



# The Civil Liabilities Reporter

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*Qualified Immunity is a defense from suit*

*The defense should be raised as early as possible to remove the officer from the suit and to protect the needless expenditure of funds*

## QUALIFIED IMMUNITY

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Oftentimes we are asked questions about this subject and it is difficult to explain for the officer on the street so he or she can have an understanding that their conduct is lawful and protected from needless litigation in court. So what is qualified immunity and what does it mean to a law enforcement officer? Qualified immunity is one of the hardest concepts for law enforcement officers to understand (along with federal judges and most lawyers). Qualified immunity arose historically as a way to prevent lawsuits against governmental officials who acted in good faith but incorrectly. Oftentimes a lawsuit combines both state law claims and federal civil rights claims in the same lawsuit. The qualified immunity defense only applies to the federal civil rights claims. The officer may have other state law defenses for claims under state law but those state law defenses are not part of this discussion.

### What is qualified immunity?

It is a defense that must be asserted by a defendant. It is only available to individual defendants and not public entities.

Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officers from harassment, distraction, and liability when they perform their duties reasonably. Pearson v. Callahan 129 S.Ct. 808 (2009)

The doctrine of qualified immunity protects law enforcement officers from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which reasonable person would have known. Person v. Callahan 129 S.Ct. 808, 815 (2009)

### What does it mean?

It is immunity from suit. If it applies, the civil rights claims are dismissed.

### If I acted in good faith why am I still a defendant in a lawsuit?

Although courts have repeatedly stressed the importance of resolving immunity questions at the earliest possible stage in litigation, (see Hunter v. Bryant 502 U.S. 224, 227, 112 S.Ct. 534, 116 L.Ed.2d 589 (1991)), typically the court does not review or address the issue until it is raised in a motion for summary judgment

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*Always raise the defense to your actions since your actions are the result of the training from your department*

*It applies in all types of police conduct cases including those asserting excessive force and even applies in cases of deadly force*

which are not usually filed until after depositions have been taken and the evidence supporting the motion has been obtained. So, even though you believe your actions were reasonable and/or made in good faith, you may remain a defendant in a lawsuit for several months.

### **How is it applied?**

The court is initially charged with the responsibility to determine whether qualified immunity applies for a defendant. The issue is a matter of law for the court to determine. It is designed to apply in cases where a defendant makes a reasonable mistake. If there are significant factual disputes as to what occurred, the court must defer ruling on the issue of qualified immunity and let the case proceed for the jury to determine the disputed facts and then determine post trial whether qualified immunity applies.

### **What kind of mistake is covered?**

The mistake must be objectively reasonable and in an area where the law is unsettled such that an officer could be confused as to whether his actions were permissible under the law.

The qualified immunity inquiry turns on objective legal reasonableness of government official's action, assessed in light of legal rules that were clearly established at time it was taken. Pearson v. Callahan 129 S.Ct. 808, 823 (2009).

To be objectively reasonable it must be apparent that another officer standing in your shoes could have believed his actions were lawful.

### **What happens if my attorney doesn't assert this defense?**

Then you waive your right to the defense.

### **Should I always want to assert this in a lawsuit?**

Yes. There is no downside to asserting this defense. Most law enforcement officers when they act do so based upon their training and practices of their department which means the conduct is almost always reasonable.

### **How do courts determine whether it applies to me in a lawsuit?**

For years the standard was that the court had to first determine whether the officer's actions violated a constitutional right. If not, there was no need to go further with the analysis and qualified immunity would not be necessary. If yes, the next step was to determine whether the law was clearly established within the confines of the facts of the case. Under a case decided in January of this year, Pearson v. Callahan 129 S.Ct. 808 (2009) the United States Supreme Court held that courts need not first determine whether facts alleged or shown by plaintiff make out violation of a constitutional right before deciding whether an officer is entitled to qualified

immunity. What we can hope for with this decision is that courts will begin to apply the doctrine at the earliest possible stage of litigation as was the original intent of the defense.

### **Does it apply in a case of excessive force?**

Yes. Not all excessive force claims involve factual disputes that prevent the defense from being used. The usual case where qualified immunity is not given involves a factual dispute between the suspect/plaintiff and the officer as to what happened. If the facts are not disputed it is a question for the court to decide.

### **What about deadly force?**

It can apply in the use of deadly force. Most agencies are taught about the case of Tennessee v. Garner 471 U.S. 1, 105 S.Ct. 1694 (1985) where Memphis Police Officers were dispatched to answer a "proowler inside call." Upon arriving at the scene they saw a woman standing on her porch gesturing toward the adjacent house where someone was breaking in. An officer went behind the house and saw someone run across the backyard. The fleeing suspect stopped at a 6-foot-high chain link fence. The officer was able to see his face and hands, saw no sign of a weapon, and was "reasonably sure" that the suspect was unarmed. The officer called out "police, halt" and the suspect began to climb over the fence. The officer felt he would get away and shot him. In this case a statute authorized deadly force against a fleeing felon but did not differentiate against violent or non-violent crime. The statute was ruled unconstitutional.

