Tort and Insurance "Reform" in a Common Law Court

by Richard S. Miller* and Geoffrey K. S. Komeya**

TABLE OF CONTENTS

* Professor of Law, Wm. S. Richardson School of Law; B.S., Boston University, 1951; J.D., Boston University, 1956; LL.M., Yale, 1959.
** Class of 1993, Wm. S. Richardson School of Law.

I. INTRODUCTION

The genius of the common law has been its ability to respond to and to reflect both the temper and the needs of the times. As Justice Cardozo pointed out,[1] the customs and mores of the times and the objective of serving society's needs are often as important as logic and history in deciding cases which "count for the future."[2] Indeed, Cardozo's own decision in the landmark case of *McPherson v. Buick Motor Co.*[3] and the line of cases which preceded it have long been held out as the paradigm of how the common law moves to keep in step with the changes in community perspectives and needs.[4] It is not particularly surprising, therefore, that the Hawaii Supreme Court also recognizes that "[t]he adaptability of the common law to the changing needs of passing time has been one of its most beneficent characteristics."[5]

The changes experienced in the United States following World War II—the rapid and vast growth of science, industry, technology, and merchandising and the relative weakening of the ability of the individual consumer to cope with the rapid increase of risks to health, body, and pocketbook—brought with them a corresponding sympathetic response from the common law courts. Led by the great chief justice of the California Supreme Court, Roger Traynor,[6] and buttressed by the

---

[1] B. N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921).

[2] Finally there remains a percentage [of cases] . . . where a decision one way or the other, will count for the future, will advance or retard, sometimes much, sometimes little, the development of the law. These are the cases where the creative element in the judicial process finds its opportunity and power. . . . In a sense it is true of many of them that they might be decided either way. By that I mean that reasons plausible and fairly persuasive might be found for one conclusion as for another. Here comes into play that balancing of judgment, that testing and sorting of considerations of analogy and logic and utility and fairness, which I have been trying to describe. Here it is that the judge assumes the function of a lawgiver.

Id. at 165-66.

[3] 111 N.E. 1050 (N.Y. 1916). *McPherson* eliminated the requirement of privity of contract in negligence actions between consumers and manufacturers. It has led to the elimination of the privity requirement in virtually all product liability actions.

[4] E. LEVI, INTRODUCTION TO LEGAL REASONING (1961).

[5] Johnston v. KFC Nat'l Mgt. Co., 71 Haw. 229, 233, 788 P.2d 159, 162 (1990) (quoting with approval Ely v. Murphy, 540 A.2d 54, 57 (Conn. 1988) (quoting Herald Publishing Co. v. Bill, 111 A.2d 4, 8 (Conn. 1955))).

[6] *See* Escola v. Coca Cola Bottling Co., 150 P.2d 456, 440 (Cal. 1944) (Traynor, J. concurring).

reasoning and support of leading tort scholars, such as Leon Green and William Prosser, as well as the general influence of distinguished proponents of a policy-oriented approach, such as Yale's Myers McDougal and Harold Lasswell, the common law courts with no help from the legislative branches created a virtual revolution in tort law. The special features of this revolution included these:

(1) A general belief that individuals were virtually powerless to protect themselves from risks created by the dangerous modern environment;

(2) A general belief that industrial firms and manufacturers were in the best position to reduce the risks they created—they were the "cheapest cost avoiders"[7]—and could be made to reduce these risks if they were held responsible for the costs of injuries their activities produced;

(3) A general belief that industry and other accident causers, rather than accident victims, could absorb and shift the costs of accidents more efficiently, without serious adverse effects, by purchasing liability insurance;

(4) A widespread agreement that, at least in the area of injuries caused by manufactured products, fault need not be a requirement of liability; and

(5) A sense, not always clearly articulated, that compensation of injury victims should be a central purpose, rather than a by-product, of the tort system.

Starting mainly in the 1960s, these views led to a series of common law decisions which, among other things, (1) imposed strict, non-fault liability on manufacturers for injuries produced by their defectively manufactured or designed products; (2) tended to reject no-duty or other limiting rules in negligence cases and thereby to expand general negligence theory to apply to many areas where courts had heretofore been unwilling to extend liability; (3) eased proof requirements for injured victims; (4) reduced the impact of the victim's own failure to use ordinary care or evident willingness to accept the risk which caused injury; and (5) tended to expand the availability of insurance proceeds to cover accident losses by penalizing insurers who wrongly refused to settle claims. The California cases which led these trends are familiar to all tort lawyers: *Greenman v. Yuba Power Products, Inc.*[8] (announcing

---

[7] G. Calabresi, The Costs of Accidents (1970).

[8] 377 P.2d 897 (Cal. 1962). An equally influential and well-known forerunner to *Greenman* was Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69 (N.J. 1960).

strict product liability) and *Barker v. Lull Engineering Co.*[9] (adopting strict liability for design defects); *Dillon v. Legg*[10] (extending liability for negligent infliction of emotional distress to persons not within the zone of physical danger) and *Rowland v. Christian*[11] (eliminating no-duty rules applicable to liability for negligence of possessors of land to licensees and trespassers); *Ybarra v. Spangard*[12] (allowing unconscious hospital patient to recover unless hospital personnel prove that they did not cause patient's injury) and *Sindell v. Abbott Laboratories*[13] (allowing "market share" liability where victim cannot prove which of several companies producing the same drug produced the particular drug which caused her injury); *Li v. Yellow Cab Co.*[14] (adopting pure comparative negligence); *Crisci v. Security Insurance Co.*[15] (holding liability insurer liable for tort damages to policyholder for negligent failure to settle within policy limits); and *Royal Globe Insurance Co. v. Superior Court*[16] (holding liability insurer liable for tort damages to accident victim for bad faith refusal to settle).

During a period which followed most of these developments in California by about four or five years, much of which coincided with the tenure of William S. Richardson as Chief Justice of the Hawaii Supreme Court,[17] a somewhat similar revolution took place in the Hawaii Supreme Court. While the Hawai'i cases may have been triggered by cases such as those just described, both from California and other states undergoing changes with similar effects, the Hawaii Supreme Court did not slavishly follow the California courts. Here are the principal decisions which epitomized the tort revolution in Hawai'i:

In *Stewart v. Budget Rent-A-Car Corp.*,[18] the Hawaii Supreme Court adopted the doctrine of strict products liability in tort. Further, in addition to a very liberal use of circumstantial evidence, the court in *Stewart* went a long way toward reducing the plaintiff's burden of proof

---

[9] 573 P.2d 443 (Cal. 1978).

[10] 441 P.2d 912 (Cal. 1968).

[11] 443 P.2d 561 (Cal. 1968).

[12] 154 P.2d 687 (Cal. 1944).

[13] 607 P.2d 924 (Cal. 1980), *cert. denied*, 449 U.S. 912 (1980).

[14] 532 P.2d 1226 (Cal. 1975).

[15] 426 P.2d 173 (Cal. 1967).

[16] 592 P.2d 329 (Cal. 1979) *rev'd*, Moradi-Shalal v. Fireman's Fund Ins. Co., 758 P.2d 58 (Cal. 1988).

[17] William S. Richardson was appointed and qualified as Chief Justice of the Hawaii Supreme Court March 25, 1966. He served as Chief Justice until his retirement on December 30, 1982.

[18] 52 Haw. 71, 470 P.2d 240 (1970) (Levinson, J.).

in cases where the product is destroyed by suggesting, in a footnote, that "[i]n the most extreme circumstances a court might hold that where no specific defect can be shown, recovery is to be allowed anyway as a carefully driven vehicle does not leave the road in the absence of a defect in the car."[19] This comes close to a doctrine of res ipsa loquitur for strict liability.

In *Rodrigues v. State*[20] the Richardson Court leaped out in front of the entire nation and adopted an independent tort of negligent infliction of emotional distress, applicable even to cases where plaintiff's distress was caused by negligent injury to property and untrammeled by limitations imposed on the cause of action by other state courts. The only significant limitations on the tort are that the foreseeable distress has to be serious and that the plaintiff has to be within a reasonable distance of the accident that caused the distress.[21]

In *Pickard v. City & County of Honolulu*[22] the court, like the California court in *Rowland v. Christian,*[23] extended the negligence principle by refusing to apply traditional liability-limiting rules to the liability of possessors of land and instead held that "an occupier of land has a duty to use reasonable care for the safety of all persons reasonably anticipated to be on the premises, regardless of the legal status of the individual."[24]

In *Kaneko v. Hilo Coast Processing*[25] the court approved "pure" comparative negligence for strict product liability cases even though Hawai'i's comparative negligence statute provides for a form of "modified" comparative negligence.[26]

Although the Richardson Court never had to decide whether to adopt actions, such as those permitted in California in *Crisci*[27] and in *Royal*

---

[19] *Id.* at 76 n.5, 470 P.2d 244 n.5.

[20] 52 Haw. 156, 472 P.2d 509 (1970) (Richardson, C.J.).

[21] Kelley v. Kokua Sales and Supply Inc., 56 Haw. 204, 209, 532 P.2d 673, 676 (1975) (Kobayashi, J.); *see generally* Richard S. Miller, *The Scope of Liability for Negligent Infliction of Emotional Distress: Making "the Punishment Fit the Crime,"* 1 U. HAW. L. REV. 1 (1979).

[22] 51 Haw. 134, 452 P.2d 445 (1969) (Richardson, C.J.).

[23] 443 P.2d 561 (Cal. 1968); *see supra* note 11 and accompanying text.

[24] 51 Haw. at 135, 452 P.2d at 446.

[25] 65 Haw. 447, 654 P.2d 343 (1982) (Ogata, J.). Although there was some question whether *Kaneko* had adopted "pure" comparative fault, that question was finally put to rest by Chief Justice Lum's opinion in Hao v. Owens-Illinois, Inc., 69 Haw. 236, 738 P.2d 416 (1987).

[26] HAW. REV. STAT. § 663-31 (1984).

[27] 426 P.2d 173 (Cal. 1967); *see supra* note 15 and accompanying text.

Globe,[28] which hold insurers liable for wrongful failure to settle within policy limits (perhaps because insurers saw to it that such cases never came before the court), the court, in *Allstate Ins. Co. v. Morgan*,[29] demonstrated a policy favoring expansion of availability of insurance proceeds for accident victims by requiring stacking of uninsured motorists coverage.[30]

One last example of the Richardson Court's joinder with the mainland's progressive trend of extending the negligence principle is the case of *Ono v. Applegate*,[31] in which the court broke with a long tradition and held that a bar could be held liable to an accident victim of a bar patron who was negligently served liquor, in violation of statute, while intoxicated.[32]

It would not have been a surprise to anyone following the recent political history of Hawai'i that the Richardson Court would adopt a most liberal and activist posture in its decisions.[33] Following years of domination by the "Big Five" and conservative business interests, Hawai'i's governmental structure shifted into the hands of the liberal Democrats and their supporters, mostly Hawai'i's working people and those who had come from a plantation background, with the election

---

[28] 592 P.2d 329 (Cal. 1979), *rev'd*, Moradi-Shalal v. Fireman's Fund Ins. Co., 758 P.2d 58 (Cal. 1988); *see supra* note 16 and accompanying text.

[29] 59 Haw. 44, 575 P.2d 477 (1978) (Ogata, J.).

[30] *Id.* at 49, 575 P.2d at 479. In *Morgan*, Insured's father had three vehicles, each covered by uninsured motorist coverage. Insured was injured by an uninsured motorist while a passenger in another vehicle. *Id.* at 46, 575 P.2d at 478. The court held that she was entitled to "stack" the uninsured motorist coverages on each of the other three vehicles to cover her injuries. She also recovered under the uninsured motorist provision of the car in which she was a passenger. *Id.* at 49, 575 P.2d at 478.

[31] 62 Haw. 131, 612 P.2d 533 (1980) (Ogata, J.).

[32] *Id.* at 133, 612 P.2d at 534. The traditional rule was that the patron's driving, and not the service of alcoholic beverages by the tavern, was the proximate cause of the accident. This bit of foolishness was also rejected by the California Supreme Court before the Hawaii Supreme Court decided *Ono*; *see* Vesely v. Sager, 486 P.2d 151 (Cal. 1917); *but see* CAL. BUS. AND PROF. CODE § 25602 (1985).

[33] *See, e.g.*, Yoshizaki v. Hilo Hospital, 50 Haw. 150, 155 n.7, 433 P.2d 220, 223 n.7 (1967) (Levinson, J.):

> Where reform is necessary in the area of tort law, the court should act whereever possible and leave to the legislature the question whether the reform should be modified or rescinded in whole or in part. Judicial action is frequently necessary to overcome legislative inertia.

Id., (citing Robert Keeton, *Judicial Law Reform—A Perspective on the Performance of Appellate Courts*, 45 TEX. L. REV. 1254, 1263 (1966)).

of Governor John Burns in 1962.[34] In the early years of the new Democratic administration, Professor Stephan Riesenfeld, a distinguished law professor at Berkeley, was brought to Hawai'i to help draft the nation's most progressive legislation providing medical care and disability income to Hawai'i's workers.[35] William S. Richardson, who served as Lieutenant Governor under John Burns, was appointed Chief Justice of the Supreme Court. The Supreme Court was thus put in the hands of a Chief Justice who was committed to serve the common people. Tort decisions following the most liberal trends, as well as other decisions which provided important benefits to the ordinary citizen, such as *In re Ashford*,[36] which expanded public access to Hawai'i's beaches, ought not to have been unexpected.

The current Supreme Court, under the leadership of Chief Justice Lum, is a product of the very same political heritage as the Richardson Court. There has been no significant change in the political control of the State. If anything, the Democrats who have descended from the Burns regime are stronger now than they were when William Richardson was appointed to the court. At the legislative and executive level they have demonstrated their progressivism by adopting, for example, the nation's most encompassing health care legislation, providing almost universal health insurance for Hawai'i citizens. Unlike the early Richardson Court, all the members of the current court have been appointed by nomination of a Judicial Selection Commission, by appointment of a governor, and by the consent of a Senate, all of which strongly reflect the recent Democratic tradition.[37] On this basis alone one might have expected the court to continue on in its progressive direction.

But another phenomenon, which started in the mid-1970s, reached new heights during the early 1980s, and which has continued with considerable force through to the present, has been the conservative movement for tort and insurance "reform." Insurance companies, businesses, physicians, governmental entities, non-profit organizations, and now even unions, alone or in various combinations, along with

---

[34] *See generally* LAWRENCE FUCHS, HAWAII PONO 263-353 (1961).

[35] Act 116, 1963 Haw. Sess. Laws (codified at HAW. REV. STAT. ch. 386 (1963)).

[36] 50 Haw. 452, 440 P.2d 76 (1968).

[37] *See generally* HAW. CONST. art. IV; STATE OF HAWAII, RULES OF THE JUDICIAL SELECTION COMMISSION; *see also* James E.T. Koshiba, *Judicial Selection and Retention in the State of Hawaii*, 20 HAW. B. J. 1 (1986).

elected and appointed governmental officials at the highest levels of the federal government,[38] have sought to reduce or limit litigation, to reduce or limit lawyers fees associated with litigation, to cap tort recoveries, to eliminate punitive damages, to constrain products liability, and generally to impose restrictions designed to reduce the number and the levels of success of tort actions. The volume of literature seeking such changes has grown exponentially over recent years, and not just a few respected legal academics have joined in on the attacks upon the tort system and in calls for both major and minor changes.[39]

This is not the place to evaluate the accuracy of the charges that have been placed against the tort and insurance system. Suffice it to say that such independent studies as there are suggest that much of the national outcry has been based upon exaggerated claims of a "litigation explosion" and exaggerated claims of the adverse effects of tort claims.[40] While costs of the tort system have increased and the size of a small percentage of damage awards have increased enormously, and while there may be individual pockets where there are serious problems,[41] and other areas where improvement is possible, the overall system is by no means in crisis.[42]

Nevertheless, unrelenting and often well-orchestrated and well-funded attacks by respected individuals and groups on various facets of the

---

[38] *See, e.g.*, Vice President Dan Quayle, Keynote Speech at the 1991 Annual Meeting of the American Bar Association (August, 1991) (calling for, among other things, requiring proof by clear and convincing evidence for awards of punitive damages; letting trial judges, rather than juries, determine the amount of punitive damages; limiting the amount of punitive damages to the amount of compensatory damages awarded; and adopting the "English rule" whereby the losing party to a lawsuit pays the winning party's attorney's fees); *see also* Daniel Broder, *Quayle Charges Some Lawyers Are "Ripping Off the System,"* WASH. POST, Sept. 7, 1991, at A3. For an earlier example of federal efforts to put controls on the tort system see U.S. ATTORNEY GENERAL'S TORT POLICY WORKING GROUP ON THE CAUSES, EXTENT AND POLICY IMPLICATIONS OF THE CURRENT CRISIS IN INSURANCE AVAILABILITY AND AFFORDABILITY (1986).

[39] *See, e.g., Symposium: Alternative Compensation Schemes and Tort Theory*, 73 CAL. L. REV. 548 (1985); STEPHEN SUGARMAN, DOING AWAY WITH PERSONAL INJURY LAW (1989); George Priest, *The Current Insurance Crisis*, 96 YALE L. J. 1521 (1987).

[40] *See, e.g.*, Marc Galanter, *Beyond the Litigation Panic*, 37 PROC. ACAD. POL. SCI. 18 (1988).

[41] Such as the senior author of this article believes is true of the automobile no-fault situation in Hawai'i.

