

# **JOURNAL**

**of the**

**HOUSE OF REPRESENTATIVES**

**of the**

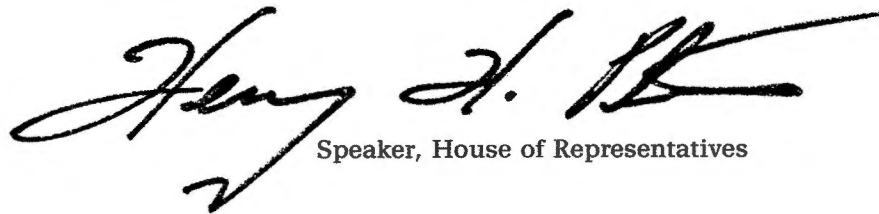
**THIRTEENTH LEGISLATURE  
STATE OF HAWAII**

**SPECIAL SESSION OF 1986**

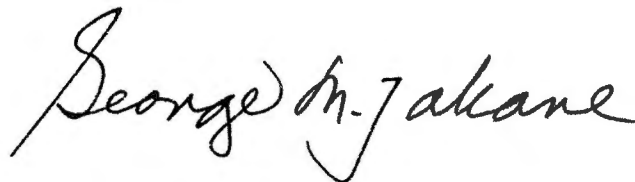
**Convened Thursday, July 24, 1986  
Adjourned Wednesday, July 30, 1986**

## CERTIFICATE

*We hereby certify that the minutes for each day's session as appears in this House Journal are true and correct and that the original copies have been duly signed by the Speaker and Clerk of the House of Representatives and are on file in the Archives of the State of Hawaii.*

A handwritten signature in black ink, appearing to read "Henry A. Baker". The signature is fluid and cursive, with a large initial "H" and a long, sweeping underline.

Speaker, House of Representatives

A handwritten signature in black ink, appearing to read "George M. Jakane". The signature is cursive, with a large initial "G" and a long, sweeping underline.

Clerk, House of Representatives

Clerk, House of Representatives

## TABLE OF CONTENTS

	Page
First Day, Thursday, July 24, 1986 .....	1
Second Day, Friday, July 25, 1986 .....	6
Third Day, Monday, July 28, 1986 .....	7
Fourth Day, Tuesday, July 29, 1986 .....	14
Fifth Day, Wednesday, July 30, 1986 .....	15

### Communication Received After Adjournment:

Governor's Message .....	33
--------------------------	----

### Appendix:

Standing Committee Reports .....	34
----------------------------------	----

### History:

House Bills .....	46
Senate Bills .....	47

THE  
THIRTEENTH LEGISLATURE  
STATE OF HAWAII  
FIRST SPECIAL SESSION OF 1986  
JOURNAL OF THE HOUSE  
FIRST DAY

Thursday, July 24, 1986

In accordance with the provisions of Section 10, Article III of the Constitution of the State of Hawaii, the House of Representatives of the Thirteenth Legislature of the State of Hawaii convened in Special Session on Thursday, July 24, 1986, for consideration of tort reform.

The Honorable Henry Haalilio Peters, member of the Forty-Eighth District, he having been elected Speaker of the House of Representatives on the opening day of the Thirteenth Legislature and retaining that position under the provision of Rule 1.5 of the Rules of Procedure of the House of Representatives, called the House to order at 11:15 o'clock a.m.

The Divine Blessing was invoked by the Reverend Edith Wolfe, Executive Secretary of the Womens' Board of Missions, after which the Roll was called showing all members present with the exception of Representatives Jones, Medeiros and Yoshimura who were excused.

GOVERNOR'S MESSAGE

A message from the Governor (Gov. Msg. No. 1) was read by the Clerk and placed on file:

"STATE OF HAWAII  
EXECUTIVE CHAMBERS

July 23, 1986

The Honorable Henry H. Peters  
Speaker of the House of Representatives  
Thirteenth State Legislature  
State Capitol  
Honolulu, Hawaii 96813

Dear Mr. Speaker:

Transmitted herewith is the Proclamation convening the Legislature of the State of Hawaii in Special Session on Thursday, July 24, 1986, at 10:00 a.m.

With warm personal regards, I remain,

Yours very truly,

/s/ George R. Ariyoshi

GEORGE R. ARIYOSHI

Enclosure"

"PROCLAMATION

Whereas, Section 10 of Article III of the Constitution of the State of Hawaii provides that the Governor of Hawaii, 'may convene both houses or the senate alone in special session';

NOW, THEREFORE, I GEORGE R. ARIYOSHI, Governor of Hawaii, pursuant to the power vested in me by Section 10 of Article III of the Constitution of the State of Hawaii, do hereby convene both houses of the Legislature of the State of Hawaii in special session on Thursday, the 24th of July, 1986, at 10:00 o'clock a.m., for consideration of legislation pertaining to the subject matter commonly referred to as 'tort reform' and, if necessary for the appropriation of funds, pertaining to the general fund expenditure ceiling.

Done at the State Capitol  
Honolulu, State of Hawaii,  
this 23rd day of July, 1986.

/s/ George R. Ariyoshi

GEORGE R. ARIYOSHI  
Governor of Hawaii

APPROVED AS TO FORM:

/s/ Ruth I. Tsujimura  
Acting Attorney General"

ORDER OF THE DAY

INTRODUCTION OF BILLS

At this time, Representative Oka-

mura moved that "all bills received by the Clerk up till midnight tonight pass First Reading by title and be referred to printing."

At 11:20 o'clock a.m., Representative Ikeda asked for a recess, and the Chair declared a recess, subject to the call of the Chair.

Upon reconvening at 11:23 o'clock a.m., Representative Ikeda seconded the motion.

Representative Ikeda then rose to speak in favor of the motion but with very grave reservations, stating:

"Mr. Speaker, we all know why we are called back here; we have known for a long time what the potentials were and it was just a matter of when and what the particulars would be.

"The motion made on this floor today leaves the Journal open to receive bills up till midnight, obviously, because the very major bill that we all are waiting for is not available.

"I find myself in a quandary. The Minority has a bill on tort reform that we had introduced that is lying on the Clerk's desk that is included in this motion. We are ready to discuss this issue and, therefore, find it rather ridiculous to vote against the motion on our own bill.

"There are also other bills there of great merit, two of which I have introduced -- one having to do with the stupid Supreme Court ruling on sex abuse which really needs to be changed, and another, having to do with regulating of ..."

The Chair, upon interrupting Representative Ikeda, stated:

"Representative Ikeda, those measures are not before this House at the present time; you will speak to the motion."

Representative Ikeda responded:

"I beg to differ with you, Mr. Speaker. The motion was, 'all bills laying on the Clerk's desk ...'"

The Chair, upon interrupting, stated:

"Those measures are not made available to the members of this House at this time."

Representative Ikeda responded:

"Those bills are laying on the Clerk's desk, Mr. Speaker."

The Chair then directed Representative Ikeda to proceed.

Representative Ikeda continued:

"Thank you, Mr. Speaker. I'm sure other colleagues of other bills feel that their bills are of much importance.

"So we are called back primarily for one reason -- and the issue is tort reform. I find it very ludicrous that after all of this time and all of this negotiations which, incidentally, did not include all of us, finally we are here, called into special session only to leave the Journal open until midnight because the bill, the vehicle, is not available.

"I know very well, Mr. Speaker, that if we go by the rules, as you pointed out, you are perfectly correct -- you can pass the bills on First Reading by title -- they do not have to be printed. We all realize that.

"However, the mere fact that this issue is such a sensitive issue, the mere fact that it was important enough for us to come back in special session to discuss this issue leads me to believe that the least we can expect is to see this vehicle, this bill, this proposed legislation, before we pass it on any reading.

"Therefore, Mr. Speaker, I might remind you again and the members of this House, we stand ready. Our bill on tort reform is here and all I can say is that it be given as much consideration as your vehicle, wherever it comes from, because your vehicle has not originated from this floor or this House.

"I would like to see that, Mr. Speaker. I would like to see your bill before I okay it without any reservations. Since I cannot because it is not available, for whatever reason, I find it very difficult to vote in favor of this motion, but will do so only because our tort bill is there and ready for discussion.

"Thank you."

Representative Marumoto then rose to speak in favor of the motion, with reservations, stating:

"I do have serious reservations regarding this measure, but I'm voting for it because the GOP tort package is on deck and ready to go

and, hopefully, will be printed today and available to the public, referred to committee and heard by committee.

"It contains many of the provisions that we have discussed in the past regular session and is a good vehicle from which we could depart or maintain. I believe that we should use it as a vehicle since the one to be introduced by the Lieutenant Governor is not yet available. But there is something on the Clerk's desk that can be used, which people can look at and can prepare testimony on and come here in public hearing and offer amendments. I feel that it is very important to have something in black and white, in writing, and tangible in which the public can see and react to.

"To go back a bit -- we do have a spending ceiling bill which I have introduced which the proclamation includes. I feel that this is also ready to go and should be referred to committee and given the opportunity for public hearing and testimony and passage.

"This caucus felt quite strongly that we wanted to have a measure before us to vote upon. The Senate has recessed; they are coming back at 4:00 o'clock p.m. Perhaps by that time, they will have something to act upon, something to pass on First Reading. We are passing 'air' on First Reading.

"We do not know whether the Lieutenant Governor's bill will be ..."

At this time, the Chair, upon interrupting Representative Marumoto, stated:

"The Chair would request that you clarify that statement about 'passing air.' Representative Marumoto, I think that you and everyone else here obviously know why we are here. It is certainly a very serious matter; it has nothing to do with 'air.'"

Representative Marumoto responded:

"That is the point, sir. Until we do have something printed and before us, I feel like we are dealing with something very intangible and that we need something that is -- we can bounce off of -- something tangible. I think the public deserves no less."

The Chair stated:

"They will receive no less."

Representative Marumoto, continued, stating:

"I ask that all bills that are passed today be printed and available as soon as possible, possibly today. I know in the past, when there have been a backlog, sometimes printing have taken several days and I ..."

The Chair, upon interrupting Representative Marumoto, stated:

"You are getting very redundant, the motion is very clear; the measures on the Clerk's desk shall pass First Reading and be sent to printing in order that all concerned will have an opportunity to review those measures before us."

Representative Marumoto then rose on a point of information.

Directed by the Chair to state her point, Representative Marumoto asked:

"I'm wondering whether all bills that pass this reading will be referred to committee?"

The Chair answered:

"The motion is 'to be sent to printing.'"

Representative Marumoto then stated:

"I then request that all bills that are passed..."

Interrupting Representative Marumoto, the Chair stated:

"Representative Marumoto, you know the motion before this House. The Chair would advise you to keep your remarks germane to the motion. Please proceed."

Proceeding, Representative Marumoto stated:

"I can only reiterate then, Mr. Speaker, that I have very grave reservations because we don't have the key measure before us yet; and it is not here because it is still in fluid form and that it is still undergoing changes, and I think that any changes that should be made should be made in the public's view, in public hearing by the committees concerned.

"Thank you very much."

Representative Crozier then rose to speak in favor of the motion, stating:

"Mr. Speaker, I stand to speak in favor of this motion because this is a very important issue to us -- we must get going. I feel insulted that the Republicans have already used terms such as 'ridiculous,' 'stupid,' and now we are passing 'air.'"

"The gird of the whole process at the beginning -- this is supposed to be a bipartisan issue. The people of Hawaii need this help. Why are we making it partisan so early? I know it is an election year; I hope we can put that aside and get something done."

"Thank you."

Representative Anderson then rose to speak in favor of the motion, with reservation, stating:

"I would rather speak against it. I believe, Mr. Speaker, that we've all been watching the new media and listening to the radio and reading the newspaper and this is a very important issue."

"Last night I saw the senators in a joint hearing in both Houses and I'm sure they were not all in agreement, and it is my understanding that this House, you my fellow colleagues on the other side of the aisle, have had a chance to at least have a document that you could look at, and you had some input. We had none and it is a bipartisan and not a partisan issue. So, I resent the fact that you had least had some input -- you may disagree on what's happening -- but you had input. We had none."

"We've been as busy and as concerned about this issue as everyone of you, and I resent the fact that you have had a chance and I have not had one. That's why I would rather vote against the measure before us, but my colleagues would rather go ahead and just go with regulations."

"Thank you very much."

Representative Metcalf then rose to speak in favor of the motion but with reservations, stating:

"I wasn't included in the formulation of the Republican package and if they're complaining that they were not included in the formulation of the Democratic package, I think I have the same grounds for reservation."

"Thank you."

Representative Anderson then rose

to speak in rebuttal, stating:

"You were more than welcomed, Representative (Metcalf) to sit in on our so-called caucus on our bill that we had before us. The only reason that we caucused yesterday and got it in is because we were not invited at any time, and we knew that everybody else was meeting and we wanted to have something that we believed in. Even though we cannot all agree on our own bill, at least we wanted a bill that the people could look at and that we could massage and get along. You folks don't have anything that we can look at, massage and work with. You haven't even got a copy of that so that you, yourself, can understand what's going on."

"Thank you very much, Mr. Speaker."

The motion was put by the Chair and carried.

#### INTRODUCTION OF BILLS

The following bills (H.B. Nos. 1-86 to 9-86) passed First Reading by title and were referred to printing:

##### House Bill Nos.

1-86 "A Bill for an Act relating to liability."

Introduced by: Representative Peters (by request).

2-86 "A Bill for an Act relating to the general fund expenditure ceiling."

Introduced by: Representative Peters (by request).

3-86 "A Bill for an Act relating to torts."

Introduced by: Representatives Marumoto, Ikeda, Jones, Kamali'i, Anderson, Liu, Medeiros, Hemmings, Cavasso, Pfeil and Isbell.

4-86 "A Bill for an Act relating to the general fund expenditure ceiling."

Introduced by: Representative Marumoto.

5-86 "A Bill for an Act relating to the penal code."

Introduced by: Representative Ikeda.

6-86 "A Bill for an Act relating to boating safety."

Introduced by: Representative Ikeda.

7-86 "A Bill for an Act relating to intimidation of an educational worker."

Introduced by: Representatives Anderson and Medeiros.

8-86 "A Bill making an appropriation for shore water safety operations."

Introduced by: Representative Cavasso.

9-86 "A Bill for an Act relating to public lands and housing."

Introduced by: Representative Cavasso.

#### ANNOUNCEMENTS

At this time, Representative Marumoto rose on a point of information.

Directed by the Chair to state her point, Representative Marumoto asked:

"Mr. Speaker, when is the bill introduction deadline?"

The Chair responded:

"Today."

The Chair then announced:

"This House will stand in recess; the Journal will remain open and all measures laying on the Clerk's desk until 12:00 midnight will pass First Reading and be referred to printing. Upon receiving those measures, the Chair will refer them to the appropriate subject matter committee or committees. At that time, subject matter chairman will be called upon to post the proper notice for public

hearing."

At 11:36 o'clock a.m., Representative Anderson asked for a recess, and the Chair declared a recess, subject to the call of the Chair.

Upon reconvening at 11:38 o'clock a.m., Chair announced:

"As all of you know, one of our colleague's son passed away recently, Mr. Damien Medeiros. That is why Representative Medeiros was not able to join us today. I would like to impose upon this body to join me in a moment of silence in his honor."

Representative Blair then rose on a point of parliamentary inquiry.

Directed by the Chair to state his point, Representative Blair inquired:

"Section 12 of Article III provides that by rule of its proceeding applicable to both Houses, each House shall provide for the date for which bills in a regular session are introduced. But there is no procedure for determining the cutoff date and I was just wondering how we go about determining the cutoff date for bill introduction."

The Chair responded:

"Representative Blair, we also have a section -- this is a special session, special circumstances. The Chair will rule in that situation and call upon the indulgence of this body to support that position."

At 11:41 o'clock the Chair declared the House in recess for the purpose of receiving bills.

#### ADJOURNMENT

At 12:00 o'clock midnight, the House of Representatives adjourned until 10:00 o'clock a.m. tomorrow, Friday, July 25, 1986.



## SECOND DAY

Friday, July 25, 1986

The House of Representatives of the Thirteenth Legislature of the State of Hawaii, First Special Session of 1986, convened at 10:10 o'clock a.m., with the Speaker presiding.

The Divine Blessing was invoked by the Honorable Joseph Leong, member of the House of Representatives, after which the Roll was called showing all members present with the exception of Representatives Andrews, Apo, Jones, Kihano, Lardizabal, Lindsey, Nakata, and Shito who were excused.

By unanimous consent, reading of the Journal of the House of Representatives was deferred.

At 10:13 o'clock a.m., the Chair declared a recess, subject to the call of the Chair.

## ORDER OF THE DAY

## COMMITTEE REFERRALS

The following bills (H.B. Nos. 1-86 and 2-86) were disposed of as follows:

<u>H.B. Nos.</u>	<u>Referred to:</u>
1-86	Jointly to the Committees on Judiciary and Health
2-86	Committee on Finance

## ADJOURNMENT

At 12:00 o'clock midnight, the House of Representatives adjourned until 10:00 o'clock a.m. Monday, July 28, 1986.

