

**THE BILL BLACKWOOD
LAW ENFORCEMENT MANAGEMENT INSTITUTE OF TEXAS**

The Use Of Pepper Spray
Does It Belong In The Use Of Force Continuum?

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Abstract

Today law enforcement organizations are under the scrutiny by both society and the courts, over any use of force against the public. The cause for the use of force seems irrelevant and the resistance faced unimportant. The fact is that if an officer uses a defensive maneuver, which is approved by the department, and uses it inappropriately or misapplies the approved use of force, the use of force could be possibly stricken from the use of force policy of the whole department. Responding to the need for a less-than-lethal alternative, law enforcement agencies throughout the country have adopted Oleoresin Capsicum (OC) or Pepper Spray as a use of force option. Anecdotal reports of Pepper Sprays effectiveness are favorable. Significant reductions in officer/arrestee injuries in use-of-force complaints have been reported. Pepper Spray (OC) has come under scrutiny the past several years, for its reliability and safety. As a result, some law enforcement agencies contemplating product adaptation are reluctant to begin use and are seeking more information affirming product safety and effectiveness.

The purpose of this paper is to research the areas of concern relating to cases where deaths have occurred subsequent to Pepper Spray (OC) use. These deaths have created some concern among those in the law enforcement community, as well as among others, with the regard to Pepper Sprays (OC) possible role. The legal issues relating to the use of Pepper Spray (OC) and litigation that follows are examined. A look into sudden death syndrome, misapplication due to lack of training, and other possible causes of deaths, in which Pepper Spray (OC) received the majority of the blame are presented. Surveys

were received to compare results of other agencies, to see if Pepper Spray (OC) has a place in the law enforcement environment.

The conclusion of this research indicates that Pepper Spray (OC) has been proven to be a safe and effective tool when used by a properly trained officer. Based on other evidence and autopsies, Pepper Spray (OC) wasn't concluded to be the cause of death, or a contributor to it. Rather the cause of death in a majority of the cases was determined to be positional asphyxia, aggravated by drugs, disease and/or obesity. It has been determined that Pepper Spray (OC) is a vital tool when an officer is submatched or outweighed by the combatant involved. Further it is important that Pepper Spray (OC) be placed in the use of force continuum at a level that is accessible when needed. Pepper Spray (OC) is useless if it is not available to the officer before deadly force is appropriate.

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Introduction

Responding to the need for a less-than-lethal alternative, police departments throughout the country have adopted Pepper Spray (OC) also known as Oleoresin Capsicum as a force option. This research will answer two questions regarding the use of this product. First, should law enforcement personnel be allowed to use this type of force and include it in their departments use of force continuum? Second, if it is used, where should it be placed within the use of force continuum?

The issue is whether Pepper Spray (OC) is safe to use. Have past incidents involving the deaths of individuals after being arrested caused law enforcement agencies to want to ban its use altogether? Have these incidents caused departments to move Pepper Spray (OC) higher on the use of force continuum causing it to become accessible to police officers? Pepper Spray (OC) has gained wide acceptance in the law enforcement community and is replacing mace as the spray of choice. When Pepper Spray (OC) was reported to have caused a death, was it used properly? Should it be held solely responsible for the deaths? Should we scrutinize the training or lack thereof, of the officer using the spray. This paper shall answer these questions for policy-makers, administrators, trainers and officers from a diversity of departments.

Surveys of other departments policies, articles from law enforcement and medical journals, books, current training guidelines and use of force continuums from a variety of law enforcement departments will be used for information pertaining to the of Pepper Spray (OC) and its practicality in the law enforcement environment.

This article will shed light on problems with the use of Pepper Spray (OC) and will allow each department to determine the feasibility of its use. Also if Pepper Spray (OC) is implemented or allowed to be used, this report shall give insight as to what level it should be placed in the use of force continuum and how that training is a departments best prevention against misapplication.

Historical, Legal and Theoretical Context

It has long been recognized by law enforcement personnel that a void exists in the range of authorized types of less-than-lethal force equipment that is available to them to control a resisting individual in an arrest situation. Beyond empty-hand (weaponless) control techniques, historically law enforcement officers have utilized an impact weapon (baton/flashlight) and/ or their firearm as a response measure to varying levels of suspect resistance. In a violent situation, officers may be obliged to choose an unnecessarily strong option for lack of an alternative force measure. The use of force presents at least several potential problems for both the officer and members of society. First, officers may have to respond to a situation with more force than is necessary. Secondly, administrators will have to take a look at several types of less-than-lethal equipment presently being utilized in the field and to examine several new technologies that might be developed for use in law enforcement. If decision is to use the hands, this usually resulted in injury to the officer or suspect. There is evidence that shows more injuries occur when an officer uses their hands. When an officer makes the decision to use the baton/flashlight, studies have shown that a suspect suffers more serious types of injuries or even death. Confrontations between police and individuals resisting arrest, which resulted in injury, have frequently spawned complaints about the level of force used.

