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Civil Liability for Use of Deadly Force – Part Three Supervisory Liability and Negligent/Accidental Acts

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 the second article, topics examined included the defense of qualified immunity as applied to the use of deadly force, and claims for inadequate training in the use of deadly force. This third article in the series focuses on liability for supervisory personnel, and civil liability for negligent or accidental use of deadly force, as well as the question of whether a violation of departmental policy may be a basis for civil liability.

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, or issues arising out of the possession of department issued firearms by off-duty officers. (For issues concerning the use of force or possession of weapons by off-duty officers, see "Civil Liability for Acts of Off-Duty Officers – Part Two," 2007 (10) AELE Mo. L.J. 101 (Oct. 2007).

2. Supervisory Liability

When are supervisory personnel liable for the allegedly improper use of deadly force by personnel under their command? Individual liability for supervisory personnel is not based on vicarious liability, i.e., it is insufficient to merely show

that an individual was a supervisor with authority over the officer who allegedly misused deadly force. Instead, there must be some sort of fault on the part of the supervisor himself, which can stem from their own personal participation in the incident, or from their own culpability in failing to adequately supervise or train the officer, in failing to properly discipline the officer in light of a known propensity to use excessive force, or in establishing a policy which allegedly caused the wrongful use of deadly force to occur. Such liability has been found both in federal civil rights cases and in state law negligence lawsuits. Liability on the part of a municipality in this context also requires that the inadequate hiring, retention, supervision, discipline, etc. be systematic enough to rise to the level of an official municipal policy or custom.

In federal civil rights litigation, the standard for civil liability for supervisors is deliberate indifference. In Ripson v. Alles, 93-1972, 21 F.3d 805 (8th Cir. 1994), the court stated "The mere negligence in failing to detect and prevent a subordinate's conduct is not enough for liability under Sec. 1983. The supervisor must know about the conduct and facilitate it, approve it, condone it, or turn a blind eye for fear of what he might see."

Amplifying that statement, the court in International Action Center v. U.S., #03-5163 365 F.3d 20 (D.C. Cir. 2004) stated that:

"A supervisor who merely fails to detect and prevent a subordinate's misconduct […] cannot be liable for their misconduct. The supervisor must know about the conduct and facilitate it, approve it, condone it, or turn a blind eye for fear of what they might see."

Courts are loathe to second guess decisions that supervisory personnel must make on a split-second basis in emergency circumstances. See Estate of Davis v. City of Richland Hills, #04-10036, 406 F.3d 375 (5th Cir. 2005), in which the court ruled that a police chief and a SWAT team leader were entitled to qualified immunity on claims for supervisory liability in case where a SWAT officer entering residence shot and killed a man inside the home within two seconds, and the plaintiffs claimed that the decedent was unarmed. Nothing showed that they made a deliberate choice to inadequately train or supervise the officer, which caused the alleged deprivation of the decedent's rights.

In federal civil rights cases, the court in Davis stated, when a plaintiff alleges a failure to train or supervise, the plaintiff must show that: 1) the supervisor either failed to supervise or train the subordinate official; 2) a causal link exists between the failure to train or supervise and the violation of the plaintiff's rights, and 3) the failure to train or supervise amounts to deliberate indifference.

One U.S. Supreme Court decision, while it does not involve the use of deadly force, sets forth some important general principles concerning responsibility for the possible liability of a county and its sheriff for a deputy's excessive use of force, implicitly establishing a framework for liability on the basis of hiring and retention. In Bd of County Com'rs of Bryan County, Okl v. Brown, 95-1100, 520 U.S. 397 (1997), the Court overturned an $800,000 award against a county based on alleged inadequate screening before hiring a deputy with an arrest record who caused injuries to an arrestee. The Court ruled that a single hiring decision could not be the basis for municipal liability in the absence of evidence that the sheriff consciously disregarded a high risk that the deputy would use excessive force.

Courts addressing issues of inadequate supervision have focused very much on the knowledge of supervisory personnel concerning any violent propensities on the part of the officer. In the absence of such knowledge, courts will not allow plaintiffs to use a claim for "inadequate supervision" as an end-run around the principal that there is no vicarious liability. See Dovalina v. Nuno, #04-00- 00738-CV, 48 S.W.3d 279 (Tex. App. 2001), (police chiefs were entitled to official immunity on arrestee's negligent supervision claim; record showed that prior complaints about officer who allegedly used excessive force against plaintiff were investigated and the manner of supervising the officer involved discretionary actions under Texas state law). On the other hand, in McCrink v. City of New York, 296 N.Y. 99, 71 N.E.2d 419; 1947 N.Y. Lexis 953, the court found that a city was liable for a shooting by an off-duty intoxicated officer who had been disciplined for intoxication on three occasions. A jury could find that the officer's retention endangered the public.

