

LIABILITY FOR USE OF FORCE

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I. In General

1999 National Survey - Justice Department's Bureau of Justice Statistics (BJS)

- | In 1999, an estimated 43.8 million people 16 years old or older, or about 21 percent of the population of that age, had contact with the police during 1999.
- | The report on police- public contact noted that more than half of these face- to-face interactions were in traffic stops.
- | Less than 1 percent of these contacts resulted in police force or threat of force.
- | An estimated 20 percent of such incidents involved only the threat to use force.
- | Approximately 422,000 people 16 years old and older were estimated to have had contact with police in which force or the threat of force was used during 1999.
- | Among blacks and Hispanics, 2 percent reported force or threatened force, compared to just under 1 percent among whites.
- | Fifty-seven percent of those involved in a police force situation reported that they had argued, disobeyed or resisted or had been drinking or using drugs at the time.

"Contacts between Police and the Public--Findings from the 1999 National Survey" (NCJ-184957),

II. Governing Law

A. Constitutional Claims

- | Three provisions in the U.S. Constitution are relevant to the use of force by government officials: the Fourth Amendment, the Eighth Amendment, and the Due Process Clause.
- | The Fourth Amendment prohibits unreasonable searches and seizures. The U.S. Supreme Court has held that within the context of arrests or other seizures of persons, the use of deadly force by police officers must be "objectively reasonable, in light of the facts and circumstances confronting [the officers] . . . judged from the perspective of a reasonable officer on the scene . . . rather than with the 20/20 vision of hindsight." *Graham v. Connor*, 490 U.S. 386, 396-397 (1989).
- | The Eighth Amendment explicitly prohibits "cruel and unusual punishments." Because of this explicit text, the Supreme Court has held that the Eighth Amendment governs the use of force appropriate for maintaining control of convicted prisoners and has framed the issue as "whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm." *Ingraham v. Wright*, 430 U.S. 651 (1977); *Whitley v. Albers*, 475 U.S. 312, 320-321 (1986).
- | The Due Process Clause (Fourteenth Amendment) prohibits the federal and state governments, respectively, from depriving any person of "life, liberty, or property, without due process of law." The Due Process Clause is potentially applicable to police use of deadly force in two general circumstances: 1) incidents where no Fourth Amendment seizure has occurred; and 2) incidents that occur during the interval between Fourth Amendment seizures and Eighth Amendment imprisonments (i.e., pretrial detentions).

1. Fourth Amendment Cases – Force During Investigatory Detention or Arrest

a. What is an “unreasonable seizure”?

- | A claim of excessive use of force arising during arrest is grounded in the Fourth Amendment protection against unreasonable seizures as applied to the states by the Fourteenth Amendment. *Robinson v. City Of West Allis*, 2000 WI 126, 239 Wis.2d 595, 610, 619 N.W.2d 692 (2000); *Graham v. Connor*, 490 U.S. 386, 394 (1989); *Felder v. Casey*, 150 Wis.2d 458, 471, 441 N.W.2d 725 (1989).
- | The Supreme Court defines a Fourth Amendment seizure as "...a governmental termination of freedom of movement through means *intentionally* applied." *Brower v. County of Inyo*, 489 U.S. 593, 596-597 (1989). An incomplete attempt to exercise custody is not a "seizure" under the Fourth Amendment. *Schaefer v. Goch*, 153 F.3d 793 (7th Cir. 1999); *Tom v. Volda*, 963 F.2d 952, 957 (7th Cir. 1992); *Carter v. Buscher*, 973 F.2d 1328, 1333 (7th Cir. 1992).
- | In *Brower*, the Supreme Court stated:
 - . . . [A] Fourth Amendment seizure does not occur whenever there is a governmentally caused termination of freedom of movement . . . nor even where there is a governmentally caused and governmentally desired termination of an individual's freedom of movement. . . Violation

of the Fourth Amendment requires an intentional acquisition of physical control.

Brower, 489 U.S. at 596-597.

A custodial seizure occurs only when a citizen is physically touched or submits to a show of authority by the police. *California v. Hodari D*, 499 U.S. 621, 626-627 (1991); *Schaefer*, 153 F.3d at 793-796.

