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CIVIL LIABILITY

STUDENT GUIDE

FEDERAL LAW ENFORCEMENT TRAINING CENTER
GLYNCO, GEORGIA

(11/79)

LAW ENFORCEMENT AND CIVIL LIABILITY

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August, 1976

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I. INTRODUCTION

The purpose of this text is to acquaint officers and administrators of law enforcement agencies with the nature of civil liability, its hazard and potential personal economic disaster. It discusses the bases for liability, incidents which generate liability, explores ways of protecting the officer, and offers suggestions as to positive steps that might be taken to relieve law enforcement officers of some of the pressure of potential civil liability.

For several years police administrators have expressed concern that the number of civil suits alleging police misconduct have dramatically increased. Until recently, no statistics were available to confirm that suspicion. As a result, the International Association of Chiefs of Police (IACP) undertook a survey of police misconduct litigation during the period from 1967 through 1971. The survey was supported by the Americans for Effective Law Enforcement, Inc. (AELE) of Evanston, Illinois, who also published the results of the survey in a special report in 1974, captioned "Survey of Police Misconduct Litigation, 1967-1971." It was reported that chances were at least one in 34 that any individual officer was sued during any of the five years surveyed. The 1971 total represented a 446 percent increase over 1967. It was further reported that while some catastrophic losses were in six figures, the majority of plaintiff verdicts were nominal, and the average loss was approximately three thousand dollars.

The growing importance of this subject is readily apparent when considered in light of the dramatic increase in the number and type of suits involving law enforcement officers. The police administrator must be aware of his own potential liability. Due to increased financial responsibility, the modern officer, both individually and as the representative of his employing agency, has become a prime target for suit because now, besides winning a judgment, there is also a good chance of collection.

No attempt was made to tailor the discussion so as to state precisely the current law in each of the States and their subdivisions. Obviously that task would require much more time and space than is available here. Court decisions which illustrate certain points; samplings of pertinent state legislation; and significant programs of protection against liability are cited to provide an overall view.

II. BASES FOR LIABILITY

Law is divided into two parts: the criminal law and the civil law. The police officer generally is more familiar with the criminal law. He deals with it daily. The principles of civil law, however, may not be so familiar. He deals with it far less frequently. It may be useful, therefore, to begin by comparing the familiar framework of criminal procedure with that upon which civil liability depends.

A. Crime and Tort - Distinguished

A crime is a public injury, an offense against the state, punishable by fine or imprisonment. It is a violation of duty which one owes the whole community and can be punished only by the state. The remedy for a breach of such duty is punishment whether by imprisonment and/or fine.

A tort is a private injury for which the injured party may sue in a civil action. Such action may bring about liability which may lead to an award of money damages. It encompasses most personal injury litigation. The injured party initiates the suit and is called the plaintiff. The person sued is called the defendant and is often referred to as the tort feasor.

Originally all crimes were torts. An injured party sought his own remedy. The result was feuding and fighting which cost much in lives and property. The peace and dignity of the community was affected. Gradually the custom of private vengeance was replaced with the concept of criminal law, that is, the community as a whole is injured when one of its members is injured. Thus, the right to act against a wrongdoer was granted the state as representative of the people.

Such a concept obviously did not replace the right of private redress. Thus, a single act may be both a crime and a tort. For example, if A, in an unprovoked attack injures B, the state will attempt to punish A in a criminal action, by sending him to prison or fining him or both. The burden of proof is for the state to establish the elements of the crime beyond a reasonable doubt. The Defendant may appeal a verdict against him; however, the state has almost no right of appeal.

On the other hand, B, the victim, may sue A for money damages in a civil action for the personal injury he suffered. The gist of his complaint is that A has failed to carry out his duty to B to act reasonably and prudently and this failure has resulted in B's injury. In law, this legal wrong is called a tort. B must prove his claim by the preponderance of the evidence. This simply means that B has the burden of proof and must put on enough evidence to tip the scales in his favor. In a civil suit, discovery is more liberal than in criminal trials. Both parties have greater access to the evidence relied on by the other party. While discovery is a growing trend in criminal trials it is not as comprehensive as the interrogatories, depositions and pretrial disclosures in civil trials. Another important distinction is that in a civil action either party may appeal.

A's unprovoked attack on B therefore was a crime against the state and a tort against B. To summarize, they can be distinguished in two ways: (1) Who initiates the action? In the case of a crime it is always brought in the name of the state, the people, the commonwealth, etc., and for a tort in the name of the party injured; (2) What is the remedy sought? For a crime the state seeks to punish the wrongdoer and for a tort the plaintiff seeks money damages.

B. Categories of Torts

There are, generally, three categories of torts which cover most of the suits against law enforcement officers. They are, negligence; intentional torts; and constitutional torts.

1. Negligence

Probably the most widely recognized duty of a law enforcement officer is that of requiring him to avoid negligence in his work. Our society imposes a duty upon individuals to conduct their affairs in a manner which will avoid subjecting others to an unreasonable risk of harm. This, of course, applies to law enforcement officers. If his conduct creates a danger recognizable as such by a reasonable officer in like circumstances, he will be held accountable to others injured as a proximate result of his conduct and who have not contributed to their own harm. These general principles are well-known concepts in the law of negligence.

It means that actions taken by officers in apprehending criminals must not create an unreasonable risk of injury or death to innocent persons. The creation of risk is not in and of itself, negligence however, the law does require a reasonable assessment of harm's likelihood, and regards as negligent any act which creates a risk of such magnitude as to outweigh the utility of the act itself. See Restatement (Second), Torts, Sec. 291.

Under the civil court system, if the police officer owed no duty to the complainant, he will not be penalized even if the plaintiff in fact suffered some injury. An officer will be liable only where it is shown that (1) he was obliged to do or refrain from doing something and (2) the plaintiff was damages because of the officer's failure to comply with this obligation or duty.

2. Intentional Torts

In negligence suits a defendant will not be liable unless he foresaw, or should have anticipated, that his acts or omission would result in injury to another. Another category of torts are termed intentional torts. The doctrine of fault is integral to both. An intentional tort, however, is the voluntary doing of an act which to a substantial certainty will injure another. It does not have to be negligently done to be

actionable. Examples of such torts are Assault and Battery; False Arrest and False Imprisonment cases; Malicious Prosecution and Abuse of Process cases.

3. Constitutional Torts - Title 42 United States Code, Sec. 1983

The duty to recognize and uphold the Constitutional rights, privileges and immunities of others is imposed on law enforcement officers by statute and violations of these guarantees may subject the officers to civil suit. Civil suit arising out of an alleged violation of a constitutional right are suits brought under Title 42 U.S.C. 1983 and are filed in Federal Court. They are often referred to as 1983 suits.

C. Burden Faced by Officer

To illustrate the officer's potential exposure to liability, lets compare his position to that of an ordinary citizen. Suppose citizen A in an unprovoked attack, assaults B. What happens to A? (1) A may be arrested and charged by the state for a crime; (2) A may be sued by B for money damages for personal injury. Now suppose A is a law enforcement officer, what happens to him? (1) A may be charged by the state for a crime; (2) A may be sued in state court by B for Assault and Battery for money damages; (3) A may be charged in Federal Court, for Civil Rights Violations - Criminal - Title 18 U.S.C. 241; (4) A may be sued by B in Federal civil court for depriving him of his constitutional rights - Title 42 U.S.C. 1983, and; (5) A may be subjected to internal discipline by his employing agency. Thus, an officer of the law has at least five areas of discipline to which he is exposed, compared to only two for a citizen for exactly the same act.

III. WHO MAY BE SUED?

A. The State (Sovereign)

Every person who commits a tortious act may be held personally liable in money damages for the wrongful act. Instances in which one person acts on behalf of, or under the direction of, another person, then both the one who commits the tort, and the one for whom that person acts, are equally liable. Thus, an employer has the same degree of liability as the employee provided the employee is working within the line and scope of his employment. This is called in tort law the doctrine of respondeat superior.[1]

1. Law Enforcement Officer as Agent or Servant of the States

The one who performs the act for another is known in legal terms as the agent, or servant, while the one for whom the work is performed is known as the principal or master. A police department is an arm of Government, therefore, may be considered as master or principal, while the officer who is employed by the department, working on behalf of and under the direction of that governmental entity may be considered an agent or servant. A lawsuit for money damages against a state agency for something one of its employees has done or failed to do is a lawsuit against the state itself. Historically, the state (also called the sovereign) could not be sued. The state as principal or master had immunity.

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1. "Under the rule of respondeat superior, as ordinarily understood, the master is held liable for the torts of his servants committed within the course of their employment. In the typical case the neglect is only that of the servant, the master is himself without fault. But because the servant is engaged in the master's work and is doing it in place of, or for, the master, the act of the servant is regarded as the act of the master. Responsibility devolves up through the relationship to the master and the question of proximate cause of the injury relates only to the act (or neglect) of the servant. Fernelius v. Pierce, 138 P2d 12 (Cal. 1943).

2. Sovereign Immunity

The general notion that a sovereign cannot be sued by its subjects has ancient roots in English jurisprudence as an outgrowth of the precept "the king can do no wrong." While an acceptance of the Crown's infallibility did not come across to America, this derivative doctrine of the sovereign's immunity from suits to which it has not consented did. Strangely enough, however, our early courts offered few reasons for continuing to enforce immunity, and the doctrine enjoyed for years a virtually unchallenged existence.[2] Mr. Justice Holmes, a notable proponent of sovereign immunity, declared in a 1907 case for a unanimous Supreme Court that "A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends."[3]

When the motivation for immunity was sought to be explained, it was generally said to be the fear that functions of Government would be crippled should individuals be free to challenge in court the manner in which those functions were performed. An 1868 Supreme Court decision found it "obvious that the public service would be hindered, and the public safety endangered, if the supreme authority could be subjected to suit at the instance of every citizen..."[4] Such justifications became less compelling as the variety of activities undertaken by Government expanded and produced an increasing number of wrongs which lay remediless behind the cloak of sovereign immunity. Relief was afforded many private claimants through the rather unwieldy process of private bills in Congress, the number of which grew steadily over the years. Whether in response to the increasing burden on Congress or to a growing awareness that Government tort liability is often justified, more recent years have witnessed the gradual demise of an unquestioned application of sovereign immunity, and the growing trend of American lawmakers and courts, both state and Federal, has been to expand the concept of governmental responsibility.[5]

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2. "...the principle has never been discussed or the reasons for it given, but it has always been treated as an established doctrine." U.S. v. Lee, 106 U.S. 196, 207 (1882).

3. Kawannakoa v. Polyblank, 205 U.S. 349, 353 (1908).

4. The Siren, 74 U.S. 152 (1868).

5. See generally, Davis, Administrative Law Treatise, Sec. 25.17 (1970) Supp.)

3. Waiver of Immunity

The move away from immunity and toward responsibility has taken different forms. One example is the approach taken by the United States in the Federal Tort Claims Act. This act set aside a large portion of the Government's immunity for the tortious conduct of its employees, and permitted the Federal courts to determine whether private claimants have suffered redressable wrongs at the hands of the Government. The act provided that the United States shall be liable, except for punitive damages.[6]

a. Discretionary-Ministerial Acts -distinguished

In waiving sovereign immunity Congress distinguished between discretionary and ministerial acts of the Government. Discretionary acts are high-level policy and planning decisions. In theory, the operation of the Government depends upon its ability to make decisions on the highest levels, which decisions should be free of nuisance litigation. Ministerial acts, however, are those day-to-day acts of the Government which carry out the decisions made on the discretionary level. The ministerial acts which implement policy decisions are subject to liability, while discretionary acts are immune from suit.

b. Governmental-Proprietary Function-distinguished

In a similar fashion some states distinguish state activities for purposes of waiving immunity between governmental functions and proprietary functions. The first--governmental functions--include those functions which only the Government can perform and which must continue to be carried on without interruption for the governmental process to continue on a daily basis, e.g.,

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6. Title 28, United States Code, Sections 1346, 2671-2680
The provision in 28 USC 2680 (h) that the Government would not accept liability for "any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights," was amended 3/16/74 (PL 93-253) so that now the Government will now accept such claims.

the activities of the courts and the legislature. The second aspect--proprietary functions--includes those functions which the Government may carry out and which may be better performed by the Government than by private parties, but which are not essential to the continuation of the Government. These would include many of the services for which the state and citizenry at one time contracted with private parties, such as fire department, utility and sanitation services.

Governmental functions are necessary for the continued operation of the Government; therefore, several jurisdictions which otherwise permit suits against the state may prohibit suits against itself which arise from its governmental operations. On the other hand, the state, in performing proprietary functions is often seen as more like a private party than like a state government and, therefore, the law may permit suits for torts arising out of the proprietary functions.

4. Tort Claims Against the State

All but one state (Maryland) possess some kind of system which permits them to assume liability for the tortious acts of their agents and employees (although in many states the amount they can pay is limited by law or by the amount of liability insurance the state carries).[7]

a. Administrative remedies

Thirteen states have established administrative remedies for handling claims against the state. These usually consist of a Claims Commission or a Board of Adjustment which review claims against the state and make cash settlement under the direction of legislative guidelines. In five of the thirteen states the administrative remedy is merely a first step which must be taken in order to have a claim against the state heard by the courts. In these states the administrative board reviews the claim and can usually settle

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7. "Liability in Correctional Volunteer Programs--Planning for Potential Problems" The National Volunteer Parole Aide Program, a project of the American Bar Association, p.3, also Appendix I.

claims for less than an amount set by the legislature. If the board's decision is not accepted the claim may be taken to court.

b. Judicial remedies

Twenty-six states specify judicial remedies for claims against the state. Fourteen require the states consent to the suit while twelve have abolished sovereign immunity in whole and therefore permit the state to be sued in the same manner as a private citizen.

In six states the legislature must approve the disbursement of funds whether the claim is settled through the courts or through an administrative tribunal.

In only one states does the rule of sovereign immunity still hold; in Maryland, state law prohibits the state from consenting to a suit.[8]

B. THE OFFICER

Obviously, the negligent officer is answerable for the harm caused by his conduct. Generally, one who has been injured and has suffered a loss due to the acts of an officer while acting within the scope of employment, may sue (1) the officer, (2) the employer, or (3) both. In practice, the legal tactic is to sue as many people as possible. There is no deterrent to listing the officer, commander and department. Those sued move for dismissal; if this motion is sustained, the defendant is simply dropped from the suit. In practice, the state is the one most likely sued because as employer, the state is the one most likely to have money to pay damages and juries are generally aware of this.

The law varies in each state as to whether the state, having lost the case, may then sue the officer to recover the judgment. In some states, the employer may

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8. Charles E. Brohawn & Brothers, Inc. v. Board of Trustees of Chesapeake College, 304 A.2d 819 (Md. 1973), immunity from suit prevails.

bring the officer into the case as a defendant even though the injured party has not sued the officer.[9]

C. THE ADMINISTRATOR

1. General Rule

The general rule is that the administrator, such as chief of police or sheriff in a civil service department, is not liable for the acts of his subordinates unless he directs, participates in or ratifies the tortious conduct. The doctrine of respondeat superior does not apply. That is, there is no master-servant relationship between the administrator and his subordinate upon which liability for the acts of the subordinate can be attributed to the administrator. Thus, personal liability can arise for the administrator and liability on the part of the municipality (provided sovereign immunity has been waived) only if the plaintiff can show that his injury was proximately caused by the administrator's own negligence.[10] The reason for the rule, as stated by the Supreme Court, is that, "...competent persons could not be found to fill positions of the kind, if they knew they would be held liable for all the torts and wrongs committed by a large body of subordinates, in the discharge of duties which it would be utterly impossible for the superior officer to discharge in person."[11]

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9. In Graham v. Worthington, 146 N.W. 2d 626 (1966) the Iowa Court held that the state had a right of action against a negligent employee to recover the amount of any judgment which the state had to pay to injured parties because of the employee's tortious acts.

However, in Gilman v. U.S., 347 U.S. 507 (1954), a Federal case, the U.S. Supreme Court held an employee does not have to indemnify the Federal Government for damages caused by the employee's negligence and collected against the Government through the Tort Claims Act.

10. Jordan v. Kelley, 233 F. Supp. 731 (1963); See, Davis, "Administrative Officer's Tort Liability," 55 Mich. L. Rev. 201, 212 (1965).

11. Robertson v. Sichel, 127 U.S. 507, 515 (1888).

Policy making officials, who perform a discretionary function for the state, may be granted "official immunity." This means that they may not be personally sued for acting in their "official capacity," so long as they do not overstep their authority.

2. Exceptions to the General Rule

a. Sheriffs

Sheriffs and their deputies have a legal status that is different from that of others. A sheriff may be held liable for the acts of their deputies whereas the chief of a municipal police department is not responsible unless he directed such acts to be done or personally participated in the matter. The distinction is that deputies hold office through the sheriff and act purely as his representatives, whereas the chief of police does not personally select his deputies but acts only as a supervising officer for other public servants hired as members of the police department. The master-servant concept characterizes the relationship of Sheriff and deputy.[12]

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12. A Tennessee Sheriff was held liable for punitive as well as compensatory damages for personal injuries caused by his deputy in a shootout. The court found that at the time of the shooting the deputy sheriff was attempting to serve an arrest warrant which was in the performance of his official duty. The shooting, which was supported by substantial evidence, was decreed by the court to be entirely unjustified. The District Court verdict was accepted by the deputy who did not appeal.

The Sheriff appealed the punitive damages award because he was not present at the shooting and did not participate in or authorize it. In his defense, the sheriff's counsel contended that under federal law, damages may not be assessed against a principal for acts committed by an agent and not participated in or ratified by the principal. However, the court ruled that since punitive damages were allowed under Tennessee state law, they would look to the state law on this civil rights suit brought in Tennessee and therefore, affirmed the assessment of punitive damages. McDaniel v. Carrol, 457 F.2d 968 (5th Cir. 1972); See also Czap v. Marshall, 315 F.2d 766 (1963); Rich v. Warren, 123 F. 198 (1941).

b. Direct Participation

Where the supervising officer ordinarily would be exempted from liability for the torts of his subordinates he may incur liability for directing or participating in the acts which constitute the tort.[13]

c. Negligence in Personnel Matters

There is potential liability of a police administrator for negligence in personnel matters such as, negligent appointment, negligent retention, negligent failure to train, negligent failure to supervise and even negligent assignment. These areas of potential liability will be discussed later in this document. The point here is that a police administrator can be held liable despite the fact that he did not direct, participate in or ratify the conduct of his subordinates.

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13. Chambers v. Anderson, 58 F.2d 151 (1932)

IV. INCIDENTS WHICH GENERATE LIABILITY

A. Negligence

1. Traffic Accidents

a. Routine Patrol

Assume that an officer while driving a department vehicle on routine patrol is involved in a traffic accident. If he or his agency is sued for personal or property damage in which the allegation is that the officer was negligent, his status as a police officer performing in the line and scope of his employment, will not alter the courts assessment of liability. That is, an officer's responsibility to exercise due care is no different from that of every other citizen.[14] The exercise of a special privilege is limited to circumstances in which he is operating as an "emergency vehicle." The discussion which follows considers problems involving police vehicles on emergency run.

b. Emergency Run

It is a common experience to see police vehicles, usually with sirens screaming and red lights flashing, weave in and out of traffic, exercising privileges that are denied to members of the general public who are operating motor vehicles. Frequently, such vehicles exceed the general speed limits, go through red lights, or engage in other conduct which appears to violate general traffic regulations.

The purpose of the exemption afforded authorized emergency vehicles from the stated "law of the road" is to provide a clear pathway for a clear flight to emergencies. The rationale is that the community will be better served by this swift response to the variety of emergencies confronting authorities. Most states have set forth the restrictions that govern the operation of authorized emergency vehicles by statute.

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14. Von Arx v. Burlingame, 60 P. 2d 304 (Cal. 1936), see also Luskin v. Bakersfield, 20 P. 2d 788 (Cal. 1933).

Notwithstanding the emergency privilege a large number of law suits arise out of injuries resulting from accidents in a hot pursuit situation. Interestingly, officials of Physicians for Automotive Safety in 1968 estimated that someone gets killed in one out of five cases of "hot pursuit" of fleeing motorists by policemen. Half of these chases end in serious injuries. Seven out of ten end in an accident. Officials estimated the annual "hot pursuit" toll at 500 killed and more than 1,000 persons seriously injured. They also indicated that 80 percent of such cases are for minor offenses.[15]

A Department of Transportation commissioned report estimated in a more recent study that from six to eight thousand police pursuits a year end in crashes, injuring some 2,500 to 5,000 persons. The National Highway Traffic Safety Administration has estimated that up to 250,000 high-speed chases take place every year. Some 8,000 of them end up in crashes injuring some 5,000 people and killing as many as 400. Most apprehensions take place in the first five minutes after which the chances of an accident or losing the runaway increases immensely.[16]

When an officer becomes involved in a collision while on an emergency run the law may extend to the officer a special privilege which may protect him from liability. Statutes or ordinances in most jurisdictions grant to emergency vehicles, such as police vehicles, the right of way over other vehicular traffic. They usually define the requirements for exemption and the standard of care to which the driver will be held. An officer while responding to an actual emergency may be held negligent, only where he breaches this statutory standard of care.

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15. Today's Health, Published by American Medical Association, November, 1968, p. 10.

16. AELE Law Enforcement Legal Defense Manual "Defense of Police Vehicle Related Liability During Emergencies" 75-3.

(1) Type of Emergency

The officer has the burden of proving that he was responding to an emergency, that is, that such an emergency existed or that he could reasonably believe existed.[17]

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17. "The test for determining whether a publicly owned motor vehicle is at a given time responding to an emergency call is not whether an emergency in fact exists at that time but rather whether the vehicle is then being used in responding to an emergency call. Whether the vehicle is being so used depends upon the nature of the call that is received and the situation as then presented to the mind of the driver." It is a mixed question of law and fact. LaKoduk v. Cruger, 296 P.2d 690 699 (Wash. 1956).

