

HOUSE No. 3055

The Commonwealth of Massachusetts

PRESENTED BY:

Paul K. Frost, (BY REQUEST)

To the Honorable Senate and House of Representatives of the Commonwealth of Massachusetts in General Court assembled:

The undersigned legislators and/or citizens respectfully petition for the adoption of the accompanying bill:

An Act relative to tort claims.

PETITION OF:

NAME:

Paul Nordberg

DISTRICT/ADDRESS:

3 Overhill Drive Auburn, MA 01501

HOUSE No. 3055

By Mr. Frost of Auburn (by request), a petition (accompanied by bill, House, No. 3055) of Paul Nordberg relative to claims and indemnity procedures. The Judiciary.

The Commonwealth of Massachusetts

**In the One Hundred and Ninetieth General Court
(2017-2018)**

An Act relative to tort claims.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

1 SECTION 1. Chapter 258 of the General Laws, as appearing in the 2014 Official
2 Edition, is hereby amended by striking out said chapter, in its entirety, and inserting in place
3 thereof the following language:-

4 Section 1. As used in this chapter the following words shall have the following
5 meanings:-

6 "Acting within the scope of his office or employment", shall include but not be limited to
7 acting in the performance of any lawfully ordered military duty, in the case of an officer or
8 soldier of the military forces of the commonwealth.

9 "Abuse of Discretion," occurs when a public employer and/or its authorized employee
10 selects a discretionary course of action, or decides to take no action, when the option selected
11 lacked sufficient merit as to warrant or justify serious consideration. Whether Abuse of
12 Discretion has occurred shall be a question of fact, to be determined by the trier or triers of fact.

13 A "Cause for Action," for purposes of the applicable statute-of-limitations, arises either
14 when: The claimant/plaintiff has knowledge of sufficient facts as to give rise to the alleged
15 course-of-action; OR a reasonable person should have become aware of the facts giving rise to
16 the alleged cause of action.

17 The question of when a reasonable person should have become aware of the facts giving
18 rise to the alleged cause-of-action bill shall be a question of fact, to be determined by the trier or
19 triers of fact.

20 "Cause of Action Based on Illegal Conduct"- In any instance in which the conduct of the
21 public employer and/or one or more of its authorized employees both: Was illegal under-then-
22 existing law; and led to injury or death or financial damages to the claimant/plaintiff.

23 The Combination of these two factors shall create a prima-facie case to the effect that a
24 tort has occurred for which the claimant/plaintiff is entitled to recover damages.

25 "Executive officer of a public employer", the secretary of an executive office of the
26 commonwealth, or in the case of an agency not within the executive office, the attorney general;
27 the adjutant general of the military forces of the commonwealth; the county commissioners of a
28 county; the mayor of a city, or as designated by the charter of the city; the selectmen of a town or
29 as designated by the charter of the town; and the board, directors, or committee of a district in the
30 case of the public employers of a district, in the case of the Massachusetts Bay Transportation
31 Authority, its general manager and rail and transit administrator, and, in the case of any other
32 public employer, the nominal chief executive officer or board.

33 "Public attorney", the attorney who shall defend all civil actions brought against a public
34 employer pursuant to this chapter. In the case of the commonwealth he shall be the attorney

35 general; in the case of any county he shall be the district attorney as designated in sections
36 twelve and thirteen of chapter twelve; in the case of a city or town he shall be the city solicitor or
37 town counsel, or, if the town has no such counsel, an attorney employed for the purpose by the
38 selectmen; in the case of a district he shall be an attorney legally employed by the district for that
39 purpose; and, in the case of the Massachusetts Bay Transportation Authority, the attorney shall
40 be the general counsel. A public attorney may also be an attorney furnished by an insurer
41 obligated under the terms of a policy of insurance to defend the public employer against claims
42 brought pursuant thereto.

