



**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-SEVENTH LEGISLATURE, 2013**

ON THE FOLLOWING MEASURE:

H.B. NO. 776, H.D. 2, RELATING TO GOVERNMENT TORT LIABILITY.

BEFORE THE:

SENATE COMMITTEE ON JUDICIARY AND LABOR

DATE: Tuesday, March 12, 2013 **TIME:** 10:30 a.m.

LOCATION: State Capitol, Conference Room 016

TESTIFIER(S): David M. Louie, Attorney General, or
Robin M. Kishi, Deputy Attorney General

Chair Hee and Members of the Committee:

The Department of the Attorney General supports this bill.¹

The purpose of this bill is to amend section 662-5, Hawaii Revised Statutes (HRS), to afford the State of Hawaii, when it is sued in tort, the right to demand a jury trial in the same manner and to the same extent as a private individual under like circumstances.²

Chapter 662, HRS, is referred to as the State Tort Liability Act. Before the State Tort Liability Act, the State under the doctrine of sovereign immunity, could not be sued. Except for prejudgment interest, punitive damages, and enumerated exceptions, the State has waived its immunity from tort liability pursuant to section 662-2, HRS, and has declared that it may be liable in the same manner and to the same extent as private individuals under like circumstances.

Private individuals sued in tort may demand jury trials under sections 603-21.5 and 635-14, HRS, and Hawaii Rules of Civil Procedure, Rule 38(b) and (c), or they may waive that right.

¹ The Department declares its strong preference for the language contained in the original bill, and its support is reluctant. The H.D. 2 addresses concerns voiced by the Hawaii Association for Justice to the original bill, and therefore, permits reciprocal rights to plaintiffs and the State to demand jury trials in tort cases against the State. Because the H.D. 2 adopts the suggested amendments of the Hawaii Association for Justice that organization should no longer have any objection to the bill.

² Private individuals and entities against whom tort lawsuits are filed almost invariably demand jury trials. However, the overwhelming majority of those cases are resolved before trial, and thus only a very small percentage of those lawsuits proceed to jury trial. Similarly, the vast majority of lawsuits against the State are, and will continue to be, resolved before trial. Therefore any costs associated with jury trials against the State will be negligible.

Currently, however, the State is not on equal-footing with private individuals under like circumstances. This is because the State does not have the same right as private individuals to demand jury trials, or elect to waive that right.

In addition, plaintiffs often sue both private defendants who have made a demand for jury trial, as well as the State as a defendant. In those cases, it is necessary for the jury to determine the claims against the private defendants, and the judge to determine the claims against the State. This creates the possibility of inconsistent verdicts.

For example, the jury may determine that the Private Defendant "A" is 20 percent at fault, Private Defendant "B" is 20 percent at fault, Plaintiff is 40 percent at fault, and the State is 20 percent at fault. The judge may determine that the State is 30 percent at fault, and Plaintiff only 10 percent at fault. The judge's decision would necessarily alter the jury determination and thereby increase the percentages of fault for both Private Defendants.

Section 662-5, HRS, provides that tort actions against the State shall be tried without a jury unless all parties consent and the court so orders. In other words, only if all other parties involved in the lawsuit agree, and only if the judge to which the lawsuit is assigned deems it appropriate and so orders, will the State be able to have a jury trial in that lawsuit.

A private individual or entity, in consultation with the individual's or entity's attorney, is in the best position to determine whether the claims against them and the issues involved should be tried by a jury or a judge. Similarly, the State, in consult with its attorneys, is in the best position to determine whether the claims against it and the issues involved are best tried by a jury or a judge. Because the State is supposed to be sued and held liable in the same manner and to the same extent as private individuals, the State ought to have the same right to demand jury trials.

This bill will ensure that the State is placed on equal-footing with other private individuals sued in tort, and ensure that the decisions and judgments in which the State is a defendant are consistent and equitable.

In addition to the above, the recent trend in non-jury bench trial decisions have emphasized and illustrated the need for the State to have the right to demand jury trials. A few of these decisions are discussed below.

The recent decision in Brem, et al. v. State of Hawaii, Civil No. 07-1-0176, Fifth Circuit Court, is one example of the recent trend in non-jury bench trials in which trial judges have been reluctant to find plaintiffs even a small percentage at fault for their own conduct. In Brem the trial judge in a non-jury bench trial found the State 100 percent at fault for the deaths of two tourists who attempted to climb down from an area near the top of the 300-foot waterfall at Opaekaa Falls on Kauai. The path the tourists took was not an official trail maintained by the State. Instead, it was an area that had been left by the State in its natural condition. Last year, the State settled this case for nearly than \$15,500,000; \$5,460,000 of which was paid from general funds and nearly \$10,000,000 from the State's excess insurance carrier. The trial judge determined that there was **no** comparative negligence on the part of the hikers who had just photographed the stunning 300 foot waterfall from the official lookout and were thus aware of the inherent, obvious, or apparent danger before they began their hike, thereby relieving the hikers of any responsibility for attempting the obviously risky climb down.

The recent decision in the consolidated cases of Callo v. State of Hawaii, Civil No. 05-1-0219(3), and Dougher et al. v. State of Hawaii, Civil No. 05-1-0425(1), Second Circuit Court, is another example. These cases arose out of an accident that occurred when the vehicle driven by Denise Callo went over the edge of and down a cliff located at a remnant parcel located along the makai side of Hooapiilani Highway on Maui. The parcel is owned by the State of Hawaii's Department of Transportation.

