



**TML Risk Management Pool**  
**POLICE LIABILITY UPDATE**  
**January 2009**

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#### **I. CIVIL LIABILITY AND QUALIFIED IMMUNITY**

In addition to civil liability issues, many of the cases outlined in this update deal with the legality of a police action and the admissibility of evidence in a criminal trial.<sup>1</sup> In these cases, there is also the issue of potential civil liability under federal statutes, specifically the Civil Rights Act, 42 U.S.C. § 1983 or for state law violations. § 1983 does not create rights but rather imposes civil liability on any person who, acting under color of state law, deprives another person of the "rights, privileges, or immunities secured by the Constitution and laws."

Qualified immunity is a police officer's right "not to stand trial or face the other burdens of litigation." This immunity is designed to aid in the effective functioning of government and is an implicit recognition that police officers, acting reasonably, may err. The concept of qualified immunity acknowledges that "it is better to risk some error and possible injury from such error than not to decide or act at all." However, as the cases below illustrate, this immunity may be removed if: (1) a protected constitutional right has been violated, (2) the right was "clearly established", and (3) the plaintiff proves that the officer's conduct was unreasonable in light of the clearly established constitutional right.

##### **A. SEARCHES AND SEIZURES**

###### **1. Introduction**

Since searches and seizures involve individuals' constitutional rights, an officer and his agency are potentially at risk under the Civil Rights Act and for a violation of the Fourth Amendment. A department must have valid rules and policies on consensual searches, training, supervision, including discipline for violations, and officers must follow the rules, policies and the court cases on the subject.

The Fourth Amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The purpose of the Fourth Amendment is to protect people from unreasonable searches and seizures by the government. In general, searches and seizures must take place only when a

police officer has probable cause of criminal activity. Probable cause is defined as sufficient information, based on the totality of the circumstances, to give a reasonable police officer a belief that a crime is being, has been, or is about to be committed. (The “totality of the circumstances” standard was reaffirmed in the case of U.S. v. Arvizu<sup>2</sup>). In terms of justifying a search, probable cause exists when there are “reasonable grounds for belief” that there is “fair probability that contraband or evidence of a crime will be found in a particular place.” An exception to the probable cause requirement is the stop and frisk power under Terry v. Ohio<sup>3</sup> which requires only “reasonable suspicion,” a lesser standard than “probable cause.” These two standards have been the basis of Fourth Amendment law for several years and remain essentially unchanged. However, there have been recent developments in other areas related to searches and seizures.

A search and seizure without a warrant is presumed by courts to be unreasonable under the Fourth Amendment. In spite of the warrant presumption, most searches take place without a warrant. The U.S. Supreme Court has created many exceptions to the warrant requirement including exigent circumstances, hot pursuit, searches incident to lawful arrest, seizures in plain view, vehicle searches, inventory searches, border searches and roadblocks. For example, in Cuffy v. Van Horn,<sup>4</sup> the 6<sup>th</sup> Circuit held that officers who entered a home without a warrant and then shot a suspect inside as he descended from a hiding place holding a machete had exigent circumstances justifying their actions. The suspect had allegedly already assaulted several people with the machete and had threatened to chop up his cousin's small dog. Additionally, he fled from officers to his house, and refused to obey orders to drop the machete.

## **2. Search and Seizure of a Home or Business**

The US Supreme Court recently addressed in Muehler v. Mena,<sup>5</sup> whether police officers could detain a suspect in her home during the search of her house pursuant to a search warrant and whether the questioning of her immigration status amounted to a seizure. The plaintiff, Iris Mena, was detained in handcuffs during a gang related search of the premises that she and several others occupied. The police defendants were lead members of a police detachment executing a search warrant of these premises. Mena sued the officers under 42 U.S.C. § 1983 arguing that the use of handcuffs to detain her during the search violated the Fourth Amendment as an unreasonable detaining and that the officers' questioning of her immigration status during the detention constituted an independent Fourth Amendment violation.

The Supreme Court upheld the holding that officers executing a search warrant for contraband have the authority "to detain the occupants of the premises while a proper search is conducted."<sup>6</sup> Mena's detention for the duration of the search was reasonable because a warrant existed to search the home and she was an occupant of the home at the time of the search. The use of handcuffs on Mena was reasonable because the governmental interests outweighed the marginal intrusion. The governmental interests include the safety of the officers and the occupants and the likeliness that the occupants detained can aid the officers in the search. The court held that the imposition of handcuffs was a separate intrusion in addition to the detention but upheld the use of handcuffs as reasonable because as a search for weapons during a gang related search is inherently dangerous and handcuffs minimize risk to officers and occupants. Further, the duration of the use of handcuffs was reasonable as it was limited to 2 to 3 hours.

The officers' detention of Mena in handcuffs during the execution of the search warrant was reasonable and did not violate the Fourth Amendment. Additionally, the officers' questioning of Mena about her immigration status did not constitute an independent Fourth Amendment violation because there was no evidence that the detention was prolonged by the questioning, and therefore, there was no additional seizure within the meaning of the Fourth Amendment. The court has "held repeatedly that mere police questioning does not constitute a seizure."<sup>7</sup>

### **3. Search and Seizure with a Search Warrant**

Even with a search warrant police officers must be careful to not expose themselves to potential liability. In Groh v. Ramirez,<sup>8</sup> the U.S. Supreme Court held that qualified immunity for officers executing a search warrant does not apply if "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." In Groh, the officers in question did not receive the benefit of qualified immunity because the search warrant they executed was invalid on its face. In Ramirez v. Butte-Silver Bow Company<sup>9</sup>, officers on a search team were held to be entitled to qualified immunity in a 1983 action by the owners of the home searched based on a defective search warrant, as the officers acted reasonably in relying on their superiors' statement that a warrant had been obtained. However, the leader of the search team was not entitled to qualified immunity, as the warrant failed to identify the place to be searched or the things to be seized, and thus was so facially deficient that the leader could not have reasonably presumed the warrant to be valid if he had read it.

To prevent potential liability issues from arising, officers must be cautioned to complete the search warrant itself as completely as possible, including the most specific description possible of the property to be seized. The discretion as to the issuance of the warrant must rest with the judicial officer, not the law enforcement officer. Executing a search warrant should be made ministerial by the terms of the warrant, as issued by a judicial officer.

### **4. Search and Seizure of a Person**

As noted above, an exception to the probable cause requirement is the stop and frisk power under *Terry v. Ohio* which requires only "reasonable suspicion," a lesser standard than "probable cause." What officers must look for is what exactly does "reasonable suspicion" include. In a recent case, Lee v. Hefner<sup>10</sup>, the 6<sup>th</sup> circuit held that a suspect's "retreat" could provide the basis for "reasonable suspicion," the lesser standard than "probable cause." After seeing a man in dark clothing in an alley in the highest crime activity zone in the city, the officer determined that reasonable suspicion existed for a *Terry* stop. The suspect was a middle-aged autistic and mute adult, who retreated by taking off running in the alley upon seeing the officer. Assuming that the adult was resisting arrest and attempting to flee, the officer forced the disabled adult to the ground, placed his knee in the adult's back, and used a wrist lock. The court found that based on the facts of the case, the police officer on patrol could have reasonably believed that an initial "retreat" upon seeing the officer justified an investigatory stop. The court held that the officer in the case was entitled to qualified immunity in a federal civil rights lawsuit.

