

MAINE STATE LEGISLATURE

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LEGISLATIVE RECORD

OF THE

***One Hundred and Eighth
Legislature***

OF THE

STATE OF MAINE

Volume I

January 5, 1977 to May 25, 1977

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AUGUSTA, MAINE

SENATE

Thursday, January 27, 1977

Senate called to order by the President.
Prayer by The Honorable Gerard P. Conley of Portland.

Mr. CONLEY: God grant this Senate the serenity to accept the things it cannot change, the courage to change the things it can, and the wisdom to know the difference.

Reading of the Journal of Yesterday.

Out of Order and Under Suspension of the Rules:

On motion by Mr. Huber of Cumberland,

ORDERED, the House concurring that when the House and Senate adjourn, they adjourn to Tuesday, February 1, at 4 o'clock in the afternoon. (S. P. 84)

Which was Read and Passed.

Sent down for concurrence.

Out of Order and Under Suspension of the rules:

On Motion of Mr. Speers of Kennebec, the Senate voted to consider the following:

Committee Report

House

Ought to Pass - As Amended

The Committee on Agriculture on, Bill, An Act to Amend the Potato Lien Law. (Emergency) (H. P. 22) (L. D. 31)

Reported that the same Ought to Pass as amended by Committee Amendment "A" (H-1).

Comes from the House, the Bill Passed to be Engrossed as amended by Committee Amendment "A".

Which report was Read and Accepted in concurrence, and the Bill Read Once.

Committee Amendment "A" was Read and Adopted, in concurrence.

Under suspension of the rules,

Read a second time and

Passed to be Engrossed, as amended, in concurrence.

Sent forthwith to the Engrossing Department.

Out of Order and Under Suspension of the Rules:

On Motion of Mr. Speers of Kennebec, the Senate voted to consider the following:

Committee Report

Senate

Ought to Pass in New Draft

Mr. Collins for the Committee on Judiciary on, Bill, "An Act to Establish the Maine Tort Claims Act," (Emergency) (S. P. 45) (L. D. 87)

Reported that the same Ought to Pass in New Draft under Same Title (S. P. 86) (L. D. 162).

The PRESIDENT: The Chair recognizes the Senator from Knox, Senator Collins.

Mr. COLLINS: Mr. President, this bill, L. D. 162, which was distributed to our desks this afternoon, "An Act to Establish the Maine Tort Claims Act", is a Judiciary Committee revision of L. D. 87, and might better be labeled Governmental Immunity Act.

In March, 1976 our esteemed former colleague, Senator Robert Clifford, stood in this Chamber and urged the Senate to pass a bill sponsored by Representative Richard Hewes, which would have held the line on Governmental immunity as State policy, with minor insurance exceptions that would be protected by insurance.

Senator Clifford prophesied that if the bill were not passed, the Court would strike down the doctrine of sovereign immunity, and leave unprotected and, in many instances, uninsured, our towns and cities, school districts, special purpose districts, as well as the State of Maine, and the officials thereof. The prophecy of Senator Clifford came to pass October 12, 1976, when the Supreme Judicial Court of Maine, in the case of Davies against the City of Bath,

struck down the doctrine of sovereign immunity, which has been the law of the State of Maine more than a century.

On motion of the Attorney General, the Court later ruled that the new posture of the law would not become effective until February 1, 1977. At that point serious study of the problem was made by the Attorney General's office, by corporation counsel of the City of Portland and other cities, Maine Municipal Association, and by the Governor's office, and out of these studies and efforts there was put together a draft of the bill which was handed to me two weeks ago.

I made a couple of modest changes in that bill, and then filed it, and it went to public hearing one week ago. The public hearing took more than one day and was continued to Monday of this week. The Committee put in two additional days of trying to hammer out an acceptable Bill to meet this problem.

This Bill that is now offered to the Senate, is, of course, a compromise. It is also intended to be a stop-gap. It is limited in its application to approximately a 2-year period, and it provides a period until the first of July in which essentially the prior law will prevail. I am sure that veterans of this Chamber will appreciate that there was a wide range of views in the Committee, as this matter came on the Committee rather quickly and that there has not been the time we would like to study it in depth.