[42] *Cf.*, 1 PAUL WEILER, AMERICAN LAW INSTITUTE REPORTER'S STUDY, ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY, THE INSTITUTIONAL FRAMEWORK, PERSPECTIVES ON THE TORT CRISIS, 3-52 (1991).

tort and insurance system coupled with vicious attacks on the tort plaintiff's bar must undoubtedly have begun to affect community attitudes and to change community perspectives. This has surely occurred notwithstanding attempts to counterattack by the well-organized plaintiffs' lawyers and by consumer advocates,[43] such as Ralph Nader. Thus, it could have been predicted that decisionmakers in our democratic society would begin eventually to respond positively to what they may have perceived, rightly or wrongly, to be a shift in community attitudes with regard to alleged excesses of the tort and insurance system.[44]

Indeed, the Hawaii Legislature has clearly felt the need to respond, but in keeping with its liberal Democratic roots and traditions, has so far managed very successfully either to adopt changes which may be effective in reducing costs and excluding non-meritorious actions but which do not significantly limit suits, recoveries or damages, or changes which create a mere appearance of reform and which impose only the narrowest of limits on tort recoveries. Thus, for example, the legislature required plaintiffs in medical malpractice actions to present their cases to a purely advisory and non-binding panel, the Medical Claims Conciliation Panel, before bringing suit against medical professionals.[45] More recently, following the Hawaii Supreme Court's lead, the legislature has required all plaintiffs in tort actions in which the claim is $150,000 or less to bring the claim to arbitration[46] before commencing a lawsuit. While it is very difficult to develop a research methodology which will determine, definitively, whether these "alternative modes of dispute resolution" have cut litigation costs or reduced the number of lawsuits, there are indications that both have indeed achieved some success.[47]

---

[43] *See, e.g., The Manufactured Crisis*, CONSUMER REP., Aug. 1986, at 544.

[44] *See* H. JONES, J. KERNOCHAN & A. MURPHY, LEGAL METHOD: CASES AND TEXT MATERIALS 742 (1980):

> If sociological jurisprudence has a message for today and tomorrow, it may be that those who have the power and responsibility for the resolution of competing social interests reach the soundest decisions when they listen—really listen, which is the hardest thing in the world for a law-trained person to do—to the inevitably extreme demands of all the contending social factions and then strive for the way of "tolerable" adjustment and ultimate social reconciliation.

Id.

[45] HAW. REV. STAT. § 671-12 (1984). This approach was later applied also to other claims against other professionals. *See* HAW. REV. STAT. § 672-4 (1985) (architects).

[46] HAW. REV. STAT. § 601-20 (1986).

[47] *See, e.g.*, John Barkai & Gene Kassebaum, *The Impact of Discovery Limitations on Cost, Satisfaction and Pace in Court-Annexed Arbitration*, 11 U. HAW. L. REV. 81 (1989).

Examples of the other kind of reform include prohibiting the inclusion of an ad damnum clause in medical malpractice complaints,[48] largely to avoid adverse media publicity when the suit is filed; prohibiting awards of damages for emotional distress arising out of injuries to property unless the emotional distress results in "physical injury to mental illness;"[49] and abolishing joint and several liability with regard only to noneconomic losses and then evidently only in malpractice actions and motor vehicle accidents as to tortfeasors who are less than twenty-five percent at fault in causing claimant's injury.[50] Perhaps the most interesting example of legislative tort reform is the provision which caps awards of pain and suffering at $375,000.[51] First, this provision probably only applies to professional malpractice cases, since it expressly does not apply to the fairly comprehensive list of tort actions mentioned in the section which purports to abolish joint and several liability.[52] The more interesting feature, however, is a separate section defining noneconomic damages, which lists several types of such damages "which are recoverable in tort actions," and which states that pain and suffering is only one such type.[53] Thus, not only do other forms of noneconomic loss remain recoverable without limitation in malpractice cases but the statute explicitly does what the Hawaii Supreme Court had yet to do: it made controversial hedonic damages—damages for loss of enjoyment of life—recoverable along with mental anguish, disfigurement, loss of consortium, and "all other nonpecuniary losses or claims."[54] To the extent that the right to any of these costly forms of noneconomic loss was questionable under Hawai'i law before the passage of this section, it is assuredly no longer questionable. So much for legislative tort reform.

The question raised in this article, then, is how has the Hawaii Supreme Court during Chief Justice Lum's leadership responded to the concerns about excesses in the tort and insurance system that have

---

[48] HAW. REV. STAT. § 663-1.3 (1986); *see also* Tobosa v. Owens, 69 Haw. 305, 741 P.2d 1280 (1987); Keomaka v. Zakaib, 8 Haw. App. 518, 811 P.2d 478 (1991).

[49] HAW. REV. STAT. § 663-8.9 (1986).

[50] *See* HAW. REV. STAT. § 663-10.9 (1991). A wag might suggest that it is possible that ultimately the cost of litigating the meaning of this complex and confusing section, which purports to eliminate joint and several liability, may far exceed the damages at stake in such cases.

[51] HAW. REV. STAT. § 663-8.7 (1986).

[52] *See supra* note 50 and accompanying text.

[53] HAW. REV. STAT. § 663-8.5 (1986).

[54] *See id; see also* Stephen Fearon, *Hedonic Damages: A Separate Element in Tort Recoveries*, 56 DEF. COUNS. J. 436 (Oct. 1989).

been expressed in the wider community? Has the court continued on the boldly progressive course first set by the Richardson Court, or has it been more responsive to a perceived community policy calling for a reversal of the trend favoring plaintiffs?

The answer—the thesis of this article—is that with regard to those areas of tort law of primary concern to those seeking "tort and insurance reform" in Hawai'i—to the State of Hawaii, to cities and counties, to liability and no-fault insurance companies, and to hotels and liquor establishments—the pro-plaintiff tort revolution has all but come to an end. While pro-recovery doctrines adopted during the Richardson years have not been overturned,[55] rights of victims and insureds have been kept within narrow bounds, and opportunities to expand recovery have generally been rejected. On the other hand, with regard to products liability, an area which ultimately has little impact on most Hawai'i enterprises since relatively few products capable of causing many serious injuries are manufactured in this State, the court has continued and indeed expanded upon the Richardson Court's liberal tendencies.

Of course, these are generalizations. The court is not a one-person court, but a court composed of five individuals who do not always share the same views and, indeed, whose composition may change significantly from case to case when individual justices recuse themselves or when judges retire and are replaced. Dissents occur, but they are rare. It may be assumed that unanimous opinions are at least occasionally the product of compromises and tradeoffs; there will therefore be decisions, as we shall indicate, that do not seem to fit the general pattern. The sections which follow, however, will demonstrate the extent to which the thesis of this article—that the court has been engaging in a mild but significant kind of tort and insurance reform—is proven. The broad areas to be examined are: insurance coverage; the scope of duty and liability in negligence cases; joint and several liability; damages; and products liability.[56]

---

[55] This contrasts with California where newly elected conservative justices of the Supreme Court are overturning or sharply limiting earlier controversial pro-victims decisions. *See, e.g.*, Moradi-Shalal v. Fireman's Fund Ins. Co., 758 P.2d 58 (1988), overturning *Royal Globe*, 592 P.2d 329 (Cal. 1979) and Brown v. Superior Court, 751 P.2d 470 (Cal. 1988), and limiting *Sindell*, 607 P.2d 924 (Cal. 1980), *cert. denied*, 449 U.S. 912 (1980).

[56] Specific topics to be examined will include insurers' liability with regard to liability insurance, no fault insurance and uninsured and underinsured motorist

II. ANALYSIS

A. *Insurance Coverage*

A strong indication of the extent of an appellate court's concern about claims of rising insurance costs and related problems is the extent to which the court expands or limits coverage in controversial areas of policy interpretation or leans in the direction of the insured or the insurer in cases of statutory interpretation. With some important exceptions, these are cases in which the applicable language of the policy or statute, or the legislative history, does not inexorably call for a particular result; the cases in which, as Cardozo noted, it is up to the court to fill the lacunae. With few exceptions, most occurring early in the period of Chief Justice Lum's tenure in that office, the court has decided these cases favorably to the insurer, and against the earlier trend of expanding the availability of coverage.

1. *Homeowner's Liability Insurance*

One technique some courts have used to expand the amount of liability insurance available to compensate victims of motor vehicle accidents is to find that defendant's homeowner's policy provides coverage. Unfortunately, the homeowner's policy typically and plainly excludes liability for bodily injury or property damage arising out of the ownership or use of an automobile. To get around this exclusion, these courts have had to hold, disingenuously, that if the insured's liability is based upon vicarious liability for the negligent driving of another, or upon negligent entrustment of an automobile by the insured to another, then the injuries caused by the accident do not arise out of the ownership or use of an automobile, but out of the relationship which creates vicarious liability or out of the insured's negligence in entrusting a vehicle to another. Although willing to apply rules of construction of insurance policies which tend generally to favor the insured, the Hawaii Supreme Court, in two unanimous opinions

---

coverage; liability of liquor servers; governmental tort liability; damages; joint and several liability; instructions in negligence cases; and products liability. Medical malpractice has not been examined because the principal cases have been decided by the Intermediate Court of Appeals and have not been re-examined by the Hawaii Supreme Court.

Not all cases in each area will be treated.

authored by Justice Nakamura, held itself bound to the exclusion in the homeowner's policy.

Thus, in *Fortune v. Wong*,[57] the court held that parents vicariously liable for the negligent driving of a minor son under *Hawaii Revised Statutes* section 577-3[58] are not covered for that liability under the terms of their homeowner's policy.[59] And, similarly, the court held, in *Hawaiian Ins. & Guaranty Co., Ltd. v. Chief Clerk of the First Circuit Court*,[60] that negligent entrustment of an automobile does not provide separate homeowner's policy coverage for liability growing out of an accident involving that vehicle.[61]

In another decision which favored the insurer in a homeowner's policy, *Hawaiian Ins. & Guaranty Co., Ltd. v. Blanco*,[62] the court held that the insurer had no duty to defend in a case where insured intentionally fired a gun at, or at least in a way to scare, a neighbor and injured him and was alleged also to have caused mental distress to the neighbor's wife, who was present at the time.[63] The clause in question excluded coverage for bodily injury "which is expected or intended by the *insured*."[64] The court held that there was no duty to defend even though, arguably, the frightening of the wife might have been negligently or recklessly caused rather than intentionally. In his opinion, Justice Padgett, with regard to both claims, found that their injuries were "expected" by the insured because a reasonable man in the insured's position would "anticipate" the injuries claimed to have been suffered.[65] With regard to the husband, the exclusion is probably warranted because firing to scare constitutes an assault, and if the

---

[57] 68 Haw. 1, 702 P.2d 299 (1985) (Nakamura, J.).

[58] HAW. REV. STAT. § 577-3 (1984) provides in pertinent part: "The father and mother of unmarried minor children shall jointly and severally be liable in damages for tortious acts committed by their children, and shall be jointly and severally entitled to prosecute and defend all action in which the children or their individual property may be concerned." *Id.*

[59] 68 Haw. at 12, 702 P.2d at 307.

[60] 68 Haw. 336, 713 P.2d 427 (1986) (Nakamura, J.).

[61] *Id.* at 342, 713 P.2d at 430-31.

[62] 72 Haw. 9, 804 P.2d 876 (1990) (Padgett, J.).

[63] *Id.* at 19, 804 P.2d at 881. The Supreme Court has also held that the insurer under an automobile liability policy has no duty to defend a person in the driver's seat of a pick-up truck while plaintiff was being raped by another passenger in the rear section of the truck. Hawaiian Ins. & Guar. Co., Ltd. v. Brooks, 67 Haw. 285, 686 P.2d 23 (1984) (Nakamura, J.).

[64] 72 Haw. at 11, 804 P.2d at 878.

[65] *Id.* at 15, 804 P.2d at 881.

plaintiff is hit as a result, a battery.[66] It is not unusual for a liability policy to exclude intentional torts. But as to the wife's claim, the tort alleged under the facts may have been negligence; the question whether a reasonable person in the insured's position might anticipate (foresee) the wife's emotional distress is very close to the question we ask to determine whether a person may be held liable for the *negligent* infliction of emotional distress.[67] The questions raised, therefore, but unfortunately not expressly discussed, are whether the "expected or intended by the insured" exclusion encompasses ordinary negligence and, if so, whether an insurer in a policy designed to protect a homeowner from liability for negligence should be permitted to exclude such liability. Because of the doubt surrounding these questions, the court's holding that there was no duty to defend the wife's claim seems to contradict the broad expression of the insurer's duty to defend adopted by the court in 1982 in *Standard Oil Co. of California v. Hawaiian Ins. & Guaranty Co., Ltd.*[68]

2. *General Liability Insurance*

It is understandable why general liability policies covering businesses might ordinarily be written to exclude liability coverage which would serve, in effect, as a guarantee of the quality of the insured's product or the effectiveness of an insured's services. We do not, for example, expect papaya growers' general liability policies to protect the growers from liability to purchasers if the papayas they sell turn out to be overripe and inedible. On the other hand, we do expect the provisions of such policies to cover injuries to persons and to things other than the product itself caused by defects in the products or negligence in performing the service.

Early in the period under examination the Lum Court decided two cases in which general liability policy coverage of the quality of the insured's product or the effectiveness of the insured's work was in question. In the first, *Sturla, Inc. v. Fireman's Fund Ins. Co.*,[69] the court, in an opinion by Justice Nakamura, held that the comprehensive general liability policy of a carpet manufacturer provided no coverage

---

[66] *See generally* RESTATEMENT (SECOND) OF TORTS §§ 13, 21 (1965).

[67] *See* Rodrigues v. State, 52 Haw. 156, 472 P.2d 509 (1970); *also supra* note 20 and accompanying text.

[68] 65 Haw. 521, 527, 654 P.2d 1345, 1349 (1982) (per curiam).

[69] 67 Haw. 203, 684 P.2d 960 (1984) (Nakamura, J.).

and that the insurer had no duty to defend a suit in which the gravamen of the claim was that carpeting sold by insured rapidly faded "after its delivery and installation in a condominium-hotel project on Kauai."[70] Construing the policy's standard but arcane language, the court held, "[T]he terms of the policy could not have given rise to an objectively reasonable expectation of protection against claims that the product Sturla sold was 'not that for which the damaged person bargained.'"[71] Rather, the court said, "[W]e believe the risks insured by the standard form policy are 'injury to people and damage to property caused by [a] faulty [product or] workmanship.'"[72]

How far *Sturla*'s restrictive view of the coverage of business risks would go was raised in the same year in *Hurtig v. Terminix Wood Treating & Contracting Co., Ltd.*[73] There, the question was whether an exterminator's comprehensive general liability policy covered termite damage to premises which followed insured's failure adequately to perform its contract to exterminate termites.[74] In one of the few cases in which the Lum Court held in favor of expanded insurance coverage, Chief Justice Lum and Justices Hayashi and Padgett held that injury to the premises was not excluded since the business risk exclusion recognized in *Sturla* only applies "to the insured's own work or work product."[75] In this case the exterminator's work and work product were "inspection and treatment" but the loss went beyond that "to the home itself."[76]

Justice Nakamura, joined by Justice Wakatsuki, dissented strongly. Their view was that the termite damage to the house was a business risk under the policy and that the insurance policy "could not have given rise to an objectively reasonable expectation of protection against a claim that the service rendered by Terminix was not that for which

---

[70] *Id.* at 204, 684 P.2d at 961.

[71] 67 Haw. at 210, 684 P.2d at 963 (citing James A. Henderson, *Insurance Protection for Products Liability and Completed Operations—What Every Lawyer Should Know*, 50 NEB. L. REV. 415, 441 (1971)). The court in *Sturla* did not explain why the claim for consequential damages which the court found to be "of an intangible nature," 67 Haw. at 206 n.3, 684 P.2d at 963 n.3, as distinguished from the claim for the economic loss of replacing the carpet, was not covered.

[72] *Id.* (quoting Weedo v. Stone-E-Brick, Inc., 405 A.2d 788, 791 (N.J. 1979)).

[73] 67 Haw. 480, 692 P.2d 1153 (1984) (Hayashi, J.).

[74] *Id.* at 480, 692 P.2d at 1154.

[75] *Id.* at 482, 692 P.2d at 1154.

[76] *Id.*

the Hurtigs' bargained."[77] Their concern was that the majority's interpretation "would make the insurer a guarantor of adequate performance of contractual obligations and transmute a liability policy into a performance bond."[78]

Justice Hayashi's majority opinion, however, is arguably the better one on two grounds. Technically, the homeowner was seeking consequential damages to property damaged by the exterminator's failure properly to conduct the extermination. The business risk that would not be covered would be the economic cost of doing the inspection or exterminating job over again. But damage to other property, even if the purpose was to protect that property, would not, as the majority pointed out, constitute damage to the insured's "own work or work product."[79] By way of analogy, it can hardly be doubted that a claim by a person who drowned as a result of a defective life preserver would be covered by the standard comprehensive general liability policy, even though the exclusive purpose of the preserver, like the exterminating service, was to protect against the very risk that occurred. Not every business risk is the kind of risk that is excluded by the language of the policy.

The *Hurtig* decision, one of the few during the period under review in which the court actually expanded the availability of liability insurance, seems sound on policy grounds, as well. Virtually every building in Hawai'i is at risk of termites. Those building owners who can afford termite treatment feel compelled to contract for it. If the job is badly performed, and not caught in time, the damage to the treated premises can be extensive. The only recourse of the owner in such cases is against the exterminator, and many exterminators are small businesses which may not be able to self-insure against such losses. The decision not to exclude coverage for such damage, therefore, constitutes an important protection to Hawai'i property owners, at least those who insist on using exterminators who are insured by a comprehensive general liability policy, and to the insured exterminators, as well.[80]

---

[77] *Id.* at 485, 692 P.2d at 1156 (Nakamura, Wakatsuki, JJ., dissenting).

[78] *Id.*

[79] *Id.*

[80] *Cf.* K. ABRAHAM, INSURANCE LAW AND REGULATION: CASES AND MATERIALS (1990). As a possible explanation of the justification for not applying the business risk exclusion to damage to property other than the economic loss involved in redoing the work, Professor Abraham suggested:

[L]iability for bodily injury or damage to other property [caused by faulty work]

3. Uninsured and Underinsured Motorist Insurance

The Hawaii Legislature has kept the amount of uninsured motorist (U.M.) insurance that must be offered to automobile owners[81] and the amount of mandatory automobile liability insurance[82] at very low levels relative to the damages that may be expected in serious automobile accidents. In consequence, the availability of underinsured motorist (U.I.M.) insurance and the possibility of stacking U.M. and U.I.M. coverages have taken on great potential significance in cases of serious accidents where a defendant is uninsured or only insured for the minimum required coverage.[83]

While the language of the statute which required the offering of U.M. coverage[84] did not clearly call for stacking, the absence of clear language to the contrary coupled undoubtedly with a progressive, if unspoken, policy of providing more adequate compensation for victims, led the Richardson Court to interpret the U.M. statute liberally to allow U.M. coverages to be stacked.[85]

---

is sufficiently infrequent and the average cost of such liability sufficiently high that self-insuring against this kind of liability would be too risky for most small and medium-sized businesses. The business risk exclusions therefore do not pertain to this kind of liability.

