

Police Pursuit and the Use of Force

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Chapter I

Introduction

As we have seen, studies of police vehicle pursuits have increased during the past two decades see generally, Lucadamo, 1994, Auten, 1994, Alpert and Fridell, 1992, Falcone, Wells, & Charles, 1992 While researchers and practitioners alike are beginning to accumulate good quality and very important data, the literature is limited to in depth studies of single agency information or studies from multiple agencies with restricted data.

The history of research on pursuit follows the trend found in research on the use of firearms (Alpert and Fridell, 1992). Geller and Scott report the state of research on police use of firearms, but could be explaining what we know and do not know about pursuit driving (1992:13). More is known now about the nature and frequency of shootings in which police are involved, although we have nothing resembling a comprehensive, continuous national picture of these violent police citizen encounters. Even police insight into the nature, extent, causes and prevention of police shootings tends to draw on anecdotal rather than systematic information, and insight is highly localized . This state of affairs poses a dilemma for public policy makers, who do not have the luxury of waiting for systematic data or tactical advances before making concrete decisions about how the police are supposed to conduct themselves. The atmosphere surrounding the deadly force debate is charged with emotion, fear entrenched assumptions, class, and race based suspicions and virtually intractable value conflicts. Geller and Scott inform us of two of the competing values that raise concerns among members of law enforcement and members of the communities they serve. On the one hand, if too many restrictions are

placed on police use of deadly force, the public will be endangered threatened endangered by permitting dangerous persons to escape immediate apprehension and such restrictions discourage effective police work. On the other hand, insufficient controls are placed on the police use of deadly force, there will be needless killings in the community.

Over the years, the effort to reform the police has influenced the promulgation of restrictive policies. For instance, in 1985, the United States Supreme Court prohibited police officers from shooting non-dangerous fleeing property offenders (*Tennessee v Garner*, 1985). The social movement aimed at reforming police use of deadly force was a direct result of the perception in minority communities that police had one trigger finger for Blacks and another for whites. Over the years, the staggering increase in complaints against the police use of firearms has triggered government investigations and the formation of grass-roots community groups serving in a watchdog capacity. The consequences of these interests have been a moving force in the reform of deadly force policies, training and applications.

As Gerald Caiden (1977:3) pointed out in the 1970s in *Police Revitalization*, reform movements do not appear by magic. Dissatisfaction with the status causes optimism about the efficacy of remedial action. The dissatisfaction must carry people over their threshold of tolerance and inertia to the point where they demand action and support promising prescriptions. In many communities, similar attention is now being directed toward police pursuit driving.

Police Pursuits and Reform

The public and private response to pursuit driving is in its beginning stages but a growing number of public agencies, media representatives and private citizens are calling

for investigations and reform. There have been many government investigations on the issue of pursuit driving. The United States Congress has had hearings on pursuit and several local grand juries have investigated the problems associated with pursuit.

The consequence of this type of inquiry has been reform in policies, training and supervision of pursuit driving. In the 1980s, the first grass-roots organization to reform pursuit driving was created by the father of a victim of pursuit, Gerald LaCrosse. Named after his daughter, Desere, his foundation strongly influenced the original organization and direction of many victims and their families. Mr. LaCrosse has dedicated his life to the education of law enforcement officials and the public in pursuit-related activities. In the 1990s, the movement has grown considerably and the Organization STOPP (Stop the Tragedies of Police Pursuit) has taken the lead role in the organization and development of reform in pursuit driving. This group has developed a national network of victims and others who are seeking reform in pursuit driving as a police tactic. In fact, Senator Byron Dorgan has introduced legislation (the Pursuit Awareness Act of 1995) to Congress. Senator Dorgan, who lost his mother in a police pursuit, has been a voice in the need to reform and manage police pursuit driving.

As a result of this publicity and the knowledge of local tragedies, some members of the police community, the media and citizen groups have criticized the negative results of pursuit driving as unnecessary and dangerous. The result of this criticism has been a reevaluation of pursuit policies and practices by many law enforcement agencies. Most of these police agencies responded to their evaluations with more restrictive policies and procedures.

Perhaps the most significant reform by a police agency during this period of the 1980s was spearheaded by the International Association of Chiefs of Police (IACP) which, in its 1990 model policy, restricted pursuits to those actions for which an officer would make a custodial arrest (1990). This statement exemplified the concerns expressed by many police officials. The Concepts and Issues Paper discussing the model policy warns the reader (1990: 3) the Model Policy is relatively restrictive in prohibiting pursuit where the offense in question would not warrant an arrest. Most traffic violations, therefore, would not meet these pursuit requirements. It is recognized that many law enforcement officers and administrators may find this prohibition difficult to accept and implement, particularly where they have accepted a more permissive pursuit policy. Nevertheless, in this critical area of pursuit driving, law enforcement administrators must be prepared to make difficult decisions based on the cost and benefits of these types of pursuit to the public they serve.

There is no indication exactly what prompted the IACP to recommend a relatively restrictive policy but most research and professional literature has concluded that pursuits create a far greater risk than benefit to law enforcement and to the public (for an opposing view, see Hannigan, 1992). In other words, when controlling for certain criminal actions, the risk created by vehicular pursuits is greater than the need to enforce the law (Crew et al, 1994). While this means that some offenders will escape immediate apprehension, it also means that innocent lives will be saved. There has been an increase in research on the risks and benefits of pursuit driving since the beginning days of empirical research started by the California Highway Patrol in 1983. The interpretation of those data provides a convincing argument that pursuit driving is an extremely

dangerous police activity and officers must not be allowed unbridled discretion. However, many police officials still believe that the injuries and deaths caused by pursuits are worth the value of pursuing law violators (Hannigan, 1992). Because the issue of pursuit driving involves the heart of what many police view as their major concern, to apprehend law violators, some police defend pursuit driving emotionally it brings out their emotions. Similarly, as pursuit driving involves what many view as the central police mission, to save lives, it brings out opposing emotional responses from citizens and many law enforcement officials. In other words, pursuit driving is a highly emotional topic. Just as police use of firearms required study and reform, so do the tactics of pursuit. This study reports information collected over a two year period. It begins with a review of the legal, behavioral and attitudinal literature on pursuit and then turns to the original data collected for the study, and their analysis. The data include a national survey of law enforcement agencies, detailed case studies of several police agencies, opinion data from police recruits, officers and supervisors, members of the public and offenders who have attempted to elude the police. Following the data, policy implications will be discussed.

CHAPTER II

Civil Liability and Risk Management for Emergency Vehicle Operations

Legal Underpinnings of Emergency Vehicle Operational Liability

In our media conscious society, law enforcement and public safety organizations face increased scrutiny of their pursuit operations on a daily basis. Much of what has been termed "media sensationalism" has come about due to a variety of factors including victim outrage and high dollar civil judgments. To understand the need for reform in law enforcement pursuit training and the concept of law enforcement risk management requires that we adopt a new focus on the impact which emergency vehicle operations may have on the public which we have sworn to protect. Law enforcement risk management, in a fundamental sense, is about both the protection of the public and the reduction of agency and officer civil liability. Once the fundamentals of liability exposure for both agency and officer are understood, we can begin to build a protective structure, which is the risk management process.

Law enforcement pursuit operations should be viewed as a high profile component of every municipality's efforts at risk management. Indeed, the conventional wisdom is that, nationally, claims settlements and damage awards attributable to law enforcement activities account for approximately forty percent (40%) of all payouts for governmental entities. While this figure is not an exact one, to be sure, it highlights the increasing national concern over law enforcement exposure. For example, in a 1992 survey commissioned by the National Institute

of Municipal Law Officers (NIMLO), sixty percent (60%) of the NIMLO members surveyed identified police operations as the one municipal function which is most negatively affected by litigation costs. Members further identified litigation as the fastest growing "uncontrollable" expense affecting government budget priorities and processes¹. To understand the breadth of this exposure, the role which police pursuits may play in its creation and the mechanisms which may be available to assist in controlling it, requires that, as before mentioned, we understand the fundamentals of police civil liability exposure.

