



PURSUING POLICE ACCOUNTABILITY:

REPRESENTING PLAINTIFFS IN EXCESSIVE FORCE CLAIMS

BY C.J. POTTER, IV, ESQ.

Recent discontent arising from grand juries' decisions not to issue indictments following the police killings of Michael Brown and Eric Garner mirror the debates that occurred in communities in Nevada following a Clark County Grand Jury's decision, in December 2012, not to indict the police officer who shot and killed unarmed, disabled veteran Stanley Gibson.

However, as was the case for the widow of Stanley Gibson, whom my father and I represented, victims of police misconduct have the opportunity, through a civil action, to hold police accountable for depriving victims of their constitutional rights. In fact, courts have recognized the potential for attorneys representing civil rights plaintiffs to hold police accountable for misconduct, referring to those attorneys as private attorneys general.

Proving Liability of Individual Officers

When a law enforcement officer uses excessive force upon an individual, that victim may seek recovery either as a state tort or a civil rights violation under 42 USC § 1983. However, damages for state torts committed by law enforcement are capped at \$100,000 in Nevada pursuant to NRS 41.035(1), whereas a federal civil rights action under 1983 is not capped, and damages can potentially be well into seven figures. Additionally, a plaintiff who prevails under 1983 may also be entitled to attorney's fees under 42 USC § 1988.

In order to establish liability under 1983, a plaintiff must prove two elements:

1. The defendant was acting under the color of law, and
2. That the defendant deprived the plaintiff of a constitutional right. (*Monroe v. Pape*, 365 U.S. 167 (1961)).

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Claims for excessive force, against individuals at liberty, are analyzed under the Fourth Amendment. (*Graham v. Connor*, 490 U.S. 386 (1989)). The Fourth Amendment analysis is a factually intensive inquiry that requires determining whether the defendant’s use of force was objectively reasonable under the “totality of the circumstances.” *Id.* The analysis is intended to balance “the nature and quality of the intrusion on the individual’s Fourth Amendment interests against the countervailing governmental interests at stake.” *Id.* Factors a court will consider include the severity of crime at issue, whether the suspect poses an immediate threat to the safety of officers or others and whether the individual was actively resisting arrest or attempting to evade arrest by flight. *Id.* Defendants in civil rights actions will frequently attempt to narrowly frame the totality of the circumstances analysis at the instant that force is deployed. However, from a plaintiff’s perspective, properly ascertaining which circumstances are relevant to the reasonableness of a defendant’s use of force should include the conduct of the law enforcement officer prior to the use of force, such as escalating a confrontation that did not warrant force into a situation where excessive force was deployed. The Ninth Circuit has endorsed the proposition that actions leading up to the use of force should be analyzed in order to truly consider the totality of the circumstances. (*Billington v. Smith*, 292 F.3d 1177 (9th Cir. 2002)).

Additionally, during discovery it is important to illuminate all of the objective facts available to the officer at the time of the incident that illustrate that the use of force was unreasonable, because a simple statement by an officer that he fears for his safety is not enough to justify the use of force. (*Deorle v. Rutherford*, 272 F.3d 1272 (9th Cir. 2001)). These facts include whether the victim of excessive force was emotionally disturbed and the training that an officer has received.

An attorney representing a victim of police misconduct will also likely encounter obstacles stemming from the fact that officers do not typically provide adverse information against fellow officers. The Ninth Circuit has taken judicial notice that the police code of silence is a formidable barrier to the investigation of complaints about the police. (*Blair v. City of Pomona*, 223 F3d 1074 (9th Cir. 2000)). Therefore, the court must

carefully examine all the evidence in the record to determine if the officers’ account of the events is credible and look at the circumstantial evidence that, if believed, tends to discredit the police officer’s story. (*Gregory v. County of Maui*, 523 F.3d 1103 (9th Cir. 2008)).

Overcoming the Defense of Qualified Immunity

In excessive force cases, the individual officers will almost certainly assert a defense of qualified immunity. Qualified immunity is not merely immunity from judgment, but rather immunity from suit. Consequently, a defendant is entitled to a prompt judicial determination of whether or not the defendant enjoys immunity. (*Saucier v. Katz*,

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533 U.S. 194 (2001). As a result, a defendant is permitted to appeal a denial of qualified immunity. As a practical matter, a defendant's decision to challenge the denial of qualified immunity through an interlocutory appeal can significantly delay the litigation.

Qualified immunity is an affirmative defense; therefore a defendant bears the burden of proof. In evaluating the issue of qualified immunity, the court follows a two-part test:

1. Whether the facts alleged show the officer's conduct violated a constitutional right; and
2. Whether the constitutional right in question was clearly established.

