UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 39 | Number 4 Article 8

6-1-1961

Torts -- Speed Exemption Statute -- Standard of Care in Operation of Police Vehicles -- Liability of City, County, or State for Negligence of Police Officers

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Torts—Speed Exemption Statute—Standard of Care in Operation of Police Vehicles—Liability of City, County, or State for Negligence of Police Officers.

The North Carolina speed exemption statute[1] provides:

> The speed limitations . . . shall not apply to vehicles when operated with due regard for safety under the direction of the police in the chase or apprehension of violators of the law or of persons . . . suspected of any such violation . . . . This exemption shall not, however, protect the driver of any such vehicle from the consequences of a reckless disregard of the safety of others.

In *Goddard v. Williams*[2] the court applied this statute and considered its effect upon the standard of care required of police officers in the performance of their official duties. The plaintiff brought an action against a deputy sheriff to recover for injuries sustained in a collision between the plaintiff's automobile and the officer's patrol vehicle. The plaintiff was proceeding down a city street at night and began to make a left turn into a driveway. The defendant, in his patrol vehicle, approached from the plaintiff's rear at a speed of seventy miles per hour and struck the plaintiff's vehicle on the left side.

The officer testified that he was driving seventy miles per hour when he was within twenty-five feet of the point of collision. He alleged in the answer, however, that at the time of the accident he was pursuing the plaintiff for failure to obey a stop sign and that the patrol vehicle's siren and red light were in operation. He filed a counterclaim alleging that the plaintiff's negligence was the sole cause of the accident.

[1] N.C. GEN. STAT. § 20-145 (1953). This statute also applies to fire department vehicles, ambulances and the vehicles of the Utilities Commission provided they are on official business. The seemingly conflicting provisions of "due regard for safety" and "reckless disregard of the safety of others" contained in speed exemption statutes have caused confusion in determining the standard of care required of police officers. In construing a statute similar to North Carolina's the Arizona Supreme Court stated: "The intent of [the speed exemption statute] . . . is not to hold the patrolman to less than the usual degree or standard of care. Instead, by its very words the section holds him to 'due regard for safety' *making exception only for the speed at which a patrolman's job sometimes requires him to travel.* The last sentence of this section [the reckless disregard provision] . . . refers only to the speed exception, and is by its own terms so limited. *It would breach all rules of construction to apply the 'reckless disregard' standard to any but this speed exception.*" Ruth v. Rhodes, 66 Ariz. 129, 137, 185 P.2d 304, 309-10 (1947). [Emphasis added.] *But cf.* Lakoduk v. Cruger, 48 Wash. 2d 642, 296 P.2d 690 (1956), where the court said that "if the driver of an emergency vehicle is at all times required to drive with due regard for the safety of the public *as all other drivers are required to do,* then all the provisions of these statutes relating to emergency vehicles become meaningless and no privileges are granted to them. But if his 'due regard' for the safety of others means that he should, *by suitable warning, give others a reasonable* opportunity to *yield the right of way,* the statutes become workable for the purposes intended." *Id.* at 661-62, 296 P.2d at 701. See ARIZ. REV. STAT. ANN. § 28-624(d) (1956); WASH. REV. CODE § 46.08.050 (1959).

[2] 251 N.C. 128, 110 S.E.2d 820 (1959).

The trial court charged that when a police officer is engaged in the discharge of his duties in an effort to apprehend an offender and the offender operates his vehicle so as to guard, hinder, and delay the arrest, the officer would not be liable upon any aspect of negligence unless his conduct was wilful and wanton or the injuries were intentionally inflicted.[3] The jury returned a verdict for the officer on his counterclaim.

