

Chapter 2

Pursuit Driving, the Law, and Liability

Lawsuits against the police for improper pursuit actions are a way for injured parties to seek relief, accountability, and a change in the ways police respond to fleeing suspects. While suing the police may censure or punish the officer and/or agency for wrongdoing, civil remedies are rarely a sufficient form of accountability as they do not always address flawed management, policies, or patterns of abuse, nor do they hold an individual officer financially responsible.¹ Nonetheless, a few important cases have shaped pursuit policy in the United States, some that have also been influenced by empirical research on pursuits. These cases emphasize the importance of generating more empirical knowledge and research about pursuits to better calculate their characteristics, costs, and benefits.

Historically, lawsuits involving pursuits have been brought in both federal and state courts. The cases in federal court have most often been filed under Title 42 U.S. Code §1983 that was enacted as part of the Civil Rights Act of 1871. Interestingly, the title is also known as the “Ku Klux Klan Act” because one of its primary purposes was to provide a civil remedy against the abuses that Klan members were committing in the southern states. The Act was intended to provide a private remedy for such violations of federal law and has subsequently been interpreted to create a class of tort liability. The Act creates no substantive rights but is a vehicle for suing a defendant protected by state law and is limited to those actors who exert authority derived from the government and who act as a representative of that government. The Act mandates that:

Any person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any

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¹Often cities pay settlements to plaintiffs but do not admit liability for the misconduct and do not accept legal responsibility for the harm. In addition, settlements leave unresolved possible changes in policy and can impact officer morale.

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

After an initial flurry of activity involving slavery-related issues, the Act lay dormant until 1961 when the Supreme Court decided *Monroe v. Pape* (365 U.S. 167 (1961)). In *Monroe*, the Supreme Court held that a Chicago police officer was acting “under color of state law” even though his actions, which involved a search and seizure, violated state law. This was the first case in which the Supreme Court held a governmental agency liable when an official acted outside the scope of his authority as granted by state law. Plaintiffs had to overcome good faith immunity² until the Court decided *Monell v. Department of Social Services of New York* (436 U.S. 658 (1978)). After the decision in *Monroe v. Pape* and *Monell*, an extensive body of law developed to govern these claims, especially involving the Fourteenth and Fourth Amendments.

A major surge in litigation followed these decisions as many attorneys figured the Court had opened the floodgates to “deep pockets” and provided as well for the payment of all court costs³ in these cases. For example, often an injury to a suspect or an innocent third party as the result of a pursuit was followed by a lawsuit alleging a violation of a federally secured right that the plaintiff sought to rectify under a Title 42 Section 1983 claim. The more serious the injury and damages, the more likely a suit would be filed. Countless civil rights suits were filed, with varying degrees of plaintiff creativity. However, there were few fact patterns that would predict a successful outcome for a plaintiff. Courts responded by applying different standards, interpreting agreed-upon standards differently, or handing down widely varied or inconsistent rulings on similar factual patterns.

By the early 2000s, the courts were contradicting each other, and practicing lawyers as well as legal scholars were mystified by the opinions. One of the few predictable rulings for a plaintiff in a civil rights suit involving pursuits relates to when a police officer used actions that reflected “means intentionally applied” (*Brower v. Inyo County* 489 U.S. 593 (1989)) to stop a fleeing suspect, such as ramming, a PIT maneuver,⁴ or

²Good faith immunity generally protects government employees who perform discretionary acts from liability for civil damages, as long as their conduct does not violate an established statutory or constitutional right which is reasonably well known. A discretionary act is one in which there is no hard and fast rule as to what course of conduct should be taken. Discretion would be eliminated if there were a rule as to the course of conduct to follow. In addition to the qualified immunity from federal claims, states have statutes that grant a different type of qualified immunity to certain government employees from state law claims. These statutes protect employees who perform acts involving the use of discretion and judgment from personal liability in some states, except for those acts involving the operation, use, or maintenance of a motor vehicle, or the use of excessive force.

³42 U.S.C. §1983.

⁴A Pursuit Immobilization Technique (PIT) is a maneuver that begins when a pursuing vehicle pulls alongside a fleeing vehicle so that either front quarter panel of the pursuing vehicle is aligned with the target vehicle’s rear quarter panel. The pursuing officer is required to make momentary contact with the target vehicle’s rear quarter panel, accelerating slightly and steering into it very briefly. The effect of the properly performed maneuver is that the rear wheels of the target vehicle lose traction, causing it to skid to a stop so that the pursuing officer or a backup vehicle is able to then block the target’s escape and apprehend the suspect. Unfortunately, the process does not always work as planned. The PIT is designed to work safely at speeds slower than 40 MPH and in safe locations.

a stationary roadblock. In these situations, the federal courts would evaluate the officer's action as a "seizure" for purposes of a Fourth Amendment claim. The courts typically relied on the precedents established in *Tennessee v. Garner* (471 U.S. 1 (1985)) and *Graham v. Connor* (490 U.S.386, 388 (1989)) to analyze the damages of a pursuit.

