



**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-SIXTH LEGISLATURE, 2012**

ON THE FOLLOWING MEASURE:

H.B. NO. 2460, RELATING TO GOVERNMENT TORT ACTIONS.

BEFORE THE:

HOUSE COMMITTEE ON JUDICIARY

DATE: Friday, February 10, 2012

TIME: 2:00 p.m.

LOCATION: State Capitol, Room 325

TESTIFIER(S): David M. Louie, Attorney General, or
Caron M. Inagaki, Deputy Attorney General

Chair Keith-Agaran and Members of the Committee:

The Department of the Attorney General strongly supports this measure.

The purpose of this bill is to clarify that the discretionary function exception in the State provides the same protection that the United States is afforded pursuant to the Federal Tort Claims Act.

Our Supreme Court's application of the State's discretionary function exception has strayed too far and too liberally from its federal model. This bill, therefore, is necessary to ensure that the State's discretionary function exception is interpreted in a manner consistent with its federal counterpart since the legislative history demonstrates that the Federal Tort Claims Act was the model and basis for the State Tort Liability Act.

I. Background of Federal Tort Claims Act and State Tort Liability Act

The State Tort Liability Act (STLA) was modeled after the federal counterpart, and is worded in substantially identical language. The Legislature intended for the exception to be applied similarly when it adopted the STLA in 1957, but our State Supreme Court has rejected on-point United States Supreme Court precedent. The court has done so based upon its preferences, and not upon the legislative intent as embodied in the text of the discretionary function exception statute. We submit that the State of Hawaii is entitled to the same liability protection afforded by the discretionary function exception in the STLA as the federal government is provided by its counterpart provision.

The STLA waives the State's sovereign immunity for the torts of its employees, and makes the State liable in the same manner and to the same extent as a private individual under

like circumstances. However, the State's sovereign immunity from suit was not waived as to all tort claims against the State. The Legislature carefully carved out express exceptions from the waiver of sovereign immunity, including the discretionary function exception, among a list of many others.

As a result of the passage of the STLA, people who allege injury from tortious acts at the hands of state employees may now sue the State for their damages. These lawsuits are resolved in our state courts. Prior to the passage of the STLA, tort suits against the State were not authorized by law, and so could not be brought. The only way that compensation was paid by the State for the torts of its employees was by way of legislative appropriation.

In passing the STLA, the Legislature modeled the act after the Federal Tort Claims Act (FTCA), which had been passed by Congress in 1947. While the goal of compensating the victims of torts committed by federal employees was appropriate, the federal government had real concerns, and no serious consideration was given to a complete waiver of sovereign immunity. A number of exceptions to the waiver of immunity were part of the FTCA, with the most important one being the discretionary function exception. The exception retains sovereign immunity against:

"[A]ny claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."

28 U.S.C. § 2680(a).

The STLA was modeled after the FTCA, including the State's discretionary function exception set forth in section 662-15(1), Hawaii Revised Statutes:

"Any claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a state officer or employee, whether or not the discretion involved has been abused."

The state wording is essentially identical to the federal. There can be little doubt that the Hawaii Legislature intended to protect the State from claims based on a discretionary function in the same manner and to the same extent as the federal government is protected by the federal counterpart provision. Indeed, early Hawaii cases did precisely that: they used federal

precedents to interpret the STLA counterpart provisions, including the discretionary function exception.

Thus, if a person wanted to know how the State discretionary function exception would be interpreted in a given context, one could look with confidence to the federal courts' interpretations of the virtually identical federal provision. There is no doubt that this is what our Legislature intended when it passed the STLA in 1957.

II. Interpretation by United States Supreme Court

There are two early and important United States Supreme Court decisions on the discretionary function exception, Dalehite v. United States, 346 U.S. 15 (1953), and Indian Towing v. United States, 350 U.S. 61 (1955).

