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### **Weapon Confusion and Civil Liability**

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#### ❖ **Introduction**

[Electronic Control Weapons](#) (ECWs) are an important and beneficial development in the use of force by law enforcement. Providing officers with a potent and effective alternative in some situations to the use of deadly force, they enable an officer to temporarily incapacitate a suspect, including from a distance (by using a Taser in the dart mode) so that they can be subdued and restrained. As with any use of force, officers are frequently required to make a split-second determination that force is needed, as well as what level of force to employ.

Overall, it seems clear that the availability of ECWs, which are becoming increasingly widespread in today's well equipped police departments, have helped save many lives and prevent many serious injuries, among officers themselves, suspects, and members of the general public. In a few cases, including some which have been highly publicized, however, officers have, during those few seconds they had to react to a potentially dangerous situation, mistakenly drawn their handgun and fired it, although intending to deploy their Taser.

Instances of weapon confusion, although relatively rare, have led to tragic consequences, including serious injuries and at least two deaths. In some of these cases, major civil lawsuits for damages have resulted against municipalities, officers, or both. In at least one instance, an officer faced criminal prosecution for the incident.

This article briefly examines four lawsuits that addressed civil liability issues arising from an officer's weapon confusion, in two of which the suspect died. It also includes a list of nine known instances in which officers drew and fired handguns while intending to fire their Tasers. The article concludes by making some suggestions. It is followed by a listing of some relevant resources and references.

### ❖ **Drawing and firing the wrong weapon**

In [\*Torres v. City of Madera\*](#), #09-16573, 648 F.3d 1119, 2011 U.S. App. Lexis 17459 (9th Cir.), cert. denied, [\*Noriega v. Torres\*](#), #11-567, 132 S. Ct. 1032 (2012), the court addressed a case in which officers arrested a man for the relatively minor offense of playing music too loudly. Handcuffed and placed in the back of a squad car, he fell asleep, only to wake up when the woman arrested with him was removed from the vehicle and replaced by another arrestee.

He reacted by yelling and kicking at the rear door of the vehicle from the inside. A female officer standing a few feet behind the patrol car heard the yelling, and remarked to other officers that a Taser should be used on the arrestee to prevent him from injuring himself by kicking through the glass window

Since she was the closest officer to the car, she decided to approach, and opened the rear driver's side door with her left hand. She subsequently stated that she intended to pull out her M26 Taser, located in a holster on her right side, which was just below the holster that contained her Glock service pistol. She accidentally pulled her pistol instead of the Taser, and shot the arrestee once in the chest. He subsequently died from the gunshot wound.

A federal appeals court ruled that she was not entitled to qualified immunity in a lawsuit over his death. The court noted that the officer had had prior difficulty in drawing the correct weapon. A "jury might question," stated the court, "the reasonableness of choosing to send 1,200 volts of electricity through a person when the alleged concern is for that person's safety." A jury could also possibly find the officer's mistake reasonable, but the trial court should not have reached that conclusion on summary judgment.

In that same case, an earlier ruling by the three-judge panel, [\*Torres v. TASER International\*](#), #05-16468, 277 Fed. Appx. 684, 2008 U.S. App. Lexis 10169 (Unpub. 9th Cir.), addressed a product liability claim—arguing that the manufacturer of the Taser should be held liable on the basis of a design defect because of the handgun shaped design, which the plaintiff argued helped promote mistaken use of the wrong weapon.

The court noted that the Taser and holster were not “used” when the injury occurred, and such use was necessary for a design defect claim. The court also found that the manufacturer exercised reasonable care in choosing a gun-shaped design for the Taser, when the only evidence presented on the decision-making process indicated that a handgun-shape was better for accuracy and feedback from training officers indicated that they preferred a handgun-shaped design. The court also rejected failure to warn, negligent warning, and training claims.

