

MAINE STATE LEGISLATURE

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**SOVEREIGN IMMUNITY WAIVERS:
A DISCUSSION OF
LEGAL, POLICY AND
PROCESS ISSUES**

November 1992

by

Deborah C. Friedman, Legislative Analyst

**Research Assistance provided by
Roy Lenardson**

**Office of Policy and Legal Analysis
Room 101, State House Station 13
Augusta, Maine 04333**

(207) 287-1670

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EXECUTIVE SUMMARY

The Joint Standing Committee on Legal Affairs reviews Resolves waiving sovereign immunity, which is provided to the State and its political subdivisions by the Maine Tort Claims Act. Enactment of such a Resolve allows an individual to sue for injuries allegedly caused by the wrongful acts of those governmental entities. A number of unique legal, policy and committee process issues arise in considering these Resolves, including:

What standards guide the committee's decision on Resolves?

How can the committee get accurate information about a case?

What are the Constitutional limits on approval of Resolves?

How has the committee decided similar Resolves in the past?

This staff study presents guidance on some of the legal issues the committee faces, summarizes past experience of the committee, and suggests possible committee procedures to address the concerns of participants in the process.

The study suggests that neither the language nor the legislative history of the Maine Tort Claims Act provide standards for decision-making by the committee. The Act appears to give the Legislature unlimited discretion in deciding whether to enact a Resolve.

The Maine Constitution, however, provides standards. The Constitution would invalidate a Resolve that fails to comply with the Special Legislation Clause and the Equal Protection Clause of the state Constitution. The Special Legislation Clause prohibits special legislation (legislation directed at a particular individual) if general legislation is "practicable." Despite the language of the Clause indicating a bias against special legislation, the case law interpreting this Constitutional provision indicates that Resolves waiving immunity or increasing the dollar limit on damages under the Tort Claims Act would probably not be invalidated by the Special Legislation Clause. The Equal Protection Clause, however, would invalidate a Resolve authorizing suit for a person whose case is not significantly different from that of other persons. The Equal Protection Clause requires the Legislature to treat "similarly situated" persons similarly. If the Legislature authorizes suit for one person when similarly situated persons are denied that right by the Tort Claims Act, the Resolve might be invalid under the Equal Protection Clause.

The study also suggests that the committee review Resolves in light of tort law standards used by the courts, including an analysis of what cause of action the injured person would proceed under and what immunities the governmental entity will have available, if the case goes to court. This might help the committee clarify for the courts and the participants in the process what laws will apply if the case goes to court. Constitutional, tort law and other standards are discussed in Section IV of the study report.

The study report offers suggestions for committee procedures to handle confidential records during and after committee hearings and to improve the fact-finding process. To improve the flow of information to the committee, the study suggests that the committee require proponents of a Resolve to fill out a standard information form and submit that to the committee before the public hearing, and require proponents and representatives of the governmental entity to provide any information given to the committee to each other so that the participants can respond in a more informed manner to committee concerns and questions about that information. These and other committee process suggestions are found in Section V of the report.

Finally, the report summarizes the 88 Resolves considered by the Legal Affairs Committee since the 1977 enactment of the Maine Tort Claims Act. The number of Resolves introduced in the Legislature fluctuates from year to year; the 115th Legislature considered more than any other Legislature. One-fourth of the introduced Resolves have been enacted, half of them in the first 3 years after enactment of the Tort Claims Act. Injuries received while a person is in state custody (in prisons, mental health institutions, and child protective custody) are the most common sources of Resolves seeking authority to sue the State, with injuries in automobile accidents on state roads being the second most common source. These facts and others relating to Maine's experience with Resolves are discussed in Section III of the report.

I. Introduction

The Maine Tort Claims Act, 14 MRSA §§8101-8111, provides the State and its political subdivisions with broad immunity from civil liability for injuries caused by their actions and those of their employees. This means that a person injured by the tortious actions of a state or local agency or an employee of such an agency is generally unable to sue for compensation for those injuries under state law, even if the agency or employee is at fault.

A provision of the Tort Claims Act, however, permits a person to apply to the Legislature for a waiver of governmental immunity to allow that person to sue the State or one of its political subdivisions:

"When a claimant or several claimants believe they may have a claim against the State in excess of the [\$300,000] limit established in subdivision 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."¹ 14 MRSA §8105, sub-§3.

The application for authority to sue the State or to exceed the limit is made in the form of a Resolve² authorizing the person to sue the State or a political subdivision "notwithstanding any statute or common law to the contrary." The Resolves are generally referred to the Joint Standing Committee on Legal Affairs for consideration.

Consideration of these Resolves occupies a significant amount of committee time and presents a number of unique legal, policy and committee process issues. Legal Affairs Committee staff in the Office of Policy and Legal Analysis requested and received Legislative Council approval for a staff study to collect information and perform research on the legal issues facing the committee, to review the history of the Maine Tort Claims Act and past committee actions on waiver Resolves, and to suggest possible guidelines for committee process to address the concerns of participants in the process. The study provides materials to help the committee answer the following questions:

- Does the legislative history of the Maine Tort Claims Act provide guidance for the Legal Affairs Committee in determining when to permit a person to sue a governmental entity, notwithstanding the Tort Claims Act's prohibition against certain types of suits?

¹ The subsection does not specifically refer to waiver of immunity of a local governmental unit or an individual employee, although Resolves authorizing suit against those persons and entities have been considered and enacted.

² Rule 36 of the Joint Rules of the 115th Maine Legislature provides that "A claim of an amount greater than \$2,000 shall be in order for introduction in the form of a resolve authorizing a suit against the State."

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- What type of Resolves has the Committee considered in the past, and what Resolves has the Committee approved?
- What standards might the Committee use in making these decisions?
- How can the language of the Resolves and the committee decision-making process be improved to clarify legislative intent?
- How can the process of considering Resolves be improved to assure that the Committee gets the information it needs while respecting the rights and concerns of participants in the process?

II. Sovereign Immunity and the Maine Tort Claims Act

By permitting a tort suit against a governmental entity, the Resolves at issue here exempt an individual from the effect of governmental immunity, provided for in the Maine Tort Claims Act. To properly consider these Resolves, the committee should understand the rationale for governmental immunity, the incorporation into the Tort Claims Act of governmental immunity and the exceptions to governmental immunity.

Sovereign immunity is an ancient doctrine, derived from the English common law notion that "the king could do no wrong," or, if the king does wrong, he should not be called to answer for that wrong in a court of his own creation. The doctrine was imported into American law, and firmly established in the Supreme Court case, Osborn v. Bank of United States, 22 U.S. 738 (1824).³ Osborn established the rule that neither the states nor their political subdivisions could be sued by an individual without their consent. From its introduction into this country until the 1950's, the doctrine was recognized by state and federal courts across the country, although it had not been enacted by the Legislatures of those jurisdictions. Various justifications have been offered for the doctrine of sovereign immunity, including the following:

- Protecting the public purse and government's ability to function. The government touches our lives in so many ways, many of which necessarily interfere with our legal rights. Law enforcement, for example, necessarily infringes on our liberty rights. If government entities were required to defend against lawsuits every time they interfered with a person's rights, the cost in time and resources would be enormous, even if the entity was found not to be liable. To avoid that cost, government entities might instead choose to cease performing functions that present a great risk of liability; this would not be in the best interest of the public. Further, the potentially endless number and unforeseeable nature of bases for liability make it difficult to insure or plan for losses.
- Preventing taxpayers, equally innocent victims of the tort, from bearing the costs of an injury. The purpose of tort law is to allocate losses, generally by shifting the loss from the innocent victim to the wrongdoer. Requiring a governmental entity to pay damages for the wrongful action of an individual employee would only shift the loss from one innocent victim (the injured person) to another (the taxpayers).
- Separation of powers. In the absence of a statute setting forth the extent of a governmental entity's duty to persons it affects and establishing liability for breach of that duty, a court hearing a tort suit decides what duty is owed. This ability of the court to define duty and impose liability for breach of that duty gives the judicial branch inordinate power over the executive branch.

³For a history and critique of the adoption of sovereign immunity in the United States, see Bale v. Ryder, 286 A.2d 344 (Me. 1972).

- Avoiding the chilling effect on governmental employees. A governmental employee concerned that her action will create liability for herself or for the agency that employs her, may be overly cautious in taking an action that may harm an individual. That caution may keep her from adequately protecting the public. That caution may also discourage people from choosing to serve in positions of public employment.
- Preventing individuals from improperly influencing the conduct of government through unreasonable threats of litigation.

Even before enactment of tort claims acts partially waiving governmental immunity, there were some situations in which governmental entities were liable for tortious actions. Municipalities, for example, were liable for injuries caused by ministerial, "proprietary," and unauthorized activities,⁴ and governmental entities were made liable by statutes in limited situations.⁵ Governmental employees were subject to suit in their individual capacities, although they were entitled to absolute immunity for discretionary, judicial or legislative actions and qualified immunity for other actions performed in "good faith." Finally, as in current practice, a person could ask a legislator to sponsor special legislation authorizing suit against the State or its subdivisions. Resolves at that time were heard in the Judiciary Committee.

Beginning in the 1950's nationally, and in 1961 in Maine, courts questioned the wisdom of continuing sovereign immunity as a judicial doctrine, and urged Legislatures to enact laws setting forth the scope of sovereign immunity.⁶ In 1976, the Maine Supreme Judicial Court abolished governmental immunity, saying that "sovereign immunity as a judicial doctrine, could no longer be logically defended." Davies v. City of Bath, 364 A.2d 1269, 1273 (Me. 1976). Without legislative action to establish immunity by law, governmental entities and their employees would be liable to pay compensation for their tortious injuries beginning February 1, 1977.

⁴ Proprietary activities are those in which a municipality performs functions more commonly provided by private enterprises, such as operating a ski resort. These are distinguished from "governmental" activities. See Martin, Common Law Sovereign Immunity and the Maine Tort Claims Act: A Rose by Another Name, 35 Me. L. Rev. 265 (1983), for a discussion of municipal liability at common law)

⁵ For example, 14 MRSA §157, repealed in 1977, required the state to pay damages from its use, ownership, or operation of motor vehicles, to the extent it was insured; 23 MRSA §3655, current law, made counties and towns liable for defects in the road of which county or town had notice; 30-A MRSA §3403, current law, permits recovery from a town for damages from failure to maintain sewers].

⁶ See Nelson v. Maine Turnpike Authority, 157 Me. 174, 170 A.2d 687 (1961), Blier v. Inhabitants of Fort Kent, 273 A.2d 732 (Me. 1971), and Bale v. Ryder, 286 A.2d 344 (Me. 1972) for critiques of sovereign immunity in Maine]

The Legislature was required to act quickly to put into effect a statute that would govern liability of governmental units in Maine. Several interested parties, including representatives of the Legislature's Judiciary Committee, the Office of the Attorney General and the Maine Municipal Association met to discuss alternatives. They considered two basic models of tort claims acts: open-ended and closed-ended laws.

The open-ended approach, used by the federal law and now the majority of states, provides that governmental entities are liable for torts to the same extent as private parties, with immunity for some specific activities, such as the performance of judicial, legislative and prosecutorial functions.⁷ Closed-ended laws provide that the State is immune from suit, with limited specific exceptions providing for liability.⁸

⁷ The following states have open-ended tort claims laws: Alaska, Alaska Stat. §9.50.250 (1983 & Supp. 1991); Arizona, Ariz. Rev. Stat. Ann. §12-820 et. seq. (1992); California, Cal. Gov't Code §810 et seq. (West 1980 & Supp. 1992); Delaware, Del. Code Ann. tit. 10 §4001 et. seq. (Supp. 1990); Florida, Fla. Stat. Ann. §768.28 (West 1986 & Supp. 1992); Hawaii, Hawaii Rev. Stat. §662-1 et seq. (1985 & Supp. 1991); Idaho, Idaho Code d6-901 et. seq. (1990); Illinois, Ill. Ann. Stat. ch. 37, §439.1 et. seq. (1990); Indiana, Ind. Code Ann. §34-4-16.5-1 et seq (Burns 1986 & Supp. 1992); Iowa, Iowa Code ch. 25A (1991); Kansas, Kan. Stat. Ann. §75-6101 et seq (1989); Louisiana, La. Civ. Code Ann. Art. 2315; La. Rev. Stat. Ann. 9:2798.1, 2800, 13:5108, 5109, 24:152, 42:1441; Massachusetts, Mass. Gen. Law Ann. ch. 258 (West 1988 & Supp. 1992); Minnesota, Minn. Stat. Ann. §3.732 et seq (West 1990 & Supp. 1991); Mississippi, Miss. Code Ann. §11-46-1 et seq (1991); Montana, Mont. Code Ann. §2-9-101 et seq (1991); Nevada, Nev. Rev. Stat. §41.031 et seq (1991); New Jersey, N.J. Stat. Ann. §59:1-1 et seq (West 1992); New York, NY Judic Law (Court of Claims Act)(McKinney 1990); North Carolina, N.C. Gen. Stat. §143-291 et seq (1990 & Supp. 1991); Ohio, Ohio Rev. Code Ann. §2743.01 et seq (Baldwin 1990); Oklahoma, Okla. Stat. tit. 51 §151 (1991); Oregon, Or. Rev. Stat. §30.260 et. seq (1989); Rhode Island, R.I. Gen. Laws §9-31-1 et seq (1985 & Supp. 1991); South Carolina, S.C. Code Ann. §15-78-10 et seq (Law Co-op & Supp. 1991); Texas, Texas Civil Practice & Remedies Code ch. 101 (1986 & Supp. 1992); Utah, Utah Code Ann. §63-30-1 et seq (1989 & Supp. 1992); Vermont, Vt. Stat. Ann. tit. 12 §5601 et seq (Supp. 1992); Virginia, Va. Code 8.01 - 195.1 et seq (1992); Washington, Wash. Rev. Code §4.92.100 et seq (1989 & Supp. 1990-1991)]

⁸ The closed-ended approach is used by Colorado, Colo. Rev. Stat §24-10-101 et seq (1988 & Supp. 1992); Michigan, Mich. Comp. Laws Ann. 691.1401 et seq (West 1987 & Supp. 1992); Missouri, Mo. Rev. Stat. §537.600 et seq (1986 & Supp. 1991); New Mexico, N.M. Stat. Ann. §41-4-1 et seq (1989 & Supp. 1992); Pennsylvania, 42 Pa. Cons. Stat. Ann. §8521 et. seq. (1982 & Supp. 1992); and Wyoming, Wyo. Stat. 1-39-101 et. seq (1988 & Supp. 1992)]

When the 108th Legislative Session convened in early 1977, a proposed Maine Tort Claims Act was introduced and referred to the Joint Standing Committee on Judiciary in the form of Legislative Document 87, An Act to Establish the Maine Tort Claims Act. LD 87 proposed a closed-ended law, making the state and its political subdivisions immune from liability, except in four areas of activities.⁹ LD 87 included a provision allowing a person to apply to the Legislature for exemption from the dollar limit on damages recoverable in a suit permitted under the Act. LD 87 did not, however, permit application to the Legislature for a waiver of immunity when a person is injured by government activity protected by sovereign immunity under the Act.

Judiciary Committee members debated whether adopting the open-ended approach to governmental tort liability would be more equitable, but in the end approved a new draft of the bill which included a modified version of closed-ended liability.¹⁰ A report prepared by Judiciary Committee staff cited the following as the committee's rationale for adopting this approach:

"The exceptions [to immunity] most often specified [in closed-ended tort claims acts] 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-end 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 this reduces the chances of surprise lawsuits and judgments in unanticipated areas. 'Sovereign Immunity and 'An Act to Establish the Maine Tort Claims Act,' Report of the Judiciary Committee." January 27, 1977 (available at the Maine State Law and Legislative Reference Library)¹¹

⁹ The four areas of liability proposed were operation or maintenance of motor vehicles or other equipment, machinery or other furnishings; operation or maintenance of certain utilities; operation or maintenance of public buildings; and creation of a dangerous condition or defect in a public building, bridge, highway or other public improvement.

¹⁰ The new draft, LD 162, An Act to Establish the Maine Tort Claims Act, included liability for all but the last proposed grounds set forth in LD 87. There was no liability in LD 162 for creation of a dangerous defect in a public building, highway or other public improvement. A bill enacted later that session, LD 1874, further amended the grounds of liability to read essentially as they do today. For a compilation of legislation amending the Maine Tort Claims Act, see Legislative History of the Maine Tort Claims Act, compiled by the Maine State Law and Legislative Reference Library

¹¹ Senator Collins, Senate Chair of the Judiciary Committee, stated in the Senate debate on January 27, 1977, that the committee had not had a chance to review and adopt the report, and cautioned that it should not be used to interpret the bill. He did not specify in what respect the report may not reflect legislative intent.]

The activities for which the state waived liability in LD 162 were those activities for which insurance coverage was readily available.

"The areas that we intended to open were areas where it appeared likely that an insurance program could be arranged within the reach of the pocketbooks of Maine communities and the State, if the State would wish to have that kind of protection. In some areas, the State prefers to be a self-insurer. But for the small towns, it is vitally important that there be insurance in areas where the town is exposed to liability." 2 Leg. Rec. 1644 (1977) (statement of Senator Collins)

LD 162 included the provision permitting a person to apply to the Legislature for waiver of sovereign immunity. None of the participants interviewed for this report recall extensive discussions of the provision permitting individual waivers of immunity.¹² One participant in the committee process characterized the addition of the special waiver process as a compromise to satisfy the concerns of persons who wanted the committee to adopt the open-ended approach to tort liability.¹³ Richard Spencer, House Chair of the Judiciary Committee during its consideration of the Tort Claims Act, said he believed that it would be more difficult for proponents of a Resolve to convince the Legislature to waive immunity after passage of the Act than before passage because the Legislature had balanced the competing interests of injured persons and governmental entities and concluded that in most cases, the governmental entity should be immune. On the other hand, he says, it is important to maintain this process as an "escape valve" to permit the Legislature to offer a chance for relief in particularly compelling cases.

Neither the report accompanying debate of the bill nor subsequent reports on the Tort Claims Act¹⁴ add to an understanding of legislative intent with respect to these Resolves.

¹² The following persons were interviewed: Samuel W. Collins, Jr., Senate Chair of the Judiciary Committee in the 108th Legislature; Richard A. Spencer, House Chair of the Judiciary Committee of the 108th Legislature; Jonathan Hull, staff attorney for the Judiciary Committee at that time.

¹³ Staff attorney Jonathan Hull recalls this to be the source of that provision.