Examples of situations held to be emergency

a. Investigation of an accident, Rowe v. Kansas City Public Service Co., 248 S.W. 2d 454 (Mo. App. 1942)
b. Call to investigate "trouble," Rankin v. Sander, 121 N.E. 2d 91, 94 (Ohio App. 1953).
c. Investigation of a death, Agnew v. Porter, 247 N.E. 2d 487, 491 (Ohio App. 1969).
d. Call that fellow officer needed help immediately, Agnew v. Porter, 260 N.E. 2d 830, (Ohio 1970).

Examples of situations held not to be emergency

a. Officers cruising in their police car on ordinary patrol duty looking for an automobile that had been reported stolen have been held not to be on an emergency run. Von Arx v. Burlingame, 60 P. 2d 304 (Cal. 1936).
b. Officer on a return trip to the police station is not usually considered to be on an emergency run. Luskin v. Bakersfield, 20 P. 2d 788 (Cal. 1933).
c. The clocking of a speeding automobile by a police vehicle has also been held not to be on emergency run. Lingo v. Hoekstra, 200 N.E. 2d 325 (Ohio 1964).
d. Vehicle used as escort to dignitary, Porter v. City of Decatur, 307 N.E. 2d 440 (Ill. App. 1974).

If the "emergency" does not in fact exist, but is a false alarm or an exaggeration, such fact is irrelevant. A reasonable belief in the existence of the emergency is all that is required of an officer. Simkins v. Barcus, 77 A.2d 717 (Pa. Super. 1951).

(2) Duty of Driver

The duty which the "emergency vehicle" statutes impose upon the officer is expressed as (1) exercise due regard for the safety of others in light of the circumstances or, (2) officer must not act with reckless disregard for the safety of others.[18]

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18. "Due regard for the safety of others is that degree of care which a reasonably prudent man would have used in the discharge of official duties of like nature and under like circumstances. "..."While it is desirable that a police officer overtake and apprehend a criminal whom he is pursuing, it is equally important that innocent persons, whether or not connected with the emergency to be met, not be maimed or killed in the attempt." Archer v. Johnson, 83 SE2d 314 (Ga. App, 1954).

In Herron v. Silbaugh, 260 A.2d 755 (Pa. 1970), a police officer was sued for a death caused when his unmarked cruiser crashed into decedent's car. The officer was pursuing a speeder at over 80 m.p.h. As he attempted to pass decedent's car, who was driving at 40 m.p.h., decedent's car drifted into officer's lane and cruiser crashed into his car. The Pennsylvania's Vehicle Code provided cars operated by police to apprehend law-breakers have privilege when operated with due regard for the safety of others but "the exemption shall not, however, protect the driver of any such vehicle from the consequences of a reckless disregard of the safety of others." The court stated that the failure of the officer to sound his siren as he came upon the decedent's car constituted reckless disregard for his safety. Had the siren been sounded, decedent would have had notice of defendant's rapid approach and pass, which would have likely prevented the accident.

A jury verdict for the police officer was reversed on appeal in Dillenbeck v. City of Los Angeles, 446 P.2d 129 (Cal. 1968). The officer was responding to a radio call of a bank robbery in progress. Utilizing both his siren and his emergency lights, he sped to the scene. As he approached an intersection, he slowed to 30 m.p.h., proceeded through a red light, and crashed into plaintiff's car. The court of appeal reversed on an evidentiary issue but wrote regarding the standard of care of the driver of an emergency driver:

> "We can attribute to the legislative intent, in addition to the requirement of an adequate warning to others using the highway, the further requirement that the driver of an emergency vehicle exercise that degree of care which, under all circumstances, would not impose upon others an unreasonable risk of harm...The question to be asked is what would a reasonable, prudent emergency driver do under all of the circumstances, including that of the emergency."

(3) Warning Required

In addition to the statutory duty of the officer a common requirement of these statutes is that the officer must provide an adequate warning to persons by use of warning lights and/or siren. These requirements are usually applied literally.[19] Notwithstanding compliance with the warning provisions the driver may still be held liable.[20]

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19. In Cotten v. Transamerica Insurance Co., 211 So.2d 110 (La. App. 1968), an officer responding to an emergency call ran a red light and collided with plaintiff. At the time, the police officer was driving an unmarked car. His headlights were flashing; his siren was also utilized, but it emitted only a muffled sound "like a bumblebee." Louisiana exempts emergency vehicles from ordinary traffic regulations so long as they provide an adequate warning to others, and provided further, they exercise due care for the safety of others.

The court held the siren in this case was inadequate to warn others of the approach of an emergency vehicle. Without an adequate siren, the police officer was not exempted from the traffic regulations, thus his running the red light was unauthorized and constituted negligence per se.

The officer did not use siren, held negligence per se, Scottsdale v. Kokaska, 495 P.2d 1327 (Ariz. App. 1972).

20. Although using siren and lights, officer's failure to slow down before intersection was negligent; Powell v. Allstate Ins. Co., 233 So.2d 38 (La. App. 1970).

Although operating lights and siren, question of officer's negligence was still one of fact for the jury; Hammon v. Pedigo, 115 N.W. 2d 222 (Neb. 1962). Although officer apparently complied with all statutory requirements, it was held proper for the jury to consider all factors, including reasonable alternatives to pursuit of speeder. Winston v. Davis, 192 N.W. 2d 413 (Neb. 1971).

The "due regard" phrase has sometimes been held to be satisfied if the emergency vehicle operator gave suitable warning of his approach, Veek v. Tacoma Suburban Lines, Inc., 304 P.2d 700 (Wash. 1956) but generally, the courts hold that due regard is not established simply by proof that an audible or visible signal was given. 7 Am Jur 2d, Automobiles and Highway Traffic Sec. 358.

c. Chased Vehicle Causes Crash

The issue not infrequently presented in hot pursuit cases is whether the driver of a police vehicle can be held liable where the chased vehicle crashes into an innocent party. The majority view is that the driver of the police vehicle will not be liable because it is his duty to apprehend those whose driving makes the road hazardous to others and because the proximate cause of the accident was the reckless driving of the pursued, even though the chase contributed to it.[21]

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21. In Roll v. Timberman, 229 A.2d 281 (N.J. 1967), an officer observed a car parked without lights. As he approached, the lights went on and the vehicle took off at a high rate of speed, failing to halt at the stop sign, the officer followed for about two miles with siren and lights on, and through another stop sign. Speeds accelerated up to 100 m.p.h. As the fleeing car attempted to pass a truck it struck the plaintiff's car. The court said the policeman was not liable for the results of the criminal's negligence. Officers cannot be made insurers of the conduct of the culprits they chase.

One of the leading cases on point is Draper v. City of Los Angeles, 205 P.2d 46 (Cal. App. 1949). There the court held that although the pursuit no doubt contributed somewhat to the reckless driving of the chased vehicle the officers of the law are under no duty to allow him to make a leisurely escape...They owe no duty to plaintiffs except to operate their own car with due care.

A traffic violator without license was told to follow police officers to station, but sped off through intersection and killed innocent 3rd party. The traffic violator, not the officer, was sole proximate cause of the death. Down v. Camp, 252 N.E. 2d 46 (Ill. App. 1969).

In Pagels v. City and County of San Francisco, 286 P.2d (Cal. App. 1955) it was held the failure of officers to sound siren or flash lights during pursuit was not proximate cause of fugitive crashing into plaintiff's car.

Some recent cases, however, have found liability on the police officer's part when a pursued vehicle hits an innocent 3rd party.[22] Often the fleeing fugitive has no assets or insurance, and the only realistic target for damages will be the officer and his department.

d. Traffic Supervision

(1) Directing Traffic

Traffic officers have been held liable in situations growing out of his effort to direct traffic.[23]

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22. In Thain and Coppola v. City of New York, 280 N.E. 2d 892 (NY 1972) a traffic violator passed a stop sign without halting, thereafter an unmarked police vehicle followed and attempted to overtake the car. The pursued car attempted to force the cruiser off the road. A three minute race continued in an urban area through 16 lights at speeds up to 60 m.p.h. Plaintiff entered an intersection with a green light in his favor; the fleeing car was almost a block away. At no time did the plaintiff hear a siren or see flashing lights. Several eyewitnesses testified that they neither heard nor saw any signals. The police said that they sounded the siren, though not constantly, and used the flashing lights on the grille. In a judgment for the plaintiff, the jury apparently found that, if the siren and flashing lights had been activated, they would have warned him not to cross the intersection.

The court recognized that the officers could not be liable on the basis of the fugitive's negligence, but that they would be liable for their own. Although the officers had a duty to try to apprehend the fugitive, they also owed a duty of due care to the public.

See also Jansen v. State, (301 N.Y.S. 2d 811 (NY AD 1968) held that alternative procedures would have been much safer; and Sundin v. Hughes, 246 N.E. 2d 100 (Ill. App. 1969) where court said officer owes duty to public at large, and could be a concurring proximate case.

23. In Czyzewski v. Schwartz, 265 A.2d 173 (N.J. Super. 1970), two state troopers were using radar equipment. The first officer was working the radar machine about .2 miles from the point where defendant policeman acted as interceptor. A radio message was received to stop a white Cadillac traveling toward the officer. He observed two vehicles approaching in the slow lane as he stood in the fast lane and motioned for the second car, the Cadillac, to pull over. Both motorists thought that the signal was meant for

(2) Roadblocks

Roadblocks established without authority, improperly established, or maintained in an unsafe manner may bring about personal injury or property damage or both, and may thereby cause civil liability. A roadblock established in an unsafe location such as just over the crest of a steep hill or around a sharp bend is particularly dangerous.[24]

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car one. It stopped and was struck in the rear by car two. The driver of car two said he had no warning of an impending stop and could not move into the fast lane where the trooper stood... The court reversed the trial courts dismissal of the complaint and said that negligence could be found under the facts.

In Gilday v. Hauchwit, 226 A.2d 835 (N.J. 1967), an officer was directing rush hour traffic at a congested intersection where the lights were not functioning. A pedestrian was crossing when the officer signaled a motorist to make a left turn. He had ample time to see and space to miss the pedestrian who had right-of-way on the crosswalk. The court held that the collision between the car and the pedestrian was caused by the negligence of the motorist. Even assuming that the officer was at fault in motioning the pedestrian to cross, the driver's negligence was intervening and was the proximate cause of the injuries. The policeman had a right to rely, in the absence of notice to the contrary, on the ability of motorists and pedestrians to obey the law and take care of themselves.

24. In Myers v. Town of Harrison, 438 F.2d 293 (2nd Cir. 1971) a police car chased a person suspected of leaving the scene of an accident over a narrow, winding and wet road, in a residential section at speeds up to 100 m.p.h. The officer radioed for a roadblock. A fellow policeman alighted from a squad car 600 to 800 feet below the top of a steep hill. A taxi driver stopped at the roadblock. The fleeing motorist topped the hill at 90 m.p.h. and hit the police vehicle and taxi, killing the taxi driver. At the speeds of the chase, a vehicle could not have come over the hill and stopped in less than 1,750 feet. The court held against the two officers and municipality for creating an unreasonable risk to the public.

In addition, liability may stem from the failure to set out appropriate warning signs, signals, or flagmen to give notice to approaching motorists.[25]

e. Effect of Departmental Policy and Guidelines

A department regulation, policy or guideline may set up stricter provisions than those applicable under state statutes. Even though a statute or ordinance permits officers to exceed speed limits the department may place additional limitations upon the officers action. Disobedience of a departmental regulation, policy or guideline may constitute evidence of negligence.[26] Such regulations may be introduced in evidence as part of the Plaintiff's case.

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25. A roadblock established in the vicinity of White Sands Proving Grounds was designed to protect the public during periods in which the military forces of the United States were conducting guided missile experiments in that area. The roadblock was located at the base of a steep mountain grade but the officers in charge failed to set out appropriate markers to warn approaching traffic. A large and heavily loaded truck came over the top of the hill and started downgrade. The driver attempted to slow the truck but was unable to do so in time to avoid collision with the barrier. The owner of the truck sued and at the trial damages were awarded for negligence in establishing and maintaining this dangerous roadblock. U.S. v. Byers, 122 F. Supp. 713, reversed on other grounds, 225 F.2d 774 (1955).

In Kagel v. Brugger, 119 N.W. 2d at 398 (Wis. 1963) the court wrote, "(N)ot every police officer aiding in the establishment of a roadblock could be charged with negligence but only those who have the responsibility for the establishment and the manner in which it is established."

In Hernandez v. U.S., 112 F. Supp. 369 (D. Hawaii 1953) the court considered a suit brought by a motorcyclist who was forced to run off the road to avoid hitting a roadblock. The court did not reach the issue of liability, but stated "...the Government had the absolute duty to properly and adequately warn passers along the road of the hazard created." Hernandez, supra. at 371.

26. In DeLong v. City and County of Denver, 530 P.2d 1308 (Colo. App. 1974), the Court of Appeals reversed in a case where jury had found for the defendant police officer. The appeals court noted that plaintiff sought to introduce departmental rules which provided that "at no time when answering fire calls will an officer proceed through red signal lights in excess of 15 miles per hour." The defendant objected to the admission of the rule into evidence under the theory that "the police department does not have the authority to set a standard of care for the operation of police vehicles." A three judge panel ruled the action of the trial court in error.

On review, the court wrote "...safety rules of an employer are admissible on the grounds that they constitute evidence of the standard of due care applicable to an employee's conduct...an employee's failure to follow the safety rules constitutes evidence of his negligence." The case was remanded for a new trial.

In Dillenbeck v. City of Los Angeles, 468 P.2d 129 (Cal. 1969) the court held the trial court should have permitted plaintiff to introduce a departmental training bulletin in which officers were instructed to slow to 15 miles per hour before entering an intersection against a red light during an emergency. The theory, of course, is that such directives are admissible because an employer can create a higher standard of care, on the part of its employees, than is required at law. If the regulation imposed is a safety rule, violation of that rule is evidence of the employee's negligence.

See Herron v. Silbaugh, 260 A.2d 755 (1970) where officer failed to activate siren under conditions contrary to departmental regulations. No explanation was given for this omission. Officer found negligent.

However, see City of St. Petersburg v. Reed, 19 CrL 2113, (2nd Dep. Fla. 3/24/76) where introduction of employers safety rules was reversible error.

2. Use of Police Weapons

a. Firearms

Civil law suits arising out of an officer's use of his firearm are not unusual. A suit may develop from its intentional use as well as from its negligent use. In the former suit the distinction between justifiable force and excessive force is important. In the latter the officer's conduct must not fall "below the standard established by law for the protection of others against unreasonable risk of harm." Restatement of Torts, Sec. 282. A risk is unreasonable if a "reasonable man would recognize the act as involving a risk of harm and the risk of such magnitude as to outweigh the utility of the act or the manner in which it was done." Restatement, Sec. 291.

Assume Officer A intentionally shoots and seriously wounds B, a suspect fleeing from the scene of suspected criminal activity. B may bring a civil suit in state court alleging Assault and Battery, an intentional tort. The gist of B;s action is that Officer A used excessive force in his effort to apprehend him and the use of his firearm was not justified. It is not alleged that Officer A was negligent -- he did what he intended to do, namely, shoot B.

Now assume Officer A intentionally shoots at B, a fleeing felon, in a congested downtown area, but misses B and hits C, an innocent bystander. C, in a civil suit against Officer A in state court will allege that Officer A was negligent in the discharge of his firearm. The gist of C;s suit is that Officer A's intentional shooting was done under negligent circumstances. The negligent actions are discussed here.

(1) Innocent Bystander Injured

Loaded firearms are regarded as dangerous instruments and a high degree of care and caution must be exercised in their use. A policeman is not exempted from the

strict rule of accountability for want of extraordinary care in the use of loaded firearms.

Whether an officer will be held liable for the injury of an innocent 3rd party will depend on whether he used such care in his action. While an officer might be justified in the discharge of his weapon the law requires that he do so with reasonable prudence to avoid injury to others and that he exercise care commensurate with the danger involved.[27]

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27. In Davis v. Hellwig, 122 A.2d 497 (NJ 1956), a policeman fired his gun at a thief running down a narrow street without making thorough observation for pedestrians beyond seeing that none were in his line of fire. A deflected bullet hit a pedestrian. Verdict entered for officer on basis of no cause of action. NJ Supreme Court reversed and held that conduct so far departed from the applicable standard of care which he should have exercised in the use of firearms that the pedestrian was entitled to have his action considered by a jury.

In an old Oregon case (Askay v. Maloney, 166 Pac 29 (Ore 1917), the court wrote, "A street is not a sanctuary for a robber, and the officers had a right to exercise their prerogative of arresting the felon wherever they might find him, whether in the street or in some secluded spot. The mere act of their shooting at him was not unlawful or negligent per se, because as to the arresting officers it was authorized by statute. Of course, it was their duty to act with reasonable prudence to avoid the injury of innocent persons, and the care must be commensurate with the danger involved. It goes without saying that a greater quantum of caution should be observed in firing upon him with pistols than if they were grappling him with their hands. Whether they were negligent under all the circumstances of the case, as a result of which the injury was inflicted, was a question for the jury to determine according to the preponderance of the evidence upon a consideration of the whole case."

Other cases arising in similar circumstances have included: bystander struck by bullet from revolver of police officer fired in pursuit of robbers fleeing down a street, Evans v. Berry, 262 N.Y. 61 (1933); officers shooting a bystander during an auto chase, Arnold v. State, 8 N.Y.S. 2d 28, (1938).

In Berry v. Hamman, 125 S.E. 2d 851 (Va. 1962) a state police officer was held not liable for bodily injuries suffered by a special police officer assisting in the apprehension of a

(2) Warning Shots

> Departmental policy usually determines whether warning shots are permitted. However, where injury results from such shots the courts will carefully review the necessity of such shooting according to the facts of a particular case. While it has been held that warning shots are proper in some cases the burden upon the one who fires such shots is almost that of an insurer. The law imposes a duty of extra-ordinary care.[28]

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person wanted for committing several felonies. The injured officer had ventured from a safe position into the open after hearing a shot fired by the state officer. The court said the shot was unintentional and accidental. The state officer was under a reasonable belief that he was shooting at the felon.

In Graham v. Ogden, 157 S.2d 365 (La. Appls. 1963) the court held that a deputy sheriff was not liable for the death of a bystander, when the fatal shot was accidentally fired while attempting a lawful arrest for creating a disturbance in the deputy's presence. The evidence showed that the shot resulted from the offender's action in resisting the officer and his attempt to take the deputy's weapon from him.

28. Wimberly v. Paterson, 183 A.2d 691 (N.J. Super. 1962).

In Davis v. Hellwig, 122 A.2d 497 P.498 (N.J. 1956), two police officers were instructed to pick up a 17-year-old boy as a parole violator and for questioning on suspicion if they saw him. The youth was on parole from a juvenile home but no complaint warrants, or indictments were outstanding against him. They saw the boy at a basketball game and arrested him as a parole violator. The arrestee broke and ran from the officers who gave chase, firing warning shots during the pursuit. The subject ran into a long alley four feet wide. One of the officers fired another warning shot; it struck and killed the subject whose father sued the officers and the city. The court emphasized the general rule that shooting a fleeing misdemeanant is not justified. Thus, the officer would be liable if the jury found that the officer had fired at the deceased. The plaintiff also argued that the officer was negligent for firing a warning shot. The court noted a split of authority over the use of warning shots and held that the better rule is that an officer may discharge a firearm to frighten into halting anyone who is attempting to escape from a lawful arrest, but that the law imposes a duty to employ extraordinary care in firing warning shots. The officer who uses warning shots is held to a "duty of prevision not far from that of an insurer."

(3) Negligent Handling of Firearms

Several cases have been discussed in which officers were sued for intentional, but negligent use of firearms. In addition, suits have arisen from unintentional shootings. These cases arise out of accidental discharge of a weapon. Obviously, where the officer trips or drops his weapon in an unavoidable accident, where there is no negligence there will be no liability. However, where accidental discharge follows improper handling, liability may attach.[29]

In Geiger v. Madden, 58 Pa. 616 (Pa. Super. 1915), where an officer held his pistol in a downward position before firing, the court wrote:

> "...even if it was pointed at the pavement, the defendant (officer) must be deemed to have taken the chance of the missile glancing and striking the prisoner. As he had no lawful right to fire in his direction, with the probability of such a consequence and view, there was no error in describing it as a negligent act, or at least no harmful error, inasmuch as the act might have been described as a reckless one."

In State v. Cunningham, 65 So. 115 (Miss. 1914) the court stated "An officer must not intentionally shoot a misdemeanant who is a fugitive, nor must he discharge a firearm while in pursuit, in such manner as to cause such fugitive injury." See also Edgin v. Talley, 276 S.W. 591 (Ark. 1925).

29. Horseplay with a loaded revolver is particularly susceptible to a holding of negligence. The courts properly condemn it. In Martin v. Garlotte, 270 So.2d 252 (La. Ct. of Appls. 1973) and officer was accidentally shot and killed when gun which had been quick drawn by a fellow officer while engaging in horseplay at the station house. On appeal the court held the Chief of Police who had also been sued in the case could not be held negligent. He had issued regulations prohibiting horseplay by police with guns. The Chief could not be expected to foresee that one of his officers would violate the regulation of the department and engaged in conduct relative to use of firearms which was violative of basis common sense and experience of everyone.

(4) Controlling Access To and Use of Firearms by Others

Where officers have acquired the duty to control access to and use of firearms by others they must discharge such responsibilities with a reasonable standard of care.[30]

In Meistinsky v. New York, 140 N.Y.S. 2d 212 (1955) Aff'd 132 N.E. 2d 900 (1956), a New York City Police Officer entered a store being robbed and announced himself and fired six shots at two bandits in close range. Four shots struck the decedent, who was being held hostage. Decedent's executor alleged negligence. The officer had been given firearms training once every four months firing 10 rounds slow fire at a target 60 feet away. His two scores were 65 and 62. There was no training in combat shooting. The lower court dismissed the complaint but the appellate court reversed, holding that a prima facie case of negligence was established.

