SENATE BILL REPORT
SB 6704

As of February 5, 2004

Title: An act relating to actions against health care providers under chapter 7.70 RCW.

Brief Description: Changing provisions relating to actions against health care providers.

Sponsors: Senators Kline, Franklin, Winsley, Brown, McAuliffe, Keiser, Shin, Spanel, Prentice, Thibaudeau and Kohl-Welles.

Brief History:
Committee Activity: Judiciary: 2/6/04.

SENATE COMMITTEE ON JUDICIARY

Staff: Jinnah Rose-McFadden (786-7421)

Background: 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: (1) the provider failed to follow the required standard of care; (2) the provider promised that the injury suffered would not occur; or (3) there was no informed 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 and similarly situated provider.

Allocation of Fault. In a civil action involving the fault of more than one entity, a trier of fact must determine the percentage of the total fault attributable to every entity that caused the plaintiff's damages. The list of entities to whom fault is assigned is potentially longer than the list of defendants against whom judgment may be entered. The plaintiff may only recover damages from those defendants who were parties to the suit and against whom judgment was entered.

Defendants pay damages in proportion to their percentage of the fault. If joint and several liability applies, the defendants are responsible only for their combined proportionate shares of the plaintiff's damages, not for any share of the fault that is attributed to an entity that is not a party to the suit.

Vicarious Liability. A person is generally not responsible for the negligent acts of third persons. In some cases, a person may be responsible for a third person's act under a theory of agency. This type of liability is called vicarious liability. Respondeat superior is a form of vicarious liability that holds an employer liable for the acts of its employees, if the employee caused harm while acting within the scope of his or her employment. Generally, however, employers are not liable for torts committed by their independent contractors.

Hospitals, generally, do not have traditional employer/employee relationships with the health care providers performing services at the hospital. Hospitals grant physicians "privileges" to

practice at the hospital and provide services through providers, characterized as independent contractors. Theories have developed under which a hospital could be held liable for negligence of a non-employee practitioner. For example, under "ostensible agency," a hospital may be held liable for the malpractice of a physician if the hospital "holds out" the physician as an agent of the hospital, and the patient reasonably relies on this information in forming a belief that the hospital was the provider of the medical care.

Statute of Limitation and Repose. Generally, a medical malpractice claim 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 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, intentional concealment, or presence of a foreign body to bring suit. Knowledge of a parent or guardian is imputed to a minor, but the imputed knowledge does not take effect until the minor reaches the age of 18.

Under statute the statute of repose, a medical malpractice claim may never be commenced more than eight years after the act or omission. However, in 1998 a Washington State Supreme Court opinion held that this eight-year stature of repose on medical malpractice claims was unconstitutional on equal protection grounds. The court found that the statute had no rational relationship to a legitimate legislative goal.

Expert Witnesses. In a medical malpractice action, the plaintiff has the burden of proving all necessary elements of the claim. Expert witnesses are generally required in medical malpractice claims to establish (1) the standard of care of a reasonably prudent health care provider and (2) to prove that the failure to exercise that standard of care was the proximate cause of the patient's injury.

Statutory law does not establish qualifications for expert witnesses, court rules do. Under the Rules of Civil Procedure, courts have some discretion to limit the number of expert witnesses and can reject witnesses if they do not meet the standards of an expert. Prior to trial, the opposing party is entitled to depose any experts and other witnesses expected to testify.

Mandatory Mediation and Arbitration. Medical malpractice claims are subject to mandatory mediation in accordance with court rules. These rules provide deadlines for commencing mediation proceedings, the process for appointing a mediator, and the procedure for conducting mediation proceedings. Mandatory mediation may be waived upon petition. Additionally, some medical malpractice claims may be subject to mandatory arbitration and parties may voluntarily agree in writing to enter into arbitration.

Offers of Settlement. The following evidence is not admissible in a civil action: furnishing or offering to pay medical expenses needed as the result of an injury; offers of compromise; conduct or statements made in compromise negotiations; and expressions of sympathy relating to the pain, suffering, or death of an injured person. However, a statement of fault is admissible.

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 collateral source compensation.

Pre-Suit Notice and Certificate of Merit. A plaintiff does not have to provide a defendant with prior notice of his or her intent to file a medical malpractice suit. There is no requirement that a plaintiff provide a health care provider's affidavit or certificate attesting to the merits of the case prior to proceeding with the suit.

Non-economic Damage Awards. Non-economic damages are defined in statute as "subjective, non-monetary losses," including pain, suffering, disability or disfigurement, loss of companionship, loss of consortium or destruction of the parent-child relationship. Statutory law does not provide any fixed standards for a jury to use to measure non-economic damages.

