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Please cite this publication as follows:

Bryant, R. and Leonard, V. (2016) Protecting the protectors. Police Professional.

Link to official URL (if available):

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Protecting the Protectors

Fictional events

An overseas terrorist group has carefully planned a number of attacks in and around London. Five local “sleeper” members (who are not known to the UK authorities) have converted two petrol tanker lorries into mobile explosive devices. The five have also been receiving and storing small consignments of military-grade weapons, ammunition, hand grenades and explosives, all smuggled into the UK over the preceding months. A further sixteen terrorists then arrive in the UK at night on a beach, where they are met by one of the sleeper members who takes them to a safe-house. They are then supplied with the weapons and other military equipment, and are ready to mount their attacks.

The first attack is at a large outdoor ceremony in a park in central London. Three terrorists on powerful off-road motorcycles race across the park towards the ceremony. Although no weapons or explosives can be seen a command is given for police officers to shoot the riders. Two of the motorcyclists are shot dead, and the third motorcyclist is injured but manages to detonate his suicide vest, killing and injuring twenty-two people. Three bystanders also die, as a result of shots fired by the police against the terrorists. The other two terrorists were also found to have been wearing suicide vests.

At the same time, two London airports are attacked using the petrol tankers. One of the tankers is driven into a crowded terminal building and detonated, causing multiple casualties and setting the building ablaze. At the other airport, the attacker drives the tanker onto the main runway into the path of an aeroplane queuing for take-off. The driver of the tanker then leaps out of the vehicle and runs away, remotely detonating the tanker, which sets the plane on fire. The terrorist (unarmed) is shot and killed by the crew of an armed response vehicle (ARV) who witnessed the attack and identified the perpetrator.

Three further large-scale attacks take place at major towns in south-east England, about thirty minutes after the London attacks. Sixteen terrorists are involved and they use hand grenades and automatic weapons to kill members of the public and arriving police officers. One attack is in a crowded high street and another takes place in a large shopping centre. The third attack is at a prominent public school attended by the children of politicians, diplomats, high-ranking military officers, celebrities and the wealthy elite. The terrorists block the main gateway of the school with a lorry, which they set ablaze. They then proceed to sweep through the school, shooting as many people as they can find.

Police officers from several different police forces, including those from non-Home Office forces rush to the scenes of the attacks and confront the terrorists in a number of fire-fights. In one incident the initial commander orders the armed officers to, “Save as many people as possible, especially the kids.” While in the second police force area the commander orders the officers to, “Kill the terrorists as quickly as possible and minimise civilian casualties.” An hour after the attacks in London, the Prime Minister chairs an emergency meeting of the COBRA (Cabinet Office Briefing Room A) committee and quickly orders the police, who have now been joined by Special Forces personnel to, “eliminate the threat to the public as expeditiously as possible.”

Of the sixteen remaining terrorists, seven are killed by police or military personnel and six detonate their suicide vests in the early stages of the attacks. The final three take a number of hostages at the school, in a gymnasium. As the police and military units close in, the terrorists begin to execute the hostages. Some of the hostages panic and manage to escape. In the confusion the first two hostages who emerge from the building are mistakenly shot by police officers. The police and military personnel then enter the building, and in the operation that follows, one terrorist is shot dead, one detonates his suicide vest and the third is savaged by a military dog and is killed before he can detonate his vest.

Introduction

The kind of fictitious events described above remain unlikely but worryingly possible. The armed police officers who would respond to such incidents are designated 'Authorised Firearms Officers' (AFOs). The AFOs remain at all times police officers who, on initial appointment to the office of Police Constable made a formal attestation that amongst other things, committed them to 'upholding fundamental human rights' which include the right to life. They are also bound by a Code of Ethics (issued as a code of practice under s 39A of the Police Act 1996), incorporated as a central feature of the police 'National Decision Model'. The Code of Ethics includes the ten standards of professional behaviour, including Standard 4 "Use of Force" (necessary, proportionate and reasonable in the circumstances) and Standard 5 "Orders and Instructions" (give and carry out lawful orders and instructions and comply with policies). Of particular note and importance for the AFO is the 2003 Home Office "Code of Practice on Police use of Firearms and Less Lethal Weapons" and the College of Policing and National Police Chiefs' Council (NPCC) 2013 'Authorised Professional Practice –Armed Policing' (APP-AP).

