

JOHN ASELTON, ADMINISTRATOR (ESTATE OF
BRIAN ASELTON) v. TOWN OF
EAST HARTFORD
(SC 17383)
February 7, 2006

“[Myers]: Apartments—I just heard some loud noise,
some groaning and yelling, I don’t know what’s going
on— **some loud noise from outside —maybe somebody
fell down the stairs — there’s somebody yelling and
Groaning** — I don’t know what’s going on.

“[Myers]: **It seems like in the apartment across—
maybe some loud noise, somebody yelling, someone
groaning—I have no idea what’s going on here.**

“Learned” – Dispatcher: -“Says that he just heard a loud noise, someone
yelling, doesn’t really have any idea what it was and
will not go look. **It was outside.**”
“Be advised that was outside of Car
Quest Auto Parts.”

...classified the call as a routine “check welfare” complaint...

Officer safety = Standards set by *DeShaney*, *Collins* and *Lewis*...

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- With respect to the claims for wilful misconduct, the court concluded that there was no evidence from which a reasonable person could conclude that any of the defendants had acted with the intent to expose the decedent to deadly force.
- Neither does unwittingly dispatching an officer to a place where he unexpectedly encounters an armed burglar, willing to kill him, shock the conscience. Negligence, recklessness, and even callous indifference by police personnel who dispatched [the decedent] that night are insufficient to create a substantive due process violation”

Appeal followed on the basis of below theory

- (1) the theory of “state created danger” as a basis for liability for a substantive due process violation under the federal constitution, because the defendants’ conduct had increased the risk of harm to the decedent; and (2) his claim against Shay on the basis of supervisory liability.

The defendants’ conduct did not rise to the level required to establish a due process violation...The due process clause of the fourteenth amendment.

- “The most familiar office of that Clause is to provide a guarantee of fair procedure in connection with any **deprivation of life, liberty, or property** by a State.

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- common-law claims of negligent, reckless and wilful misconduct; violations under article first, § 4, 7, 8, 9, 10 and 14 of the Connecticut Constitution; and violations under the first, fourth, sixth and fourteenth amendments to the United States constitution, pursuant to 42 U.S.C. § 1983.
- exclusivity provision of the Workers’ Compensation Act, General Statutes § 31-284 (a) barred the defendants’ liability for the **common-law negligence and recklessness** counts.

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- [The plaintiff], however, does not advance a procedural due process claim in this case. Instead, [he] relies on the substantive component of the Clause that protects individual liberty against certain government actions regardless of the fairness of the procedures used to implement them.” *Collins v. Harker Heights*, 503 U.S. 115, 125, 112 S. Ct. 1061, 117 L. Ed. 2d 261 (1992).
- plaintiff’s substantive due process claims largely have been established by three United States Supreme Court decisions.

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- The state created danger theory on which the plaintiff relies has its genesis in *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 109 S. Ct. 998, 103 L. Ed. 2d 249 (1989).
- rejected the petitioners' contention that the respondents' failure to discharge their duty to protect Joshua was an abuse of governmental power that so **"shocks the conscience,"** a standard first articulated by the court in *Rochin v. California*, 342 U.S. 165, 172, 72 S. Ct. 205, 96 L. Ed. 183 (1952), as to violate substantive due process.
- "nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by **private actors**."
- The Clause is phrased as a limitation on the State's power to act, ***not as a guarantee of certain minimal levels of safety and security.***

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- Second Circuit, interpreted *DeShaney* and the cases cited therein as recognizing two "exceptions" to the general rule precluding liability for the government's failure to protect against harm from a private actor: The first is a special relationship wherein the victim typically is in the care or custody of the government;⁷ and the second is a "state created danger" wherein the state affirmatively creates or increases the victim's risk of danger at the hands of a private actor.
- *Ying Jing Gan v. New York*, 996 F.2d 522, 533 (2d Cir. 1993);

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- It noted that the duty arose in those cases because the person requiring aid was in the custody of the government, such as a prison inmate or an institutionalized person.
- 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**
- It (state) placed him in no worse position than that in which he would have been had it (state) not acted at all;

