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Law Enforcement Action Forum NEWSLETTER



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U.S. Supreme Court Rules that Officers Can Use Force To Stop a Fleeing Vehicle. What Does It Mean for Michigan Law Enforcement?

By Gene King, LEAF Coordinator

This edition of the LEAF Newsletter will look at the recent United States Supreme Court ruling -- *Scott v Harris*, 127 S.Ct. 1769 (2007) -- that granted police officers qualified immunity for their use of force during a police pursuit. The Newsletter will also look at how this new case affects Michigan law and what Law Enforcement Executives need to do to make sure that their officers understand the consequences of the decisions they make during a pursuit.

The Pursuit

A deputy clocked Harris speeding, and when the deputy turned on the overhead lights of the patrol vehicle, Harris sped away. The deputy radioed that he was in pursuit at speeds exceeding 85 mph. Deputy Scott heard the call on the radio and joined in along with other officers. After Harris pulled into a parking lot, several police vehicles boxed him in. Harris hit Deputy Scott's patrol vehicle, doing only minor damage, and fled. The entire pursuit went on for six minutes and covered ten miles before Deputy Scott asked his supervisor if he could take Harris out. The supervisor said to "take him out," and Deputy Scott pushed Harris's vehicle with his patrol vehicle causing it to leave the roadway, overturn, and crash. The crash injured Harris, leaving him a quadriplegic.

The Supreme Court Case

In *Scott v Harris*, 127 S.Ct. 1769 (2007), the United States Supreme Court ruled that a law enforcement officer's conduct is "objectively reasonable" under the Fourth Amendment (Qualified Immunity) when an officer makes an on-the-spot decision to terminate a high-speed pursuit by striking the fleeing suspect's vehicle. The suspect's actions must indicate that he would continue to drive in a reckless and dangerous manner that puts the lives of innocent persons at serious risk of death. The Court's ruling appears to give officers clear guidance when it states that the use of force in "a dangerous high-speed car chase" is justified and acceptable to protect innocent lives.

We think it appropriate in this process to take into account not only the number of lives at risk, but also their relative culpability. It was the respondent, after all, who intentionally placed himself and the public in danger by unlawfully engaging in the

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LAW ENFORCEMENT ACTION FORUM

reckless, high-speed flight that ultimately produced the choice between two evils that Scott confronted. Multiple police cars, with blue lights flashing and sirens blaring had been chasing respondent for nearly 10 miles, but he ignored their warning to stop. By contrast, those who might have been harmed had Scott not taken the action he did were entirely innocent. We have little difficulty in concluding it was reasonable to take the action he did.

The Court's decision in this case departs from previous rulings involving use of force and the Fourth Amendment. Before *Scott v. Harris*, the Court had evaluated the use of force on a case-by-case basis by considering the initial offense as an indicator for the need to use force as defined in *Tennessee v. Garner* and the "reasonableness under the circumstances" as found in *Graham v. Connor*. Refer to *Garner* at 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985) and *Graham* at 490 U.S. 386, 394, 109 S.Ct. 1865, 1871, 104 L.Ed.2d 443 (1989).

In *Scott*, the Court held that in order to determine if Deputy Scott's choice of using a vehicle contact tactic was reasonable, the court had to balance the threat of using the technique against the threat Harris posed to the public. The Court ruled that it was reasonable for the officer to put the public's safety over that of a fleeing suspect who was an "actual and imminent threat" by choosing not to surrender and stop the risk he posed.

In deciding qualified immunity motions, the Court usually must view the facts in a way most favorable to the plaintiff's version of the incident. In this case, however, tape from in-car video influenced the Court's view of the facts, and it found that the plaintiff's version was not credible. The Court said, "When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion of summary judgment." (No genuine issue of material facts, *Anderson v Liberty Lobby Inc.* 477 U.S. 242, 247-248 (1986))

Scott Ruling Changes Nothing in Michigan

We asked Audrey Forbush, LEAF's Legal Advisor -- to comment on the Scott ruling in relation to Michigan's position on Governmental Immunity. According to her, all governmental agencies exercising or discharging a governmental function have governmental immunity, with some exceptions (MCL 691.1407). In addition, MCL 691.1407 (2) grants individual officers immunity if their actions meet three conditions:

- (a) The ... employee ... is acting or reasonably believes he or she is acting within the scope of his or her authority.
- (b) The governmental agency is engaged in the exercise or discharge of a governmental function.
- (c) The ... employee's ... conduct does not amount to gross negligence that is the proximate cause of the injury or damage.

