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U.S. Attorney General Dick Thornburgh

Major Art Theft
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The Cover: The Honorable Dick Thornburgh is the 76th Attorney General of the United States (See page 1). Claude Monet's *Impression: Sunrise* has been stolen (See inside back cover).

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Municipal Liability For Inadequate Training and Supervision

Divergent Views

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In 1961, the U.S. Supreme Court ruled in the case of *Monroe* v. *Pape*[1] that State and local police officers could be sued in their individual capacities in Federal court for damages pursuant to 42 U.S.C. §1983 (hereinafter §1983).[2] To succeed in a §1983 action, the Court held that the plaintiff must prove that an officer, acting under color of State law, deprived him/her of a constitutional right. However, the Court in *Monroe* refused to extend this same liability to municipalities under §1983.

In 1978, the Court, in *Monell* v. *New York City Department of Social Services,*[3] ruled for the first time that a municipal corporation[4] may be held liable under §1983 when it implements or executes a formal policy statement, ordinance, regulation, or decision officially adopted and promulgated by its officers which results in a constitutional deprivation.[5] Moreover, the Court held that a municipality may also be liable for constitutional deprivations which are caused by governmental "custom," even though such custom has not received formal approval through the city's official decisionmaking channels.[6]

The Court in *Monell* made it clear that municipal liability was predicated solely upon the unconstitutional conduct of the municipality, eschewing the idea that liability could be visited upon a city on a respondeat superior theory. This theory imposes liability upon an employer for the wrongful actions of an employee, regardless of absence of fault by the employer.

This article will examine the divergent views of the Supreme Court Justices and Federal courts with respect to the proper standard for municipal liability and the kind of proof required before liability can be found. Additionally, suggestions will be made to assist police departments in their efforts to minimize exposure to this potentially devastating form of liability.

Divergent Views of Liability Standard—Supreme Court Decisions

Plaintiffs attempting to sue a municipality under §1983 for injuries caused by unconstitutional conduct of police officers are required by *Monell* to establish that their injuries were caused by either a municipal policy or custom. If plaintiffs are unable to point to an official policy which is unconstitutional on its face, they must then establish that the department adopted a custom of inadequate training or supervision. However, exactly what level of proof is necessary to establish this custom of inadequate training and supervision is a matter of considerable dispute among the Justices of the Supreme Court. Some Justices would permit a finding of a custom based on a single incident of unconstitutional conduct; others would require a more demanding showing of a deliberate indifference to a past pattern of unconstitutional conduct. This diver-

gence is clearly illustrated by the differing opinions offered in the case of *City of Oklahoma City* v. *Tuttle*.[7]

In *Tuttle*, a rookie police officer, responding to an anonymous report of an armed robbery in progress, proceeded to a local bar. There, the officer observed Tuttle, who matched the description of the alleged robber as furnished by the anonymous caller. After learning that no robbery had occurred, the officer approached Tuttle and grabbed him. Tuttle broke away, ignored a command to halt, and ran outside, where he was seen kneeling with his hand in his boot. When Tuttle ignored a second command to halt and began to rise, the officer shot and killed him. Following the shooting, when a toy gun was found in Tuttle's boot, the officer admitted he never saw a weapon, real or otherwise, in Tuttle's possession.

Tuttle's wife sued the officer and the city in Federal court, alleging deprivation of constitutional rights in violation of §1983. At trial, an expert witness testifying on behalf of the plaintiff concluded that based on the officer's actions during the incident and his own review of the department's training practices, the officer's training was grossly inadequate. No evidence was produced showing that this officer or any other officer had ever been involved in past similar incidents.

Prior to deliberation, the jury received an instruction that permitted them to find a custom of inadequate training based upon a single, unusually excessive use of force. The jury found for the officer, but returned a verdict against the city for $1,500,000. The jury's verdict was affirmed by the U.S. Court of Appeals for the 10th Circuit. A divided Supreme Court reversed the lower courts' findings of liability, but the Justices advanced divergent views on the proper standard for municipal liability based on a custom of inadequate training or supervision.

