

CRISIS INTERVENTION TEAM (CIT) TRAINING

Legal Authority, Liability, and Use of Force

Barry T. Meek¹
October 4, 2010

- I. Legal Framework for Emergency Custody Situations**
 - A. What triggers Emergency Custody?**
 - B. Why is a Person Placed in Emergency Custody?**
 - C. How Long may a Person be Held in Emergency Custody?**
 - D. What are Our Obligations for Persons in Emergency Custody?**

- II. Legal Framework for Use of Force Analysis**
 - A. U.S. Constitution – Fourth Amendment / Fourteenth Amendment**
 - B. Federal Statutes**
 - C. State Law**
 - D. Law Enforcement Policies**

- III. Immunity**
 - A. Qualified Immunity under Federal Law**
 - B. Sovereign Immunity under State Law**

- IV. Alternate Theories of Liability**
 - A. Failure to Train**
 - B. Failure to Protect**
 - C. Disability Discrimination**

¹ Barry Meek is a Special Assistant Attorney General and Associate General Counsel for the University of Virginia where he advises and represents the UVA Police Department. He formerly served as a police officer for the Roanoke City Police Department.

The views expressed are those of the author and presenter and may not necessarily reflect the views of the UVA Office of the General Counsel or the Office of the Attorney General.

- V. **Illustrative Cases**
 - A. **No Excessive Force**
 - B. **Excessive Force**

- VI. **Review**

OUTLINE

- I. **LEGAL FRAMEWORK FOR EMERGENCY CUSTODY SITUATIONS**

- A. **What Triggers Emergency Custody?**

An Emergency Custody Order (ECO) will issue when there is:

probable cause to believe that any person

(i) has a mental illness and that there exists a substantial likelihood that, as a result of mental illness, the person will, in the near future,

(a) cause serious physical harm to himself or others as evidenced by recent behavior causing, attempting, or threatening harm and other relevant information, if any, or

(b) suffer serious harm due to his lack of capacity to protect himself from harm or to provide for his basic human needs,

(ii) is in need of hospitalization or treatment, and

(iii) is unwilling to volunteer or incapable of volunteering for hospitalization or treatment

Va. Code §37.2-808(A)

- B. **Why is a Person Placed in Emergency Custody?**

Individuals are placed in custody for evaluation to determine whether they meet the criteria for temporary detention (TDO). Va. Code §37.2-808(B).

C. How Long May a Person be Held in Emergency Custody?

The person shall remain in custody until a temporary detention order is issued, until the person is released, or until the emergency custody order expires.

An emergency custody order shall be valid for a period not to exceed four hours from the time of execution.

A magistrate may issue one two-hour extension of the ECO for good cause.

Va. Code §37.2-808(J).

D. What are Our Obligations to Persons in Emergency Custody?

In a nutshell, keep them here and keep them (and those around them) safe.

Custody may be transferred to the institution where the preliminary evaluation will be conducted – e.g., the University Medical Center.

The law-enforcement agency or alternative transportation provider providing transportation pursuant to this section may transfer custody of the person to the facility or location to which the person is transported for the evaluation . . . if the facility or location:

(i) is licensed to provide the level of security necessary to protect both the person and others from harm,

(ii) is actually capable of providing the level of security necessary to protect the person and others from harm, and

(iii) in cases in which transportation is provided by a law-enforcement agency, has entered into an agreement or memorandum of understanding with the law-enforcement agency setting forth the terms and conditions under which it will accept a transfer of custody, provided, however, that the facility or location may not require the law-enforcement agency to pay any fees or costs for the transfer of custody.

Va. Code §37.2-808(E).

Note: The University of Virginia has entered into an agreement (MOU) with certain surrounding jurisdictions that allow the University to accept a transfer of custody from those jurisdictions only.

II. LEGAL FRAMEWORK FOR USE OF FORCE ANALYSIS

A. U.S. Constitution – Fourth Amendment / Fourteenth Amendment

Courts evaluate an application of force against a person to affect a “seizure” under the Fourth Amendment.

Courts evaluate an application of force against a person already in custody under the Fourteenth Amendment.

“The Fourth Amendment only governs claims of excessive force during the course of an arrest, investigatory stop, or other ‘seizure’ of a person. . . . [E]xcessive force claims of a pretrial detainee [or arrestee] are governed by the Due Process Clause of the Fourteenth Amendment.” Orem v. Rephann, 523 F.3d 442, 446 (4th Cir. 2008).

Fourth Amendment – Protection from Unreasonable Searches and Seizures

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .

