Section 1983:
Changing Lanes:
Navigating the Evolving Legal Landscape of Police Pursuits

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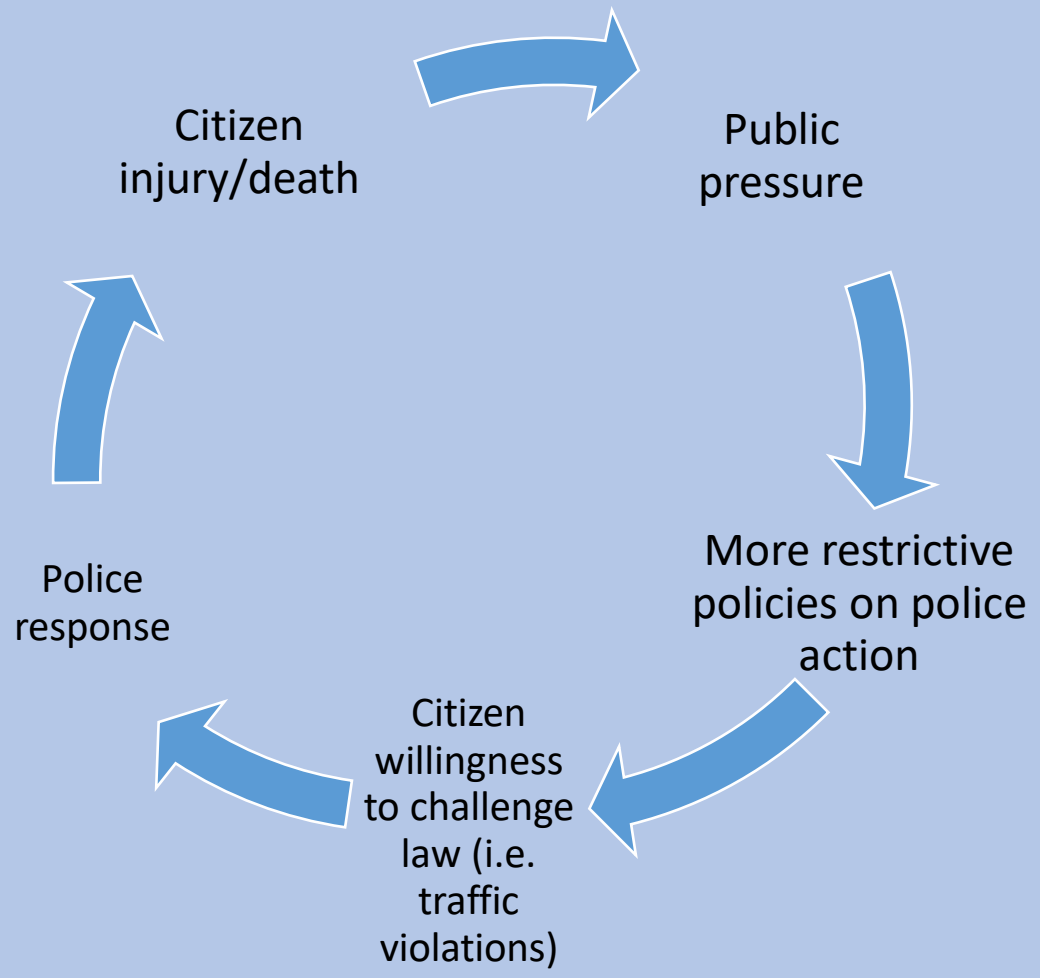
Defending Police Pursuit Lawsuits

- Police pursuits have always been high-risk situations for the pursuing police officers, the general public, and the subject of the pursuit (i.e. the suspect of the crime at issue) alike, but they have become increasingly more scrutinized in recent years.

- <u>Why</u>?
    - Generally increased scrutiny of police officers, particularly post-*Ferguson*
    - Social Media – civilian videos being posted on youtube, facebook, etc.
    - In certain jurisdictions, symbiotic relationship between increased scrutiny and citizen willingness to flaunt the rules (*see* Cycle on next slide)

Cycle of Police / Police Department Reactive Decision-Making



Departmental Policies / Directives re Pursuits

- In response to increased public pressure and accountability, some police departments have tightened policies with respect to the circumstances under which a police pursuit is appropriate
- **Philadelphia Police Department – Directive 9.4**
  - An officer is justified in initiating a vehicular pursuit only when they are:
    - (a) In close proximity to a suspect vehicle and believes a pursuit is necessary to prevent the death / serious bodily injury of another person, or
    - (b) In close proximity to a suspect vehicle and believes BOTH:
      - 1) The pursuit is necessary to effect the arrest or prevent escape, AND
      - 2) The officer has **probable cause** to believe the person being pursued has attempted or committed a forcible felony or has **probable cause** to believe that the person being pursued possesses a deadly weapon, *other than the vehicle itself.*

Philadelphia Police Directive 9.4 (cont.)

