CONCURRING OPINION OF ACOBA, J.

I concur in the result reached, but differ as to the analysis and reasoning that supports the result. As these issues are likely to reoccur in our cases, I set forth my position that: (1) the State is not immune under the State Tort Liability Act when independent governmental negligence is a legal cause of an employee's foreseeable intentional tort against a third person; (2) the serious mental stress standard adopted in Rodrigues v. State, 52 Haw. 156, 472 P.2d 509 (1970), applies to claims of psychic injury suffered by the minor plaintiffs and their parents, rather than a new exception to the "physical injury" rule; (3) the duty owed by Defendant-Appellee/Cross-Appellant Department of Education (DOE) to the Plaintiffs is based on the special relationship of in loco parentis and not on some formulation of an affirmative duty; (4) the DOE's negligence rests primarily on the absence of a well defined procedure for administering allegations of criminal behavior by teachers; and (5) DOE's obligation to pay the full amount of damages rests on joint and several liability rather than Lawrence J. Norton's dismissal from the case. The foregoing propositions are discussed in seriatim.

I.

Norton's actions, that of offensively touching Melony and Nicole, plainly fall within the common law definition of

battery. A defendant causes battery when he or she "intentionally causes bodily contact to the plaintiff in a way not justified by the plaintiff's apparent wishes or by a privilege, and the contact is in fact harmful or against the plaintiff's will." Dobbs, The Law of Torts, § 28 at 52-53 (2000) (citations omitted). As Norton touched both Melony and Nicole "against [their] will[,]" id., he committed the common law tort of battery. Thus the exception to state tort liability of "any claim arising out of . . . battery[,]" § 662-15(4) (1993 & Supp. 2001), is implicated.

Two lines of cases have developed with regard to governmental immunity when an employee negligently hired or supervised by the government, commits an intentional tort against a third person. The majority of courts hold that inasmuch as the plaintiff's cause of action "arises out of" an intentional tort, the claim is barred by governmental immunity. See, e.g., Leleux v. United States, 178 F.3d 750 (5th Cir. 1999) ("Only negligent conduct, undertaken within the scope of employment and unrelated to an excluded tort . . . may form the basis for a cause of action." (Emphasis added.); Franklin v. United States, 992 F.2d 1492, 1498 (10th Cir. 1993) ("the argument advanced to avoid [the tort liability act] in the present case should be rejected as an ineffective attempt to recast a battery claim (surgery without competent consent) as a negligent failure to prevent the battery"). "In dismissing these claims, the courts have often underscored the belief that an intentional tort formed the basis

of the action by declaring that the plaintiff could not 'circumvent' the express statutory language of [the tort liability act] by 'artful pleading,' that is, an assault or battery negligence to avoid dismissal of the suit." K. de Jonge, Recovery Under the Federal Tort Claims Act for Governmental Negligence Which Leads to an Intentional Tort by a Governmental Employee, 30 Ariz. L. Rev. 497, 502 (1988) [hereinafter Recovery Under the FTCA] (citations omitted).

In a second opposing line of cases, courts focus on the independent nature of the governmental negligence that allows the intentional tort to occur, such as the negligent hiring or supervision of an employee, and hold that the cause of action is rooted in the negligent act, not the intentional tort itself. See, e.g., Senger v. United States, 103 F.3d 1437 (9th Cir. 1996) ("[G]ranting broad immunity would be inconsistent with the purposes of the [Federal Tort Claims Act], which is to 'provide a forum for the resolution of claims against the federal government for injury caused by the government's negligence.'" (Quoting Bennett v. United States, 803 F.2d 1502, 1504 (9th Cir. 1986).)); Doe v. Durtschi, 716 P.2d 1238, 1245 (Idaho 1986) ("We do not believe the Idaho legislature, by creating an exception to governmental liability for actions arising out of assault and battery, thereby intended to relieve state agencies from any duty to safeguard the public from employees whom they know to be dangerous."). "Courts adopting the minority rule have applied

traditional tort principles and arrived at the conclusion that, although the plaintiffs' injuries directly resulted from assaults or batteries, their claims were reasonably alleged to have roots in negligence" of the government. K. de Jonge, Recovery Under the FTCA, supra, at 503.

