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## **Pointing and Threatening to Use Electronic Control Weapons**

- **Introduction**
- **Pointing: A Use of Force?**
- **Threats, Pointing, and Assault**
- **Suggestions to Consider**
- **References and Resources**

### **❖ Introduction**

Three previous articles in this journal have focused on the issue of the drawing and pointing of firearms by law enforcement personnel in the context of civil liability. See [Excessive Force Claims Concerning Pointing Firearms--Part 1](#), 2010 (10) AELE Mo. L. J. 101 and [Excessive Force Claims Concerning Pointing Firearms--Part 2](#), 2010 (11) AELE Mo. L. J. 101 and [Drawing and Pointing Weapons During a Terry Investigative Stop](#), 2013 (7) AELE Mo. L. J. 101. A related, but slightly different topic is the pointing of and threatening to use Electronic Control Weapons (ECWs) such as Tasers.

This article discusses the small but growing number of cases in which courts have directly dealt with this topic. It examines whether the mere pointing of an ECW may be considered a use of force, as well as state law assault and battery issues arising from pointing and/or threatening to use an ECW. It closes with a discussion of some suggestions to consider along with relevant references and resources.

“Pointing” an ECW consists of either (a) intentionally pointing the device at a person, (b) sparking the device to warn or deter a person, and/or (c) illuminating a person with the device’s laser beam.

## ❖ Pointing: A Use of Force?

A major reason for equipping officers with Electronic Control Weapons is to minimize the need for the actual use of force and to provide an alternative to the use of deadly force, while still giving officers the ability to inflict force from a distance, as with the use of a Taser in the dart mode. As the goal is to gain needed compliance with officers' legitimate orders and requests, facilitate effective investigations, and deter attacks on officers, the less an ECW is actually fired the better.

At the same time, if an ECW is not fairly readily accessible and at hand, its desired deterrent effect is diminished, and the greater the possibility that, in rapidly escalating encounters, yet greater amounts of force will need to be deployed for self-defense and defense of others.

As ECWs become more ubiquitous, and the number of encounters during which they are drawn, pointed, or their use is threatened grows, there will be more lawsuits by individuals objecting to their use even when they are not actually fired. In determining whether such justifications are warranted, and whether the drawing, pointing of, or threat to use an ECW constitutes a use of force (and if so, a reasonable one) courts will generally be guided by the totality of the circumstances, and by the general objective reasonableness standard applied to all force issues under the Fourth Amendment.

This is illustrated by [\*Chatman v. Buller\*](#), #12-CV-182, 2013 U.S. Dist. Lexis 22901 (N.D. Okla.), in which an officer observed a pedestrian walking on a road in alleged violation of a city ordinance. When the man ignored orders to stop walking, the officer exited his vehicle and drew his Taser, threatening to use it if the man did not get down on his knees, which he did. The officer handcuffed him, and then allegedly continued to strike him after doing so.

The court found that the officer was not entitled to summary judgment, in light of the officer's "very aggressive tactics" during the encounter over the "relatively minor offense" the arrestee was accused of. The issue of whether the officer's actions were reasonable or unreasonable, including the threat to use the Taser, was a factual one for the jury to decide, the court stated, not an issue of law.

In instances where it is exceedingly clear that an officer had little alternative but to try to do something to move an encounter along in the face of either active resistance or repeated noncompliance, courts will be more prone to summarily find that pointing and threatening to use a Taser or other ECW was reasonable and necessary. In [\*Clark v. Rusk Police Dep't\*](#), #6:07cv340, 2008 U.S. Dist. Lexis 69776 (E.D. Tex.), the court found that it was not

unreasonable for an officer to point a Taser at and threaten to use it on a motorist who was refusing to exit his vehicle during a traffic stop despite being ordered to do so at least 21 times. A clear warning was given.

The Taser was not actually used, although an officer did, under the circumstances, break a car window to get the Taser within range of the motorist to use it if necessary, given the motorist's persistent and stubborn refusal to cooperate. The motorist then exited his vehicle. A video of the entire incident made it clear that the officer's actions were eminently necessary and reasonable.

In [\*Policky v. City of Seward\*](#), # 4:05 CV 3212, 433 F.Supp.2d 1013 (D. Neb. 2006), the court found that an officer's drawing and possible pointing of a Taser at a man possibly experiencing a diabetic reaction and believed to be not acting rationally was not a seizure and the officer and municipality are entitled to a summary judgment on the issue of excessive force.

