Towards a New Tort for Police Use of LETHAL FORCE

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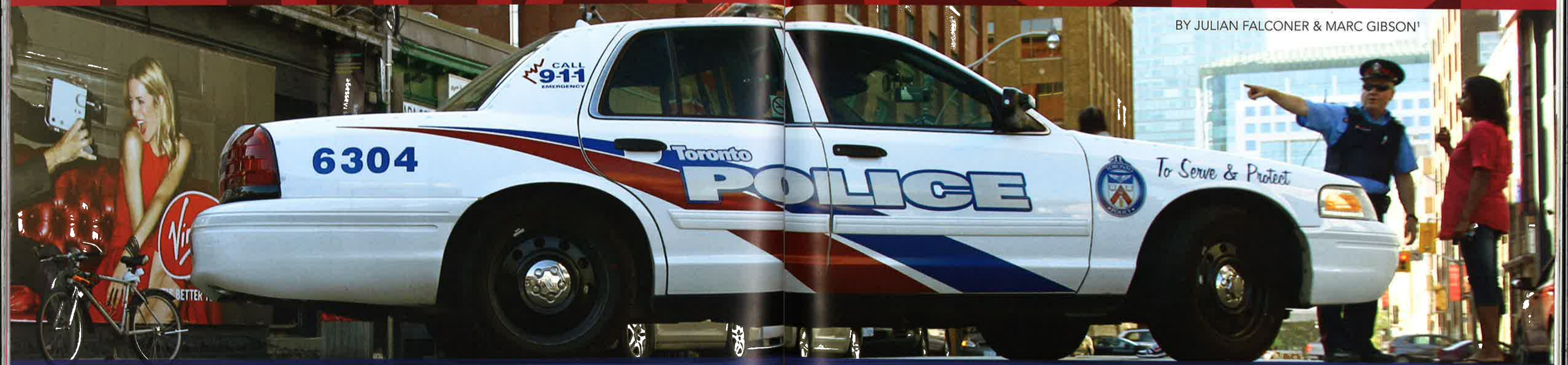

"The premise of [this] Report is that the target should be zero deaths when police interact with a member of the public – no death of the subject, the police officer involved, or any member of the public. I believe the death of a fellow human being in these encounters is a failure for which blame in many situations cannot be assigned; it is more likely a failure of a system. Policies and procedures should be designed and exercised with that zero target in mind but, of course, not at the cost of ignoring the safety of the subject, the police, or the public."

The Honourable Frank Iacobucci, *Police Encounters with People in Crisis*, Independent Report to the Toronto Police Service[2]

POLICE LIABILITY

Introduction: "Zero Deaths"

Despite numerous reports like the one quoted above ("the Iacobucci Report"), the "failure of a system" recognized by Justice Iacobucci continues to happen with alarming frequency. We argue that police use of force training in Ontario is inadequate and out-of-date to the point that it has become part of the problem. In this article, we seek to meaningfully apply the "zero deaths" standard recognized by Justice Iacobucci to issues of police liability. We suggest that it would be in the public interest to expand supervisory liability for police training that contributes to preventable deaths even when successfully delivered and applied.

While "zero deaths" is arguably aspirational rather than operational, police have an "extraordinarily important role" in society,[3] including the power to use lethal force against civilians. Police ought to be accountable to the people they serve and trained in accordance with the public expectation that all human life is to be treated as precious.

The tragic reality is that unnecessary uses of lethal force by police against vulnerable civilians have not abated since the release of the Iacobucci Report in 2014. Federal, provincial, and municipal governments in Ontario have not demonstrated a concrete resolve to implement the eighty-four recommendations in the Report. Under these circumstances, civil liability plays an increasingly important role in maintaining the public accountability of police.

