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## Civil Rights & Judiciary Committee

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### HB 1202

**Brief Description:** Addressing meaningful civil remedies for persons injured as a result of police misconduct, including by allowing for an award of attorney fees in addition to damages and injunctive and declaratory relief.

**Sponsors:** Representatives Thai, Davis, Bateman, Ramos, Kloba, Callan, Simmons, Berry, Santos, Ryu, Ramel, Sells, Ortiz-Self, Gregerson, Wicks, Berg, Bergquist, Dolan, Macri, Fey, Pollet, Harris-Talley and Frame.

#### Brief Summary of Bill

- Provides a cause of action for a person injured in person or property by a peace officer acting under color of authority if the officer engaged in specifically listed conduct, and requires an award of actual damages and costs and attorneys' fees to a prevailing plaintiff.
- Authorizes the Attorney General to investigate employers and peace officers engaging in a pattern or practice of conduct identified in the act and to bring a civil action against a peace officer or employer to restrain and prevent the peace officer or employer from engaging in the pattern or practice of conduct.

**Hearing Date:** 1/26/21

**Staff:** Edie Adams (786-7180).

#### **Background:**

##### Federal Civil Actions--Deprivation of Constitutional Rights.

Federal law, under 42 U.S.C. §1983, provides a civil cause of action to redress violations of federal constitutional rights caused by persons acting under color of state law. This cause of

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action is often referred to as a section 1983 action. The legal standard for determining whether actions violate constitutional rights depends on the particular constitutional right at issue. Section 1983 actions against law enforcement officers often involve claims of excessive use of force, unlawful search or seizure, or false arrest in violation of Fourth Amendment rights.

The general standard for evaluating Fourth Amendment claims is whether or not the officer's actions were objectively reasonable. In making this determination, the court must balance the nature and quality of the intrusion on the individual's rights against the state's interests in the case. Court decisions indicate that "reasonableness" is highly dependent on the particular facts and circumstances of each case including: the severity of the crime at issue; whether the suspect poses an immediate threat to the safety of the officers or others; and whether the suspect is actively resisting arrest or attempting to evade arrest by flight. The reasonableness of a particular use of force is examined from the perspective of a reasonable officer on the scene, and not with the benefit of hindsight.

Qualified immunity in the context of section 1983 actions is a doctrine that originated in federal case law. It provides government officials performing discretionary functions immunity from civil suits unless the plaintiff shows that the officer violated "clearly established" rights. When determining whether or not a right was "clearly established," courts consider whether the constitutional right alleged to have been violated was sufficiently clear so that a reasonable officer would have known that his or her conduct violated the rights. This is an objective standard, meaning that the standard does not depend on the officer's subjective state of mind.

Section 1983 actions are suits generally brought against the individual officer who committed the alleged violation since the doctrine of vicarious liability of employers does not apply in section 1983 actions. An officer's employing agency may only be held liable in a section 1983 action when the injury is the result of the execution of a policy or custom adopted by the agency.

#### Washington Civil Actions.

The Washington Constitution contains provisions that protect individual rights of state residents, including Article 1, section 7, which provides that "[n]o person may be disturbed in his private affairs, or his home invaded, without authority of law." Washington does not have a statute that specifically creates a cause of action for violation of state constitutional rights, and Washington courts have consistently refused to recognize a private cause of action for damages for state constitutional violations absent legislative guidance.

However, a civil suit in Washington based on excessive use of force or other police misconduct could be brought under state common law tort actions. These include actions for intentional torts, such as assault, battery, false arrest, false imprisonment, or trespass, or a negligence cause of action. In a 2019 case, the Washington Supreme Court held that the fact that an officer's conduct constitutes an intentional tort does not preclude a negligence claim based on an officer's failure to use ordinary care to avoid unreasonably escalating an encounter to the use of deadly force.

Washington courts recognize a common law qualified immunity for government officers exercising discretionary functions. A police officer is entitled to immunity from civil liability where the officer carries out a statutory duty according to procedures dictated to the officer by statute and superiors and where the officer acts reasonably.

An employer may be held vicariously liable for an employee's tortious act if the employee was acting within the scope of employment when the act was committed. An employer may also be liable for the conduct of an employee based on negligent hiring, training, or supervising of the employee. However, a claim based on negligent hiring, training, or supervising applies only where the officer acts outside of the scope of employment.