From a daily operational standpoint, both automobiles and firearms are deadly weapons. Accordingly, there has arisen a national consensus, reflected in recent court decisions, that increased scrutiny must be paid to the permissible parameters of firearms usage and emergency vehicle operations. Especially in the area of police pursuit there has been an increased outcry from the law enforcement and public safety community for more definitive operational guidance, as a matter of "front end" risk management. Again, the foundation for such guidance must rest on a comprehensive understanding of the legal principles which underlie agency and officer liability where injuries or property damage result from the conduct of the vehicular pursuit.

The purpose of this chapter is to provide insight into the various legal theories which may come into play when an individual elects to bring suit for injuries which were brought about by an emergency vehicle response, especially in a pursuit mode. An understanding of

¹MacManus, "Litigation: A Real Budget Buster for Many U.S. Municipalities"; *Government Finance Review*, February 1994.

the basis of such lawsuits can be immensely beneficial in the designing of a mechanism to assist in reduction of agency financial exposure.

Whether an injury came about from alleged officer negligence in a non-emergency response mode, from injuries sustained through an officer's intentional act in pursuit mode or an agency's failure to provide adequate or meaningful policy or training, officers must be made aware of the potential for liability based upon their acts, whether in a federal or state court setting. Likewise, from a public trust and risk management standpoint, law enforcement and public safety executives and risk managers must come to understand that both victim outrage and high dollar civil judgments are not vestiges of our society for which there is no controllable cause. The management of risk exposure, and thus litigation and its associated expense can only be based upon a comprehensive understanding of the legal principles underlying emergency vehicle operations.

THE BASES OF LIABILITY FOR EMERGENCY VEHICLE OPERATIONS

As a general proposition, lawsuits involving emergency vehicle operations will be brought in either state court or federal court. Actions brought in a state court, commonly called "tort"²actions, are generally brought in a court of general civil trial jurisdiction such as a District, Circuit or County Court. While the names of the courts may differ, they are invariably courts which have the authority to hear and decide actions brought by private parties

² A tort is generically defined as an injury to the person or property of another for which the injured party may recover damages or other relief from a court of law.

(as opposed to those actions brought by the State, such as criminal actions). Actions brought in the state courts under state tort law will not, of necessity, involve violations of federal constitutional rights. Actions brought under Title 42, section 1983 of the U.S. Code (hereinafter "§ 1983"), whether in state court or federal court, will require a showing of violation of a federally protected constitutional or statutory right. Whether a cause of action is based on state tort or on § 1983, the allegations of the plaintiff must establish responsibility on the part of the emergency vehicle operator or the employing agency, or both. Responsibility of the operator is typically based on an allegation of some variety of negligence, or some greater degree of culpability such as a so-called "intentional tort". The responsibility of the employing agency, to the contrary, may be based upon a showing of failure to provide meaningful policy or adequate training, although, under state law in many states, merely employing an officer who commits an act of negligence can constitute a basis for agency liability under a theory called *respondeat superior*. This theory of recovery is not available under § 1983. As will be developed later, § 1983 is not an appropriate cause of action for an injured party where a federal law enforcement officer is alleged to have caused the injury because §1983 is limited in application to those persons who are acting under apparent "authority of state law".

State Tort Actions

Actions brought against an officer or the employing agency under state law are generally, as noted above, based on allegations of negligence. The legal formula for negligence can be summarized as follows:

1. A duty or obligation, recognized by the law, requiring the person to conform to a certain standard of conduct, for the protection of others against unreasonable risks.
2. A failure on the person's part to conform to the standard required: a breach of the duty...
3. A reasonably close causal connection between the conduct and the resulting injury. This is what is commonly known as "legal cause," or "proximate cause," and which includes the notion of cause in fact.
4. Actual loss or damage resulting to the interests of another.

From a practical standpoint, negligence in an emergency vehicle scenario generally results from one of the three following omissions:

1. Violation of an applicable state statutory provision which created a duty to act or not act.

³ Prosser and Keeton on the Law of Torts, (5th Ed.; 1984)

2. Violation of pertinent department policy which created a duty to act or not act.

3. Violation of a duty to use "due care" generally.

The term "duty", as used here, means that there was some obligation recognized by the law to behave in a particular fashion towards the person who was injured. The law recognizes generally that if there was no duty to the injured on the part of law enforcement then there can be no responsibility for payment of monetary compensation, known as "damages", or any other type of relief to the injured party. As will be discussed later, the law also recognizes certain "constitutional duties" which are not created by statute or policy. Particularly egregious violations of an owed duty may result in liability under §1983 for either the officer or agency concerned.

Whether a lawsuit is ever filed against an officer or agency, however, may be determined by the presence of tort claims legislation in the state concerned. While it is beyond the scope of this chapter to discuss claims against federal officers and agencies under the Federal Tort Claims Act, similar limitations on suit are present where a federal government agency or actor is alleged to have been negligent. The effect of tort claims legislation is generally to limit the amounts which may be recovered for injury or to limit the available defendants in the event of a lawsuit.

The underlying purpose of state tort claims legislation is to limit litigation by encouraging settlement of claims in advance of the necessity of filing suit. Where the filing of

a lawsuit occurs nonetheless, tort claims legislation may limit significantly the number of available defendants and, as well, the amounts recoverable. A common attribute of many state Tort Claims Acts, and the Federal Tort Claims Act as well, is that intentional or criminal action or inaction is excluded as a basis for recovery under the act itself. In situations involving such behavior, the injured party may only recover by filing suit and typically will name the offending officer as an individual defendant. At the time the suit is filed the injured party becomes known as the "Plaintiff" or "Complainant".

A Brief Overview of a Typical State Court Lawsuit

In the typical state tort action, the Plaintiff alleges some variety of negligence on the part of the officer, or officers, involved in the emergency vehicle operation which has "proximately" caused the Plaintiff's injury. This allegation is set forth in a legal document known as a Complaint or Petition or some other similar expression. The party being sued, the "Defendant", is then afforded the opportunity to answer the Complaint or Petition within a certain number of days or be declared "in default". Being in default merely means that the court, in many states, may award the Plaintiff the relief requested in the Complaint or Petition without further hearing on the matter. The Defendant has, of course, the opportunity to provide a response to the Plaintiff. This is done in a document known as the Answer. In the Answer, the Defendant may also raise Counterclaims against the Plaintiff or Crossclaims

⁴ *The term "proximate cause" is an important concept in American tort law. It merely means that there is a close causal connection between the actions of the alleged "wrongdoer", legally known as the "tortfeasor", and*

against other persons who are felt to be responsible for injuries which occurred. Where the Defendant files a Counterclaim, the Plaintiff is allowed to file an additional document known generally as a Reply to address the Defendant's assertion of fault on the Plaintiff's part. All the documents mentioned above are collectively known as "pleadings".

Once the pleadings have been filed and served on opposing parties, each side to the lawsuit will engage in a process known generally as "Discovery", as permitted by the applicable state Rules of Civil Procedure. The Rules of Civil Procedure are typically contained in a volume of the state code of laws and generally govern what items of information are required to be disclosed to the opposing party, when they are to be disclosed and the remedy for failing to disclose. Many states have fashioned their discovery rules and their Rules of Civil Procedure after their federal counterpart. Discovery is a critical part of the lawsuit and many cases are settled or dismissed based upon what has been discovered by the opposing party.

If the parties get beyond the Discovery process without settlement or dismissal, each party then typically files a variety of Motions. Motions are requests directed to the court asking it to order relief without submitting the matter to trial either before the court or by a jury. Motions may be addressed to some procedural aspect of the case, such as a Motion to Extend Discovery, or to some substantive aspect, such as a Motion to Dismiss or a Motion for

the injury suffered by the Plaintiff.

Summary Judgment. In all events, the motion stage of the proceeding is critical for sorting "the wheat from the chaff" and allowing the court to deal only with the matters which should require its attention at trial.

