

# Criminal liability and policy considerations in the context of high speed pursuits

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## OPSOMMING

### **Strafregtelike aanspreeklikheid en beleidsoorwegings ten opsigte van hoëspoed-agtervolgings**

Artikels 58(3) en 60 van die Nasionale Padverkeerswet 93 van 1996 maak voorsiening daarvoor dat die bestuurders van sekere voertuie onder bepaalde omstandighede die padreëls mag verontagsaam of die spoedgrens mag oorskry. Hierdie vrystellings geld ook vir verkeersbeamptes of 'n persoon aangestel ingevolge die Wet op die Suid-Afrikaanse Polisiediens 68 van 1995 wat 'n voertuig in die uitvoering van sy of haar pligte bestuur. Hierdie artikel ondersoek die moontlike strafregtelike aanspreeklikheid van polisie- en verkeerspolisiebeamptes wat betrokke is by insidente waar ander padgebruikers in die loop van hoëspoed-agtervolgings gedood of beseer is. Die doel is om vas te stel of hulle onder hierdie omstandighede "immunitet" geniet. 'n Oorsig oor die toepaslike padverkeerswetgewing en vrystellings word gegee. Die moontlike aanspreeklikheid van polisie- en verkeerspolisiebeamptes word ondersoek met verwysing na die algemene beginsels van strafregtelike aanspreeklikheid en die waardes wat in die Grondwet verskans is. Laastens word ondersoek ingestel na die posisie in die VSA vir die ontwerp van moontlike riglyne waar daar spesifiek gekyk word na die benadering gevolg in grondwetlike en privaatregtelike sake waar derdepartypadgebruikers beseer of gedood is.

## 1 Introduction

Police vehicles engaged in high speed pursuits pose a serious danger to the lives of road users.<sup>1</sup> A number of concomitant consequences could arise from a high speed pursuit. A possible collision could be caused by either the pursued vehicle or the police vehicle, causing serious injury or death to innocent bystanders such as pedestrians, other motorists and their passengers, or damage to their property.<sup>2</sup> This is evidenced in cases

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- 1 In fact, the patrol car has been likened to "the deadliest weapon in the police arsenal" causing more deaths than the use of firearms. See Shuman & Kennedy "Police Pursuit Policies: What is missing?" 1989 *American J of Police* 21. See also King "*Robinson v City of Detroit*. When does Liability attach in Police Pursuits?" 2001 *Thomas M Cooley LR* 409; Palmer "Hot pursuit: law enforcement practice and the public interest" 2003 *Alternative LJ* 32.
  - 2 See Alpert & Anderson "The Most Deadly Force: Police Pursuits" 1986 *Justice Quarterly* 1 3. In another study undertaken by Alpert it was found that 34% of high speed chases result in an accident; Alpert & Dunham "Policing Hot Pursuits: The Discovery of Aleatory Elements" 1989 *J of Criminal Law and Criminology* 521 528; Picker "Police Liability in High

involving excessive speeds, reckless overtaking, and accidents.<sup>3</sup> The seriousness of the situation is given compelling consideration in a study of collisions, involving police vehicles, undertaken by the Proactive Research Unit (Independent Complaints Directorate) in South Africa.<sup>4</sup> It was found that in 2007/8, 69 incidents were reported, 12 were related to suspects being pursued, and 38 were pedestrians who were knocked down.<sup>5</sup> A lack of advanced driver training and over-speeding were the salient issues identified as causes of the accidents.<sup>6</sup> In a study conducted abroad in 2003, it was estimated that of the 35 000 police pursuits in the United States, 40% resulted in accidents, and of these about 50% resulted in injuries, and 350 fatalities ensued.<sup>7</sup>

This article addresses the issue of possible criminal liability of police officers engaged in high speed pursuits, where accidents involving third party road users occur as a result of such in-pursuit-driving. The first part will firstly provide an expository overview of the road traffic regulations. Secondly, the exemptions available to privileged vehicles will be discussed. Thirdly, the general principles of criminal liability will be investigated with a specific focus on the problems with proving the elements of causation and culpability, especially where charges are laid as a result of third party fatalities resulting from high speed pursuits. Constitutional aspects will also be briefly discussed in the context of the

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Speed Chases: Federal Constitution or State Tort Law; Why the Supreme Court's New Standard leaves the Burden on the State and what this might mean for Maryland" 1999 *Baltimore LR* 143; Senese and Lucadamo "To Pursue or Not to Pursue – That Is the Question: Modeling Police Vehicular Pursuits" 1996 *American J of Police* 55 55-78; Kennedy, Homant & Kennedy "A Comparative Analysis of Police Vehicle Pursuit Policies" 1992 *Justice Quarterly* 227 227-246.

- 3 For example, *S v Groep* 2002 1 SACR 538 (C) where the officer was found to be negligent despite the use of lights and sirens as no due regard to the safety of other road users was given (540-541); *S v Kwadira* 1982 4 SA 291 (ZS) 294D; *Clark v South Carolina Department of Public Safety* 608 SE 2d 573; *Feist v Simonson* 222 F3d 455; *Bublitz v Cottey* 327 F.3d 485; *Suwanski v Village of Lombard* 341 Ill App 3d 248; *County of Sacramento v Lewis* 523 U.S. 833 (1998) 118 S Ct 1708. In a news report six people were killed when suspected robbers in a high speed chase were involved in a collision with another vehicle and pedestrians ("High-Speed Crash Horror" *Pretoria News* 2012-07-14).
- 4 The Independent Complaints Directorate – Proactive Research Unit "A study of vehicle accidents involving police vehicles" (2009) available at <http://www.icd.gov.za> (accessed 2011-10-13) 3.
- 5 *Ibid.* The number of reported cases involving police accidents is on the increase. In 2004/5 the number of cases was set at 23, in 2005/6 at 30 and in 2006/7 at 44.
- 6 The Independent Complaints Directorate – Proactive Research Unit available at <http://www.icd.gov.za> (accessed 2011-10-31) iii.
- 7 O'Connor & Norse "Police Pursuits: A comprehensive look at the broad spectrum of Police Pursuit Liability and Law" 2006 *Mercer LR* 511. In a study conducted in Miami, 33% of pursuits resulted in accidents and 54% were related to traffic violations, and in yet another study of 286 pursuits in Illinois, 41% ended in accidents. See Charles & Auten "In Development of Pursuit Guidelines for the State of Illinois: A Case Study" 1994 *Police Stud Int Rev Police Dev* 43 45.

