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Herbert E. Greenston

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# *Liability of Police Officers for Misuse of Their Weapons*

*Herbert E. Greenstone\**

**T**HE FOCUS OF THIS ARTICLE is twofold; it will begin by examining the historical development of the body of law which deals with the liability of the police officer for the negligent use of his weapons, and it will attempt to consider the practical problems confronting the attorney for the injured plaintiff in marshalling his evidence and presenting his case. The author has represented plaintiffs in personal injury litigation for twenty-five years, and his interest lies particularly in the recovery of civil damages to compensate those who have been injured as a result of the negligent misconduct of others. Although the instant topic concerns the officer's liability, a consideration of municipal liability for the negligent acts of its police officers is relevant. Since police officers as a rule have limited financial resources, the main thrust to impose liability must often be directed against the municipal employer, as it is in a better financial position to bear any loss as the result of its agent's negligence.<sup>1</sup>

## **Historical Background of Governmental Immunity**

The history of the doctrine holding that "the King can do no wrong," couched in terms of sovereign immunity, has been the subject of voluminous research in the legal journals.<sup>2</sup> It has been said that the doctrine has resulted from a misinterpretation of the law, and as a practical matter the doctrine of sovereign immunity never really existed.<sup>3</sup> Sov-

\* Of the New Jersey Bar; partner in the law firm of Greenstone & Greenstone, of Newark, New Jersey.

<sup>1</sup> Mathes and Jones, *Toward a "Scope of Official Duty" Immunity for Police Officers in Damage Actions*, 53 Geo. L. J. 889, 908 (1965). This article will not consider the liability of the surety on the policeman's official bond where such bond is statutorily required; it should be recognized, however, that within the monetary limits of the bond and subject to the injury being caused by an act within the scope of the officer's employment, such bond will increase the financial ability of the policeman to respond in damages. An indemnity statute, whereby the municipality indemnifies the police officer for damages assessed against him by reason of his on-duty negligence, has the same effect. See *Andrews v. Porter*, 70 Ill. App.2d 202, 217 N.E.2d 305 (1966). The term "municipality" will be used throughout this article to mean municipal employer, state employer, or federal employer, as the principles of liability in all cases are the same.

<sup>2</sup> A partial listing includes: Borchard, *Government Liability in Tort*, 34 Yale L. J. 1, 129, 229 (1924-25), 36 Yale L. J. 1, 757, 1039 (1926), 28 Colum. L. Rev. 577, 734 (1928); Fuller and Casner, *Municipal Tort Liability in Operation*, 54 Harv. L. Rev. 437 (1941); Repko, *American Legal Commentary on the Doctrines of Municipal Tort Liability*, 9 Law and Contemp. Prob. 214 (1942); Green, *Municipal Liability for Torts*, 38 Ill. L. Rev. 355 (1944); Smith, *Municipal Tort Liability*, 48 Mich. L. Rev. 41 (1949); Davis, *Suing the Government by Falsely Pretending to Sue an Officer*, 29 U. Chi. L. Rev. 435 (1962); 2 Encyc. of Negl. §§ 430-436 (1962).

<sup>3</sup> Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 Harv. L. Rev. 1 (1963).

ereign immunity seems to find its earliest application in an English case, *Russell v. Men of Devon*.<sup>4</sup> The decision was predicated upon the absence of funds in the treasury of Devon to pay judgments arising out of tort claims, as well as the fear of a multitude of such suits.<sup>5</sup>

Times inexorably change; so do prevailing conceptions of society and the relationship between society and its individual members. The theory that the individual can better bear any given loss than can the modern State is shelved as archaic by all save the few courts still adhering to strands of sovereign immunity.<sup>6</sup> The taxing power has enabled municipal corporations to amass sums with which to pay the claims and just obligations which accrue in the conduct of municipal affairs. The tort law has, by and large, kept abreast of changes in our lives. The rapidity of our growth necessitated this flexibility. The technological millennium, from the occasional squib exploding in a market place, the occasional barrel falling from a building, or the occasional carriage breaking down, to the incredible number of casualties occurring on our public highways and the vast number of injuries resulting from more and more complicated machinery, has been telescoped into little more than a century. The necessity of spreading the risks of injury equitably is both apparent and real.<sup>7</sup> The state has expressed its interest in this basic problem by its insistence that private corporations accept the responsibility for certain phases of the risk which they themselves produce, as in the requirement, almost universal, that all firms make ample provision for workmen's compensation insurance. If such is the attitude of state governments concerning the private sphere, why should not liability of government for the hurts inflicted by its agents and employees be imposed under the same general principles as apply to individuals and private corporate groups?<sup>8</sup> Mr. Justice Holmes stated the problem eloquently:

It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitations of the past.<sup>9</sup>

<sup>4</sup> 2 Term. Rep. 667, 100 Eng. Rep. 359 (1788). The doctrine was brought to the United States in *Mower v. Leicester*, 9 Mass. 247 (1812). Professor Borchard indicates that the application of the doctrine in the United States is "one of the mysteries of legal evolution." 34 Yale L. J. 1, 4 (1924).

<sup>5</sup> Similar reasoning in a related context may be found in more recent cases: e.g., *Fisher v. City of Miami*, 172 So. 2d 455 (Fla., 1965).

<sup>6</sup> "The concept of liability in this area is an expanding one." *Burns v. City of New York*, 6 A.D.2d 30, 174 N.Y.S.2d 192, 195 (1958).

<sup>7</sup> Our most progressive courts have adopted this approach in other areas of the law. *Henningson v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960); *Santor v. A. and M. Karagheusian, Inc.*, 44 N.J. 52, 207 A.2d 305 (1965).

<sup>8</sup> *Green, Freedom of Litigation*, 38 Ill. L. Rev. 355 (1944); *Fisher v. City of Miami*, *supra*, n. 5.

<sup>9</sup> *Holmes, The Path of The Law*, 10 Harv. L. Rev. 457, 469 (1897).

If court-created sovereign immunity once served a valid need and purpose, that need and purpose are history now, and the new needs of the individual citizen vis-a-vis his state are disserved by the archaic doctrine.

### Destruction of Governmental Immunity

The courts have responded to this need. The trend today in most jurisdictions seems to be toward the abrogation of municipal tort immunity.<sup>10</sup> In many jurisdictions liability has been imposed upon a municipality in the same manner as if it were a private individual or corporation.<sup>11</sup> But old habits die hard. A rationale was introduced which seemed to provide compensation for injuries in the rawest cases, but still maintained the myth of the sovereignty of the governmental unit. That rationale differentiates between torts committed by an agent in the discharge of a governmental function and those committed by an agent while engaged in a proprietary, *i.e.*, non-governmental, task;<sup>12</sup> in the former situation the municipal corporation was held immune from liability, while in the latter liability attached. This distinction, however, is gradually disappearing. More and more courts are imposing liability for the negligent acts of agents upon the municipal employer even where the activity from which the tort ensues would be considered governmental.<sup>13</sup> These decisions have great relevance to the instant problem,

<sup>10</sup> 26 NACCA L. J. 31 (1960); Prosser, *Law of Torts*, 1005 (3d ed. 1964); 2 Harper and James, *Law of Torts*, 1612 (1957).

<sup>11</sup> See dissenting opinion of Judge Carroll, *Fisher v. City of Miami*, 160 So.2d 57 (Fla. 1964), *rev'd, supra* n. 5; *Buchholz v. City of Sioux Falls*, 77 S.D. 322, 91 N.W.2d 606 (1958); *Abrahamson v. City of Ceres*, 90 Cal. App.2d 523, 203 P.2d 98 (1949); *Craig v. City of Charleston*, 180 Ill. 154, 54 N.E. 184 (1899).

