

JAN 23 2009

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# A BILL FOR AN ACT

RELATING TO HEALTHCARE.

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

1           SECTION 1. Hawaii has a shortage of physicians, and  
2 patients are unable to obtain the medical care that they need.  
3 This crisis is most acute on our neighbor islands, which are  
4 more rural and have a smaller physician workforce. However,  
5 symptoms of the crisis are beginning to emerge on Oahu.

6           The Trauma Center at The Queen's Medical Center on Oahu,  
7 the only level two trauma center in the State, has an alarming  
8 shortage of doctors willing to volunteer for emergency and  
9 trauma call. For at least two years, Queen's Trauma Center has  
10 had only two orthopedic surgeons on call. Recently, a third  
11 orthopedic surgeon was added, who will take calls one day a  
12 week.

13           In 2007, public forums sponsored by the Hawaii Medical  
14 Association in Hilo, Kahului, Kona, and Lihue attracted large  
15 audiences of patients eager to express their concerns about the  
16 physician shortage and frustrations in trying to find a  
17 physician to care for them. Neighbor island hospitals have



1 large gaps in their on-call coverage. As a result, patients who  
2 need emergency surgery have been held in neighbor island  
3 hospitals for long hours and sometimes days because no local  
4 surgeon is available. Transfers of neighbor island patients to  
5 The Queen's Trauma Center in Honolulu, are frequently delayed  
6 due to the lack of patient beds or lack of available surgeons.

7 Immediate action is necessary to reverse this trend.  
8 Hawaii's high malpractice insurance premiums, coupled with its  
9 high cost of living and low reimbursement rates have made it  
10 difficult to effectively recruit and retain physicians. A 2004  
11 survey by the Hawaii Chapter of the American College of  
12 Obstetricians and Gynecologists found that forty-two per cent of  
13 the Hawaii obstetrician/gynecologists surveyed plan to stop  
14 providing pregnancy care for women, largely because of  
15 malpractice issues. Over the past ten years, Hawaii has lost  
16 twenty orthopedic surgeons, a decrease from sixty-eight to  
17 forty-eight orthopedic surgeons. Medical students at the  
18 University of Hawaii John A. Burns school of medicine have  
19 testified before the legislature that the lack of liability  
20 reform has caused them to avoid specialties that pay high  
21 medical malpractice premium rates and may cause them to start  
22 their practice in another state.



1 Hawaii's medical malpractice insurance premiums are  
2 unstable and have significantly increased in recent years.  
3 Unlimited and unpredictable jury awards have led to unlimited  
4 and unpredictable risk for liability insurers. Because  
5 insurance premiums are set by assessing risk, premiums in states  
6 without effective reforms have skyrocketed. In 2004, Hawaii had  
7 the third-highest average payment per malpractice claim in the  
8 United States. On average, \$393,589 was paid per claim in  
9 Hawaii compared to \$132,696 in California, which has had medical  
10 liability reform since 1975.

11 The American College of Emergency Physicians gave Hawaii a  
12 grade of D minus for its medical liability environment in its  
13 January 2006 report, *The National Report Card on the State of*  
14 *Emergency Medicine, Evaluating the Environment of Emergency Care*  
15 *Systems State by State*. It is no longer profitable to offer  
16 medical malpractice insurance in Hawaii, where there are no  
17 longer any for-profit insurers offering malpractice coverage.  
18 Medical Insurance Exchange of California, The Doctors Company,  
19 and Hawaii Physicians Indemnity Plan are the remaining  
20 malpractice insurers in Hawaii. All are not-for-profit  
21 organizations owned and operated by physicians. In Hawaii,  
22 annual premiums for Medical Insurance Exchange of California



1 policies increased an average of ninety per cent between 2002  
2 and 2006 for specialists who provide high-risk but life-saving  
3 treatment, due to the cost of defending malpractice cases filed  
4 in Hawaii. Medical Insurance Exchange of California insures  
5 1,110 physicians, the majority of Hawaii physicians.  
6 Specialists such as orthopedic surgeons, neurosurgeons, general  
7 surgeons, obstetricians, and anesthesiologists have been hit  
8 hardest by steep increases in malpractice insurance premiums.  
9 The fear of being sued has caused physicians to stop performing  
10 high-risk procedures and volunteering for on-call emergency and  
11 trauma care duty.