Increased civil liability and court –imposed limitations on the use of deadly force have resulted in a search for a safe and effective less-than –lethal alternatives (NIJ 1997). Of particular interest to law enforcement officers has been the introduction of Pepper Spray (OC) or Oleoresin Capsicum as a less-than-lethal force option for officers to consider when faced with a resisting individual. Products using spicy oils in sprays to incapacitate an individual or an animal have been used in the United States since the early 1970's. (Salem,et al,1993, Dubay 1995) Pepper Spray (OC), Oleoresin Capsicum was first used to repel bear attacks and then by the U.S. Post Office Letter Carriers to defend themselves against dog attacks. Pepper Spray (OC) has grown in its use by law enforcement agencies due to its popularized efficacy in temporarily incapacitating subjects, with minimal risk of injury to the officers or individual being arrested. A majority of manufacturers and several law enforcement professional groups have supported the widespread use of Pepper Spray (OC) due to the lack of additional force options available to them. Pepper Spray (OC) is a naturally occurring inflammatory agent found in cayenne peppers. Pepper Spray (OC) causes almost immediate swelling and burning of the eyes and breathing passages. (Devernay, 1993) When the agent is inhaled, the respiratory tract is inflamed, and breathing is restricted. Since the introduction of Pepper Spray (OC), use –of-force complaints and significant reduction in officer/arrestee injuries have been reported. (Nowiek: 1993)

Officers and their departments have been the subject of a growing trend of civil litigation for allegations of excessive force and police brutality. The cases have frequently placed the agency and the community in a financial hardship as a result of many multi-million dollar awards that have been assessed against police departments, or

for cases settled out of court. The lawsuits brought forward, provided facts that were helpful in determining when Pepper Spray should be used or attempted. All of the cases reveal the importance of officer discretion in a use of force situation. Court decisions have had a direct influence in the discretionary use of force by law enforcement personnel in setting standards of force (Graham v. Connor, 109 S.Ct. 1865 (1989), and the standard of training in the use of force (Popaw v. City of Margate, 476 F. Supp 1237, 1246 (N.J. 1979) and the role of written policies affecting police liabilities (DeLong v. the City and County of Denver, 530 P 2d 1308 (Colo. App. 1947), Affirmed 545 P. 2d 154 (1976). As the number of deaths continue, questions over the medical implications of using Pepper Spray (OC) increase. Currently a cloud of controversy hovers over the long term health risks that are potentially associated with the product in law enforcement, other professional police training groups and the American Civil Liberties Union (ACLU 1993) have challenged the effectiveness and are supporting a more conservative use of Pepper Spray (OC).

Review of Literature or Practice

The physiological effects of Pepper Spray (OC) have been studied by many to see if it was used properly, and was it the cause of many deaths. As the number of deaths continued, questions over the medical implications of using Pepper Spray (OC) increased. Currently a cloud of controversy hovers over the long-term health risks that are potentially associated with the product in law enforcement. Other professional groups and law enforcement training groups, the American Civil Liberties Union (1993 Los Angeles, California, ACLU Report 1993) have challenged the effectiveness and are supporting a more conservative use of Pepper Spray (OC). Manufacturers of Pepper

Spray (OC) have asserted that it is safe, non-toxic, and a low risk product, which does not cause permanent or long term health problems or death to subjects. Manufacturers continue to argue that "This natural organic product would control everyone but hurt no one." There have been several reviews of animal and human studies of the toxicology of Pepper Spray (OC). Both concluded that there are insufficient data currently available to fully define the health risks of Pepper Spray (OC). They cited animal studies showing that Pepper Spray (OC) can be mutagenic or carcinogenic, alters immune responses, and has substantial effects on nerves, heart, blood vessels, lungs, liver and kidneys.

