

JAN 23 2009

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 "§658A- Arbitration in medical services contracts. (a)

6 Any 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 a provision as the first article of
9 the contract that 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,
13 or were improperly, negligently, or incompetently rendered, will
14 be 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 shall appear the
6 following in at least 10-point bold red type:

7 "NOTICE: BY SIGNING THIS CONTRACT I AGREE TO HAVE ANY ISSUE
8 OF MEDICAL MALPRACTICE DECIDED BY NEUTRAL ARBITRATION AND I AM
9 GIVING UP MY RIGHT TO A JURY OR COURT TRIAL AS PROVIDED IN
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13 the contract was signed until or unless rescinded by written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. Written notice of such rescission may be given by a
15 guardian or conservator of the patient if the patient is
16 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) 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 three new sections to be appropriately
11 designated and to read as follows:

12 "§671-A 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 the plaintiff's right to any insurance benefits concerning which
5 the 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 §671-B Attorney fees. (a) An attorney shall not
11 contract for or collect a contingency fee for representing any
12 person seeking damages in connection with an action for a
13 medical tort in excess of the following limits:

14 (1) Forty per cent of the first \$50,000 recovered.

15 (2) Thirty-three and one-third per cent of the next
16 \$50,000 recovered.

17 (3) Twenty-five per cent of the next \$500,000 recovered.

18 (4) Fifteen per cent of any amount on which the recovery
19 exceeds \$600,000.

20 The limitations shall apply regardless of whether the recovery
21 is by settlement, arbitration, or judgment, or whether the



1 person for whom the recovery is made is a responsible adult, an
2 infant, or a person of unsound mind.

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

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

15 **§671-C Periodic payments.** (a) In any medical tort
16 action, a court shall, at the request of either party, enter a
17 judgment ordering that money damages or the equivalent for
18 future damages of the judgment creditor be paid in whole or in
19 part by periodic payments rather than by a lump-sum payment if
20 the award equals or exceeds \$50,000 in future damages. In
21 entering a judgment ordering the payment of future damages by
22 periodic payments, the court shall make a specific finding as to



1 the dollar amount of periodic payments which will compensate the
2 judgment creditor for such future damages. As a condition to
3 authorizing periodic payments of future damages, the court shall
4 require a judgment debtor who is not adequately insured to post
5 security adequate to assure full payment of such damages awarded
6 by the judgment. Upon termination of periodic payments of
7 future damages, the court shall order the return of this
8 security, or so much as remains, to the judgment debtor.

9 (b) A judgment ordering the payment of future damages by
10 periodic payments shall specify the recipient or recipients of
11 the payments, the dollar amount of the payments, the interval
12 between payments, and the number of payments or the period of
13 time over which payments shall be made. Such payments shall
14 only be subject to modification in the event of the death of the
15 judgment creditor.

16 (c) In the event that the court finds that the judgment
17 debtor has exhibited a continuing pattern of failing to make
18 payments, the court shall find the judgment debtor in contempt
19 of court, and, in addition to the required periodic payments,
20 shall order the judgment debtor to pay the judgment creditor all
21 damages caused by the failure to make such periodic payments,
22 including court costs and attorney's fees.



1 (d) Money damages awarded for loss of future earnings
2 shall not be reduced or terminated by reason of the death of the
3 judgment creditor, but shall be paid to persons to whom the
4 judgment creditor owed a duty of support, as provided by law,
5 immediately prior to death. In such cases the court which
6 rendered the original judgment may, upon petition of any party
7 in interest, modify the judgment to award and apportion the
8 unpaid future damages in accordance with this subsection.

9 (e) Following the occurrence or expiration of all
10 obligations specified in the periodic payment judgment, any
11 obligation of the judgment debtor to make further payments shall
12 cease and any remaining security given pursuant to subsection
13 (a) shall revert to the judgment debtor.

14 (f) For purposes of this section:

15 "Future damages" includes damages for future medical
16 treatment, care or custody, loss of future earnings, loss of
17 bodily function, or future pain and suffering of the judgment
18 creditor.

