



by Steve Giles and Mark Phillips

Although written from a US perspective, all nationalities will recognise the principles behind the term “Vicarious Liability” and in some cases will have already identified the potential risks and rightly have a feeling of impending doom. No matter what country you’re from ask yourself the following questions:

- **What will happen to one of your team members who survives a SAR accident, but is permanently disabled?**
- **What responsibility does your department or team have to the family of a SAR member who is killed during a search or a training operation?**
- **What responsibility does your department or team**

have to a SAR member or his family if he was not properly trained for a given task and is injured or killed?

- **What if one of your team members is allowed or assigned by your SAR supervisor to perform a task outside of his training and is injured or killed as a result?**

As a result of each of the above scenarios, it is quite possible (in fact very likely) that a civil lawsuit will be filed against your department, your SAR team, the team officers, and even individual members. We live in an extremely litigious society. It has become part of the American way of life for people to sue when they feel they have been injured or wronged in some fashion; or sometimes merely when they feel they have a chance

of collecting an easy dollar. Lawsuits against public agencies and their employees are absolutely out of control. The reason for this is primarily the fact that public agencies or municipalities are viewed as having “deep pockets” and an ability to pay out large sums of money on civil judgments. One concept of civil law that arises continuously in lawsuits against public entities is that of vicarious liability.

VICARIOUS LIABILITY - When one person is liable for the negligent actions of another person, even though the first person was not directly responsible for the injury. For instance, a parent sometimes can be vicariously liable for the harmful acts of a child and an employer sometimes can be vicariously liable for the acts of a worker.

An employer is vicariously liable for negligent acts or omissions by

his employee in the course of employment whether or not such act or omission was specifically authorized by the employer. To avoid vicarious liability, an employer must demonstrate either that the employee was not negligent in that the employee was reasonably careful or that the employee was acting in his own right rather than on the employer’s business.

“Vicarious” means substituted, or indirect.

Parallel synonymous words: Principal/Agent — Master/Servant — Employer/Employee
Vicarious (or indirect) liability is based upon the age-old doctrine of “Respondent Superior”, IE: the king being responsible for the actions of his subjects; a parent responsible for the acts of his child; or an employer for the acts of his employees. Vicarious liability also attaches to the officers of any organization,

including Search and Rescue teams. The more hazardous the function of the organization; the greater the liability exposure. Search and Rescue operations are potentially an extremely hazardous undertaking and thus liability exposure is considerable.

Vicarious liability attaches to the supervisor(s) of an individual who through negligence either performs an act that proximately causes property damage or injury/death either to himself or to a third party, or neglects to perform an act that is either legally or reasonably required resulting in the damages to property or the injury/death of himself or to another. There are eight different but overlapping areas of vicarious liability that have been set forth by the courts. We have endeavored to place each into the context of the Search and Rescue Team:

Negligent Appointment: This concept asserts that a supervisor or manager can be held liable for appointment of the unfit person to the SAR team. It is important in this regard that team members possess the basic skills necessary to function in a Search and Rescue capacity (IE: a given level of certification from a recognized training agency, adequate climbing, rappelling, and rope skills, medical screening, background investigation, competent on going in-service instruction, etc.). (Davis v Mason County 927 F.2d 1473).

Negligent Retention: This area addresses the individual who proves himself to be unqualified, incompetent, or reckless and is nevertheless allowed to remain and function as a part of the organization. (United States v Mohr 318 F.3d 613).

Negligent Entrustment: Allowing an individual to operate or utilize equipment that they are not competent to utilize, or allowing an individual to perform an act that they have either previously demonstrated that they are not reliably capable of performing, incapable of performing safely, or possess no training or expertise at performing. (McAndrews v Mularchuk 162 A.2d 820)

Negligent Supervision: Failing to provide meaningful supervision, leadership, and oversight to an individual or an operation. This

means that supervision must amount to more than mere supervisory presence. Supervision involves the active evaluation of the situation and participation in decision-making and guidance of the activities of the operation. (Bowen v. Watkins 669 F.2d. 979).

Negligent Failure To Train: Allowing a subordinate to perform

'If it is PREDICTABLE, It IS PREVENTABLE'

Gordon Graham

an act for which proper training has not been provided, or failure to provide training with respect to the utilization of a piece of equipment or failure to train in the performance of an activity likely to be required of the subordinate. Training must parallel industry standards and practices and be within agency policy. Training must be realistic, ongoing, verifiable, and documented. (Harris v City of Canton Ohio 109 S.Ct. 391)

Negligent Failure To Direct: Failure to provide knowledgeable guidance, instruction, and/or direction as to how to properly perform an action. Written standards and policies are important in this regard, however keep in mind that policy is a two edged sword and a department or team that violates its own written standards can be held liable. (Lee v City of Omaha 307 NW 2d 900 / Maple v City of Omaha NW 2d 254).

