

MAINE STATE LEGISLATURE

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STATE OF MAINE
ONE HUNDRED AND TWENTY-SECOND LEGISLATURE
FIRST SPECIAL SESSION
JOURNAL OF THE SENATE

In Senate Chamber
Wednesday
June 15, 2005

Senate called to order by President Beth Edmonds of
Cumberland County.

Prayer by Senator Dana L. Dow of Lincoln County.

SENATOR DOW: The Apostle Paul is often portrayed as a simple man, a tent maker with a simple message, a man short in stature, poor in eyesight, yet long in temperament. For such a surface look as that is very deceiving, for by studying his documents we find a very rare individual, the type of person that only comes along once every two or three centuries, whose understanding of life contains so much breath and width as to render him truly outstanding as well, at times, baffling. He is in his own field, the same genius as Beethoven or a Mozart. In the document we refer to as Ephesians, the Apostle Paul expounds on a great mystery that is to be revealed to the world. Unlike the meaning of the mystery in Paul's other letters, the mystery in Ephesians that is to be revealed is that the church is to be God's own instrument of reconciliation in the world. Reconciliation between opposing forces in the world that begins to tear down the walls that mankind has built and continues to build. We, too, as leaders are also His instruments of reconciliation. In Ephesians we read we are God's workmanship, created to do good works which God prepared in advance for us to do. We are his workmanship. We are His masterpiece. We are His masterpiece of reconciliation. We, too, as leaders of this great state are His workmanship, his masterpiece whose purpose in life is to carry on this work of reconciliation. Let us pray as I read a passage of His from Ephesians.

For He, Himself, is our peace, who has made the two one and destroyed the barrier, the dividing wall of hostility. His purpose was to create in Himself one new man out of the two, thus making peace and in his body to reconcile both of them to God through the cross by which he put to death their hostility. He came and preached peace to those who are far away and peace to those who are near. May we also be instruments of this peace. Amen.

Reading of the Journal of Tuesday, June 14, 2005.

Out of order and under suspension of the Rules, the Senate considered the following:

REPORTS OF COMMITTEES

Senate

Ought to Pass

Senator ROTUNDO for the Committee on **APPROPRIATIONS AND FINANCIAL AFFAIRS** on Bill "An Act To Develop a New Judicial Facility in Bangor"

S.P. 632 L.D. 1687

Reported that the same **Ought to Pass**.

Report **READ** and **ACCEPTED**.

Under suspension of the Rules, **READ TWICE** and **PASSED TO BE ENGROSSED**.

Ordered sent down forthwith for concurrence.

All matters thus acted upon were ordered sent down forthwith for concurrence.

ORDERS OF THE DAY

Unfinished Business

The following matters in the consideration of which the Senate was engaged at the time of Adjournment had preference in the Orders of the Day and continued with such preference until disposed of as provided by Senate Rule 516.

The Chair laid before the Senate the following Tabled and Later (6/2/05) Assigned matter:

HOUSE REPORTS - from the Committee on **LABOR** on Bill "An Act To Require Proof of Equipment Ownership for Employers Using Foreign Laborers"

H.P. 525 L.D. 730

Majority - **Ought to Pass as Amended by Committee Amendment "A" (H-372)** (8 members)

Minority - **Ought Not to Pass** (5 members)

Tabled - June 2, 2005, by Senator **MARTIN** of Aroostook

Pending - **ACCEPTANCE** of the Minority **OUGHT NOT TO PASS** Report, in **NON-CONCURRENCE**

(In House, May 20, 2005, 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-372).**)

(In Senate, June 2, 2005, motion by Senator **STRIMLING** of Cumberland to **ACCEPT** the Majority **OUGHT TO PASS AS AMENDED** Report, in concurrence, **FAILED**.)

THE PRESIDENT: The Chair recognizes the Senator from Aroostook, Senator Martin.

Senator **MARTIN**: Thank you, Madame President and members of the Senate. We debated this at some length a couple of weeks ago and I am just going to urge you to vote against the minority report so we can move on to accept the majority report. You have been lobbied or contacted by the industry suggesting that this poses a problem. I just want to quickly relate a couple of things. Some members of the industry have absolutely no impact from this legislation. Whether or not you are talking about Domtar or Louisiana, for example, they have absolutely no impact. There is not a single stick of wood that is cut by a bonded person going to those mills. The impact is entirely along the Canadian border between the St. John River and that wood does not come to the United States. It goes to Canadian mills and that is the area we are talking about. The only mill that has any impact from this at all is actually the Skowhegan mill. They have something to complain about. Let me point out that only 225 people were actually bonded last year under this law. There were actually 500 Canadians that worked in Maine woods last year, however keep in mind that they were individuals with visas. This bill has nothing to do with that. You are talking about a very small amount of people. Furthermore, we are not even talking about the H-2B program. This only applies to equipment and my amendment, if we get to that stage, will make it clear that this is what it does. I'd simply urge you to not accept the minority report and vote for the small business owners along the border, especially in my area.

