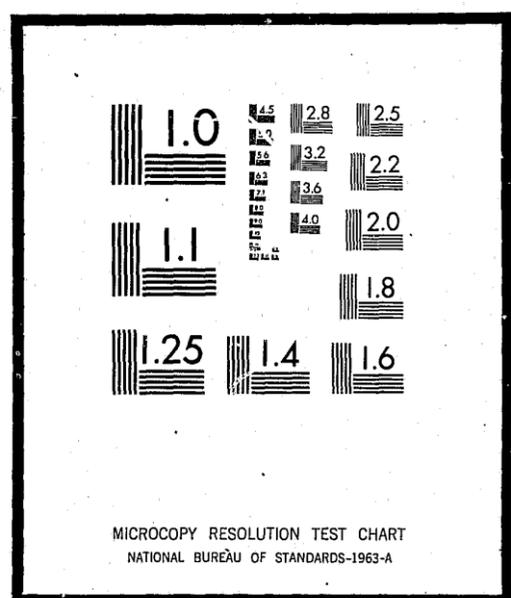


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## CIVIL LIABILITY OF GOVERNMENT FOR INADEQUATE POLICE FIREARMS TRAINING

Prepared by:

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October 15, 1972

UNITED STATES GOVERNMENT

# Memorandum

*Handwritten signature and initials*  
DATE: 2/5/75

TO : NCJRS

FROM : Captain Jack M. Sands, United States Park Police

SUBJECT: Reference material

Enclosed is a paper I prepared while attending the FBI National Academy in 1972. It is entitled, "Civil Liability of Government for Inadequate Police Firearms Training". It is an unpublished document. If you desire to reproduce it and make it available to NCJRS users at no cost, you have my permission.

*Handwritten signature of Jack M. Sands*  
Captain Jack M. Sands  
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CIVIL LIABILITY OF GOVERNMENT  
FOR INADEQUATE POLICE FIREARMS TRAINING

SCOPE

The objective of this project is to inquire into the civil liability of governments in the United States for inadequate police firearms training. In addition, an attempt has been made to study some aspects of police firearms training as they exist. The research is limited to published material relating to the subject matter and a survey of a representative group of police officers attending the 91st session of the F.B.I. National Academy.

SOVEREIGN IMMUNITY

At common law, the government was not liable for civil wrongs committed by its officers and employees. This doctrine of sovereign immunity was developed in England in 1788.<sup>1</sup> The principle justifying this doctrine was that the king could do no wrong.

In the United States, in 1946, the Federal Tort Claims Act was enacted. This abolished certain areas of federal immunity.

Sovereign immunity of the various states may be abolished through legislation or by court decisions. Recently, states have enacted legislation to accomplish this. Appellate court decisions in the following states have abolished this immunity: Florida and Colorado (1957); Illinois (1959); Michigan and California (1961); Minnesota, Alaska, and Wisconsin (1962); Arizona (1963) and Washington and Kentucky (1964).<sup>2</sup>

"The movement is now well underway at the state and local level to abolish the doctrine of sovereign immunity. . . Whether sovereign immunity has been removed by judicial or legislative action, however, the fact remains that the courthouse doors have been opened wider."<sup>3</sup>

RESPONDEAT SUPERIOR

Once sovereign immunity has been removed, the common law doctrine of respondeat superior is in force. This means the master (employer) is held answerable for wrongs committed by his servant (employee) when the servant is acting within the scope of his authority (as an employee).<sup>4</sup>

APPELLATE COURT DECISIONS

There have been numerous state appellate court decisions which hold the local and the state governments liable for misuse of firearms by its police officers due to inadequate training. A few of these decisions will be discussed here, in order to show the trend of the courts.

Meistinsky v. City of New York: An officer who witnessed a holdup in progress began shooting at close range. The death of the holdup victim resulted. In holding the city liable, the court said a prima facie case of negligence on the part of the city was established because the city had not sufficiently trained the officer in the use of small arms.<sup>5</sup>

McAndrew v. Mularchuk: In a landmark case, the New Jersey Supreme Court ruled that a municipality is liable for failing to properly train its police officers in the proper use of firearms.

