

# Ordinances

## Dr. Cop

*by Devala A. Janardan, Associate Counsel*

Last month, IMLA filed an *amicus* brief supporting the City of Reno in its petition for writ of certiorari from the Ninth Circuit decision in *Conn v. City of Reno*, 592 F.3d 1081 (9th Cir. 2009).

Readers might be familiar with this case because it was detailed in the IMLA Newsletter in July 2009. The case concerns the suicide of a jail inmate, Brenda Clustka. In April 2005, Reno police officers responded to a call from Clustka's mother, who reported that Clustka had threatened to overdose on her medication. Reno police officers transported her to a private hospital. She was examined by doctors in the emergency room and it was recommended that she be transferred to the state mental hospital for further evaluation. She was transferred and was evaluated again by a psychiatrist, psychiatric nurse, and a social worker. Clustka was determined to pose a "low risk of self-harm" and was discharged. Less than five hours later, Clustka become intoxicated and was found on the street by emergency medical personnel. Reno police were called, once again, and Clustka was taken into custody. During the drive to the jail, Clustka wrapped the seatbelt around her neck. At that point, the officers handcuffed her. Upon arriving at the jail, the officers turned Clustka over to jail staff, but failed to mention Clustka's behavior in the squad car. Four hours later, after sobering up, she was released. Late that night, police again detained Clustka on civil protective custody for violating a temporary protective order. She was yet again evaluated by a physician, who found no basis for detaining her. She was discharged a day later.

Shortly after, Clustka was arrested on for domestic abuse against her mother. She was evaluated by medical professionals for the *sixth time in 48 hours*. The nurse recommended assigning Clustka to the general jail population. She placed Clustka in the mental health unit and alerted other staffers that she was a high-risk inmate. A psychiatric nurse was scheduled to examine Clustka in the morning. Unfortunately, Clustka took her life shortly before her examination.

Cluskta's children brought a Section 1983 action against the City of Reno for its alleged failure to train its law enforcement officers and failure to implement policies to prevent suicides. The officers were also sued for alleged deliberate indifference to Clustka's medical needs.

The U.S. Court of Appeals for the Ninth Circuit ruled against the City and its officers. The panel held that a jury could find the City liable for failing to train its police officers to prevent suicides. Under *City of Canton v. Harris*, such liability under Section 1983 was possible if the "city's failure to train reflects deliberate indifference to the constitutional rights of its inhabitants." [1] Even though officers took Clustka to a jail where a medical professional immediately evaluated her, the panel believed that Reno exhibited deliberate indifference by failing to train the officers themselves to diagnose suicidal ideations. "[O]fficers predictably face situations where they must assess and react to suicide risks" and "are the first law enforcement officials to deal with detainees . . . in highly stressful situations."[2] According to the panel, the "failure to train officers on how to identify and when to report suicide risks produces a 'highly predictable consequence': that police officers will fail to respond to serious risks of suicide and that constitutional violations will ensue."[3] Likewise, the panel held that a jury could find Reno liable for failing to adopt and implement policies to prevent suicides for two reasons: first, because there was no written policy on reporting suicide threats; and second, because "neither [officer] was disciplined for failing to report Clustka's suicide threat," although they were criticized during their annual review.

The Ninth Circuit has now imposed indefinite and potentially very costly training obligations (providing medical education to law enforcement) that could create liability for thousands of cities and towns and millions of law enforcement officers. As mentioned above, Clustka was examined six different times by medical professionals shortly before she committed suicide. None of these medical professionals labeled her as suicidal, yet the Ninth Circuit believes that law enforcement officers should have received training to make a medical determination of mental status.

This decision by the Ninth Circuit has solidified a split in the United States Courts of Appeals over whether officers must be trained to diagnose mental status related to suicidal thoughts. The First, Fifth, Sixth, Seventh, and Eleventh Circuits have all ruled that it is *not* deliberate indifference for an office to not diagnose behavior related to suicidal thoughts.[4] The Third and Ninth Circuits are on the other side of the split.[5]

The IMLA *amicus* effort, broadly speaking, focuses on two main issues. The first issue concerns the fiscal challenges that municipalities currently face and the related judicial interference in deploying municipal resources. Most IMLA members can relate. Tax revenues for state and local

