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Torts: Civil Liability in the Use of Deadly Force in North Carolina

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INTRODUCTION

Many states, including North Carolina, have adopted the Model Penal Code 3:07 in whole or in part as the basis for statutes


(2) A law enforcement officer is justified in using deadly physical force upon another person for a purpose specified in subdivision (1) of this subsection only when it is or appears to be reasonably necessary thereby:

(a) to defend himself or third person from what he reasonably believes to be the use or imminent use of deadly force;

(b) to effect an arrest or to prevent the escape from custody of a person whom he reasonably believes is attempting to escape by means of a deadly weapon or any other means indicates that he presents an imminent threat of death or serious physical injury to others unless apprehended without delay; or

(c) to prevent the escape of a person from custody imposed upon him as a result of a conviction for a felony.

Nothing in this subdivision constitutes justification for willful, malicious or criminally negligent conduct by any person which injures or endangers any person or property, nor shall it be construed to excuse or justify the use of unreasonable or excessive force.


(b) The use of deadly force is not justifiable under this section unless:

(i) the arrest is for a felony; and

(ii) the person effecting the arrest is authorized to act as a peace officer or is assisting a person whom he believes to be authorized as a peace officer; and

(iii) the actor believes that the force employed creates no substantial risk of injury to innocent persons; and

(iv) the actor believes that:

(1) the crime of which the arrest is made involved conduct including the use of or threatened use of deadly force; or

(2) there is a substantial risk that the person to be arrested will
which establish the standards for the privileged use of deadly force by law enforcement officers. These statutes attempt to clarify those situations in which a law enforcement officer may use deadly force to effect an arrest without incurring civil or criminal liability.4 While the statute enacted by the General Assembly of North Carolina6 does much to clarify the circumstances under which the use of deadly force is privileged, the statute contains a paragraph added to the language of the Model Penal Code, the interpretation of which is crucial to the determination of the extent of a law enforcement officer's liability in the use of deadly force.6 The existence of a statutory privilege which modifies the privilege afforded an officer at common law7 plays an important role in the availability of recovery for persons injured by an officer's use of deadly force.

This comment will attempt to analyze the justified use of deadly force by law enforcement officers in North Carolina and the extent to which an officer is shielded from civil liability arising out of the use of deadly force under North Carolina General Statutes § 15A-401 (d)(2). (The N.C. General Statutes are hereinafter cited as G.S.)

BACKGROUND

At common law, a law enforcement officer was generally empowered to employ such reasonable force as was necessary to apprehend a suspect.4 He was allowed to use deadly force to apprehend a felon but was prohibited from using deadly force to cause death or serious bodily injury if his apprehension is not made.

N.C. Gen. Stat. § 15A-401(d)(2) adopts in principle the Model Penal Code but does not include (b)(iii) and adds a provision which justifies deadly force against an escaped convicted felon.


6. Id.

Nothing in this subdivision constitutes justification for willful, malicious or criminally negligent conduct by any person which endangers any person or property, nor shall it be construed to excuse or justify the use of unreasonable or excessive force. Id.

7. See text accompanying notes 8 through 19.

apprehend a misdemeanant. At common law, crimes which were classified as felonies (murder, rape, manslaughter, burglary, larceny, mayhem and arson) were capital offenses. Conviction of a felony meant death and forfeiture of property. In fact, arrest for a felony was tantamount to conviction. Few safeguards protected the accused and felony prosecutions rarely ended in acquittals. The right to speedy trial was unheard of and "rotting in prison was a reality. It was only a question of time when the accused died; immediately at the hands of his apprehenders or later in the law enforcement process." Misdemeanors, on the other hand, were less serious crimes which did not threaten life or limb, and were punishable by much less drastic means. Deadly force could not be used to apprehend a misdemeanant even if he might otherwise escape. The common law rationale for justifying the use of deadly force against felons but not against misdemeanants was that anyone capable of committing a felony and thus facing near certain death if captured, should be presumed so desperate as to be capable of using any means to prevent apprehension. The danger which a felon presented to society, therefore, required that his captors be authorized to employ any means necessary to effect his apprehension.

