Department of Legislative Services

Maryland General Assembly
2023 Session

FISCAL AND POLICY NOTE
First Reader

House Bill 115 (Delegate Acevero)
Judiciary

Civil Rights - Violation of Rights - Government Liability

This bill establishes that a police officer who, under color of law, deprives an individual of or infringes on (or allows another to deprive an individual of or infringe on) an individual right secured by the Maryland Declaration of Rights or the Maryland Constitution is liable for damages brought in a civil action against the police officer. The bill also (1) establishes that specified immunity provisions do not apply to a civil action brought under the bill; (2) prohibits the use of specified defenses in a cause of action brought under the bill; (3) requires the officer's employer to indemnify the officer for any judgment or settlement entered against the officer under specified circumstances; and (4) requires a court to award reasonable attorney's fees and costs, as specified. A civil action filed under the bill must be filed within two years after the cause of action accrues.

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 the bill or increased litigation of cases. General fund expenditures increase for State agencies subject to higher SITF assessments if SITF incurs losses from payments of claims. Additional significant personnel expenditures for litigation and handling of claims. Revenues are not affected.

Local Effect: Potential significant increase in expenditures for local governments to (1) pay judgment awards under the bill; (2) litigate claims filed under the bill; and (3) pay increased insurance premiums for liability coverage. Revenues are not affected.

Small Business Effect: Potential meaningful.

Analysis

Bill Summary: The bill establishes that the immunity provisions protecting State and local government personnel under the Local Government Tort Claims Act (LGTCA) and the Maryland Tort Claims Act (MTCA) do not apply to a civil action brought under the bill. The following are not defenses to a claim brought under the bill: (1) any of the elements of the federal doctrine of qualified immunity; (2) ignorance of the rights of citizens and government limitations under the Maryland Constitution and the Maryland Declaration of Rights; (3) ignorance of statutory law or the common law; or (4) good faith action.

Attorney's Fees and Costs

The court must award reasonable attorney's fees and costs to a prevailing plaintiff. If a suit seeks injunctive relief, the plaintiff must be entitled to reasonable attorney's fees and costs if the plaintiff's suit was a significant factor in the State taking or ceasing action regardless of whether an injunction was issued by the court in favor of the plaintiff. The court may award reasonable attorney's fees and cost to a prevailing defendant if the court finds that a plaintiff brought a frivolous claim.

Indemnification

While good faith action is not a defense against a claim under the bill, it is a consideration for indemnification purposes, as discussed below.

- *Court determines that the police officer acted on a good faith, reasonable belief that the officer's actions were lawful*. The officer's employer must entirely indemnify the officer for any judgment or settlement entered against the officer under the bill.
- *Court determines that the police officer did not act on a good faith, reasonable belief that the officer's actions were lawful*. The officer is personally liable and may not be indemnified for the lesser of $25,000 or 5% of any judgment or settlement entered against the officer. The remainder of the judgment or settlement must be paid by the officer's employer. If the officer's portion is uncollectible, the officer's employer or any available insurance must satisfy the judgment or settlement in full.
- *Officer was convicted of a crime for the conduct that gave rise to the claim*. The officer's employer is not responsible for indemnifying the officer.

Current Law:

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).

MTCA covers a multitude of personnel, including some local officials and nonprofit organizations. 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.

In general, MTCA limits State liability to $400,000 to a single claimant for injuries arising from a single incident. However, for claims arising on or after July 1, 2022, if liability of the State or its units arises from intentional tortious acts or omissions or a violation of a constitutional right committed by a law enforcement officer, the following limits on liability apply: (1) the combined award for both economic and noneconomic damages may not exceed a total of $890,000 for all claims arising out of the same incident or occurrence, regardless of the number of claimants or beneficiaries who share in the award; and (2) in a wrongful death action in which there are two or more claimants or beneficiaries, an award for noneconomic damages may not exceed $1,335,000, regardless of the number of claimants or beneficiaries who share in the award.

The State does not waive its immunity for punitive damages. 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.

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.