There are many active and innovative minds on the Judiciary Committee. The range of solutions was everywhere from A to Z.

This document represents the least common denominator, a stop-gap measure, which, while not perfect, we believe improves on the law of sovereign immunity and provides for the citizen of the State who is injured by a governmental wrong at least a better chance at redress after July 1 than was available before.

This Bill, of course, contains good news and bad news. The good news to the taxpayer is that the basic cloak of immunity is restored. Of course, for the aggrieved citizen, that is bad news. On the other hand, the narrow corridor of liability for the injured citizen to have available to present his claims for redress is opened up after July 1. And that is good news for the injured citizen, but bad news for the taxpayers, because the taxpayer, to protect their governmental entities, will probably in most cases want to buy insurance. And insurance costs, of course, are climbing all the time.

If I may just touch two or three of the highlights of this bill, and if members of the Senate should have some questions, I am sure that Senator Curtis, Senator Mangan or I will try to give you some answers.

When liability does open up to the narrow degree that this bill permits, the limit for any one occurrence will be \$300,000.00. A special statute of limitations is indicated, which is 2 years, whereas the general statute of limitations is 6 years. A notice provision is provided so that the governmental entity must receive a written notice at least 6 months after the event occurs. The chief areas in which liability is opened are with respect to motor vehicles and other types of vehicles and equipment. Negligence in the use of such instrumentalities is not already available for liability because of insurance provisions already in our law, and will become an open area after July 1.

Public buildings is the second category of major importance. Public buildings, the safety within those buildings; will become a subject for liability after July 1.

The original bill had provided an area of responsibility under highways, bridges and the like. We have removed that from the bill because of the high insurance costs that we found. However, we did amend the existing statutes that permit a recovery after notice

has been given of highway defect, so that the town, which formerly was liable only to the extent of \$4,000.00 has now become liable to the extent of \$8,000.00.

One of the important features of this bill is that it gives a new clarity to the status of our governmental officials. In the past couple of years, there has been a great many lawsuits brought against selectmen, school board members, planning board members, various licensing authorities, and some of those suits have caused so much dismay among people, frequently unpaid or paid very little who serve in those positions, that in some towns it is difficult to get people to run for office, or accept appointment on these public officialdom boards.

We have very carefully laid out 3 areas in which there is an absolute immunity. Those areas have to do with judicial acts, legislative acts, and other policy actions where discretion is a part of the responsibility of the job. We hope that this will cause people serving in government, particularly at the lower levels where there is basically a patriotic motive in serving, to come forward with the courage that they are not going to be sued for every little thing they do.

Part of the bill relates to what we hope to do in the future. It provides that the Judicial Committee shall embark on the major study of this problem and report back at a later Session of this Legislature. It could, of course, report even to this Session of this Legislature, or if the work is not done by that time, the next Legislature, with perhaps a more comprehensive Bill than we have been able to fashion with the evidence at hand.

In the meantime, between now and July 1, if the Legislature enacts this bill today, there will be an opportunity for the governmental entities, and I speak particularly of our towns, cities, school districts, special purpose districts, to go to the insurance market and find out what the cost is of protecting their entity from the exposures that are created by this Bill. We haven't been able to pin that down very well, and I became convinced in the course of our deliberations that we would not succeed in pinning it down very well until we actually enacted a Bill that could be handed to the insurance industry. The industry could then analyze it, go through its premium calculations, come back with answers about price of insurance, and if that price tag turns out to be higher than our communities can handle in this 5-month period ahead, I hope the feedback will come right to this Legislature, so that we can take another look at the matter and see how we can tailor the law further to make it so that insurance can be purchased to meet the needs of our community.

A Bill of this type often has to be construed later on by the Courts. For that reason, I would like to make a couple of points clear, because several people asked me questions. The original bill, for example, said that recovery in new liability areas would not permit coverage for pain and suffering. We have removed that from this draft. It will be possible, if one is otherwise able to recover for pain and suffering in other usual areas of damages in tort cases, except that it will not be possible to recover anything for punitive or exemplary damages.