In Peer v. Newark, 176 A.2d 249 (NJ Super. 1961) a Newark police officer in off-duty status removed his service revolver (worn by regulations) in his bathroom and the weapon fired. The bullet pierced a 6½ inch wall and struck a child in the adjoining apartment, paralyzing her for life. In a suit against the officer and the city, it was contended that the city was negligent in that (1) no instruction had been given to the officer in an off-duty firearms safety; (2) the officer was using a dangerous holster which would allow the weapon to fall out; (3) no retraining had been given to the officer since the original 3-day firearms class, and (4) he had not fired the weapon for over 16 months. The verdict was for the plaintiff.

In Hacker v. City of New York a policeman's wife recovered against the city when his weapon fired while he was cleaning it. The cleaning was held within the scope of the officer's duties. 261 N.Y.S. 2d 751 (N.Y.Sup. 1965) rev. on other grounds 275 NYS 2d 146.

Target practice, performed in what appeared to be an unoccupied area gave rise to liability in Truog v. American Bonding Co., 107 P.2d 203 (Ariz., 1940). The officer fired his weapon at birds and animals while in a state game preserve. His shots wounded an innocent person. The court found him personally liable but excused his surety since his act was outside the duties of his office

b. Nightstick and Handcuffs

An officer's nightstick, his handcuffs and his firearm are all part of the essential equipment he may need in the performance of his duties. As we have seen with the use of the firearms these essential police weapons when negligently used may constitute the source of civil liability problems. The use of the nightstick will be discussed under the intentional tort section, infra. assault and battery and the defense of justifiable use of force. As to the use of handcuffs rarely does their use give rise to civil litigation.[31]

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30. A civil suit developed where a father turned his son's pistol over to police saying the son had no permit and had threatened his wife's life with it. Later the police returned the gun to the son who then used it to shoot his wife and commit suicide. See Benway v. Watertown, 151 N.Y.S. 2d 485 (1956). In another case a minor was shot to death during permissive but unsupervised use of the police firearms range by youths in disregard of the department rule. Bucholz v. Sioux Falls, 77 S.D. 322 (1958).

31. In State v. Westland, 536 P.2d 20 (Wash. App. 1975) wrote: "The decision to use handcuffs must be a unilateral decision made by the arresting officer at the time of arrest. It is not a decision subject to debate, negotiation or bargaining."

Deputy sheriffs in Migliore v. Winnebago, 321 N.E. 2d 476 (App. Ct. of Ill. 2nd Dis. 1974), arrested defendant after plaintiff refused to give his name to officers attempting to serve a valid subpoena upon him. Use of handcuffs by officers was reasonable in view of belligerent attitude of the plaintiff. Deputies conduct was not wilful and wanton misconduct.

In Re Casek v. City of Los Angeles, 43 Cal. Rptr. 249, 299 (1965) police officers arrested and handcuffed two individuals on a public street. The prisoners broke away and ran, handcuffed together, along the public sidewalk which was then occupied by many persons including the plaintiff. They collided with her, causing personal injuries as she was thrown to the sidewalk. She sued, claiming the officers were negligent in failing to use sufficient force to prevent the escape of the arrestees and that this brought about her injuries. The court affirmed the dismissal and held that the amount of force or the means used by a police officer in attempting to keep an arrested person in custody is a discretionary judgment to be made by the officer. As a second

c. Tear Gas

Tear gas has long been a weapon of law enforcement. Law suits have been filed for damages to persons injured by the gas. If improperly or negligently used, plaintiffs may win.[32]

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ground for its opinion the court said that to impose civil liability generally on officers in those situations where a prisoner escapes from custody would encourage officers to use too much force in order to avoid personal liability. The court said "a rule of law which may encourage police brutality is not desirable."

32. An officer investigating broken auto windshields suspected a 29-year-old man of apparently low intelligence who lived nearby with his mother and brother. After conversation with the mother, but without medical diagnosis or warrant, the officer concluded that the suspect was incompetent and had to be taken by force from a room which he refused to leave. Tear gas was obtained -- but no gas masks -- and thrown into the small, closed room. After some minutes of being driven back by the fumes, the officers broke the barricaded door and removed the suspect, screaming, vomiting and frothing, to a hospital where he died 14 hours later. Medical testimony established that tear gas can be lethal when highly concentrated in a small room.

In the mother's suit for negligence the state showed that the officers had been instructed in the use of tear gas in the open, but the court held for the plaintiff, saying:

> "...the Court finds that the State was negligent in failing to instruct the officers that the tear gas could be lethal. Where an employer trusts his employees with an instrumentality, intending him to use it, the employee must be trained sufficiently in its use to avoid causing harm to another. The State had the duty of giving its employees proper instruction in the use of tear gas, to enable them to use the same properly and safely in a reasonably foreseeable situation... This the State failed to do, informing the troopers that tear gas was not a lethal weapon when in fact, under some conditions, it could be lethal." Titcomb v. State, 222 N.Y.S. 596 (1961).

d. Effect of Departmental Policy and Guidelines

Safety rules of an employer are admissible on the grounds that they constitute evidence of the standard of due care applicable to an officer's conduct. See discussion under Vehicle Liability, p.22. An employee's failure to follow the safety rules (of the employer) may constitute evidence of his negligence.[33]

3. Negligence in Arrest

Officer A arrests B. If the arrest is illegal and A has no justifiable belief in the validity of the arrest, A may be liable for False Arrest or False Imprisonment. If B resists the arrest and A uses force to overcome B's resistance, resulting in physical injury to B then A may be liable for Assault and Battery but only if the force he used was excessive or unnecessary to subdue B.

Generally speaking, an officer does not "negligently" arrest anyone nor does he "negligently" commit a battery. Both arrest and assault and battery are acts intentionally done. An act of

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The court further held the officers were negligent in failing to bring gas masks for use in forcing a quicker entry into the room after gassing it. See also Hagedorn v. Schrum, 226 Iowa 128 (1939) where court held dispersal of tear gas was excessive force and constituted a wanton and reckless assault upon the plaintiff. In Salazar v. Bernalillo, 62 NM 199 (1956) negligence in use of tear gas was alleged.

33. Grudt v. City of Los Angeles, 468 P.2d 825 (Cal. 1970). See also Sauls v. Hutto, 304 F. Supp. 124 (E.D. La., 1969) where NOPD regulation was admitted to show policy regarding restricted use of force.

negligence is a "violation of the duty to use care." 57 Am. Jur. 2d, Negligence, Sec. 1, page 333. It is rare therefore that negligence constitutes the basis of litigation in an arrest action. Yet, where an officer's plan for arrest is a contributing factor resulting in injury or where he negligently fails to identify himself, these acts may produce civil liability for negligence.[34]

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34. Planning the Arrest -- In Dyson v. Schmidt, 109 N.W. 2d 262 (Minn. 1961), two plain clothes officers entered a theater on special assignment and observed a man resembling a suspect wanted to several armed robberies. One of the officers went into the lobby and told the assistant manager that something was going to happen in the theater "pretty soon." The officers had information that the suspect was dangerous, having participated in several armed robberies, that he was likely to be armed and would forcibly resist arrest. They considered calling for assistance of other officers to set up the arrest but decided against it. They planned to wait and confront the suspect as he emerged from the theater.

During the intermission, the officers observed the suspect in the lobby and one approached him, idetified himself as a police officer, and asked for some identification. The suspect immediately drew a pistol, began firing at the officers, and ran. One of the officers drew his own weapon, ordered the suspect to stop and then fired. One of his shots hit the suspect and the other struck the theater manager who was hidden behind a door. The manager sued and won a verdict against the officers. The Supreme Court of the state affirmed the verdict. The court said that there appeared to have been "...ample time, between their first discussion of strategy and the intermission, to summon additional help, which was not done. They had information that the suspect was dangerous and likely to be armed and to resist arrest by force of arms if necessary."

The Court said the officers' plan to demand identification amounted to an invitation to the suspect to reach into his pocket, bring out and use his revolver. This brought about a situation which both officers expected might happen. The Court said the rule should be that where an officer is confronted with a sudden emergency such as observing a suspect committing a felony or threatening human life he should not be held liable in the event he has to fire and a bullet goes astray and wounds an innocent third party. However, the Court would not apply this rule where a jury question exists as to whether the conduct of the officer created the situation which brought about the emergency.

4. Negligence in Personnel Matters

a. In Hiring

Police Administrators have been held liable for negligence in hiring an individual unqualified or unsuited for law enforcement work. The theory is this; if Officer A negligently injures B he of course, will be liable to B. But if C, the

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Failure to Identify Yourself: A Police Department received a tip regarding the location of a large quantity of marijuana in a farmer's nearby barn. Two officers positioned themselves in the suspect's barn and the other on a road nearby. None were in uniform or wore badges. Plaintiff approached the barn but did not enter. He turned to go to his car and began to jog.

The officer who had positioned himself on the road arrived at Plaintiff's car before the Plaintiff. The Officer's general appearance was designed to "blend more with the subculture... figured to be associated with narcotics." When Plaintiff arrived at his car the officer was crouched in front with a pistol in each hand. Plaintiff testified that the officer did not identify himself and he thought the officer was a "crazed farmer." In trying to get away the officer hit Plaintiff on the head with the butt of his gun and shot out the tires of Plaintiff's car as he made his getaway.

The Plaintiff sued the officer. The court, following trial, determined as matter of law that the officer had probable cause for the arrest and that excessive force was not used. The court further concluded the only theory upon which the case could be submitted to the jury was that of negligence in the manner of arrest and the case was so submitted. The jury held for the plaintiff and the officer appealed. Celmer v. Quarberg, et al., 203 N.W. 2d 45 (Wisc. 1973). The Wisconsin Supreme Court affirmed judgment for the plaintiff. The court held the officer's failure to identify himself under the circumstances was negligence. The plaintiff's personal injuries had a causal relationship to the officer's negligence.

Chief Administrator, hired A, and A was unqualified in the first place and C knew this or should have known it, then C will also be liable to B.[35] Liability can attach to the administrator because his negligent hiring was the proximate cause of the plaintiff's injury. The act of hiring must not be negligent. Such negligence is not the direct

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35. In Peters v. Bellinger, 159 N.E. 2d 528 (Ill. App., 1959), reversed on other grounds, 166 N.E. 2d 581 (1960). An individual was employed as an officer for a trial period of thirty days. No one bothered to check his background prior to employment. Had they done so, they would have found he had a record of being involved in many street brawls and had been convicted of grand larceny. During the course of his duties, the officer stopped a motorist for speeding and driving while intoxicated. In dealing with the motorist, he used a blackjack with such force as to cause the loss of an eye. The court indicated that the city equipped the officer with a gun, a star, and a blackjack but failed to test his background and experience and failed to afford him any suitable training as an officer. In a civil action brought by the victim, judgment was given the plaintiff for, as the court said, "there seems to be little question that negligence existed in the hiring."

In Casey v. Scott, 101 S.W. 1152, 1153 (Ark., 1907), the court wrote, "The chief of police may select a police force, but he is not responsible for their acts, as each policeman is a public servant himself...There is no liability in such cases, unless the appointment officer fails to exercise reasonable care in the selection of the appointee--a question not presented here."

In a case which did not concern police officers but which expressed the principle of law involved here, a recently employed assistant in a bowling alley suddenly assaulted some of the customers. An action was filed against his employer to recover damages for negligence in hiring such an employee. The assistant had been hired three weeks prior to the assault but no inquiries were ever made into his background, even though he appeared to be a "floater" with no permanent residence and having no funds. He said some irrational things prior to the assault but was still retained in his job. The court said such facts are for the jury to consider and if they find the employer negligent in hiring and keeping a potentially dangerous employee with a history of mental instability, his assault on the customer was within the range of foreseeable consequences for which the employer would be liable. Vanderhule v. Berinstein, 285 A.D. 290 (NY 1954).

cause of injury, but is said to be the indirect or proximate cause of it. The act must set in motion conduct on an officer's part, which conduct was reasonably foreseeable under the circumstances.

In some cases a police chief has absolute authority to hire any person who fits basic employment standards. He may have the responsibility for investigating applicants. It is in this type of case in which the police chief may be subjected to liability for negligent hiring. In a few communities all pre-employment functions are removed from the Chief. The AELE Legal Defense Manual captioned "Administrator's Liability for Negligent Employment of Police Officers" indicated the following:

"Any action alleging negligent appointment or retention could be brought against the individuals exercising hiring or firing authority in their personal capacities. This would mean the police chief or each member of a civil service board that voted for appointment or retention. In some communities the city will be liable too, either directly as a co-defendant or indirectly through indemnity provisions. In many communities the unit of Government cannot be sued; thus any suit properly brought would name the chief or board members in their personal capacities."[36]

If an officer's act of misconduct is his first error and the facts indicate he should not have been hired, the hiring authority may be held liable, and the firing authority will be excused. If it is the officer's second act of serious misconduct and no disciplinary action was taken after the first incident, the firing authority will be liable. The hiring authority will also be liable if an officer shouldn't have been hired in the first place.[37]

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36. AELE Law Enforcement Legal Defense Manual, 73-6, pg. 4.

37. Ibid, p. 5.

b. In Retention

A Police Administrator may be held liable for a failure to discipline or discharge an officer who has demonstrated a pattern of misconduct or a single bad act. The theory is that the administrator is negligent if he knew, or should have known, that the officer concerned would repeat prior misconduct. For example, if Officer A injures citizen B, the officer will be liable to B. If Administrator C retained Officer A and 1) A was unqualified and 2) C knew this, or could have known it, C will share liability with Officer A. Such negligence is alleged to be the proximate cause of later inflicted injuries.

Since an administrator, such as a chief of police, has power to suspend or fire an officer for misconduct, he has the duty to exercise that power when such action would likely prevent future misconduct and injury.[38]

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38. "It is negligence to use an instrumentality, whether a human being or a thing, which the actor knows or should know to be so incompetent, inappaorpriate, or defective, that its use involves an unreasonable risk of harm to others." Restatement of Torts, Vol. II, Negligence Sec. 307, p.833 (1934 edit.).

In Fernelius v. Pierce, 138 P.2d 12 (Cal. 1943) involved a wrongful death action commenced by the widow and children of a man who died from alleged police brutality. The pleading alleged negligent retention of two officers. The claim was that the chief of police "knew, or should have known in the exercise of due care, of the aforesaid incompetence and unfitness" of the officers concerned, and wrongly retained them. Reasoning that no authority was offered to exculpate public officials from liability, the Court said that there was "no logical reason" why a superior should not be equally held accountable for failure to use care in selecting employees or "to discharge a known unfit subordinate."

In Moon v. Winfield, 383 F.Supp. 834 (USDC N.D. Ill. 1974) it was held that a police superintendent who is negligent in retaining police officer who had numerous misconduct complaints involving citizens may be held liable in a civil rights action based on such policeman's assault on individual even though the superintendent did not personally participate in the assault.

c. In Supervision

A superior officer who is given a supervisory duty and fails to perform it, or does so negligently, may suffer liability for his negligent conduct or negligent omission. He is not liable directly for the misconduct of his subordinate under the doctrine of respondeat superior. As a police administrator he is not vicariously liable for the acts of a subordinate officer unless he (1) participates in, (2) directs, or (3) authorizes or ratifies the misconduct of the subordinate. However, the administrator may be personally liable under the doctrine of proximate cause if his negligent supervision involves a breach of duty. Negligence in supervision imposes the same liability as if he had personally participated in the actual tort.[39]

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39. In Lubelfield v. City of New York, 4 N.Y. 2d 455 (1958), an intoxicated police officer, out of uniform, was placed in a taxi by three uniformed officers who told the driver to take the passenger wherever he wanted to go. The intoxicated officer subsequently shot the driver with his service revolver. Police regulations required that an officer carry his revolver at all times; however, in a civil suit resulting from these facts, the court said it was negligence for the uniformed officers to permit the drunken policeman to go upon the public street armed. That is, it is negligence to permit an officer incapacitated for duty to the extent of being a potential danger to the public to continue to exercise the authority granted him in his official capacity when the facts of his incapacity are known to his superior officers.

In Fernelius v. Pierce, 138 P.2d 12, 21 (Cal. 1943) a California Court wrote, "The law--giving to a superior officer the power to suspend or remove subordinates--would be little more than a contribution to the ego of the superior if it did not likewise place on him the correlative duty of vigilantly exercising that power in the protection of the public interest."

See also Carter v. Carlson, 447 F.2d 358 (D.C. Cir. 1971) the court, citing Thomas v. Johnson, 295 F.Supp. 1025, held "the common law imposes...a duty of supervision, with potential liability for its breach. A breach of that duty might involve either ministerial or discretionary aspects of supervising police officers." Accordingly, the court refused to dismiss the complaint. A police administrator, presumably, would be liable for a ministerial breach, but not a breach of discretion.

d. In Training

Most courts recognize that municipalities and police administrators have a duty to train officers they employ. Administrators have been held liable where there has been a negligent breach of this duty which proximately causes an injury to the plaintiff. The negligent failure to train involves a breach of executive duty, and imposes the same liability as if the administrator had participated in the actual tort.[40] Generally, a police administrator is not vicariously liable for the acts of a subordinate officer unless he participates in, directs, authorizes or ratifies the misconduct of the officer. These usually involve some affirmative act by a police chief.

In an unprovoked assault while intoxicated, an off-duty policeman used his service revolver to kill one man and permanently injure another. Plaintiff proved that the officer had been disciplined by his department three times previously, all for intoxication. The third time, the Commissioner threatened to fire him (usually done in such cases), but put the officer on probation for a year. Two months after the shootings, the officer was diagnosed as psychotic from use of alcohol and five months later he was confined in a hospital for the insane. Police regulations required officers to wear service revolvers at all times. The trial court dismissed the complaint but the appeals court reversed, holding that there was evidence from which a jury might find that the Commissioner had sufficient knowledge of the officer's dangerous tendencies that he was negligent in failing to discharge. McCrink v. City of New York, 296 N.Y. 99 (1947).

40. In Roberts v. Williams, 302 F. Supp. 972 (N.D. Miss 1969), a county farm superintendent was held liable for the grossly negligent shooting of a county prisoner by an armed trusty. The trusty was furnished a loaded shotgun without training. "Since the shooting in this case occurred under the most needless and avoidable circumstances, it is patent that Williams (trusty) was thoroughly ignorant--indeed incompetent--in the handling of a firearm. It was Arterbury's (superintendent) duty to exercise care that Williams knew how to use the gun and could handle it safely before giving him possession of it... The negligence of Arterbury in this respect, combined with the negligence of Williams in mishandling the gun, produced a classic case of causation which proximately resulted in the shooting of and personal injuries to plaintiff. It is no

5. Failure to Act

(a) Willful Neglect of Duty

The general rule is that police officers owe protection to the public and not to any particular individual. Therefore, failure of an officer to enforce the law is not grounds for a successful suit against him by an injured citizen.[41] In some states there are specific statutes which provide penalties for officers convicted of "Willful Neglect of Duty."[42] To be guilty, the officer must be aware of the nature and responsibilities of his office. He is held liable for intentionally omitting, neglecting, or refusing to discharge those duties. Such statutes usually provide that these offenses are misdemeanors so that in addition to administrative penalities the officer may be subjected to criminal penalties.

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answer to say, under these circumstances, that Williams alone is responsible for the consequences of his negligence, but that responsibility must be shared by Arterbury because of his own concurrent, tortious conduct."

See Martin v. Garlotte, 270 So.2d 252 (La. App. 1972) where police chief was held not liable for negligent failure to train subordinate officers. The chief had been held liable at trial where plaintiff's deceased, a policeman, was killed in a fast draw session in the lockerroom. The court held on appeal that the chief had adequately trained and instructed the officers concerned.

41. In Massengill v. Yuma Co., 456 P2d 376 (Ariz. 1969) a deputy sheriff was working at night near several bars and observed two cars emerge from a parking lot in a reckless manner at excessive speeds. They passed his marked vehicle and entered the highway side by side. The highway was mountainous, narrow, heavily traveled. Although the deputy was in pursuit and had the authority to arrest the motorists for the crime being committed, he did not signal them to stop. One of the cars collided head-on with another vehicle, killing five occupants and disabling the sixth. In a suit for damages, the deputy was dismissed as a defendant. The court held the deputy owed no duty to the deceased and the injured. His obligation to enforce the law was to society in general not to the individual plaintiffs. The court indicated that only a criminal prosecution of the deptuy could redress the breach of his duty. But see, Wuethrich v. Delia, 341 A2d 365, (Sup. Ct. N.J. 1975), which held police failure to check out menacing person report stated proper cause of actions.

(b) Failure to Protect Informants

Exceptions to the general rule discussed above emerge if the plaintiff can show a special relationship existed between him and the department. Such relationship has been shown where the person is an informant.[43]

See also Wong v. Miami, 7 Cr.L. 2294 (Fla. Sup. Ct. 1970). In an Indiana case a merchant sued the municipality, claiming that he was driven out of business by the refusal of the city to combat crime in his neighborhood. The court relied on the rule that the duty to protect is to the public and not an individual merchant. Simpson's Food Fair, Inc. v. City of Evansville, 272 N.E. 2d 871 (Ind. App. 1971).

42. See General Statutes of North Carolina, Section 14-230.

43. Arnold L. Schuster provided New York City police with information leading to the capture of a badly wanted fugitive. Schuster publicized his act and immediately began receiving threatening communications. Some police protection was given but three weeks later, when not under guard, he was murdered by a person or persons unknown. His father, as administrator of the estate, sued the city. The lower court dismissed the complaint but the appeals court reversed. It held that the public owes a special duty to use reasonable care to protect those who have collaborated with public officers in the arrest or prosecution of criminals once it reasonably appears that the informant is in danger due to his collaboration. Also, once the city had undertaken to protect the informant, it had the obligation not to terminate the protection under circumstances reasonably indicating that to do so would increase the risk of harm to the informant growing out of his cooperative action. Schuster v. City of NY, 154 N.E. 2d 534 (NY 1958).

In Riss v. City of N.Y., 240 N.E. 2d 860 (NY 1968) the police refused protection to a girl who reported a spurned suitor threatened to kill or maim her. She became engaged to someone else. Again the police refused to protect her. The next day someone hired by her former lover threw lye in her face. She was permanently scarred and blinded in one eye. Distinguishing the special relationship which existed in Schuster the court said that she had no enforceable right to special protection and ruled in favor of the city.

