

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 319 (Substitute S-2 as reported by the Committee of the Whole)
Senate Bill 320 (Substitute S-1 as reported by the Committee of the Whole)
Sponsor: Senator William Van Regenmorter
Committee: Judiciary

Date Completed: 3-17-99

RATIONALE

Although law enforcement officers are sworn to pursue and apprehend those who break the law, some law enforcement agencies reportedly are adopting so-called "no-pursuit" policies in response to large liability awards resulting from claims by persons injured as a result of the actions of those who flee from police. It is widely believed in the law enforcement community that, while action needs to be taken to avoid injury to innocent parties, no-pursuit policies simply are unacceptable. Some people believe that a model policy should be developed to guide police pursuit activities, and that the liability of government agencies that adopt such a policy should be limited when personal injury or property damage results from the negligent operation of an emergency vehicle by a person certified under the policy.

CONTENT

Senate Bill 319 (S-2) would amend the Revised Judicature Act (RJA) to limit damages recoverable for injury or property damage resulting from the operation of a law enforcement vehicle; and Senate Bill 320 (S-1) would create the "Law Enforcement Pursuit and Response Policy Act" to provide for the establishment of a model law enforcement vehicle pursuit and response policy. The bills are tie-barred.

Under the bills, "law enforcement pursuit and response" would mean the operation of a law enforcement vehicle in a manner described in or authorized by Section 603 or 632 of the Michigan Vehicle Code; those sections provide that the driver of an emergency vehicle may be exempt from certain traffic regulations when responding to an emergency call or engaging in police pursuit (including adhering to speed limits and stopping at red lights or stop signs), but only while using an audible signal (such as a siren) and red or blue flashing lights, unless the nature of the mission requires travel without giving warning to suspected law violators. "Law enforcement vehicle" would mean a motor vehicle owned or operated by a law enforcement agency.

Senate Bill 319 (S-2)

Overview

The bill would do all of the following:

- Limit the noneconomic damages recoverable against a governmental agency for bodily injury or property damage that resulted from the negligent operation of a law enforcement vehicle, unless the injury or damage resulted from the agency's gross negligence.
- Provide that a person who sustained bodily injury or property damage arising during his or her violation of fleeing and eluding laws could not recover damages for the injury or property damage.
- List issues that would be questions of law that could be decided upon by the court.

Liability Limitation

The total amount of damages for noneconomic loss recoverable by each plaintiff against a governmental agency for bodily injury or property damage resulting from the negligent operation of a law enforcement vehicle could not exceed \$280,000. If the negligent operation of the vehicle caused either a person's death or permanent loss of a vital bodily function, however, the cap on total damages for noneconomic loss would be \$500,000. On the bill's effective date, the State Treasurer would have to adjust those limitations to equal the RJA's limitations for noneconomic damages in medical malpractice awards. At the end of each calendar year, the Treasurer again would have to adjust the bill's limitations so that they continued to be equal to the medical malpractice limitations. In awarding damages, the trier of fact (the jury or, in the absence of a jury, the judge) would have to itemize the amount of damages awarded for economic loss and the amount of damages awarded for noneconomic loss.

The bill would define "noneconomic loss" as it is in Section 1483 of the RJA, i.e., damages or loss due to

pain, suffering, inconvenience, physical impairment, physical disfigurement, or other noneconomic loss. The bill specifies that noneconomic loss would not include the value of homemaking services or the care of dependent family members.

The limit on noneconomic damages would apply if each of the following conditions were met:

- At the time of the occurrence that resulted in the injury or damage, the agency either adopted the model policy developed under, or had in effect a law enforcement vehicle operation policy certified under, the "Law Enforcement Pursuit and Response Policy Act" proposed by Senate Bill 320.
- At the time of the occurrence, the law enforcement vehicle was engaged in a law enforcement pursuit and response.
- The operator of the law enforcement vehicle was certified by the agency as meeting the minimum requirements established for law enforcement vehicle operators under the proposed policy Act, and that certification was in effect at the time of the occurrence that resulted in the bodily injury or property damage.
- During the occurrence, the operator was in substantial compliance with the law enforcement pursuit and response policy adopted by the governmental agency.