- Increased Restrictions on Police Pursuit Justifications

- What does this exclude?

    - Pursuits in furtherance of catching suspects of many crimes, including:
        - Stolen cars;
        - Home burglaries;
        - Thefts of any kind from commercial establishments;
        - Drug deals;
        - Certain muggings (maybe);
        - Reckless driving;
        - The ***crime*** of ***fleeing from police*** *in a car.*

Practical Considerations in Defending Pursuit Lawsuits – Does the policy matter?

- Legally, probably not (but it might)
  - *See Bornstein v. Monmouth Cnty. Sheriff's Office*, 658 F. App'x 663, 668 (3d Cir. 2016) (violation of internal policies not relevant to determination of whether constitutional rights were violated)
  - *See Grazier ex rel White v. City of Phila.*, 328 F.3d 120, 127 (3d Cir. 2003) (upholding jury instruction that violations of police procedure are not akin to constitutional violations)
  - *See Meals v. City of Memphis*, 493 F.3d 720 (6th Cir. 2007) (clear violation of City protocols had no bearing on Sixth Circuit determination that the officer's actions in conducting pursuit did not violate the 14th Amendment)
- Need to be aware of any policy violations, and the fact that plaintiffs may hang their hat on any such violations

Types of Claims – Police Pursuit Cases

- Substantive Due Process – *see, e.g., County of Sacramento v. Lewis*, 523 US 833 (1998)

- Excessive Force – *see, e.g., Scott v. Harris*, 550 U.S. 372, 386 (2007)

- State Law Negligence claims

Excessive Force Claims in Pursuit Context

- *Scott v. Harris,* 550 U.S. 372 (2007)
  - Questions:
    - What constitutes a "seizure" to allow for a colorable excessive force claim in the pursuit context under the 4th Amendment?
    - Under the 4th Amendment, can police take aggressive actions to terminate a high-speed car chase that potentially threatens the lives of innocent bystanders, even if the actions taken place the fleeing motorist at risk of serious injury or death?
  - Facts:
    - Officer clocking traffic speeds clocks plaintiff traveling at 73 mph in 55 mph zone → activates lights and sirens and attempts to stop the plaintiff
    - Plaintiff takes off and speeds away at high speed (objective evidence demonstrated plaintiff exceeded 85 mph during the pursuit) and multiple officers follow in pursuit
    - Plaintiff runs multiple red lights and swerves around a dozen cars, crosses double-yellow dividing line, and causes cars in both directions to pull over to shoulders to avoid being hit

Excessive Force Claims in Pursuit Context

- *Scott v. Harris,* 550 U.S. 372 (2007)
- Facts (cont):
  - Plaintiff runs multiple red lights and swerves around a dozen cars, crosses double-yellow dividing line, and causes cars in both directions to pull over to shoulders to avoid being hit
  - It was a "*Hollywood-style car chase of the most frightening sort*" (Scalia, J., 550 U.S., at 380).
  - After police unsuccessfully attempt to box Plaintiff in in a shopping center parking lot, Defendant P/O Scott takes over as lead vehicle
  - Scott receives permission to conduct "precision intervention technique" but no time
  - Scott then **bumps / rams** the back of Plaintiff's vehicle with his bumper → causes Plaintiff to lose control and veer off the road, before flipping over and crashing
  - Plaintiff is rendered a quadriplegic as a result of the crash

Excessive Force Claims in Pursuit Context

- *Scott v. Harris,* 550 U.S. 372 (2007)
- Legal Issues:
  - Plaintiff brings claim for excessive force under 4th Amendment
  - **1st Question:** Was there a "seizure?"
    - Yes. A "4th Amendment seizure occurs when there is a governmental termination of freedom of movement through means intentionally applied." *Id.* at 381; *see also Brower v. County of Inyo*, 489 U.S. 593 (1989) (alleged use of roadblock to stop driver of a stolen car constituted a "seizure" under the Fourth Amendment)
  - **2nd Question:** Was it a 4th Amendment violation to stop Plaintiff by bumping / ramming the back of his car from behind, in light of the risk Plaintiff posed to the general community by his driving?
    - No. Officer Scott's actions were *reasonable* under the 4th Amendment

Excessive Force Claims in Pursuit Context

- *Scott v. Harris,* 550 U.S. 372 (2007)
- Reasoning for decision:
  - "**Relative culpability**" of the parties → Plaintiff *intentionally* created the danger and placed himself / general public / police in serious danger by the series of incredibly dangerous maneuvers he took
  - Policy reason → "**Perverse incentives**" if they found for Plaintiff → would allow fleeing suspects to avoid police action any time they fled and drove "so recklessly that they put other people's lives in danger."
  - Majority – had "little difficulty in concluding it was reasonable for Scott to take the action that he did." (Scalia, J., 550 U.S., at 384).
  - Concurrence – fact-specific analysis of Plaintiff's actions, emphasizing (i) whether lives of third-parties were at risk; and (ii) whether there was a "safer way, given the time, place, and circumstances, to stop the vehicle" (Ginsburg, J., 550 U.S., at 386).

