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THE ROLE OF TRAINING IN MANAGING LEGAL RISK

SPEAKING NOTES

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PURPOSES OF RISK MANAGEMENT

1. improve service delivery
2. avoid financial costs arising from disputes
3. avoid negative effects on organization arising from disputes (“organizational disruption”)
4. avoid negative effects on individuals arising from disputes
5. avoid damage to reputation of the constabulary generally
6. win disputes that do occur
7. lose small if must lose

MODES OF LEGAL REGULATION OF THE POLICE

1. Civil Law
2. Police Discipline Process
3. Supervision of Police Forces by Independent Authorities (municipal police boards or, in the case of provincial police forces or the R.C.M.P., a Minister of the Crown)
4. Ministerial Oversight
5. Human Rights Legislation
6. *Criminal Code*
 - exclusion of evidence
 - sentencing considerations
 - criminal investigation of police officers
7. *Charter of Rights and Freedoms*
8. Provincial Police Commissions and Ministry Policy
9. Commissions of Inquiry / Public Inquiries
10. Coroners Legislation
11. Freedom of Information

BASIC PRINCIPLES OF RISK MANAGEMENT

1.	2.	3.
<i>Assess Trends</i>	<i>Assess Risk</i>	Reduce Risk Through
(Historical / Prospective)	Arising from Trends	<i>Preventive Strategies</i>
Notes:	Notes:	Notes:

POLICE CIVIL LIABILITY – RECENT TRENDS

1. ***Many more cases ...*** Recent years have seen a significant increase in the number of formal legal proceedings against the police
2. ***Many firsts ...*** A significant number of recent proceedings are unprecedented - the police have never (or rarely) faced a civil action for the activity in question
3. ***Many important losses ...*** Police have lost many important cases
4. ***Many large damage awards ...*** Courts of law have frequently ordered police to pay large awards of damages and costs
5. ***Many similar cases follow ...*** New cases quickly follow precedent-setting cases
6. ***Other Considerations ...*** Complexity, Publicity, for example

Examples: **Negligent Investigation** - *Beckstead v. Ottawa (City)* (1997), 155 D.L.R. (4th) 382 (Ont. C.A.);
Hill v. Hamilton-Wentworth Police Services Board, [2005] O.J. No. 4045 (QL) (C.A.) (awaiting judgment from the Supreme Court of Canada)

Workplace Discrimination and Harassment - *Clark v. The Queen*, [1994] 3 F.C. 323 (T.D.)

Charter Damages - *Doe v. Metropolitan Toronto Board of Commissioners of Police* (1998), 160 D.L.R. (4th) 697 (Ont. Gen. Div.)

Misfeasance in Public Office - *Odhavji v. Toronto Police Services Board*, [2003] S.C.J. No. 74 (QL)

See also S. Childs and P. Ceyskens, “*Doe v. Metropolitan Toronto Board of Commissioners of Police* and the Status of Public Oversight of the Police in Canada” (1998) 36 Alta. L. Rev. 1000 (also on the O.P.C.C. website: www.opcc.bc.ca)

GENERAL PREVENTIVE STRATEGIES

Keyword: Common Sense

1. Recruitment
 - Psychological Testing (including clinical interview for all candidates)
 - Background Investigation
2. Legal Training
 - Recruit Legal Education
 - Continuing Legal Training
3. Promotion and Supervision
4. Policy Development and “Standard Setting”
 - current
 - dovetail with training
5. Legal Advice
 - Model (In-house / External)
 - The two kinds of advice
6. Other
 - Early Warning Systems, Informal Resolution of Disputes, Borrowing Risk Management Practices from Other Sectors

POLICE CIVIL LIABILITY – HIGH RISK ISSUES

Issue No. 1 – Investigative Quality

1. Duty to Person Suspected of Crime

(a) Malicious Prosecution

- very few successful cases against the police, given burden of proof: (i) defendant (police officer) initiated proceedings; (ii) proceedings terminated in favour of plaintiff; (iii) absence of reasonable grounds; and (iv) malice, or a primary purpose other than that of carrying the law into effect

(b) Negligent Investigation

- *Beckstead v. Ottawa (City)* (1997), 155 D.L.R. (4th) 382 (Ont. C.A.)
- *Hill v. Hamilton-Wentworth Police Services Board*, [2005] O.J. No. 4045 (QL) (C.A.) (awaiting judgment from the Supreme Court of Canada)
- *Bainard v. Toronto Police Services Board*, [2002] O.J. No. 2765 (QL) (S.C.)

(c) Charter-based civil actions

- *McTaggart v. Ontario*, [2000] O.J. No. 4716 (QL) (S.C.)

2. Duty to Victims of Crime

- *Hill v. Chief Constable of West Yorkshire*, [1989] A.C. 53 (H.L.)
- the Canadian approach: *Doe v. Metropolitan Toronto Board of Commissioners of Police* (1998), 160 D.L.R. (4th) 697 (Gen. Div.)

