

POLICE CIVIL LIABILITY UNDER STATE AND FEDERAL (Section 1983) LAW

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OVERVIEW

- Police civil liability – state and federal law
- Common Claims Re:
 - Detention
 - Arrest
 - Search
 - Force
 - Retaliation
 - Discrimination
- Welf & Inst § 5150 Claims – force and the ADA
- Civil Code § 52.1 Claims
- Federal qualified immunity and state statutory immunities
- Federal Rule 68 and CCP § 998 offers; effect on attorney's fees

LAWS THAT AUTHORIZE THE LAWSUIT

- Federal Claims
 - 42 U.S.C. § 1983
 - Makes entire federal constitution actionable as a claim for money damages
- Government Claims Act
 - Gov. Code § 820(a) as to officers
 - Gov. Code § 815.2 as to cities

DETENTION

(Pages 9-12)

- Did detention occur? Test: Reasonable person would believe he or she can walk away.
- Standard: “Reasonable suspicion” person is involved in criminal activity.
- Reasonable duration rule.
- Orders for officer safety are valid.
- Requiring ID – Law unsettled during pedestrian detention.
 - (Berkeley Police Training Bulletin - Ex. A to the paper)

DETENTION - DURING SEARCH WARRANTS (Page 13)

- During search warrants, occupants may be:
 - Detained duration of the search
 - In handcuffs
- Exceptions:
 - Handcuffs may violate 4th Amendment when used to restrain:
 - 11-year old occupant for 15 minutes
 - Unclothed gravely disabled person for several hours

DETENTION - MAY BECOME *DE FACTO* ARREST (Pages 13-14)

- If a detention becomes unreasonable, it becomes a *de facto* arrest requiring probable cause to arrest.
 - Factors on whether detention becomes unreasonable include:
 - Detention prolonged beyond reasonable period
 - Use of handcuffs
 - Movement of the detainee to different location

ARREST

(Pages 14-19)

- Probable cause is the standard for arrest.
 - “Fair probability” suspect committed the crime.
 - Evaluate through eyes of the officer.
 - Probable cause for any crime makes arrest valid, even if officer did not think of the correct crime.
 - No duty to further investigate once probable cause arises.
 - Officer’s motive is irrelevant.
 - Exceptions are discrimination and possibly retaliation.

ARRESTS FOR MINOR CRIMES; STATE AND FEDERAL LAW DIFFER (Pages 16-18)

- Federal law: Custodial arrest for *any* crime is lawful.
- State law: For misdemeanors and infractions:
 - Crime must be in officer's "presence" or
 - Officer must be making a citizen's arrest.
- Infractions: Officer must cite-release in the field, if person provides ID and signs citation.
- Misdemeanors:
 - Officer has discretion to cite-release in the field or book at jail.
 - If booked at jail, jailor *must* cite-release after booking, unless exception applies. Pen. Code 853.6
 - Common exceptions to cite-release rule in Section 853.6 are: (1) warrants, (2) DUI, (3) severe intoxication, (4) offense likely to continue or a person's safety will be jeopardized, and (5) the prosecution of the offense would be jeopardized.

SEARCH - DURING DETENTIONS

(Pages 19-21)

- Pat-down search during detention.
 - Requires articulable belief person is armed and dangerous.
- Search for ID during detention is unsettled.
 - Can search passenger compartment of vehicle for ID during traffic citation, if person states does not have ID.
 - Pocket search for ID might be lawful where suspect states does not have ID, but officer feels or sees wallet outline in pocket.
 - State cases: This is lawful.
 - Federal *unpublished* case: This is unlawful.

SEARCH - INCIDENT TO ARREST

(Pages 21-23)

- Must be a *custodial* arrest
- Field citation for misdemeanor does not trigger search incident to arrest rule.
- For custodial arrest:
 - Pockets and bags/containers ok.
 - Area under arrestee's "immediate control" ok.
 - *Gant* prohibits vehicle passenger compartment search based *solely* on incident to arrest, unless arrestee is still "unsecured and within reaching distance." However, passenger compartment search allowed if there is probable cause evidence of the crime will be found.
 - *Riley* prohibits cell phone search without a warrant or exigent circumstances.

SEARCH WARRANTS

(Pages 23-24)

- Leaving premises in disarray is ok.
- Unnecessarily destructive behavior violates the Fourth Amendment.
- State law bars such claims:
 - *Baughman*: Claim for destroyed property during search warrant is barred by Gov Code § 821.6.
 - Penal Code § 1531 provides immunity for forcing door open after no answer after reasonable time.

