

RISKY BUSINESS

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Counselor's Comments

Supreme Court Rules There is No Qualified Immunity in Situations Involving "Particularly Egregious" Facts

By **Dinsmore and Shohl**

As the Nation focused on electing the next president, the Supreme Court of the United States took the rare step of reversing a trial court's grant of qualified immunity to public officials. Even rarer was the way in which the Court took action. In a 7-1 unsigned decision, the Court reversed the trial court without oral argument through a decision issued less than 30 days after receiving records from the trial court. The Court's swift action is a reminder that qualified immunity shields officials from civil rights litigation – but that shield is not impenetrable.

Nearly 40,000 new civil rights cases are filed in federal courts each year, which means each year, thousands of public officials are hauled into court to have their service questioned by the judiciary. Qualified immunity stops most of these lawsuits from advancing. As the Supreme Court put it, qualified immunity is meant to protect officials so that they can carry out their public duties – often times, duties involving split-second decisions in high-pressure situations – without living in fear of suit. If qualified immunity attaches, officials are shielded from liability and in many cases, the time and expense of litigation, so that they can continue their public work.

Whether immunity applies often turns on whether an official should have known that what he or she was about to do would violate another's rights. Courts resolve that issue by asking whether another court found a violation in a prior case involving "similar circumstances" as those faced by the official at the time he or she acted – *i.e.*, whether the official had advance notice that his or her actions would be unlawful. *White v. Pauly*, 137 S. Ct. 548, 552 (2017). In other words, without a prior case to put the official on notice, qualified immunity attaches regardless of whether a constitutional violation occurred.

Articles

<u>Counselor's Comments</u>	1 & 2
<u>Loss Control Lowdown</u>	3 & 4
<u>FYI</u>	5 & 6
<u>Member Spotlight</u>	6 & 7
<u>Broker's Beat</u>	8 & 9
<u>Events/From the Board Room</u>	10

Counselor's Comments (continued)

As is the case with most things in the law, there can be exceptions – and the Supreme Court's November 2020 case was a reminder of an important one. In *Taylor v. Riojas*, 414 S. Ct. 52 (2020), an inmate spent six days naked in cells containing feces and overflowing sewage from previous occupants. Fearing that these conditions contaminated his food and water, he did not eat or drink for nearly four days, and he held his bladder for over 24 hours to avoid exacerbating the conditions. After he eventually (and involuntarily) relieved himself, the cell's drain overflowed and raw sewage spilled across the floor. Prison officials left Taylor in the cell naked, cold, and in feces and raw sewage from himself and others.

Both the trial court and the U.S. Court of Appeals for the Fifth Circuit granted qualified immunity in favor of the prison officials who took no action to correct the prison conditions. The Fifth Circuit held that Taylor's conditions violated the Eighth Amendment but prison officials were entitled to immunity because a court had not previously held that confinement in human waste for six days violated the Constitution. The Fifth Circuit applied the standard rule: if there is no prior case involving similar circumstances, qualified immunity applies.

Notwithstanding no prior case involving similar circumstances, the Supreme Court reversed and held the officials were not entitled to qualified immunity. The Court held that "any reasonable officer [confronted with Taylor's conditions] should have realized that [the] conditions of confinement offended the Constitution." Although there was no prior case on point, the Court held that it was "obvious" that Taylor's situation violated a general constitutional rule that prison officials could not force Taylor to remain confined in such "egregious" conditions. In other words, the Supreme Court recognized an "obviousness exception" to the standard rule: if it is "obvious" that conduct would violate a Constitutional principle, qualified immunity may not be available even if there is no prior case involving similar circumstances to provide advance notice.

Whether a situation presents an "obvious" case involving "egregious" circumstances is open to debate. The core of *Riojas*, however, is easy to discern. *Riojas* turned on whether officials acted reasonably when ignoring an inmate who was naked and cold, lying in feces, and not eating for nearly one week. Any "reasonable" prison official should have realized that something was seriously wrong, and if a "reasonable" official would have come to that conclusion, the officials in Taylor's case had notice that they were required to act.

Public officials are under increased scrutiny today, and the qualified immunity doctrine has been challenged like never before. Although it is unclear how courts will apply *Riojas* moving forward, *Riojas* is a reminder about common sense. *Riojas* is the Supreme Court's version of the oft-referenced duck test: if it looks like a duck, swims like a duck, and quacks like a duck, then it probably is a duck. If a situation looks wrong, feels wrong, and seems wrong, then it probably is wrong, and courts will be able to utilize the decision in *Riojas* to decline a grant of qualified immunity.

Loss Control Lowdown...

Playground Safety

Starr Markworth



Member city parks and recreation departments spend large amounts of money annually to develop and maintain play spaces because they provide positive places for children to be outside, active, and social.