After motions have been completed and ruled upon, the final stage of the proceeding is the trial. In the typical state tort case, the burden is upon the Plaintiff to show by a "preponderance of the evidence" that the Defendant has caused the injury for which the Plaintiff is seeking recovery. Typically the Plaintiff will choose between a trial by a jury or a trial by the bench (i.e. by the judge without a jury). The process of deciding whether to choose trial by jury over trial by the bench is a complicated one which is far too extensive for discussion in these materials. Where trial is by jury, however, the jury will decide the facts in the case and the judge will decide all legal issues. When the trial is by the bench, the judge decides, obviously, all issues factual and legal.

In the typical negligence action, as in most lawsuits, the issue of "damages" becomes central. The term refers to the amount of money which the court will award to the Plaintiff, or to the Defendant as a matter of Counterclaim, to compensate for an injury. Monetary damages are generally said to be either "compensatory" or "punitive" in nature. There are some

⁵ *This is the general civil standard of evidence which must be satisfied by the Plaintiff in order to be awarded relief by the court. Generally the term means that the Plaintiff must show that it is "more likely than not" that the Defendant is responsible for the injuries.*

⁶ *Some states use the terms "nominal" or "actual" to describe compensatory damages. In either event, the concepts are the same. Punitive damages, as the name implies, are assessed to punish a wrongdoer and typically have no logical relationship to compensatory damages. Thus, it is not unusual to have compensatory damages of,*

limitations on when punitive damages are appropriate, however and against whom. As a broad generalization, punitive damages are not appropriate where the Plaintiff's injury was caused merely by the "simple" negligence of a law enforcement officer or against a municipality.

Compensatory damages are awarded to "make the person whole"; in other words, to compensate the injured party for the injury suffered at the hands of the wrongdoer.

Compensatory damages may cover such matters as medical costs, lost wages, prescription costs, pain and suffering and loss of the company and association of the injured party by a family member. In the typical jury trial, the jury will determine the appropriate amount of compensatory damages, whereas the issue of punitive damages is sometimes, depending upon jurisdiction, decided by the judge.

42 U.S.C. § 1983 ACTIONS

From the standpoint of a state or local law enforcement officer or municipalities, section 1983 actions can be especially devastating from both a financial and public confidence standpoint. There has been much written about § 1983 and law enforcement activities and, yet,

say, \$ 10,000 and punitive damages of \$ 100,000 or more!

⁷ *The rules concerning award of punitive damages are varied from state to state. For example, some states may allow award of such damages where the behavior of an officer can be shown to be "grossly negligent", whereas in others punitive damages may not be appropriate unless "recklessness" can be shown. In suits brought under 42 USC § 1983, punitive damages cannot be awarded against a municipal defendant. This same applies in some state court proceedings as well.*

⁸ *This latter type damage, loss of association, is commonly known as "loss of consortium".*

⁹ For purposes of §-1983 discussion, the term "municipality" includes all units of local government at lower than the state level. The most common of these are, obviously, cities and counties.

for the most part, law enforcement officers and administrators remain somewhat unclear regarding the application of the section and how it may come to impact them.

The language of Title 42, United States Code, section 1983; frequently called the "Federal Civil Rights Act" is amazingly brief. The section states, in pertinent part:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress...."

Thus, § 1983 creates no rights in and of itself but merely provides a remedy for violations of rights secured by either the United States Constitution or the "laws" of the United States. It has only two operative requirements:

- 1) That a violation of a federal constitutional or statutory protection occur; and
- 2) That the person committing the violation be a person acting "under color of " state law

Where municipal law enforcement officers are involved, actions undertaken in the course and scope of duty will virtually always satisfy the second requirement, as the authority

¹⁰ Typically, law enforcement officers and administrators think of § 1983 in terms of federal court proceedings. The § 1983 action, however, can be brought as an action in state court as well. The substantive aspects of state and federal court § 1983 actions are identical. Some procedural differences may exist in terms of motions, discovery and various other aspects of the lawsuit which are controlled by state rules of civil procedure. For our purposes, however, we will discuss § 1983 as a federal court proceeding.

to arrest and exercise the myriad of other law enforcement functions derives from state constitutional or statutory empowerment. Interestingly, § 1983 does not apply to injuries inflicted by persons acting under the apparent authority of *federal* law, absent some state law connection. The history of the statute will show that § 1983 was enacted by the U.S. Congress in 1871 as a means of ensuring that newly emancipated slaves were not deprived of their constitutional protections by the secessionist states themselves. In fact, the law was originally referred to as the "Ku Klux Klan Act", although it has seldom been used against their activities.

The Application of § 1983 to Law Enforcement Activities

A fundamental question which must be addressed is how, or why, section 1983 applies to law enforcement activities. From the time of its enactment in 1871 it was relatively unused until the U.S. Supreme Court decided *Monroe v. Pape* (365 U.S. 167) in 1961. *Monroe's* holding, that the term "persons acting under color of state law" was applicable to municipal police officers although not directly applicable to municipal corporations themselves, started a trickle of lawsuits against law enforcement officers which did not come to full stage until 1978 in *Monell v. Department of Social Services* (436 U.S. 658). In *Monell* the Supreme Court overruled *Monroe* to the extent that it had held municipalities not to be "persons" within the meaning of §1983. After *Monell*, litigation floodgates literally opened for suits against municipalities whose "policies, customs or practices" could be said to be framed as the

"moving force" behind constitutional or federal statutory violations against their citizens. The swelling stream of §1983 litigation against municipalities has finally reached torrent levels after the U.S. Supreme Court's 1989 decision in *City of Canton v. Harris* (489 U.S. 378). No single case has become so critical to the management of municipal law enforcement risks, particularly those associated with emergency vehicle operations, especially pursuit. The aftermath of *City of Canton* and its impact on section 1983 litigation against municipalities, in particular, has become a frightening history.

Types of Liability Under § 1983

Just as it is important to understand why section 1983 applies to law enforcement operations, it is equally important to understand the types of liability which may attach in section 1983 actions.

As a broad proposition, liability under § 1983 falls into three categories:

- 1) Individual , or personal, liability of the law enforcement officer
- 2) Vicarious, or Indirect, liability of a supervisor; and
- 3) Municipal liability

¹¹ The term "vicarious liability" has spawned a significant amount of disagreement among legal practitioners as to its specific meaning. Some practitioners use the term to refer to a common law theory of imputed negligence otherwise known as *respondeat superior*. This theory of imputed negligence requires no showing of fault on the part of an employing agency but rather assigns (i.e. "imputes") the negligence of the employee to the employing agency for liability purposes. This theory of recovery is not available under § 1983 but is available in many state court proceedings. We adopt the meaning of "vicarious" shared by the other school of thought which denotes vicarious liability as a type of indirect liability for the acts of a subordinate where a superior, usually a supervisor, has through some gross negligence of his or her own, or through participation in the subordinate's activities, allowed injury to occur. We specifically do not refer to *respondeat superior*.

Individual Liability

Individual officers frequently express concern over the exposure of their personal assets in the event of a lawsuit where their personal activities are alleged to have caused a Plaintiff's injuries. For the most part, the Plaintiff alleges that some variety of negligence or intentional wrongdoing of the officer has caused compensable injuries.

In state court, an applicable Torts Claims Acts may provide some insulation to the officer where simple negligence is alleged. Typically, even where there is a finding of gross negligence on the officer's part; if the actions complained of are within the course and scope of the officer's duty, the resulting judgment will virtually always be paid by the employer or its insurance carrier. The reasons for the decision of the employer or carrier to pay the judgment are too wide and varied for discussion in this chapter but typically center around principles of public service and policy.

In § 1983 actions, however, the basis of individual officer liability is somewhat more complicated than in a state tort action and requires a basic understanding of how the § 1983 cause of action relates to emergency vehicle operations. After the discussion of § 1983 claims

¹² Beyond the individual officer's concerns with state or federal civil liability are issues which may arise with respect to allegations of criminal wrongdoing. While beyond the scope of these materials, the individual officer may face criminal liability under federal criminal civil rights statutes such as 18 U.S.C. § 241 or § 242 or criminal proceedings in state court under state criminal statute or, in some states, under state common law. The discussion in these materials relating to litigation file preparation has general application to an officer in such a situation. Agency assistance, however, may not be readily available to an officer pending criminal prosecution and the services of competent private legal counsel should be enlisted.

in emergency vehicle operations, we will discuss the bases for vicarious and municipal liability.

