

JAN 25 2006

S.B. NO. 2251

A BILL FOR AN ACT

RELATING TO TORT ACTIONS.

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

1 SECTION 1. Section 662-15, Hawaii Revised Statutes, is
2 amended to read as follows:

3 "**§662-15 Exceptions.** (a) This chapter shall not apply
4 to:

- 5 (1) Any claim based upon an act or omission of an employee
6 of the State, exercising due care, in the execution of
7 a statute or regulation, whether or not such statute
8 or regulation is valid, or based upon the exercise or
9 performance or the failure to exercise or perform a
10 discretionary function or duty on the part of a state
11 officer or employee, whether or not the discretion
12 involved has been abused;
- 13 (2) Any claim arising in respect of the assessment or
14 collection of any tax, or the detention of any goods
15 or merchandise by law enforcement officers;
- 16 (3) Any claim for which a remedy is provided elsewhere in
17 the laws of the State;

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1 (4) Any claim arising out of assault, battery, false
2 imprisonment, false arrest, malicious prosecution,
3 abuse of process, libel, slander, misrepresentation,
4 deceit, [~~or~~] interference with contract rights[+], or
5 any other intentional tort, and any claim for
6 negligent hire, retention, training, or supervision of
7 an employee who is alleged to have committed the
8 intentional tort;

9 (5) Any claim arising out of the combatant activities of
10 the Hawaii national guard and Hawaii state defense
11 force during time of war, or during the times the
12 Hawaii national guard is engaged in federal service
13 pursuant to section 316, 502, 503, 504, 505, or 709 of
14 Title 32 of the United States Code;

15 (6) Any claim arising in a foreign country; or

16 (7) Any claim arising out of the acts or omissions of any
17 boating enforcement officer.

18 (b) The discretionary function exception in subsection

19 (a)(1) shall be interpreted so as to provide the State the same
20 type of protection from liability that the United States is
21 afforded pursuant to title 28 United States Code section
22 2680(a).

1 (c) The discretionary function exception in subsection
2 (a) (1) includes any claim arising out of the adequacy of the
3 design of a highway as defined in section 264-1(a) (1) or its
4 associated structures if, at the time the design was adopted, it
5 was appropriate for the conditions prevailing and consistent
6 with design standards in effect at the time of the design.

7 (1) It shall be deemed an exercise of discretionary
8 function or duty whether or not to update the highway
9 or associated structures to conform with changed
10 conditions or updated design standards and guidelines;

11 (2) If the State has notice that the highway or its
12 associated structures may no longer be in conformity
13 with a standard, this exception shall continue for a
14 reasonable period of time sufficient to permit the
15 State to obtain approval and funds for the design,
16 planning, and construction of remedial work;

17 (3) If the State is unable to do remedial work because of
18 practical impossibility or lack of sufficient funds,
19 this exception shall continue so long as the State
20 attempts to provide adequate warning of the condition
21 that is not in conformity;

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1 (4) If a person fails to heed an adequate warning, such
2 failure shall constitute the assumption of the risk of
3 the danger indicated by the warning; and

4 (5) This exception shall not apply to maintenance and
5 repair functions."

6 SECTION 2. Section 663-10.5, Hawaii Revised Statutes, is
7 amended to read as follows:

8 "**§663-10.5 Government entity as a tortfeasor; abolition of**
9 **joint and several liability.** Notwithstanding sections 663-10.9,
10 663-11 to 663-13, 663-16, 663-17, and [section] 663-31, in any
11 case where a government entity is determined to be a tortfeasor
12 along with one or more other tortfeasors, the government entity
13 shall be liable for no more than that percentage share of the
14 damages attributable to the government entity.

15 For purposes of this section, "government entity" means any
16 unit of government in this State, including the State and any
17 county or combination of counties, department, agency,
18 institution, board, commission, district, council, bureau,
19 office, governing authority, or other instrumentality of state
20 or county government, or corporation or other establishment
21 owned, operated, or managed by or on behalf of this State or any
22 county.

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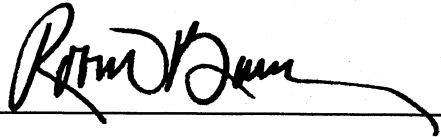
1 For purposes of this section, the liability of a government
2 entity shall include its vicarious liability for the acts or
3 omissions of its officers and employees."

4 SECTION 3. Act 213, Session Laws of Hawaii 1994, is
5 amended by amending section 3 to read as follows:

6 "SECTION 3. This Act shall apply [only] to [~~causes of~~
7 ~~action based upon acts or omissions occurring on or after its~~
8 ~~effective date.] claims that accrue on or after June 22,
9 1994."~~

10 SECTION 4. Statutory material to be repealed is bracketed
11 and stricken. New statutory material is underscored.

12 SECTION 5. This Act shall take effect upon its approval.

13
14 INTRODUCED BY: 
15 BY REQUEST

JUSTIFICATION SHEET

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DEPARTMENT: Attorney General

TITLE: A BILL FOR AN ACT RELATING TO TORT ACTIONS.

PURPOSE: Clarifies certain limitations upon State tort liability.

First, the bill reiterates the underlying intent of the discretionary function and the intentional tort exception to the State's waiver of sovereign immunity for the torts of its employees in section 662-15 of the State Tort Liability Act, chapter 662, Hawaii Revised Statutes; and further declares that all the exceptions to the State's waiver of sovereign immunity are to be broadly construed in the State's favor.

Second, the bill preserves the separation of powers between the legislative, executive, and judicial branches of the State regarding the planning and design of state highways and associated structures by providing the State with immunity when it exercises its discretion in such planning and design activities.