The test for qualified immunity is objective. Therefore, the defendant's actual purpose or state of mind is immaterial.

Whether a right is clearly established is most often determined by looking at controlling published court decisions at the time of the violation. (*United States v. Lanier*, 520 U.S.259 (1997)). It is not necessary, however, for the plaintiff to show a published decision establishing the rights in question under precisely the same circumstances as those presented in the case in question. (*San Jose Charter of the Hells Angels Motorcycle Club v. City of San Jose*, 402 F.3d 962 (9th Cir. 2005)).

de facto policy is sufficient to impose liability upon the municipality so long as the requisite causal connection between the constitutional violation and the de facto policy exists. (*City of Canton v. Harris*, 489 U.S. 378 (1989)).

Existence of a policy, practice or custom may be demonstrated by either prior or subsequent rights violations. (*Larez v. City of Los Angeles*, 946 F.2d 630 (9th Cir.1991)). Consequently, it is important for a plaintiff to conduct thorough discovery concerning related constitutional violations that may have

been committed by officers within the department.

For example, if the police department maintains a de facto policy of failing to discipline poorly performing officers' internal investigative reports and officers' disciplinary records are instrumental in proving a plaintiff's claim.

Damages

Although evidence of physical injury makes damages more easily quantifiable, physical injuries are not necessarily required in order for plaintiffs to demonstrate

that they were subjected to excessive force. For example, the Ninth Circuit has determined that pointing a gun at an unarmed arrestee may constitute excessive force. (*Hopkins v. Bonvicino*, 573 F.3d 752 (9th Cir. 2009)). Similarly, sexually harassing a female arrestee by telling her she had nice legs and massaging her shoulders may constitute excessive force. (*Fontana v. Haskin*, 262 F.3d 871 (9th Cir. 2001)).

In a 1983 action, the plaintiff's damages arise from deprivation of a constitutional right. Accordingly, the Eighth Circuit expressly approved a trial court's instruction to the jury that:

Proving Liability of the Police Department

A municipality or police department may not be held liable under a theory of respondeat superior in 1983 actions. (*Monell v. Social Services*, 436 U.S. 658 (1978)). Rather, a municipality will most often be liable if a defendant committed the constitutional violation pursuant to a department policy, practice or custom. A policy, practice or custom need not be formally promulgated for purposes of a *Monell* claim. On the contrary, a



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“no monetary value we place upon constitutional rights can measure their importance in our society or compensate a citizen adequately for the deprivation. However because these rights cannot be precisely evaluated does not mean that an appropriate monetary value cannot be awarded ... you may wish to consider the importance of the right in our system of government, the role the right has played in the history of our republic and the significance of the right in the context of the activities in which the plaintiff was engaged at the time of the violation of the right.” (*Herrera v. Valentine*, 653 F.2d 1220, 1227 (1981)).

Additionally, the U.S. Supreme Court has recognized that a primary function of 1983 is to deter future violations of civil rights. *Owen v. City of Independence*, 445 U.S.622 (1980). Accordingly, it is important for a plaintiff to advocate that the court instruct the jury of the proper measure of damages in a civil rights action.

Preserving a Plaintiff's Claims Prior to Filing Suit

Attorneys should be aware of an additional issue — any criminal charges arising out of the incident involving excessive force could potentially impact the plaintiff's ability to recover for deprivation of their constitutional rights. The rule concerning such charges is that a judgment in favor of the plaintiff's 1983 claim cannot “necessarily imply the invalidity of his conviction or sentence.” (*Heck v. Humphrey*, 512 U.S. 477, 486 (1994)). Therefore, attorneys representing victims of excessive force who have been charged with a crime must endeavor to resolve the criminal case favorably for the individual accused of a crime.

Victims of excessive force are frequently accused of spurious

charges, such as obstruction of a police officer or resisting arrest. Although the abstract and ambiguous nature of the rule announced in *Heck* creates confusion in its application, it is imperative to note that the Ninth Circuit has determined that a conviction for resisting arrest does not bar a 1983 claim for excessive force when the conviction and 1983 claim are based on different actions during one continuous transaction. (*Hooper v. County of San Diego*, 629 F.3d 1127 (9th Cir. 2011)).

Conclusion

As a community, we entrust police officers to keep us safe and enforce the law. Consequently, it is especially traumatic for individuals

to suffer excessive force at the hands of those we entrust to protect us. Additionally, police misconduct erodes the foundation of a Constitutional democracy. Therefore, acting as an advocate for victims of excessive force ensures progress towards the goal of achieving a more just society that respects the Constitutional rights of all individuals. **NL**



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