



Volume 11, Issue 1

March 2004

Law Enforcement Action Forum NEWSLETTER

THERE IS MONEY ON THE TABLE!

Things You Can Control to Reduce Your Losses Due to Accident, Liability or Injury

By Gene King, MML Loss Control Consultant

Wishful Thinking vs. Hard Reality

It would be nice if every story started with "Once upon a time, far, far away." Well this one doesn't. It is today and it is real. This is no fairytale. It is more like a horror story that can have a relatively happy ending. Read on.

Faced with a budget crisis, every governmental agency in Michigan is looking to reduce costs and find additional revenue. Law enforcement is no exception. Over the past six months chiefs, sheriffs and public safety directors have wrestled with a common problem: how to maintain quality services in the face of reduced budgets. This problem will not go away anytime soon and has been the subject of ongoing discussions by LEAF as its members struggle to identify their departmental priorities and develop strategies for maintaining their departments' effectiveness.

This LEAF Newsletter focuses on those areas over which departments can exert control, thereby maximizing available funds and reducing costs. It stresses the importance of employing solid risk management strategies to avoid wasting funds on preventable losses. Members of Michigan Municipal League Liability and Property Pool and Michigan Municipal League Workers' Compensation Fund do not have traditional commercial insurance. Participating municipalities "pool" their funds to cover each other's losses, thereby avoiding the prohibitive premium prices that commercial insurers charge. For these reasons, it is to everyone's benefit to contain and control losses. For risk control practices to provide maximum benefit to all Pool and Fund members, all members must aggressively participate in the risk control process. That is why the Pool and Fund have always emphasized the role of solid risk management.

Risk management involves identifying risk exposures and selecting available alternatives to either eliminate the exposures or to mitigate the effects of those that can not be eliminated. It is also important to audit and measure the initiation of the techniques so the department can adjust or improve the program based on the measured results. To more fully understand what Risk Management involves, go to the MML's LEAF Manual of Law Enforcement Risk Control, Chapter 1 at www.mml-leaf.org.

Law enforcement performs many job functions that put its employees in situations where there is risk. There is no way around that. However, if law enforcement recognizes that there are predictable -- even probable -- situations involving risk that officers are going to encounter, departments can take steps to prepare for these situations. If departments want to reduce the potential for injury or loss, they must train their officers to recognize when they are at risk and help them hone the skills necessary to exercise control over those situations. That is why LEAF places a priority on departments having policies, tools, training, and supervision. When these are in place, officers have guidance, they understand the scope of their discretion, and they have the weapons and/or skills so they can physically protect themselves.



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Hard Reality

Reducing losses requires management to develop, implement, and maintain an effective risk management program. The first step in developing a risk management strategy for reducing losses is to identify where law enforcement agencies are spending money. Not every injury or incident of liability is preventable. However, an objective, analytical review of past losses can help top administrators identify the root causes of claims. Armed with this information, they can formulate a plan of action that can either eliminate the risk or at least mitigate the potential for future occurrence. To assist its members, LEAF has examined the last three years of the Pool and Fund police claims history. For the Pool, the areas that stand out are excessive force, civil rights violations, and the operation of motor vehicles. For the Fund, losses center around activities involved in overcoming resistance or apprehending a suspect, slips, trips, and falls, and injuries involving the operation of motor vehicles.

Vehicle Crashes are Money Wasters

In the past three years the Pool has experienced close to 900 vehicle claims with a loss of around \$3.7 million. Many of these accidents were avoidable. They didn't happen because the officers don't know how to drive. These incidents involved situations where officers made bad decisions.

Vehicle operation is a high frequency activity that departments can easily address; so is damage caused during this activity. Frequently, the department's vehicle struck something or was damaged as a result of:

- Operator error,
- Operator inattentiveness,
- Excessive speed,
- Being struck by another vehicle, and
- Being struck by bad guys when trying to get away.

A number of the incidents involved backing up a vehicle and/or striking a fixed object -- frequently the department's own property or that of a co-worker. An analysis of these incidents also indicates that officer inattentiveness contributed to these accidents even if they were not legally at fault. To be sure, some of these are incidents where bad guys or people not paying attention have hit or pulled in front of department vehicles.

When it comes to the Workers' Compensation Fund side of vehicle operations, it took \$2.5 million over the past three years to cover the costs of injuries to employees involved in vehicle crashes. Added to the cost of vehicle damage and liability claims from the Pool, the total cost is more than \$6 million. This number does not include the additional costs of

lost time, overtime, administrative time, and deductible expenses.

