# Electronic Control Weapons

## *The State of the Law and Application to Law Enforcement Officers and Agencies*

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## I. Introduction

In 1985, when the author served as a Pennsylvania State Trooper, he was equipped with only a revolver and a flashlight. While some Troopers carried blackjacks (which were not standard issue), and tear gas and riot sticks were available at the barracks, there was no standard-issue, non-lethal force tool. Rather, the use of force continuum was quite short and limited—namely, verbal commands, to hand-to-hand, to deadly force.

Over the years, police officials and police equipment designers have searched, and continue to search, for the "magic" non-lethal weapon that will peaceably and safely subdue a suspect, with no injury to the officer, minimal or no injury to the suspect, and no danger to the public. Candidates for the magic non-lethal tool have included side handle batons, o.c. or pepper spray, and firearms that shoot pepper balls, beanbag or baton-like projectiles. One of the most recent such tools, which over 6,000 police agencies and correctional facilities across the country are using is the Electronic Control Weapon (ECW), which includes stun-guns, Tasers and stingers. For purposes of this outline, the various names for this type of police tool will be used interchangeably.

ECWs, like its predecessors, have earned accolades and respect from some in law enforcement who view it as a safe and non-lethal alternative tool that actually saves lives—both police and suspect. However, ECWs, like each of its predecessor tools, have also garnered critics ranging from civil liberties groups, plaintiffs' attorneys, and surprisingly, a handful of police agencies.

This article will look at how proponents, critics and Courts have viewed ECWs and what the case law tells us about the state of the law currently, and prediction of the future.

## II. Criticism and Litigation

Like any product, particularly one that is used in an inherently dangerous field such as law enforcement, ECWs have been the subject of criticism, and, in turn, product liability claims. Among its critics is Amnesty International who claims that more than 70 people in the United States and Canada have died since 2001 after being shot with a stun gun. *See* Tresa Balda, *Stun Gun Maker Faces Suits by Victims, Police,* The National Law Journal, Aug. 15, 2005, at 4.

Likewise, it appears that some law enforcement officials are critical of stun guns. Namely, in *Village of Dolton v. Taser Int'l, No. 05-C-4126 (N.D.Ill.)*, an Illinois police department is pursuing a class action against Taser alleging that Taser failed to adequately test the weapon and notify police departments of the potential risks involved in its use. Plaintiffs' attorney Paul Geller was quoted as saying that "Police Departments throughout the country bought Tasers under the belief that these were non-lethal weapons that could be used fairly freely to help the police do their job…[i]t turns out that these products are very, very dangerous." *Id.* A Taser spokesman responded: "The claims made in the lawsuit are based on inaccurate and incomplete news clippings…the Taser brand devices have been the most thoroughly tested of any use-of-force tools available to law enforcement." Attorney Geller claims that various police departments from "15 states" seeking to join the class, if one is certified, have already contacted him. *Id.*

In Taser's defense, there has been little or no scientific testing or analysis that links the use of ECWs to serious injury or death. Rather, there have been a number of studies conducted that establish that ECWs

are quite safe. For example, the U.S. Department of Defense Human Effects Center for Excellence concluded in a study that application of ECWs "for temporary incapacitation does not appear to pose significant risk to the recipients." (Available at http://www.taser.com/documents/HECOE_Report_Summary_101804.pdf). *See also*, R. Means and Lt. E. Edwards, Chief's Counsel, *Electronic Control Weapons: Liability Issues*, The Police Chief Magazine (IACP Publication) (February 2004).

As this author is not aware of the specifics of the pending litigation above, and concedes that any police tool used in the rough and tumble world of police arrests, has associated risks, no further comment or discussion is warranted related to product liability claims against manufacturers of ECWs. However, for purposes of Section 1983 civil rights claims brought by suspects against police officers and agencies, these product liability claims do raise several issues worth noting.

First, might a plaintiff in a Section 1983 use-of-force suit in which ECWs are used, point to the product liability suits as a means to argue that police agencies are on "notice" of the dangers of this tool? Second, might a police agency or police officer in a use-of-force suit, particularly one in which the suspect sustains serious injury or death, join the manufacturer of the ECWs as an additional co-defendant and seek to place the blame upon them?

In this author's opinion, neither of these assertions is terribly compelling and is, quite frankly, not unlike arguments that have been and could be made in any use-of-force claim in which a police tool is used. However, police officials and the lawyers that advise and represent them would be well advised to inform themselves of the benefits and risks of ECWs before issuing them to its officers and determining in what circumstances such tools are permitted to be used. As with the use of any product or tool, the best advice is always to have an informed customer (police agencies) working cooperatively with the manufacturer (ECW manufacturers) to understand the best and most appropriate use of the tool to accomplish the task with the least risk to the officers and the suspects upon whom the tool is being used.

## III. In General, Analysis of Use of Force Claims

Use of force claims can be analyzed under the Fourth, Eighth and/or Fourteenth Amendments depending on the setting under which the claim arises, and the standards vary depending on the Amendment at issue. However, almost all use of force claims involving use of force in the context of an arrest are reviewed under the Fourth Amendment.

