

# Tactical Engagement Liability Mind-Field



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Tort  
Negligence

Tort  
Recklessness

Tort  
Deliberate  
Indifference

Wilful  
Wanton  
Malicious

Tort  
Intentional

Tort Gross  
negligence

Agency  
Policy

State  
Statutory  
Negligence

State  
Statutory  
Knowingly

State  
Criminal  
Statutory  
Intention

State Criminal  
Statutory  
Negligence

State Criminal  
Statutory  
Recklessness

State  
Constitution

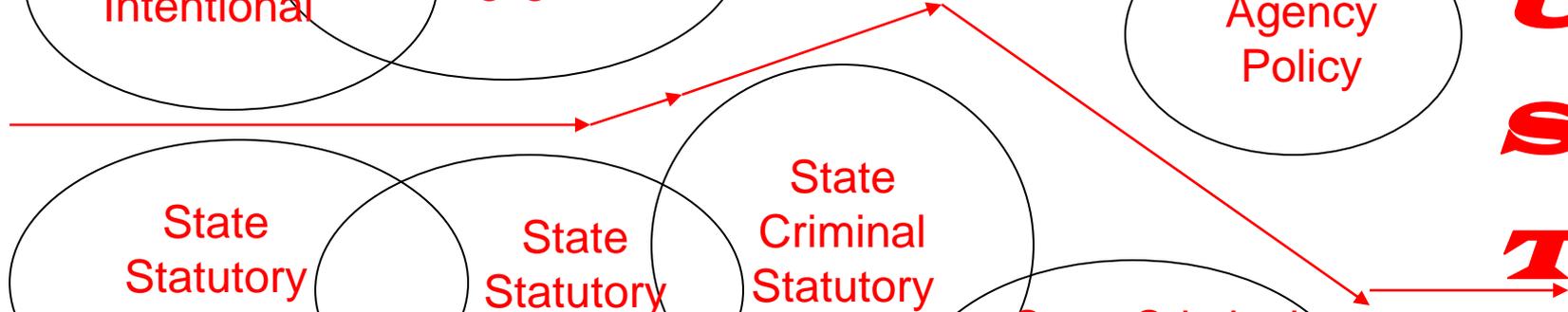
Due Care  
Special  
Relationship

Federal  
Criminal  
Statutory  
Culpability

Federal  
Constitution

**ALLARD**

**Liability Mind-Field**



Subjective/Objective  
Honest belief

Objective Reasonable  
Officer Response

Connecticut State  
Constitution Article  
1st Sec 7&9

CGS 53a-22

US Constitution  
4<sup>th</sup> Amendment

Recklessness  
& Negligence

Reasonable &  
Necessary

Immediate  
Threat - Active  
Resistance -  
Flight/Escape

Totality of Facts &  
Circumstances

Pre-Engagement &  
Moment of  
Engagement

Moment of  
Engagement

Pre-Engagement &  
Moment of  
Engagement

# Criminal Culpability Standards

## **CGS 53a-3**

- (11) A person acts "**intentionally**" with respect to a result or to conduct described by a statute defining an offense when his conscious objective is to cause such result or to engage in such conduct;
- (12) A person acts "**knowingly**" with respect to conduct or to a circumstance described by a statute defining an offense when he is aware that his conduct is of such nature or that such circumstance exists;
- (13) A person acts "**recklessly**" with respect to a result or to a circumstance described by a statute defining an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that such result will occur or that such circumstance exists. The risk must be of such nature and degree that disregarding it constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation;
- (14) A person acts with "**criminal negligence**" with respect to a result or to a circumstance described by a statute defining an offense when he fails to perceive a substantial and unjustifiable risk that such result will occur or that such circumstance exists. The risk must be of such nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation;

# CGS 53a-3

- (3) "**Physical injury**" means impairment of physical condition or pain;
- (4) "**Serious physical injury**" means physical injury which creates a substantial risk of death, or which causes serious disfigurement, serious impairment of health or serious loss or impairment of the function of any bodily organ;
- (5) "**Deadly physical force**" means physical force which can be reasonably expected to cause death or serious physical injury;

# Gross Negligence

- Although Connecticut does not recognize gross negligence as a separate basis of liability, *Decker v. Roberts*, 125 Conn. 150, 157 (1939), it is frequently coupled with claims for ***recklessness***, which are a recognized basis of tort liability. *Shay v. Rossi*, 253 Conn. 134, 181 (2000).

