

Department of Legislative Services
Maryland General Assembly
2021 Session

FISCAL AND POLICY NOTE
First Reader

House Bill 1049
Judiciary

(Delegate Wilkins)

Police Qualified Immunity and Accountability Act

This bill establishes that notwithstanding any other provision of law, an officer who causes physical or mental injury to another person through an act or omission committed while the officer is acting in an official capacity is not immune from civil or criminal liability and is liable to the injured person for specified relief. The bill also contains provisions regarding (1) damages that may be awarded against the officer; (2) causes of action against the officer's employer or the local jurisdiction where the officer is employed; (3) reimbursements of judgments or settlements paid by the officer's employer or the appropriate local jurisdiction; and (4) revocation of an officer's pension under specified circumstances. The bill applies prospectively to causes of action arising on or after the bill's October 1, 2021 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 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:

Action Against Officer

Notwithstanding any other provision of law, an officer who causes physical or mental injury to another person through an act or omission committed while the officer is acting in an official capacity is not immune from civil or criminal liability for the act or omission and is liable to the injured person for legal, equitable, and other appropriate relief. However, a person may not bring an action under these provisions to recover for physical or mental injury if the officer's act or omission did not rise above ordinary negligence, was not outside the scope of law enforcement training and standards, or did not constitute misconduct.

Statutory immunity provided under Title 5, Subtitle 5 of the Courts and Judicial Proceedings Article (Governmental Immunities), Title 12, Subtitle 1 of the State Government Article (Maryland Tort Claims Act (MTCA)), or common law public official immunity does not apply to a claim brought under the bill. Qualified immunity is also not a defense to liability.

Damages awarded for this cause of action may not exceed \$25,000, and a court must award reasonable attorney's fees and court costs to a prevailing plaintiff.

The Maryland Police Training and Standards Commission must review any case in which an officer was held liable and determine if the officer's certification to work in the State should be revoked.

Action Against Officer's Employer

Notwithstanding any other provision of law, if an action is brought against the officer's employer or the local jurisdiction where the officer is employed for an act or omission that is the basis of a claim described above against the officer, any damages awarded must be in accordance with the limits on:

- noneconomic damages (*e.g.*, pain and suffering) under § 11-108 of the Courts and Judicial Proceedings Article (\$905,000 as of October 1, 2021, and \$1,357,500 for a wrongful death action involving two or more claimants or beneficiaries; a wrongful death action is often accompanied by a separate survival action, which is independently eligible for the \$905,000 damages cap);
- economic damages under § 11-109 of the Courts and Judicial Proceedings Article (past and future loss of earnings and medical expenses); and

- damages in a wrongful death action under § 3-904 of the Courts and Judicial Proceedings Article (addresses nature and distribution of damages in a wrongful death action).

Actions for survivorship must also include funeral expenses, as specified.

Reimbursements and Revocation of Pension

The officer's employer or the local jurisdiction where the officer is employed may seek reimbursement from the officer for any final judgment or settlement entered against them if (1) the officer is convicted of a criminal offense related to the conduct that is the basis of the civil claim against the officer and (2) the action against the officer's employer or the local jurisdiction is related to the officer's conduct and conviction. The officer's employer may also revoke the officer's pension if the officer is convicted of a criminal offense under these circumstances.

Current Law:

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 their 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).

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.

MTCA limits State liability to \$400,000 to a single claimant for injuries arising from a single incident. 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

The Local Government Tort Claims Act (LGTCGA) 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, LGTCGA 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 any judgment for damages against its employee for tortious acts or omissions committed by an employee acting within the scope of employment, so long as the employee did not act with actual malice. Thus, LGTCGA 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 damages caps, 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 "[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. General fund expenditures and reimbursable fund expenditures increase significantly (by as much as \$768,000 in fiscal 2022) 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 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 estimate does not address any effect of the bill on hiring or retention of law enforcement officers.

State Treasurer's Office

The State Treasurer's Office (STO) advises that the bill may lead to an increase in applicable claims, with corresponding increases in litigation-related expenses. For actions against an officer's employer, damages are not capped under MTCA. Instead, economic damages are uncapped, and noneconomic damages are subject to the general caps under § 11-108, which are higher than the caps under SITF. Immunity for the officer and the employer under MTCA would also not apply. Additionally, a prevailing plaintiff is also entitled to attorney's fees and costs, with no cap on the amount of the awards.

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 reimbursable fund expenditures of approximately \$59,000 in fiscal 2022 and increasing to \$76,000 in fiscal 2026.

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

General fund expenditures increase by *as much as* \$708,993 in fiscal 2022, which accounts for the bill's October 1, 2021 effective date, and increasing to \$943,233 in fiscal 2026 for affected agencies to hire additional litigation personnel and support staff to handle cases brought under the bill. It includes salaries, fringe benefits, one-time start-up costs, and ongoing operating expenses.

Positions	7
Salaries and Fringe Benefits	\$669,924
Operating Expenses	<u>39,069</u>
FY 2022 State Expenditures	\$708,993

Future year expenditures reflect full salaries with annual increases and employee turnover and 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 agencies 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.

Maryland Department of Transportation

The Maryland Department of Transportation (MDOT) advises that the bill has a fiscal impact on the department and results in increased liability exposure for officers and the agency. Due to unknown information on the volume of litigation and nature of claims, MDOT cannot determine the cost of the bill at this time. MDOT also cites overtime costs to backfill officers on administrative leave during the investigatory process and the hiring of replacement officers for any officers disqualified through legal actions as potential effects of the bill.

Maryland Transit Administration

The Maryland Transit Administration's (MTA) tort liability is governed by the Transportation Article. Unlike MTCA, which limits the State's liability to \$400,000 to a single claimant, 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: Local expenditures under the bill may increase significantly for litigation, payments of claims, and insurance costs.

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.

LGIT advises that the bill's effect on applicable damage caps and immunity defenses would likely encourage attorneys to file claims in marginal cases where, although a large judgment is unlikely, the local government may elect to settle in order to avoid the financial costs and other burdens associated with litigation. According to LGIT, insurance premiums for Maryland's local governments for law enforcement coverage have increased by approximately 45% over the past four years. These increases have 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.

Anne Arundel County advises that (1) the potential attorney's fees in applicable cases can regularly exceed \$100,000; (2) the bill's definitions of "mental injury" and "physical injury" encompass a wide range of injuries, some of which can occur easily; and (3) the bill creates pressure for governments to settle marginal cases. The county anticipates additional costs of \$500,000 annually and average costs of \$125,000 per case when outside counsel is needed.

Garrett County does not anticipate a fiscal impact. While the City of Laurel does not foresee an immediate fiscal impact, the city advises that it could experience a significant fiscal impact in the form of lawsuits and legal costs.

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: None.

Designated Cross File: None.

Information Source(s): Anne Arundel, Garrett, Howard, and Montgomery counties; City of Laurel; Local Government Insurance Trust; Office of the Attorney General; Comptroller's Office; Maryland State Treasurer's Office; Judiciary (Administrative Office of the Courts); Office of the Public Defender; University System of Maryland; Morgan State University; Department of General Services; Department of Natural Resources; Maryland Department of Transportation; Department of Legislative Services

Fiscal Note History: First Reader - February 14, 2021
rh/jkb

Analysis by: Amy A. Devadas

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