- | Where an officers' show of authority did not end in physical control of the suspect, a seizure does not occur. *Hodari D*, 499 U.S. at 626-627 (assertion of a show of force to stop a fleeing suspect is not a seizure if the show of force does not produce a stop).
- | Unintended terminations of freedom of movement such as the unintentional shooting of a hostage are not "seizures" subjecting officers to liability under the Fourth Amendment. *Schaefer, infra.*; *See Campbell v. White*, 916 F.2d 421 (7th Cir. 1990)(accidental running over of motorcyclist did not constitute a Fourth Amendment seizure); *Landol-Rivera v. Cruz Cosme*, 906 F.2d 791 (1st Cir. 1990)(a former hostage who was accidentally shot during police pursuit of the driver of the vehicle in which the plaintiff was a passenger, was not subjected to seizure); *Rucker v. Hartford County*, 946 F.2d 278 (4th Cir. 1991)(Fourth Amendment claim based on unintentional shooting of bystander during attempt to apprehend suspect dismissed because shooting did not occur during "seizure").
- | Untended terminations of freedom of movement brought about through unintended means such as police pursuits of suspects that end with the intervention of an unexpected and unintended factor do not qualify as seizures under the Fourth Amendment. *County of Sacramento v. Lewis*, 118 S. Ct. 1708 (1998)(; *Frye v. Town of Akron*, 759 F.Supp. 1320 (N.D. Ind. 1991)(collision which resulted in death of motorcycle passenger after high speed police chase was not Fourth Amendment seizure); *Wozniak v. Cavender*, 875 F.Supp. 526 (N.D. Ill. 1995)(crash of suspect's all terrain vehicle not "seizure" because not "willful" on part of police).
- | Bystander who was accidentally shot in leg by police officers was not victim of excessive force in the course of an arrest or seizure under the Fourth Amendment, where officers did not intend to hit bystander. *Brandon v. Village of Maywood*, 157 F.Supp.2d 917 (N.D. Ill. 2001).
- | A fourth amendment seizure occurs when a police officer's actions restrain a person's freedom to walk away from the encounter. *See United States v. Mancillas*, 183 F.3d 682, 695 (7th Cir.1999) (quoting *Terry v. Ohio*, 392 U.S. 1, 16, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)).
- | Even an individual who is successfully seized at one point does not remain seized regardless of intervening factors. "A seizure is a single act, and not a continuous fact." *Hodari D*, 499 U.S. at 625.
- | Such seizures come in two categories: brief investigatory stops, known as *Terry* stops; and full custodial arrests. *See United States v. Mancillas*, 183 F.3d at 695; *see also Smith v. Ball State Univ.*, 295 F.3d 763, 768 (7th Cir.2002) (discussing the subtle differences between a *Terry* stop and a formal arrest).

b. What is "unlawful force"?

- | Force in making an arrest becomes unlawful if the arresting officer "employs excessive force." *State v. Giminski*, 2001 WI App 211, 247 Wis.2d 750, 764, 634 N.W.2d 604 (2001), *quoting*

State v. Reinwand, 147 Wis.2d 192, 201, 433 N.W.2d 27 (Ct.App. 1988).

- | The standard for determining whether a police officer's exercise of force is excessive is whether the officer's actions are objectively reasonable. *Robinson*, 239 Wis.2d at 610.
- | What amounts to reasonable force on the part of an officer making an arrest usually depends on the facts in the particular case.
- | Courts must balance "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion" to determine "whether the totality of the circumstances justifies a particular sort of ... seizure." *Id.* at 711 (quoting *Tennessee v. Garner*, 471 U.S. 1, 8 9, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985)).
- | The reasonableness of the force used must be judged in the light of the circumstances as they appeared to the officer at the time he acted, and the measure is generally considered to be that which an ordinarily prudent and intelligent person, with the knowledge and in the situation of the arresting officer, would have deemed necessary under the circumstances." *Robinson, infra, quoting McCluskey*, 45 Wis.2d at 354.
- | Proper application of the reasonableness test to the facts and circumstances of the particular case requires consideration of several factors:

1. the extent of injury suffered;
2. the need for the application of force;
3. the relationship between need and the amount of force used;
4. the threat reasonably perceived by the responsible officials; and
5. any efforts made to temper the severity of a forceful response.