various conflicting interests which need to be measured against each other. Lastly, the mechanisms and policies adopted with regard to in pursuit driving in the United States will be examined in order to provide a paradigm for the possible development of future policies and guidelines.

## **2 A Brief Overview of the National Road Traffic Act**

The National Road Traffic Act<sup>8</sup> (NRTA) and National Road Traffic Regulations 2000 apply to members of the South African Police Service (SAPS).<sup>9</sup> The NRTA makes it an offence for any person to disobey road traffic signs or to exceed the speed limit.<sup>10</sup> The NRTA furthermore stipulates that it is an offence for any person to drive a vehicle recklessly or negligently upon a road.<sup>11</sup> Section 63(2) of the NRTA provides that a person will be deemed to have driven recklessly if such person drives “in wilful and wanton disregard for the safety of persons or property”.

As Burchell explains reckless driving includes “inconsiderate” or “careless” driving where there might be the creation of a “risk of harm” to others.<sup>12</sup> The implication of this is that should a person drive inconsiderately, such driving could be considered to be reckless in that there is a disregard for the safety of other road users.

## **3 The Exemptions Applicable to SAPS Members**

In terms of section 58(3) and section 60 of the NRTA exemptions are provided to the drivers of fire-fighting vehicles, rescue vehicles, ambulances, traffic officers carrying out their duties, or persons engaged in civil protection, who may disregard road rules or exceed the speed

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8 93 of 1996.

9 A traffic officer is defined in s 1 NRTA as being “appointed in terms of s 3A and any member of the service, and any member of a municipal police service, both as defined in s 1 of the South African Police Services Act 68 of 1996”. According to the SAPS Act a “member” means: “any member of the Service referred to in s 5 (2), and including- (a) except for the purposes of any provision of this Act in respect of which the National Commissioner may otherwise prescribe, any member of the Reserve while such member is on duty in the Service; (b) any temporary member while employed in the Service; (c) any person appointed in terms of any other law to serve in the Service and in respect of whom the Minister has prescribed that he or she be deemed to be a member of the Service for the purposes of this Act; and (d) any person designated under s 29 as a member.”

10 Ss 58, 59 NRTA.

11 S 63(1) NRTA; s 58(3) NRTA provides that the safety of other road users must be taken into account. See Burchell *Principles of Criminal Law* (2008) 904 for a discussion on the distinction between recklessness and negligence. Recklessness is the grosser form of negligence. See also the discussion in Hoctor *Coopers Motor Law* (2009) B11-1.

12 Burchell 904.

limit under certain circumstances. Notwithstanding, the safety of other road users must be taken into account, and the driver of the privileged vehicle must be satisfied that other road users are aware of him.<sup>13</sup> The vehicle must be equipped with a device which emits sound as well as a lamp which must be used when the speed limit is exceeded.<sup>14</sup> What is important to note is that it is clear that the exemptions embodied in s 58(3) and s 60 of the NRTA will not apply where there is a disregard to the safety of other road users. In such cases, it is therefore evident that s 63(2) of the NRTA will apply to SAPS members, who can then be charged with reckless or negligent driving.

In *S v Groep*<sup>15</sup> the appellant was a police officer who was convicted of negligent driving of a police vehicle, when, after responding to an emergency in Port Elizabeth, the appellant had driven through a traffic light controlled section while the traffic lights were against her, causing a collision. The lights of the vehicle were flashing and the sirens were operational. She sought to rely on the exemption in section 84(3) of the Road Traffic Act<sup>16</sup> which allows drivers of emergency vehicles to disregard the provisions of a road traffic sign. The defence provided in section 84(3) was subject to the fact that due regard to the safety of other traffic had to be displayed.<sup>17</sup> Her appeal was dismissed as it was held that she had not in fact driven with due regard for the safety of other traffic.<sup>18</sup>

Therefore where the police vehicle is directly involved in an accident with a third party road user and the requirements of liability are met, and no due regard to the safety of the person is taken into account as required by the definitional elements of the offence, the situation is relatively straightforward. The SAPS member may be charged and convicted of reckless or negligent driving or of other crimes.<sup>19</sup> However, the problem gains a nuance of complexity where it is not the police vehicle which is directly involved in a collision with another road user, but the vehicle of the alleged transgressor who is being pursued. Specific problematic aspects relating to the requirements of criminal liability that need to be proven in order to hold SAPS members who are engaged in high speed pursuits liable for crimes such as murder and culpable homicide, will now be critically discussed.

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13 S 60 (a) NRTA; Hooctor B9-6 – B9-6A; *S v Groep* 2002 1 SACR 538 (E) 539B.

14 S 60 (b) NRTA; *R v Evans* 1962 3 SA 358 (SR); *S v Groep supra* 539 H-I.

15 *S v Groep supra* 538 C-D.

16 29 of 1989.

17 539B. See also *Rondalia Assurance Corporation of SA Ltd v Collins NO* 1969 4 SA 345 (T) 346H - 347G; *S v Kwadira supra* 294D.

