TASER Training and Legal Bulletin 14.0-5

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Subject: Recent Jury Verdict in TASER Use-of-Force Case

Background: On June 6, 2008 a jury verdict in the United States District Court for the Northern District of California in the case of Betty Lou Heston, et al. v. City of Salinas, TASER International, Inc (TASER), et al. found that the extended duration of a TASER Electronic Control Device (ECD or device) contributed 15 percent to the death of Mr. Robert C. Heston on February 19, 2005 (Mr. Heston's own actions, including toxic methamphetamine ingestion were found liable for 85%). This has lead to much speculation in the media, and misinformation from third parties seeking to mischaracterize the outcome and implications of this case.

This bulletin will set forth the salient facts and address some of the misinformation being circulated misconstruing the Heston verdict against TASER as a liability risk to law enforcement agencies who are using TASER devices. In fact, the Heston jury found just the opposite; that the prolonged and multiple TASER ECD exposures by Salinas police officers was NOT excessive use of force and exonerated the City of Salinas, the Salinas Police Department, and Salinas police officers from all liability. The Heston case continues a long line of extensive court rulings that have held that the appropriate use of the TASER device is not excessive use of force and affirms the overwhelming data from our customers showing that deployment of the TASER device significantly reduces excessive use of force claims for law enforcement.

Facts on the Heston Incident:

- For about 20 years prior to the incident, Mr. Heston had abused methamphetamines and alcohol, resulting in numerous violent altercations with police, including previous assaults on his parents including a facial strike to his mother resulting in a "black eye" and incidents where he had been subdued with TASER devices and / or police canines. Mr. Heston had been in and out of treatment facilities to no avail.
- For the 12 months prior to the incident, Mr. Heston had been in prison, where he is assumed to not have access to methamphetamines. Over this time period, his body would have lost its previous tolerance to the drug.
- On 2/19/05 Mr. Heston ingested approximately 300 milligrams of methamphetamine – an amount which could have been a dosage his body could likely sustain prior to his prison term when his tolerance was much higher, but which can be a lethal level in a novel user, or one without a developed tolerance – such as Mr. Heston on the day of the incident.
- 40 year old Mr. Heston subsequently went into a violent, delirious episode, wherein he:
    - Assaults his 350 pound father, knocking him to the ground and dragging him by one arm
    - Destroys a large grandfather clock
    - Punches holes in the ceiling of the parents' house claiming there is a "gunman" in the attic
    - Breaks a window in the residence in an attempt to get back in after his father had tried to lock him out
    - Physically tears a live outdoor lamp off the wall and throws it in the direction of approaching officers (Mr. Heston received electric burns from the live electrical wires that pulled out of the wall)

    - Throws a large piece of wood "javelin style" striking an approaching officer in the center of the chest
    - Throws a 12 pound grand father clock weight at approaching officers
- Five officers deploy TASER M26™ devices, discharging six cartridges with a total of over 25 trigger pulls before they successfully restrain Mr. Heston.
- Several of the TASER ECD deployments appear to have missed with at least one dart
- Mr. Heston pulls at least one dart from his body
- At one point, Mr. Heston falls to a couch, rolls off and hits his head on a table on the way to the floor.
- For a period of approximately one minute, Mr. Heston is on the floor with his hands underneath him,
    - Officers assert that Mr. Heston was intentionally resisting in a "turtle" position, refusing to show his hands as he lays amidst broken glass and other debris.
    - Plaintiffs' attorneys assert that Mr. Heston's hands were underneath his body because the TASER ECD discharges caused his muscles to contract and he could not cooperate, despite the fact that all known TASER probe sites are on the outer shoulder or back – locations that would stimulate the muscles that cause the arms and shoulders to pull the arms out and back, not inward beneath him.
    - During the attempted handcuffing by multiple offices, officers perceive that the TASER M26 ECDs have lost connections based on:
        - Mr. Heston's continued resistance
        - Audible and visible arcing across the front of the cartridges consistent with disconnects
        - One officer is shocked as he attempts to pull Mr. Heston's arm (again a symptom of a broken wire or other disconnection).
    - Approximately 5 officers struggle with Mr. Heston over the course of the minute period on the ground, unable to restrain his arms
    - One officer reloads and discharges a new cartridge at Mr. Heston's back. The effect is noticeable. At the conclusion of the 5-second discharge, officers are finally able to remove Mr. Heston's hands and place them in Handcuffs.
    - In the recorded 911 call of the incident, Mr. Clifford Satree, a friend of Mr. Heston's, states that Mr. Heston is "not giving up" in the last few seconds before he is restrained, consisted with the officers' testimony that Mr. Heston continued to resist.
    - Shortly after Mr. Heston is restrained, it is noted that Mr. Heston was turning blue, indicating an inadequate amount of blood circulation.
    - During the autopsy, sections of Mr. Heston's brain are sent to Dr. Deborah Mash, the leading researcher in the brain effects of prolonged drug abuse and excited delirium related deaths

