



ISSN 1935-0007

Cite as: 2015 (1) AELE Mo. L. J. 101
Civil Liability Law Section – January 2015

Civil Liability for Use of Distraction Devices Part 1

This month

- **Introduction**
- **Use in a Home or Building Entry**
- **Use in Correctional Settings**

Next Month:

- **Use in Street Settings**
- **Damage Awards**
- **Injuries to Officers**
- **Some Suggestions**
- **Resources and References**

❖ Introduction

Distraction devices such as [flashbangs](#) have a variety of uses that can be beneficial to law enforcement and correctional personnel. When facing the possibility of an encounter with violent or difficult to control suspects, diversionary devices can enable officers to make a dynamic entry into a home or business in a manner that can put the suspects off guard or give them something to have to deal with that can divert them from directly confronting officers.

This is also the case when correctional personnel are dealing with unruly prisoners or detainees who must be brought under control or extracted from their cells in a safe and controlled manner. In a growing number of instances, such devices have also been used in the context of crowd control, such as with violent or uncooperative street demonstrations or riots.

Such devices must be properly used by adequately trained personnel, skilled in both legal aspects and practical tactical considerations surrounding their intelligent deployment. Their deployment is a use of force. Although non-lethal in most instances, improper use can result in injury to both members of the public and officers themselves. In this two-part

article, their use in home and building entry and in correctional settings will be addressed this month, focusing on civil lawsuits concerning such incidents.

In next month's article, the use of distraction devices in a street setting will be examined, together with some examples of damage awards stemming from their use, and issues concerning injuries to officers and precautions to take. The second part of this two-part article concludes with some suggestions to consider and a listing of some useful and relevant resources and references on the topic.

❖ Use in a Home or Building Entry

Distraction devices such as flashbangs can be a useful way of diverting the attention of potentially violent subjects in the course of the necessity of making a dangerous entry into a home or business where they are barricaded. A flashbang is also known as a flash grenade or a stun grenade.

It is a non-lethal explosive device used to temporarily disorient an opponent's senses. It can produce a blinding flash of light as well as an intense noise (louder than 170 decibels) while endeavoring not to cause permanent injuries. Historically, such devices were initially developed for use by the British Army in the 1960s, and were later adopted for use by law enforcement and correctional personnel.

The use of such a device is illustrated by [*Helman v. Duhaime*](#), #12-3428, 742 F.3d 760 (7th Cir. 2014), in which a man sought under a warrant engaged in a six-hour stalemate at his house with officers seeking to arrest him. He was armed with a semi-automatic handgun.

When he walked into his yard carrying water and a cup, an emergency response team activated a flashbang device to distract him and to try to prevent him from again retreating inside the house. The officers said that he turned and tried to draw his gun and they then shot him multiple times. He claimed that he did not reach for his gun until after the device went off and shots were already fired.

He later pled guilty to resisting the officers with a deadly weapon. A federal appeals court held that his excessive force claim was barred because his version of events would necessarily imply the invalidity of the conviction. Under the facts needed to support the conviction, the officers acted reasonably, and the conviction had not been set aside.

In another case, officers were confronting the need to attempt to control a suicidal individual. A federal appeals court found that the officers were not entitled to qualified immunity in a lawsuit over their shooting and killing of a man. They deployed tear gas into his apartment in an attempt to extricate him from the unit where he had isolated himself threatening to commit suicide.

After he still refused to come out, the officers used additional tear gas and flashbang grenades to enter the darkened apartment, setting fire to the exterior room before throwing the flashbang grenades into the darkened bedroom inches from his head and rendering him blind and deaf before shooting him to death.

The appeals court ruled that it could be found that the excessive use of tear gas and flashbang grenades in this manner against a “non-threatening, non-violent, non-resisting individual” violated clearly established rights.

The appeals court also commented that it was clearly established at the time that it was an unreasonable use of force to throw a flashbang device blindly into an apartment where there were accelerants, without a fire extinguisher, and where the person to be seized was not unusually dangerous, was not the subject of an arrest, and had not threatened to harm anyone but himself. Accordingly, the court denied the officers qualified immunity on their interlocutory appeal.

In a subsequent proceeding, however, [*Estate of Escobedo v. Bender*](#), #11-2426, 702 F.3d 388 (7th Cir. 2012), the appeals court upheld summary judgment for the officer who fired the fatal shot, as well as a jury verdict for the remaining defendants, followed by the grant of judgment for the defendants as a matter of law.

The court reasoned that the commanders could have been held liable for setting off a chain of events that led to a violation of the deceased’s constitutional right to be free from excessive force, but not for his death. Therefore, the estate had been properly excluded from arguing that the commanders’ decision to employ a tactical response proximately caused the death.