43 "Public employee", elected or appointed, officers or employees of any public employer,
44 whether serving full or part-time, temporary or permanent, compensated or uncompensated, and
45 officers or soldiers of the military forces of the commonwealth. For purposes of this chapter, the
46 term "public employee" shall include an approved or licensed foster caregiver with respect to
47 claims against such caregiver by a child in the temporary custody and care of such caregiver or
48 an adult in the care of such caregiver for injury or death caused by the conduct of such caregiver;
49 provided, however, that such conduct was not intentional, or wanton and willful, or grossly
50 negligent. For this purpose, a caregiver of adults means a member of a foster family, or any other
51 individual, who is under contract with an adult foster care provider as defined and certified by
52 the division of medical assistance.

53 "Public employer", the commonwealth and any county, city, town, educational
54 collaborative, or district, including the Massachusetts Department of Transportation, the
55 Massachusetts Bay Transportation Authority, any duly constituted regional transit authority and
56 the Massachusetts Turnpike Authority and any public health district or joint district or regional
57 health district or regional health board established pursuant to the provisions of section twenty-

58 seven A or twenty-seven B of chapter one hundred and eleven, and any department, office,
59 commission, committee, council, board, division, bureau, institution, agency or authority thereof
60 including a local water and sewer commission including a municipal gas or electric plant, a
61 municipal lighting plant or cooperative which operates a telecommunications system pursuant to
62 section 47E of chapter 164, department, board and commission, which exercises direction and
63 control over the public employee, but not a private contractor with any such public employer, the
64 Massachusetts Port Authority, or any other independent body politic and corporate. With respect
65 to public employees of a school committee of a city or town, the public employer for the
66 purposes of this chapter shall be deemed to be said respective city or town.

67 "Serious bodily injury", bodily injury which results in a permanent disfigurement, or loss
68 or impairment of a bodily function, limb or organ, or death.

69 Section 2. Public employers shall be liable for personal injury, or financial injury or loss
70 of property or personal injury or death caused by the negligent or wrongful act or omission of
71 any public employee while acting within the scope of his office or employment, in the same
72 manner and to the same extent as a private individual under like circumstances, except that
73 public employers shall not be liable to levy of execution on any real and personal property to
74 satisfy judgment, and generally be liable only for pre-judgment interest commencing from the
75 date one year after the filing after the filing of an action under this statute. Public employers
76 generally shall not be liable for interest prior to judgment or for punitive damages or for any
77 amount in excess of \$500,000 per incident; provided, however, that all claims for serious bodily
78 injury against the Massachusetts Bay Transportation Authority shall not be subject to a \$100,000
79 limitation on compensatory damages. The remedies provided by this chapter shall be exclusive
80 of any other civil action or proceeding by reason of the same subject matter, in any separate

81 proceeding, against the public employer or, the public employee or his estate whose negligent or
82 wrongful act or omission gave rise to such claim, and no such public employee or the estate of
83 such public employee shall be liable for any injury or loss of property or personal injury or death
84 caused by his simply negligent or unintentional non-malicious wrongful act or omission while
85 acting within the scope of his office or employment; provided, however, that a public employee
86 shall provide reasonable cooperation to the public employer in the defense of any action brought
87 under this chapter. Public employers shall be liable in instances of Abuse of Discretion and/or
88 gross negligence. Public employers shall be jointly and severally liable, along with the involved
89 public employee(s) in instances of intentional or malicious tortious conduct. Failure to provide
90 such reasonable cooperation on the part of a public employee shall cause the public employee to
91 be jointly liable with the public employer, to the extent that the failure to provide reasonable
92 cooperation prejudiced the defense of the action. Information obtained from the public employee
93 in providing such reasonable cooperation may not be used as evidence in any disciplinary action
94 against the employee. Final judgment in an action brought against a public employer under this
95 chapter shall constitute a complete bar to any action by a party to such judgment against such
96 public employer or public employee, in separate litigation by reason of the same subject matter.