THE PRESIDENT: The Chair recognizes the Senator from Androscoggin, Senator Snowe-Mello.

Senator **SNOWE-MELLO**: Thank you, Madame President, ladies and gentlemen of the Senate. I do disagree with what the good Senator from Aroostook, Senator Martin, had to say. I'm going to ask you to please support the minority report. First of all, it's a fact that nearly 30 years ago the U.S. Department of Labor established a prevailing wage or equipment rate for a cable skidder and a chain saw. However, the U.S. Department of Labor has not established an equipment rate for modern mechanized equipment, the method by which most wood is harvested in Maine today. This regarding the H-2B worker and it can be applied unless the employer demonstrates to the U.S. Department of Labor that no U.S. workers are available. These workers are not foreign competition. It is already a violation to let Canadian business work in Maine with their own equipment when there is no established prevailing wage rate to protect American businesses. Also remember that this has impact on the agreement between the federal government and the State of Maine with the Homeland Security Act. I ask you, do you want to take a chance? I think not. I ask you to continue and please support the minority report. I think at this time and where we are today, we cannot take a chance by passing this bill. Thank you.

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

THE PRESIDENT: The pending question before the Senate is Acceptance of the Minority Ought Not to Pass Report. 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 (#268)

YEAS: Senators: ANDREWS, BROMLEY, CLUKEY, COURTNEY, DAVIS, DIAMOND, DOW, HASTINGS, HOBBS, NASS, PLOWMAN, RAYE, ROSEN, SAVAGE, SCHNEIDER, SNOWE-MELLO, WOODCOCK

NAYS: Senators: BARTLETT, BRENNAN, BRYANT, COWGER, DAMON, GAGNON, MARTIN, MAYO, MITCHELL, NUTTING, PERRY, ROTUNDO, STRIMLING, SULLIVAN, THE PRESIDENT - BETH G. EDMONDS

ABSENT: Senators: MILLS, TURNER, WESTON

17 Senators having voted in the affirmative and 15 Senators having voted in the negative, with 3 Senators being absent, the Minority **OUGHT NOT TO PASS** Report **ACCEPTED**, in **NON-CONCURRENCE**.

Sent down for concurrence.

All matters thus acted upon were ordered sent down forthwith for concurrence.

The Chair laid before the Senate the following Tabled and Later (6/14/05) Assigned matter:

HOUSE REPORT - from the Committee on **JUDICIARY** on Bill "An Act To Amend the Maine Tort Claims Act" H.P. 655 L.D. 936

Report - **Ought to Pass as Amended by Committee Amendment "B" (H-694)**

Tabled - June 14, 2005, by Senator **HOBBS** of York

Pending - **ACCEPTANCE OF REPORT**, in concurrence

(In House, June 14, 2005, Report **READ** and **ACCEPTED** and the Bill **PASSED TO BE ENGROSSED AS AMENDED BY COMMITTEE AMENDMENT "B" (H-694)**.)

(In Senate, June 14, 2005, Report **READ**.)

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

Senator **HASTINGS**: Thank you, Madame President and ladies and gentlemen of the Senate. What we have before us today is a bill that, in it's first iteration, did cause some controversy and confusion. It was recommitted to the Judiciary Committee and did come back out with a unanimous report. The committee did feel it was appropriate to place a few words on record to explain the committee's position and the intent of this bill. What you have before you is an amendment, Committee Amendment "B" (H-

