S-3588.3

SENATE BILL 6520

State of Washington 58th Legislature 2004 Regular Session

By Senators Brandland, T. Sheldon, McCaslin and Murray

Read first time 01/22/2004. Referred to Committee on Judiciary.

AN ACT Relating to civil liability reform; amending RCW 4.22.070, 4.22.015, 4.56.115, 4.56.110, 19.52.025, 4.56.250, 7.70.070, 7.70.100, 4.16.350, 7.70.080, 7.70.060, 4.24.250, 43.70.510, 70.41.200, 43.70.110, 43.70.250, 51.24.035, 4.16.300, 46.61.688, 4.92.005, 4.96.010, 4.92.040, 4.92.090, and 4.92.130; adding new sections to chapter 4.24 RCW; adding new sections to chapter 4.56 RCW; adding a new section to chapter 7.04 RCW; adding new sections to chapter 7.70 RCW; adding new sections to chapter 43.70 RCW; adding new sections to chapter 7.72 RCW; and creating new sections.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

PART 1
JOINT AND SEVERAL

NEW SECTION. **Sec. 101.** The legislature finds that counties, cities, other governmental entities, professionals, health care providers, businesses, individuals, and nonprofit organizations are finding it increasingly difficult to find affordable liability insurance. One of the drivers increasing the cost of liability insurance is the potential liability beyond one's proportionate share

of fault that a defendant must be insured against. Therefore, it is the intent of the legislature to enact reforms that create a more equitable distribution of liability based upon one's proportionate share of fault.

The legislature also finds, notwithstanding the tort reform measures it has enacted in the past, that in many instances defendants continue to pay more than their proportionate share of a claimant's total damages. The legislature in the 1986 tort reform act adopted as the policy of this state that several, or proportionate, liability is the general rule, subject to certain limited exceptions. This policy has been consistently recognized by the Washington state supreme court and most recently in *Tegman v. Accident & Medical Investigations*, 75 P.3d 497 (2003) when the court correctly stated "As we have consistently recognized, RCW 4.22.070 provides that several, or proportionate, liability is now intended to be the general rule." *Tegman*, 75 P.3d 499 (2003). The legislature now intends to limit further the exceptions to the general rule of several or proportionate liability.

Sec. 102. RCW 4.22.070 and 1993 c 496 s 1 are each amended to read as follows:

(1) In all actions involving fault of more than one entity, the trier of fact shall determine the percentage of the total fault which is attributable to every entity which caused the claimant's damages except entities immune from liability to the claimant under Title 51 RCW. The sum of the percentages of the total fault attributed to at-fault entities shall equal one hundred percent. The entities whose fault shall be determined include the claimant or person suffering personal injury or incurring property damage, defendants, third-party defendants, entities ((~~released by~~)) who have entered into a release, covenant not to sue, covenant not to enforce judgment, or similar agreement with the claimant, entities with any other individual defense against the claimant, and entities immune from liability to the claimant, but shall not include those entities immune from liability to the claimant under Title 51 RCW. Judgment shall be entered against each defendant except those entities who have ((~~been released by~~)) entered into a release, covenant not to sue, covenant not to enforce judgment, or similar agreement with the claimant or are immune from

liability to the claimant or have prevailed on any other individual defense against the claimant in an amount which represents that party's proportionate share of the claimant's total damages. The liability of each defendant shall be several only and shall not be joint except((~~:~~

~~(a)~~)) a party shall be responsible for the fault of another person or for payment of the proportionate share of another party where both were acting in concert or when a person was acting as an agent or servant of the party.

((~~(b) If the trier of fact determines that the claimant or party suffering bodily injury or incurring property damages was not at fault, the defendants against whom judgment is entered shall be jointly and severally liable for the sum of their proportionate shares of the claimants [claimant's] total damages.~~))

(2) If a defendant is jointly and severally liable under ((~~one of~~)) the exception((~~s~~)) listed in subsection((~~s~~)) (1)((~~(a) or (1)(b)~~)) of this section, such defendant's rights to contribution against another jointly and severally liable defendant, and the effect of settlement by either such defendant, shall be determined under RCW 4.22.040, 4.22.050, and 4.22.060.

(3)(a) Nothing in this section affects any cause of action relating to hazardous wastes or substances or solid waste disposal sites.

(b) Nothing in this section shall affect a cause of action arising from the tortious interference with contracts or business relations.

(c) Nothing in this section shall affect any cause of action arising from the manufacture or marketing of a fungible product in a generic form which contains no clearly identifiable shape, color, or marking.

Sec. 103. RCW 4.22.015 and 1981 c 27 s 9 are each amended to read as follows:

"Fault" includes acts or omissions, including misuse of a product, that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability or liability on a product liability claim. The term also includes breach of warranty, unreasonable assumption of risk, and unreasonable failure to avoid an injury or to mitigate damages. Legal requirements of causal relation apply both to fault as the basis for liability and to contributory fault.

A comparison of fault for any purpose under RCW 4.22.005 through ((~~4.22.060~~)) 4.22.070 shall involve consideration of both the nature of the conduct of the parties to the action and the extent of the causal relation between such conduct and the damages.

PART 2
EMPLOYER IMMUNITY FOR GOOD FAITH JOB REFERENCES

NEW SECTION. **Sec. 201.** The legislature finds that employers are becoming increasingly discouraged from disclosing job reference information by unclear laws and uncertain standards of liability. The legislature further finds that full good faith disclosure of job reference information will increase productivity, enhance the safety of the workplace, and provide greater opportunities to disadvantaged groups who may not have the educational background or resumes of other workers.

NEW SECTION. **Sec. 202.** A new section is added to chapter 4.24 RCW to read as follows:

(1) An employer who discloses information about a former or current employee's job performance, conduct, or other work-related information to a prospective employer, or employment agency as defined by RCW 49.60.040, at the specific request of that individual employer or employment agency, is immune from civil liability for such disclosure or its consequences when such disclosure is made in good faith. For purposes of this section, an employer's disclosure of work-related information at the specific request of another employer or employment agency is presumed to be made in good faith. However, the presumption of good faith may be rebutted upon a showing of clear, cogent, and convincing evidence that the information disclosed by the employer was knowingly false or deliberately misleading.

(2) For the purposes of this section, "employer" means a corporation, firm, organization, or any other entity with one or more employees and the employees and agents of the corporation, firm, organization, or other entity when acting within the scope of their employment or agency.

PART 3
POSTJUDGMENT INTEREST RATE

Sec. 301. RCW 4.56.115 and 1983 c 147 s 2 are each amended to read as follows:

Judgments founded on the tortious conduct of the state of Washington or of the political subdivisions, municipal corporations, and quasi municipal corporations of the state, whether acting in their governmental or proprietary capacities, shall bear interest from the date of entry at two percentage points above the ((~~maximum rate permitted under RCW 19.52.020 on~~)) equivalent coupon issue yield (as published by the board of governors of the federal reserve system) of the average bill rate for twenty-six week treasury bills as determined at the first bill market auction conducted during the calendar month immediately preceding the date of entry thereof((~~: PROVIDED, That~~)). In any case where a court is directed on review to enter judgment on a verdict or in any case where a judgment entered on a verdict is wholly or partly affirmed on review, interest on the judgment or on that portion of the judgment affirmed shall date back to and shall accrue from the date the verdict was rendered. Interest does not accrue on that portion of a judgment that is subject to appropriation by the legislature under RCW 4.92.090 or by a local legislative authority under RCW 4.96.010 until the appropriation has been made by the legislature or local legislative authority.

Sec. 302. RCW 4.56.110 and 1989 c 360 s 19 are each amended to read as follows:

Interest on judgments shall accrue as follows:

(1) Judgments founded on written contracts, providing for the payment of interest until paid at a specified rate, shall bear interest at the rate specified in the contracts: PROVIDED, That said interest rate is set forth in the judgment.

(2) All judgments for unpaid child support that have accrued under a superior court order or an order entered under the administrative procedure act shall bear interest at the rate of twelve percent.

(3) Judgments founded on the tortious conduct of individuals or other entities, whether acting in their personal or representative capacities, shall bear interest from the date of entry at two percentage points above the equivalent coupon issue yield, as published

by the board of governors of the federal reserve system, of the average bill rate for twenty-six week treasury bills as determined at the first bill market auction conducted during the calendar month immediately preceding the date of entry. In any case where a court is directed on review to enter judgment on a verdict or in any case where a judgment entered on a verdict is wholly or partly affirmed on review, interest on the judgment or on that portion of the judgment affirmed shall date back to and shall accrue from the date the verdict was rendered.