Special Agent Callahan

> ***"Plaintiffs ... are required ... to establish that their injuries were caused by either a municipal policy or custom."***

A "Pattern of Past Conduct" Standard

Justice Rehnquist, writing the plurality opinion,[8] concluded that the trial court's instruction to the jury permitted a finding based solely upon a respondeat superior theory,[9] which was expressly forbidden by the Court's holding in *Monell*. Since the instruction permitted imposition of liability based solely on proof that the city employed a nonpolicy maker who violated the Constitution, the court of appeals' decision was reversed.

In the remainder of his opinion, Justice Rehnquist provided insight into his view of whether, and under what circumstances, claims of inadequate training will give rise to municipal liability. Specifically, Justice Rehnquist's view appears to be that liability should not exist when the only proof offered is a single, unconstitutional act of a subordinate police officer. Rather, in order to prove that a custom of inadequate training caused an injury, the plaintiff will likely be required to establish a history or pattern of similar past incidents which went unaddressed or unremedied by policy-making personnel. Furthermore, the standard of liability in Justice Rehnquist's view approaches deliberate and conscious choice and proof of "gross negligence" is not sufficient.

The "Single Incident" Standard

Justice Brennan's concurring opinion focused on two types of evidence presented at trial—proof that a single subordinate officer shot and killed the deceased in an alleged unconstitutional manner and the testimony of an expert witness who introduced "direct evidence" of the city's inadequate training policies. This direct evidence included expert testimony that the department provided only

24 minutes of instruction on how to answer robbery-in-progress calls and that statistically, robbery-in-progress calls are extremely dangerous. Also, evidence was offered that the officer himself believed he was inadequately trained. Nevertheless, Justice Brennan agreed with Justice Rehnquist that the case must be reversed because the jury's instruction was improper. However, he rejected Justice Rehnquist's view that proof of a pattern of past similar instances of misconduct must be established before a city can be held liable based on a custom of inadequate training.

Justice Brennan appears ready to accept the idea that municipal liability may be established by proof of one incident of unconstitutional conduct by a subordinate employee when that evidence is coupled with direct evidence of inadequate training. While Justice Rehnquist expressed doubt about whether the standard of municipal liability should be "gross negligence" in training or supervision, Justice Brennan remained silent on that point. Justice Brennan's silence could be construed as tacit agreement with the lower courts' finding in *Tuttle* that "gross negligence" is the proper standard by which municipal policy makers should be judged. It should be noted that courts are in general agreement that simple negligence in training or supervision is never sufficient to establish liability under §1983.

> ***"... municipal liability [is] predicated solely upon the unconstitutional conduct of the municipality...."***

A "Deliberate Indifference" Standard

In the aftermath of *Tuttle*, Justice O'Connor had an opportunity to make her views known when the Supreme Court denied review in the case of *Kibbe* v. *City of Springfield*.[10] In *Kibbe*, a suspect, reportedly armed with a knife, abducted a woman and fled in his car. Police officers in pursuit attempted two unsuccessful roadblocks before the suspect was shot and killed by a motorcycle officer riding abreast of the getaway car. The victim was rescued uninjured.

Kibbe, the administratrix of the suspect's estate, filed suit against the officer and the city in Federal court under §1983. At trial, the jury was instructed to return a verdict against the city if they found the city "grossly negligent" in failing to train its officers properly. A verdict was returned against the city in the amount of $50,000. On appeal, the city for the first time challenged the jury instruction regarding "gross negligence" and argued instead for a high standard of "deliberate indifference," which would require proof of a pattern of past similar misconduct to establish a custom.

The U.S. Court of Appeals for the First Circuit rejected the city's argument and ruled that gross negligence is a viable standard for municipal liability. The court also noted that citizens of a municipality do not have to endure a pattern of police misconduct before they can be sued under §1983. The court found that Kibbe had presented sufficient "direct evidence" of inadequate training, which included:

1) Testimony from two officers that they did not receive training on how to arrest suspects fleeing in vehicles who ignored orders to stop.

2) The court observed that officers received no training as to what reasonable alternative should be considered prior to shooting.

3) The officers who fired were in conflict with a department rule prohibiting discharge of weapons when innocent persons are at risk. The jury could have inferred that no shooting would have occurred if police had been properly trained not to shoot when hostages are at risk or the incident occurs in a heavily populated area.

