

ACT 228

S.B. NO. 1681

A Bill for an Act Relating to Tort Actions.

Be It Enacted by the Legislature of the State of Hawaii:

SECTION 1. The Hawaii Revised Statutes is amended by adding a new part to be appropriately designated and to read as follows:

“PART

DESIGN PROFESSIONAL CONCILIATION PANEL

§ **Actions against architects, professional engineers, and surveyors.** In any action for damages arising out of the alleged professional negligence of actions performed in the professional practice of a person holding a license as a professional engineer, architect, or surveyor under chapter 464, before the time of filing the complaint, the aggrieved person shall file a claim with the design professional conciliation panel.

§ **Design professional conciliation panel; composition, selection, compensation.** (a) There are established conciliation panels which shall review and render findings and advisory opinions on the issues of liability and damages in tort claims against professional architects, engineers and surveyors.

(b) A design professional conciliation panel, hereafter called “the panel”, shall be formed for each claim filed pursuant to section and after each panel renders its decision or the claim is otherwise disposed of it shall be disbanded. Each design professional conciliation panel shall consist of one chairperson selected from among persons who are familiar with and experienced in the tort claims settlement process, one attorney licensed to practice in the courts of the State and experienced in trial practice, and one architect, engineer or surveyor licensed to practice under chapter 464. The chairperson shall be appointed by the chief justice of the supreme court of Hawaii. The attorney shall be appointed by the chairperson from a list of not less than thirty-five attorneys experienced in trial practice submitted annually by the supreme court. The architect, engineer, or surveyor shall be appointed by the chairperson from a list of not less than thirty-five design professionals submitted annually by the board of registration

of professional engineers, architects, and surveyors.

The chairperson shall preside at the meetings of the panel. The chairperson and all panel members shall be compensated at the rate of \$100 per claim handled which will become payable when the decision of the panel is submitted and shall be paid allowances for travel and living expenses which may be incurred as a result of the performance of their duties and they shall be paid by the department of regulatory agencies from funds collected from the claimant and defendant, to be shared equally.

The office and meeting space, secretarial and clerical assistance, office equipment and office supplies for the board shall be furnished by the department of regulatory agencies.

The board of registration shall prepare a list of architects, engineers, and surveyors along with their respective specialties who shall then be considered consultants to the panel in their respective fields. Panel members may consult with other legal, technical and insurance specialists. Any consultant called by the panel to appear before the panel shall be paid an allowance for travel and living expenses which may be incurred as a result of such person's appearance before the panel. Such costs shall be paid [by]† the department of regulatory agencies.

§ Review by panel required; notice; presentation of claims. Any person or his representative claiming that a tort has been committed by the design professional shall file a claim to the department of regulatory agencies before a suit based on the claim may be commenced in any court of this State. All claims shall be submitted to the department of regulatory agencies in writing on forms provided by this department. If the claim is presented orally, the department of regulatory agencies shall reduce the claim to writing. The claimant shall set forth facts upon which the claim is based and shall include the names of all parties against whom the claim is or may be made who are known to the claimant. Within five business days thereafter, the panel shall give notice of the claim, by certified mail, to all architects, engineers or surveyors and others who are or may be parties to the claim and shall furnish copies of written claims to such persons. Such notice shall set forth a date, not more than twenty days after mailing the notice, within which any design professional against whom a claim is made may file a written response to the claim, and a date and time, not less than five days following the date for filing a response, for a hearing of the panel. Such notice shall describe the nature and purpose of the panel's proceedings and shall designate the place of the hearing. The times originally set forth in the notice may be changed by the chairperson, on due notice to all parties, for good cause.

§ Design professional conciliation panel hearing; fact-finding; evidence; voluntary settlement. Every claim of a tort shall be heard by the design professional conciliation panel within thirty days after the date for filing a response. No persons other than the panel, witnesses and consultants called by the panel, and the persons listed in section shall be present except with the permission of the chairperson. The panel may, in its discretion, conduct an inquiry of a party,

†Bracketed word "by" substituted for "be".

witness or consultant without the presence of any or all parties.

The hearing shall be informal. The panel may require a stenographic record of all or part of its proceedings for the use of the panel, but such records shall not be made available to the parties. The panel may receive any oral or documentary evidence. Questioning of parties, witnesses, and consultants may be conducted by the panel, and the panel may, in its discretion, permit any party, or any counsel for a party to question other parties, witnesses or consultants. The panel may designate who, among the parties, shall have the burden of going forward with the evidence with respect to such issues as it may consider, and unless otherwise designated by the panel, when the design professional's records have been provided to the claimant for the claimant's proper review, such burden shall initially rest with the claimant at the commencement of the hearing.

The panel shall have the power to require by subpoena the appearance and testimony of witnesses and the production of documentary evidence. When such subpoena power is utilized, notice shall be given to all parties. The testimony of witnesses may be taken either orally before the panel or by deposition. In cases of refusal to obey a subpoena issued by the panel, the panel may invoke the aid of any circuit court in the State, which may issue an order requiring compliance with the subpoena. Failure to obey such order may be punished by the court as a contempt thereof. Any member of the panel may sign subpoenas, administer oaths and affirmations, examine witnesses, and receive evidence. Notwithstanding such powers, the panel shall attempt to secure the voluntary appearance, testimony, and cooperation of parties, witnesses and consultants without coercion.