As stated by this court in State v. Rogers, 51 Haw. 293, 459 P.2d 378 (1969), the purpose of the Act is "to compensate the victims of negligence in the conduct of governmental activities in circumstances like unto those in which a private person would be liable[.]" Id. at 296, 459 P.2d at 381 (quoting Indian Towing Co. v. United States, 350 U.S. 61, 68 (1955)). Additionally, in Breed v. Shaner, 57 Haw. 656, 562 P.2d 436 (1977), it was directed that "the State Tort Liability Act should be liberally construed to effectuate its purpose to compensate the victims of negligent conduct of state officials and employees[.]" Id. at 665, 562 P.2d at 442 (citations omitted) (emphasis added). The second line of cases and the rationale underlying them best comports with a liberal construction of the Act.

This latter line of cases require that, for a claim of negligent hiring or supervision to succeed against the government, it must be established that the government knew, or should have known about an employee's propensity to commit an intentional tort.[1] Such an approach does not premise the State's

[1] The parameters established by this qualification should preclude unnecessary litigation. Liability would not attach if a plaintiff merely claims that the State was negligent in not preventing an intentional tort from

liability to a third person on respondeat superior grounds, i.e., imputing the wrongful act of an employee to the State simply because of an employer-employee relationship. See Senger, 103 F.3d at 1441 ("These cases distinguish between negligence based entirely on a theory of respondeat superior (which cannot give rise to liability on the part of the United States under the [Federal Tort Claims Act] for the intentional torts of government employees) . . . .").

Our holding in this case means that the battery exemption does not apply and the State is liable to a third party for its own independent negligence, such as the negligent hiring or supervision of an employee, if the State knew or should have known that the employee was likely to commit an intentional tort and the State's negligence was a legal cause, i.e., a substantial factor, of the tortious injury suffered by the third party. See Durtschi, 716 P.2d at 1244 ("It is clearly unsound to afford immunity to a negligent defendant because the intervening force,

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happening. In Durtschi, the Idaho Supreme Court expressly noted that, under the facts of its case, "the government knew or should have known that one of its employees was likely to commit an intentional tort" and, thus, the case was distinguishable from the cases that failed to recognize liability under the intentional tort exception. 716 P.2d at 1245.

> A plaintiff cannot merely point to an assault and battery and then claim, based simply on its occurrence, that the state was negligent in not preventing it. For example, in the present case the school district would clearly not be liable if it had no knowledge of [the co-defendant's] proclivities. In order to withstand dismissal under the intentional tort exception . . . a plaintiff must [establish] facts which, if proven, would demonstrate that the governmental entity should have reasonably anticipated that one of their employees would commit an intentional tort.

Id.

the very anticipation of which made his conduct negligent, has brought about the expected harm." (Citing Gibson v. United States, 457 F.2d 1391, 1395 (3d Cir. 1972).)); Bennet, 803 F.2d at 1503 ("[B]ecause the government had notice and could have prevented the crime . . . by the exercise of due care by government employees, the government was liable for its own negligence."). Under the facts of this case, the independent conduct of the DOE, e.g., the negligent supervision of Norton, under circumstances in which it should have known he posed a risk to children, was a substantial factor in causing Plaintiffs' injuries and, thus, the State is not immune from suit.

II.

In Rodrigues, this court first established that a physical injury is not a predicate requirement for a negligent infliction of emotional distress (NIED) claim. See 52 Haw. at 170-71, 472 P.2d at 519-20 ("We hold that serious mental distress may be found where a reasonable [person], normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case."). Rodrigues reasoned that "[i]t can no longer be said that the advantages gained by the courts in administering claims of mental distress by reference to narrow categories outweigh the burden thereby imposed on the plaintiff." Id. at 174, 472 P.2d at 520. After Rodrigues was decided, however, this court ruled that recovery for emotional distress generally requires some physical injury to

property or a person resulting from the defendant's conduct. See Guth v. Freeland, 96 Hawai'i 147, 157, 28 P.3d 982, 992 (2001) (Acoba, J., concurring and dissenting).

Nevertheless, this court has been compelled to abandon the "physical injury" rule in light of real life experiences. Indeed, the physical injury rule has been criticized as an "inadequate method . . . of distinguishing between worthy and unworthy claims." John & Jane Roes v. FHP, Inc., 91 Hawai'i 470, 473, 985 P.2d 661, 664 (1999) (quoting Larsen v. Pacesetter Sys., Inc., 74 Haw. 1, 40, 837 P.2d 1273, 1293 (1992)). In FHP, this court held that an exception to the "physical injury" rule was created when airline employees unknowingly handled human immunodeficiency virus (HIV) contaminated blood. See id. at 477, 985 P.2d at 668. While citing to Rodrigues, which established a general standard based on the seriousness of the mental stress, this court applied the HIV exposure rule as a categorical exception to the general rule that recovery was permitted only when there was some predicate injury to person.

