The Legal Relationship Between Counties and Sheriffs Past, Present and Future

Introduction

The relationship between each county and its sheriff is fraught with political, budgetary, territorial, and performance issues. Always lurking just below the surface is the issue of county liability for the professional misconduct of sheriffs and/or deputy sheriffs in the performance of their duties. The liability landscape for counties, at least under State law, was resolved in 1989 by the Court of Appeals of Maryland ("Court of Appeals") in *Rucker v. Harford County*, 316 Md. 275. However, slowly developing events since *Rucker* make clear that many complicated liability issues remain unresolved in the historically complicated relationship between counties and their sheriffs. Recently, issues have arisen in federal cases involving alleged constitutional violations or alleged violations of anti-discrimination laws governing conduct in the workplace. The liability landscape faced by counties for the actions of sheriffs and their deputies is largely shaped by the formal (*i.e*., statutes and ordinances) and informal (*i.e*., standard practices and procedures) relationships between counties and sheriffs. The relationship is different in each county, and liability may be incurred, or avoided, based simply upon the relationship being reviewed by a court.

The Office of the Sheriff: The Historical and Constitutional Configuration

The Constitution of Maryland, Art. IV, § 44, mandates the election of a sheriff in each county and in Baltimore City. Section 44 establishes the term of office for sheriff and imposes age and residency requirements on those seeking the office. Furthermore, § 44 provides that the Governor shall appoint a replacement if a sheriff dies, resigns, or cannot serve out his or her term. As far as local control, a sheriff is required by an act of the General Assembly to submit a budget to the county in compliance with the county's budget procedure.

Even with this constitutional and statutory framework, the question remained as to whether sheriffs and deputy sheriffs were, for civil tort (non-criminal wrongdoing) liability purposes, employees of the State or county.

1989: *Rucker v. Harford County* – What it Answered

In this pivotal case, the Court of Appeals squarely faced the issue of whether sheriffs and deputy sheriffs were State or county employees when sued under State tort law. The Court held that when sued for common law torts, sheriffs and deputy sheriffs were officials and/or employees of the State. The Court's conclusion was based on the role of a sheriff as a State constitutional officer whose duties remain subject to control by the General Assembly. The control of the functions of the sheriffs by the common law, the law fashioned by the courts through their decisions, and the General Assembly, combined with the statewide nature of many sheriffs' duties, reinforced the Court's conclusion that sheriffs were State rather than local government officials. And, because deputy sheriffs function as a

sheriff's alter ego, they were also deemed to be State employees. The Court of Appeals' holding meant that when the lawsuits came, the State was required to defend them and, in the event of a judgment, to pay it.

1990: The State's Response to *Rucker* – § 9-108 of the State Finance and Procurement Article

For obvious reasons, the State did not willingly embrace its newly imposed liability for the tortious acts or omissions of sheriffs and deputy sheriffs. The State's reticence was understandable in light of its belief that sheriffs and deputies were county officials and agents and, for that reason, were not included as "State personnel" in the Maryland Tort Claims Act ("MTCA"). Despite the State's continued belief that sheriffs and deputy sheriffs should turn to the counties when sued, *Rucker* was the law and the State responded accordingly. The dispute, however, was far from over.

The State was unwilling to accept the responsibility for the tortious acts of sheriffs and deputies. This was especially true when the conduct in question arose in connection with what it deemed to be purely local functions, county law enforcement and/or the operation of a county detention center. This led to the second legislative change in light of *Rucker* – the enactment of § 9-108 of the State Finance and Procurement Article in 1990. Section 9-108 is titled "Coverage and defense for personnel other than those providing courthouse security, serving process, or transporting inmates." In essence, § 9-108 categorizes the "functions" performed by sheriffs as either "State" or "County" and it does so expressly. In 1990, and through today, State functions include: courthouse security; service of process; the transportation of inmates to and from court proceedings; and activities arising under a multi-jurisdictional agreement under the supervision of the Maryland State Police or other State agency. The "County" functions identified by the General Assembly in 1990, and which remain in place today, include law enforcement and the operation of county detention centers.

Section 9-108 made clear that the duty to insure, defend, and indemnify related to performance of "County" functions fell on the counties. The statute authorized the counties and Baltimore City to obtain insurance to provide the coverage and defense necessary under the MTCA for sheriffs and deputy sheriffs when sued in relation to law enforcement or correctional activities. The statute also contained a thinly veiled warning: "If a county or Baltimore City does not obtain adequate insurance coverage to satisfy the coverage and defense necessary under the MTCA, an assessment for coverage and payment of any litigation expenses, other than compensation for the time spent by any State employee working for the Attorney General, shall be set off from: (1) any tax which has been appropriated in the State budget to the county or Baltimore City; or (2) the subdivision's share of any income tax collected by the State Comptroller."

