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Section 1983

Changing Lanes:
Navigating the Evolving Legal Landscape of Police Pursuits

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I. Preliminary Questions

When a suspect starts to flee, whether the officer observes the flight or is informed of it by radio, officers typically respond quickly and directly. Enforcing the law and the peace and order of society requires officer not to simply permit the suspect to escape, but also to consider the safety of all third persons, and even the fleeing suspect. Legal and practical considerations are intermingled in an officer's decision to pursue, in continuing the pursuit, in how the pursuit is conducted, and when and how to end the pursuit.

Standards for liability for the officer and for the municipality—quick review of Qualified Immunity and *Monell*:

II. Review of Legal Framework

A. Qualified Immunity

To defeat qualified immunity in an ordinary Section 1983 case, the plaintiff must show that the officer violated the plaintiff's (or decedent's) constitutionally protected rights

The inquiry into whether the individual officers are entitled to qualified immunity turns on the **objective reasonableness** of their actions in light of the **legal rules clearly established at the time**. *Pearson v. Callahan*, 555 U.S. 223, 243 (2009).

B. *Monell* Liability

A municipality may not be held vicariously liable for the unconstitutional torts of its employees; unconstitutional conduct must be directly attributable to the municipality through official action. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690 n.55 (1978).

To establish municipal liability, a plaintiff must show:

1. a policy maker;
2. an official policy; and
3. a violation of constitutional rights whose "moving force" is the policy or custom.

Id. at 692-95.

Under 42 U.S.C. § 1983, a city may be held liable only for constitutional violations resulting from an official policy or custom. *Bd. of Cnty. Comm'rs of Bryan Cnty., Okla. v. Brown*, 520 U.S. 397, 403 (1997).

If the elements of the *Monell* test are not followed, the municipal liability inquiry will collapse into a *respondeat superior* analysis. *Brown*, 520 U.S. at 415.

A municipality may not be subject to liability merely for employing a tortfeasor. *City of Canton, Ohio v. Harris*, 489 U.S. 378, 392 (1989).

Municipal liability requires deliberate action attributable to the municipality that is the direct cause of the alleged constitutional violation. *Id.* at 391-92.

III. Considerations—Legal and Practical

- Reasonableness of decision to pursue—seriousness of offense
- Reasonableness of decision to pursue—time to deliberate
- Reasonableness of continuing pursuit—can be an issue but not the standard
- Alternatives to continuing the pursuit—radio ahead for assistance
- Alternatives to continuing pursuit—call off pursuit?
- Caution during the pursuit—can be an issue but not the standard
- Attempts to stop the fleeing suspect—clearly established law (*Mullenix v. Luna*)
- Following department policy—can be an issue but not the standard
- Video of the pursuit—if contradicts plaintiff's version, no need to credit plaintiff's account (*Scott v. Harris*)
- Risk to fleeing suspect—deliberate intent to harm
- Risks to third parties—deliberate intent to harm

IV. Ending the Pursuit

A. Deadly Force

Mullenix v. Luna, 136 S.Ct. 305 (2015)

Facts:

- Sergeant Randy Baker of Tulia, Texas PD followed Israel Leija, Jr., to a drive-in restaurant to serve an arrest warrant, and Leija sped off, entered Interstate 27. Sergeant Baker gave chase and was joined by Texas DPS Trooper Gabriel Rodriguez.

- On I-27, Leija "led the officers on an 18-minute chase at speeds between 85 and 110 miles per hour." *Id*. at 306.

- Leija called the police dispatcher, said he had a gun, and threatened "to shoot at police officers if they did not abandon their pursuit." *Id*.

- Officer Troy Ducheneaux from Canyon PD joined the chase and manned a spike strip placed beneath an overpass at Cemetery Road.

- DPS Trooper Chadrin Mullenix also responded, and he thought of disabling Leija's car by shooting it. Mullenix took a position with his rifle on the overpass above Ducheneaux and the spike strip, and he awaited authorization to fire at the approaching vehicle. *Id*. at 306-07.

- Mullenix saw Leija approaching, with Rodrguez in pursuit, and Mullenix fired six shots.

- None of the shots hit the car's "radiator, hood, or engine block[,]" but four of them "struck [Leija's] upper body[,]" killing him. *Id*. at 307.

