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## **Civil Liability and Domestic Violence Calls – Part One**

### *Contents*

Introduction

U.S. Supreme Court Ruling

Creating or Enhancing the Danger?

Resources

### **Introduction**

Among the calls that police departments must frequently respond to, some of the most troubling are domestic violence situations. Such situations are known to be volatile, to involve a lot of emotion and anger, and to frequently pose a dangerous situation for all present, including a risk of harm to the officers. Such calls at times involve individuals under the influence of alcohol or drugs, or who are mentally disturbed. Weapons that have been employed against a spouse, live-in lover, boyfriend, girlfriend, or other family member may suddenly be turned against the responding officers, or against members of the public.

Domestic violence most frequently involves crimes against women, although there are battered husbands and boyfriends too. Some domestic violence calls may also involve same sex relationships. The magnitude of the problem is suggested by a recent study on state court processing of domestic violence cases, listed in the resources section at the end of this article, which reported that one third of violent felony defendants processed through the courts in May of 2002 in 15 large urban counties were charged with domestic violence crimes.

Officers sometimes have arrived at the scene of a domestic disturbance only to find that things have supposedly “calmed down,” or to find that their very presence appears to have had the effect of bringing a lull to the hostilities. There have also, however, been instances in which the officers then leave, only to later find that the violence has recommenced in their absence, and resulted in serious bodily harm, the death of one person, or even multiple homicides, sometimes combined with a suicide.

Victims of domestic violence have asserted claims against individual officers and police departments for alleged failure to provide a proper response to domestic violence situations. Claims asserted have included failure to provide promised protection (sometimes in the context of existing domestic violence protective orders), failure to make an arrest, failure to remove weapons from the premises, and gender discrimination. Departments have been accused of having improper policies that discriminate against women or against domestic violence victims generally as compared to victims of other violent crimes. They have also faced allegations of failing to provide adequate training concerning how to respond to domestic violence situations.

In this first part of a three-article series, we will examine an important U.S. Supreme Court decision on the constitutional parameters of police obligations in responding to domestic violence, and how federal courts have analyzed the issue in the context of a “state-created danger” doctrine. In the second article, the focus will be on municipal and supervisory liability, as well as domestic violence situations involving officers’ own families. In the third article, the focus will be on liability issues under state law, including duties arguably imposed by state domestic violence statutes, and claims of gender discrimination.

### **U.S. Supreme Court ruling**

In a 7-2 decision in [Town of Castle Rock v. Gonzales](#), No. 04-278, 2005 U.S. Lexis 5214, 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.

Characterizing the facts in the case as “horrible,” the 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, in an opinion written by Justice Scalia, 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 enforcement of the order.

We do not believe that these provisions of Colorado law truly made enforcement of restraining orders mandatory. A well-established tradition of police discretion has long coexisted with apparently mandatory arrest statutes.

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."

It is hard to imagine that a Colorado peace officer would not have some discretion to determine that -- despite probable cause to believe a restraining order has been violated -- the circumstances of the violation or the competing duties of that officer or his agency counsel decisively against enforcement in a particular instance. The practical necessity for discretion is particularly apparent in a case such as this one, where the suspected violator is not actually present and his whereabouts are unknown.

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." The opinion concludes that the plaintiff did not have, for purposes of the due process clause, a property interest in police enforcement of the restraining order against her husband.

A strong dissent by Justice Stevens, joined by Justice Ginsburg framed the issue as whether the restraining order issued by a Colorado trial court created a property interest that is protected "from arbitrary deprivation" by the due process clause of the Fourteenth Amendment. He acknowledged that neither the U.S. Constitution nor any federal statute provided the plaintiff or her children any individual entitlement to police protection. Nor, he continued, does any Colorado statute create an entitlement to police protection for the "ordinary citizen." But he reasoned that it was also true that federal law "imposes no impediment to the creation of such an entitlement by Colorado law."

Stevens reasoned, however, that the Colorado statute's guarantee of police enforcement was triggered by a judge's granting of a restraining order in favor of an identified "protected person."

Not only does the Court's doubt about whether Colorado's statute created an entitlement in a protected person fail to take seriously the purpose and nature of restraining orders, but it fails to account for the decisions by other state courts, that recognize that such statutes and restraining orders create individual rights to police action.

Stevens argued that the plaintiff had a property interest in the enforcement of the restraining order that state officials "could not deprive her of" without "observing fair procedures." He stated that her description of the alleged police behavior in this case, and the police department's alleged "callous policy of failing to respond properly to reports of restraining order violations clearly alleges a due process violation."

[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.]

### **Creating or Enhancing the Danger?**

In general, the Supreme Court has held, there is no federal due process constitutional requirement to provide adequate protection against violence by private third parties. [DeShaney v. Winnebago County Dep't of Social Services](#), 489 U.S. 189 (1989).

