LATE TESTIMONY

TESTIMONY OF ROBERT TOYOFUKU ON BEHALF OF THE CONSUMER LAWYERS OF HAWAII (CLH) IN OPPOSITION TO H.B. NO. 2350, HD 1

February 26, 2008

To: Chairman Tommy Waters and Members of the House Committee on Judiciary:

My name is Bob Toyofuku and I am presenting this testimony on behalf of the Consumer Lawyers of Hawaii (CLH) in strong opposition to H.B. No. 2350, HD 1.

It has long been the law in Hawaii that landowners must exercise reasonable care with regard to both natural and artificial conditions on their own property that they know pose a hazard to persons or property both inside and outside of their land. Section 1 of the bill states that "the purpose of this act is to codify the common law that currently exists in Hawaii with respect to the legal duties and obligations pertaining to damages and injuries caused by natural conditions to property and persons outside the land," except for injuries on public roadways. The measure then purports to codify a rule that landowners are immune from any liability for damages caused by a natural condition on their land that injures others or property outside of the land, except for injuries on a public roadway. This is not the law in Hawaii and does not reflect the modern development of the law in other states as well.

A fair and objective analysis of landowner liability to persons outside of the property involving natural conditions was recently published in the Hawaii Bar Journal. A copy is attached. The review of both Hawaii cases and recent cases throughout the nation confirm that the rule in Hawaii and the modern trend throughout the United States is to require landowners to exercise reasonable care to mitigate both natural and artificial hazards that pose unreasonable risks of danger to others on or off of the property.

The article points out that the ancient common law rule of non-liability for natural conditions was developed at a time when land was mostly unsettled and uncultivated. As society has transitioned from primarily agricultural to urban conditions, the ancient common law rule has proved both out of place and inappropriate. Courts throughout America began to reject the common law rule as early as 1896 with the overwhelming majority of courts in recent years adopting the modern rule that landowners must exercise reasonable care to prevent injury or damage from both natural and artificial conditions on their land to persons on or off of the property. In its overview of Hawaii cases, the article observed:

> Like some other courts, the Hawaii Appellate Courts have addressed a possessor of land's liability to persons outside the premises for harm caused by falling trees. As in decisions from other jurisdictions, the reach of these Hawaii decisions do not appear to be limited to trees and should extend to other natural conditions. Moreover, the Hawaii Supreme Court has rejected traditional common law distinctions with respect to a possessor of land's duties of care owed to persons on the premises for reasons that should also support the rejection of the traditional common law distinctions between harm caused by artificial or natural conditions to persons outside the premises.

The article then reviewed the Hawaii Supreme Court cases of Medeiros, Pickard and Whitesell. The article notes that in the Medeiros cases decided in 1912 "the court held defendant liable even though the deterioration of the tree was the result of natural conditions." The article further noted that the Pickard decision in 1969 specifically stated "the common law has moved towards imposing on owners and occupiers a single duty of reasonable care in all the circumstances." And it finally stated with respect to Whitesell: "although the Whitesell court addressed the issue of landowner liability based primarily on nuisance principles, it nonetheless favorably cited and confirmed the continuing validity of Medeiros, although Medeiros had been grounded on negligence." The article reasonably concludes that these Hawaii decisions taken together indicate that Hawaii has already rejected the ancient common law approach proposed by this bill

because "to do otherwise would produce the anomalous result whereby a trespasser would be able to bring an action in negligence that would be denied a neighbor where both were standing on either side of the possessor's boundary line and were both struck by the same falling rock or other debris."

Recent decisions by the Supreme Courts of other states similarly reject the immunity rule proposed by this bill. The Tennessee Supreme Court stated in its 2005 Hale decision:

> We refuse to recognize a rule that would relieve from liability a landowner who neglects his property. Distinguishing between natural and artificial conditions in an urban setting creates the anomalous situation of imposing liability on a landowner who improves and maintains his property while precluding liability of a neighboring landowner who allows the natural condition of his property to run wild.

As the California Supreme Court stated in its 1981 Sprecher decision, it is not whether an injury happens on or off the land, or whether one is injured by a natural or artificial condition.

> The proper test to be applied to the liability of the possessor of land is whether in the management of his property he has acted as a reasonable person in view of the probability of injury to others. The question is whether in the management of his property, the possessor of land has acted as a reasonable person under all the circumstances. The likelihood of injury to plaintiff, the probable seriousness of such injury, the burden of reducing or avoiding the risk, the location of the land and the possessor's degree of control over the risk-creating condition are among the factors to be considered.

This modern rule that a landowner must exercise reasonable care given the likelihood of injury, seriousness of injury, burden of reducing or avoiding the risk, location of the land and degree of control over the hazardous condition is the most reasonable rule that represents the best public policy. For example, if natural erosion uncovers a ten ton boulder in danger of rolling down a hillside into an elementary school, it would seem that all would agree that reasonable steps to eliminate or reduce the danger should be taken. Under the provisions of this bill,

however, a landowner who is aware of the danger to the school children below can allow the boulder to roll down into the school with impunity because this measure has given him complete immunity from any responsibility in the situation.