694), which replaces the bill. This bill deals with Maine's Tort Claims Act. It arises out of a tragic accident that occurred in the Raymond area back in 1978 when a deputy sheriff's cruiser collided with a family from New Jersey, resulting in the death of two young boys. It was very tragic. There was ultimately a law suit brought by the Norton family against the county and the officer involved for damages. As has been the custom for many years in this state, our governmental entities have settled that type of case. This case did go to the Supreme Court which ruled, I think to many people's surprise, that under the Maine Tort Claims Act a governmental employee responding to an emergency was ultimately completely immune from liability. What the bill deals with, and what the issue is, is the right of an innocent party injured by the negligent operation of a government motor vehicle during an emergency response, such as a high speed chase or response to a fire, to recover damages in the event that the operation of the vehicle was done in a negligent manner. Since the 1940's this state and its entities have voluntarily settled this type of case even though they were immune under the Doctrine of Sovereign Immunity. In the mid-1970's the Supreme Court of Maine abrogated the Sovereign Immunity defense and the legislature in 1979, I believe it was, created and adopted the Maine Tort Claims Act which tried to balance the interest. It first says that the state and all its entities are immune from civil liability unless otherwise allowed in this law. It then makes some exceptions to that immunity. The one that is at hand today is conduct in the operation of a motor vehicle. It being assumed that this is a common type of conduct and it is very insurable. The Tort Claims Act allowed law suits to be brought against the state for accidents arising out of motor vehicle collisions with state, county, and town vehicles. The state was protected and the counties were protected by a limitation of damages, which is now \$400,000 against the government and \$10,000 against the operator of the motor vehicle with the government responsible for defending and paying the operator's, or the trooper's, or whoever was driving the fire engine damages if negligence is found. The Norton case turned this proposition on its head, to some extent, by reading the third section of the Tort Claims Act which says that notwithstanding a waiver of immunity if the conduct involved a person making a discretionary decision, then immunity goes back into place. I think most people thought the discretionary conduct really meant the issuance of a license or that type of thing that probably can't be insured against and really is a discretionary function. The law court ruled in the Norton case that in the case of an emergency response the officer was making a discretionary decision at every turn of the road. Accordingly, there was total immunity both to the county and the officer involved. This left the Norton family with absolutely no recourse even if they could prove total negligence in the case of the operator. It really happened. There aren't many of these cases, but imagine the situation of the fire truck being driven at 80 miles per hour through a red light and hitting a school bus full of kids. Based on the Norton case, if that fire truck was answering a true emergency call, there is absolutely no exposure or liability on the part of the state or town or the operator of the truck and the victims of that accident, the innocent victims, are left without recourse whatsoever.

This is what we were faced with in this bill. We basically undid the Norton case with respect to emergency responses. I would add that in normal routine governmental operations of motor vehicles the Norton case does not apply and there is no immunity and there is governmental liability up to the \$400,000

level. What we have tried to do is to craft a compromise that takes into account the interest of all three parties; the interest of the state not to be sued beyond its means to pay, the interest of the Nortons of this world, who are truly innocent bystanders, and the interest of the police officer that is really responding to a true emergency and having to make some very difficult decisions. We have to be sensible to that too. We don't want to discourage proper police and emergency response. What the amendment you have before you does is essentially the following. With respect to the individual police officer or operator of the government vehicle responding to an emergency, we have left immunity in place. Total immunity. With respect to the governmental entity who employs that person, we have lifted the shield of the discretionary immunity that the Norton case put into place in all cases so that if negligence can be proven, it's not an automatic and they have to prove negligence. If it can be proven then there is the right to recover against the municipality or the town or the state.

It is my understanding, and I'll ask my good friends, the Senator from York, Senator Hobbins, and the Senator from Cumberland, Senator Bromley, to let me know if I misstated this, it is my understanding that it is intended by the Judiciary Committee that this amendment before you would have the following effect. With respect to individual employees of governmental entities, the discretionary immunity from personal liability for actions taken or not taken in the employee's response to a true emergency which the law court ruled in the Norton case to currently exist under the Maine Tort Claims Act, this immunity will remain in effect and will not be changed in any manner. All governmental employees now immune from personal liability based on the Norton court ruling will remain immune from liability. With respect, however, to governmental entities, this amendment will remove, in limited cases, the discretionary immunity from civil liability for negligent acts or omissions that the law court found currently exists under the Maine Tort Claims Act. The loss of discretionary immunity to the governmental entity will occur only when the discretionary function involves the operation of a motor vehicle and when an employee's negligent operation of the motor vehicle results in a collision. The loss of immunity in such a case will occur even if the employee who was the negligent operator will be immune personally. The existing limit of \$400,000 on damages that may be recovered against the government will remain unchanged. Nothing in this amendment is intended to change the law that now exists with respect to the liability of governmental entities and their employees for civil liability arising out of the operation of motor vehicles in non-emergency situations in which the discretionary immunity described in the Norton case would not apply. It is further intended under this amendment that in the case of a law enforcement officer pursuing a suspect, the governmental entity will be responsible for the negligence of its employee only in any case and will not be responsible by way of civil liability for a collision or injuries caused by the conduct of the individual being pursued.

