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December 1992
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Page 9

Page 12

Features

Departments

On the Cover: *Small police departments can successfully implement the community policing philosophy. See article p. 1. Cover photo by Orlando Mendez, courtesy of the Metro-Dade, Florida, Police Department.*

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Firearms Training and Liability (Part 1)

By JOHN C. HALL, J.D.

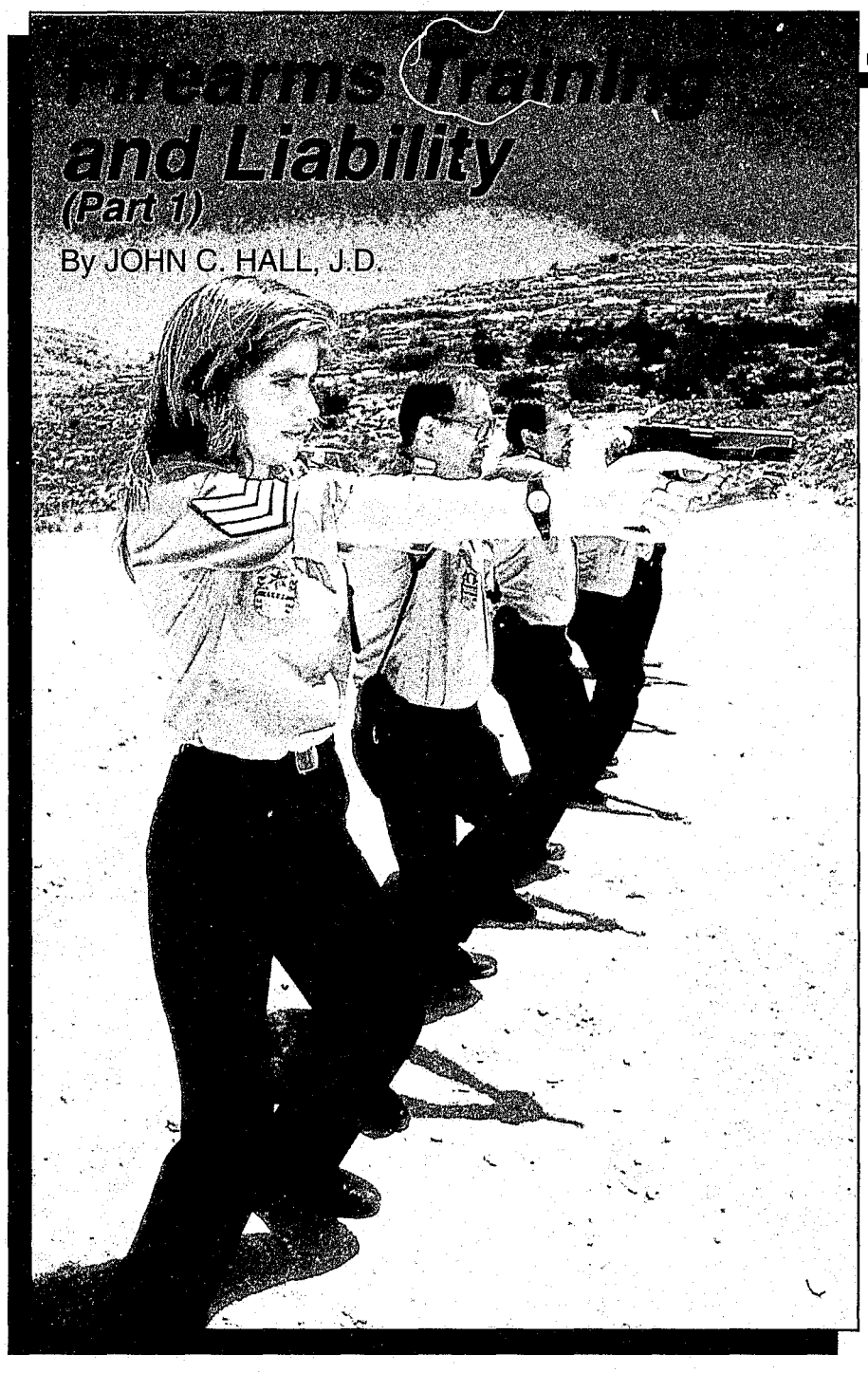

Photo by Eran Israel

This article focuses on one aspect of potential law enforcement liability—lawsuits that allege violations of federally protected rights as the result of inadequate firearms training. Although the principles apply to training in general, firearms training was chosen as the focal point for two reasons. First, the authority of law enforcement officers to use force in effecting arrests or other fourth amendment seizures of persons is a recurring source of challenge and litigation, and the use of firearms—i.e., deadly force—in that context represents the ultimate in the exercise of that authority. Second, the current trend of American law enforcement agencies making the transition from revolvers to semiautomatic pistols has generated questions about the kind and quantity of training necessary to accomplish that transition effectively.

Part I of this article provides a frame of reference by briefly reviewing the manner in which lawsuits can be brought against government agencies and employees and then analyzing the Supreme Court's decision in *City of Canton* v. *Harris*,[1] in which the general principles of "failure to train" lawsuits were established. Part II will discuss the manner in which those general principles apply to firearms training.

SUITS AGAINST EMPLOYEES AND AGENCIES

State and Local Officers

The personal liability of State and local officers under State law for their law enforcement actions is determined by differing State laws and is beyond the scope of this article. However, one factor that has contributed significantly to the growth of lawsuits against State and local law enforcement officers over the past 3 decades has been the expanded interpretation of 42 U.S.C. 1983.

This post-Civil War statute prohibits the deprivation of federally protected rights by any "person" acting under color of State law. The language clearly encompasses State and local law enforcement officers and creates the potential for lawsuits against them in either State or Federal court, independent of any liabil-