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

21 (g) It is the intent of the legislature in enacting this
22 section to authorize the entry of judgments in medical tort



1 actions against health care providers which provide for the
2 payment of future damages through periodic payments rather than
3 lump-sum payments. By authorizing periodic payment judgments,
4 it is the further intent of the legislature that the courts will
5 utilize such judgments to provide compensation sufficient to
6 meet the needs of an injured plaintiff and those persons who are
7 dependent on the plaintiff for whatever period is necessary
8 while eliminating the potential windfall from a lump-sum
9 recovery which was intended to provide for the care of an
10 injured plaintiff over an extended period, who then dies shortly
11 after the judgment is paid, leaving the balance of the judgment
12 award to persons and purposes for which it was not intended. It
13 is also the intent of the legislature that all elements of the
14 periodic payment program be specified with certainty in the
15 judgment ordering such payments and that the judgment not be
16 subject to modification at some future time which might alter
17 the specifications of the original judgment."

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

20 **"§657-7.3 Medical torts; limitation of actions; time. [No**
21 ~~action for injury or death against a chiropractor, clinical~~
22 ~~laboratory technologist or technician, dentist, naturopath,~~



1 nurse, nursing home administrator, dispensing optician,
2 optometrist, osteopath, physician or surgeon, physical
3 therapist, podiatrist, psychologist, or veterinarian duly
4 licensed or registered under the laws of the State, or a
5 licensed hospital as the employer of any such person, based upon
6 such person's alleged professional negligence, or for rendering
7 professional services without consent, or for error or omission
8 in such person's practice, shall be brought more than two years
9 after the plaintiff discovers, or through the use of reasonable
10 diligence should have discovered, the injury, but in any event
11 not more than six years after the date of the alleged act or
12 omission causing the injury or death. This six-year time
13 limitation shall be tolled for any period during which the
14 person has failed to disclose any act, error, or omission upon
15 which the action is based and which is known to the person.

16 Actions by a minor shall be commenced within six years from
17 the date of the alleged wrongful act except the actions by a
18 minor under the age of ten years shall be commenced within six
19 years or by the minor's tenth birthday, whichever provides a
20 longer period. Such time limitation shall be tolled for any
21 minor for any period during which the parent, guardian, insurer,
22 or health care provider has committed fraud or gross negligence,



1 ~~or has been a party to a collusion in the failure to bring~~
2 ~~action on behalf of the injured minor for a medical tort. The~~
3 ~~time limitation shall also be tolled for any period during which~~
4 ~~the minor's injury or illness alleged to have arisen, in whole~~
5 ~~or in part, from the alleged wrongful act or omission could not~~
6 ~~have been discovered through the use of reasonable diligence.]~~
7 Medical tort actions, as defined in section 671-1, shall
8 commence within three years after the date of injury or one year
9 after the plaintiff discovers, or through the use of reasonable
10 diligence should have discovered, the injury, whichever occurs
11 first. In no event shall the time for commencement of legal
12 action exceed three years unless tolled for any of the
13 following: (1) upon proof of fraud, (2) upon proof of
14 intentional concealment, or (3) upon discovery of the presence
15 of a foreign body, which has no therapeutic or diagnostic
16 purpose or effect, in the person of the injured person. Actions
17 by a minor shall be commenced within three years from the date
18 of the alleged wrongful act, except that actions by a minor
19 under the full age of six years shall be commenced within three
20 years or prior to the eighth birthday of the minor, whichever
21 provides a longer period. Such time limitation shall be tolled
22 for minors for any period during which a parent or guardian and



1 defendant's insurer or health care provider have committed fraud
2 or collusion in the failure to bring an action on behalf of the
3 injured minor for professional negligence."

