

COUNCIL ON LAW ENFORCEMENT EDUCATION AND TRAINING BASIC ACADEMY

Functional Area:
Legal Matters

Lesson Title:
Legal Issues Related to Use of Force LM.09.0

Duration:
3.5 Hour

Last revised: July, 2010

LEARNING GOAL(S): The student will know the amount of force permitted in effecting an arrest. Also, the student will understand the limitations imposed on the use of Deadly Force

ASSESSMENT AND STANDARDS: Successful completion of this **FUNCTIONAL AREA** is achieved when the student has performed all practical tasks and exercises to the satisfaction of the instructional staff and, when tested against the **PERFORMANCE OBJECTIVES** by multiple choice exam(s), a score of 70% or higher is attained.

PERFORMANCE OBJECTIVES:

- LM.09.01 The student will identify the meaning of the term "excessive use of force."
- LM.09.02 The student will identify the factors which may dictate the amount of force utilized by an officer.
- LM.09.03 The student will identify the legitimate amount of force that may be used by an officer.
- LM.09.04 The student will identify the meaning of the phrase "deadly force."
- LM.09.05 The student will identify when "deadly force" may be used by a peace officer, or any person acting by the officer's command in aiding and assisting.

TRAINING AIDS REQUIRED:

1. Student Reference Guide



Use or abuse of force is probably one of the most litigated areas in law enforcement and subjects the peace officer to potential liability.

PROHIBITIONS REGARDING EXCESSIVE FORCE

U.S. Constitution and state law

4th Amendment

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

The main U.S. Supreme Court cases are:

Graham v. Connor, 490 U.S. 386 (1989) (use of ‘objectively reasonable’ force, pursuant to Fourth Amendment standards)

Tennessee v. Garner, 471 U.S. 1 (1985) (use of ‘deadly force’ on fleeing felons)

Hope v. Pelzer, 536 U.S. 730 (2002) (use of cruel and unusual punishment)

Sacramento v. Lewis, 523 U.S. 833 (1998) (car chases as violations of Constitutional rights)

The main Oklahoma Supreme Court cases are:

Morales v. OKC, Oklahoma Supreme Court, 2010 (tort liability of an Officer in an arrest situation.)

DPS v. Gurich, Oklahoma Supreme Court, 2010 (tort liability of an Office in a car chase)

Each of these cases will be discussed later in this class, and some of them in defensive tactics class.

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8th Amendment

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The main Supreme Court case is Hope v. Pelzer, 536 U.S. 730 (2002).

14th Amendment

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

State Statutes Prohibit Use of excessive force

- The standard is “reasonable force under the totality of circumstances test”
- Could subject the officer to criminal sanctions

21 O.S. § 641 states: *Assault* is any willful and unlawful attempt or offer with force or violence to do a corporal hurt to another.

21 O.S. § 642 states: Battery is any unlawful and willful use of force or violence upon the person of another.

22 O.S. § 34.1 requires any agency that employs peace officers to adopt policies or guidelines on the use of force.

22 O.S. § 34.1 defines the use of excessive force by a peace officer, this definition provides that excessive force means force which exceeds the degree of physical force permitted by law or the policies and guidelines of the law enforcement entity.

22 O.S. § 34.2 requires an officer who witnesses another officer use excessive force to report said use. An officer still on the probationary term is not *required* to report excessive force, but also is not *prohibited* from reporting excessive force.

CRIMES INVOLVING USE OF FORCE

Assault, Battery, or Assault and Battery with a Dangerous Weapon (21 O.S. § 645)

Every person who, with intent to do bodily harm and without justifiable or excusable cause, commits any assault, battery, or assault and battery upon the person of another with any sharp or dangerous weapon, or who, without such cause, shoots at another, with any kind of firearm, air gun, conductive energy weapon or other means whatever, with intent to injure any person, although without the intent to kill such person or to commit any felony, upon conviction is guilty of a felony punishable by imprisonment in the State Penitentiary not exceeding ten (10) years, or by imprisonment in a county jail not exceeding one (1) year.