Id. at 504. Of course, this protection is contingent on insurers not altering the language of the policy for the specific purpose of excluding liability coverage in these cases.

[81] *Cf.* HAW. REV. STAT. § 431:10C-301(b)(3) (1990). Presumably the minimum amount of U.M. coverage that must be offered is $35,000, the minimum amount of liability coverage. However, § 431:10C-301(b)(3) refers to HAW. REV. STAT. § 287-7 for the amount which must be carried, and § 287-7, as currently written, does not mention any amount.

[82] HAW. REV. STAT. § 431:10C-301(b)(1) (1990) ($35,000).

[83] Although persons injured in an automobile accident are usually entitled to no-fault benefits, the total amount available to compensate each person injured or killed is only $15,000, unless optional additional no-fault coverage is available. HAW. REV. STAT. § 431:10C-103(10)(B) (1990). The mandatory $15,000 amount has not changed since no-fault was adopted in 1972, although the cost-of-living since then has increased by two or three times. The $15,000 is clearly woefully inadequate to compensate seriously injured victims of automobile accidents.

[84] HAW. REV. STAT. § 431-448 (1985).

[85] *See, e.g.*, Allstate Ins. Co. v Morgan, 59 Haw. 44, 575 P.2d 477 (1978) (Ogata, J.). *Cf.*, Calibuso v. Pacific Ins. Co., Ltd., 62 Haw. 424, 616 P.2d 1357 (1980) (Nakamura, J.).

Unfortunately, stacking of only U.M. coverage benefits only those who are wealthy enough to own more than one insured automobile or who are lucky enough to benefit from the policy or policies of such an insured. The better answer to the problem of

The Lum Court has not undone the Richardson era stacking cases. With regard to the *availability* of U.M. and U.I.M. insurance, it has, albeit with important exceptions, fairly liberally expanded coverage both to victims and to accidents that do not clearly fall within the class to be protected under the statute. In addition, the court has taken important steps to insure that insureds are not deemed to have rejected such coverage unless they do so knowledgeably. On the other hand, the court has kept the total amount of U.M. and U.I.M. coverage available, ordinary stacking aside, within very parsimonious bounds indeed.

Thus, although the court has refused to allow a motorcyclist injured by an uninsured motorist while riding his uninsured motorcycle to recover under the U.I.M. provisions of his father's auto policy,[86] the court has extended U.M. coverage under the policy of the owner of an ambulance to an occupant, a paramedic, who left the vehicle at the scene of a motorcycle accident to place flares in the center of the road and was there struck by an uninsured motor vehicle,[87] and has held that U.M. coverage was available to a motorist shot by a gun fired from another unidentified vehicle even though there was no indication that the gunshot had any other connection with the motor vehicles in which the victim and the shooter were riding.[88]

---

inadequate insurance resources might be for the legislature (1) to raise the amounts of required liability coverage (in Japan, for example, the required amount is about $125,000 but most owners carry higher or even unlimited coverage); (2) to raise the required, or at least the optional, amounts of U.M. and U.I.M. coverage to levels which reflect the cost of compensation in serious accidents; (3) to raise the extremely low minimum amounts of no-fault coverage to reflect changes in the cost of living since the law was passed and also to offer optional additional no-fault up to amounts which reflect the current realities of economic costs of serious accidents, or (4) to adopt some parts or all of these three recommendations. Indexing would also serve to prevent the amounts from becoming inadequate over time, as they have in the past.

[86] National Union Fire Ins. Co. v. Ragil, 72 Haw. 205, 811 P.2d 473 (1991) (Wakatsuki, J.). This decision was consistent with the Hawaii Legislature's decision to deal separately with motorcycles—and their corresponding degree of risk of injury—in order to keep the cost of injuries caused by motorcycles from causing excessive insurance costs, particularly to the motorcyclists themselves. *Id.* at 214-16, 811 P.2d at 476-77.

[87] National Union Fire Ins. Co. v. Olson, 69 Haw. 559, 751 P.2d 666 (1988) (Lum, C.J.).

[88] Ganiron v. Hawaii Ins. Guaranty Ass'n, 69 Haw. 432, 744 P.2d 1210 (1987) (Padgett, J.) (also allowing the victim to recover no-fault benefits).

As the dissenting opinion by Justice Wakatsuki, joined by Justice Hayashi, con-

Most significantly, in *Mollena v. Fireman's Fund Ins. Co. of Hawaii*,[89] the court, in an opinion by Justice Wakatsuki, did Hawai'i automobile owners bewildered by the arcane complexity of auto insurance a significant service. The court held, first, that separate offers of U.I.M. coverage must be made prior to each policy renewal, in "every policy renewal notice."[90] Second, the court "endorsed" a demanding four-part test[91] to be used to determine whether the offer of U.I.M. coverage is legally sufficient, and then held that the renewal notice sent by respondent Fireman's Fund was deficient on three of the four parts of the test.[92] In connection with the test, the court held that the burden of establishing that it has been satisfied is on the insurer, and cannot be met by telling the insured to contact an agent or broker of the insurer.[93] Third, the court held that the current requirement that an applicant for automobile insurance must reject U.M. coverage in

---

vincingly argues, for U.M. and no-fault coverage to exist, the automobile ought to "serve as more than merely the situs of the events. . . ." *Id.* at 437, 744 P.2d at 1215.

To add insult to injury, the court also held that the trial judge's award of only 55% of attorney's fees to the claimant because the issue was a difficult one was not warranted under the no-fault statute; rather, claimant was entitled to 100%. *Id.* at 436, 744 P.2d at 1215. Whether correctly decided or not, this case is likely to deter insurers from questioning coverage even in cases where the insurer's doubts are entirely reasonable.

[89] 72 Haw. 314, 816 P.2d 968 (1991) (Wakatsuki, J.).

[90] *Id.* at 325, 816 P.2d at 973-74.

[91] *Id.* The test is set forth in Hastings v. United Pac. Ins. Co., 318 N.W.2d 849 (Minn. 1982):

> (1) if made other than face-to-face, the notification process must be commercially reasonable; (2) the limits of optional coverage must be specified and not merely offered in general terms; (3) the insurer must intelligibly advise the insured of the nature of the optional coverage; and (4) the insurer must apprise the insured that the optional coverage is available for a relatively modest increase in premium.

Id. at 859.

The court in its opinion did not indicate the source of these specific requirements in the Hawai'i statutes. The sections which describe and which require offering U.M. and U.I.M. do not, for example, require that the coverage be offered "for a relatively modest increase in premium." 72 Haw. at 325, 816 P.2d at 974 (citing *Hastings*, 318 N.W.2d at 859). In *Hastings*, the Minnesota Supreme Court found the source of these requirements in Jacobson v. Illinois Farmers Ins. Co., 264 N.W.2d 804 (Minn. 1978); Holman v. All Nation Ins. Co., 288 N.W.2d 244 (Minn. 1980); and Kuehenmeister v. Illinois Farmers Ins. Co., 310 N.W.2d 86 (Minn. 1981).

[92] 72 Haw. at 322-23, 816 P.2d at 972-73.

[93] *Id.* at 320, 816 P.2d at 971.

writing applies as well to U.I.M. coverage.[94] Finally and most importantly, the court held that the effect of the failure of the insurer to satisfy the four-part test is to provide the insureds with implied coverage "in the minimum amount [$35,000] required to be offered" for the kind of coverage being offered.[95]

The question arises, however, as to just how much U.M. and U.I.M. coverage is available in individual accidents, and it is here that the court's growing concern for the premium dollar becomes evident. Its decision that U.M. coverage provided by the City and County of Honolulu under a group policy for 1106 police-owned vehicles could not be stacked to provide $27 million of coverage to a policeman injured by an uninsured motorist while occupying his insured vehicle,[96] while unexceptional, nevertheless took specific note of the likely effect on premiums if such stacking were allowed.[97] Similarly, the court referred to "the legislative objective of optional [U.I.M.] protection at the least possible cost" in *Kang v. State Farm Mutual Automobile Ins. Co*,[98] a decision holding that a person injured by the negligence of the owner and driver of the vehicle in which he was a passenger who recovers from the liability coverage of the owner-driver's insurance may not also recover U.I.M. coverage under the same policy. In *Kang* the court held a specific clause excluding the insured vehicle as an underinsured vehicle was not against public policy or in violation of the U.I.M. statute, even though the plain meaning of the U.I.M. statute would seem to require coverage.[99] It is worth noting, however, that the court

---

[94] *Id.* at 324, 816 P.2d at 971.

[95] *Id.* at 326, 816 P.2d at 974. In Moorcroft v. First Ins. Co. of Hawaii, Ltd., 68 Haw. 501, 720 P.2d 178 (1986) (Wakatsuki, J.), the court took an important step to protect the rights of those covered by U.M. insurance. It held that the insurer could not sit back and ignore the insured's demand for U.M. benefits, ignore and refuse to consent to the insured's bringing suit against the uninsured motorist, and then, after claimant gets a default judgment, seek to use the "consent to sue" clause to refuse to pay claimant the policy amount and also to insist on its right to arbitrate. *Id.* at 504, 720 P.2d at 180. However, the court also held that although the insurer thus waived its right to consent to sue and its right to arbitrate the claim, it was only liable for the face amount of the U.M. coverage, and not the very much larger amount of the default judgment. *Id.*

[96] Lee v. Insurance Company of North America, 70 Haw. 120, 763 P.2d 567 (1988) (Lum, C.J.).

[97] *Id.* at 124, 763 P.2d at 569.

[98] 72 Haw. 251, 815 P.2d 1020 (1991) (Moon, J.).

[99] The court, in an opinion by Justice Moon, while recognizing that "[u]nderinsured

evidently unanimously rejected, sub silentio, or perhaps did not even consider the opportunity to deal with the inadequacy of liability coverage in the same manner the Hawaii Supreme Court acted in the original stacking cases: by constructing a rationale, based less on statutory construction than on public policy, to allow multiple coverage.[100]

Another example of the court's restricting the amount of insurance available in an accident is *Hara v. Island Ins. Co., Ltd.*[101] There, plaintiffs, the widower and children of a person killed in an automobile accident, brought actions for wrongful death coupled with a survival action against defendants covered by an Allstate policy which provided "a maximum coverage of $25,000 per person for bodily injury or

---

motorist coverage was designed to protect against loss resulting from bodily injury or death *suffered by any person legally entitled to recover damages from an owner or operator of an underinsured motor vehicle*" (emphasis added), thus clearly describing the claimant in this case, nevertheless determined, based on the slim evidence that the no-fault law was intended to provide "adequate protection to persons injured in motor vehicle accidents *at the least possible cost*," that the plain language need not be followed. Instead, the court followed advice by Professor Widiss to the effect that uninsured motorist insurance should not be transformed into liability insurance. *Id.* at 255-56, 815 P.2d at 1022 (citing 2 WIDISS, UNINSURED AND UNDERINSURED MOTORIST INSURANCE § 35.5 at 56-57 (2d ed. 1985)). But an owner of a motor vehicle might very well wish to provide extra protection to her passengers in the event she might negligently cause their injury, and why should they not get the benefit if the existing liability insurance is inadequate? "[A]dequate protection . . . at least possible cost" is not the same as least possible cost regardless of adequacy. *See* Chun v. Liberty Mutual Ins. Co., 5 Haw. App. 290, 687 P.2d 564 (1984) (Tanaka, J.) ("In the enactment of and amendments to the No-Fault Law, the legislature was never guided solely by a policy of keeping no-fault insurance premiums low at all costs.").

It should also be noted that WIDISS, *supra*, mentions that in this situation "the fact that purchasers of underinsured motorist coverage have considerable latitude in regard to selecting the coverage limits is a matter of significant import." *Id.* § 35.5 at 56-57. Evidently, he is referring to the possibility that an owner could buy minimal amounts of expensive liability coverage but protect his passengers against his own negligence by buying enormous amounts of cheap U.I.M. coverage. However, there is no indication in *Kang* and it does not appear to be the fact in Hawai'i that large amounts of optional underinsured motorist insurance, in excess of $35,000 per person, are available to most insurance purchasers.

[100] *See, e.g.*, Allstate Ins. Co. v. Morgan, 59 Haw. 44, 575 P.2d 477 (1978) (Ogata, J.). *Cf.* Palisbo v. Hawaii Ins. and Guar. Co., 57 Haw. 10, 547 P.2d 1350 (1976) (Menor, J.); Walton v. State Farm Mut. Auto. Ins. Co., 55 Haw. 326, 518 P.2d 1399 (1974) ((Ogata, J.).

[101] 70 Haw. 42, 759 P.2d 1374 (1988) (Padgett, J.).

death."[102] Allstate tendered the $25,000 but plaintiffs proceeded to secure a default judgment in favor of the widower for $437,160, $180,712 to one child, $220,874 to another, and $86,278 to the widower as personal representative in the survival action.[103] Plaintiffs argued that, as in *Palisbo v. Hawaiian Ins. & Guaranty Co.*,[104] if the amount of liability insurance available was insufficient to cover each injured person for the minimum amount of per person coverage required under *Hawaii Revised Statutes* section 287-7, in this case $10,000, then the defendant was underinsured and the victim's own U.M. coverage should provide the minimum amounts.[105] However, the court ruled, quite correctly in this case, that the claims of the plaintiffs were derivative of the decedent and, since she was the only one who suffered bodily injury or death, and since the amount available from Allstate clearly exceeded the amount that must have been available under the statute to compensate her injuries, the defendant was neither uninsured nor underinsured.[106]

Perhaps the most restrictive decision in the interpretation of U.M. and U.I.M. coverage of the Lum Court is *National Union Fire Ins. Co. v. Ferreira*.[107] There the court held that U.M. and U.I.M. coverage were mutually exclusive: If defendant has no insurance then only U.M. coverage is available, but if defendant has insurance but it is inadequate

---

[102] *Id.* at 43, 759 P.2d at 1374-75.

[103] *Id.*

[104] 57 Haw. 10, 547 P.2d 1350 (1976).

[105] *Id.* at 44, 759 P.2d at 1375.

[106] *Id.* at 17, 759 P.2d at 1379. Interestingly, Justice Padgett's opinion suggests a possibility for expanding the liability available in an accident. He expressly leaves open the question whether, under the liability requirements of the no-fault statute—then "$25,000 for all damages arising out of accidental harm sustained by any one person as a result of any one accident applicable to each person sustaining accidental harm . . . ."—the Allstate policy, which would evidently only pay $25,000 in this case, was in compliance with the statute. *Id.* It is possible that "accidental harm" under the statute might be interpreted to include emotional distress suffered by a relative of the victim and sought by way of an "independent tort" of negligent infliction of emotional distress or even by way of a wrongful death action. If so, there should be a separate fund of $35,000 which would become available under the current no-fault law to cover liability to each person suffering such harm. *But cf.* Doi v. Hawaiian Ins. & Guar. Co., 6 Haw. App. 456, 727 P.2d 884 (1986) (Heen, J.) (action for loss of consortium was derivative and hence defendant whose liability insurance did not provide a separate fund to cover such liability was not underinsured), and National Union Fire Ins. Co. v. Villanueva, 716 F. Supp. 450 (D. Haw. 1989) (holding that a pure emotional distress claim is not independently compensable accidental harm under no-fault law).

[107] 71 Haw. 341, 790 P.2d 910 (1990) (Moon, J.).

to cover plaintiff's damage, then only underinsured coverage is available.[108] The most unfortunate feature of this holding is that a person who has purchased both $35,000 each of U.M. and U.I.M. coverage to protect herself and who suffers damage of $100,000 from an uninsured motorist, can only recover $35,000 of U.M. coverage and nothing from her U.I.M. coverage, leaving $75,000 of her losses uncovered notwithstanding she paid premiums for both and her likely expectation that both would be available in a situation like this. Unlike *Kang*, in which the court disregarded the literal meaning of the underinsured motorist statute, in *Ferreira* the court seemed to fasten woodenly on the language of the same statute and to ignore its spirit and intention.[109] The definition of an "uninsured motor vehicle" in the statute read:

> [A] motor vehicle with respect to the ownership, maintenance, or use of which *the sum of the limits of liability of all bodily injury liability insurance coverage applicable at the time of the loss to which coverage afforded by such policy or policies applies is less than the liability for damages imposed by law.*[110]

The court then held that under this language a prerequisite "is the existence of 'bodily injury liability insurance coverage . . . .'"[111] Thus, "[w]here a tortfeasor has no bodily injury liability insurance coverage . . . he is not underinsured . . . ."[112] With all due respect, however, the court's reading of the literal meaning is not inexorable, for if the "sum of the limits of liability" is zero, then zero is certainly "less than the liability for damages imposed by law." And arguably, since U.M. coverage in such a situation stands in for defendant's liability insurance, it is not stretching things too far to suggest that the defendant is "insured" and therefore "underinsured" if the U.M. coverage does not cover the entire damages. A better solution surely would have been to hold that U.M. covers the first $35,000 (or other amount of U.M. coverage) of loss and the U.I.M. coverage covers the last $35,000 (or other amount of U.I.M. coverage) of loss so that in the situation described above plaintiff would recover a total of $70,000 of this $100,000 loss.[113]

---

[108] *Id.* at 346, 790 P.2d at 912.

[109] 71 Haw. at 345, 790 P.2d at 912-13.

[110] *Id.* at 344-45, 790 P.2d at 913 (citing HAW. REV. STAT. § 431-448 (1985)).

[111] 71 Haw. at 345, 790 P.2d at 913.

[112] *Id.*

[113] If the insured had only U.I.M. coverage, arguably it would not be unfair to say that coverage does not substitute for U.M. coverage, i.e., it does not cover the first $35,000 of loss.