In response to § 9-108, counties in which the sheriff performs the law enforcement and/or detention center functions have insured against potential loss through self-insurance, insurance pooling (the Local Government Insurance Trust), or private insurance.

1991: *Dotson v. Chester* – What *Rucker* Did Not Answer

The *Rucker* Court answered the limited question of whether, for the purposes of Maryland tort law, a sheriff and/or deputy is a State or county employee. Relying on the historical roots in Maryland law, the Court of Appeals concluded that sheriffs and deputies are State employees when sued in tort under State law. The Court specifically did not answer the question of whether, for purposes of federal constitutional or statutory law, a sheriff and/or deputy is an employee or agent of the State or county. The Court said that this question was better suited for a federal court to answer, since federal law, specifically the Eleventh Amendment and Title 42, § 1983 of the United States Code, was involved.[1] In sum, the *Rucker* Court made clear that its decision was limited to State law, and that the federal questions would have to wait.

As fate would have it, it did not take long before a federal court weighed in. In *Dotson v. Chester*, 937 F. 2d 920 (4th Cir. 1991), the United States Court of Appeals for the Fourth Circuit ("the Fourth Circuit") considered the appeal in a jail conditions lawsuit brought under § 1983 by inmates at the Dorchester County Jail.

In *Dotson*, the inmates argued that the sheriff was a "final policymaker" for the county under federal law and that, as a result, the county was liable for his conduct in operating the jail. The federal appeals court agreed with the federal trial court that, under both State and county law, the Dorchester County Sheriff possessed final policymaking authority for Dorchester County in his operation of the County Jail. Consequently, since, at least in this regard, the sheriff was a county "final policymaker," the county was held liable under § 1983.

In reaching this conclusion, the Fourth Circuit agreed with the United States District Court that there was a "symbiotic relationship" between the county and the sheriff when it came to the operation of the jail. The federal district judge stated: "While the sheriff, an independently elected official, is charged with the care and custody of prisoners committed to him, he cannot operate without the fiscal cooperation and agreement of the Board of County Commissioners." The judge continued, "The Commissioners maintain the jail through local funding; they have delegated the responsibility of operating the Jail to the Dorchester County Sheriff, the *de facto* administrator of the Jail." The Fourth Circuit's approval of what had been decided by the trial court cemented the fact that the classification of sheriffs and deputy sheriffs as State personnel when sued under State tort law would have no binding effect on cases decided under federal law.

The 1990s and Beyond: The Apparent Peace in § 1983 Police Misconduct Cases

Despite some anticipated change after *Dotson*, an outward peace among the State, counties, and sheriffs existed for more than twenty years when it came to § 1983 cases in federal court. In cases where counties maintained their own police agencies and operated their own detention centers, there was no issue. In those counties where the sheriff provided law enforcement and/or operated the detention center, the counties assumed the obligations of defense and indemnification through membership in the Local Government Insurance Trust or commercial coverage. The United States District Court even strengthened the peace by repeatedly holding in cases before it that suing a sheriff and/or deputy sheriff in his or her official capacity in federal court was tantamount to suing the State, and thus such claims were barred by the Eleventh Amendment. This left only personal capacity claims (those against the individuals themselves) to be defended.

The 1990s and Beyond: The Simmering Dispute Over Employment Cases

The apparent peace that existed between the State and counties as to police and corrections cases after *Rucker* and the enactment of § 9-108 did not apply to one area: employment. Many counties voiced concern that they were defending sheriffs and paying settlements and judgments arising from administrative charges of employment discrimination or federal lawsuits alleging that a sheriff had engaged in employment discrimination. The most vocal opponents were counties that did not include sheriffs and deputy sheriffs in their merit or classified employment systems. Their thinking was as follows: If the county does not include sheriffs and deputies in its merit system, it cannot be deemed to be the sheriff's or deputy's "employer" for purposes of federal anti-employment discrimination law. The counties also supported their contention in light of *Rucker*, in which the Court of Appeals had classified sheriffs and deputies as "State personnel" for the purposes of State law. The questions raised by counties had no answer: If a county was really not the sheriff's "employer," why should it become enmeshed in disputes related to the sheriff's personnel decisions? If the county had no control over the sheriff's employment decisions, such as a hiring or firing, why should it be defending against lawsuits or administrative charges of discrimination?

At the time it was enacted, § 9-108 did not address whether administrative matters, including the employment decisions attendant to the operation of a sheriff's office, was a State or county function. The matter was simply not addressed. The counties' stance, however, proved sufficiently compelling to require amendment of § 9-108 in 2001. The amendment resulted in the inclusion and designation of a sheriff's performance of "personnel and other administrative activities" as a State function. It was hoped and expected that this change would at least establish that the State would have to defend sheriffs in the lawsuits being brought in federal court alleging employment discrimination. But, once again, § 9-108 speaks only to State law. Whether the amendment to § 9-108 would hold under federal law would have to await further developments in federal court. If not outright change, at least a reassessment of the legal landscape was coming.

