

INVESTIGATING WRONGFUL DEATH IN POLICE SHOOTINGS

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1. STATE OF THE LAW

A. Police use of deadly force standard from the United States Supreme Court

Brosseau v. Haugen, 125 S. Ct 596 (2004) Qualified immunity shields an officer from suit when she makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances she confronted. Qualified immunity operates to protect officers from the sometimes hazy border between excessive and acceptable force. Because the focus is on whether the officer had fair notice that her conduct was unlawful, reasonableness is judged against the backdrop of the law at the time of the conduct. If the law at that time did not clearly establish that the officer's conduct would violate the Constitution, the officer should not be subject to liability or, indeed, even the burdens of litigation.

FACTS: The officer was attempting to arrest the victim, who had locked himself in his vehicle. The victim ignored the officer's commands, issued at gun point, to get out of the vehicle. The officer shattered the driver's side window by hitting it with her handgun. She unsuccessfully attempted to grab the keys and struck the victim on the head with her gun. The victim, still undeterred, succeeded in starting the vehicle and began to move away. The officer fired one shot through a window of the vehicle, hitting the victim in the back. She later explained that she shot him because she was fearful for other officers she believed were in the immediate area on foot, as well as for the occupied vehicles in the victim's path and any other citizens who might have been in the area. The Supreme Court held that the appellate court was wrong on the issue of qualified immunity. Case law clearly showed that this area was one in which the result depended very much on the facts of each case. Furthermore the cases suggested that the officer's actions fell in the hazy border between excessive and acceptable force and did not clearly establish that the officer's conduct had violated the Fourth Amendment

B. Police use of deadly force standard in the Sixth Circuit

Sample v. Bailey, 337 F. Supp 2d. 1012 (2005) In reviewing a claim for qualified immunity, the United States Court of Appeals for the Sixth Circuit employs a three-step inquiry: First, the court determines whether, based upon the applicable law, the facts viewed in the light most favorable to the plaintiff show that a constitutional violation has occurred. The second step of the qualified immunity analysis is whether the constitutional right at issue was clearly established. **If the law at that time was not clearly established, an official could not fairly be said to "know" that the law forbade conduct not previously identified as unlawful.** The constitutional right cannot simply be a general prohibition, but rather the right the official is alleged to have violated must have been clearly established in a more particularized, and hence more relevant, sense: **The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.** This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law **the unlawfulness must be apparent.** The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted. In inquiring whether a constitutional right is clearly established, the United States Court of Appeals for the Sixth Circuit must look first to decisions of the United States Supreme Court, then to decisions of the court and other courts within its circuit, and finally to decisions of other circuits.

Third, the court determines whether the plaintiff has offered sufficient evidence to indicate that what the official allegedly did was objectively unreasonable in light of the clearly established constitutional rights. Qualified immunity must be granted if the plaintiff cannot establish each of these elements.

FACTS: While attempting to make an arrest during a burglary, the police officer shot the

arrestee several times while the arrestee was hiding in a cabinet. The arrestee filed suit under §§ 1983, alleging that the officer used excessive force. On appeal of the district court's judgment denying the officer summary judgment, the court affirmed. The arrestee's rights under the Fourth Amendment were violated because his mere action of moving his arm to grab the top of the cabinet in attempting to climb out would not cause a reasonable officer to perceive a serious threat of physical harm to himself or others. The factual context of the case, the darkness, the unfamiliar building, the arrestee's intoxication and unresponsiveness, was sufficiently similar to the court's body of case law applying the Robinson rule so as to give the officer fair warning that shooting a suspect who was not perceived as posing a serious threat to the officer or others was unconstitutional. It was objectively unreasonable for the officer to order the arrestee to remove himself from the cabinet and then to perceive the arrestee's movement of his right arm outward as a threat that necessitated the use of deadly force.