If a constitutional right is not clearly established, qualified immunity will be upheld. In one of the more controversial cases recently Beard v. Whitmore Lake School District,<sup>11</sup> school teachers carried out, at the direction of a police officer, strip searches of more than twenty male and female students after another student reported a theft of money. The court found that these searches were unconstitutional but held that the defendants were entitled to qualified immunity because the law was not clearly establish that the searches were unconstitutional under these circumstances when the incident took place.

## **5. Interrogation**

Interrogations are heavily scrutinized, especially when they involve minors and children. To remove a suspect for an interrogation there must be consent or some other exception absent probable cause. The court in the case of Myers v. Potter,<sup>12</sup> that an officer cannot rely solely on a Miranda waiver for consent to a search or seizure. In that case, the plaintiff was a 14 year old boy whose father was suspected of homicide. Investigators went to the plaintiff's home (where he was living with his mother, Ms. Myers) and interrogated him. There, the plaintiff signed a Miranda waiver. The investigators, including an officer Hutchins, asked Ms. Myers for permission to take her son to the local Franklin County District Attorney's Office for additional questioning. Though Ms. Myers initially refused, she relented after being told that he would return in one hour. Although she wanted to accompany the plaintiff, she was also told that her presence was unnecessary. The officers took the plaintiff to the District Attorney's Office in a completely different county where he was interrogated for four hours. At that time he signed a second Miranda. He was refused permission to go home, being placed in foster care for three weeks. Although the criminal court excluded most of the plaintiff's testimony at trial, his father was convicted of the crimes.

The plaintiff later brought a 42 U.S.C. § 1983 civil rights action against the police officer and others for violations of his rights under the Fourth and Fourteenth Amendments. The plaintiff's § 1983 claim was based on an alleged Fourth Amendment violation from an unreasonable search and seizure. The court found that the involuntary removal of a suspect from his home to a police station absent probable cause or judicial authorization is a violation of the Fourth Amendment.

The court found that Officer Hutchins had no judicial authorization to take the plaintiff into custody when he was initially seized. There was no evidence to support probable cause for an arrest for material witness nor does the signing of a Miranda waiver determine whether a person has given consent to removal and detention. Further because the plaintiff's mother's consent was given because of a misrepresentation and the seizure clearly exceeded the scope of the consent, it is also not effective.

The court also removed qualified immunity for Officer Hutchins as it would have been clear to a reasonable officer in Hutchins's position that the "consent" obtained from the plaintiff and his mother was legally insufficient to justify the plaintiff's seizure and detention, especially after he had requested to go home. Further, the court found that the plaintiff's clearly established constitutional rights were violated.

## 6. Search and Seizure of a Vehicle

The U.S. Supreme Court held that in determining whether an officer had probable cause to make an arrest, a court must examine the events leading up to the arrest, and then decide “whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to” probable cause<sup>13</sup>. . . . The Court found that where the standard is probable cause, a search or seizure of a person must be supported by probable cause particularized with respect to that person.

In Cunningham v. Sisk,<sup>14</sup> the 6<sup>th</sup> Circuit upheld qualified immunity for officers who arrested a speeder and drew their weapons during the encounter. In this case 3 officers pulled over Cunningham, an African American around 3:30 a.m. in the parking lot of an unlit rest area for speeding at 99 miles per hour in a 70 mph zone. During the encounter, the officers pointed their handgun at Cunningham, searched Cunningham's person and car and checked the status of Cunningham's license and registration. The searches turned up nothing. Cunningham was arrested and pled guilty to speeding. He then pursued a suit against the officers as to claims of civil rights violations under 42 U.S.C. § 1981 and §1983, and under state law.

Cunningham claimed under Section § 1983 a violation of his Fourth Amendment right to be free from unreasonable search and seizure because he claims that he was falsely arrested, that his vehicle was unlawfully searched and that the officers used excessive force. The court ruled that because the officers had probable cause to believe a traffic violation occurred, the seizure was lawful. The court also upheld the search of the car upholding the decision that "when the occupant of a vehicle is arrested, the police may lawfully search the passenger compartment."<sup>15</sup> The officers' use of force was not excessive in that Cunningham stopped his vehicle in a secluded and unlit rest area at 3:30 am and therefore, the officers' behavior was reasonable. The court found that the subjective motivation of the officers was irrelevant to the Fourth Amendment analysis<sup>16</sup>.

Cunningham also alleged a § 1983 claim based on the Fourteenth Amendment's Equal Protection Clause. The court found that a plaintiff must show “purposeful discrimination” in an officer's valid enforcement of laws to prove a claim based in the Equal Protection Clause. Because Cunningham failed to show purposeful discrimination in the officers' enforcement of traffic laws, his claim failed.<sup>17</sup>

Cunningham also claimed a violation of § 1981. The court noted that it was unclear whether § 1981 even applied in these cases but analyzed the issue. To succeed a plaintiff must show (1) that he is a member of a racial minority, (2) that the defendant acted with an intent to discriminate against him on the basis of his race and (3) that the defendant's race discrimination concerned one or more of the protected activities enumerated in Section 1981 (a).<sup>18</sup> The court found that the evidence suggested that the officers would have been unable to determine Cunningham's race when he was pulled over and therefore, even if § 1981 applied, the officers could not be held liable for violating it under the facts in the case.

## B. ARREST AND SEIZURE

### 1. False Arrest or Imprisonment with No Warrant

The arrest of a person without a warrant must be supported by probable cause (sufficient information, based on the totality of the circumstances, to give a reasonable police officer a belief that a crime is being, has been, or is about to be committed). It is a fact-based analysis. If an officer fails to establish probable cause, there is a chance that qualified immunity will be removed. The 6<sup>th</sup> Circuit removed qualified immunity in Jernigan v. City of Royal Oak<sup>19</sup> for false arrest claims of bar patrons officers arrested in response to another patron's fictitious story that he had been robbed in the bar's bathroom. The officers placed the plaintiffs under arrest without first asking the complaining patron to identify them as the supposed robbers. The court found that in spite of ultimately speaking to the complaining patron, and releasing the arrestees (finding that they did not match the description of the non-existent robbers), a reasonable jury could find that the detention lasted longer than necessary as an "investigatory stop," and that there was no probable cause for an arrest at the time. Probable cause has been found to exist if officers encounter someone pointing a gun at them,<sup>20</sup> or even if they merely saw someone with an unlawful weapon, such as a switchblade.<sup>21</sup> If probable cause exists, officers will be entitled to qualified immunity in false arrests cases.

