

MAINE STATE LEGISLATURE

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STATE OF MAINE
LEGISLATIVE RESEARCH COMMITTEE

SECOND SUMMARY REPORT
TO THE
ONE HUNDRED AND FIFTH LEGISLATURE
VOLUME TWO

JANUARY, 1971



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December 28, 1970

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TO THE MEMBERS OF THE 105TH LEGISLATURE:

The Legislative Research Committee hereby has the pleasure of submitting to you Volume II of its report on activities for the past two years.

This volume relates to all remaining matters except for State Government Reorganization H.P. 1468, which was undertaken by the Committee in conjunction with the State Planning Office and previously published and released by that office under separate cover on December 2, 1970.

We of the Committee gratefully acknowledge our indebtedness to the many individuals, organizations and agencies for their valuable contributions to the work of the Committee and it is our hope that the information contained in this report will be of assistance to the Members of the 105th Legislature and the people of the State of Maine.

Respectfully submitted,

William E. Dennett
Chairman
Legislative Research Committee

TABLE OF CONTENTS

	Page
Letter of Transmittal.....	i
Table of Contents.....	ii
 Research Reports:	
Environmental Improvement Commission.....	1
Associated Hospital Service.....	59
State Principals' Association.....	80
Women's Correctional Center.....	86
Liability Claims Against State Employees.....	100
Legislative Ethics.....	118
Wildlands Taxation.....	139
 General Information:	
Committee History.....	165
Committee Authority.....	171
Committee Rules.....	179
Committee Membership.....	182

STATE OF MAINE
LEGISLATIVE RESEARCH COMMITTEE

REPORT ON
LIABILITY CLAIMS
AGAINST STATE EMPLOYEES
to the
ONE HUNDRED AND FIFTH LEGISLATURE

January, 1971

Committee Publication 105-13

SUBCOMMITTEE ON LIABILITY CLAIMS AGAINST STATE EMPLOYEES

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Upon its own motion the Legislative Research Committee undertook a study of existing procedures for settlement of liability claims against employees of the State to determine more appropriate means of assuring that personal liability claims against such employees will be promptly and fairly settled and that individuals acting in good faith in an official capacity shall not be held personally responsible for their acts or omissions. The study also included a review of existing liability insurance coverage provided by the State and with a view towards determining practical means for more uniform coverage.

In the course of its study the Committee held several hearings and found claims for personal liability to be a problem of varying dimensions, particularly troublesome to the State Highway Commission and Department of Mental Health and Corrections.

At the present time the State of Maine exercises the doctrine of governmental or sovereign immunity; that is, a state cannot be held liable for the acts of its agents unless it consents to such liability by act of the Legislature.

In Austin W. Jones Co. v. State, 122 Me. 214, 222 (1923), the Maine court offers the following explanation:

[In] the absence of express legislation conferring a right or remedy, suit cannot be maintained against a sovereign state to recover damages for the malfeasance, misfeasance, laches or unauthorized exercise of power by its officers and agents...in the absence of such legislation the doctrine of respondeat superior...does not prevail against the State in the necessary employment of public agents.

In such case involving legislative permission to sue the State, a resolve is drawn setting forth the facts and introduced in the Legislature. The resolve is then referred to the Joint Standing Committee on Judiciary. If a favorable report results after the Judiciary Committee's consideration of the matter the Legislature passes the act conferring the right to suit. Under the provisions of M.R.S.A., Title 5, section 191, the Attorney General shall appear for the State, the Secretary of State, the Treasurer of State, the Bank Commissioner, the Insurance Commissioner, the head of any other state department, the head of any state institution and the state boards and commissions in all civil actions and proceedings in which the State is a party or interested, or in which the official acts and doings of said officers are called in question, in all the courts of the State; and in such actions and proceedings before any other tribunal when requested by the Governor or by the Legislature or either branch thereof. All such actions and proceedings shall be prosecuted or defended by him or under his direction.

