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Pleading the Fourth

Plaintiffs may be able to sue under seizure law in high-speed chases

BY KATHRYN R. URBONYA

The U.S. Supreme Court recently erected a nearly insurmountable roadblock to lawsuits under the 14th Amendment for injuries or deaths caused by high-speed police chases. But some plaintiffs may have a way around that obstacle.

The Court's May ruling in *County of Sacramento v. Lewis*, 118 S. Ct. 1708, held that the 14th Amendment, which protects an individual's liberty, imposes liability only if pursuing officers acted maliciously, with an intent to hurt the pursued.

But plaintiffs may be able to pursue another theory of liability. If a police chase amounts to an unreasonable seizure—if an officer intentionally rams a suspect's vehicle and causes a crash, for example—the plaintiff may be able to sue for the Fourth Amendment violation.

It seems that driving skills matter when police are seeking a shield from liability. Better to have an accident, as the facts in *Lewis* illustrate.

The plaintiffs in the case lost not because they lacked good facts, but because of the Court's stance on substantive due process claims under the 14th Amendment.

No Helmets and a Refusal to Stop

A Sacramento County, Calif., police officer spotted two boys at night riding a motorcycle without helmets. He gave chase because he thought the youths had refused another officer's command to stop. The 1.3-mile pursuit hit speeds up to 100 miles per hour before the motorcycle stalled and the officer's car hit the passenger, killing him.

The officer's actions failed to meet the Court's "shocks the conscience" test. In adopting the standard, the Court tried to explain

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Because quick decisions must be made during a vehicular pursuit, malice must be proven on the part of the police.

what it is and why it was not applied last year in *Washington v. Glucksberg*, 117 S. Ct. 2258, which held there was no substantive due process right to physician-assisted suicide.

The difference between the decisions may be their authors. Chief Justice William H. Rehnquist relied on history and precedent to reject a substantive due process right to die in *Glucksberg*.

Justice David H. Souter, in contrast, relied on neither to reject the 14th Amendment claim in *Lewis*. Instead he added a new liability requirement—the officers' actions must be shocking. This condition applies to challenges to executive action but not to legislation, which was at issue in *Glucksberg*.

Under the shock-the-conscience test, plaintiffs must prove that executive officials acted egregiously. What constitutes such conduct depends upon whether officials were forced to make a quick decision.

For example, deliberate indif-

ference to a confined individual's serious medical needs is shocking conduct, according to the Court. Deliberate indifference to the risk of injury during a high-speed pursuit is not.

The difference between these two scenarios is that the pursuing police officer has little time to reflect before acting. As a result, only malice will suffice to prove shocking conduct in a high-speed pursuit.

The next avenue for litigation is the Fourth Amendment. To challenge a pursuit under it, plaintiffs must prove there was a seizure—a difficult task—and that it was unreasonable.

Two High Court cases make clear that a Fourth Amendment seizure is no accident. In *Brower v. County of Inyo*, 489 U.S. 593 (1989), the justices held that use of a police roadblock to

In Pursuit of Safety

Some cities are putting the brakes on high-speed police chases. Plainville, Conn., has banned pursuits completely. Others limit pursuits to situations when deadly force is lawful. They include:

- Plainville, Conn.
- Richmond, Va.
- Ramoth, N.C.
- Thomasville, Ga.
- St. Petersburg, Fla.

stop the driver of a stolen automobile qualifies as a seizure. But the Court found no seizure in *California v. Hodari D.*, 499 U.S. 621 (1991), when a fleeing youth, chased by an officer on foot, tossed away a rock of crack cocaine.

Under the holdings of these cases, officers must intentionally use means that in fact stop the pursued person. Courts use an objective test to determine intent, asking whether a reasonable officer would have thought that the means applied would cause a stop.

Winners and Losers In Seizure Cases

Distinguishing accidents from intentional acts can challenge the most creative lawyers. Here are some winning and losing arguments on what constitutes a seizure:

- **Loser:** Police stayed with a pursued driver, knowing a crash was likely. *Brower* suggests that no seizure occurs in this situation.

- **Loser:** The officers followed too closely, knowing there was not enough room to stop if the pursued lost control. In *Lewis*, the plaintiff alleged that the police officer was only 100 feet away when he needed 650 feet to stop at his rate of speed. The Court implicitly rejected this argument.

- **Possible winner:** Officers intentionally sideswiped the pursued's car. *United States v. \$32,400 in U.S. Currency*, 82 F. 3d 135 (7th Cir. 1996), said a seizure occurs if contact between vehicles stops the pursued auto.