In Shaw v. Stroud, #92-2029, 13 F.3d 791 (4th Cir. 1994), a court found that the death of the plaintiff's decedent was a foreseeable consequence of a sergeant's failure to investigate or otherwise respond to complaints about the alleged pervasive violent propensities of one of the officers under his supervision, even though a period of eighteen months intervened between when the sergeant had been the officer's supervisor and the date of the shooting at issue. Another sergeant received summary judgment, because he made some efforts to remedy the problem, including reporting misconduct, providing counseling, and riding along with the officer, so that he was not acting with deliberate indifference.

In Gutierrez-Rodriguez v. Cartagena, #88-1881， 882 F.2d 553 (1st Cir. 1989), a supervisor allegedly ordered three other officers, who were in an unmarked car and not in uniform to approach a car with their guns drawn, and himself approached. The car containing a man and his girlfriend parked in a "lover's lane." The man tried to drive away when he saw the officers approaching, and they allegedly fired their weapons without warning, and failed to identify themselves as police. The man was rendered paraplegic by a severed spine, and sued supervisory

officials as well as the officers. A total of $4.5 million in compensatory damages were awarded, along with $630,000 in punitive damages.

In upholding liability for supervisory personnel in the case, including the supervisors of the officer who served as supervisor on the night of the incident, the appeals court applied the test of deliberate indifference. It stated that the supervisory officer's own supervisors knew that he had been the subject of ten recent complaints about allegedly abusive actions, including one stating that he had had other officers beat a suspect while he held a gun to the man's head, which only resulted in his suspension for five days.

The officer's supervisors had allegedly acted with deliberate indifference in continuing to give him good reviews and allowing him to lead other officers.

In McCormack v. City of New York, 568 N.Y.S.2d 747 (A.D. 1991), in addition to finding that a city's failure to provide officers with a newer type of bulletproof vest did not make it liable for the officer's shooting death under New York law; the court also ruled that supervisory personnel's "no-shoot" order at a house barricade scene also did not render the city liable for death, and a $3.67 million judgment was overturned. The court found that the alleged order was based on fear that officers could be injured, under the circumstances, by "friendly fire."

3. Negligent/Accidental Use of Deadly Force

Federal civil rights liability requires an intentional use of deadly force, as detailed in the prior articles in this series. There can also be liability under state law for the wrongful intentional use of deadly force, under theories of assault and battery. But state law in various jurisdictions will also impose, in some cases, civil liability for negligent or accidental use of deadly force.

Accidents, of course, do happen, and if they happen without unreasonable conduct on the part of the officer prior to the moment that the weapon discharges, court often will not find an officer liable. See McCoy v. City of Monticello, No. 02-2941, 342 F.3d 842 (8th Cir. 2003), (officer's action of drawing his gun when approaching a suspect's vehicle at the conclusion of a one-mile pursuit was not unreasonable under the circumstances. Officer was entitled to qualified immunity for the shooting of the motorist when he accidentally slipped and his gun discharged). In some instances, the person shot may have himself contributed to the circumstances causing the accident. See Dodd v. City of Norwich, #84-7780, 827 F.2d 1 (2d Cir. 1987), (estate of 16-year-old burglar accidentally shot when he reached for an officer's gun could not bring a civil rights or wrongful death action).

Similar cases finding no liability for the accidental discharge of a weapon or for accidentally shooting the wrong person include Telthorster v. Tennell, #01-0074, 92 S.W.3d 457 (Tex. 2002), in which the court found that an officer acted in good faith in keeping his gun drawn while assisting another officer handcuff an arrestee following a high-speed chase, entitling him to official immunity under Texas state law for injuries arrestee suffered when the gun accidentally discharged, and Alston v. City of Camden, 168 N.J. 170, 773 A.2d 693 (N.J. 2001), in which the court found that an officer was entitled to "pursuit immunity" under New Jersey statute from liability for accidental discharge of his weapon, which dislodged from his holster, while he was in foot pursuit of a drug suspect; neither the officer nor the department was liable to bystander injured by the shot. Also of interest is Medeiros v. O'Connell, #97-7355, 150 F.3d 164 (2nd Cir. 1998), ruling that officers were not liable for the accidental shooting of hostage while attempting to shoot hostage-taker. Under those circumstances, the shooting of hostage was not a Fourth Amendment "seizure," since it was not intended, and the officers' attempt to rescue hostages was beyond "acceptable"--it was admirable, and could not be called "shocking to the conscience" as required for a due process claim.