11. Id.; see generally Blackstone supra note 9, at 98 ("The idea of felony is indeed so connected with that of capitol punishment that we find it hard to separate them; and to this usage the interpretation of the law does now conform.").
13. Id.
16. United States v. Coppersmith, 4 F. 198, 202 (W.D. Tenn. 1880); see W. Blackstone, supra note 9, at 94.
17. Limits on the use of Deadly Force supra note 1, at 538; Thomas v. Kinkead, 55 Ark. 502, 508, 18 S.W. 854, 856 (1892) ("[I]t would ill become the 'majesty' of law to sacrifice a human life to avoid a failure of justice in the case of a petty offender.").
18. Holloway v. Moser, 193 N.C. 185, 187, 136 S.E. 375, 376 (1927). ("The reason for the distinction is obvious. Ordinarily, the security of person and property is not endangered by a misdemeanant being at large, while the safety and security of society requires the speedy arrest and punishment of a felon.").
19. Id.
By modern definition and penal standards, a felony is a more serious crime than a misdemeanor. No longer are felonies limited to crimes which involve conduct which endangers life or limb. Under modern legislation, many statutory misdemeanors are more dangerous to life and limb than many felonies. In light of these modern legislative enactments, the distinction between the justified use of deadly force against felons but not misdemeanants becomes less tenable. The common law distinction which allows the use of deadly force against felons but not misdemeanants has proved generally unacceptable; legislatures of many states have discarded it in favor of their own legislative pronouncements. Historically the use of deadly force by law enforcement officers has been governed exclusively by state law. To the extent that conduct of law enforcement officers conforms to state law, the use of deadly force is privileged; the officer is insulated from criminal and civil liability.


A felony is a crime which:
(1) was a felony at common law;
(2) is or may be punishable by death;
(3) is or may be punishable by imprisonment in the state's prison;
or
(4) is denominated a felony by statute.

Any other crime is a misdemeanor.

21. Jones v. Marshall, 528 F.2d 132, 138 (2d Cir. 1975). ("Many American jurisdictions . . . have of course expanded the number of felonies to include numerous crimes not involving force or violence, crimes which relate to property and to compliance with complex government regulations [e.g., income tax fraud].").


The problem all legislatures face when formulating rules to govern the justified use of deadly force by law enforcement officers is to balance the possible inefficiencies which may arise from the officer’s fear of civil suit by a party injured at his hands against society’s fear that it will have no recourse against the misuse of force by law enforcement officers. 27 Six states 28 have no statute on the justified use of deadly force by law enforcement officers and retain the common law felony-misdemeanor distinction. 29 Nineteen states have codified the common law rule. 30 A number of states 31 have discarded the common law rule and now restrict the use of deadly force by law enforcement officers to use against only those

216 N.C. 270, 4 S.E.2d 611 (1939); Sutton v. Williams, 199 N.C. 546, 155 S.E. 160 (1930).

27. Liability of Police Officers, supra note 8, at 400; see Colorado v. Hutchinson, 9 F.2d 275 (8th Cir. 1925); Ne Casek v. City of Los Angeles, 233 Cal. App. 2d 131, 43 Cal. Rptr. 294 (1965); Rayano v. City of New York, 138 N.Y.S.2d 267 (S. Ct. 1955).


29. Id.


persons who are suspected of forcible felonies. The rest of the states have adopted, either in whole or in part, Model Penal Code 3:07 which restricts the use of deadly force by law enforcement officers to use against persons, who by their own use of deadly force, pose a serious threat to the safety of the public.

Under the Model Penal Code standard, the use of deadly force is justified if the officer believes the force is necessary and believes that the individual sought has either committed a crime involving the use of deadly force or else is substantially likely to create a risk of death or serious injury unless apprehended immediately. Liability, therefore, is contingent upon the amount of force the law enforcement officer actually believed to be required under the situation. The subjective emphasis of this standard eliminates the requirement that plagues those jurisdictions which adhere to the felony-misdemeanor rule, that in order to avoid liability an officer be certain the person against whom deadly force is to be employed is in fact a felon and in fact cannot be apprehended without the use of deadly force.