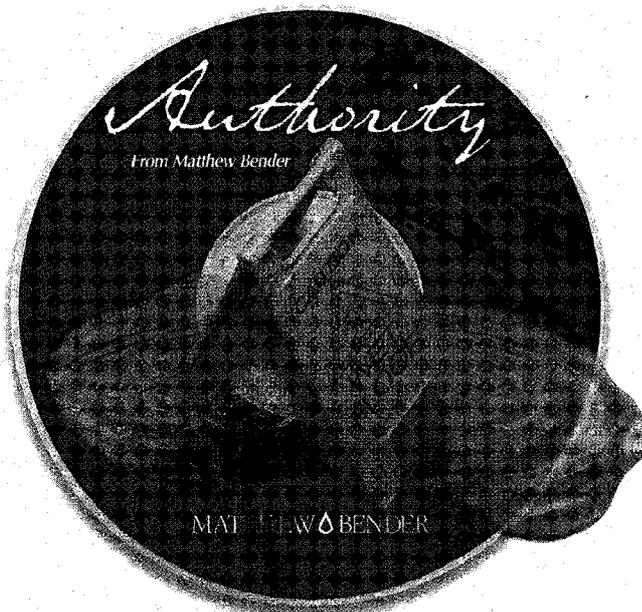
- **Possible winner:** Officers shot at the car. In *Cole v. Bone*, 993 F.2d 1328 (8th Cir. 1993), the court held such gunfire is a seizure if the driver stops as a result.

- **Possible winner:** Police used a rolling roadblock, surrounding the pursued vehicle with their cruisers and gradually slowing it down. The pursued crashes or voluntarily stops. The latter is a seizure, but whether the former is depends upon the evidence. In *White v. Tamlyn*, 961 F. Supp. 1047 (E.D. Mich. 1997), the court held no seizure occurred when there was no evidence of an intent to stop the pursued by physical impact.

- **Possible winner:** Police used a stationary roadblock. A stop determines whether a seizure occurred. *Brower* suggests that crashing into the roadblock will not nullify the seizure, unless the roadblock was small and did not effectively bar further travel.

High-speed pursuits are costly. Not only do insurance premiums rise, but people also die. In time, litigation under the Fourth Amendment may persuade police to give up the chase. ■

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A Constitutional Siesta

Court focuses on statutory interpretation and common law

BY DEBRA CASSENS

It was a relatively quiet term on the constitutional front.

As the U.S. Supreme Court issued a last-minute flurry of rulings in late June, the news was mostly about statutory development.

Interpreting four federal laws, the justices gave new protections to victims of workplace harassment and those with disabling medical conditions, but it made lawsuits more difficult for sexually abused students and citizens claiming some government civil rights violations.

Even *Swidler & Berlin v. United States*, which held that communications between a lawyer and client remain privileged after the client's death, was about development of common law.

Skirting the Big Issues

Despite the huge potential impact of those rulings on ordinary people, there wasn't much to make a con law professor's heart go pitter-patter. Out of 95 opinions, there were no religion cases, no federalism

cases and—with the last-minute settlement of a white teacher's suit against a Piscataway, N.J., school board—no affirmative action cases.

There were only two rulings on free speech: *NEA v. Finley*, which permitted the National Endowment for the Arts to consider decency when awarding arts grants, and *Arkansas Educational Television Commission v. Forbes*, which permitted public television stations to exclude minor-party candidates from televised debates.

The sleeper term is in stark contrast to the 1996-97 term, when the Court struck down laws protecting religious liberty, requiring state background checks of gun buyers and barring indecency on the Internet.

"Maybe the theme of this term is that the Court is sitting back and letting the nation react to some of the more ambitious decisions of the prior year," suggests Neal Devins, a law professor with the College of William and Mary's law school.

The justices appear to be taking a breather at a time some members of Congress have been complaining of judicial activism. "Once the dust settles the Court may be willing to pursue things in a more venturesome way," he says.

Akhil Reed Amar, a professor at Yale Law School, prefers to analyze the term in the larger context. Looking at the past few years, he sees a Court that is, well, increasingly cocky in overruling co-equal branches of government.

"Judicial review occurs all the time but typically against state and local government, not against acts of Congress," Amar says. "This is a Court that, by historical standards, thinks very well of its interpretive confidence vis-à-vis the other branches."

That attitude was woven into the Court's biggest constitutional ruling of the term, *Clinton v. City of New York*, which struck down the line-item veto, he says.



Ruth Bader Ginsburg

A liberal known for her stance against gender stereotyping, she wrote the 1995 opinion holding that the state-funded Virginia Military Institute could not exclude women.

David Souter

A Republican with a libertarian bent who believes the Constitution is flexible, he has become part of the liberal wing. He wrote one June ruling making it easier to sue for workplace sexual harassment.

Antonin Scalia

Sarcastic yet gregarious, he is perhaps the Court's most conservative member. He argues that the meaning of the Constitution and statutes should be derived from the plain text.

