

PWW | AG

PWW National Town Hall
EMS Legal Review of the Elijah McClain Case

National Webcast
January 9, 2024

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Undergraduate:

B.S., Health Planning and Administration
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Admissions to Practice

Commonwealth of Pennsylvania
State of New York
Supreme Court of the United States
U.S. Circuit Court of Appeals, 3rd Circuit
U.S. District Court, M.D. PA
U.S. District Court, E.D. PA

Professional Philosophy

“I consider myself very lucky to be able to combine my lifelong passion for EMS with the practice of law. Having gone from EMT to EMS director to EMS attorney – and to apply that background to serve an industry I care about very deeply – means that I simply love what I do for a living.”

Doug Wolfberg is a founding member of Page, Wolfberg & Wirth. For over 20 years he has been recognized as one of the nation’s most prominent EMS attorneys and consultants. Doug brings a lifelong love of EMS to his work at PWW – he answered his first ambulance call in 1978 and has been involved in EMS ever since. Doug became an EMT at age 16 and worked as an EMS provider and educator in numerous EMS systems over the decades.



Doug has steadily worked up the ladder in his EMS career. He worked as a county EMS director and then as director of a three-county regional EMS agency. He later worked for a statewide EMS council and then went to the nation’s capital to work at the United States Department of Health and Human Services, where he worked on federal EMS and trauma care issues.

After graduating law school with high honors, Doug worked for several years as a health law litigator. He then co-founded PWW in 2000 along with Steve Wirth and the late James O. Page. Doug represents public, private and nonprofit EMS agencies, billing companies, technology companies, private equity firms and others involved in providing and financing EMS. His practice focuses on revenue cycle management and compliance, EMS system design and evaluation, privacy and security, business transactions and other areas of EMS law. Doug serves as faculty at Commonwealth Law School and the University of Pittsburgh, and is a member of the Board of Trustees of Widener University. He has also endowed the Douglas M. Wolfberg Scholarship at Commonwealth Law.

Doug has been a featured presenter at virtually every major EMS conference in the United States and has authored articles and columns in the industry’s best-known publications.

In his free time, Doug is an avid bicyclist and musician.

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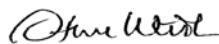
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U.S. Third Circuit Court of Appeals

Professional Philosophy

“Helping those who serve the caregivers is what I love to do. I strive to do my very best for every client, every time - so they can provide exceptional EMS for their communities.”



Steve Wirth is a founding partner of Page, Wolfberg & Wirth. In a distinguished four-decade public safety career, Steve has worked in virtually every facet of EMS – as first responder, firefighter, EMT, paramedic, flight paramedic, EMS instructor, fire officer, and EMS executive. He was one of central Pennsylvania’s first paramedics. Steve brings a pragmatic and business-oriented perspective to his diverse legal practice – he served for nearly a decade as senior executive of a mid-sized air and ground ambulance service, helping to build the company from the ground up.



Steve is a dynamic and sought-after speaker at regional, state and national conferences on a variety of EMS law and public safety subjects. He has authored many articles and book chapters on a wide range of EMS leadership, reimbursement, risk management, corporate compliance and workplace law topics. A contributing writer for *JEMS*, *EMS1* and *EMS World*, Steve has co-authored the highly acclaimed and popular compliance manuals and video training programs produced by PWW. He enjoys teaching and is an adjunct professor for the University of Pittsburgh EMS degree program.

Steve is a past chair of the Panel of Commissioners for CAAS, the national ambulance accrediting body. He serves on the boards of the National EMS Museum, the National EMS Memorial Service, and is an active participant in the National EMS Memorial Bike Ride – the “Muddy Angels.” A space exploration enthusiast, Steve serves on the board of trustees of the Astronaut Scholarship Foundation, created by the Mercury astronauts. He is a life member of the Nippenose Valley Fire Co. near Jersey Shore,

PA, where he started his public safety career at age 16 as a junior firefighter and later served as Deputy Fire Chief. Steve was an active firefighter/EMS practitioner with Hampden Twp. Fire Rescue until he recently “retired” as Safety Officer. Steve was the recipient of the prestigious James O. Page Leadership Award in 2013. Steve and his wife Jill enjoy boating, paddle boarding, scuba diving, and spending time with family – including their four grandchildren, and their golden retriever, Piper.



