

MAINE STATE LEGISLATURE

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LEGISLATIVE RECORD
OF THE
One Hundred And Fourteenth Legislature
OF THE
State Of Maine

VOLUME II

FIRST REGULAR SESSION

May 10, 1989 to June 14, 1989

Today's Session, please rise in their places and remain standing until counted.

Will all those opposed please rise in their places and remain standing until counted.

20 Senators having voted in the affirmative and 15 Senators having voted in the negative, the motion by Senator CLARK of Cumberland, to TABLE until Later in Today's Session, PREVAILED.

The Chair laid before the Senate the Tabled and Specially Assigned matter:

Bill "An Act Making It Illegal to Possess Lobsters Caught Illegally"

H.P. 693 L.D. 945

Tabled - June 12, 1989, by Senator BRANNIGAN of Cumberland.

Pending - Motion of same Senator to INDEFINITELY POSTPONE Committee Amendment "A" (H-458) in NON-CONCURRENCE

(In Senate, June 12, 1989, Committee Amendment "A" (H-458) READ.)

(In House, June 12, 1989, PASSED TO BE ENGROSSED AS AMENDED BY COMMITTEE AMENDMENT "A" (H-458).)

On motion by Senator BRANNIGAN of Cumberland. Committee Amendment "A" (H-458) INDEFINITELY POSTPONED in NON-CONCURRENCE.

The Bill LATER TODAY ASSIGNED FOR SECOND READING.

The Chair laid before the Senate the Tabled and Specially Assigned matter:

HOUSE REPORTS - from the Committee on JUDICIARY on Bill "An Act to Allow Recovery for Wrongful Death of Unborn Children"

H.P. 408 L.D. 551

Majority - Ought to Pass as Amended by Committee Amendment "A" (H-429).

Minority - Ought Not to Pass.

Tabled - June 12, 1989, by Senator CLARK of Cumberland.

Pending - ACCEPTANCE OF EITHER REPORT

(In Senate, June 12, 1989, Reports READ.)

(In House, June 9, 1989, the Majority OUGHT TO PASS AS AMENDED Report READ and ACCEPTED and the Bill PASSED TO BE ENGROSSED AS AMENDED BY COMMITTEE AMENDMENT "A" (H-429).)

Senator HOBBS of York, moved to ACCEPT the Majority OUGHT TO PASS AS AMENDED Report, in concurrence.

Senator HOLLOWAY of Lincoln, moved the INDEFINITE POSTPONEMENT of the Bill and Accompanying Papers in NON-CONCURRENCE.

THE PRESIDENT: The Chair recognizes the same Senator.

Senator HOLLOWAY: Thank you Mr. President. Mr. President, men and women of the Senate. I rise today in opposition to the Majority Report, with many mixed feelings and with some ambivalence. I want to state on the Record for all of us who oppose the Majority Report that we do so not without deep sympathy and compassion for any couple who has suffered the loss of pregnancy, as a result of a criminal or negligent act. Such loss is very real and their right to recover for that loss, for that sorrow and despair, is a right that no one in this Body would deny them. But, those of us who signed the Minority Report propose that this Bill is not the answer. The right to recover for medical expenses, emotional trauma, and mental anguish, all the very real costs of loss and suffering, already exist under Maine present law. This Bill is not the solution, because it raises far more disturbing questions than it answers.

I am not a lawyer and I am not in the business of having all of the answers, but I am a mother and a grandmother who asks what kind of extra protection, what kind of additional insurances would this grant my daughters against negligent medical care during her pregnancy?

I am also a Legislator who must ask, whenever I vote on a Bill, does this really serve the problem that we are facing, or does it create more problems than it solves? This Bill doesn't satisfy either of those questions for me. Granted, many of the questions that some of us raised in Committee work sessions have been addressed in the amendments that are before us, but many questions remain. Even the lawyers that I have talked to do not have the answers.

Basically, this Bill, for purposes of wrongful death claims would create a cause of action allowing a so-called interested party to recover damages for the stillbirth of a viable fetus. It would essentially create an estate for every stillborn viable fetus. First of all, those of us who have expressed concern about malpractice suits and the escalating costs of liability insurance to take note here, we are basically opening another door to permit additional tort claims. Where fault and liability exists, that is appropriate, but what happens when so many questions remain unanswered and what happens when the possibility of abuse is so great? Let me give you a few examples.