<sup>12</sup> *Demars v. Town of Mansura*, 246 La. 873, 166 So.2d 328 (1964). Where a municipality has been engaged in a proprietary function, the municipality has been held liable for negligence on ordinary common-law negligence principles. See, *Weeks v. City of Newark*, 62 N. J. Super. 166, 162 A.2d 314 (1960), *aff'd*, 34 N.J. 250, 168 A.2d 11 (1961).

<sup>13</sup> The leading case of *Muskopf v. Corning Hospital*, 55 Cal.2d 211, 359 P.2d 457 (1961), in repudiating municipal immunity, held that the city's responsibility extends to the negligent acts of all its agents acting in a ministerial, as opposed to discretionary, capacity. See *Molitor v. Kaneland Community Unit District*, 18 Ill.2d 11, 163 N.E.2d 89 (1959); *Williams v. City of Detroit*, 364 Mich. 231, 111 N.W.2d 1 (1961); and *Hargrove v. Town of Cocoa Beach*, 96 So.2d 130, 60 A.L.R.2d 1193 (Fla. 1957). The *Hargrove* case held that the municipality would be liable for the negligence of its police officers under *respondent superior* principles. Both *Muskopf* and *Hargrove* distinguish between ministerial acts of municipal agents and the necessarily discretionary exercise of the legislative or judicial function, retaining the municipal immunity only for torts committed by agents in the latter instances. See *Lipman v. Brisbane Elementary School District*, 55 Cal.2d 224, 11 Cal. Rptr. 97, 359 P.2d 465 (1961); *Ne Casek v. City of Los Angeles*, 233 Cal. App.2d 131, 43 Cal. Rptr. 294 (1965). The acts of police officers involving the use of their weapons have generally been considered non-discretionary under the *Muskopf-Hargrove* formulation. See *Robinson v. Smith*, 211 Cal. App.2d 473, 27 Cal. Rptr. 536 (1962); *Sherbutte v. Marine City*, 374 Mich. 48, 130 N.W.2d 920, 923 (1964). It should be noted here that municipal liability in Florida has been expanded beyond *Hargrove* to include

(Continued on next page)

because the activities of police officers within the scope of their duties have generally been classified as the performance of a governmental function.<sup>14</sup>

Doctrinally, the courts have had no difficulty imposing individual liability upon the police officer for the negligent or wrongful acts committed in discharge of his official duties,<sup>15</sup> regardless of the status of the sovereign immunity doctrine in any particular jurisdiction; that is to say, it is no defense for a police officer to state that he was acting in the course of his official duties where the municipal employer is immune from tort liability. He is unable to hide behind the cloak of governmental immunity to excuse his own wrongful conduct.<sup>16</sup>

### **The Nature of the Liability Imposed Upon the Police Officer**

The cases brought against police officers for injuries sustained as a result of negligence in the use of weaponry fall into two broad categories: (1) where the subject of an arrest or an attempted apprehension is injured as the result of the use of excessive force by the police officer; (2) where an innocent bystander is injured as the result of the careless aim or ricocheting of an officer's bullet aimed at a fugitive, or as the result of the officer heedlessly "fooling" with his weapon, or where the weapon is discharged accidentally during cleaning or repair. We will consider how the courts have dealt with both types of situations.

#### *Use of Excessive Force in Effecting Arrest*

The fundamental problem which the court must resolve in setting down a rule of law to govern police conduct is the balancing of possible inefficiencies in the apprehension of criminals resulting from the police officer's fear of subjection to the "retaliation" of a civil suit by a party injured by his hands,<sup>17</sup> against the fear that society will have no remedy

(Continued from preceding page)

intentional torts committed by municipal employees acting within the scope of their employment. *City of Miami v. Simpson*, 172 So.2d 435 (Fla., 1965).

<sup>14</sup> *Graysneck v. Heard*, 422 Pa. 11, 220 A.2d 893 (1966); *Anderson v. Vanderslice*, 240 Miss. 55, 126 So.2d 522 (1961); *State ex rel. Harbin v. Dunn*, 39 Tenn.App. 190, 282 S.W.2d 203 (1943).

<sup>15</sup> *Andrews v. Porter*, *supra*, n. 1; *City of Garland v. White*, 368 S.W.2d 12 (Tex. Civ. App., 1963); *Berry v. Hamman*, 203 Va. 596, 125 S.E.2d 851 (1962); *Davis v. Kendrick*, 52 Cal.2d 517, 341 P.2d 673 (1959); *Holland v. Martin*, 214 Miss. 1, 56 So.2d 398 (1952); *Mollnow v. Rafter*, 89 Misc. 995, 152 N.Y.S. 110 (1915); *Kouns v. Townsend*, 165 Ky. 163, 176 S.W. 989 (1915); *Powers v. Sturtevant*, 199 Mass. 265, 85 N.E. 84 (1908); *Loe v. Whitman*, 87 So.2d 217 (La.App., 1956), holding that where an officer acts pursuant to his authority, his personal liability becomes "merged" into that of the municipality.

<sup>16</sup> *Mollnow v. Rafter*, *supra*, n. 15; *Floria v. Mayor and Aldermen of Jersey City*, 101 N.J.L. 535, 129 A. 470, 40 A.L.R. 1353 (1925); *Goold v. Saunders*, 196 Iowa 380, 194 N.W. 227 (1923).

<sup>17</sup> See *Ne Casek v. City of Los Angeles*, *supra*, n. 13; *Rayano v. City of New York*, 138 N.Y.S.2d 267 (S.Ct. 1955).

for the wanton, despotic use of the force which it has placed at the police officer's command.<sup>18</sup> The need to utilize a certain amount of force in effecting an arrest has been recognized in all jurisdictions,<sup>19</sup> but the amount of force is limited by a "reasonableness" factor, *i.e.*, the police officer will have the burden of showing that the amount of force which he employed was no more than was reasonably necessary to effect the arrest.<sup>20</sup> The reasonableness of the police officer's actions is generally examined from the point of view of the policeman at the time and under the circumstances of the occurrence which led to the injury. It is unfair to hold the police officer to limits of force expressed in pounds and ounces, and the courts make every effort to instruct the jury not to examine the defendant's actions from the point of view of a dispassioned juror given the advantage of hindsight.<sup>21</sup> As Mr. Justice Holmes stated, "Detached reflection cannot be demanded in the presence of an uplifted knife."<sup>22</sup> It is left to the jury to determine the reasonableness of the police officer's action.<sup>23</sup> The jury is aided in quite a few jurisdictions by a presumption that the police officer acted in good faith in determining the amount of force necessary to make the arrest.<sup>24</sup>

Perhaps the initial factor which the jury examines in evaluating the policeman's action will be whether the offense for which the plaintiff was sought to be arrested was a felony or a misdemeanor. This is relevant because historically the peace officer could never use deadly force or kill while attempting to arrest a misdemeanant, while he could

<sup>18</sup> *Colorado v. Hutchinson*, 9 F.2d 275 (8th Cir., 1925).

<sup>19</sup> *Stephens v. City of St. Helens*, 231 Ore. 1, 371 P.2d 686 (1962); *Padilla v. Chavez*, 62 N.M. 170, 306 P.2d 1094 (1957); *State for Use of Holmes v. Pope*, 212 Miss. 446, 54 So.2d 658 (1951); *Kouns v. Townsend*, *supra*, n. 15.

