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## A BILL FOR AN ACT

RELATING TO TORTS.

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

1           SECTION 1. The increasing cost of malpractice insurance  
2 and escalating monetary awards in medical malpractice lawsuits  
3 are major factors in the current physician shortage experienced  
4 by the State of Hawaii and the neighbor islands in particular.  
5 Malpractice insurance premiums have skyrocketed for Hawaii  
6 physicians, with physicians in high-risk specialties such as  
7 surgery and obstetrics, experiencing the highest increase.  
8 Monetary awards in malpractice lawsuits are escalating,  
9 especially with respect to awards for non-economic damages.

10           As a result of the malpractice situation, many physicians  
11 are choosing to retire early, limit their practice, or refrain  
12 from practicing in Hawaii. Medical students are avoiding  
13 medical specialties that have a high risk of medical malpractice  
14 exposure. Defensive medicine may also be practiced, where a  
15 physician orders tests and procedures to protect themselves from  
16 malpractice liability. Diminishing access to health care is of  
17 particular concern in rural areas, such as the neighbor islands,



1 where relatively few doctors and fewer specialists and sub-  
2 specialists continue to practice.

3 The legislature finds that to address this critical  
4 situation, a patient's right to recover non-economic damages for  
5 injuries suffered as a result of health care negligence must be  
6 balanced against the State's interest in ensuring access to  
7 health care services.

8 The purpose of this Act is to place a cap on the amount of  
9 non-economic damages that may be recovered in medical  
10 malpractice actions in Hawaii, which is contingent on the  
11 compliance of all insurers providing professional liability  
12 insurance in Hawaii with the premium rate limitations set by  
13 this Act.

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

17 **"§671-A Limitation on noneconomic damages.**

18 Notwithstanding section 663-8.7, noneconomic damages as defined  
19 in section 663-8.5 shall be limited in medical tort actions to a  
20 maximum award of \$500,000.

21 **§671-B Assessing percentage of negligence.** Upon request  
22 of any nonsettling healthcare provider against whom a plaintiff



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

8 **§671-C Proportionate allocation of economic damages.** The  
9 amount of economic damages allocated to a healthcare provider in  
10 a medical tort action shall be based upon the healthcare  
11 provider's proportionate percentage of negligence or other  
12 fault.

13 **§671-D Noneconomic damages.** (a) If the trier of fact  
14 renders a verdict for the plaintiff in a medical tort action,  
15 the court shall enter judgment of liability against each  
16 defendant healthcare provider in accordance with the percentage  
17 of negligence or other fault for compensatory damages that is  
18 attributed to the healthcare provider by the trier of fact.

19 (b) Where a healthcare provider's degree of negligence is  
20 less than twenty-five per cent, then the amount recoverable  
21 against that healthcare provider for noneconomic damages shall



1 be in direct proportion to the degree of the negligence  
2 assigned.

3 (c) Judgment shall not be entered against any healthcare  
4 provider who has not been named a party or has been released,  
5 dismissed, or otherwise discharged as a party pursuant to  
6 section 663-15.5."

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

9 **"§663-11 Joint tortfeasors defined.** For the purpose of  
10 this part, the term "joint tortfeasors" means two or more  
11 persons jointly or severally liable in tort for the same injury  
12 to person or property, whether or not judgment has been  
13 recovered against all or some of them~~[-]~~, except as provided for  
14 healthcare providers in chapter 671."

