The Use of Deadly Force in the Apprehension of Fugitives from Arrest

A peace officer is permitted under some circumstances to use deadly force[1] in making an arrest. Any resistance on the part of the suspect, for example, may be met by deadly force if the officer reasonably believes that it is necessary to protect himself or others under his protection.[2] As well, it is sometimes justifiable to use deadly force in order to apprehend someone who flees from arrest.[3] It is the latter aspect of the question which will be treated in this note. An attempt will be made to assess the relevant Canadian law, often by means of a comparison with that of the United States, under four main headings: (1) Occasions when deadly force is necessary; (2) The application of deadly force to misdemeanants; (3) The grounds for arrest: reasonable and probable or certain; (4) Categories of offences which should permit deadly force when necessary.

1. Occasions when deadly force is necessary.

Section 25(4) of the Criminal Code,[4] which sets out the Canadian law on the subject, makes it evident that a peace officer, far from being entitled to employ whatever means and methods he chooses to prevent the escape of an offender who takes flight to avoid arrest, may only use such force as is necessary. Deadly force may be used except where "the escape can be prevented by reasonable means in a less violent manner". Since the meaning of this latter clause of the article depends ultimately on the facts of each case, it is important to see how it has been interpreted by the courts.

In *R.* v. *Smith*,[5] the accused, a police officer, attempted to arrest without a warrant a man whom he believed, on reasonable and probable grounds, to be guilty of theft. The suspect, upon catching

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[1] The expression "deadly force" refers to force which may result in death.

[2] Sec. 25(1) and (3) Cr. C.

[3] Sec. 25(4) Cr. C.

[4] "A peace officer who is proceeding lawfully to arrest, with or without warrant, any person for an offence for which that person may be arrested without warrant, and everyone lawfully assisting the peace officer, is justified, if the person to be arrested takes flight to avoid arrest, in using as much force as is necessary to prevent the escape by flight unless the escape can be prevented by reasonable means in a less violent manner."

[5] (1907), 17 Man. L.R. 282, 13 C.C.C. 326.

sight of the accused, fled. After firing several shots in an unsuccessful attempt to induce him to surrender, the accused, becoming exhausted, and allegedly believing that the suspect, then about twenty-five yards ahead of him, was about to escape, fired at him with the object of wounding him in the leg. The revolver was unintentionally pointed too high and the bullet struck the deceased in the head, killing him instantly.

In his directions to the jury Mr. Justice Perdue of the Manitoba Court of King's Bench instructed them to consider whether the accused could have apprehended the suspect by any other means than by shooting him. He emphasized that:

> Shooting is the very last resort. Only in the last extremity should a peace officer resort to such a dangerous weapon as a revolver in order to prevent the escape of an accused person who is attempting to escape by flight.
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> A man who is fleeing from lawful arrest may be tripped up, thrown down, struck with a cudgel and knocked over if it is necessary to do so to prevent his escape, and if he strikes his head on a stone and is killed the police officer is absolved because the man was fleeing to escape lawful arrest and the means taken to stop him were not dangerous and not likely in themselves to cause his death. But firing at a man with a revolver may result in the death of the man, as it did in this case, although the intention was only to wound and so prevent his escape.[6]

His Lordship told the jury that they had to consider what assistance was within immediate reach of Smith. Noting that it is the duty of every citizen to assist in the pursuit and capture of a criminal fleeing arrest when so called upon by a peace officer, Perdue, J., said:

> You will have to consider whether Smith, if he had not had that revolver or had kept it in his pocket, might not have called to his assistance persons on the street who would have joined him in the pursuit and have prevented [the] escape. You will consider whether firing with the revolver did or did not deter them from rendering assistance. You will also have to consider whether Smith should have abandoned the pursuit of Gans at that time. He says his breath failed, his wind was gone; but should he have called upon some of the other persons who were running behind him, and have asked them to follow... and keep him in sight until another policeman came up? You will have to consider if the escape... could have been prevented by such means.[7]

At the request of counsel for the defence, his Lordship further explained to the jury that the escape referred to in sec. 41[8] meant escape from the flight then going on and that the possibility of the fugitive being found and apprehended subsequently need not be

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[6] *Ibid.*, at p. 330.
[7] *Ibid.*, at pp. 330-331.
[8] Now sec. 25(4).

considered. After deliberation, the jury brought in a verdict acquitting the accused on a charge of manslaughter.

Similarly, in *R.* v. *Purvis*,[9] a policeman was declared to have justifiably used deadly force. Two men who had escaped from jail and had subsequently committed various offenses and who were believed to be dangerous, armed and likely to offer resistance if any attempt were made to arrest them, were being sought by a squad of heavily armed policemen. The two suspects were finally confronted, but while being questioned by the officers, the accused and others saw one of the suspects raise his arm with something in his hand which looked to them like a gun. One officer grabbed hold of his arm, but the suspect broke away and started to run; in pursuit, the accused fired two warning shots in the air which had no effect. Intending only to stop the suspect's flight, the accused then fired two more shots, this time at the lower part of the escaping man's legs, but the shots killed him.