97 Notwithstanding that a public employee shall not be liable for negligent or unintentional
98 and non-malicious wrongful acts as described in the preceding paragraph, if a cause of action is
99 improperly commenced against a public employee of the commonwealth alleging injury or loss
100 of property or personal injury or death as the result of the negligent or wrongful act or omission
101 of such employee, said employee may request representation by the public attorney of the
102 commonwealth. The public attorney shall defend the public employee with respect to the cause
103 of action at no cost to the public employee; provided, however, that the public attorney

104 determines that the public employee was acting within the scope of his office or employment at
105 the time of the alleged loss, injury, or death, and, further, that said public employee provides
106 reasonable cooperation to the public employer and public attorney in the defense of any action
107 arising out of the same subject matter. If, in the opinion of the public attorney, representation of
108 the public employee, under this paragraph would result in a conflict of interest, the public
109 attorney shall not be required to represent the public employee. Under said circumstances, the
110 commonwealth shall reimburse the public employee for reasonable attorney fees incurred by the
111 public employee in his defense of the cause of action; provided, however, that the same
112 conditions exist which are required for representation of said employee by the public attorney
113 under this paragraph.

114 Section 3. All civil actions brought against a public employer on a claim for damages
115 cognizable under this chapter shall be brought in the county where the claimant resides or in the
116 county where such public employer is situated, except that in the case of the commonwealth such
117 civil actions shall be brought in the county where the claimant resides or in Suffolk county. The
118 superior court shall have jurisdiction of all civil actions brought against a public employer. The
119 district court and housing court shall have jurisdiction of actions brought against housing
120 authorities pursuant to sections twenty-one to twenty-five, inclusive, of chapter two hundred and
121 eighteen.

122 Section 4. A civil action shall not be instituted against a public employer on a claim for
123 damages under this chapter unless the claimant shall have first presented his claim in writing to
124 the executive officer of such public employer within two years after the date upon which the
125 cause of action arose, and such claim shall have been finally denied by such executive officer in
126 writing and sent by certified or registered mail, or as otherwise provided by this section;

127 provided, however, that a civil action against a public employer which relates to the sexual abuse
128 of a minor, as provided in section 4C of chapter 260, shall be governed by section 4C1/2 of said
129 chapter 260 and shall not require presentment of such claim pursuant to this section. The failure
130 of the executive officer to deny such claim in writing within six months after the date upon
131 which it is presented, or the failure to reach final arbitration, settlement or compromise of such
132 claim according to the provisions of section five, shall be deemed a final denial of such claim.
133 No civil action shall be brought more than three years after the date upon which such cause of
134 action accrued; provided, however, that an action which relates to the sexual abuse of a minor, as
135 defined in said section 4C of said chapter 260, shall be governed by said section 4C1/2 of said
136 chapter 260. Disposition of any claim by the executive officer of a public employer shall not be
137 competent evidence of liability or amount of damages.

138 Notwithstanding the provisions of the preceding paragraph, in the case of a city or town,
139 presentment of a claim pursuant to this section shall be deemed sufficient if presented to any of
140 the following: mayor, city manager, town manager, corporation counsel, city solicitor, town
141 counsel, city clerk, town clerk, chairman of the board of selectmen, or executive secretary of the
142 board of selectmen; provided, however, that in the case of the commonwealth, or any
143 department, office, commission, committee, council, board, division, bureau, institution, agency
144 or authority thereof, presentment of a claim pursuant to this section shall be deemed sufficient if
145 presented to the attorney general.

146 The provisions of this section shall not apply to such claims as may be asserted by third-
147 party complaint, cross claim, or counter-claim, or to small claims brought against housing
148 authorities pursuant to sections twenty-one to twenty-five, inclusive, of chapter two hundred and

149 eighteen; provided however, that no small claim shall be brought against a housing authority
150 more than three years after the date upon which the cause of action arose.

151 Section 5. The executive officer of a public employer may arbitrate, compromise or
152 settle any claim for damages under this chapter; provided, that any award, compromise or
153 settlement in excess of two thousand five hundred dollars shall be made only with the prior
154 approval of the public attorney for such public employer; provided further, however, that in any
155 case where the public employer is the commonwealth, any award, compromise or settlement in
156 excess of twenty thousand dollars shall be made only with the prior approval of the secretary of
157 administration and finance. The executive officer shall not arbitrate, compromise or settle any
158 such claim before it has been presented to him in writing or after six months have passed from
159 the date upon which such claim was presented to him.

