CHAPTER 671
MEDICAL TORTS

Part I. General Provisions

Section
671-1 Definitions
671-2 Repealed
671-3 Informed consent
671-4 Notice of damages
671-5 Reporting and reviewing medical tort claims
671-6 Administration of chapter
671-7 Professional liability insurance; coverage for telehealth

Part II. Medical Inquiry and Conciliation
671-11 Medical inquiry and conciliation panels; composition, selection, compensation
671-11.5 Waiver of filing fee
671-12 Review by panel required; notice; presentation of inquiry; request for a more definite statement of the inquiry
671-12.5 Certificate of consultation
671-13 Medical inquiry and conciliation panel proceedings; voluntary settlement
671-14 Same; persons attending proceedings of panel
671-15 Panel termination
671-15.5 Expungement of records; malpractice insurance rates
671-16 Subsequent litigation; excluded evidence
671-16.5 Arbitration; subsequent litigation
671-16.6 Submission of inquiry to an alternative dispute resolution provider
671-17 Immunity of panel members from liability
671-18 Statute of limitations tolled
671-19 Duty to cooperate; assessment of costs and fees
671-20 Annual report

Part III. Patients' Compensation Fund--Repealed
671-31 to 37 Repealed

Case Notes

As chapter rationally furthers legitimate state interest of assuring the provision of affordable health care to Hawaii's citizens by requiring participation in medical malpractice dispute resolution such that the high cost of litigation may be avoided, plaintiff not denied equal protection of the laws. 89 H. 188, 970 P.2d 496 (1998).

Section 671-12(a) requires only that a claimant set forth facts upon which the claim is based and include the names of all parties against whom the claim is or may be made who are then known to the claimant; nowhere in §671-12 does it require plaintiffs to name all known negligent health care providers; having filed the requisite medical claim conciliation panel claim, participated in the required hearing, and rejected the panel's finding of no actionable negligence, plaintiffs satisfied this chapter's statutory prerequisites for filing suit in circuit court. 111 H. 74, 137 P.3d 980 (2006).

Where defendant was a Hawaii nonprofit organization, which served as the parent corporation of four affiliated hospitals in Hawaii, including Kapiolani, a wholly-owned subsidiary of defendant, defendant was a "health care provider" in the context of this chapter. 121 H. 235 (App.), 216 P.3d 1258 (2009).

Plaintiff's claims of neglect, abuse, and failure to provide a safe home against care home defendants did not constitute "medical torts" within the meaning of §671-1; thus, plaintiff was not required to submit plaintiff's claims to a medical claim conciliation panel (MCCP) pursuant to §§671-12 and 671-16 as a condition for plaintiff to file suit against defendants, and the circuit court erred in dismissing plaintiff's suit based on plaintiff's failure to submit plaintiff's claims to a MCCP. 128 H. 405 (App.), 289 P.3d 1041 (2012).

"PART I. GENERAL PROVISIONS

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

"Health care provider" means a physician, osteopathic physician, surgeon, or physician assistant licensed under chapter 453, a podiatrist licensed under chapter 463E, a health care facility as defined in section 323D-2, and the employees of any of them. Health care provider shall not mean any nursing institution or nursing service conducted by and for those who rely upon treatment by spiritual means through prayer alone, or employees of the institution or service.

"Medical tort" means professional negligence, the rendering of professional service without informed consent, or an error or omission in professional practice, by a health care provider,

which proximately causes death, injury, or other damage to a patient. [L 1976, c 219, pt of §2; am L 1977, c 167, §2; am L 1983, c 223, §1; am L 1984, c 267, §14; am L 1987, c 283, §64; am L 1992, c 55, §1; am L 2009, c 11, §67 and c 151, §25]

Law Journals and Reviews

Keomaka v. Zakaib: The Physician's Affirmative Duty to Protect Patient Autonomy Through the Process of Informed Consent. 14 UH L. Rev. 801 (1992).

Holding Hawai‘i Nursing Facilities Accountable for the Inadequate Pain Management of Elderly Residents. 27 UH L. Rev. 233 (2004).

Case Notes

Where certain counts of plaintiff's complaint alleged errors or omissions in professional practice by a health care provider, thus falling under the definition of "medical tort" under paragraph (2), court properly ruled plaintiff could not proceed with those counts of suit without first submitting them to medical claim conciliation panel as required by §§671-12 and 671-16. 89 H. 188, 970 P.2d 496 (1998).

Where defendant doctor never properly established at trial the "therapeutic privilege exception" to the requirement that informed consent be obtained before starting patient on antipsychotic medication, trial court erred in refusing to instruct jury concerning the tort of negligent failure to provide informed consent. 98 H. 470, 50 P.3d 946 (2002).

An alleged "unnecessary, improper and intrusive examination of a woman's breasts" where the doctor allegedly "fondled the woman's breasts and squeezed the woman's nipples until they squirted milk in the doctor's face" is an alleged "medical tort" as defined in paragraph (2) because it is an alleged "error in professional practice, by a health care provider". 93 H. 490 (App.), 6 P.3d 362 (2000).

Where defendant was a Hawaii nonprofit organization, which served as the parent corporation of four affiliated hospitals in Hawaii, including Kapiolani, a wholly-owned subsidiary of defendant, defendant was a "health care provider" in the context of this chapter. 121 H. 235 (App.), 216 P.3d 1258 (2009).

Plaintiff's claims of neglect, abuse, and failure to provide a safe home against care home defendants did not constitute "medical torts" within the meaning of this section; thus, plaintiff was not required to submit plaintiff's claims to a medical claim conciliation panel (MCCP) pursuant to §§671-12 and 671-16 as a condition for plaintiff to file suit against

defendants, and the circuit court erred in dismissing plaintiff's suit based on plaintiff's failure to submit plaintiff's claims to a MCCP. 128 H. 405 (App.), 289 P.3d 1041 (2012).

