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Three Cases Of Importance: Court Reinforces That Diminished Capacity Must Be Taken Into Account; Chiefs Have Absolute Immunity, Maybe; Robinson Ruling Said "The Proximate Cause", No-Fault Law Still May Make Department Pay!

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This issue of the LEAF Newsletter discusses three cases that define areas of risk that departments should review to ensure they have taken steps to mitigate or reduce the exposure. The first case involves handling subjects that have a diminished capacity such as those having mental or emotional difficulty or those that are obviously intoxicated due to drugs and/or alcohol. The second outlines how the Michigan Supreme Court ruled that "executive authority" applies to the job tasks of an executive official. The third outlines how -- despite governmental immunity for their actions in the operation of motor vehicles -- when it comes to the Michigan No-Fault Automobile Insurance Act, Personal Insurance Protection (PIP), departments may be responsible to pay for injuries sustained by a subject.

A Subject's Mental State Is Part Of The Totality Of Circumstances

The Sixth Circuit Court of Appeals in *Martin v. City of Broadview Heights,* 712 F. 3d 951, (6th Cir 2013) has once again ruled that officers are on notice by *Griffith v. Coburn*, 473 F.3d 650, 655 (6th Cir. 2007), that using severe force, including a neck restraint, against an unarmed and minimally threatening individual *before* he was subdued violates the Constitution. They also reaffirmed their finding in *Champion v. Outlook Nashville, Inc.*, 380 F.3d 893, 902 (6th Cir. 2004) that officers violated clearly established law that required them to take into account "the diminished capacity of an unarmed detainee… when assessing the amount of force exerted."

LEAF wrote about this issue in the January 2011, Newsletter titled "*WARNING -- The Courts Scrutinize An Officer's Response To Encounters With At Risk Subjects!*" The goal of that Newsletter was to raise awareness about sudden death and excited delirium and to explain that since 2004, the Sixth Circuit, (*Champion*) has held that during an incident, it is clearly established law that officers must consider the diminished capacity of a subject who is unarmed or minimally threatening before acting. The Court said that when faced with such a subject, officers are required to de-escalate the situation and adjust the application of force downward.

In *Martin*, using the facts alleged by the plaintiff, officers were dispatched at around 2:00 a.m. to an incident where a mostly naked man was running around yelling for help. While in route, a second call was received that a naked man had entered an apartment and then run out screaming for help. When the first officer arrived, he encountered a naked man who begs for help and tells the officer he has to take him to jail. The subject turns around and puts his hands behind his back to be handcuffed. When the officer attempted to cuff him, the subject jogged about 20 feet before the officer tackled him.

The officer then lay full body on the subject to hold him down. A second officer arrived and dropped on his knees into the side of the subject to keep him from throwing off the first officer and then fell full body over the top of the pile.

The subject bit the first officer who struck him in the face, which prompted the second officer to punch the subject several times. Officer one locked his legs around the subject's legs and thighs, put his arm around the subject's chin, and pulled back in an attempt to subdue him. Unfortunately, evidence later shows his arm went around the subject's neck.

Officer three arrived and, seeing the officers struggling to handcuff the subject, dropped on the subject's calves to prevent him from kicking and thrashing. After finally securing the subject, the officers continued to hold the subject down to keep him from jumping up and running away. When the subject began to gurgle, the officers rolled him over, noticed he was not breathing and called EMS. The subject was pronounced dead a short time later.

The original coroner ruled the subject died from an acute psychotic episode, with excited delirium, due to intoxication from LSD and cardiopulmonary arrest. The coroner concluded the death did not result from the force applied to the subject's body. The forensic pathologist who conducted an autopsy found numerous injuries that suggested death by asphyxiation. A further investigation confirmed that the officers' actions during the arrest were "compressive events" that could have caused the subject's asphyxiation and concluded that the evidence pointed to asphyxia as the likely cause of death.

The family filed suit alleging civil rights violations under the Constitution and Ohio law. The estate also sued the city under federal law for failing to train or supervise its employees. The district court denied summary judgment to the three officers and the city. The officers and the city appealed.

The Sixth Circuit Court of Appeals denied the city's appeal because it did not have jurisdiction, as a matter of law, on the municipal liability claim at that time. The court denied the officers qualified immunity citing their decisions in *Champion* and *Griffith*. In *Champion*, they held that applying pressure to the back of a prone suspect who no longer resists arrest and poses no flight risk is an objectively unreasonable use of force. *Id.* at 901. According to the court, the two officers crossed the line *Champion* drew when they placed their arms on the subject's back to restrain him after he was handcuffed and prone. In addition, *Griffith* put the officers on notice that using severe force, including a neck restraint, against an unarmed and minimally threatening individual *before* he was subdued violates the Constitution.

