

of the suit under the governing law if the dispute over it is resolved favorably to the nonmovant By like token, ‘genuine’ means that ‘the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party’” *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party’s case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Cadle Co. v. Hayes*, 116 F.3d 957, 959 (1st Cir. 1997). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, “the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue.” *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir. 1995) (citing *Celotex*, 477 U.S. at 324); Fed. R. Civ. P. 56(e). “This is especially true in respect to claims or issues on which the nonmovant bears the burden of proof.” *International Ass’n of Machinists & Aerospace Workers v. Winship Green Nursing Ctr.*, 103 F.3d 196, 200 (1st Cir. 1996) (citations omitted).

II. Factual Context

The summary judgment record, with *bona fide* conflicts resolved in the light most favorable to the plaintiff, reveals the following regarding the events leading to the filing of the instant complaint:

On November 6, 1997 Sergeant Mark Phillips and Patrolman Shawn O’Leary of the Brunswick Police Department (the “Department”) received a call from the police dispatcher telling them to respond to a disturbance and possible assault at 29 High Street, where paramedics were also being sent. Statement of Material Facts on Which There Is No Genuine Dispute (“Defendants’ SMF”) (Docket No. 13) ¶ 1; Plaintiff’s Opposing Statement of Material Facts in Dispute in Opposition to

Defendants' Motion for Summary Judgment ("Plaintiff's SMF") (Docket No. 20) ¶ 1. Phillips and O'Leary understood that a 911 call had been made for an ambulance because Richard Weymouth had been pushed out of his wheelchair and needed assistance getting back into it. Plaintiff's SMF ¶ 1; Defendants' Reply to Plaintiff's Statement of Material Facts ("Defendants' Reply SMF") (Docket No. 27) at 1.

Weymouth was paralyzed from the rib cage down. Plaintiff's SMF ¶ 38; Defendants' Reply SMF ¶ 38. He was missing one leg, was wheelchair-bound and was unable to walk or voluntarily move his body from the chest down. *Id.* He was not able to raise himself out of his chair by placing his weight on his one remaining foot. *Id.* The apartment at 29 High Street, which was leased to Raymond Bernier, consisted of a kitchen area measuring only 15½ by 12½ feet and an attached bedroom measuring only 15¼ by 12½ feet. Defendants' SMF ¶¶ 3-4; Plaintiff's SMF ¶¶ 3-4.

While Phillips and O'Leary were en route to 29 High Street, a dispatcher told Phillips that there was an outstanding warrant for Weymouth's arrest with no bail. Defendants' SMF ¶ 2; Plaintiff's SMF ¶ 2. When the officers entered the apartment, Weymouth, whom O'Leary understood to have been the victim of the disturbance to which the police were responding, appeared to have had his face beaten. Defendants' SMF ¶ 5; Plaintiff's SMF ¶ 5; Defendants' Reply SMF at 2. Wet blood was on the bridge of his nose, and his face was puffy. Defendants' SMF ¶ 5; Plaintiff's SMF ¶ 5. The smell of alcohol filled the air. Defendants' SMF ¶ 6; Plaintiff's SMF ¶ 6.¹ Cherie Andrews also was present in the apartment. Defendants' SMF ¶ 4; Plaintiff's SMF ¶ 4.

¹ Weymouth had been drinking whiskey prior to the officers' arrival. Defendants' SMF ¶ 4; Plaintiff's SMF ¶ 4. A toxicology report issued after Weymouth's death noted, "If the determined blood alcohol concentration (BAC) is representative of the circulating BAC a[t] the time of the fatal incident, then it represents an absorbed body burden of approximately 7 'drinks' of an alcoholic beverage in an adult of average size weighing approximately 155 lbs." Preliminary Toxicology Report of Weymouth, Richard, attached as Exh. B to Declaration of Margaret Greenwald, M.D., attached to Defendants' SMF.

The three people in the apartment were not unknown to O’Leary and Phillips. Defendants’ SMF ¶ 7; Plaintiff’s SMF ¶ 7. O’Leary and Phillips were well aware, from their previous interactions with Weymouth, that he was confined to a wheelchair and had physical limitations. Plaintiff’s SMF ¶ 40; Defendants’ Reply SMF ¶ 40. O’Leary knew in addition that Weymouth had been arrested for reckless conduct with a firearm, had caused disturbances on the streets of Brunswick through loud and disorderly conduct while intoxicated and was bitter toward the police, tending to blame them for a lot of his problems. Defendants’ SMF ¶ 7; Plaintiff’s SMF ¶ 7. He understood that Weymouth was in a wheelchair as a result of being shot while attempting the armed robbery of Dicky Stewart, a former police officer. *Id.*² O’Leary nonetheless had had no physical confrontations with Weymouth in his previous dealings with him. O’Leary Interview at 38. In fact, his previous interactions with Weymouth had been “positive.” Plaintiff’s SMF ¶ 47; Defendants’ Reply SMF ¶ 47. O’Leary knew Bernier and Andrews to be alcoholics. Defendants’ SMF ¶ 7; Plaintiff’s SMF ¶ 7.

Phillips had occasionally picked up Weymouth when Phillips worked part time as a cab driver, during which times Weymouth usually was intoxicated. *Id.* Phillips knew that Weymouth was strong enough to lift himself out of his wheelchair into the back of the cab without assistance; Weymouth appeared to him “to have a lot of upper body strength.” *Id.* Phillips also had previously encountered Weymouth when he assisted in arresting him for firing gun shots at the windows of the house of Kenny Maxwell on Maine Street in Brunswick. *Id.* He believed, based on newspaper accounts, that Weymouth had lost his leg while involved in an armed robbery. *Id.*³ However, on the

² The plaintiff points out that O’Leary did not mention in an earlier statement to investigators that he believed Weymouth was in a wheelchair as a result of being shot during an armed robbery. Plaintiff’s SMF ¶ 7. However, O’Leary in the pages cited by the plaintiff was responding to the question, “Have you ever had any dealings with Weymouth in the past?” State of Maine Attorney General Investigations, Transcript of Taped Interview[,], Shawn T. O’Leary (“O’Leary Interview”), attached to Plaintiff’s SMF, at 36-38.