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- The court then noted that "[a] fair reading of [the plaintiff's] complaint does not charge the city with a wilful violation of [her decedent husband's] rights. [The plaintiff] does not claim that the city or any of its agents **deliberately harmed** her husband. In fact, she **does not even allege that his supervisor instructed him to go into the sewer when the supervisor knew or should have known that there was a significant risk that he would be injured.** Instead, she makes the more general allegation that the city deprived him of life and liberty by failing to provide a reasonably safe work environment. Fairly analyzed, her claim advances two theories: that the Federal Constitution imposes a duty on the city to provide its employees with minimal levels of safety and security in the workplace, or that the city's 'deliberate indifference' to [her husband's] safety was arbitrary government action that must 'shock the conscience' of federal judges."
- "[n]either the text nor the history of the Due Process Clause supports [the plaintiff's] claim that the governmental employer's duty to provide its employees with a safe working environment is a substantive component of the Due Process Clause."
- With respect to the plaintiff's second theory of liability, the court concluded that it was ***not persuaded that the city's alleged failure to train its employees, or to warn them about known risks of harm, was an omission that can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense.***

Collins v. Harker Heights

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Sacramento v. Lewis, 523 U.S. 833, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998).

- “whether a police officer violates the Fourteenth Amendment’s guarantee of substantive due process by causing death through deliberate or reckless indifference to life in a high-speed automobile chase aimed at apprehending a suspected offender.”
- The court concluded that this conduct did not violate due process and that “in such circumstances **only a purpose to cause harm unrelated to the legitimate object of arrest will satisfy the element of arbitrary conduct shocking to the conscience, necessary for a due process violation.**”
- only the most egregious conduct can be said to be arbitrary in the constitutional sense
- **conduct intending to injure without legitimate justification** would be the type of arbitrary governmental action that would most clearly meet the **“shocks the conscience”** standard.
- The court posited, however, that, “[w]hether the point of the conscience shocking is reached when injuries are produced with culpability falling within the **middle range**, following from something **more than negligence but less than intentional conduct**, such as **recklessness or gross negligence** . . . is a matter for closer calls.”

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- The plaintiff asserts that, contrary to the trial court’s decision, the defendants may be held liable under the **state created danger theory**, and that, under the reasoning of *Lewis*, **deliberate indifference, and not intent to harm**, is the requisite state of mind to be applied in this case.
- ...because the evidence reflects that the defendants had time to deliberate before the decedent entered the building where he confronted Sostre, according to *Lewis*, a standard of deliberate indifference sensibly can be applied.
- ...**nine minutes** lapsed between the time Myers called and the police were notified that an officer was down in the building, and he asserts that Learned had plenty of time to probe Myers for details and clarification as to the location and nature of the incident, or thereafter to provide additional information to the decedent.⁹ The plaintiff distinguishes his claim from *Collins* and characterizes that case as standing only for the proposition that a claim asserting a general right to a safe workplace is not constitutionally cognizable, specifically when the claim implicates political decisions about personnel and the allocation of resources.

Intent to Harm vs Deliberate Indifference

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- the court cautioned that the degree of culpability required to demonstrate conscience shocking conduct depended on the facts of the case.
- When the facts demonstrate that there is **no opportunity for reflection and deliberation**, such as decision-making by police officers in responding to a prison riot or a high speed pursuit, a standard of **deliberate indifference** cannot be applied sensibly. In such settings, “a deliberate indifference standard does not adequately capture the importance of . . . competing obligations, or convey the appropriate hesitancy to critique in hindsight **decisions necessarily made in haste, under pressure, and frequently without the luxury of a second chance.**” Accordingly, the court concluded that in such circumstances, **liability should turn on whether the police acted with the intent to cause harm.**

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- We agree with the plaintiff that the **state created danger theory** controls this case and that **the proper state of mind is deliberate indifference.**
- because Sostre, a **private actor**, inflicted the decedent’s fatal wound, the plaintiff would be able to prevail **only** if he could attribute that harm to the government, by showing either that the **state had a special relationship** to the decedent and thereby assumed an obligation to protect him from harm, or that the **state created or increased the decedent’s risk of harm** at the hands of Sostre.
Lewis conscience shocking standard
- Most of ...courts have continued to recognize the theory as a basis for liability, but have engrafted the “conscience shocking” standard as a further limitation to recovery when the facts otherwise demonstrate wilful or deliberate indifference to a risk of harm.
Velez-Diaz v. Vega-Irizarry, 421 F.3d 71, 80 (1st Cir. 2005)

