

1987

## Police Civil Liability and the Law of High Speed Pursuit

Richard G. Zevitz  
richard.zevitz@marquette.edu

Follow this and additional works at: <https://scholarship.law.marquette.edu/mulr>



Part of the [Law Commons](#)

---

### Repository Citation

Richard G. Zevitz, *Police Civil Liability and the Law of High Speed Pursuit*, 70 Marq. L. Rev. 237 (1987).  
Available at: <https://scholarship.law.marquette.edu/mulr/vol70/iss2/3>

This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Law Review by an authorized editor of Marquette Law Scholarly Commons. For more information, please contact [elana.olson@marquette.edu](mailto:elana.olson@marquette.edu).

# POLICE CIVIL LIABILITY AND THE LAW OF HIGH SPEED PURSUIT\*

RICHARD G. ZEVITZ\*\*

## I. INTRODUCTION

Since the invention of the automobile, no aspect of American life, including crime and its control, has remained untouched by this far-reaching innovation in transportation. Vehicular "hot pursuit"—when suspects in motor vehicles use excessive speed in attempting to elude the police—is one way in which the automobile has affected the behavior of both criminals and law enforcers.

Unfortunately, accounts of wild chases across crowded inner city streets, through tree-lined suburban boulevards, and over remote country roads are very real and not merely fictional material created for entertaining television and motion picture audiences. The specter of "hot pursuit," complete with screaming sirens and red or blue flashing lights, has become a recurring fact of modern life.<sup>1</sup> So, too, are the mishaps involving police vehicles or the vehicles pursued by the police. Pursuit-related accidents causing personal injury, death or property damage very often lead to lawsuits claiming negligence on the part of police officers, their supervisors and their governmental employers. Some of these suits have resulted in six or seven figure awards and several have nearly bankrupted some municipalities and townships.

These crippling judgments have given rise to a growing realization that the deadly business of police high speed pursuit presents a serious problem that needs to be addressed. As with so many other contemporary problems in our society, the

---

\* Prepared for presentation at the annual meetings of the American Society of Criminology, October 1986.

\*\* J.D., University of Nebraska Law School; Ph.D., University of California. Assistant Professor of Criminology and Sociology, College of Arts and Sciences, Marquette University. The author gratefully acknowledges the assistance of Kevin T. Smith, Editor-in-Chief, *Marquette Law Review*, in the preparation of this article.

1. It has been estimated that between 50,000 and 500,000 high speed pursuits take place each year in the United States. See E. FENNESSY, U.S. DEP'T OF TRANSP., A STUDY OF THE PROBLEM OF HOT PURSUIT BY THE POLICE (1970).

American public has looked to legislation for a solution. Because of the complex nature of the police pursuit problem, state legislatures have tended to pass laws that provide only the general framework around which specific regulatory policies are to be locally formulated. Such is the status of the law in Wisconsin, where an amendment to the statute governing high speed police chases was adopted in 1985.<sup>2</sup>

The focus of this article is upon governmental tort liability for negligence during high speed police chases. Particular attention will be directed to the legal consequences of local law enforcement policies regulating speed pursuits by police emergency vehicles. After an initial study of Wisconsin's new high speed chase law and the rationale for its adoption, the discussion will turn to an analysis of important legal issues involved in cases of alleged negligent police pursuit. Lastly, an alternative standard for measuring governmental liability in pursuit-related accidents is suggested as a means to better serve the interests of the public.

## II. THE CASE FOR ADMINISTRATIVE RESTRAINTS

Since November 27, 1985, law enforcement agencies in Wisconsin have been required to provide written guidelines for their officers regarding high speed pursuits of actual or suspected lawbreakers.<sup>3</sup> Wisconsin thus joins the growing list of states which mandate formalized pursuit guidelines for emergency police vehicles. Even before pursuit guidelines were required, and in many places where there is still no such legal requirement, thousands of law enforcement agencies throughout the nation adopted official policies setting forth those circumstances under which high speed pursuit was permitted. Regardless of the motivation for their adoption, all such policies seemed to share a common objective: to main-

---

2. WIS. STAT. § 346.03(6) (1985-86) (originally enacted by 1985 Wis. Laws 82, § 2M; eff. Nov. 27, 1985).

3. WIS. STAT. § 346.03(6) (1985-86) provides:

Every law enforcement agency which uses authorized emergency vehicles shall provide written guidelines for its officers and employes regarding exceeding speed limits when in pursuit of actual or suspected violators. The guidelines shall consider, among other factors, road conditions, density of population, severity of crime and necessity of pursuit by vehicle. The guidelines are not subject to requirements for rules under ch. 227.

tain a high apprehension rate of fleeing suspects without undue risk to life or property.

While it is true that most high speed pursuits result in the capture and arrest of a fleeing suspect, the price paid for some of these apprehensions has been high. Many fatalities and serious injuries occur each year as a consequence of pursuit-related accidents. In fact, it has been established that approximately one-fifth of all police pursuits culminate in some type of collision involving the vehicle of the pursued suspect, a police officer or an innocent third party.<sup>4</sup> The relatively high ratio of pursuit-related accidents has had its parallel in costly pursuit-related lawsuits. In a survey conducted for the International Association of Chiefs of Police,<sup>5</sup> it was found that in a ten year period from 1967 through 1976, plaintiff verdicts in high speed chase litigation ranked second

---

4. Based on a survey of law enforcement agencies in the United States, it has been estimated that pursuit-related collisions account for 18.8% of all injury accidents sustained by police drivers. See International Association of Chiefs of Police, Inc., *Police Fleet Crash Study 12* (July 1986) (unpublished). In a study of 289 traffic accidents involving police vehicles in the City of Milwaukee in 1985, 118 (41%) occurred while the police vehicle was acting in an emergency capacity. Of these 118 emergency-related vehicular collisions, 36 (30%) involved pursuit of a fleeing violator or suspect. In turn, the injury rate for pursuit-related collisions was 39%. Milwaukee Safety Commission, *Report of Traffic Accidents Involving Police Vehicles 4* (1985).

A recent nationwide survey found that property damage occurred in about one of every five pursuits, while there were injuries in one in seven and deaths in one in approximately thirty-five pursuits. See Beckman, *Pursuit Driving*, MICH. POLICE CHIEFS, May 1986, at 26-34. Another survey conducted in California revealed that 29% of all pursuits involved collisions, and 11% resulted in bodily injury. See Dep't of the Cal. Highway Patrol, *Pursuit Study 22* (1983) [hereinafter CHP, *Pursuit Study*].

5. See W. SCHMIDT, *SURVEY OF POLICE MISCONDUCT LITIGATION: 1967-1976* (1977). The survey included a cross-section of 2060 law enforcement agencies that employed 153,130 officers, or about one-fourth of the nation's total. The following table, which is based on data from the survey, is an extrapolation of the number of motor vehicle negligence suits for the entire law enforcement community:

<u>Year Suit Filed</u>	<u>Suits</u>
1967	450
1968	484
1969	618
1970	783
1971	1009
1972	979
1973	1250
1974	1994
1975	2335
1976	2778

among police civil liability suits in terms of dollar amount awarded, exceeded only by misuse of firearm or nightstick cases.<sup>6</sup> An informal survey of police misconduct litigation in eleven states indicates that not only has the number of pursuit-connected tort actions risen dramatically, but so has the size of damage awards ensuing from such actions, although the percentage increases are not known.<sup>7</sup>

The high toll arising from pursuit-related collisions, especially those resulting in death, serious injury or extensive property destruction, has not gone unnoticed. Concerned private citizens and a number of elected officials are questioning the wisdom of allowing high speed chases in many of the cases that have received news media attention.<sup>8</sup> These concerns have been echoed in several newspaper editorials urging that tighter restrictions be placed on hot pursuit by the police.<sup>9</sup> A

---

6. For a discussion of trends in lawsuits against police based upon portions of the International Association of Chiefs of Police survey, see Schmidt, *Recent Developments in Police Civil Liability*, 4 J. POLICE SCI. & ADMIN. 197 (1976). In terms of number of suits filed, motor vehicle claims — the vast majority of which alleged negligence during emergency operations — constituted 14% of all lawsuits filed against police, compared to only 5.4% for firearm-related death or injury. There were 1.15 motor vehicle lawsuits per 100 officers during the survey period, compared to 2.01 non-firearm excess force suits per 100 and 0.44 firearm-related suits per 100 for the same period. The survey included law suits filed against local police, county sheriffs, federal agents, state patrolmen, campus police, railroad police and other specialized law enforcement personnel.

7. The states canvassed by the author were: Alaska, Arizona, California, Florida, Illinois, Iowa, Kentucky, Michigan, Minnesota, Nebraska and Oregon.

8. For example, shortly after an innocent motorist was killed when a driver fleeing police slammed into his car, State Senator Lynn S. Adelman and State Representative Marcia P. Coggs sent letters to the Milwaukee Police and Fire Commission urging the Police Department to make its high speed chase policy more specific. In this particular accident, the police began the chase after noticing the car had no license plates. Adelman was instrumental in passage of 1985 Wis. Laws 82 relating to high speed pursuit guidelines and increasing penalties for eluding a traffic officer. WIS. STAT. § 346.17(3)(b)-(d) (1985-86). The new law was written after high speed chases resulted in the deaths of the fleeing individuals and innocent citizens. See Riepenhoff, *Officer Liability Still in Question*, Milwaukee J., Oct. 16, 1986, at 3B, col. 4; Lanke, *Tighter Chase Policy for Police Is Asked*, Milwaukee Sentinel, Sept. 4, 1986; Letters from Senator Lynn S. Adelman to Police Chief Robert J. Ziarnik and the Milwaukee Fire and Police Commission (July 29, 1986; Aug. 28, 1986; Sept. 17, 1986) (on file with the Commission); Letter from Representative Marcia P. Coggs to the Milwaukee Fire and Police Commission (Sept. 4, 1986) (on file with the Commission).

9. See generally *Did Police Chase Cause Lethal Crash?*, Milwaukee J., July 10, 1986, at 12A, col. 3 ("was the mere suspicion of wrongdoing enough reason to instigate a chase, with all its attendant dangers? Was the absence of license plates enough reason?"); *Police Need Guidance for Hot Pursuit*, Milwaukee J., Feb. 20, 1986, Pt. 1, at 10,

number of experts are in accord with the public demand for greater restraint in police use of high speed chases. One such expert, Leonard Territo, who surveyed high speed pursuit policies in thirty-seven different states, concluded that there was a clear need to "impose strong controls upon the operation of police vehicles in emergency responses and high speed pursuits if there is to be a reduction in the increasing number of injuries and deaths."<sup>10</sup> Also, expert Eric Beckman reached a similar conclusion in favor of pursuit restrictions in his study referred to above.<sup>11</sup>

Both Territo and Beckman take the position that a well conceived and clearly defined set of departmental guidelines for pursuit driving, if properly reinforced by training and supervision, will at the very least reduce some of the risks involved in this inherently dangerous police activity.<sup>12</sup> Although this assumption has never been empirically tested,<sup>13</sup> its inherent logic has had strong appeal to state lawmakers, judging by the amount of legislation enacted in recent years requiring police administrators to provide written pursuit guidelines. Passing over, for the moment, the question of whether these guidelines have proved effective in reducing the number of collisions involving police pursuit vehicles, these departmental policy directives have had important repercussions for litigation involving the issue of negligent police pursuit,<sup>14</sup> even where the agency in question lacks an official

---

col. 1 ("Sometimes, officers give high-speed chase when nothing more serious than a traffic violation is involved.").

10. Territo, *Citizen Safety: Key Element in Police Pursuit Policy*, 18 TRIAL, Aug. 1982, at 31, 32.

11. See Beckman, *supra* note 4.

12. Territo, *supra* note 10, at 32; Beckman, *supra* note 4, at 34.

13. Social science research in another area of police work that also involves deadly force, namely police shootings, appears to indicate that more restrictive firearms policies, in conjunction with training and supervision, has substantially reduced the number of police killings in the United States without any accompanying increase in injuries or killings of police officers or noticeable reduction in arrest activity. L. SHERMAN & E. COHEN, *CITIZENS KILLED BY BIG CITY POLICE* (1980).

14. Police departments' safety rules, general orders and procedural manuals, as well as training bulletins governing the operation of emergency vehicles during pursuit, are generally admissible into evidence in negligence cases. They have been deemed relevant to what a police driver's standard of care in various pursuit situations should be. Compliance with such rules may be raised as a defense in negligence actions involving police pursuits. See Annotation, *Municipal Corporation's Safety Rules or Regulations as*

pursuit policy. This article addresses some of those repercussions.

### III. PURSUIT POLICIES AND LIABILITY

Law enforcement policies and procedures governing high speed chases have become the major point of contention in litigation on the question of police liability for pursuit-incurred property damage or bodily injury. In particular, two frequently raised issues relating to internal departmental policy have a direct bearing on the tort liability of police personnel and their employers. A third issue, although only indirectly related to departmental pursuit guidelines, enters into an increasing number of courtroom contests over police liability. All three issues and their growing significance for lawsuits alleging negligent police pursuits will be discussed.

The first issue involves the standard of care applicable to such cases. What duty of care is to be imposed on an officer engaged in a high speed chase where a clearly defined departmental pursuit policy exists?<sup>15</sup> The second issue for discussion is whether or not an officer's good faith compliance with departmental procedures for conducting high speed chases acts as a defense to shield the officer and the employer from liability for pursuit-related injury or damage.<sup>16</sup> The final issue to be discussed concerns the relevance of a claim by a plaintiff in a police negligence case that the law enforcement agency in

---

*Admissible in Evidence in Action by Private Party Against Municipal Corporation or Its Officers or Employees for Negligent Operation of Vehicle*, 82 A.L.R.3D 1285 (1978).

