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EVIDENCE DEVELOPMENTS IN § 1983 EXCESSIVE FORCE CASES, PART II

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*1351 In his Public Interest Law column, Martin A. Schwartz, a professor of law at Touro Law Center, discusses the admissibility of evidence of a plaintiffs other lawsuits; the police officer's character; the officer's uses of excessive force on other occasions; standard police practices; and expert testimony.

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This column continues the analysis of recent evidentiary developments in §1983 excessive force cases. Part I, published on Feb. 16, 2011, discussed the admissibility of evidence of plaintiff's medical condition; of injuries suffered by the plaintiff; that the plaintiff was a member of a gang; and that the plaintiff was attempting to commit "suicide by cop." We now turn our attention to the admissibility of evidence of plaintiffs other lawsuits; the police officer's character; the officer's uses of excessive force on other occasions; standard police practices; and expert testimony.

To place the evidentiary issues in context, it will be recalled that under *Graham v. Connor*, [FN1] excessive force claims growing out of an arrest, investigatory stop or other seizure are governed by the Fourth Amendment objective reasonableness standard. The critical issue is whether, based upon the facts and circumstances known to the officer, the force used could have been employed by an objectively reasonable officer.

Plaintiff's Litigiousness

In *Boyd v. San Francisco*, [FN2] a §1983 excessive force case in which the police had shot and killed Cammerin Boyd, the U.S. Court of Appeals for the Ninth Circuit upheld the admissibility of evidence of Mr. Boyd's criminal history, his drug use, and his prior lawsuits against the police.

This evidence was introduced in conjunction with testimony by defendants' expert, a forensic psychologist, that Mr. Boyd was attempting to commit "suicide by cop."

The evidence of Mr. Boyd's prior lawsuits against the police warrants special attention. The circuit court in *Boyd* reasoned that the prior lawsuits "were probative to establish that Cammerin was familiar with assertions of police liability and with the possibility that his family could receive substantial damages were they able to establish police liability for his death." [FN3]

The decision in *Boyd* should not be taken to mean that courts are generally receptive to the admission of evidence of a plaintiffs other lawsuits. On the contrary, courts are generally quite reluctant to allow this type of evidence to be introduced. They understand that defendants seek to introduce this type of evidence in order to paint a picture of the plaintiff as a "chronic litigant" of unmeritorious claims. [FN4] In other words, plaintiff's "litigiousness" is usually considered highly prejudicial character evidence. There is also concern that admission of this type of evidence may lead to undesirable "mini-trials" to determine whether the prior suits asserted bona fide claims.

For example, in *Outley v. City of New York*, [FN5] a §1983 excessive force case, the U.S. Court of Appeals for the Second Circuit found that the city's references to plaintiffs litigiousness in its opening statement and summation, and its cross-examination of the plaintiff about his other lawsuits, including suits against police officers, constituted reversible error. The city argued that the evidence was relevant "to impeach Outley's credibility and to show his bias toward white police officers."

The circuit court found that in order to evaluate the relationship of the prior suits to plaintiffs bias, the jury would need details about each lawsuit and the extent to which the claim asserted was bona fide. "Opening up this area thus invites *1352 detailed inquiries, denials, and explanations, likely to lead to multifariousness and a confusion of issues." [FN6] Given these strong reasons for generally excluding evidence of a plaintiffs prior lawsuits, the admissibility ruling in *Boyd* is best understood in the context of the specific "suicide by cop" theory invoked by the defendants and supported by their forensic psychologist's expert testimony.

Character of Officer

The §1983 plaintiff may not introduce evidence of the defendant police officer's character. Fed. R. Evid. 404(a) codifies the common-law principle that evidence of a person's character is not admissible to prove conduct in "conformity therewith on a particular occasion." Thus, the §1983 plaintiff may not introduce evidence of the officer's bad character, for example, as a violent or quarrelsome person. An exception to the exclusionary rule, Fed.R.Evid. 404 (a) (1), authorizes the "accused" to introduce evidence of her good character. However, as a federal district court in a Fair Housing Act recently pointed out, a 2006 amendment to Rule 404 (a) clarified that this exception pertains only to criminal defendants. Thus, a civil defendant does not have the right to introduce evidence of her good character, even when the civil defendant is alleged to have engaged in "quasi-criminal" conduct. [FN7]

Other Uses of Excessive Force

Attempts by plaintiffs' attorneys to introduce evidence that the defendant officer used excessive force on other occasions usually runs smack up against the Fed.R.Evid. 404(b) prohibition against the introduction of "other" act evidence to prove a person's character or disposition, in order to show conduct in conformity therewith on a particular occasion. Rule 404(b) spells out that the "other act" evidence "may" be admissible for another purpose, such as, to prove motive, intent, identity or knowledge. Rule 404(b)'s reference to "may" be admissible means subject to Rule 403.

