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Expert Witnesses in Police Excessive Force Cases

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Introduction by Judge Emory A. Plitt, Jr. ^[2]

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❖ **Introduction** ^[3]

Expert witnesses have been used in litigation involving professions for decades. Doctors, lawyers, dentists, engineers, and accountants have faced expert witnesses when they have been sued for some kind of professional malpractice.

It is almost impossible for a plaintiff to win a malpractice suit against such a professional without the help of expert testimony. The standards and practices used by professionals are beyond the knowledge and expertise of ordinary citizens who make up jury panels. Expert witnesses provide the testimony and opinions to help “educate” judges and juries.

The use of expert witnesses in excessive force litigation against law enforcement officers has now also become very common. They are used by both plaintiffs and defendants.

A large proportion of people who are selected to serve on juries know very little about the realities of policing, law enforcement, and running correctional facilities. The impressions that they have when called for jury service come from television, movies, novels, and the media. When was the last time you saw any kind of discussion about the constitutional aspects of use of force in any such medium?

Most expert witnesses in excessive force cases are academics, retired or former law enforcement officers (including many former chiefs and sheriffs), or current or former law enforcement executives and/or consultants.

In a study by the Federal Judicial Center which polled 303 Federal district court judges, the Center reported that 92% of trials had at least one expert for the plaintiff, 79% had at least one expert for the defendant, and 73% had at least one expert on both sides. It is much more likely to see expert witnesses in jury trials than non-jury trials.

People become expert witnesses by virtue of specialized training, knowledge, education, or experience including a combination thereof.

An expert witness is an experienced professional in a field relevant to issues in the case who can testify to visible observable facts and interpret them to the judge and jury from his background and expertise.

An expert witness has six primary attributes

- Extent of real life experience
- Earns a living in the field
- Considered a leader in the field
- Good communicator
- Good stage presence and not easily rattled
- Able to speak like a layman and relate to the judge and jury

Why are experts used in excessive force cases?

1. We do not know what goes on in a jury room during deliberations. We do not know what things may bother a juror or generate questions in a juror's mind. Expert witnesses help to fill in what attorneys may see as gaps in their respective cases and questions the jurors may have.
2. Policing is a profession. Law enforcement officers are themselves expert in what they do. They are specially trained, retrained and experienced. When officers are themselves defendants, their credibility as experts themselves may be seriously compromised because they are defendants. Jurors will likely expect defendant officers to say that which best serves the officer's defense. Expert witnesses lessen this problem.

3. Both sides may want to give the jury a level of comfort with regard to the facts of the specific case.
4. The level and breadth of an expert's training, education, and experience may be very impressive to the jury.
5. Expert witnesses are allowed to do something almost no other category of witness is allowed to do – give an opinion. More importantly, that opinion can be based on what information has been made available to the expert and the expert's own analysis even though the expert was not present at the event and all the expert's information is hearsay - that is what other people told him or information made available to the expert through reports, interviews, etc.
6. Juries especially deal with perceptions and expert witnesses help to provide them.
7. Experts explain what happened and why. It is important to remember that experts explain the testimony and information provided by others.
8. A good expert will be perceived as not simply speaking the truth – but truth itself. Part of the expert's job is to convince jury and judge that he is the truth and credible.
9. The issues involved in excessive force cases are outside the common knowledge and experience of most people.
10. Experts explain to juries what the appropriate response should have been under the circumstances.

An expert does three things:

- Provides technical knowledge and information
- Applies his or her knowledge to the facts of the case
- Comes to a conclusion and gives an opinion

❖ **California decision**

In a case of first impression in California, the Court of Appeal has ruled that a plaintiff in a case alleging excessive force by a police officer does not have to present expert testimony on “what force a reasonable law enforcement officer would have used under the same or similar circumstances.”

In [*Allgoewer v. City of Tracy*](#), # C067636, 207 Cal.App.4th 755, 143 Cal.Rptr.3d 793, (3rd Dist.) the trial court granted nonsuit on the ground that the plaintiff could not prevail without offering expert testimony. The Court of Appeal reversed, stating that

the trial court had erred when it concluded that expert testimony was required in the case.