Negligent Assignment: Assigning (or allowing) an individual to perform an act with knowledge that the individual is not competent to perform that activity or is not qualified or not properly trained to perform a given function (IE: allowing a team member designated as "support personnel" to exceed his capability and assume an active role in a SAR operation; allowing a new team member to assume the leadership role on an operation). (Moon v Winfield 383 F.Supp. 31)

Negligent Failure To Discipline: Failure to take proper corrective

steps in order to insure that critical infractions of rules or policies are not repeated. Discipline need not necessarily be harsh, but must be sufficient to discourage repeat violations. Discipline, like training, must be documented and retained. One area of discipline that undoubtedly affects nearly every SAR team in existence is the problem of the

disaster in waiting. SAR skills are diminishing and must be continually refreshed and practiced. The individual who does not train regularly simply cannot be utilized on actual operations. (Grandstaff v City of Borger 767 F.2d 161).

You will notice that each of the eight areas of vicarious liability begins with the word "negligent". Most states have Worker Compensation laws that serve as the remedy for negligence. In other words, in most cases, Worker Compensation Insurance will bear the brunt of medical costs, etc. surrounding the injury or death of a SAR team member. However, a tort action (civil lawsuit) based upon a failure to perform in one or more of these eight areas could be filed if grounded in the concept of deliberate indifference (gross negligence). In order to be successful, such a lawsuit would have to establish five elements:

A duty: A governmental entity, agency, department, etc. or any

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subdivision thereof, has an established duty to train and equip its personnel to perform the functions of their employment. A breach of the duty: a failure to provide adequate training or equipment to meet the demands of the job, or a failure to implement adequate and reasonable safety measures in the performance of the job.

Injury: There must be demonstrable proof of some type of injury that is suffered by the plaintiff (IE: death, physical injury, property damage, loss of income, loss of consortium, etc.).

Proximate cause: The injury must have been caused by a breach of the duty owed.

Indifference: a willful disregard for the rights of the injured party.

A 1982 court case firmly established that “an officer’s heirs may sue a fellow officer, agency, and municipality for failure to train”. (McKenna v City of Memphis, 544 F. Supp. 414). Although this case dealt specifically with a police officer who was killed in the line of duty, it is the opinion of the authors that this case would likewise serve as legal precedent for a lawsuit based upon an allegation of a failure to adequately train and/or equip a SAR team member.

If the circumstances surrounding the death or injury of a SAR member should warrant, a federal civil rights lawsuit could be filed under the auspices of Title 18, Section 1983 of the U.S. Code. However, in order to be successful, such a lawsuit would additionally have to establish “color of law” and a “deprivation of rights”, meaning that the plaintiff would have to prove that the team member’s fundamental rights were violated and that the party responsible was acting with legal authority in the causation of such deprivation – not a likely scenario.

With respect to the organization of a SAR team, liability could vicariously fall upon those in the parent organization (law enforcement agency, fire department, park service, etc.) such as the coordinators, team liaison, SAR manager, etc. all the way up to and including the head of the department himself, if it can

The 7 DEADLY SINS OF CIVIL LIABILITY

By: Bob Teather, RCMP

WHEN AN ACCIDENT OCCURS, THE WORD “ACCIDENT” IS OFTEN FORGOTTEN AND THE SEARCH BEGINS FOR A “CAUSE” OR PERSON TO BLAME. THE FOLLOWING HAVE BEEN REFERRED TO AS THE SEVEN DEADLY SINS OF VICARIOUS LIABILITY:

NEGLIGENT APPOINTMENT: Failure to check the background of a person and their qualifications prior to employment or membership or assignment to a task.

NEGLIGENT RETENTION: Keeping a person in a job or position, which he/she has proven they cannot do, once you have ascertained that they cannot do it.

NEGLIGENT ASSIGNMENT: Assignment of a person to do a job, which they cannot do, they are not qualified to do or are untrained.

NEGLIGENT ENTRUSTMENT: Ordering or allowing a person to use some piece of equipment or device for which they are not adequately trained to use competently and safely

FAILURE TO TRAIN: Not providing training for personnel according to their duties, assignment, work, task, equipment etc.