## THIRD DAY

Monday, July 28, 1986

The House of Representatives of the Thirtieth Legislature of the State of Hawaii, First Special Session of 1986, convened at 11:45 o'clock a.m., with the Speaker presiding.

The Divine Blessing was invoked by the Honorable Ron Menor, member of the House of Representatives, after which the Roll was called showing all members present with the exception of Representative Crozier, who was excused.

The Clerk proceeded to read the Journals of the House of Representatives of the First and Second Days.

On motion by Representative Okamura, seconded by Representative Ikeda and carried, reading of the Journals was dispensed with and the Journals of the First and Second Days were approved.

At 11:52 o'clock a.m., the Chair declared a recess, subject to the call of the Chair.

Upon reconvening at 12:05 o'clock p.m., the Chair directed the Clerk to note the presence of Representative Crozier.

## ORDER OF THE DAY

## STANDING COMMITTEE REPORTS

Representative Kiyabu, for the Committee on Finance, presented a report (Stand. Com. Rep. No. 1-86) recommending that H.B. No. 2-86 pass Second Reading and be placed on the calendar for Third Reading.

On motion by Representative Kiyabu, seconded by Representative Souki and carried, the report of the Committee was adopted and H.B. No. 2-86, entitled: "A BILL FOR AN ACT RELATING TO THE GENERAL FUND EXPENDITURE CEILING", passed Second Reading and was placed on the calendar for Third Reading.

Representatives Tom and Bunda, for the majority of the Committees on Judiciary and Health, presented a joint report (Stand. Com. Rep. No. 2-86) recommending that H.B. No. 1-86 pass Second Reading and be placed on the calendar for Third Reading.

Representative Tom moved that the report of the majority of the Committees be adopted and H.B. No. 1-86 pass Second Reading and be placed on the calendar for Third Reading, seconded by Representative Bunda.

Representative Marumoto then offered the following amendment to H.B. No. 1-86:

"SECTION 1. House Bill No. 1-86 is amended by deleting section 10 (lines 3 through 22 on page 14, all of page 15, and lines 1 through 3 on page 16.

SECTION 2. House Bill No. 1-86 is amended by amended by amending lines 13 through 22 on page 21, lines 1 through 23 on page 22, and lines 1 through 9 on page 23 to read:

'Section 663-11, Hawaii Revised Statutes, is amended to read as follows:

"§663-11 Joint tortfeasors [defined.] liability. (a) For the purpose of this part the term 'joint tortfeasors' means two or more persons jointly or severally liable in tort for the same injury to person or property, whether or not judgment has been recovered against all or some of them.

(b) In any action involving joint tortfeasors, the court, in a nonjury trial, shall make findings of fact or, in a jury trial, shall instruct the jury to return a special verdict which shall state:

(1) The total amount of damages which the plaintiff is entitled to recover; and

(2) The degree of negligence of each joint tortfeasor expressed as a per cent.

(c) Upon making the determinations under subsection (b), the court shall apportion the total amount of damages recoverable among the joint tortfeasors in direct proportion to the degree of negligence assigned to each joint tortfeasor. Each joint tortfeasor shall be liable for damages only to the degree of the joint tortfeasor's negligence and no more.

(d) Where circumstances make it impossible or impractical to determine the degree of negligence of

each joint tortfeasor, the court, in a nonjury trial, shall make findings of fact or, in a jury trial, shall instruct the jury to return a special verdict which shall state that it is impossible or impractical to determine the degree of negligence of each joint tortfeasor. When such a finding is made, the joint tortfeasors will be held equally and severally liable."

"SECTION 3. House Bill No. 1-86 is amended by amending lines 2 through 19 on page 24 to read:

'amended by adding a new part to be appropriately designated and to read as follows:

'PART . LIMITATION ON DAMAGES

\$663- Limit on noneconomic losses. In no action for tort shall the amount of damages for noneconomic losses to compensate for pain, emotional suffering, mental anguish, inconvenience, physical impairment, disfigurement, reasonably probable future disability, loss of consortium, and other nonpecuniary damage, including damages permitted under section 663-3, exceed \$250,000. This section shall also apply to a medical tort as defined in section 671-1."

Representative Marumoto moved that the amendment be adopted, seconded by Representative Ikeda.

At 12:06 o'clock p.m., the Chair declared a recess, subject to the call of the Chair.

The House of Representatives reconvened at 12:20 o'clock p.m.

Representative Marumoto rose to speak in favor of the amendment, stating:

"The bill drafted by the Lt. Governor and the Majority that is before us today is a badly drafted patchwork of interest group provisions. Consensus was reached by a few negotiators only, and now it is being pushed through the Legislature unamended.

"Republicans are offering three amendments that are essential if we are to have meaningful tort reform.

"The first part would delete the recoupment provision of the insurance section. Testimony indicated to us that it will force insurance premiums up more than the rate reductions will allow them to decrease. In other

words, the recoupment provision negates the rollbacks and makes a shibai of this bill.

"Secondly, House Bill 1-86 does not abolish joint and several liability for a significant number of cases. The bill contains a lengthy list of exceptions where the joint and several doctrine will still apply. The amendment before you would do away with joint and several for all cases -- a defendant would only be responsible for his or her percentage of negligence thereby giving more liability predictability and lower premiums.

"Thirdly, we offer an amendment to limit recovery for all non-economic losses to \$250,000, pure and simple.

"The language in the bill before us is convoluted and byzantine and complicated. It needs to be replaced. It appears to limit damages for pain and suffering to \$375,000. But in reality it is mostly exceptions.

"The exceptions amount to one loophole after another. For instance, pain and suffering is defined narrowly as actual pain and suffering arising from a physical injury. Thus, all other subjective results presently considered part of pain and suffering are not capped, such as mental anguish, disfigurement, loss of enjoyment of life, loss of consortium, and many other types.

"Also exempted are intentional torts, torts relating to environmental pollution, toxic and asbestos related torts, torts relating to aircraft accidents, strict and products liability, and torts relating to motor vehicle accidents.

"The replacement of this amendment would greatly simplify the administration of this law and reduce confusion and litigation which can only increase costs to society. We seek to make insurance more available and more affordable for all who need it.

"By voting for this amendment, we can face our constituents and tell them honestly that we voted for the strongest possible version of tort reform -- that we did not compromise their interests as buyers of insurance, as consumers of products, and as patients in the health care system.

"I ask you to please forget who is running for Governor and think of what is best for the people. A vote against this amendment is a vote for the weaker version and I ask you -- can you live with that?

"Thank you."

Representative Liu rose to speak in favor of the amendment, stating:

"My remarks will center on the area of joint and several liability and somewhat on the area of the so-called limitations on damages for pain and suffering.

"It seems clear to me, Mr. Speaker, that the drafters of this bill wanted to change as little as possible in this aspect of the law which epitomizes the unfairness and intellectual arrogance that, to me, pervades tort law today. Excepting economic damages from the abolishment of the joint tortfeasor law, in essence to a great degree, maintains the status quo for the lion's portion of most judgments or settlements. Although highly publicized and the contributing factor to the high cost of American personal injury compensation system, pain and suffering portions of judgments and awards and settlements are usually secondary to economic damages.

"Hence, under this bill, as unamended, the defendant who is one percent negligent will still be liable for a large share of most of the damages owing the plaintiff. Extending the status quo to the laundry list of torts on page 22, I believe, of the bill makes a so-called change in the law a farce. Intentional tort is not really defined; it could take a meaning of its own by including it in this area and a new section of the law. Whether or not such torts would be restricted to injuries relating to criminal-type behavior alone is really not certain, but we are involving all those exceptions or torts relating to those exceptions leaves wide open the question of what acts are involved with or related to the accident in question.

"For example, with alleged medical malpractice and treatment of injuries received in a car accident constitute a tort related to the car accident, thereby making the health care provider a defendant joint and severally liable for the potential judgment of award. No definitive answer is provided in the bill or by the proponents during hearings.

"Abolishing joint and several liability for joint tortfeasors relative to non-economic damages where the joint tortfeasor is less than 25 percent negligent will, I submit, affect few defendants; that is, I think it will breed more litigation in figuring out what the area of notice will mean. It

will also have minimal effect on actuarial estimates of the degree of exposure that insureds have to certain kinds of liability, thereby having no effect and no aid in determining when to settle and when not to settle, and that is a very important part of the tort system today. It also begs the question of whether or not it is good public policy to impose financial responsibility upon a party that exceeds the degree to which that party is adjudged negligent.

"The first two points, I will not elaborate upon. As for the third, I submit again that the concept of joint and several liability for joint tortfeasors fails to reconcile the need for and expectation of fairness and justice to all parties in the tort action in compensation to the injured. Elaborate theories of social policy and cost to society have been used by courts and plaintiffs' attorneys to rationalize the making of a defendant responsible for a higher proportion of the judgment or settlement than the degree of negligence found to be attributable to that defendant if he fails to meet the test of logic.

"Some proponents argue that it is better and fair to have at least one or some of the negligent parties pay than the rest of society to have to be burdened with the cost since even if one percent liable but for that bit of negligence, the injury would not have developed. Others would add that the system of insurance that covers many defendants allows for the efficient decimation of the cost to those in the tortfeasor's risk class, and secondarily, to the rest of society in the form of relatively minor adjustments to insurance premiums. In this manner, we are told we are assured of compensation for the injured party without resorting to more expensive and inefficient government assistance agencies.

"However, none of these arguments resolves the issue of fairness to the defendant who, regardless of the but/for standard, in fact, contributed less to the injury than to another party who escapes payment. These arguments fail to recognize that insured's capacity is not inexhaustible and that not all defendants are insured. These arguments also fail to note that the ability of an insured or defendant to pass on such costs is limited and that negative repercussions in terms of provision of services to the public have been a concomitant result with the development of the joint tortfeasor doctrine in this State and in this country.

"For these reasons I think it is not unreasonable to propose abolition of 663-11 altogether and make joint tortfeasors responsible for that proportion of judgment or settlement to the degree that they are individually found to be negligent. It is just and I believe coincides with the reality that no system of law or government programs can protect all persons in a complex society from all injuries.

"As to the proposed amendment to the limitation on damages for pain and suffering, let me just reiterate the arguments made by Representative Marumoto that it is here even more clear than in the prior section that there was no intention to change the current state of the law.

"For these reasons, Mr. Speaker, I ask all my colleagues to vote for the motion.

"Thank you very much."

Representative Ikeda then rose and stated:

"Mr. Speaker, I rise to speak in favor of this amendment. In doing so, Mr. Speaker, I would like to confine my remarks to the portion of the amendment which would delete Section 10 of this bill, the provision that would mandate the insurance company's surcharge of all property casualty policyholders in order to make up for the assessments paid by the insurance company to the Hawaii Insurance Guaranty Association to cover the losses of any insurance company that goes out of business. On the surface, this may seem reasonable; however, there are some real problems which could arise and I think it is only fair that this body contemplate the potential problems before making this serious decision.

"The rollback which will result in a mandatory decrease in premiums for certain lines of insurance; for example, it will not affect automobile insurance. And while it is true that insurance companies may still file for rate increase, even if this bill passes, when it becomes law, this bill places the burden of proof on any rate increase on the insurance company and in doing so, mandates that the filing include and I quote, 'the expected impact of tort reform implemented by Section 11 to 22 of this Act on losses, expenses and rates.'

"Mr. Speaker, this is an impossible task.

"We have included in this bill an

appropriation of \$400,000 to the Insurance Commissioner to, among other things, prepare a report based on closed cases containing an evaluation of the operation in effect for this Act. Therefore, how can we in all honesty require such justification from insurers when we are giving the Commissioner at least two years to produce the same data. It seems to me that any filing for a rate increase has a snowball's chance in hell of being approved.

"Therefore, Mr. Speaker, the real danger is in the fact that by locking in rates in the way that this bill does, should any insurance company go out of business, this recoupment provision guarantees that every holder of a liability policy, not just commercial lines, every holder of a liability policy -- that means you and me -- you own an automobile policy or homeowner's policy, you're affected. We'll end up paying for those losses through the surcharge imposed by this bill and there is no limit set for this surcharge and the Insurance Commissioner has no jurisdiction whatsoever over the process.

"Let me summarize.

"On the one hand, we roll back rates for commercial liability insurance to reduce the cost of insurance premiums for businesses. On the other, we allow a surcharge to recoup losses but make all consumers pay for those losses should the insurance company go out of business because of this bill. What have we accomplished? We have succeeded in spreading the cost to all policyholders and not just those presently affected.

"And for these reasons, Mr. Speaker, this provision should be deleted from House Bill 1-86, and I urge all members to vote in favor of this amendment.

"Thank you."

Representative Liu rose and stated:

"Mr. Speaker, I rise to speak for a final time on this motion.

"To shortly further support our position, I would like to point out that in the joint and several liability area, we're just not purely talking about an insurance problem here. It was related to us in hearings during the recent session and brought up to me again in a recent meeting with a physician that the present system allows defendant hunting. In his particular case, he was an owner of a

building that housed one of the primary defendants who was another doctor practicing, but as the owner of the building who was leasing the office space, he was brought in as a potential defendant in that case. The attorney on the plaintiff's side there only agreed to drop the action against that doctor -- the owner of the building when a promise was made not to sue that attorney for abuse of process. That is what goes on under the current law. I don't think the changes made in House Bill 1-86 does anything to change that type of practice.

"Secondly, I would like to bring forth that unless our amendment concerning the limitations of pain and suffering is accepted and the whole package, the bill has been found to be unacceptable by those representatives of the medical community, the doctors -- Hawaii Federal of Dentists and Physicians and the Hawaii Medical Association -- who do speak for the vast majority of physicians in this State.

"So, in terms of consensus, I think without that major group, without the agreement of the City and County of Honolulu, without the agreement of the plaintiff's bar on this bill, it would be folly to pass it in its current form. So, again, I urge you all to vote for our amendments.

"Thank you, Mr. Speaker."

Representative Marumoto rose and stated:

"Mr. Speaker, we've heard much testimony to amend the joint and several law and I feel that. . .

At this time, the Chair interrupted and said:

"Representative Marumoto, for what purpose do you rise?"

Representative Marumoto answered:

"I rise again to speak for the second time in favor of the measure."

Directed by the Chair to "please proceed," Representative Marumoto stated:

"I would just like to read some of the testimony that I feel we should listen very carefully to because not heeding this testimony, I feel that we are ignoring it. I feel that the amendment that we have introduced addresses many of these concerns expressed by the members of the

community.

"The Hawaii Independent Insurance Agents testified: 'The area of joint and several liability and non-economic damage has been watered down so much that we wonder if much or any savings will result. We feel the actual tort reform part of the bill needs strengthening.'

"HMSA wrote: 'We believe that modifications which limit a tortfeasor's liability to the degree of his or her negligence will provide more objective and predictable insurance loss projections and not penalize a deep-pocket tortfeasor. We are disappointed that Senate Bill 1 provides for so many exceptions to the abolition of joint and several liability that there is hardly any improvement to the situation. We strongly recommend the elimination of all these exceptions and consideration of a percentage higher than 25 percent.'

"The Hospital Association testified to the fact that there are strongly supportive of the need to modify joint and several liability. 'We are concerned, however, about the many exceptions and the 25 percent threshold which only serve to dilute the potential positive impact.

"The Hawaii Medical Association, likewise, agreed. 'While we support the intent of this section, we have serious concerns regarding the overall effect.'

"The Hawaii Insurers Council talks about the cap which also applies only to pain and suffering while such amorphous and immeasurable damages as mental anguish, loss of enjoyment of life, loss of consortium are unlimited.

"The 25 percent threshold before joint liability takes effect applies only to non-economic damages. These large loopholes in the law make it nearly useless in making insurance losses more predictable.

"Hawaii Federation of Physicians and Dentists: 'The second most important reform needed is the abolition of the joint and several liability law. Bill No. 1 amends the current and several liability law and improves the present law but would be more effective if it applied to the recovery of economic as well as non-economic losses.'

"Chamber of Commerce said: 'Substantial relief will come only if the Legislature enacts stronger tort

reform provisions such as those contained in House Bill 3-86, or the compromise package we previously offered. House Bill 1-86, Senate Bill 1, do not abolish joint and several but they restore the deep-pocket rule to many types of tort cases. They severely dilute the effect and reduces the savings that can be anticipated.'

"The Attorney General testified: 'We prefer the complete abolition of joint and several as we repeatedly testified during the Regular Session. The notice provision of the proposed paragraph 4 of the new section to be added to Chapter 663, HRS, by Section 17, et cetera, et cetera, raises some questions and they raise some technical questions that could be as similar... that could be a great problem if we enact this bill.'

"And finally, the County said: 'We emphasize, however, that the doctrine of joint and several strikes government particularly hard and in ways not shared by other interest concerns. If we have to close the road or a beach because of potential liability, all the people will lose. We would ask that language similar to Section 12 of House Bill 3-86 be made applicable to state and county government and include it in any enacted legislation.'