In this opinion piece we ask if, in light of significant changes in threat to the public, whether policies and guidelines surrounding an AFO's use of force should not be comprehensively debated and revised to provide more clarity in the light of changing circumstances. As many readers will recall, the former Prime Minister, David Cameron, ordered a review of the law governing police use of firearms after a meeting of the National Security Council in December 2015, after pressure from police chiefs in the wake of the Paris attacks. However, events in 2016 have seen Cameron leave office and (apart from occasional media speculation¹) there has been no official news of progress of the review, apparently being conducted by the Home Office but also involving the Attorney General, the Ministry of Justice (and, one must assume, the NPCC).

In our view it is important that a wider debate is also led by Parliament, has a wide arc of public consultation and results in clear guidance for AFOs and their commanders who, on our behalf, have to cope with life-threatening and traumatic situations. For, although the scenario described above is thankfully fictional, what is certain is that UK policing is readying itself for a serious armed conflict, with resources, personnel and public statements of reassurance of the state of readiness. This being the case, the police cannot make plans in isolation but must have the support of the law-makers in Parliament and those they serve. Public opinion must understand and endorse the need for a "metal fist" that may not always be concealed in a velvet glove. Attempts, such as the televised "show and tell" by the Commissioner of the Metropolitan Police when introducing the personnel and

¹ For example, "Do police have the firepower to tackle gun menace?", BBC News, 17 May 2016, 'Home Office review of police firearms use', Channel 4 News, 27 May 2016.

equipment funded by the government's "ARV Uplift"², will orient the public to the new landscape but we question whether this preparedness has also considered the aftermath and investigation process, which, under current policy and practice, policing in the UK is tightly bound. Simply put and setting aside the unquestioned abilities of firearms officers, this capability 'window dressing' does not address questions of who shares the responsibility for killing terrorists that threaten us and whether it is right to hold those officers involved in fire-fights to account in the same way as those, for example, suspected of corruption or malpractice in the police service. The responsibility for how armed policing operations unfold and conclude is unclear and rather than an open debate resulting in a clear and unequivocal set of principles enshrined in law we currently have a what might be too easily viewed as a process of issue avoidance that allows police forces to accumulate large quantities of arms, train officers to high levels of proficiency to deal with a potent threat without clearly and unequivocally, telling them what the consequences of their actions following such a confrontation may be.

Time for a re-think?

Punch (2016) identifies that the "rules of engagement" for armed officers, particularly when dealing with terrorists are unduly weighted against the officer who pulls the trigger. This, he says has been the case for too long, highlighting the cases of Ashley, 1998³, Stanley 1999⁴ and Stockwell 2005⁵ and supports the direction suggested by Justice Rafferty of drawing accountability upwards to the corporate level. Officers involved in shootings, particularly those that are controversial, sometimes have to endure years of legal processes that are costly to the public purse and can be personally devastating. As recent "historic" trials have demonstrated, officers can be held to account years after an incident, the most recent being Tony Long of the MPS, charged with murder nine years after the shooting of Azelle Rodney⁶ and standing alone in the dock of the Old Bailey with none of those who mounted, ran or decided how to conclude the operation being co-defendants.

So, as a society we have a serious issue to decide; who should hold the responsibility for the deaths of those killed by agents of the State? The current NPCC APP-AP appears clear enough:

'Each AFO is individually responsible and accountable for their decisions and actions, nothing can absolve them from such responsibility and accountability. This includes decisions to refrain from using force as well as any decisive action taken, including the use of force, the use of a firearm and the use of a less lethal weapon' (CoP, 2013).

When identifying 'Constraint, Direction and Authorisation of Action' the APP-AP explains that:

² "More armed police set to protect London say Met chief and mayor." BBC News 3rd August 2016.

³ BBC News 12/11/03 and Hansard, 11/2/02 (Col. 46-49 Mrs Louise Ellman MP [Liverpool, Riverside])

⁴ "Harry Stanley – IPCC publishes decision and report (Press release) IPCC 2006-02-09.

<http://www.ipcc.gov.uk/news/pr090206stanley>

⁵ IPCC (2007) *Stockwell One: Investigation into the Shooting of Jean Charles De Menezes on Stockwell Underground Station on 22 July 2005*. London: IPCC.

⁶ The Independent 30th July 2014 "Armed Police Officer charged with murder over Azelle Rodney Shooting."

