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GENDER, RACE & JUSTICE

## NEGLIGENT USE OF FIREARMS BY POLICE OFFICERS: LIABILITY, DEFENSES, AND, TRENDS

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### INTRODUCTION

One of the most frequently discussed police practices is the use of deadly force by police officers. Recent events around the nation involving the use of deadly force by law enforcement against unarmed citizens, and other use of deadly force by law enforcement officers has again captured the attention of the civilized world. As a society, we empower the police with the authority to use deadly force; however, even though this authority is granted, the decision to exercise it is so significant that an officer using deadly force can anticipate a questioning of its appropriateness. In some cases, the police officer's use of deadly force has been found to be unjustified.

Police officers are expected to follow an accepted standard in the use of force.<sup>2</sup> This standard is particularly important since we have authorized police officers to use force in certain situations. By the very nature of their work, police officers live with their weapons on a daily basis. The use of firearms in the United States is an integral aspect of police work. Society expects law enforcement personnel to use deadly force only under certain circumstances, such as to protect the officer's life, to defend the lives of innocent citizens, and to apprehend suspects involved in violent felonies.<sup>3</sup>

However, events in the fairly recent past questions the appropriateness of the use of deadly force and whether police officers are going beyond their expectation in certain circumstances. There is a widespread perception of imprudence when police officers discharge their firearm. This controversy can be seen when deciding whether law enforcement should be subject to personal liability for overzealous use of their firearms.<sup>4</sup>

This article examines several aspects of police liability for negligence involving the use of firearms. First, we discuss case law in which the officer is liable for negligence involving the use of a firearm. Second, we review the defenses available to officers involved in a civil action for negligent use of firearms. Finally, an analysis of the trends of officer liability will be presented.

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<sup>2</sup> HARRY MOORE & W. FRED WEGENER, *EFFECTIVE POLICE SUPERVISION*, 306 (1990).

<sup>3</sup> Law enforcement officers are given wide discretion in the use of their firearms. In some instances, they are authorized to use their firearms even if it is not necessary for self-defense. The use of deadly force is permitted in several states against a felon participating in a crime involving the use of or the threatened use of deadly force or in cases when there is a substantial risk that the delay of the suspect's apprehension will result in serious bodily injury or death. PETER SCHARE & ARNOLD BINDER, *THE BADGE AND THE BULLET: POLICE USE OF DEADLY FORCE* 139-179 (1983).

<sup>4</sup> GEOFFREY P. ALPERT, *CRITICAL ISSUES IN POLICING: CONTEMPORARY READINGS* 480-495 (ROGER G. DUNHAM & GEOFFREY P. ALPERT eds. 1989).

One of the most common complaints by minorities is the excessive use of force by police officers. One scholar concluded that the number of blacks and Hispanics is overrepresented among those citizens who are shot and killed by police.<sup>5</sup> For example, one study of the Boston Police Department indicated that the police shot and killed blacks twenty-five times more often than whites.<sup>6</sup>

Individuals who are the victims of police misconduct have several remedies available to them.<sup>7</sup> Filing a complaint with the department's internal affairs section may result in either criminal charges being brought against the officer, the imposition of discipline by the department, or both.<sup>8</sup> In addition, victims may file civil lawsuits against the officer and the agency. These actions may be filed either in state or federal court. The action will be filed in federal court if the officer's acts involved a violation of the victim's constitutional rights.

An action in state court alleging a violation of constitutional rights is called a tort. Civil lawsuits in state courts may allege intentional or negligent causes of action. A tort is a civil wrong in which the action of one person causes injury to another person or property of another.<sup>9</sup> Under state laws, there are three general categories of torts:<sup>10</sup> (1) intentional torts;<sup>11</sup> (2) negligent torts;<sup>12</sup> and (3) strict liability torts.<sup>13</sup> Normally, only intentional and negligence torts are filed against law enforcement officers or their agencies. Intentional torts can be defined as a "type of tort that occurs when an officer intends to bring some physical harm or mental effect upon another person."<sup>14</sup> A negligent tort is "the breach of a common law or statutory duty to act reasonably toward those who may foreseeably be harmed by one's conduct."<sup>15</sup>