Sova v. City of Mt. Pleasant, 142 F. 3d 898 (1998). *Sova*, supra, maintains that police officers are afforded qualified immunity for their discretionary functions...provided their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. Discovery in *Sova* clearly demonstrated that the two sides did not agree on the facts which gave rise to the death of Mr. Sova. In that case the officers' claimed Mr. Sova threatened to get a gun and then charged at them through a kitchen door with knives drawn. Sova's parents deny what the officers stated and argue that their son never said anything about a gun and was shot before their son ever stepped out of the kitchen door frame. The 6th Circuit determined that its resolution of the case turned upon whether it was proper for the District Court to grant the officers qualified immunity in the face of such a factual dispute. The Court argued that "qualified immunity in cases involving claims of deadly force is difficult to determine on summary judgment because liability turns upon the 4th Amendment's

reasonableness test....the proper application of 4th Amendment reasonableness requires careful attention to the facts and circumstances of each particular case, including 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.” “This is an objective test, to be judge from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight...In a civil suit arising from the use of deadly force, the police will not be immune if, on an objective basis, it is obvious that no reasonably competent officer would have shot the victim.” *Id* at 902. The court went on to say “this Court has established that summary judgment is inappropriate where there are contentious factual disputes over the reasonableness of the use of deadly force. When the legal question is completely dependent upon which view of the facts is accepted by the jury, the District Court cannot grant a defendant police officer immunity from a deadly force claim....this is because the reasonableness of the use of deadly force is the linchpin of the case. If the jury determines the officer shot the suspect without a reasonable belief that he posed a significant threat of death or serious physical injury to the officer or others, then the officer’s actions were legally unreasonable under the 4th Amendment.” The *Sova* Court reversed the trial Court’s grant of summary judgment and held, “Where, as here, the legal question of qualified immunity turns upon which version of the facts one accepts, the jury, not the judge must determine liability.”

FACTS: Defendant police officers shot and killed son within fifteen minutes of arriving on the scene of his attempted suicide. The lower court granted summary judgment because it ruled that the officers had acted reasonably, as a matter of law, because the threat son posed to himself justified the use of deadly force. The court agreed that parents failed to show that any government policy or custom caused the injury and that the officers had been properly trained.

However, it found there was a jury issue as to whether the officers who actually shot the son had qualified immunity. Although qualified immunity was a threshold issue, the use of deadly force required a showing that the police had probable cause to believe that the suspect posed a significant threat of death or serious physical injury to the officers or others, as viewed by the officers at the time. Because there was a dispute as to the facts which occurred, it was for the jury and not the judge to determine liability.

Leong v. City of Detroit, 151 F. Supp. 2d 858 (2001) The law does not require that a suspect pose a direct, imminent, and unmistakable threat of serious injury or death before an officer may use deadly force in defense of himself or others.

FACTS: After the officers signaled for the decedent to stop due to a traffic violation, the decedent led them on a chase. Upon cornering the decedent, he fired his shotgun into the roof of his truck and emerged from his vehicle with the weapon. The decedent disregarded repeated warnings that he put down his gun, and instead racked his gun and invited the officers to shoot him. The officers shot and killed the decedent. In the estate representative's civil rights action, the court granted defendants' summary judgment motion because the officers were entitled to qualified immunity for their reasonable use of deadly force. The officers had probable cause to believe that the decedent posed a threat of serious physical harm to the officers. The court determined that the law does not require that a suspect pose a direct, imminent, and unmistakable threat of serious injury or death before an officer may use deadly force in defense of himself or others. The representative's arguments regarding the positions of the decedent and the officers did not raise an issue of material fact as to the reasonableness of the officers' use of deadly force.

C. Qualified Immunity

Saucier v. Katz, 533 U.S. 19 (2001) Under the qualified immunity analysis, the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. The relevant, dispositive inquiry in determining whether a

right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted. The right allegedly violated must be defined at the appropriate level of specificity before a court can determine if it was clearly established.

FACTS: At about the time the Vice President of the United States began speaking at a public gathering, respondent protestor raised a banner and walked toward the speakers' platform. Petitioner officer arrested the protestor and shoved him into a van. The protestor sued the officer, alleging excessive force. The district court denied the officer's summary judgment motion on the grounds of qualified immunity. The appellate court affirmed, finding that qualified immunity was duplicative in an excessive force case. On certiorari, the Supreme Court reversed because the inquiries for qualified immunity and excessive force remained distinct and the officer was entitled to qualified immunity. The initial inquiry should have been whether the facts alleged showed the officer's conduct violated a constitutional right. The next question should have been whether the right was clearly established in the context of the case. In the circumstances presented to the officer, which included the duty to protect the safety and security of the Vice President, there was no clearly established rule prohibiting the officer from acting as he did.