¹⁴ Study of the Maine Tort Claims Act, Report of the Joint Standing Committee on Judiciary, December 1, 1977 (First Draft) (available in the Maine State Law and Legislative Reference Library); The Maine Tort Claims Act, Report of a Study by the Joint Standing Committee on Judiciary to the 111th Maine Legislature, January 1985 (available in the Maine State Law and Legislative Reference Library)

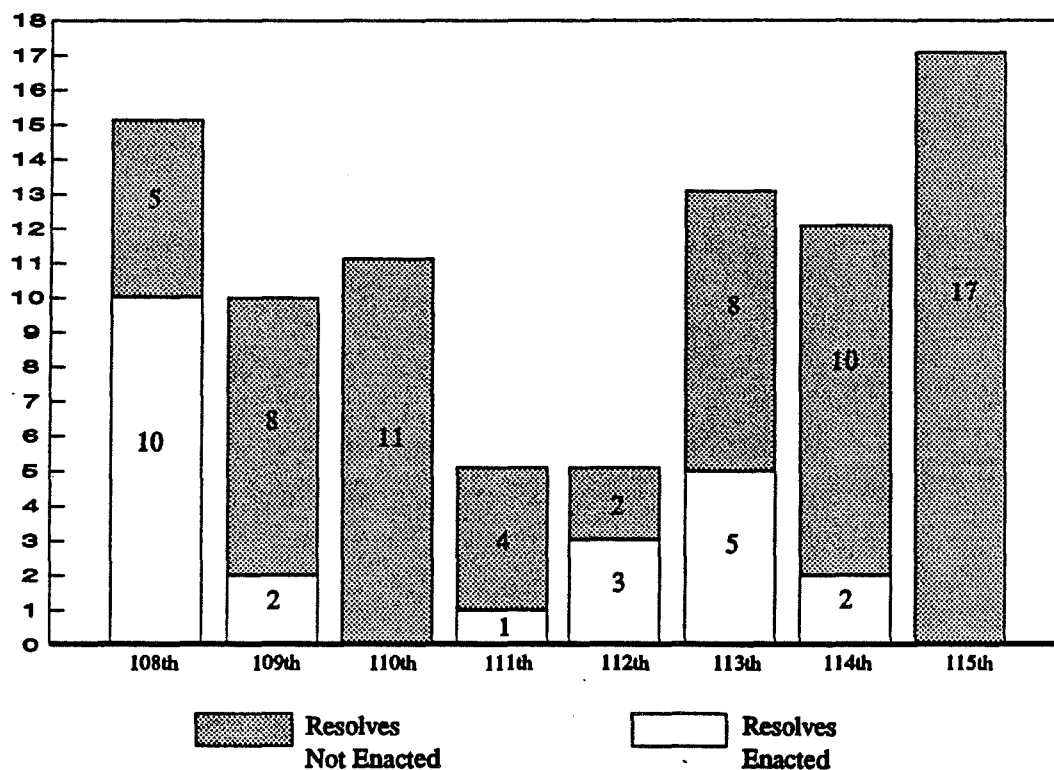
III. Maine Experience with Resolves Waiving Governmental Immunity

In the 15 years since passage of the Maine Tort Claims Act, the Maine Legislature has considered 88 Resolves seeking compensation or authorization to sue the State or its subdivisions for injuries allegedly caused by tortious actions of state or local agencies or their employees. Appendix F contains summaries of the 88 Resolves.

A. Number of Resolves Proposed, Enacted.

The number of Resolves introduced in the Maine Legislature fluctuates from year to year. The 115th Legislature considered more bills than any previous Legislature.

Figure 1. Number of Resolves Proposed, Enacted, by Legislative Session



Twenty-three of the 88 Resolves have been enacted by the Legislature, over half of them (12) in the first 3 years after passage of the Act. Of the 23 Resolves that became law, 13 authorized suit against the State (2 also authorized suit against a county), 9 provided direct compensation to the injured person, and one increased the dollar limit for a suit previously authorized. Eight people brought Resolves to the Legislature more than once, one of the 8 brought Resolves before the Legislature 3 times. One other person brought Resolves in successive sessions, one to sue the State, the other to sue a town for the same incident. Table 1 lists enacted Resolves.

Table 1

**Enacted Resolves Authorizing Suit Against a Governmental Entity
or Compensation for Losses**

<u>Year--Chapter #</u> <u>Name</u>	<u>Auth to sue/Award</u>	<u>Type of loss</u> <u>Injury</u>
Harm to a Person in State Custody		
* 77 - Res. C. 13 Ronald G. Valente, by his legal reps.	Auth. to sue	Death Suicide at BMHI
* 78 - Res. C. 87 Beverly Mortimer, Dennis Perkins	Auth. to sue	Injury Injury to child in in foster care
* 79 - Res. C. 10 Barry A. Brann	Auth. to sue	Injury Prisoner fell through window
* 80 - Res. C. 43 Edwin Grant Bracy	Auth. to sue	Injury Lost finger at Gov. Baxter School
* 86 - Res. C. 87 Edgar Warren	Award (\$10,000)	Injury Lost hand while ward of the state
Harm to a Third Person by a Person Released from, escaped from, or held in, State Custody		
+ 78 - Res. C. 59 Phillip G. Rotolo	Award (\$110)	Prop. Damage Rotolo lost property while employee of Maine Youth Center
+ 78 - Res. C. 89 Henry E. Ripley	Award (\$850)	Prop. Damage Theft of Ripley's tools at AMHI
85 - Res. C. 50 Clayton, Maryann, Jeremy and Elizabeth Huff	Auth. to sue	Injury Furloughed inmate attacked Huff
86 - Res. C. 84 John P. Taylor, as pers. rep. of Sharon Taylor	Award (\$200,000)	Death Death by AMHI resident on unsupervised leave

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<u>Year--Chapter #</u> <u>Name</u>	<u>Auth to sue/Award</u>	<u>Type of loss</u> <u>Injury</u>
87 - Res. C. 45 Sharon Trafton Duthie	Award (\$786.58)	Prop. Damage Car stolen by prison escapee and damaged
87 - Res. C. 46 Dorothy Gammon	Auth. to sue (incl. Cumb. Cty)	Injury Inmate permitted to leave prison caused personal injury
89 - Res. C. 57 Oscar, Wendalyn Rae Thompson	Award (\$1,999)	Prop. Damage Foster child in their care destroyed car
Dangerous Road/Bridge		
83 - Res. C. 42 Gerald Pelletier	Auth. to sue	Injury Injury crossing mislabelled bridge
Administrative Error		
* 77 - Res. C. 54 Alban E. Cyr, Sr., Cyr Bros. Meatpacking	Auth. to sue	Econ. loss Improper information given; food processing plant closed
Miscellaneous Personal Injury		
* 77 - Res. C. 14 Charles S. Estes	Auth. to sue	Injury/prop. dam. Dept. of Inland Fisheries & Wildlife; no other details given
* 77 - Res. C. 5 Vandelia T. Rowe	Auth. to sue	Injury Fall at Motor Vehicle Registration Office
* 77 - Res. C. 6 Romeo, Genevieve St. Armand	Incr. limit, prev. auth'd suit	Injury Fall at Augusta airport
* 77 - Res. C. 7 Robert J. Gilbert	Auth. to sue	Injury Tile fell from wall at Maine Maritime Academy
87 - Res. C. 48 Jacqueline Caron, pers. rep. of Alphee Caron	Award (\$75,000,	Death Boulder from truck killed Mr. Caron

<u>Year--Chapter #</u> <u>Name</u>	<u>Auth to sue/Award</u>	<u>Type of loss</u> <u>Injury</u>
88 - Res. C. 108 Kenneth, Janice Demuth	Award (\$125,000)	Injury Helping state subdue dangerous person
Miscellaneous Economic Harm		
78 - Res. C. 88 6 persons	Award (\$4,132.84)	Prop. Damage Cars damaged by building collapse
87 - Res. C. 70 Reginald, Alice Huard	Auth. to sue	Economic loss Investigation of child abuse allegations
89 - Res. C. 56 Lorraine Gray	Auth. to sue	Economic loss Investigation of child abuse allegations

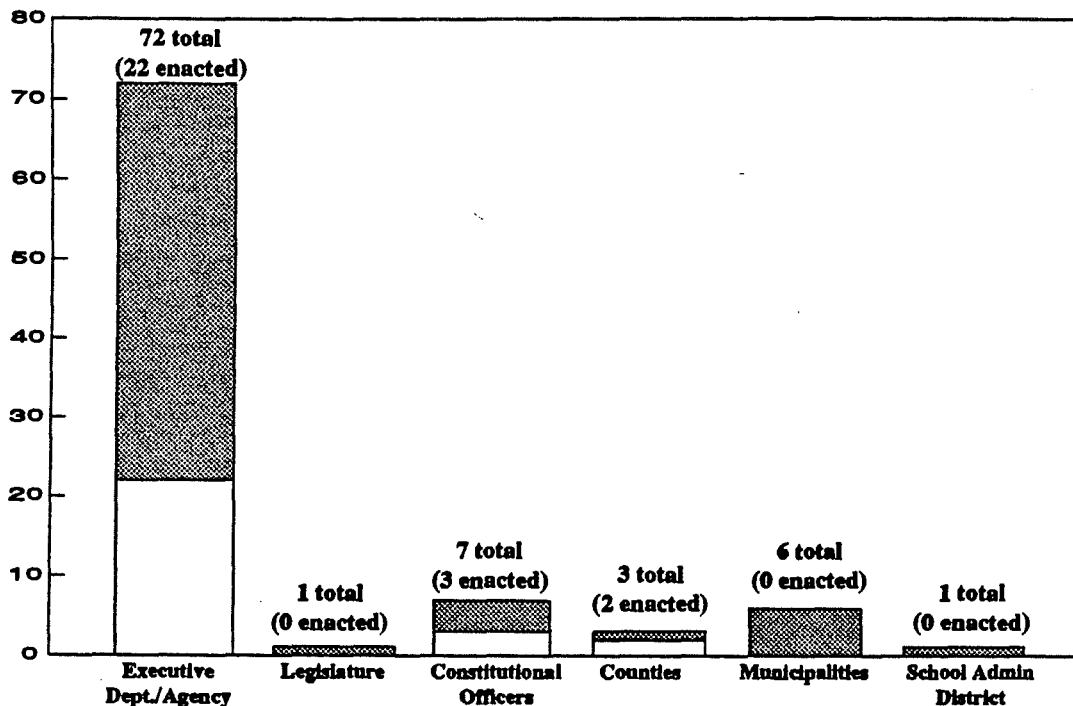
* Resolves relating to losses suffered before the effective date of the Maine Tort Claims Act. The Act would probably have permitted suit in the following cases: Res. 1977, c. 5, 6, and 7; Res. 1979, c. 10; and Res. 1980, c. 43.

+ Resolves appealing decision of State Claims Board

B. Identity of Alleged Wrongdoer

The vast majority of the Resolves sought recovery from, or authorization to sue, executive-branch state agencies. Municipalities, counties, and non-executive branch agencies were the subject of only a few of the Resolves.

Figure 2. Number of Resolves Proposed and Enacted by Identity of Alleged Wrongdoer



* The total number of Resolves proposed and enacted exceeds 88 and 23, respectively, because some of the Resolves sought or authorized litigation against more than one governmental entity.

Table 2 shows the Resolves that have been introduced, grouped by the department or governmental unit that is alleged to have caused the injury. A great many of the Resolves (29) sought relief for injuries to, or injuries caused by, persons for whom the state has or had custodial responsibility. Those Resolves sought to sue the Departments of Corrections, Mental Health and Mental Retardation and Human Services. Another large group of Resolves (12) sought recovery for injuries caused by allegedly defective road and highway design by the Department of Transportation.

Table 2**Resolves Seeking Waiver of Governmental Immunity**

Listed by Governmental Entity Accused of Committing Tort

Name of Person Suffering Loss	Final Action on Resolve	Type of Loss	Alleged Cause of Loss
I. Executive Departments			
<u>Department of Agriculture, Food and Rural Resources</u>			
Kierstead (1991)	ONTP	Economic loss	Loss due to negligent potato inspection
Bubar/Helstrom (1992)	ONTP	Economic loss	Loss due to negligent potato inspection
<u>Department of Audit</u>			
City of South Portland (1982)	Died Between Houses	Economic loss	Loss due to failure to detect misappropriation of funds during audit
<u>Department of Conservation</u>			
Penney (1992)	ONTP	Personal injury	Fall at Fort Knox Historic Site
<u>Department of Corrections</u>			
Rotolo (1978)	Resolves 1977, ch. 59 (compensation)	Property damage	Damage to employee's clothing
Lockhart (1979)	ONTP	Property damage	Damage to car by juveniles on entrustment from Youth Center
Brann (1979)	Resolves 1979, ch. 10 (suit authorized)	Personal injury	Inmate fell through window at prison
Coffren (1980;1983)	1980:LVWD; 1983:ONTP/OTP- ONTP Accepted	Property damage	Damage to trucks by inmates
Huff (1985)	Resolves 1985, ch. 50 (suit authorized)	Personal injury	Furloughed inmate attacked Huff
Gammon (1987)	Resolves 1987, ch. 46 (suit authorized)	Personal injury	Inmate allowed to leave prison; attacked Gammon
Duthie (1987)	Resolves 1987, ch. 45 (compensation)	Property damage	Car damaged by escapee of Correction Center

Resolves Seeking Waiver of Governmental Immunity

Listed by Governmental Entity Accused of Committing Tort

Name of Person Suffering Loss	Final Action on Resolve	Type of Loss	Alleged Cause of Loss
Tufts (1989)	LVWD	Personal injury	Released criminal suspect assaulted Tufts
Pineo (1990)	ONTP	Personal injury	Injury due to prison's failure to render medical care
Maynard/Briggs (1991)	ONTP	Death	Death of person who escaped from custody of Maine Youth Center

Department of Education

Various persons (1978)	Resolves 1977, ch. 88 (compensation)	Property damage	Cars damaged due to building collapse
Bracy (1979)	Resolves 1979, ch. 43 (suit authorized)	Personal injury	Finger injury from machine operation

Department of Environmental Protection

Cyr Bros. (1977)	Resolves 1977, ch. 54 (suit authorized)	Economic loss	Misinformation about regulatory requirements
Town of Brooks (1979)	LVWD	Economic loss	Gas spill clean-up expenses (3rd party)
Haines (1990)	LVWD	Economic loss	Oil discharge damages (3rd party)
Alna Store, Inc. (1990)	LVWD	Economic loss	Misinformation about regulatory requirements

Department of Finance

Potvin (1981)	ONTP/OTP ONTP Accepted	Economic loss	Loss of fair chance to win lottery due to improper drawing
Wolley (1990;1991)	1990:ONTP 1991:ONTP	Economic loss; Personal injury	Loss due to criminal prosecution for misappropriation of lottery funds

Department of Human Services

Mortimer/Perkins (1978)	Resolves 1977, ch. 87 (suit authorized)	Personal injury	Injury to child placed in foster care
Redding, Personal Care Boarding Home Ass'n. (1979)	Died Between Houses	Economic loss	Loss due to improper nursing home reimbursement ratesetting

Resolves Seeking Waiver of Governmental Immunity

Listed by Governmental Entity Accused of Committing Tort

Name of Person Suffering Loss	Final Action on Resolve	Type of Loss	Alleged Cause of Loss
Huber (1981)	ONTP	Personal injury	Father absconded with child in state custody due to Department's failure to supervise visitation
Bellmore (1984)	LVWD	Property damage	Damage to car by ward of state
Huard (1987)	Resolves 1987, ch. 70 (suit authorized)	Economic loss; Personal injury	Loss due to child abuse investigation
Gray, Lorraine (1989)	Resolves 1989, ch. 56 (suit authorized)	Economic loss; Personal injury	Loss due to child abuse investigation; removal of child from home
Thompson (1989)	Resolves 1989, ch. 57 (compensation)	Property damage	Foster child damaged car
Gray, Robert (1990;1991)	1990:LVWD 1991:ONTP	Personal injury?	Loss due to investigation for child abuse
Slotaky (1991)	ONTP	Property damage	Damage to car by ward of state
LaTourneau (1991)	ONTP	Death	Death due to injury inflicted by foster mother
Rudge (1992)	ONTP	Death	Child abducted and killed due to negligent supervision of visitation

Department of Inland Fisheries & Wildlife

Estes (1977)	Resolves 1977, ch. 14 (suit authorized)	Personal injury; property damage	?
Sweck (1991)	ONTP	Economic loss	Deer damaged blueberry fields

Maine Maritime Academy

Gilbert (1977)	Resolves 1977, ch. 7 (suit authorized)	Personal injury	Injured when tile fell from wall
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Department of Marine Resources

Walker (1982)	ONTP	Economic loss	Loss due to failure to comply with Administrative Procedures Act in granting of aquaculture lease
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Resolves Seeking Waiver of Governmental Immunity

Listed by Governmental Entity Accused of Committing Tort

Name of Person Suffering Loss	Final Action on Resolve	Type of Loss	Alleged Cause of Loss
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Department of Mental Health & Mental Retardation

Valente (1977)	Resolves 1977, ch. 13 (suit authorized)	Death (suicide)	Suicide of AMHI patient
Berg (1977)	LVWD	Economic loss	Recovery of funds required to defend state employee
Ripley (1978)	Resolves 1977, ch. 89 (compensation)	Property damage	Damage by person in custody
Levesque (1981)	ONTP	Death (suicide)	Suicide at Bangor Mental Health Institute
Taylor (1986)	Resolves 1985, ch. 84 (compensation)	Death	AMHI patient on unsupervised leave killed Sharon Taylor
Clavette (1987)	LVWD	Death	Patient left Pineland Center and was later found dead
Batzell (1988)	ONTP	Personal injury; economic loss	AMHI patient was injured in high-speed chase with police
Weigleb (1991)	ONTP (Parties reached settlement)	Death (suicide)	Suicide of AMHI patient

Department of Professional & Financial Regulation

Kane (1987)	LVWD	Economic loss	Failure to assist by regulators
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Department of Public Safety (Maine State Police)

Powers (1977;1979; 1981)	1977:ONTP 1979:ONTP 1981:ONTP/OTP ONTP Accepted	?	Illegal search
Clark (1983)	ONTP	Personal injury	Injury to passenger in car involved in high-speed chase
Demuth (1988)	Resolves 1987, ch. 108 (compensation)	Personal injury	Injury while rendering assistance to law enforcement
Batzell (1988)	ONTP	Personal injury; economic loss	AMHI patient injured in high-speed chase with police

Resolves Seeking Waiver of Governmental Immunity

Listed by Governmental Entity Accused of Committing Tort

Name of Person Suffering Loss	Final Action on Resolve	Type of Loss	Alleged Cause of Loss
Harvath (1989)	ONTP	?	Loss due to fraudulently obtained search warrant
Gray (Tyron) (1990)	ONTP	Economic loss	Failure to protect drug agent and informer
Department of Public Safety (other)			
Condon (1982)	ONTP/OTP-A ONTP Accepted	Personal injury; property damage	Injury due to assistance to law enforcement
Boone (1991)	1991:ONTP	Economic loss	Loss due to investigation by Criminal Justice Academy
Retirement, Maine State Retirement System			
Dishon 1988)	ONTP	Economic loss	Improper information
Department of Transportation (roads & bridges)			
Turner/Fitzmaurice (1977)	ONTP	Death; personal injury	Car accident due to negligent road design
LaRochelle (1977)	ONTP	Death	Car accident due to negligent road design and maintenance
Benner (1978)	ONTP	Death	Car accident due to negligent road maintenance
Gray (Lyman et.al.) (1979)	LVWD	Economic loss	Property loss due to road construction
Town of Strong (1979)	LVWD	Economic loss	Property loss due to bridge construction
Pelletier (1981;1983)	1981:Died Between Houses 1983: Resolves 1983, ch. 42 (suit authorized)	Personal injury	Accident due to mislabelling of bridge clearance
Hodgdon/Brown (1981;1985)	1981:Died Between Houses 1985:ONTP/OTP; ONTP Accepted	Death	Car accident due to negligent road design
Ross (1981)	LVWD	Personal injury	Car accident due to negligent road design

Resolves Seeking Waiver of Governmental Immunity

Listed by Governmental Entity Accused of Committing Tort

Name of Person Suffering Loss	Final Action on Resolve	Type of Loss	Alleged Cause of Loss
Doiron (1987)	LVWD	Personal injury	Car accident due to improper placement of stop sign
Kelly (1988)	ONTP	Death; Personal injury	Car accident due to negligent road design & maintenance
Tweedie (1988)	ONTP	Personal injury	Car accident due to negligent road design (utility pole placement)
Hayes/Shorie (1988/p.66)	ONTP	Personal injury	Car accident due to negligent road design

Department of Transportation (Misc.)

