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Notes: 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)

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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).

I. INTRODUCTION

With screaming sirens and flashing lights, the police chase the suspect's automobile through crowded city streets. The suspect panics and miscalculates a turn, ending the chase in a bloody crash in which an innocent third person is killed. This devastating scene no longer appears only on television and in the movies; it is occurring frequently on the nation's streets and hundreds of people are dying as a result.[1]

These accidents have led to an increase in lawsuits against police officers, municipalities, and state governments.[2] Traditionally, many of these plaintiffs were left uncompensated because of various forms of governmental immunity and the refusal of many courts to place legal restraints on police officers during the pursuit of suspects. As more legislatures waive governmental immunity, however, courts have been increasingly willing to allow injured plaintiffs to recover for police negligence during high speed pursuits. The Court of Appeals of Maryland recently addressed this growing problem in *Boyer v. State*.[3]

The *Boyer* court interpreted several statutory waiver provisions as waiving governmental immunity for actions based on the negligent commencement and continuation of a high speed pursuit.[4] The court also held that a police officer owes a duty of due care to innocent third persons injured by the suspect who is fleeing the officer.[5] The *Boyer* decision is significant because it provides a remedy for innocent

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1. According to one recent study, 45% of high speed pursuits result in property damage, 34% result in an accident and 23% involve personal injury. Geoffrey P. Alpert & Roger G. Dunham, *Policing Hot Pursuits: The Discovery of Aleatory Elements*, 80 J. CRIM. L. & CRIMINOLOGY 521, 528 (1989).
2. *See* Sean M. Carlin, Comment, *High-Speed Pursuits: Police Officer and Municipal Liability for Accidents Involving the Pursued and an Innocent Third Party*, 16 SETON HALL L. REV. 101, 111-12 (1986).
3. 323 Md. 558, 594 A.2d 121 (1991).
4. *Id.* at 574-75, 594 A.2d at 129.
5. *Id.* at 585-88, 594 A.2d at 134-36.

tort victims, along with a reasonable means of reducing the growing number of injuries resulting from high speed pursuits.

II. THE PURSUIT

In *Boyer v. State*,[6] Maryland State Trooper Robert C. Titus observed another vehicle being driven in an unsafe manner and Trooper Titus suspected the driver, Richard Farrar, was intoxicated.[7] When Farrar's vehicle stopped at a red light, Trooper Titus approached the vehicle and told Farrar to pull over as soon as the light turned green.[8] When the light turned green, Farrar, instead of pulling over, pulled away at a high rate of speed.[9] Trooper Titus began pursuing the vehicle and was joined by Charles County Deputy Sheriffs and other Maryland State Troopers.[10] The chase continued at high rates of speed for approximately seven miles.[11]

The chase ended when Farrar's vehicle hit the rear of a vehicle occupied by Mary and Joseph Boyer.[12] Both Mr. and Mrs. Boyer died as a result of the accident.[13] The surviving sons of the couple filed suit against the State of Maryland, the County Commissioners of Charles County, Trooper Titus, and Richard Farrar.[14] The State, Trooper Titus, and the County Commissioners of Charles County all filed motions for summary judgement on the grounds that they were entitled to governmental immunity and that Trooper Titus owed no duty to the Boyers in regard to the injuries caused by Farrar.[15] The circuit court granted all three motions for summary judgement and the court of special appeals affirmed.[16] The Court of Appeals of Maryland then granted the plaintiff's petition for a writ of certiorari.

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6. 323 Md. 558, 594 A.2d 121 (1991).
7. *Id.* at 562, 594 A.2d at 123.
8. *Id.*
9. *Id.* at 563, 594 A.2d at 123.
10. *Id.*
11. *Id.* The plaintiffs alleged that the police reached speeds in excess of 100 miles per hour during the course of the chase. The plaintiffs also alleged that Trooper Titus failed to immediately activate all of his emergency equipment. *Id.* at 563, 594 A.2d at 124.
12. *Id.* at 563, 594 A.2d at 124.
13. *Id.*
14. *Id.* at 563-64, 594 A.2d at 124. The plaintiffs also named the Charles County "Sheriff's Department" as a defendant but the court of appeals concluded that the Charles County "Sheriff's Department" is not an entity capable of being sued. *Id.* at 572 n.9, 594 A.2d at 128 n.9.
15. *Id.* at 568-70, 594 A.2d at 126-27.
16. Boyer v. State, 80 Md. App. 101, 560 A.2d 48 (1989).

III. LEGAL THEORIES OF LIABILITY

In any suit brought against the government and its employees based on the alleged negligence of a governmental employee, the first step is to determine whether the government and the governmental employee are immune from suit. The state will likely argue that it is protected under the principle of sovereign immunity - a doctrine which bars all suits against the state unless legislative permission has been given. While the doctrine originated from the English common law notion that "the king can do no wrong,"[17] its continued viability in Maryland has been based on policy grounds such as "fiscal considerations" and "administrative difficulties."[18] The court of appeals, despite the often unjust results for tort victims,[19] has continually refused to abrogate the doctrine of sovereign immunity on the grounds that only the legislature can waive the state's immunity.[20]

The full immunity vested in the state has never been extended to the state's counties and municipalities. Instead, the court of appeals has held that counties and municipalities are immune from suit only for governmental functions, and not for those functions deemed proprietary.[21] The court reasoned that when a municipality is per-

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17. Katz v. Washington Suburban Sanitary Comm'n, 284 Md. 503, 507, 397 A.2d 1027, 1030 (1979).
18. Jekofsky v. State Roads Comm'n, 264 Md. 471, 474, 287 A.2d 40, 42 (1972). The court of appeals summed up its reasons for refusing to abrogate the doctrine of sovereign immunity as follows:

> [I]t is desirable and in the public interest that any change in the doctrine of sovereign immunity should come from the legislative branch of State Government rather than from the judicial branch inasmuch as there are fiscal considerations, administrative difficulties and other problems in balancing the rights of the State and its agencies with new possible rights of the individual citizens, which can far better be considered and resolved by the legislative branch than by the judiciary of the State.

