Immunities

Emergency Vehicle Litigation and 1970s Pop Culture

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There are lots of things about the 1970s that are hard to explain: Leisure suits and bell bottoms, disco music and tight polyester shirts. Then, there is *Smokey and the Bandit*, one of the most popular movies of 1977, second only to "Star Wars."[1]

Here's the premise: Bandit (Burt Reynolds with sideburns and mustache) and his buddy get hired to haul a huge load of special beer from Texas to Georgia for a political rally. The trick is, the beer needs to get there in a short amount of time or they don't get paid the big bucks for the delivery. Burt will drive a souped-up Pontiac Trans Am and lead the way for his trucker buddy (played by Jerry Reed), who will drive the truck load of beer and communicate with Burt by CB radio. Along the way, Burt picks up a run-away-bride hitchhiker (Sally Field – caught awkwardly in mid-career, somewhere between "The Flying Nun" and her later Oscar-worthy roles) who happens to be being chased by Sheriff Buford T. Justice, played by Jackie Gleason. The rest of the movie is basically a series of high-speed police chases through several southern states, involving so many smashed, flipped, and otherwise obliterated police cars and innocent bystanders (all in good fun, of course) that it's hard to keep track.

There are several things wrong with this movie: First, the sale of gas guzzling Trans Ams nearly doubled by 1979.[2] Second, otherwise apparently normal and reasonable persons started talking in CB lingo and saying things like, "Ten-Four, good buddy" instead of "goodbye." Third, (and here is what is really, *really* wrong with *Smokey and the Bandit*) in all its purported good fun, the movie doesn't show any of the numerous deaths and life-altering injuries that would have had to result from those wild and crazy crashes, those high-speed flips into the ditches, or those multi-car pile-ups at the intersections. The movie ignores the reality, for example, that high-speed police chases kill or maim hundreds of people every year.[3]

Ima Bystander v. Buford T. Justice Jr.

Fast-forward to today, and pretend that Buford T. Justice Jr., whose father was a sheriff in Texas, is working as a trooper for the State Police in Central Virginia. One day he spots an old 1977 Trans Am, and, of course, he wonders if it might be his father's old nemesis, Bandit. The Trans Am is missing a front license plate, so the state trooper pulls in behind the Trans Am (the rear license plate says: "TEN FOUR") and turns on his blue lights. Instead of pulling over, though, the Trans Am speeds off. Buford T. Justice Jr. gives chase, and before long, the speeding Trans Am slams into a car being driven by Ima Bystander. After she gets out of the hospital, Ima Bystander consults an attorney

to see if she might have a cause of action against the Commonwealth or the state trooper, because the Trans Am driver (not Bandit, but a 17-year-old kid skipping school) only had $25,000 in insurance coverage. Here's what her attorney finds:

Exempt Emergency Vehicles

There are a number of issues pertaining to the liability of the Commonwealth *generally* under the State Tort Claims Act, and municipal immunity and liability *generally*, when an emergency vehicle (such as a police car) is involved in an accident, and many of those issues are ably and thoroughly addressed by the writers of other articles in this issue of the *Journal*. Nevertheless, some of those issues will overlap with this discussion pertaining to emergency vehicles and will be discussed briefly here where appropriate.

Any discussion about the liabilities or immunities that attach to the operation of an emergency vehicle should begin with the Virginia statute providing that certain emergency vehicles will be exempt from some of the traffic laws and regulations governing the operation of vehicles generally.[4] By this statute, emergency vehicle operators are exempt from criminal prosecution for traffic violations while driving an emergency vehicle "in the performance of public services," when such vehicle is "operated under emergency conditions," and while it is displaying specified emergency lights and sounding a prescribed siren, exhaust whistle or air horn.[5] The statute expressly requires that emergency vehicle drivers must exercise "due regard for safety of persons and property" even if they otherwise might disregard speed limits, disregard parking or stopping prohibitions, disregard regulations governing a direction of movement, pass or overtake vehicles, or cross the center line of a highway.[6] In proceeding through red traffic lights or stop signs, for example, drivers of emergency vehicles may proceed past such signals only "if the speed of the vehicle is sufficiently reduced to enable it to pass a signal, traffic light, or device *with due regard to the safety of persons or property*." [7] Moreover, in § 46.2-920 (B) the statute also provides that "[N]othing in this section shall release the operator of any such vehicle from civil liability for failure to use reasonable care in such operation."