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Presenters



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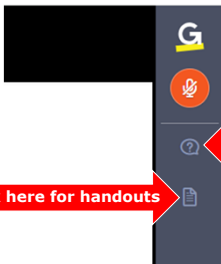
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About PWW

 The nation's leading EMS law firm
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Attorneys and Consultants with EMS clinical and leadership experience

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Training Opportunities

In-Person or Virtual

- **Criminal Liability and Emerging Standards of Care for EMS Providers**
 - 2-hour interactive seminar
- **Workshop: the Lessons of the Elijah McClain Case for EMS Leaders and Providers**
 - Half or Full-Day Workshop

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- The nation's only EMS documentation certification program
- Developed by PWW, offered through the National Academy of Ambulance Compliance (NAAC)

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For more information on our training opportunities:

info@pwwemslaw.com

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Webinar Overview

- Opening Perspective:
 - Criminal Liability in EMS: Is it Time to Panic?
- Facts and Chronology of the Elijah McClain Case
- Overview of the Paramedics' Trial
 - The Prosecution's Case
 - The Defense Case

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Webinar Overview

- The Verdict – a Legal Breakdown
- The Critical Lessons
- Important Cases on the Horizon
- Questions and Answers

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Before We Start...

- We were not involved in the case, nor did we advise or represent any of the parties
- Our comments and views are our own, based on our review of documents, testimony and facts of the case as they were reported

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Opening Perspective

Criminal Liability in EMS –
Is it Time to Panic?

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No.

It's not time to panic.
It's time to learn.

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Perspective

- Criminal liability in EMS is still exceedingly rare
- The overwhelming majority of EMS practitioners will work their whole career without being a defendant in a criminal case or a civil lawsuit

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It's in Your Control

- Things in the control of every EMS practitioner:
 - How you assess a patient
 - How you care for a patient
 - How you interact with others, including police
 - What you say and what you do
 - How you advocate for your patient
 - How you will look and sound on a body cam video

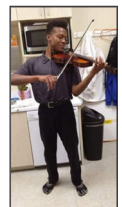
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**Facts and Chronology of the
Elijah McClain Case**

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Facts

- On August 24, 2019, 23-year-old Elijah McClain was walking home from a convenience store
- He was wearing a ski mask and waving his arms
- Someone called 911



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Facts

- Despite there being no probable cause to stop Mr. McClain, three responding police officers concluded that Mr. McClain was “suspicious”
 - A physical confrontation ensued as police acted to “take control” of Mr. McClain
 - Officers applied a carotid control hold, after which Mr. McClain vomited
 - Police summoned EMS to the scene



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Facts

- A four-person ALS engine crew from Aurora Fire Rescue arrived, included two paramedics
 - Lt./Paramedic Peter Cichuniec
 - FF/Paramedic Jeremy Cooper
- Arrived on scene to find Mr. McClain restrained and in handcuffs

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Facts

- After less than two minutes on scene, the medics concluded that Mr. McClain was suffering from excited delirium and decided to administer 500 mg of ketamine
 - Video shows that Mr. McClain was physically restrained and not actively struggling at the time ketamine was administered
 - Medics had overestimated the pt’s weight; proper ketamine dose should have been 325 mg

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Facts

- About two minutes after the Ketamine administration, Mr. McClain was placed on the ambulance gurney, unconscious and limp, with visible vomit on his face
 - Determined to be in cardiac arrest in the ambulance
 - The AFR medics and transport medics initiated resuscitative measures
 - ROSC achieved

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Facts

- Mr. McClain was declared brain dead 3 days later, on August 27, 2019

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Autopsy Report: November 2019

Cause of Death:	Undetermined
Contributing Factors:	Intense Physical Exertion and a Narrow Left Coronary Artery
Manner of Death:	Undetermined

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Initial Decision Not to Prosecute

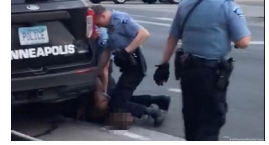
- On November 23, 2019, the Adams County D.A. Dave Young concluded his investigation and decided that no criminal charges were warranted



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George Floyd - 2020

- In Minneapolis, on March 25, 2020, George Floyd died at the hands of police officers
- This case sparked a national outcry
- Many cases of in-custody deaths across the country were re-examined



