

# Police Misconduct and Civil Rights

## LAW REPORT

Volume 9

Number 18

November/December 2010

## The Anatomy of a Post-Tasering Death

By Lynne Wilson\*

The Government of British Columbia's independent inquiry into the circumstances surrounding Robert Dziekanski's death on October 14, 2007, is the most comprehensive and illuminating investigation conducted to date into the dangerousness of Tasers or "conducted energy devices or weapons" ["CEDs or CEWs"]. We in the United States will never see such an enlightening window into a tragic death following police use of Tasers and we can learn much from it. The British Columbia ["BC"] Government appointed former British Columbia Supreme Court and Court of Appeals Judge Thomas Braidwood to conduct a public inquiry into Dziekanski's death.<sup>1</sup> It gave Judge Braidwood wide latitude as well as sufficient resources to conduct it thoroughly and well. Mr. Dziekanski was a 40-year-old Polish man who was immigrating to Canada and waiting for his mother at the Vancouver BC Airport. He died after police used aggressive restraint procedures on him, including five Tasers. His death was videoed and broadcast widely over international media, creating a great public outcry.<sup>2</sup>

Phase I of Judge Braidwood's inquiry into Dziekanski's death issued on June 18, 2009, made 19 recommendations concerning police use of CEDs. The Executive Summary of those recommendations was published in Volume 9, Number

13 of *Police Misconduct and Civil Rights Law Report* (January/February 2010). Phase II of Judge Braidwood's inquiry was issued on June 18, 2010, and dealt with the circumstances surrounding and cause of Dziekanski's death. It was issued after 61 days of publicly conducted evidentiary hearings, including 91 witnesses who testified under oath, and five days of closing oral submissions.<sup>3</sup>

Phase II also included Judge Braidwood's recommendation that all police incidents involving death or serious harm be investigated by an entirely civilian run Independent Investigation Office ["IIO"] operated under the jurisdiction of the provincial Ombudsperson, an office completely removed from the police.<sup>4</sup> BC's Attorney General announced that the IIO will be established and the Vancouver Police Chief is now asking that its jurisdiction extend to *all* police complaints.<sup>5</sup>

By far the most illuminating section of the Braidwood Commission's Phase II Report is Part 7 entitled "The Cause of Mr. Dziekanski's Death."<sup>6</sup> This is because of the light it sheds on the medical mysteries and controversies surrounding the over 500 deaths that have occurred after police use of CEDs in North America.<sup>7</sup>

The only comparable publicly funded independent inquiry into these deaths in the United States is the "Study of Deaths Following Electro Muscular Disruption," an interim report of a study conducted by the National Institute of Justice ["NIJ"]

\*The author is a Seattle attorney who contributes frequently to *PMCLRL*.

published in June 2008.<sup>8</sup> The NIJ interim study was conducted by a panel of medical examiners, cardiologists, emergency medicine experts, pathologists, and a toxicologist. Although the NIJ panel admitted that many aspects of the effects of CEDs on so-called "at-risk" (other than normal healthy) individuals remain unknown, its interim conclusion is that "there is no conclusive medical evidence within the state of current research that indicates a high risk of serious injury or death from the direct effects of CED exposure" as long as law enforcement uses the weapons in accordance with nationally accepted guidelines.<sup>9</sup>

The NIJ panel noted that many of the deaths following CED exposure involved "repeated or continuous exposure of CED to an actively resisting individual" who may also have been "under drug intoxication or in a state of excited delirium." However, the panel declined to postulate as to the role of CEDs in causing death in these cases, simply noting that the associated risks are unknown and urging caution in using "multiple activations of CED as a means to accomplish subdual."<sup>10</sup>

The Braidwood Commission's investigation into the death of Robert Dziekanski gives us much additional knowledge about the causes of these tragic deaths. What follows is a summary of the facts and circumstances surrounding Mr. Dziekanski's last few hours as presented in the Phase II report and an edited version of Part 7, "The Cause of Mr. Dziekanski's Death."

## Mr. Dziekanski's Pre-Taser Status and Entry into Canada<sup>11</sup>

That Robert Dziekanski was an "at risk" person before police approached him at the Airport is well documented in the report. He had lived his entire life in Poland before deciding in 2007 to move to Canada after his mother immigrated there. He spoke only Polish and had never flown in an airplane. In the days preceding his departure, he grew increasingly anxious about flying and on the night before his departure, he began to panic. Friends described him as "shaking, vomiting and clinging to a heat radiator in the apartment." He was nervous about turbulence and his inability to speak English. He did not sleep for 48 hours before departing for Canada. Friends described him as physically fit, a moderate smoker, and a social drinker who used no drugs. Trained as a typesetter, Mr. Dziekanski planned to start his own construction business in Canada once he learned English.

