Tasing Soccer Moms, Police Use of Force and Officer Liability

By Philip Bogdanoff



A woman with two young children is driving her car in a suburban residential area when a lone police officer stops her car for a traffic violation. After giving the police officer her license and registration, she gets out of the vehicle demanding to view the police video of the infraction. The officer orders her back into her auto but she refuses. He places her under arrest. She then attempts to get back into the car and the officer restrains her. When she will not relent, he pulls out his Taser and threatens to use it if she continues to ignore his commands. She remains noncompliant. The officer aims and fires his Taser, shooting a massive electric current into her body, dropping her to the ground where she is handcuffed. Excessive force or good police work?

1. A police officer has the right to avoid being injured or killed while making an arrest.

When I present this scenario while instructing police officers about potential civil liability, many in the class argue that even though the arrestee is a "soccer mom" with young children, the officer's actions are proper since she could pose a threat if she has a concealed weapon or refuses to follow his commands to stay in the car. Further, after being arrested and returned to her vehicle, she could reach for a hidden firearm. Paramount in their minds is officer safety.

Police officers have a good reason to be concerned. In 2012, 74 police officers were killed in the line of duty and 52,901 officers were assaulted, with 27.7 percent suffering injuries. Assailants used personal weapons (hands, fists, feet, etc.) in 80.2 percent of the incidents, firearms in 4.3 percent of incidents, and knives or other cutting instruments in 1.7 percent. Other types of dangerous weapons were used in 13.9 percent of assaults.[1] During my presentations to law enforcement, I have found that almost every police officer during his or her career has been spit upon, kicked, pushed, shoved, or punched by a noncompliant individual who is often under the influence of drugs or alcohol. Numerous officers have been hospitalized by individuals resisting arrest.

Although use of Tasers has resulted in a significant number of lawsuits, the Department of Justice has found that they actually reduce injuries, both to arrestees and police. In a longitudinal study by the Orlando Police Department, the departmental use of Conducting Electrical Devices (Tasers) was found to result in a 50 percent decline in arrestee injury rates and a 60 percent decline in injury to the police. In a Seattle Use of Force study, the use of Tasers resulted in a 48 percent decline in officer injury. A Miami Use of Force study similarly concluded that Taser usage reduced injury to arrestees and police officers.[2]

2. The constitutional dimensions of excessive force.

As the Supreme Court has repeatedly illustrated, the determination of an officer's civil liability when using a Taser to make an arrest is a Fourth Amendment issue.[3] The Amendment states: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated..." A Fourth Amendment seizure occurs when there is a "governmental termination of freedom of movement through means intentionally applied."[4] The constitutional question is whether the amount of force used to make the arrest is reasonable under the totality of the circumstances. In determining how much force is reasonable, the Court has looked at the severity of the crime, whether the suspect posed a threat to the police officers or the public, and whether the suspect was actively resist-

ing arrest or attempting to evade an arrest.[5] Most importantly, in determining whether a police officer used excessive force when making an arrest, the required perspective is that of the "reasonable officer on the scene," standing in the *officer's* shoes, perceiving what *he/she* then perceived and acting within the limits *of his/her* knowledge or information as it then existed.[6] In other words, courts are not to apply hindsight or take a "Monday Morning Quarterback" approach from the safety and security of the judges' chambers when evaluating whether the police used excessive force. Further, a mistaken belief can nevertheless be a reasonable belief. An officer incurs no liability if he mistakenly uses excessive force as long as his mistaken perception was reasonable under the totality of the circumstances.[7]

Every police department has a use of force policy that incorporates this constitutional standard indicating that the police can only use the amount of force necessary to control an incident, make an arrest or to protect themselves or the public from injury. This policy includes a "use of force continuum" that describes an escalating amount of force that may be required to gain compliance of an unwilling subject. The police officer is responding to the actions of the suspect in order to gain control of the situation and make an arrest. The greater the threat by the suspect, the more force necessary to effectuate an arrest. Further, the officer must also consider the particular characteristics of the subject including age, size, sex and relative strength.