ity that may exist under State law. Importantly, officers sued under sec. 1983 may assert the defense of qualified immunity, in addition to any other defenses available.[2]

Local Government Agencies

State and local governmental entities can generally be sued in State court for violations of State law to the extent that sovereign immunity has been waived by that State. While the 11th amendment[3] to the U.S. Constitution precludes some suits against a State for money damages, the amendment does not shield local government entities (i.e., counties and municipalities) from such suits.[4]

Prior to a Supreme Court decision in 1978, local government entities were generally not liable under sec. 1983 because that statute explicitly applies to "persons"—a term that the Supreme Court historically interpreted to mean a "natural" person distinct from a corporate body, such as a governmental entity.[5] However, in *Monell* v. *Department of Social Services*,[6] the Court reversed that holding and concluded that local government entities can be sued under sec. 1983 when a policy or practice of the agency causes the constitutional violation.

Thus, while the local entity is not "vicariously" liable for the wrongdoing of its employees, it may be liable for its own acts or omissions that *cause* the employees to commit constitutional violations. Such suits are generally framed in terms of "failure to properly train or supervise" or "negligent hiring or retention." Local government entities, unlike their employees, are not entitled to the qualified immunity defense.[7]

> ***"...a 'failure to train' lawsuit...may be described as a chain composed of three essential links—a constitutional violation, a policy of inadequate training, and a causal connection between the two."***

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Federal Agents

By its express terms, sec. 1983 applies only to those acting under the color of *State* law. It has no applicability to persons acting under the color of *Federal* law, and there is no comparable statute to impose liability on those acting under the color of Federal law.

However, as a result of the Supreme Court's 1971 decision in *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*,[8] Federal employees can be sued, independent of any statutory authority, for alleged violations of Federal constitutional rights. Consequently, though the mechanisms may differ, Federal, State, and local law enforcement officers may be sued in Federal court for alleged deprivations of Federal constitutional rights. Federal officers, like their State and local counterparts, are also entitled to the defense of qualified immunity.

