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Law Enforcement Action Forum NEWSLETTER



Michigan's New Law Regarding Police Operation of Vehicles

by Gene King, Loss Control

BACKGROUND

On July 11, 2000, the Michigan Supreme Court announced a major decision in *Robinson, et al v. City of Detroit*; Docket Nos. 110360, 107421 (2000). The decision resulted in some important changes in the law concerning the operation of motor vehicles by police officers. Since 1983 the rule of law for the operation of police motor vehicles in pursuits has been *Fiser v City of Ann Arbor*, 417 Mich 461 (1983). In that case, an officer from the City of Ann Arbor Police Department was in a high-speed pursuit that ended in a crash and litigation. When the case reached the Michigan Supreme Court, the court ruled that a causal relationship existed between the officer's operation of the vehicle and the plaintiff's injuries. In deliberating this case, the Court established the factors that determine whether a pursuing officer's actions were reasonable. *Fiser* has been the basis for the establishment of the police operation of motor vehicle policy and training ever since.

In *Rogers v City of Detroit*, 457 Mich 125 (1998), the Michigan Supreme Court reaffirmed the principles of *Fiser*. In that case, the Court agreed with *Fiser* that an officer's operation of a vehicle during a pursuit could constitute "negligent operation" of a motor vehicle, thus opening the door to the vehicle exception to governmental immunity.

In 1994 the Michigan Court of Appeals issued an opinion in *Jackson v Oliver*, 204 Mich App 122 that the police do not owe any duty to a fleeing suspect except not to use excessive force. The Court ruled that a suspect who willingly attempts to avoid apprehension should not be able to recover damages because of his own intentional acts.

In the Federal context, the rules concerning the conduct of police pursuits remain the same. However, *Robinson v Detroit* changes the law significantly in Michigan. To find out how this ruling actually affects police operation of motor vehicles, we turned to Law Enforcement Action Forum legal advisor James I. DeGrazia, partner in the firm of O'Connor, DeGrazia and Tamm, PC. DeGrazia has been the legal advisor for and a valued member of the LEAF Committee since its inception. In addition to advising on policy development, DeGrazia authors a "Review of the Law" for each chapter of the Manual of Law Enforcement Risk Reduction that is specific to the chapter's topic. The latest edition of the Manual, expected later this year, has updated law reviews including one that address the changes brought on by the Michigan Supreme Court ruling in *Robinson*.

GOOD NEWS

DeGrazia said that *Robinson* significantly changes the law on pursuits. He cautions police officials to remember that MCL 691.1401 grants government immunity from liability. There is, an

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exception. As set forth in MCL 691.1405, an agency may be liable for damages resulting from the negligent operation of a vehicle that an agency owns and that an officer or employee is driving. Officers should remember that MCL 691.1407 (2) grants individual officers immunity if their actions meet three conditions:

1. Officers must act, or must reasonably believe that they are acting within the scope of authority.
2. The agency must be engaged in a governmental function, and
3. The conduct must not amount to gross negligence that is the proximate cause of injury or damage.

Even with the favorable ruling in *Robinson*, the issues outlined in the law must be satisfied to maintain immunity.

The *Robinson* decision encompassed three major points that DeGrazia feels require discussion. First, the Michigan Supreme Court ruled that although the police have a duty to innocent car passengers, they do not owe a duty to “wrongdoers.” Those wrongdoers who allege negligence by police bear the burden of proving their innocence before any duty attaches to a police officer.

Second, according to DeGrazia, in the *Robinson* decision, the Court narrowly construed the motor vehicle exception to governmental immunity. The Court agreed with the *Fiser* conclusion that an officer’s physical handling of a motor vehicle during a police pursuit can constitute negligent operation of a motor vehicle as defined in the motor vehicle exception to governmental immunity. The Court then took *Fiser* a step farther, because the facts of the *Robinson* case indicate that the plaintiff’s injuries did not, “as a matter of law”, result from the operation of the police vehicle.

The police vehicle did not hit the fleeing car or physically cause another vehicle or object to hit the vehicle that police were pursuing or physically force the vehicle off the road or into another vehicle or object. Therefore, there was no exception to governmental immunity.



Additionally, DeGrazia said the Court overruled *Rogers* by determining that an officer’s decision to pursue does not constitute the negligent operation of a motor vehicle.

Third, the Court made a significant distinction between “a” proximate cause and “the” proximate cause in these motor vehicle cases. The ruling determined that individual police officers are immune from liability when their actions were not “the proximate cause” of the plaintiffs’ injuries.

DeGrazia was delighted with the *Robinson* decision and said it signifies recognition by the Court of the practical realities of police work. He said this well-reasoned Michigan Supreme Court decision allows officers to carry out their sworn duties with less of a threat of their every move being second guessed.

