



Civil Liability - Part II: Civil Liability Avoidance

The best defense against civil liability is to avoid, or at least minimize, the filing of lawsuits against the officer and the department. Although in our legal system eliminating civil suits entirely is difficult, based upon past experience, it is estimated that a good claim-avoidance program can reduce the frequency of the filing of civil suits in a given jurisdiction by as much as 95 percent. You can't lose a lawsuit that is never filed.

An effective civil liability avoidance program involves many preventive steps. Some of these must be taken at the management level and involve department-wide policies and procedures. For the individual officer, civil liability avoidance requires that the officer (a) know which law enforcement tasks are most likely to generate civil lawsuits, (b) achieve and maintain a high degree of proficiency in the performance of these high-risk-of-liability tasks and (c) practice civil liability avoidance techniques.

Sources of Civil Liability

Although almost any aspect of police work may result in an incident that leads to a civil suit, certain specific areas of law enforcement activity tend to generate a very high percentage of the lawsuits being brought today. These areas of activity are discussed below. They are not necessarily listed in order of importance; any one of these activities may produce a significant amount of civil litigation in any given year.

Use of Firearms. Civil suits for the use of firearms fall into several categories, including the following:

1. Intentional shootings — Suspects. When a suspect or fugitive has been deliberately shot by a police officer, the suspect may contend that the shooting was not justified under the circumstances.

2. Intentional shootings — Injured bystanders. Even though the officer was justified in shooting at a suspect, if an innocent bystander is injured during the incident, liability is likely.

3. Accidental discharges. A remarkable number of suits result from accidental discharge of firearms. Victims may be suspects, bystanders or fellow officers.

4. Horseplay. Officers playing with firearms cause a significant number of deaths and injuries each year. The victims

tend to be fellow officers, although civilians may be involved also. Quick-draw contests and so-called practical jokes are high on the list of causes of this type of injury.

Motor Vehicle Pursuits. Numerous persons, including suspects, officers and innocent citizens, are killed or maimed each year in traffic accidents resulting from high-speed pursuits or other emergency operation of police vehicles. Unless police officers are immune from suit in their jurisdiction, such incidents almost always result in a finding of liability against the police officer and the city or county involved.

Routine use of patrol cars and other police vehicles cause many traffic accidents each year. Police officers are human, and they can become careless and make driving mistakes just like anyone else.

Arrest, Search and Seizure. False arrest has always been a fertile source of civil litigation against police. By contrast, civil suits for improper search and seizure have been much less frequent, such issues usually being litigated only in criminal hearings for the suppression of evidence. However, civil liability can arise in specific cases. Liability for arrest and search and seizure typically includes scenarios such as the following:

- Arrest of the wrong person.
- Arrest without probable cause.
- Use of excessive force in effecting the arrest.
- Search of the wrong person or premises.
- Search of persons or premises without probable cause.
- Entries, with or without a warrant, that are executed with excessive violence or that result in personal injuries to persons on the premises.

Given the nature of police work, suits of this nature will probably never be completely eliminated. Frequently, mistakes occur that are simply beyond the control of the individ-

ual officer. In many instances, however, the police themselves are at fault, and this risk can be minimized by knowledge, good training and sound operational planning.

Handling of Arrestees. Many arrestees (or their survivors) file suit each year alleging the excessive use of force during arrest or while the arrestee is in custody. Such injuries are not necessarily intentionally inflicted by the officer; improper restraint techniques, for example, are often to blame.

Improper monitoring of arrestees while they are in custody may provide such persons with an opportunity to commit suicide or otherwise harm themselves or others. Intoxicated and drug-impaired arrestees or those with medical problems may suffer severe harm unless closely watched.

Response to Citizen Complaints or Requests for Protection. In general, the courts have held that there is no “duty to protect” the public at large. However, the courts have often found liability when there is some sort of “special relationship” between the citizen and the police. Where a citizen has made a request for assistance, or where specific individuals or classes of individuals are known to the police to be at risk, liability may result, especially where there has been some undertaking by police to render assistance, but the attempt has failed to ensure the safety of the citizen.

Failure to respond promptly and effectively to specific citizen complaints or requests for help is a growing source of civil suits. The responsibility here is not limited to 911 dispatchers; any failure by any police officer to render assistance when assistance has been requested will be subject to legal scrutiny. If the failure is unjustified by the circumstances, liability may result.

Rendering First Aid. Often, police officers are the “first responders” in medical emergencies. The failure to render first aid, or the failure to perform it promptly and properly, has been a major source of lawsuits in recent years.

