

# MASSACHUSETTS Lawyers Weekly

## Time to revisit qualified immunity doctrine

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As protests continue in the wake of the killing of George Floyd by a Minneapolis police officer, criminal proceedings have commenced and a civil rights lawsuit under §1983 will likely follow. That suit, however, could be derailed by the doctrine of qualified immunity.

Qualified immunity is a non-statutory, judge-made doctrine born in the late 1960s that bars civil rights suits against an officer (or other government official) whose unconstitutional conduct had not been “clearly established” as being illegal at the time it occurred. The original purpose of qualified immunity was to block frivolous suits against government officials. But today the doctrine is as likely to bar a legitimate claim as it is to stop a frivolous one.

As it stands now, a plaintiff who suffers a deprivation of his or her constitutional rights at the hands of a police officer must point to an appellate case in existence at the time of the incident with similar facts and circumstances that established the unconstitutionality of the specific police conduct complained of.

That’s often an unsurmountable hurdle. Courts have sided with police because of the difference between subduing a woman for walking away from an officer and subduing a woman for refusing to end a phone call; between shooting at a dog and hitting a child and shooting at a truck and hitting a passenger; and between unleashing a police dog to bite a motionless suspect in a bushy ravine and unleashing a police dog to bite a compliant suspect in a canal in the woods.

In one recent case, a federal appeals court dismissed a §1983 excessive force suit against an officer who picked up a 5-foot-tall unarmed woman clad only in a bathing suit and threw her onto the ground with such force that she was knocked unconscious and broke her collarbone.

The court held that the officer was entitled to qualified immunity because at the time of the event it was not clearly established that an officer was forbidden to use a takedown maneuver to arrest a suspect who ignored an instruction to “get back here” and continued to walk away.

As the Cato Institute, a public policy research organization, pointed out in reviewing the case, it was dismissed not because it was lawful for the police officer to do what he did, but because there happened to be no other case with precisely those facts.

Requiring a plaintiff to match the facts and circumstances in his or her case to a previously decided case is a tremendous burden. It is disheartening to consider that there could be a dismissal on qualified immunity grounds of a legitimate §1983 claim in the George Floyd case if

there is not a prior case in which a 200-pound police officer knelt on the neck of a suspected counterfeit-20-dollar-bill-passing suspect for nearly nine minutes, thereby causing his death.

The other problem with recent decisions in qualified immunity cases is that once courts find that the doctrine applies, they do not determine the constitutionality of the specific conduct, thereby missing the chance to send a message that similar actions will not be protected by immunity in the future.

The U.S. Supreme Court recently declined to take up cases that could have been used to either end or recalibrate the doctrine. But political and legislative opposition to qualified immunity is building. Suffolk County District Attorney Rachael Rollins and U.S. Sen. Edward Markey recently spoke out against the use of qualified immunity in excessive force cases. Markey and several other senators have introduced a congressional resolution that seeks to do away with the doctrine under federal law. And U.S. Rep. Ayanna Pressley is a co-sponsor of the Ending Qualified Immunity Act, which would allow civil lawsuits against police without affording officers the protections of qualified immunity.

Eliminating the doctrine won't magically bring an end to the years of underlying racism that contributed to the death of George Floyd at the hands of police. But it will provide victims with some justice they are currently being denied, and it will make clear to police officers that the use of excessive force is unacceptable.