In Dalehite v. United States, the Supreme Court of the United States held that the discretionary function exception barred recovery for claims arising from a massive fertilizer explosion. The fertilizer had been manufactured, packaged, and prepared for export pursuant to detailed regulations as part of a comprehensive federal program aimed at increasing the food supply in occupied areas after World War II. In holding that the exception protected the United States from liability in that case, the Supreme Court described the discretion protected as "the discretion of the executive or the administrator to act according to one's judgment of the best course." Dalehite, at 34. The Court added:

It is unnecessary to define apart from this case, precisely where discretion ends. It is enough to hold, as we do, that the "discretionary function or duty" that cannot form a basis for suit under the Tort Claims Act includes more than the initiation of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations. Where there is room for policy judgment and decision there is discretion. It necessarily follows that acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable. If it were not so, the protection of § 2680(a) would fail at the time it would be needed most, that is, when a subordinate performs or fails to perform a causal step, each action or nonaction being directed by the superior, exercising, perhaps abusing, discretion.

Id. at 35-36.

In Indian Towing, the Coast Guard negligently failed to maintain a lighthouse by allowing the light to go out. The United States was held liable, not because the negligence occurred at the operational level, but because making sure the light was operational "did not

involve any permissible exercise of policy judgment." See United States v. Gaubert, 499 U.S. 315, 326 (1991).

These two early Supreme Court decisions guided the federal courts for over twenty-five years. Notwithstanding the clear statements of the Dalehite opinion to the effect that "where there is room for policy judgment and decision there is discretion" and that "acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable," the exception created some difficulty for the courts.

It was not until thirty years had passed after the Dalehite decision that the Supreme Court of the United States took up the issue again in United States v. Varig Airlines, 467 U.S. 797 (1984) ("Varig Airlines"). The Supreme Court clearly held that it is the nature of the conduct, rather than the status of the actor, that governs. Thus, the basic inquiry concerning the application of the discretionary function exception is whether the challenged acts of a government employee -- whatever his or her rank -- are of the nature and quality that Congress intended to shield from tort liability. 467 U.S. at 813. Judgments made by the inspectors were pursuant to the policy decision of the FAA, and therefore protected.

Notwithstanding the Court's holding in Varig Airlines, litigants continued to argue their cases based upon a planning/operational level distinction. The Court therefore put the issue finally to rest in its decision in United States v. Gaubert, 499 U.S. 315 (1991):

In light of our cases and their interpretation of § 2680(a), it is clear that the Court of Appeals erred in holding that the exception does not reach decisions made at the operational or management level of the bank involved in this case. A discretionary act is one that involves choice or judgment; there is nothing in that description that refers exclusively to policymaking or planning functions. Day-to-day management of banking affairs, like the management of other businesses, regularly requires judgment as to which of a range of permissible courses is the wisest. **Discretionary conduct is not confined to the policy or planning level.** "[I]t is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case." Varig Airlines, supra, at 813, 104 S.Ct., at 2764.

499 U.S. at 325 (emphasis added).

This decision was authored by Justice White, and joined by all members of the court except Justice Scalia, who concurred. The essentially unanimous decision makes tremendous

practical and legal sense -- the type of discretion that the Congress and the Legislature intended be insulated from liability cannot be dependent on a form-over-substance distinction.

III. Interpretation by the Hawaii Supreme Court

Because the STLA enacted in the State of Hawaii was modeled after the FTCA, including its discretionary function exception, the expectation was that Varig Airlines and Gaubert would be applied in Hawaii courts, as well. But that did not occur. The State Supreme Court rejected the Gaubert decision. Surprisingly, it did so in a regulatory case, where the direct precedents were particularly strong and clear. In doing so, our State Supreme Court reasoned:

We believe that the analysis in Gaubert does not provide sufficient protection to citizens injured by the actions of government employees. Adoption of the Gaubert standard would run directly contrary to our past holdings that the discretionary function exception did not apply to the act of designing a highway, Breed v. Shaner, supra, the placement of road signs and stripings, Rogers v. State, 51 Haw. 293, 459 P.2d 378 (1969), or the maintenance of drainage culverts, Rodrigues v. State, 52 Haw. 156, 472 P.2d 509 (1970). We reaffirm our holdings in, inter alia, Breed, Julius Rothschild and Nakahira and hold that the discretionary function exception is limited to situations in which the government agent is engaged in the effectuation of "broad public policy." The investigation of a complaint by the HCRC, in and of itself, does not involve such considerations. We therefore hold that the counterclaim for negligence in the performance of the investigation is not barred by sovereign immunity.