Id.

19. *See* Austin v. Mayor of Baltimore, 286 Md. 51, 78, 405 A.2d 255, 269-70 (1979) (Cole, J., dissenting). Judge Cole stated that, "[a]s the law now stands in Maryland, the injured citizen must bear all the harm thrust upon him by a negligent government. This is manifestly unjust and inequitable in light of contemporary concepts of cost spreading and the general rule that liability follows tortious conduct." *Id.* at 83, 405 A.2d at 272.
20. *See* Department of Natural Resources v. Welsh, 308 Md. 54, 59, 521 A.2d 313, 315 (1986) ("We have consistently declined to abrogate sovereign immunity by judicial fiat."); Katz v. Washington Suburban Sanitary Comm'n, 284 Md. 503, 512-13, 397 A.2d 1027, 1032 (1979) ("[W]e have consistently refused to judicially abrogate sovereign immunity . . . ."); Jekofsky v. State Roads Comm'n, 264 Md. 471, 474, 287 A.2d 40, 42 (1972) ("[A]ny change in the doctrine of sovereign immunity should come from the legislative branch . . . .").
21. *See, e.g.*, Tadjer v. Montgomery County, 300 Md. 539, 546-50, 479 A.2d 1321, 1324-26 (1984) (holding that the determination of whether county's operation

forming a governmental function, the same principles protecting the state from suit also justify protecting municipalities from suit.[22]

The Maryland General Assembly has responded to the judiciary's call for action by enacting several statutory provisions waiving governmental immunity. One of the most important of these enactments, the Maryland Tort Claims Act (MTCA),[23] waived the state's immunity for certain enumerated tort actions.[24] One of these provisions, section 5-403(a)(1), waives the state's immunity for "[a]n action to recover damages caused by the negligent maintenance or operation of a motor vehicle by a State employee."[25]

Another statutory waiver provision relevant to automobile accidents involving government employees is section 19-103(c) of the transportation code. This section provides that an owner or lessee of an emergency vehicle is liable "for any damages caused by a negligent act or omission of an authorized operator while operating the emergency vehicle in the performance of emergency service as defined in subsection (a) of this section."[26] The statutory definition of emergency

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of landfill is a government or proprietary function turns on amount of profit county made); Austin v. Mayor of Baltimore, 286 Md. 51, 61-63, 405 A.2d 255, 260-61 (1979) (holding city operation of day camp is a governmental function); Mayor of Baltimore v. State, 173 Md. 267, 273-77, 195 A. 571, 574-76 (1937) (holding city operation of municipal swimming pool is a governmental function).

22. Mayor of Baltimore v. State, 173 Md. 267, 271-72, 195 A. 571, 574 (1937).
23. MD. CODE ANN., STATE GOV'T §§ 12-101 to -109 (1984 & Supp. 1992). At the time of the accident, the Act was codified at MD. CODE ANN., CTS. & JUD. PROC. §§ 5-401 to -408 (1984). *See infra* note 24.
24. *See* MD. CODE ANN., CTS. & JUD. PROC. § 5-403 (1984). The MTCA has been amended on several occasions. Effective October 1, 1984, the act was moved to the State Government Article with some minor modifications to its language. *See* MD. CODE ANN., STATE GOV'T §§ 12-101 to -109 (1984). Effective July 1, 1985, the General Assembly repealed the provision listing the categories of cases for which immunity was waived and replaced it with a general waiver of the state's tort immunity subject to enumerated exceptions. *See id.* § 12-104 (Supp. 1992). In *Boyer*, because the accident occurred on August 9, 1984, the court applied the pre-1985 language of the Act. *Boyer*, 323 Md. at 565 n.2, 594 A.2d at 124 n.2. Since the 1985 changes to the Act broadened the legislature's waiver of government immunity and would include all situations enumerated under the 1984 language as well as new situations not previously covered, the changes to the Act are not pertinent to the *Boyer* decision. *Id.*
25. MD. CODE ANN., CTS. & JUD. PROC. § 5-403(a)(1) (1984). After the 1985 changes to the MTCA, there no longer exists a specifically enumerated category of the waiver of the state's tort immunity for the negligent maintenance or operation of a motor vehicle. This category, however, is still encompassed in the broader language of the current MTCA. *See supra* note 24.
26. MD. CODE ANN., TRANSP. § 19-103(c) (1987). In *Boyer*, the State argued that § 19-103(c) only applies to political subdivisions and does not apply to the state. The court, however, did not decide the issue since § 19-103(c) provides no greater a waiver than already provided in § 5-403(a)(1) of the MTCA,

service includes "[p]ursuing a violator or a suspected violator of the law."[27] In the context of a police chase, therefore, the critical determination under both section 9-103(c) of the transportation code and section 5-403(a)(1) of the MTCA is what is included under the "negligent operation of a motor vehicle" language.