The officer drew the Taser when the man had become combative and at a point when he believed that he might have had some object in his hands, which could have been a weapon. When it became clear to the officer that there was nothing in the man's hands and the situation started to get more under control, the Taser was put back into the holster.

The officer denied ever actually pointing the Taser at the man, but that was disputed. But the court found that, under these circumstances, even if it had been pointed, it was hardly an excessive use of force when there was not even any indication that he intended or attempted to fire it.

Some detainees or arrestees will falsely claim that a Taser has actually been fired at them when all an officer did was threaten to use it, drawing and pointing it to gain compliance. In [\*Garcia v. Contreras\*](#), #C-07-359, 2008 U.S. Dist. Lexis 83438 (S.D. Tex.), for instance, a husband and wife sued claiming that police officers illegally searched their home and used excessive force. The wife claimed that she had been Tasered in the dart mode, causing her to fall. Officers denied discharging a Taser, but one officer did admittedly unholster and point his Taser.

A subsequent download confirmed that it had not been discharged. The officers were entitled to a Summary Judgment because there was no proof that force had been used. And, in fact, when an officer pointed a Taser at the husband, a second officer, advised that the husband had a heart condition, even placed his own hand in front of the Taser to ensure that it wasn't used.

[\*State v. Williams\*](#), #A06A1514, 635 S.E.2d 807 (Ga. App. 2006) was a criminal rather than civil case. In it, a man was coerced into granting consent to emptying his pockets to search

for drugs during an investigative stop by an officer's action of pointing a stun gun at him. The consent was therefore invalid, the court found, and the marijuana found was suppressed. While the defendant's flight when the officers approached gave rise to a reasonable suspicion justifying an investigative stop, the fact that the officers admitted that the reason they asked the defendant to empty his pockets was to search for drugs rather than find out if he had weapons, meant that they exceeded the permissible stop of a permitted search under the circumstances.

### ❖ **Threats, Pointing, and Assault**

The cases discussed above involve issues of federal constitutional law. But it should not be forgotten that the state laws concerning assault and battery may also apply to officers' actions in some circumstances when pointing a weapon and threatening its possible use are arguably not justified and privileged by the circumstances the officers reasonably believes that they are confronting.

Battery requires the actual use of force, and a harmful or offensive touching of the body or something closely connected with it (such as the person's clothing, eyeglasses, purse, cane, wheelchair, etc.). Assault, on the other hand, is a civil cause of action for damages under state law in which the actual use of force is not required, rather it involves actions creating the imminent apprehension of a harmful or offensive touching, i.e., the fear that it will occur, even if it does not.

A case illustrating some of these principles concerned a detainee who became involved in a scuffle with officers while he was in the process of being booked into a county detention facility. A sergeant displayed her Taser and told the detainee that she would use it if he did not cease his resistance. After she shined the Taser's aiming light in his eye, he ceased his resistance.

The detainee sued, claiming that aiming the laser in his eye amounted to a battery and that doing so permanently impaired his left field of vision. A jury found that the use of the Taser was not an assault. The appeals court found that this did not preclude the possibility that pointing the Taser's aiming laser was a battery.

Someone can commit a battery without committing an assault because it is possible to intentionally cause a harmful or offensive touching without first putting the victim in fear or apprehension of such contact. Additionally, the county's argument that the battery claim was barred assumed that the jury decided that the sergeant lacked the intent to assault the detainee. "In fact, the verdict form did not require findings on each element of assault so

we cannot be sure which element or elements of the claim were not shown to the jury's satisfaction.”

The trial court ruled on whether the sergeant intended to use the Taser on the detainee, but failed to rule on the issue of whether shining the laser in the detainee's eye constituted a battery, so the appeals court ordered further proceedings on that theory of liability. [Evans v. Multnomah County](#), #10-35215, 2012 U.S. App. Lexis 17623, 492 Fed. Appx. 756 (Unpub. 9th Cir.). In a subsequent decision, [Evans v. Multnomah County](#), #3:07-CV-01532, 2013 U.S. Dist. Lexis 55403 (D. Ore.), the trial court granted a motion for summary judgment by the defendant county on its argument that shining the light from the Taser in the Plaintiff's eye was not a battery. A battery requires an intent to cause harm, and there was no allegation that the officer who did this acted with the intent to cause personal injury.