Civil lawsuits under federal law are usually based upon Title 42 of the United States Code Section 1983.<sup>16</sup> This statute was originally enacted by Congress following the Civil War in reaction to the states' inability to control the activities of the Ku Klux Klan and was entitled the Ku Klux Klan Act of 1871.<sup>17</sup> The original intent of the law did not include police misconduct and it was ignored as a tool to redress these types of wrongs until 1961. During that year, the U.S. Supreme Court decided *Monroe v. Pape*.<sup>18</sup> In *Monroe*, thirteen Chicago police officers broke into Monroe's home without a warrant, held the family at gunpoint and questioned the plaintiff for ten hours before releasing him without filing charges. The Supreme Court held the officers acted under color of law as set forth in the statute and thereby violated the plaintiff's federal civil rights.

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<sup>5</sup> JAMES J. FYFE, POLICE USE OF DEADLY FORCE 29 (1978).

<sup>6</sup> G. Robins, "Justifiable Homicide by Policy Officers," 54 Journal of Criminal Law, Criminology, and Police Science 225, 225-231 (1963).

<sup>7</sup> SAMUEL WALKER, THE POLICE IN AMERICA. (2d. ed. 1992).

<sup>8</sup> *Id.* at 242.

<sup>9</sup> WILLIAM L. PROSSER & W. PAGE KEETON, PROSSER AND KEETON ON THE LAW OF TORTS (5th ed. 1984).

<sup>10</sup> ROLANDO V. DEL CARMEN, CIVIL LIABILITIES IN AMERICAN POLICING (1991).

<sup>11</sup> Lewis v. Down, 774 F. 2d 711 (6th Cir. 1985).

<sup>12</sup> Peterson v. City of Long Beach, 24 Cal.3d 238 (1979).

<sup>13</sup> Del Carmen, *supra* note 9, at 138.

<sup>14</sup> *Id.* at 424.

<sup>15</sup> *Id.*

<sup>16</sup> 42 U.S.C. § 1983 (1988).

<sup>17</sup> KENNETH PEAK, POLICING IN AMERICA 343 (1993).

<sup>18</sup> *Monroe v. Pape*, 365 U.S. 167 (1961).

Not all torts, state or federal, involve the use of a firearm by police officers. There are as many different causes of action for injury by tortuous conduct as there are drops of water in a rainstorm.<sup>19</sup> However, the use of a firearm by a law enforcement officer is inherently dangerous. Firearms by their very nature are deadly weapons and should be treated with care and caution. When an officer abandons that standard of care, there are dire consequences for any person that is the intended or unintended recipient of the force that is a natural consequence of discharging a firearm.<sup>20</sup>

## I. CASES ILLUSTRATING LIABILITY

As we have discussed above, civil actions against law enforcement officers involving the use of firearms can be divided into two categories: state court actions and 1983 federal civil rights violations. The following sections briefly examine some court decisions in these categories.

### A. STATE COURT CASES

Police officer negligence involving the use of a firearm which results in the death of a victim is usually included in a state's wrongful death statute. For example, in Texas, when a wrongful death occurs because of a law enforcement officer's discharge of a firearm, the Texas Wrongful Death Statute provides:

“A person is liable for damages arising from an injury that causes an individual's death if the injury was caused by the person's or his agent's or servant's wrongful act, neglect, carelessness, unskillfulness or default.”<sup>21</sup>

If the officer's negligent use of the firearm did not cause death, but resulted in other injuries, there are standard remedies available in various state statutes and case law that provide for recovery for injuries as a result of another's negligence.<sup>22</sup>

In *London v. Ryan*, police officers were held liable for the wrongful death of a citizen.<sup>23</sup> The officers responded to a call concerning an individual with a gun. Upon arrival at the scene, the officers approached the decedent's residence. The victim, unaware that the “intruders” were police officers, fired his own weapon and the officers returned fire and killed the victim. The officers were found to be negligent and their defense utilizing the “sudden emergency doctrine” was disallowed as the emergency was caused by their own negligence.<sup>24</sup> This doctrine will be discussed in more detail later in this article.