1. What is a seizure?

- An application of force through a means intentionally applied;
- A submission to a show of authority; or
- The presence of facts and circumstances that would lead a reasonable and prudent person to believe that s/he is not free to leave.

“A Fourth Amendment seizure occurs when there is a governmental termination of freedom of movement through means intentionally applied.” Scott v. Harris, 550 U.S. 372 (2007).

2. How much force may be used?

“A claim of ‘excessive force in the course of making a seizure of the person is properly analyzed under the Fourth Amendment’s objective reasonableness standard.” Graham v. Connor, 490 U.S. 386, 388 (1989).
Milstead v. Kibler, 243 F.3d 157 (4th Cir. 2001).

“In determining the reasonableness of the manner in which a seizure is [a]ffected, ‘we must balance the nature and quality of the intrusion on the individual’s Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.’”

Scott v. Harris, 550 U.S. 372 (2007).

3. What is “objective reasonableness”?

The objective facts of a particular situation will be viewed in light of the officer’s perceptions at the time of an incident.

Rowland v. Perry, 41 F.3d 167 (4th Cir. 1994); Gooden v. Howard County, 954 F.2d 960 (4th Cir. 1992).

An officer’s actions will be judged from the perspective of a reasonable police officer on the scene, taking into account (1) the severity of the crime at issue, (2) whether the suspect poses an immediate threat to the safety of the officer or others, and (3) whether the suspect is actively resisting arrest or attempting to evade arrest by flight.

Sigman v. Town of Chapel Hill, 161 F.3d 782 (4th Cir. 1998), quoting Graham v. Connor, 490 U.S. 386 (1989).

A court will inquire whether an officer’s actions were reasonable in light of the facts and circumstances confronting him or her, without regard to the officer’s underlying intent or motivation.

Graham v. Connor, 490 U.S. 386 (1989).

Cox v. County of Prince William, 249 F.3d 295 (4th Cir. 2001).

A suspect’s apparent mental state is one of facts and circumstances of the particular case that should be considered in weighing an excessive force claim.

Gaddis v. Redford Township, 364 F.3d 763 (6th Cir. 2004).

“Even when an emotionally disturbed person is acting out and inviting others to use force against him, the government’s interest in using such force is diminished by the fact that the officers are confronted not with a person who has committed a serious crime, but with a mentally ill individual.”

Deorle v. Rutherford, 272 F.3d 1272 (9th Cir. 2001).

Fourteenth Amendment – Due Process

Did the officer inflict unnecessary and wanton pain and suffering?

“In determining whether this constitutional line has been crossed, a court must look to such factors as [i] the need for the application of force, [ii] the relationship between the need and the amount of force used, [iii] the extent of the injury inflicted, and [iv] whether the force was applied in a good faith effort to maintain and restore discipline or maliciously and sadistically for the very purpose of causing harm.”

Orem v. Rephann, 523 F.3d at 446 (4th Cir. 2008).

B. Federal Statutes

1. 42 U.S.C. §1983 – Civil Action for Deprivation of Rights.

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution or laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress . . .

[Note: Applicability of 42 U.S.C. §1988 allowing recovery of attorneys’ fees in successful §1983 action.]

2. 18 U.S.C. §242 – Criminal Prosecution for Deprivation of Rights.

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person . . . to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States . . . shall be fined under this title or imprisoned not more than one year, or both; and

if bodily injury results . . . shall be fined under this title or imprisoned not more than ten years, or both; and

if death results . . . shall be fined under this title, or imprisoned for any term of years or for life, or both, or may be sentenced to death.

C. State Law

1. Assault and Battery.

An arrest utilizing excessive force amounts to a battery, because that touching is not justified or excused and therefore is unlawful. Gnadt v. Commonwealth, 27 Va. App. 148 (1998).

[Battery may be prosecuted as a criminal offense, or may be prosecuted civilly as a “tort” compensable by monetary damages.]

2. False Arrest.

A police officer is not liable for false arrest if he acted in good faith and with probable cause. To establish a defense, an officer need not prove probable cause in the Constitutional sense, but rather that he believed in good faith that the arrest was lawful, and that his belief was reasonable.

DeChene v. Smallwood, 226 Va. 475 (1984).

3. Intentional Infliction of Emotional Distress.

To recover under this theory of liability, a plaintiff must prove that an officer’s conduct (i) was intentional and reckless; (ii) was outrageous or intolerable; (iii) resulted in emotional distress; and (iv) produced emotional distress that was severe.

Delk v. Columbia/HCA Healthcare Corp., 259 Va. 125 (2000).