The federal district court recently addressed the issue of police liability with respect to invalid but *facially* valid warrants in Cunningham v. Reid.<sup>22</sup> Officers in that case were called to the scene of a possible domestic dispute. After they arrived, they arrested the plaintiff for an outstanding warrant. That warrant turned out to be invalid. In addition to state law claims, the plaintiff, Cunningham, brought § 1983 claims against the officers, and the city. In seeking a § 1983 claim, the plaintiff argued that he was subject to an unconstitutional search and seizure, and that excessive force was used. The Fourth Amendment demands that the seizures be supported by probable cause. Cunningham argued that his Fourth Amendment rights were violated at two points: first, when he was handcuffed and detained and, second, when he was arrested based on a warrant that was later determined to be invalid.

The court found that the detention between the time he was detained and his arrest was not a violation of the Fourth Amendment. A person may be detained for a brief period until a judicial officer can make a determination of whether there is probable cause to justify continued detention.<sup>23</sup> A temporary seizure *may* be justifiable if a reasonable articulable suspicion of criminal activity actually exists.<sup>24</sup> The call to the police warning of a domestic dispute provided this justification. Further, the court found that the officers had probable cause to arrest the plaintiff pursuant to an outstanding assault warrant and that the officers were entitled to qualified immunity. It was irrelevant that the warrant later turned out to be invalid. Probable cause exists when the police have "reasonably trustworthy information ... sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense."<sup>25</sup>

In a similar case, McCutchen v. Tipton County,<sup>26</sup> the courts removed qualified immunity. The plaintiff arrestee alleged that her arrest (for violation of probation concerning prostitution) was made with a warrant that was not valid on its face, and which had been altered after it was issued by the handwritten insertion of her proper married last name. The plaintiff claimed that

her identity had been stolen ten years before and that the jurisdiction seeking the suspect had both a photograph of the suspect and her fingerprints, but failed to send those items to the county officers who arrested her.

The plaintiff's claims under 42 U.S.C. § 1983 were for violation of the Fourth and Fourteenth Amendments. In addition, she also brought claims under state law for negligence against Tipton County and for negligence and false imprisonment against the individual defendants. The court held that on the § 1983 claims that the officers violated the Fourth Amendment's requirement that all arrests be reasonable and made on probable cause and that Tipton County deprived her of liberty without due process in violation of the Fourteenth Amendment.

As in Cunningham v. Reid, the city tried to argue that (1) "a false arrest made pursuant to a valid warrant does not establish a Constitutional deprivation" and (2) the officers are entitled to qualified immunity. However, the court found the facts led to a different result than in Cunningham v. Reid because "an apparently valid warrant does not render an officer immune from suit if his reliance on it is unreasonable in light of the relevant circumstances, [which include] other information that the officer possesses or to which he has reasonable access."<sup>27</sup> The officers' reliance on the warrant was unreasonable and therefore the defendant officers were not entitled to qualified immunity. McCutchen differs from Cunningham in that the officers had reasonable access to information that would have shown the warrant to be invalid, chiefly fingerprints and a photograph. Also unlike in Cunningham, the Plaintiff in McCutchen was arrested and detained for much longer than a brief period. The officers had time to confirm her protestations but failed to take any actions such as verifying her fingerprints.

## **2. False Arrest or Imprisonment: Unlawful Detention**

Officers can also be held liable for action if they hold persons for an unreasonable time period. The court in Turner v. City of Taylor<sup>28</sup> removed immunity from officers that unlawfully detained (without being arraigned) a man for four (4) days and threatened him with another arrest if he did not leave his home. Supervisory officers, in the case, knew that he was being detained for an unreasonable time without being brought before a judge. It is important for an officer to take the process before a judge to determine probable cause. In another case, Mitchell v. Boelcke<sup>29</sup>, the court removed qualified immunity from a police officer that detained a man in front of his home as a suspect in an assault and robbery. The court found that the unlawful detention of him was not based on any articulated facts.

## **C. EVICTION OR FORFEITURE PROCEEDINGS**

Evictions and forfeiture proceedings can also provide the basis for liability of officers. However, the 6<sup>th</sup> Circuit has upheld qualified immunity for officers in evicting people when the officers have the legal authority to issue the vacate orders. In Sell v. City of Columbus<sup>30</sup> city code enforcement officers were not liable for federal civil rights violations because the officers had the legal authority to issue an eviction, and had grounds to do so because the residents were living in an unsanitary condition (keeping 33 dogs and four birds in a two bedroom house). In a

forfeiture case, the court has upheld the seizure of vehicles driven by males caught soliciting prostitution and the forfeiture of the vehicles if fines were not paid.<sup>31</sup>

## **D. EXCESSIVE FORCE**

### **1. Introduction**

The Fourth Amendment is also the basis for “excessive force” claims. Similar to search and seizure cases, claims of use of excessive force are analyzed under the “reasonableness” standard. The standard for excessive force claims is found in the Supreme Court case Saucier v. Katz<sup>32</sup>, holding that to overcome an officer’s claim of qualified immunity, a plaintiff must establish that (1) the facts alleged demonstrate that “the officer’s conduct violated a constitutional right” and (2) that “the right was clearly established.” The latter question involves a determination of “whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.”

In Dunigan v. Noble<sup>33</sup> the Sixth Circuit Court of Appeals held again that in determining if qualified immunity applies in excessive force cases there is a “two-fold inquiry to determine an officer’s entitlement to qualified immunity in the context of an excessive force claim.” It is important to note that the facts in these analyses are to be taken in favor of the plaintiff’s version since qualified immunity analysis takes place at summary judgment. In Cunningham v. Reid, (facts discussed above) the court removed qualified immunity on a claim of excessive force. The court sought to determine whether the force used was reasonable in light of the circumstances but the facts in the case were unclear. The officers and the plaintiff disputed virtually all of the essential facts and therefore it was impossible to determine as a matter of law whether the officers’ use of force was reasonable. As a result a trial was necessary to determine liability.

In Floyd v. City of Detroit<sup>34</sup>, a very recent case, officers who shot at an unarmed suspect were denied qualified immunity, even when one of the officers missed the suspect. After a domestic dispute, a man calls the police and states that his neighbor (Floyd) had threatened him with a shotgun when it was in fact a fence pole. Floyd left following the argument and when he returned home, two officers ran up to him, each firing one shot. The first shot missed Floyd and was fired by Officer Quaine. The second shot was fired by Officer Reynoso and struck the Floyd in the chest. Floyd sued Officer Quaine alleging excessive force. The court ruled in Floyd’s favor. Officer Quaine appealed, arguing that because his shot missed Floyd, he did not seize him within the meaning of the Fourth Amendment and was entitled to immunity. The trial court’s decision was affirmed and Quaine was not entitled to immunity. Under the circumstances, the fact that Officer Quaine’s shot failed to strike Floyd did not absolve the officer of his responsibility for participating in the events surrounding Floyd’s seizure.