The State of Maine already has an insurance law concerning its motor vehicles, which in effect waives the sovereign immunity of the State where there is State insurance on these vehicles. Then that basically will continue to prevail. There may be one technical word in the bill which causes a question about that but, if that is so, it will be corrected in the Errors and Inconsistencies Bill which is now pending before the Judiciary Committee, so it is not a serious problem, but one that we are aware of and will correct.

In the technical area, I have to make one more comment which I wish I did not have to make. I left the State House last night at about 5:00 and returned this afternoon. About 20 minutes ago there was handed to me a printed 11-page report entitled: "Report of the Judiciary Committee on Sovereign Immunity." This is the first time that I have seen this report. The Judiciary Committee has not, as far as I have been able to tell in the last few minutes, viewed this report. It is not proper to consider that this report has any legal significance in the interpretation of this Bill, because it has not had the review of the Committee. I think that the effort to put out this report was very well intended. A quick look at the report causes me to say that most of it is well presented and valuable, and I see at least one error that might be misconstrued. I have to put on the record the fact that this item, which says it is the report of the Committee, is really not the report of the Committee at this stage. We will, of course, review it in time. If we find, as a Committee we can accept it and adopt it, then we will report back, for the sake of the record.

This is a rather long review, but this is an important legal problem in our State and one that we must face under pressure of a very tight deadline. I would urge the Senate to enact today this measure, L. D. 162. Thank you.

(Off Record Remarks)

The PRESIDENT: Is it now the pleasure of the Senate to accept the Ought to Pass in new draft report of the Committee?

Mr. MERRILL: Mr. President.

The PRESIDENT: Chair recognizes the Senator from Cumberland, Senator Merrill.

Mr. MERRILL: Mr. President and Members of the Senate: Very briefly I would like to congratulate the Senator from Knox, Senator Collins, the other Senators, the members of the other body, and members of the committee who worked on this Bill.

I don't think that this is a perfect bill, I don't think that Senator Collins or any other members of the Committee think it is, but I think this is an excellent effort, and I think it is a much better Bill as the result of the efforts of Senator Collins and the other members of the Committee than the original Order that they had to deal with.

I would just like to say a couple things about that effort. They have had a very short time, as Senator Collins has pointed out, really to deal with a very complex area, so I think they have been guided by a principle of moving in a conservative way, being careful to move as slowly as possible and I think that is a good course. The Senator from Knox, Senator Collins, has pointed out that this was debated in the Chambers during the last Session of Legislature, and I made an effort in these Chambers as a member of the Judiciary Committee to have us study this issue over the summer because I was confident, as was my then colleague on the Judiciary Committee, Senator Clifford from Androscoggin, that the report would strike this document down, and it did.

But I think that a good beginning has been made here and I think a valuable precedent has been set by this Bill. I find of special interest the fact that I communicated with several lawyers across the State, lawyers who represent municipalities, lawyers who have practices that generally deal with plaintiffs, lawyers who are Democrats and lawyers who are Republicans, to ask for their comments on the original bill and, of course, they had a limited period of time in which to provide us with their input. They were very helpful and I found that in so many cases that the specific most troubling thing about the Bill that they mentioned in the original bill was the fact that it removed the right to jury trial, for example,

which was raised as a problem by the former Executive Councilor, Charles Abbott, a practicing attorney of high repute in the Lewiston-Auburn area, and the fact that it had those provisions, took away the provisions for pain and suffering, which was a problem raised by the firm of which Harry Richardson is associated with. Improvements have been made in that area by the Committee.

As I said, in reviewing their letters, specific problems they had with the Bill, and when I look at the redraft, I am very much impressed with the job the Committee did in the short period of time to respond to make this the best Bill possible within conservative constraints with which they had to operate.

I would like to congratulate the Committee. I think it is a good beginning. It will ultimately have to be a Tort Claims Act, much broader in scope, so that we can end up ultimately with the Tort Claims Act that addresses the inequities that first forced the Maine Supreme Court to start to reconsider its own doctrine of sovereign immunity.

The Bill that we have before us does, in fact, as I read it, deal with specific areas which were the result of the suit in Bath and would, I think if I read it correctly, in the future, allow the limitations set here for an action to be brought against the sovereign in regards to those areas, but the Bill would be broader in the other cases that originally prompted the Court to say to itself that this doctrine of sovereign immunity is inequitable, in the way that it works upon the plaintiffs who come before this Court. We have not dealt with those areas. We have not dealt with the perceived injustice of that rule that forced the Court to consider doing away with it in the first place. I think we have a long way to go and I am glad that the Committee recognizes that, and plans to study the draft further.

