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Civil Liability for the Police Use of Impact Projectiles

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❖ **Introduction**

The use of force is a necessity for law enforcement. It is used to subdue criminal suspects, including those actively resisting arrest, attempting to evade capture through flight, or posing a threat of death or serious bodily harm to officers, third parties, or themselves.

To respond appropriately, legally, and safely to the force requirements of a myriad of different situations requires access to a range of weaponry, from batons to deadly force. In recent years, there has been an increased emphasis on less-lethal weapons which give officers additional options besides either engaging in hand-to-hand combat with suspects or using deadly force.

In addition to the use of [Electronic Control Weapons](#) (ECWs) such as Tasers, one type of weaponry employed by many agencies are impact projectile deployed from guns or launchers.

This two-part article takes a look at how courts have addressed civil liability for the use of such weapons in excessive force cases. The series examines a number of different types of impact projectile weapons, including pepper balls, bean bags, baton launchers, and rubber balls, as well as looking at situations where officers are confused about which weapon they are utilizing, mistakenly drawing a firearm rather than an impact projectile weapon.

At the end of part two, a section attempts to draw out some general lessons and make some recommendations. Also at the end of part 2 is a listing of relevant resources and references.

❖ **Pepper ball projectiles**

[Pepper balls](#) are propelled projectiles that break into pieces on impact and release oleoresin capsicum powder (commonly known as pepper), thereby causing both pain at the point of impact and irritation of the targeted individual's eyes and breathing passages. They can be used in stand-off situations, where physical proximity to a suspect is either not possible or is deemed dangerous, but the use of deadly force is not justified or not desired. The projectiles are sometimes used either to disperse crowds or to bring individual or multiple suspects into compliance.

The Ninth Circuit denied a qualified immunity defense to a police officer who used pepper ball projectiles to break up a crowd. [Nelson v. City of Davis](#), #10-16256, 685 F.3d 867 (9th Cir. 2012). In that case, a college student suffered a permanent eye injury when he was struck by a pepper ball projectile fired by a campus police officer.

Campus and local police were attempting to clear a crowd of about 1,000 students holding a party at and near an apartment complex, blocking streets to traffic. Qualified immunity was denied because the action could be found to constitute an unlawful seizure in violation of the injured student's Fourth Amendment rights.

Even if the plaintiff actually heard and failed to comply with the police order to the crowd to disperse, such a single act of non-compliance, without any attempt to threaten the officers or place them at risk, would not rise to the level of "active resistance" justifying the significant level of force used.

A reasonable officer, the court believed, would have known that firing projectiles, including pepper balls, in the direction of individuals suspected of, at most, minor crimes, who posed no threat to the officers or others, and who engaged in only passive resistance,

was unreasonable, even if there was no binding precedent specifically discussing the use of pepper ball projectiles in this context. The general law on the use of force available at that time, even if it involved the use of other weapons, was enough, according to the appeals court, to put the officer on notice that using the pepper balls under these circumstances constituted excessive force.

Did the officer intend to strike the plaintiff with the pepper balls or to harm him?

Ultimately, that did not really matter or enter into the equation. The Fourth Amendment standard for the use of force is based on objective reasonableness, not subjective intent.

The officer took aim and intentionally fired the pepper balls in the direction of a group of which the plaintiff was a member, striking him in the eye with significant force, rendering him immobile until another person removed him from the scene.

Firing the pepper balls in the direction of a crowd under these circumstances created an apparent risk of serious injury which required either more serious crimes being committed or a credible threat to the officers or others to justify. In this instance, at most, the students may have been trespassing once they willfully refused to leave. Trespassing, however, is a relatively minor offense that can only justify a minimal use of force, in the absence of active resistance or aggressive conduct. The desire by the officers to disperse the crowd as quickly as possible could not support the use of a significant level of force, given that there was no emergency situation.

The appeals court also noted that the officers failed to give the crowd of students a proper warning before firing the projectiles. That might have given them an opportunity to disperse without facing the risk of the type of injury that the plaintiff suffered, which included a permanent loss of visual acuity, as well as temporary blindness, and damage to his eye which required multiple surgeries to repair. According to the officers, they gave orders to the crowd to disperse but did so from a distance of 45 feet to 150 feet from various groups of students. They did not use sound amplification. The plaintiff student's failure to instantly comply with this order was, at most, passive resistance, if that.

Further, while officers going through the building complex did, at various times encounter some individual persons who threw objects such as bottles or garbage at them, no one was observed in the group standing where the plaintiff was when hit who was observed engaging in such conduct or encouraging others to do so. The "individuals causing the problems were not so numerous that the two categories of partygoers were

indistinguishable,” so that “the general disorder of the complex cannot be used to legitimize the use of pepper ball projectiles against non-threatening individuals.”

