AELE Monthly Law Journal

ISSN 1935-0007
Cite as: 2007 (5) AELE Mo. L. J. 501
Special Articles Section - May, 2007

Electronic Control Devices: Liability and Training Aspects

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Recent media stories have caused debate about the lethality of electronic control devices sometimes called "tasers"* or "stun guns." This article is intended to outline the current legal principles regarding the deployment and use of such devices. Overall, the areas of constitutional law regarding the use of such devices are somewhat clear. However, aspects of potential liability under state tort claims of negligence are less than clear.

A Less-than-Lethal Device

In general, electronic control devices have been defined as a form of less-than-lethal (non-deadly) force. In *McKenzie v. City of Milpitas* [1] the court explained:

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* TASER ® is a registered Trademark of TASER International, Inc.
[1] 738 F. Supp. 1293, 1296 (N.D. Cal. 1990); *See also, Russo v. City of Cincinnati*, 953 F.2d 1036, 1040 n.1 (6th Cir. 1992).

> [One type of electronic control device] is a hand held immobilizing device … that is used by [police departments] to control uncooperative or dangerous subjects. [It] is operated by propelling two darts at a hostile subject. When the two darts … strike the subject, so long as both [hooked barbs] remain in contact with the subject's body and/or clothing, the officer can send an electrical charge through the wires. The officer can continue to send charges through the subject by depressing a button…. The current generated by the [electronic control device] causes involuntary muscular contractions in the subject, which in turn usually causes the subject to lose muscular control for a short period of time and to fall to the ground. Because the … subject loses muscular control, an officer can establish control over an uncooperative or dangerous subject without the need to resort to mace, batons, or personal combat techniques.

Landmark Case: *Graham v. Connor*

Despite being a form of less-than-lethal force, the use of electronic control devices by law enforcement officers must comply with constitutional standards. To comply with constitutional standards, law enforcement officers must be trained to make proper legal judgments about the amount of force to utilize in a particular situation. These judgments must be based on the facts and circumstances confronting that officer in the specific incident. The United States Supreme Court, in the landmark case of *Graham v. Connor*,[2] held that excessive force claims are properly analyzed under the Fourth Amendment's "objective reasonableness" standard. The *Graham* Court said:

> The right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it…. The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.[3]

The Court further stated:

> The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments -- in circumstances that are tense, uncertain, and rapidly evolving -- about the amount of force that is necessary in a particular

[2] 490 U.S. 386, 396 (1989).
[3] 490 U.S. at 396.

> situation…. The "reasonableness" inquiry in an excessive force case is an objective one: the question is whether the officers' actions are "objectively reasonable" in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.[4]

The Court then outlined several factors that impact upon the "reasonableness" of a particular use of force:

> Because the test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application … its proper application requires careful attention to the facts and circumstances of each particular case, including: (1) the severity of the crime at issue; (2) whether the suspect poses an immediate threat to the safety of the officers or others; (3) whether he is actively resisting arrest; or (4) whether he is attempting to evade arrest by flight.[5]

Since *Graham*, other lower courts have developed additional factors to consider in making the determination as to whether an officer's use of force is "reasonable." Some of these other factors include: (1) the number of suspects and officers involved;[6] (2) the size, age, and condition of the officer and suspect;[7] (3) the duration of the action;[8] (4) whether the force applied resulted in injury;[9](5) a previous violent history of the suspect, known to the officer at the time;[10] (6) the use of alcohol or drugs by the suspect;[11](7) the suspect's mental or psychiatric history, known to the officer at the time;[12] (8) the presence of innocent bystanders

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[4] 490 U.S. at 396-97.
[5] 490 U.S. at 396 (altered from original).
[6] *See, Sharrar v. Felsing*, 128 F.3d 810, 822 (3rd Cir. 1997); *Crosby v. Paulk*, 187 F.3d 1339, 1351 (11th Cir. 1999).
[7] 128 F.3d at 822; 187 F.3d at 1351.
[8] 128 F.3d at 822; 187 F.3d at 1351.
[9] 128 F.3d at 822; 187 F.3d at 1351; *See also*, *Mellott v. Heemer*, 161 F.3d 117, 123 (3rd Cir. 1998), *cert. denied*, 526 U.S. 1160 (1999); *Jackson v. Sauls*, 206 F.3d 1156, 1170 n.18 (11th Cir. 2000); *Wardlaw v. Pickett*, 1 F.3d 1297, 1304 n.7 (D.C. Cir. 1993), *cert. denied*, 512 U.S. 1204 (1994).
[10] *Martin v. Gentile*, 849 F.2d 863, 869 (4th Cir. 1988).
[11] *Krueger v. Fuhr*, 991 F.2d 435 (8th Cir.), *cert. denied*, 510 U.S. 946 (1993).
[12] *Deorle v. Rutherford*, 272 F.3d 1272, 1283 (9th Cir. 2001), *cert. denied*, ___ U.S. ___, 122 S. Ct. 2660 (2002); *Ludwig v. Anderson*, 54 F.3d 465, 472 (8th Cir. 1995).

