# Revisiting the Doctrine of Governmental Immunity?

By CHARLES D. RAY and MATTHEW A. WEINER

**A police officer sees a car with illegal undercarriage lights and decides to follow it.** After the car attempts to avoid being followed by the officer, the officer gives chase. A minute or two later, the chased car crashes, killing one of the passengers inside. Can the decedent's estate sue the police officer and municipality, claiming that the officer acted unreasonably in his pursuit? Maybe, maybe not. That, at least, is the lesson we learned from *Borelli v. Renaldi*, 336 Conn. 1 (2021).

Eric Ramirez operated the Mustang convertible that came to the attention of Officer Anthony Renaldi. Dion Major rode in the front passenger seat of the Mustang and 15-year-old Brandon Giordano rode in the back. As the Mustang drove along Route 67 in Seymour, Renaldi observed that it had illuminated underglow lights, in violation of state law. Renaldi maneuvered his vehicle behind the Mustang, which then sped up. The Mustang continued at a high rate of speed and illegally passed vehicles operating on Route 67. At some point, Renaldi activated his emergency lights and siren, and notified dispatch that he was engaged in a pursuit. After the chase crossed into Oxford, the Mustang turned off Route 67 onto Old State Road. Renaldi lost sight of the Mustang, which struck an embankment and turned over onto its roof. Ramirez and Major survived the crash, but Giordano did not.

The administratrix of Giordano's estate sued, among others, Renaldi and the Town of Seymour. The complaint alleged that Renaldi was negligent in pursuing the Mustang. The defendants moved for summary judgment based on their claim that the doctrine of governmental immunity barred the suit. The trial court granted the summary judgment motion.

On appeal, a majority of the Supreme Court affirmed, with Chief Justice Robinson and Justice D'Auria authoring separate concurring opinions, and Justice Ecker authoring a dissenting opinion. Justice Kahn, writing for the majority, began by clarifying what the appeal was *not* about. Specifically, although the complaint reasonably could have been understood to challenge both Renaldi's decision to begin the pursuit and his manner of driving during it, on appeal, the plaintiff had narrowed her argument, addressing only whether governmental immunity applies to an officer's decision to begin a pursuit after observing illegal conduct. Whether a police officer can be sued for negligently operating his or her vehicle *during* a pursuit, or in a *nonemergency* situation, was not before the Court.

The majority started with the observation that "the operation of a police department is a governmental function" and, as such, "acts or omissions in connection therewith ordinarily do not give rise to liability on the part of the municipality." There are, however, exceptions to governmental immunity, and the majority opinion focused on whether those exceptions applied under the facts presented in *Borelli*.

For example, a police officer has immunity for discretionary decisions made in the exercise of professional duty, but does not have immunity for ministerial acts. See Conn. Gen. Stat. § 52-557n(a)(2)(B) (providing that municipalities are not liable for negligent acts that "require the exercise of judgment or discretion as an official function"). "A ministerial act is one which a person performs in a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to or the exercise

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of his own judgment [or discretion] upon the propriety of the act being done." To demonstrate the existence of a ministerial duty, a plaintiff usually "must point to some statute, city charter provision, ordinance, regulation, rule, policy, or other directive that, by its clear language, compels a municipal employee to act in a prescribed manner, without the exercise of judgment or discretion…."

In arguing that Renaldi's decision to start pursuing Ramirez was ministerial, rather than discretionary, the plaintiff pointed to General Statutes § 14-283, which govern the rights and duties of, among others, officers operating police vehicles "in the pursuit of fleeing law violators…." The plaintiff cited § 14-283(d), which provides that "[t]he provisions of this section *shall not* relieve the operator of an emergency vehicle from the duty to drive *with due regard for the safety of all persons and property*." (Emphasis added.) The plaintiff argued that the emphasized language imposed on officers a ministerial "duty to weigh the safety of all persons and property and the seriousness of the offense prior to initiating a pursuit…."

The majority disagreed. It first found support for its decision in the text of the relevant statutes. It reasoned that the phrase "due regard" does not mandate a particular response to specific conditions. Instead, it "imposes a general duty on officers to exercise their judgment and discretion in a reasonable manner." In addition, General Statutes § 14-283a, which authorize the adoption of "a uniform statewide policy for handling pursuits by police officers," sets forth guidelines for officers to consider when initiating a pursuit. But these factors—which include road and environmental considerations, population density, whether the identity of the occupants of the fleeing vehicle is known, and whether immediate apprehension is necessary for public safety—"highlight the discretionary nature of the duty."

