LIABILITY FOR POLICE INACTION II
DOMESTIC VIOLENCE

INTRODUCTION

In Part I of this series,[1] the basis for newfound liability for police inaction was set forth. Part I dealt primarily with police and municipal liability for failure to act in general situations (drunk drivers, witnesses, insufficient investigations). This article focuses on recent cases involving police liability for a failure to respond to calls for assistance in domestic violence situations. The premises are functionally the same, a finding of a special relationship between the victim and the officer, assurances of protection or special knowledge the officer could and should have employed to protect the victim. The verdicts have been substantial and in favor of the plaintiffs. Protecting your officers and your department from liability could be quite simple by recognizing the changes in the law and instructing your officers accordingly.

THE NEWEST WORD ON DOMESTIC VIOLENCE LIABILITY

In *Sorichetti* v. *City of New York*,[2] the New York Court of Appeal made precedent in recovery for police inaction in domestic violence situations. Josephine and Frank Sorichetti had been married since 1949. Theirs had been a tumultuous marriage, filled with numerous incidents of violence. The Sorichettis had their third child in 1969, a daughter named Dina. Frank's violence had reigned the home for years and the 43rd Precinct police were well acquainted with the numerous assaults. In 1975 alone, Frank attacked Josephine three times. First in January, Frank attacked Josephine, punching her in the chest so forcefully as to knock her across the room. In July, Frank attacked Josephine with a butcher knife, cutting her hand, and threatened to kill both her and the children. In September, in a fit of rage, Frank destroyed all the contents of their apartment, cutting up clothes belonging to Josephine and Dina and bending every knife and fork. The 43rd Precinct had arrested Frank six times since June of 1975.

On November 6, 1975, the family court made a third protective order final, issued to protect Josephine from Frank. Despite Josephine's ardent protests, the court awarded Frank visitation privileges with Dina each weekend. Frank was required to pick Dina up and leave her off at the 43rd Precinct. On November 8, Frank picked up Dina and as he was walking away with the child, issued death threats to both Dina and Josephine.[3] Josephine immediately reported the threats to the desk officer at the precinct and again on Sunday when she went to get Dina. Despite the issuance of the protective order, her numerous pleas to have him arrested, and the extensive police knowledge of Frank's violent history, the police refused to take any action and sent Josephine home. They assured her that if Frank did not return the child within a reasonable time, they would send a car to investigate.

After Frank failed to return Dina to the precinct, a relative found Frank and Dina unconscious on the floor of Frank's apartment. Frank had attacked Dina with a fork, a knife and a screwdriver, and had attempted to saw off her leg. Dina suffered brain damage from the loss of blood, underwent seven hours of surgery and forty days of hospitalization, and is permanently scarred. Frank was later arrested and convicted for attempted murder.[4]

The Supreme Court of New York denied the city's pretrial motion to dismiss the complaint for failure to state a cause of action.[5] The appellate division affirmed.[6] A jury returned a verdict in favor of the plaintiffs, finding that the police department had breached the duty it owed to Dina to provide her with reasonable protection.[7] Dina was awarded three million dollars in damages and Josephine received forty thousand dollars for lost services. This was the first time a court permitted such a large verdict against a city for its officers' failure to intervene in a domestic violence situation.

IDENTIFYING THE SPECIAL RELATIONSHIP

The unusual part of the decision by the New York Court of Appeal affirming the jury findings was that it abrogated the doctrine of sovereign immunity which had theretofore been so richly ingrained into such actions. The only way a plaintiff could circumvent the city's assertion that it owed only a "general duty to the public as a whole," was to demonstrate that a special relationship existed between the injured plaintiff and the city. Although sovereign immunity is being eroded, it is still an effective bar to liability. The court of appeal still faced the question: Did a special relationship exist between the city and Dina Sorichetti, the infant, so as to circumvent the "public duty" immunity rule, and if so, on what basis did such a relationship exist?

Domestic violence is recognized as a major social problem of unmanageable proportions. In an effort to address the problem, forty-nine states and the District of Columbia have, over the past

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decade, enacted new legislation dealing with domestic violence.[8] One such piece of legislation is New York's amendment to the Family Court Act.[9] One of the key provisions of the amendment was to strengthen the family court's power to issue protective orders.[10]

The family court issues a protective order after its determination that the holder warrants protection from a specific individual; the order requires the individual against whom it is issued to either do or refrain from doing certain acts. More significantly, a certificate setting forth the terms of the order, when presented to a peace officer, authorizes the officer to "take into custody" the person charged with violating the order.

