

ELECTRONIC CONTROL WEAPON LIABILITY



Eric P. Daigle, Esq.

Daigle Law Group, LLC

Work: (860) 270-0060

Eric.Daigle@DaigleLawGroup.com

Use of Force must be objectively reasonable

Courts Consider Three Specific Factors: Graham v. Conner

- 1. How Serious was the offense that the officer suspected at the time that the officer used force. The more serious the offense, the greater the need for apprehension, thus, the greater level of force that may be used.
- 2. Did the suspect pose a threat to the officer or any other person present,
- 3. Was the suspect actively resisting or attempting to evade arrest by flight.

History of Taser Cases

- **Beaver v. The City of Federal Way**,
507 F.Supp.2d 1137(W.D.Wash. 2007); (Qualified Immunity upheld by 301 Fed.Appx. 704 (9th 2008))
 - **Active v. Passive resistance**
- **Parker v. Gerrish**,
 - 547 F.3d 1 (1st Cir., 2008)
 - **Cuffing could have been done without the need for a Taser and it was simply a question of timing**
- **Heston v. City of Salinas**
 - Jury Trial (2008) – (2009 U.S. Dist. Lexis 10096)
 - **Training Bulletin 15.0**
- **Bryan v. McPherson**
 - 608 F.3d 614, 629 (9th Cir. 2010) **Intermediate Weapon**
- **Mattos v. Agarano**
 - 2010 WL 92478 (9th Cir. (Hawaii) **Strong Governmental Interest**

Beaver v. Federal Way

- In 2007, the United States District Court for the Western District of Washington at Seattle issued an opinion in their analysis of a summary judgment motion in the case of Beaver v. The City of Federal Way.
- In Beaver, the issues clearly presented is at what point, if any, do multiple Taser applications against a suspect constitute excessive force.

Beaver

- After being “Tased” five times during the course of an arrest for a residential burglary, the plaintiff, Mr. Beaver, sued the defendants under 42 U.S.C. Section 1983 claiming that Officer Laird had used excessive force in making the arrest.
- In August 2004, Mr. Beaver had been smoking crack cocaine, marijuana and drinking alcohol.
- A federal way Police Officer Douglas Laird was dispatched to investigate the report of a residential burglary.

Beaver

TASER DISCHARGE REPORT

- Application 1: 13:24:32
- Application 2: 13:24:53
- Application 3: 13:25:00
- Application 4: 13:25:15
- Application 5: 13:25:42

Beaver

- In conducting its analysis, the Beaver court determined that the use of TASER did constitute a significant force.
- The court recognized that while the advent of the TASER has undeniably provided law enforcement officers with a useful tool to subdue suspects with minimal risk of harm to the suspect or the officer, it is equally undeniable that being “tased” is a painful experience.

Beaver

- Conducted a Graham Analysis
 - **Severity of the Crime**
 - No violent burglary
 - **Immediate Threat of Safety**
 - No threats or visible weapons
 - **Actively resisting or attempting to evade arrest**
 - First three tasings justified- before backup officer
 - Fourth and Fifth were **not objectively Reasonable**

Beaver

- **The court concluded by stating that as far as it was concerned, the following issues are now clearly established.**
- First, the use of a taser involves the application of force.
- Second, each application of a taser involves an additional use of force.
- Third, multiple applications of a taser cannot be justified solely on the grounds that a suspect fails to comply with a command, absent other indications that the suspect is about to flee or poses an immediate threat to an officer.

Beaver

- The court found that this is particularly true when more than one officer is present to assist and control a situation.
- Fourth and finally, the court concluded that any decision to apply multiple applications of a Taser must take into consideration whether a suspect is capable of complying with the officers' commands.

