

# Maine Law Review

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Volume 63  
Number 2 *Symposium: Remembering Judge  
Frank M. Coffin: A Remarkable Legacy*

Article 13

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January 2011

## Estate of Fortier v. City of Lewiston: Is Maine's Tort Claims Act Unintelligible?

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### Recommended Citation

William I. Olver, *Estate of Fortier v. City of Lewiston: Is Maine's Tort Claims Act Unintelligible?*, 63 Me. L. Rev. 551 (2011).

Available at: <https://digitalcommons.mainerlaw.maine.edu/mlr/vol63/iss2/13>

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*ESTATE OF FORTIER V. CITY OF LEWISTON: IS  
MAINE’S TORT CLAIMS ACT UNINTELLIGIBLE?*

*William Olver*

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## ESTATE OF FORTIER V. CITY OF LEWISTON: IS MAINE'S TORT CLAIMS ACT UNINTELLIGIBLE?

William Olver\*

### I. INTRODUCTION

In *Estate of Fortier v. City of Lewiston*,<sup>1</sup> the Maine Supreme Judicial Court, sitting as the Law Court, was asked to decide if the City of Lewiston was “using” an aircraft under the Maine Tort Claims Act (MTCA) when it chartered a plane from Twin Cities Air Services (Twin Cities) as part of an Air Force Junior Reserve Officer Training Corp (AFJROTC) exercise.<sup>2</sup> Tragically, the pilot and three AFJROTC cadets from Lewiston High School lost their lives when the plane crashed into Barker Mountain shortly after take-off.<sup>3</sup> The families of the students brought suit against Lewiston, in part, alleging negligence on behalf of the high school’s Senior Aerospace Instructor, who was responsible for coordinating the chartered flight as part of the AFJROTC program.<sup>4</sup>

A slim majority held that, under the court’s rules of statutory construction, and in the interest of narrowly construing exceptions to immunity under the MTCA, the statutory exception for “use”<sup>5</sup> only applied when the governmental entity had some measure of direct control over the vehicle that was being used.<sup>6</sup> Because the aircraft was under the direct control of Twin Cities’ pilot, Lewiston was not “using” the plane as defined by the MTCA and was thus immune from suit.<sup>7</sup> The dissent would not have equated “use” to “operation,” as it believed the majority did, but instead would have used a broader, plain meaning definition of “use.”<sup>8</sup> When Lewiston chartered the plane as part of its AFJROTC program, this “use” qualified as an exception to the MTCA, allowing the lawsuit to go forward.<sup>9</sup>

This Note begins by discussing the historical background of state sovereign immunity generally within the United States and specifically within Maine. Part III will discuss the facts of *Fortier* as well as the majority’s and dissent’s analyses. Part IV will address several other avenues the Law Court could have used to decide the case without further interpreting the MTCA. Part V will examine other states’ tort claims acts (generally, TCAs) to see how *Fortier* may have been decided had they been applied. Part VI will briefly explore a recent case analyzing the MTCA. Part VII will conclude that the overly ambiguous language of the MTCA prevents

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1. 2010 ME 50, 997 A.2d 84 (4-3 decision).

2. *Id.* ¶¶ 2-6, 997 A.2d at 85-86.

3. *Id.* ¶ 4, 997 A.2d at 86.

4. *Id.* ¶ 5, 997 A.2d at 86.

5. See ME. REV. STAT. ANN. tit. 14, §8104-A(1)(2003 & Supp. 2010) (“A governmental entity is liable for its negligent acts or omissions in its ownership, maintenance or use of any . . . [a]ircraft.”).

6. *Fortier*, 2010 ME 50, ¶ 15, 997 A.2d at 89.

7. *Id.*

8. See *id.* ¶¶ 21-22, 997 A.2d at 90-91 (Silver, J., dissenting) (noting that the Supreme Court, as well as legal and non-legal dictionaries, define “use” as some sort of “employment”).

9. *Id.* ¶ 26, 997 A.2d at 92.

the court from faithfully interpreting the Maine Legislature's intent and will urge the Legislature to amend the MTCA in the interest of clarity.

## II. HISTORICAL BACKGROUND OF GOVERNMENTAL IMMUNITY

### A. Federal

The doctrine of sovereign immunity in the United States has its roots in English common law and was thought to pass through to the several states before the founding of this country.<sup>10</sup> When the Constitution was drafted in 1787, Article III cast doubt on this principle by exposing states to suits from citizens of other states and foreign states.<sup>11</sup> In 1793, the United States Supreme Court dealt precisely with this issue in *Chisholm v. Georgia* and abolished the doctrine of sovereign immunity with respect to states.<sup>12</sup> Several years later, in response to *Chisholm*, Congress proposed, and three-fourths of the states ratified, the Eleventh Amendment, which reinstated states' sovereign immunity, at least to the extent that Article III encroached upon it.<sup>13</sup>

Still open was the question whether a state was amenable to suit from one of its own citizens.<sup>14</sup> For more than 100 years, states enjoyed protection from lawsuits, and the Supreme Court even answered the earlier question by extending the protection of the Eleventh Amendment to prohibit suits against a state by one of its citizens.<sup>15</sup> However, the doctrine showed cracks in 1908 when the Supreme

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10. The doctrine's history can be described as follows:

[T]he doctrine is derived from the laws and practices of our English ancestors; and . . . is beyond question that from the time of Edward the First until now the King of England was not suable in the courts of that country. . . . And while the exemption of the United States and of the several States from being subjected as defendants to ordinary actions in the courts has since that time been repeatedly asserted here, the principle has never been discussed or the reasons for it given, but it has always been treated as an established doctrine.

See generally JOHN LOBATO & JEFFERY THEODORE, STUDENT AUTHORS, HARVARD LAW SCH., BRIEFING PAPER NO. 21, FEDERAL SOVEREIGN IMMUNITY 3 (2006), available at [http://www.law.harvard.edu/faculty/hjackson/FedSovereign\\_21.pdf](http://www.law.harvard.edu/faculty/hjackson/FedSovereign_21.pdf) (last visited Mar. 1, 2011) (quoting *United States v. Lee*, 106 U.S. 196, 205-07 (1882)).

11. U.S. CONST. art. III, § 2 ("The judicial Power shall extend . . . to Controversies . . . between a State and Citizens of another State . . . and between a State . . . and foreign States, Citizens or Subjects").

12. 2 U.S. 419, 469 (1793) (indicating that "the Constitution warrants a suit against a State, by an individual citizen of another State").

13. U.S. CONST. amend XI (1795) ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State").

14. See Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1, 4-5 (1988).

15. See *Hans v. Louisiana*, 134 U.S. 1, 18 (1890) ("The state courts have no power to entertain suits of individuals against a state without its consent. Then how does the circuit court, having only concurrent jurisdiction, acquire any such power?"). The *Hans* court described *Chisholm* as a decision that sent "a shock of surprise throughout the country"; the Eleventh Amendment, as well as the decision in *Hans*, was simply a return to what was known before the Constitution. See John. J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1893-94 (1983) (quoting *Hans*, 134 U.S. at 11).

