

# MAINE STATE LEGISLATURE

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**LEGISLATIVE RECORD**  
OF THE  
**One Hundred And Fourteenth Legislature**  
OF THE  
**State Of Maine**

**VOLUME II**

**FIRST REGULAR SESSION**

May 10, 1989 to June 14, 1989

bit of the effect of collective bargaining. When you go to the table, the thing you have on your mind is knowing that you are going to lose your job if you do elect to strike and knowing that out on the street there are replacement workers that are going to be taking your job. It takes away the bargaining process.

I hope today when you vote you will vote with the good Representative from Madawaska on this bill.

The SPEAKER: The Chair recognizes the Representative from Jay, Representative Pineau.

Representative PINEAU: Mr. Speaker, Ladies and Gentlemen of the House: The bill before you is an important one. Those of you who were here last time saw measures like it. Since January, all I have heard is, we don't want another Jay. Well, I beg to differ, Jay is a good community that was taken advantage of.

I am not going to talk about the multibillion dollar corporation strategy of taking Maine workers and throwing them in the street. I am not going to talk to you about the Maine workers who won't talk to their brothers or the fathers who won't talk to their sons because of a strategy.

What I am going to talk to you about is what we discussed in the Labor Committee on other issues. The people on the coast, the people up in the county, the people in southern Maine, the Mainer's who paid for International Paper's decision to throw Mainer's in the street. The administration's own Department of Labor has a figure of over \$423,000 which had to be put in for retraining the Maine workers of Jay and the surrounding towns, almost half a million dollars because of a company's decision to throw their workers away.

The Unemployment Fund which we heard all through this session in the Labor Committee, how small businesses are affected by any major decision on the trust fund, the Employment Security Commission, over \$3,300,000 was taken out of that fund to help feed the families of Jay, Livermore Falls, Farmington, Wilton, Athens, Wayne, Augusta, and the Lewiston/Auburn areas. That fund was depleted because of International Paper's decision and also because the State of Maine failed to send a message. An additional \$1,970,000 plus funds were paid in dislocated worker benefits.

Ladies and gentlemen, representatives of people from the coast, the county -- couldn't your people have used those funds better? Couldn't a decision have been made to protect those funds and use those funds in the training? It scares me what the state did over the last couple of years. The loggers, the fishermen, the small business owners all helped pay to replace these funds, funds that weren't intended for a dislocated work force because of the strategy of a multi-national corporation. These companies have the money, they have the funds to hire who they want at what cost they want. They have spent over a million dollars (the company did) in housing extra security and transporting them to the mill site.

You have been handed an advertisement in an April, 1989 issue of Pulp and Paper. It says, before you get a piece of his mind, I want you to look at the face of that gentleman, all he is is a regular Mainer. You can smirk, you can smile, but that is all he is. I don't think he is somebody to be feared.

Yes, I want the yeas and nays taken because I want the people of this House to think of the people that work for a living in this state. I want to send out a message to every giant employer that wants to use and abuse our people and that Maine cherishes its working sons and daughters and we want them to know where we stand on it.

The SPEAKER: A roll call has been ordered. The pending question before the House is the motion of Representative McHenry of Madawaska that the House accept the Majority "Ought to Pass" Report. Those in favor will vote yes; those opposed will vote no.

ROLL CALL NO. 59

YEA - Adams, Aliberti, Allen, Anthony, Bell, Carter, Cashman, Chonko, Clark, H.; Clark, M.; Coles, Conley, Constantine, Cote, Crowley, Daggett, Dipietro, Dore, Duffy, Dutremble, L.; Erwin, P.; Farnsworth, Gould, R. A.; Graham, Gurney, Gwadosky, Hale, Handy, Heesch, Hichborn, Hickey, Hoglund, Holt, Hussey, Jacques, Jalbert, Joseph, Ketover, Kilkelly, LaPointe, Larrivee, Lawrence, Lisnik, Luther, Macomber, Mahany, Manning, Marston, Martin, H.; Mayo, McGowan, McHenry, McKeen, McSweeney, Melendy, Michaud, Mills, Mitchell, Moholland, Nadeau, G. G.; Nadeau, G. R.; Nutting, O'Gara, Paradis, P.; Parent, Paul, Pendleton, Pineau, Plourde, Pouliot, Priest, Rand, Richard, Ridley, Rolde, Rotondi, Rydell, Sheltra, Simpson, Skoglund, Smith, Stevens, P.; Swazey, Tammaro, Tardy, Townsend, Tracy, Walker, The Speaker.

NAY - Aikman, Anderson, Ault, Bailey, Begley, Brewer, Butland, Carroll, J.; Curran, Dellert, Dexter, Donald, Farnum, Farren, Foss, Garland, Greenlaw, Hanley, Hastings, Hepburn, Hutchins, Lebowitz, Libby, Look, Lord, MacBride, Marsano, Marsh, McCormick, McPherson, Merrill, Murphy, Norton, Paradis, E.; Paradis, J.; Pines, Reed, Richards, Seavey, Sherburne, Stevens, A.; Stevenson, Strout, D.; Telow, Webster, M.; Wentworth.

ABSENT - Boutilier, Burke, Carroll, D.; Cathcart, Foster, Higgins, Jackson, O'Dea, Oliver, Pederson, Ruhlin, Small, Strout, B.; Tupper, Whitcomb.

Yes, 89; No, 46; Absent, 15; Vacant, 1; Paired, 0; Excused, 0.

89 having voted in the affirmative and 46 in the negative, with 15 being absent and 1 vacant, the Majority "Ought to Pass" Report was accepted, the Bill read once.

Committee Amendment "A" (H-417) was read by the Clerk and adopted and the Bill assigned for second reading Friday, June 9, 1989.