The Supreme Court granted review of *Kibbe*, but later dismissed the writ of certiorari as improvidently granted.[11] One issue that the Court contemplated resolving in *Kibbe* was whether the standard of municipal liability for inadequate training should be gross negligence or some higher standard. The Court dismissed *Kibbe* because it determined that the city did not timely object to the gross negligence jury instruction at trial.

Justice O'Connor, joined by three Justices,[12] filed a dissenting opinion and objected to the dismissal. More importantly, Justice O'Connor provided her viewpoint on the correct standard of municipal liability for a custom of inadequate training. She explained that inadequate police training may serve as a basis for §1983 liability

only where the failure to train amounts to a reckless disregard for, or deliberate indifference to, the rights of persons within the city's domain.

Justice O'Connor criticized the direct evidence of failure to train which the court of appeals relied upon. She labeled it speculative and insufficient to support a jury finding that the city adopted a policy of inadequate training by deliberate indifference to the constitutional rights of the suspect. Justice O'Connor would therefore reverse the lower court's finding of municipal liability.

In *Tuttle*, Justice Rehnquist adopted a liability standard that required proof of a pattern of past similar misconduct to establish §1983 liability against a city for a custom of inadequate training. Justice O'Connor's "deliberate indifference" standard is closely aligned to Justice Rehnquist's standard requiring a "pattern of past misconduct." Both standards pose formidable proof burdens on plaintiffs. Under either standard, a plaintiff would be required to prove a past pattern of similar bad acts which department policy makers failed to remedy, thereby displaying deliberate indifference to the problem, and by acquiescing to the problem, adopting a custom of inadequate training.

Lower Court Determinations of Liability Based on a Custom of Inadequate Training or Supervision

In light of the divergent views on the Supreme Court, it is not surprising that Federal appellate courts also disagree over the appropriate standard of municipal liability for a custom of inadequate police training or supervision and the amount and nature of proof required to support a verdict. Some Federal appellate courts appearing to follow the views of Justices Rehnquist and O'Connor require a pattern of past misconduct and a standard of deliberate indifference.[13] One case which illustrates this point involved claims of inadequate police supervision.

In *Harris* v. *City of Pagedale*,[14] a city police officer stopped Harris for allegedly running a red light. The officer handcuffed Harris and took her to the station, where he sexually fondled her. He subsequently took Harris to a nearby cemetery, where he repeatedly raped and sodomized her. Harris sued the officer and the city under §1983, alleging that the city had adopted a custom of failure to receive, investigate, and act upon citizen complaints of physical and sexual misconduct against city police officers. Harris presented evidence at trial of prior incidents of sexual misconduct by the officer involved and other city officers. Additionally, Harris presented evidence that city policy makers were aware of these complaints and failed to remedy a known and continuing pattern of unconstitutional police misconduct. The jury returned a verdict against the officer and the city for $200,000.

The Eighth Circuit Court of Appeals affirmed the jury verdict, setting forth its view of the standard of municipal liability. First, the court ruled that the plaintiff must demonstrate deliberate indifference to, or tacit authorization of, the misconduct by city policy makers by failure to take remedial action following notice of a pattern of misconduct by subordinates. Second, the court reviewed the evidence presented which included testimony by the plaintiff and another woman that they were sexually assaulted by the officer in question. Moreover, city officials and residents testified that similar accusations had been made against that officer and others by many other victims. Finally, several city officials admitted they were aware of these complaints, had received complaints themselves, and had notified other officials about them. In ruling against the city, the court observed that "there was a pattern of sexual misconduct by City police officers ... City officials in positions of authority and responsibility were notified ... but ... repeatedly failed to take any remedial action."[15]

> ***"... simple negligence in training or supervision is never sufficient to establish liability under §1983."***

The court thus concluded that the city's actions, or lack thereof, amounted to deliberate indifference. Having found that Harris successfully established that her injuries resulted from a custom of inadequate supervision, the court of appeals upheld the lower court's finding of liability against the city.

In contrast, the U.S. Court of Appeals for the Sixth Circuit recently decided a case which would apparently fall within Justice Brennan's view that municipal policy makers may be held liable

for a custom of inadequate training or supervision based on a single incident which results in a constitutional injury. That custom can be established by proof of an unconstitutional act, plus direct evidence of inadequate training.