The suspect shot in [\*Henry v. Purnell\*](#), #08-7433, 652 F.3d 524, 2011 U.S. App. Lexis 14391 (4th Cir. *en banc*), cert. denied, [\*Purnell v. Henry\*](#), #11-458, 132 S. Ct. 781 (2011), was also only suspected of a misdemeanor. He was wanted under an eleven-day-old warrant for failing to pay court ordered child support. An officer stopped the suspect’s vehicle and got him to exit it. As the officer went to the rear of the truck with the suspect, he started to run back towards the front, which was in the direction of the trailer where he lived.

The officer ran after him. He had two weapons holstered on his right leg—a Glock .40 caliber handgun on his hip and a Taser M26 on his thigh. The Taser was just underneath the pistol, approximately twelve inches apart. He unholstered his Glock and held it in the horizontal firing position, allegedly for three to five seconds, and did not issue any verbal warning messages, commands, or instructions to halt. He then fired a single shot, striking the suspect in the elbow.

The parties in the lawsuit stipulated that the officer believed that he was shooting his Taser rather than his Glock, but was mistaken. The court rejected the officer’s argument that the shooting should, therefore, be regarded as simply an “honest mistake.” The court commented that it was not the honesty of the officer’s intentions that determined the constitutionality of his conduct, but rather it was the “objective reasonableness of his actions,” whether mistaken or not.

The Ninth Circuit ruled, in a 9-to-3 *en banc* decision, that the officer was not entitled to summary judgment. Even though the officer claimed that he intended to use his Taser rather than his gun, a jury could view the shooting as objectively unreasonable. The suspect posed no threat of death or serious bodily injury to anyone. There was nothing in his actions or history to suggest a propensity for violence, and his identity and address were known. There were no indications that he was armed or dangerous.

As for the officer’s alleged confusion between his gun and his Taser, the appeals court noted that the Taser was holstered approximately a foot lower than his gun was, had no

thumb safety, unlike his gun, and only weighed half as much as his gun. Because of these facts, the court reasoned, the officer should have realized he was holding and shooting his gun.

In [\*Johnson v. Bay Area Rapid Transit\*](#), #CV-09-00901, 790 F. Supp. 2d 1034 (N.D. Cal. 2011), a police officer shot and killed a man being detained at a transit station, mistakenly using his gun rather than his X26 Taser. The officer stated that he had intended to use a Taser against one of a group of young men being detained on the transit station platform on suspicion of involvement in a fight, but that he mistakenly drew his Sig Sauer P22DAK handgun and fired a single shot into his back, killing him.

There was a genuine issue of fact as to whether the individual, Oscar Grant, was being cooperative or resisting, and therefore, whether any use of force was justified. The officer was therefore not entitled to qualified immunity on his mistaken use of his gun, nor on his action of handcuffing Grant after he was mortally wounded and posed no further threat to the officers. Two settlements, totaling \$2.8 million, were subsequently reached with the mother of Grant's daughter, with \$1.3 million to be paid to the mother and \$1.5 million to be paid to the daughter in a series of payments.

The officer who fired the shot that killed Grant subsequently was convicted of involuntary manslaughter, but was acquitted of second degree murder and voluntary manslaughter. He was sentenced to two years confinement.

An appeal was taken, and a three-judge panel unanimously confirmed the conviction. [\*People v. Mehserle\*](#), #A130654, 2012 Cal. App. Lexis 674, 2012 WL 2053774. The panel wrote:

“We find sufficient evidence that his conduct of mistakenly drawing and firing his handgun instead of his taser constitutes criminal negligence under the second prong of manslaughter liability: that defendant committed a lawful act in an unlawful manner, or without due caution and circumspection — i.e., he believed he was tasing an arrestee, but mistakenly, and criminally negligently, drew and fired his handgun with lethal results. \* \* \*

“The jury also heard evidence that in the past 10 or 11 years, several hundred thousand, if not a million, tasers had been deployed by 13,000 police agencies across the United States. In all that time, with all those deployments, the jury was told there were only six documented instances of taser/handgun confusion in the United States and Canada. The jury could reasonably have concluded

‘inattentional blindness’ is uncommon and is not something suffered by a reasonably prudent person.

