

JAN 19 2007

A BILL FOR AN ACT

RELATING TO TORTS.

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

1 PART I. MEDICAL TORT REFORM

2 SECTION 1. Chapter 658A, Hawaii Revised Statutes, is
3 amended by adding a new section to be appropriately designated
4 and to read as follows:

5 "§658- Arbitration in medical services contracts. (a) Any
6 contract for medical services which contains a provision for
7 arbitration of any dispute as to a medical tort, as defined in
8 section 671-1, shall have such provision as the first article of
9 the contract and shall be expressed in substantially the
10 following language: "It is understood that any dispute as to
11 medical malpractice, that is as to whether any medical services
12 rendered under this contract were unnecessary or unauthorized or
13 were improperly, negligently or incompetently rendered, will be
14 determined by submission to arbitration as provided by Hawaii
15 law, and not by a lawsuit or resort to court process except as
16 Hawaii law provides for judicial review of arbitration
17 proceedings. Both parties to this contract, by entering into



1 it, are giving up their constitutional right to have any such
2 dispute decided in a court of law before a jury, and instead are
3 accepting the use of arbitration."

4 (b) Immediately before the signature line provided for the
5 individual contracting for the medical services must appear the
6 following in at least 10-point bold red type:

7 "NOTICE: BY SIGNING THIS CONTRACT YOU ARE AGREEING TO HAVE
8 ANY ISSUE OF MEDICAL MALPRACTICE DECIDED BY NEUTRAL ARBITRATION
9 AND YOU ARE GIVING UP YOUR RIGHT TO A JURY OR COURT TRIAL. SEE
10 ARTICLE 1 OF THIS CONTRACT."

11 (c) Once signed, such a contract governs all subsequent
12 open-book account transactions for medical services for which
13 the contract was signed until or unless rescinded by written
14 notice within 30 days of signature. Written notice of such
15 rescission may be given by a guardian or conservator of the
16 patient if the patient is incapacitated or a minor.

17 (d) Where the contract is one for medical services to a
18 minor, it shall not be subject to disaffirmance if signed by the
19 minor's parent or legal guardian.

20 (e) Such a contract is not a contract of adhesion, nor
21 unconscionable or otherwise improper, where it complies with
22 subsections (a), (b), and (c) of this section."



1 SECTION 2. Chapter 663, Hawaii Revised Statutes, is
2 amended by adding a new section to be appropriately designated
3 and to read as follows:

4 "§663- Medical tort actions, limitation on non-economic
5 damages. Notwithstanding section 663-8.7, with respect to
6 actions for medical torts, as defined in section 671-1,
7 noneconomic damages shall be limited to a maximum award of
8 \$250,000."

9 SECTION 3. Chapter 671, Hawaii Revised Statutes, is
10 amended by adding a new section to be appropriately designated
11 and to read as follows:

12 "§671- Evidence of collateral benefits admissible. (a)
13 In the event the defendant so elects, in an action for a medical
14 tort, the defendant may introduce evidence of any amount payable
15 as a benefit to the plaintiff as a result of the personal injury
16 underlying the action pursuant to the United States Social
17 Security Act, any state or federal income disability or worker's
18 compensation act, any health, sickness or income-disability
19 insurance, accident insurance that provides health benefits or
20 income-disability coverage, and any contract or agreement of any
21 group, organization, partnership, or corporation to provide, pay
22 for, or reimburse the cost of medical, hospital, dental, or



1 other health care services. Where the defendant elects to
2 introduce such evidence, the plaintiff may introduce evidence of
3 any amount which the plaintiff has paid or contributed to secure
4 his right to any insurance benefits concerning which the
5 defendant has introduced evidence.

6 (b) No source of collateral benefits introduced pursuant
7 to subsection (a) shall recover any amount against the plaintiff
8 nor shall it be subrogated to the rights of the plaintiff
9 against a defendant."

10 SECTION 4. Chapter 671, Hawaii Revised Statutes, is
11 amended by adding a new section to be appropriately designated
12 and to read as follows:

13 "§671- Attorney fees. (a) An attorney shall not contract
14 for or collect a contingency fee for representing any person
15 seeking damages in connection with an action for a medical tort
16 in excess of the following limits:

17 (1) Forty percent of the first \$50,000 recovered.

