

SB2098

Measure Title: RELATING TO HEALTH.

Report Title: Professional Medical Discretion; State Employees

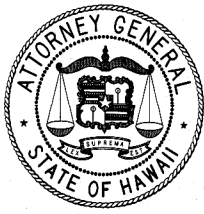
Description: Clarifies that medical health professionals who are employed by the State receive a qualified immunity from personal liability when exercising their governmental discretion as employees of the State when acting in the course and scope of their state employment.

Companion:

Package: None

Current Referral: CPH/JDL, WAM

Introducer(s): NISHIHARA, TOKUDA, Baker, Kahele, Kidani, Wakai



**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-EIGHTH LEGISLATURE, 2016**

ON THE FOLLOWING MEASURE:
S.B. NO. 2098, RELATING TO HEALTH.

BEFORE THE:

SENATE COMMITTEES ON COMMERCE, CONSUMER PROTECTION, AND HEALTH
AND ON JUDICIARY AND LABOR

DATE: Friday, February 12, 2016 **TIME:** 9:00 a.m.

LOCATION: State Capitol, Room 229

TESTIFIER(S): Douglas S. Chin, Attorney General, or
Caron Inagaki, Deputy Attorney General

Chairs Baker and Keith-Agaran and Members of the Committees:

The Department of the Attorney General supports this bill.

The purpose of this bill is to clarify that physicians and other medical health professionals employed by the State enjoy a qualified privilege or immunity against personal liability when they are exercising their professional medical discretion in their state employment.

State employees are generally afforded a qualified privilege for torts as a result of actions taken while in the course and scope of their State employment, affording them protection from individual liability. In the recent case of Slingluff v. State of Hawai'i, et al., 131 Hawai'i 239, 317 P.3d 683 (App. 2013), however, the Intermediate Court of Appeals held that prison physicians are not entitled to a qualified privilege or immunity for the exercise of their professional medical judgment. The Court reasoned that these employees exercise judgment for which they are specially licensed, therefore making their judgment separate and distinct from governmental judgment.

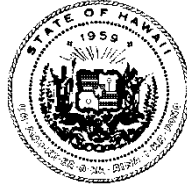
Through the years up until Slingluff, Hawaii's appellate courts have applied a qualified privilege or immunity to many types of government employees. In none of those cases did the courts deny the qualified privilege or immunity based on the distinction between professional judgment and governmental judgment. The Court's approach in Slingluff effectively nullifies the qualified judgment or immunity for the very government officials to whom Hawaii's appellate courts have long granted that privilege or immunity.

A physician or other medical health professional employed by the State to perform tasks for which he or she is employed is exercising judgment for which the State hired the employee, and is therefore exercising governmental judgment and discretion. This is the position taken by a majority of jurisdictions nationwide and we seek to adopt this position legislatively.

To address the ramifications of Slingsluff and in an effort to attract and retain its doctors, including those who work in the prisons, the State has taken steps to obtain professional liability insurance covering claims of individual liability for its physicians. This comes at a cost. This cost is expected to rise over time as claims are made against such policies. The need for such insurance becomes unnecessary with the passage of this bill.

The potential for personal liability prevents good, well-qualified physicians and other medical health professionals from applying for jobs with the government. Even though the State may now carry insurance for its physicians, doing so comes at an unnecessary cost.

We respectfully ask the Committees to pass this bill.



STATE OF HAWAII
DEPARTMENT OF HUMAN SERVICES

P. O. Box 339
Honolulu, Hawaii 96809-0339

February 12, 2016

TO: The Honorable Rosalyn H. Baker, Chair
Senate Committee on Commerce, Consumer Protection, and Health

The Honorable Gilbert S.C. Keith-Agaran, Chair
Senate Committee on Judiciary and Labor

FROM: Rachael Wong, DrPH, Director

SUBJECT: **SB 2098 - RELATING TO HEALTH**

Hearing: Friday, February 12, 2016; 9:00 a.m.
Conference Room 229, State Capitol

DEPARTMENT'S POSITION: The Department of Human Services (DHS) appreciates the opportunity to testify on this bill and provides comments.

PURPOSE: The purpose of this bill is to clarify that medical health professionals who are employed by the State receive a qualified immunity from personal liability when exercising their governmental discretion as employees of the State when acting in the course and scope of their state employment.

The Department supports the concept of immunity for health professionals acting within the course of government employment and scope of license. The measure will immediately and directly enhance the Department's ability to recruit and retain highly qualified clinicians, and narrow the competitive gap with the private sector. Without such immunity, Department professionals acting in good faith and in the best interest of the individuals and families may be at personal financial and professional risk, which is an unfair burden and detrimental to Department's ability to recruit and retain highly qualified clinicians.

Thank you for the opportunity to testify on this measure.

