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Police Pursuits After Scott v Harris: Far from Ideal?

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At approximately 3 a.m. on February 10, 1941, Milton Elmore was working as he drove a horse drawn, lighted milk wagon northwardly along Center Street in Owensboro, Kentucky, and began to turn left in a westerly direction onto Fourth Street. A few moments earlier, police officers Robert Chambers and Jack Long had observed a parked car occupied by Wren Shearer, a person whose "bad reputation had become known to them."[1] Shearer sped off to avoid investigation by the police, and before Mr. Elmore completed his left turn, Shearer, who was fleeing at approximately 75 miles per hour, crashed into the milk wagon, seriously injuring Mr. Elmore. Both Mr. Elmore and the Ideal Pure Milk Company sued Officers Chambers and Long, and at the trial in October 1949 the jury rendered a verdict for $588.83 in favor of the milk company for its property damage and a verdict for $10,588.85

[1] *Chambers v Ideal Pure Milk Co.*, 245 S.W.2d 589 (Ky. App. 1952) at 590.

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in favor of Mr. Elmore, as compensation for his injuries.

The verdict was challenged by the officers, and on appeal to the Kentucky Supreme Court the trial court's decision was reversed. The supreme court noted: "Charged as they were with the obligation to enforce the law, the traffic laws included, they would have been derelict in their duty had they not pursued him. The police were performing their duty when Shearer, in gross violation of his duty to obey the speed laws, crashed into the milk wagon. To argue that the officers' pursuit caused Shearer to speed may be factually true but it does not follow that the officers are liable at law for the results of Shearer's negligent speed. Police cannot be made insurers of the conduct of the culprits they chase. It is our conclusion that the action of the police was not the legal or proximate cause of the accident, and that the jury should have been instructed to find for the appellants."[2]

The *Chambers* decision was handed down in 1952 and clearly indicated that while the actions of the officers most likely caused the offender to flee, they should not be held legally responsible for the actions of the fleeing suspect, even though he crashed into and injured an innocent bystander. During fifty-six years since the *Chambers* decision, the laws relating to police emergency and pursuit driving have changed dramatically, but that transformation may have, in fact, come full circle with the 2007 United States Supreme Court decision in *Scott v Harris*.[3] At a minimum, a number of the judicial parameters thought by many observers to have been reliably established have been called into question, and the operational management of police pursuit operations has again been thrust to the forefront as a matter of concern for law enforcement agencies (Lum and Fachner, forthcoming).

Where Have We Been?

Since 1960, police departments have dramatically changed the ways in which they respond to fleeing suspects. During the 1960s and 1970s, there was very little attention paid to the pursuit issue, other than with respect to officer safety concerns. In other words, police departments trained officers how to drive and provided them with defensive and emergency driving skills, the focus being on technical proficiency. Little attention was given to the crashes, injuries, and deaths involving innocent bystanders whose sole transgression was, typically, being in the wrong place at the wrong time. During the late 1960s, however, a watchdog group called Physicians for Automotive Safety, comprised of emergency room physicians, released a report asserting that 70 percent of all pursuits resulted in a crash, 50 percent of all pursuits ended in serious injuries, and 20 percent of pursuits resulted in a death (Fennessy, Hamilton, Joscelyn, and Merritt 1970). Unfortunately, the report relied more on anecdotal information than quantitative data. Nonetheless, the report captured more than the simple passing interest of those already concerned with police emergency vehicle operations. A second generation of research on pursuits was initiated in the 1980s and relied on quantitative data from police agencies. The California Highway Patrol (CHP) led the effort, collecting a variety of information from law enforcement agencies in California, and reported that 29 percent of pursuits resulted in a crash, 11 percent ended in injury, and 1 percent resulted in a death (California Highway Patrol 1983). While the CHP study was fraught with methodological shortcomings, it has been recognized as the first of a series of studies that, ultimately, would learn from the shortcomings of the earlier studies and improve over time. Whereas Physicians for Automotive Safety concluded that pursuits were extremely dangerous and reform was necessary to save lives, the CHP study concluded that "[a] very effective technique in apprehending pursued violators may be simply to follow the violator until he voluntarily stops or crashes" (1983, 17).

[2] Ibid. at 590–591.

[3] 127 S. Ct. 1769 (2007).

In 1986, Alpert and Anderson published an article, *The Most Deadly Force: Police Pursuits*, which sought to sharpen the focus of law enforcement and academic observers on the inherent risks and potential dangers of police pursuits. During the same timeframe, a series of studies was published, following the CHP research model but using improved methodology and sampling techniques (Alpert and Fridell 1992; Alpert, Kenney, Dunham, and Smith 2000). The findings from these second-generation studies highlighted the dangerous nature of pursuits and the risks posed to both police and citizens. The empirical research debunked two common myths: most fleeing suspects are dangerous violent felons; and if the police don't chase suspects, all suspects will continue to flee, thereby greatly endangering public safety. What emerged from the research findings was the fact that most suspects who flee the police were young males who had committed minor offenses and who had made very bad decisions to flee. Additionally, the research supported the finding that if the police were to restrict their pursuit policies and not chase all offenders, no wholesale fleeing was likely to occur by those signaled to stop by the police (Alpert, Dunham, and Stroshine 2006).

