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## Tort Liability of Law Enforcement Officers: State Remedies

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being the recent ruling that the decision in *Duncan* is not retroactive.<sup>60</sup> Unanimity through the imposition of a federal standard should not be required; rather the states should be allowed to develop their own jury procedures. It would be a better course to allow the concepts of practicality and evolutionary progress to prevail in this instance, rather than to force the states to conform to a historical jury pattern.

Judith M. Arnette

### TORT LIABILITY OF LAW ENFORCEMENT OFFICERS: STATE REMEDIES

Duty brings the law enforcement officer into touch with all levels of society. The constant contact with people and his exercise of a not infallible discretion sometimes leads to the injury of innocent people or unnecessary abuse of the guilty. This Comment will discuss only the state law although a broad federal area also exists.<sup>1</sup> This Comment has a dual purpose, first, to discuss the circumstances under which liability of the individual officer arises, and second, to examine the extent to which the employing agency may be found liable as a result of the torts of its policemen.<sup>2</sup>

Citizens may be injured by policemen in various ways. Primarily the injuries are caused by the use of "unreasonable force" in effecting arrest (assault and battery), the making of an improper arrest (false imprisonment, false arrest), and the commission of an unauthorized entry upon a person's lands to search, seize, or arrest (trespass). Problems also arise in connection with harms as a result of officers' negligence in failing to take

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60. See note 13 *supra*.

1. 42 U.S.C. § 1983 (1964): "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress." See also *Pierson v. Ray*, 386 U.S. 547 (1967); *Monroe v. Pape*, 365 U.S. 167 (1961).

2. One phase of liability is the issue of immunity of the individual officer. In *Loe v. Whitman*, 107 So.2d 536, 540 (La. App. 2d Cir. 1958), the court said: "[W]hen the defendant (police officer) acts outside of his strict authority he breaches the condition of his immunity and is liable to a civil action for damages to persons harmed by his improper conduct." Effectively this means the policeman has no immunity. Furthermore, even if the officer is acting on orders from his superior, he is not protected unless such orders are "found fair and reasonable on their face." *Anders v. McConnell*, 31 So.2d 237 (La. App. 2d Cir. 1957).

adequate precautions for the safety of others in their charge or endangered by their actions.

### ASSAULT AND BATTERY

Article 201 of the Louisiana Code of Criminal Procedure defines arrest as "the taking of one person into custody by another."<sup>3</sup> It states that "actual restraint"<sup>4</sup> is a requisite and that such restraint "may be imposed by force."<sup>5</sup> Article 220 imposes upon the arrested subject a duty to submit peaceably to a lawful arrest. Further, it authorizes the use of "reasonable force to effect the arrest and detention; and . . . to overcome any resistance or threatened resistance. . . ."<sup>6</sup>

Louisiana jurisprudence reveals that the officer is liable if the force he uses exceeds the reasonable force allowed.<sup>7</sup> In *Stoehr*

3. LA. CODE CRIM. P. art. 201.

4. *Id.*

5. *Id.*

6. *Id.* art. 220.

7. *Stoehr v. Payne*, 132 La. 213, 61 So. 206 (1913); *Musmeci v. American Automobile Ins. Co.*, 146 So.2d 496 (La. App. 4th Cir. 1962); *Espanan v. Carona*, 179 So. 119 (La. App. Or. Cir. 1938). As to when an officer is justified in using deadly force as reasonable force, the RESTATEMENT (SECOND) OF TORTS § 131 (1965) supports the view that one can kill a felon if necessary to prevent his escape: "The actor's use of force against another, for the purpose of effecting a privileged arrest of the other, by means intended or likely to cause death is privileged if (a) the arrest is made under a warrant which charges the person named in it with the commission of treason or a felony, or if the arrest is made without a warrant for treason or for a felony which has been committed, and (b) the other is the person named in the warrant if the arrest is under a warrant, or the actor reasonably believes the offense was committed by the other if the arrest is made without a warrant, and (c) the actor reasonably believes that the arrest cannot otherwise be effected. *Caveat*: The Institute expresses no opinion as to whether the use of force which so intended or likely to cause death is privileged to effect a privileged arrest for a crime which, although only a misdemeanor, is of a type normally involving danger of death or serious bodily harm."

Prosser says that although courts are not in complete agreement, generally the rule is "deadly force may be used to enforce the arrest of the dangerous criminal whose offense had threatened human life or safety, but not one guilty of such felonies as theft." W. PROSSER, *LAW OF TORTS* § 26 (1964). He also says "there is no dispute that such force may be used to prevent the commission of a felony which threatens the life or safety of a human being, including the burglary of a dwelling house, which by its nature is so regarded. As to felonies which involve no such danger the tendency in the modern cases is to say that the use of deadly force is unreasonable in proportion to the offense." *Id.* at 137. *Cf. State v. Plumlee*, 177 La. 687, 149 So. 425 (1933). See generally 6 C.J.S. *Arrest* § 13 (b) (1937): "The right to kill a felon is . . . not absolute, and may be used only as a last resort, and under circumstances indicating that the felon cannot be otherwise taken . . . It has been held essential that the killing, in order to be justified, must be necessary, not merely reasonably necessary, and the law does not clothe an officer with authority arbitrarily to judge of the necessity of the killing." *Id.*