Background: A Deficit in Public Accountability

Bill Blair, then-Chief of the Toronto Police Service ("TPS"), commissioned the Iacobucci Report after TPS Constable James Forcillo shot and killed Sammy Yatim on July 27, 2013. Many people have seen the footage of the eighteen-year-old's death, which was posted on social media and introduced as evidence in the criminal trial of Police Constable (PC) Forcillo. Sammy was alone on an empty Toronto streetcar with a pocket knife at the time he was killed. In an interaction that lasted less than 50 seconds, PC Forcillo shot at Sammy 9 times, striking him with 8 bullets. Most of the shots struck Sammy while he lay on his back, dying and paralyzed, after one of the first shots shattered his spine and another ruptured his heart. He was subsequently tasered by TPS Sergeant Dan Pravica.

On January 25, 2016, PC Forcillo was acquitted of second degree murder and convicted for only the *attempted* murder of Sammy Yatim, despite firing the lethal shots.[4] This outcome is a legal "fiction" that highlights the difficulty in securing a criminal conviction for police use of lethal force against a civilian. Notably, PC Forcillo was the first Ontario police officer convicted of any type of homicide since the creation of the Special Investigations Unit ("SIU") in 1990.[5]

In the absence of effective criminal liability, there are relatively few mechanisms of public accountability for police use of lethal force. Internal police discipline inherently relies on the judgment of police by other police officers. Inquests and inquiries make recommendations that go all too easily ignored. Media investigations have no legal effect on their own.

Justice Iacobucci's independent review was far from the first Ontario review related to police use of force. Unfortunately, police have been slow to adopt the numerous recommendations that have been produced over the last three decades. In June 2016, the Ombudsman of Ontario stated:

> There have been scores of fatal police shootings in Ontario involving persons with mental illness in recent years – more than 40 just since 2000. They have sparked multiple probes and studies. Coroner's inquests have returned more than 550 recommendations for improvement and change since 1989. …
>
> Over and over, dating back nearly three decades, these reports and recommendations have emphasized the importance of police using de-escalation techniques when dealing with people in crisis. They call for simple directions, such as calmly offering to help, instead of shouting, with guns drawn. Yet very little has been done to implement this advice.[6]

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Unfortunately, the costs of advice without action have been borne by the public rather than the police. In the meantime, preventable civilian deaths at the hands of police continue to occur. Since the release of the Iacobucci Report in 2014, the deaths of Jermaine Carby,[7] Andrew Loku,[8] and Abdirahman Abdi[9] in southern Ontario alone have raised serious questions about police use of lethal force. Like Sammy Yatim, all of these men were racialized minorities experiencing some form of mental or emotional crisis when they were shot and killed by police.

The available evidence shows that this is not a coincidence. Racial minorities, including Indigenous people and African Canadians in particular, are highly overrepresented in serious police use of force incidents.[10] Biases regarding race and mental health are very real issues that need to be addressed in police training.[11] There is an urgent need for reform of police practices to better reflect society's expectations for how police deal with its most vulnerable members.

The Failures of the Use of Force Model: The "Wheel Goes Round and Round"

Ontario first developed a circular representation of police use of force options in 1993. This "wheel" featured three rings that overlaid an officer's situational assessment process with a range of subject behaviours and a continuum of tactical and communication options, including levels of force ranging from mere officer presence to lethal force. The use of force wheel was updated in 2004, but the changes were largely a matter of form and not substance.

Despite claims by police trainers that their use of force training has evolved significantly over time, the use of force model has not. Beyond cosmetic changes, it remains the heart of training for police in respect of the use of force. What has changed over the years is the way the use of force model has been described by the trainers. At first, coroner's juries were told that the wheel was actually a training tool. More recently, the experts have explained that it is not a prescriptive model, but that the intention is rather to create a common lexicon for the discussion of use of force incidents after they occur. Throughout this time, the actual training given to police officers has varied considerably. This has created a moving target for police behaviour that is nonetheless always described as following from a substantially constant use of force model.