The majority also found support for its determination in prior decisions. For instance, in *Coley v. Hartford*, 312 Conn. 150 (2014), the Court concluded that General Statutes (Rev. to 2013) § 46b-38b(d)(5)(B), which requires officers reporting to a domestic violence scene to stay there "for a reasonable time until, in the reasonable judgment of the officer, the likelihood of further imminent violence has been eliminated," allows for the exercise of judgment and discretion, notwithstanding language that "*required* that officers remain at the scene for a reasonable time and exercise reasonable judgment...." (Emphasis in original.) Moreover, although the Court, in *Tetro v. Stratford*, 189 Conn. 601 (1983), affirmed a negligence verdict against officers for their role in a police chase during which the fleeing vehicle injured an innocent bystander, the defendants in *Tetro* did not assert governmental immunity. Instead, the legal issues in *Tetro* involved proximate cause and the applicability of § 14-283 to accidents that did not directly involve an emergency vehicle. *Tetro*, therefore, was inapplicable.

The majority further concluded that the identifiable person-imminent harm exception to discretionary act governmental immunity did not apply. Pursuant to that exception, there is no immunity where the plaintiff proves: (1) an imminent harm; (2) an identifiable victim or a "narrowly defined identified class[ ] of foreseeable victims"; and (3) "a public official to whom it is apparent that his or her conduct is likely to subject that victim to that harm…." Giordano, however, was not like a schoolchild, *legally compelled* to attend a public school during school hours—the only class the Court previously had identified as falling within this exception. Furthermore, under the plaintiff's theory, the identifiable person-imminent harm exception would swallow the rule because, in any police pursuit, there will always be at least one person whose presence the police should have been aware of. For the majority, such an outcome would violate good public policy, pursuant to which police officers must be "free to exercise judgment and discretion in their official functions, unhampered by fear of second-guessing and retaliatory lawsuits…."

Justice Ecker disagreed and wrote a tome challenging the generally accepted narrative that "near-total [municipal] immunity [i]s an unadulterated continuation of an old and deeply rooted common-law tradition…." At the outset, Justice Ecker disagreed with the majority that the legal issue on appeal was confined to whether the plaintiff could pursue a claim challenging Renaldi's decision to initiate the pursuit. For Justice Ecker, the plaintiff had challenged "the entire pursuit from start to finish." Having reframed the legal question before the Court, the door was opened to Justice Ecker's wide-ranging critique. Because it's impossible to do justice to Justice Ecker's dissent within the confines of this column, we urge those of you interested in the historical development of municipal immunity law to read it. Here are just a few highlights.

Over the past three decades, the Court's jurisprudence has, in effect, conferred near-absolute immunity from negligence liability for municipal employees. To Justice Ecker, these decisions not only undermine good public policy, but conflict with the text and purpose of General Statutes § 52-557n, which the legislature enacted in 1986. Furthermore, the jurisprudence conflicts with the common law as it existed before § 52-557n which, according to Justice Ecker, did not provide blanket immunity for municipal employees carrying out

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■ Any views expressed herein are the personal views of DASA Weiner and do not necessarily reflect the views of the Office of the Chief State's Attorney and/or the Division of Criminal Justice.

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## Time To Go Pro Bono

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to Counsel in Summary Process Proceedings," Proposed Senate Bill No. 531; "An Act Establishing a Pilot Program That Will Provide Legal Counsel to Tenants in Eviction Proceedings," Proposed Senate Bill 523 (2021)