Before *Boyer*, the Maryland courts had not decided whether a police officer's decision to pursue and continue to pursue a suspect constitutes negligence while operating an emergency vehicle within the meaning of section 19-103(c) of the transportation code and section 5-403(a)(1) of the MTCA. The only guidance the court of appeals has provided is that the phrase "operate a motor vehicle" is to be interpreted broadly, "much broader than the term drive."[28] Under this interpretation, it seems likely that the commencement and continuation of a high speed pursuit will be found to be included within the phrase "operate a motor vehicle." This would be in accord with the majority of other jurisdictions which, when interpreting language similar to Maryland's, have held that a police officer's decision to pursue and continue to pursue may constitute the negligent operation of a motor vehicle.[29]

Public official immunity is another important form of immunity that was first adopted by the Maryland courts in 1898[30] and protects

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which explicitly waives the state's immunity in this situation. *See Boyer*, 323 Md. at 581 n.16, 594 A.2d at 132 n.16.

27. MD. CODE ANN., TRANSP. § 19-103(a)(3)(ii) (1987).

28. *Boyer*, 323 Md. at 574, 594 A.2d at 129 (quoting Thomas v. State, 277 Md. 314, 318, 353 A.2d 256, 258 (1976)). The *Thomas* court distinguished driving and operating as follows:

> The words 'operating' and 'driving' are not synonymous; they have well-recognized statutory distinctions. Of the two terms, the latter is generally accorded a more strict and limited meaning. The term 'driving' is generally used to mean, in this connection, steering and controlling a vehicle while in motion; the term 'operating,' on the other hand, is generally given a broader meaning to include starting the engine or manipulating the mechanical or electrical devices of a standing vehicle.

Thomas, 277 Md. at 318, 353 A.2d at 258-59 (quoting McDuell v. State, 231 A.2d 265, 267 (Del. 1967)).

29. *See, e.g.*, Miller v. Department of Highway Safety & Motor Vehicles, 548 So. 2d 880, 881 (Fla. Dist. Ct. App. 1989) ("A police officer's negligent driving during a 'police chase' constitutes an operational level activity for which the governmental unit is not immune."); Force v. Watkins, 544 A.2d 114, 115 (Pa. Commw. Ct. 1988) (holding allegations that pursuing police officers endangered life and property while exceeding speed limits was sufficient to bring claim within government immunity exception); Mason v. Bitton, 534 P.2d 1360, 1365 (Wash. 1975) (holding that the decision to initiate and continue a high speed pursuit is not a "basic policy decision" and is not subject to immunity).

30. Cocking v. Wade, 87 Md. 529, 40 A. 104 (1898).

government officials from personal liability in certain circumstances. In *James v. Prince George's County*,[31] the court of appeals formulated a two part test to determine if public official immunity applies. First, the government actor must be a "*public official* rather than a mere *government employee*," and, second, the official's non-malicious conduct must have occurred while he was "performing *discretionary*, as opposed to *ministerial* acts in furtherance of his official duties."[32]

One of the first cases to apply the *James* test to alleged police negligence was *Ashburn v. Anne Arundel County*.[33] *Ashburn* involved a suit brought by a pedestrian who was injured by an intoxicated driver after the defendant police officer failed to detain the suspected law breaker.[34] The court concluded that, for purposes of the first prong of the *James* test, a police officer is a public official when performing law enforcement functions.[35] Furthermore, the court held that a police officer's decision regarding whether a suspect should be detained is within the officer's discretion.[36] The court concluded, therefore, that a police officer is not personally liable for damages caused by a suspect the officer failed to detain.[37]

If a police officer does makes a decision to apprehend a suspect and initiate a chase, it has not been decided whether an officer's pursuit is protected by the common law doctrine of public official immunity.[38] There are, however, several statutory grounds of im-

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31. 288 Md. 315, 418 A.2d 1173 (1980).
32. *Id.* at 323, 418 A.2d at 1178 (emphasis in original).
33. 306 Md. 617, 510 A.2d 1078 (1986).
34. *Id.* at 619-20, 510 A.2d at 1079.
35. *Id.* at 622, 510 A.2d at 1080.
36. *Id.* at 626, 510 A.2d at 1082. In coming to this conclusion, the *Ashburn* court interpreted MD. CODE ANN., TRANSP. § 16-205.1(b)(2) (1987), which mandates certain procedures a police officer must follow if he detains a suspected intoxicated driver. The court concluded that once a police officer detains a suspected intoxicated driver, his duties become ministerial because the officer must comply with § 16-205.1(b)(2). The original decision to detain, however, is still discretionary and protected by public official immunity. *Ashburn*, 306 Md. at 626-35, 510 A.2d at 1082-87. This holding was reaffirmed by the *Boyer* court. 323 Md. at 577-78, 594 A.2d at 130-31.
37. *Ashburn*, 306 Md. at 626, 510 A.2d at 1082.
38. The question has not yet been decided by the Maryland courts. The *James* court, however, did hold that the operation of a motor vehicle is "not ordinarily a discretionary act for which immunity will shield the driver from liability for negligence." 288 Md. at 328, 418 A.2d at 1180-81. The court of special appeals, however, held that the term "ordinary" in the *James* opinion denotes exceptions and it proceeded to apply public official immunity to a police officer during a chase. Boyer v. State, 80 Md. App. 101, 106, 560 A.2d 48, 50 (1989). When the *Boyer* case reached the court of appeals, the court refused to decide the issue since it held that the officers were protected by statutory immunity during the chase. The court did point out, however, that most of the other jurisdictions

munity to protect an officer from liabilities arising from the chase. Section 19-103(b) of the Transportation Code provides immunity to the operator of an emergency vehicle "in the performance of emergency services . . . ."[39] As previously mentioned, the statutory definition of emergency services includes a police pursuit of a suspected law breaker.[40]