18 (2) Thirty-three and one-third percent of the next \$50,000
19 recovered.

20 (3) Twenty-five percent of the next \$500,000 recovered.

21 (4) Fifteen percent of any amount on which the recovery
22 exceeds \$600,000.



1 The limitations shall apply regardless of whether the
2 recovery is by settlement, arbitration, or judgment, or whether
3 the person for whom the recovery is made is a responsible adult,
4 an infant, or a person of unsound mind.

5 (b) If periodic payments are awarded to the plaintiff
6 pursuant to section 671- , the court shall place a total value
7 on these payments based upon the projected life expectancy of
8 the plaintiff and include this amount in computing the total
9 award from which attorney's fees are calculated under this
10 section.

11 (c) For purposes of this section, "recovered" means the net
12 sum recovered after deducting any disbursements or costs
13 incurred in connection with prosecution or settlement of the
14 claim. Costs of medical care incurred by the plaintiff and the
15 attorney's office overhead costs or charges are not deductible
16 disbursements or costs for such purpose."

17 SECTION 5. Chapter 671, Hawaii Revised Statutes, is
18 amended by adding a new section to be appropriately designated
19 and to read as follows:

20 "§671- Periodic payments. (a) In any medical tort
21 action, a court shall, at the request of either party, enter a
22 judgment ordering that money damages or the equivalent for



1 future damages of the judgment creditor be paid in whole or in
2 part by periodic payments rather than by a lump-sum payment if
3 the award equals or exceeds \$50,000 in future damages. In
4 entering a judgment ordering the payment of future damages by
5 periodic payments, the court shall make a specific finding as to
6 the dollar amount of periodic payments which will compensate the
7 judgment creditor for such future damages. As a condition to
8 authorizing periodic payments of future damages, the court shall
9 require a judgment debtor who is not adequately insured to post
10 security adequate to assure full payment of such damages awarded
11 by the judgment. Upon termination of periodic payments of
12 future damages, the court shall order the return of this
13 security, or so much as remains, to the judgment debtor.

14 (b) (1) The judgment ordering the payment of future
15 damages by periodic payments shall specify the recipient or
16 recipients of the payments, the dollar amount of the payments,
17 the interval between payments, and the number of payments or the
18 period of time over which payments shall be made. Such payments
19 shall only be subject to modification in the event of the death
20 of the judgment creditor.

21 (2) In the event that the court finds that the judgment
22 debtor has exhibited a continuing pattern of failing to make the



1 payments, as specified in paragraph (1), the court shall find
2 the judgment debtor in contempt of court and, in addition to the
3 required periodic payments, shall order the judgment debtor to
4 pay the judgment creditor all damages caused by the failure to
5 make such periodic payments, including court costs and
6 attorney's fees.

7 (c) However, money damages awarded for loss of future
8 earnings shall not be reduced or payments terminated by reason
9 of the death of the judgment creditor, but shall be paid to
10 persons to whom the judgment creditor owed a duty of support, as
11 provided by law, immediately prior to his death. In such cases
12 the court which rendered the original judgment may, upon
13 petition of any party in interest, modify the judgment to award
14 and apportion the unpaid future damages in accordance with this
15 subdivision.

16 (d) Following the occurrence or expiration of all
17 obligations specified in the periodic payment judgment, any
18 obligation of the judgment debtor to make further payments shall
19 cease and any security given pursuant to subsection (a) shall
20 revert to the judgment debtor.

21 (e) For purposes of this section: (1) "Future damages"
22 includes damages for future medical treatment, care or custody,



1 loss of future earnings, loss of bodily function, or future pain
2 and suffering of the judgment creditor.

3 (2) "Periodic payments" means the payment of money or
4 delivery of other property to the judgment creditor at regular
5 intervals.

