

# SB 2075

RELATING TO CIVIL ACTIONS.

Clarifies that government entities are only liable for the percentage share of the damages that they actually caused.



Deputy Directors  
FORD N. FUCHIGAMI  
JADE BUTAY  
RANDY GRUNE  
JADINE URASAKI

IN REPLY REFER TO:

STATE OF HAWAII  
DEPARTMENT OF TRANSPORTATION  
869 PUNCHBOWL STREET  
HONOLULU, HAWAII 96813-5097

February 6, 2012

**SB 2075  
RELATING TO CIVIL ACTIONS**

SENATE COMMITTEE(S) ON TRANSPORTATION AND INTERNATIONAL AFFAIRS  
and ON PUBLIC SAFETY, GOVERNMENT OPERATIONS, AND MILITARY AFFAIRS

The Department of Transportation supports this bill to amend HRS sections 663-10.5 & 663-10.9, as it clarifies and limits a government entity's liability to its percentage share of the damages attributed to the government entity. This bill will abolish joint and several liability for tort claims relating to the maintenance and design of highways which has in the past resulted in the Department of Transportation paying a disproportionate share of damages and settlements.

The Department of Transportation is responsible to plan, design, construct, operate, and maintain State facilities in all modes of transportation, including air, water, and land. Projects developed by our Highways Division are generated through a comprehensive assessment of a facility's physical condition, safety performance, traffic operational performance, capacity, efficiency, convenience, sustainability, environmental compatibility, and maintenance aspects.

Currently, the law specifically excludes highways design from protection against joint and several liability. In an effort to minimize overall financial risk and exposure, the Department of Transportation has settled many cases. This includes cases where we have been nominally at fault but are exposed to significant potential risk of having to pay the bulk of any financial award due to joint and several liability. The current language in the bill also encourages plaintiffs to sue the department since while the State may have only been at 1% fault, joint and several liability may result in the State paying a disproportionate share of damages. The proposed amendments to the law will align the Department of Transportation on par with other Government entities in being responsible for its appropriate and reasonable share of damages, potentially saving the public millions of dollars.

Thank you for the opportunity to provide testimony.



TESTIMONY BEFORE  
SENATE COMMITTEE ON TRANSPORTATION AND INTERNATIONAL  
AFFAIRS and  
SENATE COMMITTEE ON PUBLIC SAFETY, GOVERNMENT OPERATIONS,  
AND MILITARY AFFAIRS

By Joseph P. Viola  
Manager, Legal Department  
Hawaiian Electric Company, Inc.

**1:16 p.m., February 6, 2012**

**Senate Bill 2075**  
Relating to Civil Actions

Chair English, Chair Espero, Vice Chair Kidani, and Committee members:

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 respectfully requests that SB 2075 be amended to clarify that joint and several liability is eliminated for all entities with respect to tort claims relating to highway maintenance and design. As currently drafted, SB 2075 eliminates such liability for government entities but could be construed to shift greater joint and several liability to others with facilities in the roadway, including the utilities.

II.

This Bill would impact HECO in highway motor vehicle accident cases involving utility poles. In those cases, plaintiffs often sue (a) HECO, (b) the State or county responsible for that highway, and (c) any joint owners of the pole.<sup>1</sup> Plaintiffs have argued that utility pole location is part of the highway design or maintenance, and, on that basis, seek to hold the government and utility companies jointly and severally liable for damages.<sup>2</sup> However, under SB 2075, the State and counties could never be held jointly and severally liable for highway maintenance or design. That would shift undue risk to HECO.

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<sup>1</sup> Other joint pole owners may include Hawaiian Telcom Company and the State or City and County.

<sup>2</sup> 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”).

Under joint and several liability, defendants who have the ability to pay -- such as the government and the public utilities -- are at risk to pay more than any proportionate share of liability they may be assigned. By limiting the government's liability, alone, the Bill would effectively shift greater liability exposure in highway cases to the other so-called "deep pockets" -- the public utilities. However, there is no justification for increasing the utilities' risk 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.

