NEWS ABOUT MUNICIPAL RISK SHARING AND LOSS CONTROL

RISK REVIEW

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WINTER 2010

Court finds use of Taser device excessive force in traffic stop

Police agencies have been contacting Taser International Inc., the Scottsdale-based company that manufactures the devices, asking about a recent decision by the U.S. 9th Circuit Court of Appeals that a California police officer used excessive force when he shot a suspect with a Taser device during a traffic stop for a seat-belt infraction.

The Court concluded the officer had violated the suspect's constitutional rights and was not entitled to qualified immunity for use of the weapon. The Court found that the suspect's behavior, while bizarre, was a "far cry from actively struggling with an officer attempting to restrain and arrest an individual.

"The circumstances here show that [the officer] was confronted by, at most, a disturbed and upset young man, not an immediately threatening one," says the Court's written verdict. "A desire to resolve quickly a potentially dangerous situation is not the type of governmental interest that, standing alone, justifies the use of force that may cause serious injury. Rather, the objective facts must indicate that the suspect poses an immediate threat to the officer or a member of the public."

The Court's decision "does not establish any new law for use of a Taser device apart from applying it to the specific facts of this case," Steve Tuttle, a company spokesman told the *Arizona Republic*.

In 2005, Coronado (Calif.) police officer Brian McPherson stopped Carl Bryan's car for a seatbelt infraction as the 21-year-old was driving home after visiting his brother. Bryan, who was wearing only boxer shorts and tennis shoes, swore at himself as he stepped out of the car.

"There is no dispute that Bryan was agitated, standing outside his car, yelling gibberish and hitting his thighs," says the Court's ruling in describing the incident. "It is also undisputed that Bryan did not verbally threaten Officer McPherson and, according to Officer McPherson, was standing twenty to twenty-five feet away and not attempting to flee.

"Officer McPherson testified that Bryan took 'one step' toward him, but Bryan says he did not take any step, and the physical evidence indicates that Bryan was actually facing away from Officer McPherson. Without giving any warning, Officer McPherson shot Bryan with his Taser gun.

"One of the Taser probes embedded in the side of Bryan's upper left arm," the ruling continues. "The electrical current immobilized him whereupon he fell face first into the ground, fracturing four teeth and suffering facial contusions."

Bryan was subsequently arrested and transported by ambulance to a hospital. He filed a suit against McPherson, the Coronado Police Department, the police chief and the City of Coronado for use of excessive force and failure to train police officers.

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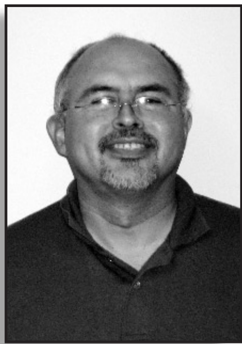
Rudy Rodriguez
AMRRP President

LETTER FROM THE PRESIDENT

Dear AMRRP Members:

On behalf of the AMRRP Board of Trustees, I hope each of you had an enjoyable Holiday Season and that your new year is off to a good start.

Although we don't yet have our final 2009 financial results, figures through the end of November indicate that our 2009 written premiums have increased by more than $1 million compared with our November 2008 results. Even more positive is the fact that at the end of the first 11 months of 2009, our Member surplus grew by approximately $5.5 million over the November figures from last year. This solid increase was even after the issuance of $3 million in total Member dividends during 2009. In the face of rising medical bills and increased indemnity benefits that have effected our workers' compensation business and in spite of an increasingly litigious environment fueled by tough economic times, these are extremely favorable results for our Pool.

In our continuing effort to look for ways to improve the products and services the AMRRP provides for its Members, the Board of Trustees recently reviewed a number of potential enhancements to the coverages we offer. I'm very pleased to announce that several new coverages and coverage options are going to be offered in the upcoming months.