Further, this bill was amended in the prior committee to also give immunity to landowners even when a condition on their land happens to injure someone on a public highway. Even under the Restatement of Torts which has been reflective of the common law this was not the case.

I thank the committee for this opportunity to testify and ask that this measure be held.

Hawaii Bar Journal
April, 2005

Feature

*4 LANDOWNER LIABILITY TO PERSONS OUTSIDE THE PREMISES: BEWARE OF FALLING

Lennes N. Omuro [FNa1]

Jennifer M. Young [FNaa1]

In recent years, a series of incidents have raised a heightened awareness across Hawai'i of the risk of rocks, boulders and other debris falling from neighboring property.

Numerous media reports have highlighted and closely documented this risk. [FN1] For example, in 2000, a rockslide caused twenty cubic yards of rock to crash onto Kamchameha Highway near Waimea Bay, mandating a three-month long road closure. [FN2]

In 2001, a twelve-foot boulder landed in the middle of Kalaniana'ole Highway by Queen's Beach. [FN3] In 2002, rockslides along Kalaniana'ole Highway near Makapu'u Beach resulted in road closures; [FN4] a rock fall at the Lalea residential development in Hawai'i Kai damaged two parked vehicles and resulted in the evacuation of two buildings until remedial work could be completed; [FN5] and most tragically, a five-ton boulder crashed into the Nuuanu home of Dara Rei Onishi while she slept, instantly killing her. [FN6]

In 2003, landslides onto Kalaniana'ole Highway near Castle Junction prompted the State to undergo a lengthy project to reshape the eroding hillside. [FN7] 2004 proved to be another eventful year when another boulder tumbled down the Nuuanu hillside and came to rest in the back yard of a home on the same street as the Onishi residence; [FN8] a boulder weighing ten tons rolled down a hillside and settled against a house in Nanakuli prompting the evacuation of residents, [FN9] the Navy announced plans to strap down a sixty-ton boulder in Moanalua Valley; [FN10] and two people were injured on the H-1 Freeway near Makakilo when a tumbling boulder collided with their sports utility vehicle. [FN11]

As recent as March 2005, a boulderemanating from an upper privately-owened property crashed into a palolo Valley Home (http:// starbuketin.com/2005/03/09/news/story10.html).

These incidents have not only raised questions about future development in or near hillside areas, but also issues surrounding who should bear responsibility for addressing the risk of falling rocks and boulders and/or for paying compensation for any resulting damages. This has become and will continue to be a major issue in Hawai'i as the islands continue to age. In fact, Professor Greg Moore of the University of Hawai'i's Department of Geology and Geophysics, in evaluating the risk posed to Hawai'i homeowners by falling rocks, speculated that

anywhere from 10,000 to 20,000 homes on Oahu may be "too close" to a valley wall. [FN12]

There should be little doubt that a possessor of land must exercise reasonable care for persons on its premises. [FN13] The *Sacred Falls* cases serve as a recent dramatic example of a trial court holding a landowner liable for harm to persons caused by falling rocks and debris. [FN14] However, there is a lack of uniformity among the jurisdictions as to whether a possessor of land should be held liable for harm caused to persons outside the premises, particularly when the claims are based on negligence or nuisance and when the harm is caused by a natural condition of the land. The modern trend is towards applying ordinary negligence principles when determining a possessor's liability to others outside the premises. Hawai'i decisions suggest that Hawai'i has essentially adopted or is likely to follow this modern approach.

Overview

As an initial matter, there should be little dispute that a possessor of land may be liable for harm caused to persons outside the premises under theories of ***6** strict liability for abnormally dangerous activity, or trespass if there has been an intentional and unlawful invasion of another's property. The grounds for such causes of action are not common, however, and a claimant will more frequently assert causes of action based on negligence or nuisance law.

Under the traditional common law approach, a distinction was drawn between whether the harm caused to others outside of a possessor's land arose from artificial or natural conditions. [FN15] In particular, a possessor's liability to persons outside the premises was determined according to ordinary negligence principles if the harm arose out of non-natural or artificial conditions on the land. [FN16] On the other hand, the possessor of land was not subject to liability if the harm resulted from natural conditions. [FN17] This was true even if the condition was highly dangerous with a strong probability of causing serious harm and the labor or expense necessary to make the condition reasonably safe was slight. [FN18]

While some courts continue to adhere to the traditional common law rule, [FN19] the more recent trend of the law is to reject the common law distinctions between natural and artificial conditions and, instead, apply ordinary negligence principles to determine liability. [FN20] Some courts further distinguish between rural and urban environments and utilize the traditional rule of non-liability for natural conditions in rural settings while following the modern trend of applying ordinary negligence principles in urban settings. [FN21] Other courts ignore the urban and rural distinction, noting it is unjustified in light of the growth of suburbs and traffic in rural areas and/or because the location of the property should be only one of the factors considered in determining the reasonableness of a defendant's conduct. [FN22]

