Section 41 (Qualified Immunity Reform) – Questions and Answers

1. ***Under what circumstances will officers be personally liable?***

   An officer can be personally liable for damages or legal fees only if, at the end of the case, a court judgment is entered against an officer that finds that officer's acts were "malicious, wanton, or willful." This standard describes only the most egregious cases, where an officer acted knowing that what they were going to do was illegal and would violate the victim's rights, or with the actual intent to violate those rights. These acts would very often constitute crimes under existing law, and many such cases are accompanied by criminal charges.

   Importantly, even under these circumstances, the officer does not owe the judgment to the victim, and the victim cannot pursue the officer or their assets. The municipality or law enforcement unit will pay the judgment and all relevant legal fees. The municipality or law enforcement unit will then be able to seek reimbursement from the officer.

2. ***Who decides whether an officer's act was malicious, willful, or personally liable?***

   The factfinder at a trial, either a jury or a judge, would decide this. This determination would not be relevant for pre-trial settlements. Additionally, because they want officers to be indemnified and want to ensure their clients get paid if they win, lawyers who represent plaintiffs in civil-rights cases nearly always try to plead or prove their cases in a manner so that there is no finding that the officer's act was malicious, wanton, or willful.

3. ***What in this legislation prevents frivolous cases from going forward?***

   The reformed qualified immunity defense will cut off meritless cases where the officer had a reasonable, good-faith belief they were not violating the law. Additionally, the plaintiff would still have to prove that a civil-rights violation took place. With these burdens, it is unlikely that lawyers will take frivolous cases that are likely to lose or have low damages.

4. ***Isn't it true some frivolous cases will go forward?***

   No standard is foolproof, and every outcome will depend on the individual case. But the existing qualified immunity standard would not weed out those frivolous cases any better than the new one. We feel there are strong incentives in this legislation to prevent or eliminate incentives to bringing meritless cases.

5. ***Won't this impose an additional cost on municipalities?***

   It may impose additional costs on municipalities. This is in fact the point of the law: municipalities should have to internalize the costs of rogue officers and civil-rights violations, as this will increase their incentives to look more closely at their hiring, training, supervision, and retention decisions. It is also important to remember that in these cases, someone is always paying the "cost" of the violation. We believe the cost is better placed on the violator of our most sacred rights, not the victim.

   Nonetheless, we do not expect that it will dramatically increase costs for municipalities. Municipalities and state agencies are nearly all insured, in one form or another. Premiums

should not rise dramatically. Municipalities are already subject to liability in a number of areas, and unless it is engaging in many serious civil-rights violations—in which case it should face liability that will force it to change its behavior—it should not face many additional potentially high-damages cases.

6. Won't officers have to get liability insurance?

No. Their employer will act as their insurer and pay legal fees and costs. The kind of conduct for which a municipality or law-enforcement unit may seek reimbursement from the officer after the fact—the most egregious, intentional conduct—is generally not insurable under other circumstances (insurance policies generally have exceptions so that they don't cover intentional unlawful conduct). Notably, the existing qualified immunity doctrine would not protect officers from personal liability in these situations, either.

7. What having a "good faith and objectively reasonable belief" that the "conduct did not violate the law" mean?

It means (a) the officer actually subjectively believed that their conduct was not a violation; and (b) that belief was a reasonable one under all the facts and circumstances, including the law and policies in place at the time.

a. To whom must that belief be reasonable?

A reasonable person in the officer's position, given all the facts and circumstances, including the information available to the officer at the time the officer acted. One of the relevant facts and circumstances may be that the person is a police officer.

b. How is the "at the time of the conduct complained of" language relevant?

This language indicates that the officer's belief must be subjectively held and objectively reasonable based at that time, based on the information the officer knew or a reasonable officer in their position should know, including the law at that time, given all the facts and circumstances. This ensures that the officer is not held responsible based on information gained later on or with hindsight, or based on new developments in the law that the officer should not reasonably have been aware of. On the other hand, it ensures that an officer will not receive an immunity based on information learned after the fact or based on a subjective belief they did not hold at the time.

8. Won't the risk of being sued cause officers to hesitate in doing their duties? Won't it put officers in danger?

Under this legislation, officers will not be personally responsible for paying any damages, costs, or fees unless they commit highly egregious civil-rights violations that would likely lead to criminal charges. This legislation should therefore not cause them to hesitate in doing their duties or put them in danger.

9. ***Won't the burden of responding to discovery put a strain on officers and take them away from their duties?***

   Some officers will have to answer written questions, provide documents, or undergo depositions in some cases under this section. However, in most existing federal civil-rights cases, lawyers usually include additional (non-civil-rights) state-law claims so that they can at least get through discovery to summary judgment even if qualified immunity cuts off the claims earlier. As a result, this legislation should not lead to a dramatically increased discovery burden. It will, however, allow more meritorious civil-rights cases to reach a judge or a jury for decision.

