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**When is Law “Clearly Established”
For Purposes of Qualified Immunity
in Civil Rights Litigation?**

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❖ **Introduction**

In a case involving police use of deadly force, the U.S. Supreme Court has further clarified the law governing grants of qualified immunity to individual defendants in federal civil rights litigation under 42 U.S.C. Sec. 1983. The effect of the decision will be to clearly place the burden on plaintiffs in such litigation to show with particularity—rather than simply by citing broad general principles—that an officer’s alleged conduct violated clearly established prior case law in order to defeat a qualified immunity defense.

42 U.S.C. Sec. 1983 provides a statutory remedy against state and local law enforcement officers for federal civil rights violations, while the Supreme Court created the same cause of action to be taken against federal law enforcement agents in [Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics](#), #301, 403 U.S. 388 (1971). The qualified immunity defense also applies to *Bivens* lawsuits].

The Court noted that it had found it necessary in multiple cases in recent years to overturn denials of qualified immunity by lower courts that appeared to misunderstand what it meant to determine that the law on a subject was “clearly established,” giving officers notice that a particular course of conduct was proscribed.

This article briefly reviews the general doctrine of qualified immunity as a defense in federal civil rights litigation, using case examples involving the use of deadly force, followed by an examination of the U.S. Supreme Court decision in [White v. Pauly](#), #16-67, 137 S. Ct. 548, 196 L. Ed. 2d 463, 2017 U.S. Lexis 5. At the end of the article there is a list

of useful and relevant resources and references.

❖ **Qualified Immunity in General**

One of the most important defenses available to individual defendants in federal civil rights lawsuits is that of qualified immunity. Qualified immunity is what is known as an “affirmative” defense, which means that it must be raised by a defendant, or else it is lost.

The essence of the concept is that because police officers are often called upon to make difficult decisions, sometimes with only split seconds to respond, they ought not face civil liability or the burden of the litigation process, including discovery and trial, in circumstances where they have not acted in violation of clearly established law.

Because the immunity involved offers the officer relief not just from civil liability, but also from the burdens of litigation, a trial court’s denial of a defendant officer’s motion for qualified immunity is, with some exceptions, subject to immediate appeal. See [Anderson v. Creighton](#), #85-1520, 483 U.S. 635 (1987) and [Mitchell v. Forsyth](#), #84-335, 472 U.S. 511 (1985).

In circumstances where the defense of qualified immunity is upheld, an officer will not be found liable, even if their conduct, such as the use of deadly force, actually could be said to have violated the plaintiff’s federal civil rights, so long as an objectively reasonable officer could have believed, under the circumstances, that the conduct was lawful.

Qualified immunity shields an officer from suit when he makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances he confronted (or reasonably believed he was confronting). Because the focus is on whether the officer had fair notice that his conduct was unlawful, reasonableness is judged against the backdrop of the law at the time of the conduct. If the law at that time (prior case law) did not clearly establish that the officer's conduct would violate the Constitution, the officer should not be subject to liability or, indeed, even the burdens of litigation.

This is illustrated by [Mullenix v. Luna](#), #14-1143, 136 S. Ct. 305, 2015 U.S. Lexis 7160. In that case, rather than submit to an officer armed with an arrest warrant, a man drove off in his car, leading officers on a high-speed chase. The pursued man twice called police dispatch, claiming that he had a gun and threatening to shoot the officers. The dispatcher broadcast these threats and the possibility that the motorist might be intoxicated. A tire spike strip was placed beneath a highway overpass in an attempt to stop the pursued vehicle.

A state trooper drove to that location, radioing a plan to shoot and disable the car. He later spotted the vehicle and fired six shots. The car engaged the spikes, hit the median, and rolled. The motorist was killed by the trooper's shots. No shots hit the car's engine block, radiator, or hood.

The U.S. Supreme Court reversed a denial of qualified immunity to the trooper on an excessive force claim. The Court did not address whether firing at the vehicle in this manner under these circumstances was a Fourth Amendment violation, but rather ruled that the trooper was entitled to qualified immunity because prior precedents did not indicate that it was “beyond debate” that he acted unreasonably. He had confronted a fugitive that was reported to be intoxicated, who was trying to evade arrest through a high-speed car flight, and who had twice threatened to shoot officers. At the time of the shooting, the vehicle was moments away from reaching the trooper's location.

Similarly, in [*Plumhoff v. Rickard*](#), #12-1117, 134 S. Ct. 2012, 2014 U.S. Lexis 3816, the U.S. Supreme Court ruled that officers did not use excessive force when they shot the driver of a vehicle fleeing from a traffic stop to end a dangerous high-speed car chase. Both the driver and his passenger died. While the Court ruled that this conduct did not violate the Fourth Amendment, even if it had, the officers were entitled to qualified immunity when no cases were cited that clearly established the unconstitutionality of using deadly force to end a high-speed car chase.

