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I. How much help is too much from a police attorney after an OIS?

Should an attorney be allowed to help an officer craft a report on a shooting or other major use of force?

In a case that grew out of 2 controversial fatal shootings by police, an appeals court in Canada has emphatically said "No."

Officers are entitled to legal advice about their "rights and duties" in an OIS investigation, the court ruled recently, but a lawyer cannot vet or assist them in preparing their primary written account of what happened. And these "notes," the court added, must be completed "by the end of the officers' tour of duty."

Technically, the decision by the Court of Appeal for Ontario affects lower courts only in that province. But it may prove influential in other Canadian jurisdictions as well, and it raises a pertinent question for officers, unions, administrators, attorneys, and jurists in the U.S. where post-shooting procedures are often fraught with public contention about appropriate protocol: What is the proper role of an attorney representing an officer after a significant use of force?

Send us your thoughts on this subject to: editor@forcescience.org and we'll share responses in a future edition of Force Science News. Meantime, you can access the full appellate decision, including the court's reasoning, in *Schaeffer v. Wood* by [clicking here](#)

Here, in essence, are the circumstances and arguments involved:

SEPARATE SHOOTINGS, SAME CONTROVERSY. Within 2 days of each other in June of 2009, 2 knife-wielding offenders with histories of mental illness were shot and killed in separate incidents by constables of the Ontario Provincial Police.

One, 59-year-old Douglas Minty, after an angry altercation with a salesman in a small town north of Toronto, took fatal rounds when he advanced on responding constable Graham Seguin with "a small utility knife" and refused commands to stop. The other, Levi Schaeffer,

32, camping in isolated bush country north of Thunder Bay, was gunned down when he brandished a "small" blade during a struggle with Cst. Kris Wood and A/Sgt. Mark Pullbrook who were trying to take him into custody for stealing a boat.

The same controversy concerning union-provided legal representation for the officers arose in both cases during the investigations that followed. According to the appellate court decision, a sergeant in the Minty case advised Seguin and 2 other officers who quickly arrived at the scene, not to write their official "notes" on the incident until after they spoke with an attorney, who would act as counsel for all of them.

The same directive was made by a "senior officer" to Wood and Pullbrook after the Schaeffer shooting. When they conferred with their lawyer hours later, he asked each of them "to prepare notes for him to review." Wood's notes were "excellent," said the attorney, Andrew MacKay, who also represented officers in the Minty shooting. But he offered some "legal advice...on the notes" from Pullbrook. Final versions from the officers were then submitted to departmental authorities 2 days after the incident, although, under OPP policy, incident notes normally must be completed by end of shift on the day of occurrence.

INVESTIGATIVE CONCERNS. In Ontario, OISs and other uses of force "causing death or serious injury" are automatically investigated for possible criminal wrongdoing on the part of involved officers by an independent, impartial, "transparent," civilian-directed statutory entity called the Special Investigations Unit. The mandated goal of the SIU is "to foster public confidence in [its] investigations and in the integrity of the police."

Several months after the shootings, SIU Director Ian Scott reported to the province's attorney general that "no reasonable grounds" had been discovered to indicate a criminal offense by any of the officers involved. Yet he expressed "serious concerns" over the process by which their final written accounts of the incidents had been prepared.

Addressing the Schaeffer shooting, for example, he complained:

"This note-writing process flies in the face of the 2 main indicators of reliability of notes: independence and contemporaneity. The notes do not represent an independent recitation of the material events. The first drafts have been 'approved' by an OPPA [Ontario Provincial Police Assn.] lawyer who represented...the involved officers..., a lawyer who has a professional obligation to share information among his clients when jointly retained by them.

"Nor are the notes the most contemporaneous ones--they were not written as soon as practicable and the first drafts remain in the custody of their lawyer. I am denied the opportunity to compare the first draft with the final entries [because of a claim of lawyer-client confidentiality]. Accordingly, the only version of the material events are association lawyer approved notes.... I have no information base I can rely upon [to] conclude what probably happened...."

JUDGES RULE. Before long, surviving relatives of the dead suspects were in court, guided by a prominent plaintiffs' attorney, seeking a declaratory judgment that would clarify the law and, they hoped, impose some restrictions on the extent to which lawyers can assist officers who are under use-of-force investigation.

The judge for the Superior Court of Justice who first reviewed the case dismissed it last year, reasoning, among other things, that officer-lawyer protocols are matters of administrative concern and do not warrant judicial intervention. Supported by the Canadian Civil Liberties Assn., the Urban Alliance for Race Relations, and the Criminal Lawyers Assn., the families appealed. The involved officers and others named as defendants were supported by the Ontario Assn. of Chiefs of Police and the Police Assn. of Ontario.

Before the 3-judge Court of Appeal for Ontario, the plaintiffs found more sympathetic ears. In a 36-page opinion written by Justice Robert Sharpe, the appellate panel rebuked the lower court's dismissal and declared that police officers' right to counsel "cannot be absolute or without limit." The decision itemized these conclusions:

- Officers have a "professional obligation" to prepare notes consisting of "concise, comprehensive particulars" of occurrences during their tour of duty. These notes must contain an officer's "independent recollections, providing an accurate and complete account of police observations and activities...."

"Reliable independent and contemporaneous police officer notes are central to the integrity of the administration of criminal justice." They "provide the basis for laying charges" and making decisions regarding prosecution, convey "vital information" to the accused on "how to conduct the defense," and "assist the officer in testifying at trial."

