

RISKY BUSINESS

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COUNSELOR'S COMMENTS

Supreme Court Continues Deference to Police in Determining Whether Claims of Excessive Force Are So Clearly Established So As to Defeat Officers Entitlement to Qualified Immunity

By Surdyk, Dowd and Turner

In a trio of recent cases, the Supreme Court has re-affirmed and reassured the Police Community that each excessive force claim “requires careful attention to the facts and circumstances of each particular case”. The Courts defense of this approach could not come at more crucial point in time as the media and court of public opinion has begun examining police conduct with a microscope.

The most noteworthy case of the trio stemmed from U.S. Court of Appeals for the Eighth Circuit. In *Lombardo v. City of St. Louis, Missouri*, the court of appeals seemed to create a blanket rule for the use of prone restraints when suspects are resisting arrest. More specifically the Court of Appeals held that, “the use of a prone restraint—no matter the kind, intensity, duration, or surrounding circumstances—is per se constitutional so long as an individual appears to resist officers’ efforts to subdue him.”

In reviewing the Eighth Circuit’s decision, the Supreme Court determined that the Eighth Circuits “per se” approach circumvents careful analysis and removes any leeway for nuance for each individual situation. Furthermore, the Supreme Court’s decision reflects the Court’s deference for the endless differences each police encounter could involve. A blanket rule for excessive force, specifically as to prone restraints, disregards everything that led up to the potential need to employ such a restraint. Three justices dissented to this decision. Their opinions are not in direct disagreement with the majority opinion, but rather, they suggest the Supreme Court has a duty to determine whether the force used was excessive in an effort to shed clarity for officers moving forward. The dissent is of the opinion that accepting these cases and then consistently remanding them back to the Court of Appeals does nothing more than cause more confusion as to what constitutes excessive force. The dissent argued further that if the Supreme Court is unwilling to provide clarity in a convoluted area of law to the lower courts, they should not hear the case at all. While the majority and dissenting justices have varied opinions as to this case, both outcomes tend to support the notion that each excessive force case is unique and should be treated as such.

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COUNSELOR'S COMMENTS...continued

The other two decisions coming out of the Supreme Court are *Rivas-Villegas v. Cortesluna* and *City of Tahlequah, Oklahoma v. Bond*. Both of these cases repeat and reinforce the need for careful attention to the facts of each individual situation.

The second case in the trio is *Bond*. This case involved police responding to a domestic disturbance in which an ex-husband, Rollice, had returned to his ex-wife's house drunk and entered her garage where he kept his tools. A disagreement began between the three police officers on scene and Rollice. The police were at the entrance of the side door of the garage and the suspect was towards the back of the garage. Rollice expressed concern that the officers were going to take him to jail. The officers insisted that they were simply trying to give him a ride home. It was at this point one of the officers realized Rollice began fidgeting with something in his hands and appeared nervous. Subsequently, an officer asked Rollice if they could pat him down for weapons. He refused. It was at this point that one of the police officers stepped into the garage. The other two followed leaving the suspect cornered. As Rollice went towards the workbench, the officers ordered Rollice to stop, but he ignored them, grabbed a claw hammer and held it as if he was going to swing it at the officers. The officers drew their guns and ordered him to drop the hammer. Rollice refused and "took a stance as if he was about to throw the hammer or charge at the officers." In response, the officers fired and killed Rollice.

The Court of Appeals in the Tenth Circuit said that its current precedent "allows an officer to be held liable for a shooting that is itself objectively reasonable if the officer's reckless or deliberate conduct created a situation requiring deadly force." Further it concluded "that a jury could find that [the first officer's] initial step toward [the suspect] and the officers' subsequent 'cornering' of him in the back of the garage recklessly created the situation that led to the fatal shooting."

The Supreme Court overruled this decision because for a police officer to be liable under excessive force it must be clearly established that the officer's conduct was unlawful and an objectively reasonable officer would have been on notice that the conduct was unlawful, otherwise the officer is entitled to qualified immunity. The Court's analysis of the Officers' actions was not necessary because it was clear that the Officers had not violated any clearly established law. Therefore, the officers were entitled to qualified immunity from the outset. The Tenth Circuit relied on several prior cases to establish unlawful conduct, but the Supreme Court found that those cases were not remotely similar to the details of this case. Because of the factual differences, Tenth Circuit should not have relied upon them to conclude it was it was "clearly established" that the Officers' conduct in this case was reckless, or that their ultimate use of force was unlawful.

