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LETTER FROM THE PRESIDENT

STRONGER TOGETHER:

The Power of Colleagues Supporting Each Other

In the hustle of professional life, deadlines and deliverables often take center stage. But behind every project completed and every milestone reached is a network of people – colleagues – who, when they support one another, become one of the most valuable assets a workplace can offer.

Support among professional colleagues goes far beyond the occasional helping hand or friendly chat over coffee. It's the quiet encouragement that turns self-doubt into confidence. It's the willingness to listen, to step in when someone is overwhelmed, and to celebrate others' successes as if they were your own. In a world that often glorifies individual achievement, we forget that collaboration and mutual support are what drive long-term success.

Consider the moments when a colleague offers to review your work before a big presentation, or when a team member notices you're off your game and checks in. These aren't just acts of kindness – they're acts of leadership. They create an environment where people feel safe, valued, and motivated to do their best work.

Support also fosters resilience. When challenges arise – and they always do – knowing that your team has your back can make all the difference. A culture of support helps transform failure into a learning opportunity rather than a source of shame. It builds trust, and trust builds teams that don't just work together, but grow together.

There's no one way to support a colleague. It might mean advocating for them in meetings, sharing credit, mentoring, or even just being a sounding board. What matters is the intention: choosing to lift others as we climb.

Let's normalize asking for help and offering it freely. Let's lead with empathy and show that professionalism and compassion are not mutually exclusive. Because at the end of the day, success tastes better when it's shared.

In supporting each other, we don't just become better professionals – we become better people.

IMLA fosters numerous opportunities for local government attorneys to participate as part of a mutually supportive professional community. One of those involves attendance at the highly anticipated annual conference each year. This year's conference will be held from October 17-21, 2025 in New Orleans, LA. Attendance at IMLA's annual conference provides the opportunity to learn from colleagues from throughout North America. It will also be a fabulous setting for folks to socialize with colleagues and friends. I hope to see you there!

On a personal note, I'll be passing the gavel at this year's conference to our incoming IMLA President, Susana Alcala Wood. It has been an incredible honor to serve as IMLA's President during the past year. I owe an immense debt of gratitude to so many people I've met through IMLA – colleagues who have helped me do a better job in my role as a city attorney and folks who have become true friends.

My fellow members of the IMLA board of directors include a collection of individuals who are immensely accomplished attorneys and committed public servants. More importantly, I have found them to be a group of kind and thoughtful people. I thank all of them for their contributions to, and support of, IMLA. Of course, the true stars of IMLA are the dedicated and talented staff. Amanda Karras, Jenny Ruhe, Caroline Storer, Erich Eiselt, Deanna Shahnami, Trina Shropshire-Paschal, Avery Morris, Carolina Moore, Christine Dodd, Sean Cooley, and Chuck Thompson form an amazing team who, collectively, help make IMLA the successful organization that it is.

To all IMLA Members, I hope that you have had an enjoyable summer and I look forward to seeing many of you at this year's Annual Conference in New Orleans!

JEFFREY DANA
City Solicitor,
Providence,
Rhode Island



AMANDA KARRAS

IMLA Executive Director, Rockville, Maryland

LETTER FROM THE EXECUTIVE EDITOR

FINDING BALANCE:

OPPORTUNITIES AND CHALLENGES

This past month, our eyes turned to the District of Columbia as the federal government sought to reduce crime by assuming control of the D.C.'s police force, placing federal law enforcement in the city, and deploying the National Guard. Although Congress enacted the District of Columbia Home Rule Act in 1973, which allows D.C. to maintain a form of local self-governance, D.C. has a special relationship with the federal government, which allows the President more latitude than he would enjoy in other jurisdictions.

The Act allows the President to assume emergency control of the police if the President determines "that special conditions of an emergency nature exist which require the use of the Metropolitan Police force for Federal purposes." Such a presidential takeover is limited to 30 days or until the end of the emergency, whichever comes first. D.C. sued the President to enjoin the takeover of the police, arguing the President and Attorney General Bondi have exceeded their authority under the Home Rule Act and have acted contrary to law in violation of the APA. That action is still pending as of this writing. And while the Home Rule Act creates unique challenges for D.C., the President also mentioned other cities when he made the announcement about the police takeover in Washington, including Chicago, Baltimore, Oakland, Los Angeles, and New York City. As of this writing, the President announced he plans to deploy the National Guard to Chicago, though it remains to be seen whether the President will employ similar actions in other communities.

The deployment of National Guard troops and federal law enforcement officers to help reduce crime in a city is a different legal matter than the takeover of D.C.'s police force. One of the efforts underway in Washington, with the influx of federal troops and law enforcement, is clearing homeless encampments. According to some reports, more than 48 encampments have been cleared in just a few weeks. D.C.'s Mayor has emphasized that there is indoor shelter space available for individuals experiencing homelessness, though it is unclear if people have moved indoors or moved to a new part of the city to create new encampments.

The decision to bring in federal troops and the National Guard to respond to public safety challenges—including encampments of unhoused individuals—raises fundamental questions about governance: Who should bear responsibility for public safety, and what happens when that responsibility shifts away from the local level?

At IMLA, we have long emphasized the importance of local autonomy. Local governments are closest to the people, best positioned to understand their communities' unique challenges. They are often tasked with balancing urgent public safety concerns with the rights of their residents. The recent developments in D.C. highlight what our members across the country already know: public safety is about much more than policing. It increasingly involves addressing homelessness, addiction, mental health, and social services—all of which demand nuanced, community-specific solutions.

Federal involvement in homelessness policy is not new, but it has intensified in recent months. For example, in addition to the actions taking place in D.C., President Trump issued an Executive Order on July 24, 2025, entitled "Ending Crime and Disorder on America's Streets," (the "Homelessness EO"). The Homelessness EO seeks to move away from a housing first model to one focused on civil commitment of individuals with mental illness or those who pose a risk to themselves or the public. It also directs several agencies to set up discretionary grants for States and local governments that have policies and practices in place, including those enforcing prohibitions against urban camping and open illegal drug use.

These actions create both opportunities and challenges for local governments. Federal resources can help communities, but they come with strings attached, compliance requirements, and potential litigation risks. Local governments must carefully navigate the balance between accepting federal assistance and retaining the flexibility needed to address their community's needs.

That balance was at the heart of *Grants Pass v. Johnson*, the Supreme Court homeless encampment case decided last June. IMLA was proud to advocate for local governments in that case, filing an amicus brief that underscored the need for localities to retain authority over how best to address homelessness in their jurisdictions, including the ability to clear encampments. The Court's decision reaffirmed that these difficult policy choices belong to local communities—not to the federal judiciary. While no ruling eliminates the challenges communities face, *Grants Pass* made clear that local governments have the constitutional space to craft solutions. As Justice Gorsuch, who authored the opinion, explained:

> Instead of encouraging "productive dialogue" and "experimentation" through our democratic institutions, courts have frozen in place their own "formulas" by "fiat." Id., at 534, 537. Issued by federal courts removed from realities on the ground, those rules have produced confusion. And they have interfered with "essential considerations of federalism," taking from the people and their elected leaders difficult questions traditionally "thought to be the[ir] province."

Whether or not clearing encampments and requiring civil commitment of homeless individuals is good policy remains to be seen, and each community may seek to address homelessness in different and nuanced ways. The Homeless EO is incentivizing those policies through discretionary grants, which localities may choose to apply for. Incentives are one thing, but taking the homeless policy decisions away from D.C.'s elected officials and forcing the clearing of encampments within the District would seem to offer some of the same problems that we saw in *Grants Pass* when the federal judiciary had prevented localities from clearing encampments in the Ninth Circuit. IMLA maintains that local elected leaders are in the best position to come up with solutions to the difficult problem of homelessness in their communities.

These developments remind us why IMLA exists: to equip local government lawyers with the tools they need to navigate evolving legal landscapes, assert local authority, and serve their communities effectively. Through our conferences, webinars, working groups, and other resources, we provide education on public safety, homelessness, federal grant compliance, and intergovernmental relations. And through our advocacy, we continue to speak collectively for local governments when the stakes are highest.

As we look ahead to our upcoming Conference in New Orleans, these themes will be front and center. From sessions on homelessness to panels on public safety, immigration, federal funding, and constitutional law, we will explore the most pressing challenges facing our members. I encourage you to join us, connect with colleagues, and share your own experiences.

Local government lawyers stand on the frontlines of some of the most complex and consequential issues of our time. Whether in Washington, D.C., Grants Pass, Oregon, or your own community, the questions of public safety, homelessness, and local autonomy are deeply intertwined. At IMLA, we are here to support you as you address them.

Warm regards,
Amanda Karras
Executive Director, IMLA

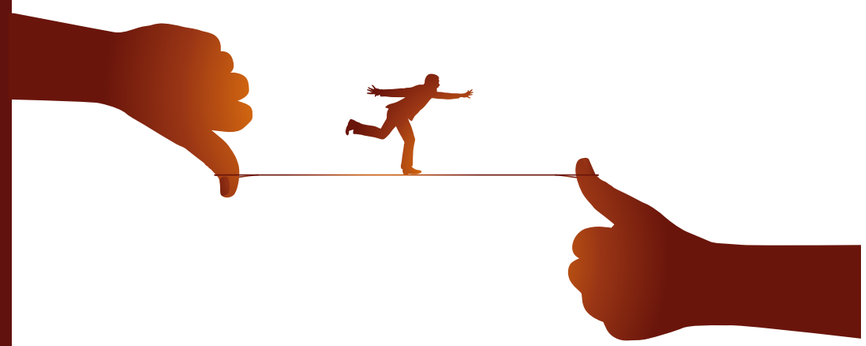




MENTOR'S CORNER

7 Skills for Success as a Municipal Lawyer

This Mentor's Corner is provided to you by the mentors from the following cities: Leann Guzman, Fort Worth; Shaun Dabby Jacobs, Los Angeles; Trish Link, Austin; Mandana D. Vidwan, Charlotte; and Jeannine Williams, St. Petersburg.



Local government attorneys are in a unique position in the legal profession: everything we touch is in the public eye and funded by public dollars, we are working for the level of government closest to the people, we are called on to do more with less every day, we never know what will cross our desk at any given moment, and even the most creative storywriter couldn't make up some of what we encounter. So, to succeed long-term as a municipal lawyer, it takes much more than just knowing the law.

This niche area of law practice requires the development of certain skills to build a successful career.

1. Political savvy. Pay attention to which individuals, groups, and entities have influence with various people in the city, both elected and non-elected. Also take note of what issues are most likely to be of interest or what has been of interest to the public and the media (both traditional and social). This knowledge will help you give advice and provide legal services in the context of power dynamics and media attention, which have an immense impact on your client's strategies and decisions.

2. Know and accept your role. Your role is to provide legal services, risk analysis, and good advice, and the decisions your client makes with what you provide is their job, not yours. You must be willing to let the client make the decisions, even those you don't agree with. Stay in your lane and try your best not to adopt a "told you so" attitude when they inevitably come to you to untangle messes caused by not doing what you advised in the first place.

3. Resilience. Practicing law of any kind requires resilience, but practicing in public in front of performative critics, pot-stirrers, and keyboard warriors requires a whole other level of strength and tough skin. It's important that you learn to keep things in perspective, let things go, stay grounded in and base your identity on something bigger and more important than your job, and take the time on a regular basis to do what restores peace to your soul.

