

# MAINE STATE LEGISLATURE

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(EMERGENCY)  
New Draft of H. P. 1312, L. D. 1559  
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ONE HUNDRED AND EIGHTH LEGISLATURE

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Legislative Document

No. 1873

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H. P. 1679 House of Representatives, June 10, 1977  
Reported by a Majority from Committee on Judiciary. Sent up for concurrence and ordered printed under Joint Rules No. 2.  
EDWIN H. PERT, Clerk

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STATE OF MAINE

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IN THE YEAR OF OUR LORD NINETEEN HUNDRED  
SEVENTY-SEVEN

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**AN ACT to Revise the Maine Tort Claims Act.**

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**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, in response to that decision and the problems it created, the Legislature, as an emergency measure, enacted the Maine Tort Claims Act reestablishing immunity and defining certain exceptions to it; and

Whereas, as a result, state employees may be exposed, without the protection of insurance, to liability in areas where the State is immune from liability; and

Whereas, certain additional revisions of the Maine Tort Claims Act are necessary to enable governmental entities to obtain insurance before the exceptions to immunity take effect on July 1, 1977; 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**Sec. 1.** 14 **MRSA § 8103**, as enacted by PL 1977, c. 2, § 2, is repealed and the following enacted in its place:

**§ 8103. Immunity from suit**

1. Immunity. 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.

2. Examples. 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 207;

F. The construction, ownership, maintenance or use of:

(1) Unimproved land;

(2) Historic sites, including, but not limited to memorials, as defined in Title 12, section 601, subsection 1;

(3) Land, buildings, structures, facilities or equipment designed for use primarily by the public in connection with public outdoor recreation;

G. The discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalines, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water, except as provided in section 8104, subsection 3.

H. The ownership, maintenance or use of any building acquired by a governmental entity for reasons of tax delinquency from the date of foreclosure and until actual possession by the delinquent taxpayer or his lessee or licensee has ceased for a period of 60 days; or

I. The ownership, maintenance or use of any building acquired by a governmental entity by eminent domain or by condemnation until actual possession by the former owner or his lessee or licensee has ceased for a period of 60 days; or

J. Any defect, lack of repair or lack of sufficient railing in any highway, town way, sidewalk, parking area, causeway, bridge, airport runway or taxiway, including appurtenances necessary for the control of such ways including but not limited to street signs, traffic lights, parking meters and guardrails, except as provided in section 8104, subsection 4, and in Title 23, section 3655.

Paragraphs A through J of this subsection, to which immunity applies, are cited as examples and shall not be interpreted to limit the general immunity provided by this section.

Sec. 2. 14 MRSA § 8104, as enacted by PL 1977, c. 2, § 2, is repealed and the following enacted in its place:

§ 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. In its ownership, maintenance or use of any:
  - A. Motor vehicle, as defined in Title 29, section 1, subsection 7;
  - B. Special mobile equipment, as defined in Title 29, section 1, subsection 14;
  - C. Trailers, as defined in Title 29, section 1, subsection 18;
  - D. Aircraft, as defined in Title 6, section 3, subsection 5;
  - E. Watercraft, as defined in Title 12, section 2061, subsection 17;
  - F. Snowmobiles, as defined in Title 12, section 1971, subsection 3; and
  - G. Other machinery or equipment, whether mobile or stationary;
2. In the construction, operation, or maintenance of any public building or the appurtenances thereto, except as provided in section 8103, subsection 2, paragraphs F, H and I;
3. In the sudden and accidental discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalines, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water; and
4. Arising out of and occurring during the performance of construction, street cleaning or repair operations on any highway, town way, sidewalk, parking area, causeway, bridge, airport runway or taxiway, including appurtenances necessary for the control of such ways including but not limited to street signs, traffic lights, parking meters and guardrails.

**Sec. 3. 14 MRSA § 8107, sub-§ 3, ¶ B**, as enacted by PL 1977, c. 2, § 2 is amended to read:

**B.** Notice of claims against any political subdivision or an employee thereof 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~~ the Maine Rules of Civil Procedure, Rule 4, in a civil action against a political subdivision.

