

# Police Misconduct and Civil Rights Law Report

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## THE USE AND ABUSE OF PEPPER SPRAY

by Lynne Wilson

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Late one June evening in 1995, San Francisco Police Officer Marc Andaya stood at the bottom of the stairway of the apartment building where Aaron Williams lived and called out for Williams to come down to talk. Williams, a 37-year-old suspect in a pet store robbery, stepped down the stairwell. When Williams reached the bottom, Andaya grabbed him and ultimately a dozen San Francisco officers piled into the effort to arrest him. The intense melee that ensued succeeded not only in subduing and arresting Williams; within the hour, probably by the time he reached the Richmond District Police Station or shortly afterward, Williams was dead.

Williams had been handcuffed from the rear and his legs had been placed in plastic restraints. At least three of the officers sprayed Williams directly in the face with pepper spray both before and after he was fully restrained and subdued. Once Williams was on the ground, officers kicked him in the face, then left him in the street bleeding for twenty minutes without calling for an ambulance. The officers then placed the comatose, dying Williams into a police van in a prone position.

No medical treatment was ever provided. No one ever attempted to wash or blow the pepper spray off Williams' face. No one ever monitored him to determine the effects of the spray. With macabre irony, Andaya and the other officers "forcibly placed a hospital mask over [Williams'] face to prevent dissipa-

tion of the pepper spray," further constricting his ability to breathe. *Williams v. City of San Francisco, Marc Andaya, et al.*, No. C-96-0705-SBA (N.D. Cal. filed Mar. 25, 1996), Complaint at 5–6,

Williams' death was, according to the local coroner, caused by the combined effects of cocaine toxicity, hog-tying and "excited delirium," a frenzied mental state induced by drugs or acute psychiatric disorders. Although pepper spray was not initially identified as a contributing factor in Williams' death, his death has been identified as one of over sixty nationwide that have occurred in police custody since 1990 after a suspect was sprayed. Mark Pinsky, "If Pepper Spray Isn't Lethal, Why All The Deaths?" L.A. Times, June 10, 1995, at A1 (hereinafter Pinsky).

According to the American Civil Liberties Union, California accounts for over half of the total: 32 people have so far died in custody after being pepper sprayed by California law enforcement officers. Allan Parachini and the ACLU of Southern California, *Pepper Spray Update: More Fatalities, More Questions* 1 (June 1995) (hereinafter ACLU Report) (detailing 23 of these fatalities). Nearly all California police officers are armed with pepper spray.

Across the country, 3,000 police departments now

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### **Police Misconduct and Civil Rights Law Report**

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authorize the use of pepper spray canisters as part of their arsenal of weapons. Pepper spray is specifically designated for dealing with individuals who are "extremely agitated, mentally ill, or under the influence of drugs or alcohol." National Institute of Justice Technology Assessment Program, *Pepper Spray as a Force Alternative 1* (Mar. 1994) (hereinafter NIJ TAP Report). In addition, some 6.5 million civilians use pepper spray as a weapon for self-protection, although in a form that is only about one-fifth the concentration of that used by law enforcement. Virtually every state now authorizes it for both civilian and law enforcement use.

The National Institute of Justice's Technology Assessment Project lists sixteen manufacturers offering pepper spray products for sale in the United States. NIJ TAP Report at 5-6 (listing names, addresses and phone numbers). In addition, these manufacturers have two separate lobbying organizations representing them before state legislatures to ensure certification of their products for sale, the Aerosol Defense Spray Association and the Association of Defensive Spray Manufacturers. *Id.* at 5 (lists addresses and phone numbers). Because of these manufacturers' lobbying efforts, not a single state or federal agency has completed scientifically based testing on the contents or health risks of pepper spray, according to the U.S. Consumer Product Safety Commission. Lenore Anderson, "Berkeley Considers Pepper Spray Ban," COPWATCH Report, Winter 1996, at 3.

Since the introduction of pepper spray into the police arsenal in the early 1990s, its use has been surrounded with controversy, particularly over the circumstances in which it can be potentially lethal. The National Institute of Justice's Technology Assessment Program declares that there appear to be "no verified long-term physical effects or health risks associated with the use of [pepper spray]." NIJ TAP Report at 5. The International Association of Chiefs of Police (IACP) encourages its use on "violent, intoxicated/drugged and mentally ill individuals," blatantly asserting that it "has not caused any deaths, even among persons with pre-existing conditions." IACP, *Pepper Spray Evaluation Project: Results of the Introduction of OC into Baltimore, MD, Police Department* iii (June 22, 1995).

The medical research conducted to date, however, suggests otherwise. *See, e.g.,* Steffee, Lantz, Flannagan, Thompson & Jason, "Oleoresin Capsicum (Pepper) Spray ("OC") and In-Custody Deaths," 16 *Am. J. Forensic Medicine & Pathology* 185-92 (1995) (hereinafter Steffee et al.) (pepper spray may be capable of contributing to death where other factors such as drug intoxication or a frenzied mental state are present). Even the President of the Aerosol Defense

Spray Association, Steve Beazer, has this to say about his own product: "You have people who die after they have been sprayed. . . . Does pepper spray have a role in some of these deaths? I will say yes. It is going to have an effect. These are weapons. Clearly, this is not a breath freshener or an underarm deodorant." Pinsky, *supra*.