Subsection C of the statute specifically defines an "emergency vehicle" for purposes of the exemption statute as, among other things, "[a]ny law-enforcement vehicle operated by or under the direction of a federal, state, or local law enforcement officer (i) in *the chase or apprehension of violators* of the law or persons charged with or suspected of any such violation or (ii) *in response to an emergency call*."[8] Emergency vehicles also include regional detention center vehicles, vehicles used to fight fires, ambulances and rescue vehicles, and Department of Emergency Management vehicles, all with a caveat that the vehicle must be "responding to an emergency call or operating in an emergency situation,"[9] or, for example, that a fire vehicle must be "traveling in response to a fire alarm or emergency call."[10]

In other words, just driving around in an emergency vehicle would not bring our potential defendant, Buford T. Justice Jr., within the purview and protections of the exemption statute. The exemptions would not apply unless he was operating his State Police car "in the chase or apprehension of violators" or "in response to an emergency call."[11] Likewise, Trooper Justice would not necessarily be entitled to the protections of sovereign immunity simply by driving around in his State Police vehicle, but would be entitled to the exemptions of the statute and the protections of sovereign immunity if he is operating his vehicle as a governmental employee and using "the discretionary judgment involved in vehicular pursuit by a law enforcement officer."[12]

In our case against Buford T. Justice Jr., who was using his State Police vehicle to pursue a would-be law violator, let's assume that his operation of the vehicle would come within the exemptions of §46.2-920, and that such driving and the pursuit of the Trans Am (*sans* front license plate) would be covered by the doctrine of sovereign immunity, as it has been applied in Virginia in similar contexts. What are the implications of the exemption statute and the doctrine of sovereign immunity in Ima's action against Buford T. Justice Jr. and his employer, the Commonwealth of Virginia?

"Ordinary Person" or "Ordinary Officer" Standard

At first blush, a reading of the plain text of §46.2-920 might suggest that a negligence *per se* or a "reasonable care" simple negligence standard could be imposed on police officers or other emergency vehicle operators who violate the "due regard for the safety of persons" standard set forth in the statute. Indeed, that was the argument of the plaintiff in *Colby v. Boyden*, who was hit by the defendant police officer's vehicle while the officer was pursuing a criminal. Colby argued that the language in the statute stating that "[n]othing in this section shall be construed to release the operator of any such vehicle from civil liability for failure to use reasonable care in such operation" meant that civil liability could still be imposed against the officer based on a simple negligence standard if it was found that he failed "to use reasonable care" in the operation of his police vehicle. Citing *Smith v. Lamar,* 212 Va. 820, 188 S.E.2d 72, 74 (1972), and other cases, however, the court in *Colby* concluded that where the exemption statute was applicable, the officer's duty under that statute is not that of an "ordinary person" or "ordinary motorist," but that of "an ordinary officer performing his duty under like circumstances."[13] Thus, the appeals court in *Phillips*, citing and applying the supreme court's ruling in *Colby*, stated as follows:

> The Supreme Court has held that, in determining the civil liability of a police officer for violating an act exempted by Code § 46.2-920, the appropriate standard to apply is not that of an "'ordinary person' or 'ordinary motorist'" but that of "an officer performing his duty under like circumstances." *Colby*, 241 Va. at 131, 400 S.E.2d at 188 (citing *Smith*, 212 Va. at 824, 188 S.E.2d at 74). Additionally, proving simple negligence is insufficient to impose civil liability for acts covered under Code § 46.2-920. *See id.* at 130-31, 400 S.E.2d at 187-88. The Court explained that the exemption statute "tailored" a standard to the particular acts recited therein. *See id.* at 132, 400 S.E.2d at 188. Thus, for an act exempted under Code § 46.2-920, a plaintiff in a civil action must establish that the police officer's conduct was grossly negligent in order to prevail. *Id.*; *see also Meagher* [*v. Johnson*] 239 Va. [380] at 383, 389 S.E.2d [310] at 311 [(1990)] (holding that any failure of a police officer to operate his vehicle in a reasonable manner is actionable only if it amounts to gross negligence in the case of exempted behavior).[14]

The court in the *Colby* case also concluded that the exemption statute (now §46.2-920) did not abrogate the common law doctrine of sovereign immunity and that, where an individual officer defendant was entitled to sovereign immunity, the statute required a showing of gross negligence in order for the plaintiff to prevail in an action against the officer.[15] Therefore, the concept of gross negligence under the cases dealing with sovereign immunity and the operation of emergency vehicles will have to be examined as we cut to the chase in our potential action against Buford T. Justice Jr.

Is That Gross, or What?

