

JAN 23 2009

A BILL FOR AN ACT

RELATING TO TORTS.

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

1 SECTION 1. Chapter 663, Hawaii Revised Statutes, is
2 amended by adding a new section to be appropriately designated
3 and to read as follows:

4 "§663- Design professional as a tortfeasor. (a) Any
5 other law to the contrary notwithstanding, including but not
6 limited to sections 663-10.9, 663-11, 663-12, 663-13, 663-16,
7 663-17, and 663-31, in any case where a design professional is
8 determined to be a tortfeasor along with one or more other
9 tortfeasors, the design professional shall be liable for no more
10 than that percentage share of damages attributable to the design
11 professional for tort claims relating to the maintenance and
12 design of public highways, except when the design professional's
13 degree of negligence is twenty-five per cent or more.

14 (b) For purposes of this section:

15 (1) "Design professional" means a professional engineer,
16 architect, surveyor, or landscape architect licensed
17 under chapter 464; and



S.B. NO. 154

1 (2) The liability of a design professional shall include
2 vicarious liability for the acts or omissions of the
3 design professional's officers and employees."

4 SECTION 2. The provisions of this Act shall apply
5 retroactively to the extent permitted by law.

6 SECTION 3. New statutory material is underscored.

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

8

INTRODUCED BY:

Norman Saterfield

Barry H. Bell



Report Title:

Joint and Several Liability; Design Professionals

Description:

Abolishes joint and several liability for design professionals except when the design professional's degree of negligence is 25% or more.



TESTIMONY BEFORE
SENATE COMMITTEE ON COMMERCE & CONSUMER PROTECTION

By Joseph P. Viola
Hawaiian Electric Company, Inc.

8:30 a.m., February 17, 2009

Senate Bill 154
Relating to Torts

Chair Baker, Vice Chair Ige, and members of the Committee:

My testimony is presented on behalf of Hawaiian Electric Company (“HECO”) and its subsidiaries, Hawaii Electric Light Company (“HELCO”) and Maui Electric Company (MECO”). For ease of reference, I will refer to all three companies collectively as “HECO.”

I.

HECO does not oppose granting protection to the design professionals, provided that the same protection is afforded to public utilities. Granting protection to the design professionals alone will shift liability exposure to HECO. Thus, HECO respectfully requests that SB 154 be amended to provide similar protection to the public utilities.

II.

For purposes of joint and several liability in highway cases, utility poles are considered part of the road design.¹ Thus, in highway motor vehicle accident cases involving utility poles, plaintiffs may sue HECO and the professionals that designed the highway upon which the pole is located.² However, under SB 154, design professionals could not be held jointly and severally liable for highway design unless the professional’s negligence was 25% or more. That would shift risk to HECO and other defendants.

Because of the way joint and several liability works, defendants who have the ability to pay -- such as the government, public utilities and professionals -- are at risk to pay far more than any proportionate share of liability they may be assigned. Therefore, by limiting the design professionals’ liability, the Bill would effectively shift greater liability exposure in highway cases to the other so-called “deep pockets” – including the public utilities. We respectfully submit that it is inequitable to increase the utilities’ risk

¹ See Hawaii Revised Statutes (“HRS”) § 663-10.9(4) (joint and several liability preserved in tort actions relating to highway maintenance and design, which includes “utility poles” (text attached)).

² The State or County that owns the highway may also be sued, along with other joint pole owners, which may include Hawaiian Telcom Company and the State or City and County.

in these cases. Public utilities do not plan, design or build the highways. Indeed, governmental rules, regulations and design play a significant role in determining where utilities may locate their poles and facilities within the highways.

Thus, we believe that any reasons justifying limitations on joint and several liability for design professionals in highway cases should apply equally to the public utilities.

A better result can be accomplished by amending SB 154 to add a new section 2 as follows:

SECTION 2. Chapter 663, Hawaii Revised Statutes, is amended by adding a new section to be appropriately designated and to read as follows:

"§663- Liability of public utility companies limited in highway cases. Notwithstanding section 663-10.9, 663-11 to 663-13, 663-16 and 663-31, public utility companies that place and maintain their facilities on or within public highways shall not be held jointly and severally liable for recovery of economic or non-economic damages in motor vehicle accidents involving tort actions relating to maintenance and design of highways unless the public utility's degree of negligence is twenty-five percent or more. For purposes of this section, "public utility" shall have the meaning set forth in section 269-1, and the liability of a public utility shall include its vicarious liability for the acts or omissions of its officers and employees."