With law enforcement use of pepper spray increasing exponentially on the street, it is no wonder that "[t]he rising frequency of OC application has been paralleled by an increasing number of deaths-in-custody following its use." Steffee, et al. at 185. In spite of the NIJ's statement that "litigation has decreased since the use of the spray," pepper spray is becoming the focus of excessive force, wrongful death and product liability litigation. NIJ TAP Report at 5.

In an effort to help clarify some of the legal issues surrounding its use as a police weapon, this article will focus on: (1) pepper spray as a use of force and at what point its use becomes excessive; and (2) the current status of police department pepper spray policies and training and at what point a municipality might become liable for the failure to promulgate adequate policies or adequately train on its use. This article will also briefly discuss potential failure-to-warn product liability claims against manufacturers and the difficulties that litigators have encountered when attempting to assert such claims.

### **Background on Oleoresin Capsicum**

Derived from the cayenne pepper plant, *oleoresin capsicum* or pepper spray was officially introduced into the United States by the Postal Service as a dog repellent in the 1980s. It is 300 times hotter than Jalapeno pepper and has been called a "naturally occurring inflammatory agent." Pepper spray is particularly popular with law enforcement because it avoids the major drawbacks of other chemical agents such as mace and tear gas: it doesn't blow back on the person using it and it can be washed off with relative ease because it is a "natural" substance.

When sprayed in the face, OC incapacitates a person not only by causing intense, painful burning of the skin, but also by causing eyes to swell and burn which forces them to shut automatically. OC spray also attacks the respiratory system when inhaled: The respiratory tract becomes inflamed and breathing is restricted. Granfield, Onnen & Petty, *Pepper-Spray and In-Custody Deaths*, IACP Executive Brief (Mar. 1994) (hereinafter IACP Report) (reviewing 30 in-custody deaths).

The pain caused by pepper spray is intense and can last up to 45 minutes if medical treatment is not provided. Some people who are intoxicated by certain drugs such as PCP or cocaine are not affected by

this "pain factor." However, law enforcement managers emphasize the effectiveness of pepper spray even on these individuals because "the closing of the eyes is a physiological reaction rather than a pain reaction [and] the worst case situation is that although the subjects don't feel pain, they can't see either." NJ TAP Report at 1.

Ever since the late 1980s, OC, in liquid and foam form, has gained popularity among police as an alternative to using other weapons such as batons that cause more injuries. Police managers claim that pepper spray is "95 percent effective in stopping suspects almost immediately," compared to much lower "success" rates for tear gas and mace. The California Commission on Peace Officer Standards and Training (CCPOST) recommends pepper spray as superior to other chemical agents: "The chief advantage of OC is that it is consistently effective when used against combative persons with reduced sensitivity to pain." Training/Orientation Outline for OC, CCPOST (Revised Mar. 30, 1993).

Pepper spray has also been promoted, along with numerous other technologies, as an effective alternative to using lethal force. Mike Grudowski, "Not-So-Lethal Weapons," N.Y. Times, Aug. 13, 1995, Sec. 6, at 40 (sticky foam, rear-seat-airbags, snare nets, smart guns). In at least one federal case, a city was held liable for not training officers in alternatives to lethal force such as pepper spray. *Roy v. Inhabitants of City of Lewiston (ME)*, 42 F.3d 691 (1st Cir. 1994) (city and police chief liable for failure to adequately train officers in non-lethal alternatives for subduing dangerous but intoxicated persons).

In 1987, the FBI adopted pepper spray as its "official chemical agent." See ACLU Report, *supra*, at 18. Pepper Spray was considered an improvement over tear gas which reportedly does not work well on intoxicated or agitated persons. Its effectiveness and safety was promoted to local law enforcement agencies in a series of reports written by FBI Special Agent Thomas Ward, the chief chemical weapons expert at the FBI Academy in Virginia. In July 1989, Ward's report, entitled "Chemical Agent Research: Oleoresin Capsicum," was wired to every local police agency in the country, and in 1990 Ward travelled around the country promoting Cap-Stun as the FBI's approved OC brand. Ward's promotion no doubt provided the impetus for local law enforcement's nearly ubiquitous use of pepper spray by the early 1990s. Rhodes, "Cap-Stun Kickbacks," *Policing by Consent*, Apr. 1996, at 10-11.