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

6 "**§671-1 Definitions.** As used in this chapter:

7 (1) "Health care provider" means a physician or surgeon
8 licensed under chapter 453, a physician and surgeon
9 licensed under chapter 460, a podiatrist licensed
10 under chapter 463E, a health care facility as defined
11 in section 323D-2, a chiropractor licensed under
12 chapter 442, a dentist licensed under chapter 448, a
13 dental hygienist licensed under chapter 447, an
14 acupuncture practitioner licensed under chapter 436E,
15 a massage therapist licensed under chapter 452, a
16 nurse licensed under chapter 457, an occupational
17 therapist licensed under chapter 457G, an optometrist
18 licensed under chapter 459, a pharmacist licensed
19 under chapter 461, a physical therapist licensed under
20 chapter 461J, a psychologist licensed under chapter
21 465, a marriage and family therapist licensed under
22 chapter 451J, a dietitian licensed under chapter 448B,



1 a radiologic technologist licensed under chapter 466J,
2 a speech pathologist or audiologist licensed under
3 chapter 468E, a veterinarian licensed under chapter
4 471, and the employees of any of them. Health care
5 provider shall not mean any nursing institution or
6 nursing service conducted by and for those who rely
7 upon treatment by spiritual means through prayer
8 alone, or employees of such institution or service.

- 9 (2) "Medical tort" means [~~professional negligence, the~~
10 ~~rendering of professional service without informed~~
11 ~~consent, or an error or omission in professional~~
12 ~~practice, by a health care provider, which proximately~~
13 ~~causes death, injury, or other damage to a patient.]~~
14 a negligent act or omission to act by a health care
15 provider in the rendering of professional services, or
16 the rendering of professional services by a health
17 care provider without informed consent, which act or
18 omission or rendering of service without informed
19 consent is the proximate cause of a personal injury or
20 wrongful death, provided that such services are within
21 the scope of services for which the provider is



1 licensed and which are not within any restriction
2 imposed by the licensing agency or licensed hospital."

3 PART II. JOINT AND SEVERAL LIABILITY

4 SECTION 6. The legislature believes that the present
5 system of joint and several liability is unfair and inequitable
6 in that a person with only one per cent of fault can become
7 liable for one hundred per cent of the damages. Even if the
8 plaintiff was partially to blame, a person with only one per
9 cent of fault could have to pay nearly all of the damages.

10 Joint and several liability has led to a search for "deep
11 pockets," or governments, large companies, and other insured
12 persons and entities, who must bear the greatest burdens of
13 liability even if their involvement is minimal.

14 The legislature finds that the fairest solution is to
15 abolish joint and several liability. This Act clarifies that
16 each joint tortfeasor may be held liable for no more than that
17 percentage share of the damages attributable to that joint
18 tortfeasor.

19 SECTION 7. Section 663-8.7, Hawaii Revised Statutes, is
20 amended to read as follows:

21 "~~§~~663-8.7~~§~~ **Limitation on pain and suffering.** Damages
22 recoverable for pain and suffering as defined in section 663-8.5



1 shall be limited to a maximum award of \$375,000 [~~; provided that~~
2 ~~this limitation shall not apply to tort actions enumerated in~~
3 ~~section 663-10.9(2)] ."~~

4 SECTION 8. Section 663-10.5, Hawaii Revised Statutes, is
5 amended to read as follows:

6 "**§663-10.5 Government entity as a tortfeasor; abolition of**
7 **joint and several liability.** Any other law to the contrary
8 notwithstanding, [~~including but not limited to sections~~
9 ~~663-10.9, 663-11 to 663-13, 663-16, 663-17, and 663-31,~~] in any
10 case where a government entity is determined to be a tortfeasor
11 along with one or more other tortfeasors, the government entity
12 shall be liable for no more than that percentage share of the
13 damages attributable to the government entity [~~; provided that~~
14 ~~joint and several liability shall be retained for tort claims~~
15 ~~relating to the maintenance and design of highways pursuant to~~
16 ~~section 663-10.9]~~.

17 For purposes of this section, "government entity" means any
18 unit of government in this State, including the State and any
19 county or combination of counties, department, agency,
20 institution, board, commission, district, council, bureau,
21 office, governing authority, or other instrumentality of state
22 or county government, or corporation or other establishment



1 owned, operated, or managed by or on behalf of this State or any
2 county.

3 For purposes of this section, the liability of a government
4 entity shall include its vicarious liability for the acts or
5 omissions of its officers and employees."

