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How to Avoid Police Liability

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How To Avoid Police Liability

The majority of police liability claims can be broken down into three categories. Those categories are: **(1) unlawful search and seizure claims**; **(2) excessive force claims**; and **(3) automobile accident (negligence) claims**. This article will discuss each of these three areas of litigation and make practical suggestions about avoiding each type of claim.

I. Unlawful Search and Seizure Claims

The most prevalent type of police liability claim is the claim of unlawful search and seizure. Unlawful search and seizure claims are those in which an individual or his property is unlawfully searched and/or seized by the Police. If the United States Constitution is violated during an arrest, search, or seizure of a person or property, the evidence obtained by the Police pursuant to the unlawful conduct must be excluded by the courts in the suspect's criminal prosecution. Furthermore, the person may have a valid Fourth and/or Fourteenth Amendment violation claim against the officer, his supervisors, and the employer.

The best way to avoid this type of liability is to ensure that your police officers are trained frequently on these issues, as the Courts are issuing new opinions in this highly litigated area on a daily basis. In addition, police departments should ensure that its policies address these issues. If an officer is appropriately trained and the necessary policies are in place, it is unlikely that an officer would violate an individual's civil rights. Nevertheless, if a person's rights are violated, it will be virtually impossible for that individual to succeed in a civil rights suit against the officers' supervisors, the department, or the employer if the officer was appropriately trained and these suggested policies are in place. However, it is important to remember that policies are not sufficient if the custom in the police department is to ignore the policies. If such is the case, it is necessary to begin disciplining those officers who flagrantly violate the policies. Allowing the custom to continue will result in supervisor and employer liability, regardless of how good the policies are.

A. Warrant Preference

The best way to avoid police liability for an unlawful search or seizure is to require police officers to get an arrest or search warrant whenever practicable. If an arrest or search warrant is obtained, the courts are more likely to clear the officer of any wrongdoing, so long as he did not make a false statement to the judge in obtaining the search and/or arrest warrant. A policy should be implemented requiring all officers to obtain a warrant whenever possible.

If the information used in obtaining the search and/ or arrest warrant is based on an anonymous tip, the officer must first verify much of the information before seeking the warrant; otherwise, the warrant will not be valid, and the search or arrest could result in liability.[1] In addition, if information from a confidential informant is used in obtaining a warrant, the officer must set forth specific facts in the affidavit for warrant which indicate that the informant is reliable. If your department routinely relies on anonymous tips and/or confidential informants, training and department policies in this area could serve as a useful technique to prevent liability.

B. Warrantless Searches and Arrests

If it is not practicable to obtain a warrant prior to conducting the search and/or arrest, then the officer must be aware of his rights, as well as the suspect's rights, in order to avoid liability. It is axiomatic that a police officer is permitted to arrest a person, without a warrant for a misdemeanor or felony committed in his presence or for a felony not committed in his presence, so long as there is probable cause for making the arrest .[2] A frequent question is whether the officer has probable cause to arrest a suspect for DUI following an accident in which the officer did not personally observe the suspect driving the vehicle but has probable cause to believe that the person is intoxicated. The answer to this question is yes, so long as the suspect admits to the officer that he was the driver of the vehicle.[3]

1. Consent

In searching a suspect's property without a warrant, the best way to avoid liability is to have the owner of the property consent to the search. I have handled numerous cases in which the officer obtained consent to search from an owner who later denied that he had consented. The easiest way to avoid this frequent problem is to enact a policy that requires the officer to obtain the owner's signature on a consent to search form. This requirement makes incredible sense when the officer is seeking to search a home or business. At the very least, the officer should avoid requesting the owner to consent without a fellow officer present. Of course, if the officer is requesting an owner for consent to search his vehicle, police vehicle cameras with microphones are the absolute best way to obtain consent that cannot later be denied.

2. Search Incidental to Arrest and "Exigent Circumstances"

Absent a warrant or consent to search, an officer can search a person's property incidental to arrest. This type of search is limited to the suspect's person and the immediate area surrounding the suspect.[4] In addition, an officer may enter a home without a warrant or consent to search if exigent circumstances exist. It is important that officers are trained to know what is considered "exigent circumstances." A policy that sets forth those circumstances that the courts consider to be exigent would be useful to the officer and could help avoid employer liability if the officer fails to follow the policy.

3. Automobile Search

An automobile can be searched upon a finding by the officer that there is probable cause to believe that evidence of a crime will be found. However, as stated previously, consent to search should always be requested first.

