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FISCAL IMPACT REPORT

ORIGINAL DATE 2/19/09

SPONSOR Chasey LAST UPDATED _____ HB 799

SHORT TITLE Tort Claim Permissible Damage Awards SB _____

ANALYST Archuleta

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY10	FY11	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
	\$0.1 Significant Indeterminate	\$0.1 Significant Indeterminate	\$0.1 Significant Indeterminate	Recurring	All Sources of Funding including General Fund*
Total	\$3,750.0	\$3,750.0	\$7,500.0	Recurring	PSIA Risk Fund

(Parenthesis () Indicate Expenditure Decreases)

*All responding agencies indicate that the estimated cost associated with House Bill 799 is significant with a corresponding impact on all sources of funding used for state government operations.

SOURCES OF INFORMATION

LFC Files

Responses Received From

Administrative Office of the Courts (AOC)
 Attorney General's Office (AGO)
 Public School Insurance Authority (PSIA)
 General Services Department (GSD)
 Department of Public Safety (DPS)
 Children, Youth and Families Department (CYFD)
 Department of Health (DOH)
 Human Services Department (HSD)
 New Mexico Association of Counties

SUMMARY

Synopsis of Bill

House Bill 799 amends the Tort Claims Act to waive sovereign immunity for the torts and constitutional violations listed in Section 41-4-12 for public employees as well as law enforcement officers. Current law only waives immunity for these torts when committed by law

enforcement officers. The bill explicitly provides that plaintiffs suing the state may recover unlimited damages, including punitive damages, prejudgment interest, attorney fees and costs in cases brought under the constitution of the United States or the State of New Mexico.

FISCAL IMPLICATIONS

According to the Association of Counties, this bill would impose a potentially huge financial burden on the state, counties, and municipalities, all of which are in the midst of a serious fiscal crisis. The state is facing a large budget deficit, and counties and cities are being faced with substantially reduced revenues and fiscal uncertainty. This is clearly not the time to be expanding governmental liability and increasing the fiscal burden already placed on the state and its political subdivisions. Unfortunately, this bill will result in a substantial and material increase in judgments and settlements against public entities. The financial impact could be devastating. Among other things, the cost of procuring excess liability insurance, which already is extremely high and which has increased substantially over the past several years, will continue to soar.

GSD indicates that in future years the fiscal impact on the Public Liability Fund would be substantial but undeterminable at this time as there is no way to know how many additional suits would be filed against public employees nor to determine the actual awards for NM Constitutional violations. (NOTE: The Public Liability Fund is the Fund which provides monies to cover both the costs of defense and settlements and/or judgments against public employees who commit torts or constitutional violations while acting within the scope of their duties.) For example, if this bill is enacted, any public employee who is disciplined or dismissed would be able to sue his/her supervisors for libel, slander and defamation. Even if the suits are ultimately unsuccessful, the mere cost of defending those suits would create a very significant fiscal impact.

Similar to GSD, PSIA self-insures its liability program and purchases stop-loss coverage from a reinsurer for claims in excess of \$750,000. The reinsurer traditionally discounts PSIA's liability premium because of the protections afforded by the NM Tort Claims Act. It is estimated that PSIA's liability reinsurance premium would increase by \$500,000 to \$750,000 as a result of this change. As far as the increase in claim dollars paid by PSIA, it is difficult to project, as state courts are still handing down case law with respect to constitutional rights, but an estimate of an additional \$2 to \$3 million dollars is not unreasonable.

HSD also notes that there are enormous fiscal implications for this bill. The expansion of liability from actions solely involving law enforcement officers to all public employees acting within the scope of their employment will have a huge fiscal impact for the state. State departments will have to contribute additional money to the risk management fund. Additional money will need to be appropriated to the department. In addition, money will need to be appropriated for attorneys to defend the state in tort actions involving state employees. Additional funds will need to be appropriated for litigation costs and expenses.

