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**Use of an Electronic Control Weapon (ECW) on  
a Person Suffering from  
Delirium or Other Agitated Condition  
Part 1**

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❖ **Introduction**

This two-part article focuses on litigation involving the use of Tasers on persons suffering from “excited delirium” or other agitated conditions – including cases involving a death, a non-fatal injury, or taking place in a correctional setting.

The second part of this article (next month) offers suggestions for policies and practices plus a listing of relevant resources and references on the subject.

❖ **What is “Excited Delirium”?**

Excited delirium (ED) is a medical condition that can manifest itself as a combination of anxiety, disorientation, elevated body temperature, delirium, psychomotor agitation, speech disturbances, superhuman strength, disorientation, hallucinations, insensitivity to pain, and violent and bizarre behavior. It may result in sudden death, often through respiratory or cardiac arrest. Individuals exhibiting these symptoms often resist, sometimes violently, attempts to subdue or restrain them. Because of their strength and insensitivity to

pain, they may not be stopped by even repeated applications of an electronic control weapon (ECW) such as a Taser if it is not optimally deployed (i.e., good contact with sufficient probe spread).

It often occurs in persons, especially males, with chronic drug abuse or serious mental illness in their history. Drug abuse can involve stimulants such as PCP, methamphetamine, or cocaine. The pre-existence of a medical or psychiatric condition, including a psychotic illness, delirium with or without the use of psychostimulant drugs, or a pre-existing cardiac condition can increase the risk of sudden death occurring in a person exhibiting symptoms and signs consistent with excited delirium.

Persons with excited delirium, once restrained, require immediate medical attention to prevent death or serious injury. A variety of other medical conditions may exhibit symptoms resembling excited delirium, including hyperthermia, diabetes, delirium tremens, hyperthyroidism, head injury, or panic attacks.

- While law enforcement and corrections officers should be educated in ED, they are not trained or expected to diagnose a person's medical condition.

There has been controversy over the use of the term excited delirium, by critics of ECW use, suggesting that it is not fully recognized, and not currently listed as such in the current edition of the [\*Diagnostic and Statistical Manual of Mental Disorders\*](#). They argue that the term is being used to cast off blame for deaths that use of Tasers by police to restrain subjects caused or contributed to.

However, both the [National Association of Medical Examiners](#) and the [American College of Emergency Physicians](#) have accepted the term, as have a good number of courts adjudicating cases involving deaths in which Tasers were used. A [white paper](#) published in 2009 by the American College of Emergency Physicians put forward the position that excited delirium is essentially already described by several codes for existing disorders within the [International Classification of Diseases](#) (ICD) maintained by the UN's World Health Organization, which is the international standard diagnostic tool for epidemiology, health management, and clinical purposes.

- The [Institute for the Prevention of In Custody Deaths](#) has partnered with local agencies to offer courses that educate excited delirium instructors.

### ❖ Cases Involving Death

A number of reported cases of the use of a Taser—whether in the dart mode, the stun mode, or some combination of the two—involving persons said to be suffering from excited delirium or other highly agitated states have resulted in death. Some plaintiffs have argued

that the use of the Taser has either caused or contributed to causing the deaths. A small number of such cases have led to liability awards, either through judgment or settlements, particularly in cases in which the Taser was activated repeatedly, sometimes appearing to have little or no effect on the agitated subject, who may keep coming at an officer, actively resisting attempts to subdue them, ignoring electrical shocks and pain that would stop a normal person in their tracks.

### ***Cases finding actual or potential liability***

In [\*Salinas v. City of San Jose\*](#), #5:09-cv-04410, 2011 U.S. Dist. Lexis 46773 (N.D. Cal.), police responding to a reported disturbance at a motel used a Taser Model X26 in the dart mode repeatedly against a man, who they claimed was noncompliant, and he subsequently died. The officer's visual observations justified their attempts to detain the man, whom they believed to be involved in an act of domestic violence.

The plaintiffs claimed, however, that the Taser was only used against him after he was subdued and handcuffed, so there were genuine issues of fact as to whether the force used was excessive. Among other claims, the decedent's family argued that the Taser manufacturer failed to adequately warn that repeated applications of an ECW could cause serious injury or death, and that it expressly warranted that it would not do so.

