THE LIABILITY OF NEGLIGENCE

A LEARNING CONTRACT

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A Historical Perspective of Civil Rights Litigation

Litigation as a remedy for violations of civil rights has existed, and been virtually ignored, for almost a century in the United States. A renewed awareness of, and a concern for individual rights, blossomed during the decade of the 1960's making Title 42, United States Code, Section 1983, second only to *habeas corpus* in the number of cases filed in the United States federal courts.[1]

During the years following the Civil War, Congress broadened the scope of federal judicial authority and passed legislation that provided new sources of judicial power. Many of these acts of legislation addressed civil rights. The Act of 1871, which contains the current 42 U.S.C. Section 1983, provided broad civil rights jurisdiction for all claims of deprivation of federally secured rights.

In actuality, the Act of 1871 was a Congressional reaction to the Ku Klux Klan and the powerlessness and/or inactivity of the states to control the activities of the Klan. The Act was implemented pursuant to the Fourteenth Amendment to provide a direct avenue to the federal courts for allegations of civil rights violations. A large degree of hostility and distrust existed between Congress and state courts during this time period. The Act was controversial and was the target of heated debates in Congress. However, Section I of the Act, known today as 42 U.S.C. 1983, was the least controversial portion of the

bill as it only added civil remedies to the criminal sanctions established by the Civil Rights Act of 1866.

The Act was intended to provide civil rights protection against the inactivity, and toleration, by the states of private lawlessness. However, little indication exists that Congress sought to impair the states' political independence. Soon after the end of the Civil War, the Supreme Court acted to return to the states the primary role regarding civil rights and liberties through narrow interpretations of the Fourteenth Amendment. The Supreme Court developed a doctrine in which the Fourteenth Amendment would govern only the conduct of state governments and state officials and not private individuals. A plaintiff must be able to demonstrate that the conduct in question was action under "color of state law,"[2] that is, the misuse of power, possessed by virtue of state law, without the existence of legal right. Early cases ruled that executive and judicial conduct sanctioned by the state was a state-action. Conduct by state officials in violation of their authority was not considered a state-action. As a result, the very lawlessness that was to be remedied by the Act of 1871 was immunized from federal sanction. It was during this time period, the end of Reconstruction and the Depression, that the federal judiciary placed a higher priority on the maintenance of a tranquil federalism rather than the safeguarding of individual rights.[3]

Section 1983 became an active mechanism for addressing civil rights complaints in 1961 with Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473 (1961). The plaintiff and his family sued the City of Chicago and thirteen of its police officers for warrantless, forced entry into their home. The family was held naked at gunpoint after being forced out of bed, while the house was searched

without regard for the property. The family was also subjected to verbal and physical abuse. Monroe was taken to the police station where he was held and interrogated over a ten hour period. He was subsequently released without being charged. The case was eventually heard before the United States Supreme Court which ruled that the officers' conduct violated the civil rights of the plaintiff under Section 1983. The Supreme Court also held that municipalities were, however, immune from liability under the statute.

A sixteen year period ensued where the Supreme Court continued to grant absolute municipal immunity. In effect, law enforcement practitioners could be held liable for violations under Section 1983 but the plaintiff was not able to recover large damage awards as police personnel simply did not earn a great deal of money.

The Supreme Court reversed itself in 1978 with Monell v. Department of Social Services, 436 U.S. 658, 98 S.Ct. 2018 (1978). A class action suit was filed by female employees of the Department of Social Services and the Board of Education of the City of New York under Section 1983. The complaint was directed toward an official policy that compelled pregnant employees to take unpaid leaves of absence before such leaves of absence were medically required. The defendants were sued solely in their official capacity. While not directly related to law enforcement liability, the decision handed down by the Supreme Court was to have a tremendous impact on the suits that followed the *Monell* decision as the Supreme Court reversed its' position with the *Monroe* decision and ruled that municipalities are no longer immune to tort action under Section 1983. The decision of *Monell* was that a plaintiff that has been deprived of a right, privilege, or immunity secured by the Constitution has a right to relief

under Section 1983 if such a deprivation resulted from the official policy of a local government entity.

In terms of dollars and cents, more money was now available through the successful litigation of civil rights complaints against law enforcement officers, jailers and other criminal justice practitioners.

Criminal and Tort Acts

By definition, a crime is a public injury committed against the state and is punishable by fine and/or imprisonment. The criminal act is viewed as a violation of the duty one owes society. The remedy for a breach of such duty is punishment which can only be implemented by the state.

A tort is a private injury for which the party harmed may seek relief in civil action. A civil action can result in liability which may lead to an award of money damages.

