

MAINE STATE LEGISLATURE

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One Hundred and Twenty-Eighth Legislature
State of Maine

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Majority Report of the Committee on **JUDICIARY** reporting **Ought Not to Pass** on Bill "An Act To Include Tax-exempt, Nonprofit Regional Transportation Providers under the Maine Tort Claims Act" (EMERGENCY)

(H.P. 213) (L.D. 280)

Signed:

Senators:

KEIM of Oxford
HILL of York

Representatives:

MOONEN of Portland
BRADSTREET of Vassalboro
CARDONE of Bangor
McCREIGHT of Harpswell
RECKITT of South Portland

Minority Report of the same Committee reporting **Ought to Pass as Amended by Committee Amendment "A" (H-464)** on same Bill.

Signed:

Senator:

WHITTEMORE of Somerset

Representatives:

BABBIDGE of Kennebunk
BAILEY of Saco
GUERIN of Glenburn
JOHANSEN of Monticello
SHERMAN of Hodgdon

READ.

On motion of Representative MOONEN of Portland, **TABLED** pending **ACCEPTANCE** of either Report and later today assigned.

Majority Report of the Committee on **JUDICIARY** reporting **Ought Not to Pass** on Bill "An Act To Allow a Wrongful Death Cause of Action for the Death of a Viable Fetus"

(H.P. 241) (L.D. 327)

Signed:

Senator:

HILL of York

Representatives:

MOONEN of Portland
BABBIDGE of Kennebunk
BAILEY of Saco
CARDONE of Bangor
McCREIGHT of Harpswell
RECKITT of South Portland
SHERMAN of Hodgdon

Minority Report of the same Committee reporting **Ought to Pass** on same Bill.

Signed:

Senators:

KEIM of Oxford
WHITTEMORE of Somerset

Representatives:

BRADSTREET of Vassalboro
GUERIN of Glenburn
JOHANSEN of Monticello

READ.

Representative MOONEN of Portland moved that the House **ACCEPT** the Majority **Ought Not to Pass** Report.

Representative FREDETTE of Newport moved that the Bill be **TABLED** until later in today's session pending the motion of Representative MOONEN of Portland to **ACCEPT** the Majority **Ought Not to Pass** Report.

Representative HERBIG of Belfast **REQUESTED** a roll call on the motion to **TABLE** until later in today's session pending the motion of Representative MOONEN of Portland to **ACCEPT** the Majority **Ought Not to Pass** Report.

More than one-fifth of the members present expressed a desire for a roll call which was ordered.

The **SPEAKER**: A roll call has been ordered. The pending question before the House is to Table until later in today's session pending the motion of Representative Moonen of Portland to Accept the Majority Ought Not to Pass Report. All those in favor will vote yes, those opposed will vote no.

ROLL CALL NO. 284

YEA - Austin S, Bickford, Bradstreet, Campbell, Casas, Cebra, Chace, Corey, Craig, Dillingham, Espling, Farrin, Foley, Fredette, Gerrish, Gillway, Ginzler, Guerin, Haggan, Hanington, Hanley, Harrington, Harvell, Hawke, Head, Herrick, Higgins, Hilliard, Johansen, Kinney J, Lockman, Lyford, Malaby, Marean, Mason, McElwee, O'Connor, Ordway, Parry, Perkins, Picchiotti, Pickett, Pouliot, Prescott, Reed, Sampson, Sanderson, Seavey, Sherman, Simmons, Sirocki, Skolfield, Stearns, Stetkis, Stewart, Strom, Sutton, Theriault, Timberlake, Tuell, Turner, Vachon, Wadsworth, Wallace, Ward, White, Winsor, Wood.