# Reasonable Foreseeability Theory

- 'Duty is a legal conclusion about relationships between individuals, made after the fact, and imperative to a negligence cause of action. The nature of the duty, and the specific persons to whom it is owed, are determined by the circumstances surrounding the conduct of the individual. . . . Although it has been said that no universal test for [duty] ever has been formulated . . . our threshold inquiry has always been whether the specific harm alleged by the plaintiff was foreseeable to the defendant. The ultimate test of the existence of the duty to use care is found in the foreseeability that harm may result if it is not exercised .... By that is not meant that one charged with negligence must be found actually to have foreseen the probability of harm or that the particular injury which resulted was foreseeable, but the test is, **would the ordinary [person] in the defendant's position, knowing what he knew or should have known, anticipate that harm of the general nature of that suffered was likely to result?...** Thus, initially, if it is not foreseeable to a reasonable person in the defendant's position that harm of the type alleged would result from the defendant's actions to a particular plaintiff, the question of the existence of a duty to use due care is foreclosed, and no cause of action can be maintained by the plaintiff.
- *Clohessy v. Bachelor*, supra, 237 Conn. 35±36, citing *Dillon v. Legg*, 68 Cal. 2d 728, 740, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

# Craig v. Driscoll, No. AC 19299 (Conn.App. 08/07/2001)

- Every injury has ramifying consequences, like the rippings of the waters, without end. The problem for the law is to limit the legal consequences of wrongs to a controllable degree. . . . Society cannot be blind to changing social mores.
- "To prevail on a negligence claim, a plaintiff must establish that the defendant's conduct 'legally caused' the injuries. . . .

# The first component of 'legal cause' is 'causation in fact.'

- 'Causation in fact' is the purest legal application of . . . legal cause. The test for cause in fact is, simply, would the injury have occurred were it not for the actor's conduct....
- "The second component of 'legal cause' is proximate cause, which [our Supreme Court has] defined as [a]n actual cause that is a substantial factor in the resulting harm .... The 'proximate cause' requirement tempers the expansive view of causation [in fact] . . . by the pragmatic . . . shaping [of] rules which are feasible to administer, and yield a workable degree of certainty. . . . Remote or trivial [actual] causes are generally rejected because the determination of the responsibility for another's injury is much too important to be distracted by explorations for obscure consequences or inconsequential causes. . . . In determining proximate cause, the point beyond which the law declines to trace a series of events that exist along a chain signifying actual causation is a matter of fair judgment and a rough sense of justice....

# Craig v. Driscoll, No. AC 19299 (Conn.App. 08/07/2001)

- '[Our Supreme Court] has often stated that the 'test' of **proximate cause** is whether the defendant's conduct is a **'substantial factor'** in producing the plaintiff's injury. . . . That negligent conduct is a 'cause in fact,' however, obviously does not mean that it is also a 'substantial factor' for the purposes of a proximate cause inquiry. The 'substantial factor' test, in truth, reflects the inquiry fundamental to all proximate cause questions; that is, **'whether the harm which occurred was of the same general nature as the foreseeable risk created by the defendant's negligence. . . . In applying this test, we look from the injury to the negligent act complained of for the necessary causal connection....**

# Craig v. Driscoll, No. AC 19299 (Conn. App. 08/07/2001)

- a negligent defendant, whose conduct **creates or increases the risk of a particular harm** and is a **substantial factor** in causing that harm, is not relieved from liability by the intervention of another person, except where the harm is intentionally caused by the third person and is not within the scope of the risk created by the defendant's conduct. . . . The reason [for the general rule precluding liability where the intervening act is intentional or criminal] is that in such a case the third person has deliberately assumed control of the situation, and all responsibility for the consequences of his act is shifted to him. . . . Such tortious or criminal acts may in themselves be foreseeable, [however,] and so within the scope of the created risk ...." Doe v. Manheimer, 212 Conn. 748, 757±59, 563 A.2d 699 (1989), overruled in part on other grounds, Stewart v. Federated Dept. Stores, Inc., 234 Conn. 597, 608, 662 A.2d 753 (1995).