By the late 1990s, the collective awareness of society had been opened to the dangers of pursuit driving and, concomitantly, police departments began to modify their policies and to restructure their training to address the awareness. Lawsuits also played a major part in modifying police policies and practices where vehicular pursuits were at issue. A major litigation trend evolved such that whenever a person, whether suspect or innocent third party, was injured by actions arising from a police pursuit, suit was almost certain to follow. And in many instances the filing involved some allegation of violation of a federally secured right that the plaintiff sought to redress under Section 1983.[4] While countless civil rights suits were filed, with varying degrees of plaintiff creativity, courts throughout the country responded to them in an overall inconsistent fashion, applying different standards, interpreting even agreed-upon standards differently, and handing down widely varied rulings on highly similar factual patterns. By the early 2000s, the only reasonably sure bet in civil rights based pursuit actions appeared to be that if a police officer used a physical "means intentionally applied"[5] to stop a fleeing suspect, such as ramming or a Pursuit Immobilization Technique (PIT) maneuver,[6] the federal courts would evaluate the officer's action as involving a "seizure" for purposes of a Fourth Amendment claim. The courts typically worded their analyses in the context of *Tennessee v Garner*[7] and *Graham v Connor*.[8] With the advent of the 1990s, through its decisions in *Brower v County of Inyo*[9] and *County of Sacramento* v *Lewis*,[10] the U.S. Supreme Court provided a barely translucent analysis of the liability parameters of police pursuits under federal civil rights law. The decisions in *Brower* and *Lewis* did little to provide any type of operational guidance, however, to law enforcement agencies legitimately seeking to balance a need to apprehend against a requirement to protect public safety in pursuits. But they did spawn a cottage industry

[4] Title 42 U.S. Code Section 1983 is frequently referred to as the Federal Civil Rights Act. Although Section 1983 creates no rights in and of itself, it does provide a remedy for violations secured by the U.S. Constitution or statutory provisions.

[5] *Brower v County of Inyo*, 489 U.S. 593, 597 (1989).

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

[7] 471 U.S. 1 (1985).

[8] 490 U.S. 386, 388 (1988).

[9] 489 U.S. 593 (1989).

[10] 523 U.S. 833 (1998).

of consultants and experts who speculated, based on the tea leaves left by the Court and the subsequent iterations provided by the federal circuit courts, where police pursuit liability would ultimately settle. Unfortunately, those prognostications suffered from the same lack of clarity as the historical precedent provided by the courts.

Where Are We Going?

The 2007 United States Supreme Court decision in *Scott v Harris*,[11] while in the minds of many a definitive comment on the state of potential police pursuit liability, must be viewed in the context of a convoluted, and often confusing, jurisprudential heritage. From the early years of the high court's constitutional analysis of pursuit-related issues, broached in such cases as *Brower v County of Inyo*,[12] until its pre-*Scott* decision in *County of Sacramento v Lewis*,[13] the Court's assessment and characterization of police actions, victim injuries, and corresponding responsibilities has left inferior federal and state courts to speculate on the ultimate parameters of police constitutional liability under 42 U.S.C. Section 1983. The ruminations of those inferior courts produced an extensive body of opinions whose only consistency was their disagreement with respect to the appropriate standard to be applied to the actions of the police, especially in the context of Fourteenth Amendment due process claims. Even after *Lewis*, the Supreme Court's anointment of the "shocking to the conscience" standard for substantive due process claims left many courts with less than clear guidance and caused many observers to speculate as to the factual circumstance in which the standard might ever have application. Although pursuits involving seizures of suspects fared better in terms of judicial clarity, due in large part to the relative clarity of Fourth Amendment decisions and the availability of an "objective reasonableness" standard against which to govern police action,[14] the plight of third parties injured by the activities of fleeing suspects or pursuing police officers remained an unresolved question at the center of a lively discussion.

In the context of Fourth Amendment pursuit claims, many observers felt that the Supreme Court's insinuation of its 1985 decision in *Tennessee v Garner*[15] into the discussion of pursuit-related seizures provided a reliable backdrop against which to evaluate such police pursuit tactics as ramming and the so-called Pursuit Immobilization Technique (PIT), police actions that have typically been classified— both judicially and operationally—as applications of deadly force. The Court's proclamation in the *Brower* decision that "a seizure occurs when governmental termination of a person's movement is effected through means intentionally applied,"[16] taken in conjunction with the holding in *Garner* that deadly force may not be used to seize a fleeing suspect unless the suspect poses a significant threat of death or serious physical injury to the officer or others, led many to conclude that the police use of such maneuvers as PIT and ramming against those who had committed only minor traffic offenses would implicate an unreasonable seizure, supporting Section 1983 Fourth Amendment liability. However reasonable such a conclusion may have appeared based on the then-existing judicial landscape, the contours of reasonableness changed significantly after the decision in *Scott*.

The 2007 Supreme Court decision in *Scott v Harris*[17] involved a factual scenario in which a police officer rammed a suspect who was fleeing for a speeding violation. The opinion surprised onlookers, not so much for the ultimate outcome but by its marginalization of the importance of the *Garner*

[11] 127 S. Ct. 1769 (2007).
[12] 489 U.S. 593 (1989).
[13] 523 U.S. 833 (1998).
[14] *Graham v Connor*, 490 U.S. 386 (1989).
[15] 471 U.S. (1985).
[16] 489 U.S. 593 (1989) at 597.
[17] 127 S. Ct. 1769 (2007).

decision handed down more than twenty years earlier. In *Harris*, the Court never explicitly questioned the logic behind *Garner* but implied a flaw in the application of that case's standard of reasonableness to pursuit cases involving questions of the dangerousness of the fleeing suspect.