Beyond this, the Committee finds that certain types of liability coverage are provided by the State in the following areas:

- Maine State Police
- University of Maine
- Maine Maritime Academy
- Maine Port Authority

Of these, the only instance where professional liability coverage is offered is the Maine State Police. This is primarily

due to the hazards of the occupation and involves a premium cost of approximately \$11,000 per year. As to the University of Maine, Maine Maritime Academy and Maine Port Authority which also have a form of limited liability coverage under the basic policy, the State provides such insurance due to the fact that these institutions are quasi-governmental and don't necessarily fall within the governmental immunity structure.

Aside from those situations where insurance is offered by the State, all other state officers and employees must rely on the doctrine of governmental immunity and the legislative process. As the hazards of waiving governmental immunity are great the Committee's first consideration was professional liability insurance which would put everyone on an equal status and had the appearance of an alternative.

According to information supplied to the Committee by the Maine Insurance Advisory Board it was learned through an earlier study that none of the insurance purchasing agencies of the several New England States have a comprehensive program of insurance which would provide professional liability coverage for all State officials and employees in those instances where liability occurs in the performance of duty and within the scope of employment. Of the ten major insurance companies and agencies operating within the State none were found to have the facilities to provide the insurance program required for all classes of professional State employees. Also, in a survey of the insurance market including a visit to the regional offices of the Insurance Company of North America, Hartford Accident and Indemnity Company, Fireman's Fund-American and

Continental Casualty Companies, the advisory board was similarly advised by company officials that they would not provide coverage for all employees on a blanket basis but would entertain coverage on an application or individual selection basis. The best estimate of cost for all employees varied from \$250,000 per year to \$400,000, with no guarantee of the quality of coverage which in Maine would be considered desirable.

In view of these findings the Committee agreed with the conclusions of the Maine Insurance Advisory Board that the purchase of insurance was not a practical answer to the problem on the grounds that: the cost as estimated was prohibitive; the quality of coverage uncertain, and the coverage, if obtained, on an application or individual basis, could develop a situation of discrimination against those whom the company would not insure.

After disposing of the possibilities of insurance the Committee looked to the laws of the other states and with the cooperation of the Attorney General's office, developed a statute modeled from the State of Connecticut and other states. (See Exhibit I)

Basically, this draft was patterned after Connecticut law with some major changes. A Claims Commission was established to hear claims with an upper limit as to jurisdictional amount of \$5,000. It was contemplated any claim in excess of this amount would be submitted to the Legislature as is the practice now. Under the Connecticut law the commission on claims has decision making power in connection with whether an action may be brought against the State. This power was not given to the claims commission in the Maine draft limiting its determinations only to the merits of claims. It was

proposed that the chairman of the commission be an attorney. This was considered highly desirable in view of the purpose of the commission. No per diem fee was fixed in the draft and no appropriation figure was attached, these items being appropriate for later discussion.

The final provision of the draft makes reference to non-liability of State officers and employees in connection with their acts and omissions causing damage or injury in the performance of duties and within the scope of employment. It also provides that a State agency may obtain liability insurance coverage as is the case with the State Police, at this time.

In regard to the possibility of suits against state officers under the Federal Civil Rights Act, 42 U.S.C., §1983, actions brought under that statute are for the deprivation of constitutional rights and would be brought mainly in connection with the operation of State institutions. Therefore, no feasible way was found to build protections into the proposed Act against liability befalling State officers in such suits. In general, injunctive relief is sought in such cases and it appears to be the rare case where damages are awarded.

Following a thorough review of each aspect of the study and previous studies the Committee unanimously concluded that governmental immunity as extended to State officers and employees should not be impaired.

As stated in California Law Revision Commission, Recommendation Relating to Sovereign Immunity 810 (1963):

Government cannot merely be made liable as private persons are, for public entities are fundamentally different from private

persons. Private persons do not make laws. Private persons do not issue and revoke licenses to engage in various professions and occupations. Private persons do not quarantine sick persons and do not commit mentally disturbed persons to involuntary confinement. Private persons do not prosecute and incarcerate violators of the law or administer prison systems. Only public entities are required to build and maintain thousands of miles of streets, sidewalks and highways. Unlike many private persons, a public entity often cannot reduce its risk of potential liability by refusing to engage in a particular activity, for government must continue to govern and is required to furnish services that cannot be adequately provided by any other agency.