In acquitting Purvis of a charge of criminal negligence, Swayze, J., declared himself satisfied that, in the circumstances, every reasonable means of making the arrest in a less violent manner had been exhausted before shooting and that, at that moment, no other effective means of force was available. Nonetheless, it was pointed out that the accused might have been found guilty had any of the various circumstances developed in the evidence been wanting and it was stressed at the end of the decision that:

> The fatal result of the shooting by the accused is most regrettable and could not be allowed to go unchallenged. It is to be hoped that he and all other peace officers will be warned of the great risk they take in resorting to firearms in pursuing a fleeing criminal. Only in very exceptional cases should this course be adopted, in view of the fact that the officer in so doing may be called upon to justify the shooting in a criminal action, as the accused in this case has been.[9a]

Vignitch v. *Bond* [10] is an example of a situation where a court ruled that the application of deadly force was not neccessary in order to apprehend the fugitive. As the plaintiff was leaving a railway yard, allegedly with stolen property, the defendant, a C.P.R. constable, struck him twice on the head with his gun, stunning him and causing him to fall. After plaintiff regained his feet and while he was rubbing blood from his face the constable shot and wounded him. In awarding damages in a civil action Adamson, J., referred with approval to *R.* v. *Smith*:[10a]

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[9] (1929), 51 C.C.C. 273.

[9a] *Ibid.*, at p. 293.

[10] (1928), 37 Man. L.R. 435, [1928] 1 W.W.R. 449, 50 C.C.C. 273.

[10a] (1907), 17 Man. L.R. 282, 13 C.C.C. 326.

> ...I heartily concur in the statement... that "shooting is the very last resort." In the present instance it seems to me that it was not done as a last resort. Bond had not attempted to pursue the plaintiff, he had not called upon anyone to assist him, he had not attempted to handle the plaintiff after he struck him with his gun. There is some evidence that the shooting kept people from coming to his assistance though they were not called upon. Shooting a gun off, even as a threat or warning or attempted intimidation should not be lightly resorted to in a closely built up part of the city... I have found that there was no "flight to avoid arrest," and even if there was, I find that the escape of the plaintiff could have been prevented by reasonable means and in a less violent manner than by shooting him through the body.[11]

Cases have also been reported in which deadly force was used in the course of a lawful arrest without a deliberate intention either to wound or to kill but in which death accidentally resulted.

The Supreme Court of Canada has held that it is permissible to fire warning shots into the air or the ground in order to induce the person fleeing to surrender. In *Savard* v. *R.*,[12] Guénette, a fleeing suspect, was struck by a bullet fired by a member of the R.C.M.P. when warning shots had been fired into the air and ground. In the course of quashing a conviction for manslaughter, Mr. Justice Taschereau stated:

> Sans doute, les trois constables qui poursuivaient Guénette se sont entendus, tacitement ou autrement, pour tirer des coups de feu dans l'air ou sous le sol, afin d'inspirer au fugitif une crainte salutaire, qui peut-être le pousserait à se livrer aux officiers de justice, et cette entente demeure jusqu'ici dans les cadres de la stricte légalité. Rien en effet ne défend à des constables, autorisés à porter des armes, de s'en servir pour les fins que je viens de mentionner.[13]

The right to fire shots into the ground has occasionally had unfortunate results for those who have chosen to flee.

In *Maratzear* v. *C.P.R.*,[14] a civil action, two constables charged with investigating thefts of merchandise from railway cars, had seen two persons enter one of the cars and throw bales of merchandise onto the ground. When the suspects jumped from the car and began to flee, the constables, in pursuit, first shouted at them to stop and then fired a shot in the air but to no avail. Realizing all the while that the suspects were on the verge of escaping, a second shot was fired into the ground. The bullet ricocheted, and struck one suspect, who later died from the wound. In an appeal to the Quebec Court of Review from an earlier dismissal of an action for damages, De Lorimier, J., said:

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[11] *Ibid.*, at pp. 280-281.

[12] [1946] S.C.R. 20, (1945), 85 C.C.C. 254, 1 C.R. 105, [1946] 3 D.L.R. 468.

[13] *Ibid.*, at p. 31.

[14] (1920), 27 R.L. 81, 37 C.C.C. 297.

> La preuve démontre d'une manière évidente que le mari de la demanderesse était un voleur opérant de nuit et qu'il a fait tout ce qu'il a pu pour éviter son arrestation, et que si l'officier de la paix ne l'avait pas atteint de la balle de son revolver, il se serait échappé. Les constables ont rempli le désir de la loi dans les circonstances... [Ils ont] eu raison.[15]

In *Merin* v. *Ross*,[16] the defendant police officer, suspecting the driver of a car of breaking into a shop, arrived at the garage from which he was satisfied the car had come just in time to see a man emerge who was wearing the same kind of hat as he had observed the driver of the car to be wearing. After shouting that he was a police officer, and ordering the man, who by this time had been joined by two other men who also fled, to stop, he fired several shots in the air and, while under a viaduct, on the ground behind the men running ahead of him. One of the shots ricocheted and killed the principal suspect.

