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Civil Liability for the Police Use of Impact Projectiles

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This is a two-part article. Part 1 can be accessed [here](#).

❖ **Beanbags**

Another impact projectile type of weapon is the beanbag propellant gun. A [beanbag round](#) consists of lead shot contained in a cloth sack. It is intended to induce compliance by causing sudden, debilitating, localized pain, similar to a hard punch or baton strike. While they are not designed to cause serious injury or death, a bean bag gun is considered a “less-lethal” weapon, as opposed to a non-lethal weapon, because the bean bags can cause serious injury or death if they hit a relatively sensitive area of the body, such as the eyes, throat, temple or groin.

In [Ciminillo v. Streicher](#), #04-4346, 434 F.3d 461 (6th Cir. 2006), the court ruled that a police officer was not entitled to qualified immunity in a lawsuit claiming that he shot a man attempting to peacefully leave a street party riot with a beanbag propellant gun, since the right to not be subjected to the use of non-lethal force, under such circumstances, was

clearly established. There was no evidence, however, of inadequate training by the city on the use of the beanbag weapon.

The case involved a Cincinnati, Ohio man who went to a street party with his roommates. Within minutes, the crowd started moving up the street. The members of the crowd became rowdy, with some of them setting fires in the street, and throwing bottles at police officers and others present. Fifteen police officers in riot gear then walked down the street to clear the crowd, ordering them to disperse using megaphones.

As the man attempted to leave through the backyard of a friend's house, a property owner with a bat refused to allow him onto an adjacent property. A kneeling police officer allegedly started firing beanbag propellants randomly at the crowd, and the man allegedly slowly began walking towards the officers with his hands above his head. After he advanced about ten feet, an officer shot him in the chin and chest with a beanbag propellant, allegedly without provocation and at point blank range. As a result, he needed twenty stitches in his chin and also incurred a bruised lung and a permanent facial scar.

Officers claimed that the man was shot while in the act of throwing an unknown object in the direction of the police. The injured man filed an excessive force lawsuit. The trial court granted the defendants a summary judgment on the plaintiff's claims for excessive force, and also on a failure to train claim against the city that employed the officer.

A federal appeals court reversed the summary judgment for the officer on the excessive force claim, but upheld the rejection of the failure to train claim against the city.

The appeals court rejected the argument that the plaintiff was not "seized" for purposes of the Fourth Amendment. Whether the officer shot the plaintiff in an effort to restrain him, however, was a disputed question of fact, the court acknowledged, but assuming the facts alleged in the manner most favorable to the plaintiff, that he was shot after attempting to leave, and as he approached the officer with his hands raised in the air, there was a seizure. The fact that he was not eventually placed in handcuffs or taken to the police station, the court stated, did not mean that he was not seized.

The appeals court found that if the facts were as the plaintiff alleged, the officer was not entitled to qualified immunity, as the use of this level of force to seize him would not be reasonable. The plaintiff claimed that he was not engaged in a crime when the officer shot him, and that his conduct did not suggest that he posed an immediate threat to the safety of

the officers. Additionally, there was no evidence that he was attempting to resist or evade arrest, but merely trying to leave the scene of the riot in a peaceful manner.

The court also found that it was clearly established law at the time of the incident that the use of less-than-deadly force under such circumstances may be excessive, and that individuals have the right not to be shot unless they are perceived as posing a threat to officers or others and to be free of the unreasonable use of non-deadly force.

The appeals court panel in the Sixth Circuit cited only one prior case on the use of a beanbag propellant, and that was from the Ninth Circuit, [*Deorle v. Rutherford*](#), #99-17188, 272 F.3d 1272 (9th Cir. 2001), cert. denied, *Rutherford v. Deorle*, #01-1245, 536 U.S. 958 (2002). (use of beanbag propellants against an unarmed man who posed no immediate threat was not objectively reasonable).

In that case, a suicidal man who had previously possessed a hatchet and a crossbow was shot with a beanbag round. The court held that it was unreasonable to shoot him with a beanbag after he had discarded his weapon. At the time, he was slowly approaching an officer while carrying a bottle or can in his hand. The Ninth Circuit characterized him as an unarmed man who did not pose an immediate threat to the officer. That court also noted that the beanbag was fired at him without warning.