Liability may be imposed against Trooper Justice if it can be established that he was guilty of gross negligence in operating the State Police vehicle in carrying out the pursuit of the Trans Am. That gross negligence, of course, will also have to be found to be at least *a* proximate cause of Ima Bystander's injuries. Under the law of Virginia, the individual officer is not entitled to sovereign immunity (even if the state, county, or city might be entitled to such immunity) for acts that amount to gross negligence.[16]

There are situations, as in *Muse* or *Colby v. Boyden*, where the courts determined that there was no gross negligence as a matter of law on the part of the pursuing police. In *Muse*, for example, the deputy sheriff was on his way to an emergency domestic disturbance call and proceeded through a red light at only about 5 to 7 miles per hour, relying on his peripheral vision to check for traffic while engaged in conversation with a passenger next to him. The court there determined that, although such inattention might be negligence, it was not gross negligence. And in *Colby*, the supreme court upheld the trial court's determination that the policeman who ran a red a light while pursuing a fleeing suspect and hit the plaintiff was not grossly negligent as a matter of law under the following circumstances:

> The trial court held that, based on the stipulated facts, Officer Boyden "did exercise some degree of diligence and due care" and, therefore, as a matter of law, his acts could not show "utter disregard of prudence amounting to complete neglect of the safety of another." Officer Boyden activated his lights and, for at least part of the time, his siren. *His speed was no more than five miles over the speed limit, and he swerved and braked in an attempt to avoid the collision.*
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> On this record, we cannot say that the trial court erred in finding that Officer Boyden exercised "some degree" of care for the safety of others. As gross negligence is the "absence of slight diligence, or the want of even scant care," *Frazier v. City of Norfolk*, 234 Va. 388, 393, 362 S.E.2d 688, 691 (1987), the trial court properly held that Colby failed to establish a prima facie case of gross negligence.[17]

On the other hand, gross negligence might be established (or at least be determined to be a question for the jury) if the plaintiff can establish that Buford T. Justice Jr. not only operated his vehicle in a shockingly careless manner (grossly high speeds, blowing past red lights, crossing double yellow lines, and the like) but that he also failed to follow standard operating procedures or department rules and regulations pertaining to vehicular pursuits. To the extent it can be established that Trooper Justice disregarded department rules, training procedures, instructions or directives, Virginia supreme court authority would hold that at least a fact issue for the jury is presented as to whether he might be grossly negligent.[18]

In the *Green* case, for example, in an action by the administrator of the estate of a woman who was killed by fragments from a frangible round from a shotgun used by the defendant Richmond policeman (a SWAT team member) to blast open a door during a drug raid, the supreme court held that there was sufficient evidence of gross negligence on the part of the policeman to present the issue to a jury. According to evidence pertaining to SWAT team training materials and information from the manufacturer, such frangible rounds were to be fired down at a certain angle and were intended to be directed at the locking mechanism on the door.[19] The evidence against the police officer in the case,

however, suggested that he did not follow the training directives when he fired several rounds into the wooden part of the door and frame rather than the locking mechanism, and the evidence was unclear as to whether he fired at the appropriate angle. In concluding that a jury issue was presented on the question of whether the policeman was grossly negligent, the supreme court stated as follows:

> Both parties agree that under Virginia law, a government agent such as Ingram is immune from suit for simple negligence but not for gross negligence. *Colby v. Boyden*, 241 Va. 125, 128, 400 S.E.2d 184, 186 (1991). Additionally, both parties agree the trial court correctly instructed the jury below that gross negligence is "that degree of negligence which shows indifference to others as constitutes an utter disregard of prudence amounting to a complete neglect of the safety of [another]. It must be such a degree of negligence as would shock fair minded [people] although something less than willful recklessness." *Ferguson v. Ferguson*, 212 Va. 86, 92, 181 S.E.2d 648, 653 (1971); *see also Meagher v. Johnson*, 239 Va. 380, 383, 389 S.E.2d 310, 311 (1990).
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> A reasonable jury *could conclude that Ingram departed from instruction and training,* and fired in a location below the lock rather than between the lock and the frame. Given Ingram's own testimony about assumptions made concerning the presence of people on the other side of the door, *a reasonable jury could have concluded that Ingram acted "with that degree of negligence which shows indifference to others as constitutes an utter disregard of prudence amounting to a complete neglect of the safety" of others*. The trial court's ruling to grant the motion to strike plaintiff's evidence was based upon the issue of gross negligence, not proximate causation. Viewed in the light most favorable to the plaintiff and drawing all fair inferences from these facts, the administrator presented sufficient evidence to constitute a jury question on the issue of gross negligence.[20]

In addition to the application of the gross negligence standard to the actions of the officer in *Green*, further guidance concerning what constitutes gross negligence can be found in any number of Virginia cases which have defined and applied the gross negligence standard in various contexts.[21]

Thus, the answer to the question of whether Buford T. Justice Jr.'s operation of the emergency police vehicle in chasing the Trans Am was sufficiently "gross" so as to impose "gross negligence" liability is: it depends. If Trooper Justice pursued the Trans Am through hilly, twisting roads at extremely high speeds, past school bus stops with children coming and going, and onto a busy roadway during a busy time of the day – and he broke a number of department rules, directives, and procedures in doing so – then it would seem that at least a fact issue exists as to whether such conduct rises to the level of "gross negligence."