In general, LGTCA limits the liability of a local government to $400,000 per individual claim and $800,000 per total claims that arise from the same occurrence for damages from tortious acts or omissions (including intentional and constitutional torts). However, for claims arising on or after July 1, 2022, if the liability of a local government arises from intentional tortious acts or omissions or a violation of a constitutional right committed by a law enforcement officer, the following limits on liability apply: (1) the combined award

for both economic and noneconomic damages may not exceed a total of $890,000 for all claims arising out of the same incident or occurrence, regardless of the number of claimants or beneficiaries who share in the award; and (2) in a wrongful death action in which there are two or more claimants or beneficiaries, an award for noneconomic damages may not exceed $1,335,000, regardless of the number of claimants or beneficiaries who share in the award.

LGTCA further establishes that the local government is liable for tortious acts or omissions of its employees acting within the scope of employment, so long as the employee did not act with actual malice. Thus, LGTCA prevents local governments from asserting a common law claim of governmental immunity from liability for such acts or omissions of its employees.

A local government is not liable for punitive damages. However, a local government, subject to the liability limits, may indemnify an employee for a judgment for punitive damages entered against the employee. A local government may not enter into an agreement that requires indemnification for an act or omission of an employee that may result in liability for punitive damages.

Federal Qualified Immunity

Qualified immunity is a legal doctrine created by the U.S. Supreme Court under which a government official is shielded from civil liability if the official's actions do not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

Qualified immunity under federal law in 42 USC § 1983 actions based on Fourth Amendment excessive force claims examine whether a police officer's "actions [we]re 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Graham v. Connor*, 490 U.S. 386, 397 (1989). However, the *Graham* standard is not applicable to determinations of immunity in MTCA claims, since "[u]nlike the judicially-fashioned purely objective tests for immunity under § 1983, the General Assembly has made clear that State personnel do *not* enjoy immunity under [Courts and Judicial Proceedings Article] § 5-522(b) if they act with malice." *Shoemaker v. Smith*, 353 Md. 143, 160-61 (1999). Under MTCA, the "[l]egislature has decided that when State personnel act maliciously, they, and not the State, must bear the risk." *Id*. at 161. Similar principles apply to the actions of local officials. As noted above, MTCA also contains an exception for gross negligence.

State Expenditures: Special fund expenditures increase, perhaps significantly, for litigation and payment of claims. General fund expenditures may increase significantly for SITF assessments against affected State agencies. Transportation Trust Fund (TTF) expenditures may also increase for payment of claims. State expenditures may increase

significantly for additional personnel to address claims filed under the bill, as discussed below. The magnitude of the bill's fiscal impact cannot be reliably determined at this time and will likely depend on judicial interpretation of the bill's provisions. Regardless of the bill's exemption of application of components of MTCA, this estimate assumes that litigation and payment of claims under the bill will be addressed in the same manner as current practice.

Presently, many civil rights plaintiffs opt to file their lawsuits in the federal courts, where attorney's fees and costs are already recoverable by statute. However, the State is typically not named in those suits because of its Eleventh Amendment immunity. The bill creates an incentive to file suit in State court as opposed to federal court, as the plaintiff may sue the State and recover damages in an amount dependent on application of the damages cap, plus formerly unavailable attorney's fees and costs. As noted above, MTCA contains specific attorney's fees provisions, and attorney's fees are subject to MTCA's damages cap. It is unclear how those provisions will operate under the bill. Furthermore, the bill may create a new State cause of action by making an officer liable *for the actions of others* who infringe on the rights of individuals. Such actions could be broad in scope and remedies, and likely would cause an increase in claims, lawsuits, and the payment of damages and attorneys' fees. The legal exposure of affected State agencies may also increase due to prohibited defenses.

While the bill specifies that the "immunity provisions" under MTCA and LGTCA protecting State and local personnel do not apply in an action brought under the bill, it is unclear if the damages caps under those Acts still apply.

State Treasurer's Office

The State Treasurer's Office (STO) advises that the bill may lead to an increase in claims for violations of rights cases, with corresponding increases in litigation-related expenses. STO cannot estimate the increase in claims but advises that additional staff are needed to handle claims processing. Currently, STO has approximately 150 to 175 cases in litigation under MTCA each year. One third of these cases involve actions of law enforcement officers. Given current workloads of STO personnel, the office requires one additional adjuster to investigate anticipated claims under the bill, resulting in increased State expenditures of approximately $65,700 in fiscal 2024 and increasing to $88,600 in fiscal 2028.

