

# MAINE STATE LEGISLATURE

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Senate Legislative Record  
One Hundred and Twenty-Sixth Legislature

State of Maine

Daily Edition

First Regular Session  
beginning December 5, 2012

beginning at Page 1

Off Record Remarks

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**RECESSED** until 3:00 in the afternoon.

After Recess

Senate called to order by the President.

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**ORDERS OF THE DAY**

The Chair laid before the Senate the following Tabled and Later Today Assigned matter:

**Non-Concurrent Matter**

HOUSE REPORTS - from the Committee on **LABOR, COMMERCE, RESEARCH AND ECONOMIC DEVELOPMENT** on Bill "An Act To Require the Use of Preapproved Subcontractors for Publicly Funded Construction Projects" H.P. 922 L.D. 1295

Majority - **Ought to Pass as Amended by Committee Amendment "A" (H-417)** (7 members)

Minority - **Ought Not to Pass** (6 members)

Tabled - June 13, 2013, by Senator **GOODALL** of Sagadahoc

Pending - **FURTHER CONSIDERATION**

(In House, June 11, 2013, 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-417).**)

(In Senate, June 12, 2013, Reports **READ**. Motion by Senator **PATRICK** of Oxford to **ACCEPT** the Majority **OUGHT TO PASS AS AMENDED** Report **FAILED**. Subsequently, the Minority **OUGHT NOT TO PASS** Report **ACCEPTED**.)

(In House, June 12, 2013, that Body **INSISTED**.)

(In Senate, June 13, 2013, motion by Senator **GOODALL** of Sagadahoc to **RECEDE** and **CONCUR**, **FAILED**.)

Senator **GOODALL** of Sagadahoc moved the Senate **INSIST**.

On motion by Senator **KATZ** of Kennebec, supported by a Division of one-fifth of the members present and voting, a Roll Call was ordered.

The Doorkeepers secured the Chamber.

The Secretary opened the vote.

**ROLL CALL (#271)**

YEAS: Senators: **BOYLE, BURNS, CAIN, CLEVELAND, COLLINS, CRAVEN, CUSHING, DUTREMBLE, FLOOD, GERZOFKY, GOODALL, GRATWICK, HAMPER, HASKELL, HILL, JACKSON, KATZ, LACHOWICZ, LANGLEY, MASON, MAZUREK, MILLETT, PLUMMER, SAVIELLO, SHERMAN, THIBODEAU, THOMAS, TUTTLE, VALENTINO, WHITTEMORE, WOODBURY, YOUNGBLOOD, THE PRESIDENT - JUSTIN L. ALFOND**

NAYS: Senators: **JOHNSON, PATRICK**

33 Senators having voted in the affirmative and 2 Senators having voted in the negative, the motion by Senator **GOODALL** of Sagadahoc to **INSIST, PREVAILED**.

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The Chair laid before the Senate the following Tabled and Later Today Assigned matter:

HOUSE REPORTS - from the Committee on **JUDICIARY** on Bill "An Act To Allow a Wrongful Death Cause of Action for the Death of an Unborn Child"

H.P. 837 L.D. 1193

Majority - **Ought Not to Pass** (7 members)

Minority - **Ought To Pass as Amended by Committee Amendment "A" (H-447)** (6 members)

Tabled - June 13, 2013, by Senator **VALENTINO** of York

Pending - motion by same Senator to **ACCEPT** the Majority **OUGHT NOT TO PASS** Report, in concurrence

(In House, June 12, 2013, the Majority **OUGHT NOT TO PASS** Report **READ** and **ACCEPTED**.)

(In Senate, June 13, 2013, Reports **READ**.)

On motion by Senator **KATZ** of Kennebec, supported by a Division of one-fifth of the members present and voting, a Roll Call was ordered.