Expert Findings:

- The medical examiner who performed the autopsy listed the cause of death as "multiple organ system failure due to cardiopulmonary arrest, due to agitated state associated with methamphetamine intoxication and applications of the TASER [ECD]."
    - The medical examiner specifically comments on the risk that Mr. Heston was in ventricular fibrillation (VF).
    - Subsequent evidence shows that Mr. Heston was never in VF, and the plaintiffs withdrew the arguments about VF
- With the VF theory withdrawn, plaintiffs introduce a theory that the TASER ECDs caused muscle contractions that, similar to physical exertion, cause lactic acid to be released which may have worsened Mr. Heston's exhausted, methamphetamine induced acidotic state. This theory is put forth by a cardiologist serving as the plaintiffs' expert who, in his report, overstated the output characteristics of the TASER device by over 10 fold, and the primary pulse duration by over 1,000 fold.

- Dr. Deborah Mash, working directly with the medical examiner, reports that Mr. Heston's brain analysis clearly shows the markers for excited delirium death associated with long-term stimulant abuse and damaged dopamine receptors in the brain. She opines that Mr. Heston's death is consistent with excited delirium and methamphetamine abuse. She finds the TASER ECD did not play a role in the death of Mr. Heston.
- Dr. Michael Graham, former president of the National Association of Medical Examiners, opines that Mr. Heston's death is due to methamphetamine abuse and excited delirium He opines that the TASER ECDs did not contribute to the cause of death
- Dr. Michael Evans, a world-renowned toxicologist, testified that the blood tests indicate that Mr. Heston had ingested 300 milligrams of methamphetamine – a toxic dose which caused Mr. Heston's death.
- Dr. Jeffrey Ho, the leading published researcher in the application of TASER ECDs to medically monitored human subjects, described medical testing on human volunteers, including exhausted human subjects wherein an extended duration TASER ECD applications did not cause any clinically significant changes to blood pH (acidity). He reports that these findings contradict the plaintiffs' theory and opines that the death is due to methamphetamine intoxication and agitated delirium – similar to more than a dozen deaths Dr. Ho has personally observed in his clinical duties as an emergency medicine physician and in his extensive research into sudden custodial deaths.
- All police experts, both plaintiff and defense, as well as plaintiffs' attorneys agreed that the "TASER [ECD] was the perfect force option for this incident." **The disagreement occurred over the number and duration of applications, which the plaintiffs alleged were excessive.**

Jury Findings:

- It is very important to note that the Heston jury found that the use of the TASER devices by Salinas law enforcement officers was not excessive use of force, even though it involved multiple TASER ECD deployments for extended durations.
- **There were no damages awarded against either the Salinas Police Department or any of the officers involved.**
- The jury found that Mr. Heston's own actions were 85% responsible for his death. They assigned 15% of the responsibility to TASER International for a "negligent failure to warn" that extended or multiple TASER ECD applications could cause muscle contractions that could potentially contribute to acidosis to a degree that could cause cardiac arrest.
- The jury awarded $1,021,000 in compensatory damages and $5,200,000 in punitive damages against TASER International based on alleged negligent failure to warn.
    - The compensatory damages will be reduced by 85% to approximately $153,000.
    - It remains to be seen how the punitive damages will be effected by the findings of Mr. Heston's primary responsibility.
- TASER International intends to pursue appropriate legal channels, including a motion for a new trial, judgment notwithstanding the verdict and filing an appeal in this matter.
    - There is strong case law that limits punitive damages to 3-4 times compensatory damages, with an upper limit of 10 times compensatory damages. We believe this will limit the damages to $1.5 million maximum and likely much less.
    - There is further case law that supports that a finding of negligent failure to warn, especially with only 15 percent culpability, is not sufficient to support punitive damages, in which case the punitive damages will likely be eliminated completely
    - There were a number of legal thresholds, including expert testimony necessary to establish the standard for warnings, which were not met. TASER International believes these legal thresholds are sufficient to overturn the findings of the jury.