4. Adaptability. Daily adaptability and flexibility are necessary because the day you plan is not usually (ever?) the day you have. Municipal lawyers must be able to prioritize and pivot to the most important issue of the day, while still ensuring the regular tasks get done. Adaptability in communications is also crucial, so that your communication style fits its intended audience and the needs of the moment. A brief to the court requires a much different communication style than the written legal advice to a person who doesn't care what cases you read and only wants the answer, which had better be short.

5. Curiosity. Be open and curious about everything, be an active listener, and ask good questions. If you have the opportunity to work in different divisions or handle different kinds of matters within your office, take advantage of those opportunities because it will help you understand more about the city and make you a more valuable resource to your client. Also, use your curiosity to dig for details of the story they tell you because they always leave something out and you'll need those details to provide better service.

6. Hard-working. Local government lawyers are going to carry a heavy workload, so the only way to succeed long term is to be a hard worker. With a heavy workload, it's tempting to cut corners, look for quick and easy ways to get an answer, or shoot off a response that you're less than 100% sure is right. But none of those methods lead to long term success as a lawyer of any kind, much less the lawyer who works with elected officials and the public.

7. Strong belief in public service. You may not have come to local government work because of a strong belief in public service, but if you stay for the long haul, holding that belief is what will carry you through. Working for local government is an incredibly rewarding way to contribute to the community in which you live, work, or play. Few other areas of the law offer such a tangible reward for your efforts; work in a city for a while and you'll drive around and see projects you've touched that make things better for people. Believe it: your work has a positive impact on the public, your work is meaningful, and your work is important! ML





MOVIE REVIEW

Is That Legal?
Deep Cover

Contributed by Darren Shulman

Deep Cover is a 2025 film that continues the trend of movies skipping theatrical releases and going directly to streaming. While that is often a sign of a low budget, Deep Cover features an impressive cast that includes Bryce Dallas Howard (Jurassic World), Orlando Bloom (Pirates of the Caribbean), and Ian McShane (Deadwood), and throws them into a ridiculous plot. Howard, Bloom, and Nick Mohommed (Ted Lasso) are improv comedy actors recruited to go undercover to infiltrate the criminal underworld. As far as setups go, this is one of the silliest I've ever seen, but the film leans into it and doesn't take itself too seriously. Hearing an accomplished actor like Sean Bean (the guy who dies in everything you've seen him in), earnestly explaining he needs improv comics for undercover operations because police officers can't think as well on their feet, cracked me up.

For a movie like this to work, you must care about the characters. Bryce Dallas Howard conveys an earnestness and desperation that serves as the movie's heart. Orlando Bloom is hilarious as a method actor who can't find roles because he's typecast. As can be expected, what starts as a reasonably straightforward operation quickly escalates, and the comics find themselves getting into more and more trouble. Deep Cover slips in a few OMG moments you probably won't see coming, and the comedy is largely based on shock and cringe-inducing gags. Without getting into spoilers, while the comedians are undercover, they are forced to engage in increasingly illegal behavior. This got me thinking about whether they could escape criminal liability based on the circumstances, which led me to research the defense of duress.

What is duress? The affirmative defense of duress excuses criminal conduct where the actor is under an unlawful threat of imminent death or serious bodily injury.[1] Duress doesn't negate an element of an offense; instead, it excuses the defendant from liability based on the circumstances.As the Supreme Court noted in 1868, "a prisoner who breaks prison shall be guilty of felony, [but this] does not extend to a prisoner who breaks out when the prison is on fire—for he is not to be hanged because he would not stay to be burnt."[2] With that said,



Orlando Bloom, Bryce Dallas Howard and Nick Mohammed star in DEEP COVER | Credit: Peter Mountain | Copyright: Metronome Film

there are apparently limits to this 'get out of (burning) jail free' card as the Court later held that where a criminal is charged with escape, he must proffer evidence of a bona fide effort to return to custody as soon as the duress ended.[3]

Reviewing the elements of the duress defense gives us insight into what might happen to three deep-cover improv comics in real life. As you watch Deep Cover, think about how these elements would apply to the situations in the movie.

The defendant reasonably believed that a danger existed. In *State v. Martin*, the defendant pushed his way into an acquaintance's house (her testimony: "He didn't hurt me, but he like shoved [past] me into my house…and I'm like dude, you got to go."). He paced around her house shirtless and said people with guns were out to get him. Martin admitted to entering the house but said he was afraid for his safety because someone named Terry was out to get him. However, he couldn't give many details, and his claims were found to be "without any basis in reality."

The court found that a defendant's belief he is acting under duress must be reasonable, and Martin's erratic story was not.[4]

While a threat must be reasonable, it does not always have to be explicit. The Supreme Court of Washington held that an implicit threat can be sufficient to establish a basis for duress.[5]

The defendant can't have caused or put themselves in a position to cause the duress. The 'some guys made me rob this place' defense has been rejected numerous times because the defendant's own conduct played a role in their predicament. For example, in *Williams v. State*, the defendant claimed he was abducted by three men he owed money to because he knew where another guy kept his drug stash. He took them to a house, and they broke in and searched the place for drugs. The court found that William's contributory actions barred the duress defense, noting "the defense of duress is not successful if the compulsion arose by the defendant's own fault, negligence, or misconduct."[6]

In *People v. Rodriguez*, the defendant didn't return from a jail work furlough because an officer had given him money to buy a pound of marijuana while he was out. The defendant was afraid to return because he spent the money celebrating instead. His duress claim was rejected.[7]

In *State v. Healy*, a burglary defendant argued he was forced to commit the crime by two guys who found out he was working as an informant (though Healy was not an improv comedian). The court allowed a duress instruction, but added language indicating the defense of duress is not available if the defendant intentionally or recklessly placed themselves in a situation where it was probable they would be subject to duress. The court found that a string of reckless behavior led to Healy's predicament. He had a long history of unlawful activity involving the man who threatened him; he had a falling out with the man over stolen property and drugs, he retaliated for hitting Healy with a baseball bat by moving stolen cars to an area around his house, and he stole a truck (which led to him becoming an informant).[8]

ANATOMY OF A SHOOTING TRIAL: TRIAL PRACTICE 101
ETHICS 101
LAND USE 101
MUNICIPAL FINANCE 101
NEGOTIATIONS 101
ORDINANCE DRAFTING BEST PRACTICES: LAND USE
PERSONNEL 101

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The defendant had no reasonable means to avoid danger except by committing the crime. If there is a reasonable, legal alternative to violating the law while avoiding the harm, the defense of duress fails.[9] In *State v. Daoud*, the defendant alleged her boyfriend forced her to drive while intoxicated. The defense of duress for driving while intoxicated was denied when the State showed there were lawful alternatives, such as calling a friend or a taxi.[10]

Duress was found not to be an appropriate defense for having a weapon illegally when the defendant could have called the police or avoided the person he was arming himself to defend against, instead of going and visiting her on purpose.[11] Similarly, a duress instruction was denied when a defendant committed robbery to pay a drug debt owed by his daughter because there were other alternatives available to the defendant (coupled with the fact that no one actually threatened him or a third party if he didn't commit the robbery).[12]

If you watch Deep Cover with these elements in mind, you will be able to weigh the likelihood that the characters would be able to avoid prosecution for their hijinks, which adds a layer of interest to an otherwise middling movie (I won't share my thoughts in the interest of avoiding spoilers, but I'd love to discuss with you after you watch it). Deep Cover won't win any awards, and I wouldn't subscribe to Prime Video just to see it, but if you can buy into the silly premise and don't mind cursing, violence, and drug use in your movies, it's a decent way to spend a few hours. At worst, it will give you an opportunity to show off your extensive knowledge of the duress defense to the people you watch it with.

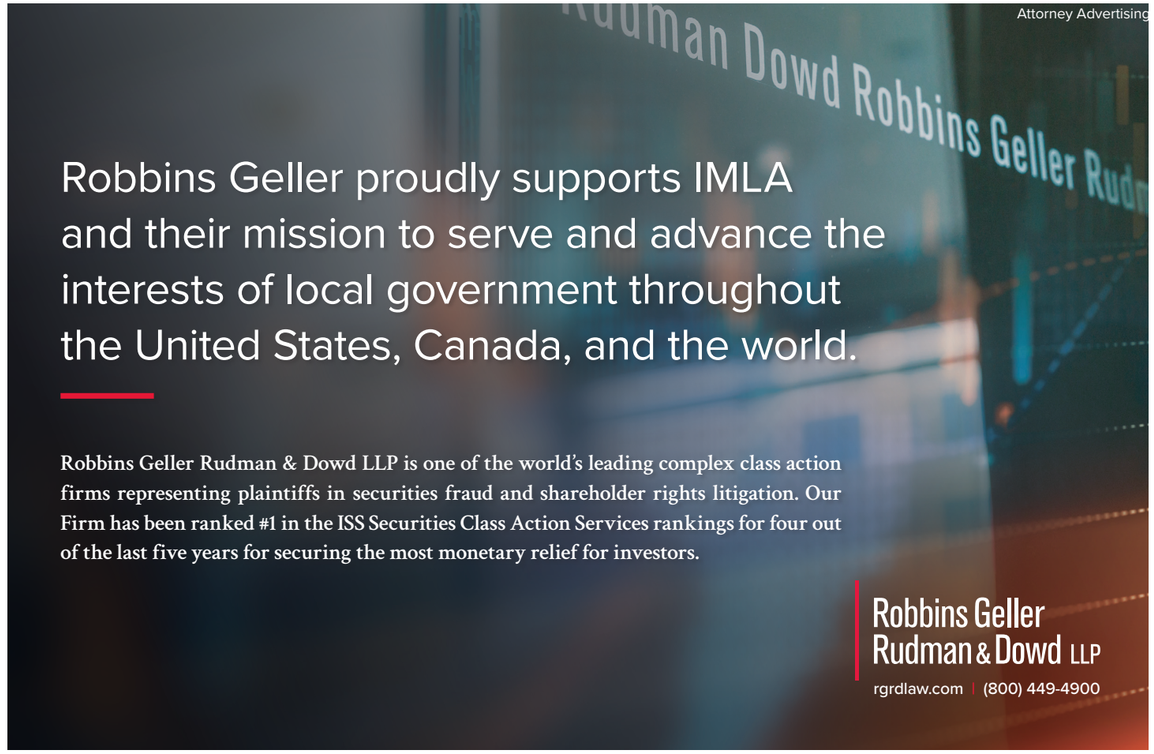
Deep Cover: B

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ENDNOTES

1. See *U.S. v. Bailey*, 444 U.S. 394, 409-10 (1980).
2. *U.S. v. Kirby*, 74 U.S. 482, 487, 19 L. Ed. 278 (1868).
3. *Bailey* at 415.
4. *State v. Martin*, 2023-Ohio-2631, ¶ 16 (12 Dist. Ct. App. 2023). See also *State v. Richter*, 245 Ariz. 1, 424 P.3d 402 (2018)(A duress claim must be evaluated from the perspective of a reasonable person in the defendant's situation).
5. *State v. Harvill*, 169 Wash. 2d 254, 264, 234 P.3d 1166, 1171 (2010)(Defendant perceived request for drugs as a threat to come to Chuck E. Cheese's and hurt him or his family if he refused).
6. Willams, 101 Md.App. 408 (Ct. of Special App. MD 1994); See also *Meador v. State*, 10 Ark.App. 325, 664 S.W.2d 878 (1984) (Defendant forced to rob nursing home by men he owed money to).
7. *People v. Rodriquez*, 30 Ill.App.3d 118, 332 N.E.2d 194 (1975).
8. *State v. Healy*, 157 Wash. App. 502, 514, 237 P.3d 360, 366 (2010).
9. *Bailey* at 410.
10. *State v. Daoud*, 141 N.H. 142, 679 A.2d 577 (1996).
11. *State v. Castrillo*, 1991-NMSC-096, ¶ 18, 112 N.M. 766, 773, 819 P.2d 1324, 1331.
12. *State v. Davenport*, 973 S.W.2d 283, 288 (Tenn. Crim. App. 1998).

