

## **TRAINING OFFICERS IN CRITICAL POLICY**

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### **SUMMARY:**

“Critical policy” is agency policy for high liability activities – use of force, arrest, search, emergency driving, etc. Supervisors should make a special effort to train all officers in the requirements of critical policy.

Ideally, a small segment of critical policy should be the subject of training at every assembly, using scenarios to illustrate how policy is applied in a typical encounter. “Failure to train” in critical policy may, in certain cases, be an independent source of liability

### **I. “Critical Policy” Is Agency Policy For High Liability Activities.**

High liability law enforcement activities include arrest and search procedures, entry on private premises, medical care for prisoners, intervening to protect prisoners, domestic violence response, handling mental subjects, and the two classics: pursuit driving and use of force. Big jury verdicts come from serious injury. Serious injury is the red flag of police liability.

In terms of legal theory, serious injury has no significance. The issue is whether or not the officer acted within lawful authority. Even a fatal injury is lawful when an officer confronts an imminent risk of death or serious injury. If the officer's use of force is lawful, the injury is lawful.

Agency policy should be to reduce the risk an officer will act outside of lawful authority. Agency policy ought to be a bright line the officer can follow with confidence. Especially in high liability activities, agency policy should be a shield to protect the individual officer, thereby protecting the agency.

Policy cannot anticipate every situation an officer may encounter. The unexpected happens. But the routine and recurring problems ought to be clearly covered by policy. We do not know every hazard in a pursuit, but we know pursuits will cross busy intersections. We need intersection rules in our pursuit policy. We know officers will confront a hostile suspect who refuses to drop a knife. We need policy on how officers should react in that encounter. We cannot anticipate every problem, but we can anticipate the typical, routine, recurring problems any officer could face during any tour of duty. Policy must cover the ordinary.

### **II. Use of Deadly Force Policy.**

After the Miami shoot-out in 1988, the Federal Bureau investigation realized it needed to change its written policy on use of deadly force, especially on shooting to prevent escape of a dangerous, violent felon. A test was given to

supervisors during their annual in-service training. The test was composed of eight scenarios illustrating typical F.B.I. enforcement encounters. It turned out that the supervisors substantially disagreed in their understanding of policy in many of the eight scenarios. Even in the most serious decision an officer will make, the supervisors did not agree.

A police shooting in Raleigh involved a suspect at a drug-selling location who turned and walked away from an arresting officer. When challenged again, the suspect suddenly turned around and walked toward the officer. The suspect then put his hand in his jacket pocket and started to withdraw it, all contrary to commands. Before the suspect's hand was out of the pocket, the officer shot. The suspect had nothing in his pocket.

A very good Chief in another city remarked to me that he wanted his officers to wait until the hand was out of the pocket before shooting. I was tempted to ask the Chief if he had made this known to his officers, which I doubted very much. But that kind of encounter can happen any day to any officer. There are many reported cases where a reaching suspect is shot before it is clear there is an object in the hand, let alone before the officer knows what that object is. These reported court opinions approve such shootings.

We can assume the “reaching” suspect can happen any time to any officer. We should develop training scenarios for the “reaching” suspect. At every assembly, we should have a three-minute training video covering just one scenario of critical policy. To my knowledge, nothing exists at this time to fill this need. Assembly training covers everyone, not just those assigned to training. It is video training because video is the most flexible, easiest form of training for supervisors to execute. Three minute videos because three minutes is the time available for training at an assembly. If a three minute video is played twice, it will be watched if it has any action at all. Three minutes is enough time to cover one aspect of a critical policy.

If the claim is deprivation of a federal constitutional right, “failure to train” can be basis for city or county liability, even if the officer is not liable because of qualified immunity. The consequences for the agency are substantial.

### **III. “Critical Policy” Is Agency Policy For High Liability Activities.**

#### **Assumptions:**

1. Serious injuries create jury sympathy, leading to big dollar verdicts. A fatality is the worst injury.
2. Police pursuit driving ends in a fatality once every one hundred pursuits, according to researchers.
3. If, during a pursuit, the fleeing suspect hits and kills an innocent third-party, the decedent's estate will almost always sue the pursuing officer and the officer's agency, claiming the officer was grossly negligent.
4. The ONLY theory for liability in the fleeing suspect/innocent third party fatal collision is gross negligence in failing to terminate the pursuit before the fatal collision. The pursuing officer hits no one, so the officer's vehicle control skills are not relevant.
5. If the claim is not terminating the pursuit sooner, the law suit will focus on the agency's written pursuit policy and the adequacy of training officers in the requirements of that policy.
6. North Carolina statute law, in GS 20-141.5(f), requires every law enforcement agency to have a pursuit policy that includes factors to be considered in terminating the pursuit.
7. The challenge is to train all officers in what the “termination factors” are and how the policy is interpreted in making the pursuit termination decision.