An additional way to search a vehicle is upon being impounded by the police, pursuant to an "inventory search", so long as there is a policy in effect that requires searches of impounded vehicles. Police departments should develop an "inventory search" policy for several reasons. The obvious reason is that it is a great tool to allow officers to search a vehicle that they otherwise could not. The second reason is to ensure that items in the vehicle when seized are not lost, stolen, or falsely reported to be lost or stolen. In other words, such a policy helps reduce police liability. The policy should require the searching officer to complete an inventory form which the owner is requested to sign. It is not rare for impounded vehicle owners to file false claims about items missing from their impounded vehicle. Of course, without an inventory form, it would be hard to prove otherwise.

4. Search of Person

An officer may search a person without a warrant if the officer has reasonable suspicion to believe that the person is engaged in criminal activity and could be armed and dangerous.[5] In doing so, the officer must identify himself as a police officer and may conduct a limited search of the outer clothing of the suspect ("pat-down search") in an attempt to discover weapons which might be used to assault him. An individual's presence in a high crime area is not sufficient to justify a "pat-down search." In addition, mere running upon seeing a police officer is not reasonable suspicion to justify chasing the individual and conducting a "pat-down search." However, if the individual is in a high crime area and flees upon seeing a police officer, the officer has reasonable suspicion to give chase and conduct a "pat-down search."[6] In my training of police, it is apparent that officers typically do not understand this rule of law. Numerous officers that I have spoken to believe that if a person runs from them, the person can be chased down and a pat-down search can be conducted, regardless of where the

incident occurred. This is simply not true. Officers should be trained and retrained, and police departments should develop policies on this subject. Therefore, if an officer chases an individual in violation of the policy and injures him in the tackle, the ultimate suit that follows will at least not be successful against the supervisors, department, or employer.

II. Excessive Force

The second type of claim against a police officer is one of excessive force. An officer may be held liable for excessive force when he uses more force than necessary to subdue a suspect. The United States Supreme Court has held that "[o]ur Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it."[7] In determining how much force to use, the officer should consider the following factors: (1) the severity of the crime at issue; (2) whether the suspect poses an immediate threat to the safety of the officers or others; and (3) whether he is actively resisting arrest or attempting to evade arrest by flight.

Police officers are typically taught PPCT Resistance Control Continuum. Set forth in a chart, PPCT Resistance Control Continuum provides what force should be used under which circumstances. In order to avoid police liability, every department should adopt this chart as their policy on force. If the officer uses more force than allowed in the policy, the officer's supervisors, the department, and his employer would likely escape liability. Of course, it is again worth mentioning that if officers routinely use excessive force, without regard to the department's policies, then a custom of excessive force has been established and the officer's supervisors, department, and employer will be held liable. As stated previously, if this is the case, the department must begin disciplining those officers who violate the excessive force policy in order to change the custom and prevent liability.

An additional way to avoid excessive force claims is to ensure that all officers are appropriately trained on the many defensive tactic techniques that are available. Furthermore, in subduing a suspect, the officers should be encouraged to use one of those techniques every time. I have had numerous excessive force cases that were dismissed by the judge because the officer simply used a defensive tactic technique. The issue is whether the officer acted reasonable under the circumstances. Certainly it is hard to argue that the officer did not act reasonable when he used a defensive tactic technique that he had been taught at the Academy. Furthermore, officers should be required to include the fact that they used a defensive tactic technique in subduing the suspect in their report. It is extremely hard for a litigant to overcome this documentation in an excessive force case.

Finally, some police departments that I represent have started requiring their officers to complete and submit a "use of force" form every time that force (beyond handcuffing) is used against a suspect. This form should be helpful in defending future excessive force claims since the policy requires the officer to include the type of force used, i.e., defensive tactic technique. Furthermore, because supervisors can gauge the type of force being used on the streets by the officers, it should be apparent if there is a custom of excessive force that needs to be addressed, which should result in reduced liability of the supervisors, department, and employer.

III. Automobile Accident (Negligence) Claims

A third category of police liability claims are negligence cases. These typically involve those in which a suspect or innocent bystander is injured in an automobile accident due to a police officer's negligence. In Kentucky, a police officer of a municipal corporation is not immune from this type of suit. Furthermore, his employer, i.e., the municipal corporation, can be held liable under the theory of respondeat superior, if the officer was acting in his capacity as an employee.