32. Id.
33. See supra note 1.
34. See supra note 3.
35. Id.
36. Id.
37. Id.; see Police Misuse of Weapons, supra note 8, at 401 ("The reasonableness of the police officer's actions is generally examined from the point of view of the policeman at the time and under the circumstances of the occurrences which led to the injury. It is unfair to hold the police officer to limits of force expressed in pounds and ounces . . . .").
38. Felony-misdemeanor rule is the judicial acceptance or statutory codification of the common law privilege discussed above. See supra text accompanying notes 8 through 19.
39. MODEL PENAL CODE § 3.07 Comment (a) (Tent. Draft No. 8 1956) ("The felony-misdemeanor distinction is inherently incapable of separating out these persons of such dangerousness that the perils arising from failure to accomplish immediate apprehension justify resort to extreme force to accomplish it."); see Limits on Use of Deadly Force, supra note 1, at 538 ("Most American Courts did not closely adhere to the rationale underlying the distinction between felons and misdemeanants. Accepting the premise that deadly force could be used to apprehend a felon they readily concluded that it would be unfair to make the officer's privilege depend upon whether a jury viewing the facts with advantages of hindsight and the calm of the jury room determine a suspect had in fact committed a felony."); Brown v. United States, 256 U.S. 335, 343 (1921) ("Detached reflection cannot be demanded in the presence of an uplifted knife."); Holloway v. Moser, 193 N.C. 185, 136 S.E. 375 (1927).
ANALYSIS

G.S. § 15A-401(d)(2) adopts the Model Penal Code standard for the justified use of deadly force by law enforcement officers.40 However, the General Assembly of North Carolina added a paragraph to the language of the Model Penal Code,41 the interpretation of which will affect the scope of the privilege conferred on law enforcement officers in the use of deadly force.42 G.S. § 15A-401(d)(2) reads in part: “Nothing in the subdivision constitutes justification for willful, malicious or criminally negligent conduct by any person which injures or endangers any person or property nor shall it be construed to justify the use of unreasonable or excessive force.”43 Professor Leon Corbett has written that the drafters of the North Carolina statute referred to New York Penal Law § 35.3044 as a basis for G.S. § 15A-401(d)(2).45 The New York stat-

40. Limits on the Use of Deadly Force, supra note 1, at 539.
42. See text accompanying notes 56 through 74.
44. N.Y. PENAL LAW § 35.30 (McKinney 1967).
1. A peace officer, in the course of effecting or attempting to effect an arrest, or of preventing or attempting to prevent the escape from custody, of a person whom he reasonably believes to have committed an offense, may use physical force when and to the extent he reasonably believes to have committed an offense, may use physical force when and to the extent he reasonably believes such to be necessary to effect the arrest, or to prevent the escape from custody, or to defend himself or a third person from what he reasonably believes to be the use or imminent use of physical force; except that he may use deadly physical force for such purposes only when he reasonably believes that:
(a) The offense committed by such person was:
   (i) a felony or an attempt to commit a felony involving the use or attempted use or threatened imminent use of physical force against a person; or
   (ii) kidnapping, arson, escape in the first degree, burglary in the first degree or any attempt to commit such a crime; or
(b) The offense committed or attempted by such person was a felony and that, in the course of resisting arrest therefor or attempting to escape from custody, such person is armed with a firearm or deadly weapon; or
(c) Regardless of the particular offense which is the subject of the arrest or attempted escape, the use of deadly physical force is necessary to defend the peace officer or another person from what the officer reasonably believes to be the use or imminent use of deadly physical force.
ute contains a similar paragraph which states in part that although an officer is justified under the provisions of the statute in the use of deadly force, "the statute does not constitute justification of reckless conduct by such officer amounting to an offense against or with respect to innocent persons whom he is not seeking to arrest or retain in custody."\[46\] The words "willful," "malicious," "reckless" and "criminal negligence" imply conduct which is more than simple negligence, an extreme departure from the exercise of ordinary care.\[47\] However, the Practice Commentary to the New York statute alters the usual meaning of "reckless," stating that the paragraph in question is "aimed at protecting the innocent bystander from police action which, though in the line of duty, is performed recklessly or negligently."\[48\] The General Assembly of North Carolina did not follow the New York interpretation on this point. The General Assembly modified the original draft of the paragraph "by striking out the reference to 'reckless' conduct by an arresting officer and inserting instead that the subdivision did not justify 'willful' or 'malicious' conduct."\[49\] The Official Commentary to the North Carolina Statute fails to explain the meaning of the lan-

2. The fact that a peace officer is justified in using deadly physical force under circumstances prescribed in paragraphs (a) and (b) of subdivision one does not constitute justification for reckless conduct by such peace officer amounting to an offense against or with respect to innocent persons whom he is not seeking to arrest or retain in custody.
3. A person who has been directed by a peace officer to assist such peace officer to effect an arrest or to prevent an escape from custody may use physical force, other than deadly physical force, when and to the extent that he reasonably believes such to be necessary to carry out such peace officer's direction, unless he knows that the arrest or prospective arrest is not or was not authorized and he may use deadly physical force under such circumstances when:

(a) He reasonably believes such to be necessary to defend himself or a third person from what he reasonably believes to be the use or imminent use of deadly physical force under the circumstances.