" **§671-2 REPEALED.** L Sp 1986, c 2, §12.

" **§671-3 Informed consent.** (a) The Hawaii medical board may establish standards for health care providers to follow in giving information to a patient, or to a patient's guardian or legal surrogate if the patient lacks the capacity to give an informed consent, to ensure that the patient's consent to treatment is an informed consent. The standards shall be consistent with subsection (b) and may include:

(1) The substantive content of the information to be given;
(2) The manner in which the information is to be given by the health care provider; and
(3) The manner in which consent is to be given by the patient or the patient's guardian or legal surrogate.

(b) The following information shall be supplied to the patient or the patient's guardian or legal surrogate prior to obtaining consent to a proposed medical or surgical treatment or a diagnostic or therapeutic procedure:

(1) The condition to be treated;
(2) A description of the proposed treatment or procedure;
(3) The intended and anticipated results of the proposed treatment or procedure;
(4) The recognized alternative treatments or procedures, including the option of not providing these treatments or procedures;
(5) The recognized material risks of serious complications or mortality associated with:
    (A) The proposed treatment or procedure;
    (B) The recognized alternative treatments or procedures; and
    (C) Not undergoing any treatment or procedure; and
(6) The recognized benefits of the recognized alternative treatments or procedures.

(c) On or before January 1, 1984, the Hawaii medical board shall establish standards for health care providers to follow in giving information to a patient or a patient's guardian, to ensure that the patient's consent to the performance of a mastectomy is an informed consent. The standards shall include the substantive content of the information to be given, the manner in which the information is to be given by the health care provider and the manner in which consent is to be given by

the patient or the patient's guardian. The substantive content of the information to be given shall include information on the recognized alternative forms of treatment.

(d) Nothing in this section shall require informed consent from a patient or a patient's guardian or legal surrogate when emergency treatment or an emergency procedure is rendered by a health care provider and the obtaining of consent is not reasonably feasible under the circumstances without adversely affecting the condition of the patient's health.

(e) For purposes of this section, "legal surrogate" means an agent designated in a power of attorney for health care or surrogate designated or selected in accordance with chapter 327E. [L 1976, c 219, pt of §2; am L 1982, c 95, §1; am L 1983, c 223, §2 superseded by c 284, §1; am L 2003, c 114, §2; am L 2008, c 9, §3]

Cross References

Mental illness, informed consent for nonemergency treatment, see §334E-1.

Law Journals and Reviews

Consent for Testing and Treatment of Minors in Hawaii. 13 HBJ, no. 13, at 165 (2009).

Keomaka v. Zakaib: The Physician's Affirmative Duty to Protect Patient Autonomy Through the Process of Informed Consent. 14 UH L. Rev. 801 (1992).

Holding Hawai‘i Nursing Facilities Accountable for the Inadequate Pain Management of Elderly Residents. 27 UH L. Rev. 233 (2004).

Case Notes

Patient-oriented standard applies to physician's duty to disclose risk information prior to treatment. 79 H. 475, 904 P.2d 489 (1995).

Under circumstances of case, physician did not have affirmative duty to inform patient that physician was not plastic surgeon and did not have hospital privileges. 86 H. 84, 947 P.2d 952 (1997).

Where defendant doctor never properly established at trial the "therapeutic privilege exception" to the requirement that informed consent be obtained before starting patient on antipsychotic medication, trial court erred in refusing to instruct jury concerning the tort of negligent failure to provide informed consent. 98 H. 470, 50 P.3d 946 (2002).

Circuit court did not err in denying defendant's motion for judgment as a matter of law on plaintiff's informed consent claim as this section requires the physician to inform patients of recognized alternative treatments, and defendant did not show that Hawaii courts have directly held that plaintiffs claiming the failure to disclose an alternative treatment are required to show that they suffered an injury that the physician failed to disclose. 125 H. 253, 259 P.3d 569 (2011).

The circuit court erroneously allowed plaintiffs' standard of care expert to testify that physician owed a duty to disclose physician's and the medical community's experience with the treatment, and that physician failed to meet that obligation, where expert's testimony was contrary to the plain language of this section and Hawaii law. 125 H. 253, 259 P.3d 569 (2011).

Under the patient-oriented standard adopted by Hawaii courts for determining whether particular information must be disclosed to a patient, an alternative dosage can constitute a "recognized alternative treatment" within the meaning of subsection (b)(4); where plaintiffs adduced evidence that recognized alternative dosing regimens had a lower risk of steroid myopathy, plaintiffs adduced evidence that a reasonable person would need to hear about the different recognized pulsing methods to make an informed decision. 125 H. 253, 259 P.3d 569 (2011).

Informed consent doctrine discussed. 8 H. App. 518, 811 P.2d 478 (1991).

A consent form is no substitute for a physician's affirmative duty to inform his or her patient. 86 H. 93 (App.), 947 P.2d 961 (1997).

" **§671-4 Notice of damages.** (a) In any medical tort action, the party against whom the complaint, counterclaim, or cross-claim is made at any time may request a statement setting forth the nature and amount of the damages sought. The request shall be served upon the complainant, counterclaimant, or cross-claimant who shall serve a responsive statement as to the damages within fifteen days thereafter. In the event a response is not served, the requesting party may petition the court with notice to the other parties, to order the appropriate party to serve a responsive statement.

