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Civil Liability for Use of Deadly Force – Part Two
Qualified Immunity and Inadequate Training

Contents

1. Introduction.

In the first article in this series, the general legal guidelines for civil liability for the use of deadly force by law enforcement officers were examined, and a number of links were presented to some useful resources. In this article, topics to be examined include the defense of qualified immunity as applied to the use of deadly force (including discussion of a U.S. Supreme Court case addressing that issue), and claims for inadequate training and supervision in the use of deadly force. A third article in this series will focus on the issue of whether a violation of departmental policy may be a basis for civil liability, liability for supervisory personnel, and civil liability for negligent or accidental use of deadly force under state law.

This series does not discuss cases in which the use of certain tactics in the context of pursuit driving or use of police dogs cause or threaten death, as those questions have been covered in other articles in this publication. It also does not address issues concerning the measure of damages to be awarded once liability is found.

2. Qualified Immunity as a Defense

One of the most important defenses available to individual defendants in federal civil rights lawsuits is that of qualified immunity. Qualified immunity is what is known as an "affirmative" defense, which means that it must be raised by a defendant, or else it is lost.

The essence of the concept is that, because police officers are often called upon to make difficult decisions, sometimes with only split seconds to respond, they ought not face civil liability or the burden of the litigation process, including discovery and trial, in circumstances where they have not acted in violation of clearly established law.

Because the immunity involved offers the officer relief not just from civil liability, but also from the burdens of litigation, a trial court's denial of a defendant officer's motion for qualified immunity is, with some exceptions, subject to immediate appeal. See Anderson v. Creighton, #85-1520, 483 U.S. 635 (1987) and Mitchell v. Forsyth, #84-335, 472 U.S. 511 (1985)

In circumstances where the defense of qualified immunity is upheld, an officer will not be found liable, even if their conduct, such as the use of deadly force, actually could be said to have violated the plaintiff's federal civil rights, so long as an objectively reasonable officer could have believed, under the circumstances, that the conduct was lawful.

A U.S. Supreme Court decision, Brosseau v. Haugen, No. 03-1261, 543 U.S. 194 (2004), illustrates the application of this principle in the context of the use of deadly force, and ruled that an officer who shot a fleeing felon motorist in the back was entitled to qualified immunity, when prior case law did not clearly establish that her conduct violated his Fourth Amendment rights.

In this case, an officer learned that a man was wanted on a felony no-bail warrant for drugs and other offenses, and heard a report of a "ruckus" at his mother's house. The suspect attempted to flee in a vehicle, getting into a Jeep and trying to start it. The officer ran to the Jeep with her handgun drawn and ordered him to stop. As the suspect fumbled with his keys, she hit the driver's side window several times with her handgun and, on the third or fourth try, broke the window. She had mace and a baton, but allegedly did not use them, instead trying to grab the car keys.

Just after she broke the window, the suspect succeeded in starting the Jeep. Either before he pulled away, or just after he started to do so (the evidence being conflicting), the officer shot him in the back. Because he did not stop, the officer believed she had missed him, but she did not take a second shot, believing the risk to be too great as he began to drive away and others being in the potential line of fire. The driver subsequently pulled over and passed out.

A federal appeals court ruled that the officer who shot the suspect did not act reasonably if there was no evidence that he posed a threat of serious harm to others or was armed with a weapon, overturning a grant of qualified immunity to the officer by the trial court. Haugen v. Brosseau, #01-35954, 339 F.3d 857 (9th Cir. 2003).

The U.S. Supreme Court disagreed, and ruled that the officer was, indeed, entitled to qualified immunity.

> Qualified immunity shields an officer from suit when she makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances she confronted. Because the focus is on whether the officer had fair notice that her conduct was unlawful, reasonableness is judged against the backdrop of the law at the time of the conduct. If the law at that time did not clearly establish that the officer's conduct would violate the Constitution, the officer should not be subject to liability or, indeed, even the burdens of litigation.

The Supreme Court noted that the parties had pointed to only a "handful of cases" relevant to the issue of whether shooting a disturbed felon, set on avoiding capture through vehicular flight, when persons in the immediate area are at risk from that flight was reasonable.

