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Civil Liability Law Section – April 2014

**Civil Liability for the Use  
of Pepper Spray (OC), Tear Gas,  
and Chemical Agents**

*Part 1 – (This month):*

- Introduction
- Use by Law Enforcement
- Use on Handcuffed Persons
- Warnings
- Crowds and Bystanders
- The Aftermath of Their Use
- New Orleans Police Consent Decree

*Part 2 – Next month:*

- Correctional Settings
- Suggestions to Consider
- References and Resources

❖ **Introduction**

Pepper Spray (OC) and other chemical weapons are intended and designed to be used as disabling agents, for law enforcement officers and correctional personnel to use to attempt to overcome resistance, and to subdue persons with minimal injuries to officers, arrestees and others.

Chemical weapons can be used in situations in which a disturbance involves a number of people, but they also are effective against an actively resisting individual.

This is not a technical article, and it does not survey the wide variety of specific chemical weapons available to law enforcement and correctional personnel, or to assess their pros and cons. Rather, the focus is to briefly look at how courts have discussed their use in the context of civil lawsuits for excessive force. At the conclusion of part two of this two-part article, there is a presentation of some suggestions to consider, followed by a brief listing of useful and relevant resources and references.

- ❖ This article also does not address the use of impact projectiles releasing chemical weapons, such as pepper ball projectiles, which are discussed in part 1 of a two-part article entitled [Civil Liability for the Police Use of Impact Projectiles](#), 2012 (11) AELE Mo. L. J. 101 (Nov. 2012).

### ❖ Use by Law Enforcement

The use of chemical agents-can result in widespread public condemnation, expensive official inquiries and private lawsuits.

In 2011, campus police officers in [Davis, California](#), confronted nonviolent “Occupy” protestors, who were sitting on a paved path. An officer applied MK-9 pepper spray to the group, which was photographed, [video recorded](#) and viewed around the world.

The University Chancellor apologized to the students, and commissioned an independent review of police tactics. Protestors subsequently received [\\$1million](#) to settle their ACLU supported federal lawsuit. [Baker v. Katehi](#), #2:12-cv-00450 (Sealed, E.D. Cal. 2013).

In [Barnard v. Theobald](#), #11-16655, 721 F.3d 1069 (9th Cir. 2013), a man claimed that officers who came to his house to arrest his brother under a warrant used excessive force when he answered the door, lying on top of him, applying a chokehold, and using pepper spray. The jury awarded the plaintiff over \$2 million in damages, which was reduced by \$500,000 to \$1,611,656 by the trial court. A federal appeals court found that the jury’s award and their decision to believe the plaintiff’s version of the incident were supported by the evidence, and that the officers were not entitled to qualified immunity.

A “reasonable officer would have known it violated clearly established law to use a chokehold on a non-resisting arrestee who had surrendered, pepper-spray him and apply such knee pressure on his neck and back that it would cause the collapse of five vertebrae in his cervical spine.” The damages were high because of the plaintiff’s spinal injuries, not the use of OC.

In [Duran v. Town of Cicero](#), #08-2467, 653 F.3d 632 (7th Cir. 2011), a federal trial jury awarded \$2.58 million against a town and six officers for actions taken involving the use of pepper spray against 23 individuals attending a baptismal party at a house. No damages were awarded to another 56 plaintiffs who attended the same party. The federal appeals court ruled that the judgment appeared to have allowed 13 of the successful plaintiffs to improperly receive double recovery for their injuries--once on their federal claims against the officers and once on their state law claims against the town on the basis of vicarious liability for the officer’s actions. The appeals court ordered that, on remand, the judgment be amended to avoid the possibility of double recovery.

In [\*Young v. County of Los Angeles\*](#), #09-56372, 655 F.3d 1156 (9th Cir. 2011), the court ruled that an officer's use of pepper spray and a baton against a motorist who disobeyed orders to get back in his vehicle was an “intermediate” use of force that “while less severe than deadly force, nonetheless present a significant intrusion upon an individual's liberty interests.” It is “rarely necessary, if ever,” a federal appeals court stated, “for a police officer to employ substantial force without warning against an individual who is suspected only of minor offenses, is not resisting arrest, and, most important, does not pose any apparent threat to officer or public safety.” The motorist did not resist, but merely sat on the curb, so he could proceed with his excessive force claim.