Allgoewer's ex-wife complained that he had violated a child custody order by failing to return their child to her. Officer Mejia and Officer Freitas went to Allgoewer's house, where they found him gardening with a rake in the yard. Officer Mejia told him he was in violation of the custody order and was going to have to give the child back to his ex-wife.

Allgoewer began to get upset and started to raise his voice. Officer Mejia told Allgoewer to put the rake down, but Allgoewer did not comply. He told the officers he was not going to hurt them. Officer Freitas told Allgoewer to put the rake down or he was going to Taser him. Then, before either officer told him he was under arrest, Officer Freitas moved toward Allgoewer, grabbed his right arm, and attempted to kick the rake out of his hand. Officer Freitas then drove Allgoewer to the ground with a leg sweep.

When Allgoewer refused to comply with Officer Freitas's command to put his arms behind his back, Officer Mejia applied his Taser to Allgoewer twice. The officers arrested Allgoewer for violating a court order, brandishing a weapon and resisting arrest.

Allgoewer filed a complaint against the City of Tracy which alleged that the degree of force the officers used in arresting him was unreasonable under the circumstances. During the trial, the defendants filed a motion for nonsuit, contending that the amount of force a reasonable police officer would have used under the circumstances the officers faced was "not within the common knowledge of laypersons," and therefore it was "necessary for the plaintiff to introduce expert opinion evidence in order to establish a prima facie case."

The trial court found "that it would be necessary to have that kind of testimony" and granted the motion for nonsuit.

Generally, the opinion of an expert is admissible when it is "related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." That is usually the case, for example, in medical malpractice actions, "[b]ecause the standard of care in a medical malpractice case is a matter peculiarly within the knowledge of experts', expert testimony is required to prove or disprove

that the defendant performed in accordance with the standard prevailing of care.”

This rule does not apply, however, when the negligence is obvious to a layperson. “Where the jury is just as competent as the expert to consider and weigh the evidence and draw the necessary conclusions, then the need for expert testimony evaporates.”

In this case, the defendants took the position - and the trial court agreed - that the “standard of conduct” in an excessive force case is like the standard of care in a medical malpractice case in that, in all but the egregious cases, the degree of force a reasonable police officer would use under a particular set of circumstances is peculiarly within the knowledge of experts.

❖ **Wisconsin precedent**

Since whether expert testimony is necessary to establish that a particular amount of force was objectively unreasonable is not a question that has been addressed in California, the Court of Appeal looked to out-of-state authorities for guidance on the issue.

A case from Wisconsin supported the proposition that expert testimony is not required in an excessive force case, [*Robinson v. City of West Allis*](#), #98-1211, 239 Wis. 2d 595, 619 N.W.2d 692 (2000). There, the court in explaining its conclusion noted, “requiring expert testimony rather than simply permitting it represents an extraordinary step, one to be taken only when unusually complex or esoteric issues are before the jury.”

The California Court of Appeal found the analysis of the Wisconsin Supreme Court persuasive. The Wisconsin court wrote that “[t]he average layperson does not have training or experience in police practices and procedures, and does not have experience with the tools, methods or theories of implementing those practices and procedures” does not mean that expert testimony is required for a jury to determine whether a particular amount of force was unreasonable under the circumstances of a particular case.

The California Court of Appeal then held, there “is nothing about the particular use of force in this case that was so far removed from the comprehension of a lay jury as to necessitate expert opinion testimony on the applicable standard of conduct or on what amount of force was reasonable under the circumstances that confronted the officers who arrested Allgoewer.

While expert testimony will not always be **required** in an excessive force case, that does not mean that it is not always admissible. Expert testimony can be admissible on the issue of reasonable force. Whenever possible, an officer who is defending himself in such a case should have an expert witness available to give testimony that would assist the jury.

Notes:

1. Muna Busailah and Robert Rabe are members of the Pasadena law firm of Stone Busailah, LLP. They concentrate in police defense litigation.
2. Emory A. Plitt Jr. is an Associate Circuit Judge in Bel Air, Maryland. He previously served two decades as counsel for the Maryland State Police. Judge Plitt also is the lead speaker and Course Director at AELE's legal seminars.
3. The *Introduction* to this article is part of the AELE Police Law Instructor's Manual (2008), which is an exclusive publication given only to those persons who have earned the AELE [Certified Litigation Specialist](#) designation.

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