Divided Report

Majority Report of the Committee on Judiciary reporting "Ought to Pass" as amended by Committee Amendment "A" (H-429) on Bill "An Act to Allow Recovery for Wrongful Death of Unborn Children" (H.P. 408) (L.D. 551)

Signed:

Senators:

HOBBINS of York  
GAUVREAU of Androscoggin  
ANTHONY of South Portland  
PARADIS of Augusta  
CONLEY of Portland  
COTE of Auburn  
RICHARDS of Hampden  
MACBRIDE of Presque Isle

Minority Report of the same Committee reporting "Ought Not to Pass" on same Bill.

Signed:

Senator:

Representatives:

HOLLOWAY of Lincoln  
FARNSWORTH of Hallowell  
STEVENS of Bangor  
HANLEY of Paris  
HASTING of Fryeburg

Reports were read.

The SPEAKER: The Chair recognizes the Representative from Augusta, Representative Paradis  
Representative PARADIS: Mr. Speaker, I move that the House accept the Majority "Ought to Pass" Report.

Mr. Speaker, Men and Women of the House: What we have before us in the Majority Report is Committee Amendment "A" (H-429). I would urge you to read it during the course of the discussion on this bill because it redoes what L.D. 551 had originally sought to do in a much more coherent and tighter fashion. It addresses specifically the issue of allowing civil recovery (we are not talking criminal now, we are talking civil) for the death of an unborn viable fetus. If you will look at the Committee Amendment, we even changed the title to read "An Act to Allow Recovery for Wrongful Death of an Unborn Viable Fetus." We have, if you will look at the majority signers, sought to take into consideration practically every point of view of the membership of the committee.

I respect the signers of the Minority "Ought Not to Pass" Report but I think those of us on the majority have taken consideration and care to address the issue specifically of what happens when a viable fetus dies and no recovery is allowed in the civil court system in the state. This bill is before us because of a decision of about a year and a half ago by the Law Court in the case of Hallie Milton vs. Cary Medical Center up in Caribou where the Milton's sought to recover for the death of an 8 month viable fetus and were not allowed under the Maine Probate Code to recover any damages. The Maine Probate Code allows up to \$50,000 in damages for the death of a person but it does not define what a person is. When Maine adopted the Probate Code in 1981, it did not lend definition nor did it have any discussions since it was a unanimous committee report.

What we have before us is a sort of a dichotomy — Justice Daniel Wathen of Augusta, speaking for the minority signers of the decision who dissented from the majority on the Law Court, gave a beautiful example to the people of Maine to the dichotomy to the problem that we have existing in the state. Quoting Justice Wathen, "Unless the court is prepared to buy a claim for prenatal injury, we are now left with result that prenatal injury is actionable while prenatal death is not. The absurdity of such a result is usually illustrated by the hypothetical of twins suffering simultaneous prenatal injuries with one dying moments before birth and the other dying moments after birth." Such an extreme case demonstrates the irrationality of the requirement of a live birth.

Since the Lord Campbell Act of 1846 in Great Britain, which brought about this whole area of law, you have the possibility of recovering damages if the fetus is born and takes only one breath. But since 1946 in the United States, we have allowed for recovery in many states, practically 36 of them, from the point of viability. As medical science goes on and gives us greater insight into the whole life process, the legal system is hurrying to catch up to this whole idea. Maine stands as the only New England state not to permit such civil action. This bill, this committee amendment, would bring Maine into the mainstream and would make us the 37th state to permit this type of action.

Let me briefly give you a couple of cases where we could have such action and I continue to make the distinction between a criminal because we are not talking manslaughter, we are talking civil action where the estate of that unborn child, the fetus, can bring action to recover for the parents. In Fairfield, Maine several months ago, we had a case where a young woman of 19 was returning from a baby shower with her fiance, the fetus was 8 months, she was hit by a driver who alleged had been driving under the influence of alcohol and the state now has

charges of OUI against this person. She was 8 months pregnant and four days after the accident, the baby was stillborn in a Waterville hospital.

About a year or so ago in Litchfield, a young woman was going to a birth class with her brother when they approached an intersection, the other driver did not stop at the stop sign, crashed into their vehicle, both baby and mother were killed as a result of the accident, the fetus was about 8 months of gestation at that time.

It is absurd if either of those unborn viable fetuses had taken but one breath, whether it be in the seat of the car, on the stretcher, in the ambulance or in the emergency room of the hospital, our laws would have permitted a recovery of damages through court civil action but because there was not one breath, the absurdity is, they are not allowed to recover any damages whatsoever. I think we can all sympathize that any woman who has carried a baby to term or practically to term knows what is living inside of her and anticipates the arrival of this child and for that reason, I think that when they want to carry this baby and someone interferes in this process in this negligent way, that we ought to have cause of action in this state.

I urge you to read the amendment especially the Statement of Fact which explains that this is not aimed at any woman who is seeking to have an abortion, it does not infringe on her right as defined in Roe vs. Wade. It does not mean that we are going to prosecute women who perhaps are abused through alcohol, smoking or drugs — it does not do any of those things, it speaks to clarify what other states have done (36 of them) and seeks to put Maine into the mainstream of the other New England states to permit this. Really, I think it seeks to address a wrong that we have left uncorrected for many, many years.

In the Maine Law Review of several years ago, Justice Wathen based his minority dissent (he told me) in the case in a wonderfully written article on Maine's Probate Code dealing with actions for wrongful death and damages. At the very end, Mr. Ward Graffam, the class of '67 Law School writes and I quote, "The best ends of justice cannot be served until the courts and the legislatures have fully recognized that an individual has a value simply for his status as a human being." I think that really beautifully illustrates that the human family is all encompassing and that we in the legislature today, in 1989, are seeking to add definition to the human family.