MCL 691.1407(7) (a) defines "Gross negligence to mean conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1405 also echoes MCL 691.1407(7) (a): "Governmental agencies shall be liable for bodily injury and property damage resulting from the negligent operation by any officer, agent, or employee of the governmental agency, of a motor vehicle of which the governmental agency is owner." Michigan's Supreme Court has further ruled that a proximate cause analysis is not sufficient to define "resulting from." Instead, it requires, **in the context of a police pursuit that involves a fleeing vehicle, that the government vehicle "hit the fleeing car or otherwise physically force[d] it off the road or into another vehicle or object."**

These opinions define the essential difference between the *Scott* decision and Michigan law. Under Michigan law, governmental immunity applies as long as the patrol vehicle does not push, bang, ram, PIT, or otherwise touch the fleeing vehicle, or cause any other object or vehicle to hit it. For example,

LAW ENFORCEMENT ACTION FORUM

the Michigan Supreme Court has implied that the motor vehicle exception *does apply* if, for example, “a police vehicle rammed a car off the road and into an innocent pedestrian.” This example demonstrates that a government vehicle can cause an injury by placing some object in motion that then injures the plaintiff.

Forbush cautions that even if officers can show they were not grossly negligent and the court grants them immunity, their actions could still bring liability to the municipality through the negligent operation of motor vehicle exception. She went on to say that, “*negligence is measured by what an ordinary reasonable person, under similar circumstances, would do.*”

Negligence can arise through allegations that officers ignored accepted police tactics. To prove negligence, plaintiffs may look to the department’s policy and rules for guidance as to when officers may use a specific tactic. They may try to prove failure to supervise the officer when the officer exercised his discretion in initiating the pursuit, or they may evaluate the timing of the use of the level of force used to conclude it. In these circumstances, the plaintiff is likely to add alleged violation of the Civil Rights laws at the federal level.

Robinson v. Detroit

Michigan’s leading case on police vehicle pursuits is *Robinson v. Detroit*, 462 Mich 439; 613 NW2d 307 (2000). The *Robinson* decision established three major points. First, the Michigan Supreme Court ruled that although the police have a duty to innocent car passengers, they do not owe a duty to “wrongdoers.” Those wrongdoers who allege negligence by police must prove their innocence before any duty attaches to a police officer. Second, the Court made a significant distinction between “a” proximate cause and “the” proximate cause in these motor vehicle cases. The ruling determined that individual police officers are immune from liability when their actions were not “the proximate cause” of the plaintiffs’ injuries. Third, the Court narrowly construed the motor vehicle exception to governmental immunity. The Court agreed that an officer’s physical handling of a motor vehicle during a pursuit could constitute negligent operation of a motor vehicle as defined in the motor vehicle exception to governmental immunity.

However, the Court also ruled that the facts in the *Robinson* case proved that the plaintiff’s injuries did not, “as a matter of law,” result from the operation of the police vehicle. The police vehicle did not hit the fleeing car, or physically cause another vehicle or object to hit the vehicle under pursuit or physically force the vehicle off the road or into another vehicle or object. Therefore, there was no exception to governmental immunity. Additionally, *Robinson* established that an officer’s decision to pursue does not constitute the negligent operation of a motor vehicle as it had prior to this case.

How to Protect Governmental Immunity

Forbush asserts that the need for the safe and reasonable operation of patrol vehicles has not changed. Because a police pursuit presents varying degrees of risk to the officers involved and to the traveling public, the emphasis on decision-making is still critical. Officers must be able to articulate the reasons for the pursuit and for their choice of tactics. An audio/video recording that captures the entire pursuit should reveal an officer’s decision-making process and will likely assist in the defense of a claim. The United States Supreme Court had a recording in *Scott*, and it influenced its decision.

Clear Message – Get It On Video

What better evidence to present to the Court than an audio/video recording of the actual pursuit. The Court gets to hear the escalating tension. Its members can see the recklessness of the pursued, hear the frantic screams of the sirens, and see the constant penetration of the overhead lights as they signal a warning to those that might venture into the path of the hurtling danger.

LAW ENFORCEMENT ACTION FORUM

The radio is raging, both giving and demanding information about what is happening and where the path of carnage is heading. The recording allows the Court to see first-hand the need for instantaneous decision-making that leads to the action that officers take in high-risk situations. They can get a feel for how hard it is for officers to maintain control. Sound dramatic? It is.

