



The Changing Landscape of Municipal Liability in New Hampshire: The Doctrines of Official and Discretionary Function Immunity

by Erik G. Moskowitz

The doctrine of Qualified Immunity has long protected police actors from federal constitutional claims such as excessive force and wrongful arrest under 42 U.S.C. 1983.

The doctrines of Official and Discretionary Function Immunity, like Qualified Immunity, are designed to encourage and safeguard the ability of government officials at the city and town level to exercise their duties and carry out their functions without being hampered by concerns over possible liability from litigation.

While Discretionary Function Immunity has been a common-law theory since the mid-70s, on September 21, 2007, the New Hampshire Supreme Court issued an opinion in *Everitt v. General Elec. Co.*, 156 N.H. 202 (2007), adopting Official Immunity protection for municipal police officers and altering the government liability landscape drastically.

Underlying Facts

The *Everitt* case arose out of a police officer's decision whether or not to take a suspect into custody. The suspect, Jeremiah Citro, was an employee of General Electric. On November 1, 2003, Mr. Citro showed up at work after being told explicitly, the day before, to stay away from the premises. The police were called, and upon arrival, spoke with Mr. Citro. They were unable to properly understand the situation, but determined that Mr. Citro was acting strangely. The police officers decided to conduct a field sobriety test with Mr. Citro based on his behavior.

After conducting the field sobriety test, the officers determined that, despite Mr. Citro's unusual behavior, he showed no signs of intoxication. Because there was no basis to detain him, they let Mr. Citro leave the scene. Several hours later, Mr. Citro was involved in a motor vehicle accident that caused significant injury to Sarah Everitt.

Ms. Everitt sued, among others, the Town of Hooksett, New Hampshire, where the officers worked, as well as the officers individually. She alleged that the police officers (and vicariously, the Town) were negligent in failing to take Mr. Citro into custody when he appeared disoriented.

The Town and the officers argued that the officers should be immune from suit based upon the doctrine of official immunity – a doctrine New Hampshire had yet to adopt. The trial court rejected that argument and an appeal was taken.

Supreme Court Appeal

The New Hampshire Supreme Court overturned the trial court decision, establishing a three-part test for Official Immunity: "Municipal police officers are immune from personal liability for decisions, acts, or omissions that are: (1) made within the scope of their official duties while in the course of their employment; (2) discretionary, rather than ministerial; and (3) not made in a wanton or reckless manner." Additionally, the Court held that the Town may enjoy vicarious immunity from suits based on the negligence of its officers.

The *Everitt* decision allows for the dismissal of claims where police officers are sued for negligence for having taken some action (or having failed to take some action). Where an officer makes a decision (to arrest, to continue a pursuit, to detain someone – or not) and that act or omission results in an injury and lawsuit, the officer can seek to have the case dismissed on the grounds that his or her actions are immune from suit.

Importantly, the doctrine of Official Immunity will often provide a means to avoid the expense and difficulty of litigation. The *Everitt* immunity standard is an immunity from suit, not simply from liability. If it appears the doctrine will apply, municipalities and municipal officials will want to bring a motion to dismiss or motion for summary judgment early in the proceedings to avoid the inevitable expense of discovery and trial preparation.

Applying the Doctrine

1. Acting within the Scope

As long as the individual is making decisions or taking actions within the scope of her official duties and within the course of her employment, Official Immunity will apply. This is often easiest to meet in situations where an officer, in full uniform and/or in a fully-marked cruiser, has taken some official action.

The difficulty in this prong arises when off-duty officers observe unlawful or criminal activity and take action. It is unclear, based on the limited case law available since the *Everitt* decision, whether the courts will grant Official Immunity in these situations. The answer will likely depend on whether the officer has properly identified herself and whether the officer was under an obligation to respond to the activity even during off-duty hours.

2. Discretionary Activity

The second prong requires that the actor have taken a discretionary rather ministerial action.

The Court explained:

“A discretionary decision, act, or omission involves the exercise of personal deliberation and individual professional judgment that necessarily reflects the facts of the situation and professional goal. Such decisions include those for which there are no hard and fast rules as to the course of conduct that one must or must not take and those acts requiring the exercise of judgment and choice involving what is just and proper under the circumstances.”

By contrast, a decision is “ministerial” if it is an activity involving the execution of a specific duty in a prescribed manner – one involving no exercise of judgment or discretion. These activities include driving a routine patrol, handcuffing a suspect in such a way as to avoid injury, or responding to radio calls.

An officer who drives recklessly while on regular patrol, or who indiscriminately cuffs and injures a suspect, will not likely be protected from suit by Official Immunity. An officer who decides whether or not to use force, or whether or not to continue a pursuit, however, *will* likely be subject to Official Immunity since these decisions require an exercise of professional judgment and discretion.

3. Not Wanton or Reckless

The final prong requires a determination as a matter of law that an individual's actions were not wanton or reckless. Wanton conduct requires heedless and reckless disregard for another's rights with consciousness that that act or omission to act may result in injury to another. Recklessness involves conduct evincing disregard of or indifference to consequences under circumstances involving danger to life or safety of others, although no harm was intended.

So long as a police officer acts reasonably, even if mistakenly, under the circumstances, Official Immunity will be available. Officers must often act with decisiveness in stressful situations requiring split-second decisions. The Official Immunity doctrine prevents others from second-guessing those decisions after the fact. As long as officers have some articulated reason for their actions, immunity will apply.

Doctrinal Effect on Municipal Liability

An employer can often be held liable for the negligent acts of its employees under the theory of *respondeat superior*. Municipalities are no different. When an officer is charged with violating an individual's constitutional rights or acting in some negligent manner, the municipality is often also charged under a vicarious liability theory.

The *Everitt* decision extends Official Immunity to protect municipalities from vicarious liability claims. When a town is sued under a theory of *respondeat superior*, the police officer's Official Immunity will also provide vicarious immunity to the town.

It is questionable whether Official Immunity will protect municipalities from *direct* liability claims. While it is encouraged that municipal defendants raise an Official Immunity defense, municipalities in New Hampshire are also eligible for Discretionary Function Immunity when the injurious conduct was the result of a discretionary policy decision.

Discretionary Function Immunity

Municipalities charged with negligent hiring, training, or supervision, as a general rule in New Hampshire, are subject to the same rules as “private corporations if a duty has been violated and a tort committed.” *Hacking v. Town of Belmont*, 143 N.H. 546, 549 (1999); *Merrill v. Manchester*, 114 N.H. 722, 730 (1974). As an exception to that general rule, however, the *Merrill* and *Hacking* decisions reinforced the theory that municipalities are entitled to Discretionary Function Immunity – towns are immune from liability for “acts and omissions that constitute the exercise of an executive or planning function involving the making of basic policy decisions.” *Hacking*, 143 N.H. at 549. To determine whether the particular conduct constitutes discretionary planning, the Court considers whether that conduct which caused the injury is “one characterized by a high degree of discretion and judgment” involving “weighing alternatives and making choices with respect to public policy and planning....” *Id.* at 549-50.

The Doctrines of Official Immunity and Discretionary Function Immunity are constantly being pushed further in New Hampshire courts. One important issue that remains undecided following *Everitt* is whether Official Immunity will protect municipal employees other than police officers. While Discretionary Function Immunity fills in some of those gaps, litigants seeking to extend immunity to other governmental actors would be well served to analyze the nature of the task or function that that governmental official plays, the amount of discretion necessary to perform that task, and the likelihood that citizens will second-guess those decisions. The greater the degree to which these factors apply, the more likely the Court will be to extend these immunity doctrines to other governmental actors in the future.

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