

Cop Chase:

The Liability of Police Officers and the State for Injury to Innocent Motorists and Pedestrians

From Wyatt Earp to Dirty Harry, the police have chased and arrested criminals. However, when Dirty Harry chases a criminal, bystanders never get hurt. In real life, sometimes innocent people are killed when criminals flee arrest. Wyatt Earp had a posse to back him up. Today a jury may review the police officer's pursuit of the criminal to make sure he did it right. Of course, if the police officer runs into another motorist or pedestrian while pursuing a fleeing suspect, he, or the state, can be sued. However, even where the suspect runs into the victim, the police officer and the state are the most likely Defendants. Fleeing suspects rarely have deep pockets and frequently end up in jail, leaving innocent victims to deal with injuries or death. Several jurisdictions have held police officers liable to members of the general public injured by fleeing suspects.¹

Recently, the Maryland Court of Special Appeals held that where the suspect causes the injury, the police officer is immune from suit, absent malice. Further, the court held that since the police officer is personally immune, then the state is also without liability. *Boyer v. State*, 80 Md. App. 101 (1989). The Court of Appeals has granted a writ of certiorari. Where the Maryland appellate courts strike the final balance remains to be seen.

Safe Chase

Police officers exercise the state functions of maintaining order, enforcing the law and detecting crimes. One of a police officer's duties is to apprehend criminals. When criminals flee, officers chase. When a police officer chases a fleeing suspect, he is likely to exceed the speed limit, run red lights, and possibly force the suspect's car off the road. Were he not a police officer, this conduct would be negligent, if not grossly negligent. Where the police car is involved in a traffic accident during a chase, a jury must decide whether the police officer acted with due care under the circumstances. Did the officer use a siren or warning lights? Did he slow when entering intersections against the right of way? Did he conduct a chase in a heavy traffic area? What was the speed of each vehicle and the weather conditions? Whether the police officer's conduct amounts to negligence, gross negligence or malice will depend on the circumstances. The quality of the conduct will also determine which, if any, of the Defendants is liable.

The State as a Defendant

The state is the most likely party to be

named as the Defendant in an action to recover for injury or death suffered as the result of a police chase. The state is the proper Defendant even where the chase was conducted by a county sheriff and his deputies. County sheriffs and their deputies are state officials and/or employees. *Rucker v. Harford County*, 316 Md. 275 (1989). Although the fleeing suspect may be subject to liability if he struck the Plaintiff or the Plaintiff's vehicle, as a practical matter he is likely to be judgment proof or close to it.

The starting point for analyzing any action against the state is the doctrine of sovereign immunity. The state legislature first passed the Maryland Tort Claims Act, *State Government Article*, Section 12-101, *et seq.* ("MTCA"), a relatively limited waiver of immunity, in 1981. The state waived immunity for specifically enumerated tort actions, including negligent operation of a motor vehicle.² The MTCA provided partial immunity from damages for all state employees, where the state had waived its immunity. So if a police officer negligently struck a pedestrian while pursuing a suspect, the state was potentially liable for damages, but the officer was not.

The MTCA was amended effective July 1, 1985, to provide a much broader waiver. The state's immunity is waived "as to a tort action, in a court of the state, to the extent of insurance coverage." MTCA, Section 12-104(a).³ The waiver of specific categories of torts was eliminated. The MTCA's grant of immunity to state employees mirrors the state's waiver of immunity. If the state has waived immunity, the state employee is not only immune from liability, but from suit. MTCA, Section 12-105.

Neither the current nor earlier versions of the MTCA waived immunity for

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any act of state personnel made outside the scope of their public duties or made with gross negligence or malice. Further, the waiver does not extend to punitive damages or prejudgment interest. MTCA, Section 12-104.

The most popular theory of state liability is vicarious liability for the acts of the police officer. Also, direct liability of the state for its own negligent failure to adequately train or supervise its police officers in the methods of conducting pursuits may be cognizable under the current MTCA. See, e.g., *Briscoe, supra*, at footnote 1. Of course, sovereign immunity is not waived at all if the police officer was grossly negligent or acted with malice.