who could be harmed if force is not used;[13] and (9) the availability of weapons, such as pepper spray, batons, or tasers.[14]

Constitutional Aspects: Use and Training

Under constitutional principles, there is a distinction between active resistance and passive resistance. Active resistance is generally defined as threatening an officer;[15] shoving, striking, wrestling with and even biting an officer.[16] In contrast, passive resistance is described by the following suspect actions: (1) remaining seated, refusing to move, and refusing to bear weight;[17] (2) protestors going limp, or persons chaining themselves together and covering their hands with maple syrup to impede the use of handcuffs;[18] (3) protestors employing lock-down devices that immobilize their arms and prevent their separation by police, although the protestors could disengage themselves from the devices.[19] The use of pepper spray upon passive resistors can be found to be excessive and therefore unconstitutional.[20] Likewise, it appears that the use of an electronic control device on a suspect who is merely passively resisting an officer can result in an unconstitutional use of force.[21]

Generally, the use of an electronic control device is constitutionally allowed when a subject is actively resisting the law enforcement officer. In *Draper v. Reynolds,* [22] a deputy sheriff lawfully used an electronic control device to subdue a tractor-trailer driver during a traffic stop. The court said that from the time the driver met the deputy at the back of the truck, the driver was hostile, belligerent, and uncooperative. No less than five times, the deputy asked the driver to retrieve documents from the truck cab, and each time the driver refused to comply. Instead, the driver used profanity, moved around and paced in agitation, and repeatedly yelled at the deputy. On appeal, the *Draper* court said that there was a reasonable need for some use of force in this arrest. Although being struck

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[13] *Dean v. Worcester*, 924 F.2d 364, 368 (1st Cir. 1991)
[14] *See, Tom v. Voida*, 963 F.2d 952, 962 (7th Cir. 1992).
[15] *Draper v. Reynolds*, 369 F.3d 1270, *cert denied*, 125 S. Ct. 507 (U.S. 2004).
[16] *See, Hinton v. City of Elwood*, 997 F.2d 774 (10th Cir. 1993).
[17] *Forrester v. City of San Diego,* 25 F.3d 804, 814 (9th Cir. 1994).
[18] *Amnesty America v. Town of West Hartford,* 361 F.3d 113 (2nd Cir. 2004).
[19] *Headwaters Forest Defense v. County of Humboldt,* 276 F.3d 1125 (9th Cir. 2002).
[20] *See,* 276 F.3d 1125.
[21] *See*, 361 F.3d 113 (2nd Cir. 2004) (use of force on passive protestors consisting of pressing back wrists, throwing and dragging face-down to ground, placing a knee on a neck and ramming a head into a wall required denial of summary judgment for negligent supervision); 276 F.3d 1125 (9th Cir. 2002) (use of pepper spray on passive protestors unconstitutional).
[22] 369 F.3d 1270.

by an electronic control device is an unpleasant experience, the amount of force the deputy used - a single use of the device causing a one-time shocking - was reasonably proportionate to the need for force and did not inflict any serious injury. The deputy's use of the electronic control device did not constitute excessive force, and the deputy did not violate the driver's constitutional rights in this arrest.

In *Hinton v. City of Elwood,*[23] an animal control officer reported that a suspect verbally threatened him. A police officer approached the suspect to speak to him. Thereafter, a struggle between police and the suspect occurred. Eventually, the police used an electronic control device to subdue the suspect. The suspect was taken into custody and charged with various crimes. Thereafter, the suspect filed a lawsuit under 42 U.S.C. § 1983 alleging excessive force. On appeal, the *Hinton* court held that the arresting officers' use of force did not rise to the level of a constitutional violation. Under *Graham*, some of the factors did not justify this use of force. The crime for which the suspect was initially stopped by the police was the misdemeanor of disturbing the peace. The suspect did not constitute any type of immediate threat to the police or the public. There was no showing that he had a weapon or was under the influence of alcohol or drugs. In addition, he was outnumbered by the arresting officers.