I urge that you please vote to accept the Majority "Ought to Pass" Report.

The SPEAKER: The Chair recognizes the Representative from Bangor, Representative Stevens.

Representative STEVENS: Mr. Speaker, Men and Women of the House: I will thank the majority of the committee for all the work they did on this bill. They did meet many of the concerns that the minority signers had. If you were to look at the bill that is out, you can see about five or six concerns that were addressed. However, all of us sitting around at the end of the session struggled to anticipate all the problems that might arise with this bill. These are the ones that came to mind. What I fear are the ones not discovered but will come to light after the bill is passed.

Representative Paradis is right in that 36 states have some form of protection for the death of a viable fetus. However, what he failed to mention is that only two states, Tennessee and South Dakota, have done it through their statutes. According to the literature that's been circulated by the

proponents of this bill, the rest of the states have done it by court made law in their judicial system to meet the specific needs and the equity that is required in cases that come before the court. Maine would be only the third state to statutorily pass a wrongful death action.

There is recovery available right now under Maine law for the death of that fetus. Parents can sue for emotional distress, medical costs -- that is currently available under our Tort Law. What is different in this bill from that remedy is that they put it under the Probate Code. That means for us who are not lawyers is that what we are doing today is, we are creating an estate for every stillborn fetus potentially in the State of Maine. Think of the consequences of creating an estate for a stillborn fetus.

I would suffer a loss, all of us would suffer a loss if we had the grave misfortune of losing a viable fetus, any fetus. That is a very sad thing for a family. However, they do (right now) under Maine law have the right to recovery. If we create an estate for a stillborn fetus, try to anticipate the consequences in inheritance law and tax law that might arise as a result of our good intentions. If there were no available recovery, that would be something different, but there is under Maine law.

The terrible case that Representative Paradis spoke of where the accused OUI driver killed this 8 month old fetus is a terrible thing. This bill would not punish him in the way that is most appropriate for the state, it would not punish him by criminal sanctions. This bill does not touch criminal sanctions for that OUI driver who kills that 8 month old fetus. It is only in the Probate Code and that is what we have to remember, whether or not that is the appropriate place to try to create a right for this loss that a family will suffer. I know it is difficult for the body to look at the signers on this report and by looking at the signers try to get some idea how they should go on the vote. Everybody has good intentions, everybody wants a recovery for the death of this fetus, we just feel that the Probate Code is not the appropriate place to do it because it might create problems that we cannot anticipate.

Mr. Speaker, I move the indefinite postponement of this bill and all its accompanying papers.

The SPEAKER: The Chair recognizes the Representative from Hampden, Representative Richards.

Representative RICHARDS: Mr. Speaker, Men and Women of the House: There are 36 other states that have adopted some form of law either through their judge-made law or through statutes that deal with this problem. In looking through the cases and looking through the statute, it has not been an easy process. We see a period of time where Roe vs. Wade came down and courts were uncertain as to what to do to recognize life at what point or what a viable fetus meant, and, after a period of time with our technology and understanding that a viable fetus is an individual that can live independent of the mother outside the womb, then states became a little bit more comfortable with that.

The next problem they overcame was the fact that a lot of the statutes, the wrongful death statutes, dealt with person. Our present statute deals with person and that still is a problem because when you interject person and then include that to be the viable fetus, then you have problems of interpreting the Probate Code. Our court in this state, in 1988, struggled with that issue, with the issue of person. They did not consider the fact that the wrongful death statute had words of viable fetus, that is a major distinction.

I think the primary distinction between what is happening in our current law today and the 36 states and the states that have not adopted or are in the process of adopting it, is that we have in our majority opinion in this state, logic that is devoid of human experience. We have them straining through the Probate Code, we have them straining through the laws that already exist by use of the word person and coming to the conclusion that the procedural process would be difficult or create a burden on interpreting what type of damages there would be and whether this person would be able to recover, where an estate would be a problem, and all kinds of procedural nightmares.

In our presently existing law, if a child is born and lives one minute, the Probate Code will take care of it so we simply have made a change to say that, we are not talking about a person, we are talking about a viable fetus. Now what happens in an instance like that? First you need a cause of action. The cause of action is that there is an injury and a stillborn and as a result of that, you next have got to determine whether it is a viable fetus. That could either be a question of fact or a matter of law. If I could just briefly explain that -- if you have a question of law that goes to the judge and if that fetus was 7 weeks old and is stillborn, as a matter of law, our scientific technology does not recognize that fetus to be a viable fetus -- the question of law -- it is out, there are no damages. If that child reaches the age of between 20 and 28 weeks, we then have a question of fact, it is a matter of proof to determine whether that child is viable. Then you introduce evidence (and that is by scientific evidence) by calling in an expert to determine the age of the child and as to whether that child could live outside the womb. We have the technology to do that, the 36 other states are using that technology and using it successfully.

It appalls me to say that because there are difficulties in proof of this issue, that we should say there is no cause of action. The other way around is that first you determine there is a cause of action, the cause of action does not attach to the mother, there is no double recovery and if you accept the notion of the Representative from Bangor, that there is a double recovery, you would have to accept the fact that a viable fetus could not live outside the womb independently. That is not true. That cause of action of that child is not attached to the mother and she cannot recover for that cause of action. A cause of action attaches to that individual, that viable fetus.