On a Fourth Amendment excessive force claim, the other act evidence is not admissible to prove the defendant officer's motive or intent because, under the *Graham* Fourth Amendment objective reasonableness standard, the officer's motive or intent in employing force is irrelevant. [FN8] Thus, the federal courts in §1983 excessive force cases consistently hold this type of "other act" evidence inadmissible. [FN9]

For example, in *Hudson v. District of Columbia*, [FN10] a §1983 excessive force case, the U.S. Court of Appeals for the D.C. Circuit held that the district court committed reversible error in allowing plaintiff's counsel to question the defendant officer about, inter alia, a disciplinary action involving the officer's alleged use of excessive force, and allowing plaintiff's counsel to argue in summation that the officer was a "bad cop" every day of the week, and that he acted in conformity therewith on the occasion in question. The circuit court found that the trial court acted in clear violation of Fed.R.Evid. 404(b). [FN11] Of course, the reference to "bad cop" was impermissible character evidence under Fed.R.Evid. 404(a).

In some cases, however, the "other act" evidence is relevant for a permissible Rule 404(b) purpose, such as to show the identity of the officer who employed the force on the occasion in question. In *Lewis v. City of Albany*. [FN12] Phillip Lewis, an African-American, alleged, inter alia, §1983 excessive force and racial discrimination claims against the defendants officer and the city. The federal district court admitted evidence of prior complaints of uses excessive force by the defendant officer against African-American suspects. The court found that the evidence was relevant for proper Rule 404(b) purposes to show the officer's identity, since the officer alleged that he had not used force against Mr. Lewis, the officer's racial motive and intent since the plaintiff asserted a racial discrimination equal protection claim, and on the municipal liability claims based on the city's alleged deliberately indifferent failures to discipline, train and supervise its police officers. The court found the circumstances of the incidents alleged in the prior complaints against the officer "strikingly similar" to those in the instant case, namely, the police use of excessive force against handcuffed African-American suspects.

The admissibility of the "other act" evidence on §1983 municipal liability claims raises an important point. Frequently, the other act evidence is found inadmissible on the personal-capacity claim against the officer, but is highly probative and likely admissible on claims against the municipality based upon allegations of a municipal custom or practice of condoning use of excessive force, and deliberately indifferent failures to train and supervise. [FN13]

It should be noted that if the plaintiff can show that the defendant officer engaged in a pattern of employing excessive force, the evidence might be admissible "habit evidence" under Fed.R.Evid. 406. Rule 406 authorizes the admission of habit evidence to prove conduct in accordance with the habit on the occasion in question. The reality, however, is that it is unlikely that the §1983 plaintiff will be able to show sufficient instances, and a sufficient percentage of instances, in which the officer employed excessive force to constitute a "habit." [FN14]

Police Standards Under the Fourth Amendment objective reasonableness standard, the critical issue is whether an objectively reasonable officer could have employed the force used by the defendant officer. It is clear that the fact that the officer's use of force may have violated national police standards or practices, or the directives of the officer's police department, is not dispositive of the Fourth Amendment issue. The pertinent issue is whether the officer violated the Fourth Amendment, not whether she violated police department regulations, directives, or prevailing national standards or practices.

The more difficult question is whether these standards, practices or directives are a relevant aspect of the "totality of the circumstances" in evaluating the reasonableness of the officer's use

of force. Although the author views it as an issue of some difficulty, the lower federal courts rather consistently exclude this type of evidence, either on relevance grounds, under Rule 403, or both. [FN15]

To provide a recent example that is fairly illustrative of the judicial attitude, in *McKenna v. City of Philadelphia*, [FN16] a §1983 excessive force case, the U.S. Court of Appeals for the Third Circuit held that the district court did not abuse its discretion in excluding evidence of Police Department directives on appropriate uses of force, because the directives had "potential to lead the jury to equate local policy violations with constitutional violations, and that this risk of confusing the issues substantially outweighed the directives' probative value." This, of course, is another way of saying that the evidence was properly excluded under Rule 403. [FN17]

Not all courts agree with this analysis. For example, a federal district court concluded that "[a]lthough a police department's policies or training materials are not dispositive on the constitutional level of reasonable force, courts may consider a police department's own guidelines when evaluating whether a particular use of force is constitutionally reasonable." [FN18] And, it would seem that a jury instruction could easily explain that these standards and directives may be considered in determining the reasonableness of the officer's use of force, but are not dispositive of the Fourth Amendment claim.

