Transcript: Disparity of Force

0:00 · Don West I'm Don West, National Trial Counsel for CCW Safe, and I'm here with Andrew Branca, Law of Self Defense expert. Andrew, thank you. Tell the viewers, if you would, how they can find you online, and a little bit about yourself.

0:10 · Andrew Branca Sure. I'm attorney Andrew Branca. I specialize exclusively in use-of-force law. I have for the last 25 years. At my law practice, Law of Self Defense, our slogan is: "You carry a gun so you're hard to kill. Know the law so you're hard to convict." By which we mean not know legal tricks, but know the actual law of self-defense, so that your use of force in self-defense is compliant with the law.

Don West Your website is LawOfSelfDefense.com.

Andrew Branca Yes, sir.

0:37 · Don West And if someone goes there and looks around, what kind of materials will they find that you've authored and published?

0:43 · Andrew Branca We always encourage people to first take advantage of the stuff we offer for free, which is mostly our blog posts, videos and podcasts. We also have books. We have DVD courses, online courses, live online courses, sometimes live classes around the country. So, there's a lot for people to take a look at.

Don West How does a live online course work?

1:02 · Andrew Branca It's just a webinar, so people can log in from their computer. It's the same course we teach live all over the country, a full-day course, except we do it over the computer screen, so they don't have to travel anywhere. And even more important, from my perspective, I don't have to travel anywhere.

1:17 · Don West And you have some state-specific materials? The law is pretty consistent throughout the US, but there's some pretty big differences, for example, if you're in a stand-your-ground state versus a duty-to-retreat state.

1:28 · Andrew Branca We do. We have an individual, what we call a supplemental course, for each of the 50 states. So, every one of the 50 states is covered in a separate supplementary course that covers that state's specific use-of-force statutes, court decisions and jury instructions.

1:42 · Don West Well, I would certainly encourage everyone to take advantage of the material that you have, not just the free stuff, but to buy a book. I read the book. I benefited greatly from it. I thought I knew a lot about self-defense, and I do know a lot about self-defense, but I have to tell you, it's accessible. It's not legalese, and it's so comprehensive. I truly enjoyed it and recommend it to colleagues and friends.

Andrew Branca I appreciate it.

2:08 · Don West Today, let's talk about something. We know everyone's heard the expression, "You can't bring a gun to a fistfight." We've heard that. That's in the context of disparity of force. At least

that's something that you see on the internet, in comments, or people talking about it. What is disparity of force, and more specifically, how do you discuss that aspect of use-of-force law?

2:38 · Andrew Branca So this phrase, "disparity of force," is really poorly used. It's very common in self-defense instruction; I've seen it in many of the classes I've taken. What the law actually wants is what we call proportionality, meaning that the degree of defensive force you're using is proportional to, not disproportionately greater than, the threat you're facing. So, the law is not actually looking for disparity. If there's disparity, that's bad for your case of self-defense. The law is looking for proportionality.

3:12 · Andrew Branca And in terms of proportionality, what the law does in assessing degree of force is place force into one of two buckets. Either the force involved is deadly force, which means force capable of causing death, of course, but also includes force capable of causing serious bodily injury, typically some kind of maiming or disabling kind of injury. That's the deadly force bucket. The other bucket is the non-deadly force bucket, which is simply all lesser degrees of force: force not likely to cause death or serious bodily injury.

3:48 · Andrew Branca And what the law says, for lawful self-defense purposes, is if the threat you're facing is only non-deadly in nature, you're only allowed to use non-deadly defensive force to stop that threat. If the threat you're facing is deadly in nature, force likely to cause you death or serious bodily injury, then you may be privileged to use deadly defensive force to stop that threat. So that's the proportionality: the two forces, the threat and the defensive force, are proportional to each other, in balance.

4:20 · Andrew Branca Now, in terms of a deadly force threat, there's many ways that a threat can get to be deadly in nature. Obviously, if the attacker has a gun or a knife, they can readily cause death or serious bodily injury. But that's not required for them to be a deadly force threat. If there's a disparity of numbers, so there's multiple attackers and one defender, well, those multiple attackers can inflict death or serious bodily injury; collectively, they're a deadly force threat. If an attacker is much larger, or much stronger, or has an exceptional fighting ability that the defender does not have, even though it's a barehanded attack, it could be a deadly force attack if it's of a nature that can cause death or serious bodily injury.

