TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-EIGHTH LEGISLATURE, 2015

ON THE FOLLOWING MEASURE:
H.B. NO. 301, RELATING TO TORT LIABILITY.

BEFORE THE:
HOUSE COMMITTEE ON WATER AND LAND

DATE: Friday, February 6, 2015 **TIME:** 9:00 a.m.

LOCATION: State Capitol, Room 325

TESTIFIER(S): Russell A. Suzuki, Attorney General, or
Caron Inagaki, Deputy Attorney General

Chair Yamane and Members of the Committee:

The Department of the Attorney General supports this bill with amendments.

This bill provides the State with limited immunity from liability for injury or damage to persons or property arising out of hazardous recreational activities. The bill also sets limits on the amount that can be recovered in situations where the State may be liable.

Because of the dangers inherent in the hazardous activities set forth in this bill, injuries and accidents are inevitable and the State will continually be open to lawsuits. Unlimited liability against the State may lead to prohibitions on what type of activities people can engage in, or the State may be forced to permanently close off and prevent access by the public to these recreational areas because there is no way for the State to eliminate all risk of injury. Moreover, members of the public will likely continue to access the area regardless of whether the area is closed off.

This bill limits the State's unfettered liability for injuries and accidents that it cannot control or prevent and relies on those engaging in these activities to exercise personal responsibility and to assume the risk of what they know to be an inherently dangerous activity.

This bill does not absolve the State of any and all liability regardless of actions by the State or its employees. The State could still be liable for injury or damage for its own negligent, reckless, or grossly negligent acts.

However, the department recommends that paragraph (2) of subsection (c) on page 3, lines 10-20, be amended or deleted. Paragraph (2) provides that liability is not limited where "[i]njury or damage [is] suffered in any case where permission to participate in the hazardous

recreational activity was granted for a specific fee." This wording seems to suggest that the State would automatically be held responsible for any injury or damage simply because it grants permission or charges a fee for participation in a recreational activity. The State should not be subject to liability without a showing that the State was negligent or otherwise failed to meet its duty of care.

We request this bill be passed with the recommended amendments.

TESTIMONY OF ROBERT TOYOFUKU ON BEHALF OF THE HAWAII ASSOCIATION FOR JUSTICE (HAJ) IN OPPOSITION TO H.B. No. 301

Date: Friday, February 6, 2015
Time: 9:00 am

To: Chairman Ryan I. Yamane and Members of the House Committee on Water & Land:

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. 301, relating to Tort Liability.

The Hawaii Association for Justice, whose members represent individual citizens, opposes the complex, unnecessary, and mostly incomprehensible amendment to Chapter 662 which is contained in this bill. The liability of the State of Hawaii is already, under existing laws, severely limited under the State Tort Liability Act in a similar manner that has been adopted by both by the federal government (in The Federal Tort Claims Act) and state jurisdictions throughout the country. The State Tort Liability Act currently provides that an individual may only recover against the state upon a showing that the state failed to exercise a reasonable standard of care and that negligence was the cause of specific injuries suffered by the injured person. Under the existing law before there is any recovery, the injured person must show that the state agency or any individual working under the authority of the state agency knew or should have known that the failure to exercise reasonable care would result in a risk or potential injury. Furthermore, the determination of whether any state entity was negligent is left to the sound judgment of a judge not a jury, unless the State itself consents to a jury trial.

The specific standards that have been articulated in decades of Hawaii jurisprudence as well as under the Federal Tort Claims Act and cases under other state tort liability acts provides a substantial jurisprudential basis for the evaluation of conduct for liability for recreational activities. The Department of Land and Natural Resources, in conjunction with recreational interest groups, recently established an administrative procedure for the conduct of hazardous recreational activities that involves the use of private insurance, indemnification from recreational groups desiring use of public property to conduct their activities, and waivers from participants. This procedure appears to adequately protect the State while providing public

access to State lands for hazardous recreational activities. The prudent course at this time is to allow the administrative procedure sufficient experience to assess how well it works and whether any further tweaks are necessary in the future.

