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Safety and Liability Issues Concerning the Use of Oleoresin Capsicum Spray

A Policy Research Project
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ABSTRACT

The purpose of this research project is to examine issues surrounding the use of Oleoresin Capsicum, and to determine if the liabilities incurred by the Tyler Police Department by its mere use are justified. It will also address the current policy and training regarding the use of OC as a force option.

A review of literature from both the manufactures of OC as well as from studies conducted by various groups was considered. Although there are some who are opposed to the use of OC, an overwhelming majority agrees that it is a safe and viable force option that should remain available for law enforcement use. Deaths blamed on the use of OC can generally be shown to have been caused by other contributing factors.

The courts appear to be standing behind the use of OC spray, as long as the officer acted in a reasonable and lawful manner. Correct training on the use of and the proper decontamination procedures can drastically reduce civil liability. OC spray has been shown to decrease both officer and suspect injury from use of force.

It is demonstrated that maintaining the use of OC spray in the force continuum is a wise choice for the Tyler Police Department. Additional training and policy revisions are also recommended. With adequate training and due care by officers, OC will continue to be a risk worth taking, in an effort to control difficult individuals who present a threat to officers and to others.

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Introduction

The purpose of this research project is to address several issues, which may affect the current Tyler Police Department's Use of Force policy and the force option of Oleoresin Capsicum (OC) Spray. Specifically, it will address the issue of in-Custody Death and the liabilities assumed by an officer or department upon the use of this force option.

Officers of the Tyler Police Department are currently authorized to use OC spray when force is necessary to subdue individuals who are non-compliant to the officer's physical presence and verbal commands. It may also be used for crowd control and riot situations.

This paper will attempt to determine if OC spray is known to cause death or if alleged OC In-custody Deaths can be attributed to other factors. There have been several cases where the use of OC spray is alleged to have caused death. Is this fact or fiction? How do these cases affect our profession and the entities involved? It will also look at decisions of the courts, which pertain to claims of excessive force resulting from the deployment of OC spray, and review the outcomes to determine the legal stance they are taking.

This project is being prepared to aid the executive management of the Tyler Police Department in making a sound decision on current policy. It may also be used as a basis for any amendments to policy or required training.

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In conducting this project, facts and information are obtained from related occupational journals, training manuals, magazine articles, departmental policies and court decisions among others. It is anticipated that the information will show that OC spray is a viable less-than-lethal force option for law enforcement to use. Also, that it is a safe product and, when used as recommended by the manufacturer's guidelines, the courts will support its use by law enforcement.

Historical, Legal and Theoretical Context

In February of 1997, the Tyler Police Department issued a revision to the existing Use of Force policy that allows for the use of Oleoresin Capsicum (OC) spray in the force continuum. It is classified as a less-than-lethal force option, falling equal to open hand control (Tyler Police Department 2). Since the inception of OC spray into the law enforcement field, there has been a continuing debate over the safety of the product and its use.

OC is a powerful inflammatory agent that occurs naturally in cayenne peppers (Morgan 22). More than two centuries ago, the Chinese used pepper to disarm adversaries by blowing it through a straw into the opponent's face and eyes. This may have been the beginning of law enforcement's newest weapon (Reynolds and Burke 1).

A subject who is sprayed with OC will have the following reactions: His eyes will involuntarily slam shut; his breathing will become short and shallow; and he will have intense burning sensation in his eyes, throat and any area of the skin that was sprayed. He may feel as if he were choking. He may cough, feel nauseous, become uncoordinated, lack upper body strength, and feel disoriented and afraid (Pilant 5).

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Pepper sprays have been used by law enforcement in the United States since about 1977 (DuBay 65). Oleoresin Capsicum over the past five years has steadily replaced CS and Mace as the number one aerosol restraint system and has become a staple of non-lethal force in every major police department in the country (Grossi and Young 64). OC did not become prominently used until after the FBI conducted a study between 1987 and 1989. They sprayed 899 subjects and observed the symptoms listed above. There were no long-term problems noted with the test subjects. Decontamination consisted of fresh air and water. Soap was used in a few cases to wash the OC from the skin (FBI 3).

Theoretically, when choice of force options do not include a chemical agent, the probability of physical injury to officer and suspect increase. When encountering a violent suspect an officer must decide whether to control the suspect with empty hand techniques or resort to the use of an impact weapon. If the decision is to use the hands, this may result in an injury to the officer or the suspect, which might not have occurred if the officer could use OC spray (Schneider 3).