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Revised Autopsy Report: July 2021

Cause of Death: Complications of ketamine administration following forcible restraint

Manner of Death: Undetermined

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State Attorney General Takes Over

- State AG impaneled a grand jury
- On September 1, 2021, the Colorado state grand jury indicted the two paramedics and 3 police officers with 11 counts each of crimes including:
 - Manslaughter
 - Criminally negligent homicide
 - Assault with a deadly weapon
 - Assault by unlawful administration of a drug

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Provider License Suspensions – September 2021

Name	Colorado Provider ID	Certification Status	Responsibility Level	Certification Date	Expiration Date
▶ Cichunec, Peter	032320	Suspended	Paramedic	02/22/2020	02/22/2023
▶ Cooper, Jeremy	004621	Suspended	Paramedic	04/21/2021	04/21/2024

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Civil Settlement – November 2021

Aurora agrees to pay \$15 million to Elijah McClain's parents to settle lawsuit over 2019 death

Payment is one of largest police-related settlements in U.S. history

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Law Enforcement Trials - 2023

- The three police officers were tried in October and November 2023, prior to the paramedics' trial
 - 2 officers acquitted
 - 1 officer convicted of criminally negligent homicide and third-degree assault
 - Sentenced on January 5, 2024, to 14 months in jail

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**Overview of the
Paramedics' Trial
December 2023**

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The Prosecution's Case

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The Prosecution's Case

“These defendants treated Elijah McClain like he was a problem, not like he was their patient.”

Jason Slothouber
Senior Assistant Attorney General
Closing Argument, December 21, 2023

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The Prosecution's Case

Failure to Assess

- The defendants failed to adequately assess Mr. McClain's symptoms
- They “pigeonholed” Mr. McClain as a “noncompliant young man fighting with the police”

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The Prosecution's Case

Failure to Assess

- The defendants didn't bring a cardiac monitor, airway kit, oxygen or other necessary equipment to the patient
- This equipment was left on the ALS engine, which was parked about a block away

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The Prosecution's Case

Failure to Assess

- The failure to assess led to an inaccurate determination of excited delirium
- Therefore:
 - The defendants should not have been in the excited delirium protocol
 - Ketamine should never have been administered

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The Prosecution's Case

Failure to Assess

- The ketamine protocol used weight-based dosing, and the paramedics failed to properly estimate Mr. McClain's weight
 - Had no conversations with others on scene about their weight estimate

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The Prosecution's Case

“Without a proper assessment, giving a drug is like hitting the gas when you can't see out of your windshield.”

Ann Joyce
Assistant Attorney General
Closing Argument, December 21, 2023

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The Prosecution's Case

Illegal Administration of Ketamine

- Prosecution argued that because Mr. McClain was not suffering from excited delirium, the correct dose of ketamine was zero
 - Therefore, use of ketamine was *unlawful* and it constituted assault with a “deadly weapon” and assault by unlawful administration of a drug
 - Prosecutors also argued that the defendants overdosed Mr. McClain on the ketamine

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The Prosecution's Case

Cause of Death

- Medical examiner testified that after reviewing additional evidence, including body cam footage, that ketamine administration caused Mr. McClain's death
- He testified he was persuaded by the way Mr. McClain changed after the ketamine injection

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The Prosecution's Case

“Within two minutes of getting that shot...it looked like he was in severe respiratory distress.”

Dr. Stephen Cina
Forensic Pathologist
Trial Testimony, December 5, 2023

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Importantly...

- At the close of the prosecution's case, the judge ruled that the evidence did *not* establish that ketamine *specifically* was a "deadly weapon" under the law
 - Under CO law a "deadly weapon" can be a firearm, knife, club, or any "material or substance," that, in the manner used or *intended to be used*, can produce death or a serious bodily injury"

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The Defense Case

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The Defense Case

It's the System

- Defense argued that in 2019, there were lots of systemic problems with law enforcement and the practice of paramedicine that needed to be fixed
 - Defense argued that systemic problems shouldn't be fixed by criminalizing the conduct of paramedics who are attempting to comply with a protocol
 - The protocol wasn't perfect, but they had to follow it