The court also pointed out that four years before their encounter with this subject, the department adopted a Positional Asphyxia Policy and trained the officers on the topic. The policy regulated the conduct of the officers when they encountered the subject, instructing them to recognize the risks of restraining an individual exhibiting bizarre and agitated behavior. The court reacted strongly on this issue saying, "The officers' failure to adhere to a departmental policy that explained the grave dangers of positional asphyxia verifies the unreasonableness of their actions. The quantum of force the officers used was constitutionally excessive, violating the Fourth Amendment right of an unarmed, minimally threatening, and mentally unstable individual to be free from gratuitous violence during an arrest."

LEAF's Legal Advisor, Audrey Forbush commented that this case, like *Griffith*, puts emphasis on the officer's actions. As she has said many times in past LEAF Newsletters, officers have to be educated about the specific requirements of *Garner* and *Graham* concerning use of force and the courts' methods of evaluating an officer's actions. She said officers have to understand that the courts consider a subject's mental state as part of the totality of circumstances when determining the reasonableness of an officer's actions.

Forbush further noted that in *Martin*, the court made it clear that their prior rulings and the department's policy clearly established in 2007 that a reasonable officer should have known that subduing an unarmed, minimally dangerous, and mentally unstable individual with compressive body weight, head and body strikes, neck or chin restraints, and torso locks would violate that person's clearly established right to be free from excessive force. The Constitution does not allow this level of force.

Forbush remarked that officers regularly encounter subjects who are having mental or emotional difficulty or are under the influence of drugs or alcohol, which smacks of being a regular and reoccurring task that the department expects officers to repeatedly fulfill, as discussed in *Canton*. She commented further that even though the court in *Griffith* or *Martin* may have not specifically ruled such, its expectations appear to be the same; officers involved in taking a subject believed to be having mental or emotional difficulty into custody need skills to recognize the situation and refrain from unnecessarily escalating it. Officers need to have training on how to decompress the situation, if possible, to avoid requiring a high level of force response to take the person into custody.

A Chief Has Absolute Immunity, If …!

The Michigan Supreme Court ruled in *Petipren v Jaskowski*, 494 MICH 190 (2013) that the Governmental Immunity Statute, MCL 691.1407(5), says that a judge, a legislator, and the elective or highest appointive executive official of all levels of government is **immune from tort liability** for injuries to persons or damages to property if he or she is acting within the scope of his or her judicial, legislative, or executive authority. The court found the term "executive authority" encompasses all authority vested in the highest executive official of a level of government by virtue of his or her role in the executive branch, including the authority to engage in tasks that might also be performed by lower-level employees. Tort claims can include claims of gross negligence, assault and battery, false arrest, false imprisonment and malicious prosecution.

In this case, a village had been holding a fund raising event in which bands were performing. There had been complaints about the music and the Police Chief was called to the scene. The decision was made to stop the bands from playing. As this decision was reached, a subject was warming up on the stage for the next performance.

This is where the facts are in dispute. The Chief said he went to the subject warming up on the stage and told him to stop. The Chief said the subject refused to stop playing, swore at him, struck him in the jaw, and then resisted arrest. The subject said he was unaware of the decision to stop the performances and was warming up when the Chief approached him. He alleged that he did not resist arrest, but that the Chief barged through the drum set and then pushed him off his seat and into a pole before pushing him off the stage and onto the grass where he was handcuffed.

The subject sued alleging that the Chief had assaulted and wrongfully arrested him for resisting, obstructing, and disorderly conduct. The Chief filed a separate suit against the subject alleging assault and negligent and intentional infliction of emotional distress. The subject then filed a counterclaim in the separate lawsuit, alleging claims of negligence, negligent infliction of emotional distress and intentional infliction of emotional distress against the Chief.

When the Chief filed for summary disposition for absolute immunity citing he was acting with "executive authority," the trial court denied the motion. The Chief then appealed to the Michigan Court of Appeals who reaffirmed the trial court's ruling. The Michigan Supreme Court granted the Chief leave to appeal. At this point, the Michigan Chiefs of Police Association filed an Amicus Brief in support of the Chief's appeal for governmental immunity under MCL 691.1407(5) that says that the highest executive official of a level of government by virtue of his or her role in the executive branch has executive authority that entitles him or her to absolute immunity.

The Michigan Supreme Court ruled that, indeed, the Chief was entitled to absolute immunity and went on to say that an official's scope of authority is the extent or range of his or her delegated executive power. The Court said an objective inquiry into the factual context is necessary to determine the scope of the individual's executive authority and should consider the following factors: the nature of the specific acts alleged, the position held by the official alleged to have performed the acts, the charter, ordinances, or other local law defining the official's authority, and the structure and allocation of powers in the particular level of government. The inquiry does not include analysis of the actor's subjective state of mind. The court further ruled that when the highest appointed executive official of a level of government acts within the authority vested in the official by virtue of his or her executive position and there are no questions of material fact, the official is entitled to absolute immunity as a matter of law.