Chemical weapons may justifiably be used in self-defense of the officers or others. In [\*Shreve v. Jessamine County Fiscal Court\*](#), #05-6271, 453 F.3d 681 (6th Cir. 2006), the court found that deputy sheriffs were not entitled to summary judgment in an excessive force lawsuit by woman arrested by them in her home pursuant to a warrant. Her version of the events, including that they beat her with a billy club and jumped on her after she was incapacitated by pepper spray and was only passively resisting, if true, showed an excessive use of force. The use of the pepper spray, however, was not excessive since she was hiding from them under a blanket in a closet at the time, and could have been thought to be planning to “ambush” them.

Similarly, chemical weapons can be useful in ending a stalemate or standoff that has gone on for a while. In [\*Bayer v. City of Simi Valley\*](#), #01-55736, 43 Fed. Appx. 36, 2002 U.S. App. Lexis 15796 (Unpub. 9th Cir.), the court held that after a four-hour armed standoff and failed negotiations, it was reasonable for officers to fire tear gas into a mentally disturbed man’s vehicle to extricate him after he had previously shot at police and refused to surrender. There was no liability for “excessive force” or the subsequent confrontation that led to his death.

Such force might not be justified in response to fairly minor offenses when there is no active physical resistance to the officers. In [\*Howell v. Sheriff of Palm Beach County\*](#), #09-10940, 2009 U.S. App. Lexis 22592 (Unpub. 11th Cir.), deputies responding to complaints of loud music coming from a party encountered an off-duty deputy who was providing music at the party. When told to turn off the music, he allegedly responded in a “confrontational” tone, and was sprayed with pepper spray in the face and arrested.

In a federal civil rights lawsuit over the incident, the appeals court held that the deputies were not entitled to qualified immunity, as there was a genuine factual issue as to whether the use of the pepper spray was excessive, given the minor nature of the infraction involved, and the absence of physically aggressive action by the arrestee.

Officers are only required to act in an objectively reasonable manner based on what they know or reasonably believe at the time of the incident. In [\*Padula v. Leimbach\*](#), #10-3395, 656 F.3d 595 (7th Cir. 2011), for instance, police believed that a motorist who veered off the road, and disobeyed orders to exit his vehicle was intoxicated. He was actually diabetic, and suffering from hypoglycemia. The officers physically pulled him from his car, struck him, and used a chemical spray on him as he resisted their efforts. After a paramedic recognized the driver's diabetic condition, he was transported to a hospital, where he subsequently died. The officers, under these circumstances, were not liable for the motorist's death, based on the reasonableness of their belief that he was intoxicated.

Officers can sometimes be granted qualified immunity from liability if undisputed facts show that they did not violate clearly established prior case law, or if the facts, even construed in the manner most favorable to the plaintiff, do not establish a constitutional violation. An appeals court will not uphold such immunity, however, when there are still genuinely disputed issues of material fact that could have an impact on liability. In [\*Bomar v. City of Pontiac\*](#), #10-2161, 643 F.3d 458 (6th Cir. 2011), the court ruled that an officer was not entitled to qualified immunity in a lawsuit over his alleged use of pepper spray against a woman who he claimed tried to hit him after he followed her son from a drug raid into her house. Factual issues concerning whether the woman actually tried to hit the officer, and whether he actually used the pepper spray had to be resolved, precluding the appeals court from upholding the officer's immunity defense.

Similarly, in [\*Howard v. Wayne County Sheriff's Office\*](#), #09-2171, 2011 U.S. App. Lexis 5270 (Unpub. 6th Cir.), while a sheriff's deputy did have probable cause to arrest a city employee, there was a factual issue as to whether the use of pepper spray against the arrestee was excessive. The arrestee had allegedly elbowed the deputy while going through an employee entrance security checkpoint at a city building, and responded with a profane statement when ordered to stop. While there was probable cause to arrest the plaintiff for failing to obey a lawful order, his version of the incident, in which he denied making physical contact with the deputy or making the profane statement, if true, would render the deputy's use of pepper spray and action in taking him to the ground an excessive use of force.

In [\*Mierzwa v. U.S.\*](#), #07-3362, 2008 U.S. App. Lexis 13523 (Unpub. 3rd Cir.), cert. denied, #08-8012, 129 S. Ct. 2378 (2009), the court ruled that officers did not use excessive force in response to a belligerent motorist who shouted and refused to comply with their directions to step to the curb, lower his voice, and calm down. When he resisted their attempts to place handcuffs on him, they tackled him to the ground and applied arm locks for purposes of restraint. After that too proved unsuccessful, they then used pepper spray.