St. Armand (1977)	Resolves 1977, ch. 6 (increased limit for suit previously authorized)	Personal injury	Fall at Augusta Airport
Caron (1987)	Resolves 1987, ch. 48 (compensation)	Death	Rock fell onto car from improperly loaded truck
Dreher (1989)	LVWD	Personal injury	Dreher struck disabled and negligently parked snowplow

Miscellaneous Departments (unclear)

McDaniel (1983;1985)	Carried over 1985: LVWD (general law enacted)	?	Damages due to wrongful imprisonment
Warren (1986)	Resolves 1985, ch. 87 (compensation)	Personal injury	Injury due to improper job training while a ward of the state

II. Legislature

Curtis (1979)	Died Between Houses	Economic loss	Loss due to oversight in workers' compensation law
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III. Constitutional Officers

Attorney General (?)

Huard (1987)	Resolves 1987, ch. 70 (suit authorized)	Economic loss; personal injury	Loss due to child abuse investigation
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Resolves Seeking Waiver of Governmental Immunity

Listed by Governmental Entity Accused of Committing Tort

Name of Person Suffering Loss	Final Action on Resolve	Type of Loss	Alleged Cause of Loss
Gray (Lorraine) (1989)	Resolves 1989, ch. 56 (suit authorized)	Economic loss; personal injury	Loss due to child abuse investigation
Gray (Robert) (1990; 1991)	1990:LVWD 1991:ONTP	Personal injury?	Loss due to child abuse investigation
Wright (1990)	LVWD	Economic loss; personal injury	Loss due to criminal investigation and prosecution for unlawful sexual contact

Secretary of State

Rowe (1977)	Resolves 1977, ch. 5 (suit authorized)	Personal injury	Fall at motor vehicle registration office
McCaffrey (1981)	LVWD	Economic loss	Improper information to independent political candidate
Tamecki (1991)	ONTP	Economic loss	Clerical error in motor vehicle title records

IV. Local Governments

Counties

Huff (1985)	Resolves 1985, ch. 50 (suit authorized)	Personal injury	Furloughed inmate attacked Huff (Cumberland County)
Gammon (1987)	Resolves 1987, ch. 46 (suit authorized)	Personal injury	Inmate allowed to leave prison; attacked Gammon (Cumberland County)
Tufts (1989)	LVWD	Personal injury	Released criminal suspect attacked Tufts (York County)

Cities & Towns

Tweedie (1988)	ONTP	Personal injury	Car accident due to negligent road design (utility pole placement) (Town of Durham)
Tufts (1989)	LVWD	Personal injury	Released criminal suspect attacked Tufts (Town of Kennebunk)

Resolves Seeking Waiver of Governmental Immunity

Listed by Governmental Entity Accused of Committing Tort

Name of Person Suffering Loss	Final Action on Resolve	Type of Loss	Alleged Cause of Loss
Leighton/Nilsen (1991)	Indef. PP	Personal injury	Fall at school while under construction (Town of Casco)
Bruno (1991)	ONTP	Personal injury	Injury in collision with police car (City of Lewiston)
Desgrosseilliers (1991)	ONTP	Economic loss	Improper zoning information (City of Auburn)
Boone (1992)	LVWD	Economic loss	Loss of employment on police force due to cheating allegations (Town of Princeton)

School Administrative District

Leighton/Nilsen (1991)	Indef. PP	Personal injury	Fall at school during construction (SAD #61)
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C. Outcome of Authorized Lawsuits

The 13 suits authorized against the State or its subdivisions were resolved in a variety of ways. The State and injured parties settled 6 of the suits (Pelletier, Bracy, Mortimer, Valente, Gilbert and Huard). The State won 2 cases at trial (Gray and Huff), although the Gray case is on appeal to the Supreme Judicial Court. The plaintiff won a jury verdict of \$50,000 against the State in one case (Brann). Cumberland County settled one case, permitting the State to be dismissed from that suit (Gammon). Court files on the other 3 cases could not be located.

The Resolves resulted in litigation that lasted anywhere from 1 to 7 years in Superior Court.

In 4 of the suits, Constitutional challenges were raised to the Resolve under the Equal Protection and Special Legislation Clauses of the Maine Constitution (Gammon, Bracy, Brann, Mortimer). In one of those cases (Brann), the challenge reached the Maine Supreme Court, which upheld the Constitutionality of the Resolve. In 3 other cases, the issue was not ruled upon by the court because the actions were settled and dismissed.

D. Time Spent Considering Resolves

Of the bills considered in the 115th Legislature, the great majority were considered and resolved after a public hearing and one work session. The public hearings on these bills, however, were sometimes lengthy.

Figure 3. Time Spent Considering Resolves

<u># of Work Sessions</u>	<u># of Resolves</u>
1	12
2	4
3	1
4	1

E. Partisanship in the Decision-making Process

One commentator has characterized legislative settlement of tort claims against a State as "notoriously and often crudely partisan."¹⁵ It is difficult to test whether this criticism is valid in Maine's experience. Each Resolve is unique, so it is not possible to determine whether bills of equal merit were treated disparately based on the sponsorship of the Resolve. The numbers alone, however, do not indicate that the party affiliation of the Resolve's sponsor has a major effect on enactment of the Resolve.

¹⁵ Note, Tort Liability of the State: A proposal for Maine, 16 Me. L. Rev. 209 (1964), quoting from Pound, Justice According to Law 69 (1951)1

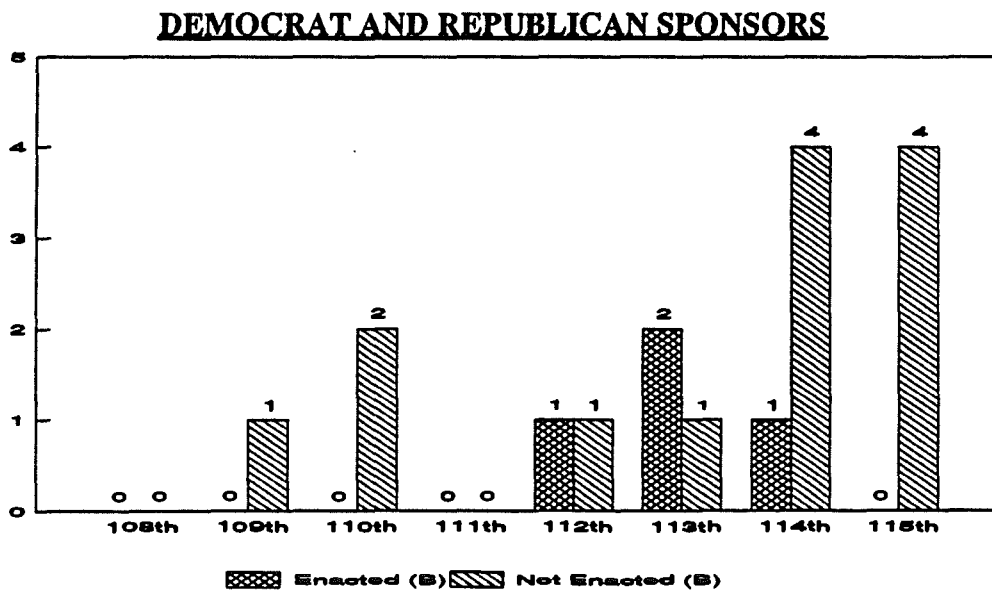
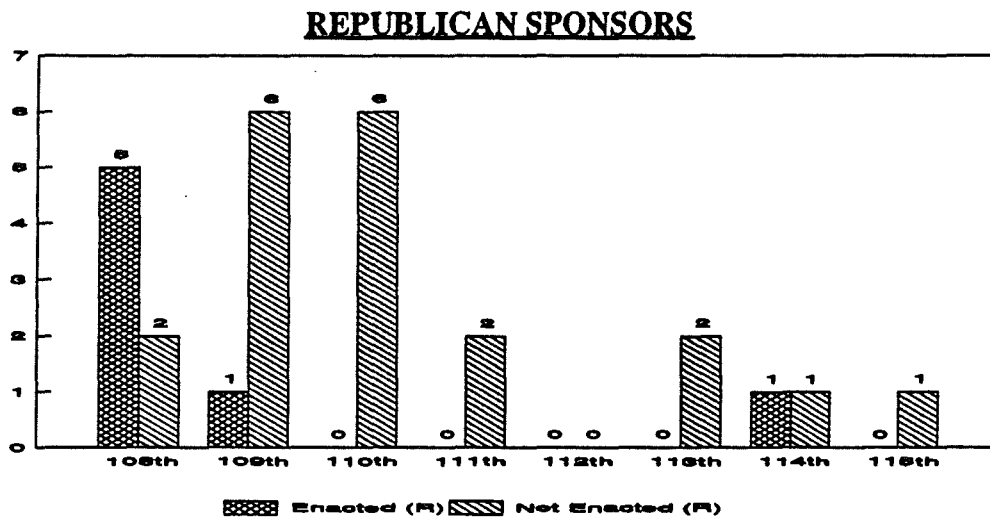
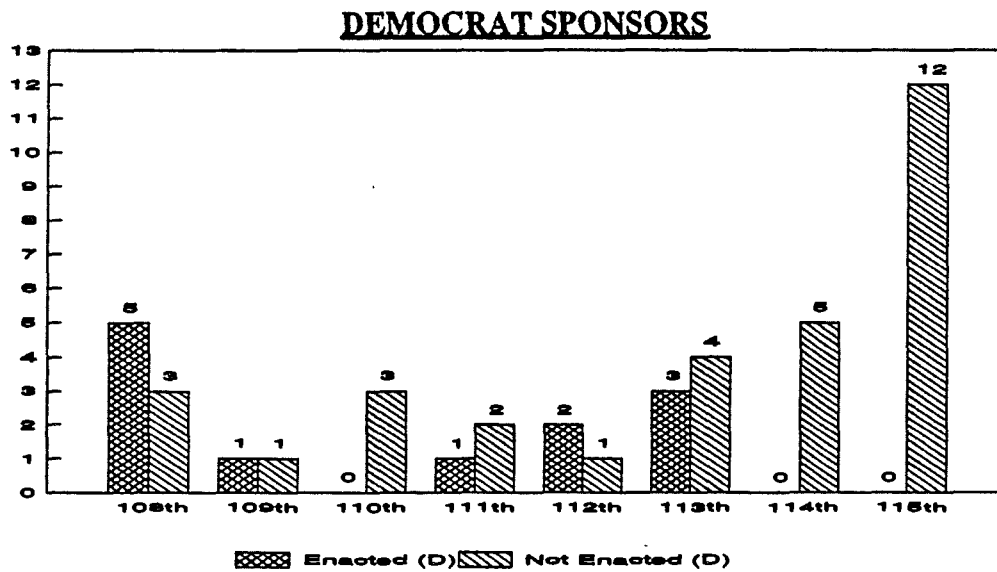
The percentage of successful Resolve attempts varies from year to year, and, because the numbers are so small, varies widely. Over the 15 years since enactment of the Tort Claims Act, however, a slightly higher percentage of Democratic-sponsored bills (27.9%) were enacted as compared to bills sponsored by Republicans (25%) or by members of both parties (23.5%).

There has been a decline in the number of Resolves sponsored by Republicans alone since the end of the 110th Legislature, and an increase since then in the number of Resolves with bipartisan or Democratic sponsorship.

**Figure 4. Percent of Resolves Introduced and Enacted,
by Party of Sponsor
1977 - 1992**

<u>Sponsor(s)</u>	<u>Resolves Enacted</u>	<u>Resolves Introduced</u>	<u>Percent Enacted</u>
Democrat(s)	12	43	27.9%
Republicans	7	28	25.0%
Both Parties	<u>4</u>	<u>17</u>	<u>23.5%</u>
TOTAL	23	88	26.1%

**Figure 5. Resolves Introduced and Enacted
by Legislative Session and by Party of Sponsor**



IV. Standards for Decision-making

The Maine Tort Claims Act gives the Legislature absolute discretion in deciding when to waive governmental immunity; the Act contains no standards to guide or limit decisions on Resolves. The state Constitution, however, provides some limits which must be considered in making a decision. This section reviews the Constitutional limits.

Past practice of the Legal Affairs Committee suggests one other standard that has guided committee process. The committee generally asks whether there is any other avenue for the person to seek relief under state or federal law, as an alternative to seeking waiver of the Tort Claims Act and other general laws. This section also discusses various alternatives for the committee to consider.

Finally, this section discusses the use of traditional tort law principles as guidance for the committee in considering these Resolves, to provide a framework for committee discussion and to clarify legislative intent.

A. Constitutional Standards

Because waiver Resolves exempt one or more persons from a general law applicable to all other persons, they present a risk of violating two provisions of the Maine Constitution: the Special Legislation Clause and the Equal Protection Clause.¹⁶ The Maine Supreme Judicial Court has reviewed the Constitutionality of waiver Resolves in two cases, Nadeau v. State, 395 A.2d 107 (Me. 1978) and Brann v. State, 424 A.2d 699 (Me. 1981). The Court upheld both Resolves, and provided guidance in determining whether Resolves enacted in the future would be upheld against similar challenges.

1. Equal Protection.

The equal protection clause of Maine's Constitution, Art. I, §6-A, provides that

"No person shall be deprived of life, liberty or property without due process of law, *nor be denied the equal protection of the laws...*" (emphasis added)

The guarantee of equal protection does not guarantee that all persons will be treated the same, only that all similarly situated persons will be treated the same. Resolves authorizing an individual to sue the State are subject to criticism under the Equal Protection Clause because they grant to one individual a right to sue the State when others injured by the State are denied that

¹⁶ The U.S. Constitution also includes an Equal Protection Clause, but since analysis under the U.S. and Maine Constitutions is generally the same, the U.S. Constitutional provision will not be discussed in this section.

right. The critical question, however, is first, whether there are persons "similarly situated" to the person who is authorized to sue, and, second, whether those similarly situated persons are denied a right granted to the person in whose favor the Resolve is enacted.

In Nadeau v. State, 395 A.2d 107 (Me. 1978), the Court upheld a Resolve granting authorization to sue the State to a person who had been imprisoned for murder. Nadeau had confessed to the murder and entered a guilty plea at the probable cause hearing, but he was not given the right to consult counsel before making the confession or entering the plea. A U.S. Supreme Court decision issued almost 20 years after Nadeau was imprisoned required that suspects be given the right to counsel at a probable cause hearing. Upon rehearing of Nadeau's case, the Maine Law Court reversed Nadeau's murder conviction. The Legislature then enacted a Resolve permitting Nadeau to sue for damages suffered as a result of 20 years of allegedly wrongful imprisonment. The Maine Law Court reviewing the Resolve found that the "materially unique facts and circumstances" of this case demonstrate that it is unlikely that there are other persons similarly situated to Nadeau. The Resolve, therefore, does not violate the Equal Protection Clause.

The second Resolve challenged as violating the Equal Protection Clause permitted suit by a prisoner injured when he fell through a window in the prison gym. The prisoner was playing basketball with prison staff, who had been warned not to use the gym because protective screens had been removed from the windows for painting. In that case, Brann v. State, 424 A.2d 699 (Me. 1981), the Court stated as the general rule:

The law need not operate uniformly on all individuals, as long as those affected are reasonably different from those excluded and there is a rational basis for treating them differently. Brann, 424 A.2d at 703.

The Court found that Brann's status as a prisoner set him apart from members of the general public who might be injured by the State's negligence, and created a rational basis for treating him differently.

"A prisoner living under state custody and control, who is injured under circumstances alleged to constitute gross negligence or misuse of authority, is in a significantly different position from that of other persons injured by the State's ordinary negligence in areas routinely used by the general public. The state may rationally, because of this difference, decide to assume a greater responsibility for the prisoner's injuries." Brann, 424 A.2d at 703.

In addition to alleging that allowing the lawsuit resulted in treating members of the general public differently from Brann, the State apparently alleged that there were other prisoners injured by the State's negligence who have been denied equal protection by passage of the Resolve. The Court noted that the state had failed to present evidence of the existence of other injured prisoners, and that, even if they had produced such evidence, it would not have found an Equal Protection violation so long as that prisoner had an equal opportunity to present his case before the Legislature.

"The legislature could legitimately prefer to deal with prisoners' claims on a case-by-case basis and to waive sovereign immunity only after considering the specific circumstances of each case. Since the Superior Court was given no indication that any similarly injured prisoner has applied for and been denied the legislative dispensation granted to Barry Brann, it should not have assumed that any violation of equal protection occurred. The impact of such a legislative denial may be determined, if and when it occurs, with specific reference to the rights of any person thereby denied relief." Brann, 424 A.2d at 703.

From these cases it appears that unique material facts justify passage of a Resolve waiving sovereign immunity under the Equal Protection Clause. A material fact would be one that not only distinguishes one case from another, but provides a rational basis for permitting suit in one case when it is denied in other similar cases. To bolster legal support for a Resolve that the Legal Affairs Committee recommends for passage, it would be helpful to include a statement of the material facts supporting passage in the Statement of Fact of any amendment added, or in a statement placed in the Legislative Record during debate on the Resolve.

2. Special Legislation Clause

The Special Legislation Clause of the Maine Constitution, Article IV, pt. 3, §13, provides that:

"The Legislature shall, from time to time, provide, as far as practicable, by general laws, for all matters usually appertaining to special and private legislation."

The Clause was intended to prevent lawmaking based on privilege, favoritism and monopoly and to prevent the attention of legislators from being diverted from issues of public importance to consider matters of only private benefit. The Inaugural Address of Governor Connor to the 55th Legislature, 1876 Me. Acts at 165, quoted in Opinion of the Justices, 80 A.2d 866 (Me. 1951).

The Law Court has interpreted this to mean that "where a general law has been enacted or could have been made applicable, passage of special legislation violates Article IV., pt. 3, §13." Nadeau, 395 A.2d 107, 112 (Me. 1978). Conversely, "where the objects of a law cannot readily be obtained by general law, special legislation may be enacted." Nadeau, 395 A.2d at 113. In a literal sense, it is always possible to draft a general law. But the Law Court makes a distinction between possibility and practicability. A general law is not practicable if the Legislature finds some policy argument against a general law or if the facts of a case are so unusual that a general law could not be crafted to anticipate such a case without being unacceptably general.

The Court under the Special Legislation Clause has struck down Private Resolves that permit an individual to sit for a pharmacy exam when he was not qualified to do so under the generally applicable law, Maine Pharmaceutical Association v. Board of Commissioners, 245 A.2d 231 (Me. 1968), and that authorize a person to sue the State for damages to property from the grading of a highway by, in effect, waiving the six-month statute of limitations existing in the general law governing such suits, Look v. State, 267 A.2d 907 (Me. 1970).

In both cases, a general law existed addressing the precise situation involved.

On the other hand, the Court has upheld Private Resolves authorizing suit against the State for a prisoner who was injured when he fell through a window at the prison, Brann v. State, 424 A.2d 699 (Me. 1981) and a former prisoner who was convicted of murder on the basis of a confession made and a guilt plea entered without the benefit of legal counsel, Nadeau v. State, 395 A.2d 107 (Me. 1978).

In Brann, the Court set forth a standard for reviewing laws under the Special Legislation Clause that defers to the Legislature's judgment:

"It is appropriate for the Legislature, rather than the Court, to make the policy decision regarding what is practicable in a given situation." Brann, 424 A.2d at 704.

