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**Anatomy of a Deadly Force Lawsuit
Surviving a Qualified Immunity Defense**

- **Introduction**
- **Facts of the Case**
- **Deadly Force and Qualified Immunity**
- **Municipal Liability Issue**
- **Appeals Court Comment**
- **Resources and References**

❖ **Introduction**

In a recent decision, [*Estate of Jones v. City of Martinsburg*](#), 2020 U.S. App. Lexis 18136 (4th Cir.), a federal appeals court addressed the police shooting and death of a black homeless schizophrenic man that began as an encounter with an officer over the relatively minor offense of walking in the street alongside a sidewalk rather than on the sidewalk itself. As the encounter escalated, it turned out that the man was armed with a knife and a physical altercation ensued, including multiple uses of Tasers, a chokehold, the confronting of the suspect by five officers, a knife injury to an officer, and the firing of 22 shots, resulting in death.

A federal civil rights lawsuit by the decedent's estate was kicked out of the federal trial court on three different occasions over the seven years since the incident. In the most recent federal appeals ruling in the case, the third time the case has been reviewed on appeal, the court reinstated the case, rejecting a qualified immunity defense to excessive force claims against the individual officers while also rejecting municipal liability claims.

The court's decision, and its reasoning, are instructive and worth examining in detail, particularly for how the court reasoned its way through to the rejection of the qualified immunity defense. That is the focus of this article, aside from a brief look at why the municipal liability claims were rejected. At the conclusion, there is a brief listing of relevant resources and references.

❖ Facts of the Case

On a March evening in 2013, a police officer patrolling observed a man walking in the road, instead of on the sidewalk, near downtown Martinsburg, West Virginia. Both a state statute and a city ordinance mandated that all pedestrians use the sidewalks when available. The man observed, Wayne A. Jones, was 50 years old, black, homeless, and had previously been diagnosed with schizophrenia.

After following Jones for about one minute in his police vehicle, the officer parked, exited the squad car, and inquired why he was walking in the street. He also asked Jones to produce identification, which he did not have. The officer asked to search him for weapons and Jones inquired "what's a weapon?" When he was told that this included "anything" including "guns, knives, and clubs," he admitted that he did in fact have "something."

From that point, the incident swiftly escalated, with the officer calling for backup and ordering Jones to place his hands on the police vehicle. He failed to comply, instead attempting to move away. With the officer repeatedly shouting his commands, Jones replied, "What are you trying to do?" "What do you want?" and "What did I do to you?"

The officer never replied to these questions but instead pulled out a Taser and discharged it at Jones in the dart mode. A second officer arrived just then and also fired his Taser at Jones. The Tasers seemed to have no impact on the man's behavior, according to the officers.

Jones then hit the first officer in the face, doing so with sufficient force that the officer's toboggan was pulled down over his eyes. After that, Jones broke away, running down the street. The second officer then pursued him on foot and caught up with him. This officer reported that Jones's hands were "about to go up," and he "took that as [Jones] may try to assault him."

In summarizing the facts, the appeals court commented that “Unless he was clairvoyant,” the officer could not have known that Jones’s hands were “about” to be raised. The officer stated that he then “struck [Jones] in the brachial.”

A third officer arrived and went towards the altercation. By that time, Jones had “cornered himself” in “a stoop entranceway to a bookstore, up a couple steps.” The second officer told the suspect to “just get on the ground, just listen to what we’re saying,” to which he replied: “I didn’t do anything wrong,” and then moved his hands up. The third officer described this as “the guy kind of put his hands up like ‘alright’ [resigned tone], so me and North [the second officer] both kind of grabbed his hands,” and all three men tumbled down the stairs so that one officer was thrown away from the suspect and other officer.

The other officer chipped a bone in his thumb during the fall, wrestled Jones to the ground, and put him in “a choke hold, just to kind of stop him from resisting.” An audio recording made at the time revealed a loud choking or gurgling sound, seemingly coming from the suspect.