There are circumstances where the officers use of firearms results in serious injury instead of death. These situations typically involve injury to an innocent bystander. The safety of innocent bystanders is of sufficient importance to the state as to require law enforcement officers to use reasonable care in the apprehension of criminals.

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<sup>19</sup> See POLICE MANAGEMENT TODAY, ISSUES AND CASE STUDIES 65 (James J. Fyfe ed., 1985).

<sup>20</sup> Frank G. Zarb, Jr., *Policing Liability for Creating the Need to Use Deadly Force in Self Defense*, 86 MICH. L. REV. 1982 (1988).

<sup>21</sup> Texas Civ. Prac. Rem. Code Sec. 71.002(b) (Vernon's 1986), see also CAL. CODE OF CIV. PROC. § 377.

<sup>22</sup> Rittenmeyer, *supra* note 18.

<sup>23</sup> *London v. Ryan*, 349 So. 2d 1334 (La. Ct. App. 1st Cir. 1977).

<sup>24</sup> *Id.*

*Davis v. Hellwig* held a law enforcement officer liable for the negligent discharge of his weapon during an attempt to capture a fleeing suspect.<sup>25</sup> In this case, an officer discharged his weapon in an effort to halt a fleeing suspect who allegedly had stolen items from a department store. The officer, while pursuing the suspect, called for the man to halt at least four times. When the suspect failed to stop, the officer drew his revolver and fired at the suspect. The bullet struck and injured a 19 year old bystander who was on the sidewalk. The court found that the officer's "conduct so far departs from the applicable standard of care in the use of firearms as to entitle the plaintiff to have her action considered by the jury."<sup>26</sup>

The proximity of a bystander to the shooting incident does not seem to be significant in determining liability. In *Heiderbreder v. Northampton Tp. Trustees*, the court found an officer negligent when he fired at a fleeing vehicle containing armed robbers and hit a bystander some 100 feet away.<sup>27</sup> Similarly, in *Munoz v. Olin*, the California Supreme Court upheld a verdict finding an officer liable for an injury inflicted from shots fired on a stake out approximately 300 feet away from the victim.<sup>28</sup>

Under state statutes if an officer violates the accepted duty of care in discharging a weapon, liability attaches if the plaintiff can establish the officer acted negligently. However, as we discuss below, negligence may not be sufficient to establish liability under the Federal Civil Rights Act.<sup>29</sup>

#### B. 42 U.S.C. SECTION 1983

As indicated above, another possible theory of recovery involves alleging a violation of the plaintiff's federal civil rights. However, the Supreme Court has held that a violation of a person's Fourteenth Amendment Due Process rights and Fourth Amendment right to be free from illegal seizures requires intentional acts and simple negligence is insufficient to hold an officer liable under this statute. In *Daniels v. Williams*, an inmate brought a federal civil rights action against a deputy sheriff to recover for injuries sustained when he slipped and fell on a pillow left on the jail stairs by a deputy sheriff.<sup>30</sup> The Court overruled its earlier decision in *Parratt v. Taylor* that had allowed recovery for lack of due care by a state officer.<sup>31</sup> The court in *Daniels* went on to state:

"Far from an abuse of power, lack of due care suggests no more than a failure to measure up to the conduct of a reasonable person. To hold that an injury caused by such conduct is a deprivation within the meaning of the Fourteenth Amendment would trivialize the centuries-old principle of due process of law."<sup>32</sup>

However, the court did not completely slam the door on the possibility that liability might attach under the Civil Rights Act for negligence when it stated: "But we need not rule out the possibility that there are other constitutional provisions that would be violated by mere lack of

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<sup>25</sup> *Davis v. Hellwig*, 21 N.J. 412 (1956).