Subsequently, in Guth, this court established another exception to the physical injury rule, holding that "the policies behind the NIED cause of action and HRS § 663-8.9 support allowing a claim for NIED arising from the negligent mishandling of a corpse." 96 Hawai'i at 154, 28 P.3d at 989 (footnote omitted). It was explained by the majority that "we believe that the minority view, that does not require the plaintiff's

emotional distress to manifest itself in a physical injury, is the better reasoned approach." Id. As I noted in that case, a categorical approach lacks "a cohesive rationale and can produce unjust results[,]" id. at 158, 28 P.3d at 993 (Acoba, J., concurring and dissenting) (citations omitted), as opposed to a general reasonableness standard:

> [T]he appropriate measure for determining whether plaintiffs have alleged an actionable claim [for emotional distress] in this jurisdiction is that set forth in *Rodrigues*--that is, whether a reasonable person, normally constituted, would suffer severe mental distress under the circumstances of the case.

Id. at 159, 28 P.3d at 994.

In the instant case, the majority creates yet another exception to the "physical injury" rule, this time for school children subjected to unauthorized contact by a teacher and for parents of such children. Predictably, then, "[r]ecognition of negligently inflicted psychic injury as an independent tort, like the life experiences that compel it, . . . cannot be confined in a doctrinal straitjacket." Id. It is apparent that the "physical injury" rule will, as cases come before us, press this court to create more categorical exceptions. The experiences of more than three decades has shown that "[t]he fears of unlimited liability have not proven true[,]" id. (quoting Campbell v. Animal Quarantine Station, 63 Haw. 557, 565, 632 P.2d 1066, 1071 (1981)), and that the legal interest in psychic security is entitled to independent protection:

> [T]he advantages gained by the courts in administering claims of mental distress by reference to narrow categories was outweighed by the burden thereby imposed on the plaintiff and that the "interest in freedom from negligent

> infliction of serious mental distress is entitled to independent legal protection."

Id. (quoting Rodriques, 52 Haw. at 173-74, 472 P.2d at 520).

"Applying [the Rodrigues] standard returns reason and symmetry to the law and easily resolves the issue presented to us in this case." Id. First, there would be near universal agreement that "a reasonable person [such as a child or the parent of such a child], normally constituted, may be unable to adequately cope with the mental stress engendered" by the acts perpetrated by Norton, id., even in the absence of a physical injury. Second, Rodrigues "is precedent in our jurisdiction and controls on the question of who is entitled to claim mental distress resulting from" the conduct of Norton and the DOE. Id.

> *Rodrigues* instructs that a "limitation on the right of recovery, as in all negligence cases, is that the defendant's obligation to refrain from particular conduct is owed only to those plaintiffs who are foreseeably endangered by the conduct and only with respect to those risks or hazards whose likelihood made the conduct unreasonably dangerous." 52 Haw. at 174, 472 P.2d at 521 (citations omitted). Under *Rodrigues*, then, the nature of the risk defines the scope of liability. As a result, in devising a rule as to who should recover in this case, there is justification for affording the right to sue to those most likely to suffer mental distress because of the [child abuse] for they are those "foreseeably affected by the wrongful conduct."

Id. at 159-160, 28 P.3d at 994-95 (Acoba, J., concurring and dissenting) (brackets omitted) (emphasis added). "Those most likely affected are those who are also most likely to suffer the greatest [distress]" over such inappropriate touching of a child, id. at 160, 28 P.3d at 995, -- and a child's parents plainly fall within this formulation.

III.