Mr. Justice Fisher of the British Columbia Supreme Court stated:

> It seems to be clear that if such escape could have been prevented by reasonable means in a less violent manner, the shooting should not have been resorted to. It is suggested that the defendant might have stopped and got the name and address of the driver of the car... or in any case should have done nothing more than to fire in the air but I cannot see that it is reasonable to believe that the escape could have been thus prevented or by any other reasonable means in a less violent manner. There is undoubtedly a principle here involved which concerns the rights of both the public and the individuals concerned. The result is greatly to be regretted and one might very naturally sympathize with the relatives of the deceased but the duty and rights of the police in protecting public interests must be considered and, though I would like not to part with this case without emphasizing what was said by the court in the *Smith* case... that "shooting is the very last resort," I must find in the present case that the defendant in shooting as he did was acting within his rights in a proper manner and doing no more than his duty required him to do in the circumstances while engaged in protecting public interests. The defendant's plea of justification is therefore sustained and the action is dismissed.[17]

On the other hand, in two more recent decisions, the courts have reached different conclusions. In *Woodward* v. *Begbie*,[18] plaintiff, who was loitering or prowling at night "upon the property of another person near a dwelling house situated on that property" contrary to s. 162 Cr. C. took flight when defendant police officers attempted to apprehend him. Both officers gave chase and fired shots at the ground, one of which pierced plaintiff's thigh. In the

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[15] *Ibid.*, at p. 87.

[16] (1932), 46 B.C.R. 471, [1933] 1 W.W.R. 109, 60 C.C.C. 18.

[17] *Ibid.*, at pp. 21-22 (C.C.C.).

[18] [1962] O.R. 60, (1961), 132 C.C.C. 145, 31 D.L.R. (2d) 22.

action for assault, McLennan, J., of the Ontario High Court held that the circumstances did not justify the use of guns. At the time when the first shot was fired, it could hardly have been apparent that the plaintiff was going to escape. When the second shot was fired one of the officers was already overtaking the plaintiff. Although the defendants did not intend to hit the plaintiff, the shooting was negligent and both defendants were held liable.

In *Beim* v. *Goyer*,[19] the Supreme Court of Canada looked to the principles of civil responsibility to decide the issue without considering section 25(4) Cr. C. The defendant police officer and another constable saw the plaintiff driving an automobile which they knew to be stolen in the wrong direction on a one-way street. Ignoring their signals to stop and abandoning the car, the suspect fled across a rough, rocky field, partially covered with snow. The first constable to leave the police car fired several warning shots, but becoming exhausted, was forced to give up pursuit. The defendant, meanwhile, continued the chase and fired warning shots as well, though falling twice on the rough terrain. While he was preparing to fire still another shot into the air, he fell again and struck his elbow on the ground. The shot, which was discharged accidentally, struck the plaintiff and seriously injured him.

The majority of the Supreme Court considered the matter as one of pure negligence and found Goyer to be civilly liable. It has been submitted elsewhere [20] that the real issue in this case was not grasped, for to use the words of Martland, J., in his dissenting opinion, at p. 20:

> The issue which the jury should have been asked to determine was whether the conduct of the respondent, during his pursuit of the appellant, was negligent; and, in determining that issue, they should have been instructed that such conduct had to be considered in light of the fact that the appellant was seeking to escape arrest, and that the respondent was a peace officer, with the right defined in s. 25(4) of the *Criminal Code*. They should have been asked to determine whether, under those circumstances, it was negligent for the respondent to carry his revolver in his hand, and whether it was negligent for him to fire a warning shot in the course of pursuit without coming to a halt.

The author of the comment concludes that:

> Instead of being able to appreciate the nature of the duty of care owed by respondent to young Beim in the light of his duty to make an arrest, the circumstances were reduced by the trial judge to a pure consideration of conduct, accidental to the true question as to what action the policeman was allowed to take in this particular situation.[21]

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[19] [1965] S.C.R. 638, [1966] 4 C.C.C. 9, 57 D.L.R. (2d) 253.
[20] Leclerc, *Case and Comment: Beim* v. *Goyer*, (1967), 13 McGill L.J. 516.
[21] *Ibid.*, at p. 520.

It is submitted that the Supreme Court put this matter in its proper prospective. As Spence, J., noted, at p. 24:

> We are not really concerned at all with the provisions of s. 25 of the *Criminal Code* and the issue of justification. The Defendant has always sworn and made his whole defence upon the allegation that the Plaintiff was shot accidentally and there was no question of justification for the use of any degree of force. The matter is reduced to a pure question of negligence.

Constable Goyer had twice fallen while in pursuit, had himself fired two warning shots and did not intend to shoot at Beim since he knew, as the jury later answered, that the escape could have been prevented by reasonable means in a less violent manner. In fact, he specifically answered in reply to a question put to him by the jury, that he would not have fired voluntarily at Beim if his revolver had not gone off accidentally. He was clearly at fault because he failed to foresee that he could have stumbled again and accidentally discharged his revolver.

An automobile was used as a means of escape in *A.-G. Canada* v. *Sandford*.[22] Two constables in a patrol car observed an automobile stop at a service station which was closed. Suspecting some illegal purpose, they drew up beside the car to investigate. When one of the constables shone a flashlight on the driver and observed that there were several persons in the car, the vehicle suddenly sped off and the constables gave chase. One or two pistol shots were fired in the air and then several more shots were aimed at the rear tires of the car. The police car radioed ahead and another patrol car set up a partial road block. When the car broke through, the two policemen at the roadblock each fired two shots at the tires, one of which struck and killed an innocent passenger.

Thurlow, J., of the Exchequer Court felt that, in the circumstances, the officer who fired the fatal shot had not exhausted all other means at his command to prevent the escape. The police were in close pursuit and able to summon further assistance by car radio. The siren could have been used to warn drivers of other vehicles and thereby minimize the danger at intersections. Moreover, even assuming that there was no other reasonable means of preventing the escape of the driver and that the police officer could have justified shooting and killing him in an attempt to hit one of the tires, the officer was negligent in shooting as he did without due regard for the safety of the passengers.