Last spring, however, Ward pled guilty and was sentenced to federal prison for taking nearly \$60,000 in payoffs from Lucky Police Products, the manufacturer of Cap-Stun and the country's second largest

manufacturer of pepper spray. Because of his conviction, every study he authored and every promotion he made about pepper spray is now considered tainted. Allen, "Some FBI Agents Like It Hot," *Covert Action Quarterly*, Summer 1996, at 4-5. After Ward's conviction, the ACLU of Southern California called on the FBI to "immediately retract and rescind" all documented research on pepper spray and begin a "neutral investigation" into the substance. The FBI responded that although it was reviewing the studies, it continues to believe that OC "should continue to be used by its agents as a less-than-lethal weapon and an alternative to lethal force." "ACLU on New OC Push," *Law Enforcement News*, Mar. 31, 1996, at 1, 6.

### Medical Implications and Causation

In a series of reports, the American Civil Liberties Union has raised concerns that the number of deaths in which OC has been a contributing factor may be much higher than the 61 so far documented. For example, although none of the autopsy reports for 28 post-spray deaths studied by its Southern California branch listed pepper spray as a cause of death, the group concluded that "documents recovered . . .

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establish that [California] state scientists have warned for more than two years that so little is known about residual effects of pepper spray that medical examiners may not know what to look for during an autopsy.” ACLU Report at 1. (For copies of this report as well as those issued in 1993 and 1994, write to: ACLU, 1616 Beverly Boulevard, Los Angeles, CA 90026.) *But see* IACP Report at 4 (determination that OC was neither a cause nor a contributing factor in any of 22 cases studied).

The first autopsy report directly connecting pepper spray to an in-custody death was issued in July 1993 in Chapel Hill, North Carolina. That report noted that Angelo Robinson, a 24-year-old black parolee stopped for disorderly conduct, had bronchitis at the time of his death. Officers reportedly sprayed Robinson ten to fifteen times and “then placed him in a prone position on the ground while he was handcuffed, a position that has been known to cause death.” The cause of death was stated as “asphyxia due to bronchospasm precipitated by pepper spray.” Report of Autopsy Examination No. ME-93-658 (8/26/93) for Angelo Darcel Robinson, Chief Medical Examiner for Chapel Hill, N.C.

“Positional asphyxia” is most often seen as a major contributing factor in those in-custody deaths associated with pepper-spray. IACP Report at 4 (major cause of death in 18 of 22 cases with drugs or disease as contributing factors). It results when the body is placed in a position that causes the body weight to compress the chest which in turn causes respiratory failure. In connection with police in-custody deaths, it usually occurs when a person is handcuffed, placed on his stomach, and placed in ankle restraints or hog-tied. IACP Report at 4. Essentially, the person suffocates from the position his body has been placed in. Reay, Fligner, Stilwell & Arnold, “Positional Asphyxia During Law Enforcement Transport,” 13 *Am. J. Forensic Medicine & Pathology* 90–97 (1992).

“Excited delirium” is a rare form of severe mania, sometimes part of the spectrum of manic-depressive psychosis and chronic schizophrenia. O’Halloran & Lewman, “Restraint Asphyxiation in Excited Delirium,” 14 *Am. J. Forensic Medicine & Pathology* 289–95 (1993) (discussing 11 cases of sudden death of men restrained in a prone position by police). “It is characterized by constant, purposeless, often violent speech and hallucinations with paranoid delusions.” *Id.* at 292. Individuals in this state exhibit bizarre behavior, can be aggressive, exhibit great strength, have a significantly diminished sense of pain, and can become violent.

“Excited delirium” is often associated with cocaine intoxication. *Id.*, citing Wetli, “Fatal Cocaine Intoxication: A Review,” 8 *Am. J. Forensic Medicine & Pa-*

thology 1–2 (1987). According to the above mentioned report issued by the International Association of Chiefs of Police in 1994, “cocaine-induced excited delirium is usually regarded as a potentially lethal medical emergency.” Most individuals, according to the IACP Report, “will respond to treatment,” and thus do not die from this condition if treated properly. IACP Report at 9.

In part because “pathologists did not consider or had no reliable tests for pepper spray when determining cause of death,” coroners almost never list OC as a cause of or a contributing factor to death. ACLU Report at 29. Often, police officers do not mention its use in police reports and therefore fail to inform medical examiners of its possible contribution to an in-custody death. ACLU Report at 22 (10 of 26 pathology reports made no mention of pepper spray, implying that pathologists are not informed that pepper spray was used on the decedent).

In the Aaron Williams case, for example, the San Francisco Medical Examiner stated the cause of death as “excited delirium” causing a fatal heart attack with a conclusion that there was no evidence of pepper spray in Williams’ system. Young, “Dead Heat,” *S.F. Weekly*, May 15–21, 1996, at 15. Plaintiffs’ attorneys then had their own autopsy performed by pathologist Dr. Robert D. Lawrence. He declared that multiple factors were to blame for Williams’ fatal heart attack: cocaine intoxication with violent toxic delirium, multiple exposures to pepper spray with resulting respiratory irritation and the hog-tie posture. “There is no way to determine the relative importance of each factor,” stated Dr. Lawrence. “However, it is reasonably medically certain that all factors played a role in the death, and that the combination of factors, rather than any one factor, resulted in death.” *Id.*

### **Pepper Spray as Excessive Force**

According to the National Institute of Justice, most police agencies rank pepper spray on the use-of-force continuum “just after physical pain compliance and immediately before the use of impact weapons, i.e., batons.” NIJ TAP Report at 5. The justification for placing OC at this low level is that “there appears to be no verified long-term physical effects or health risks associated” with its use. *Id.* In light of what is now known about pepper spray, placing it so low on the continuum is not justified by reality, at least with respect to certain individuals. More recently, some departments such as New York City have placed the use of pepper spray at the same level as a nightstick. Fazlollah, “Popular Police Tool Draws Fire,” *Phila. Inquirer*, Dec. 30, 1996, at 1 (hereinafter Fazlollah).

