

# MAINE STATE LEGISLATURE

The following document is provided by the  
**LAW AND LEGISLATIVE DIGITAL LIBRARY**  
at the Maine State Law and Legislative Reference Library  
<http://legislature.maine.gov/lawlib>



Reproduced from scanned originals with text recognition applied  
(searchable text may contain some errors and/or omissions)

**This document is from the files of the Office of  
the Maine Attorney General as transferred to  
the Maine State Law and Legislative Reference  
Library on January 19, 2022**

RICHARD S. COHEN  
ATTORNEY GENERAL



STEPHEN L. DIAMOND  
JOHN S. GLEASON  
JOHN M. R. PATERSON  
ROBERT J. STOLT  
DEPUTY ATTORNEYS GENERAL

STATE OF MAINE  
DEPARTMENT OF THE ATTORNEY GENERAL  
AUGUSTA, MAINE 04333

80-5

January 14, 1980

David Silsby, Director  
Office of Legislative Research  
State House  
Augusta, Maine 04333

Dear David:

You have requested that this office render an opinion regarding the current status of the Maine Tort Claims Act, 14 M.R.S.A. §§8101-8118. More specifically, the question is whether the portions of that Act enacted by P.L. 1977, c. 578 are still in effect or whether they have expired under the so-called "sunset" provision of that chapter. We conclude that the provisions of the Tort Claims Act enacted by Chapter 578 have not expired and are therefore now in full force and effect.

A brief review of the history of the Tort Claims Act will clarify the issues discussed and conclusions reached in this opinion. In 1977, as a result of the decision of the Maine Supreme Judicial Court in Davies v. City of Bath, 364 A.2d 1269 (Me. 1976), which abrogated the doctrine of sovereign immunity in the State of Maine, the 108th Legislature enacted the Maine Tort Claims Act, P.L. 1977, c. 2. This statute re-instituted the immunity doctrine, making exceptions in a number of areas. It was admittedly a temporary measure, 1 Me. Leg. Rec. 68 (1977) (remarks of Sen. Collins), enacted for the purpose of meeting the deadline of February 1, 1977 after which, under the decision in Davies, sovereign immunity would no longer obtain in the State. 364 A.2d at 1274. Because of the emergency nature of its enactment and the express desire of the Legislature to re-evaluate the effect of the Act and the experience thereunder, a "sunset" or "self-destruct" provision was made part of the Act, so that it would expire on February 1, 1979. P.L. 1977, c. 2, §5.

Later in the 1977 session of the 108th Legislature, a bill was passed which effected substantial changes in the Tort Claims Act. P.L. 1977, c. 578. These changes primarily addressed the areas of public employee immunity and its relationship to the immunity of the State and other governmental bodies. Chapter 578, as this later

enactment will be referred to in this opinion, repealed and replaced what Chapter 2 had enacted as sections 8103, 8104, 8112 and the first paragraph of 8116 of Title 14, and amended sections 8107 and the second paragraph of section 8116 of the same Title. The remainder of Chapter 2 was left intact. In a provision clearly parallel to that in Chapter 2, Chapter 578 was to expire on February 1, 1979. Since both Chapters addressed the same subject matter and therefore gave rise to the same necessity of legislative review and re-evaluation, it is evident that the two "sunset" provisions had identical purposes and were meant to operate together.

The problems analyzed in this opinion were precipitated by two Acts of the Legislature passed in early 1978 and in 1979. The first Act extended the expiration date of Chapter 2 until November 1, 1979. P.L. 1977, c. 591, § 6. By its terms, Chapter 591, as this enactment will be referred to in this opinion, did not refer to the provisions of the Tort Claims Act found in Chapter 578. In 1979, the 109th Legislature passed a bill eliminating the "sunset" provision from Chapter 2, thereby ensuring its continued effect. P.L. 1979, c. 68, § 5. Unfortunately, Chapter 68, as we will refer to this statute throughout this opinion, also did not refer to Chapter 578 in the language eliminating the "self-destruct" provision of the Tort Claims Act.