CYFD indicates this bill significantly expands the waiver of sovereign immunity in the Tort Claims Act and exposes CYFD to potential liability for a wide range of tortuous conduct for which claims are currently barred by sovereign immunity. The Tort Claims Act currently limits the liability of the state for torts committed by public employees by (1) limiting the torts for which the state waives sovereign immunity, (2) capping awards of damages, and (3) prohibiting punitive damage awards. The bill would make all public employees, rather than just law enforcement officer, subject to suit for a broad range of torts listed in Section 41-4-12, ranging

from wrongful death, false imprisonment, malicious prosecution to libel, slander and defamation of character. This broader waiver of sovereign immunity will result in additional lawsuits against the state, which will increase the amount the Risk Management Division of GSD must spend both in defense of cases and in settlements and judgments.

In addition to substantially revoking the state's sovereign immunity, Section 3 of the bill appears to create a cause of action (with uncapped damages, attorney fees and prejudgment interest) for state constitutional violations. Under current New Mexico law, there is no private cause of action for state constitutional violations.

This bill also increases the maximum amounts that the state may have to pay in certain cases by explicitly authorizing punitive damages, unlimited damage awards, prejudgment interest, and awards of attorney fees and costs in cases involving state and federal constitutional violations. Although federal civil rights awards are not capped under current law and attorney fees are available in such cases, the bill removes the current law's caps on damage awards in state constitutional cases and authorizes punitive damages, prejudgment interest, attorney fees and cost awards against the state in such cases. Again, the effect of this, while presently unquantifiable, will be to increase the number of suits against the state, the amount that the state must pay to defend cases, and the amount that the state must pay out in judgments and settlements.

Although there is no way for CYFD to quantify how much more the department will have to pay to defend and settle lawsuits if this bill becomes law, the amount is likely to be substantial.

SIGNIFICANT ISSUES

The Association of Counties suggests this bill will also open the door for many more claims against public entities. The state, counties, and municipalities will find themselves responsible for the intentional torts of unrelated third parties in a myriad of unanticipated situations. Vicarious liability for governmental entities will skyrocket, and cause undue financial hardship on the public treasury. It is conceivable that tax increases will be required to fund the increased liability and expenditures resulting from passage of this bill. This bill also would expand liability for governmental entities under the state constitution. In addition, under federal law punitive damages cannot be assessed directly against a governmental entity; rather, such charges would have to be brought against the individual public employee. This bill would radically change existing and established law and treat the state and its political subdivisions the same as a private person, making them vicariously liable for the actions of rouge employees in virtually all situations. This bill, as drafted, may also expose public entities to substantial liability for punitive damages beyond the legislatively imposed tort cap limits.

This bill would affect PSIA's exposure to judgments against our insured by requiring payment of exemplary or punitive damages where the claim is based on a provision in the State Constitution. Exemplary or punitive damages are damages a jury may assess that are, in its judgment, adequate to deter others from like behavior. This bill would allow a jury, in addition to assessing actual damages, to look at the school district budget (say, for example, \$50 million) and come up with an added damage amount (say, for example, \$1-2 million) to deter future like conduct. An example would be where a school district ignores the past sexual behavior of an employee, hires that employee and then an assault on a student occurs.

According to PSIA, no state allows punitive damages to be awarded against public entities. It would significantly increase exposure for all public entities, including municipalities, highway, and correctional, and police.

In addition this would allow fee shifting and prejudgment interest (from the time of the incident). The plaintiff could add his attorney fees (as is now done vis-à-vis federal claims). The result could be multimillion dollar judgments as opposed to multi-hundred thousand dollar judgments as is now the case.

