

JOURNAL
of the
SENATE OF THE
THIRTEENTH LEGISLATURE
of the
STATE OF HAWAII

Special Session of 1986

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

TABLE OF CONTENTS

	PAGE
First Day, Thursday, July 24, 1986	1
Second Day, Friday, July 25, 1986	4
Third Day, Monday, July 28, 1986	5
Fourth Day, Tuesday, July 29, 1986.	21
Fifth Day, Wednesday, July 30, 1986	22
Communications Received after Adjournment:	
Governor's Messages	24
Appendix:	
Standing Committee Report	25
Special Committee Reports	25
History:	
Senate Bills	31

THE
THIRTEENTH LEGISLATURE
STATE OF HAWAII
SPECIAL SESSION OF 1986

JOURNAL OF THE SENATE
FIRST DAY

Thursday, July 24, 1986

The Senate of the Thirteenth Legislature of the State of Hawaii, Special Session of 1986, was called to order at 10:20 o'clock a.m., by Senator Richard S.H. Wong, President of the Senate, in accordance with the Proclamation issued by Governor George R. Ariyoshi on July 23, 1986, as follows:

MESSAGE FROM THE GOVERNOR

A message from the Governor (Gov. Msg. No. S1-86), transmitting the proclamation convening the Legislature of the State of Hawaii in Special Session on Thursday, July 24, 1986:

"P R O C L A M A T I O N"

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 day 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
RUTH I. TSUJIMURA
Acting Attorney General,"

was read by the Clerk and was placed on file.

The Divine Blessing was invoked by the Reverend Roy Birchard of the Metropolitan Community Church after which the Roll was called showing all Senators present.

At 10:23 o'clock a.m., the Senate stood in recess until 4:00 o'clock p.m. this afternoon.

EVENING SESSION

The Senate reconvened at 10:05 o'clock p.m.

INTRODUCTION OF SENATE BILLS

On motion by Senator Cobb, seconded by Senator Soares and carried, the following bills passed First Reading by title, were printed and distributed, and were referred to the Special Committee on Liability and the General Fund Expenditure Ceiling:

Senate Bills:

No. S1-86 "A BILL FOR AN ACT
RELATING TO LIABILITY."

Introduced by: Senator Wong, by
request.

No. S2-86 "A BILL FOR AN ACT
RELATING TO THE GENERAL FUND
EXPENDITURE CEILING."

Introduced by: Senator Wong, by
request.

No. S3-86 "A BILL FOR AN ACT
RELATING TO TORTS."

Introduced by: Senators Henderson,
Soares, A. Kobayashi and George.

At this time, the Chair appointed the following members of the Senate to the Special Committee on Liability and the General Fund Expenditure Ceiling:

Senator Mamoru Yamasaki, Chairman
Senator Neal Abercrombie
Senator James Aki

Senator Benjamin Cayetano
 Senator Tony Chang
 Senator Steve Cobb
 Senator Gerald Hagino
 Senator Bert Kobayashi
 Senator Gerald Machida
 Senator Malama Solomon
 Senator Charles Toguchi
 Senator Ann Kobayashi and
 Senator W. Buddy Soares.

Senator Abercrombie then rose to inquire:

"Mr. President, am I correct that the bills on the desk have been properly introduced and action taken to the satisfaction of moving them along?"

The Chair answered in the affirmative and Senator Abercrombie continued:

"Mr. President, I have on my desk bills which reflect the governor's vetoes minus the vetoes with respect to duplications. Many of these bills, Mr. President, are of vital interest to the people of this state. I think there is some degree of consternation on the part of many members of this body and members of the public that these bills were vetoed. We now have, as a result of this special session, an opportunity to correct what defects might have existed or if we believe that the governor's veto was either incorrect or ill-advised to override those vetoes on those bills ... and I thank you for the opportunity of reviewing my remarks made in 1984 when we also had an opportunity for a special session and I rose at that time and requested that we take advantage of the special session and introduce these bills. It's not a rhetorical activity on my part. We have gone through the effort of producing these bills and I would like to be able to introduce those bills into this session.

"I recognize that the governor has called a special session under Section 10, Article III, and indicates that he wishes the items that are contained in S1, 2 and 3 be taken up. We are a co-equal branch of government and have the capacity and opportunity and privilege to be able to introduce legislation when appropriate in this session it seems to me is appropriate. I would like an opinion from you as to whether that would be in order at this time."

The Chair answered:

"Senator Abercrombie, the Chair at this time would like to point out that a motion to introduce the bills will not be considered by this body. The agreement with the House and Senate leaderships is that only bills dealing with tort would be considered for introduction. Therefore, the chair will not entertain a motion to have those bills submitted or referred to specific committees."

Senator Abercrombie continued:

"Mr. President, I have a further question to ask of you then on that basis.

"There are occasions, nonetheless, notwithstanding the view that you just expressed, when legislative bodies have an opportunity and, I believe, an obligation to act under these circumstances. I refer in this particular instance to the question of divestment in South Africa. I have before me a bill which we developed which reflects, I think, the situation that has transpired since the time of certain resolutions which passed this body in the last session. There are certain times when moral imperatives operate whether or not the technical reference points are all in order or convenient for a legislative body and I think this is one of those times. And I think that it is vital that we take up this particular question. I think there will be sufficient time to do it, given the length of this session or the possible extension of this session, given the nature of the bills that are before us.

"I'm quite serious in making this proposal if only to reflect the kind of legislative actions going on all across this country. I might mention to you, just as recently as this past week in the State of California where there is bi-partisan agreement in that state to divest from their pension funds, their public school funds, their health funds, all with respect to South Africa. I make the same request to you that given the moral imperatives involved that we consider a bill entitled 'Relating to Investments,' which has as its essence prohibiting investments, divestiture in point of fact, in South Africa."

The Chair then said:

"Again, good Senator, the Chair does not disagree with the intent of your measure on investments. However, again the Chair must refuse the submittal of that particular measure for consideration by this body."

Senator Abercrombie continued:

"Mr. President, out of respect for you, I will accept your ... I won't call it a ruling but your ... I don't think I really asked for that but, rather, your viewpoint. But I do want to state then for the record and I think I have discussed with you the importance I give to this body and the record which prevail because that's what we will leave behind us and that's what will be referred to by those who come here in the future.

"Mr. President, I find it very unfortunate that the governor has chosen to limit this session and put the burden on yourself and the good Senators who have worked so hard to bring the bills which are before us now to this floor. I feel very strongly that there

are people in the community who are just as passionately interested, just as passionately committed to the subject matter in these bills which have already passed this body or could pass this body, I believe, if they were allowed to be introduced. I think it's very unfortunate that certain elements in our society are able to gain the governor's ear and cause him to bring us into special session for something which is very limited in scope and thus deprives us of the opportunity to either correct some wrongs or to redo legislation or to take the opportunity to override a veto which is fundamental in the legislative prerogatives in our constitution.

"I respect your point of view on it but I consider that we are not taking full advantage of the legislative opportunities that are before us."

The Chair responded:

"The Chair wishes to thank the good Senator for his respect for the Chair."

Senator Cobb then stated:

"Mr. President, for the record, I would like to rise and express my agreement both totally and in principle with the remarks of the Senator from the 16th District and add a couple of remarks of my own.

"During the course of the deliberations on the measure relating to liability before us, I had raised a question whether or not there's any time limit on a veto override. So far, I have been unable to discover any such time limit ... as long as the override attempt takes place within the same legislature, i.e. the thirteenth legislature, in which the veto occurred.

"I think it leaves this session short of

productive work when we don't have the opportunity to consider veto overrides and at the same time it gives the executive a certain immunity to be able to call a special session so recently after having vetoed many bills, a number of which I think have very substantial merit, broad support in the community, and should be addressed by this body.

"Like the previous speaker, I will accede to your discretion and judgment rather than challenging it. I was considering asking for an attorney general's opinion as to the legality or constitutionality of what I have just said but, Mr. President, I've had a rather recent object lesson as to the validity of attorney general's opinions.

"Thank you."

At this time, Senator Yamasaki, chairman of the Special Committee on Liability and the General Fund Expenditure Ceiling, requested a waiver of the 48-hour Notice of a Public Hearing on Senate Bill Nos. S1-86, S2-86 and S3-86, and the President granted the waiver.

At 10:15 o'clock p.m., the Senate stood in recess subject to the call of the Chair.

The Senate reconvened at 10:16 o'clock p.m.

ADJOURNMENT

At 10:17 o'clock p.m., on motion by Senator Cobb, seconded by Senator Soares and carried, the Senate adjourned until 11:30 o'clock a.m., Friday, July 25, 1986, in memory of the late Barney Menor, former Justice of the State Supreme Court and former State Senator, and in memory of the late Damien Medeiros, son of Representative John Medeiros.

SECOND DAY

Friday, July 25, 1986

The Senate of the Thirteenth Legislature of the State of Hawaii, Special Session of 1986, convened at 11:44 o'clock a.m., with the President in the Chair.

The Divine Blessing was invoked by Father W. Eric Potter of St. Andrew's Cathedral, after which the Roll was called showing all Senators present with the exception of Senators Aki, Kawasaki, Solomon and Young who were excused.

The President announced that he had read and approved the Journal of the First Day.

Senator Kuroda introduced to the members of the Senate Mr. Houa Kato, son of Osaka assemblyman Senator Hoei Kato and a student of the University of Kyoto, who was accompanied by Mrs. Evelyn Shintani and Mr. Milton Sakuoka.

STANDING COMMITTEE REPORT

Senator Hagino, for the Committee on Legislative Management, presented a report (Stand. Com. Rep. No. S1-86) informing the Senate that Senate Bill Nos. S1-86 to S3-86 have been printed and have been distributed to the members of the Senate.

On motion by Senator Cobb, seconded by Senator George and carried, the report of the Committee was adopted.

SPECIAL COMMITTEE REPORTS

Senator Yamasaki, for the Special Committee on Liability and the General Fund Expenditure Ceiling, presented a report (Spec. Com. Rep. No. S1-86) recommending that Senate Bill No. S1-86, pass Second Reading and be recommitted for further consideration.

On motion by Senator Yamasaki, seconded by Senator Chang and carried, the report of the Committee was adopted and S.B. No. S1-86, entitled: "A BILL FOR AN ACT

RELATING TO LIABILITY," passed Second Reading and was recommitted for further consideration.

Senator Yamasaki, for the Special Committee on Liability and the General Fund Expenditure Ceiling, presented a report (Spec. Com. Rep. No. S2-86) recommending that Senate Bill No. S2-86, pass Second Reading and be recommitted for further consideration.

On motion by Senator Yamasaki, seconded by Senator Chang 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 recommitted for further consideration.

Senator Yamasaki, for the Special Committee on Liability and the General Fund Expenditure, presented a report (Spec. Com. Rep. No. S3-86) recommending that Senate Bill No. S3-86, pass Second Reading and be recommitted for further consideration.

On motion by Senator Yamasaki, seconded by Senator Chang and carried, the report of the Committee was adopted and S.B. No. S3-86, entitled: "A BILL FOR AN ACT RELATING TO TORTS," passed Second Reading and was recommitted for further consideration.

