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When Police Officers Are Sued An Overview of Police Misconduct Litigation in Maryland

Lawsuits filed against law enforcement officers (collectively referred to as “police officers” in this publication) are an established part of the legal landscape. Although police officers generally have broad powers to carry out their duties, the United States Constitution, State Constitutions, and other laws place limits on the actions police officers may take in enforcing the law. The videotaped beating of motorist Rodney King in Los Angeles more than 25 years ago shockingly illustrated to the nation that police officers can cross the line. Subsequent events have etched images of police use of force, including fatal shootings, into the nation’s consciousness. Moreover, the continuous recording of police officers by citizens has created an atmosphere in which lawsuits against police officers have become the rule rather than the exception. Those who claim to have been victimized by police officers have ample recourse available under both federal and state law. One of the primary purposes of civil rights laws is to protect citizens from abuses by government, including police misconduct. In addition to the compensatory and punitive damages and other forms of relief available to Plaintiffs, federal civil rights laws allow for the recovery of attorney’s fees, providing a further incentive to sue.

Police misconduct litigation is vastly different from the criminal justice system with which police officers are most familiar. In police misconduct cases, not only police officers, but their supervisors, agencies, and local governments can be Defendants. Cases can be time-consuming and take years to resolve. Settlements can leave officers embittered and judgments can damage careers.

This publication focuses on what happens when police misconduct lawsuits are filed. The objective is for police officers to be able to answer the most common questions related to lawsuits: What can I be

sued for? What do I do if I am sued? What types of damages or other relief can I be sued for? Will I be assigned an attorney if I am sued? What will occur during the litigation? Will I be covered in the event a judgment is entered against me? The civil litigation process should not be alien to police officers; officers must and should have a basic understanding of the process in which they have so much professionally and personally at stake.

The Exercise of Police Powers and Allegations of Police Misconduct

The exercise of most routine police powers, *i.e.*, investigatory stops and detentions, arrests, searches and seizures, the use of force, and custodial interrogations, can give rise to a lawsuit alleging police misconduct.

The Sources of Legal Claims of Police Misconduct

A. The Federal Sources

The source of police misconduct claims under federal law is found in in the United States Constitution. Lawsuits alleging federal constitutional violations against state and local police officers are brought pursuant to federal law, 42 U.S.C. § 1983, popularly known as “Section 1983.” Section 1983 establishes a cause of action for any person who has been deprived of rights secured by the United States Constitution or laws of the United States by a person acting under color of state law.

In order to prevail on a § 1983 claim, a Plaintiff must prove that (1) the conduct was committed by a person acting under color of state law and (2) as a result of this conduct he or she was deprived of rights, privileges or immunities secured by the Constitution or the laws of the United States. The first requirement is known as the state action requirement. The Plaintiff must prove that the police officer acted with the appearance of legal power, even though the conduct may have violated the law. An example would be a police officer making an arrest, which he or she is empowered to do, but lacking probable cause to do so. Most commonly, police officers are sued under § 1983 for alleged violations of the Fourth Amendment (unreasonable search and seizure), which governs detentions and arrests, the Fourteenth Amendment (guarantees against deprivations of life, liberty, or property without due process of law), and First Amendment (protection of freedom of speech and assembly).

B. The State Sources

There is no state version of § 1983. Police officers can be sued directly under the Maryland Constitution, or more specifically, the Maryland Declaration of Rights. The Declaration of Rights is a series of Articles establishing certain rights for people in Maryland. These include guarantees similar to those found in the first ten amendments to the United States Constitution, commonly referred to as the Bill of Rights. Examples include: freedom of speech (Article 40), guaranty of due process (Article 24), and prohibition of unreasonable searches and seizures (Article 26).

In addition to claims under the Declaration of Rights, police officers can be sued under Maryland’s common law (judge/court made law) for an array of torts. “Tort” means “wrong” and, unlike a criminal case, which is initiated and managed by the State, a tort suit is a civil action brought by a Plaintiff against a Defendant. Common law torts include: assault, battery, false imprisonment, false arrest, malicious prosecution, defamation, trespass, and intentional infliction of emotional distress.

The Lawsuit

The Lawsuit (Complaint) will be drafted by the Plaintiff, or, if represented, his or her attorney. The Lawsuit will identify the Defendants and set forth allegations, both factual (a description of the events giving rise to the lawsuit) and legal (the specific claims). Specific claims, or causes of action, are divided into counts, *e.g.*, Count I – Section 1983 – Fourth Amendment Claim; Count II – Violation of Declaration of Rights; Count III – False Arrest / False Imprisonment; and Count IV – Assault and Battery. Claims for relief can be for compensatory damages, punitive damages, and/or equitable (most commonly injunctive) relief. A jury trial may or may not be requested.