5:05 · Andrew Branca So the law doesn't really care so much how we get to the deadly force threshold. It simply cares whether or not we've gotten to the deadly force threshold. And if the threat is readily capable of causing death or serious bodily injury, that's what privileges you to use deadly defensive force to neutralize that threat.

5:25 · Don West The assessment of whether the force is sufficient to cause serious bodily harm or death would be at that moment that the lethal use of force is the response, I guess. In other words, for example, would the vulnerability of an individual—you talked about size; I imagine age and physical condition—

Andrew Branca Absolutely.

Don West And how about the position they might be in during what might have started as a non-deadly fight, for example?

5:57 · Andrew Branca Right. So of course, a fight is typically very dynamic. Two individuals can start a fight, both of them being roughly the same, say, strength or fighting ability, but one of them suffers a broken arm in the course of the fight. Well, he no longer has the same defensive ability that he had before. Now he's got a broken arm. That changes the degree of threat that he's defending against. What was before not a deadly force threat, not a threat likely to cause serious bodily injury, now is such a threat. And it's the same with the nature of the prospective defender. For an 18-year-old to be shoved to the ground, probably not that big a deal. They tend to pop right up; at least I did when I was 18. Someone's 80 years old and they're shoved to the ground, well, that could be a life-threatening event. They break a hip, that's clearly serious bodily injury.

6:50 · Don West Certainly someone can be vulnerable simply by not being as good a fighter. They can be in a vulnerable position. You see that in MMA all the time: someone who is the best and the strongest and the fastest is put in a position where they are virtually helpless.

7:03 · Andrew Branca That's exactly right. And although in an MMA fight you can tap out before you're seriously injured or killed, if it happens on the street or in a parking lot somewhere, you can't, obviously.

7:15 · Don West Absolutely. And if you believe that the person intends to cause you serious bodily injury or death, and has the ability to do it, and has probably demonstrated it by then (you may already be injured to some degree), it's certainly legally sufficient to respond with deadly force, if you wind up in this situation where you believe if you don't use deadly force in response to the attack, you'll be seriously injured.

7:45 · Andrew Branca Right. So strictly speaking, if you reasonably believe that to be the case. An unreasonable fear of harm would not be sufficient. But you may reasonably believe it because you've already suffered serious injury in the course of the fight. You may reasonably believe it because the person attacking you may not be a stranger to you, right? You may know they have an exceptional fighting ability that you don't have, for example. That would definitely play a role in your subjective perception of the degree of threat you were facing.

8:15 · Andrew Branca This comes up a lot in spousal abuse cases, where an abused wife, for example, knows that when her husband gets drunk, he gets incredibly violent and causes her serious injury. She knows this because she's experienced it multiple times in the past. When he's sober, he's fine; when he's drunk, he's a nightmare that causes serious bodily injury. Then at home one night, she sees him getting drunk again. Well, based on her experience, she has the ability to infer that a violent attack is likely to follow his drunken state, because it has so many times in the past.

8:50 · Don West But if he doesn't assault her that night, but instead goes to bed, notwithstanding the history, notwithstanding his propensity for violence and all of that, she can't very well go into the room and shoot him.

Andrew Branca Well, she can, but it won't be lawful.

9:07 · Don West Right. It may be mitigated. We've certainly known of the battered spouse defense, which may mitigate from a higher degree of murder to manslaughter, typically, but it's not a defense. It brings us sort of to the imminence idea. We talk about proportionality in the sense of this disparate force, but regardless, it has to be imminent, and that's what would be the undoing of the spouse who

shot the abusive husband in bed, right? Likewise, if you're being assaulted by someone, that threat of great bodily harm or death has to be imminent: either actually occurring or immediately about to occur.

Andrew Branca Mm-hmm.

9:53 · Don West That's hard to get a handle on, I would think. We know what it means intellectually, but it's probably pretty hard to identify in terms of feet or yards as someone approaches you.

10:03 · Andrew Branca So where people tend to get in trouble on imminence, it's not really where it's a close call, because remember, the prosecution does have to disprove self-defense beyond a reasonable doubt, so he's looking for something more than a close call. Typically, where people tend to get into trouble is where it's not a close call, where the threat is nowhere near imminent. So, where they're using force against a threat that's already over: the fight's ended, whatever the fight might have been, the threat's gone, the person's running away, and then they use force. So clearly there's no reasonable perception that the threat was about to occur, because the person is running away, for example. Or when they use force to prevent some speculative future threat. So, someone says, "I'm going to go home and get my gun and come back here and shoot you."