I will say just briefly in closing because I don't know if I will be up again perhaps clarifying some other statements that might be made later on, but I think with the way we have drafted the amendment, I urge everyone to read it very carefully. We have put the human element back into it, the human element being that we have taken into consideration a situation where a cause of action should not be brought against the mother for a number of reasons. We have also made it clear that a doctor that does not know that a woman is pregnant and administers some kind of medical treatment and as a result of that, the child dies, then he should not be liable. It was something that he didn't know so he would be cautious to begin with.

Secondly, it indicates that any medical treatment that is consistent with informed consent and consistent with the rights of the mother would not hold the doctor liable for an abortion. We have also disclaimed the fact that manslaughter is not an instance here, this is not something that a medical

examiner would get into like an ordinary homicide. I would urge that you vote against the indefinite postponement and support the Majority Report.

The SPEAKER: The Chair recognizes the Representative from Fryeburg, Representative Hastings.

Representative HASTINGS: Mr. Speaker, Ladies and Gentlemen of the House: When I learned this split Judiciary report was coming on the calendar today, I was very happy that the Speaker called us in at eight-thirty. Obviously, there were many questions in our committee and I rise to show you those which the minority, five of us, with a very huge philosophical difference came to the decision that this bill ought not to pass.

I would like to indulge you with Oliver Twist. Some of you remember the young lad ensnared by Fagan born of a very rich family, by father of an unwed mother and, at the very end, when they were going to find and prove that he was, indeed, entitled to an inheritance, they brought in Mr. and Mrs. Bumble. Mr. Bumble ran a parochial trust or parochial home, a home where four women would often stay, free of charge run by the church and as this woman had died, Mrs. Bumble had taken a couple of trinkets, a locket and a ring, and had sold them to a pawn broker and it was that connection that showed concretely that Oliver was, indeed, the son of this rich lady who had left half of her estate to Oliver. When the conclusion of the interrogation of Mrs. Bumble was finished, the lawyer Mr. Brownlow, was talking with Mr. Bumble and Mr. Bumble said, "You know the incident of my wife taking those things was unfortunate but, of course, I presume it will not take away my position of trust. I will still be able to continue as the officer of the parochial home." Keeping in mind the era in which this is written, it is said in the book by the lawyer, "That is no excuse, replied Mr. Brownlow, you were present on the occasion of the destruction of these trinkets and, indeed, are the more guilty of the two in the eye of the law for the law supposes that your wife acts under your direction." "If the law supposes that" said Mr. Bumble squeezing his hat emphatically in both hands, "The law is an ass, an idiot. If that is the eye of the law, the law is a bachelor and the worse I wish the law is, that his eye may be opened by experience."

The law has for centuries set limits on wrongful death. We have said that our children cannot drink until 21, not 20 years and 364 days, we said they could vote at eighteen, not seventeen and a half. We don't count children who are within the womb in our census, we allow children in gestation, children in our womb to inherit, provided they live, that they breathe. That has been law for centuries.

The common law evolved initially without allowing anybody to collect for the wrongful death of a person, that is, the person who died could not collect because that person was dead. There was no cause of action but in the Industrial Revolution in the mid-19th Century in England, they evolved the law of wrongful death and said, if somebody is killed through the negligence of another, you may have a cause of action in behalf of the estate of that person. The estate of that person has the cause of action and so it evolved into the 20th Century. As scientific knowledge developed and expanding life as some would claim it, courts started pecking away through creativity of the arguments of the lawyers so that it expanded wrongful death beyond living people, people who breathe, to those who did not. Approximately, to the best count of our library downstairs, 33 states by court decree, court interpretation, have said that, indeed, you have

wrongful death to an unborn child. A claim may be made by the estate of that child by the Personal Representative. Only two states have passed a law to the report of that library where the legislature made a conscious decision that said you had a right to claim wrongful death damages for the death of an unborn child.

Today, we are asked to change a decision made in February of 1988, not centuries ago, in February of 1988, just as Caroline Glassman ruled that under the laws of the State of Maine, there is no right to wrongful death claims of an unborn child. The legislature had not spoken and while the legislature may, it felt it inopportune for the court to expand this type of cause of action, which has been done in 33 other states, because it would breach the very fabric of our Probate Code, that which we had adopted in 1981.

If adopted, this law gives us a moving target like we see at the fair with the ducks going across and a BB gun sitting there to pound them out. What is a viable fetus? In Boston, Portland, Rockport, Fort Kent -- it is different in each one of those communities. It is a medical standard that changes depending on whether you are in the state and the medical and scientific expertise of that particular court in which you are acting -- let me give you a little synopsis of what really happens under our wrongful death action for a fetus. Because we can go even at an earlier age for a viable fetus perhaps in Portland, most probably in Portland, let's say that we have a young couple driving into Portland on a rainy day and the car goes off the highway and the young mother who was pregnant with child is injured as a result of the accident -- what happens? There has always been a right of cause of action by the mother against the driver of that vehicle, her husband. Obviously, we wouldn't want to take money from the husband and put it over in the pocket of the wife -- that doesn't really make much sense -- but it makes a lot of sense where we have insurance and so the wife gets a lawyer and sues the husband. If the fetus dies, if the fetus is stillborn at birth, the mother has a further cause of action for emotional distress and mental anguish. That cause of action has always existed and should she, under present law, lose that fetus, according to all treatises, there is an enhancement for the damages if, in fact, a factor causing that mental anguish and emotional distress is, in fact, the death of a stillborn child, the fetus carried by the mother.

However, what else happens now? First, because of a conflict, they would go and get themselves a lawyer for the estate of the fetus, that lawyer would probate the fetus's estate and because again of the nature of the case, that lawyer as Personal Representative now to the estate of the fetus will go and get a lawyer to bring a lawsuit against the father of that fetus. After a lawsuit, the Probate Attorney representing the estate, will pay off the attorney representing the cause of action, pay the bills of the estate, pay himself, and distribute the money, half to the mother and half to the father. The father caused the injury that resulted in the death through his negligence, so what happens? He gets half of the money. The mother has already recovered for her mental anguish and emotional distress and she would have gotten an enhancement of that according to the reports of ALR but now she would be recovering double.

