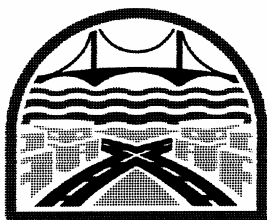


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A DISCUSSION OF LESS LETHAL WEAPONS: ADOPTING A PROGRAM FOR PROTECTING OFFICERS AND SUBJECTS

By Gene King, MML Loss Control Consultant

Less Lethal Weapons

Interest in the use of Less Lethal Weapons has recently intensified as a result of several incidents – both at the state and national level – in which law enforcement used lethal force. In these cases, members of the public criticized the officers for using deadly force in situations where the public believed other means might have been better. Evaluating the actions of officers in these types of incidents is appropriate for quality assurance. At the same time, we should remember that it is easy to criticize decision-making after the fact. Once an incident is over, it is easier to identify and evaluate many pieces of information that highlight other alternatives that officers should or might have taken. In conducting the evaluation, we need to 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?”** (*Graham v. Connor*).

This standard is the basis that police administrators use when determining what policy, weapons and training they should provide for their officers. The purpose of this edition of the Law Enforcement Action Forum (LEAF) Newsletter is to discuss issues that a law enforcement administrator should take into consideration when determining what Less Lethal Weapon (LLW) the department is going to authorize.

For purposes of this newsletter, an LLW is a system or weapon the design of which allows officers to respond to subject resistance with a level of force that is less likely than a firearm to cause serious or fatal injury.

This definition covers a number of options, among them subject control techniques, holds and strikes. Additionally, the following are LLW’s: ASR’s and batons, electronic devices, foam, long range gas, pads, fin stabilized, pellets, as well as nets and ball projectiles. Each LLW has unique risks and, therefore, the trigger for using a specific LLW will vary widely.

Social Pressure for Less Lethal Weapons

During the 1960’s when there was civil unrest and many people lost their lives or received injuries while rioting and protesting. The government recognized the need to develop less lethal methods to control crowds and quell disturbances. In the 80’s, government actions and court rulings led to the dismantling of many psychiatric institutions in favor of main stream housing, education, and treatment techniques. This circumstance increased the pressure on law enforcement to find solutions for handling situations in which individuals acted in a manner that forced the police officers to take action. A 1985 Supreme Court Ruling, the L. A. riots after Rodney King, the Miami Riots, the Branch Davidians and, in Michigan, the Malice Green incident thrust the issue of developing LLW’s to the forefront.

The Legal Issues

To gain an understanding of the legal issues surrounding the use of force, LEAF turned to its Legal Advisor, James I. DeGrazia of O’Connor, DeGrazia, Tamm & O’Connor PC, and asked what court cases are on point in the use of LLW’s. Mr. DeGrazia suggested that the primary case that stimulated action for the development of LLW’s and for departments to consider their use was *Tennessee v. Garner*, 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985).

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In the *Garner* incident, a Memphis police officer fatally shot a 15 year old, eighth grader. Garner stood about 5'4" tall and weighed between 100 and 110 pounds. The officer was reasonably sure that Garner was unarmed. Nevertheless, the officer shot Garner in the back of the head as he fled from the officer. *The Supreme Court ruled that a police officer may not seize an unarmed, non-dangerous suspect by shooting him dead.*

Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, ***deadly force may be used if necessary*** to prevent escape, and if, where feasible, some warning has been given. “ *Id.* at 11-12, 105 S.Ct. at 1701-02. (Emphasis added)

This Court was very specific that law enforcement must use means other than deadly force to apprehend unarmed, non-dangerous fleeing felons. However, the ruling also acknowledged the validity of using deadly force on a suspect who meets the criteria and the dangerous behavior outlined in the case.

Mr. DeGrazia also cited *Graham v. Connor*, 490 U.S. 386, 394, 109 S.Ct. 1865, 1871, 104 L.Ed. 2d 443 (1989) as a case in which the United States Supreme Court analyzed police conduct in a force situation. The court said that police conduct must be examined to determine *“whether the officers’ actions are [objectively] reasonable in light of the facts and circumstances confronting them, without regards to their intent or motivation; ...* This is to be judged from the perspective of the officer on the scene, rather than with the benefit of 20/20 hindsight.”

In *Graham*, the plaintiff was a diabetic who felt the early stages of an insulin attack. Officer Connor saw Graham enter and leave a store quickly. He followed the vehicle driven by Graham’s friend and made an investigatory stop. Although Graham insisted that he was having a diabetic reaction, the police officer ordered him to stay until he found out what happened at the store. Backup officers arrived at the scene and despite Graham’s protestations, handcuffed him and allegedly “roughed him up.” Graham received various injuries; he was later released and taken home.

