

Tort Reform

Overview

A tort is any intentional or negligent wrongdoing for which an action for civil damages may be brought for injuries sustained as a result of the wrongdoing. As a result of the increase in the number of tort cases being filed, the size of awards being granted, and court decisions making it easier to sue and to obtain large awards, reform is needed to ensure a more balanced and fair tort liability process.

Medical malpractice reform is an important part of overall tort reform. Access to health care in Washington State is at risk. Excessive costs and an unfair legal system are threatening the ability of physicians to practice medicine, potentially leaving patients without access to needed care. Doctors are limiting vital services such as obstetrics, trauma care and brain surgery because of the fear of being sued and the uncontrolled costs of the legal system. Many Washington communities are finding themselves without necessary medical services and unable to recruit new physicians. The current legal system hinders efforts to improve patient safety and reduce medical errors. The ever-increasing cost of health care is being significantly driven by a legal system many believe is overly influenced by personal injury attorneys who receive up to 50 percent of the award plus expenses, leaving little for the injured party.

Medical Malpractice

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

- The health care provider promised that the injury would not occur.
- The injury resulted from health care to which the patient did not consent.
- The health care provider failed to follow the required standard of care. Failure to follow the standard of care means that the health care provider did not exercise the degree of care expected of a reasonably prudent provider in the same field at that time, and acting in the same or similar circumstances.

Employer References

Employer references actions are civil tort actions for the recovery of damages for alleged injury to reputation (defamation) resulting from the provision of references by current or former employers of employees to potential or future employers of the employees.

The Washington state Supreme Court has held that an employer is generally protected by a common-law qualified privilege to provide job reference information to other employers. A qualified privilege allows the employer to disclose potentially defamatory information about an employee if the employer reasonably believes that the information is true and the employer is not acting out of malice toward the employee. To overcome the qualified privilege, an employee must prove by a preponderance of the evidence that the employer acted out of ill will, with a design to "causelessly or wantonly" injure the employee.

Governmental Liability

Governmental liability actions are civil tort actions for the recovery of damages for alleged injury or death resulting from the provision of health care resulting from the actions or inactions of government.

Under common law, states were immune from tort liability under a doctrine known as sovereign immunity. The Washington Constitution, in Article 2, section 26, provides that the Legislature shall direct in statute the manner in which the state may be sued. The Legislature adopted a broad waiver of state governmental immunity in 1961 and local governmental immunity in 1967. These statutes provide that a governmental entity may be sued "to the same extent as if it were a private person or corporation."

Seatbelt Defense

Any person 16 or older driving or riding in a car is required to wear a seat belt. A person may not drive a car unless every child passenger under 16 is wearing a seat belt or is in an appropriate car seat. A person who fails to comply with the seat belt laws may be issued a traffic infraction. With certain exceptions, a violation of a statutory mandate is not per se negligence, but the fact of such a violation may be introduced as evidence of negligence. However, the seat belt statute specifically declares that a person's failure to comply with the seat belt requirement does not constitute negligence. In addition, the same statute provides that the failure to wear a seat belt is not admissible as evidence of negligence or contributory fault in any civil action.

Limitations on Damages

In 1986, the Legislature placed limitations on the amount of non-economic damages that may be awarded in any civil action for personal injury or death.

"Non-economic damages" are defined as subjective, non-monetary losses such as pain and suffering, mental anguish or emotional distress, disability or disfigurement, loss of consortium, loss of companionship, and destruction of the parent-child relationship. In contrast, "economic damages" are defined as monetary losses such as medical expenses and loss of earnings or employment. This limitation on the amount of non-economic damages recoverable in a civil action was struck down by the Washington Supreme Court as a violation of the constitutional right to trial by jury. The Court found that the determination of damages, especially non-economic damages, is a factual issue within the province of the jury's fact-finding role.

Statute of Limitations

A medical malpractice action must be brought within time limits specified in statute, called the statute of limitations. Generally, a medical malpractice action must be brought within three years of the act or omission or within one year of when the claimant discovered or reasonably should have discovered that the injury was caused by the act or omission, whichever period is longer. The statute of limitations is tolled for minors and during any period of incompetency or disability. In addition, the statute is tolled for fraud, intentional concealment, or the presence of a foreign body; in these cases, the person has one year from actual knowledge of the fraud, concealment, or presence of a foreign body to bring suit.

Knowledge of a parent or guardian is imputed to a minor, but the imputed knowledge does not take effect until the minor reaches age 18. The statute governing the time period for bringing a medical malpractice action also provides that an action may never be commenced more than eight years after the act or omission. This eight-year outside time limit for bringing an action is called a "statute of repose." The Washington state Supreme Court has held this eight-year statute of repose unconstitutional on equal protection grounds. The Court found that the statute had no rational relationship to a legitimate legislative goal.

Joint and Several Liability

Generally, a defendant in a tort case is responsible only for his or her own percentage of fault in causing the claimant's harm. In some instances, however, multiple defendants may be "jointly and severally" liable for the whole of the claimant's damages. Joint and several liability means that any one defendant can be required to pay all of the damages. The paying defendant then has a "right of contribution" against any other defendant to recover shares of the damages based on each defendant's fault. Joint and several liability applies in actions where the defendants were acting in concert, or in cases where the plaintiff is entirely free from fault in causing his or her own injuries.