Federal Agencies

There is a significant distinction between the liability of Federal Government agencies and local government entities. Just as with State governments, the Federal Government cannot be sued without a waiver of sovereign immunity. The Federal Tort Claims Act (FTCA)[9] constitutes the Federal Government's limited waiver and permits lawsuits against the Federal Government for certain negligent or other wrongful acts of its employees.

This application of the doctrine of *respondeat superior*—the employer is "vicariously" liable for the acts of the employee—does not require the plaintiff to establish that a constitutional violation occurred. Nor does it require a causal connection between the act of a Federal employee and some policy, custom, or practice of the agency. For that reason, it is not necessary to prove a failure or deficiency in training to establish the liability of the Federal Government under the FTCA.

In light of these differences in State and Federal liability, most lawsuits alleging inadequate training arise from State or local law

enforcement activities. It is very difficult to establish personal liability against an individual officer based on alleged inadequacies in a training program unless that officer is a high-ranking official, such as a sheriff or chief of police, with policymaking authority. For example, personal liability against an individual instructor would require proof that the alleged deficiency in instruction was of constitutional dimensions[10] and that it was attributable to the instructor. Therefore, within the general framework described above, how is a lawsuit alleging inadequacy of a training program most likely to arise?

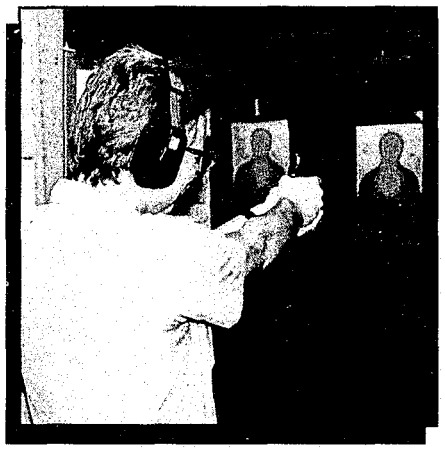
THE FAILURE TO TRAIN LAWSUIT

In a typical scenario, someone sues a police officer under sec. 1983 for allegedly depriving that person of a Federal constitutional right, e.g., use of excessive force, unreasonable search, etc. Because defendants with "deeper pockets" and less formidable defenses make more attractive targets, the plaintiff may name the local governmental entity as a defendant for allegedly causing the constitutional violation through "inadequate training."

In *City of Canton* v. *Harris*,[11] the Supreme Court considered whether a municipality can ever be liable under 42 U.S.C. sec. 1983 for constitutional violations resulting from its failure to train municipal employees. The Court concluded:

> "...that there are limited circumstances in which an allegation of a 'failure to train' can be the basis for liability under [Section] 1983."[12]

But those "limited circumstances" are present "*only* where the failure to train amounts to *deliberate indifference* to the rights of persons with whom the police come into contact" and when the identified deficiency is "closely related to the ultimate injury."[13] Thus, a "failure to train" lawsuit under sec. 1983 may be described as a chain composed of three essential links—a constitutional violation, a policy of inadequate training, and a causal connection between the two.



The First Link—A Constitutional Violation

Before a claim against a department's training program can be established, there must first be a constitutional violation. It is not sufficient to establish that some harm resulted from an officer's improper performance of duties; there must be a clearly defined constitutional right that was allegedly infringed.

For example, in the course of making an arrest, an officer, untrained and unskilled in the use of a firearm, may unintentionally discharge the weapon, causing death or injury. Or, he may intentionally fire the weapon, miss the intended target, and strike an innocent person.

Obviously, harm resulted from the officer's actions, but it is unclear whether either of these events would provide the requisite constitutional violation. The obvious allegation would be that the officer used excessive force in attempting to effect the arrest. However, to establish that point, either plaintiff—the intended arrestee or the unintended bystander—may first have to establish that a "seizure" occurred.

In *Brower* v. *County of Inyo*,[14] the Supreme Court defined a fourth amendment "seizure" of a person as "an *intentional* acquisition of physical control...[i.e.] when there is a governmental termination of freedom of movement *through means intentionally applied.*"[15] The emphasis on the intentional aspect of both the objective and the means suggests that an accidental or negligent act by an officer may not suffice to establish a constitutional violation.