The conduct complained of must be so extensive in degree as to go beyond all bounds of decency, so as to be regarded as atrocious and utterly intolerable in a civilized community.

Russo v. White, 241 Va. 23 (1991).

D. Law Enforcement Policies

It is the policy of this law enforcement agency that officers use only the force that reasonably appears necessary to effectively bring an incident under control, while protecting the lives of the officer and others.

IACP National Law Enforcement Policy Center, Model Policy on Use of Force (October 1988).

Violations of federal or state law and/or department policy create potential exposure to liability for officers, their departments or agencies, and their municipalities.

III. IMMUNITY

A. Qualified Immunity under Federal Law

1. Why was the doctrine of qualified immunity created?

Qualified immunity refers to immunity from liability for damages and immunity from litigation. Once qualified immunity is established, an officer is entitled “not to stand trial or face the other burdens of litigation.”

Hunter v. Bryant, 502 U.S. 224 (1991).

“[T]he ‘driving force’ behind creation of the qualified immunity doctrine was a desire to ensure that ‘insubstantial claims’ against government officials will be resolved prior to discovery.”

Pearson v. Callahan, 129 S.Ct. 808, 815 (Jan. 21, 2009).

“Qualified immunity protects law enforcement officers from bad guesses in gray areas and ensures that they are liable only for transgressing bright lines.”

Schultz v. Braga, 455 F.3d 470, 476 (4th Cir. 2006).

2. When can qualified immunity be invoked?

Law enforcement officers performing discretionary functions are entitled to qualified immunity unless their conduct violates a clearly established statutory or constitutional right.

Pearson v. Callahan, 129 S.Ct. 808, 815 (Jan. 21, 2009).

See also Wilson v. Layne, 526 U.S. 603 (1999); Davis v. Scherer, 468 U.S. 183 (1984); Harlow v. Fitzgerald, 457 U.S. 800 (1982).

Qualified immunity exists to protect officers in the performance of their duties unless they are plainly incompetent or knowingly violate the law.

Malley v. Briggs, 475 U.S. 335 (1986).

See also Springman v. Williams, 122 F.3d 211 (4th Cir. 1997);

Price v. Sasser, 65 F.3d 342 (4th Cir. 1995); Hodge v. Jones, 31 F.3d 157 (4th Cir. 1994).

3. What is the difference between “individual” and “official” capacity?

Qualified immunity is available only to individuals who are performing official acts within the scope of their official authority and duties.

Pierson v. Ray, 386 U.S. 547 (1967).

Suit against an officer in his “official capacity” is generally the same thing as a suit against the entity for which he works.

Brandon v. Holt, 469 U.S. 464 (1985).

Immunity is not available when a public officer or official is sued in his “individual capacity.”

Kentucky v. Graham, 473 U.S. 159 (1985).

4. What are the elements of qualified immunity?

To establish qualified immunity, an officer must show: (1) that there was no previously established law prohibiting or restricting his conduct at the time it occurred, or (2) if the law was clearly established, that a reasonable officer under the circumstances would not have known his conduct was illegal.

Gomez v. Toledo, 446 U.S. 635 (1980).

The standard is one of objective reasonableness, i.e., whether a reasonably well-trained officer would have known that his conduct would violate an individual’s constitutional rights.

Anderson v. Creighton, 483 U.S. 635 (1987).

Simmons v. Poe, 47 F.3d 1370 (4th Cir. 1995).

If a court finds that an officer did not act in an objectively reasonable manner then the claim may proceed against him.

McLenagan v. Karnes, 27 F.3d 1002, 1009 (4th Cir. 1994).

5. How does qualified immunity apply in the context of CIT?

In the context of seizures for mental health evaluation, the Fourth Circuit has stated: “We have recognized that “the general right to be free from seizure unless probable cause exists [is] clearly established in the mental health seizure context.”

Gooden v. Howard County, 954 F.2d 960, 968 (4th Cir. 1992).

S.P. v. City of Takoma Park, 134 F.3d 260 (4th Cir. 1998).

6. Illustrative Cases:

Orem v. Rephann, 523 F.3d 442, 448-49 (4th Cir. 2008).

Holding deputy not entitled to qualified immunity where there is evidence bearing heavily against deputy that “the taser gun was not used for a legitimate purpose; such as protecting the officers, protecting [the detainee], or preventing escape. Rather, Deputy Rephann used the taser to punish or intimidate Orem – a use that is not objectively reasonable, is contrary to clearly established law, and not protected by qualified immunity.” Notably, in determining whether the deputy’s conduct was consistent with what a reasonable officer would do in the same or similar circumstances, the court compared the deputy’s response to the response of other deputies on the scene.