10:50 · Don West Let's talk about that more specifically.

Andrew Branca Sure.

10:53 · Don West Instead of being at home, let's be in a bar. You're in a bar, you're having a couple (well, maybe a beer, maybe not), but you're in a bar or a restaurant, and somebody sees something they misinterpret, or it escalates to the point that somebody says to you, "I'm going out to my car to get my gun and come back here and shoot you," and they head for the door. When can you shoot them?

Andrew Branca Well, if they come back with the gun and they appear that they're prepared to shoot you, that would be an imminent threat.

11:20 · Don West Assuming all of that to be true, and you absolutely believe them, that that's their intent, that they intend to go to their car, get their gun, come back in and shoot you: can you shoot them as they head out the door?

11:36 · Andrew Branca Well, the real criterion for imminence is either it's happening, it's immediately about to happen, or it's otherwise unavoidable. By otherwise unavoidable, I mean, say you're trapped in the bar. Say before they got to their car, they handcuffed you to the bar, so you can't get away. Then I would say yes, the threat is imminent, even as they're walking out the door, because you can't escape. You can't get away before they come back. The threat's otherwise unavoidable. But of course, that would not normally be the case. Normally you would have some option other than simply staying there, waiting for them to come back with their gun.

12:05 · Andrew Branca In fact, I would suggest that if you do wait for them to come back with the gun, and you're preparing to shoot them when they come back, it begins to look a lot like a mutual combat situation, where you're actually agreeing to get into a deadly force fight with this other person when it wasn't necessary.

Don West Even if you don't have a legal obligation to avoid it, if you're in a so-called stand-your-ground jurisdiction, your conduct will still be evaluated under a reasonableness standard.

12:32 · Andrew Branca Sure. Or if you're a mutual combatant, if you agree to get into a fight, then you're a co-aggressor in the fight. So, you lose self-defense simply for being a co-aggressor in the fight. The rest of it doesn't matter, because you've lost self-defense, because you're not an innocent party in the eyes of the law.

12:55 · Don West You've talked about innocence; you've talked about, I'm sorry, imminence; and you've talked about proportionality in the context of disparate force. In your materials, you've identified what you believe are the five elements of self-defense. Would you touch upon them just for a minute? Then we're going to close out and refer people to your website for additional information.

13:13 · Andrew Branca Sure. And we actually cover these in some detail on our website, in totally free content. But in just summary, the five elements of a self-defense claim (and it's up to five; in many cases not all five even apply, but it's only up to these five) are innocence, imminence, proportionality, avoidance and reasonableness. In a nutshell, innocence simply means you must not have been the aggressor in the fight if you want to justify your use of force in self-defense. Imminence is, the threat you're defending yourself against has to be either actually happening, or immediately about to occur, or be otherwise unavoidable. Proportionality has to do with the degree of force involved, whether it's non-deadly force or deadly force.

13:55 · Andrew Branca Avoidance has to do with whether or not you have a legal duty to retreat, if safely possible, before you're entitled to use force in self-defense. And the fifth element is reasonableness. It's really kind of an umbrella element that sits over the others. Everything you perceive, you decide, that you do in self-defense has to be the conduct of a reasonable person, meaning it's not, for example, an irrational fear of harm or an unreasonable fear of harm. You're perceiving things and making decisions as a reasonable person would.

14:29 · Don West As always, thank you, Andrew. I really appreciate you joining me here, and I look forward to our next get-together. I would encourage all of our viewers to go to Andrew's website, investigate LawOfSelfDefense.com, and take a look at the materials. I wish that all of my clients had known of Andrew and read his book, or viewed some of those materials, before they wound up in that lethal self-defense scenario.

14:56 · Don West An ounce of prevention, I guess, is worth a pound of cure. And sometimes the pound of cure, even if you're successful at it, can be several hundred thousand dollars, easily. We know that from real-world experience. If you can avoid the conflict, avoid it, and certainly act within the law and avoid being immersed in the legal system. Thanks so much. I'm Don West, National Trial Counsel for CCW Safe.