NAY - Ackley, Austin B, Babbidge, Bailey, Bates, Battle, Beebe-Center, Berry, Blume, Brooks, Bryant, Cardone, Chapman, Collings, Cooper, Daughtry, DeChant, Denno, Doore, Duchesne, Dunphy, Farnsworth, Fay, Fecteau, Fuller, Gattine, Golden, Grant, Grohman, Hamann, Handy, Harlow, Herbig, Hickman, Hogan, Hubbell, Hymanson, Jorgensen, Kornfield, Kumiega, Lawrence, Longstaff, Luchini, Madigan C, Madigan J, Martin J, Martin R, Mastraccio, McCreia, McCreight, McLean, Melaragno, Monaghan, Moonen, Nadeau, O'Neil, Parker, Perry, Pierce T, Reckitt, Riley, Rykerson, Sanborn, Schneck, Sheats, Spear, Stanley, Talbot Ross, Tepler, Terry, Tipping, Tucker, Warren, Zeigler, Madam Speaker.

ABSENT - Alley, Black, Frey, Grignon, Kinney M, Pierce J, Sylvester.

Yes, 68; No, 75; Absent, 7; Excused, 1.

68 having voted in the affirmative and 75 voted in the negative, with 7 being absent and 1 excused, and accordingly the motion to **TABLE** until later in today's session pending the motion of Representative MOONEN of Portland to **ACCEPT** the Majority **Ought Not to Pass** Report **FAILED**.

Subsequently, Representative FREDETTE of Newport **REQUESTED** a roll call on the motion to **ACCEPT** the Majority **Ought Not to Pass** Report.

More than one-fifth of the members present expressed a desire for a roll call which was ordered.

The **SPEAKER**: The Chair recognizes the Representative from New Gloucester, Representative Espling.

Representative **ESPLING**: Thank you, Madam Speaker, Ladies and Gentlemen of the House. I stand in opposition to the current motion. I oppose this motion simply because I believe women and families in Maine should be allowed a cause of action for the wrongful death of an unborn viable fetus in probate court. This would only be in situations where the woman has reached 24 weeks pregnant and clearly specifies that the cause of action does not exist against the mother,

against a provider performing an abortion permitted by law, nor against a healthcare provider who did not know of the pregnancy nor had any medical reason to know of the pregnancy. Currently, in Maine, a cause of action may be brought forward only if the injured viable fetus is born alive and then dies. In committee, it is my understanding that there were some concerns raised about some information provided on how many states allow for cause of action in a wrongful death situation. I provided information stating that 40 states, in some form, allow for a wrongful death cause of action. At this point, it may be more than 40 states. In many of these states, the allowance for a cause to be brought forward is a result of judicial action in those states. Judicial precedence, in many of these states, has allowed for a cause of action. In some of these 40 states a cause of action is allowed for a pre-viable fetus. In Maine, court cases have been brought by families seeking this course of action, but each time, the courts have said, since they lack guidance from Maine law, they will not allow for such cases. Some most recent cases include *Milton v. Cary Medical Center*, which was decided by Maine Supreme Judicial Court in around 1988. Then again in 1998, we have a case of *Shaw v. Jendzejec*, which also included York Hospital. In reading the Milton case summary, the justices were keenly aware of the subject being, and I quote from the court decision written by Justice Glassman, this is what they said in the decision, "Extensively litigated in other jurisdictions with the courts and a majority of those states allowing a wrongful death action to be brought on behalf of a fatally injured viable fetus. In Tennessee and South Dakota, the same result has been achieved by statute." I continue with the quote from the summary. "Courts in a lesser number of states, however, have refused to permit such an action. In each case, the essential question has been whether a viable fetus is a person. Although we are aware of these decisions of other jurisdictions, we conclude that rights under §2-804 of the Probate Code are to be defined not by the reasoning of other courts, but from a reading of our own law to derive its meaning and intent." Basically, that's saying that Maine court decided that even though other states allow for a cause of action, they were looking at Maine law and decided that Maine's court should not consider a cause of action in Maine. The summary goes on to explain the history of cases and any such legislative action in regards to minor children, and illustrate the actions in other states. In further study of the summary of that case, and I believe it is in the dissenting opinion, I quote from the summary of the court case again: "Unless the Court is prepared to bar a claim for prenatal injury, we are now left with the 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." That was the quote from the summary of the court case. Maine allows for a live birth, and then if the baby were to die, they do have a right to cause of action, but not prior to birth. Let me just take a moment to explain viability. In the notes for the Milton case, the term viability, and I quote, again, means, "the state of fetal development when the life of the fetus may be continued indefinitely outside the womb by natural or artificial life supportive systems." So to be clear, we're talking about viable fetuses in this proposed legislation. Let me also take a moment to explain this notion of personhood that the opponents often bring up. In the summary written by Justice Wathen in the Shaw case in 1998, it seems clear that the court

