4.9.1 Section 1983 – Deadly Force – Stop, Arrest, or other "Seizure"

Model

The Fourth Amendment to the United States Constitution protects persons from being subjected to excessive force while being [arrested] [stopped by police]. In other words, a law enforcement official may only use the amount of force necessary under the circumstances to [make the arrest] [conduct the stop]. Every person has the constitutional right not to be subjected to excessive force while being [arrested] [stopped by police], even if the [arrest] [stop] is otherwise proper.

In this case, [plaintiff] claims that [defendant] violated [plaintiff's] Fourth Amendment rights by using deadly force against [plaintiff] [plaintiff's decedent].

An officer may not use deadly force to prevent a suspect from escaping unless deadly force is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others. Also, the officer must give the suspect a warning before using deadly force, if it is feasible under the circumstances to give such a warning.

In order to establish that [defendant] violated the Fourth Amendment by using deadly force, [plaintiff] must prove that [defendant] intentionally committed acts that constituted deadly force against [plaintiff]. If you find that [defendant] [describe nature of deadly force alleged by plaintiff], then you have found that [defendant] used deadly force. In addition, [plaintiff] must prove [at least one of the following things][1]:

- deadly force was not necessary to prevent [plaintiff's] escape; or
- [defendant] did not have probable cause to believe that [plaintiff] posed a significant threat of serious physical injury to [defendant] or others; or
- it would have been feasible for [defendant] to give [plaintiff] a warning before using deadly force, but [defendant] did not do so.

You should consider all the relevant facts and circumstances (leading up to the time of the encounter) that [defendant] reasonably believed to be true at the

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[1] Include all bullet points that are warranted by the evidence. Include the bracketed language if listing more than one bullet point.

time of the encounter. The reasonableness of [defendant's] acts must be judged from the perspective of a reasonable officer on the scene. The concept of reasonableness makes allowance for the fact that police officers are often forced to make split-second judgments in circumstances that are sometimes tense, uncertain, and rapidly evolving, about the amount of force that is necessary in a particular situation.

As I told you earlier, [plaintiff] must prove that [defendant] intended to commit the acts in question; but apart from that requirement, [defendant's] actual motivation is irrelevant. If the force [defendant] used was unreasonable, it does not matter whether [defendant] had good motivations. And an officer's improper motive will not establish excessive force if the force used was objectively reasonable.

Comment

The Fourth Amendment excessive force standard discussed in Comment 4.9, supra, applies to cases arising from the use of deadly force; but such cases have also generated some more specific guidance from the Supreme Court and the Court of Appeals. Deadly force may not be used "to prevent the escape of an apparently unarmed suspected felon . . . . unless it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others." *Tennessee v. Garner*, 471 U.S. 1, 3 (1985).[2] "Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so." *Garner*, 471 U.S. at 11.

However, "[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force." *Garner*, 471 U.S. at 11. Accordingly, "if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been

[2] "[T]here can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment." *Garner*, 471 U.S. at 7.

given." *Garner*, 471 U.S. at 11-12.

The Court of Appeals has summed up the standard as follows: "Giving due regard to the pressures faced by the police, was it objectively reasonable for the officer to believe, in light of the totality of the circumstances, that deadly force was necessary to prevent the suspect's escape, and that the suspect posed a significant threat of death or serious physical injury to the officer or others?" *Abraham v. Raso*, 183 F.3d 279, 289 (3d Cir. 1999) (citing *Graham v. Connor*, 490 U.S. 386 (1989), and *Garner*).

What constitutes deadly force. Although *Garner* concerned a shooting, the Court's reasoning extends to other types of lethal force. *See Garner*, 471 U.S. at 31 (O'Connor, J., joined by Burger, C.J., and Rehnquist, J., dissenting) ("By declining to limit its holding to the use of firearms, the Court unnecessarily implies that the Fourth Amendment constrains the use of any police practice that is potentially lethal, no matter how remote the risk.").

The Court of Appeals has not provided much guidance on the scope and nature of the term "deadly force."[3] *In re City of Philadelphia Litigation* is the only case in which the Court of Appeals has so far confronted the question of defining deadly force for *Garner* purposes.[4] The extraordinary facts of that case, coupled with the fact that none of the opinions handed down clearly commanded a majority

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[3] For a summary of cases in other circuits, see Avery, Rudovsky & Blum § 2.22 ("The use of instrumentalities other than firearms may constitute the deployment of deadly force. Police cars have been held to be instruments of deadly force. A majority of the courts that have considered the question and have concluded that police dogs should not be considered an instrument of deadly force.").