<sup>20</sup> *McCormick v. State of New York*, 34 Misc.2d 806, 229 N.Y.S.2d 441 (1962); *Alaniz v. Funk*, 69 N.M. 164, 364 P.2d 1033 (1961); *Wendelboe v. Jacobson*, 10 Utah2d 344, 353 P.2d 178 (1960); *City of Miami v. Albro*, 120 So.2d 23 (Fla., 1960); *Orr v. Walker*, 228 Ark. 868, 310 S.W.2d 808 (1958); *Pike v. Eubank*, 197 Va. 692, 90 S.E.2d 821 (1956); *Antwine v. Jones*, 14 N.J. Super. 86, 81 A.2d 374 (1951); *Garvey v. Ware*, 139 F.S. 71 (D. Mass., 1956). See editorial notes, *The Civil Liability of Peace Officers for Wounding or Killing*, 28 U. Cinc. L. Rev. 488, 493 (1959), which lists the many state statutes providing that the limit of allowable force shall be that amount necessary to effect the arrest.

<sup>21</sup> *Breese v. Newman*, 179 Neb. 878, 140 N.W.2d 805 (1966); *Oliver v. Kasza*, 116 OhioApp. 398, 188 N.E.2d 437 (1962); *Alaniz v. Funk*, *supra*, n. 20; *Anderson v. Foster*, 73 Idaho 340, 252 P.2d 199 (1953); *United States v. Jasper*, 222 F.2d 632 (4th Cir., 1955); *Lippert v. State of New York*, 207 Misc. 632, 139 N.Y.S.2d 751 (1955); *Thompson v. Norfolk & W. Ry. Co.*, 116 W.Va. 705, 182 S.E. 880, 884 (1935); *Sheehan v. West*, 27 R.I. 84, 60 A. 761 (1905). See *Restatement, Torts 2d*, § 132; *Annot.*, 60 A.L.R.2d 866, 888.

<sup>22</sup> *Brown v. United States*, 256 U.S. 335, 343, 41 S.Ct. 561, 65 L. Ed. 961 (1921).

<sup>23</sup> *Breese v. Newman*, *supra*, n. 21; *Perry v. Gibson*, 247 N.C. 212, 100 S.E.2d 341 (1957); *State to Use of Holmes v. Pope*, *supra*, n. 19; *Human v. Goodman*, 159 Tenn. 241, 18 S.W.2d 381 (1929); *Colorado v. Hutchinson*, *supra*, n. 18.

<sup>24</sup> *Rich v. Cooper*, 234 Ore. 300, 380 P.2d 613 (1963); *Schell v. Collis*, 83 N.W.2d 422, 426 (N.D., 1957); *Flamer v. Yonkers*, 309 N.Y. 114, 127 N.E.2d 838 (1955); *West v. Nantz's Administrator*, 267 Ky. 113, 101 S.W.2d 673, 678 (1937); *Village of Barboursville ex rel. Bates v. Taylor*, 115 W.Va. 4, 174 S.E. 485 (1934).

use such force against a felon in certain circumstances.<sup>25</sup> This distinction is expressed in the law of most jurisdictions today. In the case of an attempted arrest of a felon, where there are reasonable grounds to believe that the person whose arrest is sought is guilty of the commission of that felony,<sup>26</sup> the officer may use all force necessary to capture the felon, even to slaying him in flight.<sup>27</sup> In the case of a misdemeanor, the officer may defend himself reasonably from bodily harm,<sup>28</sup> and he may use sufficient force to effect the arrest by reasonably overcoming the resistance which he may encounter;<sup>29</sup> but if the offender is simply fleeing and not resisting, he has no right to use deadly force or to kill.<sup>30</sup> This is so because "[t]he law considers that it is better to allow him (a petty offender) to escape altogether than to take his life or to do him great bodily harm."<sup>31</sup> As may be discernible, the felony-misdemeanor distinction concerning the tolerable limits of force which could be used to effect an arrest was originally instituted to enable the peace officer to apprehend those criminals whose freedom represented a real danger to the community.<sup>32</sup> It has been stated that in practice the distinction is ineffectual:

The felony-misdemeanor distinction is inherently incapable of separating out those persons of such dangerousness that the perils

<sup>25</sup> *Holloway v. Moser*, 193 N.C. 185, 136 S.E. 375, 376, 50 A.L.R. 262 (1927); *State v. Smith*, 101 N.W. 110 (Iowa, 1904), *rev'd*, 127 Iowa 534, 103 N.W. 944 (1905).

<sup>26</sup> *Askay v. Maloney*, 85 Ore. 333, 166 P. 29 (1917), *rev'd* on other grounds, 92 Ore. 566, 179 P. 899 (1919).

<sup>27</sup> *Alaniz v. Funk*, *supra*, n. 20; *Stinnett v. Commonwealth of Virginia*, 55 F.2d 644 (4th Cir. 1932); *Green v. State*, 91 Ark. 510, 121 S.W. 727, 728 (1909). But see *Fields v. City of New York*, 4 N.Y.2d 334, 151 N.E.2d 188 (1958): "The common law rule allowing an officer to kill a felon in order to arrest him cannot be extended to cases of suspected felonies . . . To justify taking life, it must be shown that a felony had actually been committed." *Accord*, *City of Miami v. Nelson*, 186 So.2d 535 (Fla., 1966); *People v. Kilvington*, 104 Cal. 86, 37 P. 799 (1894).

<sup>28</sup> *City of Festus v. Kausler*, 77 S.W.2d 197 (Mo.App. 1934); *State v. Smith*, *supra*, n. 25; *cf.*, *Rich v. Cooper*, *supra*, n. 24.

<sup>29</sup> *Noback v. Town of Montclair*, 33 N.J. Super. 420, 110 A.2d 339, 343 (1954): ". . . the law will not countenance the shooting or killing of a fleeing offender charged merely with a misdemeanor [or] breach of the peace. . . ." See *Holland v. Martin*, *supra*, n. 15; *Tuck v. Beliles*, 153 Ky. 848, 156 S.W. 883 (1913); *Powers v. Sturtevant*, *supra*, n. 15.

<sup>30</sup> *Piatkowski v. State*, 43 Misc.2d 424, 251 N.Y.S.2d 354 (1964); *Padilla v. Chavez*, *supra*, n. 19; *Holloway v. Moser*, *supra*, n. 25; *Moore v. Foster*, 182 Miss. 15, 180 So. 73 (1938); *Human v. Goodman*, *supra*, n. 23 at p. 381: "Except in self-defense, an officer cannot resort to the extremity of killing or shedding blood in arresting or preventing the escape of one charged with an offense less than felony, even though the offender cannot be taken otherwise. The lawmaking power has not imposed the death penalty for contravention or misdemeanor, and it cannot be assumed by arresting officers that the power of life or death over persons accused or suspected of misdemeanor has been extended to them; and they have no right to sacrifice human life or to shed blood to prevent the escape of petty offenders." But see *Orr v. Walker*, *supra*, n. 20.

<sup>31</sup> *State ex rel. Harbin v. Dunn*, *supra*, n. 14, at p. 206. See *Thomas v. Kinkead*, 55 Ark. 802, 18 S.W. 854 (1892).