### A. Fourth Amendment Analysis

In order to set forth a claim for excessive force under the Fourth Amendment, plaintiff must establish that 1) there was a seizure and 2) that the use of force was unreasonable. *Graham v. Connor*, 490 U.S. 386 (1989).

#### 1. Seizure

Under the first prong of the two-part test, the Fourth Amendment is only implicated when the actions of an officer constitute a "seizure" upon a person. See *Brower v. County of Inyo*, 483 U.S.593, 594 (1989). (Note that Brower is a police pursuit case, in which a "seizure" was found to have occurred due to the fact that a roadblock was set up around a blind curve thus denying the fleeing suspect the ability to choose for himself whether or not to stop). "Whenever an officer restrains the freedom of a person to walk away, he has seized that person." *Tennessee v. Garner*, 471 U.S. 1, 7 (1984) (citing *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975)). Generally, seizure is not an issue and the analysis turns upon the second element—was the use of force reasonable?

An officer does not seize a suspect, and the Fourth Amendment is not violated, unless the officer *intends* to acquire physical control over another. *Brower*, 483 U.S. at 596. The mere result of the restraint of a person's freedom of movement does not violate the Fourth Amendment—the restraint of the freedom of movement must be done intentionally. *Id*.

Thus, in cases of accidental use of force, particularly accidental discharge of weapons, the defense may want to contend that there was no "seizure" and thus the claim should be analyzed under the higher Fourteenth Amendment "shocks the conscience" standard. For example, in *Troublefield v. City of Harrisburg*, 789 F. Supp. 160 (M.D. Pa. 1992), the Middle District of Pennsylvania was presented with an accidental shooting claim. An officer was in the process of handcuffing the plaintiff and holstering his weapon when his gun accidentally fired into the plaintiff's leg. *Id*. at 162. The court noted that although the plaintiff was seized during the time he was being handcuffed, the officer did not intend to bring the plaintiff under his control by use of the gun, and therefore he was not again seized. *Id*. at 166. If the officer intended to use the gun to shoot the plaintiff or "settle down" the plaintiff, the officer would have, in effect, brought about a second seizure of the plaintiff. *Id*. However, since he did not intend to shoot the arrestee, his negligence in allowing the gun to misfire did not constitute a seizure, and thus the court dismissed the plaintiff's Fourth Amendment excessive force claim. *Id*.

Likewise, in *Glasco v. Ballard*, 768 F. Supp. 176, 180 (E.D. Va. 1991), an officer, while driving in his vehicle, surveyed a suspect that he thought was shoplifting. The officer pulled his vehicle over, attempted to step out to question plaintiff and when the vehicle began to move and the officer attempted to apply the brake, his gun accidentally fired striking plaintiff in the neck. *Id*. The court held there is a difference between specific intent and general intent. *Id*. at 179. The court stated "it is irrelevant whether the police officer intended to brutalize a suspect or merely intended to discipline him, but it is still relevant whether the officer intended to perform the underlying violent act at all." *Id*. The court found the officer did not intentionally restrain the movement of the plaintiff, and therefore, there was no seizure under the Fourth Amendment. *Id*.

The decisions in *Troublefield* and *Glasco* that an accidental shooting does not constitute a seizure—and, in turn, a violation of the Fourth Amendment, are consistent with a number of other cases. See, *e.g.*, *Campbell v. White*, 916 F.2 d 421 (7th Cir. 1990), *cert. denied*, 499 U.S. 922 (1991) (finding officer did not seize individual he accidentally collided with after a chase); *Landol-Rivera v. Cruz Cosme*, 906 F.2d 791 (1st Cir. 1990) (accidental shooting of hostage in suspect's lap during police pursuit did not constitute seizure of hostage); *Dodd v. City of Norwich*, 827 F.2d 1 (2d Cir. 1987), *cert. denied*, 484 U.S. 1007 (1988) (officer did not seize decedent suspect when during process of cuffing, decedent reached for officer's weapon and weapon discharged); *Matthews v. City of Atlanta*, 699 F. Supp. 1552, 1556–57 (N.D. Ga. 1988) (accidental shooting did not constitute seizure where officer approached decedent suspect, put gun to his head, reached in to vehicle to turn off engine and gun accidentally fired).

There have been reported cases where an officer, in the heat of a tense arrest, intending to reach for and use his less-than-lethal stun-gun, mistakenly unholsters and uses his service weapon thereby seriously injuring or killing someone he had intended to merely temporarily incapacitate. See *Yount v. County of Sacramento*, ___ Cal. Rptr. 3d ___ (11/9/05). There are a number of steps that both the manufacturers of these tools, and the police agencies that use them, have taken and continue to take to avoid this terrible and potentially deadly mistake. However, in cases where this happens, could a defendant officer employ the "accidental" or unintended use of deadly force argument to argue that there was no seizure thus raising the liability bar to the higher Fourteenth Amendment "shocks the conscience" standard?

Unfortunately, while this argument may be available, it is not likely to be successful in most cases as the likely response by plaintiff will be that the officer's decision to use force—regardless of the specific type of

force, was not accidental, rather it was intentional. Further, it will likely be argued that the issue of the officer's intent is one that needs to be determined by a jury and thus not appropriately decided via summary judgment.