Pursuit policy is the only policy mandated by a statute. The General Assembly has imposed a duty on all law enforcement agencies to have a pursuit policy that includes factors for terminating a pursuit. In N.C.G.S. 20-141.5 (f), Speeding To Elude Arrest, appears this language:

“(f) Each law enforcement agency shall adopt a policy applicable to the pursuit of fleeing or eluding motorists. Each policy adopted pursuant to this subsection shall specifically include factors to be considered by an officer in determining when it is advisable to break off a chase to stop and apprehend a suspect. The Attorney General shall develop a model policy or policies to be considered for use by law enforcement agencies.”

I was sitting in a court room, waiting to testify on behalf of an officer in a case brought by the widow of a man killed when a fleeing suspect's car hit the family mini-van. The family just left a basketball game at a high school near the intersection where the collision occurred. The highway was a major route into a large suburb west of Raleigh. The view of the intersecting street was blocked by commercial buildings in a small shopping center. The time was 8:00 p.m; weather dry and clear. The good news was the mother and two young children in the van survived, and the pursuing officer was not hurt.

A lawyer for the widow was questioning the pursuing officer: "Officer, in your training, were there any test questions where the correct answer was terminating a pursuit?" The officer answered : "Not that I recall." Next question: "Officer, did your training include a description of the psychological stress of a pursuit?" The officer answered: "I recall that in BLET." I immediately thought that failure to train would be the basis for a finding of negligence. I doubted the agency did any regular in-service training on how to make the termination decision or on pursuit stress as it affects decision-making. I doubted there was recent training on psychological stress in emergency driving. Usually the discussion of policy is very brief in BLET. Few, if any, illustrations are given on how the policy is applied to a specific set of facts. I got worried about the case.

But, as happens in real life, the lawyer let the matter drop. The subject of training was never mentioned again. The judge eventually dismissed the law suit, saying there was insufficient evidence of gross negligence in the officer's driving. But what about negligence in the way officers are trained? Is "negligent training" a theory that might have won? Of course, if the officer was not guilty of gross negligence, the agency could not be guilty of gross negligence in failing to train, at least in theory. Be glad pursuit driving is not a federal constitutional claim, where qualified immunity can win for the officer but not for the employing agency. I am glad I have yet to find out.

## **A. Legal Theory of Pursuit Liability.**

**A single recent case sums up the law of pursuit liability -**

PARRISH v. HILL, 350 N.C. 231, 513 S.E.2d 547 (1999). Officers are liable only if maintaining the pursuit is "gross" negligence, defined as wanton conduct done with a conscious or reckless disregard for the safety of others (Compare: "simple" negligence is the failure to use the same level of care a reasonable and prudent officer would use under like circumstances – a much lower standard). High speeds alone do not constitute gross negligence where the suspect's driving is so reckless it creates a substantial danger to the public – a compelling need to stop the suspect immediately. If traffic is light, the weather clear, and the road is dry, the pursuit is not gross negligence. The North Carolina Supreme Court reviewed a series of recent pursuit cases, commenting that the need to stop a suspect whose driving is seriously threatening the public justifies high speeds over long distances, nothing else appearing. All in all, the gross negligence standard has saved officers from the risks of liability in many cases.

But a number of legal restrictions must be kept in mind:

- The speed limit exemption prohibits driving at a speed in disregard of the safety of others, NCGS 20-145.
- The right-of-way exemption prohibits disregard of the safety of others or arbitrary claiming the right of way, NCGS 20-156.
- Criminal liability for death by vehicle or involuntary manslaughter is more threatening than a civil law suit.

## **B. Innocent-Third Party (Bystander) Fatalities In Pursuit Driving.**

Pursuit accidents may involve any of three people: (i) the pursuing officer; (ii) the fleeing suspect; and (iii) the innocent bystander. The worst case is an innocent bystander fatality, where either the pursuing officer or the fleeing suspect hits a vehicle occupied by innocent third parties. Occasionally the innocent bystander is a passenger in fleeing suspect's car. A fatality always provokes extreme sympathy for the surviving family. Tears will be shed. Lies will be told. The jury will want to help the family. The money could be enormous.

Where pursuing officer hits innocent bystander, the issue may be gross negligence in vehicle control and gross negligence in not terminating the pursuit. Both theories might be pressed in the same trial – if the officer collides with innocent bystander.

Suppose fleeing suspect collides with innocent bystander? The only grounds for imposing liability on the officer, and the officer's employer, is gross negligence in not terminating the pursuit. The officer cannot be guilty of gross negligence in vehicle control because the officer did not collide with anyone. The entire case will hinge on the reasonableness of the officer's decision not to terminate.

How do we teach termination decision-making?