Put that even in a more strained law school classical textbook type issue and say that the two people weren't even married but it was the girlfriend who was with child and the boyfriend caused the death

of both the mother and the fetus. Now we go through the same lawsuits that I told you about before and in addition, we now have a further lawsuit as to the paternity of the child so that this father who is negligent can show himself to be the father and claim as the father of the child, an inheritance under the Probate law. Interesting and there are further complications and hypotheticals that could go on and on just as Judge Wathen uses the example of the twins who are fetuses.

I will tell you that it has been a long time in coming to this state and I suggest that, in the past where we have adopted a physical rule by our Probate Court that says, one shall breathe to bring an action is one which we have over the centuries tried and found accommodating and comfortable to our style of life. We, as a legislature, and none of the other 33 of 35 legislatures in states which have passed or adopted a wrongful death action, have ever taken any action on this and yet today, we are asked to do it. What does this lead to? As Representative Paradis very quickly points out, this isn't criminal, but I will tell you that in six states where they have adopted, either by court decree or by legislative statute wrongful death to a fetus, they have adopted a crime of better side.

Number two statute will be coming along, the crime of feticide and you then would be saying that, indeed, it is not only a civil cause of action when hit by this drunken driver -- as Representative Paradis said, you will also be charged for a crime. The courts have never been willing to go that far. The courts at least know that it is only money that makes them move to expand their jurisdiction, not crime. They have never expanded the criminal laws to include the crime of feticide. They have left that to the legislature but they have never suggested that legislatures could not do that and six have.

I ask you why this law is amerce? I will give you a few possible further legal complications. One is, if we are going to have an estate for an unborn fetus, why not a will for an unborn fetus? Perhaps we will have to have a judicial bypass to accommodate one where they don't have one in advance.

Secondly, with the scientific growth and development of our health industry, are our test-tube babies going to have wrongful death?

Lastly, do we ever understand that a case itself uses an approach of common sense? It says the Probate Code would be violated by this law, by this change and therefore, the court does not adopt the change. It says by Justice Caroline Glassman, "In turn, we will use the common sense meaning of a child and that is birth." It is an absolute line that we can find, we need not shoot at a moving target as to what is liability, rather it is a definitive absolute answer that, when a child is born, it breathes, it can be touched, loved, nurtured and held. Then that child has a cause of action under wrongful death. Until that time, we do not have a cause of action. To pass this bill as proposed would simply expand an action into an area where the court has found the law does not apply in Maine.

I strongly urge you to adopt the motion which is to indefinitely postpone this bill and all its accompanying papers.

The SPEAKER: The Chair recognizes the Representative from Fairfield, Representative Gwadosky.

Representative GWADOSKY: Mr. Speaker, Ladies and Gentlemen of the House: Speaking as the Representative from Fairfield, I am always amazed at the capacity of members of this body who make the

most simple issue and the most simple solution very, very complex.

I am very familiar with the circumstances that Representative Hastings and Representative Paradis have mentioned about the unfortunate circumstances of the young lady who was nine months pregnant and lost her baby because she is employed by myself.

Occasionally, serving as a member of this legislature and in life, we are called upon to make a very difficult choice or a difficult decision. Sometimes we are called upon to make that decision with very little supporting background information. Usually in those circumstances, each of us looks within ourselves, reexamine our values, we go back to the basics, understand the difference between right and wrong in playing by the rules.

I am proud to say that I belong to a political party that has a long history of sticking up for people who only had the rules to go by, people like immigrants, minorities, women, and in that same history, I think it impels us all today to stand up and fight for families, for the future of families and, indeed, for the potential of life itself.

I commend the majority members of the Judiciary Committee, I think they have done an outstanding job with this piece of legislation and I think it deserves enactment.

The SPEAKER: The Chair will order a vote. The pending question before the House is the motion of the Representative from Bangor, Representative Stevens, that L.D. 551 and all its accompanying papers be indefinitely postponed. Those in favor will vote yes; those opposed will vote no.

A vote of the House was taken.

Representative Stevens of Bangor requested a roll call.

The SPEAKER: A roll call has been requested. For the Chair to order a roll call, it must have the expressed desire of more than one-fifth of the members present and voting. Those in favor will vote yes; those opposed will vote no.

A vote of the House was taken and more than one-fifth of the members present and voting having expressed a desire for a roll call, a roll call was ordered.

The SPEAKER: The Chair recognizes the Representative from Hallowell, Representative Farnsworth.

Representative FARNSWORTH: Mr. Speaker, Men and Women of the House: I rise just to explain on behalf of the minority of the Judiciary Committee that I don't believe there is any question but what the minority is a concern to the majority for the loss of families who undergo the death of an unborn child. I think the issue here has nothing to do with that law and our feelings about that law. The issue here has to do whether this bill and this mechanism is appropriate for dealing with it.

Every time we looked at this bill in committee, more concerns came up, more issues were raised, more amendments were added and since the committee has acted on it, additional concerns have been raised, additional concerns that could be added by amendments.