"We should adopt this amendment. We should not ignore the pleas of those people who have come to the Legislature. This is the reason that we are in Special Session. We should pass this amendment and I beg you not to turn a deaf ear to these great needs.

"Thank you very much."

The motion to adopt the amendment was put by the Chair and failed to carry by voice vote.

Representative Hemmings then rose to speak against the motion to pass House Bill 1-86 on Second Reading and placed on the calendar for Third Reading, stating:

"As a matter of point, I would like to address everybody's attention to the first sentence of House Bill 1-86 because I think it is very indicative of this entire effort. To read the first sentence, you will see that it is ill-conceived; it is poorly drafted; and it counters its intent, just as the legislation does.

"I urge you to vote no.

"Thank you."

The motion was put by the Chair and carried, and the report of the majority of the Committee was adopted and H.B. No. 1-86, entitled: "A BILL FOR AN ACT RELATING TO LIABILITY", passed Second Reading and was placed on the calendar for Third Reading, with Representative Ikeda voting no.

#### ANNOUNCEMENTS

Representative Medeiros rose and stated:

"Mr. Speaker, at this time, may I take the opportunity to thank the Honorable House for the beautiful flowers presented to my son at his funeral. Thank you very much, Mr. Speaker."

The Chair responded:

"Thank you very much, Representative Medeiros. Our aloha and condolences to you and your family."

Representative Okamura then proceeded to make a motion as follows:

"Mr. Speaker, I move that the Journal remain open until midnight tonight and that all bills received from the Senate pass First Reading by title."

At 12:43 o'clock p.m., Representative Kiyabu asked for a recess and the Chair declared a recess, subject to the call of the Chair.

The House of Representatives reconvened at 12:54 o'clock p.m.

Representative Okamura repeated his previous motion, saying:

"Mr. Speaker, I move that the Journal remain open until midnight tonight and that all bills received from the Senate pass First Reading by title."

The motion was seconded by Representative Kawakami.

Representative Kiyabu: "Your Committee on Finance will hold a decision-making hearing on Senate Bill 1 in Finance Committee Room at 8:00 a.m. tomorrow morning, because it is an identical bill to the House Bill 2-86 which pertains to the expenditure ceiling. However, if Senate Bill 1 is amended, then we will have a full hearing and decision-making at 8:00 o'clock tomorrow morning."

Representative Tom: "Your Commit-

tees on Judiciary and Health will be having a public hearing tomorrow morning at 8:30 and decision-making on Senate Bill 2-86, assuming that it is the same as House Bill 1-86. If there are amendments to Senate Bill 2-86, then we will have a full public hearing on it at 8:30 tomorrow morning, Room 328."

At 12:56 o'clock p.m., Representative Kiyabu asked for a recess and the Chair declared a recess, subject to the call of the Chair.

The House of Representatives reconvened at 12:57 o'clock p.m.

Representative Tom: "Mr. Speaker, I wish to just clarify my announcement by stating that if the bill is identical to House Bill 1-86, we'll just have decision-making at 8:30. If there is any changes or amendments, then we will have a public hearing on the amendments. If there are no changes, just the decision-making at 8:30."

Representative Jones then rose and stated:

"Mr. Speaker, I think that it is wrong that the bill passes over here even though it perhaps might be identical. We still don't allow further public input. What if a number of people out there who were interested in this legislation had found out further information they want to present to the floor of this body for our consideration. I feel like we are on a railroad here in some ways and I think we really ought to make sure that as we look at this legislation, we have all the public input that we should have, Mr. Speaker, so I would ask the Speaker to change that direction of the Chair of the Judiciary so that no matter what bill comes

over, we have a full and open hearing as is the policy of our body here.

"Thank you, Mr. Speaker."

The motion to have the Journal remain open until midnight to receive Senate bills was put by the Chair and carried.

At 12:58 o'clock p.m., the House of Representatives stood in recess for the purpose of receiving Senate bills.

#### SENATE COMMUNICATIONS

The following communications from the Senate (Sen. Com. Nos. 1 and 2) were received and placed on file:

A communication from the Senate (Sen. Com. No. 1) transmitting Senate Bill No. S1-86, entitled: "A BILL FOR AN ACT RELATING TO LIABILITY", which passed Third Reading in the Senate on July 28, 1986, was placed on file.

A communication from the Senate (Sen. Com. No. 2) transmitting Senate Bill No. S2-86, entitled: "A BILL FOR AN ACT RELATING TO THE GENERAL FUND EXPENDITURE CEILING", which passed Third Reading in the Senate on July 28, 1986, was placed on file.

In accordance with the motion made earlier, S.B. Nos. S1-86 and S2-86 passed First Reading by title and further action was deferred.

#### ADJOURNMENT

At 12:00 o'clock midnight, the House of Representatives adjourned until 10:00 o'clock a.m. tomorrow, Tuesday, July 29, 1986.



## FOURTH DAY

Tuesday, July 29, 1986

The House of Representatives of the Thirteenth Legislature of the State of Hawaii, First Special Session of 1986, convened at 10:50 o'clock a.m., with the Speaker presiding.

The Divine Blessing was invoked by the Honorable Robert Nakata, member of the House of Representatives, after which the Roll was called showing all members present with the exception of Representatives Kihano, Lardizabal, Leong, Menor and Shito, who were excused.

By unanimous consent, reading of the Journal of the House of Representatives of the Third Day was deferred.

At this time, the following introductions were made to the members of the House:

Representative Graulty introduced "some people that are very, very close to me," as follows: Mrs. Stella Harn, his mother-in-law from the Philippines; Gigi, his wife; and daughters, Erinn and Stephanie.

Representative Marumoto introduced two neighbors, Dr. Bob Allen and his wife, Jo-Ann.

## ORDER OF THE DAY

## STANDING COMMITTEE REPORTS

Representative Kiyabu, for the Committee on Finance, presented a report (Stand. Com. Rep. No. 3-86) recommending that S.B. No. S2-86 pass Second Reading and be placed on the calendar for Third Reading.

On motion by Representative Kiyabu, seconded by Representative Souki and carried, the report of the Committee was adopted and S.B. No. S2-86, entitled: "A BILL FOR AN ACT RELATING TO THE GENERAL FUND EXPENDITURE CEILING", passed Second Reading and was placed on the calendar for Third Reading.

Representatives Tom and Bunda, for the majority of the Committees on Judiciary, presented a joint report

(Stand. Com. Rep. No. 4-86) recommending that S.B. No. S1-86 pass Second Reading and be placed on the calendar for Third Reading.

On motion by Representative Tom, seconded by Representative Bunda and carried, the joint report of the majority of the Committees was adopted and S.B. No. S1-86, entitled: "A BILL FOR AN ACT RELATING TO LIABILITY", passed Second Reading and was placed on the calendar for Third Reading.

The Chair directed the Clerk to note that printed copies of S2-86 and S1-86 were made available to the members of the House at 10:50 o'clock a.m.

## THIRD READING

H.B. No. 2-86:

On motion by Representative Kiyabu, seconded by Representative Souki and carried, H.B. No. 2-86, entitled: "A BILL FOR AN ACT RELATING TO THE GENERAL FUND EXPENDITURE CEILING", was re-committed to the Committee on Finance.

H.B. No. 1-86:

On motion by Representative Tom, seconded by Representative Bunda and carried, H.B. No. 1-86, entitled: "A BILL FOR AN ACT RELATING TO LIABILITY", was recommitted jointly to the Committees on Judiciary and Health.

At 11:00 o'clock a.m., the Chair declared a recess, subject to the call of the Chair.

Upon reconvening at 11:10 o'clock a.m., the Chair directed the Clerk to note the presence of Representatives Kihano, Leong and Menor.

## ADJOURNMENT

At 11:11 o'clock a.m., on motion by Representative Okamura, seconded by Representative Ikeda and carried, the House of Representatives adjourned until 9:00 o'clock p.m. tomorrow, Wednesday, July 30, 1986.

## FIFTH DAY

Wednesday, July 30, 1986

The House of Representatives of the Thirteenth Legislature of the State of Hawaii, First Special Session of 1986, convened at 9:10 o'clock p.m., with the Speaker presiding.

The Divine Blessing was invoked by the Honorable Russell Blair, member of the House of Representatives, after which the Roll was called showing all members present with the exception of Representatives Apo, Hagino and Say, who were excused.

The Clerk proceeded to read the Journals of the House of Representatives of the Third and Fourth Days.

On motion by Representative Okamura, seconded by Representative Ikeda and carried, reading of the Journals was dispensed with and the Journals of the Third and Fourth Days were approved.

## ORDER OF THE DAY

## SUSPENSION OF RULES

On motion by Representative Okamura, seconded by Representative Ikeda and carried, the rules were suspended for the purpose of considering bills on Third Reading on the basis of a modified consent calendar.

The Chair, at this time, stated:

"The Chair, for the record, would like to show that Senate Bill No. S2-86 was received by this House at 9:00 p.m. on Monday, and Senate Bill No. S1-86 was received at 11:00 p.m.

## THIRD READING

The following bills, which were on the calendar for Third Reading, were read throughout and the following actions taken:

S.B. No. S2-86:

Representative Kiyabu moved that S.B. No. S2-86, having been read throughout, pass Third Reading, seconded by Representative Souki.

Representative Marumoto then rose and requested that her remarks, in favor of the bill, be inserted into the Journal and the Chair, noting that there were no objections, "so ordered."

Representative Marumoto's remarks are as follows:

"Mr. Speaker, I rise to speak in favor of this bill.

"Mr. Speaker, I am grateful that this bill to re-enact the constitutionally mandated general fund expenditure ceiling has received unanimous bi-partisan support.

"When I first called the public's attention to the fact that the ceiling had been allowed to be automatically repealed on June 30th, 1986, I asked that it be re-enacted during this Special Session, and I was pleased that the Governor included this important matter in his proclamation calling the Legislature into Special Session.

"My only regret, Mr. Speaker, is that the Majority has added a new automatic repeal date to the spending ceiling statute. Having done so, the Legislature will have to re-enact the ceiling again, in the next session. It is vital that the ceiling remain in force to provide needed guidance and restraint in developing a budget and in appropriating funds.

"Thank you, Mr. Speaker."

The motion was put by the Chair and carried, and S.B. No. S2-86, entitled: "A BILL FOR AN ACT RELATING TO THE GENERAL FUND EXPENDITURE CEILING", having been read throughout, passed Third Reading by a vote of 48 ayes, with Representatives Apo, Hagino and Say being excused.

The Chair directed the Clerk to note that S.B. No. S2-86 had passed Third Reading at 9:16 o'clock p.m.

S.B. No. S1-86:

Representative Tom moved that S.B. No. S1-86, having been read throughout, pass Third Reading, seconded by Representative Bunda.

Representative Hemmings rose to speak against the bill, stating:

"The measure being voted on is not necessarily legislation. Rather, it is a bill conceived by the executive branch of government behind closed doors and railroaded through this Legislature. This special session has made a mockery, particularly of the

legislative process. The bill we are being asked to vote on has not been amended, nor has there been constructive work done on it here at the Legislature. We are not legislating this bill. The public hearing process was an exercise in futility.

"First and foremost, Senate Bill S1-86 is not 'reform' of the existing law. The major components of tort liability are not changed. It is interesting that the provisions of the bill address the issues, but through complicated wording and exemptions, much is said, but nothing is done. For instance, under this bill, joint and several liability which has been eliminated or modified in other states, remains intact for the vast majority of the situations.

"Contingency fees will remain the same. Defense and plaintiffs' attorneys will continue to take away the majority of money in insurance payouts. The victims and consumers will lose.

"The section of this bill addressing pain and suffering or non-economic damages is especially hypocritical. It is a classic case of double talk. This is, the section proposes to limit to \$375,000 payouts for pain and suffering, but leaves the spigot open by incorporating other exceptions, such as loss of enjoyment of life. The lawyers will have a good time figuring out what that means.

"The section limiting punitive damages is innocuous.

"This bill ultimately is supposed to offer the consumers and taxpayers of Hawaii lower insurance rates, however, it provides no absolute means to do so. The mandatory rate reductions could be gobbled up by insurance companies recouping losses through the surcharge system.

"I agree with a recent newspaper editorial that this effort must be viewed as a whole. That is exactly why I am asking you to vote no. The bill as a whole is not doing the job. The bill is not tort liability law reform. This bill funds new programs that has the taxpayers paying for arbitration, certain insurance costs and more bureaucracy. This bill is very, very clever. It's clever in its deception. What it purports to do, and ultimately, what it does, are two different things. We could have passed clear, concise and definitive legislation as other states have done to alleviate the crisis in insurance in this country. Instead,

we are asked to rubber stamp an executive order worked out without the majority of our consultation. Hawaii will continue to suffer higher insurance costs because of the failure of this special legislative session to enact realistic tort reform.

"I think it probably would have been easier for many of us, or at least for myself who is opposed to this bill, to simply vote 'yes' and go home and tell our constituents, 'yes, we voted in favor of tort reform.' I personally couldn't live with that and I am hoping that this Legislature will do what is correct by voting 'no' for this bill.

"Thank you, Mr. Speaker."

Representative Tom rose to speak in favor of the bill, stating:

"When the 1986 regular legislative session ended and we had no tort and insurance reforms, I frankly felt that positive legislation in these areas would not come until as early as 1987. Several weeks ago, when lawmakers of both houses, including myself, got together under the leadership of Lieutenant Governor John Waihee to reach some kind of consensus of how these problems could be resolved and to meet the concerns of all interests. I frankly still had my doubts and after the numerous hours of hard work, discussion and negotiations with special session suddenly upon us, although cautiously somewhat more optimistic but still uncertain how the end product would be received by lawmakers, I still felt that this legislation had an uphill battle.

"Senate Bill S1-86 is the result of many long and hard hours of negotiations, discussions, and give and take. You know, there has been criticism that not enough people were involved in the formulation of this bill. Mr. Speaker, I disagree, and I want to publicly state that under Lieutenant Governor John Waihee's able and steady leadership, this House was ably represented by Representative Bunda and myself. For those of you who had a difficult time assessing the merits and demerits of this bill, based on your personal beliefs and biases, just imagine how difficult and painful it was for Representative Bunda and myself to have to discuss each and every provision in the bill and to understand its full ramifications.

"Representative Bunda is in the field of insurance. I am an attorney.

One could argue that the insurance industry and the attorneys held directly opposite and diverse positions concerning tort reform and insurance premiums rollback. Representative Bunda and myself philosophically and conceptually disagreed with each other because we represented two distinct points of view. But together, we agreed that something positive had to be done and done now in order to come up with a fair bill. All sides having a stake in this legislation, each had to give up something in order to make this comprehensive package of reforms work. Mr. Speaker, through your infinite wisdom and feelings of people, I could not have worked with more of a gentleman and compassionate person as Representative Bunda.

"Senate Bill S1-86 is a bittersweet bill. Sweet because for the first time, Mr. Speaker, a positive step has been taken to reform our tort laws and reduce insurance premiums with a mechanism available to keep the availability and affordability of insurance coverage alive for our consumers. The bill is bitter because all interests affected -- attorneys, victims, insurers -- have to give up something, some rights, to make the law work. Each and every provision in the bill is there for a particular reason and when viewed in its entirety, the bill presents my long-standing position of maintaining that very delicate and fine balance for the protection of victims' rights on one hand and positive tort reform on the other, resulting in reducing insurance premiums for you and me, the people of Hawaii.

"It upsets me to hear critics attacking certain provisions of the bill without viewing the bill in its entirety. The balance between insurance premiums rolled back go hand in hand with the partial elimination of joint and several with the 25 percent threshold and a cap of \$375,000 to physical pain and suffering. You know, critics say that joint and several should be totally abolished. You know, is that what you really want? Selfishly looking at it, with the full abolition of joint and several, it could be your loved one, or my loved one next who is severely injured or killed, absent any fault, and how are you going to support that loved one? That is precisely why economic damages like wages and medical bills, present and future, was not eliminated by abolishing joint and several. An injured person, unable to work, needs at least, at the very

least to subsist as a matter of fairness and maintaining some dignity and enjoyment, all non-economic loss will be apportioned for those tortfeasors 24 percent or less at fault.

"Why cap only physical pain and suffering, you ask, because other non-economic losses such as disfigurement, loss of consortium and medical suffering, although difficult, are calculable from past experiences and a jury can place a monetary value on such losses. But the actual amount of physical pain that an individual who has to endure for the rest of his life with his injury is a very personal experience and cannot be calculated by dollars and cents, or from past experiences, and a cap in such situations must be applied to prevent runaway verdicts. Even the exceptions like from tort reform, like products liability, toxic and asbestos -- they are there for a reason. These exceptions were made to maintain this delicate balance and have equity in our laws for certain classes of injured people.

"Between now and October, 1988, our rates in commercial liability coverage will go down 37 percent if everything runs according to schedule. Our Insurance Commissioner is going to be very busy and will play a vital, vital role in this scheme to make it work.

"In order for this law to work, all interests are going to have to work together and give on their part to make it work, and it will work. And the benefactors from all of this will be the people -- the people of the State of Hawaii.

