

# MAINE STATE LEGISLATURE

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Report of the Judiciary Committee on  
Sovereign Immunity and  
"AN ACT to Establish the Maine Tort Claims Act".

January 27, 1977

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## Background

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The new draft of "AN ACT to Establish the Maine Tort Claims Act" is essentially a stopgap measure in response to the deadline imposed by the Supreme Judicial Court. In the case of Davies vs. City of Bath, Me., 364 A. 2d 1269, dated October 12, 1976, the court abolished the doctrine of governmental or sovereign immunity. The abolition of the doctrine was not retroactive but only prospective, to take effect 60 days after the court decision. The court later granted a motion to extend that deadline until February 1, 1977. On and after that date, unless the Legislature declares otherwise, the State, the municipalities and the various other political subdivisions will be liable for their torts, meaning primarily their negligence and also certain other wrongful acts, which result in damage to persons property.

Governmental immunity had been a rule of judicial interpretation in this State, not a statute or a constitutional provision. The courts in many other states, especially in the last 10 to 20 years, have abolished the doctrine on the ground that it was not good public policy for the government to be so immune. Most state legislatures have responded to these decisions by enacting claims acts more or less similar to the bill under consideration. The Maine Supreme Judicial Court had in several cases in recent years stated that it looked with disfavor on the doctrine, but wished to give the Legislature the opportunity to act. Past Legislatures failed to take any action. A bill somewhat similar to the present bill was defeated in the 107th Legislature. This failure prompted the court to act when the Davies case was presented.

As stated, the new draft is an interim measure. It will no longer be effective after February 1, 1979, two years after the deadline. It reestablishes governmental immunity, generally, effective February 1, with limited exceptions, which do not take effect until July 1, to give municipalities time to explore the insurance market. If there were serious problems, the Legislature could amend those parts of the bill before they become effective on July 1.

There are a number of issues which the Judiciary Committee and the Legislature do not have time to explore or to treat before February 1. Therefore, the bill directs the committee to study the whole area and to report, with proposed new legislation, to the Second Regular Session of this Legislature. The second session will have the time to examine the new legislation without the threat of an immediate deadline.

### Issues

#### I. Scope of Liability

The new draft adopts what is generally referred to as a "closed-end" approach to the liability of state and local governments, with a more restricted scope of liability than in L.D. 87.

The closed-end approach basically restores the doctrine of sovereign immunity by law and then specifies certain exceptions to it. The exceptions most often specified are negligent acts which lead directly to physical injuries, such as improper operation of a motor vehicle or poor maintenance of a structure. The advantages of the closed-ended approach are that it allows determination with some certainty of those activities for which governmental entities are liable, thus easing the task of appropriating funds or securing

insurance to cover risks. It also discourages efforts by potential claimants to seek recovery based on tenuous legal theories and thus reduces the chances of surprise lawsuits and judgments in unanticipated areas.

The alternative to that approach is generally referred to as "open-ended". The open-ended approach makes the governmental entity liable for its actions in the same manner as a private person with certain exceptions then being specified where the governmental entity will not be liable. The Federal Tort Claims Act takes this approach. The advantages of this approach are that it assures that persons who are actually injured and deserving of recovery as a result of governmental activities are less likely to be barred from recovery, particularly when their injury develops in an area which was unanticipated by drafters of legislation. Reliance is placed on the current judicial system to apply the law in the same way as it applies to private persons to avoid unfair results.

The committee felt that the open-ended approach would subject governmental entities to increased costs and that it raised serious questions of insurability. Insurers might be reluctant to provide coverage for broad and uncertain areas of exposure. In such a situation, governments would probably become reluctant to provide many needed services when they might be exposed to liability by doing so.

The new draft establishes liability, effective July 1, in 3 basic areas:

- 1) Motor vehicles and equipment - The Legislature had already waived sovereign immunity in this area (as it had several other specific, limited areas) in 14 MRSA § 157.
- 2) Certain utilities and services - These would be communications, water and electric utilities (only when operated by a

governmental entity) and solid and liquid waste collection and disposal.

3) Public buildings - The state and local governments would be liable for injury or damage caused by their negligence in such buildings.

Beyond these limited exceptions, governments are not liable in any of the other areas in which private persons and businesses would be subject to tort claims, such as intentional injuries, defamation, and other types of negligence beyond the specified 3 areas.