“Finally, the jury could reasonably have concluded the situation on the platform was not an extreme high-stress situation at the time of the shooting itself. There were seven officers on the platform, the detainees were under control, and the crowd from the train was being held back. \* \* \*

“This court is not blind to the stress and danger of police service; but neither can we ignore established California law of involuntary manslaughter. That law established the definition of criminal negligence and makes no exceptions for any particular occupation. Such an exception would, we presume, be a matter for the Legislature and not for the courts.”

Johannes Mehserle had already served his sentence before the appeal was resolved.

In [\*Yount v. City of Sacramento\*](#), # S139762, 43 Cal. 4th 885, 183 P.3d 471, 76 Cal. Rptr. 3d 787, 2008 Cal. Lexis 5426, there was evidence that a DUI arrestee being transported in handcuffs and restraints to jail was kicking, spitting, and refusing to cooperate with officers in the back of a police vehicle, and threatening the officers. He called one officer a racial epithet and the other a “whore,” expressing his hope that they “would both die.” He kicked at an officer, kicked out a patrol car window, fought to stay in the vehicle, and continued struggling when removed, falling on top of an officer and kicking at him. Even with restraints on his wrists and ankles, he continued to fight, trying to bite and spit at the officers. Because of this resistance, the court noted, the officer was entitled to use reasonable force.

The officer intended to draw and fire his M26 Taser, but mistakenly pulled out and fired his gun instead, hitting the back of his upper thigh. The court found that the plaintiff’s claim that the officer was not entitled to use any force at all was barred. Additionally, the fact that the arrestee was convicted for resisting the officers was inconsistent with his claim that he had offered no resistance to them, so that they were unjustified in any use of force. The plaintiff could, however, pursue his claims for battery arising out of the accidental use of deadly force.

In another case, officers encountering an intoxicated man sought to subdue him and take him into custody for safety reasons. As one officer struggled with him, a second officer sought to assist him. He said he believed that he had his M26 Taser in his right hand. He fired one bullet from his Glock Model 22 .40 Caliber SW firearm into the suspect’s back,

injuring him, and asserted that he had mistaken the Glock for the Taser.

In a lawsuit for excessive use of force against the officer and inadequate training against the city which employed him, a federal trial court granted summary judgment for the city, but denied it to the officer. The court found no evidence of “recurring situations that alerted or should have alerted the city to any obvious need to further train its officers.” It rejected the plaintiff’s argument, supported by expert witness testimony, that the city’s failure to train officers to carry their Taser on the weak side of their body was sufficient, even based on a single incident, to show deliberate indifference to an “obvious” training need.

The officer was not entitled to qualified immunity, the court reasoned, since there was a disputed factual issue as to whether he intended to seize the plaintiff through the use of deadly force. *Atak v. Siem*, #04-cv-02720, 2005 U.S. Dist. Lexis 37185 (D. Minn.). Subsequently, the claim against the officer was settled without trial for \$900,000.

#### ❖ **List of Taser confusion instances\***

The following is a description of nine cases involving the mistaken use of a handgun by officers who intended to use their Taser, occurring between 2001 and 2009.

1. March 2001. A Sacramento, CA police officer intended to fire an M26 Taser at a resisting handcuffed suspect in the back seat of a police car. Instead, he drew and fired his handgun, wounding the suspect. (Strong-side leg holster, strong-hand draw).
2. September 2002. A Rochester, MN police officer intended to fire an M26 Taser at a resisting suspect. Instead, he drew and fired his handgun, wounding the suspect. (Strong-side cargo pocket, strong-hand draw).
3. October 2002. A Madera, CA police officer intended to fire an M26 Taser at a resisting handcuffed suspect in the back seat who was attempting to kick out the window of the police car. Instead, she drew and fired her handgun, killing the suspect. (Strong-side leg holster, strong-hand draw).
4. October 2003. A Somerset County, MD deputy sheriff intended to fire an M26 Taser at a fleeing warrant suspect. Instead, he drew and fired his handgun, wounding the suspect. (Strong-side leg holster, strong-hand draw).