# Craig v. Driscoll, No. AC 19299 (Conn. App. 08/07/2001)

- **Violation of a statute** often forms the legal basis of an action sounding in **negligence per se**. Gore v. People's Savings Bank, 235 Conn. 360, 368, 665 A.2d 1341 (1995).
- The two-pronged test of negligence per se is:
  - (1) whether the plaintiffs are within the class of persons protected by the statute **and**
  - (2) whether the injury suffered is of the type that the statute is intended to prevent.
- "While in general the violation of a statute is negligence per se, there are limitations to this rule. In order to base a recovery upon negligence in violation of a statute, it must appear that the **injury suffered was of a nature which the statute was intended to guard against. . . .**

# Craig v. Driscoll, No. AC 19299 (Conn. App. 08/07/2001)

- "Recklessness is a state of consciousness with reference to the consequences of one's acts. Commonwealth v. Pierce, 138 Mass. 165, 175 [1884]. . . . It is **more than negligence, more than gross negligence.** Bordonaro v. Senk, 109 Conn. 428, 431, 147 A. 136 [1929]. The state of mind amounting to recklessness may be **inferred from conduct.** But, in order to infer it, there must be something **more than a failure to exercise a reasonable degree of watchfulness to avoid danger to others or to take reasonable precautions to avoid injury to them.** Mooney v. Wabrek, 129 Conn. 302, 308, 27 A.2d 631 (1942). **Wanton misconduct is reckless misconduct.** Menzie v. Kalmonowitz, 107 Conn. 197, 199, 139 A. 698 (1928). It is such conduct as indicates a **reckless disregard of the just rights or safety of others or of the consequences of the action.** Markey v. Santangelo, 195 Conn. 76, 78, 485 A.2d 1305 (1985); see also Brown v. Branford, 12 Conn. App. 106, 108, 529 A.2d 743 (1987)....

# Craig v. Driscoll, No. AC 19299 (Conn. App. 08/07/2001)

- 'While we have attempted to draw definitional distinctions between the terms wilful, wanton or reckless, in practice the **three terms have been treated as meaning the same thing**. The result is that 'willful,' 'wanton,' or 'reckless' conduct tends to take on the aspect of highly unreasonable conduct, involving an extreme departure from ordinary care, in a situation where a high degree of danger is apparent. . . . It is at least clear . . . that such aggravated negligence must be more than any mere mistake resulting from inexperience, excitement, or confusion, and more than mere thoughtlessness or inadvertence, or simply inattention .... W. Prosser & W. Keeton, Torts (5th Ed.) § 34, p. 214." Dubay v. Irish, 207 Conn. 518, 532±33, 542 A.2d 711 (1988).

# Craig v. Driscoll, No. AC 19299 (Conn. App. 08/07/2001)

- "One is guilty of **reckless misconduct** when 'knowing or having reason to know of facts which would lead a reasonable [person] to realize that the actor's conduct not only creates an unreasonable risk of bodily harm to the other but also involves a high degree of probability that substantial harm will result to him.'

# Deliberate Indifference

- deliberate choice to follow a course of action made from among various alternatives"
- "conscious" choice
- it may happen that in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need. In that event, the failure to provide proper training may fairly be said to represent a policy for which the city is responsible, and for which the city may be held liable if it actually causes injury.
- the focus must be on adequacy of the training program in relation to the **tasks the particular officers must perform.**

# Deliberate Indifference

- the deliberate indifference standard embodies both an **objective and a subjective prong**. Objectively, the alleged deprivation must be "sufficiently serious," in the sense that "a condition of urgency, one that may produce death, degeneration, or extreme pain" exists. (Nance v. Kelly, 912 F.2d 605, 607 (2d Cir.1990) . Subjectively, the charged official must act with a sufficiently culpable state of mind. According to the United States Supreme Court, the **subjective element of deliberate indifference "entails something more than mere negligence . . . [but] something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result."** Farmer v. Brennan, 114 S. Ct. 1970, 1978 (1994). The subjective element requires a state of mind that is the **equivalent of criminal recklessness**; the official must both be **aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference."** Hathaway II, 37 F.3d at 66.