"And finally, Mr. Speaker, credit must be given to Lieutenant Governor John Waihee for his ability, for his guts, and his foresight to bring everyone together at the bargaining table and hammer out each provision and to fit it all together. Believe me, it wasn't easy. To all parties affected by this law, the bill is in your court now. It is up to you to make this law work, and it will work.

"Thank you, Mr. Speaker."

Representative Bunda rose to speak in favor of the bill, stating:

"Mr. Speaker, for the record, I would just like to say that this is a legislative package, not an administrative one.

"Mr. Speaker, I would like to thank

Representative Tom for his leadership, his insight, and his wisdom in helping to develop a positive and meaningful response to this very complex issue. How I know now, Mr. Speaker, that he can see through things very easily. I would like to also acknowledge Lieutenant Governor Waihee for his role in bringing the different parties together to work on this enormous problem.

"As you know, we are here to deal with an issue that affects virtually everyone -- public entity, private concern, and professionals -- all of whom have been finding liability insurance coverage prohibitively expensive, facing non-renewal of policies, or discovering that coverage is simply not available at any price. The situation has threatened the economic health and development of our State. If businesses aren't able to find affordable liability insurance, they will be forced to cut back on services or products, close their doors, or rest possible catastrophic losses. At the same time, we have heard heart-wrenching stories of accident collisions, long-term exposure to asbestos, and other toxic substances, and other accidents that have sadly and unfortunately altered the lives and health of many people.

"To ensure that these victims are compensated for their injuries, we must make sure that insurance coverage is available. To do less would encourage businesses to operate without any liability coverage, purchase limited coverage, or self-insure without adequate funds, leaving the injured victims without recourse to just compensation.

"Mr. Speaker, under this bleak scenario, it is the public who will be ultimately paying for the compensation costs whether it be high in insurance which will eventually be passed on to the consumer, or whether it be an additional public assistance provided to an injured person who has not adequately been compensated and therefore unable to sustain the financial burden.

"For myself, Mr. Speaker, this has been one of the most difficult issues, if not the most difficult issue, that I have ever dealt with. It's been difficult, Mr. Speaker, not because I am in the insurance business; it's been difficult, Mr. Speaker, not because I am a father and a husband wanting to ensure that my family is well protected in the event of an accident; it's been difficult, Mr.

Speaker, not because I am a consumer looking for a lower cost. It's been difficult because, as an elected official, it's my duty and responsibility to ensure that all parties and interests are treated as equitably and fairly as possible and to balance these interests in order to benefit the entire community.

"The result before us today is a bill that attempts to infuse some sort of balance between our State's civil justice system and the insurance industry. Granted, not everyone is pleased with this bill, but this is a very complicated and emotional issue with very distinct philosophies as Representative Tom has stated. Simply, what we have here and what we've actually started to do is to put forth public policy of compensating injured victims by trying to somewhat modify an elaborate tort system that moves money. My guess is that in the future, we will find other ways to transfer that money.

"We have made changes to our statute of limitations for medical torts so that doctors and hospitals will no longer have to wait twenty-four years to find out that they have been sued by a baby that they have delivered.

"To provide much needed relief to hospitals, hotels, and other deep pockets, we have amended the law on joint and several liability. Under certain circumstances, those who are found to be less than twenty-five percent negligent will no longer be liable for payment of all non-economic damages. Under this bill, they will be liable for only that amount equal to their percentage of negligence.

"We have provided a \$375,000 cap on pain and suffering under certain circumstances. We have provided stronger disincentives to filing frivolous lawsuits. We have appropriated funds to subsidize medical malpractice insurance premiums to ensure that doctors will continue to deliver babies, and we have permitted periodic payments of damages by the government when judgment is over \$1-million.

"As you can see, we have a very comprehensive measure.

"We have asked all the parties involved to make some very difficult concessions and it is my hope and desire that those affected by this bill will maintain and follow the spirit of the law. While I have personally still have some current concerns about the

bill and expect in all probability that we will have to continue to wrestle with this very complex issue.

"This bill before us sets forth the necessary framework to ensure the widest possible availability of liability insurance at reasonable rates, to ensure a stable marketplace for liability insurers and to pass on the cost savings to the public, Mr. Speaker.

"Finally, Mr. Speaker, I feel we deserve a system that is predictable, that provides prompt, just and full compensation to each injured victim at a reasonable cost, and that does not make each of us a potential target for lawsuits arising from one another persons's accidents. In other words, Mr. Speaker, we need a system that does not outrage our common sense notions of justice.

"Thank you, Mr. Speaker."

Representative Cavasso rose and stated:

"Mr. Speaker, I rise to speak against this bill, a bill that claims to solve a terrible problem in this State," and sang, "This bill is a lie and deception on the people of Hawaii. I am deeply disturbed."

"I am deeply disturbed by the deceptiveness and the contradiction of this legislation and by the language it is written in -- legislative double-talk. Just look how the so-called limitation on the huge lawsuit awards is loophole for the convenience of special interest profiteers. It says, and I quote: 'Damages recoverable for pain and suffering as defined in Section 663 shall be limited to a maximum award of \$375,000.' The bill goes on to provide that there shall be no cap on any size award no matter how big for loss of enjoyment of life. Cute. In plain words, this is what it means: We will limit money damages to \$375,000 but we won't limit money damages if your suffering causes you to enjoy life less. In other words, this bill will not put a ceiling on anything because there are few, if any, injuries that don't cause us to lose enjoyment in life. Is there anybody in this room, anybody in this State who recently suffered injury and enjoyed life more?

"I vote 'no' on this bill because it is a badly written patchwork of special interest group provisions. We had a much better solution and we dumped it. Partisan politics killed a

House bill with meaningful tort reform in committee without a hearing.

"The only thing that works in everything we do is truth -- not double-talk and deception."

Representative Metcalf rose and stated:

"Mr. Speaker, with the indulgence of my colleagues, I will not sing my speech. I rise to speak in favor of this bill, Mr. Speaker.

"The bill that is before us may not be the ultimate answer to the problems of liability insurance in the law, but it is a highly significant step in the right direction. Let us recall the difficulty that we faced in trying to solve this problem during the regular session earlier this year. There were deep divisions and different approaches and in the end, we were unable to reach agreement.

"Mr. Speaker, the Lieutenant Governor of Hawaii has gotten us moving again. He met with the various parties to this dilemma; he met with Representatives Bunda and Tom and members of the Senate, and he proposed a package that we can all support. In so controversial an issue as this, Mr. Speaker, that is a considerable accomplishment. It is a tribute to Mr. Waihee's skill as a negotiator and as a person who can bring people together that we have before us a measure which we can vote on, I believe, in good conscience.

"This is a good bill. It will produce immediate and continuing savings in the cost of insurance. It will streamline the way in which we handle our liability matters, and it will give us a firm foundation on which to build for the future. It does not enjoy unanimous support. I would be astonished if it did, given the range of viewpoints possible on an issue so controversial as this. But I think the fact that we have a package, a package put together through long hours of labor and hard work by selected Senators, Representatives, and our Lieutenant Governor, I think what that has resulted in is a noteworthy achievement -- one worthy of respect of the members of this House and of the people of this State of Hawaii.

"I urge all my colleagues to join me in voting for this measure.

"Thank you."

Representative Ikeda rose to speak against the bill, stating:

"Mr. Speaker, I had sincerely hoped that we would be able to pass something substantive that would indeed help to solve or at least lessen this crisis, but this bill will do nothing of the kind. It will not reduce cost and by mandating rollbacks and making it virtually impossible for insurance companies to cover their losses by requiring them to substantiate the impact of the tort reform implemented in this bill, it will make it even harder for people to get insurance and thus cause an availability crisis as well.

"When this happens, an insurance company will leave the state or become insolvent, their losses, by law, must be absorbed by the other insurance companies. The recoupment provision in this bill will then mandate that all property and casualty policyholders be assessed the surcharge to cover those losses. That means that everyone who insures a car, for example, will be paying that surcharge, even though motor vehicle insurance premiums will not be reduced by this bill. Anyone with a homeowner's policy or renters who insure their property will also pay that surcharge and that effect will be a rate increase for all insureds. In addition, the rollback will have absolutely no impact on rates charged by speciality or surplus lines and they are a major cause of the problem.

"So how have we lowered prices?

"In the second year when medical malpractice insurance is rolled back by twelve percent, what happens when the only company insuring doctors refuses to renew policies because of, for example, reinsurance problems. Will we then appropriate enough funds to cover all doctors' insurance? If not, how do we prevent these doctors from closing their practices? And, more important, how do we assure adequate medical care for the people of this State?

"The joint and several provisions will do virtually nothing to eliminate the so-called deep pocket problems which affects every taxpayer every time the State or any of its counties loses its suit or settles out of court. There are so many exceptions that a smart attorney will be able to get around most of its provisions and it does nothing to add predictability to an already chaotic situation.

"So how have we lowered costs with this provision?

"The deep pocket may be eliminated only in cases involving property damage and it is unclear what its effect will be on people in situations like those in Waialua who now find that their so-called 'affordable homes' are rapidly becoming unlivable, or how it will affect the people in Manoa whose homes are breaking apart because the ground is shifting. Will they be able to attain relief once this bill is passed? How can we say that this bill is equitable?

"This bill is also riddled with technical flaws as pointed out in the Attorney General's testimony. We have not seen fit to address these flaws. Even in the committee report as she suggested, 'This intentional oversight could mean the rollback provision in this bill will not extend to non-profit organizations such as those organizations which provide services to the State under Chapter 42, HRS.' How terribly ironic!

"In our haste to pass this bill without amendments, we could be hurting some of the people who need the most help. So who are we helping with this bill?

"Mr. Speaker, this bill has been called a compromise bill -- one that has been agreed to by all parties involved. Well, we are still trying to find out who some of these parties are. This bill reminds me of the story about the Emperor's new clothes, because just like the Emperor's court who pretended rather than admit they couldn't see his beautiful clothes. I watched as the representatives from the various groups complimented the authors of this bill for their efforts and testified that this bill is a step in the right direction. But remember, in the story, when the Emperor went out to proudly show off his beautiful new outfit to the subjects, they all bowed low, not looking at him, until a little child cried out, 'But he has no clothes on!' Then everyone looked at the Emperor and started to laugh and the Emperor ran back to his palace in embarrassment.

"Unfortunately, Mr. Speaker, this is no laughing matter. Neither is it a fairy tale and there will be no happy ever after ending.

"What will the people do when they find out that they have been fooled, that like the Emperor they have also



been left bare? I don't know, Mr. Speaker, but I won't be a party to this elaborate charade.

"I am voting 'no' on this bill and I urge my colleagues to join me."

Representative Jones rose to speak against the bill, stating:

"Mr. Speaker, in the spirit of the last speaker, I would like to say that the Emperor is not only nude but he is also on a roll right now, and it is in light of that that a few of my colleagues and I have put together just a light-hearted little card for the author of the bill, Mr. Speaker.

"We thought rather than call it tort reform, that it's really tort deform and we think that the person who is helping to grease the rails for this ought to get this and we see this legislation, not so much as passing because it is meaningful, but passing because it is being railroaded through on very grease rails at the taxpayers expense, running over the tax dollars, and those of us who were never in any of the negotiations that we knew of that were going on before it came to the session, and the person with the mustache who is driving the train -- I don't know who that is, I'll just let you all guess, but I did shave my mustache off.

"Mr. Speaker, as I meditated on the real impact of this legislation that has been produced by this special session, the song that was popular a few years ago keeps coming to mind and it's that rather wilting and melancholy rendition of Peggy Lee called, 'Is That All There Is.' And as the average taxpayer notices, no decrease in his or her family's insurance premiums, many of the supporters of this bill are going to hear tried and true words of a failed Democratic presidential nominee, 'Where's the beef?'

"We have met here in response to a major crisis in our community, a crisis that affects job creation, consumer living expenses, and our efforts to reduce the burden of taxes. Our community facilities, sporting events and other recreational opportunities are facing extinction in many areas unless we act boldly and without regard to the special interest that would have us make no change at all in our tort reform laws. Without a significant change in our present law, profiteers will continue to prey upon families, businesses and the deep pockets of our taxpayers. Millions of

dollars we made each year off the tragedies of many of our citizens and the worst tragedy is that up to 65 percent of those dollars will not go to the victims at all. Many perhaps cynical critics of this Legislature are going to say that we have met at the cost of thousands of dollars and thousands of person hours and the taxpayers have lost again. It will be sad for us to leave this session and try to fool the taxpayers of Hawaii into believing anything else.

"This legislation will not reduce insurance rates for the average family. It will not reduce rates for businesses that need speciality insurance. It will not reduce rates for non-profit groups. It especially will not reduce the cost of attorneys' fees.

"The doctors of our State have told us that this legislation is not meaningful reform and will not reduce the cost of medical insurance for the average family. The bill now before us will not help create more jobs for our high school and college graduates. Small businesses will continue to suffer under the burden of high liability costs because we still have not enacted legislation that provides predictability. A leading insurance expert says, 'Large loopholes in the law make it nearly useless in making insurance losses more predictable. The more predictable the loss, the lower the price can be and the more available insurance will become.' Taxpayers will continue to be forced to pay taxes to the State, City and County governments for their insurance and they're mostly self-insured. Under the provisions of this bill, these governments will see their annual insurance costs rise yearly.

"New York City is self-insured. Taxpayers there have seen annual liability cost go from \$24-million to over \$100-million in just a few years. Officials from our counties in Hawaii, in our own State, have testified: 'S.B. No. S1-86 and H.B. No. 1-86 are not real solutions to our problems. Any advocates of this legislation who says it is an open-door for future changes is making a very weak argument at best in light of the crisis facing every family, business and non-profit organizations in Hawaii.'

"How many more doctors will retire early and withdraw their services from our community? How many small businesses in our State will go out of business from the burden of our liability crisis and from the govern-



ment regulations placed upon them? How many more high school and college graduates will be forced to leave our State because there are no jobs available here -- jobs that might have been created if we had passed a tort reform bill that would reduce the cost of business and allow companies to hire young people? How many of our families will leave our State because they simply can't afford to stay here?

"The people of Hawaii have asked us to act boldly like a lion but instead we have squeaked like a mouse. This legislation is meaningless except for its use as a political tool for the advancement of a partisan candidate for Governor. Politicians have been placated, special interests have been served; the taxpayers have been ripped off and no one has been fooled. It's my strong opinion that this legislation will not meet the demands of our community or of our State. Therefore, I recommend my colleague tonight to vote 'no'.

"Thank you, Mr. Speaker."

Representative Isbell rose to speak against the bill, stating:

"Mr. Speaker, this special session on tort reform has not been to pass meaningful legislation to lower the cost of liability insurance. Rather, it appears to me that this special session has been to focus on candidates running for office and has become a public forum for election.

"If we truly wanted to bring about changes in the climate for all of us in the area of liability insurance, why didn't we take the time to make the recommended changes of the Attorney General to at least legalize the language?

"This bill will not lower the premiums as insurance companies prove a hardship reversing the rollback. They will go up and who pays? The little guy -- all of us.

"The party in power which is pushing this bill through has forgotten the little guy -- the consumer.

"I liken this bill on tort reform to the space shuttle, Mr. Speaker. It was hastily pushed through and lifted off in the glare of the public eye. But, alas, in that haste to meet a deadline, the small details -- the technicalities, if you will, caused failure and the repercussions are being felt even now. When this bill

goes to the Governor's desk for signature, and it most surely will, the enormous power in force is most evident -- only then will the truth be known as lawyers clap with glee and insurance companies raise their costs. They are the winners -- the public is the losers. There is no tort reform.

"Who do we represent? Special interest or the public? How have we helped the little guy?

"I urge you to vote your conscience and remember your oath of office. Vote against this sloppy piece of hastily and poorly written legislation. Vote 'no'.

"Thank you, Mr. Speaker."

Representative Graulity rose to speak against the bill, stating:

"First, I would like to acknowledge the work that has been done by Chairman Tom and Chairman Bunda and the others on the committee, including Lieutenant Governor Waihee, because I know that they have put in many long hours and having served with both members of the House, I can honestly say that they are both very hardworking and able chairmen and they have tried their very best to solve what is a very complex problem.

"In evaluating this particular bill, however, the only provision that I can really buy is the closed claim study provided for in the latter portions of the bill. As I read the bill, many times I felt that we were tinkering with the system. With our eyes closed and without knowing the facts and the effects of what we do, it became very difficult for me to support this particular bill. We don't have the information that we need in order to determine whether if we did x, y would result, or if we did z, this is what would result. So what we have in effect is a groping in the dark, a playing of Russian roulette with victim's rights, and I feel that that is not the proper action for us to take.