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

8 "~~§663-10.9 Abolition of joint and several liability[
9 exceptions]~~. (a) Joint and several liability for joint
10 tortfeasors [~~as defined in section 663-11~~] is abolished [~~except
11 in the following circumstances:~~

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

15 ~~(2) For the recovery of economic and noneconomic damages
16 against joint tortfeasors in actions involving:~~

17 ~~(A) Intentional torts;~~

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

19 ~~(C) Toxic and asbestos-related torts;~~

20 ~~(D) Torts relating to aircraft accidents;~~

21 ~~(E) Strict and products liability torts; or~~



1 ~~(F) Torts relating to motor vehicle accidents except~~
2 ~~as provided in paragraph (4);~~

3 ~~(3) For the recovery of noneconomic damages in actions,~~
4 ~~other than those enumerated in paragraph (2),~~
5 ~~involving injury or death to persons against those~~
6 ~~tortfeasors whose individual degree of negligence is~~
7 ~~found to be twenty-five per cent or more under section~~
8 ~~663-31. Where a tortfeasor's degree of negligence is~~
9 ~~less than twenty-five per cent, then the amount~~
10 ~~recoverable against that tortfeasor for noneconomic~~
11 ~~damages shall be in direct proportion to the degree of~~
12 ~~negligence assigned; and~~

13 ~~(4) For recovery of noneconomic damages in motor vehicle~~
14 ~~accidents involving tort actions relating to the~~
15 ~~maintenance and design of highways including actions~~
16 ~~involving guardrails, utility poles, street and~~
17 ~~directional signs, and any other highway-related~~
18 ~~device upon a showing that the affected joint~~
19 ~~tortfeasor was given reasonable prior notice of a~~
20 ~~prior occurrence under similar circumstances to the~~
21 ~~occurrence upon which the tort claim is based. In~~
22 ~~actions in which the affected joint tortfeasor has not~~



1 ~~been shown to have had such reasonable prior notice,~~
2 ~~the recovery of noneconomic damages shall be as~~
3 ~~provided in paragraph (3).~~

4 ~~(5) Provided, however, that joint and several liability~~
5 ~~for economic and noneconomic damages for claims~~
6 ~~against design professionals, as defined in chapter~~
7 ~~672, and certified public accountants, as defined in~~
8 ~~chapter 466, is abolished in actions not involving~~
9 ~~physical injury or death to persons].~~

10 (b) Each party shall be liable for:

11 (1) That party's share of any damages only, and not for the
12 share of any other person; and

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

15 (c) A separate judgment shall be rendered against each
16 party for the amount allocated to that party. For the purposes
17 of this section, the trier of fact shall determine the
18 proportion of responsibility of each party for the claimant's
19 harm."

20 SECTION 10. Section 663-11, Hawaii Revised Statutes, is
21 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~~] who are liable in tort for the
4 same injury to person or property, whether or not judgment has
5 been recovered against all or some of them."

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

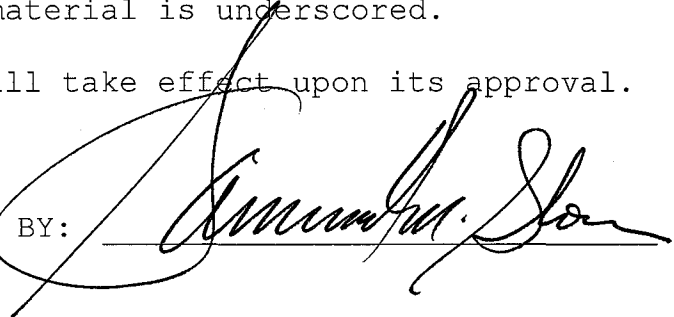
9 SECTION 12. This Act does not affect rights and duties that
10 matured, penalties that were incurred, and proceedings that were
11 begun, before its effective date.

12 SECTION 13. Statutory material to be repealed is bracketed
13 and stricken. New statutory material is underscored.

14 SECTION 14. This Act shall take effect upon its approval.

15

INTRODUCED BY: _____



Report Title:

Torts; Medical Tort Reform; Joint and Several Liability

Description:

Revises medical tort reform laws to: allow for arbitration of medical services contracts, create a new cap on noneconomic damages for medical torts, allow for introduction of evidence, limit contingency fees, and allow for periodic payments for future damages. Makes a tortfeasor liable for no more than the percentage of share of damages attributable to that individual or entity. Removes exceptions from law, thus abolishing joint and several liability.