Tseu v. Jeyte, 88 Haw. 85, 90, 962 P.2d 344 (1998).

The State Supreme Court therefore chose, in effect, to retain the planning or operational distinctions discredited by the Supreme Court of the United States.

The decision of our State Supreme Court was not based upon statutory text or legislative history. Its decision was based instead upon the Court's own view that to adopt the federal interpretation of the federal model of the discretionary function exception would not provide "sufficient protection to citizens injured by the actions of government employees." The State Supreme Court chose to in essence make the policy decisions that were for the Legislature to make, not for the courts.

Other state courts, however, have followed Gaubert, stating:

The Gaubert Court was analyzing the discretionary function exception to the Federal Tort Claims Act, which is nearly identical to that of Vermont's Tort Claims Act. We therefore look to the case law interpreting the federal provision to guide us in analyzing [our provision].

Searles v. Agency of Transportation, 762 A.2d 812, 814 (Vt. 2000) (specifically declining to follow Tseu). See also, Liberty Bank of Seattle, Inc. v. Henderson, 878 P.2d 1259, 1266 (Wash. App. 1994) ("We find especially persuasive the United States Supreme Court's analysis in United States v. Gaubert"); Olson v. City of Garrison, 539 N.W.2d 663 (N.D. 1995); Poly v. Moylan, 667 N.E.2d 250, 255 (Mass. 1996) ("operational decisions are included within the discretionary function exception"); Goodman v. City of Le Claire, 587 N.W.2d 232, 238 (Iowa 1998) ("The city urges us to adopt the *Berkovitz* two-step analysis in determining whether a challenged action falls within the discretionary function exception, and we do. In adopting this analysis, we are mindful that this is a significant shift from the planning/operational bright line test we have been using. But as *Gaubert* makes clear, we--like many other courts--have misinterpreted *Dalehite* as holding that the discretionary function exception does not reach any decisions made at the operational level"); Jones v. Mississippi Dept. of Transp., 744 So.2d 256, 264 (Miss. 1999) (court follows Gaubert because of similarly worded state exception; "It would run counter to the discretionary function exception to second-guess or micro-manage the kinds of steps appropriate to maximize safety in government facilities, even where the decisions are made below the policy level"); Kimps v. Hill, 546 N.W.2d 151, 161 (Wis. 1996) ("A discretionary act is one that involves choice or judgment; there is nothing in that description that refers exclusively to policy-making or planning functions"); First Nat'l Bank of Omaha v. State, 488 N.W.2d 343, 348 (Neb. 1992).

The compelling need to realign the State's discretionary function exception with the federal model is further underscored by the Hawaii Supreme Court's summary disposition order in the case Hashimoto v. State of Hawaii, decided January 21, 2005 (S. Ct. No. 25524). In Hashimoto, the Supreme Court refused to apply the discretionary function exception defense to the installation of a left turn phase of a traffic signalization, which cost over \$400,000.

Hashimoto arose out of a two-vehicle accident at the signalized intersection of Vineyard Boulevard and Nuuanu Avenue. Although the intersection was signalized, the signal did not have a left turn phase for left turns from Nuuanu Avenue onto Vineyard Boulevard. The absence of this left turn signal was alleged to be an unreasonably dangerous condition. However, the decision to install a left turn phase into the traffic signalization for this intersection required, by its very nature, the evaluation of broad public policy, such as the prioritization of the project

among many other worthwhile projects to fund, the appropriation of over \$400,000 by the Legislature, and consideration of traffic flow impacts upon the motoring public.

Under the facts of this case, the Department of Transportation could not, by itself, have designed and installed the left turn phase into the signalization. Gubernatorial approval and allotment, and legislative appropriation were also required. This is the very prototype of a discretionary function that was intended to be protected from liability by the FTCA's model discretionary function exception.

Other cases in which we believe the local courts should have applied the discretionary function exception are attached hereto as "Attachment A." These cases demonstrate the need for this bill since the analyses of the Hawaii Supreme Court in denying the discretionary function exception are inconsistent with federal case law interpreting the discretionary function exception under the FTCA. The cases that have already been resolved have cost the State approximately \$9,000,000.00 and the cases that are still awaiting a resolution could potentially cost the State an additional \$70,000,000.00.