On the other hand, in *Priestman* v. *Colangelo*,[23] the Supreme Court held that the death of innocent parties was not foreseeable.

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[22] [1957] Ex. C.R. 210, 118 C.C.C. 93, 11 D.L.R. (2d) 115.

[23] [1959] S.C.R. 615, 124 C.C.C. 1, 30 C.R. 209, 19 D.L.R. (2d) 1.

The defendant and another constable in a police car were pursuing a stolen vehicle driven by one Smythson. On three different occasions, the police car attempted to pass the stolen car and each time was cut off by Smythson. The third time, the police car was forced over the curb and was compelled to slow up in order to avoid colliding with a hydro pole. Thereupon, the defendant fired a warning shot in the air and Smythson accelerated. The cars were approaching a very busy intersection and the defendant attempted to steady his arm by placing it on the car window sill while he aimed his pistol in an attempt to deflate a rear tire of the fleeting car. As he fired, the patrol car went over a bump in the road, and the shot hit the rear window of Smythson's car, ricocheted and struck Smythson in the back of the neck, rendering him unconscious. The car went out of control and killed two young ladies.

The Supreme Court, by 3-2, dismissed the civil action, the majority taking the view that the principle that shooting is a last resort is too broadly stated and cannot be applied under all circumstances. In the words of Locke, J.:

> Applied literally, it would presumably mean in the present case that, being unable to get in front of the escaping car, due to the criminal acts of Smythson, the officers should have abandoned the chase and summoned all the available police forces to prevent the escape. This would have involved ignoring their obligation to endeavour to prevent injury to other members of the public at the intersections which would be reached within a few seconds by the escaping car.[24]

And then, adressing himself to the question of foreseeability, he stated, at p. 11:

> It was only the fact that the car struck a bump on the roadway, of the existence of which he was unaware, which elevated the revolver as the shot was fired that caused the bullet to pass through the rear window of the fleeing car and strike Smythson. Had the bullet hit the tire, presumably a blow-out would have resulted and the speed of the fleeing car reduced, so that the police car could have passed and then stopped it. There is no evidence that such a blow-out would have menaced the safety of persons 100 yards distant who were off the roadway, and I think this is not to be presumed.

Thus, where one attempts to make a lawful arrest and the arrestee flees, deadly force may only be deliberately employed as a last resort, provided all reasonable alternatives have been exhausted. If the pursuit is by foot, the officer must be aware that he may call upon local citizens who have a duty to assist him. This requirement, a relic of the days of the hue and cry, is unrealistic and should no longer be considered by the courts.

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[24] 124 C.C.C. at p. 10.

On the other hand, where the shooting is accidental, section 25(4) theoretically provides exoneration from civil in addition to criminal liability.[25] The usual means of flight are by foot and by car. If flight is by foot, there are two basic dangers: (1) a bullet may ricochet and strike the fugitive and (2) a bystander may be injured. In the first case, it should be sufficient for a policeman to show that shooting was a last resort. This situation could be largely avoided by restricting warning shots to those fired into the air, unless the chase takes place in an enclosed area. In the second case, however, it is insufficient to prove that shooting is a last resort. In addition to his duty to apprehend, a policeman has a duty not to do an act which a reasonable man placed in his position would foresee as likely to cause injury to persons in the vicinity.[26] Therefore, where flight is by foot he must bear in mind the danger to bystanders.

If the pursuit is by car, the police may shoot at the tires or at the driver, but, again, only as a last resort. They must consider roadblocks and radioing ahead for assistance as reasonable alternatives to shooting, balancing these latter alternatives against the danger which the fleeing car itself creates. They must bear in mind the possibility that if the tires or driver are hit, the car might go out of control and strike someone, an innocent passenger in the car may be shot, or a stray bullet might hit a bystander.

2. The Application of Deadly Force to Misdemeanants

In the United States, the general rule of law is that an arrestor can use such force as is necessary to effect the arrest of a misdemeanant, save deadly force. It is believed that, since every person's life is at least theoretically an asset to society, more would be gained

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[25] *Ibid.*, at p. 17.

[26] In the words of Locke, J., in the *Priestman* case, *ibid.*, at p. 8: "The performance of the duty imposed upon police officers to arrest offenders who have committed a crime and are fleeing to avoid arrest may, at times and of necessity, involve risk of injury to other members of the community. Such risk, *in the absence of a negligent or unreasonable exercise of such duty, is ... damnum sine injuria*". In *Poupart* v. *Lafortune*, unreported, C.S.M. 606,735, March 20, 1967 and presently under appeal, Mr. Justice Batshaw adopted a strict view of the nature of this duty. A bandit carrying a machine gun was walking backwards down a corridor when a policeman rushed in, fired and struck an innocent bystander. Batshaw, J., stated.

> While it is undoubtedly true that the atmosphere must have been charged with tension at the time, nevertheless it is precisely in such situations that a peace officer often has to perform his duties, in accordance with the training he has received. And he is expected to show a greater element of "sang froid" and control than an individual not so trained.

by preserving his life than by executing him. It is also felt that a misdemeanour is not a serious enough offence such that the police may kill the misdemeanant if they cannot arrest him. Thus, in *State* v. *Smith*,[27] the Court said:

> In such cases it is better, and more in consonance with modern notions regarding the sanctity of human life, that the offender escape than that his life be taken, in a case where the extreme penalty would be a trifling fine or a few days' imprisonment in jail.