The court made several hundred findings of fact regarding four major acts of negligence. According to the court, these acts "include" the DOE's negligent investigation subsequent to Norton's acquittal; the negligent supervision of Norton, particularly after he repeatedly engaged in issuing hall passes and hugging children; and the lack of training and/or implementation of standards regarding allegations of sexual abuse, including the interview by Principal Schlosser and the failure to notify the children's parents regarding the potential abuse.[2]

It would be less than accurate not to acknowledge the difficulty facing the DOE in resolving allegations of sexual assault as it was brought to its attention, particularly in light of conflicting facts and views. While this court has the faultless perspective of hindsight, the allegations must be considered in the context presented to the DOE. Here there was a large number of parents and children who were "extremely upset" that Norton "would no longer be teaching their children[.]" On the advice of counsel and the police, respectively, neither Norton nor T.Y's parents provided information to DOE personnel. Additionally, Norton was acquitted in criminal trials arising out of T.Y's allegations and subsequently, Melony's and Nicole's

[2] The majority rejects the final allegation of negligence, that of misrepresentation by Administrator Sosa to the Kaneohe Marine Corps Air Station Base Commander's Executive Officer.

accusations, further demonstrating the difficulty in discerning the truth of T.Y.'s original charge and in assessing the potential risks that Norton might pose in the future.

I do not believe the many findings of the court as "indicating" negligence are to be taken as an enumeration of factors for judging or governing the future conduct of DOE teachers, principals, or administrators.[3] DOE personnel are charged with a myriad of other tasks, not the least of which is to accomplish their primary obligation of educating children.[4] In my view, the negligence in this case is grounded in the apparent absence of clear and definite DOE procedures for administering accusations of criminal behavior.

The disposition of such matters cannot be accomplished appropriately as a matter of internal school policy or ad hoc administrative action, for the resolution of such questions are generally beyond the normal purview of professional educators. No written policy or regulation pertaining to such matters was entered into evidence in this case. There must be a separate administrative track established for determining such complaints irrespective of the pendency or outcome of any criminal case. Allegations of abuse or criminal behavior must be recognized as a

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[3] In describing the several hundred findings of negligence committed by the DOE, the court used the word "indicating" to depict the overall conclusion of negligence. Inasmuch as these findings may "indicate" negligence, they do not each establish singular and independent liability.

[4] I do not agree with some of the characterizations of the DOE personnel or their actions, as set forth by the majority.

distinct and separate matter from the day-to-day operation of a school. To avoid future occurrences of this type, and to protect both children and DOE personnel, a defined, coherent and uniform procedure for resolving such matters must be enacted by rule or statute. See, e.g., Regotti, Negligent Hiring and Retaining of Sexually Abusive Teachers, 73 Ed. Law Rep. 333, 339-40 (1992) (listing suggestions for school officials regarding sexually abusive teachers).

IV.

In general, this court is "reluctant to impose a new duty upon members of our society without any logical, sound, and compelling reasons[,] taking into consideration the social and human relationships of our society." Lee v. Corregedore, 83 Hawai'i 154, 166, 925 P.2d 324, 336 (1996). Generally, a "person does not have a duty to act affirmatively to protect another person from harm." Id. at 159, 925 P.2d at 329. However, as the majority notes, where there is a "special relationship," then a defendant may owe a duty to "control the conduct of [the] third person so as to prevent him or her from causing physical harm to the plaintiff." Majority opinion at 69 (citations omitted). Here, it is apparent that a special relationship of in loco parentis exists between the DOE and the students, and that that relationship gives rise to a duty of reasonable care to protect students from foreseeable harm.

But the majority continues on and indicates that a duty may arise because the DOE is "required to exercise . . . 'ordinary care' in the activities it affirmatively undertakes to prevent foreseeable harm[.]" Majority opinion at 71 (citing Upchurch v. State, 51 Haw. 150, 154, 454 P.2d 112, 115 (1969)). This appears to be a reference to Restatement (Second) of Torts § 302 comment a (1965).[5] But as this court recently stated in McKenzie v. Hawai'i Permanente Med. Group, Inc., 98 Hawai'i 296, 47 P.3d 1209 (2002), that "Restatement (Second) § 302 by itself does not create or establish a legal duty; it merely *describes* a type of negligent act." Id. at 300, 47 P.3d at 1213 (emphasis in original). Quoting comment a of section 302, this court noted:

> Section 302 is concerned only with the negligent character of the actor's conduct, and *not with the actor's duty to avoid the unreasonable risk*. In general, anyone who does an affirmative act is under a duty to others to exercise the care of a reasonable person to protect them against an unreasonable harm to them arising out of the act . . . . *If the actor is under no duty to the other to act, his [or her] failure to do so may be negligent conduct with the rule stated in this Section, but it does not subject him [or her] to liability, because of the absence of duty.*

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[5] This comment states:

> This Section is concerned only with the negligent character of the actor's conduct, and not with his [or her] duty to avoid the unreasonable risk. In general, anyone who does an affirmative act is under a duty to others to exercise the care of a reasonable [person] to protect them against an unreasonable risk of harm to them arising out of the act. The duties of one who merely omits to act are more restricted, and in general are confined to situations where there is a special relation between the actor and the other which gives rise to the duty. As to the distinction between act and omission, or "misfeasance" and "non-feasance," see § 314 and Comments. If the actor is under no duty to the other to act, his [or her] failure to do so may be negligent conduct within the rule stated in this Section, but it does not subject him [or her] to liability, because of the absence of duty.