### **C. Two Training Responsibilities: Vehicle Control and Decision-Making.**

If what I am told is correct, most in-service driver training takes place in a car on a low-speed driving course. The objective is teaching vehicle control; how to steer, stop, and control the car under simulated emergency conditions. Many agencies use a shortened version of BLET training exercises for in-service driver training. That makes sense and is defensible. High speed training is difficult to do, expensive, and dangerous without specially equipped vehicles. What choice is there?

But if decision-making is critical to serious liability, we know we do not train for decision-making on the low-speed track. Officers and supervisors are required by policy to re-evaluate the risks of pursuit on a continual basis. Does the need to stop the violator immediately justify the risk of injury? That is the central question in continuing a pursuit. The Attorney General's Model Policy on Pursuit lists ten factors that must be considered in making that decision. My “Model Policy” has factors. They are:

- (1.) Weather conditions;
- (2.) Road conditions;
- (3.) Traffic density;
- (4.) Officer experience, vehicle condition;
- (5.) Officer knowledge of area;
- (6.) Suspect's danger to public;
- (7.) Seriousness of offense;
- (8.) Positively identified suspect;
- (9.) Likely “unsuccess” of chase;
- (10.) Approach of major intersections if heavy traffic is likely.

Decision-making to terminate a pursuit is taught in a classroom, not on a track. It would surprise me if half of all law enforcement agencies did any in-service training on pursuit termination decision-making. I confess I would be shocked if even a third of all officers could name all the factors their policy says to consider in terminating a pursuit.

All policy tends to be written in abstract terms: “Don't drive at a speed that is a reckless disregard of the rights of others.” What does that mean in a given factual situation? Do you have the same understanding of your policy as other officers? Same as your Chief or Sheriff? Most important, how do you know?

### **D. What Decision-Making Training Looks Like.**

**A. Some part of a class on pursuit decision-making would include a simple test on what the policy requires. DO YOU KNOW THE POLICY?**

**Question 1:** Name four offenses where policy prohibits pursuit.

**Question 2:** Some emergencies are so serious any speed is lawful, no matter what the circumstances.  
TRUE FALSE

**Question 3:** Name three factors to consider in evaluating the risk of continuing a pursuit.

**Question 4:** Name four factors to consider in evaluating the need to apprehend immediately.

There are innumerable questions that can be asked just on the basic text of the policy. Don't make all of them TRUE/FALSE or multiple choice. An officer cannot fall back on TRUE/FALSE during a law suit deposition. The officer must know the policy COLD.

Any officer that cannot memorize all factors in the termination decision should not be permitted to pursue.

**B. There should be hypothetical questions about how policy is applied to a given set of facts. These are tougher to design because the “brass” must agree with your answer.**

**Question 5:** You see a car go through a stop sign near an elementary school that is just letting out. There is a moderate rain falling and the street is a narrow two-lane road. To stop the violator, you must turn around and drive through the school zone, with its flashing yellow light.

**Answer 5:** Is stopping this violator authorized under policy? YES NO

**Question 6:** A car passes your patrol car late at night, traveling in excess of 70 miles an hour. It is 10:00 p.m. The weather is clear and road surface dry. Traffic is light. The fleeing suspect turns onto an Interstate Highway and speeds up to 120 miles an hour after you activate blue lights and siren. The suspect is passing cars that have pulled off the road.

**Answer 6:** Are you authorized by policy to continue this pursuit?  
YES NO

**Question 7:** Suppose the fleeing suspect in Q.6 turns off on a two lane rural road that passes by an occasional farm house. Are you authorized to continue the pursuit?  
YES NO

**Question 8:** Suppose the rural road leads past a shopping center next to a hospital, about 2 miles ahead. Does policy require you to terminate the pursuit?  
YES NO

### **E. Combating Myths and Values Affecting Police Driving.**

Think of the number of officers who die when they go off the road or cross into an opposing travel lane in a curve. At one time, I estimated that forty percent of all officer pursuit fatalities were caused by hitting a tree or colliding with on-coming traffic, or the equivalent. What causes an officer to drive that fast? What is it about the psychology of speed and chase that makes an officer drive that fast? Do we educate (and re-educate) officers to appreciate the psychological compulsions of speed and chase? If we are teaching vehicle control at high speeds, do we teach driving skills or do we warn about the psychological factors that cause an officer to drive that fast? Obviously we should do both. Do we?

Years ago, a female officer from a very good agency asked me if she could be disciplined because she followed driving policy? Recently her Lieutenant remarked she had been the last officer to arrive at the scene in the last three calls. She said she followed policy and others did not. I realized the Lieutenant was accusing her of cowardice. Do officers race to the scene of a call to be the bravest officer on the squad? Do they race to the scene to avoid being viewed as a coward? Or to prove we are not afraid to take chances to prove our courage?

Do our emotions make terminating a pursuit more difficult? The possibility must be part of our training.