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Michigan Started Taser® Implementation In 2003 -- How Is It Going and What We Have Learned?

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In January 2003, the Michigan Legislature passed and the Governor signed what became MCL 750.224a, a law authorizing and regulating the use of a portable device or weapon directing electrical current, impulse, wave, or beam. The new law and the adoption of Tasers have changed the way Michigan law enforcement does business. This issue of the LEAF Newsletter explores this change, looks at the actions of law enforcement that have been successful, and discusses some of the areas that need improvement.

Since 2003, there have been some incidents involving law enforcement's use of Tasers that have resulted in litigation. LEAF examined both the MML Liability and Property Pool's experience with these types of cases as well as other cases filed in the State in an attempt to identify the trigger points that caused the litigation. This examination has resulted in some suggestions that LEAF hopes will help departments and officers understand the need to clearly explain the decisions they make and actions they take when using Tasers.

History of LEAF's Response to Tasers

In March 2003, LEAF published *A Discussion of Less Lethal Weapons: Adopting a Program for Protecting Officers and Subjects*, a newsletter that outlined considerations for selecting less lethal weapons and integrating them into the department's operations. In June of 2003, LEAF conducted a program at the MACP Summer Conference on the importance of properly educating top-level management and the public on the intended use of Tasers and the possible outcomes of officers using them. In February of 2004, at the MACP Mid-Winter Conference, LEAF spoke about the importance of not overselling the Taser. In particular, we stressed how the unintended consequences of police actions that involved Tasers and other less lethal weapons were undermining the protections that police officers had under the law. In the newsletter and the presentation, LEAF cautioned departments against marketing the Taser in way that might erode the "Dangerous Suspect/Reasonable Officer Standard" found in *Tennessee v. Garner* and *Graham v Connor*.

LEAF also advised executives not to oversell the Taser, but rather to market it to municipal leaders by speaking specifically of their departments' expectations for use. LEAF warned executives against using the hyperbole about saving lives and insurance costs that sales and marketing were pushing. LEAF believes that officials and the public needed to hear the goal of using a Taser was to reduce the potential injury to the officer and, in most cases, to the subject. LEAF offered strategies to re-educate the public through disseminating information on how departments intended to use Tasers.

The public heard – and still believes – that the reason officers use Tasers is to protect themselves and citizens during incidents that pose an extreme threat to their lives. These types of incidents are rare, and, in all likelihood, the successful use of a Taser during them is more luck than good judgment. Not surprisingly, the public has become sensitive to the Taser's most common use on drunk and disorderly or threatening people who are not cooperating and/or are resisting officers' attempts to control them.

Over the years, LEAF has emphasized the need to train officers in the department's philosophy and expectations when they use force. The advent of Tasers provided an opportunity to reinforce that

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need for training. LEAF advised departments to train officers both on the mechanical aspects of deployment and firing and on how to recognize when the use of a Taser on a subject is not appropriate. LEAF also emphasized the importance of officers knowing the medical ramifications of using Tasers, including what they should do when they encounter something unusual or when using the Taser fails. Finally, LEAF stressed that training should include scenarios and the environments in which actual incidents have indicated officers have an expectation that they would deploy the Taser. This last warning has proven to be extremely important when officers face a subject who is exhibiting the symptoms of Excited Delirium.

In this situation, any judgment about the officers' choice of tactic ultimately may be judged by the highly predictable consequences that their actions became the driving force of a constitutional violation. In other words, officer response will be judged against what the officers knew or should have known at the time they chose to use force.

LEAF's next concern was to ensure that departmental supervisors are accountable for monitoring the actions of their officers. This includes management's responsibility to ensure that officers are meeting the department's standards and goals by reviewing the department's use of force activity. Part of this quality assurance process includes a periodic audit of the information on the computer chip in the Taser against department records of its activation. Auditing and holding officers accountable reinforces the message that the department has high standards for the deployment and use of the Taser. The process also allows the department to assess the effectiveness of their training.

What We Have Learned Over the Past Four Years

The nationwide implementation of Tasers has been a learning experience for everyone. Michigan was lucky because the Taser did not become an authorized weapon until after a number of states had already implemented its use. Michigan law enforcement watched Washington, Arizona, Florida, Wisconsin, Illinois and others go through the controversies, hearings, investigations and public outcry over the use of Tasers in what were alleged to be inappropriate situations or in an excessive manner. It became clear that the public's response was the result of law enforcement's failure to educate the public on the intended use of the Taser.

Michigan observers also noted that officers in states implementing Tasers were confused about the level of subject resistance necessary before they could use the weapon and about who was eligible to have the Taser used on them. When establishing thresholds for Taser use, most of the departments had followed Taser International's training and advice. Law enforcement, however, soon discovered that Taser International's threshold of application and its definition of eligible recipients for application were too liberal for public acceptance. This caused all involved, including Taser International, to reassess their positions and training.

Although the MML does not recommend specific weapons and leaves the decision to adopt any weapon to the individual municipal entity, LEAF and the MML's Risk Management Services believe that the Taser is a legitimate police weapon. At this writing, Taser is the only electrical current weapon that meets Michigan standards.