Court ruled that sovereign immunity was not absolute and states did not have immunity against lawsuits alleging an unconstitutional action by the state.<sup>16</sup> Furthermore, the Court determined that Congress may limit state sovereign immunity through the Fourteenth Amendment.<sup>17</sup> In 1946, the Federal Government passed the Federal Tort Claims Act, which waived sovereign immunity for itself with respect to torts.<sup>18</sup> Afterwards, states began to follow with their own tort claims acts.<sup>19</sup>

### B. Maine

Maine's sovereign immunity also has its roots in English law. In 1788, *Russell v. Men of Devon* was decided in England and supported the doctrine of immunity under the principle that "the king can do no wrong."<sup>20</sup> In 1812, Massachusetts took the lead from *Russell* and extended the concept to municipalities, despite the lack of a king or comparable entity.<sup>21</sup> Later, Maine built upon the Massachusetts standard but also gradually began to carve out exceptions to the rigid doctrine.<sup>22</sup> Notably, although a municipality was not liable for discretionary acts, it was liable for ministerial acts.<sup>23</sup> As early as 1961, however, the doctrine of sovereign immunity came under attack in Maine as being contrary to public policy.<sup>24</sup> In the early 1970s, several cases came before the Law Court, which again questioned the viability of the doctrine and strongly urged the Legislature to take action to remedy the situation but fell short of crafting a judicial solution.<sup>25</sup> Although the Legislature did consider limiting the scope of sovereign immunity after these cases, ultimately it did nothing.<sup>26</sup> After several years of inaction by the Legislature, the Law Court

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16. See Jackson, *supra* note 14, at 11 (discussing *Ex parte Young*, 209 U.S. 123 (1908)). In *Young*, the Court held that "[t]he state cannot . . . impart to the official immunity from responsibility to the supreme authority of the United States." 209 U.S. at 167.

17. See Jackson, *supra* note 14, at 12 (discussing *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976)).

18. See John Martinez, *Hurry Up and Wait: Negative Statutes of Limitation in the Government Tort Liability Setting*, 19 ST. JOHN'S J. LEGAL. COMMENT. 259, 270 (2005). See also Federal Torts Claims Act, Pub. L. No. 79-601, ch. 753, 60 Stat. 842 (1946) (codified as amended in scattered sections of 28 U.S.C.).

19. See generally Martinez, *supra* note 18, at 273-76 (indicating that Florida was one of the first states to judicially abolish sovereign immunity in 1957, to which the Florida Legislature responded by passing a TCA in 1973).

20. R. Michael Martin, *Common Law Sovereign Immunity and the Maine Tort Claims Act: A Rose by Another Name*, 35 ME. L. REV. 256, 266-67 (1983) (citing *Russell v. Men of Devon*, (1788) 100 Eng. Rep. 359 (K.B.)).

21. *Id.* at 267 (referencing *Mower v. Leicester*, 9 Mass. 247 (1812)).

22. See *id.* at 268-69.

23. *Id.* at 268. The concept of a discretionary act versus a ministerial act is discussed briefly in Part IV.A.

24. See *id.* at 276. In response to an accident caused by negligent maintenance on the Maine Turnpike, the court suggested that "sovereign immunity from tort liability has served its usefulness and ought to be destroyed." *Id.* (quoting *Nelson v. Me. Tpk. Auth.*, 157 Me. 174, 186, 170 A.2d 687, 693 (1961)).

25. See generally *Bartashevich v. City of Portland*, 308 A.2d 551, 551 (Me. 1973) (reiterating the court's disapproval of the doctrine); *Bale v. Ryder*, 286 A.2d 344, 344, 347-48 (Me. 1972) (a police officer accused of assault, battery, and false arrest was ultimately dismissed despite the court's reservations on the doctrine's fairness).

26. See Martin, *supra* note 20, at 277.

finally had enough, and, in 1976, abolished the doctrine of sovereign immunity in *Davies v. City of Bath*.<sup>27</sup> The Legislature quickly responded by passing the MTCA, which generally restored sovereign immunity save for a few exceptions that would allow a lawsuit to go forward.<sup>28</sup>

### III. THE *FORTIER* DECISION

#### A. Background

In June 2006, as part of Lewiston High School's AFJROTC program, the school's Senior Aerospace Instructor, Lieutenant Colonel (ret.) Robert Meyer contracted with Twin Cities to provide training flights to a number of cadets.<sup>29</sup> Charlie Weir, a FAA-certified instructor, was Twin Cities' pilot for the day.<sup>30</sup> Previously, Meyer had used Twin Cities and Weir to provide similar flights without incident.<sup>31</sup> On this occasion, students split up into several groups.<sup>32</sup> When the first group returned, Meyer noted that Weir's landing was "unusual" but was not concerned enough to halt the flights.<sup>33</sup> After a quick turnaround, the second group of three students took off with Weir; the plane quickly flew over Barker Mountain and out of sight.<sup>34</sup> Matthew Taylor, a student aboard the first flight, reported to Meyer several irregularities with Weir's flying, including Weir not wearing any shoes, performing a "zero-gee"<sup>35</sup> maneuver, and flying close to the tree-tops.<sup>36</sup> It is unclear if the communication between Taylor and Weir occurred before or after the second flight took off.<sup>37</sup> Later, it was discovered that the plane had crashed into

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27. 364 A.2d 1269 (Me. 1976). In that case, the plaintiff alleged that the city's negligent maintenance of its sewer system damaged her property. *Id.* at 1269. The court held that "[w]e will no longer dismiss actions in tort brought against the State or its political divisions solely on the basis of governmental immunity." *Id.* at 1273.

28. See ME. REV. STAT. ANN. tit. 14, § 8101-18 (2003 & Supp. 2010). There are several relevant MTCA sections for this Note. Section 8103 generally provides immunity from suit to governmental entities. Section 8104-A allows four primary exceptions to immunity: negligent ownership, maintenance, or use of vehicles and other similar equipment; negligent construction, operation, or maintenance of a public building or an appurtenance to a public building; negligent discharge of pollutants; and negligent road construction or repair. In particular, Section 8104-A(1)(D) states: "A governmental entity is liable for its negligent acts or omissions in its ownership, maintenance or use of any . . . [a]ircraft." Sections 8104-B(3) and 8111(1)(C), which are exceptions granting immunity notwithstanding waiver for discretionary functions, and Section 8116, which relates to liability insurance, will be discussed briefly in Part IV.

29. Estate of Fortier v. City of Lewiston, ANDSC-CV-2008-084 at 3 (Me. Super. Ct., And. Cty., July 22, 2009) (Delahanty, J.).

30. *Id.*

31. *Id.*

32. *Id.*

33. Brief of Appellees Estate of Fortier et al. at 7, Estate of Fortier v. City of Lewiston, 2010 ME 50, 997 A.2d 84 (No. AND-09-422) [hereinafter Brief of Appellees].