Waterman v. Batton, 294 F. Supp.2d 709 (D. Md. 2003).

Police officers were not entitled to qualified immunity in lawsuit brought by family of mentally ill man they shot and killed while he was driving his vehicle towards a toll plaza. The family claimed that the officers shot him multiple times at close range and continued firing after all officers were out of the way of his vehicle.

Buchanan v. Milwaukee, 290 F. Supp.2d 954 (E.D. Wis. 2003).

Officer was not entitled to qualified immunity on claim he shot a mentally ill man in the stomach as he pointed a butcher knife towards himself with suicidal intentions; court held that deadly force is only permissible when a suspect poses an imminent threat to an officer or to others – not solely to himself.

Bailey v. Kennedy, 349 F.3d 731 (4th Cir. 2003).

Officers’ alleged continued use of physical force after a man was subdued and restrained violated clearly established law (and, if plaintiff’s description of the officers’ actions is accepted as true, the force was excessive as used against a man who had committed no crime). Officers also lacked probable cause to restrain the man for an involuntary mental evaluation solely on the basis of a neighbor’s 911 call reporting that he was suicidal.

Federman v. County of Kern, 2003 U.S. App. LEXIS 7180 (9th

Cir.). Sheriff and SWAT team members were not entitled to qualified immunity for death of a man shot and killed in his home after he resisted being taken into custody for a psychiatric evaluation. Further, warrantless entry into the home when the man had not committed any crimes and there was no immediate need to subdue him was held to be an excessive use of force.

B. Sovereign Immunity under State Law

1. Sovereign immunity is a doctrine that precludes an individual from seeking recovery against an officer for state-law claims of negligence. In Virginia, sovereign immunity applies to all agencies of the Commonwealth (including its political subdivisions, such as a county) and their employees, unless a state statute expressly provides otherwise.

Mann v. County Bd. of Arlington County, 199 Va. 169 (1957).

Municipalities (cities) enjoy the same immunity from liability when they are engaged in the performance of a governmental function, such as the provision of law enforcement services.

Transp. Inc. v. City of Falls Church, 219 Va. 1004 (1979).

2. Whether or not an employee of a municipality will be entitled to immunity from acts of negligence depends upon several factors: (1) the nature of the function being performed by the employee; (2) the extent of the “state’s” interest and involvement in the function; (3) the degree of control and direction exercised by the state over the employee; and (4) whether the act complained of involved the use of judgment and discretion.

James v. Jane, 221 Va. 43 (1980).

Lohr v. Larsen, 246 Va. 81 (1993).

3. In Virginia, an officer entitled to sovereign immunity is not immune from suit. Rather, the degree of negligence which must be shown by a plaintiff in order to impose liability on the officer is elevated from simple to gross negligence.

Colby v. Boyden, 241 Va. 125 (1991).

4. Officers are not entitled to sovereign immunity for acts of gross negligence.

Gross negligence is “that degree of negligence which shows indifference to others as constitutes an utter disregard of prudence amounting to a complete neglect of the safety of [another]. It must be such a degree of negligence as would shock fair minded [people] . . .”

Meagher v. Johnson, 239 Va. 380 (1990).

Officers are not entitled to qualified immunity for intentional torts (e.g., assault and/or battery).

IV. ALTERNATIVE THEORIES OF LIABILITY

A. Failure to Train

City of Canton v. Harris, 489 U.S. 378, 390-91 (1989).

A constitutional deprivation caused by a municipality's failure to train its employees is cognizable under 42 U.S.C. §1983 only if the municipality's failure to train reflects deliberate indifference to the constitutional rights of its inhabitants. The fact that a particular officer may be unsatisfactorily trained will not, alone, suffice to fasten liability on the municipality, nor will it suffice to prove that an injury or accident could have been avoided if an officer had better or more training sufficient to equip him to avoid the particular injury-causing conduct. "[T]he need for more or different training [must be] so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need." A plaintiff therefore must demonstrate that the alleged injury "would . . . have been avoided had the [officer] been trained under a program that was not deficient in the identified respect." "Adequately trained officers occasionally make mistakes; the fact that they do says little about the training program or the legal basis for holding the [municipality] liable."

Estate of Barber v. Barnes,

2006 U.S. Dist. LEXIS at 44679 *42 (M.D.N.C.)

In a case arising from Deputy's shooting of an unarmed assailant demonstrating irrational behavior, granting summary judgment to Sheriff and Deputy on failure to train claims where "the uncontradicted evidence shows that Deputy Gordy received lengthy training before beginning duties as a deputy, including specific training in the use of force and the handling of 'sensitive populations,' including the mentally ill."