In some instances, however, the officer's allegedly unreasonable behavior leading up to the moment that the weapon accidentally discharged may be found to be culpable negligence. See Heyward v. Christmas, #3562, 573 S.E.2d 845 (S.C. App. 2002), in which an appeals court ruled that a trial court erred in ruling that officer's accidental shooting of auto passenger was reasonable and that he was entitled to qualified immunity. There was a genuine issue of material fact as to whether the officer's manner of approaching the car with his gun drawn and pulling the passenger out of the vehicle was reasonable, based on expert testimony and the claim that the passenger put his hands up and was cooperating.

In a rare instance of a court awarding substantial damages for what was characterized as an "accidental" shooting, Wilson v. Beebe, 743 F.2d 342 (6th Cir. 1984), $2.5 million was awarded to an arrestee for an accidental shooting during his handcuffing. While an officer was attempting to handcuff the arrestee while standing behind him, his revolver, which was cocked, accidentally discharged and struck the suspect in the back, causing him injuries to his spine, intestines, and gall bladder, as well as other injuries. Federal civil rights claims were rejected, but damages were awarded under Michigan negligence law.

Accidental or negligent shootings, a number of courts have said, are not "seizures" of the person for purposes of the Fourth Amendment, since the officer did not intend to shoot the person. See Clark v. Buchko, 936 F.Supp. 212 (D.N.J. 1996), holding that the accidental shooting of arrestee did not constitute a "seizure" for purposes of the Fourth Amendment; officer's approach within arm's

length of the arrestee in order to subdue him was reasonable in light of arrestee's refusal to obey lawful orders and his alleged prior statements that he would kill police rather than submit to an arrest. Also see Troublefield v. City of Harrisburg, Bureau of Police, 789 F.Supp. 160 (M.D. Pa 1992) (officer's accidental shooting of an arrestee did not constitute a "seizure" for Fourth Amendment purposes which could serve as the basis for an excessive force claim), Glasco v. Ballard, 768 F. Supp. 176 (E.D. Va 1991) (accidental shooting of suspected shoplifter was not a Fourth Amendment "seizure"; no recovery for plaintiff in civil rights suit over injuries), and Matthews v. City of Atlanta, 699 F.Supp. 1552 (N.D.Ga 1988) (accidental shooting by officer was not fourth amendment seizure; no civil rights liability for negligent shooting). Also of interest is Carlisle v. City of Minneapolis, 437 N.W.2d 712 (Minn. App. 1989), (no civil rights liability for shooting of unarmed robbery suspect which was, at most, negligent), and Pleasant v. Zamieski, #88-1378, 895 F.2d 272 (6th Cir. 1990), (neither officers nor city were liable for accidental shooting of unarmed auto theft suspect; mere drawing of revolver was not unreasonable).

In Landol-Rivera v. Cruz Cosme, #89-2009, 906 F.2d 791 (1st Cir. 1990), a federal appeals court overturned a $105,000 award of damages to hostage inadvertently shot by an officer. In this case, the officer shot at a car containing both armed robber and hostage for the purpose of stopping robber's flight, and the wrong person was struck. Similarly, in City of Houston v. Newsom, 858 S.W.2d 14 (Tex. App. 1993), the court found that a bystander could not sue officers and city for damages for his accidental injuries from bullet officers fired at armed felon they were pursuing; officers were acting in good faith and were entitled to official immunity. Also of interest is Rodriguez v. City of New York, 595 N.Y.S.2d 421 (A.D. 1993), in which a New York intermediate appeals court overturned a $2 million award against the city for an officer's alleged negligent shooting at an armed suspect when there was a crowd nearby, hitting a bystander. The court found that the amount awarded was excessive and jury was improperly allowed to consider alternate theory of liability based on officer's prior failure to stop and arrest the suspect before the gunfire began.

In instances where the officer acted in a negligent manner, breaching a duty to act as a reasonable officer would under the circumstances, there may be liability for the use of deadly force under state law. Liability may be imposed under state law even if federal civil rights liability has been rejected in an earlier proceeding (or is rejected on separate claims in the same proceeding). Additionally, some state courts have ruled that officers' allegedly negligent actions arguably "creating" the circumstances where the use of deadly force is necessary may be sufficient to impose liability, even if the use of the deadly force is "justified" at the moment of the shooting.

An example of this is Hernandez v. City of Pomona, No B182437, 145 Cal. App. 4th 701, 51 Cal. Rptr. 3d 846, 2006 Cal. App. Lexis 1925 (2nd Dist.). In that case, despite a prior jury verdict in a federal civil rights lawsuit in favor of officers who fatally shot a man twenty-two times as he was attempting to evade arrest, the officers could still possibly face liability for negligence under California state law for the same incident on a theory that they unnecessarily put themselves in the way of harm, and therefore had to "shoot their way out." The jury verdict in the federal civil rights case only dealt with the constitutionality of the use of deadly force under the circumstances that existed at the time of the shooting, and did not decide the question of whether the officers' prior actions constituted negligence, the court ruled. (**Editor's Note**: This opinion has been ordered "depublished," and review of the case has been granted by the California Supreme Court at Hernandez v. City of Ponoma, 153 P.3d 955, 2007 Cal. Lexis 1901. A report on the court's decision in this case will appear in the AELE Liability Reporter when issued).