Negotiations with the decedent had been ongoing for four hours and the deceased was high on cocaine, wielding a powerful gun with a long range, and had a clear view of surrounding buildings. The imminent threat to others meant he did not have a clearly established right to be free from the deployment of tear gas.

That the deceased had not threatened anyone during negotiations did not mean he did not point the gun at the shooting officer when the team entered his bedroom. Officers’ discrepancies on how far the deceased’s arm was extended when he was shot did not create a genuine issue of material fact on the lethal force claim as the room was dark and filled with tear gas.

As for the use of the flashbangs, the appeals court stated that in light of the evidence at trial, there was a clearer picture of the potential threat the decedent had posed, even though he did not make any explicit verbal threats against others. The court found that he “was

unusually dangerous and thus did not have a clearly established constitutional right to be free from the use of flashbangs.”

For these reasons, the district court did not err when it granted qualified immunity to the defendant commanders regarding the use of flashbang grenades against the decedent.

In [*Boyd v. Benton County*](#), #02-35776, 374 F.3d 773 (9th Cir. 2004), the appeals court found that throwing a flashbang device “blind” into an apartment which officers believed might have one armed robbery suspect and up to eight other people sleeping there who were not involved in the robbery was an excessive use of force when it was done without a warning or the consideration of alternatives, federal appeals court rules. The officers were entitled to qualified immunity from liability, however, as the law on the subject was not clearly established at the time.

In this case, a few days after an armed robbery of a jewelry store, Oregon police officers were contacted by a confidential informant who identified two residences where he believed one of the suspects in the robbery could be found, identifying a man he claimed bragged about his involvement in the robbery.

Officers made various observations around and outside one of the apartments, and arrested two suspects who sped away following a high-speed chase that began at the residence. The officers obtained a search warrant for the other apartment, to look for the remainder of the stolen jewelry.

Because one of the armed suspects was still at large, and could be inside the second apartment, and because there could be five to eight people sleeping inside the apartment, the SWAT Team supervisor decided that a flashbang device should be used to gain entry and secure the premises. It was to be deployed against the apartment’s front wall and near the door, where the risk of someone sleeping there was minimal.

The search warrant was executed in the early morning hours, and after the officers announced their presence, one of them reached inside the door of the dark apartment and, without looking, tossed the flashbang near the front wall and few feet from the door. As it turned out, one of the residents was sleeping on the floor, near the front wall where the flashbang came to rest. She suffered burns on her forearm when the device ignited.

After the officers secured the premises, she was treated for her injury and transported to a hospital. She subsequently filed a federal civil rights lawsuit claiming excessive use of force.

What was excessive, the appeals court stated, was the action of throwing an explosive, incendiary weapon with the potential to cause injury “blind” into a room occupied by as many as eight persons who were unconnected to the robbery, many of whom were likely to

be asleep, and doing so without sounding a warning that the device would be used. The officers also failed to consider “alternatives such as a controlled evacuation followed by a search.”

While there are “likely circumstances” in which a risk to officers’ safety would make the use of the device appropriate, the court stated, it

“cannot be a reasonable use of force under the Fourth Amendment to throw it ‘blind’ into a room occupied by innocent bystanders absent a strong governmental interest, careful consideration of alternatives, and appropriate measures to reduce the risk of injury.”

The appeals court also found that every officer involved in the search operation was an “integral participant” in the event, as they knew of the planned use of the flashbang device and did not object to it. At the same time, the court held that the individual defendants were entitled to qualified immunity from liability because a reasonable officer would not have known, in October of 1997, that this use of the device was unconstitutional.

The court also rejected the claim that the city had made a conscious choice not to train its employees adequately in the use of flashbang devices because it failed to have a written policy on their use, as the officers involved in the search were in fact trained in the use of the device.

In another case, police officers, including SWAT team members, were entitled to qualified immunity for surrounding the home of a man who had fired shots into the air and ground nearby, entering the home forcibly without a warrant, and using pepper gas and a flashbang in an attempt to flush him out.

Assuming that the use of a second flashbang, which burned down the house, was excessive, it still did not violate any “clearly established right.” Factual disputes about whether the suspect was still armed and was threatening officers at the time they shot and killed him, however, barred qualified immunity for the officers on a claim that the use of deadly force was excessive. [*Estate of Bing v. City of Whitehall*](#), #05-3889, 456 F.3d 555 (6th Cir. 2006).

Flashbangs as well as other tactics used in making a dynamic entry into a building may wind up being destructive to property, but this can be justified if made necessary by the dangerousness of the suspect and the urgency of the need to apprehend him.

In [*Cook v. Gibbons*](#), #07-1754, 308 Fed. Appx. 24, 2009 U.S. App. Lexis 1095 (Unpub. 8th Cir.), officers who had a valid warrant authorizing no-knock entry reasonably believed that the occupant of a residence was armed and dangerous, since he had a history of having a “significant” number of guns, storing some of them in the walls within trap doors, owning a lion, and had not been seen leaving the residence before the entry.

