



TASER®

ELECTRONIC RESTRAINING / COMPLIANCE DEVICES



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Over the past few years, the use of Tasers® (electronic restraining/compliance device) has become more common among law enforcement agencies nationwide. Recent literature indicates that “electronic control devices” are being used by 11,500 agencies, with approximately 260,000 of the devices deployed.ⁱ As the use of Tasers® becomes more prevalent, law enforcement agencies can expect claims to be made regarding their use. As with any use of force, courts will look at three factors in determining if a particular use of force is objectively reasonable. First, how serious was the offense that the officer suspected at the time the officer was in contact with the individual; second, did the suspect pose an active threat to the officer or others; and third, was the suspect actively resisting or attempting to evade arrest by flight. These three factors, announced in *Graham v. Connor*, are the basis for judging all uses of force during arrest. Law enforcement officers would be well-advised to consider these three factors in determining whether force should be used and if so, how much force is appropriate in any given circumstance.

Issues with respect to Deployment

Throughout the United States, more law enforcement agencies are adding electronic control devices to their force options.ⁱⁱ As noted, more than 260,000 electronic control devices are currently in use by law enforcement. Law enforcement agencies that utilize the most common brand of electronic control devices, Taser, report a dramatic decrease in suspect and officer injury following the addition of Taser to their force options. At the same time we see reports in the media which would lead one to believe that every taser use results

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in death. In fact, a number of groups have sought legislation which would limit the use of taser to deadly force situations.ⁱⁱⁱ

Overall, the cases where Taser has been utilized and the arrestee subsequently died are limited and because of what has been a lack of consensus by the medical community they have been more of a media phenomenon than a legal one. One recent case has been reported where Taser International was found liable by a jury which awarded punitive damages as well as compensatory damages totaling more than 6 million dollars.^{iv} What went largely unreported in the main stream media is the fact that the court, threw out the punitive damages portion of the award of over 5 million dollars.^v The facts of the case involved a subject Heston, who was on methamphetamine at the time of his contact with officers and was tased multiple times by three officers. The officers were dismissed from the suit on qualified immunity. The finding of the jury against taser was based on the failure of taser to warn law enforcement that multiple tasings may be more harmful to an individual. It should be noted that current taser training and most law enforcement policies now include a provision discouraging multiple deployments on a subject unless necessary to control the individual.

The most recent study being conducted on the relationship between electronic control weapons and death is being conducted by doctors from around the United States under funding by the National Institute of Justice.^{vi} The study issued an interim report in June of 2008 which concluded: "Although exposure to CED is not risk free, there is no conclusive medical evidence within the state of current research that indicates a high risk of serious injury or death from the direct effects of CED exposure. Field experience with CED use indicates that exposure is safe in the vast majority of cases. Therefore, law enforcement need not refrain from deploying CEDs, provided the devices are used in accordance with accepted national guidelines."

Some of the more problematic issues with respect to Taser deployment involve things such as use in circumstances where use is unreasonable under the three-part *Graham v. Connor*^{vii}

Another area where future cases should be anticipated is cases involving the issue of secondary impact as the result of the deployment. There are numerous cases where the arrestee is not injured by the electronic impulse, but rather suffer serious injuries when they fall as the result of the muscular disruption. Most agencies now warn officers to consider the area of deployment as well as whether the subject is in an elevated position.^{viii} Since the fall is a foreseeable result of the deployment, injuries can be anticipated where the subject is in area or in a circumstance where a hard impact can be anticipated.

CASES

Draper v. Reynolds,^{ix} which involved the use of a Taser®, exemplifies how a court will review this type of force. Stacy Draper filed a lawsuit against Deputy Clinton Reynolds alleging a civil rights violation arising out of a motor vehicle stop and his arrest, during which Deputy Reynolds used a Taser on Draper. The reason for the initial stop was an improperly illuminated registration plate light.

In his lawsuit Draper alleged that Reynolds shined a flashlight in his eyes during a traffic stop and he politely asked Reynolds to refrain from doing so. The initial contact between Reynolds and Draper took place at the side of Draper's truck and could not be seen on the police cruiser's video recorder. Their initial conversation could not be heard on Reynolds's audio recorder either. Draper alleged that Deputy Reynolds used harsh language in this initial contact at the side of the truck.

Deputy Reynolds then ordered Draper to come to the back of his truck. At that point all activity and all audio were recorded by the police vehicle's equipment. The tape showed an uncooperative and belligerent Draper who refused to comply with several polite commands by Deputy Reynolds to produce paperwork from the truck. As many as five times Draper would start toward the truck to retrieve the paperwork, but then would turn and return toward Deputy Reynolds in what Reynolds described as a "threatening" manner which put Reynolds on "the defensive." On the fifth occasion, with Draper yelling and returning toward Reynolds, the deputy discharged his Taser® at Draper's chest. Draper fell to the ground, was handcuffed and taken into custody. In his allegation of excessive force, Draper alleged that if Deputy Reynolds had simply informed him that he was under arrest he would have complied, thus there was no need to employ the Taser®.