In the penultimate case of the trio, *Rivas-Villegas*, police responded to domestic disturbance of a mother and her two children barricading themselves in a bedroom from the mother's boyfriend, who at the time was believed to have a chainsaw. Upon arrival the officers ordered Cortesluna, the suspect, out of the house with his hands up. As he approached the officers, they saw a knife in his front pocket. They ordered him to keep his hands up, but he put them down, and officers shot him twice with bean bag rounds. He then complied and dropped to the ground. After he was face down on the ground, Officer Rivas-Villegas straddled Cortesluna, placing his left knee on the left side of Cortesluna's back (the side the knife was on) for no more than eight seconds before he stood up again.

COUNSELOR'S COMMENTS...continued

Cortosluna brought suit under the Fourth Amendment for excessive force. The Court of Appeals for the Ninth Circuit held that existing precedent put the officer on notice that his conduct constituted excessive force, therefore he was not entitled to qualified immunity. The Court relied on one prior case (*LaLonde*) which involved a noise complaint. When the officers arrived, the suspect was in underwear, a t-shirt, and had a sandwich in his hand. The suspect refused officers entry. They entered anyways. They then knocked the sandwich out of his hand, grabbed his ponytail, knocked him to the ground, and pepper sprayed him. At that point the suspect stopped resisting arrest. However, the cop continued and deliberately dug his knee into the suspect's back causing significant injury.

At issue on appeal to the Supreme Court was whether Rivas-Villegas violated a clearly established law. The Supreme Court compared the facts of *LaLonde* to the present case under the analysis that was covered in *Bond*. What the court found was that although both cases involved a knee to the back of someone lying prone and not resisting, but rather complying at the time the knee was placed into their backs. However, the Supreme Court noted that other facts in each case were vastly different and "materially distinguishable." Contrasting *LaLonde* against this case it is clear there are stark differences. In *LaLonde*, officers were responding to a mere noise complaint, whereas here they were responding to an alleged incident of domestic violence possibly involving a chainsaw. In addition, Cortosluna had a knife protruding from his left pocket. Further, in this case, video evidence showed, and Cortosluna did not dispute, that Rivas-Villegas placed his knee on Cortosluna for no more than eight seconds and only on the side of his back near the knife that officers were in the process of retrieving. *LaLonde*, in contrast, testified that the officer deliberately dug his knee into his back when he had no weapon and had made no threat when approached by police. These facts, considered together in the context of the arrest, materially distinguish this case from *LaLonde*. Therefore, the Court reasoned that even when the same precedent is at play, the facts must also be so similar such that it would justify stripping officers of the protections afforded to them by qualified immunity.

A review of these cases and the applicability of qualified immunity provides an opportunity for departments to discuss certain topics with its officers, including the use of force and proper technique and changes in the law regarding those techniques. It is clear that the Supreme Court's analysis relating to qualified immunity is very fact specific, so it is important to be familiar with current caselaw.

Loss Control Lowdown...

Starr Markworth

OHIO PUBLIC EMPLOYERS RISK REDUCTION PROGRAM

Were you aware that in the State of Ohio the Federal OSHA standard is applied differently to local governments?

With the ratification of Ohio House Bill 308 in December 1992, the Public Employment Risk Reduction Program (PERRP) went into effect. The purpose of the program is to ensure that the public employees in the State are provided with a safe and healthful working environment. Prior to PERRP, only state agencies, under an executive order first enacted in 1973 and updated in 1982, were held responsible for the occupational safety and health of their respective employees. House Bill 308, therefore greatly expanded the responsibility of all public employers in Ohio as it extends safety and health coverage to approximately 600,000 employees across the state. However, House Bill 308 exempts peace officers, firefighters, and correctional officers in county or municipal correctional institutions from coverage. (See Ohio Revised Code 4167 for more detail on PERRP)

The role and mission of PERRP is to ensure public employees in Ohio have safe and healthy working conditions. Public employers must furnish to each public employee a workplace free from recognized hazards that are causing or are likely to cause death or serious physical harm. This fundamental requirement is the foundation of the Public Employment Risk Reduction Act (the Act) which is also referred to as House Bill (HB) 308.

What standards are enforced by PERRP?

PERRP has incorporated by reference all federal [Occupational Safety and Health Administration \(OSHA\)](#) standards found in the Code of Federal Regulations (CFR) Title 29 Parts [1910](#), [1926](#) and [1928](#) as Ohio Employment Risk Reduction Standards. All adopted Ohio Employment Risk Reduction Standards are found in Chapter 4167 of the [Ohio Revised Code](#) and the [Ohio Administrative Code](#).

- [ORC 4167](#)
- [OAC 4167](#)
- [10 CFR 20](#)

If you would like to be notified of future changes to PERRP rules or operations, email PERRPupdate@bwc.state.oh.us

What are the most common standards cited?

Each calendar year PERRP compiles statistics on the top 25 recognized hazards identified during voluntary and enforcement inspections. Public employers and employees can use the lists to help identify hazardous conditions in their workplace.