In the case of *Harris* v. *Cmich*,[16] a police officer stopped Mrs. Harris for speeding and subsequently arrested her after she became uncontrollably upset and uncooperative. Mrs. Harris had to be carried into the police wagon because she could not or would not walk on her own. Upon arrival at the station, Mrs. Harris was discovered lying on the floor of the wagon. A police captain asked Mrs. Harris if she needed medical help, but she did not respond and no medical help was rendered. During booking, Mrs. Harris slumped to the floor three times and was left there for 10 minutes to avoid further falls. She was incarcerated between 30 to 40 minutes before being released on bail, whereupon she was taken to the hospital by her family. The diagnosis was gross stress reaction, anxiety, and depression. Mrs. Harris received psychiatric therapy for over a year.

Harris sued the city under §1983 for depriving her of a constitutional right to medical care. She argued alternatively that inadequate training or direct participation of supervisory personnel caused her injuries. The jury awarded $200,000 to Mrs. Harris.

The Sixth Circuit Court of Appeals reversed that verdict because of an improper jury instruction regarding Harris' claim of injury through participation of supervisory personnel. The court, however, approved the evidence produced at trial regarding inadequate training and would have affirmed the verdict, but for the improper jury instruction.

In reaching that result, the court observed that an appropriate standard for municipal liability is gross negligence. The court examined the evidence produced regarding inadequate training. In addition to testimony regarding the actual incident, plaintiff introduced a police department regulation which stated that jail officials shall take an inmate to the hospital when the inmate cannot explain his or her condition or complains of illness. The former police chief testified that shift commanders have sole discretion based upon personal observation to decide whether to send an inmate to the hospital. The city offered no evidence that shift commanders received medical training, other than minimal first aid training, to help them decide whether inmates should be brought to the hospital. The court found this evidence sufficient to support a jury verdict that a custom of inadequate training caused plaintiff's injury. However, because the jury could have found against the city based on the improper jury instruction, the case was remanded for a new trial.

> ***"... divergent views ... exist regarding the proper standard for assessing municipal liability for a custom of inadequate training or supervision."***

The U.S. Supreme Court has agreed to review this decision of the sixth circuit and will have an opportunity to provide more definitive guidance as to the proper standard for determining municipal liability under §1983 for a custom of inadequate training or supervision and the amount and type of proof necessary to meet that standard.

When courts are confronted with particularly egregious allegations of police misconduct that extend beyond an isolated incident, they are likely to find liability based on a custom of inadequate training or supervision, irrespective of the divergent views on the Supreme Court. For example, the Fourth Circuit Court of Appeals permits recovery under two theories of liability. First, it allows suit against a municipality by determining it adopted a custom of inadequate training of police officers in the absence of evidence of past instances of abuse. Alternatively, when past evidence of abuse does exist, the plaintiff may allege the municipality adopted a custom of inadequate supervision. Both theories were successfully advanced by the plaintiff in *Spell* v. *McDaniel*.[17]

Spell was arrested for possession of a controlled substance and driving under the influence. At trial, it was alleged that the arresting officer brutally assaulted Spell by kneeing him in the groin, which resulted in the surgical removal of a testicle and irreversible sterility. Spell sued the officer and the city under §1983. With respect to the city, Spell alleged that a custom of inadequate training and supervision caused his injuries.

The jury returned a joint verdict of $900,000 against all defendants.

The fourth circuit affirmed the verdict and observed that two theories of municipal liability have emerged when no municipal policy can be found which is per se unconstitutional. The first located fault in deficient police training programs, which cause constitutional violations by untrained or mistrained officers. The second located fault in the failure of police managers to correct a widespread pattern of unconstitutional conduct by subordinates. The court stated that in appropriate circumstances, either theory may be invoked.

Regarding the custom of inadequate training theory, the court required proof that with respect to a particular training deficiency, department policy makers acted with deliberate indifference to the constitutional rights of citizens. The court explained that this standard of liability requires proof that there was a "reasonable probability" that the training deficiency would cause constitutional injury. If reasonable probability can be established, municipal liability can result from a single incident caused by a custom of inadequate training.

