CHAS' COVER PAGE FOR

AELE Monthly Law Journal

Civil Liability Law Section – January 2009

Restraint and Asphyxia

Part Two – Compressional Asphyxia

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Restraint and Asphyxia Part Two can be found on the Internet at:
http://www.aele.org/law/2009all01/2009-01MLJ101.pdf

CHAS' REVIEW of Part Two

Wow. It is pretty clear that "Part One" of this AELE article was written by one or more individuals with very ***different*** PERSONAL AGENDAS from whomever wrote "Part Two"!

Part Two appears to have been designed to be incredibly helpful to attorneys seeking to HOLD RESTRAINERS LIABLE FOR HAVING CAUSED A RESTRAINT ASPHYXIA DEATH.

As such, it also provides information that SHOULD cause restraint EDUCATORS to ensure that they train people NOT to employ techniques that can cause restraint asphyxia.

Part Two still offers REFERENCES to several grossly biased and inaccurate sources (such as the "Institute for the Prevention of In-Custody Deaths, Inc."). HOWEVER! Part Two also offers many references to ***UNBIASED*** resources, such as "**Ms. Charly D. Miller's Restraint Asphyxia Library (*an individual's collection*)**"! [Hey. Although many may consider ME to be a "biased" individual, my **RA Library** contains ALL articles about restraint asphyxia and its related issues – not only those that inaccurately and inappropriately argue against its existence. Thus my **RA Library** IS an ***UNBIASED*** resource!]

Although many of its "**List of judicial decisions**" links lead to cases wherein restrainers were gratuitously awarded **immunity** or an **excuse** for having caused someone's restraint asphyxia death, many of those links lead to cases wherein restrainers WERE held responsible for causing someone's restraint asphyxia death.

CONCLUSION:

I highly recommend this AELE article to attorneys seeking to HOLD RESTRAINERS LIABLE FOR HAVING CAUSED A RESTRAINT ASPHYXIA DEATH.

I also highly recommend this AELE article to EDUCATORS of restrainers, seeking to ENSURE THAT RESTRAINERS DO NOT EMPLOY RESTRAINT TECHNIQUES THAT CAN CAUSE DEATH.

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Restraint Ties and Asphyxia

Part Two - Compressional Asphyxia

Contents - Part One (last month)

Contents - Part Two

- This is the second and final part of the article. Part one can be viewed here.

1. Compressional asphyxia

Liability can attach because officers (or others) continuously applied weight to a person's back, while they suffocated in a face-down body position. A leading case in the Ninth Circuit is Drummond v. City of Anaheim, #02-55320, 343 F.3d 1052, cert. den. 2004 U.S. Lexis 4396 (9th Cir. 2003).

Officers determined that a man who was mentally ill should be taken to a medical facility for his own safety, but the manner in which they allegedly attempted to subdue and restrain him resulted in his falling into a coma from which he never recovered.

They allegedly knocked him to the ground, and cuffed his arms behind his back as he laid on his stomach. Although he offered no resistance, it was claimed that one officer put his knees into the his back and placed the weight of his body on him. Another officer also put the weight of his body on him, except that he had one knee on his neck.

With two officers leaning on his neck and upper torso, he fell into respiratory distress. Two eyewitnesses later stated that the he repeatedly told the officers that he could not breathe and that they were choking him, but the officers continued to put their weight upon his back and neck. The officers were alleged to be laughing during these events, although they were obviously causing the man to have trouble breathing.

After approximately twenty minutes, the officers obtained a hobble restraint, which they used to bind his ankles. A minute after the restraint was applied, he went limp, and the officers realized that he had lost consciousness.

They then removed the handcuffs and hobble restraint and turned him over onto his back, attempting to perform CPR. While he was revived approximately seven minutes after losing consciousness, he sustained brain damage and fell into a coma, and is now in a "permanent vegetative state."

The plaintiff's medical expert stated that the detainee "suffered a cardiopulmonary arrest caused by lack of oxygen to his heart," due to his inability to breathe "caused by mechanical compression of his chest wall such that he could not inhale and exhale in a normal manner."

Overturning a summary judgment for the defendants, a three-judge panel found that the alleged actions of the police, if true, constituted excessive force under the circumstances. The detainee was unarmed, and was seized for purposes of transporting him to a medical facility, and there was no crime he was accused of. The detainee was likely to pose only a "minimal threat" to anyone after he was handcuffed, and he did not resist the officers after he was on the ground.

The degree of force used was "severe," the court found, since it posed a risk of "compression asphyxia" which could cause serious injury or death.

The appellate panel also rejected the argument that the officers were entitled to qualified immunity for continuing to press their weight onto the man's neck and torso as he lay handcuffed on the ground and begged for air. A reasonable officer, the court found, should have known that such force was excessive.

In 2008, another Ninth Circuit panel cited *Drummond* as a basis for denying qualified immunity in a compressional asphyxia lawsuit.