First, the Board authorized the Administrator to revise coverage documents in order to give AMRRP Members the option to purchase "replacement cost" coverage for specified vehicles and pieces of heavy equipment. Current auto and inland marine coverages provide for actual cash value ("ACV") reimbursement for vehicles or equipment items that are declared total losses due to accidental damage. When payment is made, depreciation is applied based on the age and pre-accident condition of each vehicle or equipment item, meaning that reimbursement payments may not be enough to cover the purchase of a replacement model. In the case of items such as fire trucks, road graders, tanker trucks, etc., replacement costs can significantly exceed municipal budget allocations. Offering Members the option of purchasing "replacement cost" coverage will allow the Pool to reimburse Members for the actual cost of replacing scheduled vehicles or equipment with comparable models, up to a stated value amount.

Next, the Board authorized the Administrator to expand the Pool's canine coverage. Current AMRRP canine coverage provides up to $20,000 in replacement cost reimbursement for service dogs killed in the line of duty. The new coverage, which will be provided at no additional premium, will also provide loss payment for theft or attempted theft of a covered canine where there are visible signs of forced entry.

Finally, the Board authorized the Administrator to create forms providing "crisis intervention coverage" at no additional Member premium. This coverage will reimburse Members who choose to provide on-site crisis and grief counseling via a 24/7 crisis hotline for up to three months. The coverage will be triggered when a Member arranges for these types of crisis intervention services following a work-related incident that resulted in an employee's death or serious injury, and where there is a failure of coping mechanisms and evidence of significant stress or functional impairment. The limit for this new coverage will be $25,000 per occurrence with a $25,000 annual aggregate.

Thanks to the continued financial success the Pool has enjoyed due to its Members' support and loyalty, the Board remains committed to finding new and innovative risk management products to provide our Members with ways to reduce loss costs and to ease municipal budgets.

Sincerely,

Rudy Rodriguez
President, AMRRP Board of Trustees

Member Profile: *The City of Bullhead City*

Bullhead City, which is in Mohave County near where Arizona, Nevada and California meet, is a community that got a second chance and then some.

It started its existence in the 1860s as Hardyville, which became a ghost town when the railroad between Needles, Calif., and Kingman dipped to the south rather than coming north. However, it was resuscitated in 1951 with the completion of Davis Dam and had more than 10,000 residents when it was incorporated in 1984. Estimates put the current population at more than 40,000.

Much of Bullhead City's vitality can also be traced to the entrepreneurial endeavors of Don Laughlin, who in 1964 bought the southern tip of Nevada on the western banks of the Colorado River across from Bullhead City. Laughlin opened what would become the Riverside Resort, offering all-you-can-eat chicken dinners for 98 cents, 12 slot machines and two live gaming tables, along with 8 motel rooms. Laughlin, Nev., which is not incorporated as a municipality, would grow into the third most visited casino and resort destination in Nevada after Las Vegas and Reno and is one of the top five destinations for American RV enthusiasts.

Together, Bullhead City and Laughlin attract six million visitors annually, and Bullhead City provides much of the work force for the Laughlin casinos and resorts.

Some other noteworthy facts about Bullhead City include:

- The hottest temperature – 132 F – in the United States was recorded Aug. 11, 1983 at 2:21 p.m. in the shade at the Bullhead City Fire Department.
- The world's largest live rattlesnake – 8 ft. 5 in., 32.67 lbs. – was captured there.

Bullhead City was named for Bull's Head Rock, an old landmark located along the Colorado River used as a navigation point during the years of steamboat travel up the river. As the waters rose behind Davis Dam, creating Lake Mohave, Bull's Head Rock was gradually covered. Today, only a small, undistinguishable part of the rock remains uncovered.

William Harrison Hardy founded Hardyville. He was a postmaster, county supervisor and member of the Territorial Legislature. Now only a cemetery marks Hardyville's existence.

Davis Dam is about 45 miles downstream from Hoover Dam. The dam's purpose is to regulate releases from Hoover Dam and facilitate the delivery of Colorado River water to Mexico. Bullhead City and Laughlin are located just below the dam. Originally called Bullhead Dam, Davis Dam was renamed after Arthur Powell Davis, who was the director of the U.S. Bureau of Reclamation from 1914 to 1932.