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

However, in the late 1990s, the US Supreme Court provided a somewhat puzzling analysis of the liability parameters of police pursuits under federal civil rights law using the opinions in *Brower v. County of Inyo* (489 U.S. 593 (1989)) and created a new standard in *County of Sacramento v. Lewis* (523 U.S. 833 (1998)) for Fourteenth Amendment claims. The *County of Sacramento v. Lewis* case began on May 22, 1990, at about 8:30 p.m., when Sacramento County Deputies James Everett Smith and Murray Stapp responded to a call to break up a fight. As the officers were completing their call and were about to leave, Deputy Stapp saw a motorcycle approaching at a high rate of speed. The motorcycle was operated by 18-year-old Brian Willard, who had a passenger—16-year-old Philip Lewis. Deputy Stapp turned on his overhead lights, yelled to the boys to stop, and pulled his patrol car closer to Deputy Smith's, attempting to block in the motorcycle. Instead of pulling over, Willard ignored the officer's commands and maneuvered his way between the two cars, taking off at a high rate of speed. Deputy Smith then put on his emergency overhead lights and sirens, and began a high-speed pursuit of the motorcycle. The chase lasted approximately 75 s and covered 1.3 miles of a residential neighborhood, reaching speeds of 100 mph in 30 mph zones. The motorcycle drove in and out of oncoming traffic, causing a few vehicles to swerve off the road. The chase ended when the motorcycle reached the top of a crest, tried to make a hard left turn, tipped over, skidded, and stopped. When Deputy Smith drove over the hill, he saw the motorcycle and slammed on his brakes. However, he was driving too close and too fast and was unable to stop in time, running over Lewis and killing him.

Lewis' parents filed suit against Sacramento County, the Sacramento County Sheriff's Department, and Deputy Smith under 42 U.S.C. §1983, alleging a deprivation of their son's Fourteenth Amendment substantive due process right to life. The specific question before the Court was: Does a police officer violate substantive due process by causing death through deliberate or reckless indifference to life in a high-speed chase aimed at apprehending a suspected offender? The unanimous Court decision changed the standard to one that required a plaintiff to show that the behavior of a police officer "shocked the conscience" and held: "High-speed chases with no intent to harm suspects physically or to worsen their legal plight do not give rise to liability under the Fourteenth Amendment" (854). The opinion continued:

Smith was faced with a course of lawless behavior for which the police were not to blame. They had done nothing to cause Willard's high-speed driving in the first place, nothing to excuse his flouting of the commonly understood law enforcement authority to control traffic, and nothing (beyond a refusal to call off the chase) to encourage him to race through

traffic at breakneck speed forcing other drivers out of their travel lanes. Willard's outrageous behavior was practically instantaneous, and so was Smith's instinctive response. While prudence would have repressed the reaction, the officer's instinct was to do his job as a law enforcement officer, not to induce Willard's lawlessness, or to terrorize, cause harm, or kill. Prudence, that is, was subject to countervailing enforcement considerations, and while Smith exaggerated their demands, there is no reason to believe that they were tainted by an improper or malicious motive on his part. 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 . . . (at 834–835)

The *Lewis* decision essentially closed the door on successful allegations of constitutional deprivations of actions resulting from a police pursuit under the Fourteenth Amendment. Suits filed since are rare and settle outside of court. In order to gain any advantage for a defendant, the facts must be so outrageous that a jury might believe that an officer wanted to cause harm to the person they were chasing unrelated to the legitimate object of arrest or worsen their legal plight. Since *Lewis*, almost no realistic claims alleging a Fourteenth Amendment violation concerning a pursuit has been successful, leaving only a Fourth Amendment claim as a realistic remedy for a plaintiff looking to allege an unreasonable seizure.

Fourth Amendment

The use of the Fourth Amendment's protection against illegal seizures was the last federal remedy available for those who questioned the actions of police involved in pursuits. Relying on *Tennessee v. Garner* and *Graham v. Connor*, the courts determined the reasonableness of the officer's actions. The Fourth Amendment protects:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Interestingly, the federal courts left a better protection for the fleeing suspect who was “seized” illegally than the innocent bystander who was in the wrong place at the wrong time, even to be run over by a police car chasing a fleeing suspect.

