
A BILL FOR AN ACT

RELATING TO MEDICAL TORTS.

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

1 SECTION 1. Chapter 671, Hawaii Revised Statutes, is
2 amended by adding a new part to be appropriately designated and
3 to read as follows:

4 "PART . PATIENT ACCESS TO HEALTH CARE SERVICES

5 §671-A Findings and purpose. (a) The legislature finds
6 that our current civil justice system is adversely affecting
7 patient access to health care services, better patient care, and
8 cost-efficient health care, in that the health care liability
9 system is a costly and ineffective mechanism for resolving
10 claims of health care liability and compensating injured
11 patients, and is a deterrent to the sharing of information among
12 health care professionals which impedes efforts to improve
13 patient safety and quality of care.

14 (b) The purpose of this Act is to implement reasonable,
15 comprehensive, and effective health care liability reforms
16 designed to:

17 (1) Improve the availability of health care services in
18 cases in which health care liability actions have been



1 shown to be a factor in the decreased availability of
2 services;

3 (2) Reduce the incidence of "defensive medicine" and lower
4 the cost of health care liability insurance, all of
5 which contribute to the escalation of health care
6 costs;

7 (3) Ensure that persons with meritorious health care
8 injury claims receive fair and adequate compensation,
9 including reasonable noneconomic damages;

10 (4) Improve the fairness and cost-effectiveness of our
11 current health care liability system to resolve
12 disputes over, and provide compensation for, health
13 care liability by reducing uncertainty in the amount
14 of compensation provided to injured individuals; and

15 (5) Provide an increased sharing of information in the
16 health care system which will reduce unintended injury
17 and improve patient care.

18 **§671-B Definitions.** As used in this part, unless the
19 context clearly requires otherwise:

20 "Alternative dispute resolution" means a system that
21 provides for the resolution of medical tort lawsuits in a manner



1 other than through a civil action brought in a state or federal
2 court.

3 "Claimant" means any person who brings a medical tort
4 lawsuit, including a person who asserts or claims a right to
5 legal or equitable contribution, indemnity, or subrogation,
6 arising out of a health care liability claim or action, and any
7 person on whose behalf such a claim is asserted or such an
8 action is brought, whether deceased, incompetent, or a minor.

9 "Collateral source benefits" means any amount paid or
10 reasonably likely to be paid in the future to or on behalf of
11 the claimant or any service, product, or other benefit provided
12 or reasonably likely to be provided in the future to or on
13 behalf of the claimant, as a result of the injury or wrongful
14 death, pursuant to:

- 15 (1) Any state or federal health, sickness, income-
16 disability, accident, or workers' compensation law;
- 17 (2) Any health, sickness, income-disability, or accident
18 insurance that provides health benefits or income-
19 disability coverage;
- 20 (3) Any contract or agreement of any group, organization,
21 partnership, or corporation to provide, pay for, or



1 reimburse the cost of medical, hospital, dental, or
2 income disability benefits; and

3 (4) Any other publicly or privately funded program.

4 "Compensatory damages" means objectively verifiable
5 monetary losses incurred as a result of the provision of, use
6 of, or payment for (or failure to provide, use, or pay for)
7 health care services or medical products, such as past and
8 future medical expenses, loss of past and future earnings, cost
9 of obtaining domestic services, loss of employment, and loss of
10 business or employment opportunities, damages for physical and
11 emotional pain, suffering, inconvenience, physical impairment,
12 mental anguish, disfigurement, loss of enjoyment of life, loss
13 of society and companionship, loss of consortium (other than
14 loss of domestic service), hedonic damages, injury to
15 reputation, and all other nonpecuniary losses of any kind or
16 nature. The term "compensatory damages" includes economic
17 damages and noneconomic damages, as those terms are defined in
18 this section.

19 "Contingent fee" includes all compensation to any person or
20 persons that is payable only if a recovery is effected on behalf
21 of one or more claimants.



1 "Economic damages" means objectively verifiable monetary
2 losses incurred as a result of the provision of, use of, or
3 payment for (or failure to provide, use, or pay for) health care
4 services or medical products, such as past and future medical
5 expenses, loss of past and future earnings, cost of obtaining
6 domestic services, loss of employment, and loss of business or
7 employment opportunities.

8 "Health care goods or services" means any goods or
9 services, provided by a health care organization, provider, or
10 by any individual working under the supervision of a health care
11 provider, that relate to the diagnosis, prevention, or treatment
12 of any human disease or impairment or the assessment of the
13 health of human beings.

14 "Health care liability action" means a civil action brought
15 in a state or federal court or pursuant to an alternative
16 dispute resolution system, against a health care provider, a
17 health care organization, or the manufacturer, distributor,
18 supplier, marketer, promoter, or seller of a medical product,
19 regardless of the theory of liability on which the claim is
20 based or the number of plaintiffs, defendants, or other parties
21 or the number of causes of action in which the claimant alleges
22 a health care liability claim.