3. Other Issues

- prominence
 - *Kvello Estate v. Miazga* (2003), 234 D.L.R. (4th) 578 (Sask. Q.B.)
 - *Dix v. Canada (Attorney General)*, [2002] A.J. No. 784 (QL) (Q.B.)
- related scrutiny through the police discipline process or inquiry process (*Stonechild*)

POLICE CIVIL LIABILITY – HIGH RISK ISSUES

Issue No. 2 – Care of Persons in Custody

Top Civil Court Judgments (England and U.K.)

- *Socha (Public Trustee of) v. Millar* (1994), 48 A.C.W.S. (3d) 879 (Ont. Gen. Div.), aff'd, [1998] O.J. No. 2006 (QL) (C.A.): “[t]o the intoxicated inmate the duty is to exercise the greatest care”)
- *Kirby v. British Columbia (Attorney-General)* (1997), 41 B.C.L.R. (3d) 45 (S.C.) (placing an intoxicated person into custody)
- *Fortey v. British Columbia (Attorney-General)* (1997), 45 B.C.L.R. (3d) 264 (S.C.), aff'd (1999), 63 B.C.L.R. (3d) 185 (C.A.) (medical care - refusal by prisoner)
- *Lipcsei v. Central Saanich (District)*, [1995] 7 W.W.R. 582 (B.C. S.C.) (medical care)
- *Smith v. British Columbia (Attorney General)* (1988), 30 B.C.L.R. (2d) 356 (C.A.) (protection of intoxicated prisoners from other prisoners)
- *Euteneier v. Lee*, Ont. C.A., 19 September 2005 (treatment of incarcerated woman apparently attempting suicide)
- *Roy v. Canada (Attorney General)*, 2005 BCCA 88 (questionable consciousness)
- *Reeves v. Commissioner of Police of the Metropolis*, [2000] 1 A.C. 360: police 50% responsible for the death of a suicidal prisoner who pushed his shirt through a small open “wicket hatch” in his cell door and attaching the shirt to the door, hanging himself
- *Orange v. Chief Constable of West Yorkshire*, Eng. C.A., 1 May 2001 (whether police ought to have known that prisoner was suicidal)
- *Kirkham v. Chief Constable of the Greater Manchester Police*, [1990] 2 Q.B. 283 (C.A.) (transfer of a suicidal prisoner to another institution)
- *Wilson v. Chief Constable, Lothian and Borders Constabulary* (1986), 1989 S.L.T. 97 (O.H.) (release of prisoners)

POLICE CIVIL LIABILITY – HIGH RISK ISSUES

Issue No. 3 – Use of Force

Use of Pepper Spray

Christopherson v. Saanich (District) (1994), 2 B.C.L.R. (3d) 218 (S.C.)
see also *Harty v. Kroeker* (1998), 6 A.L.E.R.B.J. 247 (Alta. L.E.R.B.) (complaint case)

Use of Police Dogs

C. (T.L.) v. Vancouver (City) (1995), 9 B.C.L.R. (3d) 201 (S.C.)
Arnault v. Prince Albert Board of Police Commissioners (1995), 136 Sask. R. 49 (Q.B.)

Use of Police Baton

Allarie v. Victoria (City), [1995] 1 W.W.R. 655 (B.C. S.C.)

Use of Full Nelson Hold

Green v. Lawrence (1998), 163 D.L.R. (4th) 115 (Man. C.A.)

Use of Arwen Anti-Riot Weapon

Berntt v. Vancouver (City) (numerous)

Incident Command

Crampton v. Walton, [2005] A.J. No. 178 (QL) (C.A.)
McLean v. Toronto Police Services Board, [2004] O.J. No. 185 (QL) (C.A.)
Vukelic v. The Queen (1997), 29 B.C.L.R. (3d) 288 (C.A.)
Rabideau v. Maddocks (1992), 37 A.C.W.S.(3d) 754 (Ont. Gen. Div.)

Weapons of Opportunity

Nault v. Tremblay (1995), 2 P.L.R. 51 (B.C. S.C.)
Marshall v. Monpetit, Ont. C.A., 4 April 1997

Weaponless Defence

R. v. Yum (2000), 277 A.R. 238 (C.A.)

Other Forums

Re Cooper (1991), 1 P.L.R. 256 (R.C.M.P. P.C.C.) (examination of carotid restraint – complaint case)

POLICE CIVIL LIABILITY – EMERGING AREAS OF RISK

1. Negligent Training

- new area of police civil liability - first case in 1981
- very common allegation
- *Berntt v. Vancouver (City)* (1997), 28 B.C.L.R. (3d) 203 at 253-61 (S.C.), rev'd (1999), 63 B.C.L.R. (3d) 233 (C.A.)