15. The duty of care owed by a driver of an emergency police vehicle may vary according to jurisdiction, but the underlying principles of negligence are the same from state to state. In general, the driver of a police vehicle during an emergency situation must "exercise the care which a reasonably prudent person would exercise in the discharge of official duties of a like nature under the circumstances." 7A AM. JUR. 2D *Automobiles and Highway Traffic* § 418 (1980).

16. Some state legislatures have side-stepped this issue by enacting immunity statutes which apply to emergency vehicle operations of police. Although such statutes absolve from liability the police driver who complies in good faith with departmental pursuit guidelines, general immunity statutes do not repeal statutory duties of care. For a discussion of the effect of state immunity statutes in tort actions arising out of the operation of an emergency vehicle, see I. SILVER, *POLICE CIVIL LIABILITY* § 3.07 (1986).

question failed to reinforce its existing pursuit policy through adequate training and proper supervision.<sup>17</sup>

*A. Determining the Degree of Care Owed  
by Police Pursuit Drivers*

Under the general principles of tort liability, the conduct of a police officer, as with other members of society, is usually measured by the reasonable person standard.<sup>18</sup> However, in the law of negligence, the police are viewed in a different light than the ordinary citizen. The law demands that they not only exercise reasonable care in what they do, but also that they possess a certain amount of special knowledge and ability. Accordingly, those persons trained as police officers must conduct themselves in a manner consistent with that training.<sup>19</sup> Thus, in high speed chase situations, pursuing police officers must use that degree of care which is deemed reasonable in light of their special training and experience.<sup>20</sup> The degree of care exercised in pursuit driving must also be commensurate with the circumstances at hand.<sup>21</sup> All things considered, if the manner in which a police officer carries out a

17. See *Biscoe v. Arlington County*, 738 F.2d 1352 (D.C. Cir. 1984), cert. denied, 469 U.S. 1159 (1985) (applying Virginia law). In this case, the jury found the county negligent for failing to adequately train and supervise its police officer in high speed pursuit driving, which was a causal link to plaintiff's injury. *Id.* at 1356.

18. W. PROSSER & W. KEETON, *THE LAW OF TORTS* § 32 (5th ed. 1984).

19. "Professional persons in general, and those who undertake any work calling for special skill, are required not only to exercise reasonable care in what they do, but also to possess a standard minimum of special knowledge and ability." *Id.* at 185 (citation omitted).

20. See, e.g., *Smith v. Nieves*, 197 N.J. Super. 609, 485 A.2d 1066 (Ct. App. Div. 1984). One commentator argues that because civil litigation against municipalities for high speed pursuit-related injuries is usually based on negligence in training the officers involved, "[t]he establishment of a good training program would greatly reduce such causes of action." Carlin, *High-Speed Pursuits: Police Officer and Municipal Liability for Accidents Involving the Pursued and an Innocent Third Party*, 16 SETON HALL 101, 119 (1986). However, another writer argues that current state-of-the-art training in pursuit driving offered by police academies is inadequate. He states:

[W]e can document no training activity that validly prepares officers for this particular task, viz., driving a police car at high speeds after another car which, in most cases, has committed a traffic offense, through populated areas, signalized intersections, and roads where the chances of running into other cars are extremely high.

*Confronting a Problem: Some Assistance Needed*, 10 TRAINING AIDS DIGEST 10 (July 1985).

21. 41 AM. JUR. PROOF OF FACTS 2D *Police Pursuits* § 4 (1985).



high speed chase falls below the level of skill, care and diligence generally expected of members of the police profession, that officer may be held liable for injuries or damages resulting from his or her conduct. For police professionals, that level is measured by the occupational skill and training commonly accepted by those who undertake this line of work.<sup>22</sup>

In determining the appropriate standard of care in actions alleging negligent police behavior, courts have looked to the safety rules and regulations of the department to which the defendant police officer belongs.<sup>23</sup> This information may be gathered from the department's manual on standard operating procedures, from the officer's departmental handbook of rules and regulations, and from written directives issued by the chief or from training bulletins.<sup>24</sup> Basing a finding of negligence on a breach of a law enforcement agency's self-imposed work rules is consistent with the principle in law that holds tortfeasors to the standards they have set for themselves.<sup>25</sup> Where a departmental procedure clearly prohibits the course of conduct the officer engaged in, courts have not hesitated to support a jury determination that negligence existed in an arbitrarily conducted pursuit.<sup>26</sup>

However, a problem arises in a number of jurisdictions where statutes or ordinances require a degree of care in conducting a police pursuit that is less restrictive than the standard which a department has set for itself. This situation

---

22. See *Selkowitz v. County of Nassau*, 45 N.Y.2d 97, 379 N.E.2d 1140, 408 N.Y.S.2d 10 (1978).

23. See *DeLong v. City & County of Denver*, 34 Colo. App. 330, 530 P.2d 1308 (1974), *aff'd*, 190 Colo. 219, 545 P.2d 154 (1976). In this case, the appellate court ruled that the trial court erred in refusing to admit police department rules requiring that a police officer proceeding through a red light in an emergency situation limit his or her speed to 15 miles per hour. *DeLong*, 34 Colo. App. at \_\_\_, 530 P.2d at 1309.

24. See *Dillenbeck v. City of Los Angeles*, 69 Cal. 2d 472, 446 P.2d 129, 72 Cal. Rptr. 321 (1968). In this case, the trial court erred in refusing to admit into evidence a police department training bulletin recommending a speed of 15 miles per hour while proceeding against a traffic light through a blind intersection. The plaintiff had brought a wrongful death action where the deceased had been killed when his car collided at an intersection with a city police car travelling at 30 miles per hour at the time of the collision. *Id.* at \_\_\_, 446 P.2d at 131, 72 Cal. Rptr. at 325.

25. See C. KRAMER, *EVIDENCE IN NEGLIGENCE CASES* 14-15 (6th ed. 1977). For a contrary position, see *Schumacher v. City of Milwaukee*, 209 Wis. 43, 243 N.W. 756 (1932).

26. See generally *Grudt v. City of Los Angeles*, 1 Cal. App. 2d 529, 81 Cal. Rptr. 821 (1969), *vacated*, 2 Cal. 3d 575, 468 P.2d 825, 86 Cal. Rptr. 465 (1970).

usually occurs where state statutes or local ordinances exempt emergency vehicles from compliance with speed and other traffic regulations when such vehicles are being operated in the pursuit or apprehension of law violators. While these legislative enactments exempt police pursuit vehicles from speed and other driving restrictions, they generally rely upon the application of prevailing common law standards within a given jurisdiction for measuring whether or not a speed chase was properly conducted or even justified under particular circumstances.<sup>27</sup> A typical statute is that of Wisconsin.<sup>28</sup>

While Wisconsin law grants the drivers of emergency vehicles the privilege to exceed posted speed limits when such vehicles are being operated in the pursuit of law violators,<sup>29</sup> the statute requires that "due regard" be exercised in pursuits which would jeopardize the safety of other persons.<sup>30</sup> The only guidance the statute provides for determining what is or is not "reasonable"<sup>31</sup> is inferred from its use of the words "under the circumstances," which requires that one must examine the exigencies of each chase situation presented.<sup>32</sup> Thus, for those in search of a comprehensive state policy governing police pursuit driving, statutory law offers little assistance. One is compelled to turn to court decisions which, in Wisconsin, have interpreted such language as requiring operators of police vehicles to exercise ordinary care.<sup>33</sup> That is to

27. See Note, *Emergency Vehicles — Standard of Care*, 41 MARQ. L. REV. 88 (1957).

28. WIS. STAT. § 346.03 (1985-86) provides an exemption for emergency vehicles "in the pursuit of an actual or suspected violator of the law" permitting the emergency vehicle to "exceed the speed limit." Additionally, as a limitation, the statute explicitly states that it "Do[es] not relieve such operator from the duty to drive with due regard under the circumstances for the safety of all persons nor do they protect such operator from the consequences of his reckless disregard for the safety of others."

29. WIS. STAT. § 346.03(2)(c) (1985-86).

30. WIS. STAT. § 346.03(5) (1985-86).

31. See *Antoniewicz v. Reszczyński*, 70 Wis. 2d 836, 857, 236 N.W.2d 1, 11 (1975) ("[N]egligence is to be determined by ascertaining whether the defendant's exercise of care foreseeably created an unreasonable risk to others.").

32. See *Burnette v. Employers Mut. Liab. Ins. Co.*, 107 Wis. 2d 361, 320 N.W.2d 43 (Ct. App. 1982).

33. See *Suren v. Zuege*, 186 Wis. 264, 201 N.W. 722 (1925). In this case, the Wisconsin Supreme Court held that even though a police pursuit driver was entitled to a statutory exemption from compliance with the posted speed limitations, he or she was still under a duty to exercise reasonable and ordinary care for the safety of others and himself. *Id.* at 267, 201 N.W. at 724. On the other hand, in some jurisdictions, where

say, in Wisconsin as in most other states, the standard of care owed by police drivers of pursuit vehicles is that which a reasonably prudent person, faced with official responsibilities of a law enforcement nature, would exercise under the circumstances.<sup>34</sup>

While the intent of the statute granting operators of emergency police vehicles special driving privileges has been interpreted to require a duty of ordinary care for the safety of others and himself, the care required is not the same as that required of other drivers.<sup>35</sup> For one thing, the pursuit driver is not subject to posted speed limits nor is he or she deemed negligent per se for fast driving.<sup>36</sup> The police pursuit driver, under state law, is also released from the strong presumption of negligence which applies to violations of other traffic safety laws, such as running stop signs and traffic lights.<sup>37</sup> Consequently, in the past, courts in negligence cases have been more liberal with the operators of police vehicles in giving them the benefit of the doubt than they have been with other drivers who do not possess special highway privileges.<sup>38</sup> As long as police officers involved in high speed chases could demonstrate that they had exercised some degree of precaution, such as sounding a siren and using a flashing light, courts tended to grant them latitude and ample protection.<sup>39</sup> Only when they

---

statutory exemption from speed restrictions also exists, it has been held that such statutory immunity can be denied only if there is evidence of gross negligence. *See, e.g., Schatz v. Cutler*, 395 F. Supp. 271 (D. Vt. 1975). Where a gross negligence standard applies, the police driver cannot be held liable for negligence unless it can be proven that he or she was arbitrary in the exercise of the speeding privilege or acted with "reckless disregard" to the safety of others. *Id.* *See generally* Note, *supra* note 27, at 90; *infra* notes 130-31 and accompanying text.

34. *Suren*, 186 Wis. at 267, 201 N.W. at 724.

35. *See Montalto v. Fond du Lac County*, 272 Wis. 552, 76 N.W.2d 279 (1956).

36. *Suren*, 186 Wis. at 267, 201 N.W. at 723-24. The court noted that the statutory exemption effectively prevents the application of the rule in law that excess speed forms a prima facie presumption of negligence. To interpret its effect otherwise would be to render the emergency vehicle provisions of the statute meaningless and thereby nullify the privileges granted, contrary to the clear intent of the legislature to recognize the public necessity of apprehending actual or suspected violators.

37. *See* Campbell, *Wisconsin Law Governing Automobile Accidents — Part I*, 1962 Wis. L. Rev. 240.

38. *See Brunette v. Employers Mut. Liab. Ins. Co.*, 107 Wis. 2d 361, 320 N.W.2d 43 (Ct. App. 1982).

39. *See Pedek v. Wegemann*, 271 Wis. 461, 74 N.W.2d 198 (1956). The court held that although a police officer was operating an emergency vehicle, he did not come under the statutory exemption as to speed restrictions, since his siren was not in opera-

evidenced a callous indifference for the safety of others were they held accountable for their actions.<sup>40</sup>

Even before the passage of the 1985 act mandating written pursuit guidelines, a number of law enforcement agencies in Wisconsin, finding their state's common law standard too vague to suit their purposes, adopted specific guidelines for their patrol officers to use in making pursuit decisions.<sup>41</sup> These departmental guidelines tended to place more restrictions on the decisions leading into high speed pursuits than the ad hoc decisionmaking that occurs when one follows relevant court decisions. Because these guidelines are generally more restrictive than decisional law,<sup>42</sup> attorneys representing plaintiffs in police negligence cases have argued that these internal policies of departments should serve as the standard for measuring the degree of care owed by defendant police officers in pursuit situations.<sup>43</sup> In civil actions alleging negligent police pursuit, where such policies have been viewed by trial judges as admissible evidence, judgments for plaintiffs have been easier to obtain.<sup>44</sup>

Consequently, allegations of negligence in hot pursuit cases have been based on violations of departmental high

tion prior to the intersectional collision of his vehicle and a vehicle operated by the defendant. *Id.* at 464, 74 N.W.2d at 199.

40. *See id.*

41. *See, e.g.,* STATE PATROL DIVISION, WIS. DEP'T OF TRANSP., TRAINING BULL. No. 8, *High Speed Pursuit Driving* (1983). The Wisconsin State Patrol (WSP) adopted a policy which states that:

Maximum top speed is justified only when and where it is reasonably safe, i.e., a clear, straight highway under good weather and road conditions with no visible or probable conflict with other traffic. At any time due to any of the conditions listed above, [i.e., weather, traffic or highway problems] or for any other reason, reduced speed is necessary to provide a reasonable degree of safety to the trooper and others, the speed must be reduced accordingly. The speed or actions of the fleeing violator have no bearing on this factor. The danger created by the violator neither relieves the trooper of his grave responsibility to exercise due care nor justifies the creation of a similar or greater danger by the trooper to innocent bystanders or other drivers or pedestrians.