Thank you for the opportunity to testify on this matter.

Hawaii Revised Statutes § 663-10.9 (Underscore added) :

§663-10.9 Abolition of joint and several liability; exceptions. Joint and several liability for joint tortfeasors as defined in section 663-11 is abolished except in the following circumstances:

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

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

(A) Intentional torts;

(B) Torts relating to environmental pollution;

(C) Toxic and asbestos-related torts;

(D) Torts relating to aircraft accidents;

(E) Strict and products liability torts; or

(F) Torts relating to motor vehicle accidents except as provided in paragraph (4);

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

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

(5) Provided, however, that joint and several liability for economic and noneconomic damages for claims against design professionals, as defined in chapter 672, and certified public accountants, as defined in chapter 466, is abolished in actions not involving physical injury or death to persons.

February 16, 2009

EMAILED TESTIMONY TO: CPNtestimony@Capitol.hawaii.gov

Hearing Date: Tuesday, February 17, 8:30 a.m., Conference Room 229

Honorable Senators Rosalyn H. Baker, Chair, David Y. Ige, Vice Chair, and Members of the Senate Committee on Commerce and Consumer Protection
Subject: **SB 154, Relating to Torts**

Aloha Chair Baker, Vice Chair Ige, and Committee Members,

Austin, Tsutsumi & Associates, Inc. is a 60-person locally-owned engineering firm with 75 years in Hawaii. We strongly support **SB 154, Relating to Torts**. SB 154 is important to the local engineering community and the State of Hawaii as our business impacts infrastructure development, construction, and ultimately the local economy.

Under the current law, a design professional who is pulled into a claim (even frivolously), but who may be found by a jury to be only one percent (1%) liable for damages, could be forced to pay far more than his/her share of damages. Under **SB 154**, design professionals who are found less than 25% at fault would be responsible only for the percentage of damages attributed to them, and would not be subject to joint and several liability. If the design professional is twenty-five percent (25%) or more liable, joint and several liability would still apply. This provides for reasonable fairness and distribution of risk, which we are willing to accept.

Recently, our company has been involved in a lawsuit involving an accident on a roadway. The extent of our company's work was the preparation of a traffic study. We were not involved in the design of any improvements, construction, administering of any contracts, or management of the project in any way. The mediator has supported our company being dropped from the suit; nonetheless, the plaintiff's counsel is naming our company as a party to the action. The possibility of our company being held 100% responsible for damages in addition to cumulative legal fees has prompted our insurance carrier to settle. According to our counsel, our legal fees and the possible settlement amount may reach \$300,000, although we have been asked to pay \$4 million. All this for a \$10,000 traffic study?

Our insurance premiums will definitely rise, and all it will take is one more large suit to put us under financially. Unless changes are made to the law, small firms like ours will no longer be able to afford the necessary liability insurance required to perform County, State and Federal work. We will see larger mainland firms acquiring and taking the design work off-island. This will be a detriment to local small businesses, especially in light of the anticipated infrastructure stimulus spending.

We appreciate your work in the Senate and thank you for the opportunity to testify in **support of SB 154**.

Mahalo nui loa,

Terrance Arashiro, PE
Austin, Tsutsumi & Associates, Inc.



Consulting
Electrical
Engineers

ECS, Inc.

February 14, 2009

EMAILED TESTIMONY TO: CPNtestimony@Capitol.hawaii.gov

Hearing Date: Tuesday, February 17, 8:30 a.m., Conference Room 229

Honorable Senators Rosalyn H. Baker, Chair, David Y. Ige, Vice Chair, and Members of the Senate Committee on Commerce and Consumer Protection

Subject: **SB 154 Relating to Torts**

Dear Chair Baker, Vice Chair Ige, and Committee Members,

ECS, Inc., a small Hawaii-owned engineering firm, appreciates this opportunity to express our **support of SB 154**, Relating to Torts. SB 154 attempts to bring fairness to the judicial system for design professionals, whose designs provide beneficial public highway projects that greatly improve the quality of life for the citizens of our State. However, the professional liability risk for the design professionals and our firms generally far outweigh the financial reward from these projects.