(c) Failure to Cancel Wanted Notice

Negligent failure to cancel a wanted notice may form the foundation for civil liability.[44] With increase in computer programs such as the National Crime Information Center it has become very important to assure that entries are accurate.

In Swanner v. U.S., 406 F2d 716 (5th Cir. 1969) the court held informant entitled to protection, when he reported to IRS that he had received threats when his identity became known. Warning was communicated to agents. Several days later his home was bombed and he was hurt. He had relied upon their assurance that he was safe. He was scheduled to appear before a grand jury three days before the bombing of his home. The government negligently breached its duty to protect the informant.

44. There was a robbery in Hartford, Connecticut. The Hartford Police sent a message to the New York State Police giving a description and license number of a car and stating that two men in the car were wanted for the crime and that one of them was armed. The New York State Police relayed the message to the White Plains, New York, Police Department. White Plains forwarded the message to New Rochelle. About nine hours later the New York State Police received a cancellation indicating the original information was in error but they allegedly failed to forward the cancellation. Subsequently, the New Rochelle officers, acting on the original information, spotted the designated car and attempted to arrest its two occupants. The men in the car, apparently believing the plainclothes officers were bandits, resisted arrest and one of them was killed. In a suit brought against the State Police charging negligence in failing to transmit the cancellation message, the court held for the plaintiff. Slavin v. State of NY, 249 App. Div. 72 (1936).

B. Intentional Torts

Discussed here is the category of civil suits called intentional torts. Assume Officer A arrests B without warrant and without probable cause to believe either that a crime was committed or that B committed it. B may bring a civil suit against Officer A alleging False Arrest, an intentional tort. The gist of the action is not that Officer A is negligent for he intended to do what he did. His liability rests on the plaintiff being able to prove that Officer A did not act in good faith and that he had no reasonable objective belief that his conduct was lawful. If B resists arrest and A uses force to overcome B's resistance, resulting in physical injury to B then A may be liable for Assault and Battery, another intentional tort. Officer A will be liable to B for Assault and Battery only if the force the officer used was excessive or unreasonable. False Arrest and Assault and Battery suits accounted for over 67.8% of the civil suits filed against police officers according to an AELE Survey.

Generally speaking, an officer does not "negligently" arrest anyone nor does he "negligently" commit a battery. Both are acts intentionally done. What follows is review of incidents that generate liability in the intentional tort area.

1. False Arrest and False Imprisonment

The torts of false arrest and false imprisonment are separate torts and have distinct elements yet they are often filed as separate counts arising from a single incident. They both may result from unlawful custody. Thus, a false imprisonment may follow a legal arrest when the justification for detention is no longer present.

The gist of the civil action of false arrest is that the plaintiff was illegally arrested. This means that a prudent man could not have believed (1) that a crime was committed or (2) that the plaintiff committed it. It has been said that false arrest and false imprisonment as causes of action are distinguishable only in terminology.[45] A person who is falsely arrested

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45. 6 Am Jur 2d False Imprisonment Sec. 12.

Essential elements of offense of false imprisonment is absence of valid legal authority for restraint imposed. Welch v. Bergeron, 337 A.2d 341 (NH 1975).

is at the same time falsely imprisoned, therefore an unlawful arrest may give rise to either cause of action. The right of freedom of movement is a basic and fundamental right.

False imprisonment is misleading as a cause of action for what is frequently conjured up in the mind of the officer is generally that some form of jail house incarceration must take place. Actually the place where the confinement occurs has nothing to do with the proof of the tort of false imprisonment. Likewise, the period of detention or duration of custody has little effect on liability. Any period, however brief, may create liability. Except in determining damages, whether the confinement is temporary or not is of no concern. The true test is lawfulness of the custody. Where one is arrested by lawful authority an action for false arrest or imprisonment cannot be maintained.

In an action for false arrest, issue of probable cause, or legal justification to arrest, is a substantive matter of affirmative defense which, if proven, constitutes a complete bar to plaintiff's claim for relief. White v. Pierson, 533 P.2d 514 (Colo. App. 1974).

As an affirmative defense to claim for false arrest, issue of probable cause or legal justification to arrest presents mixed question on law and fact and must be resolved by trier of facts under appropriate instruction from the court. White, supra.

False imprisonment involves the unlawful restraint by one person of the physical liberty of another. Laska v. Steinpreis, 231 N.W. 2d 196 (Wis. 1975). A required element of a cause of action based on a claim of false imprisonment is intent to cause confinement. False imprisonment is intentional, unlawful, and unconsented restraint by one person of physical liberty of another. Dupler v. Seubert, 230 N.W. 2d 626.

"False arrest" and "imprisonment" are not separate torts. Collins v. City and County of San Francisco, 123 Cal. Rptr. 525.

False imprisonment is direct restraint by one person of physical liberty of another without adequate legal justification and its essential elements are, 1) wilful detention of person, 2) detention without authority of law, and 3) detention without consent of party detained. Black v. Kroger, 527 S.W. 2d 794 (Tex. Civ. App. 1975).

a. Arrest with a Warrant

When an arrest is illegal but made under the authority of a warrant, the general rule is that the officer is immune from personal liability, being merely regarded as an arm of the court issuing the warrant. The issuance of a warrant by a magistrate usually determines the existence of probable cause. The fact that an accused was found innocent of an offense or was acquitted by a jury or that charges were dropped will not give rise to a civil cause of action for false arrest.

Three exceptions, when probable cause to believe that the accused committed a crime is no defense to a civil suit for false arrest, are as follows: 1) when the warrant is patently defective on its face; 2) when the arresting officer had no jurisdiction to make the arrest and; 3) where the officer obtained a conviction by perpetrating a fraud on the court.

b. Arrest without a Warrant

A legal arrest may be made on probable cause alone but all too often an officer is confronted with the necessity, in a doubtful case, to guess whether there is sufficient probable cause. If he makes an arrest and is held to have acted without probable cause, or the prosecution fails to prosecute, or the judge dismisses the case, he may find himself being sued in tort, possibly in Federal court for violation of civil rights. If, however, he fails to arrest, he may find himself liable under a state statute for failure to perform a nondiscretionary ministerial duty of his office.[46] While an officer's

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46. Pierson v. Ray, 386 U.S. 547 (1967), the Supreme Court of the U.S. wrote "Under the prevailing view in this country a peace officer who arrests someone with probable cause is not liable for false arrest simply because the innocence of the suspect is later proved. A policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does. Although the matter is not entirely free from doubt, the same consideration would seem to require excusing

> lack of knowledge that a law has been repealed or held unconstitutional in his jurisdiction is no defense, neither can he ordinarily be held liable for false arrest, if after the arrest the law is repealed or held unconstitutional. This is in spite of the fact that similar laws have been held unconstitutional by other state courts.

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him from liability for acting under a statute that he reasonably believed to be valid but that was later held unconstitutional, on its face or as applied."

Arrest by police officer for acts committed in his presence in violation of ordinances which are valid upon their face are privileged and will not subject officer to liability if thereafter the ordinance is held void. Boca Raton v. Coughlin, 299 So.2d 105 (Fla. App. 1974) (officer arrested without warrant for possession of obscene material illegal because of the U.S. Supreme Court decision holding that private possession of obscene material may not be made a crime).

A showing that federal officer acted in good faith and with a reasonable belief in validity of arrest and search constitutes a valid defense to suit against officers to recover damages for violation of 4th Amendment. Tritsis v. Backer, 501 F2d. 1021 (7th Cir. 1974).

Officer who arrests someone with probable cause is not liable for false arrest simply because the innocence of suspect is later proved. Boca Raton v. Coughlin, 299 So.2d 105.

Where the facts are in dispute, the issue of probable cause for alleged false arrest and a malicious prosecution is for the jury. Nichols v. Woodward & Lothrop, Inc., 322 A.2d 283 (D.C. App. 1974).

Although it might be difficult to believe that a police officer would be ignorant of the U.S. Supreme Court decision holding that private possession of obscene material is not a crime nearly two years after decision, the good faith of officer was a factual issue for jury determination in suit by plaintiff for false arrest and false imprisonment arising out of her arrest of possession of obscene material in violation of city ordinance and state statute. Boca Raton, Supra.

The term "false arrest" may mislead an officer into thinking that the apprehension and release of a person is not an arrest if no "booking" or other charging process is made. On the contrary, the intention to arrest the accused and the assumed or actual authority to arrest him, coupled with physical or constructive restraint and the accused's recognition of the arrest, satisfies the test as to what constitutes an arrest.

(1) Probable Cause for Arrest

The legality of an arrest without a warrant depends upon whether the officer had probable cause to believe that the person committed the offense for which he is arrested. It is not sufficient for the policeman to be suspicious of an individual. While he may justify a stop or investigative detention on less grounds than would be needed to justify an arrest, to remove a suspect to the station house for a longer period of investigation may be held illegal and may subject the officers to civil liability.[47] When a police officer is sued for false arrest or false imprisonment his defense to such a suit is to allege and prove that he acted in good faith and that he had an objective basis to believe that his conduct was lawful, that is, he had probable cause. Yet, the probable cause standard in the fourth amendment sense and the standard which protects an officer in civil suits are different.[48]

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47. See Beightol v. Kunowski, et al., 486 F.2d 293 (3rd Cir. 1973) where the court held that officers who took accused to station house for fingerprinting and photographing without probable cause for arrest could be sued in civil court for money damages.

48. Justice Lumbard expressed it best in Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 456 F2d 1339, 1348 (2nd Cir. 1972) when he wrote in a concurring opinion "...(T)here are two standards to be considered. The first is what constitutes reasonableness for purposes of defining probable cause under the fourth amendment for the protection of citizens against governmental overreaching. The other standard is the less stringent reasonable man standard of the tort action against government Agents. This second and lesser standard is appropriate because,

(2) Cancellation of Wanted Notice

Of particular significance today is the need to stay alert to the possible cancellation of a wanted notice. With the advance of computers and the determination at a moment's notice that an individual is wanted it is vital that the information be kept current. Arrest under a cancelled notice may mean liability for the failure to cancel.[49]

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in many cases, Federal officers cannot be expected to predict what Federal judges frequently have considerable difficulty in deciding and about which they frequently differ among themselves. It would be contrary to the public interest if Federal officers were held to a probable cause standard as in many cases they would fail to act for fear of guessing wrong. Consequently, the law ought to, and does, protect government Agents if they act in good faith and with a reasonable belief in the validity of the arrest and search."

Reasonable man standard to be applied in false arrest actions against governmental agents is less stringent than definition of probable cause applied in criminal proceedings. Brubaker v. King, 505 F.2d 534 (7th Cir. 1974).

In view of its recent adoption, in Brubaker v. King, 505 F2d 534, and Tritsis v. Backer, 501 F2d 1021, of "good faith" defense for police officers sued for making illegal searches or seizures that was announced in Bivens, the U.S. Court of Appeals for the 7th Circuit affirms a federal district court's dismissal of an action against a police officer who had arrested the plaintiff without probable cause but in clear faith that he was acting legally. Boscarino v. Nelson, 377 F.Supp. 1308 (D.C. Wis. 1975).

49. The U.S.D.C. for Eastern Wisconsin in Maney v. Ratcliff, 17 Cr.L. 2512 (9/3/75), refused to dismiss a suit brought against a Louisiana prosecutor who allowed an entry naming the plaintiff as a fugitive from justice to remain in the FBI's computerized information system NCIC.

(3) Arrest Under Mistake of Law

The courts generally have held that an officer is not protected in a civil suit where he has made a mistake of law no matter how reasonably he may have acted.[50]

(4) Duty v. Personal Feelings

Officers are subjected to personal stress as much as other people but they must not confuse their personal feelings with their law enforcement duties.[51]

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50. In Snyder v. State, 38 NY Misc. 2d 488 (1963), a motorist, stopped by the New York State Police for a routine check, exhibited a Massachusetts Operator's License. As this license was expired, the motorist was arrested for having no New York State Operator's License. At a Justice of the Peace hearing he entered a plea of not guilty and for the first time produced a valid NYS Operator's License. Charges were dismissed but the State Police rearrested the motorist for violating a state statute prohibiting the holding of more than one license at the same time. At the second trial the charges again were dismissed on the grounds that the statute referred to unexpired licenses and his possession of the expired Massachusetts license did not violate the law. The motorist filed a civil suit for false arrest and false imprisonment and it was held that although his first arrest was proper because of his failure to exhibit his New York license, his second arrest was not authorized by the statute and therefore he was entitled to damages.

51. A plaintiff recovered a judgment of $1,500 against an officer for false arrest and imprisonment where the facts indicated the officer had been dating the plaintiff's divorced wife and there had been personal friction between the officer and the plaintiff. The alleged events which led to the filing of the civil suit were that the officer thought he saw the plaintiff make an illegal U-turn. He called the plaintiff over to his car, said nothing about the traffic offense, and proceeded to discuss their social problems. While they were talking, the former wife appeared on the scene and the plaintiff began talking to her. The officer then commented concerning the fact that the plaintiff was on probation for nonsupport of his former wife. The plaintiff then referred to the officer using obscene language. The officer asked the plaintiff to repeat the statement, he did, and the officer arrested him for disorderly conduct, which charge was later dismissed by the prosecutor. The civil suit for false arrest, the court said abusive language may be probable cause for an arrest, but a police officer cannot provoke a person into a breach of the peace and then arrest him without a warrant. Lane v. Collins, 138 N.W. 2d 264 (Wis. 1965).

(5) Arrest of Wrong Person

A problem often faced by law enforcement officers is whether to arrest an individual that looks like a fugitive. He knows that a crime has been committed but yet is not certain about the identity of the individual he suspects as being the fugitive. The Supreme Court has written in regard to the arrest of the wrong person "When the police have probable cause to arrest one party and when they reasonably mistake a second party for the first party, then the arrest of the second party is a valid arrest...(P)robability, not certainty, is the touchstone of reasonableness under the Fourth Amendment..."[52]

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52. In Hill v. California, 401 U.S. 797 (1971), arresting officers made a good faith mistake as to the identity of the party arrested. Officers had probable cause to believe that one Hill had committed robbery. They went to Hill's apartment and a person at Hill's apartment who looked like Hill answered the door. He denied he was Hill and produced identification of a person named Miller. Thinking it was Hill, the officers arrested him and found evidence in the search incidental to the arrest. It turned out the individual arrested was Miller. Upholding the arrest as a valid one notwithstanding the fact that it was the wrong person the court wrote, "Aliases and false identification are not uncommon."

If one makes an identification honestly and without malice which is the basis for the arrest of another, the person arrested is not entitled to an award of damages when it is subsequently discovered that a mistaken identification has been made. Roche v. Aetna Cas. & Sur. Co., 303 So.2d 888 (La. App. 1974).

See also, Johnson v. Reddy, 126 N.E. 2d 911 (1955) where court thought difference between plaintiff and person wanted was not so great as to make defendant's actions unreasonable. In Maracle v. State, 270 NYS 2d 439 (1966) an officer was held to have exercised reasonable care to satisfy himself that the person arrested was the proper person. The only effort to establish the validity of the arrest in the case was to ask for a driver's license, and she had none with her. They did not use due diligence to find out if they were arresting the correct person, the court held.

2. Assault and Battery

Charges of "police brutality" and "excessive force" are not uncommon complaints. Such charges are frequently made following an arrest. Brutality and excessive force are not actionable torts. The specific legal allegation in a civil suit is that of assault and battery, an intentional tort.

The elements of an assault and battery which are required to bring about liability are; (1) harmful contact with another's person, (2) intention to bring about the harmful contact and (3) that such contact is not privileged. The prevailing view is that mere words alone are not sufficient to constitute the tort. However, a person may be held liable for participating in the tort of assault and battery, although he encouraged or incited the commission of the tort merely by words. [53]

When a law enforcement officer makes a lawful arrest it is the duty of the arrestee to submit. If he does not it is the responsibility of the arresting officer to see that he does. Force may be necessary. The officer will use only the minimal amount of force necessary to carry out his legal responsibility. The officer escalates the force he uses only to overcome the resisting force of the person being arrested. To do less would simply frustrate the processes of the law.

Use of force against another for purpose of effecting an arrest or preventing escape is usually privileged. It becomes a "battery" only when it is excessive under all the circumstances. The reasonableness of the force used in making an arrest under all the circumstances is a question of fact for the jury or other trier of fact (such as a judge in a bench trial) and the standard usually expressed is "...conduct of ordinary prudent men under existing circumstances." [54] Not a very precise standard to be sure.

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53. Monk v. Veillon, 312 So2d 377 (La. 1975), also Kansas v. Aetna Gas & Sur. Co., 235 N.W.2d 42 (Mich. App. 1975).

Green v. Cauthen, 379 F. Supp. 361 (DC S.C. 1974).

54. Conklin v. Barfield, 334 F. Supp. 475 (D.C. Mo. 1971).

a. Self Defense

The law has traditionally recognized that an officer may use whatever force is necessary, including deadly physical force, to protect himself or another from imminent death or great bodily harm.[55]

b. Use of Reasonable Force

While it is frequently stated that an officer is privileged to use reasonable force to complete an arrest, what is unreasonable or excessive force is a difficult fact question. It has been held that a police officer has discretion to determine the amount of force required (within reasonable limits) under the circumstances as they appeared to him at the time he acted. The officer does not have the burden of proving that he did not use unreasonable or unnecessary force in making an arrest; the presumption is in favor of his correct performance of duty.[56]

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55. A deputy sheriff received a radio report regarding a suspected drunken driver, he observed a vehicle matching the description given on the broadcast. He stopped the automobile as two other units drove up. Plaintiff driver stepped out of the car. The deputy told plaintiff that he was under arrest for driving while intoxicated. The plaintiff reacted belligerently and, while arguing with the deputy, he reached into the side pocket of his trousers. The defendant pulled a nightstick from his belt and struck plaintiff a severe blow on the side of the head. Plaintiff was about 5 feet 7 inches tall and weighed about 150 pounds. Defendant was over six feet and weighed about 250. However, defendant alleged self-defense because he believed plaintiff was reaching for a weapon. The court held that the deputy had reasonable grounds to fear bodily harm when plaintiff reached into his pocket; defendant's striking him with a nightstick was justified. Crawford v. Maryland Cas. Co., 169 So.2d 612 (La. 1964). See also Schell v. Collis, 83 N.W.2d 422 (N.D. 1957)where the court held that a deputy sheriff in making a legal arrest, was not only not obliged to retreat but rather had a duty to overcome resistance. The force used must be measured by the circumstances of the blow, not by the incidental results. The presumption, that an officer performs his duty correctly and acts with ordinary caution and in good faith, prevails unless overcome by definite evidence to the contrary.

56. Gigler v. City of Klamath Falls, 537 P.2d 121 (Or. App. 1975); evidence that physical violence exerted by officers against arrestee was no more than necessary to accomplish legitimate purpose of fulfilling their duty demonstrated that the violence was justified and that arrestee could not recover for assault and battery.

(1) Before Arrest

While an officer may use reasonable force to effect a lawful arrest the general rule is that he has no right to employ force before an arrest.[56a]

56a. Officers pursued two speeding automobiles. The reer speeder collided with the other. Both vehicles and the cruiser stopped. The three occupants of the cars alighted, and the two officers approached them. One patrolman and the driver of the second automobile wrestled. When the operator of the first vehicle attempted to intervene, the other policeman grabbed his arm and held it in an arm lock. His feet were knocked out from under him; he was stomped by both officers and repeatedly hit with fists. No arrest had been made before the driver was hit. Although he was booked at the station, he was never charged or prosecuted. He suffered severe and permanent injuries from the blows. In an assault and battery suit against the officer and the city, judgment was awarded to plaintiff driver. Scruggs v. Haynes, 60 Cal. Rptr. 355 (1967). See also Hash v. Hogan, 453 P2d 468 (Alaska 1969) where Plaintiff started screaming officers insisted that she stop or she would be arrested for breach of the peace. One officer grabbed her wrist and twisted her arm. She kicked, scratched and tore his wristwatch off. They knocked her down and pinner her with a knee in her back. She was handcuffed and dragged to the car. Plaintiff sued the officers for assault and battery. She won compensatory and punitive damages.

See Levine v. Enlow, 462 S.W. 2d 50 (Tex. 1970), at about 2 a.m. plaintiff went to an apartment house in Dallas, Texas, to visit a friend. Not locating the frind, plaintiff started to go to his car in the parking lot. Defendant, an employee of Great Southwest Patrol, stopped plaintiff and demanded identification. He displayed a driver's license and other cards. The security guard informed plaintiff that he was going to be taken to an apartment for a woman to look at him. He was frisked and handcuffed. The apartment dweller denied that he was the man being sought. Defendant called the police inquiring whether plaintiff was wanted for anything, then drew his pistol and ordered plaintiff to a car where he was shoved inside. The guard pointed a shotgun at him and locked the doors. For some 20 minutes defendant stood guard until the city police arrived. They unhandcuffed plaintiff, took him to the station and told him of the suspected charges--peeping tom, burglar and thief. No complaint was filed, and he was released. In a suit against defendant and his employer, plaintiff won on counts of false imprisonment, assault and battery.

(2) After Arrest

Once an officer has subdued an arrestee the only force which an officer is privileged to employ is that which is necessary to detain the individual. Additional force or excessive force in this regard will usually result in liability.[57]

(3) Illegal Arrest

In many states a citizen may use force to resist an unlawful arrest. The legality of an arrest is good or bad at the moment it takes place and is not changed by what develops. The legality of an arrest is not affected by the success or failure of the subsequent prosecution.[58]

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57. In a traffic arrest, defendant ordered plaintiff driver to get out. As he slowly complied, he was struck by officers with a nightstick. Plaintiff slumped to his knees and was kicked and hit twice more by the plaintiff according to occupants of the automobile. The court did not believe the officer's defense that plaintiff resisted arrest and was the aggressor. This was a traffic arrest; the attack amounted to a deliberate assault upon a person who offered no physical resistance. Defendant was liable. His employer was also responsible, because defendant was acting within the scope and during the course of the employer's business. The employer's knowledge of the employee's intent to commit a wrongful act is not necessary for liability to exist. Taylor v. City of Baton Rouge, 233 So2d 325 (La. App. 1970). See also Hardwick v. Hurley, 289 F.2d 529 (7th Cir. 1961).