Domestic Disputes. Domestic dispute calls have always presented a hazard to the physical safety of officers, and in recent years, domestic disputes have presented a significant civil liability hazard as well. Many suits are being filed alleging that the failure of the police to deal effectively with a domestic dispute resulted in injury to one of the domestic partners. In particular, a number of civil rights actions have been brought claiming that police have a policy or pattern of inaction in domestic matters based upon gender or marital status.

Citizen Endangerment. Many civil suits are based upon the alleged failure of police to take precautions for the safety of persons who are present at a scene of police activity but who are not in custody or otherwise charged with any offense. While statistically this is less frequently a source of liability than the categories discussed above, there have been a substantial number of lawsuits of this type. Typical situations include the following:

1. Motor vehicle passengers. When the driver of a vehicle is arrested and taken to jail, those who were passengers in the vehicle may be left stranded on the road. In several instances, lawsuits have been brought when such persons were subsequently injured while attempting to get home or to some other place of safety. Courts have disagreed as to the liability of the police in this situation, but at least some decisions have resulted in liability.

2. Persons who have sought police protection. Persons who have asked police for protection but who subsequently have been injured due to lack of such protection have often brought

suit against the police department concerned. As noted previously, there is no general “duty to protect” the public at large. However, it has been held that a plea for help by a citizen creates a “special relationship” that may lead to liability if the help is not forthcoming. Today, liability is particularly likely where the person seeking protection is threatened by an estranged domestic partner, and is injured or killed by the estranged partner subsequent to a request to the police for assistance.

In any such case, if the plaintiff has been promised protection, has acted in reliance on that promise, yet has thereafter failed to receive the protection offered, departmental liability is likely.

3. Motorists and others at traffic accident scenes. Failure to handle a traffic accident scene properly may result in liability if another motorist or other passerby is injured (as, for example, by colliding with the police vehicle or with the vehicles involved in the original accident). Curious bystanders at accident scenes present a hazard to themselves and others; if injured, they will blame the police, not themselves. Persons who volunteer to assist in traffic control at accident scenes also present a problem; use of such volunteers in effect makes the police responsible for their safety, and liable for any injury that they may suffer or that others may suffer because of their activities.

Sexual Harassment. In the past few years, there has been a great increase in complaints of sexual harassment. Most of these involve charges of sexual harassment of fellow workers, but a police officer may be the subject of such a complaint by others, including informants, suspects, arrestees, detained traffic offenders or others.

Sexual harassment of citizens encountered by the officer in the field is usually so obviously improper that it is unlikely to be inadvertent, but in the case of lawsuits by fellow officers or other departmental employees, inadvertent or “accidental” sexual harassment is entirely possible. Here, simple ignorance of what constitutes sexual harassment in the workplace under current law is often involved. Whether the plaintiff is a co-worker or a fellow citizen, however, the fact that the conduct was not intended to be objectionable is no defense; in many instances, what appears to be innocent or well-intentioned conduct may be regarded as sexual harassment, both by the plaintiff and by the courts. The following types of conduct have been held to be sexual harassment. Some of these actions are obvious, but others are more subtle.

1. Making demands for sexual favors. This is the best-known and most obvious form of sexual harassment, and it is difficult to avoid liability where such behavior has occurred. An officer who stops a citizen for a criminal or traffic violation and then offers to ignore or forget about a criminal or traffic violation in return for sexual favors from the citizen has no defense if the citizen elects to file a complaint or a lawsuit regarding such conduct. Offers to a co-worker to exchange sexual favors for consideration in employment matters (for example, assignment, promotion, scheduling) are equally improper.

2. Making sexually suggestive remarks. Even though made jokingly or without actual intent, such remarks to a fellow worker or citizen may generate a civil suit.

3. Hazing of a fellow officer of a different gender. The fact that the hazing was not specifically sexually oriented, or that other co-workers are similarly hazed, is no defense. If the haz-

ing creates an unpleasant or oppressive atmosphere for the person who is the object of the hazing, liability may result.

4. Displaying sexually oriented material in the workplace. The display of pinups, cartoons, limericks or other sexually oriented material in the workplace — on bulletin boards, in locker rooms and the like — may be sexual harassment.

5. Using foul language in the presence of a fellow officer. Even though the language is not sexually oriented, if the language creates an unpleasant or oppressive atmosphere in the workplace for a fellow officer, a lawsuit may follow.

6. Failing to stop sexual harassment by others. An officer who has any supervisory responsibility of any type, whether by virtue of rank, assignment or seniority, may be liable for failing to stop sexual harassment being committed by other officers.

Note: Although the bulk of current harassment suits are based upon alleged sexual harassment, harassment related to race, creed or other factors may be equally actionable.