(4) Except as provided under subsections (1) ((~~and~~)), (2), and (3) of this section, judgments shall bear interest from the date of entry at the maximum rate permitted under RCW 19.52.020 on the date of entry thereof((~~: PROVIDED, That~~)). In any case where a court is directed on review to enter judgment on a verdict or in any case where a judgment entered on a verdict is wholly or partly affirmed on review, interest on the judgment or on that portion of the judgment affirmed shall date back to and shall accrue from the date the verdict was rendered. The method for determining an interest rate prescribed by this subsection is also the method for determining the "rate applicable to civil judgments" for purposes of RCW 10.82.090.

NEW SECTION. **Sec. 303.** The rate of interest required by sections 301 and 302(3), chapter . . ., Laws of 2004 (sections 301 and 302(3) of this act) applies to the accrual of interest as of the date of entry of judgment with respect to a judgment that is entered on or after the effective date of this section.

Sec. 304. RCW 19.52.025 and 1986 c 60 s 1 are each amended to read as follows:

Each month the state treasurer shall compute the highest rate of interest permissible under RCW 19.52.020(1), and the rate of interest required by RCW 4.56.110(3) and 4.56.115, for the succeeding calendar month. The treasurer shall file ((~~this rate~~)) these rates with the state code reviser for publication in the next available issue of the Washington State Register in compliance with RCW 34.08.020(8).

PART 4
MEDICAL LIABILITY

NEW SECTION. **Sec. 401.** The legislature finds that it is in the best interest of the people of the state of Washington to contain the significantly increasing costs of malpractice insurance for licensed health care professionals and institutions and noninstitutional care providers in order to ensure the continued availability and affordability of health care services in this state by enacting further reforms to the health care tort liability system.

The legislature finds that, notwithstanding the tort reform measures it has enacted in the past, the amounts being paid out in judgments and settlements have continued to increase inordinately, and that as a result there have been dramatic increases in the cost of health care professional liability insurance coverage. The legislature further finds that the upward pressures on already high malpractice insurance premiums threaten the publics' health by discouraging physicians and other health care professionals from initiating or continuing their practice in this state.

The legislature further finds that the state of California, largely as a result of its enactment of the "medical injury compensation reform act" in 1975, has been able to successfully stabilize the health care professional liability insurance market, maintain access to affordable quality health care services, and avert the kind of crisis now facing the residents of Washington.

The legislature finds that such reforms are rationally related to the legitimate goals of reducing the costs associated with the health care tort liability system while ensuring adequate and appropriate compensation for persons injured as a result of health care, ensuring the continued availability and affordability of health care services in this state, preventing the curtailment of health care services in this state, stabilizing insurance and health care costs, preventing stale health care liability claims, and protecting and preserving the public health, safety, and welfare as a whole.

Sec. 402. RCW 4.56.250 and 1986 c 305 s 301 are each amended to read as follows:

(1) As used in this section, the following terms have the meanings indicated unless the context clearly requires otherwise.

(a) "Economic damages" means objectively verifiable monetary losses, including medical expenses, loss of earnings, burial costs,

loss of use of property, cost of replacement or repair, cost of obtaining substitute domestic services, loss of employment, and loss of business or employment opportunities.

(b) "Noneconomic damages" means subjective, nonmonetary losses, including((,)) but not limited to pain, suffering, inconvenience, mental anguish, disability or disfigurement incurred by the injured party, loss of ability to enjoy life, emotional distress, loss of society and companionship, loss of consortium, injury to reputation and humiliation, ((and)) destruction of the parent-child relationship, and other nonpecuniary damages of any type.

(c) "Bodily injury" means physical injury, sickness, or disease, including death.

(d) "Average annual wage" means the average annual wage in the state of Washington as determined under RCW 50.04.355.

(2) In no action seeking damages for personal injury or death may a claimant recover a judgment for noneconomic damages exceeding an amount determined by multiplying 0.43 by the average annual wage and by the life expectancy of the person incurring noneconomic damages, as the life expectancy is determined by the life expectancy tables adopted by the insurance commissioner. For purposes of determining the maximum amount allowable for noneconomic damages, a claimant's life expectancy shall not be less than fifteen years. The limitation contained in this subsection applies to all claims for noneconomic damages made by a claimant who incurred bodily injury. Claims for loss of consortium, loss of society and companionship, destruction of the parent-child relationship, and all other derivative claims asserted by persons who did not sustain bodily injury are to be included within the limitation on claims for noneconomic damages arising from the same bodily injury.

(3) If a case is tried to a jury, the jury shall not be informed of the limitation contained in subsection (2) of this section.

NEW SECTION. **Sec. 403.** A new section is added to chapter 4.56 RCW to read as follows:

(1) In an action or arbitration for damages for injury or death occurring as a result of health care, or arranging for the provision of health care, whether brought under chapter 7.70 RCW, or under RCW 4.20.010, 4.20.020, 4.20.046, 4.20.060, 4.24.010, or 48.43.545(1), or

any combination thereof, the total amount of noneconomic damages may not exceed two hundred fifty thousand dollars.

(2) The limitation on noneconomic damages contained in subsection (1) of this section includes all noneconomic damages claimed by or on behalf of the person whose injury or death occurred as a result of health care or arranging for the provision of health care, as well as all claims for loss of consortium, loss of society and companionship, destruction of the parent-child relationship, and other derivative claims asserted by or on behalf of others arising from the same injury or death. If the jury's assessment of noneconomic damages exceeds the limitation contained in subsection (1) of this section, nothing in RCW 4.44.450 precludes the court from entering a judgment that limits the total amount of noneconomic damages to those limits provided in subsection (1) of this section.

Sec. 404. RCW 7.70.070 and 1975-'76 2nd ex.s. c 56 s 12 are each amended to read as follows:

(1) Except as set forth in subsection (2) of this section, the court shall, in any action under this chapter, determine the reasonableness of each party's attorneys' fees. The court shall take into consideration the following:

((~~(1)~~)) (a) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

((~~(2)~~)) (b) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

((~~(3)~~)) (c) The fee customarily charged in the locality for similar legal services;

((~~(4)~~)) (d) The amount involved and the results obtained;

((~~(5)~~)) (e) The time limitations imposed by the client or by the circumstances;

((~~(6)~~)) (f) The nature and length of the professional relationship with the client;

((~~(7)~~)) (g) The experience, reputation, and ability of the lawyer or lawyers performing the services;

((~~(8)~~)) (h) Whether the fee is fixed or contingent.

(2)(a) An attorney may not contract for or collect a contingency fee for representing a person in connection with an action for damages against a health care provider based upon professional negligence in excess of the following limits:

(i) Forty percent of the first fifty thousand dollars recovered;

(ii) Thirty-three and one-third percent of the next fifty thousand dollars recovered;

(iii) Twenty-five percent of the next five hundred thousand dollars recovered;

(iv) Fifteen percent of any amount in which the recovery exceeds six hundred thousand dollars.

(b) The limitations in this section apply regardless of whether the recovery is by judgment, settlement, arbitration, mediation, or other form of alternative dispute resolution.

(c) If periodic payments are awarded to the plaintiff, the court shall place a total value on these payments and include this amount in computing the total award from which attorneys' fees are calculated under this subsection.

(d) For purposes of this subsection, "recovered" means the net sum recovered after deducting any disbursements or costs incurred in connection with prosecution or settlement of the claim. Costs of medical care incurred by the plaintiff and the attorneys' office overhead costs or charges are not deductible disbursements or costs for such purposes.

(3) This section applies to all agreements for attorneys' fees entered into or modified after the effective date of this section.

Sec. 405. RCW 7.70.100 and 1993 c 492 s 419 are each amended to read as follows:

(1) No action based upon a health care provider's professional negligence may be commenced unless the defendant has been given at least ninety days' notice of the intention to commence the action. If the notice is served within ninety days of the expiration of the applicable statute of limitations, the time for the commencement of the action must be extended ninety days from the service of the notice.

(2) The provisions of subsection (1) of this section are not applicable with respect to any defendant whose name is unknown to the

plaintiff at the time of filing the complaint and who is identified therein by a fictitious name.

(3) After the filing of the ninety-day presuit notice, and before a superior court trial, all causes of action, whether based in tort, contract, or otherwise, for damages arising from injury occurring as a result of health care provided after July 1, 1993, shall be subject to mandatory mediation prior to trial.

((~~(2)~~)) (4) The supreme court shall by rule adopt procedures to implement mandatory mediation of actions under this chapter. The rules shall require mandatory mediation without exception and address, at a minimum:

(a) Procedures for the appointment of, and qualifications of, mediators. A mediator shall have experience or expertise related to actions arising from injury occurring as a result of health care, and be a member of the state bar association who has been admitted to the bar for a minimum of five years or who is a retired judge. The parties may stipulate to a nonlawyer mediator. The court may prescribe additional qualifications of mediators;

(b) Appropriate limits on the amount or manner of compensation of mediators;

(c) The number of days following the filing of a claim under this chapter within which a mediator must be selected;

(d) The method by which a mediator is selected. The rule shall provide for designation of a mediator by the superior court if the parties are unable to agree upon a mediator;

(e) The number of days following the selection of a mediator within which a mediation conference must be held;

(f) A means by which mediation of an action under this chapter may be waived by a mediator who has determined that the claim is not appropriate for mediation; and

(g) Any other matters deemed necessary by the court.

