AELE Monthly Law Journal

ISSN 1935-0007
Cite as: **2007 (11) AELE Mo. L. J. 101**
Civil Liability Law Section – November, 2007

Civil Liability for Use of Deadly Force – Part One
General Principles and Objective Reasonableness

Contents

1. Introduction.

There are circumstances under which law enforcement officers use force—including deadly force—to prevent the escape of dangerous suspects or to defend themselves or others against an apparent imminent risk of death or serious bodily harm. Because the use of deadly force, by its very nature, usually results in serious injuries, and often results in death, it is hardly remarkable that such use often results in the filing of lawsuits seeking substantial money damages.

The U.S. Supreme Court has set forth some important legal guidelines both for the use of deadly force itself, and for the inquiries which must be conducted before such use results in civil liability in a federal civil rights claim. In the first article in this series, the Court's decisions on these subjects are examined, followed by a discussion of some cases by lower courts applying these guidelines and principles in the context of federal constitutional claims for use of deadly force against apparently armed or dangerous suspects. At the conclusion of this article, a number of links are presented to some useful resources.

In the next article in this series, 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), claims for inadequate training and supervision in the use of deadly force, the issue of whether a violation of departmental policy may be a basis for civil liability, 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. Two Important U.S. Supreme Court Cases

Any discussion of civil liability for the use of deadly force must begin with an examination of two important U.S. Supreme Court cases.

In Tennessee v. Garner, No. 83-1035, 471 U.S. 1 (1985), the Court addressed the constitutionality of a Tennessee state statute that provided that a police officer could use deadly force ("all necessary force") to stop a felony suspect who attempts to flee or forcibly resists. Upon the authority of this statute, a police officer shot and killed a teenager who, after being ordered to halt, fled over a fence at night in the backyard of a house he was suspected of burglarizing. In this case, the officer was "reasonably sure" that the suspect was not armed. The suspect turned out to be a 15-year-old eighth grader, who was 5'4" tall and weighed around 100 or 110 pounds. A purse and ten dollars was missing from the burglarized house, along with a ring.

The Court found that the statute was unconstitutional insofar as it authorized the use of deadly force against an apparently unarmed, non-dangerous fleeing suspect. Such force, the Court stated, may not be used unless it is necessary to prevent an escape and the officer has probable cause to believe that the suspect sought poses a significant threat of death or serious physical injury to either the officer or to other people.

Stopping a criminal suspect by the use of deadly force, the Court reasoned, is a "seizure" subject to the Fourth Amendment's reasonableness requirement. A determination of whether that seizure is reasonable must be based on a balancing of the government's interest in effective law enforcement against the amount of intrusion on a suspect's rights.

The fact that an officer has probable cause to make an arrest—and therefore to use some amount of force to stop and seize the suspect, is not enough, standing alone, to allow the officer to do so by killing him or her. Using deadly force to prevent the escape of all felony suspects, no matter what the factual circumstances of the case are, is unconstitutional, according to the Court.

At common law, the Court noted, any force necessary could be used to arrest a fleeing felon. A change in the rules concerning deadly force was justified, the Court believed, by other changes in criminal law, and the legal and technological "context." At common law, for instance, felonies were capital crimes, but few felonies are now capital crimes. Additionally, many crimes that were previously classified as misdemeanors may now be classified as felonies. Accordingly, a literal application of the rule allowing the shooting of any fleeing felon would "distort" the rule "almost beyond recognition.

The Court also noted that the common law rule was developed at an earlier time when weapons were "rudimentary." The Court further pointed to rules adopted by various states and by police departments themselves which were increasingly moving away from the common law rule.

The Court believed that holding the use of deadly force against an unarmed fleeing felon unconstitutional would not severely hamper effective law enforcement. The decision acknowledges that burglary, such as the crime the suspect was accused of, is a serious crime, but found that the officer in the case could not have reasonably believed that the decedent, who was young, slight, and unarmed, posed any threat. The mere fact that the unarmed suspect had broken into a dwelling at night did not automatically show that he was dangerous, according to the opinion.

The Court believed that "it is not better that all felony suspects die than that they escape. Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so."

On the other hand, when an officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, the Court stated, it is not unreasonable to prevent his escape by using deadly force.

"Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given."

Note that the Court states that a warning should be given before firing "where feasible." The standard established by this decision does <u>not</u> require that a warning must necessarily be given in each instance before the use of deadly force is constitutionally permissible.

