

The Danger Creation Doctrine and Section 1983: Governmental Liability for Third Party Torts

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A. Introduction: Constitutionalizing Third-Party Torts

This article focuses on the specific situation of asserting a section 1983 claim on behalf of a plaintiff injured or killed by a third party as a consequence of state action or policy. This does not include those cases where the state actor directly inflicts the injury, e.g., where the police officer swings the baton and hits the plaintiff, but rather where the governmental entity, either through policy or direct action, creates a situation of peril or danger that results in a third party injuring the plaintiff.

For example, a police officer pulls over a car occupied by a female passenger, arrests the driver for intoxication, impounds the vehicle, and leaves the plaintiff at the side of the road in a dangerous neighborhood. As the plaintiff begins to walk home, she is assaulted by the local criminal element, i.e., a third party assailant. Despite the fact that the police did not physically inflict the injury, the governmental entity may nonetheless be liable under the Fourteenth Amendment for leaving the plaintiff in such a dangerous situation. As will be explained below, the government "created the danger" of the third party tort, thereby "constitutionalizing" the case.

This article provides a legal analysis of the "danger creation" doctrine, how it was created and how it acts to constitutionalize a plaintiff's third party injury case. The article begins with the United States Supreme Court's decision in *De Shaney*, which is the modern basis for the "danger creation" doctrine, and also discusses the lower circuit cases that have utilized *De Shaney* to solidify "danger creation." Finally, the article discusses the current pleading standard that pervades many of the federal circuits,

including the Ninth, and summarizes the major legal premises the reader should take from this work.

B. The Initial Hurdle: The Constitution is a Charter of Negative Liberties

The major problem with asserting a section 1983 claim against a governmental entity in a third party injury case is that the "Constitution is a charter of negative liberties; it tells the state to let people alone; it does not [generally] require ... the state to provide services, even so elementary a service as maintaining law and order."¹ In other words, the Constitution generally tells the governmental actor what it cannot do once it chooses to engage in an activity, but it does not require it to undertake the action in the first place. For example, the Constitution does not mandate that a police officer pull over a person who is thought to be drunk, but does prohibit that same officer from discriminating against the drunkard once he has been stopped.

Two major categorical exceptions to this "prohibitional" character exist: first, where the plaintiff is in state custody, such as state prisoners and involuntary mental patients, and second, where the state creates the danger that causes the injury, such as described above with the female passenger who was left in a dangerous neighborhood. This article focuses upon the latter "danger creation" exception.

C. *De Shaney* and the Genesis of the "Danger Creation" Exception

In *De Shaney v. Winnebago County Department of Social Services* (1989) 488 U.S. 189, the United States Supreme Court determined "that the due process



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clause of the Fourteenth Amendment does not impose an obligation upon public authorities to protect children from parental abuse, even when they know that a child is threatened with harm and they took some protective measures."²

In *De Shaney*, the Department of Social Services ("DSS") was made aware that four year old Joshua De Shaney was potentially being abused by his father. DSS conducted multiple inquiries and investigations, including several visits to the hospital when Joshua was admitted for bruises and abrasions, but did nothing. After the third visit to the hospital (for what the medical staff called child abuse injuries), the DSS case worker made two special follow-up trips to the De Shaney home. However, she was unable to meet with Joshua on those visits because he was "too sick" to receive visitors. Still, nothing was done. Finally, Joshua's father beat him so severely that Joshua fell into a life-threatening coma. The brain damage was so extensive,

Joshua will spend the remainder of his life in an institution for the profoundly retarded.

Despite these egregious facts, the High Court's majority held that, outside the custodial setting, the state does not have a constitutional obligation to protect those who are in danger of being harmed by third parties. In other words, the state was not liable for Joshua's injuries because it was Joshua's father, a non-governmental third party actor, that inflicted them. Such a result illustrates the Court's general philosophy that claims sounding in traditional tort law will not be easily constitutionalized under the substantive due process clause of the Fourteenth Amendment.³

However, in reaching their decision in *De Shaney*, the Court made the following extremely important observation:

While the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them. That the State once took temporary custody of Joshua does not alter the analysis, for when it returned him to his father's custody, it placed him in no worse position than that in which he would have been had it not acted at all; the State does not become the permanent guarantor of an individual's safety by having once offered him shelter. Under these circumstances, the State had no constitutional duty to protect Joshua. (*Id.*, at 201.)