Assault and Battery with a deadly weapon is addressed below.

Aggravated Assault and Battery (21 O.S. § 646)

- A. An assault and battery becomes aggravated when committed under any of the following circumstances:
 - 1. When great bodily injury is inflicted upon the person assaulted; OR
 - 2. When committed by a person of robust health or strength upon one who is aged, decrepit, or incapacitated, as defined in Section 641 of this title.
- B. For purposes of this section “great bodily injury” means bone fracture, protracted and obvious disfigurement, protracted loss or impairment of the function of a body part, organ or mental faculty, or substantial risk of death.

Shooting with Intent to Kill – Use of vehicle to facilitate discharge of weapon - Assault and Battery with Deadly Weapon, etc. (21 O.S. § 652)

- A. Every person who intentionally and wrongfully shoots another with or discharges any kind of firearm, with intent to kill any person, including an unborn child as defined in Section 1-730 of Title 63 of the Oklahoma Statutes, shall upon conviction be guilty of a felony punishable by imprisonment in the State Penitentiary not exceeding life.
- B. Every person who uses any vehicle to facilitate the intentional discharge of any kind of firearm, crossbow or other weapon in conscious disregard for the safety of any other person or persons, including an unborn child as defined in Section 1-730 of Title 63 of the Oklahoma Statutes, shall upon conviction be guilty of a felony punishable by imprisonment in the State Penitentiary for a term not less than two (2) years nor more than twenty (20) years.
- C. Any person who commits any assault and battery upon another, including an unborn child as defined in Section 1-730 of Title 63 of the Oklahoma Statutes, by means of any **deadly weapon**, or by such other means or force as is likely to produce death, or in any manner attempts to kill another, including an unborn child as defined in Section 1-730 of Title 63 of the Oklahoma Statutes, or in resisting the execution of any legal process, shall upon conviction be guilty of a felony punishable by imprisonment in the State Penitentiary not exceeding twenty (20) years.
- D. The provisions of this section shall not apply to:
 - 1. Acts which cause the death of an unborn child if those acts were committed during a legal abortion to which the pregnant woman consented; or
 - 2. Acts which are committed pursuant to usual and customary standards of medical practice during diagnostic testing or therapeutic treatment.

E. Under no circumstances shall the mother of the unborn child be prosecuted for causing the death of the unborn child unless the mother has committed a crime that caused the death of the unborn child.

FORCE AGAINST ANOTHER NOT UNLAWFUL WHEN

21 O.S. § 643 provides that the use of force is not unlawful when committed:

- By a Peace Officer in the performance of any legal duty, or by any other person assisting him or acting by the Officer's direction.
- By a person in arresting one who has committed a felony and delivering the arrestee to a public officer competent to receive the arrestee in custody.
- Either by the party about to be injured, or by any other person in his aid or defense, in preventing or attempting to prevent an offense against his person, or any trespass or other unlawful interference with real or personal property in his lawful possession; provided the force or violence is not more than sufficient to prevent such offense.
- By a parent, agent of parents, or by any guardian, master, or teacher in the exercise of lawful authority to restrain or correct child if necessary by the misconduct of the child or the child's refusal to obey lawful commands, if force or violence used is reasonable in manner and moderate in degree.
- By a carrier of passengers, or the authorized agents or servants of such carrier, or by any person assisting them at their request, in expelling from any carriage, railroad car, vessel or other vehicle, any passenger who refuses to obey a lawful and reasonable regulation prescribed for the conduct of passengers, if:

Vehicle has been stopped;

Force and violence is not more than necessary to expel the passenger;

With reasonable regard to the passenger's personal safety.

- Or when utilized to prevent a person who is impaired by reason of mental retardation or developmental disability, mentally ill person, insane person or other person of unsound mind, including persons temporarily or partially deprived of reason, from committing an act dangerous to himself or another, or enforcing such restraint as is necessary for the protection of his person or for his restoration to health. Force may be used only during the time necessary to obtain legal authority for restraint or custody.

