Torts, Tasers and Causation
by Greg Hagen

Resurfice Corp. v. Hanke, [2007] 1 S.C.R. 333
http://www.canlii.org/en/ca/scc/doc/2007/2007scc7/2007scc7.html
Athey v. Leonati, [1996] 3 S.C.R. 458
http://www.canlii.org/en/ca/scc/doc/1996/1996canlii183/1996canlii183.html
Snell v. Farrell, [1990] 2 S.C.R. 311
http://www.canlii.org/en/ca/scc/doc/1990/1990canlii70/1990canlii70.html

The recent deaths that occurred in Calgary and Edmonton following the use of a conducted energy weapon (generically referred to here as a "taser") have once again raised the issue of the appropriate use of tasers in policing. In fact, there have been at least 20 deaths in Canada following the use of tasers. The British Columbia Civil Liberties Association and Amnesty International Canada have called for a moratorium on their use. The RCMP Public Complaints Commissioner called for a moratorium on their use if the RCMP cannot properly instruct its members to appropriately deploy the taser in an operational setting. It is in this context that the Alberta Solicitor General, Fred Lindsay, and the Premier of Alberta, Ed Stelmach, downplayed the possibility that the use of a taser can cause death. This post argues that, notwithstanding the opinions of these elected officials regarding causation, it is possible for police officers to be found liable in negligence as a result of using a taser.

If a police officer breaches a duty of care with respect to the use of a taser, thereby proximately causing harm to a victim, then the police officer is liable to pay compensation to the victim. This is a straightforward application of negligence law. The main issue that needs to be resolved is the standard of care with respect to the use of tasers. However, the statements of the Premier and Solicitor General, if correct, would show that the tort of negligence cannot be proven against a police officer who used a taser since causation, an essential element of the tort of negligence, cannot be proven according to them.

In support of his contention that tasers do not cause death, the Solicitor General reasoned:

> How many of those deaths have been confirmed to be because of the use of the Taser? I haven't seen a lot of evidence come forward yet that confirms at the end of the investigation that it was caused by the voltage that was put into the person's body by the Taser.

One claim that the Solicitor General seems to be making in this passage is that most investigations of death following the use of a taser revealed no evidence that the *voltage* of the electrical current that flows through the body when tasered caused the death. (This interpretation of the evidence can be disputed.) So, on his view, one cannot say that the voltage is a cause of death. However, as a matter of negligence law, there is no need to know exactly *how* the use of a

taser caused the death physiologically; whether it was the voltage, the amperage, frequency or some other property of the electric current. The test for whether, in fact, the use of a taser causes injury or death in negligence law is, generally speaking, the "but for" test: see *Resurfice Corp. v. Hanke,* 2007 SCC 7. This implies merely that, in the case of tasers, the use of the taser caused the death if no death would have occurred *but for the use of the taser*.

Of course, the lack of understanding of how the use of tasers can cause death may make it difficult or impossible for a medical expert to provide testimony about the but for cause of a death following the use of a taser. Instances of this problem have arisen in medical malpractice cases. So, in *Snell v. Farrell*, [1990] 2 S.C.R. 311, at para 44, the Supreme Court said that it "...is not essential to have a positive medical opinion to support a finding of causation." In that case it noted, at para 33, that in some cases "...in the absence of evidence to the contrary adduced by the defendant, an inference of causation may be drawn although positive or scientific proof of causation has not been adduced." It added at para 30 that in such cases "...very little affirmative evidence on the part of the plaintiff will justify the drawing of an inference of causation in the absence of evidence to the contrary."

In *Resurfice*, at para 25, the Supreme Court notes that there are cases when liability can be found in the absence of proof of but for causation because "... it would offend basic notions of fairness and justice to deny liability by applying a "but for" approach." In the same case, at para 24-25, the Supreme Court said that in cases where current limits of scientific knowledge make it impossible to prove causation using the but for test a material contribution test may be used. The material contribution test requires that "...the defendant breached a duty of care owed to the plaintiff, thereby exposing the plaintiff to an unreasonable risk of injury, and the plaintiff must have suffered that form of injury" (at para 25). Assuming that there is a lack of scientific proof that tasers can cause death, the Alberta Government should be asking itself whether police who follow its taser policy - e.g. deploying it merely when someone is threatening to resist arrest - can subject persons to an unreasonable risk of injury.

Premier Stelmach apparently thought that a simple Alberta Government "experiment" could refute the idea that the use of tasers could cause death. He said:

> This minister is standing. He got Tasered and he's alive.

The logic of the government's experiment is straightforward. If tasers did cause death, then the Solicitor General would be dead, but he is not. So the use of a taser does not cause death. But to say that the use of a taser can cause death on the but for test does not imply that if one uses a taser a death will always occur. Instead, the but for test implies that given a death, had the taser not been used, the death would not have occurred. (Technically the Premier conflates necessary and sufficient conditions.) The experiment and some studies suggest that the use of the taser may trigger death only if certain pre-existing physiological conditions are present in the victim. Indeed, Solicitor General Lindsay is reported to have said that "excited delirium" is the cause of

the deaths following being tasered rather than the use of the taser. (He says this notwithstanding that excited delirium has been described by Dr. Ian Dawe, director of Psychiatric Emergency Services at St. Michael's Hospital in Toronto as merely a pop culture phenomenon without much currency among psychiatrists.) Since multiple causes can satisfy the but for test in negligence law (*Resurfice*, at para 19), however, even if a pre-existing condition is *a* cause of the death after being tasered, the taser is *also a* cause if the death would not have occurred but for the firing of the taser. An analogous conclusion can be drawn on the material contribution test.

Public officials might be tempted to respond that, since "the Minister...got Tasered and he's alive", the taser might be a minor cause of death, but the pre-existing condition is the main cause, so the liability of the victim is great and that of the police officer is small. In negligence law, however, the fact that both the use of the taser and a pre-existing condition are causes does not, in and of itself, diminish the liability of the person who uses the taser. Since there is no liability attached to non-tortious causes in negligence law, a small degree of causation might result in a large degree of liability: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para 23. For example, even if one could attribute 99% degree of causation to a non-tortious, pre-existing condition (say "excited delirium") and 1% degree of causation to a tortious use of the taser by the police officer, 100% of the liability will be apportioned to the police officer's tortious use of the taser.

Finally, a public official who survived being tasered might be tempted to say that someone who died from being tasered was more susceptible to death than normal or symbolically, possessed a "thin skull." So, any liability should fall on the deceased. However, in negligence law, the thin skull rule provides that one must take the victim as found even if the injuries are unexpectedly severe owing to a pre-existing condition: *Athey v. Leonati*, at para 34. The wrongdoer is therefore liable even though the victim's losses are more dramatic than they would be for the average person: *Athey v. Leonati*, at para *34*. It follows that a police officer whose negligence proximately and unreasonably exposes someone to a risk of death who subsequently dies because of a pre-existing condition is not excused because the vast majority would not have suffered death or even severe injury.