While this author is unaware of any reported decisions addressing this issue, it nevertheless may be a viable argument under the right set of facts and with a sympathetic court. At minimum, if the argument can be effectively and persuasively made, it may afford some settlement leverage in those cases where an officer is facing a suit in which by his own admission, he determined the less-than-lethal force was called for, yet he mistakenly employed deadly force.

#### 2. Reasonableness

Under the second prong of the Fourth Amendment analysis, even if there was a seizure, plaintiff bears the burden of demonstrating that the use of force was unreasonable. *Miller v. Taylor*, 77 F.2d 469 (6th Cir. 1989).

In *Graham v. Conner*, 386 (1989) 490 U.S., the Supreme Court adopted an objective reasonableness test which requires an analysis of "facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id*. (citing *Garner*, 471 U.S. at 8–9). The facts and circumstances must be viewed in "the perspective of a reasonable officer on the scene, rather than 20/20 vision of hindsight." *Id*. "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 situation." See *id*. at 396–97.

As well-stated by the United States Sixth Circuit Court of Appeals in *Smith v. Freland*, 954 F.2d 343, 347 (6th Cir.), *cert. denied*, 504 U.S. 915 (1992):

[W]e must avoid substituting our personal notions of proper police procedure for the instantaneous decision of the officer at the scene. We must never allow the theoretical, sanitized world of our imagination to replace the dangerous and complex world that policemen face every day. What constitutes "reasonable" action may seem quite different to someone facing a possible assailant than to someone analyzing the question at leisure.

### B. Fourteenth Amendment

Excessive force claims analyzed under the substantive due process clause of the Fourteenth Amendment are governed by the "shocks the conscience" standard. See *County of Sacramento v. Lewis*, 523 U.S. 833 (1998). Notably, "[T]he due process clause is simply not implicated by a *negligent* act of an official causing unintended loss of or injury to life, liberty and property." *Daniels v. Williams*, 474 U.S. 327, 328 (1986) [emphasis in original]. Rather, in order for conduct to "shock the conscious," plaintiff must establish conduct "so egregious as to…offend those canons of decency and fairness which express notion of justice of English-speaking peoples." *Fagan v. City of Vineland*, 22 F.3d 1296, 1303 (3d Cir. 1994). The conduct must be "malicious and sadistic," *Gottlieb v. Laurel Higlands Sch. Dist.*, 272 F.3d 168, 175 (3d Cir. 2001); *Lee v. Williams*, 138 F. Supp. 2d 748, 761 (E.D. Va. 2001), or the defendant must harbor an intent to harm the plaintiff to "shock the conscience." See *Neal v. St. Louis Bd of Police Comm'rs*, 217 F.3d 955, 958 (8th Cir. 2000); *Childress v. City of Arapaho*, 210 F.3d 1154, 1158 (10th Cir. 2000).

As noted above, a number of courts have addressed "accidental" use of force cases, particularly shooting cases, under the Fourteenth Amendment "shocks the conscience" standard. However, this is rare and the Fourteenth Amendment is the analysis typically employed in use of force cases.

### C. Eighth Amendment

The Eighth Amendment applies to claims of excessive force in the context of a prison setting. *Whitley v. Albers*, 475 U.S. 312 (1986). Thus, it is not applicable to claims that arise as part of an arrest. However, this analysis that would be employed when prison officials employ an ECW to subdue or control an inmate.

## IV. ECW Claims against Individual Officers

### A. Circuit Courts of Appeal Cases

#### 1. *Atwell v. Hart County, Kentucky*, 122 Fed. Appx. 215 (6th Cir. 2005) (unpublished)

Plaintiff Steven Atwell, a paranoid schizophrenic suffering from acute psychosis, was arrested after trespassing on a golf course near his home. Due to Atwell's mental condition and fearing for his safety, jail personnel sought an emergency hospitalization order. The order was issued and Atwell was transported to the Western State Hospital. Atwell resisted and fought with the guards that were transporting him so much so that they used a stun gun and pepper spray on him in their efforts to subdue him. The altercation was recorded on videotape.

Atwell subsequently brought claims under, *inter alia*, §1983, alleging that officials used excessive force in their use of a stun gun and pepper spray in their efforts to transport him to the Western State Hospital. The United States Court of Appeals for the Sixth Circuit confirmed the district court's grant of summary judgment in favor of the defendants, finding that "the evidence demonstrates unequivocally that the force used was only that necessary to maintain control and accomplish the legitimate purpose of moving Mr. Atwell in order to ensure that he received the appropriate medical care…. The use of force was not punitive and was [therefore] objectively reasonable." *Id*. at 218.

#### 2. *Draper v. Reynolds*, 369 F.3d 1270 (11th Cir. 2004)

In *Draper*, plaintiff was a truck driver who was stopped in Georgia by Officer Reynolds allegedly because the truck's tag light was not illuminated pursuant to Georgia law. During the traffic stop, the officer asked Draper at least five times for his identification, proof of insurance, bill of lading and other items. Each time the plaintiff refused, finally stating "How 'bout you just go ahead and take me to f-cking jail, then, man… because I'm not going to kiss your damn ass because you're a police officer" (some of this confrontation was recorded by a camera located in Officer Reynold's cruiser). After the fifth request was ignored by Draper, who complained that Reynolds was "disrespecting" him and treating him "like a child," Officer Reynolds discharged his taser gun at Draper's chest. Draper fell to the ground and Reynolds ordered a back-up officer to handcuff "this son of a bitch."