This proposal in this bill is entirely unnecessary and may very well cost the state more. For example, the proposed bill attempts to employ caps on damages which by definition are an extremely unfair, generalized approach to damages which may operate to provide artificial improper limitations on the recoveries. In Hawaii, the activities of the state are often covered by insurance purchased by the state. Very serious injuries that are caused by the negligent activity by the state are usually paid by insurance purchased by the state and does not come out of the state general fund. In the event the state, through its welfare agencies or other benefits provided to the disabled persons, paid money out for care in the form of Medicaid or other expenses, the Medicaid funds are often reimbursed back to the state out of the insurance proceeds. If the recoveries were limited on a catastrophic case requiring lifetime medical or custodial care, the state would end up providing those benefits because the judgment for damages to be paid by the insurance carrier would be limited by the proposed caps. The perceived benefit of caps in a state tort liability case is only a benefit to the insurance companies covering the loss and is an enhanced expense to the State.

The caps are simply improper, unfair, and not adjustable for the individual circumstances that are appropriate for the evaluation of an injury to any particular person when that injury has been caused by the negligent action of another party. These caps, at $150,000 for any individual or $600,000 aggregate for an unlimited number of persons have no rational relationship to the nature and extent of injuries that result from negligent (and even grossly negligent) conduct by State agencies and employees. There is no justification given for limiting the value of a life to $150,000 if one person is killed or substantially less if multiple people are injured or killed. The $600,000 aggregate maximum means that if 10 people are killed, the $600,000 maximum will be shared by all 10 resulting in a paltry $60,000 per person.

Finally, it's important that state officials who are responsible for managing our state resources understand and be held accountable for doing their jobs properly and to exercise reasonable care in matters that are obviously within their control and jurisdiction. There is nothing that serves as an incentive for state officials to exercise reasonable care and diligence than the potential for a judicial inquiry under the state tort claims act for their failure to carry out

their essential duty to provide for the public safety and welfare. This is the type of accountability and responsibility that is encouraged by the State Tort Liability Act to ensure the safety of our residents and the visitors who come to Hawaii for recreational activities.

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.

Dear Chair Yamane and Committee Members

I am writing both as a Hawaii resident who enjoys the outdoors and as one the secretary/treasure of the newly formed Hawaii Climbing Coalition (HCC) **in very strong support of HB 301**, which extends comprehensive liability protection to the state for actions taken by individuals engaged in hazardous recreational use on state lands. The bill before you is modeled after the California hazardous recreational use statute, and if passed will provide the state with a far better and more coherent protective scheme than current law.

As you all know, last year, the Hawaii legislature passed Act 82, which made permanent the requirement that the DLNR post signage warning users of possible hazards on official state trails. However, this legislation leaves large gaps in state protection from hazardous recreational use because of the lack of state protection for injuries caused by non-natural hazards as well as unclear protection for the state for hazardous recreational use on unencumbered state lands. The state needs better protection than this.

As the DLNR noted in testimony for prior bills, social media has opened up previously unknown or little traveled areas to more user groups. As more people seek extreme thrills, often on unofficial trails not maintained by the state, it is likely that serious injury will result. The state should have in place better liability protection than what Act 82 can provide which requires both a time and labor intensive process of signage. In fact, the very presence of a warning sign was instrumental in the state losing one of the biggest liability settlements in its history. In the Brem case, where over $15 million was awarded to the families of the two women who fell off a cliff on Kauai, the presence of the sign posted by DLNR to warn people away from the area was used as one of the reasons the state was liable. Thus, it is unclear how the Act 82 signage will in the end provide significant protection. **As the State's sole protection from liability, Act 82 is insufficient on the grounds that it neither protects the State from lawsuits, nor preserves public land access.** Settlements will continue to be paid, and trails will continue to be closed. A long term solution must be one that clearly defines the State's liability, so that questionable interpretation of Act 82 does not lead to more unjust closures - such as those that essentially outlawed rock climbing for most of the past three years.

HB 301, by contrast, clarifies that the burden of care rests on the individual outdoor enthusiast. Certainly, the state should remain liable if it knowingly creates harmful conditions, but it is vital that individual recreational users take responsibility for their own actions on state lands, just as they must assume responsibility for their own lives while in the water in Hawaii.