In Louisiana it seems well settled that an officer cannot use deadly force to effect arrest in cases involving misdemeanors unless his safety or that of another person is at stake. Also an officer is held to the standard of reasonableness in his determination of whether a felony has in fact been committed or is presently being committed. *State v. Turner*, 190 La. 198, 182 So. 325 (1938); *Graham v. Ogen*, 157 So.2d 365 (La. App. 3d Cir. 1963). In the *Turner* case, the defendant

*v. Payne*<sup>8</sup> and *Espanan v. Carona*,<sup>9</sup> the court held the defendant policemen liable for damages resulting from "unnecessary violence"<sup>10</sup> or "unnecessary brutality"<sup>11</sup> whether the arrest they were effecting was lawful or not. In *Stoehr* the town marshal used his pistol to strike an intoxicated citizen who had become rowdy. Although the court found that the officer was justified in arresting the plaintiff, he was not justified in using such force to subdue him. A similar situation arose in *Espanan*. The defendant officer arrested the plaintiff, an ice cream vendor, for selling without a license. In the ensuing hassle, the plaintiff sustained injuries. Although the court was satisfied that the arrest was in order, the issue of the officer's liability was to be determined by the reasonableness of the force he employed.<sup>12</sup> One factor which Louisiana courts have used to determine whether or not the force employed by police officers was reasonable has been the relative physical size and strength of the officer.<sup>13</sup> The court in *Musmeci v. American Auto. Ins. Co.*<sup>14</sup> was impressed by the fact that the plaintiff was a 125-pound drunk; as opposed to a 250-pound officer, in finding that the officer had acted with unreasonable force. Similarly, in *Stoehr v. Payne*,<sup>15</sup> the court felt that defendant marshal and his deputy

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policeman had been hired to work extra duty guarding a scrap yard where numerous thefts had been committed. The victim and his lady friend, on the night in question, were parked in the scrap yard area. The defendant, thinking the victim a thief, called for him to stop when he attempted to drive away. When he failed to do so, the officer killed him when he fired at the car. The Supreme Court held that it was unreasonable for the defendant, considering the size of the automobile and the value of the scrap as stolen goods, to believe that a felony had been committed. The court said it is "well settled that . . . an officer cannot take human life in attempting the prevention of a misdemeanor." *State v. Turner*, 190 La. 198, 202, 182 So. 325, 326 (1938).

8. 132 La. 213, 61 So. 206 (1913).

9. 179 So. 119 (La. App. Orl. Cir. 1938).

10. *Id.* at 120.

11. *Stoehr v. Payne*, 132 La. 213, 61 So. 206 (1913).

12. In *Espanan*, the court said: "We have no difficulty in finding the law to be as stated by plaintiff's counsel that when a town marshal or other enforcement officer undertakes to make an arrest and in doing so uses unnecessary violence or brutality, he is liable for such injuries as he may inflict." 179 So. 119, 120 (La. App. Orl. Cir. 1938). The degree of force which is reasonable is to be determined from facts as seen and understood by the officer when he is required to act. *Crawford v. Maryland Cas. Co.*, 169 So.2d 612 (La. App. 2d Cir. 1964); *cf.* LA. CODE CRIM. P. art. 220, comment (b), which says that although "the force employed must be reasonable, both as to the nature and amount of force . . . , it is neither just nor sound policy to impose a test of actual necessity upon a person who is performing a public service, and acting on the spur of the moment, in making an arrest. Yet a requirement of reasonableness would preclude the use of clearly inappropriate force."

13. *Stoehr v. Payne*, 132 La. 213, 61 So. 206 (1913); *Crawford v. Maryland Cas. Co.*, 169 So.2d 612 (La. App. 2d Cir. 1964); *Musmeci v. American Auto. Ins. Co.*, 146 So.2d 496 (La. App. 4th Cir. 1962).

14. 146 So.2d 496 (La. App. 4th Cir. 1962).

15. 132 La. 213, 61 So. 206 (1913).

were men of sufficient strength to handle the boisterous and drunken plaintiff without striking him in the head with a pistol. The fact that an officer often must make a quick decision is appreciated by the court. In *Crawford v. Maryland Cas. Co.*<sup>16</sup> the plaintiff was stopped by an officer for drunken driving. The plaintiff argued with the officer and thrust his hand suspiciously into his pocket. The officer, alarmed by his sudden action, struck plaintiff with his club. Although finding that the force used had an "unfortunate and tragic result,"<sup>17</sup> the court determined that the officer had acted reasonably under the circumstances.<sup>18</sup>

The "aggressor rule" has been used by law enforcement officers as a defense to suits alleging assault and battery against them.<sup>19</sup> In *Smith v. Clemmons*,<sup>20</sup> the court sustained the district court's instruction to the jury that they must find the defendant free of liability unless the plaintiff established her freedom from fault in the encounter.<sup>21</sup> The plaintiff alleged that she telephoned for assistance from the sheriff's office after being assaulted on the streets by an intoxicated person. Minutes later the defendant deputy arrived and began to question a bystander in an effort to determine the cause of the disturbance. When the plaintiff approached the defendant officer to inform him that she had telephoned the sheriff's office, defendant allegedly said, "shut up, I'm not talking to you." Plaintiff alleged she again interrupted defendant, whereupon he struck her with a night stick and placed her under arrest. Deputy Thompson asserted that the plaintiff, in a drunken condition, had abused and attacked him from the

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16. 169 So.2d 612 (La. App. 2d Cir. 1964).