Furthermore, a state employee could also rely on section 5-404(b) of the pre-1985 MTCA as a shield against liability. This section provides that if the state has waived its immunity for a particular tort, the employee who committed the tort will not be personally liable if he committed the tortious act while acting within the scope of his duties.[41]

A police officer, however, will lose his immunity under both section 19-103(b) of the transportation code and section 5-404(b) of the MTCA if his conduct during the chase constitutes gross negligence. Gross negligence, in the context of operating a motor vehicle, has been defined in Maryland as a "wanton and reckless disregard for human life" while operating the motor vehicle.[42] Before *Boyer*,

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that have decided the issue hold that continuation of a chase is ministerial and not protected by public official immunity. *Boyer*, 323 Md. at 582 n.17, 594 A.2d at 133 n.17.

39. MD. CODE ANN., TRANSP. § 19-103(b)(1) (1992). This section provides:

> An operator of an emergency vehicle, who is authorized to operate the emergency vehicle by its owner or lessee while operating the emergency vehicle in the performance of emergency service as defined in subsection (a) of this section shall have the immunity from liability described under § 5-399.5 of the Courts and Judicial Proceedings Article.

Id.

40. *Id.* § 19-103(a)(3)(ii).

41. MD. CODE ANN., CTS. & JUD. PROC. § 5-399.2(b) (Supp. 1992). This section provides:

> State personnel are immune from suit in courts of the state and from liability in tort for a tortious act or omission that is within the scope of the public duties of the State personnel and is made without malice or gross negligence, and for which the State or its units have waived immunity under Title 12, Subtitle 1 of the State Government Article, even if the damages exceed the limits of that waiver.

Id. The forerunner of this code provision was section 5-404(b) of the pre-1985 MTCA, which provided:

> A State employee who has acted within the scope of his public duties, absent malice or gross negligence, is not liable in his individual capacity for any damages resulting from tortious conduct for which the State has waived its immunity under this subtitle, even when the damages exceed the limits of the state's waiver of immunity.

MD. CODE ANN., CTS. & JUD. PROC. § 5-404(b) (1984).

42. Nast v. Lockett, 312 Md. 343, 366-67, 539 A.2d 1113, 1124-25 (1988). The *Nast* court held that driving under the influence of alcohol, without more, does not constitute wanton or reckless behavior. *Id.* at 366, 539 A.2d at 1124.

Maryland courts had not applied this standard to the conduct of police officers during a high speed chase. Other jurisdictions with similar language, however, have been slow to find a police officer guilty of gross negligence while pursuing a suspect.[43]

Once it has been determined that there has been a waiver of immunity, the next step is to determine if an actual tort has been committed. It is, of course, settled law in Maryland that in order for negligence to exist there must be "the breach of some duty that one person owes to another."[44] In the context of a police chase, it must be determined whether a police officer engaged in a high speed chase owes a duty to other drivers and pedestrians.

Under Maryland law, it is clear that police officers are exempt from certain traffic laws while in the performance of emergency service.[45] It is equally clear under Maryland statutory law, however, that these privileges do not "relieve the driver of an emergency vehicle from the duty to drive with due regard for the safety of all persons."[46] The court of appeals has interpreted this statutory duty to mean that the operator of an emergency vehicle must "exercise reasonable care and diligence under the circumstances."[47]

In *Keesling v. State*,[48] the court of appeals also imposed a common law duty on police officers. *Keesling* involved a state trooper who allegedly assisted criminals in commandeering an innocent third party's automobile.[49] The court, in reversing summary judgement for

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The court also held, relying on Smith v. Gray Concrete Pipe Co., 267 Md. 149, 297 A.2d 721 (1972), that the wanton or reckless standard was all that was required for a punitive damage award. *Id.* at 350-52, 539 A.2d at 1116-18. The court of appeals, however, has recently overruled this aspect of *Nast* and *Smith* and now requires actual malice for punitive damages awards. Owens-Illinois, Inc. v. Zenobia, 325 Md. 420, 601 A.2d 633 (1992).

43. *See* Breck v. Cortez, 490 N.E.2d 88, 94 (Ill. App. Ct. 1986) (holding that in light of the danger arising from the suspect's reckless driving, the officer's conduct during pursuit was not willful and wanton); Bullins v. Schmidt, 369 S.E.2d 601, 604 (N.C. 1988) (holding officers were not grossly negligent during pursuit since they used emergency equipment and kept vehicle under control); Peak v. Ratliff, 408 S.E.2d 300, 309-10 (W. Va. 1991) (holding that officer's conduct during pursuit, which included speeds approaching one hundred miles per hour, did not constitute gross negligence as a matter of law).
44. West Virginia Cent. & Pittsburg Rail Co. v. Fuller, 96 Md. 652, 666, 54 A. 669, 671 (1903).
45. *See, e.g.*, MD. CODE ANN., TRANSP. § 21-106 (1992) (providing that a police officer may, in certain circumstances, exceed maximum speed limits and drive through stop signs and red lights).
46. *Id.* § 21-106(d).
47. Martin v. Rossignol, 226 Md. 363, 369, 174 A.2d 149, 152 (1961) (quoting Baltimore City v. Fire Ins. Salvage Corps, 219 Md. 75, 148 A.2d 444, 447 (1959)).
48. 288 Md. 579, 420 A.2d 261 (1980).
49. *Id.* at 581-82, 420 A.2d at 262.