<sup>26</sup> *Id.* at 501.

<sup>27</sup> *Heidbreder v. Northampton Township Trustees*, 64 Ohio App. 2d 95 (1979).

<sup>28</sup> *Munoz v. Olin*, 24 Cal. 3d 629 (1979).

<sup>29</sup> *Del Carmen*, *supra* note 9 at 140.

<sup>30</sup> *Daniels v. Williams*, 474 U.S. 327 (1986).

<sup>31</sup> *See Parratt v. Taylor*, 451 U.S. 527 (1981), *overruled by Daniels v. Williams*, 474 U.S. at 330-331.

<sup>32</sup> *United States v. Loud Hawk*, 474 U.S. 302, 327 (1986).

care in order to hold, as we do, that such conduct does not implicate the Due Process Clause of the Fourteenth Amendment.”<sup>33</sup>

The Court clearly states that it is unconstitutional under the Fourth Amendment for the police officer to use deadly force to apprehend non-violent suspects who are unarmed. However, the Court ruled that in instances in which a police officer’s life is in danger or the life of others is in danger deadly force could be used.

As the above discussion indicates, simple negligence will not at this time give rise to police liability for use of their firearms.<sup>34</sup> That is not to say that liability will not attach in an appropriate factual situation. The Supreme Court has not yet closed the door to this type of action. We must wait and see what type of facts or social policy will present itself to the Court which will allow it to set forth clear guidelines on federal civil rights liability and negligent use of firearms.

## II. POLICE OFFICER DEFENSES IN LIABILITY CASES

Police officers who negligently discharge their weapons are not automatically liable for the consequences of their actions. Society has determined that law enforcement officials need wide discretion in the performance of their duties. As a result, states provide officers with several shields to lawsuits filed because of negligent discharge of a firearm. There are three main defenses to state and federal actions based upon the negligence of law enforcement officers: (1) Tort Claims Acts; (2) The Sudden Emergency Doctrine; and (3) Qualified Immunity. This section will briefly examine each of these defenses.

### A. TORT CLAIMS ACTS

All states and the federal government have Tort Claims Acts. While there are exceptions, these acts normally require an individual desiring to sue the sovereign to file a claim before the initiation of any court action. In addition, many of these statutes provide for immunity for agencies and officers when carrying out certain official duties.

This is not to say that all negligent actions by law enforcement officers are barred by state tort claims acts. There are numerous exceptions that are outside the scope of this article. However, in some situations, these acts may prevent a plaintiff from recovering for injuries sustained as a result of the negligence on behalf of an officer.

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<sup>33</sup> *Id.* at 334. Similarly in Fourth Amendment Cases, the courts have required intentional acts to hold officers liable under the Federal Civil Rights Act. In *Tennessee v. Garner*, a case involving the fleeing felon rule, an officer shot and killed an unarmed suspect who was fleeing from a suspected burglary. 471 U.S. 1 (1985) The Supreme Court held the officer had violated the decedents Fourth Amendment Rights by illegally seizing him with the use of unlawful and excessive force. The court held that the Fourth Amendment requires a balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the government's interest alleged to justify the intrusion.

In *Graham v. Conner*, the Supreme Court applied the *Garner* standard to the use of non-deadly force by a police officer. 490 U.S. 386 (1989). In that case officers detained and assaulted a citizen they suspected of robbing a local convenience store. The suspect complained that he was diabetic and needed treatment, but the officers disregarded his repeated requests. The *Graham* court distinguished a violation of constitutional rights from liability for state tort action stating: “Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers . . . violates the Fourth Amendment.”

<sup>34</sup> See *Landol-Rivera v. Cosme*, 906 F. 2d 791 (1990), for an excellent discussion of police officer's liability for intentional acts vs. negligent acts.

