
A BILL FOR AN ACT

RELATING TO MEDICAL TORTS.

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

1 SECTION 1. Chapter 671, Hawaii Revised Statutes, is
2 amended by adding a new part to be appropriately designated and
3 to read as follows:

4 "PART . PATIENT ACCESS TO HEALTH CARE SERVICES

5 §671-A Findings and purpose. The legislature finds that
6 the current civil justice system adversely affects access to
7 health care services, the quality of patient care, and the cost
8 of health care. The medical tort system is a costly and
9 ineffective mechanism for resolving claims and compensating
10 injured patients. It also deters the sharing of information
11 among health care providers and impedes efforts to improve
12 patient safety and the quality of care.

13 The purpose of this Act is to implement reasonable,
14 comprehensive, and effective reforms designed to:

15 (1) Improve the availability of health care services in
16 cases where it is demonstrated that medical tort
17 actions have contributed to a decrease in available
18 services;



- 1 (2) Reduce the incidence of "defensive medicine" and lower
2 the cost of medical malpractice insurance that
3 contributes to the escalation of health care costs;
- 4 (3) Ensure persons with meritorious medical tort claims
5 receive fair and adequate compensation, including
6 reasonable noneconomic damages;
- 7 (4) Improve the fairness and cost-effectiveness of the
8 medical tort system by reducing uncertainty in the
9 amount of compensation provided to injured patients;
10 and
- 11 (5) Increase the sharing of information in the health care
12 system to reduce unintended injury and improve patient
13 care.

14 **§671-B Definitions.** As used in this part, unless the
15 context clearly requires otherwise:

16 "Alternative dispute resolution" means a system used to
17 resolve medical tort actions that does not require a traditional
18 and formal adjudicatory trial or contested hearing.

19 "Collateral benefits" means any amount paid or reasonably
20 likely to be paid to or on behalf of the plaintiff, or any
21 service, product, or other benefit provided or reasonably likely

1 to be provided to or on behalf of the plaintiff as a result of
2 an injury or wrongful death, pursuant to:

3 (1) Any state or federal health, sickness, income-
4 disability, accident, or workers' compensation law;

5 (2) Any health, sickness, income-disability, or accident
6 insurance that provides health benefits or income-
7 disability coverage;

8 (3) Any contract or agreement of any group, organization,
9 partnership, or corporation to provide, pay for, or
10 reimburse the cost of medical, hospital, dental, or
11 income disability benefits; and

12 (4) Any other publicly or privately funded program.

13 "Compensatory damages" means objectively verifiable
14 monetary losses incurred as a result of the provision or use of,
15 or payment for (or failure to provide, use, or pay for), health
16 care services or medical products, such as past and future
17 medical expenses, loss of past and future earnings, cost of
18 obtaining domestic services, loss of employment, loss of
19 business or employment opportunities, damages for physical and
20 emotional pain, suffering, inconvenience, physical impairment,
21 mental anguish, or disfigurement, loss of enjoyment of life,
22 loss of society and companionship, or loss of consortium (other



1 than loss of domestic service), hedonic damages, injury to
2 reputation, and all other nonpecuniary losses of any kind or
3 nature. The term "compensatory damages" includes economic
4 damages and noneconomic damages, as those terms are defined in
5 this section.

6 "Contingent fee" includes all compensation to any person or
7 persons that is payable only if a recovery is effected on behalf
8 of one or more plaintiffs.

9 "Economic damages" means objectively verifiable monetary
10 losses incurred as a result of the provision or use of, or
11 payment for (or failure to provide, use, or pay for) health care
12 services or medical products, such as past and future medical
13 expenses, loss of past and future earnings, cost of obtaining
14 domestic services, loss of employment, and loss of business or
15 employment opportunities.

16 "Health care goods or services" means any goods or services
17 provided by a health care organization, provider, or by any
18 individual working under the supervision of a health care
19 provider, that relates to the diagnosis, prevention, or
20 treatment of any human disease or impairment or the assessment
21 of the health of human beings.



1 "Malicious intent to injure" means intentionally causing or
2 attempting to cause physical injury other than providing health
3 care goods or services.

4 "Medical product" means a drug or device intended for
5 humans. As used in this definition, the terms "drug" and
6 "device" have the same meanings as in sections 201(g)(1) and
7 201(h) of the federal Food, Drug and Cosmetic Act (21 U.S.C.
8 321), respectively, including any component or raw material used
9 in those sections, but excluding health care services.

10 "Noneconomic damages" means damages for physical and
11 emotional pain, suffering, inconvenience, physical impairment,
12 mental anguish, disfigurement, loss of enjoyment of life, loss
13 of society and companionship, or loss of consortium (other than
14 loss of domestic service), hedonic damages, injury to
15 reputation, and all other nonpecuniary losses of any kind or
16 nature.

17 "Plaintiff" means any person who brings a medical tort
18 action, including a person who asserts or claims a right to
19 legal or equitable contribution, indemnity, or subrogation
20 arising out of a medical tort claim or action, and any person on
21 whose behalf such a claim is asserted or such an action is
22 brought.