As a small business owner and design professional, I must always be aware of the potential professional and personal liability of every new project we consider. While a certain amount of risk is a reality of doing business, the current situation under joint and several liability seems very unfair, especially for our small firms. This is particularly true for highway projects, where the claims and awards can be large, creating risks under joint and several liability that far outweigh our firm's potential profit. Under the current law, a design professional who is pulled into a claim (even frivolously), but who may be found by a jury to be only one percent (1%) liable for damages, could be forced to pay far more than his/her share of the damages.

It is unfair that my financial future and that of our firm should be at risk because of our minor involvement in a public works project, especially if I am not in any way negligent. Engineering work on such projects is performed to State and Federal design standards and codes, and are reviewed and approved by government agencies. As a small business electrical engineering firm, serving as a subcontractor on State highway projects, our fee is typically less than \$50,000 (profit of less than \$5,000). Clearly, the State and its citizens benefit far more than the design professional by the design of these projects, and some protection for small business design professionals is warranted.

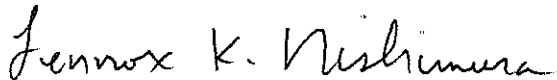
SB 154 provides for more fairness in allocation of risk, but certainly does not allow us to escape our responsibilities. Design professionals who are found less than 25% at fault would be responsible only for the percentage of damages attributed to them, and would not be subject to

joint and several liability. But if the design professional is found to be twenty-five percent (25%) or more liable, joint and several liability would still apply.

The fear of undue risk on the part of small business design professionals is likely limiting the pool of highly qualified consultants available to conduct State projects. With the potential increase in the number of infrastructure projects, the impact of having small business firms decline to work for the DOT is to have this work go to large, predominately mainland firms, who choose to essentially self-insure and are able to absorb more risk, but who take their profits out of the State

We appreciate the continuing efforts of your committee and the members of the Senate to assist small businesses in Hawaii. Thank you for the opportunity to testify in support of SB 154.

Sincerely,



Lennox K. Nishimura, P E , FACEC
President
ECS, Inc



February 14, 2009

EMAILED TESTIMONY TO: CPNtestimony@Capitol.hawaii.gov

Hearing Date: Tuesday, February 17, 8:30 a.m., Conference Room 229

Honorable Senators Rosalyn H. Baker, Chair, David Y. Ige, Vice Chair, and Members of the Senate Committee on Commerce and Consumer Protection

Subject: **HB 154, Relating to Torts**

Dear Chair Baker, Vice Chair Ige, and Committee Members,

Pacific Geotechnical Engineers, Inc. is a locally owned and managed geotechnical engineering consulting firm. Our firm is an active member of the American Council of Engineering Companies of Hawaii (ACECH) and various local professional organizations. As a small business firm in Hawaii, we are faced with numerous business challenges, including onerous tort laws and increasing insurance costs.

We strongly support SB 154 Relating to Torts. This bill addresses a major problem with joint and several liability for design professionals who have worked on highway projects. Under the current tort law, the design professional and other parties involved in the design and construction of a highway or freeway have been the target of repeated claims for accidents. Even when the main cause of the accident was due to the plaintiff's negligence, the design professional and their insurance company have had to pay large settlements that in some cases have been equal to the limits of the design professional's liability insurance policy.

As our highways and freeways become more congested by the day, the risk of accidents involving injury or death will increase at an alarming rate. Because of these conditions and the onerous joint and several liability provisions in the current tort law, our firm has had to turn down numerous highway contracts. The risk of doing highway or freeway work is much too great for a small business like our firm. One claim could jeopardize the existence of our firm and the livelihood of our employees.

We urge you to support SB 154 Relating to Torts to improve the business climate for small business in Hawaii. With the many major infrastructure projects anticipated, it will be essential to support small businesses to help stimulate our local economy rather than letting much of this work go to large mainland companies who take their profits out of the State.

Thank you for an opportunity to express our views and for your consideration of this important bill.