34. NAT'L TRANSP. SAFETY BD., REPORT NO. NYC06FA154 (2007) [hereinafter NTSB REPORT].

35. That is, the occupants of the plane experienced a brief moment of weightlessness.

36. Brief of Appellees, *supra* note 33, at 9.

37. Fortier's brief alleges that the communication took place immediately after the first group exited the plane and before the second group took off. *Id.* Lewiston's brief alleges that Meyer was not made aware of any piloting irregularities until after the crash. Brief of Appellants City of Lewiston et al. at 8,

Barker Mountain; there were no survivors.<sup>38</sup>

The families of the students aboard the ill-fated flight brought suit against Lewiston, claiming that Meyer's failure to stop the second group from boarding the plane—given his alleged knowledge of the first flight—was negligent.<sup>39</sup> Additionally, even though Lewiston was a qualifying governmental entity under the MTCA, the suit argued that the exception to immunity for “use” of an aircraft should apply in this case.<sup>40</sup> Specifically, the families argued that Lewiston was “liable for its ‘negligent acts or omissions in its ownership, maintenance or use of any aircraft.’”<sup>41</sup>

Lewiston contended that it was immune from suit because it was not “using” the plane under the definition of the MTCA.<sup>42</sup> Alternatively, Lewiston argued that Meyer was performing a discretionary function while supervising the AFJROTC program, providing immunity for Lewiston, notwithstanding the “use” exception.<sup>43</sup> On Lewiston's motion for summary judgment, the trial court ruled for the families, noting that Lewiston was “using” the aircraft for the chartered flights under the MTCA and that Meyer's decision to allow the second group of student to take off was not a discretionary function.<sup>44</sup> Lewiston appealed.<sup>45</sup>

### B. Majority and Dissent

The majority began by reviewing the principles of statutory construction in MTCA cases: “Immunity is the rule and exceptions to immunity are to be strictly construed.”<sup>46</sup> With that in mind, they determined that the case turned on whether or not Lewiston was “using” the aircraft.<sup>47</sup> In order to parse the language of Section 8104-A of the MTCA, the majority looked to the surrounding language to provide a context for “use.”<sup>48</sup> Notably, the statute references a governmental entity by discussing “its negligent acts in its [ownership and] maintenance.”<sup>49</sup> For these two categories, “its” implies a measure of control by the governmental entity.<sup>50</sup> Because these provisions are very specific, the majority found that a broad meaning of “use” would be illogical and interpreted a restrictive meaning for “use” as part of

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Estate of Fortier v. City of Lewiston, 2010 ME 50, 997 A.2d 84 (No. AND-09-422) [hereinafter Brief of Appellants].

38. Estate of Fortier v. City of Lewiston, ANDSC-CV-2008-084 at 3 (Me. Super. Ct., And. Cty., July 22, 2009) (Delahanty, J.).

39. *Id.* at 4.

40. *Id.* at 7.

41. *Id.* (citation omitted).

42. *Fortier*, 2010 ME 50, ¶ 6, 997 A.2d at 86.

43. *Id.*

44. *Id.*

45. *Id.* Interlocutory appeals are generally not allowable, but raising a claim of immunity is an exception to the rule. *Id.* ¶ 1, 997 A.2d at 85.

46. *Id.* ¶ 8, 997 A.2d at 87 (quoting *Thompson v. Dep't of Inland Fisheries & Wildlife*, 2002 ME 78, ¶ 5, 796 A.2d 674, 676).

47. *Id.* ¶ 10, 997 A.2d at 87.

48. *Id.* ¶ 11, 997 A.2d at 87.

49. *Id.* ¶ 12, 997 A.2d at 88 (citing ME. REV. STAT. ANN. tit. 14, § 8104-A(1) (2003 & Supp. 2010)) (quotation marks omitted).

50. *Id.*

the statute's legislative intent.<sup>51</sup> The example put forth was if the governmental entity were able to exercise direct control over the aircraft or pilot, such as a state trooper flying a Maine State Police aircraft, it would be "using" the aircraft.<sup>52</sup> Because Twin Cities had direct control over the aircraft and its pilot, Lewiston's control through Meyer and the AFJROTC was indirect at best and insufficient to trigger an exception to immunity under the MTCA.<sup>53</sup> As Lewiston had immunity, the court did not discuss whether Meyer's supervision of the flight was a discretionary function.<sup>54</sup>

The dissent argued that the restrictive meaning of "use" put forth by the majority was equivalent to "operation," and this narrow meaning contradicted the plain meaning of "use."<sup>55</sup> Because "use" has a broader definition than "operate,"<sup>56</sup> it should be read as such; if the Legislature had meant to use the more restrictive "operate," it would have done so when drafting the statute.<sup>57</sup> The dissent also pointed out that a broad meaning of use does not necessarily expand the breadth of the statute without a check: the governmental entity's use must still be negligent.<sup>58</sup> In this case, because Lewiston's "use" of the aircraft was contemplated under the plain meaning of the statute, the dissent believed that an exception to immunity existed and argued that the case should be remanded to determine whether Meyer was negligent.<sup>59</sup>

### C. Critique

When interpreting the work of legislatures, courts must utilize some principles of statutory construction in order to lend meaning to the words of the statutes. In Maine, as Justice Silver's dissent articulated in *Fortier*, the Law Court assumes that all words within the statute have an "independent meaning" as the Legislature would not intentionally create surplusage.<sup>60</sup> As long as courts can glean a reasonable interpretation from the language of the statute, words will not be treated as surplusage.<sup>61</sup> In order to create a reasonable interpretation, the court first looks to the plain meaning of the words,<sup>62</sup> however, it also reads them within the overall

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51. *Id.* ¶¶ 13, 15, 997 A.2d at 88-89.

52. *Id.* ¶ 15, 997 A.2d at 89.

53. *Id.*

54. *Id.* ¶ 16, 997 A.2d at 89.

55. *Id.* ¶¶ 17-18, 997 A.2d at 89-90 (Silver, J., dissenting).

56. Compare WEBSTER'S NEW INT'L DICTIONARY 2523 (3rd. ed. 1986) (defining "use" as "to put into action or service"), with *id.* at 1581 (defining "operate" as "bring about . . . by the exertion of positive effort or influence").

57. *Fortier*, 2010 ME 50, ¶¶ 20-22, 997 A.2d at 90-91. In particular, the dissent points out an instance where the legislature used "operation" with respect to aircraft. *Id.* ¶ 22, 997 A.2d at 91 (citing ME. REV. STAT. ANN. tit. 6, § 3(24) (2009)).

58. *Id.* ¶ 23, 997 A.2d at 91.

59. *Id.* ¶ 26, 997 A.2d at 92.

60. *Id.* ¶ 20, 997 A.2d at 90 (citing *Linnehan Leasing v. State Tax Assessor*, 2006 ME 33, ¶ 21, 898 A.2d 408, 413).