In Canada, there is no statutory authority for the application of deadly force to a fleeing misdemeanant. The subject is mentioned in two reported cases. In *R.* v. *Purvis*,[28] where the deceased, serving a sentence for a misdemeanour, escaped from jail and proceeded to commit various indictable offences, Swayze, J., stated at p. 293:

> It is quite possible my judgment might have found the accused guilty had... the charge against the deceased... been for a misdemeanour.

In *Carrière* v. *Cité de Longueuil*,[29] two policemen in a patrol car saw an automobile with its lights turned off speeding through a stop sign. With their siren on, they gave chase and succeeded in approaching the fleeing car. When their orders to halt were ignored, several warning shots were fired at the tires of the car and in the air. The car struck a pole and just as its occupants were getting out, a bullet killed young Carrière. An action in damages was instituted by the parents of the dead boy. In their pleadings, the defendants alleged that when they first saw the speeding car, they "realized" that it was either stolen or that it contained thieves fleeing from a burglary. Tellier, J., however, noted that "realizing" is not the equivalent of "knowing". The theft of the car had only been reported several hours after its commission. As far as the police were concerned, the occupants of the fleeing car had merely violated municipal traffic by-laws. In the circumstances, his Lordship held that the police had acted imprudently by employing unjustified violence and force.

Even in the United States, there is considerable uncertainty among legal scholars as to whether deadly force should ever be used in misdemeanour cases. For, despite the general view that it is better to allow one who is guilty only of a misdemeanour to escape rather than to take his life, it can be argued that some misdemeanours involve risks of such a nature that deadly force should be allowed. La Fave gives the following illustration: a traffic officer sees a car speed through an intersection against the light. The car barely

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[27] (1905), 127 Iowa 534, 103 N.W. 944 at p. 945.
[28] (1907), 17 Man. L.R. 282, 13 C.C.C. 326.
[29] [1957] C.S. 143.

misses a pedestrian crossing the street. When the officer steps into the street to signal the driver to stop, he drives on, almost hitting the officer. The officer draws his revolver and fires at the car.[30]

The *Restatement of Torts* does not express an opinion regarding the extent to which force should be used in making an arrest for a misdemeanour involving danger of death or serious bodily harm.[31] The comments to the *Model Penal Code* note that many misdemeanours do endanger life and that "the felony-misdemeanour distinction is inherently incapable of separating out those persons of such dangerousness that the perils arising from failure to accomplish immediate apprehension justify resort to extreme force to accomplish it".[32]

Police officers faced with the necessity of making a quick decision on the use of force may feel that they should employ only the criterion of danger without first considering whether the conduct is a misdemeanour or a felony. This is particularly likely when the continuing conduct of the offender presents some immediate threat of harm.

The above criticisms may also be directed at the Canadian distinction between misdemeanours and criminal offences for which an arrest may be made without a warrant. Although the law is not beyond reproach in this area, it can be said that the legislative characterization of certain conduct as a mere misdemeanour is a determination that the conduct is not so dangerous that deadly force is justified against it. If the need strongly arises to curb particular conduct by making it subject to deadly force, it can be converted into a criminal offence. To entrust police officers with discretion as to whether or not a particular mode of conduct constitutes a danger significant enough to be subjected to deadly force would introduce an element of subjectivity more productive of abuse than good.

3. The Grounds for Arrest: Reasonable and Probable or Certainty

In the United States, the law allows an arrestor to kill, when necessary, to arrest a felon. Although the rule is easily stated, the courts have had difficulty applying it. One of the controversial issues is whether the arrestee must be a felon in fact before an arrestor is entitled to use deadly force to make the arrest.

In all states, it is agreed that mere suspicion that a person is a felon is insufficient to permit the application of deadly force. Thus,

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[30] Wayne R. La Fave, *Arrest*, (1965), at p. 213.

[31] *Restatement of Torts*, sec. 131, second caveat (1934).

[32] *Model Penal Code*, sec. 3.07, Comment 3 (Tent. Draft No. 8, 1958).

in *Wiley* v. *State*,[33] where the defendant deputy sheriff, patrolling a highway together with another deputy looking for persons who had committed a robbery nearby, saw a car some distance away turn and proceed in the opposite direction. When they pursued and fired shots, the car came to a halt. One of the shots killed the driver's wife who was sitting beside him. A verdict of murder in the second degree was affirmed by the Arizona Supreme Court which held that there was no justification for an officer to kill a person who fled from him when the officer was acting merely on suspicion.

