

---

---

# 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



# H.B. NO. 2025

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[~~7~~] 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, 2007.  
 11  
 12

INTRODUCED BY:

Sahara Yamamoto

Mark Moore

Bob Stonebraker

Guthrie Hobbes

Effunrejan

Colleen Meyer

Ann V. St.

Z. R.  
Chuan K. G.

Ch. L. K.

JAN 20 2006

HB 2025

**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.

