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STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES

POST OFFICE BOX 621
HONOLULU, HAWAII 96809

TESTIMONY OF THE CHAIRPERSON OF THE BOARD OF LAND AND NATURAL RESOURCES

on Senate Bill 2065, Senate Draft 2 – Relating To Landowner Liability For Natural Conditions

BEFORE THE HOUSE COMMITTEE ON WATER, LAND, OCEAN RESOURCES AND HAWAIIAN AFFAIRS

March 14, 2008

Senate Bill 2065, Senate Draft 2 clarifies common law regarding non-liability of landowners regarding natural conditions on their land that cause damage outside the land. The Department of Land and Natural Resources (Department) notes that supports this bill. The Department notes further that the House companion to this measure, House Bill 2350, House Draft 2, has crossed-over to the Senate.

This is an issue that affects many private landowners that are protecting and managing public trust resources on their lands – and much of the public lands managed by the Department. The Department is responsible for managing the forest reserve the Natural Area Reserve Systems, which together comprise nearly 800,000 acres of land. The vast majority of these lands are unimproved according to the definition set forth in this measure. The Department also regulates development activities on lands in the Conservation District, comprising approximately two million acres of land, or roughly half of the lands in the State. The Department primarily tries to keep these lands in a natural state that provides the watershed, forests, native habitats and open space that support our cherished quality of life. In the last 10 years, new and productive public/private watershed partnerships have been created out of recognition of the need to manage these unimproved conservation lands at a landscape level – and maintain their conservation values. These unimproved conservation lands, both public and privately owned, continue to fulfill their purpose and serve the public interest.

With increased population, urban and residential development continues to expand and build on any available parcel of developable land. Because of current or prior zoning decisions, many residential areas are adjacent to unimproved conservation lands. This has created a situation that may put some property owners and individuals at risk from rocks and landslides originating from these lands. A similar hazardous situation exists with the ocean, many live in close proximity to the ocean and that puts property owners and individuals at risk from storms and tsunamis. Many of our citizens have accepted these risks in exchange for the benefits of living near the mountains or by the ocean.

The current trend in the law is to hold landowners responsible for actions emanating off their land that affect their neighbor. Act 82, Session Laws of Hawaii 2003, was passed to provide the State and Counties with protection from liability for damages caused by dangerous natural conditions in unimproved recreational areas within their lands. This bill provides limited liability to owners of unimproved lands from injuries outside the boundaries of their land caused by naturally occurring land failure originating on their unimproved land. This measure is wise public policy because it does not penalize the landowner of unimproved conservation lands for the results of acts of nature. It removes one of the major disincentives - the liability exposure for naturally occurring acts – from the private conservation landowner and encourages them to keep and maintain their conservation lands.

The Department recognizes the terrible personal tragedy that can result from natural catastrophes such as landslides, tsunamis, floods and hurricanes. Exposure to rockfall and landslide can be mitigated by restrictive zoning during the permitting process to prevent development in a potential rockfall zone and mitigated by using rockfall barrier fences, hillside settling ditches, protective netting, or selective removal of rocks. The Department believes that mitigation of these hazards should be built into the process and cost of developing property in hazardous areas, just as is done in tsunami, flood or hurricane zones and supported by appropriate insurance coverage with restrictive zoning and building limitations. Greater scrutiny needs to be applied during the permitting processes to prevent further development in hazardous areas.

TESTIMONY OF THE STATE ATTORNEY GENERAL
TWENTY-FOURTH LEGISLATURE, 2008

ON THE FOLLOWING MEASURE:
S.B. NO. 2065, S.D. 2, RELATING TO LANDOWNER LIABILITY FOR NATURAL CONDITIONS.

BEFORE THE:
HOUSE COMMITTEE ON WATER, LAND, OCEAN RESOURCES & HAWAIIAN AFFAIRS

DATE: Friday, March 14, 2008 **TIME:** 10:00 AM
LOCATION: State Capitol, Room 312
Deliver to: State Capitol, Room 427, 3 Copies

TESTIFIER(S): Mark J. Bennett, Attorney General
or Caron M. Inagaki, Deputy Attorney General

Chair Ito and Members of the Committee:

The Attorney General supports S.B. No. 2065, S.D. 2.