61. *Id.*

62. *Id.* (citing *Me. Sch. Admin. Dist. No. 37 v. Pineo*, 2010 ME 11, ¶ 16, 988 A.2d 987, 993).

statutory scheme to ensure a “harmonious result.”<sup>63</sup>

But what happens when the plain meaning of a word creates a possibly discordant result? Should the court defer to the Legislature and err on the side of plain meaning, or should the court perpetuate its own judicial fiction and impose a pleasant symmetry on the legislative language? Luckily, the court has created another standard for analyzing the MTCA: all exceptions destroying immunity must be interpreted narrowly.<sup>64</sup> Although this is reasonable given the Legislature’s reluctance to abrogate sovereign immunity, there is nothing to suggest that the Legislature did not intend to eliminate immunity for “use” to the fullest extent envisioned by the MTCA.<sup>65</sup>

The priority of these three statutory construction principles as applied to the MTCA—plain meaning, harmonious reading, and narrow exceptions—is unclear. The majority in *Fortier* started off with the goal of construing exceptions narrowly and then moved on to reading the statute in a harmonious way. Because it was able to interpret the statute using the first two criteria, the majority did not reach the plain meaning of the words in its analysis. The dissent would have started with the plain meaning of the text and then, presumably, ensured a harmonious reading. It is unclear how, if at all, the dissent would have applied the narrow construction principle although it did express a general disdain for the practice of automatically seeking to limit liability.<sup>66</sup> In any event, the primary goal for construing statutes should be to ascertain and apply the Legislature’s intent as faithfully as possible. A one-vote majority, the equivalent of a judicial coin flip, does not engender much certainty that the legislative goals have been accurately applied.

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63. *Id.* ¶ 11, 997 A.2d at 87 (majority opinion) (citing *McPhee v. Me. State Ret. Sys.*, 2009 ME 100, ¶ 23, 980 A.2d 1257, 1265). For the particular statute of interest in *McPhee*, the Legislature specifically instructed that it should be interpreted according to the “plain meaning of its terms.” ME. REV. STAT. ANN. tit. 5, § 17059(6)(A) (2010). Interestingly, one of the issues was if utilizing the “plain meaning” of terms was consistent with the entire statutory scheme. *McPhee*, 2009 ME 100, ¶ 23, 980 A.2d at 1265. In general, the court attempts to utilize plain meanings, even without explicit legislative direction.

64. *Fortier*, 2010 ME 50, ¶ 8, 997 A.2d at 87 (citing *Thompson v. Dep’t of Inland Fisheries & Wildlife*, 2002 ME 78, ¶ 5, 796 A.2d 674, 676). See also *New Orleans Tanker Corp. v. Me. Dep’t of Transp.*, 1999 ME 67, ¶ 5, 728 A.2d 673, 675 (citing several cases in which the court has required strict construction of the MTCA). The oldest case for strict construction in *New Orleans Tanker* is *Clockedile v. State Department of Transportation*, 437 A.2d 187 (Me. 1981). The authority that *Clockedile* cites is *Cushing v. Cohen*, 420 A.2d 919, 923 (Me. 1980) (referencing *Drake v. Smith*, 390 A.2d 541, 543 (Me. 1978)). *Cushing* only requires a “specific authority conferred by an enactment of the legislature” to waive sovereign immunity. *Id.* There is no mention that the “specific authority” must be narrowly construed.

65. The legislative record suggests that the exceptions to immunity were suggested, in part, based on accessibility to insurance coverage at a reasonable cost and were intended to provide some relief to injured parties. See 1 Legis. Rec. 71 (1977) and 2 Legis. Rec. 1644 (1977) (remarks of Sen. Collins). It is unclear what caused the court to have a change of heart between *Davies* in 1976 when it completely abrogated sovereign immunity and *Clockedile* in 1981 when it began to construe the MTCA strictly, effectively increasing the scope of sovereign immunity.

66. *Fortier*, 2010 ME 50, ¶ 24, 997 A.2d at 91.

## IV. AVOIDING “USE” ALTOGETHER

A. *Discretionary Function*

Given the court’s discordant views on the meaning of “use” within the MTCA, perhaps the court could have held for Lewiston on different grounds and avoided interpreting the MTCA altogether. Title 14, Section 8104-B(3) of the Maine Revised Statutes provides immunity for governmental entities, notwithstanding the Section 8104-A exceptions, for any discretionary functions or duties.<sup>67</sup> The court’s reluctance to address the discretionary function provision may be, in part, due to the court’s own complicated jurisprudence on the matter.

In 1981, the court adopted a four-factor test for discretionary immunity, which generally looks at the character of the decision and the nature of the governmental goal.<sup>68</sup> Since that time, the court has applied these factors in a number of cases.<sup>69</sup> For instance, in *Norton v. Hall*, the Law Court determined that an officer who was involved in a car crash while responding to an emergency was entitled to discretionary function immunity, reasoning that “the response to an emergency by a law enforcement officer serves the basic governmental objective of public safety.”<sup>70</sup> However, routine patrolling, an everyday operation, was not entitled to discretionary immunity.<sup>71</sup> Additionally, “[for] conduct [that] has little or no . . . governmental conduct but instead resembles decisions or activities carried on by

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67. ME. REV. STAT. ANN. tit 14, § 8104-B(3) (2003 & Supp. 2010). Governmental employees have a similar personal immunity when performing discretionary functions within the scope of their employment. *Id.* § 8111. If Section 8111 is inapplicable, then the personal immunity for a governmental employee’s negligent acts is \$10,000. *Id.* § 8104-D. It does not appear that the families sued Meyer personally in this case.

68. The court gave the following formulation of the test:

(1) Does the challenged act, omission, or decision necessarily involve a basic governmental policy, program or objective? (2) Is the questioned act, omission, or decision essential to the realization or accomplishment of that policy, program, or objective as opposed to one which would not change the course or direction of the policy, program, or objective? (3) Does the act, omission, or decision require the exercise of basic policy evaluation, judgment, and expertise on the part of the governmental agency involved? (4) Does the governmental agency involved possess the requisite constitutional, statutory, or lawful authority and duty to do or make the challenged act, omission, or decision?

*Darling v. Augusta Mental Health Inst.*, 535 A.2d 421, 426 (Me. 1987) (citations omitted).

69. See *Grossman v. Richards*, 1999 ME 9, ¶ 8, 722 A.2d 371, 374 (holding that statements regarding public money were a discretionary function and entitled to immunity); *Robert v. State*, 1999 ME 89, ¶ 10, 731 A.2d 855, 857-58 (holding that a prison guard shutting a prison door on an inmate’s hand was a discretionary function and entitled to immunity); *Berard v. McKinnis*, 1997 ME 186, ¶ 10, 699 A.2d 1148, 1151 (holding that the revocation of an EMT’s license was a discretionary function and entitled to immunity).