160 The acceptance by the claimant of any such award, compromise or settlement shall be in
161 writing and shall, except when procured by fraud, be final and conclusive on the claimant, and
162 shall constitute a complete release of any claim against the public employer or against the public
163 employee whose negligent or wrongful act or omission gave rise to such a claim, and a complete
164 bar to any action by the claimant against such public employer or public employee, by reason of
165 the same subject matter.

166 Section 6. The public attorney shall defend all civil actions brought against a public
167 employer or public employee of the commonwealth pursuant to this chapter. Service of process
168 for such civil action shall be made upon the public attorney or, where no such public attorney has
169 been employed for such purpose at the time service is made, service shall be made upon the
170 executive officer of such public employer.

171 Section 7. Any award, compromise or settlement of a civil action brought under this
172 chapter in excess of twenty thousand dollars which has been approved by a public attorney for a
173 public employer, or, in the case where the public employer is the commonwealth, approved by
174 the secretary of administration and finance, shall be made final only after approval of same by a
175 judge of the superior court having jurisdiction over the action.

176 The acceptance by the claimant of any such award, compromise or settlement shall be in
177 writing and shall, except when procured by fraud, be final and conclusive on the claimant, and
178 shall constitute a complete release of any claim against the public employer or against the public
179 employee whose negligent or wrongful act or omission gave rise to such claim, and a complete
180 bar to any action by the claimant against such public employer or public employee, by reason of
181 the same subject matter.

182 Section 8. A public employer may procure insurance for payment of damages incurred
183 pursuant to this chapter. In the event that the public employer has in place insurance coverage for
184 damages incurred pursuant to this chapter, and the amount of coverage by the insurer exceeds the
185 damage limitations set forth in this chapter, the amount of liability shall be capped or limited to
186 the larger amount.

187 Section 9. Public employers shall indemnify public employees, and the commonwealth
188 shall indemnify persons holding office under the constitution, from personal financial loss, all
189 damages and expenses, including legal fees and costs, if any, in an amount not to exceed
190 \$1,000,000 arising out of any claim, action, award, compromise, settlement or judgment by
191 reason of an intentional tort, or by reason of any act or omission which constitutes a violation of
192 the civil rights of any person under any federal or state law, if such employee or official or

193 holder of office under the constitution at the time of such intentional tort or such act or omission
194 was acting within the scope of his official duties or employment. No such employee or official,
195 other than a person holding office under the constitution acting within the scope of his official
196 duties or employment, shall be indemnified under this section for violation of any such civil
197 rights if he acted in a grossly negligent, willful or malicious manner.-but the public employer
198 shall be directly liable to the complainant/plaintiff for any amount(s) awarded (or agreed to by
199 settlement-as to which the public employer shall have the right of approval or disapproval) for
200 claims based on gross negligence or willful or malicious conduct.

201 For purposes of this section, persons employed by a joint health district, regional health
202 district or regional board of health, as defined by sections twenty-seven A and twenty-seven B of
203 chapter one hundred and eleven, shall be considered employees of the city or town in which said
204 incident, claim, suit, or judgment is brought pursuant to the provisions of this chapter.

205 Section 9A. If, in the event a suit is commenced against a member of the state police or
206 an employee represented by state bargaining unit five, by reason of a claim for damages resulting
207 from an alleged intentional tort or by reason of an alleged act or failure to act which constitutes a
208 violation of the civil rights of any person under federal or state law, the commonwealth, at the
209 request of the affected police officer, shall provide for the legal representation of said police
210 officer.

211 The commonwealth shall indemnify members of the state police or an employee
212 represented by state bargaining unit five, respectively, from all personal financial loss and
213 expenses, including but not limited to legal fees and costs, if any, in an amount not to exceed one
214 million dollars arising out of any claim, action, award, compromise, settlement or judgment

215 resulting from any alleged intentional tort or by reason of an alleged act or failure to act which
216 constitutes a violation of the civil rights of any person under federal or state law; provided,
217 however, that this section shall apply only where such alleged intentional tort or alleged act or
218 failure to act occurred within the scope of the official duties of such police officer.