Audrey Forbush, LEAF's Legal Advisor, said that Police Chiefs should look at this ruling as a clarification of their role in municipal government containing some very specific requirements. The Court stated that Police Chiefs, as the *highest executive official of a level of government* by virtue of their role in the executive branch, has absolute immunity from tort liability *when acting within the scope of their authority* as outlined by charter, ordinance or other local law defining the official's authority. In this case, the Chief had the statutory authority to conduct an arrest and his job duties included arresting offenders.

She cautions all municipal entities and, specifically, top-level law enforcement executives to examine all the elements the court lists that grant the position authority, including the job descriptions, to ensure that the Chief is the highest executive official of the department and that law enforcement related duties are listed as a primary job task. This is important if a Public Safety Director has been appointed or another level holds the executive authority for the department.

Forbush said the court's decision in *Petipren v Jaskowski* eliminates the former method of evaluating a Chiefs' actions based on what job task they were performing to determine the level of immunity. This decision is very specific in its application and requires that the courts evaluate the specific authority granted to the position and the job tasks assigned to it. *Petipren* reinforces LEAF's position that all job descriptions of any police employee should include the enforcement of the laws of the state and the ordinances of the municipal entity.

You May Have Done It Right But PIP Still Makes You Pay

While reviewing a legal update, a reported case caught LEAF's interest because it involved a police pursuit and the aftermath of legal wrangling. One would expect that the case would revolve around a claim of wrongdoing and civil rights violations by a police agency in the pursuit and apprehension of a bad guy. Well, this case, *State Farm v Michigan Municipal Risk Management Authority*, 2013 WL 4081110, from the Michigan Court of Appeals is an unpublished, per curiam opinion that involved a pursuit of a motorcycle that lost control and hit an SUV with the subject suffering serious injuries. Other than following at a distance behind, the officer was not involved in the accident. It is a classic governmental immunity situation under Michigan's current state of the law in *Robinson*!

It started when a sheriff's deputy saw a subject traveling on a motorcycle in excess of the speed limit. The Deputy went after the subject, activating the emergency lights and siren. This resulted in the subject speeding away making several turns. The Deputy gave pursuit. The pursuit lasted several miles before the subject turned on to a dirt road, and the Deputy decided it was getting dangerous and slowed because there were sharp turns in the road. The Deputy did continue the pursuit at a slower speed.

Upon rounding a curve he came upon an SUV nose down on the edge of the road and saw the motorcycle on the ground with the subject in a heap several feet in front of the motorcycle. The driver of the SUV was not injured but the vehicle had damage to the left front. It appeared the motorcycle struck the SUV, but it was unknown if the subject was riding the motorcycle when it hit. Witnesses in the area said the motorcycle was traveling between 70 and 100 mph at the time of the accident. They put the police car only a short distance behind the motorcycle. The driver of the SUV did not see a police car until the Deputy spoke with her.

The subject was seriously injured, had no insurance, but because of Michigan law he was eligible for Personal Injury Protection (PIP) benefits from the SUV owner's insurance company in the amount to $675,114.16. The insurance company for the SUV decided that under the Michigan No-Fault law that the County should be liable for a pro-rata share of the PIP and sued the County for 50% of any money already paid to the subject and 50% of the any money paid in the future. The Circuit Court found for the SUV's insurance company and the County's insurance company appealed. The Michigan Court of Appeals said the County owed!

LEAF asked its legal advisor, Audrey Forbush, how this could be. She said, in brief, that all governmental agencies exercising or discharging a governmental function have governmental immunity, with some exceptions. The employee is entitled to immunity from tort liability as long as the employee's conduct does not amount to *gross negligence* that is *the proximate cause* of the injury or damage (MCL 691.1407 (2)). The law states at MCL 691.1405, "Governmental agencies shall be liable for bodily injury and property damage *resulting from the negligent operation* by any officer, agent, or employee of the governmental agency, of a motor vehicle of which the governmental agency is owner." Forbush cited the July, 2007 LEAF Newsletter, *U.S. Supreme Court Rules that Officers Can Use Force to Stop a Fleeing Vehicle. What Does It Mean for Michigan Law Enforcement?* because it provides a full discussion of the state immunity statutes involved when operating motor vehicles.

She said that *Robinson v City of Detroit* 462 Mich 439 (2000) clarifies the issue of liability. In *Robinson*, the Michigan Supreme Court ruled that although the police have a duty to innocent car passengers, they do not owe a duty to "wrongdoers." Those wrongdoers who allege negligence by police must prove their innocence before any duty attaches to a police officer. The court made a significant distinction between "a" proximate cause and "the" proximate cause in these motor vehicle cases. The ruling determined that individual police officers are immune from liability when their actions were not "the proximate cause" of the plaintiffs' injuries. In addition, the court narrowly construed the motor vehicle exception to governmental immunity. The court agreed that an officer's physical handling of a motor vehicle during a pursuit could constitute negligent operation of a motor vehicle as defined in the motor vehicle exception to governmental immunity.