Draper filed §1983 claim against Reynolds alleging false arrest and excessive force. Under the "totality of the circumstances" test, the eleventh circuit found that Reynolds' use of the taser gun "did not constitute excessive force" explaining that "although being struck by a taser gun is an unpleasant experience, the amount of force Reynolds used—a single use of the taser gun causing a one-time shocking—was reasonably proportionate to the need for force and did not inflict any serious injury…the single use of the taser gun may well have prevented a physical struggle and serious harm to either Draper or Reynolds."

### 3. *McKenzie v. City of Milpitas*, 953 F.2d 1387 (9th Cir. 1992), 1992 WL 19813 (unpublished)

In *McKenzie*, the district court held that the police department's vague and ambiguous policy regarding the use of taser guns warranted a denial of summary judgment as to plaintiff's *Monnell* claim. In 1985, the Milpitas police department distributed taser guns. In so doing, it adopted a written policy concerning its use almost identical to the written policy of the Los Angeles police department with one minor omission—when the taser gun can or should be used. Milpitas also required its officers to complete taser gun training prior to being issued the weapon. In March 1988, Milpitas police officers responded to a call concerning a family dispute at the home of plaintiff Lucille McKenzie. When approached by various officers regarding a family dispute, Ms. McKenzie refused to answer. At that point, an officer stood in front of the house in a manner suggesting use of his taser. Next, McKenzie's son ran out on the front porch in aid of his mother and the officer responded with the taser to his back. McKenzie responded by running towards her son and when another officer requested that she halt, he tasered her twice in the back.

At trial, McKenzie and her son were awarded $200,000 and $10,000, respectively. In so doing, the jury found that the city of Milpatis failed to adequately train its officers and instituted vague and ambiguous policies. The court noted that the Milpatis policy mirrored the LAPD policy in every way except for the vital omission that the taser gun was to be used only "against violent or potentially violent suspects." This lack of limitation, the tenth circuit found, "makes it reasonably likely that Milpitas officers will resort to their tasers immediately after verbalization fails."

### 4. *Moore v. Novak*, 146 F.3d 531 (8th Cir. 1998)

In *Moore*, Terri Lobdell, a Lincoln, Nebraska Police Officer arrested plaintiff Darnell Moore, in connection with a burglary investigation. Moore was intoxicated and acted belligerently. Once at the jail, Moore kicked Officer Lobdell, screaming obscenities and knocking her backwards. Two correctional officers, defendants Mitchell Novak and Craig Schmidt, went to Officer Lobdell's aid and attempted to subdue the handcuffed Moore. Schmidt removed his stun gun, displayed it to Moore and told him he would use it if Moore continued to struggle. Moore ignored the warning and "shouted more obscenities" at the officers, at which time Schmidt used the stun gun on Moore's lower back. Moore was then wrestled to the ground and secured. He was charged with assaulting a police officer.

In his subsequent §1983 claim, Moore alleged that defendants Novak and Schmidt used excessive force in restraining him, specifically alleging that Schmidt wrongfully used the stun gun against his neck. Moore further claimed that the police's loss of the videotape recording of the incident violated his right to due process, arguing that the videotape would have corroborated his allegations.

In affirming the district court's grant of judgment in favor of defendants, the appellate court agreed that "the decision to use force and the amount or degree of force used—physical restraint and use of the stun gun—were objectively reasonable because Moore was not under control, even though he was handcuffed, and represented a continuing threat to his physical safety and that of the officers." *Id*. at 534. Thus, the district court's finding that excessive force was not used was not clearly erroneous.

## B. Recent Federal District Court Cases

### 1. *Schlotter v. Walsh*, No. 6:05CV277ORL-22KRS, 2005 WL 1051183 *1 (M.D. Fla. April 28, 2005)

Plaintiff Gerardus Schlotter, who described himself in his complaint as permanently disabled, brought suit under §1983 claiming that defendant Orange County Sheriff Deputy Michael Walsh used excessive force when he "tased" Schlotter in the chest. *Id*. at *1. Schlotter alleged that at the time of the tasing, he was "walking down the street with his hands held high in the air, unarmed and non-threatening." *Id*. at *1. The court dismissed Schlotter's complaint without prejudice and granted leave to file an amended complaint with a more definite statement of facts.

### 2. *Maiorono v. Santiago*, No. 6:05CV107ORL-19KRS, 2005 WL 1200882 *1 (M.D. Fla. May 19, 2005)

In *Maiorano*, the Middle District of Florida's Chief Judge Fawsett considered a motion to dismiss in a §1983 claim involving the defendant police officer's use of a taser on a plaintiff, a minor named Jessica Maiorono, who at the time of the tasing was in a physical confrontation with another female student at Freedom High School. Plaintiff alleged that defendant Police Officer Gilbert Santiago "applied his M26 taser to the left side of Maiorano's back…[w]ithout warning." *Id*. at *1.

