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Legal Aspects of Training Injuries
Part Two

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As mentioned in Part One, this short article is an overview of the topic, and is not intended to be a comprehensive review of training injury litigation.

Duty to Provide a Safe Workplace

In 1992, the Supreme Court held that the Constitution does not require a public agency to provide a safe workplace for public employees. Justice Stevens wrote, in a rare, unanimous opinion:

> "Neither the text nor the history of the Due Process Clause supports petitioner's claim that the governmental employer's duty to provide its employees with a safe working environment is a substantive component of the Due Process Clause. ....
>
> "In sum, we conclude that the Due Process Clause does not impose an independent federal obligation upon municipalities to provide certain minimal levels of safety and security in the workplace and the city's alleged failure to train or to warn its sanitation department employees was not arbitrary in a constitutional sense." 503 U.S. 115 at 126, 131.

Collins v. City of Harker Heights, #90-1279, 503 U.S. 115 (1992).

A recent example of the holding in Harker Heights is a case where the Seventh Circuit denied recovery to a bailiff that had sued the county after a criminal defendant shot him. The panel wrote:

> "[He] was paid to protect judges and the public from the likes of [his attacker]. To the extent this exposed him to a personal risk he took it willingly, in exchange for pay and fringe benefits. ... Neither the text nor the history of the Due Process Clause supports a claim that the governmental employer's duty to provide its employees with a safe working environment is a substantive component of the Due Process Clause."

Witkowski v. Milwaukee Co., #06-3627, 480 F.3d 511, 2007 U.S. App. Lexis 5761 (7th Cir. 2007).

On the other hand, a federal or state statute can support a damage claim. Common examples of this are sexual harassment claims, where agency officials have tolerated a sexually hostile environment.

In the area of training injuries, a worker would have to allege a violation of a state or federal law and prove that this was the proximate cause of the injury suffered. One such example was mentioned in Part One of this article: Singleton v. City of New York, #9640/06, 2006 NY Slip Op 26412, 13 Misc.3d 117, 827 N.Y.S.2d 535, 2006 N.Y. Misc. Lexis 2928 (2006).

State Created Danger

What if a public entity "creates" the danger, and a death or injury results?

Although the defendants prevailed in the Supreme Court's decision in DeShaney

v. Winnebago Co. Dept. of Social Services, 489 U.S. 189 (1989) proponents of the "state created danger" theory rely on a small part of Chief Justice Rehnquist's opinion:

> "While the State may have been aware of the dangers that [the Petitioner] faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them." [489 U.S. 202]

Since 1989, every circuit has accepted the doctrine except for the Fifth Circuit, and it has not rejected it. An early example of the doctrine is L.W. v. Grubbs, 974 F.2d 119 (9th Cir. 1992).

Oregon prison officials placed a nurse in danger by assigning a violent sex offender inmate to work with her alone in the prison clinic. The panel noted that the nurse was "not seeking to hold Defendants liable for [the inmate's] violent proclivities. Rather, [she] seeks to make Defendants answer for their acts that independently created the opportunity for and facilitated [his] assault on her."

The Supreme Court's decision in City of Harker Heights was not applicable, because the nurse alleged that "the Defendants took affirmative steps to place her at significant risk, and that they knew of the risks."

What if the state created danger is an unsafe training exercise?

Jailers at the Shelby County Jail in Memphis, TN, spent between ten and thirty minutes believing that they were being held hostage by two gunmen that had taken over the jail's second-floor control room.

Unknown to them, their superiors planned a mock takeover as a "training exercise" designed to test the security of the jail.

Other jailers witnessed the events unfolding in the control room and believed the hostage scenario to be real. Two of these jailers called family members, reporting that inmates were going to kill them.

The jailers who were in the control room, along with others subjected to the mock takeover, sued the officers who planned and carried out the exercise, claiming violations of various state and federal laws, including the Fourth Amendment prohibition against unreasonable seizures.

The District Court refused to dismiss the civil action, and the superiors appealed. The Sixth Circuit reversed, noting that the plaintiffs failed to cite any case, statute, rule, regulation, or other authority that would have put the defendants on notice that by conducting a training exercise that interfered with the jailers' freedom of movement, they were unreasonably seizing the jailers.