Excessive Force Claims in Pursuit Context (general)

- Determination between 4th Amendment excessive force case and 14th Amendment Due Process case boils down to whether there exists a "*seizure*"

- A "seizure" for 4th Amendment purposes "occurs when there is a governmental termination of freedom of movement through means intentionally applied." *Scott*, 550 U.S., at 381.

- Accidents that result from a pursuit are not seizures. *See, e.g., Cobb-Leavy v. Borough of Yeadon*, No. 18-1069, 2018 WL 4252385, at *2 (E.D. Pa. Sept. 5, 2018) (no seizure and thus no excessive force claim when suspect being chased by police lost control of car and crashed into building, injuring building occupant). **No detainment = no seizure.**

Excessive Force Claims in Pursuit Context (general)

- Seizures *generally* require physical contact between police vehicle/officer and suspect vehicle/suspect
  - Subject to certain exceptions – i.e. roadblocks in certain circumstances - *Brower v. County of Inyo*, 489 U.S. 593 (1989)

- While due process claims are typically (although not always) brought by uninvolved third-parties harmed from the pursuit, excessive force claims are almost always brought by the suspect who was the subject of the pursuit.
  - Why?
    - 1) Legally – concept of "seizure" → uninvolved third party is not being detained / seized
    - 2) Practically – very hard to convince a jury that a police officer used force against a third-party who was completely uninvolved in and unrelated to the pursuit

Practical Considerations in Defending Pursuit Claims

Police pursuits are often more complicated than they appear at first glance from a number of different perspectives

Lawyers for police officers should be aware of the various issues at play:

- Internal police policies
- Applicable law / lawsuit-specific issues
- Concern for incentivizing members of the public to disobey police
- Public relations

Practical Considerations in Defending Pursuit Claims (individual Defendants)

- **Focus on big picture early on**
  - Who is your plaintiff/decedent?
    - Suspect or uninvolved third-party?
  - What was the conduct at issue that caused the police to pursue?
    - Violent / scary or ministerial / traffic-related?
  - What did the police officer do that could inflame a jury?
    - Speed? Reckless driving? Firearm?
- **Consider Rule 68 Offer of Judgment in certain circumstances**
  - If you expect plaintiff's counsel to work up the case a great deal / conduct a lot of frivolous discovery
  - If you believe it's a lawyer who will over-value the case
  - If you have reason to know they will be unreasonable and that the case will thus try

Practical Considerations in Defending Pursuit Claims (individual Defendants)

- **Know your jurisdiction (judge, juries, laws)**
  - Use leverage where you have it (especially with plaintiff's lawyers who aren't experts in these claims, which many are not)
    - i.e. in Philadelphia, the federal judges are typically better versed on the law than the state court judges, and the federal juries are far more police-friendly than Philadelphia juries
    - Negligence claims are often much easier to prove than intentional civil rights violations, but plaintiffs will often initially proceed in federal court (either affirmatively or post-removal) because they want the opportunity to pursue *both* types of claims
    - If you have a federal judge / federal jury that are likely more police-friendly / more likely to apply the law in your favor, pick up the phone and explain to plaintiff's counsel that they may not want a federal judge deciding not only the civil rights claims, *but also their negligence claim at summary judgment*, because they could end up with nothing. Instead, if they drop the civil rights claims, they will have a state court judge / local jury deciding the claims, which in certain jurisdictions (i.e. Philadelphia), is a far better option for the plaintiffs and eliminates a lot of risk for both sides
      - Especially beneficial in PA because PA Political Subdivision Tort Claims Act caps negligence claims at $500,000, while civil rights claims have no cap

- **Decision to file a Motion to Dismiss or not**
  - Generally, we file motions to dismiss to narrow the issues and/or streamline discovery
  - In these cases, consider <u>refraining</u> from filing a motion to dismiss
  - Do not educate other side unless they know what they're doing / unless necessary

Practical Considerations in Defending Pursuit Claims (individual Defendants)