While most professionals agree playgrounds are needed, these spaces have risks. Across the country, more than 200,000 children under age 14 are seen in emergency rooms annually for injuries that occur on playgrounds. According to the Consumer Product Safety Commission (CPSC), 75 percent of those injuries happen on public playgrounds. Because of these statistics, the CPSC has developed playground safety guidelines to combat the most typical injuries related to falls, design problems and maintenance issues.

Studies describing how children play and use playground equipment are continuously reviewed to make changes to the guidelines as well as to reduce injury incidences.

As parks and recreation departments continue to invest in play spaces, there must also be ongoing maintenance and evaluations. The more a playground is used, the more likely it is to incur problems. For example, playground surfacing is worn away by shoes, while swing chains wear out, and nuts are loosened from bolts. Weather also affects equipment – paint chips, metal rusts, and plastics crack. Evaluations should be conducted by trained, certified playground inspectors who know where to look for problem areas. Once issues are identified, they must be fixed. Therefore, it is recommended that there be a playground maintenance plan and a certified playground evaluator on staff.

To get started, follow these tips for implementing playground safety initiatives:

1. Identify any equipment within the agency's jurisdiction that has caused a reported injury due to poor maintenance, lack of repairs or poor design that does not comply with CPSC guidelines and ASTM standards. If the cause of the injury has not been corrected, remove the equipment.
2. Remove any existing playground equipment that is not recommended for use on public playgrounds in the CPSC guidelines and ASTM standards, including:

Playground Safety (continued)

- Heavy animal-figure swings
- Multiple-occupancy swings (excluding tire swings)
- Rope swings
- Swinging exercise rings and trapeze-bar swings
- Swinging gates
- Giant strides (Maypole).

For added protection:

- Cover or replace exposed concrete footing
- Remove cement landing pads in use zones
- Evaluate older playground equipment for the presence of toxic substances.

3. Ensure that adequate surfacing material exists below each piece of playground equipment. It has been widely documented that almost 70 percent of all playground injuries can be avoided or minimized by providing soft landing materials.

4. Identify any tall equipment that requires a landing surface that exceeds the maximum fall height of the underlying protective surfacing material. Agencies should strongly consider removing any equipment that is deemed unsafe due to height.

5. Adjust playground borders and/or when possible, relocate equipment to accommodate CPSC and ASTM Layout and Spacing Guidelines (use zone requirements).

6. Identify and repair areas of non-compliance on playground equipment by beginning or improving a regular playground-inspection and maintenance program. A major playground-equipment manufacturer study alleges that more than 30 percent of playground accidents are caused by inadequate maintenance practices by operators. Inadequate maintenance inspections and lack of follow-up corrective procedures are common causes of playground accidents. The resulting lack of inspections or poor documentation may be a basis for legal action against a public agency.

7. Conduct a comprehensive playground safety audit of each playground site to determine the adequacy of its compliance with the CPSC handbook and the current ASTM standards. This audit will assist agencies developing playground replacement schedules by identifying and prioritizing serious areas of non-compliance in existing playground equipment and park/playground sites as a whole. The results of the audit will also identify some conditions that are correctable by agency staff as well as those that may be abated by contacting manufacturers.

8. Formalize maintenance policies and procedures.

9. Establish a long-term action plan to upgrade playground sites, and which is reflected in the agency's capital-equipment replacement program, existing staff resources and maintenance/repair budget.

If you would like more information- the [CPSC handbook](#) and the [ASTM standards on playground surfacing](#) can be great resources.

If you are interested in becoming a certified playground safety inspector, visit <https://www.nrpa.org/certification/CPSI/> to obtain more information.

FYI- The MVRMA Advantage in Hard Insurance Markets

By Tom Judy

Membership in a public entity insurance pool provides many advantages including flexible coverage options, the ability to share in the pool's financial successes, and training and loss control services. The foundational reason pools came into being, however, was to provide stable pricing by distancing public entities from the fickleness of the commercial insurance market. The insurance market has a history of volatility characterized by a repeating cycle of "soft markets" with favorable premium rates and "hard markets" with escalating rates. A prolonged hard market was the catalyst for the formation of MVRMA in 1988.

We find ourselves in the midst of another hard insurance market with rapidly increasing rates and lower limits of coverage. Many public entities find themselves paying more for less. In contrast to the commercial insurance market, MVRMA was built to withstand such market conditions.

The primary strategy utilized by MVRMA to insulate its member cities from the commercial insurance market roller coaster is to retain the risk of the first \$500,000 of each liability claim and the first \$250,000 of most property claims. Effectively, MVRMA's liability and property programs are insurance plans with "pool deductibles" of \$500,000 and \$250,000, respectively. Losses within these layers are paid by MVRMA from funds contributed to the pool by its member cities. In MVRMA's 32-year life, approximately 99.7% of the pool's paid claims have fallen below those thresholds. As you can then see, MVRMA self-insures most of its losses and rarely needs the resources of a commercial insurance company to pay a claim. This greatly lessens the impact of commercial insurance premiums upon the pool and protects it from the market's volatility.