Although the defendants' actions may have supported a claim of unreasonable seizure, such a claim was not clearly established with respect to the law enforcement training situation. The appellate panel ruled that the defendants were entitled to summary judgment on the basis of qualified immunity.

In no way did the appellate court exonerate jail officials. They said, "We have no difficulty in assuming that defendants' actions violated plaintiffs' Fourth Amendment right to be free from unreasonable seizures." But there was, until this case, no precedent that would have put the supervisors on notice that the training exercise was unlawful.

Humes v. Gilless, #03-5630, 108 Fed. Appx. 266, 2004 U.S. App. Lexis 16599 (6th Cir. 2004) reversing 154 F.Supp.2d 1353 (W.D. Tenn. 2001).

Workers' Compensation: Exclusive Remedy and Exceptions

Generally, a worker's compensation claim is a "no fault" recovery. The employee loses the right to sue the employer for damages, but the defenses of contributory negligence and assumption of risk cannot be raised by management.

Each state is free to fashion exceptions and defenses to compensation claims. If a county sheriff's deputy is injured by a municipal police officer, the deputy can sue the officer and city because there are different employers.

- *Example*: A California municipality and a police officer, who allegedly struck another officer during a baton training exercise, resulting in a disabling injury, were found liable for $2.35 million in damages. The suit claimed there was negligent supervision by the city. Hamilton v. City of Brawley, #84701 (Imperial Co. Super. Ct., 11/24/1997) summarized at 41 ATLA L. Rptr. 94

(April 1998). {N. 1}

If one officer harms another while engaged in "horseplay" during a training session, the agency might escape liability and the errant officer might be exclusively liable. That is because workers' compensation liability and indemnity rights are limited to those acts which arise from the "scope and course" of an employee's duties.

- *Example*: A New York appellate court held that a sheriff's lieutenant was not acting within the scope of his employment when he allegedly injured a deputy sheriff at a defensive tactics training program. He had placed the deputy in a neck restraint, causing him to fall. The lieutenant was not entitled to defense and indemnification by the county that employed them. Riehle v. County of Cattaraugus, #04-01149, 17 A.D.3d 1029, 794 N.Y. Supp.2d 186, 2005 N.Y. App. Div. Lexis 4595 (4th Dept. 2005).

Generally, compensation laws do not prevent an injured employee from suing a manufacturer for product liability, although the compensation fund might have a right to subrogate to the extent of benefits paid and those which are anticipated. Subrogation would reduce the amount the employee might retain, if the claim against the manufacturer is successful. {N. 2}

If the manufacturer alleges that the injury was the result of a poorly designed training session, rather than a product defect, a secondary lawsuit is likely to be filed (known as an impleader or third-party claim).

- *Example*: The estate of a Chicago firefighter, who was killed after jumping into an inflatable "Life Cube" during a training exercise, sued the manufacturer and distributor. The defendants, in turn, were entitled to implead the city. McNamee v. Federated Equipment & Supply v. Chicago, #1-96-1825, 286 Ill. App.3d 806, 677 N.E.2d 8 (1st Dist. 1997). {N. 3}

TASER® Injury Litigation

All less lethal weapons have three problems:

1. They are not always effective, for a variety of reasons; {N. 4}
2. Suspects are sometimes injured;
3. Officers are sometimes injured.

The TASER® has been on the market for many years, but it was not until a change of management that the product was dramatically improved. Now more than a quarter million law enforcement and correctional officers use the device.

Many agencies that used OC insisted that officers get sprayed, so that they could understand the effects of pepper spray. Some of those agencies used the same reasoning when they adopted TASERs and insisted that officers receive an electrical shock. This has resulted in litigation against the manufacturer.