2010: *Durham v. Somerset County, et al.*

The reassessment came in the form of litigation in the United States District Court in the case of *James "Troy" Durham v. Somerset County, et al*., 1:10-cv-02534-WMN, and related cases in the same court. The litigation in the first *Durham* case resulted in a verdict in excess of $1,000,000 against the Sheriff of Somerset County in his personal capacity, a refusal by the State of Maryland to pay the judgment, although the State had defended the sheriff at trial and through an unsuccessful appeal to the Fourth Circuit, a refusal by the County (which was voluntarily dismissed as a defendant in the initial case) to pay the judgment, and the garnishment of the sheriff's wages by the deputy who sued him. However, the tortured history of the numerous *Durham* cases need not be laid out here. The essentials are that James "Troy" Durham ("Durham"), a former deputy with the Somerset County Sheriff's Office, claimed that he was wrongly fired in 2009 after refusing to omit facts from a police report. In response, Sheriff Bobby Jones said Durham was told to clarify information in his report – not to omit any facts. After a year-long investigation, the Somerset County Sheriff's office terminated Durham's employment. Sheriff Jones said Durham was ultimately fired for the unauthorized release of police documents to people outside the agency, and for conduct unbecoming of an officer.

Durham sued Sheriff Jones and Somerset County, alleging that he was terminated because he had publicly voiced his complaints about the Sheriff's Office, speech that he alleged was protected by the First Amendment. After dismissing the county from the case, the deputy proceeded against the sheriff and eventually recovered the large verdict mentioned above. When the State refused to pay the judgment, the deputy filed a second lawsuit under § 1983, naming the county, the county attorney, the sheriff, and the State as defendants. In yet a third lawsuit, the deputy sued each and every member of the Maryland Police Training Commission for failing to reinstate him. The deputy alleged post-verdict retaliation in violation of the First Amendment and, of particular interest here, *Monell* (unconstitutional government policy, custom, or practice)[2] liability against the county. In this regard, the deputy alleged that the county commissioners were intricately involved in the hiring, discipline, and firing of deputy sheriffs in Somerset County. He further alleged that the sheriff stated that the county commissioners had "agreed and approved" of his decision to terminate the deputy. As a result, the deputy's lawsuit asserted that a jury could find that, in terminating him, the sheriff had acted as the County's "final policymaker" with respect to disciplining deputy sheriffs and, for that reason, the sheriff's violation of the First Amendment was directly attributable to the County. The battle lines were drawn but the battle never took place. As alluded to above, the fiercely contested *Durham* cases taxed all sides, and ended with a virtual whimper. Eventually, Durham's counsel withdrew and the second and third cases were dismissed. The judgment against the sheriff in the first case remains largely uncollected to this day.

But how did the rulings and observations that surfaced in the *Durham* cases fit in with the long line of cases that seemingly rejected even the suggestion that a sheriff was a county official, much less a county policymaker under § 1983? In short, the court in

Durham looked past these recent cases to *Dotson v. Chester*, and focused more closely on the relationship between county and sheriff and the specific conduct in question, as opposed to focusing on the formal constitutional and statutory barriers that separate counties and sheriffs. In *Dotson*, the sheriff was deemed the county's final policymaker because the county had delegated to him control over the day to day operation of the jail. In *Durham*, the contention was that the sheriff had acted as a final policymaker because the county had delegated to him authority over the disciplinary sanctions to be imposed against deputy sheriffs. But could the county delegate to the sheriff disciplinary authority which, under State law (namely the LEOBR), it did not possess? In any event, the *Durham* cases may be an indication that federal judges may be more inclined than they have been in the past to look more closely at the particular function at issue rather than simply rely upon the historical evolution of the office of sheriff.

In counties where the sheriff performs law enforcement and/or detention center functions, it is virtually conceded that the sheriff and his deputies are county agents. The functions they perform are local and the duty to defend and indemnify does, and should, rest with the county. What remains the subject of dispute is county responsibility for a sheriff's employment decisions, such as the one in *Durham*. Counties will urge that they are not liable because the sheriff does not establish county personnel policy. The defense in each case, however, will be dependent upon the county's formal and informal relationships with its sheriff.