The purpose of this bill is to provide limited liability to landowners of unimproved lands for injuries or damages that occur outside the landowner's property caused by naturally occurring land failures.

The State of Hawaii owns and manages millions of acres of public lands, many of which are unimproved conservation or forest reserve lands. The bill would allow the State to serve the public interest to keep these lands in their natural state without fear of liability for damages occurring outside the boundaries of its lands caused by unpredictable and naturally occurring land failures, such as landslides and rockfalls.

The bill makes clear that the natural condition would still exist despite minor alterations such as the installation or maintenance of utility poles, fences, and signage. The bill also allows for maintenance activities for prudent land management such as forest plantings or weed, brush, rock, boulder, and tree removal. Thus, landowners who are protecting and managing public trust resources on unimproved lands are encouraged to act prudently and responsibly to

maintain and manage these lands without fear that their actions to remove or mitigate potential hazards would be a material "improvement" that would take them out of the protections afforded under this bill.

We request your support in passing S.B. No. 2065, S.D. 2.

KAMEHAMEHA SCHOOLS

WRITTEN COMMENT TO THE SENATE COMMITTEE ON
JUDICIARY AND LABOR
By
Kelly LaPorte, Outside Counsel for the Kamehameha Schools

Hearing Date: Friday, March 14, 2008
10:00 a.m., Conference Room 312

Thursday, March 13, 2008

TO: Representative Ken Ito, Chair
Representative Jon Riki Karamatsu, Vice Chair
Members of the Committee on Water, Land, Ocean Resources & Hawaiian Affairs

SUBJECT: Support of S.B. No. 2065 S.D.2 – Relating to Landowner Liability for Natural Conditions.

My name is Kelly LaPorte, and I am outside counsel for the Kamehameha Schools. I am providing this testimony in support of S.B. No. 2065, S.D. 2 relating to landowner liability for natural conditions. This Bill codifies common law that protects State, County and private landowners who have not altered the natural condition of their land.

This Bill provides clarity with respect to liability from naturally occurring dangers, insulating up-slope landowners who have not altered the natural environment on their property, and is consistent with both common law and the Restatement of the Law of Torts. In two recent court cases involving a rockfall, Onishi v. Vaughan, and a massive mud and boulder slide, Makaha Valley Towers v. Board of Water Supply, after substantial litigation, the First Circuit Court in both instances acknowledged the applicability of this law when no artificial improvements have been constructed to create any additional risk. We have attached copies of the Hawaii Revised Statute section that adopts common law, the treatises that restate this law, and the order in the Onishi case.

By codifying common law, this Bill provides certainty in Hawaii law for natural conditions that exist on unaltered lands. Further, by expressly allowing minor improvements on land, it allows a reasonable use of natural land without triggering additional responsibilities. Expressly allowing minor improvements such as utility poles provides benefits to the community at large or, in the case of protective fences or warning signage, enhances safety. Importantly, the provision in this Bill that allows other, specified minor alterations of land, such as the ***removal*** of potentially dangerous natural conditions such as boulders or rocks, allows voluntary acts undertaken by either the landowner or owners of neighboring property without increasing the risk of liability.

KAMEHAMEHA SCHOOLS

Thursday, March 13, 2008

Representative Ken Ito, Chair
Representative Jon Riki Karamatsu, Vice Chair
Members of the Committee on Water, Land, Ocean Resources & Hawaiian Affairs

This is essentially a Good Samaritan provision that will encourage cooperation in voluntarily undertaking such measures intended to enhance safety. In the absence of this provision, a landowner may be reluctant to remove or alter any natural condition or allow others to come onto the land to do the same for fear of losing protection afforded by the common law.

By expressly allowing minor alterations of the land, such as allowing recreational visitors like day hikers on a hiking path, this similarly promotes the reasonable use and enjoyment of natural land, without losing the protection of this law. The Hawaii legislature has already deemed this an important public policy in its enactment of Chapter 520, which purpose is to "encourage owners of land to make land . . . available to the public for recreational purposes by limiting their liability towards person entering thereon for such purposes." This Bill is consistent with this purpose.