A jury could not be advised by the court or by counsel of the limitation on noneconomic damages, and the court would have to reduce an award of damages in excess of the bill's cap or the revised liability limit as adjusted by the Treasurer.

The limitation on noneconomic damages would not apply if the trier of fact determined that the bodily injury or property damage resulted from a governmental agency's gross negligence. "Gross negligence" would be defined as it is in the governmental immunity Act, i.e., "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results".

Fleeing and Eluding

An individual who sustained bodily injury or property damage arising from a law enforcement pursuit and response while he or she was violating either the Michigan Penal Code's or Michigan Vehicle Code's prohibition against fleeing and eluding a police or conservation officer, could not recover monetary damages from any person for that injury or property damage. ("Person" would include an individual, association, partnership, corporation, unit of government, governmental agency, or any other legal entity.)

Questions of Law

The bill specifies that all of the following issues would be questions of law and could be decided by the court upon the motion of a party at any time before entry of judgment:

- Whether, at the time of the occurrence that resulted in the bodily injury or property damage, the agency had in effect a law enforcement pursuit and response policy certified pursuant to the proposed policy Act.
- Whether, at the time of the occurrence, the law enforcement vehicle was engaged in a law enforcement pursuit and response.
- Whether, at the time of the occurrence, the law enforcement vehicle operator was certified by the governmental agency as meeting minimum requirements established for law enforcement vehicle operators under the proposed policy Act.
- Whether, at the time of the occurrence, the law enforcement vehicle operator was in substantial compliance with the law enforcement pursuit and response policy adopted by the governmental agency.
- Whether the bodily injury or property damage resulted from a governmental agency's gross negligence.
- Whether the bodily injury or property damage sustained by a person who violated fleeing and eluding laws arose from his or her violation.

Governmental Agency

For purposes of the bill, "governmental agency" would be defined as it is in the governmental immunity Act (the State, political subdivisions, and

municipal corporations), and would include an employee or agent of a governmental agency, acting within the scope of his or her employment or agency.

In an action against two or more governmental agencies, the total amount of damages for noneconomic loss recoverable by each plaintiff against all of the agencies could not exceed the total amount permitted under the bill.

Senate Bill 320 (S-1)

Overview

The bill would create the "Law Enforcement Pursuit and Response Policy Act" to do all of the following:

- Establish a "Law Enforcement Vehicle Pursuit and Response Policy Advisory Panel" within the Commission on Law Enforcement Standards created by the Commission on Law Enforcement Standards Act.
- Require the Commission to develop, with the advice of the advisory panel, a model law enforcement vehicle pursuit and response policy to govern emergency operation of law enforcement vehicles.
- Authorize a governmental agency to adopt all or a portion of the model policy or to develop and adopt its own policy for certification by the Commission.

The bill would take effect on January 1, 2000, and would be repealed five years after its effective date.

Advisory Panel

The proposed advisory panel would consist of the members of the Commission on Law Enforcement Standards, and at least one member and one alternate member from each of the following groups:

- The Michigan Association of Counties.
- The Prosecuting Attorneys Association of Michigan.
- The Michigan Municipal League.
- The Michigan Townships Association.
- An organization of police officers who regularly perform law enforcement duties on urban streets or roads.
- An organization of police officers who regularly perform law enforcement duties on suburban streets or roads.
- An organization of police officers who regularly perform law enforcement duties on rural streets or roads.
- An organization of police officers who regularly perform law enforcement duties on limited access highways.

The members and alternates would have to be appointed by the Governor from a list of individuals

provided by each group. In addition, the panel would have to include at least one member of the general public, appointed by the Governor. Each entity that provided a list would have to state which persons were nominated as members and which were nominated as alternate members.