The site for Davis Dam was selected in 1902, but construction did not start until 1942. It was discontinued in December of that year due to the war. Construction resumed in April 1946, and the dam was completed in 1951.

Although the Bullhead City/Laughlin area is mainly desert, nearly 190 square miles is water, making water sports a favorite among residents and visitors alike.

The area around Lake Mohave and along the Colorado River below Davis Dam also provides a multitude of recreational opportunities, including fishing, boating, swimming, water skiing, camping, picnicking, exploring, auto touring, photography and just plain relaxing.

There are hundreds of beaches that can only be accessed by boat. In the summer, boaters seek out their own private beach site for a base camp from which they then swim, water ski and relax. If you like to fish, rainbow trout are found in the cool, clear waters at the upper end of Lake Mohave, while largemouth and striped bass are taken from the lower reaches of the lake. A fishing license from either Arizona or Nevada, to which a special-use stamp from the opposite state is attached, is required on Lake Mohave.

Legislators hope to ban texting while driving

Two Arizona legislators say they will team up to try to get approval of a statewide ban on text messaging while driving.

"Anyone who follows the news knows people die as a result of texting while driving," State Senator Al Melvin, a Tucson Republican, told a reporter for Cronkite News of Arizona State University.

Arizona does have a statewide restriction on cell phone use by school bus drivers while they are on the job, and the Phoenix City Council passed a ban on text messaging in 2007.

Melvin sponsored a bill during the 2009 legislative session to prohibit text messaging that failed on a 14-15 vote in the Arizona Senate. Melvin has vowed to try again. "My motivation is to save lives," said Melvin. "I'm confident the voters want it."

Melvin said he plans to team up with State Rep. Steve Farley, a Tucson Democrat, to sponsor another bill during the 2010 session. Farley sponsored a bill in 2009 that would have prohibited use of a cellular phone while driving unless the phone was equipped with a hands-free device. The bill was not voted on in any House committee.

"This is an issue of safety on our highways," Farley told the Cronkite News reporter.

Melvin and Farley apparently are counting on the momentum building nationally. State legislators across the U.S. have proposed more than 200 bills to curb distracted driving, and policy analysts expect to see many more as legislatures convene, according to various news sources.

"It's the hottest safety issue in the states right now by far," Jonathan Adkins, spokesman for the Governors Highway Safety Association, told the *New York Times*.

A sample of the proposed legislation includes:

- A ban on motorists from sending text messages in Kansas.
- A similar ban in South Carolina as well as a debate whether to prohibit drivers from using phones altogether or requiring them to use hands-free devices.
- A ban on drivers manipulating a navigation system in a moving car in New Jersey.
- A proposal in Maine to require cell phone manufacturers to put warnings on packaging, like those on cigarettes.

In a similar vein, State Sen. John Nelson, a Glendale Republican, has introduced a bill prohibiting a person operating a motor vehicle from watching television.

Four bills are pending in Congress that would push states to regulate various types of cell phone use by drivers, including banning texting, requiring hands-free devices or prohibiting motorists under the age of 21 from using any devices.

Currently, 19 states and the District of Columbia ban texting while driving, and six states and the District of Columbia require use of hands-free devices by motorists talking on phones.

In December, the U.S. House of Representatives passed an order banning 8,000 House staff members from texting while driving, following on an order signed in October by President Barack Obama banning 4.5 million federal employees from texting in government-provided cars or phones or during work hours.

There are other efforts besides legislation. The Transportation Department, which in October held a conference on distracted driving, has started a television ad campaign that says motorists who text or talk on phones lack common sense.

In April, the department plans to spend $400,000 on projects in Hartford and Syracuse to test whether laws restricting cell phone use by drivers really affect behavior behind the wheel.

Transportation Secretary Ray LaHood, who during the October conference called distracted driving a "deadly epidemic," said reform must not end with the demonization of texting.

In Congressional hearings, he said that talking on the phone, even when using a hands-free device, poses a cognitive distraction risk that should not be ignored.