12 An improved medical liability environment would help to  
13 recruit and retain Hawaii physicians. The legislature has the  
14 authority to adopt reforms that would bring malpractice lawsuits  
15 and insurance premiums under control. Other states have adopted  
16 legislation that balances the need for patient access to care  
17 and preserves the patient's right to sue. The Texas model has  
18 been deemed successful and is an excellent prototype of what  
19 Hawaii should strive to do to fix the access-to-care crisis. In  
20 2003, the Texas Legislature passed sweeping liability reforms to  
21 combat health care lawsuit abuse, reverse skyrocketing  
22 professional liability insurance premiums, and ensure access to



1 high-quality care. The centerpiece of those reforms was a  
2 \$750,000 stacked cap on noneconomic damages assessed against  
3 physicians and health care facilities in a liability judgment.  
4 There is no cap on economic damages. Texas voters then approved  
5 Proposition 12, a constitutional amendment, which ratified the  
6 legislature's authority to impose the caps. As a result of the  
7 reforms, claims and lawsuits in most Texas counties have been  
8 cut in half. Texas licensed a record 3,324 new doctors in 2007,  
9 808 doctors more than in 2006, including a net gain of 186  
10 obstetricians, 156 orthopedic surgeons, and 26 neurosurgeons.  
11 Texas has improved its national standing from 48th to 42nd in  
12 the American Medical Association's measurement of patient-care  
13 doctors per capita. Critical specialties have increased in  
14 underserved areas such as Rio Grande Valley, which gained 189  
15 physicians.

16 All major physician liability carriers in Texas have cut  
17 their rates since the passage of the reforms, most by double-  
18 digits. Texas physicians have seen their liability rates cut  
19 24.3 per cent on average. Two-thirds of Texas doctors have seen  
20 their rates slashed a quarter or more. Seventeen rate cuts have  
21 occurred in Texas since the passage of the 2003 landmark  
22 reforms.



1 The purpose of this Act is to:

- 2 (1) Require insurers, after receiving a claim for the
- 3 payment of benefits, to make direct payment to the
- 4 healthcare provider that provided the services; and
- 5 (2) Limit the amount of noneconomic damages in medical
- 6 tort actions.

7 SECTION 2. Chapter 237, Hawaii Revised Statutes, is  
8 amended by adding a new section to be appropriately designated  
9 and to read as follows:

10 "§237- Exemption of insurer payments for healthcare  
11 services. There shall be exempted from and excluded from the  
12 measure of the taxes imposed by this chapter all insurer  
13 payments made to any healthcare provider for the provision of  
14 healthcare services pursuant to sections 431:10A-A, 432:1-A, and  
15 432D-A."

16 SECTION 3. Chapter 431, Hawaii Revised Statutes, is  
17 amended by adding a new section to article 10A to be  
18 appropriately designated and to read as follows:

19 "§431:10A-A Direct payment for healthcare services. (a)  
20 An insurer, after receiving a claim for payment of benefits,  
21 shall make the payment directly to the healthcare provider that  
22 provided the services, regardless of the healthcare provider's



1 participatory status with the insurer's plan; provided that this  
2 subsection shall not require payment for services that are not  
3 covered under the plan.

4 (b) If the insurer makes payment to the insured, the  
5 insurer shall remain liable for payment to the healthcare  
6 provider. This subsection shall not prohibit the insurer from  
7 recovering any amount mistakenly paid to the insured.