Police are still reluctant to respond to domestic violence calls. In light of the fact that 40% of all night calls involve domestic disputes, lack of police cooperation has rendered protective orders largely ineffective.[11]

In *Bruno* v. *Codd*,[12] New York was struck by the reality that police cooperation was necessary to effectuate judicial protective orders. In *Bruno*, twelve battered women brought an action against the New York City Police Department charging the police with refusal to assist battered women or to arrest their husbands solely because the parties were married. Evidence presented to the court indicated unacceptable police response to domestic violence situations. Before trial, however, the police and plaintiffs entered into a consent judgment settling all claims.[13] The decree, in part, requires that the police now respond as soon as possible to *every* request for assistance or protection in family matters, based on an allegation by a person that a violation of a protective order issued in his or her favor has occurred. The decree also requires arrest in each instance supported by probable cause (an allegation by the holder of the order) and that the department must send one or more officers immediately. Adoption of the consent decree by the city does, at least, indicate a recognition and acknowledgement of its obligation and duty to respond to domestic violence and to assist the courts in giving effect to protective orders.

The court of appeal in *Sorichetti* was faced with a unique set of facts presenting issues which required skilled legal reasoning in applying the "special duty" rule to find the city liable. The law is well settled that absent a special duty owed to a specific individual, or class of individuals, a police department cannot be held liable for the negligent actions of its employees.[14] For the Court of Appeal to hold the city liable, past cases required the court to find that a special relationship existed between the city and Dina Sorichetti. The court had to address the question of a special relationship in light of (1) a protective order granted to Josephine which didn't mention Dina within its scope; (2) the holding in *Riss* v. *City of New York*, which stated that prior knowledge of imminent danger did *not* create a special duty; and (3) whether Josephine's reliance on the assurance of police action was reasonable enough to create a duty owed to Dina, the victim.

EXAMPLE: Wife held a protective order issued in her favor against her husband. Police responded to a call from the wife, but when presented with the protective order they refused to take further action, saying that it was "only a piece of paper" and "no good." Some weeks later, the woman saw her husband in the domestic relations court at a scheduled meeting. On seeing him, she expressed her fear of confronting him and requested permission to remain in the office where she was located. Court personnel denied her request and sent her to the waiting room where some twenty minutes later, her husband shot her. The court held that the existence of a protective order was sufficient to create a special relationship and therefore police owed a special duty to the woman.[15]

SPECIAL KNOWLEDGE OR PROMISES

In *Sorichetti* the court of appeal found that the protective order created a special relationship and corresponding duty between the city and Josephine, but the protective order alone was not sufficient to find a special relationship between the city and Dina.[16] Unable to establish the existence of a special relationship based on the protective order alone, the court turned to the issue of whether the police department's extensive knowledge of Frank's violent history was sufficient to establish a special relationship. The court distinguished *Riss*, which held that no liability was premised solely on prior knowledge of imminent danger for the victim, on its facts.[17]

The *Sorichetti* court, in distinguishing *Riss*, cited the police's response to Josephine's plea for them to arrest Frank as a critical fact in finding that a special relationship existed between Dina and the city.[18] A police officer said that they would dispatch a car to investigate if Frank did not return Dina within a reasonable time. The court found that reliance on such a statement was reasonable. In *DeLong* v. *County of Erie*,[19] there existed a special relationship where a woman called 9-1-1 and was told assistance would be forthcoming. She relied on the assurances and exposed herself to danger which resulted in her death.

The court of appeal concluded that violation of the protective order, the police's knowledge of Frank's extremely violent propensities, and Josephine's reasonable reliance on police promises to take action, *together* were sufficient to find a special relationship between the city and both Josephine and Dina.[20] This relationship arose from the combination of these three factors, not any one independently.

STATE RESPONSES TO THE SITUATION

Some states have adopted mandatory arrest statutes requiring police to make a warrantless arrest of the abuser if there is probable cause to believe a spousal assault has occurred.[21] Other states have enacted legislation that authorizes a warrantless arrest at the scene of the incident, if there is probable cause to believe that a felony *or* misdemeanor has been committed, *or* if a protective order has been violated.[22] Generally, the statutes also provide immunity for police officers from any criminal or civil liability for making an arrest, provided the officer acts in good faith and without malice.[23]

Unless a statute or municipal ordinance explicitly states that the issuance of a protective order to a potential victim creates a special duty owed that person, the city still has the "general duty" immunity defense to protect it from liability in the event a police officer fails to provide protection. Unless a statute or municipal ordinance imposes a duty upon police to respond in a reasonable manner to every domestic violence situation—regardless of whether a protective order exists—the general duty rule will prevent liability.