The court ruled that no reasonable officer would have thought that the defendant officers applied excessive force under the circumstances, and that the officers were entitled to qualified immunity.

### ❖ Use on Handcuffed Persons

The use of chemical weapons can, in some instances, be completely justified initially, but become an excessive use of force when circumstances change and resistance ends, as when the force continues after the suspect is subdued. In [\*Champion v. Outlook Nashville, Inc.\*](#), #03-5068, 380 F.3d 893 (6th Cir. 2004), a federal appeals court upheld a \$900,000 jury award to the family of an adult non-verbal autistic man who died after officers seeking to restrain him allegedly continued to use pepper spray and to lay on top of his body after he was handcuffed, hobbled, and laying on his stomach on the ground, no longer resisting. Continued use of such force at that point, the court ruled, violated clearly established law, and jury's award was not excessive.

See also [\*Henderson v. Munn\*](#), #05-1403, 439 F.3d 497 (8th Cir. 2006). In that case, an officer was not entitled to qualified immunity on arrestee's claim that he sprayed pepper spray in his face while he was lying on the ground with both hands cuffed and another officer on top of him. Such use of force, after the arrestee had been subdued, if true, could not be said to be objectively reasonable as a matter of law.

Handcuffs placed on a suspect may shift the justification away from using force, but not always, as force may continue to be used if active resistance continues. In [\*Revak v. Lieberum\*](#), #09-4179, 2010 U.S. App. Lexis 22466 (Unpub. 3rd Cir.), state police followed a motorist to his home after observing him speeding and driving erratically. When they approached his vehicle and ordered him to exit, he did so, but began screaming obscenities at them. The motorist smelled of alcohol and he resisted being patted down, leaning backwards and knocking into an officer, and again trying to push back into the officer.

He was placed under arrest, but refused to cooperate with being handcuffed, so two bursts of pepper spray were used to accomplish this. Even while handcuffed, he continued to resist, requiring a third pepper spray burst to subdue. He was convicted of DUI and resisting arrest, and sued the officers for excessive use of force. A federal appeals court ruled that the use of the pepper spray against the plaintiff, who was resisting arrest, was an objectively reasonable use of force.

In [\*Tracy v. Freshwater\*](#), #08-1769, 623 F.3d 90 (2nd Cir. 2010), cert. denied, 132 S. Ct. 1617 (2012), an arrestee claimed that an officer used excessive force in arresting him, including the use of pepper spray. The officer, during a traffic stop of the plaintiff,

suspected that he might be wanted for a criminal offense. The arrestee claimed that the officer struck him several times with a flashlight after he slipped on a patch of ice, jumped on him after he began to run and fell to the ground, used pepper spray against him after he had already been subdued and handcuffed, and ignored his protests that he was in pain in forcibly moving him from the ground to a police vehicle. Because it was disputed whether the officer used the pepper spray on the arrestee before or after he was handcuffed, the excessive force claim concerning the use of the pepper spray survived summary judgment.

## ❖ Warnings

Warnings, when possible, prior to the use of chemical weapons, are a good idea, as the purpose is to gain compliance, not the use of force as an end in itself. Courts have recognized, however, that officers often have to make split second decisions in volatile circumstances, so warnings are not always required. In [\*McCormick v. City of Fort Lauderdale\*](#), #01-16567, 333 F.3d 1234 (11th Cir. 2003), the court ruled that an officer was not required to give advance warning of his use of pepper spray in his attempt to subdue a man, armed with a walking stick, who was suspected of having already used it to inflict serious injury on a woman in a laundromat who was observed bleeding profusely from her head at the scene.

The use of warnings, however, can help play a role in avoiding liability. The case of [\*Cabaniss v. City of Riverside\*](#), #06-3546, 231 Fed. Appx. 407, 2007 U.S. App. Lexis 8271 (Unpub. 6th Cir.) illustrates this. The federal appeals court found that police officers did not violate a man's rights by using pepper spray on him in the back seat of their car, where they placed him after finding him intoxicated. The officers feared that he was suicidal, based on his behavior, and were trying to assist him. He was unsecured in the backseat of the car because he was uncooperative, and he started kicking the plexiglass separating the front and backseats, and beating his head on it.