I also would suggest that to take the entire Probate Code and amend one paragraph of it to change such a radical concept in our law so quickly without addressing the potential questions of inheritance tax and other kinds of issues related to this is a change too fast for our law. The kind of concerns that we raised in committee that have been dealt with by amendment, I think, are only the tip of the iceberg. I think the minority concern is that this issue has not been properly studied and researched. I think that is why there are only two states that have

passed laws on this subject as opposed to all the other states where the judiciary interpreted their existing law to apply to this kind of situation. Our judiciary interpreted our existing law and said that there was no recovery under the Probate Code, under the wrongful death act. The fact is, the court made very clear that there are other funds of recovery for the parents in this kind of situation -- for negligence or intentional treatment that causes death, for emotional and mental distress for lack of consortium. We are not talking about leaving people with no run for recovery, we are talking about whether this is the appropriate mechanism and whether this bill, as amended, is fully and adequately researched and drafted. I would suggest if there is a concern where there needs to be more recovery available that this bill needs more work and it should be done over the next few years and brought back again.

I urge you to vote for indefinite postponement.

The SPEAKER: The Chair recognizes the Representative from Hampden, Representative Richards.

Representative RICHARDS: Mr. Speaker, Ladies and Gentlemen of the House: I hate to rise again because I think the Representative from Fairfield, Representative Gwadosky, has hit the nail on the head as to what we are doing here today. I do feel compelled to clarify some statements made by the Representative from Fryeburg, Representative Hastings, a good colleague and seatmate.

There are no other forms of recovery for a fetus that is born dead. Another person cannot recover for that cause of action, that is an absolute, and that has always been the law. It has not been said regarding the statutes that have been on the books in 36 other states the court found that, despite the common law, those statutes were sufficient. I might add that that was not a majority, the majority found that the statutes did cover it and then made judge-made law. The reason why they accommodated the concept was to deal with this dichotomy as a result of a breakdown in logic. Our Supreme Court decision was strained in going through our Probate Code in defining person -- it didn't fit. The logic, they would have you believe, is that because we have a procedural nightmare, there is no cause of action. There is a cause of action and if you have person, there is a procedural nightmare -- if you have viable fetus and put the safeguards in there, it is no longer a nightmare.

As far as the Probate Code and the estate and all the other problems that exist that were pointed out eloquently by Representative Hastings, just flip that over and say, what do we do if a child is born and lives one minute? There is no difference. To accommodate no difference, that is the reason we came up with the statute we did.

Reference was made to feticide and went on with an elaborate thing about how much then can develop to manslaughter, criminal sanctions and all the rest -- well, the bill that we designed took those into account. I might add the feticide statute is just a play on words. That was synonymous with a wrongful death statute. Feticide, homicide -- if you have a homicide, does it mean that somebody was murdered? Murder and homicide is different. Homicide is a result of a car accident and negligence so I would say in closing that the only difference is where we draw the line and that is to take the logic and put the human experience in with the logic and make sense of our law.

The SPEAKER: The Chair recognizes the Representative from South Portland, Representative Anthony.

Representative ANTHONY: Mr. Speaker, Ladies and Gentlemen of the House: I guess I feel on behalf of the Judiciary Committee a kind of a sense of apology to the whole body that one of the first things you have to do on Thursday morning is deal with the intricacies and technicalities of the law of wrongful death.

What we have presented here in the simplest terms is a bill that would propose drawing a slightly different line than has been drawn in the past. People seem to have this fear that we shouldn't be drawing lines or that the line drawn by centuries is the only line that can be drawn. I should point out that the decision of the Supreme Court that we are asked to reverse was a 4 to 3 decision. This was not an easy case for them to decide either. We are asked all the time here to draw lines and I would suggest that what we have here is a situation where the line that has been drawn by the court needs to be moved ever so slightly to allow local death action for a viable fetus.

This bill has been worked carefully hard by the Judiciary Committee to address any number of problems and I submit to you that what we have here is a reasonable, carefully drawn, tightly controlled measure that would allow recovery by the estate of a fetus. People get all upset about the fact that there is an estate of a fetus, that is the way wrongful death actions happen and that is the only way that wrongful death actions happen. So is the way that it was used and we are asking you to move the line ever so slightly to allow in the case of the good Representative from Fairfield's employee or other women who lose a viable fetus in the last few months of pregnancy through the negligence of another, not of herself, that has been precluded as well by the way we have drawn this thing, but who lose an unborn viable fetus by the negligence of another, to allow a cause of action for that loss. It is a reasonable measure, it makes good sense, it is fair, it is just and it is giving recovery for those who suffer severe forms of loss. I ask you to defeat the motion to indefinitely postpone.

The SPEAKER: The Chair recognizes the Representative from Bangor, Representative Stevens.

Representative STEVENS: Mr. Speaker, Men and Women of the House: I beg to speak after my good friend Representative Anthony. He says we are moving the line ever so slightly -- ladies and gentlemen of the House, we are moving the line all right, we are moving the line that says "before" in our state and our society. People had an estate after they drew a breath of life. This bill says you have an estate before you are born. I don't call that a slight move, I call that an enormous move and that is exactly what this bill seeks to do. We are creating an estate in the Probate Code for someone who never drew a breath of life.

The SPEAKER: The Chair recognizes the Representative from Fryeburg, Representative Hastings.

Representative HASTINGS: Mr. Speaker, Ladies and Gentlemen of the House: Very briefly, I would rise to indicate that, while my brother Representative Richards is correct, that there is no cause of action for the fetus under the present law, there is in fact causes of action that do compensate those who are injured and who survive. Wrongful death simply was a statute enacted to give further meaning where there was not such causes of action in the past. But here, the mother herself, the person most harmed by such an accident, is, according to the treatise of the American Law Review, to the extent that the plaintiff, the mother, is deprived of the opportunity to recover whatever elements of damages might be



recoverable in the wrongful death action -- that mother is able to offset this to some extent by establishing how the loss of the child added to the pain and the suffering to the child's mother.