In Nelson v. Maine Turnpike Authority, 157 Me. 174, 186 (1961), the Maine court indicated its unwillingness to abrogate the doctrine of sovereign immunity.

The policy of immunity from liability for tort under the circumstances before us has been so long established and so long acted upon that only the clearest and most convincing reasons should compel a reversal by our court. It cannot be questioned that Legislatures and the people of the State from 1820 have acted or refrained from acting in reliance upon sovereign immunity.... The issue is not complex. Should sovereign immunity in tort, time tested in our State, be discarded or destroyed? This is a policy question which, in our opinion, is more properly directed to the Legislature than to the court.

Since insurance is not a practical solution to the problem as seen before and the proposed draft establishing a claims commission would only serve to open the floodgates to claims up to \$5,000 the Committee submits the following legislation as offering some measure of relief and recommends its adoption:

AN ACT Relating to Immunity of State Officers and Employees from Personal Liability.

Be it enacted by the People of the State of Maine, as follows:

R.S., T. 5, §13, additional. Title 5 of the Revised Statutes is amended by adding a new section 13, to read as follows:

§13. Immunity of state officers and employees from personal liability

No state officer or employee shall be personally liable for damage or injury not wanton or willful, caused in the performance of his duties, and within the scope of his employment.

In any action brought by any person to recover damages for wanton or willful damage or injury caused in the performance of duties and within the scope of employment of any state officer or employee, the property or interests in property, real or personal, of any state officer or employee, shall not be subject to attachment.

Statement of Fact

The purpose of this legislation is to preclude personal liability by suit or attachment for certain activities involving state employees acting within the scope of employment in the performance of duty and without professional liability insurance.

AN ACT RELATING TO CLAIMS AGAINST THE STATE

Be it enacted by the People of the State of Maine as follows:

R. S., T. 5, c. 154, additional. Title 5 of the Revised Statutes is amended by adding a new chapter 154 to read as follows:

CHAPTER 154

CLAIMS COMMISSION LIABILITY OF STATE OFFICERS AND EMPLOYEES

§ 1791. Definitions. As used in this chapter: "Claim" means a petition for the payment or refund of money by the State; "person" means any individual, firm, partnership, corporation, association or other group, including political subdivisions of the state; "state agency" includes every department, bureau, division, board, office, commission, agency and institution of the state government, whatever its title or function, and "state officers and employees" includes every person elected or appointed to or employed in any office, position or post in the state government, whatever his title, classification or function.

§ 1792. Claims commission; excepted claims. The Claims Commission, established by this chapter, hereinafter called the commission, shall hear and determine all claims against the State for not more than \$5,000, except: (1) claims for the periodic payment of disability, pension, retirement or other employment benefits; (2) claims upon which suit otherwise is authorized by law; (3) claims for which an administrative hearing procedure otherwise is established by law;

(4) claims for the refund of taxes; (5) claims arising from Acts or occurrences with respect to which a state agency is covered by liability insurance.

§ 1793. Appointment, removal, compensation of commission. The commission shall be composed of 3 members, residents of the State, who shall be appointed by the Governor, as follows: The initial appointments shall be 1 member for a term of 2 years, 1 member for a term of 3 years, 1 member for a term of 5 years and until their successors are duly appointed and qualified. Appointment thereafter shall be for terms of 5 years and until their successors are duly appointed and qualified. Of the members appointed one shall be an attorney licensed to practice law in this State who shall be the chairman of the commission. The Governor may remove any member for incompetence, misconduct or material neglect of duty.

The members of the commission shall receive as compensation for their services \$ _____ a day for the time actually spent in the discharge of their duties, and shall be reimbursed for necessary expenses incurred in the discharge of their duties at the same rates as would apply to employees of the State of Maine, subject to appropriations made.