The purpose of this paper is to examine the use of deadly force in the course of police pursuits and to review the changing ways the Supreme Court has analyzed danger in the pursuit context. Of necessity, we will first revisit, briefly, the *Garner* decision and then examine the relatively recent application of *Garner* in the pursuit context, as set out in *Brosseau v Haugen*.[18] Finally, we will look at the Court's recent analysis of *Garner* in *Scott v Harris* and discuss the implications that analysis may have for the operational management of pursuits by law enforcement agencies and, generally, for policing in America.

The Fourth Amendment and Tennessee v Garner[19]

The facts and holding of *Garner*, as mentioned briefly below, have been widely disseminated and discussed in law enforcement circles since the decision was announced in 1985. In essence, *Garner* has come to stand for the proposition that the police may not use deadly force to seize a fleeing suspect unless the suspect poses a significant threat of death or serious physical injury to the officer or others. The impact of *Garner* has been to set into place a reasonableness standard regarding the use of deadly force to apprehend fleeing suspects. In the wake of *Garner*'s holding, law enforcement agencies have typically viewed the case's significant threat qualification in the context of a dangerous or forcible felony suspect. With substantial unanimity, law enforcement agencies have excluded minor misdemeanors or traffic offenses from the *Garner* calculus, prohibiting their officers from using applications of deadly force against "non-dangerous" fleeing suspects.[20]

Garner's focus on reasonableness was clarified by *Graham v Connor*,[21] in the context of a non-deadly force scenario, to put into place the rule that claims involving the seizure of a suspect are to be analyzed under the Fourth Amendment's objective reasonableness standard, a rule that encompassed claims resulting from the police use of force against a fleeing suspect. In short, *Graham* made clear what was implicit in *Garner*. In the context of the use of force to effect the seizure of a fleeing suspect, *Graham* confirmed the *Garner* message that the force used by the police to seize a suspect must be proportional to the threat posed by the suspect. The Court, in *Garner*, had concluded that the suspect must pose an immediate threat to human life for there to be a justification for the use of force that is likely to kill or cause serious injury to the fleeing suspect. For many, the clear rule of *Garner* seemed a logical fit for seizures performed in the course of a vehicular pursuit, since most observers were in agreement that the application of physical contact by a police vehicle in a pursuit should be evaluated as an action involving deadly force.

The facts in *Garner* show that Memphis police officers Elton Hymon and Leslie Wright were called to the scene of a residential burglary. Upon arrival and after a brief investigation, Officer Hymon saw the suspect, Edward Garner, running away from the rear of the house, preparing to scale a chain link fence at the rear of the property, and yelled, "Police. Halt." After the suspect continued to flee and did not

[18] 543 U.S. 194 (2004).
[19] 471 U.S. 1 (1985).

[20] For example, the Kansas City, Missouri, Police Department advises in its Pursuits and Emergency Vehicle Operations Procedure that "[o]fficers will not initiate a vehicle pursuit unless they determine that there is reasonable belief that the suspect presents a clear and immediate danger to the safety of others. Factors involved in this decision may include the commission of a dangerous felony." [Procedural Instruction 06–11, effective date 11–21–06, at Annex B, C. (Initiating or Continuing Pursuit)] accessed online at http://www.kcpd.org/masterindex/files/pi/PI0611.pdf, May 2, 2008. The guidance provided by the KCPD is fairly representative of the practice of large urban law enforcement agencies.

[21] 490 U.S. 386 (1988).

stop when ordered by Officer Hymon to do so, the officer shot and killed Mr. Garner, who was an unarmed, slightly built eighth grader. The officer did so under the authority of a Tennessee statute that provided that, if, after a police officer has given notice of an intent to arrest a criminal suspect, the suspect flees or forcibly resists, the officer may use all the necessary means to effect the arrest.[22] The question before the Court was whether the use of deadly force to prevent the escape of an apparently unarmed, suspected felon constituted an unreasonable seizure under the Fourth Amendment. The Court ruled that a police officer who uses deadly force to seize a fleeing felony suspect who "poses no immediate threat" to human life violates the Fourth Amendment.[23] The Court also noted, "It is not better that all felony suspects die than that they escape. Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so. It is no doubt unfortunate when a suspect who is in sight escapes, but the fact that the police arrive a little late or are a little slower afoot does not always justify killing the suspect. A police officer may not seize an unarmed, non-dangerous suspect by shooting him dead."[24]

The Court recognized that limited circumstances might justify the use of deadly force: (1) "Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others . . .;" or ". . . if the suspect threatens the officer with a weapon or there is probable cause to believe that he had committed a crime involving the infliction or threatened infliction of serious physical harm . . .;" (2) if deadly force is "necessary to prevent escape;" and (3) ". . . if, where feasible, some warning has been given."[25] Without meeting all of the above conditions, the Court noted that the use of deadly force is constitutionally unreasonable.

Interestingly, Justice White's majority opinion commented only on the likelihood that the suspect would commit future violent crimes if he remained free, but was silent to the dangers that could occur during the escape. One critical aspect of the case that was left unaddressed was the meaning of the term "immediate." The Court did not explain or define what it meant by the term, leaving others to interpret whether "immediate" connotes instant, as in imminent, urgent, as in close proximity to, or some other meaning. Additionally, the Court's proffer of the hypothetical situation where ". . . there is probable cause to believe that [the suspect] has committed a crime involving the infliction or threatened infliction of serious physical harm"[26] does little to address the timeframe in which the commission of the offense must have occurred. One could query whether a convicted murderer who committed his crime decades before but who now, detained pending trial for a non-serious offense, attempts to escape from a police officer after being hailed to stop, meets the *Garner* criteria for the use of deadly force. The absence of clarification has fostered what some have come to refer to as the *Garner* "temporal proximity" problem.