2. OVERCOMING THE *MISTAKE OF FORCE* EXCUSE IN YOUR WORK UP OF THE CASE TO AVOID QUALIFIED IMMUNITY

In order to overcome the leeway given the offending police officer by the Courts the plaintiff must demonstrate the police officer's articulation for his use of deadly force to be incredible, or not really possible, given that which is alleged by the officer to be the conduct of the deceased prior to the seizure.

I. Live witness who saw and can dispute the version of the shooting officer(s)

In the cases that survive SJ the Courts tend to rely on the testimony of live witnesses who dispute the plaintiff or deceased posed any threat to the police officer at the time of the seizure. These witnesses must clearly dispute the officer's articulation that he was in fear of his life or the life of another. This is the best evidence to dispute the officer's excuse for the use of deadly force. **This type of evidence is often rare.** Officers can rely on their version being given great weight if there are no witnesses and the deceased can not speak. **If no live witness to dispute the officer's version the next best evidence is the forensic.**

II. Forensic and other evidence in order to dispute the version of the shooting police officer(s)

- a. Ballistics
- b. Gun shot residue
- c. Scene of shooting
- d. Photos
- e. Autopsy
- f. Scene sketch/diagram
- g. Incident reports
- h. Department policy
- I. Officer's background
- j. Department investigation into the use of deadly force
- k. Training in deadly force and firearms

a. Ballistics testing concerns the scientific and non scientific examination of the involved firearm, spent bullets, live rounds, spent cartridges, magazine or chamber, holster and clothing. In investigating all cases of the use of deadly force where the police shoot a person, whether the

person lives or dies, justification must be established for each bullet fired from an officer's gun. An account of each bullet should be made by the use of deadly force police investigators. Often, this is not done. It must be done by the plaintiff.

EXAMPLE:

Ballistics also concerns the path the bullet takes once fired from the gun. This is called trajectory. In the case of Cora Bell Jones the path the bullet took was depicted to demonstrate the relative positions of the shooter and the deceased at the time he shot. This illustration demonstrates a scenario consistent with the physical condition of an elderly women who suffered from arthritis, dementia and other diseases at the time she was shot by the young spry officer. The officer attempted to claim the elderly women was a threat to the other officers present at the time he shot Ms. Jones.

In the Leong case an illustration of the scene was used to depict the officers versions of what actually took place. The examination of the scene suggested the position of the officers when they shot Mr. Leong was not supported by where the spent shell casings were found. The ejection pattern of the Glock weapon is to the right and to the back. By examining the evidence technicians scene depiction the spent shells were collected and marked. Microscopic examination of the tool markings on the casings matched the casing to the officer's gun. Comparing this to the officer's version of where he claims he was did not match.

b. Gun shot residue is the deposit of stippling left on an object after a gun discharges. The amount of stippling can determine distance of the muzzle to the target. It can also be used to suggest if a person handled a weapon at the time the weapon was fired. A caveat is that residue spreads and can deposit easily. So one can be affected without having fired a weapon if they are in the zone of coverage.

c. Scene of shooting. Evidence at shooting scene is to be preserved. The exact state of things at the time of the seizure is to be preserved in order to recreate and corroborate the justification for the use of deadly force. Where it is apparent things were not preserved a question may be raised as to the version given by the officer.

d. Photos are taken by the evidence technicians to also document justification or corroboration. Careful examination of photos is important as a picture can be worth a thousand words.

e. The autopsy is used to document the manner and cause of death. The examiner attempts to portray the entrance and exit wounds, bullet paths, injury types, and other signatures of the offense.

f.. Scene sketch/diagram is another way of documenting justification.

g. Incident reports by the officer are summaries of the purpose for the officers actions.

h. Department policy can be used to determine if the officers actions are consistent with law and shooting policy.

I. Officer's background is helpful to determine pattern and notice to the department.

j. Department investigation into the use of deadly force should be examined for whether the department looks objectively at it's officers claims for the use of deadly force.

k. Training in deadly force and firearms should be regarded to determine the department's overall attitude toward the officers use of force.

