

CML 2020

VIRTUAL SEMINAR ON MUNICIPAL LAW

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OCTOBER 9, 2020 @ 3:00 PM

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CLAIMS FOR DAMAGES AGAINST PEACE OFFICERS UNDER **SB 20-217** AND **ARTICLE II** OF THE COLORADO CONSTITUTION

HISTORY, PERSPECTIVE, AND ANALYSIS



SB 20-217: HOW DID WE GET HERE?

George Floyd dies while in custody of the Minneapolis PD on May 25, 2020.

Colorado General Assembly reconvenes on May 26, 2020.

SB 20-217 introduced into Senate on June 3, 2020.

Bill signed into law by Governor on June 19, 2020.

25 May 2020

26 May 2020

3 June 2020

19 June 2020

WHERE ARE WE GOING TODAY?

- The necessary background.
- The new look of civil rights litigation.
- Some budding (and perhaps perplexing) issues.
- Your questions and discussion.

NECESSARY BACKGROUND

- Entitled "Enhance Law Enforcement Integrity Act", SB 20-217 is a composite of a wide variety of law enforcement provisions.
- What became **Section 3** of the Act is provision that adds C.R.S. 13-21-131, creating a new "civil action for deprivation of rights".

NECESSARY BACKGROUND

- A very similar bill had been introduced earlier in the legislative session (2/4/20).
- Called the “Colorado Rights Act”, HB 20-1287.
- Applied to any “person or public entity” who deprived of Colorado constitutional rights.
- Not limited to Article II rights.
- Postponed indefinitely in committee (3/5/20).

THE RECIPE FOR A C.R.S. 13-21-131 CLAIM.

- A peace officer:
 - As defined by 24-31-901(3);
 - Employed by a local government.
- Under color of law.
- Subjects or causes to be subjected;
 - Including a failure to intervene.
- To the deprivation of individual rights that create binding obligations secured by Article II of the state constitution.
- Is liable for legal or equitable relief or any other appropriate relief.

NOTES REGARDING THE RECIPE.

- **CSP** conspicuously absent.
- “**Local government**” not defined (varying definitions appear elsewhere throughout the CRS).
- What’s up with the “**that create binding obligations**” language?

ARTICLE II, BILL OF RIGHTS, HIGHLIGHTS.

- Sec. 4, Religious freedom.
- Sec. 7, Security of person and property – searches – seizures –warrants.
- Sec. 10, Freedom of speech and press.
- Sec. 13, Right to bear arms.
- Sec. 18, Crimes – evidence against one's self – jeopardy.
- Sec. 24, Right to assemble and petition.
- Sec 25, Due process of law.

DEFENSES ELIMINATED.

- Statutory immunities and statutory limitations do not apply.
- CGIA does not apply.
- Qualified immunity is not a defense.

SO WHAT IS A DEFENSE?

No constitutional violation occurred.



No causation.



Damages are not to the extent claimed.

OTHER FEATURES.

Attorney fees to prevailing plaintiff.

Employer to indemnify peace officer, except:

Two-year SOL.

The 5% or \$25,000 rule.

Conviction of a crime.

APPARENT
EFFECT ON
PUNITIVE
DAMAGES.

“Notwithstanding any other provision of law.”



“Shall indemnify...for any liability incurred by the peace officer...for claims arising pursuant to this section.”



And, CGIA does not apply.

BEFORE SB 20-217, HOW HAD POLICE-RELATED CASES BEEN HANDLED HISTORICALLY

- 42 USC § 1983:
 - Vast majority of cases.
 - Filed in federal court.
 - Qualified immunity defense.
- State tort claims:
 - Assault/battery/negligence.
 - CGIA (immunity, notice, damage caps).

NEW LOOK FOR COLO. CIVIL RIGHTS CASES.

- Heading back to the state courts?
- Abandoning federal law claims?
- What does this mean for MSJ?
- Are there really no limits on damages?
- What about jury pools?

**SOME BUDDING
(PERHAPS PERPLEXING)
QUESTIONS.**

DISPOSITIVE MOTIONS AND INTERLOCUTORY APPEALS: ARE THEY HISTORICAL RELICS?

- Very limited MTD/MSJ opportunities.
- With QI and CGIA gone, interlocutory appeals are likely a dead letter.

WHAT WILL BE THE EFFECT ON SETTLEMENTS?

- The Ferguson-effect is still in play if not stronger.
- Protecting officers from liability/loss of certification.

IS THERE A GREATER NEED TO OBTAIN SEPARATE COUNSEL FOR OFFICERS?

