

Stakes High As Pa. Justices To Mull Gov't Suit Damages Cap

By **Y. Peter Kang**

Law360 (March 26, 2024, 7:54 PM EDT) -- The Pennsylvania Supreme Court's recent decision to review the constitutionality of the \$250,000 damages cap for personal injury suits against state agencies sets the stage for two extremes: absolute immunity or limitless liability, experts say.

Hayley Freilich, who lost part of her foot after she was hit by a Southeastern Pennsylvania Transportation Authority bus, successfully sued SEPTA under an exception to the Sovereign Immunity Act, which provides limited immunity for state agencies, and received a \$7 million verdict that was slashed to \$250,000.

After subtracting \$160,000 for legal fees and costs, Freilich was left with about \$90,000, which would need to be repaid to her health insurer since she racked up more than \$500,000 in medical bills. She argues that the damages cap therefore effectively denied her of her right to a legal remedy and right to a jury trial under the Pennsylvania Constitution.


A lower appellate panel **affirmed the reduced award** in July, with one concurring judge urging the state high court to "analyze both the deprivation of the right to trial by jury and the deprivation of rights under the remedies clause."

Attorneys are watching the case with interest, as it has the potential to upend the current legal landscape for injury suits against Pennsylvania agencies, according to Casey Coyle of Babst Calland Clements and Zomnir PC in Harrisburg.

"The stakes are rather significant in this case," said. "At one end, you have potential uncapped tort liability, which has serious implications for political subdivisions all across the commonwealth. The other scenario is simply that the court says the caps can't be severed [from the Sovereign Immunity Act], so we revert to absolute immunity. There are two extremes."

Cliff Rieders of Rieders Travis Dohrmann Mowrey Humphrey & Waters, a plaintiffs-side personal injury attorney based in Williamsport who said he helped draft the act in the late 1970s, said the cap — which in more than four decades has never been adjusted for inflation — has become unfair to injury victims and has attracted the attention of the justices.

"I think the Pennsylvania Supreme Court, with 40 years of living with this law with no change, at some point said the failure to make this law consistent with reality could make this unconstitutional," he told Law360.

Rieders explained that the law he helped write was in response to the Pennsylvania Supreme Court's 1978 decision in [Mayle v. Pennsylvania Department of Highways](#) , which abolished sovereign immunity.

"[The damages cap] was a compromise between total sovereign immunity and the no immunity of Mayle, and gave people the right to sue under exceptions of the act," he said. "However, with the passage of time, a good thing became draconian because the Legislature would never raise the caps or impose an escalator clause based on the cost of living. In my view, that makes it unacceptable from a constitutional point of view."

Due to the cap, which limits total damages and not just noneconomic damages, Rieders said plaintiffs

firms are loath to take on severe injury cases against the government, which Freilich's attorneys with Pennsylvania personal injury powerhouse Kline & Specter PC argue effectively denies her right to a jury trial.

"Very few lawyers want to take them because the caps are so draconian, and the collateral sources diminish any verdict you get," Rieders explained. "There are very legitimate claims that go unanswered and, as a result, you don't have the commonwealth and local agencies practicing as safely as they should."

Philadelphia-based Eric Weitz of The Weitz Firm LLC, a plaintiff-side personal injury attorney, told Law360 that the high court will address a subset of injury cases: catastrophic injury.

"The cost of litigating a catastrophic injury case is exponentially greater than \$250,000," he said. "What happens is citizens who are catastrophically injured by a commonwealth agency are essentially denied a remedy because the cost of bringing the suit and the amount you have to pay back to insurance carriers and lawyers and court reporters and experts exceeds what they could recover. Therefore, the statute as applied is potentially unconstitutional."

Weitz said Kline & Specter "very strategically" took on Freilich's case after the state high court in two previous cases said the cap was within the authority of state lawmakers and begrudgingly declined to overturn it.

"Kline & Specter took them up on the invitation and created a record showing how expensive these cases are and how much time has to go into it," he said. "They are now arguing that the caps violate the remedy clause of the Pennsylvania Constitution and the right to a jury trial, because effectively nobody can bring the case because it could end up costing more than you could ever recover."

"The [Pennsylvania] Supreme Court has pointed out to the Legislature on multiple occasions that there is this real lack of fairness in their unwillingness to revisit the cap," he added.

If it was the justices' intention to hear the case in order to "send a message" to the Pennsylvania Legislature, perhaps in order to prod lawmakers to draft an amendment to the statute, it could limit the scope of any decision the court renders, Weitz said.

"The court could find that the cap itself is unconstitutional, as opposed to finding that the entire statute is unconstitutional," he said.

But Coyle of Babst Calland said the court might nevertheless have a "line-drawing problem" on their hands. If the court strikes down the cap as unconstitutional as applied to Freilich's case, it would create an offshoot of litigation that never existed before, and call for trial courts to make a case-by-case analysis of injury suits against the state government.

"The problem is the waiver of sovereign immunity is inextricably intertwined with the cap," he said, since the caps served as the state lawmakers' compromise between no immunity and complete immunity. "The statute says the commonwealth is immune except for these exceptions with these caps. I don't think you can carve the turkey by saying the caps go away and the rest stays, because you will get an uncapped liability scheme."

Coyle, who submitted an amicus brief on behalf of the business-friendly Pennsylvania Coalition for Civil Justice Reform, said injury suits against the government that exceed \$250,000 in damages "are the outlier, not the norm."

"The vast majority of cases fall within the existing caps," he said. "This is a case plaintiff's counsel was targeting because it was the rare one where the caps would be exceeded."

He warned that abolishing the cap could lead to an increase in government costs that will burden Pennsylvania taxpayers.

"If you get into a scheme where you get this uncapped tort liability, and you are a small municipality and have no insurance, what are you going to do to fund a \$10 million verdict? Raise taxes? There are real-world consequences. The overarching premise of the caps is protecting the public fisc," he

said. "Once you open the door, how far is the door going to open? I have a hard time believing you can contain that reasoning just to the particular facts of that case. It's a classic example of the exception swallowing the rule."

Freilich is represented by Thomas R. Kline, Charles L. Becker, Colin Burke and Andra Laidecker of Kline & Specter PC.

SEPTA is represented by Mark E. Gottlieb of Offit Kurman PA, Joshua D. Groff of Green Silverstein & Groff LLC, and Jeffrey S. Pollack, Robert M. Palumbos and Leah A. Mintz of Duane Morris LLP.

The case is Hayley Freilich v. Southeastern Pennsylvania Transportation Authority, case number 245 EAL 2023, in the Supreme Court of Pennsylvania.

--Editing by Alanna Weissman and Kelly Duncan.

Update: This article has been updated to add counsel info for Freilich.