((~~(3)~~)) (5) Mediators shall not impose discovery schedules upon the parties.

(6) The supreme court shall by rule also adopt procedures for the parties to certify to the court the manner of mediation used by the parties to comply with this section.

Sec. 406. RCW 4.16.350 and 1998 c 147 s 1 are each amended to read as follows:

(1) Any civil action for damages for injury or death occurring as a result of health care which is provided after June 25, 1976, against:

((~~(1)~~)) (a) A person licensed by this state to provide health care or related services, including, but not limited to, a physician, osteopathic physician, dentist, nurse, optometrist, podiatric physician and surgeon, chiropractor, physical therapist, psychologist, pharmacist, optician, physician's assistant, osteopathic physician's assistant, nurse practitioner, or physician's trained mobile intensive care paramedic, including, in the event such person is deceased, his estate or personal representative;

((~~(2)~~)) (b) An employee or agent of a person described in (a) of this subsection ((~~(1) of this section~~)), acting in the course and scope of his or her employment, including, in the event such employee or agent is deceased, his or her estate or personal representative; or

((~~(3)~~)) (c) An entity, whether or not incorporated, facility, or institution employing one or more persons described in (a) of this subsection ((~~(1) of this section~~)), including, but not limited to, a hospital, clinic, health maintenance organization, ((~~or~~)) nursing home, or boarding home; or an officer, director, employee, or agent thereof acting in the course and scope of his or her employment, including, in the event such officer, director, employee, or agent is deceased, his or her estate or personal representative;

based upon alleged professional negligence shall be commenced within three years of the act or omission alleged to have caused the injury or condition, or one year of the time the patient or his or her representative or custodial parent or guardian discovered or reasonably should have discovered that the injury or condition was caused by said act or omission, whichever period ((~~expires later, except that in no event shall an action be commenced more than eight years after said act or omission: PROVIDED, That the time for commencement of an action is tolled upon proof of fraud, intentional concealment, or the presence of a foreign body not intended to have a therapeutic or diagnostic purpose or effect, until the date the patient or the patient's representative has actual knowledge of the act of fraud or concealment, or of the presence of the foreign body; the patient or the patient's~~

~~representative has one year from the date of the actual knowledge in which to commence a civil action for damages.~~

~~For purposes of this section, notwithstanding RCW 4.16.190, the knowledge of a custodial parent or guardian shall be imputed to a person under the age of eighteen years, and such imputed knowledge shall operate to bar the claim of such minor to the same extent that the claim of an adult would be barred under this section. Any action not commenced in accordance with this section shall be barred.~~

~~For purposes of this section, with respect to care provided after June 25, 1976, and before August 1, 1986, the knowledge of a custodial parent or guardian shall be imputed as of April 29, 1987, to persons under the age of eighteen years~~)) occurs first.

(2) In no event may an action be commenced more than three years after the act or omission alleged to have caused the injury or condition except:

(a) Upon proof of fraud, intentional concealment, or the presence of a foreign body not intended to have a therapeutic or diagnostic purpose or effect, in which case the patient or the patient's representative has one year from the date the patient or the patient's representative or custodial parent or guardian has actual knowledge of the act of fraud or concealment or of the presence of the foreign body in which to commence a civil action for damages.

(b) In the case of a minor, for any period during minority, but only for such period during minority in which the minor's custodial parent or guardian and the defendant or the defendant's insurer have committed fraud or collusion in the failure to bring an action on behalf of the minor.

(c) In the case of a minor under the full age of six years, in which case the action on behalf of the minor must be commenced within three years or prior to the minor's eighth birthday, whichever provides a longer period.

(3) Any action not commenced in accordance with this section is barred.

(4) For purposes of this section, the tolling provisions of RCW 4.16.190 do not apply.

(5) This section does not apply to a civil action based on intentional conduct brought against those individuals or entities

specified in this section by a person for recovery of damages for injury occurring as a result of childhood sexual abuse as defined in RCW 4.16.340(5).

Sec. 407. RCW 7.70.080 and 1975-'76 2nd ex.s. c 56 s 13 are each amended to read as follows:

(1) Any party may present evidence to the trier of fact that the ((~~patient~~)) plaintiff has already been, or will be, compensated for the injury complained of from ((~~any source except the assets of the patient, his representative, or his immediate family, or insurance purchased with such assets. In the event such evidence is admitted, the plaintiff may present evidence of an obligation to repay such compensation. Insurance bargained for or provided on behalf of an employee shall be considered insurance purchased with the assets of the employee~~)) a collateral source. In the event the evidence is admitted, the other party may present evidence of any amount that was paid or contributed to secure the right to any compensation. Compensation as used in this section shall mean payment of money or other property to or on behalf of the patient, rendering of services to the patient free of charge to the patient, or indemnification of expenses incurred by or on behalf of the patient. Notwithstanding this section, evidence of compensation by a defendant health care provider may be offered only by that provider.

(2) Unless otherwise provided by statute, there is no right of subrogation or reimbursement from a plaintiff's tort recovery with respect to compensation covered in subsection (1) of this section.

NEW SECTION. **Sec. 408.** A new section is added to chapter 7.04 RCW to read as follows:

(1) A contract for health care services that contains a provision for arbitration of a dispute as to professional negligence of a health care provider under chapter 7.70 RCW must have the provision as the first article of the contract and must be expressed in the following language:

"It is understood that any dispute as to medical malpractice that is as to whether any medical services rendered under this contract were unnecessary or unauthorized or were improperly, negligently, or incompetently rendered, will be determined by submission to arbitration

as provided by Washington law, and not by a lawsuit or resort to court process except as Washington law provides for judicial review of arbitration proceedings. Both parties to this contract, by entering into it, are giving up their constitutional right to have such a dispute decided in a court of law before a jury, and instead are accepting the use of arbitration."

(2) Immediately before the signature line provided for the individual contracting for the medical services, there must appear the following in at least ten-point bold red type:

"NOTICE: BY SIGNING THIS CONTRACT YOU ARE AGREEING TO HAVE ANY ISSUE OF MEDICAL MALPRACTICE DECIDED BY NEUTRAL ARBITRATION AND YOU ARE GIVING UP YOUR RIGHT TO A JURY OR COURT TRIAL. SEE ARTICLE ONE OF THIS CONTRACT."

(3) Once signed, such a contract governs all subsequent open-book account transactions for medical services for which the contract was signed until or unless rescinded by written notice within thirty days of signature. Written notice of such rescission may be given by a guardian or other legal representative of the patient if the patient is incapacitated or a minor.

(4) Where the contract is one for medical services to a minor, it may not be disaffirmed if signed by the minor's parent or legal guardian.

(5) Such a contract is not a contract of adhesion, nor unconscionable, nor otherwise improper, where it complies with subsections (1) through (3) of this section.

(6) Subsections (1) through (3) of this section do not apply to any health benefit plan contract offered by an organization regulated under Title 48 RCW that has been negotiated to contain an arbitration agreement with subscribers and enrollees under such a contract.

NEW SECTION. **Sec. 409.** A new section is added to chapter 7.70 RCW to read as follows:

RCW 7.70.100, 7.70.110, 7.70.120, and 7.70.130 do not apply if there is a contract for binding arbitration under section 408 of this act.

NEW SECTION. **Sec. 410.** A new section is added to chapter 7.70 RCW to read as follows:

(1) The definitions in this subsection apply throughout this section unless the context clearly requires otherwise.

(a) "Future damages" includes damages for future medical treatment, care or custody, loss of future earnings, loss of bodily function, or future pain and suffering of the judgment creditor.

(b) "Periodic payments" means the payment of money or delivery of other property to the judgment creditor at regular intervals.

(2) In any action for damages for injury occurring as a result of health care, the court shall, at the request of either party, enter a judgment ordering that money damages or its equivalent for future damages of the judgment creditor be paid in whole or in part by periodic payments rather than by a lump-sum payment if the award equals or exceeds fifty thousand dollars in future damages. In entering a judgment ordering the payment of future damages by periodic payments, the court shall make a specific finding as to the dollar amount of periodic payments which will compensate the judgment creditor for such future damages. As a condition to authorizing periodic payments of future damages, the court shall require the judgment debtor who is not adequately insured to post security adequate to ensure full payment of such damages awarded by the judgment. Upon termination of periodic payments of future damages, the court shall order the return of this security, or so much as remains, to the judgment debtor.

(3)(a) The judgment ordering the payment of future damages by periodic payments must specify the recipient or recipients of the payments, the dollar amount of the payments, the interval between payments, and the number of payments or the period of time over which payments must be made. The payments are only subject to modification in the event of the death of the judgment creditor.