Darren Shulman is the city attorney for Upper Arlington, Ohio. A graduate of Northwestern University and Harvard Law School, Darren previously served as the City Attorney for Delaware Ohio, Associate Legal Counsel for the Ohio Department of Administrative Services, and as an Assistant Prosecuting Attorney for the Montgomery County Prosecutor's Office. When Darren was the Delaware City Attorney, he co-hosted a movie review show called Through the Lens on local radio, which is now a podcast. Writing movie reviews through a legal lens allows Darren to combine his love of movies with his profession.





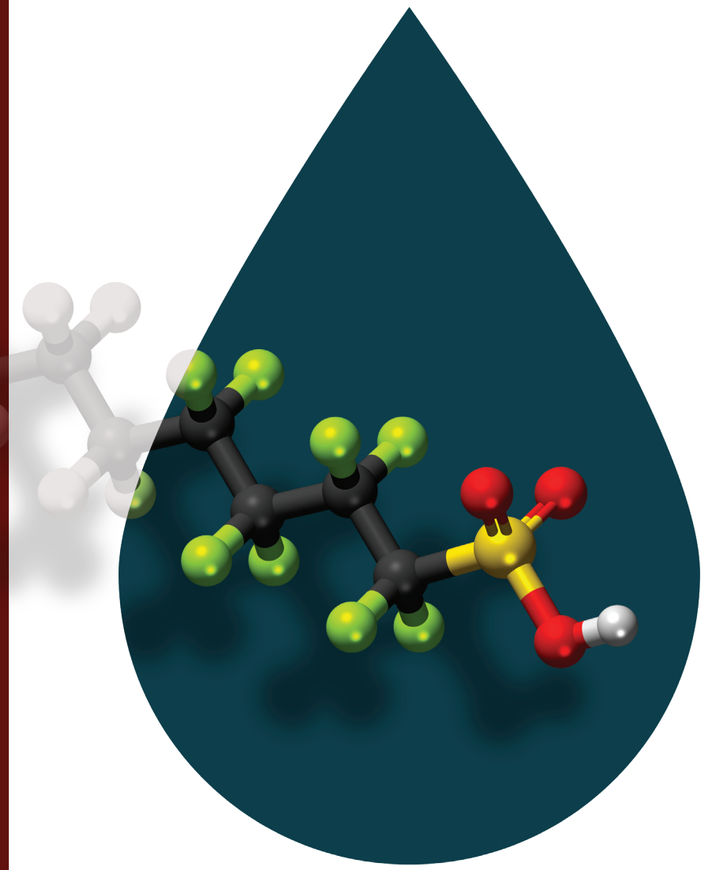


PRACTICE TIPS

The Hidden Cost in Our Cities:

What Municipal Attorneys Must Know About PFAS Remediation

Contributed by Stag Liuzza



PFAS—per- and polyfluoroalkyl substances—are a class of synthetic chemicals that have become an unavoidable environmental and legal issue for municipalities across the United States. Originally developed in the 1940s, these compounds were prized for their ability to resist heat, water, and oil. That made them ideal for use in a wide range of industrial and consumer products: firefighting foams, non-stick cookware, water-repellent fabrics, food packaging, cleaning agents, and chemical manufacturing.

TODAY, PFAS ARE EVERYWHERE.

What makes PFAS so problematic is their chemical structure. The carbon-fluorine bond is one of the strongest in nature, making these substances incredibly resistant to environmental degradation. As a result, PFAS compounds do not break down easily in soil or water. Instead, they accumulate—often undetected—for years. Once released into the environment, PFAS travel easily through air, groundwater, and stormwater systems. They have been found in drinking water sources, wastewater treatment plants, agricultural runoff, and even rainfall.

The health implications are equally serious. Research has linked long-term PFAS exposure to a range of medical concerns, including increased cholesterol, liver and kidney damage, immune system suppression, developmental issues in children, and certain cancers. Because of this, the U.S. Environmental Protection Agency (EPA) and several state agencies have begun to regulate PFAS more aggressively, imposing lower advisory levels, mandating testing, and launching enforcement actions.

This shift has brought a new layer of complexity to municipalities. PFAS can originate from many sources, including airports, military facilities, landfills, and industrial sites. Local governments are often left to identify, manage, and clean up. Cities may own impacted properties, oversee public water systems, or unknowingly contribute to PFAS migration through aging infrastructure.

Municipal legal teams must now do more than react—they must lead. Depending on a municipality's resources, complying with evolving federal and state standards, identifying sources of exposure, and preparing for insurance notice may require working with outside environmental counsel. Early stages of response include:

1. Completing initial site assessments.
2. Taking a comprehensive inventory of historically impacted properties
3. Locating past records related to firefighting foam use, landfill intake, or industrial permitting.
4. Conducting baseline testing,
5. Preserving evidence and reviewing chain-of-custody documentation,
6. Assessing potential claims,
7. And defining your legal position.

WHERE LEGAL STRATEGY MUST BEGIN

PFAS contamination rarely stems from municipal negligence. In most cases, these chemicals entered the environment through historically permitted uses—firefighting foam at airports and military bases, industrial discharges, or long-forgotten consumer waste streams. Still, municipalities are often left to manage the aftermath: testing water systems, coordinating remediation, and navigating public pressure.

Legal strategies often begin with four foundational actions:

1. Site Identification
This is the cornerstone of PFAS risk assessment. Before a city can test, report, or remediate, it must first understand where PFAS contamination is likely to exist—and why.

A. Airports are one of the highest-risk locations due to historical use of aqueous film-forming foam (AFFF) in fire suppression training and emergency response. Many municipal airports used these foams for decades, often without recordkeeping or containment infrastructure. Even decommissioned facilities may still have PFAS hotspots in soil or groundwater.

B. Fire Stations are another common source. Training exercises, equipment cleaning, and on-site foam storage have all contributed to legacy contamination. This risk applies not just to city headquarters, but to satellite stations and volunteer departments operating under the municipality's umbrella.

C. Wastewater Treatment Plants are increasingly flagged as PFAS concentrators. These facilities don't create PFAS but often receive it—from industrial users, consumer waste, and upstream stormwater. PFAS can accumulate in biosolids, which are then land-applied as fertilizer, creating long-term exposure risks that extend into agricultural zones.

D. Landfills are also a significant concern, particularly those that accepted industrial or construction waste. Leachate from landfills can carry PFAS into groundwater or surface water if not adequately contained or monitored. Older facilities, closed before PFAS was regulated, often lack modern liners or reporting systems. Other frequently overlooked sites include:

E. Decommissioned military bases or training grounds previously leased to the city.

F. Public works yards storing old firefighting or industrial supplies.

G. Industrial parks where city leases may obscure PFAS use by tenants.

H. Schools or athletic facilities using artificial turf containing PFAS-derived chemicals.

2. Historical Usage Audit
Once priority sites are identified, the next step is investigating past activity. Without a paper trail, proving that a city was unaware of the contamination, used best practices, or is eligible for funding or reimbursement becomes difficult. And in litigation, lack of documentation is often interpreted as negligence. Reviewing procurement records, contracts, permitting files, insurance policies, and vendor agreements explains how PFAS-containing products entered city systems and who may share responsibility. This may involve:

A. Pulling AFFF purchasing logs and disposal records from fire department
Reviewing building permits and utility extensions for industrial tenants

B. Interviewing long-time public works staff or retirees with historical knowledge.

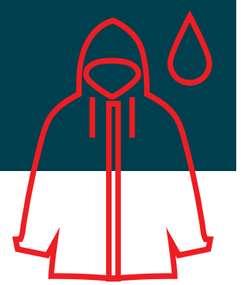
C. Searching archived council meeting minutes for funding or procurement decisions.

D. Locating insurance carriers from the relevant time period to preserve coverage claims.

3. Funding Strategy
Legal strategy must also include a funding roadmap. While EPA enforcement is increasing, so is the availability of grants, revolving loan funds, and cost recovery pathways tied to PFAS. The challenge is timing: funding programs often have narrow windows, strict eligibility requirements, and documentation thresholds that cities must meet in advance.

A. Ensure environmental consultants and engineers are documenting sampling in legally defensible ways

WASTEWATER TREATMENT PLANTS ARE INCREASINGLY FLAGGED AS PFASCONCENTRATORS.



WITHOUT A PAPER TRAIL, PROVING THAT A CITY WAS UNAWARE OF THE CONTAMINATION, USED BEST PRACTICES, OR IS ELIGIBLE FOR FUNDING OR REIMBURSEMENT BECOMES DIFFICULT.

B. Review terms and conditions of state or federal funding agreements to avoid unintended liability waivers

C. Coordinate with financial officers to identify matching fund opportunities

D. Preserve cost documentation for reimbursement down the line

E. Notify insurers to preserve potential claims—even if lawsuits haven't yet been filed

4. Communications Planning
Even when cities act responsibly, the perception of inaction can damage trust and create legal exposure. PFAS affects more than infrastructure—it affects public opinion, agency relationships, and political capital. A city that communicates early and often is more likely to be seen as a partner—not a polluter. Early planning includes:

A. Public meeting talking points that communicate transparency while protecting the city's legal position, Press releases and FAQs that explain what PFAS is, what the city is doing, and why action takes time.

B. Internal coordination protocols so that water boards, public works, and legal speak with one voice.

C. Pre-drafted templates for community notices in the event of an EPA contact or test result exceedance.

BUT IT DOESN'T STOP AT PFAS.

PFAS may be the most urgent environmental challenge today, but it's not the last. Municipalities are now facing a wave of interrelated risks:

A. Lead pipe replacement mandates.

B. Emerging contaminants like 1,4-dioxane.

C. New stormwater retention rules.

D. Flood resilience requirements tied to climate policy.

E. Biosolid restrictions affecting waste management.

F. Increased scrutiny of pesticide and fertilizer runoff.

Many of these will follow the same pattern: delayed regulation, surprise enforcement, and expensive cleanup. Cities that have legal frameworks in place—ones that promote documentation, interdepartmental coordination, and proactive funding—will be better prepared.

REAL CITIES. REAL CHOICES.

The outcome often comes down to one thing: when legal leadership enters the conversation. Early engagement results in preparedness, access to funds, and community trust. Late engagement results in scramble, liability, and missed opportunities.