70. 2003 ME 118, ¶ 7, 834 A.2d 928, 931. However, *Norton* led to a legislative amendment in 2005 of Section 8104-B(3), which provided that “if the discretionary function involves the operation of a motor vehicle . . . this section does not provide immunity for . . . negligent operation . . . regardless of whether the employee has immunity under this chapter.” P.L. 2005, ch. 448, § 1 (codified at § 8104-B(3)).

71. *Norton*, 2003 ME 118, ¶ 14, 834 A.2d at 932.

people generally, discretionary function immunity is not afforded.”<sup>72</sup> These types of decisions are referred to as “ministerial” or “operational” decisions. In other words, immunity is not automatically afforded simply because there is an element of decision-making.

The scope of discretionary function immunity is itself based on the scope in which a particular act is viewed. For instance, just as a police officer responding to an emergency serves the larger goal of public safety, so too does routine patrolling. Although responding to an emergency deals with an immediate crisis, everyday patrolling helps to prevent crime or at least encourage an immediate response if an emergency should arise. Generally, actions by police officers are not carried out by everyday citizens: they do not respond to emergencies, nor are they tasked with maintaining the public order. However, if the scope of immunity is limited to the officer’s operation of the vehicle—an action that is carried out by people generally—discretionary immunity may not apply.

In *Fortier*, Lewiston’s AFJROTC program seemed to be the type of governmental program that would qualify for discretionary function immunity. The court could have found that the entire AFJROTC program served governmental policies on the federal, state, and local level. As Lewiston argued at trial, “it is hard to fathom a program, policy, or objective that is inherently more governmental.”<sup>73</sup> If the Law Court had been unwilling to make a broad statement about these sorts of programs, it could have found that Meyer was acting in furtherance of Lewiston’s specific governmental policy of maintaining the AFJROTC program at Lewiston High School. In other words, Meyer’s decision to employ Twin Cities was a discretionary function. Similarly, it is possible that Meyer’s decision to continue or discontinue the flights, which was part of the AFJROTC curriculum, could also qualify as a discretionary function. Decisions regarding the administration of the AFJROTC program are not made by people generally.

The trial court limited the scope of Meyer’s actions to an “operational decision[] made by a school employee regarding the safety of children.”<sup>74</sup> Rather than interpreting the “use” provision of the MTCA, the Law Court could have found that the trial court’s interpretative scope for discretionary function was too narrow. The court could have expanded the scope and concluded that Lewiston was entitled to immunity because Meyer was acting in his official capacity as the AFJROTC administrator.

### B. Negligence

In order to be liable under the MTCA, an exception to immunity under Section 8104-A must apply without any other provision allowing for immunity, such as

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72. *Jorgensen v. Dep’t of Transp.*, 2009 ME 42, ¶ 16, 969 A.2d 912, 917 (quoting *Tolliver v. Dep’t of Transp.*, 2008 ME 83, ¶ 21, 948 A.2d 1223, 1231) (quotation marks omitted). The origin of this phrase can be traced back to *Adriance v. Town of Standish*, 687 A.2d 238, 241 (Me. 1996), which itself is quoting from W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* § 131 (5th ed. 1984).

73. *Estate of Fortier v. City of Lewiston*, ANDSC-CV-2008-084 at 11 (Me. Super. Ct., And. Cty., July 22, 2009) (Delahanty, J.).

74. *Id.* at 12-13.

Section 8104-B's immunity for discretionary functions. However, to reach either of these questions, there first must be a *negligent* act or omission.<sup>75</sup> Typically, the MTCA is addressed at the summary judgment phase on immunity grounds, as it was in this case, because a lawsuit utterly fails if immunity is preserved. Even though certain facts were assumed in this case,<sup>76</sup> there is nothing that would have prevented either court from finding that Meyer was not negligent as a matter of law.<sup>77</sup>

The victims' families contended that Meyer was negligent based on his first-hand knowledge of Weir's "unusual" landing and his second-hand knowledge, through Taylor, of Weir's maneuvers during the first flight.<sup>78</sup> First, Weir's landing in and of itself may not have been indicative of how he handled the plane in the air. Although Meyer described it as "unusual," there is no indication that Meyer believed or had reason to believe that the landing was dangerous per se.

Second, even if Meyer had learned the details of the first flight prior to take-off of the second flight, it is uncertain what alternative course of action he should have taken. Meyer himself testified that there was nothing unsafe per se regarding any of Weir's previous alleged maneuvers.<sup>79</sup> The families argued that Weir had plainly violated certain FAA regulations, such as one prohibiting aerobatic maneuvers below an altitude of 1,500 feet.<sup>80</sup> Based on Taylor's statements, Meyer may not have had enough information to conclude anything with respect to Weir's piloting. If Meyer had no rational reason to believe that Weir was a threat to the safety of the passengers, then Meyer could not have breached his duty of care for the students' well-being by allowing them to board the plane.

Third, it does not appear from the record that Meyer, as a career Air Force pilot, was hired as the Senior Aerospace Instructor because of his knowledge of FAA regulations and pilot safety. Meyer's vast experience certainly made him a valuable resource as an instructor and an ideal candidate to teach the cadets about the Air Force, but his ability to pilot an aircraft and his monitoring of Twin Cities' pilots during the training flights may not have been part of his job. Prior to Meyer's arrival, Master Sergeant Thomas Noury served as the AFJROTC liaison and coordinated similar training flights, despite Noury's inexperience as a pilot.<sup>81</sup> If Noury had been in charge in June 2006, he may not have been able to adequately critique Weir's flying. The court could have found that Meyer was not negligent because he did not have a heightened duty as the school's instructor to assess the piloting skills of Twin Cities' employee.<sup>82</sup>

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75. See § 8104-A(1).

76. See *Estate of Fortier v. City of Lewiston*, 2010 ME 50, ¶ 4, 997 A.2d 84, 85.

77. In fact, some courts do analyze the negligence component as part of their standard TCA analysis. See *infra* Part V.

78. See Brief of Appellees, *supra* note 33, at 9, 12.

79. See Brief of Appellants, *supra* note 37, at 7.

80. See Brief of Appellees, *supra* note 33, at 9 n.3 (citation to footnote only).

81. *Id.* at 5 n.2 (citation to footnote only) (stating that Noury was never a licensed pilot and was not in the position to evaluate other pilots).