The Supreme Court has sent out mixed signals on the issue. in *Whren v. United States*. [FN19] the Court, in holding that probable cause is a wholly objective standard, ruled that it is irrelevant whether the officer "deviated materially from usual police practices...." The Court was concerned that "police enforcement practices, even if they could be assessed by a judge, vary from place to place and from time to time." [FN20] On the other hand, in *Bell v. Wolfish*. [FN21] a case involving the due process rights of pretrial detainees, the Court stated that although correctional standards issued by private organizations such as the American Correctional Association "do not establish the constitutional minima; rather they establish goals recommended by the organization in question[,]" they may be "instructive." [FN22]

An admission by a police official that the force used on the occasion in question was "unreasonable" or "inappropriate" may be admissible. In *Bonds v. Dautovic*, [FN23] the plaintiffs asserted excessive force claims against the arresting officers and the city. The federal district court, in an opinion by Chief Judge Robert W. Pratt, ruled that the Chief of Police's deposition testimony that the defendant arresting officers' use of batons was "inappropriate" was a vicarious admission under Fed.R.Evid. 801(d)(2) and admissible under Rule 403. "As an agent and person authorized to make statements on behalf of the City, [the Chiefs] opinion regarding the appropriateness of the use of the [steel tactical] ASP batons has substantial probative value with respect to Plaintiff's excessive use of ferce claims...." [FN24]

The court found that the chiefs statements that the officers' use of the batons was "inappropriate" were relevant to the "reasonableness" of the officers' use of force. One difficulty with the court's vicarious admission analysis is that, although the Chief of Police is an agent of the city, she is not an agent of the arresting officers. Thus, the chief's statement should be admissible only on the municipal liability claim against the city, not on the personal-capacity claims against the arresting officers.

On the other hand, relying upon *Whren v. United States* and circuit court authority excluding evidence of police department policies, Judge Pratt found that the chiefs "statement that the officers' use of the ASP batons was not consistent with training or policy is not relevant to the 'reasonableness' inquiry required in a Fourth Amendment excessive force claim." [FN25] Although the court's distinction between the admissible and inadmissible testimony finds support

in the case law, the author questions whether the distinction is so fine as to not be meaningful when considered from the perspective of lay jurors.

Expert Testimony

Federal courts consistently find expert testimony "permissible in assisting the jury in evaluating claims of excessive force." [FN26] For example, law enforcement experts have been permitted to testify about proper uses of force in various situations, and the continuum of different levels of force. [FN27] (Query whether there is a meaningful distinction between such expert testimony and evidence of national standards or prevailing practices.)

An expert, however, should not be able to offer an opinion whether the use of force by the defendant was "reasonable." Although Fed.R.Evid. 704(a) abolished the common-law rule prohibiting an expert from giving an opinion on the ultimate issue in the case, the testimony should be excluded under Fed.R.Evid. 702 because it would not assist the trier of fact. It is not helpful for an expert to give an opinion as to which side should prevail. [FN28]

Expert testimony may be important on the issue of causation. In *Cyrus v. Town of Mukwonago*, [FN29] a §1983 excessive force case in which arrestee Nickolos Cyrus died after multiple tasings, the district court excluded the medical examiner's testimony about the cause of arrestee Mr. Cyrus' death. Linda Beidrzycki, the county medical examiner who performed the autopsy on Mr. Cyrus* body, testified at her deposition that she believed that eight different factors contributed to the arrestee's death. These factors were "(1) the exertion and struggle with the officers; (2) the panic and fear; (3) Cyrus' prone position; (4) the pressure applied to Cyrus' torso and possibly neck; (5) Cyrus' psychiatric condition; (6) Cyrus' restraint in handcuffs and the officers' additional attempts to [restrain] him with leg irons; (7) the pain and panic caused by the taser; and (8) the electric shock from the taser.

