MISSISSIPPI LEGISLATURE

By: Representatives Flaggs, Guice

REGULAR SESSION 2002

To: Judiciary A

HOUSE BILL NO. 1211

AN ACT RELATING TO MEDICAL PROFESSIONAL LIABILITY; TO CREATE
SECTION 11-1-58, MISSISSIPPI CODE OF 1972, TO MAKE LEGISLATIVE
DECLARATIONS WITH RESPECT TO MALPRACTICE ACTIONS AGAINST HEALTH
CARE PROVIDERS; TO AMEND SECTION 11-1-59, MISSISSIPPI CODE OF
1972, TO LIMIT DAMAGES IN MALPRACTICE ACTIONS; TO DEFINE CERTAIN
TERMS; TO PROVIDE THE PROCEDURE FOR THE AWARD OF PUNITIVE DAMAGES
IN MEDICAL MALPRACTICE ACTIONS; TO AMEND SECTION 11-1-65,
MISSISSIPPI CODE OF 1972, IN CONFORMITY TO THE PROVISIONS OF THIS
ACT; TO AMEND SECTION 11-7-13, MISSISSIPPI CODE OF 1972, TO
CONFORM DAMAGE LIMITATIONS TO WRONGFUL DEATH ACTIONS; TO AMEND
SECTION 13-1-21, MISSISSIPPI CODE OF 1972, TO CLARIFY PRIVILEGED
COMMUNICATIONS IN MEDICAL MALPRACTICE ACTIONS; AND FOR RELATED
PURPOSES.

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

SECTION 1. The following shall be codified as Section
11-1-58, Mississippi Code of 1972:

11-1-58. The Legislature of the State of Mississippi finds
and determines as a matter of public policy and does hereby
declare: (a) that the citizens of this state are entitled to the
best medical care and facilities available and that health care
providers, as defined in Section 11-1-59, offer an essential and
basic service which requires that the public policy of this state
encourage and facilitate the provision of such service to our
citizens; (b) that the possibility of injury or death from
negligent conduct commands that protection of the public served by
health care providers be recognized as an important state
interest; (c) that our system of litigation is an essential
component of this state interest in providing adequate and
reasonable compensation to those persons who suffer from injury or
death as a result of negligence of one or more health care
providers; (d) that it is the duty and responsibility of the
Legislature to balance the rights of our individual citizens to
adequate and reasonable compensation with the broad public
interest in the provision of services by health care providers;

(e) that the purpose of Section 11-1-59 is to provide for a
resolution of the matters which the Legislature has determined is
necessary to achieve the balance of rights as set forth herein;
and (f) that the provisions of Sections 11-1-59 and 11-1-61 are
reasonable and necessary in order to preserve the availability and
continuity of adequate health care in this state.

SECTION 2. Section 11-1-59, Mississippi Code of 1972, is
amended as follows:

11-1-59. (1) For purposes of this section the following
definitions shall apply:

(a) "Actual medical expenses" means monies paid to
and/or legally obligated to be paid to a health care provider by
the claimant, Medicaid, Medicare and/or other third-party payors.

(b) "Claimant" means a party, including a plaintiff,
counterclaimant, cross-claimant, or third-party plaintiff, seeking
recovery of damages.

(c) "Defendant" means a party, including a
counterdefendant, cross-defendant, or third-party defendant from
whom a claimant seeks relief with respect to damages.

(d) "Economic damages" means compensatory damages for
pecuniary loss including, but not limited to, actual medical
expenses, future medical expenses and loss of wages; the term does
not include damages for physical pain and suffering and mental
anguish, loss of consortium, disfigurement, physical impairment,
loss of enjoyment of life, loss of companionship and society or
any other nonpecuniary loss.

(e) "Future damages" includes damages for future
medical treatment, care or custody, loss of future earnings, or
loss of bodily function.