One of the first questions I have that I keep getting different answers on is, who can qualify as an interested party in the estate of a fetus? Certainly the mother, if she survives and if she is married, her husband, who under law is presumed to be the father. But, what about when the woman who dies, or both she and her husband died, are the interested parties then the grandparents? Are they the siblings? Or a distant aunt, or an uncle, or a cousin, if there is no immediate family? Who in this case has the right to file a claim? What if all of these individuals claim an interest? Let's take a more simple case. Presuming that the prospective father and mother both survive and they are the only interested parties able to file for recovery, what happens when there is disagreement or conflict on the issue of who the natural father is? For example, does an unwed father have a right to file a claim? What about the case where the husband, who is not the natural father, tries to file a claim? Does he have the right not as the natural father, but as a legal father as recognized by the law, to file a claim? What about another man claiming to be the natural father comes along and he challenges that claim? If the mother is still alive, then we may or may not have some ability to settle that question, but what happens if she also dies? How is parentage then determined? Who then has the right as the interested party? I have asked these questions and there is a lot of theories, but there are no answers. That is when you have almost unlimited possibilities for litigation. If there ever was a lawyers Bill, this one is it. I know we toss that around in this Chamber very frequently, but this time it is really true and we can test it out. We can go out into that hallway and ask ten different lawyers what will happen in these hypothetical parentage suits, and we will get ten different answers. I can't believe that there is not a better way to find justice for that young couple who has suffered such a devastating loss. I can't believe that we can't find a better way to recognize the multitude of their grief. I can't believe we can't find a better way to insure them the right to have a safe pregnancy and to have a healthy child.

My heart does go out to these people. They were wronged. There is no question about it, this Bill will not make it right for them, or for any other young couple that is faced with this tragedy in the future. I would strongly urge this Body to join me in Indefinitely Postponing this Bill and its Accompanying Papers. There are just too many questions that have no answers. Thank you.

THE PRESIDENT: The Chair recognizes the Senator from Kennebec, Senator Matthews.

Senator MATTHEWS: Thank you Mr. President. Mr. President, men and women of the Senate. I urge this Body not to support the pending motion to Indefinitely Postpone this Bill and to support the Majority Report. The particular individual that has gotten so much attention happens to be a constituent of mine in the town of Fairfield. The issue of abortion is one which we have debated before and we will probably continue to debate in this Chamber and in other forums and that is fine. But, think of the tragedy that occurred to this young lady. Eight months pregnant, a young child in that womb. The loss of that young baby and no redress under the law. Something is wrong, something is fundamentally wrong with that void, that lack of protection that each of us have under the Constitution. I respect every member of the Judiciary Committee, but this Bill goes to simple justice under the law. It doesn't allow a person who was drinking and driving and negligent to callously commit murder on our highways. It doesn't allow for people to callously run amuck in our state and in our society. It grants a special limited protection for a viable fetus. My God, eight months pregnant, eight months. I hope you will defeat the pending motion and support the majority members of the Judiciary Committee that have labored and worked extremely hard given all the tough controversial issues and I commend them and support them. Thank you Mr. President.

THE PRESIDENT: The Chair recognizes the Senator from York, Senator Hobbins.

Senator HOBBS: Thank you Mr. President. Mr. President, men and women of the Senate. As you can see from the Committee Report, this issue was thoroughly debated by the Judiciary Committee. Those who signed the Majority Report, differed in many philosophical ways. Those who signed the Minority Report, differed in many philosophical ways. The members who signed the Minority Report had some logical, sincere arguments why this particular Bill should not pass. However, after weighing this issue very heavily, having been involved in the redraft of this particular Bill, I feel that the Majority Report is a cogent one. As the good Senator from Kennebec, has mentioned, in 1988 the Maine Supreme Court denied damages for the wrongful death of an unborn viable fetus, basing its ruling at that time on the interpretation of the language of our probate code which gave the word person "a common sense meaning of one born alive." The original Bill came before us as an attempt to outline and articulate the justices of the Maine Supreme Courts position in the interpretation of that particular provision of the probate code, which would allow for damages if the unborn viable fetus was injured in the womb, but not if the child died.

This Amendment is an attempt to revise the Bill to apply to only viable but unborn fetuses rather than any fetus. Whether the fetus was viable is always a question of fact that is subject to proof in each individual case. The Majority Report attempted, and the members in drafting and crafting this particular amendment, to limit who could be held liable for the wrongful death of a viable fetus by

providing that the mother cannot be held liable for any actions that result in the death of her viable fetus. This was a very important revision that the Judiciary Committee and the Majority Report outlined, which differed from the original Bill. The Committee Amendment, which is essentially replacing the Bill, does not create a cause of action against any health care practitioner or health care provider for any abortion permitted by law and for which the required consent was lawfully given. Again, the Judiciary Committee wanted to specify in this particular amendment and clarify any ambiguity that might arise from the interpretation of the original Bill, as drafted. In addition, there is no cause of action if the health care practitioner or health care provider did not know of the pregnancy and under the applicable standard of care, had no medical reason to know of the pregnancy for any alleged professional negligence.

