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Civil Liability and Domestic Violence Calls – Part Three

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Introduction

Two prior articles in this series have addressed [federal civil rights liability in general](#) for police response to domestic violence calls, and [municipal and supervisory liability](#) for such responses (as well as domestic violence situations involving officers' own families). In this third, and concluding, article in the series, the focus is on liability issues under state law, including duties arguably imposed by state domestic violence statutes, and claims of gender or sexual orientation discrimination in responding to domestic violence calls. Just as with the two prior articles, the current one ends with a brief listing of some useful resources.

Liability Under State Law for Domestic Violence Calls

The state law on domestic violence and the rules concerning imposition of liability on law enforcement for the results of response or non-response to domestic violence calls varies from jurisdiction to jurisdiction. There is no substitute for becoming familiar with the statutes in your own state, including statutes that may impose mandatory duties in domestic violence cases, particularly when domestic violence orders of protection have been obtained. In a number of jurisdictions, immunities of various kinds may also be afforded to law enforcement responders.

State law may impose duties and result in liability when no such duty or liability would be found under federal constitutional law. Factors that are often looked at by state courts include responding officers knowledge of the dangers that

domestic violence victims are faced with (sometimes based on a past pattern or record of abuse, repeated calls for assistance, etc.), the language of particular statutes and court orders as to whether certain kinds of responses are mandatory or discretionary, any “special relationship” with the domestic violence victim (such as may be created by an assurance to the victim that help or protection will be provided, combined with reasonable reliance on such assurances), or actions that arguably enhance the dangers to the victim or prevent or hinder either the victim themselves from engaging in self-help or third parties from assisting them.

In [Lacey v. Village of Palatine](#), No. 1062842, 2008 Ill. App. Lexis 61, 882 N.E.2d 1187 (Ill. App. 1st Dist.), for instance, a court found that claims were properly asserted against municipality and its personnel for alleged failure to protect two victims of domestic violence from being murdered after receiving information of a man's alleged plan to engage in a murder for hire scheme. The man had engaged in a pattern of abuse, according to the plaintiffs, while living with a woman, who then obtained protective orders against him.

Subsequently, the man's chiropractor allegedly contacted police and reported that the man had been asking if there was anyone who could be hired to kill the woman or "break her legs." The Complaint alleges that the failure to protect the woman and another family member who was also murdered at the same time violated the Illinois Domestic Violence Act, 750 ILCS 60/101 et seq. An intermediate Illinois appeals court found that the alleged willful and wanton failure to provide protection under the circumstances was adequate to survive a motion to dismiss, and that the provisions of a state Tort Immunity Act did not override the protections provided by the Domestic Violence Act. The court also ruled, however, that the second murder victim, who was not named in the protective order, was not a protected person under the statute, so that claims involving her death were properly dismissed

In [Moore v. Green](#), No. 100029, 2006 Ill. Lexis 613, 848 N.E.2d 1015, a prior decision in the same state, the Illinois Supreme Court rules that police officers who allegedly failed to assist domestic violence victim in response to 911 call were not entitled to absolute immunity under state law on a claim that their inaction was willful and wanton conduct that caused her death when her husband subsequently shot her. More specific limited immunity provision of domestic violence statute applied instead, with an exception for willful and wanton conduct. The officers allegedly failed to adequately investigate the call, leaving the scene of the disturbance only minutes before the husband killed the wife. See also [Doe v. Calumet City](#), #75347, 161 Ill 2d 374, 641 N.E.2d 498 (1994), finding that an allegation that officer declined to break into apartment to rescue minor girl from intruder who was raping her, despite her mother's pleas to do so, because he did not want to be liable for property damage stated claim against officer for willful

and wanton negligence, intentional infliction of emotional distress, and gender discrimination, and [Calloway v. Kinkelaar](#), #5-92-0652, 633 N.E.2d 1380 (Ill App. 1994), ruling that an Illinois domestic violence statute creates a "special duty" to provide protection for persons possessing a court issued order of protection, and that law enforcement officers may be held liable for willful and wanton failure to provide such protection.