8 (c) This section shall not apply to any entity or  
9 situation when their application to the entity or situation  
10 would be preempted under the Employee Retirement Income Security  
11 Act of 1974, title 29 United States Code section 1001, et seq.

12 (d) As used in this section, "healthcare provider" means a  
13 "provider of services", as defined in title 42 United States  
14 Code section 1395x(u), a provider of "medical and other health  
15 services", as defined in title 42 United States Code section  
16 1395x(s), and any other person or organization who furnishes,  
17 bills, or is paid for healthcare in the normal course of  
18 business."

19 SECTION 4. Chapter 432, Hawaii Revised Statutes, is  
20 amended by adding a new section to article 1 to be appropriately  
21 designated and to read as follows:



1           "§432:1-A Direct payment for healthcare services. (a) A  
2 mutual benefit society, after receiving a claim for benefits  
3 under this chapter, shall make payment directly to the  
4 healthcare provider that provided the services, regardless of  
5 the healthcare provider's participatory status with the  
6 society's healthcare plan; provided that this subsection shall  
7 not require payment for services that are not covered under the  
8 plan.

9           (b) If the society makes payment to the member, the  
10 society shall remain liable for payment to the healthcare  
11 provider. This subsection shall not prohibit the society from  
12 recovering any amount mistakenly paid to the member.

13           (c) This section shall not apply to any entity or  
14 situation when their application to the entity or situation  
15 would be preempted under the Employee Retirement Income Security  
16 Act of 1974, as amended.

17           (d) As used in this section, "healthcare provider" means a  
18 "provider of services", as defined in title 42 United States  
19 Code section 1395x(u), a provider of "medical and other health  
20 services," as defined in title 42 United States Code section  
21 1395x(s), and any other person or organization who furnishes,





1 bills, or is paid for healthcare in the normal course of  
2 business."

3 SECTION 5. Chapter 432D, Hawaii Revised Statutes, is  
4 amended by adding a new section to be appropriately designated  
5 and to read as follows:

6 "§432D-A Direct payment for healthcare services. (a) A  
7 health maintenance organization, after receiving a claim for  
8 benefits under this chapter, shall make payment directly to the  
9 healthcare provider that provided the services, regardless of  
10 the healthcare provider's participatory status with the health  
11 maintenance organization healthcare plan; provided that this  
12 subsection shall not require payment for services that are not  
13 covered under the plan.

14 (b) If the health maintenance organization makes payment  
15 to the enrollee, the health maintenance organization shall  
16 remain liable for payment to the healthcare provider. This  
17 subsection shall not prohibit the health maintenance  
18 organization from recovering any amount mistakenly paid to the  
19 enrollee.

20 (c) This section shall not apply to any entity or  
21 situation when their application to the entity or situation



1 would be preempted under The Employee Retirement Income Security  
2 Act of 1974, title 29 United States Code section 1001, et seq.

3 (d) As used in this section, "healthcare provider" means a  
4 "provider of services," as defined in title 42 United States  
5 Code section 1395x(u), a provider of "medical and other health  
6 services", as defined in title 42 United States Code section  
7 1395x(s), and any other person or organization who furnishes,  
8 bills, or is paid for healthcare in the normal course of  
9 business."

10 SECTION 6. Chapter 671, Hawaii Revised Statutes, is  
11 amended by adding five new sections to be appropriately  
12 designated and to read as follows:

13 "§671- Limitation on noneconomic damages.

14 Notwithstanding section 663-8.7, noneconomic damages as defined  
15 in section 663-8.5 shall be limited in medical tort actions to a  
16 maximum award of:

17 (1) \$ \_\_\_\_\_ per health care provider other than  
18 institutions;

19 (2) \$ \_\_\_\_\_ per health care institution, on a per case  
20 or occurrence basis; and

21 (3) \$ \_\_\_\_\_ per each unrelated health care institution  
22 on a per case or occurrence basis.