John Paul Stevens

The Court's oldest member, he is a liberal on civil liberties issues. His decisions show a concern for the constitutional structure of government.

William Rehnquist

Once dubbed "the Lone Ranger" for his conservative dissents, he is moving to the Court's center. Favors judicial deference to legislative decisions, federalism.

Amar is also watching another trend: the Court's general reluctance to extend the Warren Court's pro-defendant rulings. In the last half-dozen years or so, Amar can't recall any case in which the Court excluded evidence that was alleged to have been illegally seized.

The pattern continued last term, when the Court ruled in *Pennsylvania Board of Probation v. Scott* that the exclusionary rule does not apply to parole revocation hearings. Another anti-defense ruling, *United States v. Balsys*, held that the privilege against self-incrimination does not apply if the suspect cites only a fear of foreign prosecution.

The criminal rulings were part of a term in which the Court just seemed to be doing less, says Ronald Rotunda, a law professor at the University of Illinois College of Law. "On the whole it was a relatively quiet year," he says.

Commentators are split on whether the uneventful term was by design or happenstance. In Devins' view, the Court purposefully avoided controversy. "It made a decision that it didn't want to go out of its way to bring issues to the fore."

But to Erwin Chemerinsky, a professor at the University of Southern California

Law Center, it is wrong to assume the justices act with a unified purpose. "In reality cert grants are the product of four individual votes," he points out.

Besides, the Court had been willing to jump back into the affirmative action fray in *Piscataway Board of Education v. Taxman*. It was brought by a white teacher challenging a school board decision to preserve diversity by laying her off instead of a black teacher. The plaintiff dropped the case after she accepted a six-figure settlement collected by civil rights groups.

Numbers Tell the Story

Left with few constitutional rulings to explore, Court pundits are watching individual justices and charting the ideological divides.

They note that Justice Anthony M. Kennedy is surpassing Justice Sandra Day O'Connor as the swing vote on the Court, and that conservative Justices Antonin Scalia and Clarence Thomas are parting ways in more cases.

Chief Justice William H. Rehnquist and Kennedy had the closest voting relationship this past term, highlighting the chief justice's movement toward the center, says Tom Gold-

stein of Boies & Schiller in Washington, D.C., an adjunct law professor with American University's law school who collects Court statistics.

His numbers show that Kennedy was in the majority in 13 of 16 cases decided on a 5-4 vote. Out of 95 cases, Kennedy or O'Connor were in the majority in 94. "It's almost impossible to win without one of those two voting with you," Goldstein says.

In the 1995-96 and 1996-97 terms, Thomas and Scalia were on the same side in all 5-4 decisions. But last term they were on opposite sides in four such cases, including *U.S. v. Bajakajian* in which Thomas joined the majority in finding a forfeiture to be constitutionally excessive. In the other decisions, Scalia dissented in favor of criminal defendants based on statutory interpretation.

All in all, the Court was fairly cohesive, issuing 9-0 rulings in 47 cases. Rotunda, who is also a special consultant to independent counsel Kenneth Starr, wonders if some of the unanimous decisions reversing lower courts are evidence of appellate activism. "This is bad news for litigants because it creates more uncertainty in the law if ... judges read Supreme Court opinions so differently."

On the other hand, some lower courts may be missing changes in the law because the Court is issuing stealth opinions. "The Supreme Court is not flamboyantly announcing these larger trends," says Amar.

While the Court did clear up some confusion last term—in statutory rulings like *Faragher v. Boca Raton* and *Burlington v. Ellerth*—there will be plenty of questions left for the lower courts to decide.

Those two High Court decisions made clear that employers are vicariously liable for sexual harassment by supervisors, even if there is no tangible harm. Companies can claim an affirmative defense, though, if they took reasonable steps to prevent the harassment and the employee unreasonably failed to use those mechanisms.

But Chemerinsky asks who qualifies as a supervisor? What policies to prevent the harassment are sufficient? He and others will watch the legal developments at the same time they await the next blockbuster constitutional case. The last term could simply be the calm before the storm. ■



Sandra Day O'Connor

A former state legislator she is the first woman on the Supreme Court. One of the swing votes, she writes opinions that are often fact-specific and limited.

Anthony Kennedy

A pragmatic and moderate conservative, he is one of the swing votes. He wrote the lone opinion that the Americans With Disabilities Act protects persons with the virus that causes AIDS.

Clarence Thomas

One of the Court's most conservative members, he often urges adoption of clear, bright-line rules that go beyond the facts of a particular case.

Stephen Breyer

A liberal sensitive to business interests, he argued in a 1995 dissent that Congress has the power to make it a crime to possess guns near schools.