"I am not sure what the cause of this particular problem is. What I know is that at the beginning of the session, at the regular session, those that were affected by the rise in liability insurance premiums came to us asking for a solution. Will this bill reduce costs? I don't know. I don't think anyone here knows. Is reductions of ten, twelve, fifteen percent sufficient? I don't know. I

don't think anyone here knows. It is a very clever bill in a political sense because we will only know the answer to those questions one year from now. In the meantime, we are all being asked to take a giantly parfait and to assume that by passing this measure, we do no injustice to anyone and that is too big a leap for me to take. And for that reason, I ask you all to vote 'no'."

Representative Marumoto rose to speak against the measure, stating:

"Mr. Speaker, I am tired of giving speeches and I know many of you across the aisle are probably tired of hearing me, but the degree of my displeasure is so great with the matter pending before us that it compels me to speak. In all good conscience, I cannot keep silent and allow this sorry mess to pass Final Reading without registering my objections.

"I am quite sincere of my feelings toward this bill -- so much so that I feel if I were a member of the House Majority today rather than Minority Leader, my words could not be construed as partisan and would, therefore, have greater impact.

"The bill before us does not address the problems in our cumbersome tort system. Adequate compensation for the plaintiff does not equate with justice and fairness for the various defendants. Our legal system rewards law suits. With high court costs, the incentive is to settle no matter who is right or wrong. We seek out the deep pockets. We often penalize a defendant in an amount disproportionate to his or her negligence. It is often pointed out to us that it is not the individual who is the target of our suit, but rather big company or big government, or a large insurance policy -- an impersonal entity.

"I do not feel that or litigiousness is solely responsible for the insurance unavailability problem before us but it does play a large part.

"Insurance companies themselves have not been totally guiltless in bringing about the present crisis. Government has not been totally blameless and has at times been negligent. Big business has been known to produce imperfect products so we do need an arena to keep these sectors honest so to speak. But our greed has gotten us all seeking awards from an impersonal, seemingly

bottomless, pocketbook. This bill demonstrates that we have failed to do away with the incentives that seek out monetary awards from those who have money, irrespective of degree of negligence. We still have a long way to go to correct our system which has gone awry.

"This bill is steamrolling through the House unamended. It is an election year. The feeling seems to be 'let's get out of here.' The steamroller is not going to even pause for the litany of suggestions for technical amendments brought up during the weekend hearings -- changes that would increase the likelihood of this bill withstanding court challenges. We will go home to our districts with a bill that's simply labeled tort reform which in reality is a shibai. Every section has a front door and a back door. This bill contains one loophole after another, so much so that it resembles Swiss cheese. And if it is full of holes, then it is full of air so my remarks on the first day were not so far off.

"Mr. Speaker, I thank you for allowing me to vent my spleen. This bill is a blood pressure raiser and no one likes it. So in parting, I ask you, why are so many voting for it? And why is it passing?

"Thank you."

Representative Kamali'i rose and stated:

"Mr. Speaker, I rise to speak against this bill if I don't have a conflict."

The Chair declared her "not in conflict" and directed Representative Kamali'i to "please proceed."

Representative Kamali'i continued:

"Mr. Speaker, with very few exceptions, the only legislators voting against this measure have been Republicans, leaving what I believe is the mistaken impression that there is some kind of philosophical difference between us. On the contrary, whether Democrat or Republican, we are in complete accord that our community is suffering economic and social harm because of what is commonly called the crisis in liability insurance.

"But what is the nature of this crisis?

"Such respected sources of opinion as 'U.S. News and World Report' has

reviewed the national scope of this crisis and traced its root-cause to poor management and bad investment policies in the insurance industry.

"Consumer Reports -- Hardly a radical or anti-business publication. Even went so far as to charge that the insurance companies 'manufactured' this crisis. Then initiated an expensive but effective advertising campaign, and raised their liability insurance rates to exorbitant levels in an effort to offset their losses and to blame anyone but themselves for a poor ledger.

"Frankly, I agree with that assessment of the cause of this crisis.

"The high rates and forced cancellations of liability policies is not directly related to our justice system, but to management by the companies.

"The most attractive feature of this bill is that it pretends to respond to that problem.

"In one of the best scams this State has seen since Ron Rewald went out of business, a lot of people have been led to believe that this bill will actually reduce insurance costs. After all, aren't we 'rolling back' liability insurance rates ten, twelve, then fifteen percent over three years? Aren't we effectively telling the insurance companies that we think they're charging too much?

"No.

"Like Mr. Rewald, this bill promises you a 'money back and more guarantee' today so that you can be taken for even more tomorrow.

"This morning, the Honolulu Advertiser reported that State Insurance Commissioner Ramil believes that the 'recoup section' of this bill will result in: (1) higher premiums for every other kind of insurance in the State; and (2) an estimated recovery of \$2-million more in liability costs over the next three years.

"Boy, this bill will show those insurance companies how to invest their money very wisely.

"Some say, but the cost is small if it will encourage doctors to maintain their practices, and demonstrate to corporations that Hawaii is making a sincere effort to improve our business climate.

"I disagree.

"Because money isn't the only cost to our citizens.

"No. They, and we, are losing much more.

"First, as has been said on the floor of this House, this bill was conceived, drafted, and dictated to us from behind the closed doors of the executive level. This bill is not a legislative product. Not merely because it was not authored here, but because it is not the result of open debate, of committee inquiry and deliberation, or of public decision-making. Worse, in the course of this session, no legislative amendments have been allowed. We are being asked, and by an 'aye' vote, become the rubber stamp of the Executive Branch, not the representatives of the people. We are abdicating our role and responsibility and duties as legislators. And the people, my fellow colleagues, have lost their voice.

"Second, political solutions may require compromise, but a compromise is not automatically a solution. When did it become either fashionable or good sense to defend a bill by saying 'if nobody likes it, it must be good.' On its face, that statement is absurd. If nobody likes it, then why is it before us? Why is this bill minutes away from becoming law? Because while it may be true that nobody likes it, there are some who want it. The insurance companies want it. The Governor wants it. The Lt. Governor wants it -- he's out campaigning on the bill today!

"But because, my fellow colleagues, like Rewald they believe that they can enjoy the profit of the scam long enough before they get caught. After all, this scam only has to work until November.

"But what about the people -- the ones who don't really like it? What did the people want?

"They wanted lower insurance costs. This bill doesn't do that.

"They wanted a more equitable claims process. This bill doesn't do that.

"They wanted an assurance of medical care and fairness for doctors. This bill doesn't do that.

"Mr. Speaker, I could go on but I think I've said enough to convince you, my fellow colleagues, of why I

am going 'no.'

"Thank you."

Representative Liu rose to speak against the bill, stating:

"Reform is defined as a removal or correction of an abuse, wrong or errors to improve upon. What is contained in this bill is not, I repeat to those who report on such matters, that this is not tort liability or insurance reform. What is contained in this bill is not a delicate balance of interest but a house of cards with the jokers gone wild.

"Looking at the bill as a whole and looking at the way we as society decide when individuals should be compensated for certain injuries, it is the opinion of many groups who are much more effective than newspaper editorial writers; that is, doctors, counties, plaintiff's bars, a group of divergent views, their feeling that no bill would be better than this bill.

"As my colleague from Waikiki has stated, to paraphrase, the art of good legislating is effectuating good compromise but compromise in and of itself for the sake of compromise is not good legislation, nor is it a sign of leadership. Perhaps the deformed nature of this bill is attributable to the concern that this is purely an insurance crisis which I believe it is not and that we are in a manufactured crisis. Perhaps. But I am not convinced that it is or that it isn't. The evidence has not been adduced as yet. However, I do know that we needed actuarial expertise and testimony to sort through the information provided us.

"If the medical malpractice insurers were making tens of millions of dollars during the 70s and early 80s as offered by many during testimony, and if they are part of a money-hungry profiteering monster called the insurance industry, why would they pass up an opportunity to make another ten to twenty million dollars when moving out of Hawaii about two years ago? Why is it that if projections by insurers of incurred losses have been too high, in other words, that their estimates of losses to be were much too high and therefore dictating higher reserves and premium levels than required? Why is it that I can receive a letter, or why is it that I received a letter from the insurance service office showing that at least, on a nationwide basis, using actuarial accepted projections, that

projected losses made in 1981 for that year by the time 1984 rode around turned out to be too low? In other words, their projections were verified. The same occurred for 1982 and 1983.

"If this is an engineered crisis, why would MIEC, the physicians-owned mutual, writing nearly all of the medical malpractice insurance in Hawaii, allow its actuaries to over-project future losses? That would only mean higher premiums to be paid by its owners -- that is the doctors themselves.

"The Day and Baske Company lie when it reports that profits and losses of property and casualty insurance of the companies have been subject to greater fluctuations than those of other such industries as banks and industrial companies, that the property casualty business during the last quarter century has recorded a net underwriting loss after policyholders' dividends of more than \$65-billion, that, yes, they have been able to continue to run because they have made money on investments, and yet, in 1984 income from investments fell more than \$3.8-billion of offsetting record losses from underwriting operations while investment income was up 10.6 percent to a new high of \$17.6-billion, the industries net underwriting loss still spiralled by 61.2 percent to \$21.5-billion.

"Does the Justice Department of the United States lie when its review of the issue concludes that changes in the tort system are needed to ensure greater stability in liability insurance rates?

"Reports on insurers profits and liability insurance are reported by a retired insurance executive to be very high locally. But is that retired insurance executive an actuary? Can he explain loss development factors and transactors which are so key in determining whether this is or is not a manufactured crisis?

"In any event, these questions could have been answered, should have been answered, before we embarked on blessing this poor excuse for a structure of change. Twice I requested during hearings to the State Insurance Commissioner's Office and to various committee chairmen during this past regular session that we should bring in an actuarial expertise to help us in this area. It would have been worth the expense and effort. But we didn't so

we go for it with our bodies moving but with our heads still stuck in the sand.

"We go on in the same posture in dealing with attorneys' fees in this bill. Figures can be cited supporting contentions that there is or that there is not an explosion in suits and claims made for various kinds of torts. But what I know is that there is a high heightened conscientiousness to our ability to possibly get compensation for all kinds of injuries through use of attorneys. I get calls fairly often myself. I see bumper strips in my district that say, 'Hit me, I need the money' or 'America, land of the free in courts.'

"I know that the incentives built into the contingent fee system in tort cases remain intact in this bill. Contingency arrangements rewards the high volume speciality tort law firm. Some cases will be lost but with more claims filed, more cases and absolute numbers will be won or settled favorably. The fees that result from applying a 33-1/3 percent to the judgment or settlement are more than enough to offset case losses to the plaintiff's bar.

"The rewards of this system are preserved in this bill and as long as the plaintiff's bar stays within the currently lucrative 33-1/3 percent standard, judges will very rarely question the reasonableness of their fees.

"The system also makes you wonder if in fact there is something wrong with the practicing of the medical profession in this State. I believe the contingency fee has something to do with the fact that 40 percent of all doctors have been sued or at least had a claim filed against them once, and at the rate that claims are being made against them, every single doctor in the State will have had one claim filed against them by the year 2000, and by the year 2020 sixty percent would have had two or more claims filed against them. That's more than just an insurance crisis.

"Further, the attempt to apply judicial review of the defense attorneys fees in this bill is defective. That is lacking a dispute between the defendant and the defendant's attorneys. In most cases, the defendant would be the insurance company, little will result in judicial review of their fees. There won't be any review. Bolder attempts to force insurers to do a better job of case

management is needed. Defense attorney fees are the highest portion of administrative expense for insurers and controls are in order of more creative and effective method of controlling defense fees would have been to impose a ceiling on the proportion of insurers administrative budgets that would have been allowed to go toward defense attorneys costs. Exceeding the ceiling could have triggered certain types of penalties, coming under the ceiling could have triggered some kind of rewards relative to the rate-setting process.

"This scheme might be construed as perhaps violative of certain constitutional rights but I believe that they would no more intrude on constitutional rights as many other parts of this bill.

"I spoke of the problem of joint and several liability on Monday will only summarize that this bill will not add any predictability to those affected most by this section of our current law. The City and County of Honolulu opposes it and has called it ineffective, that the section dealing with highways will breed more fighting over what constitutes notice. The Attorney General of the State of Hawaii has cited as many as eleven examples of recent cases where the current joint and several liability section of the law has been a factor in settling the cases of probably to the detriment of the taxpayers of the State. The cases run the gamut, some of their names include Kayama vs. Codeiro, Peers vs. State, Acobatage vs. State, Deneres vs. Hannah, et cetera. The taxpayers of Hawaii should only have to pay for the portion of damages that coincide with the degree of negligence of their employees.

"I could go on to point in detail the major language problems with the frivolous suit section of this bill. The cause for damages of up to 25 percent of the amount played against the frivolous party which would be impossible against the defense since the defense never plays for any judgment. And, in fact, where the arbitration section of this bill might encourage lawsuits, if it is a lot cheaper for filings, or in fact, might discourage suits if it's found out that arbitrators begin to act like judges as they do in some other areas that require as much or more material to be produced by both parties.

"I could go on to talk about the short and statute limitations of actions

to be brought by minors and the lack of research that was done to figure out what due diligence means in regard to discovery of an injury. This language, I predict, will become an area of great litigation with this reduced time for bringing of actions by minors.

"There are many, many more problems with this bill.

"Let us not place ourselves into the mental trap of believing those defenders of our legal system who say that a key foundation of America's greatness is its tort law. I think that's hogwash. Our tort law does not make us any more civilized than the Japanese, the Chinese, New Zealanders, those who live in Great Britain, the French, or the Germans. In New Zealand, where tort actions are barred in most cases, there has not been an explosion in tortuous behavior or accidents in that population. Their society is not crumbling. Neither are the Japanese falling into an abyss of social or moral corruption because they lack a joint and several liability doctrine.

"The tort system of law, like any other, needs to be dynamically reviewed by both courts and legislators. Otherwise, it loses touch with reality. Each case before court is case specific. Attorneys, judges and juries are ethically bound to focus upon the fact before it. And that's the way it should be. But the form in which to a judge the cumulative and societal effects of individual decisions remain with the Legislature. As in the area of civil rights where the courts had to take an active role in the 50s and 60s, the law will stagnate without dynamic interplay between the common law and the legislative process.

"This bill represents a failure in our duty to provide that kind of dynamic interplay, a failure by those who call this session to lead, and a fraud upon the people of Hawaii.

"Thank you, Mr. Speaker."

Representative Shito rose to speak in favor of the bill, stating:

"Mr. Speaker, I have been a member of this House for quite a few years and I have seen quite a few difficult mergers come to cause all this. Tort reform is one of them that appeared last year and this year. That's because there are many members on all sides of the House, the

question of who have very strongheld opinions about what is the best way to solve the problem.

"Make no mistake about that, Mr. Speaker. We do have a problem.

"I think that a fact has gotten a little lost in some of the rhetoric that has flowed through these halls in the last few days. The truth of the matter is that we have a problem and it hasn't gone away. However, as I said before, there are many opposing views about how to solve these problems.

"Mr. Speaker, if it were easy to pass a tort reform bill, we wouldn't be here tonight. If it were easy, we would have done it ourselves during the regular session. It wasn't easy and we didn't do it. Fortunately, we had some timely help from our Lt. Governor who took on the task of working out a package that could be workable.

"There are some who will find fault with certain aspects of the legislation; however, Mr. Speaker, we have before us a bill which is a good start in the right direction and it is with this in mind, I ask my colleagues to support the measure.

"Thank you."

Representative Anderson rose to speak against the bill, stating:

"Mr. Speaker, it is no unmeaningful thing that I am here in blue tonight because I really feel that way and I dress that way. I told you on opening day that this issue was supposed to be non-partisan. It has turned into a partisan issue. We have turned around; you have refused any amendments. I carried these forms down tonight and I don't even sit on the committee when we're in session, just to make you realize how many people had input and wanted changes, and we refused them.

"I looked at the Senate Bill that came over with the 'I do not concur' and 'WR' and right here in this House -- the same thing. And yet, there has not been an attempt to try to amend it, to make it better; no one has had the input. Some people have said it's been bulldozed. Well, I know a good bulldozer driver so I don't think it is going to bother him too much. But it bothers me that the consumer could lose. When you can take a bill that is so meaningful and



say that people have brought themselves together as Representative Tom says, then what about this side of the aisle? We have attorneys. We have people in insurance that could give the expertise that we need. We could have been a part of this so that we could have made a more meaningful bill. But no, you had to make it a partisan bill and on opening day, you said no way is it going to be that way.

"Well, I am really ashamed to say that I would have been more than willing to stay here longer than five days. We couldn't do it in sixty and we did it in five because we brought all of the people together. All of what people? The people that you folks have chosen? And if everyone of you would remember that, you vote your conscience, and if you're going to just vote to get re-elected back here, it might go ahead and bounce against you because I don't think that the people are going to forget it. I hope you vote against it.

"Thank you, Mr. Speaker."

Representative Kawakami rose to speak in favor of the bill, stating:

"After many years in this Legislature, it is my opinion that this measure before us this evening is perhaps one of the most difficult measures I have been called upon as a legislator to make an informed decision on.