With regard to the second theory of liability, the court observed that proof of a custom of inadequate supervision must include evidence of a history of widespread comparable abuse. Municipal liability would then depend upon proof of actual or constructive knowledge of the problem and deliberate indifference to correcting it.

The court examined the evidence in *Spell* and concluded that the plaintiff should prevail on both theories of liability. The court first examined evidence offered to prove that a custom of inadequate training caused plaintiff's injury. It observed that one officer testified that police were trained to knee, strike, or grab the arrestee's testicles to help subdue him. Another officer testified he had seen recruits trained in the technique of kneeing persons in the groin and he also received such training. A third officer testified that the police chief attempted to project a tough guy image in training recruits and condoned the use of excessive force. The arresting officer himself testified that he had been trained to strike and grab the testicles to subdue a suspect. The court ruled that a custom of deficient training was established, constituting deliberate indifference.

> ***"... police departments should carefully review training and supervisory procedures related to high-risk activities ... and citizen complaints against officers."***

Next, the court examined proof that the custom of inadequate supervision existed which caused constitutional injury. The proof included testimony from several witnesses who were the victims of brutality by city officers. Complaints were filed with the department, but no corrective action was taken and no officer was disciplined. Moreover, several officers testified that they observed instances of excessive force by other officers. Two officers were prosecuted for physical assault by the local district attorney's office, and a former department legal adviser testified that the chief advocated use of excessive force and rejected corrective measures when suggested. Department records corroborated the existence of brutality complaints which were dismissed after cursory investigation. Consequently, the court held that ample proof existed to establish a pattern of widespread past abuse which established a custom of inadequate supervision.

Suggestions to Minimize Liability

The previously discussed court decisions illustrate the divergent views that exist regarding the proper standard for assessing municipal liability for a custom of inadequate training or supervision. Regardless of what standard a particular court adopts, there are some steps that can be taken to minimize exposure to potentially devastating liability.

Generally, police departments should carefully review training and supervisory procedures related to high-risk activities. More specifically, training practices which warrant careful scrutiny include firearms, use of deadly and nonlethal force, high-speed pursuit, constitutional criminal law and procedure, civil rights, and prisoner safety in detention facilities. Training practices and policies should be reviewed to insure that they are not per se unconstitutional. Moreover, no training pol-

icy or practice should fall below minimum State standards. Training practices and policies should be compared with those of other major local departments to insure that they are not clearly inferior. No officer should be permitted to avoid training in a high-risk area of potential liability. Strong consideration should be given to providing inservice training in the area of criminal law and procedure, because this area of the law is constantly changing.

With respect to firearms training, officers should train and qualify with the guns they carry on the street. Officers should not be permitted to carry weapons unless they have qualified with those particular weapons. Additionally, targets for qualification should be scored by a firearms instructor, and remedial training should be required for officers who do not qualify.

Supervisory policies relating to citizen complaints against officers and departmental disciplinary actions must be carefully reviewed. Strong consideration should be given to establishing specific procedures for receiving, reviewing, and investigating citizen complaints against officers. These procedures should require that all important information regarding the complaint, investigation, and recommendations of supervisors be in writing. Moreover, procedures should include prompt written notification to high-level department personnel regarding the results of the investigation. Department supervisors responsible for making disciplinary decisions should insure that all decisions are written and fully documented. If an officer becomes a serious disciplinary problem, dismissal from the force should be considered as an option. Failure to discipline or dismiss officers who develop a "track record" of using excessive force could result in liability.

Departments should insure that hiring policies for new officers are carefully reviewed and evaluated. Serious consideration should be given to conducting background investigations and appropriate testing of potential applicants.

> **"... responsible management is the key to reducing municipal liability."**

Departments that maintain detention facilities are especially vulnerable to liability because inmates often injure or kill themselves or others. A careful review of inmate safety procedures is recommended. In that regard, some departments have installed closed-circuit television to monitor each cell.

It is recognized that all these recommendations require monetary expenditures. However, the failure to follow reasonable training and supervisory practices could result in monetary liability which far exceeds those prophylactic expenditures. In the final analysis, responsible management is the key to reducing municipal liability. FBI

Footnotes

[1]365 U.S. 167 (1961).