In Brann, the Court found that the Legislature could legitimately find that concerns about prison discipline and administrative control of prison populations could lead the Legislature to refuse to pass a general law, and to decide prisoner claims on a case-by-case basis.

Although it is not necessary for a case to present unique facts¹⁷ to pass muster under the Special Legislation Clause, unique facts may lead the Court to find that a general law is impracticable. The uniqueness of the facts in *Nadeau* lead the court to doubt whether general legislation could have been enacted to anticipate the unique facts of the case, other than legislation permitting suit for all claims.

The court has been fairly deferential to Resolves in its decisions under the Special Legislation Clause to date. Those cases, however, preceded enactment of the Maine Tort Claims Act, and therefore have involved Resolves waiving common law governmental immunity. It is not clear what effect passage of the Maine Tort Claims Act will have on future decisions regarding a waiver of the general law. In *Brann*, the Court seems to feel that the passage of the Act eliminates the need for special legislation, apparently ignoring the effect of §8105.¹⁸

The Court has been less deferential with Resolves altering the outcome required by an already existing general law. This might indicate that the Court would strike down a Resolve altering the outcome already provided in the Tort Claims Act, i.e., providing liability where the Act provides immunity. On the other hand, the Act expressly provides for case-by-case decision-making in §8105. This may be an indication of the Legislature's judgment that it is not practicable to provide a blanket rule by general legislation. The Court would probably defer to this judgment, provided some rational reason were given for deciding on a case-by-case basis. For example, the Legislature may argue that blanket liability would chill performance of governmental duties, and threaten the financial viability of the State and its activities.

Waiver of a legal provision other than sovereign immunity itself may be more difficult to justify. In *Look v. State*, 267 A.2d 907 (Me. 1970), the Maine Law Court invalidated a Resolve waiving the statute of limitations for filing a claim for damages from road construction. The policy rationale for case-by-case decision-making on procedural issues may be more difficult to justify than case-by-case decisions on immunity.

¹⁷ "As long as there is no violation of the equal protection clause, validity under the Special Legislation Clause does not depend on unique facts or highly unusual circumstances." *Brann*, 424 A.2d at 704.]

¹⁸ *Brann*, 424 A.2d at 704-705]

3. Public Purpose Doctrine

Resolves authorizing compensation to an injured person or permitting suit against the State must pass a third legal hurdle: the public purpose doctrine. The public purpose doctrine prohibits a gift of public funds. Compensation to an individual must benefit the public or compensate an individual for injury when fairness so requires. If the State finds that it owes a moral obligation to a person it has injured, compensation to that person passes scrutiny under the public purpose doctrine.

'The Constitution does not prohibit the Legislature from doing in behalf of the state what a fine sense of justice and equity would dictate to an honorable individual. It does prohibit the Legislature from doing in behalf of the state what only a sense of gratitude or charity might impel a generous individual to do.' Opinion of the Justices, 170 A.2d 647, 651 (Me. 1961) quoting Ausable Chasm Co. v. State (citation omitted)

Although the finding of facts is exclusively a matter for the Legislature, the Court may review whether the facts support a finding of moral obligation. Opinion of the Justices, 170 A.2d at 651. This legal doctrine has not been a major issue in consideration of Resolves, but it should be considered in making decisions on Resolves.

B. Alternatives to Resolve Authorizing Suit Against the State

The Legal Affairs Committee's goal in considering a Resolve waiving sovereign immunity is to decide whether to permit the person to sue the State, free of the complete bar of sovereign immunity, not to decide whether the person deserves compensation for his or her injury. But in making that decision, the committee inevitably makes a judgment of whether there is at least a reasonable argument in favor of compensating the person. It may appear to the committee on occasion that an injured person deserves to be compensated. In such a case, the committee may choose one of a number of ways for that compensation to be granted: the committee may approve the Resolve authorizing suit and presume that the court will approve of compensation or it may amend the Resolve to provide for direct compensation. The committee may also wish to consider some of the following alternative forms of relief.

1. Passage of General Law offering Relief in Similar Circumstances.

If the committee believes persons other than the proponent of the Resolve have been injured, or are likely in the future to be injured, in the same way that the proponent of the Resolve was injured, and that the relief offered by the Resolve should be offered to all such injured persons, the committee should consider drafting a general law providing that relief to all such

injured persons. The law could provide direct compensation, waive immunity, or change a procedural rule that bars the individual from entering court.

There are at least two recent examples of committees responding with general law changes to incidents brought to the attention of the Legislature through Private Resolves. In 1991, the Legal Affairs Committee heard a Resolve authorizing Martin Bruno to sue the City of Lewiston. Bruno had been injured in a car accident with police, who were involved in a high speed chase. Although the Tort Claims Act permits suit for such injuries, Bruno failed to give the 180-day notice of suit required under the Act. He says he missed the deadline because the city's insurance company had been making payments to Bruno for medical treatment, and he assumed that they thereby were accepting responsibility for the accident. However, the insurance company stopped making payments after the 180-day notice period expired. Although the city's insurance company knew about the accident, and the city presumably did also, Bruno's failure to file notice of claim within 180 days of the injury barred him from filing suit. The Judiciary Committee that same year enacted PL 1991, c. 460, a general law, amending the Tort Claims Act to provide that a person who relies on an insurance company's implied promise to cover losses from an injury is good cause for failure to file notice of claim within 180 days of the injury.

A second example occurred in 1985, when the Judiciary Committee enacted a general law permitting suit against the State for wrongful imprisonment, in response to a Resolve heard before the Committee in 1983 and 1985 that would have compensated a person for wrongful imprisonment.¹⁹ The law included a two-year statute of limitations, but permitted a person who was injured more than two years before enactment of the law to bring such a suit within one year of passage of the act, thereby giving the person who was subject of the Resolve an opportunity to sue under the new law.

Proposal of general law changes by the Legal Affairs Committee may be somewhat difficult. The Legal Affairs Committee does not have primary responsibility for the Maine Tort Claims Act or for liability laws generally, so an amendment to those laws would probably be referred to, or at least discussed with, the Judiciary Committee. In addition, rulings by the presiding officers of the House and the Senate have in the past prohibited amendments to turn Resolves (proposing unallocated law) into bills (to amend the Maine Revised Statutes).

Finally, a general law may have to be applied retroactively to offer effective relief for the proponent of the Resolve, who has

¹⁹ The Resolve was 1985 LD 185; the new law was PL 1985, c. 436]

already been injured. While there is not a Constitutional problem with retroactively changing rules regarding legal liability of the State or a municipality,²⁰ there are Constitutional limits on laws retroactively exposing individuals to legal liability where none existed at the time of the injury. The Due Process Clause of the Constitution provides that a law may not deprive a person of a "vested right." A defense to a lawsuit (such as the policy immunities provided in §8104-B, or the bar of the statute of limitations, once it has run) may be considered a "vested right."²¹ It is therefore necessary to determine what "right," specifically, what defense, is being retroactively denied to an individual and to research whether that would be considered deprivation of a vested right under the due process clause. In that analysis, it would be important to consider to what extent the individual is effectively exposed to liability, given the fact that the governmental entity generally indemnifies the employee for liability, unless there is criminal liability or the employee acted in bad faith.

2. Other applicable general laws.

There are laws outside the Tort Claims Act specifically providing compensation or authorizing suit against the State or a municipality or county for certain kinds of injury. They generally relate to property damage during highway construction, or to damage caused by municipal functions. The following are examples of such laws. This list is not exhaustive, and the committee in a particular fact situation should determine whether relief may be offered by a general law.

23 MRSA §652, 2103, 3659, provide for recovery of damages to property, including private water supplies, resulting from highway construction

23 MRSA §3655, known as the "pothole law," permits suit against a county or town for damages suffered due to a defect in highways, bridges, town ways and causeways, provided the county or town had prior notice of the defect; damages are limited to \$6,000 (\$25,000 if death results)

30-A MRSA §3403, permits action against a town for damages for failure to maintain or repair certain sewers.

²⁰ See 16 Am Jur 2d Constitutional Law §§395, 681 (1979); McQuillin, Municipal Corporations, §4.20 (3d ed. rev'd, 1988)

²¹ See the discussion and cases in 16A Am Jur.2d Constitutional Law §673 (1979)

3. Seeking Settlement from a State Department.

Title 5, section 1510-A authorizes a state agency to hear and decide claims of \$2,000 or less against it, except a claim that may be submitted under the Tort Claims Act. If the state agency refuses to hear the claim or fails to make a final decision within 90 days of submission, or the state agency's action or omission has caused the person to miss a time limit for submission of claim under another statute, the person may submit the Claim to the State Claims Commission in the Department of Finance. The State Claims Commission also hears appeals from state agency decisions. Under Joint Rule 36, a person must file claim under this section and receive denial or partial denial of a claim less than \$2,000 before bringing the claim to the Legislature.

Claims over \$2,000 are sometimes settled outside the legislative process without litigation. Title 14, section 8109 sets forth the procedure for settling claims over \$2,000 when the claim is covered by the Tort Claims Act. According to William Stokes, Assistant Attorney General, the Departments generally follow those rules even for claims not covered by the Tort Claims Act. It might be efficient for the committee to require any person seeking approval of a Resolve to attempt to resolve the issue with the Department before the committee considers the Resolve.

4. Litigation against the Governmental Entity.

A governmental entity may be sued in some instances without obtaining a waiver of immunity. The following alternative sources of liability should be considered before waiving immunity.

- a. Exceptions to immunity under the Tort Claims Act. The Tort Claims Act waives governmental immunity and provides for liability of governmental entities for injuries caused by certain kinds of governmental activities. A person may sue to recover losses for these injuries without a waiver of immunity.²² A governmental entity is liable for its negligent acts or omissions in the performance of the following activities:

- (1) Ownership, maintenance or use of vehicles, machinery and equipment;
- (2) Construction, operation or maintenance of public buildings, with specific exceptions such as historic sites and public outdoor recreation sites;

²² If a person failed to comply with one of the procedural requirements of the Act, however, such as the notice requirement or the statute of limitations, a Resolve waiving those requirements would still be necessary.

- (3) Sudden and accidental discharge, dispersal, release or escape of pollutants; and
 - (4) Construction, street cleaning or repair on any highway, town way, sidewalk, parking area, causeway, bridge, airport runway or taxiway, but not for any defect, lack of repair or lack of sufficient railing on any of them.
- b. Non-tort suits. The Tort Claims Act does not prohibit suit on grounds other than tort, for example, contract suits, and does not prohibit tort suits in which the person seeks relief other than money damages. For example, a person may sue for a declaration that a department is improperly implementing a law, or directing a state official to take a certain action.
 - c. Federal civil rights act suit (42 USC §1983). The Federal Civil Rights Act permits suit against a "person" who deprives another of Constitutional or other federal rights "under color of law." Such suits are known as "section 1983" suits, after the section number of the law that permits the suit.²³

Municipalities are considered "persons" under the law and are therefore subject to suit, Monell v. Department of Social Services of the City of New York, 436 U.S. 658 (1978), but the State may not be sued under §1983, as it is protected from liability by the 11th Amendment. Will v. Michigan Dept. of State Police, 491 U.S. 58 (1989)

The law provides a remedy for deprivations of Constitutional rights including the rights to due process, freedom of speech, freedom from unreasonable searches and seizures, and freedom from cruel and unusual punishment. Section 1983 is not a tort remedy, but some injuries that would give rise to tort liability are also redressible under section 1983. In particular, the state may have a duty to prevent injury to a person in state custody. The state has been found liable under section 1983 for injuries to a person involuntarily confined to a state mental hospital, Youngberg v. Romeo, 457 U.S. 307 (1982), and to a child it places in a foster home, Taylor by and through Walker v. Leadbetter, 818 F.2d 791 (11th Cir. 1987), cert. den. 489 U.S. 1065 (1989) (state

²³ 42 USC §1983 provides that "Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States ... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress. ..."

and county officials were liable for gross negligence in placing a child in a foster home, where he was subject to child abuse). Other types of special relationships may give rise to liability, such as in the case of a woman who had notified police that she was being harassed by a man who later murdered her, Dudosh v. City of Allentown, 629 F.Supp. 849 (E.D. Pa. 1985). The government is not liable for death or bodily injury in all circumstances, Collins v. City of Harker Heights, Texas, -- U.S. --, 112 S. Ct 1061 (1992) (city not liable under §1983 for failure to provide safe workplace for its employees, one of whom was killed in a workplace accident), especially when the acts of a third person cause the injury, DeShaney v. Winnebago County, 812 F.2d 298 (7th Cir. 1987), aff'd 489 U.S. 189 (1985) (County welfare agents not liable for failure to remove child from home of abusive father), Martinez v. California, 444 U.S. 277 (1980) (15-year old girl killed by paroled prisoner 5 months after his release). There is an extensive body of case law applying section 1983, much of which is analyzed in the treatise entitled Cook and Sobieski, Civil Rights Actions, Matthew Bender (1992). It is worthwhile to consult that treatise and to review the case law under section 1983 to determine whether a section 1983 action is feasible.

The law also protects certain rights provided by federal statutes, although the Supreme Court has set up a fairly rigorous standard for finding that a federal law establishes a right enforceable under §1983.²⁴

A municipality is not liable solely as the employer of a person who violates the civil rights of another. It is liable for a deprivation only if it results from implementation or execution of a "policy statement, ordinance, regulation or decision officially adopted or promulgated by that body's officers... [or] ... pursuant to governmental custom even though such a custom has not received formal approval through the body's official decision-making channels." Monell, 436 U.S. 658, 690-691 (1978).

²⁴ Section 1983 is available to enforce a violation of federal statutes only if the statute clearly creates an enforceable right, privilege or immunity, and only if the statute does not establish its own enforcement mechanism, Wright v. Roanoke Redevelopment & Housing Authority, 479 U.S. 418 (1987), Sue Suter et. al. v. Artist M., 60 USLW 4251 (March 25, 1992). See 14 A CJS Civil Rights §228 (c) for list of court decisions determining whether a federal law creates a right enforceable under §1983.']

In an action under section 1983, a municipality is not entitled to assert the good faith of its employees as a defense to liability under §1983. Owen v. City of Independence, Missouri, 445 U.S. 622 (1980).

5. Litigation against a Government Employee.

An injured person may hesitate to sue a governmental employee because the employee has fewer resources, or because they feel the employee should not be personally responsible for the injury. Nonetheless, the options for suit against an employee, and the actual effect of such a suit should be considered.

- a. Suit under the Act. A government employee may be sued for his tortious conduct without waiving provisions of the Act, although the policy immunities provided in §8111 would provide a defense in many cases, and §8104-D limits the damages that may be recovered in such an action to \$10,000. Although the suit goes against the employee, it should be noted that the indemnification provisions of §8112, sub-§§1 and 2 protect the employee against out-of-pocket expenses for attorney fees and other litigation expenses, unless the employee acted criminally, outside the scope of his employment or in bad faith. The law also requires the governmental entity to indemnify the employee for any judgment ordered against him, where the governmental entity is also liable, and permits the entity to indemnify the employee in all other cases.
- b. Tort suits not governed by the Act. Employees are not protected by the Act or its immunities for acts outside the course and scope of employment.
- c. Federal civil rights act suits (Section 1983 actions) As noted above, Section 1983 permits suit against a person, including a governmental officer or employee, who deprives another of Constitutional or other federal rights "under color of law." There are two differences between suits against individuals and suits against governmental entities. First, an individual need not be acting pursuant to an established law or custom to be considered acting "under color of law." Whenever the employee is acting in his official capacity or using power he possesses by virtue of his governmental position, he is acting under color of law, even if he is abusing that power or is acting for purely personal reasons. West v. Atkins, 487 U.S. 42 (1988). Second, a governmental officer is entitled to immunity if he acts in good faith. Generally, an officer or

employee acts in good faith unless he violates a "clearly established right." Harlow v. Fitzgerald, 457 U.S. 800 (1982), Anderson v. Creighton, 483 U.S. 635 (1987).²⁵

C. Tort Law Principles

1. Why consider traditional tort law principles?

If a Resolve authorizing suit against the State or a political subdivision is enacted, the person named in the Resolve is entitled to bring suit in Superior Court. The Resolve generally provides the standard for the court's decision: "Liability and damages must be determined according to state law as in litigation between individuals." Although the committee is not required to consider how tort law principles applicable to suits between individuals will be applied to the case under consideration, it might be beneficial for the committee to consider those principles when discussing the Resolves, for a number of reasons.

First, using tort law principles would provide a framework for committee discussion and would help participants in the process understand what factors the committee will look at in making its decision. This would help participants to plan their presentation to the committee and to understand the committee's decision on the Resolve.

Second, using those principles to review the Resolve would enable the committee to clear up some of the ambiguity surrounding the legislative intent of the Resolves. According to the Office of the Attorney General, which represents the State in litigation, courts have questioned what law to apply in suits filed pursuant to a Resolve. In particular, courts question whether the Legislature intends the Court to recognize a cause of action based on the facts of the case,²⁶ and whether immunities provided in the Tort Claims Act and in common law apply to these cases. A more detailed discussion of the case may enable the committee to more clearly draft the Resolve to indicate its intent.

²⁵ "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Creighton, 483 U.S. at 640.

²⁶ In Nadeau v. State, 395 A.2d 107, 111 (Me. 1978), the Court ruled that a Resolve does not create a cause of action, but as the discussion below indicates, this decision has not completely resolved the issue.

Finally, tort law principles used by the courts reflect established social concepts of justice. Persons violating these established norms have warning that they may be held liable for their actions, while persons held accountable under unspoken principles or new principles have less warning. Of course, the committee is free to establish new principles, but it would be helpful to understand when that is happening.

2. What are traditional tort law principles?

Among the questions a court would consider in acting on a tort suit are the questions: What cause of action does this person have, and what defenses exist to that cause of action? A cause of action is "the fact or facts which give a person a right to judicial relief." Black's Law Dictionary, 5th ed. 1979 Facts give rise to a right to judicial relief when a statute or a judicial decision declares that they do. Maine's Liquor Code, for example, 28-A MRSA §§2504, 2506 and 2507, creates a cause of action for reckless or negligent alcohol server liability. Court cases in Maine recognize causes of action for, among other injuries, defamation, invasion of privacy, and negligent infliction of emotional distress.

Proponents of Resolves rarely tell the committee what cause of action they intend to plead if they reach court. Occasionally, the facts of a case sound like the elements of a recognized cause of action. More often the facts indicate simply that, in the performance of a government function, a government official or employee caused physical, economic or emotional injury to a person. The law, however, does not grant a remedy for every harm. But when a person has a duty to act reasonably to avoid injuring another person, and breaches that duty, the law may say that he has engaged in negligent behavior that deserves judicial relief. It is in the area of negligence that the Court has a great deal of leeway in creating -- or recognizing -- new causes of action. Recognizing a cause of action requires a finding that a person or agency had a duty to act reasonably; deciding what reasonable action is; and deciding that the person or agency breached that duty by acting unreasonably. Courts are frequently called upon to determine whether a duty exists and what the standard of care is with regard to private behavior. In sending Resolves to the Court, the Legislature asks the Court to make these decision with respect to public activities. Does DHS have a duty to avoid harm in placing children in foster care? What is reasonable behavior? In these situations, the Court is making new law. In determining whether to recognize a new cause of action, the court may look to social norms, or

to expressions of legislative intent.²⁷ It is logical, then, for the court to view the committee's approval of a Resolve as an expression of recognition that the department had a duty to act reasonably, and that the evidence presented to the committee indicates a breach of that duty. If this is what the committee intends in its decision, it might help resolve some ambiguity for there to be some expression of that decision in the Resolve. If the committee truly intends for the court to grant relief only on the basis of recognized causes of action, the court might be less uncertain if the Resolve is amended or if the Legislature makes an initial determination of whether a cause of action exists and send to the Court only those cases likely to fall within a recognized cause of action.