Suits Against Police Officers

Police officers are protected by two overlapping defenses: the MTCA and "public official" immunity. The MTCA partially shields all state personnel, including police officers, from liability in tort. They are immune for tortious acts or omissions that are within the scope of their law enforcement function, made without malice or gross negligence, and for which the state has waived immunity. MTCA, Section 12-105. This immunity, designed for all state employees, gives police officers some much deserved statutory protection. It leaves police officers individually liable for gross negligence and for acts outside the scope of their public duties. MTCA, Section 12-105.

From a public policy perspective, certainly no immunity should attach to acts of police officers outside the scope of their public duties. Gross negligence is a different issue. Gross negligence is easy to allege in a police chase case. The distinction between negligence and gross negligence is a sliding scale often

weighed by jurors based upon the damage to the victim. Where the victim is killed in a collision with police officers chasing a fleeing suspect, the jury is more likely to find gross negligence than where the plaintiff received minor injuries. This exposure to suit is bound to affect how a police officer does his job. He knows that not arresting a suspect is a safe harbor. See, *Ashburn v. Anne Arundel County*, 306 Md. 617 (1986). Why should a police officer take the personal risk of pursuit?

The doctrine of "public official immunity" fills this gap. Police officers are "public officials" who are immune from liability for nonmalicious acts committed within the scope of their law enforcement function. See *Ashburn v. Anne Arundel County, supra*, and *Clea v. City of Baltimore*, 312 Md. 662 (1988). This doctrine shields police officers from all police chase suits except where malice is alleged.

Where the Fleeing Suspect Strikes the Innocent Motorist or Pedestrian

Innocent motorists injured by the fleeing suspect often have sued the pursuing police officer and the state. The Court of Special Appeals addresses this issue in *Boyer v. State*, 80 Md. App. 101 (1989). *Boyer* involved two innocent motorists killed by a suspect fleeing arrest. The Court of Special Appeals held that the police officer was a "public official" entitled to immunity from suit for nonmalicious tortious acts and that his decision to pursue the suspected intoxicated driver was an exempt discretionary act. The Court further held that since the decision to apprehend was an exempt act, the county and state were also without liability.

The Court of Special Appeals chose not to address whether the police officer owed the decedents a private duty in tort to use due care in apprehending a fleeing suspect. Hopefully the Court of Appeals will consider whether police officers even owe a duty to control the unpredictable acts of fleeing suspects. In any event, the decision of the Court of Special Appeals in *Boyer* does not leave the innocent motorist or pedestrian without a remedy. They may proceed against the party actually at fault — the fleeing suspect. In addition, the Legislature has provided a minimum pool of available funds through the uninsured motorist laws.

¹/ Several jurisdictions have held that police officers are members of the public with a duty to exercise reasonable care under the circumstances in conducting high-speed chases or hot pursuits. See, e.g., *Briscoe v. Arlington County*, 288 App. D.C. 206, 738 F.2d 1352 (1984), cert denied, 469 U.S. 1159 (1985); *Tetro v. Stratford*, 189 Conn. 601, 458 A.2d. 5 (1983); and *Fiser v. Anne Arbor*, 417 Mich. 461, 339 N.W.2d. 413 (1983).

²/ Another statute which is not discussed in this article is *Transportation Article*, Section 19-103, *Liability for Negligent Operation of Emergency Vehicles*. It provides immunity from simple negligence suits for operators of emergency vehicles. *Taylor v. City of Baltimore*, 314 Md. 125 (1988). However, the public official immunity available to police officers when pursuing fleeing suspects provides greater protection.

³/ A condition precedent to suit against the state is notice to the Treasurer "within 180 days after the injury to person or property that is the basis of the claim." *State Government Article*, Section 12-106(b)(1). The Treasurer has six months to settle or deny the claim. Strict compliance with the statute is required. *Elizabeth Uhlinger v. State, et al.*, Court of Special Appeals No. 25, September Term, 1989, filed September 26, 1989 (unreported).