Restatement (Second) of Torts § 302 comment a, at 82 (1965) (emphasis added).

Id. (brackets omitted) (emphases in original). It was explained that "the fact that [the defendant's] negligent conduct falls under the rubric of Restatement § 302 does not establish per se that he owes a duty to the [plaintiffs]; it only describes the *manner* in which he may be negligent *if* he owed a duty to the [plaintiffs]." Id. at 301, 47 P.3d at 1214 (emphases in original). Similarly, the DOE's negligent conduct, by itself, does not create a duty of care to school children; rather, this duty arises out of the special relationship between the DOE and the children. To the extent that any other basis for a duty is alluded to, see majority opinion at 71 ("[r]egardless of the source of a particular duty"), I must disagree that it is necessary in this case to so extend our holding. "Duty . . . is a legal conclusion which depends upon 'the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection.'" Rodrigues, 52 Haw. at 170, 472 P.2d at 519 (quoting Prosser on Torts § 53 at 332 (3rd ed. 1964)); see also Blair v. Ing, 95 Hawai'i 247, 259, 21 P.3d 452, 463 (2001) (citations omitted); Cootey v. Sun Investment Co., 68 Haw. 480, 484, 718 P.2d 1086, 1090 (1986) (citations omitted). In light of the well recognized legal relationship between school and student, we are not called on anew to make a duty calculus.

V.

Relying on HRS § 663-10.5 (Supp. 1994),[6] the court held that the DOE, as a governmental entity, was liable for forty-nine percent of the total damages, its apportioned amount. The 1994 version of § 663-10.5, since amended (Supp. 2001),[7] abolished joint and several liability for a governmental party for "acts or omissions occurring on or after" June 22, 1994, the date it was enacted. HRS § 663-10.5 (Supp. 1994). The majority rejects the court's view and holds that HRS § 663-10.5 is inapplicable and does not limit the DOE's liability. The majority further concludes that (1) Norton and the DOE are not "joint tortfeasors" as defined by HRS § 663-11 (1993), (2) inasmuch as Norton and the DOE are not "joint tortfeasors[,]" HRS § 663-10.9 (Supp. 2001), which generally repealed joint and several liability, does not apply, (3) "[b]ecause the circuit court dismissed the

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[6] This statute states in pertinent part as follows:

> **§ 663-10.5 Government entity as a tortfeasor; abolition of joint and several liability.** Notwithstanding the provisions of sections 663-11 to 663-17 and section 663-31, in any case where a government entity is determined to be a tortfeasor along with one or more other tortfeasors, the government entity shall be liable for no more than that percentage share of the damages attributable to the government entity.
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> . . . .
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> For purposes of this section, the liability of a government entity shall include its vicarious liability for the acts or omissions of its officers and employees.
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> . . . .
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> (3) This Act shall apply only to causes of action based upon acts or omissions occurring on or after its effective date.
>
> (4) This Act shall take effect upon its approval.

(Boldfaced font in original.) (Emphasis added.)

[7] The amended version of HRS § 663-10.5 no longer contains the qualifying words "occurring on or after" the date of the statute's enactment.

[P]laintiffs' claims against Norton with prejudice . . . , Norton cannot be liable in tort to the plaintiffs[,]" Majority opinion at 105 n.50, and, hence, (4) the State is liable for all the damages.

I must disagree with this analysis. I agree that HRS § 663-10.5, abolishing joint and several liability for government entities, is inapplicable. However, in my view, (1) Norton and the DOE are indeed joint tortfeasors under HRS § 663-11; (2) 663-10.9, the prohibition against joint and several liability, does not apply because this case "involv[es]" the intentional tort exception to such a ban; and (3) the DOE's obligation to pay the judgment is based upon its several liability, i.e., its obligation as a joint tortfeasor to pay all the damages caused by it and Norton, because Norton is apparently judgment proof.

VI.