LEAF members spent a significant amount of time discussing the various issues that the Coordinator and Legal Advisor posed at its meetings. This helped to shape the MML response to the adoption of the weapon without causing excessive controversy. As our experience with aerosol sprays taught us, controversy soon turns to litigation.

In addition, following the advice of LEAF, risk management, Taser, and MCOLES, law enforcement executives in Michigan modified how they adopted, trained, and integrated the Taser. Observations about Taser controversies in other states, an analysis of the way in which Michigan courts manage litigation involving public entities, and a review of how departments are using Tasers have resulted in a number of approaches that law enforcement takes to implement Tasers successfully. These approaches are:

- They present the reason for buying Tasers logically and appropriately.
- They do not adopt Tasers without having a policy in place.
- They train officers in the use of force, including the department's expectations for its use.
- They hold officers accountable for using the Taser and for reporting each use.

- They evaluate Taser use in incidents to see if officers are meeting department policy.
- They report the use of Tasers to the public to reinforce the purpose and need for the weapon.
- They update their training to make officers aware when multiple exposures are inappropriate.

Because Michigan started adopting the Taser fairly late, we could learn from the mistakes of the others. Michigan law enforcement's modifications to the process for implementing the weapon kept the overall controversy surrounding Tasers under control. Most of the incidents that have garnered media attention have been out of the ordinary and have either been defensible or have been situations where law enforcement made a bad choice.

Taser International's Changes

Taser International, Inc. also found that it had to reshape its presentation and philosophy as it sought to integrate the weapon into law enforcement across the country. With encouragement from Michigan-based risk management experts and law enforcement nationwide, Taser modified the training requirements for users of its weapon. The company eliminated the requirement that officers take a hit with the Taser because of the risk of injuries to trainees. In Michigan, MIOSHA provided an opinion that mandatory exposure was a violation of its regulations. MIOSHA also outlined the rules that an employer had to follow if they were going to allow voluntary exposure to the Taser. Taser also addressed the important issue of having continuity between training and field applications by modifying its training plan and changing the cartridge so it meets the specifications of the field cartridge. Realistic training continued to be a priority for Taser.

In 2005, Taser again modified its training to encourage officers to take advantage of the five-second window of opportunity provided by the probes to take control of a subject. Doing this reduces the risk of injury to the officers and the subject. Most importantly, this change also reduces the need for multiple Taser applications. Fewer applications lessen the pain that the subject experiences and the potential for sudden death complications.

The June 2005 bulletin from Taser is the first time that they warned users of the potential for injury or death if the subject suffered from one or more of a variety of health and psychological problems. The potential for injury or death has and continues to cost Taser a huge amount of money in litigation and marketing costs. The company continues to support the users of their products with continued research as well as product and training upgrades.

Just the Facts, Ma'am

LEAF's Legal Advisor, Audrey Forbush of Plunkett Cooney, has had the opportunity to evaluate and defend cases involving the use of Tasers. Because these are relatively new cases, Forbush discussed the cases with other Pool attorneys and expert witnesses who are involved in the defense of police liability cases. She brought the information she garnered to LEAF for discussion. These discussions led to the following observations.

It is apparent that some officers will deploy the Taser rather than using good verbal and/or listening communication skills with subjects. This may cause officers to misunderstand the actual circumstances of an incident. Officers often rely on their first impressions and sometimes forget they are supposed to be the third party objective observer who is there to help resolve a problem.

In addition, when officers jump to conclusions or have a knee jerk reaction to a subject's behavior, they may not be sensitive to any underlying mental or medical problems that may be causing it. The U.S. District Court's Sixth Circuit Court addressed this issue in *Griffith v. Coburn*, 473 F.3d 650 (Sixth Cir. 2007). The Court stated that "*the diminished capacity of an unarmed detainee must be taken into account when assessing the amount of force exerted.*" The force that officers use in these situations must be proportionate to the resistance faced. Officers cannot unnecessarily escalate the situation, thus causing more subject resistance, to expedite the outcome. Officers should explore other options before using the Taser. Consider the following incident, as reported by the Canadian news source, *Le Devoir.com*, that took place in October 2007:

Twenty-four Seconds. That's all the time four RCMP policemen took to evaluate the "threat" posed to them in the person of Robert Dziekanski, this past October 14, at the Vancouver airport. The Polish citizen did not understand English; he was disoriented and had been looking for his mother with no

success for close to ten hours. Without even speaking to him, although he offered no resistance at all, the police struck him twice with the Taser. "Intervention" is not the correct word to describe the policemen's work, which was sealed by Dziekanski's death. It was an aggression by men in uniform that was captured by an amateur videographer.

The media portrays the incident as symbolic of everything that is wrong with police culture with respect to the use of force.