If, however, as in *Colby*, he basically chased the Trans Am, but not very vigorously and apparently without breaking any police department rules or directives, then a Virginia court might very well determine that Justice was not grossly negligent as a matter of law.[22]

The Plot Thickens

Other slight wrinkles in the case of Ima Bystander against Buford T. Justice Jr. are the implications of the Virginia State Tort Claims Act, V.C.A. §§8.01-195.1 *et seq*. (because of the operation of the state emergency vehicle by a state employee in the course of his employment), and the proximate cause issue, where the impact to Ima Bystander was not from the state trooper's car, but from the Trans Am that Trooper Justice was chasing. Under the various authorities outlined above, Trooper Justice himself might be held liable if the plaintiff can establish his gross negligence and proximate cause. The question arises, however, whether the Commonwealth might be held liable under the terms of the State Tort Claims Act. In situations where the policeman is a local city or county law enforcement officer, common law sovereign immunity still applies to those local government entities, even though the individual officer might be subject to liability based on his gross negligence.[23]

In the case of the Commonwealth, however, under the plain terms of §8.01-195.3, it might be possible to establish liability against the Commonwealth for the simple negligence of the trooper in the operation of his vehicle (subject to the $100,000 damages cap imposed by the Tort Claims Act), even though the plaintiff would have to establish gross negligence to impose liability against the individual trooper, who then would *not* be subject to the damages cap under the Tort Claims Act.[24] This issue will likely need further gloss through other litigation.

As for the proximate cause issue, there are any number of cases from Virginia and numerous other states holding that the question of proximate cause in this context, where the fleeing suspect's vehicle strikes the plaintiff and inflicts damage, may be a question of fact, or at least not appropriate for decision on the pleadings.[25]

Thus, depending on the circumstances of the chase and the operation of the emergency vehicle in this case, it might be entirely possible to present Ima Bystander's claim to a jury and allow that jury to decide whether Trooper Buford T. Justice Jr. was grossly negligent for purposes of his own liability, and whether he was at least negligent for purposes

of the Commonwealth's liability under the Tort Claims Act. In any event, plaintiffs' lawyers should be vigilant in protecting the rights of persons like Ima Bystander. The statistics regarding the misery inflicted by high-speed police chases every year are shocking. And regardless of what the "official" rules and procedures might be within a particular police department concerning such vehicular pursuits, a check of any number of law enforcement web sites and on-line chat rooms will reveal that the attitude and "de facto" rule among many state and local street cops is this: "We chase 'em 'til the wheels fall off." That might be well and good for a supposedly fun-loving movie like *Smokey and the Bandit*, but in real life, such an attitude merely courts disaster.

DeSoto and Gage to the Rescue

Before *ER* or *Grey's Anatomy*, there was *Emergency*, the 1970s reality-based TV show about California fire department paramedics DeSoto (played by Kevin Tighe) and Gage (played by Randolph Mantooth), again with the mandatory sideburns. Let's change the script on the complications faced by our protagonist Ima Bystander. Let's pretend that the actors Kevin Tighe and Randolph Mantooth have retired from show biz and are now volunteer firemen for a volunteer fire company and rescue squad in suburban Charlottesburg, Virginia. Kevin Tighe is driving a fire truck, sirens and lights going full blast, on his way to a brush fire. As he's going through a green light intersection (not a green arrow), daydreaming about his salad days in southern California, he suddenly remembers he has to turn left and cuts abruptly across the path of Ima Bystander, who was creeping along in the far right lane and trying to be watchful because of the oncoming fire truck. Nevertheless, she gets creamed and wonders if Kevin Tighe (whom she thought she recognized from somewhere) or the Charlottesburg Volunteer Fire Department might be held responsible for the crash.

