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❖ The Mentally Ill or Deranged

In the first part of this series last month, we addressed some of the issues that arise when law enforcement personnel encounter physically ill individuals in the community. It summarized some of the relevant case law when civil liability might be imposed, and presented some recommendations that could minimize liability.

Law enforcement personnel also encounter individuals suffering from a wide variety of mental illness or derangement. Many such individuals have also either abused illegal or prescription drugs or alcohol, are suffering a variety of intense symptoms from having gone off their necessary medications, or have underlying psychiatric conditions. It is not possible, in the brief span of this one article, to address in detail all of these difficulties. The central focus here, therefore, is on acute psychotic episodes and delirium, a controversial

topic. After surveying the civil liability case law on the topic, this article makes some recommendations and lists useful resources and references.

❖ Acute Psychotic Episodes and Delirium

A term used with increasing frequency is "excited delirium," which has been the subject of some controversy. A University of Miami website states:

> "The presentation of excited delirium occurs with a sudden onset, with symptoms of bizarre and/or aggressive behavior, shouting, paranoia, panic, violence toward others, unexpected physical strength, and hyperthermia. Hyperthermia is a harbinger of death in these cases."

This is illustrated by the case of *Martin v. City of Broadview Heights*, #11-4039, 2013 U.S. App. Lexis 7094, 2013 Fed. App. 0101P (6th Cir.), where police encountered a running naked man who was speaking nonsensically. When they tried to subdue him, he bit an officer and a physical altercation ensued in which an officer fell on top of both the suspect and a fellow officer. One officer folded his legs around the suspect and gripped his chin with his arm, and a third officer kneeled on the suspect's calves. One officer allegedly wrapped his arm around the suspect's neck. Two officers allegedly continued to hold the man face down after he was secured.

The man became unresponsive and paramedics could not revive him. The coroner concluded the death was from an acute psychotic episode with excited delirium due to LSD intoxication and cardiopulmonary arrest. The pathologist who carried out the autopsy noted injuries consistent with asphyxia, and the plaintiffs in an excessive force lawsuit presented an opinion that asphyxia caused the death. The police department had both a use of force policy and a "positional asphyxia" policy warning that those who are acting psychotic due to drugs, alcohol or mental illness can be particularly susceptible to death. Two officers stated that they had not considered that policy. The officers were properly denied qualified immunity.

The man's cause of death was disputed. Dr. Frank Miller, III, the Cuyahoga County Coroner, determined that Martin died from an acute psychotic episode with excited delirium due to intoxication by lysergic acid diethylamide (commonly known as LSD or acid) and cardiopulmonary arrest. Dr. Miller concluded the death did not result from the force applied to the decedent.

In a growing number of cases, excited delirium has been listed by medical examiners as a cause of death. Excited delirium is a syndrome, however, so it really cannot cause a death. It is associated with deaths.

Some activist groups have attempted to claim that this diagnosis is "made up" and serves to excuse and exonerate the excessive use of force against such individuals. But excited delirium has been officially recognized by the American College of Emergency Physicians as a unique syndrome, rejecting the argument that it is invented or is a means of covering up the role excessive use of force by law enforcement allegedly plays in such in-custody deaths. There are also several peer-reviewed medical papers that confirm its existence.

In a number of cases, officers have used Tasers in an attempt to control individuals who often attack them or others while undergoing acute psychotic episodes. Frequently, such use of force, particularly multiple uses of a Taser in the stun mode in an attempt to gain compliance through the infliction of pain, is unavailing since some individuals in this condition seemingly act as though they are impervious to pain, and simply continue their attack until physically restrained with handcuffs and/or shackles, and sometimes even then continue to attempt to kick, bite, etc.

In *Davidson v. City of Statesville*, #5:10-cv-00182, 2012 U.S. Dist. Lexis 58303 (W.D.N.C.), a lawsuit was brought over the death of an arrestee being processed into a county jail who was subjected to multiple uses of a Taser in both dart mode and stun mode. The arrestee passively resisted by refusing to walk or support his own weight, and then attempted to run down a hallway, and it was disputed whether his resistance further escalated. Once restrained, he was sent to a hospital for medical clearance before being admitted to the facility. At the hospital, he was breathing, but unresponsive, and died thirty hours later.