<http://independent.co.uk/news/uk/crime/armed-police-officer-charged-with-murder-over-azelle-rodney-shooting-9638777.html> (accessed 23/8/16) and BBC News 3rd July 2015 "Met Police officer Anthony Long cleared of Azelle Rodney murder." <http://www.bbc.co.uk/news/uk-england-london33386224> (accessed 23/8/16)

'Where command decisions are made to constrain, or direct, or authorise the action of an AFO, the communication from the commander will form an essential part of an AFO's decision making. Any direction or authorisation from a commander to an AFO in these circumstances must be communicated with absolute clarity what is being directed or authorised and the action required, including any time imperative.

If a commander decides that as a last resort a critical shot is absolutely necessary in self-defence, which includes the defence of another, a commander will communicate that decision to an AFO with the words, "critical shot authorised", and an AFO will be entitled to rely on them subject to whatever other information is available, principally that from the scene. Such a communication is an authorisation to use such force and not an order to do so' (ibid.)

Post incident, a commander will be accountable for giving the authorisation and the AFO for their response.

Turning to the Code of Ethics, Standard 4 states that

'I will only use force as part of my role and responsibilities and only to the extent that it is necessary, proportionate and reasonable in all the circumstances' (CoP, 2014, p. 4).

and later at 4.3

'[...] you must use only the minimum amount of force necessary to achieve the required result' (CoP, 2014, p. 8).

Standard 4.4 cautions that

'You will have to account for any use of force, in other words justify it based upon your honestly held belief at the time that you used the force' (ibid).

Two further extracts from the Code of Ethics are worth considering here. Standard 5 states that

'I will, as a police officer, give and carry out lawful orders only, and will abide by police regulations. I will give reasonable instructions only and will follow all reasonable instructions' (CoP, 2014, p.4).

Also, when considering the use of discretion, Standard 5.5 explains that:

'Police discretion is necessary but must be used wisely. When making decisions about using your discretion you must:

- use your training, skills and knowledge about policing
- consider what you are trying to achieve and the potential effects of your decisions
- take any relevant policing codes, guidance and procedures into consideration
- ensure you are acting consistently with the principles and standards in this Code'

(CoP, 2014. P. 10).

It is not difficult (Punch, 2011, 2012 & 2016; Squires and Kennison, 2010) to identify the weight of responsibility resting on the shoulders of the individual AFO to justify both action and inaction and all too easy to see what direction any enquiry would be likely to take, at least in the initial stages.

Analysis of the fictional events

The first point to consider is whether it was lawful to shoot dead the two motor-cycling terrorists. Later evidence might prove that the decision taken and the command given were both probably life-saving but, at the time the decision was taken to open fire, was a calculated risk taken (by necessity) on the spur of the moment. Post-hoc legal justification for the decision could likely be based in part on the 'reasonable suspicion' contained in Section 3 of the Criminal Law Act 1967. This piece of legislation has been the bulwark of defences mounted by AFOs for nearly fifty years and together with the Criminal Justice and Immigration Act 2008, (which allows an officer with an 'honest and instinctive' belief that opening fire was reasonable) and common law provisions of self-defence has stood as a buttress behind which embattled AFOs have taken refuge. The question in this particular set of circumstances is whether all AFOs will be willing to take this calculated risk in case it later emerges that the motor-cyclists are not terrorists and they, the AFOs, are in then in jeopardy of facing criminal charges. Further, it could be questioned whether the command given to shoot the motor-cyclists was lawful or just lucky. Based on the limited information available, it is legitimate to question whether such a critical shot authorisation would be given, although with the imprecise way in which delivering "reasonable instructions" and "authorisations" happens, it still seems likely that the AFOs would be left alone to face an inquiry. It is also, we suggest, not only reasonable but highly likely to suppose that in such dynamic circumstances that instinct will play a large part of what is said and done and text-book precision, whilst desirable, is extremely unlikely to be prominent.

The second point to consider is the action to be taken in respect of the casualties at the large outdoor ceremony who were shot dead by police officers, who in a war would be regarded as being caught in tragic but unavoidable 'cross fire'. Their status as innocent victims presents a difficulty that could result in lengthy litigation and/or prosecutions for damages or violations of Health and Safety legislation⁷. However, the sobering fact is that even if they are not the intended target, bystanders close to any terrorist action are likely to become casualties. Modern ammunition of the type carried and used by police officers in the UK is very powerful, capable of travelling long distances and still inflicting fatal injuries even as it decelerates. Shooting at a fast moving object is extremely difficult, even for the best trained shot under training conditions and rounds that miss or ricochet from their intended target, in an urban setting where crowds are gathered, may cause this "collateral damage" with no malicious intent or even knowledge of consequence on behalf of the shooter.

