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LIABILITY ISSUES FOR LAW ENFORCEMENT ADMINISTRATORS

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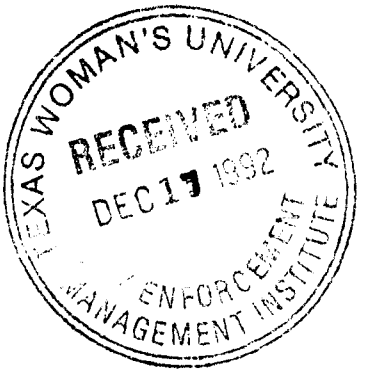

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INTRODUCTION

Imagine a job in which every critical decision an employee makes is subject to the review of not only his immediate supervisor but also to many others as well. This review process may include a jury of twelve people who know nothing about the particular job but who may be permitted to judge certain aspects of the work performed. If the jury finds that the employee was negligent or incorrect in his work performance, or simply that the work was not performed as well as it might have been, the employee may be ordered to pay a large settlement or fine or may even be sentenced to prison.

Further imagine that many of these critical decisions often involve life and death situations and must be made without prior notice, warning or preparation. Instantaneous decisions, with such great consequences, are a common aspect of a police officer's work.

Police officers today are being held more accountable than ever before in both criminal and civil proceedings.

Accountability is a current catch word of the legal system. Establishing accountability in police liability

issues makes lawyers rich, helps the aggrieved feel justified, and often creates financial ruin for individual police officers and the law enforcement agencies who employ them. Every aspect of a police officer's work is subject to scrutiny, especially if it appears that a mistake or wrong doing was committed. Police officers, like other professionals, are held accountable for their actions while engaged in their primary job activities. Additionally, an officer may be forced to justify his actions in job specific areas such as the use of deadly force, pursuit driving, first aid, etc., where the quality of his training and his personal knowledge of laws and procedures may be questioned.

In addition to an individual police officer's accountability, an increasing number of law enforcement supervisors are being held responsible for the actions of their subordinates. This vicariousness subjects the supervising officer to the same scrutiny and review as the officer accused of an act or an omission. A supervisor may be held accountable for hiring practices, for training programs, and other personnel policies which may have affected an accused employee.

Police administrators can no longer ignore the impact of liability matters on their departments. Proactive

administrators must continually update their knowledge of laws, personnel issues, and training requirements to ensure that their officers are meeting or exceeding standards of accountability expected of today's police officer.

This paper will seek to answer some of the questions regarding liability issues which a police administrator may have. No organization can be insulated fully from liability, but through a thorough study of applicable court decisions and other respected sources, police can identify many reasonable steps which can be taken to improve the quality of police service and protect themselves and their agencies.

LEGAL BACKGROUND

To understand the effect of liability issues in relation to law enforcement administrators, one must first define and discuss the elements of liability. Police officers and law enforcement agencies may incur liable under state or federal statutes or both. As an overview, legal liabilities may be classified as follows: (Bailey, 1989, 453)

I. Civil Liabilities
   A. State Law
      1. State tort law
      2. State Civil Rights Law
   B. Federal Law
      1. 42 USC section 1983
      2. 42 USC section 1985
      3. 42 USC section 1981

II. Criminal Liabilities
   A. State Law
      1. Specific penal provisions
         (a) official oppression,
         (b) official misconduct,
             and
         (c) civil rights violations
      2. General penal provisions
         (a) assault
         (b) false arrest

B. Federal Law
   1. 18 USC section 242
   2. 18 USC section 241
   3. 18 USC section 245

TORTS

To determine whether an individual has a right to legal action, one first must examine what wrong or wrongs have occurred to the individual. A tort is defined as a legal wrong committed against a person or the property of a person. A tort is different from a crime. Torts are prosecuted by the injured party and are considered wrongs committed personally against individuals as opposed to a crime which is considered a wrong committed against the state and is, therefore, prosecuted by the state. The most important distinction between a tort and a criminal act is that the standards of proof are different. For the purposes of this paper, state actions will be categorized as either intentional torts or torts arising from negligence. A third category of strict liability normally does not apply to law enforcement officers or police agencies.