Additional insulation between MVRMA's members and the commercial insurance market is achieved by insuring the first layer of liability in excess of the \$500,000 pool retention through Government Entities Mutual (GEM). GEM is a captive insurer providing reinsurance to its 19 member pools. Like MVRMA, GEM retains a significant portion of its risk with funds contributed by the member pools. Effectively a "pool of pools," GEM provides stable pricing throughout the various market cycles.

We cannot predict when the current hard market will end but we can say, with certainty, that MVRMA is well-positioned to provide MVRMA members with a strong "port in the storm" for the duration.

FYI – Changes to MVRMA’s Claims Administration Services

By Tom Judy

MVRMA contracted with Gallagher Bassett Services, effective February 15, 2021, as a third-party administrator of the pool’s claims program. This arrangement is certainly a different model than the in-house claims administration model under which the pool had operated for the previous 26 years. However, a TPA arrangement has a number of advantages over the one-person in-house claims department, including a deep “bench” of experienced claims adjusters and other personnel that ensure continuity of service during the temporary absence or loss of key personnel. We appreciate the members’ patience during the transition and encourage you to contact MVRMA staff if you have any questions.



Centerville Launches ‘Uptown Upgrades’ to Spur Investment

The City of Centerville is proud to announce ‘Uptown Upgrades,’ a grant program with three components to incentivize façade and streetscape improvements and encourage art.

The 2019 Uptown Action Plan recommended creating incentive programs to assist businesses and building owners to make investments in the district. The Uptown Action Plan was created by a stakeholder group of business owners, neighbors and community leaders. The six goal areas of the plan include improving walkability and reducing traffic congestion, improving parking, scheduling and organizing new events, focusing on business development, developing branding and increasing greenspace.

“These programs were created to help building owners in Uptown and to show the city’s commitment to enhancing this important area in the community. Uptown is vibrant and unique, and we are invested in helping realize the vision for this important district,” Development Director Michael Norton-Smith said.

Uptown Upgrades is comprised of three components:

Historic Façade Improvement Grants

Uptown Historic Façade Improvement Grants are designed to encourage building and business owners in the City’s Architectural Preservation District (APD) to invest in façade improvements and exterior building upgrades that address code enforcement violations.

Member Spotlight...Continued

The program aims to alleviate conditions that could negatively impact public health and safety. In addition, these targeted investments will prevent the spread of blighting influences to adjacent properties throughout the district.

The grants will be supported by \$75,000 of Community Development Block Grant (CDBG) funds provided by Montgomery County. Grants provide a 1:1 match for eligible costs up to \$15,000 per building.

Examples of eligible projects include reconstructing deteriorated façades, replacing structurally compromised decks and porches and addressing peeling paint.

Applications will be evaluated by the Centerville Community Improvement Corporation (CCIC) on a first-come, first-serve basis and projects must be reviewed by Montgomery County prior to the CCIC issuing a funding recommendation.

The CCIC will use \$50,000 of its funds to initiate the Uptown Streetscape Funds. Improvement grants will be provided through forgivable loans, matched 1:1 up to \$10,000 per building.

Examples of eligible projects include construction of outdoor patios, activated spaces, and landscaping, building modifications to accommodate new businesses and signage. Whereas the Historic Façade Improvement Grants is limited to buildings in the APD, the Uptown Streetscape Funds will have a larger footprint within the boundaries of Uptown Centerville.

The CCIC will accept and review applications and award funds on a first-come, first-served basis. Priority will be given to applicants based upon total investment, impact on the Uptown district and overall community and alignment with the Uptown Action Plan.

Centerpieces Mural Program

Centerpieces is a mural program designed to encourage high-quality visual art in Uptown by creating opportunities for murals that enhance the district's visual appeal. The proposed mural program will be a partnership between the Centerville Arts Commission and the CCIC.

Once a mural location is identified, the city will seek artists' designs for consideration. Designs would be reviewed and scored by a committee made up of representatives from the Arts Commission, CCIC and community stakeholders. Once mural designs are chosen, the CCIC and Arts Commission will work to select and contract with a lead artist and team.

Funding for the murals will be dependent upon size and complexity.

"Uptown Upgrades showcases the city's eagerness to innovate and find new solutions to make Centerville an even better place to live. I hope many small businesses and artists will consider applying," Deputy Mayor and CCIC Chair JoAnne Rau said.

Applications for each of the Uptown Upgrades programs are available at centervilleohio.gov/uptown.



