

TESTIMONY
HB 951 HD1
LATE

William P. Kenoi
Mayor



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March 24, 2009

LATE TESTIMONY

The Honorable Senator Clayton Hee, Chair,
and Members
Committee on Water, Land, Agriculture and Hawaiian Affairs
Hawaii State Capitol
415 South Beretania Street
Honolulu, Hawaii 96813

Dear Chair Hee and Senators:

*Re: Testimony in Support to House Bill No. 951, HD1
Hearing: Wednesday, March 25, 2009 at 2:45 p.m.
Conference Room 229*

The purpose of House Bill 951, HD1, is to relieve a landowner for any damage, injury, or harm to persons or property outside the boundaries of the landowner's land caused by naturally occurring land failures originating on unimproved land. We provided similar written testimony in support of original House Bill 951 that was heard by the House Committee on Water, Land and Ocean Resources on Monday, February 2, 2009.

We support House Bill 951, HD1, for several reasons.

First, it clarifies the landowner's duties when naturally occurring land failures originates on unimproved land. This bill codifies the common law which provides that landowners of unimproved land shall not be liable for any damages, injury, or harm to persons or properties outside of their land, caused by any naturally occurring land failure that originates from the unimproved land.

Second, the County of Hawaii ("County") has jurisdiction and authority over substantial acreages of unimproved land and it is not always possible to maintain or provide signage that warns people of possible dangers. So, this bill allows the County the limited reasonable use of their natural lands, without losing the intended protections of the bill. Hence, the County could do minor improvements, such as, the installation or maintenance of signage; or undertake minor alteration to preserve or manage the

The Honorable Senator Clayton Hee, Chair,
and Members
March 24, 2009
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LATE TESTIMONY

unimproved land, such as, installing or maintaining fences, trails or pathways; or conduct maintenance activities, such as, planting or removal of weeds, brushes, rocks or trees; or the removal or securing of huge rocks or boulders to reduce the risk of injury or damage to down slope properties.

And, third, consequently, this protects our County, who owns or purchases unimproved land, from unnecessary and costly litigation. Where the County has not created or increased the risk of harm by artificial improvements or alterations to its lands, this bill provides some level of protection with respect to its legal duties and obligations arising from the inherent risks of land failures by natural conditions on unimproved lands.

If the committee is considering passage of this measure, the County would still like to amend the definition "minor alterations" in Section 663-___(2). The definition should be amended to include "the installation or maintenance of fences, trails, pathways or drainage facilities." The primary reason for this additional language is to properly clean and maintain drainage ways to reduce and minimize potential flood damage to adjoining lands.

Thank you for your consideration of our testimony.

Sincerely,



Joseph Kamelamela
Deputy Corporation Counsel,
Litigation Supervisor
County of Hawai'i

JKK:fc

c: Kevin Dayton, Executive Administrator
Warren Lee, Director of Public Works
Robert A. Fitzgerald, Director of Parks and Recreation
Bobby-Jean Leithead-Todd, Planning Director

LATE TESTIMONY

TESTIMONY OF PATRICK T. ONISHI IN OPPOSITION TO H.B. 951

March 24, 2009

To: Chairman Clayton Hee and Members of the Senate Committee on Water, Land, Agriculture, and Hawaiian Affairs

I am Patrick T. Onishi, a practicing Architect and a part-time associate professor with the University of Hawaii School of Architecture's Community Design and Sustainable Research Program. I have also previously served as the City and County of Honolulu's Planning Director and it's Director of Land Utilization. More relevant to the subject bill is that I am the father of Dara Rei Onishi who was killed in the early hours of August 9, 2002, when a 6-ton boulder "bounced" down the mountainside and crashed into Dara's bedroom as she slept. She did not die instantly as reported by the media. We have maintained that lore because it seemed like the civil thing to do. Our family continues to be haunted by that tragic event—our son who was in the adjoining bedroom ended up in the basement of our home when the boulder tore through wood frame floor in the bedroom wing and miraculously survived. He is now 29 years old and is not the same happy soul that he was before that harrowing night.

It was a horrible experience, but more excruciating has been the legal process that we encountered in seeking solace and safety in our home. What we have learned from our experience is that Common Law already protects landowners from existing hazards on their land that is in its natural state. But, there are no laws that creates duty to landowners to maintain his property for the safety of neighboring property owners. I believe that H.B. 951 intends to codify what is already in Common Law and is therefore redundant.

I ask that your committee hold H.B, 951 in Committee and convene a taskforce to craft legislation that truly addresses the safety of people who inhabit lands that are prone to the hazards of rock falls and landslides. I know the issue is a complex one, saving lives is pono.

Aloha... Patrick T. Onishi



LATE TESTIMONY

HB 951 HD1

RELATING TO LANDOWNER LIABILITY

**SENATE COMMITTEE ON WATER, LAND, AGRICULTURE, AND HAWAIIAN
AFFAIRS**

Date: March 25, 2009 Time: 2:45 pm
Room: 229

Aloha Chair Hee, Vice Chair Tokuda and Members. The Office of Hawaiian Affairs (OHA) SUPPORTS THE INTENT OF House Bill 951.

