

Department of Legislative Services
Maryland General Assembly
2015 Session

FISCAL AND POLICY NOTE

House Bill 728
Judiciary

(Delegate Carter, *et al.*)

Governmental Tort Claims - Excessive Force or Misuse of Force by Law
Enforcement Officer

This bill establishes separate, higher, liability limits under the Local Government Tort Claims Act (LGTCA) and the Maryland Tort Claims Act (MTCA) for claims based on excessive force or misuse of force by a law enforcement officer. With respect to these types of claims, the liability of a local government or the State may not exceed \$1,000,000 for an individual claim and \$1,500,000 for total claims that arise from the same incident or occurrence.

The bill applies prospectively to causes of action arising on or after the bill's October 1, 2015 effective date.

Fiscal Summary

State Effect: Potential significant increase in special fund expenditures if the bill results in higher payments from the State Insurance Trust Fund (SITF) for claims filed under MTCA or increased litigation of MTCA cases. General fund expenditures increase for State agencies subject to higher SITF assessments if SITF incurs losses from MTCA payments or if agencies need to employ additional staff to process MTCA cases filed as a result of the bill's provisions. Revenues are not affected.

Local Effect: Potential significant increase in expenditures for local governments to (1) pay judgment awards that exceed the current liability limits under LGTCA; (2) pay increased insurance premiums for liability coverage against LGTCA claims; and (3) litigate additional claims filed as a result of the bill. Revenues are not affected.

Small Business Effect: Potential meaningful impact on small business law firms that secure higher judgment awards for their clients as a result of the bill.

Analysis

Current Law:

Local Government Tort Claims Act: LGTCA defines local government to include counties, municipal corporations, Baltimore City, and various agencies and authorities of local governments such as community colleges, county public libraries, special taxing districts, nonprofit community service corporations, sanitary districts, housing authorities, and commercial district management authorities.

LGTCA limits the liability of a local government to \$200,000 per individual claim and \$500,000 per total claims that arise from the same occurrence for damages from tortious acts or omissions (including intentional and constitutional torts). It further establishes that the local government is liable for tortious acts or omissions of its employees acting within the scope of employment. Thus, LGTCA prevents local governments from asserting a common law claim of governmental immunity from liability for such acts of its employees.

Maryland Tort Claims Act: In general, the State is immune from tort liability for the acts of its employees and cannot be sued in tort without its consent. Under MTCA, the State statutorily waives its own common law (sovereign) immunity on a limited basis. MTCA applies to tortious acts or omissions, including State constitutional torts, by “State personnel” performed in the course of their official duties, so long as the acts or omissions are made without malice or gross negligence. Under MTCA, the State essentially “...waives sovereign or governmental immunity and substitutes the liability of the State for the liability of the state employee committing the tort.” (*Lee v. Cline*, 384 Md. 245, 262 (2004)).

However, MTCA limits State liability to \$200,000 to a single claimant for injuries arising from a single incident. Attorney’s fees are included in the liability cap under MTCA. Under MTCA, attorneys may not charge or receive a fee that exceeds 20% of a settlement or 25% of a judgment. MTCA claims are typically paid out of SITF, which is administered by the State Treasurer. The liability for an MTCA tort claim may not exceed the insurance coverage granted to units of State government under the State Insurance Program/SITF.

In actions involving malice or gross negligence or actions outside of the scope of the public duties of the State employee, the State employee is not shielded by the State’s color of authority or sovereign immunity and may be held personally liable.

State Expenditures: Special fund expenditures increase, perhaps significantly, if the bill results in higher payments from SITF for claims filed under MTCA or increased litigation costs for MTCA cases. General fund expenditures increase for State agencies subject to

higher SITF premiums/assessments if SITF incurs losses from MTCA payments as a result of the bill or if additional staff are needed to process claims filed as a result of the bill.