### **2. Firearms Use**

In Brosseau v. Haugen<sup>35</sup>, the U.S. Supreme Court further refined the analysis in determining whether qualified immunity applies to individual officers. In Brosseau, an officer shot a suspect who ignored repeated requests to halt, and when the suspect entered into and started a vehicle. The officer believed that the suspect was an immediate threat to other officers

on the ground in the area, and to other drivers and pedestrians. The court had to determine if the officer's actions clearly violated an established constitutional right of the suspect to determine if qualified immunity would be removed. The court cited several other cases where courts found no constitutional violation when a fleeing suspect presented a risk to others. The court found that if an officer has a reasonable belief that a suspect presents a clear and grave harm to others, use of deadly force would not clearly violate the constitutional rights of the suspect, preserving qualified immunity.

However, in Smith v. Cupp<sup>36</sup>, the court removed qualified immunity for an officer who shot at a fleeing suspect. In that case, the family of deceased arrestee brought a § 1983 action against an officer alleging use of excessive force when he fired fatal shots at an arrestee fleeing in a stolen police car. The court paid special attention to the fact that the fatal shot occurred after the vehicle had passed the officer and that the arrestee had been taken into custody for the nonviolent offense of making harassing phone calls. It was held that the officer violated the arrestee's Fourth Amendment constitutional right to be free from an unreasonable seizure as he no longer posed an immediate threat to the officer after driving past him. The danger to the general public from the fleeing suspect driving a stolen police car was not so grave as to justify the use of deadly force. The arrestee's right not to be seized by deadly force was clearly established at time he was killed as it is clearly established constitutional law that an officer cannot shoot a non-dangerous fleeing felon in the back of the head.

They found that the issue was close, given the very short period of time in which the officer had to react but the 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.<sup>37</sup> The court concluded that a reasonable officer would not have felt he was in danger and had the opportunity to choose not to use deadly force to protect himself or others. The fact that it was a rapidly evolving situation does not, by itself, permit deadly force. The circuit's previous cases gave substantial deference to an officer's decision to shoot an unarmed suspect in a car chase. However, the officer must have reason to believe that the car (or the fleeing felon) presents an imminent danger.

In another vehicle case, the court decided the issue of when the plaintiffs were seized within the meaning of the Fourth Amendment. In Ferrante v. Peters,<sup>38</sup> the officers shooting at a car when the occupants ignored orders to exit and began to drive off did not result in a seizure because none of the occupants were hit and the car continued to leave without stopping. Without a seizure, the occupant's excessive force claim had to be analyzed under the Fourteenth Amendment's "shocks the conscience" due process legal standard, rather than the Fourth Amendment's reasonableness standard.

### **3. Other Physical Force**

In Alexander v. Newman,<sup>39</sup> an arrestee filed a § 1983 action as well as state law actions for negligent infliction of emotional distress and intentional infliction of emotional distress and sought punitive damages against the city of Memphis and police officials alleging that officers wrongfully arrested him and used excessive force. The court found that officers in that case approached the plaintiff, searched him and repeatedly struck him on his ribs, back and head even

after he fully submitted to arrest. The plaintiff sued the officers and their shift commander as well as the city for violation of the Fourth Amendment via § 1983.

The § 1983 claims against the officers were based on allegations that the officers used excessive force. Against the officers, the court applied the Fourth Amendment reasonableness standard and found that it is well established that the force used by the officers was unreasonable in violation of the Fourth Amendment. “[T]he right to be free from excessive force is a clearly established Fourth Amendment right,”<sup>40</sup> as it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted. As a result the court found that the officer was not entitled to qualified immunity for the Fourth Amendment violation.

Courts have found many uses of force in violation of the Fourth Amendment (the failure to handcuff a man with an obvious medical condition to his torso in front as opposed to behind his back,<sup>41</sup> the grabbing of a suspects handlebar on a moving motorcycle,<sup>42</sup> the beating of a woman with a billy club as well as jumping on her after she was incapacitated with pepper spray,<sup>43</sup> the shooting of a man with a beanbag propellant gun when he was merely trying to peacefully leave a street riot,<sup>44</sup> the striking with a baton of a suspect who had already surrendered,<sup>45</sup> as well as others.)

The court has also upheld qualified immunity for many uses of force by officers especially in cases where the safety of others is in question (the tackling of a suspect who was in physical confrontation with another officer,<sup>46</sup> the use of pepper spray by officers on a woman who was hiding under a blanket in a closet.<sup>47</sup>)

## **E. FIRST AMENDMENT**

The First Amendment is the basis of claims on freedom of speech grounds. Whenever the government seeks to regulate freedom of speech, the court weighs the interests of protecting free flow of thoughts against the interests to be served by the regulation. In this analysis, the court has placed regulations on speech into two categories: 1) an action by the government prohibiting the content of speech and 2) actions that prohibit conduct.

Actions by the government that prohibit the content of speech are presumed to be unconstitutional. The Supreme Court has defined certain exceptions to this, i.e. obscenity, defamation, and fighting words. If a regulation on speech is content-neutral, it is more likely to pass constitutional muster.

In that vein, regulations over conduct are generally given more leeway if the regulations are content-neutral. This allows the government to regulate the time, place, and manner that freedom of speech may be exercised. Regulations over speech need to be expressed with a level of specificity as broad discretion over speech is not allowed.

The courts have also made a distinction between public forums and nonpublic forums. In public forums, speech may be regulated according to reasonable time, place, and manner regulations. In nonpublic forums, speech may be regulated to reserve the area for its intended

use. Additionally, there are some circumstances in which restriction of speech can be justified by circumstances like traffic control or similar requirements.

In a recent case, Parks v. Columbus,<sup>48</sup> the 6<sup>th</sup> Circuit removed qualified immunity for actions by a police officer that violated a man's First Amendment rights. An arts council held a festival in the city streets by permit. The festival was free and open to the public but was sponsored by a private group. A man walked around wearing a sign with a religious message and distributed leaflets. A police officer threatened him with arrest if he did not leave. The court held that in spite of its being held by a private group, the festival was a traditional public forum for First Amendment purposes and that the man's First Amendment rights had been violated by the police officer. The festival was open to the public so it was not a private event. Qualified immunity was therefore removed.