Mularchuk was a reserve patrolman in the Borough of Keansburg, New Jersey. He had served in this capacity for 16 years and had never received formal firearms training, although he wore a uniform and carried a service revolver while on duty. He was periodically assigned to parades, public gatherings and places of entertainment. He also performed other patrol and traffic duties. On the witness stand, he testified that he had been told he could use his revolver if his life were threatened; to prevent a holdup and that he could use force against those who resisted arrest.

McAndrew, the plaintiff in the case, was 17 years old. He and a friend became involved in an argument with a tow-truck driver over a service charge. When Mularchuk and another officer arrived on the scene, the altercation was quite intense. The other officer placed the tow-truck operator in the police vehicle while Mularchuk fired his service revolver at the youth, striking him in the back about chest high.

In court, both parties told conflicting stories. The plaintiff testified that he attempted to run away because he was frightened, while Officer Mularchuk testified that McAndrew came towards him with his hand in his pocket. He stated he drew his revolver because he thought McAndrew had a gun or a knife. He testified that he fired on the ground in front of McAndrew to "scare him off", but as he

fired, the plaintiff turned and the bullet struck him in the back.

McAndrew brought suit against Officer Mularchuk and the municipality for damages. The lower court dismissed the suit against the municipality on the grounds that it could not be held responsible. A jury found the officer was liable and awarded the plaintiff \$8,000 for damages.

The plaintiff appealed regarding the dismissal of the suit against the municipality and a new trial was granted. A subsequent appeal was then made to the New Jersey Supreme Court, in which the municipality contended it was not guilty of active wrong doing and should not be held for damages.

The court's opinion was as follows: "Municipal entities must take cognizance of the hazards of sidearms . . . The obligation is to use care commensurate with the risk, to see to it that . . . persons are adequately trained or experienced in the proper handling and use of the weapon they are to carry . . . That if an injury results from an unjustified or negligent shooting by that officer in the course of the performance of his duty . . . chargeable to the lack of training or experience, the municipality is liable."<sup>6</sup>

Peer v. City of Newark: In this New Jersey case, the City of Newark was held liable for damages resulting from an accidental discharge by an officer who was off duty and in his home. As in the preceding case, the lack of adequate training was the issue.

One day in April 1958, Officer Thomas, who had been a member of the Newark Police Department for sixteen months or so, was off duty and dressed in civilian clothes. He spent about three hours during the afternoon in a tavern consuming 5 or 6 bottles of beer. He returned to his apartment about 8 p.m. and removed his overcoat. He commenced to take his revolver from the holster, preparatory to using the bathroom. His off-duty holster was worn on his left side, attached to the belt which supported his trousers. Using his right hand, he took the loaded .38 caliber service revolver from the holster, intending to place it on the toilet tank about 3 feet from him. When the gun was about a foot away from his body, it discharged.

The bullet traveled through a wall  $6\frac{1}{2}$  inches thick and struck a small child, who was in the bathtub, in the adjoining apartment. The child was seriously injured.

When the case was tried before a jury, \$180,000 was awarded on behalf of the child and another \$45,000 awarded in favor of the parents. The verdicts were against both the city of Newark and the officer. At the trial, the city admitted ownership of the revolver and the cartridges and that Thomas was ordered to carry the revolver at all times while off-duty. The city appealed to the Appellate Division of the Superior Court which reviewed the trial.

The basis of the claim of active wrongdoing against the city was that its training program was inadequate in that it had not

trained or instructed Officer Thomas sufficiently in the safe use of his service revolver. Two firearms experts, Donald MacNamara and Paul Weston, testified for the plaintiffs.

MacNamara testified that in his opinion Thomas' training was inadequate as to (1) safety during off-duty hours, (2) the type of holster to be used during such periods, and (3) the manner of handling the gun. He was also critical of the fact that Thomas had not fired his revolver since he was appointed, a period of  $16\frac{1}{2}$  months.

Weston characterized the police department's training program as "below standard - far below standard", and inadequate for substantially the same reasons as given by MacNamara.

At the trial, the court considered the firearms training program of the police department and the type of off-duty holster which should be used. It was brought out that Thomas had received no instruction regarding off-duty holsters and there was no regulation regarding off-duty holsters nor inspection of same. The holster that Thomas had purchased was described by Weston as a "gimmick type" which was dangerous.

At the trial, it was brought out, as previously mentioned, that Thomas had received no retraining in firearms since appointment. MacNamara testified that marksmanship retraining should be conducted at least once a month, while Weston fixed a standard of three times a year.