(b) If no request is made for a statement setting forth the nature and amount of damages sought, the complainant, counterclaimant, or cross-claimant, as the case may be, shall give notice to the other of the amount of special and general damages sought to be recovered, either before a default may be taken, or in the event an answer is filed, at least sixty days prior to the date set for trial. [L 1976, c 219, pt of §2; am L 1980, c 232, §36; am L 1992, c 55, §2]

Case Notes

Medical malpractice claim not dismissed for violation of section where other claims brought with it. 69 H. 305, 741 P.2d 1280 (1987).

" **§671-5 Reporting and reviewing medical tort claims.** (a) Every self-insured health care provider, and every insurer providing professional liability insurance for a health care provider, shall report to the insurance commissioner the following information about any medical tort claim, known to the self-insured health care provider or insurer, that has been settled, arbitrated, or adjudicated to final judgment within ten working days following such disposition:

(1) The name and last known business and residential addresses of each plaintiff and claimant, whether or not each recovered anything;
(2) The name and last known business and residential addresses of each health care provider who was claimed or alleged to have committed a medical tort, whether or not each was a named defendant and whether or not any recovery was had against each;
(3) The name of the court in which any medical tort action, or any part thereof, was filed and the docket number;
(4) A brief description or summary of the facts upon which each claim was based, including the date of occurrence;
(5) The name and last known business and residential addresses of each attorney for any party to the settlement, arbitration, or adjudication, and identification of the party represented by each attorney;
(6) Funds expended for defense and plaintiff costs;
(7) The date and amount of settlement, arbitration award, or judgment in any matter subject to this subsection; and
(8) Actual dollar amount of award received by the injured party.

(b) The insurance commissioner shall forward the name of every health care provider, except a hospital and physician or an osteopathic physician or surgeon licensed under chapter 453 or a podiatrist licensed under chapter 463E, against whom a settlement is made, an arbitration award is made, or judgment is rendered to the appropriate board of professional registration and examination for review of the fitness of the health care

provider to practice the health care provider's profession. The insurance commissioner shall forward the entire report under subsection (a) to the department of commerce and consumer affairs if the person against whom settlement or arbitration award is made or judgment rendered is a physician or osteopathic physician or surgeon licensed under chapter 453 or a podiatrist licensed under chapter 463E.

(c) A failure on the part of any self-insured health care provider to report as requested by this section shall be grounds for disciplinary action by the Hawaii medical board or the state health planning agency, as applicable. A violation by an insurer shall be grounds for suspension of its certificate of authority. [L 1976, c 219, pt of §2; am L 1983, c 223, §3; am L 1984, c 168, §17; am L 1985, c 197, §22; gen ch 1985; am L 1992, c 55, §3; am L 2008, c 9, §3; am L 2009, c 11, §68]

" **[§671-6] Administration of chapter.** The director of commerce and consumer affairs shall be responsible for the implementation and administration of this chapter and shall adopt rules, in conformity with chapter 91, necessary for the purposes of this chapter. [L 1976, c 219, pt of §2; am L 1982, c 204, §8; am L 1983, c 124, §17]

" **[§671-7] Professional liability insurance; coverage for telehealth.** *[Section effective January 1, 2017.]* (a) Every insurer providing professional liability insurance for a health care provider shall ensure that every policy that is issued, amended, or renewed in this State on or after January 1, 2017, shall provide malpractice coverage for telehealth that shall be equivalent to coverage for the same services provided via face-to-face contact between a health care provider and a patient.

(b) No insurer providing professional liability insurance policies shall require face-to-face contact between a health care provider and a patient as a prerequisite for coverage of services appropriately provided through telehealth in accordance with generally accepted health care practices and standards prevailing in the applicable professional community at the time the services were provided. The coverage required in this section may be subject to all terms and conditions of the policy agreed upon between the health care provider and the insurer.

(c) For purposes of this section:

"Distant site" means the location of the health care provider delivering services through telehealth at the time the services are provided.

"Originating site" means the location where the patient is located, whether accompanied or not by a health care provider, at the time services are provided by a health care provider

through telehealth, including but not limited to a health care provider's office, hospital, critical access hospital, rural health clinic, federally qualified health center, a patient's home, and other non-medical environments such as school-based health centers, university-based health centers, or the work location of a patient.

"Telehealth" means the use of telecommunications services, as defined in section 269-1, to encompass four modalities: store and forward technologies, remote monitoring, live consultation, and mobile health; and which shall include but not be limited to real-time video conferencing-based communication, secure interactive and non-interactive web-based communication, and secure asynchronous information exchange, to transmit patient medical information, including diagnostic-quality digital images and laboratory results for medical interpretation and diagnosis, for the purpose of delivering enhanced health care services and information while a patient is at an originating site and the health care provider is at a distant site. Standard telephone contacts, facsimile transmissions, or e-mail text, in combination or by itself, does not constitute a telehealth service for the purposes of this section. [L 2016, c 226, §4]

Revision Note

In subsection (a), "January 1, 2017" substituted for "the effective date of Act [226], Session Laws of Hawaii 2016".

"**PART II. MEDICAL INQUIRY AND CONCILIATION**

Note

Part heading amended by L 2012, c 296, pt of §4.

§671-11 Medical inquiry and conciliation panels; composition, selection, compensation. (a) There are established medical inquiry and conciliation panels which shall facilitate the resolution of inquiries regarding the rendering of professional services by health care providers that involve injury, death, or other damages to a patient.

(b) A medical inquiry and conciliation panel shall be formed for each inquiry filed pursuant to section 671-12 and shall be disbanded after an inquiry is resolved, a notice of termination is filed, or a suit based on the circumstances of the injury is filed in a court of competent jurisdiction. Each medical inquiry and conciliation panel shall consist of one chairperson who shall be an attorney licensed to practice in the

courts of the State and experienced in trial practice and the personal injury claims settlement process and one physician, osteopathic physician, or surgeon licensed to practice under chapter 453. The chairperson shall be appointed by the director of commerce and consumer affairs from a list of eligible persons approved by the chief justice of the supreme court of Hawaii. The physician, osteopathic physician, or surgeon shall be appointed by the chairperson and shall be licensed and in good standing under chapter 453.