USE OF FORCE DEFINED

P.O. (LM.09.01) The student will identify the meaning of the term 'excessive use of force'

Excessive Use of Force - The amount of force utilized which is not authorized by law or goes beyond the amount of force necessary and reasonable to detain, restrain, or protect.

The Excessive Use of Force Implicates

- Unreasonable seizure (4th Amendment)
- Cruel and Unusual Punishment (8th Amendment)
- Deprivation of life, liberty, or property without due process (14th Amendment)

Illegitimate Force

Any force which is used to perpetrate a criminal offense, i.e. rape, robbery, etc.

Any force used by an officer which exceeds the amount of reasonable and necessary force required to apprehend a suspect (arrest) or to protect the citizen or officer.

Factors Which May Dictate Amount of Force Utilized by an Officer.

P.O. (LM.09.02) The student will identify the factors which may dictate the amount of force utilized by an Officer.

Courts use the "totality of the circumstances" test.

Graham v. Connor

Graham was a diabetic and was trying to get some orange juice at a convenience store and was acting strangely. Officers thought he was intoxicated and refused to consider the possibility that Graham's behavior was caused by his disease. In taking him into custody, the officers broke his foot, cut his wrist, bruised his forehead and injured his shoulder. Graham sued pursuant to 42 U.S.C. § 1983 alleging that the officers used excessive force.

The trial court used a test which allowed any use of force so long as the officer was not acting out of 'malice' or 'sadism'.

The Supreme Court rejected the ‘malice or sadism’ standard and held that the amount of force used must be ‘reasonable’ under the ‘totality of the circumstances’ test. The reviewing court is also to allow for “the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation”.

The Graham court identified several factors which might affect whether the officer’s use of force was ‘reasonable’.

- Severity of the crime at issue
- Whether the suspect poses an immediate threat to the safety of the officer or others
- Whether the suspect is actively resisting arrest
- Whether the suspect is attempting to evade arrest by flight.

Legitimate Amount of Force by Officer

P.O. (LM.09.03) The student will identify the legitimate amount of force that may be used by an Officer.

The amount of reasonable and necessary force to effect the arrest of offender.

The amount of reasonable and necessary force to protect the officer from harm.

The amount of reasonable and necessary force to protect citizens from harm.

TYPES OF FORCE

P.O. (LM.09.04) The student will identify the meaning of the phrase ‘deadly force’.

Deadly Force is force which is likely to create a substantial risk of causing death or serious bodily harm.

Excusable Homicide - 21 O.S. § 731

Homicide committed by accident or misfortune in doing any other lawful act, by lawful means, with usual and ordinary caution, and without unlawful intent.

When committed by accident and misfortune in the heat of passion, upon any sudden and sufficient provocation, or upon sudden combat provided that no undue advantage is taken, nor any dangerous weapon is used, and that the killing is not done in a cruel and unusual manner.

P.O. (LM.09.05) The student will identify when deadly force may be used by a Peace Officer, or any person acting by the Officer's command in aiding and assisting.

Justifiable Homicide - 21 O.S. § 732

A peace officer, correctional officer, or any person acting by his command in his aid and assistance, is justified in using deadly force when:

The officer is acting in obedience to and in accordance with any judgment of a competent court in executing a penalty of death or in effecting an arrest or preventing an escape from custody following arrest and the officer reasonably believes both that:

Such force is necessary to prevent the arrest from being defeated by resistance or escape and there is probable cause to believe that the person to be arrested has committed a crime involving the infliction or threatened infliction of serious bodily harm, or the person to be arrested is attempting to escape by use of a deadly weapon, or otherwise indicates that he will endanger human life or inflict great bodily harm unless arrested without delay; OR

The officer is in the performance of the officer's legal duty or the execution of legal process and reasonably believes the use of force is necessary to protect the officer or others from the infliction of serious bodily harm; OR

The force is necessary to prevent an escape from a penal institution or other place of confinement used primarily for the custody of persons convicted of felonies or from custody while in transit thereto or there from unless the officer has reason to know:

The person escaping is not a person who has committed a felony involving violence, AND the person escaping is not likely to endanger human life or to inflict serious bodily harm if not apprehended.

