

Liability Issues of Developing and Maintaining a Special Response Team

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Introduction

SWAT. SRT. ERT. SERT. ESU. No matter what the unit is named, police departments across the United States, and around the world, have come to rely on a dedicated group to respond to incidents beyond the scope of 'normal' police activities. Whether it is a high-risk warrant, a barricaded gunman, an emotionally disturbed person, or a hostage rescue, the team that responds is expected to be highly trained and ready to handle the incident professionally and within the limits of the legal system. The level of professionalism expected is not something that is easily obtained and requires training, confidence, teamwork, self-discipline and the controlled use of force when necessary. All too often, the public's image of the Special Response Team is that of the fictional characters they see on television- muscle-bound, military commando types wielding fully automatic weapons that they shoot from the hip. With this type of public opinion, an ill-formed Special Response Team can be a police department's worst nightmare. From a city manager or mayor's perspective, the Special Response Team may appear to be one of the biggest liabilities of the police department, but to the persons whose lives are saved by a well trained and equipped team's actions, they are the most valuable asset of the city. This paper will focus on those liabilities that are incurred by the police agency that wants to develop and maintain a Special Response Team. This paper will provide valuable information to police managers (Chiefs, Captains, etc.) and city managers that are making the final decisions about the implementation of a Special Response Team. Establishing the need for the team, team selection, team training, and team deployments are the four main areas of concern. Each of these areas contains liabilities that should concern police and city managers, as well as the officers that make up the team.

Establishing the Need

The need for specialized teams of officers that respond to those situations that are outside the scope of routine police incidents has been recognized since the 1960's. As violent crime increased in the '70's and '80's, more police agencies across the United States responded by forming specialized teams. When a police agency is considering forming a Special Response Team, the establishment of the need for the team as well as the justification of that need is complicated. The benefits that a Special Response Team can produce are hard to measure and all we can do is speculate about how high-risk incidents might turn out in the absence of a team. What we do know is that many victims' and suspects' lives have been saved because of the deployment of a Special Response Team that had training and equipment beyond that of the ordinary patrol officer. In 1985, a study by the International Association of Chiefs of Police showed that "the presence of a SWAT unit tends to decrease the number of shooting incidents" (Matulia). This study also revealed a trend showing that agencies with hostage negotiation units and/or training had a lower justified homicide rate than agencies without such training. The study also showed that the number of firearms incidents tended to decrease with the presence of hostage negotiation units (Matulia).

One question that must be answered early on in the process is how to fund the Special Response Team if it is formed. The operating costs of a Special Response Team may prove to be more cost effective in the long run when compared to the ever-increasing cost of lawsuits the agency might incur. Lt. Douglas Cave of the Fullerton, CA, Police Department says, "If money is that much of a concern in developing a SWAT Team, you're better off delaying, or foregoing, the start of a SWAT unit than to promulgate an inevitable failure." (Scoville) The costs normally thought of when deciding to form a team include specialized equipment, initial training, and overtime for deployments. But the costs sometimes not considered include continuing training costs (ammunition, overtime, etc.), specialized equipment replacement (things will be broken), team member selection (specialized testing), and team deployment (any imaginable incidental costs). Utilizing asset forfeitures, private donations, and federal government reutilization/surplus programs may mitigate the costs associated with developing a

Special Response Team. These costs are only monetary—Special Response Teams deal with incidents that have the potential for personal harm and/or loss of life. The cost of poor decisions is the greater risk—to the agency, administrators, team members, victims, and suspects (Smith).