The bill intends to codify the common law regarding the liability of owners of unimproved lands for personal or property damage that occurs outside the land owner's property boundary and that occurs due to naturally occurring events on the unimproved land.

OHA prefers the measure as it was introduced and requests that the HD1 amendments be reversed. In particular, the amendment in the HD 1 that "clarified that the landowner remains liable for negligence and intentional torts arising from activities on unimproved land" actually goes against existing common law, rather than codifying it as was the bill's intent.

Mahalo for this opportunity to testify.

From: mailinglist@capitol.hawaii.gov
Sent: Tuesday, March 24, 2009 6:09 PM
To: WTLTestimony
Cc: darakawa@lurf.org
Subject: Testimony for HB951 on 3/25/2009 2:45:00 PM
Attachments: SB 754 SD1, HD1 AFF HSG Study by LRB (LMG) 090325LURFfinal2.doc; HB 951 HD1 PROPOSED SD1 LURF version 090325.doc

Testimony for WTL 3/25/2009 2:45:00 PM HB951

Conference room: 229
Testifier position: comments only
Testifier will be present: Yes
Submitted by: david z. arakawa
Organization: Land Use Research Foundation of Hawaii
Address:
Phone: 8085214717
E-mail: darakawa@lurf.org
Submitted on: 3/24/2009

LATE TESTIMONY

Comments:



LAND USE RESEARCH
 FOUNDATION OF HAWAII
 700 Bishop Street, Ste. 1928
 Honolulu, Hawaii 96813
 Phone 521-4717
 Fax 536-0132



LATE TESTIMONY

Via Capitol Website

March 25, 2009

**Senate Committee on Water, Land, Agriculture and Hawaiian Affairs
 Hearing Date: Wednesday, March 25, 2009, 2:45 pm in CR 229**

**Testimony in Support of HB 951, HD1. Relating to Landowner Liability
 (Relieves landowner of liability caused by natural conditions)**

Honorable Chair Clayton Hee, Vice Chair Senator Jill N. Tokuda and Members of the Senate Committee on Water, Land, Agriculture and Hawaiian Affairs:

My name is Dave Arakawa, and I am the Executive Director of the Land Use Research Foundation of Hawaii (LURF), a private, non-profit research and trade association whose members include major Hawaii landowners, developers and a utility company. One of LURF's missions is to advocate for reasonable, rational and equitable land use planning, legislation and regulations that encourage well-planned economic growth and development, while safeguarding Hawai'i's significant natural and cultural resources and public health and safety.

We appreciate the opportunity to provide our testimony with **comments regarding HB 951, HD1**. Our comments are as follows:

- **LURF strongly supports the original intent, purpose and language of HB 951.**
 - The purpose of HB 951 is to "codify the common law that currently exists in Hawaii with respect to the legal duties and obligations pertaining to damages and injuries caused by natural conditions to property and the persons outside of the land."
 - The original language of this measure provided" A landowner shall not be liable for any damage, injury, or harm to persons or property outside the boundaries of the landowner's land caused by naturally occurring land failure originating on unimproved land."
- **However, we strongly object to the following HD1 addition:** "provided that a landowner shall remain liable for damages proximately caused by negligence...." This new HD1 language basically nullifies the original intent and language of the bill, and is inconsistent with the purpose of HB 951, which is to

“codify the common law that currently exists in Hawaii with respect to the legal duties and obligations pertaining to damages and injuries caused by natural conditions to property and the persons outside of the land.” LURF respectfully recommends deletion of the term “negligence.”

- LURF would also respectfully **request that this Committee approve a SD1** (in the form attached), which would delete the term “negligence,” but provide an exception for “willful or wanton acts or omissions...”

HB 951, HD1. The stated purpose of this bill is to codify the common law that currently exists in Hawaii with respect to the legal duties and obligations pertaining to damages and injuries caused by natural conditions to property and persons outside the land. The original HB 951, proposed to amend Chapter 663 HRS by adding a new part which provides that landowners of unimproved land shall not be liable for any damage, injury, or harm to persons or properties outside the boundaries of their land, caused by any naturally occurring land failure originating on the unimproved land. Unimproved land is defined as “any land upon which there is no improvement, construction of any structure, building, facility, or alteration of the land by grading, dredging, or mining that would cause a permanent change in the land area on which it occurs and that would change the basic natural conditions that exist of the land.”

The original bill would also allow the landowners the limited reasonable use of their natural lands, without losing this protection. The bill defines “natural condition of land,” as including the following: minor improvements such as the installation of maintenance or utility poles and signage; or minor alterations undertaken for the preservation or prudent management of the unimproved land, such as the installation or maintenance of fences, trails or pathways; or maintenance activities, such as forest plantings and weed, brush, rock, boulder or tree removal; or the removal or securing of rocks or boulders undertaken to reduce the risk to downslope properties.

