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# A BILL FOR AN ACT

RELATING TO MEDICAL TORTS.

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

1 PART I

2 SECTION 1. Over the years, a number of doctors have  
3 retired or left Hawaii, especially the neighbor islands, citing  
4 reasons that include high medical malpractice insurance rates,  
5 low insurance reimbursement rates, and the high cost of living.  
6 Hawaii has been unable to replace these doctors in a manner that  
7 provides Hawaii residents timely access to adequate healthcare.

8 Doctors are critical components of our society, providing a  
9 very important service to everyone in the state, and addressing  
10 the needs and concerns of healthcare providers is a key step  
11 toward keeping Hawaii healthy.

12 The purpose of this Act is to address the high cost of  
13 medical malpractice insurance and defensive medicine by placing  
14 a \$250,000 cap for non-economic damages in medical tort cases  
15 for certain physician specialists.

16 SECTION 2. Chapter 671, Hawaii Revised Statutes, is  
17 amended by adding seven new sections to be appropriately  
18 designated and to read as follows:



1        **§671-A**    **Evidence of collateral benefits admissible.**    (a)  
2    In the event the defendant so elects, in an action for a medical  
3    tort, the defendant may introduce evidence of any amount payable  
4    as a benefit to the plaintiff as a result of the personal injury  
5    underlying the action pursuant to the United States Social  
6    Security Act, any state or federal income disability or worker's  
7    compensation act, any health, sickness or income-disability  
8    insurance, accident insurance that provides health benefits or  
9    income-disability coverage, and any contract or agreement of any  
10   group, organization, partnership, or corporation to provide, pay  
11   for, or reimburse the cost of medical, hospital, dental, or  
12   other health care services. Where the defendant elects to  
13   introduce evidence of collateral benefits, the plaintiff may  
14   introduce evidence of any amount that the plaintiff has paid or  
15   contributed to secure the plaintiff's right to any insurance  
16   benefits concerning which the defendant has introduced evidence.

17        (b) No entity that is a source of collateral benefits,  
18   evidence of which is introduced pursuant to subsection (a),  
19   shall recover any amount against the plaintiff nor shall it be  
20   subrogated to the rights of the plaintiff against a defendant.

21        **§671-B**    **Attorney fees.**    (a)   An attorney shall not contract  
22   for or collect a contingency fee for representing any person



1 seeking damages in connection with an action for a medical tort  
2 in excess of the following limits:

- 3       (1) Forty per cent of the first \$50,000 recovered;  
4       (2) Thirty-three and one-third per cent of the next  
5       \$50,000 recovered;  
6       (3) Twenty-five per cent of the next \$500,000 recovered;  
7       and  
8       (4) Fifteen per cent of any amount of recovery that  
9       exceeds \$600,000.

10 The fee limitations shall apply regardless of whether the  
11 recovery is by settlement, arbitration, or judgment or whether  
12 the person for whom the recovery is made is a responsible adult,  
13 an infant, or a person of unsound mind.

14       (b) If periodic payments are awarded to the plaintiff  
15 pursuant to section 671-C, the court shall place a total value  
16 on these payments based upon the projected life expectancy of  
17 the plaintiff and include this amount in computing the total  
18 award from which attorney's fees are calculated under this  
19 section.

20       **§671-C Periodic payments.** (a) In any medical tort  
21 action, a court, at the request of either party, shall 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 that will compensate the  
7 judgment creditor for the future damages; provided that when  
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 ensure full payment of the 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) A judgment ordering the payment of future damages by  
15 periodic payments shall specify the recipient or recipients of  
16 the payments, the dollar amount of the payments, the interval  
17 between payments, and the number of payments or the period of  
18 time over which payments shall be made. The payments shall only  
19 be subject to modification in the event of the death of the  
20 judgment creditor.

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



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

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

14 (e) Following the performance or expiration of all  
15 obligations specified in the periodic payment judgment, any  
16 obligation of the judgment debtor to make further payments shall  
17 cease and any remaining security given pursuant to subsection  
18 (a) shall revert to the judgment debtor.

19 **§671-D Limitation on noneconomic damages.** In an action on  
20 a medical tort claim where final judgment is rendered against a  
21 physician specialist, the limit on civil liability for  
22 noneconomic damages of the physician specialist, inclusive of



1 all persons and entities for which vicarious liability theories  
2 may apply, shall be limited to an amount not to exceed \$250,000  
3 for each claimant, regardless of the number of defendant  
4 physician specialists. Notwithstanding section 663-8.7,  
5 noneconomic damages as defined in section 663-8.5 shall be  
6 limited in medical tort actions to a maximum award of:

- 7       (1) \$250,000 against any physician specialist; or  
8       (2) \$3,000,000 allocated proportionately based upon  
9             percentage of fault if the gross negligence standards  
10            are met.