So, any reasons justifying abolishment of joint and several liability for the State and counties in highway cases should apply equally to the public utilities. The Legislature recognized that the government and public utilities deserve similar protection in highway cases when it passed Act 185 in 2005 (now codified as HRS § 264-20), which extended liability protection to the State, counties and public utilities with respect to flexibility in highway design. See § 264-20(b)(4) (see Attachment A hereto).

The same fair result can be accomplished by amending SB 2075 so that HRS section 663-10.9 would, instead, read as follows:

**§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) for 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;

(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.

Otherwise, this Bill should be held without further action.

Thank you for the opportunity to testify on this matter.

Attachment A

**Hawaii Revised Statutes §264-20 (underscore added) :**

**§264-20 Flexibility in highway design; liability of State, counties, and public utilities.** (a) If a highway, including any bridge, principal and minor arterial road, collector and local road, or street, requires new construction, reconstruction, preservation, resurfacing (except for maintenance surfacing), restoration, or rehabilitation, the department of transportation with regard to a state highway, or a county with regard to a county highway, may select or apply flexible highway design guidelines consistent with practices used by the Federal Highway Administration and the American Association of State Highway and Transportation Officials. Flexibility in highway design shall consider, among other factors:

- (1) Safety, durability, and economy of maintenance;
- (2) The constructed and natural environment of the area;
- (3) Community development plans and relevant county ordinances;
- (4) Sites listed on the State or National Register of Historic Places;
- (5) The environmental, scenic, aesthetic, historic, community, and preservation impacts of the activity;
- (6) Access for other modes of transportation, including but not limited to bicycle and pedestrian transportation;
- (7) Access to and integration of sites deemed culturally and historically significant to the communities affected;
- (8) Acceptable engineering practices and standards; and
- (9) Safety studies and other pertinent research.

(b) Any other law to the contrary notwithstanding, any decision by the State, the department of transportation, a county, or any officers, employees, or agents of the State, the department of transportation, or a county to select or apply flexibility in highway design pursuant to this section and consistent with the practices used by the Federal Highway Administration and the American Association of State Highway and Transportation Officials shall not give rise to a cause of action or claim against:

- (1) The State;
- (2) The department of transportation;
- (3) The counties;
- (4) Any public utility regulated under chapter 269 that places its facilities within the highway right of way;  
or
- (5) Any officer, employee, or agent of an entity listed in paragraphs (1) to (4).

(c) The exception to liability provided in subsection (b) applies only to the decision to select or apply flexibility in

highway design pursuant to this section and does not extend to design, construction, repair, correction, or maintenance inconsistent with subsection (a).

**SB 2075**

**RELATING TO CIVIL ACTIONS**

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

**FEBRUARY 6, 2012**

Chairs English and Espero, and Members of the Transportation and International Affairs and Public Safety, Government Operations, and Military Affairs Committees:

I am Ken Hiraki, Vice President of Government and Community Affairs, testifying on behalf of Hawaiian Telcom in opposition to SB 2075, "RELATING TO CIVIL ACTIONS."

Hawaiian Telcom opposes this bill. SB 2075 unfairly exempts the state and county government from joint and several liability in tort cases involving a public road or rights of way. This bill discriminates against 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 or county government responsible for the highway. If the state and/or county government are exempt from joint and several liability, by default public utilities may be the only the only remaining parties left subject to liability. This unfair shift in liability means that a utility will end up paying more than its assigned share of liability despite the fact that in most cases, it is usually the governmental entity that



determines where and under what conditions a utility may place a utility pole along a road or highway.

Passage of this bill will inevitably lead to increased lawsuits and expenses for utilities such as Hawaiian Telcom.

Based on the aforementioned, Hawaiian Telcom respectfully requests that SB 2075 be held.

Thank you for the opportunity to testify.