The Michigan Municipal League's Liability and Property Pool supports departments placing recording equipment in interrogation rooms, in patrol vehicles, and in prisoner handling, public, and jail areas for precisely the reasons the Court found the pursuit video compelling. The video documents and verifies the actions that officers take. In most circumstances, the video frees officers from accusations of wrongdoing or inappropriate behavior. It is also fair to say that because officers know that video cameras are recording their actions, they are more aware of the need to do a good job.

Define Department Policy And Train To It

The Supreme Court ruling in *Scott* gives officers more latitude for using force to stop a dangerous pursuit at the federal level. However, it also increases the need for an officer to explain why a suspect's actions led to the conclusion that the pursuit was an "actual and imminent threat" to others on or near the road. Therefore, an officer will have to prove that the threat was not speculative but based on the officer's observation of the suspect's behavior and conduct. In addition, since the threat must be immediate and impending, the officer will have to demonstrate his knowledge of the environment along the path of the pursuit, and have the ability to relate this knowledge and his observations to the potential for the pursuit to result in death or serious injury.

The Michigan Supreme Court in *Robinson* also allows police officers to do their duty but without having to take responsibility for the actions of the fleeing offender. *Officers and governmental entities maintain their State governmental immunity as long as they do not physically touch the fleeing car, physically cause a different vehicle, or object to hit the fleeing car, or physically force the fleeing car off the road or into another vehicle or object.* Officers should only consider intentionally striking the pursued vehicle when options are limited and the immediate need to end the pursuit outweighs the risks. Other options such as using a spike device are preferable and allow officers to maintain governmental immunity when stopping a pursuit.

Despite the ruling in *Scott*, Michigan's law has not changed from *Robinson*. Officers and governmental entities can still be subject to liability. Police Executives must decide the course of action for handling pursuits. They then must instill in their officers the department's philosophy when it comes to making decisions during vehicle operations. Officers must understand their departments' policy and their responsibilities when operating a motor vehicle, especially in view of the risks associated with making the wrong decision.

As always, officer training and supervision are critical. Officers must be able to recognize when they should not initiate a pursuit and when they should stop a pursuit already in progress. This can only occur through training and discussion between management and department members. Executive management must hold supervisors accountable for the actions of their officers. Supervisors must act when an officer acts inappropriately or ignores the policy and philosophy of the department. Discipline and/or retraining may become necessary if officers violate the department's policy concerning pursuits.

The LEAF Committee of the Michigan Municipal League Liability and Property Pool and Workers' Compensation Fund continues to develop policies and resource documents designed to help Law Enforcement Executives manage their risk exposure. Do not hesitate to contact the Michigan Municipal League's Risk Management Services at 734-669-6344 or MML Loss Control Services at 800-482-2726, for your risk reduction needs and suggestions.

Action Points

LAW ENFORCEMENT ACTION FORUM

To reduce the risk exposures that are inherent in the operation of a police motor vehicle, the LEAF Committee and their Legal Advisor recommends the following:

- ◆ Adopt Vehicle Operations policies like those found in the Manual for Law Enforcement Risk Reduction (Chapter 2).
- ◆ Provide officers with training on the department's vehicle operations policy at least once a year.
- ◆ Include the department's philosophy and expectations when training officers about using the discretion that the Vehicle Operations policy allows.
- ◆ Train new employees at hire and before assigning them to operate a motor vehicle.
- ◆ Install in-car audio and video recording equipment and require its use. (LEAF Manual Chapter 21)
- ◆ When possible use tire deflation devices to stop pursued vehicles.
- ◆ Only allow the use of techniques or devices (i.e. PIT Maneuver, deflation device, roadblocks) by officers who are trained and authorized.
- ◆ Provide practical, psychomotor skills driver's training at least once every three years.
- ◆ Train supervisors in their responsibilities and duty to implement department policy, monitor activity, and evaluate the officer performance.
- ◆ Establish an accident review panel to review the reports of accidents and pursuits to determine if officers followed policy, if training is necessary, and if the panel should submit recommendations for policy changes to executive management.
- ◆ Keep records of all training, reviews, and analyses that you perform.

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For the LEAF Manual, go to www.mml.org and put your cursor on Insurance, on the pop up menu pick LEAF. The screen will switch to the Member page. Click on the arrow at Member sign in and follow the prompts. On the Table of Contents page, look to the right for the bar marked "What's New." It will link you to the updated policies. If you have a problem getting on the site, contact Gene King, MML LEAF Coordinator at gking@meadowbrook.com.

While compliance to the loss prevention techniques suggested herein may reduce the likelihood of a claim, it will not eliminate all exposure to such claims. Further, as always, our reader's are encouraged to consult with their attorneys for specific legal advice.