Rulings:

The district court denied QI for Mullenix.

Fifth Circuit affirmed.

Supreme Court reversed, reasoning and holding as illustrated by the following bullet points:

- Arrest warrant, suspect immediately fled

- 18-minute chase at speeds reaching 110 miles per hour

- Multiple officers in pursuit from various agencies

- Fleeing suspect stated that he is armed and intended to kill officers

- Spike strip—potential danger to officer

- Shooting at motor of fleeing suspect's car

- Result that fleeing suspect was killed unintentionally

- Law "not beyond debate" that this action was unconstitutional, so QI

Plumhoff v. Rickard, 572 U.S. 765 (2014)

One night in West Memphis, Arkansas, Lieutenant Joseph Frothman stopped driver Donald Rickard because one of Rickard's headlights was out. Upon approaching the vehicle, Lieutenant Frothman noticed "an indentation, 'roughly the size of a head or a basketball' in the windshield of the car." *Id*. at 768. Frothman asked Rickard if he had been drinking, and Rickard said he had not. When Frothman asked Rickard to step out of the car, "Rickard sped away." *Id*. at 769.

Frothman began pursuit and was soon joined by five other officers, including Sergeant Vance Plumhoff. They pursued Richard east on I-40 toward Memphis, Tennessee, and attempted to stop him using a "rolling roadblock," but to no avail. *Id*.

There were multiple collisions between Rickard and various police cars, bringing Rickard to a momentary stop in a parking lot. But Rickard accelerated against one of the police cruisers, at which time Plumhoff fired three shots into Rickard's car. As Rickard sped away again and continued his flight, two other officers fired 12 more shots toward Rickard's car, for a total of 15. "Rickard then lost control of the car and crashed into a building. Rickard and [his passenger] both died from some combination of gunshot wounds and injuires suffered in the crash that ended the chase." *Id*. at 770 (internal citations omitted).

The district court denied qualified immunity, and the Sixth Circuit affirmed.

In reversing, the Supreme Court held that the officers' conduct in collectively firing 15 shots into suspect's vehicle did not amount to excessive force. The court reasoned:

> Under the circumstances at the moment when the shots were fired, all that a reasonable police officer could have concluded was that Rickard was intent on resuming his flight and that, if he was allowed to do so, he would once again pose a deadly threat for others on the road.
>
> * * *
>
> Under the circumstances present in this case, we hold that the Fourth Amendment did not prohibit petitioners from using the deadly force that they employed to terminate the dangerous car chase that Rickard precipitated. In the alternative, we note that petitioners are entitled to qualified immunity for the conduct at issue because they violated no clearly established law.

Id. at 777, 78

Orn v. City of Tacoma, 949 F.3d 1167 (9th Cir. 2020), distinguishing *Mullenix*, *Scott*, and *Plumhoff*:

> Clark has not argued that his use of deadly force was justified on the theory that permitting Orn to escape could have posed a threat to the safety of the general public. Nor is there any basis in the record for making such an argument. A fleeing suspect's escape can pose a threat to the public when police have probable cause to believe that the suspect has committed a violent crime, *see Garner*, 471 U.S. at 11, 105 S.Ct. 1694, but neither of the offenses for which Orn was wanted involved any sort of violence. Such a threat can also exist when the suspect has driven in a manner that puts the lives of pedestrians or other motorists at risk, as by leading officers on a high-speed chase. *See Mullenix v. Luna*, __ U.S. __, 136 S. Ct. 305, 306, 309, 193 L.Ed.2d 255 (2015) (per curiam) (suspect drove at over 100 miles per hour and threatened to shoot police officers unless they abandoned the pursuit); *Plumhoff*, 572 U.S. at 776, 134 S.Ct. 2012 (suspect swerved between congested traffic lanes at speeds exceeding 100 miles per hour); *Scott*, 550 U.S. at 380, 127 S.Ct. 1769 (suspect engaged in "a Hollywood-style car chase of the most frightening sort"). In such cases, officers have an interest in terminating the suspect's flight because the flight itself poses a threat of serious physical harm to others. But to warrant the use of deadly force, a motorist's Prior interactions with police must have demonstrated that "he either was willing to injure an officer that got in the way of escape or was willing to persist in extremely reckless behavior that threatened the lives of all those around." *Latits*, 878 F.3d at 548 (internal quotation marks omitted).