Watkins v. New Castle County, 374 F. Supp.2d 379 (D. Del. 2005).

Town was not liable, on the basis of inadequate training, for the death of a drug-intoxicated arrestee allegedly through positional asphyxia. The Court found that the town did not have information about the risks of a cocaine-induced excited delirium and the potential serious consequences of a prone restraint of such an arrestee, and therefore did not act with deliberate indifference in failing to train its officers concerning such circumstances.

Herrera v. Las Vegas Metro. P.D., 298 F. Supp.2d 1043 (D. Nev. 2004). Estate of mentally ill man shot and killed by police officers after use of bean bag pellets and pepper spray failed to subdue him presented a genuine issue of fact as to whether officers had been inadequately trained in dealing with mentally ill persons and in the use of impact projectiles, and whether the alleged inadequate training caused his death. The officers' treatment of the situation, combined with their statements that a mentally ill person should be treated as any other person, regardless of the situation, indicates the police department's training dealing with the mentally ill falls well below the reasonable standard of contemporary care.

Cortez v. Prince George's County, 31 Fed. Appx. 123, 128 (4th Cir. 2002). County's failure to train deputies to recognize symptomatology that warranted full psychiatric assessment and treatment allegedly resulting in suicide of prisoner stated a claim under 42 U.S.C. §1983.

Lord v. Riley, 921 F.2d 272 (4th Cir. 1990). Affirming summary judgment for municipality and supervisors on failure to train claim under 42 U.S.C. §1983, where defendants presented evidence that they provided specific training on the problems of the mentally ill and those with seizures and plaintiff pointed to no evidence that the training program was so inadequate as to evidence a "deliberate indifference" to the rights of those served by police and fire departments.

Temkin v. Frederick County Comm'rs, 945 F.2d 716 (4th Cir. 1991). Claim of inadequate training cannot be established under 42 U.S.C. §1983 absent a finding of a constitutional violation by the officer whose actions are the subject of the lawsuit. The same rule applies with respect to attempts to impose liability on non-shooting officers, a supervisor, or a municipality.

Accord McLenagan v. Karnes, 27 F.3d 1002 (4th Cir. 1994); Hinkle v. City of Clarksburg, 81 F.3d 416 (4th Cir. 1996).

B. Failure to Protect

DeShaney v. Winnebago County, 489 U.S. 189 (1989).

An officer's failure to protect an individual against private violence does not constitute a violation of the Due Process Clause. However, an allegation that police in some way assisted in creating or increasing danger to an individual could implicate those Due Process rights.

Pena v. Deprisco, 432 F.3d 98 (2nd Cir. 2005).

“When state officials communicate to a private person that he or she will not be arrested, punished, or otherwise interfered with while engaging in misconduct that is likely to endanger the life, liberty, or property of others, those officials can be held liable under 42 U.S.C. §1983 for injury caused by that misconduct . . . even without an allegation of explicit approval.”

Bukowski v. City of Akron, 326 F.3d 702 (6th Cir. 2003).

Victim was a 19-year old mentally disabled girl who graduated from a special education program and was proficient in using the computer. On the internet she met a 39-year old man who told her he was an 18-year-old disabled person and encouraged her to come to his home in Akron. Victim traveled to Akron on her own and was raped by him. Police in victim's hometown tracked her through her e-mail account and contacted Akron police. Akron police convinced victim to come to their station. She appeared to be able to take care of herself, referred to suspect as her boyfriend, and asked to be returned to his residence. After checking with a victim's advocate and a prosecutor, officers returned victim to suspect's residence. Victim and her family later sued the Akron police, alleging failure to protect. Court found that the police had merely returned victim to a pre-existing danger, and had not put her in a more dangerous position. At the time, they did not know that suspect was dangerous or that he had raped victim, and the police did not possess the legal authority under state law to intervene by detaining victim at the station. The Court ruled that the police did not breach their constitutional obligation to refrain from actively increasing an individual's susceptibility to private violence.