Section 1983 Constitutional Claims in Emergency Vehicle Operations

Although the expression "emergency vehicle operations" may encompass non-emergency, emergency response and pursuit activities, § 1983 lawsuits have generally focused on emergency response and pursuit activities. Traditionally, non-emergency vehicle operations have been the focus of state negligence claims. To understand how the § 1983 action is set out in an emergency vehicle operations case, one must recall the two operative requirements for § 1983 set out earlier in this section:

- 1) That a violation of a federal constitutional or statutory protection occur; and
- 2) That the person committing the violation be a person acting "under color of " state law

For the moment , discussion of the first requirement is critical, with a concentration on violations of constitutional protection.

Constitutional Violations in Emergency Vehicle Operations

A federal constitutional violation cannot occur unless the injured party has constitutional protection. While this statement may seem overly simple, it is a critical concept in understanding how liability attaches, or does not attach, to law enforcement emergency

vehicle activities. Federal constitutional protections are laid out in the Bill of Rights to the Constitution, which consists of its first ten amendments, and the Fourteenth Amendment which makes the first ten amendments applicable to the states. Therefore, if a Plaintiff alleges that a violation of constitutional rights occurred, the protection must be found either in the Bill, of Rights, the Fourteenth Amendment or in the courts' interpretations of those rights. The mere fact that injury occurs to the Plaintiff and that there was law enforcement involvement in the set of circumstances out of which the injury arose is insufficient to attach liability, by itself , to the law enforcement officer or agency. The reason for this result is that there must have been some duty on the part of law enforcement towards the Plaintiff; whether the duty was to act or refrain from acting. If there was no duty, which is frequently set out as a "special relationship" to the Plaintiff, there can be no liability. This concept will be further developed below in the discussion of Fourteenth Amendment "due process" claims. At the present time, the vast majority of emergency vehicle constitutional claims under § 1983 are brought under the Fourth Amendment or the Fourteenth Amendment to the U.S. Constitution. These claims differ significantly from each other and are based, in large part, on the identity of the Plaintiff as suspect or innocent third party. It is also important to note that, unlike state tort actions, § 1983 "due process" claims generally require a degree of "fault" greater than simple negligence to be present if the action is to go forward.

¹³ This is a somewhat significant oversimplification in as much as the U.S. Supreme Court has ruled only that substantive due process claims under § 1983 cannot be supported by an allegation of simple negligence (see *Davidson*

Fourth Amendment Claims

The Fourth Amendment to the United States Constitution prohibits, among other things, "unreasonable" searches and seizures,. From the standpoint of emergency vehicle claims, we need only concentrate on claims for unreasonable "seizures". This type claim is typically brought by a suspect who has fled from law enforcement and suffered injury as a result. Because Fourth Amendment claims require that a "seizure" occur and because of the definitionä of seizure given by the United States Supreme Court in such cases as *California v. Hodari D.* (111 S.Ct. 1547 ;1991), Fourth Amendment claims will typically arise only where a pursuit has occurred. For purposes of illustration, it may be helpful to take a look at how such a claim arises.

Although there have been few cases decided on a pursuit factual basis by the U.S. Supreme Court, there is a wealth of cases which have dealt with the issue of seizures, especially by deadly force. Perhaps the most important of these is the 1985 decision in *Garner v. Tennessee* (471 U.S. 1) which essentially sounded the death knell for the so-called "fleeing felon" rule. That rule had allowed a law enforcement officer to use deadly force, typically a firearm, to stop the flight of a fleeing suspect where the suspect, having committed a serious crime (i.e. felony), refused to stop on police demand. The Court, noting the development of the concept of "felony" from the English common law to its present day iteration, ruled that in

v. Cannon and Daniels v. Williams; 1986); footnote 8 of *City of Canton v. Harris* clearly sets forth the court's reluctance to address the operative degree of fault required to establish an underlying violation; although general consensus is that mere negligence will likely be held insufficient..

present day society, where the classification of "felony" is no longer reserved solely for capital crimes (as it had been at Common Law), use of deadly force is an inappropriate means of stopping a non-dangerous fleeing suspect. In fact, at the time of the *Garner* decision many jurisdictions classified various non-dangerous offenses as felonies. As an example, in South Carolina, the crime of "Peeping Tom" was classified as a felony punishable by up to three (3) years imprisonment, but the crime of Assault and Battery of a High and Aggravated Nature was classified as a misdemeanor, punishable by up to ten years' imprisonment! The upshot of the ruling in *Garner* has been that law enforcement agencies are now required to operate under a "two prong" analysis before using deadly force against fleeing suspects. Specifically, an officer electing to use deadly force must now answer both of the following questions affirmatively before deadly force usage is authorized under *Garner*:

- 1) Does the fleeing suspect against whom deadly force usage is considered pose a "significant threat" to members of the public if immediate apprehension is delayed; and, if so
- 2) Is there any lesser means of stopping the flight of the suspect, besides deadly force, which is reasonably available ?

In 1989, the U.S. Supreme Court addressed the issue of the constitutional limitations of deadly force usage in a pursuit situation. The decision was called *Brower vs Inyo County* (489 U.S. 593). *Brower* has become important for its recognition that certain pursuit tactics may

result in a claim of constitutional violation through a seizure by deadly force. The facts of the case are that a suspect in a stolen car was being pursued at high speed by deputies of the Inyo County California Sheriff's Department. The chase terminated when the suspect collided with a roadblock, consisting of an 18-wheel tractor-trailer rig pulled across both lanes of a two-lane highway just beyond a blind curve. Additionally, a police cruiser had been parked on the shoulder of the roadway near the tractor-trailer with its high-beam headlights aimed at the suspect's eye level in an effort to blind the suspect and conceal the fact of the roadblock. The court held that a "seizure" by deadly force, for purposes of the Fourth Amendment, had occurred and sent the case back to the lower court to determine whether the seizure was unreasonable.

The *Brower* ruling, discussed above, relied heavily on the holding in *Garner* to point out that whether a suspect in a pursuit case could be seized by use of deadly force would depend upon the nature of the offense for which pursuit was initiated and the danger which the suspect posed to the public. The net impact of *Brower* is that a seizure by deadly force; such as by ramming, discharge of a weapon or other contact method, will not likely be permitted for minor nondangerous offenses, such as traffic violations, where the suspect's driving does not pose a "significant threat" to the public, to include the officer. This point becomes critical to discussions of pursuit tactics and policy development and training to the policy.

Fourteenth Amendment Claims

Although Fourth Amendment claims are typically raised only in pursuit claims by suspects, Fourteenth Amendment claims are generally brought by innocent third parties who are injured in either pursuits or in emergency response situations. This cause of action under § 1983 alleges usually that the Plaintiff has been deprived of "due process" protections under the due process clause of the Fourteenth Amendment. The pertinent language of the Fourteenth Amendment states:

"No State shall ...deprive any person of life, liberty, or property without due process of law..."

The term "due process" is a nebulous one in the law and may be spoken of in terms of "substantive due process" or "procedural due process". For our discussion purposes we will focus on the so-called "substantive" aspects, meaning that we will look at those situations where a person has been deprived of "life, liberty or property" itself as opposed to the right to have a hearing prior to deprivation by the government.

Situations where an innocent motorist is struck by a fleeing suspect or law enforcement vehicle in pursuit or a law enforcement vehicle in emergency response mode are perhaps the most tragic situations imaginable for law enforcement professionals. The idea that an innocent person is made to suffer runs contrary to the law enforcement mission to protect and serve. Understanding that, we must further understand that injury to third parties will be balanced by a court against the duty owed to those persons by law enforcement. It is this duty concept which underlies Fourteenth Amendment claims. As we noted earlier, if there is no duty on the

part of law enforcement to act or refrain from acting with respect a particular individual then any injury which may result to the individual from law enforcement activity or inactivity legally will not result in liability. This proposition frequently causes concern on the part of law enforcement officers who, for example, feel that they have a *duty* to pursue. To understand the duty concept, it may be helpful to use a practical illustration before undertaking further analysis.