Nearly every study that has looked at in-custody deaths and pepper spray has noted that the deaths

almost always involve police use on a person in a state of cocaine-induced or psychosis-induced "excited delirium." ACLU Report at 28 (24 of 26 deaths involved people high on drugs or suffering from a serious psychiatric disorder); IACP Report (drugs and/or alcohol were involved in most of the 30 cases studied). These are the very people on whom pepper spray has no "pain compliance" effect and who are already in, according to the International Associations of Chiefs of Police, a state of acute medical emergency that by itself is potentially lethal without medical treatment. They also happen to be the very people at whom law enforcement officials are directing its use. *See, e.g.*, NIJ TAP Report at 1 (encouraging use on "subjects who are extremely agitated, mentally ill, or under the influence of drugs or alcohol").

In addition, none of the in-custody deaths studied by the ACLU "involve[d] people who posed a serious threat of violence to civilian bystanders when they were sprayed or who were engaged in serious violent criminal activity when or shortly before police arrived." ACLU Report at 28. Also, as the ACLU has pointed out, of the 26 deaths it investigated, "all of the victims were acting irrationally when police first contacted them, but pepper spray had a zero percent effectiveness rate on them. . . . In virtually every case, victims continued to struggle with officers after they were sprayed, sometimes becoming more combative." ACLU Report at 28-29. *See also* IACP Report at 4 (of 30 deaths studied, all subjects behaved in a "combative and/or bizarre manner and struggled with the police. . . . In the majority of cases, OC spray was either ineffective or less than totally effective"). A most telling illustration of pepper spray's ineffectiveness occurred in Oregon in 1992 when Officer Frank Ward [no relation to the FBI agent] was beaten to death by a burglary suspect whom he had sprayed with Cap-Stun. *Ward v. SNC Distributors, Inc.*, No. 9303-01609 (Multnomah County Or. June 1994), Third Amended Complaint.

Based on its study of 26 deaths in California, the ACLU came to a number of conclusions about police use of pepper spray in certain circumstances, two of which are supported by the conclusions reached in other comprehensive studies performed to date (IACP Report and Steffee, et al. *supra*):

1. Pepper spray is unlikely to subdue a suspect high on stimulant drugs or in a psychiatric crisis.
2. A clear statistical association exists between in-custody deaths, pepper spray use, hog-tying and other restraint techniques and drug intoxication or other mental health crises.

ACLU Report at 29.

These conclusions as well as the comprehensive studies that have documented the difficulties with pepper spray should be useful to any attorney who is litigating a

wrongful death or excessive force case that involves police use of OC. Even though the National Institute of Justice recommends standard operating procedures that approve using pepper spray on "actively combative individuals who have resisted or ignored verbal commands," it is precisely in those situations where an excessive force situation is most likely to occur. NIJ TAP Report at 5. At least one professional has commented that an officer should not use pepper spray at all "unless he is attacked." Fazlollah, *supra* (quoting Professor James Fyfe of Temple University).

Where no pain compliance or other purpose is served by OC use on a high or agitated person (even where the person is struggling) and where the possible risk of using it is high (death), its use may be objectively unreasonable under the Fourth Amendment. *Graham v. Connor*, 490 U.S. 386 (1989) (reasonableness depends on circumstances in each case). *See also* Miller, "Less-Than-Lethal Force Weaponry: Law Enforcement and Correctional Agency Civil Law Liability for the Use of Excessive Force," 28 Creighton L. Rev. 733, 770-75 (1995) (hereinafter Miller, "Less-Than-Lethal Force") (Officer Overreaction as Excessive Force). Furthermore, use of pepper spray prior to arrest and then failure to provide medical treatment afterward, particularly in a situation that clearly calls for it, can also be said to also be objectively unreasonable, excessive force under both the Fourth and the Eighth Amendments. *Id.* at 776-77 (Officer Indifference to Medical Needs).

