Training Key® #449

Civil Liability - Part I: Basic Principles of Civil Liability

In the past three decades, civil liability has become a major consideration for American law enforcement agencies. Multimillion-dollar lawsuits against police agencies and police officers have become almost common. As a result, most police executives and supervisors have become knowledgeable about the basic principles of civil liability. However, continued education and training are essential to reduce the risk of civil litigation.

In order for police executives to effectively address the task of civil liability avoidance within their agencies, they must keep the following fundamental points in mind:

1. Newly recruited officers are usually not familiar with the civil liability problem. Unless instruction in civil liability principles is included in their recruit training, they will enter on duty without the knowledge necessary to enable them to protect themselves and their departments from civil suits.

2. Even more experienced officers have many misconceptions about civil liability that need to be corrected. Because so many officers have never been properly trained in civil liability principles, much of the information that they have about civil liability may be incomplete or erroneous.

3. The law of civil liability is constantly changing. Information that was formerly accurate may become outdated. In the civil liability field, as in other areas of law enforcement, obsolete information may be worse than no information at all. Constant updating through roll-call training or periodic in-service instruction is therefore vital.

4. Proper training in civil liability principles at all departmental levels dramatically reduces a police department's civil liability exposure. This has repeatedly been demonstrated over the years. Departments that conduct proper training in liability recognition and avoidance can and do materially reduce the number of civil suits filed against them, and successfully defend a higher percentage of the suits that are filed.

5. To be effective, civil liability training must occur at all departmental levels. This means that both entry-level and in-service training must include proper coverage of this subject.

This two-part *Training Key*® is designed to provide a framework for such training. It discusses the fundamental principles of civil liability and provides the basic information necessary to enable officers to understand, recognize and avoid civil liability in the course of their law enforcement duties.

In order to minimize civil liability exposure for the officer, the department, the jurisdiction and the police officer must (1) recognize the civil liability problem and its potential consequences, (2) understand the nature of the civil justice system and the legal principles that govern civil liability in the law enforcement context, and (3) practice the techniques of civil liability avoidance. This requires, among other things, that the officer know which law enforcement tasks are most likely to generate civil lawsuits, achieve and maintain a high degree of proficiency in performing these high-risk-of-liability tasks and follow procedures that will minimize liability exposure without compromising officer effectiveness or interfering unduly with the department's mission.

Recognizing the Problem: The "Attitude Adjustment"

Everyone in the department, from the newest recruit up to and including the chief, must recognize that civil liability is a problem for them personally as well as for their departments and their city or county. This may seem so obvious as to require no comment, but the unfortunate truth is that even today, many law enforcement professionals, whatever their rank or length of service, refuse to acknowledge that there is a problem. Too many officers think that "it can't happen to me." It can. Furthermore, if the "it can't happen to me" attitude is not corrected, it will.

Therefore, the first step in civil liability avoidance is to eliminate this potentially disastrous attitude by persuading every officer in the department, whether new recruit or twenty-year veteran, that civil liability is an unpleasant reality

that must be recognized and dealt with maturely and professionally.

The Consequences of Civil Liability. The importance of developing a realistic and professional attitude toward civil liability becomes apparent when the potential consequences of a civil suit are fully understood. Many officers are not fully aware of the ramifications and potential impact of civil liability on the officer, the department and the community as a whole.

1. Consequences for the department and the community. A finding of civil liability may have major consequences for both the officer's department and for the city or county that employs the officer. For example, a series of civil judgments, or even one highly publicized case, may significantly damage the department's image, thus reducing respect for law enforcement in that community and making the task of policing the community just that much more difficult.[1]

A major damage award may also financially cripple a jurisdiction. In recent years, more than one small American city has found itself literally bankrupted by a multimillion-dollar judgment in a police civil liability case.

2. Consequences for the officer. Discipline, Dismissal and Personal liability. The personal impact on the officers involved in a civil suit may be extremely grave.

Unlike a criminal conviction, a finding of civil liability does not normally include the threat of incarceration. However, the effect upon the officer's career may be catastrophic. If the officer is found to have been guilty of a civil wrong against the plaintiff, departmental discipline (suspension, reassignment, demotion, etc.) may follow. In some instances, dismissal from the department may result.

Severe financial consequences (over and above the loss of income resulting from discipline or dismissal) may also be involved. Many police officers erroneously believe that if a civil judgment is rendered against them, the judgment will be paid by the city or county that employs the officer. This is not necessarily true.

In the first place, it is possible that the officer may be held liable while the city or county will be exonerated of any responsibility for the injury; under such circumstances, it is highly unlikely that the city or county will pay the judgment on the officer's behalf.