The court did find that deadly force was permissible if the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others.

Following Garner, courts routinely judged the reasonableness of the use of deadly force under the language articulated in Garner that deadly force is reasonable if the suspect threatens the officer with a weapon or there is probable cause to believe that the suspect has committed a crime involving or threatening the infliction of serious physical harm and if feasible, a warning is given.

Then in April of 2007 the Supreme Court said in the case of Scott v. Harris, 550 U.S. 372, 127 S.Ct. 1769 (2007) that Garner did not establish a magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute "deadly force." The Supreme Court clarified that rather than set the standard for when deadly force is to be determined reasonable, Garner simply applied the Fourth Amendment's "reasonableness" test to the use of a particular type of force in a particular situation.

The Court said that the reasonableness of each application of deadly force must be determined on its own unique set of facts. In situations involving deadly force the court balances the nature and quality of the intrusion on the individual's Fourth

Amendment interests against the importance of the governmental interests allegedly justifying the intrusion.

In Scott v. Harris, Officer Scott used his patrol vehicle to end a high speed vehicle pursuit by ramming the suspect vehicle off the road. This act was viewed as a reasonable application of deadly force.

## **Can you provide some more examples of qualified immunity?**

An officer was justified in using deadly force when the suspect violently resisted arrest, physically attacked the officer, and tried to grab the officer's gun, thereby posing an imminent threat of injury or death. Billington v. Smith 292 F.3d 1177, 1185 (9th Cir. 2002).

An officer's use of deadly force was reasonable when the suspect pointed a gun at officers. Scott v. Henrich 39 F.3d 912, 914 (9th Cir. 1994).

The doctrine of qualified immunity operates to "protect officers from the sometimes hazy border between excessive and acceptable force." Saucier v. Katz 533 U.S. 194, 206 (2001). Saucier involved a case against a military policeman who used force against a demonstrator protesting a speech by the Vice-President.

The immunity inquiry is to acknowledge that reasonable mistakes can be made as to the legal constraints on particular police conduct. It is sometimes difficult for an officer to determine how the relevant legal doctrine will apply to the factual situation the officer confronts. An officer might correctly perceive all of the relevant facts but have a mistaken understanding as to whether a particular amount of force is legal in those circumstances. If the officer's mistake as to what the law requires is reasonable the officer is entitled to the immunity defense. Qualified immunity operates in this case, then, just as it does in others, to protect officers from the sometimes "hazy border between excessive and acceptable force, and to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful. Saucier v. Katz 533 U.S. 205-06.

Qualified immunity protects all but the plainly incompetent or those officers who knowingly violate the law. Malley v. Briggs 475 U.S. 335, 341 (1986).

In the case of Brosseau v. Haugen 543 U.S. 194, 125 S.Ct. 596 (2004), Officer Rochelle Brosseau shot a suspect in the back while he attempted to flee from her in his vehicle. Haugen sued Brosseau for excessive use of deadly force. The trial court granted Brosseau qualified immunity, but the Court of Appeals for the Ninth Circuit reversed. The case went to the United States Supreme Court which held that even though Brosseau did violate Haugen's Fourth Amendment rights, qualified immunity should be granted because the law was not clearly established in such a manner that Brosseau would have been on notice that her actions were unlawful.

While qualified immunity is a valuable defense, it should not be taken for granted that just because you may think your actions were reasonable you will be granted qualified immunity. There are plenty of cases in which officers have been denied qualified immunity. For example, in Winterrowd v. Nelson 480 F.3d 1181 (9th Cir. 2007), the court denied qualified immunity to officers who stopped a suspect in his vehicle on suspicion of invalid license plates. The plaintiff said the officers slammed him against the hood of a car when he explained that he could not put his hands behind his back to facilitate a pat down search because he had a shoulder injury. The plaintiffs said the officers then grabbed his arm and pumped it up and down while he screamed in pain.

Plaintiff's version may seem hard to believe, but remember that usually the qualified immunity issue is raised for the first time in a motion for summary judgment, and keep in mind that the law holds the court must take the plaintiff's version of the facts as true unless there is persuasive evidence that completely contradicts the plaintiff's version. For example, if there is a video tape of the incident which contradicts the plaintiff's version or if you had the presence of mind to turn on your belt recorder and you captured the events on tape which completely contradict the plaintiff's version.

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