

Police Misconduct and Civil Rights

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The Implication of Taser Failure to Warn Liability for Police Misconduct Lawsuits

By Lynne Wilson*

Introduction

Until June 2008, Taser International, Inc. ["Taser"] often boasted that it had not lost a single one of 70 product liability or wrongful death lawsuits filed against it.¹ Faced with Taser's aggressive and well-funded legal defense team, no plaintiff had been able to overcome a lack of causation defense to their claims that Taser failed to warn its customers about the potential lethality of its weapons. Then on June 6, 2008, a federal jury found Taser liable under California products liability law for its failure to warn that "prolonged exposure to electric shock from the device ... poses a risk of cardiac arrest in a person against whom the device is deployed."² The jury awarded over \$6.2 million to the family of deceased 40-year-old Robert Heston, including \$5.2 million in punitive damages. Although in May 2011 this amount was significantly reduced on appeal,³ the jury's finding forced Taser to revise not only its product warnings but also all hands-on training that it gives to law enforcement officers who use Tasers on the street.⁴

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More recently, a second federal jury found Taser similarly liable under North Carolina products liability law, awarding \$10 million to the family of deceased 17-year-old Darryl Turner.⁵ With an estimated 559,000 Tasers now distributed to law enforcement officers in 107 countries,⁶ there is no doubt that the new world order of so-called less lethal policing has been forced to recalibrate.

A few days after the *Heston* verdict, Taser issued "Taser Training and Legal Bulletin 14.0-5" with its own spin on the verdict and refusing to admit defeat. After pointing out that the jury had exonerated the officers who shot Robert Heston, Taser concluded that "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."⁷

Taser also pointed out that its earlier Training Bulletin No. 12.0 issued in June 2005 had warned officers about the risks of extended, prolonged or multiple Taser applications on exhausted or otherwise compromised subjects.⁸ Because it was issued four months after Robert Heston's death, the Salinas officers who Tasered him did not have the benefit of that warning.

Not coincidentally, 465 people died after being Tasered by police officers before the *Heston* jury found Taser liable for its inadequate warnings.⁹ Many if not all of these deaths involved prolonged, repeated, and sometimes simultaneous Taserings combined with numerous other police restraint methods.¹⁰

Eventually, Taser had to bow to the jury's verdict in *Heston*. On October 12, 2009, Taser issued "Training Bulletin No. 15.0" that included specific revised warnings to its law enforcement users.¹¹ Based on more recent medical research and a scathing June 2009 report issued by British Columbia's Braidwood Commission,¹² Taser recommended that Taserings applications should be limited to 15 seconds. Taser conceded that medical research had shown that Taserings over 15 seconds in an already stressed person might worsen that person's susceptibility to "acidosis" that might lead to cardiac arrest.

But the most significant new warning in Training Bulletin No. 15.0 is the one involving lowering the "Target Zone" to an area below the chest. Taser lowered the "Targeting Guide" used to train officers, recommending that the "point of aim" be moved from "center of mass to lower center of mass for front shots." In other words, officers

from October 2009 on have been (or should have been) taught to avoid chest shots with ECDs since such shots are less effective and to aim when possible below the belt.

In making this major change, Taser did not concede that the use of an ECD posed a *per se* danger to the heart as did the Canadian Braidwood Commission and the *Heston* and *Turner* juries. Rather, it allegedly made the change to lower the "extremely low, almost non-existent possibility of a cardiac event," to improve the effectiveness of Taser targeting, and to "enhance the ability to defend such cases in post event legal proceedings."¹³ Says Taser's Training Director Rick Guilbault in a memo posted on the Taser website, the "intent of the new preferred target zones is risk mitigation, pure and simple."¹⁴ Taser continues to make these recommendations in its current training materials and on its website.¹⁵

The purpose of this article is to better understand the current status of U.S. law related to Taser use by police officers through the impact of the recent product liability victories as well as Taser's significant changes it has made

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to the training of "end user" officers. To that end, this article will summarize *Heston v. City of Salinas and Taser International, Inc. et al* and *Turner vs. Taser International, Inc.* and then analyze the implications for excessive use of force and failure to train claims.

The Heston Case: Background Facts

When Robert C. Heston showed up at his parent's home in Salinas, California on the afternoon of Saturday, February 19, 2005, he began acting strangely. The 40-year-old Heston had a history of abusing methamphetamine as well as several arrests and convictions related to drug offenses and run-ins with the police.¹⁶ He had been in prison and was living with his parents. His father, 66-year-old Robert H. Heston, called 911 around 1:30 p.m. wanting his son to leave the residence because of his bizarre behavior. According to dispatch records, the residence had been "flagged," requiring a minimum of three police officers to respond.¹⁷

A number of Salinas officers responded to the call and attempted to convince the younger Heston to leave the residence but he would not do so. The officers left after they determined that Heston had not broken anything and that they could not force him to leave the premises. Sgt. Michael Dominici arrived and explained to the elder Heston the process for obtaining an eviction or restraining order.

At about 2:20 p.m., the father called 911 a second time informing the dispatchers that his son had now assaulted him and was throwing items from the home. The sergeant (Dominici) returned to the scene, requesting that additional units respond and that units with Taser ECDs should also respond. As they arrived, officers could see items hurled out of the residence through the front door onto the front lawn, including a smashed grandfather clock, picture frames, clothing, and pieces of shattered wood. As Sgt. Dominici approached the front door, he could hear items being broken inside and could see the elder Heston on the living room floor being dragged by one arm across the room by his son. Sgt. Dominici and Officer Craig Fairbanks attempted to deploy their Tasers but neither shot was effective.

Sgt. Juan Ruiz and Officer Lek Livingston then simultaneously fired their Model M26 Tasers at Heston. The first two Taserings caused Heston to strike his head on an end table, fall to the ground, and roll onto his stomach, placing his hands underneath his body. The officers could not remove Heston's hands from underneath his body, so they Tasered him again.