On appeal the court granted the plaintiff a new trial, holding that the charge was erroneous and stating that "in such situation, an officer is liable for his negligent acts as well as for his wilful and wanton acts."[4]

As to the standard of care required of the officer while in pursuit, the court quoted two authorities to the effect that the officer is to exercise the care which a reasonable and prudent man would exercise in the discharge of official duties of a like nature under like circumstances.[5] The court then stated that "if . . . the defendant was engaged in his official duties at the time of the collision . . . mere speed alone, unaccompanied by any recklessness or disregard of the rights of others, would be insufficient to support an allegation of negligence . . . ."[6]

Many duties are imposed upon operators of motor vehicles. The general duty imposed by statute and the law of torts is to drive with due care. Virtually all jurisdictions have statutory provisions requiring

[3] It would seem that the trial court was instructing the jury that the plaintiff may have been contributorily negligent in trying to hinder or delay arrest in failing to obey the officer's siren, and in failing to yield the right of way. If the plaintiff had been found contributorily negligent, he would have been barred from recovery unless the defendant's acts amounted to wanton or intentional misconduct. Ballew v. Asheville & E. Tenn. R.R., 186 N.C. 704, 120 S.E. 334 (1923); Brendle v. Spencer, 125 N.C. 474, 34 S.E. 634 (1899).

[4] 251 N.C. at 133, 110 S.E.2d at 824. The court stated: "There is no exemption granted by G.S. 20-145 from reckless and negligent conduct by an officer *unless* such reckless and negligent conduct is wilful and wanton, intentional and purposeful, and made for the purpose of injuring the person the officer was seeking to arrest. In such situation, an officer is liable for his negligent acts as well as for his wilful and wanton acts." *Ibid.* (Emphasis added.) This statement is problematical. If the trial judge was here instructing the jury on the issue of contributory negligence, the instruction would seem sound. See note 3 *supra*. If on the other hand, the trial judge was not instructing on the issue of contributory negligence, the instruction would seem to be wrong. Apparently, the supreme court did not consider the former interpretation of the instruction. Even assuming the latter interpretation to be correct, the language of the court is not entirely clear.

[5] McKay v. Hargis, 351 Mich. 409, 88 N.W.2d 456 (1958); 60 C.J.S. *Motor Vehicles* § 375 (1949).

[6] 251 N.C. at 133, 110 S.E.2d at 824; *accord,* Goldstein v. Rogers, 93 Cal. App. 2d 201, 208 P.2d 719 (1949); McKay v. Hargis, *supra* note 5; La Marra v. Adam, 164 Pa. Super. 268, 63 A.2d 497 (1949). The court also held that the evidence of the character of the area in which the collision occurred was sufficient to require its submission to the jury for its determination as to whether it was residential. If the jury should so find, "then the plaintiff would be entitled to have the jury consider the conduct of the defendant in the light of the character of the area . . . whether he was subject to the . . . [speed limit] . . . or G.S. 20-145." 251 N.C. at 131, 110 S.E.2d at 823.

operators to observe the speed limits, obey stop signs, and yield the right of way. A violation of these duties may result in negligence. The speed exemption statute removes the requirement of obeying the speed limit when an officer is in pursuit of an offender. There is no exemption for an officer from the duty to maintain a proper lookout, to maintain proper control of the vehicle while operating it, or to maintain the patrol vehicle in proper condition. A violation of these duties would be a failure to exercise due care or a due regard for safety, and the officer would be negligent.[7] If, however, a speeding officer meets all of the other duties required of him, then, in order to hold him liable, his speed must be in reckless disregard of the safety of others. Thus where speed alone is concerned, it appears from the principal decision that a different test is to be used in determining whether the officer is liable.[8]

Two distinct views have emerged from the decisions as to the officer's standard of care under speed exemption or right of way statutes. The precise wording of the statutes varies in each jurisdiction and the court's construction necessarily depends to some degree upon the phraseology used.[9] The first view is referred to as the Maine rule.[10] Court following this rule hold that the exemptions from traffic regulations given to emergency or police vehicles do not relieve their operators from the duty to exercise due care.[11] The second view is referred to as the California rule.[12] Courts following this rule hold that the duty of the officer to use due care is met when he gives adequate warning of the police vehicle's approach. Liability of the officer may then be predicated only upon an abuse or arbitrary exercise of the privilege granted by the speed exemption and right of way statutes.[13] Speed

[7] City of Kalamazoo v. Priest, 331 Mich. 43, 49 N.W.2d 52 (1951).

