

Senate Fiscal Agency
P. O. Box 30036
Lansing, Michigan 48909-7536

SFA



BILL ANALYSIS

Telephone: (517) 373-5383
Fax: (517) 373-1986
TDD: (517) 373-0543

Senate Bill 306 (as introduced 3-13-97)
Sponsor: Senator Leon Stille
Committee: Judiciary

Date Completed: 3-18-97

CONTENT

The bill would amend the highway liability provisions of the governmental immunity Act to do all of the following:

- Define "improved portion of the highway designed for vehicular travel"; include in the term a guardrail, a traffic control signal or warning sign or signal that required a change in speed or direction (unless it provided a "needlessly repetitive identical traffic cue"); and specify that the term would not include an installation or condition beyond the traveled portion of the roadbed.
- Provide that an action based on a guardrail could be brought only if the guardrail existed on the bill's effective date and only if the defendant were grossly negligent.
- Provide that an injured party who failed to procure automobile insurance could not recover noneconomic damages, and limit the amount of noneconomic damages recoverable in all other cases.
- Limit the amount of economic damages recoverable by someone who failed to procure automobile insurance.
- Require that damages for medical services be objectively verifiable.
- Provide that it would be an absolute defense if the person who was injured or killed had an impaired ability to function due to the influence of intoxicating alcohol or a controlled substance and were 50% or more at fault; and require a reduction of damages if the percentage were under 50%.
- Provide that failure to give notice to a governmental agency of death, injury, or property damage, within the prescribed time limit, would be an absolute bar to recovery of damages.

In addition, regarding an action against a governmental agency for a defective or dangerous public building, the bill provides that failure to give notice within the prescribed time limit would be an absolute bar to recovery.

Duty to Repair and Maintain

The Act specifies that the duty of the State and the county road commissions to repair and maintain highways, and the liability for that duty, extends only to the "improved portion of the highway designed for vehicular travel" and does not include sidewalks, crosswalks, or any other installation outside of the improved portion of the highway designed for vehicular travel. The bill would delete reference to sidewalks, crosswalks, or any other installation. The bill provides that the duty would require that the improved portion of the highway designed for vehicular travel be reasonably safe and fit for travel.

The bill would define "improved portion of the highway designed for vehicular travel" as "the physical structure of the traveled portion, paved or unpaved, of the roadbed actually designed for public vehicular travel". The term would include a guardrail, a traffic control signal, or a warning or regulatory sign or signal that required the driver to change speed or direction, but only to the extent that the control signal, or the warning or regulatory sign or signal, was essential to reasonably safe travel and not to the extent that it provided a needlessly repetitive identical traffic cue. The bill also specifies that, as illustration and not limitation, "improved portion of the highway designed for vehicular travel" would not include a shoulder, curb, vegetation, tree or other vegetation, utility pole, median, sidewalk, crosswalk, culvert, or barrier; lighting; or another installation or condition located beyond the traveled portion of the roadbed. The bill states that the inclusive and exclusive

provisions in this definition could not be considered to amend or expand the inclusive or exclusive provisions in the definition of the term "highway".

Currently, "highway" means every public highway, road, and street that is open for public travel, including bridges, sidewalks, crosswalks, and culverts on any highway; the term does not include alleys, trees, or utility poles. Under the bill, "highway" also would not include parking lots or roadside rest areas.

The bill specifies that a highway or the improved portion of the highway designed for vehicular travel would not be defective and would have to be considered reasonably safe and fit for travel if the condition that allegedly caused the injury or damage were a depression or elevation with a vertical difference from the immediately adjacent traveling surface of two inches or less.

The bill provides that only the governmental agency that had jurisdiction over the highway at the time of the occurrence that resulted in the injury or damage would be liable. ("Jurisdiction" would mean inclusion of a highway in a governmental agency system under Sections 1 to 9 of the Michigan Transportation Fund law (MCL 247.651-247.659).) The bill would prohibit a person from maintaining a separate action against an employee, agent, or volunteer of a governmental agency.

Limitations on Damages

Noneconomic Loss. In an action for failure to maintain and repair a highway, the verdict recoverable from all governmental agencies could not include damages for noneconomic loss if the individual upon whose death or injury the action was based, or who sustained the property damage upon which the action was based, were required, at the time of the occurrence that resulted in the death, injury, or property damage, to procure no-fault automobile insurance and failed to do so. ("Verdict" would mean the total of damages; interest; fees, including, but not limited to, attorney and expert fees; and costs.) In all other cases, the verdict recoverable from all governmental agencies for noneconomic loss could not exceed the lower of the following for all claims by an individual or his or her estate for bodily injury or for damage to the individual's property and all other claims by other persons arising out of the same death, injury, or damage:

- If the action were based on the individual's death or loss of a vital bodily function, not

more than \$500,000.

- For an action other than one described above, not more than \$280,000.

On the bill's effective date, the State Treasurer would have to adjust these limitations so that they were equal to the corresponding limits on noneconomic damages in medical malpractice actions under Section 1483 of the Revised Judicature Act (RJA), as those amounts had been adjusted to date. After the initial adjustments had been made, the State Treasurer would have to adjust the limitations prescribed by the bill at the end of each calendar year so that they continued to equal the corresponding limits provided in Section 1483. (As enacted in 1986, Section 1483 limits the noneconomic damages recoverable by all plaintiffs in a medical malpractice action to \$280,000, except under certain circumstances in which noneconomic damages may not exceed \$500,000. Section 1483 requires the State Treasurer to adjust these limitations annually to reflect the change in the consumer price index.)