In some instances, immunity under state law may be provided for actions taken in good faith, but not for a complete failure to act at all in response to a known danger. See [Roy v. City of Everett](#), #56705-1, 823 P.2d 1084 (Wash 1992), holding that a city and its police officers were not immune from a suit by a domestic violence victim based on alleged year-long failure to enforce Washington state's domestic violence act, and that the statute provided immunity for good-faith actions, but not for failure to act.

In [Ortega v. Sacramento County Dept. of Health & Human Services](#), No C054262, 2008 Cal. App. Lexis 470, 74 Cal. Rptr. 3d 390 (3rd Dist.), a minor failed to show that there was a mandatory duty under California state law to protect her from violence by her father, who stabbed her in the heart and lung. The father had previously been arrested for screaming in an uncontrollable manner in the street and around his apartment, and violently banging on a refrigerator. Following the arrest, a urine test showed that he was under the influence of phencyclidine. Even though the ensuing investigation by a social worker was "lousy" and failed to make a proper determination about the risk of returning the minor to her father, there was immunity from liability for the exercise of discretion under these circumstances

Officers will not be expected to anticipate unforeseen behavior. In [Halpin v. Town of Lancaster](#), No. 167 SSM 26, 2006 N.Y. Lexis 2551, 855 N.E.2d 1169, the highest court in New York ruled that officers who allegedly failed to remove weapons from a home when called to the scene of a domestic dispute were not liable for an estranged husband's action, after they left, of shooting and injuring his wife before killing himself with the same gun. Without a "special relationship" imposing a duty to provide protection, officers "cannot be expected to predict and prevent irrational behavior."

Similarly, in [Kromer v. County of Onondaga](#), # 05-02037, 809 N.Y.S.2d 723 (A.D. 4th Dept. 2006), an intermediate New York appeals court found that a county sheriff and other law enforcement officials were not liable for failing to protect woman from being murdered by her estranged husband based on their alleged failure to take adequate measures in response to her report that he had assaulted and raped her two weeks before. There was no indication that the

decedent had justifiably relied on any affirmative promises by the defendants to provide protection or take particular action, and therefore no "special relationship" existed between the defendants and the decedent sufficient to support the imposition of liability.

Another New York state case of interest is [Berliner v. Thompson](#), #64278, 578 N.Y.S.2d 687 (A.D. 1992), ruling that a sheriff could not be held vicariously liable for his deputies' acts or omissions in failing to prevent estranged husband's stabbing to death of his wife. The court stated that a domestic protection order under New York state law did not, by itself, establish a special duty to protect the wife, but might when combined with officers' knowledge of order and a possible violation.

Some state statutes allow the imposition of liability on law enforcement officers responding to domestic violence calls only when the officer's actions or failure to act is truly egregious. In [Collins v. Tallahatchie County](#), No. 2003-CA-01377-SCT, 876 So. 2d 284 (Miss. 2004), for instance, the Mississippi Supreme Court held that even if employees of the county sheriff's office were negligent in failing to arrest a husband before he shot and wounded his wife, the department was immune from a lawsuit under a statute providing that a government entity is not liable for any claim in the absence of conduct by an employee acting in "reckless disregard" of the safety of others. The wife had previously signed a criminal affidavit against her husband for domestic violence, and a judge signed a warrant for his arrest, but this was allegedly never delivered to the county sheriff's department prior to the shooting incident.

On the other hand, in [City of Jackson v. Calcote](#), No. 2003-CA-01318-COA, 910 So. 2d 1103 (Miss. App. 2005), a court found that the Mississippi state statute providing immunity for officers who take reasonable measures to prevent domestic violence did not apply to an officer who allegedly first handcuffed an arrestee during a domestic violence call and then ground the arrestee's face into the concrete floor in reckless disregard of the arrestee's safety.

Federal courts, in addressing federal civil rights claims, will also sometimes reference state domestic violence statutes in determining what duties law enforcement officers had under the circumstances, or whether their actions were such that no reasonable officer could have taken them. In [Hudson v. Hudson](#), No. 05-6575, 2007 U.S. App. Lexis 1705, 475 F.3d 741 (6th Cir.), for instance, a court found that police officers were entitled to qualified immunity for allegedly failing to prevent the murder of a son by his father, despite repeated calls to the police and the existence of a protective order, since the officers had discretion as to what actions to take in enforcing the protective order issued under Tennessee state law.