INTENTIONAL TORTS

Intentional torts are defined as actions arising from an actor's intent, either expressly or implicitly, to injure. In this type of action, a plaintiff must prove three things: (1) the act was committed by the defendant; (2) the defendant had intended the act to occur, or there was a substantial certainty the results would occur; and (3) the committed act caused an injury to the plaintiff. With respect to police liability, torts are generally categorized as false arrest, assault, and wrongful death. An example of an intentional tort would be a police officer using more force than is necessary to arrest a suspect. In one case, an officer attempted to arrest a pregnant woman and repeatedly kicked the suspect in the stomach even though the woman was offering no resistance (Herrera, 1981, 1225).

NEGLIGENCE

Torts of negligence normally involve an actor either acting or failing to act in such a way that an unintended injury to another occurs. Instances of negligence by law

enforcement agencies often involve training received or not received by police officers. Pursuit driving, the use of firearms, the use of force, and general police responsibilities are training topics often subjected to scrutiny. For example, a police agency may incur liability if one of the agency's officers fails to take appropriate action when statutorily required. In Bailey vs Town of Forks, the court wrote, "When statutes intend to insure the safety of the public highways," a governmental officer's knowledge of an actual violation creates a duty of care to all persons and property who come within the ambit of the risk created by the officer's negligent conduct" (Bailey, 1987, 1261).

STATE CRIMINAL ACTIONS

In addition to civil actions for illegal acts committed by police officers, the state may elect to prosecute the officers in criminal actions. Criminal charges are always filed against the individual officer and do not involve the officer's agency or supervisor. An exception would be those cases in which the officer's supervisor is also accused of being an actor in the issue. In criminal actions involving police officers, law enforcement administrators should determine whether or not the action taken by the officer was solely attributable to a conscious deed by the officer. Correct determination of such facts may relieve the agency from further liability. If facts reveal that the officer took the action based upon conduct condoned by the department through custom, policy, or failure to enforce regulations, the agency may incur liability for the act. In such cases, the probability of legal action taken against the police agency increases. Because criminal actions vary by statute and jurisdiction, a comprehensive analysis is beyond the scope of this paper.

It should suffice to say that an effective police administrator constantly must monitor the activity of his

subordinates. This may be done through actual on the job supervision or through a review of case reports submitted by the officer. Another form of monitoring that is sometimes neglected, but is possibly one of the most accurate in determining the propensity of an officer to abuse his authority, is a review of complaints from the public that an officer may have filed against him.

FEDERAL LIABILITY ACTIONS

Of approximately 30,000 liability lawsuits filed each year, a significant percentage are filed in federal court (Whalin, 1992). Police liability under federal law is found primarily in Title 42 U.S.C., section 1983. This statute states in part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. (Title 42 U.S.C., section 1983)

It should be noted that this statute had been in existence since 1871, but had not been significantly used in liability issues until recently. As the courts continued to put more emphasis on the rights of individuals through interpretations of the Thirteenth and Fourteenth Amendments, more people sought legal redress for abuses of police power. "The goals of the federal statutes are compensation of persons whose civil rights have been violated, and prevention of the abuse of state power" (Burnet, 1984, 2931).

Section 1983 creates no substantive rights; it serves as a pipeline for citizens to come to federal (or state) court. In order to prevail, the plaintiff must show a minimum of two elements: (1) a deprivation of a right, privilege, or immunity secured by the Constitution and the laws of the United States, and; (2) that the defendant committed such deprivation while acting under color of a statue, ordinance, regulation, custom, or usage of a state (including political subdivisions). It would appear that Section 1983 encompasses almost any act that contravenes the United States Constitution or a Federal Law. However, such is not the case. The courts have concluded that for there to be a valid claim under this section, the deprivation of a

federal constitutional or legal right must have resulted from the sort of abuse of government power that is necessary to raise an ordinary tort by a government agent to the stature of a violation of the Constitution.

