“Less than Lethal” Force: Trends and Case Law on the Use of Tasers

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Police use excessive force, ER docs say

Wed Dec 24, 11:22 am ET

NEW YORK (Reuters Health) – In a survey of a random sample of U.S. emergency physicians, virtually all said they believed that law enforcement officers use excessive force to arrest and detain suspects.

The sample included 315 respondents. While 99.8 percent believed excessive force is used, almost as many (97.8 percent) reported that they had managed cases that they suspected or that the patient stated had involved excessive use of force by law enforcement officers.

Nearly two thirds (65.3 percent) estimated that they had treated two or more cases of suspected excessive use of force per year among their patients, according to a report of the survey published in the January 2009 issue of the Emergency Medicine Journal.

Dr. Jared Strote of the University of Washington, Seattle, and a multicenter team also found that emergency physicians at public teaching hospitals were roughly four times more likely to report managing cases of suspected use of excessive force than those at university or
Excessive use of force by police: a survey of academic emergency physicians

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ABSTRACT
Objective: To determine the clinical experience, management and training of emergency physicians in the suspected use of excessive force by law enforcement officers.
Methods: Surveys were mailed to a random sample of academic emergency physicians in the USA.

Results: Of 393 emergency physicians surveyed, 315 (80.2%) responded. Of the respondents, 99.8% (95% CI 98.2% to 100.0%) believed excessive use of force actually occurs and 97.8% (95% CI 95.5% to 99.1%) replied that they had managed patients with suspected excessive use of force. These incidents were not reported by 71.2%.

METHODS
Study design and population
The study consisted of a cross-sectional survey of academic EPs in the USA. A random sample of academic faculty at emergency medicine residency training programs in the USA was generated by obtaining the names of all full-time academic EPs from each of the 122 approved emergency medicine residency programs. Two programs declined to
ER survey is fatally flawed

- Impossible for doctors to know the context of injuries from an examination
- Nature and extent of injuries do not correlate to the justification for the degree of force used
- Reports on physicians’ subjective judgments as opposed to objective evidence
- Reflects perception rather than what really happened
- Renders study meaningless
- Survey maligns law enforcement unjustly and unscientifically

Alternatives to Lethal Force

- Law enforcement seeks alternatives to lethal force and better methods to subdue individuals to limit injuries and death

- Electro-muscular disruption technology (EMD), sometimes called conducted energy devices (CED) or conducted energy weapons (CEW)

- 11,500 law enforcement agencies have acquired approximately 260,000 devices in operational settings

Source: National Institute of Justice Interim Report on Deaths Following Electro-Muscular Disruption, June 2008
Tasers: “Less Than Lethal” Force

- Developed by a NASA scientist in the 1970’s
- Alternative to lethal weapons to reduce injuries and deaths
- Uses electrical current to disrupt voluntary control of muscles (neuromuscular incapacitation or “NMI”)
- Fires two dart-like electrodes propelled by compressed nitrogen cartridges and connected to gun by conductive wire
- 50,000 volts
- 5 second shock cycle capable of repeated shocks
- Can be used as a stun gun device

Tasers: Pros and Cons

- According to Taser International, its product has reduced injuries by nearly 80% and saved 9,000 lives and residual cost savings in civil liability cases.

- Amnesty International has called for a moratorium on Taser use citing more than 334 deaths of persons since 2001.
U.S. Dept. of Justice Study of Arrest Related Deaths

U.S. Department of Justice reported 2,002 arrest-related deaths (all causes) in two year period

- 55% caused by law enforcement
- 13% caused by drug/alcohol intoxication
- 12% caused by suicide
- 7% accidental injury
- 6% illness/natural causes
- 8% other/unknown

36 police-related deaths involved conducted energy devices (CED)
17 reported as the weapon that caused the death
Over 60% involved violent offenses and assaults on police officers
All involved intoxication, threats, resisting arrest, attempted flight, fighting, or other weapons, alone or in combination

2008 Study of Deaths Following Electro Muscular Disruption

- No conclusive medical evidence that indicates a high risk of serious injury or death or a significant risk for induced cardiac dysrhythmia
- Warned against use on small children, elderly, pregnant women and those with diseased hearts
- Cautioned that associated risks with continuous or repeated discharges are unknown
- Law enforcement need not refrain from deploying devices subject to national guidelines
- Decision best left to tactical judgment of officers at the scene