Discussion of Jury Findings:

- We believe the findings of the jury were greatly influenced by sympathy for the Heston family, and Mr. Heston's 69 year-old father in particular. This family had endured decades of considerable hardship and pain, culminating in the incident wherein Mr. Heston ransacked that house and died in his drug-induced violent confrontation with police.
- Plaintiffs emphasized the financial strength of TASER International, and focused on the fact that one of our board members had sold stock options worth approximately $2.5 million as the company grew. Surely, they argued, TASER could afford to pay at least that much to Mr. Heston's family.
- This case is a reminder of the inherent risks involved in jury trials, regardless of the strength of evidence and facts. It is widely understood within the legal community that juries are unpredictable.
- This first legal finding of a TASER device contributing to a cause of death (albeit only 15%) needs to be considered in the broad view of the number of TASER cases adjudicated to date. TASER International has successfully disposed of 70 cases, with a record of 70 dismissals to one loss We are unaware of any other technology with such a strong affirmative case history.
- TASER intends to challenge the findings of this jury. In fact, TASER International recently successfully challenged the findings of 3 medical examiners in Ohio, wherein the court reviewed the evidence and ordered the TASER devices removed as a cause or contributor of death in those 3 cases. We are optimistic that the appellate process to challenge this jury finding will find similar success.

Important Legal Implications for Law Enforcement:

- Plaintiffs provided two police practices experts who testified that each TASER ECD deployment after Mr. Heston went to the floor constituted "excessive force". It's worth noting that even these experts and the plaintiffs' attorneys all stated that the TASER device was the "best" tool to use on Heston to try to get him under control.
- Despite the testimony of these plaintiff's police practices experts, the jury specifically found that the Salinas police officers did not use excessive unconstitutional force on Heston, agreeing instead with the police practice experts for the defense.
- As a result the police officers were exonerated and not found liable.
- This was a clear victory for law enforcement and the TASER device.
- The fact that TASER International was found liable for product liability related claims should not impact law enforcement at all since law enforcement is not liable for product liability claims. No viable product liability claims can be made against law enforcement.
- In this context, law enforcement is only liable for excessive use-of-force and refusal to provide medical care claims and this verdict exonerating the Salina police officers on the use-of-force allegations affirms the extensive legal holdings in reported cases where courts have held that the use of TASER devices is not excessive use of force when used properly.
- The deployment of TASER devices has had a pronounced impact in reducing excessive use-of-force claims against our customers and the Heston case represents one more example of how effective the TASER device is in reducing our customers' liability for excessive use-of-force claims even under the most extreme circumstances.
- This case emphasizes the importance of appropriate policies, robust training, and warnings. It is critical that agencies constantly update their policies and training with the latest information and the latest training versions and bulletins from TASER International (and other equipment providers and organizations).
    - TASER Instructors are required to visit the training resources page at www.TASER.com within 72 hours before each course they instruct to check for training bulletins and updates to ensure they are training with the latest information.

- Training bulletins need to be expeditiously distributed to TASER device operators when issued
- TASER International will make reasonable efforts to distribute training updates, however instructors need to check www.taser.com to ensure they have the latest information given the possibility of items lost in the mail, emails deleted or non delivered, or unsuccessful fax delivery.

- **Consistent with current and previous versions of TASER training, officers should minimize the number and durations of TASER applications, just as they should minimize all applications of force wherever practicable.**
  - Field statistics clearly indicate that law enforcement agencies are, indeed, minimizing the number of TASER applications. Recent data from the Royal Canadian Mounted Police indicate that 57% of TASER device uses involve only a single application, 83% of cases utilize three or less discharges, and 99% of TASER uses involve six or fewer TASER applications.
- TASER International worked carefully and cooperatively with the Salinas Police Department in developing a joint litigation strategy to ensure that the most important parties, the police officers involved (who were facing exorbitant personal punitive damages), were not "scape-goated" in any way. This strategy included TASER International taking some additional risk at trial, a strategy that we believe is the right thing to do.
- Salinas Police Chief Daniel Ortega said his department wouldn't make any major changes in its TASER ECD use and training procedures... "I have absolutely no intention of not using TASER [devices]," Ortega said.
- Ortega said he would keep trying to purchase TASER CAM™s, which videotape incidents when TASER ECDs are used, and suggested that if the officers had been equipped with the TASER CAMs the trial never would have occurred.
- Agencies considering suppliers of critical incident systems that may be used in use-of-force related incidents should consider the litigation experience and support of the equipment provider as well as whether the provider will support law enforcement, or attempt to shift liability away from the supplier toward the agency or end users when times get difficult. Agencies wishing to learn more about TASER International's customer support and legal strategies should contact either the Salinas Police Department, or the litigation staff at the Los Angeles Police Department who successfully co-defended a case with TASER in 2006.
- Agencies should carefully evaluate the quality, accuracy, and thoroughness of training materials, medical testing support documentation, and warnings as part of their equipment selection process given the importance of these factors in downstream litigation defense.