[8] The court in the principal case cited Edberg v. Johnson, 149 Minn. 395, 184 N.W. 12 (1921), where the court said the conduct of the officer in pursuit of a lawbreaker is to be examined and tested by another standard. He is required to observe the care which a reasonable and prudent man would exercise in the discharge of official duties of a like nature under like circumstances.

[9] *Compare* Ruth v. Rhodes, 66 Ariz. 129, 185 P.2d 304 (1947), *with* Lakoduk v. Cruger, 48 Wash. 2d 642, 296 P.2d 690 (1956). These courts construed similar exemption statutes but reached different results.

[10] Russel v. Nadeau, 139 Me. 286, 29 A.2d 916 (1943).

[11] "They are bound to exercise reasonable precaution against the extraordinary dangers . . . duty compels them to create. They must keep in mind the speed at which their vehicle is traveling and the probable consequences of their disregard of traffic [regulations] . . . . The measure of their responsibility is due care under all circumstances." *Id.* at 288, 29 A.2d at 917; *accord,* Ruth v. Rhodes, 66 Ariz. 129, 185 P.2d 304 (1947); Johnson v. Brown, 75 Nev. 437, 345 P.2d 754 (1959); Montalto v. Fond Du Lac County, 272 Wis. 552, 76 N.W.2d 279 (1956).

[12] Lucas v. City of Los Angles, 10 Cal. 2d 476, 75 P.2d 599 (1938).

[13] *Ibid.* The California court indicated that the following would constitute an arbitrary exercise of the privilege: (1) emergency operation where there is no emergency, such as a fire truck returning from a fire or a policeman making routine runs with no criminal in sight or using the patrol vehicle for personal use; (2) where the operator sees that another has not heard or heeded the required warning given by the officer, and the officer persists in speeding or con-

alone would not constitute an arbitrary exercise of the privilege granted by such statutes.[14] It would seem that the courts following the California "arbitrary exercise" rule require a lesser degree of care on the part of the officer than those following the Maine "due care" rule.[15]

In the *Goddard* case it appears that the North Carolina court took a position which incorporated aspects of both the Maine and California rules. As under the Maine rule, the officer is required to exercise due care; nevertheless, following the California rule, mere speed alone, unless in reckless disregard of the rights of others, will not render the officer liable.

The North Carolina speed exemption statute applies only when the officer is operating his vehicle with "due regard for safety."[16] California[17] and Washington[18] have held that this provision, in their respective statutes,[19] is essentially satisfied when (1) the driver of the emergency vehicle has by suitable warning given other drivers or pedestrians an opportunity to yield the right of way and (2) having discovered the peril in which another has unknowingly or negligently become involved despite the operation of the required warning devices, the driver reasonably utilizes any last clear chance to avoid the accident. The Washington court stated that this was the only reasonable interpretation of the provision, for if the officer "is at all times required to drive with due regard for the safety of the public as all other drivers are required to do, then all the provisions of the speed exemption statute . . . become meaningless and no privileges are granted . . . ."[20]

The question arises as to the North Carolina position on the issue of what is required of the officer to satisfy the "due regard for safety" provision of the speed exemption statute.[21] It may not be safely as-

tinues through the intersection; (3) when the conduct of the driver of the emergency vehicle is so reckless that it amounts to wilful misconduct. The court compared the latter, wilful misconduct, as being analogous to the conduct under which most guest statutes fix liability. *Accord*, Lakoduk v. Cruger, 48 Wash. 2d 642, 296 P.2d 690 (1956) See, CAL. VEHICLE CODE §§ 21055, 21056; WASH. REV. CODE § 46.08.050 (1959). The Washington statute, like North Carolina's, provides that the exemption shall not protect the operator of any emergency vehicle "from the consequences of a reckless disregard for the safety of others." Apparently the Washington court considered this provision analogous to the provision of the California statute which provides that the officer is not protected from the consequences of abuse or arbitrary exercise of the privilege granted.