At 11:49 o'clock a.m., the Senate stood in recess subject to the call of the Chair.

The Senate reconvened at 11:52 o'clock a.m.

ADJOURNMENT

At 11:53 o'clock a.m., on motion by Senator Cobb, seconded by Senator Soares and carried, the Senate adjourned until 11:00 o'clock a.m., Monday, July 28, 1986.

THIRD DAY

Monday, July 28, 1986

The Senate of the Thirteenth Legislature of the State of Hawaii, Special Session of 1986, convened at 11:18 o'clock a.m., with the President in the Chair.

The Divine Blessing was invoked by the Reverend H. Joanne Stearns, Pastor, Church of the Holy Nativity, after which the Roll was called showing all Senators present.

The President announced that he had read and approved the Journal of the Second Day.

Senator George introduced to the members of the Senate Toni and Joe Sarcinella, visitors from California.

At 11:23 o'clock a.m., on motion by Senator Cobb, seconded by Senator Soares and carried, the Senate stood in recess until 1:30 o'clock p.m. or subject to the call of the Chair.

EVENING SESSION

The Senate reconvened at 8:19 o'clock p.m.

ORDER OF THE DAY

THIRD READING

Spec. Com. Rep. No. S4-86 (S.B. No. S2-86):

Senator Yamasaki, for the Special Committee on Liability and the General Fund Expenditure Ceiling, presented a report (Spec. Com. Rep. No. S4-86) recommending that Senate Bill No. S2-86 pass Third Reading.

On motion by Senator Yamasaki, seconded by Senator Abercrombie 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," having been read throughout, passed Third Reading on the following showing of Ayes and Noes:

Ayes, 23. Noes, none. Excused, 2 (Cobb and Kawasaki).

Spec. Com. Rep. No. S5-86 (S.B. No. S1-86):

Senator Yamasaki, for the majority of the Special Committee on Liability and the General Fund Expenditure Ceiling, presented a report (Spec. Com. Rep. No. S5-86) recommending that Senate Bill No. S1-86 pass Third Reading.

Senator Yamasaki then moved that the report of the majority of the Committee be adopted and S.B. No. S1-86 pass Third

Reading, seconded by Senator Aki.

At 8:20 o'clock p.m., the Senate stood in recess subject to the call of the Chair.

The Senate reconvened at 8:21 o'clock p.m.

At this time, Senator Hee offered the following amendment:

"SECTION 1. Senate Bill No. S1-86 is amended as follows:

1. Page 2, line 19 is amended by replacing the word 'ten' with the word 'thirty-seven';

2. Page 3, line 11 is amended by deleting the words 'twelve per cent'; and

3. Page 3, line 19 is amended by deleting the words 'fifteen per cent'."

Senator Hee moved that the amendment be adopted, seconded by Senator Abercrombie.

Senator Hee then explained:

"Mr. President, the amendment is drafted because after much discussion with the Senate members during this special session as well as with the lieutenant governor, many answers as to why this bill is before us remain unclear. I think one of the biggest dilemmas that I find the Senate in is the basis for the 10 percent mandatory reduction. It has not been made clear and is not clear to any member of the Senate the basis for the 10 percent. As a result, the 10 percent is not defensible.

"What has been made clear is, the 10 percent is apparently what 'the insurance industry' can live with. Mr. President, I'm not sure we have convened for the purpose of serving the insurance industry. One thing is clear in the public perception and that is, we are here to serve the public.

"With the capricious outlining of the 10, 12, and 15 percent reductions contained in this bill, I have used the same empirical logic apparently deployed by whomever and whoever is in charge of this session and added the 10, 12 and 15 and came out with 37. The net effect, Mr. President, is that what you will have over the three years, if the bill should pass as unamended, the original form, would be a savings, if this amendment were to be included, of 37 percent.

"Mr. President, there is one thing that the

public will understand when all is said and done with this special session; when after all of the arguments and motions to amend are passed or defeated, the public will understand how much they benefit by it. And if the authors of this bill can defend the 10, 12, and 15 then I can stand before the Senate and, using the same logic, defend the 37 up front with the insurance industry coming back the second year and having the onus upon themselves, as has been said in caucus, to defend no percentage increase in each subsequent year.

"Thank you, Mr. President."

Senator Abercrombie rose to speak in support of the amendment and said:

"Mr. President, in support of Senator Hee's amendment, I would appreciate the opportunity to have this discussion because I think the central issue of all of the complicated matters that are before us rests with the capacity to have something genuine in the way of savings passed on to the consuming public.

"I think that Senator Hee's amendment is in the spirit with which this bill has been presented to this legislature. That is to say, that the individuals involved have worked very hard, have worked long, long hours, I should probably say weeks, to present this bill and this amendment is trying to show the kind of respect that is necessary to address all that hard work.

"It would be a shame, Mr. President, to see the bill which has many items that not everybody is happy with which I think has been said over and over again but, nonetheless, one which many of us might be prepared to vote for despite our reservation because of the collective effort that's been put forward, then not to see a significant addressing of the testimony that was given at our public hearing with respect to the rollback would be most unfortunate.

"The 37 percent figure is one, Mr. President, which I believe the insurance industry as a result of the testimony that we heard on Saturday could easily absorb. You have heard all kinds of figures in the press and many figures used by different people. But for the benefit of those who were not there at the hearing and to put into the formal record of this session, when asked what the basis for the 10, 12, and 15 percent figure was the spokesperson for the insurance company stated and I quote: '... guesswork, approximations and negotiations.' When I pressed a bit further to find what the basis for the negotiations might be it got back to guesswork.

"What is involved in that, Mr. President, very simply is, and I will grant the insurance industry then good faith with that. Let us

suppose that an educated guess has been made. Inasmuch as there's a three-year testing period, if you will, it makes sense to assume that they can absorb the 37 percent. Inasmuch as the bill before us, elsewhere, provides for the insurance companies being able to come before the commissioner and make a presentation with respect to what the rates might be. It makes good sense to put in the high figure now and then let them defend against it. This way if we are to err, we should err on the side of the public interest and let the insurance companies try to make the best case that they can. The negotiators for the Senate and House have wisely put into this bill a considerable increase in terms of appropriations ... operating appropriations in personnel ... for the insurance commissioner. As a result I think the commissioner will be much better able to deal with insurance companies.

"I am quoting again from the testimony given by Mr. Goss of the insurance industry: 'We feel it is important to get the tort reform concepts established in the law.' He had no real argument to make on these numbers. They were interested in concepts. This bill does that, as I say, Mr. President, and I think you would agree and other members would agree many of us have grave reservations about any of those concepts being in but we are trying to be constructive. We are trying to find something that we could in good conscience vote for and given an opportunity to succeed with. Therefore, if they are interested in the concepts primarily, this bill contains it.

"If we want to serve the public interest as well, the 37 percent figure will send an unmistakable message from this legislature that we intend to see that the public interest is well served in the process. Thank you."

Senator George then inquired:

"Mr. President, reference has been made to the bill before us. Mr. President, I don't have a copy of the bill. I have a copy of the committee report. It has no attachments to it."

The Chair responded:

"Senator George, the bills were printed and distributed several days ago. It's either in your office or wherever your staff may have placed the bill. Every member of the Senate does have a copy of the bill under discussion. We can get you another one."

Senator George continued:

"Is it not customary ... maybe these are unusual circumstances but it seems to me customary to attach a copy of the bill.

"It's very difficult, Mr. President, to follow amendments when reference is made to page and section numbers if we haven't the appropriate material distributed."

Senator Abercrombie interjected:

"Mr. President, I would be very happy to give my copy of the bill to Senator George."

The Chair answered:

"We'll see that Senator George receives a copy."

At 8:31 o'clock p.m., the Senate stood in recess subject to the call of the Chair.

The Senate reconvened at 8:35 o'clock p.m.

Senator Yamasaki, at this time, spoke against the amendment as follows:

"Mr. President, I rise to speak against the amendment.

"Members of this body, I believe that you will recall that during the last session of the legislature, the regular session, the position of the Senate was that House Bill 1692, H.D. 2, S.D. 2, tied together with House Bill 2525, that there should be a rollback in the cost of insurance back to 1982. However, during the course of the conference with the House and the Senate, we were not able to convince the members of the House on the rollback and today in this compromise bill, Senate Bill S1-86, I believe we have come a long way and the members of the House have come to agree to a rollback. During the discussion of the special committee assigned by the President on tort reform, there were all kinds of numbers recommended and in the final version we came up with the numbers of 10 percent mandatory rollback, a 12 percent increase in 1987, and a 15 percent in 1988.

"I believe that this represents a total package that we have in front of us and, therefore, I would like to urge the members of this body that the amendment be voted down."

Senator Hee then asked the Chair if the chairman of the Special Committee would yield to a question. The Chair posed the question and Senator Yamasaki answered: "What is the question, Mr. President?"

Senator Hee continued:

"Mr. President, will you ask the chairman, if this bill were to reflect the Senate position of the 1986 session, what would the percentage rollback be in the bill to reflect 1982 insurance costs?"

Senator Yamasaki answered:

"Mr. President, in the regular session of the legislature, I believe that the Senate did not propose any kind of a percentage, a definite percentage, but we said the rates of insurance, the cost of insurance, should go back to 1982 levels. That was the position of the Senate."

Senator Hee thanked the chairman and continued:

"Mr. President, in the absence of an answer to the direct percentage, one thing we can agree on and that is, since 1982 the cost of insurance has been greater than 10 percent, has been greater than 12 percent, has been greater than 15 percent.

"What this amendment does, Mr. President, is to highlight the fact that this state as well as the other 49 states are experiencing a manufactured insurance crisis.

"What this amendment does is clearly send a message to the consumers. It clearly sends a message to those businesses which are required to carry insurance and that is that the Senate as opposed to a 10, 12, and 15 percent buy-out plan, a compromise plan, has taken those same numbers and put it up front. It sends a message that is pro-business because it reduces insurance costs. It sends a message that is pro-consumer because as in the case, for example, of day-care centers they will not have to close down because they cannot afford insurance.

"It may not be the panacea but it certainly is one aspect of this session which consumers can see and consumers can understand and consumers can experience by staying in business and by benefiting from business.

"Thank you, Mr. President."

At 8:40 o'clock p.m., the Senate stood in recess subject to the call of the Chair.

The Senate reconvened at 9:33 o'clock p.m.

Senator Hee then rose to state as follows:

"After the caucus, Mr. President, there are several things which are very obvious besides the Senate trying to deal with a manufactured crisis and some members of the Senate trying to amend the bill. As with every bill or every amendment, there is a reality of the likelihood of passage and with reluctance, and it's beyond me, but it appears that the votes are not there to move the amendment so"

Senator Soares then interjected:

"Mr. President, point of order. I'd like to

ask for a recess, it's very important."

At 9:35 o'clock a.m., the Senate stood in recess subject to the call of the Chair.

The Senate reconvened at 9:36 o'clock a.m.

Senator Hee then withdrew his motion to adopt the amendment, and Senator Abercrombie withdrew his second.

