Defending Excessive Force Actions: A Step by Step Approach to Defending Police Officers In Excessive Force Cases



Lisa Skehill Maki, Senior Assistant Corporation Counsel

Susan M. Weise, First Assistant Corporation Counsel

City of Boston Law Department

IMLA Conference, April 2016

©2016 International Municipal Lawyers Association. This is an informational and educational report distributed by the International Municipal Lawyers Association during its 2016 Mid-Year Seminar held April 15-18, 2016 in Washington D.C. IMLA assumes no responsibility for the policies or positions presented in the report or for the presentation of its contents.

What is excessive force?

- When the police officer uses force beyond what is reasonably necessary to subdue a suspect and keep police and bystanders safe.
  - Accidentally shooting an individual during a warrant execution?
  - Swearing at an arrestee during an arrest?
  - Shooting a suspect who refuses to drop a knife?
  - Shooting at a moving vehicle from an overpass?

Use of Force Standard

- **Free Citizens**: Fourth Amendment reasonableness standard or the Fourteenth Amendment Substantive Due Process "shock the conscience" standard.
- **Pretrial Detainees:** Fourteenth Amendment objective reasonableness standard.
- **Prisoners:** Eighth Amendment cruel and unusual punishment standard.

Excessive Force—Fourth Amendment

- Whether a police officer has used excessive force depends on whether:

  (1) whether the individual was "seized" within the meaning of the Fourth Amendment; and

  (2) Whether the force was objectively unreasonable

Assessing the Complaint

- What Constitutional right was infringed?
  - Identify the individual's liberty status
    - Free citizen
    - Pretrial detainee (awaiting trial, not yet convicted)
    - Prisoner (convicted)

Step 1: Was the Victim Seized?

- The Supreme Court has articulated the following three definitions for a "seizure" to occur under the Fourth Amendment:

  (1) "the officer, by means of physical force **or** show of authority, has in some way restrained the liberty of a citizen; or

  (2) "a reasonable person would have believed that he was not free to leave," and the person in fact submitted to the show of authority; or
  (3) "a governmental termination of freedom of movement through means intentionally applied."

Excessive Force – But Not a Seizure

- A free citizen can be subjected to force by a police officer **without** implicating the Fourth Amendment
  - Victims of unintentional conduct by police officers (bystander struck by unintended bullet, bystander injured during car chase)
  - Individual was subjected to some level of police force outside the context of an arrest

Free Citizen – Not Seized

- In cases of excessive force arising outside an intentional seizure, the case is analyzed under the Fourteenth Amendment substantive due process "shock the conscience" standard.
  - Conduct that demonstrates an intent and purpose to cause harm unrelated to the legitimate object of arrest.

Step 2: Was the Force reasonable?

Graham Factors

- The severity of the crime at issue
- The immediate threat that the suspect posed to themselves, others, or the officers; and
- Whether the suspect was actively resisting or evading arrest

Reasonableness

- In addition to the *Graham* Factors, the calculus of reasonableness is:
  - Judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.
  - Allows 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 a particular situation.
  - Does not include the officer's subjective intent