However, the court also ruled that the facts in the *Robinson* case proved that the plaintiff's injuries did not, as a matter of law, "*result from"* the operation of the police vehicle. The police vehicle did not hit the fleeing car, did not physically cause another vehicle or object to hit the vehicle under pursuit, or did not physically force the vehicle off the road or into another vehicle or object. Therefore, there was no exception to governmental immunity. Additionally, *Robinson* established that

an officer's decision to pursue does not constitute the negligent operation of a motor vehicle as it had prior to this case.

Forbush said the No-Fault law, MCL 500.3101 et seq, is a different beast. She opined that the problem exists because the language/standard is not the same for No-Fault as it is for a tort liability claim. Here the Court of Appeals ruled MCL 500.3114(5) provides, in relevant part, that an injured person may recover PIP benefits from a motor vehicle accident that occurred "while an operator or passenger of a motorcycle." The subject in this case was presumed the operator at the time of the accident even though no one testified they actually saw him on the bike when it hit the SUV.

Therefore, the subject is eligible for benefits under MCL 500.3114(5), which states: A person suffering accidental bodily injury arising from a motor vehicle accident which shows evidence of the involvement of a motor vehicle while an operator or passenger of a motorcycle shall claim personal protection insurance benefits from insurers in the following order of priority:

> (a) The insurer of the owner or registrant of the motor vehicle involved in the accident.
> (b) The insurer of the operator of the motor vehicle involved in the accident.
> (c) The motor vehicle insurer of the operator of the motorcycle involved in the accident.
> (d) The motor vehicle insurer of the owner or registrant of the motorcycle involved in the accident.

Forbush said the County was assigned damages because, under the No-Fault definitions, the Deputy was "involved" in the accident. The analysis is "foreseeably identifiable" as opposed to "the proximate cause" standard in *Robinson.* She points to the quote found in the *State Farm* case as the explanation:

> "While the automobile need not be the proximate cause of the injury, there still must be a causal connection between the injury sustained and the ownership, maintenance or use of the automobile and which causal connection is more than incidental, fortuitous or but for. The injury must be foreseeably identifiable with the normal use, maintenance and ownership of the vehicle." (Internal citations omitted.)

Using the analysis found in the Michigan Supreme Court ruling in *Turner v Auto Club Ins Ass'n*, 448 Mich 22, 39; 528 NW2d 681 (1995), the court ruled that the police officer, who was using his vehicle as a motor vehicle while he pursued a stolen vehicle, was involved in the resulting accident. This active use precipitated the stolen vehicle's flight, which, in turn, resulted in the collision with the other car and the damage to the nearby property. *State Farm* is similar to *Turner* in that the deputy's vehicle was involved in the accident because he pursued the subject, which caused the subject to continue to flee, which resulted in the accident.

Forbush said, bottom-line, the court ruled that under the definitions found in MCL 500.3114(5), the deputy's vehicle was an involved vehicle that was insured by the County, through MMRMA, so they are responsible to pay 50%, which at the time of the case was in excess of $300,000.

Forbush said that this is a problem between the two systems. On the liability side there is Governmental Immunity when doing what government is supposed to do. On the No-Fault side, there are risks that cannot be planned for or even predicted. The expenses of this type of case will affect the insured's loss ratio and resulting premium no matter who is the insurance provider. This is a problem that only the courts or legislature can fix, and, until it is done, these cases will remain an expensive source of frustration.

LEAF continues to develop policies and resource documents designed to help Law Enforcement Executives manage their risk exposure. Do not hesitate to contact the Michigan Municipal League's, Loss Control Services at 800-482-2726, for your risk reduction needs and suggestions.

While compliance to the loss prevention techniques suggested herein may reduce the likelihood of a claim, it will not eliminate all exposure to such claims. Further, as always, our readers are encouraged to consult with their attorneys for specific legal advice.

LAW ENFORCEMENT ACTION FORUM (LEAF) is a group of Michigan law enforcement executives convened for the purpose of assisting loss control with the development of law enforcement model policy and procedure language for the Manual of Law Enforcement Risk Reduction. Members of the LEAF Committee include chiefs, sheriffs, and public safety directors from agencies of all sizes from around the State.

The LEAF Committee meets several times yearly to exchange information and ideas relating to law enforcement issues and, specifically, to address risk reduction efforts that affect losses from employee accidents and incidents resulting from officers' participation in high-risk police activities.

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