The Court stated that the inquiry into the reasonableness of an officer’s action in an excessive force case must be objective. In *Graham*, the Court established the Reasonableness Test as follows:

1. In order to determine reasonableness, one balances the nature and quality of the intrusion with the countervailing governmental interest.
2. The analysis of reasonableness contemplates careful consideration of the facts and circumstances, including (a) the severity of the crime at issue; (b) whether the suspect poses an immediate threat to the safety of the officers and others; and (c) whether he is actively resisting arrest or attempting to evade arrest by flight.
3. Reasonableness is judged from the perspective of a reasonable officer on the scene, rather than 20/20 hindsight.
4. If there is the right to make an arrest, there is the right to use some physical force. Not every push or shove violates the Fourth Amendment.
5. The reasonableness standard must make an allowance for the fact that police officers are often forced to make split second judgments in circumstances that are tense, uncertain and rapidly evolving.
6. Underlying intent or motives should not be considered. Evil intent will not make a Fourth Amendment violation if the force used is reasonable. Good intentions will not make an objectively unreasonable use of force constitutional.

In Michigan, the following has long been true: the police have the right to use that level of force that is reasonable under the circumstances to effect a lawful arrest. The police may also take what action is reasonable to protect themselves in the course of an arrest or an attempted arrest. *Delude v. Raasakka*, 391 Mich. 296, 303; 215 NW2d 685 (1974).

Reasonable force has been defined as follows:

The reasonableness of the force used must be judged in the light of the circumstances as they appear to the officer at the time he acted, and the measure is generally considered to be that which an ordinarily prudent and intelligent person, with the knowledge and in the situation of the arresting officer, would have deemed necessary under the circumstances. The officer has discretion, within reasonable limits, to determine the amount of force which the circumstances require, and he is not guilty of wrong unless he arbitrarily abuses the power confided in him. 5 AmJur2d, Arrest, § 81, p 768.

When the officer believes himself to be in great danger, the Michigan Court of Appeals reaffirms the following standards (*Alexander v. Riccinto*, 192 Mich App 65 [1991]):

In other words, a police officer making a lawful arrest may use that force that is reasonable in self-defense circumstances and is not required to retreat before a display of force by the adversary, unlike a private citizen in similar circumstances. Like a private citizen, though, the officer must have a reasonable belief of great danger before responding with the appropriate amount of force to foreclose the threat. (*Alexander*, p. 69.)

These cases guide law enforcement executives as they develop policy, identify techniques, and select weapons for their officers' use, as well as when they develop training or conduct a post incident review of an officer's actions when he or she has used force.

Training to the Law

Although the purpose of the Michigan Law Enforcement Officer-Subject Control Continuum (The MEOSCC) is to serve as a training guide, law enforcement in Michigan considers it the measurement for the use of force. Confrontations between officers and subjects are often fluid. Therefore, officers must be flexible and recognize the need to respond to subjects' behavior with the amount of force necessary to overcome any resistance they face. For their own safety, officers must receive training in department policy and in the way the department expects them to respond based on the situations they encounter. During force training, departments should emphasize the need to rapidly assess a subject's behavior and, if necessary, respond with appropriate force. Training should provide an understanding of the Force Continuum and how it correlates to the fluidity of officer-subject encounters. Departments can accomplish this by using real life scenarios. Officers can evaluate the scenarios and make decisions about each; training officers can help them to improve their decision making. This type of training enables officers to recognize the need to respond appropriately and to articulate their course of action based on the test the Court set in *Connor*.

Mr. DeGrazia emphasized that, especially in these tough economic times, it is crucial for municipal administrators and police executives to maintain their commitment to providing employees with opportunities to learn, develop, and advance their education. He said that law enforcement could provide training, in part, by reviewing and discussing the rules, policies, procedures, philosophy, and practices of the department and current case law applicable to officers' performance as employees. DeGrazia further remarked that the purpose of training is to assist employees in performing their essential job functions. Therefore, departments may provide their employees with briefings, videos, periodicals, magazines, bulletins,

newsletters, books or lectures. He continued that training might also include discussion of current events, incident debriefing and public policy issues and performing mechanical and motor skills important to the job. Most importantly, he said that employees do not have to be sitting in a classroom to receive training and that departments need to document any training it provides in a training file. The file should document the date of training, the subject matter under discussion, and the names of the employees who received training.