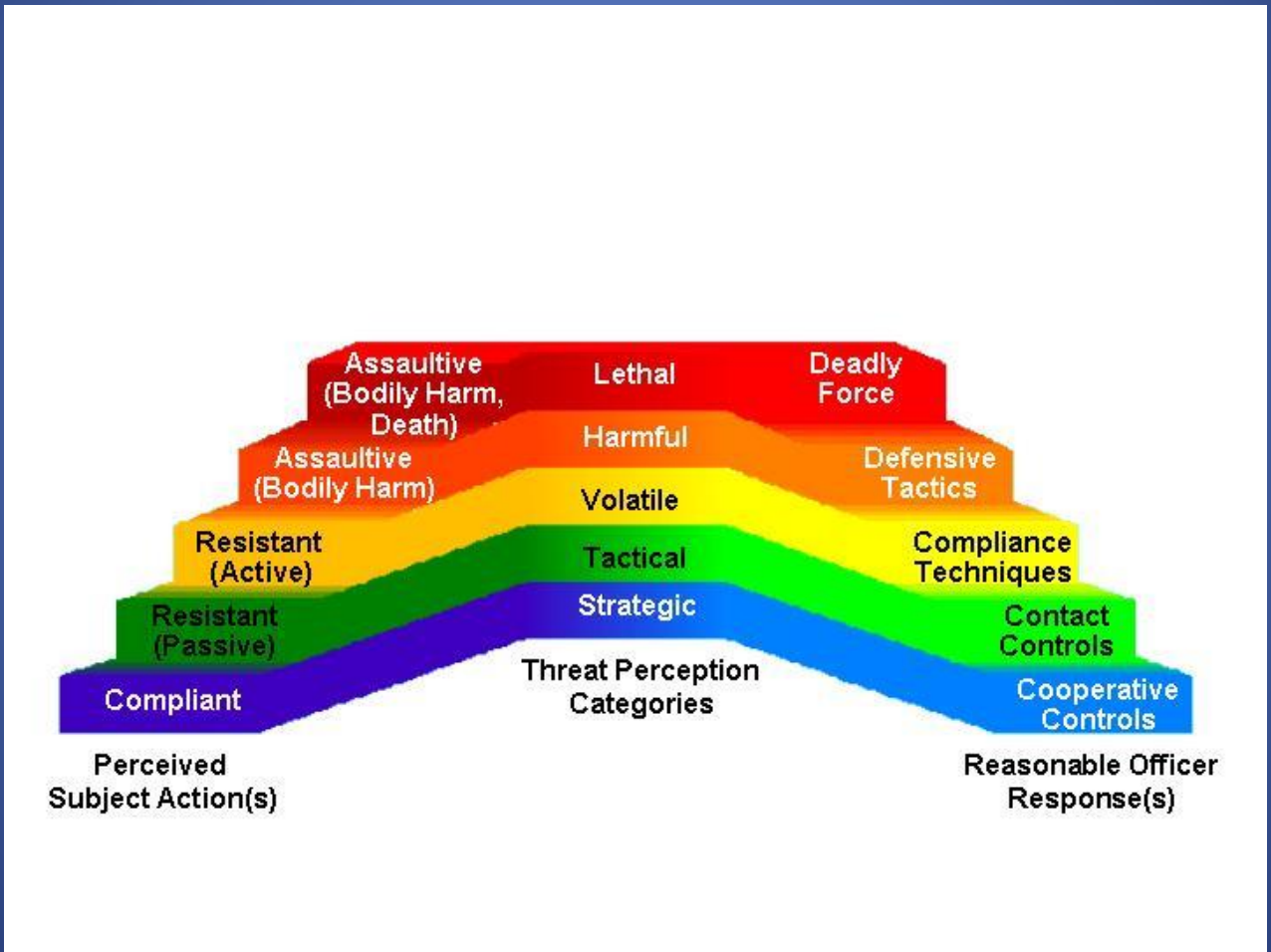
Beyond Excessive Force

- **Duty to Intervene**
  - Liability attaches where an officer knew or had reason to know that excessive force was being used; had a reasonable opportunity to prevent it; and the officer failed to act to prevent/stop it
- **Failure to Provide Medical Care**
  - Officers are required to provide medical care to persons who have been injured while being apprehended by the police

Understanding Use of Force

- Develop a clear understanding of how officers are trained to use force
  - Consult with a use of force expert
  - Visit the academy
  - Review training materials
  - Speak with instructors
  - Oftentimes, the defendant officer may not be able to articulate *why* he used the force that he did but his actions mirrored his training

What is the Municipality's Use of Force Policy?



Training Materials/ Rules and Procedures

- Was the force that was used consistent with training, rules, procedures?
- Use the policies, rules, procedures, and training materials to show that the officer acted consistently with his training



Expert Witnesses

- **Expert witnesses can be invaluable in use of force cases:**
  - Educate the jury on use of force and training
    - Use of force is not an emotional reaction to the plaintiff's disrespect of authority – but rather a tactical strategic response based on years of training and experience
  - Defendant officers may not be able to articulate at trial the "science" behind the particular use of force
  - Non-party witness – adds credibility

Expert Witnesses

- **Use of Force Experts**
  - Training, perceived threat, response, etc.
- **Force Science/P Experts**
  - tunnel vision, “inattentional blindness,” decisional lag time, officer fatigue which creates danger to officers after a prolonged struggle
- **Forensic Experts**
  - Reconstruct the scene to demonstrate what the officers were facing at the time the force was used
- **Medical Experts**

Qualified Immunity – Staging the Defense

- Determine the level of force the officer used, i.e., taser, spray, kicks, punches, handcuffing, etc.
- What circumstances have officers been given qualified immunity for using that level of force?
- What is “clearly established” in the officer’s jurisdiction at the time the force was used?