A. The Statute of Limitations

In Maryland, a civil action must be filed within three years from the date it accrues. Accrual in the context of police misconduct claims generally means the date of the occurrence. The same limitations period applies to claims under § 1983.

B. Personal v. Official Capacity Claims

Under federal law, police officers can be sued both in their personal and official capacities. Under Maryland law, official capacity suits are not recognized in this context.

1. Personal Capacity Claims

A personal capacity action is just that – a suit against a police officer for his or her alleged wrongdoing. Under federal law, personal capacity claims are not limited to the officer who allegedly committed the wrongful act. Other forms of personal capacity liability are recognized, namely Bystander Liability and Supervisory Liability.

Bystander Liability is a theory of liability fashioned under § 1983 that exposes officers, including supervisors, to personal liability, including punitive damages. To succeed on a theory of bystander liability, a Plaintiff must demonstrate that a police officer (1) knew that a fellow officer was violating the Plaintiff’s constitutional rights; (2) had a reasonable opportunity to prevent the harm; and (3) chose not to act. Bystander Liability claims are most common in excessive force cases. It is a claim that is difficult to prove, but, depending on the circumstances of each case, puts the officer “as bystander” on the same footing as the alleged wrongdoer.

Supervisory Liability is yet another theory that exposes supervisory officers to personal liability, including punitive damages. Supervisory Liability requires that a supervisor had actual or constructive knowledge that his or her subordinate officer was engaged in conduct that posed a pervasive and unreasonable risk of constitutional injury to citizens and that the supervisor responded with deliberate indifference to or tacit authorization of the alleged offensive practices, such that there was an affirmative causal link between the supervisor’s inaction and the particular constitutional injury suffered by the Plaintiff. In other words, the liability of a supervisor is premised on a recognition that supervisory indifference to or tacit authorization of a subordinate officer’s misconduct may be seen as

a cause of the constitutional injury sustained by the Plaintiff. The bottom line is that a supervisor cannot turn a “blind eye” to the misconduct of subordinates. By doing so, he or she is potentially exposed to personal liability.

2. Official Capacity Claims

Under federal law, an official-capacity action may proceed only to the extent that the police officer’s conduct implements governmental law, policy, or custom, *i.e.*, the deprivation underlying the § 1983 claim is caused by a statute, regulation, policy, or custom of the governmental entity that the official was implementing. An official capacity action is really an action against the governmental entity, of which the police officer was merely an agent. Examples of policy and custom claims include failure to train, failure to discipline, failure to supervise, and condoning the use of excessive force or unlawful arrests.

What Relief Can Be Requested

A Plaintiff can sue for compensatory damages, punitive damages, injunctive, and declaratory relief.

Compensatory Damages – a sum of money awarded in a civil action by a judge or jury to indemnify a Plaintiff for the particular loss or injury suffered as a result of the unlawful conduct of a Defendant.

Punitive Damages – a sum of money awarded in a civil action by a judge or jury in addition to the award of compensatory damages. Punitive damages are intended to punish the Defendant and discourage others from acting in the same manner in the future.

Local government employees, including police officers, are liable for punitive damages under state law if they acted with malice (hatred, ill will, improper motive) or under federal law if they acted with reckless or callous indifference to the Plaintiff’s federally protected rights, as well as when their actions were motivated by evil motive or intent. Because it is the personal conduct of the officer that is alleged to be wrongful, punitive damages are permissible in a personal-capacity action, but the Plaintiff may look only to the personal assets of the police officer, and not to the local government, for the recovery of any punitive damages award.

Injunctive Relief (Injunction) – a legal remedy that may be sought in a civil lawsuit, in addition to, or in place of, monetary damages. Rather than offering money as payment for a wrong in a civil action, injunctive relief is a court order for the Defendant to stop a specified act or behavior. In a police misconduct lawsuit, injunctive relief would be pursued against the local government police agency as opposed to an individual officer.

Declaratory Relief – is a binding judgment from a court defining the legal relationship between parties and their rights in the matter before the court. A declaratory judgment does not provide for any enforcement, however. In other words, it states the court’s authoritative opinion regarding the exact nature of the legal matter without requiring the parties to do anything.

Attorney’s Fees – are available to a Plaintiff who prevails in a § 1983 claim. Attorney’s Fees are awarded in addition to any other recovery a prevailing Plaintiff receives.