The *Graham* decision, which built on *Garner*, required an objective inquiry into the officer's behavior that must consider the officer's perspective at the time, including the often “tense, uncertain, and rapidly evolving” circumstances of the event (*Graham v. Connor*, 490 U.S. 386, 396–397 (1989)). The Court determined that reasonable behavior was to be determined by balancing the intrusion on the individual's interests with the government's competing interests, by considering:

1. “the severity of the crime at issue,
2. whether the suspect poses an immediate threat to the safety of the officers or others,

3. whether he is actively resisting arrest ... or
4. [whether he is] attempting to evade arrest by flight.” (at 396)

The Court’s language in *Brower* (that “a seizure occurs when governmental termination of a person’s movement is effected through means intentionally applied”), taken in conjunction with the holding in *Garner* that deadly force may not be used to seize a fleeing suspect unless the suspect poses a significant threat of death or serious physical injury to the officer or others, led many observers to conclude that the police use of such maneuvers as PIT and ramming against traffic or other non-violent offenders would represent an unreasonable seizure, supporting Section 1983 liability. This belief was based on the balance between the level of offense committed by the suspect and the amount of government intrusion or force, which was a hallmark of the *Garner* decision. The case of *Scott v. Harris* (550 U.S. 372 (2007)) abruptly changed this belief.

Scott v. Harris, 550 U.S. 372 (2007)

On March 29, 2001, at approximately 10:40 p.m., Deputy Clinton Reynolds of the Coweta County Sheriff’s Department (CCSD) in Georgia was stationed on Highway 34 when he clocked a vehicle driven by Victor Harris traveling 73 mph in a 55 mph zone. Reynolds decided to pursue Harris for speeding. As Harris sped away from the officer, he passed other motorists by crossing over double-yellow traffic control lines and also raced through a red traffic light. Reynolds radioed dispatch and reported that he was chasing a fleeing suspect, providing the license plate number of Harris’ vehicle. Deputy Reynolds received the name and address of the owner of the car but did not broadcast any information about the underlying offense—speeding—for which he was chasing Harris. Based on the speeding offense and the fact that the car was known to be lawfully registered to Harris, Reynolds’ initiation of the pursuit violated the sheriff department’s vehicular pursuit policy. That policy did not authorize officers to engage in pursuits for offenses such as speeding if they had information about a fleeing suspect that would allow apprehension of the suspect later.

At the time of Reynolds’ call to dispatch, Deputy Timothy Scott, also from Coweta County Sheriff’s Department, was parked by a church about a mile away. Along with Reynolds, his assignment that evening was to assist undercover officers who were making a controlled buy of illegal drugs. Assuming the pursuit was in connection with the undercover operation, Deputy Scott joined the pursuit to assist Reynolds. Scott estimated that in order to join the pursuit he reached speeds in excess of 100 mph on the narrow two-lane road. From the evidence available in the record, it also appeared that he forced numerous motorists from the roadway in his efforts to join the pursuit of Harris.

The pursuit began in Coweta County and ultimately ended in Peachtree City in Fayette County near Harris’ home. At one point, when the chase entered Peachtree City, Harris slowed his vehicle and entered an empty drugstore parking lot. Deputy

Scott attempted to stop Harris, who despite bumping into Scott's patrol car remained undeterred and sped off again onto another road, Highway 74, where he again drove at high speeds, crossing double-yellow lines and running a red light.

As the pursuit left the parking lot, Scott requested to be the primary pursuit unit, stating over the radio, "Let me have him ... my car's already tore up." Deputy Scott took over as the lead vehicle and then requested permission from his supervisor, Sgt. Fenninger, to use a PIT maneuver on Harris. The Coweta County Sheriff's Department had never trained its officers in applying the PIT maneuver. Sgt. Fenninger responded to Scott's request by stating over the radio, "Go ahead and take him out. Take him out." At the time of his approval to Scott, Fenninger was aware that there were no other vehicles or pedestrians in the area and that Harris posed no immediate threat to the officers or to others.

During the pursuit, Scott became concerned that both his and Harris' vehicles were moving too quickly to execute a PIT maneuver safely and instead picked a moment when no motorists or pedestrians appeared to be in the immediate area. He then rammed Harris's vehicle while they were traveling at approximately 90 mph. The ramming resulted in Harris losing control of his vehicle, rolling it down an embankment, and crashing. Because of the crash, Harris was rendered quadriplegic. Immediately after Deputy Scott rammed Harris' vehicle, Deputy Reynolds notified dispatch that there was a bad crash.

Harris filed suit under 42 U.S.C. §1983, alleging the use of excessive force resulting in an unreasonable seizure under the Fourth Amendment. The District Court denied Scott's summary judgment motion, which was based on a claim of qualified immunity. The Eleventh Circuit affirmed on appeal, concluding that Scott's actions could constitute "deadly force" and that the use of such force violates Harris' constitutional right to be free from excessive force during a seizure. The United States Supreme Court granted a writ of certiorari on the second prong of the immunity question, whether the law gave fair warning to Scott that his conduct was unlawful, and heard oral arguments. It published its written decision on April 30, 2007, reversing the denial of qualified immunity by the Eleventh Circuit and granting summary judgment to Deputy Scott.

