

Public Safety Laws: Civil Liability



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Liability Limitation

You should consult the legal advisor for your firm or your agency before taking security, police or administrative actions based on the materials provided and/or the opinions of law expressed in this instruction. What is permissible in one jurisdiction may not be legal in all jurisdictions. Legal opinions can vary. Check and be safe!

Introduction

- Risk Assessment/Liability Exposures within a public safety agencies and related management issues.
- Legal theories used in civil liability cases against first responders and their firms and agencies.

RISK ASSESSMENT

- Definition of civil liability
- Strategies to manage civil liability
- Elements in liability management program
- The benefits of civil litigation in society

Civil Liability Defined

- Civil Liability - the actual or potential exposure to litigation alleging an obligation or the condition of being responsible for a possible or actual loss
- Actual Exposure - litigation is filed
- Potential Exposure - litigation could be filed
- Risk Assessment - assessing exposure

Civil Courts:

Friend or Foe To Public Safety Providers?

- No home court advantage for public safety providers
- Different rules and procedures
- Proof requirements less than criminal cases
- Rating familiarity with civil litigation
- Accountability for action and inaction
- Professional / Personal impact of litigation

How Agencies Respond

- The Run and Hide Method
- The Deal With It As It Happens Approach
- A Lawyer For Every Incident
- Develop and Utilize A Risk Management and Liability Reduction Program

Risk Management Concept

- **Risk** - the chance of injury, damage, or loss-deals with a degree of probability
- **Management** - the handling, controlling, directing, tactful treatment, skillful handling
- **Concept** - a thought or idea concerning a particular subject matter

Goals Of Risk Management

- Identify the likelihood of real or potential hazards prior to their occurrence
- Provide protective measures which are reasonable and cost effective to prevent such hazards from occurring **or** to otherwise minimize unavoidable damage or injury

Four Components in Risk Management (SARA)

- 1) Identify the hazards or potential hazards faced by the police agency (exposure)
- 2) Determine the means of eliminating or curtailing the identified exposures
- 3) Implement appropriate measures for reduction of exposure
- 4) Monitor effectiveness of the reduction measure - further changes as appropriate

Starting Points With Risk Management Policy Reviews

- Review of Current Operational Policies
 - Policy itself
 - Training in the policy
 - Actual compliance with policy
- Review Current Administrative Policies
 - Policy itself
 - Training in the policy
 - Actual compliance with policy

Anticipate Change

- Anticipate new activities and the need for change or new policy, training, compliance
 - Operational techniques
 - Administrative requirements
 - Legislative changes
 - New case law (case precedent)

Function Assessment & Proficiency in Public Safety

- Critical Functions Assessment - categorize risk activities from High to Low
- Set proficiency goals for the activities
- Create a plan to achieve the proficiency goal established by the agency
- Assure continued proficiency

Place Responsibility

- Supervisors should be supervisors
- Policy compliance is part of the job
- Accountability increases with rank
- Supervisors are the eyes and ears of the agency

Require Proper Discipline

- All policies and procedures must be clear
- Training should reinforce the policies
- Custom and practice should not prevail over policy and training
- Disciplinary policies should insure the proper investigation of complaints
- Discipline for proven policy violations should be the rule rather than the exception

Require Proper Discipline

- Progressive Discipline
- Suspension/Termination
- Adherence to labor agreements, state statutes, and civil rights of the employees/citizens
- Holding supervisors accountable
- Documentation is essential

Assess Liability Risk in External Interactions

- Property management
- Contracts for goods and services
- Inter-agency agreements for assistance
- Multi-jurisdictional task force agreements
- Grant and asset forfeiture awards

Available Legal Support

- City / Village Attorney
- States Attorney
- Attorney General
- In-house counsel
- Outside law firm

Plan Appropriate Litigation Response

- Plaintiff
- Public
- Media
- Named officer/employee
- Family of the named officer/employee
- Members of the agency or firm
- Larger governmental entity

Balance Law with Ethics & Common Sense

- Legal may not be ethical or wise
- Ethics - conduct conforming to professional standards
- Common sense - sound practical judgment in dealing with people and situations rightly based on a broad range of knowledge, experience, and understanding