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- *Christiansen v. Tulsa*, 332 F.3d 1270, 1281 (10th Cir. 2003) (“[t]o make out a proper danger creation claim, a plaintiff must demonstrate that [1] the charged state entity and the charged individual actors created the danger or increased [the] plaintiff’s vulnerability to the danger in some way; [2] [the] plaintiff was a member of a limited and specifically definable group; [3] [the] defendants’ conduct put [the] plaintiff at substantial risk of serious, immediate, and proximate harm; [4] the risk was obvious or known; [5] [the] defendants acted recklessly in conscience disregard of that risk; and [6] such conduct, when viewed in total, is conscience shocking” [internal quotation marks omitted]); *Schieber v. Philadelphia*, 320 F.3d 409, 417 (3d Cir. 2003) (adding requirement of showing conscience shocking conduct to existing test requiring: “[1] the harm ultimately caused was foreseeable and fairly direct; [2] the state actor acted in willful disregard for the safety of the plaintiff; [3] there existed some relationship between the state and the plaintiff; [and] [4] the state actors used their authority to create an opportunity that otherwise would not have existed for the third party’s crime to occur”). Thus, we adopt the majority view that the state created danger theory still is viable, but requires conduct that rises to the level of conscience shocking and evidences the requisite degree of culpability, either deliberate indifference to harm or intent to harm.

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- We hesitate to deny a **discrete class of individuals** the right to assert a constitutional claim irrespective of the degree of egregiousness of the government’s conduct. Under such an approach, a law enforcement official would be denied relief even if it could be proved that the **government acted with actual intent to harm**. Second, to the extent that the cases rejecting due process claims under the theory of state created danger in the context of law enforcement suggest a legitimate concern, namely, that the very nature of the work itself—sending police officers to respond to dangerous situations—could give rise to liability, such a concern can be addressed in determining **whether the conduct shocks the conscience**. *Sacramento v. Lewis*, supra, 523 U.S. 849 (“**conduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level**”).
- Finally, we decline to embrace a standard that at best tolerates and at worst encourages wanton and reckless behavior toward the safety of our law enforcement officials.

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- It appears that only a few courts have considered claims of state created danger theory as applied to law enforcement officers, and in all of those cases, the courts have rejected the claims. *Walls v. Detroit*, United States Court of Appeals, Docket No. 92-1846, 1993 WL 158498, *5 (6th Cir. May 14, 1993); *Pahler v. Wilkes-Barre*, 207 F. Sup. 2d 341, 351 (M.D. Pa. 2001), aff’d, 31 Fed. Appx. 69, 71, 2002 U.S. App. LEXIS 4124 (3d Cir. March 12, 2002); *Rutherford v. Newport News*, 919 F. Sup. 885 (E.D. Va. 1996), aff’d, United States Court of Appeals, Docket No. 96-1535, 1997 U.S. App. LEXIS 3502 (4th Cir. February 27, 1997) (per curiam); *Hartman v. Bachert*, 880 F. Sup. 342 (E.D. Pa. 1995); *Jensen v. Oxnard*, 145 F.3d 1078, 1084 (9th Cir. 1998) (distinguishing preceding cases from claim wherein **law enforcement officer was shot fatally by fellow officer during raid on ground that claim alleged excessive force under fourth a mendment rather than due process clause and concluding “the difference is quite significant”**). These courts have viewed the conscience shocking standard mindful that **law enforcement duties necessarily entail exposure to dangerous, and even deadly, situations**. They further have reasoned that the **government cannot be held liable merely for exposing a law enforcement official to a danger that the officer knowingly and voluntarily assumed as part of his or her duties**. *Walls v. Detroit*, supra, **5–6 (**The court rejected a claim by the executor of the estate of a police officer who was fatally shot after being ordered to enter a building and arrest a barricaded gunman, reasoning: “[The] [p]laintiff’s artful attempt to recast his complaint in terms distinguishable from [Collins] is unavailing, because it misunderstands one of the central tenets of the Supreme Court’s holding in that case: the Constitution does not guarantee police officers and other municipal employees a workplace free of unreasonable risks of harm. . . . Nowhere does [the] plaintiff’s complaint allege that [the decedent] did not understand or appreciate the risk involved in his job. . . . Without more, the Constitution is not implicated when the [city’s] . . . [c]hief of [p]olice orders officers to go in and arrest a barricaded gunman. Such a command decision does not rise to the level of conscience-shocking.”**; *Pahler v. Wilkes-Barre*, supra, 351 (“**[The plaintiff police officer] entered into [his] job voluntarily and fully aware of the substantial risks of harm faced on a daily basis. City policemen, unlike private citizens, are constantly faced with dangerous situations in which they risk possible injury.**”); *Hartman v. Bachert*, supra, 351 (“**[The decedent] entered into his duties as a [d]eputy [s]heriff voluntarily and with knowledge of the possible dangers faced by law enforcement personnel. More than the sanitation worker in Collins, [the] decedent’s job involved routine exposure to danger, and he was aware of the substantial risk of harm faced daily. . . . [T]he state did not force [the] appellant to become a [deputy sheriff], and the state has no constitutional obligation to protect him from the hazards inherent in that occupation.**”).