The committee might also want to examine what defenses a potential defendant would have, in particular to look at whether defenses provided in the Tort Claims Act would or should apply to these actions. The Tort Claims Act provides several defenses for governmental entities and employees sued under the Act: the defense of sovereign immunity, 14 MRSA §8103; the immunity for legislative, judicial, discretionary and prosecutorial functions for those acts for which liability is provided in the Act, 14 MRSA §8104-B; defenses provided by a litigant's failure to comply with statutory notice requirements, 14 MRSA §8107; and the defense of the running of the statute of limitations, 14 MRSA §8110. It is not clear which if any of these defenses would be available to a defendant in one of these cases. The Resolve authorizes suit "notwithstanding any statute or common law to the contrary," which could be interpreted to mean that these defenses are unavailable. The committee may want to clarify in the language of the Resolve which defenses it intends to eliminate. Before eliminating defenses, the committee might want to consider each of these defenses and the rationale for providing the defense for other governmental suits and denying the defense in this suit. A letter from the Attorney General, reprinted in Appendix G, summarizes the reasoning behind some of the defenses.

²⁷ Keeton, Prosser & Keeton on the Law of Torts (5th ed. 1984) §3, fn. 31, p. 19.

V. Committee Process

A. Fact-finding

To make a proper decision on a Resolve, the committee must receive the necessary information about the case in a time-efficient way, and parties must have a fair opportunity to present their cases to the committee. Because the committee does not have a procedure for submitting or presenting information, information often comes to the committee at the last minute, often in the form of voluminous records, which, although useful, are difficult to manage. Information submitted at the public hearing, or after the hearing, is often not provided to the opposing party to enable them to respond to the contents.

In addition, the necessary parties are not always present at the work sessions on the bill, making it difficult to obtain information. This is sometimes attributable to last-minute schedule changes, and sometimes to lack of ability to attend or lack of interest on the part of the party. When the State is the subject of the Resolve, the Attorney General's office, which has a system for tracking legislation, is usually aware of the Resolve. But when a municipal or county governmental unit is threatened with suit, it is less likely to have notice of the Resolve, and it is not clear whose responsibility it should be to notify the entity of the committee's consideration of the Resolve.

To improve the committee's fact-finding ability, the committee may want to consider the following:

1. Requiring parties to submit information before the public hearing, to provide an index to records and other material submitted, and to complete a standard form providing relevant information in a concise, easily readable form (a suggested form is included in Appendix D);
2. Requiring parties to provide to the opposing party a copy of any information given to the committee; and
3. Requiring the injured person, or the legislator who sponsors the Resolve, to notify the opposing party of the public hearing date and time, or to notify the committee clerk of the name of an appropriate representative of the party and require the clerk to notify the party of the public hearing date.

B. Confidentiality & Executive Sessions

In reviewing Resolves, the Legal Affairs Committee may ask to see confidential records held by private entities, such as physicians or psychiatrists, or by state agencies such as the Department of Mental Health & Mental Retardation or the Department of Human Services. Privately-held and publicly-held records containing information about an individual's medical, psychological, financial or family history are generally classified by statute as confidential and not subject to

public disclosure.²⁸ The statutes vary, but most provide civil or criminal liability for unauthorized disclosure of the records. Many permit the person who is the subject of the record to waive confidentiality and to permit disclosure to named persons.

The Attorney General's office has, in the past, drafted waivers of confidentiality to permit release of state agency records to the committee. An example of the release appears in Appendix E. It authorizes release of information to "members of the Legislature of the State of Maine for the limited purpose of allowing the Legal Affairs Committee of the said Legislature and/or the Legislature as a body to have sufficient information and testimony to act on" a particular Legislative Document.

When working with confidential records, the committee should take precautions to protect the records during the committee process and following committee action on the Resolve.

1. During the public hearing.

The Freedom of Access Law, Title 1, section 405, permits public bodies to hold executive sessions to discuss "information contained in records made, maintained, or received by a body or agency when access by the general public to those records is prohibited by statute" 1 MRSA §405, sub-§6, ¶F. Thus, the committee may move to call an executive session to discuss matters in these records. However, it may not make a final decision on the Resolve in executive session, and the Committee may only discuss matters specifically set forth in its motion to enter Executive Session. 1 MRSA §405, sub-§§2,5.

It is not clear who, other than committee members, may be present during an Executive Session, since Title 1 does not contain a definition of "executive session." Title 3, which governs the Legislature, provides two definitions of executive session. The section of Title 3 that sets forth committee powers provides that a "committee may hold ... executive sessions excluding all except members of the committee." 3 MRSA §165, sub-§3. Chapter 21 of Title 3, which governs legislative investigating committees, defines an executive session as:

"A session at which only members of the investigating committee, staff of the committee, counsel to the committee, the witness and his counsel are present." 3 MRSA §402.

²⁸ See, e.g., 16 MRSA §611 et. seq. (criminal history records); 22 MRSA §4008 (Department of Human Services child protective records); 34-A MRSA §3003 (Department of Corrections records); and 34-B MRSA §1207 (Department of Mental Health and Mental Retardation records)

This definition would require the Committee to exclude opponents of the Resolve from the committee room during discussion of the witness' records, and is probably not the best model to use. Under the Maine Administrative Procedures Act, discussions of confidential information are dealt with in this way:

"During the introduction of confidential information, the proceeding is open only to the hearing officer, employees of the agency, parties, parties' representatives, counsel of record and the witness testifying regarding the information, and access to the information is limited to these people. Disclosure is limited to information directly related to the matter at issue." 5 MRSA §9057, sub-§6, ¶B, sub-¶2.

This suggests that an executive session called for the purpose of discussing confidential information should include all parties directly concerned in the matter, provided the waiver of confidentiality authorizes disclosure to all of them.

2. Confidentiality of records following disclosure to committee.

The waiver, combined with the protection of the Speech and Debate Clause of the Maine Constitution,²⁹ protects legislators from liability for discussing matters in the records in committee or in floor debate on the Resolve. But the waiver does not destroy the confidentiality of the records, and any disclosures outside the sphere protected by the Speech and Debate Clause could result in civil or criminal liability. For example, unlawful dissemination of confidential Department of Human Services records is a Class E crime, carrying a penalty of up to \$1000 in fines and up to 6 months imprisonment.³⁰

In addition, there may be non-statutory penalties for disclosure of information. A person who is injured by release of confidential information may sue the person who released the information for invasion of privacy through the public disclosure of private facts.³¹ When sued under this tort theory, a person is held liable for disclosing information that is highly offensive and objectionable to a reasonable person of ordinary sensibilities, even if the information is true.

²⁹ Art. IV, pt. 3, §8 provides that "[n]o members shall be liable to answer for anything spoken in debate in either House, in any court or place elsewhere."

³⁰ 22 MRSA §4008, sub-§4

³¹ See Keeton, Prosser & Keeton on The Law of Torts (5th ed. 1984), p. 856.

Although a statutory declaration that records are confidential does not in itself create tort liability for disclosure, Hudson v. S.D. Warren, 608 F. Supp. 477 (D.C. Me. 1985), release of information declared confidential by statute would certainly create a risk of harm to the person who is subject of the record, and would thus create a risk of liability.

3. Committee records.

Committee files, including the committee master file, legislators' files and staff files become public records under the Freedom of Access law at the end of the legislative session in which the Resolve is considered or to which it is carried over. Title 1, section 402 provides that records designated confidential by statute are not public records, but since confidential records submitted to the committee are not separated from the files and specifically designated confidential, those records may be released to the public unintentionally. There is not at present a legislative policy for protecting confidential records held in committee files.

One policy option would be to require the subject of the records to waive all confidentiality rights and permit the records to be open to the public. This could be justified by arguing that the records are used to consider a piece of legislation affecting the public, and for that reason should be accessible to the public. Another option would be to protect the privacy of the individual by destroying confidential records or returning them to the source of the records before the committee files become public records. A third option would be to retain the records in the file, but place them under seal and only permit persons who were authorized to have access under the waiver to see them.

C. Witnesses: Compelling Testimony; Employee concerns

Although a Resolve generally authorizes suit against a governmental entity, it is often an individual employee who is accused of wrongdoing or who has the information necessary to help the committee understand the incident at issue. That employee is not always present at the public hearing or work session on the Resolve. If a state agency is accused of wrongdoing, an attorney from the Office of the Attorney General usually appears, accompanied by the supervisor of the employee who is alleged to have caused the injury. If those parties cannot answer a question, the Committee may be delayed or frustrated in its attempts to understand the incident. At times, the committee has expressed an interest in issuing a subpoena to force attendance of a witness, and an interest in taking testimony under oath to assure truthfulness. The following section discusses subpoena power and employee concerns employees in appearing before the committee.

1. Committee power to compel attendance, require oaths.

A legislative committee does not automatically have power to compel attendance of witnesses or to require witnesses to testify under oath. The Legislature, however, may grant to a committee subpoena power to compel attendance of witnesses or production of documents, the power to administer oaths, and the power to cause depositions of witnesses to be taken. 3 MRSA §165, sub-§7. When these powers are given to a legislative committee, the committee is considered a "Legislative Investigating Committee," and must comply with the provisions of Title 3, chapter 21. Among other things, chapter 21 requires a legislative investigating committee to provide 3-days advance notice of meetings, to take all testimony under oath, and to prepare a complete transcript of all testimony taken at the hearings.

2. Employee concerns about appearing before the Committee.

Although the Legislature does not have power to punish employees or other witnesses who appear before the committee, testimony given during a public hearing or work session may subject the witness to punishment in other arenas.

The Maine State Employees Association has expressed concern about the repercussions of testimony on an employee's job. Although the union contract with the State does not preclude investigation of employee wrongdoing by the Legislature, it establishes a procedure for investigating complaints against employees, and affords certain rights to the employee who is under investigation.³² For example, if the employee is to be interviewed in response to a complaint, the employee "shall be afforded a reasonable opportunity and facilities to contact and consult privately with his/her Union representative or Union attorney. Such representative or attorney may participate in the interview."³³ Questioning at a committee hearing may bring forth information that would be used by the Department in a disciplinary proceeding, without the protections afforded by the union contract.

In addition, comments and information disclosed at a public hearing or work session on a Resolve might have repercussions for subsequent civil or criminal proceedings. Those comments are likely

³² See, e.g., Article 12 of the Agreements between the State of Maine and the Maine State Employees Association, Professional and Technical Services Bargaining Unit and the Law Enforcement Services Bargaining Unit, 1989-1992.

³³ Article 12, section 6, Agreement between the State of Maine and the Maine State Employees Association, Professional and Technical Services Bargaining Unit.

to be admissible as evidence in a subsequent proceeding.³⁴ The Resolves do not usually seek authority to sue individual employees, so the employee is not often personally at risk from passage of the Resolve. However, there may be some instances where the employee is being asked to give evidence that may later lead to a criminal proceeding, or to a suit against the person for acting outside the scope of their employment, proceedings for which the Maine Tort Claims Act does not provide immunity.

³⁴ Although the Rules of Evidence generally prevent a person from testifying as to what another person said (hearsay), Maine Rule of Evidence Rule 801(d)(2) provides that admissions by a party opponent are not excludible as hearsay. If they are relevant and otherwise admissible in court, the hearsay exclusion does not prevent their admittance as evidence. Field and Murray, Maine Evidence (1987), pp. 292-314.

VI. SUMMARY OF SUGGESTIONS

A. Confidentiality

- Establish a procedure for handling confidential records submitted to committee. Options include: returning records to the department from which they came; destroying records after the Legislature has concluded its work on the bill; retaining the records in the files with a label indicating that the records are not public records, and including a list of persons authorized to have to access them; or requesting that a person waive confidentiality entirely to permit access by the public to all records submitted to committee.

B. Information Improvements

- Require proponents of a Resolve to fill out a standard information sheet to provide information to committee before public hearing.
- Require all parties to provide a copy of any information provided to the committee to the opposing party

C. Drafting of Resolves

- Clarify what defenses the Resolve waives (governmental immunity, policy-based immunities, statute of limitations, notice requirement)
- Clarify whether the Resolve intends the court to create a cause of action not previously recognized in Maine, or whether only recognized cause of actions may be the basis for recovery

D. Possible statutory changes

- Clarify the subsection authorizing waivers (§8105, sub-§3) to address whether waivers of immunity of municipalities and individual employees are permitted under that subsection
- Move the subsection authorizing waivers to a more appropriate place and reword the subsection to clarify that it applies to waiver of immunity as well as to waiver of the limit on damages
- Clarify the effect of a private resolve waiving sovereign immunity with regard to the issues addressed in #3

E. Committee process

- Clarify who is required to notify parties to the potential suit, including the municipalities, state agencies and employees

APPENDIX A
Staff Study Proposal

OFFICE OF POLICY AND LEGAL ANALYSIS

1992 INTERIM: STAFF STUDY PROPOSAL

Re: Resolves Waiving Governmental Tort Immunity

The number of bills waiving governmental immunity under the Maine Tort Claims Act has increased over the past few years. In the First Regular Session of the 114th Legislature, there were 5 bills authorizing suit against the State. In the First Regular Session of the 115th, the Legal Affairs Committee heard 10 bills authorizing suit against the state and 3 bills authorizing suit against various municipalities. Several issues and difficulties arise during the committee's consideration of these bills, including issues about confidentiality of information revealed during the hearings, confusion regarding what rights the state is actually waiving under the bill, and difficulties with obtaining appropriate factual information with which to understand the issue involved. It would be helpful to the committee to have some established procedures and guidelines for hearing and considering these bills, which are unlike other bills considered in the legislative process.

It would also be helpful to look back at the history of these bills to see how often immunity is waived, under what circumstances, how the suits authorized are concluded, and what difficulties arise in those suits from the way the bill is drafted or the way the legislative process considers the bill.

The Attorney General's Office has expressed interest in the past in reviewing the way these resolves are drafted and discussing other issues related to the resolves. The Revisor's Office has also expressed interest in clarifying the format they use for drafting these resolves.

The study would include:

1. Developing a list of bills waiving governmental immunity since adoption of the Tort Claims Act, and committee action on each bill;
2. Tracking post-legislative action on bills that are approved by the Legislature;
 - This would include finding the outcome of the cases, talking with the parties to the cases to determine any difficulties they encounter in bringing or defending these cases;

3. Reviewing and proposing guidelines for committee process in considering these bills;

- Confidentiality issues, such as what waiver of confidentiality to require from parties to guarantee that privacy is respected, but to protect the public's right to information concerning committee activities, and under what circumstances, if any, to hold executive committee sessions;

- Obtaining information for the committee regarding the case in a useable manner and in a useable time frame so that the committee can adequately understand the incident; process for assuring that parties have opportunity to react to information presented;

- Concerns about state employee rights;

4. A review of other states' laws regarding governmental immunity and how those states handle waivers.

APPENDIX B

Summary of the Maine Tort Claims Act

Summary of the Maine Tort Claims Act
Title 14, Chapter 741 (§§8101 et. seq.), Maine Revised Statutes
(as of November 1, 1992)

Liability of a Governmental Entity

1. Bases of liability. Governmental entities (the State and its political subdivisions) are immune from tort suits, except for:

A. Suits arising out of negligence in the following activities:

- (1) ownership, maintenance or use of motor vehicles, aircraft, and other machinery and equipment;
- (2) construction, operation or maintenance of a public building, excluding such property as outdoor recreational facilities and historic sites, and property acquired by condemnation or tax foreclosure;
- (3) sudden and accidental discharge of pollutants;
- (4) acts occurring during the performance of construction, street cleaning or repair of a highway, sidewalk, parking area, bridge or other infrastructure (§8104-A).

B. Actions for which the entity obtains insurance coverage (§8116);

C. Suits authorized by the Legislature (§8105, sub-§3).

2. Limit on type and amount of recovery. The amount of damages recovered in an action authorized under the Act may not exceed \$300,000 for any and all claims arising out of a single occurrence (§8105, sub-§1), unless:

A. The person gets authorization from the Legislature for a higher limit (§8105, sub-§5); or

B. The entity has obtained insurance coverage that exceeds \$300,000 (§8116). In that case, the insurance coverage limit is the limit of recovery.

Punitive or exemplary damages may not be awarded against a governmental entity (§8105, sub-§5).

3. Procedural requirements. A person who intends to sue a governmental entity under the Act must give notice of the intent to sue that entity within 180 days after the claim or cause of action accrues, unless the claimant shows good cause for failing to file within that time (§8107, sub-§1). The notice must include a description of the injury and

the incident causing the injury, and must be filed with the department accused and the Attorney General, if the State is accused of tort, and with an appropriate official if a political subdivision is being sued (§8107, sub-§3). Suit must be brought within 2 years after the cause of action accrues.

4. Immunities; Other bars to recovery. The actions listed in §8104-A do not create liability if they involve the performance of legislative, judicial, discretionary or prosecutorial functions, activities of state military forces, leasing of buildings to other organizations, or if the injury results from a decision not to provide certain utility services (§8104-B). Failure to comply with the procedural requirements listed above is also a bar to recovery for suits brought under the Act.

Liability of Governmental Employees

1. Bases of liability; immunities. A governmental employee is liable for negligent acts and omissions within the course and scope of employment under the common law, to the same extent as any privately-employed person (§8104-D).

2. Limit on damages. Claims against employees are limited to \$10,000 for any claims arising out of a single occurrence (§8104-D).

3. Procedural requirements. The procedural requirements for suing an employee are the same as for suing a governmental entity.

4. Immunities. An employee is immune from civil liability for:

A. taking or failing to take any legislative, judicial, discretionary, or prosecutorial function; or

B. Any intentional act or omission within the course and scope of employment, unless the action was taken in bad faith (§8111).

5. Indemnification. In any litigation against an employee under the Act or under federal law (such as a §1983 action), the governmental entity is required to defend the employee, or to provide and pay for outside legal counsel for the employee, unless the employee is found criminally liable for the action, or the employee acted in bad faith or outside the course and scope of his employment (§8112). When an employee is sued for an action for which the governmental entity is also liable, the governmental entity must also indemnify the employee for any damages ordered against the employee, unless the employee is found criminally liable for his actions (§8112, sub-§2). The entity is not required to indemnify the employee for punitive damages if the employee is found to have acted in bad faith. If the employee is sued for an action for which the governmental entity is not also liable, or is sued under federal law, the governmental entity may indemnify the employee (§8112, sub-§1).

APPENDIX C
Sample Resolve



115th MAINE LEGISLATURE

FIRST REGULAR SESSION-1991

Legislative Document

No. 950

S.P. 348

Received by the Secretary, March 6, 1991

Referred to the Committee on Legal Affairs and 1400 ordered printed pursuant to Joint Rule 14.

A handwritten signature in cursive script, reading "Joy J. O'Brien".

JOY J. O'BRIEN
Secretary of the Senate

Presented by Senator CONLEY of Cumberland

STATE OF MAINE

IN THE YEAR OF OUR LORD
NINETEEN HUNDRED AND NINETY-ONE

Resolve, Authorizing Kathleen Maynard and Howard Briggs to Sue the State.



