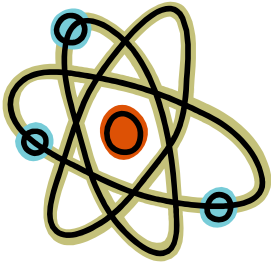


Officer-Involved-Shootings: Preparing for the Plaintiff's "Big Bang Theory"



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I. FUNDAMENTAL PRINCIPLES IN POLICE LIABILITY CASES

Fourth Amendment

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

California Penal Code §835a

"Any peace officer who has reasonable cause to believe that the person to be arrested has committed a public offense may use reasonable force to affect the arrest, to prevent escape, or to overcome resistance."

42 U.S.C. § 1983

"Any person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory, or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or any other person 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, sued in equity, or other proper proceeding for redress."

42 U.S.C. § 1988

The Court may award attorneys' fees to the prevailing party in a civil rights lawsuit. [A plaintiff may receive attorneys' fees if he prevails in all or in part. A prevailing defendant may receive attorneys' fees only if the Court determines the action was frivolous as a matter of law.]

Graham v. Connor (1989) 490 U.S. 386

Graham, a diabetic, was having an insulin reaction and went into a convenience store to purchase orange juice. He left quickly, arousing the suspicion of a peace officer. The officer detained him, cuffed him, shoved him face first against the hood, and then threw him into the patrol car. He then learned that no crime had been committed and released him. Graham filed a lawsuit and the United States Supreme Court ruled that civil rights claims arising in the context of an arrest or investigatory stop are analyzed under the Fourth Amendment "reasonableness" standards:

"The reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than the 20/20 vision of hindsight." ... "The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments--in circumstances that are tense, uncertain, and rapidly evolving--about the amount of force that is necessary in that particular situation." The reasonableness inquiry is an objective one, and the officer's subjective intention is not relevant.

To determine reasonableness, the nature and quality of the intrusion on an individual's Fourth Amendment interest must be balanced against the legitimate governmental interests at stake. Factors to consider in weighing the governmental interest include:

1. Severity of the crime at issue.
2. Whether the suspect poses an immediate threat to the safety of the officers or others.
3. Whether the suspect is actively resisting or attempting to evade arrest by flight.
4. Whether a warning was given if feasible to do so.

Tennessee v. Garner (1984) 471 U.S. 1

Memphis officers respond to a prowler call and see a suspect fleeing across a back yard. Although "reasonably sure" the suspect was unarmed; the officer called "halt" and shot the suspect when he started to climb over a fence. The Supreme Court holds that "the use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is Constitutionally unreasonable." ... "When the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to

others, it is not Constitutionally unreasonable to prevent escape by using deadly force.'

Scott v. Henrich (9th Cir. 1994) 39 F.3d 912

The appropriate inquiry under the Fourth Amendment is whether the officers acted reasonably, not whether they had less intrusive alternatives available to them. Officers need not use the least intrusive means of responding to an exigent situation; they need only act within the range of conduct that is identified as reasonable.

[But see *Smith v. City of Hemet* (9th Cir. 2005) 394 F.3d 689 which says “an additional factor that we may consider in our *Graham* analysis is the availability of alternative methods of capturing or subduing a suspect.” The Ninth Circuit considered an expert’s declaration that the officers could have and should have used control holds instead of commanding the dog to attack.]

II. HOW TO PREPARE YOUR BEST DEFENSE

- A. The steps an entity can take before, during and after an OIS case to prepare for litigation
 1. Be able to alert criminal investigators to evidence that is important to defending civil litigation
 2. Evidence preservation is KEY
 - Interview civilian witnesses sooner rather than later
 - All electronic media
 - Actual time frame of event and shooting decision
 - Suspect(s) demeanor, statements, and behavior
 - Officer(s) demeanor, statements, and behavior leading up to, during, and immediately after the incident
 - Applicable Dept. policies in effect at the time of the incident
 - Maintain accurate training records
 3. Anticipate that the internal investigation and other investigative materials will be requested- and likely turned over to the other side- during discovery
 4. Be cautious about what information is, and is not, disclosed to concerned inquirers, on social media, and to reporters

B. Anticipate Criticisms of Officers and Supervisors

1. Pre-shooting conduct

- An officers' tactical conduct and decisions leading up to a use of deadly force can be considered in determining whether the deadly force was reasonable under the totality of the circumstances. (*Hayes v. County of San Diego* (2013) 57 Cal.4th 622)

2. Decision to use deadly force

- Plaintiff will downplay the nature of the safety threat
- Example: officer believes he sees suspect holding a weapon but it turned out to be non-threatening object
- Consider less-lethal alternatives?
 - *Smith v. City of Hemet* (9th Cir. 2005) 394 F.3d 689
- Suspect's mental illness
 - *Sheehan v. City and County of San Francisco* (9th Cir. 2014) 743 F.3d 1211
- The sympathetic shooter

3. "Inconsistencies" in statements

4. Timing of when statements of involved officer(s) are taken

5. "Lack of supervision" claims

- Statements of supervisors involved in incident

C. Potential Claims Against the Department

Monell v. Dept. of Social Services (1978) 436 U.S. 658

Public entity is liable under §1983 only where the constitutional violation is the result of an official custom, policy or practice. No liability based on *Respondeat Superior* (i.e.: Principal is liable for acts/omissions of the Agent).

Oklahoma City v. Tuttle (1985) 471 U.S. 808

A single act of police misconduct is generally not, by itself, sufficient to establish an official policy or custom under *Monell*.