6 (f) It is the intent of the Legislature in enacting this
7 section to authorize the entry of judgments in medical tort
8 actions against health care providers which provide for the
9 payment of future damages through periodic payments rather than
10 lump-sum payments. By authorizing periodic payment judgments,
11 it is the further intent of the Legislature that the courts will
12 utilize such judgments to provide compensation sufficient to
13 meet the needs of an injured plaintiff and those persons who are
14 dependent on the plaintiff for whatever period is necessary
15 while eliminating the potential windfall from a lump-sum
16 recovery which was intended to provide for the care of an
17 injured plaintiff over an extended period, who then dies shortly
18 after the judgment is paid, leaving the balance of the judgment
19 award to persons and purposes for which it was not intended. It
20 is also the intent of the Legislature that all elements of the
21 periodic payment program be specified with certainty in the
22 judgment ordering such payments and that the judgment not be



1 subject to modification at some future time which might alter
2 the specifications of the original judgment."

3 SECTION 6. Section 657-7.3, Hawaii Revised Statutes, is
4 amended to read as follows:

5 "§657-7.3 Medical torts; limitation of actions; time. [Ne
6 ~~action for injury or death against a chiropractor, clinical~~
7 ~~laboratory technologist or technician, dentist, naturopath,~~
8 ~~nurse, nursing home administrator, dispensing optician,~~
9 ~~optometrist, osteopath, physician or surgeon, physical~~
10 ~~therapist, podiatrist, psychologist, or veterinarian duly~~
11 ~~licensed or registered under the laws of the State, or a~~
12 ~~licensed hospital as the employer of any such person, based upon~~
13 ~~such person's alleged professional negligence, or for rendering~~
14 ~~professional services without consent, or for error or omission~~
15 ~~in such person's practice, shall be brought more than two years~~
16 ~~after the plaintiff discovers, or through the use of reasonable~~
17 ~~diligence should have discovered, the injury, but in any event~~
18 ~~not more than six years after the date of the alleged act or~~
19 ~~omission causing the injury or death. This six year time~~
20 ~~limitation shall be tolled for any period during which the~~
21 ~~person has failed to disclose any act, error, or omission upon~~
22 ~~which the action is based and which is known to the person.~~



1 ~~Actions by a minor shall be commenced within six years from~~
2 ~~the date of the alleged wrongful act except the actions by a~~
3 ~~minor under the age of ten years shall be commenced within six~~
4 ~~years or by the minor's tenth birthday, whichever provides a~~
5 ~~longer period. Such time limitation shall be tolled for any~~
6 ~~minor for any period during which the parent, guardian, insurer,~~
7 ~~or health care provider has committed fraud or gross negligence,~~
8 ~~or has been a party to a collusion in the failure to bring~~
9 ~~action on behalf of the injured minor for a medical tort. The~~
10 ~~time limitation shall also be tolled for any period during which~~
11 ~~the minor's injury or illness alleged to have arisen, in whole~~
12 ~~or in part, from the alleged wrongful act or omission could not~~
13 ~~have been discovered through the use of reasonable diligence.]~~

14 Medical tort actions, as defined in section 671-1, shall
15 commence within three years after the date of injury or one year
16 after the plaintiff discovers, or through the use of reasonable
17 diligence should have discovered, the injury, whichever occurs
18 first. In no event shall the time for commencement of legal
19 action exceed three years unless tolled for any of the
20 following: (1) upon proof of fraud, (2) intentional concealment,
21 or (3) the presence of a foreign body, which has no therapeutic
22 or diagnostic purpose or effect, in the person of the injured



1 person. Actions by a minor shall be commenced within three
2 years from the date of the alleged wrongful act, except that
3 actions by a minor under the full age of six years shall be
4 commenced within three years or prior to the eighth birthday of
5 the minor, whichever provides a longer period. Such time
6 limitation shall be tolled for minors for any period during
7 which parent or guardian and defendant's insurer or health care
8 provider have committed fraud or collusion in the failure to
9 bring an action on behalf of the injured minor for professional
10 negligence."

11 SECTION 7. Section 671-1, Hawaii Revised Statutes, is
12 amended to read as follows:

13 **"PART I. GENERAL PROVISIONS**

14 **§671-1 Definitions.** As used in this chapter:

15 (1) "Health care provider" means a physician or surgeon
16 licensed under chapter 453, a physician and surgeon
17 licensed under chapter 460, a podiatrist licensed
18 under chapter 463E, a health care facility as defined
19 in section 323D-2, a chiropractor licensed under
20 chapter 442, a dentist licensed under chapter 448, a
21 dental hygienist licensed under chapter 447, an
22 acupuncture practitioner licensed under chapter 436E,