The lesson? No city is immune, but every city has a choice. The right legal strategy—carried out at the right time—can mean the difference between recovery and regret. ML

Looking Ahead: Join Us in NOLA
Stag Liuzza, LLC's foundational expertise lies in environmental and complex litigation, emphasizing plaintiff-centric approaches. Our professional commitment is steadfast: to advocate for and protect the rights of cities and municipalities, ensuring both justice and environmental integrity.

This October, the Stag Liuzza team will continue this conversation at the IMLA Annual Conference in New Orleans. Attending the conference means a chance to learn what's ahead for municipal PFAS litigation—to understand not only litigation, but infrastructure, risk allocation, and the evolving regulatory frameworks driving these cases. More information is also available at www.cleangroundwater.com.

INSIDE CANADA

Procedural Fairness, Privacy Protection, Purchasing Land, and more.

Contributed by partners
Margo Hoffner, Cathryn Duxbury, and Marta Caufield
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Procedural Fairness Owed May Vary Depending Whether Decision or Recommendation Made.

Halifax (Regional Municipality) v. Dalhousie University
2025 NSCA 33
https://canlii.ca/t/kc690

Dalhousie University ("Dalhousie") purchased a residential lot in Halifax containing a house built in 1897 ("property") which was not subject to any heritage designation at the time of purchase. Dalhousie applied to Halifax (Regional Municipality) ("HRM") for a demolition permit. The Halifax University Neighborhood Association ("HUNA") learned of Dalhousie's intention to demolish the house, and made an application under the *Heritage Property Act*, R.S.N.S. 1989, c. 199 ("Act") to have the property registered as a heritage property. Upon receipt, HRM heritage staff reviewed the application and prepared a report to the Heritage Advisory Committee ("HAC") to assist in its evaluation. A meeting of the HAC was expedited over concerns by HUNA that the house would be demolished before the HAC would otherwise meet. The HAC recommended registration. HRM Council ("Council") acted on the recommendation and registered the property as a municipal heritage property. Dalhousie sought judicial review of Council's decision for several reasons, including that it was denied procedural fairness at both the HAC and Council level. The reviewing judge agreed with Dalhousie, quashed Council's decision, and ordered the property be removed from the municipal registry of heritage properties. HRM appealed.

HELD: Appeal allowed, heritage designation restored.

DISCUSSION: Considering the factors set out by the Supreme Court of Canada in *Baker v. Canada (Minister of Citizenship & Immigration)*, 1999 SCC 699 ("the *Baker* factors") regarding the content of the duty of fairness owed by a public body, at the Council hearing Dalhousie was owed a level of procedural fairness on the high end of the spectrum. Council did not provide reasons for its decision and the parties agreed that they were not required to, given the format of its adjudication of the matter. Dalhousie had notice of the hearing, the hearing was conducted by Council during a regularly scheduled meeting, and the process accorded with their established practice. Council received evidence and submissions, debated the matter, and then voted. Dalhousie was entitled to a contextually fair procedure, not a perfect one. The Court held that there was no breach of procedural fairness before Council, that any irregularities were not material, and that the reviewing judge was incorrect to have concluded otherwise. Considering the *Baker* factors regarding the content of the duty of fairness owed at the HAC level, Dalhousie was owed a lower level of fairness. The HAC only makes a recommendation to Council regarding the registration of a municipal heritage property. The decision whether to register a property is made by Council and any shortcomings at the HAC level were rectified during the hearing *de novo* before Council where Dalhousie had meaningful participatory rights it exercised. The Legislature clearly did not intend for there to be full participatory rights by the property owner at the committee level as it expressly provided a full right of participation to the property owner at the hearing before Council.

Right to Information Authorized by Statute Cannot be Used to Redress Other Wrongs

Craft v. Town of Grand Bay-Westfield
2025 NBKB 021
https://canlii.ca/t/k95sb

This case involved a referral under the *Right to Information and Protection of Privacy Act*, S.N.B. 2009, c. R-10.6 ("Act") arising out of a request by Craft to the Town of Grand Bay-Westfield for access to information pertaining to any bylaw infractions at her home, correspondence between bylaw officers and a number of individuals, and all related information, including the name of the complainant. The Town identified the relevant documents and reviewed them to determine which ones or parts thereof should be disclosed, and which should be withheld or redacted under the Act. Some information in the documents was redacted pursuant to s. 16 of the Act (not relevant), s. 18(1) (provided in confidence), ss. 21(1)(2) (unreasonable invasion of a third party's privacy), s. 22.1 (solicitor-client privilege), and s. 26(1)(a) (could reveal advice, opinions, proposals or recommendations developed by or for the public body). Craft filed a referral to the Court of King's Bench objecting to the reasons given for withholding and redacting documents. She alleged that she had been harassed by the complainant since moving into her home five years prior, and that the bylaw complaints made lead to her receiving an eviction notice from Habitat for Humanity, who financed her purchase of the property. She argued that the information redacted was required to stop the constant harassment and for the eviction hearing.

HELD: Some valid issues were raised by Ms. Craft.

DISCUSSION: While the Act permits disclosure of third party personal information if the third party consents, failure of the third party to object to disclosure does not equate to consent. The Court held that while Ms. Craft raised some valid issues which would be considered as the Court reviewed the redactions, some of her other submissions were rejected. The Court found that the Act is designed to protect personal privacy, and not to redress other wrongs. An application such as this, which is authorized by statute, must be kept within the boundaries of the enabling statute and expanding it beyond those boundaries would be an error in law. If the information redacted is critical to the eviction application, Craft could pursue the documents in that proceeding.

The Power to Purchase Land Comes with the Corresponding Power to Divest it.

Davies v. Bowen Island Municipality
2025 BCSC 1381
https://canlii.ca/t/kd9fs

In 1969, Munro Davies transferred land to the Bowen Island Fire Protection District ("BIFPD") for the construction of a fire hall. The BIFPD was incorporated under the *Water Act*, R.S.B.C. 1960, c. 405, and Order in Council 2940-68, with the power to purchase land. Mr. Davies entered into several agreements with the BIFPD in 1969, which referred

"Intermunicipal services" should be interpreted to include services for which a municipality is responsible even though a third party is involved in the delivery of the service to the residents

to the transfer alternatively as "selling" and "donating". On the same date that the transfer deed was signed, sealed, and one dollar in consideration exchanged, an agreement was also created between Mr. Davies and the trustees of the BIFPD stipulating that if the fire hall was not built on the land within a year, the land would be reconveyed to him. The fire hall was built within the year and operated by BIFPD. Bowen Island Municipality ("BIM") was incorporated in 1999 by letters patent under what was then referred to as the *Municipal Act*. The municipal letters patent provided for the transfer of the assets and liabilities of the BIFPD to BIM. The fire hall continued to be operated on the land until the Fall of 2022, when the fire hall was relocated. BIM intended to sell the property to purchase a fire truck. Until then, the land was being leased out. Mr. Davies' estate ("Estate") commenced an action against BIM, arguing that the land reverted back to the Estate when the land was no longer used for a fire hall.

HELD: Action dismissed.

DISCUSSION: The Court did not accept that the legislation and letters patent could be read as providing the BIFPD with the power to purchase land without the corresponding power to divest land. Such interpretation was inconsistent with a fair, large, and liberal reading of the statutes and letters patent expressly required by the BIFPD letters patent. The objective of the BIFPD was to provide fire protection. The Court agreed with the Estate that this does not include entering into the commercial leasing business to finance fire protection, but this was not what was being done here. The stated intention was to sell the property to purchase a fire truck, and the land was being leased only in the meantime. In the Court's view, the BIFPD acquired a fee-simple interest in land but simply lacked the power to use the land for purposes outside of the object of their letters patent. When the municipality acquired the land from the BIFPD, it received a fee-simple interest in the land subject to any relevant legislative restrictions imposed on the municipality.

Allegation of Bias Cannot be Raised for the First Time on Judicial Review.

Robinson v. Pickering (City) 2025 ONSC 3233
https://canlii.ca/t/kccb1

Robinson was an elected member of the city council of the City of Pickering ("City"). She sought judicial review of two decisions of council in which they unanimously voted to suspend her salary for 30 days in the first instance, and for 60 days in the second. Both suspensions were based on recommendations provided by the City's integrity commissioner ("Commissioner") who determined, following investigation of various complaints, that Robinson had violated council's code of conduct. Robinson was found to have made social media posts that publicly named residents who were in opposition to her personal minor variance application to the City and promoted motions and conduct that was considered homophobic and transphobic at public event. One of Robinson's arguments was that the Commissioner was biased, and because they were exercising an adjudicative function, there is a lower threshold for establishing bias.

HELD: Application dismissed.

DISCUSSION: The Commissioner is responsible for performing in an independent manner various functions assigned by the municipality, including conducting an inquiry in respect of a request or complaint by a member of council or the public as to whether any member of council has contravened the City's Code of Conduct, and then reporting to City council. The Commissioner's role in this case was to investigative issues and provide opinions to City council, and not to adjudicate or give binding decisions. City council had the discretion to consider whether to accept or reject the Commissioner's recommendations, and whether to impose sanctions on Robinson. Council members received the Commissioner's two reports separately at two different meetings, had an opportunity to ask questions of the Commissioner, and debated on motions to impose the recommended sanctions. The Court found that there was no basis to conclude that the Commissioner was biased, and in any event, an allegation of bias must be raised before the person who is alleged to be biased and cannot be raised for the first time on judicial review as was done in relation to the Commissioner's first report.

Defining "Intermunicipal Services"

Woodlands (County) v. Whitecourt (Town) 2024 ABKB 388
https://canlii.ca/t/k5gm4

Woodlands ("County") and Whitecourt ("Town") had common boundaries. They were unable to agree to a required intermunicipal collaboration framework ("ICF") and proceeded to arbitration pursuant to the *Municipal Government Act*, R.S.A. 2000, c. M-26, where a framework was established. The County brought an application for judicial review on the basis that the arbitrator erred in finding certain matters to be "intermunicipal services", and in directions made involving costs related to services provided by third parties such as library, police, rail, and recreation services.

HELD: Application dismissed, with one minor exception

DISCUSSION: The arbitrator was empowered to bind the parties with respect to the responsibility for providing, delivering, and funding intermunicipal services. The Court held that the arbitrator properly found that intermunicipal services can be planned, delivered, and funded; they must benefit residents of more than one municipality party to the framework; they may be provided in only part of a party municipality; they must be the responsibility of a municipality, and they must be capable of being described as to how they will be delivered and funded. Intermunicipal services are things the public needs or public activities or commodities delivered by or on behalf of one municipality that benefits residents of one or more other municipalities. As a matter of plain or ordinary meaning, "intermunicipal" denotes service between or among municipalities, carried on between municipalities, occurring between municipalities, or shared by municipalities. The Court concluded that arbitrator's definition of "intermunicipal services" was not only reasonable but correct. "Intermunicipal services" should be interpreted to include services for which a municipality is responsible even though a third party is involved in the delivery of the service to the residents of the municipalities party to the ICF, so long as the service is not one that is "uniquely" and autonomously provided by a third party. The arbitrator's direction that "library services" be included in the ICF conflicted with subsequent caselaw and was quashed. However, the arbitrator's direction that the services of providing and maintaining the library building in the ICF as an intermunicipal service was appropriate.