Beyond this point of unanimity, there are three views as to the liability of a police officer when he applies deadly force. The first exonerates the officer from both civil and criminal liability if he reasonably believed that the deceased committed a felony, although none had been committed in fact. Thus, in *People* v. *Kilvington*,[34] the California Supreme Court reversed a conviction for manslaughter of a night watchman who, hearing one man chasing another shout "stop thief" and himself attempting to overtake the alleged thief and yelling that he would shoot him if he did not stop, shot and killed the fleeing man. At his trial the defendant testified, "I couldn't tell whether this man had stolen a loaf of bread or robbed a bank... For all I know, this man might have committed a murder, or robbed someone".[35] In fact, the man pursuing the deceased had seen him run out of a back yard and had mistaken him for a thief. It was held:

> [T]he court ought to have instructed the jury that defendant had the right, under the circumstances established by the evidence, to arrest the deceased, leaving the jury to determine the further question whether the act of shooting the deceased in attempting to effect such arrest was or was not an act of criminal negligence on the part of the defendant. The latter is purely a question of fact, and its determination must be left to the sound judgment and discretion of the jury, and in the decision of which question the defendant is entitled to the benefit of any reasonable doubt arising upon the evidence.[36]

Other states take a slightly more stringent position, requiring that a felony must have in fact been committed although the deceased need not have committed it, if the officer reasonably believed that he did.

Finally, there are jurisdictions which impose a rule of absolute liability. The right to use deadly force exists only when the deceased

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[33] (1918), 19 Ariz. 246, 170 P. 869, discussed in *Commonwealth* v. *Duerr*, (1946), 45 A.2d 235 at p. 239.

[34] (1894), 104 Cal. 86, 37 P. 799.

[35] *Ibid.*, at p. 799.

[36] *Ibid.*, at p. 801.

has in fact committed a felony regardless of all considerations of reasonable belief. The latter view was expressed in the case of *Petrie* v. *Cartwright*.[37] Plaintiff, proceeding home one night with another woman, was followed by two men who exposed themselves and proposed sexual intercourse. The women hurried on until they met plaintiff's husband who, after being told of the men's conduct, chased them; in the scuffle that ensued one of the men swiped at the husband with a knife. The deceased took flight when someone called out to him to run, but at that very moment the defendant city marshall arrived on the scene and, seeing one man fall while plaintiff's husband sped by, he twice called to the latter to halt. When he did not stop — he did not appear to have heard him — the marshall fired at the ground, and then a second time took aim and killed the fleeing man. Neither had recognized the other in the dark. The man who had fallen, meanwhile, suffered no injury apart from a bruise on the back of the head.

In a civil action instituted under the Kentucky wrongful death statute, the marshall pleaded that he had used no more force than was necessary and that he reasonably believed that a felony had been committed by the deceased. The appeal court first held that Petrie had committed no felony and then stated:

> We have been unable to find any common-law authority justifying an officer in killing a person sought to be arrested, who fled from him, where the officer acted upon suspicion, and no felony in fact had been committed... it seems to us that the sacredness of human life and the danger of abuse do not permit an extension of the common-law rule to cases of suspected felonies. To do so would be to bring many cases of misdemeanour within the rule, for in a large per cent. of these cases the officer could show that he had reasons to suspect the commission of a felony, and it would be left entirely with him to say whether he was proceeding against the defendant for a misdemeanour or for a felony. The notion that a peace officer may in all cases shoot one who flees from him is unfounded... where there is only a suspicion of felony the officer is not warranted in treating the fugitive as a felon. If he does this, he does so at his peril, and is liable if it turns out that he is mistaken. He may lawfully arrest upon a suspicion of a felony, but he is only warranted in using such force in making the arrest as is allowable in other cases not felonious, unless the offence was in fact a felony.[38]

Similarly, in *Commonwealth* v. *Duerr*,[39] the police arrested a car thief who told them of a supposed meeting with his accomplices. A trap was laid, but the wrong men appeared. Seeing a roadblock, they suspected a hold-up, fled and were killed. In holding that no matter

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[37] (1902), 114 Ky. 103, 70 S.W. 297.
[38] *Ibid.*, at p. 299.
[39] (1946), 158 Pa. S. 484, 45 A.2d 235.

how reasonable the grounds of belief may be, an officer making an arrest upon suspicion of a felony is not justified in killing the suspect unless a felony has in fact been committed, the court stated:

> The felony in question must have been committed by the person whom the officer is presently seeking to arrest. Otherwise, if a felony has been committed in the community an officer could shoot and kill an entirely innocent person, whom he might suspect of being a felon as in this case.[39a]

Thus, starting from the premise that an arrestor may kill if necessary to effect an arrest, the courts have arrived at different results, thereby indicating the difficulty of attempting to balance the interests of society with those of the individual. Some courts have emphasized the speedy capture of suspected felons and the importance that respect be shown to police officers. Others have recognized the need to protect the innocent.

If the courts admit that an officer may not kill on mere suspicion, is it not desirable that he be permitted to kill as a last resort to apprehend someone whom he has reasonable grounds to suppose is a felon? In support of this view, it has been argued that if the officer had reasonable grounds to believe that the fugitive was guilty, he should not be liable for killing him because, had the facts actually been as he believed, then no action at law would lie against him.[40]

The trend in the United States is toward requiring arrestors to know with certainty that the person to be arrested is a felon before deadly force can be used to effect the arrest. The prevailing view, according to Moreland,[41] is that human life is so precious and so irreplaceable that it is better that an occasional felon escape than that an occasional innocent man be killed on suspicion, even though the suspicion be a reasonable one.

In Canada, on the other hand, there is little room for judicial legislation as the Criminal Code limits the use of deadly force to an offence for which a person may be arrested without warrant,[42] a category which includes both summary and indictable offences.[42a] With respect to the former, the use of deadly force is condoned only where a peace officer is arresting a person whom he finds actually committing the offence. As to the latter, a police officer may use deadly force where he finds a person actually committing an indictable

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[39a] *Ibid.*, at p. 239.