Dr. Biedrzycki testified at deposition that while she believed that all eight factors contributed to Mr. Cyrus' death, she could not determine whether any one factor was more significant than the others. The trial judge ruled that because the medical examiner "could not 'unbundle' the factors contributing to Cyrus' death--that is, she could not isolate one factor as the primary cause of death--her opinion testimony on cause of death was inadmissible." [FN30]

Although the plaintiff did not challenge this ruling on appeal, the U.S. Court of Appeals for the Seventh Circuit strongly indicated that the district court erred in excluding the medical examiner's testimony because she could not "unbundle" the several contributing causes, including the officer's use of the taser. The circuit court stated that "an expert's inability to isolate one specific factor when multiple factors cause an injury implicates the weight of the expert's testimony, not its admissibility. Because evidentiary weight is a jury question, expert testimony on the cause of an injury is admissible even when it does not eliminate all other possible causes of injury." [FN31]

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[FN1]. 490 U.S. 386(1989).

[FN2]. 576 F.3d 938 (9th Cir. 2009).
[FN3]. Id. at 948.

[FN4]. M. Schwartz, Section 1983 Litigation: Federal Evidence §2.04 (4th ed. Aspen Law Publishers 2010).

[FN5]. 837 F.2d 587 (2d Cir. 1988).
[FN6]. Id. at 595.

[FN7]. *United States v. Peterson*, 83 Fed.R.Evid. Serv. 330, 2010 WL 2992367 (E.D. Mich. 2010). See also Schwartz, supra note 4 at §2.08 [B].

[FN8]. See *Ricketts v. City of Hartford*. 74 F.3d 1397 (2d Cir.), cert. denied, 519 U.S. 815 (1996).

[FN9]. See cases cited in *Jonas v. Board of Comm'rs of Luna County*, 699 F. Supp.2d 1284, 1291-92 (D.N.M. 2010).

[FN10]. 558 F.3d 526 (D.C. Cir. 2009).

[FN11]. See also *Luka v. City of Orlando*, 382 Fed. Appx. 840, 842 (11th Cir. 2010); *Taken v. Kelley*, 370 Fed. Appx. 982, 985 (11th Cir. 2010).

[FN12]. 547 F.Supp.2d 191 (N.D.N.Y. 2008), aff'd, 332 Fed. Appx. 641 (2d Cir. 2009), cert. denied, 130 S.Ct. 757 (2009).

[FN13]. See Schwartz, Section 1983 Litigation: Federal Evidence, Ch. 12.

[FN14]. See, e.g., *Thompson v. Boggs*, 33 F.3d 847, 854 (7th Cir. 1994) (“five unsubstantiated incidents of Officer Boggs' alleged excessive force, without any evidence of the total number of contacts Officer Boggs had with citizens or the number of arrests he performed” is insufficient to establish habit), cert. denied, 514 U.S. 1013 (1995).

[FN15]. Schwartz, Section 1983 Litigation: Federal Evidence at §1.04 [C] [14].

[FN16]. 582 F.3d 447, 461 (3d Cir. 2009).

[FN17]. The circuit court also relied upon the fact that the “plaintiffs could have offered evidence of police practice standards in other ways; for example, plaintiffs had the opportunity

to--and did--cross-examine police witnesses about proper police conduct." 582 F.3d at 461.

[FN18]. *Neal-Loma v. Las Vegas Metro. Police Dept.*, 574 F.Supp.2d 1170, 1184 (D. Nev. 2008) (citing *Drummond v. City of Anaheim*, 343 F.3d 1052 (9th Cir. 2003)), aff'd, 371 Fed. Appx. 752 (9th Cir. 2010).

[FN19]. 517 U.S. 806, 814(1996).
[FN20]. Id. at 818.

[FN21]. 441 U.S. 520(1979).
[FN22]. Id. at 543 n. 27.

[FN23]. 725 F.Supp.2d 841 (S.D. Iowa 2010).
[FN24]. Id. at 846.
[FN25]. Id. at 847.

[FN26]. *Parker v. Gerrish*, 547 F.3d 1, 9 (1st Cir. 2008).

[FN27]. See, e.g., *Kladis v. Brezek*, 823 F.2d 1014, (7th Cir. 1987).

[FN28]. Schwartz, Section 1983 Litigation: Federal Evidence §6.07 [C].

[FN29]. 624 F.3d 856 (7th Cir. 2010).
[FN30]. Id. at 861.
[FN31]. Id. at 864 n. 8.

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