45. Criminal Process, supra note 41, at 413.
46. N.Y. Penal Law § 35.30 (McKinney 1967) (emphasis supplied).
47. Black's Law Dictionary 932 (5th ed. 1979). ("The usual meaning assigned to 'willful,' 'wanton' or 'reckless' . . . is that the actor has intentionally done an act of an unreasonable character in disregard of a risk known to him or so obvious that he must be taken to have been aware of it and so great as to make it highly probable that harm would follow.")
49. Criminal Process, supra note 41, at 413.
guage used in the paragraph. Professor Corbett suggests that the final paragraph of G.S. § 15A-401(d)(2) "makes explicit in the negative, the positive implications of the authorizing statute's statement that it must appear to be 'reasonably necessary' to use deadly force. Since the apparent necessity is assessed from the officer's perspective, this added paragraph sets the minimum standards of reasonableness for the officer's exercise in judgment." 51

Under G.S. § 15A-401(d)(2), the use of deadly force to effect an arrest is justified if deadly force is, or reasonably appears to the officer to be, necessary to: (a) defend himself or a third party from the imminent use of deadly force by the suspect; (b) to prevent escape of a person who is using deadly force as means to escape or else the use of deadly force is reasonably believed to represent a threat of imminent bodily harm to another; or (c) to prevent the escape of one in custody as a result of a conviction of a felony. 52 The statute expressly denies authorization of the use of deadly force if the force used constitutes willful, malicious or criminally negligent conduct which injures or endangers any person or property. 53 Similarly, the statute expressly denies authorization of the use of unreasonable or excessive force. 54

Thus, under the statute, a law enforcement officer in North Carolina is not justified in the use of deadly force if his conduct amounts to willful, malicious or criminally negligent conduct. 55 The commonly used example is a police officer who fires into a crowded street at an armed and fleeing suspect. 56 Despite that the officer may actually believe the use of deadly force is reasonably necessary in the situation, his conduct is "in disregard of a risk so obvious that he must be taken to have been aware of it and so great as to make it highly probable that harm would follow." 57 This much is "explicit in the negative." 58 Here the law enforcement officer is not justified in the use of deadly force and civil liability attaches for any injury to innocent bystanders. 59

51. Criminal Process, supra note 41, at 401 (emphasis supplied).
53. Id.
54. Id.
55. Id.; Criminal Process, supra note 41, at 401.
56. Id.
57. BLACKS LAW DICTIONARY 932 (5th ed. 1979); see supra note 47.
58. Criminal Process, supra note 41, at 401.
59. Id.
The statute's application is less clear to a police officer who fires into an empty street at an armed and fleeing suspect and the bullet passes into a nearby shop, injuring a shopkeeper. Assuming the officer believed the use of deadly force was reasonably necessary and absent some actual or imputed knowledge that he would injure the shopkeeper, the officer's conduct would amount to neither criminal negligence nor "willful or malicious conduct which endangers any person or property." The officer's conduct conforms to the minimum standards of reasonableness of the statute.

Upon these facts, the courts should construe G.S. § 15A-401(d)(2) to shield the officer from any criminal or civil liability arising from injuries sustained by the shopkeeper. In a recent New York case, the New York Supreme Court applied New York Penal Law § 35.30 to an analogous situation. It is clear from Professor Corbett's commentary that G.S. § 15A-401(d)(2) was patterned after the New York law. Thus, an analysis of the New York statute is helpful in ascertaining the scope of the privilege conferred upon a law enforcement officer by G.S. § 15A-401(d)(2). The defendant in the New York case asserted that his shooting of a fleeing robber was per se justified under New York Penal Law § 35.30 and, therefore, he could not be subject to criminal prosecution by an injured innocent bystander. The defendant was charged with reckless endangerment and negligent assault; the New York Supreme Court dismissed the negligent assault charge but allowed the reckless endangerment charge to stand. The Court noted that New York Penal Law § 35.30 is an amended statute. While the statute's predecessor allowed liability to attach for negligent conduct, the amended statute's language eliminates negligent conduct as a predicate for liability. Any confusion with respect to the