[40] Waite, *Some Inadequacies in the Law of Arrest*, (1930-1), 29 Mich. L.R. 448, at p. 462. See also Moreland, *The Use of Force in Effecting or Resisting Arrest*, (1954), 33 Neb. L.R. 408, at p. 411.

[41] *Loc. cit.*, at p. 412.

[42] Sec. 25(4) Cr. C.

[42a] Sec. 435 Cr. C.

offence or where he seeks to arrest someone who has committed or who on reasonable and probable grounds he believes has committed or is about to commit an indictable offence.[42b]

Whether Canadian law should be revised to follow the American trend of requiring certainty before a police officer may be permitted to use deadly force is questionable. If such a position were adopted in Canada the result would, it is submitted, render law enforcement less effective without an appreciable corresponding benefit to society. Consider the following example: a policeman on night patrol, walking down an alley in a commercial section of the city, sees a man coming towards him carrying a bulky sack. Suspecting a theft, he shouts at the man to halt, informing him at the same time that he is a policeman. If the man flees, what may the policeman do? If the reasonable and probable criterion applies, he can shoot — as a last resort — to halt the escaping man. On the other hand, if he must be certain that the man has committed a theft, he is unable to shoot because he did not see him commit it. Therefore, in such a situation, unless the officer is fleet of foot, the suspected felon will escape.

The requirement of certainty has other defects. It introduces an absolute standard whereas even the standard of the burden of proof required in a criminal trial is only that of "beyond a reasonable doubt". This would require not only that the officer be certain that a felony has been committed, but that he be certain that the escaping man committed it. In the Canadian case of *R.* v. *Mitchell*,[43] the occupants of a stolen car which was being pursued by a police cruiser some distance behind suddenly flung open the doors and fled in opposite directions. The car began to roll towards a parked car which belonged to one Young, who, anxious to discover why the men were conducting themselves in this fashion, left his car and proceeded across the road after one of them. Observing the police car he realized that it was in pursuit of these men, he continued to pursue the man with the intention of assisting the police in apprehending him. The defendant constable, seeing these two men running, thought that both were the suspects he was seeking. As Young was about to place his hands upon a fence for the purpose of vaulting over it in pursuit of the fugitive, he was shot and wounded by the constable. Apart from the question of whether the police officer was negligent in shooting, this case illustrates

[42b] An offence may be either an indictable offence or one punishable under summary conviction (e.g. common assault — see sec. 231(1). In such circumstances, since the Crown has a discretion as to how it will proceed, the distinction of sec. 435 becomes academic.

[43] (1937) 69 C.C.C. 406.

what an unduly harsh and unfair burden a standard of strict liability imposes upon a policeman.

Furthermore, the criterion of reasonable and probable grounds does not mean that the policeman has a license to kill. The fact that he would have to show reasonable grounds for the killing would deter the officer from killing merely because the arrestee attempted to escape.

Finally, there exists an additional unwritten restraint; the police are apt to limit their use of deadly force to those instances where they believe such action would receive public approval, as in their dealings with dangerous professional criminals.

4. Categories of Offences Which Should Permit Deadly Force When Necessary.

The common law rule that an officer may do all that is reasonably necessary to effect an arrest for a felony was originally accepted because all felonies were punishable by death, and, therefore, the killing of an actual or suspected felon was regarded as preferable to his escape from arrest. With the passage of time, legislatures have made conduct a felony which frequently involves less serious penal consequences than offences which are classified as misdemeanours.

In contrast to this practice, there has been a general relaxation of the severity of criminal law by removing the death penalty from less serious felonies and, in some jurisdictions, by removing it even from serious offences. The result is that today relatively few crimes are capital offences and only a very small percentage of arrests are punishable by death. Of these, the number in which capital punishment is actually imposed is substantially smaller. Therefore, if the only justification is the historical one, there is no more excuse for killing a felon than for killing a misdemeanant.

Canadians long ago became aware of the inadequacies of the felony-misdemeanour distinction, but, unlike the United States, abolished this distinction long ago.[44] Sir John Thompson stated in the House of Commons:

> The distinction between felony and misdemeanour was, in early times, nearly, though not absolutely, identical with the distinction between crimes punishable with death and crimes not so punishable. For a long time past this has ceased to be the case. Most penalties are no longer punishable with death and many misdemeanours are now punishable more severely than many

[44] 55-56 Vict., S.C. 1892, c. 29, sec. 535.

> felonies. The great changes which have taken place in our criminal law have made the distinctions nearly if not altogether unmeaning.[45]

As a result of this legislative change, Canada has managed to avoid most of the difficulties which have been the subject of debate in the United States. Nevertheless, American efforts at reform are of interest since they are directed to the question as to whether deadly force should be applicable only to certain specific offences or types of offences.

In seeking new justifications for the right to use deadly force, the Americans have suggested that certain classes of felons are continuing menaces to innocent citizens as long as they remain at large. Therefore, the refusal of these offenders to submit to arrest vests in the police the right to use whatever force may be required to protect society against the danger of their continued liberty. Once this theory is accepted, it remains only to determine which criminals are potentially dangerous while at large.

