

MAINE STATE LEGISLATURE

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(EMERGENCY)

ONE HUNDRED AND EIGHTH LEGISLATURE

Legislative Document

No. 87

S. P. 45

Referred to the Committee on Judiciary. Sent down for concurrence and ordered printed.

In Senate, January 13, 1977

MAY M. ROSS, Secretary

Presented by Senator Collins of Knox.

STATE OF MAINE

IN THE YEAR OF OUR LORD NINETEEN HUNDRED
SEVENTY-SEVEN

AN ACT to Establish the Maine Tort Claims Act.

Emergency preamble. Whereas, Acts of the Legislature do not become effective until 90 days after adjournment unless enacted as emergencies; and

Whereas, the Maine Supreme Judicial Court has abrogated the common law doctrine of sovereign immunity effective February 1, 1977; and

Whereas, exposure to unlimited liability may cause undue reluctance on the part of government entities to provide needed services, and increase governmental costs; and

Whereas, liability insurance for governmental entities is becoming increasingly difficult to obtain in all areas of exposure and may become completely unavailable in some areas of exposure; and

Whereas, in the judgment of the Legislature, these facts create an emergency within the meaning of the Constitution of Maine and require the following legislation as immediately necessary for the preservation of the public peace, health and safety; now, therefore,

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

Sec. 1. 14 MRSA § 157, as last repealed and replaced by PL 1969, c. 428, is repealed.

Sec. 2. 14 MRSA c. 741 is enacted to read:

CHAPTER 741
TORT CLAIMS

§ 8101. Title

This chapter shall be known and may be cited as the "Maine Tort Claims Act."

§ 8102. Definitions

As used in this chapter unless the context otherwise indicates the following words shall have the following meanings:

1. Employee. "Employee" means a person acting on behalf of the governmental entity in any official capacity, whether temporarily or permanently, and whether with or without compensation from local, state or federal funds, including volunteer firefighters as defined in Title 30, section 3771, and rescue squad members where the rescue squad receives full or partial financial support from political subdivisions, but the term "employee" shall not mean a person or other legal entity acting in the capacity of an independent contractor under contract to the governmental entity.

2. Governmental entity. "Governmental entity" means and includes the State and political subdivisions as defined.

3. Political subdivision. "Political subdivision" means any county, municipality, city, town, plantation, village or municipal corporation, and any governmental entity created pursuant to Title 30, chapters 203, 204 and 239, and any other quasi-municipal body, School Administrative District, school union, school unit or committee, community school district, special purpose district or any other similar governmental subdivision of the State.

4. State. "State" means the State of Maine or any office, department, agency, authority, commission, board, institution, hospital, college, university or other instrumentality thereof, including the Maine Turnpike Authority, the Maine Port Authority and all such other state created and controlled entities.

§ 8103. Immunity from suit

Except as otherwise expressly provided by statute, all governmental entities and employees acting within the course or scope of their duties shall be immune from suit on any and all claims seeking recovery of damages. When immunity is removed by this chapter, any claim for damages must be brought in accordance with the terms of this chapter.

1. Immunity provision. The immunity provided by this section shall include, but not be limited to, the following:

A. The undertaking or failure to undertake any legislative or quasi-legislative act, including, but not limited to, the adoption or failure to adopt any statute, charter, ordinance, order, regulation, resolution or resolve;

B. The undertaking, or failure to undertake, any judicial or quasi-judicial act, including, but not limited to the granting, granting with conditions, refusal to grant or revocation of any license, permit, order or other administrative approval or denial;

C. The performance or failure to exercise or perform a discretionary function or duty, whether or not the discretion be abused; and whether or not the statute, charter, ordinance, order, resolution, regulation or resolve under which the discretionary function or duty is performed is valid or invalid;

D. The failure to provide communications, heat, light, water, electricity or solid or liquid waste collection, disposal or treatment services;

E. The activities of the Maine National Guard when engaged in combatant activities during a time of war, or when called to duty in accordance with a proclamation of emergency by the Governor in accordance with Title 37-A, section 57; or

F. The use of unimproved land.

Paragraphs A to F to which immunity applies are cited as examples and shall not be interpreted to limit the general immunity provided by this section.