58. An officer was walking his beat when his attention was attracted by the Plaintiff making faces and sticking out his tongue at the officer. Plaintiff was inside a poolroom. Defendant spoke to plaintiff and then resumed his patrol. After a distance of twenty to thirty yards separated them, plaintiff shouted at defendant. The language used was not profane or obscene. Defendant returned and arrested plaintiff. There was some resistance to the apprehension. No evidence was presented as to the charges filed or the outcome of the prosecution. Plaintiff sued for false arrest, assault and battery and won on both counts. Tessier v. La Nois, 198 A.2d 142 (R.I. 1964).

c. Use of Deadly Force

Under the common law an officer could use, when necessary, deadly force to apprehend fleeing felons. The overwhelming majority of courts continue to follow the common-law rule. While learned scholars mostly disagree with such a rule, this disagreement has had little effect on the court decisions.

Most states through their justifiable-homicide statutes embody the common law view of a law officer's privilege to use deadly force in apprehending fleeing felons. Judges have been most reluctant to adopt a contrary view when faced with tort actions involving alleged assaults and batteries by a police officer. As one judge wrote, "(i)t is not the role of a judge to legislate for the people of a state." Any change in the common law rule, most courts have felt, should be left to the legislative process to evaluate and remedy. 58a

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New York's Penal Law, Sec. 35.25 provides as follows: "A person may not use physical force to resist an arrest, whether authorized or unauthorized, which is being effected or attempted by a peace officer when it would reasonably appear that the latter is a peace officer." The following is the Practice Commentary:

"This section is new. It introduces to New York Law a doctrine popularly known as the 'no sock' principle.

While there has never been any legislation on the subject, it has long been the judicially established law of New York that a person is justified in using physical force to resist an unlawful or unauthorized arrest, even though the arrester is a peace officer and known by the arrestee to be such...That rule is changed by the instant section, which forbids the use of physical force by the arrestee against an arresting peace officer, whether the arrest be authorized or unauthorized, 'when it would reasonably appear that the latter is a peace officer.'

"The rationale of this so-called 'no sock' principle is that to authorize or encourage a person to engage an arresting officer in combat because of a difference of opinion concerning the validity of the arrest being effected or attempted produces an unhealthy submission to duly constituted law enforcement authority in the first instance; and that if it develops that the officer was in error and the arrest unauthorized, ample means and opportunity for remedial action in the courts are available to the arrestee."

58a. Mattis v. Schnarr, 404 F.Supp. 643 (E.D. Mo. 1975). For a complete listing of states and pertinent statutes regarding justifiable use of force in arresting a fleeing felon see note 5 in instant case on page 650.

3. Abuse of Process

An officer who makes use of criminal process, such as the securing of a lawful arrest warrant or search warrant without any misuse is not guilty of abuse of process. This tort is concerned with the improper use of process after it has been issued. An officer is civilly liable for an abuse of process when he is guilty of an improper or illegal exercise of authority under a legally authorized writ. An action for abuse of process will lie to recover damages for loss or damages to, or destruction of, property seized under a lawful writ due to its misuse by the person having custody of the property, to improper care of the property, or other failure to exercise proper diligence to protect and preserve it.[59]

There are scores of suggested substitutes for the common law rule regarding deadly force in apprehending a fleeing felon. The following are samples:

1. Model Penal Code, Proposed Official Draft, Sec. 3.07(b) American Law Institute (1962) authorized the use of deadly force where the arrest is for a felony and the felony involved the use or threatened use of deadly force, or there is a substantial risk that the person sought to be arrested will cause death or injury if his apprehension is delayed. Presidential Commission on Law Enforcement and the Administration of Justice, is in accord.
2. Restatement of Torts Sec. 131 authorized the use of deadly force if the crime normally caused death or serious injury or involved breaking and entering of a dwelling.
3. Restatement of Torts (Second) of Torts Sec. 131 follows the felony-misdemeanor distinction.

Recent cases rejecting the more restricted use of deadly force to certain felonies; adhering to the common law any-felony rule:

Schumann v. McGinn (18 CrL 2345 (Minn. Sup Ct. 1/2/76).
Hilton v. State, 18 CrL 2329 (MeSupJud Ct 12/2/75).
Qualls v. Parrish; 19 CrL 2115, (6th Cir. 4/19/76).

Statutes similar in some respects to the Model Penal Code rule have been adopted by the legislatures of New York, Georgia, Illinois, and Louisiana.

"If effective law enforcement is to be maintained the race should not be to the swift. The fleeing criminal, regardless of his offense, must be considered as the author of his own misfortune." 14 McGill L.J. at page 311.

4. Malicious Prosecution

The action for abuse of process is sometimes confused with the action for malicious prosecution, yet the two are independent of each other. An action for abuse of process differs from an action for malicious prosecution in that the latter is concerned with maliciously causing process to issue, while abuse of process is concerned with the improper use of process after it has been issued. Thus it is said in substance that the distinction between the two is that malicious use of process is the employment of process for its ostensible purpose, but without reasonable or probable cause, whereas the malicious abuse of process is the employment of a process in a manner not contemplated by law, or to obtain an object which such a process is not intended by law to effect.

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59. 1 Am Jur 2d, Abuse of Process, Sec. 1. See Smith v. Weeks, (18 NW 778, Wis.), where railroad engineer was arrested just prior to the departure of his train so late at night that it was impossible to secure bail, although it might have been made at any time during the day.

An abuse of process exists where, after arrest the party arrested is subjected to unwarrantable insult, indignities, is treated with cruelty, is deprived of proper food, or is otherwise treated with oppression and subjected to undue hardships. Woods v. Graves, 11 NE 567 (Mass. 1887).

Using power tools and heavy equipment, federal agents who were looking for $4 million in drug profits ripped apart the home of a New York businessman. The agents found nothing after a day of searching on 6/9/72, in the home of John Conforti. The extensive search stemmed from the arrest of Conforti's brother-in-law, Louis Contrillo, who was convicted of heroin smuggling and sentenced to 15 years in prison. In the course of the all-day search of Conforti's $65,000 split-level hope in Massapequa, New York, agents removed the aluminum siding, interior panels and some of the roof shingles. The family's furniture was wrecked as the search progressed through the house and deep trenches were dug in the lawn. As a result of the search, Conforti sued the federal government for $18,365,000 in damages. The suit was decided in Conforti's favor and he was awarded $160,000. Conforti v. U.S. AELE Legal Liability Reporter 6/73, p.10.

There are four elements of malicious prosecution, they are: 1) criminal charges filed by defendant against plaintiff; 2) termination of the proceedings favorable to the plaintiff; 3) lack of probable cause for the charges and 4) malice. This tort arises only when defendant had proceeded under proper legal formalities.

C. Constitutional Torts

1. State Officers

Over one hundred years ago the First Session of the 42nd Congress became concerned about the alleged denial of civil rights in certain of the States. The result was legislation enacted April 20, 1871 with the purpose of providing a remedy for the wrongs allegedly being perpetrated. The language of the statute has been preserved and now appears in Title 42, United States Code, Section 1983, as follows:

> "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 of other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Thus, 1983 as it is often called, creates a right to sue law enforcement officers personally for depriving another of "...any rights, privileges, or immunities secured by the Constitution and laws..." Such suits may be filed in the U.S. District Courts under the provisions of Title 28, United States Code, Section 1343.

Prior to the year 1961, it was thought the plaintiff had to exhaust possibilities that local or State remedies would give relief, before coming to the Federal court. In a landmark decision[60] in 1961 the United States Supreme Court established the principle that the right to sue police officers under 1983 was completely independent of any State remedies that might be available. The court stated, "It is no answer that the State has a law which if enforced would give relief. The Federal remedy, is supplementary to the State remedy, and the latter need not first be sought and refused before the Federal one is invoked."[61] Thus, an officer could no longer regard abstention or exhaustion of local remedies as useful in defending an action under 1983.

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60. Monroe v. Pape, 365 U.S. 167 (1961)

62. Id. at p. 183

The scope of protection afforded by this section is identified by the two elements that must be proven in each case, namely, 1) conduct must have been done by some person acting under color of state law, and 2) conduct must have deprived another of rights, privileges, or immunities secured to him by the Constitution and laws of the United States.[62] The essence of the action is a claim to recover damages for injury wrongfully done to another person. The liability is personal.[63]

a. Limits on Application of 1983

(1) "Every Person"

It is well established that a public entity such as a city is not a "person" within the meaning of Section 1983 and thus cannot be sued under its provision.[64] This is true even if plaintiff seeks only equitable relief. Thus, a city, state or county police department cannot be named as a party to a 1983 suit even though sovereign immunity has been waived for purposes of state civil claims.[65]

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62. Needleman v. Bohlen, 386 F. Supp. 741

63. Madison v. Wood, 410 F.2d 564

64. The 11th Amendment bars suits not only against the state when it is the named party but also when it is the party in fact. Scheuer v. Rhodes, 416 U.S. 232 (1974). A municipality is not a "person" within the meaning of 1983, City of Kenosha v. Bruno, 412 U.S. 507; it has frequently been held that no political subdivision of a state is amenable to suit as a "person" under this section. Klein v. New Castle County, 370 F.Supp. 85. A county is not a "person" under 1983, Ryan v. New Castle County, 365 F.Supp 124; Glass v. Hamilton County, 363 F.Supp 241; Diamond v. Coleman, 395 F. Supp. 429 (SD Ga. 1975).

No action for damages may be maintained against the governing authority nor a member of the governing body in his official capacity. However, independent of jurisdiction under 1983, an action against the official may be brought against him in his individual capacity where the amount in controversy exceeds $10,000 under Title 28, United States Code, 1331.

A municipality may not be made a party to a 1983 action even where the plaintiff seeks only equitable relief. LaRoughe v. City of New York, 369 F.Supp. 565 (SDNY 1974).

(2) "Color of State Law"

Private action cannot form the basis for relief under 1983. Thus, acts of police officers in the area of their personal, private pursuits fall outside the coverage afforded by 1983.[66] However, when an officer performs an act in his capacity as an officer rather than a private citizen, he is acting "under color of state law."[67] What this section prohibits is official abuse of position. It should be clear therefore, that it is not because a man is a police officer that he is liable. Rather, liability is imposed where a man uses his official authority to deprive another of constitutional rights, privileges and immunities.

Acting "under color of State law" does not require that the officer must have been enforcing a statute or ordinance at the time, nor is it necessary that his actions be within the authority granted him as a police officer. Acts may be "under color of State law" even where they are clearly in violation of the State constitution and statutes.[68]

"State action" and "under color of State law" are alternative ways of expressing the same legal principle.[69] The United States Supreme Court has written, "(M)isuse of power, possessed by virtue of state law and made possible only because the

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65. A police department is not a "person" within the meaning of 1983. Green v. Cauthen, 379 F.Supp 361 (DC S.C. 1974) also White v. Flemming, 374 F.Supp 267 (DC Wis. 1974). A police department may not be sued even though the city has waived immunity for purposes of state civil liability. LaRoughe v. City of New York, 369 F. Supp. 565.

66. "An official's actions are not 'under color of state law' merely because he is an official; an off-duty policeman's discipline of his own children, for example, would not constitute conduct, 'under color of law'." Paul v. Davis, 47 L.Ed.2d 405, (1976). (Dissenting opinion of Justice Brennan). See also, Edwards v. Phil. Elec. Co., 371 F.Supp. 1313, Aff'd 510 F.2d 969.

67. Marshall v. Sawyer, 301 F.2d 639.

68. Monroe v. Pape, 365 U.S. 167 (1961).

69. Greco v. Orange Memorial Hospital, 515 F.2d 1183.

wrongdoer is clothed with the authority of state law, is action taken 'under color of State law!"[70] As long as an officer has a badge of authority of a State and represents it in some capacity and is acting as an officer at the time of the alleged deprivation, then he is acting "under color of State law" for purposes of personal liability under 1983.[71]

The fact that an officer is on or off duty, or in or out of uniform is not controlling on the question as to whether he was acting under color of law. "It is the nature of the act performed, not the clothing of the actor or even the status of being on duty, or off duty, which determines whether the officer has acted under color of law."[72]

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70. U.S. v. Classic, 313 U.S. 299 (1941).

71. Reed v. Phil. Housing Authority, 372 F. Supp 686 (E.D. Pa. 1974), where security guard employed by a state agency was treated in the same manner as a police officer "...because security guards and police officers alike wear badges of authority of the state and represent it in an official capacity."

72. On Duty: In Johnson v. Hackett, 284 F.Supp. 933, 937 (E.D. Pa. 1968) two officers in uniform and on patrol, allegedly offered to fight a group of black individuals, including plaintiff and notified the group that they would return later that evening. The District Court found the alleged acts of the officers were not under color of state law, and that no valid 1983 claim was stated by plaintiff. The court wrote: "The acts complained of here were not under 'pretense' of law. They were not committed in the performance of any actual or pretended duty of policemen. They were not acts these defendants could not have committed but for the cloak of the state's authority. It is not alleged that the offer to fight was in any way related to the performance of police duties. Quite to the contrary, the purely personal nature of the offer is emphasized by the allegation that, before the challenge was issued, Thompson removed his gun belt, laying aside, as it were, the symbol or 'pretense' of police authority.

"What plaintiff's position boils down to is that any act committed by a police officer while on duty and in uniform is under 'color of law', even if the act is wholly unrelated to the performance of any of his duties. This contention attempts to equate 'clothed with the authority of state law' to 'wearing a

policeman's uniform.' Of course they are not the same. It is the nature of the act performed, not the clothing of the actor... which determines whether the officer has acted under color of law." See also Robinson v. Davis, 447 F.2d 753 (4th Cir. 1971), cert. denied, 405 U.S. 979.

Off Duty: In Watkins v. Oaklawn Jockey Club, 183 F.2d 440 (8th Cir. 1950) a sheriff and his deputy were employed during off-duty hours in policing a race track by club which operated race track. In accordance with orders from race track, president, the sheriff, and deputy ejected plaintiff from the race track. Plaintiff sued on the theory that president of track together with the sheriff and his deputy had entered into a conspiracy to deprive him of civil rights and liberties. The court held, however, that they were not performing duties imposed on them by the state and were acting only in the ambit of their personal pursuits and thus not liable under 1983.

In Stengel v. Belcher, 522 F.2d 438 (6th Cir. 1975) an officer entered a bar with his girlfriend and seated themselves with another couple in one of the booths. The officer was off duty and out of uniform, but was equipped with a can of mace and a 32 caliber revolver which police regulations required him to carry at all times. An altercation broke out in the bar. Without identifying himself as a police officer at any time, the officer involved himself in the altercation. When the altercation was over he had killed two men and seriously wounded another. The officer was sued under 1983 and he contended that he was not acting under color of state law at the time of the incident therefore he could not be sued under that section of the U.S. code. He contended that the evidence showed that he was engaged in private social activity, was out of uniform and off duty and never identified himself as a police officer. In other words, he contended that his actions were taken as a private citizen.

At trial the chief of police testified that the officers of his department were required to take action "in any type of police or criminal activity 24 hours a day." When asked if the officer would have been disciplined if he had not taken action the chief replied that he would. The City Attorney represented the officer at the trial having determined that he was "acting within the line of his duty" and that he received workmen's compensation on the ground that he was "in line of duty" under circumstances relating to police duties. Plaintiffs recovered $800,000 in compensatory damages and $3,000 in punitive damages.

The Sixth Circuit ruled that the officer was acting "under color of law." The Supreme Court of United States has granted cert. See 44 LW 3564.

(3) Only Federal Rights are Protected.

Allegations of misconduct in 1983 suits are drawn from a broad spectrum of rights, privileges, and immunities afforded protection by the Federal Constitution and laws of the United States. The approach is for the complainant to allege a violation of the 14th Amendment, Section 1 of which contains the following language:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor to any person within its jurisdiction the equal protection of the laws."

The key words, "privileges and immunities," "due process of law," and "equal protection of the laws" are the vehicles by which 1983 protections are usually identified. For example, the guarantee against unreasonable searches and seizures contained in the fourth amendment is applicable to State officers by reason of the "due process" language of the 14th. Thus, an officer acting contrary to the fourth amendment might be held liable for denying a citizen his constitutional right to due process of law.

Practically all routine law enforcement work has the potential of becoming the subject of complaint by an irate citizen who demands satisfaction by way of a civil suit under this statute.[73] Therefore, one of the heavy responsibilities of each law enforcement officer is to recognize and protect the rights, privileges, and immunities of persons within the jurisdiction he serves. 1983 crystallizes the officer's duty in this respect where Constitutional or Federal rights are concerned. Thus the statute implies that an officer has a specific duty to avoid depriving others of the enjoyment of these guarantees and that, by his failure to comply with that duty, he may incur personal liability for the resulting injuries.

(4) Immunity

It has been argued that 1983 while creating a species of tort liability admits no immunities and

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73. Glasson v. City of Louisville, 518 F.2d 899 (6th Cir. 1975) cert. den. 96 S.Ct. 280 (1975).

thus should be applied as stringently as it reads.[74] This view has not prevailed. The United States Supreme Court has established that 1983 is to be read in harmony with general principles of tort immunities and defenses rather than in derogation of them.[75] The Court has decided five cases dealing with the scope of the immunity protecting various types of governmental officials from liability for damages under 1983. The results are as follows:

1. Legislators are immune from liability for what they do or say in legislative proceedings. Tenny v. Brandhove, 341 U.S. 367 (1951).

2. The common-law absolute immunity of judges for "acts committed within their judicial jurisdiction" was found to be preserved under 1983 in Pierson v. Ray, 386 U.S. 547 (1967).

Police officers sued for a deprivation of liberty resulting from unlawful arrest were held to enjoy a "good faith and probable cause" defense coextensive with their defense to false arrest actions at common law, Id., at 555-557.

3. The chief executive officer of a State, the senior and subordinate officers of the State's National Guard, and the president of a state controlled university were granted a qualified immunity under 1983. Scheuer v. Rhodes, 416 U.S. 232 (1974). The elements of the qualified immunity were described as follows:

> (1) "It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with (2) good faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct." Id., 247-248.

4. School officials are entitled to a qualified good-faith immunity from liability for damages under 1983. Wood v. Strickland, 43 LW 4293 (1975).

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74. Pierson v. Ray, 386 US 547 (1967).

75. Tenny v. Brandhove, 341 US 367 (1951).

5. State prosecutors enjoy absolute immunity for damages resulting from his conduct in initiating and pursuing the prosecution of criminal cases. Imbler v. Pachtman, 47 LEd2 128. (1976).

The Court has pointed out that the procedural difference between the absolute and the qualified immunities is important. An absolute immunity defeats a suit at the outset, so long as the officials' actions were within the scope of the immunity. The fate of an official with qualified immunity depends upon the circumstances and motivations of his actions, as established by the evidence at trial.[76]

While a police officer does not have an absolute immunity he does enjoy a qualified immunity.[77] The cases of most significance to him are those that have addressed qualified immunity, namely, Pierson, Scheuer and Ward. These cases will be discussed in more detail.

Pierson v. Ray, 386 US 547 (1967)

Fifteen clergymen were arrested by city police officers while attempting to desegregate interstate bus facilities. Violence appeared likely and arrests were made on the basis that "anyone who congregates with others in public place under circumstances such that a breach of the peace may be occasioned thereby." Charges were later dropped.

The clergymen sued the arresting officers under 1983 in an action that resembled a common law false imprisonment action. The court determined liability even if they acted in good faith and with probable cause in making an arrest under a state statute not yet held invalid. The Supreme Court reversed, holding, "...the defense of good faith and probable cause, which...is available to the officers in the common-law action for false arrest and imprisonment, is also available to them in the action under 1983." "Under the prevailing view in this country a peace officer who arrests someone

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76. Imbler v. Patchtman, 47 LEd2d 128 (1976).

77. Pierson v. Ray, 386 US 547 (1967).

with probable cause is not liable for false arrest simply because the innocence of the suspect is later proved...the same consideration would seem to require excusing him from liability for acting under a statute that he reasonably believed to be valid but that was later held unconstitutional, on its face or as applied."[78]

Scheuer v. Rhodes, 416 US 231 (1974)

In a case arising out of the 1970 Kent State shootings, the defendants were the governor, high officials of the Ohio National Guard, Guard officers and the university president. The defendants claimed absolute executive immunity. The Court cited two rationales underlying official immunity; "1) the injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion; 2) the danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and the judgment required by the public good."[79]

The second point was emphasized, the majority wrote: "(I)t is important to note, even at the outset, that one policy consideration seems to pervade the analysis: the public interest requires decisions and action to enforce laws for the protection of the public...Public officials, whether Governors, Mayors or police, legislators or judges who fail to make decisions when they are needed or who do not act to implement decisions when they are made do not fully and faithfully perform the duties of their offices. Implicit in the idea that officials have some immunity--absolute or qualified -- for their acts, is a recognition that they may err. The concept of immunity assumes this and goes on to assume that it is better to risk some error and possible injury from such error than not to decide or act at all."[80]

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78. Id., at 551.

79. Scheuer v. Rhodes, 416 U.S. 232.

80. Id., at 246.

The Court then examined cases involving Section 1983 and said, "it can hardly be argued, at this late date, that under no circumstances can the officers of state governments be subject to liability under the statute."[81] "...In common with police officers," the Court wrote, "officials with a broad range of duties and authority must often act swiftly and firmly at the risk that action deferred will be futile or constitute virtual abdication of office."

The key language in Scheuer is as follows: "These considerations suggest that, in varying scope, a qualified immunity is available to officers of the executive branch of Government, the variation dependent upon

1) the scope of discretion and responsibilities of the office and;
2) all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based.