The Supreme Court in the 1989 case of Graham V. Connor, 45 Crl.3033, May 1989, held that a central issue in physical force cases is whether the officer's actions are objectively reasonable considering the facts and circumstances when the incident occurred. The Fourth Amendment to the Constitution provides that "the right of the people to be secure in their persons...against unreasonable searches and seizures, shall not be violated..." (MacDonald 160). The key issue being whether or not an officer is justified in using OC spray as a method of reasonable seizure of a person. In Johnson v.

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Glick, 481 F2d 1033, the Second Circuit Court developed a four-part “substantive due process” test, which considers the following factors:

[1] the need for the application of force, [2] the relationship between need and the amount of force that was used, [3] the extent of injury inflicted, and [4] whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm (Brown 1259).

The courts look at the use of OC spray as another force option to be used in “reasonable” seizure of a person. If the officer is justified in using the force by meeting the Glick standards, no problem is anticipated. Training of officers should be a key issue with the department in all areas of use of force.

Review of Literature

In perusing the literature available on oleoresin capsicum, it becomes evident that there are two points of view. The first is the information presented by the manufacturers of OC spray which tout the benefits of their product to law enforcement. Law enforcement echoes what the OC manufacturers claim, in that the product is safe and effective in its use.

The International Association of Chiefs of Police looked at the use of OC spray by police departments around the country before reaching this conclusion. Courts are expected to uphold OC use; and the potential for permanent or long-lasting physical injury is improbable. While not a panacea, OC is currently considered an effective and viable less-than-lethal force alternative (Onnen 3).

After the allegations of 30 deaths attributed to the use of OC spray, the International Association of Chiefs of Police looked at 22 of the cases in which enough information could be obtained. It was concluded that in 18 of the 22 cases, positional

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asphyxia was the cause of death, with drugs and/or disease also being contributing factors. In the remaining four cases, three involved a drug (cocaine)-related death, and one involved a drug (cocaine) / disease-related death (Granfield, Onnen and Petty 2).

Much of the literature available touts the reduction of injury to police officers and to suspects when the OC spray is deployed (Gauvin 32; Morgan 22; Orrick 1). Other agencies of comparable size are using OC spray on the level of open hand or pain compliance (Waco; Plano).

The second view, which quickly becomes obvious, is the segment of the population who alleges that OC spray is deadly. There are some claims that persons arrested after being doused with OC have died shortly after its use. The IACP study, which was listed above, refuted this claim. The American Civil Liberties Union has acted as a watchdog for constitutional rights. The Los Angeles based ACLU chapter studied pepper sprays for approximately three years from 1993 – 1996. They report that 26 suspects died in California alone over a 2 ½ year period (Orrick 7).

Critics are also pointing out the corruption of an FBI agent as one more reason to restrain the unrestricted civilian and police use of pepper sprays, or to at least cut down on their potency (Orrick 1). They are referring to FBI Special Agent Ward who conducted the initial studies by the FBI on the use of OC spray, leading both the FBI and eventually other law enforcement agencies to the use of it. Ward pled guilty to taking \$57,500 from the creator of Cap-Stun, Luckey Police Products of Fort Lauderdale, in the form of kickbacks. These were funneled through a company owned by his wife (Orrick 1).

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Angelo Robinson was a suspect who was sprayed in July 1993 by an officer of the Concord, N. C. Police Department after he resisted arrest. When officers arrived at the police station, Robinson was dead. The autopsy report concluded that the cause of Robinson's death was asphyxia precipitated by the pepper spray (McCauley 37). This was the first case in which a medical examiner listed the cause of death resulting from the use of OC spray.

Discussion of Relevant Issues

There are two relevant issues being addressed by this research project. The first is what kind of and how much training should be given to officers prior to their being allowed to use OC spray as a force option. The second issue deals with the overall liability incurred by the agency or municipality.

During the research of OC spray, one topic kept surfacing. It was the issue of training prior to use of the product. It has been stressed that there is no control on the availability of OC, and that it is readily available both to the general public as well as law enforcement. Much of the information available stresses the importance of the officer being sprayed with OC in training situations. The reasoning given was that the officer, who has previously been exposed, knows how he or she will react. This allows for them to recognize the attack and deal with it without panic (Lein 36).

The National Institute of Justice cites the case of an Arizona State trooper who was sprayed with OC by a subject. The officer said he survived the attack because his exposure to the spray in training taught him how to react (NIJ 1994:3).

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Training is the key. If you face a fighter after a spray, simply step back and spray him again. One problem has been that when the officer sprays, he sometimes jumps in to subdue too quickly (Clede 58). If officers do not know “the good, the bad, and the ugly” of OC aerosols, death or injury can occur to both the assailants and officers. The key to responsible use of OC is knowing what the spray can and cannot do. This is a training issue (Nowicki 28).