STRIP SEARCHES

(Pages 24-28)

- Basic parameters: no touching private areas, same gender (if possible), and private place.
- Allowed in 4 situations (2 at jail and 2 in field):
 1. *Florence* (2012): If going into general jail population.
 - However, state law requires 3-hour period to make bail first.
 2. If “reasonable suspicion” exists during booking period.
 - Factors include arrest charge, criminal history, conduct.
 - State law also requires written ok from supervisor.
 3. Field strip search of narcotics parolee/probationer.
 4. Field strip search of person named in narcotics search warrant.
- Physical body cavity search requires warrant + medical personnel.
(Exhibit B to paper is a model strip search policy that complies with these requirements.)

FORCE (Pages 28-34)

- Reasonable force, not least amount of force.
- *Graham* factors:
 - Objective test – “reasonable officer”
 - Severity of crime
 - Level of threat
 - Resistance or flight
- Detentions: Grasping arm ok; handcuffs ok if needed.
- Arrest: Reasonable force ok under Pen Code § 835a; need not retreat.
- Gun Pointing: Can be an unlawful use of force, if the threat level is not significant.

FORCE – STATE LAW ISSUES

(Pages 32-34)

- *Hayes*: Claim of negligent use of *deadly* force can be based on negligent *pre-force* tactics even if deadly force was reasonable at moment used.
- *Cf.* Federal law: Negligent pre-force tactics *not* actionable under 4th Amendment if force was reasonable at the moment used, unless the tactic was also unlawful.
- *Hayes* left 2 questions open:
 1. Can a negligent pre-force tactics claim be made in *non-deadly* force case?
 2. Can a negligent pre-force tactics claim arise in an *arrest* situation? (*Hayes* was not an arrest situation. *Cf.* Penal Code § 835a gives the officer a statutory privilege to use force to arrest without retreat. Case law also states without waiting.)

SECTION 5150 CASES – USE OF FORCE AND REASONABLE ACCOMMODATION (Pages 35-38)

- State law (negligent tactics claim):
 - *Hayes*: A negligent tactics claim can arise as follows:
 - (a) If there is no immediate need to act;
 - (b) The officer does not gather info about the person and request assistance from available psychiatric emergency personnel *before* making contact; and
 - (c) As a result, deadly (and non-deadly?) force is used; then
 - (d) A jury will decide the negligent tactics claim.
- Federal law (reasonable accommodation claim):
 - *Sheehan*: An ADA claim can arise as follows:
 - (a) If there is no immediate need to act;
 - (b) A violent confrontation is likely to occur if force is used to immediately take the person into protective custody; and
 - (c) Force is immediately used; then
 - (d) A jury will decide whether the “reasonable accommodation” rule under the ADA required the officer to “use the passage of time to defuse the situation” or “non-threatening communication” rather than immediately proceed with force.

EFFECT OF *HAYES* AND *SHEEHAN* IN 5150 CASES (Pages 37-38)

When there is no immediate need to act, the officer should:

- Utilize a records check/collect information about the subject before contact;
- Call in staff with mental health expertise, if available; and
- If the person is likely to physically resist being taken into protective custody, proceed slowly with non-threatening language as a “reasonable accommodation.”

DISCRIMINATION (Pages 38-39)

- 14TH Amendment Equal Protection Clause.
(Civil Code §§ 51.7 and 52.1 discussed below.)
- Valid detention or arrest violates the Equal Protection Clause, if it is the product of “selective enforcement,” e.g. based on race.
- Evidence of racial *animus* required to proceed to trial.

CIVIL CODE § 52.1 (Pages 44-49)

- Civil Code § 52.1: “If a person ... interferes ... or attempts to interfere by *threats, intimidation, or coercion*, with the *exercise* ... of rights secured by the Constitution or laws of the United States, or the rights secured by the Constitution or laws of this state,” the individual can bring “a civil action for damages.”
- Damages can include treble damages, a \$25,000 penalty, and attorney’s fees.
- *Carvalho* : Federal courts are bound by pronouncements of the California Supreme Court on state law, but if none, must follow Court of Appeal cases, unless there is convincing evidence the Supreme Court would hold otherwise.
- *Shoyoye* and *Austin B.*: “Threats, intimidation, or coercion” require “intentional” wrongful conduct.
- *Shoyoye*: Interference with a right must be “deliberate or spiteful.”
- Federal district court *published* cases conflict on whether wrongful intent required.
- *Unpublished* federal district court cases trend toward not requiring wrongful intent, especially for a claim of excessive force.
- *Gates*: Tort immunities are applicable to a Section 52.1 claim.