The issue presented is clear: if Chapters 591 and 68 do not apply to the provisions of the Tort Claims Act found in Chapter 578, those provisions would have expired, by the terms of that Chapter, on February 1, 1979. Moreover, if Chapter 578 expired, the provisions of Chapter 2 repealed and replaced by Chapter 578 would not be revived, 1 M.R.S.A. § 302, and substantial gaps would now exist in the Maine Tort Claims Act. An analysis of the substantial legislative history of the provisions in question and the case law regarding statutory construction leads us, however, to conclude that the clear intent of the Legislature in enacting both Chapters 591 and 68 was to extend, and later eliminate, the "sunset" provisions of both Chapter 2 and Chapter 578.

We predicate our analysis on the fundamental rule that the end of statutory construction is to effectuate the intent of the Legislature. E.g., State v. Hussey, 381 A.2d 665 (Me. 1978). A related rule is that courts will correct errors in legislative drafting, and more particularly in statutory references to other statutes, if to do so will have the effect of promoting the intent of the Legislature. See generally Anno., "Effect of mistake in reference in statute to another statute, constitution, public

document, record, or the like," 5 A.L.R. 996 (1920) (supplemented at 14 A.L.R. 274). This general rule has been followed in a Maine case to correct an inadvertent misreference which had the effect of undercutting a right of appeal to the Maine Supreme Judicial Court. Inhabitants of Gray v. County Commissioners, 83 Me. 428 (1891) (court read an additional section number into a statute). The Gray Court viewed the result as consistent with the clear legislative intent underlying the statute, stating that "We ought rather . . . to be "curious and subtle to invent reasons and measures" to carry out the clear intent of the law-making power when thus expressed. A thing which is within the intention of the makers of the statute is as much within the statute as if it were within the letter." [citations omitted], 83 Me. at 435-36, citing Oates v. National Bank, 100 U.S. 239 (1879).

In Blake v. Brackett, 47 Me. 28 (1859), the Law Court also corrected a misreference, basing its decision in part upon the illogical result which would follow if the corrections were not made. 47 Me. at 33.

In the factual situation presented here, courts have generally supplied additional words or figures where the legislative intent was to include such references but they were inadvertently omitted. See 5 A.L.R. at 1002 and cases cited therein. Furthermore, the cases generally support the proposition that an erroneous repeal which would, if given effect, undercut a whole area of governmental control or a statutory scheme, will not be given such effect in the absence of specific legislative evidence indicating that that effect was intended. E.g., State ex rel. Scovill v. Moorhouse, 67 N.W. 140 (N.D. 1896) (statute clearly not intended to eliminate entire state revenue law); Smith v. People, 47 N.Y. 330 (1872) (statute which, by its terms, would have repealed basic organizational act controlling New York City criminal courts was not given this construction in light of absence of evidence of legislative intent to effect such a broad purpose.) Finally, an important factor taken into account by courts in determining whether a given law has been erroneously repealed is whether the legislature, at a later date, attempts to amend or repeal the purportedly repealed law. See, e.g., Howlett v. Cheatham, 50 P. 522 (Wash. 1897). Such attempts establish that the legislature did not view the statute as having been repealed by its previous actions. 50 P. at 525. The final lesson of these various principles is that courts will go far to seek and effectuate legislative intent and will, if necessary, go beyond the specific letter of the law to reach the intended result. See New England Tel. & Tel. Co. v. P.U.C., 376 A.2d 448 (Me. 1977).

In applying these rules to determine whether Chapters 591 and 68 apply to Chapter 578 as well as to Chapter 2, it is necessary to establish first whether it was the intent of the Legislature that those portions of 591 and 68 dealing with the sunset provisions of Chapter 2 were to apply generally to the Tort Claims Act and, second, whether there is any evidence which would support a contrary literal reading of Chapters 591 and 68.

We think the Legislature meant the time provisions of Chapters 591 and 68 to be equally applicable to the entire Maine Tort Claims Act. This conclusion is based on a review of the legislative history of all four relevant provisions.

The significant aspect of the legislative history of Chapter 2 for our purpose is the Legislature's acknowledgement throughout the debate on this measure that further legislation in the area was necessary and that Chapter 2 was not intended to be complete as written.<sup>1/</sup>

---

1/ The following remarks of Senator Merrill provide a good example:

. . . I think that a good beginning has been made here and I think a valuable precedent has been set by this Bill.

