

MUNICIPAL TORT AND CIVIL RIGHTS LITIGATION UPDATE

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POLICE LIABILITY—EXCESSIVE
FORCE, SEARCH AND SEIZURE,
QUALIFIED IMMUNITY.

District of Columbia v. Wesby, 138 S. Ct. 577 (2018)



Facts

- Police officers respond to complaint about loud music and illegal activities in a vacant house.
- Officers enter, smell marijuana, there are beer bottles and cups of liquor on the filthy floor, a make-shift strip club in the living room, a used condom on a window sill, and a naked woman and several men in an upstairs bedroom.

Facts

- Some partygoers ran away, others hid.
- Some said it was a bachelor party, but couldn't say who it was for.
- Others said they were invited by "Peaches."
- Peaches not there.

Facts

- Officers call Peaches on the phone, and she first says she had permission to be there, then admits she did not actually lease the premises.
- The owner confirms that Peaches was not leasing the place.
- Officers arrest 21 partygoers for illegal entry; charges subsequently dropped.

District Court Proceedings

- 16 plaintiffs sue for wrongful arrest.
- District court grants summary judgment to plaintiffs – no probable cause given that officers had no reason to believe that the plaintiffs knew that Peaches was not authorized to grant them entry.
- No qualified immunity.
- Jury awards \$680,000 in damages.
- Court grants almost \$1 million in attorney fees.

Circuit Court Decision

- D.C. Circuit affirms.
- No probable cause.
- No qualified immunity.

Supreme Court

- Reverses on both probable cause and qualified immunity.
- “Considering the totality of the circumstances, the officers made an ‘entirely reasonable inference’ that the partygoers were knowingly taking advantage of a vacant house as a venue for their late-night party.”

Supreme Court –Key Facts For Probable Cause

- Neighbors confirmed that the house had been vacant for months.
- No moving boxes or clothes indicating “Peaches” had moved in.
- “Most homeowners do not live in near-barren houses. And most homeowners do not invite people over to use their living room as a strip club, to have sex in their bedroom, to smoke marijuana inside, and to leave their floors filthy. The officers could thus infer that the partygoers knew their party was not authorized.”

Supreme Court –Key Facts For Probable Cause

- Partygoers acted guilty – some ran, others hid.
- Gave evasive answers to questions: “Based on the vagueness and implausibility of the partygoers’ stories, the officers could have reasonably inferred that they were lying and that their lies suggested a guilty mind.”
- Peaches was evasive: “[T]he officers could have inferred that Peaches told the partygoers (like she eventually told the police) that she was not actually renting the house, which was consistent with how the partygoers were treating it.”

Supreme Court – Legal Standard For Probable Cause

- Totality of circumstances the key.
- Circuit Court improperly focused on individual facts-- erroneously concluding that if no single piece of evidence by itself constituted probable cause, none existed.
- Lower court “mistakenly believed that it could dismiss outright any circumstances that were ‘susceptible of innocent explanation.’”
- “[P]robable cause does not require officers to rule out a suspect’s innocent explanation for suspicious facts.”

Supreme Court – Qualified Immunity

- Exercises discretion to rule on immunity, because of the importance of the issue.
- Once again notes that it has not yet stated what constitutes clearly established law other than its own cases.
- Other than the most obvious cases require plaintiff to point to a robust consensus of cases showing the conduct was improper.
- No such showing here –single D.C. Circuit case.

Impact Of Decision

- Clarifies that probable cause is a broad standard.
- Officers have considerable discretion in weighing evidence and making credibility determinations.
- Helpful in Ninth Circuit, which has some troublesome case law on duty to investigate.
- Reaffirms the plaintiff's duty to show clearly established law to get around qualified immunity.

Kisela v. Hughes, 138 S.Ct. 1148 (2018)



Facts

- Officer Kisela and his partner receive 911 call that a woman was hacking a tree with a kitchen knife.
- 911 caller flags them down, describes the woman and says she was acting erratically.
- Officers see a woman in a driveway of a nearby house, with a chain link fence separating her from the officers.