18 539 H-I. Jones, J states that the driver of the privileged vehicle must “be satisfied that all cross-traffic is aware of his presence”; see *S v Grobler* 1992 1 SACR 184 (C) 185D where a young constable was found guilty of reckless driving.

19 See *S v Groep supra* (negligent driving); *S v Grobler supra* (reckless driving).

## 4 Criminal Liability of SAPS Members Where the Pursued Vehicle Collides With a Third Party

It is clear that an SAPS member, who drives recklessly or negligently while being involved in a high speed pursuit, can be charged in terms of traffic offences where they themselves are involved in a collision. But what of the situation where Miss Y is on her way home in a car with friends when they are involved in a fatal car accident, with an alleged criminal in a pursued vehicle, who skips a traffic light in an attempt to evade the police in a high speed police car chase?<sup>20</sup> The question that necessarily arises is whether the police officers engaged in the high speed pursuit may also be held criminally liable if their vehicle is not the one which is directly involved in a collision with such third party road user? This issue is somewhat more complex and the next part examines the possible criminal liability of SAPS members where the pursued vehicle is involved in a collision with a third party in an attempt to answer this question.

### 4 1 Investigating Criminal Liability in the Context of in Pursuit Driving

In high speed pursuit situations where innocent third parties are killed on the roads, the charges of murder or culpable homicide would inevitably be laid against the driver of the pursued vehicle who directly causes the accident, but the question is whether the same charges may also be successfully brought against the police officers engaged in the same high speed pursuit? In terms of the principles of general criminal liability, the requirements of legality, conduct, compliance with the definitional elements of a crime, unlawfulness and culpability must be met.<sup>21</sup>

#### 4 1 1 *The Crimes of Murder and Culpable Homicide and the Requirements for Criminal Liability*

There must be conduct in the form of an act, or an omission.<sup>22</sup> The definitional requirements must be met and the issue of causation plays a

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20 *S v Groep supra*; *S v Grobler supra*; *Bublitz v Cottey supra*; *County of Sacramento v Lewis* 523 US 833.

21 Snyman *Criminal law* (2008) 30 – 33.

22 Snyman 51. See *S v Trickett* 1973 3 SA 526 (T) 533, 537 and *S v Henry* 1999 1 SACR 13 (SCA) 19 on the issue of when an act will be deemed to be voluntary or not. For cases dealing with omissions and the instances where a duty to act positively arises, see *Minister of Police v Ewels* 1975 3 SA 590 (A) 596 and in general *Minister of Safety and Security v Hamilton* 2004 2 SA 216 (SCA), *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC), *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA) which deals the duty which rests on the state to protect citizens from violent crime.

role in the case of materially-defined crimes.<sup>23</sup>

In materially-defined crimes the issue of causation becomes relevant in the determination of whether a prohibited result is “caused” by certain conduct.<sup>24</sup> Both murder and culpable homicide are materially-defined crimes. Culpable homicide is the “unlawful and negligent causing of the death of another human being and murder is the “unlawful and intentional causing of the death of another human being”.<sup>25</sup>

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- 23 Snyman 79-80. Crimes can be divided into two groups known as formally and materially-defined crimes. In terms of formally-defined crimes, certain types of conduct are prohibited (“conduct crimes”) irrespective of the result attained through such conduct. Reckless or negligent driving are examples of formally-defined crimes. On the other hand, materially-defined crimes do not prohibit specific types of conduct but any conduct which causes a specific condition (“result crimes”). Murder and culpable homicide are examples of materially-defined crimes as the prohibited result is the unlawful “causing” of another’s death.
- 24 Where the police vehicle is directly involved in the accident with another road user, the ordinary principles of criminal liability would normally be applied to hold him or her criminally liable. Where the police vehicle is not directly involved in the accident with another road user but an alleged criminal is and it cannot be determined with certainty who caused the forbidden result, the question is whether the doctrine of common purpose could perhaps be utilised as a possible tool to assist in finding the police members also liable? The doctrine of common purpose entails that where two or more people act together with a common purpose in mind, the act of each of them is imputed to the others which includes the causing of the result – Snyman 264; *S v Safatsa* 1988 1 SA 868 (A); *S v Mambo* 2006 2 SACR 563 (SCA). The doctrine of common purpose has been declared constitutional in the case of *Thebus* 2003 2 SACR 319 (CC). Common purpose is usually applied in the case of murder but there have been cases where common purpose has been applied to other crimes – *R v Mashotonga* 1962 2 SA 321 (R) (Public violence); *S v A* 1993 1 SACR 600(A) (assault). If applied to the above-mentioned situation, it will appear as if the doctrine of common purpose is rendered futile for the following reasons. The doctrine of common purpose is not applicable to “autographic crimes”. See Snyman 169 where he states that: “Autographic crimes are crimes that can be committed only through the instrumentality of a person’s own body”. Traffic offences are autographic offences and are furthermore formally-defined crimes and not materially-defined crimes where the issue of causation and common purpose would play a role. In other words a finding of reckless or negligent driving in terms of the National Traffic Act 1996 will be precluded on the basis of common purpose. Furthermore according to section 1 of the Administrative Adjudication of Road Traffic Offences Act 46 of 1998 (AARTO) an infringer refers to “a person” in the singular and as there can only be one driver of a vehicle at a time, it is submitted that the doctrine of common purpose cannot be applicable to a police official and an alleged criminal who in the high speed pursuit contravene traffic regulations. The question that remains then is whether the doctrine of common purpose could still be applied to such persons if they are charged in their individual or professional capacity of other materially-defined crimes such as culpable homicide, murder or assault? If common purpose is proved, the act of the alleged criminal could be imputed to the police officer. It is highly doubtful though whether active association and consequently common purpose is present under these circumstances, as the police are pursuing the individual as a result of the latter’s crime and are not consciously co-operating to commit a crime with the alleged criminal (Snyman 268).