An officer can often gain control of a situation by his or her mere presence or use of verbal commands. A 1999 Bureau of Justice Statistics Report estimated that less than half of one percent of an estimated forty-four million people who had face-to-face contact with a police officer were threatened with or actually experienced force. Most officers I have taught indicate that approximately ninety percent of the public will comply with their verbal commands. However, if the suspect is not complying with the verbal commands of the officer, more force may be used to gain compliance including open hand control where an officer can grab, hold or use a joint lock on a suspect. If the suspect wrestles with a police officer, the officer may escalate the use of force by striking the suspect, using a chemical spray, or firing a non-lethal conducting energy device such as a Taser. If the suspect strikes a police officer, the police may respond by hitting the suspect with a baton. Finally, if the suspect uses a deadly weapon against the officer, or attempts to disarm the officer or places the officer or public in imminent danger of death or bodily harm, the officer may use deadly force against the suspect.

[A] mistaken belief can nevertheless be a reasonable belief. An officer incurs no liability if he mistakenly uses excessive force as long as his mistaken perception was reasonable under the totality of the circumstances.

3. A police officer can use deadly force only where he or another person is in imminent danger of death or great bodily harm.

The Supreme Court has clearly articulated that the police use of deadly force when making an arrest is a seizure under the Fourth Amendment. [8] In *Gardner v. Tennessee*, the police officer shot and killed an unarmed young suspect of slight build who was fleeing from a burglary and posed no threat to the officer. The police found ten dollars and a stolen purse in his pocket. The decedent's father filed suit alleging that the police violated his son's Fourth Amendment rights. The Tennessee statute allowed the police to use deadly force when attempting to arrest any fleeing suspect: "If, after notice of the intention to arrest the defendant, he either flees or forcibly resists, the officer may use all the necessary means to effect the arrest."[9] The Court evaluated the nature and quality of the intrusion into the individual's Fourth Amendment rights against the importance of the governmental interests which allegedly justified the intrusion--and ruled the Tennessee statute unconstitutional. The Court stated that the police could only use deadly force to make an arrest where the police have probable cause to believe that the suspect poses a threat of death or serious bodily harm to the officer or to public.[10]

However, the *Gardner* test--whether a suspect poses a threat of death or serious bodily harm to the police or to the public--does not control every Fourth Amendment issue involving police use of deadly force. In *Scott v. Harris* police attempted to stop a car for speeding by activating their overhead lights but the suspect refused to stop. The police chased him suspect for several miles. At one point officers had the suspect boxed in at a parking lot but he was able to elude arrest, striking a police cruiser as he sped away. A police video of the chase indicated that the suspect led law enforcement on a "Hollywood-style car chase of the most frightening sort, placing police officers and innocent bystanders alike at great risk of serious injury." A police officer directly behind the suspect's car obtained permission to stop the auto by using a precision intervention technique (PIT) that causes the suspect's vehicle to spin and stop. Instead, the police cruiser struck

Continued on page 10



Philip Bogdanoff spent 30 years with the Summit County Prosecutor's Office (Akron, Ohio), retiring in 2008 as senior assistant prosecutor. He has argued 20 cases before the Ohio Supreme Court, including six death penalty cases. He is a frequent CLE presenter, including search and seizure, Miranda and police use of force and has taught at seminars nationwide sponsored by various prosecuting attorney's associations. www.philipbogdanoff.com.

the escaping car from behind causing the suspect to lose control of his vehicle and flip down an embankment. He was left a quadriplegic.[11]

In a civil suit the plaintiff argued that the police use of a PIT maneuver constituted deadly force in violation of *Gardner* because the suspect had not threatened officers or the public with deadly force. The Court emphasized that the touchstone of Fourth Amendment analysis was not simply the standard set forth in *Gardner*, but whether the police action in the particular situation was reasonable.[12] The Court found that the police attempt to terminate the chase using the PIT maneuver was reasonable because the plaintiff's flight "posed an actual and imminent threat to the lives of any pedestrians who might have been present, to other civilian motorists, and to the officers involved in the chase."[13]