Finally, the bill clarifies that section 663-10.5, Hawaii Revised Statutes, which limits the liability of government entities to that percentage share of damages attributable to the government entities, supersedes section 663-10.9, Hawaii Revised Statutes. Section 663-10.9(4) has been interpreted as permitting a finding that government entities are jointly and severally liable for non-economic damages in tort actions relating to the maintenance and design of highways, under certain circumstances. This interpretation is incorrect.

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MEANS: Amend sections 662-15 and 663-10.5, Hawaii Revised Statutes, and section 3 of Act 213, Session Laws of Hawaii 1994.

JUSTIFICATION: In 1957, the legislature of the State of Hawaii passed the State Tort Liability Act (STLA), modeled after its federal counterpart, the Federal Tort Claims Act (FTCA). Most of the language of the STLA was taken directly from the FTCA. At the time the legislature adopted the STLA, its intent was generally to create the same types of potential tort liabilities for the State of Hawaii as the federal government created in the FTCA, with the same limitations on liabilities. Unfortunately, our courts have interpreted the STLA differently, in significant ways. The justification given by our courts is that the STLA should be liberally construed to effectuate its remedial purpose. However, in so interpreting the STLA, our courts fail to protect the State from liability in situations in which the federal government would be protected under the FTCA. In so construing the STLA, our courts dilute its protections for the State. Thus we can no longer interpret our STLA by referring to the decisions of the federal courts interpreting the FTCA. Rather, we must look to the courts to determine the meaning of the STLA. This is unacceptable, and should be corrected through legislation such as the instant bill.

A case in point is Tseu v. Jeyte, 88 Haw. 85 (1998). In that case, the liability of the State was premised upon a claim of negligent investigation by the Hawaii Civil Rights Commission. The State should have prevailed under the federal precedent of Gaubert v. United States, 499 U.S. 315 (1991). However, the Supreme Court of the State of Hawaii

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rejected the Gaubert decision as precedent for the STLA, and instead found potential liability. It did this even though discretion is obviously involved in the investigative process. The State's investigators, therefore, are now under a duty to protect from harm the very people they are investigating. Federal officials are not so burdened.

Another case in point in DOE Parents No. 1 v. State, Dept. of Education, 100 Haw. 54 (2002). In that case, plaintiff minors were molested by a DOE teacher in a classroom during the school day. Under the majority of federal precedents, the State would not be liable for a claim arising out of an assault and battery by an employee, including a claim of negligent hire, negligent retention and negligent supervision. However, the Supreme Court of the State of Hawaii rejected the majority view of the federal precedent, and instead interpreted the STLA as permitting negligent hire, retention and supervision claims. Once again, the federal government would be protected, but the State of Hawaii had to pay a large judgment. The instant bill seeks to correct this erroneous interpretation by clarifying that the discretionary function exception should be interpreted to provide the State the same protection from liability that the United States is afforded under the counterpart federal law.

This bill also amends section 662-15, Hawaii Revised Statutes, to provide the State with immunity when it exercises its discretion in planning and allocation of funds for planning and design of state highways and associated structures. This immunity protects the decision-making processes of the legislative and executive branches by protecting them

from interference by the judicial branch or a jury.

This immunity from liability for the design of highways and their associated structures is similar to the immunity given for the planning and design of public construction and improvements in many states (e.g., see Idaho Code §6-904), and is more closely patterned after the immunity provided in California (see West's Ann. Cal. Gov. Code §830.6).

This immunity expressly exempts the exercise of ministerial functions such as maintenance and repair work.

In addition, section 663-10.5, Hawaii Revised Statutes was intended to protect public funds by preventing government entities from being held jointly and severally liable for the entire damages in cases in which the government entities bore minimal responsibility in causing those damages. Section 663-10.5 thus abolished joint and several liability for government entities and provided that government entities would be liable for no more than that percentage share of damages attributable to the government entities. In application, however, section 663-10.5 has erroneously been interpreted as being superseded by section 663-10.9(4), which provides for joint and several liability for noneconomic damages in tort actions relating to the maintenance and design of highways, under certain circumstances. The effect of this erroneous interpretation has been that government entities are often still required to pay the entire damages in highway cases, which frequently involve deaths or catastrophic injuries and corresponding large damages. This bill clarifies that government entities should have the benefit of section 663-10.5 even in

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highway cases, by providing that section 663-10.9 applies notwithstanding section 663-10.9.

This bill also provides that the protection afforded by section 663-10.5 shall apply to all causes of action that accrue on or after June 22, 1994, which was the effective date of Act 213, Session Laws of Hawaii 1994. Act 213 provided that, "This Act shall apply only to causes of action based upon acts or omissions occurring on or after its effective date." This language has been relied upon by the court to find the State jointly and severally liable for events occurring after June 22, 1994, if the initial, "key" negligent act or omission occurred prior to June 22, 1994. The amendment in this bill regarding effective date is thus intended to address the misapplication of section 663-10.5.

Impact on the Public:

(1) Public moneys will be preserved for public benefits, without judicial second guessing of the Executive Branch's discretionary judgments, and consistent with the Legislature's intent as expressed in the State Tort Liability Act.

(2) Although this bill will limit plaintiffs' ability to recover damages from government entities as "deep pockets," the public in general will benefit from the saving of public funds.

(3) This bill will ensure that the State and its taxpayers are protected from design claims and associated litigation defense costs that have historically plagued the State. The bill will also ensure that the State of Hawaii has protections similar to those afforded to

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many other states.

Impact on the department and other agencies: This bill will protect the general fund from judgments against the State based upon discretionary functions, as well as claims arising from assault and battery incidents.

GENERAL FUND:	None.
OTHER FUNDS:	None.
PPBS PROGRAM DESIGNATION:	None.
OTHER AFFECTED AGENCIES:	Judiciary.
EFFECTIVE DATE:	Upon approval.