

JAN 21 2011

S.B. NO. 270

A BILL FOR AN ACT

RELATING TO TORTS.

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

1 SECTION 1. Chapter 658A, Hawaii Revised Statutes, is
2 amended by adding a new section to be appropriately designated
3 and to read as follows:
4 "§658A- Arbitration in medical services contracts. (a)
5 Any contract for medical services which contains a provision for
6 arbitration of any dispute as to a medical tort, as defined in
7 section 671-1, shall have a provision as the first article of
8 the contract that shall be expressed in substantially the
9 following language: "Any dispute involving allegations of
10 medical tort including a negligent act or omission to act by a
11 health care provider in the rendering of professional services,
12 or the rendering of professional services by a health care
13 provider without informed consent will be determined by
14 submission to arbitration as provided by Hawaii law, and not by
15 a lawsuit or resort to court process except as Hawaii law
16 provides for judicial review of arbitration proceedings. Both
17 parties to this contract, by entering into it, are giving up
18 their constitutional right to have any such dispute decided in a



1 court of law before a jury, and instead are accepting the use of
2 arbitration."

3 (b) Immediately before the signature line provided for the
4 individual contracting for the medical services shall appear the
5 following in at least 10-point bold red type:

6 "NOTICE: BY SIGNING THIS CONTRACT I AGREE TO HAVE ANY ISSUE
7 OF MEDICAL TORT DECIDED BY NEUTRAL ARBITRATION AND I AM GIVING
8 UP MY RIGHT TO A JURY OR COURT TRIAL AS PROVIDED IN ARTICLE 1 OF
9 THIS CONTRACT."

10 (c) Once signed, such a contract governs all subsequent
11 open-book account transactions for medical services for which
12 the contract was signed until or unless rescinded by written
13 notice. Written notice of such rescission may be given by a
14 guardian or conservator of the patient if the patient is
15 incapacitated or a minor.

16 (d) Where the contract is one for medical services to a
17 minor, it shall not be subject to disaffirmance if signed by the
18 minor's parent or legal guardian.

19 (e) A contract is not a contract of adhesion, nor
20 unconscionable or otherwise improper, where it complies with
21 subsections (a), (b), and (c) of this section."



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

4 "§671-A Evidence of collateral benefits admissible. (a)
5 In the event the defendant so elects, in an action for a medical
6 tort, the defendant may introduce evidence of any amount payable
7 as a benefit to the plaintiff as a result of the personal injury
8 underlying the action pursuant to the United States Social
9 Security Act, any state or federal income disability or worker's
10 compensation act, any health, sickness or income-disability
11 insurance, accident insurance that provides health benefits or
12 income-disability coverage, and any contract or agreement of any
13 group, organization, partnership, or corporation to provide, pay
14 for, or reimburse the cost of medical, hospital, dental, or
15 other health care services. Where the defendant elects to
16 introduce such evidence, the plaintiff may introduce evidence of
17 any amount which the plaintiff has paid or contributed to secure
18 the plaintiff's right to any insurance benefits concerning which
19 the defendant has introduced evidence.

20 (b) No source of collateral benefits introduced pursuant
21 to subsection (a) shall recover any amount against the plaintiff



1 nor shall it be subrogated to the rights of the plaintiff
2 against a defendant.

3 §671-B Attorney fees. (a) An attorney shall not contract
4 for or collect a contingency fee for representing any person
5 seeking damages in connection with an action for a medical tort
6 in excess of the following limits:

7 (1) Forty per cent of the first \$50,000 recovered.

8 (2) Thirty-three and one-third per cent of the next
9 \$50,000 recovered.

10 (3) Twenty-five per cent of the next \$500,000 recovered.

11 (4) Fifteen per cent of any amount on which the recovery
12 exceeds \$600,000.

13 The limitations shall apply regardless of whether the recovery
14 is by settlement, arbitration, or judgment, or whether the
15 person for whom the recovery is made is a responsible adult, an
16 infant, or a person of unsound mind.

17 (b) If periodic payments are awarded to the plaintiff
18 pursuant to section 671-C, the court shall place a total value
19 on these payments based upon the projected life expectancy of
20 the plaintiff and include this amount in computing the total
21 award from which attorney's fees are calculated under this
22 section.



1 (c) For purposes of this section, "recovered" means the
2 net sum recovered after deducting any disbursements or costs
3 incurred in connection with prosecution or settlement of the
4 claim. Costs of medical care incurred by the plaintiff and the
5 attorney's office overhead costs or charges are not deductible
6 disbursements or costs for such purpose.