Defendants argued in their motion to dismiss that pursuant to *Draper v. Reynolds*, 369 F.3d 1270 (11th Cir. 2004), a single application of a taser to quell a disturbance, even without warning, is per se reasonable. The court denied defendants' motion, stating "it cannot be said that an objectively reasonable officer could believe that it would be reasonable to use a taser against Plaintiff, without advance warning or a verbal command to desist, because of Plaintiff's action of engaging in an unspecified type of physical altercation with another student." *Id*. at *8. The court distinguished *Draper* and declined to hold that a single taser application was per se constitutional. Rather, the court held that reasonableness of the use of force is fact specific. The court also declined defendants' qualified immunity argument holding that it could not be said that an objectively reasonable officer could believe that it was reasonable to use, without any warning, a taser upon a student engaged in a minor and unspecified disagreement with another student. (*Note*: There was a motion to dismiss and thus the court was constrained to accept the allegations of plaintiff's complaint as true).

### 3. *Rios v. City of Fresno*, No. CVF-05*644REC/SMS, 2005 WL 1829614 *1 (E.D. Cal., July 25, 2005)

In *Rios,* plaintiff was a bus driver who was driving a chartered bus returning a group of retirees from a day trip to San Juan Capistrano to the parking lot of the Catholic Diocese of Fresno. As plaintiff drove into the parking lot, he noticed several Fresno Police Department squad cars behind him, the lights activated in order to perform a routine traffic stop. Once stopped, FPD officers, defendants Campos and Manning, approached plaintiff Rios and asked him to exit the bus because an unidentified "tipster" had reported that Rios had made an "unsafe lane change." The officers then asked for Rios' driver's license and he complied. The license Rios gave the officers was temporary as plaintiff had yet to receive his actual license in the mail. At this point, the eight (8) uniformed officers "covered" by a police helicopter hovering overhead, asked him to sit down and Rios asked "why?" Defendant Campos told him to sit or he would be arrested for resisting arrest and then "forcibly bent Plaintiff's arm in such a way as to cause him to 'stiffen' his arm…[the defendant officers] interpreted this 'stiffening' as a sign of resistance" and tasered Rios. *Id.at *2*. After being tasered, Rios fell to the ground, hitting his

head on the asphalt. Rios was taken to a local hospital and treated for his injuries and charged with the crime of resisting, obstructing and delaying an officer.

In their motion to dismiss Rios' excessive force claim, defendant Campos and Manning argued that tasering plaintiff one time after he failed to comply with verbal commands did not constitute a civil rights violation. The court disagreed, and denied the motion on the grounds that the question of the reasonableness of tasering Rios under the circumstances he alleged in his complaint was one of fact.

#### 4. *Nichols v. Davison*, No. Civ-03-804-L, 2005 WL 1950361*1 (W.D. Okl. July 26, 2005)

In the early morning of June 14, 2002, decedent Jason Nichols was visiting the home of his uncle Kevin O. Nichols ("Kevin") and his cousin, Kevin T. Nichols ("KT"), when a fight broke out between Jason and Kevin. KT attempted to intervene and also became embroiled in a physical confrontation with Jason. Jason and Kevin continued to fight. Kevin was eventually able to call 911. Defendant Police Officer Kevin Smith arrived at the scene and found Jason and Kevin locked together, Smith yelled at the men to stop fighting, but they ignored him at which time defendant Police Officer Alan Davison, who had just arrived, sprayed all three men with pepper spray. After separating Jason from Kevin and KT, the officers attempted to subdue Jason while he continued to kick and struggle. The defendant officers sprayed Jason again with pepper spray and hit him with their batons. Officer Davison finally used the taser gun on him. After "five or six strikes with the taser, the officers were able to grab Jason and drag him from the garage." *Id*. at *6. Jason was then transported to the hospital at 3:40 a.m. and was pronounced dead at 4:23 a.m., the cause of death was listed as head trauma.

Representatives of Jason's estate brought suit against officers Smith and Davison, claiming, *inter alia*, that the officers' use of force was excessive and violated Jason's Fourth Amendment rights.

In granting the defendant officers' summary judgment motion, the court noted that the "defendants progressively increased the level of force used to subdue Jason, terminating with the use of taser strikes… [d]uring this time, Jason was actively resisting the officers' attempts to handcuff him." *Id*. at *3. Thus, "[t]he use of the taser gun [did] not constitute excessive force under these circumstances."

#### 5. *DeSalvo v. City of Collinsville, Illinois*, No. 04-CV-0718-MJR, 2005 WL 2487829 *1 (S.D. Ill. Oct. 7, 2005)

During the Labor Day weekend in 2003, plaintiff Christopher DeSalvo had traveled to Collinsville, Illinois for the annual "Monster MOPAR" at the Gateway International Raceway. After returning for dinner at the local Holiday Inn, where he was staying, DeSalvo went to the parking lot where approximately 100–150 people were gathered to watch some members of the crowd doing "burn outs" (spinning the tires of their cars rapidly in place until they produced smoke). Around 6 p.m. on September 4, 2003, Police Officer Mark Krug was dispatched to the Holiday Inn and observed the crowd. At around 9:30 that evening, Krug returned and at that time, ordered the crowd to disperse and radioed for assistance. As the crowd began to disperse, Krug noticed an older man who was not leaving the area; Krug approached the man and asked for identification. The man did not respond and instead turned and walked toward the Holiday Inn, at which time Krug grabbed the man by his arm and again requested his identification. The man complied with this request.