"This bill has made it necessary for all of us on this floor this evening to become insurance and personal injury experts. At a minimum, each of us had to become familiar with all the aspects of insurance, the statutory scheme, regulatory mechanism, and the real mechanics of reinsurance, and we had to become familiar with the personal injury law, the tort system that over 200 years of public policy and precedent, litigation techniques and strategies, and even the procedures utilized by both plaintiffs and defense attorneys. And most important, Mr. Speaker, while we were called back to this Capitol to deal with the liability insurance crisis, we had to always keep in mind the plight of the innocent, injured victim. In other words, the Legislature was called upon to take call these competing interests and come up with a bill that would respond to each special interest.

"Mr. Speaker, this is the scenario we had to respond to at the outset of

this special session. In essence, we had to pick up where we left off at the end of the regular session. The House negotiators, Representatives Tom and Bunda, and the committee members, faced an arduous task of re-examining their position, oftentimes polarized, and reviewing all the information received, including reports from the forty-nine other jurisdictions and going back to the table.

"Mr. Speaker, I commend our Judiciary Chairman and our Health Chairman for their diligence, perseverance, and above all, their patience and stamina.

"We have before us tonight a bill which recognizes the interests of all the parties concerned. No one group of people are totally excluded. Each segment of the population and their particular problem is addressed and accomplishing what some was a mission impossible.

"Some critics will argue that it doesn't go far enough, and we've heard it tonight. Mr. Speaker, I can safely say that the most prudent first course of action in 99 percent of all the cases of this magnitude is a cautious one. We don't want to tip the scales drastically and then be in a predicament of backtracking to correct injustice. I, for one, would rather be in a position of more cautious movement, always moving forward and never backwards.

"In closing, Mr. Speaker, I call the members attention to one of the last night's of the 1985 Regular Session when we stood here debating another measure drafted to address an insurance crisis of a different sort in the area of workers' compensation. If you recall, we were asked at that time to pass another cautious measure addressing the concerns of all parties involved, and if you recall, the Majority passed the measure after arguments that the bill did not go far enough. And again, Mr. Speaker, we've heard it all tonight. I am pleased to note that workers' compensation premium rates have decreased and I am told that another significant decrease will be possible in the very near future. Mr. Speaker, I envision a similar situation with liability insurance. And it is my hope that all of the parties involved would work within the spirit of the law to accomplish the same.

"I urge all the members to vote in favor of Senate Bill S1-86.

"Thank you very much."

Representative Marumoto rose and requested that further remarks against Senate Bill S1-86 be inserted into the Journal and the Chair, noting that there were no objections, "so ordered."

Further remarks of Representative Marumoto are as follows:

"Many persons have stated that they believe this bill will be ineffective because the definition of pain and suffering is too narrow and that there are far too many exemptions from the \$375,000 cap. In committee the testimony ran as follows:

"The Hawaii Insurers Council said that, 'The cap also applies only to pain and suffering while such amorphous and unmeasurable damages as mental anguish, loss of enjoyment of life and loss of consortium are unlimited.'

"The Hawaii Hospital Association: 'Placing a reasonable limit on non-economic losses is, in our opinion, an essential reform which would have a significant impact on the liability crisis. Sections 19 and 20 seek to address this point by placing a limit of \$375,000 on purely physical and pain and suffering. Of the nineteen states that decided to place caps as part of their solution to the liability crisis, none has taken as limited an approach as this one, choosing instead to place caps on either total awards or non-economic losses or both. The Hawaii Hospital Association does not believe this limited provision will have any impact on the availability, affordability or predictability of insurance.'

"The Chamber of Commerce testified that, 'H.B. 1-86 establishes the principle that there should be a cap on non-economic awards, but the limits are extremely weak. The limit at \$375,000 is high and applies only to pain and suffering and only in certain cases. It does not apply to mental anguish, disfigurement, loss of consortium or all other non-economic losses or claims. If approved in its present form, we predict pain and suffering claims will be repackaged as other types of non-economic damages.'

"The Hawaii Federation of Physicians and Dentists said: 'The single most important reform needed to lessen this crisis is a meaningful cap on non-economic losses of about \$250,000. This bill caps awards for

pain and suffering only, at \$375,000. There is no limit on awards for all other non-economic losses. Since all non-economic damages are hard to identify and to quantify, it is reasonable to presume that the plaintiff will attempt to attribute most of his non-economic losses to categories other than pain and suffering.'

"The Hawaii Medical Services Association testimony read: 'We do not understand and do not therefore support limiting recovery to pain and suffering only as stated in Section 20 of S.B. S1-86 because we believe all of these losses are subjective. There is no way to measure any of these losses objectively. We recommend all non-economic losses be limited to an award of \$375,000.'

"Finally, the Hawaii Medical Association stated that '...we must point out that no other state has limited their cap on damages to only the "pain and suffering" portion of non-economic damages. HMA is very concerned that this limited provision will have little impact on the affordability and availability of insurance.

"If the cap is extended to all non-economic damages, then we can support this bill.

"Obviously, Mr. Speaker, this bill is clearly deficient in the eyes of many organizations. It needs substantive changes to make it a substantial measure.

"Likewise, this bill needed changes of a more minor nature, corrections if you will.

"This bill moved through the Senate and the House like a freight train--like an express freight train--no stops. Not even to make substantive changes, not to improve the bill, not even to make technical changes. No one dare touch a comma.

"I guess I can understand that the delicate compromise balance would have been upset if major changes in concepts were made, but the determination not to change one word, even for technical reasons, baffles me. Would not it be safer to iron out questionable legal points and mistakes which were pointed out in hearings? For instance, the title may be too restrictive. This was pointed out by the Attorney General. On the other hand, it might be okay.

"The Attorney General also stated that the rate reduction section might



pertain to non-profit organizations. If it does, their insurance costs would skyrocket.

"In Section 14, interest to be paid is referred to in Chapter 428-2 when the reference should be to 662-8 for the State.

"Section 16 may affect the State's pursuit of third party liens of medicated benefits. The statute should have been cleaned up. There are questions about the notice provision in paragraph 4 of the new section to be added to Chapter 663.

"The Attorney General also said that a subsidy should not be made directly to certain obstetricians and gynecologists but to the insurers. This section is dead wrong. The Department of Health said that it is not clear as to how the determination will be made as to the conditions which would create eligibility for a subsidy.

"The Hawaii Hotel Association is worried about the definition of the word 'charge.'

"To all these requests for changes, the answer was always that it would be clarified in the committee report but not in the bill. We have, therefore, produced a bill with much questionable language, sloppy drafting and a document over which we will be splitting legal hairs for years.

"Politically, the most important task was to get a bill, this bill, through the session and onto the Governor's desk without any hitches. Well, that's going to happen, but the result was not worth all the trouble."

Representative Jones rose and stated that he had additional comments, against the bill, that he would like to have inserted into the Journal and the Chair, noting that there were no objections, "so ordered."

Additional comments by Representative Jones are as follows:

"This bill is NOT tort reform.

"This bill is NOT 'better than nothing.'

"This bill is NOT 'a start in the right direction.'

"This bill is a cruel hoax being perpetrated on the citizens of this State.

"It is a hoax because it holds out the prospect of the possibility of limited insurance premium rollbacks in exchange for cosmetic changes to the tort law, cosmetic changes which do nothing to the inequities in the present system which cause liability insurance to be unaffordable or unavailable in the first place...inequities such as joint and several liability, and unlimited, highly subjective non-economic awards.

"This bill is a hoax because the premium rollbacks may be transitory: the reduced rates may be challenged on appeal by the insurer, and the bill permits the insurer to charge existing rates during the appeal.

"This bill is a hoax because the premium rollbacks apply only to commercial liability insurance, defined as insurance written for businesses. Thus automobile liability and homeowner's liability insurance is not affected. Nor, as the Attorney General has pointed out, are non-profit organizations, such as child care facilities, benefitted by the bill's rate reductions.

"Even worse, the reduction in premiums is a hoax because of the hidden cost: the surcharges which insurers will be allowed to tack on to premiums to recoup assessments paid to the Hawaii Insurance Guarantee Association. Not only are these surcharges expected to wipe out any reductions in premiums, but they will be added on to premiums for almost all kinds of insurance, including motor vehicle and homeowners insurance -- not just commercial liability insurance. The net result will be higher insurance costs for more citizens, not lower costs for some businesses.

"That's worse than a hoax; that's a con job.

"This bill is a hoax because it purports to prohibit cancellations of policies due to the rate reductions. But there is a catch-all escape clause which permits cancellations 'for any good faith reason.' Furthermore, the bill allows insurers to refuse to renew policies, as long as 45 days' notice is given.

"So much for improving the availability of liability insurance.

"Witness after witness in the futile hearings on this bill testified as to the solution to the problem of insurance availability and affordability:

meaningful tort reform -- specifically, a cap on the 'sky's-the-limit' non-economic awards, and elimination of joint and several liability. But this bill does not provide these urgently-needed reforms, even though it is purported to do so -- another example of the hoax being perpetrated on the people of Hawaii.

"Although the bill places a limit on the award of damages for pain and suffering, the pain and suffering is carefully and narrowly defined so that there is still no limit on most forms of non-economic damages. The sky is still the limit on such vague and subjective claims as 'mental anguish', 'loss of enjoyment of life', and 'all other non-pecuniary losses.'

"The bill fraudulently claims to abolish joint and several liability, but it lists exceptions after exceptions to the so-called abolition, so that there is no real abolition.

"Without these essential elements of true tort reform, there is no economic basis for premium reductions nor for the entry of other insurers into the Hawaii market -- competition which would encourage lower rates.

"More importantly, these reforms are essential for the taxpayers of this State, because State and local governments will not be affected by any reduction in commercial liability insurance premiums. All citizens of the State are the ultimate victims of this failure to enact true tort reforms, because government is the defendant of last resort. Through their State and local governments, all citizens are the ultimate 'deep pockets.' As the Attorney General has repeatedly testified, State and local governments are frequently sued in cases in which their negligence is low or even questionable, because a lawyer would commit malpractice if he failed to sue the State or county if their liability is potentially one percent or more. Since 1980, the taxpayers of this State have paid more than \$13-million in claims against the State. Last year, the taxpayers paid almost \$6-million in claims. This bill does nothing to prevent such exorbitant claims, because the bill does not really eliminate joint and several liability, nor limit non-economic awards.

"Thus, the taxpayers of Hawaii are the ultimate victims of the hoax perpetrated by this bill -- a bill which is so full of loopholes that it looks like swiss cheese and smells like

limburger."

At 10:33 o'clock p.m., Representative Marumoto asked for a recess and the Chair declared a recess, subject to the call of the Chair.

Upon reconvening at 11:08 o'clock p.m., the Chair directed the Clerk to note the presence of Representatives Apo, Hagino and Say.

Representative Onouye then rose and stated:

"I rise to speak in favor of this bill but with some reservations.

"Mr. Speaker, I wanted the Journal to reflect that I have many problems with this bill, but I won't belabor these problems because of the time and probably the futility of doing so. But I believe that the bill, as a whole, is a step in the right direction, and I believe one step, even though a small one in the direction of ending the issue of tort reform, is better than no step at all.

"Thank you."

Representative Ikeda then rose and requested a roll call vote on S.B. No. S1-86.

The Chair then stated:

"Before our proceeding with the roll call, the Chair would like to share with the members that the Governor has signed into law Senate Bill No. S2-86 at 9:54 p.m. and as a consequence, the appropriations in S1-86 can be passed with the expenditure ceiling in place."

#### GOVERNOR'S MESSAGE

A communication from the Governor (Gov. Msg. No. 2) informing the House that on July 30, 1986, he signed the following bill into law:

Senate Bill No. S2-86 as Act 1, entitled: "RELATING TO THE GENERAL FUND EXPENDITURE CEILING";

was read by the Clerk and placed on file.

Roll call having been requested, the motion was put by the Chair and carried, and S.B. No. S1-86, entitled: "A BILL FOR AN ACT RELATING TO LIABILITY", having been read throughout, passed Third Read-

ing by a vote of 37 ayes to 13 noes, with Representatives Anderson, Cavasso, Graulty, Hemmings, Ikeda, Isbell, Jones, Kamali'i, Liu, Marumoto, Medeiros, Pfeil and Yoshimura voting no, and Representative Levin being excused.

The Chair directed the Clerk to note that S.B. No. S1-86 had passed Third Reading at 11:12 o'clock p.m.

At this time, Representative Marumoto introduced Diana and Sid Snyder, "neighbors of mine. . . and Mr. Snyder is an architect with the architectural firm of Ossipoff Snyder & Rowland."

Representative Oshiro then rose and on behalf of the members of the House, extended congratulations and best wishes to Representative Taniguchi on the birth of a son, Daniel.

Representative Cavasso then rose and stated:

"Mr. Speaker, I would like to have the pleasure of announcing that I also had a baby daughter -- three months old tonight. Psalm is her name. She was born in the back of our station wagon on the way to the hospital."

Representative Anderson rose and stated:

"Mr. Speaker, I'm not sure if this is the proper time but for those of our colleagues who have chosen not to come back, I would like to say, I'm sure for everyone, that regardless of our differences of opinion, we've really enjoyed working with everyone of you and we hope you the best of luck in your endeavors.

"Thank you, Mr. Speaker."

Representative Levin rose and asked:

"Mr. Speaker, to my great embarrassment, I understand I missed another roll call vote. Either officially or unofficially, could the Clerk or could the record indicate that I would have voted 'aye' on the bill?"

The Chair answered:

"Representative Levin, you are recognized as being here now."

Representative Levin thanked the Chair.

The Chair then stated:

"As all of you know, there is a tradition in this House to end every one of our sessions with the joining of hands and the sharing of aloha. I want to share an observation with all of you. I think it has been said before, this measure that we had to deal with today obviously was a very, very difficult and trying one for all of us. I want to thank all of you for your perseverance and your patience and your hard work in accomplishing what we needed to accomplish during this special session.

"Some of you, as Representative Anderson had indicated, have decided not to return. I think Representative Graulty has decided just to retire. For Representative Menor and Representative Blair, Representative Nakasato, the Chair would like to correct the record. Representative Anderson, they have decided to seek lower office which obviously is their prerogative. Placing kidding aside, I want to call on all four of them -- Representative Graulty, Representative Nakasato, Representative Menor and Representative Blair; Representative Lindsey, my goodness, sorry for the oversight, and Representative Onouye -- who else have I forgotten? My goodness! All of you, will you please join me up here, and I will impose upon all of you members to please rise as we join hands together in closing this session. I impose upon the members of the audience to do the same."

The members of the House and the audience, with their hands joined together, sang "Hawaii Aloha."

#### ADJOURNMENT

Representative Okamura moved that the House of Representatives of the Thirteenth Legislature of the State of Hawaii, First Special Session of 1986, adjourn Sine Die, seconded by Representative Ikeda and carried.

At 11:21 o'clock p.m., the Speaker rapped his gavel and declared the House of Representatives of the Thirteenth Legislature of the State of Hawaii, First Special Session of 1986, adjourned Sine Die.

---

GOVERNOR'S MESSAGE RECEIVED AFTER THE ADJOURNMENT  
OF THE LEGISLATURE SINE DIE

Gov. Msg. No. 3 informing the  
House that on August 4, 1986, he  
signed the following bill into law:

Senate Bill No. S1-86 as Act 2,  
entitled: "RELATING TO LIA-  
BILITY".

## STANDING COMMITTEE REPORTS

SCRep. 1-86 Finance on H.B. No. 2-86

The purpose of this bill is to define the general fund expenditure ceiling and establish a repeal date of June 30, 1987.

Act 277, Session Laws of Hawaii 1980, implemented the provisions of the constitutional amendments ratified in 1978 which required that the Legislature establish an expenditure ceiling to limit the rate of growth of general fund appropriations to the estimated rate of growth of the State's economy. A sunset clause was included to allow for periodic review of the specific provisions contained in the act to ensure that they comply with the original intent and that they are useful and workable.

Provisions relating to the State general fund expenditure ceiling were repealed as of June 30, 1986.

After reviewing the manner in which the expenditure ceiling mechanism has worked since its enactment, your Committee finds that it should be extended for a one-year period. Your Committee believes that a more timely and in-depth review of the expenditure ceiling provisions should be made during the next regular legislative session.

Your Committee on Finance is in accord with the intent and purpose of H.B. No. 2-86 and recommends that it pass Second Reading and be placed on the calendar for Third Reading.

Signed by all members of the Committee.

SCRep. 2-86 Judiciary and Health on H.B. No. 1-86 (Majority)

The purpose of this bill is to alleviate the seriousness of the current insurance crisis; to prevent its reoccurrence; to ensure the widest possible availability of liability insurance at reasonable rates; to ensure a stable market for liability insurers, and; to provide for means to adjust insurance premium rates in the context of anticipated cost savings from tort reform legislation affecting the affordability and availability of liability insurance.

Many citizens and organizations representing a fair cross section of our community appeared at the public hearing on the bill and presented their views on the subject covered by the bill.