(f) "Health care provider" means a physician, dentist,
hospital, nursing home, ambulatory surgical facility, clinic,
nurse, pharmacist, podiatrist, optometrist, chiropractor, and
employee of any such individual or facility, any other individual
or facility licensed, certified or otherwise authorized or
permitted by law to provide health care in the ordinary course of
business or practice of a profession, or any employee of any such
other individual or facility.

(g) "Malpractice action" means a cause of action,
including those alleging a lack of informed consent or wrongful
death as set forth in Section 11-7-13, based on a negligent or
intentional act or omission by a health care provider in the
rendering of professional services or based on a contract with a
health care provider to provide professional services, which act
or omission is the proximate cause or proximate contributing cause
of an injury or wrongful death.

(h) "Noneconomic damages" means compensatory damages
for nonpecuniary loss including, but not limited to, physical pain
and suffering and mental anguish, loss of consortium,
disfigurement, physical impairment, loss of enjoyment of life and
loss of companionship and society.

(i) "Periodic payments" means the payment of money or
delivery of other property to the judgment creditor at regular
intervals.

(j) "Punitive damages" means any damages awarded as a
penalty or by way of punishment.

(2) Notwithstanding any other statute or law that may
otherwise apply, this section shall apply to all malpractice
actions for damages for injury or wrongful death against any
health care provider.

(3) In any malpractice action at law against a health care
provider to recover damages based upon a professional negligence
theory, the complaint or counterclaim shall not specify the amount
of damages claimed, but shall only state that the damages claimed
are within the jurisdictional limits of the court to which the
pleadings are addressed and whether or not the amount of such
damages is Seventy-five Thousand Dollars ($75,000.00) or more, or
such other minimum amount as shall be necessary to invoke federal
jurisdiction if the action is brought in federal court.

(4) In any such malpractice action against a health care
provider, even when such malpractice action is joined with other
causes of action and/or includes one or more nonhealth care
provider defendants, economic and noneconomic damages shall be
limited as follows:

(a) A claimant may recover economic damages for medical
expenses only to the extent of the claimant's actual medical
expenses and his or her future medical expenses as shown to a
reasonable degree of medical probability.

(b) Noneconomic damages may not be recovered if the
claimant receives no recovery for economic damages.

(c) As limited by paragraph (b) above, a claimant may
recover noneconomic damages as shown to a reasonable degree of
medical probability which shall not exceed the lesser of (i) the
amount of the recovery for economic damages or (ii) Five Hundred
Thousand Dollars ($500,000.00).

(5) In any such malpractice action against a health care
provider, even when such malpractice action is joined with other
causes of action and/or includes one or more nonhealth care
provider defendants, in which punitive damages are sought:

(a) Punitive damages may not be awarded if the claimant
does not provide by clear and convincing evidence that the
defendant against whom punitive damages are sought:

(i) Acted with actual malice, gross negligence
which evidences a willful, wanton or reckless disregard for the
safety of others, or

(ii) Committed actual fraud which proximately
caused injury or death of the patient.
(b) In any malpractice action in which the claimant seeks an award of punitive damages, the trier of fact shall first determine whether compensatory damages are to be awarded and in what amount before addressing any issues related to punitive damages.

(c) If, but only if, an award of compensatory damages has been made against a defendant, the court may promptly commence an evidentiary hearing before the same trier of fact to determine whether punitive damages may be considered.

(d) After such evidentiary hearing, the court shall determine whether the issue of punitive damages may be submitted to the trier of fact; and, if so, the trier of fact shall determine whether to award punitive damages and in what amount.

(e) In situations involving an award of punitive damages, the fact finder, in determining the amount of punitive damages, shall consider, to the extent relevant, the following:

(i) The defendant's financial condition and net worth;

(ii) The nature and reprehensibility of the defendant's wrongdoing, such impact of the defendant's conduct on the plaintiff or the relationship of the defendant to the plaintiff;

(iii) The defendant's awareness of the amount of harm being caused and the defendant's motivation in causing such harm;

(iv) The duration of the defendant's misconduct;

and

(v) Any other circumstances shown by the evidence that bear on determining a proper amount of punitive damages. The trier of fact shall be instructed that the primary purpose of punitive damages is to punish the wrongdoer and deter similar misconduct in the future by the defendant and others while the purpose of compensatory damages is to make the plaintiff whole.
(f) (i) Before judgment for an award of punitive damages the trial court shall ascertain that the award is reasonable in its amount and rationally related to the purpose to punish what occurred giving rise to the award and to deter its repetition by the defendant and others.

