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Public Protection: Civil Liability for Failure to Protect Minors

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❖ Introduction

Children are the most vulnerable members of society. Starting out in life almost completely dependent on their parents or other caregivers for their safety and support, they all too often suffer injury or even death as a result of abuse or neglect, as well as being targets for criminals and predators of all kinds seeking helpless and defenseless prey. Police officers, as well as child welfare agencies, are called upon to investigate reports of danger to children.

This article briefly discusses the question of what courts have said about possible civil liability for failure to protect minors from violence by third parties, with a focus on federal law. At the conclusion, there is a listing of relevant and useful resources and references.

❖ General Rule: No Duty

Under the principles set down in [*DeShaney v. Winnebago County Dep't of Social Services*](#), #87-154, 489 U.S. 189 (1989), there is no general duty under federal civil rights laws to protect individuals against private violence. Exceptions have been made in some instances where a special relationship--such as having a person in custody, or very specific promises of protection that are reasonably relied on--or the existence of a "state created danger" (or state enhanced one) is found. State law generally follows the same line of reasoning, and

ordinarily imposes no specific duty to particular persons to provide police protection or other emergency services—with any duty being a general one owed to the public at large.

DeShaney itself involved a federal civil rights claim arising out of the alleged failure of government employees to protect a child against violence by a family member. The plaintiff was a child who was subjected to a series of beatings by his father, whom he lived with. The defendants were a county department of social services and a number of its social workers who received complaints that the minor was being abused by his father, and who did take various steps to try to protect him. They failed, however, to attempt to remove him from his father's custody.

Subsequently, the father finally beat the child so badly that he suffered permanent brain damage and profound retardation. The lawsuit claimed that the failure to remove him from the household caused these injuries and deprived him of his liberty interest in bodily integrity in violation of his rights under the substantive due process guarantees of the Fourteenth Amendment by failing to intervene to protect him against his father's violence.

The Court rejected this claim, holding that a state's failure to protect an individual not in custody against private violence is not a violation of due process. Due process does not create a duty to provide general members of the public with adequate protective services. It is a limitation on the power of government and its employees to act, rather than a guarantee of a certain minimal level of safety and security.

In this case, the Court found no merit to the argument that the defendants' knowledge of the child's danger and expression of a willingness to protect him against such dangers created a "special relationship" creating an affirmative duty to provide adequate protection. Such an affirmative duty arises when government agents impose limits on an individual's freedom to act on his own behalf through such things as imprisonment, institutionalization, "or other similar restraint" of personal liberty. In this case, the harm came to the child while he was in the custody of his father, not the defendants.

Additionally, the defendants played no role in creating the danger or in making the child more vulnerable to it. The Court cautioned that under state tort law in some states, the voluntary undertaking to provide a child with adequate protection against a known risk of violence may create a duty giving rise to liability but that did not transform such state law violations into violations of the Constitution.

Applying these principles in [*Cantrell v. City of Murphy*](#), #10–41138, 666 F.3d 911 (5th Cir. 2012), a court ruled that officers were entitled to qualified immunity for temporarily physically separating a twenty-one-month-old male infant from his mother. The child became entangled in a soccer net, and was extricated by his mother, who found him not

breathing. Officers summoned to the scene saw strangulation marks on the child and declared the area a crime scene. The mother was taken away because she kept screaming threats of suicide. The child died, and the mother sued, claiming that the officers' actions slowed down the efforts of paramedics to save him. There was no clearly established due process duty to provide protection and medical treatment to the child in these circumstances.

Similarly, in [*McLean v. Gordon*](#), #07-2250, 548 F.3d 613 (8th Cir. 2008), state social workers and agency were not liable for the accidental shooting and death of a child in foster care. Their alleged repeated failure to check the foster home for the presence of unsecured firearms did not "shock the conscience." Additionally, the state agency could not be sued under 42 U.S.C. Sec. 1983 because of Eleventh Amendment immunity.

In another case, the adoptive parents of a child could not recover damages against a county or county employees based on a constitutional claim that they failed to protect the child from physical abuse by the child's natural mother. The governmental defendants did not create the danger at issue or have any special relationship imposing a duty of care, as the alleged injuries occurred when the child was in the care of his natural mother prior to his removal from the home. [*Robbins v. Cumberland County Children and Youth Services*](#), 802 A.2d 1239 (Pa. Cmwlth. 2002).