It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good faith belief, that affords basis for qualified immunity of executive officers for acts performed in the course of official conduct."[82]

Wood v. Strickland, 43 LW 4293 (1975)

In this case a school board expelled students who "spiked" punch at a school function in violation of school regulations prohibiting use of intoxicating beverages. The students sued under 1983 claiming that their federal constitutional rights to due process were infringed under color of law by their expulsion. The District Court directed verdicts in favor of the school board on the ground that they were immune from damage suits absent proof of malice in the sense of ill will towards the students. The Court of Appeals reversed. Specific intent, it held, was not a requirement for the recovery of damages. Instead, "(I)t need only be established that the defendants did not, in the light of all the circumstances, act in good faith. The test is an

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81. Id., at 246.

82. Id., at P. 248.

objective, rather than a subjective, one." Defendants appealed and asserted an absolute immunity from liability under 1983. The U.S. Supreme Court noted that lower courts have not agreed on the "good faith" immunity. "...(T)he courts have either emphasized different factors as elements of good faith or have not given specific content to the good faith standard."

Echoing Scheuer's concern for principled and fearless decision making, the Wood majority noted that potential school board candidates would be unlikely to stand for election to these nonpaying positions "if heavy burdens upon their private resources from monetary liability were a likely prospect." While absolute immunity is not justified, there must be a qualified immunity "such that public school officials understand that action taken in the good-faith fulfillment of their responsibilities and within these bounds of reason under all the circumstances will not be punished and that they need not exercise their discretion with undue timidity."

In Wood the District Court and the Appeals differed on their application of the "good faith" immunity between the 'objective' versus 'subjective' test. The Supreme Court wrote:

> "We think the appropriate standard necessarily contains elements of both. The official must himself be acting sincerely and with a belief that he is doing right, but an act violating a student's constitutional rights can be no more justified by ignorance or disregard of settled, indisputable law on the part of one entrusted with supervision of students' daily lives than by the presence of actual malice. To be entitled to a special exemption from the categorical remedial language of Sec. 1983 in a case in which his action violated a student's constitutional rights, a school board member, who has voluntarily undertaken the task of supervising the operation of the school and the activities of the students, must be held to a standard of conduct based not only on permissible intentions, but also on knowledge of the basic, unquestioned constitutional rights of his charges. Such a standard neither imposes an unfair burden upon a person assuming a responsible public

office requiring a high degree of intelligence and judgment for the proper fulfillment of its duties, nor an unwarranted burden in light of the value which civil rights have in our legal system. Any lesser standard would deny much of the promise of Sec. 1983."

Thus, a public official is not immune from liability for damages under Section 1983 if;

1) "he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights, ... OR (emphasis added)

2) if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to...

A compensatory award will be appropriate only if the school board member has acted with such an impermissible motivation or with such disregard of the student's clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith."

Four justices dissented. The Court's decision, they said, "appears to rest on an unwarranted assumption as to what lay school officials know or can know about the law and constitutional rights. These officials will now act at the peril of some judge or jury subsequently finding that a good-faith belief as to the applicable law was mistaken and hence actionable."

"The problem is ascertaining what is meant by settled, indisputable law and unquestioned constitutional rights. One need only look to the decisions of this Court--to our reversals, our recognition of evolving concepts, and our five-to-four splits--to recognize the hazard of even informed prophecy as to what are unquestioned constitutional rights." The dissenters characterized the Scheuer test as a "considerably less demanding standard."

(5) Standing

One individual may not sue for the deprivation of another's civil rights.[83] In order to have standing to litigate a constitutional question under 1983 it must be brought by one who asserts the right in his own behalf.[84]

Parents are often appropriate plaintiff's under wrongful death claims, where the child dies leaving no issue or dies without wife.[85]

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83. Hall v. Wooten, 506 F.2d 564; Black Brothers v. City of Richmond, 386 F.Supp. 147; Smith v. Wickline, 396 F.Supp. 555

84. Two class actions under 1983 were instituted in the U.S. District Court for the ED of PA against Philadelphia's Mayor, City Managing Director, and supervisory police officials, the plaintiffs seeking equitable relief because of allegedly pervasive pattern of unconstitutional police mistreatment of minority citizens. The District Court concluded that the evidence showed an unacceptably high number of incidents of police misconduct, for which the defendants should be held responsible because of their failure to act in the fact of the statistical "pattern" of misconduct, and entered an order requiring the defendants to submit for the court's approval a program for improving the handling of citizen complaints alleging police misconduct, in accordance with guidelines contained in the court's opinion. The Third Circuit affirmed (506 F.2d 542). On certiorari, the United States Supreme Court reversed. Rizzo v. Goode, 46 L. Ed2d 561 (1976). The Court expressed the view that the controversy between those individually named in the suit and the petitioners was lacking, since their claim to "real and immediate" injury rests not upon what the named petitioners might do to them in the future but upon what one of a small, unnamed minority of policemen might do to them, and thus lacked the requisite "personal stake in the outcome."

The Court went on to say that the District Court judgment constituted an unwarranted federal judicial intrusion into the discretionary authority of Rizzo and others to perform their official functions as prescribed by state and local law, and by validating the type of litigation and granting the type of relief involved here, the lower courts exceeded their authority under 1983.

(6) Statute of Limitation

Unless the action is commenced within a given time frame the plaintiff will lose his cause of action under 1983. While 1983 does not mention a limitation in this regard the Federal Court will look to the state statute of limitation most analogous to a federal civil rights claim.[86]

"The District Court's theory of liability under 1983 was erroneous, being based on a showing of an "unacceptably high" number of incidents of constitutional dimension when in fact there were only 20 in a city of three million inhabitants with 7,500 policemen, and on the untenable conclusion that even without a showing of direct responsibility for the actions of a small percentage of the police force petitioners' failure to act in the fact of a statistical pattern was...enjoinable under 1983."

85. See Scheuer v. Rhodes, 416 U.S. 232 (1974), in which the personal representatives of the estates of three students who were killed on the campus of Kent State University sought damages against the Governor and others under 1983. See also Mattis v. Schnarr, 505 F.2d 588 (8th Cir. 1974).

86. Smith v. Wendell, 390 F.Supp. 260, (E.D. Pa. 1975), "Time within which civil rights action must be brought is the state limitation period applicable to the state cause of action most closely approximating the Federal cause of action. See also, Heard v. Caldwell, 364 F.Supp. 419 (S.D. Ga. 1973).

b. State Tort Liability Claims and 1983

Was 1983 intended to grant a federal forum to every citizen who claims a right to be free of injury whenever the State may be characterized as the tortfeasor? If so, the 14th Amendment becomes the vehicle by which a federal body of tort law is superimposed upon whatever system may already be administered by the States. The United States Supreme Court recently stated; "It is hard to perceive any logical stopping place to such a line of reasoning. Respondent's construction would seem almost necessary to result in every legally cognizable injury which may have been inflicted by a state official acting under 'color of law' establishing a violation of the 14th Amendment. We think it would come as a great suprise to those who drafter and shepherded the adoption of that Amendment to learn that it worked such a result, and a study of our decisions convinces us they do not support the construction urged by respondent."[87]

It is true that the Court requires the statute be read against the background of tort liability that makes a man responsible for the natural consequences of his actions.[88] What has divided the courts below, however, is the extent to which common law causes of action for tort liability may be made applicable in a 1983 suit using the due process clause of the 14th Amendment. For example, to what extent, if any, should negligence form the basis of a suit under 1983?

(1) Negligence and 1983

Officer A drew his revolver in an attempt to maintain order when the gun accidentally discharged and B was struck with the officer's bullet, seriously injuring B.

Officer A yelled "halt" and B halted. Officer A had drawn his revolver and in returning it to his holster accidentally pulled the trigger, putting a hole through B's thigh.

Would B, under either or both illustrations have a cause of action under 1983 against Officer A?

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87. Paul v. Davis, 44 U.S. 4337 (1976).

88. Monroe v. Pape, 365 U.S. at 187.

It is generally held that an allegation of negligent conduct by a state officer is not sufficient, in and of itself, to bring a claim within Section 1983.[89] Yet some courts have held where the officer's conduct is grossly or culpably negligent then a valid claim can be made for a 1983 cause of action. In the illustrations above, both actual cases, the courts held a valid claim had been established under 1983.[90]

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89. Gittlemacker v. Prasse, 428 F.2d 1 (3rd Cir. 1970).

90. The first illustration was the facts in Reed v. Philadelphia Housing Authority, 372 F.Supp. 686 (ED Pa. 1974). The District Court wrote that the officer's conduct was "raw abuse of power." The court wrote "...we are not dealing with simple negligence or inadvertence."

The second illustration was the facts in Jenkins v. Averett, 424 F.2d 1228 (4th Cir. 1970). According to all the witnesses, including the officer, Jenkins dropped the tire tool he was carrying when the officer yelled for him to halt. He turned to face his pursuer. The tool made a distinct noise upon falling that was heard by all around, and even the officer recalls that it droppted. Only a few feet away, and two or three seconds later, the officer lowered his gun, and in doing so accidentally pulled the trigger, hitting the plaintiff.

The trial court determined that the shooting was not intentional; it did find that the defendant officer had been grossly or culpably negligent. The issue before the Fourth Circuit Court of Appeals was whether such a finding would support a cause of action under 1983. The court held that a valid claim had been established. They wrote "...the plaintiff was subjected to the reckless use of excessive force. The wound he suffered was a result of unreasonable 'gross or culpable' conduct of the police officer. This arbitrary action was a constitutional violation." They pointed out that their finding of 'gross or culpable' conduct was the equivalent of a finding of arbitrariness. "Our concern here is with the raw abuse of power by a police officer...not with simple negligence on the part of a policeman or any other official."

In rejecting a claim of defamation as covered by 1983, Paul v. Davis, 44 LW 4337, in dictum the Court wrote: "And since it is surely far more clear from the language of the 14th Amendment that "life" is protected against state deprivation than it is that reputation is protected against state injury, it would be difficult to see why the survivors of an innocent bystander mistakenly shot by a policeman or negligently killed by a sheriff driving a government vehicle, would not have claims equally cognizable under 1983."

(2) Intentional Torts and 1983

One of the essential elements of a 1983 action is that state conduct must have deprived another of rights, privileges, or immunities secured to him by the Constitution and laws of the United States. Rights assertedly conferred by a state statute may not be the basis for a cause of action under 1983.[91]

In like manner it does not provide a remedy for all common law torts.[92] For example, trespass to property, negligent or intentional, is merely a common law tort and does not infringe the Federal Constitution.[93]

The Survey of Police Misconduct Litigation, 1967-1971 conducted by the International Association of Chiefs of Police, Inc., for Americans for Effective Law Enforcement, Inc., reported that the largest group of suits centered around false arrest and assault and battery cases. The two types of suits represented some 67.8 percent of the total number of suits brought. While False Arrest and Assault and Battery cases are not 1983 cases, as such, it is not difficult to allege constitutional violations flowing from such conduct.

(a) False Arrest

The guaratee against unreasonable searches and seizures contained in the 4th Amendment is applicable to State officers by reason of the "due process" language of the 14th. Thus an officer acting contrary to the 4th Amendment might be held liable for denying a citizen his constitutional right to due process of law.[94] However, failure of a state

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91. Stiltner v. Rhay, 322 F.2d 314 (3rd Cir. 1963)

92. Robinson v. McCorkly, 462 F.2d 111, (3rd Cir. 1972) a claim of physical and emotional distress were not actionable under the civil rights statute 1983.

93. Kao v. Red Lion Municipal Authority, 381 F.Supp. 1163 (D.C. Pa. 1974).

94. In Street v. Surdyka, 419 F.2d 368 (4th Cir. 1974), the plaintiff was arrested without a warrant, for a misdemeanor but later was acquitted. He sued in Federal District Court under 1983 by analogy to the common law tort of false arrest. Under state law probable cause was not enough to authorize warrantless arrest for a misdemeanor, it must be committed in the officer's presence. Jury returned a verdict for the officer. The plaintiff contended on appeal that the trial judge should have directed a verdict in his favor.

officer to follow the state code requirement regarding arrest does not give rise to a 1983 cause of action.[95]

(b) Assault and Battery and 1983

The use of excessive force by police officers in effecting an arrest is a well recognized ground for liability under 1983.[96] The exact place in the Constitution of a right to be free from intentional assault by a police officer or other state official has been the subject of extensive discussion in opinions of the Court of Appeals. This right is thought to arise from the due process clause of the 14th Amendmend, a right to be secure in one's person which stands separate and apart from any specific right found in the Bill of Rights. Application of undue force by law enforcement officers thus deprives the individual of liberty without due process of law.[97]

Some decisions, on the other hand, rely on the cruel and unusual punishment clause of the 8th Amendment.[98] Whichever the rationale used the common law tort of assault and battery often forms the basis of a 1983 suit.

After noting that the 4th Amendment does not prohibit warrantless arrests for misdemeanors committed outside an officer's presence, the court pointed out: "...states are free to impose greater restrictions on arrests, but by so doing their citizens do not thereby acquire a greater federal right for purposes of civil rights statute." Accordingly, there is no cause of action for "false arrest" under section 1983 unless the arresting officer lacked probable cause. See also, Diamond v. Marland, 395 F.Supp. 432 (SD Ga. 1975).

Lamb v. Cartwright, 393 F.Supp. 1081 (D.C. Tex. 1975) "An individual's right to be free from unlawful arrest is clearly such a constitutional right as, if violated, may be the basis for a suit under 1983."

95. Failure of a city police officer to comply with a state code requiring police to obtain prior authorization from county youth court prior to incarcerating juvenile was insufficient to constitute a cause of action cognizable under 1983. Hamilton v. Chaffin, 506 F.2d 904 (5th Cir. 1974).

96. Alridge v. Mullins, 377 F.Supp. 850, Aff'd 474 F.2d 1189.

97. Curtis v. Everette, 489 F.2d 516 (3rd Cir. 1973)

98. Howell v. Cattaldi, 464 F.2d 272 (3rd Cir. 1972)

Use of force against another for purpose of effecting an arrest or preventing escape is usually privileged. It becomes a "battery" in violation of constitutional rights only when it is excessive under all the circumstances.[99] The reasonableness of the force used in making an arrest under all the circumstances is a question of fact for the jury or other trier of fact (such as a judge in a bench trial) and the standard usually expressed is "...conduct of ordinary prudent men under existing circumstances."[100]

Certainly one of the most controversial questions in this area of the law is in determining the scope of an arresting officer's privilege for the use of deadly force. "The American Law Institute's (ALI) almost 50 years of consideration of the problem demonstrates that the area in which we are treading is one still characterized by shifting sands and obscured pathways."[101] The law has traditionally recognized that an officer may employ deadly force against another, if such officer reasonably believes such force is necessary to protect himself or another from imminent death or great bodily harm. Furthermore, the law has traditionally granted a police officer a privilege to use deadly force to apprehend one whom the officer reasonably believes to be a fleeing felon. The officer must reasonably believe that deadly force is necessary to effect the arrest.[102]

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99. Daly v. Pedersen, 278 F.Supp. 88 (D.C. Minn. 1967)
Ambrose v. Wheatley, 321 F.Supp. 1220 (D.C. Del. 1971)
Green v. Cauthen, 379 F.Supp. 361 (D.C.S.C. 1974) "Person has Federal right to be free from unnecessary force while being legally arrested."

100. Conklin v. Barfield, 334 F.Supp. 475 (D.C. Mo. 1971)

101. Jones v. Marshall, 528 F.2d 138 (2nd Cir. 1975)

102. Clark v. Ziedonis, 513 F.2d 79 (7th Cir. 1975). While the court applied the traditional rule the judge in a bench trial determined that plaintiff's constitutional rights had been violated because the officer used excessive force while arresting him. The police officer who fired a shotgun at the plaintiff who was allegedly escaping from a burglary, did not reasonably believe deadly force was necessary to effect arrest. Even if the officer proved that he actually feared for his own life or that deadly force was necessary to prevent escape, he must still show that such belief was reasonable under all the circumstances. This he did not do the court held, thus he was liable under 1983.

The ALI, Model Penal Code, on the other hand, permits the use of deadly force only if the underlying felony included the use or threatened use of deadly force, or if there is a substantial risk that the individual will cause death or serious bodily harm unless arrested without delay.

Federal Courts generally recognize, they are not bound by whatever privilege state law may afford. Therefore, an important question is, what standard will a Federal Court apply in deciding a damage action under 1983 against a state police officer who has shot and killed a "fleeing felon?"

Several Federal Courts faced with the issue have applied the state common law privilege even though they disagreed with it and preferred the ALI, Model Penal Code, modified rule.[103]

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103. Jones, supra, Note 101, the court commented,

"Here we are dealing with competing interests of society of the very highest rank--interests in protecting human life against unwarranted invasion, and in promoting peaceable surrender to the exertion of law enforcement authority. The balance that has been struck to date is very likely not the best one that can be. In an area where any balance is imperfect, however, there must be some room under 1983 for different views to prevail....This would seem peculiarly to be one of those areas where some room must be left to the individual states to place a higher value on the interest in this case of peace, order, and vigorous law enforcement, than on the rights of individuals reasonably suspected to have engaged in the commission of a serious crime...the states must be given some leeway in the administration of their systems of justice, at least insofar as determining the scope of such an unsettled rule as an arresting officer's privilege for the use of deadly force."

The Sixth Circuit in Qualls v. Parrish (19 CrL 2115, 4/19/76), agreed with the Second Circuit and gave as its principal reason "that a decision to the contrary would be unfair to an officer who relied, in good faith, upon the settled law of his state that relieved him from liability for the particular acts performed in his official capacity."

It was pointed out in a recent case (see note 103) that a large number of metropolitan law enforcement agencies now instruct their personnel to follow a rule similar to that of the Model Penal Code. Assume that an officer who was employed by a department that required a modified privilege but yet the state law permitted the common law "any felony" privilege to which standard would the officer be held if sued for assault and battery? At least one state court recently held that while the local order might have been the appropriate standard for a police department to follow in disciplining its officers, state-wide standards for the use of deadly force control in a civil action.[104]

Most state courts continue to follow the common law rule. Those recently considering it are: Hilton v. State, 18 CrL 2329, (MeSupJud Ct 12/2/75) reversed Superior Court panel declaring "...the panel improperly exercised judicial power. In effect, it undertook to formulate a new public policy for the State of Maine in an area in which thedelicacies of the balancing of values, the strongly held differing attitudes among segments of the populace and the potential for enormous impact upon the public welfare strongly point to the propriety of judicial restraint, and an acknowledgement that inadequacies, if any, in the common law as presently operative should be left to the Legislature to evaluate and remedy."

See also Schumann v. McGinn (18 Cr.L. 2345 Minn. Sup. Ct. 1/2/76).

104. In City of St. Petersburg v. Reed, 19 CrL 2113, D.C. Appls., 2nd Dis. Fla. 3/24/76, the court pointed out that in Florida the courts follow the majority view that an officer is entitled to use deadly force to apprehend a person reasonably suspected of committing a felony. The trial judge admitted into evidence a departmental order which authorizes a police officer to use firearms only when the officer reasonably believes the fleeing person has committed either (1) a violent crime to the person of another, or (2) a crime against property that clearly demonstrates a wanton and reckless disregard for human life. The officer had shot a teenager he tried to arrest on suspicion of breaking and entering. The suspect first scuffled with the officer then fled. The Florida District Court of Appeals for Second District, concluded

(c) Malicious Prosecution; Defamation and 1983

The common-law tort of malicious prosecution does not constitute a cause of action under 1983.[105]

Defamation it has now been held does not implicate any federally-protected right and is not cognizable under 1983.[106]

(3) Respondeat Superior

The Supreme Court has stated that 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions."[107] In construing the

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that the introduction of the order into evidence was reversible error. "The effect of a departmental regulation limiting the right of a policeman to use deadly force was considered in an opinion of the Attorney General. The opinion held that such regulation would be invalid...In a suit for assault and battery, state-wide standards for the use of deadly force must be controlling. Thus we hold that the introduction into evidence of the safety order was error." See also Chastin v. Civil Service Board of Orlando, 19 CrL 2113, (Fla. App. 4th Dis. 4/4/76).

105. Paskaly v. Seale, 506 F.2d 1209 (9th Cir. 1974); Everett v. Chester, 391 F.Supp. 26 (ED Pa. 1975).

106. In Azar v. Conley, 456 F.2d 1382 (6th Cir. 1972) in which the court indicated that plaintiff's arrest and incarceration made by members of the police department and released to the local media could not form the basis of action because freedom from defamation is not a federally protected right.

In Paul v. Davis, 44 LW 4337 (1976) plaintiff was arrested on a shoplifting charge in Louisville, Ky., but charges were later dropped. In the meantime a photograph of respondent bearing his name was included in a flyer of "active shoplifters" and distributed to area merchants. A 1983 suit was brought against the police chief alleging that such action, under color of law, deprived him of his constitutional right. The United States Supreme Court held that the chief's action did not deprive plaintiff of "liberty" or "property" rights secured against state deprivation by the Due Process Clause of the 14th Amendment. "Reputation alone, apart from some more tangible interests such as employment, does not implicate any 'liberty' or 'property' interests

statute pursuant to this mandate, the courts are divided as to whether vicarious liability under the doctrine of respondeat superior is applicable to actions brought under 1983.[108] Most circuits have expressly rejected the doctrine in application to 1983 cases.[109]

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sufficient to invoke the procedural protection of the Due Process Clause; hence to establish a claim under 1983 and the 14th Amendment more must be involved than simply defamation by a state official."

The Court emphasized that the plaintiff should have made a claim for defamation under the laws of Ky. "Concededly if the same allegations had been made about respondent by a private individual, he would have nothing more than a claim for defamation under state law. But, he contends, since petitioners are respectively an official of city and of county government, his action is thereby transmuted into one for deprivation by the State of rights secured under the 14th Amendment."

"...(S)uch a reading would make the 14th Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States. We have noted the 'constitutional shoals' that confront any attempt to derive from congressional civil rights statutes a body of general federal tort law; a fortiori the procedural guarantees of the Due Process Clause cannot be the source for such law."