In passing the STLA, the Legislature modeled the act after the FTCA, and its intent was to have the nearly identical discretionary function exception in the FTCA apply to the State in the same manner. The function of the proposed amendment is to ensure that the judicial branch respects the prerogative and authority of the legislative and executive branches as well as to give the courts guidance based on the wealth of federal law on what are discretionary functions, and what are merely ministerial functions.

We therefore respectfully request passage of this bill.

ATTACHMENT A

DeSilva v. State of Hawaii

Civil No. 97-0303(3), Second Circuit Court
\$685,974 judgment + interest paid in 2001

A boy was driving a dirt bike on Kam V Highway on Molokai when he collided with a pickup truck. The boy died as a result of the accident. Plaintiffs alleged that the State should have installed reflectors and a guardrail at the scene.

Castro v. State of Hawaii

Civil No. 90-139, Third Circuit Court
\$3,563,323.00 judgment paid in 2001

This case involved an early morning one-car accident that occurred on Route 130, Keeau-Pahoa Road, on the island of Hawaii in April 1988. Plaintiff was rendered a quadriplegic after his car left the lane of travel, went over the opposite embankment and rolled over. Plaintiff had been at a party before the accident, where he drank several beers. He apparently had fallen asleep at the wheel, causing him to lose control of his vehicle.

Plaintiff alleged that had there been a guardrail at the site of the accident, his car would have been redirected onto the highway and he would not have been injured. The State filed a motion for summary judgment, arguing, among other things, that installation of guardrails after the highway was completed would involve a process of evaluating the need for guardrails at the site, and obtaining funding for the project through the Department of Transportation's capital improvement budget. The capital improvement budget would have to be approved by both the Governor and the State Legislature. The State therefore took the position that such an undertaking constituted the type of decision-making protected by the discretionary function exception in the State Tort Liability Act.

The State looked to interpretations of the discretionary function exception under federal law, such as United States v. Gaubert, 499 U.S. 315 (1991). The State noted that per Gaubert, "discretionary conduct" was conduct involving choice or judgment, and was not confined to the policy or planning level. The State also relied upon the case Miller v. United States, 710 F.2d 656 (10th Cir. 1983), for the proposition that unless there was a statutory duty to erect a guardrail at a particular location, the decision not to do so was a discretionary function. The trial court agreed, granting the State's motion for summary judgment and dismissing the case. This

dismissal, however, was subsequently vacated by the Intermediate Court of Appeals via memorandum opinion. A judgment in excess of \$3,000,000 was ultimately rendered against the State after trial.

Trendler v. State of Hawaii
Civil No. 95-0924(3), Second Circuit
\$2,000,000.00 settlement paid in 1999

On February 5, 1995, Plaintiff Tracey Trendler was a passenger on a motorcycle being driven by her then-boyfriend Justin Trendler. The motorcycle was traveling north on Haleakala Highway when it was struck broadside by a truck at the intersection with Makawao Avenue. Plaintiff's left leg had to be amputated as a result of the accident, and she suffered a brain injury that allegedly prevented her from returning to her career as an attorney. Plaintiff's case was premised upon the theory that the intersection was unreasonably dangerous and that if the State had installed traffic control devices, the collision would not have occurred.

The evidence showed that during the design of the Pukalani Bypass, the Department of Transportation (DOT) evaluated the need for a traffic signal light at the intersection of Makawao Avenue and a proposed new segment of Haleakala Highway. After considering a number of factors including projected traffic volumes, projected traffic flow patterns, the cost of signaling the intersection and allocating funds to other intersections, the DOT decided instead to utilize stop signs located on Makawao Avenue to regulate traffic within the intersection.

After the Pukalani Bypass was opened to the public in 1993, accidents began to occur at the Makawao Avenue intersection. This prompted the DOT to reconsider whether a traffic signal was needed at that location. In late 1993, the Legislature appropriated funds for the design and installation of a traffic control device. In February 1994, the DOT completed the required engineering study and requested release of the funds from the Governor. The traffic signal light was installed in July 1995, roughly five months after the Trendler accident. Thus the DOT was in the process of installing a signal light at the Makawao Avenue intersection, but the project was not completed before the accident occurred.

Under these facts, the State argued that installation of a traffic control device at the location of the accident was a discretionary function. This argument proved unsuccessful.