It is convenient to argue that the reason for paying insurance premiums is to cover the expense of these types of incidents at a lesser cost. The reality is that the cost of insurance is based on the members' exposures and experience. The more you use insurance, the more costly it becomes.

Policy vs. Reality

For example, one hundred of the reported vehicle incidents involved hitting an animal. The average cost of one of these types of claims is approximately \$1900 plus any deductible and loss of use of the vehicle. It does not include injuries that result because the operator attempted to avoid the collision and a more serious accident occurred. An analysis of these accidents showed that they generally occurred:

- During the normal operation of a vehicle, not pursuits,
- Most often at night, or
- On emergency runs.

This suggests that the officers were overdriving their headlights and that generally indicates excessive speed. Not all of these types of accidents are preventable, but a reduction in the number of them will occur if departments make their officers accountable for their actions. If a collision with an animal is unavoidable, departments should instruct their officers that the right decision is to hit the animal and maintain control of the vehicle. The outcomes of attempts to avoid animals have been quite serious. If we can slow them down during general operation some of these can be avoided. In your department, is it the norm for officers to hurry every place they drive even though your motor vehicle policy may prohibit it?

Establish Accountability

It is management's responsibility to make the safe operation of motor vehicles a top priority. If top management makes it important not to damage vehicles, then it becomes important for the operators. The first step in controlling vehicle accidents is to investigate and analyze every incident involving damage to a vehicle to identify all the causes. Departments must then hold operators responsible for their actions. That doesn't always mean discipline. After the accident investigation is complete, operators must be told if they contributed to the accident. Operators with a history of damaging vehicles should have a big picture review of how they are operating the department's vehicles. This review may involve video taping and/or an evaluation of the operator's driving skills by a supervisor or field trainer. The department should also review the operator's driving record to

see if it reflects problems in how they operate their personal vehicles. It may provide clues as to why they put themselves at risk. The department must also explore if the operator has a physical or emotional problem that is contributing to the operator's actions. Management needs to evaluate if they should implement engineering controls to reduce the exposure.

Reducing vehicle damage will result in direct savings to the department. Deductibles are retained, the vehicle stays available, officers are not injured and management is more efficient because it does not have to handle the administrative details of managing a claim.

Officer Conduct and Performance

More than 80 % of all police liability claims filed with the Pool since January of 2001 are either claims of excessive force, false arrest, or violations of civil rights. The severity of the cost of those claims represents 92% of all police liability losses. These numbers are comparable to the losses due to vehicle operations.

While departments can do nothing to dissuade a person who is intent upon filing a lawsuit, they can strive to remove any reason for litigation and be in a position to provide a sterling defense against the charge. The best way to provide that solid defense is to have policy in those high-risk areas that often cause liability:

- Rules of Behavior,
- Vehicle Operations,
- Use of Force,
- Use of Weapons,
- Arrest,
- Pre-Arrest,
- Search and Seizure,
- Juvenile Handling, and
- Handling Persons In-Custody.

(Sample policies and topical resources on these and many other topics can be found at www.mml-leaf.org).

In addition to developing and implementing policies,

- All employees must receive training in the intent of the policies, so they understand both the department's philosophy and the extent of discretion they have in the applying the policies.
- The department must also train officers in the appropriate use of the weapons and tools that the department provides for its officers' use.
- The department should also have a process of quality assurance. This process should include periodic audits of departmental activity to ensure that employees meet the department's behavioral, philosophic and discretionary expectations.
- The department should maintain records of this activity for at least five years.

If management emphasizes maintaining a quality operation and requires its employees to work safely, the likelihood of litigation is diminished because employees are doing the right things.

How Officer's Get Hurt

Analysis of the Workers' Compensation Fund claims uncovered some interesting details. The most frequent cause of officer injury is chasing or engaging a bad guy. Apprehending bad guys is part of what police officers do for a living, and it isn't always nice. There is no way an officer can apprehend bad guys without having to come into contact with them.

Find the Root Cause

Departments should review each incident to determine exactly what caused the officer's injuries. It is important to find out what officers were doing just before they did what got them hurt. Analyzing why they decided to use a specific strategy will lead to the root cause of the injury. Identifying the root cause will enable departments to determine whether there is an issue of training, a need for better or alternative tools or implements, or whether the culture of the organization is out of tune with its philosophy.