11       **§671-E Economic damages.** A trier of fact may render a  
12 verdict for the plaintiff in a medical tort action that includes  
13 economic damages, including but not limited to past and future  
14 medical expenses, loss of past and future earnings, loss of use  
15 of property, cost of repair or replacement, cost of obtaining  
16 domestic services, loss of employment, or loss of business and  
17 employment opportunities.

18       **§671-F Proportionate allocation of economic damages.** The  
19 amount of economic damages allocated to a physician specialist  
20 in a medical tort action shall be based upon the physician  
21 specialist's proportionate percentage of negligence or other  
22 fault.



1           §671-G Allocation of noneconomic damages. (a) If the  
2 trier of fact renders a verdict for the plaintiff in a medical  
3 tort action, the court shall enter judgment of liability against  
4 each defendant physician specialist in accordance with the  
5 percentage of negligence or other fault for compensatory damages  
6 that is attributed to the physician specialist by the trier of  
7 fact.

8           (b) Judgment shall not be entered against any physician  
9 specialist who has not been named a party or has been released,  
10 dismissed, or otherwise discharged as a party pursuant to  
11 section 663-15.5."

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

14           "**§657-7.3 Medical torts; limitation of actions; time.** [No  
15 ~~action for injury or death against a chiropractor, clinical~~  
16 ~~laboratory technologist or technician, dentist, naturopath,~~  
17 ~~nurse, nursing home administrator, dispensing optician,~~  
18 ~~optometrist, osteopath, physician or surgeon, physical~~  
19 ~~therapist, podiatrist, psychologist, or veterinarian duly~~  
20 ~~licensed or registered under the laws of the State, or a~~  
21 ~~licensed hospital as the employer of any such person, based upon~~  
22 ~~such person's alleged professional negligence, or for rendering~~



1 ~~professional services without consent, or for error or omission~~  
2 ~~in such person's practice, shall be brought more than two years~~  
3 ~~after the plaintiff discovers, or through the use of reasonable~~  
4 ~~diligence should have discovered, the injury, but in any event~~  
5 ~~not more than six years after the date of the alleged act or~~  
6 ~~omission causing the injury or death. This six year time~~  
7 ~~limitation shall be tolled for any period during which the~~  
8 ~~person has failed to disclose any act, error, or omission upon~~  
9 ~~which the action is based and which is known to the person.~~

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





1 An action for a medical tort, as defined in section 671-1, shall  
2 commence within three years after the date of injury or one year  
3 after the plaintiff discovers, or through the use of reasonable  
4 diligence should have discovered, the injury, whichever occurs  
5 first. In no event shall the time for commencement of the legal  
6 action exceed three years unless tolled for:

- 7       (1) Proof of fraud;
- 8       (2) Proof of intentional concealment; or
- 9       (3) Discovery of the presence of a foreign body that has  
10       no therapeutic or diagnostic purpose or effect in the  
11       person of the injured person.

12       (b) Actions by a minor shall be commenced within three  
13 years from the date of the alleged wrongful act, except that  
14 actions by a minor under the age of six years shall be commenced  
15 within three years, or prior to the eighth birthday of the  
16 minor, whichever provides a longer period. The time limitation  
17 shall be tolled for minors for any period during which a parent  
18 or guardian and defendant's insurer or health care provider have  
19 committed fraud or collusion in the failure to bring an action  
20 on behalf of the injured minor for professional negligence."

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



1           **"§663-11 Joint tortfeasors defined.** For the purpose of  
 2 this part, the term "joint tortfeasors" means two or more  
 3 persons jointly or severally liable in tort for the same injury  
 4 to person or property, whether or not judgment has been  
 5 recovered against all or some of them[-], except as provided for  
 6 physician specialists as defined in chapter 671."

7           SECTION 5. Section 671-1, Hawaii Revised Statutes, is  
 8 amended to read as follows:

9           **"§671-1 Definitions.** As used in this chapter:

10           "Future damages" means damages for future medical  
 11 treatment, care, or custody, loss of future earnings, loss of  
 12 bodily function, or future pain and suffering of the judgment  
 13 creditor.

14           "Gross negligence" means the reckless provision of health  
 15 care that is clearly below the standard of acceptable medical  
 16 practice, without regard for potential consequences or with  
 17 wilful or wanton disregard for the well-being of the patient.