17. *Id.* at 614.

18. *Id.*: "The risks which are necessarily faced by peace officers in the discharge of their duties cannot be over-emphasized. An incident of the nature which is here under consideration is of such instantaneous development and immediate menace that it does not afford time for reflection and consideration as to the nature or degree of necessary force which an officer might use in protection of his own life and safety."

19. *Veillon v. Sylvester*, 174 So.2d 189 (La. App. 3d Cir. 1965); *Smith v. Clemmons*, 48 So.2d 813 (La. App. 1st Cir. 1950). In *Veillon*, plaintiff, a deputy sheriff, was prevented from recovering for his injuries resulting from an encounter which resulted from plaintiff's attempt to arrest defendant. The court said: "[I]t is clear that he provoked the difficulty which led to any assault . . . and . . . thus is prevented from recovering damages . . . because [the deputy] . . . used more force than was necessary in the performance of his duties." 174 So.2d 189, 192 (La. App. 3d Cir. 1965). See Comment, 12 LA. L. REV. 469, 484 (1952).

20. 48 So.2d 813 (La. App. 1st Cir. 1950) (suit for assault, battery, and false imprisonment against East Baton Rouge Parish Sheriff Bryan Clemmons, and Deputy Thompson).

21. *Id.* at 815: "The issue involved . . . is whether the attack upon plaintiff was provoked by her. . . . It is well established that a plaintiff cannot recover civil damages in this state if it is shown that such plaintiff has been at fault in provoking the difficulty in which the injury is received [citations omitted]."

rear before he struck her.<sup>22</sup> The jury verdict for the defendant was *not* predicated on a finding that the force used was reasonable, but rather that plaintiff had provoked the difficulty.

#### FALSE IMPRISONMENT

An officer may validly make an arrest when either he has reasonable cause to believe that the person arrested has committed an offense<sup>23</sup> or he has a warrant of arrest valid on its face.<sup>24</sup> Officers, however, will be liable for false imprisonment when they make an arrest without a warrant or without "reasonable cause."<sup>25</sup> In *Gladney v. DeBretton*,<sup>26</sup> plaintiff, an attorney, went to the jail to interview a client. When told by deputies that he would have to be searched first, he objected and requested to know on whose authority this was being done. The deputy said it was on orders from the sheriff and promptly called him. The sheriff told his deputy to hold plaintiff while he came up to search him, whereupon he was locked in a cell to await the sheriff's arrival. Plaintiff recovered on the basis of false imprisonment. In another case, *Abraham v. Boat Center*,<sup>27</sup> a deputy sheriff was sued for false arrest. Plaintiff, a local business man, had stopped payment on a check given the complainant because he feared an outboard motor he had acquired from them was defective. The deputy was aware of the facts when he issued a pick-up order on the plaintiff. Without the officer's knowledge, plaintiff and complainant had made a restitution arrangement and considered the matter dropped. In deciding for plaintiff, the court was impressed with the fact that the defendant deputy had no reason to believe that the plaintiff's actions displayed an

22. Defendant alleged that he did not know his assailant was a woman. The court noted a great deal of conflicting testimony which the jury resolved in favor of the defendant.

23. LA. CODE CRIM. P. art. 213.

24. *Id.* authorizes an officer to make an arrest if he has "reasonable cause to believe that the person to be arrested committed an offense." Offense is interpreted to include both felonies and misdemeanors. Under *id.* art. 204, an officer with a warrant may also arrest. Several cases have held that the officer is protected from civil liability if he acts under a warrant which appears valid on its face. *Martin v. Magee*, 182 La. 263, 161 So. 604 (1935); *McGuire v. Hughes*, 13 La. Ann. 281 (1858); *Brown v. Dawkins*, 2 La. App. 213 (2d Cir. 1925).

25. *Gladney v. DeBretton*, 218 La. 296, 49 So.2d 18 (1950); *Abraham v. Boat Center, Inc.*, 146 So.2d 23 (La. App. 4th Cir. 1962). It has been held that the question of reasonable cause is identical with the peace officer's right to arrest. *Gould v. Gardner*, 11 La. Ann. 289 (1856). Reasonable cause and guilt cannot be equated. The former is merely a reasonable ground of suspicion supported by circumstances sufficiently strong to warrant a cautious man in believing in the guilt of the accused. *Glisson v. Biggio*, 139 La. 23, 71 So. 204 (1916); *Sandoz v. Veazie*, 106 La. 202, 30 So. 767 (1901); *State v. Marchetti*, 247 La. 649, 173 So.2d 531 (1965) (criminal case defining probable cause).