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The Defense Case

Subjective Words Pose Challenges

- Many terms are "subjective," such as:
 - "Non-compliant"
 - "Agitated"
 - "Out of control"
 - "Danger to self or others"
- Defense argued that these words pose challenges to paramedics attempting to follow vague protocols

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The Defense Case

"Paramedics are required to go in and make a very rapid judgment to decide these subjective words and decide immediately if they apply"

Michael Pellow
Defense Attorney
Closing Argument, December 20, 2023

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The Defense Case

Incomplete/Inaccurate Information

- Paramedics testified:
 - They didn't hear the police tell them that they had used a carotid hold (note: video clearly showed police telling them)
 - That they didn't know Mr. McClain had said "I can't breathe"
 - That they didn't know Mr. McClain had lost consciousness
- Paramedics said they were told:
 - That Mr. McClain exhibited superhuman strength, "he did a pushup with three of us on his back"

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The Defense Case

Paramedics Did an Assessment

- Paramedics testified they did an assessment even though they didn't touch or speak to the patient and used no equipment
- They testified that they did a visual assessment and were able to determine that the patient was:
 - Breathing fast
 - Moving, and therefore had circulation
 - Sweating
- Testified that they didn't need equipment to make these determinations

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The Defense Case

“There did not appear to be a need to get that equipment...with all the wires on it...what’s that gonna do? Wrap wires around his neck or somebody else’s? Equipment would bring more risk, and less calm, to the scene.”

Michael Pellow
Defense Attorney
Closing Argument, December 20, 2023

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The Defense Case

Ketamine is Safe

- Paramedics testified they were taught that ketamine has a broad safety profile
 - Testified that they were trained that you can make a mistake in dosing and that it's still safe in the prehospital setting
 - Said they were taught that even in large doses, risks are rare
 - Argued that Mr. McClain's blood concentration of ketamine was therapeutic, not toxic
 - “No evidence that anyone has ever died from a single dose of 500 mg of ketamine”

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The Defense Case

Cause of Death

- Defense argued that the cause of death was a narrowed left anterior descending (LAD) artery and acidosis following aspiration
- Defense produced evidence that the medical examiner was politically pressured to change the autopsy report in 2021 and that it was unusual to be asked to revisit a prior case

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The Defense Case

“I did receive death threats. We had to step up our security at home.”
“It’s unusual for a separate agency to ask me to look at a case.”

Dr. Stephen Cina
Forensic Pathologist
Trial Testimony, December 5, 2023

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The Defense Case

Police Were in Control

- The paramedics testified that they were not able to promptly gain access to Mr. McClain
 - Testified that the police did not release handcuffs when first asked by the paramedics
 - Testified that there was no policy on when a person in police custody becomes a “patient,” but that the custom had always been that “the patient is not ours until police remove the handcuffs”

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The Defense Case

“What is [the Paramedic] supposed to do at that point? Say, ‘hey, back off of my patient?’”

Michael Pellow
Defense Attorney
Closing Argument, December 20, 2023

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The Verdict
A Legal Breakdown

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The Verdict

Paramedic Cichuniec

- Criminally Negligent Homicide
GUILTY
- Second Degree Assault, Unlawful administration of drugs
GUILTY
- Immediately remanded into custody

Paramedic Cooper

- Criminally Negligent Homicide
GUILTY
- Second Degree Assault
NOT GUILTY
- Free pending sentencing

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Sentencing

- Scheduled for March 1, 2024
- Sentencing Ranges
 - Criminally Negligent Homicide
 - 1 to 3 years in prison
 - Second Degree Assault
 - 5 to 16 years in prison

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Employment Terminations

- Both paramedics were terminated by AFR following the convictions

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The Critical Lessons

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EMS Interactions With Law Enforcement

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General Recommendations

- Interaction with LE must be improved – better policies, protocols, and scenario-based training
- Don't take at face value what you are told or what you initially see – independently assess the situation, using all available info and observations
- Talk, communicate, ask questions, ask for others' opinions to provide optimum patient care

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EMS Legal Duty is Patient Care

- EMS practitioners' duty is to care for the patient, *not* to assist law enforcement
 - EMS actions and interventions must be in furtherance of patient care
 - Interventions must not be for the purpose of assisting law enforcement in restraining, subduing or detaining someone
- EMS and law enforcement need to “stay in their lanes”