Christiansen v. City of Tulsa, 332 F.3d 1270 (10th Cir. 2003). Suspect's wife reported that her husband had loaded guns and had threatened to kill her and to commit suicide. An 8-hour standoff began, during which police officers prevented suspect's mother and doctor from having contact with him. Suspect had indicated that he wanted to speak to his mother to explain why he was committing suicide, so the police decision to prevent her from entering the home was intended to forestall the suicide. Suspect had access to a telephone line during most of the standoff and he turned down repeated offers for medical treatment and inquiries by a police negotiator as to whether he wished to speak with his doctor. There was no evidence that the doctor sought to insist on speaking with suspect during the siege. Eventually, police fired a flexible baton into a window of suspect's apartment. Shortly thereafter, he committed suicide. His family claimed that the police handling of the incident violated suspect's constitutional rights under the Special Relationship Doctrine. The court held that, absent involuntary restraint there is no duty to protect under the Special Relationship Doctrine. The court found no violation of any constitutional rights, and determined there was no merit to the family's "danger-created" claim. The court held that to make a proper danger-created claim, six elements must be established: (1) police actors must have created or increased the plaintiff's vulnerability; (2) plaintiff must have been a member of a specifically definable group; (3) police conduct must have put the plaintiff at substantial risk of serious immediate and proximate harm; (4) the risk was obvious or known; (5) police must have acted recklessly in conscious disregard of the risk, and (6) conduct of the police, when reviewed in total, must have been conscience shocking.

Officers may be held liable for release of an incapacitated person who subsequently suffers injury. Inglesias v. Wells, 441 N.E.2d 1017 (Ind. App. 1982) (person released subsequently suffered injuries from exposure); Wagar v. Hasenkrug, 486 F. Supp. 47 (D. Mont. 1980) (failure to properly care for an incapacitated intoxicated person). But see Abraham v. Maes, 430 So.2d 1099 (La. App. 1983) (officers not liable for failing to recognize that man arrested for public drunkenness had internal head injury); Gilchrist v. City of Livonia, 599 F. Supp. 260 (E.D. Mich. 1984) (no liability for refusal to take mentally ill person into custody and he subsequently kills himself).

C. **Disability Discrimination**

Arnold v. City of York, 340 F. Supp.2d 550 (M.D. Pa. 2004).

Court found a possibly viable claim for disability discrimination under the Americans with Disabilities Act, based on alleged failure to provide adequate training for officers in handling encounters with mentally ill persons. Parents of a mentally ill man sued the police department after their son died, allegedly of positional asphyxia, after being taken into custody. Officers had transported the son to a hospital, handcuffed and hog-tied in a face-down position, and they had noticed his irregular breathing but failed to adjust his position.

Thompson v. Williamson County, 965 F. Supp. 1026 (M.D. Tenn. 1997).

Deputy's shooting and killing of mentally disturbed man was not disability discrimination, in absence of showing that decedent was a "qualified individual with a disability" or that he was somehow "denied public services" because of such a disability.

Bates v. Chesterfield County, 216 F.3d 367 (4th Cir. 2006).

Officers' actions in detaining an autistic youth for questioning after he reportedly acted strangely while trespassing in a homeowner's garage was a proper investigatory stop. The ensuing confrontation with the youth, and his subsequent arrest for assaulting a police officer, were not a violation of either the Fourth Amendment or federal disability discrimination statutes.

Waller v. City of Danville, 2006 U.S. App. LEXIS 30799 (4th Cir).

The fact that there was no violation of the Fourth Amendment in shooting and killing a suspect that an officer reasonably could have believed was armed and was holding a person against her will, did not mean that the appeals court could find no set of facts from which the plaintiff could establish a claim for either violation of the ADA (based on the suspect's mental illness) or for race discrimination. Therefore, the appeals court ordered further proceedings on both claims.

Green v. City of New York, 465 F.3d 65 (2nd Cir. 2006).

Transporting a man with ALS to a hospital against his will, at a time when he was no longer in imminent danger, and despite his non-verbal protests, if true, could constitute disability discrimination and a violation of his Fourth Amendment rights.

V. EXCESSIVE FORCE CASES

A. No Excessive Force

Scott v. Harris, 550 U.S. 372 (2007).

An officer engaged in a high-speed pursuit acted in an objectively reasonable way in terminating the pursuit by pushing the suspect's vehicle off of the roadway, ultimately causing serious bodily injury to the suspect.

Reasonableness is a balancing test: "We must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion. . . . We must consider the risk of bodily harm that Scott's actions posed to respondent in light of the threat to the public that Scott was trying to eliminate."

Relative culpability matters: "We think it appropriate in this process to take into account not only the number of lives at risk, but also their relative culpability. It was respondent, after all, who intentionally placed himself and the public in danger by unlawfully engaging in the reckless, high-speed flight that ultimately produced the choice between two evils that Scott confronted. . . . By contrast, those who might have been harmed had Scott not taken the action he did were entirely innocent."