Mr. Dziekanski calmed down when he finally arrived at the airport. He had two unremarkable flights to Canada, although it was not clear whether he had been drinking before or during the flights. Airline personnel on the 10-hour flight from Frankfurt to Vancouver described him as "a little bit helpless" but very polite and thankful. One passenger noted that he slept a lot and was otherwise totally inconspicuous.

Mr. Dziekanski arrived at the Vancouver Airport at 3:15 p.m. on October 13, 2007. A "customer service" greeter attempted to speak with him as he got in line to go through Customs. He seemed calm but had "a small sheen of perspiration over his lips." A Customs officer helped him locate a Polish translation of the customs form and he spent time attempting to understand it while wiping perspiration from his face repeatedly. Another employee described him as having a "disturbed look on his face" but he showed no signs of impairment, aggression, or agitation. Finally, a Border Services officer

Police Misconduct and Civil Rights Law Report is prepared under the auspices of the National Police Accountability Project

Published bimonthly by Thomson Reuters  
Editorial Offices: 50 Broad Street East, Rochester, NY 14694  
Tel.: 585-546-5530 | Fax: 585-258-3708

Customer Service: P.O. Box 64833, St. Paul, MN 55164-0833  
Tel.: 800-328-4880 | Fax: 612-687-6674

Subscription: \$571.00 for six issues  
© 2010 Thomson Reuters ISSN 0738-0623

### Editorial Board

Ben Elson, G. Flint Taylor, Clifford Zimmerman

### Issues and Recent Cases Co-Editors

Ben Elson, G. Flint Taylor, Clifford Zimmerman

### Publisher's Staff

Andrea Nadel, *Attorney Editor*  
Specialty Composition

Thomson Reuters, has created this publication to provide you with accurate and authoritative information concerning the subject matter covered. However, this publication was not necessarily prepared by persons licensed to practice law in a particular jurisdiction. Thomson Reuters are not engaged in rendering legal or other professional advice, and its publication is not a substitute for the advice of an attorney. If you require legal or other expert advice, you should seek the services of a competent attorney or other professional.

helped him fill out the form, scanned his passport and visa, and motioned for him to proceed to "secondary immigration and customs processing." This second level of processing was necessary when there was a language issue. The officer recalled that he had "sweat rolling down and dropping off his chin" but that he was courteous. She completed her processing of him at 4:09 p.m.

For the next six hours, Mr. Dziekanski apparently hid himself somewhere in the Customs Hall of the Vancouver Airport, an area that is closed to the public, to catch some sleep. None of the closed circuit cameras in the Hall showed him wandering around during that time. Around 10:30 p.m., a Secondary Customs officer finally interacted with him. He was not sweating at that time. About two hours later, the Border Services officer saw several other Customs officers standing with Mr. Dziekanski. He appeared calmer and was not sweating.

In the meantime, Mr. Dziekanski's mother arrived at the airport at 1:20 p.m. with a neighbor. She and the neighbor anxiously waited in the Public Meeting Area of the airport, attempting numerous times to find out where he was from various information officers. No one was able to give her any information. After an immigration officer told her that her son was not at the airport, she and the neighbor left at around 10:00 p.m., planning to return the next day.

A few hours later, as Mr. Dziekanski was being processed through Secondary Customs, an officer paged for his mother in the Public Meeting area but there was no response. She also called his mother at her home and left a message. Mr. Dziekanski repeatedly asked for a glass of water and appeared distracted and visibly fatigued. He was perspiring but otherwise calm.

Another officer who saw Mr. Dziekanski at this time stated that he appeared to be drunk. Another noted that he looked tired, his eyes were red and he would talk to himself and pace around the room. Numerous officers attempted to communicate with him but without an interpreter present, they could not do so.

Mr. Dziekanski did not clear Canadian Immigration and leave the Customs Hall until 12:40 a.m. on October 14, 2007. An officer led him to the International Reception Lounge, a secured area just before the Public Meeting Area that his mother had just left a few hours before. At this point Mr. Dziekanski was unsteady and stumbling. At about 2:00 a.m., his mother called the immigration officer who had left the message and an attempt was made to locate Mr. Dziekanski. By this time, he was lying on the

floor and paramedics were attempting to revive him. Thirty seconds later, they pronounced him dead.

Judge Braidwood concluded based on the testimony and evidence he received that by the time he reached Vancouver, Mr. Dziekanski was fatigued, confused, and stressed. He also found that although some witnesses claimed that he appeared to be intoxicated, the evidence confirmed that Mr. Dziekanski was not intoxicated. Similarly, although some of his behaviors were unusual, none of those who attempted to interact with him felt threatened by him. He was aware of time and place, and appeared to understand what people were telling him or asking of him.