Plaintiff's Litigation Strategy

- Find a deep pocket
- Identify a legal theory that permits a judgment against the defendant
- Highlight facts beneficial to plaintiff
- Stress public safety agency deficiencies

Legal Theories & Liability

- **State Tort Claim** – alleged by negligence, intentional conduct, or under a theory of strict liability failed to perform duties and obligations required by state law.
- **Federal Law or Constitutional Claim** - alleged violated federal rights protected by federal statute or the U.S. Constitution

State Tort Claims

- Tort defined: A civil wrong for which the court will provide a remedy in the form of an action for damages
- History of Tort Claims
 - Private Revenge and Resolution
 - Modern Society
 - Redress by State - Criminal Law
 - Redress by Individual – Tort /Civil Law

State Tort Claims

- 1) Negligence Tort Claims
- 2) Intentional Tort Claims
- 3) Strict Liability Tort Claims

Negligence Tort Claims

- Accidental or Inadvertent – results not intended but there was a failure to perform a duty owed to a person that resulted in a damage or injury.
- Mental state of defendant not an issue - good intentions irrelevant.
- Low degree of FORESEEABILITY - the degree of knowledge that harm will result need not be great.
- Issue - Did the defendant create an unreasonable risk to another judged by the “Reasonable Person Standard.”

Reasonable Person Standard

- Not what the defendant believed in good faith to be safe or careful.
- Key is whatever care the “reasonable person” would have exercised under the circumstances – dependent upon the proof of the particular circumstances in each case

Compliance With Custom-Policy-Law

- Compliance with custom-policy-law admissible as evidence but is never conclusive as to standard of care that was required of the defendant.
- Standard is a reasonable person test.
- Compliance is a plus for defendant.
- Deviation is a a plus for plaintiff.

Professional Standards

If a defendant is a member of a profession or trade, that defendant is held to a standard of care customarily exercised by members of that profession or trade whether or not the defendant personally possesses those particular skills

Elements Plaintiff Must Establish: Negligence Tort Claim

- There was a **DUTY** owed to the plaintiff
- There was a **BREACH** of that duty
- The breach was the **ACTUAL CAUSE** and **PROXIMATE CAUSE** of damage
- There was **DAMAGE** or **INJURY**

Was There A Duty?

- Duty - an obligation to conform to particular standard of care or conduct toward another – reasonable person standard
- Source of Duties - laws, customs, judicial decisions, department policy
- Traditional Duty Rule versus Special Duty Rule

Traditional Duty Rule

- Traditional Duty Rule - while police owe a duty to protect the general public, this duty is not owed to individuals or any one person.
- Purpose - to limit potential liability claims against officers and police agencies.
- Result – becomes a defense in protecting officers and agencies.

Special Duty Rule

- Special Duty Rule - police may owe a special duty to individual persons where actions of the police or the status of the individual set that person apart from other members of society.
- Purpose - to increase police accountability.
- Result - increases potential litigation against officers and agencies.

Good Samaritan Rule

- Where a citizen clearly owes no duty to aid a person initially (did not cause the situation or has no special duty to the person) the citizen has two options:
 - 1) not act or
 - 2) voluntarily undertake to aid the person
- If plaintiff acts, then owes a duty of reasonable care when undertaking the aid.
- Good Samaritan statutes in most states have exemptions for physicians (and others) that render aid in an emergency.

Was There A Breach Of Duty?

- Based on the facts of each case
- Based on the Reasonable person test
- Action Breach – an action, something done by defendant
- No Action Breach – an omission, something should have been done by defendant

Was Breach the Actual Cause of the Damage?

- Actual Cause - (Cause in Fact) a finding that there is a direct factual link between the act which represents the breach and the harm that results (determined by the “but for test”).
- “But For Test” - but for the conduct of the defendant, would the plaintiff have sustained damage (was a material element or a substantial factor in causing the injury).

Was Breach the Proximate Cause of the Damage?

- Proximate Cause - (Legal Cause) A social and legal policy determination that may limit liability EVEN if there is Actual Causation.
- Purpose - To limit liability of defendant where damage was unforeseeable or an unusual occurrence or consequence following the defendant's act.
- Issue: How far should a defendant's liability extend for consequences caused by their action?
- Result: If there is no proximate cause determination, then there is no liability.

Was there Damage Or Injury?