Two other officers arrived, with police on the scene now totaling five, facing the suspect who was now on the ground with his feet facing down, moving in a swimmer’s kick-like motion. An officer was recorded calling him a “motherf**ker.” A recording shows one officer kicking the suspect lying on the ground. One officer used a Taser an additional time in the dart mode and yet another applied his Taser on the suspect in the drive stun mode, all apparently with no visible effect.

The officer still holding Jones in a choke hold had his knees on the ground. Just then he felt “like a scratch on my hand.” He then “didn’t think much of” it because they “were rolling around on the concrete.” Almost immediately, at about the same time another officer used a Taser on the suspect, he experienced “a sharp poke in [his] side,” alarming him. He then “saw the subject’s right hand with a fixed blade knife in his hand” and shouted, “He’s got a knife! He’s got a knife!” A second officer claimed that he saw “a weapon in [Jones’s] right hand.” One officer then called to “Get back, get back!”

Once the knife was observed, the officers all drew back about five feet. The suspect’s left arm dropped lifelessly, and he was motionless on the ground, lying “with his right side on the ground” and his “right elbow . . . on the ground.” All five of the officers drew their firearms, forming a semi-circle around the suspect, who

was between the officers and the bookstore wall.

The officers ordered him to drop the weapon. He remained motionless and did not verbally respond. One officer later reported that Jones “did not make any overt acts with the knife towards the officers.” Another reported that Jones “still had the f**king knife in his hand and he wasn’t f**king doing nothing.” Seconds later, the five officers fired a total of 22 rounds at Jones, causing 23 wounds, and killing him lying on the sidewalk.

Afterwards, one or two of the shooting officers called for emergency medical services, but none rendered aid themselves. When searching the lifeless body, they found a small fixed blade knife tucked into his right sleeve. Upon being informed that state police were coming to investigate, officers were recorded saying that the incident would be a “cluster” and that they were going to “have to gather some f**king story.”

At the time, the local police department’s aggression response policy was to “meet your aggression with the suspect’s aggression.” That policy required that policy incidents of physical force be “necessary, objectively reasonable, and proportionate.” The department did not then have any program or policy concerning interactions with people suffering mental illness. Following the incident, the police chief decided to conduct training on the subject.

The decedent’s estate sued the city and the officers, claiming the use of excessive force in violation of the Fourth Amendment, violation of the Fourteenth Amendment by killing Jones and thus wrongfully depriving his family of a familial relationship with him, and that the city was liable under a variety of theories, including failure to train and failure to discipline the police officers.

Earlier appeals in the case addressed evidentiary issues and the trial court’s improper consideration of the facts in the light most favorable to the officers, rather than the Estate, as well as ignoring “discrepancies among the officers’ accounts”, and assumption that Jones presented an ongoing threat as he lay on the ground because he still had the knife. In prior appeals, the court concluded that a reasonable jury could find excessive force, because “it is not clear that Jones continued to pose an immediate threat of physical harm to the officers at the time they shot and killed him.”

It identified two pieces of evidence corroborating that Jones was not holding a knife

when he was shot. First, he was laying on his right side and the knife was in his right hand. Second, “at least one police officer” said that he ““did not make any overt acts with the knife towards the officers’ once they stepped back.” See prior appeals at [*Estate of Jones v. City of Martinsburg*](#), #14-2135, 655 Fed. Appx. 948, 2016 U.S. App. Lexis 12452, 2016 WL 3613356 (4th Cir. 2016) and [*Estate of Jones v. City of Martinsburg*](#), #17-1003, 726 Fed. Appx. 173, 2018 U.S. App. Lexis 5571, 2018 WL 1151558 (4th Cir. 2018).

❖ **Deadly Force and Qualified Immunity**

In the latest appeal, the key issue was whether the five officers who shot and killed Jones as he lay on the ground were protected by qualified immunity. Qualified immunity, if granted, is a powerful defense, as it not only protects against liability but against having to go through the burdens of trial.

Granting officers summary judgment on qualified immunity grounds is only appropriate if they demonstrate “that there is no genuine dispute as to any material fact and [that they are] entitled to judgment as a matter of law.”

Police officers who commit constitutional violations are protected from liability when, based on “clearly established law,” they “could reasonably believe that their actions were lawful.”