### **Lay Witness Testimony Regarding Police Restraint of Mr. Dziekanski<sup>12</sup>**

Between 12:40 a.m. and about 1:30 a.m. when police officers arrived, Mr. Dziekanski wandered about between the International Reception Lounge and the Public Meeting area of the airport with his suitcases on a luggage cart. He appeared to be disheveled, looking for something and was hitting the glass doors between the two areas with his hands. A cart attendant tried to help him and then asked a limo driver to call security when Mr. Dziekanski would not respond. The security guards came and tried to help but could not so they called the police.

Mr. Dziekanski, who by this time appeared angry and distraught, smashed a chair against the glass doors. He also barricaded himself into the secured area with chairs and suitcases. A corporate valet who was waiting for a client called 911 to tell them that a man was "freaking out." He later told Judge Braidwood that he did not personally feel threatened. One witness described him as sweating, with perspiration all over his face and making "rrr, rrr, rrr" sounds, but basically not in a threatening manner. Witnesses reported that he was throwing computers and chairs around and breaking glass.

Four Royal Canadian Mounted Police ["RCMP"] officers arrived. Bystanders informed them that Mr. Dziekanski did not speak English, that he appeared to be drunk and to also be asking for the police. Some of the officers vaulted over a handrail to approach him.

One bystander heard a police officer say something about "Taser" and another respond "Okay." The officers formed a half circle around Mr. Dziekanski and he looked relieved. One officer approached Mr. Dziekanski and said "Hi, how are you, sir? How's it going, bud?" Another officer motioned that he wanted to see his identification

and Mr. Dziekanski made a tentative gesture toward his suitcases. Then another officer told him to "stop." The Corporal in charge then motioned toward the counter to get him to put his hands there.

Mr. Dziekanski moved away from the officers and then toward the counter. He then held both arms up in the air. In one hand was a stapler and the other hand was clenched into a fist. According to one civilian witness, he did not make a movement toward the officers and according to another, he moved away.

At that point, one of the officers deployed his Taser on Mr. Dziekanski and he fell to the ground. Three other officers moved in and struggled with him to get the handcuffs on. He was lying on his stomach with his head turned. One officer had his knee on Mr. Dziekanski's neck and upper back between his shoulder blades. His hands began to turn blue. A security guard manager stepped in when he saw Mr. Dziekanski banging his legs extremely hard on the floor. He moved in and held his legs with his hands to prevent him from hurting himself further.

A few seconds later, Mr. Dziekanski stopped making any movement. One of the officers rolled him onto his side into the "partial recovery position." By 1:35 a.m., an ambulance had been called by airport security. Because police reported that Mr. Dziekanski was now unconscious, the call was upgraded to a "Code 3" emergency. The security guard manager checked Mr. Dziekanski's carotid artery pulse three times. By the time the paramedics arrived, Mr. Dziekanski had turned from blue to grey.

Judge Braidwood made a number of conclusions concerning the situation the police faced when they encountered Mr. Dziekanski based on the testimony received. Among them was that even though Mr. Dziekanski was distraught and acting in a bizarre manner, no one who approached him felt threatened or afraid. In addition, Mr. Dziekanski did destroy two items of Airport property, a small wooden table and a computer monitor.

### **RCMP, Firefighter, and Paramedic Testimony Regarding the Incident and Tasings<sup>13</sup>**

According to testimony from the officers, the videotape of the incident taken by a young man in the waiting area and the data ports of the Tasers used that night, Mr. Dziekanski was Tasered five separate times. No one recalls that warnings were given and Mr. Dziekanski would not have understood them in any event. The officers described him as being "combative" and "resistive" although they

later admitted that his behavior could be explained as simple fear. The officers did not recall smelling liquor on his breath.


One officer stated that he thought Mr. Dziekanski was experiencing "excited delirium," given his extreme behavior and what appeared to be superhuman strength. He indicated that he had been trained to use a Taser in these circumstances, to subdue the person as quickly as possible with the "lowest level of force possible, in order to give this person the best chance of surviving." The Corporal on the scene later used the term "excited delirium" to justify deployment of the Taser.

RCMP Constable Millington was the only officer who had a CED with him, although two other officers had been trained in their use. Mr. Dziekanski was standing in front of the officers with his fists clenched and a stapler in one hand, allegedly "yelling and screaming." Officers testified that they considered the stapler a weapon, that he had the intent to use it against them, was aiming it at them, "advanced" toward them with it, and that they needed to act accordingly. Four seconds after Mr. Dziekanski picked up the stapler, Constable Millington Tasered him in "probe" mode for six seconds. One of the probes lodged in his chest area and the other attached to the lower part of his jacket which was flapping against his body.