Members would serve two-year staggered terms, or until a successor was appointed. A vacancy on the advisory panel would have to be filled in the same manner as the original appointment. If a member were absent from an advisory panel meeting, the person serving as the alternate member for that person would have to act as a member at that meeting.

Members of the advisory panel would have to be appointed by the Governor within 90 days after the bill's effective date and would have to hold their first meeting within 90 days after appointment.

The advisory panel would have to hold a regular annual meeting at a place and on a date fixed by the panel. Special meetings could be called by the chairperson or not less than seven advisory panel members, on at least three business days' actual notice. A majority of the advisory panel appointed and serving would constitute a quorum. Final action by the advisory panel could only be by affirmative vote of a majority of members appointed and serving. A member could not vote by proxy.

Members of the advisory panel would serve without compensation. Expenses incurred in the performance of official duties would have to be reimbursed as provided by law for State employees. The advisory panel would have to assist the Commission in performing its duties. The Commission would have to provide facilities for meetings of the advisory panel and necessary office and clerical assistance.

Model Policy

Within one year after the advisory panel's first meeting, the Commission, with the advice of the panel, would have to develop a model law enforcement vehicle pursuit and response policy governing emergency operation of law enforcement vehicles by a governmental agency. The model policy would have to do all of the following:

- Define the model policy's coverage.
- Recognize that pursuit or response had the potential for risk or harm.
- Identify the circumstances that would warrant initiation, maintenance, or termination of pursuit or response, based on: the risks to the physical safety of employees and the public, including innocent bystanders, of initiating or maintaining pursuit or response; and for pursuits involving the chase of a person

charged with or suspected of a violation of law, the danger to society of not effecting immediate apprehension, including consideration of the seriousness and immediacy of the threat posed by a pursued person and the adequacy of alternative apprehension methods.

- Identify procedures for a law enforcement agency's initiation, maintenance, and termination of law enforcement pursuit and response, and include: authorization for an employee other than one actively engaged in the pursuit or response to prohibit, modify, or terminate the pursuit or response; specific rules governing law enforcement pursuits and responses that crossed jurisdictional boundaries; and specific rules governing permissible law enforcement pursuit and response methods and tactics.
- Establish guidelines requiring a law enforcement agency to monitor internally the effects of its law enforcement pursuit and response policy.
- Establish minimum requirements for law enforcement vehicle operators and provide guidelines for training employees to comply with an adopted pursuit and response policy.
- Include any other provision the advisory panel considered necessary for a model pursuit and response policy.

The Commission would have to report the model policy developed by the advisory panel to the Senate and the House of Representatives and to each law enforcement agency in Michigan.

The advisory panel would have to meet at least once annually to review the model pursuit and response policy developed under the bill.

Adoption of Policy

A governmental agency could adopt all or part of the model policy developed under the bill, or could develop and adopt its own law enforcement vehicle pursuit and response policy. If a governmental agency adopted the model policy, it would have to notify the Commission. If a governmental agency adopted either part of the model policy and part of its own policy or an entire policy of its own, it would have to send that policy to the Commission for review and certification. The Commission would have to examine each aspect of a policy that was in variance with the model policy. If the Commission found that each variation was reasonably justified by unusual circumstances that existed in a government agency's jurisdiction, and that the policy as a whole substantially achieved the objectives of the model policy, the Commission could certify the policy. If, however, the Commission found that any variation was not reasonably justified by unusual circumstances that existed in a governmental

agency's jurisdiction, or that the policy as a whole did not substantially achieve the objectives of the model policy, the Commission could not certify the policy and would have to return it to the agency that developed it with an explanation of the basis for the Commission's decision.

If a governmental agency discontinued all or a portion of a pursuit and response policy adopted under the bill, the agency immediately would have to inform the Commission, in writing, of the date on which the policy was discontinued. The Commission would have to keep a record of what type of policy each agency adopted.