On appeal, Plaintiffs maintain, as we hold, that HRS § 663-10.5 was misapplied by the court because DOE's negligent acts occurred before its effective date. Plaintiffs argue that the court erred in establishing as the pertinent date, the date the cause of action "accrued[,]" i.e., the dates of the assault on the Plaintiffs, rather than the date of DOE's negligent acts or omissions. DOE's negligence in failing to complete its investigation of T.Y.'s allegations of abuse after Norton's acquittal and the subsequent reinstatement of Norton to a teaching position occurred on January 19, 1993.

This precipitating negligent act occurred before the effective date of HRS § 663-10.5, June 22, 1994. By the plain language of HRS § 663-10.5, this statute did not take effect on the accrual date of the cause of action, as the DOE argues and the court held, but rather, on the date of the "act or omission" on which the action is based. Accordingly, as the majority notes, the court erred in applying HRS § 663-10.5 and this statute did not absolve the DOE from joint and several liability.

VII.

I believe that the DOE and Norton are "joint tortfeasors" under the 1939 Uniform Contribution Among Tortfeasors Act (UCATA), HRS §§ 663-11 to 663-17. See Saranillio v. Silva, 78 Hawai'i 1, 9, 889 P.2d 685, 693, reconsideration denied, 78 Hawai'i 421, 895 P.2d 172 (1995) (noting that Hawai'i adopted the 1939 version of UCATA in 1941). HRS § 663-11 (1993) defines "joint tortfeasors" as "two or more persons jointly or severally liable in tort for the same injury to person or property, whether or not judgment has been recovered against all or some of them." (Emphasis added.). See also Ginoza v. Takai, 40 Haw. 691, 691 (1955) (holding that judgment does not need to be recovered "to constitute a [party as] a joint tortfeasor for purposes of the Uniform Act"). The term "liable[,]" as employed in this statute, has been construed to mean "subject to suit or liable in a court of law or equity." Tamashiro v. De Gama, 51

Haw. 74, 75, 450 P.2d 998, 100 (1969) (internal quotations omitted); see Peterson v. City and County of Honolulu, 51 Haw. 484, 462 P.2d 1007, 1008 (1969) ("whether contribution may be had from a person depends upon whether the original plaintiff could have enforced liability against him [or her], had he [or she] chosen to do so."); Gump v. Walmart Stores, 93 Hawai'i 428, 446, 5 P.3d 418, 436 (App. 1999), overruled on other grounds, 93 Hawai'i 417, 5 P.3d 407 (2000) (Under the UCATA, "'liable' means 'subject to suit' or 'liable in a court of law or equity.'" (quoting Tamashiro, 51 Haw. at 75, 450 P.2d at 1000)); cf. Karasawa v. TIG Ins. Co., 88 Hawai'i 77, 80-81, 961 P.2d 1171, 1174-75 (App. 1998) (omitting liability discussion, but holding that "tortfeasors are 'joint' for purposes of the Act if they individually or collectively cause the same injury.").

In Tamashiro, it was held that a "minor child is liable in tort to his parent," and thus, he is "subject to contribution to his joint tortfeasor under the [UCATA]." 51 Haw. at 79, 450 P.2d at 1002. In that case, the parents sued for injuries sustained in an automobile accident between their automobile, driven by their minor son, and a vehicle driven by the defendant. See id. at 74, 450 P.2d at 999. The defendant joined the minor as a third-party defendant, attempting to obtain contribution from the minor as a joint tortfeasor. See id. at 74, 450 P.2d at 1000. The trial court dismissed the third party complaint, based on the assumption that a minor child is legally immune from suit from his parents. See id. This court reversed and held that a

minor child is liable for contribution as a joint tortfeasor under the UCATA. See id. at 79, 450 P.2d at 1002. In doing so, this court construed the term "liable" in the phrase "joint and severally liable in tort," as "having acquired the technical, legal meaning of 'subject to suit' or 'liable in a court of law or equity[.]'" Id. at 75, 450 P.2d at 1000 (footnote and citations omitted).

In Saranillio, this court considered the common law rule, which mandated that the release of an employee from liability in a tort action automatically released the employer from respondeat superior liability. See 78 Hawai'i at 8-9, 889 P.2d at 692-93. It was explained that the UCATA definition of joint tortfeasors, "which is based on liability rather than negligence, 'is exceedingly broad and goes beyond the traditional meaning of the term.'" Id. (quoting Holve v. Draper, 505 P.2d 1265, 1267 (Idaho 1973)). Thus, this court held that the "plain and unambiguous language of the 1939 version [of the UCATA] abrogates the common law rule that the release of an employee automatically releases his/her vicariously liable employer." Id. at 12, 889 P.2d at 696.