The appeals panel applied that ruling, together with other Sixth Circuit cases on the use of less than deadly force, such as pepper spray, to rule that it was clearly established that shooting the plaintiff with a beanbag in the immediate case was objectively unreasonable.

However, the appeals court found inadequate evidence to support a claim against the city for inadequate training. The defendant officer stated in his affidavit that he was trained in the use of the beanbag shotgun at the Police Academy every year at the police firing range, and that part of that training was a review of policy and procedure about when a beanbag shotgun can and can't be used. This and other evidence in the case showed that the city was affirmatively taking steps to train officers in the use of beanbag propellants. The plaintiff also failed to submit any additional evidence regarding the number of incidents of beanbag misuse, or anything else to indicate constitutionally defective training.

Another case involved an intoxicated suicidal 18-year-old standing in the driveway of his home threatening to kill himself with a pocketknife and breaking car windows. Officers arrived on the scene and within four minutes shot him with a "less-lethal" beanbag shotgun

when he refused to drop the knife he was holding to his own neck. When he was struck by the beanbag round, he started moving towards an alcove between the house and garage. Officers then fatally shot him eight times with their service revolvers.

Rejecting a trial court determination that no constitutional violation could be found on these facts, a federal appeals court noted that a number of factors argued against him constituting an immediate threat to the officers or others, as he was only threatening to harm himself. He was engaged in less than active resistance, as defined by the department's own policies, which did not justify the use of a beanbag shotgun, much less deadly force. There were triable issues as to whether excessive force was used. [*Glenn v. Washington County*](#), #10-35636, 661 F.3d 460, 2011 U.S. App. Lexis 22300 (9th Cir. 2011), *rehearing denied*, 673 F.3d 864 (9th Cir. 2011).

[*Herrera v. Las Vegas Metropolitan Police Department*](#), #2CV-S-01-0826, 98 F. Supp. 2d 1043 (2004) is a similar case involving the shooting death of a man experiencing an episode of delusion and severe mental illness. Police used bean bag rounds and pepper spray to try to contain and subdue him, but he held a knife to himself and was then shot and killed. Rejecting summary judgment for the defendant officers, the court found that there was nothing to suggest that the man had posed a significant threat to the officers' safety, if the plaintiff's version of events was true. The officers claimed that he began to move towards them, but this was disputed. Resistance to their commands was due to his delusional state.

At the time force was used, he alone was in his home, and the officers failed to retreat or reconsider their "confrontational" approach, despite the fact that it was clearly making the man more agitated. Claims for both excessive use of force and supervisory liability could go forward.

A case involving the use of bean bag rounds in a correctional context is [*Council v. Sutton*](#), #09-13968, 366 Fed. Appx. 31, 2010 U.S. App. Lexis 2886 (Unpub. 11th Cir.) in which the federal appeals court denied qualified immunity to deputy sheriffs. An inmate claimed they had used excessive force against him by repeatedly using a Taser in dart mode against him as well as shooting him twice with bean bag rounds from a shotgun. He claimed that he was already on his knees with his hands in the air when the deputies entered his cell, and stayed that way while the Taser and bean bag rounds were used. If this were true, the force used was excessive, as it constituted a malicious and sadistic use of force to harm him.

On remand, in [*Council v. Sutton*](#), #1:07-cv-331, 2010 U.S. Dist. Lexis 88623 (M.D. Ala.), the court found that the force used was not unreasonable as it occurred at a time when the prisoner constituted a threat to officers. During an ongoing prison riot, the prisoner refused to comply with orders, crawled under a bunk, and was in a “notorious” cellblock where a weapon had recently been found. Neither the use of the Taser nor the use of beanbag rounds was excessive under these circumstances.

❖ **Baton launchers**

Another impact projectile weapon is the baton launcher, which fires a baton which makes impact with the suspect’s body causing less-than-lethal pain and affords officers the opportunity to move in and gain compliance and control over the subject.

In a case with largely undisputed facts, a woman argued that police officers used excessive force when they shot her four times in the leg with an SL6 baton launcher after she disregarded their orders to come out of her car. After a jury ruled in the officers’ favor, the plaintiff argued that she should have been granted judgment as a matter of law. The trial court declined to do so, and an appeal followed.