60. Id.; see supra note 47.
61. Id.
63. Id. (The defendant, a 64 year old civilian robbery victim, was charged with reckless endangerment arising from his shooting of a passerby as he was attempting to stop a fleeing robber. The defendant contended that § 35.30 shielded him from criminal liability arising out of the injuries incurred by the passerby.)
64. Criminal Process, supra note 41, at 413.
66. Id. at 619.
67. Id. at 618.
68. Id. The New York Court expressly rejects the Practice Commentary's alteration of the usual meaning of "reckless." See supra text accompanying note 48. It can be inferred that the use of "reckless" in the New York statute is substan-
statute on this point is caused by the Practice Commentary which accompanies the New York statute.\textsuperscript{69} Despite the change in the statute's language, the Practice Commentary has remained unchanged since the amendment of New York Penal Law § 35.30.\textsuperscript{70} The New York Court concluded that the legislative amendment was both rational and deliberate,\textsuperscript{71} and accordingly, with respect to negligent assault, a police officer would be shielded from liability.\textsuperscript{72} An analysis of the North Carolina statute should yield the same result. The intent of the General Assembly of North Carolina, as gleaned from the legislative history and the literal reading of the statute,\textsuperscript{73} is the same as that of the legislature of the State of New York: to shield law enforcement officers from liability arising from their negligent use of deadly force but not with respect to their reckless use.\textsuperscript{74}

North Carolina has a long history of allowing liability to attach to law enforcement officers for acts which go beyond the limits of their authority.\textsuperscript{75} Indeed, several cases\textsuperscript{76} give one reason to believe that North Carolina case law conforms to the standard laid down by the Supreme Court of Michigan: "We know of no better standard to determine a claim of negligence on the part of a police officer than by comparing his conduct to the care which a reasonably prudent man would exercise in the discharge of official duties..."

tially equivalent to the use of "willful," "malicious" and "criminally negligent" in N.C. GEN. STAT. 15A-401(d)(2).

\textsuperscript{69.} Id.
\textsuperscript{70.} Id.
\textsuperscript{71.} Id. ("There is nothing inherently unreasonable in a decision by the Legislature to absolve anyone from criminal responsibility if he performs a lawful act in a negligent manner. There is of course, greater culpability when a person acts recklessly than when he acts negligently. Failure to perceive a risk is palpably less serious than consciously disregarding a risk.")
\textsuperscript{72.} Id. at 619.
\textsuperscript{73.} See supra text accompanying notes 43 through 51.
\textsuperscript{74.} Id.
\textsuperscript{75.} State v. Irick, 291 N.C. 480, 231 S.E.2d 833 (1977); Perry v. Gibson, 247 N.C. 212, 100 S.E.2d 341 (1957); Pierce v. Honeycutt, 216 N.C. 270, 4 S.E.2d 611 (1939); Sutton v. Williams, 199 N.C. 546, 155 S.E. 160 (1930); Hanie v. Rice, 194 N.C. 234, 139 S.E. 380 (1929); Sossoman v. Cruse, 133 N.C. 470, 477-478, 45 S.E. 757, 764 (1903) ("It behooves the officer[s] of the law to be very careful that they do not misbehave themselves in the discharge of their duty for if they do they may forfeit its special protection."); Furr v. Moss, 52 N.C. 527 (1860); State v. Stallcup, 24 N.C. 50 (1841).
\textsuperscript{76.} Id.
in like circumstances." Nevertheless, the Supreme Court of North Carolina, in looking at both prior case law and Professor Corbett's analysis, has concluded that G.S. § 15A-401(d)(2) "was designed to codify and clarify those situations, in which a police officer may use deadly force without fear of civil or criminal liability." There is no reason to conclude that G.S. § 15A-401(d)(2) does not set down the standard of care required of law enforcement officers in the use of deadly force.

The rationale behind the common law justification for the use of deadly force against felons was premised on the idea that a felon, faced with imminent capture, would present a serious threat to the safety of society. Only in situations in which the threat of injury to the public was likely did the common law allow law enforcement officers the use of deadly force. The rationale of the modern rules regarding the justified use of deadly force by law enforcement officers is the same as that of the common law. Deadly force may be directed at those individuals who present an imminent threat to the safety of the public. At common law, felons presented such a threat. Today, legislatures have specified the situations in which the use of deadly force is authorized. The North Carolina statute reflects the Model Penal Code view that the use of deadly force is justified only against dangerous criminals—the armed escapee fleeing his captors by means of deadly force; the person who poses an imminent threat of serious injury to the officer or a third party; or the escaped convicted felon.