(ii) In determining whether the award is excessive, the court shall take into consideration the following factors:

1. Whether there is a reasonable relationship between the punitive damage award and the harm likely to result from the defendant's conduct as well as the harm that actually occurred;

2. The degree of reprehensibility of the defendant's conduct, the duration of that conduct, the defendant's awareness, any concealment and the existence and frequency of similar past conduct;

3. The financial condition and net worth of the defendant; and

4. In mitigation, the imposition of criminal sections on the defendant for his or its conduct and the existence of other civil awards against the defendant for the same conduct.

(g) Under no circumstances shall a punitive damage award in a malpractice action against a health care provider, even when such malpractice action is joined with other causes of action and/or includes one or more nonhealth care provider defendants, exceed an amount equal to the greater of:

(i) Two (2) times the amount of economic damages; plus

2. An amount equal to any noneconomic damages awarded by the jury, not to exceed Five Hundred Thousand Dollars ($500,000.00); or

(ii) Five Hundred Thousand Dollars ($500,000.00).
(h) Because punitive damages are awarded by a jury against a defendant as a penalty and not by way of making a claimant whole, monies paid by such penalized defendant, after the deduction of attorney’s fees in the amount of twenty-five percent (25%) of the punitive damage award, shall be paid directly to the state’s Emergency Medical Services Operating Fund, created pursuant to Section 41-59-61.

(6) (a) In any malpractice action, the court shall, at the request of either party, enter a judgment ordering that money damages or its equivalent for future damages of the judgment creditor be paid in whole or in part by periodic payments rather than by a lump-sum payment if the award equals or exceeds Five Hundred Thousand Dollars ($500,000.00) in future damages. In entering a judgment ordering the payment of future damages by periodic payments, the court shall make a specific finding as to the dollar amount of periodic payments which will compensate the judgment creditor for such future damages. As a condition to authorizing periodic payments of future damages, the court shall require the judgment debtor who is not adequately insured to post security adequate to assure full payment of such damages awarded by the judgment. Upon termination of periodic payments of future damages, the court shall order the return of this security, or so much as remains, to the judgment creditor.

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

(ii) In the event that the court finds that the judgment debtor has exhibited a continuing pattern of failing to make payments as specified in paragraph (5)(a) the court shall
find the judgment debtor in contempt of court and, in addition to
the required periodic payments, shall order the judgment debtor to
pay the judgment creditor all damages caused by the failure to
make such periodic payments, including court costs and attorney's
fees.

(iii) However, money damages awarded for loss of
future earnings shall not be reduced or payments terminated by
reason of the death of the judgment creditor, but shall be paid to
persons to whom the judgment creditor owed a duty of support, as
provided by law, immediately prior to his or her death. In such
cases the court which rendered the original judgment, may, upon
petition of any party in interest, modify the judgment to award
and apportion the unpaid future damages in accordance with this
subdivision.

(iv) Following the occurrence or expiration of all
obligations specified in the periodic payment judgment, any
obligation of the judgment debtor to make further payments shall
cease and any security given, pursuant to subsection (5)(a) shall
revert to the judgment debtor.

SECTION 3. Section 11-1-65, Mississippi Code of 1972, is
amended as follows:

11-1-65. (1) Except as otherwise provided in Section
11-1-59, in any action in which punitive damages are sought:

(a) Punitive damages may not be awarded if the claimant
does not prove by clear and convincing evidence that the defendant
against whom punitive damages are sought acted with actual malice,
gross negligence which evidences a willful, wanton or reckless
disregard for the safety of others, or committed actual fraud.