The cause of death was determined to be complications from excited delirium. State law claims of gross negligence and trespass by an officer survived summary judgment, while direct claims under the North Carolina state Constitution were ruled inapplicable in light of other state remedies. Claims were also made against the county sheriff, in his official capacity, and the city, for failing to adequately train officers to handle mentally ill arrestees and in the proper use of Tasers, as well as in handling persons diagnosed with "excited delirium." There was no evidence of inadequate training or that departmental norms deviated from policies prohibiting the use of a Taser on a handcuffed prisoner in the

absence of assaultive behavior. Summary judgment was granted to the sheriff and the city.

In another case, on arrival at a jail, a detainee refused to cooperate and had to be pulled from the police vehicle. After his handcuffs were removed, he swung his arms, attempting to bite and kick officers -- successfully biting one of them. The Taser was used in stun mode against the detainee's left leg, with no apparent effect. The detainee kicked an officer in the chin, and the Taser was used again in the stun mode on his lower back, and a third time to the back of his leg as the detainee continued to resist. An officer subdued him by placing a knee in his back, and again handcuffed him. He vomited, became unresponsive, and stopped breathing. He died of cardiac arrest.

An autopsy determined that the cause of death was acute drug intoxication from ethanol and methamphetamines during a drug-induced delirium. He also had alcohol and marijuana in his system. A plaintiff's expert claimed that he may have died from compression of either his neck or back. The trial court found that a federal civil rights wrongful death claim, as well as municipal liability inadequate training claims, were not supported by the evidence. Qualified immunity was available to the officer who used the Taser on the detainee, since it was used only after he had repeatedly attacked, bitten and resisted officers who were attempting to get him in the shower to wash off his pepper-sprayed face.

A federal appeals court found that there was insufficient evidence to support the strangulation theory put forward by the plaintiff's expert, since only the expert's conclusory opinion supported it. That opinion was contradicted by other evidence, including the testimony of all the officers and two EMTs. *Burdine v. Sandusky County, Ohio*, #12-3672, 2013 U.S. App. Lexis 7691, 2013 Fed. App. 376N, 2013 WL 1606906 (Unpub. 6th Cir.).

Similarly, in *Lee v. Metro. Gov't of Nashville/Davidson Co.*, 432 Fed. Appx. 435, 2011 U.S. App. Lexis 14872, 2011 Fed. App. 0493N (Unpub.6th Cir.), cert. denied, #11-558, 132 S. Ct. 1135, 2012 U.S. Lexis 816, police used a Taser a total of nine times in both dart and stun mode on a man who refused to leave a concert and engaged in strange behavior. The man ran from police and removed all his clothes and several applications of the Taser appeared to have no effect. He continued to resist being handcuffed. As he was being held while the officers waited for an ambulance, he allegedly succumbed to excited delirium and died. The autopsy revealed the presence of drugs in his system.

The plaintiffs claimed that he died as a result of metabolic acidosis, while their medical expert witness claimed that death could have resulted from muscle contractions caused by the application of the Taser, together with a lack of oxygen caused by one officer applying weight on his chest. The court found that none of the officers used excessive force.

In Marquez v. City of Phoenix, #10-17156, 693 F.3d 1167 (9th Cir. 2012), police officers were not liable for the death of a combative suspect after they repeatedly used a Taser first in the dart mode and then in the stun mode. The officers broke into a small barricaded bedroom where a man, having injured a naked woman, was attempting to perform an exorcism on a three-year-old girl. They found the walls smeared with blood and the man with his hands around the child's neck in a choke hold.

The suspect refused to stop what he was doing and kicked at an officer, after which the Taser was deployed. Neither the dart mode nor the stun mode appeared to have much effect on the man. The officers pulled the Taser X26's trigger a combined 22 times, but the discharges were not the uniform five-second cycle associated with the weapon. It was unclear how long the X26 was in contact with the man while discharging. They then wrestled him until he was subdued, after which he had no pulse. He never recovered.

An autopsy found that the cause of the man's death was excited delirium with "hypertensive/atherosclerotic cardiovascular disease" as a contributing condition. The officers' repeated use of the Taser was reasonable, given that the man was suspected of serious crimes, was a potential threat to them and a child, and was resisting arrest.