A number of federal courts, faced with similar arguments for liability in federal civil rights cases—as opposed to state law negligence claims, have rejected those arguments. See Salim v. Proulx, #95-7899, 93 F.3d 86, 1996 U.S. App. Lexis 21758 (2nd Cir. 1996), in which the court reasoned that although the officer may have "created a situation in which the use of deadly force became necessary" because of violations of police procedure and "failing to disengage," his "actions leading up to the shooting are irrelevant to the objective reasonableness of his conduct at the moment he decided to employ deadly force." Reasonableness, the court stated, "depends only upon the officer's knowledge of circumstances immediately prior to and at the moment that he made the split-second decision to employ deadly force." Similarly, in Plakas v. Drinski, #93-1431, 19 F.3d 1143 (7th Cir. 1994), cert denied, 115 S.Ct. 81 (1994), the court ruled that officers are not compelled to adopt alternative approaches to avoid creating a situation where deadly force must be used; officers do not have to first attempt to use non-deadly alternatives when the use of deadly force has become necessary; police departments and other law enforcement agencies are not required to provide officers with equipment which might be a substitute for the use of deadly force, such as dogs, Tasers, capture nets, CS gas, rubber bullets, sticky foam, or beanbag projectiles; officers have no obligation to simply "walk away" from a situation where the use of deadly force is justified; and officers have no obligation to keep themselves a particular distance or to maintain a barrier between the suspect and themselves.

Cases in which liability is imposed for negligent use of deadly force often involve the issue of attributing percentages of fault for the damages to the officer, to others involved in the incident, and to the person who was shot, based on their conduct and the degree to which it caused the incident.

An example of this is Munoz v. City of Union City, No. A110121, 2007 Cal. App. Lexis 278 (1st Dist.). In a lawsuit over a police officer's shooting and killing of a woman under the influence of drugs, armed with knives, who was believed to pose a threat to herself or relatives, the jury found the decedent to be 5% negligent, the city to be 45% negligent, and the officer to be 50% negligent. The evidence, however, was insufficient to show direct negligence by the city, so there was no basis for allocating a portion of the damages to the municipality under California law. Because the jury's assessment of fault in the case indicated that the officer was 10 times more at fault that the decedent, liability should be divided to make the decedent 9% at fault, and the officer 91% at fault. See also Harden v. United States, 688 F.2d 1025 (5th Cir. 1982) (15-year-old "hell raising" with fraternity at a campsite was contributorily negligent when shot and killed by ranger), Stone v. Keyport Boro Police Dept, 468 A.2d 442 (NJ Super 1983), (plaintiff allegedly attempting suicide at home was contributorily negligent when officer shot and injured him), and Solomon v. Shuell, 420 N.W.2d 160 (Mich.App. 1988) (man fatally shot by officer was found 80% negligent, but the officer was still liable for $20,000 for 20%, negligence).

In some negligence lawsuits concerning the use of deadly force by police, the person shot may even have engaged in conduct egregious or unreasonable enough that they will be found to be entirely responsible for their own injuries. In Fernandez v. City of New York, 645 N.Y.S.2d 1004 (Sup 1996), the court found that an officer who shot an arrestee in the head was entitled to a jury instruction that the arrestee, who committed a violent crime with shotgun and then fled by vehicle and on foot may have "assumed the risk" of being shot; arrestee's last minute cooperation seconds before officer's firearm discharged did not alter this result in the arrestee's negligence lawsuit.

4. Violation of Departmental Policy

Can civil liability be based on a violation of departmental policy or other internal document, standing alone? In Galapo v. City of New York, No. 138, 744 N.E.2d 685 (N.Y. 2000), a jury award of $17.9 million to the family of a New York officer accidentally shot by his partner was set aside. New York's highest court held that the requirements of a police department internal manual cannot be the basis for civil liability by the city since it does not establish clear legal duties and is not part of a "duly-enacted body of law or regulation."

See also Richardson v. McGriff, No. 142, 762 A.2d 48 (Md. 2000), in which the highest court in Maryland ruled, in a case involving the police shooting of a burglar by an officer who mistook a vacuum cleaner hose for a weapon, that the trial court acted properly in excluding evidence of police regulations, guidelines, and training procedures pertaining to the use of deadly force, since the relevant

question that the jury had to consider was the circumstances at the time of the shooting, and whether the officer acted reasonably.

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