Senator Henderson then offered the following amendment:

"SECTION 1. Senate Bill No. S1-86, section 3, is amended as follows:

1. By amending line 16, on page 2 to read: 'level increase in liability insurance during the'
2. By amending line 18 on page 2 to read: 'October 1, 1986, all authorized insurers transacting'
3. By amending lines 21 and 22 on page 2 to read: 'insurance commissioner for all policies containing motor vehicle or liability coverage, except medical malpractice'
4. By amending line 10 on page 3 to read: 'providing liability insurance in this State shall'
5. By amending line 12 and 13 on page 3 to read: 'containing motor vehicle or liability coverage from the rates in effect on September 30, 1987, for'
6. By amending line 18 on page 3 to read: 'providing liability insurance in this State shall'
7. By amending lines 20 and 21 on page 3 to read: 'containing motor vehicle or liability coverage from the rates in effect on September 30, 1988, for'
8. By amending line 4 on page 4 to read: 'liability insurance shall comply with the provisions'
9. By amending line 5 on page 9 to read: 'refuse to renew a liability policy if notice to the'
10. By amending line 8 on page 9 to read: 'liability insurance policy, once issued shall not be'

SECTION 2. Senate Bill No. S1-86 is amended as follows:

1. By deleting sections 9 and 10 (lines 18 through 23 on page 9, all of pages 10 through 15, and lines 1 through 3 on page 16).

SECTION 3. Senate Bill No. S1-86 is amended as follows:

1. By amending section 17, line 16 through 22 on page 21, lines 1 through 23 on page 22, and lines 1 through 9 on

page 23 to read:

'§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 4. Senate Bill No. S1-86 is amended as follows:

1. By deleting lines 1 through 11 on page 24.

SECTION 5. Senate Bill No. S1-86 is amended by amending lines 15 through 19 on page 24 to read as follows:

'§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 \$375,000. This section shall not apply to a medical tort as defined in section 671-1.'

SECTION 6. Senate Bill No. S1-86 is amended by adding a new section to read:

'§671- Noneconomic losses, limitation, excessive damages.

(a) In any action for medical tort, the plaintiff shall be entitled to recover for noneconomic losses, including compensation

for pain, suffering, physical impairment, and disfigurement. In any action subject to this section, recovery for noneconomic losses shall not exceed \$375,000.

(b) Any law to the contrary notwithstanding, a judge may award less than the amount of general damages returned by a jury for a medical tort if the judge determines they are excessive based on any one or combination of the following criteria:

- (1) Financial resources of the person to whom damages are awarded;
- (2) Age and life expectancy of the person to whom damages are awarded;
- (3) Duration of need of the person to whom damages are awarded;
- (4) The person to whom damages are awarded was fully informed and aware of the risks inherent in the medical treatment or procedure that caused the injury, but willingly undertook the risk because of the potential benefit; or
- (5) Any other factor bearing on the reasonableness of the award.'

SECTION 7. Senate Bill S1-86, Section 29 is amended to read as follows: 'Severability. If any provision of this Act, or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable; provided that Sections 2 to 7, Section 15, and Sections 17 and 18 are not severable and if any one of these sections is held invalid all of Sections 2 to 7, Section 15, and Sections 17 and 18 shall be invalid; provided further that Sections 2 to 7 and Section 13 are not severable and if any one of Sections 2 to 7 are held invalid, Section 13 shall be invalid.'

SECTION 8. Senate Bill No. S1-86 is amended to read as follows: 1. 'This Act shall take effect upon its approval, and Sections 2 to 7, Section 15, and Section 17 and 18 shall be repealed on October 1, 1989.'

SECTION 9. Senate Bill No. S1-86 is amended to renumber all sections accordingly."

Senator Henderson moved that the amendment be adopted, seconded by Senator Soares.

Senator Henderson then rose to state as follows:

"Mr. President, I think that the Clerk has distributed the amendment to Senate Bill S1-86 which is on each Senator's desk.

"Basically, Mr. President, this amendment does four things: It abolishes joint liability

and bases the person's damages on the degree of negligence. It puts a cap on all noneconomic damages of \$375,000, not just pain and suffering. It returns the recoupment of the assessment provision to the current law and, finally, it provides rate reduction to all lines of liability insurance, including motor vehicle insurance.

"Mr. President, this amendment does what needs to be done for tort reform. Basically, tort reform needs to address the 'deep pocket' and tort reform needs to put a cap on noneconomic losses. This amendment would be both of those things.

"It also provides for a reduction in all insurance rates, not just commercial liability rates. It provides a reduction in all insurance rates that deal with liability insurance so it really, truly would go to the consumer. It would affect his homeowner's policy and it would affect his auto policies so it truly passes the savings that are presented in tort reform back to the consumer.

"I think it's no question that when we have a system where the victim receives 37 percent of the money and the plaintiff's attorney and defense attorney and the costs involved eat up 62 percent of the funds we have something wrong with our tort liability system. Obviously, the way to change that is to vote for and approve these amendments to the bill.

"I truly believe that if the State of Hawaii follows through on meaningful tort reform we will certainly see a change in the crisis which is affecting businesses in this state and I urge the members to vote for this reform."

Senator Soares spoke in support of the amendment as follows:

"Mr. President, I rise to speak in favor of the amendment and, hopefully, to make an impact on my colleagues on the Senate floor as to why the amendment is important for us to vote for and, also, why the Senate in this case should review its position on tort reform. As I see it now, we have acquiesced to a package that has been agreed to by a committee and no matter how you want to make an amendment to make the bill better, no matter how you want to make the bill reach the consumer as we had hoped to, the answer is 'no' because we have a package that has been framed that way.

"Mr. President, Saturday morning your committee chairman and we on the committee sat and listened to testimony from no less than 35 people and not one of the testimonies received spoke in favor, totally, of S1. In fact, almost unanimously, they all had amendments which they

believed very strongly that we had the hearing to hear from them. But I must say for the record that I am unhappy because we did not have the hearing for them at all.

"I understand ... I didn't see the television cameras at six o'clock on Saturday evening ... but the question that I asked our insurance commissioner apparently came across on television causing my phone to ring all weekend. When I asked the insurance commissioner whether or not the person on the street, the average Joe Blow and Mary and Sally would benefit in the automobile insurance and the answer was 'no.' And I asked him, is it fair to say then that this bill before us that we are having a hearing on will not in fact benefit the public, and the answer was 'no.' Obviously, then, Mr. President, the bill is going to benefit those who made a deal with the lieutenant governor prior to the convening of this so-called special committee's hearing on Saturday.

"Mr. President, I have here in front of me a number of copies of testimonies by various people who testified on Saturday. For example, the testimony by the attorney general — 'We prefer the complete abolition of joint and several tortfeasor liability as we repeatedly testified during the regular session.'

"The department of health supported our position on amending the bill. The insurance commissioner could not stand behind the bill. The administration did not show up to testify for the bill but the insurance commissioner obviously did.

"Why are we sitting here tonight putting the bill before us to vote with no amendments and just go with the bill as it is? John wants the bill.

"Mr. President, if we are going to exercise the independence that you so proudly talk about in the Senate and we ourselves here in the Senate have taken a lot of pride in, when we have a public hearing let's open our ears to the public. Let's have the amendments discussed and debated on the merits in order to make the bill better for the guy in the street. That's what we are here for. We are not here to represent the insurance industry, the trial lawyers and those groups who have commanded this bill to become an act and locked into concrete for their benefit.

"I believe we have before the body a good amendment that makes the bill what it should be. I believe that my colleague's amendment before us, again for the public, fell on deaf ears.

"Mr. President, I don't think we have to rush five days, get a bill through just to say we have tort reform. I believe we should

take seven days or ten days or fifteen days and if we truly are concerned with the public then the amendments be addressed and if they are worthwhile and they are going to do the job for the public we should pass the amendment. I believe before you you have a very good amendment. It addresses the concerns that were raised by all the people who came down.

"It seems very unfair, my fellow Senators, to all those people to find out that we never intended, in the first place, to make a single change on their behalf on the bill. It seems unfair to me to have you vote for a bill knowing full well that while there are some things you like and some things you don't like, what you like or don't like doesn't matter, the bill goes as it is. Why, because that's the way they want it.

"For once in our lives step back and find out exactly how we feel about the guy on the street.

"Mr. President, I urge all my colleagues to support the amendment. It means we've listened to those who testified for the bill on Saturday. Thank you."

Senator Cobb then rose to speak against the amendment and remarked:

"Mr. President, I'm going to speak against the amendment and in doing so point out that the witnesses who came to testify were by no means unanimous in their support of the bill. Several of the witnesses called the bill, S3, which I imagine is incorporated in this amendment before us 'an unmitigated disaster for victims.'

"In fact, there was considerably strong testimony to that point because of the sweeping changes involved in the joint and several doctrine and in the cap on noneconomic lawsuits.

"I don't think that the bill that was presented has been unchanged. In fact, after the initial presentation to the Senate caucus as a whole and to the House several substantive changes were made. For example, duty to defend was taken out. Several other changes I think were proposed both in the House and the Senate and were also addressed but I recall that one in particular because it engendered a good deal of discussion.

"One of the reasons that we are meeting so late tonight is because there have been a number of considerations for further changes to the bill which have been discussed in great detail. I for one as a member of this special committee have not felt locked in and have tried to keep an open mind as to any and all proposed changes.

"If there is anything that can be said

about the bill is that most people either felt it wasn't or it was too much, depending on which side of the spectrum they fell. Most trial attorneys felt it was way too much. Most of the people in the medical or business community felt it wasn't enough. In short, most of the special interests involved are not happy with this bill. Perhaps that means that public interest is being served because it is a series of compromises.

"The figure that was arrived at of \$375,000 is not an arbitrary figure for pain and suffering. What was done was, the legal community was asked for what is the highest award in Hawaii on pain and suffering. The information was received back was, to date, at \$300,000, at least for an award or judgment in Hawaii. Not on the Mainland but here. And so the discussion that took place was then arriving at some figure above that — \$350,000 — \$400,000 some wanted to go as far as \$500,000. So the \$375,000 figure is a compromise above that highest previous judgment in Hawaii.

"But I think, Mr. President, it is erroneous to say that all of the witnesses who testified were in support of S3 as opposed to S1. In fact, looking"

Senator Soares interjected:

"Mr. President, point of order. I did not say the testimony was all for S3. That's wrong."

Senator Cobb responded:

"Mr. President, I think that was the impression that was conveyed and I merely wanted to correct that for the record.

"Looking at the testimony that was presented, it's roughly half and half. Half in favor of S1 as was heard, many favoring amendments to it, not satisfied with it, wanting more, the other half, roughly speaking, opposed for wanting further changes made.

"Mr. President, the amendment before us, if it's adopted, should call for a much greater insurance rollback because the impact in the tort law is concurrently much greater. What's being proposed before us is to take the same amount of rollback that has been agreed to and adding a great deal more of changes in tort and loss of victim's rights.

"Thank you."

The motion to adopt the amendment was put by the Chair and, Roll Call vote having been requested, failed to carry on the following showing of Ayes and Noes:

Ayes, 4. Noes, 20 (Abercrombie, Aki,

Cayetano, Chang, Cobb, Fernandes Salling, Hagino, Hee, Holt, B. Kobayashi, Kuroda, Machida, Matsuura, McMurdo, Mizuguchi, Solomon, Toguchi, Yamasaki, Young and Wong). Excused, 1 (Kawasaki).