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Physical or Chemical Restraint

- Physical and chemical restraint may be used by EMS only when:
 - In furtherance of patient care
 - It follows an appropriate patient assessment
 - Indicated under an applicable clinical protocol or directed by online medical control

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“Duty to Act and a Duty to Access the Patient”



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Access the Patient

- LEOs may control the *scene*, but EMS should control the *patient*
- EMS practitioners have a duty to access any patient in custody of law enforcement (PICLE)
- If law enforcement is delaying, impeding or preventing patient access, EMS practitioners have a duty to “speak up” – and document accordingly

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Law Enforcement Directives

- EMS practitioners may not take medical directions or treatment instructions from law enforcement officers
 - *Important note: if an LEO says, “give this guy ketamine,” or any other drug, it may turn out that the patient does in fact clinically require a drug*
 - *But such a determination can be made only on a clinical basis, after an appropriate assessment and pursuant to an applicable protocol*

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Protocols

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Active Medical Direction

- Medical director needs to be actively engaged in developing, monitoring and updating protocols
 - Must be a key participant in education and training, and quality review of incidents
 - Delineate if/when online medical control should be consulted in these situations
- Ketamine is safe – but *prove it*
 - If your system uses ketamine, consider 100% chart reviews, have *ongoing clinical and public accountability* that it's being used properly

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Revisit Key EMS Protocols

- EMS agencies should revisit any protocols that address:
 - Law enforcement interactions
 - Patients in custody
 - Administration of ketamine, benzodiazepines, etc.
 - Agitated and combative patients, and “excited delirium”
- Also obtain legal counsel review of potential high-risk, controversial or high-exposure protocols

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“Excited Delirium”

- This “diagnosis” is essentially no longer used
 - Some states (CA, CO) have outlawed the diagnosis
 - Several professional societies have declared that the diagnosis should no longer be recognized
- The diagnosis was thought to “justify” the use of excessive force or to improperly medicate people in custody

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“Protocols Are Just Guidelines”

- There is much debate in EMS about the legal impact of failing to follow protocols
- In this case, proper selection of the protocol, and adherence to that protocol, were absolutely central issues

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An Important Legal Shift

- Many have commented that criminal charges shouldn't be filed where there's no "intent" to harm
- But, laws such as **reckless** manslaughter and **negligent** homicide allow for the filing of criminal charges even without "intent" to harm
- Therefore, these laws can result in *criminalizing* deviations from protocols and standards of care
 - In other words, **malpractice** can become **manslaughter**

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Patient Assessments

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Patient Assessments

- A thorough patient assessment is foundational to patient care
- One of the most devastating issues in the McClain trial was the prosecution debunking the claim that a "visual assessment" was sufficient

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Patient Assessments

- Any EMS treatments or interventions **are suspect** if not based on a foundational patient assessment, with objective and documented clinical findings that support each intervention
- An assessment requires the use of appropriate equipment or devices available for this purpose

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Social Justice and Health Equity

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WE HUMANS

Prejudiced thoughts run through all our minds — the key is what we do with them

Aug 28, 2020 / Steven C. Hayes, PhD

<https://ideas.ted.com/prejudiced-thoughts-run-through-all-our-minds-the-key-is-what-we-do-with-them/>

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Social Justice

- No direct evidence that race played a role in the McClain case
- But the reality is that in many of these high-profile cases, the police and EMS providers are White, and the patients/victims are Black
- EMS needs to become a part of the national conversations and understand its role in larger issues of social justice

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Health Equity

- Data clearly demonstrates inequities in healthcare – including EMS – among many underserved and minority populations
- EMS must make the identification of disparities in care part of their QA and data surveillance, and act to address any disparities that are found

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Workforce Diversity, Equity and Inclusion

- Studies show reduction in healthcare disparities when the provider workforce is more representative of populations served
- DEI must be a priority for EMS agencies to well and faithfully care for the populations they serve

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Implicit and Confirmation Bias

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Implicit Bias is...

Attitudes, Stereotypes, & Beliefs that can affect how we treat others based on categorizations such as...

Race Ability Gender
Culture Language

Implicit bias runs contrary to our stated beliefs. We can say that we believe in equity (and truly believe it). But then unintentionally behave in ways that are biased and discriminatory.