Other jurisdictions have adhered to the same view. Cf. New Amsterdam Cas. Co. v. Holmes, 435 F.2d 1232, 1234 (1st Cir. 1970) ("liable in tort" does not require present liability to whoever might be a particular plaintiff); MetroHealth Med. Center v. Hoffmamn-LaRoche, Inc., 685 N.E.2d 529 (Ohio 1997) (a contribution claim is not barred by the fact that the underlying

claimant failed to comply with the statute of limitation as to the contribution defendant); Hayon v. Coca Cola Bottling Co. of New England, 378 N.E.2d 442, 445 (Mass. 1978) ("The term 'liable in tort' . . . is broad in scope and not suitable language for implying a narrow or restricted range of application within the framework of potential tort defendants."); Zarrella v. Miller, 217 A.2d 673, 676 (R.I. 1966) ("[A] tort-feasor may recover such contribution even though, for some reason, the plaintiff who has obtained a judgment against both of them is precluded from enforcing liability thereunder against the joint tort-feasor." (Citing Puller v. Puller, 110 A.2d 175, 177 (Pa. 1955)). In MetroHealth, the Supreme Court of Ohio held that a tortfeasor's contribution claim did not fail "merely because the underlying claimant failed to comply with a statute of limitations as to the contribution defendant." 685 N.E.2d at 533. The MetroHealth court recognized that a contrary position would allow a plaintiff to "wait to file a complaint until a claim against one of the defendants, but not the other, was time-barred, thereby destroying the disfavored defendant's statutory right to contribution." Id.

But in Ozaki v. Association of Apt. Owners of Discovery Bay, 87 Hawai'i 265, 954 P.2d 644 (1998) [hereinafter "Ozaki II"], this court stated in a brief footnote, without analysis, that only parties as to whom damages could be recovered are joint tortfeasors. Id. at 270 n.5, 954 P.2d at 649 n.5. While acknowledging that "[t]he definition of 'joint tortfeasors' . . .

'is based on liability[,]'" this court, quoting Black's Law Dictionary, said that parties "cannot be jointly and/or severally liable with another unless '[t]he person who has been harmed can sue and recover from both[.]" Id. (quoting to Black's Law Dictionary 914 (6th ed. 1990) (emphasis in original)). Such language implies that a person or entity can only be a joint tortfeasor if recovery is possible. See also Gump v. Walmart Stores, Inc., 93 Hawai'i 417, 5 P.3d 407 (2000) [hereinafter Gump II] ("A party is liable within the meaning of section 663-11 if the injured person could have recovered damages in a direct action against that party, had the injured person chosen to pursue such an action." (Quoting Velazquez v. National Presto Ind., 884 F.2d 492, 495 (9th Cir. 1989)); Ozaki II, 87 Hawai'i at 270 n.5, 954 P.2d at 649 n.5.[8] Following this rationale, a bankrupt or judgment-proof party could never be considered a joint tortfeasor.

It should be further noted that the definition employed by the Ozaki II court was incomplete. An accurate rendition of the definition of "[j]oint and several liability" in Black's Law Dictionary is that "[t]he person who has been harmed can sue and recover from both wrongdoers or from either one of the wrongdoers (if he [or she] goes after both of them, he [or she] does not, however, receive double compensation)." Black's Law Dictionary

[8] In Velazquez v. National Presto Ind., 884 F.2d 492 (9th Cir. 1989), the Ninth Circuit Court of Appeals, without explanation, indicated that recovery is necessary for joint tortfeasor status. The Velazquez court cited to Peterson, 51 Haw. at 485-86, 462 P.2d at 1008 and Tamashiro, 51 Haw. at 75 n.3, 450 P.2d at 1000 n.3. However, neither of these cases indicated that the ability to recover damages is a prerequisite to joint tortfeasor status.

at 914 (emphasis added). The correct definition of joint and several liability then, as used in Black's, indicates that two parties may be considered joint tortfeasors even if recovery can be obtained from only one of them. Accordingly, I would distinguish Ozaki II to the extent that it suggests that a party is a joint tortfeasor only if a plaintiff can sue and recover from it.