1 a massage therapist licensed under chapter 452, a
2 nurse licensed under chapter 457, an occupational
3 therapist licensed under chapter 457G, an optometrist
4 licensed under chapter 459, a pharmacist licensed
5 under chapter 461, a physical therapist licensed under
6 chapter 461J, a psychologist licensed under chapter
7 465, a marriage and family therapist licensed under
8 chapter 451J, a dietitian licensed under chapter 448B,
9 a radiologic technologist licensed under chapter 466J,
10 a speech pathologist or audiologist licensed under
11 chapter 468E, a veterinarian licensed under chapter
12 471, and the employees and legal representatives of
13 any of them. Health care provider shall not mean any
14 nursing institution or nursing service conducted by
15 and for those who rely upon treatment by spiritual
16 means through prayer alone, or employees of such
17 institution or service.

- 18 (2) "Medical tort" means [~~professional negligence, the~~
19 ~~rendering of professional service without informed~~
20 ~~consent, or an error or omission in professional~~
21 ~~practice, by a health care provider, which proximately~~
22 ~~causes death, injury, or other damage to a patient] a~~



1 negligent act or omission to act by a health care
2 provider in the rendering of professional services, or
3 the rendering of professional service by a health care
4 provider without informed consent, which act or
5 omission or rendering of service without informed
6 consent is the proximate cause of a personal injury or
7 wrongful death, provided that such services are within
8 the scope of services for which the provider is
9 licensed and which are not within any restriction
10 imposed by the licensing agency or licensed hospital."

11 PART II. JOINT AND SEVERAL LIABILITY

12 SECTION 8. The legislature believes that the present system
13 of joint and several liability is unfair and inequitable in that
14 a person with only one per cent of fault can become liable for
15 one hundred per cent of the damages. Even if the plaintiff was
16 partially to blame, a person with only one per cent of fault
17 could have to pay nearly all of the damages. Joint and several
18 liability has led to a search for "deep pockets" -- governments,
19 large companies, and other insured persons and entities -- who
20 must bear the greatest burdens of liability even if their
21 involvement is minimal.



1 The legislature finds that the fairest solution is to
2 abolish joint and several liability. This Act clarifies that
3 each joint tortfeasor may be held liable for no more than that
4 percentage share of the damages attributable to that joint
5 tortfeasor.

6 SECTION 9. Section 663-10.5, Hawaii Revised Statutes, is
7 amended to read as follows:

8 "**§663-10.5 Government entity as a tortfeasor; abolition of**
9 **joint and several liability.** (a) Any other law to the contrary
10 notwithstanding, [~~including but not limited to sections 663-~~
11 ~~10.9, 663-11 to 663-13, 663-16, 663-17, and 663-31,~~] in any case
12 where a government entity is determined to be a tortfeasor along
13 with one or more other tortfeasors, the government entity shall
14 be liable for no more than that percentage share of the damages
15 attributable to the government entity[~~; provided that joint and~~
16 ~~several liability shall be retained for tort claims relating to~~
17 ~~the maintenance and design of highways pursuant to section 663-~~
18 ~~10.9]~~.

19 (b) For purposes of this section, "government entity"
20 means any unit of government in this State, including the State
21 and any county or combination of counties, department, agency,
22 institution, board, commission, district, council, bureau,



1 office, governing authority, or other instrumentality of state
2 or county government, or corporation or other establishment
3 owned, operated, or managed by or on behalf of this State or any
4 county.

5 (c) For purposes of this section, the liability of a
6 government entity shall include its vicarious liability for the
7 acts or omissions of its officers and employees."

8 SECTION 10. Section 663-10.9, Hawaii Revised Statutes, is
9 amended to read as follows:

10 "\$663-10.9 Abolition of joint and several liability[
11 ~~exceptions~~]. (a) Joint and several liability for joint
12 tortfeasors as defined in section 663-11 is abolished [~~except in~~
13 ~~the following circumstances:~~

14 ~~(1) For the recovery of economic damages against joint~~
15 ~~tortfeasors in actions involving injury or death to~~
16 ~~persons;~~

17 ~~(2) For the recovery of economic and noneconomic~~
18 ~~damages against joint tortfeasors in actions~~
19 ~~involving:~~