At this time, Senator McMurdo rose to speak against passage on Third Reading of S.B. No. S1-86 as follows:

"Mr. President, I didn't speak to the Republicans' amendment because I think it went far, far beyond the bill that is before us right now but I do rise to speak against this bill.

"Mr. President there is not one shred of evidence produced on Saturday or any other time which indicates that if we put in tort reform that we are going to see liability rates go down. On the other hand, there is plenty of evidence which suggests that tort reform will do nothing to bring rates down and in the meantime we will be touching a civil justice system which I think the consumers should expect us to uphold.

"One of the things in this scheme — this manufactured crisis of insurance companies — as the 'St. Petersburg Times' said, '... the push to tort reform is a cynical scheme to pin the blame on the courts for the current high cost of commercial liability insurance while allowing the insurance industry to escape blame for its own financial mismanagement.'

"The article from 'Consumer Reports' of August of '86 states that with evidence that this is true and I will read from it: 'The insurance industry is trying to turn its crisis into an opportunity — a chance to press for one of its favorite objectives, "tort reform." In plain words, the industry's version of tort reform means placing limits on the rights of injured people to sue for and recover damages.

"The latest round in the industry's long-standing campaign began in early 1985. At that time, insurance-industry leaders already knew that a cycle-borne crisis that would necessitate jarring premium increases was brewing. The industry launched an advertising complaint program aimed at U.S. opinion leaders — politicians, business leaders, executives, and journalists.

"In June, 1985, John Byrne, then chairman of the board of Geico, a major insurance company, told the Casualty Actuaries of New York that "the insurance industry should quit covering doctors, chemical manufacturers, and corporate officers and directors." Byrne also said, "It is right for the industry to withdraw and let pressure for reform [tort] reform build in the court and in the state legislatures."

"In other words, they've sat back, put out this campaign and then started putting up the rates of insurance so that consumers got very upset and began to pressure for the very tort reform which the insurance industry wanted themselves.

'In early 1986, the Journal of the American Insurance pointed to the tort-reform movement as a superb example of coalition-building by the insurance industry.

'This March, the Insurance Information Institute announced a \$6.5 million advertising campaign to sell "the lawsuit crisis."

"This, I believe, is proof positive that this insurance crisis although the crisis itself was not manufactured, certainly, this move for tort reform has been and, I'm sorry, I cannot support anything which in any way will take the rights of citizens, put caps on pain and suffering, touch the joint and several liability, at this point.

"Thank you."

Senator Henderson then asked if the chairman of the special committee would yield to a question. The Chair posed the question to the chairman and Senator Yamasaki having answered in the affirmative, Senator Henderson inquired:

"Mr. President, in the bill as we have before us this evening, under Section 17, it talks about the abolition of joint and several liability. I wonder if the chairman or anybody here who is supporting the bill could point out to me torts that would be exempt by this section."

Senator Yamasaki responded:

"Mr. President, Section 17 states that '... joint and several liability for joint tortfeasors as defined in section 663-11 is abolished except in the following circumstances:

(1) For the recovery of economic damages against joint tortfeasors in actions involving injury or death to persons;

(2) For the recovery of economic and noneconomic damages against joint tortfeasors in actions involving:

- (A) Intentional torts;
- (B) Torts relating to environmental pollution;
- (C) Toxic and asbestos-related torts;
- (D) Torts relating to aircraft accidents;
- (E) Strict and products liability torts; or
- (F) Torts relating to motor vehicle

accidents except as provided in paragraph (4).

(3) For the recovery of noneconomic damages in actions, other than those enumerated in paragraph (2), involving injury or death to persons against those tortfeasors whose individual degree of negligence is found to be twenty-five per cent or more under section 663-31. Where a tortfeasor's degree of negligence is less than twenty-five per cent, then the amount recoverable against that tortfeasor for noneconomic damages shall be in direct proportion to the degree of negligence assigned.

(4) For recovery of noneconomic damages in motor vehicle accidents involving tort actions relating to the maintenance and design of highways including actions involving guardrails, utility poles, street and directional signs, and any other highway-related device upon 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. In actions in which the affected joint tortfeasor has not been shown to have had such reasonable prior notice, the recovery of noneconomic damages shall be as provided in paragraph (3)."

Senator Henderson then remarked:

"Mr. President, that doesn't answer my question."

Senator Yamasaki responded:

"Well, that is my answer."

Senator Cobb then remarked:

"Mr. President, I'll take a try at it. I think we're all entitled to our stabs so if I may.

"It exempts negligent medical malpractice torts or other negligent actions other than those exceptions that have been read, all common torts."

Senator Henderson then inquired:

"Medical malpractice where there is no injury or death, right?"

Senator Cobb answered:

"Negligent medical malpractice."

Senator Henderson continued:

"Well, how do you get ... but if there is injury or death it's not exempt, is that right? Can you give me an example of a medical malpractice tort that didn't involve

injury or death?"

Senator Cobb answered:

"Yes. The prescription of a wrong medicine or"

Senator Henderson interjected:

"Isn't that injury?"

Senator Cobb replied:

"Not necessarily. An adverse reaction is not necessarily considered injury."

Senator Henderson remarked:

"Well, that's your opinion. Can you give me another example? Is there anyone else who'd like to take a try at it?"

The Chair then asked:

"What is the point, Senator Henderson?"

Senator Henderson answered:

"What I'm saying, Mr. President, is that this does not do anything to eliminate joint liability from the tort law. There's nothing eliminated."

Senator Cayetano then responded:

"Mr. President, may I take a crack at it?"

"Mr. President, I was discussing this with Senator Chang and actually we thought we had gotten them all but we missed a few.

"For example, if Senator Henderson got injured on his boat that would not be covered."

Senator Henderson then asked:

"On a boat?"

Senator Cayetano answered:

"It doesn't include water craft, Senator."

Senator Henderson continued:

"No, but if I'm injured it's not covered, right? There's no elimination of joint liability if you're injured."

Senator Cayetano then asked:

"You're speaking about the exemptions, right?"

Senator Henderson answered:

"Yes."

Senator Cayetano continued:

"Okay. Wasn't the question which torts are not covered?"

Senator Henderson answered:

"Yeah, what exemption ... where is the joint liability exempted? If you're injured you're still liable for joint liability on economic damages."

Senator Cayetano then continued:

"Economic damages. Your question does not go to noneconomic damages ... okay. I thought maybe you were trying to find, pursuant to our earlier discussion, the torts which were covered and as I said"

Senator Henderson interjected:

"I know all the torts that are covered. I'm trying to find the torts that aren't covered."

Senator Cayetano answered:

"Good luck."

The Chair then remarked:

"Senator Henderson, would you like to enlighten the body?"

Senator Henderson responded:

"There is none, Mr. President. That's the answer. This bill does nothing."

The Chair remarked:

"Okay. That's the conclusion."

Senator Cobb then said:

"Mr. President, just to respond further to the Minority Leader's question.

"If the tort, except for the list of exceptions that is provided, any tort that gets into the area of noneconomic damages is joint and severable. The theory behind that is that the individual or the victim should be made whole on his or her economic loss including the application of the joint and several doctrine but on the noneconomic loss, if the threshold of liability is 25 percent or less then the joint and several is repealed as it is also repealed in property losses. The theory and the compromise here is to make the victim whole on his or her economic losses and then"

Senator Abercrombie then interjected:

"Point of order, Mr. President. Is the speaker speaking for or against this bill?"

Senator Cobb responded:

"Point of order, Mr. President, I was merely responding to the Minority Leader's question."

The Chair remarked:

"Correct. Just a response to your inquiry, Senator Abercrombie."

Senator Abercrombie then rose to speak against the measure and said:

"Mr. President, I stand and speak against this bill till we can get some clarity.

"Mr. President, I went to the hearing on Saturday in good faith hoping that I could find some way to respond positively to this bill as you know and other members know I have long been on record, publicly and in private conversation with my colleagues here, with respect to protecting the rights of victims.

"Mr. President, the testimony given by the administration with respect to this bill is probably the single most embarrassing instance of incompetent testimony that I have ever witnessed in the legislature. The attorney general's office was totally unprepared to testify on the bill. No attorneys general, no deputies were there who have engaged in litigation in any way that could comment on the bill. The attorney general's office was unprepared to testify on the constitutionality of any of the provisions in the bill. They stated they did not have enough time to prepare for giving us any kind of opinion as to the constitutionality of any of the provisions. When I asked for any information, any information of any kind with respect to what might be termed excessive awards under the present tort system, the chief deputy attorney general representing the attorney general at the hearing was unable to give me a single instance of any excessive award.

"The attorney for the County of Kauai, Mr. Graham, was in the most uncomfortable position as a professional and admitted it from a personal point of view as an attorney that the presentation made with respect to the counties and the 'deep pocket' situation ran counter to common law which traditionally went to the plaintiff.

"Mr. President, the most single, precious right that exists in the United States of America is the right of any individual to seek redress in our courts for any injury done to that person whether in the criminal or on the civil side of life, particularly in the civil justice system which is involved in this bill, the individual must have the right to seek counsel and to seek redress in a court against anyone particularly those of high station or of great power. No institution including the United States of America

itself is immune from that kind of opportunity for the individual in this country. It distinguishes us from every other nation on earth.

"How are the people at Chernobyl in the Soviet Union to gain redress for the grievances they have today as we meet? A hundred thousand plus people driven from their homes probably forever ... over and above the deaths to come, the deaths that have already occurred and the grievous injuries which have been suffered. The loss of property, the loss of emotional stability, the loss, literally, of an entire region of the earth because of neglect, because of dereliction of duty. To whom do they turn? Who will represent them? Or if we were in Iran or we were in South Africa? We pride ourselves in this country on the individual being able to come into court to state their case, to go before a jury and to ask whether justice will be done for them.

"No one should lightly overturn any aspect of the tort system which has been hard won not over painful years but, literally, centuries in the common law so that the average man or woman could stand against even king and country and ask for the right to prevail on the basis of justice and we come so casually to this floor and say we are going to overturn that system.

"I have stated in the caucus, I have stated in other forums, and I state here tonight that I came to the judiciary committee uninformed as to the history of the tort system and prepared on the surface from what I had seen to perhaps go for some modifications, especially with respect to joint and several liability and I concluded, at the end of extensive discussions held in the judiciary committee, in fact, seminars, learning opportunities that this system had evolved for good and sufficient reason and that it was the most fair in the end. That it was only right where the individual needed assistance and deserved economic and noneconomic assistance in order to achieve justice that should there be a governmental entity involved in any way that that entity should be made to pay because then the costs associated with whatever was awarded could be spread among the general populace so that no one individual would be burdened entirely with the amount to be paid to the degree monetary damages were awarded. This is only right because the individual is injured and it's the individual in this country that we are supposed to be looking out for. Who's looking out for the individual in this bill? I don't see it.