Wrongful Death

Wrongful death and survival statutes provide monetary damages as a remedy to replace the loss to survivors due to the premature death of the decedent, including (depending on the specific cause of action) compensation for the loss of financial and emotional support, love, companionship, and household and childcare services, and in some cases for the decedent's pain, suffering, anxiety, grief, emotional distress, and mental anguish. Wrongful death claims have always required some form of familial relationship and financial dependence on the deceased by the survivors.

Legislative History

There have been several liability reform bills introduced by Republicans during the past few years, including proposals in areas such as health care, construction, employer reference and seatbelt defense.

In 2005, the Legislature passed HB 1625 that ensured that an employer who discloses information about a former or current employee to a prospective employer or employment agency at the request of the employer or employment agency is presumed to be acting in good faith. The employer is immune from civil liability for the disclosure if the information relates to the:

- Employee's ability to perform his or her job.
- Employee's diligence, skill, or reliability in carrying out job duties.
- Illegal or wrongful acts committed by the employee when related to job duties.

In 2006, the Legislature passed 2SHB 2292, a large but relatively insubstantial health care liability reform measure that was not opposed by anybody, including physicians and trial lawyers. It contained a large number of provisions that were somewhat helpful, but did not make the real changes necessary for implementing meaningful medical malpractice reform. Some of these provisions include:

- Provides that in medical negligence actions, any statement of fault, apology, or sympathy, or a statement of remedial actions that may be taken, is not admissible as evidence in a civil trial under certain circumstances.
- Expands the statute granting immunity to a physician, dentist, or pharmacist who files charges or presents evidence about the incompetence or misconduct of another physician, dentist, or pharmacist to any health care professional.
- Authorizes a health profession disciplining authority to consider prior findings of unprofessional conduct when imposing a sanction against a health care provider.
- Requires a medical facility to notify the Department of Health (DOH) within 48 hours of confirmation that an adverse event has occurred and a subsequent report of the adverse event be made to the DOH within 45 days to include a root cause analysis of the adverse event and a corrective action plan, or an explanation of the reasons for not taking corrective action.
- Requires prescriptions for legend drugs to either be hand-printed, typewritten, or generated electronically.
- Requires self-insurers and insuring entities that write medical malpractice insurance to report medical malpractice closed claims closed after January 1, 2008 to the Office of the Insurance Commissioner, including specific data relating to the type of health care provider, specialty and facility involved; the reason for the claim and the severity of the injury; the dates when the event occurred, the claim was reported to the insurer, and the suit was filed; the injured person's age and sex; and information about the settlement, judgment, or other disposition of the claim, including an itemization of damages and litigation expenses.
- Increases the mandatory notice period for cancellation or non-renewal of medical malpractice liability insurance policies from 45 days to 90 days and requires an insurer to actually deliver or mail to the insured a written notice of the cancellation or non-renewal of the policy, which must include the actual reason for the cancellation or non-renewal and the significant risk factors that led to the action.
- Re-establishes the eight-year statute of repose in response to the Washington Supreme Court's decision overturning the statute of repose.
- Requires in medical negligence actions involving a claim of a breach of the standard of care that the plaintiff file a certificate of merit executed by a qualified expert stating that there is a reasonable probability that the defendant's conduct did not meet the required standard of care based on the information known at the time, and provides that the failure to file a certificate of merit that complies with these requirements results in dismissal of the case.
- Establishes a new voluntary arbitration system for disputes involving alleged professional negligence in the provision of health care where all parties have agreed to submit the dispute to voluntary arbitration.
- Provides that a medical malpractice action may not be commenced unless the plaintiff has provided the defendant with 90 days prior notice of the intention to file a suit.
- Provides that any attorney in a medical malpractice action who signs and files a claim or defense certifies that the claim or defense is not frivolous and that if the claim is found to be frivolous, the attorney is subject to sanctions, including an order to pay reasonable expenses and reasonable attorneys' fees incurred by the other party.

In 2008, the legislature considered HB 1873 that made a number of changes to state statutes governing wrongful death and survival causes of action, particularly in the areas of expanding areas of who could sue and the damages they could recover. It would have greatly increased the rewards

plaintiffs and their lawyers could have received in wrongful death suits, especially from "deep pockets" such as governmental agencies at the state and local levels. It eventually died in the Senate when it was amended to eliminate joint and several liability for the state and its political subdivisions in certain actions and to make certain liability of the state and its political subdivisions several and not joint in other actions. HB 1873 represented an enormous change in over 150 years of established law and in the underlying purpose of wrongful death statutes which has always been to replace the income of the decedent to the family.

Issues and Outlook

It is certain that numerous and comprehensive tort reform proposals similar to those that have failed in the past will continue to be introduced with the hope of getting them enacted. House Republicans should

continue to promote meaningful liability reform, including limitations on non-economic damages; evidence of collateral source payments; a sliding scale of attorney contingency fees; statute of repose/limitations reform; allowing periodic payments of damages; binding arbitration; mandatory mediation; joint and several liability reform; further tort judgment interest rate reform; seatbelt defense reform, and contractor liability insurance reform. House Republicans should also continue to pursue reform measures limiting actions against product manufacturers. A large part of the costs of products is due to the real and potential costs of defending against products liability action alleging that an injury was caused by a failure to provide adequate warnings or information with regard to a product. We should provide that a manufacturer is not liable if the warnings or information that accompanied the product were consistent with those required by a government agency. This is a necessary means of eliminating frivolous lawsuits against basically all manufacturers, including firearms manufacturers.

Wrongful death legislation similar to the original HB 1873 will be introduced in 2009.