DeSalvo, who had been passing by at the time, noticed the interaction between Krug and the older man and asked the officer why "he was arresting someone who, in DeSalvo's opinion, had done nothing illegal." Krug told DeSalvo to return to his room and that if he did not, he would be arrested for "obstructing." *Id*. at *2. DeSalvo responded "he hadn't done anything wrong." Krug then handcuffed DeSalvo and pushed him up against his squad car. While handcuffed, DeSalvo asked Krug why he was being arrested. Krug answered by pulling out his taser, firing it near DeSalvo's head and threatening that he would "pull the trigger" unless

DeSalvo got into the squad car. Then, without warning, Krug tased DeSalvo twice; once in his neck and another time on or near his forehead. A witness with a video camera recorded the incident on videotape, and immediately prior to being tasered, the court noted that "DeSalvo stood motionless at the door of the squad car, showing no obvious signs of aggression or physical resistance." *Id*. at *2.

The court denied defendant Krug's summary judgment motion, finding that a jury could find that Krug's actions violated DeSalvo's constitutional rights. Noting that Krug tasered DeSalvo "with little, if any warning" and that the evidence supported DeSalvo's assertion that he was not physically resisting arrest or running away, the court found "that a reasonable jury *could* find that Krug used excessive force against DeSalvo" rendering summary judgment as to Krug inappropriate. *Id*. at *6 [emphasis in original]. The court *granted* the City's summary judgment motion, finding that the evidence on the record regarding the City's taser training procedure and policy, including a four-hour block of taser training, did not "reasonably support a finding that [the City] was deliberately indifferent toward the constitutional rights of its citizens." *Id*. at *7.

### 6. *Stanley v. City of Baytown*, Texas, No. Civ. A. H.-04-2106, 2005 WL 2757370 *1 (S.D. Tex., Oct. 25, 2005)

Plaintiff's wife, Kelly Stanley, called the Baytown 911 on July 19, 2003, fearing that her husband, Robert, an epileptic, was experiencing precursor seizure symptoms. When the Baytown paramedics arrived, they found Robert Stanley alert and oriented, but he told them he was experiencing the initial stages or "aura" of an epileptic seizure. Robert then suffered two grand mal seizures which, according to one of the EMTs at the scene, renders the person "incapable of controlling his physical actions" and that "the patient" will have no mental state." The grand mal seizures lasted a few seconds each. When the seizures were over, Robert "took off the oxygen mask, jumped up and became combative." *Id*. at *1. Attempts by the EMTs to restrain Robert failed. Robert, who was "seriously into lifting weights" and had "body builder muscles" left his apartment and wandered around the apartment complex. *Id*. at *1 n.4. Each time the EMTs tried to restrain him physically or verbally, Robert would become "violent" and "combative." *Id*. at *2. Finally, the EMTs stopped trying to treat Robert and called the police for assistance.

Baytown Police Officers Bert Dillow and defendant Officer Edgar Elizondo arrived at the scene to find Robert sitting in the ambulance but refusing further medical treatment. Officer Elizondo observed that Robert was extremely sweaty and agitated and that he was dressed only in his boxer shorts. Officer Elizondo repeatedly ordered plaintiff to calm down so that the EMTs could strap him in and take him to the hospital, but Robert ignored him and continued to be, according to Officer Elizondo "very aggressive." Elizondo testified that "[b]ased on his experience in dealing with combative people…attempting to control a muscular, sweaty, mostly unclothed individual was going to be difficult, especially in a confined space like an ambulance" and that if he "didn't do something, someone was going to get hurt." *Id*. at *2. At this point, Elizondo showed the taser to Robert, warned him he would use it and did so, striking him with the taser on his back. After being tasered, Robert became "cooperative and appeared to regain full control of his mental faculties." *Id*. The EMTs strapped him to the stretcher and began treating him.

In his §1983 claim, Robert alleged "by using the Taser, Elizondo violated [his] right to be free from excessive force." *Id*. at *6. The court granted summary judgment in favor of Elizondo, finding that Elizondo's "use of the Taser on Plaintiff was not objectively unreasonable and therefore did not constitute excessive force within the meaning of the Fourth and Fourteenth Amendments." *Id*. at *8. Characterizing Elizondo's conduct as a proper exercise of the police's "community caretaking function," the court noted that "[t]he fact that 'in retrospect, there may have been alternative courses of action for [Elizondo] to take' does not render Elizondo's use of the Taser excessive or unreasonable." *Id*. at *7 (citing *Mace v. City of Palestine*, 333 F.3d 621, 625 (5th Cir. 2003)).