One Federal appellate court also took this view in *Landol-Rivera* v. *Cruz Cosme*,[16] in which a police bullet, meant for the hostage taker, struck and wounded a hostage. The hostage sued the police officer and won a jury verdict. On appeal, the court cited *Brower* and stated:

> "It is clear...that a Fourth Amendment seizure does not occur whenever there is a governmentally caused termination of an individual's freedom of movement, nor even whenever there is a governmentally caused and governmentally desired termination of an individual's

freedom of movement, but only when there is a governmental termination of freedom of movement through means intentionally applied."[17]

Neither the Supreme Court's relatively narrow definition of "seizure" nor the lower court's equally narrow application in this case necessarily establishes that an officer's ineptitude or lack of skill in using a firearm can never result in a fourth amendment seizure. It is possible that an officer may terminate the freedom of movement of the intended person, and with the intended instrumentality, but in an unintended manner.

For example, an officer may unintentionally discharge a weapon into a person whom he only meant to threaten with the gun. In such an instance, there is an intentional acquisition of control, through the intended means, albeit not necessarily in the intended manner. The Supreme Court recognized this possibility in *Brower*:

> "In determining whether the means that terminates the freedom of movement is the very means intended we cannot draw too fine a line, or we will be driven to saying that one is not seized who has been stopped by the accidental discharge of a gun with which he was meant only to be bludgeoned, or by a bullet in the heart that was meant only for the leg. We think it enough for a seizure that a person be stopped by the *very instrumentality set in motion* or put in place in order *to achieve that result.*"[18]

This illustrates how a fourth amendment seizure may occur of an intended person through the intended means, but not necessarily in the intended manner. But, it is questionable whether the unintentional shooting of a person would ever constitute a fourth amendment seizure, unless it could be shown that

> ***"Unless the plaintiff succeeds in establishing the threshold constitutional violation, no constitutional basis exists for challenging a department's training program."***

the officer's actions were so reckless under the circumstances that the tragic consequences should have been foreseen. In any case, a constitutional right must exist before it can be violated, and the plaintiff has the burden of asserting and proving the violation.

Once it has been determined that a fourth amendment seizure did occur, the next issue is whether it occurred in an "unreasonable" manner. The Supreme Court has described this inquiry as "whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them..." and has mandated that the assessment be made from the "perspective of a reasonable officer at the scene, rather than with the 20/20 vision of hindsight...."[19]

To put it in a somewhat simplified fashion, the Constitution does not require officers to be *right*—it requires them to be *reasonable*. Unless the plaintiff succeeds in establishing the threshold constitutional violation, no constitutional basis exists for challenging a department's training program. It is not necessarily essential that an officer first be held liable before the claim against the municipality can succeed, but only that a constitutional violation must first be established. As noted previously, even if the plaintiff succeeds in proving that a constitutional violation occurred, an officer may yet escape personal liability by asserting the defense of qualified immunity.[20]

The Second Link—A "Policy" of Inadequate Training

Because *respondeat superior*—vicarious liability—does not apply in sec. 1983 lawsuits, establishing that an officer committed a constitutional violation is not sufficient to attach liability to the department. It is necessary to establish that the officer's training was deficient and that the deficiency was due to the department's policy or custom.

In *Canton*, the Court established a relatively high standard for plaintiffs to reach if they are to succeed against a municipality under the "failure to train" theory of liability. Although the Court rejected the proposition that a plaintiff must show that "the policy in question [is] itself unconstitutional," the challenge of proving that municipal policymakers were deliberately indifferent to training deficiencies and the potential risks becomes a formidable one.