[Loram Maintenance of Way, Inc. v. Ianni](#), No. 08-02-00049-CV, 141 S.W.3d 722 (Tex. App. 2004) is an interesting case in which liability for injuries to a police officer responding to a domestic violence call was imposed on a third party. Under the court's decision, an employer whose drug intoxicated employee shot a police officer responding to a domestic dispute he was having with his wife was properly held liable for \$800,000 in compensatory and \$500,000 in punitive damages. Evidence showed that supervisors were aware of, and even encouraged, work crew to use drugs to stay "alert" and awake while repairing railroad tracks.

Other cases of interest by state courts or referencing state law include:

* [Bartunek v. State](#), No. S-02-710, 666 N.W.2d 435 (Neb. 2003), in which the Nebraska Supreme Court overturned \$300,000 award to woman assaulted in her home by a former boyfriend while he was on probation. No special relationship existed between crime victim and the state that gave rise to any specific duty to protect her from her former boyfriend.

* [Borlaug v. City of Cedar Falls](#), No. 05-6847, 710 N.W.2d 541 (Iowa App. 2006), deciding that enforcement by a city and county of a court "no-contact" order, entered against a man in a criminal proceeding for domestic assault, even though it prevented him from returning to his home, where he lived with the woman he was accused of assaulting, was not a "taking" of private property entitling him to compensation. The actions taken were carried out in enforcing a facially valid court order, and the defendants' employees could not make their own determination of the merits or enforceability of that order

* [Masse v. Thompson](#), #03-567, 90 P.3d 394 (Mont. 2004), in which the Montana Supreme Court reinstates \$358,000 award against county sheriff for allegedly failing to protect woman against fatal shooting by her husband. The sheriff had a duty to protect the wife on the basis of a special relationship created by a Montana state statute requiring him to provide a notice of rights and information on community resources to domestic violence victims, and he allegedly failed to provide such notices or information during a three year period of responding to domestic violence calls at the couple's residence.

* [Florence v. Town of Plainfield](#), No. CV-03 00695808, 849 A.2d 7 (Conn. Super. 2004), concluding that a woman's estate could pursue a negligence claim under Connecticut law against town and police officers for allegedly failing to protect her and her unborn fetus from being fatally shot by her estranged boyfriend, who was the father. The court ruled that the defendants did not have tort immunity because the decedents were identifiable persons facing imminent harm. It was alleged that the officers knew of two prior assaults and a kidnapping that the boyfriend had perpetrated against the woman, and that the woman had

expressed fear for her life

* [White v. Beasley](#), #101350, 552 NW2d 1 (Mich 1996), in which the Michigan Supreme Court rules that police officer who arrived on scene of domestic disturbance in response to neighbors' 911 phone calls, but allegedly did not attempt to contact a woman who neighbors stated had been attacked by her husband, was not liable for woman's death three hours later; no special relationship, imposing a duty of protection, existed between decedent and officer, as there was no direct contact between them

* [Matthews v. Pickett County](#), #01501-9801, 996 S.W.2d 162 (Tenn. 1999), holding that a county could be liable for the burning down of woman's house after officers failed to arrest her ex- husband who had allegedly just threatened to kill her in violation of a court order of protection. The court found that such orders impose a special duty to provide protection if relied upon, and that duty extends to protecting property.

* [Hamilton v. City of Omaha](#), #5-90-679, 243 Neb 253, 498 N.W.2d 555 (1993), in which the Nebraska Supreme Court upholds dismissal of suit against city and officer by woman beaten again by her ex-husband after officer called to the scene allegedly assured her that he would be in the area to protect her. The officer did not allegedly tell her it was safe to remain at home and complaint did not allege where else she might have gone

* [Donaldson v. City of Seattle](#), #356-02-51, 831 P.2d 1098 (Wash App. 1992), find that, while a Washington state statute created a mandatory duty for police to arrest an abusive boyfriend or spouse if he was present, officers were not liable for boyfriend's later deadly stabbing attack on woman when he was not present to be arrested when they arrived on the scene, and the woman declined their offer to take her to a shelter.