<sup>32</sup> As well as a personal risk to the lawman from the possibility of ambush. *Thompson v. Norfolk & W. Ry. Co.*, *supra*, n. 21.

arising from failure to accomplish immediate apprehension justify resort to extreme force to accomplish it.<sup>33</sup>

One may further question the wisdom of this distinction, since under modern legislation many statutory misdemeanors involve conduct more dangerous to life and limb than many felonies,<sup>34</sup> and *prima facie* it would seem difficult and unnecessary for a police officer to determine, at his peril, into which category a given offense may fall:

In the split second or so in which he might have an opportunity to effect an arrest, he must at his peril go through a most problematic "balancing" process to determine "reasonable cause" for the arrest and the degree of force reasonably necessary. Confronted with such a delicate choice and personal responsibility for its correctness, it would not be surprising if police officers generally decided to err on the side of caution and think of home and family instead of the public interest in law enforcement.<sup>35</sup>

The jury's ultimate conclusion concerning the reasonableness of the force employed may turn on any of the following additional factors as well: the availability of alternative courses of conduct, *i.e.*, methods by which the suspect can be subdued without recourse to that quantum of force used;<sup>36</sup> any physical disparities between plaintiff and defendant as a result of which the defendant might feel it necessary to use greater force;<sup>37</sup> whether or not plaintiff was armed with a deadly weapon;<sup>38</sup> the violent or non-violent nature of the resistance employed by plaintiff;<sup>39</sup> the dangerous nature of a continuing misdemeanor, *e.g.*, reckless driving;<sup>40</sup> and what might be termed undue savagery, as where there is no resistance at all, or the physical difference between the two parties is so slight that less forceful means of capture could easily have been employed.<sup>41</sup> Of course, an officer has no absolute right to kill, either to

<sup>33</sup> Model Penal Code, § 3.07, Comment (Tent. Draft No. 8, 1956).

<sup>34</sup> Model Penal Code, *Ibid.* See Caveat to Restatement, Torts 2d, § 131 (1965).

<sup>35</sup> Mathes and Jones, *op. cit. supra*, n. 1, at p. 898.

<sup>36</sup> Chaudoin v. Fuller, 67 Ariz. 144, 192 P.2d 243 (1948); Graham v. Ogden, 157 So.2d 365 (La.App. 1963).

<sup>37</sup> Holland v. Martin, *supra*, n. 15; Dufrene v. Rodriguez, 38 So.2d 511 (La.App. 1949).

<sup>38</sup> Burvick v. City of New York, 15 Misc.2d 478, 181 N.Y.S.2d 572 (1959); Holland v. Martin, *supra*, n. 15 at p. 400: "A killing may not be justified on account of apprehension which is reasonably no more than that some minor battery might be inflicted on the defendant."

<sup>39</sup> Hood v. Brinson, 30 Ill.App.2d 498, 175 N.E.2d 300 (1961) (incredulous questioning). The plaintiff's provocation, of course, may be a defense, subject to the reasonableness of the force used to meet that provocation. See Smith v. Clemmons, 48 So.2d 813 (La.App. 1950); Schell v. Collins, *supra*, n. 24.

<sup>40</sup> Breese v. Newman, *supra*, n. 21 (reckless driving).

<sup>41</sup> Bell v. City of Palos Verdes Estates, 224 Cal.App.2d 257, 36 Cal. Rptr. 424 (1964); Stephens v. City of St. Helens, *supra*, n. 19 (iron claw); Piatkowski v. State, *supra*, n. 30; City of Charleston *ex rel.* Peck v. Dawson, 97 W.Va. 65, 125 S.E. 234 (1924); Brown v. Wyman, 224 Mich. 360, 195 N.W. 52 (1923).



take a prisoner or prevent his escape, even in the case of felons, unless such action is reasonably necessary to prevent escape.<sup>42</sup>

It becomes relevant here to consider the right of the policeman to arrest a suspect, since if a plaintiff is wrongfully apprehended by an officer without proper authority to arrest him several courts allow him the right to use reasonable force to escape.<sup>43</sup> This proper authority to arrest may consist of a warrant,<sup>44</sup> the plaintiff's committing a misdemeanor in the officer's presence,<sup>45</sup> the officer's reasonable grounds to believe that the plaintiff has committed a felony,<sup>46</sup> or a statute authorizing the arrest of a certain class of persons, e.g., drunks or vagrants.<sup>47</sup> While somewhat broad discretion is allowed the officer as to the arrest of felons,<sup>48</sup> significantly less discretion is allowed in the arrest of a suspected misdemeanant.<sup>49</sup> And, although the officer's authority may be unquestioned, the officer is often subject to a duty of informing the offender of the offense for which the arrest is sought, the fact of the impending arrest, and the officer's authority, before the use of force will be legally justified.<sup>50</sup> This requirement may be waived, especially where the plaintiff is apprehended during the commission of the offending act, in immediate pursuit thereafter, or in other extenuating circumstances.<sup>51</sup>

<sup>42</sup> *Fields v. City of New York*, *supra*, n. 27; *Human v. Goodman*, *supra*, n. 23; *Edgin v. Talley*, 169 Ark. 662, 276 S.W. 591 (1925).

<sup>43</sup> *Basista v. Weir*, 340 F.2d 74 (3rd Cir., 1965); *Ware v. Garvey*, *supra*, n. 20; *Anderson v. Foster*, *supra*, n. 21. *Contra*, *Edgin v. Talley*, *supra*, n. 42, *Clark v. DeWalt*, 65 Abs. 193, 114 N.E.2d 126 (1953).

<sup>44</sup> *Tuck v. Beliles*, *supra*, n. 29; *Restatement, Torts 2d* § 131 (1965).

<sup>45</sup> *Lippert v. State of New York*, *supra*, n. 21; *Huth v. Woodward*, 108 OhioApp. 135, 161 N.E.2d 230 (1958); *Caffini v. Herrmann*, 112 Me. 282, 91 A. 1009 (1914).

<sup>46</sup> *City of Miami v. Nelson*, 186 So.2d 535 (Fla. 1966); *Goold v. Saunders et al.*, *supra*, n. 16; 6 C.J.S. Arrest, § 13. But see *Bucher v. Krause*, 200 F. 2d 576 (7th Cir., 1952), holding that mere suspicion is not sufficient to justify a felony arrest.

<sup>47</sup> *Palmer v. Commonwealth*, 252 S.W.2d 677 (Ky.App. 1952), in which the officer's reasonable belief was held to constitute justification for the arrest. The right of the defendant to make the arrest was assumed as a matter of law. *Cf.*, *Schweder v. Baratko*, 103 OhioApp. 399, 143 N.E.2d 486 (1957), where the court held that the subsequent conviction of the plaintiff for the offense for which he was arrested was conclusive in demonstrating the proper authority of the defendant police officer to make the arrest. Whether or not excessive force was used was still left in issue.

<sup>48</sup> *Bourne v. Richardson*, 133 Va. 441, 113 S.E. 893 (1922).

<sup>49</sup> *Ware et ux. v. Dunn*, 80 Cal.App.2d 936, 183 P. 2d 128 (1947): "We are not cited to a single case involving a misdemeanor wherein the conduct of the officer in making the arrest . . . was considered in the light of 'reasonable grounds' or 'probable cause' for causing such detention." *Accord*, *Edgin v. Talley*, *supra*, n. 42: "The officer must determine at his peril whether an offense has been committed or not." *Contra*, *Perry v. Gibson*, *supra*, n. 23, where the defendant's arrest of plaintiff misdemeanant was justified on defendant's reasonable grounds to believe that plaintiff had committed a misdemeanor.

<sup>50</sup> *Model Penal Code*, § 3.07 (Proposed Official Draft, 1962); *Bearry v. Stringfellow*, 246 Miss. 123, 149 So.2d 500 (1963); *cf.*, *City of Miami v. Nelson*, *supra*, n. 46.