(c) The chairperson shall preside at the meetings of the panel. The chairperson, second panel member, and any consultant called by the panel to appear before the panel shall be compensated at the rate of $450 per inquiry which will become payable at the conclusion of panel proceedings. At the discretion of the director, the chairperson, second panel member, and any consultant called by the panel to appear before the panel, may be compensated at one-half the amount of compensation specified in this section, if the inquiry is disposed of by any means prior to a meeting of the panel and the parties or their legal representatives. The chairperson, second panel member, and any consultant called by the panel to appear before the panel also shall be paid allowances for travel and living expenses which may be incurred as a result of the performance of their duties on or for the panel. These costs shall be paid by the department of commerce and consumer affairs from the filing fees paid by the parties.

(d) The party initiating an inquiry shall pay a filing fee of $450 to the department upon the filing of the inquiry, and the failure to do so shall result in the inquiry being rejected for filing. Each health care provider and other parties to the inquiry shall pay a filing fee of $450 to the department within twenty days of being served with the inquiry. Each party to an inquiry shall be assessed a non-refundable processing fee by the department in the amount of $50. The non-refundable processing fee shall be retained from each party's filing fee, and shall be used to defray the administrative costs of the medical inquiry and conciliation panel program.

(e) After the panel has filed a notice of termination, or after a final disposition of the inquiry has been made without proceedings before the panel, the department shall return any moneys remaining after all panel costs have been paid, to the respective parties on a pro rata basis.

(f) The office and meeting space, secretarial and clerical assistance, office equipment, and office supplies for the panel shall be furnished by the department. The chairperson may designate any alternative meeting place or site for the proceedings.

(g) The Hawaii medical board shall prepare a list of physicians, osteopathic physicians, surgeons, and podiatrists, as the case may be, along with their respective specialties. These physicians, osteopathic physicians, surgeons, and podiatrists shall be eligible to serve as consultants to the medical inquiry and conciliation panel in their respective fields. Panel members may consult with other legal, medical, and insurance specialists. [L 1976, c 219, pt of §2; am L 1977, c 167, §4; am L 1978, c 60, §1; am L Sp 1981 1st, c 21, §1; am L 1982, c 204, §8; am L 1983, c 223, §4; am L 1987, c 283, §65; am L 1989, c 214, §2; am L 1991, c 75, §1; am L 1992, c 55, §4; am L 1995, c 213, §2; am L 2008, c 9, §3; am L 2009, c 11, §69; am L 2012, c 296, pt of §4]

" **§671-11.5 Waiver of filing fee.** (a) If any party to an inquiry cannot pay the required filing fee, the party may file with the director a motion to waive the filing fee. The motion to waive the filing fee shall be accompanied by an affidavit in a format prescribed by the department, showing in detail:

(1) The party's inability to pay the filing fee;

(2) The party's belief that the party is entitled to redress; and

(3) A statement of the issues that the party intends to present at proceedings before a medical inquiry and conciliation panel.

(b) The director shall decide on the motion to waive the filing fee as expeditiously as possible, and no oral arguments shall be permitted.

(c) If the director grants the motion to waive the filing fee, the party may proceed without further application to the director or panel, and without payment of the filing fee. If the motion is denied, the director shall state the reasons for the denial in writing. The director shall promptly provide the party with a filed copy of the director's order granting or denying the motion.

(d) If a motion to waive the filing fee is denied by the director, the party may seek judicial review under section 91-14.

(e) If the director denies a party's motion to waive the filing fee, the party shall pay the filing fee within thirty days after the denial of the motion, unless the party has filed an appeal under section 91-14. If the party has filed an appeal under section 91-14, the party may proceed without payment of the filing fee, until the time that a final judicial determination is rendered.

(f) If the party files an appeal under section 91-14, and the court upholds the director's denial of the aggrieved party's

motion to waive the filing fee, the party shall pay the filing fee within thirty days after the court's affirmation of the denial. If the court determines that the party's motion for waiver of the filing fee was improperly denied, the party shall be entitled to proceed without payment of the filing fee. [L 1995, c 213, §1; am L 2012, c 296, pt of §4]

" **§671-12 Review by panel required; notice; presentation of inquiry; request for a more definite statement of the inquiry.** (a) Any person or the person's representative having concerns regarding the existence of a medical tort shall submit an inquiry to the medical inquiry and conciliation panel before a suit based on the circumstances of the inquiry may be commenced in any court of this State. Inquiries shall be submitted to the medical inquiry and conciliation panel in writing and shall include the facts upon which the inquiry is based and the names of all parties against whom the inquiry is or may be made who are then known to the person or the person's representative.

(b) Within five business days after receipt of an inquiry the panel shall give notice of the inquiry and the statement of the inquiry, by certified mail, to all health care providers and others who are or may be parties to the inquiry and shall furnish copies of written inquiries to those persons. The notice shall set forth a date, not more than twenty days after the mailing of the notice, within which any health care provider against whom an inquiry is made shall file a written response and a date and time, not less than five days following the last date for filing a response, for a proceeding upon the inquiry by the panel and the parties. The notice shall describe the nature and purpose of the panel's proceedings and shall designate the place of the meeting. The times originally set forth in the notice may be enlarged by the chairperson, on due notice to all parties, for good cause.