Firing a total of 15 shots during the 10-second span was reasonable when the driver never abandoned his attempt to flee. While ordinarily, a trial court order denying summary judgment is not a final decision and therefore not immediately appealable, a denial based on a qualified immunity claim can be immediately appealed, and therefore the federal appeals court had jurisdiction to hear the appeal, but erroneously did not grant the officers qualified immunity.

In [*Brosseau v. Haugen*](#), #03-1261, 543 U.S. 194 (2004), an officer who shot a fleeing felon motorist in the back was found entitled to qualified immunity. The U.S. Supreme Court held that prior caselaw did not clearly establish that her conduct violated his Fourth Amendment rights.

In this case an officer learned that a man was wanted on a felony no-bail warrant for drugs and other offenses, and heard a report of a “ruckus” at his mother's house. The suspect attempted to flee in a vehicle, getting into a Jeep and trying to start it. The officer ran to the Jeep with her handgun drawn and ordered him to stop. As the suspect fumbled with his keys, she hit the driver's side window several times with her handgun and, on the third or fourth try, broke the window. She had mace and a baton, but allegedly did not use them, instead trying to grab the car keys.

Just after she broke the window, the suspect succeeded in starting the Jeep. Either before he pulled away, or just after he started to do so (the evidence being conflicting), the officer shot him in the back. Because he did not stop, the officer believed she had missed him, but she did not take a second shot, believing the risk to be too great as he began to drive away and others being in the potential line of fire. The driver subsequently pulled over and passed out.

A federal appeals court ruled that the officer who shot the suspect did not act reasonably if there was no evidence that he posed a threat of serious harm to others or was armed with a weapon, overturning a grant of qualified immunity to the officer by the trial court.

The Supreme Court, however, noted that the parties had pointed to only a “handful of cases” relevant to the issue of whether shooting a disturbed felon, set on avoiding capture through vehicular flight, when persons in the immediate area are at risk from that flight was reasonable.

In two of the cases, the lower courts found no Fourth Amendment violation when an officer shot a fleeing suspect who presented a risk to others, including on the basis of the possibility that a speeding vehicle being used to flee could endanger others or that the suspect had proven that they would do almost anything to avoid capture.

In a third case, the court found summary judgment inappropriate on a Fourth Amendment claim involving a fleeing suspect, ruling that the threat created by the fleeing suspect's failure to brake when an officer suddenly stepped in front of his just-started car was not a sufficiently grave threat to justify the use of deadly force.

The Court found that these three cases taken together “undoubtedly show that this area is one in which the result depends very much on the facts of each case,” and that none of them “squarely governs the case here,” while suggesting that the officer's actions fell in the “hazy border” between excessive and acceptable force.

Since it was not “clearly established” that the officer's conduct violated the Fourth Amendment, she was entitled to qualified immunity.

❖ **White v. Pauly**

In *White v. Pauly*, #16-67, 137 S. Ct. 548, 196 L. Ed. 2d 463, 2017 U.S. Lexis 5, 85 U.S.L.W. 4027, 26 Fla. L. Weekly Fed. S 409, the U.S. Supreme Court addressed the situation of an officer who, having arrived late at an ongoing police action and having witnessed shots being fired by one of several individuals in a house surrounded by other officers, shot and killed an armed occupant of the house without first giving a warning.

In this case, a 911 call reported that a male motorist was a drunk driver on the highway. The women who made the call followed his car with their bright lights on. He pulled over at an off-ramp to confront them, and then drove to a secluded home where he lived with his brother.

Two officers went to the residence after interviewing the women. The two men inside became aware of them and asked “who are you?” and “What do you want?” The officers said “Hey (expletive), we got you surrounded. Come out or we’re coming in,” and one shouted “Open the door, State Police, open the door.”

The men inside allegedly only heard “we’re coming in” and not the identification. They armed themselves and yelled “We have guns.” One of them fired two shotgun blasts from the back door at an officer. Then the second man opened a window and pointed a handgun in an officer’s direction. An officer fired at him but missed.

A third officer, who had arrived late on the scene, and heard the statement “We have guns,” shot at this man and killed him. Both the trial court and a federal appeals court denied this officer qualified immunity.

The U.S. Supreme Court, viewing the facts in the light most favorable to the plaintiff, reversed, finding that the officer did not violate any clearly established law. The Court declined to consider whether a reasonable jury could infer that the third officer had witnessed the other officers’ deficient performance and should have realized that corrective action was necessary before using deadly force because neither lower court addressed that argument. (Or remand, the courts below could still consider that issue).