Canton v. Harris (1989) 498 U.S. 378

Inadequate police training may be a violation under § 1983 where it can be shown to have been a policy reflecting "deliberate indifference" to Constitutional rights.

Laraz v. City of Los Angeles (9th Cir. 1991) 946 F.2d 645

Police Chief's failure to sustain complaints of excessive force or to discipline officers may create an unconstitutional policy or custom, resulting in liability against the City.

Grandstaff v. Borger (5th Cir. 1985) 767 F.2d 161

Failure to take disciplinary action for improper shooting can rise to the level of "reckless disregard" and thus constitute a policy or custom, and thereby impose liability on a public entity.

Trevino v. City of Los Angeles (9th Cir. 1996) 99 F.3d 911

Plaintiff settles excessive force case against City, and then files another suit, alleging that the City had a policy of always paying the punitive damages awarded against officers, and that this created an unconstitutional policy or custom which removed the fear of punitive damages from officers and thereby encouraged officers to violate civil rights. Court says that there is no improper policy if City Council considers each case on an individual basis.

III. LESSONS LEARNED FROM RECENT CASES: GOING FORWARD CONSIDER "WW9D?" or What Would the Ninth Circuit Do?

Espinosa v. City and County of San Francisco (9th Cir. 2010) 598 F.3d 528

Officers received a call from a neighbor that the front door of an apartment was swing open and the location could be a drug house. The first officer arrived and saw the door was closed: he pushed it slightly and it opened. The officer called for backup and entered the apartment. There was a bloody shirt hanging over an interior door. The apartment looked as if it were being renovated. Two backup officers arrived and they continued to search the apartment. They found a locked bedroom and kicked open the door after announcing themselves. Inside the room they found a resident of the apartment. He was cooperative. After searching him and finding a knife the officers heard noises indicating someone was in the attic. All three officers entered the attic with their guns drawn, where they encountered Sullivan. Sullivan did not put up his hands after the officers instructed him to do so. Two officers shot: one believed he saw something black in Sullivan's hand and the other thought she saw something in Sullivan's hand. Sullivan was fatally wounded. It was then discovered that he was unarmed.

The Ninth Circuit upheld the denial of summary judgment to the officers based on qualified immunity. Because the initial officer at the scene entered the apartment improperly, all of the officers (including those who arrived later)

could be held liable for provoking the confrontation with Sullivan. This case went to trial in federal court in San Francisco and the jury found for the defendants.

Lal v. Cal. (9th Cir. 2014) 746 F.3d 1112

Ninth Circuit affirmed grant of summary judgment in favor of defendant-officers who shot and killed Kamal Lal following a high speed chase. Upset over a domestic disturbance with his wife, Lal led police on a 45-minute high-speed chase on and off freeways before his vehicle was disabled. Lal then exited his truck and tried to seriously hurt himself, then tried to provoke the officers into shooting him, and then advanced on two officers while holding a large rock over his head. Lal refused to comply with commands to stop and continued to advance on the officers, who then shot and killed him. The court held that under the totality of the circumstances, the district court's finding that the use of deadly force was a reasonable because the officers objectively feared immediate serious physical harm. The threat Lal posed to the officers is not negated because he possibly wanted to commit suicide by cop.

Gonzalez v. City of Anaheim (9th Cir. 2014) 747 F.3d 789

Officers pull over a minivan that had cut them off. Officers Ellis and Wyatt approached the van. Officer Wyatt thought he saw the driver (Gonzales) reach for something. Wyatt drew his gun and told Gonzales that if he reached down again, he would shoot. Gonzales held his fists clenched in his lap and then grabbed a bag that was between the front seats. He did not respond to commands to turn off the engine and give Officer Ellis his hands. Officer Wyatt reached into the car and tried to get Gonzalez to open his hand. Gonzalez then raised his hand to his mouth as if to swallow something. Officers tried to restrain Gonzalez and called for assistance. Wyatt then entered the van and began punching Gonzalez in the head. Ellis saw Gonzalez reach for the gearshift so he hit Gonzalez on the back of the head to prevent him from driving the van. Gonzalez shifted the van into drive and the van began moving. The passenger door closed behind Wyatt and Gonzalez accelerated. Unable to stop or gain control of the van, Wyatt shot Gonzalez in the head.

The district court granted summary judgment in favor of Officer Wyatt and City. In an en banc decision, the Ninth Circuit reversed the grant of summary judgment on the 4th Amendment excessive force claim but affirmed the grant of summary judgment as to the 14th Amendment denial of family relationship claim and on the uses of non-deadly force leading up to the shooting. The court reasoned that there was a genuine dispute of material fact due to perceived inconsistencies in Wyatt's testimony regarding the speed of the vehicle. If the jury were to find that the van was moving slowly at the time of the shooting they could find that other alternatives to deadly force were reasonable.

IV. HOW USE OF EXPERTS CAN STRENGTHEN YOUR DEFENSE

A. Toxicology

B. DNA/GSR

- Jurors expect to see this (CSI effect). So if you don't have it, explain why
- Limits on its practical use/benefit
- Preserve evidence for later testing, even if criminal case is never filed or after criminal case concludes

C. Suicide-by-Cop

- *Boyd v. City and County of San Francisco* (9th Cir. 2009) 576 F.3d 938
- *Espinosa v. City and County of San Francisco* (9th Cir. 2010) 598 F.3d 528

VI. Q & A

Questions? Please feel free to contact us at (916) 564-6100 or at the following email addresses:

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