In a Canadian case, a Toronto police officer pleaded guilty to threatening bodily harm. The officer was recorded by his vehicle's onboard camera pressing a Taser against a handcuffed suspect's neck and also threatening to Taser the groin of a second handcuffed suspect. The Taser was not actually discharged and neither suspect was injured. The officer's lawyers claimed that, at the time, he suffered from a diabetes-related hypoglycemic reaction.

The judge imposed a sentence of nine months of probation, a \$500 victim surcharge fee and 50 hours of community service. Later, the officer was demoted from the rank of sergeant for a year. [R. v. Christopher Hominuk](#) (2011). View [photo](#) of the incident.

### ❖ **Suggestions to Consider**

Given the relative newness of the widespread deployment of Tasers and other ECWs, understandably policy development has largely focused on when their actual use is justified, and on various cautions on using them on particularly susceptible types of people or in particularly dangerous circumstances or manners. A number of the earlier articles on Tasers and other ECWs in this publication have discussed such issues at some length and are listed at the end of this article.

It is suggested that the question of when and under what circumstances officers should be unholstering, pointing, or threatening to use ECWs can also be a fruitful area for more detailed policy discussion, development, and officer training and education. The caselaw on the subject is still relatively limited, but there are a few things to consider.

1. Officers approaching an encounter with stopped motorists, criminal suspects, and persons to be subjected to investigative detention can legitimately unholster an ECW when they believe that it is necessary for their own protection or the

protection of others, particularly when there is a reasonable fear that the persons might be armed. Waiting to unholster an ECW until it is clearly necessary to fire it could lead to tragic results.

2. The more clear it is that the persons encountered are noncompliant with legitimate orders and requests, the more certain that it is the pointing an ECW and threatening to use it after giving a warning is reasonable.
3. Pointing an ECW at persons who are complying with orders, and against whom there appears to be no real need to use force, or threatening to fire it when doing so would not be justified under the circumstances may constitute an assault under state law, and also unnecessarily escalate encounters to a point where the use of force becomes involved.
4. The point of having ECWs is to gain compliance and cooperation. ECWs are not toys and inappropriate brandishing or horseplay should always be avoided.
5. TASER International says, in its literature, that you should always assume that a Taser is loaded and not point it at “anything you do not intend to hit.”
6. Lasers attached to ECWs should not be pointed at the eyes, and no one should ever stare into the beam. ECWs should not be left where children may point the laser light at another person. This type of "play" can be very harmful.
7. Officers should be required to document instances where an ECW is sparked or the laser beam is directed at a person, even if the darts were not deployed.
8. To avoid weapon confusion during the dynamics of a confrontation, management should consider adopting a requirement that an ECW be holstered on the opposite side from an officer's firearm.

In an interesting recent use of force study covering a five year period (2008-2012) by one police department, during the timeline of the report, Tasers were pointed at a subject 23 times. Officers gained voluntary compliance from the resisting subjects in 16 instances merely by pointing their Tasers. In the remaining 7 instances where the Taser was actually deployed, it was effective 6 times. This is comparable to data released by TASER International, reporting a 94.5% effectiveness, with ideal probe deployment from the X-26 Taser. This would indicate that when properly used by trained officers, ECWs are a highly effective tool for law enforcement purposes. [Mason Police Department Use of Force Five Year Study](#) (Mason, Michigan, Jan. 18, 2013).

#### ❖ Resources

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

- [Electronic Control Weapons](#). AELE Case Summaries. [search for keyword pointing].
- [Pointing Electronic Control Weapons](#). AELE Case Summaries.
- AELE Seminar on [Legal, Psychological and Biomechanical Aspects of Officer-Involved Lethal and Less Lethal Force](#)

#### ❖ **Prior Relevant Monthly Law Journal Articles**

- [Drawing and Pointing Weapons During a Terry Investigative Stop](#), 2013 (7) 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® 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® constituted excessive force: Two cases involved noncompliant subjects](#), 2011 (12) AELE Mo. L. J. 101
- [Weapon Confusion and Civil Liability](#), 2012 (6) AELE Mo. L. J. 101

- [The Use of Electronic Control Weapons Against Handcuffed or Restrained Persons - Part 1](#), 2012 (9) AELE Mo. L. J. 101
- [The Use of Electronic Control Weapons Against Handcuffed or Restrained Persons - Part 2](#), 2012 (10) AELE Mo. L. J. 101.

❖ **References**

- [Mason Police Department Use of Force Five Year Study](#) by Sgt. Don Hanson and Officer Matt Thorne (Mason, Michigan, Jan. 18, 2013).
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