As an example, the Texas Tort Claims Act requires potential plaintiffs to file a claim with the agency. Once the claim requirement is met, the Act waives governmental immunity where an employee commits a ton in the use of a motor driven vehicle.<sup>35</sup> However, the statute provides for immunity from a lawsuit when the officer is “responding to emergency calls or reacting to emergency situations when such action is in compliance with the laws and ordinances applicable to emergency action.”<sup>36</sup>

## B. THE SUDDEN EMERGENCY DOCTRINE

The Sudden Emergency Doctrine reduces or alters the standard of care for use of a weapon, unless the officer creates the emergency. In *Scott v. City of Opa Locka*, the court found that an officer was not liable when one of four bullets he fired killed the plaintiff who was one hundred feet away.<sup>37</sup> The officer in that case had been shot during a robbery and returned fire from the ground where he had fallen. The court found that an "emergency situation" existed so a "speedy decision" was necessary.<sup>38</sup>

Under this doctrine, an emergency is a sudden or unexpected event or combination of circumstances which calls for immediate action.<sup>39</sup> In an emergency, the actor is left no time for thought or is so disturbed or excited that he cannot weigh alternative courses of action and must make a speedy decision based largely on impulse or guess.<sup>40</sup>

In order for the doctrine to come into play, the following requirements must be satisfied: (1) The claimed emergency actually or apparently existed; (2) The perilous situation was not created or contributed to by the person confronted with the emergency; and (3) The action or course taken was such as would or might have been taken by a person of reasonable prudence in the same or similar situations.<sup>41</sup>

## C. QUALIFIED IMMUNITY

The law recognizes two forms of immunity: absolute and qualified. Absolute immunity is conferred upon judges and attorneys during judicial proceedings and is a complete shield to liability for any acts that occur in this setting.<sup>42</sup> Qualified immunity is available to law enforcement officers and requires the dismissal of lawsuits if certain requirements are met.<sup>43</sup>

Qualified immunity for law enforcement officers is based upon a balancing of interests. In *Bivens v. Six Unknown Federal Narcotics Agents*, the Supreme Court ruled that law enforcement officials should be encouraged to perform their official duties without fear of lawsuits; at the same

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<sup>35</sup> Tex. Rev. Civ. Stat. Ann. art. 6252-19 (West 1970).

<sup>36</sup> *Id.* at Section 14 (8).

<sup>37</sup> *Scott v. Opa Locka*, 311 So. 2d 825 (Fla. Dist. Ct. App. 1975).

<sup>38</sup> *Id.* at 827.

<sup>39</sup> *Id.*

<sup>40</sup> *Hormovitis v. Mutual Lumber Company*, Fla. App., 120 So. 2d 42, 45 (1960).

<sup>41</sup> *Dupree v. Pitts*, Fla. App., 159 So. 2d 904, 907 (1964).

<sup>42</sup> *See Hans v. Louisiana*, 134 U.S. 1 (1981), for one of the earliest cases upholding the principle of sovereign or absolute immunity.

<sup>43</sup> *Wood v. Strickland*, 420 U.S. 308 (1975).

time, they should be encouraged to perform those acts in conformity with established constitutional standards.<sup>44</sup>

The leading case in this area, *Harlow v. Fitzgerald*, set forth the test to determine when governmental officials are entitled to qualified immunity.<sup>45</sup> The *Harlow* court stated:

“[g]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”<sup>46</sup>

Courts utilize a three-step process in determining whether to uphold a claim of qualified immunity by a law enforcement official: (1) There must be a determination of whether the plaintiff has stated a constitutional violation in the complaint;<sup>47</sup> (2) The court will examine whether the constitutional right allegedly violated was clearly established at the time the incident occurred;<sup>48</sup> and (3) The court must determine if a reasonable law enforcement officer believed that the actions were lawful in light of clearly established law and facts known to the officer when the activity occurred.<sup>49</sup>

The determination of whether or not qualified immunity exists is a matter of law to be decided by the court before the matter even reaches the jury. If immunity is present, the case may be dismissed early in the proceedings. On the other hand, if the court determines that the officer is not entitled to qualified immunity the case may proceed to jury trial and the issue of qualified immunity is never brought up before the jury.