219 No member of the state police or an employee represented by state bargaining unit five
220 shall be indemnified for any violation of federal or state law if such member or employee acted
221 in a willful, wanton, or malicious manner.

222 Section 10. The provisions of sections one to eight shall be limited by the provisions set
223 forth in the remainder of this Section 10:

224 (a) Any claim based upon an act or omission of a public employee when such employee
225 is exercising due care in the execution of any statute or any regulation of a public employer, or
226 any municipal ordinance or by-law, whether or not such statute, regulation, ordinance or by-law
227 is valid;

228 (b) Neither public employers nor their employee shall be liable for most claims based
229 upon the exercise or performance or the failure to exercise or perform a discretionary function or
230 duty on the part of a public employer or public employee, acting within the scope of his office or
231 employment. The exception shall be that claims based on Abuse of Discretion shall be decided
232 on their merits.

233 (c) Public employers shall presumptively be jointly and severally liable with the involved
234 public employee in claims arising out of intentional tort, including assault, battery, false
235 imprisonment, false arrest, intentional mental distress, malicious prosecution, malicious abuse of
236 process, libel, slander, misrepresentation, deceit, invasion of privacy, interference with

237 advantageous relations or interference with contractual relations, and willful or malicious
238 tortious conduct.

239 Public employers may avoid liability in such instances by demonstrating, by clear and
240 convincing evidence, which neither the adequate training, nor adequate supervision, nor adequate
241 internal controls, would likely have resulted in the tort(s) not occurring. Decisions on the merits
242 of such defense(s) shall be viewed as issues of fact and decided by the trier or triers of fact.

243 (d) Neither public employers nor their employee shall be liable for damaged based on any
244 claim arising in respect of the assessment or collection of any tax, or the lawful detention of any
245 goods or merchandise by any law enforcement officer;

246 (e) Neither public employers nor their employee shall be liable for damages based on any
247 claim based upon individual decisions made as to the issuance, denial, suspension or revocation
248 or failure or refusal to issue, deny, suspend or revoke any permit, license, certificate, approval,
249 order or similar authorization; Conduct which is determined to be repetitive and having the likely
250 effect of undermining a system of licensure or similar control shall be actionable.

251 (f) Neither public employers nor their shall be liable for damages based on any claim
252 based upon the failure to inspect, or an inadequate or negligent inspection, of any property, real
253 or personal, to determine whether the property complies with or violates any law, regulation,
254 ordinance or code, or contains a hazard to health or safety, except as otherwise provided in
255 clause (1) of subparagraph (j).

256 (g) Neither public employers nor their shall be liable for damages based on any claim
257 based upon the failure to establish a fire department or a particular fire protection service, or if
258 fire protection service is provided, for failure to prevent, suppress or contain a fire, or for any

259 acts or omissions in the suppression or containment of a fire, but not including claims based
260 upon the negligent operation of motor vehicles or as otherwise provided in clause (1) of
261 subparagraph (j).

262 (h) Neither public employers nor their shall be liable for damages based on any claim
263 based upon the failure to establish a police department or a particular police protection service,
264 or if police protection is provided, for failure to provide adequate police protection, prevent the
265 commission of crimes, investigate, detect or solve crimes, identify or apprehend criminals or
266 suspects, arrest or detain suspects, or enforce any law, but not including claims based upon the
267 negligent operation of motor vehicles, negligent protection, supervision or care of persons in
268 custody, or as otherwise provided in clause (1) of subparagraph (j).

269 (i) Neither public employers nor their shall be liable for damages based on any claim
270 based upon the release, parole, furlough or escape of any person, including but not limited to a
271 prisoner, inmate, detainee, juvenile, patient or client, from the custody of a public employee or
272 employer or their agents, unless gross negligence is shown in allowing such release, parole,
273 furlough or escape.