In a subsequent decision, the trial court granted Taser International's motion for summary judgment on all claims against it, including those based on negligence and express warranty. The court found that the warnings provided by Taser were adequate to warn that the use of a Taser may be unsafe for persons with certain physical conditions, stating that "conditions such as excited delirium, severe exhaustion, drug intoxication or chronic drug abuse, and/or exertion from physical struggle may result in serious injury or death."

The warnings further stated that "[i]n some circumstances in susceptible people, it is conceivable that the stress and exertion of extensive, repeated, prolonged, or continuous application(s) of the Taser device may contribute to cumulative exhaustion, stress and associated medical risk(s)."

Additionally, the court noted, entire sections of these warnings are dedicated to discussing "Sudden In-Custody Death Syndrome Awareness" and cautions officers to combine the use of a Taser device "with immediate physical restraint techniques and medical assistance" if the subject is exhibiting certain behaviors. [\*Salinas v. City of San Jose\*](#), #5:09-cv-04410, 2013 U.S. Dist. Lexis 79260 (N.D. Cal.).

In a subsequent trial of the excessive force claims against the officers, however, the jury found that one officer had used excessive force that had been the cause of the decedent's

death. The decedent was a naked 260 pound man high on PCP. Four surviving members of the decedent's family were each awarded \$250,000 in damages, for a total award of \$1 million. The Taser was activated for 10 five-second cycles over a 90 second time frame, despite a city policy (since modified) that limited use to three cycles. The officer who used the Taser did not appear at trial. [\*Salinas v. City of San Jose\*](#), #5:09-cv-04410, PACER Doc. #220 (N.D. Cal., July 12, 2013).

Mental illness and the use of drugs are frequently involved in these cases. In one case, a woman told a 911 operator that her husband may be mentally ill, was acting paranoid, had a history of prior suicide attempts, might have taken some of her diet pills, and had been drinking. Several officers arrived and told the man that he was under arrest for being under the influence of a controlled substance and attempted to handcuff him.

During a long scuffle, one officer used his Taser twice in the stun mode to the man's shoulder, and also applied a carotid restraint. After more officers arrived, one fired his Taser in the dart mode at the man, with both probes striking him on his left side, and activated it three or four times. Pepper spray was also used. He was ultimately subdued and taken to a hospital because he had difficulty breathing; he died shortly after arrival.

The coroner determined the cause of death to be excited delirium due to methamphetamine intoxication, and that the multiple applications of the Taser did not cause his death. The next of kin sued individual officers for unlawful arrest and excessive force, and the city for deliberate indifference and a failure to properly train and supervise its police officers. The parties agreed to a settlement of \$205,000. [\*Fernandez v. Taser Intl. and City of Santa Rosa\*](#), #4:06cv04371 (N.D. Cal.), Settlement Order. The facts are recited in a prior ruling at [2008 U.S. Dist. Lexis 90718](#) and in Williams, [Taser ECDs and Sudden Death](#), p. 138 (2008).

Officers in [\*Quyên Dang v. City of Garden Grove\*](#), #8:10-cv-00338, 2011 U.S. Dist. Lexis 85949 (C.D. Cal.) responded to a call to investigate a person with a possible mental impairment. Although the man was compliant and non-threatening, the officer tried to handcuff him. Having trouble placing him in handcuffs, the officer made the decision to Taser him in the stun mode 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 excited delirium caused by 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.

Since that ruling, counsel for the defendants filed a notice with the court that a [settlement](#) was reached for an undisclosed amount.

Establishing good policies is important in avoiding liability. Because a county had a number of allegedly Taser-related deaths, and subsequently failed to change its existing policies on Taser use, a court found that there were triable issues of fact on claims for municipal liability for a disturbed man's death, based on inadequate customs and training.

The stated policy allowed for Taser use whenever there was a "tactical advantage." The court found that this gave officers "wide discretion in the use of force. This makes it disputable whether the county had a 'custom', either actively or by omission, of having officers employ excessive force in arrests."