18           [(-)] "Health care provider" means a physician or surgeon  
 19 licensed under chapter 453, [~~a physician and surgeon licensed~~  
 20 ~~under chapter 460,~~] a podiatrist licensed under chapter 463E, a  
 21 health care facility as defined in section 323D-2, and the  
 22 employees of any of them. Health care provider shall not mean



1 any nursing institution or nursing service conducted by and for  
2 those who rely upon treatment by spiritual means through prayer  
3 alone, or employees of [~~such~~] the institution or service.

4 [~~2~~] "Medical tort" means professional negligence, the  
5 rendering of professional service without informed consent, or  
6 an error or omission in professional practice[~~7~~] by a health  
7 care provider[~~7~~, ~~which~~] that proximately causes death, injury, or  
8 other damage to a patient[~~7~~]; provided that the services are  
9 within the scope of services for which the provider is licensed  
10 and that are not within any restriction imposed by the licensing  
11 agency or licensed hospital.

12 "Periodic payments" means the payment of money or delivery  
13 of other property to the judgment creditor at regular intervals.

14 "Physician specialist" means a physician or osteopathic  
15 physician licensed in this state and board certified by the  
16 American Board of Medical Specialties or Bureau of Osteopathic  
17 Specialties in one of the following specialties:

- 18 (1) Emergency medicine;  
19 (2) Neurological surgery;  
20 (3) Obstetrics and gynecology;  
21 (4) Orthopedic surgery, or  
22 (5) Surgery.



1       "Recovered" means the net sum recovered after deducting any  
2 disbursements or costs incurred in connection with prosecution  
3 or settlement of the claim; provided that costs of medical care  
4 incurred by the plaintiff and any administrative fees, including  
5 overhead costs, are not deductible disbursements or costs for  
6 such purposes."

7       SECTION 6. Beginning January 1, 2010, all insurers  
8 providing professional liability insurance for health care  
9 providers in the state shall implement a premium rate that is  
10 twenty-five per cent of the lowest rate in effect between  
11 January 1, 2003, and December 31, 2009, for physicians or  
12 osteopathic physicians licensed in this state and board  
13 certified by the American Board of Medical Specialties or Bureau  
14 of Osteopathic Specialties in one of the following specialties:

- 15       (1) Emergency medicine;  
16       (2) Neurological surgery;  
17       (3) Obstetrics and gynecology;  
18       (4) Orthopedic surgery, or  
19       (5) Surgery;

20 provided that such a premium rate reduction shall not cause  
21 imminent insolvency or fail to provide a fair rate of return.



1 SECTION 7. The department of commerce and consumer affairs  
 2 shall submit a report to the legislature no later than twenty  
 3 days prior to the convening of the 2013 regular session that  
 4 identifies any benefits and detriments related to passage of  
 5 part I of this Act as well as any suggested legislation for  
 6 recommended changes.

7 PART II

8 SECTION 8. Chapter 321, Hawaii Revised Statutes, is  
 9 amended by adding a new section to be appropriately designated  
 10 and to read as follows:

11 **"§321- Duty to notify patients of adverse events;**  
 12 **definitions; penalty; rules.** (a) An appropriately trained  
 13 designee of a health care provider shall notify in person each  
 14 patient, or the patient's relative or representative, regarding  
 15 any adverse event that results in serious harm to or a life  
 16 threatening situation for the patient within seventy-two hours  
 17 of the adverse event or discovery of the adverse event.

18 (b) The notification under subsection (a) shall not be  
 19 admissible as evidence of an admission of liability pursuant to  
 20 rule 409.5, Hawaii rules of evidence, under section 626-1.

21 (c) For purposes of this section, unless the context  
 22 otherwise requires:



1       "Adverse event" means an event that is a negative  
2 consequence of care resulting in unintended injury or illness  
3 that may or may not have been preventable.

4       "Health care provider" means a physician or surgeon or  
5 osteopathic physician or surgeon licensed under chapter 453, a  
6 podiatrist licensed under chapter 463E, and a health care  
7 facility as defined in section 323D-2.

8       "Notify" means a forthright and empathetic discussion of  
9 clinically significant facts about the occurrence of an adverse  
10 event that resulted in patient harm, or could result in patient  
11 harm in the foreseeable future.

12       "Relative" means the patient's spouse, parent, grandparent,  
13 adult children, adult siblings or any other adult person who has  
14 a family-type relationship with the patient.

