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Negligent Operation of a Police Vehicle

Harvey S. Morrison*

AS A GENERAL RULE a police officer on an emergency call is required to exercise the care which a reasonable, prudent man would exercise in the discharge of official duties of a like nature under like circumstances.¹ Comparing this standard of care to that required of a civilian driver, one finds not that a lesser degree of care is required of the police officer but that the care exercised must be commensurate with the circumstances. The ordinary driver under ordinary circumstances uniformly has the duty to exercise ordinary care toward other travelers to avoid injury or property damage.² The police officer, however, due to the exigencies of an emergency may take risks, particularly as to the speed of travel, which, if undertaken by the ordinary driver, would amount to negligence.³

It has also been said that operators of emergency vehicles are bound to exercise reasonable precautions against the extraordinary dangers of the situation that the proper performance of their duties compels them to create. When dealing with the operation of emergency vehicles, it is important to recognize that "negligence" and "reasonable care" are relative terms, and their application depends upon the situation of the parties and the degree of care and vigilance which circumstances reasonably impose. Negligence and reasonable care derive their only significance from a factual background, and that background must contain evidence of circumstances which justify a legitimate inference that in the exercise of reasonable care and prudence injury could have been avoided.⁴

Under normal circumstances all operators of motor vehicles, whether they are policemen or civilians, are bound to observe the laws established for the operation of their vehicles. However, under special circumstances "emergency vehicles" are excused from prima-facie speed limitations, right-of-way, and other standards.⁵ Under the Ohio statute, which is similar to that of other jurisdictions, the operator of the emergency vehicle must sound an audible signal by bell, siren, or exhaust whistle, and he is further admonished that exemption from speed limit require-

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¹ Reynolds v. Hart, 26 Ohio L. Rep. 256, 6 Ohio L. Abs. 301 (1927).

² Stoops v. The Youngstown Suburban Transportation Co., 121 Ohio St. 437, 169 N.E. 456 (1929).

³ McCarthy v. Mason, 132 Me. 347, 171 A. 256 (1934); Russell v. Nadeau, 139 Me. 286, 29 A.2d 916 (1943).

⁴ Montalto v. Fond du Lac County, 272 Wis. 552, 559, 76 N.W.2d 279, 283 (1956); Torres v. City of Los Angeles, 58 Cal. 2d 35, 48, 372 P.2d 906, 914 (1962).

⁵ Ohio Rev. Code, § 4511.24 (1965).

ments does not relieve him of the duty to drive with due regard for the safety of all persons using the street or highway.

By way of comparison, the Pennsylvania Vehicle Code⁶ provides that "the speed limitations set forth . . . shall not apply to vehicles when operated with due regard for safety, under the direction of police in the chase or apprehension of violators of the law, or of persons charged with or suspected of any such violation. . . . The exemption shall not, however, protect the driver of any such vehicle from the consequences of a reckless disregard of the safety of others."

Applying law to facts and bearing in mind that the exemption statute of Pennsylvania appears much broader on its face than that of Ohio, it is found that the supreme courts of each jurisdiction have reached the same result in similar fact situations. In 1964, the Ohio Supreme Court held that pacing a suspected law violator to determine whether he is violating the speed law does not constitute "responding to an emergency call" under the immunity provisions of The Ohio Revised Code.⁷ In 1938, the Pennsylvania Supreme Court held that clocking a speeding automobile is not such an emergency duty as to bring the case within the exemption of the Traffic Code.⁸ In the same year the Court held that police officers in pursuit of felons in a stolen car were immune from the speed restrictions, provided there was audible warning and no reckless disregard for the safety of others.⁹

In 1938, the California Supreme Court set forth the rule which it followed until 1962. In *Lucas v. City of Los Angeles*,¹⁰ they held:

Our conclusions from the foregoing are that when the operator of an emergency vehicle responding to an emergency call gives the statutory notice of his approach the employer is not liable for injuries to another, unless the operator has made an arbitrary exercise of these privileges. In such cases speed, right-of-way, and all other "rules of the road" are out of the picture; the only questions of fact, in so far as the public owner is concerned, are first, whether there was an emergency call within the terms of the statute; second, whether the statutory warning was given; and third, whether there was an arbitrary exercise of these privileges.

This rule was followed until 1962, when the Court considered *Torres v. City of Los Angeles*.¹¹ The so-called "California rule" was discarded, and the Court declared:

From the foregoing it is manifest that as to such conduct not specifically exempt from the imposition of liability, the degree of

⁶ Pa. Stat. Ann., tit. 75, § 1002(f) (1960).

⁷ *Lingo v. Hoekstra*, 176 Ohio St. 417, 200 N.E.2d 325 (1964).

⁸ *Cavey v. City of Bethlehem*, 331 Pa. 556, 1 A.2d 653 (1938).

⁹ *Reilly v. Philadelphia*, 328 Pa. 563, 195 A. 897 (1938).

¹⁰ 10 Cal.2d 476, 486, 75 P.2d 599, 604 (1938).