I respect your patience for this, but the committee did feel it was important to have this placed on the record because of the confusion and controversy we have over this bill. Thank you very much.

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

Senator **HOBBS**: Thank you, Madame President and members of the Senate. I am very thankful to the gentleman and colleague from Oxford, Senator Hastings, for his thorough, professional, and accurate representation of the intention of this legislation. The good gentleman has succinctly put on the record the intention of this bill and why this bill is so important to be enacted. Again, this bill does not in any way expose a responder from any type of liability as represented in the presentation of the good Senator from Oxford, Senator Hastings. This bill has been well vetted by the Judiciary Committee, by many of the stakeholders subsequent to the initial report of the Judiciary Committee, and it is a good effort and an excellent effort on the part of the committee and the good Senator and his presentation of representing the intention of the legislation. Thank you.

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

Senator **NASS**: Thank you, Madame President, men and women of the Senate. I'd like to pose a question through the Chair if I can?

THE PRESIDENT: The Senator may pose his question.

Senator **NASS**: Thank you, Madame President. I perhaps made the mistake, Madame President, this morning of reading the MMA's bulletin that had recent comments on this. They claim they will not be able to buy insurance for police and fire vehicles. My question, Madame President, can anybody address this? They seem to claim that the burden being shifted to what we have today called these entities over here, not the individual police officers. That is where our property tax burden is. One of those burdens is insurance. If anybody could comment on that I'd appreciate it.

THE PRESIDENT: The Senator from York, Senator Nass poses a question through the Chair to anyone who may wish to answer. The Chair recognizes the Senator from Oxford, Senator Hastings.

Senator **HASTINGS**: Thank you, Madame President, ladies and gentlemen of the Senate. In response to the good Senator from York, Senator Nass's question. I'm unaware of this. In my conversations with the MMA, of which we've had many on this subject, dealt solely with their concern over the risk or leaving the liability on the officer, the person driving, the employee. I don't believe there is any problem providing insurance for this. In fact, I believe they are covered and have been for many years. In my conversations with one of their representatives, these types of cases, although quite rare, have been settled in the past through their own insurance coverage. I don't believe the ability of any municipality to obtain this coverage is at stake. Yes, there is some additional cost to the municipality or the county or the state for it. This is the kind of claim that has been paid since the 1940s. High speed chase claims, they sound bad but they are quite rare. Most police officers and fire responders drive carefully within the confines of their instructions and they don't cause many accidents. I don't believe the cost of insurance is a major issue to the MMA or the counties or the state. I believe, yes, there will be some additional cost factor for this, but I think they are essentially already paying it. Thank you.

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

Senator **HOBBS**: Thank you, Madame President, men and women of the Senate. In addition to the comments that were just made by the good Senator from Oxford, Senator Hastings, and response to my fellow York County colleague, the Senator from York, Senator Nass, the Maine Municipal Association, in the bulletin that you read, was written and distributed prior to the drafting and the vetting of this amendment. Apparently, as we see in many publications, there was a difference of opinion with respect to what the initial bill said and what it didn't say. We have clarified the issue of the responder and the liability that would not be attached to that responder if they met the requisite requirements that are outlined in the Maine Tort Claims Act. This takes care of that issue that was raised in that publication. That was their main concern. Many of you, I am sure, have received telephone calls last week, in panic, from your police chiefs and fire chiefs because of the emergency memo or e-mail that went out from the Maine Municipal Association. Since that time, all the concerns that we outlined in that have been clarified with this amendment and have been discussed with the individuals involved. Thank you.

Report **ACCEPTED**, in concurrence.

READ ONCE.

Committee Amendment "B" (H-694) **READ** and **ADOPTED**, in concurrence.

Under suspension of the Rules, **READ A SECOND TIME** and **PASSED TO BE ENGROSSED AS AMENDED**, in concurrence.

All matters thus acted upon were ordered sent down forthwith for concurrence.

Senate at Ease.

Senate called to order by the President.

Senator **BRENNAN** of Cumberland was granted unanimous consent to address the Senate off the Record.

Off Record Remarks

On motion by Senator **BRENNAN** of Cumberland, **ADJOURNED**, to Thursday, June 16, 2005, at 10:00 in the morning.