§ 8104. Exceptions to immunity; limitations

The immunity granted pursuant to section 8103 does not apply to claims arising from injury or damage caused by the negligent act or omission of a governmental entity or its employees while acting within the scope of their duties in the following instances:

1. Moving vehicles and equipment. In the operation or maintenance of any motor vehicle, aircraft, snowmobile, watercraft or other such moving vehicle or of any equipment, machinery or furnishings whether mobile or stationary;

2. Certain utilities and services. In the operation or maintenance of a communications, water or electric utility, or a solid or liquid waste collection, disposal or treatment service;

3. Public buildings. In the operation or maintenance of any public building, except for the maintenance of any public building acquired in any manner for reasons of eminent domain, tax delinquency, escheat or gift during the first 120 days of its ownership by the governmental entity;

4. Certain dangerous conditions in public improvements. Where a dangerous, unsafe or defective condition has been created in the construction, operation or maintenance of any public building, structure, dam, reservoir, street, alley, sidewalk, bridge, highway or other public improvement controlled by such governmental entity, provided, that immunity shall not be removed under this subsection for latent conditions or conditions resulting from deterioration through continued use or exposure to weather unless constructive and actual notice to the governmental entity of such conditions prior to the occurrence alleged and proved.

§ 8105. Limitations on damages

1. Limits established. In any action for damages permitted by this chapter, the claim for and award of damages including costs shall not exceed:

A. \$25,000 to any individual claimant for any number of claims for property damage arising out of a single occurrence;

B. \$50,000 to any individual claimant for any number of claims for personal injury; and

C. \$200,000 total for any and all claims arising out of a single occurrence.

2. Attorney's fees, court costs, etc. Attorney's fees, court costs, interest and all other costs which a court may assess shall be included within the damage limits specified by this section.

3. Claims in excess of limits. When a claimant or several claimants believe they may have a claim in excess of the limits established in subsection 1 they may apply to the Legislature for special authorization to proceed within another specified limit.

4. Apportionment of claims. Where the amount awarded to or settled for multiple claimants exceed the limitations imposed by this section, any party may apply to the Superior Court for the county in which the governmental entity is located to apportion to each claimant his proper share of the total, limited as required by this section.

A. Any award by the court in excess of the maximum liability limits specified by subsection 1 of this section shall be automatically abated by operation of this section to the maximum limits of liability.

5. Exclusion from judgment or award. No judgment or award against a governmental entity or an employee shall include:

A. Punitive or exemplary damages;

B. Damages for pain or suffering, except where the pain and suffering in question is of a severe and long lasting nature;

C. Damages for mental injuries, except for consequent loss of earnings and the cost of treatment;

D. Loss of consortium, loss of parental guidance or affections, loss of services of a child, and 3rd party loss of earnings.

§ 8106. Jurisdiction of the courts

1. Original jurisdiction. The Superior Courts shall have original jurisdiction over all claims permitted under this Act and not settled in accordance with section 8109.

A. All claims heard by the Superior Court shall be considered by the court without a jury.

2. Appeals.

A. Copies of each notice of appeal filed in an action arising under this chapter shall be served on the Attorney General at the same time as such notice is served upon the parties to the action.

B. The Attorney General shall have the right to appear before the Supreme Judicial Court by brief and oral argument as a friend of the court and any appeal in an action arising under this Chapter where the Attorney General is not appearing representing a party to the action.

§ 8107. Notice to Governmental Entity

1. **Notice requirements for filing.** Within 180 days after a cause of action against a governmental entity or an employee accrues, or at a later time within the limits of section 8110 where a claimant shows good cause why notice could not have reasonably been filed within the 180 day limit, a claimant or his estate shall file a written notice containing:

- A. The name and address of the claimant, and the name and address of his attorney or other representative, if any;
- B. A concise statement of the basis of the claim, including the date, time, place and circumstances of the act, omission or occurrence complained of;
- C. The name and address of any governmental employee involved, if known;
- D. A concise statement of the nature and extent of the injury claimed to have been suffered; and
- E. A statement of the amount of monetary damages claimed.