Unfortunately, because pepper spray has only been in widespread use since 1992 and because it has only been connected with in-custody deaths since 1994, little case law has developed on these issues. One recent class-action suit involved a peaceful labor demonstration at the Staley Manufacturing Plant in Decatur, Illinois, on June 25, 1994. Police pepper-sprayed a crowd of over 2,000 demonstrators who had "gathered to exercise their rights of speech and association under the First Amendment." *Lamb v. City of Decatur*, 947 F. Supp. 1261 (C.D. Ill. 1996). In denying the defendants' motion for summary judgment, the *Lamb* court held that the Decatur police were not entitled to qualified immunity because the Staley demonstration was "an aspect of a basic constitutional right under the First and Fourteenth Amendments guaranteeing freedom of speech and assembly." *Id.* at 1264 ("What value would the First Amendment carry if its demonstrators could be dispersed or intimidated by police brutality or unnecessary force?"). The court also denied the defendants' motion for summary judgment on the question of excessive force, holding that under the rule of *Graham v. Connor*, genuine issues of material fact precluded summary judgment:

[T]he court feels that in these unique, hitherto untested circumstances, involving not only Fourth Amendment concerns, but also strong First Amendment concerns, a fact finder must decide what happened on June 25, 1994, and whether the force used by the defendants was reasonable under all of the circumstances.

947 F. Supp. at 1265.

In the absence of First Amendment considerations, other courts have wrestled with whether pepper spray use can be considered excessive force under the Fourth Amendment or “punishment” under the Eighth Amendment when combined with lack of medical treatment. Significantly, one federal court held that where there was evidence that an unruly trespasser posed no “physical threat” to any of the officers or where it was doubtful that “his behavior constituted anything more serious than disorderly conduct,” it was an issue of fact for a jury to determine whether the use of chemical spray constituted excessive force for the purpose of a Fourth Amendment seizure. *Estate of Bryant v. Buchanan*, 883 F. Supp. 1222, 1225 (S.D. Ind. 1995). Also, in an unpublished opinion, the Fourth Circuit upheld an officer’s four-day suspension for using unnecessary force with pepper spray. *Harris v. City of Virginia Beach*, 69 F.3d 532 (4th Cir. 1995) (reported in full, 1995 U.S. App. LEXIS 30912).

In a federal case based on the Eighth Amendment, a South Carolina prisoner sued under 42 U.S.C. § 1983 after he was pepper-sprayed and chained to a bare metal bunk for eight hours. The court held that chaining and pepper-spraying the plaintiff in those circumstances, without fumigating the cell or providing medical treatment, could only be interpreted as “punishment” rather than an attempt to quell a disturbance. *Williams v. Benjamin*, 77 F.3d 756 (4th Cir. 1996). However, in three cases involving pepper spray “cell extractions” at California’s notorious Pelican Bay State Prison, the U.S. District Court for the Northern District of California has granted summary judgments of dismissal to defendant corrections officials on the basis of qualified immunity. *Bennett v. Cambra*, 1997 WL 88329 (N.D. Cal. 1997) (pepper spray may be used reasonably if a prisoner refuses after adequate warning to move from a cell); *Washington v. Cambra*, 1996 WL 507313 (N.D. Cal. 1996) (defendants repeatedly warned plaintiffs that they would resort to calculated use of chemical force to force TB testing); *Washington v. Cambra*, 1996 WL 417245 (N.D. Cal. 1996) (repeated warnings with videotape showing that plaintiff refused to submit to handcuffs).

In a criminal case, the Third Circuit discussed the potential danger of “Phaser Mace,” a brand of pepper spray, in *United States v. Harris*, 44 F.3d 1206 (3d Cir. 1995). Harris, a convicted bank robber, had used the pep-

per spray on bank tellers during the robbery. In an effort to enhance Harris’ sentence, the government attempted to show that the pepper spray was a “dangerous weapon.” It submitted a promotional bulletin for Cap-Stun, which included some of the information summarized above connecting pepper spray to in-custody deaths, in arguing that pepper spray could cause “serious bodily injury.” Although the district court agreed and added four points to Harris’ sentencing calculation, the Third Circuit held that the government had not met its burden of proving that pepper spray was a “dangerous weapon.” *Harris*, 44 F.3d at 1216. The *Harris* court concluded that the promotional bulletin “lacked sufficient indicia of reliability” for the purpose for which it was used. *Id.*

On the question of qualified immunity for individual officer defendants, the Tenth Circuit (in an unpublished opinion) granted one of the defendants qualified immunity for excessive force by pepper spray where there was undisputed evidence that the plaintiff continued to resist arrest after the officer’s efforts to use a baton were ineffective. *Thompson v. City of Kansas City*, 79 F.3d 1156 (10th Cir. 1996) (published at 1996 WL 112104). Similarly, an Alabama court granted qualified immunity to a defendant officer even though the plaintiff was handcuffed at the time and the officer sprayed him directly in the face. *Griffin v. City of Canton*, 932 F. Supp. 1359 (M.D. Ala. 1996). The court held that the use of pepper spray was not excessive as a matter of law since it was “generally of limited intrusiveness” under the circumstances and since the plaintiff apparently suffered no physical injuries as a result. *Id.* at 1368. *See also United States v. Holloway*, 906 F. Supp. 1437 (D. Kan. 1995) (use of pepper spray directly into criminal defendant’s face while he was handcuffed was not an unreasonable use of force to extract evidence of narcotics in his mouth).