Where the Section 1983 claim is based upon procedural due process rights under the Fourteenth Amendment, and the state law provides due process of law, a defendant's tortious conduct, whether intentional or negligent, will not suffice to state a cause of action. Even where substantive property or liberty rights are involved, the defendant's negligent conduct will not provide a basis for suit.

Section 1983 affords lawsuits against officials and employees of states and their political subdivisions which can be brought in either state or federal court. By its terms, Section 1983 provides a cause of action in law or equity.

MUNICIPAL LIABILITY

To do something "under color of law" means that a law enforcement agency has placed a person in a position in which he or she will be able to assert an authority based on the position. A police officer is expected to assert his authority in accordance with law and policy while on duty. Questions often arise concerning police actions that an officer may take while the officer is off-duty. If a law enforcement agency has a policy or custom which requires or expects off-duty officers to take enforcement actions, the agency can be held liable for results of those off-duty actions. In Manning v. Jones, 696 F. Supp. 1231 (1988), a question arose as to whether or not off-duty troopers were acting under color of the law when they abused a motorist. This case is often cited as being representative of the "deep pocket" mentality of our society today. In many such "off-duty cases", a plaintiff will attempt to hold a police agency responsible for allowing an officer to act as he did, even though the officer was in an "off-duty" capacity at the time of the incident. The concern then must be for the agency to assure its policies regarding off-duty conduct are addressed and also are consistent with current court

decisions.

The second item required in determining "under color of law" status is for a constitutional deprivation to occur. The illegal deprivation required normally is connected to a violation of rights under the First, Fourth, Fifth, Sixth, Eighth, or Fourteenth Amendments. Normally the deprivation must be part of a pattern or history of conduct (Patzner, 1985, 1363). However, in recent cases the courts have stated that a single incident can create the deprivation (Garner, 1985, 1694).

The police administrator must be knowledgeable in the way in which the courts have come to interpret Section 1983. In the past, this statute was used primarily against persons acting in their individual capacities. Police agencies tended to be immune from liability. However, in 1978 the U. S. Supreme Court held that agencies could be held for the actions of off-duty police officers if those officers were expected or required to act by custom or policy. "Municipalities and other local government units are included among those `persons' to whom the Civil Rights Act of 1871 applies" (Monell, 1978, 2018). In the same case the court stated, "Local governing bodies can, therefore, be sued directly under section 1983. . . Where the action

implements or executes a policy, statement, ordinance, regulation, or decision officially adopted or promulgated by those whose edicts or acts may fairly be said to represent official policy" (Monell, 1978, 2019). Not only were official policies considered but also "customs" of a department were scrutinized even though such customs had not received official sanction.

Police administrators must remember that an agency's official policy may include more than strict legal decisions. Official policy may result from the decisions of ranking officers. For example, the decision to adopt a course of action even though the policy is tailored to a single situation and the action is taken only once (Pembaur, 1986, 1300). In Languirand v. Hayden, 171 F. 2d, 220 (1983), it was stated ". . . It is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly said to represent official policy, inflicts the injury that the government as an entity is responsible under section 1983."

An officer who creates the need to use deadly force in self-defense could also be subject to liability under state tort law. For example, in Young v. City of Killeen, (Fifth Circuit 1985) the Fifth Circuit, applying Texas tort law,

upheld a verdict against an officer who negligently created the need to use deadly force. In that case, the plaintiff-suspect asserted both state law tort claims and a constitutional tort claim under section 1983 (Killeen, 775 F. 2d at 1352-53).

Finding a police officer liable in tort for his culpability in causing the need to use deadly force would not conflict with tort law notions of causation. Some courts, in determining tort liability, do deny the plaintiff recovery if his own conduct represents a voluntary and independent intervening cause of the injury (Hart & Monroe, supra note 17, at 133-85). However, a growing number of courts `discard causal criteria and apply the theory that if the harm is of a foreseeable type and would not have occurred but for the defendant's negligence, he is responsible, whatever the manner of its occurrence or the nature of the intervening acts or events.'