Where the Lawsuit May be Filed

Police misconduct lawsuits may be filed in federal or state court. To file in federal court, *i.e.*, the United States District Court for the District of Maryland, there must be at least one claim that arises under federal law, such as a claim under § 1983. State law claims are often included in Complaints filed in the United States District Court. Section 1983 claims can be filed in state court. If a lawsuit filed in state court includes a claim under § 1983, the Defendants can, if they all agree, remove the case to the United States District Court.

After the Lawsuit is Filed

The clerk of court will issue a Writ of Summons for each Defendant. Service of the Writ of Summons, Complaint, and any related papers will then be made upon each Defendant. Service is effected in various ways, including service by private process server, sheriff (state court), U.S. Marshal (federal court), and certified mail.

Problems commonly arise when someone without authority accepts service for a police officer or signs for and receives restricted or certified mail addressed to individual officers without express permission to do so. Police officers can avoid these problems by making it known to the Chief of Police or Sheriff, in writing, that no other person has express or implied authority to accept service of process on their behalf or to sign for and receive restricted and/or certified mail deliveries addressed to them individually.

When the Lawsuit is Served

Since response times are triggered by service of process, it is of critical importance for police officers to:

- **Retain all documents served, including the mailers, envelopes, etc., in which the Writ of Summons, Complaint, and other papers were contained.**
- **Immediately notify the Chief of Police or Sheriff when and how you were served with the Complaint.**
- **Make sure that all departmental protocols concerning service of process are followed.**
- **Follow-up with the Chief of Police or Sheriff to make sure that the paperwork has been forwarded to the appropriate person, department, or entity.**
- **Failure to take action could have serious consequences including the possibility of a default judgment being entered against you.**
- **Ensure that your personal contact information on file with your department is current.**
- **Cooperate with your assigned counsel. Failure to cooperate can result in serious consequences, including the withdrawal of your defense and the loss of insurance coverage.**
- **Civil litigation is much different from the criminal justice system with which you are intimately familiar; it is far more detailed and time consuming.**
- **Remember that you are often the best source of information concerning the events giving rise to the lawsuit. Begin assembling all documents (paper and/or electronic) that is in your or your agency's possession, and reflect on the events to refresh your recollection of them.**

[The Insurance Decisions: Coverage and Indemnification](#)

Once the Chief of Police or Sheriff has notified the appropriate municipal or county officials, including the municipal or county attorney, of the lawsuit, it is expected that the appropriate official (usually the Risk Manager) will place the local government's insurer (LGIT, commercial carrier, or self-insurance fund manager) on notice and transmit copies of all papers served upon the officer. At LGIT, the Claims Services Department will review the lawsuit and determine if there is an obligation to defend (duty to defend) and potentially to indemnify (duty to indemnify).

[The Decision to Defend and Scope of Employment](#)

The duty to defend is the insurer's obligation to provide an insured with defense to claims made under a liability insurance policy. As a general rule, an insured need only establish that there is potential for coverage under a policy to give rise to the insurer's duty to defend. Therefore, the duty to defend may exist even where coverage is in doubt and ultimately does not apply. The decision to defend essentially is tied to the allegations in the Complaint. For example, if it is alleged in the Complaint that the police officer made an unlawful arrest in performance of his or her duties, LGIT will provide a defense for the officer sued. In other words, the decision, and duty, to defend, generally arises when it is alleged that the officer acted in performance of his or her duties as a police officer, *i.e.*, within the scope of employment.

There are many considerations relevant to whether an employee's actions were within the scope of employment. The general test for determining if an employee's tortious acts were within the scope of his or her employment is whether the acts were in furtherance of the employer's business and were "authorized" by the employer. The Maryland Court of Appeals described it this way in 1991: When an employee's "actions are personal, or where they represent a departure from the purpose of furthering the employer's business, or where the employee is acting to protect his own interests, even if during normal duty hours and at an authorized locality, the employee's actions are outside the scope of his employment." *Sawyer v. Humphries*, 322 Md. 247 (1991).

Here are just two examples of Maryland appellate courts speaking to scope of employment in the context of police misconduct litigation:

"[Plaintiff] concedes that the scope of an officer's employment does not encompass the rape of a citizen and that neither the Local Government Tort Claims Act nor the first paragraph defining an insured in the County's self-insurance regulations require the County to pay the tort judgment against [its police officer.]" Wolfe v. Anne Arundel County, 374 Md. 20, 30 (2003).

