

REPORT OF THE POLICE COMPLAINTS AUTHORITY ON THE FATAL SHOOTING OF EDWIN LEO NEAR HELENSVILLE ON 1 JULY 1999

INTRODUCTION

At approximately 2.48pm on Thursday 1 July 1999, Edwin Leo (referred to throughout this report as 'Leo') a 31 year old male Samoan, was fatally shot by a member of the New Zealand Police at the intersection of Bradley Road and State Highway 16 near Helensville, north-west of Auckland.

Leo was shot when he alighted from a crashed stolen motor vehicle and after he presented an imitation Glock pistol at the Police officers.

He was challenged to put the weapon down several times but did not do so. He was shot once by a Police officer carrying a standard Glock pistol. Leo momentarily brought the weapon down to his waist but then raised it again. He was shot a second time. Again he momentarily lowered his weapon, but then raised it and was shot for a third time. Leo died shortly thereafter.

The cause of death was a single gunshot wound to the chest area fired from the Glock pistol. The other two rounds went into Leo's left forearm and right upper shoulder and did not cause fatal injuries.

INVESTIGATION

The Authority was informed of the incident shortly after its occurrence, pursuant to section 13 of the Police Complaints Authority Act. The following day the Authority visited Auckland to commence oversight of an investigation into the incident pursuant to section 17(1)(c) of the Police Complaints Authority Act. During that visit the scene of the incident was visited, family

members of Leo were visited, the two Police officers immediately involved were spoken to and the Authority discussed the procedures which would follow in the investigation, with the Police officer appointed to conduct it. This investigation was separate from another Police investigation which focused on the issue of potential criminal liability on the part of the officer responsible for the shooting.

NARRATIVE OF FACTS

At about 2.30pm on Thursday 1 July 1999 Leo, with three associates as passengers, was driving north through Waimauku in a Mazda motor vehicle which had been unlawfully taken from Point Chevalier the previous evening.

They stopped at the Huapai Tavern. Two of the passengers entered the Tavern and left with a box of 30 cans of beer. One attempted to pay with his cash card but when it was rejected they left the Tavern without making payment. They travelled north and stopped at the BP petrol station at Waimauku for petrol. Leo drove off without paying. This incident was reported to the Police at 2.39pm, and in response to that call, a patrol car from the Helensville Police Station was dispatched. This car was manned by two officers who will be referred to as Officer 1 and Officer 2. Officer 1 was the driver.

The patrol car headed south on State Highway 16 and near Rimmer Road passed the Mazda being driven by Leo travelling in the opposite direction. The patrol car turned and followed the Mazda which turned left into a private driveway. The Mazda stopped on the front yard at an angle to the patrol car which stopped behind it. Officer 1 approached the Mazda and opened the front driver's door. Leo reversed, wedging Officer 1 between the driver's door and the Police car. As this occurred, Officer 1 struck Leo on the right side of his jaw with a baton and sprayed him in the face with OC spray. Neither seemed to have any effect. The force of the Mazda reversing caused the front door of the Mazda to bend back and Officer 1 escaped by rolling over the bonnet of the Police car.

The Mazda drove back onto the highway, turned right and headed south, back towards Waimauku. The patrol car followed. The speeds reached did not exceed the speed limit for the area. Leo attempted to turn his vehicle right into Bradley Road, failed to make the turn and crashed into a post and wire fence. The patrol car stopped a safe distance behind the crashed Mazda. All four occupants of the Mazda alighted, with one of the passengers carrying a bottle by the neck.

Officer 1 took a Glock pistol from the locked floor safe of his vehicle and shouted to the four occupants of the Mazda. He told them he was armed and told them to lie on the ground.

Two of Leo's associates complied. The third associate did not comply and he was forced to the ground by Officer 1. Meanwhile, Leo had been in the paddock inside the fenceline. He came back under the fence and pointed a pistol at Officer 1.

Officer 1 warned Leo and told him to drop the weapon or he would shoot him. Leo did not comply. Officer 1 saw Leo drop his head "slightly to aim and his body tense to pull the trigger". Officer 1 fired at Leo. Leo lowered the pistol but raised it again. Officer 1 fired a second shot. Again Leo raised the weapon. Officer 1's weapon then did not function (which may not necessarily have been as a result of weapon fault). Officer 1 cleared the pistol and fired a third shot at Leo. Leo fell to the ground and died shortly thereafter. It was now approximately 2.48pm. The distance between the point where Officer 1 was when the shots were fired and where Leo lay was four metres.

The firearm Leo presented was a replica pistol identical in shape, size and colour to the Glock pistol used by Police.

The post mortem carried out on Leo the following day showed that Leo had three bullet wounds. One entered the left forearm and another the upper right arm. Neither of these wounds was either singly, or jointly, life threatening. The fatal shot entered the chest, right of centre, and pierced the heart and right lung.