'Notions of tort liability are changing because courts that determine causation for the purposes of tort liability are often guided by social policy considerations rather than by the notion that the party burdened with the cost of the injury should have had a `meaningful choice' in bringing it about (Kinsman Transit Co., 338 F. 2d 708, 725-26). A

court, therefore, may find an officer liable for damages despite the suspect's intervening act of attacking the officer.

Imposing tort liability on officers who caused the need to use deadly force, moreover, would not conflict with the rationale underlying the self-protection defense. Imposition of such liability would not undermine the "lesser evil" rational because it would not deter the officer from protecting his own life. The threat of tort liability should have a much weaker deterrent effect than the threat of criminal liability, because civil penalties, unlike criminal penalties, do not involve loss of liberty or severe moral stigma. Any deterrent effect resulting from the possible imposition of tort liability should be weakened to the extent that states or municipalities indemnify officers for acts committed within the scope of their employment. These jurisdictions realize that officers could become overly cautious and ineffective if personally exposed to tort liability (Cass, Damage Suits Against Public Officers, 129 U. PA L. REV 1110 (1981). Although an indemnified officer may still have to suffer the burden of a trial, as well as the moral disapproval associated with an adverse verdict, those possibilities probably would not deter an

officer from defending his life.

Imposition of tort liability, moreover, would not conflict with the excuse rational underlying the self-protection defense. The excuse concept is predicated on the notion that an actor should not be subject to the severe penalties associated with criminal liability if he did not have sufficiently meaningful choice in bringing about the injury to be considered morally blameworthy. However, since the penalties associated with tort liability are not as severe as those associated with criminal liability, courts, influenced by policy considerations, impose tort liability even on those not blameworthy. The reason for according a legal excuse does not exist for the purposes of tort liability; therefore, it should not become the basis of a self-protection defense to such liability.

Courts should apply a "gross negligence" standard in evaluating the tort liability of an officer whose conduct creates the need to use deadly force. A gross negligence standard is more lenient than a simple negligence standard but more stringent than a recklessness standard. "Simple negligence" is defined as a deviation from "conduct of the reasonable person of ordinary prudence under the circumstances." (Prosser, 209) Under such a standard,

acts of mere inadvertence may lead to liability. "Recklessness," on the other hand, is "an act . . . . In disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow, and which thus is usually accompanied by a conscious indifference to the consequences." (Prosser, 213) Under this standard, the risk of harm must be so obvious that either the actor knew of the risk he was disregarding or such knowledge may be imputed to him; mere inadvertence is not enough. The two standards differ in kind rather than degree since "recklessness, unlike negligence" involves an element of intent . . or imputed intent. (Prosser, 212)

Neither of these standards is adequate. Application of a simple negligence standard would be too harsh. It would be bad policy, and unfair to hold an officer accountable for ordinary acts of inadvertence, since such acts are all the more likely to occur in the often dangerous and unpredictable environment in which police officers must operate. At the same time, however, a "recklessness" standard would be too lenient, since it would impose liability only on those officers who commit such "obvious" errors that knowledge may be imputed. Even a deviation from normal police procedure may not necessarily be deemed

"obvious".

A "gross negligence" standard, on the other hand, would provide suspects (or their families) adequate means to redress injury resulting from the abuse of police discretion. "Gross negligence" is not easily defined, but it falls somewhere between simple negligence and recklessness. Gross negligence is perhaps best understood as aggravated negligence, or a significant deviation from the standard of ordinary care. In other words, unlike the "recklessness" standard, the risk of harm need not be so obvious that the officer's knowledge may be imputed, but, unlike the simple negligence standard, the deviation must be a "significant" one. While recognizing the need to grant officers some leeway to commit inadvertent wrongs (negligence) without incurring liability, a gross negligence standard would provide suspects with a means to redress their injuries. It would adequately balance the need to allow officers discretion and the need to provide suspects an adequate remedy for unlawful arrests.