The fundamental problem which faces legislatures in formulating rules of law to govern the use of deadly force by law enforcement officers is the balancing of two important social policies. Modern society requires effective law enforcement. To the extent that rules of conduct for law enforcement officers inhibit the effective enforcement of the law and protection of the public, society loses. However, to the extent that the rules of conduct allow reckless and indiscriminate behavior on the part of law enforcement personnel, society also loses. Invariably the rules of law enacted by the legislatures on the justified use of deadly weapons by law en-

79. Holloway v. Moser, 193 N.C. 185, 187, 136 S.E. 375, 376 (1927); see supra note 18.
80. Id.
81. Liability of Police Officers, supra note 8, at 402.
82. Id.
Enforcement officers represent a balancing of these conflicting social goals. Subdivision 2 of New York Penal Code § 35.30 is designed to protect the innocent bystander from police action which is performed recklessly, although in the line of duty. Both the legislative history and the legal import of the language selected by the General Assembly of North Carolina indicate that the paragraph added to G.S. 15A-401(d)(2) was similarly intended. The General Assembly also intended that efficient law enforcement not be inhibited by the threat of civil suit against a police officer. The addition of the paragraph to the statute is based upon the belief that good social policy requires a law enforcement officer be authorized to employ deadly force if that officer reasonably believes deadly force is necessary to capture a dangerous criminal. The police officer is shielded from liability to injured innocent bystanders so long as the officer's conduct conforms to the requirements of G.S. § 15A-401(d)(2) and does not amount to willful disregard of the safety of others. The effect of the added paragraph is to erect a tort liability shield for the North Carolina law enforcement officer's use of deadly force.

The implications which arise from a finding of a tort privilege for North Carolina's law enforcement officers in the negligent use of a deadly weapon are too far reaching to be explored fully in this comment. However, the existence of a tort privilege plays an important role in the availability of recovery for the injured innocent bystander in two situations: claims arising under the North Carolina Tort Claims Act and claims arising under Chapter 42 United States Code Section 1983.

84. See supra text accompanying notes 43 through 51 and 61 through 74.
86. See supra text accompanying notes 43 through 51 and notes 61 through 74.
§ 1983: 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 persons 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 proceeding for redress.
Under the North Carolina Tort Claims Act, a plaintiff may sue the State of North Carolina if the injury complained of was the proximate result of the negligence of a state employee or agency; if the state employee or agency was acting within the scope of employment; and if the plaintiff was free of contributory negligence. Negligence under the Tort Claims Act is defined by common law principles, and essentially is a failure to use due care or to act as a reasonable and prudent person would act under like circumstances. Gross negligence, on the other hand, is conduct in which the actor is cognizant of the probable consequences of his actions but nevertheless acts in disregard of these consequences. Contributory negligence is no defense to a claim of gross negligence. It has been held that because contributory negligence is a bar to recovery under the Tort Claims Act, it follows that there is no recovery under the Act for gross negligence. For example, the Tort Claims Act has been invoked to hold the State liable for the negligent discharge of a firearm by a highway patrolman, but recovery under the Act has been denied for the intentional discharge of a firearm by a highway patrolman.

G.S. § 15A-401(d)(2) authorizes the use of deadly force, creating a tort privilege and removing any claim of negligence by an injured suspect. Similarly, the last paragraph of G.S. § 15A-401(d)(2) creates a tort privilege with respect to an injured innocent bystander. G.S. § 15A-401(d)(2) authorizes the use of deadly force in certain specified situations in which deadly force is or ap-

89. TORT CLAIMS ACT, supra note 87.
93. BLACK'S LAW DICTIONARY 932 (5th ed. 1979); see supra note 47.
94. Torts, supra note 90, at 566.
95. Id.; see Jenkins v Dept. of Motor Vehicles, 244 N.C. 560, 564, 94 S.E.2d 577, 581 (1956) (“That contributory negligence is made a defense lends powerful support to the view that the negligent acts contemplated are those to which contributory negligence is no defense.”).
96. Lowe v. Dept. of Motor Vehicles, 244 N.C. 353, 93 S.E.2d 448 (1956).
99. See supra text accompanying notes 43 through 51 and 61 through 74.
pears to be necessary to effect an arrest or to protect life or limb. Only if the patrolman's use of deadly force is willful, malicious or criminally negligent will his actions be unauthorized and not privileged under the statute. So long as the officer's conduct is privileged there is no actionable negligence. Without actionable negligence, there can be no recovery under the Tort Claims Act. Similarly, because there is no recovery under the Tort Claims Act for gross negligence, it follows that if the officer's conduct is willful, malicious or criminally negligent, and thereby is not privileged, recovery under the Act will also be denied.