Prior to the *Garner* decision, many police agencies had already formulated deadly force policies that justified the use of deadly force only when the officer's life or the life of another was being threatened at that moment. After *Garner*, many more departments adopted that language, which has become known as the defense-of-life policy.

An Invitation to Change? Brosseau v Haugen[27]

A noteworthy case that may have set the stage for the Court's decision in *Scott v Harris* is *Brosseau v Haugen*. In *Brosseau*, the Court reversed a

[22] The statute provided that "[i]f, after notice of the intention to arrest the defendant, he either flee or forcibly resist, the officer may use all the necessary means to effect the arrest." Tenn. Code Ann. § 40-7-108 (1982).

[23] 471 U.S. 9–10 (1985).

[24] Ibid.

[25] Ibid. at 11–12.

[26] Ibid. at 3.

[27] 543 U.S. 194 (2004).

Ninth Circuit Court of Appeals decision[28] denying qualified immunity to an officer who had shot a suspect in the back as he was attempting to flee in his vehicle. The facts were that Officer Brosseau responded to a fight between Haugen and two other men in Haugen's mother's yard. Haugen ran away when Brosseau arrived, and two other officers and their dogs arrived to help search the neighborhood. The other people involved in the skirmish, including Haugen's girlfriend, her daughter, and the two men who were fighting with Haugen, were instructed to remain in their vehicles at the scene. Haugen returned and attempted to flee in his Jeep. Brosseau pointed her gun at Haugen and ordered him to get out of the vehicle. When Haugen ignored her order, Brosseau broke the driver's window with her handgun and hit Haugen on the head with it. As Haugen began to drive away, Brosseau stepped back and fired a shot through the rear driver's side window, hitting Haugen in the back. Brousseau stated that she shot Haugen because he presented a threat of serious bodily harm to the other officers who were on foot somewhere in the neighborhood and the persons in the occupied vehicles at the scene. Haugen pleaded guilty to "eluding," which, according to the court, constituted an admission that he drove with "wanton or willful disregard for the lives . . . of others."[29]

The court of appeals concluded that a reasonable jury could find that, at the time Brosseau fired her gun, Haugen did not pose a significant threat of harm to her or others and that Brosseau's conduct violated the Fourth Amendment.[30] The court noted that "Under *Garner,* deadly force is only permissible where 'the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others'."[31] Viewing the evidence in favor of Haugen, the court concluded that "Brosseau's use of deadly force was a clear violation of *Garner*."[32] The court of appeals made the following findings in support of its conclusion.

> Viewing the evidence in Haugen's favor, Brosseau shot Haugen in the back even though he had not committed any crime indicating that he posed a significant threat of serious physical harm; even though Brosseau had no objectively reasonable evidence that Haugen had a gun or other weapon; even though Haugen had not started to drive his vehicle; and even though Haugen had a clear path of escape. Viewing the evidence in Haugen's favor, there is insufficient objective evidence to support Brosseau's stated concern that, at the time she shot him, Haugen posed a significant risk to police officers or others in the area.[33]

The Supreme Court reversed the Ninth Circuit's opinion, expressing no view as to the correctness of the court of appeals' decision on the constitutional question of the use of deadly force itself, and instead limiting its opinion to the question of whether at the time of the officer's actions it was "clearly established" that they violated the Fourth Amendment's restrictions on the use of deadly force. The Court held that the law was not so "clearly established." In dicta, however, the Court gave a possible hint of its inclination to continue modification of the precedent set in *Garner*.[34] After *Brosseau*, many observers anxiously awaited a factual scenario that would provide the Court the opportunity to fully address the contours of Fourth Amendment pursuit liability, beyond the narrow issue of qualified immunity addressed in *Brosseau*. Many observers anticipated that the Court would find fertile ground in the facts in *Harris* to provide an expanded explanation

[28] 339 F.3d 857, 9th Cir. (2003).

[29] Ibid at 860.

[30] Ibid at 872.

[31] Ibid at 873.

[32] Ibid at 874.

[33] Ibid.

[34] In particular, the Supreme Court's comments regarding *Smith v Freland*, [954 F. 2d 343; (CA6 1992)] appear to give some indication of approval of an officer's decision to use deadly force, albeit through the medium of a firearm, against a pursued suspect who "had proven he would do almost anything to avoid capture" (at 347).

of Fourth Amendment pursuit jurisprudence, especially as it related to the use of deadly force to stop a fleeing suspect.

In *Harris*, the facts centered on a high-speed chase, a video of the chase,[35] and the ostensible use of deadly force, albeit not through the medium of a firearm. To many observers, the facts in *Harris* provided an exceptional opportunity to address numerous ambiguities in constitutional pursuit issues, and the anticipation felt by many long-time observers was strangely akin to that felt before the *Garner* decision was released. Unlike *Garner*, however, a decision that provided important opportunities to digest and analyze the Court's language, the Court's decision in *Harris* would come to be viewed by many as the premature closing of a door behind which lay many unanswered and troublesome questions.

Why Are We Here?

On March 29, 2001, at approximately 10:40 p.m., Deputy Clinton Reynolds of the Coweta County, Georgia, Sheriff's Department (CCSD) was stationed on Highway 34 when he clocked Victor Harris' vehicle traveling 73 MPH in a 55 MPH zone. Deputy Reynolds flashed his blue lights to attempt to get Harris to slow down, and later testified that if Harris had slowed down, he would not have even initiated a traffic stop. Deputy Reynolds decided to pursue Victor Harris for speeding. As Harris sped away from the officer, he passed other motorists by crossing over double yellow traffic control lines and also raced through a red traffic light. Deputy Reynolds radioed dispatch and reported that he was chasing a fleeing suspect.

