Bigger, Smaller, Stronger, Weaker, Younger, Older:

Understanding Disparity of Force

WRITTEN BY **JIM FLEMING** | MAY 18, 2012 for USCCA
Article appeared in CONCEALED CARRY MAGAZINE

You’re in your home, late at night, when suddenly you hear a loud banging at your front door.

Arming yourself, you move to investigate, and are confronted by a very large individual who has smashed through the front door and is standing in your home. You don’t know him or why he is there.

You raise your pistol and demand that he leave, warning that you will shoot if he doesn’t go. Without a word, he advances on you. You retreat, repeating your warning, until you have run out of room, your back to the wall, with nowhere to go. He continues advancing, menacingly, his arms outstretched in an aggressive posture. He is unarmed; Your mind races; Do you shoot? If you choose to shoot, what might be the ramifications of that split-second decision?

Self-defense students nationwide are instructed that, before a person is justified in employing deadly force, they must have a reasonable apprehension of imminent death or great bodily harm.

Self-defense students nationwide are instructed that, before a person is justified in employing deadly force, they must have a reasonable apprehension of imminent death or great bodily harm. In states which have adopted the castle doctrine into their common law, citizens have no duty to retreat within their own home; many of us are taught that even an unarmed assailant may be subjected to deadly force if there is a disparity of force situation. Although this precise terminology cannot be found in a single reported case anywhere in the country, the concept is articulated in a great many cases from around the country.

For example, the Minnesota Supreme Court has observed that a disparity in the age and physical size of victim and defendant are relevant to the determination of whether the level of force used by the defender was reasonable. But, you think, “Wait a minute, if I am justified in using deadly force why are we even talking about how much deadly force is reasonable?”

Following an incident involving the exact scenario provided above, a client of mine recently found himself charged with Felony First Degree Assault and jailed on $100,000 bail, due to “public safety concerns.” Armed with my knowledge of disparity of force, garnered primarily as a self-defense instructor, I went to the prosecutor and began to argue the concept as a justification for the shooting.

The response was, “I’ve never heard of it,” and, “We don’t want people with guns going around shooting unarmed people.” In reality, these incidents, most often occur at white hot, blinding speed, under circumstances where a defender is experiencing shock, fear, adrenaline dump, and sensory distortion. They will, however, be subject to a cold and calculated review and evaluation by individuals sitting in the relative safety of a courtroom or a jury deliberation room.

The events and actions of the principals will be subject to intense scrutiny lasting for days. You have heard of the concept of a jury of your peers. If you are the individual confronted in your own living room in the middle of the night by the large, vicious attacker who comes at you full speed, his eyes filled with rage, think about it. Who are your peers? Are you scared now? You ought to be.

It will still be up to the jury to determine whether the use of deadly force was justified based upon an application of these factors to the evidence presented at trial.

With these thoughts in mind, I began an exhaustive study of the disparity of force concept in the law, with an eye toward instructing my prosecutor, highlighting the pointlessness of further prosecution, and getting my client out of jail with the charges dismissed. What I found during my research enlightened me, and prompted me to write this article on the subject.

Across the country, the law of self-defense is incorporated into state statutes, enacted by legislatures. In general, these statutes state the deadly force test as (1) a reasonable apprehension of imminent death or great bodily harm; (2) that the defender must retreat if it can be done safely, or unless in such circumstances that no duty to retreat exists; (3) that the defender not be the aggressor in the confrontation; and (4) that the defender employ only that level of force reasonably necessary to protect from the attack.

Most important, the analysis of these factors is employed in the courts, not as an absolute defense that prevents prosecution, but instead only to assist a trial court in determining whether a self-defense instruction should be given to a jury. If the defendant who has been charged with a crime for having used deadly force can produce some evidence supporting the existence of these elements, and the prosecution cannot disprove the defendant's claims, the instruction must be given.

However, it will still be up to the jury to determine whether the use of deadly force was justified based upon an application of these factors to the evidence presented at trial. If the prosecution cannot disprove the existence of the elements of self-defense beyond a reasonable doubt, then the jury should acquit. But the issue does not end there.

In some jurisdictions, the circumstances many of us understand as evidence of a disparity of force are to be considered by the jury in determining whether the defender had a reasonable fear of death or great bodily injury (element #1 above). Examples are found in decisions issued in Alabama, Alaska, Illinois,

Mississippi, North Carolina, Ohio, and Oklahoma.1 In other jurisdictions, the jury is instructed to consider this evidence in determining whether the amount of force employed was a reasonable level of force (element #4).

Examples are found in Massachusetts and Minnesota, and in a 1996 decision from New York, where a jury had to determine whether the defender used an excessive amount of force when he shot his attacker six times. “But wait,” you say, “Weren’t we trained to continue shooting until the threat is stopped?” Yes you were, but you need to understand that having done so does not lead you to the medal platform for the awarding of trophies. It can, and may well lead you into the courtroom, where the second part of this battle is going to take place.

This sort of analysis can vary from state to state. In Illinois, in 1962, the Illinois Supreme Court ruled that the defender, who shot an individual who entered his room in a boarding house and attacked him, was not required to measure the precise amount of force he might use to repel that invasion of his room, or to protect his person from the reasonably anticipated violence.

In other words, the court did not take up a consideration of whether the amount of force the defender used was excessive. They ruled that once he determined that he had to use deadly force to protect himself, he was not obliged to worry about how much deadly force he could employ.