The PRESIDENT: The Chair recognizes the Senator from Cumberland, Senator Conley.

Mr. CONLEY: I wish to certainly commend the good Senator from Knox, Senator Collins, for his diligence and the hard work that his Committee has performed in dealing with this measure before this body today.

A look at sovereign immunity, and many of us that have been here for a few years recognize the fact that the Court has, on many occasions, at least hinted and finally struck down sovereign immunity, which forces us in the position of doing something about it.

As a lay person, and I know most of the members of this body are, have a very difficult time understanding what sovereign immunity is really all about. It is my understanding this sovereign immunity came to us from England. It was common law established by the Court, that the State and creatures of the State, subdivisions of the State were immune from any suits brought upon them. The Court has said that no longer do they recognize the doctrine of sovereign immunity, which obviously now leaves the State and its creatures open to suit.

The Bill that is before us is one that has been worked on several months. In fact, a major part of this bill was drafted by Maine Municipal Association and people within their organization. I am sure they wrestled with this problem and dealt with it long before it was brought to these Chambers. As a lay person, though, I have a great many concerns. My concerns are, one, that the taxpayers themselves are protected and that its citizens are also protected.

The original proposal that came to the Legislature does not permit an injured party to sue for damages in a lot of very obvious situations. For example, a local policeman loses his temper and strikes a citizen causing injury. The citizen can sue the policeman but not the town which is responsible for having such a poorly trained officer on the payroll.

An employee of a state or municipal health

care facility causes injury through his or her negligence. Again, only the individual can be held liable for damages, not the hospital or clinic.

Your county commissioners put a relative on the payroll and this person loses some valuable documents, causing citizens to lose title to their property and suffer considerable economic loss. These citizens can obtain financial reimbursement only by suing the employee, who the commissioners are probably paying less than the minimum wage.

Citizens could be poisoned eating at public institutions, injured as result of poor supervision on a public beach, or pushed through a window at one of our State liquor stores. Hopefully, these things could not happen, but if they did, your constituents have no way of obtaining damages except by lawsuit against the individual involved.

Unless these problems are straightened out, we should not pass this legislation.

Another serious problem is the unfairness. A student injured in a shop class can recover damages from the school if the injury was caused by a poorly maintained power saw, but not if caused by a mislabeled jar of chemicals.

The proposal before us puts the public employee up front, liable for damages, but gives immunity to the employing body of government, there is no provision that the state or municipality reimburse the employee for damages suffered from a lawsuit.

This is an area of great potential unfairness and should be studied before we act.

We should study the need for a limitation on attorney's fees. The federal tort claims act limits attorney's fees to 25% and should be considered here.

This issue is not just one of law: it concerns something much more important to our citizens — Money. Until we have a better idea as to what kind of liability coverage the insurance firms are willing to provide to our cities and towns, we are groping around, talking about a state fund without knowing the costs involved.

We are unsure about the two crucial matters at the heart of this issue. We do not know how much immunity we want to provide.

And until we know how much immunity we should provide, we cannot know how much insurance coverage will be required. Furthermore, our ideas on insurance coverage are based upon the vague testimony of a few insurance lobbyists, and not on any kind of careful study.

We can act in haste, repent in leisure, or we can simply extend sovereign immunity by 60 or 90 days and be sure of what we are doing to our communities and our constituents.

Mr. President and Members of the Senate, it is my understanding that the Bill still before us apparently establishes the doctrine of sovereign immunity until July 1st of this year. It appears to me that we are going to be here for a great number of months ahead. We have heard the good Senator from Cumberland, Senator Merrill; good Senator from Knox, Senator Collins, express their concerns about this not being a model piece of legislation, and perhaps we can never arrive at a model piece of legislation. But I think we should give the Judiciary Committee the opportunity of sitting down and working this out over the next few months.

It would be my hope that instead of passing this particular Bill, and I speak as only a Senator from Portland, that we just extend sovereign immunity to the State by Legislative Act, by Statute, for an additional 90 days, and see if Senator Collins and his very diligent Committee couldn't work something better.