Training. Both the jurisdiction and individual officers may be held liable for improper training.

Such suits may be based on:

- Failure to include training in some aspect of officers' duties;
- Giving erroneous instruction, such as teaching the wrong principles or techniques; or
- Failure to train officers to a sufficient degree of competence in some aspect of their duties.

Lawsuits for improper training may be brought as civil rights actions or as common-law tort actions.

Most suits for improper training are brought against the jurisdiction, but individual officers may be held liable for improper training as well. Liability is not limited to officers who are certified instructors or who are instructing in a specific academy or in-service course. Any officer, such as a field training officer or any other officer with training responsibilities, whether full- or part-time, may be civilly liable for improper training.

Most plaintiffs in suits for improper training are arrestees or other citizens ' but training suits may also be brought by fellow officers who feel that the failure to train has contributed to injuries that they have suffered in the line of duty.

Dispatch, Monitoring and Control of Police Activities. As noted earlier, dispatchers and other personnel may incur liability by failing to respond properly to requests for assistance. In addition, many lawsuits have been brought alleging that dispatchers or other communications personnel improperly monitored or controlled activities in progress. For example, it may be claimed that a dispatcher improperly monitored or directed a hot pursuit, thus causing or contributing to a collision that resulted in injuries to the plaintiff.

Note: The situations discussed above are by no means the only scenarios that can lead to liability. Particular duty assignments such as vice or narcotics may present special problems, as may the location of the activity and variations in local laws.

Professional Competence and Civil Liability Avoidance

One major factor in civil liability avoidance is the ability to perform professional tasks skillfully and effectively. Lack of professional competence is a quick ticket to a civil suit. In fact, someone's failure to perform a police task in the proper man-

ner is at the root of a high percentage of civil liability actions. True, many civil suits are totally unfounded and the officers involved completely blameless, but the majority of civil suits arise because the police officers involved erred in some manner. Thus, an officer's achievement of proficiency at performing the various tasks that make up his responsibilities will in itself drastically reduce the incidence of civil suits against that officer.

Following are some recommendations to assist in avoiding civil suits in some of the areas more often litigated.

Firearms

1. Know — and remember — the laws applicable to the use of deadly force by police officers. Know when you are justified in shooting a suspect, and when such action is prohibited by law and/or departmental regulation. This involves both knowing the law and developing good shooting skills and judgment. Take full advantage of any judgmental shooting training (such as "shoot/don't shoot" programs) offered by your department.

2. Become proficient in the use of all weapons used both on and off duty. Know the capabilities of each weapon and how to use it. Develop good combat marksmanship skills — miss rates under high stress situations, in particular, are notoriously high and present serious danger to innocent bystanders or fellow officers. Avoid using weapons in environments in which they are unsuitable because of the risk to bystanders. By the same token, seek out firearms training that includes combat scenarios and the use of firearms under stress.

3. Develop firearms awareness. Any unholstered weapon has the potential for accidental discharge; therefore, do not unholster, brandish or display firearms without proper cause. Treat all weapons as being loaded, even if you are sure that they are not. When it comes to accidental discharges, the most dangerous weapon is the "unloaded" one. And while it may appear self-evident, it deserves repeating: Never play with a firearm.

Use of Motor Vehicles

1. Pursue only when necessary, and then only in accordance with established departmental policies. Pursuit of fleeing suspects and traffic violators should not be a "knee-jerk" reaction. Balance the need for pursuit against the risk involved. Weigh the nature of the offense and the conditions under which the pursuit is to be conducted carefully.

2. If you must pursue or proceed at high speed for any other reason, exercise extreme caution. High-speed driving is one of the more dangerous of all police activities. Even though the law of the jurisdiction excuses officers from criminal liability when a police vehicle is in pursuit or otherwise responding to an emergency, civil liability may still result if the officer fails to exercise reasonable care in operating the vehicle.

3. Stop the pursuit if it becomes excessively dangerous. Even though pursuit is initially justified, be prepared to terminate the pursuit if conditions render the continuation of the pursuit dangerous to yourself, your fellow officers or other users of the road.

4. Do not drive when unfit to do so. Stress, emotional upset, medications and alcohol all figure in a substantial number of police-involved traffic accidents every year.

Arrest, Search and Seizure.

1. Study the law of arrest, search and seizure diligently and continuously. The law on these points is complicated and changes rapidly. There are numerous IACP publications and other sources that will provide you with the necessary knowledge. Study them. Ignorance of the current law will NOT excuse you from liability.