In the absence of this Bill, landowners who, to date, have kept their land in a natural condition will possess a disincentive to keep the land in its unaltered state because of potential liabilities. Instead, these landowners possess an incentive to either develop the land or sell it to third parties for development. To the extent that the State, Counties, and Public Land Trusts acquire unaltered land for preservation and conservation purposes, this Bill protects them. Passage of this Bill will promote sustainable communities by encouraging the retention of natural lands, while at the same time protecting consumers by fostering proper planning and consideration of appropriate safeguards. We have attached a table explaining the basis for each of the foregoing provisions and its practical application.

In sum, landowners – both private and government – should be insulated from liability from any damage as a result of the natural condition of the land as recognized by common law, and should be encouraged to allow limited, reasonable use of their natural lands and to voluntarily reduce risk of rockfalls without losing this protection. Kamehameha Schools respectfully requests that you pass this important Bill, and that you amend the date in Section 5 so that the Act takes effect on July 1, 2008.

§ 1-1. Common law of the State; exceptions.

The common law of England, as ascertained by English and American decisions, is declared to be the common law of the State of Hawaii in all cases, except as otherwise expressly provided by the Constitution or laws of the United States, or by the laws of the State, or fixed by Hawaiian judicial precedent, or established by Hawaiian usage; provided that no person shall be subject to criminal proceedings except as provided by the written laws of the United States or of the State. [L 1892, c 57, § 5; am L 1903, c 32, § 2; RL 1925, § 1; RL 1935, § 1; RL 1945, § 1; RL 1955, § 1-1; HRS § 1-1]

PROSSER AND KEETON
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be the misrepresentation as to the character of the property.[39]

Natural Conditions

The one important limitation upon the responsibility of the possessor of land to those outside of his premises has been the traditional rule, of both the English and the American courts, that he is under no affirmative duty to remedy conditions of purely natural origin upon his land, although they may be highly dangerous or inconvenient to his neighbors.[40] The origin of this, in both countries, lay in an early day when much land, in fact most, was unsettled or uncultivated, and the burden of inspecting it and putting it in safe condition would have been not only unduly onerous, but out of all proportion to any harm likely to result. Thus it has been held that the landowner is not liable for the existence of a foul swamp,[41] for falling rocks,[42] for uncut weeds obstructing the view of motorists at an intersection,[43] for thistles growing on his land,[44] for harm done by indigenous animals,[45] or for the normal, natural flow of surface water.[46] Closely allied to this is the generally accepted holding that an abutting owner is under no duty to remove ice and snow which has fallen upon his own land or upon the highway.[47]

On the other hand, if the occupier has himself altered the condition of the premises, as by erecting a structure which discharges water upon the sidewalk,[48] setting up a parking lot upon which water will collect,[49] weakening rocks by the construction of a highway,[50] damming a stream so that it forms a malarial pond,[51] planting a row of trees next to the highway,[52] digging out part of a hill,[53] or piling sand or plowing a field so that the

39. See infra, § 61.

40. Second Restatement of Torts, § 363. See Noel, Nuisances from Land in its Natural Condition, 1943, 56 Harv.L.Rev. 772; Goodhart, Liability for Things Naturally on the Land, 1930, 4 Camb.L.J. 13.

41. Roberts v. Harrison, 1897, 101 Ga. 773, 28 S.E. 995.

42. Pontardawe R. D. C. v. Moore-Gwynn, [1929] 1 Ch. 656. But see Sprecher v. Adamson Companies, 1981, 30 Cal.3d 358, 178 Cal.Rptr. 783, 636 P.2d 1121 (duty of due care to prevent landslide).

43. See supra, note 25.

44. Giles v. Walker, 1890, 24 Q.B.D. 656 (thistles); cf. Salmon v. Delaware, L. & W. R. Co., 1875, 38 N.J.L. 5 (leaves); Langer v. Goode, 1911, 21 N.D. 462, 131 N.W. 258 (wild mustard).