[4] *Compare In re City of Philadelphia Litigation*, 49 F.3d 945, 966 (3d Cir. 1995) (opinion of Greenberg, J.) (concluding that defendants' actions in dropping explosive on roof of house and allowing ensuing fire to burn did not constitute "deadly force" so as to trigger *Garner* standard), and *id.* at 973 n.1 (opinion of Scirica, J.) ("Although I believe the police may have used deadly force against the MOVE members, that confrontation is readily distinguishable from the situation in *Garner*."), *with id.* at 978 n.1 (opinion of Lewis, J.) ("I believe that *Garner* controls, and under *Garner*, it is clear to me that the deadly force used here was excessive as a matter of law and, therefore, unlawful.").

The Court of Appeals has decided other cases involving use of deadly force, but because those cases involved shootings, *see, e.g.*, *Carswell v. Borough of Homestead*, 381 F.3d 235, 237 (3d Cir. 2004), the court did not have occasion to consider what other types of force could fall within the definition of "deadly force."

of the panel on the definitional question,[5] render it difficult to distill principles from that case that can be applied more generally. However, at least two members of the panel in *City of Philadelphia* relied upon the Model Penal Code's definition of deadly force "as 'force which the actor uses with the purpose of causing or which he knows to create a substantial risk of causing death or serious bodily harm,'"[6] and one district court has since followed the MPC definition, *see Schall v. Vazquez*, 322 F.Supp.2d 594, 600 (E.D.Pa. 2004) (holding that "[p]ointing a loaded gun at another person is a display of deadly force").

In some cases, there may be a jury question as to whether the force employed was "deadly." *See, e.g.*, *Marley v. City of Allentown*, 774 F. Supp. 343, 346 (E.D. Pa. 1991) (rejecting contention "that the court erred in instructing the jury to determine whether or not the force Officer Effting used was 'deadly'"), *aff'd without opinion*, 961 F.2d 1567 (3d Cir. 1992). In such cases, it may be necessary to instruct the jury both on deadly force and on excessive force more generally. *See id.* However, if the court can resolve as a matter of law whether the force used was deadly or not, the court should rule on this question and should provide either Instruction 4.9 or Instruction 4.9.1 but not both.

Probable cause to believe suspect dangerous. Probable cause to believe a suspect has committed a burglary does not, "without regard to the other circumstances, automatically justify the use of deadly force." *Garner*, 471 U.S. 21 (stating that "the fact that an unarmed suspect has broken into a dwelling at night does not automatically mean he is physically dangerous"). The *Garner* Court did not elaborate the range of circumstances that would provide the requisite showing of probable cause to believe the suspect dangerous. *See Garner*, 471 U.S. at 32 (O'Connor, J., joined by Burger, C.J., and Rehnquist, J., dissenting) ("Police are given no guidance for determining which objects, among an array of potentially lethal weapons ranging from guns to knives to baseball bats to rope, will justify

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[5] The portion of Judge Greenberg's opinion that addressed the definition of deadly force was joined by Judge Scirica, "but only for the limited purpose of agreeing that Tennessee v. Garner is inapplicable and that the appropriate inquiry is the reasonableness of the city defendants' acts." *In re City of Philadelphia Litigation*, 49 F.3d at 964-65.

[6] *In re City of Philadelphia Litigation*, 49 F.3d at 966 (opinion of Greenberg, J.) (quoting Model Penal Code § 3.11(2) (1994) and finding no deadly force); *see also id.* at 977 (opinion of Lewis, J.) (quoting same section of MPC and finding deadly force).

the use of deadly force.").[7]

It is clear, however, that the relevant danger can be either to the officer[8] or to a third person.[9] The jury should "determine, after deciding what the real risk . . . was, what was objectively reasonable for an officer in [the defendant]'s position to believe . . . , giving due regard to the pressures of the moment." *Abraham*, 183 F.3d at 294. An officer is not justified in using deadly force at a point in time when there is no longer probable cause to believe the suspect dangerous, even if deadly force would have been justified at an earlier point in time. *See id.* ("A passing risk to a police officer is not an ongoing license to kill an otherwise unthreatening suspect.").[10] Thus, for example, the Court of Appeals cited with approval a Ninth Circuit case holding that "the fact that a suspect attacked an officer, giving the officer reason to use deadly force, did not necessarily justify continuing to use lethal force" at a time when "[t]he officer knew help was on the way, had a number of weapons besides his gun, could see

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[7] In *Brosseau v. Haugen*, 543 U.S. 194 (2004) (per curiam), the Court characterized the choice facing the defendant as "whether to shoot a disturbed felon, set on avoiding capture through vehicular flight, when persons in the immediate area are at risk from that flight," and the Court held that the defendant's decision to shoot did not violate a clearly established right, *see id.* at 200.

Justice Stevens believed the qualified immunity issue in *Brosseau* presented a jury question; as he pointed out, "[r]espondent Haugen had not threatened anyone with a weapon, and petitioner Brosseau did not shoot in order to defend herself. Haugen was not a person who had committed a violent crime; nor was there any reason to believe he would do so if permitted to escape. Indeed, there is nothing in the record to suggest he intended to harm anyone." *Brosseau*, 543 U.S. at 204 (Stevens, J., dissenting) (footnote omitted); *see id.* at 207 n.5 ("The factual issues relate only to the danger that [Haugen] posed while in the act of escaping.").