§ 1794. Chairman; office. The chairman shall be the presiding officer and chief administrative officer of the commission. The commission shall employ, subject to the Personnel Law, an executive secretary and such clerical assistants, as it finds necessary to administer the provisions of this chapter. The executive secretary shall be responsible for carrying out the administrative duties of the commission imposed by this chapter,

with the advice of the commission. The executive secretary shall be the clerk of the commission. The commission shall maintain an office at Augusta to which all papers required to be filed with the commission shall be addressed or delivered.

§ 1795. Quorum; all members to participate in claim disposition. Two members of the commission shall constitute a quorum to do business and the commission may act upon the vote of 2 members of the commission but all members shall participate in the disposition of each claim and any member absent during the hearing of a claim shall study the evidence adduced at such hearing.

§ 1796. Notice of claim. Any person presenting a claim against the state shall file with the office of the commission a notice of claim, in triplicate, containing the following information: (1) the name and address of the claimant; the name and address of his principal, if the claimant is acting in a representative capacity, and the name and address of his attorney, if the claimant is so represented; (2) a concise statement of the basis of the claim, including the date, time, place and circumstances of the act or event complained of; (3) a statement of the amount demanded. The commission shall cause a copy of the notice of the claim to be forwarded promptly to the Attorney General. The notice shall be for informational purposes only, and shall not be subject to any formal or technical requirements, except as may be necessary for clarity of presentation and facility of understanding.

§ 1797. Limitation on presentation of claim. (a) No claim shall be presented under this chapter beyond one year after it accrues. Claims for injury to person or damage to property shall be deemed to accrue on the date when the damage or injury

is sustained, or discovered, or in the exercise of reasonable care should have been discovered, provided no claim shall be presented more than three years from the date of the act or event complained of. (b) No claim cognizable by the commission shall be presented against the State except under the provisions of this chapter, and as to such claims the procedure and remedy provided for in this chapter shall be exclusive. The decision of the commission in each case, shall be final and binding upon the claimant and upon the state agency, except as provided in section 1805.

§ 1798. Attorney General. The Attorney General shall represent the state agency against which a claim is filed before the commission. When the Attorney General opposes a claim he shall file with the commission a notice of opposition, in triplicate, containing a concise statement of his objections. He shall promptly forward a copy of the notice of opposition to the claimant.

§ 1799. Service on or delivery to commission of subpoenas and papers. (a) Any subpoena or other paper required to be served upon or delivered to the commission or to any person or official may be served or delivered in person or by certified mail. Service or delivery by certified mail shall be deemed complete upon the certification and deposit of such subpoena or paper at a United States post office. Proof of deposit and the return receipt, shall be sufficient proof of service or delivery; (b) Any such service or delivery required between the commission and any state agency or any state officer or employee may be made through the interdepartmental mailing system of the State, provided reasonable means are taken to

ascertain that the subpoena or paper was received by the addressee.

§ 1800. Hearings. (a) Claims shall be heard as soon as practicable after they are filed. Hearings may be held at the office of the commission, at any available hearing facility in the state capitol, or State Office Building, upon request at any county courthouse in the state, or at such other suitable place as the commission finds is convenient and just to the claimant and to the state agency; (b) The commission may call witnesses, require information not offered by the claimant or the state agency and stipulate matters to be argued. Any member may examine and cross-examine any witness. The commission shall not be bound by any law or rule of evidence, except as it may provide by its rules; (c) Any member of the commission may administer oaths, cause depositions to be taken, issue subpoenas, and order inspection and disclosure of books, papers, records and documents. Upon good cause shown any such order or subpoena may be quashed by the commission or by the member who issued it. (d) If any person fails to respond to a subpoena the chairman may issue a capias, directed to the sheriff of the county in which such person resides, to arrest such person and bring him before the commission to testify. (e) If any person refuses to testify or to produce any relevant, unprivileged book, paper, record or document the chairman shall certify such fact to the Attorney General, who shall apply to the Superior Court for the county in which such person resides for an order compelling compliance. Further refusal of such person shall be punished as for contempt. If

such person is the claimant, the commission shall summarily dismiss his claim and order it forfeited to the State. (f) When subpoenaed by the commission, witnesses shall be offered the fees and mileage allowances authorized for attendance of witnesses in the District Court, provided no such fee or allowance shall be paid to any state officer or employee who appears on behalf of the State.