Shortly after the pursuit was initiated, Deputy Reynolds obtained Harris' vehicle's license plate number and radioed this information to his dispatcher. Deputy Reynolds received the name and address of the owner of the car (Victor Harris) but did not broadcast information about the underlying offense—speeding—for which he was chasing Mr. Harris. Based on the speeding offense and the fact that the car was known to be lawfully registered to Mr. Harris, Deputy Reynolds' initiation of the pursuit violated CCSD's vehicular pursuit policy, which stated that officers were not authorized to engage in pursuits for offenses such as speeding when they had information about a fleeing suspect that would allow apprehension of the suspect at a later time.

At the time of Reynolds' call, Timothy Scott, another Coweta County deputy sheriff, was parked by a church about a mile away. Along with Deputy Reynolds, his assignment on that evening was to assist undercover officers who were making a controlled buy of illegal drugs. When Scott heard Reynolds' report, he assumed the pursuit was in connection with the undercover operation and, as a result, Scott became one of several police officers who joined the chase to assist Deputy Reynolds. Responding to Reynolds' radio broadcast, Scott estimated that, in order to join the pursuit, he reached speeds in excess of 100 miles per hour on the narrow two-lane road. From the evidence available in the record, it also appeared that he forced numerous motorists from the roadway in his efforts to join the ongoing pursuit of Harris. At the time he became involved in the pursuit, Deputy Scott, who had not been requested to join the pursuit, did not know the underlying offense for which the pursuit had been initiated.

The pursuit began in Coweta County, Georgia, and ultimately ended in Peachtree City in Fayette County, Georgia, near Harris' home. As the chase entered Peachtree City, Harris slowed his vehicle, turned on his blinker, and entered an empty drugstore parking lot. Scott, by then in close pursuit of Harris, was unable to stop his vehicle in time to follow Harris into the parking lot but he entered the exit to the complex and attempted to block Harris from escaping. Unfortunately, this effort to stop Harris in the parking lot failed and, as the videotape of the chase shows, Harris, undeterred by Scott's effort, collided with Scott's patrol car and then sped off back onto

[35] http://www.supremecourtus.gov/opinions/06slipopinion.html.

another road, Highway 74, where he once again drove at high speeds, crossing double yellow lines and running a red light.

It is important to note that when Harris had first turned into the parking lot, there were two Peachtree City Police Department (PCPD) officers in their patrol cars already in the lot, but they were unaware of the underlying basis for the unfolding pursuit, not having been so apprised by the Coweta County deputies or their dispatcher. This lack of communication to the Peachtree City officers would come to play a significant part in the outcome of the chase because the Peachtree City officers were equipped with and had immediate access to stop sticks, devices that are designed to slowly flatten the tires of a fleeing vehicle so as to allow the safe termination of a pursuit. The Peachtree City officers did not become involved in the pursuit of Mr. Harris, made no attempt to block his vehicle, and did not attempt to use their stop sticks, as they had not been made aware of the underlying basis for the Coweta County pursuit and were subject to their department's violent-felony-only pursuit policy. They did, however, block nearby intersections in an effort to protect members of the public from the Coweta County pursuit.

As the pursuit left the parking lot, Deputy Scott requested to be the primary pursuit unit, stating over the radio, "Let me have him...my car's already tore up." Deputy Scott took over as the lead vehicle and then requested permission from his supervisor, Sergeant Fenninger, to use a PIT maneuver on Harris, although neither he nor any other member of the Coweta County Sheriff's Department had ever been trained in its usage. Fenninger responded to Scott's request by stating over the radio, "Go ahead and take him out. Take him out." At the time of his approval to Deputy Scott, Fenninger was aware that there were no other vehicles or pedestrians in the area and that Mr. Harris posed no immediate threat to the officers or to others. According to Scott, he became concerned that both his and Harris' vehicles were moving too quickly to safely execute a PIT maneuver. Instead, he picked a moment when no motorists or pedestrians appeared to be in the immediate area and made contact with Harris' vehicle by ramming it with the push bumper of his patrol car while traveling at approximately 90 MPH. The ramming resulted in Harris losing control of his vehicle, rolling it down an embankment, and crashing. As a result of the crash, Harris was rendered quadriplegic. Immediately after Deputy Scott rammed Harris' vehicle, Deputy Reynolds notified dispatch that there had been a crash.

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

The Opinion

As in other qualified immunity cases decided after *Saucier v Katz*,[36] the Court addressed the threshold question of whether Scott's actions could be seen as violating a constitutional right. Even though the Court specifically notes that in resolving the question of qualified immunity a court is required to view the facts alleged in the light most favorable to the party asserting the injury, it does not

[36] *Saucier v Katz*, 533 U. S. 194, 201 (2001). Under the analysis required by the Court in *Saucier*, a court must first find that a violation of a constitutional right has occurred before it can inquire as to whether the right was "clearly established."

do so, instead substituting its own view of the facts. Perhaps the most unique feature of the Supreme Court opinion was the reliance on the videotape that was taken from Deputy Scott's patrol car. All but one of the justices agreed that Mr. Harris drove in a dangerous and reckless manner and presented a real threat to any driver on the roadway. The majority opinion, in an exceptional departure from the Court's standard of review of district court factual determinations, viewed Harris' version of the events underlying the pursuit as being "so utterly discredited by the record (videotape) that no reasonable jury could have believed him."[37] The high court's *de novo* factual review is all the more interesting in that the Eleventh Circuit Court of Appeals reviewed the same videotape as the district court and reached the same opinion as the lower court: that Harris' depiction of the events was credible and warranted consideration by a jury, not disposition by summary judgment. The Supreme Court's observations notwithstanding, a review of the referenced videotape might cause an observer versed in police practices and procedures to question the actions of the police officers themselves who, even in the words of the majority, were ". . . forced to engage in the same hazardous maneuvers just to keep up."[38] Nonetheless, the Court decided that the videotape provided incontrovertible evidence that Harris presented a threat to others on the road, and that the only question remaining for resolution was whether Scott's use of force to eliminate the threat was "objectively reasonable."[39]