(b) In any action in which the claimant seeks an award
of punitive damages, the trier of fact shall first determine
whether compensatory damages are to be awarded and in what amount,
before addressing any issues related to punitive damages.
(c) If, but only if, an award of compensatory damages has been made against a party, the court shall promptly commence an evidentiary hearing before the same trier of fact to determine whether punitive damages may be considered.

(d) The court shall determine whether the issue of punitive damages may be submitted to the trier of fact; and, if so, the trier of fact shall determine whether to award punitive damages and in what amount.

(e) In all cases involving an award of punitive damages, the fact finder, in determining the amount of punitive damages, shall consider, to the extent relevant, the following:

- The defendant's financial condition and net worth;
- The nature and reprehensibility of the defendant's wrongdoing, for example, the impact of the defendant's conduct on the plaintiff, or the relationship of the defendant to the plaintiff;
- The defendant's awareness of the amount of harm being caused and the defendant's motivation in causing such harm;
- The duration of the defendant's misconduct and whether the defendant attempted to conceal such misconduct; and
- Any other circumstances shown by the evidence that bear on determining a proper amount of punitive damages.

The trier of fact shall be instructed that the primary purpose of punitive damages is to punish the wrongdoer and deter similar misconduct in the future by the defendant and others while the purpose of compensatory damages is to make the plaintiff whole.

(f) (i) Before entering judgment for an award of punitive damages the trial court shall ascertain that the award is reasonable in its amount and rationally related to the purpose to punish what occurred giving rise to the award and to deter its repetition by the defendant and others.

(ii) In determining whether the award is excessive, the court shall take into consideration the following factors:
1. Whether there is a reasonable relationship between the punitive damage award and the harm likely to result from the defendant's conduct as well as the harm that actually occurred;

2. The degree of reprehensibility of the defendant's conduct, the duration of that conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct;

3. The financial condition and net worth of the defendant; and

4. In mitigation, the imposition of criminal sanctions on the defendant for its conduct and the existence of other civil awards against the defendant for the same conduct.

(g) The seller of a product other than the manufacturer shall not be liable for punitive damages unless the seller exercised substantial control over that aspect of the design, testing, manufacture, packaging or labeling of the product that caused the harm for which recovery of damages is sought; the seller altered or modified the product, and the alteration or modification was a substantial factor in causing the harm for which recovery of damages is sought; the seller had actual knowledge of the defective condition of the product at the time he supplied same; or the seller made an express factual representation about the aspect of the product which caused the harm for which recovery of damages is sought.

(2) The provisions of Section 11-1-65 shall not apply to:

(a) Contracts;

(b) Libel and slander; or

(c) Causes of action for persons and property arising out of asbestos.

SECTION 4. Section 11-7-13, Mississippi Code of 1972, is amended as follows:
11-7-13. Whenever the death of any person shall be caused by any real, wrongful or negligent act or omission, or by such unsafe machinery, way or appliances as would, if death had not ensued, have entitled the party injured or damaged thereby to maintain an action and recover damages in respect thereof, or whenever the death of any person shall be caused by the breach of any warranty, express or implied, of the purity or fitness of any foods, drugs, medicines, beverages, tobacco or any and all other articles or commodities intended for human consumption, as would, had the death not ensued, have entitled the person injured or made ill or damaged thereby, to maintain an action and recover damages in respect thereof, and such deceased person shall have left a widow or children or both, or husband or father or mother, or sister, or brother, the person or corporation, or both that would have been liable if death had not ensued, and the representatives of such person shall be liable for damages, notwithstanding the death, and the fact that death was instantaneous shall in no case affect the right of recovery. The action for such damages may be brought in the name of the personal representative of the deceased person for the benefit of all persons entitled under the law to recover, or by widow for the death of her husband, or by the husband for the death of the wife, or by the parent for the death of a child, or in the name of a child, or in the name of a child for the death of a parent, or by a brother for the death of a sister, or by a sister for the death of a brother, or by a sister for the death of a sister, or a brother for the death of a brother, or all parties interested may join in the suit, and there shall be but one (1) suit for the same death which shall ensue for the benefit of all parties concerned, but the determination of such suit shall not bar another action unless it be decided on its merits. In such action the party or parties suing shall recover such damages allowable by law as the jury may determine to be just, taking into consideration all the damages of every kind to the decedent and
all damages of every kind to any and all parties interested in the
suit.