In addition to the provisions of the emergency vehicles exemption statute, §46.2-920, discussed above, the provisions of V.C.A. §27-23.6 will need to be examined in this potential action against the volunteer fire company and Kevin Tighe. Under §27-23.6, sovereign immunity will extend to a volunteer fire company and to the individual driver if the fire company has an express or implied contract with a city or county government under the terms of Va. Code Ann. 27-23.6 and for purposes of providing fire protection and fulfilling some of the fire protection duties that otherwise ordinarily might be fulfilled by a governmental political subdivision.[26]

In order to take advantage of the immunity protections offered by V.C.A. §27.23.6, the defendant volunteer fire company will have to present evidence of either an express or implied contract.[27] Nevertheless, even if at least an *implied agreement* between the county or city government and the Charlottesburg Volunteer Fire Department can be found, the individual driver of the fire truck, Tighe, who was a volunteer for the fire company, will still be legally responsible for his own negligence or gross negligence in the operation of the fire truck, and he will not be cloaked with the immunity which might extend to the fire company, unless he was (1) *exercising discretion* in the operation of an emergency vehicle, (2) *during an emergency*, and (3) he did so *without gross negligence*.[28]

In the present situation, Ima Bystander would have to establish that Kevin Tighe was not exercising any meaningful discretion in the operation of the fire truck, even if he was responding to an emergency, or that he acted with gross negligence in the operation of the truck, thus vitiating the sovereign immunity defense as to his individual liability. She will want to argue that, at the very least, *fact questions exist* as to whether Tighe was responding to an emergency, whether he was exercising any discretion in the operation of the truck while so responding, and whether his conduct in failing to yield, failing to keep a proper lookout, and failing to follow standard operating procedures for the fire company in making the sudden left turn in front of the Plaintiff constitute gross negligence.[29]

In the *Spivey* case, for example, the court ruled that the volunteer fireman was not entitled to sovereign immunity because he was not exercising discretion beyond that of ordinary driving – a ministerial act – when he failed to yield the right of way while driving a fire truck on a non-emergency call into shopping mall parking lot to assist in removing an infant who was reportedly locked in a motor vehicle. He was not using his lights and siren at the time. Nevertheless, the defendant driver in the case argued that he was entitled to immunity because he was operating the large, specialized truck used for fighting fires while en route to respond to a call for assistance. The *Spivey* court's analysis offers some guidance as to the possible outcome in Ima Bystander's case, where the court stated:

> [T]he facts of this case do not support the conclusion that Collier's driving involved the exercise of judgment and discretion beyond that required for ordinary driving in routine traffic situations. . . .
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> . . . Collier was driving in a nonemergency manner without lights and sirens, to a "public service call" during which he was required to obey all traffic regulations. The special skill and training required to operate a fire truck under these circumstances is not the exercise *per se* of judgment and discretion for purposes of sovereign immunity. To find otherwise would not comport with our prior decisions, which have held that sovereign immunity does not extend to "ordinary driving situa-

> tions," *Heider,* 241 Va. at l45, 400 S.E.2d at 191, in "routine traffic." *Colby*, 241 Va. at 129, 400 S.E.2d at 187. Thus, there were no "special risks" inherent in Collier's task as existed in cases such as *Colby* (police officer in hot pursuit in a high speed chase with emergency lights and siren activated), or *National R.R. Passenger Corp. v. Catlett Volunteer Fire Co.*, 241 Va. 402, 404 S.E.2d 216, 7 Va. Law Rep. 2232 (1991) (fire truck en route to a burning vehicle with emergency lights and siren activated).
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> Collier's suggestion that a controlling factor is whether a government employee received specialized training in the operation of a special or heavy duty vehicle (e.g. tractor-trailer, fire truck, school bus, dump truck, snow plow, etc.) has been effectively rejected in prior decisions. Such a rule would create a blanket immunity as a matter of law whenever that vehicle was used to perform a governmental function. The analysis by this Court in prior decisions demonstrates that this suggested approach has been rejected. . . . [30]

In Ima's case, the facts might shade more toward the ministerial, non-discretionary type of driving at issue where the courts have denied immunity. Although Tighe was using his siren and lights at the time of the accident, and he was responding to an emergency (brush fire), further development of the facts will be necessary. Even if Tighe did have the emergency lights and siren activated, for example, there might be clear and express terms in the volunteer fire company's standard operating procedures or safety manual that demonstrate that the driver had a ministerial, non-discretionary responsibility to "use extreme caution when approaching and traversing street and road intersections," and a ministerial, non-discretionary responsibility to operate the truck "in accordance with any and all current Virginia laws pertaining to emergency vehicles."