Another question to be asked is can a police agency or city be held liable in a civil lawsuit for NOT having a Special Response Team. In at least one case, the answer is no. In *Salas v. Carpenter*, 980 F.2d 299 (5th Cir. 1992), the plaintiffs sued the Tarrant County Sheriff's Department in Texas for deliberate indifference in not utilizing a SWAT team to handle a hostage situation during which a hostage was killed. The court rejected the plaintiffs' arguments by applying a 14th Amendment due process analysis. The court held that that, "The substantive due process clause is phrased as a limitation on the state's power to act, not a guarantee of certain minimal levels of safety and security; while it forbids the state itself to deprive individuals of life, liberty and property without due process of law, its language cannot fairly be read to impose an affirmative obligation on the state to ensure that those interests do not come to harm through other means." A summary of the facts of *Salas v. Carpenter* follows: On August 1, 1989, Juanita Hermosillo was taken hostage in a superior court judge's chambers by her estranged husband, Cabano. The Fort Worth Police Department responded with their Special Response Team and began to deploy. Before the team fully deployed, the Tarrant County Sheriff, Don Carpenter, declared that the courthouse was the Sheriff's Department's jurisdiction and refused the offer of assistance from the Fort Worth PD's Special Response Team. Sheriff Carpenter's department did not have a Special Response Team and only had five deputies that had attended a weeklong school of hostage negotiation training. The sheriff's office had no meaningful communications with Cabano, had no weapons or training for a dynamic type entry, and ultimately Cabano killed Hermosillo and then killed himself. While the trial court found in *Salas v. Carpenter* that there was no Constitutional denial of Hermosillo's rights, the law has evolved greatly in the last several years and the actions described could amount to negligence and deliberate indifference to a citizen's Constitutional rights (Franscell).

When the decision has been made to form a Special Response Team, no aspect of the development of the Team should be left open for speculation. Considerations of

continual, ongoing training, mutual aid agreements with other teams in the state, and the possibility of a multi-jurisdictional team are just a few possibilities. If, and when, something goes wrong, no one should be able to second-guess the decisions and tactics of the Team (Scoville).

Team Selection

After the decision has been made to implement a Special Response Team, the selection of team members is the next daunting task. Applicants for team membership should be volunteers; the closeness of team tactics with specialized weapons demands that the team member be willing and ready to perform to the absolute best of his or her ability. The selection process should spell out, in policy form, the requirements of a team member and the process by which applicants will be tested. This will help ensure the validity and legal soundness of the testing process. Terms such as “discrimination,” “adverse impact,” “affirmative action,” and “gender bias” have created many new legal concerns regarding the selection of personnel to “coveted” or desirable positions on Special Response Teams (Lamprey). The validated standards of a selection process should not be lowered or ‘relaxed’ in order to fill vacancies or show any favoritism.

The selection process can be broken down into four major areas: evaluation of the applicant’s work performance and work ethic, a physical fitness exam, a written exam, and an oral interview board. The evaluation of the applicant’s work performance and work ethic should show his or her willingness to be a part of a team effort, response to stressful situations, training background, and control of emotions. This step should eliminate some applicants that would cause liabilities because of past incidents such as excessive force or improper application of the law. Negligent retention could become an issue if the applicant has a past history of disciplinary actions that would make him or her unsuitable for making the types of decisions required of a team member.

The physical fitness exam should be an accurate representation of the tasks that team members may be required to perform. In the past, physical fitness tests were based on the “Cooper Standards” that define certain levels of physical fitness, but more police agencies are moving toward an obstacle-style course that directly measures the

applicant's ability to function in SWAT gear while manipulating SWAT equipment. The maximum time allowed in these tests should be the time of the slowest current team member, as testing is more fair and less prone to criticism when all of the current team members can complete the testing themselves (Swon).

The written exam should consist of departmental policies including general policies, use of force policies, and tactical team policies. All of these policies should be available for review prior to testing. The oral board may consist of stress scenarios to test the applicant's decisiveness under pressure, problem-solving ability, and ability to communicate clearly tactical ideas and plans (Swon). When an applicant is selected for the team, he or she should be considered probationary and be given extensive training to bring him or her within reach of team standards.

The discussion of team member selection is not complete without discussing the jobs of team leader and sniper; these two individuals carry some of the greatest responsibility and liability of the team. The team leader has to be a person that has sound tactical judgment and the respect of the team. The specific liability issue at hand is that of negligent supervision. The Special Response Team Leader should also be at least a first-line supervisor of the department and have specialized training in the management of a Special Response Team, as well as training in the supervisory functions of the department. Just discussing the job of the police sniper is enough to make most police administrators squirm. They simply do not want to think about selecting and assigning as a sniper an officer who has the ability and willingness to kill when required. Of course, any police officer may be required to kill, but a police sniper is usually not personally being threatened when he or she has to kill. The police sniper has to be able to properly evaluate the situation at hand and make split-second decisions without supervision that are legally and civilly sound and within department Use of Force policies (Bartlett).