Sincerely,

Pacific Geotechnical Engineers, Inc.

Glen Y.F. Lau, P.E.
President

**TESTIMONY OF ROBERT TOYOFUKU ON BEHALF OF THE CONSUMER
LAWYERS OF HAWAII now known as the HAWAII ASSOCIATION FOR JUSTICE
(HAJ) IN OPPOSITION TO S.B. No. 154**

February 17, 2009

To: Chairperson Rosalyn Baker and Members of the Senate Committee on Commerce and Consumer Protection:

My name is Bob Toyofuku and I am presenting this testimony on behalf of the Hawaii Association for Justice (HAJ) in strong opposition to S.B. No. 154.

The purpose of this bill is an attempt to materially change the statute that was passed in 1986 and absolve design professionals as defined in this bill from joint and several liability for damages suffered by a person injured through their negligence.

Under current law joint and several liability for joint tortfeasors is retained for claims relating to the maintenance and design of public highways. This measure would exempt design professionals from joint and several liability while retaining joint and several liability for all others involved in the design, construction and maintenance of roads and highways. There is no justification for treating design professionals differently than all others involved in the design, construction and maintenance of roads and highways, as currently mandated by H.R.S. Section 663-10.9.

However, their concern should not be about joint and several liability. It should be about indemnification. The arguments of the design professionals in support of this bill are misplaced. The design professional proponents of this bill state that this legislation is needed because they should be held liable only for their percentage of fault in highway design cases. However, they overlook a basic fact. When design professionals enter into a contract with the state to design a

highway, the contract generally provides for the design professional to indemnify the state or county.

An indemnification provision in a contract, as a legal concept, means that the party indemnifying (design professional) is obligated to compensate the party being indemnified (government) for any loss that may occur during the performance of the contract.

In this context, the design professional is obligated to pay the state if the state is found to be liable. This is due to the indemnification provision in the contract and not the doctrine of joint and several liability. Under the indemnification provision, so long as the state is found liable, the design professional is obligated to pay and the defense of the litigation is often tendered to the design professional and their insurance carrier.

As to the provisions in this bill, the effect of this measure must also be considered in connection with governmental joint and several liability for highway maintenance and design pursuant to H.R.S. Section 663-10.5. The State is generally exempt from joint and several liability, except for cases involving highway maintenance and design. H.R.S. Section 663-10.5 specifically states: “provided that joint and several liability shall be retained for tort claims relating to the maintenance and design of highways pursuant to Section 663-10.9.” Because the State is subject to joint and several liability for highway maintenance and design cases, the abolition of joint and several liability for design professionals would shift liability currently covered by insurance for design professionals to the State and subject the State to additional liability. The extent of this additional liability that would be shifted to the State is enormous because of the numerous design professionals involved in the design, construction and maintenance of roads and highways. There are typically numerous design professionals involved in highway construction including architects, mechanical engineers, surveyors, electrical

engineers, landscape architects, environmental engineers and structural engineers. The potential void that may be created by granting these design professionals with immunity from joint and several liability is substantial given the importance of their functions in the design, construction and maintenance of roads and highways. The failure of a freeway overpass or elevated sections of highways such as the H-3 has the potential for liability in the many millions of dollars. That is why these design professionals are required to purchase substantial insurance coverage as a condition of working on government construction projects. This measure has the potential of eliminating the coverage from those insurance policies and shifting the financial burden to State government.

Public policy is not served by affording design professionals special treatment when there is no imperative need for such action that would shift liability currently covered by private insurance for design professionals to State tax payers and limit the right of citizens injured by design professional negligence.

Design professionals argue that this measure will assist them by lowering their insurance premiums. Yet there is no confirmation provided by insurance companies that this measure will have any effect on insurance premiums, or the amount of reduction that will result if there is any. A rational decision to weigh the benefit of this measure on the impact of insurance cost cannot be made without this data. It is incumbent upon those justifying this measure on the cost of insurance to show that insurance will in fact be reduced by this measure and the amount of such claimed reduction.

It is claimed that this measure is necessary because architects and engineers may be liable for defective workmanship many years after they perform the work. In fact, however, design professionals already enjoy special protections that limit their future liability for their work.