(b) In the event that the court finds that the judgment debtor has exhibited a continuing pattern of failing to make the payments, as specified in (a) of this subsection, the court shall find the judgment debtor in contempt of court and, in addition to the required periodic payments, shall order the judgment debtor to pay the judgment creditor all damages caused by the failure to make such periodic payments, including court costs and attorneys' fees.

(4) However, money damages awarded for loss of future earnings may not be reduced or payments terminated by reason of the death of the judgment creditor, but must be paid to persons to whom the judgment

creditor owed a duty of support, as provided by law, immediately prior to his or her death. In such cases the court that rendered the original judgment, may, upon petition of any party in interest, modify the judgment to award and apportion the unpaid future damages in accordance with this subsection (4).

(5) Following the occurrence or expiration of all obligations specified in the periodic payment judgment, any obligation of the judgment debtor to make further payments ceases and any security given under subsection (2) of this section reverts to the judgment debtor.

(6) For purposes of this section, the provisions of RCW 4.56.250 do not apply.

(7) It is the intent of the legislature in enacting this section to authorize, in actions for damages for injury occurring as a result of health care, the entry of judgments that provide for the payment of future damages through periodic payments rather than lump-sum payments. By authorizing periodic payment judgments, it is the further intent of the legislature that the courts will utilize such judgments to provide compensation sufficient to meet the needs of an injured plaintiff and those persons who are dependent on the plaintiff for whatever period is necessary while eliminating the potential windfall from a lump-sum recovery that was intended to provide for the care of an injured plaintiff over an extended period who then dies shortly after the judgment is paid, leaving the balance of the judgment award to persons and purposes for which it was not intended. It is also the intent of the legislature that all elements of the periodic payment program be specified with certainty in the judgment ordering such payments and that the judgment not be subject to modification at some future time that might alter the specifications of the original judgment.

NEW SECTION. **Sec. 411.** A new section is added to chapter 4.56 RCW to read as follows:

In the event that the Washington state supreme court or other court of competent jurisdiction rules or affirms that section 403 of this act is unconstitutional, then the prescribed cap on noneconomic damages takes effect upon the ratification of a state constitutional amendment that empowers the legislature to place limits on the amount of noneconomic damages recoverable in any or all civil causes of action.

Sec. 412. RCW 7.70.060 and 1975-'76 2nd ex.s. c 56 s 11 are each amended to read as follows:

If a patient while legally competent, or his or her representative if he or she is not competent, signs a consent form which sets forth the following, the signed consent form shall constitute prima facie evidence that the patient gave his or her informed consent to the treatment administered and the patient has the burden of rebutting this by ((~~a preponderance of the~~)) clear, cogent, and convincing evidence:

(1) A description, in language the patient could reasonably be expected to understand, of:

(a) The nature and character of the proposed treatment;

(b) The anticipated results of the proposed treatment;

(c) The recognized possible alternative forms of treatment; and

(d) The recognized serious possible risks, complications, and anticipated benefits involved in the treatment and in the recognized possible alternative forms of treatment, including nontreatment;

(2) Or as an alternative, a statement that the patient elects not to be informed of the elements set forth in subsection (1) of this section.

Failure to use a form shall not be admissible as evidence of failure to obtain informed consent.

Sec. 413. RCW 4.24.250 and 1981 c 181 s 1 are each amended to read as follows:

(1) Any health care provider as defined in RCW 7.70.020 (1) and (2) as now existing or hereafter amended who, in good faith, files charges or presents evidence against another member of their profession based on the claimed incompetency or gross misconduct of such person before a regularly constituted review committee or board of a professional society or hospital whose duty it is to evaluate the competency and qualifications of members of the profession, including limiting the extent of practice of such person in a hospital or similar institution, or before a regularly constituted committee or board of a hospital whose duty it is to review and evaluate the quality of patient care, shall be immune from civil action for damages arising out of such activities. The proceedings, reports, and written records of such committees or boards, or of a member, employee, staff person, or investigator of such a committee or board, shall not be subject to

subpoena or discovery proceedings in any civil action, except actions arising out of the recommendations of such committees or boards involving the restriction or revocation of the clinical or staff privileges of a health care provider as defined above.

(2) A coordinated quality improvement program maintained in accordance with RCW 43.70.510 or 70.41.200 may share information and documents, including complaints and incident reports, created specifically for, and collected and maintained by a coordinated quality improvement committee or committees or boards under subsection (1) of this section, with one or more other coordinated quality improvement programs for the improvement of the quality of health care services rendered to patients and the identification and prevention of medical malpractice. Information and documents disclosed by one coordinated quality improvement program to another coordinated quality improvement program and any information and documents created or maintained as a result of the sharing of information and documents shall not be subject to the discovery process and confidentiality shall be respected as required by subsection (1) of this section and by RCW 43.70.510(4) and 70.41.200(3).

Sec. 414. RCW 43.70.510 and 1995 c 267 s 7 are each amended to read as follows:

(1)(a) Health care institutions and medical facilities, other than hospitals, that are licensed by the department, professional societies or organizations, health care service contractors, health maintenance organizations, health carriers approved pursuant to chapter 48.43 RCW, and any other person or entity providing health care coverage under chapter 48.42 RCW that is subject to the jurisdiction and regulation of any state agency or any subdivision thereof may maintain a coordinated quality improvement program for the improvement of the quality of health care services rendered to patients and the identification and prevention of medical malpractice as set forth in RCW 70.41.200.

(b) All such programs shall comply with the requirements of RCW 70.41.200(1)(a), (c), (d), (e), (f), (g), and (h) as modified to reflect the structural organization of the institution, facility, professional societies or organizations, health care service contractors, health maintenance organizations, health carriers, or any other person or entity providing health care coverage under chapter

48.42 RCW that is subject to the jurisdiction and regulation of any state agency or any subdivision thereof, unless an alternative quality improvement program substantially equivalent to RCW 70.41.200(1)(a) is developed. All such programs, whether complying with the requirement set forth in RCW 70.41.200(1)(a) or in the form of an alternative program, must be approved by the department before the discovery limitations provided in subsections (3) and (4) of this section and the exemption under RCW 42.17.310(1)(hh) and subsection (5) of this section shall apply. In reviewing plans submitted by licensed entities that are associated with physicians' offices, the department shall ensure that the exemption under RCW 42.17.310(1)(hh) and the discovery limitations of this section are applied only to information and documents related specifically to quality improvement activities undertaken by the licensed entity.

(2) Health care provider groups of ((~~ten~~)) five or more providers may maintain a coordinated quality improvement program for the improvement of the quality of health care services rendered to patients and the identification and prevention of medical malpractice as set forth in RCW 70.41.200. All such programs shall comply with the requirements of RCW 70.41.200(1)(a), (c), (d), (e), (f), (g), and (h) as modified to reflect the structural organization of the health care provider group. All such programs must be approved by the department before the discovery limitations provided in subsections (3) and (4) of this section and the exemption under RCW 42.17.310(1)(hh) and subsection (5) of this section shall apply.

(3) Any person who, in substantial good faith, provides information to further the purposes of the quality improvement and medical malpractice prevention program or who, in substantial good faith, participates on the quality improvement committee shall not be subject to an action for civil damages or other relief as a result of such activity.

(4) Information and documents, including complaints and incident reports, created specifically for, and collected, and maintained by a quality improvement committee are not subject to discovery or introduction into evidence in any civil action, and no person who was in attendance at a meeting of such committee or who participated in the creation, collection, or maintenance of information or documents specifically for the committee shall be permitted or required to

testify in any civil action as to the content of such proceedings or the documents and information prepared specifically for the committee. This subsection does not preclude: (a) In any civil action, the discovery of the identity of persons involved in the medical care that is the basis of the civil action whose involvement was independent of any quality improvement activity; (b) in any civil action, the testimony of any person concerning the facts that form the basis for the institution of such proceedings of which the person had personal knowledge acquired independently of such proceedings; (c) in any civil action by a health care provider regarding the restriction or revocation of that individual's clinical or staff privileges, introduction into evidence information collected and maintained by quality improvement committees regarding such health care provider; (d) in any civil action challenging the termination of a contract by a state agency with any entity maintaining a coordinated quality improvement program under this section if the termination was on the basis of quality of care concerns, introduction into evidence of information created, collected, or maintained by the quality improvement committees of the subject entity, which may be under terms of a protective order as specified by the court; (e) in any civil action, disclosure of the fact that staff privileges were terminated or restricted, including the specific restrictions imposed, if any and the reasons for the restrictions; or (f) in any civil action, discovery and introduction into evidence of the patient's medical records required by rule of the department of health to be made regarding the care and treatment received.