# Deliberate Indifference

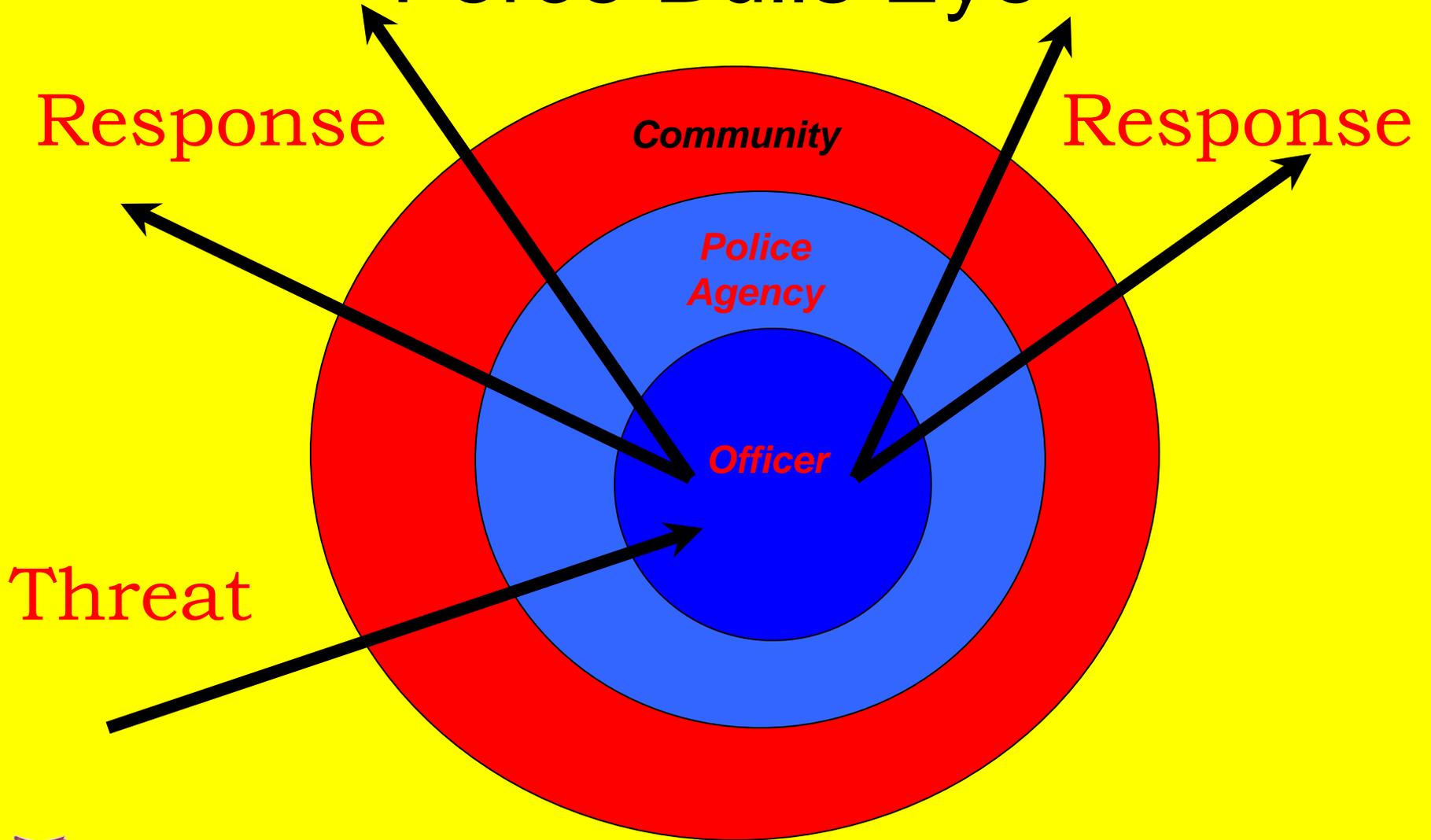
- In charging the jury on deliberate indifference, the district court correctly explained that **deliberate indifference involves unnecessary and wanton infliction of pain, or other conduct that shocks the conscience.** It also correctly explained to the jury that the defendant need not expressly intend to inflict the unnecessary pain, but, rather, can establish the element by proving that the defendant **acted recklessly.** The court then proceeded to explain what it meant by **"recklessly:"** Now, by recklessly, I mean that the plaintiff must prove two things by a preponderance of the evidence. First, ..prove that... **knew of a substantial risk of serious harm to** ... Second, ...must prove that ... **consciously disregarded that risk.** The plaintiff need not show that .....failed to act, believing that harm would actually befall ... It is sufficient if plaintiff demonstrates that ....failed to act despite his **knowledge of a substantial risk of serious harm** to .....
- If actions reflect a simple lack of due care, or negligence, with respect to the plaintiff, then you must find in favor of the defendant and need not proceed any further in your deliberations.