In two of the cases, the courts found no Fourth Amendment violation when an officer shot a fleeing suspect who presented a risk to others, including on the basis of the possibility that a speeding vehicle being used to flee could endanger others or that the suspect had proven that they would do almost anything to avoid capture. In a third case, the court found summary judgment inappropriate on a Fourth Amendment claim involving a fleeing suspect, ruling that the threat created by the fleeing suspect's failure to brake when an officer suddenly stepped in front of his just-started car was not a sufficiently grave threat to justify the use of deadly force.

The Court found that these three cases taken together "undoubtedly show that this area is one in which the result depends very much on the facts of each case," and that none of them "squarely governs the case here," while suggesting that the officer's actions fell in the "hazy border" between excessive and acceptable force.

Since it was not "clearly established" that the officer's conduct violated the Fourth Amendment, she was entitled to qualified immunity.

The Court in Brosseau was applying the method for determining qualified immunity previously established in Saucier v. Katz, No. 99-1977, 533 U.S. 194 (2001).

Under that method, a trial court should first inquire, in response to a motion for qualified immunity, whether a constitutional right would have been violated on the facts alleged by the plaintiff, because if no right would have been violated, there is then no need for any further inquiry. Secondly, if a violation could be made out, based on the facts alleged, the court must then determine whether the right involved was clearly established.

The most important ruling in Saucier is that this second inquiry must be made in light of the case's specific facts and context, not as a "broad general" proposition. The Court in Brosseau, in applying this approach, therefore, focused its inquiry not on whether there was a broad general right clearly established not to be subjected to unreasonable use of deadly force, which, of course, there is, but whether it would be clear to a reasonable officer, in the specific circumstances confronted, that her conduct was unlawful in the those circumstances.

When there is clear and well-established law indicating that the officer's actions in using deadly force would not be justified under the alleged circumstances, the motion for qualified immunity will be denied. See Lehman v. Robinson, No. 05-15636, 2007 U.S. App. Lexis 8978 (9th Cir.), holding that officers were not entitled to qualified immunity for shooting and killing a man sitting in his car with the tires shot out when they allegedly knew he had no gun, was only in possession of a pocket knife, was not suspected of any crime, and when the purpose of trying to get him out of his vehicle was to talk him out of possibly killing himself. Under these alleged circumstances, no use of deadly force would be justified, particularly when he was surrounded by a number of police vehicles and at least ten armed police officers.

Another such case is Adams v. Speers, No. 05-15159, 2007 U.S. App. Lexis 442 (9th Cir.), in which the court held that a California highway patrol officer was not entitled to qualified immunity in a lawsuit claiming that he shot and killed a teenage driver at the conclusion of a pursuit without warning and without reason to believe that he needed to do so to defend himself or others at that time.

The flip side of that, of course, is that if, on the facts alleged, it is clear that the officer's use of deadly force was justified, qualified immunity will be granted. See Robinson v. Arrugueta, No. 04-10856, 415 F.3d 1252 (11th Cir. 2005), finding that an officer was entitled to qualified immunity for shooting and killing a suspect in a drug transaction investigation who was slowly moving a vehicle towards him, which threatened to crush him into another car.

In circumstances where the officer or officers who used deadly force seek qualified immunity, but there is a genuine issue of disputed material fact essential to the determination of whether there is or is not a constitutional violation, a federal appeals court will often rule that it cannot determine whether or not the officers were entitled to qualified immunity until the disputed factual issue is first decided.

The case of Green v. Taylor, No. 06-3583, 2007 U.S. App. Lexis 21593 (6th Cir.) illustrates this. In that case, the court stated that if a vehicle had come to a stop with the engine running, and suspects in the car had their hands in the air or on the steering wheel when officers approached, then an officer who shot and

killed a 16-year-old in the vehicle would not have acted reasonably. If, on the other hand, as the officer claimed, the car was backing up, and threatened the safety of the officers or others, the result could be different. Genuine issues of disputed material fact, therefore, barred qualified immunity for the officers.

