



Although failure-to-protect claims may involve tragic incidents, the legal requirements to establish liability are high.

Governmental Immunity: Understanding liability for failure to protect

*A CIRMA Law Enforcement Advisory Committee
White Paper - By Elliot Spector, Esq.*



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Governmental immunity shields law enforcement agencies against liability for discretionary acts.

“Connecticut courts have long held that government officials and employees are immune from liability for their official acts or omissions as long as they are done “in good faith, in the exercise of an honest judgment, and not in abuse of discretion, or maliciously or wantonly.”

Lawrence K. Furbish,
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Introduction

It is clearly established that the operation of a police department is a government function, and that acts or omissions in connection therewith ordinarily do not give rise to liability on the part of the municipality. *Coley v. City of Hartford*, 312 Conn. 150, 164 (2014). Governmental Immunity shields a government entity from liability. The purpose of governmental immunity is to protect a municipality from liability arising from a municipal officer’s negligent, discretionary acts unless the officer’s duty to act is clear and unequivocal. *Doe v. Petersen*, 272 Conn. 607, 615 (2006). General Statutes section 52-557n (a)(2). “This policy is especially relevant in cases where the official is called upon to make split-second, discretionary decisions on the basis of limited information. Discretionary act immunity reflects a value judgment that — despite injury to a member of the public — the broader interest in having government officers and employers free to exercise judgment and discretion in their official functions, unhampered by fear of second-guessing and retaliatory lawsuits, outweighs the benefits to be had from imposing liability for that injury.” *Doe* at 615. *Durrant v. Board of Education*, 284 Conn. 91 (2007).

“Municipal officers are not immune from liability for negligence arising out of their ministerial acts, defined as acts to be performed in a prescribed manner without the exercise of judgment or discretion.” *Doe* at 615. Evidence of a ministerial duty is provided by an explicit statutory provision, town charter, rule, ordinance or some other written directive. *Wisniewski v. Darien*, 135 Conn. App. 648, 654 (2008). “The hallmark of a discretionary act is that it requires the exercise of judgment.” *Bonington v. Westport* 297 Conn. 297, 306 (2010). “A municipality generally is liable for the ministerial acts of its agents under section 52-557n(a)(1)(A). However, section 52-557n(a)(2)(B) explicitly shields a municipality from liability for damages to person or property caused by the negligent acts or omissions which require the exercise of judgment or discretion as an official function of the authority expressly or impliedly granted by law. *Ventura v. Town of East Haven*, 170 Conn. App. 388, 401 (2017).

“The failure to provide, or the inadequacy of, police protection usually does not give rise to a cause of action in tort against a city.” *Ventura v. Town of East Haven*, 170 Conn. App. 388 (2017), citing *Coley v. Hartford*, 312 Conn. 150, 164 (2014).

There are three exceptions to discretionary act immunity:

1. Where the conduct involves malice, wantonness or intent to injure;
2. Where a statute provides for a cause of action for failure to enforce certain laws;
3. When circumstances make it apparent to the public officer that his or her failure to act would likely subject an identifiable person to imminent harm.

“The identifiable person-imminent harm exception has three requirements:

1. An imminent harm;
2. An identifiable victim; and
3. A public official to whom it is apparent that his or her conduct is likely to subject that victim to that harm.” *Doe* at 620.

Imminent Harm Requirement

“If a harm is not so likely to happen that it gives rise to a clear duty to correct the dangerous condition creating the risk of harm immediately upon discovering it, the harm is not imminent.” *Haynes v. City of Middletown*, 314 Conn. 303, 318 (2014). “Imminent does not simply mean a foreseeable event at some unspecified point in the not too distant future. Rather, we have required plaintiffs to identify a discrete place and time period at which the harm will occur.” “The test for foreseeability is

There is no constitutional right to be protected by police against exposure to danger.

would the ordinary person in the defendant's position, knowing what he knew or should have known, anticipate that harm of the general nature of that suffered was likely to result."