(5) Information and documents created specifically for, and collected and maintained by a quality improvement committee are exempt from disclosure under chapter 42.17 RCW.

(6) A coordinated quality improvement program may share information and documents, including complaints and incident reports, created specifically for, and collected and maintained by a quality improvement committee or a peer review committee under RCW 4.24.250 with one or more other coordinated quality improvement programs maintained in accordance with this section or with RCW 70.41.200, for the improvement of the quality of health care services rendered to patients and the identification and prevention of medical malpractice. Information and documents disclosed by one coordinated quality improvement program to

another coordinated quality improvement program and any information and documents created or maintained as a result of the sharing of information and documents shall not be subject to the discovery process and confidentiality shall be respected as required by subsection (4) of this section and RCW 4.24.250.

(7) The department of health shall adopt rules as are necessary to implement this section.

Sec. 415. RCW 70.41.200 and 2000 c 6 s 3 are each amended to read as follows:

(1) Every hospital shall maintain a coordinated quality improvement program for the improvement of the quality of health care services rendered to patients and the identification and prevention of medical malpractice. The program shall include at least the following:

(a) The establishment of a quality improvement committee with the responsibility to review the services rendered in the hospital, both retrospectively and prospectively, in order to improve the quality of medical care of patients and to prevent medical malpractice. The committee shall oversee and coordinate the quality improvement and medical malpractice prevention program and shall ensure that information gathered pursuant to the program is used to review and to revise hospital policies and procedures;

(b) A medical staff privileges sanction procedure through which credentials, physical and mental capacity, and competence in delivering health care services are periodically reviewed as part of an evaluation of staff privileges;

(c) The periodic review of the credentials, physical and mental capacity, and competence in delivering health care services of all persons who are employed or associated with the hospital;

(d) A procedure for the prompt resolution of grievances by patients or their representatives related to accidents, injuries, treatment, and other events that may result in claims of medical malpractice;

(e) The maintenance and continuous collection of information concerning the hospital's experience with negative health care outcomes and incidents injurious to patients, patient grievances, professional liability premiums, settlements, awards, costs incurred by the hospital for patient injury prevention, and safety improvement activities;

(f) The maintenance of relevant and appropriate information gathered pursuant to (a) through (e) of this subsection concerning individual physicians within the physician's personnel or credential file maintained by the hospital;

(g) Education programs dealing with quality improvement, patient safety, medication errors, injury prevention, staff responsibility to report professional misconduct, the legal aspects of patient care, improved communication with patients, and causes of malpractice claims for staff personnel engaged in patient care activities; and

(h) Policies to ensure compliance with the reporting requirements of this section.

(2) Any person who, in substantial good faith, provides information to further the purposes of the quality improvement and medical malpractice prevention program or who, in substantial good faith, participates on the quality improvement committee shall not be subject to an action for civil damages or other relief as a result of such activity.

(3) Information and documents, including complaints and incident reports, created specifically for, and collected, and maintained by a quality improvement committee are not subject to discovery or introduction into evidence in any civil action, and no person who was in attendance at a meeting of such committee or who participated in the creation, collection, or maintenance of information or documents specifically for the committee shall be permitted or required to testify in any civil action as to the content of such proceedings or the documents and information prepared specifically for the committee. This subsection does not preclude: (a) In any civil action, the discovery of the identity of persons involved in the medical care that is the basis of the civil action whose involvement was independent of any quality improvement activity; (b) in any civil action, the testimony of any person concerning the facts which form the basis for the institution of such proceedings of which the person had personal knowledge acquired independently of such proceedings; (c) in any civil action by a health care provider regarding the restriction or revocation of that individual's clinical or staff privileges, introduction into evidence information collected and maintained by quality improvement committees regarding such health care provider; (d) in any civil action, disclosure of the fact that staff privileges were

terminated or restricted, including the specific restrictions imposed, if any and the reasons for the restrictions; or (e) in any civil action, discovery and introduction into evidence of the patient's medical records required by regulation of the department of health to be made regarding the care and treatment received.

(4) Each quality improvement committee shall, on at least a semiannual basis, report to the governing board of the hospital in which the committee is located. The report shall review the quality improvement activities conducted by the committee, and any actions taken as a result of those activities.

(5) The department of health shall adopt such rules as are deemed appropriate to effectuate the purposes of this section.

(6) The medical quality assurance commission or the board of osteopathic medicine and surgery, as appropriate, may review and audit the records of committee decisions in which a physician's privileges are terminated or restricted. Each hospital shall produce and make accessible to the commission or board the appropriate records and otherwise facilitate the review and audit. Information so gained shall not be subject to the discovery process and confidentiality shall be respected as required by subsection (3) of this section. Failure of a hospital to comply with this subsection is punishable by a civil penalty not to exceed two hundred fifty dollars.

(7) The department, the joint commission on accreditation of health care organizations, and any other accrediting organization may review and audit the records of a quality improvement committee or peer review committee in connection with their inspection and review of hospitals. Information so obtained shall not be subject to the discovery process, and confidentiality shall be respected as required by subsection (3) of this section. Each hospital shall produce and make accessible to the department the appropriate records and otherwise facilitate the review and audit.

(8) A coordinated quality improvement program may share information and documents, including complaints and incident reports, created specifically for, and collected and maintained by a quality improvement committee or a peer review committee under RCW 4.24.250 with one or more other coordinated quality improvement programs maintained in accordance with this section or with RCW 43.70.510, for the improvement of the quality of health care services rendered to patients and the

identification and prevention of medical malpractice. Information and documents disclosed by one coordinated quality improvement program to another coordinated quality improvement program and any information and documents created or maintained as a result of the sharing of information and documents shall not be subject to the discovery process and confidentiality shall be respected as required by subsection (3) of this section and RCW 4.24.250.

(9) Violation of this section shall not be considered negligence per se.

Sec. 416. RCW 43.70.110 and 1993 sp.s. c 24 s 918 are each amended to read as follows:

(1) The secretary shall charge fees to the licensee for obtaining a license. After June 30, 1995, municipal corporations providing emergency medical care and transportation services pursuant to chapter 18.73 RCW shall be exempt from such fees, provided that such other emergency services shall only be charged for their pro rata share of the cost of licensure and inspection, if appropriate. The secretary may waive the fees when, in the discretion of the secretary, the fees would not be in the best interest of public health and safety, or when the fees would be to the financial disadvantage of the state.

(2) Except as provided in section 418 of this act, fees charged shall be based on, but shall not exceed, the cost to the department for the licensure of the activity or class of activities and may include costs of necessary inspection.

(3) Department of health advisory committees may review fees established by the secretary for licenses and comment upon the appropriateness of the level of such fees.

Sec. 417. RCW 43.70.250 and 1996 c 191 s 1 are each amended to read as follows:

It shall be the policy of the state of Washington that the cost of each professional, occupational, or business licensing program be fully borne by the members of that profession, occupation, or business. The secretary shall from time to time establish the amount of all application fees, license fees, registration fees, examination fees, permit fees, renewal fees, and any other fee associated with licensing or regulation of professions, occupations, or businesses administered

by the department. In fixing ((~~said~~)) such fees, the secretary shall set the fees for each program at a sufficient level to defray the costs of administering that program and the patient safety fee established in section 418 of this act. All such fees shall be fixed by rule adopted by the secretary in accordance with the provisions of the administrative procedure act, chapter 34.05 RCW.

NEW SECTION. **Sec. 418.** A new section is added to chapter 43.70 RCW to read as follows:

(1) The secretary shall increase the licensing fee established under RCW 43.70.110 by two dollars per year for the health care professionals designated in subsection (2) of this section and by two dollars per licensed bed per year for the health care facilities designated in subsection (2) of this section. Proceeds of the patient safety fee must be deposited into the patient safety account in section 422 of this act and dedicated to patient safety and medical error reduction efforts that have been proven to improve, or have a substantial likelihood of improving, the quality of care provided by health care professionals and facilities.

(2) Health care professionals and facilities subject to the one percent patient safety fee are:

(a) The following health care professionals licensed under Title 18 RCW:

(i) Advanced registered nurse practitioners, registered nurses, and licensed practical nurses licensed under chapter 18.79 RCW;

(ii) Chiropractors licensed under chapter 18.25 RCW;

(iii) Dentists licensed under chapter 18.32 RCW;

(iv) Midwives licensed under chapter 18.50 RCW;

(v) Naturopaths licensed under chapter 18.36A RCW;

(vi) Nursing home administrators licensed under chapter 18.52 RCW;

(vii) Optometrists licensed under chapter 18.53 RCW;

(viii) Osteopathic physicians licensed under chapter 18.57 RCW;

(ix) Osteopathic physicians' assistants licensed under chapter 18.57A RCW;

(x) Pharmacists and pharmacies licensed under chapter 18.64 RCW;

(xi) Physicians licensed under chapter 18.71 RCW;

(xii) Physician assistants licensed under chapter 18.71A RCW;

(xiii) Podiatrists licensed under chapter 18.22 RCW; and

(xiv) Psychologists licensed under chapter 18.83 RCW; and

(b) Hospitals licensed under chapter 70.41 RCW and psychiatric hospitals licensed under chapter 71.12 RCW.