The concept between crime and tort does not preclude an individual from seeking private recompense. For example, an individual who is injured by an unprovoked act may seek relief in a civil action for injuries received in addition to the state seeking punishment for the same act. The state must prove the elements of the crime beyond a reasonable doubt. The injured party, in a civil action, need only prove by a preponderance of the evidence that the assailant failed to carry out his duty to act reasonably and as a result of this failure the victim suffered harm. Originally, all crimes were torts with the victim left to seek private remedy. Eventually, the right to act against one of questionable conduct was granted to the state as the representative of the people.

Principles of Negligence

Negligence as a tort relies upon two principles. One is the existence of a duty. Justice Cardozo, ruling in Palsgraf v. Long Island R.R. Co. (248 N.Y. 339, 162 N. E. 99, 1928) defined negligence as "...the absence of care, according to the circumstances."[4] The person accused of negligence is not liable unless he has acted in disregard of one to whom he owed a *duty*. The duty owed must be implied from all of the circumstances present at the time of the act.

The second principle is one of *fault*, i.e., that one has failed to meet the obligation of duty under circumstances that would have allowed him to do so. The concept of duty as a prong in proving allegations of negligence is generally thought of as an issue of law to be determined by a judge. The presence of fault is generally left to the discretion of a jury as it analyzes the conduct of a defendant from the perspective of reasonableness under the totality of circumstances.

Elements of a Negligence Tort

Generally, three categories of torts exist that cover the majority of suits brought against law enforcement practitioners. These categories are *Constitutional*, *Intentional*, and *Negligence* torts.

Negligence occurs when an individual has acted unreasonably under the totality of circumstances and has harmed another who is a forseeable victim of the act. Lack of intent of harm has no bearing on the tort if the individual failed to exercise due care to prevent the

harm. Thus, actual or immediate cause is the direct factual link between the act of negligence and the harm.

Proximate cause is a legal concept which may act in limiting the liability of negligence. Proximate cause is defined as that action which stands next in causation to the effect. An example of the difference between immediate and proximate cause is the illustration of an intoxicated individual falling into water and drowning. The intoxication of the individual is the proximate cause of his death if it can be shown that he would not have fallen into the water if he was sober. The immediate cause of the individual's death is drowning. The concept can also be applied vicariously. Not only can a person be liable for negligent acts which cause harm to another individual, but also the supervisor can be held liable for his own personal negligent conduct which was the proximate cause of a subordinate's actionable conduct.

Proximate cause is a topic of debate and the courts have devised numerous tests for determining proximate cause with varying results. However, fulfillment of both requirements of immediate and proximate cause is necessary to a cause of action for either a negligent or intentional tort.

Forseeability has also been addressed by the courts as a critical concept in negligence. This concept relates only to the question of duty and not to proximate cause. However, forseeability itself does not necessarily create a duty. For example, an individual who observes another individual drowning, and where inaction may clearly and forseeably result in death, the forseeability of harm does not, by itself, create a duty.

Generally, when viewing allegations of negligence, acts are to be distinguished from failures to act, unless a duty exists to act under the circumstances present.

American society has been reluctant to mandate duties to act or place a large degree of liability on the failure to act.[5] This is due in part on the individuals' right of self determination in response to his own best interests in whether to act or not. Returning to the case of the drowning individual, even though the rescue presents no extraordinary danger to the observer, no legal existence of duty is present. Hence, the concept of negligence is present under the legal definition of duty and not necessarily where a moral duty exists.

The same lack of duty for private citizens is not necessarily extended to police officers which, in turn, encourages police inaction. The law therefore can discourage socially desirable acts by subjecting the actor to negligence liability in the performance of such acts. The premise is that voluntary activities should not worsen the victim's situation.[6]

Defenses to Claims of Negligence

Numerous defenses exist against claims of negligence of which the most important appear to be *Contributory* and *Comparative Negligence*. Both of these defenses argue that the plaintiff was partially at fault for the harm he suffered.

Unreasonable conduct by the plaintiff, in the few states that still use the complete defense of contributory negligence, will result in judgments of non-liability, provided the plaintiff's negligence can be shown to be the proximate cause of the harm inflicted. For use as a defense the defendant must be able to show that the plaintiffs' conduct amounted to a breach of duty that law imposes on persons to protect themselves from injury, and

which occurred in conjunction with the actionable conduct of the defendant, and contributes to the injury suffered by the plaintiff.

The majority of states have moved to incorporate the concept of comparative negligence as a replacement for contributory negligence. A jury must determine that portion of negligence attributable to the plaintiff and that which is attributable to the defendant. Measurements are made in terms of percentages. Damages allowed are inversely proportional to the amount of negligence attributable to the plaintiff. Currently, four general categories have been established under the defense of comparative negligence that may act in barring recovery by the plaintiff:

1. Pure Comparative Negligence - The plaintiff's recovery is never barred unless his negligence caused 100% of the damages.