Sgt. Ruiz pulled the trigger of his ECD six times over the next 48 seconds. Officer Livingston pulled the trigger of his ECD approximately 13 times over the next 74 seconds, discharging his ECD continuously for over one minute. Officer James Godwin also discharged his ECD four times over 28 seconds. Officer Godwin then switched cartridges and fired again into Heston's back at which point his arms came free and he was handcuffed.

While lying on the ground, Heston was shocked continuously for one minute and 14 seconds, most of that time simultaneously with multiple ECDs. He received 25 total discharges from three different devices.¹⁸ Some of the Taser shocks were administered after Heston was held down by several officers in their attempts to handcuff him.¹⁹

As the last Taser was discharged, the officers noticed that Heston was limp and unresponsive. His head had turned blue. The officers checked and found that he was not breathing. Paramedics arrived and found no pulse. They were able to revive him after 10 minutes. After extensive brain damage and systemic organ failure, he was taken off life support and died in a local hospital the next day.

Dr. Terri L. Haddix, the medical examiner who conducted the autopsy for Monterey County, attributed Heston's death to "multiple organ system failure due to cardiopulmonary arrest, due to agitated state associated with methamphetamine intoxication and applications of the Taser [ECD]."

The Heston Case: Claims Asserted

Attorneys John Burton and Peter Williamson filed an initial wrongful death complaint on behalf of Heston's parents and his estate on September 12, 2005, in the U.S. District Court of Northern California in San Jose.²⁰ Named defendants included the City of Salinas and the Salinas Police Department; Officers Dominici, Godwin, Livingston, and Ruiz; and Taser International, Inc.

The Hestons claimed that defendants Godwin, Livingston, and Ruiz subjected Heston to excessive force with the M26 Taser in violation of the Fourth Amendment and deprived his parents of their due process rights to familial relations in violation of the Fourteenth Amendment. They also claimed that defendant Dominici was an "integral part" of these violations and that Dominici and Ruiz were liable in their supervisory capacities.²¹

The Hestons further claimed that the deliberate indifference of the City of Salinas and its police department

in the training and supervision of officers using ECDs was a substantial factor in causing these constitutional violations. Additionally, they alleged that defendants Godwin, Livingston, Ruiz, and Dominici battered the younger Heston and that the City and its police department were vicariously liable for that battery. They were also allegedly liable for negligence and negligent training.

As to Taser, the Hestons claimed that it negligently manufactured and marketed the Taser M26 ECD by not providing adequate warnings "that repeated applications of its electrical current can cause cardiac arrest, especially in persons who are in an agitated or excited physical state." Taser was alleged to be strictly liable for its failure to provide such warnings.

The defendant City of Salinas and its officers contended that Heston was a threat to the officers and his father, that he assaulted the officers and resisted and obstructed their efforts to subdue him, that he continued to resist while on the ground, and "that the rapidly evolving, tense and uncertain totality of circumstances warranted using ECDs to control Heston." These defendants also contended that use of the Taser ECD was a "reasonable alternative means of subduing [Heston] who was observed to be in excited delirium." Individual officers contended that they used only reasonable force considering the totality of the circumstances and that they were immune from liability as their conduct did not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

All defendants including Taser contended that "multiple applications of ECDs is [sic] medically safe." The City contended that its "training was appropriate and pursuant to all training and scientific information available on and before February 19, 2005." The City also contended that it did not act with deliberate indifference to the need to adequately train officers.

Taser denied the product liability claims, contending that the product was not defective in design, manufacture or distribution and that any warnings or instructions given by Taser were adequate to avoid injury. It further contended that "multiple and/or sequential and/or simultaneous deployment of Taser ECDs is not lethal, and that the decedent died due to excited delirium as a result of his chronic substance abuse, heavy use of methamphetamine, and an enlarged heart caused by his long-term drug abuse." Taser asserted a total of 33 affirmative defenses, including lack of causation, that the use of the Taser was not reasonably foreseeable and was inappropriate for its purpose, that it had no obligation to

warn, that an alternate design would entail unreasonable cost, that the alleged risk was not "scientifically knowable" at the time of manufacture, that Heston's own acts barred any recovery, that the injuries were the result of an "idiosyncratic reaction" which was not reasonably foreseeable and not the result of Taser's negligence, and that "Taser did not owe a duty to any plaintiff."

All defendants claimed that Heston's own contributory negligence caused or proximately contributed to the incident and to the injuries. Taser contended that in the event it was found at fault which in any manner contributed to Heston's injuries, "a finding should be made apportioning and fixing the comparative fault of any and all parties or persons whether named to this action or otherwise."

As to disputed fact issues to be put to the jury, the Hestons and Taser disputed the state of scientific research as to the effects of ECD discharges on the human body. Taser framed its position by stating that "[i]n the last century of medical, scientific, electrical and engineering research there exists no peer-reviewed published human scientific literature that finds that the small amount of energy delivered into a person by an ECD is foreseeable to cause serious injury or death." The Hestons framed the dispute as "[w]hether any peer-reviewed, published human scientific literature exists which has determined that an ECD can cause serious human injury or death."

As to disputed legal issues, the City and the officers argued that whether or not the force was reasonable should only be assessed at the point that Heston landed on the floor and not before that. They also argued that the defendant officers were entitled to qualified immunity since "an officer may have all the correct relevant facts, but have a misunderstanding about whether a particular amount of force is legal under the circumstances. If the mistake is reasonable, the officer is entitled to qualified immunity." Good faith immunity also allegedly applied to the tort of assault and battery under California law. Finally, the City argued that it could not be held liable for failure to train under *Monell* because the plaintiffs would be unable to prove deliberate indifference, i.e. that the City and the Police Department failed to adequately train their officers while knowing that their failure to train adequately "made it highly predictable that their police officers would engage in conduct that would deprive persons such as Robert C. Heston of his rights under the Constitution and laws of the United States."