Sorichetti is an attempt to restrict the "general duty" immunity rule. The court spelled out the required response to an alleged violation of a protective order and the consequences for failure to respond. This ties in with the courts' general trend to impose

liability upon a city where the court finds the officer failed to respond when a victim reasonably relied on a special duty of the officer.[24]

The court of appeal has clarified the importance of a protective order in the State of New York. It is no longer a judgment call for the police whether or not to respond and investigate when presented with a protective order and an allegation of its violation. Nor is a protective order a "worthless piece of paper" requiring injury to the holder before authorizing action. It is, in fact, a court-given shield to victims, saying, "This will protect you."[25] Failure to respond will result in huge financial losses to a city.

STATUTORILY IMPOSED DUTIES

In a recent case,[26] the Oregon Supreme Court held that police officers could be held liable in a civil suit for damages resulting from failure to arrest in a domestic violence situation. In *Nearing* v. *Weaver*,[27] the victim had filed an assault charge against her husband and had been granted a temporary restraining order prohibiting her husband from entering her home or molesting her. Her husband entered the home twice after the order was granted. He also assaulted the victim on one occasion outside the home. Each time, the victim reported the incidents to the police and requested an arrest but no arrest was made. Plaintiff filed suit, claiming that as a "proximate result" of the police officers' failure and refusal to arrest her husband, she and her children suffered severe emotional distress and physical injuries.

The Supreme Court of Oregon rejected the defense of immunity and held that police officers could be found liable when they neglected a specific duty.[28] In this case, the duty was imposed by the statute for the benefit of individuals previously identified by judicial order: the temporary restraining order. The court held that the purpose of the Oregon Code authorizing arrest for violation of a restraining order issued under the Abuse Prevention Act was to negate any discretion on the part of the officer enforcing the order. In effect, the statute[29] creates a mandatory duty on officers to arrest a violator of a protective order in Oregon.

CONSTITUTIONAL IMPLICATIONS OF FAILURE TO RESPOND

The departmental custom which tends toward non-interference and non-arrest in domestic violence situations is being stricken by the courts. Such a police policy, written or unwritten, is not substantially related to an important state interest. It has been determined to be tied to constitutionally impermissible stereotypic views that a man has the right to beat his wife.[30]

A 1984 case in which the plaintiff alleged that police discriminatorily refused to respond to domestic violence calls was decided under a constitutional framework. In *Thurman* v. *City of Torrington*,[31] the court found that police policy decisions to treat battering of and by spouses with less priority than non-familial beatings was clearly violative of equal protection guarantees stemming from the Fourteenth Amendment.[32] Applying an intermediate constitutional scrutiny to a gender-based policy, the court failed to find any permissible important state objective justifying the policy.

> It is violative of equal protection for police to consistently choose to give domestic disputes lower priority than non-domestic disputes, to treat domestic disputes less seriously than non-domestic disputes, or to altogether ignore complaints made by women in domestic disputes. Such a consistently made choice is no longer the exercise of discretion, but rather is the creation of a classification. It is violative of equal protection for police to create a classification, however cloaked in the language of discretion, which metes out the right to enforcement of the criminal law in a manner which ultimately is based on gender.[33]

Most notable is that the court arrived at this decision from Tracey Thurman's individual experience with Torrington police over an eight-month period, not from a survey of Torrington's response to battered women generally.[34] The resulting verdict was for $2.3 million, in favor of the plaintiff.

Moreover, the court expressed its unwillingness to accept the city's reasoning that failure to arrest batterers is justified becaused battered women often drop the charges later. The court found that this rationale was not substantially related to the purported important state interest of using limited resources most efficiently. The evidence presented to the court demonstrated that most women do not drop the charges, and the court emphasized that police are required to fulfill their legal duty irrespective of the results in the prosecutor's office.[35]

The remedies for a consistent refusal by police to intervene in domestic violence may be sought under 42 U.S.C. Section 1983, the civil rights provision which states "every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress." This is a field ripe for plaintiffs to circumvent the "general duty" immunity rule upon which cities have relied.