Moreover, even under the terms of V.C.A. §46.2-920, which exempts the operators of emergency vehicles from certain traffic rules while operating the vehicle in response to an emergency, there is nothing express within its provisions which exempts such an operator from the duty *to yield the right of way* to oncoming traffic or to use due care in attempting to *turn left in front of oncoming traffic*. Indeed, the wording of the statute suggests that the driver, Tighe, still had a responsibility to operate the truck (even in emergent conditions) with "due regard for safety of persons and property."[31] Furthermore, §46.2-920 specifically provides that: "Nothing in this section shall release the operator of any such vehicle from civil liability for failure to use reasonable care in such operation."[32] Therefore, it might be argued that Tighe had a ministerial, non-discretionary duty to yield the right of way to oncoming traffic, including Ima Bystander, and that he is not excused from that ministerial duty even if he was operating the truck in an emergency. Under such circumstances, sovereign immunity might not attach to Tighe's actions in causing this accident.

Even if Tighe is entitled to the cloak of immunity in this scenario, however, the immunity is *not absolute*, and he may still be held liable for gross negligence.[33]

Likewise, the question of whether the defendant driver Tighe was guilty of gross negligence in the way he operated the fire truck (by failing to yield and by turning left suddenly and directly in front of oncoming traffic) might not be a question that is susceptible to decision on a Plea in Bar. This is especially true in light of the gross negligence standard as it has been defined and applied in Virginia.

Thus, even assuming for the sake of discussion that the volunteer fire company might enjoy immunity from a common law negligence action, to the extent it can be established that the individual driver acted with gross negligence or a willful and wanton or reckless disregard for the rights of Ima Bystander, then individual liability might be imposed against that individual driver, Kevin Tighe.[34]

As discussed above, guidance as to whether there might be a finding of gross negligence in Ima's situation can be found in a number of Virginia cases which have defined and applied the gross negligence standard in various contexts.[35]

Once again, as this episode of the travails of Ima Bystander unfolds, the potential liability of the driver of the emergency vehicle, Kevin Tighe, will likely come down to the question of whether he was *grossly negligent* in failing to obey standard operating procedures, failing to yield the right of way, failing to keep a proper lookout and avoid oncoming traffic, and turning left directly into the path of Ima – all while operating a large, unwieldy, and dangerous fire truck. It would seem that such conduct could be considered an utter disregard of prudence amounting to a complete neglect of the safety of Ima and other members of the traveling public, and therefore, gross negligence. At the very least, the circumstances of Ima's accident might raise fact issues on the gross negligence question.

Conclusion

There is no doubt that a balance must be struck between roadway safety and the need for the operators of emergency vehicles (such as policemen and firemen) to be able to respond to emergencies without some of the constraints that attach to regular, non-emergency drivers. What that appropriate balance might be is suggested, as a matter of public policy, by some of the statutes and immunity doctrines discussed above. As attorneys for clients like Ima Bystander, it is our responsibility to test the balance in particular cases, to make sure that

vigorous and reasonable responses to emergent situations do not cross over the line and into the realm of gross negligence, heedlessness, and downright roadway mayhem. The worthy goals of protection, service, and rescue by the operators of emergency vehicles should not and cannot be allowed to devolve into the street cop motto of: "We chase 'em 'til the wheels fall off."