"The Health Department was told insurance companies will no longer write insurance. Where in this bill will the insurance companies be required to offer it? I don't see it. The spokesperson for the insurance industry, Mr. Goss, was absolutely

delighted ... totally disinterested in the discussion that was taking place on Saturday ... diffident, casual. He stated and I quote, '... we feel it is important to get the tort reform concepts established in the law.' We are apparently passing concepts tonight not law. As far as he was concerned they'll take the paper loss on these rates, these cutbacks, so called, and get it back when they do their ballet with the books which will take place in front of the tax commissioner.

"The entire panoply of accountants, economists, bookkeepers, actuaries, executives, lobbyists, everybody will line up to beat up on the consumer and we want to aid and abet that process with this bill. Mr. Goss considered the 10 percent and I quote, '... a worthwhile investment' He mocks us to our faces and says pass this bill. The 10 percent rollback is called by the insurance industry, in a public hearing, an investment. I repeat, he mocks us to our faces.

"There is no basis for the rollback at all. As an aside, he said it's done by guesswork, approximations, and negotiations and said he was proud to be consulted as to what that number should be. Who was there to represent the victim? The plaintiffs' attorneys? They have their own association. I hear special interest being discussed all over this floor tonight. Where's this real special interest? The average man and woman in this state that pay their taxes and ask us to represent their best interests. That's not what has happened with this bill.

"A councilman got up from one of the neighbor islands and said he didn't want to punish the taxpayers. He didn't want to punish the taxpayer by having joint and several liability be spread among the entire population. I pointed out to him, is it punishing the taxpayers to support public schools, to support medicaid for those who do not have the funds in order to make their medical payments? To support public transportation? On the contrary, it is well established in our country that in matters of public policy where the public interest is served that we join together to see to it that whether or not you have a child in school you nonetheless support the public school system because it is in the interest of the community to do so, and we should do it gladly. The same with seeing to it that everyone gets proper medical attention or that transportation is available to our populace. We are not punishing the taxpayer in that respect, we are punishing our citizens when we take their rights away.

"It was stated by the insurance commissioner and I quote, 'You cannot say this is the problem and that's it.' But that is exactly what we are doing. We are

talking about cost and availability of insurance but we are saying it is the tort system that is the cause of high cost and sometimes unavailability of insurance and yet there is no evidence offered whatsoever. None has been offered in the hearing. None has been offered in any of the papers. None has been offered here tonight. I haven't heard any of it ... to show that there is a relationship direct or even indirect that can be made.

"You cannot say this is the problem and that's it. If we cannot do it and it is the tax commissioner that is saying that ... excuse me, the insurance commissioner ... might as well be the same thing. The insurance commissioner is saying it then how can we pass this bill? The insurance commissioner quoted the Crosby report which he apparently gave great emphasis to because it was a legislator responding saying that the public has a right to expect action if there was tort reform, so called, with respect to the cost of insurance. Didn't say there was going to be a guarantee, just that we had a right to it. We have a right to expect action. I think we have a right to expect the defense of people's interests.

"Now in respect of that, how are we defending anybody's interest with this bill? The victim's interest, how are we defending it? Can someone illuminate it for me how that's done with this bill?

"The insurance companies are flying in the face of the testimony given by the spokesman for the Kokua Council for Senior Citizens who said and I quote, '... the tort system is the only viable control over corporate conduct in the country today.' How else is the average person to defend himself or herself? I have the right to choose anybody that I want to defend me in such a case. You cannot tell me, at least if this still remains a democracy, what I shall pay that person, what my arrangement shall be. That's my business as an injured party. Not yours, not this legislature's. It shouldn't be.

"We let the insurance companies go unregulated. They are not subject to any kind of regulation on a national basis. They can go anywhere and do anything that they want and that's what they are doing to us. In any other context, Mr. President, this would be blackmail. The prosecutor should be in on this. It's extortion.

"There was no credible evidence of any kind given to justify the passage of this bill other than to satisfy the interest of the insurance companies who are already making an ungodly profit. It was less than a year ago that we had the same kind of situation prevail — a crisis, supposedly, in workers' compensation — and it turns out it's the most profitable line of insurance

that they have, but, we don't hear anything anymore about it. I guarantee you the same thing is going to happen with this.

"I've gone on at length for good reason because I want it on the record before I leave this legislature that the last act that this senator was associated with, to his great regret, and it's not going to be a 'yes' vote, it's going to be a 'no' vote in defense of the things that I think are associated with the Democratic Party.

"Mr. President, I tell you that it is a source of great pain to me that the Minority Floor Leader has to stand up and give a speech that should be given by every Democrat on the floor. Not only with respect to the public hearing but with the sum and substance of the process. I voted against the amendments contained in the floor amendment submitted by Senator Henderson because I oppose the elements contained in there which I believe do violence to victim's rights. But the process associated with the arrival of this bill is something that cannot be denied, unfortunately, with respect to failure to act in the public interest and to respond.

"My conclusion is this. I resent and refute any statement that we have failed to pass something; that we failed to act. It is not a failure when you defend the first ten amendments to the Constitution — it is a triumph. It is not a failure to act to defend the rights of victims, all victims of any station in life — it is a triumph of democracy. We should defeat this bill because as Democrats and as Republicans on a nonpartisan basis we should be defending the people of this state and the people of this country against private interests who want to take away the hard won rights that belong to everybody.

"Thank you."

Senator Yamasaki rose to speak in support of the measure and remarked:

"Mr. President, I thought that I would be quiet and effective, but, I am now compelled to speak in favor of Senate Bill S1-86.

"Mr. President, your Special Committee on Liability and the General Fund Expenditure Ceiling, composed of 13 members, conducted its public hearing on Saturday, July 26, 1986, at 9:35 a.m. at the Capitol Auditorium.

"Two bills relating to torts, Senate Bill S1-86 and Senate Bill S3-86, attracted 35 people who presented testimonies representing the state departments, hospital and medical associations, insurance industry, counties, plaintiffs attorneys, Chamber of Commerce, labor unions, nurses

groups, Kokua Council and others. The hearing was concluded after seven and a half hours of testimonies.

"Mr. President, in the June 30, 1986 issue of the 'Pacific Business News' in its article on an insurance study conducted by a former insurance executive, Paul L. Brown, it stated that 'Hawaii may not be a paradise for insurance companies, but it's no purgatory either, and that the 306 companies licensed to write property and casualty insurance here experienced a claim cost of only 63% on their Hawaii business in 1985 compared with 80% for all of their business nationwide.'

"Mr. Brown is also quoted as saying, 'We (in Hawaii) have a tremendously negative image relative to business. All the Mainland insurers hear that our legislature is labor bound, that we've got the most atrocious workers' compensation laws in the nation, but when you put all the numbers together, its surprising how good they were. Another surprising finding was a loss ratio of 55% for the \$187 million worth of workers' compensation premiums earned in Hawaii last year.'

"The study also showed, according to the article, that insurance companies in Hawaii fared better than the national average in general liability insurance which has been at the center of the tort reform debate. It said that the study also showed that despite insurance companies' claims of horrendous operating losses, the companies generally had a healthy bottom line when figured with generally accepted accounting principles and companies' investment income. For example, the article continued, the 306 companies licensed in Hawaii last year had \$175 billion in gross premiums written last year, and after adding adjustments and unrealized capital gains — such as increased portfolio values — those companies had a \$7.3 billion profit.

"Mr. President, we are reading more and more that this insurance crisis is nothing but an orchestrated campaign at a cost of \$6.5 million dollars by the insurance industry to turn its crisis into an opportunity — a chance to press for one of its favorite objectives, tort reform.

"This information is contained in the August issue of 'Consumer Reports,' as a previous speaker has said, and it tells us when the campaign started in early 1985 and by summer of 1985 insurance rates started rising and liability insurance consumers began to feel the squeeze and they started to complain. The insurance industry was telling the consumers that greedy lawyers and excessive jury verdicts were to blame for the increasing insurance rates. Mr. John Byrne who was chairman of the Board of Geico, a major insurance company, said it is

right for the industry to withdraw and let pressure for tort reform build in the courts and in the state legislature.

"And here in Hawaii, the pressure did come from the business people, the professionals who began a letter writing campaign, and the latest was the editorial of the Chamber of Commerce of Hawaii called 'Viewpoint' which directed its members to pack the Capitol galleries, walk the hallways, show up at hearings and camp out in legislators' offices. Apparently as a last ditch effort to achieve tort reform.

"During the regular session of 1986 which ended on Wednesday, April 23rd, an honest attempt was made to resolve the tort and insurance reform issues. However, given the time constraints, the subject matter was in effect deferred.

"S.B. S1-86 represents a compromise in the areas of concern held by the different interest groups. It was not an easy task for the special committee of the House and Senate because the interests of the major groups had to be given consideration. Because this is a compromise bill in an attempt to make liability insurance available and affordable, I believe that a major step forward has been taken, and with the strengthening of the insurance commissioners office, the state will be able to do a better job in regulating the insurance rates in Hawaii.

"Therefore, I ask that serious consideration be given in casting your vote so that passage of this bill by the Senate can be assured and further work, if necessary, can follow and a review be made during the next session after the areas covered in the bill have been implemented.

"I grant that this is a 'hot potato' and it may be difficult to swallow, but if you chew it carefully with caution, I am sure it will not cause any serious digestive problems that may necessitate any tortious action.

"Therefore, I ask for your vote for the passage of this bill even though it is not armor clad and this bill may have to crawl over to the House.

"Thank you very much."

Senator Cayetano also rose to speak in support of the measure and said:

"Mr. President, I rise to speak in favor of the bill.

"Mr. President, I'm voting for this bill primarily because of the prescription of Dr. Yamasaki. I think others have made the point that this is based on a questionable premise, namely, that tort reform is the cause of the insurance crisis. Others have

addressed that issue I think more eloquently than I can and I will not go into it.

"I would hope that and I think the mood now is appropriate for the Senate to consider, Mr. President, that the ad hoc committee continue its work in this area. Continue its work in terms of looking at the different alternatives for bringing about insurance reform because I think the information that is now becoming available to us indicates that the charges that the so-called liability insurance crisis is a manufactured crisis has substantial basis to it.

"Part of the problem, Mr. President, is that insurance companies have a very deceptive way of doing their accounting and I would suggest that the ad hoc committee, if, Mr. President, you deem it appropriate for the committee to do more work in this area, begin to look at ways to regulate the way the insurance industry reports information to the insurance commissioner. For example, we have already made some strides in this direction in workers' comp where just recently we are now requiring the insurance companies to report investment income. The same, I think, should apply for any rate requests for all other lines of insurance.

"We also, Mr. President, should look at ways to regulate to bring about stronger controls or set some guidelines for the way insurance companies set aside reserves for losses. We all know that when they set aside reserves they get a tax break on it and they put the money in the bank to generate income while they do enjoy the benefits of the tax break. This is another area that we can look into.

"Much of the 'shibai' in terms of the losses claimed by the insurance industry come about because of these very complex and deceptive accounting practices.

"One other area that I think that this Senate can look at is the matter of the joint underwriting provision that is now part of the no-fault law. I think that would be a very appropriate vehicle for this Senate to consider next session and have that apply to liability insurance as well.

"One final word about the insurance companies and the ten-year cries they make about losses and crisis.