The lower court erred in concluding that a police officer was not entitled to qualified immunity on an excessive force claim where no settled Fourth Amendment principle required the officer, who arrived late to the scene and witnessed shots being fired by one of several individuals in a house, to second-guess the earlier steps already taken by his fellow officers or shout a warning to an armed occupant before shooting, and thus, there was no clearly established law that would have placed the constitutional question beyond debate. The Court expressed no opinion on whether the first two officers were entitled to qualified immunity.

The Court acknowledged that its prior precedents did not require a “case directly on point” for a right to be clearly established, but the existing precedent must have placed the statutory or constitutional question “beyond debate.” In that way, qualified immunity protects “all but the plainly incompetent or those who knowingly violate the law.”

The Court noted that in the last five years it had issued a number of opinions reversing federal courts in qualified immunity cases.

The Court found it necessary to clarify the test for granting qualified immunity to an officer:

“Today, it is again necessary to reiterate the longstanding principle that ‘clearly established law’ should not be defined ‘at a high level of generality.’ ... As this Court explained decades ago, the clearly established law must be “particularized” to the facts of the case. Otherwise, ‘[p]laintiffs would be able to convert the rule of qualified immunity . . . into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights.’ ... The panel majority misunderstood the ‘clearly established’ analysis: It failed to identify a case where an officer acting under similar circumstances as [the third officer] was held to have violated the Fourth Amendment. Instead, the majority relied on *Graham, Garner*, and their Court of Appeals progeny, which—as noted above—lay out excessive-force principles at only a general level. Of course, ‘general statements of the law are not inherently incapable of giving fair and clear warning’ to officers, but ‘in the light of pre-existing law the unlawfulness must be apparent,’”

Clearly established federal law, the Court concluded, does not prohibit a reasonable officer who arrives late to an ongoing police action in circumstances like this from assuming that proper procedures, such as officer identification, have already been followed. “No settled Fourth Amendment principle requires that officer to second-guess the earlier steps already taken by his or her fellow officers in instances like the one [the third officer] confronted here. “

Qualified immunity in a case such as this cannot be defeated by a plaintiff merely citing, on a high level of abstraction and generality, cases that mandate that officers, prior to using deadly force, give a warning first “if feasible” without examining the particular circumstances the officer believed he was confronting.

❖ Resources

The following are some useful resources related to the subject of this article.

- [Defenses: Qualified Immunity](#). AELE Case Summaries.
- [Qualified Immunity](#). Definition. Wex Legal Dictionary. Legal Information Institute, Cornell University Law School.

❖ **Prior Relevant Monthly Law Journal Articles**

- [Civil Liability for Use of Deadly Force-- Part One--General Principles and Objective Reasonableness](#), 2007 (11) AELE Mo. L.J. 101.
- [Civil Liability for Use of Deadly Force-- Part Two. Qualified Immunity and Inadequate Training](#), 2007 (12) AELE Mo. L.J. 101.
- [Liability for Use of Deadly Force-- Part Three. Supervisory Liability and Negligent/Accidental Acts](#), 2008 (1) AELE Mo. L.J. 101.
- [Long v. Honolulu Police Sharpshooter Decision](#), 2008 (5) AELE Mo. L.J. 501.
- [Anatomy of a Fatal Police Shooting -- Allegations and Holdings](#), 2009 (2) AELE Mo. L. J. 101.
- [Shooting at Moving Vehicles](#), 2010 (9) AELE Mo. L. J. 101
- [The Scope of Federal Qualified Immunity in Civil Rights Cases](#), 2009 (2) AELE Mo. L. J. 501.

❖ **References:** (*Chronological*)

1. [United States Supreme Court Clarifies “Clearly Established Law” for Qualified Immunity in Deadly Force](#), by Jack Ryan, Legal & Liability Risk Management Institute (January 2017).
2. [The Supreme Court’s Quiet Expansion of Qualified Immunity](#), by Kit Kinports, 100 Minn. L. Rev. 62 (2016).
3. [The Qualified Immunity Defense: What’s “Clearly Established” and What’s Not](#), by Karen M. Blum, Touro Law Review: Vol. 24:No. 3, Article 4 (2014)
4. [Qualified Immunity: How It Protects Law Enforcement Officers](#), by Richard G. Schott, FBI Law Enforcement Bulletin (September 2012).
5. [The Burdens of Qualified Immunity: Summary Judgment and the Role of Facts in Constitutional Tort Law](#) by Alan K. Chen, 47 American University Law Rev. 1 (1997).
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