Fourth Amendment does not require termination of pursuit: "We are loath to lay down a rule requiring the police to allow fleeing suspects to get away whenever they drive *so recklessly* that they put other people's lives in danger. . . . The Constitution assuredly does not impose this invitation to impunity-earned-by-recklessness."

[Note: Supreme Court relied heavily on video recorded from dashboard camera to determine indisputable facts.]

Abney v. Coe, 493 F.3d 412 (4th Cir. 2007).

Pursuit which ended when deputy's car and motorcycle driven by suspect collided was objectively reasonable and therefore did not violate the Fourth Amendment. During pursuit, suspect violated numerous traffic laws placing himself, officers, and other motorists at substantial risk of serious harm. Deputy was not required to let suspect go; was not acting in an objectively unreasonable manner even if his actions violated policies of the sheriff's department; and differing eye witness testimony did not create material disputes requiring trial.

Willis v. Oakes, 493 F.Supp. 2d 776 (W.D. Va. June 19, 2007).

A police officer who fatally shot a suspect and wounded a passenger did not act in an objectively unreasonable manner and therefore did not violate

the Fourth Amendment. After being confronted by officers on the parking lot of a “Double Kwik” convenience store (where pedestrians and other motorists were present), suspect attempted to re-enter his vehicle and flee while officers were hanging on to suspect through the open driver door. “[W]hat is relevant is the undisputed fact that [suspect] intentionally placed himself, [passenger], and innocent bystanders in danger by recklessly attempting to drive off.”

Caricofe v. Ocean City, Md., 32 Fed. Appx. 62 (4th Cir. 2002).

Police officers responded to the call of a motel clerk, and found a large, naked man running through the halls of the motel. The man threw off officers who tried to handcuff him. The man did not respond to pepper spray. The man grabbed an officer and pinned him against a wall, two others began hitting the man in the legs with their nightsticks. The man got away, and officers chased him down a flight of stairs, and tackled him in the parking lot, applying a violent prisoner restraining device. The man stopped breathing and died. The court ruled that the officers’ force was not excessive because the man posed a threat to others and the officers escalated their force only when the previous level of force was ineffective.

S.P. v. City of Takoma Park, 134 F.3d 260 (4th Cir. 1998).

Removing a woman from her home and forcibly taking her to a hospital for an emergency psychiatric evaluation could be viewed by reasonable officers as not only reasonable, but prudent, when they had reason to believe she might be suicidal, even if they were mistaken.

Sigman v. Town of Chapel Hill, 161 F.3d 782 (4th Cir. 1998).

Officer acted reasonably in shooting and killing a man armed with a knife who ignored commands to drop it and advanced toward the officer.

Untalan v. City of Lorain, 430 F.3d 312 (6th Cir. 2005).

Suspect, who suffered from schizophrenia, grabbed a butcher knife while at home with his mother and father. Police were called to the home, and four officers tried to speak with suspect for 45 minutes. Eventually, suspect, who had been in the kitchen barricading himself behind a waist level cart, moved the cart aside and lunged at a police officer and stabbed him. The officer threw suspect onto a couch, where suspect’s father tried to restrain him and wrestled for control of the knife. Another police officer, believing that suspect was continuing to attack the officer who had been stabbed, fatally shot suspect. Suspect’s father claimed that just prior to the shooting he had gained control of the knife. The court held that the use of deadly force was objectively reasonable, even if suspect had lost control of the knife just before being shot. This did not occur until a few seconds, or as little as a split second prior to the use of deadly force and under the circumstances a reasonable officer could have perceived that suspect still had the knife.

B. Excessive Force

Orem v. Rephann, 523 F.3d 442 (4th Cir. 2008).

A woman ransacked her husband's office destroying equipment and damaging property. She also assaulted her husband and had thrown his belongings into the front yard. She was served with a protective order and left the family residence. [The husband was a former sheriff's deputy.] Later, under the influence of prescription drugs, marijuana and alcohol, she became enraged and returned to her home where she ran her vehicle into a ditch, charged at deputies and was arrested. She was restrained in handcuffs and leg restraints and placed in a patrol car for transport. While en route to jail the woman was screaming, cursing, banging her head against the window and managed to loosen her leg restraints. The transporting deputy pulled over and the two deputies following also pulled over. While the transporting deputy was attempting to re-secure the detainee's leg restraints, another deputy confronted the detainee and shocked her twice with a taser – once under the breast and once on the inside of her thigh. The court held that the deputy was not entitled to summary judgment or qualified immunity. The court noted that the detainee weighed 100 pounds and the deputy who tased her weighed 280 pounds. Aside from a weak and ineffectual verbal command, the deputy made no other effort to exert control over the detainee before he shocked her twice (e.g., no soft hand tactics). The use of the taser directly followed the woman's verbal insult of the deputy. The verbal exchange had been captured on the dashboard camera of the patrol vehicle. Moreover, the use of a taser in these circumstances violated departmental policy. The Fourth Circuit held that the facts "evidence that Deputy Rephann's use of the taser gun was wanton, sadistic, and not a good faith effort to restore discipline. [The woman's] behavior without question was reprehensible, but Deputy Rephann's use of the taser was an 'unnecessary and wanton infliction of pain.'" Id. at 447.