Endnotes

1. *See* www.imdb.com/title/ tt0076729/trivia.
2. *Id.*
3. *See* R. Seals, "The High Speed Chase," *Greensboro News-Record* (April 6, 2008), http://www.news-record.com/apps/pbcs.dll/article?AID=/20080406/NRSTAFF/4519771427 (reporting that high-speed police pursuits kill, on average at least one person a day, according to federal data: "From 1996 through 2006, the national average stood just above 386 fatalities each year. Nearly a third of all reported pursuits end in a collision, leaving thousands more injured each year"); *see also* J. Hill, "High-Speed Police Pursuits: Dangers, Dynamics, and Risk Reduction," *FBI Law Enforcement Bulletin* Vol. 71, No. 7 at 14-15 (July 2002) (noting that because of the lack of mandatory reporting to the National Highway Transportation Safety Administration, the attempt to track high-speed pursuit fatalities is difficult, but "[e]ven conservative estimates by various researchers recalculate the actual number of fatalities between 400 and 500 deaths per year," and noting further that "[i]nnocent third parties who just happened to be in the way constitute 42 percent of the persons killed or injured in police pursuits").
4. *See* Va. Code Ann. § 46.2-920 (2008).
5. §46.2-920 (A) and (B).
6. §46.2-920 (A) (1-7).
7. §46.2-920 (A) (2) (emphasis added).
8. §46.2-920 (C) (1) (emphasis added).
9. §46.2-920 (C) (2)
10. §46.2-920 (C) (3).
11. §46.2-920 (C) (1).
12. *See Heider v. Clemons*, 241 Va. 143, 400 S.E.2d 190, 191 (1991) (holding that deputy sheriff who had just finished serving process on someone and then attempted to pull back out into traffic was engaged in a mere ministerial function in his driving and, therefore, was not entitled to immunity); and *Colby v. Boyden*, 241 Va. 125, 400 S.E.2d 184, 187 (1991) (applying V.C.A. § 46.1-226 [now § 46.2-920] in action against Virginia Beach police officer who hit plaintiff while pursuing criminal suspect, and concluding that sovereign immunity protected the individual officer from liability unless the plaintiff could establish that officer was grossly negligent in driving and carrying out pursuit).
13. 400 S.E.2d at 188. *See also Phillips v. Commonwealth*, 25 Va. App. 144, 487 S.E.2d 235, 239 (1997) (court of appeals discussing the standard for civil liability under the statute in the context of criminal prosecution of police officer who was found guilty of reckless driving for causing wreck by crossing double yellow line; the appeals court upheld the conviction).
14. 487 S.E.2d at 238-39.
15. 400 S.E.2d at 188-89.
16. *See Green v. Ingram*, 269 Va. 281, 608 S.E.2d 917, 922 (2005); *Colby v. Boyden*, 400 S.E.2d at 189; *Meagher v. Johnson*, 239 Va. 380, 389 S.E.2d 310, 311 (1990); *Phillips v. Commonwealth*, 487 S.E.2d at 239; *Robinson v. Picha*, 25 Va. Cir. 433, 1991 WL 835287 (City of Richmond Cir. Ct. 1991) (cause of action properly stated against defendant police officers who chased suspect from Chesterfield County into City of Richmond at speeds of up to 115 miles per hour, where fleeing suspect collided with decedent; officers could be held liable for their gross negligence, and court could not decide, as a matter of law, that officers pursuing a suspect at speeds reaching 115 miles per hour with lights flashing and sirens were not grossly negligent; therefore, officers were not entitled to immunity defense on demurrer); *Daddio v. Ashley*, 43 Va. Cir. 283, 1997 WL 1070410 (Loudoun County, Va., Cir. Ct. 1997) (volunteer fireman for township, who was considered an employee for purposes of liability and who was en route to firehouse on emergency call at the time of his collision with the plaintiff, would not be entitled to sovereign immunity for his gross negligence; the issue of his gross negligence was not susceptible to decision on a plea in bar); *see also Muse v. Schleiden*, 349 F. Supp. 2d 990, 1000 (E.D. Va. 2004) (in police chase case where deputy entered intersection against red light, court noted that, under Virginia law, an employee of a sovereign entity is entitled to sovereign immunity only from claims for ordinary negligence, not gross negligence; court granted summary judgment to deputy, however, where record reflected that he proceeded into the intersection "only once he believed he saw the light change from red to green, and that he was driving only '5-7 miles per hour' at the time of impact").
17. 400 S.E.2d at 189 (emphasis added).
18. *See Green v. Ingram*, 608 S.E.2d at 923.
19. 608 S.E.2d at 921.
20. 608 S.E.2d at 922-23 (emphasis added).
21. *See Wilby v. Gostel*, 265 Va. 437, 578 S.E.2d 796, 801 (2003) (gross negligence "is action which shows indifference to others, disregarding prudence to the level that the safety of others is completely neglected. Gross negligence is negligence which shocks fair-minded people, but is less than willful recklessness"); *Ferguson v. Ferguson*, 212 Va. 86, 181 S.E.2d 648, 653 (1971) (defining gross negligence in the context of an automobile accident as "that degree of negligence which shows such indifference to others as constitutes an utter disregard of prudence amounting to a complete neglect of the safety of the [plaintiff]. It must be such a degree of negligence as would shock fair minded men"); *Kennedy v. McElroy*, 195 Va. 1078, 81 S.E.2d 436, 439 (1954) (evidence was sufficient to make a case for the jury as to whether driver was grossly negligent in injuring his passenger); *see also Frazier v. City of Norfolk*, 234 Va. 388, 362 S.E.2d 688, 691 (1987); *Koppel v. Morgan*, 41 Va. Cir. 130, 1996 WL 1065633 (Fairfax County 1996).
22. For collections of cases from various jurisdictions addressing the circumstances under which police or their

employers may be held liable for injuries from high-speed chases, see generally: S. Brunette, *Cause of Action for Injury Caused by Negligent Operation of Police Vehicle,* 1 C.O.A.2d 819 (2006); M. Lindensmith, *Cause of Action Against Government Entity for Injuries Arising Out of Police Chase*, 13 COA 867 (1987) (both articles collecting cases from various jurisdictions); and P. O'Connor & W. Norse Jr., *Police Pursuits: A Comprehensive Look at the Broad Spectrum of Police Pursuit Liability and Law*, 57 Mercer L. Rev. 511 (2006) (collecting numerous cases from various jurisdictions).