*Id.* at 3.

42. Compare the "duty to exercise that which under [the] circumstances . . . is reasonable and ordinary care" language, which is the standard of *Suren*, 186 Wis. at 267, 201 N.W. at 724, with the WSP training bulletin's mandate to reduce speed if specified hazardous driving conditions are present, *supra* note 41.

43. Koonz & Regan, *Hot Pursuit*, 21 TRIAL, Dec. 1985, at 63.

44. *Id.* at 66.

speed chase policies.<sup>45</sup> If it can be shown that a defendant police officer clearly violated his or her department's internal work rules, which plaintiff's attorney will claim constitutes a "self-imposed standard of care,"<sup>46</sup> a major step has been taken toward convincing a jury that a pursuit was performed negligently. In cases where this has occurred,<sup>47</sup> defendants have been held to a greater degree of care than that which was required by state law.<sup>48</sup> The violation of the higher duty imposed by what is essentially a self-determined standard of liability is tantamount to a finding of negligence as a matter of law.<sup>49</sup> For all practical purposes, the negligence per se standard, which had been rendered inapplicable to law enforcement agencies in Wisconsin with the enactment of the statute granting police vehicle operators special highway privileges,<sup>50</sup> has returned in the form of the departmental directive and is now being applied as the current standard for police liability.

With the new law now in effect, which requires law enforcement agencies to adopt their own written pursuit guidelines, several developments are apt to occur. First, in searching for a workable standard for liability in hot pursuit cases, courts will probably continue their present practice of looking closely at the official policies of police departments and other law enforcement agencies. The pursuit guidelines contained in a department's policies and procedures manual<sup>51</sup>

---

45. See *Schmidt*, *supra* note 6, at 200.

46. *Id.*

47. See *Tetro v. Town of Stratford*, 189 Conn. 601, 458 A.2d 5 (1983); *Dillenbeck v. City of Los Angeles*, 69 Cal. 2d 742, 446 P.2d 129, 72 Cal. Rptr. 321 (1968); *DeLong v. City and County of Denver*, 34 Colo. App. 330, 530 P.2d 1308 (1974), *aff'd*, 190 Colo. 219, 545 P.2d 154 (1976).

48. *DeLong*, 34 Colo. App. 330, 530 P.2d 1308.

49. 41 AM. JUR. PROOF OF FACTS 2D *Police Pursuits* § 9 (1985).

50. WIS. STAT. § 346.03 (1985-86).

51. See, e.g., MILWAUKEE POLICE DEPARTMENT, ORDER NO. 9491, AMENDMENT OF STANDARD OPERATING PROCEDURES RELATING TO HIGH SPEED PURSUITS (eff. Jan. 30, 1987). The Milwaukee Police Department (MPD) guideline reads, in part, as follows:

EMERGENCY VEHICLE OPERATION

- A. An emergency situation is one in which the probability of death, personal injury or the loss or destruction of property exists, and action by a law enforcement officer may avert or reduce the seriousness of the situation.
- B. An "authorized emergency vehicle" is any police vehicle that, when responding to an emergency call or pursuing an actual or suspected law violator, has in operation the emergency lights and siren.

will be increasingly relied upon to determine the duty of care

---

*NOTE:* Only officers in marked police vehicles are authorized to charge persons with violations of Section 346.04(3) of the Wisconsin Vehicle Code (Fleeing or Attempting to Elude Police Officer).

Routine traffic stops or other instances in which officers activate their emergency lights and sirens and the citizen/ vehicle operator complies by coming to a stop in a reasonably short distance will not be considered a motor vehicle pursuit.

C. Procedures

These procedures provide Department members with guidelines to follow when engaged in a motor vehicle pursuit.

1. Restrictions

- a.) Officers shall not engage in a motor vehicle pursuit while there is a citizen occupant in the Department vehicle, including, but not limited to, arrestees, victims, witnesses or non-sworn members of the Department.
- b.) Police officers operating unmarked Department vehicles may only engage in a motor vehicle pursuit in the event of an extreme emergency (e.g., when the fleeing motor vehicle represents an immediate and direct threat to life or property or wherein a substantial loss of property has occurred).
- c.) Whenever a marked Department vehicle becomes available to take over a vehicle pursuit, the unmarked Department vehicle operator shall withdraw from active pursuit and shall serve in a support function for the marked vehicle.

2. Department Vehicle Operators

- a.) A Department vehicle operator shall only engage in a motor vehicle pursuit when:
  - (1) He/she has activated the emergency roof lights and siren if in a marked vehicle or has activated the emergency light and siren if in an unmarked vehicle and the motor vehicle operator refuses to voluntarily comply with the law requiring him to stop.
  - (2) He notifies the Communications Division dispatcher of the pertinent facts concerning the pursuit and requests assistance in order to apprehend a pursued motor vehicle operator who is taking evasive action to avoid being apprehended.
  - (3) The speeds involved and/or the maneuvering practices engaged in permit the Department vehicle operator complete control of his vehicle and do not create unwarranted danger to the public or Department members.
  - (4) The volume of pedestrian and/or vehicular traffic permits continuing the pursuit.
  - (5) Weather and road conditions are not such that the pursuit becomes inordinately hazardous.
- b.) Police officers engaged in the motor vehicle pursuit of a driver who is an IMMEDIATE threat to the safety of the public may take reasonable and prudent measures to apprehend the driver without endangering the welfare of others. However, the deliberate striking of a pursued vehicle or the use of a Department or other vehicle(s) as a stationary barricade is only permitted to be used as a last resort when:

owed by individual officers in high speed chase situations. They will continue to be interpreted as setting the standard of care to be applied in pursuit-related personal injury or property damage cases where police negligence is alleged.

Self-determined procedural standards for police conduct, which have now been ruled admissible in a number of jurisdictions,<sup>52</sup> may very likely be used in future lawsuits as a basis for jury instructions on the question of what standard to apply on the issue of police negligence.<sup>53</sup> Critics of these decisions may well argue that by holding the police responsible for failing to follow their own internal rules and regulations, courts in effect are prompting law enforcement agencies to avoid adopting specific operational guidelines from which liability might subsequently be construed. Nevertheless, by not having guidelines or by having guidelines that are so vague that an inordinate amount of discretion is left to patrol officers, the individual officer, agency or governmental entity may actually

- 
- (1) The occupant(s) of the vehicle being pursued is wanted for a serious felony, or
  - (2) The manner in which the pursued vehicle is being operated creates a substantial risk of serious injury or death.
  - c.) The Department vehicle operator or supervisor shall terminate a motor vehicle pursuit when in his/her judgment further pursuit is not warranted. Some examples of items to be considered are the volume of pedestrian and/or vehicular traffic, road and weather hazards or the distance between vehicles indicates that further pursuit will create more danger to the public and/or Department members than does the conduct of the pursued driver.
  - d.) When a motor vehicle pursuit is initiated by a law enforcement agency of another jurisdiction, the initiating unit and jurisdiction shall be responsible for the progress of the pursuit. Department vehicle operators who become actively involved in the pursuit shall adhere to all applicable provisions of this directive.
3. Report Required
- The Communications Division dispatcher shall dispatch a supervisor to their termination point of the pursuit if one has not responded. The supervisor shall file an In the Matter of report detailing the following information: time pursuit began, reason suspect fled (if known), approximate speeds reached, general route of pursuit, time pursuit ended and charges against suspect. This report shall be forwarded to the Traffic Division which shall serve as a central repository for information concerning police pursuits.

52. See cases cited *supra* note 47 and accompanying text.

53. See generally Annotation, *supra* note 14. This annotation discusses the question of using departmental safety rules or regulations to determine the appropriate standard of care in negligence cases, providing views for and against such a practice.

be left with less protection from civil liability. This is because, as one writer has noted,<sup>54</sup> where an agency's performance standards are lacking, courts could look to the written policies and procedures of similarly situated agencies for guidance in such matters.<sup>55</sup> However, where the statutory requirement for written pursuit guidelines actually lists certain factors that must be included,<sup>56</sup> some degree of specificity is assured and vague directives are unlikely.

Another probable consequence in mandating the adoption of pursuit guidelines for law enforcement agencies is a continuation of the trend toward stricter accountability in delineating the scope of police liability for the negative consequences of high speed pursuits. Mandated high speed chase guidelines will most likely result in a tightening of controls over the series of officer decisions that enter into police pursuit driving. Police administrators are already under considerable pressure to reduce the number of pursuit-related injuries and deaths.<sup>57</sup> Many units of local and county government have had to bear the brunt of multi-million dollar judgments brought about by negligently performed high speed chases. Liability insurance for police patrols, which has always been expensive, has tripled or quadrupled in cost in recent years.<sup>58</sup> For some jurisdictions, liability coverage has become virtually unobtainable.<sup>59</sup>

---

54. Note, *Negligence of Municipal Employees: Re-defining the Scope of Police Liability*, 35 U. FLA. L. REV. 720, 736 (1983).

55. See *Bonsignore v. City of New York*, 521 F. Supp. 394 (S.D.N.Y. 1981). In this case, the court held that a municipality could be liable for failure to adopt reasonable procedures to identify emotionally unstable police officers. Police department procedures for psychological testing were found by the court to be inadequate when compared to other city police departments. *Id.* at 402.

56. WIS. STAT. § 346.03(6) (1985-86). See *supra* note 3 for the full text of the subsection of the statute.

57. See generally Barker, *Police Pursuit Driving: The Need for Policy*, POLICE CHIEF, July 1984, at 70.

58. See generally *Worried Counties Seek Tighter Liability Guards*, J. Times (Racine, Wis.), Jan. 30, 1986, at 6A col. 1 (Wisconsin counties may recommend that the state legislature enact a limit on the size of awards against county-owned vehicles); Byles, *Insurance is Too Costly for Some*, J. Times (Racine, Wis.), Nov. 18, 1985, at 1A, col. 2 (Racine's premium costs have risen 300% in recent years); Shepard, *Cities Dig Deeper for Lawsuit Policies*, Milwaukee J., July 11, 1985, at 4, col. 3 (many cities have experienced up to 150% increases in insurance premiums).

59. See generally *Sorry, Your Policy is Canceled*, TIME, Mar. 24, 1986, at 16 [hereinafter TIME] (police patrols in many locales have been temporarily suspended because of lack of liability insurance); *Some Counties Halt Services as Insurance Ends*, Milwaukee J., Jan. 2, 1986, § 2, at 1, col. 3 (several rural counties in Wisconsin have drastically



This means that many municipalities, townships and even some county governments, already struggling with the problem of funding essential public services from a diminishing revenue base, must now contend with the prospect of self-insuring the high-risk work activities of their law enforcement personnel.

In light of this predicament, and given the public's heightened concern over highway safety, courts and legislators will be more inclined to carefully scrutinize those actions of police officers which have the highest potential for incurring liability.<sup>60</sup> A reweighing of public policy considerations in the areas of police firearms practices and domestic abuse arrest procedures is already well underway.<sup>61</sup> A similar re-evaluation is likely to take place in the realm of pursuit driving, a police activity described in a recent study as "the most deadly force."<sup>62</sup> The latter will most likely be subjected to the same kind of narrowing of police officer discretion that occurred in these two other high risk police activities. Courts may even hold police officers more accountable for the consequences of their actions in pursuit driving because of the clear signal that they have received from the legislature. Also, considering the very real possibility that they will be named as party defendants in pursuit-connected litigation,<sup>63</sup> police administrators will very likely respond to this threat of liability in the way many of them have reacted to misuse of firearms and domestic abuse cases.<sup>64</sup> They will respond by defending themselves as best they can through adopting and enforcing more restrictive pursuit policies and improving training and supervision.

---

reduced patrol operations because of the problem of obtaining liability insurance coverage).

60. Telephone interview with Lynn S. Adelman, Wisconsin State Senator and author of 1985 Wis. Laws 82 (Dec. 8, 1986). See WIS. STAT. §§ 343.31(3)(d), 346.17(3), 346.03(6) (1985-86).

61. See generally Sherman, *Reducing Police Gun Use: Critical Events, Administrative Policy and Organizational Change* (M. Punch, ed., THE CONTROL OF POLICE ORGANIZATIONS, 1983); see also Sherman & Berk, *The Specific Deterrent Effects of Arrest for Domestic Assault*, 49 AM. SOC. REV. 261 (1984).

62. Alpert & Anderson, *The Most Deadly Force: Police Pursuits*, 3 JUST. Q. 1, 3 (1986) (indicating that "weapons are used in a very small percentage of police activity as compared to the use of the squad car").

63. See Schmidt, *supra* note 6, at 200.

64. See generally Milton, Halleck, Lardner & Albrecht, *Legal and Administrative Restraints on the Use of Deadly Force* (L. Territo, ed., Police Civil Liability, 1984).

*B. Good Faith Compliance with Guidelines as Defense to Pursuit-Related Lawsuits*

A second issue arising out of the development of internal departmental policy on police high speed pursuit is the question of whether good faith compliance with such a policy acts as a defense to shield the officer and the employer from liability for pursuit-incurred personal injury or property damage. Obviously, a defendant police officer who deliberately disregards a departmental directive regulating police chases would have difficulty claiming "good faith" as a defense to a suit for negligent pursuit.<sup>65</sup> Nor would this defense presumably be available where a pursuing officer claims to have misinterpreted written departmental guidelines. In such cases, an action for injury or damage caused by a negligently conducted pursuit might also be brought against the officer's department under the theory that the department failed in its duty to ensure that the officer understood the procedure in question, and that failing to do so was the proximate cause of the improper conduct which harmed the plaintiff.