As to the products liability failure to warn claim, Taser argued that the plaintiffs had to prove that the Taser M26

did not include "sufficient instructions or warning of potential safety hazards." To do so plaintiffs had to prove that the product had potential risks that were known or knowable by the use of scientific knowledge available at the time of manufacture, that the potential risks presented a substantial danger to users of the product, that ordinary consumers would not have recognized the potential risks, that Taser failed to adequately warn of the potential risks, that the product was used in a way that was reasonably foreseeable to Taser, that plaintiffs were harmed, and that lack of sufficient warnings was a substantial factor in causing plaintiff's harm. Similar elements were required to prove the plaintiffs' claim that Taser failed to use reasonable care "to warn about the product's dangerous condition or about facts that make the product likely to be dangerous."

The Heston Case: Medical Testimony at Trial

The case was tried to a six person jury for four weeks in May and June 2008. The Hestons did not contest that Tasers were appropriately used to subdue Heston. What they contested was the prolonged and repeated Taserings of him when he was in an already agitated and vulnerable state.

To assist the jury in assessing the claims regarding the dangerousness of Tasers, the Hestons called two expert medical witnesses, Dr. Mark Myers and Dr. Terry Haddix.²² Dr. Haddix, a board certified forensic pathologist, was the coroner who performed the autopsy on Mr. Heston and determined the cause of death. Dr. Meyers is a board certified cardiologist who specializes in cardiac arrhythmia and is an expert in cardiac electrophysiology.

Based on his review of the incident, his extensive training and experience as well as his review of the relevant scientific literature, Dr. Myers concluded that Heston died "of multiple-system organ failure due to cardiopulmonary arrest caused by metabolic acidosis resulting from multiple Taser applications, compounded by breathing impairment and vasovagal nervous reactions." Dr. Myers opinion was supported by "peer-reviewed medical literature demonstrating a causal connection between multiple ECD applications and cardiac arrest resulting from metabolic acidosis." One of the most controversial of these was Dennis, et al., "Acute Effects of Taser X26 Discharges in a Swine Model (2007)," a study which involved repeated ECD cycles administered to two pigs. The repeated ECD cycles induced severe "metabolic acidosis" and resulted in cardiac arrest in both pigs.

"Metabolic acidosis" refers to the build-up of lactic acid in the bloodstream and is caused by excessive muscle contractions. It is a known cause of cardiac arrest in humans and has been associated with cardiac arrests suffered by agitated people during police restraint procedures.²³ The relationship between EDC-induced muscle contractions and severe metabolic acidosis was documented in a study sponsored by the United States Air Force and is among the first peer-reviewed ECD studies not sponsored by Taser.²⁴ The Air Force study also involved pigs and demonstrated that repeated, prolonged ECD exposures "caused the lactic acid levels to skyrocket into the danger zone."

Dr. Myers testified regarding these studies at trial concluding that they demonstrated a significant increase in blood lactic acid levels from muscle contractions proportionate to the exposure to electrical current from Taser ECDs. Dr. Myers took into account that Heston was in an agitated state that would result in some degree of acidosis but nevertheless concluded that "it was the Taser that pushed him off the cliff." Taser repeatedly objected to Dr. Myers' testimony, arguing that reliance on animal studies is inappropriate. Dr. Myers testified "that pigs and humans are similar in size, that their physiology is essentially the same, that their muscles contract in the same way, that pigs are widely used for cardiovascular research and for finding ways to build better pacemakers and fibrillators, and that Taser itself has conducted research using pigs."

Dr. Haddix conducted an extensive external and internal examination of Heston's body. She had toxicology tests performed on blood obtained shortly after his hospital admission, a portion of his brain tested for an evaluation of "excited delirium," and his heart evaluated by a cardiac pathologist. She also conducted her own search of medical literature and spoke to Taser employees for their recommendations. One major report that she reviewed was from the Joint Non-Lethal Weapons Human Effects Center of Excellence dated March 1, 2005. It specifically referenced "the risk posed by cardiac arrest due to acidosis from multiple and prolonged ECD applications."²⁵

Based on her investigation, Dr. Haddix concluded and testified that the cause of Heston's death was "multiple organ system failure due to cardiopulmonary arrest, due to an agitated state associated with methamphetamine intoxication and application of Taser." On further examination, Dr. Haddix explained that the prolonged Taserings contributed to Heston's agitation and stress which further increased his oxygen demands. Secondly, it also had metabolic consequences "that may cause him to develop a fatal heart rhythm."

A trial, Taser's numerous medical witnesses agreed that Heston was acidotic but claimed "that the root causes of his acidosis were methamphetamine intoxication and the fact that he was in cardiac arrest for more than ten minutes after being restrained."²⁶ The experts argued that ECDs did not increase blood acidity to the point of endangering human health. They argued that Heston died not from the Tasers but from "excited delirium," a state in which victims allegedly become violent, uncontrollable, exhibit super-human strength, have a rise in body temperature and then can suddenly collapse and die. They also testified that methamphetamine can cause "excited delirium" and pointed out that the level of methamphetamine found in Heston's blood could have alone caused his death.²⁷

Taser's key expert on "excited delirium" was Dr. Deborah Mash, a professor of neurology and cellular and molecular pharmacology at the University of Miami School of Medicine. She testified that "excited delirium is a brain disease that causes a person to become hyperactive, paranoid, and hostile," and that it is likely a genetic disorder. Essentially, Taser argued through their medical experts that Heston would have died during the incident from the struggle and the drugs he had ingested even if the Tasers had not been deployed on him.

The *Heston* Case: Verdict and Appeal

The jury returned a unanimous verdict on June 6, 2008. As to the four defendant officers, it found that none of them used excessive force on Heston by their deployments of Taser ECDs against him.²⁸ Because it so found, it did not address the question of whether or not the City of Salinas failed to adequately train them or failed to supervise them with respect to the deployment of Taser ECDs with deliberate indifference to constitutional rights. Thus, the City of Salinas and its police department were also found not liable.