As the above discussion indicates, law enforcement officials are not absolutely immune from lawsuits. However, the laws do encourage police officers to perform their duties without the constant fear of specious lawsuits. Does this mean that law enforcement officials can never be sued when they negligently discharge their firearms? The following section attempts to analyze some trends that may assist in answering this question.

### III. TRENDS

While some areas of the law changes on a daily basis, state and federal decisions in the area of negligence and peace officer liability have remained fairly constant since the mid-eighties. If the officer is negligent, the plaintiff may file an action in state court using the standard tort laws of that state. A problem arises under existing law, if the victim attempts to allege a constitutional violation in federal court.

As previously indicated, courts will consider and weigh various rights and duties in

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<sup>44</sup> See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). In *Bivens*, the Supreme Court held agents of the Federal Bureau of Narcotics acted under "color of law" when they made a warrantless entry and arrest of the petitioner, all without probable cause, and stated a cause of action for damages. The court balanced the rights and duties of law enforcement officers against the constitutional rights of citizens to be secure against unreasonable search and seizures. The balancing of these two interests has resulted in the establishment of certain factors the courts will consider when deciding if a police officer has the right to claim qualified immunity.

<sup>45</sup> *Harlow v. Fitzgerald* 457 U.S. 800, 802 (1982).

<sup>46</sup> *Id.* at 818.

<sup>47</sup> See *Siegert v. Gilley*, 500 U.S. 226, 232 (1991).

<sup>48</sup> See *Wright v. Whiddon*, 951 F. 2d 297, 299 (11th Cir.1992).

<sup>49</sup> See *Hunter v. Bryant*, 502 U.S. 224, 227 (1991).

determining liability.<sup>50</sup> In applying the legal principles to the specific facts of any case, courts will take into account not only constitutional rights of citizens, but -also the procedural aspects of law enforcement activities.<sup>51</sup>

In *Hewitt v. City of Truth or Consequences*, the city and officer were accused of negligently causing the death of Mr. Hewitt and thereby violating his constitutional rights under Section 1983.<sup>52</sup> The deceased was arrested on suspicion of burglary and placed in the back of a patrol vehicle.<sup>53</sup> He managed to escape and threatened the officer with a gun. Officer Callahan fired his service shotgun one time killing the suspect. The gun turned out to be a non-shooting starter pistol.

The Tenth Circuit dismissed the federal civil rights action stating, “In sum, the alleged negligent conduct in the present case fails to rise to a denial of due process not because state post deprivation procedures are adequate, but because the negligence asserted does not constitute an abuse of official power.”<sup>54</sup> *Hewitt* is in accord with the Supreme Court position that simple negligence will not suffice for recovery under Section 1983.<sup>55</sup>

In *Young v. City of Killeen*, the officer and the City of Killeen were accused of violating the plaintiff's federal civil rights by violating his Fourth Amendment rights to be free from illegal seizures.<sup>56</sup> In *Young*, the officer stopped a car driven by Young based upon a suspicion that Young had just completed a drug transaction.<sup>57</sup> After ordering the occupants to step out of the car, the officer observed Young reaching down to the floorboard of his car. The officer shot and killed him based upon his erroneous belief that Young was reaching for a weapon. The officer violated at least six police procedures, such as abandoning a covered position and advancing into the open. The Fifth Circuit stated there was no Section 1983 recovery available to the plaintiff holding: “(t)he constitutional right to be free from unreasonable seizure has never been equated by the [Supreme] Court with the right to be free from a negligently executed stop or arrest.”<sup>58</sup> However, the appellate court left in place an award of \$202,295.80 against the officer based upon his negligence.<sup>59</sup> Thus, the *Young* decision clearly establishes the principle that while recovery will not be allowed for a violation of the victim's federal civil rights, courts will not disturb an award based upon a state tort action.