Claims of Gender or Sexual Orientation Discrimination

A number of prior cases, in both federal and state courts, have involved allegations that police officers, in responding to domestic violence calls, engaged in gender or sexual orientation discrimination, or discrimination against some other protected category of persons. While finding such discrimination claims valid in some instances, courts have generally imposed a fairly high threshold for imposing liability on officers or agencies on this basis.

In [Mata v. City of Kingsville, Tex.](#), No. 06-41518, 2008 U.S. App. Lexis 9211 (Unpub. 5th Cir.), for instance, a woman married to a police officer failed to show that she was denied equal protection regarding alleged incidents of domestic

violence. The wife claimed that officers unjustifiably stopped her on a number of occasions, that her husband stalked her in his police vehicle, and that she was intentionally treated differently than other victims of domestic violence not married to police officers. To the contrary, the court found that officers took steps to try to protect the wife, even over the objections of both her husband and herself, including going to their home in response to a 911 call which was made and then "rescinded," and filing various reports. Any actual difference in treatment was the result of the wife's own requests, as she asked that only "informal" measures be taken to stop her husband's alleged violent actions.

In [Kelley v. City of Wake Village, Texas](#), No. 07-40227, 2008 U.S. App. Lexis 2441 (Unpub. 5th Cir.), the court found that a woman who was shot and injured by her husband after obtaining a protective order against him under Texas law, established a factual issue as to whether police violated state law in failing to follow the provisions of a state domestic violence statute. The court also ruled, however, that the plaintiff failed to provide evidence that the alleged failure to enforce the state law was motivated by discriminatory intent against women. Her allegation that officers threatened to take away her children if she kept calling to complain about her husband did not establish such discriminatory intent. The city, a police chief, and a police officer were therefore entitled to summary judgment.

If such discrimination can be shown, however, damages may be awarded. In [Macias, Estate of, v. Ihde](#), #99-15662, 219 F.3d 1018 (9th Cir. 2000), for instance, the court ruled that the family of woman killed by her estranged husband could assert a claim for violation of equal protection based on alleged failure to provide police protection because of gender, regardless of whether they could show that this failure helped cause the murder or indeed caused any actual harm at all; nominal damages could still be awarded if a constitutional violation without actual harm was proven.

Some courts have been loathe to accept claims of gender discrimination based largely on statistical evidence. In [Ricketts v. City of Columbia, Missouri](#), #93-3633, 36 F.3d 775 (8th Cir. 1994), for instance, the court found that officers' failure to previously arrest a husband for reported acts of harassment did not cause his later kidnapping and rape of estranged wife and murder of her mother. The court also ruled that statistics showing that fewer arrests were made in domestic abuse cases than non-domestic cases did not establish an equal protection violation based on gender discrimination

Also see [Williams v. City of Montgomery, Alabama](#), #98-A-361, 48 F.Supp. 2d 1317 (M.D. Ala. 1999), ruling that a detective exercised his discretion by deciding not to pursue investigation of alleged domestic violence until the following morning, and that the city was not liable for facially neutral domestic violence

policy when it could not be shown that woman, shot and killed by her ex-husband, had been treated differently than male victims of domestic violence.

A number of men have asserted that they were subjected to gender discrimination in domestic violence cases. These claims have been rejected in Fedor v. Kudrak, No. 3:02 CV 1489, 421 F. Supp. 2d 473 (D. Conn. 2006), in which a husband, involved in divorce proceedings with his wife, did not show that police officer violated his right to equal protection, as a member of a class of persons involved in domestic disputes, by refusing to treat his complaint that his wife had stolen his personal property the same as a similar complaint by other persons, as well as in Burrell v. Anderson, No. CIV.04-43, 353 F. Supp. 2d 55 (D. Me. 2005), ruling that the father of several children was not deprived of equal protection of law, nor were his due process rights as a parent violated when police officers and prosecutors failed to find probable cause to arrest his child's biological mother for kidnapping, but prosecuted him for alleged domestic violence. There was no evidence that the defendants were motivated by gender bias.