The guidelines adopted by the U.S. Supreme Court in Garner must be adhered to by state and local law enforcement agencies and personnel as a minimal standard. States and local departments, of course, are free to adopt further restrictions and additional factors that officers should or must take into consideration before firing, and some have. "What's Your Use-of-Deadly-Force Standard?" by Michael A. Brave, and John G. Peters is a good discussion of a variety of these standards.

The Fourth Amendment protects persons against "unreasonable searches and seizures." The use of deadly force against a suspect is clearly a "seizure." When is the use of force, whether deadly or not, excessive rather than reasonable?

In Graham v. Conner, #87-6571, 490 U.S. 386 (1989), the U.S. Supreme Court held that all claims that law enforcement officials have used excessive force - deadly or not - in the course of an arrest, investigatory stop, or other "seizure" of a free person are properly analyzed under the Fourth Amendment's "objective reasonableness" standard. The right to make an arrest or investigatory stop, the Court stated, necessarily carries with it "the right to use some degree of physical coercion or threat thereof to effect it." All the law requires is that it be a reasonable amount of force.

Such reasonableness, however, has to be judged in light of the facts and circumstances confronting the officer, rather than on the basis of their underlying "motivation" or intent. The issue is whether the officer acted in an "objectively reasonable" manner based on what they knew at the time. The reasonableness of each particular use of force has to be judged, the Court stated, from the perspective of a reasonable officer on the scene, and must make an allowance for the fact that police officers often have to make "split second" decisions about the amount of force that is necessary.

This must be based on the facts that the officer knows at that time, or reasonably believes that he or she knows, rather than looking back at the circumstances with hindsight or on the basis of information later discovered but not then known. An officer may, therefore, act upon what he reasonably believes or perceives is a threat of death or serious bodily harm to himself or others, and the fact that he may, for example, be mistaken in believing that a suspect confronting him is armed, will not alter the legitimacy of his use of deadly force.

Garner and Graham are required reading for those interested in understanding the framework for federal civil rights liability for use of deadly force.

3. Apparently Armed or Dangerous Suspects

The U.S. Supreme Court cases discussed above approve the use of deadly force against armed or dangerous suspects, who pose a risk of death or serious bodily injury to an officer, their crime victims, or other members of the public. Officers are not, of course, required to use deadly force in such circumstances, and may, when appropriate, use less lethal alternatives to attempt to subdue such suspects. (A three-article series previously published in this periodical discusses the use of Tasers and other Electronic Control Devices in that context).

Few of us would be surprised, or to find it at all remarkable that officers who are being directly threatened by an armed suspect (whether armed with a firearm or with some other dangerous weapon, such as a knife, axe, or sword) may use deadly force in defense of themselves, fellow officers, and members of the public. A case which illustrates this principle include Hayek v. City of St. Paul, No. 06-3802, 488 F.3d 1049 (8th Cir. 2007), in which police officers were found to have acted properly in shooting and killing an allegedly emotionally disturbed 19-year-old, 300 pound man, 6'7" tall, who was attacking an officer with a sword. The decedent had allegedly continued to stab the officer despite being struck by initial shots, saying "ow," but otherwise continuing his assault.

Other cases illustrating the same principle are Hassan v. City of Minneapolis, No. 06-3504, 489 F.3d 914 (8th Cir. 2007) (officers acted reasonably in shooting and killing a man who approached them in a threatening manner while brandishing a machete and tire iron); Livermore v. Lubelan, No. 06-1465, 476 F.3d 397 (6th Cir. 2007) (officer acted reasonably in shooting and killing a suspect who was armed and whom he believed was pointing his gun at another officer); and Buchanan v. State of Maine, No. 06-1466, 469 F.3d 158 (1st Cir. 2006) (officers did not use excessive force in shooting and killing a mentally ill man when they only did so after he had repeatedly stabbed one of the two officers present).

A suspect need not, however, be in possession of a gun, knife, axe, or sword, etc. In some instances, their conduct may constitute a threat to the officers or others utilizing such ordinary instrumentalities as a car, a heavy object, etc., which are not ordinarily "weapons" but which can be used in a manner making them deadly. See Williams v. City of Grosse Pointe Park, No. 05-2409, 496 F.3d 482 (6th Cir. 2007), in which the court found that a police sergeant acted objectively reasonably in firing at a stolen car, striking the driver in the back of the neck and leaving him paralyzed. The car had been reported stolen, was being driven by a minor, and who had evaded attempts to block the vehicle, going into reverse to collide with an officer's cruiser. When the sergeant pointed his gun at the driver's head, he was knocked down by the vehicle, prior to shooting several rounds. No jury, the court concluded, could reasonably find the use of deadly force

unreasonable, based on the driver's decision to flee and the immediate threat of harm the driver posed to the sergeant, pedestrians, and other drivers.