Parker v. Gerrish

- First Circuit Court of Appeals, November 2008
- A jury found in favor of plaintiff, Stephen Parker, on his claim that defendant, Officer Kevin Gerrish of the South Portland Police Department, violated his constitutional rights by using his Taser during the course of arresting Parker for operating a motor vehicle while under the influence of alcohol.
- The jury awarded \$ 111,000 to Parker, who complained that the use of the Taser and subsequent cuffing caused nerve damage to his arm and injured his shoulder.
- Gerrish disputes the finding of excessive force, argues that he is entitled to qualified immunity

Parker

- Gerrish testified that once the first cuff was on he saw a struggle between the cuffing officer and Parker. Gerrish did admit that he couldn't really see what was happening because his view was partially blocked.
- Cuffing officer testified that Parker tried to pull his hands free after the first cuff was applied, but he never let go of Parkers hand and felt that he could have finished the cuffing without the Taser being employed. Important

Parker

- The first Circuit court said that a reasonable jury could have believed that the cuffing could have been done without the need for a Taser and it was simply a question of timing, that Gerrish should have waited a few seconds before using the Taser and if he had Parker would have been arrested without injury.

Bryan v. McPherson

Ninth Cir. 2009

- Officer Brian McPherson deployed his taser against Carl Bryan during a traffic stop for a seatbelt infraction.
- Appellate Court- June 18, 2010 for the purposes of summary judgment, that Officer MacPherson used unconstitutionally excessive force. However, a reasonable officer confronting the circumstances faced by Officer MacPherson on July 24, 2005, could have made a reasonable mistake of law in believing the use of the taser was reasonable.

Bryan v. MacPherson, 608 F.3d 614, 629 (9th Cir. 2010)

Bryan

- We, along with our sister circuits, have held that tasers and stun guns fall into the category of **non-lethal force**.
- We therefore conclude that tasers like the X26 constitute an **"intermediate or medium, though not insignificant, quantum of force,"**
- We hold only that the X26 and similar devices constitute an **intermediate**, significant level of force that must be justified by **"a strong government interest [that] compels the employment of such force."**

Bryan

- Even if Bryan had taken a single step toward Officer McPherson, this would not have rendered him an immediate threat justifying an intermediate level of force, as he still would have been roughly nineteen to twenty-four feet away from Officer McPherson, by the officer's own estimate.

Bryan

- We thus conclude that the intermediate level of force employed by Officer McPherson against Bryan was excessive in light of the governmental interests at stake.
- Bryan never attempted to flee. He was clearly unarmed and was standing, without advancing in any direction, next to his vehicle.

Bryan

- Consequently, the objective facts reveal a tense, but static, situation with Officer McPherson ready to respond to any developments while awaiting back-up. Bryan was neither a flight risk, a dangerous felon, nor an immediate threat. Therefore, there was simply "no immediate need to subdue [Bryan]" before Officer McPherson's fellow officers arrived or less-invasive means were attempted.

Bryan

- Based on these recent statements regarding the use of tasers, and the dearth of prior authority, we must conclude that a reasonable officer in Officer MacPherson's position could have made a reasonable mistake of law regarding the constitutionality of the taser use in the circumstances Officer MacPherson confronted in July 2005. Accordingly, Officer MacPherson is entitled to qualified immunity.

Interpretation

- **Mattos v. Agarano,**
 - 590 F.3d 1082 (9th Cir. 2010) (Hawaii)
 - Use of a Taser in stun mode on a domestic violence victim while attempting to arrest her husband did not amount to excessive force.
- **Brooks v. City of Seattle,**
 - 599 F.3d 1018 (9th Cir. 2010) (Wash.)
 - Use of a Taser in stun mode on a pregnant driver who resisted arrest for failure to sign a traffic ticket did not amount to excessive force.
 - Accepted for *en banc* review (pending).

Interpretation

- **Marella v. City of Bakersfield**

- 2010 WL 3386465 (E.D.Cal.) (Aug 2010)
- Qualified Immunity – Hot pursuit of a person suspected of a violent felony- suspected armed – reasonable mistake.

- **Garcia v. City of Imperial**

- 2010 WL 3834020 (S.D.Cal.) (Sept. 2010)
- Less intrusive alternatives
- Lack of adequate warning

Training Bulletin 15.0

- The confusion that was caused by Bulletin 15.0 comes from the distinction and confusion between product liability law and law enforcement use of force liability best described by the background of the Heston case.
- The action, Heston v. The City of Salinas detailed a long litigation history stemming from a February 2005 incident in which City of Salinas police officers utilized multiple Tasers with 20 - 23 discharges against Robert Heston, Jr in about 70 seconds.