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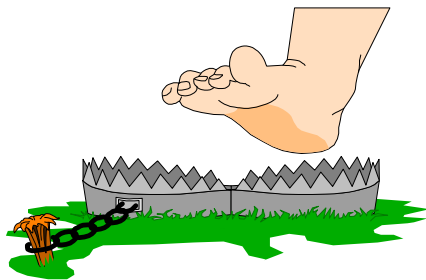
- The meaning of **deliberate indifference**, in the context of state created danger, post *Collins* and *Lewis*, sets forth a stringent standard. It has been described as **“equivalent to the concept of recklessness utilized in the criminal [context] . . . [requiring] that the [actor] have an actual, subjective appreciation of an excessive risk of serious harm to [the victim’s] health or safety and that [the actor] ‘consciously disregarded [the] risk.’”** *Schieber v. Philadelphia*, supra, 320 F.3d 421; accord *Kennedy v. Ridgefield*, 411 F.3d 1134, 1143 (9th Cir. 2005) (“**[d]eliberate indifference is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his actions**”; *Beltran v. El Paso*, supra, 367 F.3d 307 (“**[d]eliberate indifference requires that the state actor both knew of and disregarded an excessive risk to the victim’s health and safety**”); *Phelps v. Kapnolas*, 308 F.3d 180, 185–86 (2d Cir. 2002) (same); *Sutton v. Utah State School for the Deaf & Blind*, 173 F.3d 1226, 1238 (10th Cir. 1999) (“**[The] plaintiff-appellant’s § 1983 claim must rest on a showing of reckless conduct on the part of [the defendant]. We have said that an ‘act is reckless when it reflects a wanton or obdurate disregard or complete indifference to risk,’ and that reckless intent is established if the state ‘actor was aware of a known or obvious risk that was so great that it was highly probable that serious harm would follow and he or she proceeded in conscious and unreasonable disregard of the consequences.’”**). **Thus, the defendants cannot be held liable for merely appreciating a possibility of a risk of harm; they must have consciously disregarded that risk.** *Schieber v. Philadelphia*.

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- “a supervisor may be found liable for his deliberate indifference to the rights of others by his failure to act on information indicating unconstitutional acts were occurring or for his gross negligence in failing to supervise his subordinates who commit such wrongful acts, provided that the plaintiff can show an affirmative causal link between the supervisor’s inaction and [the] injury.” *Poe v. Leonard*, 282 F.3d 123, 140 (2d Cir.2002); accord *Hayut v. State University of New York*, 352 F.3d 733, 753 (2d Cir. 2003) (noting that claim requires supervisor’s personal involvement in challenged conduct by direct participation or “official’s [1] failure to take corrective action after learning of a subordinate’s unlawful conduct, [2] creation of a policy or custom fostering the unlawful conduct, [3] gross negligence in supervising subordinates who commit unlawful acts, or [4] deliberate indifference to the rights of others by failing to act on information regarding the unlawful conduct of subordinates”). Although there is a question of fact as to whether there is a causal link between Shay’s failure to institute certain policies and procedures in the dispatch department and the misinformation conveyed to the decedent, our conclusion that the trial court properly rendered summary judgment as to the claims against Shay’s subordinates, and thus that no constitutional violation occurred, precludes a claim of supervisory liability against Shay.

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We are mindful that the defendants’ failure to provide the decedent with complete and accurate information ***impeded his ability to assess the incident effectively and to avoid the ambush awaiting him.***



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- In *Collins*, the defendant city was on notice of the precise risk of harm by a strikingly similar prior accident involving the decedent’s supervisor.
- We do not intend to suggest that negligence, whether gross or minimal, should be tolerated when life and limb are at risk. Our law enforcement officials face great enough potential for harm at the hands of violent criminals without saddling them with the additional risk that their ***coworkers’ actions may impair the officers’ ability to protect themselves from harm.*** Nonetheless, we must be mindful of *Lewis’* admonition that ***“only the most egregious official conduct can be said to be arbitrary in the constitutional sense”***

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PAUL MELANSON v. TOWN OF WEST HARTFORD ET AL.(A C 20399)February 13, 2001