1           §671-    Assessing percentage of negligence.    Upon request  
2 of any nonsettling healthcare provider against whom a plaintiff  
3 alleges a medical tort causing injury, the trier of fact shall  
4 consider, in assessing any percentage of negligence or other  
5 fault, the negligence or other fault of all alleged parties,  
6 including the negligence or other fault of any person or entity  
7 who has entered into a settlement with the plaintiff for the  
8 claimed damages, even when the settlement has been determined to  
9 have been made in good faith, pursuant to section 663-15.5.

10           §671-    Economic damages.    (a) A trier of fact may render  
11 a verdict for the plaintiff in a medical tort action that  
12 includes economic damages.

13           (b) For the purposes of this section, "economic damages"  
14 includes but is not limited to:

- 15           (1) Past and future medical expenses;
- 16           (2) Loss of past and future earnings;
- 17           (3) Loss of use of property;
- 18           (4) Cost of repair or replacement;
- 19           (5) Cost of obtaining domestic services;
- 20           (6) Loss of employment; and
- 21           (7) Loss of business and employment opportunities.



1           §671- Proportionate allocation of economic damages. The  
2 amount of economic damages allocated to a healthcare provider in  
3 a medical tort action shall be based upon the healthcare  
4 provider's proportionate percentage of negligence or other  
5 fault.

6           §671- Noneconomic damages. (a) If the trier of fact  
7 renders a verdict for the plaintiff in a medical tort action,  
8 the court shall enter judgment of liability against each  
9 defendant healthcare provider in accordance with the percentage  
10 of negligence or other fault for compensatory damages that is  
11 attributed to the healthcare provider by the trier of fact.

12           (b) Judgment shall not be entered against any healthcare  
13 provider who has not been named a party or has been released,  
14 dismissed, or otherwise discharged as a party pursuant to  
15 section 663-15.5."

16           SECTION 7. Section 663-11, Hawaii Revised Statutes, is  
17 amended to read as follows:

18           "§663-11 Joint tortfeasors defined. For the purpose of  
19 this part, the term "joint tortfeasors" means two or more  
20 persons jointly or severally liable in tort for the same injury  
21 to person or property, whether or not judgment has been



1 recovered against all or some of them[-], except as provided for  
2 healthcare providers in chapter 671."

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

5 "§671-1 Definitions. As used in this chapter:

6 ~~[-(1)]~~ "Health care provider" or "healthcare provider"  
7 means a physician or surgeon licensed under chapter 453, a  
8 physician and surgeon licensed under chapter 460, a podiatrist  
9 licensed under chapter 463E, a health care facility as defined  
10 in section 323D-2, and the employees and legal representatives  
11 of any of them. Health care provider shall not mean any nursing  
12 institution or nursing service conducted by and for those who  
13 rely upon treatment by spiritual means through prayer alone, or  
14 employees of [~~such~~] the institution or service.

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



1 rendering of service without informed consent is the proximate  
2 cause of a personal injury or wrongful death; provided that the  
3 services are within the scope of services for which the provider  
4 is licensed and which are not within any restriction imposed by  
5 the licensing agency or licensed hospital."

6 SECTION 9. This Act does not affect rights and duties that  
7 matured, penalties that were incurred, and proceedings that were  
8 begun, before its effective date.

9 SECTION 10. In codifying the new sections added by  
10 sections 2, 3, 4, 5, and 6 of this Act, the revisor of statutes  
11 shall substitute appropriate section numbers for the letters  
12 used in designating the new sections in this Act.

13 SECTION 11. Statutory material to be repealed is bracketed  
14 and stricken. New statutory material is underscored.

15 SECTION 12. This Act shall take effect on July 1, 2009.

16

INTRODUCED BY: Shianne Chun Adland



**Report Title:**

Medical Tort Actions; Noneconomic Damages

**Description:**

Limits the amount of noneconomic damages in medical tort actions. Requires insurers to make direct payments to healthcare providers making claims for the payment of benefits.