In another case, involving mace rather than OC, the Sixth Circuit held that questions of material fact precluded summary judgment on the question of qualified immunity where there were fact disputes as to whether the plaintiff was incapacitated. *Adams v. Metiva*, 31 F.3d 375 (6th Cir. 1994). The court held: “If the jury determines that Metiva . . . gratuitously maced a helpless and incapacitated person, then as a legal matter no reasonable officer would believe that such conduct would not violate plaintiff’s constitutional rights. . . . A reasonable person would know that spraying mace on a blinded and incapacitated person sitting in a car would violate the right to be free from excessive force.” *Id.* at 387. *See also Lamb v. City of Decatur*, 947 F. Supp. 1261 at 1265 (C.D. Ill. 1996) (analogizing *Metiva* and use of mace to use of pepper spray and denying summary judgment on the issue of excessive force).

## Municipal Liability

Given the widespread current knowledge, at least in law enforcement circles, of the potential dangers of pepper spray, a municipality's failure to promulgate a chemical restraint policy can provide the basis for imposing Section 1983 liability. The National Institute of Justice advises "specific, prescribed guidelines for the use of OC," to include at a minimum: (1) appropriateness of use, (2) necessity of warnings, (3) decontamination procedures (ventilation and water for flushing the face and eyes), (4) incident documentation, and (5) possible sanctions for indiscriminate use. NIJ TAP Report at 5.

The ACLU, as part of its 1995 Report, proposed detailed policies for both police and corrections agencies, including a prohibition against leaving a person who has been sprayed "lying on his/her stomach or side for a period longer than required to put restraints in place." ACLU Report at B-2 to B-7. The 1995 Report also recommended that departments adopt policies prohibiting officers from using OC on suspects who fit the criteria for in-custody death syndrome, but to date no department has done so.

The Philadelphia Police Department has gone further than any other large city department in adopting cautious pepper spray procedures. In 1995, the Department adopted a comprehensive policy on pepper spray use that includes strict rules regarding post-spray medical treatment and special reporting requirements. Directive 43: Pepper Spray, Philadelphia Police Department (11/30/95). In 1996, Police Commissioner Neal directed officers not to use the spray against nonviolent suspects, orderly crowds, children, the elderly, pregnant women or people believed to be suffering from heart or respiratory problems. He also directed officers to closely monitor suspects who have been sprayed and to bring all such suspects to hospitals for immediate treatment. Appendix A to Directive 43: Pepper Spray, Philadelphia Police Department (10/18/96).

The reality is that although most large cities have written guidelines on OC use, most small rural and suburban departments do not. Fazlollah, *supra*. In addition, most departments, small and large, rely on manufacturers to provide officer training in pepper spray use, a situation that creates potential inadequate training liability for the cities that do so. In one recent case in Pennsylvania, a small department police chief testified that "his seven-member department had no written rules on using the spray, that the only training was provided by the department's pepper-spray supplier, and that he did not know the content of the training." Fazlollah, *supra* (summarizing deposition of Collegeville Police Chief John Clawson).

With respect to failure to promulgate an adequate chemical restraint policy, numerous federal courts have

held that where situations obviously call for the adoption of procedures, a city's deliberately indifferent failure to do so is actionable under Section 1983. *City of Canton v. Harris*, 489 U.S. 378 (1989) (deliberate indifference established "where the need . . . is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers . . . can reasonably be said to have been deliberately indifferent to the need"). Because courts have extended *City of Canton* to apply to a municipality's "deliberately indifferent" failure to adopt a policy where the need for doing so was obvious, a strong argument can be made that the need for an OC policy has been "obvious" since 1994 when the National Institute of Justice recommended it and that the likely "consequences of not adopting [such] a policy [is the] deprivation of constitutional rights" in the form of increased excessive force. *Rhyne v. Henderson*, 973 F.2d 386, 392 (5th Cir. 1992) (failure to adopt a policy regarding care of known suicidal inmates).

Other courts have held municipal policymakers liable for failure to adopt policies when the need was obvious. The Ninth Circuit upheld a jury determination that a county was deliberately indifferent to the constitutional right of a pretrial detainee not to be incarcerated without prompt pretrial procedures. *Oviatt v. Pearce*, 954 F.2d 1470 (9th Cir. 1992). The County Sheriff, a municipal policymaker, failed to institute procedures to detect inmates who did not receive prompt arraignment, knowing that some of them would remain incarcerated and that the lack of procedures made it "virtually certain that some inmates" would suffer unconstitutional deprivations of liberty. The need for procedures was so obvious that the Sheriff's failure to promulgate them constituted deliberate indifference. *Id.* at 1478.

Similarly, a city has been held liable for its deliberately indifferent failure to adopt a policy regarding the non-custodial strip searches of arrestees. *Timberlake v. Benton*, 786 F. Supp. 676 (M.D. Tenn. 1992). The court in *Timberlake* stated:

[A] failure to set a policy governing such a highly intrusive police action can render a City's actions as culpable as if they had a policy permitting unreasonable searches themselves. A local governing body does not shield itself from liability by acting through omission. Thus, when a city provides no guidance to its officers regarding such intrusive actions as strip searches, it must face the consequences of its inaction.