See also Johnson v. Board of Police Commissioners, No. 4:06CV605, 2007 U.S. Dist. Lexis 40292 (E.D. Mo.), in which the court found that if the plaintiff's version of events were believed, officers who allegedly pursued him without identifying themselves as police, shot him, beat him, and then shot him again were not entitled to qualified immunity, because the beating and shooting of a person who was already shot and was incapacitated, under these circumstances, would violate clearly established law. The officers, on the other hand, claimed that they had identified themselves as police and only shot him after he had shot at them a number of times, as well as denying that they beat him. Accordingly, further proceedings were required to resolve the factual dispute.

In Finks v. City of North Las Vegas, No. 04-15806, 135 Fed. Appx. 976 (9th Circ. 2005), factual issues concerning whether or not a man was holding a toy gun or otherwise threatening an officer before the officer shot and killed him barred granting summary judgment on the basis of qualified immunity to the officer in the surviving family's federal civil rights lawsuit.

The defense of qualified immunity is granted or withheld not on the basis of hindsight, but on the basis of what the police officer reasonably believed at the time of the shooting, given what they knew and perceived then. See Bouggess v. Mattingly, No. Civ. A. 3:04CV-180, 426 F. Supp. 2d 601 (W.D.Ky. 2006), ruling, in a lawsuit over the fatal shooting of a suspect by an undercover officer, that the officer was not entitled to qualified immunity because of issues of fact as to whether, at the time of the shooting, he reasonably believed that the suspect was armed and would try to shoot him. The issue was not whether or not the suspect was actually armed, but what the officer reasonably believed.

Further illustrating this principle is Blanford v. Sacramento County, No. 03-17146, 406 F.3d 1110 (9th Cir. 2005), in which deputies who shot a sword-carrying schizophrenic man, rendering him paraplegic, after he appeared to be ignoring their orders to drop the weapon and attempted to enter a house, were entitled to qualified immunity. They did not then know that he could not hear their orders, or that he was attempting to enter his own home.

See also Webster v. Beary, No. 06-12194, 2007 U.S. App. Lexis 8142 (11th Cir.), in which the court found that deputies reasonably believed, at the time they shot at a car attempting to escape them by going in reverse, that a deputy behind

the car was in serious danger of harm, so that they were entitled to qualified immunity.

The fact that officers may be mistaken in considering a particular individual to be a threat to themselves or others will not bar qualified immunity as a defense, provided that the mistake is reasonable under the circumstances.

In Flynn v. Mills, No. 1:03-CV-00515, 361 F. Supp. 2d 866 (S.D. Ind. 2005), police officers were found to be entitled to qualified immunity for mistakenly shooting a witness to a shooting who was crawling towards other officers with a gun in hand. Under the circumstances, a reasonable officer could have believed that the witness was the shooter and that they had problem cause to arrest him and use deadly force against him.

3. Inadequate Training and Supervision in the Use of Deadly Force

One important issue for municipalities and supervisory personnel is the question of whether, and under what circumstances, liability may be imposed on them for officers' alleged excessive use of deadly force, based on claims of inadequate training.

The general rules of imposition of civil liability for inadequate police training were established in City of Canton v. Haris, #86-1088, 489 U.S. 378 (1989), a case not involving the use of deadly force, but whose reasoning has been applied in deadly force cases. In that case, the U.S. Supreme Court held that the inadequacy of police training may serve as the basis for civil rights liability under 42 U.S.C. Sec. 1983 only where the failure to train in a relevant respect amounts to deliberate indifference to the constitutional rights of persons with whom the police come into contact.

Further, while a municipality is not liable under Sec. 1983 unless a municipal "policy" or "custom" is the "moving force" behind the constitutional violation, pursuant to Monell v. New York City Dept. of Social Services, #75-1914, 436 U.S. 658 (1978), the Court found that liability for "deliberate indifference" in training was consistent with that principal. The failure to train can only properly be thought of as an actionable city "policy," the Court commented, where that failure reflects a "deliberate" or "conscious" choice by the municipality. The focus in the courts, therefore, is on whether the program of training provided is adequate for the tasks that the particular employees must perform, and, if it is not, on whether that inadequate training can justifiably be deemed to represent city "policy."

