

## Comprehensive Liability Reform Killed in the House

It was an unprecedented year for the Liability Reform Coalition in Olympia. Armed with a broad membership base, polling, a grassroots network of hundreds of thousands and supportive legislators on both sides of the aisle – the LRC made an aggressive push for the passage of comprehensive, meaningful liability reform. There hasn't been an attempt of this magnitude for nearly 20 years.

Early in the session, the Senate passed last year's reform bill, SB 5728 (see page 3 for bill details), with bipartisan support. Though this measure was missing several reforms needed, such as those in the area of construction, pharmaceuticals and obesity, it went a long way to address the liability crisis experienced by businesses, government, health care providers and not-for-profit organizations. We were pleased to see construction reform and obesity liability bills signed into law.

Unfortunately, the debate for comprehensive liability reform ended when SB 5728 reached the House Judiciary Committee. Representative Pat Lantz, Committee chair and most recent Legislator of the Year Award recipient by the Washington State Trial Lawyers Association, was unwilling to pass any meaningful liability reform measures. Instead she – along with House Democratic leadership – focused on bills that were a piecemeal approach but never getting to the core issue of comprehensive, balanced liability reform (see a comparison of House and Senate bills).

After great pressure by members of the LRC, Representative Lantz relented and agreed to give SB 5728 a hearing. However, at the eleventh hour she made the decision to kill the bill rather than to move it forward for more debate and deliberation.

So where does this leave us? Simply put we have four options: 1) Make another attempt to pass liability reform in the 2005 legislative session; 2) send a liability reform initiative to the people; 3) send a liability reform initiative to the Legislature or; 4) do nothing and walk away from this issue. Over the coming months, the Liability Reform Coalition will bring together its members to develop an ongoing strategy. You'll hear more from us on this in the near future.

### 2004 CIVIL LIABILITY REFORM

#### Comparison of Senate-passed and House-passed liability reform bills

ESSB 5728	Senate-passed Bills	House-passed Bills
Part 1: Joint and Several Liability Reform	Yes/Comprehensive joint and several liability reform	Limited to health care claims only, & only for non-economic damages (HB 1928)
Part 2: Employer Reference Check	Yes	Less comprehensive than Senate (HB 2779)
Part 3: Tort Judgment Interest Rate	Yes/T-bill plus 2%	Yes/T-bill plus 2% (HB 2485)
<b>Part 4: Medical Malpractice:</b>		
(a) Cap on Non-Economic Damages	Yes/\$350,000	None
(b) Advance Notice of Claim	Yes	Yes (HB 1927)
(c) Statute of Repose	Yes/3 years	Yes/6 years (HB 3200)
(d) Evidence of Collateral Sources of Payment	Yes	Yes, but without allowing consideration of future collateral sources or eliminating subrogation (HB 1928)
(e) Changing the Burden of Proof in Cases Involving Written Informed Consent	Yes	None
(f) Binding Arbitration Agreement (prior to delivery of services)	Yes	None
(g) Allowing Periodic Payments of Future Damages	Yes	None
Part 5: Construction Liability	Providing defenses in homeowner lawsuits passed last year (Chapter 80, Laws of 2003). See below for 2004 reforms.	
Part 6: Seatbelt Defense	Yes	None
Part 7: Governmental Liability	Yes/Partially restores sovereign immunity for state and local governments	None
Part 8: Certificate of Merit	Yes/Includes all persons licensed, certified, or registered under state law	Limited to health care only (HB 1926)
<b>OTHER REFORMS:</b>		
Construction Liability Reform	SSB 6600	Passed
Limiting Obesity Lawsuits	SSB 6601	Passed