## II. MUNICIPAL AND SUPERVISORY LIABILITY

### A. MUNICIPAL LIABILITY

In addition to liability to individual officers, there exists possible liability in the form of supervisory liability as well as municipal liability. The court has upheld that a municipality may be held liable under § 1983 *only* if the municipality itself caused the constitutional deprivation.<sup>49</sup> Municipalities are not liable under § 1983 for an injury inflicted solely by its employees or agents as the doctrine of respondeat superior is inapplicable to municipalities under § 1983. To prove municipal liability a plaintiff must look to whether the constitution deprivation was caused by an illegal policy or custom of the city. A plaintiff can look to (1) the municipality's legislative enactments or official agency policies; (2) actions taken by officials with final decision-making authority; (3) a policy of inadequate training or supervision; or (4) a custom of tolerance or acquiescence of federal rights violations.<sup>50</sup>

In many cases, the plaintiff seeks to prove a "custom of tolerance" by the municipality. To prove this, a plaintiff must show:

- (1) the existence of a clear and persistent pattern of [illegal activity];
- (2) notice or constructive notice on the part of the [defendant];
- (3) the [defendant's] tacit approval of the unconstitutional conduct, such that their deliberate indifference in their failure to act can be said to amount to an official policy of inaction; and
- (4) that the [defendant's] custom was the "moving force" or direct causal link in the constitutional deprivation.<sup>51</sup>

In Thomas v. Chattanooga<sup>52</sup>, the court held for the city of Chattanooga in a municipal liability action. In the case, an officer for the city of Chattanooga arrived at the scene of a possible domestic dispute. The officer looked through a window and had a partial view of the

plaintiffs, a husband and wife, and several weapons. The officer thought the wife and himself were in immediate and secondary danger from being shot by the husband. The officer responded by shooting the husband seven times. The husband and wife both claim they were merely putting away the guns. An internal investigation of the shooting came back as justified.

The plaintiffs sued the City of Chattanooga's Police Department in a municipal liability action under 42 U.S.C. § 1983. To prevail in a § 1983 suit against a municipality, a plaintiff must show that the alleged federal right violation occurred because of a municipal policy or custom.<sup>53</sup> A municipality "may not be sued under § 1983 for an injury inflicted solely by its employees or agents."<sup>54</sup>

The plaintiffs argued that the city of Chattanooga must have an unwritten policy of condoning excessive force because of the mere number of complaints previously filed against it. The court found that this evidence was insufficient to create a genuine issue of material fact on which a jury could reasonably find that such a policy exists. Further the city was not liable because the plaintiffs failed to show a municipal policy of condoning the excessive use of force. The plaintiffs' use of an expert's opinion that the city must have had such a policy simply because of the number of excessive force lawsuits filed was inadequate without any analysis of those past cases and their similarity to the current one. Failing to show other cases as relevant, the court had to rely solely on the facts of the case, which fall short of proving deliberate indifference.

Inadequacy of police training may also serve as the basis for § 1983 liability where the failure to train amounts to "deliberate indifference" to the rights of persons with whom the police come into contact. Deliberate indifference requires proof that the government entity disregarded a known or obvious risk. Inadequate training constitutes a municipal policy only if "the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers can reasonably be said to have been deliberately indifferent to the need."<sup>55</sup> For example, city policymakers know to a moral certainty that their police officers will be required to arrest fleeing felons. The city has armed its officers with firearms, in part to allow them to accomplish this task. Thus, the need to train officers in the constitutional limitations on the use of deadly force<sup>56</sup> can be said to be "so obvious," that failure to do so could properly be characterized as "deliberate indifference" to constitutional rights.

This basis for § 1983 liability was granted in City of Canton v. Harris.<sup>57</sup> In the case, the plaintiff claimed a violation of her right to receive medical care while in police custody. Her claim against the municipality in the case was based on a theory of "grossly inadequate training." She showed that the police shift commanders of the city had complete discretion on whether to allow prisoners access to medical care. The commanders had no training for this.<sup>58</sup> The court held that the inadequacy of a training policy may serve as the basis for § 1983 liability only where the failure to train amounts to "deliberate indifference to the rights of persons with whom the police come into contact."<sup>59</sup> A plaintiff must identify a deficiency in the training program and prove that the deficiency was the actual cause of the denial of the plaintiff's constitutional right. Mere proof that an officer was inadequately or negligently trained is not enough.

In Cunningham v. Reid (facts discussed above), the court once again applied the standards laid out in City of Canton v. Harris. The plaintiff in the case alleged that the City violated his civil rights by inadequately training and supervising its police officers and by inadequately investigating citizen complaints of misconduct. The court upheld that a municipality may be held liable under § 1983 only if the municipality itself caused the constitutional deprivation.<sup>60</sup> Cities are not liable under § 1983 for an injury inflicted solely by its employees or agents as the doctrine of respondeat superior is inapplicable under § 1983. The court found that that the training by the city did not amount to “deliberate indifference” to a constitutional right.

In addition, the court has found that when a plaintiff constitutional rights are not “clearly established”, a city may still be held liable if the city had a policy that was the moving force of the violation. In Gray v. City of Detroit,<sup>61</sup> the officer in the case was entitled to qualified immunity because of the “clearly established” test. However, the court ruled that the municipality may be liable under §1983 where the risks from its decision not to train its officers were ‘so obvious’ as to constitute deliberate indifference to the rights of its citizens. The rights of the citizens do not have to be clearly established under this analysis.

## **B. SUPERVISORY LIABILITY**

Supervisory liability is often intertwined with officer and municipal liability but can be imposed without a determination of municipal liability. Supervisory liability runs against the individual supervisor, and is based upon the supervisor’s responsibility for the constitutional violation. Unlike municipal liability, it does not require any proof of official policy or custom as the “moving force,”<sup>62</sup> behind the conduct. When supervisory liability is found; it is held against the supervisor in his/her individual capacity for his/her own actions or inactions in the training, supervising, or controlling subordinates.<sup>63</sup>

A plaintiff claiming supervisor liability must show that the supervisor in question had some role in training or supervision. In Alexander v. Newman (facts discussed above), the plaintiff sued the shift commander in the case claiming that the officers were acting on behalf of and under the control the shift commander when they attacked the plaintiff. Further the plaintiff alleged that the shift commander failed to train the officers properly or to instruct them in the proper use of force. The court found for the shift commander noting that he had no role in training the officers or in setting policy for the department. Also, in Loy v. Sexton,<sup>64</sup> the court found that the plaintiff failed to provide any evidence of inadequacy of training on the part of a sheriff who was not present when a deputy allegedly used excessive force. Consequently, the sheriff was held not to be liable.

## **C. DISABILITY DISCRIMINATION**

Municipalities and their police force can also be held liable for not complying with the Americans with Disabilities Act (“ADA”). A plaintiff can succeed in a suit if it can be proven that the city police department engaged in intentional discrimination against the plaintiff for being a disabled person. According to Title II of the ADA, a plaintiff may have a cause of action if it can be established that “(1) he/she has a disability; (2) he/she is otherwise qualified; and (3)

he/she is being excluded from participation in, being denied the benefits of, or being subjected to discrimination under the program solely because of his/her disability."<sup>65</sup> Further, the ADA provides that "in any action . . . commenced pursuant to this chapter, the court or agency, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee."

However, in a very recent case, Dillery v. City of Sandusky,<sup>66</sup> qualified immunity was upheld even though the plaintiff did show the city had violated federal accessibility requirements. In the case the plaintiff was confined to a wheelchair and was forced to ride it in the road instead of the sidewalks because the city had not provided proper curb cuts on the streets. Police officers stopped and ticketed her several times as cars had to swerve to miss hitting her.