10. ***Can you define for us now what the "the equal privileges and immunities under the laws of this state, including, without limitation, the protections, privileges and immunities guaranteed under article first of the Constitution of the state" are?***

    They are spelled out in our laws and Constitution. Our police already are trained to ensure they follow all these laws. We want to ensure they can use their common sense and all the information available to them all the ground to ensure they can make the best decision possible.

    a. ***Can you tell us how that would play out in specific situations?***

       Potentially, but every situation is fact-specific. The standard is necessarily flexible to ensure that the officer's decision is evaluated only based on the information they had, on the ground, at the time, without the benefit of hindsight. Essentially, it provides a buffer so that there is no liability where an officer makes a reasonable mistake.

    b. ***What's the difference between "equal protection" of the laws and "equal privileges and immunities"?***

       These are legal terms of art referring to all our civil rights. In general, the "equal protection of the laws" refers to the right all Connecticut residents to have all our existing laws applied to them without discrimination on the basis of any protected category, like race, color, national origin, sexual orientation, sex, or age. The term "privileges and immunities" generally refers to the rights that are guaranteed in our laws and Constitution, like the rights to freedom of religion, assembly, speech, and to be free from unreasonable searches and seizures.

    c. ***What's in article first of CT Constitution? In relevant part:***

       i. Equality before law and public emoluments and privileges
       ii. Freedom of religion
       iii. Freedom of speech
       iv. Freedom of the press
       v. Freedom from unreasonable searches and seizures
       vi. Certain rights of the accused in a criminal prosecution, including right to counsel, hear accusation, confront witnesses, summon witnesses, bail except in capital offenses with high proof, speedy and public trial by jury, against self-incrimination; to due process of law; no excessive bail or fines

vii. Right not to be arrested, detained, or punished except where clearly warranted by law
viii. Open courts
ix. Just compensation for takings of private property for public use
x. Habeas corpus
xi. Right against conviction of treason or felony by legislature
xii. Right to peaceable assembly
xiii. Right to bear arms
xiv. No quartering in peacetime
xv. No hereditary emoluments, privileges, or honors
xvi. Right to trial by jury
xvii. Right to equal protection of law and against segregation or discrimination on basis of religion, race, color, ancestry or national origin.

11. Why did you remove the requirement that the right be "clearly established"?

This legislation is meant to revert qualified immunity back to its original form, as a "good-faith" immunity as it existed from its creation in *Pierson v. Ray* (1967) until 1982. Since that time, the Supreme Court has created a requirement that, to get past qualified immunity, a plaintiff must show the defendant violated "clearly established statutory or constitutional rights of which a reasonable person would have known." In recent years, the U.S. Supreme Court has emphasized that the right must be established "with specificity." This means generally that the plaintiff must show a previous case in the same circuit where a court found a violation under extremely similar circumstances. This extremely strict standard has led to qualified immunity being granted (and cases being dismissed) in outrageous situations:

- In *Brooks v. City of Seattle* (9th Cir. 2008), police knowingly dragged a pregnant woman from her vehicle, in front of her 11-year-old son, and tased her three times because she refused to sign a traffic citation (she believed this meant she would not be able to contest the citation). The court found the right "not clearly established" because although there was a similar case finding a violation where someone had been tased in "dart mode" under similar circumstances, there was no case finding a violation where the taser had been used in "drive-stun mode" (as it was against Ms. Brooks).

- In *Jessop v. City of Fresno* (9th Cir. 2019), police allegedly stole more than $225,000 in assets while executing a search warrant. Though "the City Officers ought to have recognized that the alleged theft was morally wrong," the unanimous court said, the officers "did not have clear notice that it violated the Fourth Amendment."

- In *Corbitt v. Vickers*, the 11th Circuit awarded an officer qualified immunity after he shot a 10-year-old boy while aiming at a nonthreatening dog. The officer was in pursuit of a criminal suspect who had no relationship to the boy and who was eventually apprehended without incident. "Corbitt failed to present us with any materially similar case from the United States Supreme Court, this Court, or the Supreme Court of Georgia," the 11th Circuit wrote, "that would have given Vickers fair warning that his particular conduct violated the Fourth Amendment."

- In *Kelsay v. Ernst*, based on an erroneous report of a "domestic assault," police officers came to rescue Melanie Kelsay from the man who supposedly was attacking her at a community swimming pool in Wymore, Nebraska. Then one of the officers assaulted her instead, lifting the 130-pound woman off the ground in a bear hug and throwing her to the ground, breaking her collarbone and knocking her unconscious, because she disobeyed his command to "get back here." The 8th Circuit ruled that her right to be free from such conduct under such circumstances was not sufficiently "clearly established" and granted the officer qualified immunity.