Again, we have defined in the Committee Amendment the terms health care provider, health care practitioner, and professional negligence. What we did is we borrowed from the language of the Maine Health Security Act. This Amendment, unlike the original Bill, does not apply to the loss of a unviable fetus and has no relevance to abortions of nonviable fetuses. Again, a very important narrow interpretation which differs from the original Bill. In Enacting this particular Amendment that is before you in the Majority Report, the Legislature, I don't believe, intends to effect the interpretation or enforcement of any criminal statute. Again, the Committee was very cognizant of insuring that a pregnant woman with an unborn viable fetus would not be charged sanction criminally.

This Amendment is also not intended to provide grounds for a doctor, a hospital, or any other person to compel a pregnant woman to undergo any kind of medical treatment for the benefit of the viable fetus. Again, the Judiciary Committee, felt very strongly that we should not have ourselves in a situation that we saw in the State of New York this past February, which made national news as you know. Again, the Majority Report, as the Judiciary Committee has done in the Amendment, provides that the wrongful death of an unborn viable fetus does not require the medical examiner to complete an investigation or to issue a certificate. Again, the Committee attempted to carefully structure and define the perimeters of this particular Bill, so as not to lead any other interpretation that could have been the case if the original Bill, as drafted, was passed.

As many of you know, this issue is a very emotional, philosophical issue. I respect all of the members of this Body for whatever position they take on this issue or the related issues regarding unborn viable fetuses. Again, please look to see what the Committee attempted to do. We attempted not to have the law liberally construed. It was not an attempt to make this Bill to be wrapped in what is known as a right to life Bill.

It was an attempt, by the Committee, to acknowledge that damages should be recovered in those instances as the case that happened tragically in Fairfield, that those individuals, that mother, that father, be compensated for the wrongful death of an unborn viable fetus. It doesn't attempt to define that unborn viable fetus as a person. If you will notice the Committee Amendment replaces the title of the Bill to reflect "An Act to Allow Recovery for Wrongful Death of an Unborn Viable Fetus". The Committee was cognizant that we must change the title to reflect the strict construction of this particular

amendment. I urge passage of the Majority Report. Thank you.

THE PRESIDENT: The Chair recognizes the Senator from Sagadahoc, Senator Cahill.

Senator CAHILL: Thank you Mr. President. Mr. President, men and women of the Senate. Just for the Record I would like to say that this is not an abortion Bill. This Bill does not discuss the debate surrounding abortion. Unfortunately, this Bill whether it passes or fails, will never address the pain and the suffering that the couple from Fairfield has gone through. I do feel for those people and I do feel for the good Senator from Kennebec, Senator Matthews, because I know as only a parent knows, that the pain and suffering must be the very worst. This Bill would entitle the mother and father or interested parties to recover damages for the wrongful death of a viable fetus. While this, at first glance, would appear probably like the right thing to do, the acceptable thing to do, upon closer inspection it raises far too many questions in my mind. The first question is of interested party. Could an interested party be a mother? The legal father? The biological father? What happens if there are two people claiming to be the biological father? In Maine, the issue of surrogate parenting has not been made illegal, so would a surrogate parent be an interested party? Would the contract, the person that had the contract with the surrogate parent, would that be an interested party? It also raises the question of viability. Even though the courts have agreed that viability occurs sometimes after twenty-four weeks, there is still major disagreement about whether the definition of viability can really be captured through the letter of the law. Viability, for example, in a rural hospital could be very different from a hospital with access to the most modern, state of the art medical equipment. There are already laws in Maine statute that permit parents suffering from a stillbirth, resulting from negligent medical treatment, to recover emotional distress and medical expenses. This Bill opens a whole new door of litigation by creating a whole new area. It creates an estate for every viable fetus. Only two states have statutes that give fetuses this standing, thirty states allow for recovery for the death of a fetus, but they have done so not through legislation, but through the judicial process. Again, ladies and gentlemen, the loss to the mother and father from the stillbirth must be a devastating experience, one I hope I will never have to go through with my grandchildren, but I see the possibility of abuse of this particular piece of legislation should it pass, compounding the loss and the pain of those parents, not reducing it. Thank you.

Off Record Remarks

Senator MATTHEWS of Kennebec requested a Division.