This negative view of Taser use is on the rise around the world. On November 23, 2007, the United Nations' "Committee against Torture" issued a statement about a report originating in Portugal that use of Taser weapons can be a form of torture, in violation of the U.N. Convention against Torture. This announcement may keep the Taser controversy on the front page for some time. To be prepared for any inquiry, law enforcement executives in Michigan should compare their expectations about officers' use of Tasers against their actual use.

In addition, the use of Tasers on individuals exhibiting the symptoms of Excited Delirium Syndrome has created yet another explosive issue because it has, in several cases, resulted in Sudden Death. Though not recognized as an official medical diagnosis, Excited Delirium Syndrome is when people demonstrate superhuman strength and limitless energy and are overheating from the activity being generated by their bodies. These subjects need immediate medical treatment. As soon as they can be controlled, they should be turned over to EMS. Even then, in most circumstances these subjects do not survive. This is when the Taser five-second window of opportunity gives officers the chance to restrain the subject. If it can be done relatively quickly, the chances for subject survival increase.

Just Because You Can Doesn't Mean You Should!

Because many departments have adopted a subject's non-compliance as the trigger for the use of a Taser, officers sometimes forget they are paid to take some verbal abuse. Without a clear definition of non-compliance, officers can default to tasing a subject who is upset, is venting their anger by being loud, waving their arms, or is otherwise agitated, but not threatening.

Forbush posed the following questions to LEAF: Are officers so busy that they cannot allow a person to disagree with their decisions without getting physical? Has the introduction of the Taser eliminated the officer's ability and need to calm the subject and de-escalate the situation? At what point does non-compliance with orders become active resistance? What determines how long it should be before an officer uses control techniques to take the person into custody?

She pointed out that, when litigation occurs, an issue that often arises is whether the department has unintentionally allowed officers to lower the intended threat level for using the Taser. In some cases, the threshold seems to have gone from a person displaying active resistance by words, posturing, or actual threatening behavior to one of disagreement, frustration, or not moving fast enough to do what the officer has ordered.

Officers must know that, in general, the application of a Taser should only occur when subjects' behaviors or demeanors suggest that they are going to physically resist. In these cases, officers must be able to describe what they saw as signs of a threat to their safety and how their previous experience led them to believe that the outcome would be physical resistance by the subject.

Got To Have a Plan

When officers approach a potentially threatening situation, they often seem to believe that the Taser is all they need to handle the incident. They forget to plan what they will do if the Taser does not work. Taser has published warnings that discourage multiple tasings because the practice can be dangerous. Most of the deaths in incidents involving Tasers involve multiple exposures to the jolts. The warning against multiple applications has created a problem for small departments across the state that obtained Tasers using the rationale that because they do not have backup readily available, the Taser is as good as another officer. We have seen videos on television and the Internet showing that, an officer can keep a suspect on the hook for a long time until backup arrives.

The question that arises and is often posed in litigation involving multiple exposures to the Taser is at what point the exposure goes from a control mechanism to punishment. True, if subjects would only submit, they would no longer receive the jolt of the Taser. However, sometimes people do not do rational things, and that, in itself, should signal to officers that an unusual situation is in play. Officers need to be trained and ready to respond with a second level of control should they run into one of these irrational people. Departments have to support their officers and provide them with aerosol sprays, impact weapons, and defensive tactics training. Officers have to have confidence that should the Taser fail, they can take another course of action that may have some risk but still brings the subject under control.

What to Do!

Forbush does not believe that the issues that have been raised surrounding the use of Tasers are too large for law enforcement to address. She feels that police executives can ensure that they do not have officers in the field misusing Tasers or using bad discretion by implementing the following measures.

- Review the department's policy on use of force, including Tasers, and ensure that the definition for the level of resistance necessary for its use is defensible. LEAF suggests that officers believe they are facing Active Resistance before a Taser is used.
- Train officers on the definition of non-compliance to the level of Active Resistance. Consult MCOLES' Subject Control Continuum for a practical definition of behavior that meets that criterion. Teach officers what management expects of officers when they sense that the subject is going to prevent them from gaining control.
- Train officers to manage non-threatening incidents properly. Officers should receive training on listening and observing, so they can understand the cause of the individual's behavior that has gotten them to the scene. They need to learn to communicate with the subject -- not just give commands.
- Make supervisors responsible for observing officer behavior in the field to ensure compliance with policy and procedures.
- Hold supervisors accountable for initially investigating all uses of force by their officers to ensure the actions were appropriate given the resistance encountered.
- When officers use the Taser or any other physical controls to overcome resistance the top level of management should require a Use of Force Report and conduct a review of each incident to ensure it complies with the intent of policy and falls within the discretion that is allowed by the department.

The LEAF Committee of the Michigan Municipal League Liability and Property Pool and Workers' Compensation Fund has formulated Policy that fits most departments' operations. These Policies are found at mml.org in the Manual for Law Enforcement Risk Control. Always check the "What's New" folder for the latest Policy Updates. Further information concerning the address and access to the Manual will be coming to eligible Members soon. LEAF 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, Loss Control Services at 800-482-0626, 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 readers are encouraged to consult with their attorneys for specific legal advice.