On the first Tasing, Mr. Dziekanski did not immediately fall to the ground although the video reveals that he did fall by the end of the first six second Tasing. One officer described him as "fighting through" the effect of the Taser. One second after the first Tasing, Constable Millington Tasered him again for five seconds. By this time, Mr. Dziekanski had released the stapler and was on the ground writhing and screaming.

The three other RCMP officers who arrived at the scene then moved in to subdue and restrain Mr. Dziekanski. He was lying on his chest with both arms underneath his body, kicking his legs. One of the officers said "Hit him again, hit him again." Constable Millington Tasered him a third time for five seconds. He then Tasered him in "push-stun" mode twice on the back of his shoulder in an attempt to get pain compliance, once for nine seconds and once for six seconds. The three officers were eventually able to handcuff Mr. Dziekanski.

After the handcuffing, Mr. Dziekanski continued kicking with his legs for five to 15 seconds and then stopped. He was lying on his chest, breathing heavily. One of the officers rolled him onto his right side to do a pat down search. At this point, he was still breathing heavily and making a



snoring sound. His face had turned blue. Firefighters and then paramedics arrived and the handcuffs were removed. One of the RCMP officers realized that Mr. Dziekanski was unconscious and called for Emergency Health Services.

Firefighters arrived to the scene 12 minutes after the last Taser. The firefighter who arrived first found Mr. Dziekanski lying motionless on his chest in the prone position with his face turned to the left. He was handcuffed behind his back. The RCMP officers were standing about 10-15 feet away but no one was at his head. A firefighter assessed that he was unconscious, not breathing and had no pulse. Firefighters were not informed that he had been Tasered multiple times or had turned blue. They asked to have the handcuffs removed but were told by one officer "He's been violent. We're not going to take the cuffs off."


Paramedics then arrived and were informed that he had been Tasered three times. They insisted that handcuffs be removed in order to properly assess the patient. When Mr. Dziekanski was finally rolled over, a paramedic assessed that he was in "cardiac arrest" and that he did not think he was alive. The firefighters started CPR. A defibrillator was activated but the device announced "no shock advised," indicating that there was no heart rhythm. CPR was continued for another 20-25 minutes until Mr. Dziekanski was pronounced dead.

### Non-Medical Expert Testimony<sup>14</sup>

Judge Braidwood also heard extensive testimony from experts. These included three video analysis experts, a Polish translator, a Taser expert, and four use-of-force experts.

A video expert gave an opinion that based on a short excerpt from the video taken by a civilian witness in the waiting area, Mr. Dziekanski did move towards the officers with the stapler. However, the other two video analysis experts stated that his opinion was not "technically supportable."

The Taser expert concluded based on the data port entries and the video that the first two Tasers did not have a full impact on Mr. Dziekanski. The Taser expert agreed that Mr. Dziekanski's "flailing and hyperactive reactions" while on the floor "were consistent with involuntary spasm caused by the deployment of the weapon."



The Polish translator testified regarding his translation of what Mr. Dziekanski said during portions of the video. During his agitated state while throwing a table and computer monitor around, he made statements such as "I will trash this office. Fuck off. I will smash the glass. I

will smash the entire desk. Leave me alone everybody. Go away I said. For fuck's sake." As security officers arrived, he asked "So you will not let me go? You will not let me out of here?" As the police are approaching him, he can be heard saying "Police, police" and then "Leave me alone, leave me alone! Have you gone insane? Why? Why?"

One use-of-force expert concluded that the "actions of the officers in this incident represent a reasonable escalation and de-escalation of force based upon the actions of the subject." Their use of the CED was consistent with their training under "the Force Options Theory contained within the Incident Management/Intervention Model (IM/IM), which advocates that officers are not required to incrementally escalate through all categories of force options before they determine the appropriate use-of-force response."

The second use-of-force stated that officers were trained to use a CED when a subject was demonstrating active resistance. However, officers are also taught that "there's no medical information that is available that supports that it's a cause of death or that it has a direct relationship on core body functions such as cardiac care or respiration, [or] that increased exposure does carry increased risk."

The third use-of-force expert was a retired RCMP sergeant who had testified as an expert witness in numerous BC court cases. He indicated that a major factor in assessing use of force is the ratio between officers and subject which in this case was four to one. This expert also stated that he did not see the reason for the second through fifth deployments of the CED. He also pointed out the confusion created when more than one officer is communicating with a suspect about what is expected even if there is no language barrier.