³ The plaintiff points out that Phillips did not mention in an earlier statement to investigators that he believed Weymouth had lost his leg during an armed robbery. Plaintiff’s SMF ¶ 7. However, Phillips was asked, “Is Richard Weymouth a person who’s known to you? (continued...)

previous occasions on which Phillips had dealt directly with Weymouth in Phillips' capacity as a police officer, Weymouth was not violent. Deposition of Mark A. Phillips ("Phillips Dep."), attached to Defendants' SMF, at 35. Phillips had dealt with Andrews and Bernier on numerous prior occasions, Bernier because of his alcoholism and Andrews through her involvement with the Kenny Maxwell incident and because "she was constantly calling the police department and harassing us." Defendants' SMF ¶ 7; Plaintiff's SMF ¶ 7.

Weymouth had no violent criminal history with the Department and no criminal convictions post-dating 1982. Plaintiff's SMF ¶ 45; Defendants' Reply SMF ¶ 45. In addition, Weymouth was not involved in an attempted robbery when shot by Richard Stewart on October 16, 1966. Affidavit of Donna Connors, Submitted in Support of Her Opposition to Motion for Summary Judgment ("Connors Aff.") (Docket No. 21) ¶¶ 6-8.⁴

After arriving and entering the apartment O'Leary told Weymouth that there was an outstanding warrant for his arrest for failing to appear in court to respond to a charge of operating a vehicle under the influence of alcohol. Defendants' SMF ¶ 8; Plaintiff's SMF ¶ 8. O'Leary then began to call dispatch to confirm details of the warrant and asked Phillips if there was any bail. Defendants' SMF ¶ 9; Plaintiff's SMF ¶ 9. When Phillips replied that there was none, Weymouth asked to be taken to Togus Veterans' Hospital. Plaintiff's SMF ¶ 10; Defendants' Reply SMF ¶ 10.⁵ The officers refused.

... And how so?" State of Maine Attorney General Investigations, Transcript of Taped Interview[,] Mark A. Phillips, attached to Plaintiff's SMF, at 6. Asked whether he had ever known Weymouth to use violence, Phillips responded: "I believe that he had an incident down in Portland, but I don't know the particulars of it." *Id.* at 10.

⁴ The defendants protest that these assertions lack foundation and are based on hearsay as well as being irrelevant. Defendants' Reply SMF ¶ 48. However, the plaintiff states that Weymouth was her brother, she knew him all her life, and she has personal knowledge of the facts set forth in her affidavit. Connors Aff. ¶¶ 3-5.

⁵ The defendants assert that Weymouth's statement constitutes inadmissible hearsay. Defendants' Reply SMF ¶ 10. The statement does not appear to be offered to prove the truth of the matter asserted (that Weymouth in fact wanted to go to Togus) and thus does not fall within the scope of Fed. R. Evid. 801(c).

Videotaped Deposition of Raymond A. Bernier (“Bernier Dep.”), attached to Plaintiff’s SMF, at 34-35. O’Leary and Phillips then noticed that Weymouth was holding an eight- to ten-inch-long knife. Deposition of Shawn T. O’Leary (“O’Leary Dep.”), attached to Defendants’ SMF, at 109, 115, 118; Phillips Dep. at 50, 55.

Once O’Leary and Phillips saw the knife they immediately retreated as they were trained to do away from the east wall of the apartment back toward the refrigerator, Phillips to the southwest corner of the kitchen and O’Leary to the threshold between the kitchen and bed/living room. Defendants’ SMF ¶ 12; Plaintiff’s SMF ¶ 12.⁶ Both officers immediately drew their firearms when they saw the knife. Defendants’ SMF ¶ 13; Plaintiff’s SMF ¶ 13.⁷ In O’Leary’s estimation the retreat put only eight to eleven feet between Weymouth and himself; Andrews and Bernier testified that O’Leary was ten to fifteen feet away from Weymouth when he shot him. O’Leary Dep. at 116; Deposition of Cherie Ann Andrews (“Andrews Dep.”), attached to Plaintiff’s SMF, at 28-29; Bernier Dep. at 19-20.⁸

⁶ The plaintiff points out that the officers were trained to retreat upon encountering a threat initiated with a weapon. Plaintiff’s SMF ¶ 12. However, her further assertion that Weymouth at that point had not threatened anyone is not supported by the citations offered. Compare Plaintiff’s SMF ¶ 12 with O’Leary Dep. at 94 (officers trained to retreat when threat initiated with weapon); Deposition of Jerry A. Hinton, attached to Plaintiff’s SMF, at 128-29 (shooting would not have been justified if Weymouth merely sat across room stabbing himself). A similar allegation that Weymouth posed no threat to O’Leary after drawing the knife likewise is not supported by the citation given. See Plaintiff’s SMF ¶ 62; O’Leary Dep. at 117 (Weymouth was not facing O’Leary when he first stabbed himself).

⁷ The plaintiff contends that “the officers’ drawing of their firearms, prior to Mr. Weymouth allegedly threatening their safety is a violation of Brunswick Police Department policy.” Plaintiff’s SMF ¶ 13. However, the cited testimony of Robert F. Annese merely sets forth Department policy forbidding police officers from using a greater degree of force than required in a given situation. Deposition of Robert F. Annese (“Annese Dep.”), attached to Plaintiff’s SMF, at 31-32.