The pepper spray was only used after it was clear that repeated orders would not cause him to stop this behavior, and after the man was given a warning about the use of the spray, and was motivated by a fear that the man might harm himself. After they cleaned the residue of the pepper spray off of his face outside the police/fire station, he attempted to stand up, despite their statements that he should not try to do so, and fell, hitting his head and suffering injuries that allegedly led to his death from a swelling on his brain. The court found that the decedent would not have suffered his fatal fall except for his own conduct in disregarding the warnings of the defendant officers, so that they could not be held liable for his death.



## ❖ Crowds and Bystanders

One of the issues that sometimes arises in the use of chemical weapons is that when used against larger groups of people, sometimes innocent people and bystanders can be impacted by the substances used. At the same time, there are occasions when it is still the best available option to try to control an unruly crowd. In [\*Moss v. United States Secret Service\*](#), #10-3615, 572 F.3d 962 (9th Cir. 2009), when President George W. Bush was dining at a restaurant during his 2004 reelection campaign, groups of demonstrators both in favor of and opposed to his re-election attempted to gather outside.

A federal appeals court ruled that, if the facts were as alleged, Secret Service agents violated the First Amendment by forcing protesters opposed to the President to move further away from the restaurant than where they permitted supporters of the President to rally. This was enforcement of a content-based restriction. The agents were not entitled to qualified immunity. The court also found that state and local police supervisors could not be held liable for the alleged use of excessive force against the anti-Bush demonstrators, including the use of pepper spray, clubs, and shoving, since there was no indication that they were personally involved.

In [\*Dalrymple v. U.S.\*](#), # 05-14375, 460 F.3d 1318 (11th Cir. 2011), the use of a gas gun against demonstrators outside the home where INS agents were executing warrants to remove the Cuban boy Elian Gonzalez was objectively reasonable when demonstrators were attempting to interfere and threw objects at the agents.

In [\*Asociacion de Periodistas de Puerto Rico v. Mueller\*](#), #07-2196, 529 F.3d 522 (1st Cir. 2008), journalists claimed that FBI agents, while executing a search warrant at a condominium building, grabbed and assaulted them, and used pepper spray and metal batons against them when they entered a gated area. The agents were using the building's fences and security structure in an attempt to restrict the flow of people into the area, and allegedly did not give them a chance to exit before using force against them.

The appeals court ruled that "mere obstinance" by a crowd did not justify the use of force when there is no showing that crowd members posed a public safety threat or that any other law enforcement considerations were at risk. The court ruled, therefore, that Fourth Amendment excessive force claims by individual journalists could proceed.

Police officers were not entitled to qualified immunity for allegedly spraying pepper spray inside a house filled with 34 people after telling several of them to "get inside" the house when they arrived. If, as the plaintiffs claimed, they were subjected to pepper spray after they were detained, without any provocation, that would violate their clearly established

constitutional rights. [\*Duran v. Sirgedas\*](#), #05-4278, 240 Fed. Appx. 104, 2007 U.S. App. Lexis 10338 (Unpub. 7th Cir.).

### ❖The Aftermath of Their Use

When chemical weapons are used on persons taken into custody or already in custody, there may be a need to provide medical attention or at least the opportunity to wash off a substance to avoid adverse long term effects.

In [\*Mantz v. Chain\*](#), #00-1032, 239 F. Supp. 2d 486 (D.N.J. 2002), for instance, there was a genuine issue of fact as to whether an officer's use of pepper spray was reasonably necessary to subdue a man being arrested for disorderly conduct. But the officer did not engage in deliberate indifference to the arrestee's serious medical needs by failing to immediately call an ambulance after the use of the spray, in the absence of any evidence that the delay caused any harm. The evidence further showed that the arrestee declined the officer's offer to give him a towel and water to flush out his eyes.

### ❖New Orleans Police Consent Decree

The consent decree between the DoJ and the NOPD provides:

G. 69. NOPD agrees to prohibit the use of possession of Oleoresin Capsicum Spray by on-duty officers, including officers working secondary employment.

See, [\*United States v. City of New Orleans\*](#), #12-1924 (E.D. La. 2013). The NOPD prefers Tasers because it's easier to track their use, and cameras provide a video of the incidents.



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## **AELE Monthly Law Journal**

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