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

7           Doctors are critical components of our society, providing a  
8 very important service to everyone in the State, and it is the  
9 job of the legislature to ensure that the State provides the  
10 best quality of life possible for its residents. Addressing the  
11 needs and concerns of healthcare providers is a key step toward  
12 keeping Hawaii healthy.

13           The purpose of this Act, to be known as "The Hawaii Non-  
14 Economic Damages Cap Act of 2009" is to address the high cost of  
15 medical malpractice insurance and defensive medicine by placing  
16 a \$750,000 aggregate cap and a \$250,000 individual cap for non-  
17 economic damages in medical tort cases.



1           This is one of eight proposals introduced in the twenty-  
2 fifth legislature, regular session of 2009, designed to address  
3 the increasingly challenging healthcare environment in Hawaii.  
4 Collectively these eight bills shall be known as "The Hawaii  
5 Doctor Recruitment and Retention Action Plan of 2009".

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

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



1 contributed to secure the plaintiff's right to any insurance  
2 benefits concerning which the defendant has introduced evidence.

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

7 **§671-B Attorney fees.** (a) An attorney shall not contract  
8 for or collect a contingency fee for representing any person  
9 seeking damages in connection with an action for a medical tort  
10 in excess of the following limits:

- 11 (1) Forty per cent of the first \$50,000 recovered;  
12 (2) Thirty-three and one-third per cent of the next  
13 \$50,000 recovered;  
14 (3) Twenty-five per cent of the next \$500,000 recovered;  
15 and  
16 (4) Fifteen per cent of any amount of recovery that  
17 exceeds \$600,000.

18 The fee limitations shall apply regardless of whether the  
19 recovery is by settlement, arbitration, or judgment or whether  
20 the person for whom the recovery is made is a responsible adult,  
21 an infant, or a person of unsound mind.



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

7        §671-C Periodic payments. (a) In any medical tort  
8 action, a court, at the request of either party, shall enter a  
9 judgment ordering that money damages or the equivalent for  
10 future damages of the judgment creditor be paid in whole or in  
11 part by periodic payments, rather than by a lump-sum payment, if  
12 the award equals or exceeds \$50,000 in future damages. In  
13 entering a judgment ordering the payment of future damages by  
14 periodic payments, the court shall make a specific finding as to  
15 the dollar amount of periodic payments that will compensate the  
16 judgment creditor for the future damages; provided that when  
17 authorizing periodic payments of future damages, the court shall  
18 require a judgment debtor who is not adequately insured to post  
19 security adequate to ensure full payment of the damages awarded  
20 by the judgment. Upon termination of periodic payments of  
21 future damages, the court shall order the return of this  
22 security, or so much as remains, to the judgment debtor.



1        (b) A judgment ordering the payment of future damages by  
2 periodic payments shall specify the recipient or recipients of  
3 the payments, the dollar amount of the payments, the interval  
4 between payments, and the number of payments or the period of  
5 time over which payments shall be made. The payments shall only  
6 be subject to modification in the event of the death of the  
7 judgment creditor.

8        (c) In the event that the court finds that the judgment  
9 debtor has exhibited a continuing pattern of failing to make  
10 payments, the court shall find the judgment debtor in contempt  
11 of court, and in addition to the required periodic payments,  
12 shall order the judgment debtor to pay the judgment creditor all  
13 damages caused by the failure to make the periodic payments,  
14 including court costs and attorney's fees.

15        (d) Financial damages awarded for loss of future earnings  
16 shall not be reduced or terminated by reason of the death of the  
17 judgment creditor, but shall be paid to persons to whom the  
18 judgment creditor owed a duty of support, as provided by law,  
19 immediately prior to death. In such a case, the court that  
20 rendered the original judgment, upon petition of any party in  
21 interest, may modify the judgment to award and apportion the  
22 unpaid future damages in accordance with this subsection.



1        (e) Following the performance or expiration of all  
2 obligations specified in the periodic payment judgment, any  
3 obligation of the judgment debtor to make further payments shall  
4 cease and any remaining security given pursuant to subsection  
5 (a) shall revert to the judgment debtor.

6        **§671-D Limitation on noneconomic damages.** In an action on  
7 a medical tort claim where final judgment is rendered against a  
8 physician or health care provider, the limit on civil liability  
9 for noneconomic damages of the physician or health care  
10 provider, inclusive of all persons and entities for which  
11 vicarious liability theories may apply, shall be limited to an  
12 amount not to exceed \$250,000 for each claimant, regardless of  
13 the number of defendant physicians or health care providers.  
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) \$250,000 against any physician or health care  
18 provider, \$250,000 against any health care  
19 institution, and \$250,000 against all persons and  
20 entities for which vicarious liability theories may  
21 apply, totaling at most \$750,000 in aggregate for all  
22 health care liability claims where final judgment is



1 rendered against any physician or health care  
2 provider, health care institution, or other liable  
3 person or entity;

4 (2) If the gross negligence standards are met, then non-  
5 economic damages shall be limited to a maximum award  
6 of \$3,000,000 allocated proportionately based upon  
7 percentage of fault.

