Training Liability in the Use of Deadly Force

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Any time a law enforcement officer uses deadly force, the likelihood that a lawsuit will follow is almost a certainty. Most of these lawsuits are brought in the federal courts as civil rights claims based upon the Fourth Amendment to the United States Constitution. These actions are brought under a federal statute, 42 U.S.C. § 1983 which creates civil liability when a person, acting under color of law, violates federally protected rights of another, causing damage. Under § 1983, a governmental entity, specifically a town, city or county are not liable for all of the actions of their employees. Governmental entities are only liable in cases where some policy, custom, rule or ordinance causes the employee to commit the violation or where the entity has failed to supervise, discipline or train the employee and this failure leads to a foreseeable constitutional violation.[i]

The focus of this article is on training with respect to law enforcement's use of deadly force. The article will begin with a summary of the law with respect to law enforcement training and then proceed to the more specific area of firearms training.

The foundation case on failure to train is *City of Canton v Harris.*[ii] Geraldine Harris was arrested by the Canton Police and brought to lock-up. During the booking process she fell to the floor several times. When asked if she needed medical assistance, she responded incoherently. No medical attention was ever summoned for her. Following her release, relatives brought her to the hospital where she was treated for several emotional ailments.

During the lawsuit which followed on Harris' claims, evidence was established that shift commanders had the sole discretion to determine whether or not a detainee needed medical attention. It was further established that the shift commanders were given no training to assist them in making these medical evaluations. Harris prevailed on her claim at the trial court level, but the United States Court of Appeals for the 6th Circuit vacated the finding against the city because of the jury instructions. The 6th Circuit would have applied a standard of recklessness, intentional or gross negligence.

The United States Supreme Court held that "a municipality may be held liable under § 1983 for violations of rights guaranteed by the Federal Constitution, where violations result from the municipality's failure to adequately train its employees, only if that failure reflects a **DELIBERATE INDIFFERENCE** on the part of the municipality to the constitutional rights of its inhabitants.

It should be noted that failure to train cases can be established in two ways. The first involves a lack of training in an area where there is a patently obvious need for training, for example an officer who is untrained in deadly force unreasonably shoots someone. The second method of establishing a failure to train by an agency is to establish a pattern of conduct by officers that would put the final policymaker on notice and the policymaker failed to respond with training. Certain forms of conduct are beyond the reach of failure to train. For example, in *Walker v. City of New York,* a plaintiff who spent nineteen years in jail for a crime he did not commit brought a failure to train claim based on the department's failure to train its officers not to commit perjury.[iii] Walker's wrongful conviction was based upon perjured testimony by a police officer. The United States Court of Appeal for the 2nd Circuit asserted: "*If the conduct on which the claim is based is such that a common person would know the right response without training, there is no duty to train."* Some additional language from the Walker case provides further guidance as to when training is required. Specifically: when policy makers know "to a moral certainty that officers will confront a particular situation" and where "the situation present(s) a difficult choice or is there a history of mishandling by employees" and where "the wrong choice frequently result(s) in a deprivation of constitutional right."[iv]

Should policy makers know to a "moral certainty" that officers will be faced with making decisions on whether or not to use deadly force? Is the decision to use deadly force a difficult choice? Will the wrong choice frequently result in deprivations of a constitutional right? Decision making training with respect to the use of deadly force falls squarely within the description of a law enforcement task for which there is a patently obvious need for training.

For many years law enforcement agencies trained officers the "how to" shoot by using marksmanship courses for firearms training. Officers would stand at various distances from paper targets and take aim. As training progressed, agencies began creating combat and stress courses that incorporated officer movement, target movement and limits on the amount of time an officer would have to fire. While these courses are sufficient in training officers how to shoot; they fail in training an officer when to shoot and they fail to reflect the conditions under which most officers are required to work.