"I'm on a rampage about this, and I'm not going to let up," LaHood said of the broader issue of distracted driving. He said that he believed the goal should be to persuade people to shut down their devices or lock them in the glove compartment when they get behind the wheel.

Personnel Perspectives and Lessons in Land Use

Featuring legal issues from the AMRRP Personnel Assistance Lifeline (PAL) and Land Use Assistance Lifeline (LUAL)

AMRRP Personnel Assistance Lifeline (PAL) Q&A

By Justin Pierce, Ford & Harrison, LLP

Question: Our Town allows retirees who have met certain requirements to continue their health insurance benefits through the Town. In this economy, this has become quite a strain on our budget, and we would like not to have to provide these benefits any longer. Additionally, we don't want to offer the benefit going forward to any of our current employees. Can we legally do this?

Answer: You cannot unilaterally take away the benefits for retirees and current employees, but there is a way to do it legally. Obviously, you can, and should, stop the benefit going forward for anyone who has yet to become employed with the Town.

On the matter of retirees and current employees, Arizona happens to be one of the few jurisdictions that follows a "contract" theory of retirement benefits, as opposed to the otherwise well-established presumption that statutes do not create contract rights. Under this contract theory, the Town's promise to pay retirement benefits is part of its contract with the employee. By accepting the job and continuing work, the employee has accepted the offer of retirement benefits, and the Town may not impair or abrogate that contract without offering consideration and obtaining the consent of the employee. As a result, the only way to terminate the retirement benefit is to offer all current employees *and* qualified retirees new consideration in exchange for the termination. In other words, the Town may offer employees and qualified retirees buyouts or new benefits in exchange for termination of retirement benefits. However, the parties to the contract – the Town and the employee – must mutually agree to modify the contract, and each employee and retiree has the right to decline the new offer. Depending on the number of people who are either current employees or eligible retirees, this may prove to be a difficult undertaking.

As an alternative (and probably much easier) course of action, the Town may increase premiums in an effort to keep the plan afloat. Arizona case law allows flexibility in benefit plan maintenance when necessary, but the Town must be able to show that it raised premiums in good faith. As an example, if the Town raises premiums for retirees to an unreasonable level with the intent to force them out of the system, the Town acts unfairly and in bad faith. On the other hand, if the Town raises premiums across the board with the intent to assure the plan's survival, it probably acts fairly and in good faith because it is not seeking to defeat the purpose of the contract.

AMRRP Land Use Assistance Lifeline (LUAL)

How to abate a nuisance?

By William J. Sims III, Moyes, Sellers & Sims

Suppose your city or town has a property owner who is using his or her property in a way that is threatening their neighbor's use and enjoyment of the neighbor's property. What should you do?

You have two distinct options: (1) attempt to abate the nuisance under the Arizona Criminal Code (A.R.S. § 13-2917) or (2) abate the nuisance under A.R.S. § 9-499. If possible, the procedure under A.R.S. § 9-499 may be the preferable option, particularly in light of a recent unpublished Memorandum Decision issued by the Arizona Court of Appeals in the matter of City of *Safford v. Lavonne Seale*, 2CA-CV2007-194.

Nuisance Abatement Under Arizona's Criminal Code

A.R.S. § 13-2917 allows a city attorney to "bring an action in superior court to abate, enjoin, and prevent" a public nuisance that is "injurious to health, … offensive to the senses or … interferes with the comfortable enjoyment of life or property by an entire community or neighborhood of by a considerable number of persons." *See Armory Park Neighborhood Ass'n v. Episcopal Comty. Servs. In Arizona*, 712 P.2d 914 (1985).