Finally, Judge Braidwood heard from a police psychologist who has acted as a consultant to the FBI and the RCMP. He was accepted as an expert in the use-of-force from a crisis intervention perspective. Given Mr. Dziekanski's state of hyper-arousal, the officers' objective should have been to start out with low intensity to help him regain his cognitive organization. Forming a semi-circle around him and putting their hands on their weapons was not only inconsistent with getting him to calm down but bound to "stimulate reactive behavior." Using a Taser repeatedly was going to a force level "designed to overwhelm, dominate, or destroy."

Judge Braidwood made a number of factual findings based on this testimony. One of them was that Mr. Dziekanski's movement of throwing his hands up, then

moving toward the counter and away from the officers was not made in defiance of them. Rather, he was simply acting out of frustration at being given contradictory instructions by two of the officers.

Another was that Mr. Dziekanski did not "brandish" the stapler either by placing it above his head or motioning with it in an aggressive manner toward any of the officers. These actions did not appear on the video. He further did not believe that any of the four officers actually thought that Mr. Dziekanski was brandishing the stapler.

In addition, Mr. Dziekanski did not step towards one or more of the officers while clenching the stapler. He found the testimony of one forensic video analyst that Mr. Dziekanski did so not supportable because his methodology was flawed and because he did not have the technical expertise necessary to make such a determination.

Further, Judge Braidwood found that Constable Millington was not justified in deploying the CEW against Mr. Dziekanski, given the totality of the circumstances he was facing at that time. Similarly, the Corporal on the scene was not justified in instructing him to do so. He found that neither officer honestly perceived that Mr. Dziekanski was intending to attack them or the other officers. He found unsupportable two of the use-of-force expert opinions that the force used was justified in part because the video did not support a conclusion that Mr. Dziekanski was aggressive or combative. Even if it is true that he had damaged some property before the officers arrived, he had not shown any aggression toward any person and showed no signs of aggression or hostility to the officers.

Judge Braidwood also found the model used by these experts to evaluate the officers' conduct was a "force-centric" one that invited officers to evaluate a situation entirely from a "what type of force should I use to respond in order to control the situation" perspective. The model has no room for whether the person was emotionally disturbed or mentally ill and contained no expectations of officer empathy or use of nonforce intervention.

With respect to the multiple Taser deployments, Judge Braidwood rejected the officers' justification that they were necessary because Mr. Dziekanski appeared to be fighting through the electrical discharge. Rather, any reasonable viewer of the video would conclude that he was reacting to the extreme pain of the weapon's discharge. This was not resistive behavior that could justify repeated Tasers.

Judge Braidwood also found that one of the officers did apply force to Mr. Dziekanski's neck when he was on the ground "when such force was not justified, given the totality of the circumstances he was facing at that time." He made this finding based on what is shown in the video and in spite of the officer's adamant denial that he did so.

## The Cause of Mr. Dziekanski's Death<sup>15</sup>

Judge Braidwood heard opinion testimony or reviewed written opinion testimony from 13 medical experts: Four forensic pathologists (Drs. Charles Lee, Vincent De Maio, Michael Pollanen, and John Butt), three cardiologists (Drs. Charles Swerdlow, Charles Kerr, and Zian Tseng), three emergency department physicians (Drs. Christian Sloane, Jeffrey Ho, and William Bozeman), two psychiatrists (Drs. Shao-Hua Lu and Paul Janke), and an epidemiologist (Dr. Keith Chambers). He also heard from an electrical engineer (Dr. Dorin Panescu). Two of these experts (Drs. Ho and Panescu) are paid consultants for TASER International, Inc.

Dr. Lee performed an autopsy on October 16, 2007. Dr. Lee found that Mr. Dziekanski had a very fatty liver, atrophy in the cerebrum and cerebellum parts of his brain, and a partially enlarged heart with some cardiomyopathy. These findings were consistent with chronic alcohol use but could not alone explain his death. The toxicology analysis was negative for any drugs or alcohol. There was thus no anatomical or toxicological cause of death. When he was asked about the significance of one of the officer's knees being placed on the back of Mr. Dziekanski's neck, he said: "I don't think that played a significant role since he was still struggling, he was still moving around, and he was still somewhat vocalizing, which indicates that he was still able to breathe." Overall, Mr. Dziekanski was in reasonable health.

Dr. Lee listed as the principal cause of death "Sudden Death During Restraint" due to or as a consequence of "Chronic Alcoholism." Dr. Lee stated that although Mr. Dziekanski had no alcohol in his blood at the time of his death, "the changes to his organs due to chronic alcoholism could have made him more susceptible to the development of a lethal arrhythmia." The cardiomyopathy also would not have caused death by itself, although it would have put him at greater risk of an arrhythmia and sudden death. It also would have made him more susceptible to other stressors such as lack of food, water, or sleep, recent cessation of smoking or alcohol and being alone at the airport for eight or more hours.