Training in the use of OC spray is much more involved than just spraying subjects “until they stop, drop, or drip” (Nowicki 28). Officers should have an understanding of the use of force and any department policies prior to using an OC aerosol. OC use should be part of a formal block of instruction that includes testing to ensure that officers understand its attributes and limitations, and to ensure competency (Nowicki 28).

Officers should be trained how to respond after they have exposed a subject to OC. The initial actions of an officer after using spray against an adversary should include loud, repetitive verbal commands. Commands should instruct the spray recipient to get to the ground with hands away from the body. If the suspect panics, the officer should reassure him to calm down and breath slowly. The officer should only move in to handcuff the suspect after he has gained compliance (Dunston 37).

Use of force progression issues must also be addressed. Not only “how to”, but “when to” must be emphasized. Proper terminology has to be emphasized during all stages of the training: trigger, nozzle, expiration date, carrier, etc. Additionally, the area of psychomotor skills, movement, disengaging and alternate force options needs to be addressed (Grossi and Young 66).

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Proper decontamination procedures need to be taught to officers as well as being incorporated into department policy (Reynolds and Burke 88; Russo 38). Officers need to be given all possible information available so that they can make sound decisions in the field when using OC spray.

The second issue to be discussed is the liability incurred by the department when OC spray is used as a force option. Reports indicate that use of OC may result in reduced use of force complaints, civil litigation, and injury to officers and subjects (Onnen 3).

Training enhances product effectiveness, protects both the officer and the agency in the event of litigation, and ensures both officer and subject safety (NIJ 1994:3). The training should be followed up by a clear, unambiguous policy that will be enforced concerning the use of OC and other agents. Anything less could easily be construed as negligent (Dunston 39).

If a department offers adequate training in the use of OC spray to officers, and establishes a solid, viable policy, then the chance of being encountered with negligent liability is reduced. Proper training in the "reasonableness" standard, established in Johnson V. Glick will also work to widen the safety net. When officers use sound judgement in deciding when to deploy OC, just as with any other force option, the courts tend to stand behind the officer.

The key to maintaining the support of the courts in the use of OC spray as a force option is, extensive training and responsibility on the part of both the officers and the department.

The benefits of the use of OC far outweigh the costs. A can of OC can be purchased for less than \$10.00, and training can be handled in-house by a certified OC

instructor. An instructor can be certified for approximately \$300.00. This training can be conducted in conjunction with firearm re-qualification or for new recruits in the police academy. Benefits include fewer injuries for officers, less lost time and fewer lawsuits from excessive force claims, to name only a few. OC spray and training can be provided for \$11.69 per officer or for all 178 Tyler Police officers for \$1,780.00.

Conclusions / Recommendations

Numerous articles have been reviewed that present both the pros and cons of incorporating OC spray as a less-than-lethal force option for law enforcement. It is a controversial issue across the United States and has been for several years.

For OC spray to continue to be a viable force option, departments as well as officers must recognize the importance of training. Officers will have to become aware of their responsibilities when using OC spray, and ensuring that proper verbalization and decontamination procedures are followed.

Documentation abounds which clearly indicates that injuries to both officers and to suspects have been drastically reduced since the inception of OC spray use. It is clearly a force option, which needs to continue to be available to officers of the Tyler Police Department.

From studies conducted by the FBI and the International Association of Chiefs of Police, it is shown that oleoresin capsicum is a relatively safe force option, which is in some cases the only viable force option available for certain situations. As long as officers are aware that the OC spray is not 100% effective on all suspects, and they train accordingly, most problems will be eliminated.

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It is very important that decontamination procedures be stressed during training. Most deaths that have been attributed to OC spray can be traced back to other causes of death or precipitating factors. Sudden In Custody Deaths can generally be avoided when the arresting officer takes precautions. Proper monitoring of the suspect after being taken into custody is a must to reduce liability to the officer and the department.

The Tyler Police Department covers OC spray in its use of force policy. The policy is well written and covers step by step what is expected of an officer after the use of OC. It is recommended that the Tyler Police Department continue to carry OC and to leave it on the force continuum equal to verbal commands.

It is recommended that the department consider making it mandatory that officers be sprayed during training, instead of leaving it optional. The only exception to this being for claimed medical conditions such as asthma, which would make being sprayed optional. Research documents numerous incidents where officers who were sprayed with OC attributed their survival to being sprayed and knowing what their physical reaction was going to be. This allows the officer to form a plan of action. It can further be argued that an officer who has experienced the effects of OC will be more attentive to the suspect after its use, responding more quickly with decontamination. Presumably, this will reduce excessive use of force claims against officers. By slightly broadening the expectations in policy and in training, the use of OC spray should continue to be a safe bet for law enforcement.

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