2. Do everything in your power to ensure proper identification of the person to be arrested or the premises to be searched. Many of the more serious incidents in recent years have involved errors by the police as to the identity of the person or premises concerned. Breaking in the wrong door is a mistake that at best will lead to an ugly scene, one that may easily escalate into a major confrontation, leading to violence, tragedy and civil liability for the officers and agency involved.

3. When executing a search warrant, use only the minimum degree of force necessary to obtain entry and carry out the search. Many otherwise valid searches have led to liability because of excessive destructiveness by the police while executing the warrant.

4. Know and use the correct techniques of arrest and restraint. Many major injuries, including fatalities, have resulted from lack of knowledge of proper arrest procedures and/or the improper execution of those procedures. See "Handling Arrestees," below.

Handling Arrestees

1. Use proper arrest and restraint techniques. Do not use choke holds or other dangerous restraints.

2. Be conscious of, and allow for, adverse physical characteristics of arrestees. Do not demand compliance with orders that the arrestee is physically incapable of following. Do not place arrestees in positions that may result in injury to them. For example, avoid placing obese arrestees or those with respiratory problems in the "belly down" position for any significant length of time — a number of fatalities have resulted from this.

3. Learn to recognize the symptoms of serious mental or physical conditions. For example, know the signs of drug or alcohol intoxication, acute illness, physical injuries or handicaps, severe mental depression, suicidal tendencies and other conditions that place the person at risk. Take appropriate precautions while such persons are in custody; do not leave them unattended in holding cells or in police vehicles, and obtain medical aid promptly for those who need it. The fact that such persons have resisted arrest or are guilty of serious crimes does not alter this requirement.

4. Avoid using chemical or electric devices on persons known to have cardiac or respiratory conditions or other serious physical disabilities. Although the use of such devices will not normally cause injury to a healthy person, individuals with serious physical conditions or other predisposing factors may suffer major harm from the use of this type of equipment. Following the use of such devices, carry out any procedures that have been prescribed by the manufacturer or by your department to minimize the risk of injury.

Response to Citizen Complaints and Requests for Protection

1. Assume all complaints to be valid and serious until the contrary is proven. Even the most bizarre complaint may be

well-founded, and the complainant may desperately need help.

2. Respond as promptly as possible to any complaint. If a prompt response is not possible because of other commitments, make this fact a matter of record with your dispatcher.

3. Treat all complainants equally, without regard to race, ethnic background, gender, etc. A pattern of failure to respond to the complaints of a particular segment of the community may render your jurisdiction liable in a civil rights action.

4. Know, and respond to, the circumstances that frequently result in violence to the endangered person. One example is the situation where a person has been threatened by an estranged domestic partner, a scenario that today often results in serious injuries or even fatalities.

5. Do not promise assistance or protection that you cannot actually deliver. By assuming a responsibility and then failing to carry it out successfully, you increase your own risk of civil liability. You may also increase the risk to the endangered citizen, who may forego other means of protection while relying upon your promises.

First Aid

1. Obtain proper first-aid certification. In some states, the "good samaritan" laws will protect you from liability for rendering first aid only if you are properly qualified to administer first aid and have been certified as such.

2. Render first aid when it is needed, but do so in accordance with your training, the exigencies of the situation and departmental policies. Do not try techniques that you are not qualified to perform.

3. Follow proper techniques to protect yourself against the transmittal of communicable diseases. This protects yourself, fellow officers and any citizens involved.

Domestic Disturbances

1. Follow your departmental policies to the letter in domestic dispute calls. Failing to follow policy will expose you to both danger and civil liability.

2. Take effective action. Within the limits prescribed by your departmental policies, take whatever action is necessary to ensure, insofar as possible, that violence does not occur after the police have left the scene.

3. Avoid any pattern of treating domestic disputants differently based upon gender, marital status, race, etc. If you find that your departmental policy tends to result in such differentiation, call this to the attention of your supervisors.

Endangered Citizens

1. Follow your departmental policies regarding the safety of innocent third persons left in a position of danger following the arrest of another individual. If there is no departmental policy, consult your supervisors. If you do attempt to help such persons, do not abandon the attempt until everyone involved has arrived at a place of safety.

2. Know and follow your departmental policy regarding the disposition of vehicle passengers left stranded when the driver of a vehicle has been arrested. If policy dictates that you assist such persons, do not terminate your assistance until the passengers have reached a place of safety.

3. Follow approved procedures for safety and traffic control at accident scenes. Maintain control. Keep bystanders out

of the zone of danger if you can do so. If possible, obtain qualified assistance rather than letting untrained volunteers (such as passing motorists) assume traffic control duties. Use such assistance only when there is no other choice, and then only if your departmental policies and procedures authorize it. Be aware that if such persons act improperly, you may be held responsible for any resultant injuries.