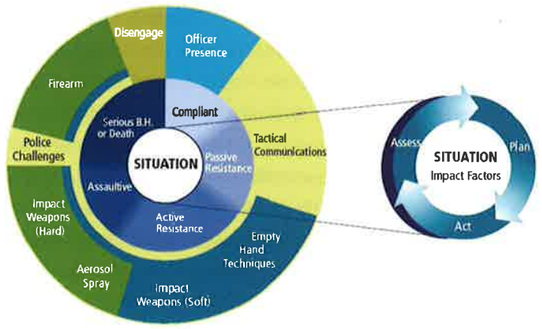
Police training in Ontario emphasizes a very broad range of threats that may meet the standard of grievous bodily harm required by s. 25 of the *Criminal Code*. This includes items as innocuous as a pen or scissors. In these "edged weapon" encounters, police are instructed to adopt the following approaches to the situation:

1. Their *only* option is to respond with lethal force;
2. They are not to evaluate the nature of the subject's weapon, but rather assume it could be deadly;
3. They are not to evaluate the apparent capacity of the subject, but rather assume he or she is an expert with the weapon;
4. There is no distance at which the officer or the public are safe from the potential threat.[12]

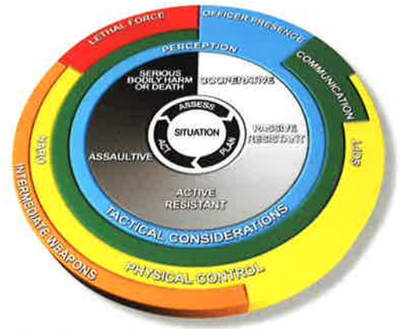
The result of these guidelines is that, in practice, lethal force can be justified after the fact in virtually *any* situation involving a potential weapon. This holds true if the subject is a child or an elderly person, and if the "weapon" is a fork, a pencil, or just an indeterminate shiny object.

As time passes, it has become evident that the same use of force wheel can serve the function of *ex ante* justification regardless of changes to the underlying training that it is supposed to reflect. This is possible because the wheel focuses solely on the police side of a use

Ontario Use of Force Model (1993)



Ontario Use of Force Model (2004)



The officer continuously assesses the situation and selects the most reasonable option relative to those circumstances as perceived at that point in time.

of force interaction. Justice Iacobucci observed that the use of force model unreasonably prioritizes officer safety over the safety of the subject:

> A theme that is seen reflected in attitudes as well as in some training materials is that the safety of the police officer takes priority over the safety of the person in crisis. This is an incorrect premise. The life of the officer and the life of the person in crisis are equally important. While it is true that the police officer has a duty to protect the public and that, to do so, the officer must protect himself or herself, it is equally true that the officer has a duty to protect the person in crisis. That person is no less human, no less deserving of protection.

Justice Iacobucci also noted in his Report that the use of force model does not necessarily support best practices:

> Another notable feature of the evaluation framework is that recruits are graded on whether they are able to legally justify the use-of-force option selected. That approach raises a concern about whether new officers are being taught that it is acceptable to meet minimum legal standards rather than achieve the optimum result. In my view, police training should aim to meet best practices and professional standards of excellence, and not only to justify one's actions based on minimum legal standards.[13]

The 2016 report from the Ontario Ombudsman also supports our contention that police officers are actually following their training, and it is the training itself that is the problem:

> **The problem is not that police officers aren't following their training. They are. The problem is the training itself.** When facing a person armed with a knife, they are taught to pull their guns and loudly command the person to drop it. Although that tactic might prove effective with rational people, a person waving a weapon at armed police is irrational by definition. Too often, the command only escalates the situation. It can exacerbate the mental state of a person who is already irrational and in a state of crisis. And once police have drawn their guns, using them is often the only tactic they have left. [Emphasis added.][14]

The use of force wheel represents the most basic representation of police use of force training. The implication of its failure to evolve is either that the training model was correct in 1993 and does not need to be improved, or else that 1993 justifications can still be applied to police use of force encounters regardless of changes in training.

Neither position is acceptable.

An effective use of force model should evolve alongside actual training curricula and should reflect the perspectives on both sides of an interaction with police. Most importantly, it should reflect the risk to the public inherent in any use of force encounter. Police have the right to go home after work and the right to not be subjected to unreasonable risks, but not every individual with a pointy object truly poses an unreasonable risk.

There is an urgent need for reform of police practices to better reflect society's expectations for how police deal with its most vulnerable members.