- Actual damage or injury
- Substantial interference with person or property
- Not potential, speculative, or uncertain future damage

Examples of Negligence Cases

- Operation of vehicles
- Failure to protect - domestic cases
- Failure to arrest - DUI cases
- Failure to render assistance - sick or injured

Intentional Tort Claims

- Act was intentional - must have intended to engage in the conduct that led to the injury.
- Does not mean - intended to inflict the specific injury or damage that resulted.
- Only need to show that the act was intended, not the infliction of specific damage or injury.
- Punitive damages— when the defendant had the desire or believed that the result was substantially certain to cause injury— the defendant can be exposed to punitive damages.

Intentional Tort Responsibility

- Direct Responsibility – Only a person that participates directly can be held liable under intentional tort claim.
- Indirect Responsibility - Others can be held indirectly liable for the offending conduct of the offender through a negligence tort claim.

Strict Liability Torts

- Liability neither the result of negligence nor intentional tort.
- Liability imposed simply because certain types of injuries happen even though no one is at fault.
- Based on nature of the activity that caused the harm.

Strict Liability Examples

- Domestic animals with known dangerous propensities not shared with most members of the animals class (dog that bites) - strictly liable for harm done as the result of that dangerous propensity (not so for unknown propensities or normally dangerous animals).
- Can include a person who maintains an abnormally dangerous condition or activity on the premises or engages in dangerous acts that presents an unavoidable risk to a person or property.
- Defective products that cause injury – design - assembly – no warnings.

Tort Liability Defense: Sovereign Immunity

- History - the King or State can do no wrong
- Government is immune from tort claims in its own courts
- Government is not responsible for torts committed by employees

Sovereign Immunity

- **Originally** - AN ABSOLUTE DEFENSE for Federal and State Governments
- Counties/Local - lesser form of defense - called **Governmental Immunity**
- Governmental Immunity - a more limited defense depending on the activity:
 - Governmental Function - No liability
 - Proprietary Function - Liability

Different Functions/Different Rules

- Governmental or Public Functions – those functions that can be performed ONLY by government – No liability
- Proprietary Functions – those functions that can be performed by a private corporation – Liability

Sovereign Immunity Today

- Most States have limited but not eliminated sovereign immunity by constitution, law, and court cases
- Reason - unfair to injured - cost not an issue - greater government responsibility
- Replaced by **State Tort Claim Acts** and **Local Government Tort Acts**

State Tort Claim Acts

- Different in each state
- Limits state, county, and local immunity
- Permits tort actions under certain conditions
- Requires elements to be proven
- Open Ended Acts - Liability the rule with certain exceptions (Illinois)
- Close Ended Acts - Immunity the rule with certain exceptions (Ohio)

State Tort Claim Acts

- Special procedure and notice for filing
- Limits damage awards - no punitive damages
- Creates special courts - Exclusive Jurisdiction (Illinois Court of Claims)

State Tort Claim Acts

- Retains absolute immunity for essential government functions (judicial-legislative-high executive actions)
- Permits some negligence actions against government if employees were within scope of employment
- Specifies personal (not government) liability for intentional torts- but still possible negligence action against government

Another Defense to Tort Liability: Traditional Duty Rule

- The duty of the police to provide protection is a duty owed to the general public and not to any one particular person
- If no duty, no basis for liability
- Purpose - Limit liability
- Special Duty - Increases liability

Other Defenses To Tort Liability

- **Contributory Negligence** - Plaintiff was partially responsible for own injuries (in Illinois - if over 50%, defendant not liable)
- **Comparative Negligence** - Apportions damages between the parties

Other Defenses to Tort Liability

- **Assumption of Risk** - Plaintiff voluntarily engaged in known and foreseeable danger – is defense to action.
- **Good Faith Defense (Qualified Immunity)** - reasonable person thought it was valid but later it was determined to be wrong.
- **Sudden Peril** - cannot be held to a reasonable person standard since it was an emergency situation therefore an exception to liability should be allowed.

