SUBJECT: Limiting tort liability of public servants

COMMITTEE: State Affairs — committee substitute recommended

VOTE: 9 ayes — Seidlits, S. Turner, Alvarado, Black, Bosse, Danburg, Hochberg, Ramsay, Wolens

4 nays — Carter, Craddick, Hilbert, B. Hunter

1 present, not voting — D. Jones

1 absent — McCall

WITNESSES: (*On original bill*)

For — Mark Clark, Combined Law Enforcement Associations of Texas; Susan Horton, Texas Municipal League

Against — Mike Slack, Texas Trial Lawyers Association

BACKGROUND: The concept of sovereign immunity exempts the state and other governmental units from liability for the acts of their officers and employees. The state, however, has waived its immunity in the Texas Tort Claims Act (Civil Practices and Remedies Code Chapter 101 *et seq.*). The Tort Claims Act allows the state or local governmental units to be sued for torts caused by public employees in the scope of their duties, and limits the liability of the governmental body. The act also provides for indemnification (reimbursement for damages) of public employees who are sued individually for actions done within the scope of their duties.

DIGEST: CSHB 383 would limit to $100,000 the liability of public servants for any personal injury or any damage to property if they are covered for the first $100,000 by state or local government indemnification or state or local government liability or errors and omissions insurance.

The limit would apply to all elected or appointed officials and all government employees and volunteers, except independent contractors and

persons licensed by the Texas State Board of Medical Examiners, the Board of Nurse Examiners or the State Board of Pharmacy.

CSHB 383 would also make a drafting correction in current law to specify that actions *not* taken with conscious indifference or reckless disregard are exempted from liability.

CSHB 383 to claims filed after September 1, 1995.

SUPPORTERS SAY:

Public servants under current law are subject to suits for actions that occur in the performance of their duties. The governmental body they work for has limits on liability, but the individual worker does not. CSHB 383 would take a middle-ground approach to correct this situation. The bill would cap liability for public servants at $100,000 as long as the public servants were indemnified by their government employer or otherwise insured for up to $100,000. It would also ensure that a legitimate claimant could collect up to $100,000. Currently, the liability of public servants is limited only by their assets, which for most workers total less than $100,000. CSHB 383 would allow a successful claim against a public servant to be compensated by up to $100,000, if the injuries were that severe, but not more.

CSHB 383 also would give the state greater flexibility in setting indemnification amounts. Civil Practice and Remedies Code sec. 104.003(a) now limits state liability for indemnification to $100,000 for a single person, $300,000 for personal injury, death or deprivation of rights, or $10,000 for a single occurrence of damage to property. The bill would allow the state, through specific appropriations, the flexibility to increase these indemnification limits.

A primary problem with the bill in its original form was that it would have protected those who work at public hospitals from malpractice actions while health care professionals at private hospitals would still have substantial liability. To counter this objection and provide fairness, CSHB 383 would not apply to licensees of the State Board of Medical Examiners, Nursing Board or Board of Pharmacists.

Health care professionals were specifically excluded from the liability limits provided by HB 383 because their actions are not *governmental*. The Texas Tort Claims Act, which CSHB 383 would modify, allows the state to be sued for torts committed in the performance of *governmental* functions. Even at public hospitals, the actions performed by health care professionals are non-governmental. Medical liability is limited for all health care professionals under Art. 4590i, VACS (the Medical Liability and Insurance Improvement Act). The Tort Claims Act is not the proper vehicle to limit medical liability.

Excluding physicians, nurses and pharmacists from the CSHB 383 liability limits would not make them any more likely to be sued in a health care-related tort action. No matter what liability limits a person has, most plaintiff attorneys will likely bring everyone with any connection to the case into the suit. If these professionals have any connection to the case, they are already being sued under the current law, and CSHB 383 would not change this.