The requirement of unlawfulness must also be complied with which means there must not be a ground of justification such as, for example, necessity, private defence<sup>26</sup> or official capacity present.<sup>27</sup> Necessity may be raised when a person is in an emergency situation and can be utilised in the protection of one's own or another's life or other legally recognised interests and may be applicable to a situation where the interests of an innocent third party are infringed.<sup>28</sup> There are, however, two points of importance which need to be considered in the context of necessity being applied to a high speed pursuit situation. Firstly, the necessity must be necessary and secondly, where there are two conflicting interests, such interests need to be weighed up against each other, and the interest which is of lesser importance according to the *boni mores*, may be sacrificed for the interest deemed to be of greater importance.<sup>29</sup> The implication is thus that if there are other means of apprehending a criminal such as the use of a helicopter or another patrol car in the vicinity towards which the criminal is heading, it is doubtful whether this defence will succeed as it could be argued that the high speed pursuit was unnecessary. Furthermore, it would have to be shown that the legal convictions of society regard the administration of justice as being of greater value than another person's life which could be fraught with difficulties. The *boni mores* of society and the Constitution<sup>30</sup> will

25 Snyman 451, 447.

26 Private defence can be raised where a person uses force to repel an unlawful attack which has commenced or which is imminently threatening, and can be applied to situations where another person's life or property is threatened, as long as it is necessary to protect the threatened interest, is aimed at the attacker and is reasonably proportionate to the attack. It can therefore not be raised as a defence against the innocent road user as the latter would not qualify as the attacker but rather the alleged criminal being pursued. Snyman 103; Burchell *South African Criminal Law and Procedure: General Principles of Criminal Law* (2011) 121.

27 An act is not unnecessarily unlawful if such act complies with the definitional elements of a crime. See Snyman 95ff. For examples of cases dealing with these various grounds of justification see *S v Fourie* 2001 2 SACR 674 (C); *S v Mostert* 2006 1 SACR 560 (N) 564; *Maimela v Makhado Municipality* 2011 2 SACR 339; *S v Goliath* 1972 3 SA 1 (A); *R v Patel* 1959 3 SA 121 (A).

28 See Snyman 115ff for a comprehensive discussion of the requirements of necessity. It is doubtful whether this defence may be successfully raised in a high speed pursuit situation, not only for reasons set out in the text, but also for *inter alia* the following reasons: In order to raise a defence of necessity, a person who finds him- or herself in a situation of emergency should usually be faced with a choice of either breaking the law or suffering personal harm (116), and furthermore it should be noted that where a person is legally compelled to endure the danger by virtue of their profession, necessity may not be raised (120). See in general *S v Goliath* 1972 3 SA 1 (A); *S v Kibi* 1978 4 SA 173 (E).

29 *S v Fourie supra* 678. Snyman 117. There are circumstances where the sacrificing of one person's life for another will not qualify as a ground of justification, but may operate instead as a ground excluding culpability (117, 122-123).

30 Constitution of the Republic of South Africa, 1996.

therefore play a key role in the weighing up of conflicting values in the context of a high speed pursuit situation.<sup>31</sup>

Official capacity may be raised as a ground of justification where a police member performs an act which he or she is entitled to perform due to the position held in the execution of his or her duties.<sup>32</sup> An act which may have been unlawful may however be lawful if the police member who is involved in the high speed pursuit can justify that the act was performed under official capacity, and more specifically in the execution of his duties.<sup>33</sup> A police officer may use reasonable force or even deadly force to overcome resistance against an alleged criminal who is resisting arrest or attempting to flee under certain circumstances.<sup>34</sup> However, Snyman mentions that the force must be proportional and necessary in that “X’s conduct should be the *only* way in which she (X) can affect Y’s arrest”.<sup>35</sup> Furthermore and for reasons set out later, it is questionable whether a high speed pursuit is always necessary or whether limitations could be imposed on in pursuit driving.

Where the officer for instance claims that he was acting in the interests of the administration of justice, the case of *S v Fourie*<sup>36</sup> is relevant. In this case a regional magistrate raised a defence of official capacity as a ground of justification when he was charged with exceeding the speed limit and claimed he was acting in the interests of the administration of justice.<sup>37</sup> The court held that the respondent’s actions were unlawful as the interest protected by road safety legislation is “the physical safety of the members of the public” and that the respondent should have considered alternate measures whereby the speed limit would not be exceeded.<sup>38</sup> If applied to high speed situations, this ground of justification might not succeed if the safety of the general public is not considered and if alternate measures could be adopted.

Lastly the requirement of culpability must be met.<sup>39</sup> Proving culpability and causation could be problematic and therefore merit closer investigation.

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31 This issue is explored in more detail under par 4 2.

32 Snyman 129.

33 Snyman 120-130.

34 S 49 (2) Criminal Procedure Act 51 of 1977. See also *Ex parte Minister of Safety and Security: in re S v Walters* 2002 2 SACR 105 (CC).

35 Snyman 131.

36 2001 2 SACR 674 (C).

37 *S v Fourie supra* 679.

38 679.

39 Snyman 149ff. *S v Laubscher* 1988 1 SA 163 (A) 166 (criminal capacity); *S v Sigwahla* 1967 4 SA 566 (A) 570; *S v Mtshiza* 1970 3 SA 747 (A) 751 (intention and negligence); *S v Steyn* 2010 1 SACR 411 (SCA) for the distinction drawn between unlawfulness and negligence.