### Inside This Issue

Legislative Session Report

Voting Record

Where to Find Us

Page 1

Page 2 & 3

Page 3

Message from the Chairman

Supreme Court Rases

Page 4

Page 4

# Voting Record

\*E = Excused \*A = Absent

House	Tort judgment				House	Tort judgment				Senate	Tort judgment			
	interest rate (70-27) HB 2485	Employer reference (51-45) HB 2779	Construction liability (83-13) SB 6600	Obesity (95-1) SB 6601		interest rate (70-27) HB 2485	Employer reference (51-45) HB 2779	Construction liability (83-13) SB 6600	Obesity (95-1) SB 6601		Comprehensive reform (27-22) SB 5728	Construction liability (48-0) SB 6000	Obesity (48-0) SB 6601	Tort judgment interest rate (43-3) HB 2485
An X supports the LRC position					An X supports the LRC position					An X supports the LRC position				
John Ahern - R	X	X	X	X	Pat Lantz - D	X		X	X	Sen. Don Benton - R		X	X	X
Gary Alexander - R	X	X	X	X	Kelli Linville - D	X		X	X	Sen. Jean Berkey - D		X	X	X
Glenn Anderson - R	X	X	X	X	John Lovick - D	X		X	X	Sen. Dale Brandland - R	X	X	X	X
Mike Armstrong - R	X	X	X	X	Dave Mastin - R	X	X	X	X	Sen. Lisa Brown - D		X	X	*E
Barbara Bailey - R	X	X	X	X	John McCoy - D	X		X	X	Sen. Don Carlson - R	X	X	X	X
Brad Benson - R	X	X	X	X	Joe McDermott - D				X	Sen. Alex Deccio - R	X	X	X	X
Brian Blake - D				X	Joyce McDonald - R	X	X	X	X	Sen. Mark Doumit - D		X	X	X
Marc Boldt - R	X	X	X	X	Jim McIntire - D				X	Sen. Tracey Eide - D		X	X	X
Jim Buck - R	X	X	X	X	Lois McMahan - R	X	X	X	X	Sen. Luke Esser - R	X	X	X	X
Roger Bush - R	X	X	X	X	Cathy McMorris - R	X	X	X	E*	Sen. Darlene Fairley - D		X	X	*E
Jack Cairnes - R	X	X	X	X	Tom Mielke - R	X	X	X	X	Sen. Bill Finkbeiner - R	X	X	X	*A
Tom Campbell - R		X	X	X	Mark Miloscia - D	X		X	X	Sen. Rosa Franklin - D		X	X	X
Mike Carrell - R	X	X	X	X	Jim Moeller - D	X		X	X	Sen. Karen Fraser - D		X	X	X
Bruce Chandler - R	X	X	X	X	Dawn Morrell - D	X		X	X	Sen. Pat Hale - R	X	X	X	X
Maralyn Chase - D				X	Jeff Morris - D	X		X	X	Sen. Jim Hargrove - D	X	X	X	X
Frank Chopp - D	X		X	X	Ed Murray - D				X	Sen. Mary Margaret Haugen - D	X	X	X	X
Jim Clements - R	X	X	X	X	Dan Newhouse - R	X	X	X	X	Sen. Mike Hewitt - R	X	X	*E	X
Judy Clibborn - D	X		X	X	Toby Nixon - R	X	X	X	X	Sen. Jim Honeyford - R	X	X	X	X
Eileen Cody - D	X		X	X	Al O'Brien - D	X		X	X	Sen. Jim Horn - R	X	X	X	X
Cary Condotta - R	X	X	X	X	Ed Orcutt - R	X	X	X	X	Sen. Ken Jacobsen - D		X	X	