. . .

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 reconsider its own doctrine of sovereign immunity.

I Me. Leg. Rec. 72 (1977)  
(remarks of Sen. Merrill).

Indeed, legislators raised at that time some of the problems of employee immunity which were resolved by Chapter 578.<sup>2/</sup>

---

2/

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 a 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.

Id. (remarks of Sen. Conley).

By enacting Chapter 578, the Legislature further recognized the need for additional legislation to supplement Chapter 2. Chapter 578 is essentially amendatory of Chapter 2, and, looking at the structures of the two statutes, it is clear that they were meant to effectuate a single scheme covering the field of tort claims against the State. While the debate on Chapter 578 dealt primarily with the substantive issues raised by that measure, it is implicitly recognized throughout that Chapter 578 was an organic part of the whole Tort Claims Act. The following excerpt provides an example of that implicit recognition:

We found . . . that in these areas where the State and other governmental entities were to become liable that it was possible to insure the employees at a modest additional cost . . . . So we decided to accept some changes in the existing Tort Claims Law, and to try to get those changes into effect by July 1st when the principal liability sections of the existing law become effective.

II Me. Leg. Rec. 1644 (1977)  
(remarks of Sen. Collins).

The Report of the Judiciary Committee dated December 1, 1977, confirms this conclusion. That report spoke of Chapter 578's having worked a "major revision" of the Tort Claims Act. Report of the Standing Committee on the Judiciary, December 1, 1977, (first draft) at first page (unpaginated). It is also significant that nowhere in the lengthy debate on Chapter 578 are there any comments suggesting that that chapter could exist and function independent of the provisions of Chapter 2. The absence of such evidence strongly indicates that the Legislature viewed chapters 2 and 578 as two parts of a coherent whole.

The Legislature's treatment of the effective dates of Chapter 2 and 578 also supports the view that these two enactments are to be read as a coherent whole. Chapter 2 became effective on January 28, 1977, except for the section establishing exceptions to governmental immunity, which became effective on July 1, 1977. P.L. 1977, c. 2, § 5. The Legislature clearly attempted to treat Chapter 578 similarly to Chapter 2 on the issue of its effective date. Although the entire bill became effective as an emergency measure on July 25, 1977, when the Governor's veto was overruled by both Houses, the Legislature had apparently expected that it would be passed and approved sometime prior to July 1, 1977, since its "emergency clause" is identical in effect to that of Chapter 2 in effectuating the whole bill as of the date of passage, with the exception of the replacement section establishing exceptions to governmental immunity, which was to become effective July 1, 1977. When the entire bill was not passed until a later date, this last exception was rendered a nullity. Nonetheless, this identical treatment of Chapters 2 and 578 constitutes further evidence of the Legislature's view that these bills comprised a single statutory scheme.



Finally, it is impossible to separate Chapters 2 and 578 logically, and the two cannot stand separately as complete enactments in their field. If Chapter 578 had expired, leaving in effect, as a result of the operation of our nonrevival statute, 1 M.R.S.A. § 302, only those provisions of Chapter 2 which had not been repealed and replaced by Chapter 578, the Maine Tort Claims Act would lack sections establishing immunity and making exceptions to that immunity. Such a statute would not constitute a workable and logical system for dealing with claims against the State. A statute devoid of reference to the issue of governmental liability would provide no guidance to the State or other governmental entities in this area. Whether sovereign immunity would still exist would be, at best, unclear. Such an extraordinary result cannot have been intended by the Legislature, in the absence of positive evidence of such an intent.

It follows from internal analysis and from the legislative history that the Legislature intended the provisions of Chapters 2 and 578 to operate together and could not have intended that only one of the acts lapse, at least without legislation replacing the lapsed enactment.