1 "Health care liability claim" means a demand by any person,
2 regardless of whether pursuant to alternative dispute
3 resolution, against a health care provider, health care
4 organization, or the manufacturer, distributor, supplier,
5 marketer, promoter, or seller of a medical product, including
6 third-party claims, cross-claims, counter-claims, or
7 contribution claims that are based upon the provision of, use
8 of, or payment for (or the failure to provide, use, or pay for)
9 health care services or medical products, regardless of the
10 theory of liability on which the claim is based or the number of
11 plaintiffs, defendants, or other parties or the number of causes
12 of action.

13 "Health care organization" means any person or entity which
14 is obligated to provide or pay for health benefits under any
15 health plan, including any person or entity acting under a
16 contract or arrangement with a health care organization to
17 provide or administer any health benefit.

18 "Health care provider" means any person or entity required
19 by state or federal laws or regulations to be licensed,
20 registered, or certified to provide health care services and
21 being either so licensed, registered, or certified, or exempted
22 from such requirement by other statute or regulation.



1 "Malicious intent to injure" means intentionally causing or
2 attempting to cause physical injury other than providing health
3 care goods or services.

4 "Medical product" means a drug or device intended for
5 humans, and the terms "drug" and "device" have the meanings
6 given these terms in sections 201(g)(1) and 201(h) of the
7 Federal Food, Drug and Cosmetic Act (21 U.S.C. 321),
8 respectively, including any component or raw material used in
9 those sections, but excluding health care services.

10 "Medical tort lawsuit" means any health care liability
11 claim concerning the provision of health care goods or services
12 affecting interstate commerce, or any health care liability
13 action concerning the provision of health care goods or services
14 affecting interstate commerce, brought in a state or federal
15 court or pursuant to an alternative dispute resolution system,
16 against a health care provider, a health care organization, or
17 the manufacturer, distributor, supplier, marketer, promoter, or
18 seller of a medical product, regardless of the theory of
19 liability on which the claim is based or the number of
20 claimants, plaintiffs, defendants, or other parties or the
21 number of claims or causes of action in which the claimant
22 alleges a health care liability claim.



1 "Noneconomic damages" means damages for physical and
2 emotional pain, suffering, inconvenience, physical impairment,
3 mental anguish, disfigurement, loss of enjoyment of life, loss
4 of society and companionship, loss of consortium (other than
5 loss of domestic service), hedonic damages, injury to
6 reputation, and all other nonpecuniary losses of any kind or
7 nature.

8 "Punitive damages" means damages awarded for the purpose of
9 punishment or deterrence, and not solely for compensatory
10 purposes, against a health care provider, health care
11 organization, or a manufacturer, distributor, or supplier of a
12 medical product. Punitive damages are neither economic nor
13 noneconomic damages.

14 "Recovery" means the net sum recovered after deducting any
15 disbursements or costs incurred in connection with prosecution
16 or settlement of the claim, including all costs paid or advanced
17 by any person. Costs of health care incurred by the plaintiff
18 and the attorneys' office overhead costs or charges for legal
19 services are not deductible disbursements or costs for such
20 purpose.



1 §671-C Compensating patient injury. (a) In any medical
2 tort lawsuit, the full amount of a claimant's economic loss may
3 be fully recovered without limitation.

4 (b) In any medical tort lawsuit, the amount of noneconomic
5 damages recovered may be as much as \$250,000, regardless of the
6 number of parties against whom the action is brought or the
7 number of separate claims or actions brought with respect to the
8 same occurrence.

9 (c) In any medical tort lawsuit, an award for future
10 noneconomic damages shall not be discounted to present value.
11 The jury shall not be informed about the maximum award for
12 noneconomic damages. An award for noneconomic damages in excess
13 of \$250,000 shall be reduced either before the entry of judgment
14 or by amendment of the judgment after entry of judgment, and the
15 reduction shall be made before accounting for any other
16 reduction in damages required by law. If separate awards are
17 rendered for past and future noneconomic damages and the
18 combined awards exceed \$250,000, the future noneconomic damages
19 shall be reduced first.

20 (d) In any medical tort lawsuit, each party shall be
21 liable for that party's several share of any damages only and
22 not for the share of any other person. Each party shall be



1 liable only for the amount of damages allocated to the party in
2 direct proportion to the party's percentage of responsibility.
3 A separate judgment shall be rendered against each party for the
4 amount allocated to the party. For purposes of this section,
5 the trier of fact shall determine the proportion of
6 responsibility of each party for the claimant's harm.