As to Taser, the jury found that at the time that Taser manufactured and sold Taser ECDs, a reasonable product manufacturer of an ECD knew or reasonably should have known that the Taser ECD was "dangerous or likely to be dangerous because prolonged exposure to electric shock from the device potentially causes acidosis to a degree with poses a risk of cardiac arrest in a person against whom the device is deployed." It also found that Taser failed to adequately warn purchasers of the risk.

The jury further explicitly found that on February 19, 2005, the defendant Salinas officers used the product in a manner reasonably foreseeable by Taser by administering a prolonged deployment of Taser ECDs against Heston and


that "the failure by Taser International to warn the Salinas Police Officers of the risks of prolonged deployment was a substantial factor in causing the officers to use the device in such a way." Finally, the jury found that "as a consequence of the prolonged deployment of Taser ECDs prior to his death, Robert C. Heston suffered acidosis to a degree which caused him to have a cardiac arrest" and that his parents suffered harm because as a consequence of the cardiac arrest Heston died.

After the verdict, Heston attorney Williamson spoke to three of the six jurors including the foreman. He said that the jury agreed with the crux of the plaintiffs' case, that Taser "should have made more of an effort to warn people about their product once they realized it was potentially dangerous, perhaps even e-mailing its customers. They should have sent out a warning and they didn't."²⁹

The jury awarded \$21,000 in compensatory damages and \$200,000 in punitive damages against Taser to Heston's estate. It awarded \$1 million in compensatory damages and \$5 million in punitive damages against Taser to Heston's parents. It found Taser to be 100% at fault. However, it also found that Heston's own negligent conduct "caused acidosis to a degree that posed a risk of cardiac arrest concurrently with the prolonged deployment of Taser ECDs and that these two causes continued to operate concurrently to the point that Robert C. Heston had a cardiac arrest." It found Heston 85% at fault and Taser 15% at fault. In a post-trial motion, the district court struck the punitive damages award, stating that the jury's answers regarding the strict liability claim appeared to contradict the failure to warn claim and that on the verdict form the \$5 million punitive damages award was erroneously assigned to the parents' wrongful death claim rather than to the estate.


The verdict thus resulted in a net award against Taser of \$153,150 in compensatory damages. The district court ordered Taser to pay attorney's fees totaling \$1,423,127 to Heston's attorneys John Burton and Peter Williamson based on California's Private Attorney General Statute, Cal. Code Civ. Proc. § 1021.5 (allowing attorney's fees in any action which has resulted in "the enforcement of an important right affecting the public interest").³⁰

Taser appealed the verdict and the Hestons cross appealed the post-trial order striking the punitive damages award. In an unpublished opinion dated May 5, 2011,³¹ the Ninth Circuit ruled that the jury instructions regarding expert testimony were appropriate and that the district court did not abuse its discretion in qualifying and admitting the expert testimony from Drs. Myers and



Haddix. It specifically ruled that the studies on which the two experts relied were “sufficiently analogous to this case to support the expert witnesses’ theories of causation” and to be the basis for the admitted expert testimony. It concluded that the “studies demonstrated a relationship between Taser deployments and blood acid levels that could be aggravated by additional factors at play in this case, such as the numerosity and duration of Taser deployments and the victim’s already-enhanced oxygen needs and blood acid levels.”


As to the compensatory award, the Ninth Circuit ruled that the district court abused its discretion when it affirmed the compensatory award to the estate. The estate failed to present any evidence as required by California law that as he was treated by paramedics and transported to the hospital where he received medical treatment, Heston sustained any compensable loss or damage “before death ... not including any damages for pain, suffering or disfigurement.” It thus vacated the \$21,000 compensatory damages that the jury awarded to the estate.



The Ninth Circuit then vacated the attorney’s fee award. It stated that Cal. Code Civ. Proc. § 1021.5 did not apply because the possibility of a large recovery meant that the attorneys had an “adequate incentive to litigate” their case aside from any motive to enforce an important public right and that they had taken the case on a contingency fee basis without expecting that they would benefit from California’s private attorney general statute. Finally, it upheld the district court’s vacating of the punitive damages award stating that Taser’s negligent failure to warn did not rise to the level of “willful or wanton misconduct” required under California law. It also found that the jury contradicted itself by answering “No” to the question of whether Taser actually knew of the risk of prolonged Taser deployment.

The final damages awarded against Taser in the *Heston* case thus totaled \$150,000. But *Heston* established for the first time the dangers of prolonged, repeated Taserings and it forced Taser to explicitly and clearly warn officers of this danger, something it would never have done otherwise. Thus, the net result in the real world for anyone subsequently Tasered by a police officer has been immeasurable.

The Turner Case: Background



Unfortunately, the impact of the *Heston* verdict in June 2008 may have been too late for 17-year-old Darryl Turner. On the early afternoon of March 20, 2008, Turner had been working as a bagger-cashier at a Food Lion supermarket

in Charlotte, North Carolina.³² Charlotte-Mecklenburg Police Department Officer Jerry Dawson, Jr. was called to the supermarket to assist with Turner, who had become upset and was refusing to leave, knocking over a display and throwing an umbrella. A store surveillance video showed Officer Dawson entering the store with a Taser in his hand.³³ When Turner refused to comply with Officer Dawson’s commands, Dawson deployed his X26 Taser into Turner’s chest. He was three to five feet away from Turner when he did so.

Turner staggered toward the front door with the Taser’s electrical current activated and collapsed, never to move again. Officer Dawson did not stop cycling his Taser until Turner had fallen and was in a position to be restrained. He cycled the Taser for a total of 37 seconds.

Paramedics who arrived minutes later found Turner in “ventricular fibrillation.” Their resuscitation efforts failed. In the subsequent autopsy, medical examiner Dr. Thomas Owens found no drugs and found Turner’s heart to be disease free. The autopsy showed that the “teenager’s heart was pumping so fast and chaotically from the Taser shot and stress from the confrontation that it stopped pumping blood properly.”³⁴

Darryl Turner was in excellent health and there were no unusual heart ailments in his family. He had completed high school early, graduating first in his class, and had planned to attend college. He had never been arrested before and was planning to marry his high school sweetheart. His parents were divorced and he lived with his grandparents.