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an obligation to include, in any licensing by-law, an explanation of the reason why the municipality was licensing a business or imposing conditions, and how that reason related to the purpose for which the by-law was enacted.
16. (2005), 18 M.P.L.R. (4th) 89 (Ont. C.A.) *rev'g* (2005), 5 M.P.L.R. (4th) 114 (Ont. S.C.J.).
17. (2006), 18 M.P.L.R. (4th) 153 (Ont. S.C.J.). The court here determined that a by-law requiring second-hand goods dealers to submit daily reports of all transactions to police was authorized under s. 150(2). The court gave "consumer protection" a broad and generous interpretation that allowed the municipality to achieve its legitimate interests.
18. (2004), 49 M.P.L.R. (3d) 1 (Ont. S.C.J.).
19. *Id.* at & 23.
20. *Id.* at & 24.
21. *Adult Entertainment Ass'n. of Canada v. Ottawa (City)* (2007), 33 M.P.L.R. (4th) 1 (Ont. C.A.).
22. In *The Annotated Municipal Act, Second Edition, supra* note 13 at MA4-9, the authors note that: "Licensing now applies to almost all forms of municipal systems. This widens the scope of a municipality's licensing powers enormously and means that the municipal authority to require licenses may extend to any business activity, matter or thing that a municipality can regulate under ss. 9, 10 and 11. Therefore, it is imperative that the term 'license' effectively be read as meaning 'license/approval/registration/permission.'"
23. (2004), 46 M.P.L.R. (3d) 1 (S.C.C.).
24. Former s. 150(6) of the *Municipal Act, 2001* [now s. 152(1)] set out an exhaustive list of the various types of business that could be licensed, while s. 150(7) provided some limited exceptions.
25. O. Reg. 583/06. ML

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of remedies was resolved by the court deciding that both the Notice of Application and the supporting affidavit would be struck, but without prejudice to Alpha Care's right to commence a fresh application. G. was to have no communication with new counsel and Alpha Care was to make no reference to the contents of the privileged report when instructing new counsel. The court's reasons were since edited to remove the references to the privileged contents of the confidential report. The case is reported as *1784049 Ontario Limited (Alpha Care Studio 45) v. Toronto (City),* 2010 ONSC 1204 (Ont. S.C.J. Feb. 24, 2010). ML

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governments in the second quarter of 2009 (at the time the Ninth Circuit decided the case), compared to the second quarter of 2008, were down 12.2 percent, by over $42 billion.[6] The second issue concerns the inappropriate burden of forcing law enforcement officers with having to diagnose psychological conditions, particularly when the detainee has been evaluated by medical professionals. Nevada law requires 480 hours of mandatory training for law enforcement officers on subjects like civil liability, constitutional law, juvenile law, probable cause, traffic laws, search and seizure, investigation of crime scenes, preservation of evidence, interrogation, weapons training, courtroom demeanor, ethics, and much more.[7] The training necessary to properly diagnose types of mental illness or mental status would require specialized and advanced training that is better suited for individuals in the medical profession. The Supreme Court is on recess until October 1, so it will be a few months before we find out whether the Court believes this to be a case worthy of Supreme Court review. IMLA thinks it is. Stay tuned.

### Notes

1. City of Canton v. Harris, 489 U.S. 378, 388 (1989).
2. *Conn*, 591 F.3d at 1103.
3. *Id.*
4. *See* Boncher ex rel. Boncher v. Brown *City*, 272 F.3d 484, 485-86 (7th Cir. 2001); Manarite ex rel. Manarite v. City of Springfield, 957 F.2d 953, 959-60 (1st Cir. 1992); Barber v. City of Salem, 953 F.2d 232, 240 (6th Cir. 1992); Burns v. City of Galveston, 905 F.2d 100, 104 (5th Cir. 1990); Popham v. City of Talladega, 908 F.2d 1561, 1564 (11th Cir. 1990).
5. *See* Simmons v. City of Philadelphia, 947 F.2d 1042, 1049 (3d Cir. 1991).
6. U.S. Census, Quarterly Summary ML

## Cases

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In *Graham v. Connor*, 490 U.S. 386 (1989), the U.S. Supreme Court laid out several factors to consider whether the force used was excessive, including (1) the severity of crime, (2) whether the suspect posed an immediate threat to the safety of officers or others, and (3) whether he was actively resisting arrest or attempting to evade arrest by flight. In light of this, Norris's actions did constitute excessive force, as Brown was not arrested for a serious crime; she did not pose a threat to anyone's safety; and she was cooperative, did not resist arrest, and was not attempting to flee. *Brown v. City of Huntsville, Ala.*, No. 09-12965, 2010 WL 2243877 (11th Cir. June 7, 2010).

### Excessive Force & Damages

Anthony Guy brought a Section 1983 action against certain San Diego officers, claiming the use of excessive force. Guy had participated in a fight outside a bar, and claimed that the police officers used pepper spray to subdue him, tightened the handcuffs on him to the point that they caused wrist pain, and caused cuts when they threw him to the ground. The jury returned a special verdict in favor of the defendants on all claims, with one exception: the jury determined that one officer did violate Guy's Fourth Amendment right to be free from excessive force. However, the jury awarded no compensatory or punitive damages, and only one dollar in nominal damages. The district court explained that, while excessive force was used against Guy, a jury could still conclude that all of the injuries he suffered were the result of the officers'