A unique feature of the Supreme Court opinion was the reliance on the videotape that was taken from Scott's patrol car. All but one of the justices agreed that Harris drove in a dangerous and reckless manner and presented a real threat to any driver on the roadway. The majority opinion, in an exceptional departure from the Court's standard of review of District Court factual determinations, viewed Harris' version of the events underlying the pursuit as being "so utterly discredited by the record (videotape) that no reasonable jury could have believed him" (at 1775, 1776). The high court's *de novo* factual review is even more interesting in that the Eleventh Circuit Court of Appeals reviewed the same videotape as the District Court and reached the same opinion as the lower court: that Harris' depiction of the events was credible and warranted consideration by a jury, not disposition by summary judgment. The Supreme Court stated that a review of the videotape might cause an observer versed in police practices and procedures to question the actions of the police officers who, even in the words of the majority, were "forced to engage in the same hazardous maneuvers just to keep up" (at 1775). Nonetheless, the Court

decided that the videotape provided incontrovertible evidence that Harris presented a threat to others on the road and that the only question remaining for resolution was whether Scott's use of force to eliminate the threat was "objectively reasonable."

The underlying act of speeding played little, if any, role in the majority's assessment of the appropriateness of the level of force used by Scott. Instead, the court focused on the threat it believed Harris posed to the public. The Court rejected Harris' request that it analyze Scott's actions as an application of deadly force set out in *Tennessee v. Garner* and instead chastised both Harris and the Court of Appeals for seeking to apply *Garner* as an "on/off switch that triggers rigid preconditions whenever an officer's actions constitute 'deadly force'" (at 1777). The Court's opinion noted that *Garner* did not create a rule, but "was simply an application of the Fourth Amendment's 'reasonableness' test, to the use of a particular type of force in a particular situation" (1777, citations omitted). The majority opinion drew no distinction between excessive use of force and the use of deadly force in its analysis of Deputy Scott's behavior. The Court's opinion rested not upon whether the force used was deadly, only whether it was reasonable. The Court also gave little attention to the fact that Harris' underlying offense was speeding and instead voiced its greatest concern over the view that the act of fleeing and the nature of his driving were a threat to everyone, and that those who flee from the police recklessly implicitly authorize officers to seize them with the force necessary. In sharing the basis for its opinion, the Court offered the following contemplation:

So how does a court go about weighing the perhaps lesser probability of injuring or killing numerous bystanders against the perhaps larger probability of injuring or killing a single person? 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 respondent, after all, who intentionally placed himself and the public in danger by unlawfully engaging in the 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 for Scott to take the action that he did (at 1778).

The Court decided the case on grounds of qualified immunity, as the facts as represented by each side had never been presented to a jury. Interestingly, the unique element in the case was the Court's deference to the videotape it repeatedly mentions. The Court viewed the videotape of the chase during oral argument and posted a link to it on the Court's website for the public to view. The significance of the tape is its role in the Court's *de novo* determination of the facts considered in the summary judgment motion. In a summary judgment motion, as the Court notes, the trial court is "required to view the facts and draw reasonable inferences 'in the light most favorable to the party opposing the [summary judgment] motion.' In qualified immunity cases, this usually means adopting (as the Court of Appeals did here) the plaintiff's version of the facts." (at 1774, citations omitted). In this case, however, the Court noted "an added wrinkle... [the] existence in the record of a videotape capturing the events in question" (at 1775). Relying on a single videotape, the Court ruled that Harris' version of the facts was blatantly contradicted and went on to indicate that courts should not rely on the plaintiff's statement where such records,

as videotapes, exist. Interestingly, there is no mention of three other police tapes that had been entered into the record and show different portions of the pursuit (Stevens, J. dissenting at 1785, footnote 7).

Scott v. Harris and the Cost–Benefit Calculation of Pursuits

At the end of the day, the Court balanced the risk of harm created by Scott's action of ramming Harris' vehicle with the threat created by Harris' fleeing from Scott. Even though the Court admitted that there is no obvious way to quantify these risks, it noted that Harris "posed an actual and imminent threat to the lives of any pedestrians who might have been present, to other civilian motorists, and to the officers involved in the chase" (at 1778). While the Court noted that Deputy Scott's actions posed a high likelihood of serious injury or death to Harris, although not specifically declaring Scott's action as an application of deadly force, it stated that the action did not pose the near certainty of death posed by shooting a fleeing felon in the back of the head or pulling next to a fleeing motorist's car and shooting the driver (at 1778). Essentially, the Court approached its analysis of the reasonableness of an application of force through a process of quantification of the level of force based on likely outcome—something it states there is no obvious way to do. The Court explained the logic by considering the number of lives at risk and the relative culpability of those involved. In that Harris disobeyed the initial order by Reynolds to stop, he intentionally placed himself and others at great risk. By contrast, members of the public who might find themselves at the wrong place at the wrong time were clearly innocent of any wrongdoing. Under this analysis, the wrongdoer, irrespective of the underlying offense, shoulders the total responsibility for the consequences of the actions of all involved parties, including the police. Appropriately, the Court shifts any blame away from the innocent bystanders, but it places total blame and culpability on the fleeing suspect.