Apparentness Requirement

To meet the apparentness requirement, "the plaintiff must show the circumstances would have made the government agent aware that his or her acts or omissions would likely have subjected the victim to imminent harm. *Doe* at 618. This is an objective test requiring consideration of the information available to the government agent at the time of the act or omission. "The exception applies only if an officer chooses a course of action that was clearly beyond the pale because it was apparent that it would likely subject someone to imminent harm. Accordingly, the exception requires not only that it be apparent that the victim was at risk of imminent harm, but also that it be apparent that the defendant's chosen response or nonresponse to the imminent danger was likely to subject the victim to that harm." *Brooks v. Powers*, 165 Conn. App. 44 (2016).

Ventura v. East Haven, 170 Conn. App. 388 (2017). On November 4, 2006, Officer Strand was dispatched to investigate a possible domestic violence incident occurring inside a large white van in the McDonald's drive-thru. The caller described the operator as irate, and possibly drunk, on drugs and nodding out. He was punching the ceiling and not normal. Strand and Officer Conte interviewed the driver, Trnka, and his girlfriend who coincidentally were in a white van at the same location but were apparently not the persons identified by the complainant. The officers determined there was no probable cause of domestic violence or reasonable suspicion of intoxication sufficient to justify an arrest or field sobriety test. Because neither party had a license and DMV database was malfunctioning Strand drove Trnka home and directed him to leave his truck in the lot.

Fifty-six minutes later Trnka retrieved his truck and subsequently struck the plaintiff, an eighteen year old high school student as he was getting into his car. Trnka fled the scene leaving the seriously injured plaintiff. Trnka was operating the vehicle with a plate that did not match and without insurance or proper registration. Determinations not made during the original investigation.

Plaintiff claimed Strand had a ministerial duty to tow the vehicle based on EHPD Tow Board rules and regulations requiring vehicles towed in every case involving misuse of plates, lack of insurance or registration. A jury returned a verdict in the amount of \$12,200,000.

The Appellate Court found that the plain language of the tow rules did not impose a ministerial duty upon East Haven officers. Significantly, paragraph 6 of the tow rules states that "officer's discretion will prevail regarding vehicles that are to be towed." Even if the language appeared to be ministerial the plaintiff's interpretation would be unworkable, absurd and unjust. For example, a man driving his pregnant wife in labor to the hospital in an unregistered vehicle should not have his car towed upon being stopped for speeding. An officer under such circumstances must have discretion. The judgment was reversed.

In a footnote, the Court determined that governmental immunity would have applied even if plaintiff had claimed that Strand failed to make an arrest for domestic violence because the arrest decision would have been discretionary and the identifiable person-imminent harm exception would not have applied.

Brooks v. Powers, 165 Conn. App. 44 (2016). The jury could have found that when two officers were at a Foodmart in the Town of Westbrook, the Tax Collector

“Qualified immunity shields government officials from constitutional claims for money damages so long as the officials did not violate clearly established law. The Supreme Court has described the doctrine as incredibly strong—protecting ‘all but the plainly incompetent or those who knowingly violate the law.’”

Joanna C. Schwartz,
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Yale Law Journal, 2017

drove up and informed them that a woman was standing in a field who needed medical attention. She was wearing a shirt and pants and had her hands raised to the sky. At the time, there was a torrential downpour and lightning. The field was about ½ mile away and less than a half mile from the ocean. Officer Powers said they would take care of it. Powers called dispatch and said a person stopped by and told them about the woman in the field who might need medical attention. Powers asked the dispatcher to send one of the constables.

The dispatcher never sent anyone. She later claimed she forgot. A couple of hours later the officers slowly drove by the field with their spotlight on but did not see anyone. The grass in the field was knee high but neither one got out of the car. The morning after the storm the woman’s body was found by a fisherman. The Tax Collector confirmed it was the same woman she had seen the night before.