Authorization to sue the State. Resolved: That, notwithstanding any statute or common law to the contrary, Kathleen A. Maynard and Howard L. Briggs, both individually and as coadministrators of the estate of Jessica Lea Briggs or their legal representative, who claim to have suffered damages as a result of the State's incarceration of Jessica Lea Briggs, aged 16, at the Maine Youth Center, and their failure to maintain control and custody of her as required by state law, which neglect resulted in Jessica's death, are authorized to bring a civil action against the State of Maine and against individual past or present employees of the State.

This action may be brought in the Cumberland County Superior Court within one year from the date this resolve is approved. Liability and damages, including punitive damages, must be determined according to state law as in litigation between individuals. The action may be heard by a Justice of the Superior Court or by a jury. The Maine Rules of Civil Procedure govern the conduct of the action. The Attorney General shall appear, answer and defend the action.

The Treasurer of State shall pay any judgment, including costs and interest, on final process issued by the Superior Court or, if applicable, the Supreme Judicial Court. Recovery may not exceed \$1,000,000, including costs and interest.

STATEMENT OF FACT

This resolve authorizes Kathleen A. Maynard and Howard L. Briggs, both individually and as coadministrators of the estate of Jessica Lea Briggs, to sue the State for damages resulting from alleged acts and omissions of the State, its agents and employees concerning the incarceration and death of Jessica Lea Briggs. The maximum authorized recovery is \$1,000,000.

APPENDIX D

Suggested Fact Sheet for Proponents of Resolves

Suggested Information Sheet for Proponents of Resolves

1. Please state the name, address and telephone number of the claimant and the claimant's attorney or other representative, if any;

2. Please give us a concise statement of the facts upon which this claim is based, including:

time and place of the circumstances giving rise to the claim

the action or failure to act alleged to have caused the injury

the name of the state or local department, agency or institution, and the name of any employee involved in the incident alleged to have caused the injury

a statement of the nature and extent of the injury claimed to have been suffered, and the amount of monetary damages claimed

3. Has the claimant attempted to negotiate a settlement of this claim with the state or local department or agency? What was the outcome of the negotiation?

4. Has the claimant received payment from any person or company with regard to this claim?

5. Has the claimant initiated a lawsuit against any person as a result of this injury or loss?

6. Has the claimant presented this claim to the Legislature before? If so, what was the outcome of that presentation?

7. What documents does the claimant have that would be helpful to the committee in understanding the claim? Please describe each document or group of similar documents.

8. Do you know of any other persons who have been injured in the same way you have been injured? If so, what makes this case different from those other cases?

9. Has the claimant consulted an attorney about this claim? If so, have other avenues of relief such as a federal civil rights act suit been explored with the attorney?

APPENDIX E

Sample Waiver of Records Confidentiality

INFORMED CONSENT

I, _____, do, pursuant to __ MRSA §__ (statute authorizing waiver of confidentiality by subject or representative) hereby consent to the disclosure of all records relating to _____ to Assistant Attorney General _____ (or to other representative of the governmental entity accused of wrongdoing) and staff and to members of the Maine State Legislature and staff for the limited purpose of allowing the Joint Standing Committee on Legal Affairs and the Legislature as a body to have sufficient information and testimony to act on L.D. __, A Resolve Authorizing _____ to Bring a Civil Action Against _____.

(May also be notarized)

STATE OF MAINE
, SS

Then personally appeared the above named _____ and acknowledges the foregoing instrument to be his/her free act and deed.

Before me, _____
Notary Public

APPENDIX F

Chronological Summary of Resolves Seeking Compensation or Waiver of Governmental Immunity, 1977-1992

**RESOLVES SEEKING COMPENSATION OR WAIVER OF SOVEREIGN IMMUNITY
LISTED CHRONOLOGICALLY**

1977
LD 134
Gilbert
Resolves 1977,
ch. 7

RESOLVE, Authorizing Robert J. Gilbert of Rumford to Bring Civil Action Against an Agency of the State of Maine. Gilbert suffered an eye injury when a piece of tile fell from a wall at the Maine Maritime Academy in July 1974. Limit of recovery authorized: \$100,000. Judiciary Committee: OTP-A. Outcome of litigation: Parties apparently settled the case.

1977
LD 611
Rowe
Resolves 1977,
ch. 5

RESOLVE, Authorizing Vandelia T. Rowe to Bring Action against the State. Rowe suffered injury as a result of a fall at the Motor Vehicle Registration Office in Augusta in October, 1975. Limit of recovery authorized: \$30,000. Legal Affairs Committee: OTP-A. Outcome of litigation: Unable to locate files.

1977
LD 702
Powers
Not Enacted

RESOLVE, Authorizing Arthur G. Powers to Sue the State of Maine. Powers suffered damages as a result of 3 Maine State Police officers allegedly illegally entering his home on the basis of a faulty search warrant. Limit of recovery sought: \$25,000. Judiciary Committee: ONTP. See also 1979 - LD49 and 1981 - LD290.

1977
LD 1000
St. Armand
Resolves 1977,
ch. 6

RESOLVE, Increasing to \$25,000 the Amount for which Romeo and Genevieve St. Armand or their Legal Representatives may Bring a Civil Action against the State of Maine. Genevieve St. Armand suffered injuries in November of 1973, at the Augusta Airport Terminal Building due to failure of the Bureau of Aeronautics to properly maintain lighting, barriers or other safeguards around a construction project at the terminal. Resolves 1975, ch. 19 authorized the St. Armands to sue the State, but limited recovery to \$4,000. The injuries were more serious than anticipated in 1975, so this resolve sought to increase the limit to \$25,000. Legal Affairs Committee: OTP.

Committee Action Abbreviations:

OTP	Ought to Pass	LVWD	Leave to Withdraw
OTP-A	Ought to Pass as Amended	OTP-ND	Ought to Pass in New Draft
ONTP	Ought Not to Pass	XXX/XXX	Divided Report

1977
LD 1051
Turner/
Fitzmaurice
ONTP

RESOLVE, Appropriating \$225,665.36 for Unpaid Liability of State of Maine to Eleanor Turner, as Administratrix of the Estate of Durwood G. Turner, Durwood G. Turner, Jr., David G. Turner, Ellen S. Turner and Francis Fitzmaurice. A traffic accident on July 7, 1971, killed Mr. Turner, and injured the other 3 Turners. It is not clear who Mr. Fitzmaurice is. Resolves 1975 chapter 9 authorized suit against the State for alleged negligence of the Maine Highway Department in permitting a dangerous condition to exist on a state highway (Knowlton Corner Road). The resolve authorized recovery of \$250,000, but the judgment against the state exceeded that amount. The resolve sought the difference between the judgment and \$250,000. The total difference was \$255,665.36. (Title appears to be erroneous). Appropriations Committee: ONTP.

1977
LD 1214
Valente
Resolves 1977,
ch. 13

RESOLVE, Authorizing Ronald G. Valente, Deceased, and Formerly of Bradford, County of Essex, Commonwealth of Massachusetts, by His Legal Representatives, to Bring Civil Action Against the State of Maine. Valente was a patient at Bangor Mental Health Institute. He hanged himself in his room at BMHI on June 17, 1976. The Resolve authorizes suit against individual officials and personnel as well as the State and departments. The Resolve states as causes of action: deliberate indifference to medical needs, violation of the right to treatment, and violation of state and federal constitutional rights. The Resolve sought a limit of \$100,000 in damages; a committee amendment reduced the maximum recovery to \$20,000. Judiciary Committee: OTP-A. Outcome of litigation: Parties apparently settled the case.

1977
LD 1220
Estes
Resolves 1977,
ch. 14

RESOLVE, Authorizing Charles S. Estes, or His Legal Representative, to Bring a Civil Action Against the State of Maine. Estes claims to have suffered personal injury and property damage on May 10, 1976, as a result of negligence of the Department of Inland Fisheries & Wildlife. No details are given of the alleged injury or its cause. Limit of recovery authorized: \$15,000. Judiciary Committee: OTP. Outcome of litigation: Unable to locate file.

1977
LD 1572
Berg
LVWD

RESOLVE, Authorizing Alfred E. Berg, M.D., to Bring Civil Action Against the State of Maine. Dr. Berg incurred legal expenses in defending his actions as a state employee in a suit alleging that he had illegally confined and detained a person at Bangor Mental Health Institute without due process of law. Limit of recovery sought: \$5,000. Legal Affairs Committee: LVWD.

1977
LD 1739
LaRochelle
ONTP

RESOLVE, Authorizing Donald LaRochelle as Executor for the Estates of Wilfred and Alice LaRochelle Late of Waterville or his Legal Representatives to Bring Civil Action Against the State of Maine. Wilfred and Alice LaRochelle were killed in a car accident on December 5, 1975. The Resolve alleges that the Department of Transportation failed to properly design and maintain road and bridge, causing the accident. Limit of recovery sought: \$200,000. Legal Affairs Committee: ONTP.

1977
LD 1798
(ND of LD 1087)
Cyr Bros.
Resolves 1977,
ch. 54

RESOLVE, Authorizing Alban E. Cyr, Sr., and Cyr Brothers Meatpacking, Inc., and Cyr Food, Inc., of Caribou to Bring Civil Action Against an Agency of the State of Maine. In reliance on a letter written to him by the Commissioner of Environmental Protection in August of 1975, Cyr believed that the deadline for a pretreatment plant had been extended beyond the original deadline of October 1, 1976. He did not meet the October 1, 1976 deadline, and was required to close his plant, under threat of severe fines. As a result of the closing, Cyr suffered loss of potatoes, lost orders and broken contracts. Limit of recovery authorized: \$300,000. Judiciary Committee: OTP- ND. Outcome of litigation: Unable to locate file.

1978
LD 1912
Several Persons
Resolves 1977,
ch. 88

RESOLVE, to Appeal the Decision of State Claims Board Regarding Property Damage Claims from Collapse of Building at Northern Maine Vocational Technical Institute. Building collapse at Northern Maine Vocational Technical Institute caused damage to 2 cars. The owners submitted claims to the State Claims Board, which denied their claims by a split vote. In accordance with Title 5, §1510, the decision was appealed to the Legislature. Committee amendment added claims for damage to 3 other cars. Total compensation granted: \$4132.84. Legal Affairs Committee: OTP-A (Maj)/ONTP(Min).

1978
LD 1949
Rotolo
Resolves 1977,
ch. 59

RESOLVE, To appeal the Decision of the State Claims Board Regarding Property Damage Suffered by Phillip G. Rotolo of Portland Because of a Resident of the Maine Youth Center. Rotolo was employee of the Maine Youth Center. In the process of restraining a resident of the Center from inflicting further injury on himself, Rotolo's clothing and jewelry were damaged. The State Claims Board granted his claims, but valued the property at \$35; Rotolo claims the property was worth \$145. Rotolo appealed the decision of the Claims Board for the \$110 difference. Compensation granted: \$110. Legal Affairs Committee: OTP.

1978
LD 2025
Benner
Not Enacted

RESOLVE, Authorizing Edward E. Benner, Jr., Mable C. Benner of St. George and the Administrators of the Estate of Daniel E. Benner to Bring Civil Action against the State of Maine. Daniel Benner was killed in a car accident on February 28, 1977. His parents allege that the Lincoln County sheriff's department asked the Augusta police dispatcher to sand the road, informed them of the dangerous condition of the road and that there had already been an accident on the road, and that unless something was done the road would have to be closed. Two hours later, the accident in which Benner was killed occurred. The Benners claim that the DOT did not heed the advice, or that they did not receive the message, and that the failure to sand the road was the cause of the accident. Limit of recovery sought: \$150,000. Legal Affairs Committee: ONTP.

1978
LD 2086
Ripley
Resolves 1977,
ch. 89

RESOLVE, To Appeal the Decision of the State Claims Board Regarding Property Loss Suffered by Henry E. Ripley of Liberty Because of Theft at the Augusta Mental Health Institute. Ripley was employed as a mechanic at AMHI. Because of a shortage of funds, Ripley was asked to use his own tools on the job. On June 25, 1976, there was a break-in at AMHI and Ripley's tools were stolen. State Claims Board approved his claim, but approved reimbursement of only \$500 of the \$1,350 he sought. Ripley appealed to the Legislature for the \$850 difference. Compensation granted: \$850. Legal Affairs Committee: OTP-A.

1978
LD 2174
Mortimer/ Perkins
Resolves 1977,
ch. 87

RESOLVE, Authorizing Beverly Mortimer and Dennis Perkins to Bring Civil Action Against the State of Maine. Dennis Perkins, while in custody of the Department of Human Services, was placed in foster care in Boys Port, in Limerick, Maine. The plaintiffs contend that DHS also placed a second minor child there, knowing that the child was dangerous to others around him. On October 2, 1976, the second child poured gasoline on Dennis Perkins and ignited it, causing severe and permanent injury. Limit of recovery authorized: \$100,000. Judiciary Committee: OTP-A. Outcome of litigation: Parties apparently settled the case.

1979
LD 49
Town of Brooks
Not Enacted

RESOLVE, Directing the State to Assume the Cost of Clean-Up Operation for a Gas Spill in Brooks, Maine, Caused by Vandals. Board of Environmental Protection cleaned up gas spill caused by vandals on May 20, 1977, and billed owner of the gas station \$3,854.40 for the clean-up. Resolve seeks to have the Maine Coastal Protection Fund pay for the clean-up. Energy & Natural Resources Committee: LVWD.

1979
LD 78
Powers
Not Enacted

RESOLVE, Authorizing Arthur G. Powers to Sue the State of Maine. Powers claims to have suffered damages as a result of 3 Maine State Police officers illegally entering his home on September 26, 1969, on the basis of a faulty search warrant. Limit of recovery sought: \$100,000. Legal Affairs Committee: ONTP. See also 1977 - LD 702 and 1981 - LD 290.

1979
LD 159
Lockhart
Not Enacted

RESOLVE, Authorizing Burton L. Lockhart or his Legal Representatives to Bring Civil Action Against the State of Maine.

Juveniles on entrustment from the Maine Youth Center allegedly stole and damaged Lockhart's car. Limit of recovery sought: \$5,000. Legal Affairs Committee: ONTP.

1979
LD 506
Gray (Lyman et.al.)
Not Enacted

RESOLVE, Authorizing Lyman F. Gray, Celia M. Gray and Bernard L. Gray to Bring Civil Action Against the State of Maine.

Department of Transportation in June 1976 took piece of Grays' property containing the only water well used for domestic purposes by the Grays. Grays seek payment for the costs of digging another well. Limit of recovery sought: \$3,500. Legal Affairs Committee: LVWD.

1979
LD 678
Brann
Resolves 1979,
ch. 10

RESOLVE, Authorizing Barry A. Brann of Wilton to Bring Civil Action Against the State of Maine. Inmate at Maine State

Prison was severely injured when he fell through glass window at the prison on September 25, 1975, during a basketball game with prison employees. Employees allegedly knew that gym was unsafe because protective screens on windows had been removed for repainting. Limit of recovery sought: \$50,000. Legal Affairs Committee: OTP-A(Maj)/ONTP(Min). Outcome of litigation: Brann won \$50,000 judgment at trial.

1979
LD 1268
Curtis
Not Enacted

RESOLVE, to Reimburse Norman M. Curtis for Financial Loss Due to Legislative Oversight. 106th Legislature enacted law that, as interpreted by the Supreme Judicial Court, included Mr. Curtis in the Maine Workers' Compensation Act. The Legislature later amended the law to clearly exempt employers like Mr. Curtis. Curtis claims this was the intent of the Legislature in the original law, and that his inclusion was an oversight. He sought to sue for damages from the inclusion. Limit of recovery sought: \$26,200 in original bill; committee amendment reduced amount to \$14,760. Labor Committee: OTP-A(Maj)/ONTP(Min). Died between Houses.

1979
LD 1310
Personal Care
Boarding Home
Association, Inc.
Not Enacted

RESOLVE, Authorizing Aiden Redding,
Victorian Villa, Maplewood Lodge, Mildren
DeCoster, the Personal Care Boarding Home
Association, Inc., et al, to Bring Civil
Action Against the State of Maine.
Commissioner of Human Services on July 25,
1977, set maximum benefit rate to be paid
recipients of state income maintenance
benefits to support boarding home care.
Plaintiffs allege that the rates set are not
consistent with Commissioner's statutory
authority, and that they violate the
contracts between Commissioner and boarding
homes regarding acceptance of SSI
recipients. Limit of recovery : \$75,000 in
resolve; committee amendment raised to
\$125,000. Legal Affairs Committee:
OTP-A(Maj)/ONTP(Min). Died between Houses.

1979
LD 1836
Town of Strong
Not Enacted

RESOLVE, Authorizing the Town of Strong to
Sue the State of Maine. Town suffered
damages from erosion of stream banks,
allegedly caused by Department of
Transportation bridge construction in the
1950's. Erosion has washed out access roads
and part of cemetery. Limit of recovery
sought: none specified. Legal Affairs
Committee: LVWD.

1980
LD 1837
Coffren
Not Enacted

RESOLVE, Authorizing Larry R. Coffren of
Strong to Bring Civil Action Against the
State of Maine. Coffren suffered damage on
November 9, 1976 to trucks and other
property at his place of business in
Strong. He alleges that the damage was done
by inmates or former inmates of the Maine
State Prison or the Maine Correctional
Center while on probation, parole or bail.
Limit of recovery sought: \$50,000. Legal
Affairs Committee: LVWD. See also 1983 - LD
944.

1980
LD 1954
Bracy
Resolves 1979,
ch. 43

RESOLVE, Authorizing Ervin Grant Bracy of
Portland to Bring a Civil Action against the
State of Maine. On September 14, 1976,
Bracy lost the tip of his finger using a
unguarded table saw in the vocational shop
at Baxter School for the Deaf. Limit of
recovery authorized: \$50,000. Legal Affairs
Committee: OTP-A. Outcome of litigation:
Parties apparently settled the case.

1981
LD 290
Powers
Not Enacted

RESOLVE, Authorizing Arthur G. Powers to Sue the State of Maine. Powers suffered damages as a result of 3 Maine State Police officers allegedly entering his home on the basis of a faulty search warrant. September 26, 1969. Limit of recovery sought: \$25,000. Legal Affairs Committee: ONTP(Maj)/OTP(Min). ONTP Accepted. See also 1977 - LD 702 and 1979 - LD 78.

1981
LD 333
Pelletier
Not Enacted

RESOLVE, Authorizing Gerald Pelletier to Bring Civil Action Against the State of Maine. On July 25, 1980, Pelletier was driving across a bridge maintained by the State when a spare tire that was loaded on top of a truck crossing in the other direction struck one of the horizontal girders, fell off the truck onto the roof of Pelletier's car, and broke his neck, causing severe permanent damage. Pelletier alleges that the clearance under that horizontal girder was under 14 feet, although the sign on the bridge indicated clearance of 14 feet, 2 inches, and that this mislabelling by DOT caused the accident. Limit of recovery sought: \$3,000,000; Committee amendment lowered limit to \$300,000. Legal Affairs Committee: OTP-A. Died between Houses. See also 1983-LD 144.

1981
LD 420
McCaffrey
Not Enacted

RESOLVE, Authorizing James J. McCaffrey to Bring a Civil Action Against the State of Maine. McCaffrey alleges that he incurred legal expenses and court costs as a result of erroneous instructions from the Secretary of State to independent candidates for public office in the 1976 election. Resolve authorizes suit or right to assert claim in action now pending against McCaffrey by Secretary of State. Limit of recovery sought: \$10,000. Legal Affairs Committee: LVWD.