What is missing from the equation is the responsibility of the police officers given what we know about the dynamics of pursuit. First, the opinion includes language that questions what Harris, or any other fleeing suspect, might have done or would do if the police end a pursuit. The Court was also silent on the established dynamics of pursuit and ignores research findings that have been published on the likelihood that a suspect will slow down and reduce the risk to the public, himself, and the police should the police terminate pursuit (see Alpert et al. 2000; California Highway Patrol 1983; see also Chap. 3 in this monograph).

Second, the Court did not see fit to address the great risk that Scott's ramming of Harris' car posed for the innocent motorists the Court claims the act was intended to protect. In its *de novo* factual determination of the "actual and imminent threat to the lives of any pedestrians who might have been present," the Court neglects, or refuses to consider, the role of Scott in this calculus. Substituting its view of a single videotape for evaluation of Scott's conduct by those more familiar with acceptable police *operational* practices, the Court sidesteps the issue of potential harm to the public or

the reasonableness of the ramming of Harris' vehicle from a police practices perspective, and instead focuses on the relative culpability of Harris. The record in the case establishes that Harris' vehicle veered to the right and collided with a telephone pole after Deputy Scott rammed it. Because no innocent driver, passenger, or pedestrian was injured, the Court was able to sidestep the issue of actual harm.

Likewise ignored by the Court was the fact that ramming a vehicle at 90 mph disables the driver of the target vehicle's ability to steer or guide it. Based on the angle and height of the ramming vehicle, a rammed vehicle can be forced to travel in any number of directions. In this case, it could just as easily have veered to the left and across the median and into oncoming lanes of traffic. Thus, while the Court underpins its opinion on the protection of innocent third parties and the moral culpability of Harris, the fact remains, even under the Court's own analysis, that the missile put into motion by Scott's ramming could as easily have injured those parties as protect them. The irony of the Court's factual reevaluation in the case is that the analysis does precious little to provide protection to a potentially endangered public and a great deal to "green light" unrestrained police vehicular tactics in those agencies not holding a tight rein on their officers. The Court's own statements confirm that the practice of "pursue until the wheels fall off," a practice that so many law enforcement driving professionals and administrators have worked to change, could be more acceptable under federal law:

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 (at 1779).

In theory, the police can stop motorists who flee from them and threaten the lives of innocent bystanders with whatever force is necessary. If a suspect were to flee from the police on a highway while driving at high speed and the officer shot and killed the suspect under the guise of protecting the innocent motoring public, it is fairly clear that there would be no constitutional liability for the police under Harris. In fact, after Harris, any use of force or deadly force to stop a fleeing motorist when there is probable cause to believe he or she is posing a serious threat to the public is going to be justified under the Fourth Amendment. The key issue appears to be how the risk created by the continued flight of the suspect driver is determined by the officers involved (*Allen v. City of West Memphis*, No. 11-5266, U.S. Court of Appeals for the Sixth Circuit, October 9 2012).

Unfortunately, there is no bright line or formula to determine the risk created by the continued flight of a motorist. Unless there is probable cause that a fleeing suspect has committed a violent crime, it is difficult to determine that a reasonable officer would consider continued flight a clear risk to others. In fact, footnote 11 of the *Scott v. Harris* opinion states:

Contrary to Justice Stevens' assertions, we do not "assum[e] that dangers caused by flight from a police pursuit will continue after the pursuit ends," post, at 6, nor do we make any "factual assumptions," post, at 5, with respect to what would have happened if the police had gone home. We simply point out the uncertainties regarding what would have happened, in response to respondent's factual assumption that the high-speed flight would have ended.

Since the decision in *Scott v. Harris*, a few cases in federal circuits have made it past the summary judgment stage, but none has gone to trial. Some of the settlements have been substantial, but there has been insignificant clarification of the law. Perhaps one of the most important cases comes from the Fifth Circuit. In *Lytle v. Bexar County* (560 F.3d 404, 414 (5th Cir. 2009)), the court ruled, “it is unreasonable for a police officer to use deadly force against a fleeing felon who does not pose a sufficient threat of harm to the officer or others” (at 417). While this general principle is correct, it still begs the question of what constitutes a sufficient threat. In *Lytle*, the police shot at a fleeing vehicle that posed “some threat of harm” (at 415). That threat, however, consisted of driving at high speeds through a residential area. “... the Court’s decision in *Scott* stated that an officer’s attempt to end a high-speed chase that threatens lives of innocent bystanders, even if it places the fleeing motorist at serious risk of death, did not declare open season on suspects fleeing in motor vehicles” (Id. at 415). The court referenced Justice Ginsburg’s concurring opinion in *Scott v. Harris* in which she pointed out that *Scott* did not “articulat[e] a mechanical, per se rule” but was situation specific and was concerned with the lives and well-being of those who were not fleeing but were acting in lawful ways and happened to be at the wrong place at the wrong time, or those who were in pursuit of the fleeing suspect (*Scott* at 1779).