It also follows that, in the absence of evidence to the contrary, the provisions in Chapters 591 and 68 relate to the expiration date of the Tort Claims Act were intended by the Legislature to apply to both enactments comprising the Tort Claims Act. There is little debate to be found in either Chapter 591 or Chapter 68 and none on this particular issue. The absence of any positive legislative evidence which might suggest that the Legislature intended to treat the expiration dates of Chapters 2 and 578 differently is significant. Clearly, were such an unusual result intended, substantial legislative comment could be expected.<sup>3/</sup> Finally, the

---

<sup>3/</sup> At least one of the comments which appears in the record can be characterized as having been made on the assumption that both substantive chapters were in effect and operating together.

The "Tort Claims Act" was written by the Judiciary Committee, two years ago and enacted as an emergency measure, because the Courts had placed the State and Municipalities in a very difficult position with regards to Tort Liability.

We did such a rush job that at the time we said, well let's put an expiration date, so that we will be forcing ourselves to look again at this legislation within two years, in order to see whether its working out as we hope it will. That provision did force us to review the Act. We reviewed it last year, and we had a further report on it from the Attorney's General [sic] Department, within this past month, and the concensus [sic] of these studies was that there were no problems that would mean that we ought to abolish the Act. There may be some improvements here and there,

statements of fact of the various versions of the two bills in question are not inconsistent with the view that both Chapters 2 and 578 were to be included within their operative scope. For example, the original legislative document considered by the Legislature to eliminate the sunset provisions of the Tort Claims Act states in its "Statement of Fact" as follows:

This bill repeals the sunset provision on the Tort Claims Act that would effectively repeal the Act on Nov. 1, 1979.

L.D. 228, Statement of Fact (1979).

As noted above, where there is some doubt whether a law has been repealed by a legislature it is considered strong evidence against repeal that the Legislature subsequently acted upon the purportedly repealed provision, by either amending or repealing it. The Maine Legislature did exactly this in 1979 when it enacted Chapter 68, which purported to amend 14 M.R.S.A. § 8104. Had Chapter 578 expired by its terms on February 1, 1979, § 8104 would no longer have been in effect as a result of the operation of Maine's non-revival statute, 1 M.R.S.A. § 302. In enacting Chapter 68, the 109th Legislature must have proceeded on the assumption that § 8104, as enacted by Chapter 578, had not expired and therefore that the sunset provisions of c. 578 had been first extended by Chapter 591 and then eliminated by Chapter 68 itself. Also supportive of this view in the fact that Chapter 68 added a fifth subsection to § 8104, which, as originally enacted by Chapter 2, had only three subsections. Chapter 68 must clearly have been addressed to the Tort Claims Act as enacted by both Chapters 2 and 578, and it therefore follows that the Legislature assumed that Chapter 578 was still in effect when Chapter 68 was enacted.

It appears from the foregoing analysis that the intent of the Legislature to enact an expiration provision for the Maine Tort Claims Act, which was later extended and then eliminated, was equally applicable to both bills comprising the Tort Claims Act and that the Legislature intended the parallel expiration provisions of Chapters 2 and 578 to be treated in the same manner. The failure of the extension and excision measures in Chapters 591 and 68 to refer to Chapter 578 as well as to Chapter 2 was a clerical or drafting error which is correctable, where the legislative intent is clear, in order to give effect to that legislative intent. It follows that

---

3/ continued,

but we certainly need the Act if cities and towns as well as the State, are to have some clear definition of what their liability is. That's the only reason that an expiration date was inserted.

Me. Leg. Rec. 140 (1979)  
(remarks of Sen. Collins).

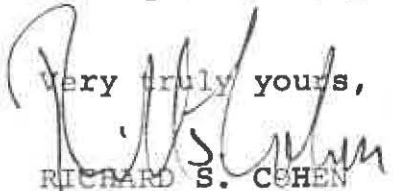
4/ It should be noted that Chapter 68 became law on September 14, 1979, well after the ostensible expiration date of Chapter 578.

David Silsby  
Page 9

the provisions of Chapter 578 did not expire on February 1, 1979, but are presently in effect in the same manner as if they had been properly referred to in Chapters 591 and 68.

We hope that this opinion addresses the issues raised by your request. If you have any further questions, please feel free to contact this office.

Very truly yours,



RICHARD S. COHEN  
Attorney General

RSC:jg