However, certain situations will invariably arise where the prescribed departmental directives are of little or no help to the officer in pre-pursuit or actual pursuit situations, notwithstanding the officer's willingness and ability to comply.<sup>66</sup> In

---

65. See, e.g., *Dehner v. California Highway Patrol*, 147 Law Enforce. Leg. Liab. Rep. (AELE) at 9 (Cal. Super. Ct. Jan. 18, 1985). In this case, the California Highway Patrol (CHP) entered into a twelve million dollar settlement for injuries sustained by a plaintiff who was struck by a motorist after a CHP officer crossed all lanes of traffic on the Pasadena freeway in an attempt to arrest a speeder. The officer's actions were apparently in violation of CHP pursuit policy and procedure.

His maneuver allegedly caused a drunken motorist, who could not stop, to rear-end a motorcycle which carried the woman [i.e., plaintiff] as a passenger. She was thrown under a car and dragged for 300 feet which resulted in the loss of her right arm and disfiguring scars over 20% of her body. One attorney said, "no attempt was made to slow the flow of traffic or to give regard to motorists on the freeway." The settlement, which was reportedly the largest ever obtained from the CHP, has to be enacted into law by the legislature.

*Id.*

66. See *Lee v. City of Omaha*, 209 Neb. 345, 307 N.W.2d 800 (1981). The police department policy stated that "[a]ll pursuits shall be terminated when the risks outweigh the desirability of apprehension." *Id.* at \_\_\_, 307 N.W.2d at 803. Plaintiff's vehicle was struck in an intersection by a van driven by an individual who was being chased by two patrol cars. Departmental procedure was apparently followed in that both police vehicles used their sirens and revolving red lights during the entire pursuit, slowed at all intersections, and maintained appropriate speeds under the circumstances. Fur-

such cases of inadequate guidance,<sup>67</sup> if a pursuit-related injury occurs and negligence is alleged, the question becomes whether the defense of good faith compliance can be successfully raised. Of course, any answer to this question would probably depend upon the standard used for assessing the care required of police pursuit drivers in the jurisdiction in which this defense was asserted.<sup>68</sup> In Wisconsin, where an ordinary negligence standard is used to measure negligence claims against operators of authorized emergency vehicles,<sup>69</sup> the defendant would probably be barred from raising this defense. In other jurisdictions, where courts have interpreted the standard of care required of emergency vehicles more liberally in favor of their operators, the defense of good faith reliance on existing departmental pursuit policies might well be considered. For example, where state courts have construed a gross negligence standard for drivers of emergency vehicles,<sup>70</sup> the defense might be allowed. This is because the United States Supreme Court has long recognized "good faith" as a defense to allegations of gross negligence in lawsuits charging government violation of individual civil rights.<sup>71</sup>

Compliance with formal policies and procedures or rules and regulations has been viewed as an important indicator of good faith in the performance of official duty.<sup>72</sup> Therefore, following departmental guidelines on pursuit driving should not be precluded as a defense to the liability of the defendant officer in those jurisdictions adhering to the gross negligence

---

thermore, light traffic conditions prevailed in the area of the chase, which occurred on a Sunday evening. The Nebraska Supreme Court held that the trial court's finding that the police officers were guilty of no negligence was reasonable and proper notwithstanding the fact that the offender, at the inception of the pursuit, was committing no moving traffic violations and his only offense at the time he was observed was driving while his operator's license was under impoundment. *Id.* at \_\_\_, 307 N.W.2d at 804.

67. *See, e.g.,* Mason v. Bitton, 85 Wash. 2d 321, 534 P.2d 1360 (1975). The failure of a police radio dispatcher to transmit important information to officers in pursuit of a fleeing motorist traveling 140 miles per hour was evidence of possible negligence. *Id.*

68. *See supra* text accompanying notes 18-19.

69. *See* cases cited *supra* notes 33-35 and accompanying text; *see also* WIS. STAT. § 346.03(5) (1985-86).

70. *See, e.g.,* Schatz v. Cutler, 395 F. Supp. 271 (D. Vt. 1975) (applying Vermont law).

71. *See* Procnier v. Navarette, 434 U.S. 555 (1978); Scheuer v. Rhodes, 416 U.S. 232 (1974); Pierson v. Ray, 386 U.S. 547 (1967). *But see* Owen v. City of Independence, 445 U.S. 622 (1980).

72. *See* Stoller v. Marsh, 682 F.2d 971 (D.C. Cir. 1982).

standard.<sup>73</sup> Even so, regardless of the state standard in effect, the officer whose department adopts pursuit guidelines that are inconsistent with what is required by state law, or guidelines that fail to address the particular conditions or circumstances presented, may still be held liable if it is subsequently determined that the officer acted carelessly.<sup>74</sup>

Although no one embodiment of official departmental guidelines can be expected to anticipate every possible situation that arises while on patrol, guidelines that do not adequately inform the officer who is confronted with a typical pursuit decision should be avoided. Where a law enforcement administrator is legally obligated to provide written guidelines setting forth a department's policy on high speed pursuit, that official has a responsibility to provide those under his or her command with a well-developed set of procedures specific enough to afford them a reasonable amount of direction.<sup>75</sup> Failure to do so means that officers presented with pursuit decisions must rely on their instinctive reactions as well as past experience. The belief that good judgment plus patrol experience is enough to get any officer through a pursuit situation without the need for written guidelines may be true. However, if injuries or fatalities do occur, the officer, department and governmental entity, as well as the taxpaying public, may be exposed to a greater risk of liability than need be.<sup>76</sup> In the

---

73. See, e.g., VT. STAT. ANN. tit. 23, § 1015 (1985) (which immunizes police officers from civil liability unless their actions are grossly negligent).

74. The classic case of police civil liability arising out of an inconsistency between state law and local police directive is in the area of liability for police misuse of firearms. In *Palmer v. Hall*, 380 F. Supp. 120 (M.D. Ga. 1974), the defendant police officer was held liable for shooting the plaintiff, even though he acted pursuant to a standing order which read in part as follows: "Those people engaged in lawlessness and anarchy must be stopped. SHOOT TO KILL!" *Id.* at 127.

75. Prior to 1985 Wis. Laws 82, however, a federal appellate court ruled that there could be no official liability for not formulating a written policy governing high speed police pursuits since such a matter was considered a discretionary act, not a ministerial one. Given the unequivocal mandate of 1985 Wis. Laws 82, it is very doubtful whether a similar ruling would prevail today. See *Dodge v. Stine*, 739 F.2d 1279 (7th Cir. 1984) (applying Wisconsin law).

76. Wisconsin law, as with the law of many other jurisdictions, e.g., New York, Illinois, Massachusetts, provides for the payment of judgments rendered against a law enforcement officer for liability arising out of performance of official duties. WIS. STAT. § 895.46 (1985-86); see *Matczak v. Mathews*, 265 Wis. 1, 60 N.W.2d 352 (1953); see also *Morrison, Negligent Operation of a Police Vehicle*, 16 CLEV.-MAR. L. REV. 442, 445 (1967).

highly charged emotional context of hot pursuit, even the most skilled and experienced pursuit driver may suffer from a momentary lapse of good judgment and not respond appropriately to a hazard.<sup>77</sup> A clear and comprehensive set of pursuit of guidelines eliminates a great deal of guesswork and will no doubt answer many legal questions that may ensue from a high speed chase.

An important issue related to the defense of good faith compliance is whether mandated pursuit guidelines will ultimately shift the burden of proof from injured plaintiffs to party defendants, *i.e.*, the officers involved, their departments and their public employers. Once the plaintiff has set forth a *prima facie* case that the defendant officer violated internal departmental directives on pursuit, it becomes incumbent on the latter to attempt to rebut such evidence by offering evidence of its own. Where it has been shown to have occurred, a violation of a police department's general order governing high speed pursuit carries sufficient weight that the burden falls upon the defendant to refute or explain the violation.<sup>78</sup> Courts seem very willing to allow departmental guidelines to have this effect, notwithstanding the possible incentive it may

---

77. See, e.g., *Joyner v. District of Columbia*, 28 CRIM. L. REP. 2496 (D.C. 1981), cited in Law Enforce. Leg. Defense Center, *Defense of Police Vehicle Related Liability During Emergencies or Pursuit* (AELE) at 20. The appellate court, in upholding the trial court's finding of liability against police officers and their department for third party pursuit-related injuries, noted: "While the half minute [Sgt.] Leonard allegedly had to make his decision [whether or not to abandon the chase] is not a long time, it is longer than the split second he had to decide to give chase. During this time, he had a duty to make the difficult decisions inherent in a situation of this kind with due regard to the safety of other drivers or pedestrians . . ." *Id.*

78. Even though respondeat superior liability of state and local police employers is no longer barred in Wisconsin, *Holytz v. City of Milwaukee*, 17 Wis. 2d 26, 115 N.W.2d 618 (1962), if Wisconsin decisions follow the trend set by a number of other jurisdictions, there are limitations on how far the courts will go in imposing liability on governmental entities for the negligently conducted pursuits of their law enforcement agents. Pursuit drivers who knowingly and deliberately violate departmental pursuit guidelines may be deemed to have significantly departed from the scope of their agency employment relationship so as to preclude respondeat superior liability. See, e.g., *Charles v. Town of Jeanerette*, 234 So. 2d 794 (La. Ct. App.), writ refused, 256 La. 853, 239 So. 2d 358 (1970) (plaintiff's decedent was shot after a high speed chase which concluded outside of town; defendant officer, who was held personally liable, created no respondeat superior liability on governmental employer, since his actions exceeded the scope of his employment); see also *Maynard v. City of Madison*, 101 Wis. 2d 273, 304 N.W.2d 163 (Ct. App. 1981).

have on departmental legal advisers to avoid specificity in drafting formal pursuit policies.

### C. *Failure to Implement Written Pursuit Policy Through Negligent Training and Supervision*

Law enforcement agencies, as well as the governmental entities under whose auspices they operate, are almost routinely named as party defendants in police misconduct litigation, which includes lawsuits for negligent pursuit driving.<sup>79</sup> Although a plaintiff injured during a high speed chase may have an immediate cause of action against the named defendant police officer, that plaintiff will usually also sue the officer's department, the department's top administrator and the governmental body that employs both. This is because any substantial damage award against an individual officer, unless the officer is insured, will be difficult if not impossible to collect. In searching for a "deeper pocket"<sup>80</sup> than that of the individual officer, plaintiffs will attempt to allocate as much responsibility as possible for the conduct in question to others higher in the chain of command. The latter are likely to be covered by publicly supported liability insurance. Ultimately, the plaintiff, as a rule, will try to tie the actions of the defendant to the alleged tortfeasor's governmental employer, which presumably has the resources to compensate the plaintiff for his or her injuries. Since municipal tort liability may not always follow the rule of respondeat superior,<sup>81</sup> the theory of

---

79. In Wisconsin, tort claims against municipalities, towns and counties must comply with the statutory requirements of WIS. STAT. § 893.80 (1985-86), which permits these governmental units to be named as party defendants, but limits monetary recovery to \$50,000. See WIS. STAT. § 16.007 (1985-86). A claim against the state must be filed with the State Claims Board. A claim against the federal government must proceed pursuant to the Federal Tort Claims Act, 28 U.S.C. § 1346(b) (1982).

80. See generally Seng, *Municipal Liability for Police Misconduct*, 51 MISS. L.J. 1 (1980). For a discussion of why a victim of alleged police misconduct finds the municipality's "deep pocket" so attractive, see *id.* at 23-24.

81. See *Coffey v. City of Milwaukee*, 74 Wis. 2d 526, 247 N.W.2d 132 (1976). In this case, involving alleged negligence of a building inspector, the court held that the imposition of liability did not always flow from a finding of negligence and cause-in-fact. The Wisconsin Supreme Court held:

[E]ven where the chain of causation is complete and direct, recovery may sometimes be denied on grounds of public policy because: (1) The injury is too remote from the negligence; or (2) the injury is too wholly out of proportion to the culpability of the negligent tort-feasor; or (3) in retrospect it appears too highly

recovery often used is that the public law enforcement agency which employed the officer failed to provide adequate training and proper supervision.

Where written pursuit guidelines are in effect, the plaintiff, as well as the defendant officer through an action for indemnity,<sup>82</sup> may claim that the employing agency failed to reinforce its formal policy because of inadequate training and improper supervision. In order to succeed here, the plaintiff must prove not only that the police department failed in its duty<sup>83</sup> to train and supervise, but that such failure was a "substantial factor" in causing the plaintiff's injuries.<sup>84</sup> For its part, the municipality or other public entity will probably attempt to avoid liability by claiming that its officer, in conducting the high speed chase in clear violation of departmental pursuit policies and procedures, acted without authorization and therefore beyond the scope of the official agency relationship.<sup>85</sup> Notwithstanding this denial, courts have held that laws aimed at reducing the level of risk associated with inherently dangerous police activities impose a duty on police administrators not only to provide adequate direction<sup>86</sup> for their officers but also

---

extraordinary that the negligence should have brought about the harm; or (4) because allowance of recovery would place too unreasonable a burden on the negligent tort-feasor; or (5) because allowance of recovery would be too likely to open the way for fraudulent claims; or (6) allowance of recovery would enter a field that has no sensible or just stopping point.