FAILURE TO SUPERVISE: Permitting personnel under your direction to act in an unsupervised manner at any time or under any condition where supervision is needed to maintain safety of all parties.

FAILURE TO DIRECT: Failure to have rules and regulations, standard operating procedures, instruction, guidelines and the enforcement of same which relate to the operation of the training, school, or any specified activity

VICARIOUS LIABILITY: The liability of any organization and its officers and supervisors for the acts or omissions of those whom they supervise.

be shown that he had knowledge (or should have had knowledge) of an unsafe condition, practice, or individual and did nothing affirmative to correct the situation. Additionally, SAR team officers (IE: team captain, training officer, equipment officer, research and development officer, etc.) each have an affirmative responsibility to insure that the team is staffed with competent, reliable people and that they are provided supervision, training, and direction in order to safely perform assigned tasks and meet the goals and objectives of the organization.

It is an unfortunate fact of life

that sometimes — bad things happen to good people. There are indeed instances that occur that simply are not preventable. However there are also cases where prevention of an accident is possible. If it is predictable – it is preventable.

Managing Liability:

With respect to avoiding a lawsuit, the best that one can do is to insure that actions taken by your SAR team and its members are reasonable, and to institute sound policies and procedures — which may provide some insulation from

such suits, if they are followed. Considering the nature of SAR operations and training, it is critical that steps be taken to minimize the liability of all of the organizations and people who are subject to exposure (IE: the governmental entity, the law enforcement or fire agency, SAR management and liaison, SAR team officers, park and recreation districts, etc.). Some of the avenues by which this can be accomplished are:

■ **Written policies and guidelines** — Policies and procedures must reflect what the SAR team actually does and how it goes about doing it. Policies must be reviewed periodically to insure that they are current. Entities operating outside the parameters of their written policies subject themselves to liability. Written policies and guidelines are one of the first and most important steps to accomplish!

■ **Reasonability of actions** – Efforts must be made to insure that actions taken by the team officers (or by others with their consent and knowledge) are reasonable and do not exceed the bounds of reason and moderation, and fall within industry standards and practices.

■ **Implementation of safety procedures** – Plans should be formulated to deal with all foreseeable situations that could be dangerous and result in injury to anyone. Remember Murphy’s Law: If it can happen – it will happen. Maybe not today, but sooner or later...

■ **Competent training** — Training, in order to be valid, must be realistic, ongoing, verifiable, and documented. Training should be conducted in the venues and under the conditions where actual operations are likely to take place. Scenario training should be performed as if it was an actual operation; with all equipment, personnel and safety measures in place BEFORE the exercise is initiated.

■ **Pre-operation briefing** – It is critical that everyone participating in an operation or training exercise have a thorough understanding of their role, responsibilities, and the

‘Under stress, you WILL perform as you trained’

PSDiver a Textbook for Public Safety Diving
By Mark Phillips

expectations of them.

■ **Waivers and Informed Consent Agreements** – Signed waivers can be effective tools in avoiding liability and causing participants to assume liability for risks associated with an activity. However, waivers will not always hold up in court.

■ **Equipment / facility inspection and maintenance** – A high duty of care is owed to insure that injury is not incurred due to faulty facilities or equipment. Equipment should be regularly inspected and maintained to insure that it is in good operating order. Facilities should be routinely checked for hazardous conditions and such conditions should be immediately remedied.

■ **Post operational de-briefing** – It is critical that following both training exercises and actual operations that team de-briefs be held in order to identify and discuss problems that were encountered and their possible



solutions. Discussion should take into account both actions that were taken which had a positive result and why they were employed; and actions taken which negatively impacted the training or operation and what can be done in the future to prevent similar occurrences. Steps must be taken on future operations and/or training exercises to eliminate or mitigate those

problems in so far as is possible.

■ **Record Keeping** — Written records must be kept detailing all of the efforts made to insure the safety of all personnel. (Inclusive of training records; equipment inspection / maintenance / repair records; operational records, and disciplinary records.) The rule in court concerning records is, “If it

isn't documented – it didn't occur”.

Consider the following cases involving Public Safety Dive Teams:

July 1973
A 15-year-old volunteer was taking an advanced course taught by a rescue squad to become a member of the PSD team. He was performing a “bailout” from a boat into 35 feet of water. As he struggled to perform the exercise, his buddy endeavored unsuccessfully to help. There was an effort to share air and ascend during which the victim continued to struggle. The commotion resulted in the buddy diver's mask being displaced and he lost contact with the victim diver who dropped out of sight. The victim's body was recovered several hours later.