Beyond Federal Constitutional Liability – Title VII and Federal Anti-Discrimination Laws

Beyond the potential for federal constitutional liability, counties may be exposed to federal statutory liability resulting from a sheriff's violation of federal anti-discrimination laws, such as Title VII of the Civil Rights Act of 1964, the Americans With Disabilities Act, and the Age Discrimination in Employment Act. Unlike § 1983, these statutes directly seek out "employers" of those engaging in acts of discrimination, and liability rests on the employment relationship alone. The path that could lead to county liability under these laws is based on the common law concept of "joint employers." Simply stated, the concept recognizes that an employee may have one or more employers. If and when applied in the context of counties and sheriffs, the "joint employers" inquiry determines if a deputy sheriff is employed by the sheriff, the county, and/or potentially the State.

There is little authority applying the common law doctrine of "joint employers" in the employment discrimination context to either private or public employees. However, acceptance of the doctrine is becoming more common, and, in 2015, in *Butler v. Drive Automotive Industries of America, Inc.*, 793 F. 3d 404, the United States Court of Appeals for the Fourth Circuit recognized the doctrine for the first time in a Title VII lawsuit against private employers. In doing so, the Court adopted what is known as the "hybrid test" and articulated a set of factors to be used in deciding whether or not an employee has more than one employer. The factors are: (1) authority to hire and fire the individual; (2) day-to-day supervision of the individual, including employee discipline; (3) whether the putative employer furnishes the equipment used in the place of work; (4) possession of and responsibility over the individual's employment records, including payroll, insurance, and taxes; (5) the length of time during which the individual has worked for the putative employer; (6) whether the putative employer provides the individual with formal or informal training; (7) whether the individual's duties are akin to a regular employee's duties; (8) whether the individual is assigned solely to the putative employer; and (9) whether the individual and the putative employer intended to enter into an employment relationship. The Court identified the first three factors as the most important, but cautioned that control remains the principal guidepost for determining whether multiple entities can be a plaintiff's joint employer.

In sum, courts will determine if the employer entities share or co-determine the essential terms and conditions of employment, including the ability to hire, fire or

discipline, affect compensation and benefits, and direct and supervise performance. Courts may also look to see if the human resources function is shared between employers, including units of government. For example, does the Office of the Sheriff have its own Human Resources Department or does it utilize the County's department for personnel administration?

Even if a county is deemed to be a deputy sheriff's "joint employer," the inquiry is not at an end. That is because having more than one "employer" does not mean they are equally culpable. The issue of culpability turns on the county's role in the employment decision, its ability to control the sheriff's employment decisions, and, ultimately, its legal responsibility for the sheriff's conduct of his office.

Finally, even if a county is not named as a defendant in a federal anti-discrimination case, that may be of little comfort. That is because many of these statutes, including Title VII, allow the recovery of both back pay (measured from termination to judgment) and front pay (measured from judgment to reinstatement, if feasible). Under the IRS code, awards of back pay and front pay are treated as income. And, under State law (§ 2-309 of the Courts and Judicial Proceedings Article), counties are responsible for the budgets of sheriffs and their offices. So, even in cases where the Office of the Attorney General is defending the sheriff, a judgment for back and/or front pay must be paid by the county. Being aware of this liability is the first step in controlling or limiting it.

Conclusion

Based on historical roots, constitutional provisions, and State and local laws, as well as long-standing practices, each Maryland county has imbedded relationships with its elected sheriff. The relationships, both formal and informal, determine if and when a county may be legally responsible for the acts of its sheriff or the sheriff's deputies. Consequently, it is imperative that each county not only thoroughly examine, but also fully understand, the connections. Only then can a county decide if change is, or is not, necessary. There is no perfect solution nor should there be one. Each county is different as is each county's relationship with its sheriff. Ultimately, it is up to each county to determine and define the relationship with its sheriff that best serves the county's needs. The determination cannot be driven solely by concerns of legal liability, but such liability must be taken into account. And, as we all can agree, informed change is best.[3]

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[1] The Eleventh Amendment states: The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Title 42, Section 1983 of the United States Code states: Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, 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 and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any

action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

[2] *Monell v. Department of Social Services*, 436 U.S. 658 (1978), is an opinion given by the United States Supreme Court in which the Court held that a local government is a "person" subject to suit under Section 1983 of Title 42 of the United States Code.

[3] Apart from sheriffs and deputy sheriffs, similar issues may arise with other "State personnel" whose offices are funded by counties, for example, State's Attorneys' Offices. Indeed, the Maryland Court of Special Appeals has referred to state's attorneys as "state personnel" who perform fundamental State government functions, but are not compensated by the State. *Conaway v. State*, 108 Md. App. 475, 489 (1996). In this regard, the Maryland Court of Appeals has suggested that, although employees of a State's Attorney's office are State employees, a county may be a joint employer for the purpose of disputes over payment, such as claims brought under the Fair Labor Standards Act or the Maryland Wage and Hour Law. *Newell v. Runnels*, 407 Md. 578, 649 (2009).