Legal Implications for TASER International

- This case found no product design defect and did not find that the TASER device is inherently dangerous or defective. In fact, the case evidence strongly supported the TASER device as the best force option available for this type of circumstance.
- The jury verdict found a negligent failure to warn of the specific risk of the metabolic effects of TASER device induced muscle contractions in exhausted, acidotic subjects such as Mr. Heston. On June 28, 2005, TASER International issued revised warnings that included language about the risks of extended, prolonged, or multiple TASER ECD applications on exhausted or otherwise compromised subjects.
- The Heston case occurred before those warnings were issued, hence a failure to warn case for incidents after June 28, 2005 are highly unlikely to find a failure to warn claim on this issue or any other known risk discussed in those warnings.

Correction of Misinformation

- Some parties have stated that the 2005 Protection of Lawful Commerce in Arms Act (codified as 15 U.S.C. Sections 7901-7903) would protect a firearms provider from liability such as the Heston case. This is completely false. The 2005 Protection of Lawful Commerce in Arms Act only protects firearms manufacturers from claims related to the criminal misuse of their products, not from product liability or failure to warn claims. Further, the 2005 act provides zero protection to law enforcement agencies or end users in any way.
- Stinger® Systems has used this Heston case to imply that their device systems are somehow safer.
    - Stinger claims that the Stinger S-200 or any other Stinger product has never been involved in an in-custody death. To the best of our awareness, there are no significant law enforcement agencies deploying more than a handful of S-200 devices. Comparatively, over 300,000 TASER devices are used by over 13,000 agencies in over 40 countries, with over 1.3 million human exposures. Any device used in significant numbers by law enforcement in tense, uncertain, and rapidly evolving use-of-force situations will eventually be involved in a case where there is a death in police custody. The question is whether to be the first agency defending an untested device, or to rely on a proven track record.
    - There are over 125 medical and field studies supporting the safety and effectiveness of TASER devices. For more information:

      Recent U.S. Department of Justice Comparative Study:
      http://www.ojp.usdoj.gov/nij/topics/technology/less-lethal/taser-stinger.htm

      Comparison PowerPoint:
      http://www.taser.com/training/Pages/TrainingResources.aspx

Related Matters

- On Friday, May 2, 2008, after a four-day trial in Common Pleas Court in Ohio, Judge Ted Schneiderman, ordered that the TASER be removed from three medical examiner reports, finding that there is "simply no medical, scientific or electrical evidence to support the conclusion that the TASER X26 ECD had anything to do with the death of Dennis S. Hyde, Richard Holcomb, or Mark D. McCullaugh. The Medical Examiner failed to present any evidence of the use and effect of TASER devices."
    - The Common Pleas Court also announced that TASER International and the City of Akron "have proven their claims for changing the reports of autopsy and death certificates on the three individuals by more than a preponderance of the evidence" as well as "provided overwhelming credible medical and scientific evidence to support their positions."
    - TASER International filed the suit to correct the erroneous medical examiner reports that resulted in just one of the 3 cases, 15 officers being sued civilly and 5 charged criminally. The corrected reports should significantly help the officers in defense of their related cases
    - A video expose that explores the details of these cases is available at www.lineofduty.com
- The Rand Corporation, a world-renowned think-tank, recently completed a study commissioned by the New York City Police Department. The research report recommends increased use of TASER devices to help reduce the risk of incidents escalating to lethal force levels. See pages 64-78 and 96-96 in the Rand report link on the NYPD home page at: http://www.nyc.gov/html/nypd/html/home/home.shtml
- A recent report from the Force Science Research Center, "New study: TASERS as safe as weapons can be." looks at a first-of-its-kind case-by-case study of in-custody deaths. Chief Howard Williams of the San Marcos, TX police department tracked down 213 cases in which suspects died in police custody in events following TASER ECD use. He concludes that TASER devices are "Safe weapons. At least as safe as weapons can be." Read the article at http://www.policeone.com/less-lethal/articles/

- On May 20, 2008, in a U.S. Department of Justice, National Institute of Justice (NIJ) Sponsored Medical Study - Deaths Following Electro Muscular Disruption -- where the study framework was directed by a steering group with representation from NIJ, the College of American Pathologists, the Centers for Disease Control, and the National Association of Medical Examiners, wherein to support the study, the steering group appointed a medical panel comprised of physicians, medical examiners and other relevant specialists in cardiology, emergency medicine, epidemiology, pathology, and toxicology. Mr. John Morgan, Deputy Director for Science & Technology, National Institute of Justice, May 20, 2008, Less Lethal and Critical Incident Technologies stated:

  "While exposure to CED is not risk-free, there is no conclusive medical evidence within the state of current research that indicates a high risk of serious injury or death from the direct effects of CED exposure. Field experience with CED use indicates that exposure is safe in the vast majority of cases. Therefore, law enforcement need not refrain from deploying CED's, provided the devices are used in accordance with accepted national guidelines such as the model policy of the International Association of Chiefs of Police."