Use of force literature speaks of two types of errors in use of force encounters. False negatives arise where force should have been used but was not. False positives are situations where force was used but not actually warranted. The experts recognize that there is an inverse relationship between the two, such that training directed at minimizing one type of error will increase the incidence of the other. In our view, the goal should be to balance officer safety and public safety towards a target of zero deaths. As a result of focusing solely on officer safety, the risk to the public, and in particular to some of our most vulnerable citizens, has become unacceptably high.

Civil Liability for Unlawful Use of Lethal Force by Police

Unlike other accountability mechanisms, the risk of successful civil actions puts financial pressure directly on police services and incentivizes the use of policies and training to avoid unnecessary use of lethal force. Civil actions have the advantage of being available even without any criminal conviction, given the lower burden of proof.

Justice Iacobucci observed in the Report that civil damages may be available for police use of force under the tort of negligence or under intentional torts such as assault or battery.[15] Police owe a duty of care to people they use force against, just like anybody else would. However, police have a statutory defence to both criminal and civil liability under s. 25 of the *Criminal Code*,[16] which "justifies the use of necessary force proportionate to the specific circumstances".[17]

Subsection 25(1) authorizes police officers to use "as much force as necessary" in the enforcement of the law if they act "on reasonable grounds". However, subsection 25(3) prohibits a police officer from using more serious or lethal force unless additional conditions are met:[18]

> (3) Subject to subsections (4) and (5), a person is not justified for the purposes of subsection (1) in using force that is intended or is likely to cause death or grievous bodily harm unless the person **believes on reasonable grounds that it is necessary for the self-preservation of the person or the preservation of any one under that person's protection from death or grievous bodily harm.** [Emphasis added.]

Police are presumptively liable in tort for use of force unless they can prove that it was justified under s. 25. Police bear the burden of proving on a balance of probabilities that the force used was (1) authorized by law, (2) based on reasonable grounds, and (3) that no unnecessary force was used.[19] Generally, lethal force can only be justified where a police officer has a subjective and objectively reasonable belief that it is necessary to prevent death or grievous bodily harm to the officer or anyone under his or her protection.[20]

Although subject to different burdens of proof, the criminal, civil, and statutory misconduct standards for use of force all turn on the same analysis of lawfulness, reasonableness, and necessity under s. 25.[21] That analysis turns on questions of fact that are dependent on the particular circumstances of the officer.[22]

In particular, the content of the training received by the officer is highly relevant, and in some ways potentially determinative of whether the standard of care was met in any given case. The standard of care for police actions, as with other members of society, is judged in comparison to reasonable and similarly-situated persons. In other words, it is compared to other police officers acting appropriately.[23] Where officers act in accordance with their training, it is difficult to argue that they act negligently or that their actions are not reasonable and necessary as required by s.25. Few courts or tribunals are likely to find civil, criminal, or professional liability where officers do what they are trained to do. The content of police training poses a substantive bar to civil recovery for police use of force if the officers are trained to act in a manner that would otherwise be considered misconduct.

Negligent Use of Lethal Force: Expanding Liability for Inadequate Police Training

The bodies responsible for training police officers may also attract civil liability. For example, a chief of police may be held liable for negligent training and supervision. Section 41(b) of the *Police Services Act (PSA)* places a legal duty on chiefs of police to ensure that police officers carry out their duties in accordance with that *Act* and the needs of the community.[24] It follows that the chief of police may be liable where police officers injure a member of the public through misconduct, including excessive use of force.[25] In *Odhavji Estate v. Woodhouse*, the Supreme Court of Canada held that it is "only reasonable that members of the public vulnerable to the consequences of police misconduct would expect that a chief of police would take reasonable care to prevent, or at least to discourage, members of the force from injuring members of the public through improper conduct in the exercise of police functions".[26]

In Ontario, a police services board is vicariously liable for torts committed by its officers, including the chief, pursuant to s. 50(1) of the *PSA*. In addition, the Court in *Odhavji* noted that the board's obligation to provide "adequate and effective" services to communities may include the obligation to address circumstances that we argue have now been proven to exist - a widespread problem of excessive force against identifiable minorities.[27]

While chiefs and boards ensure the delivery of proper training, the Ontario government has a key role in determining its substantive content.[28] This includes responsibility for the

Ontario Police College, which provides basic training to all police across the province. Where a chief of police ensures that officers are fully trained in accordance with provincial policies and standards, failures in the substantive content of that training may well be the sole responsibility of the provincial government. However, the courts have not yet considered whether the Minister (or any other entity) can be held legally liable for negligent supervision and training in that context.