1981
LD 562
Levesque
Not Enacted

RESOLVE, Authorizing Thomas J. Levesque, of Guilford, Administrator of the Estate of Shelby Lynn Levesque, to Bring Civil Action against the State of Maine. Shelby Lynn Levesque committed suicide while a patient at Bangor Mental Health Institute. Thomas Levesque alleges that state employees knew or should have known that she was suicidal, and carelessly and negligently failed to take reasonable steps to prevent her injury and death. Limit of recovery sought: \$200,000. Legal Affairs Committee: ONTP.

1981
LD 614
Hodgdon
Not Enacted

RESOLVE, Authorizing Jeanette Hodgdon, Administratrix of the Estate of Kenneth R. Hodgdon, to Maintain a Civil Action Against the State of Maine. Kenneth Hodgdon was killed on June 30, 1978, when the motorcycle he was riding collided with a car at an intersection of state and state-aid highways. The intersection was redesigned at State expense after the accident. It is alleged that the town and the State knew the intersection was dangerous before the accident, but did not redesign it because they were in dispute over who was responsible for the intersection. In a suit pending against the town and the State, the court had ruled that the town was not protected by sovereign immunity, but that the state was so protected. Limit of recovery sought: \$300,000. Legal Affairs Committee: OTP. Died between Houses. See also 1985 - LD 1683.

1981
LD 818
Potvin
Not Enacted

RESOLVE, Authorizing Richard Potvin or his Legal Representative, to Bring Civil Action Against the State of Maine and the Maine State Lottery Commission. Potvin claims that the State Lottery Commission improperly conducted the "Super Drawing" on November 28, 1975, thereby denying him a fair and equal opportunity to win the "Super Drawing." He would sue for breach of warranty, breach of implied contract, breach of contract and negligence. Limit of recovery sought: \$499,000. Legal Affairs Committee: ONTP(Maj)/OTP(Min). ONTP Accepted.

1981
LD 1012
Ross
Not Enacted

RESOLVE, Authorizing Rodney W. Ross, Jr., to Bring Civil Action Against the State of Maine. Ross became a quadriplegic as a result of a car accident on a state highway on April 6, 1977. He alleges that the accident occurred because of improper design, lighting, signing and maintenance of the highway by Department of Transportation. Limit of recovery sought: None specified. Legal Affairs Committee: LVWD.

1981
LD 1344
Huber
Not Enacted

RESOLVE, Authorizing Nancy Huber to Bring Suit Against the State of Maine. Huber's children were placed in custody of the Department of Human Services custody. On July 3, 1979, DHS permitted Gregory R. Huber to visit with the children, under supervision of a DHS employee. During that visitation, Gregory Huber is alleged to have illegally taken and absconded with the children. Nancy Huber alleges that DHS employees failed to properly supervise the visitation. Resolve authorized suit against individual officials and personnel as well as the State. Limit of recovery sought: \$100,000. Legal Affairs Committee: ONTP.

1982
LD 1772
City of South Portland
Not Enacted

RESOLVE, Authorizing the City of South Portland to Bring a Civil Action Against the State. City claims that annual municipal audit by the Department of Audit on July 22, 1976 failed to detect embezzlement of \$289,300. Resolve authorized suit against officers, agents and employees as well as the State. Limit of recovery sought: \$289,300, plus interest. Committee amendment reduced limit to \$241,800, excluding interest. Legal Affairs Committee: OTP-A(Maj)/ONTP(Min). Accepted OTP-A. Died between Houses.

1982
LD 1812
Condon
Not Enacted

RESOLVE, Authorizing David Condon to Bring Suit Against the State. Condon alleges that he suffered personal injury and property damage as a result of assistance he gave to the Division of Special Investigations. Limit of recovery sought: \$35,000. Legal Affairs Committee: ONTP(Maj)/OTP-A(Min). ONTP Accepted.

1982
LD 1913
Walker
Not Enacted

RESOLVE, Authorizing Ian M. Walker to Bring Suit Against the State. Walker claims that his company, Spinney Creek Oyster Company, Inc., lost a duly granted aquaculture lease to raise oysters because the Department of Marine Resources failed to follow the Maine Administrative Procedure Act regarding adjudicatory proceedings. Limit of recovery sought: \$300,000. Legal Affairs Committee: ONTP.

1983
LD 144
Pelletier
Resolves 1983,
ch. 42

RESOLVE, Authorizing Gerald Pelletier to Bring Civil Action Against the State of Maine. On July 25, 1980, Pelletier was driving across a bridge maintained by the State when a spare tire that was loaded on top of a truck crossing in the other direction struck one of the horizontal girders, fell off the truck onto the roof of Pelletier's car, and broke his neck, causing severe permanent damage. Pelletier alleges that the clearance under that horizontal girder was under 14 feet, although the sign on the bridge indicated clearance of 14 feet, 2 inches, and that this mislabelling by the Department of Transportation caused the accident. Limit of recovery: \$3,000,000 sought; Committee amendment lowered limit to \$300,000. Legal Affairs Committee: OTP-A(Maj)/ONTP(Min). Outcome of litigation: Parties apparently settled the case. See also 1981 - LD 333.

1983
LD 401
Clark
Not Enacted

RESOLVE, Authorizing Melanie Ann Clark, or her Legal Representative, to Bring Civil Action Against the State of Maine. Clark was a passenger in a car that was involved in a high-speed chase with Maine State Police. The car crashed and Clark was injured. Limit of recovery sought: \$50,000. Legal Affairs Committee: ONTP.

1983
LD 944
Coffren
Not Enacted

RESOLVE, Authorizing Larry R. Coffren of Strong to Bring Civil Action Against the State of Maine. Coffren suffered damage on November 9, 1976 to trucks and other property at his place of business in Strong. He alleges that the damage was done by inmates or former inmates of the Maine State Prison or the Maine Correctional Center while on probation, parole or bail. Limit of recovery sought: \$50,000. Legal Affairs Committee: ONTP(Maj)/OTP(Min). ONTP Accepted. See also 1980-LD 1837.

1983
LD 992
McDaniel
Not Enacted

RESOLVE, to Reimburse David James McDaniel for Damages Suffered as a Result of Wrongful Imprisonment. McDaniel served 26 months in prison for assault and battery, but was pardoned when another person confessed to the crime. The Resolve seeks \$100,000 for damages from wrongful imprisonment. Judiciary Committee: ONTP(Maj)/OTP(Min). The bill was amended on the floor to establish a cause of action for wrongful imprisonment. See also 1985 - LD 185.

1984
LD 2226
Bellmore
Not Enacted

RESOLVE, Reimbursing Jeffrey Bellmore of Waldoboro for Damages Caused by Actions of a State Ward. Bellmore suffered damages to his car, which was being operated by a minor who was a ward of the State. The Resolve seeks \$2,500 in damages. Legal Affairs Committee: LVWD.

1985
LD 185
McDaniel
Not Enacted

RESOLVE, to Reimburse David James McDaniel for Damages Suffered as a Result of Wrongful Imprisonment. McDaniel served 26 months in prison for assault and battery, but was pardoned when another person confessed to committing the crime. The Resolve seeks \$100,000 as settlement of claims for damages from his wrongful imprisonment. Appropriations Committee: LVWD. See also 1983 - LD 992.

1985
LD 1368
Huff
Resolves 1985,
ch. 50

RESOLVE, Authorizing Clayton, Maryann, Jeremy and Elizabeth Huff to Bring Civil Action Against the State and Cumberland County. Maryann Huff was attacked and stabbed by Jon A. Brown, an inmate at the Maine State Prison. Brown was in prison on a conviction for gross sexual assault; while in prison, he had been convicted of assault and trafficking. Brown was given a furlough, but did not return when the furlough ended. He attacked Maryann Huff while he was an escapee of the prison. The Resolve alleges that the State was negligent in giving Brown a furlough, in failing to notify the public of his escape, in failing to transport or retrieve Brown when notified of his impending escapee status, and in supervising Brown in an improper and negligent manner. Limit of recovery authorized: \$300,000. Legal Affairs Committee: OTP. Outcome of litigation: Verdict in favor of the State.

1985
LD 1683
Brown
Not Enacted

RESOLVE, Authorizing Jeanette Hodgdon Brown, Administratrix of the Estate of Kenneth R. Hodgdon, to Recover Judgment Entered in Her Favor Against the State in Lincoln County Superior Court. Kenneth Hodgdon was killed on June 30, 1978, when the motorcycle he was riding collided with a car at an intersection of state and state-aid highways. The intersection was redesigned at State expense after the accident. It is alleged that the town and the State knew the intersection was dangerous before the accident, but did not redesign it because they were in dispute over who was responsible for the intersection.

Brown sued the State and the town. Although the State raised the issue of sovereign immunity several times during the trial, the issue was decided against the State during the trial. The jury found the State 60% responsible and the other driver 40% responsible for the action. The State's portion of the jury's verdict was \$121,500. The State appealed the ruling on immunity to the Law Court, and the Law Court ruled in the State's favor. This resolve seeks recovery of \$121,500 notwithstanding immunity. Limit of recovery sought: \$121,500. Judiciary Committee: ONTP(Maj)/OTP(Min). ONTP Accepted. See also 1981 - LD 614.

1986
LD 1940
Warren
Resolves 1985,
ch. 87

RESOLVE, in Favor of Edgar Warren of Portland, for Injuries Received While He was a Ward of the State. Warren severed his left forearm in an accident in 1941 while he was a ward of the state. He alleges that he was improperly trained for the job he was performing at the time of the accident. Resolve sought authority to sue for up to \$150,000; floor amendment turned Resolve into one authorizing payment of \$10,000. Legal Affairs Committee: OTP.

1986
LD 2376
(ND of LD 2238)
Taylor
Resolves 1985,
ch. 84

RESOLVE, to Compensate John P. Taylor of Augusta, as Personal Representative of the Estate of Sharon Taylor, also of Augusta. Fifteen-year old Sharon Taylor was stabbed to death on March 23, 1985 by Paul Addington, an AMHI patient who was out on an unsupervised leave. Addington had been committed to AMHI 11 years earlier after pleading not guilty by reason of insanity to 3 previous attacks on women. Taylor's father alleges that the State's negligence with respect to Addington was the proximate cause of Sharon's death. Resolve originally authorized suit for a limit of \$500,000; Committee amendment instead granted compensation of \$200,000 (\$25,000 cash; \$50,000 in annuity to pay \$175,000). Legal Affairs Committee: OTP-ND.

1987
LD 453
Clavette
Not Enacted

RESOLVE, to Permit Lucille A. Clavette, Personal Representative of the Estate of Richard J. Clavette, to Sue the State for Wrongful Death. Richard J. Clavette, a resident of the Pineland Center, wandered off the premises on the morning of Friday, February 21 and apparently died that night. Lucille Clavette, his mother, alleges that the Center's negligence caused her son's death. An inquiry panel appointed by the Commissioner of Mental Health and Mental Retardation apparently found the following faults with the search effort for Clavette: that there were major system failures and serious errors in judgment; substantive problems regarding administrative leadership and continuity of command; that communications broke down on several levels during the search; that the Center's own missing or lost resident policy was not followed; and that the Clavette family was not well served during the stressful time. The panel recommended dismissal, demotion, suspension and reprimand of several of the employees involved. Limit of recovery sought: \$65,000. State and Local Government Committee: LVWD.

1987
LD 638
Duthie
Resolves 1987,
ch. 45

RESOLVE, Compensation to Sharon Trafton Duthie for Damage to her Car Caused by an Escapee. On September 6, 1986, Duthie's care was stolen by an escapee of the Charleston Correctional Center. The car was damaged in a roadblock set up by the Maine State Police. Compensation granted: \$786.58. Legal Affairs Committee: OTP-A(Maj)/ONTP(Min).

1987
LD 1157
Doiron
Not Enacted

RESOLVE, Authorizing Floris Doiron of Auburn to Bring a Civil Action Against the State of Maine. Doiron suffered injuries in a car accident allegedly caused by the improper placement by DOT of a stop sign at the intersection of Routes 117 and 219 in Turner. Limit of recovery sought: \$500,000. Legal Affairs Committee: LVWD.

1987
LD 1323
Kane
Not Enacted

RESOLVE, Authorizing Richard W. Kane or his Legal Representative to Bring a Civil Action Against the State. Richard W. Kane alleges that he was inequitably treated by the State and that the result of this inequitable treatment is that he was denied the opportunity to engage in his business. Kane built, then was required to tear down, a water slide because the state refused to issue an amusement license because no liability insurance was available. He was allegedly told by the State to obtain insurance, and received no help from the State when he was unable to find a carrier to provide him with insurance. He alleges that the State has granted allowances to others that he was not granted. Limit of recovery sought: none specified. Legal Affairs Committee: LVWD.

1987
LD 1570
(ND of LD 519)
Huard
Resolves 1987,
ch. 70

RESOLVE, To Permit Reginald and Alice Huard to Sue the State for Compensation for Losses Claimed to have been Suffered as a Result of Claims of Child Abuse Instituted by the State. Huards were accused of child abuse, charges which were investigated, but did not result in convictions. They claim that they were required to close a nursery school they operated, that they lost their livelihoods as nursery school and prekindergarten teachers as a result of the charges, and that they incurred legal expenses to defend against the claims and medical expenses for the emotional trauma they suffered. The Resolve specifies that this does not constitute waiver for Federal Civil Rights Act suits under 42 USC §1983. Limit of recovery: \$150,000 sought; committee amendment reduced to \$75,000. Legal Affairs Committee: OTP-ND. Outcome of litigation: Parties settled the case.

1987
LD 1657
(ND of LD 1136)
Caron
Resolves 1987,
ch. 48

RESOLVE, To Compensate Jacqueline A. Caron, Personal Representative of the Estate of Alphee Caron, for Wrongful Death and for Personal Injuries on Behalf of Herself and her Minor Child, Jeffrey Caron, in Excess of Statutory Limits of Recovery. Alphee Caron was killed when a rock fell onto his car from an improperly loaded truck owned and operated by the DOT. Resolve seeks \$75,000 lump sum in addition to insurance settlement already received by Caron. Compensation granted: \$75,000 plus 4 years' tuition waiver at State post-secondary institution. Legal Affairs Committee: OTP-ND.

1987
LD 1687
(ND of LD 458)
Gammon
Resolves 1987;
ch. 46

RESOLVE, Authorizing Dorothy Gammon to Bring Civil Action Against the State and Cumberland County. Dorothy Gammon was beaten and raped on September 20, 1986 by Dwayne A. Lakin, who was in State prison custody to serve a sentence for burglary and theft. Lakin had begun serving his sentence in the State Prison in Thomaston, but was transferred to the Cumberland County Jail. Because of overcrowding at the county jail, he was then transferred to the Portland public safety building. He was allegedly allowed to leave the lockup for a short while, and during that time he attacked Gammon. Gammon alleges that the county knew of Lakin's dangerous propensities, and that he had escaped from prison in the past. She also alleges injury from the fact that she feared for her safety for a longer period of time than necessary because the police did not tell her immediately that Lakin had been apprehended, and that the manner in which he was returned to Maine caused her further emotional injury (the county sheriff drove to Florida with Lakin's girlfriend to pick him up). Resolve authorized suit against employees as well as the State and County. Limit of recovery: \$300,000 sought; floor amendment reduced recovery to \$50,000. Legal Affairs Committee: OTP-ND. Outcome of litigation: County settled with Ms. Gammon; Action against State was dismissed.

1988
LD 2250
Demuth
Resolves 1987,
ch. 108

RESOLVE, to Compensate Kenneth and Janice Demuth. Kenneth Demuth was shot in the face while attempting to talk a neighbor into giving himself up to police. The neighbor had been shooting at passersby, and the police requested Demuth's assistance. The Demuth's allege that the State was negligent in failing to take steps to protect Demuth. Original Resolve authorized suit against the State with a limit of \$300,000; Amendment provided for compensation of \$125,000. Legal Affairs Committee: OTP-A.

1988
LD 2272
Kelly
Not Enacted

RESOLVE, Authorizing Gary Kelly, Daniel Kelly and the Estate of Cynthia Kelly to Sue the State for Compensation for Wrongful Death and Other Injuries Suffered as a Result of a Motor Vehicle Collision. Cynthia Kelly was killed and Gary and Daniel Kelly injured on January 19, 1987, when the car Kelly was driving hit a ridge in a state highway, went out of control, and crossed the lane into oncoming traffic. Kelly alleges that the State was negligent in allowing the ridge to exist, and in plowing the road off-center so that what appeared to be the course of travel led directly into the ridge. Limit of recovery sought: \$300,000. Legal Affairs Committee: ONTP.

1988
LD 2354
Tweedie
Not Enacted

RESOLVE, Authorizing Barry B. Tweedie to Bring Suit Against the State and the Town of Durham. Tweedie became a quadriplegic when his car left the road and hit a utility pole. He alleges that the maintenance and placement of the utility pole were negligent. Limit of recovery sought: \$1,000,000 or higher insurance limits. Legal Affairs Committee: ONTP.

1988
LD 2406
Hayes Shorey
Not Enacted

RESOLVE, to Permit Christie L. Hayes and Richard E. Shorey, Jr. to Sue the State for Compensation for Personal Injuries Resulting from Negligence on the Part of the Department of Transportation. Hayes and Shorey were injured in an automobile accident apparently due to an ice patch on a state highway. They claim the ice conditions have existed on that road since the road was rebuilt by DOT in 1957. Limit of recovery sought: \$1,000,000 for each. Legal Affairs Committee: ONTP.

1988
LD 2540
Batzell
Not Enacted

RESOLVE, to Allow Joel Batzell of West Farmington to Bring Civil Action Against the State of Maine. Batzell, who had been involuntarily committed to AMHI, was injured in an automobile accident while attempting to elude police after an alleged high speed chase. Batzell claims to have suffered emotional pain and suffering and a loss of business due to adverse publicity. He claims that the negligence of the hospital and the police caused these damages. Limit of recovery sought: \$3,000,000. Legal Affairs Committee: ONTP.

1988
LD 1829
Dishon
Not Enacted

RESOLVE, Authorizing Alton Dishon to Bring Civil Action Against the Maine State Retirement System. Dishon claims that he lost retirement benefits as a result of misrepresentation by agents of the Maine State Retirement System. He claims damages for lost benefits and future benefits. Limit of recovery sought: \$50,000. Legal Affairs Committee: ONTP.

1989
LD 75
Gray (Lorraine)
Resolves 1989,
ch. 56

RESOLVE, Authorizing Lorraine Gray to Sue the State for Compensation for Losses Allegedly Suffered as a Result of Claims of Child Abuse Instituted by the State. Gray claims to have suffered damages as a result of allegedly erroneous claims of child abuse and as a result of the Department of Human Services' removal of her child from her home. The original Resolve authorized suit against past and present employees of DHS as well as the State; the committee amendment deleted authorization to sue employees. Limit of recovery: \$500,000 sought; \$75,000 authorized in amendment. Legal Affairs Committee: OTP-A. Outcome of litigation: Verdict for the State.

1989
LD 284
Harvath
Not Enacted

RESOLVE, to Allow Rickie Harvath of Blaine to Bring Civil Action Against the State of Maine. State Police obtained a search warrant as a result of an anonymous tip, searched Harvath's home, and found marijuana and illegal moose meat. Harvath apparently claims that the officer who filed the affidavit gave false information. Limit of recovery sought: \$118,000. Legal Affairs Committee: ONTP.

1989
LD 378
Thompson
Resolves 1989,
ch. 57

RESOLVE, Granting Compensation to Oscar and Wendalyn Rae Thompson for Damage to Their Car Caused by a Foster Child in Their Care. A foster child in the Thompson's care took their car without authorization and damaged it. The original Resolve authorized suit against the State with a limit of \$3,000; the committee amendment provides for compensation of \$1,999. Legal Affairs Committee: OTP-A.