The HD1 version created an exception – for harm arising from “negligent” acts or omissions. This revision is inconsistent with the common law, it would raise major questions regarding the protections in the bill for limited reasonable use of natural lands, and would create uncertainty.

LURF’s Position. LURF **supports the original version of HB 951**, which was intended to provide a level of protection to landowners from “acts of god” events; and **opposes the HD1 revisions.** The original version would provide some legal certainty with respect to the legal duties and obligations of landowners arising from the inherent risks of land failures caused by natural conditions on unimproved lands, where the landowner has not created or increased the risk of harm by artificial improvements or alterations to the land. The HD1 version, which added the legal term “negligence,” would lead to further ambiguity, confusion and uncertainty.

Based on the above, we respectfully request your **favorable consideration of the proposed SD1** to HB 951, HD1.

Thank you for the opportunity to express our **comments regarding HB 951, HD1.**

LATE TESTIMONY

Report Title:

Landowner Liability; Unimproved Land

Description:

Relieves landowner of liability for any damage, injury, or harm to persons or property outside the boundaries of the landowner's land caused by naturally occurring land failure originating on unimproved land, except for harm arising from willful or wanton acts by the owner of the unimproved land. (HB951 HD1)

A BILL FOR AN ACT

LATE TESTIMONY

RELATING TO LANDOWNER LIABILITY.

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

SECTION 1. The legislature finds that it is in the best interest of the public to provide certainty in the law with respect to the legal duties and obligations of landowners arising from the inherent risks of land failures caused by natural conditions to persons and property outside the boundaries of their land when these risks have not been created or increased by artificial improvements or alterations to the land.

The purpose of this Act is to codify the common law that currently exists in Hawaii with respect to the legal duties and obligations pertaining to damages and injuries caused by natural conditions to property and persons outside the land.

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

"PART . UNIMPROVED LAND; LIABILITY

§663- Definitions. As used in this part:

"Naturally occurring land failure" means any movement of land, including a landslide, debris flow, mudslide, creep, subsidence, rock fall, and any other gradual or rapid movement of land, that is not caused by human alterations to or improvements constructed upon the land.

"Unimproved land" means any land upon which there is no improvement, construction of any structure, building,

facility, or alteration of the land by grading, dredging, or mining that would cause a permanent change in the land area on which it occurs and that would change the basic natural condition that exists on the land. Land remains unimproved land notwithstanding the following:

(1) Minor improvements, including the installation or maintenance of utility poles and signage;

(2) Minor alterations undertaken for the preservation or prudent management of the unimproved land, including the installation or maintenance of fences, trails, or pathways;

(3) Maintenance activities, including forest plantings and weed, brush, rock, boulder, or tree removal; or

(4) The removal or securing of rocks or boulders undertaken to reduce risk to downslope properties.

§663- Land failure on unimproved land caused by natural condition; liability. A landowner shall not be liable for any damage, injury, or harm to persons or property outside the boundaries of the landowner's land caused by any naturally occurring land failure originating on unimproved land; provided that a landowner shall remain liable for damages proximately caused by willful or wanton acts or omissions committed in the course of any activities on the unimproved land."

SECTION 3. This Act does not affect rights and duties that matured, penalties that were incurred, and proceedings that were begun, before its effective date.

SECTION 4. If any provision of this Act, or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the Act that can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

SECTION 5. This Act shall take effect on January 1, 2046.



LATE TESTIMONY

KAMEHAMEHA SCHOOLS

WRITTEN TESTIMONY TO THE COMMITTEE ON WATER, LAND, AGRICULTURE,
AND HAWAIIAN AFFAIRS

By

Kelly LaPorte, Outside Counsel for the Kamehameha Schools

Hearing Date: Wednesday, March 25, 2009
2:45 p.m., Senate Conference Room 229

Wednesday, March 25, 2009

TO: Senator Clayton Hee, Chair
Senator Jill N. Tokuda, Vice Chair
Members of the Committee on Water, Land, Agriculture and Hawaiian Affairs

SUBJECT: Comments on H.B. No. 951 HD 1- Relating to Landowner Liability for Natural Conditions.

My name is Kelly LaPorte, and I am outside counsel for the Kamehameha Schools. I am providing this testimony in support of the intention of H.B. No. 951 relating to landowner liability for natural conditions. We do not support the HD 1 because of the amended language. The original draft of this Bill codified common law that protects State, County and private landowners who have not altered the natural condition of their land.

However, the current version of the Bill seeks to alter the common law and provide a deterrent to hillside and ridgeland landowners. If passed in its current version, landowners who, to date, have kept their land in a natural condition will possess a disincentive to keep the land in its unaltered state because of potential liabilities. Instead, these landowners possess an incentive to either develop the land or sell it to third parties for development. To the extent that the State, Counties, and Public Land Trusts acquire unaltered land for preservation and conservation purposes, this Bill will not protect them. This could mean landowners will protect themselves by denying access and use of the land for fear of legal liability. Passage of this Bill will not promote sustainable communities but instead encourage sale or development of natural lands. This does not protect consumers by fostering proper planning and consideration of appropriate safeguards by developers and builders but instead shifts that responsibility.