The Court stated that the real question was whether the harm was imminent. That is, whether the harm is more likely than not. The Court held that a jury could reasonably conclude that it was apparent that the way Powers reported the emergency to dispatch, together with the defendants’ failure to respond, ensured the victim’s emergency would go unaddressed, leaving her to fend for herself close to the ocean during a severe storm. Although imminent harm requires a higher level of risk than foreseeability, both should be defined at the same level of generality. Here the court agreed with the plaintiff that the harm was “from the storm” rather than the defendants’ contention that the harm was “drowning off the coastline.” Obviously, the range of harms that might be caused by the storm is much broader than the specific harm of drowning. (This case is on appeal to the Supreme Court to determine if the “harm” was imminent and whether the identifiable victim, imminent harm standard was properly applied.)

In *Swanson v. City of Groton*, 116 Conn. App. 849 (2009) the Court addressed the application of the identifiable person imminent harm exception when a statute allegedly created a duty to act. Bressert the manager of a lodge in Groton told Lasalle that he was going to be evicted for his threatening and harassing behavior toward others when intoxicated. Shortly thereafter, Groton police were called on a complaint that Lasalle was grossly intoxicated and engaging in behavior that constituted a public nuisance. Officer Bickford offered to give Lasalle a ride home but when he refused to show identification, was allowed to walk back to the lodge. Bickford determined that Lasalle was intoxicated, but not incapacitated, and did not believe he was a danger to himself or others. Lasalle walked back to the lodge where he fatally stabbed Bressert.

Plaintiff alleged that C.G.S. section 17a-683(b) created a ministerial duty to take Lasalle to a hospital or treatment facility. Although a determination of whether an act is ministerial or discretionary is normally a question for a jury there are cases where such determination is apparent from the complaint and may be subject to summary judgment. The question is whether the alleged act or omission necessarily involves the exercise of judgment. The statute in question provides that an officer finding a person who appears to be intoxicated in a public place and in need of help may, with such person’s consent, assist such person to his home, a treatment facility, or a hospital or other facility able to accept such person. Subsection (b) provides that an officer finding a person who appears to be incapacitated by alcohol shall take him into protective custody and have him brought to a treatment facility.

An intoxicated person, pertaining to subsection(a), is a person whose mental or physical functioning is substantially impaired. Incapacitated by alcohol, pertaining to subsection (b), is defined as a condition in which a person as a result of the use of alcohol has his judgment so impaired that he is incapable of realizing and making a

rational decision with respect to his need for treatment. {17a-680 (13)}.

An officer finding a person in a public place who appears to be intoxicated must use judgment to determine if the person is “intoxicated,” “needs help,” “is incapacitated,” or “affected by some other problem.” The exercise of such judgement calls obviously makes an act or omission pursuant to this statute discretionary. Officer Bickford believed Lasalle was not incapacitated.

The next question is whether the identifiable, imminent harm exception applied. The Court found that Officer Bickford had no knowledge of the dispute between Bressert and Lasalle, did not believe Lasalle was a danger to himself or others, had no reason to believe he was armed and therefore, the exception was not applicable. In this case there was neither an identifiable victim nor was it apparent that allowing an intoxicated Lasalle to walk home would subject a particular victim to harm.

In *Fleming v. Bridgeport*, 284 Conn. 502 (2007), officers were called to remove the plaintiff from an apartment because she was causing a disturbance. The plaintiff failed to inform the police of her status as a tenant and the police failed to ask her questions that would have clarified such status. If they had known the pertinent information they would not have removed her from the apartment. For the purpose of immunity, the question was not what the officers should or could have known but what they knew at the time they acted. The test is whether based on the information known at the time, that their duty was “clear and unequivocal.” *Id* at 535. The “inquiry is not whether it is apparent to the government official that an action is useful, optimal, or even adequate. Rather, we determine whether it would have been apparent to the government official that her actions likely would have subjected an identifiable person to imminent harm.” *Doe* at 620.

In *Edgerton v. Town of Clinton*, 311 Conn 217 (2014) a dispatcher allegedly did not terminate a pursuit. The defendant did not know that the vehicle was traveling at a high rate of speed, therefore, it would not be apparent that her acts or omissions might cause imminent harm. In addition, the audio recording revealed only that Vincent merely was attempting to keep the Infinity in sight to identify details regarding the vehicle, including the model, color and plate and to report its location. Although flashing blue lights, high speed and tailgating might have indicated to the occupants of the Infinity that Vincent was pursuing them, the defendant was not aware of these facts, and thus, it could not have been apparent to her that a dangerous vehicular pursuit was in progress. At 238.