1989
LD 882
Tufts
Not Enacted

RESOLVE, Authorizing Christine R. Tufts, formerly Christine Willey, to Maintain an Action Against the State, York County and Town of Kennebunk. After being arrested, bailed and released from York County Jail (for assault?), Gary Willey returned home and assaulted Christine Tufts, his former wife (for a second time?). Tufts alleges that Kennebunk law enforcement personnel should have informed the York County Jail of Willey's past criminal history, which included domestic disturbances against Tufts. She alleges negligence of the State, York County and Town of Kennebunk in "failing to protect, prevent and notify requisite parties of the prior criminal history of Gary Willey." Limit of recovery sought: none specified. Legal Affairs Committee: LVWD.

1989
LD 965
Dreher
Not Enacted

RESOLVE, Authorizing Brian Dreher of North Whitefield to Bring a Civil Action Against the State. Dreher struck a DOT snowplow that was stuck in snow and partially projecting into the lane in which Dreher's vehicle was travelling. Dreher alleges that there were no warning flashers or other signals indicating the disabled status of the plow. Limit of recovery sought: \$2,000. Legal Affairs Committee: LVWD.

1990
LD 1821
Gray (Robert)
Not Enacted

RESOLVE, Authorizing Robert L. Gray to Bring a Civil Action Against the State of Maine. Gray claims to have suffered damages as a result of allegedly erroneous claims of child abuse. The Resolve alleges that the actions of DHS caused him damage, but DHS claims they were not involved in the case because the children involved were not members of Gray's family. Limit of recovery sought: \$300,000. Legal Affairs Committee: LVWD. See also 1991 - LD 144.

1990
LD 1850
Pineo
Not Enacted

RESOLVE, Authorizing Robert Pineo of Old Orchard Beach to Bring a Civil Action Against the State and the Department of Corrections. Pineo was a prisoner at the Maine Correctional Center in Windham. When he entered the prison, he told prison employees that he had Crohn's disease. He claims that he was not given proper medical treatment or diet and, as a result, was required to undergo extensive and repeated surgical procedures. Pineo was also suing the prison physician, who worked on an independent contractor basis. Limit of recovery sought: \$500,000, plus medical expenses. Legal Affairs Committee: ONTP.

1990
LD 1906
Wolley
Not Enacted

RESOLVE, Authorizing Philip Wolley of Searsport to Bring Suit Against the State of Maine. In April of 1984, Wolley was accused of misappropriation of funds and discharged from his position with the State Lottery Commission. The charges were later dismissed due to insufficient evidence. Wolley seeks recovery for legal expenses and mental and emotional injuries as a result of the charges. Limit of recovery sought: \$100,000. Legal Affairs Committee: ONTP. See also 1991 - LD 238.

1990
LD 1954
Wright
Not Enacted

RESOLVE, Authorizing Douglas Wright to Bring a Civil Action Against the State for Damages he Sustained as a Result of the Investigation, Prosecution and Trial for Unlawful Sexual Contact. Wright claims to have suffered mental and emotional distress, loss of earnings and legal fees as a result of the State's negligence in investigating and prosecuting him for unlawful sexual contact. He was acquitted of the charges on October 5, 1989. Limit of recovery sought: none specified. Legal Affairs Committee: LVWD.

1990
LD 2095
Gray (Tyron)
Not Enacted

RESOLVE, to Allow Tyron Gray to Sue the State. Gray served as a drug agent and informant for the Maine State Police. He alleges that the Police failed to keep its promises and agreements to protect and support his family during the time he was serving in that capacity and thereafter. He claims to have suffered financial losses, including costs to relocate and reestablish his family. He also seeks punitive damages. Limit of recovery sought: none specified. Legal Affairs Committee: ONTP.

1990
LD 2449
Haines
Not Enacted

RESOLVE, Authorizing Rommy Haines to Present a Claim for 3rd-party Damages to a Board of Arbitration a 2nd Time. Haines claims to be entitled to 3rd party damages for damages suffered as a result of an oil discharge, and claims that the Board of Arbitration decision on that issue was incorrect. Legal Affairs Committee: LVWD.

1990
LD 2452
Alna Store, Inc.
Not Enacted

RESOLVE, Authorizing the Alna Store, Incorporated and Its Proprietors to Sue the State. The store allegedly suffered damages as a result of a DEP order to remove underground oil tanks 5 years before they were legally required to do so. They claim loss of earnings during time of removal. Limit of recovery sought: \$75,000. Legal Affairs Committee: LVWD.

1991
LD 24
Tamecki
Not Enacted

RESOLVE, Authorizing Mark Tamecki to Bring A Civil Action Against the State. Tamecki says that he overpaid for a 1979 model truck and incurred higher insurance and excise tax payments because of a clerical error in motor vehicle title records. Limit of recovery sought: \$75,000. Legal Affairs Committee: ONTP.

1991
LD 144
Gray (Robert)
Not Enacted

RESOLVE, Authorizing Robert L. Gray to Bring a Civil Action Against the State. Gray claims to have suffered damages as a result of erroneous claims of child abuse. Gray alleges bias, coercion, collusion in the investigation and prosecution of his case. Limit of recovery sought: \$50,000. Legal Affairs Committee: ONTP. See also 1990 - LD 1821.

1991
LD 147
Wiegler
Not Enacted

RESOLVE, Authorizing Paul Wiegler to Bring a Civil Action Against the State. Margaret Davidson committed suicide at AMHI on September 5, 1989, allegedly due to the negligence of state employees in not properly safeguarding her. The parties apparently came to a settlement of the claims outside the legislative process. Limit of recovery sought: \$75,000. Legal Affairs Committee: ONTP.

1991
LD 238
Wolley
Not Enacted

RESOLVE, to Reimburse Philip Wolley for Litigation Expenses Incurred in Connection with his Termination and Reinstatement as a State Employee. Wolley was terminated and subsequently reinstated in his job at the State Lottery Commission. He seeks reimbursement for legal fees and other costs of that action. Compensation sought: \$15,200. Legal Affairs Committee: ONTP. See also 1990 - LD 1906.

1991
LD 411
Slotsky
Not Enacted

RESOLVE, Authorizing Arthur Slotsky to Bring a Civil Action Against the State. The Slotsky's car was damaged when used by a ward of the State. Limit of recovery sought: none specified. Legal Affairs Committee: ONTP.

1991
LD 413
Boone
Not Enacted

RESOLVE, Authorizing David Boone to Bring a Civil Action Against the State of Maine. Boone was dismissed from the Criminal Justice Academy after being investigated for cheating on a test. He claims that he was not cheating, and that the Academy's method of handling the allegation was negligent and harmful. He claims that the Academy failed to follow its own Disciplinary Code; that the policy of advising the town that employs the trainee before a full investigation is harmful; that the Academy defamed him; and that the investigation was negligent. Limit of recovery: none specified. Legal Affairs Committee: ONTP. See also 1992 - LD 2122 (Resolve to sue Town).

1991
LD 950
Maynard/ Briggs
Not Enacted

RESOLVE, Authorizing Kathleen Maynard and Howard Briggs to Sue the State. Jessica Lee Briggs escaped from the Maine Youth Center and was murdered. Maynard and Briggs allege that the Center was negligent in failing to maintain control and custody of her as required by law. There were also allegations that an employee at the Center was personally involved with her, and that employees knew where they could locate her after she escaped but failed to do so. Limit of recovery sought: \$1,000,000. Legal Affairs Committee: ONTP.

1991
LD 951
Leighton/
Nilsen
Not Enacted

RESOLVE, Authorizing Sara Leighton, Peter Nilsen and Linda Nilsen to Bring a Civil Action Against the Town of Casco. On October 16, 1985, Colleen Nilsen was injured in a fall at school in Casco, while a portion of the school was under construction. The original Resolve authorized suit against the State, SAD #61, and their employees. The committee amendment declared SAD #61 legally obligated to pay for Colleen's medical and dental expenses, or provided for suit against the SAD if the SAD could not or did not pay the expenses by a certain date. Limit of recovery: \$300,000 in Original Resolve; \$10,000 in amendment. Legal Affairs Committee: OTP-A. Indefinitely Postponed.

1991
LD 962
Kierstead
Not Enacted

RESOLVE, to Allow Scott Kierstead and Don Kierstead, Who are a Partnership Farming Operation Located in Presque Isle, Known as Kierstead Farm, to Bring a Civil Action Against the State. Kiersteads claim to have suffered economic loss as a result of negligence of the Department of Agriculture, Food and Rural Resources in inspecting and analyzing potatoes. Limit of recovery sought: none specified. Legal Affairs Committee: ONTP.

1991
LD 981
Sweck
Not Enacted

RESOLVE, Authorizing Peter K. Sweck of Columbia Falls to Bring a Civil Action Against the State. Sweck claims recovery for damage by deer to his blueberry field. Limit of recovery sought: \$75,000. Legal Affairs Committee: ONTP.

1991
LD 1076
LaTourneau
Not Enacted

RESOLVE, Authorizing Pamela LaTourneau, as Personal Representative of the Estate of Richard LaTourneau, III, and Pamela LaTourneau and Richard Latourneau, Jr. to Bring Civil Action Against the State. Richard LaTourneau, III, died as a result of injuries inflicted by his foster mother, who was later convicted of assault. The LaTourneaus allege that DHS was negligent in placing the child in the foster home and in failing to properly supervise the foster home placement. Limit of recovery sought: \$500,000. Legal Affairs Committee: ONTP.

1991
LD 1237
Bruno
Not Enacted

RESOLVE, to Allow Martin L. Bruno to Bring Suit Against the City of Lewiston and its Employees. Bruno was injured when a police car involved in a high speed chase with a third car hit his car. The city's insurance company began making payments to Bruno but stopped when the period for giving notice of suit under the Maine Tort Claims Act had expired. Limit of recovery sought: \$300,000. Legal Affairs Committee: ONTP.

(PL 1991, c. 460 provides that reliance on an insurance company's implied promise to cover losses is good cause for failure to comply with the 180-day notice requirement in the MTCA).

1991
LD 1281
Desgrosseilliers
Not Enacted

RESOLVE, Authorizing Harvey and Rachel Desgrosseilliers to Sue the City of Auburn. The Desgrosseilliers relied on alleged misrepresentations of town zoning officials, and made investments in a nursery business that was later declared to violate the zoning ordinance. Limit of recovery sought: none specified. Legal Affairs Committee: ONTP.

1992
LD 2001
Rudge
Not Enacted

RESOLVE, Authorizing Zelma Rudge to Sue the State. Victor Lizotte was abducted at gunpoint and killed by his grandfather George Lizotte during a visitation supervised by DHS. George had custody of Victor, but DHS had removed Victor from George's home while it was investigating allegations that George was abusing Victor. Limit of recovery sought: \$250,000. Legal Affairs Committee: ONTP.

1992
LD 2054
Penney
Not Enacted

RESOLVE, Authorizing Elizabeth Penney to Sue the State. Penney was injured in a fall at Fort Knox Historic Site. Limit of recovery sought: \$10,000. Legal Affairs Committee: ONTP.

1992
LD 2058
Bubar/
Helstrom
Not Enacted

RESOLVE, Authorizing Fred Bubar, Thomas Bubar, Clifford Bubar, Galen Helstrom, Gary Helstrom and Gene Helstrom to Sue the State. The parties claim to have suffered damages as a result of negligence of the Department of Agriculture, Food and Rural Resources in the process of inspecting and analyzing potatoes. Limit of recovery sought: none specified. Legal Affairs Committee: ONTP.

1992
LD 2122
Boone
Not Enacted

RESOLVE, Authorizing David Boone to Bring a
Civil Action Against the Town of Princeton.
Boone was accused of cheating at the Maine
Criminal Justice Academy, and was eventually
fired from his position on the police force
in Princeton. Limit of recovery sought:
None specified. Legal Affairs Committee:
LVWD. See also 1991 - LD 413 (Resolve to
sue the State).

APPENDIX G

**Letter from Michael E. Carpenter, Attorney General
to the Joint Standing Committee on Legal Affairs**

MICHAEL E. CARPENTER
ATTORNEY GENERAL



STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
STATE HOUSE STATION 6
AUGUSTA, MAINE 04333

February 13, 1991

The Honorable Jeffrey N. Mills
Maine State Senate
Chair, Joint Standing Committee on
Legal Affairs
Station #3
Augusta, Maine 04333

The Honorable Mark W. Lawrence
Maine House of Representatives
Chair, Joint Standing Committee on
Legal Affairs
Station #2
Augusta, Maine 04333

Re: Private Resolves Authorizing Suits
Against the State of Maine

Dear Senator Mills and Representative Lawrence:

I am writing to you in your capacity as co-chairs of the Joint Standing Committee on Legal Affairs concerning what appears to be a continuing and increasing trend in the submission of private resolves authorizing individuals to sue the State of Maine. This Office is troubled by this apparent trend and believes that the use of private resolves authorizing individuals to sue the State of Maine raises very serious policy and legal issues. Members of my office will appear before your Committee to express these concerns, with respect to individual bills.

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Some of these private resolves include individuals who were unsuccessfully prosecuted for criminal conduct. We are concerned that permitting such individuals to commence suits against the State of Maine will send the wrong message to prosecutors. Prosecutors, both in this office and throughout the various district attorneys offices, are charged with the responsibility of exercising their prosecutorial judgment in deciding whether or not to pursue criminal charges. That judgment should be totally uninfluenced by the possibility that the State will be sued for monetary damages in a civil action if the prosecution is unsuccessful. Prosecutors should not be deterred from bringing charges simply to avoid the possibility of civil lawsuits. Moreover, at least with respect to murder and Class A, B and C crimes, charges can only be brought if the grand jury finds probable cause. Nevertheless, whenever a criminal charge is brought, there is always the possibility of dismissal, either prior to or during trial, or ultimate acquittal. The fact that an individual is not successfully prosecuted does not mean that he was improperly charged in the first place.

It is because prosecutors ought to exercise their independent judgment that the Maine Tort Claims Act, as well as the United States Supreme Court in the context of lawsuits under 42 U.S.C. § 1983, has firmly recognized the applicability of absolute prosecutorial immunity. Specifically, the Maine Tort Claims Act, Section 8104-B(4), embodies a legislative policy that decisions ultimately connected with the prosecutorial function are immunized from subsequent civil liability. This policy was made express in the 1987 amendments to the Tort Claims Act. In the absence of such immunity, prosecutors will have an incentive not to bring charges unless they are virtually certain of obtaining a conviction. This will mean that even in the case of serious crimes where the prosecutor has reasonable grounds to believe that a defendant is guilty and where there appears to be sufficient evidence to obtain a conviction, charges may not be brought if the case presents any difficulties or if there is a possibility that the jury might not find that the prosecution has been able to prove its case beyond a reasonable doubt.

These concerns also apply in situations that do not involve the bringing of criminal charges but do involve governmental officials exercising discretionary judgments. Both the State and its officials are provided with absolute immunity under the Maine Tort Claims Act for exercising discretionary functions.

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The rationale for this immunity is that the State wants its officials to exercise independent judgment. As the Supreme Court has recognized, not only do lawsuits against governmental officials have significant social costs, including the expenses of litigation and the diversion of official energy from other public issues, but there is also the danger that fear of being sued will affect the ability and/or desire of governmental officers to exercise independent judgment.

The Maine Tort Claims Act is a comprehensive and general piece of legislation which was intended to identify those areas where the State and its officials may be liable and those areas where, as a matter of public policy, the right and ability of the individual to sue for money damages is outweighed by the importance of the public interest in having its public officials exercise independent judgment. Our concern is that once private resolves are introduced, these policy concerns may be forgotten and the focus of inquiry becomes solely whether it is possible that the State made an erroneous decision in a given case.

A second concern is that the use of private resolves authorizing individuals to sue the State of Maine poses a significant risk of being unconstitutional as special legislation in violation of the so-called "Special Legislation Clause" of the Maine Constitution, as well as the Equal Protection Clauses of both the Maine and United States Constitutions.

The Special Legislation Clause (Art. IV, Pt. 3, § 13) provides that the Legislature shall from time-to-time provide "as far as practicable, by general laws, for all matters usually pertaining to special or private legislation." The Supreme Judicial Court sitting as the Law Court has indicated that this constitutional provision requires that general legislation be used "as far as practicable," and that special legislation is unconstitutional where its objects can be readily obtained by general legislation. See e.g., Brann v. State, 424 A.2d 699, 704 (Me. 1981); Nadeau v. State, 395 A.2d 107, 112 (Me. 1978).

In virtually all of the private resolves we have seen, general legislation could have been enacted to permit all individuals similarly situated to sue the State of Maine. In other words, there were no unique circumstances which made general legislation impractical. Not every person who has been damaged by governmental action knows enough to seek special legislation, and many private resolves are ultimately withdrawn

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or defeated. The result of this is that only a select few individuals are permitted to sue the State of Maine when general legislation could be enacted to permit an entire class of similarly situated individuals to sue the State of Maine. By way of example only, general legislation could be enacted permitting individuals who have been unsuccessfully prosecuted for criminal conduct to sue the State of Maine. We would strongly oppose such a course as a policy matter, as it would create a serious disincentive to law enforcement. For purposes of the special legislation clause, however, we believe it is hard to justify a situation where a few individuals who believe themselves to have been wrongfully prosecuted are permitted to sue the State while the vast majority of persons who have been unsuccessfully prosecuted by the State remain under the bar of sovereign immunity.

We are sending a copy of this letter to the Co-Chairs of the Joint Standing Committee on the Judiciary because that Committee has been involved over the past several years in enacting various amendments to the Maine Tort Claims Act and has necessarily had to consider the question of identifying those areas where individuals should be allowed to sue the State of Maine and those areas where the public's interest in immunity outweighs the individual's right to seek to impose liability on the State. Because the increasing use of private resolves could essentially amount to a piece-meal repeal of important provisions of the Maine Tort Claims Act, we believe that efforts to permit such suits should proceed hand-in-hand with an analysis of the provisions of the Maine Tort Claims Act. This is particularly true because most of the governmental actions as to which private resolves are directed are the kind of actions that only are taken by governments. For instance, private parties do not bring criminal prosecutions. As a result, if a private resolve is enacted based on an unsuccessful criminal prosecution, it is not clear which of the tort rules derived from suits between private parties should apply.

In sum, we have two concerns about the increasing number of private resolves authorizing suits against the State. The first is that many of these resolves seek to abrogate -- for purposes of the specific cases involved -- policy-based immunities such as prosecutorial immunity and discretionary immunity which have a sound basis in law, as demonstrated by their inclusion in the Maine Tort Claims Act. The second concern is that such resolves, if enacted, run a serious risk of violating the special legislation clause because they waive sovereign immunity for a few selected individuals while

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retaining such immunity for all similarly situated citizens.
This is true even in those cases where no policy-based
immunities are involved.

The concerns expressed in this letter are general in nature
and apply to the use of private resolves generally. In
particular cases, members of our office may appear before your
Committee to address the merits of any particular situation.

We hope that the information contained in this letter may
be helpful to you and the members of your Committee as you
study the various private resolve bills that have been referred
to the Joint Standing Committee on Legal Affairs. Please do
not hesitate to contact this office if you have any questions
or if we can be of any assistance.

Sincerely,



MICHAEL E. CARPENTER
Attorney General

MEC:sae

cc: The Honorable N. Paul Gauvreau
The Honorable Patrick E. Paradis

APPENDIX H

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