§ 1801. Waiver of hearings. On its own motion and at the request of the claimant and the Attorney General, the commission may waive the hearing of any claim for two hundred fifty dollars or less, and proceed upon affidavits filed by the claimant and the state agency concerned.

§ 1802. Records of claims. The commission shall cause a record to be made of each claim. Such record shall be retained in the files of the commission. Copies of such record and of the hearing transcript, if any, shall be made available upon request to the claimant and to the Attorney General and as the commission otherwise may direct.

§ 1803. Decision: Finding of fact. Within ninety days after hearing a claim the commission shall render its decision. It shall make a finding of fact on each claim and file such finding with its order disposing of the claim. A copy of such finding and order shall be forwarded to the claimant and to the Attorney General.

§ 1804. Disqualification of commission member. No member of the commission shall participate in the hearing, consideration or decision, of any claim in which he is interested, or in respect of which he is biased or prejudiced. Upon the disqualification of a member the chairman shall apply to the

Governor for the appointment of a temporary member, who shall participate only in proceedings on the claim in respect of which the disqualification occurred.

§ 1805. Rehearings. Upon the discovery of new evidence any claimant aggrieved by an order of the commission rejecting his claim, in whole or in part, may apply for rehearing. The claimant shall file with the commission an application for such rehearing, in duplicate, stating concisely therein the matters which he desires to submit to the commission. A copy of such application shall be forwarded promptly by the commission to the Attorney General. Each such rehearing shall be subject to the provisions of this chapter and the rules made thereunder respecting the hearing and disposition of claims.

§ 1806. Rules of procedure. The commission shall make and promulgate rules not inconsistent with the policy and provisions of this chapter, governing its proceedings. Such rules shall avoid formal and technical requirements, but shall provide a simple, uniform, expeditious and economical procedure for the presentation and disposition of claims.

§ 1807. Jurisdiction of commission: Payment of claim. The commission may approve immediate payment of claims not exceeding \$5,000. The commission shall deliver to the State Controller a certified copy of the commission's order and the state controller shall authorize payment from such appropriation as the Legislature may have made for the payment of claims or, in the case of contractual claims for goods or services furnished or for property leased, from the appropriation of the agency which received such goods or services or occupied such

property.

§ 1808. Payments not recoverable under insurance policy. No payment made by the State under section 1807 shall be recoverable under any policy of insurance carried by the State.

§ 1809. Immunity of state officers and employees from personal liability - insurance. (a) No state officer or employee shall be personally liable for damage or injury not wanton or willful, caused in the performance of his duties, and within the scope of his employment. Any person having a complaint for such damage or injury may present it as a claim against the State under the provisions of this chapter; provided however, that no such claim shall be for an amount in excess of \$5,000; (b) notwithstanding any provision of this chapter any state agency may purchase from funds appropriated by the Legislature for the purpose, or appropriated by the Legislature, and authorized by the Governor and Council, to be expended for the purpose, liability insurance coverage indemnifying the State and the State officers and employees employed by the State agency in connection with any claimed damage or injury caused in the performance of duties and within the scope of employment of any state officer or employee. During the period in which any such policy of insurance is effective the defense of sovereign immunity is abolished as to any claims or actions brought thereunder. The insurer of any such state agency shall be estopped from asserting as a defense to any claim covered by said policy that such state agency is immune from liability on the ground that it is a governmental agency. In any action brought by any person to recover damages for damage or injury caused in the performance of duties and within the scope of

employment of any state officer or employee, the property or interests in property, real or personal, of any state officer or employee, shall not be subject to attachment. The amount of damages in any such case shall not exceed the limits of coverage specified in the policy, and the courts shall abate any verdict in any such action to the extent that it exceeds such policy limit.