

SB

151

pg.

February 11, 1977

The Honorable John L. Rader
President of the Senate
Alaska State Legislature
Juneau, Alaska 99811

Dear Mr. President:

Under the authority of art. III, sec. 18 of the Alaska Constitution, and in accordance with AS 24.30.060(b) and the Uniform Rules of the Alaska State Legislature, I am transmitting a bill relating to tort claims against the state.

The bill would amend AS 09.50.250 dealing with actionable claims against the state. (Also see art. II, sec. 21 of the Alaska Constitution). Specifically, the bill would bar claims against the state arising out of motor vehicle accidents based upon the design of a state highway if the design conforms to applicable design standards. It also would bar claims arising out of motor vehicle accidents based upon the maintenance of a state highway unless the state had actual notice of a dangerous condition and had the capability to correct it. Finally, it would bar claims based on state inspection of (or failure to inspect) property not actually owned or controlled by the state for hazards or safety violations.

Specifically, this bill would bar suits arising out of a motor vehicle accident based on the design of a state highway (including the placement of warning or safety signs or markings on or along the highway) when that design conformed with the uniform design standards adopted by the Department of Highways pursuant to statutory authority and in effect at the time the design was prepared. It would also bar suits arising out of a motor vehicle accident based on the maintenance (or lack of it) of a state highway unless (1) an

employee of the state responsible for road maintenance at the place of the accident had actual notice of a dangerous road condition which required maintenance at the scene of the accident, (2) a reasonable man under similar circumstances would have taken steps to correct that dangerous condition, (3) there was adequate opportunity for the state to perform the required maintenance within the constraints of available time, personnel and equipment, and (4) the dangerous condition was a substantial contributing cause of the accident. The effect of these provisions would be the establishment of reasonable statutory standards of care to which the state must conform. State actions meeting the standards established would, by definition, be reasonable and would not give rise to state liability; state actions not meeting those standards would leave the state liable for resulting damages to the same extent it is so under existing case law.

The bill would also preclude state liability based on state inspection of (or failure to inspect) private property for violations of statutes, regulations or ordinances and/or health or safety hazards. This provision is prompted directly by the Alaska Supreme Court's decisions in Adams v. State, 555 P.2d 235 (Alaska 1976), in which the court held that the state was under a duty to abate fire hazards on private property discovered pursuant to an inspection, and Wallace v. State, _____ P.2d _____, (Alaska Sup. Ct. Op. No. 1352 - December 29, 1976), in which the court held that the state was under a duty to abate a hazardous working condition on an industrial job site.

The court specifically held that the conduct of such inspections, once the basic policy decision to inspect property has been made, requires no discretion, and therefore the state may be liable for injuries resulting from violations or hazards not discovered or not abated if discovered. The clear implication is that the choice of remedial measures, if violations or hazards on private property are discovered, is not a discretionary decision.

I firmly believe that the state must be given wide latitude in the measures it adopts to protect public health and safety. Particularly where the state's

ability to discover and abate health and safety violations and hazards on private property is limited by budgetary and other fiscal constraints, imposing liability when the state conducts an inspection places the state in an untenable position: the responsible state official must choose either not to inspect at all or to inspect and thereby expose the state to potential liability for any injuries resulting from violations or hazards, whether discovered or not.

The deployment of inspectors throughout the state, the selection of things to be inspected, the thoroughness with which inspections are conducted, and the remedial measures suggested or required if violations or hazards are discovered all involve discretionary decisions. These decisions involve a balancing of the available resources and manpower, the number of things to be inspected, the potential danger to the public health and welfare from undiscovered violations or hazards, and the potential economic and social consequences of invoking a wide variety of possible remedial measures. Subjecting the state to potential liability through judicial second-guessing any time injuries result from violations or hazards on private property which could have been discovered and/or abated is having the following consequences: either inspections of private property will not be made (except where a statute clearly requires it) or the most severe remedy available will be invoked even in marginal cases. Neither of these consequences is in the public interest; more significantly, the discretionary latitude necessary to create appropriate solutions to specific real problems is eliminated.