Adjacent Does Not Mean Near

9165-0937 ***Quebec inc. v. City of Sherbrooke*** 2025 QCCS 171
https://canlii.ca/t/k99hv

The plaintiffs, 9165-0937 Quebec inc. (the "owners"), owned a building in the City of Sherbrooke, Quebec, located in an industrial park owned by the City. There was no possible access to the owners' building from the motorway which it bordered and the only way to envision that it would not be landlocked would be to access it from Hector-Brien street.

Although discussions and negotiations took place between the owners and the City since 2012, when the owners purchased the building, related to the development of the owners' property, including the possibility of the City extending Hector-Brien street onto the owners' building and exchanging land with the plaintiffs, the plaintiff owners had always been informed by the defendant City that their land could not yet be developed since it was, among other things, not adjacent to a public street. According to the City, Hector-Brien street ended at the end of the registered lot which bore the number 4 599 668. The plaintiffs asserted that the driveable surface of Hector-Brien street ended less than 2 metres from the lot line of their building and that the underground municipal services, which were installed in the street right-of-way, ended less than 4 metres from this same lot line.

The owners sought a site preparation and development permit from the City. The City the refused the request because the parcel of land was not adjacent to a public street. The owners brought a motion for a declaration that the parcel of land was adjacent to a public street. The plaintiffs argued that the portion of Hector-Brien street that is adjacent to their building must be considered a public street since it has been developed and passable since at least 2013.

The City argued that the plaintiffs' appeal was theoretical since whatever conclusion the court might reach regarding whether or not the building is adjacent to a public street, this would not have the effect of allowing them to obtain a building permit for that building. Even without taking the adjacency of the land to a public street into account, it would not be possible for the plaintiffs to obtain such a permit because of Interim Control Bylaw 1274, which was aimed at the protection of natural environments of conservation interest.

Furthermore, the City stated that even if the concept of adjacency or the term "adjacent" was not defined, the usual definitions of these terms refer

Court found that the City was entitled to cancel the permit and prohibit the festival from continuing on the basis of a good faith conclusion that continuing the event would pose a material risk to public safety

to something contiguous, or touching, or adjoining. The City added that on several occasions, the courts have ruled that the concept of adjacency implies access, direct frontage on a public street and have rejected the concept of proximity. The City stated that when land is separated from a public street by a strip of land, even if this strip belongs to the municipality, this has the consequence that it is not adjacent to this street.

HELD: Motion dismissed.

DISCUSSION: The Superior Court of Quebec found that the bylaw, called Regulation 1203, clearly required that the parcel of land be adjacent to a public street. The Court acknowledged that this requirement has been declared valid by the courts on numerous occasions, including the Court of Appeal, in order to give municipalities the possibility of controlling the sequence of development in their territory and of making municipal services profitable.

The Court found that the term "Public street", as defined in Regulation 1200, means a street that belongs to the City of Sherbrooke or to a government. Any thoroughfare that was not the subject of a specific cadastral description was not a public street. The evidence showed that the public roadway extended into the parcel of land. However, the street inside of the parcel of land was not described in a cadastral plan. This meant that the only conclusion that could be found was that the street was outside of the cadastral limit of the parcel of land. Therefore, the Court declared that the owners' parcel of land was not adjacent to the public street.

Purpose of Court of Appeal is Not to Relitigate

Chitaroni Estate v. Coleman (Township) 2025 ONCA 424
https://canlii.ca/t/kclfc

This was an appeal of three decisions arising from a single summary judgment motion related to a disputed portion of road. The underlying issue related to a claim by the appellants for a declaration that a disputed portion of a specific road ("Road A") connecting to a developed subdivision was either a public road, a common road, or an access road. The declaration was intended to enable a long-pending approval of a plan of subdivision. The appellants also claimed damages against the Town of Coleman for alleged public misfeasance/malfeasance in not taking certain steps to assume the disputed portion of Road A earlier.

The Township brought a motion for summary judgment which the motion judge heard in three parts, with each part resulting in a final determination. In Part 1, dated January 7, 2022, the motion judge determined that summary judgment was the appropriate process, addressed the use of partial summary judgment and dismissed the appellants' claim for a declaration that the disputed portion of Road A is a public road. Further submissions were directed to be filed with respect to the issue of whether the damages claim required a trial. In Part 2, dated April 20, 2023, the motion judge dismissed the appellants' claim that the disputed portion of Road A was a common road, while permitting the access road and misfeasance claims to proceed to trial. He also sought particulars of certain allegations made by the appellants to support the claim for damages.

In Part 3, dated October 25, 2023, the motion judge made rulings with respect to specific allegations related to the access road issue and the misfeasance claim, both of which had already been ordered to proceed to trial. Some of the rulings specified that the appellants were precluded from advancing aspects of their misfeasance claim at trial. On April 17, 2024, costs were ordered in the amount of $33,000 payable to the Township.

The appeal was commenced by the appellants after the Part 3 decision was rendered.

HELD: Appeal dismissed.

DISCUSSION: The appellants argued that the motion judge erred in determining that this matter was appropriate for partial summary judgment, and in concluding that the disputed portion of Road A is neither a public road nor a common road. The appellants asked the Court of Appeal to set aside the motion judge's order and to remit all issues in the proceeding to trial.

The appellants argued that they were entitled to a declaration that the disputed portion of Road A was a public road based on the common law doctrine of dedication and acceptance, which applied until 2003, when the *Municipal Act, 2001* (Ontario) came into effect. The Court of Appeal found that the motion judge recognized that the parties advanced conflicting positions concerning the required elements of the acceptance branch of the test. Furthermore, however the test was formulated, the appellants claim was found to have failed because the appellants could not show acceptance by the Township or by the public, nor could it show dedication.

The Court of Appeal found that the appellants effectively sought to relitigate this issue on appeal, which is not the function of the Court of Appeal. The Court of Appeal confirmed that the motion judge correctly set out the law, considered the breadth of authorities and conflicting positions on the law that were advanced, made findings of fact fully available to him on evidence, and reasonably applied the law to those facts. The motion judge determined that the evidence did not show intention to dedicate, because the owner was unaware that he owned it, and this reflected neither error of law nor of fact.

Municipality May Revoke Special Events Permit

Eritrean Cultural Centre v. Toronto (City) 2025 ONSC 3672
https://canlii.ca/t/kctkw

The applicants ran an annual three-day community event called "Festival Eritrea" in Toronto since the year 2000. The City of Toronto granted the applicants a special use permit for their August 5-7, 2023 festival. The first day of the festival, on August 5, was interrupted by violent protests resulting in numerous injuries requiring multiple people to be treated at hospital, including one reported stabbing.

At 10:00 p.m. on August 5, 2023, the City revoked the special event permit on public safety grounds. The applicants immediately requested reconsideration, but the City did not respond. As a result, the balance of the 2023 festival was cancelled.
On September 1, 2023, the applicants brought an application for a judicial review seeking to quash City's revocation decision and for related relief.

HELD: Application dismissed as moot.

DISCUSSION: The Superior Court of Justice found that it was apparent that the application was moot on its face. The permit for the 2023 festival was revoked, the balance of the festival was cancelled, and these events cannot be undone by a decision of the Court. The applicants argued that declaratory relief was warranted in order to prevent recurrence in the future. However, the Court found that such an argument is not available. The events of 2023 did not preclude an application for a permit for the 2024 festival – that permit was granted and the festival took place without incident.

Furthermore, the Court found that the City was entitled to cancel the permit and prohibit the festival from continuing on the basis of a good faith conclusion that continuing the event would pose a material risk to public safety. The Court found that the impugned decision was reasonable in substance, given the apprehended risk to public safety.

Vacancy Tax Properly Issued by Municipality

Lin v. Vancouver (City) 2025 BCSC 976
https://canlii.ca/t/kcbq8

The City of Vancouver's *Vacancy Tax Bylaw* provides that a property is considered "vacant" if it has been



unoccupied for more than six months of the year. An "unoccupied" property is one that is not the occupier's principal residence. The City determined that a property owned by Lin is subject to a vacancy tax and disused a supplementary vacancy tax notice, but Lin declared that the property in issue was her principal residence for more than six months in 2018. Lin applied for judicial review to the British Columbia Supreme Court for the following remedies: an order that the supplementary vacancy tax notice be vacated and quashed on the basis that Lin was not liable for vacancy tax for 2018; an order quashing the decisions of the Vacancy Tax Review Officer ("review officer") and the Vacancy Tax Review Panel ("panel"); or an order that this matter be retuned to the panel for reconsideration and redetermination on the issue of whether the supplementary tax notice issued in this case was valid.

HELD: Petition dismissed.

DISCUSSION: The Court found that the onus was on the petitioning homeowner, Lin, to demonstrate that the review officer and panel's decisions were unreasonable and to establish that the property was "not unoccupied" at the relevant time. The panel accurately set out how tax was assessed and imposed under the bylaw wherein the notice that was issued for the given tax year always imposed tax for vacancy in the year that was earlier than the tax year. The Court found that the panel engaged in the kind of contextual and purposeful interpretation of the bylaw endorsed by Supreme Court authority. It was determined that 2019 was the applicable tax year for the 2018 vacancy period. The review officer cited several reasons to find that the homeowner principally lived at her husband's other residence in the City. The Court found that the panel's findings were consistent with the purpose of the legislation. It was determined that the supplementary vacancy tax notice was not statute-barred and the decision of the panel regarding liability for tax was reasonable.

Enforcement of Municipality's Zoning Bylaw

The Corporation of the District of Saanich v. Kinney 2025 BCSC 1132
https://canlii.ca/t/kcs37

In this petition proceeding, the District of Saanich in British Columbia sought declarations, injunctions, and various other orders enforcing bylaws they alleged were violated by the respondent, Kinney. All of the relief sought involved a 17-acre rural lot, owned and occupied by Kinney, located on Old East Road in Saanich (the "property").
The property was located within Agricultural Land Reserve (ALR) and was designated by the municipality's zoning bylaw as A-1 Rural. There were 11 structures on the property, including a large house, a covered riding ring, a small building with a washer, dryer, toilet, and shower, several small buildings used for storage, a metal workshop, a woodworking shop, and two garages. The municipality claimed that the property was being used in five prohibited ways. In particular, the municipality claimed that Kinney was allowing unpermitted and unlicensed businesses to operate on the property; was allowing use of trailers, motor vehicles, or recreational vehicles for lodging, sleeping, accommodation or residences; was permitting secondary suites on the property; was permitting occupancy of a building, or parts of a building, on the property, without a subsisting occupancy permit; and had constructed or altered use or occupancy of buildings or structures on the property without valid and subsisting permits, and not in conformity with the British Columbia Building Code.

HELD: Petition granted in part.

DISCUSSION: Section 274(1) of the *Community Charter* provides that a municipality may, by a proceeding brought in Supreme Court, enforce, prevent, or restrain the contravention of a bylaw. Once a municipality establishes a clear breach of a bylaw, the Court should grant the injunction, barring exceptional circumstances. Five examples of exceptional circumstances are: where there is a right that pre-existed the enactment contravened; where there is a clear and unequivocal expression that the unlawful conduct will not continue; where there is such uncertainty that it can be said that the breach is not being flouted; where the events do not give rise to the mischief the enactment was intended to preclude; or where the respondent has ceased the majority of its offending activities and carried on, only in a limited way, with activity that is not harmful in the way that the bylaw was intended to prevent.