#### 4 1 2 *The Crimes of Murder and Culpable Homicide and Problematic Aspects Relating Specifically to Causation and Culpability*

In materially-defined crimes such as murder or culpable homicide, both factual and legal causation must be proved.<sup>40</sup> Factual causation is proved using the *conditio sine qua non* formula or “but for” test.<sup>41</sup> One would need to thus establish whether, “but for” the police official's conduct in engaging in a high speed pursuit, would the road user have died or not? Legal causation can be determined according to a number of theories.<sup>42</sup>

- (a) The individualisation theory examines whether the conduct was the “proximate” cause of the prohibited situation; or
- (b) the theory of adequate causation regards an act as the legal cause of the situation if according to human experience and in the normal course of events such act has the tendency to bring about the cause of the situation; and
- (c) there is an absence of a *novus actus interveniens* which is where an act breaks the chain of causation between the initial act and the result.

On a charge of culpable homicide the state must prove that the negligent driving was the proximate cause which means that if it was not for the negligent driving of the accused, the victim would not have died (“but for” test) and no *novus actus interveniens* (new intervening event) must sever the chain of causation.<sup>43</sup> In applying the issue of causation to situations involving a high speed pursuit, a number of aspects need to be considered. Firstly, if one thinks away the high speed pursuit initiated by the police, would the accident have occurred? In such a situation, although it is apparent that the alleged criminal caused the accident, should the police officer not also be held liable? Secondly, is the individual act of the police officer the cause of the accident, for legal causation purposes, or is the act of the alleged criminal a *novus actus interveniens* which breaks the chain of causation? Some might even contend that it would be an application of the rejected *versari in re illicita* doctrine if the police officer is held liable for all the consequences flowing from the high speed pursuit.<sup>44</sup> A compelling argument could also be raised that it is foreseeable that other road users may be killed in a high speed pursuit. Thirdly in a similar vein, if the theory of adequate

40 Snyman 80-81.

41 Snyman 81. See *R v Makali* 1950 1 SA 340 (N); *Minister van Polisie v Skosana* 1977 1 SA 31 (A) 34; *S v Daniels supra* 324-325, 331.

42 Snyman 84-88. See *S v Daniels supra* 314 333 for criticism of the individualisation theory and a discussion of a *novus actus interveniens* at 325, 331; *R v Loubser* 1953 (2) PH H 190 (W); *S v Tembani* 2007 1 SACR 355 (SCA); *S v Van Heerden* 2010 1 SACR 529 (ECPR); *S v Mokgethi* 1990 1 SA 32 (A).

43 Hoctor C1-6. See also *S v Jantjies* 1991 1 SACR 74 (C) 78A-B. See Snyman 87 – 88 for an explanation of a *novus actus interveniens*.

44 See Snyman 153-154 for the meaning of the *versari in re illicita* doctrine. In *S v Bernardus* 1965 3 SA 287 (A) the court rejected this doctrine.

causation is applied, it could be argued that in the normal course of events, it could be expected that should a police officer be engaged in a high speed pursuit of an alleged criminal, such act could result in a collision, causing injury or death to another road user.

Therefore in a situation where the pursued vehicle is involved in a collision with a third party, it could perhaps be argued that while the alleged criminal's act may be the proximate cause of the accident, the police chase is the adequate cause. This is in line with the reasoning in the decision of *S v Daniëls*<sup>45</sup> where it was in fact held by Botha JA that "om beleidsoorwegings 'n oorsaak wat nie 'proximate' is nie nogtans as basis van aanspreeklikheid kon dien".

The remaining issue which will play an important role, and possibly be problematic in finding police officers liable for murder in a high speed chase, is the element of culpability. Can it really be said that the policeman intended to kill an innocent road user?<sup>46</sup>

A possibility that exists is that where a police member is engaged in a high speed pursuit, he or she may be found to have intention in the form of *dolus eventualis*.<sup>47</sup> *Dolus eventualis* is a form of intention which may be found to be present where the "unlawful act or the causing of the

45 1983 3 SA 275 (A) 314.

46 This problem can be illustrated with reference to the US case of *Bublitz v Cottey* 327 F 3d 485. Mr Bublitz claimed damages under the Fourth Amendment that his family's rights were violated because their car was also stopped or "seized" together with the alleged criminal's vehicle as a result of spikes placed on the road by the police officers involved in the high speed pursuit, which resulted in the death of his wife and child. This case dealt with a situation of *aberratio ictus* (where the blow aimed at one person misses and someone else is struck) and transferred intent was argued. Transferred intent means that the intent to harm Mr X is transferred to Mr Y where a definition requires for example the causing of the death of "a person". If a different person such as Mr Y is killed the intent to kill is present as Mr Y is also "a person". In contrast, the concrete approach means that the intention was aimed at a specific person or "concrete figure". This argument of transferred intent was rejected as it could not be said that by intending to stop the alleged criminal's vehicle they intended to stop or seize the Bublitz's vehicle as well. This is in accordance with the position under South African law where the concrete approach is the preferred approach as a subjective test is used to prove intention. This position must be distinguished from the present case as it deals with *aberratio ictus*, but it nevertheless illustrates the problem with intention. As far as a charge of murder is concerned it may be possible that the SAPS member could be held liable if intention in the form of the requirement of *dolus eventualis* is present. If negligence is present, they could of course be charged with culpable homicide. See Snyman 197-199 for a detailed explanation and criticism of the transferred intent approach. See *S v Mtshiza* 1970 3 SA 747 (A) 751; *S v Matje* 1984 3 SA 748 (NC) 751.