was "engaged in the awkward exercise of trying to harmonize the provisions of the wrongful death statute with other provisions of the probate code." Further into this part of the summary, Wathen explains, "Our determination that permitting a cause of action for the wrongful death of a viable fetus would grant the fetus rights that it does not have in the rest of probate code was also questionable. The wrongful death statute grants no rights to the deceased. The statute provides a cause of action only to the living relatives or heirs of the deceased." A cause of action that is provided by this piece of legislation is about economic justice for the woman or family left behind, and it is not to provide any rights to the fetus, as many are concerned that it would. And also in the court opinion it states, "We concluded that allowing the action following a stillbirth would somehow grant some legal right to the fetus that it did not have otherwise, when such is not the case." I ask folks here in this body today to consider this legislation carefully. I understand the ideological divide in situations like this and the issue that's been brought up. I respect that, but I also feel strongly on this side of the issue, and I hope you respect that as well, and I thank you for listening.

The SPEAKER: The Chair recognizes the Representative from Carmel, Representative Reed.

Representative REED: Thank you, Madam Speaker, Ladies and Gentlemen of the House. I rise in opposition to the pending motion, LD 327. I absolutely support the idea that the unborn child in the womb of its mother has every right to be protected against a death caused by an impaired driver while under the influence of alcohol or drugs. My father said to me many times as I was growing up, "Remember, Roger, if you're going to dance, you've got to pay the fiddler." I especially remembered his admonition when I started dating during my early teenage years. This says to me that you cannot enjoy the pleasures of life without enduring the costs. It also says to me you cannot break the law without facing the consequences. And that brings us to the nuts and bolts of this bill today. Everyone who gets behind the wheel of a car should understand what an awesome responsibility rests in his or her hands, not only for themselves, but for others as well. I have been blessed in my lifetime with two great kids and five wonderful grandchildren. They have brought to my wife and me countless hours of joy. We have watched their growth from infants through every phase and development of their lives. For many of us, this is the way that life should be. We welcomed their entry into this world, read them bedtime stories, prayed with them before tucking them in at night, saw them take their first steps, taught them to ride a bike, worried about every cough, fever, cold, or sickness they contracted along the way, celebrated every birthday, walked with them through nearly 20 years of education, enjoyed every ball game and cheering contest, witnessed the birth of their children, laughed with them during the good times and suffered with them during the bad times. This is my story, and for many of you in this chamber today, it is your story as well. I say all of this to remind all of us as parents in this room who have enjoyed these same memories with your children, how wrong it would be for anyone to be deprived of those pleasures of life because someone decides to disobey the law, and while driving under the influence of alcohol or drugs, takes the life of a mother and her unborn child. I cannot even imagine what it would be like to lose a son, a daughter, or possibly a grandchild in such a manner. I don't even want to think about it. However, I do know that such an act should not go unpunished, and for those who have incurred such a loss, it should not go uncompensated. Passing this law today would

allow for civil action to be brought against a driver who has been negligent while behind the wheel of a car, that results in a mother losing her unborn child. Some of you will say that such a law is not needed, because currently, in Maine, it already works. But the truth is that current Maine law does not allow a cause of action for the wrongful death of a viable fetus. To avoid guaranteeing our families this cause of action protection would be negligence on our part, and a shirking of our duties to protect the Maine people on our highways. I encourage you in the House today to pass this law that exists in more than 40 other states and put this into statute once and for all. Thank you, Madam Speaker, and thank you Ladies and Gentlemen of the House.