Further, the identified deficiency in the training provided must be "closely related" to the injury ultimately suffered. What this means is that there is no liability for inadequate training standing alone—a causal relationship must be shown between the inadequate training and the officers' alleged violations of constitutional rights. Courts have subsequently had no difficult reasoning, therefore, based on the principles enunciated in Canton, that there can be no liability for inadequate training by a municipality if there was no underlying rights violation by the officers to begin with. Accordingly, a finding in favor of the officers on liability on the basis that their use of deadly force, for example, did not violate the Fourth Amendment, should also result in a ruling in favor of the municipality on the inadequate training claim.

Those principles are also illustrated by City of Oklahoma City v. Tuttle, #83-1919, 471 U.S. 808 (1985), a U.S. Supreme Court case involving claims of inadequate training on the use of deadly force which predated Canton. In that lawsuit over a police shooting, the Court found that the fact that the plaintiff had introduced evidence of inadequate training made no difference because an "affirmative link" must be shown between the municipality's policy and the particular constitutional violation alleged.

In that case, an officer shot and killed a woman's husband outside a bar where a robbery had been reported in progress. She brought a federal civil rights lawsuit against both the officer and the city. On the potential liability of the city, the trial court told the jury that it could be held liable only if a municipal policy had caused the alleged rights violation, but further instructed them that they could "infer" from a "single, unusually excessive amount of force" that it was attributable to inadequate training or supervision amounting to "deliberate indifference" or "gross negligence" on the part of the officials in charge. Following that, the jury returned a verdict in favor of the officer, but against the city, awarding the plaintiff damages against the city alone. The U.S. Supreme Court overturned this result, rejecting the concept that there could be municipal liability without any such affirmative link between any action by a municipal policymaker and the alleged rights violation. A single act of alleged excessive use of force by an officer could not be utilized to establish the existence of a purported policy of inadequate training.

In Zuchel v. City of Denver, #91-1379, 997 F.2d 730 (10th Cir. 1993), a federal appeals court upheld a jury verdict against the Denver police for inadequate deadly force training. The plaintiffs sued the municipality and the officer who shot and killed a man while investigating a street incident. The lawsuit claimed that the failure to adequately train the municipality's police officers was deliberate indifference to the constitutional rights of citizens and was a direct cause of the shooting.

The officer was denied qualified immunity. The plaintiffs subsequently settled their claims against the officer, and the case went to trial only on the claim for inadequate training against the city. The jury awarded the plaintiffs $330,000 on that claim, and the trial judge refused to set that award aside. An award of attorneys' fees to the plaintiff also was made by the trial court.

The decedent had created a disturbance at a fast food restaurant, and the manager called the police. When the officers arrived, they were told that the man had gone around the corner, and the officers went looking for him. The man had, in the meantime, become involved in a "heated exchange" with four teenagers on bicycles. When the officers approached him and the teenagers, one of the teenagers shouted that the man had a knife. As the officers walked toward him, and he turned toward them, one of the officers shouted at him, and then shot him four times, killing him. A pair of fingernail clippers was found near the decedent's body. Evidence in the case, including medical evidence, indicated that the decedent, when shot, was not approaching the officer with his arm extended out towards the officer in a threatening manner, but instead his arm was directly across his chest when he was shot in the chest while facing the officer.

Upholding these results, the appeals court applied the theory of municipal liability established in Canton. It found that the plaintiffs, as representatives of the decedent's estate, in order to recover damages from the municipality, had to establish that the officer's use of deadly force was unconstitutional, that the record contained evidence tending to show that the circumstances giving rise to the shooting represented a "usual and recurring situation" with which police officers were required to deal, that the police training program on the use of deadly force was inadequate, and that the inadequacy in the training was directly linked to the officer's unconstitutional use of excessive force.

The appeals court found that there was sufficient evidence from which the jury could reasonably determine that the plaintiffs had shown all of this—particularly that the municipality failed to provide adequate training as to when to shoot and when not to shoot, including failure to implement recommended periodic live range training on "shoot-don't shoot."