A number of efforts have been made to deal with the problem of the differing character of felonies. In the 1930's, the American Law Institute's *Restatement of Torts* attempted to distinguish crimes on the basis of whether they normally caused death or serious bodily harm or involved the breaking and entering of a dwelling house; if so, deadly force could be used.[46] Thus, the *Restatement* recommended eliminating the right to use deadly force for minor felonies not involving danger to the person of another. In 1965, the Institute reverted to the common law rule,[47] probably because their earlier suggestion had not been applied by the courts and because it restricted the police too severely.

A more detailed list of felonies was proposed for the *Model Code of Criminal Procedure*. Here, an attempt was made to allow an officer to use deadly force in cases where "... the offence for which the arrest is being made or attempted is treason, murder, voluntary manslaughter, mayhem, arson, robbery, common law rape, kidnapping, burglary or an assault with intent to murder, rape or rob..."[48]

The strongest argument in favor of the proposed rule was made by Professor Mikell at the annual meeting of the Council of the American Law Institute in 1931 where he said:

> It has been said, "Why should not this man be shot down, the man who is running away with an automobile? Why not kill him if you cannot arrest

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[45] *House of Commons Debates*, 12 April 1892, p. 1314.
[46] *Loc. cit.*
[47] *Restatement (Second), Torts*, s. 131 (1965).
[48] (1931), 9 *American Law Institute Proceedings* 179.

> him?" We answer; because, assuming that the man is making no resistance to the officer, he does not deserve death. He may be caught later... But why should not the man be killed merely because he is fleeing and the officer cannot at that time arrest him, though he may be fleeing into the arms of a policeman at the other corner, as frequently happens. May I ask what we are killing him for when he steals an automobile and runs off with it? If we catch him and try him we throw every protection around him. We say he cannot be tried until 12 men of the grand jury indict him, and then he cannot be convicted until 12 men of the petit jury have proved him guilty beyond a reasonable doubt, and then when we have done all that, what do we do to him? Put him before a policeman and have a policeman shoot him? Of course not. We give him 3 years in a penitentiary. It cannot be then that we allow the officer to kill him because he stole the automobile, because the statute provides only 3 years in a penitentiary for that. Is it then for fleeing? And again, I insist this is not a question of resistance to the officer. Is it for fleeing that we kill him? Fleeing from arrest is also a common law offence and is punishable by a light penalty, a penalty much less than that for stealing the automobile. If we are not killing him for stealing the automobile and not killing him for fleeing, what are we killing him for? The two things put together certainly do not admit of the death penalty.[49]

However, this provision was so strongly opposed that it was not included in the *Official Draft of the Model Code of Criminal Procedure.*

In any attempt to draw up a list of serious felonies which ordinarily create substantial perils of death or injury there is a danger that the list is unlikely to be sufficiently comprehensive. In an effort to overcome this problem, the American Law Institute proposed a draft statute in 1958 which, unlike earlier attempts at reform, avoided listing specific felonies where deadly force is permitted and proceeded upon the principle that use of deadly force should be justifiable in those situations where the arresting officer "believes that there is a substantial risk that the person to be arrested will cause death or serious bodily harm if his apprehension is delayed."[50] This formulation does not attempt to control the grounds on which the officer may think that a delay in apprehension entails a substantial risk that the arrestee will cause death or serious bodily harm. It allows police officers to judge the type of man with whom they have to deal, subject to their liability in the event of negligence. The theory constitutes a recognition of the fact that "the police must make a practical and often hasty judgment as to whether or not they are dealing with a person who may be a dangerous criminal in the sense of a threat to life or limb. They are accustomed to

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[49] *Ibid.*, at p. 186.

[50] *Model Penal Code, op. cit.*, at p. 50.

making such judgments and, were the draft adopted, would rarely be prosecuted when such a judgment was in fact made."[51]

Certain criticisms of the Institute's proposals of 1958, present themselves. Consider, for example, its application to the situation where a robber flees armed with a knife. The police officer must justify the use of deadly force by showing "that there is a substantial risk that the person to be arrested will cause death or serious bodily harm if his apprehension is delayed." It is questionable whether he can do so. Then too, this new proposal is nothing more than a rewording of the *Restatement of Torts* which was formulated in the 1930's. Therefore, it is subject to the same criticism, namely, why should the threat of death or serious bodily harm be significant, since the danger has passed and the arrestor is now simply trying to arrest the felon?

The most serious and insurmountable criticism arises where the person whose arrest is sought does not fit into the category permitting the application of deadly force and the officer does not dare take the risk of shooting at him. Thus, if the arrestee can outrun him, he will escape.

Conclusions

Society requires protection against criminals. Since arrest is a condition precedent to imprisonment, whatever facilitates arrest benefits society unless there are concomitant consequences which are socially harmful. Obviously, the right to use deadly force facilitates arrest. Its legalization notifies the criminal that flight invites the risk of injury or death. On the other hand, if injury or death does occur, social injury results. Therefore, the right to use deadly force should be limited.

The limitations which Canadian law imposes are adequate to meet the needs of both society as a whole and the rights of individuals as well. It is sufficient to require that the arrest must be lawful and that deadly force can only be applied as a last resort. To go beyond this point and to require certainty on the part of the arresting officer or to restrict the criminal offences to which deadly force may be applied is to confer upon the criminal an immunity which both he and society do not deserve. If effective law enforcement is to be maintained the race should not be to the swift. The fleeing criminal, regardless of his offence, must be considered as the author of his own misfortune.

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[51] *Ibid.*, at p. 60.

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