23. *See Colby v. Boyden*, 400 S.E.2d at 186.
24. *See Shenk v. Spangler,* 46 Va. Cir. 277, 280 (Rockingham Co. Cir. Ct. 1998) (Opinion by Judge McGrath, involving gross negligence and negligence actions against Commonwealth and state trooper for injuries arising out high-speed chase; demurrers by the Commonwealth overruled as to the potential gross negligence of the trooper, and noting that *the Commonwealth conceded that "it would be liable for negligence relating to the manner in which Trooper Spangler allegedly operated his cruiser* on the date in question" Id. at 280) (emphasis added).
25. *See Robinson v. Picha*, 25 Va. Cir. 433, 436 (Richmond City Cir. Ct. 1991) (whether policeman involved in high speed chase of suspect was proximate cause of crash between fleeing suspect and plaintiff was question for trier of fact, and would not be decided on demurrer); and *Robbins v. Wessel*, 12 Va. Cir. 231, 235 (Chesterfield Co. Cir. Ct. 1988) (question of county policeman's gross negligence being proximate cause of crash between fleeing suspect and plaintiff's vehicle was for trier of fact); *see also Biscoe v. Arlington County*, 738 F.2d 1352 (D.C. Cir. 1984), cert. denied, 469 U.S. 1159 (1985) (citing numerous cases holding that policeman in high-speed chase could be proximate cause of crash between fleeing suspect and innocent plaintiff).
26. *See National Railroad Passenger Corp. v. Catlett Volunteer Fire Co.*, 241 Va. 402, 404 S.E.2d 216, 218 (1991) (finding that implied contract between Faquier County and volunteer fire company existed under the terms of § 27-23.6, and that individual who was driving fire truck across railroad tracks at the time of the crash with the train was entitled to invoke defense of sovereign immunity and would be liable only for gross negligence in the operation of the truck).
27. *See National Railroad Passenger*, 404 S.E.2d at 219.
28. *See Spivey v. Collier*, 268 Va. 384, 601 S.E.2d 591, 594-95 (2004); *National Railroad Passenger*, 404 S.E.2d at 222; *Leahy v. American Medical Response*, 49 Va. Cir. 349, 1999 Va. Cir. LEXIS 337 (Richmond City Cir. Ct. 1999) (§ 27.23.6 provides immunity for volunteer fire fighting and rescue companies, and the immunity extends to the individual members of the squad when they are acting in an emergency on behalf of the immune entity, but the individual may be liable for his own gross negligence, if proven).
29. *See Daddio v. Ashley*, 43 Va. Cir. 283, 1997 Va. Cir. LEXIS 373 (Loudoun Co. Cir. Ct. 1997) (volunteer fireman who was *operating his own vehicle en route to the firehouse* in response to emergency call was not entitled to immunity; the sovereign immunity defense would apply only to acts of discretion and judgment which are necessary to the governmental function being performed).
30. 601 S.E.2d at 594-95.
31. V.C.A. § 46.2-920 (A) (1).
32. §46.2-920 (B).
33. *National Railroad Passenger*, 404 S.E.2d at 222 (driver was entitled to sovereign immunity, but could still be held liable for gross negligence, if proven); *Leahy v. American Medical Response*, 49 Va. Cir. at 353 (volunteer fire fighter was entitled to immunity but could be liable for gross negligence, if proven).
34. *See Colby v. Boyden*, 400 S.E.2d 184; *Fox v. Deese*, 234 Va. 412, 362 S.E.2d 699 (1987); *Cowles v. Peterson*, 344 F. Supp. 2d 472, 484 (E.D. Va. 2004); *Coppage v. Mann*, 906 F. Supp. 1025, 1047 (E.D. Va. 1995) (intentional acts or grossly negligent conduct by individual officers or agents of governmental entity are actionable).
35. *See, e.g., Wilby v. Gostel*, 578 S.E.2d at 801 (gross negligence "is action which shows indifference to others, disregarding prudence to the level that the safety of others is completely neglected. Gross negligence is negligence which shocks fair-minded people, but is less than willful recklessness"); *Ferguson v. Ferguson*, 181 S.E.2d at 653 (defining gross negligence in the context of an automobile accident as "that degree of negligence which shows such indifference to others as constitutes an utter disregard of prudence amounting to a complete neglect of the safety of the [plaintiff]. It must be such a degree of negligence as would shock fair minded men").

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