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Supervisory Liability Under 42 U.S.C. Section 1983: Searching for the Deep Pocket

A GUIDE FOR PRACTITIONERS

I. INTRODUCTION

Suits under 42 U.S.C. section 1983 are complex. To the practitioner who does not often litigate in the civil rights area, section 1983 may seem a confusing hybrid of constitutional law and tort law. One of the important preliminary issues the practitioner must decide is who to include as a defendant. Section 1983's theory of constitutional wrongdoing without vicarious liability will seem strange to some practitioners. There are circumstances, however, in which a plaintiff may sue the supervisor of the person who immediately inflicted the injury. This Comment examines the intricacies of supervisory liability as determined by recent United States Supreme Court and circuit court decisions and provides pointers to practitioners. In addition, this Comment suggests an amendment to section 1983.

II. EVOLUTION OF THE SECTION 1983 CAUSE OF ACTION

Section 1983 of Title 42 of the United States Code¹ provides a mechanism for individuals to recover damages for the violation of constitutional rights. Congress enacted the section as a part of the Civil Rights Act of 1871, which was designed to enforce the recently adopted fourteenth amendment.²

1. 42 U.S.C. § 1983 (1988) (originally enacted as Act of Apr. 20, 1871, ch. 22, § 1, 17 Stat. 13 (1871), *amended by* Act of Dec. 29, 1979, Pub. L. No. 96-170, § 1, 93 Stat. 1284 (1979)). It currently reads as follows:

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983 (1988).

2. See S. NAHMOD, *CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION 2-7* (2d ed.

During the first 90 years of its existence, relatively few cases were brought under section 1983.³ In 1961, however, the Supreme Court invigorated section 1983 with its decision in *Monroe v. Pape*.⁴ *Monroe* involved a suit by an African-American family against the City of Chicago and 13 police officers for the violation of Fourteenth Amendment rights.⁵

Monroe held that the existence of a state law remedy did not preclude the federal claim. "The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked."⁶ The Court clarified the meaning of "under color of state law," which it construed in an earlier decision as "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law."⁷ The Court dismissed the claim against the City of Chicago because it found that Congress did not intend to make a municipality a "person" under section 1983.⁸ The Court held, however, that the complaint should not have been dismissed against the individual officers.⁹ As a result of this decision, section 1983 would become the principal means by which plaintiffs could hold governmental officials accountable for the deprivation of constitutional rights.

3. Nahmod, *Section 1983 Discourse: The Move From Constitution To Tort*, 77 GEO. L. J. 1719 (1989). According to the author, the reason for the lack of litigation under section 1983 was the interpretation of the words "under color of state law." Until *Monroe v. Pape*, 365 U.S. 167 (1961), an act committed in violation of state law was not considered to be under color of state law. *Id.* at 172. See *infra* note 4 and accompanying text.

4. 365 U.S. 167 (1961).

5. The petitioners were an African-American family with six children. *Id.* at 169-70. The complaint alleged that 13 Chicago police officers broke into the petitioners' home early in the morning, without either an arrest warrant or a search warrant. *Id.* at 169. The police officers allegedly made the whole family stand naked in the living room, while they ransacked every room in the house, emptied drawers, and cut open mattress covers. *Id.* Further, the petitioners alleged that Mr. Monroe was taken to the police station and detained there for ten hours while he was interrogated about a recent murder. *Id.* Monroe allegedly was not taken before a magistrate, even though one was available. *Id.* He was not permitted to call either an attorney or his family. *Id.* Monroe was subsequently released without being charged with any crime. *Id.*

6. *Id.* at 183.

7. *Id.* at 184, 187. It had been argued that actions in violation of state law could not be considered "under color of" state law. See S. NAHMOD, *supra* note 2, at 74.

8. *Monroe*, 365 U.S. at 187. This part of the decision was later overturned by *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978). See *infra* notes 14-18 and accompanying text.

9. *Monroe*, 365 U.S. at 192.

III. RESPONDEAT SUPERIOR NOT ALLOWED UNDER SECTION 1983

A victim deprived of constitutional rights ordinarily desires to include as a defendant more than just the person who directly caused the injury. In many cases, a state or local governmental employee caused the deprivation,¹⁰ and substantial monetary damages are involved.¹¹ Although section 1983 is a hybrid of tort and constitutional law,¹² the plaintiff cannot use *respondeat superior*¹³ to seek a defendant with the ability to pay a damage award. In *Monell v. Department of Social Services*,¹⁴ the Court overruled *Monroe* in part.¹⁵ The issues in *Monell* centered on the liability of the local governmental entity; however, the Court stated that *respondeat superior* was not available to permit suing either the local governmental entity or supervisors.¹⁶

In *Monell*, female employees of the Department of Social Services ("Department") and the Board of Education of New York City ("Board") brought a class action against the Department and its Commissioner, the Board and its Chancellor, and the city and its mayor. The individual defendants were sued only in their official capacities.¹⁷ The plaintiffs alleged that the Board and the Department had "as a matter of official policy compelled pregnant employees to take unpaid leaves of absence before such leaves were required for medical reasons."¹⁸

10. For example, police officers and prison guards are common section 1983 defendants.

11. For example, damage to someone's health or business is a common injury.

12. See *Nahmod*, *supra* note 3, at 1720.

13. See generally RESTATEMENT (SECOND) OF AGENCY §§ 219-253 (1965) on the liability of masters for torts committed by their servants in the scope of employment.

14. 436 U.S. 658 (1978).