Hawaii Revised Statutes Section 657-8 provides that design professionals may not be held responsible for deficiencies in their work unless a claim is commenced within two years after the deficiency is discovered, “but in any event not more than ten years after the date of completion of the improvement.” This limitation applies to road work, as well as to buildings, homes and other construction improvements. This is a special exception to the general rule that professionals normally remain responsible for their malpractice. An attorney who prepares a will for someone who later dies 30 years after the will was prepared remains responsible for any malpractice in drafting the will that is discovered upon the death 30 years later. The special ten year limitation does not apply to professionals like lawyers. Second, professionals have insurance coverage to protect them against liability for defective workmanship that is discovered after they retire. Professional liability insurance policies typically include free retirement coverage (known as tail coverage) for those who maintain the policy in effect for a period of time (typically five years or more), or provide the retirement coverage as a low cost option after retirement.

Finally, it is argued that joint and several liability should be abolished because it spreads the financial liability among joint tortfeasors who may be partially but not primarily responsible for the damages. Yet the other side of the coin of the practical advantage that this risk spreading provides is not discussed. A positive feature of joint and several liability is the spreading of risk among all those who are partially responsible and who participated in the project so as to minimize the financial impact on any one design professional. The practical result is that the insurance coverage available for all design professionals who are partially responsible generally provides adequate coverage to resolve claims. Without this pool of insurance coverage provided by joint and several liability, individual design professionals may find that their own coverage is

insufficient and will risk their own personal assets to cover judgments and claims that are now being covered by the availability of other insurance from other design professionals that are partially responsible. While design professionals feel it is unfair to them when they are responsible for a smaller portion of the liability, they forget that it is of tremendous benefit to them in situations where they have a larger share of the responsibility and yet do not risk their own personal assets because joint and several liability helps to spread the cost among other available insurance coverage that would otherwise not be available without joint and several liability.

Current law strikes a fair balance between the rights and obligations of design professionals, the State and those injured by the negligence of design professionals. Because of these reasons, HAJ strongly opposes this measure and requests that it not pass out of this committee. Thank you very much for the opportunity to testify on this measure.

Eric Arquero

From: Fukuda, Lester [les.fukuda@hdrinc.com]
Sent: Sunday, February 15, 2009 7:30 PM
To: CPN Testimony
Subject: SB 154 - Relating to Torts; 8:30am; Tuesday, Feb 17, 2009; CR 229
Attachments: Picture (Metafile) 1.jpg

COALITION OF HAWAII ENGINEERING AND ARCHITECTURAL PROFESSIONALS

Hearing Date: Tuesday, February 17, 2009, 8:30 am, CR 229

Honorable Senator Rosalyn H. Baker, Chair, David Ige, Vice Chair and Members of the Senate Committee on Commerce and Consumer Protection

Subject: SB 154 - Relating to Torts

Coalition of Hawaii Engineering & Architectural Professionals represents several professional Engineering and Architectural organizations including American Council of Engineering Companies Hawaii; American Institute of Architects; Hawaii Chapter of the American Society of Civil Engineers; American Public Works Association Hawaii Chapter; Structural Engineering Association of Hawaii; and the Hawaii Society of Professional Engineers.

We are in **STRONG SUPPORT of SB 154 - Relating to Torts** (specifically relating to Highway Accidents). This bill addresses a specific problem area for design professionals: joint and several liability relating to highway accidents. Under current tort law design professionals and contractors have been the primary targets for any and all highway accidents. Design professionals involved in the design or construction phase services have had to pay up to the full amount of their liability insurance policies in mediated settlements. Hawaii's current Joint and Several Law requires Design Professionals (with no or very small percentage responsibility for the cause of the accident) to pay out up to our full insurance typically \$1 million, plus attorney costs for our defense and the private attorney costs for the defense of the State Department of Transportation (DOT).

What happened to personal responsibility and accountability for the person or persons that chose to cause the accident by drunk driving, speeding, and/or being reckless or un-attentive. Design professionals very carefully design highways according to the current State and Federal codes and our design & construction is closely scrutinized by the State DOT. We are unfairly the "deep pocket" in every public highway accident case. Most of the small firms can no longer afford to work on highway projects, leaving only a select few firms to design and construct our local highways.