❖ Special Relationships

Courts may find liability for failure to provide protection or failure to do so properly when they find that a special relationship existed with the caller, imposing a special duty. This can arise if a person is taken into the custody or control of the officers, if a very specific promise of protection is made that the caller relies on to their detriment, perhaps foregoing other avenues of assistance or a chance to flee and escape based on a reasonable expectation that help is on the way, or if the agency voluntarily assumes the duty of providing protection to an individual or actively prevents other from coming to the endangered person's aid.

Such a special relationship imposing a duty to provide protection may arise under state law as a result of specific child welfare statutes imposing mandatory duties. For example, in [*Alejo v. City of Alhambra*](#), #B130088, 75 Cal. App. 4th 1180, 89 Cal. Rtr. 2d 768 (1999), the court found that a California statute imposed mandatory duty on police to investigate reports of child abuse, and to file reports with child protective agencies when the investigation leads to a reasonable suspicion of such abuse. As a result, a complete failure to investigate a report of child abuse stated a claim for "negligence per se."

What about when children are injured or killed after police allegedly fail to enforce a court order intended to protect them against domestic violence by a family member? In [*Town of Castle Rock v. Gonzales*](#), #04-278, 545 U.S. 748 (2005), the U.S. Supreme Court held that a woman who obtained a state-law restraining order against her estranged husband did not have a constitutionally protected due process property interest in having the police enforce the restraining order when they have probable cause to believe it has been violated.

Calling the facts in the case “horrible,” the 7-2 majority’s decision noted that the Colorado woman who was the plaintiff in the case had obtained a restraining order against her husband in connection with their pending divorce, and it required that he not molest or disturb her or the couple’s three daughters, ages 10, 9, and 7, and remain at least 100 yards from the family home at all times. The judicial order also contained a notice to law enforcement officials commanding them to “use every reasonable means to enforce this restraining order,” and to arrest, or seek a warrant for the arrest of the restrained person if they had probable cause that the restrained person had violated or attempted to violate the order.

The order was later modified to give the husband visitation with the daughters on certain days and “upon reasonable notice,” for a mid-week dinner “arranged by the parties.” One day, however, he took the three daughters while they were playing outside the home, without any advance arrangement. The mother then called the police department, and she showed the two officers who responded the copy of the restraining order and requested that it be enforced, and the children be returned to her at once. The officers allegedly said that there was nothing they could do, and suggested that she call the department again if the children did not return by 10 at night.

She later allegedly talked to her husband on his cell phone, and he admitted having the children at an amusement park. She called police again, and they allegedly refused to put out an all points bulletin for her husband or look for him and his vehicle at the amusement park. She called again at 10 p.m. and allegedly told officers that her daughters were still missing, and was told to just wait until midnight. She went to the police station at 12:50 a.m. and submitted an incident report, and the officer who took the report allegedly made “no reasonable effort” to enforce the restraining order or locate the children, but instead “went to dinner.”

The husband arrived at the police station at 3:20 a.m., and opened fire with a semiautomatic handgun he had purchased that evening. The officers shot back and killed him. Inside his pickup truck, the bodies of his three daughters were found. He had previously murdered all of them.

The wife claimed in her subsequent federal civil rights lawsuit that the town violated her due process rights because it had an official policy or custom of failing to respond properly to complaints of restraining order violations, and tolerated the non-enforcement of restraining orders by its police officers.

A federal appeals court, both through a three-judge panel and on rehearing en banc, found that the mother had a “protected property interest in the enforcement of the terms of her restraining order” and that the town had deprived her of due process because “the police never ‘heard’ nor seriously entertained her request to enforce and protect her interests in the restraining order.” [*Gonzales v. Castle Rock*](#), #01-1053, 366 F.3d 1093 (10th Cir. en banc, 2004).

The Supreme Court’s majority reversed. The Court found that the “benefit” of having such a restraining order enforced by police was not a protected property interest, rejecting the argument that Colorado, in passing its laws concerning restraining orders had created such an entitlement to the mandatory as opposed to discretionary enforcement of the order.

A true “mandate” of police action, the Court ruled, would require “some stronger indication” from the Colorado legislature than “shall use every reasonable means to enforce a restraining order.” The Court’s majority further reasoned that if the plaintiff had a statutory entitlement to enforcement of the restraining order, “we would expect to see some indication of that in the statute itself.”

AELE, which publishes this journal, joined an amicus brief of black and women police officers filed in the *Town of Castle Rock v. Gonzales* case discussed above, supporting the civil rights suit brought against the town for the lack of police response to the mother’s complaint that her estranged husband had the children, was in violation of a court order, and that harm might occur. AELE supported the International Association of Chiefs of Police (IACP) Model Domestic Violence Policy and disagreed with the Town that they owed no legal duty to protect the children or to enforce the court order. That [amicus brief](#), and the [appendix](#), which contains the IACP Model Policy, are available on-line. The appendix also contains an IACP National Law Enforcement Policy Center Concepts and Issues Paper on Domestic Violence.