82. In Maine, "[o]nly when there is a 'special relationship,' may the actor be found to have a common law duty to prevent harm to another, caused by a third party." *Belyea v. Shiretown Motor Inn*, 2010 ME 75, ¶ 9, 2 A.3d 276, 279 (quoting *Bryan R. v. Watchtower Bible & Tract Soc'y of N.Y., Inc.*, 1999 ME 144, ¶ 14, 738 A.2d 839, 845). In *Fortier*, Meyer mostly likely did have a general duty as a

Fourth, governmental entities are not liable for the negligence of its independent contractors. Certainly, Lewiston is not liable for the negligent acts of Twin Cities or its employees. Fortier attempted to assert that the negligence of Meyer, not that of Weir or Twin Cities, resulted in the death of the students. In fact, Weir was an FAA-certified flight instructor who should have been the most knowledgeable person regarding the operation and safety of the training aircraft. Despite Meyer's landing observation and conversation with the students, the court could have found that it was simply not foreseeable that the plane would crash into the mountain. The National Transportation Safety Board identified the probable cause of the accident as "[t]he flight instructor's failure to maintain altitude/clearance while maneuvering, which resulted in an impact with the trees."<sup>83</sup> This type of pilot error would likely carry a presumption of negligence.<sup>84</sup> If Weir was negligent, it would have been a superseding act of negligence that caused the crash, and Meyer would be absolved of liability, even if Meyer were negligent.<sup>85</sup>

### C. Insurance

Title 14, Section 8116 of the Maine Revised Statutes provides an interesting relief valve to the broad immunity granted by the MTCA: "If . . . insurance provides coverage in areas where the governmental entity is immune, the governmental entity shall be liable in those substantive areas but only to the limits of the insurance coverage." On the one hand, this provision would seem to greatly expand the number of exceptions to the MTCA's immunity so long as the entity had a relevant insurance policy. This would allow for compensation to injured parties who otherwise may not have received anything for their injuries. On the other hand, because having insurance would effectively increase liability, Section 8116 would also serve as a disincentive for governmental entities to protect themselves against situations that are otherwise immune under the MTCA. Lewiston in particular is covered by the Maine Municipal Association Property & Casualty Pool, which specifically limits its coverage only to cases where immunity has been waived.<sup>86</sup> In fact, most of the towns and cities in Maine are part of this insurance pool.<sup>87</sup> Although Section 8116 certainly provides that a town *may* purchase additional insurance to cover accidents where it is immune, there is absolutely no reason for the town to do so.

As it stands today, Section 8116 is functionally useless. In this case, the

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school instructor to protect the students in his care. However, that duty may not have extended beyond the reasonable care of a school instructor in a similar situation.

83. NTSB REPORT, *supra* note 34.

84. See RESTATEMENT (SECOND) OF TORTS § 288B (1965) ("The unexcused violation of a legislative enactment or an administrative regulation which is adopted by the court as defining the standard of conduct of a reasonable man, is negligence in itself.")

85. Generally, if a third party's negligence (Weir's) is an overriding cause of the harm, then a prior negligent actor (Meyer) is not liable. See RESTATEMENT (SECOND) OF TORTS § 440 (1965).

86. Telephone Interview with Edward R. Benjamin, Partner, Thompson & Bowie (Dec. 2, 2010) [hereinafter Benjamin Interview]. See also, e.g., *Old Town v. Dimoulas*, 2002 ME 133, ¶ 25 803 A.2d 1018, 1025 (stating that a disclaimer limiting coverage to instances where sovereign immunity is explicitly waived is "sufficient to avoid a waiver of immunity pursuant to section 8116") (citation omitted).

87. Benjamin Interview, *supra* note 86.

families were able to recover some damages through a settlement with Twin Cities,<sup>88</sup> but in other cases, immunity may completely bar recovery. If one of the purposes of the MTCA was to lessen the harshness of sovereign immunity, certainly one of the goals was to allow for increased recovery by injured parties. Although expanding the roads to recovery may lead to increased litigation, the Legislature should provide a better incentive for governmental entities to purchase supplemental insurance, particularly in a case like this where students were killed as part of a school function.

#### V. VIEWING *FORTIER* THROUGH OTHER STATES

All states have some mechanism to deal with tort claims against them. This section will analyze how several different states may have handled *Fortier*. The four states below were chosen to reflect a variety of approaches to sovereign immunity. The selected states are not necessarily representative of all possible approaches, but they do serve to provide some perspective on Maine's approach.

##### A. Alabama

In Alabama, the State is absolutely immune from suit.<sup>89</sup> This immunity only extends to "immediate and strict governmental agencies of the State"—county and city school boards historically did not fall into this area.<sup>90</sup> Furthermore, because the school boards were given the right to sue, there was also "the implied right [for the school boards] to be sued."<sup>91</sup> Recently, however, the Alabama Supreme Court held that school boards are "local agencies of the State," as opposed to county agencies, and are thus immune from suit.<sup>92</sup>

In contrast, Maine public schools are primarily controlled at the local level, and school districts are largely able to develop their own curriculum and policies, so long as they meet the state statutory requirements.<sup>93</sup> For example, many smaller towns band together to form "regional school units," whereas some larger cities like Lewiston are solely responsible for the administration of their schools.<sup>94</sup> Because of the uniquely local character of Maine schools, it is unlikely that Lewiston High School would qualify as a "state agency" under Alabama's narrow definition of state agencies. Accordingly, if Alabama's absolute immunity were

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88. *Id.*

89. See ALA. CONST. art. I, § 14.

90. *Ex parte* Bd. of Sch. Comm'rs of Mobile Cnty., 161 So. 108, 109 (Ala. 1935).

91. *Kimmons v. Jefferson Cnty. Bd. of Educ.*, 85 So. 774, 777 (Ala. 1920). This right to be sued was primarily founded in breaches of contract. See, e.g., *Sims v. Etowah Cnty. Bd. of Educ.*, 337 So. 2d 1310, 1313 (Ala. 1976), *overruled by Ex parte* Hale Cnty. Bd. of Educ., 14 So. 3d 844, 848 (Ala. 2009) ("[O]ur cases recognize that a county board of education may be sued on its contracts").

92. *Ex parte* Hale Cnty. Bd. of Educ., 14 So. 3d at 848 (emphasis omitted). See also ALA. ADMIN. CODE r. 290-010-010.03 (2010) ("The general supervision of the public schools in Alabama is vested in the [Alabama State] Board [of Education]").

93. See ME. REV. STAT. ANN. tit 20-A, § 2(2) (2008) ("It is the intent of the Legislature that the control and management of the public schools shall be vested in the legislative and governing bodies of local school administrative units").

94. See ME. DEP'T OF EDUC., *Maine School Administrative Units*, MAINE.GOV (Aug. 1, 2010), <http://www.maine.gov/education/eddir/saumap11x17.pdf> (last visited Mar. 1, 2011).

the law in Maine, it is likely that Lewiston could be sued in *Fortier*.

### B. Delaware

In Delaware, the State enjoys immunity under an “exception-to-immunity” style TCA similar to that of Maine.<sup>95</sup> Delaware’s relevant exception destroys immunity for “[a] governmental entity[’s] . . . negligent acts or omissions causing . . . death . . . [i]n its ownership, maintenance, or use of any motor vehicle . . . .”<sup>96</sup> The “use” exception has been interpreted several times by the Delaware Supreme Court; however, “use” has not been defined *per se*.<sup>97</sup> Instead, the analysis in these cases often turn on the level of negligence—the State is only liable for an employee’s ordinary negligence, and the employee is liable for gross negligence.<sup>98</sup> Notably, the Delaware cases seem to require a direct link between the State employee and the use of the vehicle or equipment; e.g., a police officer operating a police car.<sup>99</sup>

If the Delaware analysis were applied in Maine, the Law Court would first begin by determining the character of Meyer’s negligence, if any. If Meyer’s act of allowing the second group of students to board the plane were grossly negligent, he

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95. Title 10, Section 4011(a) of the Delaware Code provides: “Except as otherwise expressly provided by statute, all governmental entities and their employees shall be immune from suit on any and all tort claims seeking recovery of damages.” DEL. CODE ANN. tit 10, § 4011(a) (2011). *See also* *Fiat Motors v. Mayor of Wilmington*, 498 A.2d 1062, 1067 n.8 (Del. 1985) (citing 62 Del. Laws, c. 124 § 2 (House Bill #523)) (“Delaware’s act was . . . closely modeled after legislation enacted in the State of Maine”).