One of the more recent cases that almost went to trial was *Walker v. Davis* (649 F.3d 502 (6th Cir. 2011)). In that case, an officer in rural Kentucky clocked Thomas Germany riding his motorcycle at 70 mph in a 55 mph zone. That officer (who was not a defendant in the case) tried to pull Germany over for speeding, but Germany refused to stop. Another officer, Danny Davis, heard about the pursuit over the radio. As Germany approached Davis’ location, Davis blocked the road with his cruiser. After Germany maneuvered around him, Davis began his pursuit of Germany. The entire pursuit lasted about 5 min and took place on empty stretches of highway. Germany never went above 60 mph during the chase itself. He ran one red light.

Germany eventually turned off the road and cut across a muddy field. Davis followed close behind in his cruiser. According to the Estate’s reconstruction expert—who analyzed, among other things, the location of paint transfers between the two vehicles—Davis then intentionally rammed Germany’s motorcycle. Germany was thrown from the motorcycle and dragged underneath the cruiser, which crushed him to death.

The summary judgment for the Allen County, Kentucky, Sheriff’s Office was denied because ramming Germany on a motorcycle was potentially deadly force and a possible violation of his Fourth Amendment rights. The court noted that it was a question for the jury whether the ramming was an intentional and therefore illegal act:

It has been settled law for a generation that, under the Fourth Amendment, “[w]here a suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so.” *Tennessee v. Garner*, 471 U.S. 1, 11, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985). Here, Germany posed no immediate threat to anyone as he rode his motorcycle across an empty field in the middle of the night in rural Kentucky. That fact, among others, renders this case patently distinguishable from *Scott v. Harris*, 550 U.S. 372, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007), in which Harris had led the police on a “Hollywood-style car chase of the most frightening sort,

placing police officers and innocent bystanders alike at great risk of serious injury.” *Id.* at 380. The chase here was a sleeper by comparison.

Nor does it matter that, at the time of Davis’s actions, there were few, if any, reported cases in which police cruisers intentionally rammed motorcycles. It is only common sense—and obviously so—that intentionally ramming a motorcycle with a police cruiser involves the application of potentially deadly force. This case is thus governed by the rule that “general statements of the law are capable of giving clear and fair warning to officers even where the very action in question has not previously been held unlawful.” *Smith v. Cupp*, 430 F.3d 766, 776–77 (6th Cir. 2005) (internal marks omitted)” (at 505).

The case was headed to trial, but was settled in the summer of 2012 at the last hour. This course has been the path for most post-*Scott v. Harris* Fourth Amendment claims and is likely to be followed in the future. If the claim passes the summary judgment stage, then the parties must decide whether to settle. However, more generally, the federal courts have closed their doors to Constitutional claims concerning pursuits and direct litigation to state court claims.⁵

State Court Claims

The *Scott v. Harris* court decision is only relevant to federal claims made by the fleeing suspect and does not impact state law claims made by those injured because of a pursuit. Actions brought against an officer or the employing agencies under state law are based on allegations of some level of negligence that was a proximate cause of damage. Simple negligence, perhaps the most common standard found among the states, is a level of behavior (or inaction) based upon a failure to comply with the duty of care of a reasonable officer. The specific definition or standards are established by the states and it is incumbent upon the plaintiff to show that the defendant has breached the particular standard of care owed to him or her. Standards higher than negligence exist and include reckless disregard of the consequences of conduct, willful and wanton misconduct, and deliberate indifference. While these

⁵In November 2013, The U.S. Supreme Court granted certiorari in *Plumhoff v. Rickard*, No. 12–1117 (2014), an unpublished decision in *Estate of Allen v. City of West Memphis*, 509 Fed. App’x 388 (6th Cir. 2012). The Court agreed to review the July 2004 case involving a chase into Memphis by West Memphis police officers in which the fleeing car’s occupants were killed by police gunfire. The Supreme Court will likely reverse the Sixth Circuit and declare that its approach is fundamentally inconsistent with *Scott*.

standards are somewhat vague, courts have defined them or at least provided examples of behavior they believe satisfy the requirement.⁶

Regardless of whether the tort alleged involves an intentional or negligent act, a plaintiff may not recover for injury if there was no duty owed to the plaintiff by the officer who caused the injury. The term “duty,” as used here, means that there was some obligation recognized by the law for the officer to behave in a particular fashion towards the person who was ultimately injured. The law recognizes generally that if there was no duty to the injured on the part of a law enforcement officer, then there can be no liability for the officer or the employer.

Rather than attempt to provide a state-by-state comparison of pursuit standards and laws, we can examine one pursuit case filed in Tennessee, *Swindle v. City of Memphis* (Case No. CT-005342-09—Div. IX), which involves a number of issues of interest to researchers and practitioners.⁷ This pursuit and the subsequent lawsuit are noteworthy because of multiple allegations of wrongdoing, the nature and type of evidence that was available, and the complexities that were involved in the chase. As noted above, many cases are settled before trial and the facts are never heard by a fact finder, whether a judge or jury. This case is representative of those that are “worked up” for trial and include volumes of discovery, including reports, depositions, expert reports, and video tapes.

