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No Duty to Dive: 41-Degree Back Cove Death Does Not Trigger State-Created-Danger Claim, Says First Circuit

By **Daigle Law Group**

June 10, 2025

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No Duty to Dive: 41-Degree Back Cove Death Does Not Trigger State-Created-Danger Claim, Says First Circuit

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The United States Court of Appeals for the First Circuit recently addressed the State Created Danger Doctrine in *Cohen v. City of Portland*. This case arose after Eric Cohen, experiencing a psychotic episode, attacked his girlfriend and fled into the cold waters of Portland's Back Cove, where he eventually drowned from hypothermia.

Factual Background

On April 12, 2020, the Portland Maine Police Department received an emergency call that Eric Cohen, experiencing a psychotic episode, had attacked his girlfriend, stripped off his clothing, and fled from the scene. When responding officers were able to locate Cohen, he fled into the waist-deep waters of Back Cove, a basin on the northern side of the Portland Peninsula, which had an approximate water temperature of forty-one degrees Fahrenheit. To apprehend Cohen, officers requested a rescue boat from the Portland Fire Department, which set out with three officers onboard. Cunningham, a former Coast Guard rescue swimmer who was standing on the shore, proposed swimming out to retrieve Cohen, though this plan was ultimately canceled as no life vest had been made available and because the rescue boat was within 100 feet of him at that moment. The officers on shore had noted that Cohen had begun to struggle with swimming and had gone under the water. Sometime later the rescue boat pulled a lifeless Cohen aboard and, despite rescue efforts by a responding ambulance, he was declared dead due to a combination of hypothermia and drowning.

Legal Framework

In the aftermath of the incident, Cohen's estate sued the City of Portland and several members of its police and fire departments, alleging violations of Cohen's substantive due process rights due to a failure to rescue him from a state-created danger and inadequate crisis intervention training. The district Court dismissed the state-created danger claims against Sergeants Christopher Gervais and Michael Rand, finding that the officers' actions did not create or enhance the danger to Cohen. The Court then granted summary judgment to a firefighter, Ronald Giroux, concluded that Giroux's actions through making a verbal threat, did not cause Cohen's death. Summary judgment was also granted to the City of Portland, as the Court found that the City could not be held liable for failure to train its employees since no individual defendant was found to have violated Cohen's constitutional rights. The

case was appealed to the United States Court of Appeals for the First Circuit for reconsideration.

United States Court of Appeals for the First Circuit

Hearing the case on appeal, the First Circuit Court of Appeals affirmed the district court's rulings. First, the Court concluded that neither Sergeants Gervais nor Rand had taken any active step that created or intensified a threat to Cohen's safety. To satisfy a state created danger claim, the plaintiff must establish that: 1) a state actor affirmatively acted to create or enhance the danger; 2) the danger that put the plaintiff in peril was specific to them and not merely a danger to the public at large; 3) the affirmative acts by the officers actually caused the plaintiff's harm; and 4) the state actor's conduct, viewed as a whole, shocked the conscience. In applying this framework, the First Circuit explained that the officers' actions or inactions were, at best, merely negligent which is insufficient to support a claim for a substantive due process violation. Addressing the actions of Sergeant Gervais, the Court explained that while he did not perform CPR after retrieving decedent's body from the icy water, this did not create or enhance the danger to him, which was present at the moment he entered the water on his own accord. Considering the acts of Sergeant Rand, the Circuit held that the estate's State-created danger claim failed. The Court reasoned that Cohen had already been in the water for 10 minutes before Sergeant Rand arrived on scene. Further, the Sergeant had no constitutional duty to undertake actions he opted against. Though Sergeant Rand expressed his intent to have the rescue swimmer, Cunningham, wear a life jacket before entering the 41 degree water to engage with an individual undergoing a mental health crisis, the Court determined that this action hardly shocked the conscience. Cohen's estate also alleged that the officers should have attempted a rescue from shore, contacted a crisis intervention specialist, or arranged for an ambulance sooner. The court found that the officers on shore had no affirmative duty to enter the water and interrupt the danger Cohen had put himself in. The Court opined that, while the officers' actions or inaction may have fallen short of the motto "protect and serve", they did not cause the death of Cohen, nor could it be said that their conduct shocked the conscience.

Next, the Circuit tackled the state-created-danger allegation brought against Giroux's. The Circuit explained that Giroux arrived about twenty minutes after Cohen had entered the water and, unaware of Cohen's psychosis, threatened to "kick his ass if he gets out." The Court held that this threat did not cause Cohen's death, explaining that any finding of causation would hinge on speculative assumptions (e.g., whether Cohen would have swum to shore in time to avoid harm). Because the estate failed to show evidence bridging these gaps, the court properly granted summary judgment for Giroux. Finally, the First Circuit held that the district court correctly granted summary judgment to the City of Portland on the Cohen estate's failure-to-train claim, based on the Court's finding that the district court properly

dismissed Rand and Gervais from the case. The estate argued that Rand and Gervais—both behind on annual crisis intervention training—violated Cohen’s due process rights by failing to use crisis techniques. According to the estate, the City’s inadequate training of these officers led to Cohen’s death. However, the district court dismissed the claims against Rand and Gervais, leaving no individual defendant to support a municipal liability claim.

Key Takeaways

Cohen v. City of Portland highlights several important principles for police officers regarding the state-created danger doctrine and the standards for municipal liability. First, merely failing to prevent or interrupt a harm that an individual has already encountered typically does not constitute an “affirmative act” necessary for a state-created danger claim—especially when an officer’s conduct amounts to negligence rather than behavior that “shocks the conscience.” Second, causation is key: threats or omissions that have only a speculative connection to an individual’s injury will not be enough to sustain a constitutional claim. Third, municipal liability for failure to train requires proof that an individual officer’s actions violated constitutional rights and that a training deficiency was the moving force behind that violation; when the underlying claims against the officers fail, the city cannot be held liable.

Cohen v. City of Portland, 23-2026 (1st Cir. 2024)

Originally published at <https://dlglearningcenter.com/no-duty-to-dive-41-degree-back-cove-death-does-not-trigger-state-created-danger-claim-says-first-circuit/>

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