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

17 **"§671-1 Definitions.** As used in this chapter:

18 ~~[(+)]~~ "Health care provider" or "healthcare provider"  
19 means a physician or surgeon licensed under chapter 453, a  
20 physician and surgeon licensed under chapter 460, a podiatrist  
21 licensed under chapter 463E, a health care facility as defined  
22 in section 323D-2, a chiropractor licensed under chapter 442, a



1 dentist licensed under chapter 448, a dental hygienist licensed  
2 under chapter 447, an acupuncture practitioner licensed under  
3 chapter 436E, a massage therapist licensed under chapter 452, a  
4 nurse licensed under chapter 457, an occupational therapist  
5 licensed under chapter 457G, an optometrist licensed under  
6 chapter 459, a pharmacist licensed under chapter 461, a physical  
7 therapist licensed under chapter 461J, a psychologist licensed  
8 under chapter 465, a marriage and family therapist licensed  
9 under chapter 451J, a dietitian licensed under chapter 448B, a  
10 radiologic technologist licensed under chapter 466J, a speech  
11 pathologist or audiologist licensed under chapter 468E, a  
12 veterinarian licensed under chapter 471, and the employees and  
13 legal representatives of any of them. Health care provider  
14 shall not mean any nursing institution or nursing service  
15 conducted by and for those who rely upon treatment by spiritual  
16 means through prayer alone, or employees of such institution or  
17 service.

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



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

9 SECTION 5. 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, nor does it affect the rights  
12 of the State of Hawaii under section 663-10.5, Hawaii Revised  
13 Statutes.

14 SECTION 6. In codifying the new sections added by section  
15 2 of this Act the revisor of statutes shall substitute  
16 appropriate section numbers for the letters used in designating  
17 the new sections in this Act.

18 SECTION 7. Statutory material to be repealed is bracketed  
19 and stricken. New statutory material is underscored.

20 SECTION 8. This Act shall take effect upon its approval;  
21 provided that this Act shall be repealed on the earlier of  
22 January 1, 2015, or upon the failure of any insurer providing



1 professional liability insurance for a health care provider in  
2 the state to meet the following requirements:

3 (1) Between July 1, 2009, and December 31, 2009, no  
4 insurer providing professional liability insurance for  
5 a health care provider in the state may increase the  
6 professional liability insurance rates unless a rate  
7 increase is required to avoid imminent insolvency or  
8 provide a fair rate of return;

9 (2) Beginning January 1, 2010, all insurers providing  
10 professional liability insurance for health care  
11 providers in the state shall implement a premium rate  
12 that is the lower of the following:

13 (A) Not greater than the rate in effect on January 1,  
14 2007, unless to do so would cause imminent  
15 insolvency or fail to provide a fair rate of  
16 return; or

17 (B) Seventy-five per cent of the lowest rate in  
18 effect between January 1, 2007, and December 31,  
19 2009, unless to do so would cause imminent  
20 insolvency or fail to provide a fair rate of  
21 return;

22 and



1 (3) Beginning January 1, 2011, no insurer providing  
 2 professional liability insurance for a health care  
 3 provider may implement any rate increase greater than  
 4 two and one half per cent in any twelve month period,  
 5 unless a rate increase greater than two and one half  
 6 per cent is required to avoid imminent insolvency or  
 7 provide a fair rate of return.

8 Any person may seek a declaratory judgment as to whether an  
 9 insurer has failed to comply with paragraph 1, 2, or 3 by  
 10 bringing an action against the insurer in the circuit court of  
 11 the county in which the petitioner resides or has its principal  
 12 place of business; provided that upon the repeal of this Act,  
 13 sections 663-11 and 671-1, Hawaii Revised Statutes, shall be  
 14 reenacted in the same form they were in one day prior to this  
 15 Act taking effect.

INTRODUCED BY:

*Saman Maramoto*

*[Signature]*  
*Cynthia Nielsen*

*[Signature]*  
*[Signature]*





A handwritten signature in black ink, appearing to read "G. W. ...", is written over a horizontal line.

JAN 23 2009



**Report Title:**

Medical Malpractice; Insurance; Non-economic Damages

**Description:**

Limits non-economic damages in medical tort actions contingent on compliance with premium rate caps by insurers providing professional liability insurance in Hawaii. Sunsets on the earlier of the date on which an insurer does not comply with the premium rate caps, or July 1, 2015.