NEW SECTION. **Sec. 419.** A new section is added to chapter 7.70 RCW to read as follows:

(1) One percent of the present value of the settlement or verdict in any action for damages based upon injuries resulting from health care shall be deducted from the settlement or verdict as a patient safety set aside. Proceeds of the patient safety set aside shall be distributed by the department of health in the form of grants, loans, or other appropriate arrangements to support strategies that have been proven to reduce medical errors and enhance patient safety as provided in section 418 of this act.

(2) Patient safety set asides shall be transmitted to the secretary of the department of health for deposit into the patient safety account established in section 422 of this act.

(3) The supreme court shall by rule adopt procedures to implement this section.

NEW SECTION. **Sec. 420.** A new section is added to chapter 43.70 RCW to read as follows:

(1) Patient safety fee and set aside proceeds shall be administered by the department, after seeking input from health care providers engaged in direct patient care activities, health care facilities, and other interested parties. In developing criteria for the award of grants, loans, or other appropriate arrangements under this section, the department shall rely primarily upon evidence-based practices to improve patient safety that have been identified and recommended by governmental and private organizations, including, but not limited to:

(a) The federal agency for health care quality and research;

(b) The federal institute of medicine;

(c) The joint commission on accreditation of health care organizations; and

(d) The national quality forum.

(2) Projects that have been proven to reduce medical errors and enhance patient safety shall receive priority for funding over those that are not proven, but have a substantial likelihood of reducing

medical errors and enhancing patient safety. All project proposals must include specific performance and outcome measures by which to evaluate the effectiveness of the project. Project proposals that do not propose to use a proven patient safety strategy must include, in addition to performance and outcome measures, a detailed description of the anticipated outcomes of the project based upon any available related research and the steps for achieving those outcomes.

(3) The department may use a portion of the patient safety fee proceeds for the costs of administering the program.

NEW SECTION. **Sec. 421.** A new section is added to chapter 43.70 RCW to read as follows:

The secretary may solicit and accept grants or other funds from public and private sources to support patient safety and medical error reduction efforts under this act. Any grants or funds received may be used to enhance these activities as long as program standards established by the secretary are maintained.

NEW SECTION. **Sec. 422.** A new section is added to chapter 43.70 RCW to read as follows:

The patient safety account is created in the custody of the state treasurer. All receipts from contributions authorized in sections 418 and 419 of this act must be deposited into the account. Expenditures from the account may be used only for the purposes of this act. Only the secretary or the secretary's designee may authorize expenditures from the account. The account is subject to allotment procedures under chapter 43.88 RCW, but an appropriation is not required for expenditures.

NEW SECTION. **Sec. 423.** A new section is added to chapter 43.70 RCW to read as follows:

By December 1, 2007, the department shall report the following information to the governor and the health policy and fiscal committees of the legislature:

(1) The amount of patient safety fees and set asides deposited to date in the patient safety account;

(2) The criteria for distribution of grants, loans, or other appropriate arrangements under this act; and

(3) A description of the medical error reduction and patient safety grants and loans distributed to date, including the stated performance measures, activities, timelines, and detailed information regarding outcomes for each project.

NEW SECTION. **Sec. 424.** It is the intent of the legislature by enacting sections 425 and 426 of this act that health care providers should remain personally liable for their own negligent or wrongful acts or omissions in connection with the provision of health care services, but that their vicarious liability for the negligent or wrongful acts or omissions of others should be curtailed. To that end, it is the intent of the legislature that *Adamski v. Tacoma General Hospital,* 20 Wn. App. 98, 579 P.2d 970 (1978), and its holding that hospitals may be held liable for a physician's acts or omissions under so-called "apparent agency" or "ostensible agency" theories should be reversed, so that hospitals will not be liable for the act or omission of a health care provider granted hospital privileges unless the health care provider is an actual agent or employee of the hospital. It is further the intent of the legislature that, notwithstanding any generally applicable principle of vicarious liability to the contrary, individual health care professionals will not be liable for the negligent or wrongful acts of others, except those who were acting under their direct supervision and control.

NEW SECTION. **Sec. 425.** A new section is added to chapter 7.70 RCW to read as follows:

A public or private hospital shall be liable for an act or omission of a health care provider granted privileges to provide health care at the hospital only if the health care provider is an actual agent or employee of the hospital and the act or omission of the health care provider occurred while the health care provider was acting within the course and scope of the health care provider's agency or employment with the hospital.

NEW SECTION. **Sec. 426.** A new section is added to chapter 7.70 RCW to read as follows:

A person who is a health care provider under RCW 7.70.020 (1) or (2) shall not be personally liable for any act or omission of any other

health care provider who was not the person's actual agent or employee or who was not acting under the person's direct supervision and control at the time of the act or omission.

NEW SECTION. **Sec. 427.** Unless otherwise provided in sections 401 through 412 of this act, sections 401 through 412 of this act apply to all causes of action filed on or after the effective date of this section.

PART 5
CONSTRUCTION LIABILITY

Sec. 501. RCW 51.24.035 and 1987 c 212 s 1801 are each amended to read as follows:

(1) Notwithstanding RCW 51.24.030(1), the injured worker or beneficiary may not seek damages ((~~against a design professional who is a third person and who has been retained to perform professional services on a construction project, or any employee of a design professional who is assisting or representing the design professional in the performance of professional services on the site of the construction project, unless responsibility for safety practices is specifically assumed by contract, the provisions of which were mutually negotiated, or the design professional actually exercised control over the portion of the premises where the worker was injured~~)) for an injury or occupational disease occurring in the course of employment at the site of a construction project, whether accomplished by a single contract or by multiple contracts, against the owner or developer of the project or against any person or entity performing work, furnishing materials, or providing services to or for the construction project including, but not limited to, design professionals, construction managers, general or prime contractors, suppliers, subcontractors of any tier, and any employee of a design professional, construction manager, general or prime contractor, supplier, or subcontractor of any tier.

(2) The immunity provided by this section does not extend to any person or entity who injures a worker by deliberate intention as defined in RCW 51.24.020, and it is against public policy to seek

indemnification in construction contracts against such liability. Such contractual clauses are void and unenforceable.

(3) The immunity provided by this section does not extend to manufacturers and product sellers for product liability actions as defined in chapter 7.72 RCW.

(4) The immunity provided by this section does not apply to the negligent preparation of design plans and specifications by a design professional.

((~~(3)~~)) (5) For the purposes of this section, "design professional" means an architect, professional engineer, land surveyor, or landscape architect, who is licensed or authorized by law to practice such profession, or any corporation organized under chapter 18.100 RCW or authorized under RCW 18.08.420 or 18.43.130 to render design services through the practice of one or more of such professions.

Sec. 502. RCW 4.16.300 and 1986 c 305 s 703 are each amended to read as follows:

RCW 4.16.300 through 4.16.320 shall apply to all claims or causes of action of any kind against any person, arising from such person having constructed, altered or repaired any improvement upon real property, or having performed or furnished any design, planning, surveying, architectural or construction or engineering services, or supervision or observation of construction, or administration of construction contracts for any construction, alteration or repair of any improvement upon real property. This section is specifically intended to benefit ((~~only those persons referenced herein~~)) persons having performed work for which the persons must be registered or licensed under RCW 18.08.310, 18.27.020, 18.43.040, 18.96.020, or 19.28.041, and shall not apply to claims or causes of action against ((~~manufacturers~~)) persons not required to be so registered or licensed.

PART 6
SEATBELT DEFENSE

Sec. 601. RCW 46.61.688 and 2003 c 353 s 4 are each amended to read as follows:

(1) For the purposes of this section, the term "motor vehicle" includes:

(a) "Buses," meaning motor vehicles with motive power, except trailers, designed to carry more than ten passengers;

(b) "Multipurpose passenger vehicles," meaning motor vehicles with motive power, except trailers, designed to carry ten persons or less that are constructed either on a truck chassis or with special features for occasional off-road operation;

(c) "Neighborhood electric vehicle," meaning a self-propelled, electrically powered four-wheeled motor vehicle whose speed attainable in one mile is more than twenty miles per hour and not more than twenty-five miles per hour and conforms to federal regulations under Title 49 C.F.R. Part 571.500;

(d) "Passenger cars," meaning motor vehicles with motive power, except multipurpose passenger vehicles, motorcycles, or trailers, designed for carrying ten passengers or less; and

(e) "Trucks," meaning motor vehicles with motive power, except trailers, designed primarily for the transportation of property.

