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Liability Considerations for Active Shooter Incident Response

An examination of state civil and criminal, and federal civil and criminal, causes of action, claims and offenses which may arise from responding to an active shooter incident and how to handle the claims when, not if, they arise.

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CIVIL LIABILITY ARISING FROM MASS SHOOTINGS

Mass Shootings are statistically rare events.

Actions in state and federal court against a variety of defendants including governmental officials and entities, seeking a judgment of liability based on various legal theories, including negligence have been and will continue to be litigated.

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TYPES OF CIVIL CLAIMS

Premise Liability for negligence...

Plaintiffs sufficiently stated a premises liability claim against a movie theater arising from one patron's acts of exiting the theater, returning with firearms and grenades, and opening fire at other patrons...

Traynor v. Cinemark USA, Inc., 940 F. Supp. 2d 1339 (D. Colo. 2013) (applying Colorado law)



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TYPES OF CIVIL CLAIMS

Duty to Protect – Special Relationship

Factors to determine the existence of a duty in situations where a special relationships exists; the foreseeability of harm to others; the social utility of the defendant's conduct; the magnitude of the burden of guarding against injury or harm; and the practical consequences of placing such a duty on the police.

Castaldo v. Stone, 192 F. Supp. 2d 1124, 163 Ed. Law Rep. 688 (D. Colo. 2001) (applying Colorado law)



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TYPES OF CIVIL CLAIMS

42 US 1983 Negligent training and supervision

Police negligent cases, including negligent appointment, retention, assignment, and entrustment.

To establish a course of action under Section 1983, three requirements needed are:

- (1) a constitutional deprivation of rights;
- (2) rights taken under color of State law; and
- (3) deprivation resulting in injury.



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TYPES OF CIVIL CLAIMS

42 US 1983 Negligent training and supervision
In addition, negligent training cases must show that the alleged wrongdoing constitutes a municipal 'custom or policy.' (*Monell*)
Factual defenses against claims of negligent training practices include:

- 1) scope of training,
- 2) course materials,
- 3) selection of instructors,
- 4) content of training, and
- 5) mandatory attendance requirements.

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TYPES OF CIVIL CLAIMS

42 US 1983 Negligent training and supervision
Additional recommendations are

- (1) recruits be required to demonstrate their knowledge through testing and field demonstrations,
- (2) training be continuous,
- (3) officers be initiated on how police liability occurs, and
- (4) police supervisors be updated along with their subordinates.

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TYPES OF CIVIL CLAIMS

Holcombe v. United States, 2021 WL 2821125 (W.D. Tex. 2021) (applying Texas law)
Consolidated cases stemming from a mass shooting at a Texas church.
Plaintiffs, survivors of the shooting, and relatives of those injured or killed, sought recovery against the United States under the Federal Tort Claims Act ("FTCA"), 28 U.S.C.A. §§ 1346(b), 2671 to 2680, alleging that negligent failures by the government to collect, handle, and report required information about the shooter allowed the shooter to purchase firearms used in the shooting.



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TYPES OF CIVIL CLAIMS

Holcombe v. United States, 2021 WL 2821125 (W.D. Tex. 2021) (applying Texas law)
The court found the government liable under Texas law for negligence in undertaking to establish and operate a complex national background-check system and therefore the government waived immunity.
The allegations were:

- 1) the shooter purchased firearms used in the shooting in four separate purchases from federal firearms licensees
- 2) in each mandatory background check run by the retailer, the response from the National Instant Criminal Background Check System ("NICS") administered by the FBI was that the retailer could proceed with the sale.

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TYPES OF CIVIL CLAIMS

Holcombe v. United States, 2021 WL 2821125 (W.D. Tex. 2021) (applying Texas law)
The allegations cont.:

- 1) the shooter should not have cleared the background check,
- 2) shooter was convicted of a disqualifying offense of domestic assault while serving in the Air Force.
- 3) despite its obligation and multiple opportunities to submit the shooter's fingerprints and criminal history to the FBI for inclusion in the relevant databases, the government failed to do so.
- 4) the shooter previously threatened to commit mass shootings



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TYPES OF CIVIL CLAIMS

Holcombe v. United States, 2021 WL 2821125 (W.D. Tex. 2021) (applying Texas law)
The allegations cont.:

- 1) while hospitalized at a mental health facility, shooter researched tactical gear and guerilla tactics online, and attempted to order weapons by phone.



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TYPES OF CIVIL CLAIMS

Bystander Liability
White v. United States, 471 F. Supp. 3d 780 (W.D. Tex. 2020) (applying Texas law)



Plaintiff alleging that the government's negligence allowed the shooter to pass the background checks to purchase the firearms despite having a disqualifying conviction for domestic assault. The court reasoned that the child only viewed the aftermath of the shooting through the television news, not the actual shooting, and learned of the parent's death from a sibling, not from the child's own perception of the accident. The child was at home in the living room when the shooting occurred, noted the court.

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TYPES OF CIVIL CLAIMS

Mental Anguish Damages
White v. United States, 471 F. Supp. 3d 780 (W.D. Tex. 2020) (applying Texas law)

The court held that the child of the victim of a mass shooting in a Texas church did not experience a contemporaneous, sensory perception of the event, and therefore the child's estate could not hold the United States liable on a bystander claim for emotional distress under Texas law in an action under the Federal Tort Claims Act ("FTCA"), 28 U.S.C.A. §§ 1346, 2671 et seq. alleging that the government's negligence allowed the shooter to pass the background checks to purchase the firearms despite having a disqualifying conviction for domestic assault. The court reasoned that the child only viewed the aftermath of the shooting through the television news, not the actual shooting, and learned of the parent's death from a sibling, not from the child's own perception of the accident. The child was at home in the living room when the shooting occurred, noted the court.