We urge you to support HB 1316 - Relating to Torts. Mahalo for this opportunity to express our business concerns and for your consideration of this important bill.

Les Fukuda, Vice President



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AIA Hawaii State Council

A Council of The American Institute of Architects

2/17/09 8:30 am
Senate CPN

February 17, 2009

Honorable Rosalyn H. Baker, Chair
Senate Committee on Commerce & Consumer Protection

Re: **Senate Bill 154**
Relating to Torts

Dear Chair Baker Members of the Committees,

My name is Daniel Chun, Government Affairs Chair of The American Institute of Architects (AIA). AIA is in **STRONG SUPPORT** of SB 154 that will bring a better balance between personal responsibility of the consumer and personal liability of design professionals.

The current tort situation where architects, engineers, and landscape architects may be 100 percent joint and severally liable for actions of others that occur on highways and other public ways has the following negative consequences:

- It has architect's personal risk at the point where our design professional business is increasingly economically unsustainable.
- It sends a message that Hawaii continues to be an anti-business state where no wise investor would seek to create a business and more local jobs.

The current goal of the state of Hawaii to improve future economic conditions through less reliance on land development is **NEVER** going to succeed until a more balanced tort climate is achieved through legislation like SB 154. Right now Hawaii has a "plantation mentality" with respect to joint and several liability. There is no personal citizen responsibility for outcome: it is always the fault of someone else who is thought to have deeper pockets full of money.

There is a simple reason why Hawaii's economy is land development based. It is captive to land because no business that is not land-based will consider locating its economic activity in this state due to Hawaii's anti-business climate.

SB 154 is a compromise proposal and not a shirking of our legitimate professional responsibility. Thank you for this opportunity to present **STRONGLY SUPPORTING** testimony for this bill.



AMERICAN COUNCIL OF ENGINEERING COMPANIES
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February 16, 2009

EMAILED TESTIMONY TO: CPNtestimony@Capitol.hawaii.gov

**Hearing Date: Tuesday, February 17, 8:30 a.m., Conference Room 229
(Senate Committee on Commerce & Consumer Protection)**

Honorable Senators Rosalyn H. Baker, Chair, David Y. Ige, Vice Chair, and Members of the Senate Committee on Commerce and Consumer Protection

Subject: **SB 154, Relating to Torts**

Dear Chair Baker, Vice Chair Ige, and Committee Members,

The American Council of Engineering Companies of Hawaii (ACECH), representing more than 70 consulting engineering firms in Hawaii, appreciates this opportunity to express our **support for SB 154, Relating to Torts.**

SB 154 brings a measure of fairness to the judicial system for design professionals, whose work results in beneficial public works projects that greatly improve the quality of life for the State's citizens. Unfortunately the professional liability risk for our small local firms far outweighs their financial reward from these projects.

Under joint and several liability, a design professional who may be found to be only one percent (1%) liable for damages in a lawsuit related to a highway accident may be forced to pay far more than his/her share of damages. Often before going to trial, insurance companies settle for the design professional's insurance policies limit, even if there is no clear negligence on the part of the design professional, because of the risk of large awards from juries. Design professionals have been subject to paying large settlements and, in some cases, have no more insurance coverage for claims on particular projects. It's important to keep in mind that our work on such projects is performed to State and Federal design standards and codes, and is reviewed and approved by government agencies.

We are chiefly concerned with the risks of third-party lawsuits; for example, the passenger who is injured by a drunk or speeding driver. When the responsible party's limited insurance is exhausted, it is simply unfair to consider design professionals as "deep pockets" and their professional liability insurance policies as a way to compensate the third party(ies) beyond an amount proportional to the design professionals' degree of negligence. While firms may be able to obtain professional liability insurance, deductibles are high (>\$25,000) and the costs of fighting lawsuits are crippling to small businesses. And if a firm has a claim, it becomes more difficult to obtain insurance coverage in the future.

This burden to small design firms is particularly troublesome when our role in the life of the highway (and our profits from these projects) is so small. We are typically involved for a small window of only one or two years, while the State has the long-term responsibility for maintenance and repair of the highway system, and its citizens enjoy the long-term benefit of the project. The risk to our small firms is simply out of



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balance with their involvement and the profits they receive. However, while we favor the full abolition of joint and several liability, we believe this bill is a reasonable compromise, with the design professional still subject to joint and several liability if they are greater than 25% at fault.