In rejecting Draper's claim of excessive force the court held: "Reynolds's use of the taser gun to effectuate the arrest of Draper was reasonably proportionate to the difficult, tense and uncertain situation that Reynolds faced in this traffic stop, and did not constitute excessive force. From the time Draper met Reynolds at the back of the truck, Draper was hostile, belligerent, and uncooperative...Draper used profanity, moved around and paced in agitation, and repeatedly yelled at Reynolds." The court noted that a verbal arrest command and attempt to handcuff such a hostile individual as Draper may have escalated the situation into a "serious physical struggle" which was avoided by the use of the Taser®.

Some of the more significant cases involving the TASER® involve accidental circumstances. One of the most significant of these accidental cases occurred in Madera, California. An officer, while trying to gain control of a handcuffed suspect who was in the backseat of a police vehicle and kicking at the door attempted to TASE the suspect. Unfortunately the officer, who was wearing her TASER® " on the strong side of her body, accidentally pulled out her Glock® and killed the 22 year-old prisoner. A lawsuit against the

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police officer and department are pending in this case. In addition, the police department is suing TASER® International, arguing that the company failed to advise the agency against officers wearing the less-lethal weapon cross-draw on the weak-side. It should be noted that training materials from TASER® strongly recommend carrying this tool weak-side, but leaves the ultimate decision to the agency.

A recent case from the United States Court of Appeal for the 4th Circuit addressed this very issue. In *Henry v. Purnell*,^x 119 Fed. Appx. 441 (4th 2005), the court reviewed a trial court's refusal to give a deputy summary judgment and qualified immunity where the deputy testified that he attempted to stop Mr. Henry during the course of an arrest by using his Taser®, but he had accidentally pulled out his firearm instead. As the result of his firing of his handgun Mr. Henry received a gunshot wound to his elbow.

In refusing to dismiss the claims against the deputy, the court noted that the Taser® and the handgun are markedly different and the fact that the deputy did not immediately acknowledge that the shooting was accidental. More than 60 seconds went by before the deputy indicated that the shooting was accidental. The court concluded that a jury would have to decide the credibility of the deputy in indicating that the shooting was accidental.

An issue that was not addressed by the court was the fact that the deputy did intend to seize Mr. Henry, although he used the wrong weapon, thus, his use of force was arguably by a means intentionally applied. As such it was arguably a physical seizure even if the deputy was mistaken in his choice of weapons to apply that force.

Other accidental cases have occurred where officers have observed an officer pull his or her TASER® (M26) and due to similar appearance to a firearm have assumed a deadly force situation and responded with deadly force. This type of accidental circumstance is addressed in training plans by requiring officers who are preparing to use the TASER® to shout "TASER" to place other officers on notice. In addition, TASER® provides yellow striping for black-finish models and also makes the (M26) in a yellow-finish. Anecdotal responses by agencies that utilize the yellow-finish models indicate that the distinct yellow is highly effective when dealing with suspects because while they know an officer would not be justified in shooting his or her firearm, they recognize that the officer may use the yellow TASER®.

As the law on Taser® use continues to develop, law enforcement must stay abreast of current research and case law to determine the reasonableness of its use in particular cases. Some of the additional developing issues include where the Taser® fits in the use of force continuum; Taser® compatibility with pepper-spray; and what role, if any, the use of a Taser® plays in sudden-custody death cases. The most recent model policy from the International Association of Chiefs of Police places "electronic control devices" on the same level as pepper spray.^{xi}

A recent study from British Columbia examined most of the current information known to law enforcement on the impact of Taser® and the possibility that some persons may suffer serious bodily harm or death following a confrontation with the police in which a Taser® is deployed.^{xii} The study acknowledges that some persons involved in confrontations with law enforcement sometimes die as the result of the fight. The study identifies the reason for many of these deaths as based in the fact that the person fighting with law enforcement is suffering from “excited delirium.” “Excited Delirium” is defined as: “a state of mind begetting irrational and often violent behavior in some persons subsequently apprehended by law enforcement officers by use of a Taser.” It is also noted that persons suffering from “excited delirium” often had been using cocaine, “a drug that causes heart arrhythmias,” and the fact of cocaine use may be unknown to law enforcement at the time. The study points out that some of the issues raised by “excited delirium” with Taser® is not just a police issue, due to the fact that changes in medical protocols for emergency medical services may also assist in avoiding serious bodily harm or death following a deployment.