As with all instances in which plaintiffs seek to impose liability on individuals, some basis for individual involvement must be demonstrated, either personal participation in the actual use of force or some sort of supervisory role or policymaking function which caused the officer who used the force to act, or facilitated them doing so, in violation of a plaintiff’s constitutional rights.

In [*Backes v. Village of Peoria Heights*](#), #10-3748, 662 F.3d 866 (7th Cir. 2011), a wife informed police that her husband was suicidal, was on medication, and had access to weapons. The officers who arrived on the scene found him sitting in his car fairly motionless and unresponsive.

The police chief then contacted members of an inter-departmental emergency response team. Team members shot pepper balls into the car and subsequently removed him from the car. A lawsuit for excessive force followed.

The appeals court found that an excessive force claim against the police chief lacked merit where he was not involved in the removal of the allegedly suicidal man from his parked car by force, including the firing of pepper balls at him. He also was not in a supervisory role over those who removed the man, who were members of the inter-departmental emergency response team. There was, accordingly, absolutely no basis for seeking to impose liability on him, even if the use of force had been excessive, which the court did not determine.

In [*Fogarty v. Gallegos*](#), #06-2238, 523 F.3d 1147 (10th Cir. 2008), a man arrested during an anti-war demonstration close to a college claimed that he was subjected to excessive force prior to and during his arrest, and that the force employed included the shooting of pepper ball projectiles.

A federal appeals court denied a number of officers qualified immunity on his excessive force claim. The court acknowledged that there was no prior binding precedent in the 10th Circuit that specifically addressed the use of less lethal projectiles such as pepper balls. But it reasoned that officers knew or should have known of the objective reasonableness standard for the use of force under [*Graham v. Connor*](#), #87-6571, 490 U.S. 386 (1989), and the factors that courts analyze to determine, for Fourth Amendment purposes, whether the force used was reasonable under the circumstances. These factors could be looked at to

determine whether any rights violated were clearly established for purposes of qualified immunity.

Those factors include the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers and others, and whether he or she is actively resisting arrest or attempting to evade arrest by flight. The court in *Fogarty* stated that it could also consider whether the officer's own reckless or deliberate conduct in connection with the arrest contributed to the need to use the force employed.

The officers claimed that the arrestee was engaged in disorderly conduct, which the court noted was a petty misdemeanor, the least serious of three existing classes of state criminal offenses. Given the lack of severity of the alleged crime, the "amount of force used should have been reduced accordingly."

There was also no indication that the arrestee had posed any immediate threat to the safety of the officers or anybody else. At the time force was used against him, he was kneeling on the steps of a bookstore. "He was unarmed and had been drumming intermittently and peacefully."

The appeals court reasoned that even if his drumming had played a role in inciting the crowd to remain in the middle of the street, which the plaintiff disputed, it was not clear that the demonstrators were any immediate threat to public safety or the officers. Indeed, the officers' main concerns for which they wanted to disperse the crowd were to avoid disruption to area businesses and reopen the street to traffic. They did not believe that they were confronting any imminent threat of violence.

The arrestee did not actively resist arrest and did not try to evade arrest by taking flight. The court also found that the police in some ways may have contributed to the need to use force. Their decision to block off a street led him to the mistaken belief that they were allowing protestors to march in the street.

All these factors seemed to indicate that the level of force used may have been unreasonable.

"With respect to the use of pepper balls and tear gas, we acknowledge that our precedential opinions have not directly addressed the Fourth Amendment implications of what defendants call 'less lethal' munitions. Nevertheless, a

reasonable officer would have been on notice that the *Graham* inquiry applies to the use of these methods just as with any other type of pain-inflicting compliance technique. We find it persuasive that, in prior cases, we have assumed that the use of mace and pepper spray could constitute excessive force.”

The appeals court similarly found that a supervisory officer who had given direct orders on the scene and deployed the weapon could possibly be held liable for any excessive force carried out pursuant to those orders. Additionally, an officer who fails to intervene to prevent a fellow officer’s excessive use of force may be liable.

- ***Boston Police settlements***

In a very well-publicized incident, a 21-year-old woman, [Victoria Snelgrove](#), died after the Boston Police Department in 2004 used pepper ball projectile weapons in the course of trying to get a rioting crowd under control.

The incident happened about an hour and a half after the Boston Red Sox baseball team had defeated the New York Yankees for the American League championship, causing large crowds of celebrating sports fans to pour out into the streets.