5. May 2004. A Mesa, AZ police officer intended to fire an M26 Taser at a resisting suspect. Instead, he drew and fired his handgun, wounding the suspect. (Strong-hand cross-draw).
6. September 2005. A Victoria, BC constable intended to fire an X26 Taser at a resisting suspect. Instead, he drew and fired his handgun, wounding the suspect. (Strong-side cargo pocket, strong-hand draw).
7. June 2006. A Kitsap County, WA deputy sheriff intended to fire an M26 Taser at a suspect. Instead, she drew and fired her handgun, wounding the suspect. (Strong-side holster, strong-hand draw).
8. April 2008. A Nicholasville, KY police officer intended to fire an M26 Taser at a suspect. Instead, he drew and fired his handgun, wounding the suspect. (Strong-hand cross-draw).
9. January 2009. A BART police officer in Oakland, CA intended to fire an X26 Taser at a resisting suspect who was prone and refused to give up his arm for handcuffing. Instead, he drew and fired his handgun, killing the suspect. (Strong-hand cross-draw).

\* Compiled by Capt. [Greg Meyer](#), LAPD Police Academy (Ret.).

### ❖ Some Suggestions

There are a number of things worth keeping in mind, and some suggestions to consider in addressing the problem of officers mistakenly drawing and firing the wrong weapon.

- It is important to keep the issue in perspective. Only a few officers have made this mistake, out of many instances in which officers properly accessed and used Electronic Control Weapons. While the consequences of such mistakes were tragic, and every effort possible should be made to limit future occurrences, these few cases are hardly grounds for limiting the deployment of ECWs.
- [Greg Meyer](#), in an [article](#) in *Police One*, recommended holstering ECWs on the officer's weak hand side, to help minimize the chances of confusion.
- The legal test for constitutional use of force, whether deadly or not, is objective reasonableness under the known circumstances at the time. This means that the most important determination to begin with is whether the use of force is justified or necessary at all. The few cases that have addressed this issue in the context of weapon confusion concluded that this is the test here also. If no force at all was

justified, or very little force, because the suspect was not posing a threat to anyone, was not actively resisting, was not armed, and was not accused of a serious offense, courts may find that the officer's statement that he or she intended to use an ECW but mistakenly used a firearm cannot bar a claim for damages.

- Officers who are not subject to [federal civil rights liability](#) for accidental shootings may still face state law claims for battery or negligence.
- Agencies need to be concerned about the possibility of liability for inadequate supervision or training. In the [Madera case](#), a federal appeals court pointed at the fact that the officer allegedly had several other experiences (not resulting in a shooting) in which she had failed to correctly distinguish between her gun and ECW. Training exercises should teach officers to distinguish between the feel and weight of their handgun as opposed to their ECW. A litigation consultant retained in the BART case informed AELE that officers may draw a Taser as few as three times during their entire recruit training, but are required to draw their firearm hundreds of times.

#### ❖ Resources

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

- [BART Police shooting of Oscar Grant](#). Wikipedia article.
- [Court documents](#) in *People v. Mehserle*, #547353-7 (Alameda Cty., Cal.), conviction subsequently affirmed, *People v. Mehserle*, #A130654, 2012 Cal. App. Lexis 674, 2012 WL 2053774.
- [Electronic Control Weapons](#). AELE Case summaries.
- AELE – [Electronic Control Weapons Articles and Resources](#).
- [Petition for Writ of Certiorari](#) in the U.S. Supreme Court for *Torres v. City of Madera*, #09-16573, 648 F.3d 1119, 2011 U.S. App. Lexis 17459 (9th Cir.), cert. denied, *Noriega v. Torres*, 132 S. Ct. 1032 (2012).
- [Weapon Confusion](#). Case summaries from AELE's Law Enforcement Liability Reporter.