*Id.* at 541, 247 N.W.2d at 140.

82. See *supra* note 76 and accompanying text.

83. In a number of Wisconsin cases, actions against public officials have hinged on whether the duty imposed by law on the official is ministerial or discretionary in nature. In general, public officials are immunized from civil liability in carrying out or failing to carry out discretionary acts. See, e.g., *Dodge v. Stine*, 739 F.2d 1279 (7th Cir. 1984); *Lifer v. Raymond*, 80 Wis. 2d 503, 259 N.W.2d 537 (1977); *Lister v. Board of Regents*, 72 Wis. 2d 282, 240 N.W.2d 610 (1976). Although the duty to train and supervise police officers is statutorily imposed, there is considerable discretion on how that training will be carried out. See WIS. STAT. § 165.85 (1985-86).

84. *Antoniewicz v. Reszczyński*, 70 Wis. 2d 836, 857, 236 N.W.2d 1, 11 (1975).

85. See *supra* note 78 and accompanying text.

86. See, e.g., N.J. STAT. ANN. § 52:17B-71(o) (West 1986). *Smith v. Nieves*, 197 N.J. Super. 609, 485 A.2d 1066 (Ct. App. Div. 1984), discusses this law. See generally *Schmidt supra* note 6, at 199 (citing *Ford v. Brier*, 383 F. Supp. 505 (E.D. Wis. 1974), as an example of a legally imposed duty of police administrators to adequately direct members of their departments). In *Ford*, according to *Schmidt*, the court "found a duty on the part of the police chief to promulgate written directives dealing with the service of arrest warrants on the premises of third parties." *Schmidt, supra* note 6, at 199.

to make sure that they are suitably trained<sup>87</sup> and properly supervised.<sup>88</sup> Wisconsin's newly enacted law mandating that law enforcement agencies provide their officers with written high speed pursuit guidelines would seem to fall within this sphere of judicial involvement.<sup>89</sup>

#### IV. THE LAW IN WISCONSIN

Under common law, individual police officers possessed no immunity from liability for their negligent acts committed while pursuing law violators.<sup>90</sup> Even though the governmental entities that employed them could not be sued under the doctrine of sovereign immunity,<sup>91</sup> no such immunity was afforded its public servants.<sup>92</sup> Liability was assigned against individual officials in the same manner as it would be against a private citizen, that is, according to common law principles of negligence.<sup>93</sup> Fearing that public officers might be hampered by the specter of costly litigation and personal liability and concerned that many competent people would be discouraged from undertaking public service,<sup>94</sup> Wisconsin judges, along with those in most other jurisdictions, have moved toward

87. See *Biscoe v. Arlington County*, 738 F.2d 1352 (D.C. Cir. 1984), *cert. denied* 469 U.S. 1159 (1985); *Carter v. Carlson*, 447 F.2d 358 (D.C. Cir. 1971), *rev'd in part on other grounds sub nom.* *District of Columbia v. Carter*, 409 U.S. 418 (1973); *Nieves*, 197 N.J. Super. 609, 485 A.2d 1066; see also *Peters v. Bellinger*, 22 Ill. App. 2d 105, 159 N.E.2d 528 (1959); *McAndrew v. Mularchuk*, 33 N.J. 172, 162 A.2d 820 (1960); *Peer v. City of Newark*, 71 N.J. Super. 12, 176 A.2d 249 (1961); *Meistinsky v. City of New York*, 285 A.D. 1153, 140 N.Y.S.2d 212 (1955), *aff'd mem.*, 309 N.Y. 998, 132 N.E.2d 900 (1956); *Piatkowski v. State*, 43 Misc. 2d 424, 251 N.Y.S.2d 354 (1964).

88. See *Fernelius v. Pierce*, 22 Cal. 2d 226, 138 P.2d 12 (1943); *Grudt v. City of Los Angeles*, 1 Cal. App. 2d 529, 81 Cal. Rptr. 821 (1969), *vacated*, 2 Cal. 3d 575, 468 P.2d 825, 86 Cal. Rptr. 465 (1970); *District of Columbia v. White*, 442 A.2d 159 (D.C. 1982); *District of Columbia v. Davis*, 386 A.2d 1195 (D.C. 1978); *London v. Ryan*, 349 So. 2d 1334 (La. Ct. App.), *writ denied*, 351 So. 2d 171 (La. 1977); *Cutter v. Town of Farmington*, 126 N.H. 836, 498 A.2d 316 (1985).

89. Wis. STAT. § 346.03(6) (1985-86). See *supra* note 3 for the full text of the subsection of the statute.

90. See 62 C.J.S. *Municipal Corporations* § 545(b)(1)(e) (1949) ("[a] municipal officer is personally liable for damages caused by his negligence"). See generally Annotation, *Personal Liability of Peace Officer or His Bond for Negligence Causing Personal Injury or Death*, 18 A.L.R. 197 (1922).

91. See *Hayes v. City of Oshkosh*, 33 Wis. 314 (1873).

92. See *Lowe v. Conroy*, 120 Wis. 151, 97 N.W. 942 (1904).

93. See *Robinson v. Rohr*, 73 Wis. 436, 40 N.W. 668 (1889).

94. *Lister v. Board of Regents*, 72 Wis. 2d 282, 240 N.W.2d 610 (1976). The Wisconsin Supreme Court listed five other public policy reasons weighing toward immunity



providing protection for officers who cause injury or damage in the course of their employment.<sup>95</sup>

In Wisconsin, public officials charged with carrying out the law have long been protected from personal liability for harm resulting from discretionary acts performed within the scope of their official authority and in the line of duty.<sup>96</sup> The public officer tort immunity afforded Wisconsin peace officers in the performance of their duties is not founded upon principles of sovereign immunity, but rather upon principles of public policy.<sup>97</sup> A policy of not allowing the burden of personal liability to fall upon the publicly employed tortfeasor whose enforcement-related negligence harms another has been accomplished in this state through a combination of a court decision<sup>98</sup> and a legislative enactment<sup>99</sup> aimed at limiting the possibility of negligence actions against public employees. Also, to some extent, this purpose has been achieved through statutory indemnification.<sup>100</sup> In Wisconsin, a police officer is immune from most negligence damage suits;<sup>101</sup> in those cases where an officer may be sued for damage resulting from negligently performed law enforcement duties, indemnification exists for money judgments so rendered.<sup>102</sup>

---

from civil liability for negligence actions against public officers. These considerations are as follows:

- (1) the danger of influencing public officers in the performance of their functions by the threat of lawsuit;
- (2) the deterrent effect which the threat of personal liability might have on those who are considering entering public service;
- (3) the drain on valuable time caused by such actions;
- (4) the unfairness of subjecting officials to personal liability for the acts of their subordinates; and
- (5) the feeling that the ballot and removal procedures are more appropriate methods of dealing with misconduct in public office.

*Id.* at 299, 240 N.W.2d at 621.

95. *Id.* at 300, 240 N.W.2d at 621. See generally 63A AM. JUR. 2D *Public Officers and Employees* § 358 (1984).

96. See *Druecker v. Salomon*, 21 Wis. 628 (1867).

97. *Pavlik v. Kinsey*, 81 Wis. 2d 42, 49, 259 N.W.2d 709, 712 (1977).

98. *Lister*, 72 Wis. 2d at 300, 240 N.W.2d at 621.

99. WIS. STAT. § 893.80(4) (1985-86).

100. WIS. STAT. § 895.46 (1985-86); see *supra* text accompanying note 76.

101. WIS. STAT. § 893.80 (1985-86).

102. WIS. STAT. § 895.46 (1985-86).

The immunity afforded public employees in Wisconsin, including those working in law enforcement, is not absolute.<sup>103</sup> Section 893.80(4) of the Wisconsin Statutes confers tort immunity on public employees of local and county units of government for acts done in the exercise of certain kinds of functions, namely those categorized as either "legislative," "judicial," "quasi-legislative" or "quasi-judicial."<sup>104</sup>

In a series of cases involving immunity for public officers, the Wisconsin Supreme Court attempted to define and apply the term "quasi-judicial" in the context of various official activities. In *Salerno v. City of Racine*,<sup>105</sup> the court characterized "quasi-judicial" as entailing, at least in part, "an exercise of a discretionary right by the public official involved."<sup>106</sup> In *Lister v. Board of Regents*,<sup>107</sup> the court reinforced this notion by tying the principle of tort immunity for public officers to the judgment or discretion which such officers exercise in performing their official duties. The court declared public officers immune from liability only for their discretionary acts carried out in the course and within the scope of the public service.<sup>108</sup> The *Lister* decision also acknowledged an important exception to the public officer immunity rule. Where a public officer negligently performs a ministerial act, that officer may be liable to someone injured or otherwise harmed as a result of the officer's negligence.<sup>109</sup> A ministerial act was defined as one

103. Pavlik v. Kinsey, 81 Wis. 2d 42, 50, 259 N.W.2d 709, 712 (1977).

104. WIS. STAT. § 893.80(4) (1985-86), provides:

No suit may be brought against any volunteer fire company organized under ch. 213, political corporation, governmental subdivision or any agency thereof for the intentional torts of its officers, officials, agents or employes nor may any suit be brought against such corporation, subdivision or agency or volunteer fire company or against its officers, officials, agents or employes for acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions.

The above-mentioned categorization of functions is derived from language used by the Wisconsin Supreme Court in *Holytz v. City of Milwaukee*, 17 Wis. 2d 26, 40, 115 N.W.2d 618, 625 (1962). See WISCONSIN LEGISLATIVE COUNCIL REPORT—1976 (cited in WIS. STAT. ANN. § 893.80 (West 1983)). *Holytz* abrogated the doctrine of governmental immunity from tort liability, but made no attempt to modify our existing common law regarding individual liability of public employees.

105. 62 Wis. 2d 243, 214 N.W.2d 446 (1974).

106. *Id.* at 249, 214 N.W.2d at 449.

107. 72 Wis. 2d 282, 240 N.W.2d 610 (1976).

108. *Id.* at 300, 240 N.W.2d at 621.

109. *Id.* at 300-01, 240 N.W.2d at 621-22. This ministerial exception to the rule of tort immunity for public officers actually predated *Lister* and can be found in *Clausen v.*

“involving merely the performance of a specific task when the law imposes, prescribes and defines the time, mode and occasion for its performance with such certainty that nothing remains for judgment or discretion.”<sup>110</sup>

In *Coffey v. City of Milwaukee*,<sup>111</sup> the court elaborated further on the need to identify an official act as discretionary as a precondition for determining whether or not an action is “quasi-judicial” and thereby “cloaked in the doctrine of governmental immunity.”<sup>112</sup> The *Coffey* decision also reaffirmed, although in a somewhat roundabout fashion, the inverse of the doctrine, namely, that immunity does not attach to ministerial acts.<sup>113</sup> In rejecting the contention that a building inspector’s task was quasi-judicial in nature, and therefore, immune from tort liability, the court saw as significant the fact that the duty to inspect is statutorily imposed.<sup>114</sup> The court noted:

There is no discretion to inspect or not inspect. Violations exist or do not exist according to the dictates of the regulations governing the inspection, and not according to the discretion of the inspector. As to the actual conducting of the inspection, no essentially judicial procedures are accorded to the building owner. Only when it is determined that violations do exist, might quasi-judicial actions take place involving enforcement procedures. But the actual inspection as is involved here does not involve a quasi-judicial function.<sup>115</sup>

In refusing to extend tort immunity to public employees for their ministerial acts, but allowing it to operate as a barrier to negligent claims that derive from acts defined as discretionary, Wisconsin courts are by no means alone. Most jurisdictions presently adhere to this test and allow the imposition of liability only where the negligent act in question has been shown to be ministerial.<sup>116</sup> In cases where negligent police pursuit has been alleged, the discretionary immunity defense

---

Eckstein, 7 Wis. 2d 409, 97 N.W.2d 201 (1959); *Meyer v. Carman*, 271 Wis. 329, 73 N.W.2d 514 (1955).

110. *Lister*, 72 Wis. 2d at 301, 240 N.W.2d at 622.

111. 74 Wis. 2d 526, 247 N.W.2d 132 (1976).

112. *Id.* at 531-33, 247 N.W.2d at 132-36.

113. *Id.* at 533-34, 247 N.W.2d at 136.

114. *Id.* at 534-35, 247 N.W.2d at 136.

115. *Id.* at 534-35, 247 N.W.2d at 136-37.

116. *See, e.g., Mason v. Bitton*, 85 Wash. 2d 321, 534 P.2d 1360 (1975).

has been successful in some jurisdictions,<sup>117</sup> while unsuccessful in others.<sup>118</sup>

A better course of judicial action is the one followed in a minority of jurisdictions.<sup>119</sup> These courts have entirely rejected the discretionary/ministerial test in favor of one which tries to strike a balance between the public policy considerations of citizen safety, governmental efficiency and fair allocation of the costs of plaintiffs' injuries.<sup>120</sup> Just as the Wisconsin Supreme Court has repudiated other artificial distinctions used to prevent the imposition of civil liability for public officers and employees (e.g., "public duty/special duty,"<sup>121</sup> or "proprietary function/governmental function"<sup>122</sup>), the court should dispose of the discretionary/ministerial distinction in similar fashion. As the court suggested in *Coffey*, claims against governmental bodies and their employees or agents ought not to be disposed of by simply and routinely applying some arbitrary test before they are given a trial on the merits.<sup>123</sup> The decision to impose liability where it has been shown that police negligence was the proximate cause of plaintiff's injury is ultimately a decision based on "public policy considerations and requires the balancing of various policy factors."<sup>124</sup>

Since *Lister's* restatement of tort immunity for public officers,<sup>125</sup> the Wisconsin Supreme Court has not had occasion to rule on whether or not this doctrine applies to negligent high speed police pursuit. Nor does the statute governing claims against public officers and employees speak specifically

117. See, e.g., *Bratt v. City & County of San Francisco*, 50 Cal. App. 3d 550, 123 Cal. Rptr. 774 (1975) (the initial decision to engage in pursuit as well as the subsequent decision to continue pursuit were ruled discretionary and therefore covered by immunity provisions of CAL. GOV'T. CODE § 820.2).