This action and this amendment creates a new cause of action that creates double recovery. To a lawyer, it is fine but I will tell you that you are changing your philosophical meaning of the law. We have had standards which have been well set, well established and the court adopted them in the State of Maine when it reviewed it.

At this time, I believe we should live with what the court has decided and not try to tinker with the Probate Court Code by changing the law in this one area for this one civil cause of action. It is an enormous change of philosophical impute to the entire Probate Court Code.

The SPEAKER: The Chair recognizes the Representative from Bath, Representative Holt.

Representative HOLT: Mr. Speaker, I would like to pose a question through the Chair.

Medical professionals realize that accidents happen to fetuses even in uterus just before birth sometimes -- was that issue addressed in the committee? It seems to me that this is a very radical legal step to take and I would like that question answered, please.

The SPEAKER: The Representative from Bath, Representative Holt, has posed a question through the Chair to anyone who may respond if they so desire.

The Chair recognizes the Representative from Hampden, Representative Richards.

Representative RICHARDS: Mr. Speaker, may I ask that Representative Holt repeat her question?

Representative HOLT: Mr. Speaker, I asked the question of whether the state of the fetus that may have died in the uterus had been considered by the committee before the majority voted "Ought to Pass" on this bill.

There are incidences in the medical literature, of course, in which fetuses die shortly before the time of birth.

The SPEAKER: The Chair recognizes the Representative from Hampden, Representative Richards.

Representative RICHARDS: Mr. Speaker, Men and Women of the House: We did consider that question. This statute deals with somebody's negligent act, their tort against another individual to be compensated. There's a number of other reasons as a result of accidents, things that cannot be helped where a fetus may die minutes before it is actually born. There is no recovery except for perhaps emotional distress in the event there is negligence in a situation like that.

The SPEAKER: The Chair recognizes the Representative from Buxton, Representative Donald.

Representative DONALD: Mr. Speaker, Ladies and Gentlemen of the House: I rise, I had not intended to, but I am concerned because of another area of impact that this will have. It is clear that there is going to be, if this passes, substantial litigation. This ultimately will result in increases in your liability insurance, I just bring this up, I know that this should not be a paramount concern but it should be a consideration because, to me, it is clear that this is going to substantially increase the amount of litigations.

The SPEAKER: The Chair recognizes the Representative from South Portland, Representative Anthony.

Representative ANTHONY: Mr. Speaker, Ladies and Gentlemen of the House: We are talking about a very unusual situation, we are talking about a situation that arises two or three times a year at the most in

this state. I do not believe that passage of this bill would bring about any substantial increase in litigation, substantial increase in anything. We are talking about giving justice to those very few numbers of cases that do arise during the course of the year.

I urge you to vote against this motion.

The SPEAKER: The Chair recognizes the Representative from Hallowell, Representative Farnsworth.

Representative FARNSWORTH: Mr. Speaker, Ladies and Gentlemen of the House: In the Judiciary Committee's work sessions on this bill, the minority did not give the majority the dickens but we did have considerable discussion about the types of litigation that would arise if this bill were to pass. I would certainly agree with the comments that were made that there would be a lot of litigation. Just to review the list for you, we talked about the kind of litigation that would arise somewhere to the courts cases that have been referred to where there is an accident or something that would normally result from litigation and this would be an additional claim. We also talked about litigation that would arise just because of this bill and the way it is drafted such as, if the parents of the fetus are not married -- who is the father and what kinds of paternity actions might there need to be? We talked about the fact that since this creates an estate for the fetus and if there were an accident and both parents died, the recovery could actually go to any one of a number of people in the family, some of whom might not even know that the woman was pregnant.

The fact that there is recovery available and it would be through an estate like this, it seems to me that even though now we do not have numerous lawsuits when there is a stillbirth or death of a fetus, we are much more likely to have that. The kinds of cases that I think Representative Anthony was referring to are the cases that have resulted in litigation to date. Once the statute passes, there is the potential for recovery for lots more people than could recover right now so we certainly agree that that is the problem. I think in addition to that, we have not necessarily covered all the bases with respect to the medical community. Somebody mentioned to me this morning that, although we do have some provisions in the amendment for immunity for doctors treating a woman in some certain circumstances where they might not know or have any reason to know that the woman was pregnant, there is nothing in this bill that protects the doctor for immunity from lawsuit, if, for example, the woman has refused some form of treatment and later there is a stillbirth. I think this is just the beginning of looking at what might result from all of this.

The SPEAKER: The pending question before the House is the motion of the Representative from Bangor, Representative Stevens, that L.D. 551 and all its accompanying papers be indefinitely postponed.

The SPEAKER: The Chair recognizes the Representative from Thomaston, Representative Mayo.

Representative MAYO: Mr. Speaker, pursuant to House Rule 7, I wish to pair my vote with the Representative from Vassalboro, Representative Burke. If she were present and voting, she would be voting yea; I would be voting nay.

The SPEAKER: The pending question before the House is the motion of the Representative from Bangor, Representative Stevens, that L.D. 551 and all its accompanying papers be indefinitely postponed. Those in favor will vote yes; those opposed will vote no.

ROLL CALL NO. 60

YEA - Adams, Aikman, Allen, Anderson, Ault, Begley, Brewer, Butland, Cathcart, Clark, M.; Coles, Constantine, Daggett, Dellert, Donald, Dore, Farnsworth, Farnum, Foss, Garland, Greenlaw, Gurney, Handy, Hanley, Hastings, Heeschen, Hichborn, Hoglund, Holt, Joseph, Ketover, Kilkelly, Larrivee, Lawrence, Lebowitz, Libby, Look, Lord, Marsano, Marsh, McGowan, McKeen, McPherson, Merrill, Mills, Mitchell, Murphy, Norton, Pederson, Pendleton, Pines, Priest, Reed, Rolde, Rydell, Sherburne, Simpson, Skoglund, Small, Stevens, P.; Stevenson, Swazey, Webster, M.; Wentworth, Whitcomb.