"A couple of years ago there was a workers' comp crisis. Workers' comp rates shot to the ceiling and what happened was that the insurance industry blamed that crisis on our liberal courts and also on our workers. Well, the answer, after much consideration and hearings from the legislature, was a state-funded workers' comp. The insurance industry of course is

very much concerned about that because it takes away business from them. The reports that we have from other states, for example, Minnesota, as I understand it, has given a 70% reimbursement on premiums to employers, and I am informed that California, which also has a state-funded workers' comp system, refunded approximately \$258 million to premium holders also. That is why we went into workers' comp and now we don't hear much from the insurance industry about so-called workers' crisis. They seem very, very quiet hoping I guess that the state-funded workers' comp will never be funded.

"Perhaps we should go back a bit further. Maybe back to 1972 when this legislature was persuaded, primarily through the efforts of the insurance industry and also the Honolulu Star-Bulletin, I believe, to enact a no-fault insurance system. Well, that system was supposed to bring about some relief in insurance rates for automobiles and of course we know that hasn't quite happened.

"It's really unfortunate that we are in the situation that we find ourselves here tonight ... but I suppose that the doctors, the business people and all those other parties, the professionals who are calling for tort reform as the answer to their insurance problems will have to find out the hard way that insurance relief will not come about just because we institute tort reform. The evidence is very clear. It's crystal clear. Senator Yamasaki pointed out the reports by 'Consumer Reports' and there is a report by the National Association of Attorneys General Ad Hoc Committee; there are reports from all kinds of organizations and magazines and newspapers who are finding out the hard way from their experience, the Seattle Times for example, that tort reform does not automatically lead to any kind of insurance relief.

"The pressures are such that all the parties are going to have to learn the hard way and with the passage of time I think we are going to see that Ralph Nader was correct when he said we should sit back and reflect and wait a year because at about that time the profits of the insurance industry will be so obscene that they will no longer be able to justify the kind of rates that they have been charging the public.

"The Executive Letter' recently reported that the 1986 first quarter earnings for the casualty-property insurance industry went up roughly about 1300% over the 1985 first quarter earnings. That kind of information is becoming more and more available and as that kind of information is made more available to the public I think you are going to find there will be a mood and a tenor to consider once again the rights of victims. Some of us will not be here to see that this

is done. I hope that those of you who will be here will strongly consider moving in that direction.

"Thank you."

Senator Chang also supported the measure and remarked:

"Initially, let me say that I am heartened by the statements of the Senator from the 16th Senatorial District. I can think of no better statement of the objectives and purposes of the joint and several liability principles then was uttered in his declaration for the rights of victims. His statements are a demonstration that the time and resources that went into organizing the seminars and workshops for members of the Senate Committee on Judiciary were well worth the effort; effort that we hope to continue in coming sessions.

"Regrettably, we differ on the application of those principles to the provisions of this bill and I find myself ultimately persuaded by the needs and concerns raised by the special committee that this legislation is necessary. I do have reservations, however, about some of the provisions of this bill and have so indicated that reservation in the committee report.

"One major reservation that I do want to bring out is found on page 7 of the committee report. In the first line of that page the statement is made: 'It is the intent of your Committee that the prior occurrence be at the same location as the occurrence on which the tort claim is based but the term "similar circumstances" is not intended to mean that a prior occurrence need be identical or exactly similar but instead be generally the same.'

"Mr. President, the matter of prior occurrence being at the same location was never raised to your special committee and this is not a question that was considered and decided. I do believe, however, that this misimpression is not fatal to the report or to the bill because I believe that the provision made in the bill is clear on its face and does not need a statement of clarification as to whether any locational nexus needs to be established between the prior occurrence and the claim upon which the tort complaint is based. However, I think it might be prudent to prevail upon the House to make a statement as to the real intention of the legislature even though, as I stated previously, the provision appears to be clear on its face that locational nexus is not necessary.

"Thank you very much."

Senator Cobb, also in support of the bill, said:

"Mr. President, very briefly speaking in favor of the measure.

"A statement was made earlier today that perhaps bear repeating that the bill itself is not a solution but it is a test or an experiment to determine if the changes that are being made will work based on the experience to be gained over the next three years.

"I think one of the more important features in this bill is a 'drop dead' clause to ensure that there will be a legislative review for a future legislature. We are not in this bill abolishing the right to sue in court. We are providing for an expanded arbitration system with the guarantee that any party not satisfied with the arbitrator's decision may take their case to court.

"In addition, I too am concerned about the numerous statements that have been made about a manufactured crisis and I think in this case the bite that is in this bill must apply equally to those who insure and to those who collect, including those who are not yet regulated nationally.

"Earlier this year we reported out a resolution asking for national or federal regulation of the re-insurance industry which is not yet regulated, either by the states or by the federal government. A need is clear for national regulation and if this test does not work in this bill then I think the provision should properly be sunsetted.

"Finally, Mr. President, there is a change in the burden of proof under the insurance filing which is very significant and yet seems to have been largely overlooked. Up till the present time when a filing is made, normally, it is the insurance commissioner that must then gather the facts to disprove the data contained in the filing. Now under the file and prove system that is contained within this measure the burden of proof shifts. It is the insurers who must prove that the mandated rollbacks contained for the next two years are wrong and the standard is no longer the profitability of one line of insurance. It is the solvency of the entire company. That is an extremely significant change in the burden of proof which has to be brought to public attention. I, for one, will be watching very closely the activities of the insurance commissioner, the beefing up of his staff, to insure that the intent of this bill insofar as the rollbacks are concerned are followed.

"I think if this is a manufactured crisis it should be made as a public statement because you cannot manufacture a crisis and take away people's rights and expect it to stay permanently if the data that you claim as a justification for that does not in fact happen.

"I hope that my colleagues are as watchful also to monitor this and see whether or not what is projected comes to pass.

"Thank you, Mr. President."

Senator Abercrombie then said:

"Mr. President, I wonder if the previous speaker can illuminate for me then why we're passing the bill. Everything that I have heard from everybody standing up saying they are in favor of the bill is preceded by statements indicating that, if you take it on its face, is an argument against the bill. And the last speaker stated outright, when we take rights away if the facts don't warrant it they shouldn't be taken away permanently. Why are we taking it away in the first place for, if we don't know what the facts are? Is this what this is an experiment and a test? If that is what it is that's an argument against passing the bill.

"Let's get the facts first and then pass a bill, not pass a bill and see what the facts are, not when you're dealing with people's rights. We don't need crocodile tears over people's rights we need them protected.

"He says there's going to be a legislative review for a future legislature. Have the review and then the legislation, not the legislation and then the review.

"Virtually every statement made on behalf of this bill has been preceded by extensive analysis which indicates that the bill is either not needed or is ill-advised. Before we vote on this bill I ask everybody to examine whether or not they can say with certainty that they have any idea that the facts are at hand which allows them to minimize in any way people's rights. I will cite you an example. We are putting a cap on pain and suffering ... pain and suffering in the United States of America. Now if that isn't taking away someone's right I don't know what is. Is that a test? Is that an experiment? Are we supposed to see how much pain and suffering a burned victim should go through for three years and then make some decision? I don't care whether the highest rate that's ever been paid was \$300,000. Tomorrow it might be \$400,000 or \$500,000.

"I've sent to every single Senator on this floor a statement by Senator Daniel Inouye who is in a good position to understand what it's like to lose a limb, stating quite clearly that what might be satisfactory to him might not be satisfactory for somebody else. I have sent out a compendium of articles with respect to victims like burn victims.

"I just don't understand how it's possible

for us who are supposed to be representing the average person to stand here and say that we are going to experiment with your rights for three years and if it doesn't work out maybe we'll give them back to you. It seems we have the case backward. We should not be associated with such a bill and we should not have such specious reasons for supporting it."

Senator Cobb then responded:

"Mr. President, rising in rebuttal.

"Mr. President, we can say until ad infinitum that we need to develop the data. The only way to develop the data is to have the change in the law and see what happens. Otherwise, we could be looking at the experiences of other states whose changes are not identical or in many cases similar to this and justify continual delay, continual non-action, continual denial of insurance relief, a continual refusal to act.

"I don't regard an arbitration proceeding as a denial of the right to sue. I don't regard all of the exemptions provided in this bill which were agonized over in terms of the concern for victim's rights in the Senate as a denial of the right to sue. If anything, the arguments that were made in the hearing were that by exempting the other elements of noneconomic damages we would be providing for an opening for attorneys to claim for damages other than pain and suffering in a noneconomic suit. That may be the case, but the only thing that's going to show that happening is experience.

"We can sit here and do nothing. We can sit here and rationalize why there should be no action. We can sit here and say let's wait another year; let's wait another two years; let's wait until we get more data. But unless we make some changes in the law and gather the data at the same time we have no way of knowing directly and financially whether or not the changes and the rollbacks are either excessive, adequate or not enough.

"Thank you, Mr. President."

Senator Abercrombie then remarked:

"Mr. President, I appreciate that rebuttal because it makes it quite clear that the victims in the state are to be utilized as

guinea pigs for this experiment. That's a delightful position to take.

"This refusal to act. To act on behalf of whom? Arbitration? It's not binding. The suits can go on and as for rationalization I'm perfectly content to rationalize pain and suffering; that's exactly right. Does the previous speaker deny that there's going to be a cap on pain and suffering? Perhaps you might ask him that.

"Does this bill put a cap on pain and suffering during this noble experiment?"

The Chair responded:

"Is that a"

Senator Abercrombie interjected:

"That's a question. A direct question."

The Chair then responded:

"I think, Senator Abercrombie, it's in the bill. The answer would be 'yes.'"

Senator Abercrombie continued:

"Well then the answer in the refutation of the previous speaker's remarks lie right in the bill."

The motion was then put by the Chair and Spec. Com. Rep. No. S5-86 was adopted and, Roll Call vote having been requested, S.B. No. S1-86, entitled: "A BILL FOR AN ACT RELATING TO LIABILITY," having been read throughout, passed Third Reading on the following showing of Ayes and Noes:

Ayes, 18. Noes, 7 (Abercrombie, George, Hee, Henderson, A. Kobayashi, McMurdo and Soares).

At 10:51 o'clock p.m., the Senate stood in recess subject to the call of the Chair.

The Senate reconvened at 10:52 o'clock p.m.

ADJOURNMENT

At 10:53 o'clock p.m., on motion by Senator Cobb, seconded by Senator Soares and carried, the Senate adjourned until 11:30 o'clock a.m., Tuesday, July 29, 1986.

FOURTH DAY

Tuesday, July 29, 1986

The Senate of the Thirteenth Legislature of the State of Hawaii, Special Session of 1986, convened at 11:42 o'clock a.m., with the Vice President in the Chair.

The Divine Blessing was invoked by the Reverend Gary Peterson, Kailua Methodist Church, after which the Roll was called showing all Senators present with the exception of Senators Chang, Cobb, Hee, Toguchi, Wong and Young who were excused.

The Chair announced that he read and approved the Journal of the Third Day.

ADJOURNMENT

At 11:45 o'clock a.m., on motion by Senator Mizuguchi, seconded by Senator Soares and carried, the Senate adjourned until 11:30 o'clock a.m., Wednesday, July 30, 1986.