118. See *Smith v. Nieves*, 197 N.J. Super. 609, 485 A.2d 1066 (Ct. App. Div. 1984) (pursuit held to be ministerial in nature and not immunized under N.J. REV. STAT. § 59:2-3(a)); see also *Biscoe v. Arlington County*, 738 F.2d 1352 (D.C. Cir. 1984), cert. denied, 469 U.S. 1159 (1985) (pursuit described as ministerial and thus exposed to liability).

119. See *Adams v. State*, 555 P.2d 235 (Alaska 1976).

120. *Id.* at 243.

121. *Coffey*, 74 Wis. 2d at 540, 247 N.W.2d at 139.

122. *Holytz v. City of Milwaukee*, 17 Wis. 2d 26, 39, 115 N.W.2d 618, 625 (1962).

123. *Coffey*, 74 Wis. 2d at 540, 247 N.W.2d at 139.

124. *Id.* at 543, 247 N.W.2d at 140-41.

125. *Lister*, 72 Wis. 2d at 300, 240 N.W.2d at 621.

to this issue.<sup>126</sup> While Wisconsin law provides tort immunity for official acts which fall within certain categories of governmental function (e.g., "quasi-judicial"),<sup>127</sup> it is by no means clear whether or not a high speed police chase, permitted under section 346.03 of the Wisconsin Statutes,<sup>128</sup> will be viewed by courts as coming within one of those areas so as to be covered by the immunity provisions of section 893.80(4). It has yet to be determined what effect the latter statute's general immunity provisions have on section 346.03, which establishes the duty of a police pursuit driver,<sup>129</sup> specifies what he or she must do to give proper warning,<sup>130</sup> and denies protection to the negligent officer for the consequences of his or her "reckless disregard for the safety of others."<sup>131</sup> At least one writer is of the opinion that a general immunity statute would not bar a cause of action for negligent high speed chase where another statute specifically mandates a duty of due care in emergency vehicle operations.<sup>132</sup> Such is the case in Wisconsin.

Some sense of how Wisconsin courts might reconcile the apparent conflict between sections 893.80(4) and 346.03(5) in deciding if tort immunity applies to negligent police pursuit may be drawn from a series of Wisconsin cases involving allegations of negligence on the part of public employees. An important issue in all but one<sup>133</sup> of these cases was whether

---

126. WIS. STAT. § 893.80(4) (1985-86).

127. *Id.*

128. See *supra* notes 3 & 28 for text and discussion of the statute.

129. WIS. STAT. § 346.03(5) (1985-86) defines this duty as "the duty to drive with due regard under the circumstances for the safety of all persons."

130. WIS. STAT. § 346.03(3) (1985-86) provides that warning of an approaching emergency vehicle be given as follows:

[T]he visual signal given by a police vehicle may be by means of a blue light and a red light which are flashing, oscillating or rotating. The exemption granted by sub. (2)(b), (c) and (d) apply only when the operator of the emergency vehicle is giving both such visual signal and also an audible signal by means of a siren or exhaust whistle . . . .

131. WIS. STAT. § 346.03(5) (1985-86).

132. See I. SILVER, *supra* note 16. Professor Silver cites as an example the Florida case of *Reddish v. Smith*, 468 So. 2d 929 (Fla. 1985). In this case, the Florida Supreme Court ruled that the broad immunity provisions of FLA. STAT. § 768 did not supercede FLA. STAT. § 316.075(5), which defines the duty of an emergency vehicle driver and creates liability for negligent violation of such duty.

133. *Lifer v. Raymond*, 80 Wis. 2d 503, 259 N.W.2d 537 (1977). Although the *Lifer* case was decided on grounds other than § 895.43, subsequently renumbered as

certain specific acts of public officers could be properly categorized as "quasi-judicial" within the meaning of section 893.80(4).<sup>134</sup> Some of the acts in question were carried out pursuant to or regulated by specific statutory law, which makes them analogous to high speed police chases under the emergency vehicle statute.

In *Coffey v. City of Milwaukee*,<sup>135</sup> the Wisconsin Supreme Court held that the inspection of a building in order to determine whether code violations existed, under section 101.14 of the Wisconsin Statutes, was an act which did not involve a quasi-judicial function.<sup>136</sup> The court anchored its denial of statutory immunity on the specific nature and characteristics of the act itself. "The duty to inspect is statutorily imposed. There is no discretion to inspect or not inspect."<sup>137</sup>

In *Lifer v. Raymond*,<sup>138</sup> the Wisconsin Supreme Court held that the act of issuing a driver's license under section 343.06(7) of the Wisconsin Statutes was immune from liability.<sup>139</sup> Although the holding of the *Lifer* case did not rest on section 893.80(4), the decision has a bearing on section 893.80(4) public employee tort immunity because of important dictum. By declaring the terms "quasi-judicial" and "discretionary" to be "synonymous," the court, in effect, adopted the discretionary/ministerial test for applying tort immunity under section 893.80(4).<sup>140</sup> According to this test, acts of public employees which involve the exercise of judgment or discretion, rather than the mere performance of a prescribed task, come under the protection of statutory immunity.<sup>141</sup>

In *Pavlik v. Kinsey*,<sup>142</sup> decided shortly after the *Lifer* case, the Wisconsin Supreme Court held that a complaint accusing public employees of negligence in failing to follow state stan-

---

§ 893.80, it contains important dictum about this general immunity statute and was therefore included along with the other cases.

134. See *supra* note 14.

135. 74 Wis. 2d 526, 247 N.W.2d 132 (1976).

136. *Id.* at 534-35, 247 N.W.2d at 136-37.

137. *Id.* at 534, 247 N.W.2d at 136.

138. 80 Wis. 2d 503, 259 N.W.2d 537 (1977).

139. *Id.* at 511, 259 N.W.2d at 541.

140. *Id.* at 512, 259 N.W.2d at 542.

141. *Id.* at 509, 259 N.W.2d at 540.

142. 81 Wis. 2d 42, 259 N.W.2d 709 (1977).

dards for the construction of a temporary highway and failing to post warning and reduced speed limit signs was sufficient to state a cause of action alleging breach of a ministerial duty.<sup>143</sup> Therefore, a demurrer to the complaint was properly overruled. Significantly, the court relied exclusively on the discretionary/ministerial test in determining that the complaint was minimally sufficient.<sup>144</sup> Ministerial duties, according to the court, were duties that were "mandatory in nature . . . imposed by law upon subordinate employees."<sup>145</sup>

In *Maynard v. City of Madison*,<sup>146</sup> the Wisconsin Court of Appeals held that Madison police officers who edited reports of police informers for public inspection performed discretionary tasks rather than ministerial functions, and that therefore the duty to protect an informant's identity was nonministerial.<sup>147</sup> Thus, the police officers were not individually liable because of the "general rule" that "a public employee who acts within the scope of his official authority and in the line of his official duties is immune from personal liability."<sup>148</sup> However, the City of Madison was held liable under the theory of respondeat superior because the actions of the police officers in carrying out the city's policy to release intelligence reports "were not judicial or quasi-judicial" under section 893.80(4).<sup>149</sup> According to the court, "[a] quasi-judicial act involves essentially judicial procedures such as notice, hearing, exercise of discretion and a decision on the record."<sup>150</sup> The acts in question were found to be deficient in that they did not include these procedures.<sup>151</sup>

In *Domino v. Walworth County*,<sup>152</sup> a motorcyclist who was injured when her motorcycle struck a tree which had fallen

---

143. *Id.* at 51, 259 N.W.2d at 712.

144. *Id.*

145. *Id.* at 52, 259 N.W.2d at 713.

146. 101 Wis. 2d 273, 304 N.W.2d 163 (Ct. App. 1981).

147. *Id.* at 280, 304 N.W.2d at 167.

148. *Id.* at 279, 304 N.W.2d at 167. On a related issue, which is likely to arise in cases involving high speed pursuit, the court noted "that failure by a public officer to exercise ordinary care in the performance of a discretionary act does not, as a general rule, put the act beyond the scope of the officer's authority." *Id.* at 282, 304 N.W.2d at 168.

149. *Id.* at 283, 304 N.W.2d at 168-69.

150. *Id.* at 282, 304 N.W.2d at 168.

151. *Id.* at 283, 304 N.W.2d at 168.

152. 118 Wis. 2d 488, 347 N.W.2d 917 (Ct. App. 1984).

across a road sued to recover for her injuries, charging negligence on the part of a sheriff's department dispatcher. The dispatcher had received a report of a downed tree on the road and had assigned a squad to investigate. While enroute, the squad was diverted by the dispatcher to an accident involving personal injuries. No other squads were assigned to investigate the report, nor were any local town agencies notified. The issue on appeal was whether the actions of the dispatcher fell within the immunity provisions of section 893.80(4). The court of appeals ruled that her actions were not sufficiently discretionary so as to be immunized by the statute.<sup>153</sup> On the contrary, the court held that the dispatcher's duties, under the facts of the case, "appear absolute, certain or imperative," and thus the county was not immune to suit for the alleged breach of this ministerial duty.<sup>154</sup> To conclude otherwise, "would effectively emasculate the holding of the supreme court in *Holytz v. City of Milwaukee* abolishing municipal immunity from tort liability because nearly every human action involves the exercise of some discretion."<sup>155</sup>

Based upon the analysis of the above cases, several inferences may be drawn about how Wisconsin courts might handle a case of negligent high speed pursuit. While the decision of a police officer to pursue a suspect appears discretionary and therefore would probably be ruled immune from the imposition of liability, how that decision is carried out may very well involve duties which are ministerial and which expose both the officer and the employer to liability. Furthermore, as the highest court within the state has pointed out, even where an officer has made an initial discretionary-type decision which "itself would be immune from the imposition of liability, the very officer who made the immune decision may nevertheless be subject to liability as a public officer for the breach of the ministerial duty imposed by that decision."<sup>156</sup>

In time, Wisconsin courts may very well find the inherently defective discretionary/ministerial criterion to be unworkable. If and when that time arrives, they may well be

---

153. *Id.* at 492, 347 N.W.2d at 920.

154. *Id.*

155. *Id.* at 491-92, 347 N.W.2d at 919 (citations omitted).

156. *Pavlik*, 81 Wis. 2d at 51, 259 N.W.2d at 712.



advised to follow the course charted by the court in the *Coffey* decision and weigh each case on the basis of public policy considerations.<sup>157</sup> In so doing, the courts will be acknowledging that police officers require a certain amount of latitude in order to adequately perform the duties expected of them. No judge wants to deter effective law enforcement by making police officers and their governmental employers overapprehensive about being liable for damages arising out of good police work. Yet, tort immunity is something that should be allowed sparingly and only in those instances where imposing liability would hinder important police functions.

## V. IN SEARCH OF A MODEL PURSUIT POLICY

Under what circumstances should a high speed pursuit be permitted? In attempting to clarify this issue and provide a basis for a model pursuit policy it would seem appropriate to enlist the technical assistance of social science research.<sup>158</sup> Unfortunately, little empirical research has been done on the many variables that enter into pursuit driving and how they relate to the dual objectives of citizen safety and offender apprehension.<sup>159</sup> In fact, Professors Alpert and Anderson, in their in-depth analysis of empirical studies, were able to discover only five such studies, but concluded that four of these were "so methodologically flawed that the data [was] not meaningful."<sup>160</sup> The one study that was deemed worthwhile was carried out by the California Highway Patrol (CHP).<sup>161</sup> However, another study of police pursuits has since been completed, and this examination by Professor Beckman of Michigan State University stands as perhaps the most comprehensive research effort to date.<sup>162</sup> A comparison of these two studies reveals that many of their separate findings are consistent. Taken together, the CHP and Beckman studies contain important implications which should not be over-

---

157. *Coffey*, 74 Wis. 2d at 543, 247 N.W.2d at 140.

158. See generally L. FRIEDMAN, *THE LEGAL SYSTEM: A SOCIAL SCIENCE PERSPECTIVE* (1975).

159. See generally Beckman, *High Speed Chases: In Pursuit of a Balanced Policy*, POLICE CHIEF, Jan. 1983, at 34.

160. Alpert & Anderson, *supra* note 62, at 8-9.

161. CHP, *Pursuit Study*, *supra* note 4.

162. Beckman, *supra* note 4.

looked by police administrators when considering departmental policy for high speed pursuits.