A scientist present at the post mortem later advised that the entry wounds to the forearm and right upper arm indicated that the arms were raised at the time of entry, consistent with the actions of Leo described above.

The investigation revealed that prior to this incident Leo and his three associates had been drinking alcohol and smoking cannabis. A plastic bag of cannabis was found on Leo. An analysis of blood taken from him was found to contain 203 milligrams of alcohol per 100 millilitres of blood. Cannabis was also detected in his system.

PISTOL HELD BY LEO

The firearm carried by Leo was a replica 9 millimetre Glock air pistol. It is identical in shape, size and colour to the Glock pistol used by Officer 1.

It has a "hop up" mechanism which causes the projectile to spin backwards as it leaves the pistol giving it a more horizontal flight path. The pistol works by racking the top side to create the compression of the spring which provides the force to fire the projectile.

The pistol has a range of 30 metres and is accurate over 10 metres. A projectile over 5 metres would cause bruising or more serious injuries to sensitive areas like eyes.

The mechanism on Leo's pistol was working but the magazine spring was not. The action of racking this pistol is the same action as a person would carry out when preparing a real weapon for firing.

One of Leo's associates, when questioned about the firearm used by Police, said that it looked the same as Leo's.

Officer 1 said that Leo had the pistol pointed directly at him and was carrying it in both hands. Officer 1 recognised the pistol as a Glock, the same as the Police issue Glock pistol. He recalled seeing the rectangular end of the pistol and the round barrel. Officer 1 described the shooting as taking a few seconds and during that time he thought he was going to be shot by Leo and that if he did not stop Leo that Officer 2 would also have been killed.

Officer 2 was also firmly of the belief that the pistol carried by Leo was real and that the lives of both officers were in danger.

With the information available from the investigation and personal observation, the Authority is satisfied that in the circumstances faced by Officer 1, when Leo presented the pistol at him, the imitation pistol carried by Leo was indistinguishable from a real Glock pistol. The potential dangers from the carriage and use of such imitation firearms should be readily apparent.

OFFICER 1

Officer 1 has had more than 20 years Police experience. His performance appraisals and training records have been made available to the Authority. There are no issues of concern in recent years about his performance. Indeed, for the last two consecutive years he has achieved the highest rating possible.

He is fully qualified in the use of firearms. His next firearms training was due in March 2000.

The appropriate officer in charge of Arms Training describes Officer 1 as treating situations seriously in scenario training and treating practice, policy and procedure on the range very professionally. He is regarded as "a good shot".

Officer 1 is also fully qualified in the use of OC spray and first aid.

OPINION OF CROWN SOLICITOR

On the completion of the separate investigation into the potential criminal liability of Officer 1 the Police sought an opinion from the Auckland Crown Solicitor.

He considered the justification of Officer 1 for shooting Leo pursuant to section 48 of the Crimes Act which provides that:

“Everyone is justified in using, in the defence of himself or another, such force as, in the circumstances as he believes them to be, it is reasonable to use.

He expressed the following view:

“It is the obligation of the prosecution, once the defence of self defence is raised, to negate that defence beyond reasonable doubt. There is no onus whatsoever on an accused person to prove this defence. Therefore, for present purposes, if there is no available evidence upon which the prosecution could disprove such a defence then it would be idle and misconceived to prosecute in the first instance.

Having reviewed the facts ... and having applied them to the requisite elements of section 48, I have no hesitation whatsoever in concluding that not only is there a wholly credible narrative in support of such a defence but there is no available evidence to negative the account (even in part).”

The Crown Solicitor was clear in his view that Officer 1 honestly believed that Leo had a real pistol and was about to fire at him. In circumstances where he believed that he was in grave and immediate danger of death or serious injury, there was only one course to adopt and that was, in the Crown Solicitor’s words, *“...to incapacitate the deceased immediately, if necessary by seriously wounding or killing him”*.

He expressed the further opinion that it was irrelevant for the purposes of considering this defence, the fact that the pistol Leo had in his possession was in fact a replica incapable of inflicting serious injury or causing death.

The Crown Solicitor therefore concluded that Officer 1 was justified in the circumstances in shooting, and thereby fatally wounding, Leo.

The use of force when the vehicle driven by Leo was first stopped, and the force used at the scene of the shooting when a passenger was forced to the ground with a kick in the groin, were also examined by a Police legal adviser and found to be justified.

As a result no criminal proceedings have been brought against Officer 1.

CORONER'S INQUEST

An inquest into the death of Leo was conducted by the Auckland Coroner on 17 November 1999.

In his decision the Coroner said he agreed "*entirely that no culpability can be attached to the Police officer who fired the fatal shot*".