Next, let us think of the terrorist who has caused an aviation disaster at one of the major airports in London but seems to have been shot as an act of revenge. Can the officers who shot this person claim the protection of the Criminal Law Act? Article 2 ECHR states that everyone has a right to life and the test of absolute necessity will be applied under this legislation. Can the officers claim that, even if they could not see that the person was armed, they had witnessed an act calculated to result in mass casualties and it was absolutely necessary to stop a further act of this nature or have they acted as judge, jury and executioner, providing prima facie evidence for a criminal charge to be laid? We will return to this point below.

Let us turn now to the commands issued by both police and political leaders in the heat of the moment and examine the commands of the police in the light of the prevailing policy and guidance. If one accepts that in fast-moving situations where casualties are mounting and personal and

⁷ As happened in the Stockwell case where a young Brazilian man, Jean-Charles DeMenezes, was mistaken for a terrorist and shot dead by the Metropolitan Police at Stockwell Underground station. The Metropolitan Police were later convicted of breaching Health and Safety Regulations.

professional jeopardy may be significant factors, communication, which is vital for precision, becomes essential. However, the manner in which commands are issued may not always meet the standard demanded by APP. In this instance, whilst the commands issued by both police and political leaders are implicitly clear, they are not precise and nowhere is “critical shot” mentioned. Here, officers (and soldiers) have relied upon words that have spurred them on to action and, without hesitation or question, have engaged in fire-fights that have resulted in casualties. A literal reading of the APP implies that they are entitled to rely on these words but only if specific words are pronounced; we suggest that this may not be appropriate in such circumstances.

With regard to the statement by the Prime Minister, such pronouncements are usually only released after careful drafting and legal checking, so this firm statement of instruction still falls far short of ‘ownership’.

The final points we would like to consider are those that follow the action at the school. Here we have a joint military and police operation that has led to further innocent fatalities at the hands of the intervening force and a terrorist killed by a dog. These former could be placed in the same ‘collateral damage’ category as those shot near the large outdoor ceremony but there is a difference here insofar as they have been the victims of deliberate acts. The latter could be said to encapsulate our argument, with the dog being used as an instrument of another to carry out an action that results in death.

The subsequent Investigation

In broad terms, there will be two significant branches to an investigation into an incident of this nature. There would be the criminal investigation into the acts of terrorism and the preparation of evidence for coronial inquests but there would, under the current system, be an investigation into the actions of the armed officers and soldiers.

Whilst their rules of engagement emphasise the same human rights and use of force principles followed by their police colleagues, it is likely that the military would wish to investigate their own personnel and, unless a pre-existing agreement was in place, they would follow their own post-incident procedures.

It is presumed that if police officers shoot terrorists during a significant armed confrontation, such as this hypothetical scenario, then the investigating body will be the IPCC. It is open to question as to whether this would be the appropriate body to determine the correctness of actions in what may be either a paramilitary or joint police military operation. The complexity of investigating a terrorist incident that involved multiple sites and different investigating agencies (police, military, NCA, NBA, CAA) is likely to be too much for a body set up to investigate complaints against police officers. The inevitable consequence of the IPCC’s involvement would be delay due to the sheer volume of evidence to be collected, sifted and examined before the investigation into individual actions. It is not stretching reality to suggest that such a process is likely to take years, provided everyone cooperated. This is a point that former Prime Minister Cameron wished to change, with new measures being included in the Criminal Justice Bill, scheduled for introduction in 2016, to speed up the inquiry process. This view is shared by some senior members of the judiciary, and in February 2014 Sir Brian Leveson and Mr Justice Irwin expressed concern that a fear of legal consequences

could endanger lives by officers becoming reluctant to use their firearms. In part of their summing up, the learned judges stated,

“In our judgment there is considerable force in the expressed concern that minute dissection of fractions of a second with the benefit of hindsight will discourage an appropriate response, in real time, to threats thereby resulting in potentially increased danger to those involved in (or likely to be affected by) these exceedingly difficult operations” (E7 (an officer of the Metropolitan Police) v Sir Christopher Holland (Chairman of the Azelle Rodney Inquiry) [2014] EWHC 452 (Admin)).