# CITY CANTON v. HARRIS ET AL.

## (02/28/89)

- It may be, for example, that an otherwise sound program has occasionally been negligently administered. Neither will it suffice to prove that an injury or accident could have been avoided if an officer had had better or more training, sufficient to equip him to avoid the particular injury-causing conduct. Such a claim could be made about almost any encounter resulting in injury, yet not condemn the adequacy of the program to enable officers to respond properly to the usual and recurring situations with which they must deal. And plainly, adequately trained officers occasionally make mistakes;
- a city's training program must be closely related to the ultimate injury.

# Force Bulls Eye



# The number of law enforcement officers killed in the line of duty has declined since the early 1970's

- Between 1993 and 2002, of the 636 officers killed --
  - 32% were in **arrest situations**
  - 17% were investigating **suspicious persons/circumstances**
  - 15% were on **disturbance calls**
  - 15% were making **traffic pursuits/stops**
  - 15% were in **ambush situations**
  - 5% were in **other situations**
- Of the 785 assailants identified in the killing of law enforcement officers from 1993-2002 --
  - almost half had a prior conviction
  - one-fifth were on probation or parole at the time



***Restraint & Control***

***CGS 53a-22***

***4<sup>th</sup> Amendment***

***Connecticut Constitution***

***Agency Policy***

# Questions?

- What is the color of Fear?
- What was the Nature of the Sustained Injury?  
Does the Court Care?
- What was the available time cushion for decision-making alternatives?
- Tactical assessment of self-imposed danger?
- Discretionary Duty vs. Ministerial Duty
- Totality of Facts & Circumstances?
  - Garner Standard? Graham Standard? Smith Standard?



# FORCE



## Questions

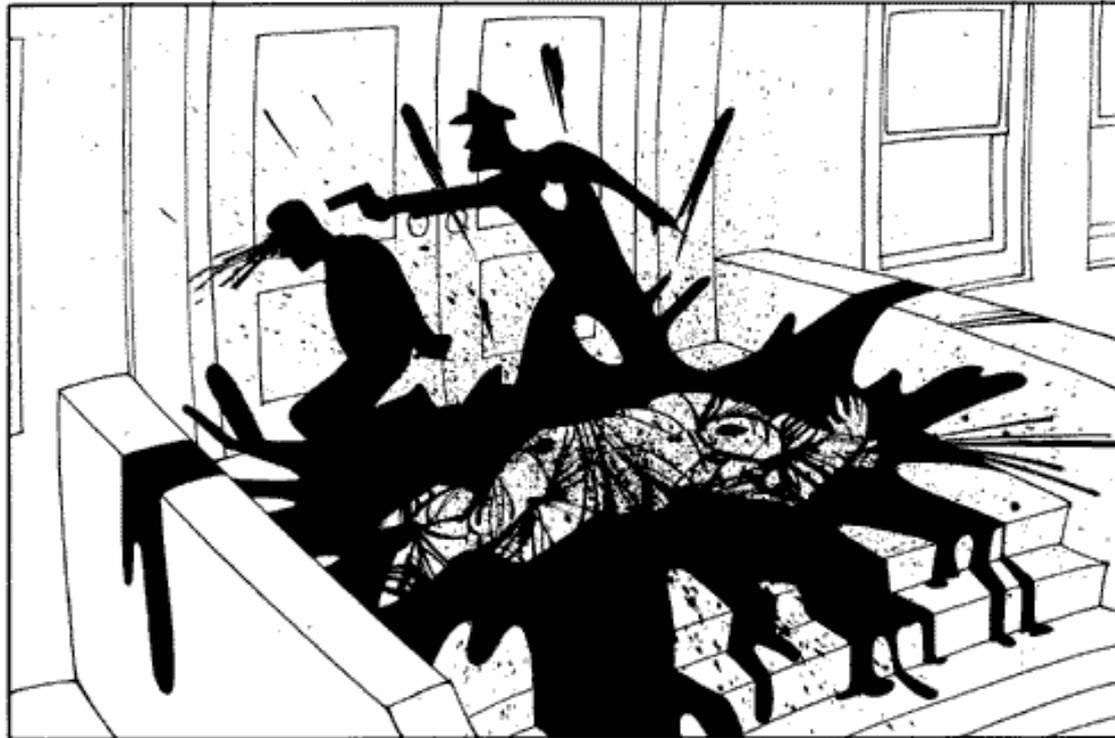


# Police



Reginald Allard Jr.

# Perception is fact!

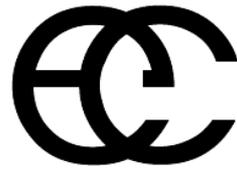


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