However, despite these factors, the third *Graham* factor of resisting arrest supported the officers' use of force as being objectively reasonable. The suspect refused to talk with the police when they requested him to stop, and he shoved the officer after the police told him to calm down and go home. Only after the suspect displayed this level of resistance did the officers make any initial use of force to subdue the suspect. This use of force was preceded by an announcement that the suspect was under arrest and consisted only of police grabbing the suspect to keep him from leaving. After grabbing the suspect the officers increased their application of force. Not only did they wrestle him to the ground but they used an electronic control device on him. However, at this point, the suspect was actively and openly resisting the officers' attempts to handcuff him, even to the extent of biting the officers. The police ceased using the device once the officers had succeeded in handcuffing him. Accordingly, the officers' use of force, even after grabbing the suspect, was not constitutionally excessive and therefore the officers were entitled to qualified immunity (which dismissed the lawsuit).

Inappropriate electronic control device training can result in potential liability for trainers. Generally, the reported training liability cases deal with municipal liability under 42 U.S.C. § 1983. In *Mateyko v. Felix,*[24] the court said

[23] 997 F.2d 774.
[24] 924 F.2d 824 (9th Cir. 1990).

that a municipality can be liable under § 1983 only if its "policy" or "custom" caused a constitutional deprivation. Inadequate training can form the basis for municipal liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact. In the *Mateyko* case, the court noted that police officers received approximately three to four hours of training in the use of electronic control devices and lacked information as to the device's voltage or its precise effect on the human body. However, the court said that these alleged inadequacies in training, without more, do not establish deliberate indifference to the rights of persons with whom the police came in contact. Failure to provide a lengthier training program suggests, at most, negligence on the part of the City in miscalculating the amount of time necessary to adequately prepare its officers. However, the evidence does not show the City knew it was creating an unjustifiable risk to its citizenry and ignoring that risk. The same must be said of the City's failure to inform its officers of the exact voltage of the electronic control device or its precise effect upon the human body. As such, a directed verdict for the City regarding the constitutional claim was upheld by the appellate court.

In *McKenzie v. City of Milpitas,*[25] the court observed that the City's policy included: supplying tasers to officers with limited experience; allowing officers to carry tasers when making investigatory stops; not requiring officers to holster their tasers; allowing officers to resort to the use of tasers immediately after verbal warnings; and, inadequately training officers in the constitutional ramifications and health hazards of using tasers. The City's electronic control device policy was absolutely silent on arrest policy. In the end, the court denied the motions to dismiss the lawsuit filed by the municipality and its police chief. The court said that the plaintiffs must prove that the City failed to train its officers, and that there is a causal connection between this failure and violation of their constitutional rights. Although this is a heavy burden, the plaintiffs are entitled to present their case to a jury.

The Federal Tort Claims Act and Negligence

In a non-deadly force situation, what if an unintentional death results after the use of an electronic control device? Under the Federal Tort Claims Act, federal employees can be sued for negligence while acting within the scope of their office or employment. [26] The elements of negligence are: (1) duty; (2) breach; (3) causation; and (4) injury/damages. A simple example illustrating these elements can be found in the case of *Sheehan v. United States*.[27] In *Sheehan*, a female

[25] 738 F. Supp. 1293 (N.D. Cal. 1990).
[26] 28 U.S.C. §2679(b)(1).
[27] 822 F. Supp. 13 (D.D.C. 1993).

arrestee fell with her arms handcuffed behind her as she was being led by officers up a ramp into the United States Capitol Police headquarters. As a result, she suffered a fracture and other injuries. The *Sheehan* court held that the government was liable for the plaintiff's fall. The court said that the female would not have fallen were it not for the officers' negligence. The officers were in sole control of the situation. It is common sense that officers have a duty to assist persons walking up a ramp whose hands are handcuffed behind their backs to ensure that they do not fall. The officers breached that duty by failing to hold on to her securely to prevent her stumbling and by failing to break her fall.