The SPEAKER: The Chair recognizes the Representative from Lincoln, Representative Hanington.

Representative **HANINGTON**: Thank you, Madam Speaker, Ladies and Gentlemen of the House. Madam Speaker, may I tell you a short story? It's a story that comes from my heart. I've lived it, and this is why I support this bill. In the summer of 1962 mom was carrying, she knew in her heart as a devout Catholic she was carrying twins. At week 15 or 16, it would have been in July, she and dad took her down to the Workman Hospital in Lincoln, and Dr. Butterfield delivered my brother. They sent her home saying it was going to be fine. She knew in her heart that she was still carrying me. On October 6th, I was born. I was in an incubator for eight weeks. They sent mom home, she had to heat hot water bottles to keep the crib at constant 72 degrees. This is why I feel deep down that it's not a fetus, it is a human being at conception. I can tell you this because, after eight years of marriage to my wife, Jean, we finally got pregnant with my daughter, Sarah. Since then she had two miscarriages. When I was overseas in February of '04, I had to fly home on emergency leave to bury my little son. Until you carry that fetus in the palm of your hand, he was only 20 weeks old, so don't tell me that a fetus is not a baby. Until you carry that little baby in your hand, about six inches long, and you have to bury him, and there's no doubt in my mind when I reach the other side of this Earth that I'm going to be watching my father, I'm going to be able to hold my brother and hold my son, both sons. So, Madam Speaker, that's my story, and I support this because every life is precious and if someone takes an unborn baby out of this world, they deserve everything that they get. Thank you.

The SPEAKER: The Chair recognizes the Representative from Pittston, Representative Hanley.

Representative **HANLEY**: Thank you, Madam Speaker. Madam Speaker and Ladies and Gentlemen of the House, I find it troubling that we have to discuss the value of a child in this chamber that is only one day away from being born; and to put that into perspective, all this bill is trying to do is to give value to that life. And if I may, I'm sure all of us, at one time or another, have held a newborn infant in our hands, in our arms, a one-day-old child. And imagine if you had a supernatural power where you could turn the clock back, 24 hours at a time. Let's give the baby a name; Agatha. I had an aunt named Agatha. She was beautiful, so I'll use that name. So -- little baby Agatha, turn the clock back one day. She's in her mother's womb. She is still Agatha, she is still a child. Keep turning the clock back one day at a time. At what day does Agatha no longer become Agatha? At what day can you say she doesn't exist? And the question -- the answer is so obvious, I don't need to answer it. I ask you to follow my light, and give value to baby Agatha. Thank you.

The SPEAKER: The Chair recognizes the Representative from Alfred, Representative Sampson.

Representative **SAMPSON**: Thank you, Madam Speaker, Ladies and Gentlemen of the House. For the sake of being consistent, I'd like to offer some food for thought. If one can support the idea of families being allowed to sue for damages should a negligent actor kill their pet dog, then in like manner, one should support allowing Maine families the right to pursue civil action against a negligent actor who kills their unborn child. I oppose this pending motion. Thank you.

The SPEAKER: The Chair recognizes the Representative from Scarborough, Representative Vachon.

Representative **VACHON**: Thank you, Madam Speaker. Madam Speaker, Ladies and Gentlemen of the House, I oppose this pending motion. Our neighbors in the rest of our New England states have this justice, and Maine should too. Thank you.

The SPEAKER: The Chair recognizes the Representative from Dixfield, Representative Pickett.