Normally I do not approve of legislation further limiting the state's tort liability since I strongly believe that the state must be as responsible for its actions as a private citizen when those actions result in personal injury or property damage. However, several recent court decisions at both the trial and appellate levels suggest that the judiciary is going beyond traditional negligence concepts when the state is a defendant, and is approaching the point where the state will be strictly liable for damages resulting from accidents in which the state has only minimal involvement. Both practical and policy considerations require that the legislature clarify and define the limits of state liability.

The most obvious practical effect of expanding state

liability has been a dramatic increase in the cost of the state's liability insurance, coupled with a decrease in actual coverage. While both inflation and the nationwide tendency toward jury verdicts exceeding \$1,000,000 are also responsible for the increased cost of insurance, judicial expansion of state liability certainly is a substantial factor.

More fundamentally, I believe that the courts are assuming the legislature's responsibility to establish and define the limits of state liability. Art. II, sec. 21 of the Alaska Constitution provides that "[t]he legislature shall establish procedures for suits against the State." (Emphasis added.) Pursuant to this section, the legislature enacted AS 09.50.250 defining the limits of state liability, and exempting the state from liability for "discretionary acts." While I agree with the Supreme Court's recent statement that the current law of sovereign immunity in Alaska is that "liability is the rule, immunity the exception" (Adams v. State, 555 P.2d 235, 244 (Alaska 1976)), I fear that the legislative determination that one such exception should encompass discretionary acts by the state is slowly being undermined by judicial decisions giving the words "discretionary acts" an artificially narrow construction not intended by the legislature.

I am also disturbed by the fact that there are no established standards of care for those situations where the state should be liable if it is negligent. This permits a court to determine the reasonableness of state actions after the fact. It is imperative that the legislature reestablish its position as the branch of government responsible for determining what situations may give rise to state liability and the standard of care to which the state will be held in those situations.

I firmly believe that society rather than the injured individual should bear the cost of the state's negligence. However, this policy of risk-spreading should be confined to those situations in which the state is clearly under a duty to act and where its failure to perform its duty was a substantial contributing cause of the injury. The state cannot, and should not, bear the cost of every injury with which the state has some

connection. This bill would place reasonable statutory limits on state liability, permitting recovery where the state really is at fault but preventing recovery when the state is only minimally involved.

Sincerely,

Jay S. Hammond
Governor

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

POUCH K—STATE CAPITOL
JUNEAU 99811

JAY S. HAMMOND, GOVERNOR

May 12, 1977

The Honorable Terry Gardiner, Chairman
The Honorable Fred E. Brown
The Honorable Larry Carpenter
The Honorable Ed Dankworth
The Honorable Richard I. "Dick" Eliason
The Honorable Bill Miles
The Honorable Lisa Rudd, Members,
House Judiciary Committee
Tenth Alaska State Legislature
Pouch V
Juneau, Alaska 99811

Re: SB 151
Tort Claims Against the State of Alaska
Our File: J-77-036-77

Dear Members of the House Judiciary Committee:

In my testimony on May 3, 1977 before the House Judiciary Committee regarding SB 151, Tort Claims Against the State of Alaska, I felt that there was some misunderstanding of the underlying intent and potential effect of this bill.

We believe the state should be liable at any time the state's negligent conduct causes a private injury, and SB 151 would not preclude state liability when the state's negligent conduct resulted in private injury. It would do the following: (1) establish a legislative standard of non-negligent "reasonable care" to be applied in actions based on the design or maintenance of a state highway; (2) preclude state liability based on state inspection of, or failure to inspect, private property for violations of statutes, regulations or ordinances and/or health or safety hazards; and, (if amended as I requested in my testimony) (3) preclude state liability when the basis of the cause of action is that the state licensed the private individual or private conduct which resulted in the injury.