NAY - Aliberti, Anthony, Bailey, Bell, Boutilier, Carroll, J.; Carter, Cashman, Chonko, Clark, H.; Conley, Cote, Crowley, Curran, Dexter, Dipietro, Duffy, Dutremble, L.; Erwin, P.; Farren, Gould, R. A.; Graham, Gwadosky, Hale, Hepburn, Hickey, Hussey, Hutchins, Jackson, Jalbert, LaPointe, Lisnik, Luther, MacBride, Macomber, Mahany, Manning, Marston, Martin, H.; McCormick, McHenry, McSweeney, Melendy, Michaud, Moholland, Nadeau, G. G.; Nadeau, G. R.; Nutting, O'Dea, O'Gara, Paradis, E.; Paradis, J.; Paradis, P.; Parent, Paul, Pineau, Plourde, Pouliot, Rand, Richard, Richards, Ridley, Rotondi, Ruhlin, Seavey, Sheltra, Smith, Stevens, A.; Strout, D.; Tammaro, Tardy, Telow, Townsend, Tracy, Walker, The Speaker.

ABSENT - Carroll, D.; Foster, Higgins, Jacques, Oliver, Strout, B.; Tupper.

PAIRED - Burke, Mayo.

Yes, 65; No, 76; Absent, 7; Vacant, 1; Paired, 2; Excused, 0.

65 having voted in the affirmative and 76 in the negative with 7 being absent and 1 vacant, the motion did not prevail.

Subsequently, the Majority "Ought to Pass" Report was accepted, the Bill read once.

Committee Amendment "A" (H-429) was read by the Clerk and adopted and the Bill assigned for second reading Friday, June 9, 1989.

At this point, Representative Michaud of East Millinocket was appointed by the Speaker to act as Speaker pro tem.

The Chair was called to order by the Speaker pro tem.

#### Divided Report

Majority Report of the Committee on Appropriations and Financial Affairs reporting "Ought to Pass" as amended by Committee Amendment "A" (H-422) on Bill "An Act to Undedicate the Alcohol Premium Tax Fund" (H.P. 710) (L.D. 971)

Signed:

Representatives: CARTER of Winslow  
POULIOT of Lewiston  
HIGGINS of Scarborough  
RIDLEY of Shapleigh  
CHONKO of Topsham  
LISNIK of Presque Isle  
MCGOWAN of Canaan

Minority Report of the same Committee reporting "Ought Not to Pass" on same Bill.

Signed:

Senators: PERKINS of Hancock  
PEARSON of Penobscot  
BRANNIGAN of Cumberland  
Representatives: FOSTER of Ellsworth  
FOSS of Yarmouth  
CARROLL of Gray

Reports were read.

The SPEAKER PRO TEM: The Chair recognizes the Representative from Winslow, Representative Carter.

Representative CARTER: Mr. Speaker, I move that the House accept the Majority "Ought to Pass" Report.

Mr. Speaker, Members of the House: Many of you may recall that the Appropriations Committee heard virtually the same bill two years ago in the First Regular Session of the 113th Legislature. The reason that I supported that legislation then and the reason I am supporting this legislation today are virtually the same.

First of all, I am convinced that the State of Maine needs two funding sources for alcohol and substance abuse services. Currently, the alcohol premium contributes approximately \$5,500,000 each year to the state's alcohol substance abuse budget while the General Fund contributes approximately \$2,900,000. Additionally, federal funds in driver evaluation and education program or DEEP revenues also contribute approximately \$4,100,000 for a total of \$12,500,000.

There are administrative inefficiencies when the state enters into separate contracts with community provider agencies using alcohol premium dollars for one contract and General Fund dollars for another. Our alcohol substance abuse funding subcommittee learned from these services in the previous session that this practice causes record keeping and other administrative burdens that detract from the contract objectives.

Secondly, because the alcohol premium revenues have stabilized at approximately \$5,500,000 per year, we are seeing more alcohol premium dollars that were originally targeted for service now being redirected to pay for the various ongoing obligations of the state, including state employees reclassifications. In short, ladies and gentlemen, the programs that this system is supposed to provide to the public is being short shifted at the expense of management.

The Alcohol Premium Budget Allocation Bill that we will pass on this morning, in virtually every account, you will see reflection of a decrease in the "All Other" compared to the previous fiscal year so these dollars may go into "Personal Services" to fund state employee costs instead of going to fund the programs where they actually should go.

Thirdly, there is an inflexibility in the current funding mechanism for alcohol substance abuse services. There was little opportunity to redirect dollars to meet a higher need. Our subcommittee also learned that the contract agencies have little or no opportunity to provide input into the ADPC, which is the Alcohol and Drug Abuse Planning Committee's resource allocation process. As you are all aware, funding for additional substance abuse services is increasingly requested from the General Fund simply because alcohol premium dollars have become constant and committed. I am also equally sure that some House members like myself have received letters from the provider agencies who have become increasingly disenchanted with the current funding system.

Fourth, I have been concerned with the lack of planative analysis that would help us target the limited dollars. We found an evaluation system last session for the treatment component but have not yet seen any results. There is no system in place that provides an objective evaluation of the education component of our system.

In conclusion, I think we are all well aware of the need for alcohol substance abuse education and treatment services in this state. No one is saying that any of these vital services should be eliminated. This bill would provide alcohol and substance abuse services with greater financial