- Officer will not want to try case due to potential “death penalty” in loss of POST certification.
- Potential personal liability of officer.
- Traditional conflicts still in play (e.g. when disciplined).
- City has right to deem no “good faith and reasonable belief”.
- Potential criminal exposure.

**WHAT ARE THE
EFFECTS OF A
PENDING CRIMINAL
PROSECUTION?**

**STAY LIKELY DUE TO
FIFTH AMENDMENT
CONSIDERATIONS.**

WILL THE OBJECTIVE REASONABLENESS STANDARD STILL PREVAIL?

- There is no other standard (and note commonality of federal and state constitutions).
- No reason for Colorado courts to revisit.
- But query effects of rework of CRS 18-1-707.
- Can criminal code provisions establish constitutional standards?

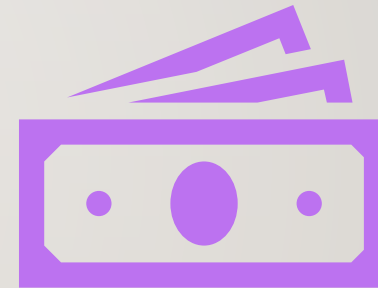
WHAT ABOUT THIS NEW FAILURE TO INTERVENE?

- Duty long-recognized in federal law.
- But federal claim tempered by “reasonable opportunity” standard.
- Failure to intervene explicitly recognized as basis of claim in CRS 13-21-131.
- What does it mean to “intervene”?
- Isn’t this potentially dangerous?
- There are perhaps clear cases, but gray areas always predominate.

WHAT ABOUT CONSTITUTIONAL CLAIMS FOR OTHER THAN USE OF FORCE ACTIONS BY PEACE OFFICERS?



The possibilities are limitless.



And, the rewards are great – no immunities, no damage limitations, and attorney fees!

ARE PEACE OFFICERS ANY MORE SUSCEPTIBLE TO PERSONAL LIABILITY THAN BEFORE?

In most instances, the answer is a clear no.

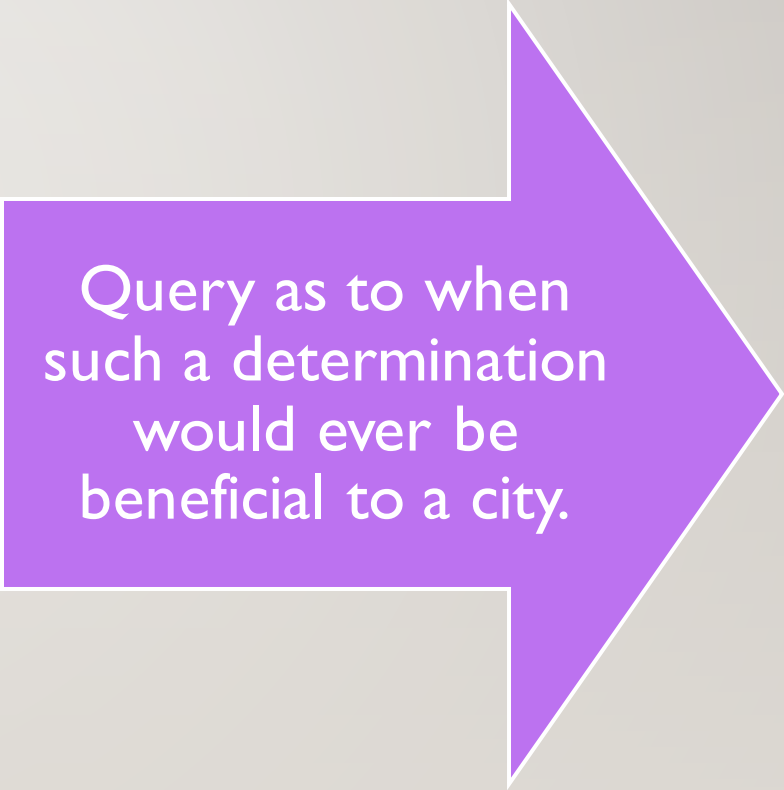
And, indemnity for punitive damages was never previously a matter of right.

There is need for cities to educate officers on these points.

WHEN IN THE PROCEEDINGS IS THE LACK OF “GOOD FAITH” DETERMINATION TO BE MADE BY THE CITY?



Not provided for in
the bill.



Query as to when
such a determination
would ever be
beneficial to a city.

IS THERE ANY RETROACTIVE APPLICATION OF CRS 13-21-131?

- This is being litigated right now.
- Our view is no; should only apply to occurrences on or after 6/19/20.
- But e.g. the Summit County DC has already determined that the grand jury report provisions do have retroactive application.



YOUR QUESTIONS.

AND COMMENTS.