In general, however, it appears the modern trend is for courts to deviate from the traditional common law rule of nonliability for natural conditions and from the distinction between urban and rural classifications for injuries occurring outside the premises, and towards a single duty of reasonable care for all possessors of land. [FN23]

The Traditional Common Law Approach: Artificial vs. Natural Conditions on Land

Under a traditional common law approach, liability to persons outside the premises extended to a possessor of land for harm arising out of artificial conditions on the land. On the other hand, a possessor of land was not liable to persons outside the premises, if the harm derived from a natural condition of the land. The term "natural condition of the land" indicates the land has not been modified by any act of a human being, whether by the possessor, any of the predecessors in possession, or even by a third person dealing with the land with or without the consent of the then possessor of the property. [FN24] In contrast, a non-natural or artificial condition would include any structures erected on the land, any vegetation planted or preserved on the land, or any man-made changes to the property. [FN25] If a non-natural or artificial condition becomes harmful because of the subsequent operation of natural forces, it is still considered a non-natural or artificial condition for the purpose of determining whether a duty of care exists. [FN26]

The justification for this rule of non-liability for natural conditions was largely based on the traditional common law notion that there is no duty or obligation to take affirmative steps for the protection or aid of others. [FN27] The common law distinguished misfeasance, the infliction of harm, from nonfeasance, the failure to prevent harm. Ordinarily, liability for nonfeasance was imposed only where a special relationship between the plaintiff and defendant existed. [FN28]

In addition, the traditional rule of non-liability for natural conditions was developed at a time when land was mostly unsettled and uncultivated. [FN29] It was therefore deemed impractical for the landowner to account for and remedy all *7 recognize a distinction between rural and urban settings when determining a landowner's liability for harm arising out of natural conditions. [FN30] Apparently, a possessor of a premises was not deemed to have such a relationship with his or her neighbors or others who may happen to be near the owner's premises.

The traditional common law rule of non-liability for natural conditions, in effect, provided a complete defense to a claim of negligence. [FN31] This rule essentially immunized a possessor of land from liability to others outside the premises for any harm caused by a natural condition of the land. As noted in the Restatement of Torts, this rule applied "although there is a strong probability that the natural condition will cause serious harm and the labor or expense necessary to make the condition reasonably safe is slight." [FN32]

The Restatement's Adoption of Common Law Principles

The traditional common law distinction between artificial and natural conditions was adopted by the Restatement of Torts and the Restatement (Second) of Torts. In particular, the Restatement (Second) of Torts, § 364 provides, in part, that "a possessor of land is subject to liability to others outside of the land for physical harm caused by a structure or other artificial condition on the land, which the possessor realizes or should realize will involve an unreasonable risk of such harm ...." [FN33] Liability may exist not only for conditions created by the possessor but also for conditions created by a third person with the possessor's consent and even for conditions created by third persons without the possessor's consent if the possessor knew or should have known about the condition and failed to take reasonable steps to make the condition safe. [FN34]

On the other hand, Restatement (Second) of Torts, § 363(1), embodies the traditional common law approach that a possessor of land is not liable for physical harm caused to others outside of the land by a natural condition on the land. An exception to the common law rule ***9** under the Restatement arises only where the possessor fails to take reasonable care to prevent an unreasonable risk of harm from the condition of trees in an urban area near a highway. [FN35] In such circumstances, a possessor of land is under a duty to prevent harm from occurring.

Similarly, with respect to a claim of nuisance, the Restatement takes the position that a possessor of land is not liable to persons outside the land for a nuisance resulting solely from a natural condition of the land. [FN36] The exception to this rule under the Restatement is that if the possessor of land knows or has reason to know of the existence of a public nuisance caused by natural conditions near a public highway, then there is a duty to exercise reasonable care for the protection of persons using the highway. [FN37]

The Modern Trend: Eliminating the Distinction Between Harm Caused By Natural and Artificial Conditions on Land

Not surprisingly, there has been dissatisfaction with the traditional common law approach of non-liability to others outside the premises for harm arising out of natural conditions on the land, especially under circumstances where the dangerous condition was known and could have been reasonably addressed. At least one jurisdiction may have begun to deviate from the traditional common law rule as early as 1896. [FN38] More widespread dissatisfaction with the rule began to appear in law review articles and treatises in the 1940s. [FN39] One court found that, during the 1960s and 1970s, at least a dozen states had begun applying ordinary negligence principles when determining a possessor of land's liability for harm caused by natural conditions to persons outside the premises. [FN40]

Moreover, although essentially adopting the traditional common law approach, the Restatement (Second) of Torts itself actually began to reflect the growing trend towards rejecting the traditional rule in favor of a single duty of reasonable care in the maintenance of ***10** traditional rule in favor of a single duty of reasonable care in the maintenance of property. In particular, Section 363(2), promulgated in 1963 to 1964, contained an exception to the rule of non-liability that was limited only to trees located near a public highway in urban areas.