Dr. Lee stated that two types of restraint contributed eventually to Mr. Dziekanski's death, the Taser and the

“tackling of the individual by the RCMP officers.” He also stated that there was no single cause of death: The stress of the physical restraint along with the decreased ability to breathe as a result of being pinned in the prone position may have been enough to elicit a fatal arrhythmia. He may also have been suffering from alcohol withdrawal, which may partly explain his agitation. It was likely a combination of these factors that led to his death. Therefore, the cause of death is best described as sudden death following restraint.

Dr. Lee agreed that there are known behaviors and patterns that are associated with “sudden death during restraint.” These include: subjects who are males between 20 and 50 years of age, agitated behaviour, collapse shortly after restraint, sweating, wide eyes, irrational behaviour, and barricading. Dr. Lee had not been told that Mr. Dziekanski had been Tasered multiple times, although he indicated that the information would not have changed his findings.

After hearing and carefully weighing all of the medical expert testimony and submissions, Judge Braidwood came to far different conclusions. The following is an edited version of Judge Braidwood’s findings of fact and conclusions concerning the cause of Mr. Dziekanski’s death. The full version is located at pp. 320-338 of Part 7 of his Phase II Report.

Judge Braidwood concluded that Mr. Dziekanski died at most 75 seconds after he was handcuffed, and at most two minutes after the completion of the third probe-mode deployment of the conducted energy weapon. “Mr. Dziekanski went into cardiac arrest first, then went unconscious, and finally showed signs of cyanosis [blue coloration of skin due to lack of oxygen in the blood], all within 75 seconds of being handcuffed.”

Judge Braidwood went through four separate “likely mechanisms” that might have led to Mr. Dziekanski’s tragic death: (1) pre-existing heart disease plus accumulated stress; (2) weapon-induced direct capture of Mr. Dziekanski’s heart; (3) “sudden death during restraint” and/or “excited delirium”; and (4) the hyperadrenergic state arising from the weapon deployment and physical altercation.

Pre-Existing Heart Disease Plus Accumulated Stress. Some of the experts suggested that Mr. Dziekanski’s accumulated stress and agitation could have triggered (before the arrival of the RCMP officers) a hyperadrenergic effect, whereby his system was flooded with adrenaline and catecholamines [stress hormones], and that this

reaction, coupled with his pre-existing medical condition, could have overwhelmed his heart, leading to cardiac arrest. While Judge Braidwood was satisfied that the hyperadrenergic effect is crucial to an understanding of his death, he was not persuaded that the scenario adequately explains his death, for several reasons.

First, Judge Braidwood was not convinced that Mr. Dziekanski had alcohol cardiomyopathy [weakening of the heart muscle]. Microscopic examination of sections of the heart did not confirm it. Second, he was not persuaded that Mr. Dziekanski was experiencing alcohol withdrawal after his arrival in Vancouver. Third, he found more persuasive one psychiatrist’s opinion that based on the evidence, Mr. Dziekanski was not experiencing delirium tremens. Fourth, the accumulated stresses and any pre-existing medical conditions did not on their own cause a fatal arrhythmia.

Weapon-induced Direct Capture of Mr. Dziekanski’s Heart. There was no dispute that an externally originating electrical current can capture a person’s heart. This can sometimes result in ventricular fibrillation where the ventricles beat chaotically at about 300 beats per minute. Blood is not pumped throughout the body, the person inevitably collapses into unconsciousness within 5–15 seconds, and if the heart is not defibrillated within a few minutes, the person will die. In recent years an intense debate has developed around whether the electrical current from a conducted energy weapon can trigger ventricular fibrillation.

At the evidentiary hearings, several medical experts testified that no human volunteer studies have documented this phenomenon. To the contrary, other medical experts cited anecdotal cases and extrapolated from animal studies where anesthetized swine went into ventricular fibrillation under certain conditions. It is fair to say that if capture of the heart and ventricular fibrillation can result from a conducted energy weapon’s electrical current, three preconditions are likely necessary—deployment in probe-mode, placement of the two probes across the cardiac axis, and a relatively small skin-to-heart distance.

A recent study by Dr. Swerdlow (who testified at the evidentiary hearings) included a significant finding that supports the proposition that the electrical current from a conducted energy weapon is capable of capturing the heart and triggering ventricular fibrillation.<sup>16</sup> He determined that one out of 56 subjects collapsed immediately after a conducted energy weapon was deployed across his chest, and the first cardiac rhythm presented was ventricular

fibrillation. The subject had no drugs or cardiac pathology. This is the first reported fatality suggestive of CEW-induced ventricular fibrillation.