Facts

- A woman matching the description given by the 911 caller emerges from the house with a knife and approaches the other woman.
- Officers approach, calling for her to drop the knife.
- The woman ignores the commands and is standing 6 feet from the other woman when officer Kisela fires and wounds her.

District Court Proceedings

- Plaintiff sues for excessive force.
- District court grants summary judgment to officer Kisela based on qualified immunity.

Ninth Circuit Decision

- Ninth Circuit reverses.
- Finds factual issue whether force was excessive –not clear that Hughes was attacking anyone.
- No qualified immunity because it is “clearly established” that officers can only use deadly force when suspect poses a threat.

Supreme Court

- The Supreme Court reverses in an 8-2 per curiam opinion.
- Officer entitled to qualified immunity because law was not clearly established on use of force in the specific circumstances confronting the officer.

Supreme Court –Qualified Immunity Analysis

- Again notes that it has repeatedly admonished the Circuit courts that other than in the most obvious case, an officer is entitled to qualified immunity unless a “robust consensus” of cases involving similar facts provide the officer with notice that the conduct is improper.
- Use of force is highly fact specific, hence the need to cite cases with very similar facts in order to overcome immunity.

Impact Of Decision

- Very beneficial to defense of excessive force claims.
- The Court's description of clearly established law as case law that “***squarely governs the specific facts*** at issue,” is the Court's most stringent application of qualified immunity.
- Has prompted a backlash against qualified immunity.

Bonivert v. City of Clarkson, 883 F.3d 865 (9th Cir. 2018)



Facts

- Police respond to a domestic disturbance call at the home of the plaintiff, Bonivert.
- Bonivert physically threatened girlfriend and their child.
- Girlfriend and child leave apartment.
- Bonivert refuses to let police enter.
- Girlfriend gives police permission to enter.
- Back up officers arrive and police force entry, tase Bonivert.

District Court Proceedings

- Bonivert sues for excessive force and unlawful entry.
- District Court grants qualified immunity.

Ninth Circuit Decision

- Ninth Circuit reverses.
- Clearly issue of fact on excessive force.
- Entry unlawful under *Georgia v. Randolph*, 547 U.S. 103 (2006) -- where a co-occupant of jointly occupied property grants consent, but another occupant refuses to allow entry, police cannot enter without a warrant, absent recognized exceptions to the warrant requirement.

Ninth Circuit Decision –Integral Participation Doctrine

- All officers potentially liable, even those who did not participate in entry.
- Individual officer conduct need not rise to level of constitutional violation for liability.
- It is enough that the officer was an integral participant in the course of conduct that resulted in the violation.

Impact Of The Decision

- Underscores application of Randolph – many officers unaware that one tenant cannot authorize entry over objections of others.
- Reaffirms troublesome integral participation doctrine – broad net of potential liability.

Smith v. City of Santa Clara, 876 F.3d 987 (9th Cir. 2017)



Facts

- Plaintiff's daughter was on probation for a serious felony and one of the conditions of her probation was consent to a search her residence.
- Officers had information the daughter was involved in a recent auto theft and stabbing, and went to plaintiff's home -- the address she listed as her residence in her last probation report.
- Plaintiff refused to let officers enter; ultimately relents after show of force.

District Court Proceedings

- Plaintiff sues for Fourth Amendment violation under section 1983 and Bane Act.
- Court grants summary judgment on section 1983 claim based on qualified immunity.
- Jury finds against plaintiff on Bane Act claim.
- Plaintiff only appeals Bane Act Claim.

Ninth Circuit Decision

- Affirms district court.
- Rejects plaintiff's argument that search was unreasonable as a matter of law under *Georgia v. Randolph* because daughter's consent to search did not override plaintiff's right to bar entry.
- U.S. Supreme Court does not use consent as basis for probation searches.
- Such searches are based on special needs doctrine – reasonable suspicion of serious crime and probationer's diminished expectation of privacy.