This section shall apply to all personal injuries of servants
and employees received in the service or business of the master or
employer, where such injuries result in death, and to all deaths
caused by breach of warranty, either express or implied, of the
purity and fitness of foods, drugs, medicines, beverages, tobacco
or other articles or commodities intended for human consumption.

Any person entitled to bring a wrongful death action may
assert or maintain a claim for any breach of expressed warranty or
for any breach of implied warranty. A wrongful death action may
be maintained or asserted for strict liability in tort or for any
cause of action known to the law for which any person,
corporation, legal representative or entity would be liable for
damages if death had not ensued.

In an action brought pursuant to the provisions of this
section by the widow, husband, child, father, mother, sister or
brother of the deceased, or by all interested parties, such party
or parties may recover as damages, as such damages are limited by
Section 11-1-59 with respect to a malpractice action brought
against a health care provider, property damages and funeral,
medical or other related expenses incurred by or for the deceased
as a result of such wrongful or negligent act or omission or
breach of warranty, whether an estate has been opened or not. Any
amount, but only such an amount, as may be recovered for property
damage, funeral, medical or other related expenses shall be
subject only to the payment of the debts or liabilities of the
deceased for property damages, funeral, medical or other related
expenses. All other damages recovered under the provisions of
this section shall not be subject to the payment of the debts or
liabilities of the deceased, except as hereinafter provided, and
such damages shall be distributed as follows:
Damages for the injury and death of a married man shall be equally distributed to his wife and children, and if he has no children all shall go to his wife; damages for the injury and death of a married woman shall be equally distributed to the husband and children, and if she has no children all shall go to the husband; and if the deceased has no husband or wife, the damages shall be equally distributed to the children; if the deceased has no husband, nor wife, nor children, the damages shall be distributed equally to the father, mother, brothers and sisters, or such of them as the deceased may have living at his or her death. If the deceased have neither husband, nor wife, nor children, nor father, nor mother, nor sister, nor brother, then the damages shall go to the legal representative, subject to debts and general distribution, and the fact that the deceased was instantly killed shall not affect the right of the legal representative to recover. All references in this section to children shall include descendants of a deceased child, such descendants to take the share of the deceased child by representation. There shall not be, in any case, a distinction between the kindred of the whole and half blood of equal degree. The provisions of this section shall apply to illegitimate children on account of the death of the mother and to the mother on account of the death of an illegitimate child or children, and they shall have all the benefits, rights and remedies conferred by this section on legitimates. The provisions of this section shall apply to illegitimate children on account of the death of the natural father and to the natural father on account of the death of the illegitimate child or children, and they shall have all the benefits, rights and remedies conferred by this section on legitimates, if the survivor has or establishes the right to inherit from the deceased under Section 91-1-15.

Any rights which a blood parent or parents may have under this section are hereby conferred upon and vested in an adopting
parent or adopting parents surviving their deceased adopted child,
just as if the child were theirs by the full blood and had been
born to the adopting parents in lawful wedlock.

SECTION 5. Section 13-1-21, Mississippi Code of 1972, is
amended as follows:

13-1-21. (1) The Legislature of the State of Mississippi
finds and affirms the importance of the privilege that exists
between a patient and the patient's health care providers which
protects medical facts and communications from disclosure to third
parties. The Legislature further finds and determines as a matter
of public policy and does hereby declare: (a) that health care
providers have a fundamental right to defend themselves when a
claim is made by a patient alleging negligence in the provision of
health care services; (b) that prior or other medical history,
examinations and treatment, however remote in time, can and often
do affect the medical decisions and care made the subject of a
malpractice claim against a health care provider, as well as the
relative merit of the claim itself; (c) that courts and lawyers in
this state, who generally are not trained in medicine or other
health services, are not qualified to determine the extent to
which prior or other medical history, examination or treatment
affect the medical decisions and care made the subject of the
malpractice claim against a health care provider, and that such
determinations should rest with medical professionals as does the
applicable standard of care in the courts of this state; (d) that
to protect the interest of both health care providers and patient
claimants, all information about prior and other medical history,
examination and treatment of the patient claimant shall be equally
available to the patient claimant and to the health care providers
and their respective representatives so that the information can
be evaluated by health care professionals to determine its
relevance to the medical decisions and care made the subject of a
malpractice claim against a health care provider; and (e) that the
provisions of this statute are reasonable and necessary in order

to preserve the availability and continuity of adequate health
care in this state.

(2) All terms used in this section shall have the same
meaning as those terms defined in Section 11-1-59.

(3) Subject to the provisions of this section, all
communications made to a health care provider by a patient under
his charge or by one seeking professional advice are hereby
declared to be privileged, and such party shall not be required to
disclose the same in any legal proceeding except at the instance
of the patient or, in case of the death of the patient, at the
instance of his personal representative or legal heirs in case
there be no personal representative, or except, if the validity of
the will of the decedent is in question, at the instance of the
personal representative or any of the legal heirs or any
contestant or proponent of the will.

(4) Waiver of the medical privilege of patients regarding
the release of medical information to health care personnel, the
State Board of Health or local health departments, made to comply
with Sections 41-3-15, 41-23-1 and 41-23-2 and related rules,
shall be implied. The medical privilege likewise shall be waived
to allow any physician, osteopath, dentist, hospital, nurse,
pharmacist, podiatrist, optometrist or chiropractor to report to
the State Department of Health necessary information regarding any
person afflicted with any communicable disease or infected with
the causative agent thereof who neglects or refuses to comply with
accepted protective measures to prevent the transmission of the
communicable disease.

(5) Willful violations of the provisions of this section
shall constitute a misdemeanor and shall be punishable as provided
for by law. Any health care provider shall be civilly liable for
damages for any willful or reckless and wanton acts or omissions
constituting such violations.
In any action commenced or claim made after April 1, 2002, against a health care provider for professional services rendered or which should have been rendered, the filing of such an action shall constitute an express waiver of the medical privilege allowing any health care provider otherwise covered by the medical privilege to meet with, provide, discuss and disclose, upon written request, all medical information and documentation held by that individual or entity to the representative of the patient making the claim and/or to the representative or attorney of the person or entity against whom the claim is made with or without the consent or presence of the patient or his representative.

In any disciplinary action commencing on or after July 1, 1987, against a physician or a podiatrist pursuant to the provisions of Sections 73-25-1 through 73-25-39, 73-25-51 through 73-25-67, 73-25-81 through 73-25-95 and 73-27-1 through 73-27-19, waiver of the medical privilege of a patient to the extent of any information other than that which would identify the patient shall be implied.

The provisions of this section, including the confidentiality and waiver provisions above, shall be deemed part of the substantive law of this state enacted by the Legislature for the purposes stated in subsection (1) of this section.

SECTION 6. The provisions of this act shall apply only to personal injury and wrongful death actions against physicians, dentists, hospitals, nursing homes, ambulatory surgical facilities, clinics, nurses, pharmacists, podiatrists, optometrists, chiropractors, any employee of any such individual or facility, any other individuals or facilities licensed, certified or otherwise authorized or permitted by law to provide health care in the ordinary course of business or practice of a profession, or any employee of any other such individual or facility which are based on causes of action arising out of
alleged negligent acts or omissions occurring on or after April 1, 2002.

SECTION 7. In the event any provision or portion of this act shall be declared unconstitutional, the remainder of this act shall remain in effect in the same manner as if the unconstitutional provision or portion were not a part of this act.

SECTION 8. This act shall take effect and be in force from and after its passage.