Finally, as a newly appointed official of the Hawaii Climbing Coalition, I can say without a doubt the state would save money if such a bill were to be passed. First, it limits the possibility of such huge payouts like that seen in the Brem case. Second, it saves the state the time and energy of negotiating permits with all user groups for their specific uses. Such a process is legally unwieldy and costs enormous numbers of staff hours. As a hiker, a climber, a mountain biker, and much more, I urge that you pass this legislation.

cullen2-Dawn Marie

From: mailinglist@capitol.hawaii.gov
Sent: Wednesday, February 04, 2015 12:23 PM
To: waltestimony
Cc: macooper.1941@gmail.com
Subject: Submitted testimony for HB301 on Feb 6, 2015 09:00AM

Follow Up Flag: Follow up
Flag Status: Flagged

HB301
Submitted on: 2/4/2015
Testimony for WAL on Feb 6, 2015 09:00AM in Conference Room 325

Submitted By	Organization	Testifier Position	Present at Hearing
Max Cooper	Hawaii Rifle Association	Support	No

Comments: Access to private property for hunting purposes and access to land-locked public hunting lands through private property is a priority for Hawaii Rifle Association. Liability issues for hunting access prevents landowners from allowing such. Much fallow agri cultural land is lost to public hunting and degraded by over-populated game species. This bill is needed.

Please note that testimony submitted less than 24 hours prior to the hearing, improperly identified, or directed to the incorrect office, may not be posted online or distributed to the committee prior to the convening of the public hearing.

Do not reply to this email. This inbox is not monitored. For assistance please email webmaster@capitol.hawaii.gov

cullen2-Dawn Marie

From: Emu Singh <facetheemu@gmail.com>
Sent: Tuesday, February 03, 2015 11:39 PM
To: waltestimony
Subject: I support HB 301

Follow Up Flag: Follow up
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Dear Chair Yamane and Committee Members
I am writing in very strong support of HB 301, which extends comprehensive liability protection to the state for actions taken by individuals engaged in hazardous recreational use on state lands. The bill before you is modeled after the California hazardous recreational use statute, and if passed will provide the state with a far better and more coherent protective scheme than current law.
As you all know, last year, the Hawaii legislature barely passed Act 82, which made permanent the requirement that the DLNR post signage warning users of possible hazards on official state trails. However, this legislation leaves large gaps in state protection from hazardous recreational use because of the lack of state protection for injuries caused by non-natural hazards as well as unclear protection for hazardous recreational use on unencumbered state lands. The state needs better protection than this.
As the DLNR has noted in testimony for prior bills, social media has opened up previously unknown or little traveled areas to more user groups. As more people seek extreme thrills, often on unofficial trails not maintained by the state, it is likely that serious injury will result. The state should have in place better liability protection than what Act 82 can provide. In fact, the very presence of a warning sign was instrumental in the state losing one of the biggest liability settlements in its history. In the Brem case, where over $15 million was awarded to the families of the two women who fell off a cliff on Kauai, the presence of the sign posted by DLNR to warn people away from the area was noted as one of the reasons the state was liable. Thus, it is unclear how the Act 82 signage will in the end provide significant protection. As the State's sole protection from liability, Act 82 is insufficient on the grounds that it neither protects the State from lawsuits, nor preserves public land access. Settlements will continue to be paid, and trails will continue to be closed. A long term solution must be one that clearly defines the State's liability, so that questionable interpretation of Act 82 does not lead to more unjust closures - such as those that essentially outlawed rock climbing for most of the past three years.
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Finally, as a newly appointed official of the Hawaii Climbing Coalition, I can say without a doubt the state would save money if such a bill were to be passed. First, it limits the possibility of such huge payouts like that seen in the Brem case. Second, it saves the state the time and energy of negotiating permits with all user groups for their specific uses. Such a process is legally unwieldy and costs enormous numbers of staff hours. As a hiker, a climber, and much more, I urge that you pass this legislation.

Aloha,
--
Emu Singh
Coordinator at Climb Aloha
2241 Noah St.
Honolulu, HI 96816

cullen2-Dawn Marie

From: faisca <stardustsparklin@gmail.com>
Sent: Tuesday, February 03, 2015 11:53 PM
To: waltestimony
Subject: I support HB 301

Follow Up Flag: Follow up
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I will not be testifying in person.