**Sec. 4. 14 MRSA § 8112**, as enacted by PL 1977, c. 2, § 2, is repealed and the following enacted in its place:

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

1. When the governmental entity is not liable. 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 which arises out of an act or omission occurring within the course or scope of his employment and for which the governmental entity is not liable.

2. When the governmental entity is liable. A governmental entity shall, with the consent of the employee, assume the defense of and shall indemnify any employee against a claim which arises out of an act or omission occurring within the course or scope of his employment and for which the liability of the governmental entity is asserted under section 8104, under another statute or by legislative authorization. If the defense of its employee would otherwise create a conflict of interest between the governmental entity and the employee, the governmental entity shall be liable for reasonable fees for the employee's attorney and for his court costs.

This subsection shall not apply if the employee settles the claim without the consent of the governmental entity.

This subsection shall not apply if notice is not required to have been filed as provided in section 8107, if the employee does not notify the governmental entity within 30 days after receiving actual written notice of the claim against him or within 15 days after the service of a summons and complaint upon him, and if the governmental entity is prejudiced thereby.

3. Discontinuation of defense. When a governmental entity assumes the defense of an employee under either subsection 1 or subsection 2, 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. If the governmental entity discontinues its defense and if it is later determined by agreement of the parties, including the governmental entity, or by a decision of a court that the act or omission of the employee occurred within the course or scope of his employment, the governmental entity shall then be liable for the employee's attorney's fees and for his court costs.

4. Conditions under which discontinuation prohibited. If the governmental entity determines that the act or omission of the employee occurred out-

side the course or scope of his employment, but decides to continue to defend the employee, the governmental entity shall be prohibited from thereafter terminating its defense.

5. Consent to suit; limit on recovery from employee. In any action on a claim against the State:

A. Which is in excess of the limit established in section 8105, subsection 1 and for which the Legislature has granted special authorization to proceed within a specified limit; or

B. For which the State is immune and for which the Legislature has granted special authorization to proceed within a specified limit;

the award of damages, including costs, against both the State and its employee shall not exceed the limit established by the Legislature. If, however, it is found that the act or omission occurred outside the course or scope of employment, the award of damages against that employee may exceed the limit specified by the Legislature.

6. This action shall not in any way impair, limit or modify the rights and obligations of any insurer under any policy of insurance.

7. Independent contractors; leases. A governmental entity may, in its discretion, assume the defense of and may indemnify any person who is providing services to the governmental entity pursuant to a written contract or with whom the governmental entity has entered into an agreement for the lease of premises.

Sec. 5. 14 MRSA § 8116, first ¶, as enacted by PL 1977, c. 2, § 2, is repealed and the following enacted in its place:

The legislative or executive body or any department of the State or any political subdivision may procure insurance against liability for any claim against it or its employees 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. If the insurance provides coverage in areas where the governmental entity is immune, the governmental entity shall be liable in those substantive areas but only to the limits of the insurance coverage.

Sec. 6. 23 MRSA § 1451, first ¶, 3rd sentence, is amended to read:

The State shall not be liable for any injury under this section in an amount exceeding ~~\$4,000~~ \$6,000.

Sec. 7. 23 MRSA § 3655, 1st sentence, as amended by PL 1977, c. 2, § 3, 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 ~~\$8,000~~ \$6,000 in case of a town.

**Emergency clause; effective date.** In view of the emergency cited in the preamble, this Act shall take effect upon approval except as otherwise provided and except that section 2 shall not become effective until July 1, 1977. Sections 1 through 5 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.

#### STATEMENT OF FACT

The new draft clarifies the Maine Tort Claims Act, especially in the definition of the areas in which governmental entities are immune or liable.

It also provides that governmental entities shall defend and pay any claims against employees in cases in which both the entity and the employee may be liable. The cost of insurance for employees in this area has been found to be reasonable.