However, at the writing of this article, the issue of whether a sheriff's deputy can be held liable for negligent operation of his vehicle is still questionable. A recent Kentucky Court of Appeals decision held that a Kentucky State Police Officer or sheriff's deputy is entitled to the defense of qualified immunity if the officer is en route to an emergency call or, presumably, chasing a suspect that has committed a serious offense. This case is currently pending before the Kentucky Supreme Court. Nevertheless, the law

is clear that the sheriff's deputy's employer, the county, cannot be held liable due to the doctrine of sovereign immunity.

In order to reduce liability in this area of the law, departments should develop policies on procedures used in operating a police cruiser. In Kentucky, KRS 189.940 allows an officer in responding to emergency calls or in pursuit of a violator of the law to exceed the speed limitations, proceed past red stop lights or stop signs, and operate his vehicle on the left side of the road if the normal lanes of traffic are blocked. In doing so, the officer is required to illuminate the vehicle's warning lights and sound the vehicle's siren. Although this statute is mandatory to all officers, it is not known by all officers. As such in order to ensure that all officers are aware that he is required to illuminate his warning lights and sound the siren at all times during the emergency, departments should develop policies adopting this statute. Furthermore, the policy should provide that the officer is to exercise due regard for the safety of others when operating his vehicle in derogation of the normal traffic laws. This policy may help prevent accidents; at the very least, if an accident does occur, the municipal corporation can argue that because the officer was acting in derogation of the City's policies the City should not be held liable.

With respect to high speed chases, the National Highway Traffic Safety Administration attributes 3,000 deaths in the past decade to high speed police pursuits. The United States Supreme Court has held that in order to prove a U.S. Constitutional violation in high speed chases, the injured party or his estate must prove that the officer's conduct was so egregious, so outrageous, that it may fairly be said to shock the conscience.[8] Obviously, this is a hard standard to prove. However, if the injured person or his estate sues a municipal officer and his employer under Kentucky's negligence standards, he must only prove that the officer breached a duty of care owed to the injured or dead person. As such, the standard is much less under this theory. In order to prevent liability, police departments should develop very strict policies that regulate and/or prohibit these types of vehicular pursuits in certain circumstances.

Such policies should allow a high speed pursuit only if the officer has probable cause to believe that the person pursued has committed a felony, and then only if the person is believed to be an immediate danger to himself or others. For example, suspects who have committed the offense of felony shoplifting should not be pursued at high rates of speed, endangering the lives of the suspect, the officer, and the public. In addition, the policy should require an officer who finds himself in a high speed chase to be in constant contact with a supervisor, who has the authority to order the termination of the pursuit at anytime. Factors to be considered by the supervisor should include: (1) the congestion of the area; (2) weather, road, and lighting conditions; (3) the officer's skill level; (4) the number and age of the passengers in the suspect vehicle; (5) the speed of the vehicle; and (6) the severity of the crime the suspect has committed.

In other words, the policies should allow the officer to enter into a pursuit of a suspected criminal only when the need for immediate capture outweighs the danger created by the pursuit itself.

IV. Conclusion

Governmental entities and supervisors are typically held liable for their officers' unlawful conduct when the officer was acting pursuant to an established custom or policy or in cases when the officer is not properly trained. As such, it is incumbent upon police departments to ensure that the appropriate policies are in place and that the officers receive adequate training. Adopting the policies suggested in this article as well as providing the recommended training should help avoid police liability.

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1. Illinois v. Gates, 462 U.S. 213 (1983).
2. U.S. v. Watson, 423 U.S. 411 (1976)
3. Cowan v. Commonwealth, 215 S.W.2d 989 (Ky. 1948).
4. Chimel v. California, 395 U.S. 752 (1969)
5. Terry v. Ohio, 392 U.S. 1 (1968).
6. Illinois v. Wardlow, 528 U.S. 119 (2000)
7. Graham v. Conner, 490 U.S. 386, 396 (1989).
8. County of Sacramento v. Lewis, 523 U.S. 833 (1998).

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Prior to practicing with **Denton & Keuler**, Stacey served as Assistant Commonwealth Attorney for McCracken County. In so doing, she developed a reputation of integrity among local public officials and prosecutors and gained significant insight into many 1983 Civil Rights actions. Since joining the firm in 1997, Stacey has counseled and trained various police departments in western Kentucky and has defended numerous police officers, municipalities, and counties in police liability lawsuits.

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