Officer Dawson was subsequently disciplined for violating police department policy by his prolonged Taser use. He was suspended for five days without pay and required to undergo additional training.

After Turner’s death, the Charlotte-Mecklenburg Police Department mandated additional training for all officers on the proper use of ECDs. The training emphasized that “repeated and prolonged deployment and exposure of the device is a strict violation of department policy.” Officers were also trained to “split the belt line,” i.e., to target their Tasers to other areas of the body such as the lower abdomen and upper leg.³⁵

The Turner Case: Trial and Medical Issues

Prior to trial, in 2009 Turner’s family settled with the City of Charlotte for \$625,000. Therefore, the sole issue to be decided at trial was Taser’s liability under North Carolina product liability law. The plaintiffs’ theory was that Taser failed to issue adequate warnings “after receiving scientific

test results demonstrating that the X26's electrical current, when applied near the heart, has the capacity to 'capture' cardiac rhythm, and thus cause cardiac death."³⁶ Plaintiffs were represented by California attorneys John Burton and Peter Williamson (the same attorneys who represented the Heston family) as well as Peter Cathcart of Los Angeles and Kenneth Harris and Charles Everage, both of Charlotte, North Carolina. The case was tried in the U.S. District Court, Western District of North Carolina, Charlotte Division.

In support of their product liability theory, the Turner family focused on the inadequacy of warnings that Taser issued with its X26 weapons prior to March 2008 as well as numerous publications from medical peer-reviewed journals. These showed that at the time it issued the allegedly inadequate warnings, Taser "had notice of the cardiac risks posed by its products."

When Officer Dawson was initially trained to use the Taser X26 weapon (which is slightly more powerful than the M26 weapon at issue in *Heston*), the Charlotte-Mecklenburg Police Department used Taser Training Version 10.³⁷ According to the Turners, this Training Version stated that "Taser tests have found: —No effect on heart rhythms ... No long-term effects—The electrical outputs are still well within the safe levels defined by international standards." Taser also stated that its earlier version (M26) was applied to the chests of test animals without heart failure, that two cardiac safety experts found no interference with heart rhythms and that this was true even when animal subjects were given drugs equivalent to PCP and cocaine.

Based on these representations made in Taser Training Version 10, plaintiffs argued that the Police Department instructed Officer Dawson that "the X26 should be fired at center body mass, that shots to the chest are not dangerous, that the current cannot affect heart rhythm, and that there was no risk from prolonged or repeated exposures to the chest." Both Version 10 and the later Version 14 issued in 2007 included "numerous images of a police officer targeting the heart and firing into the chest of a subject, directly at the heart."

Officer Dawson took a Taser refresher course in February 2008 during which he was shown Training Version No. 14. That version illustrated the whole body as an "effective target zone" and instructed users to aim at the "open front of an unzipped jacket." Plaintiffs argued that both Officer Dawson and his department thus believed prior to the date Turner died that Taser current traveling near the heart could not affect heart rhythms.

The Turners presented numerous medical journal articles establishing that as early as 2005 it was clear that Taser was placed on notice "that its products could cause ventricular fibrillation if shot into the chest of human beings." One was a letter report published in the *New England Journal of Medicine* in September 2005 documenting the case of a 14-year-old boy who went into ventricular fibrillation within two minutes of being shot in the chest by a Taser X26.³⁸ Another was one of Taser's own studies involving pigs published in March 2006. The authors of that study cautioned that "avoidance" of darts to the front of the chest near the heart "would greatly reduce any concern for induction of ventricular arrhythmias."³⁹ Another study published a few months later by a well-respected cardiac electro-physiologist explicitly cautioned that chest shots of the Taser X26 may induce "ventricular arrhythmias."⁴⁰ In spite of these numerous peer-reviewed studies, Taser changed nothing about its instructions to shoot into the chest and continued to issue no warnings about cardiac safety prior to March 10, 2008.

The Turners presented the expert medical testimony of Dr. Douglas Zipes, a world-renowned electro-physiologist. Dr. Zipes testified that X26 shocks to the chest can cause ventricular fibrillation and that the X26 shocks to the chest caused Darryl Turner's ventricular fibrillation. Dr. Zipes testified that there was no other explanation for Darryl's terminal collapse on the Food Lion floor.

Taser attempted to counter Dr. Owens' conclusion as stated in the autopsy report that Turner's heart was disease free. To do so, Taser presented the testimony of Dr. James Stone, a nuclear cardiologist from Calgary, Canada. Dr. Stone actually cut up a specimen of Turner's heart to inspect it and claimed that "the ventricular free wall was thickened." Based on this, he diagnosed "hypertrophic cardiomyopathy (HCM)," a rare condition that is responsible for a handful of sudden cardiac deaths every year.

To evaluate this claim, the Turners hired Dr. Barry Maron, an authority on HCM, to examine the heart tissue. Dr. Maron confirmed the original diagnosis made by Dr. Owens, that the heart was disease free.

Taser also cross-examined Dr. Zipes who apparently was unable to state "to a reasonable degree of medical certainty that Turner would have died with just a 5-second exposure."⁴¹ Taser used this admission to argue that had Officer Dawson not misused the Taser by deploying it far longer than five seconds, "Turner would have survived according to Plaintiff's lone causation expert." They also argued that Turner not only failed to exercise ordinary

care for his own safety and breached his duty to submit peaceably to the arrest but “instead engaged in an extended, violent confrontation.”

On the issue of notice and failure to warn, Taser simply countered that “there is not a single piece of medical, scientific, electrical or engineering peer-reviewed literature concluding that an X26 ECD caused ventricular fibrillation in humans.” It pointed to the recently issued May 2011 National Institute of Justice five-year study⁴² and another recent medical study⁴³ that both concluded that there is no current medical evidence that ECDs pose a significant risk of cardiac dysrhythmia or ventricular fibrillation. Taser also pointed out that on cross examination Dr. Zipes conceded that there is published data demonstrating that pig hearts fillibrate more readily than human hearts. Taser argued that animal studies failed to account for the difference between human and pig hearts or that pigs were artificially induced by anesthesia.