MCL 600.6304 et al. (S.B. 319)

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 bills would ensure that police officers could perform their duties in an effective, efficient, and safe manner without being urged to forego the pursuit of criminals because of the threat of exposure to liability. By limiting the damages that could be awarded for injuries resulting from an emergency vehicle operator's negligence when the employing governmental agency had an emergency vehicle operation policy, the operator was certified under Senate Bill 320, and the operator was in substantial compliance with the agency's adopted policy, Senate Bill 319 (S-2) would protect agencies from excessive damages arising out of police officers' simply performing their duties. In addition, by prohibiting an individual from recovering monetary damages from any person for injuries or property damage suffered by that individual if he or she were in violation of fleeing and eluding laws, the bill would ensure that a fleeing driver could not hold a governmental agency, its insurer, or anyone else financially responsible for his or her own criminal behavior.

Response: Senate Bill 319 (S-2) would shield from full responsibility and accountability those who were negligently involved in a police chase. It would protect perpetrators of wrongful--though not criminal--acts. The possibility of high damages as a result of a person's negligent actions serves to discourage those actions. The bill would reduce that deterrent effect.

Supporting Argument

Senate Bill 320 (S-1) would create an advisory panel, representing many points of view and areas of expertise, that would help the Commission on Law Enforcement Standards to develop a model policy on the use of high speed pursuit by police. A police officer who undertakes a high speed pursuit is employing potentially deadly force; a clearly

understood policy on pursuit, then, is as important as one on the use of a firearm. As with the use of a gun, the need to apprehend a potentially dangerous criminal must be balanced against the hazards presented to innocent bystanders. Considering that most of the drivers who attempt to flee likely are not dangerous felons, but are minor offenders (and often juveniles), it is especially important to ensure that police officers follow clearly articulated procedures that take all factors into account and specify when to start and when to stop a pursuit. By creating a panel to develop a model police pursuit policy, the bill would improve law enforcement techniques and assure adequate regard for public safety.

Response: The Michigan Municipal Risk Management Authority, a statutorily created entity that administers self-insurance pools for municipalities and public institutions, should be represented on the advisory panel. The Authority has a recommended police pursuit policy for its members and could lend its expertise to the advisory panel.

Opposing Argument

While Senate Bill 319 (S-2) could be beneficial to a few municipalities by excusing them from responsibility for sizable monetary awards when their law enforcement employees acted negligently, those who suffered as a result of that negligence would be further victimized because of the limit on the damages that could be collected. Caps on noneconomic damages arbitrarily and unfairly punish those victims who are most severely afflicted by the wrongs done to them. For example, limiting the size of these awards is harmful to many women and children who are victims of negligence because their losses cannot be easily valued by their economic worth. A woman who is not employed outside the home will suffer little wage loss, but her noneconomic injuries can be particularly devastating to herself and her family. Caps with no exceptions also are inequitable with respect to the age of the victim. A seriously injured child with an otherwise normal life expectancy might never have a chance at an ordinary adult life. To cap that child's noneconomic damages at the same level as someone who was 80 years old simply would be unjust. Further, limiting the damages that could be collected in a wrongful death case would merely send a signal that the victim's life had little worth to his or her family or to society.

Response: Senate Bill 319 (S-2) would not affect the size of quantifiable damages. These economic damages could be assessed at whatever worth was determined in the particular case. The costs of homemaking and child care could be included, and the bill specifies that those would not be noneconomic losses. The otherwise expected lifetime wages of an injured child or deceased victim also could be tabulated and included in the economic damages awarded. In addition, insurers have claimed that they need a defined cap to make an accurate assessment of their risks.