Id. at 1176-77 (emphasis added).

B. Less Lethal Means

Spike strips – *Mullenix v Luna* (unsuccessful)

Maneuver to ram bumper – *Scott v Harris* (successful)

Rolling roadblock – *Plumhoff v. Rickard* (unsuccessful)

C. Unintended Collision

Sitzes v. City of West Memphis, Ark., 606 F.3d 461 (8th Cir. 2010)

A man called 911 and reported that two people claiming to be Wal-Mart security officers robbed him and a friend off $55 in a Wal-Mart parking lot. The

man called 911 again and told the dispatcher that one of the robbers had assaulted him.

Officer James Wright of the West Memphis, Arkansas, Police Department, along with two other officers responded to the call. Officer Wright stated that he believed it to be an emergency, and he drove to the scene at speeds estimated (by witnesses) at 80-90 miles per hour on a residential street with a posted speed limit of 30.

As Officer Wright was passing cars, Brittney Sitzes was ahead of him and began to turn left onto an intersecting road. Turning left took her into the path of Officer Wright, who struck her car as she was turning. Brittney Sitzes was killed and her younger sister Shelby, a passenger, was severely injured. *Id.* at 464-65.

The district court granted summary judgment for all defendants on qualified immunity grounds, following intent-to-harm standard from *Lewis*.

On appeal, plaintiffs argue that the district court applied the wrong standard of culpability in determining whether Officer Wright's actions rise to the conscience-shocking level needed to establish a substantive due process claim. *Id.* at 465. The Eighth Circuit affirmed, holding that the intent-to-harm standard applied to Officer Wright's conduct:

> Because there was no evidence that Officer Wright intended to harm Brittney or Shelby Sitzes, the district court correctly granted summary judgment in favor of the defendants. While accidents such as this are tragic, they do not shock the modern-day conscience. As such, they cannot form the basis of substantive due process liability.

Id. at 470 (citations, internal quotation marks, and footnote omitted).

D. Abandoning the Pursuit

Officers have the option of abandoning the pursuit. The plaintiff in *Scott v. Harris*, 550 U.S. 372 (2007), presented this argument to the Supreme Court, which noted at least two reasons not to cease the pursuit:

> First of all, there would have been no way to convey convincingly to respondent that the chase was off, and that he was free to go. Had respondent looked in his rearview mirror and seen the police cars deactivate their flashing lights and turn around, he would have had no idea whether they were truly letting him get away, or simply devising a new strategy for capture. Perhaps the police knew a shortcut he didn't know, and would reappear down the road to intercept him; or perhaps they were setting up a roadblock in his

> path. Cf. *Brower,* 489 U.S., at 594, 109 S.Ct. 1378. Given such uncertainty, respondent might have been just as likely to respond by continuing to drive recklessly as by slowing down and wiping his brow.[11]
>
> Second, we are loath to lay down a rule requiring the police to allow fleeing suspects to get away whenever they drive so recklessly that they put other people's lives in danger. It is obvious the perverse incentives such a rule would create: Every fleeing motorist would know that escape is within his grasp, if only he accelerates to 90 miles per hour, crosses the double-yellow line a few times, and runs a few red lights. The Constitution assuredly does not impose this invitation to impunity-earned-by-recklessness. Instead, we lay down a more sensible rule: A police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death.

Id. at 385-86.

V. Standard for Liability

A. Deliberate Intent to Harm

County of Sacramento v. Lewis, 523 U.S. 833 (1998)

After responding to a call to break up a fight, Officer Murray Staff "saw a motorcycle approaching at high speed. It was operated by 18-year-old Brian Willard and carried Philip Lewis, respondents' 16-year-old decedent, as a passenger. Neither boy had anything to do with the fight that prompted the call to the police." Id. at 836. Officer Stapp and Deputy James Smith pursued the motorcycle.

> The motorcycle and patrol car reached speeds up to 100 miles an hour, with Smith following at a distance as short as 100 feet; at that speed, his car would have required 650 feet to stop.
>
> The chase ended after the motorcycle tipped over as Willard tried a sharp left turn. By the time Smith slammed on his brakes, Willard was out of the way, but Lewis was not. The patrol car skidded into him at 40 miles an hour, propelling him some 70 feet

> down the road and inflicting massive injuries. Lewis was pronounced dead at the scene.