To the extent that the respondent may suffer hardship from the imposition and enforcement of an injunction, that will not outweigh the public interest in having the law obeyed.
The Court found that the property was being used for business purposes not related to farming, including parking of recreational vehicles, cars, and trucks parked inside the covered riding ring, and operation of a metal workshop. Kinney was using recreational vehicles on the property for lodging or accommodation in contravention of the Zoning Bylaw. The Court also found that Kinney was providing more than one secondary suite on the property in contravention of the Zoning Bylaw. Kinney was only permitted to have one secondary suite on the Property. However, the Court also found that the municipality failed to present evidence that the structures on the property were constructed without appropriate permits or were not in compliance with the Building Code.

A permanent injunction was granted prohibiting Kinney from having more than one secondary suite, using the property for business purposes not related to farming, and permitting use of recreational vehicles on the property for lodging or accommodation. ML

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Municipal Liability in the New Age of Public Protest



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THE PREGNANT WORKERS ACT

June 2025 marked the second anniversary of the enactment of the Pregnant Workers Fairness Act ("PWFA" or the "Act"). And with that milestone, it is quickly becoming apparent that this Act is not quite as simple to maneuver through as many of us hoped. If you have been proceeding under the assumption that this Act mirrors the Americans with Disabilities Act ("ADA") or that it will be intuitive to comply with it, think again. Now, with the benefit of the regulations that went into place last summer and enough time to experience some real-life scenarios, I am convinced that employers need to pay attention to this Act. In addition, employers (and their counsel) should be getting some basic training to avoid several pitfalls that are sure to cause mischief as we see more of these claims work their way through the court system.



Contributed by Pam Howland

FIVE TIPS FOR AVOIDING CLAIMS AND LAWSUITS.

But first, let's talk a little bit about what this Act is and why it might cause some confusion. Essentially the PWFA went into place in June 2023 with the sole goal being to ensure that employees who suffer limitations related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions, are granted accommodations. In other words, this is not an anti-discrimination law. Instead, it is somewhat unique in that its focus is on accommodation. Imagine a pregnant employee who becomes unable to perform essential functions of her job because of a temporary lifting restriction related to her pregnancy. Prior to the enactment of the PWFA, an employer may have had more leeway in terminating that employee. Not so under the PWFA, which is intended to prevent, among other things, situations where pregnant employees lose their jobs because of temporary conditions related to pregnancy.

The PWFA is also unique as it is intended to overlap and run in tandem with several other laws. For example, Title VII, which prohibits discrimination based on numerous protected classes, including sex, also provides protections against discrimination for pregnant women. Now, if a pregnant employee is denied an accommodation and terminated, instead, she might have protections under both the PWFA and Title VII. Likewise, if a pregnant employee needs an accommodation because her pregnancy exacerbates a prior disability, she may be protected by both the ADA and the PWFA.

The broad scope of the PWFA warrants a little time and attention, and if you take one thing away from this article, hopefully, it is an understanding that the PWFA is very broad. In fact, in some ways, the name of the Act is misleading, as the PWFA does not just protect pregnant women. Recall that the Act applies to employees seeking accommodations arising out of pregnancy, childbirth, or related medical conditions. That is some broad language, and the phrase "related medical conditions" certainly should have your attention. What is encompassed by these broad categories, and what does the Act mean by its reference to "related conditions"? We aren't entirely sure yet, but we know that the list of possible conditions is long. Some of the medical conditions that likely would trigger protection are:

- Nausea or vomiting; edema of the legs, ankles, feet, or fingers.
- Frequent urination; incontinence; loss of balance; vision changes; varicose veins.
- Changes in hormone levels, sciatica, carpal tunnel syndrome, chronic migraines, and dehydration.
- Maternal cardiometabolic disease, gestational diabetes, preeclampsia, hyperemesis gravidarum, and anemia.
- High blood pressure, infection, anxiety, depression, or psychosis during or after pregnancy.
- Aggravation of existing medical conditions by pregnancy or childbirth.

Similarly, possible accommodations contemplated by the Act are many and varied. Under the PWFA, the following accommodations are likely considered reasonable ones:

- Additional, longer, or more flexible breaks to drink, eat, rest, or use the restroom.
- Changing equipment: devices, workstations, uniforms, safety equipment.
- Changing a work schedule: shorter hours, later start time.
- Time off (paid or unpaid) for appointments with



The broad scope of the PWFA warrants a little time and attention, and if you take one thing away from this article, hopefully, it is an understanding that the PWFA is very broad..

health care providers, including appointments related to, and recovery from childbirth or related medical conditions.
- Light duty or help with lifting or other manual labor.
- Temporary reassignment or reassignment of essential function, if an employee can do it again "in the near future," and if not, an undue hardship.

These medical conditions and accommodations may not be surprising. However, the PWFA applies to many others that might catch you by surprise. What about an accommodation for an employee to attend counseling sessions for post-partum depression? A pregnant employee who seeks protection against exposure to secondhand smoke? A pregnant employee who seeks more snack breaks to manage existing diabetes? A pregnant employee who seeks the ability to have water at her workstation, even if not usually permitted? An employee who seeks accommodations to attend IVF appointments or who seeks an accommodation related to a complication from birth control (*e.g.*, IUD)? How about issues related to menstruation? All these situations are likely covered by the PWFA, as well. Again, don't be fooled by the name – this Act is not limited to accommodations for pregnant women.

With that overview in mind, I would like to share my top five list, i.e., the top five issues that could create risk and liability for unsuspecting employers who are not devoting adequate time and attention to learning key concepts within this Act and what the Act requires.

1 Know How the PWFA Differs From the ADA.

In my practice, I spend a fair amount of time working through the ADA, which, by all accounts, is not the easiest statute to maneuver through. That's why, when I first heard about the PWFA, I was not too alarmed – I just figured that the same concepts that apply to accommodations under the ADA would apply to the PWFA. Not true! As it turns out, there are some significant differences between the mechanics of how an ADA accommodation is analyzed and how PWFA accommodations are analyzed under the Act.

First, the PWFA makes it clear that there are some situations where an employer should not require an employee to provide information from a healthcare provider. One such instance is when an employee seeks a basic accommodation due to pregnancy. According to the PWFA, an employer should not seek health care provider information to confirm that the employee is, in fact, pregnant. In addition, certain accommodations are considered so basic that an employer should not seek documentation related to them. This includes requests for: 1) Modifications to uniform or dress code; 2) Use of a closer parking space; 3) Minor modifications to workplace/workstation; 4) Providing PPE; 5) Permitting use of workstation closer to the bathroom; 6) Additional bathroom breaks; and 7) Permitting eating or drinking when not usually allowed.

This is one example of how the PWFA differs from the ADA, i.e., the extent to which a request by the employer for healthcare provider information related to an accommodation is typically allowed.

Another difference between the ADA and the PWFA lies in the language of the PWFA which lays out certain accommodations that are so basic, employers are encouraged to grant them. The PWFA indicates that these accommodation requests will not be deemed to constitute an undue hardship. The ADA has no such list. However, under the PWFA, these accommodation requests should be granted:

1. To carry or keep water near and drink it, as needed.
2. To take additional restroom breaks, as needed.
3. To sit in jobs that typically require standing and to stand in jobs that typically require sitting, as needed.
4. To take breaks to eat and drink, as needed.

2 The PWFA May Require Employers to Excuse Essential Functions.

For those of you who know and understand the ADA, you are familiar with the principle that, under the ADA, an employer does not have to excuse the essential functions of the position. For example, if a painter's job requires them to stand on scaffolding, then, under the ADA, the employer does not have to grant an accommodation that would excuse the employee from having to stand on the scaffolding. Not true under the PWFA. Instead, the PWFA provides that the employer may, in some situations, be required to excuse essential functions. This is required when:

- The inability to perform an essential function is temporary.
- The essential function could be performed in the near future, and
- The inability to perform the essential function can be reasonably accommodated without undue hardship.

Go back to the painter example. If the painter is pregnant and needs a pregnancy-related accommodation to not use scaffolding for several months, the employer may be required to accommodate her inability to use the scaffolding if it is a large painting company that has four other painters who are available to assist by performing the jobs on the scaffolding.

3 The PWFA May Require Employers to Excuse Performance Quotas.

Likewise, under the PWFA, an employee's temporary inability to achieve performance quotas due to pregnancy, childbirth, or related conditions may require accommodation. This differs from the ADA, which does not require an employer to excuse performance quotas. This may require an employer who typically penalizes an employee for failing to achieve quotas to avoid doing so when the employee experiences lower productivity, focus, availability, or contributions if the lower production is due to a reasonable accommodation under the PWFA.

Imagine a customer service representative who must contact twenty customers in a given day. If that representative is experiencing nausea/morning sickness related to pregnancy and is only able to work part-time, then the employer may need to accommodate her inability to hit the quota.

4 The PWFA Contemplates Interim Accommodations that Should be Granted Immediately.

Those of you who are familiar with the ADA are probably comfortable with the fact that analyzing ADA accommodations and completing the ADA interactive process can take quite a while. After all, the employer typically seeks health care provider input, which, in and of itself, can take several weeks, if not months, to obtain.

The PWFA takes a different approach. As noted above, it contemplates situations where the employer is not entitled to any healthcare provider information. Additionally, it requires employers, in some situations, to grant interim, or emergency/temporary, accommodations – the philosophy being that, in some situations, it is unreasonable to make an employee wait and to possibly place their health or the health of a pregnancy at issue.

One example would be if an employee asks for an accommodation on Friday, has to work on Sunday, and won't get an answer on their requested accommodation until Monday. The PWFA suggests that the employer needs to temporarily grant an interim accommodation until a final decision can be made.

Don't forget – just like with the ADA, any time you are granting an accommodation (including a temporary accommodation like the ones we are discussing here), you would be well-served to make sure there is adequate documentation. When it comes to temporary accommodations, you should put documentation in place ensuring the employee understands this is not necessarily a permanent accommodation that will continue indefinitely.

5 Don't Count on Prevailing on an Undue Hardship Argument.

Just like with the ADA, there are some situations where an employer does not need to provide an accommodation because it will constitute an undue hardship. In a nutshell, undue hardship means that the accommodation will cause significant difficulty or expense. What does that mean exactly, and how will an employer know if they can meet the undue hardship threshold? Great question.

The undue hardship analysis, like all issues under the ADA and PWFA, is done on a case-by-case basis. It will differ from employer to employer and hinge on the employer's size and the resources available. A small employer may have an easier time showing that excusing a pregnant employee from an essential function may cause undue hardship for the company. On the other hand, a large public employer will have a more difficult time showing this.

Notably, one thing we have seen in the ADA context and which we will likely see in the PWFA context, as well, is that courts will reject an argument that an accommodation is an undue hardship simply because it would negatively impact the morale of other employees. For example, if allowing a pregnant employee who is confined to bed rest the ability to work from home will frustrate the employee's co-workers (who would also like to work from home), that alone is not an adequate basis to assert an undue hardship exception.

Cost alone typically will not get employers there, either. After all, it is expected under both the ADA and the PWFA that accommodation will likely cost something for the employer to implement. However, substantial costs may get an employer in the ballpark (depending on the facts).