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TYPES OF CIVIL CLAIMS

Damages Awards
Holcombe v. United States, 584 F. Supp. 3d 225 (W.D. Tex. 2022) (applying Texas law)

Multiple suits were filed against the United States under the Federal Tort Claims Act on claims for wrongful death and survival, personal injuries, and derivative claims arising out of a mass shooting at a church, based on the government's alleged negligence for its failure to adequately undertake to provide the FBI with the shooter's criminal history, and upon consolidation, the government having been found to be 60% liable, the court awarded damages in a separate bench trial held on disputed issues of the plaintiffs' damages.

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TYPES OF CIVIL CLAIMS

Damages Awards

The court concluded that the evidence warranted awards of noneconomic damages, under Texas law, for: past loss of companionship and society and past and future mental anguish to parishioners' wrongful death beneficiaries arising out of parishioners' deaths; past and future physical pain and mental anguish to parishioners who suffered injuries from gunshot wounds but survived the shooting; past and future loss of spousal and parental consortium and loss of support; physical pain and mental anguish to estates of parishioners who died; and to parishioners injured in the shooting, for past and future physical disfigurement, past and future physical impairment, and past and future physical pain and mental anguish.

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TYPES OF CIVIL CLAIMS

Damages Awards

Continuing, the court concluded that the evidence warranted awards of economic damages, under Texas law, for: past and future pecuniary losses to wrongful death beneficiaries; past and future medical expenses to parishioners who suffered gunshot wounds; loss of earning capacity to injured parishioners; and to owners of property directly across the street from the church where the shooting occurred, for damage to their home and personal property as a result of the shooting.

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TYPES OF CRIMINAL CLAIMS

Despite grand jury investigation, officers may not face charges in Uvalde shooting response

Local prosecutor Charles Mitchell last month convinced a grand jury to investigate police officers' delay in opening the gates at Ross Elementary School.

BY PEGGY SALGRETTE FOR THE STAR | APRIL 1, 2022 | 5:40 CENTRAL | SHARE | REPLY



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TYPES OF CRIMINAL CLAIMS

But even after that monthslong review is complete, law enforcement officers may not face criminal charges, legal experts say. That's because police officers are almost never criminally prosecuted – and charges for failing to act are even more rare.

Grand jury proceedings in Texas are kept secret and it's not typically known how cases are presented to jurors who decide whether there's enough evidence to formally charge someone with a crime or proceed to a trial.

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TYPES OF CRIMINAL CLAIMS

Section 39.03 - Official Oppression

(a) A public servant acting under color of his office or employment commits an offense if he:

- (1) intentionally subjects another to mistreatment or to arrest, detention, search, seizure, dispossession, assessment, or lien that he knows is unlawful;
- (2) intentionally denies or impedes another in the exercise or enjoyment of any right, privilege, power, or immunity, knowing his conduct is unlawful; or
- (3) intentionally subjects another to sexual harassment.

(b) For purposes of this section, a public servant acts under color of his office or employment if he acts or purports to act in an official capacity or takes advantage of such actual or purported capacity.

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TYPES OF CRIMINAL CLAIMS



Investigative Summary:
Across Texas, hundreds of law enforcement officers have permanently surrendered their peace officer license in the past four years. A KXAN investigation of 297 of those surrenders has discovered nearly all the officers were accused or charged with a crime - most often felonies. And, in almost every case the officers used their license as a bargaining tool by agreeing to surrender it as part of a deal to avoid jail or prison.

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TYPES OF CRIMINAL CLAIMS

The federal criminal statute that enforces Constitutional limits on conduct by law enforcement officers is 18 U.S.C. § 242. Section 242 provides in relevant part:

"Whoever, under color of any law, ...willfully subjects any person...to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States [shall be guilty of a crime]."

Section 242 is intended to "protect all persons in the United States in their civil rights and furnish the means of their vindication." *Screws v. United States*, 325 U.S. 91, 98 (1945) (quoting legislative history).

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TYPES OF CRIMINAL CLAIMS

To prove a violation of § 242, the government must prove each of the following elements beyond a reasonable doubt:

- (1) that the defendant deprived a victim of a right protected by the Constitution or laws of the United States,
- (2) that the defendant acted willfully, and
- (3) that the defendant was acting under color of law.

A violation of § 242 is a felony if one of the following conditions is met: the defendant used, attempted to use, or threatened to use a dangerous weapon, explosive or fire; the victim suffered bodily injury; the defendant's actions included attempted murder, kidnapping or attempted kidnapping, aggravated sexual abuse or attempted aggravated sexual abuse, or the crime resulted in death. Otherwise, the violation is a misdemeanor.

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TYPES OF CRIMINAL CLAIMS

Establishing the intent behind a Constitutional violation requires proof beyond a reasonable doubt that the law enforcement officer knew what he/she was doing was wrong and against the law and decided to do it anyway.

Therefore, even if the government can prove beyond a reasonable doubt that an individual's Constitutional right was violated, § 242 requires that the government prove that the law enforcement officer intended to engage in the unlawful conduct and that he/she did so knowing that it was wrong or unlawful. See *Screws v. United States*, 325 U.S. 91, 101-107 (1945). Mistake, fear, misperception, or even poor judgment does not constitute willful conduct prosecutable under the statute.

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Any questions?
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