Almost 25 years ago, the courts began telling law enforcement that firearms training had to be more reflective of the conditions that officers would face while working. In Popow v. City of Margate[v], an officer in foot pursuit of a suspected kidnapper fired as the kidnapper ran down the street. As a result, the officer accidentally shot Mr. Popow, killing him. While the court's reasoning in Popow with respect to the constitutional analysis of an accidental shooting would not be followed by courts today, the court's assertions with respect to firearm's training is still being cited by courts.

In addressing the City of Margate's liability with respect to firearms training the court noted that the officer involved testified in his deposition that he was initially trained on deadly force at the police academy ten years prior to the shooting. His continued firearms training with respect to firearms consisted of going to a range twice a year. The court noted that there was no training with respect to low light conditions, moving targets or firing in residential areas. The court concluded that it was

entirely foreseeable that an officer from the City of Margate, a largely residential area, would have to pursue a fleeing (moving) suspect at night (low-light). The court remanded the case back to the trial court after deciding that a jury could find the training provided by the City of Margate was grossly inadequate[vi]

The need for training on the "when to" shoot is now an accepted fact among the courts. Unfortunately, many police agencies, due to a lack of resources, still have not developed training in this area. The failure to have "judgment" or "decisional" training with respect to the use of deadly force is a risk that agencies cannot afford to take.

In Zuchel v. Denver,[vii] the United States Court of Appeal examined a case which began when members of the Denver Police Department responded to a disturbance call at a fast-food restaurant. Upon arrival, officers were told that the subject responsible for the disturbance had gone around the corner. As officers turned the corner they observed Zuchel, who had his back to the officers, arguing with some teenagers. Someone shouted that Zuchel had a knife. As the officers approached Zuchel turned toward the officers, at which time Officer Spinharney fired four times, killing Zuchel. A pair of fingernail clippers was found next to Zuchel. Officer Spinharney's partner testified that she was surprised when Officer Spinharney fired because she was right next to Zuchel and about to grab him.

Following a civil trial against the City of Denver, (the case against Officer Spinharney had been settled prior to trial); a jury came back with a verdict against the city for $330,000 based upon a failure to adequately train. The City of Denver appealed. In upholding the verdict, the court cited testimony by a Denver police detective as well as testimony from the plaintiff's expert on police training. The detective testified that the only "shoot-don't shoot training" that existed at the time of Zuchel's death "consisted of a lecture and a movie." The plaintiff's police practices expert testified that if the only "shoot-don't shoot" training officers received was a lecture and a movie, then the training was grossly inadequate.

In reviewing these two decisions, Popow and Zuchel, it is clearly established that law enforcement agencies must conduct firearms training on a regular basis; the firearms training must reflect the environment that officers are likely to face, i.e. moving targets, moving officers, low-light conditions and residential areas if applicable to the agency being trained; and finally agencies must conduct decision making training with respect to when to use deadly force. Annual or semi-annual qualification courses are simply insufficient for purposes of assisting officers in making deadly force decisions and for purposes of avoiding liability.

Qualification courses and other courses which emphasize speed under stress and marksmanship, without decision making skills may actually enhance liability. Noted police practices expert G. Patrick Gallagher while speaking to groups nationally has recounted the story of an agency that determined that one of their officers had been involved in a bad shooting, fortunately for the officer's intended target, the officer missed. In order to remediate the officer's mistake, the agency sent the officer to the range where he underwent re-training. As a result, his shooting skills were enhanced, but his decision-making

skills with respect to deadly force remained unchanged. Thus, the agency now had a more skilled shooter who would more likely hit his target when he made a bad decision.

Many cases emphasize the need for enhanced decision making skills with respect to use of force decisions. Allen v. Muskogee[viii] serves as one example. In Allen, officers responded to a call of a suicidal man. Upon their arrival at the scene they observed Mr. Allen, seated alone, in his vehicle with a gun. Within 90 seconds of their arrival, the officers rushed the car in an attempt to disarm Mr. Allen, rather than isolating and negotiating with him. When the officers rushed the car, Allen made a sudden movement toward the officers leading the officers to believe they were in danger of being shot. The officers opened fire and killed Allen.