<sup>51</sup> *Brown v. Wyman*, *supra*, n. 41: "The office of sheriff carries with it no command to citizens to jump at the crook of his finger"; *Burvick v. City of New York*, *supra*,

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Thus far, the liability of the police officer for the use of excessive force directed toward an offender, with intent to stop or injure the offender, has been mooted. Liability may also attach, however, where the defendant police officer injures the plaintiff offender without intent to do so, as where a warning shot is fired to frighten the offender into halting, or where a shot is fired at the tires of the fleeing offender's automobile in order to force the car to a stop. Such use of the officer's weapon has been sanctioned in several jurisdictions, where the officer has been held non-negligent and not accountable for the resultant injuries to the offender,<sup>52</sup> and abhorred in others.<sup>53</sup> The *Harbin* court was particularly emphatic:

When applied to persons guilty only of a misdemeanor . . . a practice so unnecessary, so wanton, and so hazardous . . . [as the shooting at tires to stop a car] is not to be tolerated in a civilized state.<sup>54</sup>

The court's antipathy toward this exercise of power finds support in the *Restatement, Torts* 2d, § 135 (1965):

[T]he use of force against another for the purpose of effecting the recapture of the other, who, having been lawfully arrested, has escaped or been rescued, is privileged under the same conditions as create the privilege to use force for the purpose of effecting his arrest.

### *Injury to Innocent Bystander*

No more justifiable claim for civil damages exists than that of the innocent bystander who is injured solely as the result of the negligent use of a firearm by a police officer. Perhaps it is because we expect so much of those charged with the enforcement of the law that we least expect those officers to be responsible for trespassing upon the personal rights of innocent members of the public. Even though an officer may be justified in shooting at an offender, a jury question may be presented as to whether he was negligent in using his weapon at that particular time or place.<sup>55</sup> *Davis v. Hellwig*<sup>56</sup> involved a shooting in a busy

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n. 38; *Schell v. Collis*, *supra*, n. 24; *Anderson v. Foster*, *supra*, n. 21. The "extenuating circumstances" alluded to might be a riot, *People v. Young*, 136 Cal.App. 699, 29 P.2d 440 (1934); *Restatement, Torts* 2d, § 142 (1965); or an immediate assault by plaintiff suspect upon defendant policeman, so that such information is practically impossible to communicate, *Tuck v. Beliles*, *supra*, n. 29.

<sup>52</sup> *Wimberley v. City of Paterson*, 75 N.J. Super. 584, 183 A.2d 691 (1962); *Alaniz v. Funk*, *supra*, n. 20; *Breese v. Newman*, *supra*, n. 21; *State for Use of Holmes v. Pope*, *supra*, n. 19, where the absence of liability hinged upon the jury's finding that the shooting was intended only to stop the misdemeanant's automobile.

<sup>53</sup> *State ex rel. Harbin v. Dunn*, *supra*, n. 14; *Edgin v. Talley*, *supra*, n. 42.

<sup>54</sup> *Supra*, n. 14 at 207. See *Bobo v. City of Kenton*, 186 Tenn. 515, 212 S.W.2d 363 (1948); *State ex rel. Kaercher v. Roth*, 330 Mo. 105, 49 S.W.2d 109 (1932).

<sup>55</sup> *Dyson v. Schmidt*, 260 Minn. 129, 109 N.W.2d 262 (1961); *Davis v. Hellwig*, 21 N.J. 412, 122 A.2d 497, 60 A.L.R.2d 866 (1956).

<sup>56</sup> *Ibid.*

shopping district. The officer who used his revolver was held negligent for not taking account of pedestrian traffic. It is the duty of the peace officer placed in the position of justifiably shooting at an escaped felon "to act with reasonable prudence to avoid the injury of innocent persons, and the care must be commensurate with the danger involved [to those persons]." <sup>57</sup> While we do not wish the street to become a "sanctuary for a robber," neither should we leave room for the wantonness that may accompany unbridled discretion in the application of deadly force.

Evaluation of that "reasonable prudence," particularly in a situation where the officer's firearm or revolver has caused the injury complained of, will consist of the application of a high standard of care,<sup>58</sup> perhaps even to the point of utilizing a *res ipsa loquitur* rationale to cast upon the defendant the burden of showing his freedom from negligence.<sup>59</sup> Where the officer's use of his weapon is both justified and reasonable, liability will not attach. The following are illustrative: where the foreseeable risk of harm to innocent bystanders is very slight,<sup>60</sup> where a "sudden emergency" exists, *e.g.*, an openly hostile mob of men crowding around two military policemen (defendants) attempting to arrest a drunken soldier,<sup>61</sup> or where a police officer reasonably believes that an escaped felon for whom he is hunting is "in his sights,"<sup>62</sup> liability is denied. A leading Minnesota decision has distinguished the case in which the defendant police officer creates the very emergency which resulted in plaintiff's injuries, and has imposed liability in that situation.<sup>63</sup> The reasonableness of the policeman's action is for the jury to determine,<sup>64</sup> and the standard used is that of the reasonable man under the circumstances existing at the time of the infliction of the injury.<sup>65</sup>

<sup>57</sup> *Askay v. Maloney*, *supra*, n. 26, at p. 904.

<sup>58</sup> *Wimberley v. City of Paterson*, *supra*, n. 52; *Collins v. City of New York*, 171 N.Y.S.2d 710 (N.Y. Co., 1958), *aff'd* 11 Misc.2d 710, 185 N.Y.S.2d 740 (1958), *aff'd* 7 N.Y.2d 822, 196 N.Y.S.2d 700, 164 N.E.2d 719 (1959); *Crump v. Browning*, 110 A.2d 695, 46 A.L.R.2d 1212 (Mun. Ct. App., D.C. 1955); *Rives v. Bolling*, 180 Va. 124, 21 S.E.2d 775 (1942); *Askay v. Maloney*, *supra*, n. 26. See 4 *Shearman & Redfield on Negligence* 1742 (1941 Rev. ed.).

<sup>59</sup> *Crump v. Browning*, *supra*, n. 58: "When the cause of injury is (1) known, (2) in defendant's control, and (3) unlikely to do harm unless the person in control is negligent, the defendant's negligence may be inferred without additional evidence." See *City of Charleston ex rel. Peck v. Dawson*, *supra*, n. 41. As the *Crump* case makes explicit, if *res ipsa loquitur* is not imposed, the innocent bystander must assume the burden of explaining the accident and pinpointing the negligence.

<sup>60</sup> *Graham v. Ogden*, *supra*, n. 36.

<sup>61</sup> *United States v. Jasper*, *supra*, n. 21.

<sup>62</sup> *Berry v. Hamman*, *supra*, n. 15; 62 C.J.S. 575 (Mun. Corp.).

<sup>63</sup> *Dyson v. Schmidt*, *supra*, n. 55, discussed in *Police Officers Held Negligent in Creating Emergency Situation*, 23 Ohio St. L. J. 164 (1962); *Berry v. Hamman*, *supra*, n. 15.

<sup>64</sup> *Brown v. United States*, *supra*, n. 22; *Askay v. Maloney*, *supra*, n. 26.

<sup>65</sup> *Rayano v. City of New York*, *supra*, n. 17.