Steve Conway - D				X	Timm Ormsby - D				X	Sen. Steve Johnson - R	X	X	X	X
Mike Cooper - R				X	Kirk Pearson - R	X	X	X	X	Sen. Jim Kastama - D		X	X	X
Don Cox - R	X	X	X	X	Eric Pettigrew - D				X	Sen. Karen Keiser - D		X	X	X
Larry Crouse - R	X	X	X	X	Skip Priest - R	X	X	X	X	Sen. Adam Kline - D		X	X	
Jeannie Darnelle - D			X	X	Dave Quall - D	X		X	X	Sen. Jeanne Kohl-Welles - D		X	X	X
Richard DeBolt - R	X	X	X	X	Dan Roach - R	X	X	X	X	Sen. Rosemary McAuliffe - D		X	X	X
Jerome Delvin - R	X	X	X	X	Phil Rockefeller - D	X		X	X	Sen. Bob McCaslin - R	X	X	X	X
Mary Lou Dickerson - D				X	Jay Rodne - R	X	X	X	X	Sen. Bob Morton - R	X	X	X	X
Hans Dunshee - D	X		X		Sandra Romero - D				X	Sen. Joyce Mulliken - R	X	X	X	X
Jeanne Edwards - D	E*	E*	X	E*	Laura Ruderman - D				X	Sen. Brian Murray - R	X	X	X	X
Bill Eickmeyer - D	X		E*	X	Sharon Tomiko Santos - D	X		X	X	Sen. Bob Oke - R	X	X	X	X
Doug Ericksen - R	X	X	X	X	Lynn Schindler - R	X	X	X	X	Sen. Linda Evans Parlette - R	X	X	X	X
Dennis Flanningan - D			X	X	Mark Schoesler - R	X	X	X	X	Sen. Cheryl Pflug	X	X	X	X
Bill Fromhold - D	X		X	X	Shay Schual-Berke - D	X		X	X	Sen. Erik Poulsen - D		X	X	X
Bill Grant - D	X		X	X	Barry Sehlin - R	X	X	X	X	Sen. Margarita Prentice - D		X	X	X
Kathy Haigh - D	X		X	X	Jan Shabro - R	X	X	X	X	Sen. Marilyn Rasmussen - D	X	X	X	X
Shirley Hankins - R	X	X	X	X	David Simpson - D				X	Sen. Debbie Regala - D		X	X	X
Brian Hatfield - D	X			X	Geoff Simpson - D				X	Sen. Pam Roach - R	X	X	X	X
Bill Hinkle - R	X	X	X	X	Mary Skinner - R	X	E*	X	X	Sen. Dave Schmidt - R	X	X	X	X
Jane'a Holmquist - R	X	X	X	X	Helen Sommers - D	X		X	X	Sen. Larry Sheahan - R	X	X	X	X
Zack Hudgins - D			X	X	Brian Sullivan - D				E*	Sen. Betti Sheldon - D		X	X	X
Sam Hunt - D			X	X	Bob Sump - R	X	X	X	X	Sen. Tim Sheldon - D	X	*E	X	X
Ross Hunter - D	X		X	X	Gigi Talcott - R	X	X	X	X	Sen. Paull Shin - D		X	X	X
Fred Jarrett - R	X		X	X	Rodney Tom - R	X	X	X	X	Sen. Harriet Spanel - D		X	X	X
Ruth Kagi - D			X	X	Dave Upthegrove - D				X	Sen. Val Stevens - R	X	X	X	X
Phyllis Kenney - D			X	X	Velma Veloria - D				X	Sen. Dan Swecker - R	X	X	X	X
Lynn Kessler - D			X	X	Deb Wallace - D	X		X	X	Sen. Pat Thibodeau - D		X	X	
Steve Kirby - D				X	Alex Wood - D				X	Sen. Shirley Winsley - R		X	X	X
Dan Kristiansen - R	X	X	X	X	Beverly Woods - R	X	X	X	X	Sen. Joseph Zarelli - R	X	X	X	X