Even the advocates of the open-ended approach agree that there were certain areas in which governments should definitely not be liable. Those are the acts unique to their governmental formations, such as legislative and quasi-legislative activities, judicial and quasi-judicial activities, and discretionary activities. The new draft adds certain other areas of activity to this list, and makes it very clear that governments are not liable in these areas. (There may, of course, still be disputes over whether or not a particular function fits within one of these categories. Governmental activities are so varied that it is not really possible to list and categorize them all.)

Serious philosophical differences remain over the extent of immunity that should be granted to government. A balance must be reached between government, which is concerned over its financial situation, and the individual citizen, who has been injured by the negligent acts or omissions of government. This issue will have to be explored more thoroughly, in the light of experience under this interim bill. The resolution may turn on the practical questions of the cost and availability of insurance, an area which will also

have to be studied. If insurance turns out to be a problem, the committee will explore the feasibility of some kind of state funding or joint pool for municipalities.

## II. Damages

The basic question is not whether a limit should be imposed, but what the limit would be when liability is established in one of the 3 areas. The committee chose a single limit of \$300,000 for any and all claims resulting from a single occurrence. In a case involving one injury, a single person could be awarded that full amount. (This limit applies to both governments and their employees. When both are sued together, the total amount received from both could not exceed \$300,000. This is a form of protection for employees, a problem discussed below.)

The \$300,000 figure was selected because most careful persons have this limit on their automobile coverage, and the State currently insures its vehicles to this limit. This was a change from the original L.D. 87, with limits of \$25,000 for property damage, \$50,000 for personal injury, and \$200,000 for a single occurrence. There seemed to be no point in reducing the coverage the State now has. The experience under this somewhat arbitrarily selected limit will have to be examined.

A second issue with regard to damages is the type of damages. L.D. 87 would have prohibited damages for pain and suffering and other traditional tort damages. The committee felt that persons injured by government should have the right to the same types of compensation as persons injured by private parties, subject to the overall limit of \$300,000, which does not apply to private parties.

### III. Employees

Under the present law, in Maine, as it is generally understood, even with the sovereign immunity doctrine in effect, employees of governmental entities may be sued for negligent acts which directly result in physical injury to other persons. Further, they may be sued for other intentional or malicious acts taken in the course of their governmental activities which result in intangible injuries to persons. However, generally officials have been protected from liability, though not necessarily from being sued, for official acts as part of the decision-making process of quasi-judicial or quasi-legislative bodies or in other discretionary acts. The question to be faced in the sovereign immunity legislation is whether to change this structure or leave it as it is.

The concern on one side of this issue is to give some protection to employees in the performance of their duties and to keep them from being so overly cautious that they do not carry out their duties properly. On the other hand is the concern that complete immunity could encourage carelessness and arrogance among governmental officials and employees.

L.D. 87 granted immunity to employees for the same acts for which it was granted to governmental entities. The grant of immunity to governments, with certain exceptions, largely restores them to the same legal position they were in before Davies. The grant of immunity to employees for other than discretionary and policy-making activities would have changed Maine law with regard to employee liability, even though employee liability was not directly affected by the court's decision.



Because L.D. 87 would have substantially altered the existing legal situation and because there are serious questions on this issue, the new draft keeps employee liability largely as it was. The new new draft does spell out what the courts of Maine have already stated, that officials and employees are personally immune for discretionary and policy-making activities. It does establish a very slight form of immunity by making employees who are sued immune from attachment of their property in the commencement of such suits (although not in enforcing judgments against them after a court decision). This whole area of the law needs further study.

There are two related issues here. One is the question of indemnification of employees, meaning the payment by the government of judgments against employees. The other is that of the government's legal defense of its employees. Although some states do provide for mandatory indemnification and mandatory defense of employees, the new draft, as did L.D. 87, grants the government the discretion to decide whether or not to indemnify and/or to defend employees who are sued. There will be cases where there will be conflicts of interest between employer and employee when both are sued. The act in question may have occurred outside the scope of duty, and the government can then withdraw its defense of the employee.

These two issues also require further review.

#### Section-by-section Analysis

Sec. I. - repeals 14 MRSA § 157, the current statutory waiver of governmental immunity with regard to motor vehicles, to the extent of insurance coverage. The bill, as noted, covers motor vehicle cases.

Sec. 2. - enacts the "Maine Tort Claims Act".