Team Training

A Special Response Team can be readily identified as such by most people. They are usually the guys in the dark colored jumpsuits or fatigues, covered in body armor, wielding semi- or fully-automatic weapons, and carrying enough extra gear to outfit at

least two extra people if needed. But even with the most advanced equipment, a team is only as good as their training and missions that they have experienced. Typical Special Response Team courses are five-day schools with 40 to 50 hours of advanced level training. The training goal of these schools is NOT to have students master all aspects of a Special Response Team. These schools simply allow students to become familiar with team tactics, weapons, planning, chemical agents, and communications and provide the basis for ongoing training that will allow them to master the skills necessary to be an effective team. Many police administrators are not familiar with this concept and believe that when the standard 40-hour SWAT school is complete, the members are ready to serve as full team members. On the surface, the difference between a new tactical team member and the seasoned, extremely capable team member can be difficult to determine. The phrase “black bag” SWAT team or team member refers to the fully-equipped team or team member who has all of the latest gear and dark uniform yet has very limited skills and not very much experience. Skill defines true ability and the skill development through ongoing training should be a priority of the team and of police administrators (Smith). Required training should include not only the planning and tactics involved in making an entry into a structure, it should also include leadership training for team members, less-lethal device training, suspect handling drills, and especially training concerning updated legal rulings and liability issues. The training of the team should include the team members and their team commanders. It is inappropriate to assign a team commander that does not have the same training and experiences as the team members he or she is responsible for supervising. Any inexperienced or untrained supervisor in charge of high-risk operations will make judgment errors that will lead to liability for every police officer involved and for the police agency. Interference should not be permitted by administrative or supervisory personnel who do not possess the expertise or qualifications necessary to plan and execute a tactical operation (Kalk, Supervising...).

When considering the liability issues associated with Special Response Teams and training issues, the dominant legal catch phrase is “failure to train.” The dominant case referred to in failure to train issues is *City of Canton v. Harris*, 489 U.S. 378, 109 S.Ct. 1197 (1989). In this case the United States Supreme Court was called on to

determine the liability of the city for its alleged failure to train its jail supervisors properly in the recognition of inmates' medical needs. The U.S. Supreme Court held that in "failure to train" cases, the culpability of the city's policymakers must rise to that of deliberate indifference in order to hold the municipality liable under a Section 1983 civil rights claim. The court in *Canton* recognizes that moral imperatives may exist that require police administrators to prepare their officers to deal with certain situations, including adequate training on the use of deadly force. *Canton* also specifically recognizes that in analyzing whether officers have been properly prepared, their behavior must be assessed in light of the duties assigned to specific officers and the adequacy of programs to respond to the usual and recurring situations with which they must deal (Perkins). Following this standard, it may be that the needs for more or different types of training, tactics, and equipment selection are relative to the typical situations with which tactical units are involved. Failure to heed these needs might then reasonably be said to constitute deliberate indifference and therefore a failure to train (Perkins). Several other failure to train cases include *Davis v. Mason County*, 927 F2d 1473 (9th Cir. 1991), *Quezada v. County of Bernalillo*, 944 F2d 710 (10th Cir. 1991), and *Sova v. Mt. Pleasant*, 1998 Fed App. 0125P (6th Cir. 1998).

Training liability issues also include the chance of injury during training. Larry Glick, director of the National Tactical Officers Association (NTOA), says, "If you think about the missions that SWAT officers face, it's no surprise that preparing for those missions is dangerous." The NTOA has identified four distinct causes of recent SWAT training tragedies. These include not having a safety briefing before the exercise began, a lack of proper safety equipment, failure to conduct proper searches of participants for live ammunition, and forgetting to notify adjoining municipalities of the scope and time of training (Living and Dying...). Realistic training is a necessity and has been aided by the development of Simunition® type weapons that allow team members to experience fully a shoot/no-shoot scenario. These simulated weapons allow team commanders and team leaders the chance to evaluate how an officer will perform in a real incident. By being able to manipulate safeties, magazine releases, and the trigger, team members become "stress inoculated" to the duties required of them during the intense emotional experience of having to incapacitate or kill a suspect. The International Association of Chiefs of

Police states that Special Response Team training must be solid, realistic, ongoing, and verifiable. Solid training is defined as training that overcomes the most consistent problems for SWAT teams. Realistic training is defined as training that duplicates incidents a team will face in the course of ‘normal’ operations. Ongoing training is defined as regularly scheduled, structured training with defined goals and objectives that require a minimum performance standard to complete. Verifiable training is defined as training that is well documented by syllabus, synopsis, and video that can be easily stored, retrieved, and available for open review (SWAT...).