2. **Incapacity.** If the claimant is incapacitated and thereby prevented from presenting and filing the claim within the time prescribed or if the claimant is a minor, the claim may be presented and filed on behalf of the claimant by any relative, attorney or agent representing the claimant.

3. **Notices.**

A. If the claim is against the State or an employee thereof, copies of the notice shall be addressed to and filed with the state department, board, agency, commission or authority whose act or omission is said to have caused the injury, and the Attorney General.

B. Notice of claims against any political subdivision or an employee shall be addressed to and filed with the clerk, secretary or other official whose duty it is to keep the official records of the political subdivision.

4. **Substantial notice compliance required.** No claim or action shall be commenced against a governmental entity or employee in the Superior Court unless the foregoing notice provisions are substantially complied with. A claim filed under this section shall not be held invalid or insufficient by reason of an inaccuracy in stating the time, place, nature or cause of the claim, or otherwise, unless it is shown that the governmental entity was in fact misled to its injury thereby.

This section shall not apply to such claims as may be asserted under the Rules of Civil Procedure by a 3rd party complaint, crossclaim or counterclaim.

§ 8108. Time for allowance or denial of claims

Within 120 days after the filing of the claim with the governmental entity, the governmental entity shall act thereon and notify the claimant in writing of its approval or denial of the monetary damages claimed. A claim shall be deemed to have been denied if at the end of the 120 day period the governmental entity has failed to approve or deny the claim.

§ 8109. Compromise and settlement

1. **Procedures for State.** The State shall have authority to settle claims filed hereunder in accordance with the following procedures:

A. Any agency may settle any claim for an amount of \$500 or less where such settlement is approved by the appropriate department or agency head in accordance with regulations published by the Commissioner of Finance and Administration;

B. Any other claim may be settled for any amount where such settlement is approved by a board of settlement which shall include the head of the department or agency against which the claim is filed, the Commissioner of Finance and Administration, or his representative; and the Attorney General, or his representative. Unanimous approval of the board of settlement shall be required for such settlements.

2. **Procedures for political subdivisions.** Any political subdivision may settle claims filed against it in accordance with procedures duly promulgated by its governing body.

3. **Limitations on payment under settlement.** Where the State or a political subdivision becomes obligated to pay a claim as a result of a settlement, the limitations on payment provided by sections 8105 and 8116 shall apply in the same manner as if the State or political subdivision in question became obligated to pay the funds as a result of a judgment of the court.

§ 8110. Limitation of actions

Every claim against a governmental entity or its employees permitted under this chapter shall be forever barred, from the courts of this State, unless an action therein is begun within 2 years after the cause of action accrues.

§ 8111. Service of summons

1. **Actions against the State or its employees.** In all actions against the State or its employees, the summons and complaint shall be served on the department, board, agency, commission or authority whose act or omission is alleged to have caused the injury, on the employee, and on the Attorney General.

2. **Actions against a political subdivision.** In all actions against a political subdivision, the summons and complaint shall be served on the clerk, secretary or other official whose duty it is to keep the official records of the political subdivision.

§ 8112. Reserved

§ 8113. Liability of employees

A governmental entity may, in its discretion, assume the defense of and indemnify any employee against a claim arising out of an act or omission occurring within the course or scope of his employment.

1. **Discontinuation of defense by governmental entity.** The governmental entity may discontinue its defense of and refuse to indemnify its employee if it determines, and notifies the employee in writing, that

A. The act or omission of the employee occurred outside the course or scope of his employment, or

B. The defense of its employee would otherwise create a conflict of interest between the governmental entity and the employee.

2. Conditions under which discontinuation prohibited. If the governmental entity determines that the provisions of subsection 1 are applicable, but decides to continue to defend and indemnify its employee, the governmental entity shall be prohibited from terminating its defense, denying liability and claiming indemnity, contribution or reasonable defense costs, on basis of the grounds set forth in subsection 1.