Taylor-Rice v. Leigh, et al.
Civil No. 94-0173, Fifth Circuit Court
\$1,658,635.00 judgment + interest paid in 2000

This case arose from a one-car accident on Kauai that occurred in February 1994. Defendant Kenneth Richard Leigh drove his car off Kuhio Highway on Kauai, striking the buried end of a guardrail. The car then “vaulted” into a utility pole located behind the guardrail. Two people were killed and another was seriously injured. A blood sample taken after the accident indicated that the level of Leigh’s intoxication at the time of the accident was nearly twice the legal limit.

The trial court determined that the State was liable for negligently failing to upgrade the existing guardrail to a more modern design. The State had argued that the decision not to improve the guardrail involved the evaluation of broad policy considerations, and thus was protected by the discretionary function exception. The trial court disagreed, noting that the State could have upgraded the guardrail at the same time it was resurfacing Kuhio Highway. The Hawaii Supreme Court, in affirming the trial court’s decision, held that the decision not to upgrade the guardrail constituted an operational level decision that did not fall within the discretionary function exception.

Martin v. State of Hawaii, et al.
Civil No. 01-1-3159-10, First Circuit Court
\$1,175,000.00 settlement paid in 2004

This case arose out of an incident that occurred at the Waimanalo Reservoir in September 2000. The 16-year old Plaintiff had trespassed with some family members onto the fenced reservoir property through a large hole in the fence. Plaintiff and his family used the lining of the reservoir as a slide, and also played volleyball in the reservoir. At one point the Plaintiff was noted to be floating face-down in the water. As a result of the incident, Plaintiff was rendered a quadriplegic. Among the allegations made by Plaintiffs was that the State was negligent for not having security guards to ensure that trespassers did not venture onto the property. The Plaintiffs also alleged negligence in the State’s use and placement of warning signs, and in the State’s failure to upgrade the design and construction of the reservoir. Although the State argued that these alleged deficiencies were subject to the discretionary function defense, the court rejected this argument. The court did agree that the decision whether or not to shut-down the reservoir was discretionary.

Sacred Falls Cases
Various civil numbers
\$2,000,000.00 settlement paid in 2004

This case involved a rockslide at Sacred Falls in May 1999 that killed several people and injured many more. Although the court agreed that the decision whether to open or close the park was a discretionary function, the court held that decisions regarding the wording and placement of warning signs were not discretionary.

Kienker v. Bauer, et al.

Civil No. 98-033K, Third Circuit Court

\$1,135,188.72 judgment and interest paid in 2006

This case arose from an accident that occurred on July 5, 1997, on Queen Kaahumanu Highway near the intersection with Police Access Road in Kona. Plaintiff Jeffrey Kienker was driving northbound when his vehicle was struck head-on by a car being driven by Defendant Danielle Bauer. Bauer testified in deposition that just prior to the accident, the car in front of her abruptly stopped to make a left turn onto Police Access Road. In an effort to avoid rear-ending the car, Bauer swerved to the right and then to the left, crossing the center line and colliding with Kienker's vehicle. Kienker alleged that the State was negligent in failing to install a left turn lane for southbound traffic in the vicinity of Police Access Road.

The State argued in a motion for summary judgment that installation of the left-turn lane was a discretionary function, because it was a major project that required legislative appropriation. The planning process involved consideration of numerous factors, such as safety; the cost of widening the highway and installing a left-turn lane; prioritizing various, competing projects throughout the state highway system; engineering judgment; and the needs of the general public. The State's motion was ultimately denied. The parties later agreed to stipulate to damages so that an appeal could be taken on a different issue; i.e., whether the State was jointly and severally liable for the accident. The Supreme Court affirmed the lower court's finding that the State was jointly and severally liable with the other defendant and the State was required to pay over \$1,000,000 in damages.

Lewis v. State of Hawaii, et al.

Civil No. 02-1-0257(1), Second Circuit Court

\$318,467.62 judgment and interest paid in 2006

Plaintiff was walking on the inside of a guardrail in the dark of night along Honoapiilani Highway on Maui when she fell into a 13-foot deep culvert and broke her leg. She alleged that the State should have fenced off the culvert or taken other action to warn people of the danger posed by the culvert. At trial, the State argued that it was immune from liability because it was a

discretionary decision on the State's part whether to warn people of conditions on State property that were open and obvious in the daytime, but posed a potential danger at night.

