

QUALIFIED IMMUNITY UPDATE

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Who Cares about Qualified Immunity?

- Public officials facing common claim against municipality =
42 USC §1983
- Claims for police misconduct:
 - excessive force,
 - wrongful detention,
 - unreasonable search/seizure,
 - First Am. retaliation...
- Claims around election law and public speech

A Delicate Balance – the need for QI

Harlow v Fitzgerald, 457 US 800, 813-815 (1982):

“The resolution of immunity questions inherently requires a balance between the evils inevitable in any available alternative. In situations of abuse of office, an action for damages may offer the only realistic avenue for vindication of constitutional guarantees. (‘For people in *Bivens*’ shoes, it is damages or nothing’)... It is this recognition that has required the denial of absolute immunity to most public officers. At the same time, however, it cannot be disputed seriously that claims frequently run against the innocent as well as the guilty—at a cost not only to the defendant officials, but to society as a whole. These social costs include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office. Finally, there is the danger that fear of being sued will ‘dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.’” (internal citations omitted)

excessive force,

Benefits of QI for Local Government

- Protects government officials from being sued in their personal capacity;
- Helps control the expense and numerosity of claims;
- Benefits have traditionally been seen as so vital, that a denial of QI as a matter of law is susceptible to challenge on interlocutory appeal.

No *Respondeat Superior* for local government

- ***Monell v Dept of Social Svcs of City of New York, 436 US 658, 694 (1978):***

“a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government’s policy or custom... [representing official policy] inflicts the injury that the government as an entity is responsible under § 1983.”

- **Classic example – “stop and frisk” protocols, although *Monell* involved forced leave for pregnant employees**

MCL §691.1407

- Generally, “a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a government function.”
- And, “each officer and employee of a governmental agency, each volunteer acting on behalf of a governmental agency... is immune from tort liability for an injury to a person or damage to property caused by the officer... while in the course of employment or service or caused by the volunteer while acting on behalf of a governmental agency if all of the following are met:

(a) The officer, employee, member, or volunteer is acting or reasonably believes he or she is acting within the scope of his or her authority.

(b) The governmental agency is engaged in the exercise or discharge of a governmental function.

(c) The officer's, employee's, member's, or volunteer's conduct does not amount to gross negligence that is the proximate cause of the injury or damage.

“Broad” Qualified Immunity

- “Good Faith” defense
- Individuals are immune from claims in their personal capacity so long as their “conduct does not violate clearly established or constitutional rights of which a reasonable person would have known.” *Clemente v Vaslo*, 679 F3d 482, 489 (6th Cir. 2012).
- In the Fifth, Sixth, Seventh, Tenth and Eleventh Circuits, courts use a burden-shifting analysis to determine whether QI applies.
 - Defendant must show that the alleged conduct involved exercise of a discretionary function;
 - If he/she does, plaintiff must show an underlying constitutional violation and that the official’s conduct violated clearly established law.

George Floyd – May 2020



- Arrested by four officers on suspicion of passing a counterfeit 20-dollar bill
- Murdered – cause of death ruled “cardiopulmonary arrest due to neck compression”
- Derek Chauvin was convicted of second-degree murder and sentenced to 22.5 years in prison
- Three other officers also convicted of deliberate indifference to medical needs

QI analysis in George Floyd case

- Criminal liability for all four officers proves accountability without tort claims. cf. *Harlow and Bivens*.
- All officers were engaged in exercise of a discretionary function
- Violation of Constitutional right – no unreasonable search/seizure (4th Am)
 - In other cases, analysis complicated by resistance and/or circumstances of arrest (e.g. was officer in fear of losing control?)
- Clearly established law – “sufficiently clear that a reasonable official would understand that what he is doing violates that right.” *Anderson v Creighton*, 483 US 635, 640 (1987).
- Kneeling on detainee in handcuffs for many minutes... clear violation.

Federal Legislation – No Changes



- **Calif. Congresswoman Karen Bass proposed George Floyd Justice in Policing Act of 2020 – with a provision to eliminate QI.**
 - Bill passed in the US House; failed in the Senate.
- **House democrats introduced End Qualified Immunity Act in 2020, including language to eliminate good faith defense and law not clearly established defense.**
 - Bill failed in the House in 2020; renewed in 2021 after Tyre Nichols (Memphis).
- **Indiana Senator Mike Braud proposed Reforming Qualified Immunity Act to require defendants to affirmatively prove their actions were authorized by law and to eliminate *Monell* protection for local gov.**
 - Bill has not left the Senate.

State Law Changes – CO; NM; CT (MA & MI?)

- Several states have eliminated QI
- June 2020, Colorado enacted Enhance Law Enforcement Integrity Act, abolishing qualified immunity and giving new paths to tort recovery for police misconduct.
- July 2020, Connecticut passes Act Concerning Police Accountability, instituting statewide watchdog for misconduct, banning chokeholds, allowing QI only where officer had “objectively good faith belief that such officer’s conduct did not violate the law.”
- April 2021, New Mexico passed law similar to Colorado’s, allowing suits against all government officials, not just police.

Colorado: what's changed?

- **Denver Post:**
 - Officers have been convicted.
 - Statewide database of officer misconduct available.
 - Body cam video is more accessible.
 - Law enforcement leaders say it is harder than even to recruit and retain officers.



Thompson v City of Detroit (MCOA 2023)

- Plaintiff was arrested on suspicion of assault & battery after being involved in a bar fight that resulted in gunshots and wounds to a third party;
- Plaintiff alleges excessive force in arrest, injuring his wrists and arm; officers did not respond to complaints about tightness or inform Plaintiff of reason for arrest;
- Claims for Assault/Battery; false arrest/imprisonment; gross negligence; violations of constitutional rights;
- Officers were denied immunity for assault/battery, but received immunity for false arrest/imprisonment, gross negligence;
- Court perceived a fact issue as to whether officers acted with malice vs “good faith.”

Stucker v Louisville Metro Gov (6th Cir 2024)

- Louisville police executed search warrant (for marijuana plants) on residence while, coincidentally, Plaintiffs were working inside repainting the interior;
- Plaintiffs alleged *Monell* claim under §1983, claiming that warrant was issued without probable cause and that city provided inadequate training;
- Sixth circuit: warrant was stale (20 days had passed since criminal activity last reported by investigators);
- Sixth circuit: took judicial notice of Breonna Taylor case and remanded matter for further consideration of whether constitutional violation occurred in failure to provide adequate training.



Bauserman v UIA (MSC 2022)

- UIA deemed Plaintiffs to have committed fraud through use of automated fraud-detection system, without giving Plaintiffs notice/opportunity to be heard;
- Plaintiffs formed putative class and sued for violation of due process rights under Michigan Constitution;
- Lower courts disagreed, and MSC held claimants may seek damages for constitutional torts, as “immunity is not available to the state for violating rights guaranteed by the Michigan Constitution.”
- However, court noted, “whether other entities, such as municipal governments or individual government actors, can be liable for constitutional torts is not before us, and we decline to address that question in what would be dictum.”

Novak v Federspiel (EDMI 2024)

- County sheriff seized firearms from Plaintiff found guilty of domestic violence, and Plaintiff claimed (1) § 1983 constitutional violations, and (2) “*Bauserman* claims.”
- US district court (J. Ludington) granted summary judgment, dismissing *Bauserman* claims.
- *Bauserman’s* holding does not apply to municipal officials.

CONTACT

Thank you!

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