A police practices expert reviewing the case based his opinion of the department's training on the deposition of a training officer who testified that the officers' rushing of the car was consistent with their training. The expert opined that if rushing the vehicle was consistent with the department's training then the department's training was "contrary to every piece of training material in existence." As a result the court allowed the case to go forward against the agency. If the agency could have put forth documented training scenarios based upon this type of recurring incident, the plaintiff would not have been able to go fourth on this type of claim.

A recent case from the United States District Court, Rhode Island provides an example of how documented training that incorporates shoot-don't shoot may diminish or eliminate an agency's liability in a failure to train case. Young v. City of Providence[ix] involved every police department's worst nightmare. Two uniformed police officers responded to a call of two women fighting outside a late-night restaurant that was a common gathering spot after the local bars closed. When the officers arrived at the scene they observed a Hispanic male in the parking lot with a gun. One of the officers took cover behind a telephone pole and remained there throughout the ordeal. The second officer, who had completed field training by only eight days, took cover behind the passenger wheel-well of the police cruiser, using the engine block as cover. The officers ordered the man to drop the gun and get on the ground. When the man complied with the officers' commands the officer behind the cruiser no longer had a visual observation of him. The officer then left his position and moved behind the rear bumper of the suspect's vehicle in an attempt to see him.

As the officers continued shouting orders to take the Hispanic subject into custody, a second man came out of the restaurant brandishing a firearm. The second man, an African American male, wearing a heavy winter coat began approaching the Hispanic male. The officers ordered the man to drop his gun and when he failed to do so, both officers fired. Each of the officers fired, what would prove to be, fatal shots. As other officers arrived on the scene of this shooting it was learned that the African American male was an off-duty police officer, Cornel Young Jr., who was apparently going out to assist his brother officers.

In a bi-furcated trial a jury determined that the officer who fired at Officer Young from behind the telephone pole had acted reasonably while the second officer who had moved from his position of cover

behind the police vehicle prior to the shooting had acted unreasonably. The only clear distinction between the two officers was that one arguably left a good position of cover, while the second remained in a position of cover. Prior to the case moving on to its second phase where the plaintiff was alleging that the shooting was the result of the police department's failure to train its officers, the judge issued summary judgment for the department and the training officers who were named as defendants in the suit.[x]

In dismissing all of the failure to train claims the court cited to the documented training that the police department had conducted. This training included scenario based decision making training that included shoot-don't shoot decision making. The training also included training on an interactive firearms simulator where officers would have to give verbal commands, make decisions regarding cover, and in some cases make the ultimate decision of whether to shoot or don't shoot. As a result of the documented training the court concluded that the plaintiff would not be able to succeed on a claim that the department or its trainers were deliberately indifferent with respect to firearms and deadly-force based training.[xi]

In addition to the case law, model policies on use of force direct that agencies must conduct shoot-don't training.[xii] In a lawsuit that includes a failure to properly train on deadly force, police practices experts will use these model policies to support an opinion that the generally accepted police practice or the national standard is to conduct this type of training. An agency that fails to conduct this type of training faces the possibility that liability will be found if the failure in training has led to a bad shooting.

In developing shoot-don't shoot training, agencies should try to foresee as many possible scenarios that officers are likely to face. Every possible scenario cannot be foreseen, but many can be and training should be geared to the recurring circumstances that officers must deal with. Some examples would include situations that may be de-escalated by a proper police response; response to emotionally disturbed persons; response to off-duty situations; response to suicide-by-cop situations; decision making with respect to good citizens who are in possession of firearms i.e. the store owner with a gun who is pursuing the robber from his store; vehicle involved firearms scenarios; circumstances where missed shots may endanger innocent persons; and persons turning with innocent objects in their hands.