- A central feature of our statutory law of workers’ compensation; General Statutes §§ 31-275 is the principle of the exclusivity of workers’ compensation benefits. Pursuant to General Statutes (Rev. to 1995) §31-284,1 an employee who is covered by workers’ compensation is barred from bringing a personal injury action against his or her employer. Further, pursuant to General Statutes § 3-293a,2 a covered employee may not bring such an action against a fellow employee unless that employee’s wrongful conduct was wilful or malicious....our law makes it difficult for an employee to avoid the exclusivity of workers’ compensation benefits. *Driscoll v. General Nutrition Corp.*, 252 Conn. 215, 220-21, 752 A.2d 1069 (2000).. . . must allege facts that, if proven, would establish that the town, directly or indirectly, engaged in misconduct that was wilful or malicious."

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PAUL MELANSON v. TOWN OF WEST HARTFORD ET AL.(A C 20399)February 13, 2001

- The issue in this case is whether those statutes preclude recovery in a personal injury action brought by a police officer who, in the course of duty, was shot and injured because of the accidental discharge of a weapon fired by a fellow police officer. plaintiff claims that the tactical response team was so poorly managed, informed, trained, equipped and staffed that the town can be charged with having intentionally created a situation that it knew, with substantial certainty, would cause the injuries sustained by the plaintiff to occur.

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Allegation alleges... negligence rather than intentional misconduct.

- Plaintiff alleges....intentional misconduct on the part of the town because the tactical response team to which the plaintiff belonged was inadequately staffed, trained, managed and supervised, despite warnings to the town that the team might be at risk. According to the plaintiff, by failing to take affirmative remedial action, the town could be found to have "intentionally created a dangerous condition that made the plaintiff's injuries substantially certain To occur...

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PAUL MELANSON v. TOWN OF WEST HARTFORD ET AL.(A C 20399)February 13, 2001

- Under the test articulated in *Suarez v. Dickmont Plastics Corp.*, 242 Conn. 255, 257-58, 698 A.2d 838 (1997), the plaintiff must allege facts to establish "either that the employer *actually intended to injure* the plaintiff (*actual intent standard*) or that the employer intentionally created a dangerous condition that made the plaintiff's injuries substantially certain to occur (*substantial certainty standard*);" Under either theory of employer liability, however, the "characteristic element [of wilful misconduct] is *the design to injure either actually entertained or to be implied from the conduct and circumstances Not only the action producing the injury but the resulting injury also must be intentional.*" *Suarez v. Irish*, 207 Conn. 518, 533, 542 A.2d 711 (1988). Because direct proof of an employer's actually intended misconduct will rarely be available, the employer's intention may be established by proof of the intentional misconduct of an employee who properly can be identified as the alter ego of the defendant employer.

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PAUL MELANSON v. TOWN OF WEST HARTFORD ET AL.(A C 20399)February 13, 2001

- Failure to take affirmative remedial action, even if wrongful, does not demonstrate an affirmative intent to create a situation that causes personal injury. Second, even if the allegations somehow could be stretched to encompass a claim for intentional misconduct generally, the complaint provides no factual basis for a finding that the town was substantially certain that the specific injury that the plaintiff suffered would occur.

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PAUL MELANSON v. TOWN OF WEST HARTFORD ET AL.(A C 20399)February 13, 2001

- . . . even though the employer might be found to have created a substantial risk of injury to the employee, the employee could not prevail in the absence of a further showing that "the employer *believed* the injury was substantially certain to follow the employer's acts or conduct" The factual allegations in the plaintiff's complaint in this case cannot pass the Suarez test.

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PAUL MELANSON v. TOWN OF WEST HARTFORD ET AL.(A C 20399)February 13, 2001

- *Nolan v. Borkowski*, 206 Conn. 495, 538 A.2d 1031 (1988), in which our Supreme Court described what is meant by the phrase "wilful or malicious" in § 31-293a. "A wilful and malicious injury is one *inflicted intentionally without just cause or excuse. It does not necessarily involve the ill will or malevolence shown in express malice.* Nor is it sufficient to constitute such an injury that the act resulting in the injury was intentional in the sense that it was the voluntary action of the person involved. *Not only the action producing the injury but the resulting injury must be intentional A wilful or malicious injury is one caused by design.* Wilfulness and malice alike import intent [Its] characteristic element is the design to injure either actually entertained or to be implied from the conduct and circumstances."