45. Brady v. Warren, [1909] 2 Ir.Rep. 632; Stearn v. Prentice Bros., [1919] 1 K.B. 394; Seaboard Air Line Railroad Co. v. Richmond-Petersburg Turnpike Authority, 1961, 202 Va. 1029, 121 S.E.2d 499 (pigeons); Merriam v. McConnell, 1961, 31 Ill.App.2d 241, 175 N.E.2d 293 (box elder bugs). Nor, perhaps, for horses kept by a tenant. Blake v. Dunn Farms, Inc., 1980, ___ Ind. ___, 413 N.E.2d 560. Contra, perhaps, for horses kept by an employee. See Misterek v. Washington Mineral Products, Inc., 1975, 85 Wn.2d 166, 531 P.2d 805. Cf. Weber v. Madison, Iowa 1977, 251 N.W.2d 523 (geese); King v. Blue Mountain Forest Association, 1956, 100 N.H. 212, 123 A.2d 151 (wild Prussian boar, fourth or fifth generation from original imports).

46. See Keys v. Romley, 1966, 64 Cal.2d 396, 50 Cal. Rptr. 273, 412 P.2d 529; Mohr v. Gault, 1860, 10 Wis. 513; Livezey v. Schmidt, 1895, 96 Ky. 441, 29 S.W. 25.

47. Rockafellow v. Rockwell City, Iowa 1974, 217 N.W.2d 246; Bailey v. Blacker, 1929, 267 Mass. 73, 165 N.E. 699; Moore v. Gadsden, 1881, 87 N.Y. 84. Ordinances requiring the property owner to remove snow and ice usually are construed to impose no duty to any private individual. See supra, § 36.

48. See Leahan v. Cochran, 1901, 178 Mass. 566, 60 N.E. 382; Tremblay v. Harmony Mills, 1902, 171 N.Y. 598, 64 N.E. 501; Updegraff v. City of Ottumwa, 1929, 210 Iowa 382, 226 N.W. 928. Note, 1937, 21 Minn.L. Rev. 703, 713; cf. Harris v. Thompson, Ky.1973, 497 S.W.2d 422 (broken water pipe caused ice on road). But see North Little Rock Transportation Co. v. Finkbeiner, 1967, 243 Ark. 596, 420 S.W.2d 874 (Finky not liable for water in street from sprinkler system).

49. Moore v. Standard Paint & Glass Co. of Pueblo, 1960, 145 Colo. 151, 358 P.2d 33. But see Williams v. United States, E.D.Pa.1981, 507 F.Supp. 121 (no liability, under "hills and ridges" doctrine, for slippery sheet of ice with no ridges or elevations in parking lot).

50. McCarthy v. Ference, 1948, 358 Pa. 485, 58 A.2d 49.

51. Mills v. Hall, N.Y.1832, 9 Wend. 315; Towaliga Falls Power Co. v. Sims, 1909, 6 Ga.App. 749, 65 S.E. 844. Cf. Andrews v. Andrews, 1955, 242 N.C. 382, 88 S.E.2d 88 (artificial pond collecting wild geese, which destroyed plaintiff's crops).

52. Coates v. Chinn, 1958, 51 Cal.2d 304, 332 P.2d 289 (cultivated trees). Accord, Wisher v. Fowler, 1970, 7 Cal.App.3d 225, 86 Cal.Rptr. 582 (maintaining hedge). Cf. Crowhurst v. Amersham Burial Board, 1878, 4 Exch.Div. 5, 48 L.J.Ex. 109 (planting poisonous trees near boundary line). But there may be no liability for merely failing to cut weeds. See supra, note 25.

53. Fabbri v. Regis Forcier, Inc., 1975, 114 R.I. 207, 330 A.2d 807.

RESTATEMENT OF THE LAW
Second

TORTS 2d

Volume 2
§§ 281–503

As Adopted and Promulgated

BY

THE AMERICAN LAW INSTITUTE

AT WASHINGTON, D. C.

May 25, 1963
and
May 22, 1964

ST. PAUL, MINN.
AMERICAN LAW INSTITUTE PUBLISHERS
1965

§ 363. Natural Conditions

(1) Except as stated in Subsection (2), neither a possessor of land, nor a vendor, lessor, or other transferor, is liable for physical harm caused to others outside of the land by a natural condition of the land.