In response to growing controversy over the role that Taser use allegedly played in such deaths, and additional research on these particular types of encounters, the manufacturer issued Taser International Training Bulletin 15.0 (Oct. 2009), which says in part:

> "2. When dealing with exhausted individuals or persons exhibiting symptoms of distress or agitated/excited delirium:"
>
> > "a. Once officers engage in capture procedures, it is important to minimize the duration of the physical struggle. New research shows that physical struggle, simulated by punching a heavy bag at full intensity, can cause acidosis that can reach dangerous levels in only 45 seconds of intense exertion, starting from a resting state. Accordingly, officers engaging

subjects in a physical struggle or in an exhaustive state should minimize the duration of struggle and the adverse physiological effects. The physiological effects of a TASER ECD discharge of up to 15 seconds were significantly less than that of either fleeing (simulated with a sprint) or fighting (simulated with the heavy bag). This research shows that the TASER ECD, as part of an overall capture plan, is a viable option to help minimize the duration of the struggle."

"b. When encountering subjects exhibiting symptoms of exhaustion, distress or agitated/excited delirium, refer to your agency's guidelines for proper response. These subjects are at significant risk of arrest-related death. Immediate medical attention may reduce this risk."

"3. The primary risk of serious injury or death during ECD deployment is risk related to falls. Users should be reminded to avoid deploying ECDs on persons on elevated platforms or other places where a fall can be more injurious."

When officers use more force than is warranted against an individual who does not pose a serious safety threat at the time, qualified immunity will be denied, and civil liability for injury or death is a real possibility. In *Tucker v. Las Vegas Metro. Police Dep't*, #09-17141, 470 Fed. Appx. 627, 2012 U.S. App. Lexis 4341 (Unpub. 9th Cir.), police responded to a call from a man's roommate complaining that he was behaving erratically. A federal appeals court ruled that the force used in handcuffing him during an altercation with two police officers was reasonable, given his violent resistance.

A jury could, however, conclude that the officers used excessive force in using a Taser in the stun mode against him as well as body pressure to restrain him after he was handcuffed and face down on a bed. He subsequently died. A medical examiner found that he died from cardiac arrest during restraint procedures, and had drugs in his system. A coroner's inquest jury found that the death was excusable and that the use of the Taser did not cause the death. While the officers claimed that he continued to threaten their safety even after he was handcuffed, there were discrepancies and omissions in their varying accounts of the incident.

The officers were not, therefore, entitled to qualified immunity on the use of force against the decedent after he was handcuffed. "[E]xisting law recognized a Fourth Amendment

violation where two officers use their body pressure to restrain a delirious, prone, and handcuffed individual who poses no serious safety threat."

In subsequent decisions in the case, the trial court rejected a motion to dismiss claims against the sheriff as a policymaker arising out of the use of the Taser. "In this case, in view of the state of the law regarding the use of force on a handcuffed or restrained individual, and the existence of issues of fact regarding the degree of [the decedent's] resistance, threat to the officers, and mental state, the court cannot say that, as a matter of law, the officers' use of the Taser on [him] after his handcuffing, nor [the sheriff's] liability as a policy maker with respect to that use, was reasonable." *Tucker v. Las Vegas Metro. Police Dep't*, #2:05-cv-01216, 2012 U.S. Dist. Lexis 155329 (D. Nev.). It also rejected an argument that the officers were entitled to qualified immunity for the use of the Taser after the decedent was handcuffed. *Tucker v. Las Vegas Metro. Police Dep't*, #2:05-cv-01216, 2012 U.S. Dist. Lexis 157557 (D. Nev.).

In a case that led to a settlement for an undisclosed amount, *Quyen Dang v. City of Garden Grove*, #8:10-cv-00338, 2011 U.S. Dist. Lexis 85949 (C.D. Cal.), officers responded to a call to investigate a person with a possible mental impairment. Although the man was compliant and non-threatening, an officer tried to handcuff him. Having trouble placing him in handcuffs, the officer made the decision to Taser him in the right leg. The man dropped swiftly to the floor as soon as the Taser was deployed. Paramedics were summoned, but he was beyond medical help by the time they arrived. He died shortly thereafter.

In the subsequent litigation, the judge noted that the deceased appeared -- at least to the officer -- to be under the influence of a central nervous system stimulant that subjected him to increased risk of cardiac arrest upon application of a Taser. This vulnerability made the office's decision to use the Taser "even more problematic." A reasonable jury could conclude that the officer violated the deceased's constitutional rights. "This factor weighs heavily against the entrance of summary judgment in Defendants' favor."