Heston Case

- The case was tried to a jury and on June 6, 2008, the jury returned a verdict finding that police officers did not use excessive force when they deployed their Taser
- That defendant Taser's failure to warn of the risk associated with a prolonged deployment was a substantial factor in causing the police officers to administer a prolonged deployment; and that as a consequence of the prolonged deployment, Robert C. Heston suffered acidosis to a degree which caused him to have a cardiac arrest, leading to his death."

Training Bulletin 15.0

- “Should Sudden Cardiac Arrest occur in a scenario involving a TASER discharge to the chest area – it would place the law enforcement agency, the officer, and TASER International in the difficult situation of trying to ascertain what role, if any, the TASER ECD could have played in a unique situation that cannot be replicated in human clinical safety evaluations.”

Training Bulletin 15.0

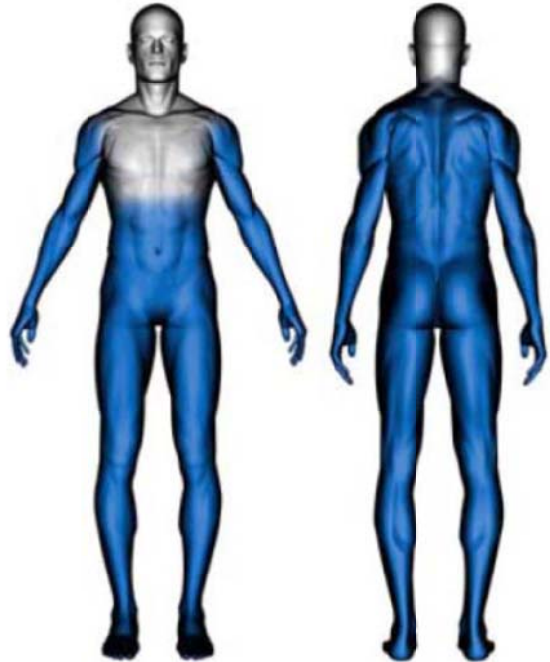
- “In order **to reduce the risk of such an event**, and in light of the fact that frontal applications of TASER ECDs have been found to be more effective when the probes are targeted at the lower torso (engaging the balancing muscles of the pelvic triangle) **we have lowered the recommended point of aim from the center of mass to the lower center of mass for frontal discharges.**”

Training Bulletin 15.0

- We believe this recommendation will improve the effective use of TASER ECDs while also further increasing safety margins and enhancing the ability to defend such cases in post event legal proceedings.” (emphasis added)

Training Bulletin 15.0

- Note, we have lowered the recommended point of aim from center of mass to lower-center of mass for front shots.
- The blue highlighted area in the adjacent target man represents the preferred target area.



Policy Application

- TASER'S September 30, 2009 "ECD Warnings, Instructions, and Information: Law Enforcement,"
- Identifies two areas of concern which must be included in your agency's policies and training: higher risk populations and physiologically or metabolically compromised persons. "ECD use on pregnant, infirmed, elderly, small child, or low Body Mass Index (BMI) persons could increase the risk of death or serious injury. ECD use has not been scientifically tested on these populations,"

Training Bulletin 15.0

- We are recommending that agencies do the following:
 - Conduct retraining in the new reduced targeting area, to include actual discharge of the device at an appropriate target. Updated TASER Training V17
 - Review your Use of Force Policy to insure that it addresses the frontal deployment of the device.
 - Follow the manufacturers recommendations with regard to targeting areas, as they are on the front line with regard to liability concerns.
 - Insure that your instructors are current on the manufacturers latest updates on training issues.

Legal Conclusions

- It is mandated that officers should be aware of the **active versus passive resistance** analysis under the Graham standards that are being applied.
- Officers must make fact based decisions in difficult and tense situations to support a claim of active resistance.
 - **Every trigger pull must justified as a separate use of force**
 - **Officers need to take into consideration secondary injuries**
 - **Is the suspect capable of complying with commands**

Legal Conclusion

- Analysis of Taser application cases shows a trend among officers relying on the Taser device in place of physical contact to apprehend and handcuff a suspect.
 - Give warning “if feasible.”
 - Over reliance on the Taser weapon –
 - Version 16
 - Use scenario based training.
 - Proper policy and enforcement of the policy

The End.....