Shore v. Stonington, 187 Conn. 147 (1982) a lieutenant allowed a drunk driver to enter a social club. After about 30 minutes the drunk left the club and drove his car striking and killing Mrs. Shore. Although legally intoxicated the driver was not arrested. The plaintiff’s negligence claim of a failure to enforce motor vehicle laws governing reckless driving and driving under the influence action failed because there was no identifiable person subject to imminent harm.

Merritt v. Town of Bethel Police Department, 120 Conn. App. 806 (2010). At approximately 1:14 a.m. the decedent left a party at the Masonic Temple in Bethel. Two officers were in the parking lot. They had information that prior criminal activity had taken place at the Temple, that a scuffle had occurred earlier and that gang members were at the party. Upon hearing gunshots, the officers went to the scene of the shooting and found the decedent severely injured. There was no evidence that the officers knew the decedent or that he was at the party or that he would be shot. There was no evidence that the gang members were armed and that they were going to shoot the decedent.

The Merritt Court noted that in *Sestito v. Groton*, 178 Conn 520 (1979) the court found a shooting victim to be an identifiable person subjected to imminent harm.

In *Sestito*, an on-duty police officer watched and witnesses an ongoing brawl in the bar's parking lot but did not intervene until after the plaintiff had been shot.

Coley v. Hartford, 312 Conn. 150 (2014). At approximately 8:39 p.m. Hartford police responded to a domestic violence call at 47 Bolton Street by Williams who said the father of her child, Chapdelaine, had attempted to gain entry and having failed, brandished a revolver and threatened her life. William's mother who lived at the same address observed the threat and told Chapdelaine she would call the police if he didn't leave. By the time officers arrived the suspect had left. Officers spoke to neighbors and went to 51 Bolton Street where the suspect lived. They were unable to find him but found his car parked illegally and towed it.

Officers learned that Williams had a protective order against Chapdelaine. Officers contacted a shelter and spoke to a representative on behalf of Williams and left her a victim services card. Officers left to prepare an arrest warrant. About 3 hours later at 12:05 a.m. officers were again dispatched to 47 Bolton Street about a man attempting to force entry. Upon arrival, they heard screams from the second-floor apartment. After setting up a perimeter they entered finding William's mother had been shot and killed.

Plaintiff claimed officers failed to arrest Chapdelaine, left the scene before the likelihood of further imminent violence had been eliminated in violation of statute and department policy. Plaintiff contended that the language in the policy "shall remain" is mandatory that renders the duty to remain ministerial.

"Failure to provide, or the inadequacy of, police protection usually does not give rise to a cause of action in tort against a city." at 164. *Gordon v. Bridgeport*, 208 Conn. 161 (1988) "underscores the considerable discretion inherent in law enforcement's response to an infinite array of situations implicating public safety on a daily basis." at 165. The Court noted that, "the gravamen of the plaintiff's allegations is that the defendant failed to remain at the scene for a reasonable time until, in the reasonable judgment of the police officer, the likelihood of further imminent violence had been eliminated. The court then concluded, "It is difficult to conceive of policy language that could more clearly contemplate the exercise of judgement." Therefore, the defendants' acts were discretionary entitling them to governmental immunity.

"The mere fact that a statute uses the word 'shall' in prescribing the function of a government entity or officer should not be assumed to render the function necessarily obligatory in the sense of removing the discretionary nature of the function." at 169. The Court quoted *Mills v. The Solution, LLC*, 138 Conn. App. 40, cert denied, 307 Conn. 928 (2012), "We disagree with the plaintiff that the word 'shall' is sufficient to convert what is otherwise a discretionary act into a ministerial duty where the text of the statute leaves to the discretion of the police official how to perform the function..." at 170. In *Mills* the plaintiff alleged that C.G.S section 7-284 required police protection at the carnival where the decedent was shot.

"We do not think that the public interest is served by allowing a jury of laymen with the benefit of 20/20 hindsight to second-guess the exercise of a policeman's discretion professional duty. Such discretion is no discretion at all." at 172 citing *Shore v. Stonington*, 187 Conn. 147, 157, (1982).