The Court noted that although the Ninth Circuit has refused to create two tracks of excessive force analyses -- one for the mentally ill and one for serious criminals -- the appellate court has repeatedly emphasized that a suspect's evident mental illness typically diminishes the government's interest in using significant force, given that swift force employed against an emotionally distraught individual often serves only to exacerbate, rather than defuse, a potentially dangerous situation. The officer had testified that, as a

result of his training, he understood that people under the influence of a nervous system stimulant face a higher risk of sudden death due to the application of a Taser. Thus, a reasonable jury could conclude that the officer's decision to Taser the deceased, in spite of this known risk, evinced a deliberate indifference to the deceased's well-being.

More cases on this topic can be found on the AELE website case digest topic of Excited Delirium and on the Electronic Control Weapons portal on the AELE website, retrievable under the keywords "delirium" and "mental."

❖ Other Mental Health Issues

While this article has focused on the narrow, but perhaps most important, subset of encounters with mentally ill persons, those who are undergoing acute psychotic episodes or are deranged, there are many other types of mental problems, disabilities, substance abuse, and illnesses that are also important, each having their own unique characteristics, and in some cases, difficult to distinguish from those undergoing an acute psychotic episode.

These include autism (a developmental disability, not a mental illness); alcohol withdrawal; dementia; diabetes (a physical disease which can manifest itself in extreme instances in perceptual difficulties and cause erratic behavior and cognitive disconnects); energy drinks; epilepsy (also a physical disease manifesting itself in seizures in which the person lacks control of their behavior); synthetic drugs; hyponatremia (water intoxication); and bi-polar disorder. All of these topics can produce behavioral cues that are similar to excited delirium.

In a prior article, Police Interactions With Autistic Persons, 2009 (7) AELE Mo. L. J. 101, we have addressed the issue of encounters with autistic persons and set forth some recommendations that should prove helpful in making those encounters end in more desirable results. Future articles may address one or more of these additional topics in more depth.

❖ Recommendations

If an officer recognizes that he is dealing with a person undergoing an acute psychotic episode and/or delirium, he or she should:

1. Regard what is occurring as a medical emergency, with an important goal being transporting the person to a medical facility and/or attempting to get EMS to the location quickly.
2. Call for backup. It will become vital to try to control the person, so they don't harm themselves or others, and so they can be transported. A degree of force will almost certainly be needed to accomplish this.
3. If possible, turn off sirens, flashing lights, and headlights at the scene; such things will only increase the person's hyper state and make them more agitated.
4. Recognize that the person may be experiencing bizarre hallucinations that seem real to them. Anticipate that they may act suddenly, seemingly irrationally, and that reasoning with them will not ordinarily work.
5. It is best, if possible, to take the person to the ground and then restrain them in handcuffs. Roll them on their side after this is done to promote them breathing adequately.
6. Attempt to control the person's legs without resorting to hog-tying. A hobble restraint strap on the ankles can be helpful, and after it is fastened, an officer can step on it, effectively helping to keep the person down without putting smothering force directly on them.
7. Use of a Taser in the stun mode may be unavailing as if the person is experiencing delirium**;** they may be essentially immune to pain. If a Taser is used in the dart mode, it is to be used once to create a period of opportunity to attempt restraint.
8. Avoid, if at all possible, anything that interferes with the person fully breathing.

These recommendations were adapted from an excellent article by Charles Remsberg appearing on PoliceOne.com, the entirety of which is recommended reading.

- This article was reviewed by John G. Peters, Jr., Ph.D., President of the Institute for the Prevention of In-Custody Deaths, Inc.

❖ Resources

The following are some useful resources related to the subject of this article.

- Excited Delirium. AELE Case Summaries.
- Excited Delirium. Wikipedia article.

- Excited delirium education, research and information website
- IACP Model Policy Dealing with the Mentally Ill (04/1997)
- IACP Training Key 487. Dealing with the Mentally Ill
- IACP Training Key 642. Munchausen Syndrome and Munchausen by Proxy
- The Institute For Prevention of In-Custody Deaths IPICD, Inc.
- Marathon County (WI) Coordinated Plan for Excited Delirium Patients.
- Portage County (WI) Coordinated Plan for Excited Delirium Patients.