As a hypothetical situation, suppose that a law enforcement officer observes a man swimming in a rain swollen river toward shore. In the course of swimming the man becomes fatigued and begins to drown. The law enforcement officer has a coil of rope in the trunk of his cruiser but elects not to retrieve it and instead gets into his car and drives away. Should liability be imposed upon the officer for the failure to attempt rescue? Morally, we would likely all agree that the officer owed a "duty" to the drowning man. Legally, however, the duty question must be framed quite differently. Absent a special relationship between the officer and the drowning man, there is no legal duty, in the majority of jurisdictions, to render rescue. This result comes about because of the widely accepted rule, often called the "public duty" rule, that a law enforcement officer's duty of protection is to the public generally and not to a specific individual, absent a so-called "special relationship". This morality-legality dichotomy causes many officers great problems when they feel the need to act from a moral, or social responsibility, basis but subsequently find themselves being subsequently sued for the decision to act. A classic example of this situation occurs when an officer is confronted with

an apparently drunken driver weaving down the road at a low rate of speed. The initial inclination of some officers is that there is an immediate need and duty to pursue the driver, at all costs, even where the driver pulls away at an increased rate of speed after being signalled to stop. But is there? It is critical to distinguish between the duty to pursue and a duty to take other possible steps to protect the public, just as it is important to distinguish moral from legal duty.

Analysis of liability under the Fourteenth Amendment due process clause focuses on this issue of duty. While the focus of the Fourteenth Amendment is on "constitutionally created duty"; we would do well to also understand that there are also "nonconstitutional" duties which may impact an officer's performance. Nonconstitutional duties are created generally in one of two ways: by state statute or local ordinance, or by agency policy. Neither state statute nor agency policy, however, can create a constitutional duty. The fashion in which a policy or statute created duty is violated, however, may give rise to a constitutional claim if the behavior itself violated some constitutional protection envisioned by the Fourteenth Amendment's due process clause.

Statutory duties

Each state has a provision in its code of laws which specifies conditions under which a vehicle may be operated as an authorized emergency vehicle. The importance of such statutory provisions is that they lay out in general terms how an emergency vehicle may be exempt from

state traffic laws when responding to an emergency or when in pursuit of an offender and, as such, may create certain duties. The most common duties created under state statute are the duties to utilize emergency warning devices and the duty to exercise "due care" in emergency response or pursuit operations. Most state statutes are based upon the language of the Model Vehicle Code which allows the operator of an emergency vehicle to exceed the posted speed limit and generally disobey traffic directives if the operator exercises "due care" and utilizes lights and/or siren. Obviously, each law enforcement agency which wishes to exceed speed limits, or otherwise disobey traffic directives, must comply with the statutory provisions. Beyond the bare guidance of the state statute, however, each agency must provide guidance to its officers in the form of policies and procedures. It is important to remember that state statutes will not likely provide guidance on such critical matters as when a pursuit or emergency response can be initiated. These issues must be addressed in the agency policy.

Policy created duties

An agency's pursuit policy is a directive for action to its officers. The joint purpose of the policy, and the procedure to implement it, is to identify for officers acceptable, as well as unacceptable, behavior in the course of pursuit operations. In other words, the policies and procedures create certain duties for officers engaged in emergency vehicle operations to undertake or not undertake certain actions. It is fairly safe to say that the majority of jurisdictions do not tell their officers in their policies that they *must* pursue all violators but rather leave the decision to continue or discontinue a pursuit to officer discretion, subject to

agency policy guidance. Until 1989, many agencies across the United States took the approach that minimal written guidance to officers and the advisement to "exercise good judgment" were the preferable means for controlling the risks of pursuits. That year, however, the U.S. Supreme Court delivered its opinion in *City of Canton vs. Harris* (109 S. Ct. 1197; 1989) (discussed above) and effectively served notice that a philosophy of "no policy is the best policy" could pose extreme liability problems for municipalities and their law enforcement agencies where the actions of their officers violated citizen constitutional protections.

Constitutional duties

Above and beyond the guidance provided by state statutes and agency policy and procedure, are the limitations and duties imposed by the United States Constitution, as interpreted by the courts. In 1989, the U.S. Supreme Court in *DeShaney v. Winnebago County Department of Social Services* (109 S. Ct. 998; 1989) effectively served notice that unless a special relationship exists between the government and an injured party; in other words that a governmental duty to the injured party exists; liability cannot attach, irrespective of the perceived moral obligation of the government or the outrageousness of its behavior.

To revisit, at this point, the question of whether there is a duty to pursue; an affirmative answer can only be forthcoming if there is either a state statutory mandate to pursue (there is none); or the agency pursuit policy mandates that officers pursue all violators (this is ill-advised and generally unlikely); or there is a constitutional duty to act to pursue all violators (*DeShaney* clearly indicates not). Is there, however, a duty to take some step to

prevent the previously mentioned drunken driving suspect from injuring the public; or should law enforcement officers turn in their cruisers and badges and allow all suspects to escape? Hardly.

Inherent in the law enforcement oath to uphold the laws and to protect and serve is a duty to take steps to protect the public. Balanced against this apparent open ended obligation, however, is a balancing test which courts will undertake where injury occurs. The balancing is basically this: Was the need to immediately apprehend the suspect so great that the risk posed to the public and the resultant injury justified by law enforcement action? Inherent in this analysis is the question of the reasonableness of the law enforcement officer's actions. In § 1983 suits, the standard for judging the reasonableness of individual officer behavior in Fourteenth Amendment "due process" claims has varied from federal circuit to federal circuit. For example, one federal court might rule that an officer's "recklessly indifferent" behavior in a pursuit could result in "due process" liability; whereas the same behavior in another federal court would likely be insufficient to trigger the threshold requirement of behavior which "shocks the judicial conscience". In summary, the balance of officer behavior against the need to immediately apprehend which will be deemed acceptable to avoid individual liability varies significantly from federal circuit to federal circuit.

Revisiting Individual Officer Liability

Individual officer liability, subject to the above discussion of Fourth and Fourteenth Amendment violations, typically comes about where the officer's behavior exceeds the course

and scope of duty or constitutes intentional violation of agency policy. As a general proposition, law enforcement officers are protected under a concept known as "qualified immunity", sometimes erroneously called "good faith immunity" for their actions in the course and scope of their duty. This concept, in its most current judicial version, allows officers to avoid individual liability where their actions do not violate "clearly established law". What may be considered as "clearly established", however, is not clearly established under current U.S. Supreme Court guidance,ä but it is generally a safe statement to say that an officer whose actions in compliance with policy result in injury to a third party or suspect will not likely be held personally liable unless the policy was known by the officer involved to violate well established law.

It is also important to remember, however, that the officer's actions in the course of an emergency response or pursuit will be critical initial indications of the potential liability which may later come about. For example, if the officer's conduct in the course of a pursuit is such that it violates agency policy, there remains the question of whether the violation of policy is merely "negligent" (i.e. unintentional, but lacking in the exercise of "due care") or "intentional" or "shocking to the conscience" (i.e. intending the resultant outcome of the behavior; or foreseeably certain to result in the injury). The answer to this question can significantly shape the character of the suit which is filed. If the officer's conduct is violative of policy solely through the failure to exercise due care, the resultant plaintiff's claim will likely be one brought under the state's tort claims act; or ultimately filed as a state court

negligence action. If, however, the violation of the policy is intentional (e.g. the officer knew that ramming of a suspect vehicle for less than dangerous felony offenses was prohibited but consciously made the decision to do so anyway), or the officer's behavior in violating the agency policy created duty rose to the level of a constitutional due process violation, as discussed above, then the plaintiff's claim will likely focus on § 1983 as a remedy. This result comes about based on our earlier discussion regarding the general non-availability of § 1983 for simple negligence claims.

