

The Legal Test for Use of Force in Police Misconduct Proceedings

Dr Clare Torrible, University of Bristol Law School

This research concerns the legal test for 'use of force' in police misconduct proceedings. It confirms that the regulatory test of 'necessary, proportionate and reasonable in all the circumstances' should be retained but with guidance that the boundaries set by the civil law should be among the issues considered in applying the test.

About the research

In a recent case commonly known as *W80* the Supreme Court ruled that applying the criminal-law test to police misconduct processes in relation to the 'use of force' would be contrary to the 'fundamental purpose of the discipline system to contribute to learning and development for both officers and the police'.

This research combines scrutiny of reforms to the police conduct system over the last 30 years with analysis of the arguments adopted by the Supreme Court in *W80*. The results confirm that neither the criminal nor civil legal tests should apply to police misconduct proceedings for 'use of force'. Instead, these proceedings should be treated as unique (*sui generis*) and subject to a bespoke test that accommodates the complex nature of policing and the multiple and potentially conflicting functions of the misconduct process.

The findings also point to policy recommendations regarding (relatively easy) data-gathering processes that will support cultural change regarding how forces handle conduct issues and enhance evidence-based approaches to police training and lesson-learning.

Policy recommendations

- Misconduct proceedings for police 'use of force' are unique (*sui generis*) and the test of 'necessary, proportionate and reasonable in all the circumstances' should apply.
- In applying the test the boundaries set by civil law (in terms of assault, unlawful arrest, and reasonable force) should be taken into account.
- Data from civil actions against the police for assault, wrongful arrest, false imprisonment and malicious prosecution (police actions) should be assessed alongside misconduct outcomes to enhance understanding and support policing by consent.
- Police and Crime Commissioners' (PCCs') duties should be extended to include collation and publication of data relating to police actions in a standardised form, and the provision of detailed police actions data to the Independent Office of Police Conduct (IOPC).
- PCCs should be required to review police actions within their forces that include claims for malicious prosecution and/or exemplary or aggravated damages and publish an annual report confirming that they are content with the correlative lesson learning and disciplinary outcomes for officers.

Key findings

The test for misconduct for 'use of force' is pivotal in structuring the practical boundaries of officer conduct. It also underpins the culture and ethos of police training and police relationships with citizens. In *W80* the NPCC argued for a test which does not support individual and organisational learning, and a police training officer has described National Decision Making model as a "get out of jail free card". A test is required that supports transparency and cultural change at every level.

The police misconduct process seeks to strike a balance between fairness to officers, protection of the public, maintenance of public confidence and enhancement of lesson learning. Fairness to officers requires that their beliefs are given substantial consideration, but a primary focus on officers' beliefs cannot support public protection or public confidence. A test with this primary focus also narrows inquiry both physically and temporally, reducing transparency in reasoning

and limiting the scope and quality of the lessons that can be learned.

A 1997 case (commonly known as *Thompson and Hsu*) impacted the ease with which police actions can be settled and has, over time, reduced a focus within the misconduct process on the lawfulness of officers' conduct. This has allowed a disproportionate emphasis on police officer training within misconduct reasoning. Such an emphasis gives police trainers inappropriate constitutional power concerning the circumstances and manner in which officers may interfere with citizens' rights.

The test of 'necessary, proportionate and reasonable in all the circumstances' with supplementary guidance that requires consideration be given to the constitutional protections provided by the civil law is necessary to redress this balance and support transparency and cultural change at all levels.



Photo by Francois Olwage for Unsplash

Further information

Torrible, C., 2023. Policing, citizenship and the civil courts: how increased settlement of civil claims has impacted police accountability. *Legal Studies*, 43(4), pp.603-623.

Torrible, C., 2024. R (on the application of W80) v Director General of the Independent Office of Police Conduct: Landmark Ruling or Business as Usual?. *The Modern Law Review*.

Additional Notes

The full citation for *W80* is *R (on the application of W80) v Director General of the Independent Office for Police Conduct [2023] 1 WLR 2300*.

The full citation for *Thompson and Hsu* is *Thompson v Commissioner of Police of the Metropolis, Hsu v Same [1998] QB 498*.

Contact the researcher

[Dr Clare Torrible](mailto:Clare.Torrible@bristol.ac.uk), University of Bristol Law School, Clare.Torrible@bristol.ac.uk