The underlying act of speeding played little, if any, role in the majority's assessment of the appropriateness of the level of force used by Deputy Scott, the Court focusing instead on the threat it believed Harris to pose to the public. The Court rejected Harris' request that it analyze Scott's actions as an application of deadly force, as set out in *Tennessee v Garner*, and instead chastised both Harris and the court of appeals for seeking to apply *Garner* as an "on/off switch that triggers rigid preconditions whenever an officer's actions constitute 'deadly force'."[40] The Court's opinion noted that *Garner* did not create a rule but ". . . was simply an application of the Fourth Amendment's 'reasonableness' test, to the use of a particular type of force in a particular situation."[41] The majority opinion drew no distinction between excessive use of force and the use of deadly force in its analysis of Deputy Scott's behavior. The Court's opinion rested, ultimately, not upon whether the force used was deadly but only on whether it was reasonable. The Court also gave little attention to the fact that Harris' underlying offense was speeding, and instead voiced its greatest concern over its view that the act of fleeing was a threat to everyone, and that those who flee recklessly from the police implicitly authorize officers to seize them with the force necessary. In sharing the basis for its opinion, the Court offers the following contemplation:

> So how does a court go about weighing the perhaps lesser probability of injuring or killing numerous bystanders against the perhaps larger probability of injuring or killing a single person? We think it appropriate in this process to take into account not only the number of lives at risk, but also their relative culpability. It was respondent, after all, who intentionally placed himself and the public in danger by unlawfully engaging in the reckless, high-speed flight that ultimately produced the choice between two evils that Scott confronted. Multiple police cars, with blue lights flashing and sirens blaring, had been chasing respondent for nearly 10 miles, but he ignored their warning to stop. By contrast, those who might have been harmed had Scott not taken the action he did were entirely innocent. We have little difficulty in concluding it was reasonable for Scott to take the action that he did.[42]

[37] *Scott v Harris*, 127 S. Ct. 1775–76 (2007).

[38] Ibid. at 1775.

[39] *Brower v County of Inyo*, 489 U.S. 386, 397 (1989).

[40] *Scott v Harris*, 127 S. Ct. at 1777 (2007).

[41] Ibid.

[42] Ibid at 1778.

The Tale of the Tape

The case was presented, and the Court decided it, on qualified immunity grounds, the facts as represented by each side never being presented to a jury. The unique element in the case, as noted before, is the Court's deference to, and its apparent fascination with, the videotape it repeatedly mentions. The Court viewed the videotape of the chase during oral argument and posted a link to it on the Court's Web site for the public to view. The significance of the tape is its role in the Court's *de novo* determination of the facts considered in the summary judgment motion. In a summary judgment motion, as the Court notes, the trial court is ". . . required to view the facts and draw reasonable inferences 'in the light most favorable to the party opposing the [summary judgment] motion.' In qualified immunity cases, this usually means adopting (as the court of appeals did here) the plaintiff's version of the facts."[43] In this case, however, the Supreme Court noted "an added wrinkle . . . [the] . . . existence in the record of a videotape capturing the events in question."[44] Relying on a single videotape, the Court ruled that Harris' version of the facts was blatantly contradicted, and went on to indicate that courts should not rely on the plaintiff's statement where such records, as videotapes, exist.

One interesting aspect of the Court's opinion, however, is that its reliance on the single videotape carries with it no mention of the other three videotapes that had been entered into the record: "In total, there are four police tapes which captured portions of the pursuit, all recorded from different officers' vehicles."[45] Thus, the Court, in reliance on one of four videotapes, substitutes its interpretation of the facts underlying the chase for that of the district court and the court of appeals. While the existence of a single existing videotape should still give pause to a wholesale appellate reversal of the factual findings of at least four other judges, the selective reliance on a single videotape of four available, all taken from different vehicles involved in the pursuit, should prompt more extensive consideration. Nonetheless, the Court determined that no reasonable juror could believe Harris' version of the facts.

It is well understood that videotaped recordings of police vehicular operations can help jurors interpret, after the fact, the reasonableness of the taped behaviors. Typically, however, due to camera angles, environmental features, lighting, vehicle speeds, and the direction of movement, the tape may require expert explanation by someone familiar with the dynamics of the vehicles and with police practices, so as to allow fair and objective understanding. This understanding notwithstanding, the Court stated that it was ". . . happy to allow the videotape to speak for itself."[46] In so stating, the Court deflected any need to question any interpretation other than its own, although clearly neither the district court nor the court of appeals interpreted the chase in the same fashion as the Supreme Court majority. This presents cause for concern because apparently the three-judge panel of the court of appeals had also viewed the videotapes and described a very different version of events.

> 'At the time of the ramming, apart from speeding and running two red lights, Harris was driving in a non-aggressive fashion (i.e., without trying to ram or run into the officers). Moreover . . . Scott's path on the open highway was largely clear. The videos introduced into evidence show little to no vehicular (or pedestrian) traffic, allegedly because of the late hour and the police blockade of the nearby intersections. Finally, Scott issued absolutely no warning (e.g., over the loudspeaker or otherwise) prior to using deadly force.'[47]

As Justice Stevens noted in his dissent:

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[43] Ibid. at 1774.
[44] Ibid. at 1775.
[45] Ibid. Stevens, J. dissenting at 1785, footnote 7.
[46] Ibid. at 1775, footnote 5.
[47] Ibid. Stevens, J. dissenting at 1785.