We believe a statutory standard of reasonable care in highway cases is necessary because there is no such standard at present. In every case, the jury is required to determine -- after the fact -- if the design or maintenance of the highway was reasonable. The standard of reasonable care which would be established by SB 151 for highway design is conformance with applicable nationally recognized uniform standards in effect at the time the design was prepared. Regarding highway maintenance, the state would be liable if (1) it had notice of the hazardous condition requiring maintenance; (2) a reasonable man would take steps to correct that condition; (3) the state was able to correct the condition and did not, and (4) the condition was a substantial contributing cause of the accident. We believe these provisions would establish a fair standard of "reasonable care" in highway cases. As I suggested in my testimony, the lack of an objective standard leads to a floating standard of care. What one jury sees as "reasonable" another jury may see as not "reasonable," and the state's conduct is always subject to second-guessing.

The bill also would bar suits based on a failure of the state, where the state is neither owner nor tenant of the property involved, (1) to inspect for statutory violations or hazards; (2) to discover a statutory violation or hazard; or (3) to abate any such violation or hazard. In determining whether or not the state should be immune from these acts or omissions, we believe you must make a fundamental policy determination of precisely what the state's role is when it becomes involved in inspecting for hazards. One approach is that the state inspects for hazards to try to minimize the dangers that state citizens encounter in using private facilities which are subject to state inspection; that is, the state is attempting to ensure that the public is not exposed to an unreasonable risk of harm, recognizing that not all dangers can be totally eliminated. The other approach is that the state inspects for hazards to guarantee the safety of the property inspected. That is, if the property is inspected and violations are not discovered or not abated if discovered, the state is liable for post-inspection injuries much like an insurance company. We believe the state's safety inspection program is designed to minimize the dangers state citizens are exposed to. We do not believe that the state should be guaranteeing the safety of non-state, privately-owned property. The owner of the private property, the individual responsible for maintaining dangerous or hazardous premises and inviting the public to use them, is the one who should be liable for injuries resulting from those hazards or dangers. All of the people -- the citizens and taxpayers of the state -- should not have to pay for the wrongs of a few individuals.

If inspection procedures are inadequate, they should be changes. If inspectors are incompetent, new ones should be hired. But making the state liable for private hazards simply because the state had the opportunity to inspect will not improve the quality of inspectors or inspections. If anything, it will have the opposite effect: the number of inspections will be minimized because liability may result. It may have a negative effect on public safety as well: private property owners will rely on the state to make their property safe and disclaim personal responsibility for their own wrongs. Finally, the impact on state finances is obvious: large dollar judgments against the state needlessly divert state resources which could be spent elsewhere with greater public benefit. I say "needlessly" because the whole concept of state liability based on inspections misses the basic point that the private property owner is the one who should bear the consequences of maintaining a hazardous condition and compensate innocent victims. They are not without a remedy.

Finally, we urge you to amend SB 151 to include a new paragraph to read:

(6) is based on the grant, issuance, refusal, extension, delay, or denial of a license, permit, appeal, approval, exception, variance, or other entitlement, or a re-zoning.

This provision appears in the recent municipal immunity bill passed by both houses and currently awaiting the Governor's signature. While the state has not yet been held liable because it issued a license or permit, it is conceivable that it will be held liable in the future, particularly since municipalities may soon be immune from liability based on the issuing of a license or permit. Liability would not be automatic; however, the state would have to prove that its licensing and permit issuing procedures are "reasonable." The procedures used for licensing drivers, physicians, etc., and issuing permits for using high explosives, transporting extra-wide loads on state highways, etc., all are designed to provide a certain amount of oversight of activities which may endanger the public. They are not designed to guarantee that dangerous activities will not be dangerous; that is impossible without the expenditure of incredible sums of money, and even then, nothing is guaranteed. Decisions regarding the procedures to be used in issuing licenses and permits include the time and manpower available to evaluate applicants, the feasibility of evaluating applicants actually performing the tasks for which they will be licensed, the need for a permit and the consequences of not granting one, etc. In any jury trial, the jury will be required to make

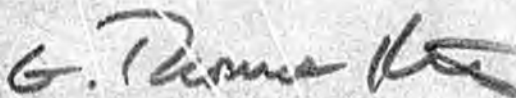
May 12, 1977

an after-the-fact determination regarding the reasonableness of the procedures involved. Particularly where the plaintiff evokes a great deal of sympathy from the jury, it may be next to impossible to prove that the procedure employed was "reasonable," and that the state should not be liable for injuries caused by an individual licensed or permitted by the state to engage in the activity which led to the injury.