See **LESSONS IN LAND USE** on page 6

LESSONS IN LAND USE

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In the *Safford v. Seale* case, however, the court seemed to ignore the common law that would allow a city to summarily abate a nuisance. In *Lawton v. Ste* 152 U.S. 133, 136 (1894), the U.S. Supreme Court had acknowledged that the power of a city "is universally conceded to include everything essential to the public safety, health, and morals, and to justify the destruction or abatement, by summary proceedings, of whatever may be regarded as a public nuisance." The Court went on to note that "the summary abatement of nuisances without judicial process or proceeding was well known to the common law long prior to the adoption of the Constitution, and it has never been supposed that the [due process clause] was intended to interfere with the established principles in that regard." *Id.* at 142. Arizona courts have followed this rule. In *Hislop v. Rodgers*, 54 Ariz. 101 (1939), the court noted that "[t]he highest court in the land has thus declared emphatically that the summary abatement of an alleged nuisance, without notice or hearing, does not violate any constitutional provisions, since the party owning the property has a complete remedy by an action for damages against the person who has destroyed the property, in case no nuisance actually existed." *Id.* at 120.

Notwithstanding this case law, the Arizona Court of Appeals determined that pursuing an abatement action under A.R.S. § 13-2917 violated the due process clause of the Constitution. So now what should you do?

Proceeding to Abate Under A.R.S. § 9-499

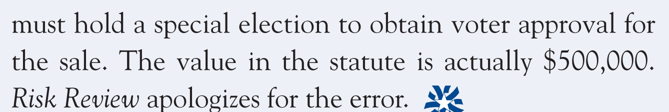
Under this statute, a city may compel a property owner to abate a nuisance simply by providing the owner 30 days written notice. If the property owner does not comply with the notice and abate the nuisance, the city may undertake the abatement and charge the owner by imposing an assessment on the property. Any assessment recorded after July 15, 1996, is prior and superior to all other liens on the property (including mortgages) except liens for general taxes. The statute even allows for interest to be charged on outstanding assessments.

Moral of the Story

The holding in *City of Safford v. Lavonne Seale* provides a good reason for a city or town to think before rigidly deciding to pursue a criminal abatement proceeding under A.R.S. § 13-2917. If the city or town has adopted an ordinance authorizing the "clean and lien" provisions of A.R.S. § 9-499, then pursuing that option may be the cleanest approach – pun intended.

Correction

The Lessons in Land Use article in the October 2009 of *Risk Review* incorrectly stated that under A.R.S. § 9-403, if the value of city property exceeds $500, the city or town must hold a special election to obtain voter approval for the sale. The value in the statute is actually $500,000. *Risk Review* apologizes for the error.



WeTip uses anonymous, toll-free crime hotline

WeTip is a service that can assist municipalities in dealing with a number of problems such as arson and other property destruction. WeTip uses an anonymous, toll-free crime hotline – 1-800-78-CRIME – to gather tips and provides WeTip members with incident-specific flyers for circulation within the community.

WeTip was founded in 1972 as a citizen's group to eliminate drug dealers, but quickly expanded to take information on all major crimes. Working together in support of trained law enforcement officers, citizens have used the WeTip system to launch a concerted attack against crime in their communities.

WeTip members in Arizona include the City of Globe and municipalities in Apache and Navajo counties. WeTip has long-standing working relationships with the Public Entity Risk Management Authority (PERMA) and the Golden State Risk Management Authority (GSRMA) in California.

For more information on the service, see WeTip's website at www.wetip.com.

COURT FINDS

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On summary judgment, a U.S. district court in California granted relief to the police department and the City, but determined McPherson was not entitled to qualified immunity. The district court concluded a reasonable jury could find that Bryan "presented no immediate danger and no use of force was necessary." The Appeals Court decision remanded the case to the district court for further proceedings.

"We must balance the amount of force applied against the need for that force," says the Court in beginning its written discussion of the incident. "Officer McPherson shot Bryan with a Taser X26 provided by the Coronado Police Department. The X26 uses compressed nitrogen to propel a pair of "probes – aluminum darts tipped with stainless steel barbs connected to the X26 by insulated wires – toward the target at a rate of over 160 feet per second. Upon striking a person, the X26 delivers a 1,200-volt, low-ampere electrical charge through the wires and probes and into his muscles. The impact is as powerful as it is swift. The electrical impulse instantly overrides the victim's central nervous system, paralyzing the muscles throughout the body, rendering the target limp and helpless.