Vicarious Liability

Once the basics of § 1983 liability are comprehended, vicarious or indirect liability can be understood by the simple concept that a supervisor, or other superior officer cannot, with impunity, allow a subordinate, to whom a duty of supervision is owed, to commit constitutional violations against a citizen or take part in the unconstitutional behavior either through direct participation or ratification. A classic, if not overused, example of this concept is the liability which attached to the inaction of the on-scene supervisor during the beating of Rodney King in Los Angeles in the early 90s. Vicarious liability under § 1983 will require, at a minimum, that gross negligence or greater culpability be attendant to the supervisory action or inaction. Where state law tort claims come about, the concept of *respondeat superior* may attach liability to the employer itself, where permitted under state law. Recall, however, that *respondeat superior* (which is liability based upon the mere employment of the officer) is not a permissible basis of recovery under § 1983.

Municipal Liability

From the standpoint of so-called "deep pockets" liability, municipalities, and we might add their insurers, are greatly at risk. As developed earlier, a municipal entity is not liable for the acts of its officers, under § 1983, merely because it employs them. The officers' infliction of constitutional injury must have been in furtherance of the "policy", "custom" or "practice" of the municipality before the treasury of the municipality is exposed. As alluded to earlier, "policy" may be deemed to exist by a court in a number of ways. Certainly, written policies and directives may be indicative of the municipality's "causation" of a Plaintiff's injury through its officers, but often the injury suffered cannot be directly attributed to anything in writing although it is well known that "it's always been done that way." In such situations, development of a history of constitutional violation by the offending agency's officers can suffice to establish the custom or practice by the Plaintiff. For purposes of municipal liability, however, mere establishment of a policy, custom or practice is not enough to impose liability. The policy, custom or practice must have been such as to have proximately caused a deprivation of the Plaintiff's constitutional rights (or federal statutory protection). In our previous discussion of § 1983 liability for pursuit and emergency response activities, we identified the Fourth and Fourteenth Amendments as significant sources of constitutional protection for Plaintiffs and as significant limitations on an agency's emergency vehicle operations. At this point, some discussion is necessary regarding how violations of constitutional protections can impose liability on a municipality. Specifically, we must discuss

the impact which *City of Canton v. Harris* has had on law enforcement emergency vehicle policy, operation and training. At the conclusion of this chapter we will discuss *Canton* and its impact on risk management for law enforcement emergency vehicle operations.

City of Canton v. Harris

In 1989 the U.S. Supreme Court effectively served notice that municipalities and their representative law enforcement agencies must be accountable for the critical law enforcement functions of their officers. The *Canton* case, on its facts, is not related to emergency vehicle operations; but the court's holding and the language of the now famous "footnote 10" are fundamentally important to protecting the public and officers alike. The *Canton* case was a § 1983 action commenced by a woman who suffered "severe emotional distress" after being arrested by officers of the Canton, Ohio Police Department. The substance of her claim related to an alleged failure to provide her medical attention when she was booked into a detention cell at police headquarters. In essence, Ms. Harris, complaint was that she was deprived of her due process right to medical attention by the city of Canton because there was inadequate training of intake officers to recognize when an arrestee was in need of medical care. In fact, Ms. Harris was taken to the emergency room of the city hospital upon her bonding out and was admitted to the hospital for treatment and, after release, was treated on an outpatient basis for a significant time period. The court, in analyzing her claim, noted that certain law enforcement activities require meaningful officer training if members of the public are to be protected against constitutional injury. Of critical importance to our discussion of

emergency vehicle operations is the court's language in footnote 10 of the opinion. In describing law enforcement activities which require significant training, the court stated:

"For example, city policy makers know to a moral certainty that their police officers will be required to arrest fleeing felons. The city has armed its officers with firearms, in part to allow them to accomplish this task. Thus, the need to train officers in the constitutional limitations on the use of deadly force, see *Tennessee v. Garner*, 471 U.S. 1 (1985), can be said to be "so obvious," that failure to do so could properly be characterized as "deliberate indifference" to constitutional rights. It could also be that the police, in exercising their discretion, so often violate constitutional rights that the need for further training must have been plainly obvious to the city policy makers, who, nevertheless, are "deliberately indifferent" to the need."

The sum and substance of the holding in *Canton* is that municipal policymakers must be cognizant that certain activities of their law enforcement officers run the great possibility of causing injury to citizens if officers are not trained in the performance of the activities. While footnote 10 discusses the use of deadly force under *Garner*, responsible inquiry by law enforcement administrators must be into those law enforcement activities which expose the public, and officers themselves, to extreme risk of injury if not properly carried out. From a statistical standpoint, we would all likely agree that a law enforcement officer is much more likely to engage a suspect in pursuit, as an example, than to discharge a weapon (other than for

training or animal humane purposes) during a career. Yet the predominant focus of law enforcement policy and training has been on firearms usage. Likewise, law enforcement administrators have traditionally focused on firearms as the virtually exclusive means of inflicting deadly force. Yet, recently, cases like *Brower* (discussed above) have caused us to reevaluate our pursuit operations as potential deadly force applications.

The bottom line for municipal law enforcement is that if a failure to provide policy and training to officers in "critical functions", such as emergency response and pursuit, can be classified as "deliberate indifference" to the constitutional rights of members of the public and constitutional injury occurs; then municipal liability will likely attach.

Liability for State Officers

A fundamental question unanswered in the foregoing discussion is the liability exposure faced by officers who are employed by state law enforcement agencies. This area is of critical importance because of the general proposition that neither a state nor its officers, who are acting in "official capacity", can be sued in federal court, or for that matter in a state court upon a federally based cause of action such as 42 U.S.C. § 1983 (See, e.g., *Will v. Michigan Department of State Police*; (491 U.S. 58; 1989)). This prohibition, however, is not an ironclad protection against any lawsuit for state officers; to include sheriffs and their deputies who may be classified as "state actors" under the laws of their respective states. It is important to recall that a state claim based upon negligence, or some variation thereof, can have application against virtually any state or local officer.

From the standpoint of § 1983 exposure, however, liability can attach against a "state actor" only in that officer's individual, capacity. Distinguishing what constitutes an official capacity act from that which constitutes an individual capacity act can, however, prove tricky. Also, it should be noted that, as a practical matter, a Plaintiff will likely allege in the Complaint that the acts of the officer which resulted in injury occurred in the officer's individual capacity. Because of the extensive effort which must be expended in the course of pretrial discovery to identify whether the acts were actually personal or official capacity, an insurer will likely intervene to defend the officer. While such an approach by Plaintiff's counsel may appear to be unfair in some clearcut instances, the reality is that it frequently is utilized to tap into the pocket of the employing governmental entity. Therefore, as a practical measure, state officers may take little solace in the protections purportedly afforded them and, as an operational concern, should tailor their conduct accordingly.

RISK MANAGEMENT AND LIABILITY REDUCTION

Risk Management: Definition and Benefit

The concept of protecting oneself by taking appropriate precautionary steps before embarking on a potentially hazardous undertaking is neither novel nor earthshaking. It is a commonsense proposition. Most of us would agree that the better we prepare ourselves for a likely adverse eventuality, the better we will be able to deal with it should it occur. In its most

basic form, this is an operating definition of the concept known as risk management. The goal of effective risk management is to accurately and prospectively identify *potential* hazards, prior to their occurrence, and to put into place reasonable, and one might add cost effective, protective measures which will prevent the hazards from becoming *actual*, or at least catastrophic, occurrences.

To understand the benefit of effective risk management requires that we understand that unprepared for hazards have financial, operational and emotional impact both on law enforcement agencies and the governmental entities they serve. Equally, financial and emotional hardship may be borne by the members of the public officers have sworn to protect and serve. In some agencies there is a smug, and one might add erroneous, perception that, once an incident has occurred, law enforcement operational exposures are an insurance company's problem. Such a shortsighted approach ignores the fact that insurance premiums are borne by the agency either directly, or indirectly through its representative governmental entity's budget allocation. Perhaps the best justification for effective law enforcement risk management measures is the budget savings which can be reallocated, away from law enforcement liability or automobile insurance premiums, to critical law enforcement needs such as increased personnel, new equipment or funding for training.