(2) A possessor of land in an urban area is subject to liability to persons using a public highway for physical harm resulting from his failure to exercise reasonable care to prevent an unreasonable risk of harm arising from the condition of trees on the land near the highway.

See Reporter's Notes.

Caveat:

The Institute expresses no opinion as to whether the rule stated in Subsection (2) may not apply to the possessor of land in a rural area.

Comment:

a. The rule stated in Subsection (1) applies although the possessor, vendor, or lessor recognizes or should recognize that the natural condition involves a risk of physical harm to persons outside the land. Except under the circumstances in Subsection (2) of this Section, this is true 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.

b. Meaning of "natural condition of land." "Natural condition of the land" is used to indicate that the condition of land has not been changed by any act of a human being, whether the possessor or any of his predecessors in possession, or a third person dealing with the land either with or without the consent of the then possessor. It is also used to include the natural growth of trees, weeds, and other vegetation upon land not artificially made receptive to them. On the other hand, a structure erected upon land is a non-natural or artificial condition, as are trees or plants planted or preserved, and changes in the surface by excavation or filling, irrespective of whether they are harmful in themselves or become so only because of the subsequent operation of natural forces.

c. Privilege of public authorities to remove danger. The fact that a possessor of land is not subject to liability for natural

LYNCH ICHIDA THOMPSON KIM & HIROTA
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Attorneys for Plaintiffs

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

PATRICK T. ONISHI, Individually and as Personal Representative of the Estate of Dara Rei Onishi; GAIL A. ONISHI; BLAINE N. ONISHI; and BRADEN T. ONISHI,

Plaintiffs,

vs.

VANCE N. VAUGHAN, INDIVIDUALLY, AND AS SUCCESSOR TRUSTEE OF THE VANCE VAUGHAN REVOCABLE TRUST, HIROKO VAUGHAN, INDIVIDUALLY AND AS SUCCESSOR TRUSTEE OF THE HIROKO VAUGHAN REVOCABLE TRUST; KERRIE N. VAUGHAN; HAWAII CASTLE CORPORATION, a California corporation; CITY AND COUNTY OF HONOLULU; JOHN DOES 1-10; JANE DOES 1-10; and DOE ENTITIES 1-10,

Defendants.

Civil No. 03-1-0660-03 KSSA
(Other Non-Vehicle Tort)

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT VANCE N. VAUGHAN, SUCCESSOR TRUSTEE OF THE VANCE VAUGHAN REVOCABLE TRUST'S CROSS MOTION FOR SUMMARY JUDGMENT FILED ON JULY 20, 2005, AND VANCE N. VAUGHAN AND KERRY N. VAUGHAN'S SUBSTANTIVE JOINDER FILED ON JULY 28, 2005

HEARING:
DATE: August 8, 2005
TIME: 10:00 a.m.
JUDGE: HONORABLE KAREN S.S. AHN

TRIAL DATE: July 31, 2006

ENYING IN PART DEFENDANT
USTEE OF THE VANCE VAUGHAN
ON FOR SUMMARY JUDGMENT
E N. VAUGHAN AND KERRY N.
DER FILED ON JULY 28, 2005

aughan, Successor Trustee of the Vance

For Summary Judgment. Vance N.

iled a Substantive Joinder to the Cross

5 Said motion came on for hearing

8, 2005 at 10:00 a.m. At that hearing,

, Esq., and Ann C. Kemp, Esq.,

Michael J. McGuigan, Esq., Defendant

Brad S. Petrus, Esq., Defendant City and

Hayashiro, Esq., Defendants Vance N.

represented by Steve K. Hisaka, Esq.,

rustee of the Vance Vaughan Revocable

sq. The Court reviewed all memoranda

counsel and took the motion under

ant Vance N. Vaughan's, Successor

Cross Motion For Summary Judgment

granted in part and denied in part as

law as adopted in the State of Hawaii

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3

o. 03-1-0660-03
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an Revocable
And Vance N.
8, 2005

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT VANCE N. VAUGHAN, SUCCESSOR TRUSTEE OF THE VANCE VAUGHAN REVOCABLE TRUST'S CROSS MOTION FOR SUMMARY JUDGMENT FILED ON JULY 20, 2005, AND VANCE N. VAUGHAN AND KERRY N. VAUGHAN'S SUBSTANTIVE JOINDER FILED ON JULY 28, 2005

