff or insurance purchased by the plaintiff is removed, so that collateral source payments of any kind may be introduced. The ability of the plaintiff to introduce evidence of an obligation to repay a collateral source payment is removed. The plaintiff may introduce evidence of amounts paid or contributed to secure the right to the collateral source payments (e.g., premiums).

An entity, such as an insurance company, that has paid collateral source compensation for the injuries does not have a right of subrogation or reimbursement from a plaintiff's tort recovery, unless otherwise provided by statute.

Periodic Payment of Damages

In a medical malpractice action, a future damages award of \$50,000 or more must be paid in whole or in part by periodic payments at the request of any party. A judgment debtor who is not adequately insured must post security adequate to satisfy the judgment. A periodic payment judgment must specify the recipient, dollar amount of payments, interval between payments, and the number of payments or period of time over which payments must be made.

The periodic payment judgment may not be modified except upon the death of the judgment creditor. Money damages for loss of future earnings may not be reduced or terminated upon the judgment creditor's death, but must be paid to persons to whom the judgment creditor owed a duty of support.

If the debtor has a continuing pattern of failing to make payments, the court must find the debtor in contempt of court and order the debtor to pay damages suffered as a result of the failure to make timely payments, including court costs and attorneys' fees.

Pre-Suit Notice and Standard of Care Affidavit

A health care negligence action may not be commenced unless the plaintiff has provided the defendant with 90 days prior notice of the intention to file a suit. The 90-day notice requirement does not apply if the defendant's name is unknown at the time of filing the complaint. If the notice is served within 90 days of the expiration of the statute of limitations, the time for commencing the action must be extended for 90 days from the date of service of the notice.

In health care negligence actions involving a claim of a breach of the standard of care, the plaintiff must serve an affidavit on each defendant stating that there is a reasonable probability that the defendant's conduct did not meet the required standard of care. The affidavit must be executed by a health care provider whose license, certification or

registration is identical to that of the defendant. The affidavit must be served on the defendant within 90 days of instituting the lawsuit, and within 60 days of the defendant's answer to the original complaint. The affidavit requirement may be waived by the court if the court finds that the defendant has refused to provide information necessary for execution of the affidavit.

Appropriation: None.

Fiscal Note: Not Requested.

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