



**TESTIMONY OF  
THE DEPARTMENT OF THE ATTORNEY GENERAL  
KA 'OIHANA O KA LOIO KUHINA  
THIRTY-SECOND LEGISLATURE, 2024**

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**ON THE FOLLOWING MEASURE:**

H.B. NO. 2349, RELATING TO ABOLITION OF JOINT AND SEVERAL LIABILITY FOR GOVERNMENT ENTITIES IN HIGHWAY-RELATED CIVIL ACTIONS.

**BEFORE THE:**

HOUSE COMMITTEE ON JUDICIARY AND HAWAIIAN AFFAIRS

**DATE:** Wednesday, February 7, 2024      **TIME:** 2:00 p.m.

**LOCATION:** State Capitol, Room 325 and Videoconference

**TESTIFIER(S):** Anne E. Lopez, Attorney General, or  
Robin M. Kishi, Deputy Attorney General

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Chair Tarnas and Members of the Committee:

The Department of the Attorney General strongly supports this bill.

This bill abolishes the government's joint and several liability in highway maintenance and design claims and limits the government's liability to its proportionate share of fault in those claims, as the Legislature originally intended when it first enacted section 663-10.5, Hawaii Revised Statutes (HRS) in 1994. The amendments to section 663-10.5, HRS, to require the government's joint and several liability only in highway maintenance and design claims were made in 2006. The deletion of the 2006 amendments by this bill will return the tort claims against the State for highway cases back to parity with all other tort claims against the State.

Since 2006 to the present, in tort claims with multiple defendants arising out of an accident on a government roadway, if the person primarily at fault could not pay the person's share of court-ordered damages, then the government has paid the balance of the damages attributed to the person primarily at fault, in addition to damages attributable to the government, even if the court has determined that the government is only nominally at fault. As a result of the disparate impact of the current law on the government in highway tort claims, the State and counties not only expend disproportionately higher amounts of public money to pay damages for which they were not at fault, amounting to judgments in the millions of dollars, but they must also take

into consideration the risk and threat of joint and several liability when they settle catastrophic tort claims.

In cases where highway maintenance and design are at issue, section 663-10.9(4) allows courts to find persons (which includes governmental entities) jointly and severally liable with the primary tortfeasor when there is "reasonable prior notice of a prior occurrence under similar circumstances to the occurrence upon which the tort claim is based."

If a judge finds that a governmental entity is only one percent at fault and the primary tortfeasor is ninety-nine percent at fault, under section 663-10.9(4), the governmental entity must pay one hundred percent of the damages if the primary tortfeasor does not pay. This "one percent rule" makes governmental entities insurers and excess insurers for drivers and other tortfeasors that may be more at fault than the governmental entities.

The following is an example of a case that illustrates how joint and several liability has adversely impacted on judgment. In Taylor-Rice v. State, 91 Hawai'i 60, 979 P.2d 1086 (1999), a vehicle struck and ramped off a guardrail along Kuhio Highway on Kaua'i, then struck a utility pole, resulting in two fatalities. The vehicle was traveling at eighty mph, and the driver's blood alcohol content level was more than twice the legal limit. The judge assigned 65 percent fault to the driver, fifteen percent to the passengers, and twenty percent to the State. The Hawaii Supreme Court held that the State was jointly and severally liable under section 663-10.9(4) because the State had "reasonable prior notice of a prior occurrence under similar circumstances." In reality, only a single accident had occurred in the vicinity several years earlier, and it had not involved the subject guardrail. In addition to paying its own proportionate share, the State was required to pay the balance of the damages left unpaid by the driver.

The 2006 amendments to section 663-10.5 ensure that the risk and threat of joint and several liability will remain a significant factor in the State's decision-making regarding whether and for how much to settle cases. For example, as recent as in the 2023 regular session, Act 39, Session Laws of Hawaii 2023, listed a settlement in James Braddock, et al. v. Misty Mitchell, et al., Civil No. 19-1-0994-06, First Circuit

Court, which resulted in a \$26 million settlement with plaintiffs, \$17 million of which was paid by the Department of Transportation and \$9 million of which was paid by the Department of Transportation's excess insurers, and a \$500,000 settlement in Satya Simmons v. State of Hawaii, et al., Civil No. 2CCV-17-000224, Second Circuit Court. In both cases the risk and threat of joint and several liability was a factor in the decision to settle those cases. Public money should not be used to insure other tortfeasors. We therefore respectfully request passage of this bill.

**TESTIMONY OF EVAN OUE ON BEHALF OF THE HAWAII  
ASSOCIATION FOR JUSTICE (HAJ) IN OPPOSITION OF  
HB 2349**

Date: Wednesday February 7, 2024

Time: 2:00 p.m.

My name is Evan Oue and thank you for allowing me to submit testimony on behalf of the Hawaii Association for Justice (HAJ) in **STRONG OPPOSITION** to HB 2349 - RELATING TO ABOLITION OF JOINT AND SEVERAL LIABILITY FOR GOVERNMENT ENTITIES IN HIGHWAY-RELATED CIVIL ACTIONS.

Under the current law, government is only subject to joint and several liability for highway design and maintenance if it is 25% to 99% responsible or if it had reasonable notice of a hazardous condition because there was a similar accident. The government has no joint and several liability where it is less than 25% at fault and did not know of a hazardous condition based on an earlier similar accident.

HB 2349 seeks to reduce government's responsibility to safely design and maintain our highways. This is bad public policy because providing safe highways is a core government function that the government has exclusive control over, and which touches most of our families on a daily basis. The public welfare depends on government to employ reasonable diligence in the design and maintenance of public highways and is at the complete mercy of the government which retains sole control over the design and maintenance of our highways.

Citizens are unable to protect themselves against defective highway designs and inadequate maintenance in what likely presents the greatest danger routinely encountered on a daily basis by our citizens. It is for this reason that this legislature originally retained joint and several liability for highway design and maintenance when it first abolished governmental joint

and several liability in other situations; and why the legislature has continued to reject attempts to reduce government's responsibility to safely design and maintain our highways to the present.

The Legislature recognized its unique responsibility as in 2006, in which HB 237 affirmatively solidified the Legislature's intent to conform the application of HRS 663-10.5 with the Hawaii Supreme Court's ruling in *Kienker v. Bauer* which expressed that the abolition of joint and several liability did not apply to highway design and maintenance. This decision was based on the legislative intent to retain governmental joint and several liability for highway claims expressed in the legislative history of Act 213, Session Laws of 1994. Specifically, the Legislature solidified this intent in Conference Committee Report No. 86-06 states:

[Y]our Committee on Conference acknowledges **government's unique role in highway maintenance and design** and the **strong public policy of providing safe roads for Hawaii's families**, as expressed in the past legislative history on this subject . . . . this bill abolishes governmental joint and several liability, **except for all damages in highway cases where government has prior notice or negligence of 25% or more, consistent with the Kienker decision.**

Moreover, in 2012, the Legislature again rejected the State's request in SB 2075 to avoid responsibility and retained joint and several liability for highway design and maintenance where governmental negligence was 25% or more and where government had reasonable prior notice of a hazardous condition.

This long standing strong public policy to provide safe roads for our families based on government's unique role in designing and maintaining our highways is no less valid today than it has been in the past. Indeed, this policy is stronger today as we continue to have more cars and more drivers on our roads.

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