> If two groups of judges can disagree so vehemently about the nature of the pursuit and the circumstances surrounding that pursuit, it seems eminently likely that a reasonable juror could disagree with this Court's characterization of events.[48]

A Practical Application

The Court balanced the risk of harm created by Deputy Scott's action of ramming Mr. Harris' vehicle with the threat created by Mr. Harris' fleeing from Deputy Scott. Even though the Court admits that there is no obvious way to quantify these risks, it noted that Harris "posed an actual and imminent threat to the lives of any pedestrians who might have been present, to other civilian motorists, and to the officers involved in the chase."[49] While the Court allowed that Deputy Scott's actions posed a high likelihood of serious injury or death to Harris, although not specifically declaring Scott's action as an application of deadly force, it noted that the action did not pose the near certainty of death posed by shooting a fleeing felon in the back of the head or pulling next to a fleeing motorist's car and shooting the driver.[50] For all intents and purposes, the Court seems to have approached its analysis of the reasonableness of an application of force through a process of quantification of the level of force based on likely outcome—something it states there is no obvious way to do. The Court explains the logic by considering the number of lives at risk and also their relative culpability. In that Harris disobeyed the initial order by Deputy Reynolds to stop, he intentionally placed himself and others at great risk. By contrast, members of the public who might find themselves at the wrong place at the wrong time were clearly innocent of any wrongdoing. Under this analysis, the wrongdoer, irrespective of the underlying offense, shoulders the total responsibility for the consequences of the actions of *all* involved parties, including the police. Appropriately, the Court shifts any blame away from the innocent bystanders but it places total blame and culpability on the fleeing suspect. Missing from the equation is the responsibility of the police officers and what we know about the dynamics of pursuit.

First, the opinion includes language that questions what Harris, or any other fleeing suspect, might do after the police end a pursuit by turning off emergency lights and siren. The language of the Court is silent with respect to any commentary on the established dynamics of pursuit and ignores published social science research findings on the likelihood that a suspect will slow down and reduce the risk to the public, himself, and the police should the police terminate pursuit (California Highway Patrol 1983; Alpert et al. 2000). In its assumed role of fact finder, the Court espouses one of the classic myths about pursuit driving: if the police don't chase, then everyone will flee. As an example, research by the Orlando, Florida, Police Department documented that only 107 suspects fled from more than 40,000 stops between March 2004 and February 2005. This occurred after the department's highly restrictive pursuit policy was made public (Alpert et al. 2006).

Second, the Court did not see fit to address the great risk that Scott's ramming of Harris' car posed for the innocent motorists the Court claims that act was intended to protect. In its *de novo* factual determination of the threat to citizens, the Court neglects, or refuses, to consider the role played in this calculus by Deputy Scott. Substituting its viewing of a single videotape for evaluation of Scott's conduct by those more familiar with acceptable police operational practices, the Court sidesteps the issue of potential harm to the public or the reasonableness of the ramming of Harris' vehicle from a police practices perspective and, instead, focuses on the relative culpability of Harris. The record in the case establishes that Harris' vehicle veered to the right and collided with a telephone pole after it was rammed by Deputy Scott. Because no innocent driver, passenger, or pedestrian was injured, the Court was able

[48] Ibid.

[49] *Scott v Harris*, 127 S. Ct. 1778 (2007).

[50] Ibid.

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

> A police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death.[51]

In elocution, and possibly in theory, this rule is easy to understand: motorists who flee from the police and threaten the lives of innocent bystanders can be stopped by the police with whatever force is necessary, including deadly force. If, under the auspices of protecting the innocent motoring public, an officer shot and killed a suspect who was fleeing at high speed on a highway, causing the suspect's vehicle to run into an adjoining tree line, it is fairly clear that there would be no constitutional liability for the police under *Harris*. In fact, after *Harris*, any use of force, deadly or otherwise, to stop a fleeing motorist, when there is probable cause to believe he or she poses a serious threat to the public, is going to be justified under the Fourth Amendment.

Unfortunately, the *Harris* Court's ruling is silent on the responsibility of the police, and its Fourth Amendment analysis can provide no basis upon which to contemplate any possible recourse for an innocent party who is injured by activities set into motion by the police, as the innocent citizen would not have been harmed by means intentionally applied by the police (see, e.g., *Lewis*, ante).

Policy Implications

The Court has created a true dilemma for law enforcement officers, trainers, and policy makers. The *Harris* decision clearly gives law enforcement the ability to "take out" fleeing vehicles that threaten public safety, without violating the driver's constitutional rights. While only a short time has passed since the Court issued its opinion, the federal circuit courts are already having to deal with the fallout from *Harris* in factually similar cases. For example, in August 2007, the Eleventh Circuit Court of Appeals rendered its decision in *Beshers v Harrison*,[52] a pursuit case involving an officer (Harrison) of the Toccoa, Georgia, Police Department who was chasing Mr. Beshers for a minor offense. Harrison realized Beshers was a danger to him, the other pursuing officers, and motorists as he observed Beshers recklessly weave in and out of traffic, cross the double center line, drive on the wrong side of the road, and force others off the road. He also observed Mr. Beshers crash into a civilian's car and was himself rammed several times by Mr. Beshers' truck while traveling around 60 MPH. Ultimately, Beshers clipped the patrol car being driven by Harrison and swerved off the road, colliding with a tree. He died on impact.