"[Defendant's] actions after the shooting—calling 911, identifying himself as a police officer, putting on his police badge, and filing reports—do not show that he was acting within the scope of his duties as a police officer when he shot the two delivery men in his house." Clark v. Prince George's County, 211 Md. App. 548, 578 (2013).

[The Decision to Indemnify](#)

Indemnification is the obligation to pay another for a future liability that might arise. This usually includes coverage of liability in the form of actual damages or losses such as having to pay a third party. In addition, such provisions often include coverage for liability in the form of defense costs, *i.e.*, the cost of dealing with

a third party claim even if there is no ultimate liability to the third party. **Punitive damages are generally excluded from coverage.** LGIT's practice is to promptly notify Defendants in writing of its decisions concerning defense and indemnification. The reasons are set forth fully, and any denials of defense or exclusions or other limitations on indemnification. Any "reservation" of coverage (essentially deferring final decision until later stages of the litigation, including the entry of judgment) must be fully explained in writing.

Defending the Lawsuit

Once the insurer assigns counsel, the defense of the lawsuit begins. Your attorney will contact you and establish the line of communication that must remain intact throughout the litigation. Your attorney will explain his or her approach to the case and what is expected from you in the way of cooperation. Your active cooperation and participation throughout the litigation will be critical to your defense.

A. Raising Defenses

Defenses are raised through an Answer or a Preliminary Motion to Dismiss. An Answer is a written pleading filed by a Defendant to respond to a Complaint filed and served upon that Defendant. An Answer generally responds to each allegation in the Complaint by denying or admitting it, or admitting in part and denying in part. A Motion to Dismiss is filed before an Answer and challenges the legal sufficiency of the Complaint; it does not test the ultimate merits of the case. There are different reasons for filing a Motion to Dismiss. Some include:

- A Lack of Subject Matter Jurisdiction (Wrong Court);
- Lack of Personal Jurisdiction (No Jurisdiction Over the Person Sued);
- Improper Venue (Wrong Jurisdiction);
- Failure to State a Claim for Which Relief Can be Granted (Insufficient or Deficient Allegations);
- Insufficient Service of Process;
- Statute of Limitations; and
- Qualified Immunity (where the law was not clearly established at the time of the alleged wrongdoing, leaving the officer "to make a bad guess in a gray area.").

All police officers have some form of immunity for negligence (unintentional conduct). However, there are no state law immunities available to municipal or county police officers against State constitutional claims or intentional torts. The opposite is true for deputy sheriffs who are immune from constitutional claims and intentional torts absent malice and/or gross negligence.

Qualified immunity can be raised against § 1983 claims, including excessive force claims, but its utility is limited. It is most effective in cases concerning seizures effected by relatively new devices, such as Tasers, or searches of new or relatively new technological devices.

If a Motion to Dismiss is filed, the Court may deny it; grant part but not all of it; or grant all of it, thus ending the case. If the case proceeds, the litigation then enters the Discovery phase.

B. The Discovery Phase

Discovery is a pre-trial procedure in a lawsuit in which each party, through the rules of civil procedure, can obtain evidence from the other party or parties by means of discovery devices such as interrogatories, requests for production of documents, depositions, and requests for physical examinations.

Interrogatories are a formal set of written questions propounded by one litigant and required to be answered by an adversary in order to clarify matters of fact and help to determine in advance what facts will be presented at any trial in the case.

Answers to Interrogatories are the written response to Interrogatories. Each interrogatory, to the extent it is not objected to, must be answered separately and fully in writing under oath, based upon the party's best knowledge, information, and belief. **Answers to Interrogatories are testimony that can be read in court and used as a tool for cross-examination.** Consequently, any police officer who executes Answers to Interrogatories must be satisfied beyond any doubt as to the accuracy of the answers.

Depositions generally follow Answers to Interrogatories. A Deposition is a part of the discovery process in which an attorney for one of the parties to a lawsuit can question the opposing party or a witness under oath. **Statements given under oath at a deposition are testimony that can be read in court and used as a tool for cross-examination.** Consequently, any police officer who testifies at a deposition must do so truthfully and accurately.

Requests for Production of Documents, Electronically Stored Information, and Tangible Things are a discovery device that requires the parties to produce documents, electronically stored information, tangible items, videos, photographs, sound recordings, images, and other data or data compilations stored in any medium from which information concerning the case can be obtained. In police misconduct cases, the most important documents were prepared long before any lawsuit was filed. The documents referred to are those recorded or prepared by police officers themselves at the time of the events in question. Examples include: body camera recordings, police communications recordings, initial reports, incident reports, arrest reports, supplement/narratives, use of force reports, charging documents, and affidavits in support of search or arrest warrants. Accuracy, truthfulness, thoroughness, and consistency must be the underpinnings of each and every document a police officer prepares. The documents generated by a police agency at the time of the event giving rise to a lawsuit are far more important to the defense than any document drafted by an attorney months or years later.