For the purposes of his analysis, Judge Braidwood assumed that the electrical current from a conducted energy weapon is capable of triggering ventricular fibrillation. The question to be addressed was whether it in fact did so, leading to Mr. Dziekanski's death.

From his consideration of all the relevant evidence, Judge Braidwood concluded that it is unlikely to have happened in this case, for three reasons. First, the only relevant deployments of the conducted energy weapon were the probe mode deployments, and the time between the completion of the third and final probe mode deployment and Mr. Dziekanski's collapse into unconsciousness was too long a time period. Second, it is not clear whether the placement of the two probes was across the cardiac axis. Third, even if the placement of the probes was across the cardiac axis, it is not known how deeply the one below the sternum embedded into his chest (if at all) or what the distance was between the tip of this probe and Mr. Dziekanski's heart.

"Sudden Death During Restraint" and/or "Excited Delirium." Several medical experts testified about a phenomenon whereby a person exhibiting bizarre behavior will sometimes die soon after being restrained, for no apparent reason. Typically, such a person will act irrationally, will be unaware of their surroundings, will not be capable of complying with demands, will be hyperthermic, will often disrobe in public, will be impervious to pain, and will exhibit superhuman strength. Almost always, they will be intoxicated with an illicit stimulant such as cocaine and will have a history of serious mental illness. The medical experts indicated that the mechanisms of such deaths are not well understood, and that the terms "sudden death during restraint" and "excited delirium" have been coined as a way of clustering such similar deaths for future research purposes.

In Judge Braidwood's view, neither term was of much assistance in attempting to ascertain how Mr. Dziekanski died. They are at best descriptive of the cluster of physical symptoms and actions that often surround such deaths, but do not provide any insight into the mechanism of such deaths. For example, ascribing a death to "sudden death during restraint" gives no greater insight into the underlying medical cause of death than would "sudden death during a car accident." The same can be said for "excited delirium." It may be a convenient label to cluster frequently recurring physical conditions and activities,

but offers no guidance as to the underlying physiological mechanisms that caused the death.

In addition, Judge Braidwood did not think that either of these postulated conditions had any application to this case, since Mr. Dziekanski was aware of his surroundings, complied with directions, was neither impervious to pain nor intoxicated with an illicit drug such as cocaine, and had no history of serious mental illness.

The Hyperadrenergic State Arising from the Weapon Deployment and Physical Altercation. Since the stress and fatigue that accumulated before, during, and after Mr. Dziekanski's trip to Canada, and any pre-existing medical condition, did not collectively trigger his cardiac arrest, the logical question is then whether his subsequent interaction with the four RCMP officers did. "Interaction" refers to the multiple deployments of the conducted energy weapon and the physical wrestling that culminated in Mr. Dziekanski being handcuffed. The interaction with the officers took 75 seconds, and he likely went into cardiac arrest within the next 25 seconds.

Many of the medical experts discussed the "hyperadrenergic effect." After reviewing their evidence, Judge Braidwood concluded that there was a refreshing degree of consensus that the hyperadrenergic effect plays a pivotal role in understanding how Mr. Dziekanski died. The effect refers to the adrenaline that flows through the body whenever the body is in a stressful or dangerous situation. Pain can significantly increase the adrenergic response. The outflowing of adrenaline increases blood pressure and heart rate, which can potentially lead to an arrhythmia. Any cofactor that increases agitation or induces additional stress exacerbates the mechanisms leading to death. The mechanism precipitating the fatal arrhythmia in Mr. Dziekanski was most likely a hyperadrenergic state due to elevated levels of catecholamines produced by autonomic hyperactivity, psychomotor agitation, anxiety, and the struggle.

Another dimension to this hyperadrenergic effect—acidosis—must also be considered. Respiratory acidosis develops when metabolic activity results in a build-up of carbon dioxide, but the body is unable to exhale it because of a cessation of breathing. The carbon dioxide builds up in the blood and the subject can die. In metabolic acidosis, lactic acid is generated when muscles work very hard and do not get sufficient oxygen transported to them. Normally a body gets rid of lactic acid by transporting it to the liver, where it is converted into carbonic acid, which is the acid that the lungs can then breathe out as carbon dioxide. However, if the person has liver disease, it will take longer



for the liver to convert the lactic acid to carbonic acid. In addition, if the person is not breathing well, the potential for being acidotic is greater.

Judge Braidwood was satisfied that the hyperadrenergic response, which was significantly exacerbated by Mr. Dziekanski's interaction with the RCMP officers, was the most likely cause of Mr. Dziekanski's death. He also concluded that acidosis played a part as well.