26. 218 La. 296, 49 So.2d 18 (1950).

27. 146 So.2d 23 (La. App. 4th Cir. 1962).

intent to defraud which was required by the statute under which plaintiff was arrested.<sup>28</sup> Thus, having no warrant and no reasonable cause to believe that a felony was committed, the defendant had no authority to arrest the plaintiff.<sup>29</sup>

As with the case of reasonable force, the standard of reasonable cause is determined from the officer's point of view, that is, on appearances deduced from facts known to him. The courts recognize that officers must be given some discretion in order to perform their duties. They do not wish to discourage diligent law enforcement by making officers unduly apprehensive about personal liability for damages.<sup>30</sup> However, there is an obligation on the officer to obtain a good grasp of the facts by a proper investigation.<sup>31</sup>

### TRESPASS

In the area of liability for trespass and resultant damages, it seems clear that the officer has no right to be present on an individual's premises without a search warrant or probable cause to believe that a subject whom he seeks to arrest is present.

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28. The court's language indicates that the defendant acted hastily when there was no necessity. *Id.* at 27. See also *Thomas v. Henderson*, 125 La. 292, 51 So. 202 (1910).

29. A distinction must be drawn between suits for malicious prosecution and those for false imprisonment. False imprisonment involves arrests without legal authority. *Barfield v. Marron*, 222 La. 210, 62 So.2d 276 (1952); *DeBouchel v. Koss Constr. Co.*, 177 La. 841, 149 So. 496 (1933); *Hunter v. Laurent*, 158 La. 874, 104 So. 747 (1925); *Lange v. Illinois Cent. R.R.*, 107 La. 687, 31 So. 1003 (1902); *Wells v. Johnston*, 52 La. Ann. 713, 27 So. 185 (1898); *Wells v. Gaspard*, 129 So.2d 245 (La. App. 3d Cir. 1961). Both malice and want of reasonable cause are required for malicious prosecution. *Glisson v. Biggio*, 139 La. 23, 71 So. 204 (1916); *Glynn v. Lenormand*, 80 So.2d 896 (La. App. 1st Cir. 1955); *Melson v. Calhoun*, 10 La. App. 492, 120 So. 115 (1929). In suits for false imprisonment the sole issue is whether the detention was without reasonable cause. In *Wells v. Gaspard*, 129 So.2d 245 (La. App. 3d Cir. 1961), it was said that the sole issue in an action for false arrest is the legal authority of the arrest. In *Lange v. Illinois R.R.*, 107 La. 687, 701, 31 So. 1003, 1009 (1902) the court said that "the existence of probable cause may protect a person even though he be acting from malice, but the converse of this proposition is not true." The good faith of the officer is no defense: *Barrios v. Yoars*, 182 So. 212 (La. App. Or. Cir. 1938). The gist of the action is the wrongful detention. The issue of malice is only important in determining the amount of damages. *Wells v. Johnston*, 52 La. Ann. 713, 27 So. 185 (1898).

30. *Lyons v. Carroll*, 107 La. 471, 474, 31 So. 760, 761 (1902): "Those who honestly seek the enforcement of law and the administration of justice, and who are supported by circumstances sufficiently strong to warrant a cautious man in the belief that the party suspected may be guilty of the offense charged, should not be made unduly apprehensive that they will be held answerable in damages. See also 160 La. 21, 106 So. 660 (1925). Note, 17 *TUL. L. REV.* 81 (1942) gives a discussion of the need to give the police officer greater latitude of discretion to arrest than the private citizen.

31. *Janes v. Wilson*, 119 La. 491, 44 So. 275 (1907); *Abraham v. Boat Center, Inc.*, 146 So.2d 23 (La. App. 4th Cir. 1962); *Loe v. Whitman*, 107 So.2d 536 (La. App. 2d Cir. 1958); *Poole v. Whitman*, 107 So.2d 542 (La. App. 2d Cir. 1958).

The officer also may go onto a person's property for proper investigative purposes unless he has been ordered to stay away or otherwise knows he is unwelcome to enter without specific permission.<sup>32</sup>

Article 164, dealing with the execution of search warrants, provides that no more force may be used to execute a search warrant than is provided in the chapter on arrest.<sup>33</sup> Article 216,<sup>34</sup> providing that arrest may be made at any time and at any place, authorizes the officer to enter private premises or lands to arrest. Article 224<sup>35</sup> further allows the use of appropriate force to enter. When the entry is not authorized by law, the cases hold the officer liable for harms which follow from unconsented entries.<sup>36</sup>

In *Loe v. Whitman*<sup>37</sup> and *Poole v. Whitman*,<sup>38</sup> companion cases, two state troopers, believing plaintiff's mules had strayed on certain designated highways, entered plaintiff's property and seized the mules. In fact the highway was not one so designated and the defendant troopers had no authority to trespass on plaintiff's land. The court held error of law no defense. It was concerned only with the fact that an unreasonable mistake had been made by the officers and that plaintiff was "harmed by their improper conduct."<sup>39</sup>

Similarly, in *Gilbeau v. Tate*,<sup>40</sup> two wildlife agents entered plaintiff's property without a search warrant after Gilbeau had instructed Agent Tate to keep off his property. There had been prior disagreements between them. When Gilbeau attempted to

32. LA. CODE CRIM. P. art. 162 provides for the issuance of search warrants upon "probable cause." This applies to searches of both persons and places. Without a search warrant or consent, it is clear that the search of a place (unless incidental to a lawful arrest) would render the participating officer liable in trespass. *Gilbeau v. Tate*, 94 So.2d 896 (La. App. 1st Cir. 1957); *Anders v. McConnell*, 31 So.2d 237 (La. App. 2d Cir. 1947).