So, there you have it: the PWFA is a broad statute requiring somewhat of a learning curve. Be aware it exists, be aware of the features that set it apart from your typical accommodation practice, and keep this list of key takeaways in mind:

1. Obvious conditions related to current, past, or intended pregnancy (or related conditions) must be accommodated.
2. If it is easy to accommodate, employers should do it.
3. Employers must act quickly. Expedience and interim accommodations are required.
4. Employers must be careful about asking for documentation.
5. Employers should be mindful of intersections with the ADA, Title VII, and the PUMP Act.
6. If job applicants are covered, would they know how to request an accommodation?
7. Forcing leave if another accommodation exists can violate the PWFA.
8. Watch for updates as the PWFA gets interpreted.
9. State and local laws could provide further protections.
10. Employers should read and be mindful of the guidance provided by the Equal Employment Opportunity Commission (EEOC), including the addendum it issued with PWFA regulations last year.
11. Employers should update their policies on lactation, how to ask for an accommodation, and their intent to comply with the PWFA overall.
12. Retaliation is prohibited under the PWFA and all related laws.
13. Confidentiality is required. ML

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In 2023, Pam formed Law for Leaders, a training program aimed at helping employers stay out of court. Law for Leaders focuses on the key issues that land employers in trouble. The Law for Leaders training platform tracks the federal employment law statutes and provides recorded and live content aimed at helping leaders learn the foundational employment law concepts that every leader needs to know to stay out of court. It is available for HR professionals, attorneys, supervisors, and leaders at all levels (located anywhere in the country) seeking to avoid making easily avoidable mistakes that could result in employer liability.

In 2025, Pam co-authored *Law for Leaders: the Roadmap Every Leader Needs to Follow to Avoid Workplace Claims and Lawsuits*, available on Amazon. Her firm kicked off its weekly podcast at the same time: *Ground Rules – Employment Law over Your Coffee Break*. Pam's goal is to help leaders across the country stay out of court and welcomes ideas and topics that would help further that goal. She can be found on LinkedIn at linkedin.com/in/pamsimmonshowland.

AMICUS

DESHANEY'S CONTROVERSIAL LEGACY: State-Created Danger

By ERICH EISELT

The Due Process Clause of the Fourteenth Amendment provides "nor shall any State deprive any person of life, liberty, or property without due process of law."[1] Over nearly 170 years, this cornerstone of American personal freedoms has formed the basis for countless challenges to alleged governmental overreach, typically under the aegis of Section 1983.[2] While the vast majority of these claims are grounded in deprivations directly perpetrated by State actors, one variant asserts that governments can also be liable for injury inflicted by third parties: state-created danger. IMLA's legal advocacy program has recently provided amicus support involved in two such cases.

Writing for a 5-4 majority, Chief Justice Rehnquist held that the County's failure to protect Joshua from his father's aggression did not violate the boy's rights under the substantive component of the Due Process Clause.

Dicta with Unforeseen Consequences-First, the back story. The tragic facts of *DeShaney v. Winnebago County*[3] are well known by now: four-year old Joshua DeShaney had been subjected to repeated thrashings at the hands of his father. Although aware of the abuse for more than two years, the County did not remove the child to protective custody. Randy DeShaney ultimately beat his son so viciously that the boy suffered permanent brain damage.

Joshua's guardian sued the County's Department of Social Services under Section 1983, alleging that by failing to intervene during such an extended period, authorities had deprived the boy of his liberty interest in bodily integrity, violating his substantive due process rights under the Fourteenth Amendment. After holdings in favor of the County at the district court and Seventh Circuit, the case reached the Supreme Court.

Writing for a 5-4 majority, Chief Justice Rehnquist held that the County's failure to protect Joshua from his father's aggression did not violate the boy's rights under the substantive component of the Due Process Clause. The Court advised that a state's failure to act in protecting an individual against private violence generally does not implicate due process. To the contrary, the Due Process Clause prohibits the government from acting, forbidding it from depriving individuals of life, liberty, and property without due process of law; it does not impose an affirmative obligation on the state to prevent third parties from inflicting harm.

That holding applied irrespective of the state's knowledge of the individual's dangerous situation. Although a "special relationship" might create governmental responsibility, the relationship would arise not due to awareness of the individual's peril, but only because the state had limited the individual's freedom to act, by imprisonment, institutionalization, or other similar restraint on personal liberty.

Acknowledging Joshua's obvious need for protection under such horrific circumstances, the Court pointed to recourse under state law: "It may well be that, by voluntarily undertaking to protect Joshua against a danger it concededly played no part in creating, the State acquired a duty under state tort law to provide him with adequate protection against that danger."[4] The ultimate recourse for victims such as Joshua, said the Court, lay with the state's voters and legislature, not in a misreading of the Fourteenth Amendment:

> The people of Wisconsin may well prefer a system of liability which would place upon the State and its officials the responsibility for failure to act in situations such as the present one. They may create such a system, if they do not have it already, by changing the tort law of the State in accordance with the regular lawmaking process. But they should not have it thrust upon them by this Court's expansion of the Due Process Clause of the Fourteenth Amendment.[5]

That analysis might seem to have settled the issue: where the government does not inflict the harm or restrain the individual, the Fourteenth Amendment does not provide a remedy. But in dicta, *DeShaney* offered an additional rationale as to why the County should not be liable--even though it had taken temporary custody of Joshua and returned him to his father, it had not heightened Joshua's risk for harm:

> 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 . . . . [The State] placed [Joshua] in no worse position than that in which he would have been had [the State] not acted at all.[6]

This peripheral language would become salient: if the state avoided Section 1983 liability because it had not placed the individual in danger, the corollary must apply—the government could be found to violate substantive due process by heightening the individual's peril. Advocates would discern in the Court's dicta a "state-created danger" cause of action based in substantive due process.

In the 36 years since *DeShaney*, the Court has never formally validated the state-created danger construct. But neither has it invalidated the paradigm, and litigants have subsequently argued state-created danger in a wide range of Section 1983 contexts. A sampling of these includes: inmates on work detail in community center abduct and terrorize town clerk (*Cornelius v. Town of Highland Lake*, 880 F.2d 348 (11th Cir. 1989)); female students assaulted in school's unisex bathroom and photographic darkroom (*D.R. by L.R. v. Middle Bucks Area Vo. Tech. School*, 972 F.2d 1364 (3d Cir. 1992)); officers assure woman that belligerent ex-boyfriend will be detained at field station all day, but he is released early and kills her three children in house fire (*Pinder v. Johnson*, 54 F.3d 1169 (4th Cir. 1995)); officers leave intoxicated and incapacitated woman alone on winter night where she falls into ravine and suffers brain damage (*Kniepp v. Tedder*, 95 F.3d 1199 (3d Cir. 1996)); law enforcement ejects inebriated man from bar on cold night and he dies of hypothermia (*Munger v. City of Glasgow*, 227 F.3d 1082 (9th Cir. 2000)); social worker transfers custody of child from mother to father, who kills child with scalding water (*Currier v. Doran*, 242 F.3d 905 (10th Cir. 2001)); officer does not follow up on commitment to arrest pedophile who violated order not to contact twelve year old, resulting in murder of younger sister (*Bright v. Westmoreland County*, 443 F.3d 276 (3d Cir. 2006)); officers leave a phone message for alleged sexual assailant who then sets fire to accuser's home, abducts her, and shoots five people, killing two (*Irish v. Fowler*, no. 20-1208 (1st Cir. 2020)); officers leave apartment before confirming that hostile landlord has no firearms; within minutes he fatally shoots tenants (*Welch v. City of Biddeford Police Department*, no. 20-1474 (1st Cir. 2021)); teachers allow special-needs middle school girl to roam hallway unsupervised; boy with known violent history repeatedly assaults her (*Fisher v. Moore*, 62 F.4th 912 (5th Cir. 2023)).

The application of state-created danger among the Circuits is hardly uniform, as a full reading of the cases above will readily illustrate. The Fifth Circuit has declined to adopt the doctrine.[7] Among the others, virtually all require that, in order to make out a state-created danger claim for a substantive due process violation, the plaintiff must establish that: (1) a state actor or actors acted to create or enhance a danger to the plaintiff—with some requiring that they acted "affirmatively"; (2) the act(s) created or enhanced a danger specific to the plaintiff and distinct from danger to the general public; and (3) the act(s) caused the plaintiff's harm.[8] Most add a fourth element: the state actor's conduct, when viewed in total, "shocks the conscience."[9] And some courts search for evidence of a "special relationship"[10] which can arise where law enforcement, although not arresting or jailing an individual, detain or otherwise impede the person from their existing course of action, insinuating a state-instigated deprivation of liberty.

IMLA's Amicus Brush with State-Created Danger-IMLA's legal advocacy program has recently been involved in two state-created danger cases, each involving difficult fact situations and each reflecting the expansive consequences of *DeShaney's* dicta.

***County of Tulare v. Murguia*-**In late 2019, Heather Langdon (Langdon), a mentally ill mother of five, experienced a particularly serious outbreak.[11] Jose Murguia (Murguia), her husband and the father of the two youngest children-infant twins-called 911, summoning Tulare County Sheriff's Department officers. Langdon refused their urging that she go to a hospital and demanded that a friend drive her and the twins to a church. Officers allowed Langdon to take the infants, preventing Murguia from following her. At the church, she again acted erratically, prompting another 911 call. Officers then brought her and the twins to a woman's shelter, where her episodes continued, prompting responding officers to bring in a Tulare Police Crisis Intervention Technician Officer.

The intervention officer called the after-hours hotline at the County of Tulare Child Welfare Services, informing them that Langdon had not been found to require involuntary hospitalization and she did not want to relinquish her twins. Although the welfare services operator was aware that Langdon had a history of child abuse involving her older children, it did not notify the officer of that fact. And based on the officer's call, the welfare operator concluded that Langdon was not an imminent threat to the children, so did not initiate an immediate in-person investigation of Langdon. The intervention officer then arranged to provide Langdon with lodging overnight and drove her and the twins to a motel. The following morning, Langdon was observed screaming for help. When paramedics arrived, they found the infants had been drowned. Langdon was prosecuted for murder but found not guilty by reason of insanity.

Murguia brought twelve federal claims under Section 1983 against various officers, the church, the City and County of Tulare, and others, alleging substantive due process violations as well as violation of the Fourth Amendment right to be free from unreasonable seizure, and violation of the First Amendment right to familial association.

The district court dismissed, finding that the Due Process Clause did not impose on the individual defendants an affirmative duty to take specific actions. And because Langdon had not relinquished custody of the twins during the entire scenario, the individual defendants had done nothing to increase the infants' risk. Given the absence of individual liability, Murguia's *Monell* claims against the local governments failed.[12]

A split panel of the Ninth Circuit reversed in part.[13] Although acknowledging that "the state's failure to prevent acts of private parties is typically insufficient to establish liability under the Due Process Clause," it identified two exceptions recognized by the Circuit, one of which was "when the state affirmatively places the plaintiff in danger by acting with deliberate indifference to a known or obvious danger (the state-created danger exception)".[14] It affirmed dismissal of two deputies who had not placed the twins in a more dangerous situation than the one in which they found them, but allowed the claim against the intervention officer: "When [he] left Langdon and the twins at the motel, he removed them from the supervision of the Lighthouse staff and rendered the twins more vulnerable to physical injury by Langdon as a result of their isolation with her."[15] The claim

As indicated in Judge Batumay's illustrative table in Murguia, the need for clarity regarding state-created danger is obvious given the wide disparity among the Circuits.

against the welfare representative also survived, because her false information "rendered the twins more vulnerable to physical injury by Langdon by eliminating the most obvious solution to ensuring the twins' safety: returning them to [Murguia's] custody."[16] Based on its finding of liability by the two, the majority reversed the lower court's denial of *Monell* claims.