96. § 4012(1).

97. *Compare* *Walls v. Rees*, 569 A.2d 1161, 1167 (Del. 1990) (holding that seizure and storage of a vehicle did not qualify as “use”), *with* *Sussex Cnty. v. Morris*, 610 A.2d 1354, 1357-58, 1360 (Del. 1991) (holding that the improper selection of equipment by a police officer to transfer a mentally ill passenger qualified as “use”).

98. *See* *City of Wilmington v. Sikander*, No. 449, 2006 Del. LEXIS 136, at \*4 (Del. Sup. Ct. Mar. 17, 2006) (indicating that a governmental entity is liable for its employee’s negligence, but the employee himself would be liable for “wanton negligence”). This distinction would not apply in Maine as the court does not recognize the difference between simple and gross negligence. *See* *Reliance Nat’l Indem. v. Knowles Indus. Servs. Corp.*, 2005 ME 29, ¶ 17 868 A.2d 220, 227 (citing *Cratty v. Samuel Aceto & Co.*, 151 Me. 126, 131, 116 A.2d 623, 627 (1955)).

99. *See, e.g.,* *Jones v. Crawford*, 1 A.3d 299, 301 (Del. 2010) (finding that a police officer who engaged in a high-speed chase that resulted in the death of a third party implicated the “use” exception). In *Jones*, the person being pursued by the officer directly caused the injury. *See id.* at 301. The court held that the officer was “using” the police car during the chase and remanded for the lower court to assess how the officer’s negligence may have related to the crash. *See id.* at 302, 304. In Maine, the court may have reached a different result given facts similar to those in *Jones*. In *Selby v. Cumberland County*, 2002 ME 80, 796 A.2d 678, a high speed chase by a police officer resulted in an injury when the chased party crashed into a third party. *Id.* ¶ 2, 796 A.2d at 679. The decision by the officer in *Selby* to initiate the pursuit was entitled to immunity under the discretionary function exception of the MTCA. *See id.* ¶¶ 7, 10, 796 A.2d at 680-82. *See also* ME. REV. STAT. ANN. tit. 14, § 8104-B(3) (2010). It is unclear how this would be analyzed by the current court given the recent amendment to Section 8104-B(3). *See* P.L. 2005, ch. 448, § 1 (codified at § 8104-B(3)). Rather than automatically dismissing the suit on immunity grounds, the court would likely have to conduct a fact-specific inquiry as to whether the particular high-speed chase was negligent under the circumstances. Although Delaware has a similar discretion exception, it was not discussed in *Jones*. *See* DEL. CODE ANN. tit. 10, § 4011(b)(3). Instead, *Jones* focused on liability created by an emergency vehicles statute. *See Jones*, 1 A.3d at 302 (citing § 4106).

would be solely liable; if the act were merely ordinary negligence, Lewiston would be liable.<sup>100</sup> Liability of either type, of course, would be contingent on “use” as it relates to the aircraft. Because the cases imply direct “use,” it seems unlikely that Meyer’s indirect use of the plane would fall under Delaware’s “use” exception, and Lewiston would maintain immunity.

### C. South Carolina

South Carolina employs an “exception-to-liability” approach, whereby immunity is broadly waived with limited exceptions restoring immunity.<sup>101</sup> There is no exception for negligence arising from the use of motor vehicles, which is consistent with the Maine and Delaware approach. There is an exception, however: the State is not liable for negligent supervision or custody of students, unless grossly negligent.<sup>102</sup> This exception does not extend to negligent operation of a vehicle containing students.<sup>103</sup> Additionally, South Carolina’s TCA is generally construed, when possible, to limit the liability of the State.<sup>104</sup>

If Maine adopted South Carolina’s approach, Meyer’s role as school instructor would seem to place his acts within the exception restoring immunity—his decision to allow the students to board the plane is connected to his supervision or custody of the students. The key question would ask if Meyer was grossly negligent in this duty. If Meyer had learned about Weir’s unusual flying before the second group of students boarded the plane, and if Meyer reasonably concluded based on his experience as a pilot that the students were not in danger, then it seems unlikely that his negligence, (if any), would rise above ordinary negligence. Additionally, because neither Lewiston nor Meyer were “operating” the aircraft, the exception to liability would likely be maintained. Applying South Carolina law, Lewiston would probably be immune from suit.

### D. Texas

Texas, like South Carolina, employs an “exception-to-liability” approach in its TCA.<sup>105</sup> Specifically, the government is liable for “negligence of an employee acting within his scope of employment if . . . personal injury[] or death arises from the operation or use of a motor-driven vehicle.”<sup>106</sup> Even though the Legislature did not define “operation” or “use,” the Texas Supreme Court construed the terms using their plain meanings: “Operation refers to a doing or performing of a

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100. Analyzing whether there was negligence first, as in this instance, may avoid the need to reach the TCA altogether. See Part IV.B.

101. See S.C. CODE ANN. § 15-78-40 (2009) (generally conferring liability on the state for its torts) and § 15-78-60 (listing forty exceptions that restore immunity).

102. *Id.* § 15-78-60(25) (restoring immunity when a loss arises from the “responsibility or duty including but not limited to supervision, protection, control, confinement, or custody of any student, patient, prisoner, inmate, or client of any governmental entity, except when the responsibility or duty is exercised in a grossly negligent manner”).

103. *Gardner v. Biggart*, 417 S.E.2d 858, 860 (S.C. 1992).

104. § 15-78-20(f).

105. TEX. CIV. PRAC. & REM. CODE ANN. § 101.025(a) (2009) (“Sovereign immunity to suit is waived and abolished to the extent of liability created by this chapter”).

106. *Id.* § 101.021.

practical work,”<sup>107</sup> and “use means to put or bring into action or service; to employ for or apply to a given purpose.”<sup>108</sup> One important exception to the State’s liability restores immunity to school districts, unless a motor vehicle is involved.<sup>109</sup> However, the governmental employee herself must be negligently operating or using the motor vehicle to confer liability.<sup>110</sup> Generally, sovereign immunity is preferred when interpreting the statute.<sup>111</sup> Thus, because a school employee was not driving the vehicle, a school district was immune from suit when a student was injured while riding in a pickup truck on school grounds.<sup>112</sup>

Because Texas’ law utilizes a broad meaning for “use,” if the Law Court applied it to *Fortier*, Lewiston’s indirect “use” of the chartered flight may have been sufficient to confer liability. However, because Meyer was not directly operating the plane and was not technically using the plane himself, Lewiston may fall under the school exception to immunity. Given the preference of immunity over liability, Lewiston most likely could not be sued under Texas law.