- [Most Common Violations by Section](#)
- [Most Common Violations by Standard](#)

Loss Control Lowdown...Continued

Starr Markworth

PERRP provides a variety of specialized workplace safety and health services for Ohio's state, county and local government agencies, school districts, public colleges and universities. PERRP services promote safe workplaces and the prevention of injuries and illnesses by raising awareness of occupational safety and health hazards and risk factors.

PERRP is your partner in workplace safety and health risk reduction. They provide compliance assistance to public employers at no additional cost.

- Voluntary compliance assistance inspections
- Written safety program reviews
- On-site safety training and presentations
- Work-site surveys related to noise, chemical exposures, ventilation, biological and other health hazards
- Industry-Specific Safety Program services

Importance of PERRP recordkeeping

Injury and illness recordkeeping is an integral component of a successful workplace safety and health program. Accurate recordkeeping helps public employers analyze their working environment for existing and predictable hazards that are likely to cause serious injuries and illnesses.

PERRP recordkeeping forms

All Ohio public employers must complete the PERRP recordkeeping forms (or an equivalent). This includes the State of Ohio and its instrumentalities; and "any political subdivisions and their instrumentalities, including any county, county or state hospital, municipal corporation, city, village, township, park district, school district, state institutions of higher learning, public or special district, state agency, authority, commission or board" as defined in Ohio Revised Code 4167.01.

Required forms can be found at [PERRP Injury and Illness Recordkeeping forms](#)

Public employers are required to post PERRP posters in areas where there is employee traffic to inform them of their right to work in a place free from recognized hazards and must include a "notice" to inform employees of their rights and responsibilities. You can [order](#) a printed copy of the required poster or you can [download](#) and print a copy on 8 ½ x 14 (legal) size paper.

Loss Control Lowdown...Continued

Starr Markworth

PERRP, through a comprehensive safety and health consultation, strives to ensure a safe and healthy workplace for all public employees. PERRP, in conjunction with responsible management, identifies actual and potentially hazardous conditions, reviews required written programs (bloodborne pathogens, hazard communication, confined space, etc.), and will prepare a detailed report for the employer, to assist in developing specific programs and abatement methods for the establishment.

If you would like more information regarding PERRP, please visit their website or use contact information below:
[PERRP](#)

Ohio Public Employment Risk Reduction Program (PERRP)

PERRP Contact Information Phone: 1-800-671-6858 Email: perrprequest@ohio.gov Fax: 614-621-5754

FYI –

Closure of 2017 Loss Year

By Tom Judy

The practice of returning all unused funds to the member cities, with interest, is just another proof that the pool, and its money, belongs to the members.

The Board of Trustees recently closed the 2017 Loss Year and authorized the refund of the remaining balance in the 2017 Loss Fund – nearly \$1.5 million – to the member cities. Almost \$24 million has now been returned to the membership from the twenty-eight loss years that have been closed since the pool's formation.

The 2017 Loss Year was originally funded with member contributions of \$2.35 million. The amount of the loss fund contribution is determined by an actuarial study. Claims arising out of 2017 events were charged against the 2017 Loss Fund. The balance in the loss fund was invested along with the pool's other funds and earned interest. Once all 2017 claims activity was resolved, it was possible to close the loss year and refund the balance to the member cities in the same proportion they contributed to it.

Refunds are credited to the members' General Reserve Fund (GRF) accounts unless, within 30 days, the member requests a cash disbursement. Once deposited to the GRF, the member may request a withdrawal in January of each year. Also, members may apply their GRF funds to any MVRMA invoice at any time during the year. Members' funds on deposit in the GRF continue to earn interest to the credit of the member.

Please contact me if you have questions about loss year funding and refunds.



Broker's Beat

Your Schedule of Values: Reporting & Trending

Each year, your schedule of values should be trended to account for inflation and ensure that values remain accurate between appraisals.

Values accuracy is a key issue for the Alliant Property Insurance Program (APIP), not only to maintain credibility with the carriers that participate on the Program, but also to ensure that exposure analysis is performed using accurate data.

In years where appraisals are not performed, values are trended. Average trend factors over the last 5 years are 2.4% for real property and 1.9% for personal property.