The legislature has already given immunity to municipalities in suits based on the inspection of private property and the issuing or denial of licenses and permits. If such immunity is not given to the state, principles of statutory construction almost certainly would lead to the conclusion that the legislature intended that the state could be found liable in such cases. If you would prefer to leave a floating standard of "reasonable care" in highway cases, the bill could be amended by removing that section. However, we urge passage of SB 151 with the amendment for causes of action based on licenses or permits. We believe that, by not passing SB 151 with the amendment, the legislature is saying that the state guarantees inspected property is not hazardous, licensed professionals are competent, and activities for which permits have been issued are safe, and the state will pay for resultant injuries when those statements are not true.

Sincerely,

AVRUM M. GROSS
ATTORNEY GENERAL

By: 
G. Thomas Koester
Assistant Attorney General

GTK:jec

cc: Fran Ulmer

THE LEGISLATURE OF THE STATE OF ALASKA
TENTH LEGISLATURE

FISCAL NOTE

I. REQUEST

Bill/Resolution No. _____
Title An Act Relating to Tort Claims Against the State of Alaska
Requested by Governor Hammond Date 2/7/77

II. FISCAL DETAIL

Agency Affected All
Program Category Affected _____
Budget Request Unit(s) Affected _____

EXPENDITURES (Thousands of Dollars)

	FY 77	FY 78	FY 79	FY 80	FY 81	FY 82
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 COMMODITIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS, ETC.						
TOTAL	0	0	0	0	0	0

FUNDING (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER (Specify)						

POSITIONS

FULL TIME						
PART TIME						
TEMPORARY						

III. ANALYSIS (See Fiscal Note Preparation Instructions, Section III)

The State receives up to 25 suits per year pertaining to highway maintenance and design. Of those suits 15-20 would be defensible by virtue of the standards of negligence outlined in this bill. Hopefully the clear defense available to us will eliminate the need to defend these suits thus saving \$300,000 to \$500,000 in attorney costs. The State retains a significant amount of self insurance which applies to claims treated by this bill. Reestablishment of traditional liability standards could result in annual savings in excess of an estimated 1.5 million dollars.

IV. DATE February 8, 1977 PREPARED BY John George
AGENCY General Services & Supply
PHONE 465-2283
Original: Legislative Finance
cc: Budget and Management
Prime Sponsor (First Legislator Named)

Introduced: 2/11/77
Referred: Judiciary

1 THE SENATE

BY THE RULES COMMITTEE BY
REQUEST OF THE GOVERNOR

2 SENATE BILL NO. 151

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 TENTH LEGISLATURE - FIRST SESSION

5 A BILL

6 For an Act entitled: "An Act relating to tort claims against the State of
7 Alaska; and providing for an effective date."

8 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

9 * Section 1. AS 09.50.250 is amended by adding new paragraphs to read:

10 (4) arises out of a motor vehicle accident and is based
11 upon

12 (A) design of a state highway, including the placement
13 of warning or safety signs or markings on or along the highway,
14 when the design conformed to nationally recognized uniform stan-
15 dards as adopted by the Department of Highways under AS 19.10.040,
16 19.10.050, or AS 19.10.160 for the system of which the highway
17 involved is a part and in effect at the time the design was
18 prepared; or

19 (B) maintenance of a highway unless

20 (i) an employee of the state who had the responsi-
21 bility for road maintenance at the place of the accident had
22 actual notice of a dangerous road condition which required
23 maintenance at the scene of the accident;