The Taser was used multiple times in stun mode when the man ran outside his house in his bathrobe and refused to stop running. A coroner listed the cause of death as "[s]udden cardiac arrest while being restrained prone after physical altercation with police that included [the] use of [T]asers, due to excited delirium due to acute cocaine and MDMA intoxication." [Estate of Zachary v. County of Sacramento](#), #2:06-cv-01652, 2010 U.S. Dist. Lexis 33226, 2010 WL 1328892 (E.D. Cal.). In a subsequent decision, both plaintiff's and defendant's motions for judgment as a matter of law were denied. [Estate of Zachary v. County of Sacramento](#), #2:06-cv-01652, 2010 U.S. Dist. Lexis 135413 (E.D. Cal.).

Similarly, see [LeBlanc v. City of Los Angeles](#), #2:04-cv-8250, 2006 U.S. Dist. Lexis 96768 (C.D. Cal.), in which a security guard observed a man engage in unusual behavior on a public street — yelling, waving his arms, and chasing cars in traffic. Believing the man

was under the influence of a substance or mentally ill, the guard handcuffed his one wrist to a fence and called 911.

LAPD officers encountered a delusional and sometimes incoherent man. Rejecting pepper spray, they chose to deploy a Taser in the dart mode, after first warning the man. Several officers swarmed him and also applied an additional Taser cycle. After restraints were applied, he did not appear to be breathing. The paramedics moved in and determined that he was in full cardiac arrest. After CPR, he was taken to a hospital and pronounced dead. The coroner's report identified the cause of death as excited delirium caused by cocaine intoxication.

In the civil action that followed, the court held that the officers were entitled to qualified immunity. Although a reasonable jury might find that the force used was excessive, there was no legal authority holding that the use of a Taser to restrain a resisting, unarmed person who had been immobilized was constitutionally unreasonable. However, the court denied summary judgment on the federal claims against the city, as well as state wrongful death and negligence claims.

The judge wrote that even if the use of the Taser was not deadly," it was still unreasonable given the testimony of [the] Plaintiff's experts." Specifically, the LAPD training materials in the record provided "no guidance on how and whether Taser should be used when dealing with narcotically intoxicated individuals, even though LAPD officers probably confront such individuals on a routine basis." In a subsequent [Order](#), all federal claims were dropped and the state law claims were remanded to a state court.

### ***Cases finding no liability***

In a number of cases, courts have found that the use of a Taser did not cause or substantially contribute to causing a death. In one case, when a coroner's report indicated that a man had died as a result of excited delirium and the presence of cocaine in his system, and that the application of a Taser did not cause or contribute to the man's death, the manufacturer could not be held liable under Louisiana state law.

The man was being transported in an ambulance from a bar after he became ill. He was stunned by police with the Taser once after he began waving a knife at paramedics and shaking it violently. *Smith v. Louisiana State Police*, Civil Action #07-1189, 2007 U.S. Dist. Lexis 73689 (E.D. La.).

In a subsequent decision, the court further held that officers could not be held liable for the man's death, as the prior decision holding that the Taser use did not contribute to the death negated a key element of civil rights liability for excessive force, that the injury resulted

directly from the use of force, which was unreasonable under the circumstances. [Smith v. La. State Police](#), #07-1189, 2009 U.S. Dist. Lexis 11708 (E.D. La.).

The threat that an individual poses is an important factor in justifying the use of significant force such as a Taser. In [Sheffey v. City of Covington](#), #12-5109, 564 Fed. Appx. 783, 2014 U.S. App. Lexis 7976, 2014 Fed App. 0330N (Unpub. 6th Cir.), a 52-year-old, 6 foot 6 inches tall, 410 pound man was walking down a residential street in the vicinity of two elementary schools carrying a handgun. A witness observed him placing the handgun in one pocket and clips and ammunition in a separate pocket when a bus approached.

The witness called 911 to report him as suspicious. Officers subsequently attempted to stop the man based on the report that he was armed with a concealed weapon and acting suspiciously in a school zone. The man ignored an officer's orders to get on the ground, despite the officer's pointed handgun. Instead, he shuffled back and forth on his feet, moved his hands around the area of his waistband, and repeated the word "dynamite."

The officer told his dispatcher that the man might be intoxicated or mentally disturbed. More officers arrived, and the handgun was holstered while a Taser was drawn. The man's conduct continued, and then he started to move towards an officer. It was disputed whether his fists were clenched, and whether he was attempting to flee or to approach an officer.

