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## Judiciary Committee

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### PSHB 2881

**Title:** An act relating to tort liability of governmental entities.

**Brief Description:** Limiting tort liability of governmental entities.

**Sponsors:** Representatives Lantz, Carrell, Clibborn, Moeller, Newhouse, Lovick, Schual-Berke, Darneille and Kagi.

<p style="text-align: center;"><b>Brief Summary of Proposed Substitute Bill</b></p> <ul style="list-style-type: none"><li>• Establishes a provision governing the liability of the state and local governmental entities, providing that governmental entities are not liable in a tort action except under certain listed circumstances.</li></ul>
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**Hearing Date:** 2/3/04

**Staff:** Edie Adams (786-7180).

**Background:**

Torts

A tort is a civil wrong in which the plaintiff seeks monetary compensation for harm to the plaintiff's person or property. Tort law was created originally by common law. Over the years, much of tort law has been codified into statutory law, so that today tort law exists in, and is being changed by, both statutory and case law.

A tort action based on negligence consists of the following elements: (1) A *duty* of the defendant towards the plaintiff; (2) *breach* of that duty; (3) *causation* of the injury by the breach; and (4) *damages* to the plaintiff.

Tort law imposes a duty upon everyone to use reasonable care when his or her actions create a foreseeable risk of harm to others. The standard of care owed is that of not being negligent. Negligence means the failure to exercise the degree of care that a reasonably prudent person would exercise under the same or similar circumstances.

Sovereign Immunity

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."

Despite this stated policy of holding government liable to the same extent as private persons, the courts have imposed some limitations on government liability in cases where the government is engaged in a governmental function not provided by the private sector, under what is called the "public duty doctrine." Governmental functions are those that are for the benefit of the public generally, and include regulatory programs, police and fire protection, correctional programs, and social welfare programs.

In contrast, the government acts in a proprietary capacity when it engages in a business-like function or service that is normally performed by the private sector. Examples of proprietary functions include garbage service, water and electrical service, and medical and psychiatric care. When the government is engaged in a proprietary function, the courts do not apply the public duty doctrine. Rather, the government is held to the same duty of care as a private individual engaging in the same activity.

### Public Duty Doctrine

The public duty doctrine is a judicially-created doctrine that provides a governmental entity with a defense against tort liability. The public duty doctrine is applied in cases where the governmental entity is acting in a governmental capacity, as opposed to a proprietary capacity. The premise of the public duty doctrine is that, when engaged in a governmental function, a governmental entity has a duty to the public in general, not a duty to any individual person. Under the public duty doctrine, a governmental entity is not liable for injuries resulting from its negligent actions unless it is shown that a duty was owed to the injured person as an individual, and not merely to the public generally.

Over the years, a number of exceptions have developed to the public duty doctrine. These exceptions recognize particular situations where the government acquires a special duty of care owed to a particular plaintiff or a limited class of potential plaintiffs. These exceptions are: legislative intent; failure to enforce; rescue doctrine; and special relationship.

*Legislative Intent:* The legislative intent exception applies when there is a statute clearly indicating that it is intended to protect a particular and circumscribed class of persons and where the plaintiff is a member of the protected class. This exception has been applied to allow governmental liability for negligent investigation of child abuse, since the statute creating a duty to investigate child abuse shows a legislative intent to protect both children and their parents. *Rodriguez v. Perez.*

*Failure to Enforce:* The failure to enforce exception to the public duty doctrine applies when: (1) A government agent is responsible for enforcing a statute, (2) the agent has actual knowledge of a statutory violation and fails to take corrective action despite a statutory duty to do so, and (3) the plaintiff is within the statute's protected class. For example, in *Bailey v. Forks*, the failure to enforce exception applied where a police officer allowed a known intoxicated person to drive, resulting in an accident that injured another person.

*Rescue Doctrine:* The rescue doctrine exception applies when a governmental entity has engaged in volunteer rescue efforts. This exception follows from the common-law principle that one who undertakes to render aid to another or to warn a person in danger must exercise reasonable care in

doing so. For example, in *Brown v. MacPherson's, Inc.*, the state was found liable for failing to provide a warning of a known avalanche danger after stating the warning would be given.

*Special Relationship:* Courts have held that the public duty doctrine does not protect a governmental entity from liability where the governmental entity had a special relationship with the injured person. A special relationship arises where: (1) There is direct contact or privity between the public official and the injured plaintiff which sets the latter apart from the general public; (2) there are express assurances given by the public official; and (3) the plaintiff justifiably relies on the assurances. In *Chambers-Castanes v. King County*, the court held that a special relationship giving rise to reliance on the part of the victim was established between a person who had called a police dispatcher repeatedly for help and the police dispatcher assured the person that police were being sent.

The courts have also recognized that a governmental entity's duty to control a third person's conduct creates a special relationship that may be the basis for liability. If the governmental entity has control over a dangerous person, the governmental entity has a duty to protect others from reasonably foreseeable dangers posed by the dangerous person. This duty to control doctrine is the basis for state and local governmental liability for the conduct of criminal offenders being supervised in the community.

#### **Summary of Proposed Substitute Bill:**

A new provision governing the liability of the state and local governmental entities is established. The state and local governmental entities are not liable for conduct, whether in a governmental or proprietary capacity, unless the conduct breached a duty owed to the individual injured person, rather than to the public in general. The state or a local governmental entity is liable only under one of the following circumstances:

- A legislative enactment states a clear intent to identify and protect a particular and circumscribed class of persons, and the injured person is within this class;
- A public official responsible for enforcing a statutory requirement had actual knowledge of a violation, failed to take corrective action despite a mandatory statutory duty to do so, and the injured person is within the class intended to be protected by the statute. In building code actions, there must also be knowledge that the violation created an inherently dangerous condition;
- A public official had direct contact or privity with the injured person in response to a specific inquiry, the official provided express assurances directly to the injured person, and the injured person justifiably relied on the assurances to his or her detriment;
- There is a duty to warn or come to the aid of a particular person, which exists only if the following conditions are met: (1) Express assurances of a successful warning or rescue are given to a person, or one in privity with the person, in response to a report of an emergency; (2) the person, or one in privity, reasonably relies on the assurances to his or her detriment; and (3) the person suffers injury as a result of the governmental entity's negligence; or
- The governmental entity had a responsibility to supervise a person charged with or convicted of a crime, and the governmental entity had actual knowledge that a specific

person, as opposed to the general public, was in imminent danger of injury caused by the supervised person, and the specific person suffered injury.

Current immunities or defenses available to governmental entities are not diminished by the provisions of the act.

The statutes providing that the state and local governmental entities are liable for their tortious conduct to the same extent as private persons are amended to reference the limitations on liability contained in the act.

**Appropriation:** None.

**Fiscal Note:** Requested on February 1, 2004.

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