In non-pursuit situations, that is to say, where the arrest of a suspect is not involved, police officers may be held to a higher standard of care than the ordinary, prudent man, principally because his training and experience have acquainted him, presumably, with the nature, mechanism, and proper use of firearms.<sup>66</sup> While this higher standard of care may apply in a case in which the police officer himself uses his weapon,<sup>67</sup> it has not been applied to a situation where a police officer has negligently allowed a prisoner to escape with the policeman's weapon, with which the escapee injured an innocent bystander. The court refused to impose liability upon the officer or the municipal employer, regardless of the negligence which might have been proved.<sup>68</sup>

### The Nature of the Liability Imposed Upon the Municipality

#### *Respondent Superior*

Fundamentally, the municipality is an employer who has authorized his agent to perform a specific task. Under ordinary agency principles, when the police officer acts within the scope of his employment and negligently causes injury the municipal employer should respond in damages.<sup>69</sup> So long as the officer is engaged in the general furtherance of his employer's business, liability to the employer will attach regardless of a deviation from the "strict line of his duty."<sup>70</sup> The injured

<sup>66</sup> *Crump v. Browning*, *supra*, n. 58. *Contra*, *Nishan v. Godsey*, 166 F.S. 6 (E.D. Tenn., 1958), at p. 10: "The courts have not made the handling of pistols by officers of a municipality analogous to the handling of instrumentalities such as dangerous animals or railroad engines." See *Rives v. Bolling*, *supra*, n. 58; *Hacker v. City of New York*, 26 A.D.2d 400, 275 N.Y.S.2d 146 (1966).

<sup>67</sup> The *Hacker* case, *supra*, n. 66, applied this high standard where the policeman's weapon discharged accidentally as he was cleaning it.

<sup>68</sup> *Scott v. City of New York*, 2 A.D.2d 854, 155 N.Y.S.2d 787 (1956), *rev'd* 142 N.Y.S.2d 594 (1955): "[City] . . . owed no duty to the respondent, as a private citizen, for damages incurred as the result of the escape and apprehension of the prisoner, even if negligence thereafter be ascribed to [the city] . . . The respondent would have to show a breach of a governmental duty fixed for his individual protection." *Accord*, *Ne Casek v. City of Los Angeles*, *supra*, n. 13: "A police officer's duty to maintain effective custody of a suspect who has been arrested involves the exercise of much judgment and discretion concerning the means used to keep the suspect from escaping. . . . the officer is immune from civil liability to third persons for damage done by a suspect who has managed to escape, because it would not be in the public interest to make the officer's acts reviewable in civil litigation, even if in a particular case a plaintiff may be able to prove negligence." *Contra*, *Young v. Kelley*, 60 OhioApp. 382, 21 N.E.2d 602 (1938). *cf.*, *Schuster v. City of New York*, 5 N.Y.2d 75, 180 N.Y.S.2d 265, 154 N.E.2d 534 (1956).

<sup>69</sup> *McCormick v. State*, 34 Misc.2d 806, 229 N.Y.S.2d 441 (1962); *Hargrove v. Town of Cocoa Beach*, *supra*, n. 13; *Hacker v. City of New York*, *supra*, n. 66; *City of Green Cove Springs v. Donaldson*, 348 F.2d 197 (5th Cir. 1965). See *Restatement, Agency*, § 245: "A master who authorizes a servant to perform acts which involve the use of force against persons or things . . . is subject to liability for a trespass to such persons or things caused by the servant's unprivileged use of force exerted for the purpose of accomplishing a result within the scope of employment. *cf.*, *Jaffe, Suits Against Governments and Officers: Damage Actions*, 77 Harv. L. Rev. 209 (1963).

<sup>70</sup> *Burns v. City of New York*, 6 A.D.2d 30, 174 N.Y.S.2d 192 (1958) at p. 199: "The tendency is to place on the master risks of all those whose faults may be regarded as incidental to the enterprise, as it should be, rather than on the innocent victim."

plaintiff has the burden of establishing that the act complained of occurred while the defendant officer was acting within the scope of his employment; he must meet this burden by a fair preponderance of the evidence.<sup>71</sup>

Because of the peculiar nature of the policeman's employment, the municipal employer has been held liable for injuries inflicted as a result of the officer's negligence, even where the policeman is technically off duty,<sup>72</sup> for the reason that he is required by statute or regulation to be available to perform in his employer's behalf at all times,<sup>73</sup> or because he is executing a function, *e.g.*, cleaning a weapon, in furtherance of his employer's interest.<sup>74</sup> The time and place of such cleaning would generally be considered immaterial.

Once the doctrine of *respondeat superior* is shown to apply, it is unnecessary to consider whether there has been any negligence on the part of a higher-echelon officer to establish municipal liability.<sup>75</sup>

### *Knowledge of Dangerous Propensities of the Individual Officer*

The municipal employer will generally be held liable where it has retained an agent whose past history did in fact, or should have, put the municipality on notice of the agent's propensity for violence or instability.<sup>76</sup> The initial consideration in this area is imposed by the concept of proximate cause. It must be affirmatively shown that the negligence of the municipality in failing to guard against potential hazard to members of the public by not selecting proper or competent officers must have proximately contributed to the injury complained of. This may entail a showing of force beyond "excessive," perhaps "wanton" or

<sup>71</sup> Hacker v. City of New York, *supra*, n. 66.

<sup>72</sup> Burns v. City of New York, *supra*, n. 70. *cf.* Peer v. City of Newark, 71 N.J. Super. 12, 176 A.2d 249 (1961).

<sup>73</sup> Collins v. City of New York, *supra*, n. 58; Hacker v. City of New York, *supra*, n. 66, *lower court opinion*, 46 Misc.2d 1003, 261 N.Y.S.2d 751 (1965).

<sup>74</sup> Rives v. Bolling, *supra*, n. 58.

<sup>75</sup> McAndrew v. Mularchuk, 33 N.J. 172, 162 A.2d 820 (1960) at p. 831: "Subject to the requirement that the negligence must be active rather than passive, so long as the actual tortfeasor commits the wrong within the scope of his authorized duties, there is no persuasive reason in law or morality which should distinguish one servant or agent from another as a means of imposing liability on the municipal principal or master when no such requirement exists as to the ordinary corporation."

<sup>76</sup> Peters v. Bellinger, 22 Ill.App.2d 105, 159 N.E.2d 528 (1959); McCrink v. City of New York, 296 N.Y. 99, 71 N.E.2d 419 (1947); Fernelius v. Pierce, 22 Cal.2d 226, 138 P.2d 12 (1943). *Contra*, Stouffer v. Morrison, 400 Pa. 497, 162 A.2d 378 (1960); Luvaul v. City of Eagle Pass, 408 S.W.2d 149 (Tex. Civ. App., 1966). It should be emphasized that negligence is not applied derivatively in these situations. Rather, we are concerned with the actual negligence of the municipality for failure to appoint qualified personnel, or failure to remove known incompetents (*i.e.*, failure to properly carry out a municipal function). Restatement, Torts 2d, § 307, recognizes that if an instrumentality is used which the actor (municipality) knows is incompetent and involves an unreasonable risk of harm to others, the actor will be held negligent.