Impact Of Decision

- Upholds probation searches, so long as some reasonable justification.
- Creates tension with California decisions which justify probation searches based on consent.
- Routine probation searches where one occupant objects may be invalid under Randolph.

Zion v. County of Orange, 874 F.3d 1072 (9th Cir. 2017)



Facts

- Deputies called when Mr. Zion attacks his mother with a knife.
- First deputy to arrive is slashed in the arm by Zion.
- Second deputy sees the attack and fires nine times at Zion from 15 feet.
- Zion flees, closely followed by the deputy.
- Zion falls to the ground and deputy fires another 9 rounds into him from 4 feet away.
- Deputy walks away for several seconds, then returns and stomps Zion in the head 3 times.

District Court Proceedings

- Zion's estate sues for excessive force under Fourth and Fourteenth Amendments.
- District Court grants summary judgment to the defendants –no excessive force because officer acted reasonably in responding to threat posed by Zion.

Ninth Circuit Decision –Fourth Amendment Claim

- Ninth Circuit reverses in part.
- Triable issue of fact on whether force was unreasonable for Fourth Amendment Claim.
- First volley – no problem, as officer clearly had reason to shoot.
- Second volley and head stomps may be excessive force if Zion no longer capable of resisting.

Ninth Circuit Decision –Fourteenth Amendment Claim

- Reversed in part.
- First and second volleys okay because officer's actions were not “unrelated to any legitimate law enforcement purpose,” and officer had no time to reflect on his actions.
- Head stomps might be a due process violation because officer had time to reflect on his actions, and jury could find Zion was not resisting.

Impact Of Decision

- Reaffirms Ninth Circuit rule that court will not simply accept officer's testimony in deadly force cases, but will rigorously examine the evidence.
- Highlights the different standards governing Fourth and Fourteenth Amendment claims.
- Underscores the impact of video in force cases.

Thompson v. Rahr, 885 F. 3d 582 (9th Cir. 2018)



Facts

- Plaintiff pulled over for reckless driving.
- Plate check reveals plaintiff was convicted for felony possession of a weapon and is driving on a suspended license.
- Officer arrests for the license offense, searches vehicle and finds a weapon.
- While waiting for back up, officer draws weapon and points it at plaintiff's head.

District Court Proceedings

- Plaintiff sues for excessive force – no need to point weapon at him as he was not resisting in any way.
- District court grants summary judgment to officer, finding that force was reasonable and that officer entitled to qualified immunity.

Ninth Circuit Decision

- Ninth Circuit affirms.
- Triable issue of fact on whether force was excessive – display of deadly force where suspect is not resisting violates the Fourth Amendment.
- However, officer entitled to qualified immunity because law was not clearly established.

Impact Of Decision

- Strong warning that even the display of deadly force may give rise to liability.
- Good case on qualified immunity – applies “clearly established law” prong with some bite in terms of need to cite case with very similar facts to overcome immunity.

Estate of Lopez v. Gelhaus, 871 F. 3d 998 (9th Cir. 2017)



Facts

- One afternoon Deputies observed a male in his mid to late teens (Mr. Lopez) walking on the sidewalk away from them, carrying what appeared to be an AK-47 assault weapon, hand on pistol grip, barrel down.
- Activate lights and “chirp” siren.
- Car stops around 60 feet behind Lopez and officers exit, taking cover behind doors.

Facts

- Deputy Gelhaus commands Lopez to “Drop the weapon,” at least once, possibly several times.
- Lopez does not comply, but starts to turn towards the officers with the barrel of the weapon beginning to rise.
- Gelhaus shoots and kills Lopez.
- Later determined that Lopez had a replica AK-47, with the orange barrel tip removed.

District Court Proceedings

- Lopez's estate sues for excessive force under Fourth Amendment.
- District Court denies Gelhaus summary judgment.
- Even though undisputed that barrel of weapon was rising, factual issue whether it had risen to a point justifying use of deadly force.
- No qualified immunity because law is clear that officers may not use deadly force unless suspect poses grave threat of harm to officers or the public.