By analyzing the root cause of an injury, management can identify if an officer demonstrated the ability to use approved defensive tactic techniques or properly brought a tool or weapon into use. If not, remedial training in those areas can be the remedy.

Evaluate Policy vs. Practice

If the analysis indicates an officer chose to forego the approved tactics, tools or weapons, and instead chose to physically fight the suspect, there may be a more significant problem. This decision – whether by a single officer in a single incident or by several officers injured over a period of years – may indicate a disconnection between a department's stated philosophy and how it is actually operating. As LEAF has stated frequently, departments need to provide:

- Guidance through policies and rules,
- Appropriate tools and weapons,
- Training necessary to support the policy and procedure,
- Training for proficiency, and
- A definition of the scope of officer discretion.

If departments provide these and a problem still exists, there may be something in the content of communications or the method of delivery that is causing officers to disregard the

message. For example, if management provides all the resources it can for its officers, but they feel that management, in its efforts to avoid liability, has made the condition of use too rigid, officers may err by not using the correct tool or by not using one at all. Another issue that might arise is the effectiveness of training. If weapons and tool training emphasizes skill over application, officers may not receive sufficient guidance on the department's stance on when using a specific technique, tool, or weapon is preferable.

Additionally, departments should evaluate the messages that their trainers are delivering to make sure that trainees cannot misinterpret them. Miscommunication is not an uncommon problem. Trainers are highly motivated, and they believe in the subject or skill on which they are providing training. Sometimes, in their enthusiasm, trainers forget that the words they use and the stories that they tell can give trainees the wrong impression about what is appropriate behavior or how much discretion trainees have once they bring the technique into use. Clearly communicated training, delivered with frequent reminders of the department's expectations about officer conduct and discretion, can have a significant effect on reducing both officer injury and the potential for liability claims.

Only a systematic analysis of the root cause of an injury will uncover these deficiencies. The department can implement appropriate remedies that will help to reduce the frequency of losses. A reduction in losses will translate into savings for the department in lost time and replacement costs. A copy of the MML Fund, Employee Report of Injury Form can be obtained from the person who handles your governmental entities Workers' Compensation Claims or at www.mmlfund.org. Log in as a member, select online forms, then claims reporting guide and forms, and finally choose the claim short form.

A Note about Officers Hurt when Using Force

Over the past year James I. DeGrazia, LEAF Legal Advisor has referred to the "Reasonable Officer Standard" in *Graham v. Connor*, 490 U.S. 386, 394, 109 S.Ct. 1865, 1871, 104 L.Ed. 2d 443 (1989), (LEAF Newsletter, Volume 10, Issue 1, March 2003) in discussions about use of force. Mr. DeGrazia suggests that when conducting an evaluation, management should remember the applicable legal standard: "was the officer's response to the subject's actions objectively reasonable in light of the facts and circumstances confronting the officer at the time the force was used?" Officers have to know that they need to be able to articulate why they chose to do what they did. There is no penalty if it was reasonable. Officers know what is reasonable but they don't always know what management thinks is reasonable. To avoid controversy or risk of review an officer often will choose not to put himself in the position of being questioned. They will

either avoid the use of a control technique, tool or weapon or they will use it inappropriately. Most often the officers will default to striking with their fist or try to strong-arm the suspect. That is when they get hurt!

Injuries That Should Never Occur

Too many employees are getting injured because they are falling down on the agency property. Governmental agencies would have a hard time defending themselves when these types of claims happen. The causes of these claims are:

- Slipping, tripping and falling on wet floors, oily surfaces, worn stair treads, worn or torn carpets,
- Falling when chairs, tables or desks collapse or tip over,
- Falling because surfaces are uneven and unmarked,
- Falling because their feet get tied up in cords, lying on the floor.
- Slipping and falling on ice, and
- Tripping over raised sidewalks, parking blocks, outdoor mats and potholes.

Every one of these accidents is preventable if management performs regularly scheduled property inspections and maintenance. Although employees ought to have some responsibility, MIOSHA require employers to maintain a safe working environment. Injuries that result from these types of exposures are like throwing money in a burning barrel.

Stop the Waste of Funds

Another interesting outcome of the claims analysis was the revelation that our Fund paid approximately \$750,000 over the past three years because of injuries that occurred during training. Of this amount, the Fund paid more than \$250,000 for injuries resulting from motorcycle training. In reviewing the causes of claims resulting from training, they usually fell into two categories. One is what I call the "Oh Sh__!" category. This is when the first thing out of a trainees' mouths is something we can't print. It usually involves dropping something on their foot, getting their hand in a weapon, being too aggressive, doing something like tripping over their own feet or falling off their motorcycle or bicycle. Most of these injuries are avoidable with supervision, reasonable judgement and making sure the trainee is exercising a little care.

