

CIVIL LIABILITY AND CIVIL RIGHTS

ONLINE

PRESENTED BY:

DPS – Law Enforcement Academy
Santa Fe, New Mexico

Date: _____

GOALS

- Students will learn how people who file lawsuits against law enforcement officers achieve success.
- Students will learn what police departments can do to reduce liability.
- Students will learn what law enforcement officers can do to reduce liability.

OBJECTIVES

Upon completion of this course, students will be able to:

- Define basic terms of civil liability: immunity, tort v. crime, plea bargain v. settlement, deep pocket theory, contingent fee, damages, risk management.
- Discuss positive and negative reasons for lawsuits.
- Understand why lawsuits are a part of the legal system.
- Explain how ignoring constitutional rights can lead to lawsuits.
- State types of damages that can be awarded in a civil lawsuit.
- Learn about differences between state and federal civil court.
- State why people filing lawsuits prefer federal over state court.
- Explain two primary federal statutes: 18 USC 242 and 18 USC 1983.
- Discuss types of cases against police officers that go to court.
- Discuss how a police department can take steps to reduce liability.

SOURCES

- New Mexico Criminal and Traffic Manual
- New Mexico Statutes Annotated.
- State and federal case law.

ESTIMATED TIME Six hours.

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INTRODUCTION

For much of the Academy, the emphasis of the legal classes is criminal law. These are interesting classes which include laws of arrest, Miranda, search and seizure, and many more.

But there is another component of the legal system, civil liability and civil rights, that's also fascinating and interesting. Sometimes we're witnesses on civil cases but sometimes we're the ones being sued.

Police departments have different approaches to lawsuits

The passive approach

A surprising number of officers have a passive approach to lawsuits. You can hear it in the way they talk: "I'm going to get sued anyway," "Every officer gets sued," "You're not doing your job if you don't get sued," and so forth. Their agencies reflect this passive attitude: when sued, they simply write checks to the other side.

The positive attitude

But there is another attitude, one that approaches this challenge differently: we're going to understand everything about lawsuits, we going to understand where those who sue us are coming from, we're going to understand what are the most common types of lawsuits, and we're going to be so well prepared that we will know how to avoid lawsuits against us.

This is an affirmative, pro-active approach. Over twenty-five hundred years ago, a famous Chinese philosopher, Sun Tzu, wrote a book called The Art of War. The greatest general, he said, is not the one who wins a victory but one who is so well prepared that the other side chooses not to fight. These are the two different approaches. For purposes of this class, we'll follow Sun Tzu.

What is civil liability?

- Every person in America is guaranteed certain civil and constitutional rights.
- If an officer violates these rights, the state becomes liable to the victim.
- Civil refers to the civil court system as opposed to the criminal justice system; liability means the state is responsible for compensating the other person.
- Compensation is in the form of money (damages).
- Although we will be discussing civil liability in the context of lawsuits against law enforcement, other agencies can also be sued for monetary damages.

Can one case go to both criminal and civil court?

Yes. This occurred in the OJ Simpson case. He was found not guilty in the criminal case. The family of one of the victims – Ron Goldman – sued OJ Simpson for wrongful death and was awarded thirty million dollars. Officers testified in both the criminal and civil trials.

It's not double jeopardy because criminal law and civil law are two different legal systems. Another example: Suppose an officer uses excessive force on an individual. He may be prosecuted for battery in criminal court and sued for damages in civil court.

Examples where officers are witnesses in a civil case for a victim

- A vehicular homicide occurs. The officer asks a highly intoxicated driver when he had his last drink and where. The driver names a bar. If the victim's estate sues the bar, the officer is likely to be called as a witness.

Basic terms and legal principles about civil liability

Some definitions will help us:

What is immunity?

For a long time the government or the state couldn't be sued. Over the years that has changed. Judges have immunity but police officers have qualified immunity and can be sued.

What is the difference between a tort and a crime?

- The word "tort" is confusing to many people. And yet, tort is all around us. The lawsuits that make headlines – tobacco, a person injured – are based on tort.
- Tort is an old French word meaning "injury." A **tort** is a wrongful act by one person that gives another person the right to sue him or her. The victim wants money, known in court as damages. When two parties in a civil case resolve a dispute prior to trial, it's called a **settlement**.
- A crime is a wrong against the person or property of another for which the remedy is fine/imprisonment or both. When a case is resolved before trial in a criminal case, it's called a **plea bargain**.