Representative **PICKETT**: Thank you, Madam Speaker, Ladies and Gentlemen of the House. There are many arguments that are placed out here in regards to this bill, in regards to wrongful death. One of them is that the law would create another tool in the abuser's toolbox to wreak havoc in his partner's life, controlling her and suing everyone involved in their life. We ought to look at it that any instance of domestic violence is wrong, and that the perpetrator should be punished; but this law is not about justice for families who have lost an unborn -- but this law is about justice for the families who have lost an unborn child. At least 40 other states have recognized the importance of allowing grieving families to seek economic justice. Maine families should not be precluded from seeking a more just remedy for their loss. And to make it more personal, I spent 40 years in law enforcement, and I know I've said that before, and 15 and a half years of that time was in the Homicide Unit, Criminal Unit of the Maine State Police. And one of the things that used to really frustrate me was when I saw domestic violence rearing its ugly head, and I would see a mother, a woman who was pregnant, at various stages, and they would be beaten, and they would be kicked, and they would be throttled, strangled, you name it, anything, not to the cause of -- not to death, but to the point where they lost the child they were carrying. And that was always problematic to me, because I could not charge them for anything to have to do with the infant they were carrying. The only thing I could do was charge the perpetrator for doing and assaulting the mother. And that was always problematic to me. Where does the justice come in that? There is no justice for that. That child -- in some cases, I had one that -- a baby was due to be born that very day when the child was killed inside his mother's womb. Now, if the next day, if that baby would have been born the next day, we would have looked at it as a human being, but because it was in the mother's womb, the day before, it had no rights. That's the issue here. We're asking for families to be able to have compensation when they have a traumatic loss such as the things we've heard here today. My heart goes out to the people that have shared their stories, Representative Hanington, for example. And we need to do the right thing here, folks. We need to come in line with the rest of the states in New England and the other states that make up the 40 that do this already, and we need to give people that go through a loss like this a chance to recover some of that loss. We never can give them the child back, but we can give them the opportunity to recover that loss, and I hope you will follow my light and vote this motion down so we can pass this bill. Thank you.

The SPEAKER: The pending question is acceptance of the Majority Ought Not to Pass Report. A Roll Call is in order. The Chair recognizes the Representative from Vassalboro, Representative Bradstreet.

Representative **BRADSTREET**: Thank you, Madam Speaker, Ladies and Gentlemen of the House. I rise in opposition to this pending motion. As I was reviewing this testimony and the comments I received, there's one thing that I can't get out of my mind, and that's if a woman who was pregnant and was in an accident and her unborn child died in the accident, legally she could sue for the loss of her luggage but not the loss of her child. I can't go back to my constituents, and certainly not my family, and tell them that in the eyes of the law, I place more value on luggage than I do on a child. Thank you.

The SPEAKER: The Chair recognizes the Representative from Scarborough, Representative Sirocki.

Representative **SIROCKI**: Thank you, Madam Speaker, and thank you, Ladies and Gentlemen of the House. I have heard that if Maine's Legislature passes this law we'd be one of a small handful of legislatures and the only one in New England that has included a fetus in its wrongful death statute. The families in at least 40 states are allowed to seek economic justice for the wrongful death of their unborn child, and families in every New England state except Maine are given this right. I urge passage of this law.

The SPEAKER: A roll call has been ordered. The pending question before the House is Acceptance of the Majority Ought Not to Pass Report. All those in favor will vote yes, those opposed will vote no.

ROLL CALL NO. 285

YEA - Ackley, Austin B, Babbidge, Bailey, Bates, Battle, Beebe-Center, Berry, Blume, Brooks, Bryant, Cardone, Casas, Chapman, Collings, Cooper, Daughtry, DeChant, Denno, Doore, Duchesne, Dunphy, Farnsworth, Fay, Fecteau, Fuller, Gattine, Golden, Grant, Grohman, Hamann, Handy, Harlow, Herbig, Hickman, Hogan, Hubbell, Hymanson, Jorgensen, Kornfield, Kumiega, Lawrence, Longstaff, Luchini, Madigan C, Martin R, Mastraccio, McCreight, McLean, Melaragno, Monaghan, Moonen, Nadeau, O'Neil, Parker, Perry, Pierce T, Reckitt, Riley, Rykerson, Sanborn, Schneck, Sheats, Spear, Talbot Ross, Tepler, Terry, Tipping, Tucker, Warren, Zeigler, Madam Speaker.