On July 20, 2005 Defendant Vance N. Vaughan, Successor Trustee of the Vance Vaughan Revocable Trust filed a Cross Motion For Summary Judgment. Vance N. Vaughan, Individually, and Kerry N. Vaughan filed a Substantive Joinder to the Cross Motion for Summary Judgment on July 28, 2005. Said motion came on for hearing before the Honorable Karen S.S. Ahn on August 8, 2005 at 10:00 a.m. At that hearing, Plaintiffs were represented by Wesley W. Ichida, Esq., and Ann C. Kemp, Esq., Defendant Hiroko Vaughan was represented by Michael J. McGuigan, Esq., Defendant Hawaii Castle Corporation was represented by Brad S. Petrus, Esq., Defendant City and County of Honolulu was represented by Derek Mayeshiro, Esq., Defendants Vance N. Vaughan, Individually, and Kerry Vaughan were represented by Steve K. Hisaka, Esq., and Defendant Vance N. Vaughan, Successor Trustee of the Vance Vaughan Revocable Trust, was represented by Amanda J. Weston, Esq. The Court reviewed all memoranda and affidavits submitted, heard the arguments of counsel and took the motion under advisement. Being fully advised in the matter,

IT IS HEREBY ORDERED that Defendant Vance N. Vaughan's, Successor Trustee of the Vance Vaughan Revocable Trust, Cross Motion For Summary Judgment filed on July 20, 2005, and Substantive Joinder is granted in part and denied in part as follows. The Court holds that under the common law as adopted in the State of Hawaii and as reflected in the Restatement 2d, Torts:

1) A real property owner owes no duty with respect to natural conditions on his property;

Under the common law as adopted in the State of Hawaii and as reflected in the Restatement 2d, Torts: 1) A real property owner owes no duty with respect to natural conditions on his property; ....

2) However, a real property owner does owe a duty to exercise reasonable care with respect to non-natural or artificial conditions on his property.

The Court finds that a genuine issue of material fact exists as to the existence or nonexistence of an artificial condition which proximately caused the injuries of which Plaintiffs complain.

DATED: Honolulu, Hawai'i, DEC 23 2005.

JUDGE OF THE ABOVE-ENTITLED COURT

APPROVED AS TO FORM:

JOHN H. PRICE, ESQ.
AMANDA J. WESTON, ESQ.
Attorney for Defendant
VANCE N. VAUGHAN, SUCCESSOR
TRUSTEE OF THE VANCE VAUGHAN
REVOCABLE TRUST

CARRIE S. OKINAGA, ESQ.
DEREK T. MAYESHIRO, ESQ.
Attorneys for Defendant
CITY AND COUNTY OF HONOLULU

BRAD S. PETRUS, ESQ.
Attorney for Defendant
HAWAII CASTLE CORPORATION

2) However, a real property owner owes a duty to exercise reasonable care with respect to non-natural or artificial conditions on his property.

S.B. No. 2065-S.D. 2

Relating to landowner liability for natural conditions.

Benefits of statute

Provides certainty in the law regarding obligations for natural conditions that exist on unaltered land:

- Expressly allows minor improvements on land such as erecting utility pole and signs without triggering additional obligations.
- Expressly provides exception for specific, minor alterations of land taken for preservation or prudent management of land.
- Avoids unnecessary litigation with respect to passive landowners who do not alter natural state of land.
- Protects consumers by fostering proper planning and consideration of safeguards in risk-creating activities outside the land.

Encourages sustainability of communities:

- Encourages retention of natural land within developed areas.
  - In the absence of statute, owners of natural land possess:
    - disincentive to retain land in natural state because of potential liabilities from naturally occurring land failures; and
    - incentive to either develop natural land or sell natural land to third parties for development.
- Allows modest recreational activities (walking, hiking) on natural land without creating additional obligations of landowner.

Encourages voluntary measures to reduce risks of naturally occurring land failures without triggering additional obligations.

Encourages prudent land management practices such as plantings and weed, brush, and tree removal without triggering liability.