The *Turner* Case: The Verdict

After six days of trial, the jury returned a verdict on July 19, 2011. It found that Taser failed to provide an adequate warning or instruction with the Taser deployed on Darryl Turner on March 20, 2008, and that its failure to do so was unreasonable. It also found that Taser created an unreasonably dangerous condition that it knew, or in the exercise of ordinary care should have known, posed a substantial risk of harm to a reasonably foreseeable claimant and that its failure to provide an adequate warning or instruction was a proximate cause of Darryl Turner’s death on March 20, 2008. The jury explicitly further found that Turner’s death was not caused by Officer Dawson’s use of the Taser in a manner contrary to any express and adequate instructions or warnings which he knew or should have known were delivered by Taser. It awarded compensatory damages in the amount of \$10 million to Darryl Turner’s estate.⁴⁴

After the jury returned its verdict, lead counsel for Turner’s family John Burton commented that “[h]opefully, this verdict will sound the alarm to police officers around the world that firing these weapons into the chests of people should be avoided. No other family should have to endure the tragedy that the Turner and Fontenot families have experienced.”⁴⁵

On July 26, 2011, Taser filed its motion for judgment as a matter of law notwithstanding the verdict or for new trial or for remittitur to reduce the \$10 million award.⁴⁶ Taser argued that the \$10 million award was based solely on sympathy and emotion that trumped the facts and

that the jury’s intent was to punish Taser even though punitive damages were not at issue. Taser also argued that the Turner family had not met its evidentiary burdens on causation or the inadequacy of its warnings since Officer Dawson misused the ECD even with the warnings he was given. Taser objected that the judge failed to instruct the jury on contributory negligence which under North Carolina would have barred the Turner estate’s recovery. Taser also objected to numerous allegedly adverse rulings at trial including the striking of numerous technical experts and the court’s refusal to permit evidence that three bags of marijuana were found on Darryl Turner and that the medical examiner did not test his blood for THC.

At this time, the District Court has not yet ruled on Taser’s post-trial motion to set aside or reduce the \$10 million verdict. Depending on the outcome, the company’s lawyers state that they will appeal.⁴⁷ Taser has also said that its insurance will pay \$6 million of the award if it is not successful on appeal.⁴⁸

Implications for Failure to Train Claims

Heston and *Turner* have forced Taser to concede the potential lethality of their weapons. Until the 2008 *Heston* verdict, Taser vociferously proclaimed the weapons’ safety. No training bulletin before October 2009 warned police officers that shooting a Taser in dart mode directly at a person’s chest might play a role in causing cardiac arrest. No training bulletin before October 2009 told Taser customers that Taserings longer than 15 seconds might contribute to an adverse cardiac event. The verdict in *Turner* has sealed the revised warnings issued in Taser’s Training Bulletin 15.0 into permanent ones. The new warnings will not resurrect Robert Heston or Darryl Turner or the other 558 people who died after being Tasered by the police before they were issued.⁴⁹ But they go a long way to ensure that police departments will now train their officers to exercise restraint.

The big question now is whether such training has actually occurred. The Charlotte-Mecklenburg Police Department’s training and discipline of Officer Dawson at issue in the *Turner* case is exemplary in this regard. Officer Dawson testified that he had no idea that the Taser could possibly cause cardiac arrest before he shot Darryl Turner in the chest on March 20, 2008, and Tasered him continuously for 37 seconds.⁵⁰ He was disciplined for violating Department policy that prohibited continuous Taser applications. Within three months, the Department changed its X26 Taser training to “split the belt line” rather than fire into the chest. It changed its policy, issued

its own advisory to line officers and made sure that each officer understood the importance of the new warnings.⁵¹

Although Taser's Training Bulletin No. 15.0 (and subsequent bulletins) contains a bold face statement that the "bulletin should be distributed to all ECD-certified officers," it is unknown whether this or any other retraining is always done. In a May 2005 report presented to the House Subcommittee on National Security, Emerging Threats and International Relations entitled "Use of Tasers by Selected Law Enforcement Agencies," the U.S. Government Accountability Office noted that of the seven agencies it studied, one agency did not require yearly recertification for officers who had been initially certified to use an ECD.⁵² Although initial training apparently always includes proper targeting, retraining after October 2009 is necessary to educate all ECD-certified officers about the new targeting guide and presumptive limits for consecutive Taser use. Officers must also be educated about higher risk populations (small children, pregnant women, elderly, infirmed or those with a low Body Mass Index) and physiologically or metabolically compromised persons.⁵³

Whether this training is being accomplished in all Departments is unknown. One Chicago emergency room doctor who has dealt with Taser injuries noted that he has never heard of a police officer being given the warnings that are packaged with the ECDs.⁵⁴ Although some departments assign kitted ECDs to individual officers as part of their training, not all do so.⁵⁵ Taser has a six minute "Roll Call Video" posted on its website that carefully explains the new warnings and the new target zone but no one really knows how many police departments have taken the time to show it.

Defense litigators John Peters and Eric Daigle have warned police departments: "Taser appears to have met its legal duty about warning the ECD user on certain issues and concerns, and now it is up to the governmental entity to amend its ECD policy, define critical terms, incorporate Training Bulletin No. 15.0 and Taser warnings into its written policy and then train its personnel regarding these changes [and] ... warnings."⁵⁶ Taser's duty under product liability law was more than likely met by packaging its products with the new warnings. However, as Peters and Daigle have now clearly warned, "if the product receiving area of the government entity and/or the agency failed to pass along the packaged warnings to the user, unintentional liability on the municipality and its administrators, managers, supervisors, trainers, and officers may have been created [emphasis supplied]."