⁸ The defendants strenuously protest the use of the Andrews and Bernier testimony to raise a genuine issue of material fact on summary judgment, contending *inter alia* that “[b]ecause of the use of alcohol by these witnesses, and the plain incoherence of the testimony, the plaintiff’s own expert dismissed the testimony of these witnesses as useless.” Defendants’ Reply SMF ¶ 3; see also *id.* ¶¶ 14, 16-19; Defendants’ Reply to Plaintiff’s Opposition to the Defendants’ Motion for Summary Judgment (“Defendants’ Reply”) (Docket No. 26) at 2-3 n.*. The defendants also argue that “it is inappropriate for the non-movant to attempt to generate an issue of fact by trying to pass off her own conflicting evidence as ‘disputed facts.’” Defendants’ Reply at 2-3 n.*. However, the case cited for this proposition, *Buckner v. Sam’s Club, Inc.*, 75 F.3d 290, 292-93 (7th Cir. 1996), notes that a non-movant cannot attempt to avoid summary judgment by the proffer of an affidavit contradicting earlier sworn testimony not the case here. Inasmuch as the defendants’ protestations go to the weight rather than the admissibility of the evidence, and the court is constrained on summary (continued...)

O’Leary made repeated positive commands for Weymouth to drop the knife, none of which Weymouth heeded. Defendants’ SMF ¶ 15; Plaintiff’s SMF ¶ 15. O’Leary, who was in the apartment for approximately ten to twenty seconds before shooting Weymouth, did not warn Weymouth that he would shoot him if he did not drop the knife. Plaintiff’s SMF ¶ 15; Defendants’ Reply SMF ¶ 15. Weymouth stabbed himself in the abdomen while still near the east wall and while being told to drop the knife and being confronted with the police officers’ drawn weapons; he did not drop the knife but withdrew it from his abdomen and stabbed himself again. Defendants’ SMF ¶ 16; Plaintiff’s SMF ¶ 16.⁹ Weymouth did not move toward the officers. Bernier Dep. at 17-18.¹⁰ Even before Weymouth pulled out the knife, the officers maced him. Andrews Dep. at 25. To Phillips’ surprise, the Cap-Stun spray had no observable effect on Weymouth, who did not even attempt to block the spray with his arm. Defendants’ SMF ¶ 20; Plaintiff’s SMF ¶ 20. Phillips administered two long bursts of Cap-Stun lasting a couple of seconds apiece. Phillips Dep. at 60. The Department instructs that Cap-Stun should be administered in one-second bursts, multiple times if necessary. Annese Dep. at 20; *see also* Deposition of Marc R. Arnold (“Arnold Dep.”), attached to Plaintiff’s SMF, at 31. “[T]he purpose of

judgment to view the evidence in the light most favorable to the non-movant, I have credited the Andrews and Bernier testimony for purposes of this motion.

⁹ The defendants’ version of these moments differs markedly from that of the plaintiff. According to the defendants, after Weymouth first stabbed himself and removed the knife from his abdomen he turned toward O’Leary and Phillips and rolled his wheelchair to the center of the kitchen, at which point he was six to eight feet from the officers. O’Leary Dep. at 117-18; Phillips Dep. at 53-56. Weymouth then stabbed himself a second time, with no apparent effect, withdrew the knife, held it raised and out in front of him and moved toward the officers. O’Leary Dep. at 124, 178; Phillips Dep. at 56-58, 92, 120. Phillips sprayed Weymouth with Cap-Stun because, as Phillips said, “[He was f]ive to six feet now. He’s still coming forward. He has got that knife out and he’s coming forward and he’s on the end of his chair coming towards me.” Phillips Dep. at 56-57; *see also* O’Leary Dep. at 122 (placing Weymouth at three to five feet from Phillips). The defendants further point out that the plaintiff’s own hired expert testified that he believed Weymouth “was moving his wheelchair toward the officers” and “was a potential threat to others.” Defendants’ SMF ¶ 26; Plaintiff’s SMF ¶ 26. The circumference of the large rear wheels on Weymouth’s wheelchair was seventy inches, meaning that it could cross nearly the entire room in two revolutions of the wheel. Defendants’ SMF ¶ 3; Plaintiff’s SMF ¶ 3.

¹⁰ Inasmuch as I credit this testimony for purposes of summary judgment, I find it unnecessary to delve into the further contested assertion that Weymouth was physically incapable of having moved in the manner asserted by the defendants. *See* Plaintiff’s SMF ¶¶ 18, 39, 67; Defendants’ Reply SMF ¶¶ 18, 39, 67.

a short duration like that is to let the propellant dissipate and get the full effect of OC in the person's face." Arnold Dep. at 31.

After the spray failed to affect Weymouth, Phillips drew his gun because he "was scared" and thought, "I'm trapped. I can't get out. I can't go by him because he can slash me. If I go towards Shawn, he can get me. I look at the window and the window is too . . . small to get out. If I get up on the counter, he can still cut me." Defendants' SMF ¶ 21; Plaintiff's SMF ¶ 21. Phillips had five to six feet of space between himself and Weymouth at the time he sprayed the chemical agent. Plaintiff's SMF ¶ 21; Defendants' Reply SMF at 5.

When Robert A. Robitaille of the Brunswick Fire Department saw Phillips spraying Weymouth, Weymouth "didn't look like the person he was a few minutes before that. Basically, eyes wide open, you could, like I said, see the whites of his eyes. He just had a I don't know how you want to describe it, determined, slash, crazed look on his face." Defendants' SMF ¶ 22; Plaintiff's SMF ¶ 22; Deposition of Robert A. Robitaille ("Robitaille Dep."), attached to Defendants' SMF, at 4.

Unable to retreat any further because Andrews and Bernier were behind him (Andrews screaming hysterically), O'Leary shot Weymouth four times at a distance of three to five feet. Defendants' SMF ¶ 24; Plaintiff's SMF ¶ 24; Defendants' Reply SMF ¶ 24. Although two of the shots went through Weymouth's body, there are no bullet holes in the wheelchair and no marks that are recognizable as damage from a bullet. Defendants' SMF ¶ 25; Plaintiff's SMF ¶ 25. Dr. Margaret Greenwald, who performed an autopsy on Weymouth's body, concluded that the bullet trajectories were consistent with Weymouth either rising out of his chair or being in a seated position. Plaintiff's SMF ¶ 25; Defendants' Reply SMF ¶ 25; *see also* Declaration of Margaret Greenwald, M.D. (Docket No. 22) ¶¶ 1-2, 5.