On the road to suing an officer: **deep pocket, contingent fee, risk management**

A person who sues another is far more interested in the agency or business that person works for. One could personally sue an officer but the reward would be minimal. Sue the county or city that the officer works for, however, and one can recover more.

That's because the agency is liable for the actions of its employees. This is known as going after the officer's **deep pocket**.

A person who wants to sue an agency may not be able to afford a lawyer or the expenses of a lawsuit. In that event, a lawyer may work on a **contingent fee** basis. The lawyer will put up expenses and get ready for trial. The lawyer's fee is determined by the settlement. Usually the lawyer will get about one-third of the settlement.

Is there anyone working for the officer? Yes, the agency the officer works for will provide an attorney to represent the officer. Also, the agency will have an insurer, sometimes called **risk management**. Money awarded to the person suing will come from risk management, not the officer.

Reminder:

[Even though not financially liable, an officer may still face adverse consequences.](#)

Does the agency always represent the officer? Almost always, since generally what the officer does is in the scope of his or her duties. Officers who do something off-duty, or outside the scope of their duties (committing a crime, for example), may have to represent themselves.

But even when an officer has committed a crime, the agency he or she works for may be liable for damages.

The difference between intentional and negligent torts

One way to have a strategy against lawsuits is to know what kind of lawsuits we are facing. If we know what the problems are – the minefields – we can use training opportunities to avoid them.

We will be discussing two kinds of torts that can lead to lawsuits:

1. Intentional tort

This is doing an act which is substantially certain to cause injury or harm to another. More than negligence, an intentional tort requires some sort of motive or deliberate fault. Example: Assault and battery after a person has been handcuffed.

2. Negligent tort

The most common tort allegations stems from negligence. Sometimes it's simple or mere negligence – usually someone wasn't thinking or didn't use common sense and made a mistake. Gross negligence is when an officer has a conscious or reckless disregard for the rights of others. Example: Negligent arrest.

But just because we're negligent doesn't mean we're liable. There must be a situation where an officer had a legal duty to the person (the plaintiff), the officer

breached or failed to perform that duty, and that breach of duty led to harm by the suing party (the plaintiff).

Type of damages that can be awarded

- If officer is negligent, general and compensatory damages are available.
- If officer's actions are intentional, in addition to general and compensatory damages, punitive damages may be awarded.
- A jury awards punitive damages to "send a message."

Positive and negative views about lawsuits

When it comes to lawsuits in America, people have definite opinions: they either support them or are against them. Some of their views follow:

Positive views on lawsuits - Some Arguments in favor of lawsuits

- Lawsuits offer a way for a citizen, regardless of status, to have a remedy if they are a victim of a wrong against them.
- Auto companies. There is a car you don't see much on the road: the Ford Pinto. In the interests of saving money, Ford decided not to put a fire wall between the gas tank and the rest of the car. When the car was rear-ended, it caught on fire. If you or your family were the victim, shouldn't you have a remedy?
- Tire companies. On a number of Firestone tires, the tread was coming off at a certain speed. The defective tires could be traced to one inefficient plant in Ohio. Lawsuits force companies to be more efficient. Shouldn't you or your family have a remedy when a company sells you a defective product?
- Drug companies. A drug given to pregnant women results in babies without arms or legs. Shouldn't the drug companies be held accountable?
- Without checking the indicators on an arrest warrant, a police officer arrests a young man – same name, wrong person. That person spends a week in jail before being released. Shouldn't that person have a remedy?

Negative views on lawsuits - Some Arguments against lawsuits

- Lawsuits or the fear of lawsuits is hurting America. Some call it "legalized extortion" – paying money to someone suing you to avoid trial.
- America have over one million lawyers, over half of the lawyers in the world.
- There is an old saying, "If you have one lawyer in town, he or she will go broke. If you have two lawyers in town, they'll both get rich." There is a perception that lawyers benefit the most from our civil law system.
- Medical malpractice is expensive. Some doctors avoid certain areas of the medical profession because of lawsuits.
- Due to lawsuits, it's very expensive for drug companies to come out with new drugs that can benefit society.

- Some people hesitate to join law enforcement because of concern of lawsuits.