Team Deployments

Almost all of the liabilities associated with Special Response Team deployments involve cases associated with the use of force. The Fourth Amendment prohibits the use of unreasonable force when a police officer makes an arrest, takes a person into custody, or in any way seizes a person. When the seizure of a person results in the injury of that person, it is almost a certainty that a lawsuit will be filed for the use of excessive force. The test will be the standard established by *Terry v. Ohio*—was the force reasonable based on the perspective of a reasonable police officer on the scene at the time the force was used, and not on the perspective of a person with the benefit of 20/20 hindsight. In a use of force case where deadly force is involved, *Tennessee v. Garner* has established the standard. When reviewing the reasonableness of force utilized by a Special Response Team, a court will most likely consider whether negotiation was attempted, whether the use of less-lethal weapons was considered, and whether there were any less intrusive measures implemented prior to the team being engaged in a physical confrontation with the suspect (Kalk, Use of Force...). In the 7th Circuit Court in *Plakas v. Drinski*, 19 F. 3d. 1143, 1149 (7th Cir. 1994), the court said, “The time-frame is a crucial aspect of excessive force cases. Other than random attacks, all such cases begin with the decision of the police officer to do something, to help, to inquire. If the officer decided to do nothing, then no force would have been used. In this sense, the police are always causing trouble. But it is trouble which the police officer is sworn to cause, which society pays

him to cause and which, if kept within constitutional limits, society praises the officer for causing.”

Special Response Teams will be held to higher standards because of their advanced training, tactics, and experience. The “reasonable officer” standards used in *Terry v. Ohio* and *Tennessee v. Garner* will most likely change to that of a “reasonable Special Response Team officer.” The team commanders and team leaders have choices to make when responding to high-risk incidents. In situations where a barricaded suspect poses no threat to police officers or citizens, the only reasonable use of force is containment. Team leaders must be responsible in the choice of weapons, restraints, and the methods chosen to apprehend or control a suspect. The under-deployment of manpower can also result in the need to use excessive force. “When any police officer must use force, the immediate use of the maximum level of force which is reasonable and legally permissible will generally reduce the need to use excessive force to end an encounter (Kalk, Use of Force...).”

The use of distraction devices, commonly called a flash-bang, by Special Response Teams is another area of potential liability. In a 1996 case titled *Commonwealth v. Garner*, 672 N.E.2d 510 (1996), a no-knock search warrant was prepared to capture a suspect in the shotgun robbery of an all-night convenience store and the rape of the store’s female clerk. The warrant service plan called for the deployment of sniper teams outside the suspect’s apartment and for an officer to break a rear bedroom window and toss in a flash-bang as a diversion for the team’s forced entry. Besides the suspect, police had learned another male, a pregnant female, and two small children might be present in the apartment. The officer deploying the flash-bang was supposed to peek into the bedroom before dropping the device into the room, but, according to the trial court, he failed to do so. A four-year-old girl was in the room and was terrified when the device exploded and filled the room with smoke. Then during the team’s dynamic and overwhelming entry, the pregnant woman was struck in the face and abdomen by a door. The use of a flash-bang was challenged as an attempt by a criminal defendant to exclude the evidence found in the subsequent search of his home (Emberton). Specifically the suspect argued three things:

- That the military-style assault on the apartment and the use of the flash-bang were unnecessary, given that there were no hostages in the place, no reason to believe the apartment had been barricaded, and no evidence that the occupants were anticipating the raid.
- The presence of the pregnant woman and two children should have ruled out the use of the flash-bang. (The child nearest the flash-bang was said to have suffered emotional injuries from the SWAT entry and health complaints associated with smoke inhalation.)
- The flash-bang was too dangerous to occupants of the apartment because of its potential health consequences. Indeed, these devices are so inherently dangerous that they should not be used without prior judicial authorization.

The trial court found these arguments convincing and ruled that in the absence of any information that warranted the strength of the police assault on the premises, the tactics used were unreasonable under the Fourth Amendment. This finding was based on the use of the flash-bang, the mode of entry, the number of officers, and the way they were dressed (in black military outfits).