Because of the risks and escalating professional liability insurance premiums associated with doing highway work, many of our small firms no longer participate in highway projects. This reduces the pool of qualified consultants available to do the work, reduces innovation and quality design, and also favors large, predominately mainland firms. These large mainland firms essentially self-insure and are able to absorb more risk, but their profits go out of the state. With the upcoming anticipated increases in infrastructure funding, the damage to the State's economy from our small firms not participating is a real negative impact for the State.

SB 154 provides for more fairness in allocation of risk. Design professionals who are found less than 25% at fault would be responsible only for the percentage of damages attributed to them, and not be subject to joint and several liability. If the design professional is twenty-five percent (25%) or more liable, joint and several liability would still apply. We have looked at tort reform legislation in other states and feel HB 1316 is a reasonable and fair compromise to the full abolition of joint and several liability enacted in a number of states.

ACECH appreciates the opportunity to testify in support of SB 154. Please contact me if you have any questions regarding our testimony.

Kind Regards,

Janice C. Marsters, National Director

February 14, 2009

EMAILED TESTIMONY TO: CPNtestimony@Capitol.hawaii.gov

Hearing Date: Tuesday, February 17, 8:30 a.m., Conference Room 229

Honorable Senators Rosalyn H. Baker, Chair, David Y. Ige, Vice Chair, and Members of the Senate Committee on Commerce and Consumer Protection

Subject: **SB 154, Relating to Torts**

Dear Chair Baker, Vice Chair Ige, and Committee Members,

Fukunaga & Associates, Inc. is a Hawaii-owned and managed Civil & Environmental Engineering firm operating in Hawaii since 1969. **We are in strong support of SB 154, Relating to Torts.**

SB 154 attempts to bring fairness to the judicial system for design professionals, who are responsible for the design of beneficial public works projects that greatly improve the quality of life for the State's citizens.

SB 154 provides that design professionals who are found less than 25% at fault would be responsible only for the percentage of damages attributed to them, and not be subject to joint and several liability. If the design professional is twenty-five percent (25%) or more liable, joint and several liability would still apply. We have looked at tort reform legislation passed in other states and feel **SB 154** is a reasonable and fair compromise to the full abolition of joint and several liability enacted in a number of states.

We believe that this limited concession to design professionals for highway projects is warranted because their work is conducted for the greater good of the State's citizens, a public benefit that far exceeds the reward to the design professional. Projects are conducted to design standards and codes and are reviewed and approved by government agencies. Many of Hawaii's design professionals are small businesses, and small firms with minimal involvement in a highway project are still subject to the same joint and several liability risks.

SB 154 provides for more fairness in allocation of risk. Under joint and several liability, a design professional who may be found to be only one percent (1%) liable for damages in a lawsuit related to a highway accident may be forced to pay far more than his/her share of damages (even up to 100% of the damages if other parties are unable to pay).

For most firms, the professional liability risk for design professionals far outweighs their earnings from these projects. Many small business firms earn less than \$20,000 for their work on a highway project, but face enormous financial risks under joint and several liability. Even before going to trial, insurance companies settle for the design professional's insurance policies limits, because of the risk of large rewards at trial. Thus the design professional, who may not have any negligence on a project, can be forced to pay many times more than his earnings on the project. If the settlement exceeds the design professional's insurance coverage, the design professional would be personally liable. This situation is punitive to a design professional doing good works for the State, while not accounting for the personal responsibility of the accident

party who may have been drinking, speeding, or reckless.

Because of the risk and escalating professional liability insurance premiums associated with doing highway work, many of our small firms no longer participate in these projects, reducing the pool of qualified consultants. This results in a delay of awarding of these projects and increase in traffic woes in the State.

We stress that we are not seeking to escape our responsibilities. Design professionals who are found liable would still be required to pay their share of the damages, and those greater than 25% liable would still be subject to joint and several liability. This bill, however, would provide particular relief for our small business firms.