FIFTH DAY

Wednesday, July 30, 1986

The Senate of the Thirteenth Legislature of the State of Hawaii, Special Session of 1986, convened at 11:40 o'clock a.m., with the President in the Chair.

The Divine Blessing was invoked by the Reverend Anthony Robinson of the Church of the Crossroads, after which the Roll was called showing all Senators present with the exception of Senator Aki who was excused.

The President announced that he had read and approved the Journal of the Fourth Day.

The President then made the following observation:

"Members of the Senate, the Senate is prepared to recess for the remainder of this session day. However, the Chair would like to take this opportunity to say farewell to some of our colleagues who have been with us for many years — Senator Abercrombie, Senator Cayetano and Senator Cobb — who have opted to run for higher (political) office of one kind or another. We wish them well.

"On behalf of the Senate, Senator Fernandes Salling will present a lei to Senator Cayetano, Senator McMurdo to Senator Abercrombie, and Senator Young to Senator Cobb."

At 11:48 o'clock a.m., the Senate stood in recess subject to the call of the Chair.

The Senate reconvened at 11:49 o'clock a.m.

At this time, Senator Kuroda introduced to the members of the Senate Mrs. Nam Snow, administrative assistant to House Speaker Peters.

At 11:50 o'clock p.m. the Senate stood in recess subject to the call of the Chair.

The Senate reconvened at 12:07 o'clock p.m.

Senator Abercrombie then rose on a point of personal privilege and remarked:

"Mr. President, I would like to thank you and members of this body for this kind gesture and would like to leave you with this fervent wish — that your automobile insurance won't go up too high. Thank you."

Senator Kuroda then introduced to the members of the Senate his daughter Lori and her husband Nathan Foo.

Senator Hee also rose on a point of

personal privilege and said:

"Mr. President, I want to thank you and members of the Senate for their kind gesture and bouquet of flowers to my wife and express to you that she appreciates it very much.

"On behalf of myself and my wife Lyla, we are very grateful for the good wishes from the members of the Senate. Thank you."

Senator Cayetano then remarked:

"Mr. President, I would like to take this opportunity to thank you, the Senate staff members, and my colleagues for the kind gesture this morning.

"Best wishes to all of you and thank you very much."

Senator Kawasaki then added:

"Mr. President, I suppose if there is anyone who is saddened by the departure of three of our very competent Senators who have been in their own way a credit to this body, it is I. I think with Neal and Ben and Steve leaving somehow there's going to be something missing in this body and I want to express, on behalf of all the Senators here, our wholehearted best wishes for their endeavors.

"If they decide to come back, realizing that this is where most of the action is, never mind the lieutenant governor's office or being one of 435 members in the Congress of the United States with very little to say, very little in the way of voting impact, then we welcome you to come back to the Senate."

Senator Cobb then stated:

"Mr. President, I think we should have our heads examined for wanting to ever leave either this beautiful Island or this body. It's a privilege and a pleasure and honor to serve here. I want to thank my fellow Senators and staff members and everyone else and particularly you for your understanding, your indulgence, your help over the years. Mahalo!"

Senator Abercrombie then responded:

"Mr. President, may I take the remarks of Senator Cobb to mean that he has now reconsidered and is going to stay. (Laughter)

"I think that those sentiments are very well taken. Thank you."

The Chair again extended best wishes to Senators Abercrombie, Cayetano and Cobb.

At 12:11 o'clock p.m., on motion by Senator Cobb, seconded by Senator Soares and carried, the Senate stood in recess subject to the call of the Chair.

ADJOURNMENT

At 12:00 o'clock midnight, the Senate of the Thirteen Legislature of the State of Hawaii, Special Session of 1986 adjourned Sine Die.

GOVERNOR'S MESSAGES RECEIVED AFTER THE ADJOURNMENT
OF THE LEGISLATURE SINE DIE DAY

Gov. Msg. No. S2-86 informing the Senate that on July 30, 1986, he signed into law Senate Bill No. S2-86 as Act 1, entitled: "RELATING TO THE GENERAL FUND EXPENDITURE CEILING."

Gov. Msg. No. S3-86 informing the Senate that on August 4, 1986, he signed into law Senate Bill No. S1-86 as Act 2, entitled: "RELATING TO LIABILITY."

STANDING COMMITTEE REPORT

SCRep. S1-86 Legislative Management

Informing the Senate that Senate Bill Nos. S1-86 to S3-86 have been printed and were distributed to the members of the Senate on July 24, 1986, prior to adjournment of the evening session, and Special Committee Reports Nos. S1-86 to S3-86 have been printed and were distributed to the members of the Senate on July 25, 1986, prior to the 11:30 o'clock a.m. session.

Signed by all members of the Committee except Senator Young.

SPECIAL COMMITTEE REPORTS

Spec. Com. Rep. S1-86 Special Committee on Liability and the General Fund Expenditure Ceiling on S.B. No. S1-86

The purpose of this bill is to ensure the widest possible availability of liability insurance at affordable rates, to provide for tort reforms, and to provide a means to adjust insurance premium rates in the context of anticipated cost savings from tort reform measures.

Your Special Committee on Liability and the General Fund Expenditure Ceiling is in accord with the intent and purpose of S.B. No. S1-86 and recommends that it pass Second Reading and be recommitted to the Special Committee on Liability and the General Fund Expenditure Ceiling for further consideration.

Signed by all members of the Committee.

Spec. Com. Rep. S2-86 Special Committee on Liability and the General Fund Expenditure Ceiling on S.B. No. S2-86

The purpose of this bill is to reenact Part V of Chapter 37, Hawaii Revised Statutes, relating to the general fund expenditure ceiling.

Your Special Committee on Liability and the General Fund Expenditure Ceiling is in accord with the intent and purpose of S.B. No. S2-86 and recommends that it pass Second Reading and be recommitted to the Special Committee on Liability and the General Fund Expenditure Ceiling for further consideration.

Signed by all members of the Committee.

Spec. Com. Rep. S3-86 Special Committee on Liability and the General Fund Expenditure Ceiling on S.B. No. S3-86

The purpose of this bill is to enact tort reform measures in order to reduce and stabilize liability insurance rates.

Your Special Committee on Liability and the General Fund Expenditure Ceiling is in accord with the intent and purpose of S.B. No. S3-86 and recommends that it pass Second Reading and be recommitted to the Special Committee on Liability and the General Fund Expenditure Ceiling for further consideration.

Signed by all members of the Committee.

Spec. Com. Rep. S4-86 Special Committee on Liability and the General Fund Expenditure Ceiling on S.B. No. S2-86

The purpose of this bill is to reenact the general fund expenditure ceiling.

Act 277, Session Laws of Hawaii 1980, implemented the amendments made to the State Constitution in 1978 which require the Legislature to establish an expenditure ceiling under which increases in general fund appropriations would be tied into the estimated rate of growth of the State's economy and limited accordingly. A repeal date of June 30, 1986 was included in order to allow for periodic review to ensure that the intent and purpose of the Act are being carried out and that the provisions of the Act continue to be useful and workable.

Your Committee, after reviewing the manner in which the expenditure ceiling has functioned since its enactment, finds that it should be extended for at least one year, and that an in-depth review of the expenditure ceiling provisions should be made during the regular session of 1987.

Your Special Committee on Liability and the General Fund Expenditure is in accord with the intent and purpose of S.B. No. S2-86 and recommends that it pass Third Reading.

Signed by all members of the Committee.

Spec. Com. Rep. S5-86 (Majority) Special Committee on Liability and the General Fund Expenditure Ceiling on S.B. No. S1-86

The purpose of this bill is to alleviate the current crisis relating to the cost and availability of commercial liability insurance.

Your Committee finds that rates for commercial liability insurance have increased dramatically during recent years to an extent that many businesses are now unable to purchase affordable insurance coverage. As is generally the case with any major issue, there is disagreement as to the cause of and solution to the insurance problem. Some contend that the root cause of the problem is the tort system because it encourages litigation which results in the awarding of unjustifiably large awards to plaintiffs. It is further contended that the civil justice system is inefficient and costly. Others view the problem as caused by the insurance system and lack of effective regulation of the insurance business. The insurance industry is accused of enjoying huge profits by raising rates which are inadequately reviewed by understaffed government regulators charged with the task of protecting consumers.

This measure attacks the problem of both fronts by making certain changes to the tort system designed to reduce costs and by improving the regulatory system to help ensure that rates are reasonable and fair. Your Committee heard extensive testimony on this bill presented by various facets of the community, including business, the medical profession, the insurance industry, and the legal profession as well as private citizens expressing their personal views.

The bill is generally divided into four subject areas as follows: Sections 2 to 10 deal with insurance provisions; Sections 11 to 22 deal with tort reform; Sections 23 to 27 deal with appropriations and reports to be submitted to the Legislature; and Sections 28 to 31 deal with applicability, severability and effective date of the bill. The sections are discussed below with headings generally describing the sections.

Insurance Provisions

Section 2. Definitions.

This section contains definitions of "authorized insurer", "commercial liability insurance", "rebate", and "surcharge" as used in the sections relating to the insurance provisions.

Section 3. Rate reduction; relief.

The purpose of this section is to adjust commercial liability insurance rates to reflect anticipated cost savings from the changes to the tort system contained in Sections 11 to 22 of the bill. There is a mandatory 10 percent reduction in rates on October 1, 1986, with further scheduled rate reductions of 12 percent on October 1, 1987, and 15 percent on October 1, 1988.

With respect to the 12 percent and 15 percent reductions in 1987 and 1988, respectively, the section provides a rate making and filing procedure that places the burden on insurers to prove that such reductions will result in inadequate rates. The section further provides for the rates to be implemented in the event the insurance commissioner's approval or disapproval of a filing, in whole or in part, is challenged through the administrative hearing process and through judicial review. This provision is designed to cause the least disruption in the rate making process and to minimize the possibility of a surcharge on premiums.

Section 4. Excessive rates; rebate or credit.

This section empowers the insurance commissioner, if the commissioner has reason to believe that rates being charged by insurers are excessive, to order a hearing to determine the validity of the rates. If the commissioner determines that insurers are charging excessive rates, a rebate or credit will be ordered.

Section 5, 6, and 7. Cancellation and failure to renew policies.

These sections are intended to prohibit evasion of the intent of this bill by prohibiting mid-term cancellation of policies and nonrenewal of policies because of the rate reductions provided for in the bill. Policies may not be canceled except for the reasons enumerated in Section 5 of the bill and it is your Committee's intent that the good faith reason for cancellation (item no. 8) be strictly construed to ensure that the rate reduction requirement of this bill is not undermined. To further protect policy holders, written notice of thirty days and forty-five days, for cancellation and nonrenewal, respectively, are required. Further, any nonrenewal notice must state the reason for such action by the insurer.

Section 8. Coverage for punitive damages in insurance contracts.

This section provides that unless specifically included, an insurance policy shall not be construed to provide coverage for punitive damages.

Section 9 and 10. Assessments for insolvencies; recoupment.

These sections deal with Chapter 431D, Hawaii Revised Statutes, relating to insurance company insolvencies. Chapter 431D establishes the Hawaii Insurance Guaranty Association (HIGA), which basically consists of insurers doing business in Hawaii. The function of HIGA is to protect insureds and claimants of an insurance company which becomes insolvent by assuming the obligations of the insolvent company to cover claims. HIGA obtains moneys to meet such obligations by assessments against member insurers.