The Court recognized as much and emphasized the point by addressing two potential assertions. First, if a plaintiff alleges that a particular officer was unsatisfactorily trained, it could be that "...the officer's shortcomings may have resulted from factors other than a faulty training program."[21] Second, if the plaintiff asserts that the injury or accident could have been avoided had an officer received better or more training, the Court offered a possible response by noting that "such a claim 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."[22]

The point is that proof of an officer's violation of a constitutional right and proof that the violation may not have occurred if the training had been different in certain respects will not satisfy the plaintiff's burden of proving that a training program is constitutionally deficient. Among other things, the Court noted that "...an otherwise sound program [may be] negligently administered....And plainly, adequately trained officers occasionally make mistakes...."[23] The design and administration of the program must be so lacking as to demonstrate "deliberate indifference" on the part of the agency. The Supreme Court emphasized:

> "Only where a municipality's failure to train its employees in a relevant respect evidences a 'deliberate indifference' to the rights of its inhabitants can such a shortcoming be properly thought of as a city 'policy or custom' that is actionable under [sec.] 1983."[24]

An illustration of how the standard can apply is found in *Davis* v. *Mason County*.[25] Plaintiffs sued the county alleging that sheriff's deputies used excessive force in four separate incidents and that the officers' actions resulted in part from inadequate training. The department produced evidence that a training program existed, but a jury returned a verdict for the plaintiffs.

In sustaining the jury verdict of inadequate training against the department, the Federal appellate court noted several important factors. First, some officers on the department never attended the State training academy, and although the department devised a "field training program" as a substitute for attendance at the State academy, no evidence existed to prove that it was seriously implemented. Second, two training officers quit the department, describing the training program as a "joke." And, third, the deputies "received no training in the constitutional limits on the use of force." Therefore, the court concluded:

> "The training that the deputies received was woefully inadequate, if it can be said to have existed at all... the deprivation of plaintiffs' Fourth Amendment rights was a direct consequence of the inadequacy of the training the deputies received."[26]

"The design and administration of the program must be so lacking as to demonstrate 'deliberate indifference' on the part of the agency."

The Third Link—A Causal Connection

Even if a plaintiff establishes that an officer violated the plaintiff's constitutional rights and that the violation was caused by a training program of the municipality that was so deficient as to reflect a policy of "deliberate indifference" to the rights of its inhabitants, it is still necessary to establish a causal connection between the deficient training policy and the constitutional injury. As the Supreme Court explained in *Canton*:

> "...for liability to attach...the identified deficiency in a city's training program must be closely related to the ultimate injury."[27]

These relatively high standards of fault and causation reflect a reluctance to open the floodgates to "unprecedented liability" claims against local government entities. "In virtually every instance where a person has had his or her constitutional rights violated by a city employee, a [plaintiff] will be able to point to something the city 'could have done' to prevent the unfortunate incident.'"[28] Furthermore, the Court has consistently exhibited a reluctance to involve the Federal courts in "...an endless exercise of second-guessing municipal employee-training programs...an exercise we believe the federal courts are ill-suited to undertake...."[29]

The preceding discussion should establish some perspective and allay some concerns regarding the risks of lawsuits based on deficiencies in training. But if the risks of legitimate lawsuits are not as great as once feared, they nevertheless do exist and are of sufficient importance to justify constant and careful attention to law enforcement training needs. In *Canton,* the Supreme Court noted:

> "...it may happen that in light of the duties assigned to specific officers or employees 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. In that event, the failure to provide proper training may fairly be said to represent a policy for which the city is responsible, and for which the city may be held liable *if it actually causes injury*."[30] (emphasis added)

In summary, "failure to train" is a legitimate cause of action under 42 U.S.C. 1983 and affixes liability on local government entities or policymaking officials when it can be shown that the failure to train constituted a policy or practice of the entity and that it caused a constitutional violation. Part II of this article will consider the vulnerability of firearms training programs to this kind of lawsuit, the issues most likely to arise, and some practical steps that can be taken to minimize the risks of liability.✦

(Continued Next Month)

Endnotes

[1] 489 U.S. 378 (1989).