- **Motion practice – selectively emphasize factors from different jurisdictions**
  - Who is the victim/decedent? Suspect or uninvolved third-party with clean hands?
  - If you are in one of the jurisdictions with different categories of culpability, point to facts that will keep you in the *Lewis* "intent-to-harm" category
    - **Speed** at which suspect was travelling
    - Length of the pursuit
    - Nature of any radio call (i.e. was it a casual call to another jurisdiction telling them to keep an eye out, or was it a high-stress, hurried call) - *Sauers v. Borough of Nesquehoning*, 905 F.3d 711 (3d Cir. 2018)
    - Were lights and sirens activated
    - Was officer pursuing an "important government objective" (i.e. attempting to prevent / stop a serious crime as opposed to a minor traffic violation) - *Browder v. Casaus*, 675 F. App'x 845 (10th Cir. Jan. 11, 2017)
  - In *Lewis* jurisdictions / situations, argue that plaintiff has burden to create a fact issue and that plaintiff has adduced no evidence of "intent to harm"
    - Because it's very hard for plaintiff to create an issue of such intent when the only person who knows the intent – the pursuing officer – explains they had no such intent
  - In excessive force cases → argue (1) no seizure (i.e. accident), and (2) analogize to *Scott v. Harris*

Practical Considerations in Defending Pursuit Claims (individual Defendants)

- Motions in Limine
  - Police policies/directives are often far more restrictive than constitutional standards on this topic, **so file MIL to keep policy violations out**
    - Argue that allowing evidence of a policy violation to come in will confuse the jury as to the ultimate issue and make it very difficult for them to distinguish between the constitutional standard at issue and the police policy issue
    - Any determination that a police officer violated policy simply amounts to an inadmissible lay opinion by whatever police supervisor made that determination
    - In the alternative, if the Court lets this evidence in, request a jury charge instructing the jury that a policy violation has no bearing on a constitutional violation
  - Additional motions in limine based on claims remaining after summary judgment

Practical Considerations in Defending Pursuit Claims (*Monell* claims)

- Claims against the City typically do not add exposure to the case, but they can allow for the admission of evidence that will either distract the jury from the seminal issue or color the jury's opinion of the police department and/or officer who is being sued
- Types of evidence to emphasize (depending on contours of the *Monell* claim):
  - The municipality / county / township policies and/or directives pertaining to police pursuits
  - Any sort of automobile / pursuit training, whether to officers in general or the Defendant-officer
  - The particular officer's history (if it's good)
    - Unlike other types of citizen's complaints (i.e. use of force, verbal abuse, planting of evidence), it is rare that an officer will have been accused by citizens of numerous driving / pursuit-related offenses
  - The number of citizen's complaints filed within the past ____ years with respect to police pursuits
    - This can be very helpful b/c unlike other types of actions, if there's no accident, then it is unlikely that an internal affairs complaint will have been filed.
    - Uninvolved third parties will have no reason to complain if they are not struck.
    - And unlike typical arrests in which suspects often say they were beaten up / cursed at, etc., a suspect who is apprehended by way of high speed police pursuit is also unlikely to raise any issue about being pursued at a high speed when they themselves were traveling at a high speed.

Practical Considerations in Defending Pursuit Claims (*Monell* claims)

- Types of evidence to emphasize (cont.)
  - Total # of sustained citizen's complaints regarding improper police pursuits *as compared* to the total # of car stops made by the department
    - If this information is ascertainable, this ratio will likely be a very good number to emphasize
  - Training (both at academy and post-academy) of police officers with respect to driving police vehicles and engaging in police pursuits

Practical Considerations in Defending Pursuit Claims

- **Experts**
  - Numerous types of experts can be helpful in these cases, including:

  - **Accident Reconstructionists**
    - Larger police departments may have one of their police officers in their accident unit (i.e. in Philadelphia, the Accident Investigation Division) review any pursuit-related accident and conduct their own analysis / reconstruction, but it is worth at least contacting a reconstructionist who can analyze the crash data in addition to video, testimony, etc.
    - Consider asking them to make an animation, particularly if collision is not depicted on video

  - **Human Factors Experts**
    - A human factors expert can be very useful in essentially explaining issues related to perception and even decision-making (i.e. if an officer testifies they did not see the other vehicle, a human factors expert can explain why / why not that testimony makes sense)

  - **Police practices experts** (*Monell*, or responsive to anyone plaintiffs retain)
    - These experts can analyze the *Monell* data and explain why any "bad" facts under *Monell* are not unusual / do not exhibit indifference to the rights of citizens. And outside the *Monell* context, although the admissibility is sometimes dubious, they can explain why the actions at issue were / were not in conformance with generally accepted practices and protocols