§ 8114. Liability not expanded, other remedies are exclusive

1. Liability not expanded unless chapter expressly provides. Except as expressly provided herein, nothing in this chapter shall enlarge or otherwise adversely affect the liability of an employee or a governmental entity. Any immunity or other bar to a civil lawsuit under Maine or federal law shall, where applicable, remain in effect.

2. Effect of other statutes concerning immunity. Where any other statute provides a waiver of governmental, sovereign or official immunity, the provisions of that statute shall be the exclusive method for any recovery of funds in any fact situation to which that statute applies.

§ 8115. Judgment against governmental entity or employee; effect

1. Separate action against governmental employee. Any judgment against a governmental entity shall constitute a complete bar to a separate action for damages by the claimant, by reason of the same subject matter, against any public employee whose act or omission gave rise to the claim.

2. Separate action against governmental entity. Any judgment against any public employee whose act or omission gave rise to the claim shall constitute a complete bar to a separate action for injury by the claimant, by reason of the same subject matter, against a governmental entity.

3. Joinder. Nothing contained in this section shall be construed as preventing the joinder of any governmental entity or employee of such governmental entity in the same action.

§ 8116. Payment of claims or judgments when no insurance

1. Payment from next appropriation. In the event no insurance has been procured by the State to pay a claim or judgment arising under this chapter, and no appropriated funds are reasonably available, as determined by the Commissioner of Finance and Administration, the claim or judgment shall be paid from the next appropriation to the state instrumentality whose action or omission, or the action or omission of whose employee, gave rise to the claim.

2. Subdivision's plan for payment. In the event that a political subdivision has not procured insurance, the trial judge may accept a reasonable plan for the payment of the amount of the judgment that exceeds \$50,000. A payment plan shall not exceed 5 years, and may include interest up to a maximum of 6% per year, provided that interest payments shall not cause the total payments to exceed the limits of liability specified in section 8105 of this chapter.

§ 8117. Liability insurance

The legislative or executive body or any department of the State or any political subdivision may procure insurance against liability for any claim under this chapter and including any activity not described in this chapter, but for which immunity is waived by another act. If the insurance provides protection in excess of the limits of liability imposed by section 8105, then the limits provided in the insurance policy shall replace the limits imposed by section 8105.

§ 8118. Prior claims

This chapter does not apply to any claim against any governmental entity or employee arising before its effective date. Any such claim may be presented and enforced to the same extent and be subject to the same defenses and limitations on recovery as if this chapter had not been adopted and as though any statute repealed by this chapter had remained in effect, and as though the doctrines of sovereign, governmental and official immunity had remained in full force and effect. Nothing herein shall be construed as denying a governmental entity the right or authority to defend or settle any claim either against it or against any of its employees pending at the time of the effective date of this chapter.

§ 8119. Eleventh amendment

Nothing in this chapter or any other provision of state law shall be construed to waive the rights and protections of the State under the Eleventh Amendment of the United States Constitution except where such waiver is explicitly stated by law and actions against the State for damages shall only be brought in the courts of the State in accordance with this chapter.

Sec. 3. Emergency; effective date. In view of the emergency cited in the preamble, this Act shall become effective immediately upon passage except that section 8104 shall not become effective until July 1, 1977. For claims arising after the effective date of this Act and before July 1, 1977, exceptions to section 8103 shall be permitted to the same extent as provided by the common law of Maine existing prior to October 12, 1976.

STATEMENT OF FACT

The Maine Tort Claims Act defines the scope of claims for damages which may be asserted against the State and local governments.

1. **Scope of liability.** Sovereign immunity is reimposed with exceptions for certain negligent acts, subject to both specific and general limitations.
2. **Limits on liability and damages.** Maximum limits of liability are imposed, and recovery for certain speculative types of damages is restricted.
3. **Exclusive Superior Court jurisdiction.** Jurisdiction to hear claims under the bill is placed with the Superior Court without a jury.
4. **Agency settlement.** State agencies may settle claims for under \$500 themselves and larger claims if the settlement is approved by the agency head, the Commissioner of Finance and Administration and the Attorney General.
5. **Employee liability.** Procedures for governmental entities to exercise discretion to defend employees are specified.