Adapted from @DrJrMarcelin

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Biases

- Need to recognize that implicit and confirmation bias can impact EMS practitioner actions and care (or lack thereof)
- Built-in biases are a built-in part of the human condition
- Providers must be aware of these biases and work to neutralize their effects
- Educate your EMS workforce

Awareness

- Implicit biases most often manifest themselves when:
 - Under pressure
 - Multitasking
 - Being in a hurry



Hmmm...could any of these situations apply to EMS?

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Examples of Confirmation Bias



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Video and Body Worn Cameras

Video is Everywhere

- Always assume you are being recorded by some audio or video recording device
 - Police body worn cameras
 - Bystander cell phone cameras
 - Business and home surveillance cameras
 - Overhead traffic cameras



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How You Act is Up to You

- If video happens to be present, and even when it's not, it is *always* up to the individual EMS practitioner to choose how they will appear
 - Calm, courteous, professional
 - Patient-centered
 - Tools of the trade by the patient's side
 - Thoroughly assessing the patient and treating them accordingly
 - ***Standing up to law enforcement if necessary to advocate for the patient***

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When We Don't Intervene...

- It “normalizes” the improper conduct – the person engaged in it feels its OK and others see that as acceptable conduct
- We can't be bystanders to improper conduct when we see a patient who needs us
- Complacency can also lead to complicity

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**Safety, Wellness and
Accountability**

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Safety and Wellness

- Need to ensure *appropriate* scene safety procedures are in place in conjunction with LE
- Training focused on prevention of workplace injuries and assaults against providers
- High priority must be placed on provider “mental wellness” and stress management programs

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**We Have a Legal, Moral and
Professional Duty to Act!**

**....duty to take proper actions to prevent
harm to the patient and the public**

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What Does the Public Expect?



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ACCOUNTABILITY


It is not only what we do,
but also what we do not do,
for which we are accountable.

[Moliere]

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**Duty to Accept
the Patient on
Their Terms
and On
Their Time**




Chronicle / Brant Ward

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**Never
Forget...**


Your job is not to judge.
Your job is not to figure out
if someone deserves something.
Your job is to lift the fallen,
to restore the broken, and
to heal the hurting.

-Joel Osteen-



EmilysQuotes.com

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Take a deep breath....and ask yourself....
**Am I doing what a reasonable
EMT/paramedic should be doing in this same
situation?**

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**Important Cases on the
Horizon**

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Earl Moore, Jr. Case

- Springfield, Illinois – December 18, 2022
- 35-year-old pt experiencing alcohol withdrawal and hallucinations suffered cardiac arrest and died after being forcibly restrained by EMTs
 - Cause of death: compressional and positional asphyxia due to prone facedown restraint on an EMS stretcher

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Earl Moore, Jr. Case

- In January 2023, the two EMTs were charged with **first degree murder**
- Case is still pending, no trial date set yet

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Tyre Nichols Case

- Memphis, Tennessee – January 7, 2023
- 29-year-old pt was beaten by Memphis PD after a traffic stop turned into a violent confrontation
- Four police officers were charged with offenses including second-degree murder and aggravated assault

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Tyre Nichols Case

- No EMS providers have been criminally charged in this case
- However:
 - Three were fired by Memphis Fire Department
 - Two providers had their licenses suspended by the state
- State determined that they failed to access and care for the pt on the scene

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Diania Kronk Case

- Greene County, PA – July 1, 2020
 - 911 dispatcher Leon Price charged with four criminal counts, including involuntary manslaughter
 - Refused to dispatch an ambulance when Ms. Kronk's daughter called and requested an ambulance
 - Dispatcher told the caller he wouldn't send an ambulance unless the pt (who couldn't speak) consented to be transported
 - Case still pending

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The Elijah McClain Case Has Changed The World For EMS – Or Has It?



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“Being a Compassionate Provider Never Led to an Arrest or to a Courtroom”



Zach Almond -1st
Paramedic at London Ambulance Service

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Conclusion

- Deviations from EMS protocols and standards of care can potentially result in criminal charges
- EMS providers must recognize new expectations and our legal duties in how we interact with law enforcement
- **You** still control **your** actions and appearances
- Always apply the fundamentals of patient care

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For more information on in-person or virtual training opportunities with PWW:

info@pwwemslaw.com

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