2. Negligent Supervision

- new area of police civil liability
- *Clark v. The Queen*, [1994] 3 F.C. 323 (T.D.)
- *Berntt v. Vancouver (City)* (above)

3. Statements to the Media

- *Uni-Jet Industrial Pipe Ltd. v. Canada (Attorney General)* (2001), 198 D.L.R. (4th) 577 (Man. C.A.)
- The sad case of Barrington Wynne

4. Liability for Off-duty Conduct

5. Recruitment - Negligent Appointment

POLICING AND THE LAW OF HUMAN RIGHTS –

Overview of Human Rights Law

1. Human Rights Legislation (traditional model)
 - (a) *Discrimination* - the three components
 - **act or omission** involving “differential treatment”
 - **protected areas** of human activity (employment, accommodation, provisions of services/facilities/goods, for example)
 - **prohibited grounds** of discrimination (age, sex, marital status, handicap, for example)
 - (b) *Human Rights Commissions* (except B.C.)
 - roles: education; investigation; mediation; prosecution
 - powers
 - (c) *Human Rights Tribunals*
2. Interpretation
 - quasi-constitutional: prevails over all other forms of law except constitutional law
 - “fair, large and liberal” interpretation
 - mixed motives rule
3. The Duty to Accommodate

POLICING AND THE LAW OF HUMAN RIGHTS –

The 5 Things that Police Need to Know

1. human rights issues arise in three areas in policing –
 - recruitment and appointment of police officers
 - the police workplace
 - delivery of operational police services
2. human rights issues constitute a rapidly emerging area of legal regulation of the police
 - all human rights tribunal decisions involving the police have occurred within the past ~25 years
3. human rights law generally has developed very rapidly in the recent past
 - reformulation of the law governing discrimination - *British Columbia Public Service Employee Relations Commission v. British Columbia Government and Service Employees' Union*, [1999] 3 S.C.R. 3 (the "Meiorin" judgment)
 - remedial interpretation of handicap as a prohibited ground of discrimination - *Québec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City)* (2000), 185 D.L.R. (4th) 385 (S.C.C.)
4. the human rights process is problematic
 - institutional inertia
 - quality of investigations
 - animus
5. human rights issues arise beyond complaints under human rights legislation
 - civil actions against the police involve human rights considerations
 - police discipline cases - misconduct arising from breach of human rights
 - criminal law process - see *R. v. Brown*, [2003] O.J. 1251 (QL) (C.A.) (profiling)

THE POLICE DISCIPLINE PROCESS

General Risk Management Considerations

- similarity between risk factors in police discipline process and other areas involving regulation of police activity
- decisions of courts of law and administrative tribunals on discipline and complaint issues are demonstrably more numerous in the past 15 years
- decisions of courts of law and administrative tribunals on discipline and complaint issues are demonstrably more complex
 - **Pepper Spray:** *Harty v. Kroeker* (1998), 6 A.L.E.R.B.J. 247
 - **Carotid Restraint:** *Re Cooper* (1992), 1 P.L.R. 256 (R.C.M.P. P.C.C.)
 - **Workplace Discrimination and Harassment:** *Drennan and Hamilton-Wentworth Regional Police* (1994), 2 O.P.R. 1103 (O.C.C.P.S.); *Howat and Ontario Provincial Police* (1990), 2 O.P.R. 877 (O.P.C.)
 - **Discrimination in Operational Policing:** *Muojekwu v. Sim*, B.C. Police Commission, 3 May 1996; *Gray v. Wilson*, Ont. Bd. Inq., 14 September 1989
 - **Handicap as a Disposition Consideration - Alcoholism:** *Marsden and Toronto Police* (1994), 2 O.P.R. 974 (O.C.C.P.S.)
 - **Handicap as a Disposition Consideration - Depression:** *Reilly and Brockville Police* (1997), 2 P.L.R. 514 (O.C.C.P.S.)
 - **Handicap as a Disposition Consideration - PTSD:** *Lee v. Royal Canadian Mounted Police Commissioner* (2000), 184 F.T.R. 74 (T.D.)

- legislative reform
 - movement from a punitive model towards a remedial model
 - scope of possible complaints has evolved:
 - historical – “conduct”-based model
 - contemporary – complaints divided into three areas: (1) conduct/ public trust; (2) generic discipline/ work performance; and (3) service and policy issues concerning the police force
 - transformation of distinction between “internal discipline” and “public complaints”
- “crossover” issues – human rights issues arising in the police discipline process
- role of professional standards section in risk management process
 - relevance of focus on reactive role
 - closing the loop and dovetailing professional standards functions with recruitment, training legal and policy sections
 - standard setting
 - selection of personnel; training of personnel
 - early warning
 - bad practices

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“TOP TEN” PROFESSIONAL STANDARDS BASIC ERRORS

(with apologies to David Letterman)

10. failure to properly select professional standards investigators
9. failure to provide initial training for professional standards investigators
8. failure to provide continuing training for professional standards investigators
7. excessive turnover of professional standards investigators
6. failure to properly select the i/c of professional standards
5. failure to provide initial training for the i/c of professional standards
4. failure to provide continuing training for the i/c of professional standards
3. excessive turnover of the i/c of professional standards
2. failure to properly support the i/c of professional standards
1. treating professional standards as a reactive role, and placing little no emphasis on preventive work