"Front End" Risk Management

Ideally, risk management for law enforcement agencies should be what is called a "front end" proposition; that is that it should put into place well in advance of the occurrence

of the contingencies which invite hazards so that adequate steps can be taken to provide protection. Unfortunately, we do not live in an ideal world and, as we will see below, risk management must sometimes take an "after the fact" approach; which many of us might colloquially refer to as "damage control". In this portion of this text we will address both "front end" and "after the fact" risk management. In order to understand the application of these concepts, a short look at the principles of risk management is necessary.

Basic Principles of Risk Management

Risk Management is an ongoing process which consists of four basic steps:

- 1) Identifying the hazards or potential hazards which face an organization.

-These hazards and potential hazards are commonly referred to as "exposures". Exposures can vary widely from such concerns as an inadequate training budget to outdated equipment.

- 2) Determining the means of reducing (i.e. eliminating or curtailing) the identified exposures.

-These means must be realistically within the capability of the organization. Examples of exposure reduction might include such possibilities as increasing the amount of training provided in certain "critical function" areas (such as EVO), reviewing the organization's progressive discipline policy or revising the organization's pursuit policy in light of recent court decisions.

3) Implementing appropriate measures for reduction of exposure.

-This is the logical followthrough to step 2) and may include the use of such risk management processes as policy development, training, post-incident reporting requirements and enhanced public relations efforts.

4) Monitoring the effectiveness of the selected exposure reduction measures and implementing changes as appropriate.

-This step requires a recognition that the risk management process is not a one time undertaking but a constantly evolving program which should be continually updated.

Identifying Exposure

In many respects this part of the risk management process is the most difficult. Any number of considerations may explain an agency head's reluctance to address the possibility that the operations or policies of the agency may be deficient or otherwise open to attack. Even where the agency head is willing to entertain the possibility, however, the logistical or financial aspects of an identification process may appear overwhelming. A number of options present themselves as means of identifying agency exposures. In the ideal setting, each law enforcement agency would undertake an objective and intensive self-study of its organization, staffing, operations, policies and procedures, insurance (to include workers' compensation) losses and litigation profile in order to accurately depict its state of exposure. Unfortunately, few agencies have the resources, financial or human, to undertake such a gargantuan effort.

Some agencies, in the course of seeking agency professional accreditation, may successfully accomplish many of these tasks and gain significant insight into actual and potential exposures.

Again, the cost of participation in a nationally recognized accreditation program may be more than a small agency, or its municipality, can bear. Still other agencies discover some of their actual exposure in a most unfortunate fashion: they are sued.

Somewhere between being sued and undertaking the ultimate self study, there is an approach to exposure identification which will serve the needs of the "average" law enforcement agency. We will refer to this approach as the "critical functions" assessment.

The Critical Functions Assessment

Most law enforcement agency heads have a fairly accurate concept of where their agencies are likely to come under legal attack. While risk management, in a pure sense, does not deal exclusively with legal exposure, the everpresent potential for police civil liability places it towards the top of most agencies' list of exposures. From a national perspective, a handful of functions appear to present the greatest operational exposure for law enforcement agencies. The purpose of the critical functions assessment is to identify those functions performed by the agency which because of their great potential for serious injury, if improperly performed by the agency's officers, warrant review. A critical function may be one which does not occur frequently but has great potential for injury such as an officer's use of deadly force in attempting to stop a dangerous fleeing suspect or it may be one which does

occur with relative frequency and which has high potential for serious injury, such as an officer's vehicular pursuit of a stolen vehicle.

Law enforcement use of force, use of deadly force and emergency vehicle operations are perhaps three of the most significant operational exposures faced by agencies, as noted above, because of their potential for serious or fatal injury, potential financial impact based on settlement or judgment and foreseeability of occurrence. In evaluating liability exposure, an agency should review with its Risk Manager, City or County Manager or other person responsible for tracking claims and lawsuits, the current and historical litigation status of the agency, to include settlement decisions. Such a review should help focus on current and past problem areas which may warrant increased attention. It is important to remember that the fact of a lawsuit does not, in and of itself, represent that the agency is deficient with respect to its treatment of an operational area. It does, however, serve to send up a "red flag" for an area which should be carefully examined individually and in conjunction with similar cases in an attempt to discern whether a trend is developing.

Determining the Means of Exposure Reduction

The means of reducing identified exposure for law enforcement activities are as wide and varied as the creative minds of law enforcement officers. It should be constantly kept in mind that risk management is not solely a proposal for Risk Managers. To the extent that a law enforcement officer is concerned about the welfare of fellow officers and serving the public, risk management is a matter for every member of the agency.

Exposure reduction can run the gamut from enhanced training programs to individual counselling of a subordinate to implementation of a progressive discipline scheme for violations of policy. Exposure reduction measures, however, should not be directed only to actual incidents which have already resulted in exposure, for this approach would amount to nothing more than "damage control". Instead, exposure identification must, of necessity, involve honest and intelligent projection of potentially problematic areas; based upon feedback from line officers and supervisors and observed trends. Exposure identification will be driven somewhat by the idiosyncratic nature of the law enforcement function under review and the legal and policy directives which address the area.

Implementing and Monitoring Exposure Reduction Mechanisms

Obviously reduction of exposure cannot come about unless implementation and monitoring of exposure control occurs. This process of implementation is what is commonly called risk control, or risk management. Technically, however, risk management refers to the entire process of identification of exposure through followup by monitoring. As we will see below, regardless of the name we assign the process, unless there is followup to assure ourselves that our selected mechanisms are, in fact, working the process of risk management will become nothing more than a senseless exercise. The monitoring process is in reality a feedback mechanism and a system of verification. The same measure, taken in the initial step of the risk management process: identification of exposure; becomes once again critical for the

monitoring phase of the process. Thus, in a very real sense the risk management process is an ongoing and continuous, if not a circular, process which warrants constant updating.

Application of the Risk Management Process to Emergency Vehicle Operations

Identifying Emergency Vehicle Operational Exposures

Determining exposure for an agency's emergency vehicle operations (EVO) is a process involving agency review of historical loss data (both from a liability and workers' compensation standpoint), review of litigation (both pending and completed), and polling of line officers regarding problematic issues arising in the course of vehicular law enforcement. Agencies should not rely solely upon examination of those EVO occurrences which result in property damage or personal injury. Exposure for EVO can come about through a "policy, custom or practice" of unconstitutional behaviors as has been previously discussed. Thus, although only a portion of EVO incidents may have actually resulted in personal injury, it is entirely possible that a pattern of unconstitutional, or merely negligent, behaviors could be in place. While severe injury might arise from only one incident in the ongoing pattern of behavior, the exposure of a municipality could very well be based upon the pattern; whereas an isolated incident would not likely have implicated the municipality!

Perhaps one of the best mechanisms available for identifying EVO exposure, and accordingly identifying means of reduction, is the "pursuit after action report". While many agencies require such reports when personal injury has occurred or where there is the perceived likelihood of a lawsuit; the better practice is to require them after each and every

pursuit. In this fashion, an agency will be able to both freshly document the specifics of each pursuit, thereby building a file to assist in its defense in the event of litigation, and be able to counter allegations of a pattern, custom or practice which seek to attach liability to the municipality. Another benefit of such an approach is that it affords officers the opportunity to learn from the specifics of their behavior and to revise training as may be necessary to remedy problem areas which may surface when the reports are reviewed.

Identifying Means of Exposure Reduction for Emergency Vehicle Operations

Identifying a means of reducing EVO exposure requires that we inquire into the variables which may have significant effect on the exposure. Where EVO is concerned, there are three major variables which determine the manner in which EVO occurs: environment, vehicle and driver. Collectively, these three could be called an "interactive triangle"; as changes in one will likely affect the other two. Experienced EVO trainers recognize, however, that control may be exercised over the behavior of only one corner of the triangle in the course of a pursuit: the driver. While law enforcement officers "control" their vehicles in the course of a pursuit, the reality is that the vehicle operates under strict principles of physical dynamics which the officer cannot alter. More plainly put, wishing that a police cruiser would stop in a hundred less feet in order to avoid a collision does not change the physical behavior of the cruiser. Likewise, wishing that a sudden rainstorm would stop or that a stretch had not buckled has little effect on meteorological or physical reality. Only the behavior of the driver

can be controlled or altered in the course of the pursuit. Therefore, our focus must be on the driver if we wish to effectively reduce exposure.