Qualified Immunity

- Where does the Circuit Court look in your jurisdiction look for “clearly established” law?
  - Supreme Court
  - Circuit Court
  - Highest court of appeal for that particular State
  - Others look to all Courts of appeal and district court cases

Qualified Immunity – "Totality of the Circumstances"

- Does the Court consider facts leading up to the use of force in reasonable determination?

OR

- Only the facts facing the officer the moment the force was used?

Discovery – *Graham* Factors

- **What crime was being committed?**
  - The crime preceding the arrest itself
- **Was the Plaintiff a threat?**
  - Size of Plaintiff
  - Size of police officer/ number of police officers
  - Behavior
    - Threat to the officer?
    - Threat to public?
      - » Imminent threat?
- **Was the Plaintiff resisting?**
  - Passive resistance?
  - Active resistance?
  - Assaultive resistance?

Discovery

- **Video**
  - Can it be enhanced?
  - Seconds count
  - From perspective of officer?
- **Plaintiff's medical records**
  - Usually first account of what happened
  - *De Minimus* injuries may contradict allegations of the level of force
  - Pre-existing injuries
- **Third Party Witnesses**
- **Radio recordings**
- **Plaintiff's criminal record**

Summary Judgment

- First “real” opportunity to raise qualified immunity based on undisputed facts with reasonable inferences drawn in Plaintiff’s favor
- Interlocutory appeal for denials of Qualified Immunity as to whether law was “clearly established.”

Summary Judgment—Disputes of Fact

- Do not have to take Plaintiff's version as true **if** video contradicts that version. *Scott v. Harris*
- Only **reasonable** inferences drawn from Plaintiff's version of events
- Courts may scrutinize officer's version of events at summary judgment stage in "undisputed" deadly force cases by looking to circumstantial evidence

Post Ferguson: Lost Confidence in Police

- Recent videos of police misconduct have eroded public confidence in police credibility



Officer Credibility

- Post-Ferguson, the public is more aware of police misconduct and, as a result, less likely to believe the officer over the plaintiff simply because of the officer's position.
- **Boost officer credibility at trial:**
  - Corroboration by non-party witnesses
  - Video
  - Experts
  - Witness prep
  - Discredit plaintiff's version of events

Trial – Using the Facts Affirmatively

- **Set the stage:**
  - Busy parking lot?
  - High crime neighborhood?
  - Enclosed space with no escape route
  - Restaurant?
  - Police station?
  - Time of day/day of week?
  - Number of people there?

Video Evidence

- The reasonableness of the use of force is determined from the perspective of the officer on scene, not 20/20 hindsight
- Oftentimes video evidence is NOT from the officer's perspective:
  - Surveillance cameras—bird's eye view
  - Cell phone cameras from different angles
  - Dash-cams
- Point out to the jury that officer may not have seen what the jury saw—goes to reasonableness

Trial – Using the Facts Affirmatively

- **Crime committed by Plaintiff?**
  - What was the Plaintiff doing/what crime had been committed *before* the officers used force
  - Minor crime usually favors the Plaintiff when force is used, i.e. traffic ticket, disorderly, breach of peace, trespassing
  - If the Plaintiff had committed a serious crime (assault with a deadly weapon), the officer *may* be allowed to use more force when arresting him if he is threatening and/or resisting

Trial – Using the Facts Affirmatively

- **Threatening conduct?**
  - Size of Plaintiff on date of incident?
  - Cognitive ability/physical handicap?
  - Mentally ill?
  - Age of Plaintiff?
  - Number of officers present?
  - Where did it take place? Pose harm to officer? i.e. side of interstate, subway platform, enclosed place with no avenue of escape, amongst a hostile crowd?
  - What did the Officers know about the Plaintiff?
    - Arrested him before?
    - Knew his record?
    - Knew he would run/fight?

Trial – Using the Facts Affirmatively

- **Resisting/Compliant?**
  - Passively resisting—sitting, refusing to move, verbal objections
  - Actively resisting—flailing arms, walking away, pinning arms under chest, tensing arms
  - Assaultive resistance—punching, kicking, spitting, use of motor vehicle, weapons, etc.

Was the force excessive?

- Fedorishin v. Leahy, et al.
- Johnson v. City of Boston, et al.

Fedorishin v. Leahy, et al.