The President requested the Sergeant-At-Arms escort the Senator from Cumberland, Senator CLARK, to the Rostrum where she assumed the duties as President Pro Tem.

The President then took a seat on the floor of the Senate.

Senate called to order by the President Pro Tem.

THE PRESIDENT PRO TEM: The Chair recognizes the Senator from Cumberland, Senator Andrews.

Senator ANDREWS: Thank you Madam President. Madam President, men and women of the Senate. I just have a question for anyone who cares to answer it. Frankly, I am confused about the issue of redress and recovery. We have heard in the debate that it is possible for parents to receive redress and recovery under the law. We have also heard that it is not possible under current law. I would like someone to please clarify that issue one way or another.

THE PRESIDENT PRO TEM: The Chair recognizes the Senator from York, Senator Hobbins.

Senator HOBBSINS: Thank you Madam President. Madam President, men and women of the Senate. To answer the good gentleman from Cumberland's question, the status of the law now is the denial of damages for the wrongful death of an unborn viable fetus. There cannot be a wrongful death action for damages recoverable by a parent or by the estate.

THE PRESIDENT PRO TEM: The Chair recognizes the Senator from Lincoln, Senator Holloway.

Senator HOLLOWAY: Thank you Madam President. Madam President, men and women of the Senate. I would like to also answer the gentleman from Cumberland. It is my understanding that you can recover for pain, anguish, and medical, but not for a viable fetus.

THE PRESIDENT PRO TEM: The Chair recognizes the Senator from Cumberland, Senator Dillenback.

Senator DILLENBACK: Thank you Madam President. Madam President, men and women of the Senate. I haven't been concerned with this Bill greatly, but one thing bothers me about the debate that has been going on today. There isn't one reason that has been stated that this would prevent any accidents that might occur. We heard about the tragedy in Fairfield. Do you think passing this Bill is going to stop any of this that happens?

It sounds to me as though this is a lawyers Bill, can you imagine the cases that will come from this. I think it is ridiculous to put a law like this on the books at this time. We have ample laws, they have ample coverage, and certainly I feel very sorry for the people who had to go through the tragedies, but let's not make a mess of this thing. Thank you.

THE PRESIDENT PRO TEM: The Chair recognizes the Senator from York, Senator Dutremble.

Senator DUTREMBLE: Thank you Madam President. Madam President, men and women of the Senate. I don't know if we should pass this law or not, but it seems to me that without passing this law we are saying to people who do drink and drive on the road that we are not going to abuse you, but we are going to protect you people and those people who may have lost a child have no recourse. I guess my question would be if a husband and wife are going to the hospital on the way to delivery and they get hit by a drunk driver and the woman loses the baby on the way, is there any recourse?

THE PRESIDENT PRO TEM: The Chair recognizes the Senator from Kennebec, Senator Kany.

Senator KANY: Thank you Madam President. Madam President, men and women of the Senate. I, too, wanted to respond to Senator Dillenback, the good Senator from Cumberland's, comment. It would seem that today if one were involved in such an accident, that one would be able to sue for losing one's arm, but because one is losing a viable fetus, one could not sue under current law. Therefore, I support the Majority Report of the Judiciary Committee.

THE PRESIDENT PRO TEM: The Chair recognizes the Senator from Sagadahoc, Senator Cahill.

Senator CAHILL: Thank you Madam President. Madam President, men and women of the Senate. Just a further clarification for my own mind. It is my understanding that this legislation would not allow recovery for the criminal, as the case asked by the good Senator from York, Senator Dutremble, it does not allow for the criminal aspect of that. Current law does allow recovery for emotional distress to the parents caused by the tragedy and current law does allow for recovery for medical expenses leading up to the event and after the event, including prenatal care and then for psychological counseling and whatever is necessary after the tragedy.

On motion by Senator KANY of Kennebec, supported by a Division of at least one-fifth of the Members present and voting, a Roll Call was ordered.

THE PRESIDENT PRO TEM: The pending question before the Senate is the motion of Senator HOLLOWAY of Lincoln to INDEFINITELY POSTPONE the Bill and Accompanying Papers in NON-CONCURRENCE.

A vote of Yes will be in favor of INDEFINITELY POSTPONE the Bill and Accompanying Papers.

A vote of No will be opposed.

Is the Senate ready for the question?

The Doorkeepers will secure the Chamber.

The Secretary will call the Roll.