C. Moving for Summary Judgment

Once discovery ends (pursuant to the Court's Scheduling Order), your attorney may file a Motion for Summary Judgment. A Motion for Summary Judgment is a request for a decision by the court of the matters submitted to it, based upon legal arguments only, where no material facts are in dispute. In other words, a Motion for Summary Judgment assumes that there are no genuine issues of (material) fact in the case, and that, as a result, the court can resolve the case upon the legal issues only, making any trial unnecessary. Motions for Summary Judgment generally are supported by exhibits, including Affidavits, Answers to Interrogatories, Deposition Transcripts, and Documentary Evidence (*e.g.*, police reports, radio communications, photographs, and videos (including dash cam and body camera footage)).

An **Affidavit** is a written sworn statement of fact voluntarily made by an affiant under penalties of perjury. An Affidavit is yet another form of testimony that can be used in court as a tool on cross-examination. A court may deny a Motion for Summary Judgment, grant part but not all of it, or grant it in its entirety, thus ending the case.

D. Trial

If all or some of the claims survive a Motion for Summary Judgment, the remaining claims will be tried to a finder of fact (either judge or jury). Preparation and presentation are the keys. In a civil case, the Plaintiff carries the burden of proof, which is a preponderance of the evidence. A preponderance of evidence has been described as just enough evidence to make it more likely than not that the fact the claimant seeks to prove is true.

It is important at this point to recall that Affidavits, Answers to Interrogatories, and Deposition transcripts can be used at trial in many ways, including to impeach one's credibility on cross-examination. Similarly, if a police officer testified in a criminal proceeding related to a police misconduct lawsuit, that testimony can be used in the lawsuit as well.

If the finder of fact (judge or jury) finds in favor of the Plaintiff on one or more claims, a judgment will be recorded in the docket. The judgment will consist of the liability determination and any award of damages. If a violation of § 1983 is proven, the judgment ultimately will include the attorney's fees that are recoverable by the prevailing party. Under § 1983, damages are unlimited. Under State law, the damages recoverable from local governments are limited to \$400,000 per individual claim and \$800,000 per occurrence. If there was no reservation of rights as to the issue of indemnification, your local government's insurance provider will satisfy the judgment for compensatory damages, as well as any award of attorney's fees, if applicable. Local governments are not liable for punitive damages. There is no limit on the amount of punitive damages that can be awarded against an individual under state or federal law.

Depending on the circumstances of each case, the parties may pursue post-trial motions (e.g., motion for a new trial, motion for judgment notwithstanding the verdict, motion to reduce the damages award).

E. Appeal

Again depending on the circumstances of each case, a party may choose to appeal. An appeal is the process in which cases are reviewed by appellate courts, where parties request a formal reversal of some aspect of the proceedings in the lower court. Appeals are not "re-trials"; instead, they function both as a process for error correction as well as a process of clarifying and interpreting law.

Appeals from the United States District Court of the District of Maryland are heard in the United States Court of Appeals for the Fourth Circuit. (The Fourth Circuit is the arbiter of federal law for a number of states, including Maryland). The Fourth Circuit Court of Appeals' decisions may be reviewed by the United States Supreme Court.

Appeals from Maryland Circuit Courts are heard first in the Court of Special Appeals. That Court's decisions may be reviewed by Maryland's highest appellate court, the Court of Appeals.

Conclusion

Lawsuits against police officers are here to stay. Through unlimited damages for federal claims or increased tort liability limits for state claims, the incentives to sue, including the award of attorney's fees, are simply too great. Since law enforcement agencies must accept the specter of lawsuits, they must be proactive to reduce not only their number, but also the likelihood of adverse results. Holding officers to the highest standards and providing thorough, updated training (including legal updates) in areas such as use of force, searches and seizures, and interacting with the emotionally disturbed and physically disabled, can help. So can technology. The ever increasing use of car and body cameras is rapidly reshaping the landscape of police misconduct litigation. It is anticipated that police cameras will reduce the "bad" behavior of both officers and suspects, and the evidentiary weight of such evidence cannot be overstated. In the end, however, it is essentially up to each individual officer to act within the confines of the law and in accordance with departmental training, policies, and procedures. Having done so is the best defense to any lawsuit.

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