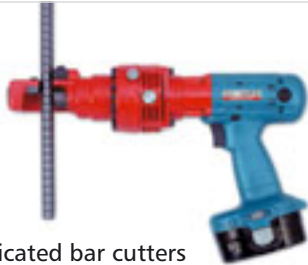
August 1973
A PSD became entrapped in a siphon pipe and drowned during a search for a possible drowning victim following the discovery of a

portable rescue tools

used by Fire & Rescue Services Worldwide

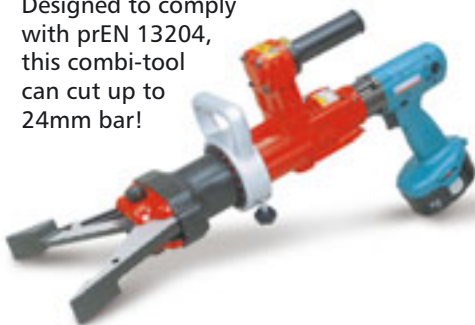
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pair of sunglasses and other objects near a canal, which indicated that a possible drowning had occurred. The report of a drowning victim turned out to be false.

*August 1980
Two PSD drowned in a quarry during an evidence search conducted in 80-85 feet of water. Both divers were making their deepest dive ever. Prior to this, each had logged a total of six dives to a maximum depth of 40 feet.*

*June 1987
A PSD was attaching a line at the surface to an overturned boat that had been involved in a boating accident. The diver wore a dry suit without underwear, no BCD, and 40 pounds of weight. Problems with the dry suit inflator resulted in the diver dropping below the surface and drowning.*

*May 2004
A PSD utilizing a handhold on a tended line while conducting a search in a canal, lost his hold and was swept into a canal grate where he drowned in 5 feet of water.*

Granted, none of the above actions will insure that you and/or your team will never be the target of a civil lawsuit. However, such steps as these will go along way toward mitigating your exposure to liability for civil damages

resulting from your operations and actions. The question now becomes, who is going to make the changes?

We are faced with the never-ending challenge of educating ourselves so that we can then educate those who are above us in the structural and administrative food chain. Proposals that are sent up the ladder that require additional funding for training programs or new equipment are

dismissed for lack of available budget. Budget requests submitted for the next year are cut because of funding shortages. Grants are hard and sometimes next to impossible to obtain. Request for just more time to train is often denied because of lack of available manpower. Budget requests made for additional training, equipment or manpower are sometimes

denied because of the lack of written justification accompanying the original request. While it is easy it criticize and complain about lack of support and funding, if there is no justification (EDUCATION) for those who approve and deny those requests—who is to blame for that?

Those citizens we swore an oath to protect are still getting lost and/or injured in the back country, becoming stranded on cliffs, falling into canyons, driving their cars off the highway and over cliffs, criminals are still disposing of evidence down embankments and Mother Nature has not stopped dumping snow on our rural communities, or flooding our rivers and streams. We are still needed and we still respond. How do we cope and still protect our teams? Document EVERYTHING and keep permanent records of all requests and responses. Sometimes teams forget that they are a minor part of a much larger organization. Funding is hard to come by if there is no justification accompanying the request. JUSTIFY EVERYTHING. When you submit a training proposal, create a separate document that expands on the reasons for the request. Elaborate the need, benefits and safety potential offered by each new piece of equipment or training

allow your equipment to be used for other tasks. How many ways can you use a rope? An Axe? A Shovel? Train as often and as much as possible and never stop asking for funds, equipment or extra training. Learn how to use what you have more safely and work towards a specified goal of obtaining specific equipment. Do the best you can with what you have and know. Work within the limits of your training and equipment and most importantly, know when the task exceeds your limits. Do not be reluctant to say “NO” when the demands of an operation exceed the capabilities of your team.

The ultimate decision to perform a specific task falls to the person being asked to do the work. If you do not get hurt or killed or hurt or kill some one else – the issue of liability may never come up. If it does, chances are someone else will have to help your surviving family. Never be afraid of asking for help or refusing a task you know you are incapable of performing. We would much rather talk with you than about you. **TR**

**‘THE ONLY WAY TO
AVOID BLAME AFTER
THE FACT IS TO
ASSUME
RESPONSIBILITY
BEFORE THE FACT !’**

Bob Teather RCMP

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