Wilson, 83 F.3d at 876; *Lister v. City of Chicago*, 830 F.2d 702, 711 (7th Cir. 1987).

- | "Subjective concepts like 'malice' and 'sadism' have no proper place in that inquiry." *Graham*, 490 U.S. at 397.
- | When police officers face what is essentially a fluid situation, they are entitled to graduate their use of force to meet the demands of the circumstances confronting them, for purposes of analyzing an excessive force claim. *Smith*, 295 F.3d at 768.
- | The court must consider "the fact that ... officers are often forced to make split second judgments - in circumstances that are tense, uncertain, and rapidly evolving - about the amount of force that is necessary in a particular situation. *Graham*, 490 U.S. at 396-97.
- | There is no requirement that officers use the least intrusive means available, but only that they act reasonably. *Plakas v. Drinski*, 19 F.3d 1143 (7th Cir. 1994), *cert. denied* 130 L.Ed.2d 34 (1994).
- | The extent of injury sustained is an element in determining whether force used was objectively reasonable. *Lunsford v. Bennett*, 17 F.3d 1574, 1582 (7th Cir. 1994).

- 1 While excessive force does not require injury, no injury gives weight to the assertion of no excessive force. *Meyer v. Robinson*, 992 F.2d 734, 739 (7th Cir.1993).
- 1 Courts have held that injuries must result directly from the force used; preexisting injuries do not establish "significant injury" required to substantiate an excessive force claim, nor do unforeseeable complications which arise from minor injuries. *King v. Chide*, 974 F.2d 653, 658 (5th Cir. 1992); *Daley v. Petersen*, 278 F. Supp. 88, 94 (D. Minn. 1987)(allegations that force used aggravated recent surgical operation but did not cause independent injury are insufficient to establish force was excessive).
- 1 Physical measures to obtain compliance have been held reasonable where a suspect offers resistance, and even where there is no physical resistance but officers reasonably believe force is necessary to secure compliance. *See Dean v. City of Worcester*, 924 F.2d 364 (1st Cir. 1994).
- 1 Taking a suspect to the ground has been held objectively reasonable where a suspect offers resistance. *Hausmann v. Tredinnick*, 432 F. Supp. 1160 (E.D. Pa. 1977).
- 1 The reasonable use of pain compliance techniques to obtain compliance with appropriate investigatory measures has been held constitutional. *Brownell v. Figell*, 950 F.2d 1285, 1293 (7th Cir. 1991)(use of "mandibular pressure hold" held objectively reasonable to secure compliance to Breathalyzer test where officers believed intoxicated suspect was resisting test).
- 1 Failure to comply with a verbal order can constitute resistance justifying the use of force necessary to overcome resistance. *See Mayer v. Skelly*, 172 F.3d 53, No. 98 2217, 1998 WL 894652, at *3 (7th Cir. Dec. 18, 1998) (unpublished order); *see also Ryan v. County of DuPage*, 45 F.3d 1090, 1093 (7th Cir.1995) (refusal to comply with verbal order to remove mask provided probable cause for crime of physically resisting lawful police order).
- 1 In excessive force cases, where an assault is carried out to completion and a battery committed, a plaintiff is not required to prove a hostile intent or a desire to do harm. If an officer acts intending to cause contact and the contact is unpermitted or excessive, it follows that the intent is also unlawful. *McCluskey, infra*.
- 1 Where the officer merely points a gun at a suspect in the course of arresting him, the suspect would have no basis for claiming that he had been seized with excessive force. . . . *Giminski*, 247 Wis.2d at 764, *quoting Wilkins v. May*, 872 F.2d 190, 194 (7th Cir. 1989).
- 1 A private citizen may not use force to resist peaceful arrest by one he knows or has good reason to believe is an authorized peace officer performing his duties, regardless of whether the arrest is illegal in the circumstances of the occasion. *State v. Hobson*, 218 Wis.2d 350, 380, 577 N.W.2d 825 (1998).
- 1 Although officials who are present and fail to intervene to prevent other officers from infringing on the constitutional rights of citizens may be liable under Sec. 1983, the plaintiff must establish that those officers had reason to know that excessive force was being used, and had a realistic opportunity to intervene to prevent the harm from occurring. *Yang v. Hardin*, 37 F.3d 282, 285 (7th Cir. 1994).
- 1 "[U]nder certain circumstances a state actor's failure to intervene renders him or her culpable