Most emergency medical technicians (EMTs) and other paramedics, certified through the Texas Department of Health, would have limited liability under the bill. This niche for EMTs was carved out because these public servants are more like police officers and firefighters than public health workers in their emergency response functions.

CSHB 383 also would extend liability protection to public servants other than employees. Elected and appointed officials and volunteers would be treated the same as paid employees, a reasonable extension of the law.

OPPONENTS SAY:

As with other so-called tort reform legislation, this bill would limit the rights of injured parties to receive compensation for the harms done to them. The liability limit on damages caused by public employees would not likely reduce the number of suits filed against public servants, nor would it help streamline the tort system; it would only limit the recovery of bona fide injured parties. The most efficient way to solve the problem that CSHB 383 purports to address would be to restrict the filing of frivolous suits.

The bill's specific exclusions for physicians, registered nurses and pharmacists were inserted into the bill to counter arguments that different liability standards for health care professionals at public and private hospitals would somehow be detrimental to the quality of health care. However, these exclusions from the liability limits granted other public servants are arbitrary and unjustified. Physicians would be excluded from the liability limits, but not dentists; psychiatrists would be excluded, but not psychologists; registered nurses (RNs) would be excluded, but not licensed vocational nurses (LVNs). Such distinctions are not based on the performance of the individual's job nor how much training they receive, but only which board issues their license.

Excluding physicians and psychiatrists employed at public facilities from liability protection could erode the quality of care that patients receive in these facilities. Also, a distinction should be made between those serving in public and private facilities because public hospitals more often receive the more seriously injured patients, creating greater risks for health care workers. This risk factor is even more pronounced at psychiatric hospitals and community mental health and mental retardation centers, which under HB 553 by B. Hunter, which passed the House on March 29, would be considered governmental units. A lack of liability limits could discourage qualified doctors from working at these public facilities if most other public servants were protected.

Registered nurses (RNs), who are licensed by the Board of Nurse Examiners, also would be unfairly discriminated against by an illogical twist in this bill. While RNs have no more liability coverage in the performance of their duties than police officers or firefighters (the sort of public servants CSHB 383 was designed to protect), CSHB 383 would make them "deep pocket" defendants in every medical-care-related tort action. While most others at a hospital (except the doctors and pharmacists) would have limited liability, RNs would not. Distinguishing RNs from all other nurses and similar health care providers would ensure that in any action, the RN in charge of a patient's care would be sued, no matter how limited the nurse's responsibility for the injuries, because the RN's liability would be unlimited. Primary care administered by LVNs and hospital orderlies, usually supervised by an RN, would lead to suits against the RN. CSHB 383 would require any reasonable RNs to obtain expensive

malpractice insurance to guard their personal assets. Because RNs would have insurance to cover damages awarded against them, they would no longer receive the indemnification from the state that they could currently receive if they are sued in their individual capacity.

Pharmacists rarely have any direct contact with patients, and in most hospital situations only fill orders directed by another health care provider. Yet CSHB 383 would allow pharmacists to be sued without any liability limits over drug-related torts at a public hospital. These pharmacists will be brought into medical-related tort suits because they would be placed in the small group of public servants lacking the protection of liability limits.

NOTES:

HB 383 as introduced would have held that filing a claim against either the governmental unit or an individual public servant would dismiss or bar any claims against the other; the committee substitute removed that provision.

The committee substitute removed from the original bill the designation of elected and appointed officials as being the same as employees for purposes of Chapter 101 of the Civil Practices and Remedies Code, which would have held the *state* liable for acts of elected or appointed officials done within the scope of their duties. CSHB 383 would instead limit the liability of elected or appointed officials when sued as individuals, without holding the state liable. The substitute would specifically exclude licensed physicians, nurses and pharmacists from the liability limits.

SB 24 by Shapiro, an identical bill to HB 383 as introduced, is pending in the Senate Economic Development Committee. HB 1556 by T. Hunter, which would completely immunize any public servant, including health care providers, from liability, has been referred to the House Civil Practices Committee.