Damages

- 1) **Actual Damages** - medical bills, lost wages, pain and suffering - to compensate for damage or injuries
- 2) **Punitive Damages**- if malice or bad faith- to punish and act as a deterrent
- 3) **Attorney Fees**
 - State Court - Most Pay Own Fees
 - Federal Court - Civil Rights Attorney Fee Act - Winning Plaintiff Gets Fees, Not Defendants

Suing States in Federal Court

11th Amendment: “The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced prosecuted against one of the United States by citizens of another State, by citizens or subjects of any foreign state.”

Who Is Protected By the 11th Amendment In Federal Court?

- The General Rule: Private citizens **cannot** sue the State, State Agencies, or State Officials in their Official Capacity for **money damages** in federal court (but injunctions permitted).
- Litigation against State Officials in their Personal Capacity for money damages is permitted.
- Litigation by Federal/Other States is permitted.

Who Is NOT Protected By 11th Amendment In Federal Court?

- Counties, municipalities, and their officials in either official or personal capacity are NOT protected by the 11th Amendment.
- 11th Amendment applies only to “States.”

Federal Law or Constitutional Claims

- Civil Rights Act of 1871 - (Ku Klux Klan Act) - 1st attempt pursuing constitutional violations - slavery issues.
- Seldom used till 1960 (36 times in 90 years).
- Later codified as Title 42 Section 1983.
- Now the primary tool in pursuing federal litigation against police for federal law or constitutional rights violations.

Section 1983

“ 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 right, privilege, or immunity secured by the Constitution and laws, shall be liable to the party injured in the action at law, suit in equity, or other proper proceeding for redress.”

Evolution of Section 1983

Monroe v. Pape 81 S.Ct. 473 (1961)

Chicago PD go into home without a warrant, claim of abuse and 4th Amendment violation - **Court says:** 1983 permits recovery for police misconduct - under color of law means misuse of power made possible because defendant is clothed with authority of the state – court says municipalities are immune (not so today)

Monroe Out---Monnell In

- Monnell v. Department of Social Service 98 S.Ct. 2018 (1978) Females required to take maternity leave before required by condition
- **Court says:** Overrules Monroe - 1983 CAN INCLUDE county and municipalities- NOT Under Respondeat Superior BUT can be liable if illegal actions are **Attributable** to entity

Evolution of Section 1983 In Monell

- When employee sued in Official Capacity damages paid by entity not the officer.
- Punitive damages against employee possible if sued in Personal Capacity.
- Actions Attributable to an Entity can make the Entity Liable in 1983 Actions.

Actions Attributable to an Entity in 1983

- **Formal Acts - (Policy)** a statement, ordinance, regulation, law, or decision officially adopted and promulgated by a government officer with policy or legislative authority which violates a federal right.
- A single unconstitutional formal act by a policy maker is sufficient to find entity has liability.

Actions Attributable to an Entity in 1983

- **Informal Acts - (Customs)** a use, custom, or practice by adoption or acquiescence that has acquired the status of law which violates a federal right - standard operating procedure - by the entity or a person with policy making authority
- A **single** unconstitutional act by a non policy maker is NOT enough to create entity liability

Customs - Liability Evidence

- **Number of Illegal Acts** - custom need not be formally approved.
- **Actual Acquiescence** - knew and approved or failed to correct.
- **Constructive Acquiescence** - actions widespread and flagrantly unconstitutional.
- **Failing To Act** - Ignoring complaints - failing to discipline or make corrections.

Connection Requirement for Entity Liability In 1983 Actions

- Connection Requirement - even if there is a policy or custom of the entity which is illegal or unconstitutional, there must be a link between the custom or policy and the specific violation of the right.
- If no connection, then no liability for the entity.
- Cause and effect relationship.
- Custom must be the driving force toward the violation.

Who is Policy Maker for Entity Liability in 1983 Actions?

- Policy Maker - a person with final decision making authority to establish policy.
- Not just to exercise discretion under a particular policy - a matter of state law

Section 1983 Requirements

- Plaintiff is a protected person under 1983.
- Defendant must be a “person” under 1983.
- Plaintiff must show officer acting “under color of law.”
- Violation involved a constitutional or law right.
- Violation reached a constitutional level.
- If not, may still be a viable tort in state court.

Section 1983 Definitions

- **Plaintiff** - almost all within the protection.
- **Defendant** - “a person” (individuals -counties-cities) but NOT STATES - NOT STATE AGENCIES - NOT STATE EMPLOYEES IN OFFICIAL CAPACITY.
- **Under Color of Law** - not acts of private persons - related to government authority - on or off duty may not matter.