Secondly, even if both the officer and the officer's city or county are held liable, some part of the damages may still have to be paid by the officer personally. For example, although the city or county may pay the portion of the award attributable to compensatory (i.e., actual) damages, any punitive damages awarded against the officer must usually be paid by the officer out of the officer's own pocket.[2]

Finally, even if both the officer and the city or county are held jointly liable, the plaintiff has the option of collecting the damages from either defendant. In some instances, the plaintiff, for various reasons, may elect to proceed against the individual officer for part or all of the award.

Thus, in addition to the possibility of discipline or even dismissal, an officer against whom a civil judgment is awarded may face personal financial ruin.

The Civil Justice System and Civil Liability

Criminal liability and civil liability differ in nature, procedure and effect. In a criminal trial, the state prosecutes the charge against the accused, and the primary purpose of the proceeding is to punish the perpetrator. In a civil trial, normally an individual person (the "plaintiff") prosecutes the case, and the primary purpose of the proceeding is monetary compensation of the plaintiff for the injury inflicted upon that individual by the defendant.

The exact procedure that will be followed in a civil suit will depend upon the type of action and the court in which it is brought. In general, however, the defendant officer may expect the following.

The action usually begins by the filing of a complaint in a civil court. A responsive pleading must usually be filed by the defendants within a specified time, typically about 14 to 21 days. If no pleading is filed, a judgment may be rendered against the defendant by default.

The filing of pleadings is typically followed by extensive proceedings called "discovery." The object of discovery is to provide the plaintiff with information and evidence for the prosecution of the suit. The officer may be questioned under oath during these proceedings.

In many instances, the case will be settled without a trial, usually by the defendant's paying the plaintiff a substantial sum of money. Settlements are particularly common where insurance is involved since insurance companies often prefer to make a settlement rather than face the expense and risk of a trial. Unfortunately, such settlements are generally made without regard to the wishes of the individual officer.

If the case goes to trial, the procedure is similar in some respects to that encountered in a criminal trial, but there are significant differences. For example, the defendant may be forced to take the stand to testify whether the defendant wishes to do so or not. In addition, juries are often composed of fewer members than in criminal trials, and, unlike criminal trials (where the verdict must be unanimous), in some jurisdictions civil jury verdicts may be by majority vote. Further, in civil cases the burden of proof is not "beyond a reasonable doubt" as in criminal cases. The plaintiff need only prove liability by "a preponderance of the evidence" or, in some instances, by "clear and convincing evidence" — both much easier for the plaintiff to establish than "guilt beyond a reasonable doubt."

Even if the jury returns a verdict in favor of the police officer, the case may be appealed to a higher court — and usually is. If the case is reversed on appeal, the officer may face a second (or third or fourth) trial on the same issues.

Legal Principles of Civil Liability

There are two basic types of civil suits being brought against police officers today: tort actions, usually brought in state courts under common-law principles, and civil rights actions, usually brought in federal courts under the provisions of the federal civil rights acts.[3]

In a state court tort action, the defendant will seek damages for injuries or death allegedly inflicted by the police through negligence or intentional wrongdoing. Battery, false imprisonment, defamation and wrongful death are examples of the torts for which damages are typically sought in state courts. Actions of this type may be brought in federal courts as well — for example, where the plaintiffs and the defendants are residents of different states.[4]

In a civil rights action, the plaintiff alleges that the defendants, acting under "color of law" (that is, by asserting their police authority), deprived the plaintiff of his or her civil rights as set forth in the Constitution of the United States, the federal civil rights acts or a state civil rights act. Actions under a state civil rights act will, of course, normally be brought in state court, while actions under the federal civil rights acts are usually brought in federal court.[5]

The principles and procedures differ greatly in these two types of actions. However, in either type of case, the essential point is that the officer and/ or the city or county that employs him may be held liable and required to pay money damages — sometimes in very large amounts — to the plaintiff.[6]

Plaintiffs. Civil lawsuits are brought by several different types of plaintiffs. For many years, the bulk of the civil suits being filed against police were brought by persons outside the department. For example, suspects and arrestees have historically accounted for the majority of such suits. Suits by suspects and arrestees tend to be either civil rights actions or common-law suits for intentional torts such as assault, battery, false arrest and the like. In addition, many innocent bystanders inadvertently injured by police operations have sought damages, usually in common-law negligence actions. Part I of this document primarily focuses on this type of action.

More recently, there has been a sharp increase in suits against departments and against individual officers by fellow employees within the department. Lawsuits of this type tend to be federal civil rights actions, although state court actions, such as defamation, are also possible. This type of suit will be discussed further in Part II of this *Training Key*®.