According to GSD, enactment of this bill would greatly expand the type of torts a public employee could be sued for under the NM Tort Claims Act, thereby dramatically increasing government liability. Individuals will also have an opportunity to sue a public employee for constitutional violations under the NM Constitution, which previously had not been allowed under the NM Tort Claims Act (See **Bell v. Board of Educ. of the Albuquerque Public Schools**, (Not Reported in F.Supp.2d), 2008 WL 2397670 *7 (D.N.M.,2008)("In the absence of affirmative legislation, the courts of this state have consistently declined to permit individuals to bring private lawsuits to enforce rights guaranteed by the New Mexico Constitution, based on the absence of an express waiver of immunity under the Tort Claims Act ." *Barreras v. N.M. Corr. Dep't*, 2003-NMCA-027 ¶ 24, 133 N.M. 313, 62 P.3d 770, 776. See *Chavez v. City of Albuquerque*, 1998-NMCA-004, ¶ 11, 124 N.M. 479, 952 P.2d 474, 477..."") as there has not been affirmative legislation permitting such liability and the maximum liability of \$750,000 set forth in NMSA §41-4-19 of the Tort Claim Act would be irrelevant as sovereign immunity would be waived with the amended language "...liable the same as a private person." See, *Luboyeski v. Hill*, 117 NM 380, 384, 872 P.2d 353, 357 (1994).

Additionally, by waiving immunity for claims under the NM Constitution, individuals would now be able to bring constitutional violations in State Court which would increase overall litigation costs since our State Courts allow unlimited discovery (unlike Federal Courts) and the established and well briefed defenses allowed in Federal Court for violations of the US Constitution by public employees would have to be fully litigated in State Courts, thereby further increasing litigation costs.

Finally, by adding language in Section 41-4-19 permitting punitive and/or exemplary damage awards for constitutional violations seems to provide a philosophical shift in the limited waiver of immunity currently provided in the Tort Claims Act.

The central issue raised by this bill is whether it is good policy to enact legislation authorizing additional suits against the state and larger verdicts and settlements at a time when reduced revenues are limiting the ability of the state to provide essential programs and services to its citizens.

HSD also notes, this bill exponentially expands the State of New Mexico's liability in tort actions. The bill, in essence abrogates the Tort Claims Act. HB 799 creates a civil rights cause of action in state courts. This bill will create an additional category of litigation in the state courts. This bill eliminates prosecutorial and judicial immunity.

DOH indicates this bill would significantly increase the liability of the state of New Mexico and other governmental entities in cases in which constitutional, property, and other claims are asserted, and would likely result in a significant increase in the number of lawsuits brought against governmental entities and actors.

ADMINISTRATIVE IMPLICATIONS

HSD suggests that because the bill will have the effect of increasing the number of lawsuits against the state and the amounts that plaintiffs may recover from the state in certain kinds of cases, it will require state government to reduce or limit the growth of programs and services in order to pay for the costs of the lawsuits.

PSIA states the Memorandum of Coverage would need to be amended to remove the exclusion for coverage of punitive damages. This additional work would be absorbed by PSIA. If punitive damages are not covered by the MOC, the individual school district would be liable for the payment of such an award.

GSD suggests that number of lawsuits against public employees would dramatically increase if this legislation were enacted, thereby increasing the number of attorneys required to handle such cases as well as increasing the overall litigation costs to the State.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

The bill is related to House Bill 750 in that both bills seek to increase the state's liability for damages under the Tort Claims Act.

OTHER SUBSTANTIVE ISSUES

DOH notes the following:

House Bill 799 proposed expansion of tort claims that can be pursued against the state:

NMSA 1978, § 41-4-4 of the NM Tort Claims Act states the general rule that a governmental entity and any public employee acting within the scope of their duty are granted immunity from liability for any tort, except as provided at sections 41-4-5 through 41-4-12 of the Act.

NMSA 1978, § 41-4-12 currently states an exception that allows damages to be recovered in tort actions against governmental entities for personal injuries, bodily injuries, wrongful death and property damage that results from (among other things) assault, battery, abuse of process, libel, slander, defamation, violation of property rights and violation of federal or state constitutional rights caused by *law enforcement officers* acting within the scope of their duty. HB799 proposes to substitute “public employees” generally instead of “law enforcement officers”, thereby permitting litigants to sue the state whenever a litigant suffers property damage, personal injury, bodily injury, or wrongful death as a result of the public employee's commission of any of the described torts.