[14] Lucas v. City of Los Angeles, 10 Cal. 2d 476, 75 P.2d 599 (1938).

[15] *Compare* Lakoduk v. Cruger, 48 Wash. 2d 642, 296 P.2d 690 (1956), *with* Johnson v. Brown, 75 Nev. 437, 345 P.2d 754 (1959).

[16] Thus, operating the vehicle with "due regard for safety" is a condition precedent to the applicability of the exemption statute, and it would seem that the speed of an officer who had not satisfied the condition would be negligence *per se*.

[17] Balthasar v. Pacific Elec. Ry., 187 Cal. 302, 202 Pac. 37 (1921); Duff v. Schaefer Ambulance Serv., 132 Cal. App. 2d 655, 283 P.2d 91 (1955).

[18] Lakoduk v. Cruger, 48 Wash. 2d 642, 296 P.2d 690 (1956).

[19] CAL. VEHICLE CODE §§ 21055, 21056; WASH. REV. CODE § 46.08.050 (1959).

[20] Lakoduck v. Cruger, 48 Wash. 2d 642, 661-62, 296 P.2d 690, 701 (1956).

[21] "[T]he speed law exemption is effective only when the officer operates his

sumed that once he has given a warning he has satisfied the "due regard for safety" provision.[22] The California court has stated that failure to sound a siren may be considered a lack of "due regard for safety."[23] As previously stated, the officer is not exempt from the duty of keeping a proper lookout, of keeping the patrol vehicle in proper mechanical condition, or of keeping his car under control. It would appear that in order to meet the "due regard for safety" provision the officer must fulfill these duties.[24]

The only other case reaching the North Carolina Supreme Court in which an officer relied upon the speed exemption statute is *Glosson v. Trollinger*.[25] The officer was pursuing the defendant down a wet, slippery road at forty to fifty miles per hour in a thirty-five mile an hour speed zone when the defendant stopped suddenly and the officer struck the rear of the defendant's vehicle. In holding that the issue of contributory negligence was properly submitted to the jury, the court emphasized the fact that the defendant had alleged that the officer was guilty of a "reckless disregard of the rights of others." Apparently the court in the principal case distinguished the *Glosson* case on this basis.[26] It would appear that in order to be certain that the complaint is sufficient to support a finding of liability on the part of the speeding

car 'with due regard to safety' . . . ." Goddard v. Williams, 251 N.C. 128, 133, 110 S.E.2d 820, 823 (1959). Also, by the words of the statute as applied to police officers, the exemption is effective only when the officer is in pursuit of a violator of the law or one suspected of a violation. The type or character of the violation may have some effect upon the court's decision as to whether the statute is applicable. In Cavey v. City of Bethlehem, 331 Pa. 556, 1 A.2d 653 (1938) (dictum), the court said that clocking a speeding automobile is not such an emergency duty of the officer as to bring the case within the exemption provision. The court distinguished Reilly v. City of Philadelphia, 328 Pa. 563, 195 Atl. 897 (1938), on the grounds that in that case the officers were in close pursuit of a fleeing felon who was driving a stolen car. In the principal case, the plaintiff was being pursued for failure to obey a stop sign. Further, the defendant testified that he recognized the plaintiff's automobile when it passed the sign. Record, p. 41. Though the statute makes no distinction as to the type or character of the violation of which the person pursued is suspected, it would seem that it should be considered as one of the "circumstances" in deciding whether the officer is justified in speeding or disregarding other traffic violations. Some of the things to be considered should be (1) the seriousness of the offense, (2) the chances for future apprehension, especially where the officer recognizes the offender, and (3) the character of the area in which the officer is driving.