Defendants. Police-related civil suits may name as defendants:

- The city or county.
- Individual police officers.
- Supervisory personnel, up to and including the chief.
- Trainers and training academies.
- Dispatchers.
- Prosecutors and others who have participated in the enforcement process.

Many actions name several or all of these as defendants in the same lawsuit. However, these various defendants are not necessarily liable upon the same basis or to the same extent. The defenses that may be asserted by each type of defendant may be different, and one or more defendants may be exonerated in a trial, while the remaining defendants are held liable.

Basis of Liability. As noted above, civil rights actions are usually based upon the claim that the police, acting under "color of law," deprived the plaintiff of his or her rights under the Constitution and the various civil rights statutes. These actions may result from many different types of police behavior, including:

- Use of excessive force.
- False arrest or improper detention.
- Unlawful search and seizure.
- Improper treatment or supervision of the plaintiff while the plaintiff is in police custody — for example, failing to obtain medical treatment for the arrestee or failing to prevent the arrestee from committing suicide.
- Discrimination against the plaintiff based upon race, gender, etc.
- Failure to train officers properly.
- Failure to assist the plaintiff when assistance has been requested.
- Operation of a jail facility.[7]
- Maintaining or tolerating any policy or custom that deprives the plaintiff of his or her civil rights.[8]

These are only examples; other types of police behavior may result in a civil rights suit.

Generally speaking, only intentional misconduct constitutes a civil rights violation; personal injuries caused by negligence are normally not actionable under the civil rights acts.[9]

In common-law torts, there are a great many actions that may be brought against police officers. These are too numerous to cover here. Usually, these actions are based upon a claim that police negligently or intentionally inflicted injury of some sort upon the plaintiff. The conduct concerned may be, for example:

- Use of excessive force.
- False arrest or improper detention.
- Unlawful search and seizure.
- Improper treatment or supervision of the plaintiff while the plaintiff is in police custody.
- Failure to assist or protect the plaintiff.
- Negligent infliction of personal injuries.
- Defamation (libel and slander).
- Invasion of privacy.
- Infliction of mental distress.

Again, these are only examples. Virtually any type of wrongful act that injures someone may be the subject of a civil action.

Legal Defenses in Actions Against Police Officers. Depending upon the type of action filed, the defendant police officer will have certain legal defenses that may be asserted to avoid liability. For example, in a negligence action, the plaintiff's suit may fail because the plaintiff was contributorily negligent or assumed the risk. In an intentional tort action, such as battery or false arrest, the officer may have the defense that the officer's actions were justified under applicable laws, or that the plaintiff consented to the actions of the police. Other defenses are available in other types of action.

The following two legal defenses are of particular interest because (a) they are often asserted in litigation against police, and (b) they are often the subject of misunderstanding by police officers. The first of these is the "good faith" defense.

Almost every officer has heard of the so-called "good faith defense" in civil actions. Unfortunately, this phrase "good faith defense" is misleading. The hard truth is that in most instances the fact that the officer acted in good faith — that is, in the honest belief that what the officer was doing was proper — is no defense at all in civil cases. Only if the officer's actions were objectively reasonable will the individual officer be relieved from liability.[10] This test of objective reasonableness is explained in various ways depending upon the court involved and the type of suit being brought, but basically it means that the officer will be held liable unless the officer can show that the ordinary, prudent, reasonably well-trained police officer would have acted in the same fashion. Subjective good faith on the part of the officer is not enough.[11]

NOTE: The term "qualified immunity" is sometimes used to describe this defense, although in reality this is not an immunity, but simply an affirmative defense.

Second is the issue of "sovereign immunity." Police officers are sometimes under the impression that, as public offi-

cials, they are protected from liability by so-called "sovereign immunity." In some situations and in some jurisdictions, this immunity may exist. However, in many instances today, there is no such immunity, or at least only limited protection. For example:

• There is no sovereign immunity in civil rights cases. Neither the officer nor the jurisdiction can avoid liability on that basis in a civil rights suit.

• Even in common-law tort actions brought in state courts, the police officer often has no protection by virtue of sovereign immunity, because (a) local officials, such as police officers, generally do not have any immunity for "ministerial" acts, a term that is often defined by state law to cover some or all of the duties of a police officer, (b) in many jurisdictions, sovereign immunity has been abolished or restricted, depriving officers of even the limited protection that they might have enjoyed at common law and (c) even where the immunity otherwise exists, it may not extend to acts of gross negligence, recklessness and/ or intentional wrongdoing by the officer.

Local law should be consulted on this point. In general, however, it may be said that today police officers cannot count upon sovereign immunity to protect them from civil liability.