Some observations on positive and negative views of lawsuits

- When it comes to lawsuits, we need to realize there isn't a one-sided easy answer.
- To be effective, we need to understand where the other side is coming from.
- Law enforcement is no different than any other agency or institution. Quite simply, if we don't do a good job, or violate people's constitutional rights, we probably deserve to get sued.
- We need to question why some police departments are sued more than others.
- We need to know our weaknesses.
- We need to be able to make recommendations to reduce or prevent lawsuits.

Two court systems: State and federal

State:

- Previously sovereign immunity prevailed which meant the citizen could not sue the state at all. The New Mexico Tort Claims Act changed this and provides citizens with a remedy for misconduct by the state.
- Liability attaches for torts within the scope of the officer's duty, violation of property rights, and violation of any rights provided by the US and New Mexico constitutions.
- State, unlike federal government, has limits on damages.

Federal:

We will discuss the two main federal statutes often used to bring an action into federal court.

Federal criminal liability - "241, 242" "Criminal Liability"

- The full title is 18 USC 242.
USC stands for United States Code
- Used in police brutality cases.
- Federal law imposes criminal sanctions against law enforcement officers who deprive individuals of their civil rights.
- Specific intent statute. Police officer must have the specific intent to violate the rights of the victim at the time of the deprivation.
- This carries criminal sanctions which could be a fine and/or incarceration.

- Section “241” refers to conspiracy to violate civil rights.

Federal Civil Rights Action - “1983” **“Civil Liability”**

- The full title is 42 USC 1983 but lawyers call this a “1983” lawsuit.
USC stands for United States Code.
- This statute allows citizens to sue for deprivation of constitutional rights in federal court.
- Now one might ask: if a state or local officer is being sued, why would that case go to federal court? There are historical reasons for this. After the Civil War, new Constitutional amendments guaranteed civil rights for all people.
- But in many southern states, state and local officials continued to violate civil and constitutional rights of people, especially the black population. The purpose of section 1983 is to make civil remedies available to citizens who are injured by the actions of state or local officials.
- Example: in 1961 the United States Supreme Court decided Monroe v. Pape. Chicago officers entered Monroe’s apartment at night, without a warrant, and questioned him for ten hours. Monroe was never charged. Supreme Court said this was a violation of Monroe’s Fourth Amendment rights and he was entitled to sue in federal court for damages.
- This statute creates a cause of action against a police officer, in the performance of his or her duty, who deprives another person of any federally protected right or other statutory right.
- One can sue in either state or federal court but federal court is preferred. This is because New Mexico has a cap on the amount of damages but in federal court there is no limit for damages.
- Non-intent statute – can sue for a negligent act.
- Some examples of where police misconduct can result in civil liability under section 1983: illegal search and seizure, excessive force, assault and battery, coerced confessions, discriminatory prosecutions, false arrest and imprisonment, and deadly force.

On the way to court: **Types of Lawsuits against law enforcement**

- We have discussed intentional and negligent torts. We will now look at some types of cases that often end up in federal court.

Type of case that could go to federal court: Failure to Protect

“I’m a cop, not a social worker.”

In the old days, many officers felt their responsibility was simply to apprehend and arrest people. In Canton v. Harris (1989), a severely emotionally disturbed lady was placed in custody. She was incoherent and fell down several times. None of the officers made any effort to help her.

The United States Supreme Court held police inaction can result in civil liability for both officers and their agency. An officer today would help that person.

- Is law enforcement better or worse off with the new standard of duty to protect?

Answer:

Most officers believe the new standard, which gives officers a duty to protect citizens, has helped improve the image of law enforcement.

FACTS:

It’s the early morning hours in a rough part of town. Police officers stop a vehicle for a broken tail light. The young couple inside had just left a local night club. Investigation reveals that the driver was intoxicated. He is arrested and the vehicle is towed. The young lady – dressed for Saturday night – is left on the sidewalk.

She asks the officer for help. The officer replies, “Lady, it’s not my problem. You should have thought of this before you go into a car with a drunk driver.” The officer leaves. Within the hour she is knocked down and her purse is taken.

- Should the officer or his department be held liable?

Answer:

This happened to the Albuquerque Police Department (before cell phones became widely available). The department was held liable for injuries to the young lady.

Recommendation:

If a person in this situation does not have a cell phone, Dispatch may be able to contact someone.

Some other categories of failure to protect:

All of these categories represent actual lawsuits against police agencies.

- Failure to respond to crime.
- Failure to protect informants.
- Failure to warn of danger.
- Failure to arrest a dangerous motorist.