Weymouth never verbally threatened either O’Leary or Phillips at any time prior to his death. Plaintiff’s SMF ¶ 64; Defendants’ Reply SMF ¶ 64. When approached by EMT Robitaille, Weymouth made no threatening motions toward him even though Robitaille was well within striking distance of the knife and was physically attempting to disarm Weymouth. Plaintiff’s SMF ¶ 65; Defendants’ Reply SMF ¶ 65. Also, although Phillips was close enough to spray a chemical agent in Weymouth’s face, Weymouth made no effort to lunge at or stab Phillips. Plaintiff’s SMF ¶ 66; Defendants’ Reply SMF ¶ 66.¹¹

In violation of Department policy requiring officers to carry batons while on duty, neither O’Leary nor Phillips had available to him or on his person a baton when Weymouth was killed. Plaintiff’s SMF ¶ 53; Defendants’ SMF ¶ 53. For a baton to be effective, the person must be “approximately three to five feet from the officer.” Deposition of Gregory A. Danas, attached to Plaintiff’s SMF, at 122. For a certain period of time prior to the introduction of collapsible batons in 1998 the majority of Brunswick officers did not carry batons. Annese Dep. at 24-25. Prior to that time, no efforts were made by anyone at the Department to require or encourage officers to carry batons. *Id.* at 26. Since then, the Department has made efforts to require all officers trained in the use of collapsible batons to carry them. *Id.* O’Leary would not have used a baton under the circumstances of this case. Declaration of Sergeant Shawn O’Leary (“O’Leary Decl.”), attached to Defendants’ Reply SMF, ¶¶ 3-4.

Although the officers carried Cap-Stun chemical spray, the Department admits that Cap-Stun is not an adequate substitute for an impact weapon and is not even in the same range of force as a baton in the “use of force continuum” as established in the Department’s use of force policy. Plaintiff’s SMF ¶ 55; Defendants’ Reply SMF ¶ 55. The failure to carry an impact weapon deprives an officer of a

¹¹ O’Leary testified that Weymouth did not have time to make an effort to stab Robitaille or Phillips. O’Leary Dep. at 122. In (continued...)

necessary option in terms of applying the correct use of force. Plaintiff’s SMF ¶ 56; Defendants’ Reply SMF ¶ 56. Nonetheless, “[t]he force continuum is not one of those where you have to go from level to level, I mean, you could jump into the force continuum wherever you feel is appropriate and go up and down the continuum based on the situation, it’s not one of those where you have to start at the bottom and take a step increase each time.” Arnold Dep. at 36.

The Department did not require training in the proper use of the Cap-Stun spray, Plaintiff’s SMF ¶ 57; Defendants’ Reply SMF ¶ 57; however, both O’Leary and Phillips were trained in its use, O’Leary Decl. ¶ 2; Phillips Dep. at 90.

Chief Hinton served as a policymaker for the Town with regard to the Department’s policies, training, employment, investigation of complaints against officers and discipline. Plaintiff’s SMF ¶ 29; Defendants’ Reply SMF at 6.

III. Analysis

A. Police Officers O’Leary and Phillips

1. Civil-Rights Claims (Count I)

The plaintiff in Count I asserts *inter alia* that O’Leary and Phillips violated Weymouth’s rights under the Fourth, Fifth, Sixth, Eighth and Fourteenth amendments to the United States Constitution by their asserted use of unreasonable and unjustified deadly force against him. Complaint ¶¶ 22, 24.¹²

addition, at the time Robitaille moved toward Weymouth, the knife was buried in Weymouth’s abdomen. Robitaille Dep. at 61.

¹² These claims are implicitly brought pursuant to 42 U.S.C. § 1983. *See, e.g., Camilo-Robles v. Zapata*, 175 F.3d 41, 43 (1st Cir. 1999) (“Section 1983 provides a private right of action against state actors – that is, public officials acting under color of state law who deprive individuals of rights confirmed by federal constitutional or statutory law.”). The plaintiff alleges in addition that the same conduct transgressed Article I, Sections 1, 5 and 6 of the Maine Constitution and 5 M.R.S.A. § 4682, 17 M.R.S.A. § 2931, 15 M.R.S.A. § 704 and 17-A M.R.S.A. §§ 107-08. Complaint ¶¶ 24-25. She observes that section 1983 qualified-immunity analysis applies as well to her claims under the Maine Civil Rights Act, 5 M.R.S.A. § 4682 (“MCRA”), and 15 M.R.S.A. § 704 to the extent not superseded by the Maine Tort Claims Act. Plaintiff’s Opposition to Defendants’ Motion for Summary Judgment, etc. (“Plaintiff’s Opposition”) (Docket No. 19) at 15 n.3. Tellingly, she does not in that context mention the remaining state statutes cited in Count I, (continued...)

The defendants assert, and the plaintiff does not dispute, that these allegations boil down to a claim of use of excessive force in contravention of the Fourth Amendment. Memorandum of Law in Support of the Defendants' Motion for Summary Judgment ("Defendants' Memorandum") (Docket No. 12) at 4-5; Plaintiff's Opposition at 5-15.

The defendants contend that the conduct of O'Leary and Phillips on November 6, 1997 did not on its face violate the Fourth Amendment and that, in any event, the officers are entitled to qualified immunity with respect to their actions that day. Defendants' Memorandum at 5. The plaintiff rejoins that genuine disputes of material fact preclude resolution of this claim on summary judgment. Plaintiff's Opposition at 4-5.

