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FISCAL AND POLICY NOTE
First Reader

Senate Bill 465

(Senator Lee, *et al.*)

Judicial Proceedings

Civil Actions - Motor Vehicle Accidents Involving Pedestrians or Nonmotorized
Vehicles - Comparative Negligence

This bill establishes a comparative negligence standard in civil actions for damages arising from the negligent operation of a motor vehicle and involving a plaintiff who was a pedestrian or was operating a nonmotorized vehicle at the time of the accident. The bill applies prospectively to any cause of action arising on or after the bill's October 1, 2018 effective date.

Fiscal Summary

State Effect: Potential significant increase in special fund expenditures and general fund expenditures if the bill increases payments in tort claims against the State and assessments on affected agencies. Revenues are not affected.

Local Effect: Potential significant increase in local expenditures for tort claims against local governments. Revenues are not affected.

Small Business Effect: Potential meaningful.

Analysis

Bill Summary: Under the bill, in an action to recover damages arising from the negligent operation of a motor vehicle, recovery by the plaintiff may not be barred due to the plaintiff's negligence unless the plaintiff's negligence was (1) a proximate cause of the plaintiff's injury and (2) greater than the combined negligence of all defendants that proximately caused the plaintiff's injury. The bill applies to a civil action brought by a plaintiff who, at the time of the motor vehicle accident giving rise to the cause of action,

was a pedestrian or was operating a bicycle, a play vehicle, or any other nonmotorized vehicle. The damages awarded in such an action must be diminished in proportion to the amount of negligence attributed to the plaintiff. The bill's provisions may not be construed to affect the rule of joint and several liability or the doctrine of last clear chance.

Current Law: Contributory negligence is conduct on the part of the injured party which falls below the standard to which the injured party should conform for self-protection and is a legally contributing causal factor (along with the defendant's negligence) in bringing about the plaintiff's harm. Under Maryland law, contributory negligence on the part of a plaintiff bars recovery by the plaintiff. See *Board of County Commissioners of Garrett County v Bell Atlantic*, 346 Md. 160 (1997).

Under the doctrine of joint and several liability, if two or more defendants are found liable for a single and indivisible harm to the plaintiff, each defendant is liable to the plaintiff for the entire harm. The plaintiff has the choice of collecting the entire judgment from one defendant or portions of the judgment from various defendants, so long as the plaintiff does not recover more than the amount of the judgment.

The "last clear chance" exception provides that when the defendant is negligent and the plaintiff is contributorily negligent, but the defendant has "a fresh opportunity (of which he fails to avail himself) to avert the consequences of his original negligence and the plaintiff's contributory negligence," the defendant will be liable despite the plaintiff's contributory negligence. *Smiley v. Atkinson*, 12 Md. App. 543, 553, 280 A.2d 277, 283 (1971); see also Restatement (Second) of Torts §§ 479-80 (1965). Therefore, under a last clear chance exception, the defendant becomes responsible for the entire loss of the plaintiff, regardless of the plaintiff's own contribution.

Background: Maryland is one of five jurisdictions, along with Virginia, Alabama, North Carolina, and the District of Columbia, that retains the doctrine of contributory negligence. Under the defense of contributory negligence, an injured plaintiff's fault, however slight, is a defense to the negligence claim and bars all recovery by the plaintiff.

Forty-six states follow the doctrine of comparative negligence. The terms comparative fault and comparative negligence refer to a system of apportioning damages between negligent parties according to their proportionate shares of fault. Under a comparative fault system, a plaintiff's negligence that contributes to causing the plaintiff's damages does not prevent recovery, but instead only reduces the amount of damages the plaintiff can recover. Comparative fault replaces the traditional contributory negligence defense. "Pure" comparative fault and "modified" comparative fault are two of the three major versions of comparative fault.

Under a pure comparative fault system, each party is held responsible for damages in proportion to the party's fault. Regardless of the level of the plaintiff's own negligence, the plaintiff can still recover something from a negligent defendant. It makes no difference whose fault was greater. Under a modified comparative fault system, each party is held responsible for damages in proportion to his or her fault, unless the plaintiff's negligence reaches a certain designated percentage of fault. If the plaintiff's own negligence reaches this percentage bar, then the plaintiff cannot recover any damages. Under a "less than" system, an injured plaintiff can recover only if the degree of fault attributable to the plaintiff's own conduct is less than the degree of fault assigned by the judge or jury to the defendant.