[2] *Pierson* v. *Ray*, 386 U.S. 547 (1967). In *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982), the Supreme Court held that government employees sued for alleged constitutional violations are shielded from liability if their conduct did not violate "clearly established" *law* of which a reasonable person should have known. In *Anderson* v. *Creighton*, 107 S.Ct. 3034 (1987), the Court extended this protection to circumstances where government employees reasonably believe that their conduct is within the bounds of clearly established law in light of the *facts* known at the time of the action.

[3] The text of the 11th amendment is as follows: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

[4] *See, e.g., Lake Country Estates* v. *Tahoe Regional Planning Agency*, 440 U.S. 391 (1979); and *Edelman* v. *Jordan*, 415 U.S. 651 (1974).

[5] *See Monroe* v. *Pape*, 365 U.S. 167 (1961).

[6] 436 U.S. 658 (1978).

[7] *Owen* v. *City of Independence*, 445 U.S. 622 (1980).

[8] 403 U.S. 388 (1971).

[9] 28 U.S.C. sec. 2671, et. seq.

[10] The Supreme Court has held that proof of simple negligence is not sufficient to establish a constitutional violation. *See Daniels* v. *Williams*, 106 S.Ct. 662 (1986).

[11] 489 U.S. 378 (1989)(plaintiff sued the police department for failing to train its personnel adequately to deal with medical problems of arrestees).

[12] *Id.* at 388.

[13] *Id.* at 391.

[14] 489 U.S. 593 (1989).

[15] *Id.* at 597.

[16] 906 F.2d 791 (1st. Cir. 1991).

[17] *Id.* at 798. For a contrary view, *see Keller* v. *Frink*, 745 F. Supp. 1428 (S.D. Ind. 1990).

[18] 489 U.S. at 588-589. In addition to the 4th amendment, there are two other constitutional provisions that govern the use of force—the 8th amendment, which protects against "cruel and unusual punishments," and the due process clauses of the 5th and 14th amendments, which protect against uses of force that "shock the conscience." *See Rochin* v, *California*, 342 U.S. 165 (1952). However, the Supreme Court has limited the eighth amendment protections to convicted prisoners, *Ingraham* v. *Wright*, 430 U.S. 651 (1977); apart from pretrial detainees, it is not yet clear where due process applies. *See Bell* v. *Wolfish*, 441 U.S. 520 (1979).

[19] 490 U.S., at 396.

[20] *See, e.g., Medina* v. *City and County of Denver*, 960 F.2d 1493 (10th Cir. 1992).

[21] 489 U.S., at 390-391.

[22] *Id.* at 391.

[23] *Id.*

[24] *Id.* at 389.

[25] 927 F.2d 1473 (9th Cir. 1991).

[26] *Id.* at 1482-1483. For other examples where training was deemed to be inadequate, *see Bordanaro* v. *McLeod*, 871 F.2d 1151 (1st Cir. 1989)(insufficient training in use of force) and *Simmons* v. *City of Philadelphia*, 947 F.2d 1042 (3d Cir. 1991)(insufficient training in handling potentially suicidal detainees). Examples where training was deemed adequate may be found in *Dorman* v. *District of Columbia*, 888 F.2d 159 (D.C. Cir. 1989)(suicide prevention training); *Colburn* v. *Upper Darby Township*, 946 F.2d 1017 (3d Cir. 1991)(suicide prevention); *Mateyko* v. *Felix*, 924 F.2d 824 (9th Cir. 1990)(tazar training).

[27] *Id.* at 391. *See Buffington* v. *Baltimore County, MD*, 913 F.2d 113 (4th Cir. 1990)(no evidence that failure to train officers in suicide prevention caused suicide).

[28] *Id.* at 392.

[29] *Id.*

[30] *Id.* at 390.

Law enforcement officers of other than Federal jurisdiction who are interested in this article should consult their legal advisor. Some police procedures ruled permissible under Federal constitutional law are of questionable legality under State law or are not permitted at all.