33. LA. CODE CRIM. P. art. 164: "In order to execute a search warrant, a peace officer may use such means and force as are authorized for the arrest by Title V." *Id.* art. 224 provides that the officer may forcibly enter to arrest: "In order to make an arrest a peace officer who has announced his authority and purpose, may break open an outer or inner door or window . . . where the person to be arrested is or is reasonably believed to be, if he is refused or otherwise obstructed from admittance. The peace officer need not announce his authority and purpose when to do so would imperil the arrest."

34. *Id.* art. 216.

35. *Id.* art. 224.

36. *Poole v. Whitman*, 107 So.2d 542 (La. App. 2d Cir. 1958); *Loe v. Whitman*, 107 So.2d 536 (La. App. 2d Cir. 1958); *Gilbeau v. Tate*, 94 So.2d 896 (La. App. 1st Cir. 1957); *Anders v. McConnell*, 31 So.2d 237 (La. App. 2d Cir. 1947).

37. 107 So.2d 536 (La. App. 2d Cir. 1958).

38. 107 So.2d 542 (La. App. 2d Cir. 1958).

39. *Loe v. Whitman*, 107 So.2d 536, 540 (La. App. 2d Cir. 1958).

40. 94 So.2d 896 (La. App. 1st Cir. 1957).

forcibly eject Tate a fight erupted and Gilbeau was injured. In its decision the court treated Agent Tate as an "ordinary trespasser" and awarded damages. The court said that he had neither warrant nor probable cause to believe that the law had been violated.<sup>41</sup>

#### NEGLIGENCE

An excellent treatment concerning negligence in the performance of police functions is found in *Graham v. Ogden*.<sup>42</sup> In that case, the defendant, Deputy Ogden, was making a routine check of a barroom when he was attacked by a drunk whom he was attempting to arrest. Ogden pulled his gun and fired a shot into the floor. The drunk continued his assault undeterred and in the struggle, the deputy's pistol discharged accidentally killing a patron. It was contended that Ogden's negligent act of drawing his gun resulted in the death of the patron.<sup>43</sup> Admitting that the issue of reasonableness of the force used to arrest has a "direct bearing on the question of negligence of the arresting officer as to third persons,"<sup>44</sup> the court felt "the basic inquiry is whether the officer acted reasonably under the circumstances."<sup>45</sup> The test it cites for reasonableness is "whether the utility of the act of the officer outweighed the risk of harm to others."<sup>46</sup> In other words, the court evaluates the question of the officer's negligence in the light of the purpose he was trying to accomplish when the alleged negligent act occurred. For example, a high-speed chase down crowded streets might be justifiable to apprehend an armed robber; whereas it would be a negligent act if merely to catch a speeder.<sup>47</sup>

There appears also to devolve upon officers a duty to use reasonable care in ascertaining whether or not an arrest should be made. He must use care to see that the law has been violated and that he has the right man. In *Abraham v. Boat Center*,<sup>48</sup> previously discussed, the court found that the defendant officer

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41. *Id.* at 899-900.

42. 157 So.2d 365 (La. App. 3d Cir. 1963).

43. *Id.* at 366.

44. *Id.*

45. *Id.*

46. *Id.* See also RESTATEMENT (SECOND) OF TORTS § 291 (1965).

47. In determining whether the manner in which the act was done was reasonable, the character and purpose of the act must be thrown into the balance. In *Miami v. Horne*, 198 So.2d 10, 13 (Fla. 1967), the court dealt with such a problem by saying: "In determining whether an officer...acted negligently or recklessly, it is to be borne in mind that he is charged with the duty of arresting the offender and must often exceed the precautions normally imposed on individuals."