Dear Chair Yamane and Committee Members

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Yours,

Kevin Nesnow
Hawaii Resident 96821

cullen2-Dawn Marie

From: Kenneth Ogata <kogata009@gmail.com>
Sent: Wednesday, February 04, 2015 1:18 PM
To: waltestimony
Subject: I support HB 301

Follow Up Flag: Follow up
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I support HB 301

Kenneth Ogata

cullen2-Dawn Marie

From: Scott Higgins <higgins.scottr@gmail.com>
Sent: Wednesday, February 04, 2015 2:20 PM
To: waltestimony
Subject: Support of HB 301

Follow Up Flag: Follow up
Flag Status: Flagged

Dear Chair Yamane and Committee Members

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Sincerely,

Scott Higgins

cullen2-Dawn Marie

From: Paul Ryan <prar@hawaii.edu>
Sent: Thursday, February 05, 2015 9:05 AM
To: waltestimony
Subject: Support HB 301

Follow Up Flag: Follow up
Flag Status: Flagged

Dear Chair Yamane and Committee Members:

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enormous numbers of staff hou rs. As a hiker, a climber, a mountain biker, and much more, I urge that you pass this legislation.

Sincerely,
Dr. Paul Ryan

LATE

cullen2-Dawn Marie

From: info@stormyseassalmon.com
Sent: Thursday, February 05, 2015 11:13 PM
To: waltestimony
Subject: I support HB 301

Dear Chair Yamane and Committee Members,

I am writing to express my enthusiastic support for HB 301. This legislation provides excellent protection for both the State and us public land users. The current Act 82, while at least allowing us to use certain closed areas now, seems to be flawed in that it doesn't clearly or adequately define the liability of either the State or the people using public lands. Act 82 is not a long term solution. I believe HB 301 is.

I have participated in outdoor activities (rock climbing, mountain biking, kiteboarding, paragliding, etc) all over the United States and the world.
It appears to me that countries/states that not only allow, but encourage the use of their public outdoor spaces for virtually all non-destructive outdoor activities have a better relationship with their citizens, have healthier more active community members, and have economies thriving, in part, on outdoor gear retail sales, outdoor related tourism, and outdoor guiding serves, among others.

Most outdoor folks are skilled and independent and understand and accept any risks they may take. Furthermore, they generally have the skills needed to mitigate those risks. But not all are as skilled as they should be; these folks need a little help. When outdoor communities are supported by their local government, they are allowed to thrive. When they thrive and have access to their outdoor playgrounds, more skilled members are able to encourage and educate less skilled members and thus build the community and make it safer at the same time. Now that us Oahu rock climbing have temporary access to some of our favorite spots after nearly
3 years, we can see this happening already. The Hawaii Climbing Coalition sprung from this ongoing access debate and has done a wonderful job of bringing the climbing community together and educating it while effectively advocating for it's interest to the state.

As far as I understand, under Act 82, the state has liability protection in two ways that are both insufficient and I believe will lead to further issues—warning signs at outdoor sites (the Brem case on Kauai where $15 million was awarded shows us these signs can only be a very small part of the overall solution, and perhaps no part of it at all as the existence of a sign in the Brem case was actually used, in part, to win the case against the State), and voluntary liability wavers at the Hawaii Climbing Coalition website. I have signed the wavers, as have many others, but there will likely be a great many climbers who will climb without signing because they are unaware they exist or do not know where to find them. Climbers take access issues very seriously and with so few climbing area on our small island, any climbers who don't sign will not be doing so out of laziness or spite, but because they simply do not know where the forms are or that they even exist.

The state of California, ostensibly the epicenter of rock climbing in the word, has at least 14,762 rock climbing routes (source:
http://www.rockclimbing.com), and probably many more than that. Their code has provided excellent protection, with few exceptions, for the state and rock climbers for more than a century. With just a handful of rock climbing routes here in the state of Hawaii (97 statewide, California has 99.34% more climbing routes than Hawaii), surely reasonable liability protection for the State and outdoor users is not so unattainable. HB 301 is a great start.

Thank you for your consideration,

Traveler Terpening