CIVIL CODE § 51.7 (Page 50)

- Civil Code § 51.7: All persons “have the right to be free from any violence, or intimidation by threat of violence, committed against their person or property *because* of their race, color, religion [etc].”
- Requires proof of discriminatory animus.
- *Gates*: Tort immunities are applicable to a claim under Section 51.7.

STATE TORT IMMUNITIES (Pages 50-54)

- When the officer has a specific immunity from liability or a common law defense, city is usually also immune. Gov. Code § 815.2(b).
- Officer has statutory immunity for:
 - Decisions relating to the deployment of police services and failing to make an arrest. Gov. Code § 846.
 - Arrest reasonably believed to be lawful. Pen. Code § 847(b). Use when (a) the enforceable scope of a statute is ambiguous, or (b) the facts give rise to arguable probable cause. But see Gov. Code § 820.4.
 - Acts and omissions in a criminal investigation (except force and arrest). Gov. Code § 821.6 and *Amylou R.* Includes property damage, defamation, etc.
 - Malicious prosecution. Gov. Code § 821.6.
 - *Decision* to take person into protective custody under Section 5150. Welf. & Inst. Code § 5278 and *Sheehan*.

FEDERAL QUALIFIED IMMUNITY

(Pages 54-55)

- Qualified immunity (QI) applies to “all but the plainly incompetent or those who knowingly violate the law.”
 - QI applies to reasonable mistake of fact
 - QI applies to reasonable mistake of law
- QI applies if the law is not “clearly established” in a “particularized sense.”
 - “Clearly established” means the “existing precedent must have placed the statutory or constitutional question *beyond debate*.”
- Arrests: QI applies, “if a reasonable officer *could have* believed that probable cause existed to arrest.”
- Force: QI applies, unless the amount of force used was “*clearly* unlawful.”
- Immediate interlocutory appeal allowed, if the denial of QI is based on a question of law such as whether the law was clearly established or whether the undisputed facts entitle the officer to qualified immunity.

OFFERS OF JUDGMENT/SETTLEMENT – EFFECT ON ATTORNEY’S FEES (Pages 59-63)

- Prevailing plaintiff on Section 1983 claim entitled to attorney’s fees.
- Attorney’s fees award = high exposure even in small damages case.
- Federal law:
 - FRCP 68(d): If the offer is *more* than the jury award + fees/costs through date of the offer, then:
 - No post-offer fees AND plaintiff pays defendants’ post-offer costs.
 - Rule 68 offer – decide *early* in the case because plaintiff’s attorney’s fees alone may exceed the offer if made late in the case.
 - Rule 68 offer - two options
 - \$30,001, *including* all recoverable reasonable fees and costs through the offer.
 - Good: Exposure limited to stated number
 - Bad: Difficult to prove offer was more favorable than award + fees through offer date
 - \$30,001, *plus* all recoverable reasonable fees and costs;
 - Good: Better option if likely to be rejected b/c can directly compare offer w/ jury award
 - Bad: Uncertain exposure to fees, if accepted

Offers Continued

- Rule 68 - City can probably make a *joint* Rule 68 offer (for itself and officer) without allocating the amount each defendant is offering and without allowing *entry of judgment* against the officer.
- Rule 68 offer can be conditioned on both plaintiffs accepting.
 - Plaintiff A offered X dollars and Plaintiff B offered Y dollars.
 - Can condition offer on *both* plaintiffs accepting, if not designed to be rejected.
- State law CCP § 998 dissimilarity:
 - 998 offer *cannot* be conditioned on multiple plaintiffs' acceptance.
- State law CCP § 998 similarities:
 - CCP § 998 uses the same rule to compare offer to trial result.
 - City and officer can probably make joint 998 offer.
 - 998 offer can be conditioned on *dismissal*; no entry of judgment problem as to officer even arises.

CONCLUSION

- Important issues remain unresolved.
- Update clients to:
 - reduce exposure,
 - enhance understanding, and
 - facilitate good government.