In dissent, Judge Ikuta criticized the majority's expansion of the state-created danger doctrine into tort law as conflicting with *DeShaney*. The result was an unwarranted conversion of negligence actions into substantive due process violations:

> Today the majority jettisons even these meager limits on our state-created danger doctrine. Contrary to Supreme Court precedent (and our own), the majority finds a substantive due process violation despite the absence of any abuse of power entrusted to the state. Instead, the majority holds that plaintiffs can state a claim for a violation of their due process rights based solely on negligence and mistake, exactly what the Supreme Court has told us not to do.[17]

The defendants' motion for rehearing and *en banc* reconsideration was narrowly denied, generating a dissent by Judge Bumatay, joined by Judges Callahan, Ikuta, and Nelson:

> In this case, our court once again aggrandizes the "state-created danger" doctrine and expands its scope. Now, commonplace actions—like providing a ride, booking a motel room, or telling a lie—when done by a State actor, could become due process violations if the actions eventually lead to injuries caused by third parties. While Jose Murguia has suffered profound tragedy and deserves redress, the Constitution doesn't provide the remedy.[18]

Buoyed by the sharp dissents in these opinions—including a table by Judge Bumatay illustrating the absence of uniformity among the Circuits in interpreting state-created danger (including outright denial of the doctrine by the Fifth Circuit), Tulare petitioned for Supreme Court review. IMLA supported the County with an amicus brief, joined by the National Association of Counties and the California State Association of Counties. Unfortunately, Tulare's petition for cert in *Murguia* was denied by the Court early in 2024.

***Rakes v. Johnson*:** In July 2019, Charlestown, Indiana police officers responded to a 911 call, arriving to find a man and woman fighting in the middle of the street.[19] The woman told officers that her husband was drunk, had hit her, was carrying a gun, kept AR-15s at their house, and was threatening to kill her and himself. The husband denied hitting her, and said he was having a hard time with the PTSD that he had developed in military service. The officers handcuffed him, confiscated his gun, and called an ambulance so he could get help with mental health issues at a nearby hospital, ostensibly via a 24-hour hold. The husband voluntarily left in the ambulance. In response to the wife's question as to whether the husband would be held for 24 hours, one officer replied "yeah." She asked if the officers could remove the AR-15s from her house, but they declined. The woman then returned home, apparently planning to remove the firearms before going to her parents' residence. But the husband had not been placed in a hold and was not required to remain in the hospital. After being discharged in less than three hours, he returned home, where he shot and killed his wife and then himself.

The administrator of the wife's estate filed a Section 1983 action against the officers based on state-created danger, claiming that they "placed Amylyn in a heightened state of special danger that [she] would not otherwise have faced when they falsely told Amylyn that RJ would be in the hospital for 24 hours and it was safe to return home."[20] The district court granted summary judgment to both officers on the basis of qualified immunity, as there was no clearly established law that put them on notice that their actions violated her Fourteenth Amendment due process rights. The court found that one officer's statements about the length of the husband's stay in the hospital did not propel the wife into danger or create a dangerous condition. As the court put it, "RJ had been a danger to Amylyn for months before the incident and would likely have continued to be so even if he had been held for 24 hours at the hospital."[21]

On appeal, a fractured three-judge Seventh Circuit panel affirmed qualified immunity as to one officer but reversed as to the other, who had confirmed that the husband would be held for 24 hours. His confirmation placed him within the parameters of *Monfils v. Taylor*, a Seventh Circuit precedent involving the release of an informant's telephone call after repeated assurances by a police chief that the call would remain confidential, which "clearly established that a police officer can be liable under the state-created danger doctrine if he makes false promises about the danger a person faces from an identified and violent third party."[22]

Following the Seventh Circuit's denial of *en banc* rehearing, Officer Johnson petitioned the Supreme Court for certiorari in May 2025. Among other points, he argues that the Circuit's holding that inaccurate assurances give rise to state-created danger violates the Supreme Court's teachings in *DeShaney* and *Town of Castle Rock v. Gonzalez,* 545 U.S. 748 (2005) which require a showing of governmental acts which affirmatively place the complainant in harms' way. He also makes the obvious point that there is no uniformity among the Circuits. (As an example, says the Petition, his affirmative response to the wife's inquiry about her husband being held for 24 hours would likely not be actionable in the Tenth Circuit. *See Gray v. Univ. of Colorado Hosp. Auth.*, 672 F.3d 909, 925 (10th Cir. 2012) ("false assurances do not constitute an affirmative act rendering decedent vulnerable to danger within the meaning of the danger creation exception . . . ").[23]

IMLA's amicus brief—captioned as a filing by the Local Government Legal Center based on participation by the National League of Cities and the National Association of Counties—was joined by a broad spectrum, including the Illinois Municipal League, Accelerate Indiana Municipalities, the Association of Idaho Cities, the Georgia Municipal Association, Inc., the Kentucky League of Cities, the League of Oregon Cities, and the Virginia Municipal League.

In addition to arguing the difficulties inherent in inconsistent standards, our brief stresses the inappropriate intrusion of federal law into matters that should be resolved via state tort mechanisms. It also points out the counterproductive impact on the provision of local services if statements or other seemingly innocuous acts can become the fodder for costly substantive due process claims. We await the Court's determination as to whether cert will be granted.

CONCLUSION: As indicated in Judge Batumay's illustrative table in *Murguia*, the need for clarity regarding state-created danger is obvious given the wide disparity among the Circuits. The Supreme Court's recent admonitions that assertions regarding fundamental constitutional rights must find mooring in the nation's founding may add another element to the discussion. As the Fifth Circuit held in *Fisher v. Moore*, declining to adopt the state-created danger theory:

> When adopting the state-created danger doctrine, our sister circuits tend to reason along the lines



What we now call the "state-created danger" exception is really a subset of the special relationship exception.

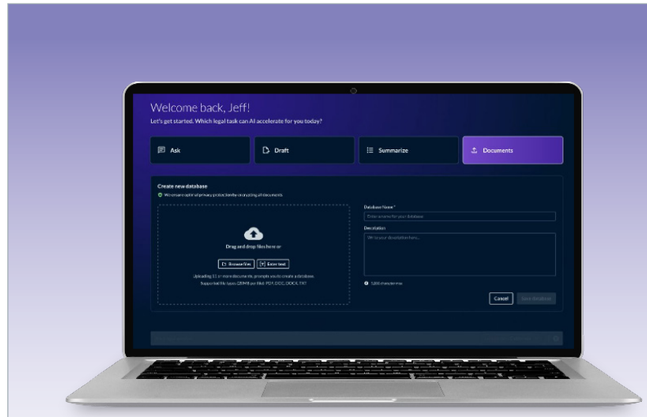
of (1) the Supreme Court left open the question in *DeShaney*, and (2) other courts have adopted the doctrine. More recently, however, the Court has reiterated—forcefully—that rights protected by substantive due process "must be 'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty.' Without briefing on how the state-created danger doctrine meets the reinvigorated test, we are content to leave the question of adopting the doctrine for another day.[24]

It may be that, under rigorous "history and tradition" scrutiny by the Supreme Court, the state-created danger expansion of governmental liability for actions by third parties will be curtailed. As a "doctrine" without readily definable Constitutional moorings, it is the type of "judge-made law" that at least one Justice is quick to criticize.[25] In that light, the words of Judge Batumay would seem to provide a defensible rationale for limiting unwarranted expansion of the *DeShaney* dicta:

> [T]he best reading of *DeShaney's* language concerning state-created danger is that the Court was supplementing its discussion of the special relationship exception—not carving out a new exception. What we now call the "state-created danger" exception is really a subset of the special relationship exception. And with that understanding, we should recognize that state-created danger must follow the limits of the special relationship exception. While DeShaney may expand this exception outside the purely custodial context, it does not untether noncustodial claims from all constitutional constraints. Rather, at the heart of *DeShaney* was the understanding that "it is the State's affirmative act of restraining the individual's freedom to act on his own behalf—through incarceration, institutionalization, or other similar restraint of personal liberty—which is the 'deprivation of liberty' triggering the protections of the Due Process Clause."[26] ML

Notes

1. U.S. Const. Amend. XIV § 2.
2. 42 U.S.C. § 1983 provides recourse against any person who "under color" of any law, subjects any citizen or other person in the United States "to the deprivation of any rights, privileges, or immunities secured by the Constitution."
3. *DeShaney v. Winnebago County Dep't of Soc Svces*, 489 U.S. 189 (1989).
4. 489 U.S. at 201.
5. *Id*. at 203.
6. *Id* at. 201.
7. *Fisher v. Moore*, 62 F.4th 912 (5h Cir. 2023).
8. *See* Judge Batumay's dissent in the denial of rehearing in *Murguia v. Langdon*, 73 F.4th 1103, 1113 (9th Cir. 2023), providing a Circuit-by-Circuit comparison of the divergent application of state-created danger).
9. *Id*.
10. *Id*.
11. *Murguia v. Langdon*, 21 WL 4503055 (E.D. Cal. Oct. 1, 2021).
12. *Id*.
13. *Murguia v. Langdon*, 61 F.4th 1096 (9th Cir. 2023).
14. *Id*. at 1111.
15. *Id*. at 1113.
16. *Id*. at 1115.
17. *Id*. at 1124.
18. *Murguia v. Langdon*, 73 F. 4th 1103 (9th Cir. 2023).
19. *Rakes v. Johnson*, 117 F. 4th 968 (7th Cir. 2024).
20. *Rakes v. Roederer*, 2023 WL 2712370 (S.D. Ind. March 30, 2023).
21. Complaint, at p. 6, *Rakes, supra* note 20.
22. *Rakes, supra* note 19, at 978, (*citing Monfils v. Taylor*, 165 F.2d 511 (Dec. 23, 1998)).
23. Petition for Writ of Certiorari at 4, Johnson v. Rakes, no. 24-1050 (U.S. Apr. 2. 2025).
24. *Fisher v. Moore*, 62 F.4th 912, 918 (5th Cir. 2023) at 918.
25. *See, for example*, Justice Thomas' concurrence in *Ames v. Ohio Dep't of Youth Services*, no. 23-1039 (US 2025): I write separately to highlight the problems that arise when judges create atextual legal rules and frameworks. Judge-made doctrines have a tendency to distort the underlying statutory text, impose unnecessary burdens on litigants, and cause confusion for courts. The "background circumstances" rule—correctly rejected by the Court today—is one example of this phenomenon. And, the decision below involves another example: The Sixth Circuit analyzed Ames's Title VII claim under the three-step framework developed by this Court in *McDonnell Douglas Corp. v. Green*, 411 U. S. 792 (1973). As with the "background circumstances" rule, the *McDonnell Douglas* framework lacks any basis in the text of Title VII and has proved difficult for courts to apply.
26. *Murguia v. Langdon*, 73 F.4th 1103 (9th Cir. 2023).



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