Daigle has further told police departments that to avoid liability, they must ensure that Training Bulletin 15.0 (or subsequent versions) as well as Taser's diagram demonstrating recommended target areas must be distributed to each ECD carrying officer along with actual physical retraining. Taser instructors should be kept current with each Taser warning update and that they should be distributing each update to all ECD carrying officers.⁵⁷

The courts continue to wrestle with when an individual police officer's Taser use is appropriate. The Ninth Circuit, for example, determined in late 2009 that a Taser is an intermediate weapon that requires a strong government interest before it can be used. *Bryan v. MacPherson*, 630 F.3d 805 (Revised Opinion 9th Cir. 2010) (officer used excessive force on 7/24/05 when he deployed Taser on the unarmed, unresisting, unthreatening Bryan but entitled to qualified immunity). *Bryan* has been interpreted by law enforcement itself to require that the suspect must pose an immediate threat to the officer or some other person to justify using an ECD.⁵⁸

More recently, the Ninth Circuit acting en banc in a combined case has again emphasized the strong governmental interests that need to be present before an officer's Taser use is justified: *Mattos v. Agarano* and *Brooks v. Seattle*.⁵⁹ Both cases involved plaintiffs who posed minimal or no threat to the officers. In one (*Brooks*), it held excessive the Tasing of an obviously pregnant woman who refused to get out of her car to be arrested for failing to sign a speeding ticket. In the other (*Mattos*), it held excessive the Tasing of the female victim of alleged domestic violence who did not immediately move out of the way as the officer tried to arrest her husband. The court found the officers entitled to qualified immunity, however, since the law regarding the boundaries of Taser use was not clearly established when the incidents occurred in 2004 and 2006.

But as amply demonstrated by *Heston* and *Turner*, in Taser cases especially the individual officer's use of force cannot be separated from the adequacy of the training. Successfully asserting a failure to train claim in these circumstances will continue to be difficult but not impossible. To do so, a plaintiff faces a significant "deliberate indifference" burden to hold a government entity liable for an unconstitutional failure to train. This requires a showing that the entity's failure to train reflected a "deliberate" or "conscious" choice amounting to a deliberate indifference to the rights of persons with whom the police came into contact.⁶⁰

A government entity will not be found liable just because one officer (like Officer Dawson in *Turner*) was unsatisfactorily trained since the officer's shortcomings may have resulted from factors other than the faulty training program.⁶¹ In order to establish liability for deliberate indifference based on inadequate training, a plaintiff must show that the government entity failed to adequately train its police officers and knew that this failure made it highly predictable that officers would engage in conduct that would deprive persons of their constitutional rights.⁶²

Any department that has failed to adequately educate and train its Taser-carrying officers how to safely use these weapons after October 12, 2009, is potentially liable under this standard. The clear and loud alarm rung in *Heston* and magnified in *Turner* can only be ignored at each department's peril.

ENDNOTES

1. See, e.g., Taser News Release, "Taser Granted Summary Judgment Dismissing Product Liability Lawsuit" (10/9/07) (total number includes a "small number of police officer training injury lawsuits" that were settled).

2. Jury Verdict Form (6/6/08) in *Heston v. City of Salinas, et al*, 2009 WL 248362 (N.D. Cal. 2009).

3. *Heston, et al v. Taser International, Inc.*, 2011 WL 1707048 (9th Cir. 2011).

4. Taser coconducts with its law enforcement customers (i.e., police departments) nearly all training of officers. United States Government Accountability Office, "Use of Tasers by Selected Law Enforcement Agencies" (May 2005) at pp. 14-16 (six of seven agencies studied co-conducted training with Taser International).

5. Jury Verdict Form (7/19/11) in *Turner v. Taser International, Inc.*, 2011 WL 2535016 (W.D. N.C. 2011).

6. "Taser Stats & Usage: How Many Taser ECDs Have Been Sold and How Often Are They Used?" at www.Taser.com (8/31/11).

7. "Taser Training and Legal Bulletin 14.0-5" (6/12/08).

8. "Taser International Training Bulletin 12.0-04" (6/28/05).

9. Statistics found at <http://truthnotTasers.blogspot.com> and www.amnesty.org.

10. See, e.g., National Police Accountability Project Newsletter Spring 2011, "Taser and Asphyxiation Death by New Mexico Cops Leads to \$1,000,000 Settlement" (victim died on 11/18/07 after police Tasered him 23 times, sat on his lower back and hips to keep him subdued, handcuffed him behind his back and placed him face down in the patrol car for the ride to jail).

11. "Taser Training Bulletin 15.0 Medical Research Update and Revised Warnings" (effective 10/12/09).

12. See "Canadian Commission Recommends Restraint on Police Use of Tasers," *Police Misconduct and Civil Rights Law Report* Vol. 9, No. 13 (Jan/Feb 2010) (concluding that Tasers may pose a risk of a fatal heart arrhythmia, even in a person with a healthy heart).

13. Jack Ryan, Esq., "Taser: The Target Zone, Policy and Training" (November 2009) at www.Taser.com.

14. Rick Guilbault, "Taser International's Preferred Target Zones" at www.Taser.com.

15. See "Roll Call Training Video—Preferred TASER Target Zones" on www.Taser.com.

16. Facts are summarized from Appellee's and Cross Appellant's Principal and Response Brief in *Heston v. Taser International, Inc.*, Ninth Circuit Case No. 09-15440 (2/16/10) at pp. 7-9.

17. John G. Peters and Eric Daigle, "Taser Training Bulletin 15.0: Training, Policy, and Legal Concerns," *Police and Security News*, Vol. 26, No. 3 (May/June 2010).

18. A discharge is measured at each five second interval.

19. The Monterey County Herald, "Taser Held Responsible in Salinas Death" (6/12/08).

20. Case No. C05-03658 JW (RS).

21. Claims and defenses are summarized from Joint Pre-Trial Conference Statement (3/31/08) filed in *Heston v. City of Salinas and Taser International, Inc.*

22. Description of plaintiffs' medical testimony regarding Tasers is summarized from Appellee's Brief, supra n.16 at pp. 26-31.