under § 1983." *Yang v. Hardin*, 37 F.3d 282, 285 (7th Cir.1994). Harris can be held liable under § 1983 if he was present during the arrest and had reason to know: "(1) that excessive force was being used, (2) that a citizen has been unjustifiably arrested, or (3) that any constitutional violation has been committed by a law enforcement official; and [Harris] had a realistic opportunity to intervene to prevent the harm from occurring." *Id.*

c. Use of Deadly Force

- | Where an officer has probable cause to believe that a suspect poses a significant threat of death or serious physical injury to the officer, the officer may use deadly force. *Plakas v. Drinski*, 19 F.3d 1143, 1146 (7th Cir. 1994); *Gardner*, 471 U.S. at 11; *Voida*, 963 F.2d at 955-557.
- | Information known to the officer at the moment deadly force is used determines whether the officer had probable cause to believe that he or she was at immediate risk. *Plakas*, 19 F.3d at 1149-50.
- | Officers who believe suspects are pointing weapons at them have probable cause to believe their lives are at immediate risk as a matter of law. *Carter*, 973 F.2d at 1331-1333 (suspect pointed gun at officer); *Plakas*, 19 F.3d at 1146-1150 (7th Cir. 1994)(plaintiff pointed fire poker at officer); *Scott v. Henrich*, 39 F.3d 912 (9th Cir. 1994)(plaintiff pointed gun at officers); *Wilson v. Meeks*, 52 F.3d 1547 (10th Cir. 1995)(plaintiff pointed gun at officer); *Reynolds v. County of San Diego*, 84 F.3d 1162 (9th Cir. 1996)(plaintiff pointed knife at officer); *St. Hilaire v. Laconia*, 71 F.3d 20 (1st Cir. 1995)(suspect reached for firearm); *Stroik v. Ponseti*, 35 F.3d 155 (5th Cir. 1994)(shooting of hostage believed to be a suspect held objectively reasonable because hostage was believed to be armed, and stood with suspect who pointed gun at officer).
- | The Seventh Circuit applies enhanced scrutiny to deadly force cases, but only where "the officer is the only witness alive to testify." *Plakas*, 19 F.3d at 1147.
- | The fact that officers are under cover does not negate a reasonable belief that a suspect armed with a gun poses an immediate risk to safety. *Liebenstein v. Crowe*, 826 F. Supp. 1174 (E.D. Wis. 1992)(use of deadly force against armed suspect held reasonable based on officers' belief that bullets might penetrate walls and windows of surrounding homes).
- | "It is from [the point just prior to the use of deadly force] that we judge the reasonableness of the use of deadly force in light of all that the officer knew. We do not return to the prior segments of the event and, in light of hindsight, reconsider whether the prior police decisions were correct. Reconsideration will nearly always reveal that something different could have been done if the officer knew the future before it occurred. This is what we mean when we say refuse to second guess the officer." *Plakas*, 19 F.3d at 1150.
- | Activities preceding the use of force are relevant only to the issue of whether an officer properly finds himself a situation where deadly force may be required. *See Plakas*, 19 F.3d at 1149-1150 ("[W]e carve up the incident into segments and judge each" . . . to determine if the officer "was properly standing . . . gun in hand . . . several feet away from [the suspect]," but review objective reasonableness of force only by considering conduct occurring thereafter).
- | When suspects present such an immediate threat, courts do not hold use of deadly force to be inappropriate simply because mental illness may be a factor. *Scott*, 39 F.3d at 915 (deadly force

against armed man who had recently fired shots and acted "crazy" held reasonable); *Manuel v. Atlanta*, 25 F.3d 990 (11th Cir. 1994)(shooting of mentally troubled person who behave violently and erratically held reasonable); *Liebenstein*, 826 F.Supp. at 1174-1189 (shooting of "mentally and emotionally unstable" suspect who fired weapon held reasonable).