7 **§671-D Maximizing patient recovery.** (a) In any medical
8 tort lawsuit, the court shall supervise the arrangements for
9 payment of damages to protect against conflicts of interest that
10 may have the effect of reducing the amount of damages awarded
11 that are actually paid to claimants. In particular, in any
12 medical tort lawsuit in which the attorney for a party claims a
13 financial stake in the outcome by virtue of a contingent fee,
14 the court shall have the power to restrict the payment of a
15 claimant's damage recovery to such attorney and to redirect the
16 damages to the claimant based upon the interests of justice and
17 principles of equity. In no event shall the total of all
18 contingent fees for representing all claimants in a medical tort
19 lawsuit exceed the following limits:

- 20 (1) Forty per cent of the first \$50,000 recovered by the
21 claimants;



1 (2) 33 1/3 per cent of the next \$50,000 recovered by the
2 claimants;

3 (3) Twenty-five per cent of the next \$500,000 recovered by
4 the claimants; and

5 (4) Fifteen per cent of any amount by which the recovery
6 by the claimants is in excess of \$600,000.

7 (b) The limitations in this section shall apply whether
8 the recovery is by judgment, settlement, mediation, arbitration,
9 or any other form of alternative dispute resolution. In a
10 medical tort lawsuit involving a minor or incompetent person, a
11 court retains the authority to authorize or approve a fee that
12 is less than the maximum permitted under this section.

13 **§671-E Additional health benefits.** In any medical tort
14 lawsuit, any party may introduce evidence of collateral source
15 benefits. If a party elects to introduce such evidence, any
16 opposing party may introduce evidence of any amount paid or
17 contributed or reasonably likely to be paid or contributed in
18 the future by or on behalf of the opposing party to secure the
19 right to such collateral source benefits. No provider of
20 collateral source benefits shall recover any amount against the
21 claimant or receive any lien or credit against the claimant's
22 recovery or be equitably or legally subrogated to the right of



1 the claimant in a medical tort lawsuit. This section shall
2 apply to any medical tort lawsuit that is settled as well as a
3 medical tort lawsuit that is resolved by a fact finder.

4 **§671-F Punitive damages.** (a) Punitive damages, if
5 otherwise permitted by applicable state or federal law, may be
6 awarded against any person in a medical tort lawsuit only if it
7 is proven by clear and convincing evidence that the person acted
8 with malicious intent to injure the claimant or that the person
9 deliberately failed to avoid unnecessary injury that the person
10 knew the claimant was substantially certain to suffer. In any
11 medical tort lawsuit where no judgment for compensatory damages
12 is rendered against such person, no punitive damages may be
13 awarded with respect to the claim in such lawsuit. No demand
14 for punitive damages shall be included in a medical tort lawsuit
15 as initially filed. A court may allow a claimant to file an
16 amended pleading for punitive damages only upon a motion by the
17 claimant and after a finding by the court, upon review of
18 supporting and opposing affidavits or after a hearing, after
19 weighing the evidence, that the claimant has established by a
20 substantial probability that the claimant will prevail on the
21 claim for punitive damages. At the request of any party in a



1 medical tort lawsuit, the trier of fact shall consider in a
2 separate proceeding:

3 (1) Whether punitive damages are to be awarded and the
4 amount of the award; and

5 (2) The amount of punitive damages following a
6 determination of punitive liability.

7 If a separate proceeding is requested, evidence relevant only to
8 the claim for punitive damages, as determined by applicable law,
9 shall be inadmissible in any proceeding to determine whether
10 compensatory damages are to be awarded.

11 (b) (1) In determining the amount of punitive damages, the
12 trier of fact shall consider only the following:

13 (A) The severity of the harm caused by the conduct of
14 the party;

15 (B) The duration of the conduct or any concealment of
16 it by the party;

17 (C) The profitability of the conduct to the party;

18 (D) The number of products sold or medical procedures
19 rendered for compensation, as the case may be, by
20 the party, of the kind causing the harm
21 complained of by the claimant;



1 (E) Any criminal penalties imposed on the party, as a
2 result of the conduct complained of by the
3 claimant; and

4 (F) The amount of any civil fines assessed against
5 the party as a result of the conduct complained
6 of by the claimant.

7 (2) The amount of punitive damages awarded in a medical
8 tort lawsuit may be up to as much as two times the
9 amount of economic damages awarded or \$250,000,
10 whichever is greater. The jury shall not be informed
11 of this limitation.