Swindle involved a high-speed pursuit of a suspected car thief by members of the Memphis Police Department (MPD) on July 20, 2009, which resulted in the death of Iyana Swindle and her unborn child. On July 20, 2009, the MPD received a dispatch that a vehicle had been stolen from a rental car company. The dispatcher provided a description of the suspect, assigning Officer Mario Tate to investigate the complaint. At the rental car company, Tate spoke with company representatives and was shown a videotape that captured the vehicle being stolen by the suspect. Employees of the rental car company informed Tate that the stolen vehicle was equipped with a GPS unit. Importantly, the vehicle stolen was not taken by force or with the use of a weapon and, therefore, there was no report that a violent felony had been committed.

The rental car company had provided the MPD dispatcher with information pertaining to the location and direction of travel of the stolen vehicle, and the

⁶For example, a reasonable summary of negligence follows: (1) A legal duty or obligation, 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, commonly known as “proximate cause”; (4) Actual damages or a loss resulting from the failure to perform a legal duty. From a practical standpoint, negligence in a pursuit may come about in any number of ways, to include the three following situations: (1) An officer violates an applicable state statute that creates a duty to act or not act; (2) An officer violates pertinent department policy which creates a duty to act or not act; and/or (3) An officer violates an established duty to use “due care” generally.

⁷The case, *Swindle v. City of Memphis, TN. Case No. CT-005342-09—Div. IX* was filed by Attorney Andrew C. Clarke, a well-known and well-respected attorney who has extensive experience in police pursuit matters. This section of the chapter comes directly from his court brief, with permission.

dispatcher broadcast that over the radio, along with a description of the vehicle and suspect. Shortly thereafter, Officer Tate spoke with Officer Tukes by car-to-car radio and cell phone about the location of the stolen vehicle. During this time Tukes had also been communicating with Detective Gaylor from the auto-theft division of the MPD, and Officer Bond about the car theft. Based on these discussions about the theft and description of the suspect, Tukes believed that he knew the person who had committed the car theft—Jarvis Evans. Confirming this point was the fact that the stolen vehicle was parked at a location where Jarvis Evans used to live. Significantly, the vehicle was stopped at this location for over 30 min based on the GPS tracking printout. Tukes was also provided with information over the radio that Evans was known to “run from police.” Finally, Tukes was informed that Evans had active warrants out for previous car thefts. Despite the fact that the stolen vehicle was stopped for a substantial period of time, Tukes did not attempt to apprehend the suspect when the vehicle was stopped because he wanted to make sure that he could arrest the suspect while driving the stolen vehicle and charge him with more serious crimes than if he were not driving the car.

After Tukes was informed that the car was moving, he continued to speak with Tate, who was providing information on the location of the vehicle based on the GPS tracking device. Tate informed Tukes that the vehicle was stopped at a convenience store at Fairway and South Third Street. Tukes requested additional police vehicles to proceed to that area without lights and sirens because Evans was known to flee. As Officer Tukes made it to the area of the convenience store, Officer Campbell and his passenger, Officer Green, were in their police vehicle approaching the corner of the convenience store. Tukes and Campbell observed the stolen vehicle in the parking lot of the convenience store. Campbell then saw the suspect leave the convenience store. Campbell motioned the suspect to his vehicle. Tukes testified that he recognized the suspect as Jarvis Evans.

Evans jumped into the stolen vehicle and drove off at a high rate of speed around the convenience store, ran through the intersection at Fairway and Third Street, and took off northbound on Third Street. Officer Campbell immediately gave chase. It is unclear whether Campbell turned on his police lights and sirens at this point or at any point during the pursuit. However, Memphis’ sworn Interrogatory Responses indicate that Campbell activated his lights and sirens at this point. Tukes put on his lights and sirens, did a U-turn through heavy traffic and became the second vehicle in the pursuit. Campbell and Tukes continued pursuing Evans to the intersection of South Third and Mitchell, where Evans turned left. Campbell and Tukes also turned left at the intersection of South Third and Mitchell while still pursuing Evans. At the intersection of South Mitchell and Horn Lake Road, Evans went through the intersection and collided with a vehicle being driven by Iyana Swindle. As a result of that collision, Ms. Swindle, who was 15 weeks pregnant at the time, was killed.

The Memphis Police Department had a pursuit policy that clearly acknowledges that pursuits are inherently dangerous and significantly restricted their application to circumstances in which an officer has probable cause to believe that the suspect has committed a violent felony. Thus, MPD policy strictly prohibits pursuits of traffic offenders and suspects believed to have committed property crimes, including

car theft. The City of Memphis in its internal affairs investigation found that Officers Tukes and Campbell violated the pursuit policy.