24 (ii) a reasonable man under similar circumstances
25 would have taken steps to correct the dangerous condition of
26 the highway at the place of the accident;

27 (iii) there was adequate opportunity for the
28 state to render the maintenance service, considering the
29 length of time in which the state had actual notice, and the

An Act of God

1 personnel and equipment capabilities of the state for the
2 area in which the accident occurred; and

3 (iv) the dangerous condition of the road was a
4 substantial contributing cause of the accident;

5 (5) is based on a failure of the state, where the state is
6 neither owner nor tenant of the property involved,

7 (A) to inspect property for a violation of any statute,
8 regulation, or ordinance, or a hazard to health or safety;

9 (B) to discover a violation of any statute, regulation,
10 or ordinance, or a hazard to health or safety if an inspection of
11 property is made;

12 (C) to abate a violation of any statute, ordinance, or
13 regulation, or a hazard to health or safety discovered on property
14 inspected.

15 * Sec. 2. This Act takes effect immediately in accordance with AS 01.-
16 10.070(c) and applies to all legal actions filed after the effective date
17 of this Act.

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19
20 1. gross negligence

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22 Amend SB299 - gross negligence
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28
29

John -

CAU

Gordon Harrison

Acad office

5500

Chotia = SB 151 file,

Sovereign Immunity

passed Senate in our
committee

Amendments will be sent down from
Gov. Office - copy John and copy -
this file

House Judiciary
May 3, 1977

The meeting was called to order at 3:55 p.m. by Chairman, Gardiner. Members present were Gardiner, Miles, Brown and Rudd. Mr. Dankworth, Mr. Eliason and Mr. Carpenter came late.

SB 12 Number of superior court and district court judges SB
12

Senator Ziegler was here to speak in support of SB 12 for which he is a sponsor. He explained the existing problem as being that Ketchikan's Judge Schultz is frequently called to Anchorage leaving Ketchikan without a judge. Sen. Ziegler would like to see a superior court judge in Ketchikan at all times.

Senator Ziegler requested that the committee put this bill in the drawer for now. He said that he will carefully monitor the superior court position in Ketchikan between now and next year, and may ask that the bill be reconsidered next year if he senses the need.

The committee agreed to set the bill aside for now.

SB 151 Tort claims against the State of Alaska SB
151

Gardiner briefly explained why he had brought this bill up before the committee.

Tom Koester from the Attorney General's office was here to support the bill, which is an administration bill.

Brown moved that consideration of SB 151 be postponed indefinitely. Gardiner explained that a committee could not do this, as it would kill the bill for this year. Brown changed his motion to table the bill. The motion to table the bill failed.

There was a very lengthy, involved discussion after which the committee decided not to do anything with the bill at this time.

The meeting was adjourned at 5:00 p.m.



STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

April 12, 1977

MEMORANDUM

TO: Representative Terry Gardiner

FROM: Fran Ulmer *Fran*

SUBJECT: Amendment to SB 151

It has come to our attention that Senate Bill 151 regarding limitation of tort claims against the State needs an additional provision to protect the State from claims arising out of the issuance of licenses and permits. This provision would be identical to the protection afforded municipalities in HB 354/SB 249. When the State licenses individuals (occupational licenses, drivers licenses, etc.), it does not assume the responsibility of ensuring that the licensee will perform adequately at all times. That is, the State does not stand behind every driver that holds a license to drive in Alaska or every doctor certified to practice medicine in the State. However, the Supreme Court's recent tort decisions could lead to such a conclusion. Furthermore, principles of statutory construction would almost certainly lead to that conclusion if municipalities are given such immunity and the State is not.

The addition on Page 2 should read "(6) is based on the grant, issuance, refusal, suspension, delay, or denial of a license, permit, appeal, approval, exception, variance, or other entitlement, or a rezoning;".

Thank you for considering this request.

~~SB 3945~~

Dept Henry

SB 151 364-2121
ext 236

James

Larkin

Please call when
this bill comes
before Committee.