#### VI. FURTHER INTERPRETATION OF THE MTCA

Adding to the complexity of MTCA case law, several months after *Fortier*, the Law Court again addressed an issue arising under the MTCA in *Searle v. Bucksport*.<sup>113</sup> The case dealt with an injury resulting from a fall on Bucksport High School’s football bleachers and required the court to analyze the MTCA’s “public building exception.”<sup>114</sup> In another 4-3 decision, the majority utilized the principles of statutory construction to determine whether the bleachers were an “appurtenance” to the high school.<sup>115</sup> Similar to *Fortier*, the court began with the aim of narrowly interpreting the MTCA exception before looking to the meaning of “appurtenance” to see if the bleachers qualified.<sup>116</sup>

This time, the majority was able to build on early case law that had narrowed Maine’s interpretation of “appurtenance” to the more restrictive term “fixture.”<sup>117</sup> An “appurtenance” is something “that belongs or is attached to a public building”<sup>118</sup> whereas a “fixture” is “an irremovable part of the real property with

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107. *Mount Pleasant Indep. Sch. Dist. v. Estate of Lindburg*, 766 S.W.2d 208, 211 (Tex. 1989) (citing *Jackson v. City of Corpus Christi*, 484 S.W.2d 456, 459 (Tex. Civ. App. 1969)) (quotation marks omitted).

108. *Id.* (citing *Beggs v. Tex. Dep’t of Mental Health & Mental Retardation*, 496 S.W.2d 252, 254 (Tex. Civ. App. 1973)) (quotation marks omitted).

109. § 101.051.

110. *LeLeaux v. Hamshire-Fannet Indep. Sch. Dist.*, 835 S.W.2d 49, 51 (Tex. 1992).

111. *Id.*

112. *Tarkington Indep. Sch. Dist. v. Aiken*, 67 S.W.3d 319, 321, 326 (Tex. App. 2002).

113. 2010 ME 89, 3 A.3d 390 (4-3 decision).

114. *Id.* ¶ 1, 3 A.3d at 393. “A governmental entity is liable for its negligent acts or omissions in the construction, operation or maintenance of any public building or the appurtenances to any public building.” ME. REV. STAT. ANN. tit. 14, § 8104-A(2) (2003 & Supp. 2010).

115. *Searle*, 2010 ME 89, ¶¶ 11-14, 3 A.3d at 394-95.

116. *See id.* ¶¶ 9-11, 3 A.3d at 394-95.

117. *Id.* ¶ 14, 3 A.3d at 395 (citing *Sanford v. Shapleigh*, 2004 ME 73, ¶¶ 9-12, 850 A.2d 325, 328-29).

118. *Id.* ¶ 11, 3 A.3d at 394 (citing *Sanford*, 2004 ME 73, ¶ 11, 850 A.2d at 329).

which [it is] associated.”<sup>119</sup> In this case, because the bleachers were movable, (albeit with significant effort), and not physically attached to the ground, the majority found that the bleachers were not an appurtenance.<sup>120</sup>

Once again, the majority distorted the plain meaning of the statutory language within the MTCA in order to narrowly construe exceptions to immunity. As the dissent points out, this narrow definition could set up a situation where one set of bleachers physically attached to the ground would expose the school to liability under the MTCA whereas immunity would be maintained for an adjacent set of unattached bleachers.<sup>121</sup> If true, this situation would seem to constitute an absurd result that the court strives to avoid when interpreting statutes.<sup>122</sup>

## VII. CONCLUSION

The Law Court reached a reasonable decision in *Fortier*. The court’s holding furthers the doctrine that the State is generally immune from suit, save for a few, narrow exceptions. Additionally, the outcome of the case is consistent with how several other states would have likely held, as discussed in Part V. However, functionally, the decisions in both *Fortier* and *Searle* serve as signals to the Legislature to revise and clarify the language of the MTCA.<sup>123</sup> Since 2003, the Law Court has rendered more than 1,200 opinions, approximately 88% of which were unanimous with only 2.6% resulting in 4-3 decisions.<sup>124</sup>

In contrast, out of the fifteen cases interpreting exceptions to MTCA immunity during the same time period, four, or more than 25%, have been 4-3 decisions.<sup>125</sup> Simply stated, the MTCA has generated more closely divided opinions than would be expected. The reason lies within the MTCA itself. Although the court is deferring to the Legislature so as to not expand the scope of sovereign immunity, the court’s highly contested decisions demonstrate that the Legislature has failed to draft reasonable, interpretable language in several of the exceptions to immunity in the MTCA. The court’s jurisprudence suggests that the MTCA is full of unworkable, ambiguous language. More precisely, when statutory language can reasonably be interpreted in multiple ways, with each interpretation yielding a reasonable result, the language itself is unworkable. Furthermore, if the Legislature did not mean to utilize the plain meaning of the words in the statute but instead intended a more nuanced interpretation, then the Legislature should revise the MTCA. If, as in *Fortier*, “use” means the more restrictive term “operation,” or if

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119. *Id.* ¶ 16, 3 A.3d at 396 (citing *Sanford*, 2004 ME 73, ¶ 9, 850 A.2d at 329).

120. *Id.* ¶¶ 22-23, 3 A.3d at 397-98.

121. *Id.* ¶ 28, 3 A.3d at 399 (Jabar, J., dissenting).

122. *Id.* ¶ 8, 3 A.3d at 394 (majority opinion) (citing *Windham Land Trust v. Jeffords*, 2009 ME 29, ¶ 12, 967 A.2d 690, 695).

123. Previously, Chief Justice Saufley urged the Legislature to clarify its intentions with respect to governmental immunity in emergency situations, and it took her advice. See *Norton v. Hall*, 2003 ME 118, ¶ 24, 834 A.2d 928, 935.

124. ME. JUDICIAL BRANCH, *Most Recent Opinions*, MAINE.GOV, [http://www.courts.state.me.us/court\\_info/opinions/supreme/index.shtml](http://www.courts.state.me.us/court_info/opinions/supreme/index.shtml) (last visited Feb. 4, 2010).

125. The exceptions to immunity are mentioned in the text accompanying note 28 *supra*. The four 4-3 decisions since 2003 include *Norton*, *Fortier*, and *Searle*. *Donovan v. Portland*, 2004 ME 70, 950 A.2d 319, another 4-3 decision, dealt with the public building exception under Section 8104-A(2).

as in *Searle* “appurtenance” means the more restrictive term “fixture,” then the Legislature should alter the language of the statute to accurately reflect its intentions. In fact, the Legislature should carefully review the MTCA in its entirety to avoid any 4-3 decisions from the court in the future.