108. Monroe v. Pape, 365 US 167 (1961)

109. In a 1983 action arising from an incident at a police station where plaintiff allegedly suffered physical and emotional injuries requiring hospitalization was not maintainable against the Chief of Police or the Board of Police Commissioners under the doctrine of respondeat superior, where none of such persons was alleged to have been present at incident or to have had duty, opportunity, or ability to intervene in order to prevent alleged unreasonable search and seizure of a patrolman. Jennings v. Davis, 476 F.2d 1271 (8th Cir. 1973). "The respondeat superior principle holds liable the "innocent" master (with the infamous deep pockets) for the torts committed by his servant in the course of his employment, "but it does not apply in 1983 litigation.

In Diamond v. Coleman, 395 F.Supp. 429 (SD Ga. 1975) the court expressed the majority view as follows: "Suit against members of governing bodies and supervisory officials of a county or municipality, under civil rights statutes (including 1983),

The question of sheriff's liability under 1983 for the acts of his deputy is controlled by state law.[110]

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where vicarious liability is sought to be imposed by reason of unconstitutional acts of subordinates, the doctrine of respondeat superior is generally inapplicable. For a mayor and alderman, a board of police commissioners, a police chief or a city manager to become liable under 1983, such official must have had personal involvement in the denial of constitutional rights by the police officer concerned.

In Boyd v. Adams, 364 F.Supp. 1180 (N.D. Ill. 1973), it was held that a police chief is not liable in a 1983 action for breach of duty to competently and professionally train the men under his command. 1983 makes person who deprives citizen of his constitutional rights liable to party injured rather than damage alleged by chain of vicarious responsibility. Thus, the plaintiff could not maintain a 1983 suit against the city chief of police under the statute on the theory of liability of breach of his duty to carefully, competently and professionally train men under his command.

For contrary position see Carter v. Carlson, 447 F.2d 358 (D.C. Cir. 1971) and Beverly v. Morris, 470 F.2d 1356 (5th Cir. 1972). In Beverly the court affirmed a damage award under 1983 against a chief of police where an auxiliary police officer blackjacked a prisoner in custody. Liability was predicted on negligence in failing to train the auxiliary officer properly and to supervise his patrol duties. Noting the complete absence of any supervision or training, the Court pointed out that the case was not "one of vicaricus liability founded on the theory of respondeat superior, but instead is a claim founded upon the defendant's own negligence." See also Roberts v. Williams, 456 F.2d 819 (5th Cir. 1971).

In Chestnut v. City of Quency, 513 F.2d 91 (5th Cir. 1975) an officer, while attempting to arrest an individual shot and injured him. Another bullet grazed a bystander. They both sued under 1983. In addition to the officer making the arrest, the chief of police was also sued. The gist of the suit against the chief was that he had notice of past culpable conduct of this particular officer and had failed to prevent a recurrence of such misconduct, thus failing in his responsibility to provide for the personal safety of individual members of society. The chief did not cause, encourage, initiate, participate in, consent to, authorize, direct, command, or have any active control over anything to do with or leading up to the shooting. The incidents to which the plaintiff referred happened before defendant became chief. Summary judgement was granted dismissing chief as a defendant in the suit.

2. Federal Officers

A Federal law enforcement officer is not subject to liability under 1983.[111] Since he does not derive his authority by virtue of state law an essential element of 1983 is lacking.

This does not mean, however, that a Federal officer cannot be sued in Federal court for an alleged violation of another's constitutional right. In a landmark decision in 1971[112] the United States Supreme Court established for the first time the Federal common law right of an aggrieved person to sue for damages caused by a violation of the 4th Amendment. Furthermore, the plaintiff is entitled to recover money damages for any injuries he has suffered as a result of the Federal officer's violation of the Amendment. The Court did not pass on the immunity from liability by virtue of their official position.[113]

Subsequent decisions by Federal Courts of Appeals have held Federal law enforcement officers do not have absolute immunity from damage suits charging violations of constitutional rights. For an officer to be immune he must show that he is performing a "discretionary act at those levels of government where the concept of duty encompasses the sound exercise of discretionary authority."[114] The immunity doctrine only applies to high officials, not to officials performing police functions. For example, making an arrest is not deemed to be a discretionary function.[115]

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110. Tuley v. Heyd, 482 F.2d 590 (5th Cir. 1973)

Sheriff summoned two county employees in manhunt thereby employees became temporary state law enforcement officers acting under color of state law when they assaulted plaintiff. A South Carolina statute empowering deputy sheriff to call out posse comitatus supplements rather than supersedes common law and implicitly recognizes sheriff's authority to summon bystanders... State law is available to civil rights claimant. Scott v. Vandiver, 476 F.2d 238 (4th Cir. 1973). "Under South Carolina law," the court wrote, "sheriff's responsibility for acts of a deputy is not dependent on doctrine of respondeat superior but on deputy's position as sheriff's representative for whose official acts the law holds the sheriff strictly accountable. Under South Carolina law, the sheriff is liable for assault and battery by deputy in performance of his duties."

However, in Schulz v. Lamb, 504 F.2d 1009 (9th Cir. 1974) the court noted that where Nevada law relieved the sheriff of vicarious liability based on an act or omission of one of his deputies, county sheriff could not be liable for action of the deputy sheriffs.

A Federal officer has the same qualified immunity from suit as does a state officer who has been sued under 1983. His defense is that he acted in good faith and that he had a reasonable belief that his conduct was lawful.[116]

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111. Sheridan v. Williams, 33 F.2d 581 (D.C. Cir. 1964).

112. Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971).

113. Id.

114. Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 456 F.2d 1339 (2nd Cir. 1972).

115. Id.

116. Id.

V. DAMAGES

In a legal sense damages mean the compensation which the law will award for an injury. There are various classifications and descriptions of damages but the discussion which follows will mention only Compensatory and Punitive damages.

A. Compensatory

Compensatory damages have been defined as those damages given as compensation in satisfaction or in recompense for loss or injury. Compensatory damages and actual damages mean the same thing.[117] Generally, there are two types of recovery, general and special. General damages are awards for anxiety, suffering, emotional trauma. The jury takes those and translates them into a monetary award, which is difficult and speculative. That is one reason jury awards vary so greatly.[118]

A second type of recoverable damage is called special damages. These are damages that attempt to compensate the plaintiff for out of pocket expenses; for example, doctor bills, prescriptions, hospital expenses. Loss of earnings as well as earning capacity are further examples of special damages.[119]

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117. 25 C.J.S. Damages Sec. 17-36.

118. In Washington County Kennel Club v. Hutto, 216 So2d 512, (DC Apps 1st Dis. 1969), False arrest action brought by patron of pari-mutuel racing track against its operator resulted in a judgment for plaintiff in the amount of $50,000. Fla. District Court of Appeals held that while evidence supported jury's liability verdict the award was excessive. The court stated that unless plaintiff would remit excess over $5,000 there must be a new trial on question of damages. In Hutto v. Washington County Kennel Club, 253 So2d 726 (DC Apps Fla. 1st Dis 1971), indicated that plaintiff elected new trial on damages question. After the trial the jury awarded plaintiff damages in the amount of one dollar ($1.00). Plaintiff appealed and court held that a verdict for grossly inadequate damages stands upon the same ground as a verdict for excessive damages. The award of $1.00 damages was so inadequate as to entitle plaintiff to a new trial on the issue of damages.

119. 25 C.J.S. Damages, Sec. 117-127.

B. Punitive

Punitive damages are of particular significance to law enforcement officers. As the name implies the theory of punitive damages is to punish and thereby hopefully deter future similar conduct. The significance rests in the fact that while an officer's employer may be required to pay compensatory damages, he is not liable for punitive damages, which may be awarded to the plaintiff. Often the officer must pay such an award out of his own pocket.

Four states have outlawed punitive damages entirely.[120] Four have placed restriction on the use of punitive damages, either as to the situations to which they apply or to the amounts which can be awarded.[121]

Courts are divided over the question, whether punitive damage awards are insurable? That is, does public policy prohibit such coverage? A number of courts have indicated that punitive damages serve as a deterrent to anti-social behavior, therefore it would be harmful to society if the punitive effect is cancelled by insurance.[122] Other courts have ruled that insurance coverage is a private contract between two parties and if punitive damages are covered by the policy it would have the effect of partially voiding the contract to hold that such damages could not be paid as a matter of public policy. Some courts have refused to do that.[123]

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120. Louisiana, Massachusetts, Nebraska and Washington. See, F.C. & S. Bulletins, Casualty & Surety Section, Public Liability "Punitive Damages" (Third Printing May, 1974).

121. Connecticut, Indiana, Michigan and New Hampshire, Id.

122. Northwestern National Casualty Co. v. McNulty, 307 F.2d 432 (5th Cir. 1962), held that insurance company was not responsible for punitive damages. The court wrote, "The public policy... would seem to require that the damage rest ultimately as well as nominally on the party actually responsible for the wrong. If that person were permitted to shift the burden to an insurance company, punitive damages would serve no useful purpose." See also, In American Surety Co. of New York v. Gold, 375 F.2d 523 (2nd Cir. 1966) held transfer of a punitive judgment to an insurer is against public policy. Esmond v. Liscio, 224 A2d 793 (Pa. Super Ct. 1967), upheld lower court's refusal to make the insurer responsible for punitive damages.

123. Universal Underwriters Insurance Co. v. Lazenby, 383 S.W. 2d 1 (Tenn. 1964). Southern Farm Bureau Casualty Insurance Co. v. Daniel 440 S.W. 2d 536 (Ark. 1969) held that liability insuring

The point is, there is no nationally accepted agreement on the doctrine of punitive damages. In a few states such awards are forbidden, while in others they are upheld as necessary to the good of society. Most states have left it up to the courts to decide whether the punitive award is to be upheld or if insurance is to be permitted. Where permitted an award of compensatory damages is generally not a prerequisite to an award of punitive damages.[124]

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agreement govern and that coverage against punitive damages is not against public policy in Arkansas. In Abbie Uriguen Olds, Buick, Inc., v. U.S. Fire Insurance Co., 511 P2d 783 (Idaho 1973) the court rejected any public policy considerations as justification for denying coverage of punitive damages in Idaho. See also Carroway v. Johnson, 139 S.E. 2d 908 (S.C. 1965).

In Price v. Hartford Accident & Indemnity Co., 502 P2d 522 p. 524 (Ariz. 1972), the court wrote "...the state of Arizona has more than one public policy...One such public policy is that an insurance company which admittedly took a premium for covering all liability for damages, should honor its obligations."

124. Gill v. Manuel, 488 F.2d 799 (9th Cir. 1973).

VI. PROTECTING THE OFFICER

A. General Rule

Under the common law the government enjoyed sovereign immunity--it could not be sued without its consent and so the injured plaintiff looked to the officer for payment of the damages. The officer stood alone and bore the full responsibility for damages occuring as a result of his action or failure to act. This was true regardless of the fact that he was not acting for himself, but for his employer. If an officer has doubt as to his potential liability in specific situations in which injury to person or property occur, he should consult legal counsel.

B. Waiver of Immunity

Some protection has been afforded the officer in those jurisdictions where the government has waived its immunity to suit.[125] State waiver of immunity has been developed through statutory enactment, [126] and by judicial decision.[127] Some state statutes provide only a partial waiver of immunity.[128]

In addition to states which have rejected the theory of municipal immunity for all purposes by statutory enactment or judicial decision, some have specifically considered the problem as concerns possible liability growing out of the operation of municipally owned vehicles.[129]

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125. Title 28 United States Code, Section 2671, Federal Tort Claims Act. Title 28, USC 2679 (b) substitutes liability of the US exclusively for that of employees operating motor vehicles within the scope of their employment. It insulates employees from personal liability; suit for damages lies against US and not against its employee.

126. New York Court of Claims Act, Sect. 8 Washington, RCWA 4.92.090 (1963).

127. Hargrove v. Cocoa Beach, 96 So2d 130 (Fla 1957). Muskopf v. Corning Hospital District, 359 P.2d 457 (1961).

128. In North Carolina Tort Claims Act liability is limited to a total of $10,000. See, Gen. Stat. of N.C., Sec. 143-291 (1958). Some states have waived immunity as to negligent conduct of its employees but not as to their intentional torts.

C. Within Line and Scope of Employment

An officer acts within the line and scope of his employment when he is furthering the purposes of his employer. Generally, where the government has waived immunity it will assume liability for the torts committed by its employees or agents acting within the scope of their employment.[130] However, where the act is outside of the line and scope of employment and beyond any authority given to the employee or agent, he is independently liable for the consequences of his action.[131]

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129. California Vehicle Code Ann., Sec. 17001; Indiana Statutes Ann., Sec. 39-1819; Annotated Laws of Massachusetts, Chapter 12, Sec. 3B; Michigan Statutes Ann., Sec. 9.1708 (1), (2); New Mexico Statutes Ann. Sec. 64-25-8, 9; North Dakota Century Code, Sec. 39-01-08; Pennsylvania, 75 P.S. Sec. 623; and West Virginia Code of 1961, Ann., Sec. 494 (6). See Shapo, "Municipal Liability for Police Torts," 17 Univ. of Miami L. Rev. 475 (1963).

130. Basista v. Weir, 225 F. Supp. 619 (1964); Kozlowski v. Ferrara, 117 F. Supp. 650 (1954).

131. In Bell v. City of New York, 137 NYS 104 (1954), aff'd. 141 N.Y.S. 2d 820, an off-duty New York City police officer, patronizing a bar, reportedly got into an argument with another patron and the dispute resulted in a fight. Without making his official status known the officer drew his gun and in the ensuing struggle the gun went off, killing an innocent bystander. In the subsequent civil action it was held there was no negligence on the part of the city. The officer was off-duty and there was no element of foreseeable danger. Any liability developing as a result of this situation would have to be borne personally by the officer. Similar cases have held a city not liable where the plaintiff was shot by an off-duty patrolman on a personal escapade. Pacheco v. City of New York, 140 N.Y.S. 2d 275 (1954), aff'd 140 N.Y.S. 2d 500; Burns v. City of New York, 141 N.Y.S. 2d 279 (1955).

An officer may find a particular problem where he is employed on a part-time job as a security officer, as for a retail establishment. If he injures someone while on that job and is sued, who will pay for his legal defense and damages? The officer normally will have to look to his private employer for payment. Public entities generally agree that an officer may not be considered to be working as a peace officer for two different employers at the same time. The officer should make sure that his private employer has a comprehensive liability insurance policy to protect him in the event of suit.

D. Exemption Status

Some states have passed exemption statutes to protect the law enforcement officer.[132]

E. Indemnification

There are eleven states that indemnify, or pay judgment on behalf of an officer when he is acting in the line and scope of his employment (except for punitive damages).[133]

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132. Illinois' "Local Governmental and Government Employees Tort Immunity Act." S.H.A. Ch. 85, Sec. 1-101, et. sez. goes further than most state provisions to protect the officer. Section 2-202 of this statute provides "A public employee is not liable for his act or omission in the execution of enforcement of any law unless such act or omission constitutes wilful and wanton negligence." Similar provisions are contained in California Government Code, Section 820.4.

New Mexico Statutes Anno. 14-17-11 provides immunity for officers committing tortious acts within the scope of municipal authority or in execution of the orders thereof and declares the municipality shall alone be responsible for such acts. This statute has been consistently interpreted as meaning that if the officer exceeds his official duties and makes an arrest without proper authority, or commits an assault, he ceases to act in behalf of the city and assumes the entire responsibility. Brown v. Deming, 56 N.M. 302 (1952), Salazar v. Bernalillo, 62 N.M. 199, (1956). However, Georgia Code Anno., Section 69-307 provides that "a municipal corporation shall not be liable for the torts of policemen or others engaged in the discharge of the duties imposed on them by law."

133. California, Colorado, Connecticut, Florida, Illinois, Missouri, Montana, New Jersey, New York, Oregon and Wisconsin. In Wisconsin, if a commission determines that the officer, against whom a judgment has been rendered, was acting in the line of duty and in good faith, it may award the officer the amount of judgment, fees and costs, up to $5,000. If this amount is inadequate, the matter is referred to the state legislature for action on a private bill. Wisconsin Stat. Ann. Section 285.06. In Massachusetts, the state attorney general may defend the officer in a civil suit and, under a 1965 amendment, where there is a compromise or an adverse judgment, the state will pay up to $25,000. Ann. Laws of Mass., Ch. 12, Section 3B.

F. Insurance

Some states provide protection for their law enforcement officers by providing that the state, county, city or other political subdivision may insure against liability by self-insurance or through an insurer.[134]

Illinois law provides that if an officer of a municipality having a population of 500,000 or over, injures the person or property of another while performing his duties as a policeman the municipality shall indemnify the policeman for any judgment recovered against him as the result of such injury, except where the injury results from the wilful misconduct of the policeman. In the case of the cities under 500,000 population, the indemnity to the officer shall not exceed $50,000, including cost of suit. Illinois S.H.A. Ch. 24, Section 1-4-6.

Connecticut law provides for indemnification for all sums the officer becomes obligated to pay by reason of a judgment from damages to persons or property which occur while he is acting within the scope of his employment and which are not wilful or wanton. Conn. Gen. Stat. Anno. Section 7-465.

Under Utah Code Ann. (1953) Section 78-11-10 there is a specific requirement that before any action may be filed against an officer enforcing the criminal laws of the state, assuming the action arises out of, or in the course of performing his duties, the plaintiff must post a bond to be sued to pay the defendant officer for his costs and expenses, including reasonable attorney's fees, in the event the defendant wins the case. This section of the Utah Code has been interpreted as authorizing payment of attorney's fees to police officers who successfully defend a suit for assault and battery, false arrest and imprisonment, and malicious prosecution. Wendelboe v. Jacobson, 10 U.2d 344 (1960).

134. California Government Code, Sections 990-990.6

In Oregon there is a provision for various state agencies to carry liability and indemnity insurance on motor vehicles for the protection of employees operating such motor vehicles in the performance of their official duties. Oregon Rev. Stat. Title 26, Sec. 278.090.

Montana Comprehensive Insurance Plan and State Tort Claims Act, Section 82-4302 (4) abolishes sovereign immunity but authorizes each state agency to secure sufficient liability insurance to cover potential liability situations.

See, James, "Tort Liability of Governmental Units and their Officers," 22 U. of Chi. L. Rev. 610, 639, (1955).

G. Legal Counsel

A large number of states provide defense counsel for an employee if asked to do so.[135] There are limitations.

H. Actions by Officers

Moved by the mounting pressure of increasing civil suits some officers have resorted to filing civil suits themselves,

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135. California, Colorado, Maryland, Massachusetts, Minnesota, Missouri, New Jersey, New Mexico, New York, North Carolina, Ohio, South Carolina, Washington, Wisconsin, are among the states affording counsel to officers.

Generally, a public entity will provide the officer with defense counsel when he is sued and acting within the scope of his employment, unless:

1. The officer engaged in criminal conduct;
2. The officer engaged in actual fraud, actual malice, or corruption; or
3. A conflict of interest would exist between the officer and the public entity if the entity decided to defend the officer.

On rare occasions, a public entity will provide a defense for an officer's criminal act if the entity determines that the act somehow occurred within the scope of the officer's employment, and the officer acted in good faith, without malice, and in the interest of the public entity.

In making its determination whether to defend an officer, the public entity generally has three options:

1. It can decide to provide the officer with a defense because the act being sued upon was clearly within the scope of employment;
2. It can decide to defend the officer but reserve the right not to pay the judgment if the court determines that the officer acted outside the scope of employment; or
3. It can refuse to provide the officer with a defense because, in its initial determination, the officer acted outside the scope of employment or engaged in conduct that was criminal.

particularly for personal injuries and property damages. Officers have been successful in filing assault and battery claims in civil court.[136] They have been less successful in suing for defamation.[137]

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136. See Blunt, "The Battered Policeman: A Law Enforcement Officer Sues for Assault and Battery," FBI Law Enforcement Bulletin, September, 1974.

137. Blunt, "A Law Enforcement Officer Sues for Defamation," FBI Law Enforcement Bulletin, February, 1974.

VII. SOME POSITIVE STEPS

Of course, the best way to avoid the difficulties described in this document is to eliminate the lack of understanding which so often is the controlling factor. But that is easier said than done, and the highest degree of education and sophistication still would not cover those situations where, by the laws of nature, two independent forces collide by accident. Still, there is room for some positive planning aimed at preventing the foreseeable errors that commonly plague enforcement officers. Three rather basic steps are suggested:

Step Number One

Establish a selection and training program capable of teaching the new officer, as well as the older more experienced ones, the broad scope of his authority and responsibilities. The substance of the offenses as well as the statutory law must be digested before the officer can be said to be prepared to act in enforcing "the law." Failure to understand the basics in regard to probable cause for arrest, search and seizure, and criminal interrogation can result in police work that is not only less than the best the officer could do but is hazardous from the standpoint of his financial well-being. As one Federal Appeals court wrote; "All members of the Police Department, from the Commissioner down to the raw recruit, are expected to be familiar with the principle that if the police intend to conduct a search of a man's home for a suspect, they must at least have probable cause to believe that he is on the premises."[138] The point here is that we are all expected by the courts to know basic legal principles, regardless of rank.

Step Number Two

Instill in all officers a sense of responsibility commensurate with the great and necessary authority inherent in the job. Officers are the visible conscience of the community and therefore, must expect the buffeting to which individuals consciences everywhere are subjected. Each man must determine how best to make his personal adjustment to the demands of his office. The more compatible he can become with high standards of performance, the more effective will be his work product. A department stressing individual responsibility along these lines is apt to be a strong, dependable community asset and one that is unafraid of incurring civil liability due to negligence, lack of understanding, or intentional wrongdoing.

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138. Lankford v. Gelston, 364 F.2d 197, 204 (4th Cir. 1966).

