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Civil Liability for Failure to Protect The Motoring Public and Pedestrians

❖ Introduction

Can police officers and their employers be held civilly liable for failure to protect motorists, their passengers, or pedestrians from injury or death on streets and highways resulting from traffic accidents? This article briefly examines that question, focusing first on the general rule that there is no duty to protect specific persons against third party injury or violence, and then discussing the handful of exceptions in which such a duty may be found and potentially result in liability. Outside the scope of this article are issues arising from accidents caused by officers' own driving, including pursuit driving.

❖ No General Duty to Protect

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 or injury. 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.

Illustrating this, in *Sorace v. United States*,#14-2683, 788 F.3d 758 (8th Cir. 2015), the estates of two people killed in a drunk driving accident on a Native American reservation sued the federal government under the Federal Tort Claims Act (FTCA), 28 U.S.C. 2674, arguing that tribal police were negligent in failing to locate and arrest the drunk driver prior to the accident. A federal appeals court upheld the dismissal of the claim, finding that, under South Dakota law, applicable to the defendant under the FTCA, there was no mandatory duty on police to protect a particular person or class of people absent a special relationship. The tribal police in this case did nothing that increased the risk of harm to the decedents by failing to arrest the drunk driver after his erratic driving was reported.

Similarly, in *Lockhart-Bembery v. Sauro*, #06-1720, #06-2228. 2007 U.S. App. Lexis 18844 (1st Cir.), a motorist claimed that she was injured while moving her disabled vehicle, after she was instructed to do so by a police officer who believed that it posed a traffic hazard on a busy road. The car lacked power, but the officer allegedly told her to "just put it in neutral and push it back, steering with the steering wheel. "He allegedly told her that if she did not move it, it would be towed. She was injured when it started rolling backwards down the incline of a driveway, dragging her face first and face down, down a hill, until it collided with some trees.

A federal appeals court, reversing a jury award of $1 in nominal damages and a trial court award of attorneys' fees, found that no reasonable and properly instructed jury could have found a violation of constitutional rights under either the Fourth Amendment or the Fourteenth Amendment's due process clause under these circumstances.

Also see *Rios v. City of Del Rio*, #04-50774, 444 F.3d 417 (5th Cir. 2006), finding that a police officer and police chief were not liable under federal civil rights law for injuries a U.S. Customs officer suffered when he was struck by a city police department vehicle being driven by an escaped arrestee.

There was no claim by the plaintiff that the officer, in leaving the arrestee unattended in the back of the patrol vehicle knew or believed that he would likely

drive the vehicle away or would likely endanger anyone. There was no deliberate indifference to a known risk of serious harm.

In *Holcomb v. Walden*, #A04A2333, 607 S.E.2d 893 (Ga. App. 2004), the court found no liability for the death of a motorcycle driver and injuries to motorcycle passenger based on a deputy sheriff's earlier failure to arrest a motorist who did not have a valid driver's license. The unlicensed driver, who drove away from the encounter with the deputy, subsequently collided with the motorcycle. The deputy owed no special duty to protect the motorcycle driver or passenger, but only a duty to the general public, which was insufficient to impose liability under Georgia state law.

❖ Special Relationships

While courts have stated that liability for failure to protect motorists or pedestrians can be based on a finding of a special relationship, this is very difficult to establish short of a custodial relationship or an explicit promise of protection that causes an individual to rely on it to their detriment or forgo other sources of protection.

In *Greyhound Lines v. Department of the California Highway Patrol*, #F063590, 2013 Cal. App. 4th 1129, 2013 Cal. App. Lexis 117, after an SUV collided with a center divider, a 911 operator allegedly told callers that California Highway Patrol officers were on the way. The 911 operator did not put into the computer that the disabled SUV was blocking traffic lanes, as a result of which the call was assigned to a patrol unit that was further away, rather than one close by. A Greyhound bus subsequently collided with the SUV, resulting in personal injury and wrongful death lawsuits by passengers.

Greyhound argued the 911 operator's actions had helped cause the second accident. Rejecting liability, an intermediate California appeals court ruled that the California Highway Patrol had no duty to come to anyone's aid in the absence of a special relationship entered into because an officer's affirmative acts caused the peril or increased it, but no such special relationship existed with the injured bus passengers**.**

Similarly, in *Dodd v. Jones*, #09-2016; 623 F.3d 563 (8th Cir. 2010), an intoxicated driver struck a motorist who had been lying injured on the road after his own

apparent alcohol-related accident. He sued two highway patrolmen who responded to his accident for failure to protect him from the intoxicated driver.