**THE PRESIDENT:** The Chair recognizes the Senator from Washington, Senator Burns.

Senator **BURNS:** Thank you Mr. President. Ladies and gentlemen of the Senate, I want to just very briefly speak on this issue. I think it's a very simple issue. It's an issue that we dealt with, as you know, in Judiciary. I want to speak in opposition to the Majority Report. This bill simply provides for a cause of action, a cause of legal action, for the wrongful death of an unborn viable fetus. It is my understand the amounts of months that seem to be the consensus there was 24 weeks as far as the viable fetus is concerned. This is something that Maine is an outlier on already. We are the only state in New England that doesn't allow this for an expectant mother that gets into a situation where the loss of their unborn fetus occurs. It excludes

any action by the mother, any action by a care practitioner, or someone performing an abortion as long as it's a voluntary and legal abortion, or any healthcare provider who did not know that the expectant mother was expecting. It takes into considerations all of things that people should be concerned about. As I said, it would bring Maine into compliance with the rest of the states. All of the New England states. There are only ten states in the nation that don't provide for this. All the rest of the states, in one form or another, do provide for this. I believe there are others that are going to speak on this issue after me, but I think it's very important for us to consider this. If we want to truly protect a mother who is expecting a child or an unborn fetus to have some type of civil action after the loss of that expected child or unborn fetus in court than this would allow them to do so because of having the ability to have companionship with that child taken away from them against their will. I would hope that you would strongly consider this. This is for expectant mothers. It's something that we need to provide for them. We're not doing it now and, again, we are an outlier. Thank you very much.

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

Senator **VALENTINO:** Thank you very much Mr. President. Members of the Senate, I want to call your attention to the title, "An Act to Allow Wrongful Death Cause of Action for the Death of an Unborn Child." The title seems very simple and a lot of people did sign onto this bill. I have a letter here from somebody who read the title of the bill and then sent a letter to the Judiciary Committee, one of the Representatives of the other Body, and in that she said, "Although I signed on as a co-sponsor, I did not realize at the time the ramifications of this bill. Thus I oppose L.D. 1193." This is one of the co-sponsors of the bill. I ask you not to be taken in by the title of the bill. Maine is not an outlier. Ten other states follow Maine. This is not a simple bill. This is not just having a cause of action. This actually defines the definition of an unborn viable fetus as a fetus that has reached the twelfth week of gestation or beyond. It actually puts a definition into law of when a fetus is viable. This is a huge step in this bill. L.D. 1193 is unnecessary. Fortunately, Maine already provides criminal and civil remedies under the law for harm to a pregnant woman causing damage or loss of her pregnancy.

In 2005 a broad coalition of many groups joined together in advocating for the successful passage of our state's Motherhood Protection Act. The Motherhood Protection Act requires judges, when determining sentences for perpetrators, to assign special weight to the fact that the victim is a woman that the convicted person knew or had reasonable cause to believe to be in fact pregnant at the time the crime was committed. At that same time as the Motherhood Protection Act the Legislature also created the crime of elevated aggravated assault on a pregnant woman. This Class A crime is punishable by up to 40 years in prison and is defined as intentionally or knowingly causing serious bodily injury to a person that person knows, or has reason to know, to be pregnant. Serious bodily injury also includes injury to the fetus or termination of the pregnancy. L.D. 1193 would convey some rights of personhood to the fetus as a distinct legal entity from the mother. It would create potential unintended consequences to doctors, nurses, and potentially to mothers.

Why should we reject this bill? The bill threatens the anonymity of pregnant women and undermines the legal protections established in *Roe vs Wade* by seeking to convey certain rights to

the fetus as a separate legal entity from the mother. The bill opens the door to protracted litigation against any healthcare provider who treats a woman the provider knows, or reasonably should know, is pregnant. This could have significant effects on prenatal care providers and other healthcare providers across Maine. Even the Maine Association of Insurance Companies is quoted in testimony as saying, "If adopted, the bill would alter 193 years of Maine law as to the interpretation of who may recover for injuries. We further believe that dramatically altering the wrongful death statute in place since 1891 is inappropriate. We do not believe this matter should be legislated through the wrongful death statutes."