The provisions of G.S. § 15A-401(d)(2) also affect recovery by a claimant under Section 1983 of the United States Code. Traditionally, suits against law enforcement officers have been the province of state courts. More recently, however, Section 1983 has been invoked as a tort remedy by parties injured by the acts of law enforcement officers. In applying Section 1983, federal courts have declared they are bound neither by state tort law nor any defenses of privilege which state law may provide. This approach is necessary to fulfill the purpose of Section 1983, to afford a federal claim of relief for injuries arising out of the misconduct of a state official acting under the color and protection of state law. Conceivably, therefore, an injured bystander, who has been denied recovery from the State or from the individual officer, might seek recovery under Section 1983. Yet federal courts have recognized that there is no general federal tort law and that not every tort action arising under Section 1983 can be construed with reference to constitutional standards.

Several federal cases deal with the application of Section

101. Id.
103. Torts, supra note 90, at 565.
104. Torts, supra note 90, at 566; see supra note 98.
106. Use of Deadly Force, supra note 4, at 655.
107. Id.
109. Id. (The conduct of law enforcement officers and other state officials is subject to the standards demanded by the Constitution regardless of the requirements and the application of state law.)
111. Garner v. Memphis Police Dept., 600 F.2d 52 (6th Cir. 1979); Wiley v.
1983 to suits arising from the use of deadly force by law enforcement officers in which the use of deadly force was privileged under state law. Referring to the privilege granted by a state statute, the Sixth Circuit Court of Appeals declared that although the federal courts are not bound "by whatever privilege state law may afford to the officer, we are still by no means free to elevate whatever view of the privilege we think to be preferable to the Constitutional standards envisioned by Section 1983." In applying the privilege to the use of deadly force in Section 1983 actions, federal courts must make a "studied attempt to weigh the competing interests in the light of historical and current cases and commentaries to arrive at a scope of the privilege." Despite a court's desire to require a state to conform to the Model Penal Code, a state's interest in the exercise of its police power must be recognized. So long as the application of the statutorily created privilege does not violate constitutional standards, "the states must be given leeway in the administration of justice, at least insofar as determining the scope of such an unsettled rule as an arresting officer's privilege for the use of deadly force." Federal courts are bound to observe a privilege in the use of deadly force so long as that privilege does not conflict with constitutional standards. Federal courts may be unwilling to limit the scope of privileges allowed at state law for the use of deadly force in Section 1983 actions. So long as the privilege conferred by the North Carolina legislature does not violate federal constitutional standards, it does not conflict with Section 1983. Therefore, recovery by a party, injured as a result of the use of deadly force by a North Carolina law enforce-


112. Id. These cases deal with the privileged use of deadly force under TENN. CODE ANN. § 40-808 (1975): "Resistance of Officer... If after notice of intention of arrest, the defendant either flees or forcibly resists, the officer may use all the force necessary to effect the arrest."


115. Id.

116. Id.

117. Id.

118. Id.

119. Id.

120. Id.

121. Id.
ment officer, may be denied.

G.S. § 15A-401(d)(2) has done much to clarify the situations in which a law enforcement officer may use deadly force without fear of civil or criminal liability. However, the final paragraph of G.S. § 15A-401(d)(2) does not clearly set forth the scope of the privilege for the use of deadly force authorized by the statute. By design, the statute contains the words "willful," "malicious" and "criminal negligence." These words have well established legal meanings which imply conduct which is beyond that of simple negligence. Taken in the context of the statute's legislative history, the learned commentary of Professor Corbett, the statements of the Supreme Court of North Carolina and the judicial interpretation of the analogous New York statute, North Carolina law enforcement officers appear to have been granted a tort privilege in the use of deadly force which exceeds the scope of any similar privilege granted by common law.