An exception to the general rule has occasionally been found where the officers' actions or failure to act have arguably either created or enhanced the danger to the ultimate crime victim. This is often referred to by the courts as the "state-created danger" doctrine. In the Gonzalez case, discussed in detail above, one of the claims initially rejected by the federal appeals court had been an argument that the city and officers "created" the danger to the children subsequently murdered by their father. [Gonzales v. City of Castle Rock](#), No. 01-1053, 307 F.3d 12258 (10th Cir. 2002). As the discussion that follows will demonstrate, establishing liability on the basis of a "state-created danger" theory in the context of domestic violence calls appears to be a difficult thing to do.

In [Tanner v. County of Lenawee](#), No. 05-1107, 452 F.3d 472 (6<sup>th</sup> Cir. 2006), 2006), a federal appeals court ruled that officers and a county were not liable for responding to a 911 call concerning a woman's drunken estranged husband's visit to her sister's house, or for failing to prevent him from shooting and killing his wife, shooting his brother-in-law and sister-in-law, and then killing himself. Nothing the officers did created or enhanced the danger, the court reasoned, as required for liability under the "state-created danger" theory.

In this case, a married couple had taken the wife's sister into their rural Michigan home, because she was involved in a domestic dispute with her husband. The sister's husband had appeared at the house the evening before, both drunk and angry. The couple called the police when he came again in the middle of the night. Just as the estranged husband was backing out of the driveway, the police arrived, and he reacted by driving back up the driveway to the house, after which he got out of his vehicle, forced his way into the residence, shot his brother-in-law five

times, shot his sister-in-law twice, and shot and killed his wife, after which he committed suicide by shooting himself in the head.

The married couple survived their wounds, and filed a federal civil rights lawsuit against the county, the officers who initially responded to their 911 call, the county sheriff, and other defendants. They claimed they were denied substantive due process based on the manner in which the confrontation with their assailant was handled. The trial court granted summary judgment to the defendants, finding that the plaintiffs had failed to show that their constitutional rights were violated. A federal appeals court upheld that result.

The appeals court rejected the argument that officers could be held liable for responding to the 911 call and then allegedly failing to pursue the suspect into the house, instead allegedly waiting and watching. There was no proof, the appeals court noted, that the officers knew or should have known that the person backing down the driveway was the suspect. There was also no evidence that the officers knew that simply pulling into the driveway would cause the suspect to draw a weapon, even if they did know that he was the man in the vehicle. Nor was there any evidence that they would know that he would "rampage" through the home on a shooting spree, as opposed to shooting at the officers, or fleeing on foot.

In short, the officers did not create or enhance the danger to the plaintiffs.

The appeals court also rejected the argument that the defendants' subsequent actions in setting up a perimeter around the house increased the danger to the plaintiffs, or prevented emergency medical personnel from rescuing those inside. The court noted that there is no constitutional right to state-provided rescue services, so that there was no constitutional violation in preventing publicly employed medical personnel from entering the home.

Other cases in which the courts have discussed the possible application of the "state-created danger" doctrine to domestic violence cases include:

\* [Brooks v. Knapp](#), No. 06-1352, 221 Fed. Appx. 402, 2007 U.S. App. Lexis 5966 (6th Cir.), in which the court found that the surviving family members of woman who was killed by her husband failed to show that officers should be held liable for failure to protect her. Mere promises of additional police patrols in the area in response to her request for protection, the court reasoned, did not constitute an enhancement of the danger to the decedent for purposes of the "state-created danger" doctrine.

\* [Burella v. City of Philadelphia](#), No. 04-1157/2495, 501 F.3d 134 (3<sup>rd</sup> Cir. 2007), finding that the spouse of a police officer who shot and injured her before shooting and killing himself did not show a violation of her substantive or

procedural due process rights on the basis of the police department's failure to arrest him when she previously reported incidents of abuse after obtaining protective orders. The mere failure to act did not violate her rights or bring his assault on her within the bounds of a "state-created danger" theory of liability. The appeals court also rejected the spouse's equal protection claim, since there was no evidence from which a reasonable jury could find an unlawful custom or believe that a discriminatory motive was behind the failure to arrest the plaintiff's husband. There was no constitutional duty to protect the plaintiff from abuse by her spouse.

\* [May v. Franklin County Comm'rs](#), No. 05-3188, 437 F.3d 579 (6<sup>th</sup> Cir. 2006), ruling that a county and officer were not liable for a woman's murder by her boyfriend, based on an officer's dispatch to her residence following 911 calls, and his decision to leave when he failed to hear any indications of a dispute inside. These actions neither created nor increased the danger that the woman would be killed, so there could be no liability under a "state-created danger" theory.