TRAINING LIABILITY

A second case which significantly affects police agencies and law enforcement administrators came about during 1989. In the City of Canton v. Harris, 109 S. Ct. 1197 (1989), the court looked at whether an agency could be held liable for the training or lack thereof for employees.

> The issue . . . is whether that training program is adequate; and if it is not, the question becomes whether such inadequate training can justifiably be said to represent "city policy." But it may happen that in light of the duties assigned to specific officers or employees the need for more or different training is 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 that event, the failure to provide proper training may fairly be said to represent a policy for which the city is responsible, and for which the city may be held liable if it actually causes injury.

The question to be answered is whether the agency, through either written policy or through an unwritten but established custom, had a training program that was inadequate. Up until the Canton case the proper standard

for municipal liability regarding inadequate training was gross negligence (Callahan, 1989, 28). In Canton, the Supreme Court stated that the proper standard for determining agency liability would be based on deliberate indifference. Deliberate indifference, for example, can be evidenced by policy makers who know that police officers may have to use deadly force, but who fail to train such officers in the use of force. One such highly publicized case was Tennessee v. Garner.

Another example of training liability is deliberate indifference on the part of police administrators to a pattern of officer misconduct. An agency must carefully consider every situation in which the issue of training may be challenged. Some types of training activities subject to review would include use of force, sexual harassment, probable cause, AIDS, plus many other types of activities that an officer may be involved in.

In a 1990 case, Doe v. Borough Barrington, 729 F. Supp. 376 (D.N.J.), an agency was held liable for not adequately training officers in understanding how AIDS is spread. The fact that an officer told an individual that his neighbor was infected with the AIDS virus made the city liable for the emotional trauma to the AIDS victim.

Using this standard today, a plaintiff must prove two things. The first is that there is a specific identifiable deficiency in training. The second proof a defendant must establish is that the deficiency in training actually caused the injury.

There have been numerous cases in which Section 1983 actions have been filed regarding training issues. Such cases may involve any aspect of a law enforcement agency's training program. Although the standard of proof is considered higher now because of Canton, an agency and its administrators must be cognizant of legal decisions which may affect their training programs. They continually must evaluate and refine their training to prevent this type of liability. "Every day new laws are passed and old ones are reinterpreted. Court decisions constantly force the police to revise their procedures and policies in accordance with these decisions" (Gallagher, 1990, 25). In one case the court observed that department rules and procedures issued during 1951 failed to address current standards of search and seizure, hot pursuit, and the use of deadly force. Little or no in-service training was provided for the officers (Bordanero v. McLeod, 1989, 1152).

SUPERVISORY LIABILITY

Supervisors normally are not held accountable for a subordinate who commits a constitutional wrong. At a minimum, to establish liability, a plaintiff must show that a police official at least implicitly authorized, approved, or knowingly acquiesced in the unconstitutional conduct of an employee (Leach, 1990, 1242). Often the history of the subordinate and the supervisor's action towards the history will be questioned when a suit is brought against the officer. In the case of Harris v. City of Pagedale, 821 F. 2d 499 (1987), the plaintiff was abused sexually by an officer and was able to prove that both the chief and the city council were aware of this officer's history of conduct, but never did anything about it (Harris, 1987, 499). A supervisor also may be held liable if he is present but fails to intervene when his subordinate commits an unconstitutional act (Taylor, 1988, 180).

NEGLIGENT HIRING AND RETENTION LIABILITY

When an agency hires someone as a police officer, several assumptions are made. The first is that the person is of good moral character and good background. It is assumed that through background investigations conducted on potential police recruits that any history of misconduct or abnormal behavior will be identified and that unsuitable candidates will be removed from the employment process. In most agencies some types of screening devices are used such as polygraphs, psychological surveys, and credit checks. Police agencies expect that by the end of the pre-employment process, a candidate selected will be the best person for the job. There are times, however, when this is not the case. Most police officers can give an example of a fellow officer who "should not have graduated from the academy." These individuals who slip through the system are the types that should concern an administrator. A "loose cannon" in a law enforcement agency can create enormous problems if not discovered. At present, there are few cases filed regarding the negligent hiring of employees. Generally, as long as the agency takes steps to screen out the potentially harmful candidates, the courts will not hold

the agency liable (Bates, 1986, 456).