The following citizens and organizations presented their views:

Earl Hisatomi, Hawaii Independent Insurance Agents Association; Robert W. Hall; Haunani Ching, Hawaii Hotel Association; Linda Johnston, Hospital Association of Hawaii; Marvin B. Hall, Hawaii Medical Service Association; Carl Caliboso, Hawaii Business League; Richard Wurdemann, The Hawaii State Association of Counties; Abelina Shaw, State Department of Health; Phyllis Eide, Hawaii Nurses' Association; Dick Goss, Hawaii Insurers Council; Phil Robertson; Bruce Woolner, Government Employees Insurance Co.; Dr. William Hindle, Hawaii Medical Association; Dr. Philip Hellreich, Hawaii Federation of Physicians and Dentists; Mario Ramil, Insurance Commissioner, State of Hawaii; James King, ILWU-Local 142; Janice Birnie/Philip Lindsey, Hawaii Association of Nurse Anesthetists; Randolph Moore, Chamber of Commerce of Hawaii; Ruth Tsujimura, Office of the Attorney General; Hawaiian Telephone Company; Richard Reed; Dr. Don Tolbert, Mid-Pacific Medical Physics; Stanley Roehrig, Attorney at Law; Gary Galiher, Gary Galiher & Associates; Elroy Chun, Building Industry Association of Hawaii; Raymond Tam, Attorney at Law; Ezra Kanocho, Kauai Economic Development Board; Professor Richard Miller, William S. Richardson School of Law; Hawaii Academy of Plaintiffs; Attorneys' John S. Edmunds, Attorney at Law; John S. Wellington, M.D., University of Hawaii School of Medicine; and Dennis Toyomura, Architect.

Your Committees appreciated the many and often conflicting views that were expressed at the hearing. Although there were many reservations expressed about specific provisions or lack of provisions in the bill, the general consensus, when all of the testimony were considered, was that the bill represents a very positive step in the right direction and should therefore be passed.

Having conducted a public hearing and deliberated upon the subject covered by the bill, your Committees make their findings and state their intent as follows:

The bill must be considered as a complex, coherent bill, which embodies the demands and concessions of many different segments of our community. The separate sections of the bill, while dealing with different aspects of insurance reform and the law on torts, are bound together in their purpose of alleviating the current serious liability insurance crisis. Thus, your Committees have reviewed and discussed each part of the bill in this report with an eye on the underlying reasons for the embodiment of those separate parts of the bill.

Although this committee report sets out and discusses the bill by reference to each section of the bill, it is not the intent of your Committees to undermine the intent of the severability clause contained in Section 29 of the bill; however, as stated in the severability clause, Sections 2 to 7, 15, 17, and 20 are not severable, and if any one of the sections listed in Section 29 is determined to be invalid then each of the other sections listed in Section 29 becomes invalid.

#### I. Provisions Relating to Insurance

##### **Section 3. Rate Reduction; Relief.**

The purpose of this section is to adjust commercial liability insurance rates in the context of anticipated cost savings from tort reform legislation contained in this bill. There is provided a 10% reduction beginning October 1, 1986 and progresses to 12% in 1987 and 15% in 1988.

This section also provides a rate-making and filing procedure with the intent of placing the burden on the insurers or rating organization to prove that the rates resulting from the 12% and 15% reductions in 1987 and 1988, respectively, are inadequate. Furthermore, this section provides the rates to be implemented in the event of the insurance commissioner's approval or disapproval, in whole or in part, is challenged through the administrative hearing process and the appeal right under section 431-69, Hawaii Revised Statutes (HRS). The rates to be implemented in the event of a challenge is designed to eliminate, to the greatest extent possible, the possibility of a surcharge. On the otherhand, rates implemented shall not be excessive and thus in no event will the rates be higher than the rates filed by the insurer or the rating organization.

##### **Section 4. Excessive Rates; Rebate or Credit.**

In the event the rates are still excessive and further reductions are required, the insurance commissioner shall request a hearing to further reduce the rates established in section 3 of the bill. If it is determined that the rates are excessive, a rebate or credit to policyholders shall be determined and ordered by the insurance commissioner. The prohibition against mid-term cancellation and refusal to renew a policy contained in sections 5, 6 and 7 is applicable to this section.

##### **Sections 5 and 6. Cancellation of Policy; Prohibitions.**

The intent of this section and section 7 is to ensure that the rate reduction requirements of this bill are not undermined. These sections also prohibit mid-term cancellations of policies with enumerated exceptions. The exceptions, specifically subsection (8), shall be construed narrowly in order to be consistent with the intent of this bill.

##### **Section 7. Nonrenewal of Policies; Notice.**

If an insurer decides to not renew a policy, this section requires that an explanation and a 45-day notice be provided to the policyholder. The explanation for not renewing a policy must be in good faith, specific, and shall be construed strictly to be consistent with the intent of this bill.

##### **Section 8. Insurance Contracts; Punitive Damages.**

Unless specifically included, an insurance policy shall not be construed to

provide coverage for punitive damages.

#### Section 9 and 10. Assessments for Insolvencies; Recoupment through Surcharge.

Presently, there is discretion on the insurance commissioner to allow recoupment either through the rate-making process or through the surcharge system. Recoupment of assessments through the rate-making process adds an additional one percent to the rates because of commissions and tax considerations. In addition, because assessments are paid directly out of insurer's surplus, the capacity to write is further limited by using the rate making process to recoup assessments. The surcharge mechanism, on the other hand, will allow insurers to recoup the assessments paid in a much more reasonable time period.

To eliminate the possibility of double recovery, section 431D-8, (b)(6), is repealed by this bill. Thus, in the event of any recovery from a liquidated insurer by the Hawaii Insurance Guaranty Association (HIGA), there will not be a refund to member insurers. The funds recovered by the HIGA will remain with that organization to be expended for future insolvencies.

## II. Provisions Relating to Tort Actions

#### Sections 11 and 12. Attorneys' Fees in Tort Actions and Attorney's Contingent Fees Arrangements.

The bill amends chapter 607, HRS, by adding a new section on attorneys' fees in tort actions and repeals section 671-2 on attorney's contingent fee arrangements in medical tort actions. The new section is intended to vest in the trial courts of the State the discretionary authority to review attorney's fees for both plaintiff and defendant in all tort actions that are brought to judgment, and if requested by either plaintiff or the defendant, in tort actions that are settled. It is expected that the trial courts in reviewing contingent fee arrangements will use and establish standards of reasonableness in approving attorney's contingent fee arrangements.

The repeal of the section on attorney's contingent fee arrangements in medical tort sections is intended to establish a single judicial procedure and standard of review of all attorney's contingent fee arrangements in all tort actions, including medical tort claims.

#### Section 13. Attorneys' Fees in Civil Actions.

Your Committees amended the law which governs the filing of frivolous claims. The amendment expands the scope of this regulatory provision to make the sanctions against frivolous claims to also apply to frivolous defenses. The deletion of the adjective "completely" before the word "frivolous" is intended to make it clear that a frivolous claim or defense can be proven to exist, provided that the court finds in writing that all of the claims or defenses of the party are found to be frivolous and not reasonably supported by the facts and the law.

It should be noted that while the standard of proof for the court's determination of frivolousness of a claim or defense was lowered, the court's determination of frivolousness is not an easy one, for it must be made in light of the plaintiff's and the defendant's due process rights and rights of access to our courts. It is the intent of your Committees to curtail frivolous claims and defenses, but it is not your Committee's intent to deny individual rights nor to embrace the English system of awarding attorney's fees.

#### Section 14. Periodic Payments of damages.

This section provides the State, any political subdivision of the State, or any governmental agency with an option to satisfy a judgment against it in a tort action by making periodic payments of that portion of the judgment in excess of \$1,000,000 within five years. Any periodic payment plan proposed is made subject to the approval of and modification by the court. The option provides the government a reasonable time to arrange for payment of large awards and mitigate the adverse and burdensome effects of such awards on a government's budget and finance. The option is not intended to preclude other periodic payment arrangements pursuant to a settlement agreement by the parties in a tort action. This



section also provides that the periodic payments will include the payment of interest specified in section 478-2, HRS, on the unpaid balance.

#### Section 15. Medical Torts; Limitation of Actions; Time.

Under existing law, the statute of limitation for a minor's medical tort claim is tolled during the period of his minority with a six-year statute of repose. Thus, under present law, a child may be able to commence a medical malpractice claim within 24 years of the date of the alleged wrongful act. Under this bill, a minor would be required to commence his medical tort claim within six years from the date of the alleged wrongful act regardless of minority, except that minors under the age of ten will be required to commence their action within six years or by the minor's tenth birthday, whichever period is longer. Accordingly, a two-year-old claimant will have eight years within which to bring suit, his tenth birthday being the outside cap.

Exceptions to the shorter statute of limitations provide that the limitation period is tolled for any period during which either the parent, guardian, insurer, or health care provider has committed fraud, collusion or gross negligence in the failure to bring the action on behalf of the injured minor. Additionally, the statute of limitations would be tolled for any period during which the minor's injury could not have been discovered through the use of reasonable diligence.

#### Section 16. Collateral Sources; Protection for Liens and Rights of Subrogation.

There is provided in this section a mechanism which would serve to avoid, upon the giving of timely notice, double payment in tort actions from collateral source lienholders who may have paid for costs or expenses arising out of the injury which is the subject of the tort action. A post-judgment or post-settlement proceedings before the court would establish first, the validity of liens of collateral source payors and second, that payment on those liens or so much thereof is deducted from the proceeds of the special damages awarded to the plaintiff. Finally, this section provides that where a collateral source lienholder is entitled to be paid out of the judgment or settlement, the court will first deduct from such payment a reasonable sum for the costs and fees incurred by the party who brought the underlying tort action and thus made it possible for the lienholder to be paid.

The intent of this provision is to prevent double payments from collateral source for costs or expenses arising out of the injury for which the plaintiff has brought the tort action and is awarded a judgment therefor. The collateral source lienholders have been limited only to that portion of the settlement or judgment which is designated as special damages so as not to deprive the plaintiff of any award for noneconomic damages which is not covered by collateral source payment for costs and expenses already made. It should also be noted that this section is not intended to affect the liens determined under chapter 346-37, HRS, pursuant to which the State enforces payment for medical assistance and burial payment.

#### Section 17. Joint and Several Liability.

Your Committees abolished the current provision on joint and several liability of joint tortfeasors, except under four different exceptions, which among other conditions, make a distinction between economic and noneconomic damages. Your Committees believe that recovery of economic damages, such as lost wages, medical expenses, lost future wages, and future medical expenses should not be denied the victim of a tort. Accordingly, your Committee established the first exception to allow the recovery of economic damages against all joint tortfeasors irrespective of their degree of fault.

The second exception allows the recovery of both economic and noneconomic damages against joint tortfeasors, jointly and severally, in certain types of tort actions, such as intentional torts, environmental pollution, toxic and asbestos-related torts, aircraft accidents, strict and products liability torts, and motor vehicle accidents.

The third exception allows the recovery of noneconomic damages in tort actions that are not listed in the second exception against a joint tortfeasor who is found



to be 25% or more to blame for the injury or death of the victim. If, however, the joint tortfeasor is found to be less than 25% to blame, that tortfeasor's liability for the noneconomic damage of the victim is limited proportionately to the degree of his blame.

The fourth exception is for the recovery of noneconomic damages in certain types of motor vehicle accidents in which the tort action relates to the maintenance and design of highways. Under this exception, if the joint tortfeasor is shown to have had reasonable prior notice of the prior occurrence under similar circumstances to the occurrence upon which the tort action is based, recovery is allowed against the tortfeasor, jointly and severally. If the joint tortfeasor was without any reasonable prior notice of a prior occurrence, the victim's recovery of noneconomic damages may be limited proportionately to the degree of negligence assigned to that tortfeasor. If that tortfeasor is found to be 25% or more to blame, that tortfeasor is liable jointly and severally, for the noneconomic damages of the victim. If the tortfeasor is found to be less than 25% to blame, that tortfeasor's liability is limited proportionately to the degree of blame assigned to it.

The fourth exception is intended to limit the effects of joint and several liability on government agencies and other institutions, which often are found to be minimally negligent in motor vehicle accidents involving maintenance and design of highways and highway related objects, but substantially liable for the damages suffered by the victim. In cases in which the governmental joint tortfeasor is found to have been without reasonable prior notice of a prior occurrence under similar circumstances to the occurrence upon which the tort action is based, and is also found to be less than 25% to blame, the liability of the governmental joint tortfeasor is limited to the proportionate degree of fault assigned to it.

#### Section 18. Loss of Impairment of Earning Capacity; Damages.

This section adds a new provision in the law to make it clear that in cases in which there is an award for loss or impairment of earning capacity, the determination of the amount of future earnings take into account the effects of income taxes on the earnings. Under this provision, the amount of the damage award may be reduced by the amount of the income taxes that may be attributable to future earnings.

The section also allows the court to use whatever other factors which it deems appropriate in calculating damages awarded for loss of impairment of earning capacity.

#### Section 19. Noneconomic Damages; Defined.

This section defines noneconomic damages in tort actions by describing certain nonpecuniary losses or claims included within the definition. Pain and suffering, which term is defined as actual physical pain that is the proximate result of the physical injury sustained by the plaintiff, is included as noneconomic damages. Noneconomic damages also include mental anguish, disfigurement, loss of enjoyment of life, loss of consortium, and all other nonpecuniary losses or claims. To avoid confusion on the matter, your Committees state their intent that damages for loss of future earning capacity and damages for future medical costs and treatment are included as economic damages and do not fall within the definition of noneconomic damages.

#### Section 20. Limitation on Pain and Suffering.

This section establishes a cap or ceiling of \$375,000 for damages recoverable for pain and suffering. The cap provides a certain measure of predictability for awards involving noneconomic damages. The cap does not apply to certain tort actions as enumerated in the bill and is not intended to apply to tort actions relating to the maintenance and design of highways in cases where there is a showing that the affected joint tortfeasor was given reasonable prior notice of a prior occurrence under similar circumstances to the occurrence upon which the tort claim is based.

#### Section 21. Court Annexed Arbitration Programs.

This section establishes a court annexed arbitration program within the Judiciary. The purpose of the program is to provide mandatory and non-binding arbitration as an alternative to costly and protracted litigation. Tort actions having a probable jury award value, exclusive of intent and costs, of \$150,000 or less, are covered by this program. The Supreme Court shall adopt rules for the implementation and administration of the program. The Court is authorized to clarify the various types of torts and establish their order or priority for the determination of arbitrability and for arbitration, subject however to the Court's discretion to remove any action from the program.

**Section 22. Serious Emotional Distress Arising from Property Damage; Cause of Action Abolished; Exception for Physical Injury.**

This section is intended to abolish the cause of action for negligent infliction of serious emotional distress where the underlying basis for an emotional distress claim emanates from property damages only. A cause of action continues to exist, however, in any case in which the emotional distress results in physical injury to or mental illness of the claimant.

**III. Other Provisions**

Sections 23 and 24 provide appropriations of \$100,000 and \$400,000, respectively to the Department of Commerce and Consumer Affairs and section 25 provides an appropriation of \$200,000 to the Judiciary for the purposes of the Act.

Section 26 directs the insurance commissioner to submit to the Legislature at each of the regular sessions of 1988 and 1989 a report on the evaluation of the operation and effects of the Act. Section 27 directs the Chief Justice to submit to the Legislature at the regular session of 1987 a report on the status of the implementation of the court annexed arbitration program and on recommendations relating to the program.

Section 28 states that the Act shall have prospective application from the effective date.

Section 29 relates to the severability of any provision of the Act from any other declared invalid except for certain provisions which are enumerated in this section to be interdependent and not severable as explained at the outset of this committee report.

Section 31 provides that sections 2 to 7 which contain the provisions relating to insurance, section 17, which contains the subject of abolition of joint and several liability, and section 20, which establishes a cap or ceiling for damages recoverable for pain and suffering, shall be repealed on October 1, 1989.

As stated at the outset of this committee report, it is clear to your Committees from the many and diverse points of view raised and presented by the witnesses at the public hearing that the bill falls short of their stated wants and expectations. It is equally apparent to your Committees that to draft a bill that fulfills, without concessions, the demands of every segment of the community affected by this bill is an impossible task. Indeed, this is the very context in which the Legislature is the appropriate forum to meld the various and diverse interests to a consensus toward societal advantage. Your Committees believe that the bill is that consensus. Although your Committees cannot expect everyone to embrace the bill in every respect, the testimony at the public hearing appear, on balance, to indicate that the divergent interests of the community can live with the bill as a consensus and comprise.

Your Committees on Judiciary and Health are in accord with the intent and purpose of H.B. No. 1-86 and recommend that it pass Second Reading and be placed on the calendar for Third Reading.

Signed by all members of the Committees.  
(Representatives Gaulty, Cavasso, Jones and Liu did not concur.)

SCRep. 3-86                      Finance on S.B. No. S2-86

The purpose of this bill is to define the general fund expenditure ceiling and

establish a repeal date of June 30, 1987.