I'm not an attorney, so I'd like to read to you from an attorney who handles a lot of these cases. He spoke before the Judiciary Committee. His name is Sheldon Tepler, Esq. He is a senior partner at Hardy, Wolf, and Downing. I'm quoting from his testimony. His testimony says, "Today if a pregnant woman is involved in a motor vehicle accident or suffers a personal injury as a result of another and thereby loses a child she is entitled to recovery. The recovery would be very significant. She is entitled to recover any loss wages that resulted. She is entitled to recover for any medical bills generated. She is entitled to recover for pain and suffering and loss of enjoyment of life. L.D. 1193 creates a cause of action for the estate of the fetus. That means that the unborn child has its own action. That means that the heirs to the estate of the fetus can recover above and beyond what has been described as above." He states that if he had one of these cases he would retain an economist to show what the unborn child would have earned during the course of a lifetime. He says you would be creating a cause of action worth millions upon millions of dollars in addition to what the mother could recover today. He also gives us a hypothetical situation which may make it clearer for some people. Hypothetically, the unintended consequences are enormous. Let me give you an example. Assume the pregnant mother runs a red light or is even driving drunk. Assume she collides with a truck. Assume that she goes to an attorney to see what she can recover for the loss of the child. An aggressive attorney would hire an accident reconstructionist to determine whether the truck was going one or two miles above the speed limit. If that truck was going 36 in a 35 there would be a cause of action. While this would be a weak case because of the exposure of a multi-million dollar law suit, the truck company, or the driver, would probably settle for a fraction of the value of the case, \$500,000 to \$1 million. I'm not sure if the Legislature wants to create these kinds of actions. He states, in summary, that mothers already can be compensated for egregious loss. You are creating a cause of action with significant consequences and this will have ramifications in many other areas of laws, most notably Workers' Compensation. He states this bill is an abortion bill intended to undermine reproductive rights.

I urge you not to pass this bill. Thank you.

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

Senator **KATZ:** Thank you Mr. President. Men and women of the Senate, I just rise to talk just briefly about the laws that exist and how I understand the law would be changed were this bill to be passed. Currently, under the wrongful death law, Jane Smith, married to Sam Smith, and Jane is driving and is struck by a car at an intersection, through no fault of her own. She is killed, leaving no children. Sam, her surviving husband, presumably

would be the personal representative or the executor of the estate to bring an action against the wrong doer and recover for Jane's medical bills, hospital bills, her conscience pain and suffering, and also the loss to her surviving family, which in this case would be the husband, for the loss of care, companionship, and comfort. It's called loss of consortium in the law. It's really what's important. It's the loss of your loved one. Those damages, by Maine statutes, are limited to \$500,000. That is for the loss of care, companionship, and society it's called. It is capped at \$500,000. As I understand the current bill, let me give you a different fact scenario now. Jane Smith, also married to Sam Smith, and she, once again, is struck in an automobile accident at an intersection through no fault of her own. She is 30 or 35 week pregnant and the viability of the fetus is ended in the automobile collision. In addition to the damages which Jane might be able to recover for her own medical bills, hospital bills, lost wages, and the like, the estate would be able to recover up to \$500,000, which could be payable to the parents in this case, for the loss of a child.

I understand that these issues are very highly charged and looked at very suspiciously. How is this going to impact Roe vs Wade? How is this not going to affect Roe vs Wade? I, frankly, see very little impact on this. I see it, though, creating a cause of action for grieving parents who have now lost what they were looking forward to in their life more than anything else, and that is the birth of a child. That's, in my view, Mr. President, all it is. Thank you.