Based on the pre-pursuit facts, the plaintiff had to show that any pursuit of the fleeing suspect was unreasonable, as the suspect was not accused of committing any violent felony. The plaintiff also had to demonstrate that there were numerous other methods of apprehending the stolen vehicle and the suspect later without exposing the public to the dangers of a pursuit under nationally recognized law enforcement standards and MPD pursuit policy. In addition, she had to convince the fact finder that because the stolen vehicle was equipped with a GPS tracking device, there was absolutely no need to pursue the suspect, as the vehicle could have been retrieved later without exposing the public to the inherent dangers of the pursuit. Further, proof had to be demonstrated that there was no need to pursue because the officers had both a description of the suspect and a videotape of the crime. Officers Campbell, Green, and Tukes observed Evans getting into the stolen vehicle that would make later apprehension and prosecution of Evans probable without exposing the public to the dangers of the pursuit. The plaintiff had to demonstrate that the decision to initiate a pursuit of Evans under the circumstances of this case violated nationally recognized law enforcement standards and the MPD Pursuit Policy and was a proximate cause of the crash between Evans and Swindle, which resulted in the death of Ms. Swindle and her unborn child.

In 2011, the case went to trial in Memphis and the court awarded the estate of Ms. Swindle more than a million dollars. The court found the City of Memphis to be 35 % responsible for the damages, and the fleeing suspect to be 65 % responsible.

The Swindle case raises a variety of issues that can be addressed by research to help guide agencies and courts in the assessment of a pursuit. First, the case involves a stolen car fitted with a GPS tracking system. Logic informs us that the use of a GPS tracking system would remove the need to pursue a vehicle. While studies may not have been conducted on the impact of a GPS on the outcome of a pursuit, research has been conducted on the use of helicopters that involve an early method of tracking vehicles. Research results indicate an almost perfect record of apprehension without a crash when a helicopter is involved in a pursuit (Alpert 1998a). It would be a rather simple analysis to determine the comparative rate of apprehension and negative outcome between vehicles with GPS systems and those without. Conventional wisdom would follow the logic of the helicopter and suggest that when a vehicle has a GPS system, all the police have to do is follow it until it stops and apprehend the driver and passengers without a dangerous pursuit.

The police knew the suspected thief and had the ability to apprehend him when he was not in control of a vehicle. Conventional wisdom and research findings show the relative lack of danger when attempting to apprehend a suspect outside of a vehicle compared to those situations where the suspect has control of one (Alpert 1998b). While the officers indicated they wanted to observe him driving so he could be arrested on more serious charges, they could have used tactics to block-in the vehicle or disable it. Overall, the decision to become involved in an active pursuit of this suspect, under these conditions, was a violation of the officers' departmental

policy and customary police practice and exposed the officers and their agency to civil liability.

The Role of Research in Legal Decisions

The federal and state cases illustrate many decisions law enforcement officers have to make regarding the costs and benefits of pursuits. The *Swindle* case is a good example of where research findings could provide information for managers and trainers that could be used to educate and train officers to help guide their decisions and avoid tragedy. The examples of *Scott v. Harris*, *Lytle v. Bexar County*, and *Walker v. Davis* all emphasize the need for high-quality information about the costs, benefits, and outcomes of pursuits to help both courts make decisions and law enforcement make better policy. Instead of best guessing, hunches, and “Monday-morning quarterbacking,” there is research evidence and empirical knowledge that can answer the many hypothetical questions that are posed by analysis of these legal decisions.

However, most of the high-profile pursuit cases in federal courts have been decided not on empirical data but based on the beliefs and philosophies of the judges and justices. One recent case in which research was relied upon is *Sykes v. United States* (131 S. Ct. 2267 (2011)), in which Justice Thomas in his concurring opinion as well as Justices Kagan and Ginsberg in their dissenting opinion cited research findings from Lum and Fachner (2008) and Schultz et al. (2009). In *Sykes*, the dissenting justices point out that research knowledge does exist about the harm that could be caused by police pursuits, but also reiterated what researchers have been saying: that more comprehensive study is needed.⁸ But generally, social science data, which can show the likelihood of pursuits resulting in crashes or injuries as well as costs of negative outcomes, are conspicuously absent from court decisions.

However, the decisions discussed in this chapter are important in building the evidence-base for police pursuits research. They serve to provide important information and questions to guide the policies, training, supervision, accountability, and research related to pursuits for law enforcement agencies. Combined with existing research on pursuit driving, the lessons learned from these legal decisions and analyses can help police managers and leaders develop their pursuit management plans. The next chapter moves from what we know about the law to what we have learned from research about pursuits and pursuit management.

⁸ Interestingly, the court used the statistic of 4 % of *injury* from pursuits found by Lum and Fachner, but do not discuss how 24 % of pursuits result in a negative outcome (i.e., injury, crashes, accidents, property damage).



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