1 "Punitive damages" means damages awarded for the purpose of
2 punishment or deterrence, and not solely for compensatory
3 purposes, against a health care provider, health care
4 organization, or a manufacturer, distributor, or supplier of a
5 medical product. Punitive damages are neither economic nor
6 noneconomic damages.

7 "Recovery" means the net sum recovered after deducting any
8 disbursements or costs incurred in connection with prosecution
9 or settlement of the claim, including all costs paid or advanced
10 by any person. Costs of health care incurred by the plaintiff
11 and the attorneys' office overhead costs or charges for legal
12 services are not deductible disbursements or costs for such
13 purpose.

14 **§671-C Compensation for patient injury.** In any medical
15 tort action:

- 16 (1) The full amount of a plaintiff's economic loss may be
17 fully recovered without limitation;
- 18 (2) A plaintiff may recover up to \$250,000 in noneconomic
19 damages, regardless of the number of parties against
20 whom the action is brought or the number of separate
21 claims or actions brought with respect to the same
22 occurrence;



- 1 (3) An award for future noneconomic damages shall not be
2 discounted to present value.
- 3 (4) The jury shall not be informed about the maximum award
4 for noneconomic damages. An award for noneconomic
5 damages in excess of \$250,000 shall be reduced either
6 before the entry of judgment or by amendment of the
7 judgment after entry of judgment, and the reduction
8 shall be made before accounting for any other
9 reduction in damages required by law. If separate
10 awards are rendered for past and future noneconomic
11 damages and the combined awards exceed \$250,000, the
12 future noneconomic damages shall be reduced first; and
- 13 (5) Each party shall be liable only for that party's share
14 of any damages and not for the share of any other
15 party. Each party shall be liable only for the amount
16 of damages allocated to the party in direct proportion
17 to the party's percentage of responsibility. A
18 separate judgment shall be rendered against each party
19 for the amount allocated to the party. For purposes
20 of this section, the trier of fact shall determine the
21 proportion of responsibility of each party.



1 **§671-D Maximizing patient recovery.** (a) In any medical
2 tort action, the court shall supervise the arrangements for
3 payment of damages to protect against conflicts of interest that
4 may have the effect of reducing the amounts awarded that are
5 actually paid to plaintiffs. In particular, when plaintiffs and
6 attorneys enter into contingent fee arrangements, the court
7 shall have the power to restrict the payment of a plaintiff's
8 damage recovery to such attorney and to redirect the damages to
9 the plaintiff based upon the interests of justice and principles
10 of equity. In no event shall the total of all contingent fees
11 for representing all plaintiffs in a medical tort action exceed
12 the following limits:

13 (1) Forty per cent of the first \$50,000 recovered by the
14 plaintiffs;

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

17 (3) Twenty-five per cent of the next \$500,000 recovered by
18 the plaintiffs; and

19 (4) Fifteen per cent of any amount by which the recovery
20 by the plaintiffs is in excess of \$600,000.

21 (b) The limitations in this section shall apply whether
22 the recovery is by judgment, settlement, mediation, arbitration,



1 or any other form of alternative dispute resolution. In an
2 action involving a minor, a court retains the authority to
3 authorize or approve a fee that is less than the maximum
4 permitted under this section.

5 **§671-E Additional health benefits.** In any medical tort
6 action, any party may introduce evidence of collateral benefits.
7 If a party elects to introduce such evidence, any opposing party
8 may introduce evidence of any amount paid or contributed or
9 reasonably likely to be paid or contributed in the future by or
10 on behalf of the opposing party to secure the right to such
11 collateral benefits. No provider of collateral benefits shall
12 recover any amount against the plaintiff or receive any lien or
13 credit against the plaintiff's recovery or be equitably or
14 legally subrogated to the right of the plaintiff. This section
15 shall apply to any action that is settled or resolved before
16 trial.

17 **§671-F Punitive damages.** (a) Punitive damages, if
18 otherwise permitted by applicable law, may be awarded against
19 any person in a medical tort action only if it is proven by
20 clear and convincing evidence that the person acted with
21 malicious intent to injure the plaintiff or deliberately failed
22 to avoid unnecessary injury that the person knew the plaintiff



1 was substantially certain to suffer. In any medical tort action
2 where no judgment for compensatory damages is rendered against
3 such person, no punitive damages may be awarded. No demand for
4 punitive damages shall be included in a medical tort action as
5 initially filed. A court may allow a plaintiff to file an
6 amended pleading for punitive damages only upon a motion by the
7 plaintiff and after a finding by the court, upon review of
8 supporting and opposing affidavits or after a hearing, and after
9 weighing the evidence, that the plaintiff has established by a
10 substantial probability that the plaintiff will prevail on the
11 claim for punitive damages. At the request of any party in a
12 medical tort action, the trier of fact shall consider in a
13 separate proceeding:

- 14 (1) Whether punitive damages are to be awarded; and
- 15 (2) The amount of punitive damages.

16 If a separate proceeding is requested, evidence relevant only to
17 the claim for punitive damages shall be inadmissible in any
18 proceeding to determine whether compensatory damages are to be
19 awarded.

