

COURT OF APPEAL CRITICIZES IMMUNITY FOR POLICE CHASES

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Division Three of the Court of Appeal for the Fourth Judicial District has joined the crusade for greater control over police officers chasing suspects at high speeds.

Recent tragic cases and hard statistical evidence prove two lamentable facts. First, the police in many communities, and particularly Los Angeles, routinely endanger the public by engaging in wild and unjustified pursuits of suspects. Second, the broad statutory immunity enjoyed by public entities and officers when a pursuit results in injury or death has delayed modification of this irresponsible police conduct.

Nguyen v. City of Westminster, 103 Cal.App.4th 1161 (2002), decided on November 26, arose when Westminster police pursued a stolen van along city streets and onto the grounds of a high school just as classes had ended. After chasing the van through the school parking lot and athletic grounds, the police continued the pursuit toward a second parking lot, where a group of students had gathered. Despite the presence of the students, the police car twice rammed the van, which crashed into a nearby dumpster. The dumpster hit a bystander, Khuong Van Nguyen, who died of his injuries.

Nguyen's wife asserted claims against the City of Westminster for negligence and wrongful death. The city moved for summary judgment, arguing it was immune from liability by virtue of Vehicle Code § 17004.7. The trial court agreed, and dismissed the case. The Court of Appeal "reluctantly" affirmed that decision.

The court summarized the basic immunity provisions of the Vehicle Code applicable to police chases. Section 17004 provides that a "public employee" is not liable for damages "resulting from the operation, in the line of duty, of an authorized emergency vehicle while responding to an emergency call or when in the immediate pursuit of an actual or suspected violator of the law."

Section 17001 provides that municipalities and other public entities generally *are* liable for torts arising from their employees' operation of motor vehicles. However, under § 17004.1(b), a municipality is immune from liability for injuries caused by pursued vehicles if it has adopted "a written policy on vehicular pursuits complying with subdivision (c)."

Subdivision (c) lists four requirements for the "written policy" referenced in subdivision (b): (1) "supervisory control of the pursuit" "if available;" (2) procedures for identifying the lead vehicle and determining the total number of vehicles involved in the pursuit; (3) "procedures for coordinating operations with other jurisdictions;" and (4) "guidelines" for determining whether "the interests of public safety and effective law enforcement justify" a particular chase.

The *Nguyen* court complained that the performance of the city and its officer had been deficient in two critical respects. First, it characterized the city's policy as drafted in "general language," "poorly organized, and neither as extensive nor as detailed" as the policies of some other municipalities. Second, the court described the officer's actions as "especially chilling."

Despite its concerns about the officer's conduct, the court was compelled to dismiss that issue as "irrelevant." It held the statute provides immunity if a city has a written policy meeting the four listed requirements, and Westminster does have one. Neither an officer's disregard of official policy and public safety, nor a city's failure to supervise its personnel, is a factor in the statutory analysis.

The court discussed at length its "displeasure" with the immunity statute. It explained that "The law in its current state simply grants a 'get out of liability free card' to public entities that go through the formality of adopting such a policy. There is no requirement the public entity implement the policy through training or other means. Simply adopting the policy is sufficient under the current state of the law."

The opinion concluded with a statement "urg[ing] the Legislature to revisit this statute and seriously reconsider the balance between public entity immunity and public safety. The balance appears to have shifted too far toward immunity and left public safety, as well as compensation for innocent victims, twisting in the wind."

Given the unavailability of a remedy under state law, some may wonder whether the city's conduct might have been actionable under 42 U.S.C. § 1983, an issue the *Nguyen* court did not address. In *Canton v. Harris*, 489 U.S. 378 (1989), the U.S. Supreme Court held that inadequate training of a municipal employee can, in "limited circumstances," lead to municipal liability for a constitutional tort. However, the case law dealing specifically with high-speed chases is not encouraging.

County of Sacramento v. Lewis, 523 U.S. 833 (1998), involved a claim by the parents of a suspect who had been killed in a high-speed pursuit. The Court ruled in general that the conduct of a municipal employee violates substantive due process only when it "shocks the contemporary conscience." Specifically, the Court held that "high-speed chases with no intent to harm suspects physically or to worsen their legal plight do not give rise to liability under the Fourteenth Amendment."

In *Onossian v. Block*, 175 F.3d 1169 (9th Cir. 1999), the Ninth Circuit Court of Appeals addressed the application of *Lewis* to injured bystanders rather than suspects, and reached a similar result. It relied upon the observation in the *Lewis* decision that "A police officer deciding whether to give chase must balance on one hand the need to stop a suspect and show that flight from the law is no way to freedom, and, on the other, the high-speed threat to everyone within stopping range, be they suspects, their passengers, *other drivers, or bystanders.*" (Emphasis added by *Lewis* court.) The Ninth Circuit concluded, "if a police officer is justified in giving chase, that justification insulates the officer from constitutional attack, irrespective of who might be harmed or killed as a consequence of the chase."

The phrase *justified in giving chase* in this holding is less promising for potential

plaintiffs than it may sound. The Ninth Circuit used it to refer to police conduct that does not "shock the conscience," the phrase employed by the Court in *Lewis*.

The facts of *Lewis* demonstrate the limitations of this doctrine. That case involved a police officer who pursued two boys on a motorcycle for the offenses of speeding and refusing to pull over. The Supreme Court's conscience was not shocked, although the officer had chased the boys through a residential neighborhood at a speed of 100 miles per hour, causing an accident that killed the motorcycle passenger.

The Ninth Circuit perceived the facts in *Onossian* as less egregious, as they involving a pursuit of an erratic driver at only 70 miles per hour. The court concluded as a matter of law that the conduct of the officer in *Onossian* did not "shock the conscience" as the Supreme Court had used that phrase in *Lewis*.

Even with these precedents, a constitutional claim might not be hopeless, because the "contemporary conscience" is changing. In the five years since the *Lewis* decision, the prevalence and consequences of uncontrolled police chases have become prominent issues for police departments and citizens alike. Recent gruesome accidents involving very young children, and appalling statistics regarding police pursuits throughout the nation and especially in California, have generated extensive publicity and intense public concern.

According to the California Highway Patrol, there were 5,334 pursuits in the state in the year 2000, and 21% resulted in collisions. Ten percent of the collisions caused significant injuries, and 0.3% (about sixteen) resulted in death.

Los Angeles leads the nation in dangerous pursuits, and their number increased by over 30% between 2000 and 2001. In 2001, there were 781 chases (over two per day), with 139 involving injuries and six causing death. The Associated Press reports that 60% of the chases initiated by the LAPD involve "minor traffic violations such as missing license plates or broken tail lights."

LAPD Chief William Bratton is to be praised for urging stricter policies governing high-speed chases. Meanwhile, the City of Westminster does not enforce its own weak policy, and the result is a police car careening through crowded school grounds in pursuit of a stolen van.

Because of the public distress resulting from notorious case histories and recent government reports, the *Lewis* decision arguably has lost whatever claim it once had as a reflection of our collective moral standard. Given its certain awareness of local tragedies, alarming statistical studies, and Chief Bratton's efforts, Westminster's carelessness and inaction may no longer fail to "shock the contemporary conscience" as a matter of law.