
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 amended
2 by adding a new part to be appropriately designated and to read
3 as follows:

4 **"PART . PATIENT ACCESS TO HEALTH CARE SERVICES**

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

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



- 1 (1) Improve the availability of health care services
2 in cases in which health care liability actions
3 have been shown to be a factor in the decreased
4 availability of services;
- 5 (2) Reduce the incidence of "defensive medicine" and
6 lower the cost of health care liability
7 insurance, all of which contribute to the
8 escalation of health care costs;
- 9 (3) Ensure that persons with meritorious health care
10 injury claims receive fair and adequate
11 compensation, including reasonable noneconomic
12 damages;
- 13 (4) Improve the fairness and cost-effectiveness of
14 our current health care liability system to
15 resolve disputes over, and provide compensation
16 for, health care liability by reducing
17 uncertainty in the amount of compensation
18 provided to injured individuals; and
- 19 (5) Provide an increased sharing of information in
20 the health care system which will reduce
21 unintended injury and improve patient care.



1 **§671-B Definitions.** As used in this part, unless the
2 context clearly requires otherwise:

3 "Alternative dispute resolution" means a system that
4 provides for the resolution of medical tort lawsuits in a manner
5 other than through a civil action brought in a state or federal
6 court.

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

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

- 19 (1) Any state or federal health, sickness, income-
20 disability, accident, or workers' compensation
21 law;



- 1 (2) Any health, sickness, income-disability, or
2 accident insurance that provides health benefits
3 or income-disability coverage;
- 4 (3) Any contract or agreement of any group,
5 organization, partnership, or corporation to
6 provide, pay for, or reimburse the cost of
7 medical, hospital, dental, or income disability
8 benefits; and
- 9 (4) Any other publicly or privately funded program.

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



1 damages and noneconomic damages, as those terms are defined in
2 this section.

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

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

13 "Health care goods or services" means any goods or
14 services, provided by a health care organization, provider, or
15 by any individual working under the supervision of a health care
16 provider, that relate to the diagnosis, prevention, or treatment
17 of any human disease or impairment or the assessment of the
18 health of human beings.

19 "Health care liability action" means a civil action brought
20 in a state or federal court or pursuant to an alternative
21 dispute resolution system, against a health care provider, a
22 health care organization, or the manufacturer, distributor,



1 supplier, marketer, promoter, or seller of a medical product,
2 regardless of the theory of liability on which the claim is
3 based or the number of plaintiffs, defendants, or other parties
4 or the number of causes of action in which the claimant alleges
5 a health care liability claim.

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

18 "Health care organization" means any person or entity which
19 is obligated to provide or pay for health benefits under any
20 health plan, including any person or entity acting under a
21 contract or arrangement with a health care organization to
22 provide or administer any health benefit.



1 "Health care provider" means any person or entity required
2 by state or federal laws or regulations to be licensed,
3 registered, or certified to provide health care services and
4 being either so licensed, registered, or certified, or exempted
5 from such requirement by other statute or regulation.

6 "Malicious intent to injure" means intentionally causing or
7 attempting to cause physical injury other than providing health
8 care goods or services.

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

15 "Medical tort lawsuit" means any health care liability
16 claim concerning the provision of health care goods or services
17 affecting interstate commerce, or any health care liability
18 action concerning the provision of health care goods or services
19 affecting interstate commerce, brought in a state or federal
20 court or pursuant to an alternative dispute resolution system,
21 against a health care provider, a health care organization, or
22 the manufacturer, distributor, supplier, marketer, promoter, or



1 seller of a medical product, regardless of the theory of
2 liability on which the claim is based or the number of
3 claimants, plaintiffs, defendants, or other parties or the
4 number of claims or causes of action in which the claimant
5 alleges a health care liability claim.

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

13 "Punitive damages" means damages awarded for the purpose of
14 punishment or deterrence, and not solely for compensatory
15 purposes, against a health care provider, health care
16 organization, or a manufacturer, distributor, or supplier of a
17 medical product. Punitive damages are neither economic nor
18 noneconomic damages.

19 "Recovery" means the net sum recovered after deducting any
20 disbursements or costs incurred in connection with prosecution
21 or settlement of the claim, including all costs paid or advanced
22 by any person. Costs of health care incurred by the plaintiff



1 and the attorneys' office overhead costs or charges for legal
2 services are not deductible disbursements or costs for such
3 purpose.