At the hearing of the panel and in arriving at its opinion the panel shall consider, but not be limited to, statements or testimony of witnesses, construction documents, inspection reports, calculations and other records kept in the usual course of the practice of the design professional without the necessity for other identification or authentication, statements of fact or opinion on a subject contained in a published treatise, periodical, book or pamphlet, or statements of experts without the necessity of the experts appearing at the hearing. The panel may upon the application of any party or upon its own decision appoint as a consultant, an impartial and qualified architect, engineer, or surveyor or other professional person or expert to testify before the panel or to conduct any necessary professional or expert examination of the claimant or relevant evidentiary matter and to report to or testify as a witness thereto. Such a consultant shall not be compensated or reimbursed except for travel and living expenses which may be incurred as a result of such person's appearance before the panel. Such expenses shall be paid by the department of regulatory agencies to be paid as provided in section . Discovery by the parties shall not be allowed.

During the hearing and at any time prior to the rendition of an advisory decision pursuant to section , the panel may encourage the parties to settle or otherwise dispose of the case voluntarily.

§ Same; persons attending hearings of panel. Unless excluded or excused by the panel, the following persons shall attend hearings before the panel:

- (1) The party or parties making the claim;
- (2) The design professional or professionals against whom the claim is

made or representatives thereof, other than counsel, authorized to act for such design professionals; and

(3) Counsel of the parties, if any.

§ Same; decisions. (a) Within fifteen days after the completion of a hearing, the panel shall file a written advisory decision with the director of regulatory agencies, who shall thereupon mail copies to all parties concerned, their counsel, the board of registration, and the representative of each design professionals' liability insurance carrier authorized to act for such carrier. The panel shall decide the issue of liability, and shall state its conclusions in writing and after a finding of liability, the panel shall decide the amount of damages, if any, which should be awarded in the case. The decision as to damages shall include in simple, concise terms a division as to which portion of the damages recommended are attributable to economic losses and which to non-economic losses; provided the panel may not recommend punitive damages.

(b) The decisions shall be signed by all members of the panel; provided that any member of the panel may file a written concurring or dissenting opinion.

(c) The advisory decision required by this section need not be filed if the claim is settled or disposed of before the decision is written or filed.

§ Subsequent litigation; excluded evidence. The claimant may institute litigation based upon the claim in an appropriate court only after a party to the design professional conciliation panel hearing rejects the decision of the panel.

No statement made in the course of the hearing of the design professional conciliation panel shall be admissible in evidence either as an admission, to impeach the credibility of a witness, or for any other purpose in any trial of the action, provided that such statements may be admissible for the purpose of section hereof. No decision, conclusion, finding, or recommendation of the design professional conciliation panel on the issue of liability or on the issue of damages shall be admitted into evidence in any subsequent trial, nor shall any party to the design professional conciliation panel hearing, or the counsel or other representative of such party, refer or comment thereon in an opening statement, an argument, or at any other time, to the court or jury, provided that such decision, conclusion, finding, or recommendation may be admissible for the purpose of section

§ Immunity of panel members from liability. No member of a design professional conciliation panel shall be liable in damages for libel, slander, or other defamation of character of any party to the design professional conciliation panel proceeding for any action taken or any decision, conclusion, finding, or recommendation made by the member while acting as a member of a design professional conciliation panel under this Act.

§ Statute of limitations tolled. The filing of the claim with the design professional conciliation panel shall toll any applicable statute of limitations, and any such statute of limitations shall remain tolled until sixty days after the date the decision of the panel is mailed or delivered to the parties.

§ Duty to cooperate; assessment of costs and fees. It shall be the duty of every person who files a claim with the design professional conciliation panel, every

architect, engineer, or surveyor against whom such claim is made, to cooperate with the design professional conciliation panel for the purpose of achieving a prompt, fair and just disposition or settlement of such claim, provided that such cooperation shall not prejudice the substantive rights of said persons.

After trial of such claim or after settlement of such claim after suit has been filed, any party may apply to the court in which the suit was brought to have the costs of the action assessed against any party or any insurance carrier or any other person providing professional liability insurance to a party design professional or both, for failure to cooperate with the design professional conciliation panel. The court may award such costs, or a portion thereof, including attorney's fees, witness fees, including those of expert witnesses, costs of discovery and transcribing depositions, and court costs to the party applying therefor.

On application of the director of regulatory agencies, the court may award as a civil penalty against any party or any insurance carrier or other person providing professional liability insurance to a party design professional, or all or any combination of such persons, all or a portion of the costs and expenses of the design professional conciliation panel attributable to a claim involving such persons, if the court finds that such person or persons failed to cooperate with the design professional conciliation panel. Such penalty shall be payable to the general fund.

In determining whether any person has failed to cooperate in good faith, the court shall consider, but is not limited to, the following:

- (1) The attendance of the persons at the hearing of the design professional conciliation panel;
- (2) The extent to which representatives of the parties and counsel representing parties came to panel hearings with knowledge of the claims and defenses and authority to negotiate a settlement or other disposition of the claim;
- (3) The testimony of members of the panel as to the facts of the person's participation in the panel hearing;
- (4) The extent of the person's cooperation in providing the panel with documents and testimony called for by the panel; and
- (5) The reasons advanced by the person so charged for not fully cooperating or negotiating.

§ **Annual report.** The director of regulatory agencies shall prepare and submit to the legislature annually, twenty days prior to the convening of each regular session, a report containing his evaluation of the operation and effects of this chapter. The report shall include a summary of the claims brought before the design professional conciliation panel and the disposition of those claims.

§ For the purposes of this part, "design professional" means a professional engineer, architect, or surveyor.

§ **Administration of part.** The director of regulatory agencies shall be responsible for the implementation and administration of this part and shall adopt rules, in conformity with chapter 91, necessary for the purposes of this part."

SECTION 2. This Act shall take effect upon its approval.

(Approved June 22, 1981.)