the state, held that a police officer owes a duty of care to a private citizen when the officer's conduct has put "a private citizen in a zone of danger without reasonable justification,"[50] and if he "set in motion a chain of events which . . . [he] knew or should have known would lead to [injury]."[51]

Before *Boyer*, the Maryland Courts had not decided whether the statutory and common law duty imposed on Maryland police officers applies to innocent third parties injured by a suspect fleeing from law enforcement officials.[52] A large number of other jurisdictions, however, have decided the issue, and these cases can generally be divided into three groups. The modern trend holds that a police officer does owe a duty to third parties injured by suspects fleeing police in the course of a high speed case.[53] These cases have recognized that both the pursuing officer and the fleeing suspect can contribute to causing injuries to third parties.[54]

The second group of states hold that while a police officer owes a duty to a third party injured by a suspect fleeing the officer at

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50. *Id.* at 589, 420 A.2d at 266.
51. *Id.* at 591, 420 A.2d at 267.
52. The court of appeals has held that when a police officer chooses not to apprehend a suspect, he owes no duty to third parties who are subsequently injured by the suspect. Ashburn v. Anne Arundel County, 306 Md. 617, 510 A.2d 1078 (1986). However, as the *Boyer* Court noted, the holding of *Ashburn* does not apply to allegedly negligent conduct during the course of a high speed chase. Boyer v. State, 323 Md. 558, 584, 594 A.2d 121, 134 (1991).
53. *See, e.g.*, Biscoe v. Arlington County, 738 F.2d 1352, 1363-64 (D.C. Cir. 1984) (rejecting gross negligence standard and holding that the proper standard for the District of Columbia is due care), *cert. denied*, 469 U.S. 1159 (1985); Tetro v. Town of Stratford, 458 A.2d 5, 10 (Conn. 1983) (holding that police officers are not entitled to blanket immunity for their negligence during pursuit of a suspected criminal); Fiser v. City of Ann Arbor, 339 N.W.2d 413, 417 (Mich. 1983) (holding emergency vehicles must be driven with due regard for others); Travis v. City of Mesquite, 830 S.W.2d 94, 99 (Tex. 1992) ("The decision to initiate or continue pursuit may be negligent when the heightened risk of injury to third parties is unreasonable in relation to the interest in apprehending suspects."); Mason v. Bitton, 534 P.2d 1360, 1363 (Wash. 1975) (holding that police officers owe a duty of due care which can be violated even if police vehicle itself not involved in accident).
54. The *Tetro* court, for example, held that "[t]he intervention of negligent or even reckless behavior by the driver of the car whom the police pursue does not, under the emergent majority view, require the conclusion that there is a lack of proximate cause between police negligence and an innocent victim's injuries." *Tetro*, 458 A.2d at 8. The reason the modern trend refuses to find a lack of proximate cause on the part of the pursuing officer is the belief that an accident between the suspect and the third party is a foreseeable result of a police pursuit. One court noted that "[a]lthough the criminal conduct of a third party may be a superseding cause which relieves the negligent actor from liability, the actor's negligence is not superseded and will not be excused when the criminal conduct is a foreseeable result of such negligence." *Travis*, 830 S.W.2d at 98.

high speeds, this duty is only breached if the officer is grossly negligent.[55] The third, and smallest, group of jurisdictions hold that a police officer is not liable to a third party hit by a suspect engaged in a high speed chase.[56] These cases proceed on the ground that a police officer's pursuit of a suspect is not the proximate cause of an injury sustained by a third party hit by the fleeing suspect.[57] This view, however, has been rejected by many courts and commentators.[58]

IV. THE *BOYER* DECISION

The court of appeals in *Boyer* held that: (1) commencing and maintaining a high speed chase may constitute "negligence while operating a motor vehicle" within the meaning of the statutory provisions waiving governmental immunity;[59] (2) a police officer is personally immune in commencing and continuing a high speed chase of a suspect;[60] and (3) a police officer engaged in a high speed chase

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55. *See, e.g.*, Breck v. Cortez, 490 N.E.2d 88, 93 (Ill. App. Ct. 1986) ("police officers owe the general public a duty to refrain from willful and wanton misconduct in the pursuit of suspected law violators."); Bullins v. Schmidt, 369 S.E.2d 601, 603 (N.C. 1988) (holding that when a third party's injuries are a result of a collision with the pursued vehicle rather than the police vehicle, the officer's conduct must be grossly negligent for the third party to recover); Peak v. Ratliff, 408 S.E.2d 300, 307-08 (W. Va. 1991) (holding that a police officer is only liable to a third party injured by a pursued suspect if the officer's pursuit amounted to reckless conduct or gross negligence).
56. *See, e.g.*, United States v. Hutchins, 268 F.2d 69, 72 (6th Cir. 1959) (holding that it is the conduct of the suspect rather than the pursuing officer that is the proximate cause of the third-party's injuries); Chambers v. Ideal Pure Milk Co., 245 S.W.2d 589, 591 (Ky. Ct. App. 1952) ("It is our conclusion that the action of the police was not the legal or proximate cause of the accident . . . ."); *see also* Thornton v. Shore, 666 P.2d 655, 668 (Kan. 1983) (holding that even though police officers have a duty of due care, pursuing a suspect is not a breach of this duty); Kelly v. City of Tulsa, 791 P.2d 826, 829 (Okla. Ct. App. 1990) (holding that a police officer's pursuit was not, as a matter of law, the proximate cause of the accident between the third party and the pursued suspect).
57. One court summed up the lack of proximate cause argument as follows:
> To argue that the officers' pursuit caused [the suspect] to speed may be factually true, but it does not follow that the officers are liable at law for the results of [the suspect's] negligent speed. Police cannot be made insurers of the conduct of the culprits they chase. It is our conclusion that the action of the police was not the legal or proximate cause of the accident . . . .