[2]42 U.S.C. §1983 provides:
"Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State ..., subjects ... any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights ... secured by the Constitution ... shall be liable to the party injured in an action at law...."

[3]436 U.S. 658 (1978) (hereinafter cited as *Monell*). For an analysis of the *Monell* decision, see, Daniel L. Schofield, "Law Enforcement and Government Liability," *FBI Law Enforcement Bulletin*, vol. 50, No. 1, January 1981, pp. 26-31.

[4]Municipal corporations include county, city, and town governments which exist within the State.

[5]*Monell, supra* note 3, at 690.

[6]*Monell, supra* note 3, at 694.

[7]471 U.S, 808 (1985).

[8]A plurality opinion is one in which more Justices join than in any concurring opinion (though not a majority of the Court) as distinguished from a majority opinion in which a larger number of the Justices on the panel join than not. See, Black's Law Dictionary, fifth ed.

[9]As explained earlier in this article, the concept of respondeat superior holds an employer responsible for the wrongful conduct of an employee, regardless of the absence of personal fault on the part of the employer.

[10]777 F.2d 801 (1st. Cir. 1985).

[11]*City of Springfield* v. *Kibbe*, 107 S.Ct. 1114 (1987).

[12]Chief Justice Rehnquist and Justices White and Powell joined Justice O'Connor.

[13]*See e.g., Fiacco* v. *City of Rensselaer*, 783 F.2d 319 (2d Cir. 1986); *Sarus* v. *Rotundo*, 831 F.2d 397 (2d Cir. 1987); *Colburn* v. *Upper Darby Township*, 838 F.2d 663 (3d Cir. 1988); *Wellington* v. *Daniels*, 717 F.2d 932 (4th Cir. 1983); *Languirand* v. *Hayden*, 717 F.2d 220 (5th Cir. 1983); *Palmer* v. *City of San Antonio, Texas*, 810 F.2d 514 (5th Cir. 1987) (proof of prior incidents required, but not clear on correct standard of liability), but *see Grandstaff* v. *City of Borger, Texas*, 767 F. 2d 161 (5th Cir. 1985) (pattern of past similar acts not required. Policy and custom of dangerous recklessness can be inferred from multiple bad acts of several officers in one incident. The court also accepted a gross negligence standard of liability); *Kirkpatrick* v. *City of Los Angeles*, 803 F.2d 485 (9th Cir. 1986) (pattern of similar unconstitutional acts required); *Owens* v. *City of Atlanta*, 780 F.2d 1564 (11th Cir. 1986) (pattern required but correct standard of liability not set forth); *Brooks* v. *Scheib*, 813 F.2d 1191 (11th Cir. 1987) (pattern required and standard is tacit authorization or deliberate indifference. However, court noted that the en banc ruling of the 11th circuit in *Gilmere* v. *City of Atlanta*, 774 F.2d 1495 (11th Cir. 1985) did not decide whether gross negligence or some higher standard of liability was appropriate).

[14]821 F.2d 499 (8th Cir. 1987).

[15]*Id.* at 506.

[16]798 F.2d 1414 (6th Cir. 1986) (unpublished opinion), *cert. granted sub nom. City of Canton. Ohio* v. *Harris*, 108 S.Ct. 1105 (1988). For other cases which have apparently adopted Justice Brennan's view, *see Voutour* v. *Vitale*, 761 F.2d 812 (1st Cir. 1985); *Wierstak* v. *Heffernan*, 789 F.2d 968 (1st Cir. 1986); and *Kibbe* v. *City of Springfield*, 777 F.2d 801 (1st Cir. 1985), *cert. dismissed*, 107 S.Ct. 1114 (1987). *See also, Bergquist* v. *County of Cochise*, 806 F.2d 1364 (9th Cir. 1986) (standard is gross negligence).

[17]824 F.2d 1380 (4th Cir. 1987).

Law enforcement officers of other than Federal jurisdiction who are interested in any legal issue discussed in this article should consult their legal adviser. Some police procedures ruled permissible under Federal constitutional law are of questionable legality under State law or are not permitted at all.