Clem v. Corbeau, 284 F.3d 543 (4th Cir. 2002).

Police officers arrived at a residence in response to a call stating that a man residing there was having mental problems. When police arrived, the man was incoherent. He was not initially agitated, but became so as the officers began speaking with him. The officers then sprayed him repeatedly with pepper spray. As the man stumbled down a hallway on his way to the bathroom, one of the officers shot him without warning. The court found this to be unreasonably excessive force, and determined that the officer was not protected by qualified immunity.

Vinyard v. Wilson, 311 F.3d 1340 (11th Cir. 2002).

Use of pepper spray against an unarmed suspect of a minor crime who was handcuffed was objectively unreasonable.

Drummond v. City of Anaheim, 343 F.3d 1052 (9th Cir. 2003).

Police officers responded to a call of an emotionally disturbed person at a 7-11 parking lot. They found suspect, who was unarmed, hallucinating and in an agitated state. Before an ambulance arrived, officers decided to take him down for his own safety. Suspect was taken to the ground, handcuffed, and then two officers placed their knees on his back and neck. During the next 20 minutes, suspect complained of difficulty breathing. He was placed in hobble restraints, and within a minute he went limp and stopped breathing. Officers turned him over on his back, administered CPR until paramedics arrived, and was revived within 7 minutes after losing consciousness, but he suffered brain damage and was left in a permanent vegetative state. Court held that some degree of physical restraints may have been necessary, but that the degree of force used in this case was not justifiable. The Court held that “the officers, indeed any reasonable person, should have known that squeezing the breath from a compliant, prone and handcuffed individual, despite his pleas for air, involves a degree of force that is greater than reasonable.” In this case, the evidence showed that police department had previously issued a training bulletin warning that when officers are kneeling on a subject’s back or neck to restrain him, compression asphyxia can result and may be a precipitating factor in causing death. Further, there had been prior federal cases describing the dangers of pressure on a prone, bound, and agitated detainee.

Cruz v. Laramie, 239 F.3d 1183 (10th Cir. 2001).

Officers may not hog tie a suspect where his diminished capacity is apparent. The diminished capacity may result from severe intoxication, controlled substances, a discernable mental condition, or any other condition apparent to the officers at the time.

Deorle v. Rutherford, 272 F.3d 1272 (9th Cir. 2001).

Officers encountered an emotionally disturbed man with a cross bow who was threatening at times, but always compliant with officers’ demands. Thirteen officers responded and established a perimeter. SIRT and negotiators were dispatched. The suspect allowed his family out of the house. Officer on SIRT moved in closer while negotiators still were en route. Officer had a verbal confrontation with suspect. Officer commanded suspect to drop cross bow, which he did. Suspect then began walking toward officer. Officer stood his ground and, without warning, shot suspect in face with a beanbag round from 30 feet resulting in loss of suspect’s eye. Court denied qualified immunity where officer shot an unarmed suspect who had committed no serious offense, was known to be mentally or emotionally disturbed, officer was aware of perimeter and negotiators response, officer fired on suspect without warning, and there was no risk of flight or threat to officer. Use of force was excessive.

Henry v. Purnell, 501 F.3d 374 (4th Cir. 2007).

Deputy shot suspect with his pistol when he intended to use his taser and thought he was using his taser. Fourth Circuit held that a seizure occurred under the Fourth Amendment even though the deputy did not intend to use the amount of force actually applied. Remanded case to determine reasonableness of force applied and whether qualified immunity was applicable.

VI. REVIEW

What suggested practices can be gleaned from these illustrative cases?

- Wait for Back-up – numbers provide options.
- Gather Information – appreciate all facts and circumstances, particularly when immediate action/confrontation is not required by circumstances.
- Calming steps – approach without lights & sirens; control the scene and bystanders; and move slowly and deliberately.
- Communicate – Effectively communicate with the individual.
- De-escalate – Avoid agitation, threats or other escalation unless necessary for protection of self or others.