The original draft of this Bill provided clarity with respect to liability from naturally occurring dangers, insulating up-slope landowners who have not altered the natural environment on their property, and is consistent with both common law and the Restatement of the Law of Torts. In two recent court cases involving a rockfall, *Onishi v. Vaughan*, and a massive mud and boulder slide, *Makaha Valley Towers v. Board of Water Supply*, after substantial litigation, the First Circuit Court in both instances acknowledged the applicability of this law when no artificial improvements have been constructed to create any additional risk. We have attached copies of the Hawai'i Revised Statute section that adopts common law, the treatises that restate this law, and the order in the *Onishi* case.

Wednesday, March 25, 2009

Senator Clayton Hee, Chair

Senator Jill N. Tokuda, Vice Chair

Members of the Committee on Water, Land, Agriculture and Hawaiian Affairs

We urge this committee to amend this version back to its original draft that codifies common law. As originally drafted the Bill provides certainty in Hawai'i law for natural conditions that exist on unaltered lands. Further, by expressly allowing minor improvements on land, it allows a reasonable use of natural land without triggering additional responsibilities. Expressly allowing minor improvements such as utility poles provides benefits to the community at large or, in the case of protective fences or warning signage, enhances safety. Importantly, the provision in the original Bill that allows other, specified minor alterations of land, such as the *removal* of potentially dangerous natural conditions such as boulders or rocks, allows voluntary acts undertaken by either the landowner or owners of neighboring property without increasing the risk of liability.

As originally drafted the bill was essentially a Good Samaritan provision that will encourage cooperation in voluntarily undertaking such measures intended to enhance safety. In the absence of this provision, a landowner may be reluctant to remove or alter any natural condition or allow others to come onto the land to do the same for fear of losing protection afforded by the common law.

While the current Bill expressly allowed minor alterations of the land, such as allowing recreational visitors like day hikers on a hiking path, this similarly promotes the reasonable use and enjoyment of natural land, this is largely negated by holding landowners for minor alterations that are done negligently. While the Hawai'i legislature has already deemed this an important public policy in its enactment of Chapter 520, which purpose is to "encourage owners of land to make land . . . available to the public for recreational purposes by limiting their liability towards person entering thereon for such purposes." This public policy would be overridden making landowners such minor alterations are done negligently. With this, landowners will be discouraged from working with adjacent homeowners on rockfall protection for fear of liability.

In sum, landowners – both private and government – should be insulated from liability from any damage as a result of the natural condition of the land as recognized by common law, and should be encouraged to allow limited, reasonable use of their natural lands and to voluntarily reduce risk of rockfalls without losing this protection. However, the current Bill negates such protection and ultimately defeats its stated intent and goes beyond current common law.

Kamehameha Schools thanks you for the opportunity to share our views. We respectfully request that you do not pass this Bill, as currently written but instead that this Bill be amended back to its original version by deleting "provided that a landowner shall remain liable for damages proximately caused by negligence or wanton acts or omissions committed in the course of any activities on the unimproved lands" in Section 2 of this Bill.

§ 1-1. Common law of the State; exceptions.

The common law of England, as ascertained by English and American decisions, is declared to be the common law of the State of Hawaii in all cases, except as otherwise expressly provided by the Constitution or laws of the United States, or by the laws of the State, or fixed by Hawaiian judicial precedent, or established by Hawaiian usage; provided that no person shall be subject to criminal proceedings except as provided by the written laws of the United States or of the State. [L 1892, c 57, § 5; am L 1903, c 32, § 2; RL 1925, § 1; RL 1935, § 1; RL 1945, § 1; RL 1955, § 1-1; HRS § 1-1]

LATE TESTIMONY

PROSSER AND KEETON
ON
THE LAW OF TORTS

Fifth Edition

W. Page Keeton

General Editor

W. Page Keeton

*Holder of W. Page Keeton Chair in Tort Law
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1984

be the misrepresentation as to the character of the property.³⁷

Natural Conditions

The one important limitation upon the responsibility of the possessor of land to those outside of his premises has been the traditional rule, of both the English and the American courts, that he is under no affirmative duty to remedy conditions of purely natural origin upon his land, although they may be highly dangerous or inconvenient to his neighbors.³⁸ The origin of this, in both countries, lay in an early day when much land, in fact most, was unsettled or uncultivated, and the burden of inspecting it and putting it in safe condition would have been not only unduly onerous, but out of all proportion to any harm likely to result. Thus it has been held that the landowner is not lia-

ble for the existence of a foul swamp,³⁹ for falling rocks,⁴⁰ for uncut weeds obstructing the view of motorists at an intersection,⁴¹ for thistles growing on his land,⁴² for harm done by indigenous animals,⁴³ or for the normal, natural flow of surface water.⁴⁴ Closely allied to this is the generally accepted holding that an abutting owner is under no duty to remove ice and snow which has fallen upon his own land or upon the highway.⁴⁵