**THE PRESIDENT:** The Chair recognizes the Senator from Somerset, Senator Whittemore.

Senator **WHITTEMORE:** Thank you Mr. President. Ladies and gentlemen of the Senate, I rise in opposition to this motion. I'd like to address something that was mentioned earlier in regards to the possibility of increased cost for insurance. I have here some testimony that was given in the committee from a Lincoln J. Merrill, Jr. who is President and CEO of Patriot Insurance Company. It is also co-signed by Cross Insurance, Downeast Insurance, Insurance Trust and Equinox, and Blackwell Insurance. He writes, "There is also a concern that if this bill becomes law it could increase the consumer's insurance rates. Any change would be negligible. For example, Patriot has added nothing into our rates for this exposure in New Hampshire and Vermont. I believe the number of claims is very small country-wide." He writes, "My personal reason for supporting this bill is that insurance companies such as mine are in the business of paying for the negligence of our policy holders. That means paying for damages to property and injury to people. I see the injury or death of an unborn child in a car accident to be negligible and is compensable as any other injury or death our policy holders cause. I believe we have the responsibility as an insurance company to pay for the negligence our policy holder caused to those loving parents who were waiting for the birth of their child." I just would like to make the point that this individual and those that co-signed this don't feel that it would have a large consequence in the cost of insurance. Thank you.

**THE PRESIDENT:** The Chair recognizes the Senator from Oxford, Senator Hamper.

Senator **HAMPER:** Thank you Mr. President. Ladies and gentlemen of the Senate, I, too, rise in opposition of the motion

and, since we're reading testimony, I'll read one from Dan Mitchell, who presented at the committee. He's a practicing attorney, shareholder in litigation practice group of Bernstein Shur. "Under current law if a pregnant woman was driving on the Interstate 95 in Kittery and had the misfortune to be the victim of an accident caused by a drunk driver that led to the loss of the woman's unborn viable fetus, she would have no compensable injury and no right to bring an action in our courts, the Maine courts. If that same drunk driver hit the same woman just a few miles south, in New Hampshire or just over the line in Massachusetts, or for that matter in any other New England state, the woman would be entitled to bring a wrongful death action and seek just compensation for her loss. There is no persuasive reason for Maine to remain out of step with the rest of New England." I add to that, it was said that Maine is leading. I question, is Maine leading or is Maine simply following here? Forty other states in the union have this provision. We're the only one in New England. I continue on, "If Massachusetts, Vermont, Connecticut, New Hampshire, and Rhode Island have managed successfully to integrate this cause of action into their civil justice systems than certainly we can do so as well. The bill was crafted carefully to avoid negative effects on the legal rights of pregnant women and their healthcare providers." Wouldn't we want the same level of justice as the rest of New England? This is a common sense bill on common ground. Thank you, Mr. President.

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

Senator **HASKELL:** Thank you very much Mr. President. Colleagues of the Senate, just to clarify. It is my understanding that a woman who has lost her pregnancy due to another's wrongful act or negligence is currently entitled to recover in civil court through tort law. Testimony from personal injury attorneys at the hearing on the bill indicated that parents would be able to recover for pain and suffering and loss of enjoyment of life related to the loss of the pregnancy. The difference with this bill would be the creation of a new separate plaintiff with the prospect of the calculation of lifetime loss of wages and resulting potentially very large dollar volumes in causes of action. Thank you, Mr. President.

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

Senator **GOODALL:** Thank you Mr. President. Men and women of the Senate, I view Maine as a leader, a leader in women's health issues, and a leader in keeping our role limited in the patient-doctor relationship. This title may sound attractive to some, but I think it's misleading and misguided. There are already numerous ways for someone in a horrific accident, in a most challenging situation and a situation of one that we would wish upon no one, to recover. It currently exists in law. We've heard much testimony at the hearing. It was discussed greatly at work sessions. Many of those quotes were articulated here on the floor today. This will bring extreme protracted litigation. It will question the standard of care of medical professionals. It will do nothing to advance women's health issues. These are the most challenging discussions, often, that we have in this Body. Let's not be misled. Let's not take a step forward that really infringes upon those women's health issues that so many of us care so

deeply about. There are already ways to recover. There are ways to recover in court. In addition to that, even if you wanted to support this bill, we should not be putting this issue in probate court with elected judges. The structure of the bill is flawed, even if you agree with it. For me, I don't agree with it. Not only do I disagree with the concept, I disagree with the process that's being outlined here. Men and women of the Senate and Mr. President, I would encourage you to follow the Ought Not to Pass. There are plenty of remedies already in law. Most importantly, we shouldn't be doing something that will have an impact, without a doubt, on the patient-doctor relationship. We should let doctors do their jobs. We should allow those patients, in the most trying situation in anyone's life, to make the decision with their doctor and their families. Thank you, Mr. President.

