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SFA BILL ANALYSIS

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Senate Bill 306 (Substitute S-1 as reported)
Sponsor: Senator Leon Stille
Committee: Judiciary

Date Completed: 3-24-97

RATIONALE

Under the governmental immunity Act, all governmental agencies (the State, political subdivisions, and municipal corporations) are immune from tort liability in cases in which a governmental agency is engaged in the exercise or discharge of a governmental function. The Act provides for specific exceptions to immunity for personal injury and property damage resulting from the failure to maintain a highway in reasonable repair, from a dangerous or defective condition of a public building, or from the negligent operation of a government-owned motor vehicle. The highway exception, in particular, has been the subject of considerable litigation over the years, and has produced Michigan Supreme Court decisions that the Court itself has described as "badly fractured".

The Act currently states, "Each governmental agency having jurisdiction over a highway shall maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel. A person sustaining bodily injury or damage to his or her property by reason of failure of a governmental agency to keep a highway ...in reasonable repair, and in condition reasonably safe and fit for travel, may recover the damages suffered by him or her from the governmental agency... 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 interpretation of this language has led to controversy over such issues as whether liability is limited to the roadbed itself or extends to the surrounding environment, such as shoulders or medians; whether the duty to maintain includes the duty to erect warning signs or traffic control devices; whether the improved portion of a highway includes guardrails; and whether a governmental agency is responsible for improving, as well as repairing, a road.

The Michigan Supreme Court's most recent decision on the subject addressed the duty of a governmental agency to provide traffic control devices and warning signs (*Pick* v *Szymczak*, 451 Mich 607, June 5, 1996). The Court stated, "...we expressly hold that a duty to provide adequate warning signs or traffic control devices at known points of hazard arises under the highway exception of the governmental tort liability act...". The Court defined "point of hazard" as "any condition that directly affects vehicular travel on the improved portion of the roadway so that such travel is not reasonably safe", and stated, "...the condition must be one that uniquely affects vehicular travel on the improved portion of the roadway, as opposed to a condition that generally affects the roadway and its surrounding environment...". The Court emphasized that "..such conditions need not be physically part of the roadbed itself".

Although the *Pick* case produced a four-justice majority opinion, a fifth justice concurred in part and dissented in part, and two justices dissented. The concurring opinion described the majority's conclusion as "...a further illustration to the Legislature of the need to clarify the extent of the highway exception...", and cited a 1994 decision that had produced five separate opinions (*Chaney* v *Department of Transportation*, 447 Mich 145). The opinions in both cases also variously discussed the split decision of the Court in a 1990 case (*Scheurman* v *Department of Transportation* and *Prokop* v *Wayne County Board of Road Commissioners*, 434 Mich 619).

In addition to the lack of consensus among the justices--which has resulted in confusion among

appellate and trial courts, litigators, injured parties, and governmental agencies--there is concern about the cost of highway-related lawsuits. From fiscal year (FY) 1983-84 through FY 1995-96, the State spent a total of $109.9 million on highway negligence payments. In FY 1994-95, three of the payments each exceeded $1 million. It has been suggested that the governmental immunity Act should be amended both to provide clarity in the law and to reduce the amount of pay-outs in highway negligence cases.

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 a 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 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.

ARGUMENTS

(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)

Supporting Argument

The bill would save the State and local units of government millions of dollars each year in highway liability cases. In FY 1995-96 alone, the State paid over $9 million in judgments and settlements in these cases. In Wayne County, the amount annually budgeted for road cases is $2 million, while the amount set aside for all other types of lawsuits combined is $2.3 million. The State and local units also must bear the considerable costs of defending these cases. Further, because the funds paid for judgments and settlements come directly from the budget of the agency sued, these pay-outs, as well as the dollars set aside for potential liability, divert appropriations that otherwise could be used to repair roads and bridges or to match Federal highway funding. The bill would curb highway-related pay-outs by making

it clear that the government's duty to repair and maintain "the improved portion of the highway" would be limited primarily to the actual roadbed. Traffic signs and signals would be included only if they were essential and not redundant. The bill also would specifically exclude shoulders, curbs, medians, vegetation, sidewalks, crosswalks, lighting, and other installations beyond the traveled portion of the roadbed. By limiting liability primarily to the roadbed, the bill would help to focus the testimony of expert witnesses, who sometimes make innovative claims about ways in which a highway could be made safer. These changes not only would reduce costs, but also would provide badly needed clarity within the law.

Response: Concerning traffic signs and signals, in some situations there may be both a sign warning of a change that is coming and a sign indicating that the change has arrived. If highway engineers believe that both are necessary for safety, it is not clear whether one sign or the other would be considered a "needlessly repetitive identical traffic cue".

Opposing Argument

The economic cost of auto accidents--in terms of medical bills, lost work time, rehabilitation, and car repairs--totals billions of dollars annually. By reducing the government's responsibility to maintain highways in a reasonably safe manner, the bill would result in more accidents, more injuries, and more deaths, as well as higher medical bills, more work days lost, and larger auto insurance premiums. In addition, more injured people or their families would have to turn to public assistance for support or help with medical expenses if they could not recover damages from the responsible governmental agency. Rather than increasing, the State's payments in highway-related cases actually have decreased in the last several years. The pay-out in FY 1994-95 represented a drop of 23.2% from the previous year, and the total in FY 1993-94 was 38.5% lower than the pay-out in the year before. Payments made in FY 1995-96 continued this decline.