The officers acted reasonably, under the circumstances, in the amount of force used in the process of entry, which included use of tear gas and flash grenades, breaking two windows, and ramming a side door and damaging its latches. Other destructive acts once inside, including tearing through the ceiling to get to the attic, and making a hole in the wall, were justified to make sure that no persons or weapons were concealed.

On remand, the complaint was dismissed with prejudice as to all of the defendants. [*Cook v. Gibbons*](#), #4:04-cv-000073, 2009 U.S. Dist. Lexis 45066 (E.D. Ark.).

A federal appeals court had little difficulty upholding as reasonable the use of a flashbang grenade and the subsequent shooting of a man who barricaded himself in a room armed with a gun and shot at officers after they arrived. [*Krause v. Redford Police Department*](#), #13-2498, 765 F.3d 675 (6th Cir. 2014).

The court found that the use of a flashbang was reasonable since the officers were faced with a troubled young man resisting arrest on drug charges, threatening to shoot them, expressing his willingness to die, and refusing all requests to surrender peacefully. The officers sought to minimize the risk of injury to themselves and others in entering the room. Because they complied with the Fourth Amendment in using the flashbang, it followed that they did not violate any clearly established law in doing so.

Waiting until the man appeared to be asleep was one part of the plan. Using a flashbang was the other. As the officers reasonably saw it, both features of the plan diminished the risk of injury to themselves and others. Yes, the light and noise would wake him. But the light and noise surely would stun and confuse him, the court reasoned, giving the officers a chance to subdue him before he could act. And of course, the flashbang dealt with the risk that he only appeared to be sleeping but was not.

“All of these increases in officer safety came with little downside, including the kinds of downsides that have led other courts to be skeptical of the use of a flashbang or to find it unreasonable. The suspect was isolated in one room, precluding the risk that the flashbang could harm others, including children, the elderly or others in the wrong place at the wrong time. The officers had a clear view into the bedroom and closet, allowing them to ignite the flashbang away from the closet and not on [the decedent]. Nothing indicated that [the decedent] had other health problems that could be triggered by the device. And nothing indicated that the condition of the room could create other problems if a flashbang were ignited.”

Similarly, police did not use excessive force in deploying a “flashbang” device or in handcuffing the plaintiffs for 2½ hours while searching a home. [*Mitchell v. Unified Government of Wyandotte County*](#), #00-2116, 2000 U.S. Dist. Lexis 19195 (D. Kan. 2000).

The entry team deployed the noise flash diversionary device inside the residence to permit the team's entry and divert the attention of subjects within the residence, and this was reasonable when drugs and weapons were being searched for under a warrant.

❖ Use in Correctional Settings

Flashbangs have sometimes been used in a correctional setting in the process of cell extraction. In [*Edwards v. Byrd*](#), #13-1560, 750 F.3d 728 (8th Cir. 2014), during a disturbance by other detainees, detainees in one cell pod placed a blanket under their door to prevent water coming from a stopped up toilet in the area of the disturbance from entering their cell.

They were allegedly lying submissively on the ground. Entering, officers allegedly used excessive force against them, including throwing a flashbang grenade into the pod, which detonated near a detainee's face, burning him and causing permanent hearing damage. Other detainees in the pod were allegedly kicked in the face or ribs, shot with beanbag guns, or handcuffed and dragged to where they had to lay in the standing water.

At no time, according to the lawsuit, did these detainees resist or act aggressively. The sheriff was entitled to qualified immunity, the appeals court ruled, as he was not at the detention center, used no excessive force himself, and had no opportunity to intervene to prevent others from using excessive force.

Officers who allegedly used excessive force, however, were not entitled to qualified immunity, nor were other officers who were present but allegedly did not intervene to protect the plaintiffs.

AELE Monthly Law Journal

Bernard J. Farber
Civil Liability Law Editor
P.O. Box 75401
Chicago, IL 60675-5401 USA
E-mail: bernfarber@aele.org
Tel. 1-800-763-2802

© 2015, by the AELE Law Enforcement Legal Center

**Readers may download, store, print, copy or share this article,
but it may not be republished for commercial purposes. Other
web sites are welcome to link to this article.**

- The purpose of this publication is to provide short articles to acquaint the reader with selected case law on a topic. Articles are typically six to ten pages long. Because of the brevity, the discussion cannot cover every aspect of a subject.
 - The law sometimes differs between federal circuits, between states, and sometimes between appellate districts in the same state. AELE Law Journal articles should not be considered as “legal advice.” Lawyers often disagree as to the meaning of a case or its application to a set of facts.
-

[AELE Home Page](#) --- [Publications Menu](#) --- [Seminar Information](#)

This article appears in the [IACP Net](#) database.