8. Conn. Gen. Stat. 47a-26c ("All pleadings, including motions, shall advance at least one step within each successive period of three days from the preceding pleading or motion.")
9. Connecticut Advisory Council on Housing Matters, Report to the General Assembly (January 6, 2021), Appendix C-3
10. Conn. Gen. Stat. 47a-35 ("Execution shall be stayed for five days from the date judgment has been rendered….")
11. Connecticut Advisory Council on Housing Matters, *Report to the General Assembly* (January 6, 2021), Appendix C-8.
12. *Id*. at Appendix C-6.
13. "The Devastating Impact of Evictions on Connecticut Families," *CT Lawyer* magazine, Vol. 31, No. 3 (January/February 2021).
14. Nat'l Low Income Hous. Coal, *Costs of COVID-19 Evictions* (Nov. 19, 2020), nlihc.org/sites/default/files/costs-of-covid19-evictions.pdf. *See also* Children's HealthWatch, *Behind Closed Doors: The Hidden Health Impacts of Being Behind on Rent* (2011), childrenshealthwatch.org/wp-content/uploads/behindcloseddoors_report_jan11-.pdf.
15. NYC Office of Civil Justice, *Universal Access to Legal Services: A Report on Year Three of Implementation in New York City* (Fall 2020), www1.nyc.gov/assets/hra/downloads/pdf/services/civiljustice/OCJ_UA_Annual_Report_2020.pdf.
16. Oksana Mironova, *NYC Right to Counsel: First Year Results and Potential for Expansion*, Cmty. Serv. Soc'y (Mar. 25, 2019), www.cssny.org/news/entry/nyc-right-to-counsel#_edn3.
17. Stout Risius Ross, *The Economic Impact of an Eviction Right to Counsel in Baltimore City* (May 8, 2020), cdn2.hubspot.net/hubfs/4408380/PDF/Eviction-Reports-Articles-Cities-States/baltimore-rtc-report-final-5-8-2020.pdf .
18. Stout Risius Ross, *Economic Return on Investment of Providing Counsel in Philadelphia Eviction Cases for Low-Income Tenants* (Nov. 13, 2018), cdn2.hubspot.net/hubfs/4408380/PDF/Cost-Benefit-Impact-Studies/Philadelphia%20Evictions%20Report_11-13-18.pdf.
19. *See* n. 18.
20. *See* n. 17.
21. www.ctbar.org/members/volunteer-today/CBA-pro-bono-connect/for-attorneys. To learn more about how to navigate Pro Bono Connect, please see Time to Go Pro Bono Column. *CT Lawyer*, September/October 2020. www.ctbar.org/docs/default-source/publications/connecticut-lawyer/ctl-vol-31/1-septoct-2020/ctl-sept-oct-20---column---time-to-go-pro-bono.pdf?sfvrsn=e06b274a_6

## Supreme Deliberations

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discretionary tasks, but rather permitted juries to impose negligence liability where municipal employees had abused their discretion when carrying out a discretionary task. Indeed, in *Tetro*, a unanimous Court upheld a damages award based on negligent police conduct during a pursuit.

But what about the majority's point that *Tetro* is irrelevant because the defendants had not raised the immunity issue in that case? Justice Ecker had "great difficulty believing" that the *Tetro* defendants "would have overlooked the most basic and common defense in the municipal playbook had it been viable." Instead, the fact that the *Tetro* defendants had not raised the defense supported Justice Ecker's conclusion that, prior to the judicial intervention of the past few decades, immunity was not available in such situations. Stated another way, "the fact that municipal immunity was a nonissue in Tetro almost certainly was a function of a failure to litigate the obvious [rather] than a failure to raise and decide the issue."

Justice Ecker also criticized the majority's determination that the identifiable person-imminent harm exception did not apply under the facts of *Borelli*. After conducting another historical review, Justice Ecker concluded that, among other things, the current understanding of the exception is far too narrow. For example, the "legally compelled presence" requirement, properly understood, is a sufficient condition for the exception to apply, not a necessary one.

On the issue of whether the contemporary understanding of this exception has strayed from its doctrinal underpinnings, Justice Ecker may not be alone. Justice D'Auria, in his concurring opinion, expressed his willingness to reevaluate the contours of the exception in a future case. And Chief Justice Robinson, in his concurring opinion, observed that "[i]n a precedential vacuum … no one would be more of an identifiable person subject to imminent harm than the occupant of a car being pursued by police…." Nevertheless, Chief Justice Robinson concluded that, as a policy matter, the exception should not apply to passenger "presumed to be in cahoots" with a fleeing lawbreaker.

So where does this leave us? After *Borelli*, a claim attacking an officer's decision to start a chase is likely to fail. But given the separate opinions of Chief Justice Robinson and Justice D'Auria, as well as Justice Ecker's dissent and the care that the majority took to limit the scope of its holding, we can't say for sure that a suit challenging the manner in which an officer conducted a pursuit, or an officer's conduct during a nonemergency situation, would meet the same fate. *See also Cole v. City of New Haven*, ___ Conn. ___ (Oct. 15, 2020) (reversing summary judgment order where, among other things, evidence indicated that city and police department policies may have imposed ministerial duty governing officer's conduct during a pursuit). Perhaps the Court is primed for a dramatic reversal of its recent municipal immunity jurisprudence. We may not have to wait long to find out. *See Daley v. Kashmanian*, 335 Conn. 939 (2020) (granting certification to address whether § 52-557n confers governmental immunity from liability for damages arising from personal injuries caused by an officer's negligent operation of a vehicle during on-duty surveillance). ■

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our story from a fuller, and perhaps less flattering perspective. It is up to us as to whether they will tell a story of fundamental transformation towards a more diverse, equitable, and inclusive legal profession for the future. ■

### NOTES

1. Lawrence M. Friedman, *A History of American Law (4th Edition)* Oxford University Press (2019), p. 707-708.
2. American Bar Association, "ABA Timeline," https://www.americanbar.org/about_the_aba/timeline/ (last retrieved on February 9, 2021)
3. *Id*.
4. *Id*.