By the time Section 840 concerning liability for nuisance was promulgated in 1977, the exception to the rule of non-liability under Section 840 had extended beyond trees to include potential liability for all natural conditions that created unreasonable risks of harm to persons using highways, regardless of whether in an urban or rural setting. The commentary to Section 840 indicates that the change in language reflected in this section from that of Section 363 was warranted by "authorities since that time." [FN41] Further, although the Restatement was not yet ready to take a position on such issues, the commentary acknowledged the emerging trend in the courts towards imposing liability for harm to adjoining landowners, not limited to trees or for the protection of persons using highways. Specifically, the Restatement indicated that "The authority at present, however, is not sufficient to express a position regarding other kinds of public nuisance than that of physical danger to travelers on the highway or private nuisance." [FN42]

The developing case law in the 1960s and 1970s largely arose based on incidents involving injury caused by fallen trees. [FN43] As acknowledged by the Restatement of Torts and courts that have reviewed these cases, however, the principles expressed in these cases were not so limited. [FN44] As remarked by the California Supreme Court,

> The courts are not simply creating an exception to the common law rule of nonliability for damage caused by trees and retaining the rule for other natural conditions of the land. Instead, the courts are moving toward jettisoning the common law rule in its entirety and replacing it with a single duty of reasonable care in the maintenance of property. [FN45]

The Urban vs. Rural Distinction

During this period, some courts recognized a distinction between a possessor's liability for harm to persons outside the premises arising from natural conditions of the land, depending on whether the land was urban or rural property. These courts generally adopted ordinary negligence principles for matters occurring in urban settings but continued to follow the traditional rule of non-liability for harm caused by natural conditions and/or refused to impose a duty of inspection on possessors of rural land. [FN46]

More recently, however, courts have astutely questioned the efficacy of a rural versus urban distinction in light of the growth of suburbs and traffic in rural areas. [FN47] Others indicated that the location of land simply becomes but one of the many factors to be considered when evaluating the reasonableness of a defendant's conduct. [FN48] Interestingly, the commentary to Section 840, Rest. (Second) of Torts also states that "an arbitrary distinction between urban and ***11** "rural" areas are extensively populated." [FN49]

The California Decision of *Sprecher v. Adamson Companies*

In 1981, the Supreme Court of California issued its ruling in *Sprecher v. Adamson Companies*. [FN50] Unlike previous cases, *Sprecher* did not involve falling trees. Rather, the issue in *Sprecher* arose from a substantial landslide triggered by heavy rains. The downhill landowner had built his property within the toe of a landslide that had been evident since the area was developed in the early 1900's. In addition, the landslide was classified as "active" because it exhibited periodic cycles of activity and dormancy. [FN51] The California Supreme Court held that the uphill landowner owed a duty of reasonable care to protect the downhill landowner from harm caused by natural conditions on or of the uphill landowner's property. [FN52]

In reaching its decision, the California Supreme Court noted the appearance of "a general trend toward rejecting the common law distinction between natural and artificial conditions." The court further noted that other "courts are increasingly using ordinary negligence principles to determine a possessor's liability for harm caused by a condition of the land." [FN53] In addition, the *Sprecher* Court reviewed the Restatement (Second) of Torts' provisions and commentary. After remarking that other courts have held a possessor of land liable for harm caused by natural conditions of the land to adjoining landowners, and especially in light of its earlier *Rowland v. Christian* [FN54] decision, it declared: "it is difficult to discern any reason

to restrict the possessor's duty to individuals using highways. To do so would create an unsatisfying anomaly: a possessor of land would have a duty of care toward strangers but not toward his neighbor." [FN55]

In the *Sprecher* decision, the California Supreme Court also recognized that the most frequently invoked reason for the rule of non-liability for natural conditions was that the rule was an embodiment of the traditionally held principle that one should not be obligated to undertake affirmative action to aid or protect others. [FN56] Nevertheless, regardless of what this rule may have once been, the court declared that the duty to exercise due care could indeed arise out of possession of the property alone. [FN57] For example, the court remarked on its prior decision of *Rowland v. Christian* [FN58] and other modern cases that have clearly rejected the common law distinction between the duties of care owed by a possessor of land to different classes of persons on the premises such as trespassers, licensees or invitees, in favor of a single duty to exercise reasonable care grounded on the possession of the premises and the attendant right to control and manage the premises. [FN59]

Finally, the court noted the inherent injustice of a rule that would allow a landowner to escape all liability for serious damage to his neighbors merely by allowing nature take its course. [FN60] The court explained: "A (person's) life or limb ***12** (or property) does not become less worthy of protection by the law nor a loss less worthy of compensation under the law because that person has been injured by a natural, as opposed to an artificial condition." [FN61]

The court in *Sprecher* emphasized that the liability imposed was rooted in negligence principles. As such, the court focused on whether the possessor of land acted as a reasonable person under the totality of the circumstances. Relevant factors to be considered included the likelihood of injury to plaintiff, the probable seriousness of such injury, the burden of reducing or avoiding the risk, the location of the land, and the possessor's degree of control over the risk-creating condition. [FN62]

Considerations Under Hawai'i Law

Like some other courts, the Hawai'i appellate courts have addressed a possessor of land's liability to persons outside the premises for harm caused by falling trees. As in decisions from other jurisdictions, the reach of these Hawai'i decisions do not appear to be limited to trees and should extend to other natural conditions. Moreover, the Hawai'i Supreme Court has rejected traditional common law distinctions with respect to a possessor of land's duties of care owed to persons on the premises for reasons that should also support the rejection of the traditional common law distinctions between harm caused by artificial or natural conditions to persons outside the premises.