*Id.* at 696. See also *Reynolds v. Borough of Avalon*, 799 F. Supp. 442 (D.N.J. 1992) (where risk of sexual harassment in workplace is obvious, employer's failure to adopt a policy forbidding it could subject it to liability).

Courts might similarly hold a municipality liable for failure to adopt a policy regarding the use of pepper spray. In *Rhyme*, the Fifth Circuit used as an example of deliberate indifference "a municipality that arms its officers with firearms, knowing to a moral certainty that the armed officers will arrest fleeing felons[.]" but fails to train the officers properly in the use of deadly force. *Rhyme*, 973 F.2d at 392. By analogy, a municipality that arms its officers with pepper spray, knowing to a moral certainty that the armed officers will encounter mentally ill, drug-intoxicated or extremely agitated people, but fails to train them properly in its use and fails to provide them with guidelines, is deliberately indifferent to its own citizens' constitutional rights. See, e.g., *Titcomb v. State*, 222 N.Y.S.2d 596 (1961) (state held negligent for failing to instruct its officers that tear gas could be lethal).

Finally, with respect to training, police departments cannot ignore administrative complaints currently being filed by police and corrections officers challenging the practice of being sprayed in the face during OC Training. The Florida Labor Department, for example, banned use of the spray during training after Florida Highway Patrol Lt. Harold Frear filed an administrative complaint. "Pepper Spray Hazardous," *Seattle Times*, July 2, 1996, at A10. Labor Department officials who investigated stated that the "spray contains hazardous chemicals and at least four troopers sprayed with the chemical suffered injuries serious enough to require medical attention." *Id.*

Similarly, in North Carolina, Corrections Officer Ann Ryder filed a complaint with the Division of Occupational Safety and Health of the North Carolina Department of Labor. Allen, "In the Line of Fire: Should Workers Be Pepper Sprayed?," *Mountain Express* (Asheville, N.C.), Oct. 16-22, 1996, at 10. Ryder likened being sprayed in the face with pepper spray to "bobbing for french fries in a deep-fat fryer." *Id.*

In support of Ryder's complaint, Dr. Woodhall Stopford of Duke University Medical Center filed an in-depth description of the medical risks associated with OC, perhaps the most comprehensive compiled to date. Statement of Dr. Woodhall Stopford Concerning the Pathophysiology of Capsaicin and Risks Associated with Oleoresin Capsicum Exposure (07/23/96) (includes bibliography of all U.S. and international medical studies). He states that the federal Occupational Safety and Health Administration recommends no exposure to OC spray during training. *Id.* at 4.

Based in part on Dr. Stopford's medical assessment, in September 1996 the North Carolina Department of Labor recommended to the state Department of Correction that because a "direct (full-face) exposure [of OC spray] poses a health risk, . . . alternatives to full exposure training" should be explored. These alternatives included indirect rather than direct exposure

as well as medical screening for those officers whose health conditions might be exacerbated by direct spraying. Letter from N.C. Dep't of Labor to N.C. Dep't of Corrections (9/20/96). According to the state Department of Labor, the Department of Corrections has modified its policies not only to comply with these recommendations but also to conform to numerous other state correction agency policies that do not require full-exposure training. Ryder's lawsuit on this issue is now on appeal after initially being dismissed by the trial court. Allen, *supra*.

### Product Liability Claims Against Manufacturers

Under common law, manufacturers of commercial products are required to warn users of their products of any limitations upon product uses or what precautions are required under differing use conditions. Keeton et al., *Prosser and Keeton on the Law of Torts* § 99, at 697-98 (5th ed. 1984). An officer or department sued for negligence or excessive force by use of pepper spray may shift fault to the manufacturer claiming a failure to warn, and where the plaintiff has not directly sued the manufacturer, the officer or department defendant "can implead the manufacturer to force the manufacturer to take the place of the original defendant." Miller, "Less-Than-Lethal Force," *supra*, at 784 (Liability Analysis: Supplier Liability).

Although a number of plaintiffs have asserted "failure to warn" claims against OC manufacturers, success has been mixed. At least three cases have settled for substantial amounts. Cap-Stun makers quickly settled the product liability claim brought in 1994 in Multnomah County, Oregon, by the widow of an officer beaten to death by a burglary suspect whom he had sprayed. *Ward v. SNC Distributors, Inc.*, *supra*. Attorney Chris Haberman of Visalis, California, settled one case without filing suit where an independent autopsy revealed a mysterious "sludging" or "sickling" in his [African-American] client's blood that may have been precipitated by pepper spray. Rhodes, "Pepper Spray, Product Liability and Cops," *Policing by Consent*, Aug. 1996, at 12. A diabetic jail inmate in Montgomery County, Alabama, entered into a \$273,000 settlement with the county and the pepper spray manufacturer after being sprayed and subsequently losing his left eye. *Goodman v. Montgomery County*, No. CV-92-H-1170-N (M.D. Ala. May 1993), reported in 37 *ATLA L. Rep.* 56 (Mar. 1994).

