

ACCOUNTABILITY VERSUS IMMUNITY FROM SUIT

By Chuck Douglas

In our republican form of government, all public employees, including police officers, exercise only the powers granted them by the people. All public employees serve the citizens and are accountable to them. That is why our Bill of Rights in Part I, Article 8 reminds us that:

All power residing originally in, and being derived from, the people, all the magistrates and officers of government are their substitutes and agents, and at all times accountable to them.

Unfortunately, our right of accountability has been denied time and time again in recent years by court decisions making government less and less accountable to individual citizens.

One way police departments can be made accountable to the George Floyds of this world is to allow suits for excessive force or illegal searches and seizures to proceed in State courts. But our State Constitution's Bill of Rights is generally not allowed to be the basis of a suit for damages if government employees violate it says the N.H. Supreme Court. The legislature is free to change that opinion, and should do so.

Part I, Article 19 of our State Bill of Rights prohibits illegal searches and seizures. But when violations do occur the citizen must now turn to the very similar federal Fourth Amendment as the basis for filing suit in federal or State court. An excessive force case cannot be based on our Bill of Rights but must be based on the federal protections that have allowed civil suits for damages since 1871 pursuant to that year's Civil Rights Act, (42 United States Code section 1983) which has no limits on damages.

Police misconduct and certain other intentional tort cases against town and city employees frequently involve claims under that federal Civil Rights Act. But the U.S. Supreme Court 50 years ago created the doctrine of “qualified immunity” to shield government officials who make “reasonable mistakes as to the legality of their actions.” Saucier v. Katz, 533 U.S. 194, 206 (2002). The key inquiry in deciding whether federal qualified immunity applies is whether the “state of the law at the time of the alleged violation gave the defendant [officer] fair warning that his particular conduct was unconstitutional.” Maldonado v. Fontanes, 568 F.3d 263, 269 (1st Cir. 2009). Federal qualified immunity is thus a defense that prevails for “all but the plainly incompetent or those who knowingly violate the law.” Malley v. Briggs, 475 U.S. 335, 345 (1986).

The State of Colorado very recently enacted a law that the federal judicially created theory of “qualified immunity” was null and void in its State courts. We should do the same here.

Also, our Supreme Court in 2007 came up with its own judicially created doctrine of “official immunity” in the case of Everitt v. General Electric, 156 N.H. 202, 219 that immunizes acts (1) made within the scope of [a police officer’s] official duties while in the course of their employment; (2) that are discretionary, rather than ministerial; and (3) not made in a wanton or reckless manner.

The legislature should abrogate that judge-made test and rely on the statutes as they were for decades under RSA 541-B:19 that contains parts (1) and (3) but not (2).

Even if a state cause of action is enacted to enforce our Bill of Rights in State courts there are ample protections to ensure an officer or trooper will not be risking their bank accounts or house:

First, they are indemnified from damages, costs and attorneys fees by the provisions of RSA 31:105 and 106 in the case of local officers, and RSA 91-D for State troopers.

Second, the State self insures and covers those verdicts and expenses while the counties, towns, etc. have coverage through the mutual risk pool known as PRIMEX.

Third, there are limits or caps on recovery of \$325,000 in cases against local officers or departments (507-B:4, I) and \$475,000 against the State (RSA 541-B:14, I).

Finally, no claim can succeed if the employee whose conduct gives rise to the claim reasonably believes, at the time of the acts or omissions complained of, that his conduct was lawful, and provided further that the acts complained of were within the scope of official duties of the employee for the state. RSA 541-B:19. The latter provision also applies to local and county officers by virtue of the holding in Huckins v. McSweeney, 166 N.H. 176 (2014).

Conclusion

In 1974 the New Hampshire Supreme Court overturned the centuries old doctrine that “the king could do no wrong” and thus the government was immune from suit. That doctrine was great if you were the king but in a democracy we the people rule, and our government is accountable to us, not the other way around. As the court said in Merrill v. City of Manchester, 114 N.H. 722, 724-5 (1974):

“[t]hat an individual injured by the negligence of a municipal corporation should bear his loss himself...offends the basic principles of equality of burdens and of elementary justice.” And “is foreign to the spirit of our constitutional guarantee that every subject is entitled to a legal remedy for injuries he may receive in his person or property” under part I, Article 14 of our Bill of Rights.

Thus this Commission should recommend that 1) legislation be enacted to allow civil rights suits under the State Constitution and 2) the abolition of qualified and official immunity in our courts.

Respectfully submitted,

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