"In police misconduct cases . . . the Supreme Court has used the same 'objectively reasonable' standard in describing both the constitutional test of liability and the Court's own standard for qualified immunity." *Roy v. City of Lewiston*, 42 F.3d 691, 695 (1st Cir. 1994) (citations and internal quotation marks omitted); *see also Anderson v. Creighton*, 483 U.S. 635, 639 (1987) ("whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the objective legal reasonableness of the action assessed in light of the legal rules that were clearly established at the time it was taken.") (citations and internal quotation marks omitted).¹³

The standard of objective reasonableness, in turn,

17 M.R.S.A. § 2931 and 17-A M.R.S.A. §§ 107-08, which this court has held cannot form the basis for liability under the MCRA inasmuch as they are criminal statutes. *See, e.g., Hodsdon v. Town of Greenville*, 52 F. Supp.2d 117, 125 (D. Me. 1999). Nor does she separately mention her state constitutional claims, which necessarily are subsumed in her MCRA cause of action. *See, e.g., Andrews v. Department of Env'tl Protection*, 716 A.2d 212, 220 (Me.1998) (MCRA the sole vehicle through which claims pursuant to Maine constitution can be brought). Federal qualified-immunity analysis is indeed properly applied to the plaintiff's two viable state-law claims in Count I, those asserted pursuant to the MCRA and 15 M.R.S.A. § 704. *See, e.g., Hodsdon*, 52 F. Supp.2d at 125-26 (applying section 1983 analysis to claims under MCRA, 15 M.R.S.A. § 704).

¹³ Qualified immunity is intended to protect "all but the plainly incompetent or those who knowingly violate the law." *Anderson*, 483 U.S. at 638 (citation and internal quotation marks omitted). The right to be free from the use of excessive force was clearly established (continued...)

is not capable of precise definition or mechanical application, however, its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight. The reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. . . . The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments in circumstances that are tense, uncertain, and rapidly evolving about the amount of force that is necessary in a particular situation.

Graham v. Connor, 490 U.S. 386, 396-97 (1989) (citations and internal quotation marks omitted).

Turning first to the conduct of O’Leary, there is no genuine dispute that (i) the smell of alcohol filled the air in the Bernier apartment, (ii) the police believed (mistakenly or not) that Weymouth had past involvement in violent crimes, including threatening with a firearm, (iii) Weymouth, who was wheelchair-bound and paralyzed from the rib cage down, obtained an eight- to ten-inch knife after the officers attempted to arrest him and twice stabbed himself in the abdomen with it, (iv) Weymouth ignored repeated commands to drop the knife, (v) Weymouth appeared unaffected by the Cap-Stun, and (vi) the events at issue took place in what fairly could be described as a confined space.

Nonetheless, the record viewed in the light most favorable to the plaintiff establishes in salient part that (i) prior to November 6, 1997 neither officer had personally observed Weymouth to be violent, (ii) Weymouth at no point moved toward either officer, (iii) Weymouth at no point verbally threatened either officer, (iv) O’Leary was ten to fifteen feet away from Weymouth when he shot him four times, and (v) the trajectories of the bullets are consistent with Weymouth having been seated in his wheelchair when shot.

I am mindful that “whether substantive liability or qualified immunity is at issue, the Supreme Court intends to surround the police who make . . . on-the-spot choices in dangerous situations with a

at the time of the Weymouth shooting. *Fernandez v. Leonard*, 784 F.2d 1209, 1215 (1st Cir. 1986).

fairly wide zone of protection in close cases.” *Roy*, 42 F.3d at 695. Nonetheless, I conclude that O’Leary’s conduct as depicted by the plaintiff falls outside of that zone. In *Roy*, the First Circuit upheld the grant of summary judgment in favor of police officers who had shot and seriously injured Roy when he brandished two steak knives after having been served a summons. *Id.* at 693-94, 697. While Weymouth, like Roy, “was armed; . . . disobeyed repeated instructions to put down the weapons; and the officers had other reasons . . . for thinking him capable of assault,” *id.* at 696, Weymouth, unlike Roy, neither verbally threatened the officers nor (in the plaintiff’s version of events) advanced toward them or made anything resembling the kicking-lunging motion that precipitated the firing of shots in *Roy*, *compare id.* at 693. Even conceding that O’Leary and Phillips found themselves in a cramped space, unlike the officers in *Roy* (who were outdoors), *compare id.* at 693, the plaintiff paints a portrait in which a wheelchair-bound man who was stock still, stabbing himself and not striking out either verbally or physically at anyone else present, was shot dead from a distance of ten or fifteen feet. A jury could find “that [t]his conduct was so deficient that no reasonable officer could have made the same choice as” O’Leary. *Id.* at 695.

Turning next to Phillips, the plaintiff argues that she has generated a trialworthy issue as to his conduct, as well, inasmuch as his “role remains substantial in terms of the officers’ unreasonable conduct leading up to the shooting” and “the potential liability from an excessive use of force could apply to Phillips as well as O’Leary.” Plaintiff’s Opposition at 12. Phillips’ only role in the few seconds leading to the shooting was to spray two bursts of Cap-Stun in Weymouth’s face. The plaintiff does not argue that this in itself was an excessive use of force. *See generally id.* To the contrary, she faults Phillips for having used the spray ineffectually, thus (in her view) failing to prevent escalation to the use of deadly force. *See, e.g., id.* at 10. Courts have indeed “held that a police officer who fails to prevent the use in his presence of excessive force by another police officer may be held liable under §

1983.” *Comfort v. Town of Pittsfield*, 924 F. Supp. 1219, 1228-29 n.4 (D. Me. 1996) (citation and internal quotation marks omitted). However, an onlooking officer cannot be charged with section 1983 liability for another’s sudden, momentary actions. *See, e.g., Gaudreault v. Municipality of Salem, Mass.*, 923 F.2d 203, 207 n.3 (1st Cir.1990) (defendant officers had no realistic opportunity to prevent attack where “the attack came quickly and was over in a matter of seconds.”). Moreover, the Fourth Amendment dictates that officers at the scene make a “reasonable attempt” to prevent the use of excessive force on the part of their fellow officers not that they succeed in so doing. *See, e.g., O’Neill v. Krzeminski*, 839 F.2d 9, 12 (2d Cir. 1988) (“Though not a guarantor of O’Neill’s safety in the face of brutality administered by other officers, Connors can be found liable for deliberately choosing not to make a reasonable attempt to stop Krzeminski.”).