A federal appeals court upheld summary judgment for the defendants, as the evidence did not show that they had taken the plaintiff into custody and held him against his will, triggering a duty to protect him. The officers did not move the motorist, awaiting the arrival of an ambulance, as they feared he had suffered a spinal injury, but they did attempt to stop the oncoming vehicle driven by the intoxicated driver, who ignored their directions.

In *Pappas v. Union Township*, #A-5850-08T2, 2010 N.J. Super. Unpub. Lexis 2054 (A.D.), an officer who served as a crash investigator was dispatched to the scene of an accident that took place between a female motorist and a male motorcycle rider. The officer, who observed the motorcycle rider lying face down after having been thrown and landing head first on the street, believed that he was dead. Other officers were already on the scene.

He later claimed that the female motorist, while "a little shaken up," had told him that she was not injured. He handed back her driver's license, registration, and insurance card, and suggested that she could leave her disabled car at the parking lot of a nearby gas station, which she did. The officer returned to his vehicle to complete paperwork, and did not inquire as to how the motorist was getting home or offer to assist her in doing so.

The elderly female motorist declined an offer from the gas station attendant to drive her home if she would wait there until closing time, and she stated that she could walk home. As she attempted to do so, she was struck by a hit and run driver as she crossed a street, suffering serious injuries, and was hospitalized for various surgeries and treatments until she died. A lawsuit against the township and officer contended that they were responsible for her injuries at the hands of the hit and run driver by "abandoning" her at the scene of the first accident.

The trial court and intermediate appeals court entered summary judgment for the defendants, finding them immune from liability for the officer's performance of discretionary acts at the scene of the first accident. The courts rejected an argument that the officer negligently performed ministerial duties in connection with the accident, for which state law does not provide immunity, since the female motorist had not asked him to provide aid. This was also not a case in which the motorist was

plainly incapacitated, so that even if the officer was not exercising discretion, there was no evidence that he "negligently performed a ministerial task."

In *Jones v. Reynolds*, #04-2320, 438 F.3d 685 (6th Cir. 2006), a court found that police officers were not liable for a bystander's death at a street drag race when they did not have custody of the decedent when the accident occurred, and had not placed her in any additional danger than she voluntarily assumed before the officers arrived on the scene. This remained true even if they had an opportunity to stop the drag race from occurring and failed to do so.

The City of New York was not liable for injuries suffered by parade spectators struck by a vehicle in the parade, based on a theory that the police department had been negligent in screening vehicles participating in the parade. Even if the city had assumed a duty to screen the vehicles, there was no special relationship between the city and the spectators injured, and therefore no special duty to protect the plaintiffs against harm. *Armstrong v. Scott*, 21 A.D.2d 822, 801 N.Y.S.2d 822 (A.D. 2nd Dept. 2005).

In *Kovit v. Estate of Hallums*, 4 N.Y.3d 499, 829 N.E.2d 1188, 797 N.Y.S.2d 20 (N.Y. 2005), the court held that a city could not be held liable for either injuries suffered by pedestrian struck by car or injuries suffered by motorist when a police officer ordered a motorist to move her car forward after an accident and she moved it backwards instead, crushing the pedestrian's legs. There was no special relationship between the pedestrian and the officer, and they had no direct contact with each other.

In a second case also ruled on in the same opinion, a county could not be held liable for injuries a motorist suffered after being told by an officer to move his car to a nearby service station, despite the motorist's statement that he had chest pains and was not feeling well. The motorist subsequently lost control of his car and suffered serious injuries after driving it into a guardrail and a telephone pole.

The motorist did not, the court noted, tell the officer that he was too ill to drive, and "we cannot expect the police to make a refined, expert medical diagnosis of a motorist's latent condition." Liability for a special relationship, the court stated, requires "knowledge on the part of a municipality's agents that inaction could lead to harm"

❖ State-Created Danger

Another circumstance in which liability can be imposed for failure to protect motorists and/or pedestrians is when the governmental actor allegedly creates or enhances the danger.

