

Department of Legislative Services
Maryland General Assembly
2022 Session

FISCAL AND POLICY NOTE
First Reader

House Bill 1012

(Delegate Wilkins)

Judiciary

Police Immunity and Accountability Act

This bill establishes that a police officer under § 3-201 of the Public Safety Article (“officer”) who subjects or causes to be subjected any individual to the deprivation of any rights, privileges, or immunities secured by the Maryland Constitution or the U.S. Constitution must be liable for damages brought in an action against the officer. The bill contains additional provisions related to immunity in these cases, attorney’s fees, and payment of a settlement or judgment by the officer’s employer or the local jurisdiction where the officer is employed. The bill also alters the notice requirements of the Maryland Tort Claims Act (MTCA) and the Local Government Tort Claims Act (LGTCA). The bill applies prospectively to causes of action arising on or after the bill’s October 1, 2022 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). General fund expenditures increase for State agencies subject to higher SITF assessments if SITF incurs losses from payments of claims. Potential 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 Police Immunity and Accountability Act

The bill's main provisions (The Police Immunity and Accountability Act) address immunity and liability of a police officer, attorney's fees and court costs, the satisfaction of any final judgment or settlement against the officer or the officer's employee, and the review of applicable cases by the Maryland Police Training and Standards Commission (MPTSC). These provisions may not be construed to limit the right of an individual to seek remedies otherwise available under any other provision of law.

Liability of a Police Officer

The bill establishes that a police officer who subjects or causes to be subjected any individual to the deprivation of any rights, privileges, or immunities secured by the Maryland Constitution or the U.S. Constitution must be liable for damages brought in an action against the officer.

Immunity

Notwithstanding any other provision of law, a police officer who violates another individual's constitutional rights under the Maryland Constitution or the U.S. Constitution is not immune from civil or criminal liability for the violation.

Statutory immunity provided under Subtitle 5 of the Courts and Judicial Proceedings Article (Governmental Immunities) or Title 12, Subtitle 1 of the State Government Article (MTCA) or common law public official immunity does not apply to a claim brought under the Act. Also, qualified immunity is not a defense to liability or an immunity from suit under the Act.

Attorney's Fees and Court Costs

The court must award reasonable attorney's fees and court costs to a prevailing plaintiff in an action brought under the Act. Also, each settlement agreement for an action brought under the Act must provide that the plaintiff is entitled to reasonable attorney's fees and court costs.

Satisfaction of Judgment and Settlement and Reimbursement by Officer

In an action brought under the Act, any final judgment or settlement against the officer or the officer's employer or the local jurisdiction where the officer is employed must be entered and satisfied by the officer's employer or the local jurisdiction where the officer is employed. However, the officer's employer or the local jurisdiction where the officer is employed must seek reimbursement from the officer for 5% or \$25,000, whichever is less, from any final judgment or settlement entered against the officer's employer or the local jurisdiction where the officer is employed.

Local Government Tort Claims Act

The bill creates an exception to the general one-year notice of claim and actual or constructive notice requirements of LGTCA. Specifically, the bill establishes that notice of a claim arising from a tortious act or omission or a violation of a constitutional right committed by a police officer must be given within *three* years after the injury; provisions regarding actual or constructive notice are also altered to reflect a three-year period under these circumstances.

Maryland Tort Claims Act

The bill contains similar provisions applicable to MTCA by establishing that a claim arising from a tortious act or omission or a violation of a constitutional right committed by a police officer must be submitted to the State Treasurer or a designee of the Treasurer within *three* years after the injury; provisions of MTCA regarding actual or constructive notice are also altered to reflect a three-year period under these circumstances.

Maryland Police Training and Standards Commission

The bill requires MPTSC to (1) review any cases brought under the Act in which an officer or officer's employer was held liable or entered into a settlement agreement and (2) determine whether the officer's certification to work in the State should be revoked.

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 indemnify a law enforcement officer for a judgment for punitive damages if the law enforcement officer has been found guilty under § 3-108 of the Public Safety Article (as a disposition in an administrative action pursuant to the Law Enforcement Officers' Bill of Rights) as a result of the act or omission giving rise to the judgment, if the act or omission would constitute a felony under State law. 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 "[I]legislature 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.

Immunity under Title 5, Subtitle 5 of the Courts and Judicial Proceedings Article

Under § 5-522 of the Courts and Judicial Proceedings Article, State personnel are immune from suit in courts of the State and from liability in tort for a tortious act or omission that is within the scope of the public duties of the State personnel and is made without malice or gross negligence, and for which the State or its units have waived immunity under MTCA, even if the damages exceed the limits of that waiver.

Section 5-507 of the Courts and Judicial Proceedings Article establishes that, with the exception of specified motor vehicle torts, an official of a municipal corporation, while acting in a discretionary capacity, without malice, and within the scope of the official's employment or authority, must be immune as an official or individual from any civil liability for the performance of the action.

Public Official Immunity

Under common law public official immunity, a public official is protected from civil liability for negligent acts committed during the performance of his or her discretionary duties. Public official immunity does not apply to acts undertaken with malice or gross negligence. *Howard v. Crumlin*, 239 Md. App. 515, 526 (2018) (citing *Cooper v. Rodriguez*, 443 Md. 680, 729 (2015)). Additionally, the defense of public official immunity "has no application in tort actions based upon alleged violations of state constitutional rights." *Lee v. Cline*, 384 Md. 245, 258 (2004).