Medeiros v. Honomu Sugar Company: Negligence

In the early decision of *Medeiros v. Honomu Sugar Company*, the Hawai'i Supreme Court addressed a situation where a defective tree fell from defendant's property and caused serious bodily injury to the plaintiff, who was traveling on a public highway. [FN63] According to plaintiff's contentions, the tree, approximately 22 feet from the highway, was 40 to 50 feet tall

and was ***13** leaning towards the highway. Moreover, the tree was "kind of rotten" and some of its roots were exposed. [FN64] The jury found that there was sufficient evidence of negligence and issued a verdict in favor of plaintiff.

In affirming the verdict, the Hawai'i Supreme Court declared as follows:

> Although the defective and dangerous condition of the tree in question ... was the result of natural causes, still, if such defective and dangerous condition was known, or by the exercise of ordinary care, could have been known by defendant, then it became the duty of the defendant to exercise reasonable care and diligence to prevent the tree from falling and injuring those who might have the occasion to use the public highway; and the defendant failing to perform this duty and as a result of such failure the tree fell and injured the plaintiff, the defendant was chargeable with negligence and thereupon became liable to plaintiff in damages for the injuries so received. [FN65]

In rendering its decision, the Court held defendant liable even though the deterioration of the tree was the result of natural conditions. More fundamentally, the Court also stated that "all the essential elements of negligence are present: (1) the existence of a duty on the part of defendant to protect plaintiff from injury; (2) the failure of the defendant to perform that duty; and (3) injury to the plaintiff from such failure of duty on the part of defendant." [FN66]

Like the rulings of other courts in the tree cases of the 1960s and 1970s that deviated from the traditional common law approach of non-liability for natural conditions, the Hawai'i Supreme Court's decision in *Medeiros* does not appear to be grounded on a special rule concerning trees but, instead, arose out of the application of basic negligence principles. The Hawai'i Supreme Court even compared a landowner's liability for trees harming persons on a highway with the liability of an owner of a building or other structure. The Court stated as follows:

> The duty which the owner of a building or other structure abutting ***14** on a street, or other public highway, owes to the public and the duty of the owner of land on which he permits a tree to remain near the public highway, are the same in principle. The principle thus invoked by the plaintiff is a familiar one and of wide application in the law of negligence. [FN67]

Consideration of Hawai'i's Rejection of Common Law Classifications in Favor of a Single Duty of Reasonable Care as to Persons on the Premises

Subsequent to *Medeiros*, in its 1969 decision of *Pickard v. City and County of Honolulu*, [FN68] the Hawai'i Supreme Court rejected the traditional common law distinctions under which a landowner's duty of care to persons entering the premises was dependent upon the person's legal classification, such as trespasser, licensee or invitee. Finding that distinctions between classes of persons bore no logical relationship to the exercise of reasonable care for the safety of others, the court held that an occupier of land has a duty to use reasonable care for the safety of all persons anticipated to be upon the premises. [FN69] In reaching its decision, the court cited and quoted from the landmark case of *Rowland v. Christian*, [FN70] the same case referenced by the California Supreme Court in *Sprecher, supra*, when it rejected the traditional common law approach of distinguishing between artificial and natural conditions when determining a possessor's liability for harm to persons outside the premises. [FN71] The Hawai'i Supreme Court further explained that:

> the classifications and subclassifications bred by the common law have produced confusion and conflict. ... Through this semantic morass, the common law has moved ... towards imposing on owners and occupiers *a single duty of reasonable care in all the circumstances.* [FN72]

Like the Court in *Sprecher*, it would seem probable that the Hawai'i appellate courts would take the next step, if they have not already done so in *Medeiros, supra*, or in the *Whitesell* decision addressed below, and specifically reject the traditional common law approach of non-liability for harm to persons outside the premises caused by natural conditions. To do otherwise would produce the anomalous result whereby a trespasser would be able to bring an action in negligence that would be denied a neighbor where both were standing on either side of the possessor's boundary line and were both struck by the same falling rock or other debris. [FN73]

Whitesell v. Houlton: A Nuisance Case

Most recently, in *Whitesell v. Houlton*, the Hawai'i Intermediate Court of Appeals examined a possessor of land's duties with respect to an overhanging tree which encroached upon and damaged a neighbor's property. [FN74] The court found that the landowner of the property upon which the tree was located, was under an affirmative duty to prevent his tree from damaging his neighbor's property and was therefore liable for the damages caused. [FN75] In reaching its decision, the Court held, in part:

> That when overhanging branches or protruding roots actually caused, or there is imminent danger of them causing, sensible harm to property other than plant life, in ways other than by casting shade or dropping leaves, flowers, or fruit, the damaged or imminently endangered neighbor may require the owner of the tree to pay for the damages and to cut back the endangering branches or roots and, if such is not done within a reasonable time, the damaged or imminently endangered neighbor may cause the cutback to be done at the tree owner's expense. [FN76]

Although the *Whitesell* court addressed the issue of landowner liability based primarily on nuisance principles, it nonetheless favorably cited and confirmed the continuing validity of *Medeiros; supra*, although *Medeiros* had been grounded on negligence. Additionally, the *Whitesell* decision extended beyond the limited exceptions to non-liability under the Restatement by holding that the landowner may be liable to an adjoining landowner not just persons using highways.

Moreover, the principles reflected in *Whitesell* were not dependent upon the traditional common law distinctions between artificial and natural conditions. Rather, *Whitesell* reflected an application of nuisance principles to overhanging trees. As such, nuisance principles should likewise apply to other conditions, including natural conditions such as boulders or rocks, that may cause or create an imminent risk of harm to persons or property outside of the premises.

Conclusion

The Onishi incident in 2002 spurred unsuccessful efforts to enact legislation to "clarify" the duty of landowners to mitigate rock fall risks. [FN77] As can be expected, there are strong

competing interests between uphill and downhill owners. What is fair and reasonable may vary according to circumstance. Therefore, it remains to be seen whether the legislature will intervene or leave the matter for the courts to decide.

Until there is legislation and/or a Hawai'i appellate decision to the contrary, given current legal trends and Hawai'i case law, a possessor of land would be well advised to exercise reasonable care in the maintenance of its property for the safety of others, even though the risk of harm may arise from natural conditions of the land or the persons or property at risk may be outside the premises. This does not mean that the possessor is strictly liable or has a duty to eliminate all risks of rock fall under every circumstance, only to act reasonably.

A system in which a possessor has an obligation to take reasonable care may be preferable to one in which a possessor can safely ignore dangerous risks of serious harm to others and/or, in effect, take some or all of the value of his neighbor's property by reducing the neighbor's rights to use and enjoy his land.

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[FN1]. *See* Mike Gordon and Robbie Dingeman, *Two Hurt When Boulder Hits SUV on Freeway*, Honolulu Advertiser, Dec. 13, 2004 at A1; Rod Antone, *Barreling Boulder Hits Nuuanu Home*, Honolulu Star-Bull., May 11, 2004.

[FN2]. Scott Ishikawa, *North Shore May Undergo Another Detour*, Honolulu Advertiser, July 8, 2000 at A1: Tanya Bricking, *Governor Tries to Speed Up Relief for North Shore*, Honolulu Advertiser, March 10, 2000 at A1.

[FN3]. Will Hoover, *Makapuu Rockfall Cleared*, Honolulu Advertiser, Dec. 30, 2001 at A25.

[FN4]. Gregg K. Kakesako & Craig Gima, Boulder Dash, Honolulu Star-Bull., Nov. 29, 2002, available at: http:// starbulletin.com/2002/11/29/news/story1.html.

[FN5]. Catherine Toth & Curtis Lum, *Rockfall Danger Forces Dozens From Homes*, Honolulu Advertiser, Dec. 7, 2002 at A1.

[FN6]. Leila Fujimori & Gregg Kakesako, *One Dead After Boulder Smashes Nuuanu Home*, Honolulu Star-Bull., Aug. 9, 2002, available at: http:// starbulletin.com/2002/08/09/news/story1.html.

[FN7]. Dingeman, *Boulder Hits SUV, supra* note 1.

[FN8]. Peter Boylan, *Boulder Smashes Into Nuuanu Home*, Honolulu Advertiser, May 11, 2004 at A1.

[FN9]. Dingeman, *Boulder Hits SUV, supra.*

[FN10]. James Gonser, *Navy to Secure Moanalua Boulder*, Oct. 27, 2004 at B1.

[FN11]. Peter Boylan & Mike Gordon, *Boulder on II-1 Causes Grash*, Dec. 14, 2004 at B1.

[FN12]. Mike Gordon, *Tumbling Rocks an Unpredictable Reality in Hawai'i*, Honolulu Advertiser, Aug. 10, 2002 at A2.

[FN13]. *Pickard v. City and County of Honolulu*, 51 Haw. 134, 452 P.2d 445 (1969).

[FN14]. *See In re: Sacred Falls Cases*, No. 00-1-0001SFC (DDD) (1st Circuit, filed September 24, 2002).