Language	Basis for Provision	Practical Application
§663-B Land failure on unimproved land caused by natural condition; liability. A landowner shall not be liable for any damage, injury, or harm to persons or property outside the boundaries of such land caused by any naturally occurring land failure originating on unimproved land.	This ***codifies*** common law, which is adopted in Hawaii under HRS § 1-1, and is consistent with the Restatement (Second) of Torts § 363 as to "natural conditions," and expressly applies it to landowners.	Under this common law rule, if the landowner does not create any condition that creates a risk of harm to others outside the land caused by a naturally occurring land failure, the landowner has no affirmative duty to remedy conditions on the property of purely natural origin. The First Circuit Court recognized and applied this common law rule in 2005 in the Onishi lawsuit. This rule did not alter the outcome in that case, however, because the court held that the factual issue of whether artificial conditions (i.e., non-natural conditions created by upslope City roadway, drainage culvert, or privately owned driveway that diverted water) caused the rockfall would have to be determined by a jury. Given these substantial alterations of the land in Onishi, the proposed statute would not have provided immunity to landowners because the land was improved (not "unimproved"). This provision does ***not*** alter any obligations that a landowner may have to persons ***on*** that landowner's property, such as the State's duty to warn visitors to the Sacred Falls State Park that the First Circuit Court held was violated following the 1999 rockfall that killed and injured visitors to the public park.

§663-C Natural condition. For purposes of this part, the natural condition of land exists notwithstanding (1) minor improvements, such as the installation or maintenance of utility poles, fences, and signage; or	This provides ***clarity*** and ***certainty*** in the application of the law by expressly providing that ***minor improvements*** placed on unimproved land that are not likely to increase the risk of naturally occurring land failures will not trigger an affirmative duty upon landowners to remedy conditions on the property of purely natural origin.	An owner of unimproved land may erect signage on the land that warns visitors of dangers that may exist ***on*** the land, or may provide easements to allow electrical or telephone companies to place utility poles that provide service to the public, without fear that doing so would trigger additional obligations to remediate any conditions unrelated to such improvements. In the absence of allowing for such minor improvements to be placed on natural land, landowners may refuse to install minor improvements such as fences that are intended to safeguard against dangers within the land. Further, this may restrict the availability of land needed by utilities to provide service to the public.
(2) minor alterations undertaken for the preservation or prudent management of the unimproved land, such as the installation or maintenance of trails or pathways or maintenance activities, such as forest plantings and weed, brush, rock, boulder, or tree removal.	This similarly provides ***clarity*** and ***certainty*** in the application of the law by expressly providing that ***minor alterations*** undertaken on unimproved land for preservation or maintenance purposes will not trigger an affirmative duty upon landowners to remedy conditions on the property of purely natural origin.	An owner may make ***minor*** alterations to natural land, such as unpaved trails or paths that are used for management of the land, or allow visitors to traverse the land for recreational purposes such as hiking with minimal disturbance to the natural conditions, without losing protection of this law. This promotes the reasonable use of the land that is unlikely to create additional danger of land failures, and allows the visitation of natural land without creating additional liabilities. An owner of unimproved land may also volunteer to remove rocks or boulders that may pose a danger to others outside the

		land without triggering a duty to remedy all ***other*** conditions of purely natural origin, or allow downslope residents to do the same without creating additional duties. Essentially, this encourages Good Samaritan acts without increasing liability. In the absence of this provision, a landowner may be reluctant to undertake ***any*** minor alterations that are intended to reduce risk because of a fear of losing immunity under the common law.

ImanageDB:836442.1

TESTIMONY OF ROBERT TOYOFUKU ON BEHALF OF THE CONSUMER LAWYERS OF HAWAII (CLH) IN OPPOSITION TO S.B. 2065, SD2

March 14, 2008

To: Chairman Ken Ito and Members of the House Committee on Water, Land, Ocean Resources & Hawaiian Affairs.

My name is Bob Toyofuku, and I am presenting this testimony on behalf of the Consumer Lawyers of Hawaii (CLH) in strong opposition to S.B. No. 2065, SD2.

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 other 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 American 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 that 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.

We 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).