7 **\$671-C Periodic payments on future damages.** (a) In any
8 medical tort action, a court may, at the request of either
9 party, enter a judgment ordering that money damages for future
10 damages of the judgment creditor be paid in whole or in part by
11 periodic payments rather than by a lump-sum payment if the award
12 equals or exceeds \$50,000 in future damages. In entering a
13 judgment ordering the payment of future damages by periodic
14 payments, the court shall make a specific finding as to the
15 dollar amount of periodic payments which will compensate the
16 judgment creditor for such future damages. As a condition to
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 assure full payment of such 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. Such payments shall
6 only be subject to modification in the event of the death of the
7 judgment creditor or as provided in subsection (c) below.

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. Upon such a finding by the court, all sums due and
12 owing on the total value of future damages from the initial
13 judgment shall come due in full. In addition to the payment of
14 all due and owing periodic payments in arrears, and payment of
15 the total value of future damages due and owing from the initial
16 judgment, the court shall order the judgment debtor to pay the
17 judgment creditor all damages caused by the failure to make such
18 periodic payments, including court costs and attorney's fees.

19 (d) Money damages awarded for loss of future earnings
20 shall not be reduced or terminated by reason of the death of the
21 judgment creditor, but shall be paid to persons to whom the
22 judgment creditor owed a duty of support, as provided by law,



1 immediately prior to death. In such cases the court which
2 rendered the original judgment may, upon petition of any party
3 in interest, modify the judgment to award and apportion the
4 unpaid future damages in accordance with this subsection.

5 (e) Following the occurrence or expiration of all
6 obligations specified in the periodic payment judgment, any
7 remaining security given pursuant to subsection (a) shall revert
8 to the judgment debtor.

9 (f) For purposes of this section:

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

16 (g) It is the intent of the legislature in enacting this
17 section to authorize the entry of judgments in medical tort
18 actions against health care providers which provide for the
19 payment of future damages through periodic payments rather than
20 lump-sum payments. By authorizing periodic payment judgments,
21 it is the further intent of the legislature that the courts will
22 utilize such judgments to provide compensation sufficient to



1 meet the needs of an injured plaintiff and those persons who are
2 dependent on the plaintiff for whatever period is deemed
3 appropriate by the court while eliminating the potential
4 windfall from a lump-sum recovery which was intended to provide
5 for the care of an injured plaintiff over an extended period,
6 who then dies shortly after the judgment is paid, leaving the
7 balance of the judgment award to persons and purposes for which
8 it was not intended. It is also the intent of the legislature
9 that all elements of the periodic payment program be specified
10 with certainty in the judgment ordering such payments and that
11 the judgment not be subject to modification at some future time
12 which might alter the specifications of the original judgment,
13 except as provided in subsection (c) above."

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

16 "§657-7.3 **Medical torts; limitation of actions; time.** [No
17 ~~action for injury or death against a chiropractor, clinical~~
18 ~~laboratory technologist or technician, dentist, naturopathic~~
19 ~~physician, nurse, nursing home administrator, dispensing~~
20 ~~optician, optometrist, osteopath, physician or surgeon, physical~~
21 ~~therapist, podiatrist, psychologist, or veterinarian duly~~
22 ~~licensed or registered under the laws of the State, or a~~



1 ~~licensed hospital as the employer of any such person, based upon~~
2 ~~such person's alleged professional negligence, or for rendering~~
3 ~~professional services without consent, or for error or omission~~
4 ~~in such person's practice, shall be brought more than two years~~
5 ~~after the plaintiff discovers, or through the use of reasonable~~
6 ~~diligence should have discovered, the injury, but in any event~~
7 ~~not more than six years after the date of the alleged act or~~
8 ~~omission causing the injury or death. This six year time~~
9 ~~limitation shall be tolled for any period during which the~~
10 ~~person has failed to disclose any act, error, or omission upon~~
11 ~~which the action is based and which is known to the person.~~

12 ~~Actions by a minor shall be commenced within six years from~~
13 ~~the date of the alleged wrongful act except the actions by a~~
14 ~~minor under the age of ten years shall be commenced within six~~
15 ~~years or by the minor's tenth birthday, whichever provides a~~
16 ~~longer period. Such time limitation shall be tolled for any~~
17 ~~minor for any period during which the parent, guardian, insurer,~~
18 ~~or health care provider has committed fraud or gross negligence,~~
19 ~~or has been a party to a collusion in the failure to bring~~
20 ~~action on behalf of the injured minor for a medical tort. The~~
21 ~~time limitation shall also be tolled for any period during which~~
22 ~~the minor's injury or illness alleged to have arisen, in whole~~