What seems to be revealed, however, by the *Ferreira* decision, and particularly by the arguably inconsistent way in which the court treated the same statute in *Kang* and *Ferreira*, is the court's newly restrictive attitude toward the ability of an accident victim to draw upon different forms of coverage to achieve full compensation for a single accident. The opinions in both cases were written by Justice Moon. Dare we suggest that with the addition of Justice Moon to the court the emphasis has shifted from more adequately compensating the accident victim to protecting the insurance buyer's pocketbook?

4. Automobile Liability Insurance[114]

The decisions deciding questions of motor vehicle liability insurance seem consistent with the emerging trend toward reducing the insurer's exposure and start with an important case early in the period which expanded coverage and an equally important case at the end which contracted it. Thus, in 1983, in *Government Employees Ins. Co. v. Franklin*,[115] the court interpreted the Franklins' policy to provide coverage to protect them against the liability of their minor daughter who had been held liable for an automobile accident while involved in a common enterprise with two friends. Evidently the three minors had operated a car owned by the parents of one of the other minors without the parent's express or implied permission.[116] Under *Hawaii Revised Statutes* section 577-3,[117] parents are strictly liable for the torts of their minor children. Under Hawai'i's no-fault law, however, liability coverage seems only to be extended to owners of automobiles involved in accidents and to drivers who are driving with the express or implied permission of the owner.[118] The difference between these two statutes potentially leaves open a serious exposure to personal liability without insurance protection for parents whose minor children negligently harm others, as in this case, while driving someone else's car without the express or implied permission of the owner of that car. Here, however, the parents argued

---

[114] For an important case dealing with the abolition of tort liability in automobile accident cases and the proof necessary to meet the conditions necessary for bringing a suit, see discussion of Parker v. Nakaoka, *infra* note 182 and accompanying text.

[115] 66 Haw. 384, 662 P.2d 1117 (1983) (per curiam).

[116] *Id.* at 385, 662 P.2d at 1118.

[117] *See supra* note 58 (quoting pertinent part).

[118] *See* HAW. REV. STAT. § 431:10C-301(a)(2)(1987).

that the language of their own policy covered them in this instance.[119] The language in question provided:

> Persons insured: The following are insured under Part I:
> . . .
> (b) with respect to a non-owned automobile,
> (1) the named insured,
> (2) any relative, but only with respect to a
> private passenger automobile or trailer, *provided his actual operation or (if he is not operating) the other actual use thereof is with the permission, or reasonably believed to be with the permission, of the owner and is within the scope of such permission*. . . .[120]

Courts had gone both ways on the question whether the proviso in part (2) also modified paragraph (1), so as to make the coverage of the parent's (the named insured's) vicarious liability conditional on their child's using the other parent's car with the permission of the other parent.[121] The Hawaii Supreme Court, however, in a per curiam opinion found the policy provisions ambiguous and, on that basis, held that they should be interpreted in favor of the insured. Thus, the parent's coverage was not conditioned on their daughter's having had permission to use the car involved in the accident.[122]

Other pro-claimant decisions relating to liability involved the limitations periods in the no-fault law.[123] They include *Crawford v. Crawford*,[124] in which the court held that the general tolling provisions relating to children apply to automobile accident cases for wrongful death brought by children to recover for the death of their mother notwithstanding the two-year limitations period in the no-fault law,[125] and *Zator v. State Farm Mutual Ins. Co.*,[126] which held that the no-fault statute of

---

[119] 66 Haw. at 387, 662 P.2d at 1119.

[120] *Id.* at 386, 662 P.2d at 1119 (emphasis the court's).

[121] 66 Haw. at 386-87, 662 P.2d at 1119.

[122] *Id.* The benefits of this holding to parents in Hawai'i would be lost if insurers modified their policies to make the proviso applicable to named insureds, as well as to relatives. Because the legislature has saddled parents with vicarious liability without any fault, however, public policy would seem to require that they be protected from liability in cases like this. Insurers, therefore, should either be prevented from excluding such protection from homeowner's or automobile liability policies or should be required to offer such protection optionally, as in the case of U.M. and U.I.M. coverage.

[123] HAW. REV. STAT. § 431:10C-301 (1987).

[124] 69 Haw. 410, 745 P.2d 285 (1987) (Hayashi, J.).

[125] *Id.* at 417, 745 P.2d at 289.

[126] 69 Haw. 594, 752 P.2d 1073 (1988) (Lum, C.J.).

limitation may be tolled pending appointment of guardian for a claimant who is incompetent when the cause of action accrued.[127]

By way of contrast, the court in 1991, in *Hawaiian Ins. & Guaranty Co., Ltd. v. Financial Security Ins. Co.*[128] had to decide whether the relatively rich ($500,000) liability policy of the retail seller of an automobile or the minimum liability coverage ($25,000) of the buyer's policy covered the car when the buyers were sued for wrongful death as a result of an accident which occurred after the car was sold and possession transferred to them. The buyers took possession of the car on December 28, 1983, and the accident occurred on January 16, 1984.[129] The seller, however, had not yet processed and sent documents reflecting the transfer of ownership to the Department of Motor Vehicles and the Department did not issue new certificates of ownership and registration until February 3, 1984.[130]

By the plain language of two statutes, *Hawaii Revised Statutes* section 286-52(e)[131] of the motor vehicle registration law and section 294-2(13)[132] of the Hawai'i No-Fault Law, the seller under these facts would not only be deemed the owner of the motor vehicle but, under the registration law, the owner "for any purpose." Further, the no-fault law required every "owner" of a motor vehicle to maintain a no-fault policy on the vehicle.[133]

Nevertheless, the court, speaking through Justice Moon, disregarded the statutes' plain meaning and found that the seller's policy was not applicable.[134] With regard to its interpretation of the motor vehicle registration law, the court relied on *Pacific Ins. Co. v. Oregon Auto Ins. Co.*,[135] a case in which a private seller had sold the car to a buyer and forwarded the documents to the Treasurer prior to the accident but the title did not reach the private buyer until a day or two later. Under those circumstances, the court found that a literal application

---

[127] *Id.* at 598, 752 P.2d at 1075.

[128] 72 Haw. 80, 807 P.2d 1256 (1991) (Moon, J.).

[129] *Id.* at 82-83, 807 P.2d at 1257-58.

[130] *Id.* at 83, 807 P.2d at 1258.

[131] HAW. REV. STAT. ch. 286 (1929).

[132] *Id.* ch. 294 (1973). The operative language provided: "Whenever transfer of title to a motor vehicle occurs, the seller shall be considered the owner until delivery of the executed title to the buyer, from which time the buyer holding the equitable title shall be considered the owner." *Id.* § 294-2(13).

[133] *Id.* § 294-8(a)(1) (1978).

[134] 72 Haw. at 89, 807 P.2d at 1262-63.

[135] 55 Haw. 208, 490 P.2d 899 (1971).

of the statute would work an absurd and unjust result by imposing liability on the seller. Arguably, the facts in this case were distinguishable, since the seller had not forwarded the documents at the time of the accident and the seller may actually have been withholding the title documents until the buyer fulfilled a commitment to pay a promised installment on the purchase price.[136] Most importantly, the mandatory provisions of the Hawai'i No-Fault Law were not involved in *Pacific*.

With regard to the provisions of the no-fault law, the court drew a distinction between the motor vehicle statute and the motor vehicle insurance policy which seems difficult to support. Noting that because the statutory definition of owner "was expressly limited to that term '[a]s used in this chapter [294],'" the court then proceeded to conclude that "it is clear that the legislature did not intend that the definition dictate the meaning of the term as used in automobile insurance policies," and that "the term 'owner' as defined in *Hawaii Revised Statutes* section 294-2(13) is not determinative of ownership in the context of insurance coverage disputes."[137]

The problem, of course, is that the entire purpose of chapter 294, dealing with motor vehicle insurance,[138] is to dictate the terms and conditions of required motor vehicle insurance. To apply different criteria of ownership to coverage disputes, on the one hand, and to questions as to who is required to purchase insurance and secure a no-fault card, on the other, is to invite confusion in enforcement of and to undermine the motivation of sellers to comply with mandatory statutory requirements to maintain a no-fault insurance policy on a vehicle until the executed title has been delivered to the buyer.

Further, as Justice Padgett noted in his dissenting opinion, the language of the policy of the seller, who is designated owner under the statute, clearly contemplated coverage when the automobile was being driven by someone with the permission of the "named insured."[139] As Justice Padgett correctly pointed out, the question was not one of "stacking," "but a question of whether or not the [seller's] policy covered the [buyers] at the time of the accident."[140] Further, as he

---

[136] This is true even though the trial judge found that the evidence was insufficient to establish that the insurer was holding the documents until monies owed under the contract were paid. *See* Hawaiian Ins. & Guar. Co., 72 Haw. at 86 n.7, 807 P.2d at 1259 n.7.

[137] *Id.* at 90, 807 P.2d at 1261.

[138] Now Haw. Rev. Stat. § 431:10C (1987).

[139] 72 Haw. at 95, 807 P.2d at 1263 (Padgett, J., dissenting).

[140] *Id.*

also stated, there is "nothing in the law that prohibits two parties, each having interests in a vehicle from taking out separate liability policies thereon."[141]

Once again, therefore, the legislative objective of "reducing motor vehicle insurance costs," explicitly set forth in the majority opinion,[142] seems to take precedence not only over the explicit language of the statutes and the seller's insurance policy, but over the legislative objective of insuring adequate coverage[143] as well. Where, by virtue of good fortune perhaps, adequate coverage—a seller's $500,000 liability policy—was made available *by law*, the sympathies of the court[144] and only $25,000 per person to the injured third parties under the buyer's liability policy seem not to be sufficient substitutes.

5. No-Fault Insurance (Personal Injury Protection)

The provisions of Hawai'i's No-Fault Law, as originally conceived and as adopted in 1973, were well designed to keep many small injury claims out of the courts and to provide adequate non-fault compensation by way of a tradeoff for the former right to sue.[145] In the interim, two distressing things have occurred. First, the mandatory amount of no-fault personal injury protection coverage required, $15,000, has not been increased and has become woefully inadequate to provide compensation for victims of many minor accidents. Second, the threshold which has to be crossed before suits can be brought has been significantly eroded,[146] allowing too many of the small claims to proceed to

---

[141] *Id.* Should the court have held the seller's insurer liable in this case, it is likely that insurers of retail automobile sellers would seek arrangements with their insureds to ensure that title documents are promptly transmitted to the director of finance for issuance and delivery of a new title to the buyer unless seller has a good reason for not doing so. Conceivably, the seller would be required by the insurer to retain possession of the vehicle until the new title was available. If this caused too much trouble for sellers, a change in the law should have been sought from the legislature.

[142] 72 Haw. at 92-93, 807 P.2d at 1261.

[143] *Id.*

[144] *Id.* at 93, 807 P.2d at 1262.

[145] *See* Wiegand v. Allstate Ins. Cos., 68 Haw. 117, 121, 706 P.2d 16, 19 (1985) (Wakatsuki, J.).

[146] *See* HAW. REV. STAT. §§ 431:10C-306(b)(2) (threshold), 431:10C-308 (annual revision of medical rehabilitative limit by commissioner). The Medical Rehabilitative limit, evidently the easiest threshold for most automobile accident victims to cross, is currently $8300.00.

suit.[147] The upshot is that insurers are having to pay the full amount for questionably necessary "soft" therapy, which enables a victim to exceed the $8300.00 medical-rehabilitative limit and thus bring suit, and then, in addition, to pay for the costs of the suit and any damages awarded. On the other hand, accident victims who suffer actual economic losses and medical expenses but who elect not to play the system by running up bills for unnecessary treatment, may not be compensated adequately for their actual economic losses.[148]

Appropriate reform, therefore, would undertake to deal with both of these problems: the inadequacy of the no-fault amount and the ineffectiveness of the threshold. The question for discussion here, therefore, is whether and to what extent the Supreme Court during the era of Chief Justice Lum has improved or exacerbated these problems.[149]

a. Inadequacy of benefits

The court's tendency during Chief Justice Lum's reign has been generally to respond favorably to requests to expand the amount or

---

[147] Arguably, any reform undertaken by the legislature should treat both problems. It would be most unfortunate if, in the interests of reducing premiums, the legislature were to impose greater barriers to suit without correspondingly increasing to adequate levels the amount of compensation available to victims who could not sue. At least one proposal, however, would do just that. *See, e.g.*, LICENSE TO STEAL (Coalition for Auto. Ins. Reform, Honolulu, Haw.) (pamphlet circulated during the Hawai'i Legislative Session of 1991; copy on file with the authors).

[148] For example, they can only recover earnings losses up to $900 per month, when in fact their actual earnings losses may be far in excess of that amount. *See* HAW. REV. STAT. § 431:10C-103(19)(A)(iii) (1987).

[149] Late in the era of the Richardson Court, two decisions, Joshua v. MTL, Inc., 65 Haw. 623, 656 P.2d 736 (1982), and McAulton v. Goldstrin, 66 Haw. 14, 656 P.2d 96 (1982), with the majority opinions written by Justice Padgett over the strong dissents of Justices Nakamura and Richardson, almost put an end to the no-fault law by holding that the provisions in the law which abolished tort liability unless certain conditions were met denied persons not eligible for no-fault benefits equal protection of the law. 65 Haw. at 632, 656 P.2d at 742; 66 Haw. at 15, 656 P.2d at 100. Thus, those persons could sue directly without meeting the threshold conditions. The Hawaii Legislature, in response, quickly stepped in, chiding the court for "having eroded one of the most important elements of the no-fault system, the mandatory insurance coverage of all who choose to exercise the privilege of driving" and amending the law to correct the defects perceived by the court. *Cf.* Washington v. Fireman's Fund Ins. Cos., 68 Haw. 192, 708 P.2d 129 (1985) (Hayashi, J.) (upholding the constitutionality of the no-fault law after passage of Act 245 (1983)). Although the two dissenters have left the court and the members of the original majority remain, no decisions during the era of the Lum Court have set aside such essential features of the no-fault law.

availability of no-fault personal injury protection (P.I.P.) benefits when asked by accident victims to do so. Often the expansion goes beyond the plain language of the statute.

Perhaps the most blatant example is *In re Maldonado*,[150] where the issue was how much by way of P.I.P. benefits, for lost earnings, should be paid to an injured bus driver who was receiving workers' compensation benefits. The worker's salary had been $1,534 per month. The accident caused him to be totally disabled. Workers' compensation paid him $931.66 per month. His actual monthly wage loss, therefore, was $602.34 per month.[151]

The no-fault statute provided, in pertinent part:

> Payment from which insurer . . . .
> (b) All no-fault benefits shall be paid secondarily and net of any benefits a person is entitled to receive because of the accidental harm from . . . workers' compensation laws. . . .[152]

When the no-fault insurer of the bus company denied Maldonado's claim for the difference between what he received from workers' compensation and his former salary, he appealed to the insurance division. The hearing officer ruled in his favor but the Insurance Commissioner reversed. On appeal both the circuit court and the Intermediate Court of Appeals affirmed the Insurance Commissioner.[153] On appeal to the Supreme Court the court reversed, holding that the quoted section "deals not with the claimant's right to benefits . . . but only with priority, as to payments, among insurers."[154] To borrow his own language,[155] Justice Padgett, the author of the opinion, seems to have "emasculate[d] the plain language of" *Hawaii Revised Statutes* section 294-5, not to mention having ignored the legislative history, which made it rather clear that workers' compensation benefits were to be subtracted from the amount of P.I.P. benefits that would otherwise be available. The dissenters, Justices Nakamura and then-Circuit Judge Moon, convincingly demonstrated the correctness of the opposite result.[156] They also noted that the decision created "an anomaly that

---

[150] 67 Haw. 347, 687 P.2d 1 (1984) (Padgett, J.).

[151] *Id.*

[152] HAW. REV. STAT. § 294-5 (1973).

[153] 67 Haw. at 347, 687 P.2d at 4.

[154] *Id.* at 350, 687 P.2d at 4.

[155] Hawaiian Ins. & Guar. Co. v. Financial Security Ins. Co., 72 Haw. 80, 95, 807 P.2d 1256, 1263 (1991) (Padgett, J., dissenting).

[156] 67 Haw. at 351, 687 P.2d at 5.

could not have been within the legislature's contemplation—a loss of $1,534 in gross earnings will now be replaced by $1,534 in tax free benefits.''[157]

Other cases which tended to expand the amount of P.I.P. benefits include these:

Early in his tenure, Chief Justice Lum wrote the opinion in *Mizoguchi v. State Farm Mutual Automobile Ins. Co.*,[158] in which the estate of the no-fault insured, who had died while driving his automobile, sought the full optional amount of P.I.P. coverage, $50,000.[159] The no-fault insurer, Allstate, argued that the survivor's recovery should be restricted to $15,000, the maximum amount set forth in the no-fault law in the event of death. The court, in a well-reasoned decision, held ''that work loss benefits would be payable in cases of death in addition to any survivors' loss benefits and that eligible beneficiaries would be entitled to no-fault benefits up to the increased aggregate limit of any additional coverage.''[160]

In *Ganiron v. Hawaii Ins. Guaranty Ass'n*,[161] the court held that a victim of a shooting from one automobile into another was entitled to no-fault benefits.[162] The court's expansive decision in *Ganiron* raises the interesting question whether the court's generous reasoning would have led to the payment of P.I.P. benefits to the victim in *Hawaiian Ins. & Guaranty Co., Ltd. v. Brooks*,[163] who was raped by another passenger in the back of a pickup truck.

In *Barcena v. The Hawaiian Ins. & Guaranty Co., Ltd.*,[164] Justice Nakamura, in his decision for the court, deliberately rejected a narrow interpretation of statutory language which seemed to allow the insurer to deny the insured's claim for the expenses of physical therapy.[165] The no-fault law, in describing no-fault benefits, barred payment of expenses

---

[157] *Id.* at 354, 807 P.2d at 6. Subsequently, the legislature amended the section in question, partially adopting the majority's holding that workers' compensation benefits paid for lost earnings should not be deducted from the earnings losses to be paid by no fault, but limiting the total payment to no more than 80% of the person's monthly earnings. *See* HAW. REV. STAT. § 431:10C-305(2)(1988).