Id. at 837.

District court granted summary judgment, and the Ninth Circuit reversed, holding that holding that "the appropriate degree of fault to be applied to high-speed police pursuits is deliberate indifference to, or reckless disregard for, a person's right to life and personal security[.]" Id. at 838.

Supreme Court reversed Ninth Circuit and held:

- Fourth Amendment reasonableness standard did not apply because police pursuit is not a "seizure"
- High-speed police chases with no intent to harm suspects physically do not give rise to liability under Fourteenth Amendment; and
- Allegation that pursuit was undertaken with deliberate indifference to passenger's survival was insufficient to state substantive due process claim.

The Court concluded:

> Regardless whether Smith's behavior offended the reasonableness held up by tort law or the balance struck in law enforcement's own codes of sound practice, **it does not shock the conscience**, and petitioners are not called upon to answer for it under § 1983. The judgment below is accordingly reversed.

Id. at 855 (emphasis added).

B. Spectrum of Culpability

Sauers v. Borough of Nesquehoning, 905 F.3d 711 (3rd Cir. 2018)

- Officer Stephen Hamanko observed a driver commit a minor traffic offense, and he began pursuit.
- During pursuit, Officer Hamanko radioed ahead to a neighboring jurisdiction and requested that officers there stop the vehicle.
- Officer Hamanko decided continued pursuit and chased vehicle at speeds over 100 miles per hour.

- Officer Hamanko lost control in a curve, went into a spin, crossed the center line into oncoming traffic, and crashed into different vehicle, which contained Michael Sauers and his wife, Carola R. Sauers.

- The crash seriously injured Mr. Sauers and killed his wife.

- Hamanko was charged and pleaded guilty to vehicular homicide, which required proof of "reckless or grossly negligent driving, and reckless endangerment."

- Sauers brought § 1983 suit based on "state-created danger" theory.

- Hamanko filed a motion to dismiss on grounds that Sauers "did not plausibly allege a state-created danger claim" and on grounds of qualified immunity.

- District court denied, concluding "that the law was clearly established in May 2014 that 'any reasonable officer would have known that pursuing a potential traffic offender in excess of 100 miles-per-hour under the [] circumstances [alleged in the complaint] gives rise to a state-created danger claim.'" (brackets in original)

- Third Circuit focused on that issue, reasoning:

> Homanko has not appealed the District Court's determination that the complaint **adequately describes a constitutional violation**, and for good reason. The pleadings describe a police officer driving at speeds over 100 miles-per-hour on a two-way, undivided road to catch someone who had committed a minor traffic infraction. **There was no emergency at all**, and Homanko **likely did the most that was warranted when he radioed the police in a neighboring jurisdiction to stop the offender.** His **hyper-aggressive decision** to chase the Dodge cannot be justified.

905 F.3d at 716 (emphasis added). To create a bullet-point list for reference purposes:

- constitutional violation

- over 100 miles-per-hour on a two-way, undivided road

- minor traffic infraction

- no emergency at all

- most that was warranted when he radioed the police in a neighboring jurisdiction to stop the offender

- hyper-aggressive decision cannot be justified.

But then the court said:

> Nonetheless, to determine whether his conduct violated a clearly established constitutional right, we must take the time to define that right and explain why the conduct violated it.
>
> * * *
>
> We accordingly define the right at issue here as one not to be injured or killed as a result of a police officer's reckless pursuit of an individual suspected of a summary traffic offense when there is no pending emergency and when the suspect is not actively fleeing the police.

905 F.3d at 716-17. The court held that this right was not clearly established at the time, but now it is. Officer Homanko was entitled to QI.

To summarize, the Third Circuit in *Sauers* created a spectrum for potential liability based on time to deliberate, and it allowed the plaintiff to proceed on a substantive due process claim under the Fourteenth Amendment based on a state-created danger theory. But since the law not clearly established in Third Circuit until this case, the defendant officer was entitled to qualified immunity.

This leaves open the question "What does it take to 'shock the conscience' for purposes of liability?" The answer will be a question of law, but it will depend upon the facts of each case.

VI. Concluding Remarks