As in *Harris*, the suspect in *Beshers* created a risk to himself and others by driving in a manner that was extremely dangerous. Although the Eleventh Circuit

[51] Ibid at 1779.

[52] No. 05–17096.

Court of Appeals did not find specifically that Harrison had "seized" Beshers, it presumed that a seizure had occurred for purposes of its analysis and opinion:

> . . . [F]or purposes of this appeal only, we operate under the presumption that Harrison 'seized' Beshers, as that term is defined under the Fourth Amendment.[53]

Based on the holding in *Harris*, the Eleventh Circuit concluded that even if Harrison had intentionally used deadly force to seize Beshers, ". . . the use of such force was reasonable."[54]

District Judge Presnell noted in a concurring opinion:

> A reasonable juror could reach this result, even though Beshers was suspected of comparatively minor offenses, and even though we have all witnessed hundreds of vehicles speeding, passing illegally, and running stop signs without causing an accident. As attested by the dangerous instrumentality doctrine, the operation of a motor vehicle is inherently dangerous to others. Thus, the chase occasioned by a fleeing motorist will itself arguably create an immediate and substantial potential for harm to the traveling public.
>
> Yet this decision troubles me. Realistically, a suspect fleeing the police in a car will inevitably violate some traffic laws. By doing so, he will endanger the lives of innocent motorists (as well as the pursuing officers). And that danger will always outweigh the threat posed to the suspect by the officer's use of deadly force, because the suspect is the one who chose to put everyone else at risk by refusing to stop. In other words, the danger to the suspect is given no weight. For all of its talk of a balancing test, the *Harris* court has, in effect, established a per se rule: Unless the chase occurs below the speed limit on a deserted highway, the use of deadly force to end a motor vehicle pursuit is always a reasonable seizure. As a practical matter, a police officer's qualified immunity to use deadly force in a car chase situation is now virtually unqualified. *Harris* and this opinion allow a police officer to use deadly force with constitutional impunity if the fleeing suspect poses any danger to the public. In my humble opinion, I believe we will live to regret this precedent.
>
> If a balancing test is to have any real meaning, a jury ought to be deciding whether the risk posed by the fleeing suspect is too minimal, or the suspected crime too minor, to make killing him a reasonable way to halt the chase. Nevertheless, based on my reading of *Harris*, that decision has been taken away from the jury where, as here, the fleeing suspect has endangered others.[55]

While *Harris* has clear implications for federal lawsuits, it will not likely have any significant impact on state negligence actions. Many law enforcement agencies, well prior to the *Harris* opinion, had promulgated policies that prohibit intentional contact between a police car and a fleeing suspect. Likewise, many agencies currently train their officers that *Harris* does not change departmental policy and that, regardless of the Court's opinion, officers are not authorized to use deadly force against a fleeing suspect unless authorized under a *Garner* analysis, giving consideration to the underlying offense. Only time will tell if this trend of reasonableness continues or if law enforcement agencies give in to the temptation to "take out" those who elude them for minor offenses. It is important to heed Judge Presnell's warning that, ". . . we will live to regret this precedent." If agencies ultimately decide, based on *Harris*, to allow their officers the discretion to "take out" fleeing suspects, irrespective of the underlying offense, the work of many law enforcement driving professionals and police administrators may well have been for naught. In *Scott v Harris*, the majority supported Scott's actions as taken in furtherance of the government's critical interest in protecting public safety. The Court's analysis and support, however, may potentially provide a basis for reversion to pursuit practices long thought abandoned by law enforcement professionals.

Perhaps the most interesting implication of *Harris* that state courts will have to consider is the use of videotapes. For example, defense attorneys may well cite *Harris* as a precedent and ask a court to analyze a

[53] Ibid at 11.
[54] Ibid at 16.
[55] Ibid at 24–26.

videotape of a pursuit as part of a summary judgment, in hopes that the judge(s) views the tape with the same concern voiced by the justices in *Harris* (but see Wasserman 2008). Most interestingly, Kahan, Hoffman, and Braman (forthcoming 2008) asked more than 1,300 subjects to view the *Harris* video. While a majority of the respondents agreed with the Court on major issues, there were significant differences of opinion among the subjects across cultural and ideological positions.

In addition to the concern that different people observe varying levels of risk in a pursuit video, a tape may be even less important when considering the role of an innocent bystander in the actions taken by the police during a pursuit. A police video can capture what is directly in front of it, but it cannot provide a proper context of the area, traffic on side streets or at intersections, or other important considerations that a fact finder should consider when analyzing the merits of continuing or terminating a pursuit. The road from *Chambers* has been both long and pockmarked, with speculative interpretation and an absence of operational guidance for those who must seek to ensure public safety. The judicial deference *Harris* ostensibly pays to police officer discretion with respect to the level of force to be used in any pursuit is troublesome. The words of another supreme court, from more than one-half century ago, seem to take on new meaning in the wake of the high court's pronouncement in *Harris* that is far from ideal:

> Charged as they were with the obligation to enforce the law, the traffic laws included, they would have been derelict in their duty had they not pursued him.[56]

One can only hope that those who are charged with the protection of public safety recall the lengthy dialogue that preceded the development of current pursuit practices and policies and that they do not, based on a reading of *Harris*, divest themselves of their professional responsibility to safely "serve and protect" those who rely upon their sound judgment.

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[56] *Chambers v Ideal Pure Milk Co.*, 245 S.W.2d 589 (Ky. App. 1952).

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