On the other hand, if the occupier has himself altered the condition of the premises, as by erecting a structure which discharges water upon the sidewalk,⁴⁶ setting up a parking lot upon which water will collect,⁴⁷ weakening rocks by the construction of a highway,⁴⁸ damming a stream so that it forms a material pond,⁴⁹ planting a row of trees next to the highway,⁵⁰ digging out part of a hill,⁵¹ or piling sand or plowing a field so that the

37. See *infra*, § 81.

38. Second Restatement of Torts, § 363. See Noel, *Nuisances from Land in its Natural Condition*, 1943, 56 *Harv.L.Rev.* 772; Goodhart, *Liability for Things Naturally on the Land*, 1980, 4 *Camb.L.J.* 13.

39. *Roberts v. Harrison*, 1897, 101 *Ga.* 773, 28 *S.E.* 996.

40. *Pontardawa R. D. C. v. Moore-Gwynn*, [1929] 1 *Ch.* 656. But see *Sprecher v. Adamson Companies*, 1981, 30 *Cal3d* 358, 178 *Cal.Rptr.* 783, 636 *P.2d* 1121 (duty of due care to prevent landslides).

41. See *supra*, note 25.

42. *Giles v. Walker*, 1890, 24 *Q.B.D.* 656 (thistles); cf. *Salmon v. Delaware, L. & W. R. Co.*, 1875, 38 *N.J.L.* 5 (leaves); *Langer v. Gooch*, 1911, 21 *N.D.* 482, 131 *N.W.* 258 (wild mustard).

43. *Brady v. Warren*, [1909] 2 *Ir.Rep.* 632; *Stearn v. Prentice Bros.*, [1919] 1 *K.B.* 394; *Seaboard Air Line Railroad Co. v. Richmond-Petersburg Turnpike Authority*, 1961, 202 *Va.* 1029, 121 *S.E.2d* 499 (pigeons); *Merriman v. McConnell*, 1961, 31 *Ill.App.2d* 241, 175 *N.E.2d* 293 (box elder bugs). Nor, perhaps, for horses kept by a tenant. *Blake v. Duns Farms, Inc.*, 1980, ___ *Ind.* ___, 413 *N.E.2d* 580. Contra, perhaps, for horses kept by an employee. See *Misterek v. Washington Mineral Products, Inc.*, 1975, 85 *Wn.2d* 166, 531 *P.2d* 805. Cf. *Weber v. Madison, Iowa* 1977, 251 *N.W.2d* 823 (geese); *King v. Blue Mountain Forest Association*, 1958, 100 *N.H.* 212, 123 *A.2d* 151 (wild Prussian boar, fourth or fifth generation from original imports).

44. See *Keys v. Romley*, 1966, 64 *Cal.2d* 398, 50 *Cal. Rptr.* 273, 412 *P.2d* 529; *Mohr v. Gault*, 1860, 10 *Wis.* 513; *Livezey v. Schmidt*, 1895, 96 *Ky.* 441, 29 *S.W.* 25.

45. *Rockafellow v. Rockwell City, Iowa* 1974, 217 *N.W.2d* 246; *Bailey v. Blacker*, 1929, 267 *Mass.* 73, 165

N.E. 699; *Moore v. Gadsden*, 1881, 87 *N.Y.* 84. Ordinances requiring the property owner to remove snow and ice usually are construed to impose no duty to any private individual. See *supra*, § 36.

46. See *Leahan v. Cochran*, 1901, 178 *Mass.* 664, 60 *N.E.* 382; *Tremblay v. Harmony Mills*, 1902, 171 *N.Y.* 598, 64 *N.E.* 501; *Updegraff v. City of Ottumwa*, 1929, 210 *Iowa* 382, 228 *N.W.* 928. Note, 1987, 21 *Minn.L. Rev.* 708, 713; cf. *Harris v. Thompson, Ky.* 1973, 497 *S.W.2d* 422 (broken water pipe caused ice on road). But see *North Little Rock Transportation Co. v. Finkbeiner*, 1967, 243 *Ark.* 596, 420 *S.W.2d* 874 (Finky not liable for water in street from sprinkler system).

47. *Moore v. Standard Paint & Glass Co. of Pueblo*, 1960, 145 *Colo.* 151, 368 *P.2d* 33. But see *Williams v. United States, E.D.Pa.* 1981, 507 *F.Supp.* 121 (no liability, under "hills and ridges" doctrine, for slippery sheet of ice with no ridges or elevations in parking lot).

48. *McCarthy v. Ference*, 1948, 358 *Pa.* 485, 58 *A.2d* 49.