48. 146 So.2d 23 (La. App. 4th Cir. 1962).

was negligent in acting without first checking with his complainant after a week had passed without hearing from either party.<sup>49</sup> In *Poole v. Whitman*<sup>50</sup> and *Loe v. Whitman*,<sup>51</sup> the court held that ignorance of the law is no defense to an action against police officers for negligence in making an illegal arrest.<sup>52</sup>

Negligence suits against officers for failure to act frequently arise in cases involving injured prisoners. In a suit against the town marshal and his deputy for negligently placing the plaintiff unguarded in a jail cell where two dangerous drunks could injure him, the court, in holding for the defendant, said:

"The law imposes the duty on a jailer to exercise reasonable and ordinary care and diligence to prevent unlawful injury to a prisoner placed in his custody, but he cannot be charged with negligence in failing to prevent what he could not reasonably anticipate."<sup>53</sup>

It logically follows from the holding that an officer *is* required to use reasonable care to protect a prisoner from other prisoners or conditions which might be reasonably anticipated to be a source of harm to him.<sup>54</sup> Clearly the officer owes the

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49. *Id.* at 26-27: The court stated that "the normal prudent course . . . would have been to check with Boat Center in view of the fact that its officials were readily available and yet had seen fit to let the entire matter lie dormant for a week. . . . [T]he sole inquiry here is whether Captain Dwyer (defendant) had under all circumstances 'reasonable cause' to believe that (1) a felony had been committed and (2) that plaintiff was the culprit. . . . The court is of the opinion that the admitted facts failed to justify such beliefs on defendant Dwyer's part; and that, all things considered, he was negligent in obtaining the arrest and detention of plaintiff."

50. 107 So.2d 542 (La. App. 2d Cir. 1958).

51. 107 So.2d 536 (La. App. 2d Cir. 1958).

52. The public has an interest is not being subjected to false arrest and harassment by police officers. The Louisiana Supreme Court, *id.* at 540-41, said: "As to the position taken by the defendants that they are unlearned in the law, we are not impressed and the answer is that they were law enforcement officers. The public is not to be subjected to arrest and harassment by enforcement officers for acts which are erroneously deemed by the officers to constitute offenses when, in reality, they are not, as would have been disclosed by a casual investigation. Ignorance of the law, as has often been stated, is no excuse. This should have particular application to the officers charged with its enforcement. A thorough knowledge of their duties and of the laws they are charged with enforcing are indispensable."

53. *Honeycutt v. Bass*, 187 So. 848, 851 (La. App. 2d Cir. 1939).

54. In *Cobb v. Jeansonne*, 50 So.2d 100, 106 (La. App. 2d Cir. 1951), the court held that regardless of the offense for which the arrest was made, the arresting officer was under a duty to provide the prisoner with reasonable medical service. In *St. Julian v. Louisiana*, 98 So.2d 284, 285 (La. App. 1st Cir. 1957), the court noted that "the general rule gathered from the cases is that in order to hold the State or the employee of a state who have charge of a prisoner liable for injury to one inmate inflicted by another inmate, there must be knowledge on the part of such officers in charge that such injuries will be inflicted, or good reason to anticipate such, and following that, there must be a showing of negligence on the part of the officials in failing to prevent the injury." See also *Shuff v.*

suspect who is in custody a greater duty of care than he owes the "man on the street." Basically the issue is to what extent will the courts impose liability for omission to act.<sup>55</sup>

In *Schuster v. City of New York*,<sup>56</sup> plaintiff's decedent was shot and killed following his informing on Willie "The Actor" Sutton. Deceased received anonymous threats and was given temporary police protection. After protection was discontinued, deceased was shot by an unknown assailant. Sovereign immunity was waived and the plaintiff recovered on a negligence theory.<sup>57</sup> The writer in the *Louisiana Law Review*<sup>58</sup> pointed out that the policy behind the increased duty under these circumstances was to encourage cooperation by informers with police authorities. It was also noted that such a rule could open a veritable "Pandora's Box of liability."<sup>59</sup> To hold the officer or the city liable for harm resulting from their negligent failure to act in every case would impose too great a financial burden on the law enforcement authorities and also encourage excessive litigation. It is therefore submitted that suit for negligent failure to act be limited to those situations in which the defendant officer has created or played a part in creating the peril of the plaintiff or in which the plaintiff has reasonably and detrimentally relied on the defendant's promise to act.<sup>60</sup>

#### LIABILITY OF THE INDIVIDUAL OFFICER AND HIS EMPLOYER

The general rule in Louisiana is that the municipality bears

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Zurich American Ins. Co., 173 So.2d 392, 395 (La. App. 1st Cir. 1965), in which the court found that the arresting officer, by placing the intoxicated plaintiff in jail, "negligently failed to take proper precautions to insure plaintiff's safety" when plaintiff later fell and injured himself.

55. As regards criminal liability for failure to act, in *State v. Scheurering*, 226 La. 660, 76 So.2d (1954), the Supreme Court held the police commissioner of New Orleans guilty of malfeasance for failure to arrest two police officers whom he had reason to believe committed a burglary. This case would thus seem to support the contention that there is an affirmative duty to arrest offenders. Cf. LA. R.S. 15:704 (1950): "Each sheriff shall . . . by all lawful means preserve the peace and apprehend all disturbers thereof, and other public offenders."

56. 5 N.Y.2d 75, 180 N.Y.S.2d 265, 154 N.E.2d 534 (1958), noted 19 LA. L. REV. 910 (1959).

57. The court found a culpable omission in the failure to protect.

58. Note, 19 LA. L. REV. 910 (1959).

59. *Id.* at 916.

60. RESTATEMENT (SECOND) OF TORTS § 314A (1965) states that there is a special relation giving rise to a duty to aid or protect where "one who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal opportunities for protection."