The Massachusetts State Supreme Court rejected this thinking. The court reasoned that the surprise entry with overwhelming force, accompanied by a strong and stunning diversion, may well have seemed the best way to avoid a deadly gun battle. Indeed, given the overwhelming number of successes by police SWAT teams in well-planned dynamic-entry operations, it would seem that this tactic has proven is reasonableness. The court also said that given the weaponry and possible resistance waiting in the apartment, the situation was too frightening to fault the officer for not looking or not seeing the child before he threw the flash-bang device into the room. The court declared that the flash-bang device was not intended to be dangerous—only to frighten and distract—and they felt the flash-bang did not contribute to the inherent dangerousness of the situation as a whole. As to the smoke inhalation by the child, the court found that since the trial court had determined that the flash-bang filled the apartment with smoke, then it was probable that the use of the device anywhere in the apartment would have had similar effects.

The court also rejected the argument that flash-bangs should only be used with prior judicial approval by saying that the court would be ill equipped by lack of training and experience to review and make decisions about detailed police plans for forcible entries (Emberton). Another case involving an excessive force claim is *Langford v. Gates*, 43 Cal. 3d 21, 729 P.2d 822 (1987). The *Langford* court found that the use of a battering ram and flash-bang device was not unreasonable and found that the LAPD had reasonable policies in place limiting the deployment of flash-bang devices as well as meeting the required training guidelines. The message of the *Garner* and *Langford* cases is that diversionary devices do not constitute excessive force when used by trained personnel under circumstances not likely to produce any significant injury, and where they may be useful to prevent armed resistance (Wallentine).

Another question to be asked is when will liability be incurred when a hostage or bystander is injured. In *Green v. Denison*, 738 S.W.2d 861 (Mo. 1987), the court held that the police do not have a general duty to protect any particular person, and there was no evidence that the police had intended to injure anyone other than the suspect. During the *Green v. Denison* incident, a suspect had fired a shot that shattered glass and blinded a bystander, and the suspect's girlfriend was shot by an officer. Both injured persons sued, claiming the police had a duty to protect them. Generally, officers will not be held liable when hindsight suggests that there could have been a better alternative, as long as the officers act reasonably. The doctrine of qualified immunity protects officers in these situations, and protects all but "the plainly incompetent or those who knowingly violate the law" (Wallentine).

When considering the liabilities of property damage by Special Response Teams, a high probability exists that something will be broken. The very nature of operating in a high-risk environment gives rise to the potential for needing to break a door or window. The United States Supreme Court has recognized in *Dalia v. United States*, 441 U.S. 238, 258, 99 S.Ct. 1682, 1694, 60 L.Ed.2d 177 (1979), that officers executing search warrants on occasion must damage property in order to perform their duty. Just as in the use of force cases mentioned above, the reasonableness standard applies when a Special Response Team carrying out a mission damages property. So then the question becomes, "How much is reasonable?" At least in one case, *Langford v. Superior Court*, 43 Cal.3d

21 (1987), the court enjoined the use of a motorized battering ram because of the potential danger which exists from the collapse of building walls, ceilings and utility lines and the possibility of gas leaks and electrical fires that could injure occupants or neighbors (Wallentine).

Conclusions

The most important liabilities to consider when discussing those associated with Special Response Teams are those that deal with the potential for the loss of life. In researching and deciding whether a team is the right choice for an agency, the types of calls to which the agency responds as well as the manner in which the team will be funded are the main concerns. Courts have not held agencies liable for not having a Special Response Team, but they have said that the resources of a team would be beneficial on high-risk incidents. In selecting team members, care must be given so the process is thorough and fair to all of the applicants involved. Just one team member that makes a wrong decision at a crucial time can spell disaster in the legal realm. When the team is selected and training begins, continual training cannot end until the team is disbanded or is placed on a non-callout status. The failure to train issues discussed are crucial to putting together a team that can withstand legal challenges. When the team does deploy, different levels of force must be used according to the dynamics of each situation. The decisive use of overwhelming force at the level allowable by policy and by law will reduce the chances of injury to the team, injury to innocent persons involved in the incident, and injury to the suspects involved. The legal cases cited are only given as a starting point for research and the agency developing a team should consult its legal representative for the most up to date and applicable laws. Each tactical unit should become affiliated with state or national associations of tactical officers. This will allow the unit to stay current with SWAT technologies as well as legal cases that affect team selection, training and deployment.

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