47 Hoctor B11-7, B11-12. As Hoctor states: "The reason is that recklessness in its ordinary usage includes an appreciation of risk and those cases in which it was stated that 'recklessly' means no more than a gross or aggravated form of negligence were concerned only with the problem whether gross negligence could constitute recklessness" (B11-7); see also s 63(2) NRTA; *S v van Zyl* 1969 1 SA 553(A) 557 B-D.

unlawful result is not the main aim but: (a) he subjectively foresees the possibility that in striving towards his main aim, the unlawful act may be committed or the unlawful result may be caused and (b) he reconciles himself to the possibility.”<sup>48</sup> The second leg of this definition may be equated with recklessness.<sup>49</sup> From an analysis of the aforementioned general principles of criminal liability, an SAPS member engaged in a high speed pursuit may therefore conceivably be found guilty of the crime of murder in an instance of reckless driving if intention in the form of *dolus eventualis* exists, that is if there is a subjective foresight that death of another road user might ensue as a result of being involved in a high speed pursuit, and if there is reckless acceptance of the risk.<sup>50</sup> In contrast, the test for negligence is objective and based on foreseeability which means that one will need to establish whether the reasonable person would have foreseen the possibility that someone may be killed as a result of the driving, whether the reasonable person would have taken preventative steps and whether the accused’s conduct differs from that of the reasonable person.<sup>51</sup>

Gross negligence may be established if an “obvious or real danger to persons or property is caused”.<sup>52</sup> As Hoctor states: “gross negligence

48 Snyman 184. One also sits with a rather peculiar situation whereby, if the alleged criminal is intoxicated and is involved in a collision as a result of the high speed pursuit, it might result in liability for a lesser charge of culpable homicide for the alleged criminal. On the other hand, the police officer engaged in the chase might be found guilty of murder should it be proven that *dolus eventualis* was present. It is a well-known fact that intoxication has an impact in terms of establishing culpability. Culpability consists of criminal capacity and either intention or negligence. The test for criminal capacity consists of: (1) The ability to appreciate the wrongfulness of his actions (cognitive function) and (2) The ability to act in accordance with such appreciation (conative function). In *S v Chretien* 1981 1 SA 1097 (A), X could not be found guilty of murder as intention was lacking. He was found guilty of culpable homicide instead. As a result of this, a crime was created in section 1 Criminal Law Amendment Act 1 of 1988. The effect of this legislation is that if the alleged criminal (X) is a drunken driver and is so intoxicated that he is unable to commit a voluntary act or lacks criminal capacity such person will be found not guilty of the crime which requires intention but he will be found guilty of contravening section 1 Criminal Law Amendment Act 1 of 1988 and be liable to the same punishment which would have been imposed as the original crime (s 1(1) & (2)). See also *Chretien* 1104E, 1106E, 1106 B-C, 1105). If X is intoxicated to the extent that he lacks intention then he will be found not guilty of the crime which requires intention as is the position in *Chretien* and will also not be guilty of a contravention of s 1 Criminal Law Amendment Act 1 of 1988. (See Snyman 225-233 for discussion and criticism; Burchell 408 – 416). Such intoxicated person can be charged with culpable homicide if he has criminal capacity as the test for negligence is objective (Snyman 227). Applied to the situation of a high speed pursuit one sits with the anomaly that a police officer could possibly be charged with murder based on *dolus eventualis* or of culpable homicide if intention is not proved, and in the same situation, the drunken driver might only be convicted of culpable homicide.

49 Snyman 184.

50 Hoctor C1-9.

51 Hoctor C1-3. *S v van Zyl* 1969 1 SA 553 (A) 557B-D.

52 *S v Sweigers* 1969 1 PH 110 (A). See also Hoctor B11-12, B11-16-17.

implies conduct in which there is a marked departure from the standards by which responsible and competent drivers habitually govern themselves”.<sup>53</sup> Some of the factors mentioned in section 63(3) which will be considered in the determination of whether section 63(1) has been contravened, is the nature and condition of the road, the amount of traffic reasonably expected on the road at that specific time and the manner and speed in which the vehicle was driven.

## 4 2 Constitutional Aspects Relating to Conflicting Interests Inherent in High Speed Pursuits

As pointed out earlier in the discussion dealing with the grounds of justification available, one should not lose sight of the role which the Constitution plays in the weighing up of conflicting interests which need to be considered in the context of high speed pursuits. One should bear in mind that some of the objectives of the police service include the prevention, combating and investigation of crime, the maintaining of public order and the protection and the securing of (all) the inhabitants of the Republic as well as their property.<sup>54</sup> A fundamental question is whose interests are greater? The Constitution provides in section 199(5) that security services (defence force, police service and intelligence services) must teach and require their members to act in accordance with the constitution and the law.<sup>55</sup> Section 205(3) of the Constitution further provides that the objectives of the SAPS are to “prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law.” A balancing act needs to be undertaken between the two juxtaposed issues of law enforcement and the protection of society, which includes the safety of road users.<sup>56</sup> Such boundaries are not necessarily clear cut in determining the exact scope and limits of liability for police officers as they may be subject to variables such as pursuit policy considerations, exemptions from certain road traffic provisions, the enforcement of rules and regulations, responsibilities and immunity

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53 Hoxor B11-8.

54 S 205 Constitution. Ss 9(1), 11 Constitution also provide for the right to equality before the law and the right to life.

55 For an example from case law where this has actually been required, see *S v Grobler supra* 185A where the constable who was convicted of reckless driving was required to attend a full course at the Cape Town Traffic Department’s Road Safety School as part of his sentence.