(c) If the statement of the inquiry in the notice is so vague or ambiguous that any party receiving notice of the inquiry cannot reasonably be required to frame a written response, the party may submit a written request to the director of commerce and consumer affairs for a more definite statement before filing the written response. Copies of the request shall be provided to the panel and all affected parties. The request, which shall be ex parte and stay the proceedings of the panel until notice of the director's decision is given to the panel and all parties, shall specify the defects complained of and the details desired. The director may deny, grant, or modify the request at the director's own discretion, without the necessity of a hearing, although the director may reach a decision after consulting with the panel or any party or parties. The director

shall provide notice of the decision to the panel and all affected parties. If the request is granted and any party so directed fails to provide a more definite statement of the inquiry within five days after notice of the decision, the panel may make an order as it deems just. This subsection shall not be used as a tactic to delay the proceedings. [L 1976, c 219, pt of §2; gen ch 1985; am L 1989, c 245, §1; am L 1993, c 96, §1; am L 2012, c 296, pt of §4]

Law Journals and Reviews

Tort and Insurance "Reform" in a Common Law Court. 14 UH L. Rev. 55 (1992).

Case Notes

Medical claim conciliation panel requirement is procedural rather than substantive, and does not apply to cases filed in federal court on the basis of diversity jurisdiction. 29 F. Supp. 2d 1174 (1998).

Claim was allowed to be heard because there was substantial compliance with procedural requirements. 69 H. 305, 741 P.2d 1280 (1987).

Where certain counts of plaintiff's complaint alleged errors or omissions in professional practice by a health care provider, thus falling under the definition of "medical tort" under §671-1(2), court properly ruled plaintiff could not proceed with those counts of suit without first submitting them to medical claim conciliation panel as required by §671-16 and this section. 89 H. 188, 970 P.2d 496 (1998).

Where plaintiff chose to sidestep requirements of §671-16 and this section by filing suit before seeking resolution of claims by a medical claim conciliation panel as required under these statutes, court properly dismissed complaint. 89 H. 188, 970 P.2d 496 (1998).

Where medical claim conciliation panel decision was filed after commencement of plaintiffs' suit in trial court, plaintiffs failed to comply with the requirements of this section; thus, trial court did not err in concluding it had no subject matter jurisdiction. 90 H. 425, 978 P.2d 863 (1999).

Subsection (a) requires only that a claimant set forth facts upon which the claim is based and include the names of all parties against whom the claim is or may be made who are then known to the claimant; nowhere in this section does it require plaintiffs to name all known negligent health care providers; having filed the requisite medical claim conciliation panel claim, participated in the required hearing, and rejected the

panel's finding of no actionable negligence, plaintiffs satisfied this chapter's statutory prerequisites for filing suit in circuit court. 111 H. 74, 137 P.3d 980 (2006).

Where defendants city, city department of health, and city director of health fit within the definition of "health care facility" under §323D-2 and "health care provider" under §671-1, and as to them, each of the eight counts alleged a "medical tort", plaintiff was required to submit the eight counts against them to the medical claim conciliation panel pursuant to this section as a precondition to filing suit. 93 H. 490 (App.), 6 P.3d 362 (2000).

Circuit court properly dismissed plaintiff's claims for lack of jurisdiction where, although plaintiff was not the patient in the case, plaintiff's allegations arose directly from an alleged medical tort involving plaintiff's son, a patient, and subsection (a) states that "any person" must submit a statement of the claim to the medical claim conciliation panel before a suit based on that claim may be commenced in any state court. 121 H. 235 (App.), 216 P.3d 1258 (2009).

Plaintiff's claims of neglect, abuse, and failure to provide a safe home against care home defendants did not constitute "medical torts" within the meaning of §671-1; thus, plaintiff was not required to submit plaintiff's claims to a medical claim conciliation panel (MCCP) pursuant to this section and §671-16 as a condition for plaintiff to file suit against defendants, and the circuit court erred in dismissing plaintiff's suit based on plaintiff's failure to submit plaintiff's claims to a MCCP. 128 H. 405 (App.), 289 P.3d 1041 (2012).

" **§671-12.5 Certificate of consultation.** (a) Any inquiry filed with the medical inquiry and conciliation panel under this chapter shall be accompanied by a certificate that declares one of the following:

(1) That the party initiating the inquiry or the party's attorney has consulted with at least one physician who is licensed to practice in this State or any other state, and who is knowledgeable or experienced in the same medical specialty as the health care professional against whom the inquiry is made, and that the party or the party's attorney has concluded on the basis of the consultation that there is a reasonable and meritorious cause for filing the inquiry. If the party initiating the inquiry or the party's attorney is not able to consult with a physician in the same medical specialty as the health care professional against whom the inquiry is made, that party or the party's attorney may consult with a physician who is

licensed in this State or in any other state who is knowledgeable and experienced in a medical specialty that is as closely related as practicable to the medical specialty of the health care professional against whom the inquiry is made. The physician or physicians consulted may not be a party to the inquiry, nor be compelled to testify or otherwise participate in proceedings related to the medical inquiry and conciliation panel;

(2) That the party initiating the inquiry or the party's attorney was unable to obtain the consultation required by paragraph (1) because a statute of limitations would impair the action and that the certificate required by paragraph (1) could not be obtained before the impairment of the action. If a certificate is executed pursuant to this paragraph, the certificate required by paragraph (1) shall be filed by the party initiating the inquiry or the party's attorney within ninety days after filing the inquiry; or

(3) That the party initiating the inquiry or the party's attorney was unable to obtain the consultation required by paragraph (1) after the party or the party's attorney had made a good faith attempt to obtain the consultation and the physician contacted would not agree to the consultation. For purposes of this paragraph, "good faith attempt" refers to the responsibility of a party initiating an inquiry or the party's attorney to make reasonable efforts to contact a physician for the purpose of reviewing the circumstances upon which an inquiry is based. The party initiating the inquiry or the party's attorney may contact physicians by letter, telephone, facsimile, or other electronic means of communication. If the physician does not respond within a reasonable time, the party initiating the inquiry or the party's attorney may submit the inquiry to the medical inquiry and conciliation panel along with a certificate declaring the nonresponse to the party or the party's attorney's good faith attempt. A "good faith attempt" shall ultimately be evaluated in light of the goal of having a qualified physician assist the party initiating the inquiry or the party's attorney in understanding the basis of the inquiry and the determination shall depend upon the circumstances of each individual case.