"reckless."<sup>77</sup> The imposition of liability in this type of action has generally been phrased in terms of *respondeat superior*, or the maintenance of a public nuisance,<sup>78</sup> but it is well established that if negligence in the selection of unfit persons or retention of known incompetents can be shown on the part of members of the appointing authority, recovery of damages against the municipality will follow subject to the proximate cause limitation.<sup>79</sup> This position is followed in the *Restatement*:

One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm.<sup>80</sup>

A related problem involves suits brought against individual members of the city council or appointing authority for negligence in failing properly to supervise the selection of officers. Two cases have held city council members liable for appointing a police officer, knowing of his reckless propensities,<sup>81</sup> while another has refused to impute the conceded negligence of the appointing board to its individual members.<sup>82</sup> The task of supervising underlings is considered discretionary under *Muskopf-Hargrove*<sup>83</sup> formulation. *Fernelius v. Pierce*,<sup>84</sup> perhaps the leading case on the subject, favors a broad-based liability:

The law giving to a superior officer the power to suspend or remove subordinates would be little more than a contribution to the ego of the superior if it did not likewise place on him the correlative duty of vigilantly exercising that power in the protection of the public interest.<sup>85</sup>

The *Fernelius* case would hold legally responsible for the consequences of an act those who permitted it with knowledge of its impending nature and with the power and duty to prevent it.<sup>86</sup> Thus the deliberate tolera-

<sup>77</sup> *City of Green Cove Springs v. Donaldson*, *supra*, n. 69; *Fernelius v. Pierce*, *supra*, n. 76 at p. 14.

<sup>78</sup> *City of Cumming v. Chastain*, 97 Ga.App. 13, 102 S.E.2d 97 (1958). Where municipal immunity for negligent torts exists, the immunity is generally not affected by labelling the tort "nuisance." *Defender v. City of McLaughlin*, 228 F.Supp. 615 (N.D. S.D. 1964); *Luvaul v. City of Eagle Pass*, *supra*, n. 76.

<sup>79</sup> *Boswell v. Laird*, 8 Cal. 469, 68 Am. Dec. 345 (1857); *Peters v. Bellinger*, *supra*, n. 76; *McCrink v. City of New York*, *supra*, n. 76. *Contra*, *Luvaul v. City of Eagle Pass*, *supra*, n. 76.

<sup>80</sup> *Restatement*, Torts 2d § 319 (1965).

<sup>81</sup> *Abrahamsohn v. City of Ceres*, *supra*, n. 11. See *Fernelius v. Pierce*, *supra*, n. 76, imposing liability upon a city manager.

<sup>82</sup> *Wray v. McMahon*, 182 Miss. 592, 182 So. 99 (1938); cf. *Laney v. Rush*, 152 S.W.2d 491 (Tex. Civ. App. 1941).

<sup>83</sup> *Supra*, n. 13. See *Steibitz v. Mahoney*, 144 Conn. 443, 134 A.2d 71 (1959), imposing a heavy burden on those who would assert an abuse of this discretion.

<sup>84</sup> *Supra*, n. 76.

<sup>85</sup> *Id.* at 21.

<sup>86</sup> *Id.* at 20.

tion of persons known to be "vicious" on a police force would be held to lack legal justification.<sup>87</sup>

Another interesting California case has held that a chief of police, in appointing a subordinate, is not liable for the latter's torts, both being "servants of the law," and no master-servant relationship therefore existing between them.<sup>88</sup> Liability of the chief is said to attach only upon proof that he directed, participated in, or ratified the tortious act "so as to make it his own in legal contemplation."<sup>89</sup> Perhaps *Fernelius* and *Michel* are pointing toward the same conclusion, i.e., a court will examine the supervisor's selection procedure and will find negligence on the part of the supervisor when an officer has caused an injury and his past history should have cast doubt on his responsibility to employ deadly force. A conclusion of this nature would be a wise step in promoting employment of effective, capable, and responsible peace officers.<sup>90</sup>

### *Liability for Lack of Training of the Individual Police Officer*

Plaintiff's cause of action may be predicated upon the issuance of firearms, tear gas guns, or other weapons capable of deadly force, to police officers untrained in the proper, safe use of these weapons.<sup>91</sup> It is generally for the jury to determine the adequacy of the municipal training afforded the police officer. Proximate cause likewise will raise a jury issue.<sup>92</sup> The court's examination of the training procedures used by the municipality may be detailed: in the *Peer* case, the court examined safety training for carrying a loaded revolver off duty; instructions as to type of holster to be used during off-duty hours; safety devices provided by the police department; retraining, including dry and range firing; films shown; and police manuals distributed.<sup>93</sup> Generally,

<sup>87</sup> See *Peters v. Bellinger*, *supra*, n. 76, holding that a city may be held liable directly for the tortious acts of its public officers following the *Molitor* decision, *supra*, n. 13. The public officer involved had been a participant in many street brawls and even convicted of grand larceny. During the course of making an arrest for drunk driving, the officer struck the plaintiff with such violence that plaintiff lost the sight of one eye. *Rev'd*, 19 Ill.2d 367, 166 N.E.2d 581 (1960). *Molitor* was held to have prospective application only (the instant action arose before the *Molitor* decision).

<sup>88</sup> *Michel v. Smith*, 188 Cal. 199, 205 P. 113 (1922), *contra*, *State ex rel. Coffelt v. Hartford Acc. and Indem. Co.*, 44 Tenn.App. 405, 314 S.W.2d 161 (1958).

<sup>89</sup> *Michel v. Smith*, *supra*, n. 88. See *Strickfaden v. Green Creek Highway District*, 42 Idaho 738, 248 P. 456, 49 A.L.R. 1057 (1926); *Hale v. Johnston*, 140 Tenn. 182, 203 S. W. 949 (1918); *cf.*, *David*, *Tort Liability of Public Officers*, 12 So. Cal. L. Rev. 127 (1938).

<sup>90</sup> *Cf.* *Scott v. City of New York*, *supra*, n. 68.

<sup>91</sup> *Nishan v. Godsey*, *supra*, n. 66. It would seem that some training requirement should be imposed for any instrument whose normal or adaptive uses are likely to produce serious injury, as a tear gas weapon of fountain pen size. See *Village of Barbourville ex rel. Bates v. Taylor*, *supra*, n. 24.

<sup>92</sup> *Peer v. City of Newark*, *supra*, n. 72.

<sup>93</sup> *Peer v. City of Newark*, *ibid.* A lower court opinion, subsequently reversed, has indicated that the arming of an officer who has been exposed to only five of sixteen

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courts have had little difficulty utilizing lack of training as a satisfactory basis for municipal liability.<sup>94</sup> The *Restatement* supports this position:

It is negligence to use an instrumentality, whether a human being or a thing, which the actor knows or should know to be so incompetent, inappropriate, or defective, that its use involves an unreasonable risk of harm to others.<sup>95</sup>

One New York case has held that where injury results from the policeman's use of his firearm, a showing that the officer had not received proper training in the use of such firearms was sufficient to establish a *prima facie* case of negligence on the part of the municipality.<sup>96</sup>

### Measure of Damages

We have examined the personal liability of the policeman for the negligent use of his weapon and the liability of the municipal employer, both direct and derivative, growing out of the same fact situations. What remains to be discussed is the measure of damages recoverable by the injured plaintiff.

There is no striking differential between the elements of damages allowable in a police tort action from those allowable in the normal negligence suit. Compensation for hurt is the basic aim.<sup>97</sup> Damages have been allowed in special circumstances for mental anguish unaccompanied by physical harm<sup>98</sup> but disallowed where the only claim involved fear engendered in the plaintiff's mind as a result of the consequences of the attempted arrest.<sup>99</sup> If the officer is justified in using force against the plaintiff, he will be held liable only for so much of the force as is determined to be excessive.<sup>100</sup>

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lessons in the use of firearms provided by the municipality may be negligence. *Hacker v. City of New York*, 46 Misc.2d 1003, 261 N.Y.S.2d 757, *rev'd* 26 A.D.2d 400, 275 N.Y.S.2d 146 (1966).

<sup>94</sup> *McAndrew v. Mularchuk*, *supra*, n. 75; *Peters v. Bellinger*, *supra*, n. 76; *Meistinsky v. City of New York*, 285 A.D. 1153, 140 N.Y.S.2d 212 (1955), *aff'd*, 309 N.Y. 998, 132 N.E.2d 900 (1956).