The plaintiff claimed that the city and police officers had intentionally discriminated in violation of Title II of the ADA through three separate omissions or actions: (1) the city failed to install proper curb cuts and sidewalks; (2) the city failed to listen to her complaints about the inaccessibility of the streets and curbs and the City's police officers stopped her because she rode her wheelchair in the street; and (3) the city failed to train its officers about the ADA.

The court upheld qualified immunity and found that the failure of the city to install handicapped-accessible sidewalks and to train its employees about the ADA affects all disabled persons, not just the plaintiff. The court held that a plaintiff must demonstrate that a municipality had intentionally discriminated against that person specifically by failing to undertake these actions. This was keeping with a 10<sup>th</sup> Circuit case that held that "acts and omissions which have a disparate impact on disabled persons in general [are] not specific acts of intentional discrimination against [the plaintiff] in particular."<sup>67</sup> In addition, the court found that the plaintiff presented no evidence that there was inadequate training of the officers. The court also held that as the plaintiff failed to obtain any relief from the trial court, she was not entitled to an award of attorneys' fees as a "prevailing party."

### **III. DUTY TO ACT**

#### **A. INTRODUCTION**

The so called "duty to act" is a creation of the courts from the Due Process Clause of the Constitution (the Fifth and Fourteenth Amendments), which state in part:

"No person shall be . . . deprived of life, liberty, or property without due process of law . . ."

The United States Supreme Court has held the Due Process Clause does not impose an affirmative duty on state and local governments to protect their citizens from private acts of violence. However, the Court has created two narrow exceptions: (1) a duty may be created when the government has a "special relationship" with a citizen; or (2) if the government creates the danger or renders the citizen more vulnerable to a danger.

## **B. DOMESTIC VIOLENCE**

Many “duty to act” cases come from domestic violence situations. In Tanner v. County of Lenawee,<sup>68</sup> the 6<sup>th</sup> circuit upheld the standard that the government must create the danger or render a citizen more vulnerable to a danger to be held liable. In the case, officers and the county were not liable for responding to a 911 call concerning a woman's drunken estranged husband's visit to her sister's house, and failing to prevent him from shooting and killing his wife, shooting his brother-in-law and sister-in-law, and then killing himself. The court noted that nothing the officers did created or enhanced the danger. Therefore, they were not liable.

The U.S. Supreme Court rejected the claim that a person has a constitutionally protected due process property interest in having the police enforce a restraining order in Town of Castle Rock v. Gonzales.<sup>69</sup> In this case, a man in violation of a restraining order murdered his three daughters. His wife alleged that the failure of police to enforce the order resulted in the murder. The U.S. Supreme Court ultimately rejected the claim, finding that there is no constitutionally protected interest in a restraining order.

## **C. 911 SYSTEMS**

Another area where “duty to act” cases come from is in the use of 911 systems. Again the 6<sup>th</sup> circuit upheld the standard that the government must create the danger or render a citizen more vulnerable to a danger to be held liable in May v. Franklin County Commissioners.<sup>70</sup> In that case, an officer was dispatched to the residence of a woman following a 911 call. The officer decided to leave when he failed to hear any indications of a dispute inside. The woman was murdered by her boyfriend. The court failed to hold the county and officer liable as the actions by the officer neither created nor increased the danger that the woman would be killed, so there could be no liability under a "state-created danger" theory.

## **D. CRIME VICTIM**

In Jackson v. Schulz,<sup>71</sup> the 6<sup>th</sup> circuit ruled that a person had to be “in custody” for the purposes of imposing a constitutional due process right in receiving medical care. In the case, paramedics failed to give medical care to a shooting victim after they placed him in an ambulance. The court held that to determine if the paramedics had custody of the shooting victim, the test is whether the paramedics engaged in a “restraint of personal liberty.”<sup>72</sup> If so, the plaintiff would be entitled to the “custody exception” that triggers a constitutional duty to provide adequate medical care to persons such as incarcerated prisoners, those involuntarily committed to mental institutions, foster children, pre-trial detainees, and those under “other similar restraint of personal liberty.”<sup>73</sup> The court ruled that the shooting victim was not in “custody” and therefore had no constitutional due process right to receive medical care. In addition, the paramedics did not create the danger to the victim and did not cut off any private attempts to assist him since no private rescue was attempted. The court held that the paramedics were entitled to qualified immunity and could not be held liable.

## E. MOTORING PUBLIC

The court upheld the higher standard for those in custody in Jones v. Reynolds.<sup>74</sup> In the case a street drag race on a public street ended in a bystander's death, after one driver lost control of his car and crashed into the crowd. Police arrived at the scene before the race began and had an opportunity to prevent it from beginning but ultimately allowed the race to continue. First, the court ruled that the victim was not in custody and therefore not entitled to the higher standard. The court then ruled that the officers did not place any additional danger on the victim (no more than she voluntarily assumed before the officers' arrived). The court ruled that this analysis would be no different even if there were evidence that the police could have stopped the drag race but failed to.

## IV. OUT OF JURISDICTION OR OFF-DUTY POLICE OFFICERS

T.C.A. § 6-54-301 provides that the "police authority of all incorporated cities and towns shall extend to a distance of one (1) mile from the lawful corporate limits thereof, for the suppression of all disorderly acts and practices forbidden by the laws of the state . . ." The courts have consistently held that there is no police jurisdiction outside that limit. However, arrests made outside of the officer's jurisdiction have also been consistently upheld.<sup>75</sup> These cases have been based on Tenn. Code Ann. § 40-7-109 which allows citizens to make arrests and provides in part that: "A private person may arrest another: (1) For a public offense committed in his presence." Under the statute, if an officer sees a public offense committed, he may arrest the offender outside his jurisdiction, because any private person could do the same.<sup>76</sup> This is true in the case of an officer merely happening to be outside of his jurisdiction at the moment, or when passing the boundary line in fresh pursuit of a fleeing offender.<sup>77</sup>

The confusion in these situations is created by provisions in Title 38, Chapter 3, Tennessee Code Annotated that requires officers to enforce the law making it a misdemeanor to fail to do so. However, the cases interpreting TCA Section 40-7-109 make it clear that a police officer is a police officer *only* in the city that hires him or her and within the limits established in § 6-54-301. Outside those limits, they are acting only as any other private citizen could act. Further, it is generally true that officers are ordinary citizens while "off-duty."<sup>78</sup> There is no "rule of law that places a mandatory duty upon police officers to keep the peace when "off duty." The proposition that police officers are under a never-ending duty to keep the peace is contrary to existing Tennessee law.

However, the courts have held that a police officer may be acting within the scope of his employment even when they are not on the clock. In Olympia Child Development Center v. City of Maryville<sup>79</sup>, two off-duty officers collided with the plaintiff, while pursuing a traffic violator in their personal vehicle. The court held the officers' conduct was considered within the scope of his employment if: (1) it is of the kind which he is employed to perform, (2) occurs substantially within the authorized limits of time and space, and (3) is motivated, at least partially, by a purpose to serve the department.