- Failure to prevent escapes or negligent release.
- Failure to adequately protect persons in police custody.
- Failure to provide emergency medical services.
- Failure to protect property in evidence.
- Negligently mishandling of emotionally disturbed or special needs of individuals.

The great majority of lawsuits seem to occur because of lack of common sense or someone wasn't thinking. We need to ask what could have been done to avoid these lawsuits.

Type of case that could go to federal court: Use of Force

Examples of where law enforcement officers can be held liable for excessive force:

- Continue to use force after resistance has ended.
- Use chemical agents to excess.
- Use excessively severe restraints.
- Command dog attacks or bites.
- Use force to cause unnecessary injury.
- Use of force is discussed extensively in another class. Unfortunately, excessive force complaints are the basis for many lawsuits against law enforcement officers.
- The standard to follow: Officers are expected to apply only the force that is reasonable in order to resolve a given situation. When resistance stops, force should stop.
- New Mexico follows the Tennessee v. Garner standard for deadly force which holds that an officer must have probable cause to believe either he/she or another is in imminent danger of death or serious bodily harm.
- When deadly force is used, the estate of the deceased person may sue for wrongful death.
- Agencies that may review deadly force include the officer's agency, the District Attorney's office or the Department of Justice.

Type of case that could go o federal court: High Speed Pursuit

- In County of Sacramento v. Lewis, the United States Supreme Court held that the standard for liability is “shocking the conscience.”
- It is important for officers to follow agencies’ policies and procedures where high speed pursuits are concerned.

Type of case that could go to federal court: Search & Seizure

- Search & Seizure falls under the Fourth Amendment. The following are some categories that may be actionable as unreasonable under the Fourth Amendment.
- Overly intrusive and degrading searches.
- Strip searches.
- Improper execution of a search warrant.
- Searching the wrong premises.

Type of lawsuit that could go to federal court: Negligence

Examples of Negligence:

- Negligent use of chemical weapons.
- Negligence in personnel matters – hiring.
- Negligence in training.
- Negligence in supervision.

But why wait for lawsuits?: One department’s response

The key to avoiding lawsuits is legal training and imagination. The following is an example from Albuquerque, New Mexico.

Collaborative Effort: Albuquerque Police and outreach groups work together to help the homeless. Albuquerque Journal, January 8, 2007.

Of the hundreds of officers dealing with Albuquerque’s homeless, a small group based downtown has been doing the almost unthinkable. The police, with social and outreach workers, walk the sidewalks and visit parks, looking for homeless people who need help – whether it’s a night shelter or the first step toward a better life.

Officer Liz Thomson said, “It’s almost like, didn’t someone’s common sense say to do this long before? The team effort (police officers and social workers) is what has completely changed our impact. When you put the two together, the effect and the level of trust has been amazing.” Officer Jerome Armijo: “It’s all turned out to be a positive thing.”

The policy in Albuquerque regarding lawsuits

Working with the District Attorney’s office, each officer received extensive legal training. Around 2001-2002, the City of Albuquerque announced a no-settlement policy: all lawsuits would go to trial. Not only has the number of lawsuits gone down, but the great majority of trials have resulted in outcomes favorable to Albuquerque Police.

The Albuquerque Police Department used a three step process:

- Legal training and imaginative, innovative thinking.
- Announcement of “no settlement” policy.
- Continued legal education.

And on a positive note:

Throughout New Mexico, police departments are engaged in more legal training and adopting an affirmative, pro-active approach. These departments support their officers, seek out imaginative solutions, and are prepared to confront lawsuits that may come their way. Sun Tzu would be proud.

How police departments can minimize liability

- Follow department policy and legal training.
- Stay current with legal developments. If a department loses a civil case anywhere in New Mexico, we need to get the word out to other departments.
- Use a tape recorder whenever possible.
- If in doubt, contact DA/legal before taking action.
- Carefully document each case or incident.
- Use imaginative approaches that reduce conflict with citizens.
- Understand legal standards such as reasonable suspicion and probable cause.
- Departments need to put continued emphasis on ethics and integrity. District Judge “Pat” Murdoch from Bernalillo County has often said, “You don’t sell

your integrity all at once. You give it away a bit at a time and then one day you look over your shoulder and it's no longer there.”

CONCLUSION

- We will evaluate our department, correct our deficiencies, stay current with legal training, and use common sense. This is effective policing and it will also help to reduce or eliminate liability.