274 (j) Neither public employers nor their shall be liable for damages based on any claim
275 based on an act or failure to act to prevent or diminish the harmful consequences of a condition
276 or situation, including the violent or tortious conduct of a third person, which is not originally
277 caused by the public employer or any other person acting on behalf of the public employer. This
278 exclusion shall not apply to:

279 (1) any claim based upon explicit and specific assurances of safety or assistance, beyond
280 general representations that investigation or assistance will be or has been undertaken, made to

281 the direct victim or a member of his family or household by a public employee, provided that the
282 injury resulted in part from reliance on those assurances. A permit, certificate or report of
283 findings of an investigation or inspection shall not constitute such assurances of safety or
284 assistance; and

285 (2) Any claim based upon the intervention of a public employee which causes injury to
286 the victim or places the victim in a worse position than he was in before the intervention; and

287 (3) Any claim based on negligent maintenance of public property; (4) any claim by or on
288 behalf of a patient for negligent medical or other therapeutic treatment received by the patient
289 from a public employee.

290 Nothing in this section shall be construed to modify or repeal the applicability of any
291 existing statute that limits, controls or affects the liability of public employers or entities

292 Section 11. If the judgment in any action brought under this chapter is in favor of the
293 public employer, judgment for costs and execution thereon may issue in favor of the public
294 employer, if the court finds the action brought by the claimant to have been frivolous or in bad
295 faith, and final judgment on the action shall be a bar to any other or further action being brought
296 on the same claim or subject matter.

297 Section 12. Claims against the commonwealth, except as otherwise expressly provided in
298 this chapter or by any general or special provision of law, may be enforced in the superior court.

299 Section 13. Any city or town which accepted section one hundred I of chapter forty-one
300 on or before July twentieth, nineteen hundred and seventy-eight, and any other city which
301 accepts this section according to its charter, and any town which accepts this section in the

302 manner hereinafter provided in this section shall indemnify and save harmless municipal
303 officers, elected or appointed from personal financial loss and expense including reasonable legal
304 fees and costs, if any, in an amount not to exceed one million dollars, arising out of any claim,
305 demand, suit or judgment by reason of any act or omission, except an intentional violation of
306 civil rights of any person, if the official at the time of such act or omission was acting within the
307 scope of his official duties or employment.

308 This act shall be submitted for acceptance to the voters of each town at an annual town
309 meeting in the form of the following question which shall be placed on the official ballot to be
310 used for the election of town officers at said meeting:?"Shall the town vote to accept the
311 provisions of section thirteen of chapter two hundred and fifty-eight of the General Laws which
312 provides that the town shall indemnify and save harmless municipal officers, elected or
313 appointed, from personal financial loss and expense including reasonable legal fees and costs, if
314 any, in an amount not to exceed one million dollars, arising out of any claim, demand, suit or
315 judgment by reason of any act or omission except an intentional violation of civil rights of any
316 person under any law, if the official at the time of such act or omission was acting within the
317 scope of his official duties or employment?" If a majority of the votes in answer to said question
318 is in the affirmative, said provisions shall thereupon take full effect, but not otherwise.

319 Section 14. For the purpose of satisfying liens for past due child support, securing
320 repayment of public assistance benefits, and past taxes, a public employer shall comply with
321 sections 24D, 24E, and 24F of chapter 175 and any regulations promulgated thereunder in the
322 same manner as if it were a company authorized to issue policies of insurance pursuant to said
323 chapter 175.

324 Section 15. Punitive Damages. In instances of gross negligence, abuse of discretion,
325 intentional torts, or malicious or willful misconduct punitive damages, not to exceed 100% of the
326 actual damages may be considered and awarded if reasonable.

327 Section 16. Consequences of failure of the public employer to make good faith efforts to
328 settle. If the complainant/plaintiff under this statute prevails, to the extent of being awarded at
329 least 50% of the damages claimed and, prior to the commencement of the trial the public
330 employer never made a settlement offer in an amount equal to, or greater than the amount
331 awarded- the complainant/plaintiff shall be entitled to a full pre-judgment interest, at an annual
332 rate of 10% (compounded annually), from the date or dates of the tortious conduct until the date
333 at which full payment of the award is made; and the complainant/plaintiff shall be awarded all
334 reasonable costs incurred in successfully advancing his or her case, including but not limited to,
335 all reasonable legal fees.