Ninth Circuit Decision

- Ninth Circuit affirms, 2-1.
- Reaffirms rule that summary judgment granted “sparingly” in deadly force cases and that court will not simply accept officer’s account.
- Court must independently review all evidence and draw any inference in favor of plaintiff.

Ninth Circuit Decision –Excessive Force

- Triable issue of fact on reasonableness of force, as jury could find that barrel had not yet risen enough to pose a threat.
- Jury could find that Gelhaus should have known that Lopez may not have heard the siren “chirp” or his command and was simply turning to respond.
- Jury could find that Gelhaus should have known it was a replica weapon.

Ninth Circuit Decision –Qualified Immunity

- No qualified immunity because law was clearly established that officers may not use deadly force unless suspect poses significant threat, and here there is a factual issue whether a reasonable officer would believe Lopez posed a threat.

Impact Of Decision

- Reaffirms Ninth Circuit's approach to deadly force cases, with defendant's evidence being discounted and effectively requiring defendant to disprove any contrary version.
- Very loose application of clearly established law standard for qualified immunity.
- Arguably inconsistent with *Kisela v. Hughes*.

Byrd v. Phoenix Police Dept., 885 F.3d 639 (9th Cir. 2018)



Facts

- Police officers stopped plaintiff for riding a bike without a headlight at night.
- Plaintiff asserts officers searched his belongings and then “beat the crap” out of him.
- Plaintiff eventually pleads guilty to conspiracy to commit possession of a dangerous drug.

District Court Proceedings

- Plaintiff sues officers for excessive force and wrongful search.
- District court dismisses excessive force claim because allegations are too vague.
- Unlawful search claim barred by *Heck v. Humphrey*, 512 U.S. 477 (1994) which prohibits section 1983 claims where success on the merits would necessarily imply the invalidity the plaintiff's state court criminal conviction.

Ninth Circuit Decision

- Reverses on excessive force claim – plaintiff's use of "a colloquial, shorthand phrase," i.e. police "beat the crap out of" him sufficient to state a claim.
- Reverses on wrongful search claim because no evidence was admitted at the time of the guilty plea, hence Heck is not implicated.

Impact Of Decision

- Continues trend of applying Heck very narrowly to state court convictions secured by a guilty plea.
- Consensus: Heck will not bar a claim based on unlawful search and seizure unless the plea agreement itself specifies the factual basis of the plea and the record unmistakably demonstrates that the unlawfully seized evidence forms the basis of the charges.

Cornell v. City & County of San Francisco, 17 Cal. App.5th 766 (2017)



Facts

- Plaintiff, an off-duty police officer trainee dressed in street clothes, takes a morning run in Golden Gate Park and stops to rest for a moment.
- Patrol officers thought plaintiff looked “worried,” and grew suspicious because the area was known for illicit drug activity.
- As officers approached him, he resumed his run, and they pursued him, eventually joined by other officers.

Facts

- Plaintiff is confronted by a dark figure with a drawn weapon who says he will shoot him.
- Plaintiff runs to a nearby officer for help, and is arrested.
- No evidence of any crime is found, but plaintiff is charged with violating PC 148.
- Charges dropped, but plaintiff is terminated as a probationary police trainee.

Trial Court Proceedings

- Plaintiff sues City and officers for violation of the Bane Act, Cal. Civ. Code § 52.1, negligence, assault and battery, false arrest and imprisonment, and tortious interference with contract and/or economic advantage.
- Bifurcated trial: Stage 1 -- jury finds for defendants on assault claim; deadlocked on other claims. Court determines unlawful arrest as a matter of law.
- Stage 2: Jury awards \$575,000 in damages and court grants \$2 million in attorneys' fees.

Court of Appeal Decision –Wrongful Arrest

- Court affirms finding of unlawful arrest -- no evidence to support even a reasonable suspicion that Cornell was engaging in any unlawful activity in the first place.
- Rejects defendants' contention that even if there was no probable cause to arrest Cornell, they could have reasonably believed that there was probable cause and hence were entitled to immunity under PC section 847.
- Section 847 shields officers from liability for an arrest made with probable cause; it does not incorporate the federal doctrine of qualified immunity.