1 ~~or in part, from the alleged wrongful act or omission could not~~
2 ~~have been discovered through the use of reasonable diligence.]~~
3 Medical tort actions, as defined in section 671-1, shall
4 commence within three years after the date of injury or one year
5 after the plaintiff discovers, or through the use of reasonable
6 diligence should have discovered, the injury, whichever occurs
7 first. In no event shall the time for commencement of legal
8 action exceed three years unless tolled for any of the
9 following: (1) upon proof of fraud, (2) upon proof of
10 intentional concealment, or (3) upon discovery of the presence
11 of a foreign body, which has no therapeutic or diagnostic
12 purpose or effect, in the person of the injured person. Actions
13 by a minor shall be commenced within three years from the date
14 of the alleged wrongful act, except that actions by a minor
15 under the full age of six years shall be commenced within three
16 years or prior to the eighth birthday of the minor, whichever
17 provides a longer period. Such time limitation shall be tolled
18 for minors for any period during which a parent or guardian and
19 defendant's insurer or health care provider have committed fraud
20 or collusion in the failure to bring an action on behalf of the
21 injured minor for professional negligence."



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

3 §671-1 Definitions. As used in this chapter:

4 "Health care provider" means a physician, osteopathic
5 physician, surgeon, or physician assistant licensed under
6 chapter 453, a podiatrist licensed under chapter 463E, a health
7 care facility as defined in section 323D-2, a chiropractor
8 licensed under chapter 442, a dentist licensed under chapter
9 448, a dental hygienist licensed under chapter 447, an
10 acupuncture practitioner licensed under chapter 436E, a massage
11 therapist licensed under chapter 452, a nurse licensed under
12 chapter 457, an occupational therapist licensed under chapter
13 457G, an optometrist licensed under chapter 459, a pharmacist
14 licensed under chapter 461, a physical therapist licensed under
15 chapter 461J, a psychologist licensed under chapter 465, a
16 marriage and family therapist licensed under chapter 451J, a
17 dietitian licensed under chapter 448B, a radiologic technologist
18 licensed under chapter 466J, a speech pathologist or audiologist
19 licensed under chapter 468E, a veterinarian licensed under
20 chapter 471, and the employees of any of them. Health care
21 provider shall not mean any nursing institution or nursing
22 service conducted by and for those who rely upon treatment by



1 spiritual means through prayer alone, or employees of the
2 institution or service.

3 "Medical tort" means [~~professional negligence, the~~
4 ~~rendering of professional service without informed consent, or~~
5 ~~an error or omission in professional practice, by a health care~~
6 ~~provider, which proximately causes death, injury, or other~~
7 ~~damage to a patient.~~] a negligent act or omission to act by a
8 health care provider in the rendering of professional services,
9 or the rendering of professional services by a health care
10 provider without informed consent, which act or omission or
11 rendering of service without informed consent is the proximate
12 cause of a personal injury or wrongful death".

13 SECTION 5. Section 663-8.5, Hawaii Revised Statutes, is
14 amended to read as follows:

15 "[+]§663-8.5[+] **Noneconomic damages; defined.** [~~(a)~~
16 ~~Noneconomic damages which are recoverable in tort actions~~
17 ~~include damages for pain and suffering, mental anguish,~~
18 ~~disfigurement, loss of enjoyment of life, loss of consortium,~~
19 ~~and all other nonpecuniary losses or claims.~~

20 ~~(b) Pain and suffering is one type of noneconomic damage~~
21 ~~and means the actual physical pain and suffering that is the~~
22 ~~proximate result of a physical injury sustained by a person.]~~



1 "Noneconomic damages" which are recoverable in tort actions
2 means damages for physical and emotional pain, suffering,
3 inconvenience, physical impairment, mental anguish,
4 disfigurement, loss of enjoyment of life, loss of society and
5 companionship, loss of consortium other than loss of domestic
6 service, hedonic damages, injury to reputation, and all other
7 nonpecuniary losses of any kind."

8 SECTION 6. Section 663-8.7, Hawaii Revised Statutes, is
9 amended to read as follows:

10 "[+]§663-8.7[+] **Limitation on pain and suffering.** Damages
11 recoverable [~~for pain and suffering~~] as noneconomic damages as
12 defined in section 663-8.5 shall be limited to a maximum award
13 of [~~\$375,000,~~] \$250,000; provided that this limitation shall not
14 apply to tort actions enumerated in section 663-10.9(2)."

15 SECTION 7. This Act does not affect rights and duties that
16 matured, penalties that were incurred, and proceedings that were
17 begun, before its effective date.

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

20 SECTION 9. This Act shall take effect upon its approval.

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S.B. NO. 270

INTRODUCED BY

Demetrius Stan



Report Title:

Torts; Medical Tort Reform; Noneconomic Damages; Definition

Description:

Revises medical tort reform laws to: allow for arbitration of medical services contracts, create a new cap on noneconomic damages for medical torts, allow for introduction of evidence, limit contingency fees, and allow for periodic payments for future damages. Redefines noneconomic damages for purposes of tort actions. Limits the amount recoverable for noneconomic damages to \$250,000.

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