The Federal Appeals Court quoted above also wrote in the same case: "The Police Department is society's instrumentality to maintain law and order, and to be fully effective it must have public confidence and cooperation. Confidence can exist only if it is generally recognized that the department uses its enforcement procedures with integrity and zeal, according to law and without resort to oppressive measures. Law observance by the police cannot be divorced from law enforcement. When official conduct feeds a sense of injustice, and breeds disrespect for the law, the difficulties of law enforcement are multiplied."[139]

Step Number Three

Cultivate integrity and competency to the point of winning public respect and support. This aspect can be critical in determining whether the governmental unit supplying the funds to operate the department will be anxious to provide modern, technically sufficient equipment or whether the officers will have to take their chances using obsolete or worn out vehicles, devices, facilities, etc. It follows that legislators will be more inclined to enact protective legislation and local communities will be more stimulated to provide the assistance of counsel and other aids where the department is the pride of the community.

Other Concerns

It should be the concern of all officers to prepare for the time when prevention does not succeed and a civil suit is filed. As a minimum, if there are any resources which provide the necessary counsel fees, court costs, compensation for days lost from work, settlement or judgment amounts, they should be identified. If there are none, some form of protection should immediately be considered. As indicated previously there is a variety of possible sources, ranging from full assumption of liability by the government to insurance programs.

The time to determine the availability of whatever protection exists is certainly before the need arises. Determine availability of services promised and determine realistically the extent of the coverage offered. Protection plans may or may not extend to all officers of the jurisdiction. Where statutes designed to be of assistance are drawn so as to be applicable only to specific classes of officers, for example, "state and city police officers" omitting "sheriffs" and you are a sheriff, determine if the protection plan extends to you.

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139. Id., at P. 204.

Statutes which purport to waive governmental immunity may do so with reservations, leaving the officer to fend for himself in many kinds of cases. They may limit the total amount of liability to a relatively small sum as compared to current tort damage awards. Insurance programs offered through the government frequently suffer from the same restrictions. Some may cover compensatory damages and exclude punitive. The government counsel may be limited to designated departments or only in specific cases upon determination of some executive officer. In short, the officer should be forwarned of his actual status as a potential defendant in a civil action which could result in an order for him to pay an amount many times the total of his annual salary.

APPENDIX I

STATE TORT CLAIMS PROCEDURES*

STATE	LIABILITY CONTROLLED BY	REMEDY
Alabama	Dunn Construction Co. v. State Board of Adjustment, 234 Ala. 372, 175 So. 383 (1937); Howell v. State, 282 Ala. 464, 213 So. 2d 199 (1968)-No legal liability recognized; state cannot consent to suit; even by legislation.	Ala. Code title 55, sec. 333 et seq.-Administrative Board of Adjustment may grant relief where equity requires it in claims arising from injury done by state or agencies and claims for injuries or death of state employees. Money comes from agency appropriation.
Alaska	State v. O/S Lynn Kendall, 310 F.Supp. 433 (D.Alaska 1970)-State must consent to suit.	AS 09.50.250-Judicial; claims against State heard in Superior Court. No action if (1) exercised due care (2) Discretionary Act (3) intentional tort. Critical language identical to Federal Tort Claims Act.
Arizona	Stone v. Arizona Highway Commission, 93 Ariz. 384, 381 P.2d 107 (1963) Sovereign Immunity abolished.	A.R.S. sec. 12-821 et seq. Judicial A.R.S. sec. 35-181-.01-Methods for presenting claims.
Arkansas	Pitcock v. State, 91 Ark. 527, 121 S.W. 742 (1909)-Immunity cannot be waived in judicial action.	Ark. Stat. Ann. sec. 13-1401 et. seq.-Administrative; Claims Commission mechanism created. No review by judiciary.
California	Cal. Gov't Code sec. 810 et seq. (West 1966) All common law actions are abolished and liability must be found in statute. Cal. Gov't Code sec. 815.2(a) (West 1966)-Public entity liable for injury caused by tortious act or omission of employee acting within scope of employment.	Cal. Gov't Code sec. 905.2 et seq. (West 1966)-Administrative & Judicial. Submit claim to State Board of Control. If claimant receives adverse administrative decision, may take case to court.

*See note on page 108.

STATE	LIABILITY CONTROLLED BY	REMEDY
Colorado	Colo. Rev. Stat. Ann. sec. 130-11-1 et seq.-Colorado Governmental Immunity Act; partial waiver of Immunity, including operations involving dangerous conditions. Provides defense fund for public employees. No general waiver of Immunity.	Colo. Rev. Stat. Ann. sec. 130-11-7-Judicial; where sovereign immunity abrogated as defense. Colo. Rev. Stat. Ann. sec. 130-10-1-Administrative and Legislative, where sovereign Immunity not waived, Claims Commission handles claims, makes recommendations for special legislative appropriations.
Connecticut	C.G.S.A. sec. 4-141 et seq.-Claims Commission may authorize suit if "just and equitable," where private person could be held liable. Officers and employees not liable if acting within scope of employment and neither willful nor wanton misconduct.	C.G.S.A. sec. 4-141 et seq.-Administrative and Legislative. Claims Commission disposes claims up to $2,500; over $2,500, Commission sends claims to legislature for approval.
Delaware	18 Del.C. sec 6511= Sovereign Immunity waived as to any risk or loss covered by insurance. Raughley v. Department of Health & Social Services, 274 A.2d 702 (Del.Super.Ct. 1971)-Immunity an absolute bar unless waived.	18 Del. C.sec. 6501 et seq. Insurance; make claims to State Insurance Coverage Office. (Not all agencies have insurance-program not fully implemented.)
District of Columbia	D.C. Code Ann. sec. 1-102 D.C. may sue and be sued. D.C. Code Ann. sec.1-921 Exempts certain District employees from liability.	Judicial; D.C. Code Ann. secs. 1-901 and 1-906-Allows settlement or compromise of claims or suits based on an employee's negligence.

STATE	LIABILITY CONTROLLED BY	REMEDY
Florida	F.S.A. sec. 768.28-Immunity waived in tort actions. F.S.A. sec. 768-14-Immunity waived as defense to counterclaims.	F.S.A. sec. 768.28-Judicial limited to $50,000 per person, $100,000 combined (excess must be submitted to legislature) or to limits of agency's insurance coverage if greater than statutory limits (claim must first be submitted to agency and denied by agency). F.S.A. sec. 768.29-Administrative; claims not exceeding $1,000.
Georgia	Crowder v. Department of State Parks, 228 Ga. 436, 185 S.E.2d 908 (1971), cert. denied, 406 U.S. 914 (1972)-Immunity applies in tort actions. Ga. Code Ann. sec. 89-932-Liability insurance may be purchased to cover employees in state-owned vehicles. Liability may not exceed limit of insurance coverage. Section does not constitute general waiver of Immunity.	Proposed: Article 2 Sec. 3710 (Constitutional Section)-Judicial; creation of State Court of Claims.
Hawaii	HRS sec. 662-2-Immunity waived for liability in tort actions. HRS sec. 662-15-Exceptions to waiver include discretionary functions, intentional torts and others.	HRS sec. 662-1 et seq.-Judicial; Tort Liability Act.
Idaho	Idaho Code sec. 6-901 et seq.-Idaho Tort Claims Act; exceptions to general liability for torts include discretionary functions, intentional torts and others.	Idaho Code sec. 6-908 et seq.-Administrative and Judicial. First, file claims with government entity; if claim denied, suit may be brought in District Court.

STATE	LIABILITY CONTROLLED BY	REMEDY
Illinois	Ill. Ann. Stat. ch. 127, sec. 801 (Smith-Hurd 1967)-State shall not be made a defendant except as prescribed in act to create a Court of Claims. Ill. Ann. Stat. ch. 37, sec. 439.8 (Smith-Hurd 1972)-Act to create a Court of Claims established tort liability in cases other than those covered by Workmen's Compensation and Workmen's Occupational Diseases Acts.	Ill. Ann. Stat. ch. 37, sec. 439-1 et seq. (Smith-Hurd 1972). Judicial; establishes Court of Claims. Maximum recovery in tort: $100,000.
Indiana	Ind. Code sec. 34-4-16.5-3 et seq.-Permits suit for tort, retaining Immunity in limited situations, including discretionary functions and others.	Ind. Code sec. 34-4-16.5-1 et seq.-Administrative and Judicial. First, file claims with government entity; if claim denied. relief may be sought in court.
Iowa	I.C.A. sec. 25A.1 et seq.-Tort Claims Act; exceptions to general waiver of Immunity include discretionary acts, intentional torts and others. Volunteers are specific encompassed by potentially liable class.	I.C.A. sec. 25A.1 et seq.-Administrative and Judicial Claims are filed with State Comptroller and given to State Appeals Board. District Court may hear suit only after State Appeals Board has made disposition.
Kansas	K.S.A. 46-901-State and state agencies Immune from suits for torts except as provided by statute. K.S.A. 74-4715-Persons may sue state agency for damage due to torts only to extent of insurance.	Sanders v. State Highway Commission, 211 Kan. 776, 508 P.2d 981 (1973)-Judicial; where Immunity is waived. K.S.A. 46-903 et seq.-Legislative; file claim with Committee of Claims and Accounts of State legislature.

STATE	LIABILITY CONTROLLED BY	REMEDY
Kentucky	KRS 44.070-Liability for negligence, limited to $20,000.	KRS 44.070 et seq.-Administrative; establishes a Board of Claims. KRS 44.140-Limited Judicial review.
Louisiana	La.Constitution of 1974, Article 12 Sec. 10(A)-No Immunity in tort.	La. Constitution of 1974, Article 12 Sec. 10(C)-Legislature shall provide a procedure for suits; funds to be appropriated by legislature. LSA-R.S. 24:152-Legislative; procedure to pass bill authorizing suit (prior to passage of La. Constitution of 1974). Board of Commissioners v. Splendour Shipping & Enterprises Co., 273 So.2d 19, 26 (La. 1973)-Judicial; no Immunity from suit and liability (prior to passage of La. Constitution of 1974).
Maine	Common Law-Immunity, unless waived by legislature. 14 M.R.S.A. sec. 157-Immunity waived in action arising from operation of motor vehicle, recovery limited to extent of insurance.	Judicial; where Immunity waived by legislature.
Maryland	Lohr v. Upper Potomac River Commission, 180 Md. 584, 26 A.2d 547 (1942); Charles E. Brohawn & Brothers, Inc. v. Board of Trustees of Chesapeake College, 269 Md. 164, 304 A.2d 819 (1973)-Immunity from suit prevails.	None

STATE	LIABILITY CONTROLLED BY	REMEDY
Massachusetts	Smith v. Commonwealth, 347 Mass. 453, 198 N.E. 2d 420 (1964)-No liability because no clear manifestation in statute of consent to suit. By interpretation, M.G.L.A. ch. 258 sec. 1 does not constitute consent to suit for torts. M.G.L.A. ch. 12 sec. 38-Where no statutory authority to sue, Attorney General may provide equity.	Judicial; if Immunity were to be waived. M.G.L.A. ch. 12 sec. 3B-Administrative and Judicial Attorney General investigates claims, determines award but refers claims in excess of $1,000 to the General Court.
Michigan	M.C.L.A. see. 691.1401 et seq.-Immunity waived for negligent operation of government owned motor vehicle, but retained for government agencies engaged in governmental activities, as opposed to proprietary activities.	M.C.L.A. sec. 600-6419-Administrative and Judicial State Administrative Board, claims under $100; Court of Claims, any claim.
Minnesota	Dunn v. Schmid, 239 Minn. 559, 60 N.W.2d 14 (1953)-Immunity upheld. M.S.A. sec. 3.7311-Claims Commission shall consider claims which state should in equity and good conscience pay, but no liability is imposed upon the state or its agencies by the Commission's approving a claim and recommending an award.	M.S.A. sec. 3.66 et seq.-Administrative; creates Claims Commission. Claims less than $250 may be settled by agency head; State Claims Commission, any claim permitted by law.
Mississippi	Miss. Code Ann. sec. 11-45-1 et seq.-State; counties and municipalities consent to suit.	Miss. Code Ann. sec. 11-45-1 et seq.-Judicial; if redress denied by auditor of public accounts after filing of complaint.

STATE	LIABILITY CONTROLLED BY	REMEDY
Missouri	Common law-Immunity, unless consent to suit. V.A.M.S. sec 105.710-Tort Defense Fund created Covers Division of Corrections, including employees and volunteers (see Op. Atty. Gen. No. 136, Shulimson, 4-4-73).	V.A.M.S. sec. 105-710-Judicial. V.A.M.S. sec. 33.120-Administrative; present claims to comptroller.
Montana	Mont. Rev. Codes Ann. sec. 82-4310-Governmental entities liable for their torts and those of their employees, arising out of governmental or proprietary function.	Mont. Rev. Code Ann. sec. 82-4301 et seq.-Administrative and Judicial. First, file claim with governmental entity; if claim denied, bring suit in District Court.
Nebraska	Neb. Rev. Stat. sec. 81-8,209-Tort Claims Act; state liable same as private person for torts of officers, agents or employees.	Neb. Rev. Stat. sec. 81-8,209 et seq.-Administrative and Judicial. State Claims Board settles tort claim (with approval of Attorney General and District Court if in excess of $5,000). Suit permitted only after Board makes a disposition of claim.
Nevada	NRS 41.031 et seq.-Immunity for state and all political subdivisions waived, except where due care or discretionary function.	NRS 41.036 et seq.-Administrative and Judicial. First, file claim with state Board of Examiners; if denied, action may be instituted.
New Hampshire	Manchester v. Manchester Teachers Guild, 100 N.H. 507, 131 A.2d 59 (1957)-State is Immune, unless legislature consents to suit. N.H. RSA 412:3-Defense of Immunity waived for damages covered by insurance, to extent of insurance.	Legislative-private bills. Judicial-where state consents to suit.

STATE	LIABILITY CONTROLLED BY	REMEDY
New Jersey	N.J. Stat. Ann. sec. 59:1-1 et seq.-Tort Claims Act, Immunity abolished in most cases, exception for discretionary acts and others.	N.J. Stat. Ann. sec. 59:8-1 et seq.-Judicial, file claim with Attorney General or agency, then pursue remedy in court.
New Mexico	Lucero v. New Mexico State Highway Department, 55 N.M. 157, 228 P.2d 945 (1951)-Tort action against state may not be maintained without legislative permission. N.M. Stat. Ann. sec. 5-6-20-Suits for negligence may be maintained against governmental entities. N.M. Stat. Ann. sec. 64-25-9-Waiver of Immunity for operators of state vehicles.	N.M. Stat. Ann. Sec. 5-6-18 et seq. and sec. 64-25-9-Judicial, but no judgment shall run against governmental entity unless covered by liability insurance.
ew York	N.Y. Judiciary Law sec. 8-Waiver of Immunity from liability.	N.Y. Judiciary Law sec. 9 et seq.-Judicial, suit brought in Court of Claims.
North Carolina	N.C. Gen. Stat. sec. 143-291 et. seq.-Authorizes claims for negligence against state agencies, judgment against employees paid by state.	N.C. Gen. Stat. sec. 143-291-Administrative, Industrial Commission hears and determines suits, award not to exceed $30,000. N.C. Gen. Stat. sec. 153A-435-Judicial, plaintiff must waive any right to jury.
North Dakota	N.D. Cent. Code sec. 39-01-08-State's Immunity waives as to suit involving state vehicle, to extent of insurance coverage. Spielman v. State, 91 N.W. 2d 627 (N.D. 1958)-State Immune; no general waiver for torts. Employees are not similarly Immune.	Judicial, if Immunity waived.

STATE	LIABILITY CONTROLLED BY	REMEDY
Ohio	Krause v. State, 285 N.E. 2d 736 (1972)-No legislative consent to suit has been given by General Assembly; Article 1, sec. 16 of Constitution is not self-executing as consent to suit.	Ohio Rev. Code Ann. sec. 127.11-Administrative, though suit not permitted, claims may be filed with Sundry Claims Board, which can give relief.
Oklahoma	11 Okl. St. Ann. sec. 1751 et seq.-Governmental Tort Liability Act, subjects municipalities to tort liability. Allows indemnification of officers and employees by a governing body.	11 Okl. St. Ann. sec. 1751 et seq.-Judicial; also if settlement exceeds $1,000, it must be approved by District Court and entered as judgment. 11 Okl. St. Ann. sec. 1763 Administrative, a governing body of a municipality may honor a "moral obligation" regardless of legal liability.
Oregon	Ore. Rev. Stat. sec. 30-265-Subject to limitations, every public body is liable for its torts and those of its officers, employees, and agencies; exceptions include discretionary functions.	Ore. Rev. Stat. sec. 30.260 et seq.-Judicial, notice to state agencies required for action to be maintained. Public body may indemnify public officers.
Pennsylvania	Sweigard v. Department of Transportation, 454 Pa. 32, 309 A.2d 374 (1973) Sovereign Immunity prohibits actions in tort. Immunity was disregarded in lower court case; Snyder v. Shamokin Area School District, 226 Pa. Super. 369, 311 A.2d 658 (1973).	12 P.S. sec. 1281-Judicial, if legislature were to waive immunity from liability.

STATE	LIABILITY CONTROLLED BY	REMEDY
hode Island	R.I. Gen. Laws Ann. sec. 9-31-1-State and political subdivisions liable in same manner as private persons.	R.I. Gen. Laws Ann. sec. 9-31-1 et seq.-Judicial, recovery limited to $50,000 if governmental function involved.
South Carolina	S.C. Code Ann. sec. 10-2621 et seq.-Governmental entity liable in motor vehicle cases (no other liability established). S.C. Code Ann. sec. 1-234-Defense of officers and employees by the Attorney General.	Judicial, where Immunity waived.
South Dakota	Conway v. Humbert, 82 S.D. 317, 145 N.W.2d 524 (1966)-Upholds governmental Immunity for tort in public function.	SDCL sec. 21-32-1 et seq.-Legislative, Office of Commissioner of Claims created to investigate claims and submit findings to Governor and legislature. Findings are advisory, do not adknowledge liability, sovereign Immunity not waived. Original action in Supreme Court provided for claim disallowed by state auditor
Tennessee	Tenn. Code Ann. sec. 23-3301 et seq.-Removal of Immunity from suit of any governmental entity, except those exempt pursuant to sec. 23-3303, in certain limited instances: motor vehicles, unsafe streets, dangerous structures, and negligence in non-discretionary function.	Tenn. Code. Ann. sec. 23-3313 et seq.-Administrative and Judicial. File claim with governmental entity; if denied, institute action in Circuit Court.

STATE	LIABILITY CONTROLLED BY	REMEDY
Texas	Tex. Rev. Civ. Stat. art. 6252-19-Each governmental unit liable under conditions that a private person would be liable, except for discretionary functions and intentional torts. No punitive or exemplary damages.	Tex. Rev. Civ. Stat. art. 6252-19-Judicial; recovery limited to $100,000 per person, $300,000 per incident, $10,000 property damage.
Utah	Utah Code Ann. sec. 63-30-1 et seq.-Government Immunity Act, waives immunity for negligent operation of motor vehicle and torts of employee except for discretionary functions and intentional torts. "Employee" includes volunteers.	Utah Code Ann. sec. 63-30-12 et seq.-Administrative and Judicial. File claim with government agency and Attorney General; if claim denied, institute action in District Court. Judgment may not exceed insurance coverage.
Vermont	Vt. Stat. Ann. title 12, sec. 5601-State liable for torts of employees, except discretionary function, intentional torts. Vt. Stat. Ann. title 29, sec. 1403-Where state purchases liability insurance, it waives Sovereign Immunity from liability to extent of coverage.	Vt. Stat. Ann. title 12, sec. 5601 et seq.-Judicial Tort Claims Act bestows exclusive jurisdiction on County Courts. Limits: $75,000 per person, $300,000 per incident.
Virginia	Elizabeth River Tunnel District v. Beecher, 202 Va.452, 117 S.E. 2d 685 (1961)-There is no statute in Virginia granting the power to sue the state in tort.	Elizabeth River Tunnel District v. Beecher, 202 Va. 452, 117 S.E.2d 685 (1961)-Legislative, only legislature, not judiciary, can consent to suit of state.

STATE	LIABILITY CONTROLLED BY	REMEDY
Washington	Wash. Rev. Code Ann. sec. 4.92.010-Any person having a claim against the state shall have right of action in the Superior Court. Wash. Rev. Code Ann. sec. 4.92.0100State waives Immunity from liability for tort actions. But discretionary acts still Immune. Evangelical United Brethren Church v. State, 67 Wash. 2d 246, 407 P.2d 440 (1965). Wash. Rev. Code Ann. sec. 4.92-070-Attorney General may defend employees.	Wash. Rev. Code Ann. sec. 4.92.010 et seq.-Judicial file claim with state auditor prior to bringing suit.
West Virginia	W. Va. Code Ann. sec. 14-2-4-State satisfies claims which it should in equity and good conscience pay; establishes Court of Claims to handle claims.	W. Va. Code Ann. sec. 14-2-4 et seq.-Legislative and administrative. Court of Claims has jurisdiction over claims against state that but for constitutional Immunity could be maintained in regular courts. Court is advisory and recommendatory to state legislature and agencies.
Wisconsin	Wis. Stat. Ann. sec. 345.05-State and municipality liable for negligent operation of its motor vehicles. Holytz v. Milwaukee, 17 Wis. 2d 26, 115 N.W.2d 618 (1962)-Removed tort Immunity as defense to liability. However, Townsend v. Wisconsin Desert Horse Association, 42 Wis. 2d 414, 167 N.W. 2d 425 (1969) stated that neither Holytz nor Wis. Stat. Ann. sec. 285.01 constituted an actual consent by state to be sued in tort, and that Wis. Stat. Ann. sec. 895.43 applied to tort actions against political subdivisions not the state or its agencies.	Wis. Stat. Ann. sec. 345.05-Judicial.

STATE	LIABILITY CONTROLLED BY	REMEDY
WYOMING	Chavez v. Laramie, 389 P.2d 23 (Wyo. 1964)- State is Immune from suit in tort.	Williams v. Eaton, 443 F. 2d 422 (10th Cir. 1971)- Legislative, any change in status of immunity from suit must be effected by the legislature.

*NOTE: Material contained in Appendix I is from "Liability in Correctional Volunteer Programs" a project of The American Bar Association, Commission on Correctional Facilities and Services and Young Lawyers Section, 1976.