"Bryan vividly testified to experiencing both paralysis and intense pain throughout his body when he was [shot]. As a result, Bryan lost muscular control and fell, uncontrolled, face first into the pavement. Additionally, a barbed probe lodged in his flesh, requiring hospitalization so that a doctor could remove the probe with a scalpel. A reasonable police officer with Officer McPherson's training on the X26 would have foreseen these physical injuries when confronting a shirtless individual standing on asphalt.

"The physiological effects, the high levels of pain, and foreseeable risk of physical injury lead us to conclude that the X26 and similar devices are a greater intrusion than other non-lethal methods of force we have confronted," the Court's discussion continues. "We recognize the important role controlled electric devices like the Taser X26 can play in law enforcement. The ability to defuse a dangerous situation from a distance can obviate the need for more severe, or even deadly, force and thus can help protect police officers, bystanders and suspects alike. We hold only that the X26 and similar devices constitute an intermediate, significant level of force that must be justified by a strong government interest that *compels* the employment of such force."

In addressing the need for the use of force in this situation, the Court says, "We agree with the district court that Bryan did not pose an immediate threat to Officer McPherson or bystanders despite his unusual behavior. It is undisputed that Bryan was unarmed, and, as Bryan was only dressed in tennis shoes and boxer shorts, it should have been apparent that he was unarmed. Although Bryan had shouted expletives to himself while pulling his car over and had taken to shouting gibberish, and more expletives, outside his car, at no point did he level a physical or verbal threat against Officer McPherson. Bryan was standing, without advancing, fifteen to twenty-five feet away from Officer McPherson between the door and body of the car. We reject Officer McPherson's contention that Bryan constituted a threat by taking a step in Officer McPherson's direction.

"Not only was Bryan standing, unarmed, at a distance of fifteen to twenty-five feet, but the physical evidence demonstrates that Bryan was not even facing Officer McPherson when he was shot: One of the Taser probes lodged in the side of Bryan's arm, rather than in his chest, and the location of the blood on the pavement indicates that he fell away from the officer, rather than towards him. An unarmed, stationary individual, facing away from an officer at a distance of fifteen to twenty-five feet is far from an "immediate threat" to that officer. Nor was Bryan's erratic, but nonviolent, behavior a potential threat to anyone else, as there is no indication that there were pedestrians nearby or traffic on the street at the time of the incident."

The severity of Bryan's purported offenses provide little, if any, basis for Officer McPherson's use of physical force. It is undisputed that Bryan's initial "crime" was a mere traffic infraction – failing to wear a seatbelt – punishable by a fine. Traffic violations generally will not support the use of a significant level of force. Officer McPherson now argues that use of the Taser was justified because he believed Bryan may have been mentally ill and thus subject to detention. To the contrary: if Officer McPherson believed Bryan was mentally disturbed he should have made greater effort to take control of the situation through less intrusive means.

"We thus conclude that the intermediate level of force employed by Officer McPherson against Bryan was excessive. Bryan never attempted to flee. He was clearly unarmed and was standing, without advancing in any direction, next to his vehicle. Officer McPherson was standing approximately twenty feet away observing Bryan's stationary, bizarre tantrum with his X26 drawn and charged. Consequently, the objective facts reveal a tense, but static, situation with Officer McPherson ready to respond to any developments while awaiting back-up. Bryan was neither a flight risk, a dangerous felon, nor an immediate threat. Therefore, there was simply no immediate need to subdue Bryan before Officer McPherson's fellow officers arrived or less-invasive means were attempted. Officer McPherson's desire to quickly and decisively end an unusual and tense situation is understandable. His chosen method for doing so violated Bryan's constitutional right to be free from excessive force."

RISK REVIEW

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The AMRRP is a non-profit corporation created in 1987. Its primary purpose is to provide property and casualty coverages to incorporated cities and towns in Arizona. AMRRP is sponsored by the League of Arizona Cities and Towns. AMRRP is governed by a nine member board elected by representatives of participating cities and towns.

Risk Review is published by AMRRP in a continuous effort to inform and educate its member cities and towns. Suggestions for article topics are welcome. Contact AMRRP at the above address and phone number.