See also, Staley v. Grady, No. 03CIV.7949, 371 F. Supp. 2d 411 (S.D.N.Y. 2005). In which a man arrested in domestic violence investigation failed to show that his right to equal protection of law was violated by the failure of the county and its prosecutor to investigate his complaint against his ex-wife in the same manner as they investigated her complaint against him

Also of interest is Shipp v. McMahon, #98-31317, 234 F.3d 907 (5th Cir. 2000), in which a federal appeals court set forth a legal test for an equal protection claim based on unequal protection given to victims of domestic violence, while holding that sheriffs and deputies were entitled to qualified immunity from liability for failure to prevent husband's abduction, rape, and shooting of his estranged wife, since the law was not previously "clearly established" on the subject. The court found that a possible alternate ground for liability, however, might be based on ill will towards the victim as a "class of one."

Same-sex couples, including live-in domestic partners or, in several states now, spouses, are sometimes also involved in domestic disputes, and there have been claims in a number of cases that law enforcement personnel engaged in sexual orientation discrimination in responding to domestic violence calls by gay or lesbian persons.

In Price-Cornelison v. Brooks, No. 05-6140, 2008 U.S. App. Lexis 9628, 524 F.3d 1103, (10th Cir.), the court ruled that an undersheriff was entitled to qualified immunity on an equal protection claim asserted by a lesbian who obtained an emergency protective order based on alleged domestic violence by her estranged girlfriend, but not on claims that he refused to enforce a permanent protective

order that she subsequently obtained. The emergency order allowed the girlfriend to access the home for a period of time to retrieve some of her property, while the permanent order barred her from the premises altogether. The plaintiff claimed that she was provided with a lesser degree of protection than that provided to heterosexual victims of domestic violence. The court also allowed a Fourth Amendment claim to proceed on the basis that the undersheriff told the plaintiff not to return to her home while her girlfriend was present, and that he would arrest her if she did, which allegedly facilitated the girlfriend's seizure of some of the plaintiff's property from the premises.

Another case involving a same-sex couple is [Lunini v. Grayeb](#), No. 04-1822, 2005 U.S. App. Lexis 885, 395 F.3d 761 (7th Cir.), in which a court rejected the claim that police officers violated a man's rights to equal protection by failing to arrest his former boyfriend, a member of the City Council, following an alleged domestic disturbance at their home. The lower trial court decision, [Lunini v. Grayer](#), #02-3028, 305 F. Supp. 2d 893 (C.D. Ill. 2004), also found that the mere fact that the officers "laughed and made silly faces" when told that the two men were ending a relationship did not show that they engaged in discrimination on the basis of sexual orientation.

Resources

A number of useful resources were also listed in the first two articles in this series. Further useful resources include:

- [Working with Young Men Who Batter: Current Strategies and New Directions](#), by Dean Peacock and Emily Rothman, MS. An overview of recent juvenile batterer intervention programs, and description of efforts to prevent re-offenses by juvenile perpetrators of domestic violence.
- [Domestic Violence – Another Perspective](#). Focuses on the issue of domestic violence against men, and also contains links to information and programs designed to assist perpetrators of domestic violence, whether male or female, in seeking counseling or other avenues to address the root causes of their anger or frustration and to take responsibility for their behavior.
- [Domestic Violence in Lesbian, Bisexual, Gay and Transgender Communities: A Fact Sheet](#) by Amnesty International USA.
- University of Minnesota, Minnesota Center Against Violence and Abuse [MINCAVA electronic clearinghouse](#). Contains information to articles, publications and other resources about domestic violence, child abuse, sexual violence, stalking, trafficking, workplace violence, and youth violence.

- [Assessing Justice System Response to Violence Against Women: A Tool for Law Enforcement](#). STOP-TA Project, Washington, D.C. Contains an assessment tool for jurisdictions to use in developing effective responses by law enforcement, prosecution, and the courts.
 - [Effective Intervention in Domestic Violence & Child Maltreatment Cases: Guidelines for Policy and Practice](#), by Louis W. McHardy, Meredith Hofford, Susan Schechter, & Jeffrey Edleson. A 133-page publication addressing issues relevant to family violence within the home and the community and specifically focused on interventions.
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