56 Alpert & Anderson 1986 *Justice Quarterly* 1 5; Senese & Lucadamo 1996 *American J of Police* 55; Carlin “High-Speed Pursuits: Police Officer and Municipal Liability for Accidents Involving the Pursued and an Innocent Third Party” 1986 *Seton Hall LR* 101 102; King 2001 *Thomas M Cooley LR* 409 410; Hoffman & Mazerolle “Police Pursuits in Queensland: research, review and reform” 2005 *Policing: An Int J of Police Strategies and Management* 530.

of such police officers and the lack of guidelines relating to aggressive pursuits.<sup>57</sup>

Arguably a high speed chase does not necessarily protect and secure road users and their property. In fact it has the potential to have the opposite effect. Constitutional rights may in fact be violated should there be a collision under such circumstances. While it is not by any means advocated that high speed pursuits should be eliminated, it is suggested that there should be strict monitoring of such activities and that liability should ensue where there is unreasonable dangerous driving. The next part examines the position in the United States to establish what mechanisms have been utilised with in-pursuit driving as a possible useful paradigm in the development of policy and guidelines in high speed pursuits.

## 5 Policy and Mechanisms Utilised in the United States for In-Pursuit Driving

The Civil Rights Act<sup>58</sup> has been one of the preferred mechanisms for instituting civil suits for claiming redress for police misconduct and the infringements of constitutional rights in the United States.<sup>59</sup> In the case of *County of Sacramento v Lewis*,<sup>60</sup> a high speed police chase led to a motor cycle accident and the death of Lewis. An action was brought under the Fourteenth Amendment that he was deprived of his due process to life. The Court of Appeals held that for liability to ensue in high speed police chases there must be a “reckless disregard” or “deliberate indifference” to a person’s right to life.<sup>61</sup> It was then held that the deliberate indifference test is not applicable to high-speed police chases.<sup>62</sup> Negligence was also held to be insufficient in finding that there had been a constitutional violation under the Fourteenth Amendment. It was held that no constitutional rights were violated in this case and judgment was given in favour of the defendants.<sup>63</sup>

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57 See Alpert & Anderson 1986 *Justice Quarterly* 1 5ff for a general discussion on the types of problems experienced; Shuman & Kennedy 1989 *American J of Police* 21.

58 42 USC 1983.

59 Alpert & Anderson 1986 *Justice Quarterly* 1. See also Shuman & Kennedy 1989 *American J of Police* 21.

60 523 US 833.

61 *Lewis v Sacramento County* 98 F 3d 434 441.

62 *County of Sacramento v Lewis supra* 853-854. In the later case of *Feist v Simonson supra* it was held that the deliberate indifference test is applicable if there was sufficient time in which to make a decision, but there was instead “a deliberate decision to continue the chase and to be indifferent to the dangers” (464).

63 *County of Sacramento v Lewis supra* 837 – 838. See further Krstulic “America’s Most Shocking Standard: When Innocent Parties are Injured or Killed in High Speed Pursuits, What Police Conduct Sufficiently ‘Shocks the Conscience’ to Allow Recovery? *Meals v City of Memphis* 493 F.3D 720 (6th

In order to be a constitutional violation it has been accepted that there must be an act of deliberate indifference which shocks the conscience.<sup>64</sup> There must be actual deliberation to qualify as deliberate indifference.<sup>65</sup> It would therefore appear as if the US courts are hesitant to view negligence as grounds for a constitutional violation and that only intentional deliberate action which shocks the conscience will be sufficient.<sup>66</sup>

In the state of New Jersey, the decision in *Smith v Nieves*<sup>67</sup> held that police officers could be held accountable for the injuries of innocent third parties which were caused by the driver of the pursued vehicle. In this case, the police officers suspected that Nieves was intoxicated due to the manner in which he was driving. A high speed chase ensued and Nieves collided with another vehicle driven by Smith who was killed. The family instituted action based on negligence. What is noteworthy is that this decision also held that a municipality could be vicarious liable where police negligence is involved, and directly accountable, where there was a failure to properly train police officers who would be engaged in such high speed pursuits.<sup>68</sup> The municipality was charged with failing to train the police officers who would be engaged in high speed pursuits. It was stated in the *Smith* case that insofar as municipality liability is concerned, they would usually need to illustrate that their exercise of discretion was not “palpably unreasonable” in the allocation of resources to other projects which were more important than training officers in high speed pursuits, in circumstances where these officers are not trained and are involved in resultant accidents.<sup>69</sup> As far as other US decisions are concerned, the position seems to vary in that:<sup>70</sup>

- (a) The actions of the police officials can never be the “proximate cause” of the injuries caused to an innocent third party.
- (b) Total immunity can be granted.<sup>71</sup>

63 Cir.2007)” 2008 *Washburn LJ* 785 787. As Krstulic states: “*Liability would only be imposed on police officers who are aware that their conduct creates unreasonable risks of harm yet do nothing to prevent that harm*” (812).

64 *Schaefer v Goch* 153 F 3d 793, 797; *County of Sacramento v Lewis supra* 852; *Rochin v California* 342 US 165 172; see also discussion and criticism by Krstulic 2008 *Washburn LJ* 785.

65 *Whitley v Albers* 475 US 312, 320 n 11; Finarelli “High-speed Police Chases and Section 1983: Why a Definitive Liability Standard May Not Matter” 1999 *Defense Counsel J* 238 238-247; see also McGue & Barker “Emergency Response and Pursuit Issues in Alabama” 1996 *American J of Police* 79.

66 See Krstulic 2008 (49) *Washburn LJ* 785 808 and *Bublitz v Cottey supra* 33.

67 197 NJ Super 609 612 – 613; *Roll v Timberman* 94 NJ Super 530.

68 197 NJ Super 609 613-614; Carlin “High-Speed Pursuits: Police Officer and Municipal Liability for Accidents Involving the Pursued and an Innocent Third Party” 1986 *Seton Hall LR* 101.

69 *Smith v Nieves supra* 197 NJ Super 614.