- *Baxter v. Bracey*. In this case, Sixth Circuit granted qualified immunity to two officers who deployed a police dog against a suspect who had already surrendered and was sitting on the ground with his hands up. Because the plaintiff found a previous case finding a violation where a police dog was deployed against someone who had surrendered lying down—but not one sitting with his hands up—the court found the right was not sufficiently "clearly established."

In 2009, in *Pearson v. Callahan*, the U.S. Supreme Court said that courts could decide a right was not "clearly established" and grant qualified immunity without deciding whether a right was violated at all—creating a Catch-22 where the required "clearly established" rights cannot even be clearly established through new caselaw.

12. Why are both equitable relief and damages available?

In some cases, it may be important not only provide damages to individuals whose rights were violated, but also to obtain court orders ensuring that a department or municipality reforms its policies, training, or procedures.

13. Can't we achieve the reform in policing required with only equitable relief?

With only equitable relief, victims whose rights have been violated would not be compensated for their injuries. There would also be less incentive for municipalities or law-enforcement units to reform on their own without being subject to a court order. Additionally, there would be little incentive for private lawyers to bring civil-rights claims if no damages are available.

14. Why is there no interlocutory appeal?

An "interlocutory appeal" is an appeal in the middle of the case, before a final ruling. One of the problems with the current qualified immunity regime is that in many cases, there is a right to appeal immediately when qualified immunity has been denied. This means that even if a court has decided that the case is meritorious, it is often put on ice and delayed for years while the appeal is decided before going to discovery or trial. Interlocutory appeals are almost never available. Appeals of denials of application of qualified immunity are still available under this legislation once there is a final ruling, including a verdict or judgment.

15. Under what other circumstances is interlocutory appeal available?

Almost never. If a ruling allows a claim to go forward, it is almost never appealable until a final ruling or the end of the case. There is a special statute that allows the Connecticut Supreme Court to grant interlocutory appeals on issues of great public importance.

16. Isn't a "good faith and objectively reasonable belief that the . . . conduct did not violate the law" too vague a standard? How can an officer know how it will come out if we can't define it now?

No standard in legislation can summarize every case: the current qualified immunity doctrine doesn't, either.

17. Can you define for us now what a "malicious, wanton or willful" act is?

"[Such conduct] is more than negligence, more than gross negligence.... It is such conduct as indicates a reckless disregard of the just rights or safety of others or of the consequences of the action.... [In sum, such] conduct tends to take on the aspect of highly unreasonable conduct, involving an extreme departure from ordinary care, in a situation where a high degree of danger is apparent."

Lawrence v. Weiner, 154 Conn. App. 592, 598 (2015) (citation omitted)

18. Wouldn't it put a lot of stress on an officer who is sued under this section not to know until the end of the case whether he will be personally responsible for a judgment against him/her?

An officer will not face the possibility of reimbursement unless they commit extraordinarily egregious misconduct, and rarely even then. This should not be a serious concern.

19. Why are attorney's fees and costs available where a violation was "deliberate, willful or committed with reckless indifference"?

Attorney's fees and costs are available only under these circumstances so as not to create an incentive for the filing of frivolous lawsuits. They are available under these circumstances because we want to encourage the pursuit of justice in the most flagrant or egregious cases where an officer has violated someone's rights, even if the damages in that case are low, for instance, because a person was not seriously physically injured.

20. What is the statute of limitations? (Why is it only 1 year?)

The statute of limitations is one year from when the cause of action accrued, which will nearly always be when the act itself took place (false arrest and/or wrongful conviction cases may be the exception, because the victim of the violation may not find out about it until later). It is one year in order to ensure that municipalities and law-enforcement units do not have to retain large amounts of data, documents, or recordings (especially body-camera recordings) for long periods because they may constitute evidence in a lawsuit years down the road.

21. Why does this legislation bar the application of existing notice-of-claim provisions?

Our existing state indemnification statutes require a plaintiff to file a "notice of claim" (essentially, a letter summarizing the case and the violation) against a municipality or agency within six months of the incident, or indemnification does not apply. However, the statute of limitations under the existing statutory provisions is two years. Under existing law, if a plaintiff files a case after the six months has passed but within two years of the incident, indemnification would not go into effect—but the lawsuit could go forward. Under these circumstances, the individual officer could be personally responsible for damages. To fix this problem and ensure an officer cannot be personally responsible for damages, legal fees, or costs unless they commit a highly egregious violation, we eliminated this requirement.