Summary of Bill: Statutes regulating medical malpractice actions are amended in the areas of: allocation of fault; vicarious liability of hospitals; the statute repose; expert witnesses; pre-suit notice and certificate of merit requirements; mandatory mediation; early offers of settlement; collateral source payments; and advisory schedule of non-economic damages.

Allocation of Fault. The method of allocating fault in a medical malpractice action is changed. Fault is to be assigned only to claimants, defendants, and entities who have been released by the claimant, but not to entities who are immune, or entities who have an individual defense against the claimant.

Vicarious Liability. A hospital is not ostensibly liable for the negligence of a health care provider who is properly licensed and acting as an independent contractor. A hospital is liable for the negligence of a provider granted privileges to provide health care at the hospital only if: (1) the provider is an agent or employee of the hospital and the negligence occurred while the provider was acting within the course and scope of the provider's agency or employment with the hospital; or (2) the provider was fulfilling an essential function of the hospital.

Statute of Limitation and Repose. New language is added addressing the statute of limitations relating to minors injured as the result of the provision of health care. A patient who is under the age of 18 at the time of the act or omission may bring an action either: (1) when the patient reaches the age of 21, or eight years from the act or omission, whichever occurs first; or (2) one year from the time the patient, or the patient's representative, discovered or reasonably should have discovered that the injury was caused by the act or omission.

The eight year statute of repose is deleted.

Expert Witnesses. The number of expert witnesses allowed per side in a medical malpractice action is limited to two per issue, and two for proving a standard of care, except upon a showing of good cause. In the event that multiple parties on the same side of an action cannot agree on the experts to be called, the court must allow additional experts upon a showing of good cause.

All parties to a medical malpractice action must file a pretrial expert report that discloses the identity of all expert witnesses and states the nature of the testimony the experts will present at trial. Further depositions of the experts are prohibited. The testimony presented by an expert at trial is limited in nature to the opinions presented in the pre-trial report. The Supreme Court is required to adopt rules to implement the expert witness provisions.

Mandatory Mediation and Arbitration. Medical malpractice claims are subject to mandatory mediation unless the action is subject to mandatory arbitration or the parties agree to arbitration after the claim arises. The Supreme Court rules implementing the mandatory mediation requirement may not provide any other exceptions to the mandatory mediation requirement.

Offers of Settlement. Evidence of an "early offer of settlement" is inadmissible, not discoverable, and otherwise not available for use in a medical malpractice action, even if it contains an apology, admission of fault, or statement regarding remedial measures that might be taken to address the occurrence that led to the injury. An early offer of settlement means an offer that is made prior to the filing of a claim and that makes an offer of compensation for the injury.

Collateral Sources. The restriction on presenting evidence of collateral source payments that come from insurance purchased by the plaintiff is removed. The plaintiff, however, may introduce evidence of amounts paid to secure the right to the collateral source payments (e.g., premiums), in addition to introducing evidence of an obligation to repay the collateral source compensation.

Pre-Suit Notice and Certificate of Merit. A medical malpractice action may not be commenced unless the plaintiff provides 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 medical malpractice actions involving a claim of a breach of the standard of care, the plaintiff must file a certificate of merit at the time of commencing the action. The certificate of merit must state that there is a reasonable probability that the defendant's conduct did not meet the required standard of care. The certificate of merit must be executed by a health care provider. The court may grant up to a 90-day extension of time for filing the certificate if the court finds there is good cause to grant the extension.

Non-economic Damage Awards. A commission on non-economic damages is established to determine whether an advisory schedule of non-economic damages in medical malpractice cases could be developed to increase the predictability and proportionality of non-economic damage awards. The commission must consider the types of information appropriate for providing guidance to the trier of fact regarding non-economic damage awards, such as past non-economic damage awards for similar injuries or claims. The commission must also consider the appropriate format for an advisory schedule and how it would be presented to the trier of fact or utilized in alternative dispute resolution proceedings.

The commission must develop an implementation plan if it determines that an advisory schedule for non-economic damages is feasible. The commission's report and implementation plan, if appropriate, must be submitted to the Legislature by October 31, 2005.

The commission is composed of the following 15 members: four members of the Legislature, one from each of the two largest caucuses in the Senate and House of Representatives; one health care ethicist; one economist; one actuary; two attorneys, one representing the plaintiff's

bar and one representing the insurance defense bar; two superior court judges; one hospital representative; two physicians; and one medical malpractice insurer representative.

The Governor appoints the non-legislative members of the commission and must select a chair of the commission from among the members who do not represent health care providers, medical malpractice insurers, or attorneys.

Appropriation: None.

Fiscal Note: Requested on February 2, 2004.

Effective Date: Ninety days after adjournment of session in which bill is passed.