20 (b) In determining the amount of punitive damages, the
21 trier of fact shall consider only the following:



- 1 (1) The severity of the harm caused by the conduct of the
- 2 party;
- 3 (2) The duration of the conduct or any concealment of
- 4 conduct by the party;
- 5 (3) The profitability of the conduct to the party;
- 6 (4) The number of products sold or medical procedures
- 7 rendered by the party for compensation, provided that
- 8 it is the type of product or procedure that allegedly
- 9 injured the plaintiff;
- 10 (5) Any criminal penalties imposed on the party, as a
- 11 result of the conduct complained of by the plaintiff;
- 12 and
- 13 (6) The amount of any civil fines assessed against the
- 14 party as a result of the conduct complained of by the
- 15 plaintiff.

16 The amount of punitive damages awarded in a medical tort
17 action may be up to as much as two times the amount of economic
18 damages awarded or \$250,000, whichever is greater. The jury
19 shall not be informed of this limitation.

20 (c) No punitive damages may be awarded against the
21 manufacturer or distributor of a medical product based on a
22 claim that the product caused the plaintiff's harm if:



- 1 (1) The medical product was subject to premarket approval
2 or clearance by the Food and Drug Administration with
3 respect to the safety of the formulation or
4 performance of the aspect of the medical product that
5 caused the plaintiff's harm or the adequacy of the
6 packaging or labeling of the medical product; and the
7 medical product was so approved or cleared; or
- 8 (2) The medical product is generally recognized among
9 qualified experts as safe and effective pursuant to
10 conditions established by the Food and Drug
11 Administration and applicable Food and Drug
12 Administration regulations, including without
13 limitation those related to packaging and labeling,
14 unless the Food and Drug Administration has determined
15 that the medical product was not manufactured or
16 distributed in substantial compliance with applicable
17 Food and Drug Administration statutes and regulations.

18 A health care provider who prescribes a drug or device
19 approved by the Food and Drug Administration, including blood
20 products, shall not be named as a party to a product liability
21 suit involving the drug or device and shall not be liable to a



1 plaintiff in a class action suit against the manufacturer,
2 distributor, or seller of the drug or device.

3 In a medical tort action for harm that is alleged to relate
4 to the adequacy of the packaging or labeling of a drug that is
5 required to have tamper-resistant packaging under regulations of
6 the Secretary of Health and Human Services, including labeling
7 regulations related to the packaging, the manufacturer or seller
8 of the drug shall not be held liable for punitive damages unless
9 the packaging or labeling is found by the trier of fact by clear
10 and convincing evidence to be substantially out of compliance
11 with those regulations.

12 **§671-G Authorization of payment of future damages to**
13 **plaintiffs in medical tort actions.** Where an award of future
14 damages equaling or exceeding \$50,000, without reduction to
15 present value, is made against a party with sufficient insurance
16 or other assets to fund a periodic payment of the judgment, the
17 court, at the request of any party, shall enter a judgment
18 ordering that the future damages be paid by periodic payments in
19 accordance with any applicable law."

20 SECTION 2. Section 657-7.3, Hawaii Revised Statutes, is
21 amended to read as follows:

1 "§657-7.3 **Medical torts; limitation of actions; time.** (a)

2 No action for injury or death against a chiropractor, clinical
3 laboratory technologist or technician, dentist, naturopath,
4 nurse, nursing home administrator, dispensing optician,
5 optometrist, osteopath, physician or surgeon, physical
6 therapist, podiatrist, psychologist, or veterinarian duly
7 licensed or registered under the laws of the State, or a
8 licensed hospital as the employer of any such person, based upon
9 ~~[such]~~ the person's alleged professional negligence, or for
10 rendering professional services without consent, or for error or
11 omission in ~~[such]~~ the person's practice~~[,]~~ shall be brought
12 more than ~~[two years]~~ one year after the plaintiff discovers, or
13 through the use of reasonable diligence should have discovered,
14 the injury, but in any event not more than ~~[six]~~ three years
15 after the date of the alleged act or omission causing the injury
16 or death. This ~~[six-year]~~ three-year time limitation shall be
17 tolled for any ~~[period during which the person has failed to~~
18 ~~disclose any act, error, or omission upon which the action is~~
19 ~~based and which is known to the person.]~~ of the following:

20 (1) Fraud;

21 (2) Intentional concealment; or



1 (3) The presence of a foreign object that has no
2 therapeutic or diagnostic purpose or effect in the
3 person of the injured person.

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

19 SECTION 3. This Act does not affect rights and duties that
20 matured, penalties that were incurred, and proceedings that were
21 begun, before its effective date.





1 SECTION 4. Statutory material to be repealed is bracketed
2 and stricken. New statutory material is underscored.

3 SECTION 5. This Act shall take effect on January 1, 2010.

4

INTRODUCED BY:









Report Title:

Medical Torts

Description:

Permits plaintiffs in medical tort actions to recover the full amount of economic loss. Limits noneconomic damages. Provides guidelines for the award of punitive damages. Permits the introduction of evidence of collateral benefits. Limits the amount of the contingent fee payable to the plaintiff's attorney.