#### ❖ Prior Relevant Monthly Law Journal Articles

- [Civil Liability for Use of Deadly Force-- Part One--General Principles and Objective Reasonableness](#), 2007 (11) AELE Mo. L.J. 101.

- [Civil Liability for Use of Deadly Force-- Part Two. Qualified Immunity and Inadequate Training](#), 2007 (12) AELE Mo. L.J. 101.
- [Liability for Use of Deadly Force-- Part Three. Supervisory Liability and Negligent/Accidental Acts](#), 2008 (1) AELE Mo. L.J. 101.
- [Excessive Force Claims Concerning Pointing Firearms--Part 1](#), 2010 (10) AELE Mo. L. J. 101
- [Excessive Force Claims Concerning Pointing Firearms--Part 2](#), 2010 (11) AELE Mo. L. J. 101
- [Civil Liability for Use of Tasers, stunguns, and other electronic control devices-- Part I: 4th Amendment claims for excessive force](#), 2007 (3) AELE Mo. L.J. 101.
- [Civil Liability for Use of Tasers, stunguns, and other electronic control devices-- Part II: Use against juveniles, and inadequate training claims](#), 2007 (4) AELE Mo. L.J. 101.
- [Civil Liability for Use of Tasers, stunguns, and other electronic control devices-- Part III: Use Against Detainees and Disabled or Disturbed Persons](#), 2007 (5) AELE Mo. L.J. 101.  
[Electronic Control Devices: Liability and Training Aspects](#), by Edmund Zigmund, 2007 (5) AELE Mo. L.J. 501.
- [Taser<sup>®</sup> Electronic Control Devices \(ECDs\): An “Intermediate” Use of Force?](#), 2010 (2) AELE Mo. L. J. 101.
- [Second Circuit Panel Allows Stun Mode to Gain Compliance of Chained Protestors](#), 2011 (5) AELE Mo. L. J. 501.
- [Ninth Circuit finds that the use of a TASER<sup>®</sup> constituted excessive force: Two cases involved noncompliant subjects](#), 2011 (12) AELE Mo. L. J. 101.

#### ❖ References and images

- [The BART Shooting 1-1-09](#). Visual presentation by Ret. Capt. Greg Meyer, LAPD (2012).
- [Unintentional Levels of Force in § 1983 Excessive Force Claims](#), by Nathan R. Pittman, 53 Wm. & Mary L. Rev. 2107 (2012).
- [“Qualified Immunity, Mistaken Shootings, and the Persistent Importance of Perspective: Henry v. Purnell, 652 F.3<sup>rd</sup> 524 \(4<sup>th</sup> Cir. 2011\)\(en banc\)”](#), by Stephen Wills Murphy, 63 South Carolina Law Review 1 (2012).
- [“When an Officer Mistakes Firearm for Taser: 9<sup>th</sup> Circuit Denies Officer Qualified Immunity in Torres v. City of Madera”](#), by Brian S. Batterton, Legal & Liability Risk Management Institute (September 2011).

- [“BART Verdict: Consider a Weak-Hand TASER Draw,”](#) Police One (Jul. 09, 2010) by Greg Meyer.
- [“The BART shooting tragedy: Lessons to be learned,”](#) Police One (Jul. 12, 2010) by Greg Meyer.
- Force Science News #154: [Force Science explains “slips-and-capture errors” and other psychological phenomena that drove the fateful BART shooting.](#) (Jul. 2010)
- [BART shooting raises issue of Taser confusion,](#) Police One, by Dave Smith (Jan. 06, 2009).
- [“Chief’s Counsel: Mistaken Use of Firearms instead of Electronic Control Weapon,”](#) by Carl Milazzo, Police Chief (Dec. 2008).

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