- Disorderly, resisting, and assault and battery arrest.
- Officer takes arrestee, spins him, throws him up against hood, and knees him in the thigh
- Was the force excessive?

Federoshin v. Leahy Video



Graham Factors

- Severity of the crime?
  - Disorderly - not serious
- Threat to officers/public?
  - No threat – walking away at time he is arrested
  - Outnumbered by police
- Resisting/Evading
  - Verbal resistance
  - Tenses up arms

Result

- **Defense verdict**
  - Force was reasonable in order to get the suspect to comply
  - Least amount of force available to subdue a suspect who was actively resisting by tensing his arms
  - Relied on police academy materials that categorized tensing arms as “active resistance” and the appropriate corresponding response to “active resistance” is “distraction technique” which includes knee strikes to the upper thigh.

Johnson v. City of Boston

- Plaintiff wanted for outstanding warrants (probation violations)
- Plan was for officer to walk by, make a visual identification, and then two officers were going to approach and arrest
- Instead - Officer immediately takes suspect to the ground
- Excessive force?

Johnson v. COB Video



Graham Factors

- **Severity of the crime?**
  - Three outstanding warrants for probation violations:
    - Failure to register as a sex offender
    - Aggravated assault and battery
    - Larceny over $250
  - Based on his failure to comply with court-imposed requirements, he was very likely to flee/arrest
- **Threat to officers/public?**
  - Outweighs officer by 60 pounds
  - Outnumbers officer 2 on 1
  - Known history of violent crimes (AB PO, Resisting Arrest, etc.)
- **Resisting/Evading**
  - Starts to run
  - Pushes officer's arm away
  - Not secured when officer strikes at him on the ground

Result

- Settled
  - Dispute of fact to be determined by the jury whether the Plaintiff knew (1) that this was a police officer; and (2) whether he was being placed under arrest.
  - If the jury resolved that in favor of the Plaintiff, the Plaintiff was not resisting for purposes of *Graham* factors and his behavior of running was less threatening
  - BUT split-second decision made by officer in a rapidly evolving tense situation, objectively reasonable?

Excessive force?

1. Accidentally shooting an individual during a warrant execution?
2. Swearing at an arrestee during an arrest?
3. Shooting a suspect who refuses to drop a knife?
4. Shooting at a moving vehicle from an overpass?

Accidental Shooting?

Answer: YES

Stamps v. Town of Framingham, -- F.3d -- 2016 WL 457153 (1st Cir. 2016). Officer accidentally shot and killed the Plaintiff. Officer argued that because he did not *intend* to shoot the Plaintiff, it was not a seizure. The First Circuit denied qualified immunity holding that the officer intended to point the gun at the suspect and his conduct—pointing a loaded gun at the head of a compliant, unarmed, non-threatening individual who was not suspected of any criminal activity with the safety off and his finger on the trigger—constituted excessive force. The accidental discharge of the firearm was just an extension of the intentional excessive force of pointing the firearm with the safety off and the officer's trigger on the finger.

Swearing at an Arrestee During an Arrest?

Answer: Maybe

Shea v. Porter, 56 F.Supp.2d 65 (2014), District Court overturns jury verdict in favor of officer in excessive force case where evidence of force was officer pounding on car window until glass broke, taking arrestee out and handcuffing her, and calling her a "fucking bitch." Finding that the use of profanity had no legitimate law enforcement purpose, was intended to threaten and terrorize her, and was similar to pointing a gun at her.

Shooting Suspect Who Refuses to Drop a Knife?

ANSWER: YES

In *Tenorio v. Pitzer*, 802 F.3d 1160 (10th Cir. 2015), the Tenth Circuit denied qualified immunity to an officer who shot and tasered a knife wielding plaintiff on the grounds that although the plaintiff had refused to drop the knife, he had not charged the officer, had not moved aggressively at the officers, and was not within striking distance. Therefore, the officer did not have probable cause to believe that the plaintiff posed a threat to the officer's life.

Shooting at a Moving Vehicle From An Overpass?

ANSWER: NO

In *Mullenix v. Luna,* 577 U.S. (2015), the Supreme Court granted the officer qualified immunity when he shot at the engine of a fleeing vehicle from an overpass where the driver had threatened to kill police officers, driven over 100 mph and was approaching a spike strip where officers were present. Therefore, as it stands, officers do not violate the Fourth Amendment if they shoot at a fleeing vehicle as long as the continued flight posed a risk to officer or the public's safety.