Many Options for Officer Safety

Before deciding on the types of LLW's to include in their arsenals, departments should first determine what it is they want to accomplish. Officer safety is the primary reason to provide LLW's to officers. The goal is to provide officers with the tools and training that will give them as many options as necessary to overcome resistance with the least risk of injury to themselves and/or the subject they are trying to control.

MML Loss Control Consultants, working with the LEAF Committee, have had long standing recommendations for law enforcement members of the Pool and Fund concerning what weapons and training present officers with the greatest number of options for controlling resistive subjects while minimizing the need to physically engage them. The recommendations start with effective communications and an understanding of behavioral cues that would indicate that the subject is suffering from a medical or psychological crisis. Subject control training is necessary at all stages of control because of officers' need to apply handcuffs or to exert physical control using empty hand techniques if other options fail. Officers should have available an aerosol subject restraint and impact weapon to overcome resistance that the officer believes is active and/or aggressive. Physical or intermediate controls are necessary in those circumstances.

If officers have an objective and reasonable belief, based on the circumstances and resistance they face, that a subject's actions may result in great bodily harm or loss of life, then a projectile firing LLW or firearm would be appropriate. It is very important that officers understand that they must follow their training, experience and judgement in these very critical situations and take the action they believe is correct based on the facts and circumstances confronting them. **Departments must review their training to ensure it does not leave the impression that an officer must default to an LLW in these critical situations. This will confuse officers when the use of the firearm may be tactically prudent over the use of the LLW. We have added so many tools to the belt and/or available weapon choices that if the message is confusing or creates hesitation it could cost an officer or a citizen their life.**

Adding Electrical Current Weapons to an Officer's Arsenal

On July 26th 2002, Public Act 536 of 2002 took effect. This Act amends 1931, PA 328, MCLA 750.231 that allows a peace officer of an authorized police agency, who is regularly employed and paid, a corrections officer with authorization from the director and others to be exempt from the prohibitions found in MCLA 750.224, 234a, 234b, 227, 227c and 227d. The Act also provides for use of a portable device or weapon directing electrical current (stun guns, electrode projectile) if the person using it has received proper training.

A number of Michigan police departments have chosen to authorize these weapons for their officers' use. A word of caution -- to date, no one has fully established the definition of "properly trained." Several vendors are offering training to departments in the use of their products. Before selecting a vendor, MML Loss Control recommends that departments only consider vendors who have registered their training with MCOLES.

The Law Enforcement Action Forum has spent a lengthy time analyzing and discussing the issues that surround adding electrical current weapons and other LLWs to the police arsenal. As you read this Newsletter, LEAF, as a member of MCOLES' Subject Matter Expert Panel discussing Less Lethal Weapons, is working to help provide guidance to departments in their attempt to keep up with the use of weapons in this area of rapidly evolving technology.

The LEAF Committee and MML Loss Control believe that there are noteworthy differences between the **potential outcome of the force** applied when using a stun type weapon or a weapon that fires electrode projectiles. The differences arise from the operating characteristics of the weapons, their effectiveness and reliability, the physiological response and motor dysfunction they cause, and the risk of officer/subject injury associated with their use. Departments should take care to clearly instruct their officers that the decision to respond to resistance with a particular weapon or technique must meet the objectively reasonable standard established in "*Connor*", given the facts and circumstances the officer faces at the time.

Choosing a Less Lethal Weapon

When determining what LLW's to authorize, departments first must decide when they expect to use them and for what purpose. We have discussed the subject control type weapons commonly authorized for use by officers and the inclusion of some new ones. Now, let's look at projectile firing LLW's that departments plan to use in a riot or when up to deadly force response may be indicated. The purpose of most of these projectile-firing

weapons is crowd control and the incapacitation of hostile individuals. There are several types and the choice of which to use depends on what situations a department wants to be ready to address. There are several common issues that departments should evaluate before choosing a weapon.

1. The environment in which officers will use the weapon (indoors, outdoors, enclosed spaces, or dwelling).
2. The weather conditions where the weapon will be in use or stored (cold, hot, wet, frozen).
3. The range for which the weapon will need to be effective given the environmental issues that have been identified.
4. The level of force at which the department will authorize weapon for use.
5. The training of officers to recognize when to consider the weapon.
6. The availability of back up officers.
7. The training of the person that is to authorize/deploy the weapon.
8. The medical/safety risks of deployment of the weapon.
9. The need for a backup plan if the LLW fails.
10. The incident review and force reporting process that will follow the use of the weapon.
11. The Management responsibility to oversee the review process and take action when needed.