2. 50% Modified Rule - Bars recovery by the plaintiff where the plaintiff's negligence exceeds that of the defendant's.

3. 49% Modified Rule - Bars recovery by the plaintiff unless the plaintiff's negligence is less than the defendant's.

4. Slight-Gross Rule - Bars recovery by the plaintiff unless the plaintiff's negligence is slight in comparison to the defendant's.

Another frequent defense used is that of *Risk* or the defense of *volenti non fit injuria.*[7] Four elements are necessary for the use of this defense by the defendant.

The plaintiff has knowledge of facts constituting a dangerous situation, he knows the condition is dangerous, he understands the nature or extent of the danger, and he voluntarily exposes himself to the danger. The adoption of comparative negligence has, however, reduced the effectiveness of risk as an affirmative defense.

Another major defense used in police related activities is that of *sudden emergency* or *sudden peril*. The contention is that a police officer confronted with an emergency or danger cannot be held to the general reasonableness standard, since action occurs by reflex and with only a minimal exercise of judgment. However, use of this defense may be inadequate in some courts as the police may be viewed as professionals who are expected to anticipate emergencies and occasions of danger, especially when the use of a weapon injures an innocent third party. In addition, the emergency cannot be created by the act of the defendant improperly responding to a dangerous situation.

CONCLUSION

States ineffectiveness or toleration of activities of the Ku Klux Klan after the Civil War led to the creation of the Act of 1871. The purpose of the Act was to provide federal relief for the violation of constitutionally protected rights of citizens. The Supreme Court's narrow interpretation of the Fourteenth Amendment effectively immunized state officials, who acted in violation of their authority, from federal sanction. This action occurred in contrast to the original purpose of passage of the Act of 1871.

Section 1983 laid dormant for the better part of a century until its' revival in 1961 with the case of *Monroe v. Pape*. The Supreme Court ruled in this case that officials (in this instance police officers), while acting under the color of state law, who violate their authority and in so doing violate the Constitutionally protected rights of another individual, can be held liable for their actions with relief sought through civil suit. The Supreme Court also held that municipalities were immune from liability.

Municipalities were granted immunity from liability until 1978 with the Supreme Court's decision in the *Monell v. Department of Social Services*. As a result of this case more money became available for the successful litigation of civil cases against criminal justice practitioners.

Negligence is embodied within 42 U.S.C. Section 1983 and is used as a means of civil action against alleged wrong doing. Negligence is based upon the principle that an individual owes a *duty* to another individual to act in a reasonable manner and the principle of *fault* if that individual fails in that duty.

Successful litigation of a negligence suit involves the fulfillment of the requirements of both proximate and immediate cause as elements of the negligent act. Forseeability is also an element within a negligent action but does not, in and of itself, create a duty to respond. As a result, a legal duty to respond does not necessarily exist in situations where a moral duty is obvious. This exception, however, may not extend to police practitioners.

Numerous defenses to negligence suits exist of which *Comparative Negligence* is the current trend in the majority of states. The defense, when successful, reduces

or bars recovery of damages by the plaintiff by arguing that the action of the plaintiff was partially or totally at fault for the harm suffered. Damages are inversely proportional to the plaintiff's attributable negligence.

Negligence as a civil action has only actively been used for thirty years, which is a short period of time compared to its total time of existence. It has only been a prosperous civil action since 1978. As a result, it has only been briefly subjected to review and interpretation. One can surmise that new and different interpretations and approaches to negligence in civil litigation concerning law enforcement practitioners will continue and increase.

ENDNOTES

[1]H.E. Barrineau, Civil Liability in Criminal Justice. Cincinnati, Ohio: Anderson Publishing Co., 1987. p 9.

[2]Henry C. Black et. al., Black's Law Dictionary, fifth edition. St. Paul: West Publishing Co., 1979. s.v. Color of Law.

[3]H.E. Barrineau, Civil Liability in Criminal Justice. Cincinati, Ohio: Anderson Publishing Co., 1987. p 8.

[4]Isidore Silver, Police Civil Liability. New York: Matthew Bender, 1986. Sec 108[4], chap. 1, p 53.

[5]Justice Cardozo, Palsgraf v. Long Island R.R. Co. [248 N.Y. 339, 162 N.E. 99 (1928)] quoted in Isidore Silver, Police Civil Liability. New York: Matthew Bender, 1986. sec 108[4], chap 1, p 51.

[6]Ibid., sec 108[4] chap 1, p 54.

[7]Henry C. Black et. al., Black's Law Dictionary, fifth edition. St. Paul: West Publishing Co., 1979. s.v. Assumption of Risk.

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