

2008 BATTERY: EXCESSIVE FORCE IN ARREST

Question ___ asks you to determine whether (defendant) used excessive force in arresting (plaintiff). It is admitted that (defendant) made contact with (plaintiff) and used force at the time of making the arrest, which force, if not reasonable under the circumstances, would constitute a battery.

As a law enforcement officer, (defendant) had the duty to enforce the laws of Wisconsin and in making an arrest may use reasonable force to overcome the resistance of the person being arrested. This force, however, must not be excessive; that is, the officer must not use more force than is reasonably necessary under all of the circumstances.

The fact that the evidence in this case shows physical contact between (defendant) and (plaintiff), which resulted in injury to (plaintiff), is not proof that (defendant) used excessive force.

(Defendant) had the lawful authority to use such force in making the arrest as a reasonable police officer would believe to be necessary. But the use of force beyond that which a reasonable police officer would believe necessary under all the circumstances then existing is excessive force.

The fact that (defendant) believed (plaintiff) was guilty of a crime is irrelevant. Persons being arrested have a right not to be mistreated by the use of excessive force.

[Give middle burden instruction, Wis JI-Civil 205.]

COMMENT

The instruction and comment were approved by the Committee in 1981. A parenthetical reference to the burden of proof instruction was corrected in 2001. The comment was revised in 1998 and 2001.

Johnson v. Ray, 99 Wis.2d 777, 299 N.W.2d 849 (1981); Wirsing v. Krzeminski, 61 Wis.2d 513, 213 N.W.2d 37 (1973); McCluskey v. Steinhorst, 45 Wis.2d 350, 173 N.W.2d 148 (1970). See also Wis JI-Civil 2155.

In Wirsing, the court specifically recognized that a police officer's liabilities for a battery are founded on legal and policy considerations that are distinguishable from those in an ordinary battery case. The court stated that the general principle applicable to police officers making arrests is found in Restatement, Second, Torts § 118:

The use of force against another for the purpose of effecting his arrest . . . [is] privileged if all the conditions stated in secs. 119-132 . . . exist.

The principal condition to the above Restatement provision is that an actor may not use force in excess of what the actor believes to be necessary. Restatement, Second, Torts § 132.

In Wirsing, the court stated that the trial court's instructions placing emphasis upon the special privilege of a police officer were correct and that they "reflected . . . the legal entitlement conferred by law upon a police officer to use necessary force." Wirsing, supra at 521. Where the relevant facts that emerge at trial are primarily concerned with the issue of excessive force, an instruction on self-defense is not necessary.

The burden upon the plaintiff to establish excessive force is the middle burden. Johnson, supra at 783. A plaintiff is entitled to be awarded compensation only for injuries and resulting damages caused by the use of excessive force by the police. Johnson, supra at 786.

Intentional Tort. In Kofler v. Florence, 216 Wis.2d 41, 573 N.W.2d 568 (Ct. App. 1997), the court said excessive force in arrest is an intentional tort. The plaintiff argued that despite its title, "battery: excessive force in arrest," the pattern jury instruction, Wis JI-Civil 2008, does not involve an intentional tort because there is no requirement for a finding that the defendant had the requisite mental intent for civil battery. The court of appeals disagreed. It said that the jury instruction is premised on the fact that the officer did commit a civil battery and that the further requirement under the instruction that the use of force must be reasonable does not change the tort to one in negligence. It is merely a limitation on the amount of force a police officer may use under his or her limited privilege to engage in civil battery.

Need for Expert Testimony. The Wisconsin Supreme Court has concluded that determinations of excessive use of force are not, in general, beyond the realm of ordinary experience and lay comprehension. It rejected a categorical requirement of expert testimony in excessive use of force cases. Robinson v. City of West Allis, 2000 WI 126, 239 Wis.2d 595, 619 N.W.2d 692.