Some of the more common injuries with electronic control device deployment were the secondary injuries received when a subject falls to the ground as the result of the deployment. This possibility requires officers to consider environmental factors when using the electronic control device, for example, is the subject standing at the top of a stairwell such that he or she may fall down the stairs as the result of the deployment. The British Columbia study noted that there has also been a trend of musculoskeletal injuries caused by powerful muscle contractions when the Taser® is deployed.

One additional matter that is currently being debated is the level of product-testing that was conducted on the (M26) model. It has been suggested that a great deal of testing was done on early models as well as the newest model (X26), but very little testing was done on the (M26). It is suggested that if the agency has purchased the (M26) model that the agency follow this debate closely. At the same time, the agency should document its own uses including training uses in order to establish an internal documentation of safe uses.

A recent case from Joplin, Missouri seems to be the result of a Taser® accident of a different type.^{xiii} Two officers from the Joplin Police Department responded to a report a suicidal man. The man, David Riley was in his backyard when officers arrived. As Officers Greg Batson and Tim Nielson approached, Riley ran into his home. The officers pursued Riley into the house. At some point while in the home, one of the officers fired his Taser® at Riley. Unfortunately, Riley had open natural gas running in the home, apparently as part of his suicide attempt. While, authorities had not concluded at the time of this writing that the Taser® had sparked the explosion, local officers familiar with the case, speculated that the Taser® had ignited the explosion. The two officers were severely burned in the explosion and Riley had died as the result of his injuries from the explosion.

Electronic Control Device Force Continuum/Policy-Training Issues:

(These recommendations are based upon model policies as well as studies conducted throughout the United States and Canada [see note 2])

- Electronic Control Device must be worn weak-side.
- Electronic Control Device deployment should not be considered for the passively resistant subject-active resistance/active aggression should be required.
- Officers must be trained concerning ability of electrical charge to act as an ignition for combustible materials. (Note: Officers have been seriously injured and or killed after deploying a Electronic Control Device in the presence of open natural gas during suicidal person call)
- Multiple Electronic Control Device deployments against an individual increases the likelihood of serious injury where the individual is suffering from other symptoms such as cocaine intoxication. Policy and training should encourage officers to minimize the successive number of discharges against an individual where possible.
- Agencies should recognize however, particularly where back-up officers are unavailable where multiple applications may be necessary.
- A contributing factor to serious injury or death is the level of a subject's exhaustion. Studies recommend that when an officer believes that control of a subject will be necessary and met with resistance, deployment of the Electronic Control Device should be considered early on in the event so that the person has not reached a level of exhaustion prior to the Electronic Control Device's use.
- In cases where subject is actively resisting an officer's attempt to take them into custody but not threatening the officer with an assault-it is recommended that the Electronic Control Device be used in the "push stun mode."
- Officers should avoid firing toward eyes/head/genitals
- The preferred targeting is the center mass of the subject's back., however it is recognized that it is not always possible to get behind the subject.
- Where back-targeting is not possible-the secondary area is chest and legs-Officers should be discouraged from chest targeting when dealing with a female subject.
- Officers should be prohibited from using the device as punitive measure.
- A warning prior to discharge is not always necessary for this type of force to be considered reasonable, model policies as well as courts have noted that giving a subject a warning may enhance the danger to the officer and the subject by giving the subject time to avoid the deployment
- The device should never be used on a handcuffed person to force compliance unless the subject poses a violent threat to the officer through physical conduct and cannot otherwise be controlled.
- Electronic Control devices are best placed along with pepper-spray in a use of force continuum.
- Officers should consider the location and environment of the subject. i.e. Is the subject at the top of a stairwell such that when incapacitated by the Electronic

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Control Device-they fall down the stairs causing a collateral injury.

- Officers should be aware that a subject's heavy clothing may impact the effectiveness of the electronic control device.
- Officers should consider whether the subject has been exposed to combustible elements that may be on their person such as gasoline. The use of a Electronic Control Device on such persons may cause an ignition and fire.
- Officers should consider the particular subject and any vulnerabilities they may have such as: a person who is small in stature will be more dramatically impacted; some agencies have been criticized as well as sued for use on pregnant women and the elderly.
- Alternative tactics should be utilized where the officer has prior information that the subject suffers from a disability which would increase the danger to that person by using the Electronic Restraint Device. i.e. A person at the scene tells an officer that the subject has a heart condition.
- Agency policy/training must address removal of darts from a person who is brought under control by deployment. Where there is any difficulty, removal should be conducted by medically trained personnel.
- All persons who have been the subject of a Electronic Control Device deployment should be cleared medically or at the very least monitored for a period of time with a focus on symptoms of physical distress. It should be noted that studies indicate that persons who suffer from excited delirium may not be immediately impacted and the onset of difficulty may occur a period of time after the police control event.