70 Carlin 1986 *Seton Hall LR* 101 110.

71 In the case of *Robinson v City of Detroit* 613 NW 2d 307 Henderson was a passenger of the vehicle which was being pursued due to a traffic violation and which vehicle collided with another vehicle. The Michigan court held that police officers do not owe a duty of care to passengers of the vehicle

- (c) Immunity can be granted unless the officer is grossly negligent.<sup>72</sup>
- (d) A municipality can be held liable.

To regulate the position, some departments in the United States have policies which allow pursuing police officers to abandon a chase if it poses a “grave danger” to their own lives or that of the general public.<sup>73</sup> One of the key advantages is that if a pursuit policy exists, the conduct of the officer could of course be measured against the policy, and he or she could then raise a defence that there was compliance with the policy and that negligence was therefore not present.<sup>74</sup>

In the determination of whether an officer is negligent or not, one would need to establish whether the officer acted as a reasonable person, foresaw that his conduct could cause the accident, should have taken steps to prevent such accident and his conduct differed from that of a reasonable person.<sup>75</sup> One should also bear in mind that it has been held that negligence is in fact sufficient to hold the state liable.<sup>76</sup>

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which is being pursued but that a duty is owed to innocent third parties (313, 322). This case also mentions that proximate cause is usually determined if the pursued car is forced off the road or if there is impact (322); see also *Rogers v City of Detroit* 579 NW 2d 840 where it was held that a duty of reasonable care must be exercised and the speed limit may only be exceeded if there is no creation of danger to life or property (843).

- 72 See Pickus “Torts – Government Immunity – Police Officer Pursuing Suspect owes Duty of Care to Third Parties injured by the Fleeing Suspect; Injured Plaintiff can Recover from State and Political Subdivisions if Officer was Negligent in Commencing and Maintaining Pursuit. *Boyer v State* 323 Md.558, 594 A.2d 121 (1991)” 1992 *Baltimore LR* 363.
- 73 Hackett “Substantive Traffic Offenses” 1977 *Police LQ* 31 35. For further discussion on the creation of pursuit policies see Alpert & Smith “Beyond City Limits and Into the Woods: A brief look at the Policy Impact of *City of Canton v Harris* and *Wood v Ostrander*” 1991 *Am J Police* 19 33; Charles & Auten 1994 *Police Studies Int R Police Dev* 43. Some policy guidelines suggested by Carlin to consider, include the nature of the offence; weather and traffic conditions, the area involved and whether there are pedestrians; whether the officer has driving experience; if the suspect could be apprehended in a different place or point in time; the weighing up of interests of the danger to innocent third parties against the necessity of apprehending the alleged criminal immediately and limiting the number of vehicles involved in the pursuit. See Carlin 1986 *Seton Hall LR* 101 113-114.
- 74 See Carlin 1986 *Seton Hall LR* 101 119.
- 75 See Snyman 209-210 for the test for negligence. If a pursuit policy exists, the conduct of the officer could of course be measured against the policy, and he or she could then raise a defence that there was compliance with the policy and was therefore not negligent. See Carlin 1986 *Seton Hall LR* 101 119.
- 76 In the case of *Carmichele v Minister of Safety and Security supra* the plaintiff claimed that the state negligently failed to protect her from being assaulted by a dangerous criminal. See also *Minister of Safety and Security v Van Duivenboden supra*.

## 6 Conclusion

The development of policies or more extensive legislative guidelines will provide a useful tool against which in pursuit driving can be measured. What is clear from the discourse above is that the physical safety of the public remains paramount. Limitations could be placed on in pursuit driving that could perhaps restrict in pursuit car chases so that they are not utilised for pursuits based on traffic violations or lesser crimes.<sup>77</sup> Alternative means of pursuing alleged criminals could perhaps be adopted as a high speed pursuit is arguably not the *only* manner in which to apprehend an alleged criminal. There are far less dangerous methods to apprehend alleged criminals *inter alia* the noting down of the licence plates, the use of video cameras on the dashboard, utilising the StarChase system which is mounted on a vehicle's grid and which shoots tracking devices onto other vehicles, the use of helicopters or other SAPS vehicles could be alerted who are patrolling the area towards which the vehicle is travelling.<sup>78</sup> It is therefore clear that there could be a proclivity towards holding police officials, involved in dangerous high speed pursuit situations, criminally liable where third party road users are injured or killed. As Carlin qualifies:<sup>79</sup>

Police officers and municipalities should be liable when their negligent actions in high-speed pursuits contribute to the injuries or deaths of innocent persons. This is not a criticism of all high-speed pursuits, but a condemnation of current policies and practices, which allow unreasonably dangerous chases to occur. Just as a police officer should not be allowed to carry a gun unless he is properly trained and certified, a police officer should not be allowed to operate a police vehicle unless he is properly trained.

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77 Krstulic 2008 *Washburn LJ* 785 810 – 811.

78 *Idem* 813. Further limitations could include regulating the speed, time or distance or the going down of one ways. See Alpert & Dunham 1989 *J of Criminal Law and Criminology* 521 and Williams "Manslaughter and Dangerous Driving" 1992 (56) *J of Criminal Law* 302 302-307. While s 63 (2) NRTA already prescribes that in the case of charges of reckless or negligent driving the court may consider the speed and manner in which a vehicle is being driven and the amount of traffic on the road, it is nevertheless a section of general application and is not a specific pursuit regulation. Vicarious liability is a possibility as far as holding the state liable is concerned, but it should be borne in mind that this is only applicable in the case of statutory crimes. See Snyman 250-251.

79 Carlin 1986 *Seton Hall LJ* 101 125. See also Krstulic 2008 *Washburn LJ* 785 815 who is of a similar view.