There is little controversy over whether the usage of Pepper Spray (OC) has proven to be a positive subject control tool. Since its introduction as a less-than-lethal force option, it has been used thousands of times successfully to deescalate varying levels of resistance, and is directly responsible for decreasing the incidents of serious injuries to law enforcement officers and arrestees. (Gauvin, 1995, Farenholt, 1993, NIJ, 1995). But with any subject control technique there are inherent risks, which require further strict scrutiny and analysis, and also dictate a level of common sense and responsibility. Like any weapon, Pepper Spray (OC) cannot be assumed to be risk free (Hunter, 1994). The use of chemicals is considered to be less harmful and less forceful than fists, nightsticks, batons and firearms. A study of the effectiveness of Pepper Spray (OC) by the New Britain Connecticut Police Department, disclosed that of 360 uses against suspects, Pepper Spray (OC) was effective 95% of the time. (NIJ, 1997). No injuries were reported to either the officer or the suspects and there was only one complaint of excessive force involving Pepper Spray (OC), which was determined to be unfounded (Nowicki, 1993). In a six week month period in British Columbia, officers used Pepper Spray (OC) 104

times and reported that it was totally effective 93 % of the time. The Federal Bureau of Investigation (FBI) also conducted numerous tests with Pepper Spray (OC). Tests on 828 individuals were performed using aerosol sprays that contained Pepper Spray (OC). Effects of the tests disclosed the following reactions by the individuals in question: respiratory inflammation, coughing, shortness of breath, gagging sensations and skin irritation ranging from a slight burning sensation to actual reddening of the skin. None of the individuals tested experienced any long-term effects.

Just how safe is Pepper Spray (OC) is an issue that needs to be explored. Pepper Spray (OC) has grown in popularity and continues to grow. There have been no published clinical studies on the human health effects of Pepper Spray (OC) marketed for law enforcement use. The American Civil Liberties Union of Southern California (ACLU, 1995) published a summary of information regarding twenty-six California in-custody deaths following the use of Pepper Spray (OC) that occurred between 1993 and 1995. In these California deaths, law enforcement action often was related to bizarre or aggressive behavior, and most individuals were under the influence of street drugs, alcohol or prescribed psychotropic medications. All of the suspects behaved in a bizarre or combative manner making it necessary to incorporate a high degree of use of force. In some cases the subject was obese or there was a presence of some type of prior respiratory ailment. None of the California deaths directly attributed to Pepper Spray (OC). Sufficient information was obtained in 22 of the 26 cases in a thorough review of the incidents so a reasonable conclusion as to the cause of death could be determined. Specifically, autopsy and law enforcement reports were necessary so an entire incident could be reviewed to ensure that all causal and/or contributory factors to the death were

examined. After reviewing all facts, the result indicated that Pepper Spray (OC) was not the cause of death in any of the cases. The review of the facts concluded that, in these cases and that something else caused the deaths. More specifically, it was concluded that in 18 of the 26 deaths, positional asphyxia was the cause of death, with drugs and/or disease also being a contributing factor.

The circumstances leading to positional asphyxia in many cases was probably initiated by handcuffing the subjects (hands behind the back) and laying them on their stomachs. In some cases, ankle restraints were employed with hog-tying and/or pressure on the back by an officer. Subjects were also often transported in a prone position, and a number of them were markedly overweight with "big bellies."

In conclusion, in none of the 22 cases was Pepper Spray (OC) considered to be a cause of death, or a contributing factor, to the deaths. Rather, the cause of death in the majority of the cases was determined to be positional asphyxia, aggravated by drugs, disease and/or obesity.

Discussion of Relevant Issues

Since Peppers Sprays (OC) introduction into law enforcement, its controversy has continued to grow. There is little controversy over whether the usage of Pepper Spray (OC) has proven to be a positive subject control tool. Since its introduction as a less-than-lethal force option, it has been used thousands of times successfully to de-escalate varying levels of resistance, and is directly responsible for decreasing the incidents of serious injuries to officers and arrestees. But with any subject control technique there are inherent risks, which require further strict scrutiny and analysis, and also dictate a level of common sense and responsibility. With the proper application Pepper Spray (OC) will

bring most violent subjects under control in just a few seconds. It has also decreased the number of complaints against officers for excessive force. As with any type of control technique, there is no substitute for common sense by the officer as to when it should be used. The officer must have the support of his department, proper training techniques and clear-cut guidelines and continuous up-to-date training to effectively utilize Pepper Spray (OC) with a minimum of liability.

Still new problems have cropped up in the continued success of this non-lethal product. What effect does this product have on long term health? There is still no real evidence that there are no health consequences directly associated with the use of this product. As tests have shown, no chemical is 100% safe or effective due to improper use. Several reports have come to light that state that there is now evidence which documents serious negative medical implications of Pepper Spray (OC) exposure. This research indicates that usage of Pepper Spray (OC) possess several health risks to humans which could result in serious injury or death to some members of the population. This report states it isn't the intent to suggest or recommend the use of Pepper Spray (OC). The research suggests the strong recommendation for the use of the product.