15       "Representative" means a legal guardian, attorney, person  
16 designated to have medical power of attorney, executor of the  
17 patient's estate, or any other person recognized in law as a  
18 patient's agent.

19       (d) Failure to comply with this section may subject a  
20 health care provider to license revocation and any other civil  
21 or criminal penalties permitted by law.





- 1        (3) A description of any final disciplinary action by the  
2        board against the physician, including fines,  
3        penalties, probation, suspension, or revocation of  
4        license;
- 5        (4) A description of any final disciplinary action taken  
6        by any other licensing jurisdiction in other states  
7        against the physician within the last five years;
- 8        (5) A description of revocation or involuntary restriction  
9        of hospital privileges for reasons related to  
10       competence, character, or substance abuse that have  
11       been taken by the hospital's governing board or  
12       administrative officer, or resignation from or  
13       nonrenewal of medical staff membership or restriction  
14       of privileges at a hospital taken in lieu of or in  
15       settlement of a pending disciplinary action. Adverse  
16       decisions reported to the board pursuant to section  
17       663-1.7 shall be included in the profile;
- 18       (6) All medical malpractice court judgments or awards in  
19       which a payment was awarded to a complainant,  
20       including those reported to the board pursuant to  
21       sections 453-8.7, 671-5, and 671-15;





- 1        (7) Name of medical school attended, dates of attendance,  
2        and date of graduation;
- 3        (8) Name of graduate medical education program, dates of  
4        attendance, and date of completion;
- 5        (9) Specialty board certification. The toll free number  
6        of the American Board of Medical Specialties shall be  
7        included to verify current board certification status;
- 8        (10) State or jurisdiction in which the physician is  
9        licensed, date of licensure, and current status of  
10       licensure;
- 11       (11) Names of hospitals where the physician has privileges;
- 12       (12) Status of compliance with continuing education  
13       requirements;
- 14       (13) Name of the professional liability insurance carrier  
15       or self-insured and status of compliance with  
16       financial responsibility provisions; and
- 17       (14) Indication of whether the physician participates in  
18       the Medicaid program, health plans, or accepts  
19       workers' compensation cases.
- 20       (b) The board shall provide a copy of the profile to the  
21       physician prior to initial publication and the physician shall  
22       have sixty days after receipt to correct inaccurate factual



1 information. The physician may elect to include the following  
2 information: professional and community memberships, community  
3 activities, publications in peer reviewed medical literature,  
4 appointments to medical school faculty, language access, and any  
5 specialized areas of treatment.

6 (c) The physician shall update information in the profile  
7 within thirty days of any change in the information by reporting  
8 the change to the board.

9 (d) The board may take disciplinary action, including  
10 assessing a fine or penalty, against the physician for failure  
11 to comply with this section.

12 (e) The board may adopt rules pursuant to chapter 91  
13 necessary to carry out the purposes of this section."

14 SECTION 11. Section 453-7.5, Hawaii Revised Statutes, is  
15 amended by amending subsection (b) to read as follows:

16 "(b) Reports of adverse decisions of peer review  
17 committees transmitted to the department under section 663-1.7  
18 shall not be available to public inspection or subject to  
19 discovery and shall be held confidential by the department;  
20 provided that:

21 (1) A written affirmative or negative reply may be given  
22 to a written inquiry by a hospital or health care



1 facility as to whether a report of an adverse decision  
2 is on file with the department; [~~and~~]

3 (2) A subpoenaed report shall be subject to the  
4 requirements under section 453-17[-]; and

5 (3) The board shall include in the physician profile under  
6 section 453- a statement that an adverse decision  
7 has been reported to the board."

8 PART IV

9 SECTION 12. Part I of this Act does not affect rights and  
10 duties that matured, penalties that were incurred, and  
11 proceedings that were begun, before its effective date.

12 SECTION 13. In codifying the new sections added by section  
13 2 of this Act, the revisor of statutes shall substitute  
14 appropriate section numbers for the letters used in designating  
15 the new sections in this Act.

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 on July 1, 2009;  
19 provided that part I of this Act shall be repealed on June 30,  
20 2014.



**Report Title:**

Medical Tort Claims; Noneconomic Damages

**Description:**

Limits the amount awarded for non-economic damages in medical tort cases to \$250,000 per physician specialist. Sets the award limit for non-economic damages in cases of gross negligence at \$3,000,000. Requires a health care provider to disclose to patients adverse events relating to their medical treatment. Requires the Hawaii medical board to collect and publish information about physicians licensed in the state to allow consumers to make informed decisions in selecting physicians.  
(HB1784 HD1)