Texidor v. Thibedeau, 163 Conn. App. 847 (2016). On March 29, 2011, at 2:57 p.m. Quintana Texidor called the West Hartford Police Department to report that teenage boys were bullying her daughter and requested the police come to her residence. She indicated that earlier in the day she complained to the principal and the school's resource officer. She said the problem was escalating and that the kids were coming around her house threatening her and her children. This was the same group of

The state-created danger legal doctrine holds that a police officer can be held liable for injury caused by a danger that the officer created.

kids who had been bullying for the past four years at Conard High School. She said they're looking to jump on her daughter and threatening to "air up my house." Plaintiff claimed that this meant shooting up the house but the dispatcher did not understand the term. When the dispatcher asked how the boys were threatening Texidor responded by "walking in front of the house..."

The dispatcher told her that someone will see her shortly and coded the call as a nonemergency juvenile call. The school resource officer was contacted but was about to leave work and was not dispatched. The area officer was attending to motor vehicle stop and the dispatcher decided not to send a cruiser from the other side of town. After shift change the oncoming dispatcher noted that the call had been waiting in the system for more than 30 minutes and decided to wait before dispatching an officer. Both dispatchers stated the nearest cruisers were busy and they did not believe it was prudent to dispatch a cruiser from across town or an available traffic cruiser.

At 3:55 p.m. Texidor again called the police station stating that the boy's threats were escalating. The dispatcher changed the code to a disturbance and officers were dispatched at 3:57 p.m. At 4:03 p.m. a call was received reporting a shooting at the address and officer's response was upgraded to an emergency. Officers arrived between 4:06 and 4:07 p.m. The plaintiff who was shot by one of the boys was not a resident of the home, but was there to help Texidor move furniture.

Plaintiff claimed that when the dispatcher stated someone would be there shortly she created a ministerial duty. The court did not agree finding that "the plaintiff did not present any evidence of a city charter, provision, ordinance, regulation, rule, policy or any other directive that created a ministerial duty regarding the time in which the officers were to respond to a call for assistance. Furthermore, one of the essential duties of the Police Department is to receive calls for assistance from the public and to determine the appropriate level of response, which includes the overall priority of calls for assistance." Citing, *Gordon v. Bridgeport Housing Authority*, 208 Conn.161 (1988).

The court then determined that the identifiable person subject imminent harm exception did not apply. "An allegedly identifiable person must be identifiable as a potential victim of a specific harm. Likewise, the alleged imminent harm must be imminent in terms of its impact on a specific identifiable person... The exception is applicable only in the clearest cases... the plaintiff must fall within a narrowly defined identified (class) of foreseeable victims." In this case the plaintiff's mere presence as an invitee on the property where he sustained injury is not sufficient to make him a member of an identifiable class of foreseeable victims. The individual defendants had no way of knowing that the plaintiff would be present at the home.

State-Created Danger Theory

In *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189 (1989), the Court stated that nothing in the substantive due process clause requires the State to protect life, liberty, and property of its citizens against invasion by private persons. While the state may be aware of a danger to a person they may not generally be held liable if a state actor played no role in creating the danger. There are two exceptions to this rule. First, there is an affirmative duty for the state to protect an individual held in custody by the state. Second, "state-created danger" exception arises when, the state affirmatively creates or increases the victim's risk of danger at the hands of a private actor.

"It is not enough to allege that a government actor failed to protect an individual

from a known danger of bodily harm or failed to warn the individual of that danger." Due process may be implicated where officials engage in conduct that explicitly or implicitly sanctions private violence. *Dwares v. City of New York*, 985 F. 2d 99 (2d Cir. 2007) where officers allegedly allowed demonstrators to be attack by skin heads. "To warrant due process liability, however, the conduct must rise to the level of an affirmative act that communicates... official sanction of private violence to the perpetrator." *Okin v. Vill. Of Cornwall-on-Hudson Police Department*, 577 F.3d 415 (2d Cir. 2009) where officers responding to 911 calls repeatedly and openly expressed camaraderie with the physical abuser and contempt for his victim. These cases, representative of this level of liability, will not be elaborated on in this white paper because Connecticut officers would not idly stand by while any person is being attacked, nor would they ignore repeated acts of domestic violence because the perpetrator happens to be a friend.

