

# LATE TESTIMONY

## TESTIMONY OF ROBERT TOYOFUKU ON BEHALF OF THE HAWAII ASSOCIATION FOR JUSTICE (HAJ) IN OPPOSITION TO H.B. NO. 2459

Date: Monday, January 30, 2012  
Time: 9:00 am

To: Chairman Joseph Souki and Members of the House Committee on Transportation:

My name is Bob Toyofuku and I am presenting this testimony on behalf of the Hawaii Association for Justice (HAJ) in OPPOSITION to H.B. No. 2459, relating to tort liability.

Highway design and maintenance is an important governmental function which carries a commensurate responsibility given the number of citizens who must travel on our roadways on a daily basis and the magnitude of the danger related to driving. Approximately one hundred people are killed on our roadways every year and thousands are involved in accidents that damage vehicles or cause injuries. This Legislature recognized this unique responsibility as recently as 2006 when it retained joint and several liability for government where governmental negligence was 25% or more and where government had reasonable prior notice of a hazardous condition. Conference Committee Report No. 86-06 states:

**[Y]our Committee on Conference acknowledges government's unique role in highway maintenance and design and the strong public policy of providing safe roads for Hawaii's families, as expressed in the past legislative history on this subject . . . . this bill abolishes governmental joint and several liability, except for all damages in highway cases where government has prior notice or negligence of 25% or more.**

This bill purports to "define what constitutes 'similar circumstances' of a prior occurrence" for a showing that government had prior notice of a hazardous condition.

But in fact, this bill (on page 3, lines 4 -8) actually eliminates completely governmental liability when government is 25% - 99% at fault under paragraph (3) of the statute. There is no sound public policy for eliminating joint and several liability where government's negligence is so substantial as to fall between 25% and 99%.

Where governmental negligence is less than 25%, the current law provides that there is no joint and several liability unless government had prior notice of the hazardous condition because there was an earlier occurrence "under similar circumstances." The key factor is that the earlier occurrence must be similar enough to give government "reasonable prior notice" under the current statute. This bill seeks to require the earlier occurrence be exactly the same - - not similar. This bill requires that the accident have been "at the same location," involve "the same highway-related device or condition," and that the condition of the road be in "substantially similar condition."

Requiring the earlier and later accidents to be the same is unreasonable and bad public policy because it defeats the commonsense concept that government should fix hazards for which it has reasonable notice. Consider the following examples.

Example 1: Crosswalks on a stretch of roadway have not been painted for 10 years and are now worn away so drivers cannot see them anymore. A pedestrian is killed in the crosswalk. A traffic engineer visits the scene and can see that all of the crosswalks in the area are worn away and need repainting. The government (whether state or county) has reasonable notice of the problem. This bill would require that another accident happen at the same crosswalk ("at the same location"). That makes no sense and is bad public policy because it encourages and permits government to ignore the danger related to the other worn crosswalks along that stretch of roadway.

**Example 2:** The afternoon sun shines on four (4) traffic lights along the same road so drivers cannot see the color of the light for about a half an hour each afternoon. A child is hit in a crosswalk because the driver could not see the red light. A traffic engineer visits the scene and sees that the sun is shining directly on all four lights, yet only orders sunshades to be installed on the one light. Another child is hit a month later at the next intersection because the driver couldn't see the red light. This bill would permit that to happen because the second accident did not involve the same traffic light ("the same highway-related device") or happen at the same intersection ("at the same location"). This again makes no sense because the traffic engineer saw and knew that the other lights also had the same problem and therefore had notice of the hazard.

**Example 3.** There is a dip in the roadway so rainwater flows down to the dip and collects there causing street light poles to corrode at their bases where the water sits. One pole falls into the road because of the corrosion. A traffic engineer visits the scene and sees that all of the poles in the dip have water collecting at their bases causing premature corrosion, yet only orders a higher concrete base to lift the pole out of the water for the pole that fell. Six months later the road is repaved and another pole falls on a passing car. This bill would eliminate current governmental responsibility because the road had been repaved and requirement that "the condition of the roadway at the time of the prior occurrence is substantially similar" would not be met; and also because a different pole was involved.

There are many situations where the condition of the roadway is not involved and therefore a requirement that the road be in the same condition in two cases makes no sense. For example, there are several areas where government knows of imminent

danger from falling rocks. The condition of the road itself has nothing to do with the hazard created by falling rocks; yet this bill would require that the condition of the road be the same. Similarly, if a tree is blocking a stop sign the condition of the road is irrelevant. The tree needs to be trimmed or the sign moved; the road doesn't need to be fixed.

The current law fairly and adequately addresses government's responsibility for highway design and maintenance. We ask that this measure be held.

Thank you very much for allowing me to testify in OPOSITION TO this measure. Please feel free to contact me should you have any questions or desire additional information.