4 **§671-C Compensating patient injury.** (a) In any medical
5 tort lawsuit, the full amount of a claimant's economic loss may
6 be fully recovered without limitation.

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

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



1 (d) In any medical tort lawsuit, each party shall be
2 liable for that party's several share of any damages only and
3 not for the share of any other person. Each party shall be
4 liable only for the amount of damages allocated to the party in
5 direct proportion to the party's percentage of responsibility. A
6 separate judgment shall be rendered against each party for the
7 amount allocated to the party. For purposes of this section, the
8 trier of fact shall determine the proportion of responsibility
9 of each party for the claimant's harm.

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



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

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

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

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

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

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



1 claimant or receive any lien or credit against the claimant's
2 recovery or be equitably or legally subrogated to the right of
3 the claimant in a medical tort lawsuit. This section shall apply
4 to any medical tort lawsuit that is settled as well as a medical
5 tort lawsuit that is resolved by a fact finder.

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



1 punitive damages. At the request of any party in a medical tort
2 lawsuit, the trier of fact shall consider in a separate
3 proceeding:

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

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

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

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

14 (1) The severity of the harm caused by the conduct of
15 the party;

16 (2) The duration of the conduct or any concealment of
17 it by the party;

18 (3) The profitability of the conduct to the party;

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



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

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

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

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

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

21 (A) The medical product was so approved or
22 cleared; or



1 (B) The medical product is generally
2 recognized among qualified experts as
3 safe and effective pursuant to
4 conditions established by the Food and
5 Drug Administration and applicable Food
6 and Drug Administration regulations,
7 including without limitation those
8 related to packaging and labeling,
9 unless the Food and Drug Administration
10 has determined that the medical product
11 was not manufactured or distributed in
12 substantial compliance with applicable
13 Food and Drug Administration statutes
14 and regulations.

15 (2) A health care provider who prescribes a drug or
16 device (including blood products) approved by the
17 Food and Drug Administration shall not be named
18 as a party to a product liability lawsuit
19 involving the drug or device and shall not be
20 liable to a claimant in a class action lawsuit
21 against the manufacturer, distributor, or product
22 seller of the drug or device.



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

13 **§671-G Authorization of payment of future damages to**
14 **claimants in medical tort lawsuits.** (a) In any medical tort
15 lawsuit, if an award of future damages, without reduction to
16 present value, equaling or exceeding \$50,000 is made against a
17 party with sufficient insurance or other assets to fund a
18 periodic payment of the judgment, the court, at the request of
19 any party, shall enter a judgment ordering that the future
20 damages be paid by periodic payments in accordance with the
21 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
6 therapeutic or diagnostic purpose or effect in the
7 person of the 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."



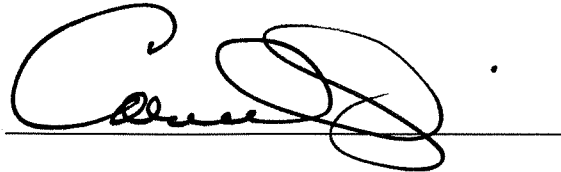
1 SECTION 3. In codifying the new sections added by section 1
 2 of this Act, the revisor of statutes shall substitute
 3 appropriate section numbers for the letters used in designating
 4 the new sections in this Act.

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.

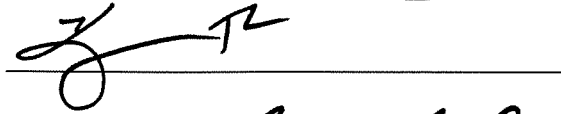
8 SECTION 5. Statutory material to be repealed is bracketed
 9 and stricken. New statutory material is underscored.

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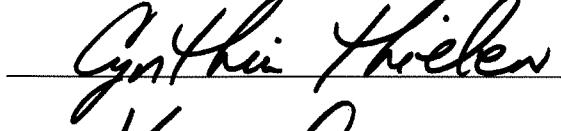
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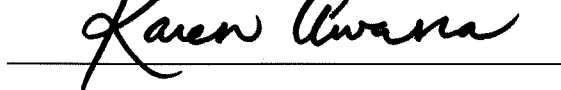














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Report Title:

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.