The State asserted that the proper focus was not upon whether a fence or warning sign should have been placed at the particular location where Plaintiff fell, but rather on the economic and aesthetic impact of the State having to erect warning signs or other protective devices around all dangerous conditions on State property that were open and obvious in daylight, but not at night. Given the hundreds of miles of highways and the hundreds of cliffs, shoreline drops, large rock formations, etc., under State jurisdiction, such an undertaking would be prohibitively expensive and undermine the natural beauty of the State. Noting that the STLA was modeled after the FTCA, the State relied upon federal precedent to show that the decision whether to erect a fence around the culvert where Plaintiff fell was a discretionary function. In particular, the State cited Fahl v. U.S. Dept. of Interior, 792 F. Supp. 80 (D. Ariz. 1992), in which a tourist fell off a ledge at the Grand Canyon National Park and was killed. The court held in Fahl that the government's failure to post warning signs or guardrails in the area of the Grand Canyon where the decedent fell was a permissible exercise of judgment under the discretionary function exception of the FTCA.

Despite these arguments, the court rejected the State's argument that it was protected from liability by the discretionary function exception. Following a trial, the State was found to be fifty percent at fault for Plaintiff's injuries. The State appealed. The Hawaii Supreme Court issued a summary disposition order affirming the trial court's ruling except for its award of pre-judgment interest.

Callo, et al. v. State of Hawaii, et al.
Civil No. 05-1-0219(3)(JEC), Second Circuit Court
Dougher, et al. v. State of Hawaii, et al.
Civil No. 05-1-0425(1), Second Circuit Court
Consolidated Cases
Pending decision from trial court

This case arose out of an accident that occurred on April 13, 2005. Denise Callo drove her vehicle off a cliff located off the Honoapiilani Highway in Maui. She and her passenger, James Makekau, died of injuries they sustained in the accident. Passengers Tiffany Romena and her infant son survived but sustained some minor injuries. The State of Hawaii, Department of Transportation, owns the area where the accident occurred. The area is neither a highway nor a

State scenic lookout, but rather a permanent remnant. The remnant parcel is located beyond the DOT right-of-way. There are no standards or guidelines that require installation of barriers or warning signs at this area. Before the accident, Callo, Makekau and Romena had been drinking alcohol and/or smoking marijuana.

The Plaintiffs argued that the State should have installed barriers to prevent vehicular access, wheel stops to prevent vehicles from going over the cliff and/or signs warning of dangers at the remnant parcel. Since the remnant is not deemed to be a highway or part of a highway, there are no standards or guidelines that mandate or require the installation of barriers or wheel stops at or near the cliff over which Callo drove her vehicle. The State filed a motion for summary judgment based on discretionary function. The motion was denied and the case proceeded to trial. The five-week trial ended in July 2008. The court has yet to make a decision but the award against the State has the potential to exceed \$1,000,000.00.

Brem, et al. v. State of Hawaii
Civil No. 07-1-0176, Fifth Circuit Court
Trial judge found State 100% liable
Damages trial scheduled for March 2012

On December 19, 2006, Elizabeth Brem, from California, and her cousin Paula Ramirez, from Columbia, South America, were visiting Kauai. They were hiking in property owned by the State and part of Wailua State Park near Opaekaa Falls when they both fell to their deaths. The area where they were hiking was not a maintained or recognized trail. Plaintiffs alleged that the State should have erected additional signs or barriers to prevent access to the area. One of the State's arguments was that the discretionary function exception applied, since there was a broad statewide policy and missions for the Department of Land and Natural Resources to maintain and preserve the parks in their natural condition to retain their natural, scenic, historic, and wildlife values, and decisions whether or not to post signs or barriers at a particular location were based on an exercise of the professional judgment of the State officials who are delegated to make these decisions. The Court rejected the discretionary function argument and the case proceeded to trial on liability only. The Court found that the State was 100 percent liable and the damages portion of the trial is currently scheduled to begin in March 2012. Plaintiffs are seeking in excess of \$50,000,000.00.