The tort of negligence can be applied to incidents involving the use of an electronic control device. As previously stated, in *McKenzie v. City of Milpitas,*[28] the court recognized that an electronic control device training program that included three to four hours of training in the use of the device and lacked information as to the device's voltage or its precise effect on the human body could suggest negligence on the part of a City in miscalculating the amount of time necessary to adequately prepare its officers.[29] However, the case law in this area is less than clear.

In a civil lawsuit involving the tort of negligence, a main issue will involve determining the first element known as the "duty of care." What is the legal "duty of care" owed to a potential suspect when devising and implementing an electronic control device training program, and in using the device in the field? Despite the current use of electronic control devices by law enforcement agencies, medical professionals and others are currently debating the safety of the use of these devices by law enforcement. Most importantly, information from medical experts can be used to define the parameters of law enforcement's "duty of care."[30] In September 2005, one highly regarded medical expert, Doctor Fabrice Czarnecki[31],

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[28] 738 F. Supp. 1293 (N.D. Cal. 1990).
[29] 738 F. Supp. 1293 (N.D. Cal. 1990).
[30] *See generally, Johnson v. City of Cincinnati*, 39 F. Supp 2d 1013, 1019-20 (S.D. Ohio 1999) (finding that information existed in the law enforcement community which put officers on notice of the dangers of positional asphyxiation).
[31] Fabrice Czarnecki, MD, MA, MPH, is the Director of Medical-Legal Research with The Gables Group, Inc., a business intelligence and investigative consultancy based in Miami, FL, and the Director of Training of the Center for Homeland Security Studies, a non-profit corporation conducting training in counter-terrorism and intelligence for domestic law enforcement. He previously was an emergency physician of the Ambroise Pare Hospital, Boulogne, France, and currently practices occupational and emergency medicine in Baltimore, MD. Dr. Czarnecki is the Medical Advisor for the American Women's Self Defense Association, and the National Law Enforcement Training Center. He was the Medical Advisor for the American Society for Law Enforcement Training (ASLET), and a member of the editorial board of the "Journal of Security Education".

conducted a presentation at the International Association of Chiefs of Police conference in Miami, Florida. Doctor Czarnecki provided his expert opinion regarding the use of electronic control devices by law enforcement officers.

Some of the important medical recommendations by Doctor Czarnecki included the following: (1) if possible, limit the number of electronic control device exposures (three exposures is probably a reasonable number); (2) identify high-risk subjects: age extremes, pregnancy, and "excited delirium" (a condition often found in drug users); (3) if possible, avoid using such devices on pregnant women, elderly persons and very young persons; (4) train all officers in "excited delirium" recognition and its management; (5) immediately contact Emergency Medical Services if an electronic control device is used on a high-risk subject or if any person is subjected to more than three exposures; and (6) avoid electronic control device exposure during training because employees may have hidden medical conditions that could result in their injury or death. It is also important to note that when an electronic control device is used on a suspect, law enforcement officers can employ a "hands-on" control technique during the apprehension. Despite its effects on the suspect, the device will not physically affect the law enforcement officer.

Conclusion

Law enforcement agencies must initially decide whether to employ electronic control devices as an optional use of force tool. Under constitutional standards, it is fairly clear as to *when* a law enforcement officer can lawfully use an electronic control device. According to current legal precedent, electronic control devices can be constitutionally used in enforcement situations when a suspect is actively resisting an officer. In contrast, definitive medical information is lacking in the area of *how* to use the devices with total safety. This is compounded by the fact that case law is less than clear as to how negligence principles apply to the use of the devices. If electronic control devices are deployed, law enforcement officers must be properly trained under current, generally accepted standards of care before using them. For example, one suggested tactic based on Doctor Czarnecki's recommendations is to use the electronic control device to initially immobilize a suspect, then immediately apply a "hands-on" control technique. Using these techniques in combination can minimize the dangers associated with multiple exposures to the electronic control

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Dr. Czarnecki served as a trainer and a consultant for several local and federal law enforcement agencies and the U.S. Marine Corps. He is a certified instructor in firearms, police defensive tactics, TASER, baton and in the use of deadly force. He co-authored the August 2003 issue of the "Clinics in Occupational and Environmental Medicine" dedicated to law enforcement worker health.

device. Overall, it appears that further litigation will occur in this area, especially when a death follows the use of an electronic control device. To avoid liability based on a claim of negligence, the recommendations set forth by competent medical experts should be incorporated into the development of any electronic control device training program or agency policy.

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ISSN 1935-0007
841 W. Touhy Ave.
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