Some of the allegations raised against the manufacturer of the TASER include the following:

1. The failure to properly design and adequately test the device so as to prevent injury to participants; and

2. The concealment of risks and hazards associated with the device; and

3. The failure to provide adequate warnings that participants are exposed to serious injury; and

4. The breach of an implied promise of fitness.

Typical civil actions generally allege either an injury from a fall or a burn on the arm; here are a few examples:

- In November 2003, a Las Vegas Metro officer allegedly "suffered a burn where the TASER® M26's lead was attached" via alligator clips, which "became seriously infected," causing "permanent injury." Lewandowski v. TASER International, #2:06-CV-00146 (D.Nev., filed 2006). The infection was diagnosed as *necrotizing fasciitis.* {N. 5}

- Also in November 2003, another Las Vegas Metro officer allegedly "struck the floor, causing injury to her face, neck and back," resulting in "ongoing and severe pain" in her jaw, back and arms, and "was forced to undergo multiple surgeries and medical procedures." Peterson v. TASER International, #2:06-CV-00145 (D.Nev., filed 2006). {N. 6}

- On December 5, 2003, a third Las Vegas Metro officer allegedly "suffered permanent injuries and damages to his right arm and shoulder." Cook v.

TASER International, #2:04-cv-01325 (Removed to D. Nev. 2004); #A490657, Clark Co. Nev. Dist. Ct. (filed 2004). The case has been dismissed.

- A Worthington, Ohio, police officer, claimed that she "incurred serious and permanent injuries to her body, including ... a right rotator cuff injury with right supraspinatus tear, requiring a right rotator cuff repair and a right shoulder arthroscopy," (while kneeling on a rubber mat and linking arms with officers kneeling down next to her on both sides, between other officers). Stevens v. TASER International, #2:04-CV-1044 (Filed S.D. Ohio 2004). The case was settled (PACER Doc. 34, filed 5/5/2006). {N. 7}

Officers have been inadvertently sprayed with OC by their colleagues, and intentionally sprayed by citizens and suspects. Although unpleasant, they can still move and otherwise react. If shocked with an electronic weapon, they cannot move or react until the charge stops. TASER International does not even require that certified instructors receive a shock.

- ***Trainers are now questioning whether training shocks are useful.*** See Chief Bert DuVernay's article, TASER® Shocks in Training, 7 (1) ILEETA Use of Force Journal 23 (Jan.-Mar. 2007).

Refusal to Participate in Shock Exercises

Whenever a peace officer or firefighter refuses to participate in a training exercise that is perceived as dangerous, management is likely to initiate disciplinary charges for insubordination. Even if the employee is a member of a bargaining unit and management unilaterally adopts the device, the appropriate response is to "obey and grieve." ***An employee risks termination if he or she is not successful in challenging a direct order.*** {N. 8}

If officers are represented by a certified bargaining unit, the union can challenge the procedure, and if unsuccessful, file an Unfair Labor Practice charge with the state's public employee relations board or commission.

Generally, the selection of a lethal or less-lethal weapon is a management prerogative. San Jose POA v. City of San Jose, 144 Cal.Rptr. 638, 78 Cal.3rd 935 (Cal.App. 1978) [a police dept's firearms use and deadly force policy is not a negotiable issue in California].

However, the implementation of a weapons policy is usually a mandatory subject of bargaining, ***especially if safety issues are raised***. Claremont POA v. City of Claremont, #S120546, 39 Cal. 4th 623, 47 Cal.Rptr.3d 69, 2006 Cal. Lexis 9518 (Cal. 2006) [although California public agencies have a unilateral right to establish

policy, management may be required to meet-and-confer with the union over implementation of the policy]. {N. 9}

Individual officers can judicially challenge an unsafe practice by seeking injunctive relief. For example, in a civil action brought by six military members, a federal court issued a preliminary injunction to halt controversial anthrax inoculations. Doe v. Rumsfeld, 297 F.Supp.2d 119 (D.D.C. 2003). The court said:

> "The women and men of our armed forces put their lives on the line every day to preserve and safeguard the freedoms that all Americans cherish and enjoy. Absent an informed consent or presidential waiver, the United States cannot demand that members of the armed forces also serve as guinea pigs for experimental drugs."