Source: U.S. Dept. Justice, National Institute of Justice Special Interim Report on Deaths Following Electro Muscular Disruption (June 2008)
Excessive force claims are analyzed under the Fourth Amendment’s prohibition against unreasonable seizures. Reasonableness is judged from the perspective of a reasonable officer on the scene. It is an objective inquiry. Thus, the officer’s actual state of mind or intent is irrelevant. The same standard applies regardless of the weapon used. *Roberts v. Manigold*, 240 Fed. Appx. 675 (6th Cir. 2007)
Factors:

- Severity of the offense;
- The immediate threat posed to the safety of officers or others;
- Whether the suspect is actively resisting arrest or attempting to evade arrest by flight.

Use of a Taser is not per se excessive.

However, it can be excessive if the use is unreasonable under the circumstances.

These cases are very fact-specific.
Favorable Conditions

Courts are more likely to uphold Taser use when:

1) There are limited alternatives, e.g., no other non-lethal weapons, officer is alone without backup, arrestee is too far away to control without weapons or with shorter-range weapons.

*Plakas v. Drinski*, 19 F. 3d 1143, 1150 n. 6 (7th Cir. 1994); *Buckley v. Haddock*, 292 Fed. Appx. 791 (11th Cir. 2008).
Favorable Conditions (cont’d)

2) **Officers give a warning or threat, such as “Stop or I’ll use my taser!”**


3) **The offense is severe and violent.**

   *Beaver v. City of Federal Way*, 2008 WL 5065620 (9th Cir. 2008).

4) **Arrestee has minor or no injuries.**

   *Draper v. Reynolds*, 369 F.3d 1270 (11th Cir. 2004); *Beaver v. City of Federal Way*, 2008 WL 505620 (9th Cir. 2008).

5) **Arrestee is actively resisting or evading arrest.**

   *Hinton v. City of Elwood*, 997 F.2d 774 (10th Cir. 1993).
Problematic Conditions

Courts are more likely to find excessive force when:

1) **Taser is used after arrestee is subdued.**
   

2) **No verbal warning or threat.**
   

3) **Arrestee is only passively resisting.**
   
Problematic Conditions

4) Tasers are used for punishment.

Courts are greatly concerned about the possibility of torture because Tasers leave minimal to no marks.

“A stun gun inflicts a painful and frightening blow, which temporarily paralyzes the large muscles of the body, rendering the victim helpless.”

Orem v. Rephann, 523 F.3d 442 (4th Cir. 2008); see also Hickey v. Reeder, 12 F.3d 754 (8th Cir. 1993)
Failure to Provide Tasers

- 7th Circuit held that the county could not be held liable for failing to provide its deputies with more non-lethal choices, such as OC spray and Tasers.

- “[I]t is clear that the Constitution does not enact a police administrator’s equipment list.”

Plakas v. Drinks, 19 F. 3d 1143 (7th Cir. 1994).
Oops! I drew the wrong gun!

- 4th and 9th federal circuits have found for officers in cases where officer meant to draw his Taser and mistakenly drew his firearm.

- Both courts noted that mistakes made by officers during the course of their duties have been held to be reasonable for Fourth Amendment purposes, citing cases involving mistaken searches of the wrong premises or mistaken arrests of the wrong person.

Torres v. City of Madera, 524 F.3d 1053 *9th Cir. 2008); Henry v. Purnell, 501 F.3d 374 (4th Cir. 2007).
Taser Policy and Training

- Active resisters only or to prevent persons from harming themselves or others
- Minimize activations
- Fleeing suspect should not be only justification
- Do not use on pregnant women, elderly persons, young children, visibly frail persons absent exigent circumstances
- Do not use on handcuffed persons absent active resistance, aggression or to prevent harm
- Avoid using in areas where fall can cause injury
- Avoid firing at head, neck and genitalia
- Holster on weak (support) side to avoid accidental drawing
- Warn before shooting

“You kids have it easy. When I was in college, you were beaten with a billy club.”