Sexual Harassment

1. Be aware of the actions that may be considered sexual harassment under the current legal definition. This is a continuing requirement, since these definitions may change rapidly over time.

2. Avoid any action that may create an unpleasant or oppressive on-the-job atmosphere for a co-worker. Remember that even when intended good-naturedly or in jest, actions that constitute sexual harassment may render you and/or your department liable to the person offended. You must therefore avoid any conduct (as previously discussed) that may be offensive.

3. Take action to stop sexual harassment being conducted by others. If you observe sexual harassment being committed by others, take action to stop it. This is especially true if you have any supervisory responsibility over the persons conducting the harassment, or those being harassed.

Training

1. Keep up to date in your field. Techniques change, equipment changes and the law changes. Avoid teaching obsolete principles or techniques.

2. Use lesson plans. They help you to conduct training effectively and, when retained on file, document the fact that the training was complete and proper. Cover every item in the lesson plan every time you teach the subject. This will help to protect you against later claims that you did not cover some critical item. If you have to deviate from the plan, make a note to that effect in your file for that course, stating the reasons for the variation. Review lesson plans frequently; as noted earlier, things change over time, and what is legal and proper today may not be so a year — or even a few weeks — from now.

3. Evaluate audio-visual materials and written handouts for accuracy. Audio-visuals and handouts, wherever, whenever and by whomever prepared, may contain erroneous material. This may be because they were in error to begin with, or it may be because the laws or the approved techniques have changed since the audio-visuals were created. If you must use material that contains errors, point out any such errors to the persons being trained and make it a matter of written record that you did so.

4. Keep accurate attendance records. Keeping good attendance records helps to protect you against a claim by the trainee or others that the trainee missed an important segment of the training and so was not properly trained in that subject.

5. Report training problems to the appropriate authority. If anything occurs during a training session that adversely affects the quality or adequacy of the training, report this fact to the appropriate departmental officials. This includes problems with the training environment (such as defective equipment, excessive noise, or inadequate heating or cooling) and any problems experienced with the trainees themselves (for exam-

ple, absence, tardiness, illness, academic deficiencies, or attitude or behavioral problems).

Remember that you do not have to be a full-time instructor to incur liability for improper training. Anyone with instructional responsibilities, including part-time instructors, field training officers and even senior officers “breaking in” new recruits in the field must observe the foregoing recommendations.

Dispatch, Monitoring and Control of Police Activities

1. Ensure that all communications personnel are properly trained. Formal training prior to assignment to communications is essential. This should be followed up by appropriate on-the-job training after the individual has assumed his or her communications duties.

2. Establish policies and procedures for communications personnel. Departmental policies and procedures should be established governing the actions of communications personnel in specified situations. In particular, guidance should be provided for dispatch or control in hot pursuit situations, which are one of the more frequent sources of dispatcher liability.

Acknowledgement

This *Training Key®* was prepared by Charles Friend, an attorney and law enforcement consultant based in Williamsburg, Virginia.

questions

The following questions are based on material in this *Training Key®*. Select the best answers.

1. The best way for the individual officer to avoid civil liability is to:
 - (a) *Know which law enforcement tasks are most likely to generate civil lawsuits.*
 - (b) *Achieve and maintain a high degree of proficiency in performing high-risk-of-liability tasks.*
 - (c) *Practice civil liability avoidance techniques.*
 - (d) *All of the above.*
2. Which of the following is not considered to be a high-risk-of-liability police task?
 - (a) *Use of firearms.*
 - (b) *Suspect interrogations.*
 - (c) *Motor vehicle pursuits.*
 - (d) *Handling of arrestees.*
3. Which of the following statements is false with regard to civil liability for law enforcement training?
 - (a) *Most plaintiffs in suits for improper training are arrestees, but they may be brought by fellow officers.*
 - (b) *Liability is limited to those who are certified instructors.*
 - (c) *Both the jurisdiction and individual training officers may be liable.*
 - (d) *Failing to train an officer to a sufficient degree of competence may be grounds for civil liability suits.*

answers

1. (d) The best way to avoid civil liability is to observe all of the stated principles.
2. (b) Interrogating suspects is not considered one of the high-risk police tasks from a civil liability standpoint.
3. (b) Liability for improper or inadequate training is not limited to certified instructors but to any full-time or part-time officer with training responsibilities.

have you read...?

“Police Officer as a Plaintiff,” *Training Key®* #370, International Association of Chiefs of Police, 515 N. Washington St., Alexandria, VA 22314

This *Training Key®* provides officers with civil remedies that can be used to counteract civil liability charges and protect officers’ rights.