3. PRACTICAL CONSIDERATIONS IN ANALYZING LIABILITY IN ANY POLICE SHOOTING

In every police shooting circumstance, police have the benefit of 20/20 hindsight. While

the courts limit the plaintiff's analysis of the use of deadly force to the officer's perspective at the time of the shooting, the courts condone the officer's use of 20/20 hindsight in justifying a person's death. ["This is an objective test, to be judge from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight...*Sova*, supra. Therefore, it is imperative that in analyzing a claimed use of deadly force you resist the temptation to buy into the police officers version of events. A rule of thumb is to distinguish the "constants" from the "variables." The constants are the immutable things that you can rely on in your search for the truth. The variables are the things that may or may not be true. What the officer writes in his report is a variable. Consider that within minutes of the shooting the officer will have the benefit of support personnel in the form of the union Stewart, the union attorney, a sympathetic supervisor and a partner. In the case where the person shot is deceased and there are no witnesses, this becomes even more critical. In general, the shooting officer will not make any account of what took place in the shooting event until huddling with his group of co-horts. Scenarios are played out before the official report or version is documented. Officers are protected under the 5th amendment following any use of deadly force. As a formal protocol a department attempts to take a recorded statement in which the shooter is advised by counsel not to make a statement. When the variable has been played out and practiced, then the officer will come forward and make his formal statement. Often days to weeks have passed since the time of the shooting. The old adage, "if you tell yourself something long enough you will begin to believe it," becomes true . This is what happens. Even when the official interview takes place the so called shooting examiners ask questions with a blue tint. In a real case the deceased was shot in the back. At the Garrity statement interview of one of the police officer witnesses the following exchange took place:

Officer: I honked the horn. My partner moves to the side. I start proceeding up here were I'm going to stop the cruiser and get out and continue the chase. At that point he starts reaching in his waistband what I believe is going to be a weapon. He had the elbows out chains(sic) going down he starts pulling something out what I can't see is the weapon but I am pretty sure he's pulling something out to harm me

Examiner: From your years of experience on the street in situations like this

Officer: Exactly

It was no search for the truth. It was a sympathetic examiner seeing through blue spectacles in an effort to determine the outcome of the shooting.

It becomes ever so important that you look for the constants. Sometimes constants can be found in the officers reports. If, for instance, all officers to the shooting agree on a point that helps your case, that fact becomes a constant. Other examples of constants are evidence. The forensics don't lie. In a real case where all the shooting and witness officers agreed the three shooting officers shot standing up and from a distance, the forensic evidence demonstrated that one of the 14 shots to the deceased was a contact shot. This evidence clearly disputed the officers' version and could not be challenged. In order to exploit such a point an illustration depicting the officers' version came in handy. In this case there were two constants. The agreement of the officers and the forensic evidence.

Prove your case through the constants and don't buy into the attempting to prove your case by disproving what most likely is a fairy tale version of what took place.

i. Cops are human beings first.

A fundamental flaw in judging police is the assumption that they are supermen. Police dodge bullets, which clearly is a hazardous occupation. However, to suggest that in doing so they

are not scarred, just as you or I would be, is a mistake. Cops are given hero status by juries and by judges. In analyzing use of deadly force cases a rule of thumb is to presume the cop who shot was “scarred.” Being scarred and being in fear of his life are two different things. However, even when the cop is actually scarred he can always claim in his report that he, “feared for his life.” This incantation becomes the script after the fact. This is not a distinction without a difference. Scenario: B& E run. Cop has his gun out. Suddenly, 15 year old kid pops out and startles the cop who shoots the kid. No gun is found or other dangerous weapon. In this scenario the cop does not admit he was scarred and that’s why he shot. Nor is it likely the cop would say the discharge was accidental. In the report you will find incantations such as, “ I shouted to the suspect to put his hands so that I could see them and he refused;” “ As I looked at the suspect he had a look which lead me to believe he had been drinking or using drugs;” “The suspect refused to remove his hand from beneath his shirt.” If the officer admitted he shot because he was scarred it was a wrongful use of deadly force by 4th amendment standards. If the officer was in fear of this life it was a justified shooting. The courts condone the officers’ use of these incantations which become the excuse to an officer who, in reality, is scarred with rhetoric in decisional law which says, “officers must make split second decisions.” So, if in reality, there was actually an interval of time, no matter how brief, which should have been used which would have preserved the constitutional rights of this individual then that interval of time should not have been avoided. The officer knows of himself, of this interval of time. Shooting review boards fail to seek this interval of time. They are in the best position to find the interval. They can ask the right questions and get the real answers. They don’t. At least, they don’t document it. Look to the officers training in your analysis. Cops tend not to think outside of the training regimen box. Departments may not train to make an officer think his way around the

“split second” phenomenon. In that case the officer defaults to what ever training he has received.