> "We have had similar cases in the past that would have put reasonable police officers on notice that … keeping an individual who is in a state of excited delirium restrained with his chest to the ground while applying pressure to his back and ignoring pleas that he cannot breathe – constituted excessive force under the Fourth Amendment."

Arce v. Blackwell, #06-17302, 2008 U.S. App. Lexis 20162 (Unpub. 9th Cir.).

Not surprisingly, the use of pepper spray was often used in cases of asphyxiation. An Ohio lawsuit was brought by the relatives of a man who weighed almost 350 pounds, and had PCP and cocaine in his bloodstream when he struggled with police and resisted their attempts to arrest him. The plaintiffs claimed that officers used excessive force, unnecessarily striking him with metal batons and causing him to suffer respiratory failure from asphyxia when they sat on him, after spraying pepper spray into his face.

The trial court found that the plaintiffs sufficiently stated a claim that the officers who apprehended him used excessive force against him, as the confrontation began simply because firefighters who encountered him perceived him as creating a "nuisance," which is "not the type of crime" permitting officers to use a greater use of force.

It was disputed whether the decedent subsequently was resisting arrest, or was simply trying to position himself so that he could breathe. Additionally, the plaintiffs in the case alleged that the officers used pepper spray against the decedent after he was already face down and was being handcuffed, which the court stated, if true, could also constitute an excessive use of force.

The officers were not entitled to qualified immunity because a reasonable officer might have known that engaging in the alleged acts violated the decedent's right to be free from excessive force. The court granted a motion to dismiss claims by the plaintiffs against the firefighters, who left the scene before some of the incidents that resulted in the decedent's death. It denied a motion to dismiss claims against the police officers involved in the incident. A three-judge appellate panel affirmed, writing:

> "The complaint alleges that each of the officers present - the six who subdued Jones and the three sergeants who arrived afterwards - knew that the handcuffed Jones was not breathing. Therefore each knew of a substantial risk of serious harm to Jones's safety while he was in their custody and disregarded that risk by failing to provide aid.
>
> "The right of a suspect in custody to receive adequate medical care, even if the suspect had been fleeing and resisting before the officers placed him in custody, was clearly established almost three years before Jones's death. Therefore, the officers who subdued Jones and the sergeants who arrived soon after are not entitled to qualified immunity on the failure to provide medical care claim."

Jones v. City of Cincinnati, # 1:04-CV-616, 2006 U.S. Dist. Lexis 75430, 2006 WL 2987820 (S.D. Ohio); affirmed, #06-4528, 521 F.3d 555 (6th Cir. 2008).

In Chicago, fourteen courtroom deputies attacked an obese witness, "forced him to the floor, sat on and handcuffed him." He did not resist the deputies' attempt to restrain him. While handcuffed and on the floor, "he emptied his bladder and bowels, and he appeared to have stopped breathing. Paramedics rendered emergency assistance at the scene and then transported him to a hospital, where he was pronounced dead."

The Seventh Circuit affirmed the district court's order denying the deputies' motion to dismiss the §1983 claims brought by the deceased's mother. Richman v. Sheahan, #07-1487, 512 F.3d 876 (7th Cir. 2008).

The Sixth Circuit upheld a $900,000 jury award to family of an autistic man who died after officers seeking to restrain him allegedly continued to use pepper spray and to lay on top of his body after he was handcuffed, hobbled face-down, and was no longer resisting. Five different witnesses testified that the officers continued to sit or otherwise put pressure on his back while he was prone on the ground with his face towards the floor. They stated that they did not see him struggle during this time.

Continued use of such force at that point, the panel ruled, violated clearly established law, and jury's award was not excessive. "We have also consistently held that various types of force applied after the subduing of a suspect are unreasonable and a violation of a clearly established right." Champion v. Outlook Nashville, Inc., # 03-5068, 380 F.3d 893, 2004 FED App. 0270P (6th Cir. 2004).

A California appellate panel ruled that Los Angeles County was properly held liable for death of arrestee who was subjected to the Sheriff's "total appendage restraint procedure." Expert testimony established that he died of mechanical asphyxia. While in a prone position, an officer was kneeling on his chest.

The panel also found that the plaintiff's expert could properly ascribe the cause of death even if he was not present at the autopsy. He had viewed a videotape, the coroner's autopsy reports and photographs, the report of another pathologist who performed a post mortem examination, the deceased's records from the Dept .of Corrections, and depositions given by several of the deputies. Nelson v. County of Los Angeles, #B161431, 113 Cal. App. 4th 783, 6 Cal. Rptr. 3d 650 (Cal. App. 2003).

The city of West Palm Beach got a one-time pass when a federal court found qualified immunity for a restraint asphyxia death of a man named Lewis. The court wrote:

> "... while Officer L_ and Officer R_ kept their knees on Lewis' back, Officer S_ picked up Lewis' bound legs and pushed them down and forward. Lewis suddenly became silent and motionless. The officers then tied Lewis' hands and feet together behind his back in a 'hogtied' position.
>
> "Officer M_ realized that Lewis had become unconscious and ordered the other officers to move Lewis onto his side. ... The officers gave first aid to Lewis, including CPR, while waiting for medical assistance to arrive. ... Paramedics arrived within several minutes and assumed control of Lewis' treatment, but they were unable to resuscitate Lewis. Lewis was later pronounced dead."