¹¹ *Supra* n. 4.

care lawfully imposed upon the agents or the employees of a municipality is that care consistent with the exercise of ordinary prudence in all the prevailing circumstances, including those circumstances manifest at the time of an emergency call. The question to be asked is what would a reasonably prudent emergency driver do under all of the circumstances, including that of the emergency. In no event, however, can a municipality justify an arbitrary exercise of emergency privileges conferred by statute.

This view is in accord with decisions in Nevada,¹² Maine,¹³ Florida,¹⁴ Kentucky,¹⁵ Arizona,¹⁶ Texas¹⁷, and New York¹⁸.

The primary area of difficulty in discussing police liability under emergency circumstances has as its center the term "emergency call." Whether or not a police vehicle is responding to an emergency call has been held to be a question to be determined by the jury.¹⁹ However, in a recent Ohio decision, concerning the pacing of a speed violator by a police officer,²⁰ the trial judge in his general charge to the jury instructed that as a matter of law the defendant police officer was not "responding to an emergency call." Following this trend, a trial court in deciding a case of a police officer responding to a dispatch to investigate the report of a discovered body,²¹ granted a directed verdict for the defendant police officer. In essence the court ruled that as a matter of law such circumstances fell within the area of "responding to an emergency call."

The courts have emphasized that in most situations, the police officer had, in fact, received a communication or dispatch requiring him to take some affirmative action. In *Bravata v. Russo*,²² the New York Court declared that the definition of "emergency call" as set forth in *Coltman v. City of Beverly Hills*,²³ to be a "sensible construction," and that an emergency call exists when, on receipt of the message, the police car occupants truly believe that an emergency exists and have reasonable grounds for such belief. If the meaning were otherwise, conscientious policemen would be penalized for responding to a police function and

¹² *Johnson v. Brown*, 75 Nev. 437, 442, 345 P.2d 754, 756 (1959).

¹³ *Russell v. Nadeau*, *supra* n. 3.

¹⁴ *City of Miami v. Thigpen*, 151 Fla. 800, 11 So.2d 300 (1942).

¹⁵ *Henderson v. Watson*, 262 S.W.2d 811 (Ky., 1953).

¹⁶ *Ruth v. Rhodes*, 66 Ariz. 129, 185 P.2d 304 (1947).

¹⁷ *Grammier-Dismukes Co. v. Payton*, 22 S.W.2d 544 (Tex., 1929).

¹⁸ *Bravata v. Russo*, 41 Misc.2d 376, 245 N.Y.S.2d 702 (Sup.Ct. 1963).

¹⁹ *Livezey v. Rogers*, 31 Cal.App.2d 412, 88 P.2d 169 (1938); *Coltman v. City of Beverly Hills*, 40 Cal.App.2d 570, 105 P.2d 153 (1940); *Torres v. City of Los Angeles*, *supra* n. 4.

²⁰ *Lingo v. Hoekstra*, *supra* n. 7.

²¹ *Spencer v. Heise*, 107 OhioApp. 505, 158 N.E.2d 570 (1958).

²² *Supra* n. 18.

²³ *Supra* n. 20.

apathetic policemen rewarded for their abandonment of such function. But in *Lingo v. Hoekstra*,²⁴ the Ohio Supreme Court held:

The word "call" in the phrase, "emergency call" . . . refers not to just a call in person or by a medium of communication from a citizen, superior officer of the patrolman or police dispatcher, but rather a "call to duty." However, the essential question here is: Was this "an emergency call," that is, did it arise from such a dangerous situation that it would excuse the defendant from being liable for his negligent conduct which resulted in injury to the plaintiff?

The Court held that a police officer who clocked a suspected speeder through a red traffic control device and struck the plaintiff who was lawfully proceeding through the intersection was not "responding to an emergency call" so as to be immune from liability under Ohio law.

Thus, the police officer, and primarily the traffic enforcement officer, is faced with a dilemma. He is under a duty to arrest and detain a person found violating the law.²⁵ He may, without a warrant, arrest a person for a crime committed or attempted in his presence.²⁶ On the other hand, if he is involved in a motor vehicle accident while in the process of making an arrest, he is subjected to the burden of trial, and in several jurisdictions, the decision of a jury as to whether or not he is "responding to an emergency call."

At common law, a police officer was not immune from liability in motor vehicle accident cases, and in many jurisdictions he is presently liable for injuries he inflicts in such situations. This doctrine was applied although the municipal corporation which he served was immune from liability under the doctrine of "sovereign immunity."²⁷ However, in recent years, various state legislatures have seen fit to protect municipal law enforcement officers by grants of immunity or provision for indemnification.

The legislatures of New York, Illinois, and Massachusetts, for example, have enacted indemnification provisions into their statutes whereby a city is required to indemnify its peace officers for expenses or damages incurred as a result of acts done by him as a police officer, in the performance of his duties and within the scope of his employment.²⁸ While the policeman remains liable to the injured party, the municipality acts as an insurer or indemnitor in the event a judgment is rendered against the officer.