Because the appeal in the immediate case arose from a summary judgment, and because the appeals court had previously held that a jury could find that the officers violated Jones's Fourth Amendment right to be free from excessive force, the focus was on whether that right was clearly established.

First, the right must be defined at the “appropriate level of specificity.” When it comes to the use of deadly force, [*Tennessee v. Garner*](#), #83-1035, 471 U.S. 1 (1985) (abolishing the “fleeing felon” rule and spelling out specific requirements for the use of deadly force) and [*Graham v. Connor*](#), #87-6571, 490 U.S. 386 (1989) (adopting the “objective reasonableness” standard for judging the constitutionality of the use of force in general) provide a general framework.

But the court noted that those cases are very general and do not by themselves at this point create clearly established law at the level of specificity required for qualified immunity.

Factors to be considered to determine whether the use of deadly force is objectively reasonable under the circumstances include “the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight”

The focus is on the moment that the force is used. Deadly force may be justified at one point in an encounter, but that justification may vanish as circumstances change.

The court found, in rejecting the qualified immunity defense in this case that there were two distinct facts that defined the decedent’s right to be free from excessive force at an “appropriate level of specificity.” First, while Jones had been armed, he had been “secured by the officers immediately before he was released and shot,” and, additionally, although armed, he had been “incapacitated at the time he was shot.”

The court stated that it had been previously clearly established that police officers “may not shoot a secured or incapacitated person, the officers are not entitled to qualified immunity.”

The court found that a reasonable jury viewing the evidence in the light most favorable to the plaintiff could find that Jones was secured “when he was pinned to the ground by five officers.” While he was not then handcuffed, and it was admitted that he had stabbed an officer, it was clearly established at the time that suspects may be secured without handcuffs when they are pinned to the ground, and that such suspects cannot be subjected to further force.

In an earlier case, the 4th Circuit had ruled that a reasonable officer would know that once he had pinned a 100-pound woman to the ground, he should not further shove her into the pavement, cracking her teeth. [*Kane v. Hargis*](#), #92-6212, 987 F.2d 1005 (4th Cir. 1993). The court reasoned that if one officer could secure a 100-pound suspect by pinning her, so could five officers in this case pinning the 162-pound Jones secure him.

The court also pointed to a prior in which it had held that an officer used excessive force when he continued to tase a domestic violence suspect after that suspect had dropped his weapon (a baseball bat) and fallen to the ground after three prior justified uses of a Taser. [*Meyers v. Baltimore Cty*](#), #11-2192, 713 F.3d 723 (4th Cir. 2013). Just as in the immediate case, the officers in [*Meyers*](#) presented conflicting

testimony as to whether the suspect was still actively resisting arrest, or whether his body had “stiffened” and “did not pose a continuing threat.”

While the fact that Jones admittedly was armed with a knife, which was tucked into his sleeve, and “which he somehow used to stab an officer” that would not “preclude a jury from finding that he was secured. The court pointed to [*Young v. Prince George’s Cty.*](#), #02-7735, 355 F.3d 751 (4th Cir. 2004) (holding that force used against a person already in handcuffs, who was cooperating during a traffic stop and informed the officer that he was armed, was excessive), saying that this established that armed suspects can be secured even before an officer disarms them.

The court believed that, given the “relatively inaccessible location of the knife,” and the physical inability to wield it “given his position on the ground,” the number of officers on Jones, and Jones’s physical state by this time, it would be “particularly reasonable to find that Jones was secured while still armed.”

The appeals court acknowledged that the obvious argument against that was that a person who stabs an officer “is not secured.” But it found that there still was a question whether Jones was secured at any point after the officer he stabbed felt the knife and before the officers backed away.

The court noted that while this was taking place, Jones remained on the ground with five officers on him. A jury therefore could reasonably find that he was secured before the officers backed away, and that they could have disarmed and handcuffed him then rather than releasing him and backing off from him.

If he was secured, the court stated, then the officers could not constitutionally release him, back away, and shoot him without violating his constitutional right to be free from deadly force under clearly established law.