The judge found that a reasonable juror could conclude that the officers used constitutionally excessive force in their confrontation with Lewis. However, because plaintiff has not demonstrated that the allegedly-violated right was clearly established in 2005, the officers were entitled to qualified immunity and summary judgment on

plaintiff's §1983 claim. Lewis v. West Palm Beach, #06-81139-Civ, 2008 U.S. Dist. Lexis 21587 (S.D. Fla. 2008).

2. Conclusions:

Police trainers must be aware of potential deaths from compressional asphyxia. Officers must be taught to avoid putting their body weight on a confined person as soon as active resistance has ended **or** the person has been adequately restrained from causing harm to himself or others. Dr. Reay's article in the May, 1996 *FBI Law Enforcement Bulletin* emphasized:

> "Instructors must stress vigilance in monitoring the subject's condition. The process of hypoxia is insidious, and subjects might not exhibit any clear symptoms before they simply stop breathing. Generally, it takes several minutes for significant hypoxia to occur, but it can happen more quickly if the subject has been violently active and is already out of breath. If the subject experiences extreme difficulty breathing or stops breathing altogether, officers must take steps to resuscitate the subject and obtain medical care immediately."

Deaths will still occur because of substance abuse, or pre-existing coronary or respiratory conditions. But if a dashboard video camera shows officers putting their weight on a person shortly before he stops breathing, a civil suit and a disciplinary investigation are likely to follow. The outcome of both might be adversely influenced by media bias, political posturing, or racial overtones.

- Caution – from a policy and training perspective, officers are admonished to cease aggressively restraining persons who *appear* to have abandoned their resistance. As a practical matter, due to the influence of abused substances or other reasons, people sometimes resist, submit, and then renew their resistance with increased vigor. "It ain't over 'til it's over" is more than a cute phrase.

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419. (*Examination of autopsy files revealed instances where positional asphyxia compromised respiration due to intoxication, multiple sclerosis, epilepsy, Parkinson disease, Steele–Richardson–Olszewski syndrome, Lafora disease and quadriplegia*.)

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http://www.exciteddelirium.org/

Institute for the Prevention of In-Custody Deaths, Inc., Henderson, NV.
http://www.ipicd.com/

Ms. Charly D. Miller's Restraint Asphyxia Library (*an individual's collection*).
http://www.charlydmiller.com/RA/RAlibrary.html

4. List of judicial decisions: *(alpha)*

Arce v. Blackwell, #06-17302, 2008 U.S. App. Lexis 20162 (Unpub. 9th Cir.).

Arnold v. City of York, #4:cv-03-1352, 340 F.Supp.2d 550 (M.D. Pa. 2004). *Parents of a mentally ill man who died, allegedly of positional asphyxia, after being taken into custody by police officers, stated a claim for violation of his civil rights by asserting that the officers, who had transported him to a hospital, handcuffed and hogtied, in a prone position, noticed his irregular breathing, but failed to adjust his position at that time.*

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Champion v. Outlook Nashville, Inc., #03-5068, 380 F.3d 893 (6th Cir. 2004).

Cruz v. Laramie, #99-8045, 239 F.3d 1183 (10th Cir. 2001).

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Lewis v. West Palm Beach, #06-81139-Civ, 2008 U.S. Dist. Lexis 21587 (S.D. Fla. 2008).

Mayard v. Hopwood, 105 F.3d 1226 (8th Cir.1997). *Placing a person in a prone position, while wearing handcuffs and leg restraints, was reasonable as a matter of law where the person had violently resisted arrest; however*:

> "Although not every push or shove ... violates the Fourth Amendment … a police officer's slapping in the face and punching in the chest a handcuffed and hobbled prisoner while using a racial epithet are actions that result in a cognizable constitutional injury. These actions are of such a nature that we find that a constitutional injury is presumed to flow from the wrong itself."

McIntire v. City of Boulder, #01-1560, 61 Fed. Appx. 639 (Unpub. 10th Cir. 2003). *The deceased expired from "cardiopulmonary arrest due to positional asphyxia associated with physical restraint and multiple drug ingestion" (cocaine and LSD). Summary judgment for defense was appropriate because the death occurred before Cruz v. Laramie was decided.*

Nelson v. County of Los Angeles, #B161431, 113 Cal.App.4th 783, 6 Cal.Rptr.3d 650 (Cal. App. 2003).

Phillips, Estate of v. Milwaukee, 123 F.3d 586 (7th Cir. 1997). *Two officers attempted to restrain an obese man exhibiting psychiatric problems; officers continuously monitored his condition, and when he ceased breathing, they began resuscitation efforts and revived him. The court held the officers' conduct to be objectively reasonable, because merely "restraining a person in a prone position with constant monitoring, cannot be characterized, in itself, as 'deadly' force."*

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