§ 8102 - Definitions -

- 1) "Employee" includes virtually all persons acting on behalf of government, specifically including elected and appointed officials.
- 2) "Governmental entity", the shorthand term used in the bill, includes both state and local governments.
- 3) "Political subdivision" is broadly defined to include virtually any type of truly governmental activity.
- 4) "State" includes all state agencies. The University of Maine, at its request, is excluded. It is covered by the separate legal doctrine of charitable immunity.

§ 8103 - is the fundamental general statement of immunity. There are express statutory exceptions which have long existed, and there are the exceptions in this bill.

Sub-§ I-lists examples of immunity. These include the broad discretionary areas mentioned earlier and three others as well: the decision not to provide certain public services, the Maine National Guard, and recreational and unimproved land. These are merely examples of immunity. The bill establishes general immunity, with specific, limited exceptions.

§ 8104 - spells out the three basic kinds of functions from which immunity is removed, as mentioned earlier.

§ 8105 - limitation on damages.

Sub-§ I.-sets forth the \$300,000 limit as described earlier.

Sub-§ 2.-includes attorney's fees and other costs within the \$300,000 limits.

Sub-§ 3. - is a reminder of the existing situation, that a person whose claim is above the limit or subject to the immunity defense may petition the Legislature for relief.

Sub-§ 4. - authorizes the court to allocate awards on an equitable basis when there are multiple claimants.

Sub-§ 5. - prevents the award of punitive and exemplary damages, a type of award in excess of out-of-pocket losses. Other such damages, such as "pain and suffering" are allowed under the new draft.

§ 8106 -

Sub-§ I. - places jurisdiction in the Superior Court. The prohibition on jury trials in L.D. 87 has been removed,

Sub-§ 2. - allows the Attorney General to participate in appeals that might establish precedents that would bind the State.

§ 8107 - sets forth the procedure for notifying an agency of a claim against it. This is a request for administrative relief, which must be filed before court action can be commenced and which must be filed within 180 days after the occurrence, unless good cause is shown. That good cause must be shown within two years, under § 8110.

§ 8108 - allows a governmental entity 120 days to respond to a claim filed under § 8107.

§ 8109 - establishes settlement procedures for the State and local governments. Under sub-§ I, controlling the State, a department head can settle claims of \$500 or under. Settlements of claims between \$500 and \$300,000 must be approved by the department head, the Commissioner of Finance and Administra-

tion, and the Attorney General. Sub-§ 2 allows other entities to establish their own procedures for claim settlement. Sub-§ 3 applies the \$300,000 limit to settlements and also applies the payment mechanisms of § 8115.

§ 8110 - establishes a strict two-year statute of limitations on claims under this bill. For comparison, the period is six years for most civil actions, two years for medical malpractice, and one year for workmens's compensation. Two years is considered appropriate, because of the frequent turnover of employees who would know the facts of a case and because insurance premiums are lower for a shorter time period of exposure.

§ 8111 - as noted earlier, spells out the established common law principles of personal immunity for officials and employees for discretionary and policy-making activity. Sub-§ 2 provides the immunity mentioned earlier with relation to suits against employees.

§ 8112 - as mentioned earlier, allows the entity discretion in determining whether to indemnify or defend employees.

§ 8113 - states that where other statutes deal with liability or immunity, those other statutes still apply to their situations.

§ 8114 - requires an employee to be sued at the same time as the entity with regard to the same occurrence, and vice versa, or the claim against the other party is forever barred if there is judgment against one.

§ 8115 - allows the State and local governments to establish plans for payment when there is no insurance or funds available, or not enough.

§ 8116 - grants entities general authority to purchase different types of liability insurance coverage. The State must purchase through its Insurance Advisory Board.

§ 8117 - provides that claims arising before the effective date are controlled by the law in effect when the claim arose and not by this act.

§ 8118 - is intended to clarify the relation of this bill to the U.S. Constitution, an area in which there would almost certainly be no problems.

Sec. 3. - amends the existing statute which provides a limited waiver of immunity for towns and counties in cases involving road conditions. It raises the liability limit from \$4,000 to \$8,000. L.D. 87 had included roads as one of the areas exempt from immunity and would have exposed the towns and counties to far greater liability.

Sec. 4. - directs the Judiciary Committee, as noted earlier, to study the whole area and report back to the next session.

Sec. 5. - sets the effective dates and includes the February 1, 1979 "self-destruct" clause.