This point is also illustrated by Jenkins v. Bartlett, No. 06-2495, 487 F.3d 482 (7th Cir. 2007) (officer did not use excessive force in shooting and killing a motorist who fled a traffic stop, entered another vehicle, and hit the officer with the car); Sanders v. City of Minneapolis, Minn., No. 06-1356, 474 F.3d 523 (8th Cir. 2007) (officer acted properly in shooting a man who backed his car into a security guard's vehicle, ignored orders to show his hands, and accelerated down an alley towards other police officers in his path); and Gaxiola v. City of Richmond Police Department, No. 03-16871, 131 Fed. Appx. 508 (9th Cir. 2005) (officers acted objectively reasonably in shooting and killing a man they were in the process of arresting for a drug offense when he used his car as a weapon, knocking one officer backwards, and there was a threat that he would then run over the fallen officer).

In some instances, the suspect may not even be in actual possession of a weapon or other dangerous instrumentality, but instead simply be engaged in apparently threatening conduct, combined with the potential to obtain such a weapon. In Henning v. O'Leary, No. 06-2378, 477 F.3d 492 (7th Cir. 2007), the court found that officers acted reasonably in shooting and killing an arrestee who had refused to submit to their attempts to handcuff him, when they believed that he had his hands on or near one officer's gun, which had come loose during the struggle between them. Officers are not required to wait to take action to protect their safety until a resisting arrestee has completely freed himself and has obtained a "firm grip" on a weapon, the court commented.

Cases illustrating that same principle include Blossom v. Yarbrough, No. 03-5146, 429 F.3d 963 (10th Cir. 2005) (police officer's use of deadly force was reasonable when a suspect refused to comply with his requests and continued to move towards the officer, reaching for the officer's gun); Webster v. Beary, No. 06-12194, 228 Fed. Appx. 844 (11th Cir. 2007) (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); and Butler v. City of Tulsa, No. 06-5078, 211 Fed. Appx. 667 (10th Cir. 2006) (officer acted objectively reasonably in shooting a man at the scene of a domestic disturbance who failed to drop the knife he was holding until the officer's third order to do so, and then ran towards him, attempting to escape through a poorly lit area outside the residence. Under the circumstances, in which the man had threatened to kill his wife, and the elapsed time between him dropping the knife and running towards the officer was approximately two seconds, the officer could believe that the man was a threat to the safety of the officer and the wife).

Civil liability for use of deadly force is based on an objective reasonableness standard. It is based on what the officers reasonably believe they know about the suspect at the time of the shooting. The fact that the suspect did not actually possess a weapon, or that a possessed firearm was not loaded, etc. will not result in the imposition of liability, so long as the officer had a reasonable belief to the contrary. See Ali v. City of Louisville, No. Civ. A. 3:03CV-427, 395 F. Supp. 2d 527 (W.D. Ky. 2005) in which the court ruled that police officers' shooting and killing of homeless mentally ill man sitting in a car was not excessive force when they acted after he raised a gun and did not know, until later, that the weapon was a BB gun. Under the circumstances, it was reasonable for them to believe that their lives were at risk. Also see Dudley v. Eden, #99-3738, 260 F.3d 722 (6th Cir. 2001) (use of deadly force to apprehend a fleeing arrestee after a bank robbery was reasonable even though a bank teller had reported that the robber was unarmed. The officer heard shots being fired, and did not know that it was other officers who had fired the shots), and Thompson v. Hubbard, No. 00-2505, 257 F.3d 896 (8th Cir. 2001) (officer did not act unreasonably in shooting fleeing suspect in the back when he believed that the suspect was reaching for a weapon, based on his motions; no liability for shooting and killing suspect who turned out to be unarmed). Another case of interest is Finks v. City of North Las Vegas, No 04-15806, 135 Fed. Appx. 976 (9th Cir. 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). In one case, the Louisiana Supreme Court overturns $4 million jury award against a city for officers' shooting of mentally disabled man holding a realistic looking toy gun. Mathieu v. Imperial Toy Corp., 646 So.2d 318 (La 1994).