FEDERAL LAW

FOURTH AMENDMENT CASES

DeGrazia also felt it was important to outline briefly the federal law as it relates to pursuits. He said municipal entities and their officers will not be involved in Fourth Amendment seizure cases unless 1) there is a seizure that meets the criteria of the Fourth Amendment; and 2) the seizure is unreasonable. He cites *Brower v County of Inyo*, 489 U.S. 593; 109 S.Ct. 1378 (1989). In this case, the County Patrol set up a roadblock around a curve. Police parked their cars so that the headlights faced the oncoming driver. The roadblock stopped him when he hit it. As one would expect, the U.S. Supreme Court ruled that there was a seizure because there was a governmental termination of freedom of movement through means intentionally applied. The Court remanded the case to the lower court to determine if the seizure was unreasonable.

In *Brower*, the Court said, “violation of the Fourth Amendment requires an intentional acquisition of physical control.” This type of control exists when departments use roadblocks, ramming, or road spikes to end pursuits. *California v. Hodari*, 499 U.S. 621; 111 S.Ct. 1547; 113 L.Ed.2d 690 (1991), reaffirmed this ruling. In *Hodari*, the Court held that a police pursuit does not amount to a seizure in the meaning of the Fourth Amendment until police gain control through means intentionally applied.

FOURTEENTH AMENDMENT CONTEXT

In *County of Sacramento v. Lewis*, 118 S.Ct. 1708; 523 U.S. 833; 140 L.Ed.2d 1043 (1998), a pursuing deputy unintentionally skidded into the passenger of a motorcycle he was pursuing after it fell over. The plaintiff alleged that the pursuit was undertaken with deliberate indifference to the passenger's survival. The United States Supreme Court ruled that "only a purpose to cause harm unrelated to the legitimate object of arrest will satisfy the element of arbitrary conduct shocking the conscious necessary for a due process violation. Note that the court did not find a Fourth Amendment seizure in *Lewis* because there was no control gained through means intentionally applied.

TRAINING ISSUES

DeGrazia said that although *Fiser* has been overruled, the basis of safe and reasonable operation still exists. Because a police pursuit presents varying degrees of risk exposure to the officers involved and the traveling public, the emphasis on decision making is still very important. Officers must be able to articulate the

The Checklist

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

- Provide practical, psychomotor skills driver's training at least once every three years.
- Adopt the sample Vehicle Operations policy found in the Manual for Law Enforcement Risk Reduction (Chapter 2).
- Provide officers with training on the department's vehicle operations policy at least once a year.
- Include training on the department's philosophy and expectations about officers' behavior when using the discretion that the Vehicle Operations policy allows.
- Train new employees at hire and before assigning them to operate a motor vehicle.
- Give written tests. One is included in Chapter 2 of the Manual.
- Train supervisors in their duty to implement the policy and monitor and evaluate officer's performance.
- Establish an accident review panel to review the reports of accidents and pursuits to determine if policy was followed, training is needed and to make recommendations for policy changes.
- Keep records of all training, reviews and analyses that you perform

reasons for the pursuit and their choice of tactics. The relief given by the Michigan Supreme Court in *Robinson* allows a police officer to do his duty without having to take responsibility for the actions of the fleeing offender. Unless officers hit a fleeing car, physically cause another vehicle or object to hit the fleeing car, or physically force the fleeing car off the road or into another vehicle or object, they will maintain their governmental immunity.

To DeGrazia, the important issues remain officer training and supervision. Officers must understand the policy of the department and their responsibilities when operating a motor vehicle. Police Executives must instill in their officers the department's philosophy when it comes to making decisions while engaged in vehicle operations. Officers must be able to recognize when they should not initiate a pursuit and when they should stop a pursuit already in progress. This can only occur through training and discussion among management and the department members. Supervisors need to be held accountable for the actions of the their officers. Action must be taken when an officer exhibits behavior that is not appropriate or within the policy and philosophy of the department. Discipline and/or retraining may be required if officers violate the department's policy concerning pursuits.

The Michigan Supreme Court's ruling in *Robinson* has given much needed relief to Law Enforcement in the area of liability in police pursuits. However, it is still each department's responsibility to provide an operational policy, training and supervision to their officers. Officers must know their responsibilities when they are engaged in this critical job function.

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



Loss Control Changes

We extend an enthusiastic “welcome back” to Mike Cascone of Meadowbrook Insurance Group. Mike recently agreed to reassume management responsibility at Meadowbrook for our Pool and Fund Loss Control Services. Mike, who is also Vice President of Corporate Loss Control, was instrumental in developing the extensive loss control services we now provide. He was also instrumental in recruiting the staff that performs the services. Mike’s past experience with the MML program will be especially valuable because of the recent departure of Rod Pearson. Rod left Meadowbrook in July to pursue other career opportunities. Rod spent much of the past three years dedicated to improving our loss control service and supervising the loss control field staff. His specialty was law enforcement loss control, and he was instrumental in developing our Law Enforcement Action Forum (LEAF) and the Manual for Law Enforcement Risk Reduction. Rod was also editor of the LEAF Newsletter. We wish him the best in his future endeavors.

The LEAF program continues its success and is in the process of publishing the next update of the Manual for Law Enforcement Risk Reduction. Gene King and Stephen Tobler are available to assist you in your Law Enforcement risk reduction efforts. You can contact Gene and Stephen at 800-482-2726, ext. 8040 and 8046 respectively.

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