61. *Taulli v. Gregory*, 223 La. 195, 65 So.2d 312 (1953); *Martin v. Magee*, 179 La. 913, 155 So. 433 (1934); *Duncan v. City of Pineville*, 192 So.2d 664 (La. App. 3d Cir. 1966); *Demars v. Town of Mansura*, 166 So.2d 328 (La. App. 3d Cir. 1964); *Brown v. City of Shreveport*, 129 So.2d 540 (La. App. 2d Cir. 1961).

no liability for the tortious conduct of its police<sup>61</sup> but the law in this area is in a state of flux.<sup>62</sup> In *Pierce v. Fidelity & Cas. Co. of N. Y.*,<sup>63</sup> the Court of Appeal for the First Circuit held that the charter of the City of Baton Rouge providing that the municipal corporation has the authority "to sue and be sued" waived the traditional immunity from the liability for torts of employees in the performance of the municipalities governmental functions.<sup>64</sup> This position could easily be extended to hold a municipality liable for a policeman's tortious conduct. In 1957 the Supreme Court of Florida in *Hargrove v. Cocoa Beach*<sup>65</sup> held a municipality liable for the torts of its policemen.<sup>66</sup> An Article in the *Miami Law Review*<sup>67</sup> refers to the *Hargrove case*<sup>68</sup> as sounding a key for the entire nation. If this trend is adopted by Louisiana courts the traditional immunity enjoyed by municipalities for the torts of their police will disappear.

It is clear that the sheriff is liable for the tortious conduct of his deputies when they act in official capacity.<sup>69</sup> In *Robertson v. Palmer*,<sup>70</sup> a deputy under the influence of intoxicants was investigating a traffic accident. When a bystander injected himself into the matter the deputy beat and shot him to prevent further interference. The court found the harm was inflicted as a result of the improper manner in which an official act was carried out and held the sheriff liable.<sup>71</sup> In another case<sup>72</sup> a deputy sheriff attempted to entice a woman to leave a man's

62. Governmental immunity is waived when the municipal charter authorizes the municipality to sue and to be sued. *Hamilton v. City of Shreveport*, 247 La. 784, 174 So.2d 529 (1965); *Pierce v. Fidelity Cas. Co. of New York*, 205 So.2d 831 (La. App. 1st Cir. 1968); *Walesch v. City of New Orleans*, 195 So.2d 302 (La. App. 4th Cir. 1967); *Lambert v. Austin Bridge Co.*, 189 So.2d 752 (La. App. 1st Cir. 1966).

63. 205 So.2d 831 (La. App. 1st Cir. 1968) (suit arising from alleged negligence of a city garbage truck driver).

64. LA. CONST. art. III, § 35 provides for waiver of the immunity from suit and from liability of municipalities and parishes, and other governmental entities, by special or general statute.

65. 96 So.2d 130 (Fla. 1957).

66. *Id.* at 133-34: "We here merely recede from the prior cases in order to establish a rule which we are convinced will be productive of results more nearly consonant with the demands of justice."

67. Shapo, *Municipal Liability for Police Torts*, 17 MIAMI L. REV. 475 (1963).

68. 96 So.2d 130 (Fla. 1957).

69. *Grey v. De Bretton*, 192 La. 628, 188 So. 722 (1939); *Sanders v. Humphries*, 143 La. 43, 78 So. 168 (1918); *Polizzi v. Trist*, 154 So.2d 84 (La. App. 4th Cir. 1963); *Jackson v. Steen*, 92 So.2d 280 (La. App. 2d Cir. 1957).

70. 55 So.2d 68 (La. App. 1st Cir. 1951).

71. *Accord*, *Brit v. Merritt*, 45 So.2d 902 (La. App. 2d Cir. 1950). The Supreme Court reversed as to the liability of the sheriff on its finding of fact that the deputy's assault on the plaintiff was motivated by personal animosity and was not within his official capacity.

72. *Davis v. McDowell*, 185 So. 634 (La. App. 2d Cir. 1938).

residence by purporting to arrest her on a warrant. When a dispute arose concerning the validity of the warrant, the deputy fired his pistol, killing the plaintiff's husband. The court, in finding the sheriff not liable, said, "[N]either the sheriff nor his bondsman [are] responsible for the wrongful act unless it was done in violation or in an unfaithful or improper performance of an official duty."<sup>73</sup> Similarly, in *Bolton v. Sevario*<sup>74</sup> a sheriff was found not liable for the excessive force used by his deputy. Deputy Sevario was in a Baton Rouge night club when he struck plaintiff with a club and shot him to quell a disturbance. The court found that since he was not assigned there by the sheriff to keep peace but was "merely a guest of the night club,"<sup>75</sup> his actions would not render the sheriff liable. The test of liability of the sheriff for the wrongful acts of his deputies seems to be whether the deputy was acting in furtherance of his official duties or acting from a solely personal motive.<sup>76</sup>

#### CONCLUSION

It is submitted that the structure of the tort liability of policemen in Louisiana should be re-examined. Wrongful harm to suspects and the general public is one of the costs of law enforcement and a burden which law enforcement as a whole must bear. In a society in which answers to a growing crime rate and a growing awareness of individual rights do not seem to cohere, it will be the job of the courts to examine the conduct of law enforcement officers with growing frequency. Learned Hand said that excessive restrictions on individual officers will surely blunt the efforts of "all but the most resolute or most irresponsible."<sup>77</sup> Yet, too much leniency will work a hardship on those suspects who are improperly handled. Who should pay for unjustified inconvenience and harm to society caused by law enforcement officers? It is argued that the employing agency should pay.