All agree that no police officer should have carte blanche to cause death without justification. However, we also need to acknowledge that there is a distinct difference between the role of an armed police officer and other public servants. Setting aside the military when sent to war or acting in a paramilitary policing role, only armed police officers are effectively given licence to kill on behalf of the State. However, this view sits at the heart of this debate – the officer being held to account rather than being supported (at the highest level) to carry out a very difficult job. It is reasonable to assume that armed police officers are acting under instructions from superiors who have examined available information and intelligence and have determined that a threat to life exists. Unless there is any reason to suppose otherwise, it should be presumed that an officer who inflicts violence upon someone he or she suspects of being the person who presents the threat to life will be acting legally and in good faith to protect the public. This presumption would not excuse acts that were malicious, uncontrolled or unnecessary and an officer would still have to explain his/her actions. The distinct difference from the current process is that the burden of proof for mounting an operation that used armed police officers as a resource would rest with the highest-ranking commander along with an expectation that consideration of consequence was a prominent part of the planning process and that public safety outweighed the risk to the person’s life. In this way, the act carried out by the officers at the London airport in our hypothetical case would be seen in a different light from a legal perspective.

In terms of subsequent inquiries into the actions of AFOs and their commanders, the IPCC could change its approach or be replaced; the current situation of long drawn-out and tortuous enquiries has to be reformed. Consideration could be given to the establishment of a part-time corps of ‘examining magistrates’ who would be responsible for investigating (exclusively) all police shootings but with the knowledge⁸, training and qualification to conduct thorough, transparent but rapid investigations. This would not supersede current legal processes but, working within the guidelines of the proposed presumption in law would be able to deal both with those shootings that were within the realm of ‘normal’ armed policing (moving them rapidly to the coronial process or preparing a prosecution case) but also becoming an expert team of investigators for complex counter-terrorist operations that may involve multi-agency teams of armed officers or soldiers.

With an expectation that investigations into police shootings were thorough and timely, time limits could be set on how long investigations could continue without resolution, leading to a statute of limitations.

Conclusion

⁸ For example they would already be aware of the way AFOs train, their different roles and responsibilities, military inter-face, command and control structures and equipment; they would not have to learn these things at each investigation.

When considering the fictional scenario, which we have used to illustrate the complex challenges faced by AFOs), one cannot rely on the legal rule of *res ipsa loquitur* (the thing speaks for itself) i.e. the agents of the state put down a violent threat and caused some collateral damage and we can therefore close the chapter and move on. In a democracy, the life of a citizen must be accounted for, especially if it has been taken by agents of the State. Without such justification it is far too easy for death at the hands of the authorities to become the norm, so we do not argue for a lack of attention to detail or thoroughness in the pursuit of truth.

A number of politicians feel that any police shootings diminish public confidence and they may be right. However, we argue that this depends entirely on the circumstances of the particular case. The public were immensely supportive of the officers who shot and injured the killers of Fusilier Lee Rigby in Woolwich in May 2013 but riots broke out when it was reported (wrongly) that police had shot dead an unarmed Mark Duggan in Tottenham in August 2011. Involving the public in the debate to change policy (and possibly the law) would allow them the opportunity to understand and have confidence in the process by which it was administered. The current review (apparently to be reported privately to the Prime Minister) seems to lack the transparency required for such a fundamental consideration.

For armed officers, it is comforting to reflect that none of their colleagues who have been involved in shootings have been convicted of a criminal offence, which means that they have every reason to believe that they, currently, have both public support and confidence. Nevertheless, this is not enough and we argue that they are entitled, as our buffer against the most violent threats to our communities, to the support of the law and their elected representatives in Parliament. A balanced law that recognises the difficulties involved in a risky and dangerous job and supports those that undertake it on our behalf but which expects the highest standards of integrity and competence in its delivery must surely be a benefit to everyone.

We understand that this issue is under consideration but there is no apparent consultation being undertaken with the public, the police or the military; in other words, those likely to be in the “front line” and most affected by actions that are, or are not, taken. The current threat level stands at “Severe”, the second highest level, which means that those who analyse such threats, (the Joint Terrorist Analysis Centre) are convinced that an attack is highly likely. So we are running out of time to protect our protectors before we are faced with a nightmare scenario, such as we consider above.

There is a popular saying, which holds that when people are running away from trouble, police officers are running towards it. If it is trouble that carries an AK47 and wears an explosive laden suicide vest, we owe it to those officers to advance safe in the knowledge that they have the support of the public, parliament and the law.

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