The court concluded that the issues described were issues to be decided by the jury; that in the trial court they had been correctly submitted to the jury under proper instructions from the trial judge, and that the verdicts against the City of Newark should stand.<sup>7</sup>

Piatkowski v. State: In an action brought before the New York Court of Claims, damages were sought against the state where a state trooper shot and killed a man fleeing from the scene of a traffic violation. The court, in awarding damages, said: "Public policy requires that police officers be trained in the use of firearms on moving and silhouette targets and instructed when and how to use them. When an employer entrusts his employees with an instrumentality, intending him to use it, the employee must be trained sufficiently in its use to avoid causing harm to another . . ."<sup>8</sup>

Hacker v. City of New York: A New York City probationary patrolman had completed five lessons of a sixteen lesson course on the care and handling of firearms. While off-duty in his home, the officer was cleaning his service revolver when it discharged and injured his wife. She sued the city for damages.

The court held that cleaning and handling the gun before completing the basic firearms course constituted negligence on the part of the officer (and therefore his employer). In this case, the act of cleaning the gun was held to be within the scope of the officer's duties and the doctrine of respondeat superior was applicable to impute liability to the city. The court said

that an employer, who requires an employee to perform acts with a dangerous instrumentality, has the duty to ascertain the employee's qualifications before entrusting him with the instrumentality.<sup>9</sup>

#### PREVENTION OF LIABILITY

The preceding discussion of cases points out quite clearly the need for adequate police firearms training. These decisions, which are only a representative sample, certainly emphasize government liability for inadequate training.

Douglas M. Walters, Administrative Assistant, Arizona Department of Public Safety, has this to say about the subject: "The various cases suggest four general phases of firearms training:

1. Care and handling of the weapon both on and off duty so as to avoid accidents and injuries;
2. How to fire the weapon effectively and accurately;
3. When to use the weapon (deadly force); and
4. Retraining to maintain the officer's level of proficiency."<sup>10</sup>

The Research Division, Police Legal Center of the International Association of Chiefs of Police speaks to the subject as follows:

"To prevent liability, a police agency must show that:

1. the officer was properly trained in its safe handling and care;
2. was well grounded in the law of deadly force;
3. that the agency has adopted and published rules, regulations or standards pertaining to the foregoing;

4. that the training has continued past recruit school; and
5. departmental records exist demonstrating the officer's proficiency in its safe handling operation and legal limitations on its use."<sup>11</sup>

#### NONLETHAL WEAPONS

One might reasonably conclude that the use of nonlethal weapons by the police would solve the problems encountered by using firearms. Many so-called nonlethal weapons have been developed over the years. Few of them have gained any widespread acceptance by police organizations. A great deal more research and development is required. One of the main problems with the so-called nonlethal weapons is that when improperly used, they may cause serious injury or death. As with firearms, proper training in the use of these weapons is necessary.

"Many local enforcement agencies provide grossly inadequate training in the proper use of weapons. . . Improper use of chemical sprays (documented in many cases to be the result of inadequate instruction and training) is one of the factors that already has led some police departments to remove them from the individual officer's arsenal."<sup>12</sup>

#### COMPARATIVE STUDY OF FIREARMS TRAINING: 13

A comparative study of firearms training, undertaken by the National Institute of Law Enforcement and Criminal Justice,

published in 1970, reveals some important facts bearing on the subject of police firearms training. Although 102 municipal, state and federal law enforcement agencies participated in the study, some of the information is incomplete. In some categories of the study, agencies indicated that information was not available or failed to supply it. Therefore, the results of the study cannot be used to draw conclusions regarding the total picture. However, the study does have some value when discussing the subject of inadequate police firearms training in America. Some of the facts revealed are as follows:

1. Twenty-seven agencies issue firearms to new recruits immediately upon appointment and 15 during recruit training (usually after qualifying).
2. The number of hours devoted to recruit firearms training varies from 89 hours in one department to only 4 hours in another. ONE DEPARTMENT HAS NO FIREARMS TRAINING. The average is 36.3 hours. These great differences appear to depend on facilities, budget and size of department.
3. Thirty-one agencies provide firearms training all at once on consecutive days while 28 spread the training over a period of time. (Firearms instructors generally agree that it is best to spread the training over a period of time.)
4. There is no standardization of qualification scores required for new recruits. A variety of bases for the various qualifying scores are given. Those offered are statute, precedent, policy and

National Rifle Association.