We appreciate the continuing efforts of your committee and the members of the State Legislature to improve the business climate for small business in Hawaii. Thank you for the opportunity to testify in support of **SB 154**.

Very truly yours,

Jon K. Nishimura, P.E.
President
Fukunaga & Associates, Inc.

SB 154

RELATING TO TORTS

**KEN HIRAKI
VICE PRESIDENT - GOVERNMENT & COMMUNITY AFFAIRS
HAWAIIAN TELCOM**

FEBRUARY 17, 2009

Chair Baker and Members of the Senate Commerce and Consumer Protection and
Committee:

I am Ken Hiraki, Vice President of Government and Community Relations,
testifying on behalf of Hawaiian Telcom on SB 154, "RELATING TO TORTS."

Hawaiian Telcom does not oppose providing protection to the design
professional but cannot support this bill unless it is amended to clarify that public utilities
are also exempt from joint and several liability. As currently drafted, this measure
exempts design professionals from joint and several liability in tort cases involving a
public road or rights of way, without providing a similar exemption for public utilities.
Without an exemption, this bill discriminates against public utilities by unfairly exposing
utilities to assume greater risk and legal liability in tort lawsuits than what was originally
intended under current law.

By way of background, Hawaiian Telcom utilizes the state and county roads and
rights of way to provide telecommunication services to the public. In tort cases involving
an accident involving a utility pole along the public roads and highways, utilities (joint
owners of the pole—telephone, electric, cable) such as Hawaiian Telcom, are often
sued together with the state and county government as well as others responsible for
the highway. Should the design professionals become exempt from joint and several
liability, by default plaintiffs will then target the only parties remaining such as utilities.

As a practical matter, this disparate shift in liability means that a utility will end up paying more than its assigned share of liability despite the fact that it is usually the government entity that determines where and under what conditions a utility pole may be placed along a road or highway.

The passage of this bill in this form will inevitably lead to increased lawsuits and expenses for utilities such as Hawaiian Telcom. As a matter of fairness, we request that SB 154 be amended to include a public utility exemption from joint and several liability as follows :

"§663-10.5 Government entity as a tortfeasor; public utility as tortfeasor; abolition of joint and several liability. [Notwithstanding] Any other law to the contrary notwithstanding, including but not limited to sections 663-10.9, 663-11 to 663-13, 663-16, 663-17, and [section] 663-31, in any case where a government entity is determined to be a tortfeasor along with one or more other tortfeasors, the government entity shall be liable for no more than that percentage share of the damages attributable to the government entity. In any such case, where one of the other tortfeasors is a public utility, then, likewise, the public utility shall be liable for no more than that percentage share of the damages attributable to the public utility.

For purposes of this section, "government entity" means any unit of government in this State, including the State and any county or combination of counties, department, agency, institution, board, commission, district, council, bureau, office, governing authority, or other instrumentality of state or county government, or corporation or other establishment owned, operated, or managed by or on behalf of this State or any county. For purposes of this section, "public utility" shall have the meaning set forth in section 269-1.

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

Based on the aforementioned, unless the bill is amended to provide an exemption for utilities from joint and several liability, Hawaiian Telcom is opposed to the passage of SB 154.

Thank you for the opportunity to testify.



ENGINEERING SOLUTIONS, INC.

Our Name, Our Mission for a Sustainable Environment

98-1268 Kaahumanu Street, Suite C-7 • Pearl City, Hawaii 96782 • Phone: (808) 488-0477 • Fax: (808) 488-3776

February 16, 2009

Hearing Date: Tuesday, February 17th, 8:30am, Room 229
Senate Committee on Commerce and Consumer Protection

Honorable Senators Rosalyn H. Baker, Chair, David Y. Ige, Vice Chair, and Members of the Senate Committee on Commerce and Consumer Protection

RE: SB 154 "Relating to Torts"

We strongly support SB 154 "Relating to Torts". The bill introduces a small, long overdue, measure of equity to a concept that is completely unfair to the Hawaii small business community. The small businesses of Hawaii should not be subject to penalties greatly exceeding our level of responsibility.

Engineering Solutions, Inc. strongly supports SB154, "Relating to Torts".

Thank you for the opportunity to express our views.

ENGINEERING SOLUTIONS, INC.

Vice President