Thirty-four-year-old Callo was the driver at the time of the accident and, based on the toxicology test results and the testimony of contemporaneous witnesses, was intoxicated by alcohol and marijuana. In fact, at the time of the accident, Callo's Blood Alcohol Content level was more than twice the legal limit. Her front seat-passenger was Tiffany Romena. Her back seat passengers were James Makekau, Callo's sixteen year-old lover, and Romena's infant daughter. Both Makekau and Romena had also shared a joint with Callo at the site before the accident. Both Callo and Makekau died as the result of the accident. Romena and her daughter sustained minor injuries.

After the accident, Romena stated to the police officer at the scene that Callo was pulling up to the side of the cliff when "all of a sudden [Callo] accidentally pressed the gas pedal, instead of brake, and the vehicle lunged forward towards the side of the cliff." Then, Romena stated that

the vehicle started to slide down the side of the cliff. She also informed the emergency medical technician that Callo had been drinking beer and that the car shot forward and over the cliff. Romena's statements were also consistent with the police evidence and conclusion that Callo drove front end first off of the edge of the cliff.

The trial judge in a non-jury bench trial found the State of Hawaii negligent and liable to Plaintiffs for 100 percent of the damages. Despite the physical evidence found by the police, Romena's statements to the police and paramedic shortly after the accident, and Callo's intoxication and impairment, the trial judge found no comparative fault on Callo. The trial judge awarded the Callo-Romena Plaintiffs \$1,400,000, inclusive of their litigation costs, and the Dougher-Makekau Plaintiffs nearly \$1,960,000, inclusive of their costs for a total judgment in the amount in excess of \$3,360,000. The State is currently engaged in settlement discussions with the Plaintiffs.

The recent decision in Eager v. State of Hawaii, Civil No. 09-1-0241-01, First Circuit Court, is yet another example of a decision in a non-jury bench trial in which the trial judge found the State 100 percent at fault, and no comparative negligence on the part of the Plaintiff. This case arose out of an accident in which the Plaintiff drove his moped over and across the railroad track in the vicinity of Fort Barrette road as he had done so on at least 40 prior occasions. Despite the fact that he was very familiar with the area and the tracks, on the day of the accident his moped struck the track, skidded then landed on Plaintiff's right foot. He alleged that he sustained a severe and permanent injury to his right foot that required surgery. The trial judge awarded Plaintiff \$306,398.00 in damages, and will be assessing costs against the State as well.

These three trial court decisions illustrate an alarming trend in non-jury bench trials in which the State is made a guarantor of the safety of plaintiffs who have made less than reasonably prudent decisions. The Department of the Attorney General does not believe that juries in any of the above discussed cases would have found the plaintiffs therein zero percent at fault. By giving the State as sovereign the same right to demand jury trials as private individuals, when the State can be held liable as private individuals under chapter 662, the State will have a better opportunity to stem the tide of this alarming trend.

We respectfully request that the Committee pass this bill.

**COMMENTS OF ROBERT TOYOFUKU ON BEHALF OF THE HAWAII
ASSOCIATION FOR JUSTICE (HAJ) REGARDING H.B. NO. 776, HD1**

Date: Tuesday, March 12, 2013
Time: 10:30 am

To: Chairman Clayton Hee and Members of the Senate Committee on Judiciary and
Labor:

My name is Bob Toyofuku and I am presenting comments on behalf of the
Hawaii Association for Justice (HAJ) regarding H.B. No. 776 HD1, relating to
Government Tort Liability.

The stated purpose of this bill is to give the State the same right as a private
individual to elect a jury trial under the State Tort Claims Act. However, the original
language of the bill gave only the State the right to elect a jury trial, not individual
citizens. The current HD1 now provides the same right to a jury trial to both the State
and individuals.

Under the current law neither the State nor individual has the unilateral right to a
jury trial. HAJ takes no position whether a jury trial should or should not be available as
a matter of right in State Tort Claims cases. But whichever it is, they should both have
equal rights, i.e., both have the right to a jury or neither have that right. Accordingly,
either the current law or the HD1 is acceptable, but not any procedure that gives only the
State the right to choose a jury trial and thus gain an unequal and unfair advantage.

Current law provides that tort claims against the State are to be tried to a judge,
unless **both** the State and individual bringing the claim agree to a jury trial. The rights of

the State and private individuals are equal - - neither one has the right to unilaterally demand a jury trial - - both must agree. Section 662-5 states:

“Any action against the State under this chapter shall be tried by the court without a jury; provided that the court, with the **consent of all the parties**, may order a trial with a jury whose verdict shall have the same effect as if trial by jury had been a matter of right.”

Under current law, a private individual does not have a right to elect a jury in a case against the State. If the State’s intent is to give the State and its citizens equal rights to elect trials by jury, then the HD1 should be adopted in its present form.

It is fundamentally unfair to tip the current balance in favor of the State by giving only the State the right to select a jury trial. This would allow the State to cherry pick judges for its case. If the State likes a certain judge, it will have the right to require a trial by that judge since the individual citizen can get a jury trial only “with the consent of all the parties.” If the State does not like a judge, it should not be allowed to unilaterally select a jury trial. This gives the State an unfair advantage because the State knows who the judge is before it must decide whether to select a jury trial or not. It is bad public policy to give the State the ability to cherry pick its judges and undermines the public’s confidence in the fairness and impartiality of our legal system and our government.

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