Chambers, 245 S.W.2d at 591.
58. *See Boyer*, 323 Md. at 587-88 n.18, 594 A.2d at 136 n.18 (listing authorities in support of proposition that a proximate cause analysis is not appropriate in high speed pursuit cases).
59. *Id.* at 574-76, 594 A.2d at 129.
60. *Id.* at 578, 594 A.2d at 131.

owes a duty to third parties injured by the fleeing suspect.[61]

The court first addressed the issue of whether the state and Charles County had waived their immunity in the context of Trooper Titus's chase of Farrar. The state and Charles County argued that commencing and maintaining a police chase was not within the "negligent operation of a motor vehicle" language in section 19-103(c) of the transportation code and in section 5-403(a)(1) of the pre-1985 MTCA.[62] The court of appeals, however, noting the broad reading previously given to the phrase "operate a motor vehicle,"[63] held that operating a motor vehicle includes more that just the mechanics of driving, it can also include a decision to operate or continue to operate.[64] The court concluded, therefore, that governmental immunity may be waived when a police officer negligently commences and maintains a high speed chase of a suspect.[65]

The court then addressed the plaintiffs' claim that Trooper Titus should be held personally liable for the damages caused by Farrar. The court reasoned that since *Ashburn* held that a police officer is protected by public official immunity when deciding not to apprehend a suspect, Trooper Titus was not liable for his decision not to apprehend Farrar at the red light.[66] As far a Trooper Titus's immunity during the chase, the court held that section 19-103(b) of the transportation code "flatly renders the operator of an emergency vehicle 'immune from suit . . . for any damages resulting from a negligent act or omission while operating an emergency vehicle.'"[67] Furthermore, the court recognized that under section 5-404(b) of the pre-1985 MTCA, a state employee is not personally liable for damages

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61. *Id.* at 585-88, 594 A.2d at 134-36.
62. *Id.* at 573-75, 594 A.2d at 128-29.
63. *See* Thomas v. State, 277 Md. 314, 318, 353 A.2d 256, 258 (1976).
64. *Boyer*, 323 Md. at 575, 594 A.2d at 129. The plaintiffs, however, did not allege that Charles County owned the vehicles used in the chase, a critical element under § 19-103(c). *Id.* at 575-76, 594 A.2d at 130. The court, therefore, remanded the case to give the plaintiffs the opportunity to prove ownership. *Id.* at 575-76, 594 A.2d at 130.
65. *Id.* at 578-79, 594 A.2d at 131. The court of special appeals, relying on Bradshaw v. Prince George's County, 284 Md. 294, 396 A.2d 255 (1979), held that the State was not liable for damages caused by a State employee who is personally immune. Boyer v. State, 80 Md. App. 101, 106, 560 A.2d 48, 50 (1989). The court of appeals, however, noted that this aspect of *Bradshaw* was overruled by *James*. After *James*, if the government has waived immunity, it is still liable even if the government employees are not personally liable. *Boyer*, 323 Md. at 582-83, 594 A.2d at 133.
66. *Boyer*, 323 Md. at 577-78, 594 A.2d at 130-31.
67. *Id.* at 578, 594 A.2d at 131. The plaintiffs argued that § 19-103(b) does not apply to state employees if they are grossly negligent, but the court rejected this argument and held that § 19-103 protects a state police officer. *Id.* at 581 n.16, 594 A.2d at 132-33 n.16.

resulting from conduct for which the state has waived its immunity, and, since the court had already held that the state waived its immunity for the negligent commencement and continuation of a high speed chase, Trooper Titus was immune under this section as well.[68]

The court noted, however, that under these two sections Trooper Titus could still be liable if his actions constituted gross negligence.[69] The plaintiffs asserted that the trooper travelled at dangerous rates of speed through heavy traffic without complying with accepted police practices and without immediately activating all his emergency equipment.[70] The court concluded that these allegations did not amount to gross negligence as a matter of law.[71] According to the court, these allegations did not support the conclusion that Trooper Titus acted "with wanton or reckless disregard for others."[72]

After determining that both the state and Charles County had waived their immunity while Trooper Titus had not, the court was left to decide whether the trooper owed the Boyers a duty of care. The court examined existing Maryland law and concluded that Trooper Titus owed the Boyers a duty of care if he placed them in "a zone of danger without reasonable justification" and if he "set in motion a chain of events which . . . [he] knew or should have known would lead to . . . [the Boyers'] injur[ies]."[73] After recognizing that there were no Maryland cases applying this duty to high speed police pursuits, the court surveyed the law in other jurisdictions and adopted the majority position that a police officer who engages in a high speed pursuit owes a duty to third parties injured by the fleeing suspect.[74] The court rejected the minority view that an officer's pursuit of a suspect is not the proximate cause of injuries sustained by a third party injured by the suspect during the chase.[75] The court