(2) This section only applies to motor vehicles that meet the manual seat belt safety standards as set forth in federal motor vehicle safety standard 208 and to neighborhood electric vehicles. This section does not apply to a vehicle occupant for whom no safety belt is available when all designated seating positions as required by federal motor vehicle safety standard 208 are occupied.

(3) Every person sixteen years of age or older operating or riding in a motor vehicle shall wear the safety belt assembly in a properly adjusted and securely fastened manner.

(4) No person may operate a motor vehicle unless all child passengers under the age of sixteen years are either: (a) Wearing a safety belt assembly or (b) are securely fastened into an approved child restraint device.

(5) A person violating this section shall be issued a notice of traffic infraction under chapter 46.63 RCW. A finding that a person has committed a traffic infraction under this section shall be contained in the driver's abstract but shall not be available to insurance companies or employers.

(6) Failure to comply with ((~~the~~)) any requirements of this section ((~~does not constitute negligence, nor may failure to wear a safety belt assembly~~)) may be admissible as evidence of negligence in any civil action.

(7) This section does not apply to an operator or passenger who possesses written verification from a licensed physician that the operator or passenger is unable to wear a safety belt for physical or medical reasons.

(8) The state patrol may adopt rules exempting operators or occupants of farm vehicles, construction equipment, and vehicles that are required to make frequent stops from the requirement of wearing safety belts.

PART 7
GOVERNMENTAL ACTIVITIES

NEW SECTION. **Sec. 701.** While the common law doctrine of sovereign immunity declares that the state is immune from liability for the tortious conduct of its employees and officers, Article II, section 26 of the state Constitution allows the legislature to waive its immunity and specify by statute "in what manner, and in what courts, suit may be brought against the state." In the granting or withholding of sovereign immunity, there are limitations, gradations, and competing interests to be balanced by the legislature, including fairness to the citizens of the state, the preservation of proper and essential functions of government, and the conservation of scarce public resources.

In balancing these competing interests, the legislature must also balance the traditional role of the jury in determining damages in civil cases and the legislature's constitutional mandate under Article VIII, section 4 of the state Constitution to protect the state treasury through the appropriation process.

The legislature finds that these constitutional principles are not adequately served by either complete sovereign immunity or the complete waiver of sovereign immunity. Pursuant to the express authority of Article II, section 26 of the state Constitution, the purpose of sections 701 through 707 of this act is to recognize and implement these fundamental constitutional principles while providing a fair and equitable means of recovery against governmental entities for the negligent acts of their employees and officers.

The legislature further finds that government agencies administer programs, in the exercise of their constitutional, statutory, and moral

obligations, that inherently create a significant risk of tort liability in the absence of sovereign immunity. This potential liability is unique to the governmental function. As a result, state and local governments are not similarly situated to individual and private organizations, who are not under legal or moral obligations to provide for the public health, safety, and welfare. For these reasons, the legislature finds it necessary and appropriate to distinguish between the civil liability of private entities and governmental agencies.

Sec. 702. RCW 4.92.005 and 1985 c 217 s 6 are each amended to read as follows:

For the purposes of RCW 4.92.060, 4.92.070, 4.92.090, 4.92.130, ((~~4.92.140,~~)) and 4.92.150, volunteer is defined in RCW 51.12.035.

Sec. 703. RCW 4.96.010 and 2001 c 119 s 1 are each amended to read as follows:

(1) All local governmental entities, whether acting in a governmental or proprietary capacity, shall be liable for damages arising out of their tortious conduct, or the tortious conduct of their past or present officers, employees, or volunteers while performing or in good faith purporting to perform their official duties, to the same extent as if they were a private person or corporation, subject to the limitations provided in subsection (2) of this section. Filing a claim for damages within the time allowed by law shall be a condition precedent to the commencement of any action claiming damages. The laws specifying the content for such claims shall be liberally construed so that substantial compliance therewith will be deemed satisfactory.

(2)(a) Neither local government entities, nor their officers, employees, or volunteers are liable to pay a claim or a judgment for noneconomic damages as defined in RCW 4.56.250 by any one person that exceeds the sum of one million dollars or any claim or judgment, or portions thereof, that, when totaled with all other claims or judgments paid by the local government entities, officers, employees, or volunteers arising out of the same incident or occurrence, exceeds the sum of two million dollars. However, a judgment or judgments may be claimed and rendered in excess of these amounts and may be settled and paid under this section up to one million dollars or two million

dollars, as the case may be, and that portion of the judgment that exceeds these amounts may be reported to the local legislative authority, but may be paid in part or in whole only by further act of the local legislative authority. Notwithstanding the limited waiver of sovereign immunity provided in this section, the local government entities, officers, employees, or volunteers may agree, within the limits of insurance coverage provided, to settle a claim made or a judgment rendered against it without further action by the local legislative authority, but the local government entities, officers, employees, or volunteers have not waived any defense of sovereign immunity or increased the limits of its liability as a result of its obtaining insurance coverage for tortious acts in excess of the waiver provided in this section.

(b) The liability of the local government entities, officers, employees, or volunteers is several only and is not joint.

(c) No attorney may charge, demand, receive, or collect, for services rendered, fees in excess of twenty-five percent of any judgment or settlement under this section.

(d) Subsection (2)(a) of this section does not apply in cases in which the local government entity or its officers, employees, or volunteers are held liable for civil damages resulting from any negligent act or omission in the rendering of community placement, community supervision, community custody, parole supervision, probation supervision, or supervision of suspended sentences if (i) the offender under supervision has ever been convicted of the crime of first or second degree rape, first or second degree rape of a child, or first or second degree homicide, and (ii) the civil damages resulted from the subsequent commission of one of these specified offenses.

(3) Unless the context clearly requires otherwise, for the purposes of this chapter, "local governmental entity" means a county, city, town, special district, municipal corporation as defined in RCW 39.50.010, quasi- municipal corporation, or public hospital.

((~~(3)~~)) (4) For the purposes of this chapter, "volunteer" is defined according to RCW 51.12.035.

Sec. 704. RCW 4.92.040 and 2002 c 332 s 11 are each amended to read as follows:

(1) No execution shall issue against the state on any judgment.

(2) Whenever a final judgment against the state is obtained in an action on a claim arising out of tortious conduct, the claim shall be paid from the liability account, subject to the limitations of RCW 4.92.090.

(3) Whenever a final judgment against the state shall have been obtained in any other action, the clerk of the court shall make and furnish to the risk management division a duly certified copy of such judgment; the risk management division shall thereupon audit the amount of damages and costs therein awarded, and the same shall be paid from appropriations specifically provided for such purposes by law.

(4) Final judgments for which there are no provisions in state law for payment shall be transmitted by the risk management division to the senate and house of representatives committees on ways and means as follows:

(a) On the first day of each session of the legislature, the risk management division shall transmit judgments received and audited since the adjournment of the previous session of the legislature.

(b) During each session of legislature, the risk management division shall transmit judgments immediately upon completion of audit.

(5) All claims, other than judgments, made to the legislature against the state of Washington for money or property, shall be accompanied by a statement of the facts on which such claim is based and such evidence as the claimant intends to offer in support of the claim and shall be filed with the risk management division, which shall retain the same as a record. All claims of two thousand dollars or less shall be approved or rejected by the risk management division, and if approved shall be paid from appropriations specifically provided for such purpose by law. Such decision, if adverse to the claimant in whole or part, shall not preclude the claimant from seeking relief from the legislature. If the claimant accepts any part of his or her claim which is approved for payment by the risk management division, such acceptance shall constitute a waiver and release of the state from any further claims relating to the damage or injury asserted in the claim so accepted. The risk management division shall submit to the house and senate committees on ways and means, at the beginning of each regular session, a comprehensive list of all claims paid pursuant to this subsection during the preceding year. For all claims not approved by the risk management division, the risk management division shall

recommend to the legislature whether such claims should be approved or rejected. Recommendations shall be submitted to the senate and house of representatives committees on ways and means not later than the thirtieth day of each regular session of the legislature. Claims which cannot be processed for timely submission of recommendations shall be held for submission during the following regular session of the legislature. The recommendations shall include, but not be limited to:

(a) A summary of the facts alleged in the claim, and a statement as to whether these facts can be verified by the risk management division;

(b) An estimate by the risk management division of the value of the loss or damage which was alleged to have occurred;

(c) An analysis of the legal liability, if any, of the state for the alleged loss or damage; and

(d) A summary of equitable or public policy arguments which might be helpful in resolving the claim.

(6) The legislative committees to whom such claims are referred shall make a transcript, recording, or statement of the substance of the evidence given in support of such a claim. If the legislature approves a claim the same shall be paid from appropriations specifically provided for such purpose by law.

(7) Subsections (3) through (6) of this section do not apply to judgments or claims against the state housing finance commission created under chapter 43.180 RCW.