5. In-service firearms training varied from once a week to none. Some departments have shooting practice but no requalification.

6. The most common comments were that more firearms training is needed (recruit and in-service), minimum qualification scores should be raised and standardization encouraged.

#### SURVEY OF FIREARMS POLICIES AND TRAINING IN JUDGMENT PISTOL SHOOTING<sup>14</sup>

A representative group of police officials attending the F.B.I. National Academy was surveyed regarding their departments' firearms policies and judgment pistol training. The survey results are as follows:

1. Does your department have a written firearms policy regarding the use of deadly force? Yes: 69% No: 31%

2. Does your department permit an officer to fire at any fleeing felon, regardless of the nature of the felony? (such as fleeing looters). Yes: 19%; No: 81%

3. Does your department permit the firing of warning shots? Yes: 31%, No: 69%

4. Does your department permit the firing of weapons from moving vehicles? Yes: 57%, No: 43%

5. Does your department require a detailed written report on all discharges of firearms? (excluding range). Yes: 86%, No: 14%

6. Does your firearms training include any sort of judgment pistol shooting, such as the firing of wax bullets at a paper movie screen on which "shoot" or "don't shoot" situations are projected? Yes: 19%, No: 81%

#### CONCLUSIONS

Based upon this study of civil liability of government for inadequate police firearms training, the following conclusions have been drawn:

1. The common law doctrine of sovereign immunity is being replaced by the doctrine of respondeat superior. This trend has been established by legislative and judicial action. Although the change may be gradual, sovereign immunity will eventually disappear with regard to the subject of police firearms training.

2. Responsibility of government to adequately train its police officers in the use of firearms is not restricted to marksmanship, but also includes proper training in the law regarding the use of deadly force, judgment pistol shooting, safe handling of firearms, both on and off-duty, and selection of off-duty holsters. The responsibility does not end with recruit training, but includes in-service training.

3. Effective nonlethal weapons will not replace firearms for police use in the foreseeable future. A great deal of research and development is required.

4. There is a need for standards to be set for minimum firearms training of police officers. At present, many departments have grossly inadequate firearms training programs.

5. There is a need for financial assistance for many departments to improve firearms training. In addition, most departments do not have a judgment pistol shooting program, which requires special equipment. Financial assistance, possibly from the federal government, could solve this problem, if the equipment was made available on a regional basis.

6. Many departments do not have a written firearms policy, as has been recommended by a Presidential Commission. (See appendix).

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## APPENDIX

### SUGGESTED GUIDELINES TO CONTROL THE USE OF FIREARMS<sup>15</sup>

"1. Deadly force should be restricted to the apprehension of perpetrators who, in the course of their crime threatened the use of deadly force, or if the officer believes there is a substantial risk that the person whose arrest is sought will cause death or serious bodily harm if his apprehension is delayed. The use of firearms should be flatly prohibited in the apprehension of misdemeanants, since the value of human life far outweighs the gravity of a misdemeanor.

2. Deadly force should never be used on mere suspicion that a crime, no matter how serious, was committed or that the person being pursued committed the crime. An officer should either have witnessed the crime or should have sufficient information to know, as a virtual certainty, that the suspect committed an offense for which the use of deadly force is permissible.

3. Officers should not be permitted to fire at felony suspects when lesser force could be used; when the officer believes that the suspect can be apprehended reasonably soon thereafter without use of deadly force; or when there is any substantial danger to innocent bystanders. Although the requirement of using lesser force, when possible, is a legal rule, the other limitations are based on the sound public policy. To risk the life of innocent persons for the purpose of apprehending a felon cannot be justified.

4. Officers should never use warning shots for any purpose. Warning shots endanger the lives of bystanders, and in addition, may prompt a suspect to return the fire. Further, officers should never fire from a moving vehicle.

5. Officers should be allowed to use any necessary force, including deadly force, to protect themselves or other persons from death or serious injury. In such cases, it is immaterial whether the attacker has committed a serious felony, a misdemeanor, or any crime at all.

6. In order to enforce firearms use policies, department regulations should require a detailed written report on all discharges of firearms. All cases should be thoroughly investigated to determine whether the use of firearms was justified under the circumstances."

**END**