[22] It should be noted that North Carolina's right of way statute does require the officer to give warning. N.C. GEN. STAT. § 20-156(b) (1953). Once this warning is given the operator of the emergency vehicle is accorded the statutory privilege of right of way. He has the right to proceed upon the assumption that when the signal is given other users of the highway will yield the right of way. Williams v. Sossoman's Funeral Home, Inc., 248 N.C. 524, 103 S.E.2d 714 (1958). Also, "every motor vehicle operated on the highways of the State by members of the State Highway Patrol shall be equipped with a siren. Whenever any such officer or member operating an unmarked car shall overtake another vehicle on the highway after sunset of any day and before sunrise for the purposes of stopping the same or apprehending the driver thereof, he shall sound said siren before stopping such other vehicle." N.C. GEN. STAT. § 20-190.1 (Supp. 1959).

[23] Raynor v. City of Arcata, 11 Cal. 2d 113, 77 P.2d 1054 (1938).

[24] City of Kalamazoo v. Priest, 331 Mich. 43, 49 N.W.2d 52 (1951).

[25] 227 N.C. 84, 40 S.E.2d 606 (1946).

[26] The plaintiff in the principal case alleged in his complaint that the officer

officer, it should allege that the officer was guilty of a "reckless disregard of the safety of others."

The police officer is generally held personally liable to the same extent as a private individual.[27] In the principal case the suit was brought against the deputy sheriff alone, and there was no attempt to join the sheriff or his surety. However, the injured plaintiff may have different sources of recovery in North Carolina, depending upon the type officer involved.

If the plaintiff is injured by a state highway patrolman he may be entitled to bring an action under the Tort Claims Act.[28] The act has been strictly construed as being applicable to situations where the state employee, by a *negligent act,* injures the plaintiff, and it is not clear whether a person injured by an officer who is speeding in "reckless disregard" would be able to recover under the act.[29]

Municipal corporations are empowered by G.S. § 160-191.1 to waive their immunity to suit by purchasing liability insurance.[30] The court has considered this statute only twice, and it is not clear whether it will apply to negligent operation of police vehicles.[31] It would appear

operated his automobile "carelessly and heedlessly, in wilful disregard of the rights and safety of others . . . ." Record, p. 4. The same allegation was made in his reply to the officer's counterclaim, apparently to set up contributory negligence on the part of the officer as a bar to recovery on the counterclaim. Record, p. 12. Therefore, it is questionable if the distinction between the principal case and the *Glosson* case is a valid one.

[27] State *ex rel.* Hayes v. Billings, 240 N.C. 78, 81 S.E.2d 150 (1954); Dunn v. Swanson, 217 N.C. 279, 7 S.E.2d 563 (1940); 47 AM. JUR. *Sheriffs, Police, and Constables* § 42 (1943).

[28] N.C. GEN. STAT. §§ 143-291 to -300 (1959).

[29] In Jenkins v. Department of Motor Vehicles, 244 N.C. 560, 94 S.E.2d 577 (1956), the patrolman intentionally shot a prisoner and recovery under the Tort Claims Act was denied, the court holding that the act does not permit recovery for wrongful and intentional injuries but limits recovery to injuries *negligently* inflicted. It has also been held that there can be no recovery for a negligent *omission* since the statute refers only to a negligent *act.* Flynn v. North Carolina State Highway and Public Works Comm'n, 244 N.C. 617, 94 S.E.2d 571 (1956). In Lowe v. Department of Motor Vehicles, 244 N.C. 353, 93 S.E.2d 448 (1956), a patrolman negligently shot the plaintiff while making an arrest. The court affirmed recovery under the act although it was argued that pointing a weapon was an statutory assault. The view stated in RESTATEMENT, TORTS § 500 (1939) is that disregard of safety is a higher degree of negligence than ordinary negligence. However, in comment *g* of the same section it is stated that this difference of degree is so marked as to amount substantially to a difference in kind of misconduct. It would seem that if the court treats acts of an officer which are in "reckless disregard of the rights of others" as only a higher degree of negligence, one so injured could recover under the act. On the other hand, if the court treats such acts as amounting to a different kind of misconduct, analogous to intentional misconduct, the Tort Claims Act would not be available to one injured by the "reckless disregard" to the officer.