[158] 66 Haw. 373, 663 P.2d 107 (1983) (Lum, C.J.).

[159] *Id.* at 374, 663 P.2d at 110.

[160] *Id.* at 378, 663 P.2d at 113.

[161] 69 Haw. 432, 744 P.2d 1210 (1987) (Padgett, J.).

[162] 69 Haw. at 435, 744 P.2d at 1212.

[163] 67 Haw. 285, 686 P.2d 23 (1984) (Nakamura, J.).

[164] 67 Haw. 97, 678 P.2d 1082 (1984) (Nakamura, J.).

[165] *Id.* at 104, 678 P.2d at 1087.

of physical therapy, as well as other expenses, "for any person receiving public assistance benefits" if the assured was issued a no-fault policy at no cost to her as a recipient of public assistance.[166] In this case, insured had been receiving public assistance benefits when she received a free policy but had evidently become ineligible for public assistance at the time she incurred the physical therapy expenses.[167] In allowing recovery, the court read the language restrictively, holding that "'no-fault benefits' are withholdable only while a person is a recipient of public aid."[168]

In a particularly generous decision, a unanimous court, in *Lorenzo v. State Farm Fire & Casualty Co.*,[169] held that a no-fault insured who became permanently disabled in an automobile accident could continue to receive work-loss benefits under his no-fault policy even after suffering a serious heart attack not caused by the automobile accident, which independently would have rendered him unable to work.[170] Although it is extremely doubtful that the legislature intended to continue payment of no-fault work loss benefits in this situation and although the relevant language of the no-fault law provided little or no support for continuing the payments, the court nevertheless found for claimant, expressing its approval of the reasoning in the dissent to a Michigan case that had been decided in favor of the insurer.[171]

While the foregoing cases indicate a large degree of liberality on the part of the court in deciding whether no fault coverage is available and, if so, in coming down on the generous side, there are other cases which indicate that the court has not "given away the whole store."

In *First Ins. Co. of Hawaii, Ltd. v. Jackson*,[172] for example, the court refused to allow an automobile accident victim and the tortfeasor to bind the insurer, which had paid no-fault benefits to the victim, by a provision in the release specifying that the settlement was for general damages only and did not duplicate payments for any no-fault benefits paid to the claimant.[173] The objective of the settlement agreement had

---

[166] HAW. REV. STAT. § 294-2(10) (1973).

[167] 67 Haw. at 104, 678 P.2d at 1087.

[168] *Id.* at 103, 678 P.2d at 1086-87.

[169] 69 Haw. 104, 736 P.2d 51 (1987).

[170] *Id.* at 110, 736 P.2d at 52.

[171] MacDonald v. State Farm Mutual Ins. Co., 350 N.W.2d 233, 238-39 (Mich. 1984) (Cavanagh, J., dissenting).

[172] 67 Haw. 165, 681 P.2d 569 (1984) (Padgett, J.).

[173] *Id.* at 167, 681 P.2d at 570.

been to bar the insurer from trying to recover fifty percent of the no-fault benefits it had already paid,[174] as it had the right to do under *Hawaii Revised Statutes* section 294-7.[175] In affirming a decision of the Intermediate Court of Appeals,[176] the court, in an opinion by Justice Padgett, disagreed with the Intermediate Court of Appeals' holding that the burden of proving that there was no duplication was on the insured.[177] Instead, the court held that "the insurer must prove factually that the settlement duplicated, in whole or in part, the no-fault benefits already paid."[178] In view of the difficulty the insurer is often likely to encounter in proving that there was a duplication, the holding that the release is not conclusive may turn out to be a Pyrrhic victory for the insurers.

A case which much more clearly kept no-fault coverage within limits was *Rana v. Bishop Ins. of Hawaii, Inc.*,[179] where the court adopted and affirmed a decision of the Intermediate Court of Appeals which had held that an insured who had a single insurance policy which covered several vehicles could not stack the basic no-fault (personal injury protection) coverage on each vehicle.[180] On this issue the no-fault statute seems to speak clearly,[181] and the court followed the clear statutory language.

b. Maintaining the threshold

With regard to the problem of maintaining the integrity of the threshold to bringing a lawsuit, the most important case of the period was arguably *Parker v. Nakaoka*.[182] Plaintiff, injured in an automobile accident, was found by a jury to have suffered $1174.10 of special damages and $66,500 as general damages.[183] The amount of special

---

[174] *Id.* at 167, 681 P.2d at 570-71.

[175] HAW. REV. STAT. § 294-7 (1973) (now HAW. REV. STAT. § 431:10C-307 (1987)).

[176] 5 Haw. App. 98, 678 P.2d 1095 (1984).

[177] 67 Haw. at 167, 681 P.2d at 570-71.

[178] *Id.* at 167, 681 P.2d at 571.

[179] 68 Haw. 269, 709 P.2d 612 (1985) (Wakatsuki, J.).

[180] That is, he could not multiply the amount of personal injury protection coverage or basic no-fault—usually $15,000 unless additional optional coverage is purchased—by the number of cars insured under the policy in order to increase the amount available to each covered person.

[181] *See, e.g.*, HAW. REV. STAT. §§ 294-2(10), 294-3(c) (now § 431:10C-303 (1987)).

[182] 68 Haw. 557, 722 P.2d 1028 (1986) (Wakatsuki, J.).

[183] *Id.* at 558, 722 P.2d at 1029.

damages was too low to reach the medical-rehabilitative limit, then set at $1500, which was one of the ways plaintiff could have overcome the abolition of tort liability.

It is important to note that, without regard to the specific facts of plaintiff Nakaoka's case, this situation—small economic losses coupled with the potential for substantial non-economic losses for pain and suffering, emotional distress, and the like—is illustrative of the very class of costly cases the legislature wanted to remove from the courts unless evidence of more serious injury was present.[184] The way in which the court handled this case is, therefore, indicative of the court's seriousness in keeping a tight rein on the cases which slip through the "tort abolition" net.[185]

In *Parker*, the critical question was whether plaintiff suffered "a significant permanent loss of use of a part of her body."[186] If she had, then her tort action was proper; if not, then her tort action would be dismissed. Two errors were claimed by the defendant: (1) that the judge, rather than the jury, should have determined the critical question, or, (2) in the alternative, that defendant's requested special verdict, putting to the jury the question whether plaintiff's injury satisfied the threshold seriousness requirement,[187] should have been

---

[184] *See id.* at 559, 722 P.2d at 1029. These were the class of cases in which the legislature believed that "relatively minor losses were overcompensated." *Id.* Also, see *id.* for the list of "notable deficiencies in the insurance system" the legislature was seeking to correct when it adopted the no-fault law. As to the trade-off between guaranteed no-fault benefits and the right to sue in order "to reap a monetary windfall," see *id.* at 560, 722 P.2d at 1030.

[185] The court seemed to misdescribe the operation of the no-fault law when it said, in discussing how the law operated, "The traditional tort remedy was left intact for economic losses exceeding those amounts assured of payment under the law, but for non-economic losses which the law assures no definite payment the tort remedy was not left wholly intact." *Id.* at 560, 722 P.2d at 1028 (citing HAW. REV. STAT. § 294-6 (now § 431:10C-306 (1987))). Under the no-fault law, if plaintiff cannot sue, she is limited to the no-fault benefits provided in the act, up to $15,000. This $15,000 includes no non-economic losses. If, on the other hand, the plaintiff crosses one of the thresholds for tort liability, she is entitled to sue for all of her economic and non-economic losses, but must return to the no-fault insurer 50% of the no-fault payments duplicated by the tort recovery. HAW. REV. STAT. § 294-6 (now § 431-10C-306 (1988)).

[186] *See* HAW. REV. STAT. § 294-6 (1973) (now § 431:10C-306 (1987)).

[187] 68 Haw. at 588, 722 P.2d at 1029. The instruction read: "In the accident of February 15, 1978, did Plaintiff SUSAN PARKER sustain injury which constituted a significant permanent loss of use of a part or function of the body? Answer: Yes-No." *Id.* at 558 n.3, 722 P.2d at 1029 n.3.

given.[188] Plaintiff, on the other hand, maintained (1) that the failure of the plaintiff to satisfy the threshold requirement should not only be a jury question but an affirmative defense, to be pleaded and proved by the defendant, and (2) that the bare-bones special verdict should not be given since the appellant failed to proffer an explanatory instruction to the jury on the threshold requirement.[189]

The court essentially "split the baby," holding first that whether the plaintiff has satisfied the threshold requirement is a question for the jury, not the judge,[190] yet then holding that the burden of pleading and proving that the threshold has been satisfied is on the plaintiff, and that the defendant in this case was entitled to have the special verdict submitted to the jury without proffering an explanatory instruction.[191]

Unfortunately, Justice Wakatsuki, in his opinion for the court, did not see fit to provide the specific facts of the *Parker* case, so the reader is left at sea as to why there was a significant issue as to whether the claimed injury satisfied the particular threshold requirement at issue. If, as a result of trial judges' interpretation of *Parker*, the practice of sending most contested cases of painful and possibly long-lasting injury to the jury should develop, then the purpose of the no-fault law could be thwarted. If the court is serious in its effort to enforce the policy behind the no-fault law, as *Parker* suggests it is, then it should not be unwilling to develop some clear interpretations which might allow most non-serious cases which ought, on fair reading of the legislative intent, to fall on the wrong side of the threshold to be dismissed on motion for summary judgment.

B. Negligence

The question is whether, and if so, to what extent the Lum Court has indulged the tendency to allow ordinary negligence principles to expand to their logical limits, as discussed at the beginning of this article. The conclusion, to be developed in the discussion below, is that, with the exception of product liability, the era of expansion of tort liability has come to an end.

---

[188] 68 Haw. at 558, 722 P.2d at 1029.

[189] *Id.* at 562-62, 722 P.2d at 1032.

[190] *Id.* at 562, 722 P.2d at 1031. Unless, of course, the judge determines that reasonable persons could not agree. *Id.*

[191] *Id.*

1. The Firefighter's Rule[192]

In 1969, in *Pickard v. City and County of Honolulu*[193] the Hawaii Supreme Court, following the lead of the California Supreme Court,[194] dispensed with the familiar categories of licensee and invitee which had traditionally governed the duties of an occupier of land to those who came upon the land. In its place the court imposed a duty on the occupier "to exercise reasonable care for the safety of all persons anticipated to be on the premises."[195] In 1965, in *Bulatao v. Kauai Motors, Ltd.*[196] the Supreme Court, in an opinion by Rhoda Lewis, citing with approval New Jersey's path-breaking decision in *Meistrich v. Casino Arena Attractions, Inc.*,[197] rejected the applicability of the doctrine of secondary assumption of risk in cases in which the doctrine merely paralleled the doctrine of contributory negligence.[198] The court also held that assumption of risk has no place when a person knowingly encountering a known risk is found to have acted reasonably in doing so.[199]

In view of these cases one might have predicted that when the court came to decide whether to allow a firefighter to recover damages for injuries suffered in line of duty as a result of a land occupier's negligence in causing the fire and the injuries, it would have answered in the affirmative. After all, absent the doctrines of primary and secondary assumptions of risk, eliminated by *Pickard* and *Bulatao*, there is precious little reason left under the traditional law of torts for denying recovery to the firefighter in such cases. This is particularly true when Hawai'i statutes impose a duty on landowners to keep their buildings "reasonably safe from loss of life or injury to persons or property by fire."[200]

---

[192] *See* Thomas v. Pang, 72 Haw. 191, 203, 811 P.2d 821 (1991) ("The name of the rule adopted in this case is not the Fireman's Rule. Its name is the Firefighter's Rule, formerly known as the Fireman's Rule." (Burns, J., concurring)).

[193] 51 Haw. 134, 452 P.2d 445 (1969) (Richardson, C.J.); *see also* Gibo v. City and County of Honolulu, 51 Haw. 299, 459 P.2d 198 (1969) (Abe, J.).

[194] Rowland v. Christian, 443 P.2d 561 (Cal. 1968).

[195] 51 Haw. at 135, 452 P.2d at 446.

[196] 49 Haw. 1, 406 P.2d 887 (1965).

[197] 155 A.2d 90 (N.J. 1959).

[198] 49 Haw. at 15, 406 P.2d at 895.

[199] *Id.* at 14, 406 P.2d at 894.

[200] HAW. REV. STAT. § 132-8 (1917).

Nevertheless, in *Thomas v. Pang*,[201] the court adopted the firefighter's rule. Rather than relying on the discredited traditional defenses, however, the court asserted that it explicitly relied "on considerations of public policy."[202] What these considerations seem to boil down to is that firefighters are to be denied the recovery available to most other public employees when they suffer injury in the line of duty as a result of an occupier's negligence because: (1) they are needed for the protection of society;[203] (2) their presence at the locus of a fire arises out of a "duty owed to the public as a whole;"[204] (3) their very purpose is to confront danger;[205] (4) "the timing of their entry cannot be predicted;"[206] (5) while they are "performing their duties a landowner or occupier is without authority to control their action;"[207] and (6) "[d]anger is inherent in a firefighter's work and the firefighter is trained and paid to encounter hazardous situations unlike the majority of public employees."[208]

While each of these reasons is true, individually they do not seem to justify the denial of recovery and they do not fare any better collectively. In order to be found liable for negligence, after all, a land owner would have to unreasonably fail to foresee and guard against an unreasonable risk of harm to those who might come on the premises. "The risk to be perceived," said Cardozo, "defines the duty to be obeyed"[209] and "danger invites rescue."[210] A landowner who negligently creates a risk of fire also negligently creates a risk of harm to the firefighter who comes to put out the fire. It is hard to see why the nature of the firefighter's profession or the other factors mentioned by the court should result in a denial of recovery.

What might arguably justify denial of recovery from a policy point of view, however, is a genuine fear that every time a firefighter is hurt in the course of duty at a fire, a lawsuit will be brought against the occupier of the premises or others who might be charged with negli-

---

[201] 72 Haw. 191, 811 P.2d 821 (1991) (Wakatsuki, J.).
[202] *Id.* at 196, 811 P.2d at 824.
[203] *Id.*
[204] *Id.*
[205] *Id.* at 197, 811 P.2d at 825.
[206] *Id.*
[207] *Id.*
[208] *Id.*
[209] Palsgraf v. Long Island Railroad Company, 162 N.E. 99, 100 (N.Y. 1928).
[210] Wagner v. International Railway Co., 133 N.E. 437, 437 (N.Y. 1921).

gence.[211] The fear of a multitude of suits, however, was pretty well discredited by the Richardson Court as a reason for denying a just claim.[212] If this is the "real" basis for the decision, therefore, the decision represents an about-face for the court, demonstrating, like others already discussed, a heightened concern for the premium payer and the insurer[213] and significantly reduced concern for deterrence and for the adequacy of compensation.[214]

2. Negligent Serving of Liquor

In 1980, in *Ono v. Applegate*,[215] the Richardson Court held that a victim of an accident caused by another's intoxication could recover damages from the bar that negligently served liquor to the other while the other was intoxicated.[216] In his opinion for the court, Justice Ogata expressly repudiated the traditional common law rationales which disingenuously reasoned that it was the voluntary consumption of the alcohol—and not its sale or service—that was the proximate cause of the ensuing accident, and that it was not reasonably foreseeable to the liquor seller or server that the sale or service of the alcoholic beverage would cause the subsequent accident or injury.

The court found the seller's duty to arise from the Hawai'i liquor law which, although it does not expressly provide a civil remedy in damages, prohibits the sale of liquor by a licensee to a person "under the influence of liquor."[217]

---

[211] 72 Haw. at 202, 811 P.2d at 827 (Padgett, J., dissenting). "Let us make no mistake about what this case really involves. It involves the liability insurance policies of those in control of the premises where the fire occurred." *Id.*

[212] *See, e.g.*, Rodrigues v. State, 52 Haw. 156, 472 P.2d 509 (1970) (Richardson, C.J.).

[213] Although the firefighter's rule has recently come under criticism, it is evidently followed by the vast majority of states. *See* Annot., *Liability of Owner or Occupant of Premises to Fireman Coming Thereon in Discharge of His Duty*, 11 A.L.R.4th 597 (1979). *But see* Christensen v. Murphy, 678 P.2d 1210 (Or. 1984).

[214] 72 Haw. at 197, 811 P.2d at 827.

[215] 62 Haw. 131, 612 P.2d 533 (1980) (Ogata, J.). For a good analysis of *Ono*, see Note, Ono v. Applegate: *Common Law Dram Shop Liability*, 3 U. HAW. L. REV. 149 (1981).

[216] The court drew heavily on the analysis of the California Supreme Court in Vesely v. Sager, 486 P.2d 151 (Cal. 1917), even though *Vesely* had been specifically abrogated by the California legislature well before the Hawaii Supreme Court considered *Ono*.

[217] HAW. REV. STAT. § 281-78(a)(2)(B) (1976). The statute provides, in pertinent part: "(a) At no time under any circumstances shall any liquor: . . . . (2) Be sold or furnished by any licensee to: (A) Any Minor. (B) Any person at the time under the influence of liquor. . . ." *Id.*

The logic of the decision in *Ono* would have suggested that since an adjacent subsection of the same statute prohibited a licensee from selling liquor to a minor, minors who are served liquor while intoxicated might also recover for their injuries caused by the intoxication. The opinion in *Ono*, however, expressly left open the question "whether a non-commercial supplier of liquor may be held liable for injuries caused by the intoxicated."[218] As to that question and the question whether the intoxicated patron, not a minor, who gets into an accident and suffers injury after leaving the premises where the liquor was served can recover against the server, the court strongly suggested that a common law duty, not grounded in the liquor control statute, might exist: "The first prime requisite to deintoxicate one who has, because of alcohol, lost control over his reflexes, judgment and sense of responsibility to others, is to stop pouring alcohol into him. *This is a duty which everyone owes to society and to law entirely apart from any statute.*"[219]

If the court were to find such a duty to run to the drinker, as well as the third person, then presumably the appropriate way to deal with the drinker's own negligence would be to consider his behavior under Hawai'i's comparative negligence statute.[220]

In a series of decisions since *Ono*, however, the Lum Court has refused to extend liability for serving of liquor beyond the facts of *Ono* itself, notwithstanding the clear promise of Justice Ogata's opinion. Thus, In *Bertlemann v. Taas Associates*[221] the court held that "in the absence of harm to an innocent third party, merely serving liquor to an already intoxicated customer and allowing said customer to leave the premises, of itself, does not constitute actionable negligence."[222] The court did note, however, that "a bar or tavern owes a duty to avoid affirmative acts which increase the peril to an intoxicated cus-

---

[218] 62 Haw. at 136 n.5, 612 P.2d at 538 n.5.