(b) Where a party initiating an inquiry or the party's attorney intends to rely solely on a failure to inform of the consequences of a procedure (informed consent), this section shall be inapplicable. The party initiating an inquiry or the party's attorney shall certify upon filing of the inquiry that the party or the party's attorney is relying solely on the failure to inform of the consequences of a procedure and for that reason is not filing a certificate as required by this section.

(c) For the purposes of this section, the party initiating an inquiry or the party's attorney shall not be required to disclose the names of any physician consulted to fulfill the requirements of subsection (a) to any of the other parties to the inquiry. The medical inquiry and conciliation panel may require the party initiating an inquiry or the party's attorney to disclose the name of any physician consulted to fulfill the requirements of subsection (a). No disclosure of the name of any physician consulted to fulfill the requirements of subsection (a) shall be made to any of the other parties to the inquiry; provided that the medical inquiry and conciliation panel may contact the physician to determine if the requirements of subsection (a) were met.

(d) Unless a certificate is filed pursuant to subsection (a) or (b), the inquiry shall not be received for filing by the medical inquiry and conciliation panel. [L 2003, c 211, §1; am L 2012, c 296, pt of §4]

" **§671-13 Medical inquiry and conciliation panel proceedings; voluntary settlement.** [(a)] Every inquiry regarding a medical tort shall be processed by the medical inquiry and conciliation panel within thirty days after the last date for filing a response. No persons other than the panel, witnesses, and consultants called by the panel, and the persons listed in section 671-14 shall be present except with the permission of the chairperson. The panel may, in its discretion, conduct an inquiry of a party, witness, or consultant without the presence of any or all parties.

[(b)] The proceedings shall be informal. Chapters 91 and 92 shall not apply. The panel may require a stenographic record of all or part of its proceedings for the use of the panel, but the record shall not be made available to the parties. The panel may receive any oral or documentary evidence. The panel shall conduct proceedings in a manner appropriate to the circumstances of the inquiry and to facilitate resolution of the matter. The panel shall conduct proceedings in a non-adversarial manner consistent with the primary purpose of conciliation.

[(c)] The panel shall have the power to require by subpoena the appearance and testimony of witnesses and the production of documentary evidence. When the subpoena power is utilized, notice shall be given to all parties. The testimony of witnesses may be taken either orally before the panel or by deposition. In cases of refusal to obey a subpoena issued by the panel, the panel may invoke the aid of any circuit court in the State, which may issue an order requiring compliance with the subpoena. Failure to obey an order may be punished by the court as a contempt thereof. Any member of the panel, the director of commerce and consumer affairs, or any person designated by the director may sign subpoenas. Any member of the panel may administer oaths and affirmations, examine witnesses, and receive evidence. Notwithstanding these powers, the panel shall attempt to secure the voluntary appearance, testimony, and cooperation of parties, witnesses, and consultants without coercion.

[(d)] At panel proceedings and to assist its conciliation role, the panel may consider, but not be limited to, statements or testimony of witnesses, hospital and medical records, nurses' notes, x-rays, and other records kept in the usual course of the practice of the health care provider without the necessity for other identification or authentication, statement of fact, or opinion on a subject contained in a published treatise, periodical, book, or pamphlet, or statements of experts without the necessity of the experts appearing at the proceeding. The panel may upon the application of any party or upon its own decision appoint as a consultant, an impartial and qualified physician, surgeon, physician and surgeon, or other professional person or expert to testify before the panel or to conduct any necessary professional or expert examination of the party initiating the inquiry or relevant evidentiary matter and to report to or testify as a witness thereto. The consultant shall not be compensated or reimbursed except for travel and living expenses to be paid as provided in section 671-11. Except for the production of hospital and medical records, nurses' notes, x-rays, and other records kept in the usual course of the practice of the health care provider, discovery by the parties shall not be allowed.

[(e)] During the proceedings or at any time before termination, the panel may encourage the parties to settle or otherwise dispose of the inquiry voluntarily. [L 1976, c 219, pt of §2; am L 1979, c 80, §2; am L 1983, c 223, §5; am L 1988, c 132, §1; am L 1989, c 245, §2; am L 2012, c 296, pt of §4]

Case Notes

Only members of a medical claim conciliation panel are authorized to sign subpoenas and only the panel can seek assistance of the circuit court for compliance with such subpoenas. 69 H. 419, 744 P.2d 1205 (1987).

" **§671-14 Same; persons attending proceedings of panel.** Unless excluded or excused by the panel, the following persons shall attend proceedings before the panel:

(1) The party or parties submitting the inquiry;
(2) The health care provider or providers against whom the inquiry is submitted or representatives thereof, other than counsel, authorized to act for the health care provider or providers; and
(3) Counsel for the parties, if any. [L 1976, c 219, pt of §2; am L 1979, c 80, §3; am L 2012, c 296, pt of §4]

" **§671-15 Panel termination.** The director of commerce and consumer affairs or the panel shall notify all affected parties upon termination of panel proceedings. At the discretion of the director or the panel, a notice of termination may state whether any party or parties to the matter failed to meet the requirements of this part or meaningfully participate in panel proceedings. [L 1976, c 219, pt of §2; am L 1978, c 60, §2; am L 1983, c 223, §6; am L 1984, c 168, §18; am L 1985, c 197, §23; am L 1992, c 55, §5; am L 2009, c 11, §70; am L 2012, c 296, pt of §4]

" **§671-15.5 Expungement of records; malpractice insurance rates.** (a) A health care provider may apply to the panel for expungement of all records of the related proceedings. The panel shall expunge all records if the panel agrees that the inquiry did not provide a sufficient basis to support the finding of a medical tort against the health care provider applying for expungement.