Therefore, victims of police negligence may allege violations of their civil rights and include in the complaint state tort actions. In July 1991, this is exactly what Christopher Glasco did. In *Glasco v. Ballard*, the plaintiff alleged both a violation of his federal civil rights and negligence on

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<sup>50</sup> *Tennessee v. Garner*, 471 U.S. 1 (1985).

<sup>51</sup> *United States v. Place*, 462 U.S. 696 (1983).

<sup>52</sup> *Hewitt v. Truth or Consequences*, 758 F.2d 1375 (10th Cir. 1985).

<sup>53</sup> *Id.* at 1377.

<sup>54</sup> *Id.* at 1380.

<sup>55</sup> In *Collins v. City of Harker Heights, Texas*, 503 U.S.112, 115 S.Ct. 1061 (1992) the United States Supreme Court recently reaffirmed its position that state law rather than the Federal Constitution generally governs the traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society. In *Collins*, the widow of a city sanitation employee who died of asphyxia after entering a manhole to unstop a sewer line filed a Section 1983 action against the city. The court held the city's negligence did not violate any federal standard and upheld the lower court's dismissal of the action.

<sup>56</sup> *Ponce-Gonzalez v. Immigration & Naturalization Serv.*, 775 F.2d 1342, 1348 (5th Cir. 1985).

<sup>57</sup> *Id.* at 1351.

<sup>58</sup> *Young v. Killeen*, 775 F.2d 1349, 1353 (5th Cir. 1985).

<sup>59</sup> *Id.* at 1353.

the part of the officer.<sup>60</sup> On January 1, 1991 Deputy Ballard responded to a call of shoplifting at a 7-11 store.<sup>61</sup> The plaintiff and a friend had just left the store and were walking along the street. Ballard, believing one of the two matched the description of the shoplifter, stopped them. He pulled his service revolver and started to exit his vehicle. The patrol car began to roll forward and the deputy leaned back inside to put his foot on the brake. As he did so, his firearm accidentally discharged, striking the plaintiff.

The District Court granted the defendant's summary judgment motion on the civil rights violation holding the Fourth Amendment only protects individuals against unreasonable searches and seizure and not negligent ones.<sup>62</sup> Since there was no longer any federal civil rights violations before the court, it agreed with the defendant that it no longer had jurisdiction on the other two counts of negligence and dismissed the remaining causes of action founded upon state tort law.

Thus, if a plaintiff is to prevail in federal court on negligent discharge of a firearm there must be independent grounds for the federal judiciary to act. If these allegations survive motions to dismiss, the state tort actions for negligence may be determined in federal court.

#### IV. CONCLUSION

We expect that law enforcement officers will faithfully and carefully carry out their sworn duties. However, we also acknowledge the proverbial "bad apple" and have in place civil and criminal sanctions for those officers who either break the law or completely disregard the standard of care imposed upon them by laws and regulations. These situations are relatively easy to understand and remedy. However, when an officer negligently discharges a service weapon with resulting injury to an innocent third party, the law and right of redress is not so clear.

There are state tort laws that allow for recovery for injuries sustained as a result of an officer's negligence. At the federal level, the United States Supreme Court has disallowed claims for violations of one's constitutional rights based on negligence of a peace officer. The Court, however, has not ruled out such a cause of action. We must wait to see if the Court will find that unique set of facts that will allow an injured party to claim a violation of their constitutional rights based upon the negligent act of another.

By the very nature of their profession, law enforcement officers face civil lawsuits for their actions. We have established three types of defenses for many of these lawsuits: the requirements set forth in various state tort claims acts, the sudden emergency doctrine, and qualified immunity. These defenses provide officers with a shield against unfounded civil actions. As long as officers comply with departmental, municipal and state rules, regulations and laws the chances of liability are remote. It is important, however, that officers are aware of the developing legal standards in this field and act within the limits of the prescribed policy.

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<sup>60</sup> Glasco v. Ballard, 768 F. Supp. 176 (E.D. Va. 1991).

<sup>61</sup> *Id.* at 177.

<sup>62</sup> *Id.* at 180 (citations omitted).