Act 277, Session Laws of Hawaii 1980, implemented the provisions of the constitutional amendments ratified in 1978 which required that the Legislature establish an expenditure ceiling to limit the rate of growth of general fund appropriations to the estimated rate of growth of the State's economy. A sunset clause was included to allow for periodic review of the specific provisions contained in the act to ensure that they comply with the original intent and that they are useful and workable.

Provisions relating to the State general fund expenditure ceiling were repealed as of June 30, 1986.

After reviewing the manner in which the expenditure ceiling mechanism has worked since its enactment, your Committee finds that it should be extended for a one-year period. Your Committee believes that a more timely and in-depth review of the expenditure ceiling provisions should be made during the next regular legislative session.

Your Committee on Finance is in accord with the intent and purpose of S.B. No. S2-86 and recommends that it pass Second Reading and be placed on the calendar for Third Reading.

Signed by all members of the Committee except Representative Lardizabal.

SCRep. 4-86                      Judiciary and Health on S.B. No. S1-86 (Majority)

The purpose of this bill is to alleviate the seriousness of the current insurance crisis; to prevent its reoccurrence; to ensure the widest possible availability of liability insurance at reasonable rates; to ensure a stable market for liability insurers; and to provide for means to adjust insurance premium rates in the context of anticipated cost savings from tort reform legislation affecting the affordability and availability of liability insurance.

Your Committees find that S.B. No. S1-86 is a companion measure to H.B. No. 1-86 which your Committees had reported out earlier in an unamended form and the contents of which are identical. On July 26, 1986, both the Senate and the House held extensive public hearings on S.B. No. S1-86 and H.B. No. 1-86 respectively, at which time many citizens and organizations testified on these measures. Consequently, your Committees find that the members of the public have had ample opportunity to present their views on this issue and that there is no compelling reason to schedule another round of hearings on this measure.

The bill must be considered as a complex, coherent bill, which embodies the demands and concessions of many different segments of our community. The separate sections of the bill, while dealing with different aspects of insurance reform and the law on torts, are bound together in their purpose of alleviating the current serious liability insurance crisis. Thus, your Committees have reviewed and discussed each part of the bill in this report with an eye on the underlying reasons for the embodiment of those separate parts of the bill.

Although this committee report sets out and discusses the bill by reference to each section of the bill, it is not the intent of your Committees to undermine the intent of the severability clause contained in Section 29 of the bill; however, as stated in the severability clause, Sections 2 to 7, 15, 17, and 20 are not severable, and if any one of the sections listed in Section 29 is determined to be invalid then each of the other sections listed in Section 29 becomes invalid.

#### I. Provisions Relating to Insurance

##### Section 3. Rate Reduction; Relief.

The purpose of this section is to adjust commercial liability insurance rates in the context of anticipated cost savings from tort reform legislation contained in this bill. There is provided a 10% reduction beginning October 1, 1986 and progresses to 12% in 1987 and 15% in 1988.

This section also provides a rate-making and filing procedure with the intent of

placing the burden on the insurers or rating organization to prove that the rates resulting from the 12% and 15% reductions in 1987 and 1988, respectively, are inadequate. Furthermore, this section provides the rates to be implemented in the event of the insurance commissioner's approval or disapproval, in whole or in part, is challenged through the administrative hearing process and the appeal right under section 431-69, Hawaii Revised Statutes (HRS). The rates to be implemented in the event of a challenge is designed to eliminate, to the greatest extent possible, the possibility of a surcharge. On the other hand, rates implemented shall not be excessive and thus in no event will the rates be higher than the rates filed by the insurer or the rating organization.

#### Section 4. Excessive Rates; Rebate or Credit.

In the event the rates are still excessive and further reductions are required, the insurance commissioner shall request a hearing to further reduce the rates established in section 3 of the bill. If it is determined that the rates are excessive, a rebate or credit to policyholders shall be determined and ordered by the insurance commissioner. The prohibition against mid-term cancellation and refusal to renew a policy contained in sections 5, 6 and 7 is applicable to this section.

#### Sections 5 and 6. Cancellation of Policy; Prohibitions.

The intent of this section and section 7 is to ensure that the rate reduction requirements of this bill are not undermined. These sections also prohibit mid-term cancellations of policies with enumerated exceptions. The exceptions, specifically subsection (8), shall be construed narrowly in order to be consistent with the intent of this bill.

#### Section 7. Nonrenewal of Policies; Notice.

If an insurer decides to not renew a policy, this section requires that an explanation and a 45-day notice be provided to the policyholder. The explanation for not renewing a policy must be in good faith, specific, and shall be construed strictly to be consistent with the intent of this bill.

#### Section 8. Insurance Contracts; Punitive Damages.

Unless specifically included, an insurance policy shall not be construed to provide coverage for punitive damages.

#### Section 9 and 10. Assessments for Insolvencies; Recoupment through Surcharge.

Presently, there is discretion on the insurance commissioner to allow recoupment either through the rate-making process or through the surcharge system. Recoupment of assessments through the rate-making process adds an additional one percent to the rates because of commissions and tax considerations. In addition, because assessments are paid directly out of insurer's surplus, the capacity to write is further limited by using the rate making process to recoup assessments. The surcharge mechanism, on the other hand, will allow insurers to recoup the assessments paid in a much more reasonable time period.

To eliminate the possibility of double recovery, section 431D-8, (b)(6), is repealed by this bill. Thus, in the event of any recovery from a liquidated insurer by the Hawaii Insurance Guaranty Association (HIGA), there will not be a refund to member insurers. The funds recovered by the HIGA will remain with that organization to be expended for future insolvencies.

## II. Provisions Relating to Tort Actions

#### Sections 11 and 12. Attorneys' Fees in Tort Actions and Attorney's Contingent Fees Arrangements.

The bill amends chapter 607, HRS, by adding a new section on attorneys' fees in tort actions and repeals section 671-2 on attorney's contingent fee arrangements in medical tort actions. The new section is intended to vest in the trial

courts of the State the discretionary authority to review attorney's fees for both plaintiff and defendant in all tort actions that are brought to judgment, and if requested by either plaintiff or the defendant, in tort actions that are settled. It is expected that the trial courts in reviewing contingent fee arrangements will use and establish standards of reasonableness in approving attorney's contingent fee arrangements.

The repeal of the section on attorney's contingent fee arrangements in medical tort sections is intended to establish a single judicial procedure and standard of review of all attorney's contingent fee arrangements in all tort actions, including medical tort claims.

#### Section 13. Attorneys' Fees in Civil Actions.

Your Committees amended the law which governs the filing of frivolous claims. The amendment expands the scope of this regulatory provision to make the sanctions against frivolous claims to also apply to frivolous defenses. The deletion of the adjective "completely" before the word "frivolous" is intended to make it clear that a frivolous claim or defense can be proven to exist, provided that the court finds in writing that all of the claims or defenses of the party are found to be frivolous and not reasonably supported by the facts and the law.

It should be noted that while the standard of proof for the court's determination of frivolousness of a claim or defense was lowered, the court's determination of frivolousness is not an easy one, for it must be made in light of the plaintiff's and the defendant's due process rights and rights of access to our courts. It is the intent of your Committees to curtail frivolous claims and defenses, but it is not your Committee's intent to deny individual rights nor to embrace the English system of awarding attorney's fees.

#### Section 14. Periodic Payments of Damages.

This section provides the State, any political subdivision of the State, or any governmental agency with an option to satisfy a judgment against it in a tort action by making periodic payments of that portion of the judgment in excess of \$1,000,000 within five years. Any periodic payment plan proposed is made subject to the approval of and modification by the court. The option provides the government a reasonable time to arrange for payment of large awards and mitigate the adverse and burdensome effects of such awards on a government's budget and finance. The option is not intended to preclude other periodic payment arrangements pursuant to a settlement agreement by the parties in a tort action. This section also provides that the periodic payments will include the payment of interest specified in section 478-2, HRS, on the unpaid balance.

#### Section 15. Medical Torts; Limitation of Actions; Time.

Under existing law, the statute of limitation for a minor's medical tort claim is tolled during the period of his minority with a six-year statute of repose. Thus, under present law, a child may be able to commence a medical malpractice claim within 24 years of the date of the alleged wrongful act. Under this bill, a minor would be required to commence his medical tort claim within six years from the date of the alleged wrongful act regardless of minority, except that minors under the age of ten will be required to commence their action within six years or by the minor's tenth birthday, whichever period is longer. Accordingly, a two-year-old claimant will have eight years within which to bring suit, his tenth birthday being the outside cap.

Exceptions to the shorter statute of limitations provide that the limitation period is tolled for any period during which either the parent, guardian, insurer, or health care provider has committed fraud, collusion or gross negligence in the failure to bring the action on behalf of the injured minor. Additionally, the statute of limitations would be tolled for any period during which the minor's injury could not have been discovered through the use of reasonable diligence.

#### Section 16. Collateral Sources; Protection for Liens and Rights of Subrogation.

There is provided in this section a mechanism which would serve to avoid, upon the giving of timely notice, double payment in tort actions from collateral source

lienholders who may have paid for costs or expenses arising out of the injury which is the subject of the tort action. A post-judgment or post-settlement proceedings before the court would establish first, the validity of liens of collateral source payors and second, that payment on those liens or so much thereof is deducted from the proceeds of the special damages awarded to the plaintiff. Finally, this section provides that where a collateral source lienholder is entitled to be paid out of the judgment or settlement, the court will first deduct from such payment a reasonable sum for the costs and fees incurred by the party who brought the underlying tort action and thus made it possible for the lienholder to be paid.

The intent of this provision is to prevent double payments from collateral source for costs or expenses arising out of the injury for which the plaintiff has brought the tort action and is awarded a judgment therefor. The collateral source lienholders have been limited only to that portion of the settlement or judgment which is designated as special damages so as not to deprive the plaintiff of any award for noneconomic damages which is not covered by collateral source payment for costs and expenses already made. It should also be noted that this section is not intended to affect the liens determined under chapter 346-37, HRS, pursuant to which the State enforces payment for medical assistance and burial payment.

#### Section 17. Joint and Several Liability.

Your Committees abolished the current provision on joint and several liability of joint tortfeasors, except under four different exceptions, which among other conditions, make a distinction between economic and noneconomic damages. Your Committees believe that recovery of economic damages, such as lost wages, medical expenses, lost future wages, and future medical expenses should not be denied the victim of a tort. Accordingly, your Committees established the first exception to allow the recovery of economic damages against all joint tortfeasors irrespective of their degree of fault.

The second exception allows the recovery of both economic and noneconomic damages against joint tortfeasors, jointly and severally, in certain types of tort actions, such as intentional torts, environmental pollution, toxic and asbestos-related torts, aircraft accidents, strict and products liability torts, and motor vehicle accidents.

The third exception allows the recovery of noneconomic damages in tort actions that are not listed in the second exception against a joint tortfeasor who is found to be 25% or more to blame for the injury or death of the victim. If, however, the joint tortfeasor is found to be less than 25% to blame, that tortfeasor's liability for the noneconomic damage of the victim is limited proportionately to the degree of his blame.

The fourth exception is for the recovery of noneconomic damages in certain types of motor vehicle accidents in which the tort action relates to the maintenance and design of highways. Under this exception, if the joint tortfeasor is shown to have had reasonable prior notice of the prior occurrence under similar circumstances to the occurrence upon which the tort action is based, recovery is allowed against the tortfeasor, jointly and severally. If the joint tortfeasor was without any reasonable prior notice of a prior occurrence, the victim's recovery of noneconomic damages may be limited proportionately to the degree of negligence assigned to that tortfeasor. If that tortfeasor is found to be 25% or more to blame, that tortfeasor is liable jointly and severally, for the noneconomic damages of the victim. If the tortfeasor is found to be less than 25% to blame, that tortfeasor's liability is limited proportionately to the degree of blame assigned to it.

The fourth exception is intended to limit the effects of joint and several liability on certain joint tortfeasors, such as government agencies and public utilities, which often are found to be minimally negligent in motor vehicle accidents involving maintenance and design of highways and highway related objects, but substantially liable for the damages suffered by the victim. In cases in which the joint tortfeasor is found to have been without reasonable prior notice of a prior occurrence under similar circumstances to the occurrence upon which the tort action is based, and is also found to be less than 25% to blame, the liability of the joint tortfeasor is limited to the proportionate degree of fault assigned to it.

**Section 18. Loss of Impairment of Earning Capacity; Damages.**

This section adds a new provision in the law to make it clear that in cases in which there is an award for loss or impairment of earning capacity, the determination of the amount of future earnings take into account the effects of income taxes on the earnings. Under this provision, the amount of the damage award may be reduced by the amount of the income taxes that may be attributable to future earnings.

The section also allows the court to use whatever other factors which it deems appropriate in calculating damages awarded for loss of impairment of earning capacity.

**Section 19. Noneconomic Damages; Defined.**

This section defines noneconomic damages in tort actions by describing certain nonpecuniary losses or claims included within the definition. Pain and suffering, which term is defined as actual physical pain that is the proximate result of the physical injury sustained by the plaintiff, is included as noneconomic damages. Noneconomic damages also include mental anguish, disfigurement, loss of enjoyment of life, loss of consortium, and all other nonpecuniary losses or claims. To avoid confusion on the matter, your Committees state their intent that damages for loss of future earning capacity and damages for future medical costs and treatment are included as economic damages and do not fall within the definition of noneconomic damages.

**Section 20. Limitation on Pain and Suffering.**

This section establishes a cap or ceiling of \$375,000 for damages recoverable for pain and suffering. The cap provides a certain measure of predictability for awards involving noneconomic damages. The cap does not apply to certain tort actions as enumerated in the bill and is not intended to apply to tort actions relating to the maintenance and design of highways in cases where there is a showing that the affected joint tortfeasor was given reasonable prior notice of a prior occurrence under similar circumstances to the occurrence upon which the tort claim is based.

**Section 21. Court Annexed Arbitration Programs.**

This section establishes a court annexed arbitration program within the Judiciary. The purpose of the program is to provide mandatory and non-binding arbitration as an alternative to costly and protracted litigation. Tort actions having a probable jury award value, exclusive of interest and costs, of \$150,000 or less, are covered by this program. The Supreme Court shall adopt rules for the implementation and administration of the program. The Court is authorized to clarify the various types of torts and establish their order or priority for the determination of arbitrability and for arbitration, subject however to the Court's discretion to remove any action from the program.

**Section 22. Serious Emotional Distress Arising from Property Damage; Cause of Action Abolished; Exception for Physical Injury.**

This section is intended to abolish the cause of action for negligent infliction of serious emotional distress where the underlying basis for an emotional distress claim emanates from property damages only. A cause of action continues to exist, however, in any case in which the emotional distress results in physical injury to or mental illness of the claimant.

**III. Other Provisions**

Sections 23 and 24 provide appropriations of \$100,000 and \$400,000, respectively to the Department of Commerce and Consumer Affairs and section 25 provides an appropriation of \$200,000 to the Judiciary for the purposes of the Act.

Section 26 directs the insurance commissioner to submit to the Legislature at each of the regular sessions of 1988 and 1989 a report on the evaluation of the



operation and effects of the Act. Section 27 directs the Chief Justice to submit to the Legislature at the regular session of 1987 a report on the status of the implementation of the court annexed arbitration program and on recommendations relating to the program.

Section 28 states that the Act shall have prospective application from the effective date.

Section 29 relates to the severability of any provision of the Act from any other declared invalid except for certain provisions which are enumerated in this section to be interdependent and not severable as explained at the outset of this committee report.

Section 31 provides that sections 2 to 7 which contain the provisions relating to insurance, section 17, which contains the subject of abolition of joint and several liability, and section 20, which establishes a cap or ceiling for damages recoverable for pain and suffering, shall be repealed on October 1, 1989.

It is clear to your Committees from the many and diverse points of view raised and presented by the witnesses at the public hearing on H.B. No. 1-86 that the bill falls short of their stated wants and expectations. It is equally apparent to your Committees that to draft a bill that fulfills, without concessions, the demands of every segment of the community affected by this bill is an impossible task. Indeed, this is the very context in which the Legislature is the appropriate forum to meld the various and diverse interests to a consensus toward societal advantage. Your Committees believe that the bill is that consensus. Although your Committees cannot expect everyone to embrace the bill in every respect, the testimony at the public hearing on H.B. No. 1-86 appear, on balance, to indicate that the divergent interests of the community can live with the bill as a consensus and comprise.

Your Committees on Judiciary and Health are in accord with the intent and purpose of S.B. No. S1-86 and recommend that it pass Second Reading and be placed on the calendar for Third Reading.

Signed by all members of the Committees except Representatives Gaulty, Menor and Shito.  
(Representatives Jones and Liu did not concur.)

[illegible]

NUMBER AND TITLE	Received Referred	First Reading	Second Reading	Third Reading	Action of Senate	Conference Committee	Final Action	Action of Governor	Further Action	Act No.	Vetoed
SB S1-86. A Bill for an Act relating to liability.	13	13	14	31				33		2	
SB S2-86. A Bill for an Act relating to the general fund expenditure ceiling.	13	13	14	15				31		1	