Legal Representation of the Officer in Civil Suits

In most instances, a civil suit against the police will be defended by the city or county attorney of the jurisdiction that employs the officers involved. However, it is frequently advisable for the officer to retain his or her own private legal counsel. There are several reasons for this.

1. City and county attorneys are not always adequately experienced in defending this particular type of suit.[12]
2. The city or county attorney must represent the best interests of the jurisdiction in which the attorney serves. Where the interests of the jurisdiction and interests of the officer conflict, it is difficult, if not impossible, for the city or county attorney to represent the individual officer effectively.
3. City or county attorneys may be precluded from representing the officer in counterclaims or counter-suits against the plaintiff — steps that are often an effective defense against possible liability.

Unfortunately, retaining private legal counsel may be extremely expensive for the officer, so even if the officer ultimately wins the suit, the financial burden upon the officer may be very heavy.[13]

Part I of this *Training Key*® has discussed the fundamental principles of civil liability litigation. In Part II, the sources of civil liability will be examined, and recommendations made for the avoidance of civil liability in such situations.

Endnotes

[1] Consider, for example, the impact of the Rodney King incident upon the city of Los Angeles and the Los Angeles Police Department.

[2] Punitive damages are not always awarded, but may be if the jury feels that the officer's conduct was malicious or otherwise flagrant.

[3] Other types of proceedings, such as EEOC proceedings, are not included in this discussion but may occur as well.

[4] This is known as a "diversity action," so-named because there is diversity of citizenship between the parties.

[5] Federal civil rights actions may also be brought in state court, although this is not usually done.

[6] An injunction may also be obtained in some instances.

[7] Since police normally do not operate jail facilities other than a temporary lockup, this area of liability is of greater concern to sheriffs and others who have permanent jail responsibilities. Therefore, no attempt will be made to discuss this area further in this *Training Key*®.

[8] These actions or omissions are not necessarily civil rights violations; in some instances, they may be more properly litigated in state courts as common-law torts, and in other instances there may be no right of action at all.

[9] See *Daniels* v. *Williams*, 107 S.Ct. 677 (1986). Negligence may, however, be the basis for a common-law tort action in state court (or in federal court if there is diversity of citizenship).

[10] *Anderson* v. *Creighton*, 107 S.Ct. 3034 (1987).

[11] At one time, the "good faith" defense required both subjective good faith and objective reasonableness, but in 1982 the Supreme Court eliminated the "good faith" element, making objective reasonableness the sole test.

[12] This is most likely to be true in small communities or rural areas where this type of litigation has not previously been encountered.

[13] In civil rights actions, if the defendant prevails in the suit, the court may require the plaintiff to pay the defendant's attorneys' fees. See, e.g., *Palmer* v. *Coohns*, 581 F. Supp. 1160 (D. Vt. 1984). This is rare, however, and occurs only when the action has been shown to be frivolous or groundless.

Acknowledgement

This *Training Key*® was prepared by Charles Friend, an attorney and law enforcement consultant based in Williamsburg, Virginia.

questions

The following questions are based on material in this *Training Key*®. Select the best answers.

1. Which of the following statements is true?

(a) The principles of civil liability are generally well known and understood by police officers.
(b) The law of civil liability has not changed much over the years.
(c) Training in the principles of civil liability dramatically reduces an officer's civil liability exposure.
(d) Civil liability training is necessary only on the recruit level.

2. Which of the following statements is true?

(a) In a civil trial, the primary purpose of the proceeding is monetary compensation of the plaintiff.
(b) Criminal liability and civil liability are essentially the same in terms of court procedure.
(c) Almost all civil liability lawsuits go to trial.
(d) Civil rights liability actions are generally brought against an officer and/or a police agency in state court.

3. Which of the following statements is false?

(a) In a state court tort action, a defendant seeks damages for injury or death allegedly inflicted by police through negligence or intentional wrongdoing.
(b) Battery, false imprisonment, defamation and wrongful death are examples of torts for which damages are typically sought in state courts.
(c) The term "color of law" refers to a police officer's use of police authority.
(d) If an officer acted "in good faith," he will not be held civilly liable for actions committed in the line of duty.

answers

1. (c) Training of all officers in a law enforcement agency provides one of the better safeguards against civil liability.
2. (a) In a civil trial, the primary purpose of the proceeding is to ascertain the extent of monetary damages due the plaintiff.
3. (d) Because an officer acted "in good faith" - or the honest belief that he was doing the proper thing - is no defense against civil liability.

have you read...?

Charles E. Friend, J.D. *Police Rights: Civil Remedies for Law Enforcement Officers*, 2nd Ed., Callaghan and Company, Wilmette, Illinois, 1987.

This book provides an overview of the process of civil litigation and specific actions officers and agencies can take to protect themselves from civil liability.