... the defense team must present an informative and well-organized body of evidence during trial in order to: justify the giving of a self-defense instruction to the jury...

In other jurisdictions, they are not clear how they want to use the disparity concept; they just do, sometimes varying the application from case to case.

For example, in a 2000 Alabama appellate court decision, the court stated that an unarmed assault normally will not justify the use of deadly force. However, when there is a "great disparity between the parties in the matter of physical power or other peculiar conditions," the inability to resist the attack by the more powerful individual may give rise to a reasonable apprehension of danger which would justify using deadly force to defend against the attack.

This reasoning echoes earlier decisions dating from 1934 in Georgia, and 1975 in North Carolina in which the courts ruled that the physical disparity between the attacker and the defender was relevant to the jury's decision as to whether the accused experienced a reasonable fear of death or great bodily injury, and also, whether the use of deadly force in defense was an excessive use of force.

It's important to note that the court decisions where these issues are considered are presented to the appellate courts following a conviction where the trial court refused to give a self-defense instruction. The accused was, in each case, convicted of criminal offenses charged as the result of having used deadly force to protect themselves from an unprovoked attack.

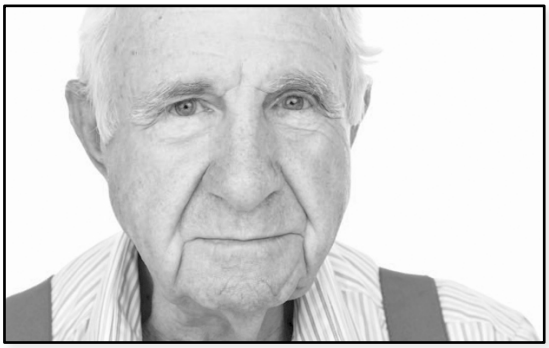
The decisions reached in each of these cases required that the convicted defender be granted a new trial in which the jury would be provided a self-defense instruction, including reference to the disparity issue. This is uniformly true of all the appellate court decisions reviewed. It is simply impossible to accurately reflect those instances where the defenders ultimately prevailed, or those cases where prosecutors have declined to bring charges in a given case based upon consideration of these factors.

But, it is clear that the analysis can get dicey, as reflected in the language of the 1975 North Carolina decision: “If the assailant uses non-deadly force, then generally deadly force cannot be used by the person attacked; provided there is no great disparity in strength, size, numbers, etc., between the person attacked and his assailant.”

Obviously, the court in this case failed to recognize that any unarmed physical attack may ultimately result in death or great bodily injury. The court chose to characterize an unarmed attack as non-deadly force simply because the attacker did not pursue the attack with some kind of weapon other than his fists and feet.

The implications are serious and worth thinking about. Must any of us, confronted with an attacker intent on using his fists or feet to assault us, stop to consider whether we will ultimately only suffer a black eye, a bloody nose, or whether we might be struck with such force that our head is bounced off concrete pavement and that we bleed to death from a brain injury?

In 1993, Alabama’s Supreme Court seemed to suggest just that when they ruled that blows from a fist caused “no reason to apprehend a design to do him great bodily harm” and therefore, did not justify the employment of deadly force in defense. This reasoning is repeated in an Oklahoma decision where the court referred to such an attack as one “of a trifling character” and ruled that unless the attack “manifests a purpose or intention on the part of the assailant to inflict a serious injury” deadly force may not be used in defense.



An older, weaker person should not be expected to use only his fists to fight off an attacker who is younger and stronger.

Any individual who has been involved in a physical encounter and experienced the speed with which such encounters develop and proceed is going to have only one response to such an irresponsible suggestion: “Good luck with that.” A blow to the temple, a blow to the throat, a blow addressed at the proper angle to the nose are all manifestly capable of being delivered at lightning speed and may well result in death for the victim, or at the very least, serious and crippling injury.

Some court opinions seem to demonstrate an awareness of this reality. Some do not. In a 2008 opinion, the Minnesota Court of Appeals ruled that a threat to “kick the sh–” out of a person or hit someone, could be viewed as a threat to commit a crime of violence calculated or likely to produce death or great bodily harm.

Obviously, the burden is going to be on the defendant to prove to a jury that this specific unarmed attack gave him or her a reasonable fear of more than a “slight, simple non-felonious assault,” and that individual is going to have no more than a few seconds to decide whether an assault is “trifling” or deadly. This is the job that the defender’s attorney and self-defense expert must perform by addressing these issues to the prosecution in an effort to educate and avoid the filing of criminal charges.

Failing that, the defense team must present an informative and well-organized body of evidence during trial in order to: justify the giving of a self-defense instruction to the jury; convince the jury that the defender held a reasonable fear of imminent death or crippling injury; show the deadly force employed in defense was not excessive, given the circumstances. A 1954 New Mexico case highlights the perils of assuming that anyone in the legal systems is capable of recognizing the obvious.

In that case, defense counsel did not present any evidence regarding the great disparity in size and physical strength of the defendant and the deceased attacker. It was not until a later appeal, following the defender’s conviction, that his attorney argued this point. The appellate court commented that this evidence

should have been presented and made a part of the trial court record. Since it was not, the appellate court was powerless to consider it on appeal.

NOTE: This article is not intended to answer the question of whether you should use deadly force in every or even any situation. Such universal, across the board advice would be totally irresponsible, because in each situation the decision is going to be driven by the facts observed by the unlucky person often given just seconds to make the choice.