- | Use of beanbag projectiles is use of deadly force. *Ohmdahl v. Lindholm*, 170 F.3d 730 (7th Cir. 1999).
- | Sheriff's failure to instruct police on handling of dangerous people who appeared to be irrational did not amount to deliberate indifference, as would support § 1983 claim, where sheriff instructed police not to **use deadly force** absent threat of death or great bodily harm; failure to instruct that special measures should be taken for apparently irrational people could amount to no more than mere negligence, absent showing that there had been rash of such killings that could have been avoided by special measures. *Pena v. Leombruni*, 200 F.3d 1031 (7th Cir. 1999).

d. In-Custody Deaths By Other Means

- | An arrestee stopped breathing and died after police officers placed him in a prone position on the floor while handcuffed. "This case does not present the usual factual scenario under a Fourth Amendment "excessive force" claim because Carroll does not claim that the officers affirmatively used force on him or caused any physical injury." *Carroll v. Village of Homewood*, 2001 WL 1467708 (N.D.Ill.); *Estate of Phillips v. City of Milwaukee*, 123 F.3d 586 (7th Cir.1997).
- | A failure to act "could be cognizable under the Fourth Amendment." *Phillips*, 123 F.3d at 596 ("although the officers' actions here are not readily thought of as 'force,' the Fourth Amendment requires that seizures be *reasonable* under all the circumstances.").
- | But see *Profitt v. Ridgeway*, 279 F.3d 503 (7th Cir. 2002)(Once arrestee was in police custody, the police had a duty not to be deliberately indifferent to the safety of the arrestee.)

B. Wisconsin State Law

| 968.14 Use of force.

- | All necessary force may be used to execute a search warrant or to effect any entry into any building or property or part thereof to execute a search warrant.

* * *

66.0511 Law enforcement agency policies on use of force and citizen complaint procedures.

(1) Definition. In this section, "law enforcement agency" has the meaning given under s. 165.83 (1) (b).

(2) Use of force policy. Each person in charge of a law enforcement agency shall prepare in writing and make available for public scrutiny a policy or standard regulating the use of force by

law enforcement officers in the performance of their duties.

(3) Citizen complaint procedure. Each person in charge of a law enforcement agency shall prepare in writing and make available for public scrutiny a specific procedure for processing and resolving a complaint by any person regarding the conduct of a law enforcement officer employed by the agency. The writing prepared under this subsection shall include a conspicuous notification of the prohibition and penalty under s. 946.66.

- | "There are circumstances where a police officer's use of force [in making an arrest] is unlawful." *State v. Mendoza*, 80 Wis.2d 122, 154, 258 N.W.2d 260 (1977).
- | Claims of excessive use of force give rise to a common law cause of action for battery. *Johnson v. Ray*, 99 Wis.2d 777, 299 N.W.2d 849 (1981); *McCluskey v. Steinhorst*, 45 Wis.2d 350, 173 N.W.2d 148 (1970); see also "Battery: Excessive Force in Arrest," WIS J I - CIVIL 2008.
- | Officers acted legally when, armed with a search warrant, they knocked on a door, pushed it open when the defendant opened it 2 inches, and put him under restraint before showing the warrant. *State v. Meier*, 60 Wis.2d 452, 210 N.W.2d 685 (1973).
- | To dispense with the rule of announcement in executing a warrant, particular facts must be shown in each case that support an officer's reasonable suspicion that exigent circumstances exist. An officer's experience and training are valid relevant considerations. *State v. Meyer*, 216 Wis.2d 729, 576 N.W.2d 260 (1998).
- | Irrespective of whether the search warrant authorizes a "no-knock" entry, reasonableness is determined when the warrant is executed. *State v. Davis*, 2000 WI 270, 240 Wis.2d 15, 622 N.W.2d 968.11 Scope of search incident to lawful arrest.
- | Police officers who use force in an arrest may have qualified immunity from suit if the conduct does not violate clearly established rights of which a reasonable officer would have been aware. *Chathas v. Smith*, 884 F.2d 980, 989 (7th Cir. 1989) *cert. denied* 493 U.S. 1095 (1990); *Ellis v. Wynalda*, 999 F.2d 243, n.2 at 246 (7th Cir. 1993).
- | An officer may reasonably but mistakenly believe force was necessary. *Whitt v. Smith*, 832 F.2d 451, 452-4 (7th Cir. 1987).