[8] *See Abraham*, 183 F.3d at 293 (assessing "whether a court can decide on summary judgment that Raso's shooting was objectively reasonable in self-defense").

[9] *See Abraham*, 183 F.3d at 293 ("[T]he undisputed facts are that Abraham had stolen some clothing, resisted arrest, hit or bumped into a car, and was reasonably believed to be intoxicated. Given these facts, a jury could quite reasonably conclude that Abraham did not pose a risk of death or serious bodily injury to others and that Raso could not reasonably believe that he did.").

[10] *Compare id.* at 294-95 ("We can, of course, readily imagine circumstances where a fleeing suspect would have posed such a dire threat to an officer, thereby demonstrating that the suspect posed a serious threat to others, that the officer could justifiably use deadly force to stop the suspect's flight even after the officer escaped harm's way.").

that [the suspect] was unarmed and bleeding from multiple gunshot wounds, and had a number of opportunities to evade him." *Abraham*, 183 F.3d at 295 (discussing *Hopkins v. Andaya*, 958 F.2d 881 (9th Cir.1992)).

Conduct giving rise to a need for deadly force. In *Grazier v. City of Philadelphia*, then-Chief Judge Becker argued in dissent that "it was an abuse of discretion for the trial judge not to explain to the jury at least the general principle that conduct on the officers' part that unreasonably precipitated the need to use deadly force may provide a basis for holding that the eventual use of deadly force was unreasonable in violation of the Fourth Amendment." *Grazier v. City of Philadelphia*, 328 F.3d 120, 130 (3d Cir. 2003) (Becker, C.J., dissenting) (citing *Estate of Starks v. Enyart*, 5 F.3d 230, 234 (7th Cir.1993), and *Gilmere v. City of Atlanta*, 774 F.2d 1495, 1501 (11th Cir.1985) (en banc)).[11] The *Grazier* majority, noting that the plaintiffs had not requested that particular charge, reviewed the district court's charge under a plain error standard. *See id.* at 127. The majority found no plain error:

> Our Court has not endorsed the doctrine discussed in *Gilmere* and *Starks* and, in fact, has recognized disagreement among circuit courts on this issue. *See Abraham v. Raso*, 183 F.3d 279, 295-96 (3d Cir.1999). In *Abraham*, we announced that "[w]e will leave for another day how these cases should be reconciled." *Id.* at 296. In this context, the District Court did not abuse its discretion by refusing to instruct the jury on a doctrine that our Circuit has not adopted. As such, plain error of course did not occur.

Grazier, 328 F.3d at 127.

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[11] As Chief Judge Becker noted, the facts in *Grazier* included the following: "[T]he defendants were plain-clothes officers, forbidden by Regulations to make traffic stops, and . . . were driving an unmarked car (in a high crime neighborhood) which they pulled perpendicularly in front of plaintiffs' car to make a traffic stop, also in violation of department policy," *Grazier*, 328 F.3d at 131 (Becker, C.J., dissenting) – with the result, according to the plaintiff driver's testimony, that he believed he was being carjacked, *see id.* at 123 (majority opinion). *Compare Bodine v. Warwick*, 72 F.3d 393, 400 (3d Cir. 1995) (stating that officers who entered a dwelling unlawfully "would not be liable for harm produced by a 'superseding cause,' . . . . [a]nd they certainly would not be liable for harm that was caused by their non-tortious, as opposed to their tortious, 'conduct,' such as the use of reasonable force to arrest [the plaintiff]").

Municipal liability. In discussing municipal liability, the Supreme Court has noted that

> city policymakers know to a moral certainty that their police officers will be required to arrest fleeing felons. The city has armed its officers with firearms, in part to allow them to accomplish this task. Thus, the need to train officers in the constitutional limitations on the use of deadly force ... can be said to be "so obvious," that failure to do so could properly be characterized as "deliberate indifference" to constitutional rights."

City of Canton, Ohio v. Harris, 489 U.S. 378, 390 n.10 (1989).

In some cases, the question may arise whether a municipality can be held liable for failure to equip its officers with an alternative to deadly force. *See Carswell v. Borough of Homestead*, 381 F.3d 235, 245 (3d Cir. 2004) ("[W]e have never recognized municipal liability for a constitutional violation because of failure to equip police officers with non-lethal weapons. We decline to do so on the record before us."); *compare id.* at 250 (McKee, J., dissenting in relevant part) (arguing that plaintiff had viable claim against municipality based on plaintiff's contention that municipality's "policy of requiring training only in using deadly force and equipping officers only with a lethal weapon, caused Officer Snyder to use lethal force even though he did not think it reasonable or necessary to do so").