In the few seconds available to him, Phillips tried to subdue Weymouth using Cap-Stun. The spray had no apparent effect. Even assuming *arguendo* that this was so because Phillips deployed it incorrectly, or that Phillips could have stopped the confrontation had he carried a baton, this is not a predicate for section 1983 liability. Phillips made a reasonable attempt to stop the escalation of force. No rational juror could conclude otherwise, and the law demands no more.

Summary judgment accordingly should be entered in favor of Phillips, but denied as to O’Leary, on Count I.

2. Additional State-Law Claims (Counts III-V)

In three pendent state-law claims, the plaintiff asserts that O’Leary’s and Phillips’ unreasonable and unjustified use of force against Weymouth constituted assault and battery (Count III) and negligence and wrongful death (Count V) and that the officers attempted to arrest Weymouth without sufficient cause or basis and without a valid warrant in violation of 15 M.R.S.A. § 704 (Count IV). Complaint ¶¶ 31-39.

The defendants invoke absolute immunity pursuant to 14 M.R.S.A. § 8111(1)(C), asserting in addition that the record demonstrates that the attempted arrest of Weymouth was made pursuant to a facially valid warrant, precluding liability as to Count IV. Defendants' Memorandum at 12-13.¹⁴ The plaintiff implicitly concedes the latter point by omitting to address it in her response. *See* Plaintiff's Opposition at 15-16; *Graham v. United States*, 753 F. Supp. 994, 1000 (D. Me. 1990) ("It is settled beyond peradventure that issues mentioned in a perfunctory manner, unaccompanied by some effort at developed argumentation are deemed waived.") (citation and internal quotation marks omitted). Summary judgment therefore is warranted in favor of both O'Leary and Phillips as to Count IV.

Section 8111(1)(C) affords absolute immunity to municipal employees for "[p]erforming or failing to perform any discretionary function or duty, whether or not the discretion is abused; and whether or not any statute, charter, ordinance, order, resolution, rule or resolve under which the discretionary function or duty is performed is valid." The effectuation of an arrest qualifies as a "discretionary function" for purposes of the statute. *Leach v. Betters*, 599 A.2d 424, 426 (Me. 1991). The Maine Law Court nonetheless has assumed (without deciding) that the execution of such an arrest in a wanton or oppressive manner would vitiate the protections of section 8111(1)(C). *Id.* This court accordingly has declined, in a summary judgment context, to grant absolute immunity as to state-law causes of action related to a plaintiff's triable claim of arrest with excessive force. *McLain v. Milligan*, 847 F. Supp. 970, 977-78 (D. Me. 1994). Inasmuch as there are genuine issues of material fact regarding whether O'Leary used excessive force against Weymouth, but no such issues regarding the conduct of Phillips, summary judgment on the ground of absolute immunity is appropriate in favor of Phillips but not O'Leary as to Counts III and V.

¹⁴ I do not reach the defendants' alternative argument that, in the event O'Leary and Phillips are found entitled to summary judgment as to the plaintiff's federal claim, the court should decline to exercise its pendent jurisdiction as to the remaining state-law claims. *See* Defendants' Memorandum at 12-13.

B. Town of Brunswick and Police Chief Hinton

The plaintiff in Count II seeks to hold the Town and police chief Jerry Hinton liable for the actions of O’Leary and Phillips as the result of alleged inadequate training, supervision and discipline in violation of 42 U.S.C. § 1983 and the First, Fifth, Sixth, Eighth and Fourteenth amendments to the United States Constitution as well as state constitutional and statutory law.¹⁵ Complaint ¶¶ 26-30. The Town and Hinton also are included within the scope of two additional state-law claims, Counts IV (warrantless arrest) and V (negligence and wrongful death). *Id.* ¶¶ 33-39.

1. Count II: Civil-Rights Claims

A municipality in a section 1983 case may not be held liable for the acts of its employees on a *respondeat superior* basis. *Monell v. Department of Social Servs.*, 436 U.S. 658, 691 (1978). Rather, it may be held liable for such isolated acts only to the extent they are tantamount to a “custom” or “policy” of the municipality. *Id.* at 694. This may be proved by a showing that (i) the acts were carried out pursuant to established policy or were reflective of a governmental custom, or (ii) were taken or ratified by a final policymaker for the municipality or someone to whom final policymaking authority clearly was delegated. *City of St. Louis v. Praprotnik*, 485 U.S. 112, 121, 123, 126-27 (1988). The “custom” or “policy” must in turn have been “the cause of and the moving force behind the deprivation of constitutional rights.” *Hodsdon*, 52 F. Supp.2d at 124 (citation and internal quotation marks omitted).

In the context of a failure to train, a municipality’s conduct can be said to be tantamount to a “policy” or “custom” if the municipality is shown to have exhibited “deliberate indifference to the

¹⁵ The plaintiff cites the same state-law grounds as in Count I. *See* Complaint ¶ 30. For the reasons discussed above, these causes of action boil down to claims pursuant to the MCRA and 15 M.R.S.A. § 704, to which section 1983 municipal-liability analysis properly is applied. *See, e.g., Fowles v. Stearns*, 886 F. Supp. 894, 899 n.6 (D. Me. 1995) (applying section 1983 municipal-liability analysis to MCRA claim).

rights of its inhabitants”; *e.g.*, that “a deliberate choice to follow a course of action is made from among various alternatives by city policymakers” or that “the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need.” *City of Canton, Ohio v. Harris*, 489 U.S. 378, 389-90 (1989) (citations and internal quotation marks omitted).

In opposing the defendants’ motion for summary judgment the plaintiff clarifies that her section 1983 claims against the Town are premised on two alleged deficiencies: toleration of officers’ failure to carry impact weapons and lack of training on the use of Cap-Stun spray. Plaintiff’s Opposition at 17-18.