The Tort Claims Act as it is presently written waives governmental immunity for the actions of “public employees” other than law enforcement officers only in specific, limited circumstances. The Act allows a governmental entity to be held liable for damages arising from bodily injury, wrongful death or property damage caused by a public employee's negligence while: (1) operating a motor vehicle, aircraft or watercraft [NMSA 41-4-5], (2) operating or maintaining a building, public park, machinery, equipment or furnishings [NMSA 41-4-6], (3) operating an airport [NMSA 41-4-7], (4) operating certain public utilities [NMSA 41-4-8], (5) operating a hospital, infirmary, mental institution, clinic,

dispensary, medical care home or like facility [NMSA 41-4-9], or (6) constructing or maintaining a bridge, culvert, highway, roadway, street, alley, sidewalk or parking area [NMSA 41-4-11]. The Act also allows governmental entities to be sued for the negligence of public employees who are licensed by the state or who are permitted by law to provide health care services, where the negligence results in bodily injury, wrongful death or property damage [NMSA 41-4-10].

Thus, HB799 would expand the potential liability of the state and other governmental entities to include damages resulting from actions by public employees that are found, for example, to violate the state or federal constitution, or that are found to have violated someone's property rights, and that also result in property damage, personal injury, bodily injury or wrongful death. The expansion of liability for any constitutional violation and any violation of "property rights" by a public employee is particularly worrisome, given the range of areas in which public employees work and the breadth of offenses (great and small) that might fall into these categories.

It could be argued that HB799 proposes to modify the Tort Claims Act to permit more claims than the Act would prohibit.

B) House Bill 799 proposed expansion of damages that may be recovered in tort actions against the state:

The NM statutes at NMSA 1978, § 41-4-19 currently prohibit awards for exemplary or punitive damages or for prejudgment interest in any case against a governmental entity or a public employee acting within the scope of the employee's duties. HB799 proposes to permit these and other damages (including attorneys' fees and expenses) in any case that "is brought pursuant to" either the U.S. or New Mexico constitution.

HB799 also contains an ambiguous statement in its conclusion that "the state shall be liable the same as a private person" in such cases. This could be interpreted to allow special damages in addition to the attorneys' fees and punitive damages, etc. that the bill specifically identifies immediately prior to this statement. It could also (conceivably) be interpreted to exclude punitive damages, etc. from the caps imposed at NMSA 1978, § 41-4-19. Under section 41-4-19 A(3), damages other than real property damage and medical and medically related expenses are capped at a maximum of \$400,000. Thus, it appears that the attorneys' fees, expenses, costs, exemplary and punitive damages that would be allowed under HB799 would likely be capped (together with all non-medical and non-real-property damages) at a combined maximum of \$400,000. However, the "liable the same as a private person" language of HB799 creates ambiguity, considering that punitive damages and attorneys' fees, etc. are not generally capped for "private persons".

By proposing to allow awards for punitive damages and attorneys' fees, etc. against the state (and other governmental entities) in cases "brought pursuant to" the state or federal constitution, HB799 effectively proposes to allow larger monetary awards against governmental entities. This potential is even greater when considered in tandem with the proposed amendment of section 41-4-12 (described above), which would likely generate more cases against governmental entities, including the state. Allowing punitive damages and attorneys' fees, etc. would likely encourage more frequent and more protracted litigation by plaintiffs, who would have all the more incentive to sue the government and less incentive to reasonably expedite their cases.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

GSD notes that public employees acting within the scope of their duties would continue to be liable for those torts for which immunity has been waived by the Tort Claims Act and the extensive list of additional torts for which public employees could be held liable for would only apply to law enforcement officers (as currently provided in Section 41-4-12). Lastly, individuals who have constitutional violations committed by a public employee would continue to have a remedy by filing a suit in Federal Court under the United States Constitution.

DA/mc