Under Color Of Law Factors

- On duty - off duty
- Identified as police
- Filed police reports
- Arrest or investigation conduct
- In agency jurisdiction
- Display of weapons or official equipment
- Was the act authorized by agency

Violation of Constitutional or Federal Law

- Not state or local laws - other remedies
- Most common cited amendment violations
 - 1st (Speech)
 - 4th (Search and Seizure)
 - 5th (Confessions)
 - 6th (Attorney)
 - 8th (Cruel And Unusual Punishment)
 - 14th (Equal Protection)

Claim Must Be Of A Constitutional Level

- Significant enough - not minor injuries - “not every push and shove.”
- Courts are divided - as to what is enough to pass this requirement of litigation.
- Not every federal law or civil right - no other intended remedy within the particular federal statute.

Liability under 1983: Entity or Officers

- **Deliberate Indifference** must be showed (intentional and malicious behavior) by the entity or the officer.
- Shown by totality of the circumstances – a even higher standard imposed in County of Sacramento v. Lewis 523 US 833 (1999) the “shocks the conscience standard” was required.
- Mere negligence usually not sufficient to impose liability.
- Accumulated negligent acts can impose liability.

OFFICIAL vs. INDIVIDUAL CAPACITY

- City of Newport v Fact Concerts, Inc. 101 S. Ct. 2748 (1981) - No punitive damages against cities.
- Will v Michigan State Police 109 S. Ct. 2304 (1989) - Can bring 1983 actions against state officers in Personal Capacity and/or in Official Capacity.

FAILURE TO TRAIN

Canton v Harris 109 S. Ct. 1197 (1989) -
Failure to train can be basis for entity liability
under 1983 if failure is based on Deliberate
Indifference to rights of citizens.

Must show training inadequate to a HIGH
Degree of indifference - with a connection &
knowledge of unconstitutional situation.

What Is Adequate Training?

- Training that prepares one for a proper response to normal and repeated incidents that the person encounters in their duties.
- To make a case: Must show training was **Inadequate** based on an expert.
- **Deliberate Indifference** (need for more training was obvious) - the lack of training was **Direct Cause** of injury.

Supervisor Liability Under 1983

- Supervisor NOT responsible under Respondeat Superior for acts of officers.
- Supervisor liability based on his/her **personal actions or failures to act.**
- Had knowledge - failed to prevent - conspiracy - created policy or custom?
- Must have actual supervisory authority - not just advisory capacity over the officers.
- Mere negligence NOT enough to find supervisory liability under 1983.

Defenses To 1983 Actions

- **Absolute Immunity** - the person cannot be held liable for anything done or not done.
- **Very Limited** - persons involved in the judicial activities
 - judge - testifying in court

Defenses To 1983 Actions

- **Qualified Immunity** - available to police
 - For Supervisors: if involved in discretionary activity - tasks that require deliberation or judgment like policy making.
 - For Officers:
 - 1) If action was NOT a breach of clearly established right at that time AND
 - 2) If the officer's conduct was objectively reasonable

Defenses To 1983 Actions

- **Probable Cause** - in false arrest and unlawful search claims - IF probable cause existed to make the arrest or conduct the search there is NO liability - BUT issues of force and conduct may still remain.
- **Good Faith** - At the time of action, officer did not know act unconstitutional - invalid warrant - bad legal advise - supervisor order.

Claims Against Federal Agents

- Federal government and agents not a “person “ under 1983 BUT still accountable for certain torts and unconstitutional acts.
- Against Agents for violation of federal constitutional rights - **Bivens Action** - suit against agent in Personal Capacity (Not Official nor U.S.) Bivens v Six Unknown Federal Agents 91 S. Ct. 1999 (1971).

Claims Against Federal Entity

- Tort actions can be brought against a federal agency under the FEDERAL TORT CLAIMS ACT (1946) – for negligent acts by governmental employees AND intentional torts by federal investigative or law enforcement officers.
- Immunity retained for other intentional torts, strict liability, and discretionary acts by government employees.
- Must be within scope of employment –only if permitted in that state – removes the personal employee liability.

QUESTIONS



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