It is this observation that left the door open for, and in fact gave birth to, the "danger creation" exception.

D. Post-*De Shaney* and "Danger Creation" in the Lower Courts

In post-*De Shaney* decisions, the lower federal courts utilized the passage quoted above to impose a specific constitutional duty under the due process clause. Such duty arises under the guise of the "danger creation" exception, and is defined as follows: the government entity is liable when it engages in activity that creates or seriously increases the risk of third-party harm to the plaintiff, or renders the plaintiff more vulnerable to such harm or injury, and the plaintiff is actually injured.

The following examples illustrate the meaning and application of this doctrine.

1) *Wood*: Law enforcement officer drops girl off in bad neighborhood

In *Wood v. Ostrander* (9th Cir. 1989) 879 F.2d 583, a state trooper pulled over the car in which the female plaintiff was a passenger, arrested the driver for being intoxicated, and impounded the vehicle. (*Id.*, at 586.) Upon making the arrest, the trooper did not offer to give the plaintiff a ride despite the fact that he knew the plaintiff was being left in a high crime area. The plaintiff began walking to her home five miles away, accepted a ride from a stranger, and was taken to a secluded place and raped.

The plaintiff filed a section 1983 suit against, inter alia, the state trooper and the Chief Officer of the Washington State Police, alleging a violation of her liberty interest in personal security under the Fourteenth Amendment. The plaintiff did not allege that the defendant directly assaulted her, but that "he allegedly acted in callous disregard for [her] physical security, a liberty interest protected by the Constitution." (*Id.*, at 589.)

In reversing the district court's grant of summary judgment, the Ninth Circuit found that the "fact that [the trooper] arrested [the driver], impounded his car, and apparently stranded [the plaintiff] in a high-crime area at 2:30 a.m. distinguishes [the plaintiff] from the general public and triggers a duty of the police to afford her some measure of peace and safety." (*Id.*, at 589.) Accordingly, the Ninth Circuit was "satisfied that Wood ... presented genuine issues of material fact" on the question of whether [the state trooper] deprived her of a liberty interest protected by the Constitution," thereby allowing the claim to proceed to trial.⁵

2) *Grubbs*: Inmate allowed to work with nurse

In *L.W. v. Grubbs* (9th Cir. 1992) 974 F.2d 119, which relied directly on *Wood*, *supra*, the plaintiff was a female nurse employed by the State of Oregon at a medium security institution for young male offenders. While working, the plaintiff was raped and terrorized by an inmate named Blehm whom the defendants

(the plaintiff's supervisors) selected to work with the plaintiff as a "cart boy." (*Id.*, at 120.) As a result of the rape, the plaintiff filed a section 1983 claim under the Fourteenth Amendment based on her right not to be deprived of liberty without due process. The trial court dismissed the claim.

On appeal, the Ninth Circuit reversed the district court's order of dismissal under the following analysis:

[T]he actions of the Defendants created the danger to which [the plaintiff] fell victim by elevating Blehm to cart boy status. According to the complaint, the Defendants knowingly assigned Blehm to work with [the plaintiff], despite their knowledge that: (1) Blehm was not qualified to serve as a cart boy; (2) Blehm had an extraordinary history of unrepentant violence against women and girls; (3) Blehm was likely to assault a female if left alone with her; (4) [the plaintiff] would be alone with Blehm during her rounds; and (5) [the plaintiff] would not be prepared to defend against or take steps to avert an attack because she had not been informed at hiring that she would be left alone with violent offenders. The Defendants, like the officer in *Wood*, thus used their authority as state correctional officers to create an opportunity for Blehm to assault [the plaintiff] that would not otherwise have existed. The Defendants also enhanced [the plaintiff's] vulnerability to attack by misrepresenting to her the risks attending her work. (*Id.* at 1120-121.)