Where repeated, sustained inaction by government officials, in the face of potential acts of violence, might constitute prior assurances rising to the level of an affirmative condoning of private violence, even if there is no explicit approval or encouragement the court has found a due process clause violation. In *Pena v. DePrisco*, 432 F.3d 98 (2d Cir. 2005) the Second Circuit found a due process violation where officers condoned an off-duty officer's act of driving while intoxicated where his drunk driving resulted in multiple deaths. This case involved the common practice of police officers drinking after their shifts and allowing fellow officers to drive while intoxicated. Such actions coupled with knowledge that if the officers were stopped enforcement action would not be taken, allowed officers to violate motor vehicle laws with impunity. These actions implicitly condoned behavior amounting to state created danger.

"To establish a violation of substantive due process rights a plaintiff must demonstrate that the state action was so egregious, so outrageous, that it may fairly be said to shock contemporary conscience." *County of Sacramento v. Lewis*, 523 U.S. 833, 837 (1998). "Lewis declared that intentionally inflicted injuries are the most likely to rise to the conscience – shocking level, that negligently inflicted harm is categorically beneath the threshold of constitutional due process, and that recklessly inflicted harms are context–dependent closer calls." Whether recklessly inflicted harm rises to a substantive due process rights violation would depend primarily on the time an officer would have to contemplate his actions. For example, in a high-speed pursuit case where an officer must make split-second decisions his actions would not amount to conscious–shocking conduct. However, in the context of care of prison inmates, where the officials would have an opportunity for deliberation, reckless actions may amount to a substantive due process violation.

The most significant domestic violence case applying the state created danger theory is *Town of Castle Rock, Colorado v. Gonzales*, 545 U.S. 748 (2005). This was an extreme case because of the nature of the tragedy and the strength of the factual allegations. On May 21, 1999 Mrs. Gonzales obtained a restraining order against her estranged husband. On June 4th, the restraining order was modified to allow the husband to see the children for midweek dinner visits arranged by the parties upon reasonable notice. At approximately five or 5:30 p.m. on June 22 the husband took his three daughters who were playing outside the family home in violation of the order. When Mrs. Gonzales realized her children were missing she suspected her husband had taken them and called the police about 7:30 p.m. Two officers were dispatched and shown a copy of the temporary restraining order. They informed Mrs. Gonzalez that they could do nothing about the restraining order and suggested she call the police department again if he did not bring the children home by 10 p.m.

At approximately 8:30 p.m. her husband called from his cell phone telling her he had taken the three children to an amusement park in Denver. She called the police again to have someone check for her husband or his vehicle at the amusement park but was again told to wait until 10 p.m. to see if her husband returned the girls. At approximately 10:10 p.m. Mrs. Gonzalez called the police and said her children were still missing. She was told to call back at midnight. She called at midnight and told the dispatcher her children were still missing and then went to her husband's apartment finding nobody there. She called the police at 12:10 a.m. and was told to wait for an officer to arrive but when no one came she went to the police station at 12:50 a.m. and submitted an incident report. The officer took the report but made no reasonable effort to enforce the restraining order or locate the children. Instead he went to dinner. At approximately 3:20 a.m. Mrs. Gonzalez's husband arrived at the police station and opened fire with a semiautomatic handgun. Police shot back killing him. Inside the cab of his pickup truck they found the bodies of all three daughters whom he had already murdered.

The District Court granted defendants motion to dismiss for failing to state a claim. The Court of Appeals affirmed the rejection of the substantive due process claim but found that the plaintiff had alleged a cognizable procedural due process claim. On rehearing *en banc*, a divided court reached the same disposition concluding that the plaintiff had a protected property interest in the enforcement of the terms of her restraining order and that the town had deprived her of her due process rights because the police never heard nor seriously entertained her request to enforce and protect her interests in the restraining order.