VIII.

Under the foregoing analysis, the DOE and Norton were joint tortfeasors. Norton was originally "subject to suit or liable in a court of law or equity[,]" although he was later dismissed as the result of a bankruptcy court stay. Accordingly, "subject to suit or liable in a court of law or equity" in HRS § 663-11 may designate a party as a joint tortfeasor if the party was subject to suit, even if subsequent events may ultimately preclude recovery from that party. Here, the court found that the DOE was forty-nine percent liable and Norton was fifty-one percent liable. This court has held that a court in its discretion may treat a non-party to the suit as a party for purposes of apportioning damages. See Gump II, 93 Hawai'i at 423, 5 P.3d at 413. Plainly, the court did that in this case.

Under joint and several liability, each defendant is "completely and fully liable toward the injured person" for the full amount of damages. Ozaki v. Association of Apt. Owners of Discovery Bay, 87 Hawai'i 273, 284, 954 P.2d 652, 663 (App.),

overruled in part by, Ozaki II, 87 Hawai‘i 265, 954 P.2d 644 (1998) [hereinafter "Ozaki I"]. Accordingly, both the DOE and Norton may be treated as joint tortfeasors pursuant to HRS § 663-11. If Norton was incapable of paying his apportioned percentage of damages, as was apparently the case, then the DOE became liable for all the Plaintiffs' damages. This is not because of Norton's dismissal at trial, as apparently the majority concludes, but because the DOE was severally liable for the injuries suffered by the Plaintiffs.[9] See Ozaki I, 87 Hawai‘i at 284, 954 P.2d at 663 (referring to the UCATA and stating that the section "would permit apportionment of pro rata shares of liability of the joint tortfeasors as among themselves. . . . [However,] each tortfeasor is still completely and fully liable toward the injured person." (citation omitted)); see also Dobbs, The Law of Torts § 170, at 413 (2000) (several liability means that "the plaintiff may obtain a judgment against both tortfeasors and enforce it against both; but . . . the plaintiff may not actually collect more than one compensation").

[9] In addition, if the court had found the Plaintiffs partially liable, I would apply a pure comparative negligence standard in apportioning fault among all the parties involved. "[C]onsideration of the plaintiff's negligence in the damage calculations, even where intentional tortfeasors are involved, best adheres to the principle that loss should be distributed according to the respective faults of the parties." Ozaki I, 87 Hawai‘i at 283, 954 P.2d at 662, overruled in part by, Ozaki II, 87 Hawai‘i 265, 954 P.2d 644 (1998) (citations omitted); see also Restatement (Third) of Torts § 14 (2000) (citing to Ozaki I for the proposition that "negligent and intentional tortfeasors could be apportioned responsibility but that the negligent tortfeasor who failed to protect should be liable for the intentional tortfeasor's share of comparative responsibility as well[.]").

IX.

HRS § 663-10.9, which generally repealed joint and several liability, would not bar recovery in this case. Inasmuch as DOE's negligence made it a joint tortfeasor in an action "involving" an intentional tort, this case comes within the intentional tort exception to the general repeal contained in HRS § 663-10.9. See Ozaki I, 87 Hawai'i at 285-86, 954 P.2d at 664-65. In Ozaki I, the ICA reasoned that joint and several liability is not abolished in an action, as HRS § 663-10.9(2)(A) states, "involving . . . intentional torts[.]"

> As set forth in HRS § 663-10.9(2)(A), joint and several liability was not "abolished" for recovery of both economic and noneconomic damages against "joint tortfeasors *involving:* (A) Intentional torts[.]" (Emphasis added.) "Involving" is the participle form of the "involve." The word "involve" means, among other things, "to have within or as part of itself: INCLUDE." *Webster's Ninth New Collegiate Dictionary* 637 (1990).
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> An action "involving" intentional torts, accordingly, is one which has within it, or as a part of it, or includes an intentional tort. Such an action, therefore, is not one which only or exclusively concerns intentional torts, but which, as denoted, would include an intentional tort as at least one of the stated theories or grounds on which liability is found.

Id. at 285, 954 P.2d at 664 (italicized emphases in original) (underscored emphasis added). Here, the action alleged an intentional tort, namely the conduct of Norton. Therefore, this case falls "squarely within the HRS § 663-10.9(2)(A) category of cases as to which 'joint and several liability for joint tortfeasors as defined in [HRS §] 663-11 [was not] abolished.'" Id.