[FN15]. *Compare* RESTATEMENT (SECOND) OF TORTS, § 363 (1965) (precluding a cause of action for injuries occurring outside the land by a natural condition of the land) with RESTATEMENT (SECOND) OF TORTS, § 364 (1965) (recognizing a cause of action for injuries occurring outside a possessor's premises for harm caused outside the land by an artificial condition); *see also Sprecher v. Adamson Companies*, 636 P.2d 1121, 1122 23 (Cal. 1981).

[FN16]. *Id.*; RESTATEMENT (SECOND) OF TORTS, § 364 (1965).

[FN17]. *Sprecher*, 636 P.2d at 1122 23, RESTATEMENT (SECOND) OF TORTS, § 363 (1965).

[FN18]. RESTATEMENT (SECOND) OF TORTS, § 363.1 cmt. a (1965); Dix W. Noel, *Nuisances from Land in its Natural Condition*, 56 Harv. L. Rev., 772, 798 (1943); 62 Am.Jur.2d § 745 (1990).

[FN19]. *See, e.g., Price v. City of Seattle*, 24 P.3d 1098 (Wash. App. 2001). Washington is a jurisdiction that continues to follow traditional common law principles of landowner liability not just with respect to a possessor's liability to persons outside the premises, but also maintains the common law distinctions as to the duties of care that a possessor of land owes to different classes of persons found to be on the premises. *Id.* 636 P.2d at 1102. Unlike Washington, and as discussed herein, Hawai'i has eliminated distinctions between duties owed to trespassers, licensees, and invitees. *See Pickard v. City and County of Honolulu*, 51 Haw. 134, 452 P.2d 445 (1969).

[FN20]. *Sprecher*, 636 P.2d at 1124.

[FN21]. *See e.g., Ford v. South Carolina Dept. of Transp.*, 492 S.E.2d 811 (S.C. 1997); *Mahurin v. Lockhart*, 399 N.E.2d 523 (Ill. App. 1979); *Barker v. Brown*, 340 A.2d 566, 569 (Pa. 1975); *see also infra note* 47 and accompanying text.

[FN22]. *Miles v. Christensen*, 724 N.E.2d 643, 646 (Ind. App. 2000); *see also Sprecher*, 636 P.2d at 1125.

[FN23]. *See Barker v. Brown*, 340 A.2d 566, 568 (Pa. 1975): Am. Jur. 2d Premises Liability § 746 (2004); *see also Dudley v. Meadowbrook*, 166 A.2d 743, 743-44 (D.C. App. 1961).

[FN24]. RESTATEMENT (SECOND) OF TORTS, § 363, cmt. a (1965).

[FN25]. *Id.*

[FN26]. *Id.*

[FN27]. Dix W. Noel, *Nuisances from Land in its Natural Condition*, 56 Harv. L. Rev., 772, 773 (1943).

[FN28]. RESTATEMENT (SECOND) OF TORTS, § 314, cmt. c (1965): *Sprecher*, 636 P.2d at 1125-26.

[FN29]. *Mahurin v. Lockhart*, 399 N.E.2d 523, 524 (Ill. App. 1979); 62A Am. Jur. 2d § 745 (1990).

[FN30]. *Mahurin*, 399 N.E.2d at 524; W. Page Keeton, ed., *Prosser & Keeton on Torts* § 57 (5th ed. 1984).

[FN31]. *Sprecher*, 636 P.2d at 1121; see RESTATEMENT (SECOND) OF TORTS, § 363 (1965).

[FN32]. RESTATEMENT (SECOND) OF TORTS, § 363, cmt. a (1965); *see also* Dix W. Noel, *Nuisances from Land in its Natural Condition*, 56 Harv. L. Rev., 772, 772 (1943).

[FN33]. RESTATEMENT (SECOND) OF TORTS, § 364 (1965). Under this rule, landowners may be liable for injuries occurring outside their premises, where they are responsible for creating, maintaining or failing to detect a harmful artificial condition of their land. Even where natural harms caused by artificial conditions or activity are at issue, courts have not besitated to impose liability on private landowners for the resulting harm to their neighbors. *See, e.g., Miller v. Montgomery Investments*, 387 S.E.2d 296, 300 (Va. 1989) (defendant could be liable where landslide was caused by artificial condition upon his property); *Brownsey v. General Printing Ink Corp.*, 510 193 Atl. 824 (N.J. 1937) (landowner who permits ice and sleet to collect upon rook which later slides off and injures another on an adjacent parcel is liable for such injuries); *Fitzpatrick v. Penfield*, 109 A. 653, 655 (Pa. 1920) (since "high winds" were expected three to four times a year, defendant landowner could have reasonably anticipated and provided against the occurrence of such natural even and thus was liable for damages caused when they occurred).

[FN34]. RESTATEMENT (SECOND) OF TORTS, § 364 (1965).

[FN35]. *See supra* § 363 (2).

[FN36]. RESTATEMENT (SECOND) OF TORTS § 840(1) (1979).

[FN37]. *See supra* § § 840(2).

[FN38]. *See Gibson v. Denton* 38 N.Y.S. 554 (4. A.D. 1896).