The statute in Colorado and the department's policy were essentially identical to Connecticut's domestic violence statute and model policy provisions. They all require officers to use every reasonable means to enforce a restraining order and to arrest a person who has or is attempted to violate any provision of a restraining order. The plaintiff argued to the Supreme Court that these provisions of law made enforcement of the restraining orders mandatory. The Supreme Court did not agree stating, "a well-established tradition of police discretion has long coexisted with apparently mandatory arrest statutes."

"In each and every state there are long-standing statutes that, by their terms, seem to preclude non-enforcement by the police... However, for a number of reasons, including their legislative history, insufficient resources, and sheer physical impossibility, it has been recognized that such statutes cannot be interpreted literally... They clearly do not mean the police officer may not lawfully decline to make an arrest. As to third parties in the states, the full-enforcement statutes simply have no effect, and their significance is further diminished." The Court noted the deep-rooted nature of law – enforcement discretion, even in the presence of seemingly mandatory legislative commands. In *Chicago v. Morales*, 527 U.S. 41 (1999) where an ordinance stated that police "shall order" persons to disperse in certain circumstances. "The court proclaimed, simple common sense that all police officers must use some discretion in deciding when and where to enforce city ordinances."

Court went on to explain that a true mandate police action would require some stronger indication than officers "shall use every reasonable means to enforce a restraining order, or shall arrest...or shall seek a warrant."

An interesting federal case involving failure to protect and use of force is *Devine v. Fusaro*, 2016 WL 183472 (CT. District Court 2016). Police were informed that Timothy Devine told a friend he was going to kill himself. His car was found in the University of Connecticut's Avery point campus in Groton at about 10 p.m. Devine

For additional information on this topic, please contact your CIRMA Risk Management Consultant.

was found on some rocks near the water holding a gun to his head. His friend, Douchette, join the police to try to convince him to come ashore. At about midnight a Groton trained crisis negotiator spoke to Devine by telephone until about 1:45 a.m. At that time, the Connecticut State police-emergency services unit responded and the negotiator, Christopher Bartolotta, negotiated with Devine by telephone, the public-address system and then by moving closer toward the rocks. Some of the Devine's family members arrived but were not allowed to speak to him.

At about 3 a.m. officers considered using a K-9, a TASER, attempting to surprise Devine by boat, and finally by surprising him with flash grenades and then shooting him with hard rubber batons. At about 3:30 a.m. he was joking around with the negotiator when officers executed their grenade/baton plan. After the tactic failed and Devine said, "Fuck what are you doing? I'm still talking." He then held the gun to his head and said, "You guys are going to make me do this!" After several moments, another six to eight batons were fired resulting in Devine shooting and killing himself.

The court noted a question regarding immediate urgency that required officers to break off negotiations and deploy force. Devine had not threatened to shoot police or anyone else except himself and his friend warned that their tactics would be ineffective and in fact the first round was ineffective. However, the court cited *Fortunati v. Vermont*, 503 F. App'x 78 (2d Cir. 2012) concluding that qualified immunity precluded liability against the police for use of less than lethal force against an armed man who would not surrender to the police. In *Fortunati* officers fired beanbags at an emotionally disturbed man who responded by pulling a gun from his waistband, resulting in officers firing lethal shots. The court found "an objectively reasonable law-enforcement officer would not have known that the use of less than lethal force against Devine in the circumstances as they presented themselves here would violate his constitutional right to be free from use of excessive force."

Conclusion

In Connecticut, the most common failure-to-protect claims arise in domestic violence situations, followed by handling of emotionally disturbed persons, and a variety of other types of incidents. The most common legal claims involve imminent harm to identifiable person and/or the state-created danger theory. Given the difficult standards described in this white paper, it is likely the plaintiffs will not prevail in our state where our officers are well-trained and unlikely to show the type of deliberate indifference underlying these types of claims. Unfortunately, these types of incidents result in deaths each year. The potential damage claims can be catastrophic and the litigation costs significant. While police will usually prevail, it is worth the effort to continue to find ways to avoid these tragic incidents.

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Governmental Immunity

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