**THE PRESIDENT:** The Chair recognizes the Senator from Washington, Senator Burns.

Senator **BURNS:** Thank you Mr. President. Ladies and gentlemen, I want to speak to a couple of things that have been mentioned here. Thank you again for the indulgence of allowing me to speak a second time. We've already heard from four attorneys with two diverse opinions from those four attorneys. That is expected. I understand that. I think my response would be that you are only going to be misled on this issue if you choose to, if you put blinders on. I don't think there is any intent here whatsoever to mislead. Certainly I haven't seen any attempt here. This is a clear attempt to give justice to women who have had a great great loss in their lives. To say that Maine is not an outlier, when we are one of only ten states in this country that don't provide for this protection, I just don't understand that logic. Yes, I'd like to see Maine be a leader. It looks to me like we're a follower. That concerns me greatly. As far as unintended consequences, read the bill. The bill excludes those persons, including the mother, from any unintended consequences. This isn't about abortion. This isn't about discussions between, and decisions between, a woman and her physician. This is about losing something that's extremely valuable to a family, an unborn child, and whether or not they should be civil remedies for that. This provides for that. It has absolutely nothing to do with the rights of the fetus. It's all about the rights of the mother. From my perspective, this Legislature and this Body has a choice to stand in the way of an expectant mother, and we all represent the same amount of people, from receiving equal justice for the loss of their unborn fetus. Thank you very much, Mr. President.

**THE PRESIDENT:** The pending question before the Senate is the motion by the Senator from York, Senator Valentino to Accept the Majority Ought Not to Pass Report, in concurrence. A Roll Call has been ordered. Is the Senate ready for the question?

The Doorkeepers secured the Chamber.

The Secretary opened the vote.

### ROLL CALL (#272)

**YEAS:** Senators: BOYLE, CAIN, CLEVELAND, CRAVEN, DUTREMBLE, GERZOFKY, GOODALL, GRATWICK, HASKELL, HILL, JOHNSON, LACHOWICZ, LANGLEY, MAZUREK, MILLETT, PATRICK, PLUMMER, VALENTINO, WOODBURY, THE PRESIDENT - JUSTIN L. ALFOND

**NAYS:** Senators: BURNS, COLLINS, CUSHING, FLOOD, HAMPER, JACKSON, KATZ, MASON, SAVIELLO, SHERMAN, THIBODEAU, THOMAS, TUTTLE, WHITTEMORE, YOUNGBLOOD

20 Senators having voted in the affirmative and 15 Senators having voted in the negative, the motion by Senator **VALENTINO** of York to **ACCEPT** the Majority **OUGHT NOT TO PASS** Report, in concurrence, **PREVAILED**.

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The Chair laid before the Senate the following Tabled and Later Today Assigned matter:

HOUSE REPORTS - from the Committee on **JUDICIARY** on Bill "An Act To Strengthen the Consent Laws for Abortions Performed on Minors and Incapacitated Persons"  
H.P. 956 L.D. 1339

Majority - **Ought Not to Pass** (8 members)

Minority - **Ought To Pass as Amended by Committee Amendment "A" (H-448)** (5 members)

Tabled - June 13, 2013, by Senator **VALENTINO** of York

Pending - motion by same Senator to **ACCEPT** the Majority **OUGHT NOT TO PASS** Report, in concurrence

(In House, June 12, 2013, the Majority **OUGHT NOT TO PASS** Report **READ** and **ACCEPTED**.)

(In Senate, June 13, 2013, Reports **READ**.)

On motion by Senator **VALENTINO** of York, the Majority **OUGHT NOT TO PASS** Report **ACCEPTED**, in concurrence.

(See action later today.)

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The Chair laid before the Senate the following Tabled and Later Today Assigned matter:

An Act To Amend the Mandatory Shoreland Zoning Laws  
S.P. 555 L.D. 1490  
(C "A" S-211)

Tabled - June 13, 2013, by Senator **KATZ** of Kennebec

Pending - **ENACTMENT**, in concurrence