[FN39]. Dix W. Noel, *Nuisances from Land in its Natural Condition*, 56 Harv. L. Rev., 772, 773 (1943) ("In recent years, however, there have been signs of discontent with the prevailing

view").

[FN40]. *Sprecher*, 636 P.2d at 1124.

[FN41]. RESTATEMENT (SECOND) OF TORTS, § 840, cmt. c (1979).

[FN42]. *Id.*

[FN43]. *Sprecher*, 636 P.2d at 1124.

[FN44]. RESTATEMENT (SECOND) OF TORTS § 840 cmt. c (1979); *Sprecher*, 636 P.2d at 1124.

[FN45]. *Sprecher*, 636 P.2d at 1124.

[FN46]. *Id.* at 1125; *see, e.g., Hensley v. Montgomery County*, 334 A.2d 542, 545-47 (1975); *Hay v. Norwalk Lodge*, 109 N.E.2d 481, 482 (1951); *Chandler v. Larsen*, 500 N.E.2d 584, 588 (Ill. App. 1986).

[FN47]. *Husovsky v. U.S.*, 590 F.2d 944, 950-51 (C.A.D.C. 1978); *Taylor v. Olsen*, 578 P.2d 779, 782 (Or. 1978); see also 54 A.L.R. 530 § 2(a) (2004); W. Page Keeton, ed., *Prosser & Keeton on Torts* § 57 (5th ed. 1984); Am. Jur. 2d *Premises Liability* § 746 (2004) (recognizing that "the trend for urban areas, where both the danger and its consequences are generally apparent, is to reject the distinction between natural and artificial conditions and the immunity from liability ... and to impose upon the landowner a duty of reasonable care to eliminate the dangers to adjoining property presented by natural conditions).

[FN48]. *Sprecher* at 1124-1125, *citing Taylor*, 578 P.2d at 782.

[FN49]. RESTATEMENT (SECOND) OF TORTS, § 840, cmt. c. (1979); *see also Valinet v. Eskew*, 574 N.E.2d 283 (Ind. 1991).

[FN50]. 636 P.2d 1121 (Cal. 1981).

[FN51]. *Id.* at 1122.

[FN52]. *Id.* at 1128 (reversed lower appellate court ruling affirming summary judgment in favor of uphill landowner and remanded for further proceedings).

[FN53]. *Id.* at 1124.

[FN54]. *Rowland v. Christian*, 443 P.2d 561 (Cal. 1968).

[FN55]. *Id.* at 1125.

[FN56]. *Id.*

[FN57]. *Id.* at 1126.

[FN58]. *Rowland*, 443 P.2d 561.

[FN59]. *Sprecher*, 636 P.2d at 1126.

[FN60]. *Id.* at 1125.

[FN61]. *Id.* at 1128, citing Rowland, 443 P.2d at 561.

[FN62]. *Id.* at 1128-29.

[FN63]. *Medeiros v. Honomu Sugar Company*, 21 Haw. 155 (1912). Although an early case, *Medeiros* should still serve as effective precedent.

[FN64]. *Id.* at 156.

[FN65]. *Id.* at 158-59.

[FN66]. *Id.* at 159.

[FN67]. *Id.* at 159.

[FN68]. *Pickard v. City and County of Honolulu*, 51 Haw. 134, 452 P.2d 445 (1969). Prior to *Pickard*, the law distinguished trespassers, licensees, and invitees in determining a landowner's duty of care. *See Pickard*, 51 Haw. at 136, 452 P.2d at 446 (1969).

[FN69]. *Id.* at 446.

[FN70]. *Rowland v. Christian*, 443 P.2d 561 (Cal. 1968).

[FN71]. *Pickard*, 51 Haw. at 146, 452 P.2d at 446.

[FN72]. *See id. citing Kermarec v. Compangnie Generale*, 358 U.S. 625, 630-31 (1959) (emphasis added).

[FN73]. Cf. *Sprecher*, 636 P.2d at 1128.

[FN74]. *Whitesell v. Houlton*, 2 Haw. App. 635, 632 P.2d 1077 (1981). This decision was issued shortly before the California Supreme Court's ruling in *Sprecher, supra.*

[FN75]. *Id.* at 366.

[FN76]. *Id.* at 367 368.

[FN77]. *See, e.g.*, H.B. 1261, 22nd Leg. Reg. Sess. (2003); B. 80, 2002 City Council, 11th Sess. (Honolulu 2002): Will Hoover & James Gonser, *Rockfall Prevention Bills Failed*, Honolulu Advertiser, May 19, 2004 at A1; *but* cf. Res. 02-320, City Council, 11th Sess. (Honolulu 2002). In particular, H.B. 1261 was designed to "clarify the duty of the owner of privately held land to ensure that these [rock fall] risks are mitigated to a reasonable extent" and to "impose an actionable duty on private landowners of property, on which there is a potential danger of falling rocks, to inspect and remove those rocks or otherwise mitigate any unreasonable danger to persons or property." H.B. 1261, H.D. 2, 22nd Leg. Reg. Sess. (2003).
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