#### 7. *Bronson v. Mitchell*, No. Civ. 393CV101SD, 1995 WL 1945489 *1 (N.D. Miss. 1995) (unpublished)

Defendant Police Officer Edward Mitchell responded to a report on July 4, 1992 that children were shooting fireworks and causing a disturbance at a subdivision in Byhalia, Mississippi. When he arrived on the scene he saw Lakesha Bronson setting off firecrackers. Mitchell approached her, warning her that she could go to jail. Bronson turned and told the officer "you got to catch me first" and ran into her grandmother's house. Mitchell pursued her and on the porch was stopped by Bronson's grandmother, Georgia Mae Bronson, and a neighbor. The two women told Mitchell that he could not enter the house without a warrant. Mitchell responded that he did not need a warrant, but the women refused to allow him into the house. Mitchell eventually tasered Grandma Georgia Mae and placed both Bronsons under arrest. In her §1983 claim against Mitchell, Georgia Mae alleged that the use of a Taser on her constituted excessive force.

Chief Judge Senter of the Western District of Mississippi found summary judgment in favor of Mitchell, finding that Mitchell "was attempting to effectuate an arrest for which he had sufficient probable cause to pursue…Georgia and [the neighbor] thwarted his efforts even after being told by Officer Mitchell to step aside…[he] used a minimum of force [and his] actions were not objectively unreasonable." *See id*. at *5.

### C. Qualified Immunity

Although the cases cited above do not address the qualified immunity defense, the qualified immunity defense is available to defendant officers when using ECWs in two respects.

First, it can be argued, that unless it is clear and well settled that an ECW cannot be used under the facts presented in the case, then the officer should be afforded qualified immunity. Likewise, it can be argued that unless it can be established that no reasonable officer would have employed this type of force, the officer should be afforded immunity. The usual response to this argument by plaintiff is 1) whether or not there is a case on point, the officer nevertheless should be aware that his use of force—regardless of the weapon, is excessive under the facts as alleged by plaintiff and 2) there are differing versions of what occurred and thus factual disputes must be decided by the jury.

Second, the defense may wish to analogize their case and the officers' use of force, to *Saucier v. Katz*, 121 S. Ct. 2151 (2001). Namely, in *Saucier*, the Supreme Court held that the officers who used force to arrest and secure a protestor in *Saucier* were protected by qualified immunity. Thus, it is argued, an officer who uses an ECW to quell a disturbance or to secure an uncooperative arrestee should likewise be protected by qualified immunity. This argument has met with limited success for the same reasons as noted above, namely the dreaded (and in the author's view overused) "disputed material facts" precludes the entry of summary judgment. Nevertheless, this can be a persuasive and successful argument in some cases.

## V. Application to Police Agencies

### A. State of the Law

As in any use-of-force claim, in order to attribute liability to a public entity under §1983, plaintiff must plead and prove: 1) an underlying constitutional violation; 2) the identity of the officials or governmental bodies with final policymaking authority and 3) proof that those individuals "have, through their decisions, 'caused the deprivation of rights at issue by policies which affirmatively command that it occur or by acquiescence in a longstanding practice or custom which constitutes the "standard operating procedure" of the local governmental entity.'" *Simmons v. City of Phila.*, 947 F.2d 1042, 1062 (3d Cir. 1991) (quoting *Jett v. Dallas Indep. Sch. Dist.*,

491 U.S. 701 (1989)). The policy must be the "moving force" behind the constitutional tort. *Monnell v. Department of Social Services*, 436 U.S. 658 (1978), 436 U.S. at 691, 94; *Fagan v. City of Vineland*, 22 F.3d 1283, 1292 (3d Cir. 1994). Plaintiff must also plead and prove that the policymakers acted with "deliberate indifference to the rights of persons with whom the police came into contact." *Simmons v. City of Phila.*, 947 F.2d at 1060–61. "'[A] single incident of unconstitutional activity is not sufficient to impose liability under *Monnell*, unless proof of the incident includes proof that it was caused by an existing, unconstitutional municipal policy, which policy can be attributed to a municipal policymaker.'" *Groman v. Township of Manalapan*, 47 F.3d 628, 637 (3d Cir. 1995) (quoting *Oklahoma City v. Tuttle*, 471 U.S. 808, 823–24, 105 S. Ct. 2427 (1985).

Likewise, absent a constitutional violation by the individual officer in the first instance, the derivative "policy, practice and custom" claim against the municipality or policy maker is irrelevant. See *Los Angeles v. Heller*, 475 U.S. 796, 799 (1986) ("If a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have authorized the use of constitutionally excessive force is quire besides the point."); see also *Belcher v. Oliver*, 898 F.2d 32, 36 (4th Cir. 1990) ("Because it is clear that there was no constitutional violation we need not reach the question of whether a municipal policy was responsible for the officers' actions."); *Estate of Smith v. Marasco*, 318 F.3d 497, 505 (3d Cir. 2003) ("[T]he initial question in a section 1983 action is 'whether the plaintiff has alleged a deprivation of a constitutional right at all.'"). Thus, if the force used is deemed reasonable, the municipal policy or training—or lack thereof, is irrelevant.

There are two fairly straightforward legal principals to be gleaned from the ECW cases discussed on the preceding pages. They are not particularly remarkable, nor do they differ from the analysis employed in the typical use-of-force/municipal liability claims.