Mr. MERRILL: Mr. President.

The PRESIDENT: The Chair recognizes the Senator from Cumberland, Senator Merrill.

Mr. MERRILL: Mr. President and members of the Senate, speaking only as a Senator from Cumberland, which of course is the only way I can speak, not holding a position of leadership as does the previous speaker. I want to say that I share many of his concerns, but I am not sure that the remedy that he suggests is the proper one or necessary one. As I understand the bill before us, it will give us plenty of time to make changes as time goes on before there will be any major changes in the position that the State faces, or the municipalities face in terms of ability to sue. In point of fact, I would like to respond to one specific area that the Senator from Cumberland, Senator Conley, has raised, because it is near and dear to my heart, and that is the area of the liability exposure on the part of those people who the State employs in its service, and municipalities employ in its service.

This Bill is certainly not a giant step, but a step forward in regard to those employees. They are in a better position now than they were a year and a half ago, or a day ago, or should I say a better position in two ways. In the narrow area that caused our governments to be sued. The total that they could be sued for, the \$300,000.00 total, that umbrella covers the employee as well, so the total recovery against the employee and the governmental entity cannot exceed \$300,000.00, in that narrow area of action that puts the State employee in a position which is at least as good as an employee in the private sector.

And looking at it in a very frank and honest way, what that means to an employee is he, in fact, is going to end up paying little or nothing in any case, because obviously the deep pocket that is available is the pocket that the Plaintiff is going to go after, and, woe, as great a trouble as we have financially in this State of ours, we are better off than most of the people we employ.

Outside of that area that we are opening up to be sued, there is at least provision for something that I have been working on for a couple of years, and had a Bill in to deal with it specifically last time, — the provision to help the public employee, the concern with pre-judgment attachments. It would at least say to the employee that we ask to go in and do our dirty work, for example in a mental institution, where he is faced with decisions every day, although being a paid employee and making judgments and decisions that he can be possibly sued for, to at least say to that employee that in the period of the suit your house will not be attached, and provide some sort of protection to that person. I don't think it is enough, but I think we are a lot better off than we were two days ago, and a lot better off than we were when the doctrine of sovereign immunity was alive and well in this State:

I would like to see at least that much, that step forward, enacted into law. Although this certainly isn't a giant step forward, for the people we employ and it represents, I think, an injustice in the sense that we leave the employees open to suit, a step that we ourselves are unwilling to be open to. It is a step in the right direction, and I think a step that we should take at this time. It certainly is not a step away from the concerns that the Senator from Cumberland, Senator Conley, raises.

Finally, let me say, there is no way to reach the ideals that the Senator from Cumberland proposes. There is no better example of the truth than what we were told before we began this work, that there is no solution to some of our problems. In the area of dealing with Governmental immunity, there is no way to say I want the Plaintiffs to be able to recover for actual damages done, but I don't want there to be a great exposure of the taxpayers. What one takes, the other will give. So it is a balancing

act at best. And then you have the other concerns that have to come forward and play a role as well, such as the concerns of the people for the State employee, and try to treat him fairly.

Any solution that you come to is not going to meet the ideals that the Senator from Cumberland, Senator Conley, has laid out. So it will be a balance, and I think as I said at the outset, this balance may be more conservative than I would like it to be, but certainly it will put us in a posture of taking a step away from the doctrine of sovereign immunity, which has all of the flaws that the Senator from Cumberland raises, only worse. It certainly isn't envisioned by the people who presented the work of the Committee here before the Senate today as a final solution, and I judge by the words that we have heard representing the opinion of the Committee by the Chairman, the Senator from Knox, Senator Collins, that they will be open and acceptable to proposed changes and improvements in what they have carved out here, and which they admit to be the beginning of a work of fashioning, slowly and carefully, the State exceptions to the doctrine of sovereign immunity.

The PRESIDENT: Is it now the pleasure of the Senate to accept the Ought to Pass new draft of the Committee?

Which report was Accepted. Under suspension of the rules, the Bill, in New Draft, Read Twice and Passed to be Engrossed. Sent down forthwith for concurrence.