Tennessee v. Garner, is the leading U.S. Supreme Court case regarding use of deadly force on a fleeing felon.

*In Tennessee v. Garner, police received reports of a person fleeing a house. When they arrived, they saw Garner attempting to flee from them by climbing over a fence. After Garner ignored a command to stop, the officer shot and killed him. At the time, Tennessee law permitted use of deadly force against a fleeing felon. Garner's dad sued pursuant to 42 U.S.C. § 1983, alleging that the Tennessee statute was unconstitutional. The Supreme Court held that deadly force may be used on a fleeing felon if Officers have a reasonable belief that the suspect has caused serious bodily harm to someone, or is going to cause serious bodily harm to someone, including the officer. The Supreme Court also stated that a warning should be given before deadly force is used, but **only** if giving a warning is feasible under the circumstances.*

21 O.S. § 732 (above) is Oklahoma’s statutory enactment of the rule from Tennessee v. Garner

Car Chases (pursuits)

Sacramento v. Lewis

Since this was a claim of Constitutional Rights, the Court analyzed it under the 14th Amendment (substantive due process)

The theory of substantive due process bars “certain government actions regardless of the fairness used to implement them”

Due process is protection against “arbitrary” government action.

Only the most egregious official conduct can be called “arbitrary” in the Constitutional sense.

“A police officer deciding whether to give chase must balance ... the need to stop the suspect and show that flight from the law is no way to freedom, and ... the high-speed threat to all those within stopping range, be they suspects, their passengers, other drivers, or bystanders.”

“...when unforeseen circumstances demand an officer’s instant judgment, even precipitate recklessness fails to inch close enough to harmful purpose to spark the shock that implicates ‘the large concerns of the governors and the governed’.”

DPS v. Gurich

Since this was a claim of tort (negligence) liability, the Court analyzed it under traditional negligence law.

An Officer may be liable for the decision to give chase, and continue the pursuit, if:

-the Officer acted in reckless disregard of public safety AND

-the jury determines that the Officer’s actions were a proximate cause of the injuries

It must be more than “mere negligence”, since there are “split-second life and death decisions involved in police pursuits”

The Court quoted OHP policy: “The decision to terminate a pursuit may be the most rational means of preserving the lives and property of ... the public ... a pursuit shall be immediately terminated when the danger imposed by continued pursuit to the public ... is greater than the value of apprehending the suspect(s).”

Non-Deadly Force

This is force which is not likely to cause death or serious physical harm.

Generally, the intent of the party utilizing the force will not be at issue. *If the force used would not have harmed a normal person, but causes substantial harm because the suspect has an unusual medical condition, the officer will potentially be responsible for the harm actually caused, even if the officer did not intend to cause substantial harm.*

In tort (negligence) law, this is known as the ‘eggshell plaintiff’ rule.

A Peace Officer May Use Non-Deadly Force in Any of the Following Situations:

- To effect a misdemeanor or felony arrest whether with or without a warrant. However, the force utilized must be reasonable and necessary to effect the arrest under the totality of the circumstances at the time of arrest.
- To protect the officer or some other person from apparent and immediate physical harm from another.
- To execute search warrants or other legal process.
- To apprehend fugitives, suspects, etc.
- **Officer liability for negligence in arrest situations**
- Morales v. Oklahoma City
- Since this is a tort (negligence) action, the Court analyzed it under traditional negligence law.
- **“A police officer’s duty is very specific: it is to use only such force in making an arrest as a reasonably prudent police officer would use in light of the objective circumstances confronting the officer at the time of the arrest.** In applying this standard, an officer’s subjective mistake of fact or law is irrelevant, including whether he (she) is acting in good faith or bad.”
- **“If police officers were exposed to suit every time the risk of harm inherent in an arrest culminated in actual harm, law enforcement would grind to a halt.** The standard of care must hence recognize that the use of force and a concomitant risk of injury are inherent in the performance of a law enforcement officer’s duty to arrest those suspected of breaking the law”

The number one rule regarding use of force

**The force utilized must be
reasonable, and necessary.**

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