The Cap-Stun claim is readily dismissed. The Town’s failure to mandate Cap-Stun training could not have been the moving force behind deprivation of Weymouth’s rights inasmuch as both Phillips and O’Leary were in fact trained in its use.¹⁶

By contrast, the plaintiff makes out a sufficient claim regarding batons to present a triable issue. The record reveals that (i) as of 1997 the Town required its officers to carry batons, (ii) for some period of time prior to 1998, which a finder of fact reasonably could infer included 1997, a majority of Brunswick officers flouted this policy by not carrying batons, and (iii) prior to 1998 the Town made no effort to require or encourage officers to carry batons. It is further undisputed that (i) neither O’Leary nor Phillips was carrying a baton on November 6, 1997, (ii) an officer must be within three to five feet of a target to use a baton effectively, (iii) Phillips was at one point five to six feet from Weymouth, (iv) Phillips had sufficient time to spray Weymouth twice with two-second bursts of

¹⁶ Nor is there evidence that any optional Cap-Stun training programs were deficient.

Cap-Stun, (v) Cap-Stun is an inadequate substitute for a baton, and (vi) failure to carry an impact weapon deprives an officer of a necessary weapon in the continuum of force.

This evidence particularly the fact that the Town considered batons important enough to mandate that they be carried but then failed to enforce that policy could support a conclusion that the Town was deliberately indifferent to the need to ensure that its officers were adequately equipped to avoid the usage of unnecessary deadly force. *Compare, e.g., Whitted v. City of Philadelphia*, 744 F. Supp. 649, 657 (E.D. Pa. 1990) (observing, in granting summary judgment to municipality in face of claim that lack of baton led to use of excessive force, that plaintiff presented no evidence that “officers so habitually disregarded the [baton] directives . . . that the City’s failure to address the alleged problem rose to the level of a conscious choice.”).

Accepting the plaintiff’s version of events, one could also conclude that this “custom” was intimately related to Weymouth’s death. *See Canton*, 489 U.S. at 391 (“for liability to attach in this circumstance the identified deficiency in a city’s training program must be closely related to the ultimate injury.”). Phillips was within striking distance of the wheelchair-bound Weymouth, who, according to the plaintiff, was not moving toward or otherwise menacing the officers. A trier of fact thus could conclude that a baton could have been employed successfully to disarm Weymouth.

The defendants protest *inter alia* that “[t]he issue is whether the force used was objectively reasonable, not whether some alternative use of force might have worked better” and that “the Constitution does not require a police officer to use a baton ‘to apprehend a violent, dangerous suspect who is threatening the lives of the officers and others nearby.’” Defendants’ Reply at 6-7 (citation omitted). Concededly, once a use of deadly force is found on summary judgment or at trial to have been objectively reasonable, the analysis ends. The fact that the injury could have been avoided in any of a thousand ways (*e.g.*, better equipment, better training, better negotiating skill) then would be

irrelevant for purposes of section 1983 liability. *See, e.g., Canton*, 489 U.S. at 391 (“Such a claim [that injury could have been avoided] could be made about almost any encounter resulting in injury, yet not condemn the adequacy of the program to enable officers to respond properly to the usual and recurring situations with which they must deal.”). The plaintiff’s theory is quantitatively different than a mere allegation that a usage of otherwise justifiable deadly force could have been avoided. She does not suggest that the Constitution mandates certain levels of equipment or training, but rather adduces evidence that the Town’s program was inadequate, that the Town knew this, and that this deficiency was a proximate cause of Weymouth’s death.¹⁷

For similar reasons, summary judgment in favor of Hinton is unwarranted. A supervisor such as Hinton may be held liable under section 1983 for the constitutional violation of a subordinate if “(i) the supervisor’s conduct or inaction amounts to either deliberate, reckless or callous indifference to the constitutional rights of others, and . . . (ii) an affirmative link exists between the street-level constitutional violation and the acts or omissions of the supervisory officials.” *Hodsdon*, 52 F. Supp.2d at 124 (citations and internal quotation marks omitted).

There is no direct evidence of record illuminating what Hinton actually knew, did or omitted to do. However, one can fairly infer that in his capacity as Town policymaker on issues of police training and discipline, he knew that his officers prior to 1998 routinely flouted official policy requiring the carrying of batons and chose not to take corrective measures at that time. *See, e.g., Bordanaro v. McLeod*, 871 F.2d 1151, 1157 (1st Cir. 1989) (evidence adduced at trial supported

¹⁷ In cases cited by the defendants in which courts rejected claims that an injury could have been avoided if the police did something different or better, the use of deadly force was found to have been objectively reasonable. *See Deering v. Reich*, 183 F.3d 645, 652-53 (7th Cir. 1999) (officers not required to use all feasible alternatives to avoid justifiable use of deadly force); *Roy*, 42 F.3d at 696 (not clear that use of mace or retreat would have been better solution in case in which use of deadly force justified); *Plakas v. Drinski*, 19 F.3d 1143, 1148 (7th Cir. 1994) (when deadly force otherwise justified, no obligation to use non-deadly alternatives first); *O’Neal v. DeKalb County, Ga.*, 850 F.2d 653, 656 (11th Cir. 1988) (police not required to use minimum of force to apprehend violent, dangerous and threatening suspect); *Estate of Fortunato v. Handler*, 969 F. Supp. 963, 973 (W.D. Pa. 1996) (inquiry is not whether deadly force might have been avoided but rather whether its use was reasonable).

(continued...)

finding that police chief had constructive knowledge of widespread practice). In view of the plaintiff's evidence that failure to carry an impact weapon deprives an officer of a necessary weapon in the continuum of force and that Cap-Stun is an inadequate substitute, one could also infer that Hinton acted recklessly, taking the risk that lack of an impact weapon or an adequate substitute would result in his officers' use of unjustified deadly force. Such an omission by Hinton could, in turn, be linked to what a jury could find to have been the unreasonable use of deadly force against Weymouth.

For these reasons, summary judgment in favor of either Hinton or the Town as to Count II should be denied.