49. *Mills v. Hall, N.Y.* 1832, 9 *Wend.* 315; *Towaliga Falls Power Co. v. Sims*, 1909, 8 *Ga.App.* 749, 65 *S.E.* 844. Cf. *Andrews v. Andrews*, 1955, 242 *N.C.* 382, 88 *S.E.2d* 88 (artificial pond collecting wild geese, which destroyed plaintiff's crops).

50. *Coates v. Chinn*, 1958, 51 *Cal.2d* 304, 332 *P.2d* 289 (cultivated trees). Accord, *Wisher v. Fowler*, 1970, 7 *Cal.App.3d* 225, 86 *Cal.Rptr.* 582 (maintaining hedge). Cf. *Crowhurst v. Amersham Burial Board*, 1878, 4 *Exch.Div.* 5, 48 *L.J.Ex.* 109 (planting poisonous trees near boundary line). But there may be no liability for merely failing to cut weeds. See *supra*, note 25.

51. *Fabbri v. Regis Forcier, Inc.*, 1975, 114 *R.I.* 207, 330 *A.2d* 807.

LATE TESTIMONY

RESTATEMENT OF THE LAW
Second

TORTS 2d

Volume 2
§§ 281-503

As Adopted and Promulgated

BY

THE AMERICAN LAW INSTITUTE

AT WASHINGTON, D. C.

May 25, 1963

and

May 22, 1964

ST. PAUL, MINN.

AMERICAN LAW INSTITUTE PUBLISHERS

1965

LATE TESTIMONY

§ 363

TORTS, SECOND

Ch. 13

§ 363. Natural Conditions

(1) Except as stated in Subsection (2), neither a possessor of land, nor a vendor, lessor, or other transferor, is liable for physical harm caused to others outside of the land by a natural condition of the land.

(2) A possessor of land in an urban area is subject to liability to persons using a public highway for physical harm resulting from his failure to exercise reasonable care to prevent an unreasonable risk of harm arising from the condition of trees on the land near the highway.

See Reporter's Notes.

Caveat:

The Institute expresses no opinion as to whether the rule stated in Subsection (2) may not apply to the possessor of land in a rural area.

Comment:

a. The rule stated in Subsection (1) applies although the possessor, vendor, or lessor recognizes or should recognize that the natural condition involves a risk of physical harm to persons outside the land. Except under the circumstances in Subsection (2) of this Section, this is true although there is a strong probability that the natural condition will cause serious harm and the labor or expense necessary to make the condition reasonably safe is slight.

b. *Meaning of "natural condition of land."* "Natural condition of the land" is used to indicate that the condition of land has not been changed by any act of a human being, whether the possessor or any of his predecessors in possession, or a third person dealing with the land either with or without the consent of the then possessor. It is also used to include the natural growth of trees, weeds, and other vegetation upon land not artificially made receptive to them. On the other hand, a structure erected upon land is a non-natural or artificial condition, as are trees or plants planted or preserved, and changes in the surface by excavation or filling, irrespective of whether they are harmful in themselves or become so only because of the subsequent operation of natural forces.

c. *Privilege of public authorities to remove danger.* The fact that a possessor of land is not subject to liability for natural

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LYNNEL KERRIN THOMPSON ESKA & HELOUA
A Last Testament

WITNESSES:
STEPHEN W. KERRIN 1974-82
SANDRA L. KERRIN 1974-82
ANN C. ESKA 1974-82
1111 Buley Street, Suite 100
Honolulu, Hawaii 96813
Tel No. (808) 221-8000
Fax No. (808) 221-4972
E-mail: WML@kerrin.com, WML@hawaii.com
Answered by Plaintiff

FILED
MAY 21 1998
HAWAII
CLERK

IN THE CIRCUIT COURT OF THE FIRST JUDICIAL
STATE OF HAWAII

PATRICK T. DUNN, Plaintiff, and
Personal Representative of the Estate of
Ann C. ESKA, A. ONSHI, PLAINTIFF
VERSUS
AND ROBERT T. ONSHI

Plaintiff

1. VANCE N. VALGONAN, INDIVIDUALLY,
AND AS SUCCESSOR TRUSTEE OF THE
VANCE VALGONAN REVOCABLE TRUST;
HONONO VALGONAN, INDIVIDUALLY,
AND AS SUCCESSOR TRUSTEE OF THE
HONONO VALGONAN REVOCABLE TRUST;
AND AS SUCCESSOR TRUSTEE OF THE
HONONO VALGONAN REVOCABLE
TRUST; KEARLE N. VALGONAN, HAWAII
CASTLE CORPORATION, a California
corporation; CITY AND COUNTY OF
HONOLULU, HONOLULU I. R. 1000
LINES 149, and DON ENTTLER,
1/0.