These issues do not differ from those that departments considered when they authorized other weapons. Departments should also be careful not to use a follow along mentality when deciding on an LLW. Just because another agency has chosen an LLW does not mean that it is the right one for another department.

There is a lot of information circulating concerning LLW's. The following appear to be reliable sources for information concerning Less Lethal Weapons and their effectiveness. These are not manufacturer sources and seem to be objective in their analysis. Before determining whether a particular LLW is right for the types of incidents that your officers will face, review the data that the following web sites provide and compare it to the information that the vendor of the weapon offers. Ask a lot of questions and verify all vendor statements and data with users of the particular LLW you are considering. If you discover other interesting web sites while researching this issue, please forward the information to the author at losscontrol@mml.org.

<http://www.homeoffice.gov.uk/pcrg/psdb/publications/lesslethal.pdf>
<http://www.arl.psu.edu/centers/inldt.html>
<http://www.cityofseattle.net/police/Publications/default.htm>

TRAINING ISSUES

The primary training a department provides should be specific to the usual and recurring situations that officers encounter in their jurisdictions. The goal is to enhance performance by providing the policy, tools skills as well as the supervision and management oversight that officers need. Job-related training includes threat recognition, decision making, demonstrating mechanical/motor skills, and recognizing the need for follow-up action.

Many law enforcement executives have said that they decided to add a projectile shooting LLW to their arsenal as an alternative to the firearm. Most weapons chosen are a projectile LLW that delivers a blunt force that enables officers to immobilize subjects who are threatening to injure themselves or others and/or who are looking for the officers to take action to end their lives. Today it is not unusual for officers to encounter people who are intoxicated and/or who are undergoing a medical or psychological crisis. The projectile LLW's may be an effective means for resolving incidents when a subject's resistance increases to the level where the officer is justified to use up to a deadly force response, but chooses not to. Officers must recognize that LLW's don't always work as intended, so they must train and prepare to have an alternative plan immediately available for their own safety.

This is where *Canton v Harris*, 489 U.S. 378; 109 S.Ct. 1197 (1989), can have an impact if the department does not train "in light of the duties assigned to specific officers". The training should focus on the usual and reoccurring situations that the officers face. Officers regularly encounter individuals who are intoxicated and/or suffer from mental illness. The use of LLW's increases the need for officers to have recognition training in identifying these types of individuals and training in strategies to handle them. Officers will need to be able to articulate why they chose the strategy they did for bringing an incident to resolution. They must know department policy and management's philosophy and expectations about their behavior. Furthermore, they must know what resources are available to them.

Departments must maintain complete training records on all areas of training -- including policy reviews -- which it provides. The department must regularly review and update officers' records throughout their employment. Training should be registered with MCOLES. Registration will require that the course developer clearly identify the goals and objectives of the training to be successful. The process of developing and stating the training goals and objectives helps the instructor and/or training coordinator align the training with job specific activities. Also, preparing the application is an opportunity to uncover problems with the training's content or format which will result in a more efficient use of training time and money. Officers who successfully complete the registered program and whose departments report this fact to MCOLES may be eligible for advanced police officer designations.

SUMMARY

The concept of Less Lethal Weapons has been part of the law enforcement arsenal for many years. Recently, there has been increased emphasis on adding additional LLWs to the police complement. Before buying one, It is important for a department to evaluate why it is including the weapon, to identify the environment in which the department expects its officers to use the LLW, and to outline the desired outcome of it's use. Officers need to receive training in all aspects of using the weapons. This begins with the ability to communicate effectively with subjects. Then, they must be able to recognize what subject behavior triggers the decision to implement which weapon and to have a backup plan if the weapon fails. Officers must have a thorough understanding of the law, department policy, and management's philosophy concerning the use of force. Management must meet its obligation to plan, to train and document as well as to supervise the use of weapons and the application of force by their officers. The law of the land is very specific in this area; upper management is responsible to protect the safety and well being of their officers and the public they serve.

The LEAF Committee of the Michigan Municipal League Liability and Property Pool and Workers' Compensation Fund continues to develop policies and resource documents designed to help Law Enforcement Executives manage their risk exposure. Do not hesitate to contact the Michigan Municipal League's Risk Management Services at 734-669-6344 or MML Loss Control Services at 800-482-2726, for your risk reduction needs and suggestions.

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.