Opposing Argument

By setting a standard of negligence for awards and allowing large awards only when there was gross negligence on the part of a certified emergency vehicle operator, Senate Bill 319 (S-2) in effect would undermine the purpose of having a policy for emergency vehicle operations. If the driver of an emergency vehicle were in "substantial compliance" with the policy but his or her actions resulted in injury or property damage, the victim still would have to prove that the driver was grossly negligent. There is no question that a model policy and better training for emergency vehicle operators are needed, but a police officer in pursuit of a suspect should always have reservations. This, in effect, acts as a check against the officer's irresponsibility. Shielding that officer's employer from liability for damages caused by him or her would remove that check. Further, setting a standard of gross negligence for an award to exceed the cap on noneconomic damages would be basically meaningless because that standard is almost impossible to meet. According to some, to prove gross negligence, a victim essentially would have to show that an emergency vehicle operator acted with intent to injure.

Opposing Argument

Before setting any cap on noneconomic damages based on a governmental agency's adoption of a model policy and a driver's certification under that policy, the policy itself should be developed. Compliance with standards should not be encouraged when those standards have yet to be developed. The State should know, not guess, what the standards of conduct would entail before adopting incentives to use them.

Opposing Argument

Senate Bill 320 (S-1) would create an additional governmental entity to do something that is already being done. Many, if not most, police agencies, including the State Police, already have policies on pursuit. It seems unnecessary to develop a model policy given that the bill does not contain sanctions for failure to adopt or follow a model policy. If there is a need for State guidance to ensure that local policies are sufficient, then the bill should grant the panel authority to oversee and evaluate policies and, if necessary, impose sanctions.

Response: While some agencies may already have specific pursuit policies, some have no such policy and others have adopted "no-pursuit" policies out of fear of civil liability. Although some consistency in pursuit policies may be desired, conditions vary from locality to locality, and local agencies are in the best position to determine what is appropriate for them. Accordingly, the bill would allow local units to adopt all or part of the model policy or to formulate their own policy. While it is reasonable for the State to require that law enforcement agencies have pursuit policies that address certain matters (such as factors and

procedures for deciding whether to initiate, maintain, and terminate a pursuit), the details of those procedures and enforcing compliance with them are best left to local decision-makers. Further, even with this local latitude in developing and adopting a policy, the bill would require certification of a policy that varied from the model policy developed by the advisory panel and the Commission on Law Enforcement Standards. Also, the sanction for not having an acceptable policy would be exposure to unlimited noneconomic damages, since the proposed cap would not apply.

Fiscal Analyst: B. Bowerman
B. Baker

Legislative Analyst: P. Affholter

FISCAL IMPACT

Senate Bill 319 (S-2)

The bill would result in indeterminate savings to governmental agencies to the extent that future damages exceeded limits contained in the bill.

The Michigan Municipal League Liability Pool reports that over a six-year period there were 40 payouts involving pursuit cases totaling \$4.9 million in noneconomic damages due to negligent operation of a law enforcement vehicle. That liability pool includes approximately 800 members.

The Michigan Municipal Risk Management Authority reports that from July 1988 through October 1997, 22 deaths and 24 serious injuries arising from 39 police chases resulted in \$22.8 million in payments as of October 1997. The Authority includes approximately 280 members that have emergency vehicles. These two organizations do not include the City of Detroit, Wayne County, Oakland County, or Macomb County.

Senate Bill 320 (S-1)

The bill would have an indeterminate fiscal impact on State and local law enforcement agencies. The bill would require State reimbursement of expenses for the proposed Model Law Enforcement Vehicle Pursuit and Response Advisory Panel, an amount that most likely would not exceed \$10,000 per year. The Commission on Law Enforcement Standards would be required to assist the panel and to provide facilities for panel meetings as well as necessary office and clerical support. In assisting the panel with its mandate of establishing emergency vehicle operation policies and guidelines, the Commission would incur administrative costs which could be covered by existing Commission resources.

Local law enforcement agencies could incur additional administrative and training costs should they opt to use, in whole or in part, the policy developed by the panel or to develop their own policy.

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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.