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68. *Id.* at 578, 594 A.2d at 131.
69. *Id.* at 578-79, 594 A.2d at 131-32.
70. *Id.* at 579-80, 594 A.2d at 132.
71. *Id.* at 580, 594 A.2d at 132.
72. *Id.*
73. *Id.* at 585-86, 594 A.2d at 134-35 (quoting Keesling v. State, 288 Md. 579, 589, 591, 420 A.2d 261, 266-67 (1980)).
74. *Id.* at 586-88, 594 A.2d at 135-36. The court held that "Trooper Titus and the deputy sheriffs, in engaging in the high speed pursuit of Mr. Farrar, owed a duty of care to the Boyers." *Id.*
75. *Id.* at 587-88 n.18, 594 A.2d at 136 n.18. The court recognized that the cases refusing to hold a police officer liable for injuries caused by a suspect fleeing from the officer do so on the basis that the police officer is not the proximate cause of the plaintiff's injuries. *Id.* The court rejected this analysis by reasoning that there can be more than one cause for an injury and that it can, at times, be foreseeable that a police officer's engagement of a high speed chase could be the proximate cause of an innocent third party hit by the fleeing suspect. *Id.*

concluded, therefore, that Trooper Titus and the Charles County Deputy Sheriffs owed a duty of care to the Boyers when they engaged in a high speed pursuit of Farrar.[76]

Since this was a case of first impression, the court proceeded to give some guidance as to when this new-found duty would be breached.[77] The standard to be applied is that of "a reasonably prudent police officer . . . faced with the same difficult emergency situation."[78] The court noted that violations of the Maryland Transportation Code, or mere conclusory allegations alone, are not sufficient.[79] Instead, the plaintiff must state with specificity allegations of negligence which proximately caused the injury.[80]

V. ANALYSIS

Most of the court's pronouncements in *Boyer* are logical extensions of existing Maryland law. By holding that negligent commencement and maintenance of a high speed chase falls within the "negligent operation of a motor vehicle" language of the governmental waiver provisions, the court was extending its previous holding that the term "operate" is to be given a broad reading.[81] This is in accord with other cases which have reasoned that if the legislature intended that only the mechanical aspects of driving be covered rather than including driving decisions, it would have used the term "drive" instead of "operate".[82] This interpretation is also in line with the legislative pronouncement that all statutory waiver provisions are to be read broadly to provide plaintiffs with a means of recovery.[83]

In holding that Trooper Titus was personally immune, the court reaffirms its traditional position of giving police officers a great deal of protection when the officers are performing their official duties.[84]

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76. *Id.* at 588, 594 A.2d at 136.
77. The question of whether the plaintiffs' allegations of negligence were enough to constitute a breach of duty was not addressed by the lower courts and, therefore, the court of appeals remanded the case for determination of this issue. *Id.* at 588-89, 594 A.2d at 136.
78. *Id.* at 589, 594 A.2d at 136.
79. *Id.* at 589 n.20, 594 A.2d at 136 n.20.
80. *Id.*
81. Thomas v. State, 277 Md. 314, 353 A.2d 256 (1976).
82. *See* McDuell v. State, 231 A.2d 265, 267 (Del. 1967).
83. *See* MD. CODE ANN., STATE GOV'T § 12-102 (1984).
84. *See, e.g.*, Taylor v. Mayor of Baltimore, 314 Md. 125, 549 A.2d 749 (1988) (holding that police officer responding to emergency without siren is still operating an emergency vehicle and is immune from liability for simple negligence); Ashburn v. Anne Arundel County, 306 Md. 617, 510 A.2d 1078 (1986) (holding that police officer not liable for injuries to third persons inflicted by drunk driver officer failed to detain); Bradshaw v. Prince George's County, 284 Md. 294, 396 A.2d 255 (1979) (finding police officer immune from liability

This policy stems from the notion that a police officer should be given wide latitude to effectively perform his law enforcement functions.[85] The court takes this notion even further when it applies gross negligence to the context of a police chase and concludes that, even though Trooper Titus failed to immediately activate his emergency equipment and failed to comply with police practices, his conduct did not constitute "wanton or reckless disregard for the safety of others."[86] It appears, therefore, that a police officer's behavior will have to be outrageous before a court will hold him personally liable. This may have the unfortunate side effect of encouraging police officers to use more dangerous tactics than they would otherwise use. Since the state or county of employment will have to pay for the officer's ordinary negligence, however, it is unlikely the officer's supervisors will allow the officer to take advantage of his personal immunity.

The major holding in *Boyer*, that police officers, when engaging in a high speed chase of a suspect, owe a duty of care to third parties injured by the fleeing suspect, can be supported on several different grounds. The first is that the court is simply extending the existing law regarding a police officer's duty to the context of a high speed chase. The court examined existing law and concluded that Trooper Titus owed a duty to Mr. and Mrs. Boyer only if he "set in motion a chain of events which . . . [he] knew or should have known would lead to . . . [the Boyers'] injuries."[87] The court then chose to follow the majority view and impose a duty on Trooper Titus. It appears, therefore, that the court is holding that when a police officer engages in a high speed chase, he has set in motion a chain of events which he should have known would lead to injuries. This proposition is a sensible extension of Maryland tort law.

Imposing a duty on a police officer during a high speed chase may also be justified on the basis of a balancing test. The two conflicting interests that must be balanced are the need to apprehend criminals and the need to protect the public from unnecessary injury.[88]

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for failure to care for victim of crime in order to preserve evidence), *overruled on other grounds by* James v. Prince George's County, 288 Md. 315, 418 A.2d 1173 (1980).

85. *See* Arrington v. Moore, 31 Md. App. 448, 358 A.2d 909 (1976). The *Arrington* court believed that "[i]f law enforcement officers are compelled to keep the peace at their peril, without some discretion as to how to respond to an apparent crisis, the peace will simply not be kept." *Id.* at 461, 358 A.2d at 916.