In another case, when an arrestee failed to comply with the officers' orders, and made furtive motions in the back of his car, the fact that bullets were exiting the car from the rear windshield made it objectively reasonable for one of the officers to perceive that the suspect was shooting at him. There was no evidence from which it could be reasonably concluded that an officer's bullet struck the suspect. Even if one of the officers did shoot the suspect, his actions were objectively reasonable under the circumstances. Swann v. City of Richmond, No.3:06CV069, 498 F. Supp. 2d 847 (E.D. Va. 2007).

When the opposite is true—i.e., the officer, regardless of their actual subjective belief, does not have what the court will view as an objectively reasonable belief that the suspect is threatening them or anyone else, even if the suspect is actually in possession of a firearm, the use of deadly force will be judged improper and may lead to liability. This is illustrated by Ngo v. Storlie, No. 06-2771, 495 F.3d 597 (8th Cir. 2007). In that case, a federal appeals court ruled that if the facts

were as stated by an undercover officer, shot by a fellow officer after reporting that he had already been shot in the area by a perpetrator, the actions of the shooting officer were not objectively reasonable. A reasonable officer, arriving on the scene after there was a report of an officer shot, would have recognized that the undercover officer did not pose an immediate threat to anyone. While he had a pistol, he dropped it on the ground, and was not pointing it at the officers or reaching for it. He was also not actively resisting arrest or attempting to evade the officers by flight, but was kneeling in the street under a streetlight by himself, and waving his arms above his head trying to attract attention. Further, the shooting officer failed to attempt to give the undercover officer any commands or warnings before firing at him, and the undercover officer did not match the description of the suspect sought, who had shot him.

See also Ham v. Brice, No. 05-50657, 203 Fed. Appx. 631 (5th Cir. 2006) (deputy who shot unarmed arrestee fleeing into unpopulated wooded area was not entitled to summary judgment on excessive force claim. The deputy had previously frisked the arrestee, and found no weapons on him before he fled on foot from the scene of his drug arrest); and Smith v. Cupp, No. 04-5783, 430 F.3d 766 (6th Cir. 2005) (if deputy sheriff fired final fatal shot at arrestee fleeing in stolen police car after the vehicle passed him, he violated the arrestee's constitutional rights. The arrestee had been taken into custody for the nonviolent offense of making harassing phone calls, and no longer posed an immediate threat to the deputy after driving past him).

4. Some Useful Resources

The following are links to some useful resources, including sample policies on the use of deadly force which are available on-line. As always, the policies are presented here for informational purposes, and should not be adopted or used except in consultation with a department or agency's own legal counsel.

Bakersfield, California Deadly Force Policy

"Dead Right," By Anthony J. Pinizzoto, Edward F. Davis, and Charles E. Miller III, 75 FBI Law Enforcement Bulletin, No. 3, pgs 1-8. (March 2006). [PDF] [HTML]

Los Angeles Police Department Policy on Shooting at or From a Moving Vehicle.

"The Must-Shoot vs May-Shoot" Controversy," by Thomas Aveni, Law and Order, pg. 38 (January 2005).

Officer-Involved Shooting Guidelines – Ratified by the IACP Psychological Services Section, Los Angeles, California, 2004

"Perceptual Factors in Police Shootings of Unarmed Suspects, by Marc Green, Ph.D.

"Selecting a Duty-Issue Handgun," by Chad A. Kaestle and Jon H. Buehler, 74 FBI Law Enforcement Bulletin, No. 1, pgs. 1-8 (January 2005) [.html format] [PDF format].

"Use of Force Policies & Training, A Reasoned Approach," Part 1, by Thomas D. Petrowski, FBI Special Agent and Instructor, FBI Academy. Vol. 71, No. 10 FBI Law Enforcement Bulletin pgs. 25-32 (October 2002). "Use of Force Policies & Training, A Reasoned Approach," Part II, by Thomas D. Petrowski, FBI Special Agent and Instructor, FBI Academy. Vol. 71, No. 11 FBI Law Enforcement Bulletin pgs. 22-32 (November 2002).

Use of Force and Deadly Force Model Policy, Minnesota Statutes, Sec. 626.8452, Subdivision 1.

"What's Your Use-of-Deadly-Force Standard?" by Michael A. Brave, and John G. Peters.

AELE Monthly Law Journal
Bernard J. Farber
Civil Liability Law Editor
841 W. Touhy Ave.
Park Ridge IL 60068-3351 USA
E-mail: bernfarber@aol.com
Tel. 1-800-763-2802