TESTIMONY OF ROBERT TOYOFUKU ON BEHALF OF THE HAWAII ASSOCIATION FOR JUSTICE (HAJ) IN OPPOSITION TO H.B. NO. 2460

Date: Friday, February 10, 2012

Time: 2:00 am

To: Chairman Gilbert Keith-Agaran and Members of the House Committee on Judiciary:

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. 2460, relating to Government Tort Actions.

This bill seeks to require Hawaii's courts to abandon their long established case law and instead mandates that our courts apply federal law in construing provisions of Hawaii's State Tort Liability Act with regard to discretionary functions. HAJ opposes this effort to strip Hawaii's courts of the authority to determine Hawaii law and to instead place Hawaii's law at the mercy of Congressional statutory enactments and federal court decisions.

The Hawaii Supreme Court has ruled that government is not liable for discretionary functions which involve the effectuation of broad public policy, but is only be liable for routine or operational level activities. Whether to build a rail system, for example, is a discretionary function for which there is no governmental tort liability. The actual building of elevated tracks in a safe manner so that the structure doesn't collapse due to faulty design or construction is not a discretionary function because government does not have the discretion to choose to build it in an unsafe manner.

First and perhaps most importantly the provision is entirely unnecessary. The Hawaii Courts are free to and often do make their decisions about Hawaii's state tort

liability act after reviewing the federal law, the substantial case law provided by our own Courts, and the unique legislative history which expresses the wishes and intent of this legislature in determining the rights and obligations of our State and its citizens. The instant proposed amendment mandates that years of Hawaii judicial precedent and unique legislative history be ignored in deference to the decisions from across the country in various, and often inconsistent, federal venues and statutory mandates of Congress.

Routinely when these cases are presented, if there are relevant cases that have similar issues under 28 U.S.C. § 2680(a), the attorneys for both sides will bring this matter to the court by citing the manner in which the Federal Courts have dealt with similar issues.. The Court considers the opinions of the federal court for their persuasive value in the context of Hawaii's legislative policies and judicial precedent. On the other hand, there has developed in Hawaii a substantial body of case law interpreting the discretionary function in the context of the circumstances we face here in Hawaii and Hawaii Courts rely on stare decisis to interpret the law. Cases arising in the context of the federal tort case often require vastly different types of issues because federal law is so much more expansive than state law. Core functions of the federal government include international diplomacy and foreign relations, war powers and military concerns, interstate commerce and relations, national and international aviation, national infrastructure projects such as the interstate highway system that crosses the borders of all states with all of their individual laws and concerns, national standards for automobile, drugs and hazardous material, and a myriad of concerns that impact national policies for federal tort liability that are substantially different from Hawaii.

This bill makes it mandatory that a long body of decisions by the Hawaii courts and statutory enactments by Hawaii's legislature, which do not necessarily favor the claimant or the state in general, shall be ignored in order to compel Hawaii's courts to follow the decisions of federal courts and Congressional enactments. In essence the United States has very different problems pertaining to discretionary function than the State of Hawaii. That is why we do not simply adopt federal law as the law of Hawaii but instead have established our own legislative process and have our own state courts to determine what is best for our State.

Additionally, it is common for different federal circuits (the nation is divided into twelve federal circuits) to arrive at different interpretations on the same issues. Which federal circuit is Hawaii supposed to follow when there are conflicts among the circuits? In Hawaii, we have only a single intermediate court of appeals and supreme court that articulate a very consistent body of law.

By compelling the use of Federal precedent and ignoring the decisions of our Hawaii courts, the courts' hands are tied to ignore many of the decisions that apply uniquely to Hawaii, as well as our unique legislative history. Under present law a Hawaii court may consider relevant federal precedence to the extent that it may apply to the issue here in Hawaii as well as Hawaii decisions and legislative history - - the best of both worlds allows the court the freedom to consider the precedent articulated in the federal jurisdiction but also allows it to consider and apply the jurisprudence articulated by Hawaii appellate courts over decades of development.

It is interesting that this bill proposes that federal law relating only to the discretionary function be adopted and not other aspects of federal tort liability. The

federal tort claims act, for example, does not have many of the liability limitations contained in our state law regarding joint and several liability, highway maintenance and design, parks liability, or lifeguard and ocean recreation liability.

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