The bill specifies that a limitation on the verdict recoverable would not apply separately to each person claiming noneconomic damages. The limitation would apply to the aggregated amount of both of the following:

- Noneconomic damage claims by an individual or his or her estate for the individual's bodily injury or death or for damage to the individual's property.
- Noneconomic damage claims by other persons arising out of the same death, injury, or damage.

Economic Loss. The verdict recoverable from all governmental agencies for economic loss could not exceed \$300,000 if the injured individual were required to procure no-fault insurance and failed to do so.

The liability of all governmental agencies for damages for medical services, including but not limited to treatment, rehabilitation services, and custodial care, would be limited to those damages for medical services that were objectively verifiable.

Other Provisions. In awarding damages, the trier of fact (the jury or, if there were no jury, the judge) would have to itemize damages into economic and noneconomic losses. The court or counsel for a party could not advise the jury of the bill's limitations on the verdict recoverable. If a limitation applied, the court would have to set aside the

amount of the verdict that exceeded the limitation.

A governmental agency would be entitled to a reduction in damages based on a payment from a collateral source as provided in Section 6303 of the RJA, including benefits paid or payable under Section 3116 of the Insurance Code. For purposes of this provision, a lien by an individual, partnership, association, corporation, or other legal entity would not be enforceable against a plaintiff's damages recovered from a governmental agency in a highway liability action. (Under Section 6303 of the RJA, in a personal injury action in which the plaintiff seeks to recover for economic loss, the court must reduce the portion of the damages by the amount paid or payable by a collateral source (e.g., insurance benefits). Section 3116 of the Insurance Code restricts the instances in which no-fault insurers may subtract from an insured person's tort recovery for bodily injury.)

Before a court applied a limitation on the verdict recoverable, the trier of fact would have to consider the negligence of the individual upon whose death or injury the action was based, or who sustained the property damage upon which the action was based, at the time of the occurrence that resulted in the death, injury, or property damage. The court would have to reduce the plaintiff's verdict in proportion to the amount by which that individual's negligence was a proximate cause of the death, injury, or property damage.

Impairment Defense

In a highway liability action, it would be an absolute defense that the individual upon whose death, injury, or property damage the action was based had an impaired ability to function due to the influence of intoxicating liquor or a controlled substance, and as a result of that impaired ability, the individual was 50% or more the cause of the accident or event that resulted in the death, injury, or damage. If the individual were less than 50% the cause of the accident or event, an award of damages would have to be reduced by that percentage.

An individual would be presumed to have an impaired ability to function due to the influence of intoxicating liquor or a controlled substance if, under a standard prescribed by Section 625a of the Michigan Vehicle Code, a presumption would arise that the individual's ability to operate a vehicle was impaired. (Under Section 625a, in a drunk driving prosecution, a presumption of impairment arises if there was more than 0.7 gram but less than 0.10

gram of alcohol per 100 milliliters of the defendant's blood, per 210 liters of the defendant's breath, or per 67 milliliters of the defendant's urine at the time alleged. It is presumed that a defendant was under the influence if there was at least 0.10 gram of alcohol per 100 milliliters of blood, 210 liters of breath, or 67 milliliters of urine.)

"Impaired ability to function due to the influence of intoxicating liquor or a controlled substance" would mean that, as a result of an individual's drinking, ingesting, smoking, injecting, or otherwise consuming intoxicating liquor or a controlled substance, the individual's senses were impaired to the point that his or her ability to react was diminished from what it would be had the individual not consumed liquor or a controlled substance.

Notification Period

The governmental immunity Act specifies that, as a condition to any recovery for injuries sustained by reason of a defective highway, the injured person, within 120 days after the injury occurred, must serve on the governmental agency a notice of the occurrence of the injury and the defect. The Act allows 180 days for notice if the injured person is under 18 years old at the time of the injury or is physically or mentally incapable of giving the notice. The bill would delete the 180-day provision for a person under 18.

The Act also provides for an action against a governmental agency for an injury or property damage resulting from a dangerous or defective condition of a public building, and requires the injured person to give notice of the injury and the defect to the responsible governmental agency. Under the bill, if the person who sustained the injury or damage were physically or mentally incapable of giving the notice, he or she would have to serve the notice within 180 days after the disability terminated. In a civil action in which the physical or mental disability of the person was in dispute, the trier of fact would have to determine the issue. These provisions would apply to all charter provisions, statutes, and ordinances requiring written notice to a county or other political subdivision or to a municipal corporation.

In either a highway liability case or an action based on a defective or dangerous public building, failure to provide notice within the prescribed time limit would be an absolute bar to recovery.

MCL 691.1401 et al.

FISCAL IMPACT

The bill would have an indeterminate impact on the State and local units of government depending on the number of claims in the future that would be limited by the bill.

The State of Michigan has paid the following amounts in highway negligence payments over the last 12 years:

<u>Fiscal Year</u>	<u>Payments (millions)</u>
1983-84	\$ 14.9
1984-85	8.5
1985-86	7.5
1986-87	26.7
1987-88	16.1
1988-89	15.0
1989-90	17.4
1990-91	20.3
1991-92	12.6
1992-93	20.3
1993-94	12.6
1994-95	9.9
 TOTAL:	 \$181.8

In FY 1994-95, the State paid \$9,882,411.71 in judgments and settlements for 47 highway negligence cases. Six were for payments of over \$300,000 (three of which exceeded \$1,000,000).

Fiscal Analyst: B. Bowerman

S9798\S306SA

This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.