A different matter occurs in allowing the "loose cannon" to continue to remain with the agency if the administrators are aware of his performance and do not take appropriate corrective measures. "The failure to discipline or dismiss officers who develop a track record of unconstitutional conduct may result in supervisory and municipal liability" (Callahan, 1990, 31).

CONCLUSION

The excessive use of force by police can generate anger and distrust. This anger was reflected in some of the language in the Garner opinion. Taking a more practical view, one former police commissioner explained the use of excessive force as having "interfered with the strenuous efforts being made to still strife between the . . .police department and the citizens it served." (Edwards, 1986) In a few instances, this anger and "strife" have resulted in calls for criminal prosecution of the officers involved. This paper has tried to demonstrate, however, that imposition of criminal sanctions are sometimes unfair to the

police and bad social policy. Recourse to state tort law and to constitutional tort law would be more fair and effective. Furthermore, application of a gross negligence standard would appropriately take into consideration the officers' simultaneous need for discretion and clear guidance. In imposing constitutional tort liability, however, a court should apply Fourth Amendment analysis to the exclusion of substantive due process analysis, since application of the latter analysis would undermine the officers' need for clear guidance.

An officer is normally authorized to use deadly force even if it is not necessary for self-defense. Several states, for example, permit the use of such force against a felon in a crime involving the use or threatened use of deadly force or when there is a substantial risk that delay of the suspect's apprehension will cause serious bodily injury or death.

A quote attributed to August Volmer by James J. Ness states:

> "The citizen expects the police officer to have the wisdom of Solomon, the courage of David, the strength of Samson, the patience of Job, the leadership of Moses, the kindness of the Good Samaritan, the strategical training of Alexander,

> the faith of Daniel, the diplomacy of Lincoln, the tolerance of the Carpenter of Nazereth, and finally, an ultimate knowledge of every branch of the natural, biological, and social sciences. If he had all these, he might be a good policeman." (Ness, 1991, 181).

Fortunately, those who choose to serve in law enforcement are not expected to be this perfect. Police officers are expected to make mistakes and the courts realize this fact. Standards of conduct have been provided through tort decisions to tell police officers, their supervisors, and the agencies who employ them under what circumstances they will be held accountable.

Officers can be sued under state or federal actions. A suit using state statutes is considered a tort and is classified as either an intentional tort or negligent tort.

A tort is a wrong which is prosecuted against the defendant by the plaintiff. The type of misconduct alleged will determine what style of tort is brought against the officer and department. As noted, tort actions are different from criminal actions. A criminal action is prosecuted against the officer in his individual capacity. The concern of the administrator in this regard is primarily for the adverse publicity that will be created. In addition, the administrator must be assured that this act

was not due in part to a policy or custom which was condoned by the agency. To permit this will bring liability upon the agency and possibly supervisors.

Federal suits normally are filed under Title 42 U.S.C. section 1983. Through this statute, plaintiffs may hold individual officers liable but also may include the officer's supervisor and the employing agency. To be successful in a claim, a plaintiff must establish that the defendant was acting "under color of law" and that the defendant was deprived of some constitutional right or privilege.

During 1978, the Supreme Court held that agencies are "persons" and as such can be liable for the acts of their employees. Based on the policies and customs established by the agency. Deprivations can occur due to hiring, training, or supervisory deficiencies.

It is important for a law enforcement administrator to stay current on legal issues which may affect his or her agency. A constant process of review of policies and procedures must be undertaken to protect the agency and its administrators from potentially disastrous economic and personal problems.

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