[219] *Id.* (emphasis added). The common law, non-statutory duty, might arise from reasoning similar to that contained in Brett, M.R.'s famous dictum in Heaven v. Pender:

> Whenever one person is by circumstances placed in a position with regard to another that every one of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger.

11 Q.B.D. 503, 509 (1883).

[220] HAW. REV. STAT. § 663-31 (1985).

[221] 69 Haw. 95, 735 P.2d 932 (1987) (Hayashi, J.).

[222] *Id.* at 101, 735 P.2d at 934.

tomer."[223] In *Feliciano v. Waikiki Deep Water*[224] the court held that the duty to avoid affirmative acts did not include "aggressive sales of drinks" to a nineteen-year-old adult who claimed lack of sophistication about drinking.[225] Plaintiff had claimed that although he did not recall ever asking for a drink, alcoholic drinks began arriving "automatically"[226] and, being intimidated by the aggressiveness of the waitresses, he paid for and drank them.[227] During the drive home Feliciano's truck left the road and crashed, rendering him a quadriplegic.[228] In *Johnston v. KFC National Management Co.*[229] the court explicitly held that "a non-commercial supplier of alcoholic beverages—the social host—does not have a duty to protect third persons from risks of injury caused by an inebriated person to whom the social host served alcoholic beverages."[230] Finally, in *Winters v. Silver Fox Bar*[231] the court extended the holding of *Bertlemann*—that the person unlawfully served liquor cannot recover for his own injuries—to an eighteen-year-old minor who became drunk and subsequently sustained a fatal injury as a result of his intoxication.[232] The decision is broad enough to deny recovery to minors under the age of eighteen.[233] However, the court's

---

[223] *Id.* Such an act, for example, might be removing the customer to a place where, because of his intoxication, he will be subjected to increased peril of bodily harm. *Cf.* Parvi v. City of Kingston, 362 N.E.2d 960 (N.Y. 1977) (holding that city had duty to plaintiff hit by a car who had been transported by police, while intoxicated, to spot outside the city limits near a busy thoroughfare).

[224] 69 Haw. 605, 752 P.2d 1076 (1988) (Lum, C.J.).

[225] *Id.* at 606, 752 P.2d at 1077. Feliciano grew up in Waianae and claimed that before the incident he had never driven to Honolulu and had never been to Waikiki; that he grew up in a sheltered environment due to an accident in which he was run over by a truck as a teenager, preventing him from attending school for a considerable period of time; and that he had tasted beer on prior occasions but was not an experienced drinker. *Id.*

[226] *Id.*

[227] *Id.* Feliciano claimed to have consumed at least four drinks in a two-and-a-half hour period and to have spent approximately $175.00. *Id.*

[228] *Id.* at 606, 752 P.2d at 1077-78.

[229] 71 Haw. 229, 788 P.2d 159 (1990) (Wakatsuki, J.).

[230] *Id.* at 230, 788 P.2d at 159-60.

[231] 71 Haw. 524, 797 P.2d 51 (1990) (Moon, J.).

[232] 71 Haw. 524, 536, 797 P.2d at 56-57. The court also held that the rights of the minor's survivors under the wrongful death act, HAW. REV. STAT. § 663-3 (1985), were derivative. Since the minor was barred, so were his survivors. *Id.*

[233] The court cited Miller v. City of Portland, 604 P.2d 1261, 1265 (Or. 1980), in which the Oregon Supreme Court denied recovery to a minor even though a statute, like Hawai'i's, prohibited the sale of liquor to persons under twenty-one. The Oregon

lengthy discussion of the legislative purpose in raising the drinking age from eighteen to twenty-one—simply to satisfy federal requirements for continued receipt of highway funds[234]—and its description of a minor as connoting "one who lacks maturity and requires supervision and protection for his/her well-being and safety,"[235] suggests that the court might eventually allow recovery in the case of such a "true" minor.[236]

The necessary effect of these post-*Ono* cases, however, is to put an end to the logical extension of the negligence principles set free in *Ono*. And the reasons for doing so are made unequivocally clear by Justice Wakatsuki in *Johnston* and by Justice Moon in *Winters*. In refusing to allow social host liability in *Johnston*, the court views the problem "[f]rom an economic perspective [where] there needs to be consideration of the effect social host liability would have on homeowners' and renters' insurance rates, and the economic impact on those not wealthy or foresighted enough to obtain such insurance."[237] In refusing to extend the right to recover to a minor unlawfully served liquor at a bar, the court in *Winters* rooted around the legislative history of the Hawai'i "tort reform" legislation, which as has been noted above does not amount to much,[238] and proceeded to adopt the legislative intent there expressed as the policy to be followed in these cases:

> [W]e note that the 1986 Regular and Special Session of the legislature focused its efforts on tort reform due to the then purported liability insurance crisis and sought to reduce and stabilize automobile and commercial liability insurance rates. Therefore, it would be totally

---

court had noted that there was another statute, as there is in Hawai'i, which prohibits minors from purchasing liquor and that "[i]t would be inconsistent with apparent legislative policy to reward the violator with a cause of action based upon the conduct which the legislature has chosen to prohibit and penalize." 71 Haw. at 529-30, 797 P.2d at 53 (quoting *Miller*, 604 P.2d at 1263).

A contrary argument, however, is that notwithstanding the prohibition and penalty imposed on minors for purchasing alcoholic beverages, the statute prohibiting licensees from selling liquor to "true" minors should be interpreted as protecting them, as a class, from their own immaturity and lack of judgment. *Cf.* W. PAGE KEETON ET. AL., PROSSER AND KEETON ON THE LAW OF TORTS, § 18 at 123 (5th ed. 1984) [hereinafter "PROSSER"].

[234] 71 Haw. at 532, 797 P.2d at 55.

[235] *Id.* at 531, 797 P.2d at 54.

[236] The court indicated that the question whether infants under 18 should be dealt with differently from infants over 18 should be decided by the legislature. *Id.* at 535, 797 P.2d at 56.

[237] 71 Haw. 229, 237, 788 P.2d. 159, 163-64 (1990).

[238] *See supra* notes 45-54 and accompanying text.

> inconsistent with the legislative policy of 1986 to conclude that it intended to expand the liability of commercial liquor suppliers which in turn would undoubtedly increase their liability insurance premiums.[239]

Such creative use of legislative policy may be appropriate as a makeweight where the court's decision may effect "changes in social relations in a society where consumption of alcohol is a pervasive and deeply rooted part of our social life,"[240] as is probably the case with holding social hosts responsible for serving liquor to their guests. But it is considerably less clear why such legislative expression of policy should be given effect with regard to a dram shop's liability to minors whom it is prohibited by statute from serving where the Hawaii Supreme Court's direction in effectuating the statutory purpose behind the liquor licensing law has already been demonstrated in a widely discussed case, *Ono v. Applegate*, and the legislature has not expressed its dissatisfaction either by overruling *Ono* or by adopting legislation limiting its expansion. Indeed, the legislature seems to be demonstrating far greater concern in recent years for the problems of drunk driving[241] than it has for the problems it has dealt with under the heading of tort reform.[242]

In any event, it is suggested that there were, and still are, options available to the court with regard to the serving of alcoholic beverages, whether by a licensee or a social host, that will enhance deterrence as well as compensation for deserving victims without necessarily bringing on a flood of litigation or producing a new crisis in the availability and cost of commercial and homeowners' insurance. For example, the court could require that the plaintiff prove that the defendant, or defendant's employee, had *actual knowledge* of facts regarding the drink-

---

[239] 71 Haw. at 534-35, 797 P.2d at 56 (footnotes omitted). The court also noted that the legislature has been adopting stricter laws and heavier penalties in order to cut down on "the devastating cause of loss of human life and limb on our highways," *Id.* at 535, 797 P.2d at 56. However, it decided that whether the law should be expanded to further deal with these problems, in the face of the economic issues it identified in connection with tort reform, should better be left to the legislative branch: "It is within the legislature's province to weigh and balance the far reaching social, economic and legal consequences of modifying the common law as Appellant urges." *Id.*

[240] 71 Haw at 237, 788 P.2d at 159 (quoting Garren v. Cummings & McReady, Inc., 345 S.E.2d 508, 510 (S.C. App. 1986) (quoting Miller v. Moran, 421 N.E.2d 1046, 1049 (Ill. App. 1981))).

[241] *See Johnston*, 71 Haw. at 236, 788 P.2d at 163.

[242] *See supra* note 240 and accompanying text.

er's consumption of alcohol or the drinker's other conduct, or both, which would make it obvious, to a reasonably prudent person in the defendant's circumstances, that the drinker was intoxicated.[243] Perhaps such a test, which eliminates the much more liberal "should have known" criteria of ordinary negligence,[244] if coupled with a higher burden of proof, such as "clear and convincing evidence"[245] would strike an appropriate balance between the competing policies involved in these cases. If so, then there is no compelling reason to refuse to so extend the negligence principle in order to help to further reduce the incidence of alcohol-based accidents and to compensate its victims.[246]

3. Actions Against Governmental Entities

In the State Tort Liability Act, the State waived its immunity from tort liability and provided that the State "shall be liable in the same manner and to the same extent as a private individual under like circumstances . . . ."[247] Notwithstanding this clear mandate for Hawai'i's courts to treat the state the same as they would a private defendant, even the Richardson Court tended to interpret the common law in a manner favoring the State against a tort claimant seeking to recover from the State's deep pocket. Thus, by way of a fairly blatant example, the court in 1973, in *Ikene v. Maruo*,[248] held that the State had no duty to design or correct a dangerous curve in a highway in order to make it safe for persons in speeding cars,[249] even though speeding drivers are as foreseeable as rain in Hawai'i, the State knew or should have known that the curve in question was dangerous, and the plaintiff was the passenger and not the speeding driver.

---

[243] In a similar vein, some states have limited the liability of social hosts or others to "obviously intoxicated" or "visibly intoxicated" minors. *See, e.g.*, CAL. BUS. & PROF. CODE § 25602(b)-(c) (West 1985); *id.* § 25602.1 (West Supp. 1988) ("obviously intoxicated); OR. REV. STAT. §§ 30.950-30.960 (1988) ("visibly intoxicated").

[244] Under *Ono*, for example, the liberal "should have known" criteria may impose on a liquor seller a burdensome duty which it would be impracticable to enforce in a busy bar.

[245] *See, e.g.*, Masaki v. General Motors Corp., 71 Haw. 1, 780 P.2d 566 (1979) (Lum, C.J.) (adopting "clear and convincing" standard as a requirement for proof of punitive damages); *see infra* note 318 and accompanying text.

[246] *Cf.*, Note, 102 HARV. L. REV. 549 (1988) (calling for judicial adoption of social host liability).

[247] HAW. REV. STAT. § 662-2 (1957).

[248] 54 Haw. 548, 511 P.2d 1087 (1973) (Levinson, J.).

[249] *Id.* at 551, 511 P.2d at 1089.

This same tendency seems to continue to be at work under the current court. Thus, by way of the most serious example, the court in *Wolsk v. State*[250] held that the State had no duty to warn or provide protection against the criminal conduct of third persons to visitors camping in a state park.[251] While camping in MacKenzie State Park two visitors were brutally beaten and one of them was killed by unidentified persons.[252] The court considered the *Restatement (Second) of Torts* which recognizes, in section 315(b), a duty to control the conduct of third persons "so as to prevent [them] from causing physical harm to another" where "a special relation exists between the actor and the other which gives to the other a right to protection."[253] Section 314(A)(3) states, as one of the situations creating such a relationship, that "a possessor of land who holds it open to the public is under a similar duty to members of the public who enter in response to his invitation."[254] Nevertheless, the court held: "[T]he Restatement principles are not applicable to the facts of this case since no special relationship exists."[255] In so holding the court inexplicably failed to explain adequately why section 314(A)(3), which was specially italicized in the opinion, was inapplicable.[256] The cases cited by the court dealt for the most part with the absence of a relationship between the criminal actor and the public entity where there was clearly no special relationship between the public entity and the plaintiff.[257] In the one cited case in which the relationship between the plaintiff and the occupier, a hotel, was in question, the Intermediate Court of Appeals had found that there was no duty to protect a non-guest of the hotel.[258] However, by way of contrast to *Wolsk*, the court in the following year, in *Knodle v. Waikiki Gateway Hotel, Inc.*,[259] found a duty based upon the special

---

[250] 68 Haw. 299, 711 P.2d 1300, 59 A.L.R. 4th 1229 (1986) (Hayashi, J.).

[251] *Id.* at 303, 711 P.2d at 1303.

[252] *Id.* at 300, 711 P.2d at 1301.

[253] RESTATEMENT (SECOND) OF TORTS § 315(b) (1965), *cited in* 68 Haw. at 301-02, 711 P.2d at 1302.

[254] RESTATEMENT (SECOND) OF TORTS § 314(A)(3) (1965), *cited in* 68 Haw. at 301-02, 711 P.2d at 1302.

[255] 68 Haw. at 302, 711 P.2d at 1302.

[256] *Id.*

[257] *Id.*

[258] King v. Ilikai Properties, 2 Haw. App. 359, 632 P.2d 657 (1981) (Hayashi, C.J.) (noting that HAW. REV. STAT. § 314(a)(2) recognizes a special relationship between an innkeeper and his/her guests).

[259] 69 Haw. 376, 742 P.2d 377 (1987) (Nakamura, J.). The opinion in *Knodle* is an important and well-written exegesis on the law of negligence and its elements.

relationship of innkeeper and guest, as set forth in *Restatement* section 314(A), to protect guests from unreasonable risks of criminal conduct.[260] It is difficult to understand, except on the ground of preferential treatment for the State, why the court followed the *Restatement* and recognized a special relationship in *Knodle* but not in *Wolsk*.[261]

Other examples of the court's granting the State greater protection than is granted to private defendants are provided by two decisions holding, first, that the tolling statute for minors applies to automobile negligence actions brought pursuant to the no-fault law,[262] which expressly bars suits based on motor vehicle accidents brought more than two years after the accident or after the last no-fault payment,[263] and second, that it does not apply to such actions brought under Hawai'i's State Tort Liability Act,[264] which bars suits in which the action is not brought within two years after the claim accrues.[265] While the court found a colorable reason applicable to the suit against the State which would justify different treatment from that given to the action under

---

[260] *Id.* at 392, 742 P.2d at 388.

[261] The most difficult issue in cases such as these may be the question of "cause in fact" or "substantial factor." It is by no means clear either in *Wolsk* or in *Knodle* that exercising reasonable care would have prevented the tragic consequences. Assuming the question is allowed to get to the jury, there is naught for the jury to do but speculate as to whether the taking of reasonable precautions by defendant would have made any difference.

Where the State is a defendant, as in *Wolsk*, the question whether the exercise of the duty falls within the "discretionary function" exception to State tort liability may provide another opportunity for the court to protect the State from liability. Because the court in *Wolsk* found no legal duty to plaintiffs, it determined that it did not have to respond to this question. In the future, however, this grounds of exception to state tort liability is likely to loom much larger in view of the extraordinarily expansive view of what constitutes a discretionary function adopted by the United States Supreme Court in United States v. Gaubert, ___ U.S. ___, 111 S.Ct. 1267 (1991). In *Gaubert* the Court rejected the planning level/operational level distinction, which had been the principal guideline for Hawai'i and other courts in the past, and held that even an operational level activity could be a discretionary function if "it involved the exercise of discretion in furtherance of public policy goals." *Id.* at ___, 111 S.Ct. at 1279. The Court noted: "If the routine or frequent nature of a decision were sufficient to remove an otherwise discretionary act from the scope of the exception, then countless policy-based decisions by regulators exercising day-to-day supervisory authority would be actionable." *Id.*

[262] Crawford v. Crawford, 69 Haw. 410, 745 P.2d 285 (1987) (Hayashi, J.).

[263] HAW. REV. STAT. § 294-36(b) (1985).

[264] Whittington v. State, 72 Haw. 77, 806 P.2d 957 (1991) (Padgett, J.).

[265] HAW. REV. STAT. § 662-4 (1985).

the no-fault law—that the tolling statute only applies to actions there specified[266] and the action under the State Tort Liability Act is not specified[267]—such a conclusion does not seem inexorable: the court could have found that the nature of the action, one for personal injury arising out of a motor vehicle accident, was specified in *Hawaii Revised Statutes* section 657-7, which is the statute of limitations applicable to "actions for the recovery of compensation for damages or injury to persons or property."[268]

It is not difficult to understand why the court might wish to protect the State's fisc against a multitude of actions. On the other hand, the State Tort Liability Act does call rather specifically for treating the State the same as a "private individual."[269]

4. Jury Instructions—Emergency Rule, Unreasonably Dangerous, and Joint and Several Liability

In two cases, one as recent as 1989, the Lum Court has upheld claims of error in negligence cases when the trial court has given instructions to the jury which are technically correct, but which the court feels tend excessively to favor the defendant. In the first case, *Dicenzo v. Izawa*,[270] the court, in an opinion by Justice Nakamura, held that it was error to give a *correct* instruction on the emergency rule[271] separately and apart from the general negligence instruction. The court said "The doctrine of sudden emergency cannot be regarded as something apart from and unrelated to the fundamental rule that everyone

---

[266] HAW. REV. STAT. § 657-13 (1984).

[267] *Whittington*, 72 Haw. at 78, 806 P.2d at 957-58.

[268] HAW. REV. STAT. § 657-7 (1907).

[269] HAW. REV. STAT. § 662-2 (1957).

[270] 68 Haw. 528, 723 P.2d 171 (1986) (Nakamura, J.).