Releases & Waivers

A release and/or waiver of liability is generally enforceable if the injured party voluntarily participates in a potentially hazardous activity. {N. 10} One court noted that unless the release or waiver is contrary to public policy, it will be enforced in the absence of fraud, willful or wanton conduct, illegality, or disparity in the bargaining position of the parties. Masciola v. Chicago Metro. Ski Council, 628 N.E.2d 1067, 257 Ill.App.3d 313 (1993).

An employer does not have explain the scope of the release. Devera v. Smithsonian, #20 06-3354, 2007 U.S. App. Lexis 3142 (Fed. Cir. 2007).

A release is just a contractual promise to forbear from initiating a claim. Contracts require either a mutuality of obligation or the offer and acceptance of a significant benefit. A common example is a citizen ride-along waiver. A ***citizen*** is able to directly observe police activity and receives an educational benefit.

It is another matter when an ***employee*** is required to attend a training program and the instructor demands a signed release. For example, the Michigan Employment Relations Commission annulled a management requirement that police officers must sign a liability release form when they submit to an involuntary psychological examination. City of Oak Park and P.O.A. of Mich., 1997 MPER (*LRP*) Lexis 12 (Mich.Emp.Rel.Cmsn.).

Notes:

1. Although the judgment was appealed, there is no published opinion; an order issued 6/5/2000 reads, "Upon written request filed by appellant City of Brawley ...

the appeal of City of Brawley (Brawley Police Department) only is dismissed and the remittitur is ordered to issue immediately ...," Docket #D030285 (Cal. App. 4th Dist. Div 1).

2. "Such city or village may have or claim a lien upon any judgment or fund out of which such representative might be compensated from such third party, for any moneys paid out of such award or allowance previous to such judgment or settlement." Illinois Pension Code and Workers' Compensation Act, 820 ILCS 305/5, Sec. 22-308.

3. The German manufacturer, *Deutsche Schlauchboot*, had placed a German language label on the device warning that it was to be used only to catch jumping or falling persons in emergency rescue situations, and was not to be used for exercise, training, or sport-jumping. The U.S. distributor replaced the German language warning label with a warning, in English, that the product was to be used only in emergency rescue situations.

4. See, Type of Less Lethal Weapon and Level of Success, Tables 4 & 5, in TASER and Less Lethal Weapons: An Exploratory Analysis of Deployments and Effectiveness, C. Mesloh, et al., 5 (5) Law Enforcement Executive Forum 74 (2005) and Injury-Based Use-of-Force Chart (LAPD study), Greg Meyer, excerpts from a Master's thesis (1992).

5. Necrotizing fasciitis or *fasciitis necroticans*, is a gas-forming, fulminating, bacterial infection of the superficial and deep fascia, resulting in thrombosis of the subcutaneous vessels and gangrene of the underlying tissues. This supposedly is the only known incident of an officer suffering necrotizing fasciitis allegedly from a TASER®.

6. Michael Brave, TASER's attorney, stated that the plaintiff was kneeling on a rubber mat and had linked arms with officers that were kneeling down next to her on both sides.

7. See note 6.

8. An arbitrator sustained an 84-hour disciplinary suspension for a corrections officer who refused to fully participate in a training course. Alaska Dept. of Corrections and the Public Safety Employees Assn., 117 LA (*BNA*) 674, Alaska Case #01-C327, PSEA Case #01-01C (Henner,2002).

9. *Also see*, City of Ansonia and IBPO L-457, Case #MPP-14,356, Decis. #2995 (Conn. Lab. Rel. Bd. 1992) [state labor board stayed a directive that officers carry their firearms with the safety in the firing position; the union claimed that the

police chief jeopardized officer safety, without resorting to bargaining]; West St. Paul v. Law Enf. Labor Serv., 466 N.W.2d 27 (Minn. App. 1991) [city must bargain with union before implementing a citizen ride-along program in police vehicles because the plan could affect officer safety]; Twp. of So. Brunswick and P.B.A. L-166, #86-115, 12 NJPER (*LRP*) ¶ 17,138 (N.J. PERC 1986) [a union safety proposal specifying equipment to be maintained in police patrol vehicles was mandatorily negotiable].

10. Another form of release is called a "covenant not to sue."

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