The CHP study involved 683 pursuits which took place primarily on highways and freeways in California.<sup>163</sup> In addition to state patrol pursuits, which comprised the bulk of those analyzed, this study also looked at pursuits by ten city law enforcement agencies.<sup>164</sup> The Beckman study, on the other hand, included 424 pursuits among seventy-five law enforcement agencies in nine states and two territories.<sup>165</sup> Both studies revealed that most suspects<sup>166</sup> were apprehended regardless of such factors as distance, time of pursuit, type of roadway, locale, environmental conditions or officer and suspect speed.<sup>167</sup> Furthermore, most pursuits concluded without a collision.<sup>168</sup> Approximately one-half of the pursuits ended through the suspect voluntarily surrendering rather than being forcibly stopped, although quite a few suspects surrendered after being involved in an accident.<sup>169</sup> In addition, both studies indicated that a driver attempts to elude capture generally for reasons other than being a dangerous felony offender.<sup>170</sup>

While the CHP study found that the pursuit of felony suspects resulted in a much higher collision rate compared to the collision rate for non-felony pursuits,<sup>171</sup> Beckman found that the type of violation preceding the pursuit was unrelated to the safety of its outcome.<sup>172</sup> Beckman also found that accidents not only occurred within a wide range of speeds, but

163. CHP, *Pursuit Study*, *supra* note 4.

164. *Id.* at 10.

165. Beckman, *supra* note 4, at 26.

166. The CHP study found that 76.9% of the police pursuits studied resulted in apprehension, CHP, *Pursuit Study*, *supra* note 4, while the Beckman study revealed an "average capture rate" of 77%, Beckman, *supra* note 4, at 34.

167. *See supra* note 166.

168. The CHP sample disclosed that 71% of pursuits ended without collision, CHP, *Pursuit Study*, *supra* note 4, while Beckman found a rate of 75%, Beckman, *supra* note 4, at 30.

169. *See* CHP, *Pursuit Study*, *supra* note 4, at 70-71; Beckman, *supra* note 4, at 30.

170. *See* CHP, *Pursuit Study*, *supra* note 4, at 71-72; Beckman, *supra* note 4, at 27.

171. CHP, *Pursuit Study*, *supra* note 4, at 43 (Table No. 20). Table No. 20 indicates an accident rate of 51.6% for pursuits of known felony suspects, compared to an average accident rate of 31% for pursuits of non-felony suspects (*i.e.*, traffic violators, DUI suspects, etc.).

172. Beckman, *supra* note 4, at 27.

took place over long, as well as short, distances.<sup>173</sup> This led him to conclude that there are no specific limits on distance or speed that guarantee safety.<sup>174</sup>

One finding that Beckman came up with was not reported in the CHP study. Roadblocks and ramming of fleeing vehicles, which generally had been considered to be especially hazardous, actually increased the apprehension rate while decreasing the overall injury rate and increasing the suspect injury rate only slightly.<sup>175</sup>

Although the CHP and Beckman studies provide much useful information to police executives charged with developing departmental pursuit policies, much more empirical research is needed before the knowledge contributed by social science can truly make a difference.<sup>176</sup> In particular, research is needed on the way in which various policies impact on field officer and supervisory discretion in initiating, conducting and terminating pursuits. Research is also needed on the deterrent effect, if any, of different types of pursuit policies on pursued drivers. For instance, it might be useful to compare the effects on the ratio of suspects who surrender after vehicular pursuit to suspects who attempt to elude capture and are either successful or forcibly apprehended.<sup>177</sup> Until such research is available, however, police policy makers and trainers who seek guidance in formulating and disseminating guidelines on high speed pursuits have no recourse but to rely upon the prevailing practice within the profession and what the courts have handed down in past decisions.<sup>178</sup> Both of these current sources of pursuit information will be briefly explored.

---

173. *Id.* at 27-28.

174. *Id.* at 26.

175. *Id.*

176. See generally Alpert & Anderson, *supra* note 62, at 11.

177. The CHP study examined 23 independent and 5 dependent pursuit variables in order to determine causative relationships and significant influences. CHP, *Pursuit Study*, *supra* note 4, at 26 (Table No. 3). However, as Alpert and Anderson point out, the effect of one variable on others depends upon their combined or total effect. "In real-life situations these variables exist in some combination, having a joint as well as an individual effect." Alpert & Anderson, *supra* note 62, at 8.

178. Alpert & Anderson, *supra* note 62, at 11.

### A. Customary Practice

In seeking to arrive at a model pursuit policy, one should also consider the shared knowledge and experience of law enforcement professionals. What are the commonly accepted norms within law enforcement which govern the behavior of officers engaged in high speed pursuit? More specifically, what set of circumstances is generally believed to justify the initial decision to use a police vehicle for this purpose? According to conventional wisdom, when and by whom should the decision be made to terminate a pursuit? What role, in general, do supervisory personnel play in making pursuit-related decisions?

Traditionally, most law enforcement administrators in policy-making positions have justified the use of high speed pursuit to effect the arrest of any actual or suspected felony offender.<sup>179</sup> The custom in law enforcement is that every reasonable effort may be made to apprehend a fleeing felon, short of endangering the lives of others. Because of the high risks involved, ramming a fleeing vehicle occupied by a dangerous felon is generally considered deadly force, and in many jurisdictions this practice has been made subject to the kinds of restraints that are analogous to other forms of deadly force.<sup>180</sup> Likewise, roadblocks are viewed as posing too great a risk by most departments and are therefore usually discouraged, except where the fleeing suspect is sought in connection with a violent felony and the suspect poses a serious threat to the public.<sup>181</sup> It is now standard practice in almost all jurisdictions to require supervisory personnel to approve the setting up of a roadblock prior to using this tactic.<sup>182</sup>

A common belief in law enforcement circles has long been that non-felony offenders who are imperiling the lives of inno-

---

179. See generally Cunningham, *Tactical Driving: A Multifaceted Approach*, 55 FBI L. ENFORCEMENT BULL. 18, 19 (Sept. 1986) ("The main reason law enforcement began to use motor vehicles was to pursue serious offenders who used vehicles to effect their escape . . .").

180. E. DOUGHERTY, *SAFETY IN POLICE PURSUIT DRIVING* 52-53 (1961). But see Beckman, *supra* note 4, at 34 (study revealed that rammings actually increased the capture rate "while decreasing the overall injury rate and increasing the suspect injury rate only slightly").

181. See Territo, *supra* note 10, at 33-34; see also 45 Op. Wis. Att'y Gen. 152 (1956).

182. See generally J. SCHWARZ, *POLICE ROADBLOCK OPERATIONS* (1962).

cent motorists or pedestrians through their reckless driving are appropriate cases for limited high speed pursuit.<sup>183</sup> Driving under the influence of an intoxicant or drug, running a red light, as well as other vehicular code violations that pose an imminent threat to public safety, are widely believed to warrant moderate to high speed pursuit.<sup>184</sup> Other traffic law violations that impose no immediate threat to the public do not merit the same degree of risk during pursuit.<sup>185</sup> Although such decisions are generally left to the discretion of the observing officer, it is the opinion of many law enforcement professionals that where no danger is imminent, excessive speed in pursuit of the minor traffic violator poses an unnecessary risk to the pursuing officer, as well as to the public, and therefore is not warranted.<sup>186</sup> As one veteran observer pointed out, "[i]f it is likely that an offender of lesser importance could be picked up later, the officer must decide between hot pursuit at the peril of highway users as well as himself or positive identification of the driver and subsequent service of a warrant under more favorable conditions."<sup>187</sup>

In addition to offense type and severity level, there are other elements that enter into the shared experience and custom of high speed pursuit. Pursuit of violators has been carried out under all kinds of road, traffic and weather conditions. A chase may take place at any time of day or night under varying degrees of visibility. It may traverse considerably different physical terrain. It may begin in a sparsely populated suburban area and lead to crowded city streets. It may carry the pursuing officer from industrial to residential or business districts. It may involve school zones, parks, dead-end side streets and blind alleys totally unfamiliar to the of-

---

183. See, e.g., Schultz, *High Speed Chases: Vehicle Pursuit vs. the Lawsuit*, POLICE CHIEF, Jan. 1983, at 32-33.

184. See International Association of Chiefs of Police, Resolution Adopted at Annual Meeting, Oct. 1966, which supports high speed pursuit driving to "accomplish the legitimate objectives of law enforcement."

185. See E. DOUGHERTY, *supra* note 180, at 27.

186. See, e.g., Wis. Council for Traffic Enforcement, Governor's Office of Highway Safety, *Model Policies and Procedures for Wisconsin Law Enforcement Agencies: Pursuit Driving* (1977). The board favors a policy of "moderate speeds, if necessary, to apprehend motor vehicle operators who have committed traffic violations." *Id.* at 1 (emphasis in original).

187. E. DOUGHERTY, *supra* note 180, at 25.

ficer. The officer's training and experience in dealing with various pursuit situations may also vary considerably.

The fact that there are numerous possible variations of these as well as other circumstances that the driver of a pursuit vehicle may have to contend with is why the pursuit method of apprehending lawbreakers is considered dangerous. The risk of collision resulting in injury or death to the officer, the pursued suspect or other highway users is commonly understood to be relatively high. Therefore, prevailing opinion among police administrators holds that pursuit decisions, including the decision to terminate pursuit, should be arrived at through weighing the anticipated risks in addition to the known hazards involved in each case.<sup>188</sup>

Most upper to mid-level police managers questioned about pursuit driving acknowledged that common sense and experience dictate that it is better to occasionally "let one get away" than to take undue risks which might bring costly litigation and invite criticism.<sup>189</sup> Among those police officials who hold command or supervisory positions, the predominant view is that a high speed chase should always be discontinued when the safety hazards become too great,<sup>190</sup> the exception being where the pursuing officer has reason to believe that the suspect being chased has committed a violent felony and poses a clear and immediate threat to the public unless apprehended. Lesser offenders, particularly those whose identities have been established through the license plates on their vehicles, do not justify taking so great a risk since they can probably be apprehended at a later date. In the case of an ongoing high speed chase, some agencies follow the practice of assigning responsibility for monitoring the progress of the pursuit to a member of the supervisory staff who is instructed to order the pursuit terminated if the danger of continuing it is too high.<sup>191</sup>

---

188. See Territo, *supra* note 10, at 34. Professor Territo of the University of South Florida directed a nationwide survey of police department policies regarding high speed pursuits and emergency response. Forty-five agencies from 37 states responded to his request for information. References to "prevailing opinion" or "predominant view" in this section of the text are based upon that survey. *Id.* at 31-32.

189. *Id.* at 34.

190. *Id.*

191. *Id.*

### B. Court Rulings

What guidance have the courts provided agencies in search of a rational policy for high speed pursuit? A knowledge of court decisions within the state which pertain to municipal liability for pursuit-related damages is essential to policy development. Prior to the enactment of laws mandating provisions for written pursuit guidelines, many departmental legal advisors believed that adequate direction was provided to police personnel in the form of court decisions construing speed exemption statutes or ordinances, and that these decisions alone sufficed for a high speed driving policy.<sup>192</sup> They felt that there was no need for promulgating a separate set of formal policy guidelines.<sup>193</sup> Of course, whether this belief was justified depended largely upon what one's primary objective was. If it was simply to fend off lawsuits arising from negligent police pursuits, relying solely on the pertinent decisions of the state's appellate courts probably did offer a trifle more protection from expensive civil litigation than having specific departmental guidelines against which deviations could more easily be proven. Admittedly, as shown above, the common law standards are less restrictive than are the standards that departments tend to set for themselves.<sup>194</sup>

Despite the somewhat dubious protection that decisional law provides, the absence of written departmental directives stressing safe pursuit driving regrettably does little to reinforce in the minds of young and inexperienced officers the need to carefully weigh all the risks before and during high speed chases. Thus, in attempting to avert liability by relying upon less restrictive and somewhat vague decisional law in lieu of adopting a formal written departmental policy, law enforcement agencies may very well have exposed themselves to more collisions and greater liability than otherwise needed.

However, many agencies which defined their primary purpose as that of reducing the number of pursuit-related injuries or deaths opted for the more comprehensive written policy format which they felt was needed to effectively govern the manner in which emergency police vehicles were being

---

192. See E. DOUGHERTY, *supra* note 180, at 21-22.

193. *Id.* at 22.

194. See Note, *supra* note 27 and accompanying text.

used.<sup>195</sup> Their rationale for adopting formal departmental policy was that if an officer knows that he or she might be held accountable for violating department rules, that officer will think twice about taking undue risks.

Regardless of the motives of those agencies which avoid formal policy directives and rely exclusively on court decisions, the fact remains that many law enforcement agencies in states without a statutory mandate to provide written pursuit guidelines do elect to follow this course.<sup>196</sup> For those agencies without formal guidelines, the direction that they receive varies according to the standards that the courts in their respective jurisdictions employ for police tort liability cases.<sup>197</sup> Depending on the jurisdiction, the standard used to define the scope of police liability is either that of ordinary care or gross negligence. Courts that have adopted an ordinary negligence standard for tort claims against the drivers of emergency police vehicles measure a police officer's pursuit driving by the care and diligence which a reasonably prudent police officer, under the same or similar circumstances, would exercise in the performance of such hazardous police duty.<sup>198</sup> However, courts that assign culpability only for gross negligence generally relieve the police of liability for the consequences of a high speed pursuit unless the pursuit was conducted with "reckless disregard" for the safety of others.<sup>199</sup>

Under either standard, operators of police pursuit vehicles are under an obligation to drive with a degree of caution and at a rate of speed that is reasonable and proper under the circumstances, with ample concern for such factors as traffic, road conditions and population density. In general, courts will not condone pursuit driving which carelessly endangers life or property or which demonstrates a total indifference to others legitimately using the streets.

195. See Schmidt, *supra* note 6, at 200. Schmidt refers to this phenomenon as "a new morality" in law enforcement leadership.

196. See generally Carlin, *supra* note 20. Carlin's research reveals that in particular "many smaller police departments have no written pursuit policy." *Id.* at 113 n.104.