Sec. 705. RCW 4.92.090 and 1963 c 159 s 2 are each amended to read as follows:

The state of Washington, whether acting in its governmental or proprietary capacity, shall be liable for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation, subject to the limitations provided in this section.

(1) Neither the state nor its agencies, institutions, officers, employees, or volunteers are liable to pay a claim or a judgment for noneconomic damages as defined in RCW 4.56.250 by any one person that exceeds the sum of one million dollars or any claim or judgment, or portions thereof, that, when totaled with all other claims or judgments paid by the state or its agencies, institutions, officers, employees, or volunteers arising out of the same incident or occurrence, exceeds the sum of two million dollars. However, a judgment or judgments may

be claimed and rendered in excess of these amounts and may be settled and paid under this section up to one million dollars or two million dollars, as the case may be, and that portion of the judgment that exceeds these amounts may be reported to the legislature, but may be paid in part or in whole only by further act of the legislature. Notwithstanding the limited waiver of sovereign immunity provided in this section, the state or an agency, institution, or any officer, employee, or volunteer may agree, within the limits of insurance coverage provided, to settle a claim made or a judgment rendered against it without further action by the legislature, but the state or agency has not waived any defense of sovereign immunity or increased the limits of its liability as a result of its obtaining insurance coverage for tortious acts in excess of the waiver provided in this section.

(2) The liability of the state, its agencies, and institutions is several only and is not joint.

(3) No attorney may charge, demand, receive, or collect, for services rendered, fees in excess of twenty-five percent of any judgment or settlement under this section.

(4) Subsection (1) of this section does not apply in cases in which the state or its agencies, institutions, officers, employees, or volunteers are held liable for civil damages resulting from any negligent act or omission in the rendering of community placement, community supervision, community custody, parole supervision, probation supervision, or supervision of suspended sentences if (a) the offender under supervision has ever been convicted of the crime of first or second degree rape, first or second degree rape of a child, or first or second degree homicide, and (b) the civil damages resulted from the subsequent commission of one of these specified offenses.

Sec. 706. RCW 4.92.130 and 2002 c 332 s 14 are each amended to read as follows:

A liability account in the custody of the treasurer is hereby created as a nonappropriated account to be used solely and exclusively for the payment of liability settlements and judgments against the state under 42 U.S.C. Sec. 1981 et seq. or for the tortious conduct of its officers, employees, and volunteers and all related legal defense

costs. Legislative appropriation is required for expenditures from the liability account to the extent specified in RCW 4.92.090.

(1) The purpose of the liability account is to: (a) Expeditiously pay legal liabilities and defense costs of the state resulting from tortious conduct; (b) promote risk control through a cost allocation system which recognizes agency loss experience, levels of self-retention, and levels of risk exposure; and (c) establish an actuarially sound system to pay incurred losses, within defined limits.

(2) The liability account shall be used to pay claims for injury and property damages and legal defense costs exclusive of agency-retained expenses otherwise budgeted.

(3) No money shall be paid from the liability account, except for defense costs, unless all proceeds available to the claimant from any valid and collectible liability insurance shall have been exhausted and unless:

(a) The claim shall have been reduced to final judgment in a court of competent jurisdiction and legislative appropriation has been made to the extent required by RCW 4.92.090; or

(b) The claim has been approved for payment.

(4) The liability account shall be financed through annual premiums assessed to state agencies, based on sound actuarial principles, and shall be for liability coverage in excess of agency-budgeted self-retention levels.

(5) Annual premium levels shall be determined by the risk manager, with the consultation and advice of the risk management advisory committee. An actuarial study shall be conducted to assist in determining the appropriate level of funding.

(6) Disbursements for claims from the liability account shall be made to the claimant, or to the clerk of the court for judgments, upon written request to the state treasurer from the risk manager.

(7) The director may direct agencies to transfer moneys from other funds and accounts to the liability account if premiums are delinquent.

(8) The liability account shall not exceed fifty percent of the actuarial value of the outstanding liability as determined annually by the risk management division. If the account exceeds the maximum amount specified in this section, premiums may be adjusted by the risk management division in order to maintain the account balance at the

maximum limits. If, after adjustment of premiums, the account balance remains above the limits specified, the excess amount shall be prorated back to the appropriate funds.

NEW SECTION. **Sec. 707.** Sections 701 through 706 of this act apply to all claims that have not been reduced to judgment on the effective date of this section.

PART 8
CERTIFICATE OF MERIT

NEW SECTION. **Sec. 801.** A new section is added to chapter 4.24 RCW to read as follows:

(1) A certificate of merit shall be filed by the claimant's attorney as specified in subsection (2) of this section within ninety days of filing or service, whichever occurs later, of any action asserting a claim, cross-claim, counter-claim, or third party claim for damages arising out of: The failure to comply with the standard of care by a person licensed, registered, or certified under Title 18 RCW; the negligence of a health care facility as defined in RCW 48.43.005; or a product liability claim under chapter 7.72 RCW. The court may, for good cause shown, extend the period of time within which filing of the certificate is required. In no event shall the period of time for filing the certificate of merit exceed one hundred twenty days from the date of filing or service, whichever occurs later.

(2) The certificate filed by the claimant's attorney shall consist of the declaration of a qualified expert. The declaration shall include:

(a) The name, address, and credentials of claimant's expert;

(b) The expert's statement that the expert has reviewed the facts of the case, is knowledgeable of the relevant issues involved, and who:

(i) Holds a license, certificate, or registration issued by this state or another state in the same profession as that of the person against whom the claim is filed, and who practices in the same specialty or subspecialty as the person against whom the claim is filed; or

(ii) Has expertise in those areas requiring expert testimony in a product liability claim or in an action against a health care facility;

(c) The expert's statement of willingness and availability to testify to admissible facts, standard of care, or opinions regarding the case; and

(d) The expert's statement that on the basis of preliminary review and consultation, that there is reasonable and meritorious cause for the filing of the action.

(3) Where a certificate is required under this section, and where there are claims against multiple persons or entities, separate certificates must be filed for each party qualified under subsection (1) of this section. As appropriate, the same expert may file multiple declarations provided that each declaration meets the requirements of subsection (2) of this section.

(4) Persons identified in subsection (1) of this section against whom a claim has been asserted are not required to file an answer to that claim until thirty days after filing the certificate required in subsection (2) of this section.

(5) The provisions of this section are not applicable to a pro se claimant until such a time as an attorney appears on the claimant's behalf.

(6) A violation of this section is grounds for dismissal of the action; and a court of competent jurisdiction may sanction the claimant or the claimant's attorney for violating this section.

NEW SECTION. **Sec. 802.** Section 801 of this act applies to all actions for damages filed on or after July 1, 2004.

PART 9
GOVERNMENT STANDARDS DEFENSE

NEW SECTION. **Sec. 901.** A new section is added to chapter 7.70 RCW to read as follows:

In a products liability action alleging that an injury was caused by a failure to provide adequate warnings or information with regard to a pharmaceutical product, the defendant or defendants shall not be liable with respect to such allegations if the warnings or information that accompanied the product in its distribution were those required by the United States food and drug administration for a product approved pursuant to the federal food, drug, and cosmetic act (21 U.S.C. Sec.

321, *et seq.*) or section 351 of the public health service act (42 U.S.C. Sec. 262), or the warnings provided were those set forth in monographs developed by the United States food and drug administration for pharmaceutical products that may be distributed without an approved new drug application.

PART 10
MANUFACTURER DISTRIBUTION LIABILITY

NEW SECTION. **Sec. 1001.** A new section is added to chapter 7.72 RCW to read as follows:

A manufacturer of goods is not liable for harm caused by defects in goods attributed to such a manufacturer where the goods have been purchased through a chain of distribution that does not establish the manufacturer as the lawful source of the defective product. This section does not apply where the harm is caused by:

(1) Willful or wanton acts of negligence by the manufacturer;

(2) Conscious indifference or reckless disregard for the safety of others by the manufacturer; or

(3) Intentional conduct on the part of the manufacturer.

PART 11
OBESITY LAWSUITS

NEW SECTION. **Sec. 1101.** A new section is added to chapter 7.72 RCW to read as follows:

(1) Any manufacturer, distributor, or seller of a food or nonalcoholic beverage intended for human consumption shall not be subject to civil liability for personal injury or wrongful death based on an individual's consumption of food or nonalcoholic beverages in cases where liability is premised upon the individual's weight gain, obesity, or a health condition related to weight gain or obesity and resulting from the individual's long-term consumption of a food or nonalcoholic beverage.

(2) For the purposes of this section, the term "long-term consumption" means the cumulative effect of the consumption of food or nonalcoholic beverages, and not the effect of a single instance of consumption.

PART 12
MISCELLANEOUS

NEW SECTION. **Sec. 1201.** Part headings used in this act are not any part of the law.

NEW SECTION. **Sec. 1202.** If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

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