The federal appeals court agreed with her argument, finding that the officers used excessive force and were not entitled to qualified immunity. [*Phillips v. Community Insurance Corporation*](#), #10-1654, 678 F.3d 513 (7th Cir. 2012), *rehearing denied* 2012 U.S. App. Lexis 11823 (7th Cir.).

The female motorist was suspected of intoxication and of having possibly stolen the vehicle, because she had evidently put on the car a license plate belonging to another vehicle that she owned. When she was stopped, seven squad cars were placed around her vehicle. When she failed, after ten minutes of repeated commands, to get out of her vehicle, the officers decided to use an SL6 Baton Launcher, a shoulder fired semi-automatic firearm that fires polyurethane bullets with a force equivalent to a .44 magnum pistol, according to the court.

Under the police department’s policy, it was classified as “less-lethal” and considered equivalent to using a bean-bag shotgun or a hand baton. The SL6 is typically targeted below a person’s belly button, excluding the groin and is designed to be used against persons exhibiting resistive, assaultive, or other dangerous behavior.

An officer first fired a beanbag shot as a warning, which hit the vehicle and made a dent in the driver-side door. Further commands were attempted to no avail for 5 minutes. The motorist was lying on the front seat with her bare legs outside the front door of the car, with her feet on the ground.

The officers aimed the baton launcher at her leg and fired, striking her four times, with very brief delays between shots. She then complied with the officers, under threat of being shot again. While she was, in fact, intoxicated, she was the lawful owner of the vehicle. One of the wounds to her ankle required 30 stitches and had torn flesh from the bone.

The appeals court found that the multiple shots fired were unreasonable under the circumstances because the significant intrusion on the woman's rights was not justified. The plaintiff never actively resisted and posed no immediate threat, having given no indication she would attempt to drive the car away. Additionally, the officers' belief that they were dealing with a car thief was objectively unreasonable in light of contradictory information they received. The appeals court ordered that judgment as a matter of law be entered for the plaintiff, and that damages to be awarded then be calculated.

In [*Mercado v. City of Orlando*](#), #04-13477, 407 F.3d 1152 (11th Cir. 2005), rehearing, *en banc*, denied, *Mercado v. City of Orlando*, 159 Fed. Appx. 183, 2005 U.S. App. Lexis 29523 (11th Cir., 2005), the court held that a police officer who allegedly intentionally aimed and shot a baton launcher at the head of a "non-threatening" suspect with suicidal tendencies was not entitled to qualified immunity in a federal civil rights lawsuit.

In that case, an Orlando, Florida man sued two police officers and the city for the alleged excessive use of force in the course of detaining him and preventing him from committing suicide. Summary judgment was granted to all defendants by the trial court. A federal appeals court, while upholding this result in general, overturned a grant of qualified immunity to one of the officers, who allegedly discharged a baton round at the plaintiff's head.

The plaintiff had allegedly wrapped a telephone cord around his neck, attached the other end to a ceiling vent, and used a kitchen knife to make multiple cuts on his arms, threatening to kill himself if his wife followed through on her threats to leave him. He then allegedly grasped the knife with both hands and pointed it toward his heart. The officers arrived at the apartment after the wife called them, and entered the apartment with the wife's permission.

The suicidal man allegedly refused to obey orders to drop the knife, but had failed to make any threatening moves toward the officers. One of the officers hit the man with a Sage SL6 Launcher to subdue him. The Sage Launcher, according to the court, is a “less lethal” munition that fires a polyurethane baton that is 1.5 inches wide, travels approximately 240 feet per second and delivers a force of 154 foot-pounds of energy—approximately the energy of a professionally-thrown baseball. It is designed to be used to protect persons from self-inflicted injury, especially when using a nightstick or baton would be unsafe or impractical, and is not designed to penetrate the body, but only to leave bruises.

The weapon was fired twice and hit the man once in the head. The officer subsequently claimed that he was aiming at the man’s shoulder. The impact fractured the man’s skull, resulting in brain injuries which now requires the taking of medication to prevent seizures, and causes other ailments rendering him disabled and unable to work.

Under applicable police department policies, targeting the head or neck with the weapon is acceptable only in deadly force situations, according to the court.