- "[T]he problem posed by a police officer seeking legal assistance before preparing his or her notes is not that the lawyer would do anything improper. Instead, the concern is that seeking legal advice is geared to the officer's own self-interest, or the interests of fellow officers, rather than the officer's overriding public duty...."

"A lawyer would only be doing his or her job in providing the police officer with information as to the ingredients of an offense or possible legal defense. Such advice is likely to influence how the police officer writes his notes. Consequently, the notes would not be a straightforward record of the officer's independent recollection but would reflect the lawyer's legal advice. An officer eager to have a sound basis for a prosecution or a legally valid explanation for his or her own conduct would naturally emphasize and present the facts in accordance with the lawyer's advice...."

"[T]he lawyer-induced refinements or qualifications that would almost certainly flow" from an attorney helping to prepare, review or vet notes "would undermine ...the officer's independent and contemporaneous record of the incident" and affect the "accountability and public confidence in the investigation of police use of deadly force...."

Thus "the right to counsel does not permit officers to have a lawyer vet their notes or to assist them in the preparation of their notes." An attorney "cannot advise [an] officer what to include in the notes other than that they should provide a full and honest record of the officer's recollection of the incident in the officer's own words." Beyond that, the officer is also entitled to "some basic legal advice" regarding his or her "rights and obligations in connection with the incident" and its investigation. "Advice of this nature can readily and quickly be given and received by telephone."

- "An officer is duty-bound to complete [his or her] notes immediately and while the officer is still on the same tour of duty that led to the incident" in question. "[T]hat period cannot be extended for the purpose of getting legal advice."

- However, officers are permitted to "consult counsel prior to being interviewed by the SIU" and to "have counsel present during" the oral interview. This, the court said, "represents a significant enhancement of the rights" of officers, compared to civilians who are subjects of an investigation.
- Finally, the court ruled, the surviving families are entitled to \$100,000 to cover their costs in the legal proceedings. According to a leading Canadian newspaper, "The decision was a victory for the families of people killed by officers in the course of their duties."

So what do you think? Did the court get it right?

[Our thanks to Force Science Analyst Eddie MacDonald, a labor representative with the Royal Canadian Mounted Police, for alerting us to this case.]

II. Readers write: Emotions, memories stirred by OIS protocol panel

In Transmission #190 [11/5/11], we reported on viewpoints expressed during the recent annual IACP conference by a panel of experts discussing post-shooting procedures, including recommendations regarding minimal on-scene "public safety" questions for involved officers and the advisability of prompt medical examination for unrealized injuries.

Reader reactions that hit our inbox included the following, edited for brevity and clarity:

"On-scene should be devoted exclusively to rendering aid"

You've got to be kidding me!! Only 12 questions??? And what are the follow-up questions?? I don't care if it's the latest and greatest "cognitive interviewing," this protocol trick-bags the officer into disclosures that he cannot possibly be accurate about in the immediate aftermath of shooting.

"Are you injured?" How does he know? He's not a physician or paramedic. Psychological injury can be as acute as physical injury, yet less available to immediate attention.

"Location?????" Get serious; how is a guy/gal going to know locations? Relative to what? When?

On-scene should be devoted exclusively to rendering aid to the officer/trooper by professionals whose job it is to make the determination about "injury." Whatever follows by way of inquiry should be 24-72 hours out, preferably the latter.

*Dr. Anthony Semone
Forensic & police psychologist
Wyndmoor, PA*

Dr. Bill Lewinski, executive director of the Force Science Institute, comments:

You're right on target with the idea that an officer might not accurately remember much after a critical incident. However, those 12 questions are not part of a cognitive interview and they do not in any way bear any resemblance to a cognitive interview. They are a public safety statement asked of the officer by a scene supervisor and not recorded. The purpose is to get the officer's knowledge of the incident scene, the assailant, etc., so an investigation and collection of evidence can begin.

In such a statement, officers give only the best estimates they can and should not be--and to my knowledge never have been--held accountable for precision or lack thereof. I do not know any federation or union rep or attorney that doesn't agree that an officer, if possible, has a duty to provide helpful information that will assist in the investigation of the incident and the apprehension of suspects.

Psych services warrant greater attention

Great article on OIS response. However, I was disappointed that there was little mention of psychological support for the officer(s) involved. This is often crucial to a successful recovery. Psych support should be provided immediately after the event, throughout the process of being away from the job, and during reentry. This should include contacts with officer's family and any other department members impacted by the event.

Peer support should also be employed. However, except in Washington, Oregon, Hawaii, and Colorado which offer confidentiality protection to peer interactions, restrictions should be observed on what the officer(s) involved can share.

Finally, a stress debriefing can be very beneficial in helping provide closure so that everyone can move on emotionally and identify who might need further support. Despite some controversy over the impact of these debriefings, officers in this department have found them to be very helpful.

*Dr. Daniel Dworkin
Police psychologist
Fort Collins (CO) Police Services*

Unnoticed injuries not unusual

Prompt transport to a medical facility is right. It's not uncommon that one is hit and yet not realize it. Adrenalin is wonderful when called on, but may blot out injuries that are not apparent.

Most of a lifetime ago 3 of us were hit, but did not know it until I noticed blood on the other 2. We had felt nothing. I have observed several others not realizing they had wounds after an action. One had a bullet hole completely through his wrist after a close-quarters night fight, discovering it about 2 hours later. He had no idea exactly when or how it happened.

*John Pepper
Inventor, Pepper Popper targets
Bladensburg, MD*