Manufacturers of Pepper Spray (OC) products were contacted and were requested to complete a questionnaire relative to their respective product. None of the 16 manufacturers responded to the questionnaire, nor submitted any medical documentation regarding their product. The majority of the manufacturers have relied on a study conducted by the Federal Bureau of Investigation (FBI) (Weaver and Jett, 1989) and the assumption that Pepper Sprays (OC) are a by-product of ground chili peppers. Since that report was first published, questions have arisen concerning the truthfulness of the report.

When the study was completed, the report entitled "Chemical Agent Research: Oleoresin Capsicum," was sent to virtually every law enforcement agency in the country. Since that time the FBI's Chief Chemist, FBI Special Agent Thomas Ward has pled guilty to taking \$60,000.00 in payoffs from the manufacturers. During 1990 he traveled the country promoting Cap-Stun as the FBI's chosen brand of Pepper Spray (OC). With his conviction and sentencing to federal prison, every study he authored and every promotion he made has become very questionable.

Every decision by a police officer has the potential consequences of civil liability. According to a legal opinion of the North Carolina Academy, there is a complete absence of reported appellate court cases fixing liability excessive force in the proper use of Pepper Spray (OC). The court also stated that Pepper Spray (OC) has no history of permanent injury to a person, thereby lessening the legal basis of alleging significant bodily injury. However, there have been some serious outcomes following the use of Pepper Spray (OC). There were a total of 30 incidents in which the death of a subject occurred following the spraying of Pepper Spray (OC) between August 1990 and December 1993. A thorough review of these cases was conducted at by the International Association of Chiefs of Police (IACP) at the request of the National Institute of Justice. In 22 of 30 cases the International Association of Chiefs Of Police was able to obtain police and autopsy reports for analysis concluding that Pepper Spray (OC) was not the cause of death in any of the cases (Granfield et al, 1994).

Conclusion/Recommendation

The purpose of this research project is to determine if the use of Pepper Spray (OC) is a viable alternative as a less-than-lethal weapon for law enforcement. Most law

enforcement agencies in the United States are concerned about officers and suspect safety. In recent years, this concern has focused on injuries to law enforcement personnel and citizens during arrest confrontations. To meet this problem, departments have sought answers in technology involving less-than-lethal weapons. Aerosol Pepper Spray (OC) is one weapon that effectively addresses the issue of officer/citizen injury. Today's law enforcement officers act according to a use-of-force continuum designed many years ago. Pepper Spray (OC) allows for expansion of this continuum and gives officers a needed degree of flexibility to confront non-cooperative subjects. The issue examined is the history of Pepper Spray (OC) and its reputation, which has been tainted by the lack of knowledge and false information. The misapplication of Pepper Spray (OC) by poorly trained law enforcement officers has also contributed to the negative opinion attributed to its use.

Since law enforcement officers have started using Pepper Spray (OC) there have been many deaths associated to its use. Sudden death in-custody is neither a new phenomenon nor attributable to the use of Pepper Spray (OC). Rather, sudden death in-custody death can occur at any time for a variety of reasons. Any law enforcement agency may experience a sudden in-custody death, regardless of Pepper Sprays (OC) involvement. Consequently, officer awareness and recognition of risk indicators are necessary to ensure subject safety and minimize the risk of sudden in-custody deaths. Diligent observation and constant monitoring of subjects is always necessary. If prone positioning is required, subjects should be closely monitored. By implementing procedural protocols, the potential for in-custody deaths may be lessened.

My recommendation is for departments to adopt the use of Pepper Spray (OC) as an intermediate use of force option. It is also recommended that all departments set up training for the use of Pepper Spray (OC) and to have their training officers proficient in its instruction. It is also recommended that reports be made on all incidents involving the use of Pepper Spray (OC) to evaluate the incidents and modify training needs as the process evolves. Yearly in-service training should be required to prove proficiency of the officer's knowledge and application of the product. Upon establishing a training program for Pepper Spray (OC), it should then be placed at a reasonable level in the use of force continuum. Pepper Spray (OC) should be placed on the use of force continuum and utilized before hard empty hand control is used as this may resolve the situation before further force is necessary.

These recommendations will give all officers an alternative for an effective countermeasure against the violence they face each day. We should not let inconclusive evidence and officer error keep this type of tool from the officer on the street.

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