# ACEC

AMERICAN COUNCIL OF ENGINEERING COMPANIES  
of Hawaii

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Brown and Caldwell  
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February 2, 2012

**Senate Committee on Transportation and International Affairs  
Senate Committee on Public Safety, Government Operations, and Military Affairs  
Hearing Date: Monday, February 6, 1:16p.m., Conference Room 224**

Honorable Chairs J. Kalani English and Will Espero, and Members of the Senate Committees

Subject: **SB 2075, Relating to Civil Actions  
TESTIMONY IN OPPOSITION**

Dear Chairs English and Espero, and Committee Members:

The American Council of Engineering Companies of Hawaii (ACECH), representing 65 member firms with over 1,800 employees throughout Hawaii, strongly opposes SB 2075, Relating to Civil Actions, **UNLESS the list of "governmental entities" is amended to include the government's contracted professional architects, engineers, and land surveyors licensed under HRS Chapter 464.**

ACECH strongly supports tort reform and the fair allocation of risk and damages. We support the abolition of joint and several liability, but only if it applies to all parties. Since the Government and the public derive far greater benefit from public works than the Government's contracted design consultants, it is reasonable that protection from joint and several liability that is granted to the Government, is also extended to the government's contracted consultants. Otherwise, the Government's risk is unfairly shifted to their consultants. In these tough economic times, it is unreasonable to expect private businesses to take on the Government's share of the risk in addition to their own.

Since Section 2 of the bill defines "governmental entity" for the purposes of this section only, the Government's design consultants can be included as follows (added language underscored):

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, or any professional architect, engineer or land surveyor licensed pursuant to HRS Chapter 464 and contracted by the government entity.

Otherwise, we strongly oppose this bill. Thank you for the opportunity to express our views regarding this bill.

Sincerely,

AMERICAN COUNCIL OF ENGINEERING COMPANIES OF HAWAII



Douglas Lee, P.E.  
President

# AMERICAN INSTITUTE OF ARCHITECTS

TIA/PGM  
2.6.12  
1:16 pm

February 6, 2012

Honorable J. Kalani English, Chair  
Senate Committee on Transportation and International Affairs

Honorable Will Espero, Chair  
Senate Committee on Public Safety, Government Operations, & Military Affairs

Re: **Senate Bill 2075**  
**Relating to Civil Actions**

Dear Chair English, Chair Espero and Members of the Committees,

My name is Daniel Chun, Government Affairs Chair of the American Institute of Architects (AIA) Hawaii State Council. AIA **OPPOSES** SB 2075 if it lacks the language proposed in testimony by the American Council of Engineering Companies of Hawaii ACECH.

AIA supports a fair allocation of risk and damages. We support the abolition of joint and several liability "JSL", but only if it applies to all parties. We assume that the impetus for this bill is government entities sensing the unfairness of "JSL" shifting damages to parties beyond their true liability. But how fair is this to leave private entities to carry the burden? If this bill is enacted the following long-term effects can be expected:

- Fewer competitors for government contracts meaning less qualifications and less price competition. This typically results in less innovation and higher prices to government.
- Fewer companies and much larger companies becoming the only offerors due to the high risk of government contracting work. In some design fields only the very largest companies, typically out-of-state nationally-based companies, can afford to risk designing government projects. Small businesses now located in Wailuku and other neighbor island county seats may disappear.
- Fewer younger persons entering the design professions due to low compensation caused by high overhead costs, the unacceptably high cost of insurance premiums and high level of personal risk.

Government projects designed by architects and engineers benefit everyone and have an extremely long service life measured in decades. Architects and engineers are already subject to joint and several liability and cannot have government entities not carrying their fair share of the burden. Thank you for this opportunity to **OPPOSE** Senate Bill 2075.

## **Kennedy/Jenks Consultants**

### **Engineers & Scientists**

AIPA Building  
3375 Koapaka Street, Suite F227  
Honolulu, Hawaii 96819  
808-218-6030  
FAX: 808-488-3776

February 3, 2012

**Senate Committee on Transportation and International Affairs  
Senate Committee on Public Safety, Government Operations, and Military Affairs  
Hearing Date: Monday, February 6, 1:16p.m., Conference Room 224**

Honorable Chairs J. Kalani English and Will Espero, and Members of the Senate Committees

Subject: **SB 2075, Relating to Civil Actions  
TESTIMONY IN OPPOSITION**

Dear Chairs English and Espero, and Committee Members:

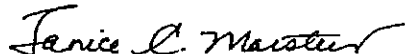
Kennedy/Jenks Consultants **strongly opposes SB2075, Relating to Civil Actions, UNLESS the list of “governmental entities” is amended to include the government’s contracted professional consultants, as recommended by the American Council of Engineering Companies of Hawaii (ACECH) in their testimony.**

Kennedy/Jenks provides design for a variety of infrastructure projects, including projects for the State of Hawaii and Counties. Our profits on these projects are very small, and the Government and the public derive far greater benefit from these public works than does our firm. In the current litigation climate, the risks far outweigh the rewards, and this bill would result in more of the risk unfairly shifted to us. It is reasonable that protection from joint and several liability granted to the Government is extended to the consultants designing these projects on behalf of the Government.

The American Council of Engineering Companies has recommended that paragraph 2 of the bill be revised to include “contracted professional consultants” among the parties defined as “governmental entity” for the purposes of this section only, and we support that change.

Thank you for an opportunity to express our views regarding this bill.

Sincerely,  
Kennedy/Jenks Consultants



Janice C. Marsters, Ph.D.  
Senior Environmental Engineer

February 3, 2012

**Senate Committee on Transportation and International Affairs  
Senate Committee on Public Safety, Government Operations, and Military Affairs  
Hearing Date: Monday, February 6, 1:16p.m., Conference Room 224**

Honorable Senators Will Espero, Chair; Michelle Kidani, Vice Chair; and Members of the Senate Committee on Public Safety, Government Operations, and Military Affairs

Subject: **SB 1537 Relating to Procurement**

Honorable Chairs J. Kalani English and Will Espero, and Members

**The Coalition of Hawaii Engineering & Architectural Professionals** represents several professional Engineering and Architectural organizations including American Council of Engineering Companies Hawaii; 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 OPPOSED to SB 2075, Relating to Civil Actions, UNLESS the list of “governmental entities” is amended to include the government’s contracted professional architects, engineers, and land surveyors** licensed under HRS Chapter 464.

Our A/E/C industry strongly supports Tort Reform efforts and the elimination of Joint and Several Liability for all parties. It is not fair practice to favor the government entity that derives the greatest benefit from our services and to push liability down to the businesses providing services to the government entity. Since the public and government entity derive the greatest benefit from public works projects. Then liability reform should extend to the government contractors including the Consulting Engineer. We ask to be extended to the government’s contracted consultants.

Since Section 2 of the bill defines “governmental entity” for the purposes of this section only, the Government’s design consultants can be included as follows (added language underscored):

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, or any professional architect, engineer or land surveyor licensed pursuant to HRS Chapter 464 and contracted by the government entity.

Sincerely,  
Coalition of Hawaii Engineering & Architectural Professionals  
Lester H. Fukuda, P.E., FACEC

*Lester Fukuda*

**From:** mailinglist@capitol.hawaii.gov  
**Sent:** Saturday, February 04, 2012 5:35 PM  
**To:** TIATestimony  
**Cc:** toyofuku@hiadvocates.com  
**Subject:** Testimony for SB2075 on 2/6/2012 1:16:00 PM

Testimony for TIA/PGM 2/6/2012 1:16:00 PM SB2075

Conference room: 224  
Testifier position: Oppose  
Testifier will be present: Yes  
Submitted by: Bob Toyofuku  
Organization: Hawaii Association for Justice (HAJ)  
E-mail: [toyofuku@hiadvocates.com](mailto:toyofuku@hiadvocates.com)  
Submitted on: 2/4/2012

**Comments:**

If I am not able to be there because of conflicting hearings Bert Sakuda may testify in my place

TO: Members of the Committees on Transportation & International Affairs and Public Safety, Government Operations & Military Affairs

FROM: Natalie Iwasa  
Honolulu, HI 96825  
808-395-3233

HEARING: 1:16 p.m. Monday, February 6, 2012

SUBJECT: SB 2075 Civil Actions - **Support**

Aloha Chairs and Committee Members,

Thank you for allowing me to provide testimony on SB 2075 which would clarify that government entities are only liable for the percentage share of damages that they caused.

Limiting liability to the amount of damage caused makes a lot of sense. Please vote "yes" to pass this bill.