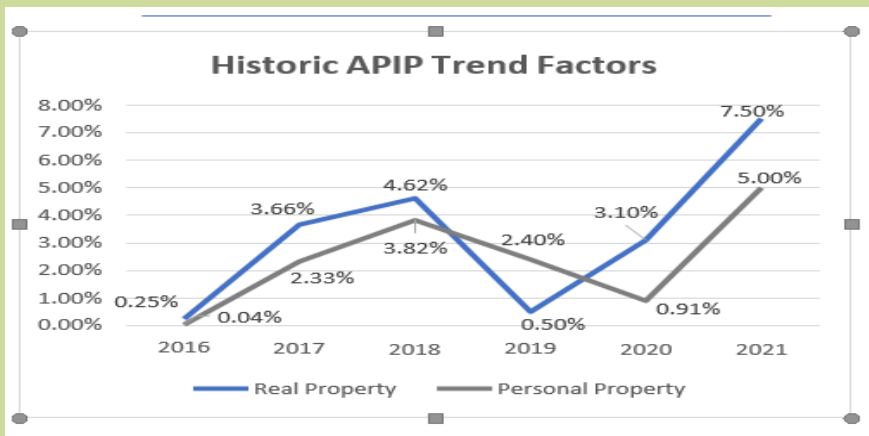
Due to the inflation that we have seen over the last year, standard **trend factors proposed for the 2022/23 renewal are 7.5% for real property and 5% for personal property.**

There are several key drivers of increasing costs of construction. Higher than average trend factors are likely to continue into the foreseeable future.

Labor Shortages - The global pandemic has affected the construction industry's workforce with 72% of contractors experiencing project delays due to COVID-19.

Material Costs - The cost of building materials such as lumber, copper and steel have increased dramatically over the last year. For example, in June of 2020 a 2x4 stud, the most common framing material, cost \$2.96. In June of 2021 it cost \$8.25.

Supply Chain Interruption - As of mid-September 2021, a record 56 container ships were waiting off the coast of California. The queue is a result of COVID-19 related disruptions, and holiday-buying surges, paired with a national labor shortage.



Although value trending takes place annually, we are highlighting it this year due to the historically high trend factors.



Centerville Installs New Electric Vehicle Charging Stations

The City of Centerville recently activated six ports at three new electric vehicle charging stations. One dual-charging station replaced an obsolete model in the parking lot behind the Municipal Building at 100 West Spring Valley Road. Two dual-charging stations replaced another in the Uptown public parking lot behind 33 West Franklin Street.

The Ohio Environmental Protection Agency awarded \$37,500 in grant funding to the City of Centerville to install the three dual-charging stations. The Ohio EPA created the Volkswagen Mitigation Trust Fund Grant Program to encourage businesses and non-profits to expand their use of electric vehicle charging stations.

“The upgraded stations will improve customer service for residents and drive additional traffic to the area thanks to the convenience and accessibility of the ports,” Deputy Mayor JoAnne Rau said.

The special advisory committee Sustainable Centerville was instrumental in supporting grant efforts. The group has also organized park clean-ups, plastic bag collections and a Styrofoam recycling event. Members worked with Matthew Lindsay at the Miami Valley Regional Planning Commission to craft a region-wide application.

“Having more locations to charge spread out across the region can reassure drivers that electric vehicles can serve their transportation needs,” Lindsay said.

As reported in the Dayton Daily News, Montgomery was one of five counties to be initially awarded the most funds – \$303,182. Additional partial grants were later added.

Nearly 5.4 million hybrid electric vehicles and more than 1.4 million plug-in electric vehicles have sold since they came on the market in 1999 and 2010 respectively, according to usafacts.org. Volkswagen itself announced that by 2030, 70% of its sedan and SUV sales will be electric.

The stations will be available for complimentary use until City Council holds a public hearing regarding whether the stations will charge for electricity. Staff members recommend charging \$1.00 for every hour of time a car is plugged in to a port. The minimal charge is consistent with other municipalities in Ohio. It also allows the city to cover ongoing costs of maintenance while discouraging drivers from parking in EV spots for longer than necessary.

The new stations provide features including energy usage reporting, analytics and real-time charging status to drivers who check online. Drivers can even sign up for text notifications when their vehicle battery is full.

Calendar of Events

Upcoming Training Events

Snow and Ice Training- February 17th - Vandalia Justice Center Training Room

Snow and Ice Training - February 22nd - Mason Location TBD

Sexual Harassment Training- February 24th - Centerville Police Training Room

Newly Elected Officials - March 9th - Yankee Trace

Upcoming Board Events

Committee Meetings - Via Zoom

Risk Management - February 24th - 10:00 AM

Finance - February 24th - 1:30 PM

Board Meeting

March 21st - Home2Suites, Centerville

From The Board Room

December 20, 2021

- Approved amended Special Events Insurance Requirements policy
- Approved 2022 Liability Coverage Document
- Approved contract with Sedgwick/Michelle Bechamps to facilitate 2022 strategic planning
- Approved 2022 liability reinsurance renewal with GEM and Genesis
- Approved 2022 crime renewal
- Approved 2022 budget, PCF and member contributions
- Approved closure of LY 29 (2017)
- Elected board officers for 2022
- Approve 2022 board and committee meeting schedule