The available means of reducing EVO exposure are many. Most of us will readily cite training and policy as two principle means of addressing exposure. In a broad sense, these measures are the most critical and effective means available to a law enforcement agency to "get hold of" its exposure. In a specific sense, however, training and policy must be agency and officer appropriate before they can have any utility for the risk management process. As an example, the term "police driver training" connotes to many officers time spent on the track at high speed or otherwise, getting a "feel for" a police vehicle. If an evaluation of an agency's pursuit after action reports, however, shows a trend in which the majority of property damage and personal injury occurrences relate to controlled intersection collisions, the more appropriate training might be related to officer decisionmaking as opposed to technical skill development. While statistically unsupported, it seems a fair statement that the majority of law enforcement officers are relatively proficient technical drivers but could probably benefit from training related to pursuit decisionmaking. Likewise, from a policy standpoint, many agencies are of the apparent opinion that an advisement to their officers to "use good judgment" and to "comply with state law" in the course of a pursuit is sufficient to control exposure.

As means of exposure reduction, training and policy are perhaps the most critical measures available to an agency. Every agency, however, must tailor both policy and training to reflect its actual operational profile and to meet the demonstrated needs of its officers.

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From a risk management perspective there are no "shortcuts" to effective policy and training. Especially from a pursuit policy development standpoint, there is a dire need to "cover all bases" to insure that agency guidance to officers addresses each critical component of pursuit operations. Checklists, such as the one enclosed in the appendix to this chapter can serve as helpful tools in the drafting of pursuit policy. Failure to accurately identify exposure problems, utilization of untested, or unread, "off the shelf" policies and unquestioned implementation of generic training materials are ingredients for financial disaster. Additionally, there is a critical need to obtain officer input and "buy in" to the agency's pursuit policy, lest it be disregarded as "unrealistic".

Revisiting City of Canton v. Harris

After *City of Canton v. Harris*, Municipal Law Enforcement Agency Heads and Risk Managers were effectively put on notice of the grave potential for section 1983 liability for uncontrolled police activities. The "deliberate indifference" standard approved by the U.S. Supreme Court extended an invitation to revisit the inventory of "critical" functions performed by the municipal police agency and to identify standards for their performance and make provision for training before the advent of a lawsuit. In a very real sense, the message of *Canton* was that management of the risks associated with such critical functions as pursuit is the principal key to effectively achieving the critical balance between departmental enforcement objectives and protection of the community.

Conclusion

Effective front-end risk management, and thus liability reduction, can only come about where there is open and honest communication between those sharing in the risk. In the context of law enforcement operations, two principal partners in the risk are the governmental entity's Risk Manager, if in fact there is such a person, and the head of a law enforcement agency involved. Ongoing dialogue between these two key actors in the risk management process should not contain phrases such as "This is strictly a law enforcement matter" from the law enforcement side or "This is a matter of administrative concern only" from the Risk Manager or the administration side; or any variation on these themes. The outcome of such dialogue will certainly be an aftermath of fingerpointing and illwill when pursuit or emergency response claims inevitably come about. The proportional percentage of law enforcement claims to a municipality's overall loss history is generally exceptionally high. Common sense dictates that identification of the areas where claims are likely to occur will assist in managing them. Support may be required from the administration in funding additional equipment or training needs. Courage will also be required to "fix" observed deficiencies rather than hope that a suit will not come about. As such, the management of EVO risks, whether under section 1983 or conventional state tort action, must be an open dialogue complemented by free exchange of information. The bottom line is that risk management must be a proactive process by which law enforcement identifies the risks of its operations and then acts upon the identified risks to reduce liability exposure and increase public safety. Ignoring the red flags which signal deliberate indifference is a sure invitation to financial disaster.

Chapter II Appendix

A CHECKLIST OF COMPONENTS FOR A DEFENSIBLE PURSUIT POLICY

I. Mission Statement:

-The mission of the Police is to "Protect Lives". This section serves not only to remind officers of their ultimate responsibility, but as well "sets the tone" from a liability standpoint.

II. Rationale:

-What is the purpose in pursuing? Generally this section will recognize that the purpose is to apprehend suspects who will be brought to trial. The purpose is not to engage in a contest with the suspect. The section should focus on the need to immediately apprehend balanced against the danger to the public and availability of alternative means to pursuit.

III. Definitions:

-Officers must communicate with a common vocabulary. Perhaps most critical is the definition of "pursuit". All critical terms must be defined clearly.

IV. Initiation and Termination Factors:

-The purpose of policy is to define officer discretion. The most important aspect of discretion concerns when to allow pursuit and when to require termination.

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V. Pursuit Tactics:

-Permissible tactics should be defined up front. Likewise, impermissible tactics should be identified. This section is highly critical because of the requirement to coordinate certain tactics, such as roadblocks, PIT and ramming, with department policy on use of force. Identification of permissible tactics is also important from the standpoint of identifying necessary training for officers who will engage in pursuits.

VI. Supervisory Responsibilities:

-An on-duty supervisor not actively involved in the pursuit must take control of pursuit operations. The supervisor must have ultimate field authority to order termination at any time, even though initial authority must belong to the officer. Likewise, the supervisor must bear ultimate field responsibility for decisions to use extraordinary measures such as roadblocks.

VII. Communications Responsibilities:

-Communications between pursuing units, dispatch and supervisor should be preestablished. This section must define initial and secondary pursuing unit

responsibility for communication and the roles to be played by central or regional dispatch and air support units where available. The section should coordinate with the agency's policy on radio communications.

VIII. Interjurisdictional Pursuits:

-Foremost must be the admonition that the agency's officers are required at all times to comply with their own policy regarding pursuit operations even where going into the territorial jurisdiction of another department or where dispatch changes hands.

Likewise, where providing assistance to another agency entering their jurisdiction, officers may only use tactics which are permitted by their own policy irrespective of what is requested by the other agency.

IX. Apprehension:

-This section should address who is to effect arrest of the suspect. The end of a pursuit should not resemble a convention of police vehicles. Affirmation of this section should be part of the controlling supervisor's responsibility. This section is especially important where crimes have occurred in multiple jurisdictions in the course of the pursuit.

X. Pursuit After-Action Report:

-This section is mandatory from a liability and risk management standpoint. Proactive supervisors and managers must know where deficiencies occur in order to better protect the public and their officers. After-action reports must be completed within a short period of time after the pursuit is terminated. The reports should be reviewed by a Pursuit Review Board composed of officers not involved in the pursuit and even, arguably, citizens. Recommendations of the Pursuit Review Board should be used to refine and improve policy and as a basis for administrative discipline where necessary.

XI. Discipline:

-This section should put officers on notice that violation of agency policy on pursuit activities will result in administrative discipline irrespective of whether property damage or personal injury has resulted. Adherence to this provision is mandatory if the agency wishes to protect against an attack premised upon allegations of "custom" or "practice" of unconstitutional acts under *City of Canton v Harris*.

XII. Training:

-This section must require that only officers who have successfully completed agency approved pursuit training be allowed to engage in pursuit. It should also require at least annual updates on the both state statutory and case law affecting police pursuit operations.

XIII. Statutory Reference:

-Either by reference within the language of the policy, or by direct reproduction of the statute itself, every policy must acquaint the agency officers with the controlling state emergency vehicle law. Where the statute is inserted remains the prerogative of the agency, but it is recommended that the beginning of the policy is the preferable location.

-Summarized from Beach, Morris and Smith, *Emergency Vehicle Operations: A Line Officer's Guide* ; Pecos Press, 1993. Used by permission of the Publisher.