**LRC Website:** To keep up-to-date on LRC activities and information, you can visit our website at [www.walrc.org](http://www.walrc.org).

## Voting Record - Bill Details

**SB 5728** – Comprehensive liability reform – see below. Died in the House.

**SB 6600** - Clarifies and re-affirms the six-year time limit for bringing a construction defect lawsuit. The bill is needed because the intent of the Legislature has been subverted by court decisions that rendered the six-year statutory limitation for liability to lawsuits irrelevant. Signed into law.

**SB 6601** – Provides liability protections for manufacturers, distributors or sellers of food in cases where liability is premised upon the individual's weight gain, obesity, or a health condition

## Engrossed Substitute Senate Bill 5728 Liability Reform

### PART 1: JOINT AND SEVERAL LIABILITY REFORM

Under current law, one party in a multi-party lawsuit can be required to pay 100 percent of all damages even if they have been found legally responsible for only 10 percent (or less). This section provides that a defendant cannot be held liable for damages more than double their percentage of fault. For example, if a defendant is found to be 20% at fault they can be held liable for up to 40% of the award.

### PART 2: EMPLOYER REFERENCE CHECK

This proposal is designed to protect employers while improving workplace safety. Under this proposal, employers who in good faith disclose job performance, on-the-job conduct or other work-related information about an employee would be protected from lawsuits.

### PART 3: TORT JUDGMENT INTEREST RATE

This sensible proposal would simply revise old statutory language that has defendants currently paying tort judgment interest rates of at least 12 percent when they lose an appeal. The language was written in the 1970s as an attempt to cap then skyrocketing interest rates in the appeals process. Today, interest rates are much lower, and this proposal would tie tort judgment interest rates to a rate two percentage points above the 26-week Treasury Bill rate.

### PART 4: MEDICAL-MALPRACTICE

There is a crisis in this state with rapidly escalating medical malpractice insurance premiums. The solution to this problem is to enact provisions from the overwhelmingly successful California reform model, MICRA (Medical Injury Compensation Reform Act). This includes:

**Cap on Non-Economic Damages** - Places a \$350,000 limit on non-economic damages (pain and suffering). Economic losses are not capped. Because this provision is a constitutional change it requires a two-thirds vote of the House and Senate, and a majority vote of the people.

**Advance Notice of a Claim** - Requires a claimant to give a 90-day notice of an intention to bring a suit for alleged professional negligence. If notice is given in 90 days of expiration of the statute of limitations, the statute is extended 90 days from the date of the notice.

**Statute of Repose** – A claim of medical negligence must be brought within three years of injury or one year from the time the patient/guardian should have reasonably discovered the injury – whichever is first.

**Evidence of Collateral Sources Payment** – A defendant may introduce evidence of collateral source payments (e.g. personal health insurance) as they relate to damage sought by the claimant. If a defendant introduces such personal evidence, the claimant

resulting from his/her long-term consumption of a food or nonalcoholic beverage. Signed into law.

**HB 2485** – Reduces the tort judgment interest rate – the interest rate defendants pay on a verdict while awaiting appeal – to two points above the T-bill. Current law sets the tort judgment interest rate at 12% or 4 points above the T-bill, whichever is HIGHER. The current 26-week T-bill rate is 1.008%). Signed into law.

**HB 2779** – The title of this bill implies it will provide liability protection for employers who provide references on current or past employees. Unfortunately, the bill as drafted fell short of this intention and therefore is not supported by the LRC. Died in the Senate.

may also introduce of the cost of the premiums for such personal insurance.

**Changing the Burden of Proof** – Raises the burden of proof in a medical negligence case to “clear, cogent, and convincing” evidence where the patient has signed an informed consent form, but nonetheless alleges he or she did not consent.

**Binding Arbitration of Disputes** – Patients and health care providers may agree that any future dispute may be resolved through binding arbitration.

**Allowing Periodic Payments of Future Damages** – A defendant may pay out damages – if over \$50,000 – in periodic amounts. This avoids claimants wasting of an award prior to actual need.

### PART 5: CONSTRUCTION LIABILITY

This section passed in 2003 as a standalone bill and is now current law.

### PART 6: SEATBELT DEFENSE

Under current law, in auto accident litigation a defendant is not allowed to enter into evidence whether the plaintiff was wearing his/her seatbelt at the time of the accident. Engrossed Substitute Senate Bill 5728 simply allows this information to be presented to a jury.