Accordingly, in upholding the efficacy of the plaintiff's 1983 claim, the *Grubbs* court found, as did the court in *Wood*, that the plaintiff was not seeking to hold the defendants liable for the assailant's violent proclivities, but rather, was seeking to "make Defendants answer for their acts that independently created the opportunity for and facilitated [the] assault on her." (*Id.*, at 122, citing *Wood*, *supra*.)

3) *Penilla*: Sickly man left in his house by police

As recent as 1997, the Ninth Circuit affirmed the "danger creation" exception as a viable theory in *Penilla v. City of Huntington Park* (9th Cir. 1997) 115 F.3d

707, *per curiam*. In that case, Penilla, the decedent, was on his porch when he became very ill. (*Id.*, at 708) His neighbors called 911. Huntington Park Police officers were the first to arrive on the scene. They examined Penilla, found him to be in grave need of medical care, yet canceled the request for paramedics, broke the lock on the front door to his residence, and locked him inside. The next day, family members found Penilla dead on the floor.

A year later, Penilla's mother, brother, and estate brought an action against the City, the police department, the police chief and the individual officers who answered the 911 call, alleging violations of section 1983, i.e., the "deprivation of Penilla's life without due process of law." (*Id.*, at 709.) In asserting such a claim, the plaintiffs did not argue that the officers "attempted, but failed, to rescue Penilla, or even that they should have, but did not, attempt to rescue him." Rather, they alleged that "the officers placed Penilla in danger in deliberate indifference to his medical needs."

In affirming this application of the "danger creation" exception, the Ninth Circuit mirrored its holdings in *Grubbs* and *Wood*, outlined above. Specifically, the court found that there is "a constitutional duty under the due process clause to protect an individual where the state places that individual in danger through affirmative conduct." (*Id.*, at 711.) Because the officer's conduct "clearly placed Penilla in a more dangerous position than the one in which they found him," the plaintiff had a proper claim under the Fourteenth Amendment.⁶

4) *Ruge*: City worker killed by ditch cave-in on the job

Finally, in *Ruge v. City of Bellevue* (8th Cir. 1989) 892 F.2d 738, a city employee was killed when a fourteen-foot ditch he was working in collapsed. (*Id.*, at 739.) His mother filed suit under section 1983 alleging that the City "had a deliberate policy of not shoring up ditches and then requiring employees to work in them without warning of the dangers." The decedent's mother alleged that such policy "deprived her son of his life in violation of his fifth amendment right to substantive due process."

In reversing the district court's dismissal, the Eighth Circuit found that "where the state abuses its governmental power through an alleged policy of actively placing a person into a situation of known danger the Constitution proscribes and limits such action."⁷ Thus, "[w]e deem a policy, if adopted and proven, that would show a city actively pursued conduct which was deliberately indifferent to the constitutional rights of its citizens, would reach constitutional dimensions and be actionable under the Civil Rights Act."⁸

Therefore, because the city's policies regarding safety in its public works projects enhanced, and actually allowed for, the decedent's death, the protections of the due process clause were invoked and the plaintiff was able to state a claim under section 1983.⁹

E. Pleading Requirements

Although this theory is important and potentially very powerful to a plaintiff's third party injury case, the lower courts have had difficulty determining exactly how egregious the state's conduct must be before the Constitution's protections are invoked. "Clearly, a showing of mere negligence will not suffice. Indeed, the courts have tended to require a fairly high level of egregiousness."¹⁰ For example, the Third Circuit has required a showing of "discrete, grossly reckless acts," while the Fifth Circuit has held that there must be a showing of "sufficiently culpable affirmative conduct," or at least deliberate indifference.¹¹ This heightened standard, and its varied incarnations, are based on the following principle: "*De Shaney* does not specify what actions of a state would render a person more vulnerable to danger, nor how much more vulnerable to danger a state must make a person before a person's rights are violated."¹²

The Ninth Circuit has addressed the legal standard at issue in "danger creation" cases and agrees with the majority view that a heightened level of culpability, i.e., more than mere negligence, is required. Specifically, in *Grubbs II*,¹³ the court held a plaintiff must plead and prove "deliberate indifference."

After the first appeal in *Grubbs*, the matter was remanded to the district court