First, the municipal policy must be logical and provide guidance to the officer. Namely, if the agency adopts and institutes a reasonable and appropriate policy, which guides the officers and instructs them how and what circumstances the ECW should be used, then the agency is unlikely to held liable. The police agency in *DeSalvo v. City of Collinsville* apparently had such a policy and escaped liability. In contrast, the police agency in *McKenzie v. City of Milpitas* was found liable when they merely cut-and-pasted another agency's taser policy and apparently neglected to "cut and paste" the most critical part of the other agency's policy—where the taser fit in the use of force continuum and under what circumstances it could be used.

Second, if the agency provides some modest training, even as little as four hours such as in *DeSalvo*, a Court is unlikely to find the requisite "deliberate indifference" to training.

### B. Use of Force Continuum and Policy Issues

Before any tool, including an ECW, taser, stinger or stun gun is issued to an officer, the department must first research the tool and be comfortable that it is something the department feels is needed and useful. They must conduct their own due diligence including speaking to other agencies already using the tool, critically examining the manufacturer's claims and carefully analyzing whether it is a good fit for the agency's needs. Once the department chooses to employ the tool, particularly one in which the range of possible affects on a suspect may include serious bodily injury, the agency would be well-advised to examine a number of issues including the following:

1) Where does the ECW fit within the agency's use of force continuum? *See*, Sample use of force continuums attached hereto; Sample ECW policy attached hereto; and International Association of Chiefs of Police, Model Policy regarding Electronic Control Weapons (1/05) (available at http://www.theiacp.org).
2) What factors should be considered as to when the ECW can be employed? These may include:

a) the age of the suspect;

b) whether the suspect has any known physical problems;

c) whether there are other officers present;

d) whether there are other tools which fall lower on the continuum that may be preferred; and

e) the physical setting where the arrest is taking place?

3) What amount of training is required before the officer is permitted to carry and use the weapon? Will the officer be required to re-qualify on a yearly basis?

4) Will the agency require all or only some officers to carry the weapon or will it be left to the discretion of the officer?

5) Will the agency require some form of oversight or permission (*e.g.*, the supervisor must authorize) before the Taser is employed?

6) Will the agency require a specific post-incident report be prepared each time the Taser is used?

7) Will the agency require that a designated use-of-force instructor(s) review each and every use of the Taser to insure it was used properly and in compliance with the agency's policy?

## VI. Conclusion

As new technology and new less-than-lethal weapons such as stun-guns, Tasers or other electronic control devices become available, and Police Departments consider their use, there are some lessons and trends that can be gleaned from court decisions to date.

Provided that the weaponry has been tested and appears reasonably reliable and safe, which Tasers are, despite some critics, courts will likely not criticize and second-guess the choice to add the weapon to the department's range of available tools. The court, and jury, may; however, question whether the stun gun is the most appropriate tool to be used in a given situation. It is defense counsel's job, with the assistance of police officials, to explain why the Taser weapon was used and why it was the best choice in this situation. This may include explaining that deadly force could have been used yet the department and officer used even the lesser force, the less-than-lethal Taser. Provided that the choice was reasonable and it was not clear and well settled that such force was excessive or disallowed (and there are no material facts in dispute), the court may even grant qualified immunity to the officer as was done in some of the cases discussed above.

Boiled down to its simplest terms, courts seem to grant summary judgment to officers employing a stun gun, taser or other form of an electronic control device provided that 1) the suspect is uncooperative and aggressive, 2) the officer warns the suspect that the taser will be employed if the suspect does not desist his resistance and 3) the injuries incurred are minor.

As to claims against the department or policy-makers, courts have traditionally given much leeway to police officials to choose what weapons are best for their department and stun guns and tasers are no exception. Courts do not want to be in the business of overseeing or advising police officials and to the extent less-than-lethal tools are sought out and used, courts will give police agencies much deference. However, there are a couple of caveats and words of caution.

First, the specific ECW should be tested and accepted in some measure before being approved for use by the officers. That is to say that a court may not countenance the deployment of a weapon that is some fly-by-night, untested weapon that has the potential to inflict serious injury or death in circumstances when such force is not justified.

Second, before the electronic control device is sanctioned for use by officers, the department should ensure that the officers are trained and qualified to use the tool. There should be some written documentation that reflects such training and approval.

Third, departments would be well advised to incorporate where the new tool fits into their use of force continuum. For example, does the taser gun fall above, below or on level with the side-handle baton? What scenarios or actions by the suspect warrant its use? Once the decision is made, officers should be made aware of where it fits either through a brief training session, or roll call discussion.

In short, the use of new weapons and new technology such as ECWs, tasers, stingers and stun guns, is welcomed both because it helps officers better perform their jobs, and because it often lessens the danger and potential for injury to all involved. Provided that the department uses good common sense, follows appropriate procedures, and provides training, the *choice* of adding a new weapon should not, in and of itself, be the subject of liability. The choice to use the particular weapon in the particular situation (as opposed to another weapon or any weapon at all) may be the subject of a successful qualified immunity argument; however, it is more likely, particularly since most use-of-force cases have disputed facts, that a jury will be asked to decide if the force used was reasonable.