NAY - Austin S, Bickford, Bradstreet, Campbell, Cebra, Chace, Corey, Craig, Dillingham, Espling, Farrin, Foley, Fredette, Gerrish, Gillway, Ginzler, Guerin, Haggan, Hanington, Hanley, Harrington, Harvell, Hawke, Head, Herrick, Higgins, Hilliard, Johansen, Kinney J, Lockman, Lyford, Madigan J, Malaby, Marean, Martin J, Mason, McCrea, McElwee, O'Connor, Ordway, Parry, Perkins, Picchiotti, Pickett, Pouliot, Prescott, Reed, Sampson, Sanderson, Seavey, Sherman, Simmons, Sirocki, Skolfield, Stanley, Stearns, Stetkis, Stewart, Strom, Sutton, Theriault, Timberlake, Tuell, Turner, Vachon, Wadsworth, Wallace, Ward, White, Winsor, Wood.

ABSENT - Alley, Black, Frey, Grignon, Kinney M, Pierce J, Sylvester.

Yes, 72; No, 71; Absent, 7; Excused, 1.

72 having voted in the affirmative and 71 voted in the negative, with 7 being absent and 1 excused, and accordingly the Majority **Ought Not to Pass** Report was **ACCEPTED** and sent for concurrence.

Majority Report of the Committee on **JUDICIARY** reporting **Ought Not to Pass** on Bill "An Act To Prioritize Family Members as Surrogates for Medical Decisions"

(H.P. 1108) (L.D. 1607)

Signed:

Senator:

HILL of York

Representatives:

MOONEN of Portland

BABBIDGE of Kennebunk

BAILEY of Saco

CARDONE of Bangor

McCREIGHT of Harpswell

RECKITT of South Portland

Minority Report of the same Committee reporting **Ought to Pass as Amended by Committee Amendment "A" (H-465)** on same Bill.

Signed:

Senators:

KEIM of Oxford

WHITTEMORE of Somerset

Representatives:

BRADSTREET of Vassalboro

GUERIN of Glenburn

JOHANSEN of Monticello

SHERMAN of Hodgdon

READ.

Representative MOONEN of Portland moved that the House **ACCEPT** the Majority **Ought Not to Pass** Report.

The SPEAKER: The Chair recognizes the Representative from Boothbay Harbor, Representative Hawke.

Representative **HAWKE**: Thank you. Ladies and Gentlemen of the House, this winter I got a phone call from a family that had lost their son to a heroin overdose and wanted to know if I could come over and talk to them. The next day I went over, and since then there's been very few days that this has not been on my mind, and I put myself in their shoes and wonder how I would have handled it. Putting this bill in will never bring back their son or even take back the pain that they went through at the hospital, but this bill could spare a family the nightmare that this family went through. On the night the family showed up at the hospital to find their son on life support, things were moving fast for them. Decisions, phone calls, and family members had to be called. Never in a million years did they expect this tragedy to take an even worse turn. When talking to the social worker, they found out that the homeless person who gave their son the drugs, and put them in the situation that they were in, was now the one making the life decisions. She had informed the hospital that they were emotionally connected, and to hedge a cause from this she also informed the hospital that they were financially connected due to them buying the drugs together. That was all she needed to say. No proof, nothing, and now she was in charge of his life-ending decisions. How did this happen? In 1999, Maine put a law that unwed but committed couples were to be given -- gay/lesbian couples were sometimes not permitted in the hospital room during health care emergencies. Marriage was not a possibility and at that time the law had the spouses first. To go to court could take longer than they had and cost thousands of dollars. Today, all couples can marry, and with the drug problem we're facing, it's time to take a look at the old