

MAINE STATE LEGISLATURE

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ONE HUNDRED AND EIGHTH LEGISLATURE

Legislative Document

No. 162

S. P. 86

In Senate, January 26, 1977

Reported by Senator Collins of Knox from Committee on Judiciary and
printed under Joint Rules No. 2

MAY M. ROSS, Secretary

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Sec. 1. 14 MRSA § 157, as last repealed and replaced by PL 1969, c. 428, is repealed.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 74I
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 elected or appointed officials, 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 in subsection 3.

3. **Political subdivision.** "Political subdivision" means any city, town, plantation, county, administrative entity or instrumentality created pursuant to Title 30, chapters 203, 204 and 239, quasi-municipal corporation and special purpose district, including, but not limited to, any water district, sanitary district, hospital district and school district of any type.

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

§ 8103. Immunity from suit

Except as otherwise expressly provided by statute, all governmental entities shall be immune from suit on any and all tort claims seeking recovery of damages. When immunity is removed by this chapter, any claim for damages shall be brought in accordance with the terms of this chapter.

1. **Immunity provision.** Notwithstanding section 8104, a governmental entity shall not be liable for any claim which results from:

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 decision not 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, including all lands used or available for public outdoor recreation.

Subsection 1, paragraphs A to F, to which immunity applies, are cited as example and shall not be interpreted to limit the general immunity provided by this section.

§ 8104. Exceptions to immunity

A governmental entity shall be liable for its negligent acts or omissions causing property damage, bodily injury or death in the following instances:

1. Moving vehicles and equipment. In the operation or maintenance of any motor vehicle, aircraft, snowmobile, watercraft or other 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; or

3. Public buildings. In the construction, operation or maintenance of any public building, except that in the case of any public building acquired by the tax delinquency, the governmental entity shall be immune from liability for the first 60 days after possession by the delinquent taxpayer has ceased.

§ 8105. Limitation on damages

1. Limit established. In any action for damages permitted by this chapter, the claim for and award of damages, including costs, against both a governmental entity and its employees shall not exceed \$300,000 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 limit specified by this section.

3. Claims in excess of limit. When a claimant or several claimants believe they may have a claim against the State in excess of the limit established in subsection 1, or for a claim for which the State is immune, they may

apply to the Legislature for special authorization to proceed within another specified limit.

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

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

5. Exclusion from judgment or award. No judgment or award against a governmental entity shall include punitive or exemplary damages.

§ 8106. Jurisdiction of the courts

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

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 in 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 accrues, or at a later time within the limits of section 8110, when a claimant shows good cause why notice could not have reasonably been filed within the 180-day limit, a claimant or his personal representative 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 shall be addressed to and filed with one of the persons upon whom a summons and complaint could be served under Rule 4, Maine Rules of Civil Procedure, in a civil action against a 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 prejudiced 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 against the State in accordance with the following procedures.

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

B. Any other claim may be settled when such settlement is approved by the head of the department or agency against which the claim is filed, the Commissioner of Finance and Administration and the Attorney General.

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.** When the State or a political subdivision becomes obligated to pay a claim as a result of a settlement, the limitation on payment provided by sections 8105 and 8115 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. **Personal immunity for employees; procedure**

1. **Immunity.** Employees of governmental entities shall be personally immune from civil liability for 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; or

C. The performance or failure to exercise or perform a discretionary function or duty, whether or not the discretion is 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.

2. **Attachment and trustee process.** Attachment, pursuant to Rule 4A, Maine Rules of Civil Procedure, and trustee process, pursuant to Rule 4B, Maine Rules of Civil Procedure, shall not be used in connection with the commencement of a civil action against an employee of a governmental entity based on a negligent act or omission of such employee in the course or scope of his duties.

§ 8112. **Defense and indemnification of employees**

A governmental entity may, in its discretion and with the consent of the employee, assume the defense of and may 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 the act or omission of the employee occurred outside the course or scope of his employment.

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 its employee, the governmental entity shall be prohibited from terminating its defense.

§ 8113. 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. When any other statute expressly 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.

§ 8114. 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.

§ 8115. 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. A payment plan shall not exceed 5 years, and may include interest at the rate provided in section 1602.

§ 8116. 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 limit of liability imposed by section 8105, then the limits provided in the insurance policy shall replace the limit imposed by section 8105.

The State may purchase insurance on behalf of its employees to insure them against any personal liability which they may incur out of or in the course and scope of their duties.

Any insurance purchased by the State under this section shall be purchased through the Maine Insurance Advisory Board.

§ 8117. 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.

§ 8118. 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. 23 MRSA § 3655, 1st sentence, is amended to read:

Whoever receives any bodily injury or suffers damage in his property through any defect or want of repair or sufficient railing in any highway, town way, causeway or bridge may recover for the same in a civil action, to be commenced within one year from the date of receiving such injury or suffering damage, of the county or town obliged by law to repair the same, if the commissioners of such county or the municipal officers or road commissioners of such town or any person authorized by any commissioner of such county or any municipal officer or road commissioner of such town to act as a substitute for either of them had 24 hours' actual notice of the defect or want of repair, but not exceeding ~~\$4,000~~ \$8,000 in case of a town.

Sec. 4. Study. The Joint Standing Committee on Judiciary of the 108th Legislature shall study the issues of governmental immunity, including, but not limited to, the question of liability of governmental employees, the question of the removal from immunity of further areas of governmental activity and the feasibility of establishing a state fund or joint underwriting association to assist municipalities with their insurance problems. The committee shall report the results of its study, together with any proposed legislation, to the Second Regular Session of the 108th Legislature. The Attorney General, the Commissioner of Finance and Administration and the Superintendent of Insurance are directed to assist the committee in this study.

Sec. 5. 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. This Act shall remain effective until February 1, 1979.

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.