



## SIGNIFICANT ISSUES

The Department of Public Safety (DPS) states that the revision of the Tort Claims Act (TCA) in this bill would establish immunity under state law for law enforcement officers which mirrors federal qualified immunity. Qualified immunity protects officers in civil rights actions brought pursuant to 42 U.S.C. §1983 if their conduct did “not violate clearly established statutory or constitutional law of which a reasonable person should have known.” *White v. Pauly*, 137 S.Ct. 548, 551; 196 L.Ed.2d 463; 85 USLW 3314 (2017).

The Administrative Office of the District Attorneys (AODA) opines that by changing “caused” to “committed” would be counter to a large body of existing case law regarding law enforcement officers’ liability for injuries caused by other people’s actions. Immunity can be waived not only for intentional torts by law enforcement officers but also for acts committed by third parties when caused by negligence of the officers. (See, *Methola v. County of Eddy*, 95 N.M. 329 (1989), *Weinstein v. City of Santa Fe*, 121 N.M. 646 (1996).) “Caused by” is used in the common law of negligence so a plaintiff now only needs to show to a violation of the common duty imposed on law enforcement officers. *Id.* A law enforcement officer has the duty in any activity to exercise for the safety of others that care ordinarily exercised by a reasonably prudent and qualified officer in light of the nature of what is being done. *Id.* (See also, *Cross v. City of Clovis*, 107 N.M. 251 (1988), *Torres v. State*, 119 N.M. 605 (1995).) All persons who are foreseeably at risk within the general population are within the class of persons to be protected. *Id.* (See also, *Wachocki v. Bernalillo County Sheriff’s Department*, 2010-NMCA-021.) A deprivation of rights can occur where a law enforcement officer fails to investigate or take enforcement action and claims for injuries proximately caused by an officer’s negligent breach of one or more their duties are within the purview of claims permitted by Sec. 41-4-12. *Id.*

The new subsection proposed in HB 279 mirrors the language in the present case law recognizing what is termed as “qualified immunity” for public officials. Government officials performing discretionary functions are entitled to qualified immunity “...insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person should have known.” See, *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), *Anderson v. Creighton*, 483 U.S. 635 (1987). See also, *Chavez v. Board of County Comm’rs*, 2001-NMCA-065. Qualified immunity does extend to law enforcement officers. *Id.*, See also, *Williams v. Board of County Comm’rs of San Juan County*, 1998-NMCA-090.

In practice, when a defendant asserts a qualified immunity defense the burden shifts to the plaintiff who must first establish that the defendant violated a constitutional right. If a violation has been shown, the plaintiff must then show that the constitutional right was clearly established. The relevant dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in that particular situation. (See, *Saucier v. Katz*, 533 U.S. 194 (2001), *Cortez v. McCauley*, 478 F.3d 1108 (10<sup>th</sup> Cir. 2007).) Since the proposed additional subsection is virtually the same as what is present now in state and federal case law, it would likely have very little effect on cases pursued under the TCA.

## TECHNICAL ISSUES

The New Mexico Attorney General’s Office (NMAG) states that it appears HB279 also seeks to amend an NMSA citation that is already the correct citation. The proposed bill, under Section 41-4-12, reads:

“The immunity granted pursuant to Subsection A of Section [~~5-14-4 NMSA 1953~~] 41-4-4 NMSA 1978 . . . .”

However, the New Mexico Compilation Commission shows the current NMSA Section 41-4-12 already reads as the amendment proposes:

“The immunity granted pursuant to Subsection A of Section 41-4-4 NMSA 1978 . . . .”

DPS suggests changing the bill beginning at p. 2, line 3:

“B. The waiver of immunity granted pursuant to Subsection A of Section 41-4-12 NMSA 1978 does not applyies if a court determines that the officer's conduct did not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”

### **OTHER SUBSTANTIVE ISSUES**

DPS states that this bill could eliminate absolute immunity for officers.

ABS/al