23. Hick, et al., Metabolic Acidosis in Restraint-Associated Cardiac Arrest: A Case Series (1999), cited in Appellee's Brief, supra n. 16 at p. 26.

24. Jauchem, et al, Acidosis, Lactate, Electrolytes, Muscle Enzymes, and Other Factors in the Blood of Sus Scrofa Following Repeated Taser Applications (2005), cited in Appellee's Brief, supra n. 16 at p.27.

25. HECOE, Human Effectiveness and Risk Characterization of the Electromuscular Incapacitation Device—A Limited Analysis of the Taser (3/1/05), cited in Appellee's Brief, supra n.16 at p.30.

26. Description of Taser's medical testimony is summarized from Appellant's Principal Brief in *Heston* Ninth Circuit appeal, supra n.16.

27. Supra n.7 at p.3.

28. Jury Verdict Form, supra n.2.

29. Supra n.19.

30. Order Granting Plaintiffs' Motion for Attorneys Fees and Denying Defendant Salinas' Motion for Costs (1/30/09), supra n.2.

31. Supra n.3.

32. Factual details obtained from Plaintiff's Trial Brief (7/5/11) and Taser International's Rule 50 Brief for Judgment as a Matter of Law Notwithstanding the Verdict, and Alternative Rule 59 Brief for New Trial or Alternatively Remittitur filed in the *Turner* case.

33. "Teen's Family Wins \$10 million Taser Verdict," www.bostonherald.com (7/20/11).

34. "Teen's Family Wins \$10 million Taser Verdict," www.bostonherald.com (7/20/11).

35. "Teen's Family Wins \$10 million Taser Verdict," www.bostonherald.com (7/20/11).

36. Summary of relevant information and evidence presented at trial obtained from briefs cited at supra n.31.

37. "Training Versions" refer to the video and written materials that Taser distributes periodically to its police department customers. The

most recent version downloadable from its website is Training Version No. 18.

38. Drs. Paul Kim and Wayne Franklin (Chicago, IL), "Ventricular Fibrillation After Stun-Gun Discharge," *The New England Journal of Medicine* 353(9): 958-959 (September 2005).

39. Drs. Dhanunjaya Lakkireddy, Patrick Tchou et al, "Effects of Cocaine Intoxication on the Threshold for Stun Gun Induction of Ventricular Fibrillation," *Journal of the American College of Cardiology* 48:805-811 (March 2006).

40. Dr. KumaraswamyNanthakumar et al, "Cardiac Electrophysiological Consequences of Neuromuscular Incapacitating Device Discharges," *Journal of the American College of Cardiology* 48:798-804 (August 2006).

41. Taser International's Rule 50 Brief at p. 11, supra n.31.

42. J. Laub, "Study of Deaths Following Electro Muscular Disruption," National Institute of Justice (May 2011).

43. M. Pasquier, "Electronic Control Device Exposure: A Review of Morbidity and Mortality," *Annals of Emergency Medicine* (May 2011).

44. Jury Verdict Form, *Turner v. Taser International, Inc.*, supra n.5.

45. Supra n.32.

46. Supra n.31.

47. Supra n.32.

48. Supra n.32.

49. Supra n.9.

50. Plaintiff's Trial Brief, supra n.32 at pp.13-14 (summarizing Dawson's deposition testimony).

51. Taser's Motion for New Trial, supra n.32 at p.3.

52. Supra n.4 at pp.14-15.

53. Supra n.17 at p.3.

54. Supra n.17 at p.4.

55. Supra n.17 at p.4.

56. Supra n.17 at p.4.

57. Eric P. Daigle, "Taser Training Bulletin 15.0—Is There a Reason for Concern?" (2010), www.halloran-sage.com.

58. "When is Using a Taser Reasonable Force?" (6/21/10) at www.spartancops.com.

59. *Mattos v. Agarano*, 2011 WL 4908374 (9th Cir. 2011) (Case Nos 08-15567 and 08-35526 (Combined Published Opinion October 17, 2011)), replacing *Brooks v. City of Seattle*, 599 F.3d 1018 (9th Cir. 2010) and *Mattos v. Agarano*, 590 F.3d 1082 (9th Cir. 2010).

60. *City of Canton v. Harris*, 489 U.S. 378, 388-389 (1989).

61. *Harris*, 489 U.S. at 390-391.

62. *Harris*, 489 U.S. at 390-391.

Supreme Court Hears Arguments in Jail Strip Search Case

By G. Flint Taylor*

On October 12, 2011, the U.S. Supreme Court heard arguments in the Fourth Amendment strip search case of *Florence v. Board of Chosen Freeholders of the County of Burlington*, No. 10-945, cert. granted, ___ U.S. ___, 131 S. Ct. 1816, (April 4, 2011). The Petitioner, Albert Florence, is an African American man who was riding as a passenger with his wife, who was driving, and their four-year-old child in their BMW sports utility vehicle when they were stopped on I-295 by the New Jersey state police, ostensibly for speeding. The officers ran a check on Florence and found an old warrant for failure to pay a fine

after he had pleaded guilty to several criminal offenses. In fact he had paid the fine, and had the paperwork to prove it, which he showed to the officers, to no avail. Florence was handcuffed, arrested, and taken first to the Burlington County Jail, where, pursuant to the County's "suspicionless" strip search policy, he was forced to strip naked, lift his genitals, and open his mouth in order to be visually examined for possible contraband by an officer standing an arm's length away. He was then compelled to shower while under observation. Six days later he was taken to the Essex County Jail where he was subjected to another strip search, this time with the added indignity of squatting and coughing for his anus to be visually observed. The next day he was finally brought before a Judge who said he was "appalled" by the course of events and released him. Florence then brought a 42 U.S.C.A.

*Mr. Taylor, a PMCRLR Editorial Board member, has successfully argued two jail and prosecutorial misconduct cases before the U.S. Supreme Court.