❖ **Prior Relevant Monthly Law Journal Articles**

- Police Interactions With Autistic Persons, 2009 (7) AELE Mo. L. J. 101
- Public Protection: Witnesses, 2009 (4) AELE Mo. L. J. 101.
- Public Protection: Informants, 2009 (5) AELE Mo. L. J. 101.
- Public Protection: Injured Crime and Accident Victims, 2009 (8) AELE Mo. L. J. 101.
- Public Protection: Intoxicated Persons, Part 1, 2013 (3) AELE Mo. L. J. 101.
- Public Protection: Intoxicated Persons, Part 2, 2013 (4) AELE Mo. L. J. 101.
- Public Protection: Arrestees**,** 2011 (2) AELE Mo. L. J. 101.
- Disturbed/Suicidal Persons -- Part One, 2012 (2) AELE Mo. L. J. 101.
- Disturbed/Suicidal Persons -- Part Two, 2012 (3) AELE Mo. L. J. 101.

❖ **References**

- Recognizing and Responding to a Diabetic Emergency, by John G. Peters, Jr., Ph.D., CLS, Police and Security News, May/June 2012, Vol. 28, Issue 3.
- Excited Delirium, Restraints, and Unexpected Death: A Review of Pathogenesis, by Mohammad Otahbachi, MD; Cihan Cevik, MD; Satish Bagdure, MPH, MBBS; Kenneth Nugent, MD, *The American Journal of Forensic Medicine and Pathology*, Lippincott, Williams & Wilkins. (February 25, 2010.).
- Deaths in custody: are some due to electronic control devices (including TASER devices) or excited delirium? J Forensic Leg Med 17 (1): 1–7. (January 2010.
- ACEP Recognizes Excited Delirium as Unique Syndrome**,** by Lisa Hoffman**,** Emergency Medicine News 31 (11): 4 (November 2009).

- Report of the Nova Scotia Panel of Mental Health and Medical Experts Review of Excited Delirium (June 30, 2009).
- Americans with Disabilities Amendments Act: What It Means for Law Enforcement Agencies, (Jan. 2009).
- The Thomas Theorem: Frontline Response to Excited Delirium, by Chris Lawrence (September 3, 2008).
- Impact of conducted electrical weapons in a mentally ill population: a brief report, by Jeffrey D. Ho MD, Donald M. Dawes MD, Mark A. Johnson BS, Erik J. Lundin, and James R. Miner MD, The American Journal of Emergency Medicine, Volume 25, Issue 7, September 2007, pages 780-785.
- Is Excited Delirium a Fake Condition Invented to Whitewash Abusive Force? A Critical Look at NPR's Recent Reports, Force Science News #67, March 9, 2007.
- Criminal Justice: Arrest for Seizure-Related Behavior, Epilepsy Foundation (2007).
- Behind the headlines about excited delirium; what cops & EMS need to know, PoliceOne.com, Charles Remsberg. December 14. 2006)
- Do's and don'ts of handling "excited delirium" suspects: Part 1 -- Special ILEETA Conference series. PoliceOne.com. Charles Remsberg (April 31, 2006).
- Do's and don'ts of handling "excited delirium" suspects: Part 2 -- Special ILEETA Conference series. PoliceOne.com. Charles Remsberg. (April 31, 2006).
- What other medical emergencies can look like excited delirium? by Chris Lawrence, PoliceOne.Com.
- Title II of the Americans with Disabilities Act: The Potential for Police Liability and Ways to Avoid It, The Police Chief (September 2006).
- Sudden Death, "Excited" Delirium, and Issues of Force: Part II - Electronic Control Devices, by John G. Peters, Jr., Police & Security News, (May-Jun. 2006).
- People with disabilities such as epilepsy "are frequently inappropriately arrested and jailed because police officers have not received proper training in the recognition of and aid of seizures." H.R. Rep. No. 100-485, pt. III (1990) reprinted at 1990 U.S.C.C.A.N. 445.

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- The purpose of this publication is to provide short articles to acquaint the reader with selected case law on a topic. Articles are typically six to ten pages long. Because of the brevity, the discussion cannot cover every aspect of a subject.
- The law sometimes differs between federal circuits, between states, and sometimes between appellate districts in the same state. AELE Law Journal articles should not be considered as "legal advice." Lawyers often disagree as to the meaning of a case or its application to a set of facts.

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