[30] N.C. GEN. STAT. § 160-191.1 (1952). The city is authorized but not required to purchase liability insurance. Immunity is waived only as to the amount of insurance obtained. Once liability insurance is obtained, in the absence of affirmative action by the city's governing body, the immunity is deemed waived. The statute is silent as to what type of "affirmative action" is necessary in order to deny waiver of immunity once the insurance is obtained.

[31] In Moore v. Town of Plymouth, 249 N.C. 423, 106 S.E.2d 695 (1959), the

that the legislature so intended since the statute is directed to the "negligent operation of any motor vehicle" by a municipal employee during the course and scope of his employment.[32]

By G.S. § 153-9(44) any board of county commissioners is empowered to secure liability insurance and thereby waive the county's immunity to suit.[33] This statute is directed to any tort claim arising from the negligence of county employees;[34] it would seem, by implication, that it would apply to claims arising from the negligent operation of police vehicles.[35]

According to the provisions of G.S. § 109-34 every person injured by the neglect or misconduct of a sheriff is given a right of action against the sheriff and his surety upon the official bond.[36] In addition, a sheriff is held liable for the wrongful acts of his deputy, committed under the color of office, his liability being governed by the law applicable to principal and agent.[37] While the court has not construed G.S. § 109-34 in a case involving the negligent operation of a patrol vehicle by a sheriff or his deputy, it would seem that this provision would enable one to sue the surety for damages incurred in such a manner.[38]

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city was held liable for damages resulting from a collision caused by the negligent operation of a truck being used by the city for pest control. In Clark v. Scheld, 253 N.C. 732, 117 S.E.2d 838 (1961), the city of Lenoir was held not to be liable for damages incurred in an accident similar to that involved in the *Moore* case because there was no showing the city had secured liability insurance.

[32] The city charter should be examined prior to instituting the action against the city. Charters usually provide for certain prerequisites which must be met before bringing suit. The most common of these is the requirement of sufficient notice of the claim to the city's governing body within a prescribed time. In Carter v. City of Greensboro, 249 N.C. 328, 106 S.E.2d 564 (1959), the court said failure to give the city notice of a claim within the time prescribed by its charter would ordinarily result in a nonsuit unless the plaintiff alleges and proves justification for the delay of notice and did actually give the city notice within a reasonable time after the disability was removed.

[33] N.C. GEN. STAT. § 153-9(44) (Supp. 1959).

[34] In Walker v. County of Randolph, 251 N.C. 805, 112 S.E.2d 551 (1960), the county was sued for the negligent maintenance of its court house.

[35] It should be noted that the Motor Vehicle Safety and Financial Responsibility Act of 1953 does not apply to any motor vehicle owned by the state, to its operator, nor to the operator of a vehicle owned by a political subdivision of the state, provided the political subdivision has waived immunity. N.C. GEN. STAT. § 20-279.32 (Supp. 1959).

[36] The sheriff is required to execute an official bond payable to the state to insure the faithful execution of his office. N.C. GEN. STAT. § 162-8 (1952). In Price v. Honeycutt, 216 N.C. 270, 4 S.E.2d 611 (1939), the court held the surety liable when the sheriff used excessive force in making a wrongful arrest. In Dunn v. Swanson, 217 N.C. 279, 7 S.E.2d 563 (1940), the sheriff and his surety were held liable for the wrongful death of a prisoner which was caused by the negligence of a jailor.

[37] Cain v. Corbett, 235 N.C. 33, 69 S.E.2d 20 (1952); Dunn v. Swanson, *supra* note 36.

[38] In Cain v. Corbett, *supra* note 37, the court held that the sheriff, his surety on the official bond, the deputy, and the deputy's surety were properly joined as defendants in an action for false arrest which was made by the deputy.