In overturning summary judgment on the basis of qualified immunity for the shooting officer, the appeals court noted that at the time of the shooting, the plaintiff was not committing a crime, resisting arrest, or posing an immediate threat to the officers, or anyone else besides himself. The court also found that, for purposes of analysis, it had to assume that the officer was aiming for the plaintiff’s head, since he was trained in the use of the weapon, that the weapon accurately hits targets from distances up to five yards, and that the plaintiff suffered head injuries. The weapon can constitute lethal force if shot at a subject from close range, the court stated, and the officer was aware of this.

If the officer intentionally aimed the Sage Launcher at the plaintiff’s head under these circumstances, the appeals court found, that he violated the plaintiff’s [Fourth Amendment](#) rights by using excessive force. Despite the lack of prior case law with exactly similar circumstances, the court reasoned, the officer should have known that by intentionally shooting the plaintiff in the head would violate his clearly established Fourth Amendment rights.

On remand, a jury found in favor of the officer on the basis of qualified immunity. The jury had been instructed that, as a matter of law, the officer’s actions did not violate the plaintiff’s rights unless he intended to aim and shoot him in the head using the Sage

launcher. Upholding the jury's determination upon further appeal, the appellate court found that the officer fired the launcher not to inflict deadly force but to gain the plaintiff's compliance.

After the plaintiff was hit by the rubber baton, he dropped his knife, enabling the officers to restrain and handcuff him before sending him to a hospital. The jury instructions were adequate in light of the appeals court's ruling in the first appeal. The court noted that conduct which is, at most, negligent, cannot be the basis of a federal civil rights lawsuit. [*Mercado v. City of Orlando*](#), #05-16609, 180 Fed. Appx. 844, 2006 U.S. App. Lexis 11035 (Unpub. 11th Cir.).

❖ **Weapon confusion**

In one case, an officer who intended to deploy a less-lethal impact projectile weapon mistakenly fired buckshot, with devastating results. [*Conner v. Rodriguez*](#), #10-CV-512, 2011 WL 904152, 2011 U.S. Dist. Lexis 156212 (D.N.M.). Officers had been in pursuit of a motorist who was traveling at high speed towards the state border. They learned that there was a warrant for his arrest, that he had rammed two police vehicles, he had been drinking, had a history of mental illness, and might be armed with knives.

When the vehicle came to a halt, the driver ignored orders to show his hands and appeared to duck down in his vehicle where it was feared he might be reaching for a weapon. The officer yelled out "bean bag," and fired, hitting the suspect in the shoulder. But what struck him was buckshot from a 12-gauge shotgun, rather than a bean bag round from the officer's other shotgun, filled with bean bag rounds, which was marked with yellow tape on the barrel and stock. The court concluded that no prior precedent in the Tenth Circuit established that such an unintentional or negligent use of deadly force violated the Fourth Amendment, and that the majority of cases from other Circuits, with only two exceptions, held the same. The officer was therefore entitled to qualified immunity.

It should be noted that the negligent use of a firearm, although not a federal civil rights violation, is a valid tort claim in state courts – absent any statutory immunities.

For more discussion on this general topic of mistaking one weapon for another, see [Weapon Confusion and Civil Liability](#), 2012 (6) AELE Mo. L. J. 101.

❖ Recommendations

1. Some of the factors to be taken into account in deciding whether to use impact projectiles include the person's possession of weapons, suicidal behavior, the offense committed, known information about the person's past history of violence or threats, and the risk of harm to officers and third parties.
2. When developing use of force policies, agencies should consider whether to mandate supervisory approval before deploying beanbag projectiles during a prolonged confrontation. The IACP Model Policy (2002) states, "Deployment of an impact projectile should be at the direction of a line supervisor or another senior officer unless it is reasonably likely that failure to take immediate action would result in injury, death, or serious property damage."
3. Officers issued projectile weapons must undergo detailed training in their use as well as on the law concerning when it is appropriate to use that level of force.
4. Care should be taken to mark and distinguish impact projectile weapons from firearms, to avoid a mistaken use of deadly force.

❖ Resources

The following are some useful resources related to the subject of this article.

- [Assault and Battery: Non-Lethal Projectiles](#). AELE Case Summaries.
- [Impact Projectile Policies](#). (specimens compiled by AELE)

❖ Prior Relevant Monthly Law Journal Articles

- [Civil Liability for the Police Use of Impact Projectiles - Part 1](#), 2012 (11) AELE Mo. L. J. 101
- [Weapon Confusion and Civil Liability](#), 2012 (6) AELE Mo. L. J. 101

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