Obviously, all of the scenarios should be conducted with varying environmental conditions such as low-lighting; residential or densely populated areas; and movement of both suspects and officers. The scenarios should also encompass a full force continuum evaluation with respect to officer response i.e. did the officer give verbal commands? Did the officer use other tools where they may have effectively resolved the event without resorting to deadly force where appropriate? Did the officer give a warning (where appropriate) before using deadly force?

In managing risk by conducting shoot-don't shoot training, agencies may consider purchasing a firearms training simulator. The current technology in these simulators has greatly advanced over the

past few years allowing training officers to escalate and de-escalate scenarios in accordance with the response of the officer involved in the training. Some of the more advanced simulators, such as Advanced Interactive Systems, AIS® simulator, have scenario authoring capability such that agencies can develop their own scenarios. An agency that does not have the resources for scenario development can also purchase canned scenarios that have been developed by their simulator's manufacturer. For example, AIS has hundreds of pre-produced scenarios, each containing numerous branching options depending on officer response, for all of the various law enforcement functions.

While no agency is immune from a lawsuit, no agency can afford to sit back in a defenseless posture. One of the most effective methods of avoiding agency liability is through proper, thorough and documented training. No agency can afford to be without such training. Proper training will undoubtedly lead to better decisions by officers as well. These better decisions also place the individual officer in a position of strength when the lawsuit is filed. Although no officer or agency likes to be served with a lawsuit, there is a great deal of satisfaction when the suit is dismissed due to the investment of the agency and officer in training and professionalism.

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CITATIONS:

[i] Note, State Government entities and state actors acting in their official capacity cannot be sued in federal court under § 1983 due to the Eleventh Amendment's bar against such suits. See E.G. Will v. Michigan Department of State Police, 491 U.S. 58 (1989).

[ii] City of Canton v Harris, 489 U.S. 378 (1989).

[iii] Walker v. City of New York, 974 F.2d 293 (2d Cir. 1992).

[iv] Id.

[v] Popow v. City of Margate, 476 F.Supp. 1237 (Dist. N.J. 1979).

[vi] Note, the standard for failure to train was set forth in City of Canton v. Harris which was decided after Popow and is a "deliberate indifference" standard.

[vii] Zuchel v. Denver, 997 F.2d 730 (10th Cir. 1993).

[viii] Allen v. Muskogee, 119 F.3d 837 (10th Cir. 1997).

[ix] Young v. City of Providence, 2004 U.S. Dist. LEXIS 1847 (R.I. 2004).

[x] Note, the case is currently under appeal to the United States Court of Appeal 1st Circuit.

[xi] Note, the author of this article was one of the defendants who was granted summary judgment in this decision.

[xii] See International Association of Chiefs of Police Model Policy on Use of Force and the accompanying concept paper revised August 2001. ("Finally, firearms training with respect to the use of deadly force cannot be limited to routine firearm qualifications and proficiency testing. It is recommended that all officers authorized to carry firearms be required to qualify with each authorized firearm on at least a semiannual basis and preferably three times per 12 month period. But, in addition to proficiency testing, it is strongly recommended that police agencies provide (1) routine instruction and periodic testing on the agency use-of-force policy and (2) instruction and practical exercises in making decisions regarding the use of deadly force. In the latter instance, it is important that an element of firearms training include realistic use-of-force simulation exercises. This includes night and/or reduced light shooting, shooting at moving targets, strong-hand/weak-hand firing, and combat simulation shooting. Firearms training should attempt to simulate the actual environment and circumstances of foreseeable encounters in the community setting, whether urban, suburban, or rural. A variety of computer-simulation training is available together with established and recognized tactical, exertion, and stress courses. In essence, acceptable firearms training and evaluation are no longer limited to target practice. Scrutiny of firearms training will normally include an evaluation of the relevance and utility of such instruction.")