Papers from the House Joint Resolution

A Joint Resolution in Memoriam:
WHEREAS, the Legislature has learned with deep regret of the death of Patricia K. Dunne, Treasurer of Cumberland County, (H. P. 118)

Comes from the House, Read and Adopted.
Which was Read and Adopted, in concurrence.

Joint Order

An Expression of Legislative Sentiment recognizing:

WHEREAS, Wellington Higgins of Winthrop Celebrated the 103rd Anniversary of his birth on January 25, 1977. (H. P. 139)

Comes from the House, Read and Passed.
Which was Read and Passed, in concurrence.

Joint Order

ORDERED, the Senate concurring, that the Joint Standing Committee on Local and County Government be directed to bring out a Resolve or Resolves for Laying of the County Taxes for the Years Nineteen Hundred and Seventy-seven and Nineteen Hundred and Seventy-eight. (H. D. 138)

Comes from the House, Read and Passed.
Which was Read.

The PRESIDENT: The Chair recognizes the Senator from Cumberland, Senator Jackson.

Mr. JACKSON: I move that this item be tabled.

The PRESIDENT: The Chair recognizes the Senator from Kennebec, Senator Speers.

Mr. SPEERS: I move this item lie on the table for one Legislative day.

The PRESIDENT: The Senator from Kennebec, Senator Speers, now moves that Item 1-3, H. P. 138, be tabled for one Legislative day, pending passage. Is this the pleasure of the Senate. It is a Vote.

Bills received from the House requiring reference to Committee were acted upon in concurrence.

Department of State

January 26, 1977

To the Honorable Senate of the
108th Legislature of the
State of Maine:

Examination of the initiative petitions relating to "An Act to Repeal the State Property Tax" filed with this office on January 19, 1977 has been completed.

The minimum number of valid signatures required to initiate this legislation has been determined to be 36,395. Our examination of these petitions reveals the following:

Number of petitions received 486

Number of valid signatures 46,583

In view of the foregoing determination of the number of valid signatures, it would appear that these petitions have met the constitutional requirements of the minimum of 36,395 valid signatures.

Respectfully,
MARKHAM L. GARTLEY
Secretary of State
(S. P. 85)

Which was Read and with accompanying papers Ordered Placed on File.

Under Suspension of the Rules, sent down forthwith for concurrence.

Out of Order and Under suspension of the Rules:

On motion by Mr. Speers of Kennebec, ORDERED, The House concurring, that the communication together with bill, "An Act to Repeal the State Property Tax," Initiated Bill (I. B. 1) and accompanying petitions, be referred to the Joint Standing Committee on Judiciary for an investigation and report as to the sufficiency of the petitions; with the power on the part of the committee to subpoena witnesses. (S. P. 87)

Which was Read.
The PRESIDENT: The Chair recognizes the Senator from Kennebec, Senator Speers.

Mr. SPEERS: Mr. President, by accepting the former communication just prior to this item, the Legislature has now received the initiated Bill from the Secretary of State's Office.

In presenting this Order I do not mean in any way to indicate, or even raise questions as to the sufficiency, or raise doubt as to the validity of the petitions which have been sent to us. This matter is simply a routine matter, which is done with every initiated Bill that comes before the Legislature, and I would, therefore, move the passage of this Order.

Which was Read.
Under further suspension of the Rules, sent down forthwith for concurrence.

Department of Conservation

January 24, 1977

President of the Senate
Speaker of the House
State House
Augusta, ME 04333
Gentlemen.

I am pleased to submit herewith the first Biennial Report of the Bureau of Public Lands. The Report is submitted in accordance with the provisions of Title 12 M.R.S.A. §553.C. I would like to take this opportunity to extend my thanks to the members of the Legislature with whom we have worked, the several State agencies upon whom we have called for advice and assistance during the past two years and, especially, to the able and dedicated staff of this Bureau.

Respectfully submitted,
(Signed) LEE M. SCHEPPS
Director
Bureau of Public Lands
(H. P. 140)

Came from the House, Read and with accompanying papers, Ordered Placed on File.

Which was Read and with accompanying papers, Ordered Placed on File in concurrence.

Department of Indian Affairs

January 25, 1977

Mr. Edwin H. Pert