[271] The instruction read, in pertinent part:

> An emergency situation is a sudden or unexpected combination of circumstances which calls for immediate action. Such a situation leaves the actor with no time for thought and requires a speedy decision based largely on impulse.
>
> Thus, if you find that if defendant . . . faced an emergency situation on April 12, 1982 which was not of her own making, you must find that she was not negligent in her conduct if you also find that her actions were those of a reasonably prudent person in a similar emergency. Whether or not such emergency situation existed on April 12, 1982 is a matter of fact for you to decide based upon all of the evidence of the case.

Id. at 540-41, 723 P.2d at 171.

is under a duty to exercise ordinary care under the circumstances to avoid injury to others."[272] The court was concerned that placing the instruction on the emergency rule apart from the negligence instruction might create the erroneous impression that the emergency rule provided a standard of care different from the ordinary standard of care in a negligence case and that this might also confuse the jury.[273] Because of problems of confusion associated with the emergency doctrine,[274] the court's opinion, though pro-plaintiff, was not exceptional.

The case of *Corbett v. Ass'n of Apartment Owners of Wailua Bayview Apartments.*,[275] however, is another story. In *Corbett*, plaintiff claimed to have fallen as a result of a five-inch difference between the height of the sidewalk and the adjacent lawn.[276] The trial court gave defendant's proposed instructions, which stated that in order to recover, plaintiff must prove that the condition was "unreasonably dangerous."[277] Evidently, the unreasonably dangerous requirement was repeated five times in the instructions.[278]

The court, speaking through Justice Padgett, held the instructions incorrect:

> The focus of the test for negligence should be, and, in the case of jury instructions, must be, on the unreasonableness of the risk of harm, not on the degree of dangerousness of the condition.
>
> A jury might, and probably would, regard the four- to five-inch difference in height between the sidewalk and the adjoining lawn as not "unreasonably dangerous" but it might find that, in the circumstances of the case, it posed an unreasonable risk of harm.[279]

With all due respect, the distinction between the charge given and the court's preferred language seems to be a distinction without a difference. "Danger" and "risk" are synonyms, as are "dangerous"

---

[272] *Id.* at 541, 723 P.2d at 179.

[273] *Id.* at 543, 723 P.2d at 181. The court also stated: "[W]e think the wiser course of action would be to withhold sudden emergency instructions." *Id.* at 544, 723 P.2d at 181. However, the court did indicate that it would be permissible for counsel to make the sudden emergency argument in addressing the jury. *Id.*

[274] *See* PROSSER, *supra* note 233, § 33 at 196-97.

[275] 70 Haw. 415, 772 P.2d 693 (1989) (Padgett, J.).

[276] *Id.* at 415, 772 P.2d at 694.

[277] *Id.* at 416, 772 P.2d at 694.

[278] *Id.*

[279] *Id.* at 417-18, 772 P.2d at 695.

and "risky".[280] It seems clear that a condition which constitutes an "unreasonable risk of harm," the preferred language, is "unreasonably dangerous," the prohibited language.

While it is true that some courts, including the Hawaii Supreme Court, have eliminated the requirement that a defective product be "unreasonably dangerous" in order to recover under strict product liability, the reason that requirement has been eliminated is that it smacks of negligence.[281] The *Corbett* case, however, was a negligence case and the unreasonably dangerous language in the charge seems entirely appropriate.

From the point of view of tort reform, surely one of the most significant cases handed down by the Lum Court was *Kaeo v. Davis*.[282] In *Kaeo*, the court held that where a party so requests, the trial court should inform the jury of the possible effect of a verdict in which it (the jury) apportions negligence among two or more joint tortfeasors.

The action was a suit by a passenger of an automobile for serious injuries suffered when the vehicle collided with a utility pole.[283] Under the facts found by the jury in its special verdict, the driver of the car was found by the jury to be 99% negligent, while the City and County of Honolulu was found to be 1% negligent.[284] Under the rule of joint and several liability, of course, the effect of such a verdict would be to make the two defendants each liable for 100% of the verdict. Although the defendant paying a higher percentage of the damages than its percentage of fault would normally have a right to contribution against the other, the reality in a case such as this, where the jury found damages of $725,000,[285] would be that the much-less-negligent defendant, in this case the City and County, will end up paying the lion's share of the verdict; more often than not the driver or owner of the vehicle will only have the minimum mandatory amount of liability insurance coverage—$35,000 for each injured person—and minimal personal assets, as well.

Why is telling the jury the effect of their verdict so significant? Because the subject of joint and several liability is one with which most

---

[280] WEBSTER'S NEW COLLEGIATE DICTIONARY 209, 732 (1961); *see also*, BLACK'S LAW DICTIONARY 393, 1328 (6th ed. 1990).

[281] *See* Cronin v. J.B.E. Olson Corp., 501 P.2d 1153, 1162 (Cal. 1972).

[282] 68 Haw. 447, 719 P.2d 387 (1986) (Nakamura, J.).

[283] *Id.* at 449, 719 P.2d at 389.

[284] *Id.* at 451, 719 P.2d at 390.

[285] *Id.*

jurors are not familiar. If the jury is asked to assign a percentage of fault to each defendant guilty of some causal fault, it is likely to infer, quite logically, that each defendant will *only* be liable for that percentage of the verdict. In fact, however, each such defendant will become jointly and severally liable to the plaintiff *for the entire verdict.* Should that be known to the jury, should the institutional defendant be guilty of the smaller amount of fault (in this case only 1%), and should the jurors, or some of them, be concerned about the high cost of taxes or utility rates, the likelihood is probably excellent that the jury will prefer to find the institutional defendant not guilty rather than subject it to what the jury might believe is an excessive and disproportionate amount of the damages. At the least, the jury will be severely tempted to distort its findings in order to remove the burden of liability from the institutional defendant.

Thus, the effect of informing the jury of the effect of joint and several liability will be to tempt the jury to distort the facts they find in order to achieve a result that they believe might benefit them as taxpayers or rate-payers. Possibly, but not necessarily, they may also believe that the result they are seeking by distorting the facts is more just. If they do so believe, then they will, in effect, be rewriting the law to suit their own view of what the law should be.

The rule of joint and several liability, however, is essentially a just rule: a party who negligently subjects another to an unreasonable risk of harm should be liable for the entire damages if the operation of that risk is the proximate cause of the damages, even though the negligence of other parties concurred to produce those damages.[286] Arguably, therefore, the jurors' substitution of their own judgment, possibly for self-serving reasons, should be discouraged. This is particularly true where, as here, the legislature has considered the matter and enacted detailed legislation which, in effect, retains the rule of joint and several liability in most cases.[287]

---

[286] One of the reasons the deep pocket defendant may end up being saddled with an excessive amount of the liability costs, when its negligence is compared with that of other defendants as in this case, is that the "shallow pocket" defendant is inadequately insured. Insurance inadequacy is a serious problem not only because of unfairness to the wealthier defendant, but especially because it adversely effects seriously injured plaintiffs in cases where there is no deep pocket defendant. This problem should be resolved by a substantial increase in the amount of minimally required liability insurance, as is the case in other nations, such as Japan and Canada.

[287] *See* HAW. REV. STAT. § 663-10.9 (1986).

In any event, the likely effect of informing the jury of the effect of their findings is to achieve a modification of the rule of joint and several liability by exposing it to the possibility of jury nullification. This is especially true in cases such as *Kaeo*, where deep-pocket public or quasi-public entities are very often joined as parties in accident cases. This may have a much more significant impact on tort claims than recent "tort reform" legislation.[288] On the other hand, however, *Kaeo* can be viewed as simply offsetting similar outcomes, often favorable to plaintiffs, where the court, as it is required to do "where appropriate," informs the jury of the effect of comparative negligence.[289] What is sauce for plaintiffs should be sauce for the defendants.[290]

5. *Foreseeability and the Negligence Formula*

The case of *Henderson v. Professional Coatings Corp.*,[291] is not only consistent with the view that the expansion of negligence has come to an end but may demonstrate a contraction of the negligence principle. There, the court held that summary judgment was correctly granted to defendant on claims of both negligent entrustment and general negligence where plaintiff alleged that the defendant, who knew that one of his employees was an alcoholic, lent a company-rented automobile to that employee for likely use in going to a party with other employees, and that employee in turn allowed another intoxicated employee to use the automobile, resulting in a head-on collision with plaintiff.[292]

As the dissenters, Justices Padgett and Hayashi, correctly pointed out, the usual rule is that "[f]oreseeability is not to be measured by

---

[288] *See, e.g., id.*

[289] HAW. REV. STAT. § 663-31(d) (1985). Telling the jury how our modified comparative negligence statute works may cause the jury to distort its percentage findings in order to prevent a sympathetic plaintiff's percentage of negligence from being greater than 50% when compared to the total of all the negligence of the persons against whom recovery is sought. If the plaintiff's negligence is greater than 50%, she will recover nothing. *Id.*, § 663-31.

[290] It is not clear that the court need give the clarifying instruction, even though requested, in all situations. Both the comparative negligence statute and the opinion in *Kaeo* provide that the instruction need only be given "where" (the statute) and "when" (*Kaeo*) appropriate. It is hoped that the courts will apply the requirement even-handedly.

[291] 72 Haw. 387, 819 P.2d 84 (1991) (Moon, J.).

[292] *Id.* at 388-90, 819 P.2d at 85-87.

what is more probable than not, but includes whatever is likely enough in the setting of modern life that a reasonably thoughtful man would take account of it in guiding practical conduct."[293] The court, however, confused the question of what risks were foreseeable with the question of breach of duty for purposes of engaging in the negligence calculus:

> [W]e accept [plaintiff's] position that the issue is . . . one of foreseeability, that is, whether [owner] knew or should have known at the time he loaned the vehicle to persons such as [the alleged alcoholic], that [the alcoholic] would act unreasonably by loaning the vehicle to persons such as [another intoxicated person], who in turn would negligently operate the vehicle and cause injury to others.[294]

With all due respect, the correct approach would have been for the court to consider *all* of the reasonably foreseeable risks, great and small. These would have included the considerable risk that the person to whom the car was entrusted, admitted by defendant to be an alcoholic, might himself cause an accident while drunk and the lesser one that, if he were to get drunk, he might entrust the car to another intoxicated person who might cause an accident. The question then to be considered by the court on motion for summary judgment should have been whether a jury could find that in light of this bundle of foreseeable risks, the defendant's entrusting of the car created an unreasonable risk of harm.[295] The answer to this clearly seems to be yes.[296]

If the court intends in the future to consider, in determining whether conduct is negligent, *only* the very particular risk that caused the injury

---

[293] *Id.* at 413, 819 P.2d at 97 (Padgett, Hayashi, JJ., dissenting) (quoting 2 FOWLER HARPER & FLEMING JAMES, THE LAW OF TORTS § 18.2 at 1020 (1956)).

[294] *Id.* at 399-400, 819 P.2d at 91.

[295] *See* United States v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947) (the "Hand" formula). *Cf.* Petition of Kinsman Transit Co., 338 F.2d 706 (1964):

> We see no reason why an actor engaging in conduct which entails a large risk of small damage and a small risk of other and greater damage, of the same general sort, from the same forces, and to the same class of persons, should be relieved of responsibility for the latter simply because the chance of its occurrence, if viewed alone, may not have been large enough to require the exercise of care. By hypothesis, the risk of the lesser harm was sufficient to render his disregard of it actionable; the existence of a less likely additional risk that the very forces against whose action he was required to guard would produce other and greater damage than could have been reasonably anticipated should inculpate him further rather than limit his liability.

Id. at 725.

[296] *See* PROSSER, *supra* note 233, § 31 at 169-73.

rather than all the reasonably foreseeable risks created by the conduct, then the court is engaged in a substantial and unfortunate contraction of traditional negligence law.

C. Products Liability

With regard to the question whether the seller or manufacturer of a product should be held liable for injuries caused by manufacturing or design defects in its product, the Hawaii Supreme Court under Justice Lum has continued without significant hesitation to follow the pro-claimant trend of its predecessor[297] and of the California Supreme Court,[298] at least in cases where the ultimate liability is likely to carry up the distributional chain to a large manufacturer.

The most significant rulings of the court are these.

(1) The plaintiff may join claims of negligence, including negligent manufacture, design or failure to warn, breach of implied warranty of fitness and merchantability under the Uniform Commercial Code,[299] and claims of strict liability in tort, all arising out of the same facts, in a single product liability action.[300]

(2) The plaintiff need not prove that a defective product is "unreasonably dangerous" as § 402A of the *Restatement (Second) of Torts* seemed to require.[301] Instead, it is enough if "the plaintiff demonstrates that because of its manufacture or design, the product does not meet the reasonable expectations of the ordinary consumer or user as to its safety."[302]

---

[297] *See, e.g.,* Stewart v. Budget Rent-A-Car, 52 Haw. 71, 470 P.2d 240 (1970) (Levinson, J.) (adopting strict products liability). "The public interest in human life and safety requires the maximum possible protection that the law can muster against dangerous defects in products." *Id.* at 74, 470 P.2d at 243; *see also* Brown v. Clark Equipment Co., 62 Haw. 530, 618 P.2d 267 (1980) (Kobayashi, J.), Kaneko v. Hilo Coast Processing, 65 Haw. 447, 654 P.2d 343 (1982) (Ogata, J.).

[298] The end of that trend in California may be marked by Brown v. Superior Court, 751 P.2d 470 (Cal. 1988), which held that strict liability for defective design does not apply to prescription drugs and that a manufacturer held liable under market share liability is only liable for the proportion of the total damages equal to its percentage share of the the relevant market.

[299] HAW. REV. STAT. §§ 490:2-314 (merchantability), 490:2-315 (fitness for particular purpose). The court's willingness to recognize these warranties along with strict liability in tort suggest that in an appropriate case the court will recognize an express warranty under the U.C.C. or under the RESTATEMENT (SECOND) OF TORTS § 402B, as well.

[300] Ontai v. Straub Clinic and Hospital, Inc., 66 Haw. 237, 659 P.2d 734 (1983) (Menor, J.).

[301] Section 402A of the *Restatement* imposed strict liability on "[o]ne who sells any product

(3) Even though the allegedly defective product is available for inspection, the plaintiff in a strict product liability case may use circumstantial evidence to establish a defect.[303]

(4) With regard to design defects, there are two alternative ways that a plaintiff may establish strict liability in tort. The first is the "consumer expectation test," described above.[304] The second is the most plaintiff-oriented and most controversial of all tests[305] for liability for design defects:

---

in a defective condition unreasonably dangerous to the user or consumer . . . ." The California Supreme Court eliminated the "unreasonably dangerous" requirement on the ground that it sounded too much like negligence. *See* Cronin v. J.B.E. Olson Corp., 501 P.2d 1153 (Cal. 1972).

[302] 66 Haw. at 241, 659 P.2d at 739. In expressing its view that the "unreasonably dangerous" requirement need not be met, the court in *Ontai* said:

> [T]he plaintiff need not show that the article was dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases or uses it. . . . It is enough that the plaintiff demonstrates that because of its manufacture or design, the product does not meet the reasonable expectations of the ordinary consumer or user as to its safety.

Id. With all due respect, however, there does not seem to be any significant difference between the two statements: a product which "does not meet the reasonable expectations of the ordinary consumer or user as to its safety" and which would subject the seller to liability is necessarily more dangerous than ("dangerous to an extent beyond that") reasonably expected ("contemplated") by the ordinary consumer or user as to its safety. The only difference is that the requirement that the expectations be "reasonable" is not spelled out in the disapproved phrase, although it may be inferred.

[303] Wakabayashi v. Hertz, 66 Haw. 265, 660 P.2d 1309 (1983) (Nakamura, J.).

[304] *See supra* note 300 and accompanying text. In adopting the consumer expectation test the court was following the Supreme Court of California in Barker v. Lull Engineering Co., Inc., 573 P.2d 443, 455-56 (Cal. 1978). In *Barker*, the test is: "a product may be found defective in design if the plaintiff establishes that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner." This test has reference to the actual expectations of ordinary consumers or users, not necessarily to "reasonable expectations." The problem with that test, as the court itself noted in *Barker*, is that consumers may be led to have very low safety expectations for some products. *Id.* So long as the product meets those low expectations, there would be not liability under this test. That is one of the reasons the court in *Barker* found it necessary to formulate a second test not dependent upon consumer expectations.

The Hawai'i test, which relates to "reasonable expectations of the ordinary consumer," rather than the "ordinary expectations," might conceivably be interpreted to mean the amount of safety that the reasonable consumer *has the right to expect*. If it were to be so interpreted then, apart from the difficulties it might create, it would probably turn out in most cases to constitute a more plaintiff-oriented test than the *Barker* formulation.

[305] *See* James A. Henderson, Jr., *Renewed Judicial Controversy Over Defense Product Design*, 63 MINN. L. REV. 773 (1979).

> [A] product may alternatively be found defective in design if the plaintiff demonstrates that the product's *design* proximately caused his injury and the defendant fails to establish, in light of relevant factors, that, on balance, the benefits of the challenged design outweigh the risk of danger inherent in such design.[306]

Note that the plaintiff's case does not include proving that the design is defective; she need only prove more probably than not that the design proximately caused her injury. Thus, for example, if plaintiff were injured when the car in which she was a passenger skidded into a wall, she need only prove by a preponderance of the evidence that she would have escaped such serious injury if the vehicle had been equipped with an airbag or an automatic braking system. In order to avoid liability, *the defendant must then prove* that the benefits of the design without the airbag, or without the automatic braking system, outweigh the risk of danger involved in not having either safety device. If defendant fails in his proof, the product is then deemed "defective" and the defendant held liable. This second test, calling for a risk-benefit analysis, is similar to the so-called "Hand formula"[307] in a negligence case except that the burden is on the defendant rather than the plaintiff.[308]

---

[306] *Barker*, 573 P.2d at 456 (emphasis added).

[307] *See* United States v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947).

[308] Another difference between the tests is also the possibility that what the defendant knew or should have known about the risks of the design and the feasibility of an alternate design [state of the art] may not be relevant in the design defect case. *See infra* note 309 and accompanying text.