8 **§671-E Economic damages.** A trier of fact may render a  
9 verdict for the plaintiff in a medical tort action that includes  
10 economic damages, including but not limited to past and future  
11 medical expenses, loss of past and future earnings, loss of use  
12 of property, cost of repair or replacement, cost of obtaining  
13 domestic services, loss of employment, or loss of business and  
14 employment opportunities.

15 **§671-F Proportionate allocation of economic damages.** The  
16 amount of economic damages allocated to a health care provider  
17 in a medical tort action shall be based upon the health care  
18 provider's proportionate percentage of negligence or other  
19 fault.

20 **§671-G Allocation of noneconomic damages.** (a) If the  
21 trier of fact renders a verdict for the plaintiff in a medical  
22 tort action, the court shall enter judgment of liability against



1 each defendant health care provider in accordance with the  
2 percentage of negligence or other fault for compensatory damages  
3 that is attributed to the health care provider by the trier of  
4 fact.

5 (b) Judgment shall not be entered against any health care  
6 provider who has not been named a party or has been released,  
7 dismissed, or otherwise discharged as a party pursuant to  
8 section 663-15.5."

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

11 **"§657-7.3 Medical torts; limitation of actions; time.** [No  
12 ~~action for injury or death against a chiropractor, clinical~~  
13 ~~laboratory technologist or technician, dentist, naturopath,~~  
14 ~~nurse, nursing home administrator, dispensing optician,~~  
15 ~~optometrist, osteopath, physician or surgeon, physical~~  
16 ~~therapist, podiatrist, psychologist, or veterinarian duly~~  
17 ~~licensed or registered under the laws of the State, or a~~  
18 ~~licensed hospital as the employer of any such person, based upon~~  
19 ~~such person's alleged professional negligence, or for rendering~~  
20 ~~professional services without consent, or for error or omission~~  
21 ~~in such person's practice, shall be brought more than two years~~  
22 ~~after the plaintiff discovers, or through the use of reasonable~~





1 ~~diligence should have discovered, the injury, but in any event~~  
2 ~~not more than six years after the date of the alleged act or~~  
3 ~~omission causing the injury or death. This six-year time~~  
4 ~~limitation shall be tolled for any period during which the~~  
5 ~~person has failed to disclose any act, error, or omission upon~~  
6 ~~which the action is based and which is known to the person.~~

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

20 An action for a medical tort, as defined in section 671-1, shall  
21 commence within three years after the date of injury or one year  
22 after the plaintiff discovers, or through the use of reasonable



1 diligence should have discovered, the injury, whichever occurs  
2 first. In no event shall the time for commencement of the legal  
3 action exceed three years unless tolled for any of the  
4 following:

5 (1) Upon proof of fraud;

6 (2) Upon proof of intentional concealment; or

7 (3) Upon discovery of the presence of a foreign body that  
8 has no therapeutic or diagnostic purpose or effect in  
9 the person of the injured person.

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

20 SECTION 4. 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 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 health care providers 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 facility" means any health care facility as  
19 defined in section 323D-2.

20           [(-1)] "Health care provider" means a physician or surgeon  
21 licensed under chapter 453, [~~a physician and surgeon licensed~~  
22 ~~under chapter 460,~~] a podiatrist licensed under chapter 463E, a



1 health care facility as defined in section 323D-2, and the  
2 employees of any of them. Health care provider shall not mean  
3 any nursing institution or nursing service conducted by and for  
4 those who rely upon treatment by spiritual means through prayer  
5 alone, or employees of [~~such~~] the institution or service.

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

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

16 "Recovered" means the net sum recovered after deducting any  
17 disbursements or costs incurred in connection with prosecution  
18 or settlement of the claim; provided that costs of medical care  
19 incurred by the plaintiff and any administrative fees, including  
20 overhead costs, are not deductible disbursements or costs for  
21 such purposes.

22 "State" means the state of Hawaii."



1 SECTION 6. This Act does not affect rights and duties that  
2 matured, penalties that were incurred, and proceedings that were  
3 begun, before its effective date.

4 SECTION 7. In codifying the new sections added by section  
5 2 of this Act, the revisor of statutes shall substitute  
6 appropriate section numbers for the letters used in designating  
7 the new sections in this Act.

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

10 SECTION 9. This Act shall take effect on July 1, 2009.

11

INTRODUCED BY:

*J. Wil. Kuntz* BR

JAN 28 2009



**Report Title:**

Medical Tort Claims; Noneconomic Damages

**Description:**

Limits the amount awarded for non-economic damages in medical tort cases to \$750,000 aggregate and \$250,000 per physician, healthcare provider, healthcare facility, and any other involved parties. Sets the award limit for non-economic damages in cases of gross negligence at \$3,000,000.