In 2004, the General Assembly passed the Mutual Aid and Emergency and Disaster Assistance Act of 2004, which allows local governments to provide aid and emergency

assistance at the request of another local government entity. This statute should not be construed to authorize police officers to respond to calls outside their jurisdiction unless their assistance has been requested pursuant to the Act. If a police department regularly responds to calls in another jurisdiction, responding under the act is generally not appropriate. In such a situation, an interlocal or mutual aid agreement is necessary. If such an agreement is used the officer would no longer be subject to out-of-jurisdiction jurisprudence. In addition, the Act has no effect on out-of-state out of jurisdiction arrangements.

## V. HIGH SPEED PURSUIT

Although the law regarding high-speed pursuits in Tennessee has not changed dramatically over the last couple of years, several accidents, injuries and deaths occur each year as a result of these pursuits. Officers should continue to refrain from pursuing fleeing suspects except under the most egregious situations. (Officers should refer to the high-speed pursuit checklist).

The Sixth Circuit Court of Appeals has held in Epps v. Lauderdale County<sup>80</sup> that liability for injuries caused by a high-speed pursuit by law enforcement officers does not violate substantive due process unless the officers intend to harm the suspects physically or to worsen their legal plight. Although similar to the standard discussed above in the “duty to act” cases, substantive due process claims for actions taken by officers (as opposed to actions not taken by officers) are different depending on the type action taken by the officer. This standard as adopted by the United States Supreme Court in County of Sacramento v. Lewis<sup>81</sup>, applies in these types of cases, as opposed to the lesser standard of “deliberate indifference.” (The Epps case did not change the law regarding injuries to third parties created by high-speed pursuits, but only dealt with liability claims of the fleeing suspects themselves). This case has received some negative treatment by the court but remains good law.

## VI. STATE LAW LIABILITY

Historically, governmental entities have been held immune from suit absent their express waiver of that immunity.<sup>82</sup> In 1973, the General Assembly enacted the Tennessee Governmental Tort Liability Act (GTTLA), which waived in part the immunity previously afforded to governmental entities. The TGTLA provides that “[e]xcept as may be otherwise provided in this chapter, all governmental entities shall be immune from suit for any injury which may result from the activities of such governmental entities wherein such governmental entities are engaged in the exercise and discharge of any of their functions, governmental or proprietary.”<sup>83</sup> This includes “false imprisonment pursuant to a mittimus from a court, false arrest, malicious prosecution, intentional trespass, abuse of process, libel, slander, deceit, interference with contract rights, infliction of mental anguish, invasion of right of privacy, or civil rights.”<sup>84</sup>

Further, Tennessee Code Annotated § 29-20-307 provides that “[t]he circuit courts shall have exclusive original jurisdiction over any action brought under this chapter and shall hear and decide such suits without the intervention of a jury.” Because of the Act, the court will dismiss state law claims that are not brought under the TGTLA as the court recently held in Cunningham v. Reid<sup>85</sup> (facts discussed above). Most importantly for plaintiffs is § 29-20-205 of the act

which removes immunity “for injury proximately caused by a negligent act or omission of any employee within the scope of his employment…” What is important to note is where immunity has been waived (such as for the negligent acts of governmental employees) the municipality is the proper party to sue for damages. The employee, on the other hand, is immune in those circumstances.<sup>86</sup>

The Supreme Court of Tennessee recently reversed a court of appeals decision that found that the TGTLA provided immunity to cities for officer actions that cause negligent infliction of emotional distress. In Sallee v. Barrett,<sup>87</sup> a Clarksville police officer accidentally discharged his sidearm inside a gas station, causing a bullet to impact close to the plaintiff. Plaintiff brought an action against the individual officer but not the city for negligent and intentional infliction of emotional distress. The officer claimed he was immune to the suit pursuant to the TGTLA. It was the officer’s position that the City of Clarksville was the proper party because governmental entities are subject to liability for the negligent acts of its employees, and there is no exception for negligent infliction of emotional distress. The court of appeals held that the city, not the officer, was immune under the TGTLA for both any alleged negligent and intentional acts of the officer allegedly inflicting emotional harm in this matter and as a result, the officer was the only proper party defendant.

The Supreme Court reversed, holding that the TGTLA only provided immunity to cities for intentional infliction of emotional distress. Specifically, the court cited to Tennessee Code Annotated § 29-20-205, which removes governmental immunity for injuries proximately caused by a negligent act or omission of its employee. Further under § 29-20-310, if the immunity of a governmental entity is removed, the employee is immune from suit. The city, therefore, was the proper party for a suit alleging negligent infliction of emotional distress and that part of the case was dismissed for the officer.

Again, in Alexander v. Newman (facts discussed above), the court found that the plaintiff could not bring a claim against the officers for assault and battery or negligence based on statutory law because of the TGTLA. Because the City of Memphis had waived its immunity for liability as to alleged assault and battery committed by city employees the court found that no claim can be brought against city employees, including police officers, for assault and battery. The proper party is the city.

In the case, the court did find that the facts supported a claim for intentional infliction of emotional distress or outrageous conduct. The court upheld the standard laid out for finding what constitutes outrageous for an intentional infliction of emotional distress in the Restatement (Second) of Torts § 46<sup>88</sup> The court then ruled that an unprovoked beating is sufficiently outrageous under Tennessee law to support a claim for intentional infliction of emotional distress as the conduct is so outrageous that civilized society would find it intolerable. Because TGTLA does not waive municipal immunity for the tort of intentional infliction of emotional distress,<sup>89</sup> the officers were the appropriate party defendants.

In Cunningham v. Sisk (facts discussed above), the plaintiff made two Tennessee state law theories, the tort of false imprisonment or false arrest and negligence per se in violation of Tenn. Code Ann. § 39-16-403, which prohibits public officials from (1) Intentionally subjecting

another to mistreatment or to arrest, detention, stop, frisk, halt, search or seizure when the public servant knows the conduct is unlawful; or (2) Intentionally denying or impeding another in the exercise or enjoyment of any right, privilege, power or immunity, when the public servant knows the conduct is unlawful. The court found that Cunningham state claims failed because the arrest was not unlawful and there was no evidence that the officers violated the statute.

In addition to liability, the TGTLA provides that punitive damages are not recoverable against local governments unless authorized by statute.<sup>90</sup> On the other hand, punitive damages may be awarded against individual defendants under § 1983.<sup>91</sup> In addition, the court has found that when an action arises out of negligence a plaintiff cannot recover punitive damages from either a governmental entity or its employees.<sup>92</sup>

## **VII. OTHER DEFENSES**

### **A. RELEASE AGREEMENTS**

The Sixth Circuit Court of Appeals has upheld an agreement to release a city and officers from liability in exchange for a dismissal of criminal charges in MacBoyle v. City of Parma.<sup>93</sup> The court found that the Supreme Court has upheld the validity of release-dismissal agreements whereby a criminal defendant releases his right to file a civil rights action in return for a prosecutor's dismissal of pending criminal charges, as long as the agreement meets certain criteria. The enforcement of such an agreement is appropriate if a court decides that (1) it was entered into voluntarily; (2) there is no evidence of prosecutorial misconduct; and (3) the enforcement furthers the public interest. The burden of proof in this analysis "falls upon the party in the section 1983 action who seeks to invoke the agreement as a defense."