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PAUL MELANSON v. TOWN OF WEST HARTFORD ET AL.(A C 20399)February 13, 2001

- . . the test of alter ego liability articulated in *Jett v. Dunlap*, 179 Conn. 215, 219, 425 A.2d 1263 (1979). In that case, our Supreme Court held that, under the law of workers' compensation, an employer generally is not liable in common-law tort for the intentional misconduct of a supervisory employee.. . . only if the person committing the intentional tort "can be characterized as the alter ego of the corporation. If the assailant is of such rank in the corporation that he may be deemed the alter ego of the corporation under the standards governing disregard of the corporate entity, then attribution of corporate responsibility for the actor's conduct is appropriate. It is inappropriate where the actor is merely a foreman or supervisor." *Id.* The *Jett* test was reaffirmed in *Suarez v. Dickmont Plastics Corp.*

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PAUL MELANSON v. TOWN OF WEST HARTFORD ET AL.(A C 20399)February 13, 2001

- **General Statutes (Rev. to 1995) § 31-284 (a)** provides in relevant part: "An employer shall not be liable to any action for damages on account of personal injury sustained by an employee arising out of and in the course of his employment . . . but an employer shall secure compensation for his employees as provided under this chapter" **General Statutes § 31-293a** provides in relevant part: "If an employee or, in case of his death, his dependent has a right to benefits or compensation under this chapter on account of injury or death from injury caused by the negligence or wrong of a fellow employee, such right shall be the exclusive remedy of such injured employee or dependent and no action may be brought against such fellow employee unless such wrong was wilful or malicious or the action is based on the fellow employee's negligence in the operation of a motor vehicle as defined in section 14-1. . .

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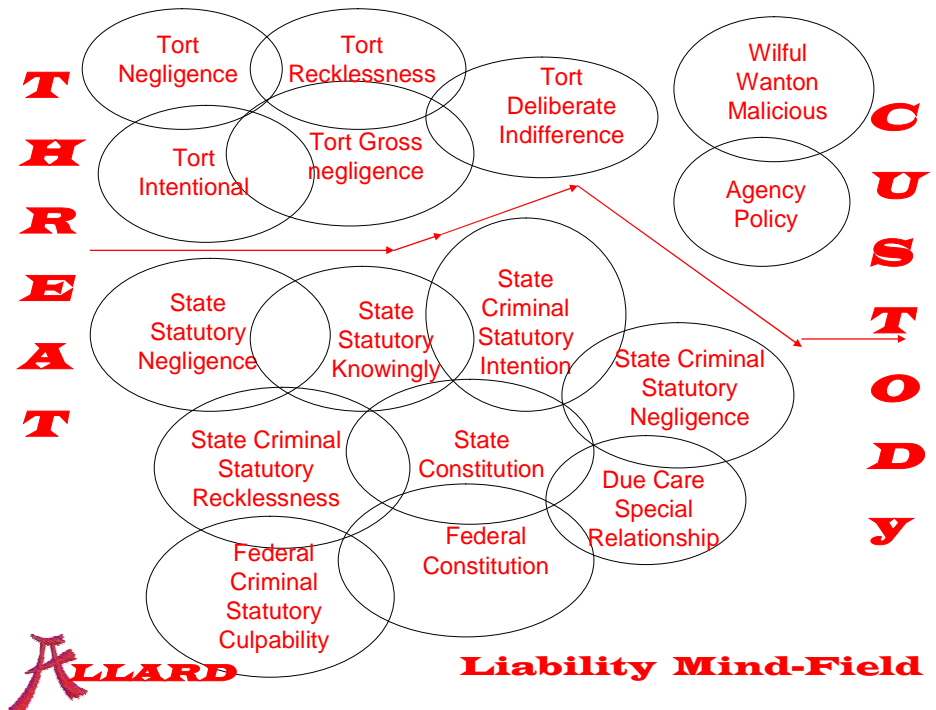
Test for Unreasonable Risk Encounter!

Mind-Field Test!

- We agree with the court that the risk associated with the town's allegedly wrongful inaction is not the equivalent of "ordering [a] soldier to walk through a mine field all by himself just to see if it was working."

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Subjective/Objective Honest belief	Objective Reasonable Officer Response	Connecticut State Constitution Article 1st Sec 7&9
CGS 53a-22	US Constitution 4th Amendment	Recklessness & Negligence
Reasonable & Necessary	Immediate Threat - Active Resistance - Flight/Escape	Totality of Facts & Circumstances
Pre-Engagement & Moment of Engagement	Moment of Engagement	Pre-Engagement & Moment of Engagement