20 ~~(A) Intentional torts;~~

21 ~~(B) Torts relating to environmental pollution;~~

22 ~~(C) Toxic and asbestos related torts;~~



1 ~~(D) Torts relating to aircraft accidents,~~
2 ~~(E) Strict and products liability torts, or~~
3 ~~(F) Torts relating to motor vehicle accidents~~
4 ~~except as provided in paragraph (4),~~
5 ~~(3) For the recovery of noneconomic damages in~~
6 ~~actions, other than those enumerated in paragraph~~
7 ~~(2), involving injury or death to persons against~~
8 ~~those tortfeasors whose individual degree of~~
9 ~~negligence is found to be twenty five per cent or~~
10 ~~more under section 663-31. Where a tortfeasor's~~
11 ~~degree of negligence is less than twenty five per~~
12 ~~cent, then the amount recoverable against that~~
13 ~~tortfeasor for noneconomic damages shall be in~~
14 ~~direct proportion to the degree of negligence~~
15 ~~assigned; and~~
16 ~~(4) For recovery of noneconomic damages in motor~~
17 ~~vehicle accidents involving tort actions relating~~
18 ~~to the maintenance and design of highways including~~
19 ~~actions involving guardrails, utility poles, street~~
20 ~~and directional signs, and any other highway-~~
21 ~~related device upon a showing that the affected~~
22 ~~joint tortfeasor was given reasonable prior notice~~



1 ~~of a prior occurrence under similar circumstances~~
2 ~~to the occurrence upon which the tort claim is~~
3 ~~based. In actions in which the affected joint~~
4 ~~tortfeasor has not been shown to have had such~~
5 ~~reasonable prior notice, the recovery of~~
6 ~~noneconomic damages shall be as provided in~~
7 ~~paragraph (3).~~

8 ~~(5) Provided, however, that joint and several~~
9 ~~liability for economic and noneconomic damages for~~
10 ~~claims against design professionals, as defined in~~
11 ~~chapter 672, and certified public accountants, as~~
12 ~~defined in chapter 466, is abolished in actions not~~
13 ~~involving physical injury or death to persons].~~

14 (b) Each party shall be liable for:

15 (1) That party's share of any damages only and not
16 for the share of any other person; and

17 (2) The amount of damages allocated to that party
18 in direct proportion to the party's percentage of
19 responsibility.

20 (c) A separate judgment shall be rendered against each
21 party for the amount allocated to that party. For the purposes
22 of this section, the trier of fact shall determine the



1 proportion of responsibility of each party for the claimant's
2 harm."

3 SECTION 11. Section 663-11, Hawaii Revised Statutes, is
4 amended to read as follows:

5 "**§663-11 Joint tortfeasors defined.** For the purpose of this
6 part, the term "joint tortfeasors" means two or more persons
7 [~~jointly or severally~~] who are liable in tort for the same
8 injury to person or property, whether or not judgment has been
9 recovered against all or some of them."

10 SECTION 12. This Act shall apply only to causes of action
11 based upon acts or omissions occurring on or after its effective
12 date.

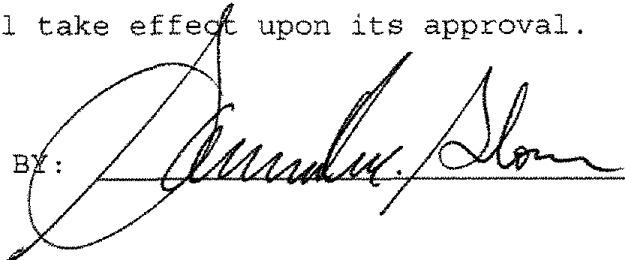
13 SECTION 13. This Act does not affect rights and duties that
14 matured, penalties that were incurred, and proceedings that were
15 begun, before its effective date.

16 SECTION 14. Statutory material to be repealed is bracketed
17 and stricken. New statutory material is underscored.

18 SECTION 15. This Act shall take effect upon its approval.

19

INTRODUCED BY:



Report Title:

Torts; Provide medical tort reform; Abolish Joint and Several Liability

Description:

Revises provisions relating to medical tort reform. Makes a tortfeasor liable for no more than that percentage of share of damages attributable to that individual or entity. Removes exceptions from law abolishing joint and several liability.