Apart from the matter of economics is the issue of whether it would be good public policy to deny recovery to people who may have suffered catastrophic injuries or to the families of those who have died. For over 100 years, Michigan law has provided a highway exception to governmental immunity, and has required the government to keep highways in good or reasonable repair, and in a condition reasonably safe and fit for travel. Over the years, governmental agencies have been held liable for failure to warn of unexpected hazards; failure to erect barriers to prevent vehicles from leaving a roadway; and failure of design that created hazards making roads less than reasonably safe and fit for travel. As a result, new roads have been designed and old roads have been redesigned to reduce the risk of accidents and to reduce the hazard of accidents that do occur.

By limiting governmental liability primarily to the roadbed, this bill would substantially reduce the government's duty to maintain a safe traveling environment. As the majority opinion in *Pick* pointed out, "Vehicular travel does not take place solely on the two-dimensional length and width of the roadway; rather, it occurs in three-dimensional space, and necessarily implicates factors not physically within the improved portion of the roadway itself...".

Response: Lowering the amount paid out in highway-related cases would free up money to build safer roads or improve existing roads and bridges, which should in turn lead to fewer accidents.

Opposing Argument

The bill is unnecessary in light of tort reforms enacted in Public Acts 161 and 249 of 1995, which took effect on March 28, 1996. Those measures made a number of amendments to the Revised Judicature Act concerning actions seeking damages for personal injury, wrongful death, or property damage. Among other things, Public Act 161 provides that noneconomic damages may not be awarded to a party whose percentage of fault exceeds the aggregate fault of the other persons, and requires the party's economic damages to be reduced; requires the trier of fact to consider the fault of nonparties, as well as parties, in determining the percentage of total fault in an action; and requires the trier of fact to allocate the liability of each person in direct proportion to the person's percentage of fault, regardless of whether the person was or could have been named as a party to the action. The Act also eliminated joint liability and the reallocation of uncollectible amounts--changes that may be of particular benefit to governmental defendants. Amendments contained in Public Act 249 provide that it is 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 was 50% or more the cause of the accident, and require a reduction of damages if the percentage was under 50%. These and other provisions in the Revised Judicature Act (such as the section concerning collateral source benefits) apply to tort actions against governmental agencies, as well as private parties. Various

provisions of the bill either are redundant or are in potential conflict with existing law.

Response: Regarding the collateral source provisions, judges in Wayne County reportedly are reluctant to adjust verdicts when benefits have been paid by a collateral source. Whether or not this applies across the State, the bill's language would help protect the government from having to make duplicative payments.

Opposing Argument

Under the bill, an injured person would be absolutely barred from recovery if he or she failed to give a governmental agency notice of an accident within 120 days. This would be unfair and unnecessary. In most cases, a governmental agency is aware of an accident right away because of police or media reports, and has the opportunity observe the site, gather evidence, and take steps to prepare a defense. According to a line of cases from the 1970s, failure to give the required notice does not bar recovery unless it results in actual prejudice to the State.

Response: The governmental agency responsible for a highway frequently does not receive notice an accident. For example, if an accident occurs in Livonia and the city police take care of it, the Wayne County Road Commission might not know anything about the incident until a lawsuit has been filed. The notice requirement gives the governmental agency a chance not only to preserve evidence, but also to take steps to remedy a defect. Simply replacing a missing stop sign or warning of a dangerous condition, for instance, could prevent further injuries or save lives. Reportedly, rather than barring recovery if failure to give notice has prejudiced the government, today's courts completely ignore the notice requirement.

Opposing Argument

By setting limits on the amount of noneconomic damages plaintiffs could be awarded, the bill would single out the most catastrophically injured victims, in order to provide monetary relief to governmental entities that had been proven negligent. Noneconomic injuries include not only pain and suffering and loss of enjoyment, but also grief, shock, terror, and humiliation. Simply because they are more difficult to quantify does not make noneconomic damages less real than economic damages. Furthermore, it would be misleading to allow a jury to award whatever amount it deemed proper in the belief that its verdict would be given effect, and then require the award to be reduced to the statutory cap.

Response: These provisions would be consistent with limitations already enacted for medical malpractice and product liability cases.

Opposing Argument

The bill could be stronger in terms of limiting liability for guardrails. The original version of the bill provided 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. The same provision also was contained in a proposal that the Senate passed during the previous session (Senate Bill 353). This provision is necessary to limit liability, especially since the bill would include guardrails in its definition of "improved portion of the highway designed for vehicular traffic".

Response: Guardrails are a very real part of the roadway and are installed for the specific purpose of protecting motorists. If a guardrail is defective or defectively installed, the government's liability should not depend on whether the guardrail already existed or is brand new. Furthermore, the gross negligence requirement would be nearly as strict as an intentional conduct standard, and would deny recovery to victims of inexcusable neglect. This point is illustrated by a case described in written testimony submitted on behalf of the Michigan Trial Lawyers Association: An individual was driving on a connecting ramp when an out-of-control car slammed into the right side of her car, forcing it into a guardrail on the left side of the highway. Designed to redirect vehicles back into the roadway, the two-tiered guardrail instead came apart and actually guided the victim's car head on into a concrete bridge abutment. The car overturned and burst into flames, with the victim inside. An investigation after the accident revealed that three of four bolts that should have connected the guardrail to the concrete abutment had never been installed; in fact, holes for the bolts had never been drilled. Although the Transportation Department's standard plans were clearly violated, and employees responsible for maintaining the guardrail had failed to notice the missing bolts in monthly inspections, it is questionable whether this conduct would constitute "gross negligence".

Legislative Analyst: S. Margules

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 13 years:

Fiscal Year	Payments (millions)

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
1995-96	9.1
TOTAL:	$109.9

In FY 1995-96, the State paid $9,074,595 in judgments and settlements for 52 highway negligence cases. Payments ranged from $500 to $1,500,000. Eight payments were over $500,000. The median payment was $40,000. No Statewide data are available for highway negligence payments by local road authorities.

Fiscal Analyst: B. Bowerman

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