Attorneys for Aaron Williams' widow, Clarence Livingston and Robert Kroll of San Francisco have included a pendent product liability claim against the pepper spray manufacturer Defense Technology in their civil rights lawsuit now in federal court. In a recent interview however, Kroll stated that he does not expect that portion of the suit to survive a pending summary judgment

motion based on dismissals of two similar product liability claims against Defense Technology in California courts. In those cases, both filed by California attorney Chris Haberman, Defense Technology successfully argued "that it was certified by the state of California to distribute pepper spray and, therefore, immune from any civil liability." Young, "Dead Heat," *supra* at 16. Both cases are currently on appeal.

### Conclusion

Any new police technology requires constant and caring vigilance to ensure that it is not transformed into a weapon of torture. Pepper spray, whether you see it as a "natural" alternative to lethal force or as a "contributing factor" to death, is no different. Aaron Williams is as dead from his violent encounter with San Francisco Officer Marc Andaya as he would have been had he been shot. It is no coincidence that Officer Andaya had a history of using unwarranted deadly force; that he and the officers with him switched to a modern "non-lethal" weapon is cold comfort. *Hopkins v. Andaya*, 958 F.2d 881 (9th Cir. 1992) (medical evidence in record undermined Andaya's version of events where he shot decedent nine times while employed by Oakland Police Department). According to attorneys for the Williams family, Officer Andaya and the others were recently cleared in administrative proceedings of using excessive force on Aaron Williams, but a decision to discipline them for failure to provide Williams adequate medical treatment was upheld by the San Francisco Board of Supervisors.

### CASE UPDATES

#### Certiorari Granted

On February 24, 1997, the United States Supreme Court granted certiorari in a prosecutorial immunity case entitled *Kalina v. Fletcher*, 93 F.3d 653 (9th Cir. 1996), *cert. granted*, 117 S. Ct. 1079 (1997). Lynne Kalina was a deputy state prosecutor who sought and obtained a warrant for the arrest of Rodney Fletcher on the charge of theft. In the verified application for the warrant, she set forth the results of the police investigation, which Fletcher alleged contained false statements in several material respects. The charges were subsequently dismissed based on these inaccuracies in the application, and Fletcher filed a Section 1983 claim against Kalina. On Kalina's motion for summary judgment, the district court denied her request for absolute prosecutorial immunity, and further held that the question of qualified immunity was one of fact for the jury. Kalina took an interlocutory appeal, and the Court of Appeals for the Ninth Circuit, after noting that the case presented a question of first impression in that

Circuit, affirmed the district court. *Fletcher v. Kalina*, 93 F.3d 653 (9th Cir. 1996).

Applying the functional analysis, the court of appeals found the prosecutor's "actions in writing, signing and filing the declaration for an arrest warrant" to be "virtually identical" to the police officer's actions in obtaining an arrest warrant in *Malley v. Briggs*, 475 U.S. 335 (1986), which held that such actions were only entitled to the protection of qualified, rather than absolute, immunity. 93 F.3d at 655-56. Relying on *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993), the Ninth Circuit found that it would be "'incongruous' to expose police to potential liability while protecting prosecutors for the same act." 93 F.3d at 656. The court of appeals further found that there was "little, if any, distinction" between the obtainment of the warrant at the time the felony complaint was issued, as the police officer did in *Malley*, and the later obtainment, contemporaneous with the filing of the information, by prosecutor Kalina in the case at bar, for purposes of determining whether the acts were investigative or advocative in nature. 93 F.3d at 656 n.2.

The Supreme Court granted certiorari on the following issue:

Is prosecutor who has brought formal criminal charges against defendant entitled to absolute immunity from Section 1983 liability when, pursuant to state statute and court rule, she causes arrest warrant to issue for purpose of bringing defendant before court to respond to charges brought?

60 Crim. L. Rep. (BNA) 3187 (Feb. 26, 1997).

#### In the Circuits

##### Bifurcation

In *Martin v. Heideman*, 106 F.3d 1308 (1997), the Sixth Circuit Court of Appeals considered the propriety of bifurcating liability and damages in a Section 1983 excessive force case, as well as whether the right to be free from excessively forceful handcuffing was a clearly established Fourth Amendment violation at the time of the incident in question. According to the evidence adduced at trial, the plaintiff and an acquaintance reenacted, for insurance purposes, an accident which had occurred between them several weeks before. They then called the police to the scene to file a police report concerning the "accident," and the police who arrived quickly discerned that the "accident" was staged. The subsequent events were disputed. According to the plaintiff and his associate, the officers became abusive, and pursuant to arresting him for a misdemeanor offense, pushed him over a guard rail and to the ground, thrust his head repeatedly against the pavement, twisted, pulled and contorted his hand, neck, and