State Expenditures: Special fund expenditures increase, perhaps significantly, for litigation and payment of claims/judgments/settlements, and attorney's fees, but are partially offset to the extent that State reimbursement efforts are successful. 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 increase by \$62,000 in fiscal 2023 for insurance personnel for the State Treasurer's Office (STO). State expenditures may increase further for additional litigation-related personnel, as discussed below. MPTSC can implement the bill with existing budgeted resources.

The magnitude of the bill's fiscal impact cannot be reliably determined at this time and can only be determined with actual experience under the bill. 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. This analysis does not address (1) the authority of the legislature to revoke federal immunity and (2) any effect of the bill on hiring or retention of law enforcement officers.

Furthermore, it is unclear how or if the bill (particularly the combination of the bill’s immunity, liability, and payment provisions) affects the applicability of the liability limits under MTCA.

State Treasurer’s Office

The bill’s provisions have the potential to significantly increase State expenditures for litigation and payments of claims, including attorney’s fees. As noted above, attorney’s fees are included in the liability cap under MTCA, and MTCA prohibits attorneys from charging or receiving a fee that exceeds 20% of a settlement or 25% of a judgment. These limits do not apply under the bill, which requires “reasonable” attorney’s fees to be awarded to a prevailing plaintiff or included in a settlement agreement and requires the officer’s employer to pay for the judgment or settlement (subject to a possible reimbursement from the officer of 5%/\$25,000).

The availability of attorney’s fees in State court under the bill may increase overall claims. The bill’s requirement that an officer’s employer pay for a settlement or judgment against the officer may also result in the State paying for claims that are currently exempted (e.g., claims involving malice, gross negligence, or actions outside the scope of the officer’s public duties).

Many civil rights plaintiffs choose to file their lawsuits in the federal courts where attorney’s fees and costs are already recoverable by statute. However, the State is not typically named as a defendant in those lawsuits due to its Eleventh Amendment immunity. Those cases involve State personnel acting within the scope of their employment for which the Office of the Attorney General and the State have decided to take on the defense and liability. However, those cases are not processed by the Insurance Division of STO. Should those cases be filed in State court as a result of the bill, workloads for STO increase. Other increases in workloads for the office including pursuing partial reimbursement from officers, as specified under the bill. STO advises that if attempts to seek reimbursement are unsuccessful, the case is eventually referred to the Central Collections Unit (CCU). However, any resulting change in CCU workloads is unlikely to materially affect CCU operations or finances.

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 \$62,000 in fiscal 2023 and increasing to \$79,000 in fiscal 2027.

As noted above, special fund expenditures may increase to reflect payments 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.

Litigation Personnel in Affected Agencies

General fund expenditures may increase significantly for affected agencies to hire additional litigation personnel and support staff to handle cases brought under the bill. The need for additional personnel cannot be reliably predicated at this time.

Assistant Attorneys General assigned to State agencies and a supervising tort assistant Attorney General in STO 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 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. *For illustrative purposes*, the cost associated with one assistant Attorney General is approximately \$122,000 in fiscal 2023 and increasing to \$161,000 in fiscal 2027.

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 and attorney's fees involving MTA police officers.

Local Expenditures: Local expenditures under the bill may increase significantly for litigation, payments of claims, attorney's fees, and insurance costs. Such expenditures may be partially offset once local governments seek reimbursement from individual officers, as required under the bill (to the extent reimbursement efforts are successful).

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 for its members also increase. In 2021, LGIT advised that insurance premiums for Maryland's local governments for law enforcement coverage had increased

by approximately 45% over the previous four years. Those increases had been driven by the number of claims filed against law enforcement officers and the increasing costs associated with settling matters where appropriate and defending them when necessary. LGIT advises that the bill would cause its claims costs to increase significantly, which would result in a further increase of 5% to 10% in premiums for its members.

LGIT further advises that its coverage contains exclusions for officers who act with malice or beyond the scope of employment. Should the bill result in local governments bearing responsibility for judgments and settlements for currently excluded claims, local expenditures increase and/or LGIT incurs additional expenses to litigate coverage of the payments under the policies.

With respect to attorney's fees, LGIT advises that the bill has the potential to add at least \$15,000 to \$25,000 to cases that are settled and at least \$100,000 to any case that LGIT loses at trial. While attorney's fees are available in federal civil rights cases, there are no provisions granting attorney's fees for a claim filed under the Maryland Constitution or the Maryland Declaration of Rights.

Prince George's County advises that the fiscal impact of the bill, while indeterminate, could be in the millions. Howard County advises that the bill has a potentially significant impact on the county and would encourage more plaintiffs to file suit in State court by allowing for the advantages of a federal lawsuit but without the immunity available in a federal lawsuit. However, the county also advises that the ability to recover a percentage of damages from an individual police officer may impact the decision to settle a case, which can often result in lower damages and attorneys' fees than if the case proceeded to trial.

As noted above, it is unclear what, if any, effect the bill's provisions have on the applicability of the liability limits under LGTCA.

Small Business Effect: The bill may have a meaningful impact on small business law firms that litigate cases affected by the bill.

Additional Information

Prior Introductions: None.

Designated Cross File: None.

Information Source(s): Howard, Montgomery, and Prince George's counties; Maryland Association of Counties; Maryland Municipal League; Comptroller's Office; Maryland State Treasurer's Office; Judiciary (Administrative Office of the Courts); Baltimore City

Community College; Morgan State University; Department of General Services; Maryland Department of Health; Department of Natural Resources; Department of Public Safety and Correctional Services; Department of State Police; Maryland Department of Transportation; Department of Legislative Services

Fiscal Note History: First Reader - February 28, 2022
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