He emphasised that the Police were being confronted by a man who was brandishing what appeared to be a real pistol and that "*It should be noted that notwithstanding the fact that the deceased had already been shot twice he still persisted undeterred in aiming his pistol at Officer 1.*"

He found that Leo died "*As a result of a gunshot wound to the heart sustained after threatening a Police officer with an imitation pistol he was shot by the said Police officer.*"

SUBMISSIONS ON BEHALF OF LEO'S FAMILY

Following the Inquest a barrister representing members of Leo's family made submissions to the Authority relating to the Police actions which led to Leo's death.

The thrust of those submissions was that the circumstances were such that the Police action was unwarranted and escalated the situation. In advancing that proposition it was submitted that Leo's car was being followed, not for a serious crime, but for offences of theft and car conversion; that Officer 1 did not properly assess the position in the driveway when Leo was first stopped but rather, he foolishly put himself at risk; that there was no high speed pursuit or dangerous driving; that the behaviour of Leo and his associates was not menacing or threatening and that therefore Police should not have apprehended danger to Police or members of the public; and that further Police support would have arrived quickly if the shooting had not occurred.

Similar submissions were made to the Coroner at the Inquest before he reached his conclusion referred to earlier in this report.

The Authority has considered these submissions carefully.

The Police were quite properly endeavouring to apprehend the occupants of a stolen motor vehicle which had been used in the commission of two crimes of dishonesty a short while earlier. Leo had driven into the driveway of a private property and when the Police endeavoured to prevent escape, Leo, rather than submitting to apprehension, drove his car in an aggressive manner to facilitate escape. The ensuing pursuit was not conducted by Police in a dangerous manner. No fault can be attributed to Police for the crash of Leo's vehicle.

Following that crash two Police officers were then faced with the task of apprehending four offenders in a rural area. If all offenders had complied with Police demands the apprehension would have been achieved without harm to any person. Instead, Leo, when confronted with an armed Police officer issuing appropriate warnings to him, chose not only to ignore the warnings but produced and presented more than once an imitation firearm which he must have known the officer would be likely to regard as real. Leo had been in possession of the pistol when he alighted from the car and before he knew that Officer 1 was armed. The Authority is not of the view that Police were responsible for the escalation of the situation which led to Leo's tragic death.

LIABILITY OF OFFICER 1

The Authority has reached the conclusion, consistent with that of the Auckland Crown Solicitor and the Coroner, that fault cannot be attributed to Officer 1.

Among the reasons for this conclusion are:

1. The efforts by Leo to evade apprehension before the pistol was presented by him.
2. The taking of a pistol from the patrol car by Officer 1 occurred only after an earlier use of OC spray and baton, when Leo was first stopped, had proved ineffective.
3. Following presentation of the pistol, the refusal of Leo to put it down.
4. The repeated presentation of the pistol at Officer 1 despite being shot twice before the fatal shot.
5. The unprotected position of Officer 1 standing in front of the patrol car.
6. The honest belief of Officer 1 that the pistol in Leo's possession was real and that the lives of the Police officers were in danger.

The question may be asked whether it was necessary to fire a fatal shot as opposed to a shot that would cause only injury. It should be recorded that officers are trained, in situations such as those faced by Officer 1, to fire to incapacitate, namely, to render the person incapable of carrying out an unlawful act which threatens the life or wellbeing of another person. The firing of warning shots or shots aimed at less vulnerable parts of the body may not incapacitate and may heighten or prolong the danger, as this case illustrates.

OTHER ISSUES

An investigation of such an incident as this under the Police Complaints Authority Act involves examination not only of responsibility for the incident but also of wider aspects of Police policy, practice and procedure disclosed in the circumstances of the incident.

PURSUIT POLICY

The period of time during which the Police car followed the car driven by Leo was brief and took place over approximately 2 ½ kilometres. A pursuit warning was given to the Police car by the Control Room. The speeds reached were not excessive and the pursuit amounted to the Police simply following the car driven by Leo. The Authority is satisfied that the Police action in following that car did not endanger the public and did not contribute to Leo's loss of control as he turned off onto a side road.

CARRIAGE AND USE OF FIREARMS

The policy and governing principles (other than legislation) covering the Police carriage and use of firearms are contained in General Instructions and Region Orders. General Instructions were updated in November 1998. Region Orders were however not updated when Police Regions were disbanded. Auckland Districts may issue local orders on matters considered relevant or rely on General Instructions. The issue of firearms to officers at the station where Officers 1 and 2 were based and within that Police District has disclosed a variety of practices. While this investigation has discovered some inadequacies in the rules governing the issue and carriage of firearms, none has had any impact on the incident under review.

Guidelines and Orders surrounding the issue and carriage of firearms by officers and at the changes of staff shifts need to be clear and preferably standardised.