Claims under MTCA are paid out of SITF, which is administered by the Treasurer's Office. The Treasurer's Office advises that it received 4,858 claims for tort claimants in fiscal 2014. Of these claims, 15 have been settled or reserved for potential settlements related to excessive force or misuse of force by a law enforcement officer. Under the current liability limit, the State's total MTCA exposure is \$3,000,000. Under the bill, it could be \$15,000,000. The State's liability exposure under MTCA may increase even further if the liability limits under the bill increase the number of claims filed.

Between fiscal 2012 and 2014, SITF paid an average of \$3.7 million per year for tort claims under MTCA. The Treasurer's Office projects that SITF will pay approximately \$4.0 million in claims during fiscal 2015. The Governor's proposed fiscal 2016 budget includes a \$7.31 million appropriation for tort claims (including motor vehicle torts) under MTCA. The funds are to be transferred to SITF.

Agencies pay premiums to SITF that are comprised of an assessment for each employee covered and SITF payments for torts committed by the agency's employees. The portion of the assessment attributable to losses is allocated over five years. The Treasurer is charged with setting premiums "so as to produce funds that approximate the payments from the fund." (*See* Md. State Fin. & Proc. Code Ann. § 9-106(b).) The actuary assesses SITF's reserves and each agency's loss experience for the various risk categories, which include tort claims and constitutional claims. An agency's loss history, consisting of settlements and judgments incurred since the last budget cycle, comprises part of the agency's annual premium. That amount is electronically transferred to SITF from the appropriations in an agency's budget.

The Treasurer's Office advises that increasing the liability limit for excessive force/misuse of force cases under MTCA may result in additional lawsuits. However, the magnitude of this increase cannot be reliably estimated at this time and can only be determined with actual experience under the bill. To the extent that the bill generates an increase in case volume sufficient to warrant additional administrative staff, expenditures for the Insurance Division of the Treasurer's Office may increase.

If additional legal personnel are required to litigate cases filed as a result of the bill, then affected State agencies may incur additional expenses. Assistant Attorneys General assigned to State agencies and a supervising tort assistant Attorney General in the Treasurer's Office litigate MTCA cases. Agencies pay the salaries of their assistant Attorneys General. The salary of the supervising tort assistant Attorney General and all other litigation costs (*e.g.*, depositions, experts, etc.) are paid out of SITF.

Local Expenditures: The bill may result in a significant increase in expenditures for local governments to pay judgment awards that exceed the current limits on liability under LGTCA, pay increased insurance premiums for coverage of LGTCA claims, and litigate additional cases filed as a result of the bill.

Some local governments covered under LGTCA obtain insurance coverage through the Local Government Insurance Trust (LGIT), a self-insurer that is wholly owned by its member local governments. LGIT assesses premiums based on the projected claims and losses of its members. If claims increase in volume or amount as a result of the bill, insurance premiums also increase.

Montgomery County advises that while the number of excessive use of force claims filed against the county is minimal, the bill may (1) result in an “exponential” increase in the number of claims; (2) significantly increase the county’s liability; and (3) provide incentive for the filing of frivolous lawsuits.

According to the county, most claims filed against the county are for the liability limit. The county advises that claims consume an inordinate amount of time and resources, even though plaintiffs seldom prevail.

St. Mary’s County advises that increasing the liability limits in excessive force/misuse of force cases greatly increases the county’s insurance premium for liability coverage. According to the county, law enforcement liability claims are the most expensive to litigate and nearly always involve outside legal counsel costs. The bill’s increase of the liability limits in these cases may increase the volume of claims and the monetary amounts of claims, resulting in increased litigation, administrative, and liability expenditures for the county. The county advises that it may need to invest additional resources in technology (such as recording equipment) to deter liability claimants.

Additional Information

Prior Introductions: None.

Cross File: None.

Information Source(s): Carroll, Montgomery, Queen Anne’s, and St. Mary’s counties; Town of Leonardtown; City of Salisbury; Department of Natural Resources; Department of General Services; Comptroller’s Office; Judiciary (Administrative Office of the Courts); Maryland Department of Transportation; State Treasurer’s Office; Department of Legislative Services

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