#### Law Enforcement Limitations Regarding Immigration Enforcement.

Legislation enacted in 2019, placed restrictions on law enforcement with respect to immigration enforcement matters, including that law enforcement may not:

- disclose nonpublic personal information about an individual to immigration authorities or give immigration authorities access to interview individuals about a noncriminal matter while the person is in custody;
- inquire into or collect information about an individual's immigration or citizenship status or place of birth, unless there is a connection between the information and a criminal investigation;
- provide information pursuant to notification requests from federal immigration authorities for the purpose of civil immigration enforcement, except as required by law; or
- detain, or take into or hold in custody, any person solely for the purpose of determining immigration status.

#### Defense and Indemnification of Public Employees.

When a civil action is brought against a state or local government officer or employee, the state or a local government must defend the officer or employee in the proceeding if his or her actions were within the scope of his or her duties. Monetary damages awarded against the officer or employee must be paid by the state or local governmental entity if the court finds that the officer or employee was acting within the scope of his or her duties, and the judgement may not become a lien upon any property of the officer or employee.

#### Contributory Negligence and Allocation of Fault.

Washington recognizes the concept of comparative fault in civil actions based on fault. In an action based on fault, any contributory fault of the plaintiff will proportionately reduce the defendant's liability for the plaintiff's injuries. "Fault" is defined to include negligent or reckless acts or omissions, but not intentional acts or omissions. In an action based on fault, the trier of facts is required to assign a percentage of the fault to every entity that caused the plaintiff's damages. Generally, each responsible entity must pay only for his or her proportionate share of the damages. However, if the plaintiff had no contributory fault or if the defendants were acting in concert, the defendants may be jointly and severally liable for the whole of the claimant's damages, which means that any one defendant may be required to pay all of the damages.

## **Summary of Bill:**

A person injured in person or property by a peace officer acting under color of authority has a cause of action against the peace officer if the officer:

- engaged in conduct that under the civil law constitutes assault, battery, outrage, false arrest, false imprisonment, malicious prosecution, trespass, or conversion;
- executed a detention, traffic stop, search, seizure, or entry into a home that is unlawful under the Washington Constitution;
- engaged in conduct that violated the duty of reasonable care under chapter . . ., Laws of 2021 (House Bill No. . . .); or
- violated a provision of RCW 10.93.160, which relates to law enforcement limitations with respect to federal immigration enforcement.

The injured person also has an action against any other peace officer who had the power through reasonable diligence to prevent or aid in preventing the injury from occurring but failed to do so.

### Employer Liability.

The plaintiff may name the peace officer's employer as a defendant in the action. The employer is vicariously liable for the harm if the peace officer was acting within the scope of employment.

The employer is independently liable if the injury is proximately caused by: a regulation, custom, usage, practice, procedure, or policy approved or condoned by the employer; or the employer's failure to use reasonable care in hiring, training, retaining, supervising, or disciplining the peace officer.

### Defenses and Immunities.

A peace officer has a defense against the claim if, when the injury occurred, the officer substantially complied with a regulation, practice, procedure, or policy that was established by the employer or approved or condoned by superior officers.

It is not an immunity or defense to an action that:

- the rights, privileges, or immunities sued upon were not clearly established at the time of the act, omission, or decision by the peace officer or employer; or
- at such time, that the state of the law was such that the peace officer or employer could not reasonably have been expected to know whether such act, omission, or decision was lawful.

### Remedies.

The court must award a prevailing plaintiff actual damages, and at least nominal damages, as well as costs and reasonable attorneys' fees. The court may grant declaratory and injunctive relief as it deems appropriate.

### Attorney General Enforcement.

The Attorney General is given authority to investigate employers and peace officers engaging in

a pattern or practice of conduct identified in the act and to bring a civil action against a peace officer or employer to restrain and prevent the peace officer or employer from engaging in the pattern or practice of conduct. The prevailing party may, in the discretion of the court, recover the costs of the action including reasonable attorneys' fees.

Other Provisions.

A cause of action against a peace officer or employer by an injured person must be commenced within three years after the cause of action accrues.

Provisions of chapter 4.22 RCW, which govern contributory negligence and allocation of fault in civil actions, do not apply to actions under the act.

Nothing in the act limits the right of a peace officer to have a legal defense provided at the expense of his or her employer or to having a judgment satisfied by the employer.

The act must be liberally construed. Nothing in the act affects any other common law or statutory right of action available to the plaintiff.

The act applies to causes of action arising on or after the effective date of the act.

**Appropriation:** None.

**Fiscal Note:** Requested on January 22, 2021.

**Effective Date:** The bill takes effect 90 days after adjournment of the session in which the bill is passed.