But further, the court argued, even if Jones was not secured, a jury could still reasonably find that he was “incapacitated” by the time the officers shot him, which would also make their use of deadly force unlawful under prior clearly established law.

By that point, in addition to being tased four times and hit in the brachial plexus, he had been kicked, and placed in a choke hold. From the circumstances, a jury could reasonably infer that he was having difficulty breathing, laying on his side and stomach on the concrete with five officers on him. When the officers then got up and

backed away, the accounts could be interpreted as indicating that the officers “saw his left arm fall limply to his body.”

The court cited its prior case of [*Brockington v. Boykins*](#), #09-2308, 637 F.3d 503 (4th Cir. 2011) as establishing that officers may not use force against an incapacitated suspect.

The court further noted that if Jones had been immobilized at the time, the mere fact that he remained technically “armed” although not wielding the knife would have been no justification for the use of deadly force. In fact, at the time of the shooting, the knife had been pinned “under the right side of his body, which was on the ground, and tucked into his sleeve” when viewing the evidence in the light most favorable to the plaintiff.

While the officers argued that Jones should have dropped the knife and that his failure to do so placed his shooting in the “gray zone” where qualified immunity is appropriate, the fact that he did not respond or move could indicate that he was incapacitated and that a reasonable officer should have recognized that.

“The officers shouting ‘drop the knife’ seconds before shooting him was, at best, farcical because it was impossible for an incapacitated person to drop a knife tucked into his sleeve.”

Shooting an incapacitated, injured person who was not moving, and who was laying on his knife, the court concluded, crossed a “bright line” for which they could be held liable if a jury finds the facts as the plaintiff alleges them.

Non-cooperation with law enforcement, the court stated, “has never given officers carte blanche to use deadly force against a suspect; luckily for many of us, neither has being “armed” with a small knife.”

The decedent was “not an armed felon on the run, nor a fleeing suspect luring officers into a high-speed car chase. Jones was walking in the road next to the sidewalk, away from the dark shadows and blind corners of buildings at night. He was without housing and had a knife on his person. As a pedestrian, he should have been on the sidewalk, but [the first officer he encountered] never told him that.”

Instead, the officer quickly escalated the incident, “What we see is a scared man who is confused about what he did wrong, and an officer that does nothing to alleviate that man's fears. *That* is the broader context in which five officers took Jones's life.”

❖ Municipality Liability Issue

Claims against the city for municipal liability under [*Monell v. Dept. of Soc. Services*](#), #75-1914, 436 U.S. 658 (1978) were a different matter. Municipal liability is not based simply on its status as the employer of the officers. Even if the officers were to ultimately be found liable for the excessive use of force in this case, liability on the part of the city would have to be based on an official policy or custom that caused the alleged misconduct.

The plaintiff's theory in this case was that this single incident demonstrates the city's failure to adequately train police officers on the use of force. The plaintiff argued that the incident showed "a *desperate* need for more or different training," because the officers repeatedly ignored the "many options short of shooting and killing Jones."

The plaintiff, while initially mentioning two other instances of excessive force in its Complaint, by the time of the appeal no longer relied on those incidents, and did not attempt to demonstrate a pattern of excessive force. It also abandoned any claim that the city's failure to train its officers concerning how to interact with people with mental illness gave rise to municipal liability.

Liability for inadequate training must be based on "deliberate indifference" to people's rights. [*City of Canton v. Harris*](#), #86-1088, 489 U.S. 378 (1989). If a failure to train shows such a deliberate or consciously indifferent "policy," then it can be found to be the "moving force [behind] the constitutional violation." But further, the training deficiency has to be shown to be "closely related to the ultimate injury." In other words, it must have caused the misconduct. A single incident, standing alone is almost always inadequate to prove municipal liability.

However, the Supreme Court left open in [*Canton*](#) the possibility that "in light of the duties assigned to specific officers or employees the need for more or different training [may be] so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need."

In the immediate case, however, the appeals court found that the death of Jones, viewed as an isolated incident of excessive force did not suffice because the city did

have an aggression policy and the plaintiff had failed to show anything inadequate about that policy.