\* [Howard v. Bayes](#), No. CIV.A. 7:02-204, 378 F. Supp. 2d 753 (E.D. Ky. 2005), in which the court concluded that a deputy sheriff was not liable for failing to arrest a man allegedly suspected of fighting with his girlfriend, who subsequently murdered her, since the duties imposed on him under a Kentucky domestic violence statute were discretionary. The plaintiffs also failed to show that the deputy had "created" or enhanced the danger to the girlfriend for purposes of the "state-created-danger" doctrine

\* [Simmons v. City of Inkster](#), #03-72318, 323 F. Supp. 2d 812 (E.D. Mich. 2004), ruling that a city could not be held liable for the death of a wife shot and killed by her estranged husband while she attempted to retrieve her belongings from their residence, accompanied by police officers. The officers had no constitutional duty to protect the wife against violence by the husband and their presence in the home did not increase or create the danger to her from him.

\* [Green v. City of Philadelphia](#), No. 03-2368, 92 Fed. Appx. 873 (3rd Cir. 2004), in which the court stated that police officers who took away a woman's gun while investigating a domestic dispute, but later returned it to her when they thought things were "under control" were not liable to the boyfriend she allegedly shot with the weapon a month later. The court rejected the argument that the return of the weapon "created" the danger that he would be shot. The shooting was too remote in time to have been caused by the officers' actions, and their conduct placed him in "no worse" a position than he would have been in had they not gotten involved to begin with.



\* [O'Brien v. Maui County](#), #00-16571, 37 Fed. Appx. 269 (9th Cir. 2002) holding that a county and police department were not liable for alleged failure to protect a woman against continued domestic violence by a man who had previously been arrested on three separate occasions for abusing her. The plaintiff did not show that the defendants placed her in any greater danger or that there was any policy of inadequate training on domestic violence.

\* [Piotrowski v. City of Houston](#), No. 98-21032, 237 F.3d 567 (5th Cir. 2001), rehearing & rehearing en banc denied, 251 F.3d 729 (5th Cir. 2001). In this case, a \$26 million award against a city for failure to protect a woman against an alleged murder plot by killers hired by her boyfriend was overturned. The court found that no city policy alleged increased the danger to her. At most, it left her in the same danger she was already in.

\* [Soto v. Flores](#), 103 F.3d 1056 (1st Cir. 1997), finding officers not liable for their failure to arrest a woman's husband for domestic abuse and his subsequent murder of her two children. Even if the officer's statement to her husband, revealing that the wife had complained about him put the children in increased danger, there was no "clearly established" constitutional right violated, entitling the officer to qualified immunity. The appeals court also found insufficient evidence of intentional gender discrimination to support equal protection claim

## Resources

**Statistics:** [State Court Processing of Domestic Violence Cases](#). Examines the processing of domestic violence (DV) and non-domestic violence (non-DV) cases filed in May 2002 in 15 large urban counties. The study compares the domestic and non-domestic offenses of sexual and aggravated assault on 11 prosecution, conviction, and sentencing outcome measures. Data are also presented regarding court issued protection orders, guilty plea versus trial convictions, and the demographic characteristics of domestic violence defendants. Highlights include the following: A third of violent felony defendants were charged with domestic violence. Prosecuted domestic sexual assault defendants had a higher overall conviction rate (98%) than prosecuted non-domestic sexual assault defendants (87%). Domestic aggravated assault defendants (54%) were less likely to be granted pretrial release than non-domestic aggravated assault defendants (62%). 02/08 NCJ 214993 [Press release](#) | [Acrobat file](#) (221K) | [ASCII file](#) (24K) | [Spreadsheets](#) (zip format 11K)

The [website](#) of the New York State Office for the Prevention of Domestic Violence has a discussion and links to resources concerning police response to domestic violence.



[Domestic Violence by Police Officers](#), a policy of the IACP Police Response to Violence Against Women Project. (July 2003). Also available is a [discussion paper](#) on IACP's policy on domestic violence by police officers.

[A Law Enforcement Officer's Guide to Enforcing Orders of Protection Nationwide](#) is a publication of the IACP that defines what Full Faith and Credit means for victims, abusers, and Law Enforcement; why it is important; and how to reduce liability.

[911 Operator / Dispatcher Response](#) is a quick guide for 911 Operators and Dispatchers for responding to domestic violence calls. Excerpted from the San Diego County Domestic Violence Protocol.

Website of the U.S. Department of Justice [Office on Violence Against Women](#).

[Violence Against Women Online Resources](#). Provides materials on domestic violence, sexual assault, and stalking for criminal justice professionals, sexual assault and domestic violence victim advocates, and other professionals who respond to these crimes.

[Intimate Partner Violence](#). "NIJ researchers have examined the nature and effects of this crime, and whether the most common law enforcement, court-ordered, and correctional interventions work. These web pages summarize key research findings, and links to other sources of information and assistance." (September 25, 2007).

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