A Taser was fired at him in the dart mode, striking him in the upper left shoulder/chest area. It apparently had little effect, other than causing him to say "ouch," and to reach to remove the probes. A second cycle of the Taser was also ineffective. A second officer fired his Taser in the dart mode, striking him in the back, but again having little effect.

Officers physically took him to the ground and handcuffed him, but he continued to struggle and tried to bite an officer. An officer lifted the man's shirt and used a Taser on him in the stun mode a number of times, to little effect. Another officer also used a Taser two more times in stun mode, and an officer and a sergeant used their Tasers in stun mode eight times over a 47 second time period.

Altogether there were 12 separate applications of the Taser transmitting electrical current to the man, according to the court. Officers finally subdued and handcuffed the man.

He stopped breathing in an ambulance and died. An autopsy reported the death was due to "a cardiac event, due to myocardial hypertrophy and coronary atherosclerosis. The pattern of circumstances with contributing morbid obesity and hypertrophic heart disease, and the use of electrical stun devices suggests that this death could be assigned to excited delirium syndrome."

The trial court found that there was no issue concerning the objective reasonableness of the force used under the circumstances. The officers had reason to believe that the man posed a

danger in a school zone at a time when school was in session. They did not know whether the handgun he had was loaded, he was not compliant with officers' orders, and he responded in an "abnormal" way.

Given the man's continued active resistance and his attempt to bite an officer, the subsequent applications of the Taser were justified, as the initial ones were. There was no claim that a Taser was used on him after he had been subdued. Claims against two officers for failure to intervene were rejected, as no use of excessive force was shown, and even if any of the uses of the Taser were excessive, these officers had not had the time or opportunity to prevent them.

The appeals court rejected the argument that the officers badly handled the situation in light of the decedent's mentally disturbed condition, as they had no way of being aware of his actual mental disability, and his conduct could also have been the result of intoxication.

"The officers' actions cannot be said to be unreasonable based upon the mental illness or perceived mental disturbance of Mr. Hughes, due to the fact that Mr. Hughes was known to be armed in a school zone with children present, that he consistently acted as if he was reaching for his waistband, that he attempted to flee the area, and also that he violently physically resisted arrest."

Police 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, 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, which their medical expert witness claimed 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. The court also rejected products liability claims against the manufacturer of the Taser based on allegedly inadequate warnings.

In some instances, courts have very pointedly emphasized that Taser use did not play a role in causing a death. An Ohio court ordered a county's chief medical officer to modify autopsy findings in three cases to remove prior references to the use of the Taser as a

contributing factor in the cause of death in three cases, involving both dart and stun mode uses.

There was evidence that the use of the Taser had nothing to do with their deaths, but that two of them died as a result of a fatal cardiac arrhythmia due to acute drug intoxication creating crazed states consistent with “Excited Delirium Syndrome.”

The third death was most likely due to a fatal cardiac arrhythmia brought on by severe heart disease, schizophrenia, the physical struggle accompanying the incident, an injection of Geodon, with no evidence showing that the use of the Taser impaired respiration causing asphyxia. [\*Taser International, Inc. v. Chief Medical Examiner of Summit County, Ohio\*](#), #CV-2006-11-7421, Ohio Common Pleas, Summit County, May 2, 2008).

The decision was affirmed on appeal in [\*Taser International Inc. v. Chief Medical Examiner of Summit County\*](#), #24233, 2009 Ohio 1519, 2009 Ohio App. Lexis 1334, discretionary appeal not allowed, [\*Taser Int’l, Inc. v. Kohler\*](#), 122 Ohio St. 3d 1503, 2009 Ohio 4233, 912 N.E.2d 108, 2009 Ohio Lexis 2390. .

Repeated use of a Taser, even many times, has been found to be reasonable in some circumstances. 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/arteriosclerotic 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. [\*Marquez v. City of Phoenix\*](#), #10-17156, 2012 U.S. App. Lexis 19048 (9th Cir.).

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## **AELE Monthly Law Journal**

Bernard J. Farber  
Civil Liability Law Editor  
P.O. Box 75401  
Chicago, IL 60675-5401 USA  
E-mail: bernfarber@aele.org  
Tel. 1-800-763-2802

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  - 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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