Judge Braidwood commented that it would defy common sense to conclude from all the evidence that the physical altercation exacerbated the hyperadrenergic state that led to Mr. Dziekanski's fatal cardiac arrhythmia, but that the multiple deployments of the conducted energy weapon played no part. It is beyond dispute that a single five-second deployment of the weapon causes intense, extreme pain, as well as emotional trauma. Multiple deployments, even if intermittent, only compound that pain and trauma.

The evidence did not allow him to conclude, with mathematical exactitude, how much the weapon and the physical altercation contributed to the hyperadrenergic state that led to Mr. Dziekanski's death. However, Judge Braidwood considered it to be a reasonable inference to be drawn from all the evidence that the multiple deployments of the conducted energy weapon played the more prominent role.

#### ENDNOTES

1. The BC Government appointed Judge Braidwood under BC's "Public Inquiry Act," S.B.C. 2007, c. 9.

2. The entire 10-minute video and audio of Dziekanski's difficulties at the Airport, encounter with police and subsequent death can be viewed at [http://www.youtube.com/watch?v=1CR\\_k-dTnDU](http://www.youtube.com/watch?v=1CR_k-dTnDU).

3. All of the Braidwood Commission reports, public hearing transcripts, videos, and submissions can be downloaded from [www.braidwoodinquiry.ca](http://www.braidwoodinquiry.ca).

4. Braidwood Commission on the Death of Robert Dziekanski Phase II Report at Part 10—Postscript: Police Investigating Themselves at pp. 413 et. seq. (Proposals for a Civilian-Based Investigative Body).

5. "Vancouver Police Chief Calls for More Oversight," CBC News (October 6, 2010) at <http://www.cbc.ca/canada/british-columbia/story/2010/10/06/bc-vancouver-police-civilian-oversight.html>. The IIO will have the authority to appoint a Special Prosecutor in every case involving death or serious harm who will make independent charging decisions.

6. Located at [www.braidwoodinquiry.ca/report/P2\\_pdf/07-CauseOfMrDziekanskiDeath.pdf#zoom=100](http://www.braidwoodinquiry.ca/report/P2_pdf/07-CauseOfMrDziekanskiDeath.pdf#zoom=100).

7. A comprehensive list of all such deaths is maintained at the "Truth Not Tasers" blog at <http://truthnottasers.blogspot.com>. Details of each death were obtained from news reports and from Amnesty International's December 2008 report detailing 334 such deaths found at <http://www.amnesty.org>. The blog is maintained by the father and brother of Robert Bagnell who died moments after being Tasered by police in Vancouver, BC in June 2004.

8. The NIJ study is found at <http://www.ncjrs.gov/pdffiles1/nij/222981.pdf>. A final report has not yet been issued.

9. NIJ Interim Report at pp. 2-3 referencing *Electronic Control Weapons*, a model policy of the International Association of Chiefs of Police referenced at pp. 11.

10. NIJ Interim Report at p. 4.

11. This section is a partial summary of Phase II of Braidwood Commission Inquiry Report at Part 3 [Mr. Dziekanski's Trip to Canada] at pp. 47-52 and Part 4 at pp. 49-79.

12. This section is a partial summary of Phase II Part 5 at pp. 85-112.

13. This section is a partial summary of Phase II Part 6 at pp. 125-193.

14. *Supra* n. 13 at pp. 193-269.

15. This section is a summary of Phase II Part 7 [The Cause of Mr. Dziekanski's Death] at pp. 275-338.

16. Swerdlow, Charles, *et al.*, "Presenting Rhythm in Sudden Deaths Temporally Proximate to Discharge of TASER Conducted Electrical Weapons," (2009) 16 *Academic Emergency Medicine*, 1 at p. 8.

## Disorderly (mis)Conduct: The Problem with "Contempt of Cop" Arrests

By Christy E. Lopez\*

*The following article was originally published by the American Constitution Society for Law and Policy as its June 2010 Issue Brief. The Police Misconduct and Civil Rights Law Report is re-publishing the article in two parts. The first half of the article appeared in Volume 9, Number 16 of PMCLR (July/August 2010). This issue includes the second half of the article, which outlines a meaningful response to the problem of abusive enforcement of disorderly conduct-type laws.*

*\*Christy E. Lopez is a civil rights attorney with a practice focusing on police and criminal justice reform. She is a former Senior Trial Attorney in the U.S. Department of Justice Civil Rights Division and recently completed a seven-year term as court-appointed monitor of the Oakland (California) Police Department.*

### V. Reducing or Eliminating Contempt of Cop and Cover Arrests

If we agree that contempt of cop and cover arrests are a destructive and costly harm, the question then is whether we can do anything to reduce or eliminate such arrests. The answer is yes, but fixing this problem is not simple: it