Some other cases of interest on inadequate training claims in the context of use of deadly force include:

- Gammon v. Blakeley, #72175, 1997 Ohio App. Lexis 5424 (Ohio App. 1997), dismissing a claim of failing to properly train and monitor a SWAT team that shot an armed man, in a case where the court found that the underlying use of force by the officers was justified.
- Rodriguez v. Quintero, Civil Action No. SA-06-CA-64-FB, 2007 U.S. Dist. Lexis 25296 (W.D. Tex.). In this case, two persons shot by a deputy when

their pickup truck started to drive away from a traffic stop as the deputy approached were found to have adequately alleged that the county sheriff, in training programs, did not clearly define the circumstances under which deadly force could be used, and that, if any such guidelines existed, the sheriff had violated them. A relationship between the sheriff's actions and the incident was also alleged. Official capacity claims against the sheriff, however, were dismissed, as the county, which was the proper defendant, was named in the complaint.

- Thao v. City of St. Paul, No. 06-2339, 2007 U.S. App. Lexis 7553 (8th Cir.), in which the state of paranoid schizophrenic shot and killed by police who came to his house in response to a 911 call from his family requesting assistance failed to show that more adequate training as to how to respond to incidents involving mentally disturbed persons would have resulted in a different outcome. The court found that the officers did not create the dangerous situation.
- Whitfield v. Melendez-Rivera, No. 04-1217, 431 F.3d 1 (1st Cir. 2005), in which officers were found to have been properly held liable for shooting man in the leg while he fled from the scene of an arson at a garage, when jury rejected their claim of self-defense, but the federal appeals court overturned jury awards against city, mayor, and police commissioner, finding no evidence of inadequate training or discipline.
- Young v. City of Providence, #04-1334, 404 F.3d 4 (1st Cir. 2005), in which the court found that a city could be liable for on-duty officer's mistaken shooting and killing of an off-duty officer also responding to a disturbance at a restaurant while out of uniform. The court found sufficient evidence to send to a jury the question of whether the city was deliberately indifferent to the risk of "friendly fire" incidents by failing to provide adequate training on identification of off-duty officers, in light of the risks of its "always armed/always on-duty" policy.
- Estate of Davis v. City of North Richland Hills, No. 406 F.3d 375 (5th Cir. 2005), in which the court ruled that nothing showed that a police chief and SWAT team leader made a deliberate choice to inadequately train an officer in a manner which caused his alleged deprivation of the rights of a man he shot and killed inside a home within two seconds of entry, despite the fact that it was claimed that the decedent was unarmed.
- Roberts v. Shreveport, No. 03-30824, 397 F.3d 287 (5th Cir. 2005), in which the court found that qualified immunity for an off-duty officer working as a crossing guard who shot and killed a motorist did not, by itself, bar a claim against a police chief for alleged inadequate training, but plaintiffs failed to produce sufficient evidence to prove that the training provided was, in fact, inadequate.

- Whitfield v. Municipality of Fajardo, 279 F. Supp. 2d 115 (D. Puerto Rico 2003), in which the court found that genuine factual issues as to whether mayor and police commissioner adopted proper regulations regarding the use of firearms and whether officers were properly trained on those regulations barred summary judgment on a lawsuit against them by an arrestee who was shot twice while running away while allegedly unarmed.
- Brown v. Gray, No. 99-1134, 227 F.3d 1278 (10th Cir. 2000), in which a city was held liable for $400,000 to a motorist shot by an off-duty Colorado officer; when the department allegedly adopted a policy requiring officers to always be on duty and always be armed, but provided no training on how to handle police response when off-duty, and without police vehicle, uniform, or radio.
- Jones v. City of St. Louis, No. 4:98 CV 2158, 92 F. Supp. 2d 949 (E.D. Mo. 2000), in which the court ruled that a city could not be held liable for an alleged failure to adequately train officers in the use of deadly force when there was no showing that officers did anything wrong in firing at men who had fired at them and then attempted to run away.
- Pena v. Leombruni, No. 99-1435, 200 F.3d 1031 (7th Cir. 1999), finding that a deputy properly used deadly force against a man advancing on him with a piece of concrete in his hand, and that the sheriff's alleged failure to train deputies in the use of deadly force against "crazy" people was no basis for liability when general policy on use of deadly force was correct and there was no showing of a prior problem in this area.

The topic of injuries to police officers during training is extensively discussed in two earlier Monthly Law Journal articles: Legal Aspects of Training Injuries -- Part One, 2007 (8) AELE Mo. L. J. 201 and Legal Aspects of Training Injuries -- Part Two, 2007 (9) AELE Mo. L. J. 201.

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