It is not clear that the court in *Ontai* fully understood the implications of adopting the *Barker* tests, since the court said:

> Under either test, it would still be incumbent upon the plaintiff to show that the offending product was dangerously defective and the defect was the proximate cause of his injuries. . . . Ontai, in the present case, was thus required to show: (1) a defect in the footrest which rendered it dangerous for its intended or reasonably foreseeable use, and (2) a causal connection between the defect and his injuries.

66 Haw. at 243, 659 P.2d at 740. Quite clearly, however, under the second test it is not "incumbent" on plaintiff to prove the product is dangerously defective. Rather, it is incumbent on the defendant to prove it is not defective.

Any misunderstanding, however, was cleared up by Chief Justice Lum in his opinion in *Masaki v. General Motors Corp.*, 71 Haw. 1, 780 P.2d 566 (1989), where the court expressly approved a charge which shifted the burden to defendant based upon the second test in *Barker*. *Masaki*, 71 Haw. at 24-25, 780 P.2d at 579.

(5) In a products liability action based upon strict liability in tort, state of the art evidence is *not* admissible to establish, as a defense, that the the manufacturer did not know or should not have known of the danger inherent is its product.[309]

(6) In a negligence action brought against manufacturers of drugs, where the plaintiff is unable to identify which manufacturer provided the specific drug which caused plaintiff's harm, proportional liabilty based on the "market share" theory of *Sindell v. Abbott Laboratories*[310] is

---

[309] Johnson v. Raybestos-Manhattan, 69 Haw. 287, 740 P.2d 548 (1987) (Wakatsuki, J.). It is difficult to know what the brief opinion in this case means. The action was based upon injuries suffered from asbestos exposure in the workplace and included a claim for strict liability for a defective product and failure to warn of the danger. The question, certified by the United States Court of Appeals for the Ninth Circuit, was worded in a way almost designed to elicit a negative response from a court committed to maintaining a separation between negligence and strict liability:

> In a strict products liability case for injuries caused by an inherently unsafe product, is the manufacturer conclusively presumed to know the dangers inherent in his product, or is state of the art evidence admissible to establish whether the manufacturer knew or through the exercise of reasonable human foresight should have known of the danger?

Id. at 287, 740 P.2d at 549.

In answering no, the court responded with the shibboleth that "in a strict liability action, [as opposed to a negligence action] the issue of whether the seller knew or reasonably should have known of the dangers inherent in his or her product is irrelevant to the issue of liability." 69 Haw. at 288, 740 P.2d at 549. (relying on Boudreau v. General Electric Co., 2 Haw. App. 10, 15, 625 P.2d 384, 389 (1981)). However, reading the question very narrowly, the court refused to answer the question whether state of the art evidence might be relevant to the duty to warn claim, *Id.* at 288 n.2, 740 P.2d at 549 n.2, and also left open the question "Whether or not state-of-the-art evidence is probative of some other factor that is relevant in a strict product liability action (e.g., consumer expectations, which bears on whether a product is defective) and therefore admissible for that limited purpose . . . ." *Id.* at 289 n.3, 740 P.2d at 549 n.3. Further, the court noted that this case involved a product that was inherently dangerous "not involving a manufacturing defect nor a design defect . . . ." *Id.* at 288 n.1, 740 P.2d at 549 n.1.

Rather than being an extremely liberal ruling restricting use of state-of-the-art evidence, therefore, the decision may simply be read as reflecting an aversion to the use of negligence language in a strict liability case. On the other hand, the court in passing remarked that "our analysis makes defendant's knowledge of the dangers irrelevant in a strict liability action . . . ." and cited, using the ambiguous "*cf.*" signal, the controversial New Jersey case which disallowed state-of-the-art evidence in a product liability case, Beshada v. Johns-Manville Products Corp., 447 A.2d 539, 544 n.3 (N.J. 1982), *subsequently limited to its facts by* Feldman v. Lederle Laboratories, 479 A.2d 374 (N.J. 1984).

[310] 607 P.2d 924 (Cal. 1980), *cert. denied*, 449 U.S. 912 (1980).

allowed.[311] In so holding the Supreme Court acknowledged the need to "fairly deal with the plight of plaintiffs who are unable to identify, for no fault of their own, the person or entity who should bear the liability for their injury."[312]

By way of contrast with these unmitigated pro-claimant cases and holdings, the court refused to extend strict liability in tort to conditions, such as a towel bar in a hotel bathroom that would not support the weight of a woman[313] and a cracked, non-shatter-proof plate glass shower door that caused injury to plaintiff's hand,[314] where the defendants were not the manufacturers or distributors of the product but were the owner or lessor of the premises in which the condition existed. The court's rationale for refusing to extend strict liability to these situations was that the usual reasons and policies which support strict liability, as in the cases described above, were not present in these

---

[311] Smith v. Cutter Biological Inc., 72 Haw. 416, 823 P.2d 717 (1991) (Lum, C.J.). The court in *Smith* went further than the California Supreme Court in *Sindell*. Plaintiff was a hemophiliac who became HIV positive by ingesting "Factor VIII" or "AHF," a blood protein extracted from donated blood which enables the blood to coagulate when a hemophiliac suffers a bleeding episode. *Id.* at 421-22, 823 P.2d at 721. Unlike the DES in *Sindell*, the drug in this case was not fungible with the Factor VIII sold by each defendant, since each defendant's product was compounded from blood taken from different donors.

In overruling defendant's summary judgment, the court also held that Hawai'i's blood shield law, HAW. REV. STAT. § 327-51 (1985), while precluding a strict liability action, does not preclude a negligence action based on "market share" liability even though the statute provides that defendant shall only remain liable for "its *own* negligence." 72 Haw. at 423, 823 P.2d at 722 (construing HAW. REV. STAT. § 327-51 (1985) (emphasis added).

Justice Moon vigorously dissented, asserting that the blood shield statute precluded the market share action; that even if the market share action was available, this was an inappropriate case because defendants' products were not fungible; and that, in any event, there was insufficient evidence of duty and breach of duty to sustain plaintiff's claims of negligence, a question which the majority left open for subsequent determination. *Id.* at 453-54, 823 P.2d at 736-37.

It is interesting that neither the majority nor the dissent cited Brown v. Superior Court, 751 P.2d 470 (Cal. 1988), in which the California Supreme Court limited liability under the market share theory of *Sindell* to proportional liability—each defendant joined only being held liable for a percentage of plaintiff's damages equal to the defendant's market share—and also held that strict liability in tort does not apply to drug manufacturers. *Id.* at 486.

[312] 72 Haw. at 428, 823 P.2d at 724.

[313] Bidar v. Amfac, Inc., 66 Haw. 547, 669 P.2d 154 (1983) (Nakamura, J.).

[314] Armstrong v. Cione, 69 Haw. 176, 738 P.2d 79 (1987) (Lum, C.J.).

cases.[315] An additional reason given in *Armstrong*, of some interest in assessing the court's attitude to expansion of liability, was that the defendant "cannot adjust the costs of protecting the consumer up the chain of distribution"[316] but must instead charge the costs "down the chain of distribution"[317] to those who rent from the defendant. In cases such as these, application of strict liability might have caused increases in hotel rates or in rent, matters of particular concern in Hawai'i.

D. Damages

Two extremely important rulings on damages emerged from a single decision, *Masaki v. General Motors Corp.*,[318] in 1989, one favoring the defendants, the other favoring claimants. First, the court held that the burden of proving punitive damages is elevated to "clear and convincing evidence."[319] In view of the United States Supreme Court's refusal to hold that punitive damages violate the United States Constitution,[320] the elevation of the burden of proof may take on considerable importance, particularly in the settlement process. It should henceforth become at least somewhat more difficult for a claimant to extract an inflated settlement because of exaggerated fear of an award of punitive damages based on the fact that the right to such damages need only be proved by a preponderance of the evidence.

Of even greater importance, however, is the court's approval, also in *Masaki*, of the controversial element of damages known as filial

---

[315] *Id.* at 184, 738 P.2d at 84. Of particular interest is the court's acceptance of the Intermediate Court of Appeals' reasoning in Messier v. Ass'n of Apartment Owners of Mt. Terrace, 6 Haw. App. 525, 535, 735 P.2d 939, 947-48 (1987) (Heen, J.): "Withholding the rule will not measurably depreciate [plaintiffs] chances of obtaining compensation for his injuries," and "[h]e does not face the kind of difficulty in proving [defendants'] negligence . . . as is faced by plaintiffs in other cases where the doctrine of strict products liability has been applied." 69 Haw. at 184, 738 P.2d at 84.

[316] 69 Haw. at 185, 738 P.2d at 84.

[317] *Id.*

[318] 71 Haw. 1, 780 P.2d 566 (1989) (Lum, C.J.).

[319] *Id.* at 16-17, 780 P.2d at 575.

[320] Pacific Mutual Life Insurance Co. v. Haslip, ___ U.S. ___, 111 S.Ct. 1032 (1991).

consortium—parents' damages for loss of the comfort, care, and services of a child.[321] Even the California Supreme Court, in *Baxter v. Superior Court*,[322] declined to extend the archaic common law action by a parent for the loss of services of a minor child to allow recovery for loss of the love, comfort, companionship, and society of the child.[323] The Hawaii Supreme Court, however, noting that such damages were allowed by statute in cases of wrongful death,[324] held that parents could bring a common law action for similar damages based upon the negligence of a manufacturer in causing a non-fatal injury to their child, *in this case a 28-year-old adult*.[325]

In his opinion, Chief Justice Lum adopted the reasoning of the Arizona Supreme Court in *Frank v. Superior Court*,[326] which noted "no meaningful distinction can be drawn between death and severe injury where the effect on consortium is concerned."[327] Further, in rejecting the tie between the common law action for loss of a child's services—which limited recovery to loss of the child's earnings until majority—and this action for loss of society, companionship and love of an adult child, the *Masaki* court said:

> It is irrelevant that parents are not entitled to the services of their adult children; they continue to enjoy a legitimate and protectible expectation of consortium beyond majority arising from the very bonds of the family relationship. Surely nature recoils from the suggestion that the society, companionship and love which compose filial consortium automatically fade upon emancipation . . . .[328]

This decision, in its boldness and in its effect, is similar to and reminiscent of the Richardson Court's landmark opinion in *Rodrigues v. State*,[329] allowing the tort of negligent infliction of emotional distress.

---

[321] 71 Haw. at 19, 780 P.2d at 576.

[322] 563 P.2d 871 (Cal. 1977).

[323] *Id.* at 874.

[324] HAW. REV. STAT. § 633-3 (1972, as amended).

[325] 71 Haw. at 22, 780 P.2d at 578.

[326] 722 P.2d 955 (Ariz. 1986).

[327] *Id.* at 957-58. Of course one significant distinction is that both the action and damages in death cases are provided for by statute while the action and damages in a negligence action are not. The court's reason for extending the right to similar damages in a negligence action may therefore be based on an equal protection argument, an independent policy argument justifying such extension, or both. The court, however, did not specifically address this issue.

[328] *Id.*; *see also Masaki*, 71 Haw. at 21-22, 780 P.2d at 577-78.

[329] 52 Haw. 156, 472 P.2d 509 (1970) (Richardson, C.J.).

Indeed, because the court in *Masaki* held that the parents may recover for negligent infliction *as well* as for loss of consortium, one wishes the court had spoken to the issue of which damages allowable under the loss of consortium claim do, and which do not, overlap the damages allowable in the mental distress claim. Surely, the mental distress engendered by learning of the son's serious injuries includes elements of distress which will be difficult, if not impossible, to separate from the mental element which composes loss of love, comfort, companionship and society.

Masaki also implies that actions for loss of parental consortium will also be allowed. In a footnote the court stated:

> In *Halberg v. Young*, 41 Haw. 634 (1957), we followed the traditional common-law rule and held that no cause of action exists in favor of a child for injuries sustained by his parents. Appellants claim that our decision in *Halberg* is dispositive of the instant case because a parent's claim for the lost consortium of a child is merely the reciprocal of a child's claim for the lost consortium of his parents. While we recognize that the two actions are analogous in many respects, the issue of parental consortium is not before us today.[330]

Nevertheless, since is it is really not possible on principled grounds to distinguish the right to filial consortium for injury to an *adult* child from the right to parental consortium, the likely effect of *Masaki* is to overturn *Halberg*.

III. Conclusion

As the Richardson Court had done in its time, so too has the Lum Court, in its own time, responded to concerns expressed in the community. This the Lum Court has done by addressing problems of insurance availability and affordability, while tending to continue to afford generous protection of victims in areas, such as products liability, where local community concerns are muted. Products liability aside, the court seems increasingly, if not consistently, to follow a path which protects local economic interests—businesses in the visitor industry, the State, and purchasers of no-fault and liability insurance—from costs that might be generated by a consistently liberal expansion of tort liability and insurance coverage.

---

[330] 71 Haw. at 19 n.8, 780 P.2d at 576 n.8.

First, with regard to the law of strict products liability, there has been no inclination to do anything but to continue the liberal trend of the Richardson Court, to consolidate its pro-victim approach, and to proceed even beyond the farthest reaches of the "mentor" court—the Supreme Court of California—which has recently backed off continued expansion of strict liability. While product liability actions often have local suppliers and distributors as parties, however, the ultimate responsibility for damages and the major costs of litigation will almost always land on manufacturers located outside of Hawai'i. Evidently, the court can therefore benefit local victims with relatively little direct or immediate impact on local enterprises or on local insurance rates.[331]

In other areas, the evidence of continued liberalism is more sparse. The expansion of liability for loss of filial consortium[332] is dramatic and important, but is not matched by other pro-victim decisions. Decisions in which the court overturned jury instructions which appeared to restrict the definition of negligence are pro-plaintiff, and at least one of them could lead to the award of damages in cases where proof of negligence is weak,[333] but they are not of overarching significance. More important, perhaps, is the decision to uphold a duty of an innkeeper to protect a guest from criminal behavior.[334] This case does not seem unduly to extend the negligence principle.

By way of contrast, cases that have imposed restrictions or limits on victim-favoring common law rules seem to predominate. These include cases requiring that proof of punitive damages be made by clear and convincing evidence,[335] restricting the expansion of liability of liquor sellers,[336] denying recovery for the negligent serving of alcoholic beverages by a social host,[337] approving the liability-limiting Firefighter's Rule,[338] holding that the State has no duty to warn or protect against criminal behavior in state parks,[339] narrowing the foreseeability concept

---

[331] This may be another reason, in addition to the differences among product liability laws among the states, why product liability reform will have to take place, if at all, at the federal level. There, any negative effects of strict liability on American enterprise in the international arena are likely to be more clearly evident.

[332] *See supra* note 318 and accompanying text.

[333] *See supra* part II.B.4.

[334] *See supra* note 259 and accompanying text.

[335] *See supra* note 318 and accompanying text.

[336] *See supra* part B.2.

[337] *See supra* note 229 and accompanying text.

[338] *See supra* note 201 and accompanying text.

[339] *See supra* note 250 and accompanying text.

by focusing on only one of several risks created by defendant's behavior in determining whether defendant was negligent in entrusting a vehicle to an alcoholic,[340] and allowing the judge in "appropriate" cases to inform the jury of the effect of joint and several liability.[341]

The insurance cases on balance seem to reflect a picture in which important protections to consumers have been provided and availability of some coverage has usually been assured, but where, for the most part, bold interpretations which would expand coverage have been rejected and the amount of insurance available in particular cases has been restricted even though the applicable language might easily have carried a more expansive interpretation.

It will thus be noted that the tort and insurance opinions of the Lum Court do not reveal a consistent and monolithic philosophy either with regard to jurisprudence or social policy. This is not an introspective court, and the justices—perhaps because the caseload is too heavy and the justices too few, or perhaps because it is their inclination—do not dwell in lengthy opinions on the underpinnings of their decisions. Rather, they tend to be relatively terse and pragmatic. On this court, the views of individual justices with strong feelings also seem to have carried great weight. Frank Padgett, who has left the court, was such a justice. His views most often favored the victims of accidents. Ronald Moon is also such a justice. He has clearly favored a policy of reducing insurance costs and has often carried the court in a conservative direction. There are now two additions to Hawai'i's five-person court, Justices Robert Klein and Steven Levinson. It is pure speculation whether the now considerable influence of Justice Moon will continue to set the direction of the court in the area of torts and related insurance.

Addressing the question of tort reform in a common law court, it is clear from the decisions of the Lum Court as here described that so far, the Hawaii Supreme Court, not the Hawaii Legislature, has been the major player in tort reform in Hawai'i.[342] Whether the Supreme Court, supposedly the "least dangerous branch,"[343] has recognized and acted upon the popular will, readers will have to decide for themselves.[344]

---

[340] *See supra* note 291 and accompanying text.

[341] *See supra* note 282 and accompanying text.

[342] *See infra* Epilogue.

[343] ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH (1962).

[344] *Cf.* Warren A. Seavey, *Negligence—Subjective or Objective?* 41 HARV. L. REV. 1

Like Hawai'i's community, the Supreme Court is composed of diverse individuals with their own personal histories, political views, predispositions, and perspectives. Yet the justices all have strong ties to, and a common membership in the community. It is through this link to the community that the court responds to and reflects the temper and needs of its time.

EPILOGUE

At the end of April, 1992, as this article was about to go to press, the Hawaii Legislature passed bills revising the Hawai'i motor vehicle insurance laws which increased the amount of mandatory no-fault insurance, on the one hand, but raised the medical-rehabilitative limit, reduced the amount of required liability insurance, and eliminated automatic stacking of uninsured and underinsured motorist coverage, on the other hand.[345] These changes, produced in large measure by political pressure to reduce premiums brought to bear by the Coalition for Automobile Insurance Reform, may indeed demonstrate a new activism on the part of the Hawaii legislature in the area of tort and insurance reform reflecting, in turn, a new attitude on the part of the wider community.

(1927):

> The lawyer cannot determine that our rules of liability for negligence are either just or unjust, unless he has first discovered what the community desires (which determines justice for the time and place), and whether the rules are adapted to satisfying those desires (which I assume to be the end of law).

Id. at 19.

[345] *See* H.R. 3974 (H.D. 1 and S.B. 2361, S.D. 2 (as amended, 1992)), 16th Leg., 1992, Reg. Sess. (1992), *reprinted in* 1992 Haw. ___ J. ___.