### PART 7: GOVERNMENTAL LIABILITY

Like the private sector, litigation costs for state and local government have increased dramatically over the past several years. From 1985 to 2000 the state tort claim payouts ranged from \$6 million to \$26 million. In 2001 the state tort claim payout was over \$80 million. These costs are borne by taxpayers and directly impact the essential services government can offer Washington citizens. ESSB 5728 includes the following provisions:

State and local government entities are not liable to pay a claim or judgment by any one person that exceeds \$1,000,000 for non-economic damages or any claim or judgment that, when totaled with all other claims or judgments arising out of the same incident, exceeds \$2,000,000 for non-economic damages. The only exception to this cap applies when a criminal offender previously convicted of rape or murder commits an additional crime of rape or murder while under supervision.

Rural public hospitals are not liable to pay a claim or judgment by any one person that exceeds \$500,000 or any claim or judgment that, when totaled with all other claims and judgments arising out of the same incident exceeds \$1,000,000.

### PART 8: CERTIFICATE OF MERIT

This section requires a person initiating an action for personal injury, wrongful death, or damage to property, in which harm is alleged to have been caused by an act which violates the appropriate standard of care to be exercised by a person licensed, certified, or registered by the state to file a “Certificate of Merit”. A “Certificate of Merit” requires that within 90 days of filing a lawsuit, a qualified expert must certify that the claim alleged in the suit has merit.

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**Message from  
the Chairman:****Cliff Webster**

The 2004 legislative session was a hard fought battle for liability reform. We haven't seen so much attention on this issue since the mid-1980s. I suppose if there is an upside to the liability crisis experienced by many businesses, health care providers and not-for-profit organizations it is that the public is gaining awareness of this issue. As we learned from a poll we recently conducted, voters overwhelmingly support liability reform and this includes Democrats, Republicans and Independents (see our website for complete poll findings). This clearly tells us we are on the right track.

While we were not successful in passing comprehensive liability reform in the 2004 session, we got much further than many expected. We knew going in that it would be difficult to get House leadership to take up comprehensive, meaningful liability reform. But still we persisted. We hired grassroots coordinators to direct our members and members' members to engage in the debate. Clearly this was an effective strategy, as legislators from both sides of the aisle repeatedly told me they receive constituent contacts supporting liability reform on a daily basis. I am convinced it was our grassroots efforts that finally earned us a hearing in the House Judiciary Committee on SB 5728.

Also making 2004 different for the LRC was our use of media. This is new territory for us. Those of you living along the I-5 corridor or in Spokane, likely saw our television ads that ran three separate weeks. Our intention for these ads was to raise the visibility of this issue and get people focused on a solution. It was clear we accomplished this objective. If you missed our ad, you can see it on our website.

None of this would have been possible, however, without significant funding. Thanks to the generous contributions of our members, we were able to lay the necessary groundwork for the passage of liability reform through polling, grassroots and media. It is a critical time for LRC members. As history has taught us we only get a shot at liability reform once or twice every decade. Now is our chance and the LRC is committed to making it happen with help of our members.

**LRC Turns Focus to the Judiciary**

It could be argued that the most critical elections this fall are those for the Supreme Court. This body is by far the most powerful and influential governing body in the state of Washington. Every piece of legislation of any consequence ends up before the Supreme Court. And this will include liability reform once it passes. This year, as with other election years, the LRC will interview all Supreme Court candidates and make recommendations to our members. In addition, this summer we will release our 2nd Judicial Scorecard which reviews important liability cases before the Court over the past two years and provides a summary of how the nine Justices ruled on these matters. If you have a case that you think ought to be included in the Scorecard, please contact Dana Childers at [dana@walrc.org](mailto:dana@walrc.org).

**2004 Supreme Court Elections**

There are three seats up for election in September, including an open seat created by retiring Justice Faith Ireland. Facing re-election are Justice Richard Sanders and Justice Barbara Madsen. State law dictates that the top two vote getters in the primary Supreme Court elections will advance to the general election. If one person garners over 50% of the vote in the primary, he/she automatically wins the election.

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**THE REFORMER**

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LIABILITY REFORM COALITION

**COMMITTED TO ENDING  
LAWSUIT ABUSE.**

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