In our view, the next frontier for police liability is the confirmation of liability for the government, police services board, and/or chief of police for training that, while adequately delivered, is unreasonable in content and results in unnecessary use of lethal force. This represents a logical expansion of negligence principles.

In addition to foreseeable harm, the test for a duty of care in negligence requires a relationship of proximity between a tortfeasor and a victim. The test looks first to whether such a relationship has already been established in case law.[29] In *Hill v. Hamilton Wentworth Regional Police Services Board,* a duty of care towards the particularized subjects of police investigations was found to support the tort of negligent investigation primarily because it is a close and direct relationship that engages personal interests.[30] In *Odhavji,* a police chief's duty of care to members of the public who are injured by police misconduct grounded the tort of negligent supervision and training. Again, there was a direct causal link between the alleged misconduct and the resulting harm that vulnerable members of the public reasonably expect supervisors to prevent.[31] In both cases, the finding of a duty of care was supported by a public interest in police accountability and the public duties of police officers.[32]

In our view, the same principles support the existence of a *prima facie* duty of care for provinces, boards, and police chiefs to not only deliver police training with respect to officers' statutory duties, but also to ensure that such training serves the purposes underlying those duties. Police training is not just for the benefit of police officers, but also for the public, especially people who interact with police. It supports the exercise of every police duty under the *PSA*. There is a direct causal link between unnecessary uses of lethal force and a failure not just to train officers, but to train them in a manner that respects the reasonable public expectation that lethal force will not be used lightly. Where officers follow their training in using lethal force that is inconsistent with their public duties, it defeats any civil action against those officers. However, the tort of negligent use of lethal force should remain available against the entities responsible for that training where it unacceptably lowers the standard of care.

Conclusion: Towards "Zero Deaths"

We have argued that civil actions are an important tool to ensure the public accountability of police. Civil liability is a fact-driven inquiry that turns on reasonableness and necessity, which is in turn informed by the content of police training. However, current training contributes to both unnecessary civilian deaths and the limitation of civil liability for such deaths. Where police training itself systemically undermines the goal of public safety, civil liability should still attach. Given a use of force model that does not prioritize best practices or the goal of zero deaths in police/civilian interactions, it is likely just a matter of time until the right factual circumstances emerge to impose civil liability for properly delivered but substantively inadequate police training.

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NOTES

[1] Julian N. Falconer is the senior partner with the Toronto law firm Falconers LLP. Marc E. Gibson is an associate at Falconers LLP. The authors gratefully acknowledge the invaluable assistance provided by Anthony Morgan, also an associate at Falconers LLP.

[2] The Honourable Frank Iacobucci, *"Police Encounters with People in Crisis"* (July 2014), online: <https://www.torontopolice.on.ca/publications/files/reports/police_encounters_with_people_in_crisis_2014.pdf> at 8-9, para 36 [Iacobucci].

[3] *Ibid* at 8, para 33.

[4] As of the writing of this article, Forcillo's conviction is under appeal and Forcillo remains out on bail: http://www.cbc.ca/news/canada/toronto/bail-extended-james-forcillo-1.3843354

[5] The SIU has a statutory mandate to investigate all cases of serious injury or death caused by police, as well as allegations of sexual assault against police: see *Police Services Act,* RSO 1990, c P.15 s 113 [PSA].

[6] Paul Dubé, Ombudsman of Ontario, *"A Matter of Life and Death: Investigation into the direction provided by the Ministry of Community Safety and Correctional Services to Ontario's police services for*