# Department of Legislative Services

Maryland General Assembly
2009 Session

## FISCAL AND POLICY NOTE

Senate Bill 457 (Senator Jones, *et al.*) (Chair, Joint Committee on the Management of Public Funds)

Judicial Proceedings

**State Government - Maryland Tort Claims Act - Malice or Gross Negligence**

This bill adds claims involving a tortious act or omission committed with malice or gross negligence by State personnel to the notice requirements and restrictions on filing a claim under the Maryland Tort Claims Act.

The bill applies prospectively to causes of action arising on or after the bill's October 1, 2009 effective date.

## Fiscal Summary

**State Effect:** Potential minimal reduction in expenditures for the State Insurance Trust Fund, the Board of Public Works, and the Office of the Attorney General if the bill's notice requirement results in an increase in the number of claims settled before significant litigation takes place. Any additional investigations conducted as a result of the bill can be handled with existing resources.

**Local Effect:** Potential minimal reduction in local expenditures if the bill results in fewer circuit court proceedings.

**Small Business Effect:** None.

## Analysis

**Current Law:** Under the Maryland Tort Claims Act (MTCA), State personnel are immune from liability for acts or omissions 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 its own common law immunity. However, MTCA limits State liability to $200,000 to a single claimant for injuries arising from a single incident. MTCA covers a multitude of personnel, including a sheriff or deputy sheriff of a county or Baltimore City. 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 liable.

A claimant may not institute an action under MTCA unless: (1) the claimant submits a written claim to the State Treasurer or a designee of the Treasurer within one year after the injury to the person or property that is the basis of the claim; (2) the Treasurer or designee denies the claim finally; and (3) the action is filed within three years after the cause of action arises. Under COMAR 25.02.01.02B(7), the "Treasurer's designee" is defined as the Chief Deputy Treasurer or the Director of the Insurance Division of the State Treasurer's Office. These requirements do not apply to a cross-claim, counterclaim, or third-party claim.

**Background:** In *Barbre v. Pope*, 402 Md. 157 (2007), a citizen (Pope) sued a Deputy Sheriff for Queen Anne's County (Barbre) over a shooting Pope alleged was committed with malice and gross negligence. Pope provided notice to a Queen Anne's County Commissioner pursuant to the 180-day notice requirement under the Local Government Tort Claims Act (LGTCA), and multiple amendments to the claims and parties named in the complaint occurred afterwards, including the eventual addition of the State and Queen Anne's County as defendants. The circuit court removed the State and Queen Anne's County as defendants and granted summary judgment in favor of Barbre on all of the claims in the first amended complaint (use of excessive and unreasonable force, due process violations, and battery).

The Court of Special Appeals affirmed the circuit court's judgments in favor of the State and county, but vacated the judgment in favor of Barbre. The court determined that even though deputy sheriffs are covered under the MTCA and not the LGTCA, the notice requirements of the MTCA did not apply in Pope's case because his claim was based on malice and gross negligence, which are actions not covered under the MTCA.

The case was appealed to the Court of Appeals, which agreed to hear the case. Three of the four questions posed as the basis of the appeal dealt with the validity of the Court of Special Appeals' ruling as to Pope's compliance with the notice requirements of the MTCA, the applicability of the MTCA's notice requirements in cases involving allegations of malice and gross negligence on the part of a State employee, and whether the Court of Special Appeals' ruling complied with the legislative intent of the MTCA. The Court of Appeals' decision to reverse the trial court's granting of summary judgment indicates that noncompliance with the notice provisions of the MTCA is not a defense to a claim against an individual if there was a sufficient allegation of malice or gross negligence; the court stated that "… we disagree [with the Court of Special Appeals] only to the extent that we have said that state personnel are not immune from suit and liability in tort when the plaintiff's complaint *sufficiently* alleges malice or gross negligence. Therefore, the gravamen on this issue is whether the allegations of malice or gross negligence against Barbre are sufficient." The Court of Appeals concluded that Pope's allegations of malice and gross negligence were sufficient to preclude summary judgment on behalf of Barbre individually.

According to the Treasurer's Office, since fiscal 2006, 383 complaints have been filed against the State and served on the State Treasurer under the MTCA. Eighty of the complaints alleged a form of malice and/or gross negligence.

**State Fiscal Effect:** The Board of Public Works pays State claims using State general funds and nonbudgeted funds from the State Insurance Trust Fund. Because the bill imposes notice requirements and restrictions on all claimants alleging malice or gross negligence by State personnel, including claimants who do not name the State in a claim, the State can potentially avoid litigation costs by conducting investigations and settling claims before litigation is complete. The bill may also decrease litigation expenditures for the Office of the Attorney General (OAG) if more claims are settled during the administrative review process.

The State Insurance Trust Fund, which is administered by the State Treasurer, funds the costs for paying for tort claims against the State. Monies for the fund come from insurance premiums paid by the individual State agencies. When the Treasurer or the Treasurer's designee receives notice of a claim against the State, the Insurance Division of the Treasurer's Office starts an investigation of the claim. OAG also conducts an investigation to determine if the employee in question was acting within the scope of employment or the acts or omission were malicious or grossly negligent. If the employee was acting within the scope of employment and was not malicious or grossly negligent, the OAG enters into a representation agreement with the employee. If the employee was acting outside of the scope of employment or was malicious or grossly negligent, the OAG advises the employee to retain separate counsel and notifies the claimant that the State is not liable due to sovereign immunity.

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## Additional Information

**Prior Introductions:** None.

**Cross File:** HB 808 (Delegate Heller, *et al.*) (Chair, Joint Committee on the Management of Public Funds) - Judiciary.

**Information Source(s):** Office of the Attorney General, Judiciary (Administrative Office of the Courts), Maryland State Treasurer's Office, Department of Legislative Services

**Fiscal Note History:** First Reader - February 25, 2009
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