(b) No insurer providing professional liability insurance for a health care provider shall increase any premium rate for the health care provider on the basis of the filing of an inquiry involving the health care provider with the medical inquiry and conciliation panel unless an indemnity payment is made to the party initiating the inquiry or the party initiating the inquiry institutes litigation in a court of competent jurisdiction based on the circumstances of the inquiry. [L 1993, c 62, §1; am L 2012, c 296, pt of §4]

" **§671-16 Subsequent litigation; excluded evidence.** [(a)] The party initiating the inquiry may institute litigation based upon the circumstances of the inquiry in an appropriate court

only after the medical inquiry and conciliation panel proceedings were terminated pursuant to section 671-15; a party has participated in alternative dispute resolution pursuant to section 671-16.6; or the twelve-month period under section 671-18 has expired.

[(b)] No statement made in the course of the proceedings of the medical inquiry and conciliation panel shall be admissible in evidence either as an admission, to impeach the credibility of a witness, or for any other purpose in any trial of the action; provided that the statements may be admissible for the purpose of section 671-19. No decision, conclusion, finding, statement, or recommendation of the medical inquiry and conciliation panel on the issue of liability or on the issue of damages shall be admitted into evidence in any subsequent trial, nor shall any party to the medical inquiry and conciliation panel proceeding, or the counsel or other representative of a party, refer or comment thereon in an opening statement, an argument, or at any other time, to the court or jury; provided that the decision, conclusion, finding, or recommendation may be admissible for the purpose of section 671-19. [L 1976, c 219, pt of §2; am L 1980, c 88, §3; am L 2003, c 211, §3 ; am L 2012, c 296, pt of §4]

Case Notes

Claim was allowed to be heard because there was substantial compliance with procedural requirements. 69 H. 305, 741 P.2d 1280 (1987).

Where certain counts of plaintiff's complaint alleged errors or omissions in professional practice by a health care provider, thus falling under the definition of "medical tort" under §671-1(2), court properly ruled plaintiff could not proceed with those counts of suit without first submitting them to medical claim conciliation panel as required by §671-12 and this section. 89 H. 188, 970 P.2d 496 (1998).

Where plaintiff chose to sidestep requirements of §671-12 and this section by filing suit before seeking resolution of claims by a medical claim conciliation panel as required under these statutes, court properly dismissed complaint. 89 H. 188, 970 P.2d 496 (1998).

Plaintiff's claims of neglect, abuse, and failure to provide a safe home against care home defendants did not constitute "medical torts" within the meaning of §671-1; thus, plaintiff was not required to submit plaintiff's claims to a medical claim conciliation panel (MCCP) pursuant to §671-12 and this section as a condition for plaintiff to file suit against defendants, and the circuit court erred in dismissing plaintiff's suit based

on plaintiff's failure to submit plaintiff's claims to a MCCP. 128 H. 405 (App.), 289 P.3d 1041 (2012).

" **§671-16.5 Arbitration; subsequent litigation.** Any person or the person's representative claiming that a medical tort has been committed or any health care provider against whom an inquiry has been made may elect to bypass the court annexed arbitration program under section 601-20 after the inquiry has been submitted to the medical inquiry and conciliation panel and the panel has been terminated pursuant to section 671-15 if the party meaningfully participated in panel proceedings, an alternative dispute resolution process has been terminated pursuant to section 671-16.6, or the panel or alternative dispute resolution process has not completed proceedings within the tolling period of the statute of limitations under section 671-18. [L 1989, c 280, §2; am L 2012, c 296, pt of §4]

" **§671-16.6 Submission of inquiry to an alternative dispute resolution provider.** (a) Any inquiry initially filed with the medical inquiry and conciliation panel may be subsequently submitted to an alternative dispute resolution provider upon the written agreement of all of the parties and with the written approval of the director of commerce and consumer affairs. The director shall approve the alternative dispute resolution provider and the alternative dispute resolution procedures. All filing fees, less a processing fee of $50, shall be refunded to the appropriate parties if the panel was not constituted or had not taken any action related to the inquiry prior to the submission of the inquiry to an alternative dispute resolution provider. If the panel was constituted or took any action prior to the submission of the inquiry to an alternative dispute resolution provider, the remaining balance of any filing fees shall be refunded to the appropriate parties, less a processing fee of $50 and a pro-rata amount to be determined by the director.

(b) The parties shall comply with the procedures established by the alternative dispute resolution provider and approved by the director. If a party does not comply with those procedures, any other party may file a motion with the director to have the inquiry resubmitted to the medical inquiry and conciliation panel. The director may collect any filing fees that were refunded pursuant to subsection (a) from a party that resubmits its inquiry.

(c) Notwithstanding section 671-12, any inquiry may be submitted directly to an alternative dispute resolution process upon the written agreement of all parties without first submitting the inquiry to a medical inquiry and conciliation

panel. A written agreement shall be effective as of the date of its execution by the parties. Any inquiry submitted directly to alternative dispute resolution need not be subsequently submitted to a medical inquiry and conciliation panel and shall not be subject to filing fees assessed by the director for the medical inquiry and conciliation panel.