The second category comprises injuries that arise when trainees are not prepared for physical exertion. A significant number of these injuries result from defensive tactics and weapons training. This training is necessary. Officers must

know how to implement the techniques. But before the activity takes place, participants have to warm up and stretch to become limber. This warm-up needs to take place before the activity, not just at the beginning of the class. Often what happens is the demonstration takes place after the initial warm-up. As a result, the trainees are cooled down before they begin to exert themselves. By making sure the participants are well stretched and warmed up before the holds are applied, the probability of injury should go down because trainees' joints and muscles are less susceptible to the pressure. The participants also need to learn that the goal of a hold is to achieve compliance, not to break someone's wrist, finger or shoulder. If the training involves blows, then the department should provide proper pads and headgear. We can neither keep sacrificing the knees, wrists, fingers and shoulders of our employees, nor waste essential funds on preventable injuries!

Risk Management is Good Management

There are dollar savings in practicing risk management. Our discussion of the areas of loss should give the reader some idea of those areas that have been causing losses in the law enforcement community and encourage management to establish an ongoing, effective incident review program. With the implementation of an accident review policy for all incidents involving vehicle damage and those that cause injury to either officer or citizen, managers will have an idea of the root cause of accidents or injuries. Managers can implement strategies for either eliminating or, at least, reducing the probability of future occurrence.

To visualize the cost of a litigation or injury claim to a governmental agency, think of an iceberg. The National Safety Council reports that there is a one-to-four ratio between the insurance cost of a claim and its actual cost. That means the money spent by the Pool or Fund is only the part above the waterline and represents one quarter of the size of the actual cost of the claim. The three-quarters is below the waterline and includes overtime, hiring, training, equipment damage, downtime, time spent administratively and employee morale. These are indirect or hidden costs that are paid by the governmental agency. This is real money that comes directly out of the coffers. If a governmental agency has a strong risk management program that includes incident investigation, analysis and remediation efforts, they will save money by reducing the potential of future occurrence

All for One and One for All

This Newsletter's critical message is that each Member of the MML Pool and Fund shares in one another's risk reduction efforts. The group is only as strong as the weakest risk management program. Each law enforcement executive can affect the department's risk position by performing a review of its operations to identify existing risk exposures. Having identified the risks, the executive can develop a plan to

eliminate those risks that can be, and mitigate the ones that can't. This risk management initiative can effectively reduce losses and their direct and hidden costs, thereby making available funds that might otherwise be spent on preventable incidents. This can be a significant benefit for managers struggling to meet the public's expectations about law enforcement service in the face of severe budgetary constraints.

The next issue of the LEAF Newsletter will outline a new initiative that the MML's Pool and Fund Loss Control is preparing to launch. It is called "Risk Management Is Good Management." This may sound obvious, but practicing it and making it an everyday part of your community takes initiative, the proper tools and, often, professional assistance. The program will do more than provide annual loss control surveys or "on-call" loss control support. We're going to provide our members with the tools you need to receive public support for making risk management a priority item in your community.

While compliance to the loss prevention techniques suggested herein may reduce the likelihood of a claim, it will not eliminate all exposure to such claims. Further, as always, our reader's are encouraged to consult with their attorneys for specific legal advice.

JOIN THE LAW ENFORCEMENT RECORDS MANAGEMENT ASSOCIATION INC.

It is a daunting task to make sure a department's records process is kept in line with current industry standards and in compliance with the law. The management of releasing information is a very difficult task. It requires that the person responsible for the task to be current with the Freedom of Information Act, Health Insurance Portability and Accountability Act of 1996, and the Michigan Victims Rights Act as well as other legal changes pertaining to the records function. In 1993 a group of law enforcement records managers formed the Law Enforcement Records Managers Association (LERMA) for the purpose of having a forum for records managers to come together to share their collective expertise. LERMA has quarterly meetings to assist their members in promoting improvements in record keeping through efficiencies and cooperation. The cost of membership in LERMA is currently \$25.00 per year. This is a nominal fee considering the benefit a department's records manager can get by sharing in this important network. Contact Debbie Fitzpatrick, LERMA Treasurer, at the Birmingham Police Department, 248-644-1800 for more information.

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