North Carolina has a long history of allowing liability to attach to law enforcement officers for acts which go beyond the limits of their authority. There is little indication that a law enforcement officer of this State has ever enjoyed as wide a privilege against civil liability arising out of the use of deadly force. It is ironic that a law enforcement officer, whom society expects to be trained and well versed in the use of firearms and arrest procedures should be held to a lower standard of accountability than the ordinary prudent person. A firearm is a dangerous instrumental-ity; when handled in public, the likelihood of injuries resulting from its negligent use is great. However, G.S. § 15A-401(d)(2) is not directed at the public but toward the law enforcement officers of North Carolina. In the words of the Supreme Court of North Carolina, the statute was "drafted to codify and clarify those situa-
tions in which a police officer may use deadly force without fear of civil or criminal liability.\textsuperscript{131}

CONCLUSION

Society has a keen interest in seeing that certain armed and otherwise dangerous criminals not be allowed to run free among the public. The likelihood that armed and dangerous persons will inflict injury upon society is great; therefore, these persons should be arrested as soon as possible. In order to effectively apprehend these persons, the State's law enforcement officers must be allowed to employ that amount of force that is reasonably necessary to effect an arrest and protect themselves and the public. All criminals are not armed and dangerous, and even those who are do not always create situations which require the use of deadly force. G.S. § 15A-401(d)(2) sets forth the conditions in which the use of deadly force by a law enforcement officer is privileged. An officer is authorized to use deadly force against only dangerous individuals\textsuperscript{132} and only if the officer reasonably believes the use of deadly force is necessary.\textsuperscript{133} To the extent that these factors are present and to the extent that the officer's conduct does not amount to some form of gross negligence, the officer's use of deadly force is privileged. The privilege extends to both civil and criminal liability which may have attached otherwise.\textsuperscript{134}

In interpreting a statute, courts must adhere to the intent of the legislature.\textsuperscript{135} The best indicia of the legislative intent are "the language of the act, the spirit of the act, and what the act seeks to accomplish."\textsuperscript{136} From these indicia, it is apparent the General Assembly of North Carolina, in weighing competing societal interests,\textsuperscript{137} concluded that society is best served when trained law en-

\textsuperscript{133} Id.
\textsuperscript{134} Criminal Process, supra note 41, at 413.
\textsuperscript{135} In re North Carolina Savings and Loan League, 302 N.C. 458, 467, 276 S.E.2d 404, 410 (1981).
\textsuperscript{136} Id., quoting Stevenson v. City of Durham, 281 N.C. 300, 303, 188 S.E.2d 281, 283 (1972); see also, In re Hardy, 294 N.C. 90, 240 S.E.2d 367 (1978).
\textsuperscript{137} Liability of Police Officers, supra note 8, at 400-401. ("The fundamental problem which the court must resolve in setting down a rule of law to govern police conduct is the balancing of possible inefficiencies in the apprehension of criminals resulting from the police officer's fear that society will have no remedy for the wanton despotic use of the force which is placed at the police officer's
forcement officers are authorized to employ deadly force against dangerous criminals without fear of being subjected to civil liability for their actions.\textsuperscript{138} To the extent the tort privilege conferred by G.S. § 15A-401(d)(2) removes the possibility of civil suit, the efficiency of the officer is enhanced and the likelihood a dangerous criminal will run free is decreased. It is unfortunate the statute is not more clear on this point. The existence of a statutory tort privilege which exceeds any allowed at common law should be expressed more clearly. Because of the ambiguity of the last paragraph of G.S. § 15A-401(d)(2),\textsuperscript{139} the existence of the tort privilege is not readily apparent and thus is subject to misinterpretation by courts, law enforcement officers and other civil authorities.\textsuperscript{140}

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\textsuperscript{138} It can be rationally asserted that the likelihood that a dangerous criminal will inflict injury upon society is greater than the likelihood that a trained law enforcement officer will negligently injure an innocent bystander while acting in conformity with N.C. GEN. STAT. § 15A-401(d)(2) (1978).

\textsuperscript{139} N.C. GEN. STAT. § 15A-401(d)(2) (1978): Nothing in this subdivision constitutes justification for willful, malicious, or criminally negligent conduct by any person which injures or endangers any person or property, nor shall it be construed to excuse or justify the use of unreasonable or excessive force.

\textsuperscript{140} N.C. GEN. STAT. § 15A-401(d) (2) should be amended by adding a sentence to the last paragraph of subdivision (2) so that the paragraph will read: Nothing in this subdivision constitutes justification for willful, malicious, or criminally negligent conduct by any person which injures or endangers any person or property, nor shall it be construed to excuse or justify the use of unreasonable or excessive force. \textit{Use of deadly force in compliance with this subdivision constitutes a privilege in favor of the officer against any criminal or civil liability resulting therefrom.}\n
This additional sentence should make clear the scope of the privilege conferred upon the law enforcement officer in the use of deadly force and should prevent the misinterpretation of the legislative intent behind the statute as enacted.