(d) Within thirty days after the completion of the alternative dispute resolution process, the alternative dispute resolution provider shall notify all parties concerned, their counsel, and the representative of each health care provider's liability insurance carrier authorized to act for the carrier, as appropriate, that the alternative dispute resolution process has been completed.

(e) The party submitting the inquiry may institute litigation based upon the inquiry in an appropriate court only if:

(1) The parties were not able to resolve the entire matter through the alternative dispute resolution process and the matter has not been resubmitted to the medical inquiry and conciliation panel pursuant to subsection (b) of this section; or

(2) The matter has not been resolved through the alternative dispute resolution process after twelve months from the date the matter was filed with the approved or agreed upon alternative dispute resolution provider.

(f) No statement made in the course of the approved or agreed upon alternative dispute resolution process shall be admissible in evidence as an admission, to impeach the credibility of a witness, or for any other purpose in any trial of the action. No decision, conclusion, finding, or recommendation of the approved or agreed upon alternative dispute resolution provider on the issue of liability or on the issue of damages shall be admitted into evidence in any subsequent trial, nor shall any party to the approved or agreed upon alternative dispute resolution hearing, their counsel, or other representative of the party, refer or comment thereon in an opening statement, in an argument, or at any time, to the court or jury. [L 2003, c 211, §2; am L 2012, c 296, pt of §4]

" **§671-17 Immunity of panel members from liability.** No member of a medical inquiry and conciliation panel shall be liable in damages for libel, slander, or other defamation of character of any party to a medical inquiry and conciliation panel proceeding for any action taken or any decision, conclusion, finding, or recommendation made by the member while acting within the member's capacity as a member of a medical

inquiry and conciliation panel under this part. [L 1976, c 219, pt of §2; gen ch 1985; am L 2012, c 296, pt of §4]

" **§671-18 Statute of limitations tolled.** The filing of the inquiry with the medical inquiry and conciliation panel or with an approved or agreed upon alternative dispute resolution provider shall toll any applicable statute of limitations, and the statute of limitations shall remain tolled until sixty days after the termination of the panel or the notification of completion from the approved or agreed upon alternative dispute resolution provider is mailed or delivered to the parties. If panel proceedings are not completed within twelve months, or the alternative dispute resolution process is not completed within twelve months, the statute of limitations shall resume running and the party filing the inquiry may commence a suit based on the circumstances related to the inquiry in any appropriate court of this State. The panel or the approved or agreed upon alternative dispute resolution provider shall notify all parties in writing of this provision. [L 1976, c 219, pt of §2; am L 1980, c 88, §2; am L 2003, c 211, §4; am L 2012, c 296, pt of §4]

" **§671-19 Duty to cooperate; assessment of costs and fees.** [(a)] It shall be the duty of every person who files an inquiry with the medical inquiry and conciliation panel, every health care provider against whom the inquiry is made, and every insurance carrier or other person providing medical tort liability insurance for the health care provider, to cooperate with the medical inquiry and conciliation panel and meaningfully participate in panel proceedings for the purpose of achieving a prompt, fair, and just resolution, disposition, or settlement of the inquiry, provided that cooperation and participation shall not prejudice the substantive rights of those persons.

[(b)] Any party may apply to the panel to have the costs of the action assessed against any party for failure to cooperate with the panel or meaningfully participate in panel proceedings. The panel may award costs, or a portion thereof, including attorney's fees, witness fees including those of expert witnesses, filing fees, and costs of the medical inquiry and conciliation panel proceedings to the party applying therefor.

[(c)] In determining whether any person has failed to cooperate or meaningfully participate in good faith, the panel shall consider, but is not limited to, the following:

(1) The attendance of the persons at proceedings of the medical inquiry and conciliation panel;

(2) The extent to which representatives of parties and counsel representing parties came to panel proceedings with knowledge of the claims and defenses and authority to negotiate a settlement or other disposition of the matter;
(3) The testimony of members of the panel as to the facts of the person's participation in the panel proceeding;
(4) The extent of the person's cooperation in providing the panel with documents and testimony called for by the panel;
(5) The reasons advanced by the person so charged for not fully cooperating, participating, or negotiating; and
(6) The failure of the person to submit any required fees to the department of commerce and consumer affairs, as required by this chapter.

[(d)] The party against whom costs are awarded may appeal the award to the circuit court. The court may affirm or remand the case with instructions for further proceedings; or it may reverse or modify the award if the substantial rights of the petitioners may have been prejudiced because the award is characterized as abuse of discretion. [L 1976, c 219, pt of §2; am L 1982, c 204, §8; am L 1983, c 124, §17; am L 1993, c 95, §1; am L 1995, c 213, §3; am L 2012, c 296, pt of §4]

" **§671-20 Annual report.** The director of commerce and consumer affairs shall prepare and submit to the legislature annually, twenty days prior to the convening of each regular session, a report containing the director's evaluation of the operation and effects of this chapter. The report shall include a summary of the inquiries brought before the medical inquiry and conciliation panel and the disposition of those inquiries, a description and summary of the work of the panel under this chapter, an appraisal of the effectiveness of this chapter in securing prompt and fair disposition of inquiries regarding the rendering of professional services by health care providers that involved injury, death, or other damages to a patient, a review of the number and outcomes of inquiries brought under section 671-12, and recommendations for changes, modifications, or repeal of this chapter or parts thereof with accompanying reasons and data. [L 1976, c 219, pt of §2; am L 1982, c 204, §8; am L 1983, c 124, §17; gen ch 1985; am L 2012, c 296, pt of §4]

"**PART III. PATIENTS' COMPENSATION FUND--REPEALED**

§§671-31 to 671-37 REPEALED. L 1984, c 232, §4.