One writer<sup>78</sup> criticizes the system of governmental immunity

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73. *Id.* at 637.

74. 25 So.2d 115 (La. App. 1st Cir. 1946).

75. *Id.* at 117: "[I]n order to hold a sheriff liable for a wrong committed by his deputy, such wrong must have been committed while in the actual performance of an official act." The court also pointed out that the mere fact that Sevario was present at the night club would not bind the sheriff for any acts done by the said Sevario.

76. It was not alleged that Sevario was attempting to arrest the plaintiff. If he had successfully established that Sevario was acting in his official capacity he could have recovered from the sheriff.

77. *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949).

78. Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 *MIAMI L. REV.* 493 (1955).

with regard to police liability as ineffective. He suggests that "governmental liability is important not only to provide financially responsible defendants, but primarily so that the deterrent will be effective where it is needed—at the level where police policy is made."<sup>79</sup> Another writer<sup>80</sup> suggests a "scope of official duties" for law enforcement officers wherein they enjoy immunity for their acts.<sup>81</sup> What should be included in this "scope of official duties"? The previously discussed cases defining harms by deputies for which the sheriff is liable provide a good test.<sup>82</sup> Thus, for liability to attach to the agency and not to the obligor it should be required that the wrongful act be done while the officer is acting in furtherance of some official duty.<sup>83</sup> Clearly malicious harms done for personal motives would be excluded since these are acts for which the officer alone should be personally liable. Basically the officer would only enjoy immunity for any harm committed while acting in furtherance of his official duty.<sup>84</sup>

Immunity of the individual law enforcement officer for his official acts is crucial. The many risks and uncertainties faced by police every day require this. The rule which holds the officer liable for damages if he fails to act within the bounds of his legal authority is overly strict. The judiciary draws those bounds with terms like "probable cause" and "reasonable force," placing it within the discretion of courts to expand or deny the authority of police.

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79. *Id.* at 514.

80. Mathes & Jones, *Toward a "Scope of Official Duty" for Police Officers in Damage Actions*, 53 *GEORGETOWN L.J.* 889 (1963).

81. *Id.* at 907-08. The authors suggest seven defects in the present system: (1) Threat of financial liability is a continual and substantial deterrent to vigorous law enforcement. (2) It is unjust to penalize officers for doing a duty incumbent on them, *i.e.*, arrest, when their error is simply one of "reasonable judgment." (3) The officer, except where he acts in "clear excess" of lawful powers, acts for the state, not for himself. (4) Competent studies show that incentive to safety and proper execution of duty are greatest where tort liability is imposed on the large corporate defendant rather than on the individual. (5) Absent insurance, the remedy against the officer is illusory. (6) Where the officer's fault is the criterion of liability, actions to enforce individual liability may force the courts to review the propriety of police-executive actions. This may involve a conflict between the court and a coordinate branch of government. (7) Liability may discourage some responsible people from entering police work.

82. Earlier it was noted that Louisiana courts would not impose liability on the sheriff for the wrongful conduct of his deputy unless it was done in violation of or in an unfaithful performance of an official duty. See notes 69-77 *supra*.

83. Making an arrest, seizing property, searching for contraband, and conducting an investigation would clearly be acts done in furtherance of an official duty.

84. The officer who shoots a personal enemy or engages in a barroom fight would not be covered by official immunity while one who used unnecessary force to make an arrest would be covered.

Good results in controlling personnel have been obtained by large corporations when liability is imposed on the corporation itself.<sup>85</sup> If the agency is to be liable for a policeman's torts, the Sheriff or the City Police Department heads will be forced to control carefully the conduct of its employees. Such control will aid in curbing abuses by individual police officers.

The imposition of liability on the agency together with immunity of the officer will achieve the goals of encouraging vigorous law enforcement and providing individuals unjustly harmed redress for their grievances. Such a liability structure would further the triangle of interests involved: the policeman, the injured person, and society as a whole. First, it serves to free the officer from fear of personal loss in the course of his already hazardous occupation. Secondly, it provides a "deep pocket" from which the injured suspect may draw funds for his damages. Thirdly, it will serve the interest of the public by encouraging law enforcement officers to act. Society is in the awkward position of wanting protection from criminals through its police and protection from its police through its courts. It is submitted that the only rational way to achieve this goal is to pass on to society the costs of harms done to its members by its police in their efforts to protect that society.

*Cheney C. Joseph, Jr.*

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85. Mathes & Jones, *Toward a "Scope of Official Duty" for Police Officers in Damage Actions*, 53 GEORGETOWN L.J. 889, 907, 908 (1965).