Illustrating this is *Pena v. Deprisco*, #03-7876, 432 F.3d 98 (2d Cir. 2005) , in which a court ruled that police officers and supervisors' alleged encouragement and "active facilitation" of an off-duty officer's drunken driving during a twelve-hour drinking binge could constitute a "state-created danger" violating the due process constitutional rights of a pregnant woman, her fetus, and two others struck and killed by the off-duty officer as he sped through a red light. Individual defendants were, however, entitled to qualified immunity from liability, as the law on the issue was not clearly established in 2001.

On the other hand, in *Bilbili v. Klein*, #05-3496, 249 Fed. Appx. 284, 2007 U.S. App. Lexis 20694 (3rd Cir.), a police officer's alleged failure to remove a drunk driver, a fellow officer, from the road, was insufficient to impose liability on him for injuries others later suffered when they were hit by his car. A federal appeals court found that the officer's alleged failure to act did not "create" the danger, and that the drunken officer would have been in the same condition even if he had not encountered his fellow officer.

A city and its police officers were not held liable, under the due process clause of the Fourteenth Amendment, for the death of a child struck as he crossed a street on foot by a vehicle that an officer lent to an informant. The appeals court ruled that, even if the city had a custom of encouraging officers to provide vehicles to informants with known histories of alcohol or drug use in exchange for information, that was insufficient for liability. Persons allegedly placed in danger as a result of those actions were not intentionally or recklessly placed in such danger, nor were the alleged actions conscience-shocking. The appeals court also rejected claims based on an alleged failure to adequately investigate the accident, since there was no statutory, common law, or constitutional right to an investigation. *Mitchell v. McNeil*, #06-5631, 497 F.3d 374 (6th Cir. 2007).

In *Koulta v. Merciez*, #06-1539, 477 F.3d 442 (6th Cir. 2007), officers who confronted allegedly intoxicated female motorist in the driveway of her estranged boyfriend's house were not liable, on the basis of the failure to detain her, for her

subsequent accident, which occurred while she was speeding, intoxicated, and running a red light, which resulted in a person's death. The officers' actions or failure to act did not either create or enhance the risk that the motorist's intoxicated driving would result in an injury.

In another case, *Minch v. California Highway Patrol*, #C050338, 140 Cal. App. 4th 895, 44 Cal. Rptr. 3d 846, 2006 Cal. App. Lexis 924, a tow truck driver struck by an oncoming vehicle after extracting a damaged car from a ditch at the scene of an accident failed to show that California Highway Patrol officers did anything wrong to create or enhance the risk of harm to him. Officers owed him no duty of protection against being struck by traffic. An Officer Safety Manual, which was not adopted as a regulation, created no duty to protect.

❖ Equal Protection

Intentional violation of equal protection in traffic enforcement, if proven, could be a basis for civil liability for resulting injury. In *Estate of Kahng v. City of Houston*, #H-07-0402, 485 F.Supp.2d 787, 2007 U.S. Dist. Lexis 30922 (S.D. Tex.), however, a city was found not liable for the death of an elderly motorist struck by a number of vehicles while trying to cross a highway on foot to get back to his van, which had run out of gas. He was attempting to do so before the city towed his vehicle under a program it had commenced under which it attempted to tow stalled vehicles from city freeways after a few minutes in order to prevent obstacles to the flow of traffic.

A federal trial court rejected the plaintiff estate's argument that the towing program violated the equal protection rights of elderly and disabled drivers. Such motorists, the court found, were not a protected class for equal protection purposes, and there was no fundamental right to be free from having a disabled vehicle towed from the highway.

❖ Resources

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

- Public Protection: Motoring Public & Pedestrians. AELE Civil Case Summaries.

❖ **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.
- Public Protection: Civil Liability for Failure to Protect Minors, 2016 (8) AELE Mo. L. J. 101.
- Public Protection: Liability for Actions of Prisoners and Former Prisoners, 2009 (2) AELE Mo. L. J. 301

❖ **References:** (*Chronological*)

1. Liability for Failure to Protect, by Devallis Rutledge, Police Chief (June 1, 2010).
2. Duty to All – Duty to No One: Examining the Public-Duty Doctrine and Its Exceptions, by Karen J. Kruger, Police Chief (May 2007).
3. No Duty to Protect: Two Exceptions, by L. Cary Unkelbach. Police Chief, vol. 71, no. 7 (July 2004).

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