GUIDELINES

Although police refusal to arrest batterers when battered women ask for help has been held to violate the Fourteenth Amendment and their special relationship duty, police policy need not remove all police discretion. Rather, police should apply the same active discretion that they use in other assault cases. As stated in *Bruno*, "Plaintiffs do not seek to abolish the traditional discretionary powers of the police; they merely seek to compel the police to exercise their discretion in each 'particular situation,' and not to automatically decline to make an arrest solely because the assaulter and victim are married to each other."[36]

The *Sorichetti* court made it clear how officers are to respond when a woman holds a protective order and the police both know of the husband's violent history and have made assurances that they will provide protection. Additionally, where state statute mandates arrest of a violator of a protective order, as in *Nearing* v. *Ware*, the officer's duty is similarly clear. It remains to be seen what the appropriate response is to a plea for protection based on threats of interspousal violence absent a protective order or a violent history of the husband.

Another as yet unresolved area involves the situation in which a battered woman does not ask the police to arrest her husband or if she asks the police *not* to arrest her husband. Whether the police are required to arrest batterers in either of these situations depends on how police treat other assault cases. If it is found that general police arrest policy is guided by probable cause considerations, rather than the victim's request, then police are required to arrest batterers when there is probable cause to believe they have com-

mitted a crime, regardless of the presence of a protective order or the victim's wishes to avoid arrest of her husband. In no instance should the potential outcome of future prosecution by the victim be a factor in the officer's discharge of his duty.

FOOTNOTES

1. *Legal Points* #142, Liability for Inaction—I.
2. 482 N.E.2d 70 (1985).
3. Frank told Josephine that before the weekend was out she and Dina would be "making the sign of the cross." *Id.* at 72.
4. *Id.*
5. 408 N.Y.S.2d 219 (Sup. Ct. 1978).
6. 417 N.Y.S.2d 202 (App. Div. 1979).
7. 482 N.E.2d at 72.
8. *See*, Lerman, *A Model State Act: Remedies for Domestic Abuse*, 21 HARV. J. on LEGIS. 61, 62 n.1 (1984).
9. 1977 N.Y. Laws 449 (McKinney).
10. N.Y. FAM. CT. ACT section 812(2)(b) (McKinney 1983).
11. *Bruno* v. *Codd*, 393 N.E.2d 976 980 (N.Y. 1979).
12. *Id.*
13. *Supra* note 11.
14. *Riss* v. *City of New York*, 240 N.E.2d 860 (N.Y. 1968) (holding city not liable for failure to provide police protection upon request, despite knowledge of possible imminent danger.)
15. *Baker* v. *City of New York*, 269 N.Y.S.2d 515 (App. Div. 1966).
16. 482 N.E.2d at 74.
17. In *Riss* the court noted that the suitor was unknown to the police, seemingly a citizen in good standing who, until the incident, had voiced only "hollow threats" against the victim. Police in *Riss* also never undertook to provide protection; instead they made it clear they would not do so. *Supra* note 14.
18. 482 N.E.2d at 75.
19. 457 N.E.2d 717.
20. *Supra* note 18.
21. ME. REV. STAT. ANN. tit. 19 section 770(5) (Supp. 1981); N.C. GEN. STAT. section 50B–4 (Supp. 1979); OR. REV. STAT. sections 133.055, 133.310 (1973 and Supp. 1979); UTAH CODE ANN. section 30–6–8(1) (1978 and Supp. 1981).
22. ARIZ. REV. STAT. ANN. section 13–360) (Supp. 1980); FLA. STAT. ANN. sections 910–15(6) to (7) (West Supp. 1984); MINN STAT. ANN. section 629.341 (West Supp. 1980).
23. FLA. STAT. ANN. section 901–15(7)(b).
24. *See*, *Schuster* v. *City of New York*, 154 N.E.2d 534 (N.Y. 1958).
25. *Supra* note 18.
26. *Nearing* v. *Weaver*, 670 P.2d 137 (Ore. 1983).
27. *Id.*
28. *Id.* at 142.
29. OR. REV. STAT. section 133.310(3) "a peace officer shall arrest and take into custody a person without a warrant when that officer has probable cause to believe that the person has violated the [protective] order."
30. *Infra* note 31.
31. 595 F.Supp. 1521 (D. Conn. 1984).
32. *Id.*
33. *Id.* at 1528.
34. *Id.*
35. *Id.* at 1530.
36. 396 N.Y.S.2d 974, 977 (Sup. Ct. 1977), *rev'd in part, appeal dismissed in part*; 407 N.Y.S.2d 165 (1978); *aff'd* 419 N.Y.S.2d 901 (1979).

