

JAN 22 2007

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. Act 112, Session Laws of Hawaii 2006, is
 7 amended to read as follows:

8 "SECTION 3. This Act shall take effect upon [its]
 9 approval, and ~~[its provisions shall apply retroactively to the~~
 10 ~~extent permitted by law.] shall be applied retroactively to the~~
 11 fullest extent permissible, and shall fully apply to all cases,
 12 actions, proceedings, and claims in which a final non-appealable
 13 judgment has not yet been entered."

14 SECTION 3. Statutory material to be repealed is bracketed
 15 and stricken. New statutory material is underscored.

16 SECTION 4. This Act shall take effect upon its approval.

18 INTRODUCED BY: _____

19 BY REQUEST

JUSTIFICATION SHEET

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.

Lastly, the bill clarifies the applicability of section 663-10.5, Hawaii Revised Statutes, to causes of action for which a final, unreviewable judgment has not been obtained.

MEANS: Amend section 662-15, Hawaii Revised Statutes, and section 3 of Act 112, Session Laws of Hawaii 2006.

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 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 is 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 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.

This bill also provides that the protection afforded by section 663-10.5 shall apply to all causes of action for which a final, unreviewable judgment has not been obtained.

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 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.