GUN SAFES IN PATROL CARS

The gun safes previously in authorised Police cars (and that fitted in the car driven by Officer 1) were designed to accommodate a type of pistol being used prior to the introduction of the

Glock. It has been shown in this investigation that the design is not entirely suitable. Furthermore the safe can only be accessed by a key usually attached to the ignition key. Unless the key is kept separately, access can only be gained when the vehicle is stopped and the ignition key removed.

The investigation disclosed a divergence of opinion within the Police as to the appropriate positioning of and access to a gun safe in patrol car.

The Authority expresses no opinion on this matter but notes that other forms of safe with keyboard mechanisms are currently being considered by the Police National Operations Manager.

USE OF OC SPRAY

The use of OC spray on Leo when first stopped was ineffective. An examination conducted by an ESR scientist supported a proposition that Leo had been sprayed in the face. The issue of why the spray had not been effective was examined, with the canister used by Officer 1 and other unused canisters analysed.

The analyst reached a conclusion that the spray time was between 1 and 1.5 seconds. At the time Leo was affected by alcohol consumption and drug use.

Experience in New Zealand and overseas has shown that OC spray can be a most effective less than lethal weapon tool for Police officers and has proved effective in approximately 90% of cases where it is deployed. A major drawback however is that its effectiveness can be reduced or nullified when used on intoxicated, drugged or goal-oriented persons or persons suffering from a mental disability. Furthermore, up to 6% of the population will not be affected by the spray.

The Police training manual makes it clear that officers “need to be aware that in some circumstances exposure to OC spray may result in minimal, or at times, no effect whatsoever. At all times members must be prepared to resort to other tactical options”.

The OC spray canister used in the present incident was shown to have a capsaicinoid concentration that was below the manufacturer’s specifications (an issue which Police are addressing with the manufacturer) but still of a level to be effective under normal circumstances.

The fact that the spray was ineffective on Leo could be explained by Leo being within one or more of the categories of persons outlined above or factors relating to the area of the face hit by the spray or the distance at which it was deployed.

AVAILABILITY AND USE OF REPLICA FIREARMS

Earlier in this report I commented that the potential dangers from the carriage and use of imitation firearms should be readily apparent.

The Auckland Coroner commented on this issue in his decision in the following way:

“The grim lesson to be learnt from this incident is that anyone who is minded to present an imitation pistol at an armed Police officer ought to know that the weapon in the hands of the Police officer is real and lethal and his is not ... Having regard to the number of armed hold-ups that have taken place in the past with imitation pistols it occurs to me that the legislature might well consider banning or restricting their sale only to holders of an arms licence.”

A former Police Inspector who for 15 years was Commander of the Auckland Police Armed Offenders Squad was interviewed during this investigation. He had experience of commanding an estimated 800 armed operations or operations dealing with armed offenders. In a number of operations it was eventually found that the weapon involved was a replica or toy firearm. He expressed real concerns about the availability, use or carriage of such replicas because of the possible consequences which may result. He said that a member of the public could be shot by Police because the officer concerned believed the weapon to be real or, alternatively, if there was some doubt on the officers part causing hesitation it may result in the officer's death, when the weapon he believed may have been a replica was in fact real.

He recorded how he had in these situations made public comment warning of the dangers.

He further pointed out that:

“The carriage and use of firearms over the years has increased dramatically. The carriage of firearms especially small arms, ie. pistols/revolvers have become a lot more prevalent when criminals were carrying out criminal activity, especially in the drug scene.”

He questioned the wisdom or the need for replica firearms to be sold or possessed.

The imposition of legislative restrictions on the availability and use of imitation firearms is not a simple issue and the Authority is informed that Police are currently approaching the general issue of imitation firearms in an educative way, with advice to retailers and articles in local and national newspapers warning of the possible consequences of misuse of such weapons.

The misuse of imitation firearms must however remain an issue of considerable concern and Police should continue to examine the position.

SAFETY AUDIT

Although it was not part of the investigation under the Police Complaints Authority Act it is appropriate to record that this incident was a catalyst for the commissioning of a Safety Audit by the District Manager of the North Shore/Waitakere District. The Audit addressed a broad range of issues that relate to the safety of Police working in a rural or semi-rural environment.

CONCLUSION

The impact on all those involved in or with this incident is clearly devastating.

In concluding this report the Authority expresses great sympathy for the family members and friends of Leo who lost his life as a result of a confrontation with Police officers.

One also has considerable sympathy for the Police officers who, in the course of duty, have been confronted with what was perceived by them as a life threatening situation that evolved quickly and who are now undoubtedly greatly shocked by the trauma of coming to terms and living with the consequences of the response made to that situation.

Judge N C Jaine
POLICE COMPLAINTS AUTHORITY

5 May 2000