That policy was to “meet your aggression with the suspect’s aggression,” and required that incidents of physical force be “necessary, objectively reasonable, and proportionate.” The plaintiff did not argue that such a policy was unreasonable on its face. It instead argued that the incident itself made it “obvious” that there was not sufficient implementation of the policy in training.

The appeals court interpreted this as an argument that the five officers involved in this case “simultaneously violated” the policy, so that the training on the policy therefore “must have been deficient.” The court agreed that a reasonable jury examining the case could possibly decide based on the evidence that the officers’ actions violated the aggression policy. But the requirement of a finding of deliberate indifference guarantees that a city cannot be held liable for the actions of its officers based on inadequate training unless it “either knew or should have known about the deficiency, so it could remedy that deficiency.”

Five officers acting at once in this single incident, the appeals court reasoned, could not have put the city “on earlier notice of the need to better train its officers as to the existing use-of-force policy. In other words, the city is not expected to have hindsight. The city clearly did understand the need for a use-of-force policy to avoid constitutional violations, and it issued one. The plaintiff could not show that any deficiency in training on that policy “reflect[ed] a deliberate or conscious choice.”

❖ Appeals Court Comment

Appeals court decisions do not take place in a vacuum, but have always, to an extent, been influenced by the context of the times. In a final section of the appeals court’s ruling, in an unusual step, the judges commented on matters outside the record of the immediate case. Their concluding comment provides a rare glimpse into their thoughts on what that context is, and how it helped shape their ruling:

“Wayne Jones was killed just over one year before the Ferguson, Missouri shooting of Michael Brown would once again draw national scrutiny to police shootings of black people in the United States. Seven years later, we are asked to decide whether it was clearly established that five officers could not

shoot a man 22 times as he lay motionless on the ground. Although we recognize that our police officers are often asked to make split second decisions, we expect them to do so with respect for the dignity and worth of black lives. Before the ink dried on this opinion, the FBI opened an investigation into yet another death of a black man at the hands of police, this time George Floyd in Minneapolis. This has to stop. To award qualified immunity at the summary judgment stage in this case would signal absolute immunity for fear-based use of deadly force, which we cannot accept. The district court's grant of summary judgment on qualified immunity grounds is reversed, and the dismissal of that claim is hereby vacated."

Clearly, this comment was intended as a caution.

❖ Resources

The following are some useful resources related to the subject of this article.

- [Firearms Related: Intentional Use](#). AELE Civil Case Summaries.
- [Defenses: Qualified Immunity](#). AELE Civil Case Summaries.
- [Deadly Force](#). Wikipedia article.

❖ Relevant Monthly Law Journal Articles

- [When is Law "Clearly Established" for Purposes of Qualified Immunity in Civil Rights Litigation?](#), 2017 (3) AELE Mo. L. J. 101
- [The Scope of Federal Qualified Immunity in Civil Rights Cases](#), 2009 (2) AELE Mo. L. J. 501.
- [Civil Liability for Use of Deadly Force-- Part One--General Principles and Objective Reasonableness](#), 2007 (11) AELE Mo. L.J. 101.
- [Civil Liability for Use of Deadly Force-- Part Two. Qualified Immunity and Inadequate Training](#), 2007 (12) AELE Mo. L.J. 101.
- [Liability for Use of Deadly Force-- Part Three. Supervisory Liability and Negligent/Accidental Acts](#), 2008 (1) AELE Mo. L.J. 101.

❖ **References:** (*Chronological*)

1. [Taming Self-Defense: Using Deadly Force to Prevent Escapes](#), by Robert Leider, 70 Fla. L. Rev. 971 (2018).
2. [Reforming the Law on Police Use of Deadly Force: De-Escalation, Pre-Seizure Conduct, and Imperfect Self-Defense](#), by Cynthia Lee, 2018 U. Ill. L. Rev. 629.
3. [A Tactical Fourth Amendment](#), by Brandon Garrett and Seth Stoughton, 103 Va. L. Rev. 211 (2017).
4. [How Qualified Immunity Fails](#), by Joanna C. Schwartz, 127 Yale Law Journal No. 1 pgs. 1-245 (October 2017).

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