### **B. STATUTE OF LIMITATIONS**

An area of law that is extremely important for potential police defendants is when the statute of limitations begins to toll for alleged violations of civil right. In Wilson v. Garcia,<sup>94</sup> it was held that "civil rights claims are best characterized as personal injury actions and they are governed by the applicable state's statute of limitations for personal injury actions. Further the 6<sup>th</sup> Circuit held Hodge v. City of Elyria<sup>95</sup> that the statute of limitations begins to toll from the date of arrest for claims for excessive force because that is the day a plaintiff should know he has a claim. Again in Kelly v. Burk,<sup>96</sup> the court held that the statute begins to toll when the plaintiff had reason to know he had a claim.

## **VIII. POLICE PLAINTIFFS**

Increasingly city and police departments must worry about the potential liability toward police plaintiffs. Both cities and their police personnel must be increasingly careful about incidents that can end up with police officers as plaintiffs and any potential liability that may result. In a recent case, the court addressed the issue of liability to police officers for actions taken by internal investigators. In the case Monistere v. City of Memphis,<sup>97</sup> a motorist complained that officers stole from him during a traffic stop. Internal investigators for the city of Memphis stripped searched the officers but were unable to find any evidence. The police

officers brought a § 1983 action against the city, alleging that a strip search of officers in connection with an investigation violated their Fourth Amendment rights.

The court held that:

- (1) the city's practice of allowing its police investigators to conduct administrative investigations into complaints against its officers without any defined parameters was a "custom," as required to establish city's liability under § 1983;
- (2) investigators had final decision-making authority as to whether to conduct strip search, as required to establish city's liability for investigator's conduct under § 1983; and
- (3) the city's unwritten custom of allowing its police investigators "unfettered discretion" to conduct administrative investigations into police misconduct directly caused the unconstitutional strip searches.

Another case that is likely important for individual officers to know about is Shepherd v. Fregozo.<sup>98</sup> In this case, a Metropolitan Nashville police officer was injured while driving a patrol car in an accident with an uninsured motorist. The city was self-insured and does not provide uninsured or underinsured motorist coverage for patrolmen operating its fleet of patrol vehicles. The officer's own policy had an exclusion of uninsured motorist coverage under the circumstances in the case. The officer's insurance denied him uninsured motorist coverage because of the exclusion.

The court upheld the exclusion citing a 1974 Tennessee Supreme Court ruling that interpreted the uninsured motorist statute T.C.A. s 56-1152 to provide "limited" rather than "broad coverage".<sup>99</sup> Enforcement of this exclusion under these circumstances did not violate public policy in Tennessee. The legislative purpose of the statute was to provide an insured motorist a right of recovery under the uninsured motorist provisions of his policy only up to the statutory required minimum.<sup>100</sup> The court recognized that the officer was trapped in a "black hole" but concluded that the dilemma was legislative, not judicial. Since Tennessee is a less-than-broad coverage uninsured motorist state, the exclusion did not violate public policy.

The release of information from a personnel file is also a potential hotspot for liability for police departments and municipal governments. Cities have been held liable for the release of personal information, which includes the release of addresses, phone numbers, immediate family names, social security numbers, and copies of driver's licenses. The Court held in Kallstrom v. City of Columbus<sup>101</sup> that an officers' right to privacy ensured a fundamental liberty interest in "preserving their lives and the lives of their family members, as well as preserving their personal security and bodily integrity."<sup>102</sup> The court concluded that "where the release of private information places an individual at substantial risk of serious bodily harm, possibly even death, from a perceived likely threat, the 'magnitude of the liberty deprivation ... strips the very essence of personhood.' " <sup>103</sup>The Fourteenth Amendment, at a minimum, requires that the city notify an officer of a request for personal information prior to releasing this information so that they may have an opportunity to invoke their constitutionally protected rights to privacy and personal security.<sup>104</sup>

However, in Hall v. City of Cookeville, Tennessee<sup>105</sup>, the court held that the release of personnel information did not violate constitutional rights where the plaintiff's "penchant" for attention by the media led to the release of his information. In the case, the city released an officer's information after he had participated in several interviews following his shooting of a third dog while on duty. The court of appeals upheld that the police chief and city manager were entitled to qualified immunity as nothing they did (or the city) increased the risk to Hall or his family.

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71 429 F. 3d 586 (6th Cir. 2005)  
72 489 U.S. at 200  
73 Id.  
74 438 F.3d 685 (6th Cir. 2006)  
75 498 S.W.2d 107 (Tenn. Ct. App. 1973)

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76 661 S.W. 2d 854 (Tenn. 1983)  
77 20 TAM 50-23 (Tenn. Cr. App. 1995)  
78 33 S.W. 3d 713 (Tenn. 2000)  
79 1999 WL 64271 (Tenn. Ct. App.)  
80 2002 WL 1869434 (6th Cir.)  
81 523 U.S. 833 (1998)  
82 59 S.W.3d 73, 79 (Tenn.2001)  
83 T.C.A. § 29-20-205  
84 T.C.A. § 29-20-205(2) (2000)  
85 T.C.A. § 29-20-307  
86 T.C.A. § 29-20-310(b) (2000)  
87 171 S.W.3d 822  
88 Restatement (Second) of Torts § 46, comment d: The cases thus far decided have found liability only where the defendant's conduct has been extreme and outrageous. It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or \*888 even that his conduct has been characterized by "malice," or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous."  
89 171 S.W.3d 822 (See 2004WL2159020)  
90 453 U.S. 247 (1981)  
91 461 U.S. 30 (1983)  
92 561 S.W.2d 148 (Tenn.1978)  
93 383 F.3d 456 (6th Cir. 2004)  
94 471 U.S. 261, 280 (1985)  
95 126 Fed. Appx. 222 (6th Cir. 2005)  
96 2005 U.S. App. Lexis 14634 (6th Cir.)  
97 115 Fed.Appx. 845 (6th Cir. 2004)  
98 175 S.W.3d 209 (Tenn. Ct. App. 2005)  
99 510 S.W.2d 509, 513 (Tenn.1974)  
100 T.C.A. § 56-1148  
101 136 F.3d 1055 (6th Cir.1998)  
102 Id. at 1062  
103 Id. at 1064 (quoting 103 F.3d 495, 506-07 (6th Cir.1996))  
104 136 F.3d at 1067  
105 157 Fed. Appx. 809 (6th Cir. 2005)