She died in the hospital later that night, and an autopsy determined that the projectile had created a three-quarter inch hole in the bone behind her eye, then broke into nine pieces, and inflicted serious damage on the right side of her brain.

Snelgrove was hit in the eye with an [FN 303](#) blunt trauma / pepper spray projectile while near the baseball park. This caused excessive bleeding and she did not receive prompt medical attention, in part because the huge crowds blocked the flow of traffic, preventing ambulances from entering the area.

The City of Boston settled a claim by the dead woman’s parents, paying out a total of \$5.1 million. In reaching the settlement, the city also acknowledged that the woman was simply an innocent bystander, not engaged in any unlawful behavior at the time that she was shot.

Following this case, the city switched to using pepper pellet guns that fired at a lower velocity. A number of other cities also reportedly dropped the use of the particular weapon that was involved in this case.

A settlement for an undisclosed amount was reached between the decedent's estate and [Fabrique Nationale de Herstal](#) (FN Herstal), the manufacturer of the weapon used, in a products liability lawsuit. [Snelgrove v. FMH USA, LLC](#), #05-CV-12004. U.S. Dist. Court (D. Mass. June 1, 2006). The plaintiff had sought \$10 million in that case.

As part of the settlement agreement that the City of Boston entered into with the family, it agreed to cooperate with the family in its lawsuit against the manufacturer, in exchange for which the City would receive half of any amount recovered in that lawsuit, capped at a maximum of \$2 million.

❖ Rubber balls

Another type of impact projectile is the rubber ball round, delivered in a casing that contains a number of rubber balls. It is used by as a crowd management and pain compliance tool by both law enforcement and corrections personnel.

In [Muhammad v. McCarrell](#), #07-2235, 536 F.3d 934 (8th Cir. 2008) a federal appeals court upheld a jury verdict for the defendant corrections officers in lawsuit brought by prisoner allegedly injured by them when they used force, including a rubber ball round, to extract him from his cell.

The plaintiff prisoner admitted that he had a weapon in his pocket at the time of the incident, and the evidence showed that he had been belligerent and uncooperative. The prisoner had created a disturbance in his cell block, and taunted an officer. Pepper spray and a 15 OC Stinger grenade were used, as well as tear gas; they had little effect and failed to subdue him.

The Stinger grenade contains small rubber balls that can be surrounded by a chemical agent. The grenade usually inflicts only bruises and is used primarily for riot control.

The officers then shot a 37MM Ferret OC powder round, designed to break through a barricade, at the cell wall, but he still allegedly refused to comply. They then dispensed a 28b Stinger 37 MM 60 Cal. rubber-ball round into the cell, and again failed to subdue the prisoner. Another Ferret OC powder round fired into the cell then went through a mattress that the prisoner used to barricade his cell door, and hit him in the groin area, finally subduing him.

To establish liability for force used against a prisoner, a plaintiff is required to show that the officers used force maliciously and sadistically for the very purpose of causing harm, rather than in a good-faith effort to maintain or restore discipline. The appeals court found no reason to disturb the jury's determination, based on the facts, that the officers used force only to secure the prisoner's compliance with their reasonable commands and to restore order to the cell block.

In another case involving the use of a Stinger grenade containing rubber balls in a correctional context, a federal court stated that setting off such a device in a prison cell could not be argued to be a minimal amount of force.

That being said, a factual issue remained as to whether the force was used maliciously and sadistically to cause harm or in a good-faith manner intended to try to restore or maintain discipline (in which case it would be justified). [*Jackson v. Gerl*](#), #07-cv-656, 622 F. Supp. 2d 738 (W.D. Wis. 2009).

In this case, the device, which releases 180 rubber balls, was used to extract a recalcitrant inmate from a cell after he covered a window with paper and refused to cooperate with being placed in restraints. The court found that it was not able to conclusively determine on the basis of undisputed facts whether the use of the grenade was proper, with some alleged facts suggesting that it may have not been, including the possibility that the officers could have decided that entering the cell without use of the grenade was a viable option.

The prisoner only weighed 135 pounds, "and was not likely to pose much of a threat to the four defendants who would enter his cell. All were larger than plaintiff and wore armor." Other factors, including the prisoner's lack of cooperation, may have justified the force used.

The inmate was denied partial summary judgment and the officer who deployed the grenade was also denied summary judgment. Other officers present were granted summary judgment on failure to intervene claims, as it was questionable whether they even had time to intervene before the grenade was used.

Shortly before a jury trial the parties settled. View [Order of Dismissal](#).

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