86. Boyer v. State, 323 Md. 558, 588, 594 A.2d 121, 136.

87. *Id.* at 585-86, 594 A.2d at 134-35 (quoting Keesling v. State, 288 Md. 579, 591, 420 A.2d 261, 267 (1980)).

88. *See* Geoffrey P. Alpert, *Analyzing Police Pursuit*, 27 CRIM. L. BULL. 358, 361 (July-Aug. 1991).

The court has implicitly concluded that while the need to apprehend criminals is important, it must, to a certain extent, give way to the need to protect the general public. Thus, while police officers may still engage in high speed pursuits, they must now conduct these pursuits with due care.

A third reason justifying the decision in *Boyer* is that it provides a remedy for innocent tort victims. Many victims of accidents caused by a suspect fleeing the police are unable to recover because of governmental immunity or because of the absence of a duty of care imposed on a police officer. In *Boyer*, the court removed these obstacles by allowing a plaintiff injured by a fleeing suspect to recover from the government if the officer has breached his duty of due care.

The greatest impact of the *Boyer* decision will be on the various law enforcement agencies throughout the state. Although individual officers will still be immune, high level police officials will now be forced to address the issue of accidents resulting from high speed pursuits. These officials will need to develop programs aimed at reducing the number of accidents resulting from high speed pursuits. Fortunately, several methods have been suggested to accomplish these goals.

Many commentators feel that if police departments promulgate clear policies listing the many considerations that should be taken into account before an officer engages in a pursuit, this will reduce the number of resulting accidents.[89] Police officers should also be given behind-the-wheel as well as classroom training on how to handle high speed pursuit situations, making it less likely that an officer will violate his duty of due care during a pursuit.[90] Furthermore, alternatives to high speed pursuits, such as the use of helicopters to pursue suspects, should also be developed.[91]

The decision in *Boyer*, however, may send the wrong message to law enforcement officials. Instead of encouraging police to exercise more care during a chase, it may encourage police officers not to

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89. *See* Richard G. Zevitz, *Police Civil Liability and the Law of High Speed Pursuit*, 70 MARQ. L. REV. 237, 241 (1987). It has been suggested that the following factors be considered before commencement of a high speed pursuit: seriousness of crime, road conditions, traffic conditions, weather conditions, police vehicle type and condition, pedestrian traffic, time of day, geographic location, the officer's familiarity with area, experience of the officer, visibility, possibility of later apprehension, location of pursuit, and the likelihood of success. Leonard Territo, *Citizen Safety: Key Element in Police Pursuit Policy*, 18 TRIAL, Aug. 1982, at 31-32.

90. *See* Carlin, *supra* note 2, at 117.

91. *See* Doug Struck, *Police Taking the Heat for Hot-Pursuit Policies*, BALT. SUN, Jan. 20, 1985, at A10.

pursue, thereby allowing a suspect a means of escape.[92] This appears to be a possibility due to the fact that, under already existing Maryland law, a police officer has no duty to third parties injured by a suspect the officer chose *not* to apprehend.[93] If, on the other hand, the officer does decide to apprehend the suspect, he does owe a duty of care to third parties.[94] It appears, therefore, that law enforcement officials will perceive that the safest route to take, in terms of possible future civil liability, is to let a suspect escape instead of trying to apprehend him.

The court of appeals arguably could have avoided the negative incentives that *Boyer* may instill in police officials by joining with the group of jurisdictions that hold an officer to a gross negligence standard during high speed pursuits.[95] The court, however, implicitly decided that giving police officers this much leeway would unjustifiably create too great a risk to the general public. Nonetheless, by defining the standard of care as that of "a reasonably prudent police officer . . . faced with the same difficult emergency situation,"[96] it appears that a major mistake is required for an officer to be found to have breached his standard of due care. The court of appeals, therefore, has provided the public with increased protection without completely forsaking police discretion in high speed pursuits.

It is unlikely that all accidents resulting from high speed pursuits of suspected law breakers will be completely avoided. The *Boyer* decision, however, gives the innocent victims of such accidents a remedy. While suits could almost always be maintained against the suspected law breaker who injures the plaintiff, the *Boyer* court has provided these victims an opportunity to dip into the government treasuries as a means of compensation. The availability of more money will, of course, almost certainly inspire more claims being filed and more litigation. The number of claims, however, will likely decrease as police officers adapt to the new duty of care imposed on them during high speed pursuits.

VI. CONCLUSION

In *Boyer*, the Court of Appeals has provided some sensible answers to some difficult problems. The new duty imposed in *Boyer*

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92. In the view of some police departments, a major reduction in the amount of high speed chases is a desirable goal. The Baltimore police department, for example, instituted a strict policy not to engage in high speed pursuits. Struck, *supra* note 91, at A10.
93. *See supra* notes 33-37 and accompanying text.
94. Boyer v. State, 323 Md. 558, 588, 594 A.2d 121, 136 (1991).
95. *See supra* note 55 and accompanying text.
96. *Boyer*, 323 Md. at 589, 594 A.2d at 136.

should encourage police officers to proceed with caution when engaging in high speed pursuits and this should lead to a reduction in the number of injuries suffered as a result of high speed chases. It is, of course, unlikely that the problem can be avoided completely, but when injuries do occur, the *Boyer* court has made it easier for a victim to be compensated. Hopefully, the decision will also draw attention to the necessity of further reform so that future tragedies may be avoided.

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