

## **Improper Tactics and Use-of-Force Liability**

Generally, an officer's use of force is judged according to the circumstances existing at the moment the force was used. There are, however, some situations in which the officer's tactics employed before the use of force may determine the officer's ultimate liability for injuries caused by the use of force. This article will explore a number of cases addressing this issue; unfortunately, these cases do not produce a consistent standard.

In *Billington v. Smith*, decided recently by the U.S. Court of Appeals for the Ninth Circuit, David Smith, a Boise police detective, had just gotten off his private duty job and was driving home with his wife and daughter in his unmarked police car. Ryan Hennessey drove past them recklessly. Unaware that Hennessey had just been involved in a hit-and-run incident, Detective Smith activated his police lights and pursued him. A short time later Hennessey's car crashed. Smith approached the wrecked vehicle holding a 16-inch metal flashlight in one hand and his handgun in the other.

Smith identified himself as a police officer and ordered Hennessey to put his hands on the steering wheel. Instead, Hennessey, who had a blood alcohol level of 0.285 percent, started the car and attempted to drive away, but the car was too damaged to move. Hennessey then grabbed Smith's flashlight and a struggle ensued, during which Hennessey climbed out the window while holding onto Smith, who was backing away. Smith hit Hennessey with his flashlight while Hennessey was kicking Smith in the stomach and groin. At one point, Hennessey grabbed the gun barrel. During the struggle for control of the gun, Smith pulled the trigger, killing Hennessey.

Several objective witnesses all believed that the officer was losing the fight but differed as to whether the gun discharged while Hennessey was grabbing the weapon or when he was as many as three or four feet away. The Bureau of Alcohol, Tobacco, and Firearms determined that the shot was fired from a distance of eight to 14 inches. Although the court found that this presented a disputed issue of fact, it determined that it was immaterial since it was undisputed that Hennessey was the aggressor and kept beating Smith even when he tried to retreat, thus posing an imminent threat of injury or death to Smith.

The trial court denied summary judgment, however, finding a genuine issue of material fact as to whether Smith's alleged tactical errors before the moment of the shooting made his reasonable use of force, at that moment, unreasonable.

The plaintiff's expert witness criticized Smith for choosing to initiate the stop, failing to properly communicate with the dispatcher, having his hands filled with a gun and a flashlight, failing to wear his duty belt with spray, handcuffs, holster, or baton, and failing to make his gun incapable of shooting. The appellate court enunciated the test for "prior act" liability as follows: "When an officer intentionally or recklessly provokes a violent confrontation, if the provocation is an independent Fourth Amendment violation, he may be held liable for his otherwise defensive use of deadly force."

Simply put, if an officer provokes the use of deadly force, he will not be held liable unless that provocation in and of itself amounts to a Fourth Amendment violation. For example, in *Alexander v. City and County of San Francisco*, an elderly man was shot by the SWAT team after it illegally forced entry into his home.

Because the entry into the home was itself a Fourth Amendment violation, the court deemed unreasonable the subsequent employment of deadly force upon seeing the man holding a gun. Other circuit courts, without expressly holding that the prior conduct must, in itself, be a Fourth Amendment violation, have held that liability may attach when officers' unreasonable actions create an encounter leading to a subsequent use of deadly force.

For example, in *Sledd v. Linsday*, officers allegedly forced entry into an apartment and shot the tenant without announcing their purpose and authority. The tenant, believing the officers were armed intruders, had confronted them holding a .22-caliber rifle. The Seventh Circuit overturned the prior summary judgment in favor of the officers as well as the dismissal in favor of the city.

In *Allen v. Muskogee, Okla.*, the Tenth Circuit held that the plaintiffs had created a genuine issue of material fact as to the reasonableness of the police officers' tactics preceding the shooting of an emotionally disturbed person armed and about to commit suicide. The plaintiffs produced

evidence that the officers ran towards the man, screaming at him to drop his gun. The plaintiffs' expert said that officers are trained to deal with armed emotionally disturbed persons by calmly talking to them, and that the officers should have done so from a position of cover rather than exposing themselves to the risk of deadly force. In such a case, reasonable use of force may be unreasonable if the officers recklessly got themselves into the situation.

In a factually similar case, the Tenth Circuit later indicated that the officers' "reckless" actions must be "immediately connected" with the use of force but that the primary focus remains on the exact moment of the threat of force.

Other jurisdictions have been far more forgiving to their police officers, limiting liability to the question of whether or not the force used was constitutional at the moment it was employed regardless of the officers' prior acts. For example, the Eighth Circuit has held that a Section 1983 federal civil rights case cannot get past summary judgment without evidence that the seizure itself, not its prologue, was reasonable.

In *Greenridge v. Ruffin*, the Fourth Circuit held that evidence of failure to employ a proper backup, for instance, did not have a bearing on the reasonableness of the officers' actions in shooting a suspect.

"An officer's actions prior to the actual use of force are irrelevant to the reasonableness inquiry," the court wrote, "because reasonableness depends upon the officer's knowledge immediately prior to and at the moment the split-second decision is made."

In *Salim v. Proulx*, the Second Circuit essentially ignored the opinion of an expert who claimed that the officer's prior acts were reckless in that he carried no police equipment, violated department use-of-force policy by firing a warning shot and carrying his own off-duty weapon, failed to properly plan the suspect's apprehension, failed to call for backup upon seeing the suspect, chased the suspect alone, engaged in a physical altercation with the suspect alone, and failed to disengage from the struggle once he had reason to believe that it would escalate. The court simply ignored all of the reckless-prior-acts arguments and focused on the moment the force was used. It found that the officer's use of deadly force

was reasonable based on the immediate threat posed when the officer fired the fatal shot.

Although it is unlikely that officers will be held liable merely because of the tactics employed before the use of deadly force, they likely will have to defend against this theory. Tactical training will help officers avoid the risk of such liability. Finally, it should be noted that the above cases discuss federal constitutional claims only. In some states, it may be possible for officers to be held liable in state court for negligence, gross negligence, or recklessness.

1. 292 F.3d 1177 (9th Cir. 2002).
2. 29 F.3d. 1355 (9th Cir. 1994).
3. 102 F.3d. 282 (7th Cir. 1996).
4. 119 F.3d. 837 (10th Cir. 1997).
5. *Medina v. Cram*, 252 F.3d. 1124 (10th Cir. 2001).
6. *Gardner v. Buerger*, 82 F.3d. 248 (8th Cir. 1996).
7. 927 F.2d. 789 (4th Cir. 1991).
8. *Id.*, 791. Citing *Sherrod v. Berry*, 856 F.2d. 802 (1998), and *Ford v. Childers*, 855 F.2d. 1271 (1988).
9. 93 F.3d. 86 (2nd Cir. 1996).