ROLL CALL

YEAS: Senators ANDREWS, BOST, BUSTIN, CAHILL, CARPENTER, DILLENBACK, EMERSON, ESTES, ESTY, HOLLOWAY, LUDWIG, PERKINS, WEYMOUTH, WHITMORE, THE PRESIDENT PRO TEM - NANCY RANDALL CLARK

NAYS: Senators BALDACCI, BERUBE, BRANNIGAN, BRAWN, COLLINS, DUTREMBLE, ERWIN, GAUVREAU, GILL, GOULD, HOBBS, KANY, MATTHEWS, PEARSON, PRAY, RANDALL, THERIAULT, TITCOMB, TWITCHELL, WEBSTER

ABSENT: Senators None

15 Senators having voted in the affirmative and 20 Senators having voted in the negative, with No Senators being absent, the motion of Senator HOLLOWAY of Lincoln, to INDEFINITELY POSTPONE the Bill and Accompanying Papers, FAILED.

On motion by Senator HOBBS of York, the Majority OUGHT TO PASS AS AMENDED Report was ACCEPTED, in concurrence.

The Bill READ ONCE.

Committee Amendment "A" (H-429) READ.

On motion by Senator PRAY of Penobscot, Tabled until Later in Today's Session, pending ADOPTION of Committee Amendment "A" (H-429).

The Chair laid before the Senate the Tabled and Specially Assigned matter:

An Act to Increase the Penalties for Repeat Violations of the Prostitution Laws

H.P. 757 L.D. 1061
(C "A" H-338)

Tabled - June 12, 1989, by Senator CLARK of Cumberland.

Pending - ENACTMENT

(In Senate, June 5, 1989, PASSED TO BE ENGROSSED AS AMENDED BY COMMITTEE AMENDMENT "A" (H-338), in concurrence.)

(In House, June 8, 1989, PASSED TO BE ENACTED.)

On motion by Senator HOBBS of York, the Senate SUSPENDED THE RULES.

On further motion by same Senator, the Senate RECONSIDERED whereby the Bill was PASSED TO BE ENGROSSED AS AMENDED.

On further motion by same Senator, the Senate SUSPENDED THE RULES.

On further motion by same Senator, the Senate RECONSIDERED whereby it ADOPTED Committee Amendment "A" (H-338), in concurrence.

On further motion by same Senator, Senate Amendment "A" (S-259) to Committee Amendment "A" (H-338) READ and ADOPTED.

Committee Amendment "A" (H-338) as Amended by Senate Amendment "A" (S-259) thereto, ADOPTED in NON-CONCURRENCE.

Which was PASSED TO BE ENGROSSED, as Amended in NON-CONCURRENCE.

Sent down for concurrence.

The Chair laid before the Senate the Tabled and Specially Assigned matter:

An Act to Prohibit the Sale of Unlawful Drugs in or near Schools

H.P. 816 L.D. 1144
(C "A" H-342)

Tabled - June 12, 1989, by Senator CLARK of Cumberland.

Pending - ENACTMENT

(In Senate, June 5, 1989, PASSED TO BE ENGROSSED AS AMENDED BY COMMITTEE AMENDMENT "A" (H-342), in concurrence.)

(In House, June 8, 1989, PASSED TO BE ENACTED.)

On motion by Senator HOBBS of York, the Senate SUSPENDED THE RULES.

On further motion by same Senator, the Senate RECONSIDERED whereby the Bill was PASSED TO BE ENGROSSED AS AMENDED.

On further motion by same Senator, the Senate SUSPENDED THE RULES.

On further motion by same Senator, the Senate RECONSIDERED whereby it ADOPTED Committee Amendment "A" (H-342), in concurrence.

On further motion by same Senator, Senate Amendment "A" (S-257) to Committee Amendment "A" (H-342) READ and ADOPTED.

Committee Amendment "A" (H-342) as Amended by Senate Amendment "A" (S-257) thereto, ADOPTED in NON-CONCURRENCE.

Which was PASSED TO BE ENGROSSED, as Amended in NON-CONCURRENCE.

Sent down for concurrence.

Under suspension of the Rules, all matters thus acted upon were ordered sent forthwith.

On motion by Senator DUTREMBLE of York, RECESSED until 4:00 this afternoon.

After Recess

Senate called to order by the President.

HELD BILL

THE PRESIDENT: The Chair recognizes the Senator from Cumberland, Senator Clark.

Senator CLARK: Thank you Mr. President. Is the Senate in possession of L.D. 404?

THE PRESIDENT: The Chair would answer in the affirmative, the Bill having been held at the Senators request.

On motion by Senator CLARK of Cumberland, the Senate RECONSIDERED whereby it PASSED TO BE ENGROSSED AS AMENDED:

Bill "An Act to Reduce the Potential for Violence During Labor Disputes"

H.P. 209 L.D. 404