In 2016, the District of Columbia enacted The Motor Vehicle Collision Recovery Act, carving out a specific exception to the District's contributory negligence standard for cases involving accidents between a motor vehicle and a pedestrian, bicyclist, or other nonmotorized users. The law establishes a modified comparative negligence standard in these cases, allowing a plaintiff pedestrian, bicyclist, or other nonmotorized user to recover if the plaintiff is found to be less than 50% at fault.

Chapters 835 and 836 of 2017 established the Task Force to Study Bicycle Safety in Maryland. One of the task force's recommendations was for the legislature to consider legislation modeled on the District of Columbia's Motor Vehicle Collision Recovery Act.

State Expenditures: Special fund expenditures for the State Insurance Trust Fund (SITF) may increase significantly if individuals who file claims against the State are allowed to recover damages under the bill that are not recoverable under the existing contributory negligence standard. General/special fund expenditures may increase significantly if State agencies that are the subject of these claims receive higher SITF assessments or have to pay additional claims.

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 the Maryland Tort Claims Act (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 \$400,000 to a single claimant for injuries arising from a single incident. (Chapter 132 of 2015 increased the liability limit under MTCA from \$200,000 to \$400,000 for causes of action arising on or after October 1, 2015.)

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.

Claims under MTCA are paid out of SITF, which is administered by the Treasurer's Office. The Governor's proposed fiscal 2019 budget includes an \$11.5 million appropriation for SITF for MTCA claims.

Depending on the extent to which the bill increases SITF payments, the bill may result in higher premium assessments against relevant State agencies. 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 the bill may result in an increase to liabilities paid from SITF in the form of higher settlement payments and/or judgments in litigated cases and higher administrative costs to process claims and legal expenses to defend the State.

The Maryland Transit Administration (MTA) advises that the bill significantly increases the number of claims for which MTA would need to pay at least a portion. MTA is not subject to MTCA. MTA advises that while the bill has a significant fiscal impact on MTA, it cannot determine the increase in claims or the increase in the costs of claims without a significant review of past claims for accidents where no claims were paid and a reevaluation of those claims under the bill's liability standard. Under § 7-702 of the Transportation Article, MTA is liable for its contracts and torts and for the torts of its officers, agents, and employees in connection with the performance of the duties and functions of the Administration under this title. Section 7-703 requires MTA to self-insure or purchase and maintain insurance against (1) loss or damage to its property and (2) liability for injury to persons or property.

The State Highway Administration (SHA) advises that the bill may increase the number of tort claims filed against SHA and increase the amount required to resolve claims, either by settlement or verdict.

The Maryland Transportation Authority (MDTA) advises that the bill may have a fiscal impact on MDTA. MDTA advises that it is difficult to predict any such impact

because it cannot determine how many times MDTA has had accidents covered by the bill. However, MDTA notes that it is unlikely that the types of accidents covered by the bill will occur in MDTA's area of responsibility.

Local Expenditures: For the reasons stated above, local expenditures may increase significantly for local governments to pay damages in and/or litigate applicable claims. The Maryland Association of Counties and the Maryland Municipal League did not respond to a request for information regarding the potential fiscal effect of the bill on local governments.

The Local Government Tort Claims Act (LGTCOA) 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. Pursuant to Chapter 131 of 2015, for causes of action arising on or after October 1, 2015, LGTCOA 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). It further establishes that the local government is liable for the tortious acts or omissions of its employees acting within the scope of employment. Thus, LGTCOA prevents local governments from asserting a common law claim of governmental immunity from liability for such acts or omissions of its employees.

Small Business Effect: The bill may have a meaningful impact on small business law firms that represent plaintiffs in the cases covered by the bill.

Additional Information

Prior Introductions: None.

Cross File: None.

Information Source(s): Maryland State Treasurer's Office; Judiciary (Administrative Office of the Courts); Maryland State's Attorneys' Association; Maryland Department of Transportation; Department of Legislative Services

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