12 (c) (1) No punitive damages may be awarded against the
13 manufacturer or distributor of a medical product based
14 on a claim that the product caused the claimant's harm
15 if:

16 (A) (i) The medical product was subject to premarket
17 approval or clearance by the Food and Drug
18 Administration with respect to the safety of
19 the formulation or performance of the aspect
20 of the medical product that caused the
21 claimant's harm or the adequacy of the



1 packaging or labeling of the medical
2 product; and
3 (ii) The medical product was so approved or
4 cleared; or
5 (B) The medical product is generally recognized among
6 qualified experts as safe and effective pursuant
7 to conditions established by the Food and Drug
8 Administration and applicable Food and Drug
9 Administration regulations, including without
10 limitation those related to packaging and
11 labeling, unless the Food and Drug Administration
12 has determined that the medical product was not
13 manufactured or distributed in substantial
14 compliance with applicable Food and Drug
15 Administration statutes and regulations.
16 (2) A health care provider who prescribes a drug or device
17 (including blood products) approved by the Food and
18 Drug Administration shall not be named as a party to a
19 product liability lawsuit involving the drug or device
20 and shall not be liable to a claimant in a class
21 action lawsuit against the manufacturer, distributor,
22 or product seller of the drug or device.



1 (3) In a medical tort lawsuit for harm that is alleged to
2 relate to the adequacy of the packaging or labeling of
3 a drug that is required to have tamper-resistant
4 packaging under regulations of the Secretary of Health
5 and Human Services (including labeling regulations
6 related to the packaging), the manufacturer or product
7 seller of the drug shall not be held liable for
8 punitive damages unless the packaging or labeling is
9 found by the trier of fact by clear and convincing
10 evidence to be substantially out of compliance with
11 such regulations.

12 **§671-G Authorization of payment of future damages to**
13 **claimants in medical tort lawsuits.** (a) In any medical tort
14 lawsuit, if an award of future damages, without reduction to
15 present value, equaling or exceeding \$50,000 is made against a
16 party with sufficient insurance or other assets to fund a
17 periodic payment of the judgment, the court, at the request of
18 any party, shall enter a judgment ordering that the future
19 damages be paid by periodic payments in accordance with the
20 applicable law.



1 (b) This section applies to all actions that have not been
2 first set for trial or retrial before the effective date of this
3 part."

4 SECTION 2. Section 657-7.3, Hawaii Revised Statutes, is
5 amended to read as follows:

6 "§657-7.3 Medical torts; limitation of actions; time. (a)

7 No action for injury or death against a chiropractor, clinical
8 laboratory technologist or technician, dentist, naturopath,
9 nurse, nursing home administrator, dispensing optician,
10 optometrist, osteopath, physician or surgeon, physical
11 therapist, podiatrist, psychologist, or veterinarian duly
12 licensed or registered under the laws of the State, or a
13 licensed hospital as the employer of any such person, based upon
14 [~~such~~] the person's alleged professional negligence, or for
15 rendering professional services without consent, or for error or
16 omission in [~~such~~] the person's practice[~~,-~~] shall be brought
17 more than [~~two years~~] one year after the plaintiff discovers, or
18 through the use of reasonable diligence should have discovered,
19 the injury, but in any event not more than [~~six~~] three years
20 after the date of the alleged act or omission causing the injury
21 or death. This [~~six-year~~] three-year time limitation shall be
22 tolled for any [~~period during which the person has failed to~~



1 ~~disclose any act, error, or omission upon which the action is~~
2 ~~based and which is known to the person.]~~ of the following:

3 (1) Upon proof of fraud;

4 (2) Intentional concealment; or

5 (3) The presence of a foreign body that has no therapeutic
6 or diagnostic purpose or effect in the person of the
7 injured person.

8 (b) Actions by a minor shall be commenced within [~~six~~]
9 three years from the date of the alleged wrongful act except the
10 actions by a minor under the age of [~~ten~~] six years shall be
11 commenced within [~~six~~] three years of manifestation of injury or
12 [~~by~~] prior to the minor's [~~tenth~~] eighth birthday, whichever
13 provides a longer period. Such time limitation shall be tolled
14 for any minor for any period during which the parent, guardian,
15 insurer, or health care provider has committed fraud or gross
16 negligence[~~7~~] or has been a party to a collusion in the failure
17 to bring action on behalf of the injured minor for a medical
18 tort. The time limitation shall also be tolled for any period
19 during which the minor's injury or illness alleged to have
20 arisen, in whole or in part, from the alleged wrongful act or
21 omission could not have been discovered through the use of
22 reasonable diligence."



1 SECTION 3. In codifying the new sections added by section
 2 1 of this Act, the revisor of statutes shall substitute
 3 appropriate section numbers for the letters used in designating
 4 the new sections in this Act.

5 SECTION 4. This Act shall not apply to any cause of action
 6 for which a complaint has been filed prior to its effective
 7 date.

8 SECTION 5. Statutory material to be repealed is bracketed
 9 and stricken. New statutory material is underscored.

10 SECTION 6. This Act shall take effect on January 1, 2008.

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Report Title:

Medical Torts; Reform Medical Malpractice Suits

Description:

Amends the law relating to medical torts to improve patient access to health care services and provide improved medical care by reducing the burden the liability system places on the health care delivery system in Hawaii.