<sup>95</sup> *Restatement, Torts* 2d, § 307 (1965).

<sup>96</sup> *Meistinsky v. City of New York*, *supra*, n. 94.

<sup>97</sup> *City of Hialeah v. Hutchins*, 189 So.2d 165 (Fla., 1966). The enumeration of the "hurt," as may be expected, varies widely. In Tennessee, recovery may be had for "physical pain, mental anguish, for the affront to his personality, the indignity, disgrace, humiliation, and mortification . . ." attendant upon the tort, *Garner v. State ex rel. Askins*, 37 Tenn.App. 510, 266 S.W.2d 358 (1953), while in Illinois loss of standing in the community is not a compensable item. *Hood v. Brinson*, *supra*, n. 39.

<sup>98</sup> *Laney v. Rush*, *supra*, n. 82 at p. 494: The "special circumstances" involved a willful, wanton, malicious assault whose "obvious purpose is to wound, humiliate, or oppress another."

<sup>99</sup> *Hutchinson v. Lott*, 110 So.2d 442 (Fla., 1959).

<sup>100</sup> *Powers v. Sturtevant*, *supra*, n. 15; *City of Fort Pierce v. Cooper*, 190 So. 2d 12 (Fla., 1966). *Restatement, Torts* 2d, § 71(a), § 133(a), § 144(a) (1965).



The assessment of punitive damages may be difficult. Where a deputy commits a tort within the scope of his employment and the sheriff is sued, punitive damages may be imposed on the sheriff by the doctrine of *respondeat superior*.<sup>101</sup> A recent Arizona case, however, has reached the opposite conclusion:

A sheriff may not be held for punitive damages for the acts of his deputy (although punitive damages were assessed against the deputy) unless he has directed, participated in, acquiesced, or ratified those acts.<sup>102</sup>

Punitive damages have traditionally been disallowed against municipalities because of the obvious difficulty of offering evidence of unlimited taxing power of the municipal corporation to ascertain the measure of a proper verdict based upon the financial worth of the defendant.<sup>103</sup> Better reasoning is exemplified in the opinion of the dissenting judge in the *Fischer* case:

If . . . municipal corporations are liable under the doctrine of respondeat superior for damages proximately resulting from the torts of their police officers acting in the scope of employment, their liability should not be any less or different than that of a business corporation under like circumstances.<sup>104</sup>

### Preparation for Trial

The responsibility of the attorney representing an injured plaintiff in an action brought against the police officer and municipal employer is one that requires the highest standards of professional diligence. Although possible theories of recovery are varied, each is only as good as the evidence which is produced to back it up. Full utilization of pre-trial procedure is a necessity. In those jurisdictions allowing pretrial discovery pursuant to the Federal Rules of Civil Procedure, there are certain avenues open to plaintiff's attorney which must be taken.

### Notice to Produce

Plaintiff's attorney should begin discovery by notifying the defendant municipality to produce certain documents and other tangible records pertaining to the defendant police officer, including the application for employment, civil service report and pre-employment investigation report. Any departmental proceeding brought against the police officer should be included. The police officer should be required to produce his

<sup>101</sup> State *ex rel.* Coffelt v. Hartford Acc. and Indem. Co., *supra*, n. 88.

<sup>102</sup> Boies v. Cole, 99 Ariz. 198, 407 P. 2d 917, 922 (1965).

<sup>103</sup> Fisher v. City of Miami, *supra*, n. 5. See Morris, Punitive Damages in Tort Cases, 44 Harv. L. Rev. 1173 (1931); case comments, Punitive Damage Liability of Municipal Corporations, 22 Wash. & Lee L. Rev. 126 (1965).

<sup>104</sup> Carroll, J., *dissenting* in Fisher v. City of Miami, 160 So.2d 57, 61 (Fla., 1964), *rev'd, supra*, n. 5.

military service record; it may turn out that either disciplinary action based upon his excessive violence or cruelty has been taken against him, or his proficiency rating in the use of firearms may have been low.

The pertinent local agency, e.g., town clerk, should be called upon to produce the ordinance instituting the police departmental rules and regulations with regard to hiring practices, training in the use of firearms, and standards of proficiency set up by the department.

The weapon used in the accident should be produced by whoever has custody of it. The police officer should produce the holster used to carry the weapon on the day of the accident. If an accident report has been filed with the police department, it should be obtained and verified.

### *Written Interrogatories*

In the course of propounding interrogatories to be served upon the defendant, plaintiff's attorney should ensure that the following subjects are covered: (1) the defendant should be required to set forth names and addresses of all witnesses who have knowledge of relevant facts, for possible oral deposition later; (2) the chain of command in the municipal government, particularly with regard to the Department of Public Safety; (3) the names of the superior officers in command over the defendant officer; (4) whether or not the gun was inspected before and after the accident, and if so, by whom, when, why, and the result of the inspection; (5) when was the weapon issued to the police officer; (6) previous accidental shootings, if any, in which the defendant officer was involved; (7) whether or not the police officer had fired the particular gun prior to the accident, and if so, the circumstances surrounding the firing.

With regard to the training program of the police department, the following issues are relevant: (1) what training the police officer received prior and subsequent to the issuance of the gun, what instructions he received, and how often he had target practice; (2) whether or not the police department had safety regulations or standards regarding the handling of firearms; (3) what printed material, if any, had been given to the officer, such as departmental manuals or brochures relating to the weapon; (4) whether any outside agencies participated in the training program such as F. B. I. or civilian experts, and the qualifications of each instructor; (5) whether there are any departmental records kept pertaining to the training program; (6) whether the officer received any additional training beyond the elementary, and any records pertaining to this training. The defendant municipality should be required to set forth in detail the method of selection and hiring of members of the police department, all standards used in the selection, and copies of written examinations, interviews and mental or psychological tests taken by the defendant policeman.

### *Oral Deposition*

The most important pretrial procedure is the use of oral deposition. Here plaintiff's attorney has the opportunity to depose the defendant's superiors, and to receive their spontaneous answers to his questions concerning the selection and training of the defendant policeman. Among those who should be deposed are the chief of police, the head of the Department of Public Safety, the defendant, fellow police officers who have knowledge of his behavior, and instructors in pistol and firearm training. The witnesses should be required to produce any records in their custody, pertaining to the selection and training of the defendant.

There are many retired members of municipal police departments, state police organizations, or the F. B. I., who qualify as experts in the use of firearms. These men can advise plaintiff's counsel as to prevailing standards of training. Reference may be made to the National Rifleman's Association and the National Institute of Criminology for additional standards. The manufacturers of various types of weapons should be consulted with regard to brochures which describe the safe, proper methods of handling the particular firearm.

### **Conclusion**

The historical tradition that the King can do no wrong has been abrogated by the development of the common law. Not only is he responsible for his own torts, he is also responsible for the torts of all the King's men. Municipalities are responsible for the negligent acts of police officers committed within the scope of their employment, and this scope of employment is extended by time and space and carries around the clock.

The attorney representing a litigant who claims injury as the result of the negligence of a police officer in the use of his firearms has a broad responsibility. He must utilize pretrial discovery procedures to the fullest. He cannot sit on his rights and wait for the facts to unfold before him.

It has been stated that immunity breeds neglect, while liability encourages care. With the trend of judicial decisions imposing liability upon police officers, we can look forward to more efficient and specialized training by municipalities of their police officers, with resultant greater protection for society.