Further, although the PIT maneuver posed a likelihood of death or serious bodily harm to the plaintiff, the police conduct was reasonable because it was the plaintiff who made the wrongful decision to flee, endangering the lives of innocent bystanders.[14] Finally, the Court rejected the plaintiff's argument that police should have terminated pursuit so as to eliminate the threat to innocent bystanders.[15] Instead, the Court set forth the rule that, "A police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death." [16]

In May 2014, the United States Supreme Court reaffirmed the *Scott* decision when the police stopped a car for having only one operating headlight and the driver, Donald Rickard, fled from the police leading to high speed chase. Although Rickard and his passenger were pinned in by the police and an officer approached the car on foot pounding on the passenger side window with gun in hand, Rickard hit the accelerator, causing his car to lurch, striking a police cruiser. The police fired fifteen shots into the vehicle; it crashed, killing both occupants. The driver's family filed a civil suit and the police moved for summary judgment based upon qualified immunity. The Court found that the police did not violate Rickard's Fourth Amendment rights because Rickard was fleeing from the police when he was shot creating a "grave public safety risk, and here, as in *Scott*, the police acted reasonably in using deadly force to end that risk."[17] Further, the Court found that the police did not use excessive force when firing fifteen times because when they fired Rickard was still attempting to flee. The Court indicated it would have been a different case if the police had initiated a second round of shots after Rickard had given himself up or had been incapacitated.

The Court found that the police did not violate Rickard's Fourth Amendment rights because Rickard was fleeing from the police when he was shot creating a "grave public safety risk, and here, as in Scott, the police acted reasonably in using deadly force to end that risk."

4. Use of the qualified immunity defense to avoid a trial where the plaintiff asserts excessive force. In *Scott* and *Plumhoff*, the issue of whether the police used excessive force arose well before a jury verdict. Instead, the police officer claimed the defense of qualified immunity, asserting that he was immune from civil suit.[18] The rationale for qualified immunity is that police officers should not be punished for vigorous performance of their duties by being held liable for actions that a reasonable person would not have known violated the rights of another. Qualified immunity encourages officials to act without hesitation when confronted with problems that require quick and decisive response. When an official pleads qualified immunity as a defense, the summary judgment burden of proof is shifted to the plaintiff "who must rebut the defense by establishing a genuine fact issue as to whether the official's allegedly wrongful conduct violated clearly established law."[19]

Qualified immunity offers complete protection from liability for government officials sued in their individual capacities if their conduct "does not violate clearly established constitutional rights of which a reasonable person would have known."[20] The plaintiff must pass a two part test—first, that the officer violated plaintiff's Fourth Amendment rights and second, that the right was so clearly established that any police officer in the same position would have clearly understood that they were under an affirmative duty to refrain from such conduct.[21] Although the Supreme Court originally ruled that courts must decide the constitutional issue first before they determine if the right was firmly established, it has recently ruled that courts can consider the issues in whatever order the court chooses. [22] (All of this is subject to the procedural mandate that, when reviewing a police officer's motion for summary judgment on the issue of qualified immunity, the reviewing court must review the evidence in a light most favorable to the non-moving party).[23]

Because the focus is on whether the officer had fair notice that his conduct was unlawful, reasonableness is judged against the backdrop of the law at the time of the conduct. [24] "If the officer's mistake as to what the law requires is reasonable, however, the officer is entitled to the immunity defense." [25] A Court properly refused to dismiss a lawsuit when an officer alleged qualified immunity because no reasonable officer could believe it was constitutional to hold a gun to the head of an unarmed nine-year-old boy and threaten to pull the trigger when the boy posed no threat to officers and was not under arrest, suspected of a crime,

attempting to flee, or interfering in the officers' search of his home. [26] Where a police officer shot a suspect who refused to get out of car and started driving his car towards police officers presenting possible danger to other officers, the appellate court erred when finding no immunity because a vehicle can be a deadly weapon and a Fourth Amendment violation was not clearly established. [27]