Court of Appeal Decision –Bane Act

- Even though jury rejected assault claim, other acts could constitute “threat, intimidation or coercion” required by the statute.
- This was more than a false arrest claim -- evidence shows that the officers acted with a specific intent to demean plaintiff and cause him to lose his job.
- Section 52.1 does not require proof of some coercive or intimidating act separate from the underlying constitutional violation – just proof the defendants had the specific intent to threaten, intimidate or coerce the plaintiff.

Impact Of Decision

- Clarifies the limited scope of PC section 847 immunity.
- Adds to conflict on whether Bane Act claim requires proof of some coercive or intimidating act separate from the underlying constitutional violation.
- Distinguishes *Shoyoye v. County of Los Angeles* (2012) 203 Cal. App. 4th 947, an over-detention case which required proof of separate act.

Claim Statute

Santos v. Los Angeles Unified School District, 17 Cal.App.5th 1065 (2017)



Facts

- Plaintiffs injured in collision with a Los Angeles School Police Department (LASPD) vehicle.
- Attorney files claim with the City of Los Angeles, which rejects it, noting that LASPD was a separate public entity and not part of the City.
- Attorney contacts the LASPD and is told it is an independent public entity, and that a claim form could be downloaded from the Department website and submitted to the LASPD.
- Attorney submits claim to LASPD, and after it is denied, files suit.

Trial Court Proceedings

- During discovery, attorney learns that vehicle was owned by the Los Angeles Unified School District (LAUSD).
- Amends complaint to name LAUSD as a defendant.
- Trial court grants summary judgment to LAUSD based on failure to file a claim as required by GC sections 911.2 and 945.6.

Court of Appeal Decision

- Appellate court reverses.
- Factual issue whether LASPD employees may have misrepresented the nature of the Department and concealed LAUSD responsibility for the actions of LASPD officers, thus estopping the LAUSD from asserting the claims statute to bar the action.
- Key facts -- LASPD website indicated it was an independent agency, and not an arm of the LAUSD—even going so far as to provide a claim form that could be downloaded from the LASPD website.

Impact of decision

- Reaffirms that public entities need to be careful in terms of their public communications concerning the nature of public agencies.
- Make certain that web-based platforms for specific municipal departments or agencies are clear about the relationship between the municipality and the department or agency.

Immunities

Arvizu v. City of Pasadena, 2018 WL 1452235 (2018)



Facts

- The 21 year old plaintiff and his friends decided to go ghost-hunting in a closed city park at 3:00 am.
- Attempting to access an unimproved trail in the park, plaintiff lost his footing, slipped down the hillside, across the trail and off the edge of a retaining wall, suffering serious injuries.

Trial Court Proceedings

- Plaintiff sues for dangerous condition, asserting that failure to provide warning of the retaining wall created a hazard.
- Trial court grants summary judgment to the City, finding no dangerous condition, and that suit is barred by the Trail Immunity of GC section 831.4 (b).

Court of Appeal Decision

- Court affirms based on immunity and finds no need to address dangerous condition issue, although noting that plaintiff and his friends “were someplace they weren't supposed to be, breaking the law, taking a shortcut in the dark, doing something they were unprepared for.”
- Even though plaintiff disclaimed any defect in the trail, he was attempting to access it, and as his suit was premised on its location in relation to the retaining wall –hence the immunity applied.

Impact of Decision

- Clarifies broad scope of section 831.4(b) immunity and underscores strong public policy considerations underlying the immunity.
- Helpfully distinguishes *Garcia v. American Golf Corp.* (2017) 11 Cal.App.5th 532 which held that a plaintiff who was injured by an errant golf ball while walking on a trail adjacent to a City owned golf course, could recover, notwithstanding the immunity of section 831.4(b).

Thanks!