²⁴ *Supra* n. 7.

²⁵ Ohio Rev. Code, § 2935.03 (1954); *City of Columbus v. Holmes*, 107 Ohio App. 391, 396 (1958).

²⁶ N.Y. Code of Crim. Proc. § 177; see also Ill. Stat. Ann. ch. 38, § 107-2 (1962); Cal. Pen. Code, § 836.

²⁷ 63 C.J.S., Mun. Corp. § 746 (1950); See also, Green, *Freedom From Litigation*, 38 Ill. L. Rev. 355 (1944).

²⁸ N.Y. Gen. Mun. Law, § 50(c); 24 Ill. Ann. Stat. ch. 24, §§ 1-4-5 (1962); Mass., Ann. Laws, ch. 41, § 100 (1958).

The approach taken by California is to grant immunity to its peace officers operating emergency vehicles. Section 17004 of the Vehicle Code provides:

A public employee is not liable for civil damages on account of personal injury to or death of any person or damage to property resulting from the operation, in the line of duty of an authorized emergency vehicle while responding to an emergency call or when in the immediate pursuit of an actual or suspected violator of the law, or when responding to but not upon returning from a fire alarm or other emergency call.

An "authorized emergency vehicle" is defined as any publicly owned vehicle operated by the following persons, agencies or organizations:

- (2) Any police department, sheriff's department or California Highway Patrol.²⁹

The immunity provision was expanded in 1965 to cover all public employees under the circumstances set forth therein, and appears to cover the situation where a traffic officer is in pursuit of a suspected speeder. There is no distinction made between felonies and misdemeanors broadening the old "emergency call" concept. Thus, a police officer can act on his own initiative when duty calls, without having to wait for a dispatch.

The Ohio Revised Code does away with municipal immunity for police operated emergency vehicles and presently provides limited police immunity under the "emergency call" concept as set forth in *Lingo v. Hoekstra*.³⁰ Section 701.02 of the Revised Code provides:

Any municipal corporation shall be liable in damages for injury or loss to persons or property and for death by wrongful act caused by the negligence of its officers, agents or servants while engaged in the operation of any vehicles upon the public highways of this state, under the same rules and subject to the same limitations as apply to private corporations for profit, but only when such officer, agent or servant is engaged upon the business of the municipal corporation.

The defense that the officer, agent or servant of the municipal corporation was engaged in performing a governmental function, shall be a full defense as to the negligence of:

- (A) Members of the police department engaged in police duties;
 (B) Members of the fire department while engaged in duty at a fire, or while proceeding toward a place where a fire is in progress or is believed to be in progress, or in answering any other emergency alarm.

Firemen shall not be personally liable for damages for injury or loss to persons or property and for death caused while engaged in the operation of a motor vehicle in the performance of a governmental function.

²⁹ Cal. Veh. Code § 165.

³⁰ *Supra* n. 7.

Policemen shall not be personally liable for damages for injury or loss to persons or property and for death caused while engaged in the operation of a motor vehicle while responding to an emergency call.

It should be noted that the police officer acting in the course of his duty as a law enforcement officer will still be liable for injuries to individuals, unless he was "responding to an emergency call." Thus it might be said that the situation is one where the principal is free from liability for the tort of its agent, even though the agent was acting within the scope of his employment and was protecting the safety and general welfare of the community.

To correct this situation and grant to individual officers under emergency circumstances same immunity enjoyed by the municipality, Hon. David Headley of Akron, Ohio, introduced H. B. 221 on February 7, 1967, before the General Assembly of Ohio. This bill proposes to amend Section 701.02 of the Revised Code by substituting the following language for the last paragraph of the existing law:

Policemen shall not be personally liable for damages for injury or loss to persons or property and for death caused while engaged in the operation of a motor vehicle in the performance of a governmental function.

It should be noted that the existing statute already gives firemen this broader protection. However, this can be justified on the basis that a police officer's normal duties require that he use the roads under normal conditions, while a fireman's use of the roads is normally under emergency conditions.

Reaction of police to *Lingo v. Hoekstra*³¹ has not been favorable. The duties of the police officer are not easy. He is frequently poorly paid, overworked, and unsupported by the general public. If he performs his sworn duty to uphold the law and protect the community, he can find himself susceptible to a civil suit, with the expense of legal fees and possible adverse verdicts. The conscientious police officer is a professional public servant. While he assumes certain risks in his employment, he should not be forced to risk his income and property as an incident to performance of his duties.

The writer concedes that opponents of H. B. 221 in Ohio, and of similar legislation in other jurisdictions, can argue that the health, safety, and general welfare of a community is more important than the arrest of a traffic violator. However, when traffic violators become aware that they will not be pursued, a general breakdown in observance of traffic laws will naturally follow, to the detriment of the community in general. Immunity from suit in motor vehicle cases is as important a weapon in law enforcement as new scientific procedures, exotic communications networks, and sophisticated firearms.

³¹ *Ibid.*