5. The excessive force issue is highly controversial and can divide a community.

When the Rodney King beating by Los Angeles police officers was captured on video and broadcast on the nightly news, it centered the nation's attention on the police use of excessive force. The incident led to the criminal trial of several officers--and the subsequent acquittal of those officers resulted in the Los Angeles riots and subsequent reforms to the Los Angeles Police Department. The United States Department of Justice has reviewed the police use of force in several major cities and found that between 2009 and 2011 the Seattle Police Department used excessive force in twenty percent of their cases and that officers resorted to impact weapons too quickly.[28] The Justice Department has also found that police departments in Miami used excessive force in their shootings and found that the 1,100-officer department engaged in an unconstitutional "pattern or practice" of excessive use of force.[29] The Justice Departments findings have led to reforms in many police departments.

Excessive force is a highly emotional issue and police dash-cam video will often make the nightly news. Plaintiffs' attorneys will often appear on television with the video describing in detail the police use of excessive force against their defenseless client. Broadcasters will replay the dash-cam video of the alleged inpropriety numerous times and then poll television viewers on their opinion of whether the police used excessive force. The use of videos and internet distribution of these videos have increasingly placed police use of force to make an arrest before the court of public opinion.

6. Conclusion: A police officer who can get a suspect to comply by using verbal commands can avoid civil liability.

There are often no right or wrong answers when determining whether law enforcement used excessive force. I have had numerous officers approach me after my presentation and indicate that their job as a police officer is to defuse a situation and calm everyone down so that force is never needed. One supervising officer indicated that he trained his police officers using the Patrick Swayze method of control from the movie Roadhouse: "If somebody gets in your face and calls you a ****sucker, I want you to be nice. Ask him to walk. Be nice. If he won't walk, walk him. But be nice. If you can't walk him, one of the others will help you, and you'll both be nice. I want you to remember that it's a job. It's nothing personal." He indicated that he has never seen a police officer face a lawsuit when getting a suspect to comply with his verbal commands "by being nice."

So, we come full circle--what is the "nicest" thing the police officer can say to the soccer mom to get her back into her car and comply with his directions, without requiring his use of a Taser?

Notes

1. FBI national press release, Oct. 28, 2013
2. National Institute of Justice, Police Use of Force, Tasers and other less lethal weapons study, May 2011.
3. Graham v. Connor, 490 U.S. 386, 395 (1989).
4. Brower v. County of Inyo, 489 U.S. 593, 596-597 (1989)
5. Graham v. Connor, 490 U.S. at 395 (1989).
6. *Id* at 490 U.S. 396.
7. Saucier v. Katz, 533 U.S. 194, 205-206 (2001);
8. Tennessee v. Garner, 471 U.S. 1 (1985).
9. Tenn.Code Ann. § 40-7-108 (1982).
10. *Tennessee v. Garner*, *supra*.
11. Scott v. Harris, 550 U.S. 372 (2007).
12. *Id* at 550 U.S. 383.
13. *Id* at 550 U.S. 384.
14. *Id*.
15. *Id* at 385-386
16. *Id* at 386.
17. Plumhoff v. Rickard, 572 U.S. _ (2014).
18. Scott v. Harris, 550 U.S. at 376
19. Brown v. Callahan, 623 F.3d 249, 253 (5th Cir. 2010.)
20. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).
21. Hensley v. Gassman, 693 F.3d 681, 687 (6th Cir. 2012).
22. Pearson v. Callahan, 555 U.S. 223 (2009).
23. Tolan v. Cotton, 572 U.S._ (2014).
24. Brosseau v. Haugen, 543 U.S. 194 (2004).
25. Saucier v. Katz, 533 U.S. 194 at 205.
26. McDonald ex rel. McDonald v. Haskins, 966 F.2d 292, 295 (7th Cir. 1992).
27. *Brosseau v. Haugen*, *supra.* 543 U.S. 194, (2004).
28. Dept. of Justice News Release, Dec. 16, 2011.
29. Miami Dade Herald, July 9, 2013. ML

IMLA's 80th Annual Conference
Las Vegas, Nevada
October 4 -7, 2015