Under present law, insurers who are assessed by HIGA may recoup such assessments through either the rate making process or a surcharge, at the discretion of the insurance commissioner. Section 10 of the bill amends the law to require that recoupment be accomplished through a surcharge process and not through the rate making process. Recoupment via the surcharge system set forth in Section 10 of the bill will allow speedier and more economical recoupment of assessments. Recoupment through the rate making process results in the addition of approximately one percent more to the amount be recouped because the insurer must pay taxes and commissions on the amount being recouped. Under the surcharge system of recoupment set forth in Section 10 of the bill, these additional costs are eliminated and insurers will be able to recoup assessments in a more timely and economical fashion.

Tort Reforms

Section 11 and 12. Attorneys' fees in tort actions.

Section 10 requires court approval of attorneys' fees for both the plaintiff and the defendant in any tort action in which a judgment is rendered. This provision is intended to limit attorneys' fees to a reasonable amount by allowing the courts to monitor attorneys' fees in cases that are brought to judgment. If an action is settled prior to judgment, either the plaintiff or defendant may request court approval of fees charged.

Section 12 repeals the existing law governing contingency fees in medical tort cases as the new law provided for in Section 10 will cover all tort cases, including medical torts.

Section 13. Frivolous claims and defenses.

This section amends Section 607-14.5, Hawaii Revised Statutes, regarding the filing of frivolous claims by specifically expanding its scope to extend to frivolous defenses. The intent of the section is to lower the standard for awarding attorneys' fees by allowing such awards when the claim is "frivolous" rather than the existing "completely frivolous" standard and requiring a showing that a claim or defense is "not reasonably supported" by the facts and law in place of the current standard of "totally unsupported" by the facts and law.

Section 14. Periodic payments of damages.

This section gives the State and counties the option to satisfy large judgments through periodic payments. Under the proposed law, when a judgment is in excess of \$1,000,000, the State or any county may elect to pay that amount of the judgment in excess of \$1,000,000 by periodic payments over a period of five years. Interest at the rate specified in Section 478-2, Hawaii Revised Statutes, would be allowed on unpaid balances during the period of periodic payments. If the government elects to make periodic payments, it must submit a periodic payment plan to the court for approval and the court is given the power to modify the plan based on the facts and circumstances of the case.

Section 15. Statute of Limitation for medical malpractice actions.

This section amends Section 657-7.3, Hawaii Revised Statutes, by amending the period within

which a minor may bring an action for a medical tort. Under present law, the statute of limitation for a minor's medical tort claim is tolled during the period of minority. This provision would require that a minor file a medical tort claim within six years of the alleged wrongful act regardless of minority except that minors under the age of ten are allowed to commence their actions within six years or the minor's tenth birthday, whichever period is longer. As an example, a two year old claimant will have eight years to commence an action, the tenth birthday being the limitation of the time within which an action must be brought.

In order to provide protection for minors, the proposed amendment provides that the time period is tolled for any period during which the parents, guardian, insurer, or health care provider have committed fraud, colluded, or been guilty of gross negligence in the failure to bring an action on behalf of the minor. In addition, the statute of limitation would be tolled for any period which the minor's injury could not have been discovered through the use of reasonable diligence.

The intent of this amendment is to limit, to some extent, the "long tail" of medical malpractice claims. Under existing law, a newborn infant would potentially have twenty-four years to bring an action if the alleged malpractice occurred during birth. This is because the statute of limitations would be tolled during eighteen years of minority and the present statute of limitation has an outside limit of six years after an occurrence during which an action must be commenced. The "long tail" adds considerable uncertainty to the rate making process for medical malpractice insurance.

Your Committee notes that the amendment proposed in this section is intended to supersede Section 657-13, Hawaii Revised Statutes, with respect to the incapacity of minors and the tolling of the statute of limitations only as it applies to medical torts.

Section 16. Collateral sources.

This section is intended to ensure that claimants who recover damages in tort actions do not receive double payments for costs and expenses arising out of the tort action. For example, a claimant who has received medical insurance payments for treatment of injuries arising out of a tort action may be awarded damages for the same medical expenses. In many cases, the health care insurer, by contract, has a lien on special damages awarded the claimant for the amount paid by the insurer for medical expenses. Under the law proposed by this section, there would be a post judgment or post settlement proceeding before the court to first, establish the validity of liens of collateral source payors and second, to provide for payment of valid liens from the special damages recovered by the claimant.

This provision will help to lower insurance costs by preventing double payments.

Section 17. Abolition of joint and several liability.

This section abolishes joint and several liability for joint tortfeasors with certain exceptions. The exceptions are as follows:

1) Recovery of economic damages. The rationale for excepting economic damages is that a victim of negligence should not be precluded from complete recovery for damages such as medical expenses and lost wages.

2) Recovery of both economic and noneconomic damages for:

- (a) Intentional torts;
- (b) Environmental pollution;
- (c) Toxic and asbestos related torts;
- (d) Torts relating to aircraft accidents;
- (e) Strict and products liability torts; or
- (f) Motor vehicle accidents, except for torts relating to the design and maintenance of highways, as further discussed in item number 4 below.

3) Recovery of noneconomic damages in tort actions not listed in the second exception enumerated above where the joint tortfeasor is twenty-five percent or more to blame for the injuries or death of the victim. If the tortfeasor's proportionate negligence is less than twenty-five percent, that tortfeasor's liability for payment of damages is limited to the degree of proportionate negligence.

4) Recovery of noneconomic damages in tort actions involving the design and maintenance of highways upon a showing that the tortfeasor was given reasonable prior notice of a prior occurrence under similar circumstances to the occurrence upon which the tort claim is based. It is the intent of your Committee that the prior occurrence be at the same location as the

occurrence on which the tort claim is based but the term "similar circumstances" is not intended to mean that a prior occurrence need be identical or exactly similar but instead be generally the same.

If the joint tortfeasor was not under prior notice, the tortfeasor would be subject to the twenty-five percent threshold discussed in the third exception in order to be held jointly and severally liable for noneconomic damages.

The intent of the exception is to place governmental and nongovernmental agencies responsible for the design and maintenance of highways within the twenty-five percent rule of the third exception despite the exception for motor vehicle accidents unless prior notice was given of an existing problem and proper corrective steps were not taken.

Section 18. Loss or impairment of earning capacity.

This section clarifies the computation of damages for loss or impairment of earning capacity by requiring that the amount of probable future earnings shall be determined by taking into account the effect of probable taxes which would be paid on such earnings. The proposed law is not intended to affect any other factors which may properly be utilized by a court in calculating damages awarded for loss or impairment of earning capacity.

Section 19. Definition of noneconomic damages.

This section defines noneconomic damages as nonpecuniary damages such as pain and suffering, mental anguish, disfigurement, loss of enjoyment of life, and loss of consortium, as distinguished from economic damages such as present and future medical expenses and impairment of present and future earning capacity. The section also provides a definition of pain and suffering as actual physical pain resulting from the injuries sustained by a plaintiff.

The purpose of this section is to provide a definitional framework for applying other sections of the bill that refer to noneconomic damages and pain and suffering.

Section 20. Limitation on damages for pain and suffering.

This section places a limitation of \$375,000 on damages awarded for pain and suffering. The intent of the provision is to provide some degree of predictability on awards for pain and suffering.

Section 21. Court annexed arbitration program.

The purpose of this section is to reduce delay and costs in the disposition of certain tort actions through mandatory and nonbinding arbitration as an alternative to costly and protracted litigation.

The section establishes a court annexed arbitration program within the judiciary to be implemented by rules adopted by the Supreme Court by January 1, 1987. Tort actions having a probably jury award, exclusive of interest and costs, of \$150,000 or less, are to be covered by the program.

Section 22. Emotional distress arising from property damage.

This section abolishes any cause of action for negligent infliction of serious emotional distress where the underlying basis for such a claim arises solely from property damages except in cases where the emotional distress results in physical injury or mental illness.

Appropriations

Section 23. Subsidy for insurance premiums.

This section provides an appropriation of \$100,000 to the Department of Commerce and Consumer Affairs for the purpose of providing a subsidy for liability insurance premiums for certain physicians providing obstetrical and gynecological services as the insurance commissioner may designate. It is intended that the insurance commissioner utilize the subsidy to ensure that such medical services are made available in areas which otherwise would lose or be without such services.

Section 24. Appropriation to strengthen insurance regulatory program.

This section appropriates \$400,000 to the Department of Commerce and Consumer Affairs in order to adequately enforce the rate reduction procedure provided for in the bill and to

strengthen the regulatory process.

Section 25. Appropriation for arbitration program.

This section appropriates \$200,000 to the judiciary for the initial implementation of the arbitration program established in Section 21 of the bill.

Other Provisions

Section 26. Insurance Commissioner report.

This section requires the Insurance Commissioner to prepare and submit to the Legislature, in 1988 and 1989, closed case reports containing an evaluation of the operation and effects of this bill and recommendations for changes.

Section 27. Report of the Chief Justice.

This section requires a report from the Chief Justice to the 1987 regular session of the Legislature on the court annexed arbitration program established by this bill.

Section 28. Rights and duties affected by this bill.

This section reflects the prospective application of the provisions of the bill.

Section 29. Severability.

This section sets forth the intent that certain sections of the bill are not severable and that a finding that certain sections are invalid will affect the validity of other sections.

Section 31. Effective date and repeal.

This section provides that the bill shall take effect upon approval and includes a "drop dead" clause of October 1, 1989 for the provisions relating to rate reductions, abolition of joint and several liability and the cap on recovery for pain and suffering. Your Committee is aware that the provisions which are to "drop dead" need further consideration and study over a period of time and the provision is intended to ensure that such consideration is forthcoming.

Upon consideration of the mass of testimony received on this bill, your Committee is impressed by the fact that while there is much disagreement over various parts of the bill, there is a general agreement that steps need to be taken to address the problem and that the bill represents positive action. Your Committee is aware the bill was drafted with the views of various diverse and sometimes opposing interests taken into account and represents a balancing of such different interests. Therefore, the bill must be evaluated as an entirety and upon such an evaluation, your Committee concludes that it represents a fair and equitable balancing of competing interests.

Your Special Committee on Liability and the General Fund Expenditure Ceiling is in accord with the intent and purpose of S.B. No. S1-86 and recommends that it pass Third Reading.

Signed by all members of the Committee.

Senators Abercrombie, A. Kobayashi and Soares did not concur.

NUMBER AND TITLE	Received Referred	First Reading	Second Reading	Third Reading	Action of House	Conference Committee	Final Action	Action of Governor	Further Action	Act No.	Vetoed
SB S1-86 A BILL FOR AN ACT RELATING TO LIABILITY.	1 1	1	4	5 20				24		2	
SB S2-86 A BILL FOR AN ACT RELATING TO THE GENERAL FUND EXPENDITURE CEILING.	1 1	1	4	5				24		1	
SB S3-86 A BILL FOR AN ACT RELATING TO TORTS.	1 1	1	4								