Defendant

Civil No. 98-1, dated 1/28/98, No. 12
(Order Show Cause Term)
GROUPEMENT EN PART DEFENDANT
VANCE N. VALGONAN, SUCCESSOR
TRUSTEE OF THE VANCE VALGONAN
REVOCABLE TRUST & ERWIN HORTON
NON REVOCABLE JOINT TRUST
OF ALICE M. MAE, AND VANCE N.
VALGONAN AND KEARLE N.
VALGONAN TO INSTANTIVE NUMBER
FILED ON 04/14/98

HEARDO
DATE: August 4, 2003
TIME: 10:00 am
JUDGE: HONORABLE KAREN S. AIN

TRIAL DATE: May 21, 2004

COMING IN PART DEFENDANT
LATE OF THE VANCE VALGONAN
OR FOR INSTANTIVE NUMBER
IN VALGONAN AND KEARLE N.
VALGONAN (FILED ON 04/14/98)

Legal, Successor Trustee of the Vance
Valgonan, Defendant, Vance N

For Summary Judgment, Vance N

Said a Affidavit Sworn in the Court

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Keary, and Ann C. Kerrin, Esq.,

Michael J. McElroy, Esq., Defendant

and S. Irving, Esq., Defendant City and

Honolulu, Esq., Defendants Vance N

is represented by Sheri K. Haski, Esq.,

partner of the Vance Valgonan Attorneys

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and The Court reviewed all submitted

Written testimony

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minutes of what

FILED COURT

**ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT
VANCE N. VAUGHAN, SUCCESSOR TRUSTEE OF THE VANCE VAUGHAN
REVOCABLE TRUST'S CROSS MOTION FOR SUMMARY JUDGMENT
FILED ON JULY 28, 2005, AND VANCE N. VAUGHAN AND KERRY N.
VAUGHAN'S SUBSTANTIVE JOINDER FILED ON JULY 28, 2005**

On July 20, 2005 Defendant Vance N. Vaughan, Successor Trustee of the Vance Vaughan Revocable Trust filed a Cross Motion For Summary Judgment. Vance N. Vaughan, Individually, and Kerry N. Vaughan filed a Substantive Joinder to the Cross Motion for Summary Judgment on July 28, 2005. Said motion came on for hearing before the Honorable Karen S.S. Ahn on August 2, 2005 at 10:00 a.m. At that hearing, Plaintiffs were represented by Wesley W. Ichida, Esq., and Ann C. Kemp, Esq., Defendant Hiroko Vaughan was represented by Michael J. McGuigan, Esq., Defendant Hawaii Cattle Corporation was represented by Brad S. Petrus, Esq., Defendant City and County of Honolulu was represented by Derek Meyoshiro, Esq., Defendants Vance N. Vaughan, Individually, and Kerry Vaughan were represented by Steve K. Hiseka, Esq., and Defendant Vance N. Vaughan, Successor Trustee of the Vance Vaughan Revocable Trust, was represented by Amanda J. Weston, Esq. The Court reviewed all memoranda and affidavits submitted, heard the arguments of counsel and took the motion under advisement. Being fully advised in the matter,

IT IS HEREBY ORDERED that Defendant Vance N. Vaughan's, Successor Trustee of the Vance Vaughan Revocable Trust, Cross Motion For Summary Judgment filed on July 20, 2005, and Substantive Joinder is granted in part and denied in part as follows. The Court holds that under the common law as adopted in the State of Hawaii and as reflected in the Restatement 2d, Torts:

- 1) A real property owner owes no duty with respect to natural conditions on his property;

Under the common law as adopted in the State of Hawaii and as reflected in the Restatement 2d, Torts: 1) A real property owner owes no duty with respect to natural conditions on his property;

LATE TESTIMONY

2) However, a real property owner does owe a duty to exercise reasonable care with respect to non-natural or artificial conditions on his property.

The Court finds that a genuine issue of material fact exists as to the existence or nonexistence of an artificial condition which proximately caused the injuries of which Plaintiffs complain.

DATED: Honolulu, Hawaii, DEC 23 2006.

[Signature]
JUDGE OF THE ABOVE-ENTITLED COURT

APPROVED AS TO FORM:

[Signature]
JOHN H. PROCE, ESQ.
AMANDA J. WESTON, ESQ.
Attorneys for Defendant
VANCE N. VAUGHAN, SUCCESSOR
TRUSTEE OF THE VANCE VAUGHAN
REVOCABLE TRUST

[Signature]
CARRIE S. OKINAGA, ESQ.
DEREK T. MAYESHIRO, ESQ.
Attorneys for Defendant
CITY AND COUNTY OF HONOLULU

[Signature]
BRAD S. PETRUS, ESQ.
Attorney for Defendant
HAWAII CASTLE CORPORATION

2) However, a real property owner owes a duty to exercise reasonable care with respect to non-natural or artificial conditions on his property.

H.B. No. 951

Relating to landowner liability for natural conditions.