As noted above, special fund expenditures may increase significantly to reflect payment of claims under the bill. Claims under MTCA are paid out of SITF, which is administered by the Treasurer's Office. 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. An agency's loss history, consisting of settlements and judgments

incurred since the last budget cycle, comprises part of the agency's annual premium. Thus, general fund expenditures increase, potentially significantly, for State agencies that are subject to higher SITF premiums/assessments as a result of the bill.

Office of the Attorney General/Attorneys in Affected Agencies

The Office of the Attorney General (OAG) did not respond to a request for information on the fiscal and operational impact of the bill. However, in response to prior, nearly identical legislation, OAG advised that additional litigation personnel and support staff in affected agencies would be needed to handle cases brought by civil rights plaintiffs, who, absent the bill, would not bring such claims, or would bring them in the federal courts where the State has less or no exposure. The cost associated with these additional personnel (5 Assistant Attorneys General and 2 paralegals) is approximately $788,700 in fiscal 2024, which accounts for the bill's October 1, 2023 effective date. It includes salaries, fringe benefits, one-time start-up costs, and ongoing operating expenses. Future year expenditures ($961,400 in fiscal 2025, increasing to $1.1 million in fiscal 2028) reflect full salaries with annual increases and employee turnover as well as annual increases in ongoing operating expenses.

Assistant Attorneys General assigned to State agencies and a supervising tort assistant Attorney General in the Treasurer's Office currently 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. Potential affected entities include the Tort Litigation Unit within STO, the Department of General Services, the Department of State Police, the Maryland Transportation Authority, the Department of Public Safety and Correctional Services, the Correctional Litigation Division, and the Courts and Judicial Affairs Division, among others.

Maryland Transit Administration

The Maryland Transit Administration's (MTA) tort liability is governed by the Transportation Article. Unlike MTCA, the Transportation Article does not include a limit on liability. TTF expenditures for MTA may increase if the bill results in additional payments for claims involving MTA police officers.

Local Expenditures: While local governments do not have Eleventh Amendment immunity in federal lawsuits, similar issues to the ones discussed above apply to local governments. Thus, local expenditures under the bill increase significantly for litigation, payments of claims, and insurance costs. In addition to the fiscal impacts discussed below, some jurisdictions cited the bill's effect on the recruitment and retention of law enforcement personnel.

Some local governments covered under the 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 annual premiums based on the projected claims and losses of its members. If the number of claims increases as a result of the bill, insurance premiums for all of its members will also increase, even those without a negative claims history. LGIT advises that while every federal civil rights claim it currently receives includes a parallel State constitutional claim, the bill increases liability against local governments because it seeks to eliminate defenses and procedural protections currently available to defendants. The bill, which allows for the recovery of attorney's fees, may also create exposure to liability above the tort caps for law enforcement claims.

Maryland Municipal League advises that the bill increases municipal expenditures, likely significantly, for payments of claims, litigation, and insurance premiums.

Baltimore City advises that the bill has the potential to significantly increase litigation and liability costs in certain actions against police officers.

Prince George's County advises that the bill may result in significant increased expenditures for the county's Risk Management Fund. Caroline County advises that the bill increases insurance-related expenditures.

Small Business Effect: The bill may have a meaningful impact on small business law firms that are able to litigate claims and secure judgment awards for their clients as a result of the bill.

Additional Information

Prior Introductions: Similar legislation has been introduced within the last three years. See HB 463 of 2022 and HB 353 of 2021.

Designated Cross File: None.

Information Source(s): Baltimore City; Caroline and Prince George's counties; Maryland Municipal League; Maryland State Treasurer's Office; Department of General Services; Department of Natural Resources; Department of State Police; Maryland Department of Transportation; Department of Legislative Services

Fiscal Note History: First Reader - January 18, 2023
km/jkb

Analysis by: Amy A. Devadas

Direct Inquiries to:
(410) 946-5510
(301) 970-5510