2. Counts IV and V: Additional State-Law Claims

The defendants seek summary judgment in favor of the Town as to Counts IV (warrantless arrest) and V (negligence and wrongful death) on the ground that the Town is immune from liability pursuant to 14 M.R.S.A. §§ 8103 and 8104-B. Defendants' Memorandum at 16. The plaintiff rejoins that (i) a town by virtue of insurance coverage waives such immunity pursuant to 14 M.R.S.A. § 8116, (ii) the Town must affirmatively demonstrate a lack of insurance coverage, and (iii) the Town cannot do so because it does in fact have insurance coverage. Plaintiff's Opposition at 19. The defendants by their silence concede the point. *See generally* Defendants' Reply; *Graham*, 753 F. Supp. at 1000. The Town and Hinton nonetheless are entitled to summary judgment as to Count IV for the reasons discussed above in the context of the plaintiff's claims against O'Leary and Phillips. I accordingly recommend that the court deny summary judgment with respect to Count V but grant summary judgment *sua sponte* in favor of the Town and Hinton as to Count IV. *See Rogan v. Menino*, 175 F.3d 75, 79 (1st Cir. 1999) ("It is apodictic that trial courts have the power to grant summary judgment *sua sponte*" provided matter sufficiently developed, appropriate notice given).

C. Punitive Damages (Count VI)

Finally, the defendants seek summary judgment as to Count VI (punitive damages) on three alternative grounds: (i) that to the extent the defendants are entitled to summary judgment as to the substantive counts on which punitive-damage liability would be predicated, they are also entitled to summary judgment as to punitive damages, (ii) that punitive damages constitute a remedy, not a separate cause of action, and (iii) that the facts taken in the light most favorable to the plaintiff would not support an award of punitive damages. Defendants' Memorandum at 16-17.

I agree that a claim for punitive damages does not constitute a separate and distinct cause of action and that the defendants are entitled to summary judgment as to Count VI on that ground alone. *See, e.g., Mason v. Texaco, Inc.*, 948 F.2d 1546, 1554 (10th Cir. 1991); *Auster Oil & Gas, Inc. v. Stream*, 835 F.2d 597, 604 (5th Cir. 1988). In the absence of Count VI, the grant of summary judgment with respect to any of the substantive claims will inherently constitute a grant of summary judgment as to any remedies sought thereunder, including punitive damages.¹⁸

Turning from technicalities to the merits of the plaintiff's claims for punitive damages, the Town is entitled to summary judgment as to section 1983 claims against it inasmuch as, although the defendants do not so assert, a municipality may not as a matter of law be held liable for punitive damages in a section 1983 action. *See, e.g., McLain*, 847 F. Supp. at 980.¹⁹ I see no basis on which to remove from the purview of the trier of fact the discretion to assess punitive damages against O'Leary, Hinton, or the Town as to state-law claims, in the event liability is found. A defendant in a section

¹⁸ The plaintiff reiterates her prayer for punitive damages in each of her substantive counts (Counts I-V). *See generally* Complaint. The striking of Count VI leaves these prayers for relief intact, except to the extent they otherwise are subject to summary judgment on the merits.

¹⁹ As to state-law claims, "[w]hile section 8105 of the Maine Tort Claims Act provides immunity from liability for punitive damages, section 8116 of the Act overrides that immunity to the extent that the municipality has obtained insurance." *McLain*, 847 F. Supp. at 981 n.13. "The types of risk covered and the amount of coverage provided by the Town of [Brunswick's] insurance policy will determine whether, and to what extent, punitive damages are available against it in the current action." *Id.*

1983 action may be subject to punitive damages for conduct “shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others.” *Smith v. Wade*, 461 U.S. 30, 56 (1983). Under Maine law, “[p]unitive damages are available if the plaintiff can establish by clear and convincing evidence that the defendant’s conduct was motivated by actual ill will or was so outrageous that malice is implied.” *Palleschi v. Palleschi*, 704 A.2d 383, 385-86 (Me. 1998).

It is possible that, were a trier of fact to credit the plaintiff’s version of events, it could discern reckless indifference on the part of O’Leary or Hinton to Weymouth’s federally protected rights and/or conduct on the part of O’Leary, Hinton or the Town so outrageous as to imply malice. *See Lyons v. City of Lewiston*, 666 A.2d 95, 102 (Me. 1995) (fact issue existed as to whether defendants acted with reckless indifference to demonstrator’s federally protected rights, precluding summary judgment as to punitive-damages claim).

IV. Conclusion

For the foregoing reasons, I recommend that the Defendants’ Motion be **GRANTED** as to Counts IV and VI in their entirety; **GRANTED** as to Counts I, III and V with respect to Phillips only; **GRANTED** with respect to the assessment of punitive damages against the Town on the plaintiff’s section 1983 claims; and otherwise **DENIED**.

Assuming that this recommendation is adopted, the only issues remaining for trial will be Counts I and III as against O’Leary only, Count II as against Hinton and the Town, and Count V as against O’Leary, Hinton and the Town, with no possibility of the assessment of punitive damages against the Town on the plaintiff’s section 1983 claims.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 16th day of August, 2000.

David M. Cohen

U.S. District Court
District of Maine (Portland)

CIVIL DOCKET FOR CASE #: 99-CV-331

CONNORS v. BRUNSWICK, TOWN OF, et al
Assigned to: JUDGE GENE CARTER
Demand: \$0,000
Lead Docket: None
Dkt# in other court: None

Filed: 10/28/99
Jury demand: Plaintiff
Nature of Suit: 440
Jurisdiction: Federal Question

Cause: 42:1983 Civil Rights Act

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Brunswick
defendant

THOMAS V. LAPRADE, ESQ.
(See above)
[COR LD NTC]

MARK A PHILLIPS, Individually
and in His Capacity as a
Police Office of the Town of
Brunswick
defendant

THOMAS V. LAPRADE, ESQ.
(See above)
[COR LD NTC]

BRUNSWICK POLICE CHIEF
defendant

THOMAS V. LAPRADE, ESQ.
(See above)
[COR LD NTC]