From: mailinglist@capitol.hawaii.gov
To: [CPH Testimony](#)
Cc: clee4@honolulu.gov
Subject: Submitted testimony for SB2098 on Feb 12, 2016 09:00AM
Date: Wednesday, February 10, 2016 4:51:10 PM

SB2098

Submitted on: 2/10/2016

Testimony for CPH/JDL on Feb 12, 2016 09:00AM in Conference Room 016

| Submitted By | Organization | Testifier Position | Present at Hearing |
|---------------------|---------------------------|---------------------------|---------------------------|
| Charlene Lee | City & County of Honolulu | Support | Yes |

Comments: Jennifer Woo will testify on behalf of the City. Thank you.

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

**TESTIMONY OF ROBERT TOYOFUKU ON BEHALF OF THE HAWAII
ASSOCIATION FOR JUSTICE (HAJ) IN OPPOSITION TO S.B. NO. 2098**

Date: Friday, February 12, 2016

Time: 9:00 am

To: Chairs Rosalyn Baker and Gilbert Keith-Agaran and the Members of the Senate Committees on Commerce, Consumer Protection and Health, and Judiciary and Labor:

My name is Bob Toyofuku and I am presenting this testimony on behalf of the Hawaii Association for Justice (HAJ) in OPPOSITION to S.B. No. 2098, relating to Health which grants immunity for all malpractice by government doctors.

This measure is similar to S.B. 2815 heard by the Committee on Commerce, Consumer Protection and Health on February 3, 2016. The Department of the Attorney General and HAJ have met and are working together to draft language for the committee's consideration that addresses the liability concerns of state employed doctors while preserving adequate protection for their patients.

This measure is a reaction to the Hawaii Supreme Court decision in the Slingsluff case where State employed doctors committed malpractice. The State argued that the doctors were government employees exercising government discretion while they committed malpractice and were therefore entitled to complete immunity. The court disagreed because immunity for governmental discretion applies to functions involving the act of "governing," such as policy-making and planning. Medical treatment by government employed doctors does not involve the exercise of any governmental discretion. Doctors don't make or implement governmental policies or functions. They treat people and their treatment is supposed to be exactly the same as they give the general public; and subject to the same professional standards.

The Slingluff case involved doctors on contract with the department of public safety. Section 662-16 mandates a specific procedure for malpractice claims against DPS doctors:

“The attorney general may also defend any civil action or proceeding brought in any court against any provider of medical, dental, or psychological services pursuant to contract with the department of public safety when the provider is sued for acts or omissions with the contract’s scope of work.”

The legislature already anticipated that there may be malpractice claims against these doctors employed by the state and mandated the procedure for those claims. The legislature would not have made this procedure if it intended that the doctors have immunity for their malpractice. The procedure is to sue the provider who is then defended by the attorney general. This is exactly what was done in the Slingluff case. The doctors did not pay anything. The court award was submitted to the legislature which funded the award as a routine claim against the state. This is the way claims against the state for the acts of state employees are supposed to be handled.

This same principle applies to all other government workers, as well. Immunity does not apply because you work for the government. It applies only when and because you exercise governmental functions. For example, legislators have immunity to decide whether or not to fund a new highway because that is a public policy-making decision; but DOT doesn’t have discretion whether to build the highway to code standards because that is implementation of the policy. A department head exercises governmental discretion in deciding whether a department should provide government cars to employees or they should use their own cars and get reimbursed; but employees have no immunity if they disregard stop signs because they do not

exercise governmental discretion when driving. Similarly, the director of the Department of Public Safety exercises governmental discretion in deciding whether to use private doctors on a contract basis or hire doctors as full time staff; but doctors do not exercise governmental policy-making discretion when deciding whether a prisoner who is having a heart attack should be admitted for treatment or improperly sent back without treatment. They exercise medical judgment that is subject to medical standards of care not governmental policy-making discretion.

Employers are responsible for liability incurred by its employees in the course of their employment. State employed doctors must remain “technically” liable for their malpractice because the state is only liable if its employee is liable. If state employed doctors are given immunity then both the employee doctor and the state will not be liable and its doctors can malpractice at will and patients will have no recourse. It is bad public policy to encourage malpractice by giving immunity and denying protection to citizens harmed by government doctors in the routine practice of medicine. This is why the great majority of states (as discussed in the *Slingluff* decisions) do not give government doctors immunity for negligent medical treatment. Hawaii is currently doing exactly what most other states do in this regard because it reflects good public policy.

The Federal Tort Claims Act is worded and operates to bypass the initial step of suing the employee and instead provides that claims should be brought directly against the federal government. Both the State and HAJ are agreeable to a similar procedure and are working on language to implement that procedure while staying within the title of the vehicle bill.

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.