197. See *Burnette v. Employers Mut. Liab. Ins. Co.*, 107 Wis. 2d 361, 320 N.W.2d 43 (Ct. App. 1982); *supra* text accompanying note 38.

198. See, e.g., *Zulauf v. State*, 119 Misc. 2d 135, 462 N.Y.S.2d 560 (1983).

199. *Schatz v. Cutler*, 395 F. Supp. 271, 274 (D. Vt. 1975).



In the final analysis, court decisions do not offer a great deal of guidance to the police planner or legal adviser seeking to develop a comprehensive policy for high speed pursuit. Decisional law tends to be most useful to those who have interests in damage actions in the nature of establishing governmental tort liability, or, conversely, in avoiding or limiting the same. In construing emergency vehicle statutes in an effort to determine the duty of care owed by operators of police pursuit vehicles, courts are prone to view pursuit-related issues in terms of whether minimum requirements were met. Questions of whether an actual emergency existed<sup>200</sup> or what constitutes adequate warning of approaching emergency vehicles<sup>201</sup> are usually addressed in language which sets forth the lowest level permitted by law. Such pronouncements are not very instructive to police policymakers faced with balancing society's need to apprehend law violators with the individual citizen's right to safe use of public roads.<sup>202</sup>

## VI. CONCLUSION

In recent years, the courts have shown an increased willingness to impose civil liability on police officers for the consequences of negligent high speed pursuit. Furthermore, a

---

200. See *Merlino v. Mutual Serv. Casualty Ins. Co.*, 23 Wis. 2d 571, 127 N.W.2d 741 (1964). "[A] police ambulance is clearly an 'authorized emergency vehicle' within the definition set forth in § 340.01(3) . . . [and it] is only when responding to an emergency call that he is excused from observing certain rules of the road." *Id.* at 583-84, 127 N.W.2d at 748.

201. See *Pedek v. Wegemann*, 271 Wis. 461, 74 N.W.2d 198 (1956). In this case, the Wisconsin Supreme Court held that although a police pursuit driver was operating an emergency vehicle, he did not come under the statutory exemption as to speed regulations because his siren was not in operation prior to the intersection collision of his motorcycle and a car operated by the defendant.

202. Professor Territo identified eleven "components that have significant bearing on . . . pursuit-related accidents" and which therefore should be addressed in developing a comprehensive police pursuit policy. They are: "[T]he decision to pursue; use of emergency equipment; silent runs; speed limitations; number of pursuit vehicles; unmarked vehicles; non-police passengers; shooting at vehicles; ramming vehicles; establishing roadblocks; and termination of pursuit." Territo, *supra* note 10, at 32.

Appended to this article is a partial draft of a proposed pursuit policy and procedure, written by Lt. Douglas Van Buren of the Wisconsin State Patrol, incorporating Territo's main policy components and adding several other elements not included in Territo's checklist. The draft proposal is exemplary not only for its thoroughness but also for the way it complies with the statutory requirements of 1985 Wis. Laws 82. As such, it could well serve as a model for high speed police pursuit in any jurisdiction.

growing number of courts appear inclined to extend liability to police supervisors and administrators for the negligently conducted pursuits of subordinates under the twin theories of improper training and inadequate supervision. This trend, coupled with enlightened self-interest, has probably led many law enforcement agencies to intensify pursuit driver training and require close supervision in pursuit situations. While improved training and supervision may result in a decrease in collisions where personal injury and property damage occur, courts must be mindful of other possible repercussions that may follow in the wake of the widening scope of police liability.

While a jury may be reluctant to impose personal liability for damages on the individual officer who actually commits the careless act, the same jury may not be so hesitant in dealing with the deeper pocket of those police officials responsible for determining pursuit policy. Since these officials are almost always indemnified by their government employers for monetary judgments assessed against them, juries desiring to compensate innocent victims of negligent pursuit have shown a tendency to render rather substantial damage verdicts against these party defendants. Larger damage awards, in turn, have led many insurance carriers to multiply annual premium costs for police liability coverage or to back away from writing such policies altogether. As a result, municipal and town governments throughout the United States, already hard pressed fiscally, are creating self-insurance funds,<sup>203</sup> banding together to form insurance pools<sup>204</sup> or taking their chances by going unin-

---

203. The City of Milwaukee is typical of many municipalities that are unable to acquire excess liability insurance. As a result, the city is uninsured in matters of general liability. Steps are currently being taken to create a self-insurance fund. Interview with Gregory Gunta, Assistant Milwaukee City Attorney and Acting Risk Manager, in Milwaukee, Wisconsin (Feb. 13, 1987).

204. Mr. Mark Rogacki, Executive Director, Wisconsin Counties Association, predicts that legislation currently in the drafting stage will be adopted which will allow counties to form insurance pools. The access to larger financial resources provided by such pools would spread the risk of crippling judgments. Currently, eleven other states have liability pools. The State of Wisconsin presently operates a high risk insurance pool for worker's compensation, which counties may join. Interview with Mark Rogacki, Executive Director, Wisconsin Counties Association, in Milwaukee, Wisconsin (Dec. 8, 1986).

sured.<sup>205</sup> A few law enforcement agencies have even felt compelled to curtail patrol services within their jurisdictions for fear that catastrophic damage awards would leave police administrators as well as taxpayers vulnerable.<sup>206</sup> Others have temporarily halted any form of vehicular chase until adequate liability insurance coverage could be arranged.<sup>207</sup> Thus, in a very real sense, departmental pursuit policy in these jurisdictions has not been shaped by society's interest in apprehending law violators, but instead by fear of financially crippling damage awards.

Despite these concerns, as well as the warnings of police legal advisers who are worried about the legal ramifications of specific guidelines, law enforcement agencies and the communities that they work for are best served by the adoption of written pursuit policies. For the department that commits itself to a sound pursuit policy, the advantages far outweigh any possible disadvantage in having a standard against which misconduct might subsequently be measured. A well-conceived policy for pursuit, provided that it is sufficiently reinforced through training and supervision, will supply an important check against abuses of the peace officer privilege of utilizing high speed to pursue known or suspected law violators. Having a formal pursuit policy in an agency is an important recognition that the privilege allowing law enforcement personnel to exceed posted speed limits is a qualified privilege which is subject to rules and regulations designed to protect all persons using public streets and highways. Formal guidelines cover-

---

205. See Byles, *supra* note 58, at 2A, col. 2 (quoting Bill Martin of the Texas Municipal League who compiled a list of one hundred cities in his state that had "gone bare"); see also TIME, *supra* note 59 ("Hundreds of other towns in California and in New York state are 'going bare.' That is, they simply cannot get liability insurance.")

206. The Wisconsin counties of Florence and Oconto are examples of jurisdictions which curtailed patrol services after being informed that their county vehicle and general liability coverage had been discontinued. Florence County deputy sheriffs "were told to work by telephone out of their homes until the insurance matter was resolved, and Oconto County deputies were told to park their vehicles" until similar assurances were received. A total of 23 Wisconsin counties were affected. See *Counties Lose Insurance*, J. Times (Racine, Wis.), Jan. 2, 1986, at 4A, col. 1.

207. In the Douglas County town of Solon Springs, Wisconsin, the town council adopted a policy that prohibited its police force from exceeding posted speed limits when attempting to catch speeding vehicles. The town's only police officer resigned in protest. See O'Meara, *Brakes Put on Constable*, Milwaukee J., Apr. 10, 1986, at 3A, col. 6.

ing high speed pursuit not only let officers know where they stand, but they also convey to the motoring public an idea of what to anticipate when police sirens blare and emergency warning lights flash.

## APPENDIX

PROPOSED HIGH SPEED POLICE PURSUIT POLICY AND  
PROCEDURE

## I. POLICY

A. *General* — All emergency vehicle operations shall be conducted in strict conformity with existing State Statutes. Division Troopers and Inspectors engaged in emergency vehicle operations shall utilize both audible and visual emergency warning equipment when engaged in pursuit unless specifically exempted by statute.

All personnel operating division vehicles shall exercise due regard for the safety of all persons. No assignment shall be of such importance and no task shall be expedited with such emphasis, that the principles of safety become secondary. There are no tasks of such importance that they justify the reckless disregard of the safety of innocent persons.

All division personnel will be held strictly accountable for the consequences of their actions.

B. *Pursuit* — Pursuit is justified only when the necessity of immediate apprehension outweighs the level of danger created by the pursuit; when the suspect has committed or is attempting to commit a serious felony; or when the officer knows or has reasonable grounds to believe the suspect presents a clear and immediate threat to the safety of others. Additionally, division employees must necessarily take into consideration the following:

1. Affected third parties;
2. Existing road and weather conditions;
3. Area demographics and terrain;
4. Traffic conditions;
5. Severity of the known offense;
6. Pursuit speed; and
7. Necessity of pursuit.

C. *Termination of Pursuit* - The decision to abandon pursuit may be the most prudent course of action. Troopers must continually reevaluate the situation and continually question whether the seriousness of the crime justifies continuing the pursuit. Troopers will not be censured for terminating pursuit when, in the officer's opinion, continued pursuit constitutes

unreasonable risk. Pursuit shall be terminated under any of the following circumstances:

1. Supervisory personnel order termination of pursuit;
2. The suspect's identity has been established to allow later apprehension and there is no other need for immediate pursuit;
3. The prevailing traffic, roadway and environmental conditions indicate the futility of continued pursuit by creating a situation of unreasonable danger to officers or other persons in the area which outweighs the competing public interests involved in the apprehension of the one being pursued; and
4. The pursued vehicle's location is no longer known. Termination of a pursuit does not prohibit the following of a vehicle at a safe speed, or remaining in an area to reinitiate pursuit if the opportunity and conditions permit.

## II. PROCEDURES

All emergency vehicle operations shall be conducted in strict conformity with existing State Statutes. Division troopers and inspectors engaged in emergency vehicle operations shall utilize both audible and visual emergency warning equipment when engaged in pursuit unless specifically exempted by statute. [The above statement on use of emergency equipment reflects a WSP revision of the original draft document.]

**A. *Primary Pursuing Unit Responsibilities*** - The officer initiating a pursuit shall, in all cases, notify the communications center as soon as reasonably possible that a pursuit is underway and provide the following information:

1. Police unit identification;
2. Location, speed and direction of travel;
3. Vehicle description, including license number if known;
4. Reason for the pursuit; and
5. Number of occupants if known.

**B. *Operational Responsibility*** - The initiating or primary unit shall be in field command and bears operational responsibility for the pursuit unless relieved by a supervisor. The primary

unit may maintain pursuit as long as it is safe to do so, or until directed to terminate the pursuit by a supervisor. The following guidelines shall apply:

1. *Roadblocks* - Generally a roadblock will be employed only as a last resort. The use of a roadblock must be directly associated with the seriousness of the crime for which the suspect is wanted and shall be conducted in strict conformity with the "Use of Force" policy (5-2) and training bulletin No. Four (4).
2. *Ramming* - Ramming is authorized only if the use of deadly force would be authorized under the policy and procedure of "Use of Force" (5-2), and then only after all other reasonable means of apprehension have been exhausted.
3. *Use of Firearms* - Division policy (5-2) regarding the use of deadly force shall be strictly followed. Firing in the direction of or from a vehicle when such force may legally be used is forbidden if there is likelihood of serious injury to innocent persons or if the use of such force would likely outweigh the police purpose served.
4. *Number of Pursuit Units* - The pursuit should be accomplished with a minimum number of vehicles. Pursuits shall normally be limited to no more than three chase vehicles. However, the number of units involved may be adjusted to fit the situation.
5. *Spacing/Following Distance* - All units in pursuit, whether the vehicle in front is the suspect unit or another police vehicle, shall space themselves at a distance that will ensure proper braking and reaction time in the event the preceding vehicle stops, slows or turns.
6. *Unmarked Cruisers and Motorcycles* - Officials operating unmarked cruisers or motorcycles shall yield the primary pursuing unit position as soon as that position can be assumed by a marked patrol unit.
7. *Aerial Assistance* - Aerial assistance will be utilized if available. When an air unit establishes visual contact with the pursued vehicle, the ground units shall immediately be notified of that contact. The air unit shall

direct the movement of the primary pursuit unit and coordinate assistance of other ground units.

**C. *Communications Responsibility***

1. Clearing the radio frequency when emergency traffic is broadcast by a pursuing unit;
2. Receive and record all incoming information on the pursuit and the pursued vehicle;
3. Immediately inform the appropriate supervisor of an initiated pursuit;
4. Dispatch backup units and provide with relevant information;
5. Notify other agencies and specify whether assistance is or is not requested;
6. Perform relevant record and motor vehicle checks; and
7. Monitor pursuit until termination and advise all affected parties of termination.

**D. *Supervisory Responsibility*** - Upon being notified of the pursuit the supervisor shall at the appropriate time:

1. Assume operational command from the primary pursuit unit in those instances when deemed necessary;
2. Ensure that no more or less than the necessary number of units are involved in the pursuit;
3. Ensure aerial assistance, if available, has been requested;
4. Ensure proper radio frequency is being utilized;
5. Ensure that an overall analysis and critique of each pursuit is completed to determine compliance with Division policy; and
6. Be responsible for submission of analysis to the commanding officer. It may be appropriate to have involved officers submit a memorandum and critique their involvement with the pursuit and subsequent events. All post pursuit analysis shall at minimum include:
  - a. Critique;
  - b. Known offenses;
  - c. Offenses discovered later;
  - d. Speeds;



- e. Length of pursuit (time & distance);
- f. Injured or killed;
- g. Crashes; and
- h. Completed or abandoned pursuit.