Police Liability for Failure to Train

By Julie A. Risher, Public Safety Attorney, Winston-Salem, North Carolina, Police Department

On May 12, 1991, an inexperienced, untrained reserve sheriff's deputy stopped a vehicle after the driver turned around to avoid a roadblock. On the dark country road, the deputy extracted the driver's wife (who offered no resistance) using an arm-bar technique. The woman suffered severe injuries to her knees. The deputy had never taken a law enforcement course and in just a few weeks on the job had effected an excessive number of take-down arrests.[1]

The U.S. Supreme Court recently considered the negligent hiring claim filed by the plaintiff in the case, known as *Brown v. Bryan County*. On April 30, 2001, the U.S. Supreme Court declined to hear the county's appeal concerning municipal liability for failure to train, allowing the opinion of the U.S. Court of Appeals for the Fifth Circuit to stand.

The Fifth Circuit held that the county was liable because a reasonable jury could conclude (1) that it should have been obvious to the sheriff that not training the deputy would result in his applying force that would jeopardize citizens' Fourth Amendment rights and (2) that this failure was the "moving force" that caused the constitutional injury.[2] The court concluded that the failure to train one officer adequately, and evidence of a causal connection between that lack of training and the injury, may create municipal liability under Section 1983.

Courts have traditionally considered several factors in determining whether a municipality is liable for failure to train under 42 U.S.C. Section 1983, the federal civil rights statute. In a civil suit alleging failure to train, the plaintiff has the burden of proving three elements: (1) the training program is inadequate for the tasks that officers perform; (2) the inadequacy of training is a result of the city's deliberate indifference; and (3) the inadequacy is closely related to or caused the plaintiff's injury.[3] Furthermore, the plaintiff must prove that the incident is a usual and recurring situation in the municipality. Only then is the municipality put on notice of the need for more adequate training.[4] But in *Brown v. Bryan County* the court held that a municipality may be liable for the inadequate training and misconduct of just one officer.

In *Brown v. Gray*, an off-duty plainclothes officer shot and severely injured the plaintiff following a traffic dispute.[5] The plaintiff filed a claim under 42 U.S.C. Section 1983 against the City of Denver. The jury found that the shooting was directly related to the officer's position as a police officer and that the police department had failed to train him on the always-armed/always-on duty policy. Consequently, the appellate court upheld the verdict against the city, finding that the plaintiff presented sufficient evidence of all three prongs of the test.

Similarly, in *Echlin v. City of Lansing* a U.S. district court found a municipality liable for failure to train under Section 1983 after an accidental discharge during a reverse-buy drug bust.[6] During the bust, an officer's weapon, an MP-5 machine gun, slipped from his grasp. When the officer caught the weapon, his finger engaged the trigger and the weapon discharged a single round, injuring the plaintiff. The Lansing, Michigan, Police Department Review Board identified necessary changes to department policies and procedures, including changing the straps on the MP-5 to accommodate both right- and left-hand shooters. The plaintiff filed a lawsuit against the municipality, claiming failure to train.

The court concluded that the city's policy was to arm START team members with MP-5 submachine guns, even when that force would be excessive. Additionally, the city was aware that the officers were having difficulties with the weapons. The court found that the lack of training was so obvious that it showed "deliberate indifference."[7] The court allowed the case to go to trial.

Failure-to-train claims do not always result from outrageous behavior. Any misstep by an officer that results in injury may lead to a failure-to-train claim. To avoid lawsuits based on these claims, managers must develop a training curriculum that involves every aspect of policing and carefully document the training of all officers. They also must assess the training by testing officers afterwards or by monitoring in-the-field performance evaluations. Lastly, police managers must identify performance problems and address them promptly. Refresher training is a good preventative measure.

Once an incident has occurred, other remedial steps may be appropriate. First, the internal investigation must be accurate and thorough. However, while conducting the internal investigation, the manager must be mindful that its findings may be used against the municipality as an admission. The internal investigation may spawn policy changes, but the policy changes may be used as evidence that the prior policy or practice showed deliberate indifference. Secondly, the department must take prompt and appropriate discipline as appropriate. ❖

[1] *Brown v. Bryan*, 219 F.3d 450 (5th Cir. 2000).
[2] *Id.* at 461.
[3] *Johnston v. Cincinnati*, 39 F. Supp. 1013 (S.D. Ohio 1999).
[4] *Brown v. Gray*, 227 F.3d 1278 (10th Cir. 2000).
[5] *Id.*
[6] *Echlin v. City of Lansing*, 1997 U.S. Dist. LEXIS 1943 (W.D. Michigan 1997).
[7] *Id.* at 22.