Mandatory Medical Clearance at Hospital:

- Persons struck in a sensitive area-eyes, head, genitals, female breasts.
- Where officer cannot safely remove darts in accordance with training.
- Persons who do not appear to have fully recovered after a short period of time (Model Policies use a ten-minute time limit however officers who observe unusual physical distress should immediately call for medical assistance and should not wait the ten-minute recovery period recommended by some of the model policies,
- Persons who fall into one of the vulnerable classes such as juveniles, pregnant women, persons who are small in stature, persons who officers become aware have a pre-existing medical condition that increases danger and the elderly.
- Subject who request medical assistance.

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Documentation Issues

- Agencies should document all Electronic Control Device use including those cases where a subject complies once threatened with such a device. By documenting the non-discharge uses, an agency establishes officer judgment and control as well as the deterrent effect of this tool.
- Photographs of the effected area, should be taken following the removal of darts from the subject to document any injury. Where the push-stun method has been used, photographs are extremely important due to the increased potential for this method to cause scarring.
- Supervisory personnel should be notified and review all Electronic Control Device deployment for consistency with policy and training.
- Darts/Cartridges should be properly stored and maintained as evidence following a discharge.
- Officer must be required to complete a “response to active resistance/ECD discharge form” following use.
- Policy should require supervisory/agency/ and training review of all uses.
- Where there is any indication of lasting injury, claim or complaint internal data from device should be maintained.

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CITATIONS:

ⁱ “Studies of Death Following Electro-muscular Disruption Interim Report 2008, U.S. Department of Justice, Office of Justice Programs, National Institute of Justice, Washington D.C.

ⁱⁱ See, e.g. “Financial Bossts due Rhode Island Justice Agencies” Providence Journal Page 1, March 30, 2009. “Electrical Stun Guns for the Central Falls Police.”

ⁱⁱⁱ “ACLU of Oregon Investigates Taser Use by Ashland Police -- and Issues a Call for Reform” ACLU of Oregon, September 2007. (“There is no federal regulation of the Taser industry, and there is no medical consensus regarding either the short- or long-term medical effects of CEDs,” said David Fidanque, Executive Director of the ACLU of Oregon. “Given the risk of unintended fatalities, we believe the use of Tasers needs to be limited to situations that most likely would otherwise lead to the use of deadly force.”)

^{iv} See “Jury Finds Extended TASER Device Application 15 Percent Responsible for Arrest Related” Reuters, June 7, 2008. (Case: Heston v. City of Salinas, United States District Court, Northern District of California).

^v See, “Punitive Damages Against TASER International Thrown Out in Heston v. City of Salinas,” lawenforcementforum.com, October 2008.

^{vi} “Studies of Death Following Electro-muscular Disruption Interim Report 2008, U.S. Department of Justice, Office of Justice Programs, National Institute of Justice, Washington D.C.

^{vii} *Graham v. Connor*, 490 U.S. 386 (1989).

^{viii} “Taser Use in Man’s Death Violated Rules, Police Say” Kareem Fahim and Christine Hauser, New York Times, September 28th 2008. (“The firing of a Taser [stun gun](#) that led an emotionally disturbed man to fall from a Brooklyn building ledge to his death on Wednesday appeared to have violated departmental guidelines, the police said on Thursday. The guidelines tell officers that when possible, the Taser, which fires barbs that deliver thousands of volts of electrical current, should not be used in situations when a person could fall from an elevated surface.”)

^{ix} *Draper v. Reynolds*, 369 F.3d 1270 (11th Cir. 2004).

^x *Henry v. Purnell*, 119 Fed. Appx. 441 (4th 2005).

^{xi} International Association of Chiefs of Police, Model Policy-“Electronic Control Devices” January 2005:

C. Deployment

1. The ECW is generally analogous to Oleoresin Capsicum (OC) spray on the use of force continuum, and decisions to use an ECW involve the same basic justification. As such, the device is prohibited from being used:

- a. In a punitive or coercive manner.
- b. On a handcuffed/secured prisoner, absent overtly assaultive behavior that cannot be reasonably dealt with in any other less intrusive fashion.
- c. On any suspect who does not demonstrate their overt intention (1) to use violence or force against the officer or another person or (2) to flee in order to resist/avoid detention or arrest (in cases where officers would pursue on foot).
- d. In any environment where an officer knows that a potentially flammable, volatile, or explosive material is present (including but not limited to OC spray with volatile propellant, gasoline, natural gas, or propane).

^{xii} “Taser Technology Review” British Columbia, Office of the Police Complaint Commissioner, Final Report June, 2005.

^{xiii} “Taser Fired Before Explosion,” The Joplin Globe, August 14, 2004.

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