Broker's Beat

What You Need to Know Before, During and After a Deadly Weapon Event— Especially in 2021

By Suzanne Rhulen Loughlin, Co-Founder and General Counsel, CrisisRisk Strategies

Over the decades, there have been high profile shootings that have garnered the public's attention. Most recently, the Spa shootings in Atlanta and the King Soopers shootings in Boulder. Many others preceded these events-- Virginia Tech, Sandy Hook, Parkland, Aurora Movie Theater, Las Vegas MGM, to name a few, and more will surely follow.

While the media and the public often focus on mass shootings due to their sensational nature, there are deadly weapon events that occur every day in US businesses, schools, governmental organizations, houses of worship and mass gathering venues. In fact, shootings are becoming much more frequent and deadly.

In an average year, there are roughly 65,000 gun-related incidents. That's one incident every ten minutes. Every year there are over two million reported incidents of workplace violence and a similar number of reported incidents of bullying in our schools. Many more incidents go unreported, with numbers estimated to be as high as another 40%. On average, there is more than one mass shooting per day in the United States, which is defined by the FBI as a shooting involving 4 or more victims. In 2020, the most violent year in history, there were more than 600 mass shootings—that's 50% more than any prior year.

2020 was unprecedented in many ways, and there are 'stressors' that carry over into 2021. The death toll from Covid-19 had reached over a half million. Economic shut-downs led to financial hardship and greatly increased unemployment. The results of the election caused deep division and political polarization. 2020 saw the greatest number of Americans buying firearms. Domestic related homicides almost doubled in some cities. There was deep division over racial and financial inequality, with increasing levels of frustration. Calls were made to defund the police throughout our nation. Concern rose over extremism and the threat posed by armed extremist groups—concerns which materialized in January 2021 with the insurrection at the Capitol.

Broker's Beat...Continued

All of these 'stressors' have taken a tremendous toll on the emotional wellbeing of people in our society and will play a role in the trajectory of the life of a perpetrator of a deadly weapon event in the months and years to come. It has also resulted in an overall lowering of society's resistance to violence. This is a bad thing.

The threat of violence is increasing, and the risk landscape is becoming more volatile. There has been so much loss, and people have greater needs than ever before—emotional, mental health, financial. Violence is a human-induced threat which requires human solutions in response. Security features, while important, won't prevent a shooting- especially by someone who is entitled to be in your workplace. What will matter is recognizing a person in need of help—before they want to bring the gun to work. What will matter is recognizing high-risk behavior that indicates someone may be on a path to violence and reporting it.

How do we accomplish this? By implementing a Violence Protection Program that not only makes everyone aware of unacceptable behavior related to weapons, hostile workplace, and bullying, but also educates people on behavioral warning signs. Set up an anonymous vehicle through which your employees can report what they see and hear, and train them to overcome their concerns about 'snitching', which can be the greatest barrier to getting people to report. After receiving reports, employers must act. Intervene. Investigate. Bring forth resources to help, or where appropriate, discipline. Behaviors of concern, if recognized, have great value. They afford the opportunity to care for another in a way that can change the trajectory of events.

Recognizing that not every event can be prevented, Critical Incident Response Training is also a vital component of your violence protection program. Stakeholders should be drilled on how to respond if a deadly weapon is brought into your facility. In addition, leadership should be trained on the decisions, actions and words that will be needed in the aftermath of a deadly weapon event. How leadership responds will determine whether the consequences of the event become defining for your organization.

2020 was a challenging year, and 2021 is not shaping up to be any better. While there is light at the end of the tunnel for the pandemic, its human impacts will carry on long into the future. Don't let your guard down. Now is the time to check in with all of your people- those on site and those working remotely- and monitor their well-being. Now is the time to really focus on enhancing your Violence Protection Program.

Calendar of Events

Upcoming Training Events

Due to COVID-19, in-person training events have been temporarily suspended. Visit www.mvrma.com for a list of on-line training opportunities.

Upcoming Board Events

Committee Meetings Via Zoom Meeting

Risk Management - May 27th, 10:00 AM

Finance - May 27th, 1:30 PM

Personnel & Compensation - June 1st, 10:00 AM

Board Meeting

June 21st, 9:30 AM **Via Zoom Meeting**

From The Board Room

March 15, 2021

- Approved Revised Claims Reporting Policy
- Approved Revised Claims Reporting Procedure
- Approved Revised Claims Management Policy
- Approved Revised Litigation Management Policy
- Approved Revised Coverage Dispute Procedure
- Approved Revised Subrogation Policy
- Approved Revised Auditing Policy
- Approved ProudCity Website Design and Maintenance Agreement
- Approved Gallagher Bassett Third Party Claims Administration Agreement
- Approved DXC Data Extraction Agreement