❖ State-Created or Enhanced Danger

Another basis for imposing liability can be when the actions or failure to act of police or other government personnel either creates a new danger or enhances or heightens an existing one. Some courts have labeled this the “state-created danger” doctrine.

Showing that officers “created” or enhanced the danger, however, is very difficult to show. In [*Doe v. Vill. of Arlington Heights*](#), #14-1461, 782 F.3d 911 (7th Cir. 2015), a police officer arrived at an apartment building in response to a complaint about minors drinking outdoors there. A minor white female drinking with a group of three African-American males was so intoxicated that she could not stand up by herself, so one of them had to hold her up from behind. The officer arrived and talked to the males, allowing them to leave with the female without asking for identification.

One of the males was on probation for armed robbery and the other two males were minors. The three males then carried the female to a laundry room, and the apartment site manager again called police. Officers arrived and caught the probationer sexually assaulting the girl in the laundry room.

In a failure to protect lawsuit, a federal appeals court found that the officer had not created the danger to the girl or done anything to make it worse. He was therefore entitled to qualified immunity from liability. The court also rejected arguments that the officer was a racist who wanted the girl to come to harm because she was white and socializing with African-Americans. The plaintiff’s reference to another incident in which the officer while operating an unmarked police car, ran over and killed an eight-year-old African-American boy and allegedly lied to cover it up was not similar to the immediate incident, and any connection was speculative.

In [*Estate of Pond v. Oregon*](#), #04-3003, 322 F. Supp. 2d 1161 (D. Ore. 2004), the court ruled that a state agency’s alleged delay in reporting allegations of sexual abuse of a minor to law enforcement could not be the basis for a federal civil rights lawsuit seeking damages for the subsequent alleged murder of the minor by the alleged abuser. This conduct did not create the danger to the minor, who remained in the custody of her mother, who was aware of the allegations of abuse.

Similarly, in [*Craddock v. Hicks*](#), #4:02 CV 216, 314 F. Supp. 2d 648 (N.D. Miss. 2003), the court found that a police officer did not create a danger to a child by leaving her at a convenience store after allegedly mistakenly arresting her mother. The child was left with a responsible adult known to her family, and the child was not placed in any actual danger. Under the circumstances, the officer’s actions in relation to the child were not objectively unreasonable.

❖ Resources

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

- [Convention on Rights of the Child](#). Wikipedia article.

- [Police child protection powers in England and Wales](#). Wikipedia article.
- [Public Protection: Minors](#). AELE Case Summaries.

❖ **Prior Relevant Monthly Law Journal Articles**

- [Public Protection: Witnesses](#), 2009 (4) AELE Mo. L. J. 101.
- [Public Protection: Informants](#), 2009 (5) AELE Mo. L. J. 101.
- [Public Protection: Injured Crime and Accident Victims](#), 2009 (8) AELE Mo. L. J. 101.
- [Public Protection: Arrestees](#), 2011 (2) AELE Mo. L. J. 101.
- [Disturbed/Suicidal Persons -- Part One](#), 2012 (2) AELE Mo. L. J. 101.
- [Disturbed/Suicidal Persons -- Part Two](#), 2012 (3) AELE Mo. L. J. 101.
- [Public Protection: Intoxicated Persons](#), Part 1, 2013 (3) AELE Mo. L. J. 101.
- [Public Protection: Intoxicated Persons](#), Part 2, 2013 (4) AELE Mo. L. J. 101.
- [Public Protection - Part 1: The Physically Ill](#), 2013 (5) AELE Mo. L. J. 101.
- [Public Protection: Part Two – The Mentally Ill or Deranged](#), 2013 (6) AELE Mo. L. J. 101.
- [Public Protection: 911 Phone Systems](#), 2014 (6) AELE Mo. L. J. 101.

❖ **References:** (*Chronological*)

1. [Interdiction for the Protection of Children](#), by Michael L. Yoder and Wayne R. Koka, FBI Law Enforcement Bulletin (February 2015).
2. [Liability for Failure to Protect](#), by Devallis Rutledge, Police Chief (June 1, 2010).
3. [Duty to All – Duty to No One: Examining the Public-Duty Doctrine and Its Exceptions](#), by Karen J. Kruger, Police Chief (May 2007).
4. [No Duty to Protect: Two Exceptions](#) by L. Cary Unkelbach. Police Chief, vol. 71, no. 7 (July 2004).

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