Benefits of statute

Provides certainty in the law regarding obligations for natural conditions that exist on unaltered land:

- Expressly allows minor improvements on land such as erecting utility pole and signs without triggering additional obligations.
- Expressly provides exception for specific, minor alterations of land taken for preservation or prudent management of land.
- Avoids unnecessary litigation with respect to passive landowners who do not alter natural state of land.
- Protects consumers by fostering proper planning and consideration of safeguards in risk-creating activities outside the land.

Encourages sustainability of communities:

- Encourages retention of natural land within developed areas.
 - In the absence of statute, owners of natural land possess:
 - disincentive to retain land in natural state because of potential liabilities from naturally occurring land failures; and
 - incentive to either develop natural land or sell natural land to third parties for development.
- Allows modest recreational activities (walking, hiking) on natural land without creating additional obligations of landowner.

Encourages voluntary measures to reduce risks of naturally occurring land failures without triggering additional obligations.

Encourages prudent land management practices such as plantings and weed, brush, and tree removal without triggering liability.

Language	Basis for Provision	Practical Application
<p>§663-B Land failure on unimproved land caused by natural condition; liability.</p> <p>A landowner shall not be liable for any damage, injury, or harm to persons or property outside the boundaries of such land caused by any naturally occurring land failure originating on unimproved land.</p>	<p>This <i>codifies</i> common law, which is adopted in Hawaii under HRS § 1-1, and is consistent with the Restatement (Second) of Torts § 363 as to “natural conditions,” and expressly applies it to landowners.</p>	<p>Under this common law rule, if the landowner does not create any condition that creates a risk of harm to others outside the land caused by a naturally occurring land failure, the landowner has no affirmative duty to remedy conditions on the property of purely natural origin.</p> <p>The First Circuit Court recognized and applied this common law rule in 2005 in the <u>Onishi</u> lawsuit. This rule did not alter the outcome in that case, however, because the court held that the factual issue of whether artificial conditions (i.e., non-natural conditions created by upslope City roadway, drainage culvert, or privately owned driveway that diverted water) caused the rockfall would have to be determined by a jury. Given these substantial alterations of the land in <u>Onishi</u>, the proposed statute would not have provided immunity to landowners because the land was improved (not “unimproved”).</p> <p>This provision does <i>not</i> alter any obligations that a landowner may have to persons <i>on</i> that landowner’s property, such as the State’s duty to warn visitors to the Sacred Falls State Park that the First Circuit Court held was violated following the 1999 rockfall that killed and injured visitors to the public park.</p>

<p>§663-C Natural condition. For purposes of this part, the natural condition of land exists and shall not be considered altered or improved notwithstanding that the following has occurred: (1) Minor improvements, including the installation or maintenance of utility poles and signage;</p>	<p>This provides <i>clarity</i> and <i>certainty</i> in the application of the law by expressly providing that <i>minor improvements</i> placed on unimproved land that are not likely to increase the risk of naturally occurring land failures will not trigger an affirmative duty upon landowners to remedy conditions on the property of purely natural origin.</p>	<p>An owner of unimproved land may erect signage on the land that warns visitors of dangers that may exist <i>on</i> the land, or may provide easements to allow electrical or telephone companies to place utility poles that provide service to the public, without fear that doing so would trigger additional obligations to remediate any conditions unrelated to such improvements. In the absence of allowing for such minor improvements to be placed on natural land, landowners may refuse to install minor improvements that are intended to safeguard against dangers within the land. Further, this may restrict the availability of land needed by utilities to provide service to the public.</p>
<p>(2) Minor alterations undertaken for the preservation or prudent management of the unimproved land, including the installation or maintenance of fences, trails, or pathways; (3) Maintenance activities, including forest plantings and weed, brush, boulder, or tree removal; or</p>	<p>This similarly provides <i>clarity</i> and <i>certainty</i> in the application of the law by expressly providing that <i>minor alterations</i> undertaken on unimproved land for preservation or maintenance purposes will not trigger an affirmative duty upon landowners to remedy conditions on the property of purely natural origin.</p>	<p>An owner may make <i>minor</i> alterations to natural land, such as unpaved trails or paths or installing fences to protect a watershed area, that are used for management of the land, or allow visitors to traverse the land for recreational purposes such as hiking with minimal disturbance to the natural conditions, without losing protection of this law. This promotes the reasonable use of the land that is unlikely to create additional danger of land failures, and allows the visitation of natural land without creating additional liabilities.</p>

LATE TESTIMONY

<p>(4) The removal or securing of rocks or boulders undertaken to reduce risk to downslope properties.</p>		<p>An owner of unimproved land may also volunteer to remove rocks or boulders that may pose a danger to others outside the land without triggering a duty to remedy all <i>other</i> conditions of purely natural origin, or allow downslope residents to do the same without creating additional duties owed to downslope residents. Essentially, this encourages Good Samaritan acts without increasing liability. In the absence of this provision, a landowner may be reluctant to undertake <i>any</i> minor alterations that are intended to reduce risk because of a fear of losing immunity under the common law rule.</p>
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