15. *Id.* at 663. See also *infra* notes 19-22 and accompanying text. The prohibition of the use of *respondeat superior* had generally been the rule in the circuits before *Monell*. See S. NAHMOD, *supra* note 2, at 338. See also *Duchesne v. Sugarman*, 566 F.2d 817 (2d Cir. 1977); *Vinnedge v. Gibbs*, 550 F.2d 926 (4th Cir. 1977); *Navarette v. Enomoto*, 536 F.2d 277 (9th Cir. 1976), *rev'd on other grounds sub nom. Proconier v. Navarette*, 434 U.S. 555 (1978); *Draeger v. Grand Cent., Inc.*, 504 F.2d 142 (10th Cir. 1974); *Jennings v. Davis*, 476 F.2d 1271 (8th Cir. 1973); *Adams v. Pate*, 445 F.2d 105 (7th Cir. 1971).

16. *Monell*, 436 U.S. at 691; S. NAHMOD, *supra* note 2, at 167.

17. *Monell*, 436 U.S. at 660-61.

18. *Id.* Specifically, the plaintiffs alleged that the city of New York had a policy of forcing women to take maternity leave after the fifth month of pregnancy unless a city physician and the head of the employees' agency allowed up to an additional two months of work. *Id.* at 661. The defendants stated that they changed this policy before the institution of the suit. *Id.* The plaintiffs further alleged, however, that the Board had a policy of requiring women to take maternity leave after the seventh month

The Supreme Court granted certiorari¹⁹ to consider whether local governmental officials sued in their official capacity and/or local school boards are "persons" within the meaning of section 1983.²⁰ The Court held that *Monroe v. Pape*²¹ was overruled insofar as it held that a municipality was not a "person" under section 1983.²²

The Court outlined a detailed examination of the legislative history involved in the adoption of section 1983.²³ Writing for the majority, Justice Brennan concluded that, "Congress *did* intend municipalities and other local government units to be included among those persons to whom section 1983 applies."²⁴ The Court held that local governmental officials who are sued in their official capacities are "persons" under section 1983 in cases where a local governmental entity would be liable in its own name.²⁵ Local governmental entities may be sued under section 1983 where "the action alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers."²⁶ Additionally, this liability extends to situations where the constitutional deprivation occurs as a result of a governmental "custom," even though that custom has not received formal approval from the government's official decision making body.²⁷

The Court went on to explain that Congress only intended municipalities to be held liable when action taken pursuant to official municipal policy caused a constitutional tort.²⁸ The Court noted, however, that "a municipality cannot be held liable *solely* because it employs a tortfeasor or, in other words,

of pregnancy unless that month fell within the last month of the school year. In that case, the teacher could remain through the end of the school year. *Id.* at 661 n.2.

19. 429 U.S. 1071 (1977).

20. *Monell*, 436 U.S. at 662.

21. 365 U.S. 167 (1961).

22. *Monell*, 436 U.S. at 690. The Court, however, upheld *Monroe* "insofar as it holds that the doctrine of *respondeat superior* is not a basis for rendering municipalities liable under § 1983 for the constitutional torts of their employees." *Id.* at 663 n.7. The Court discussed this holding in greater detail later in the opinion.

23. *Id.* at 665-89.

24. *Id.* at 690 (*italics in original*).

25. *Id.* at 690 n.55.

26. *Id.* at 690. Note that in reality, this basis of liability is extremely narrow, as most municipal entities do not officially adopt unconstitutional policies. The great number of section 1983 claims occur when governmental officers cause a constitutional violation through actions unsanctioned by any official policy. *See infra* notes 32-38 and accompanying text.

27. *Monell*, 436 U.S. at 691.

a municipality cannot be held liable under section 1983 on a *respondeat superior* theory.²⁹

After *Monell*, a local government may not be sued under section 1983 for a constitutional deprivation inflicted solely by its employees or agents. Liability exists only when the execution of a government's policy or custom inflicts the injury.³⁰ In *Monell*, the Court upheld liability against the governmental entities because an official policy was responsible for the constitutional violation.³¹

Subsequent interpretation of the requirements for liability under section 1983 by the Supreme Court and courts of appeal have further confused the issue of supervisory liability. The remainder of this Comment will examine theories of supervisory liability under section 1983 in situations where federal courts addressed the issue.

IV. SUING SUPERVISORS IN THEIR PERSONAL CAPACITY

A plaintiff may name a supervisor as a defendant either in the supervisor's personal capacity or official capacity. The Supreme Court addressed the differences between personal capacity and official capacity suits in *Kentucky v. Graham*.³² The case involved an award of legal fees under 42 U.S.C. section 1988 resulting from a section 1983 claim.³³ Writing for the

29. *Id.* (italics in original). The Court cited the original language of section 1983 which stated, "shall subject or cause to be subjected," which, in the Court's view, cannot be read to include vicarious liability. In addition, the Court was unwilling to create a federal law of *respondeat superior*. *Id.* at 691-94.

30. *Id.* at 694. The Court said earlier in the opinion that suits against governmental officials in their official capacities should be considered as if the suit were against the governmental entity itself. *Id.* at 690 n.55.

31. *Id.* at 694-95.

32. 473 U.S. 159 (1985).

33. The suit dealt with the illegal search, beating, and false arrest of the members of the family of Clyde Graham, who was suspected of killing a Kentucky state trooper. *Id.* at 160. The police had entered Graham's father's house, without a warrant, to look for Graham. *Id.* Graham was not there, but six members of his family were. *Id.* They were abused by the police, and subsequently brought the suit. *Id.* An investigation by the Kentucky Attorney General's office concluded that the police had used excessive force and that a "complete breakdown" in police discipline had created an "uncontrolled" situation. *Id.* at 161.

The plaintiffs sued various local and state law enforcement officers, the city of Elizabethtown, Kentucky, Hardin County, Kentucky, and the Commonwealth of Kentucky. *Id.* Kenneth Brandenburg, Commissioner of the state police, was named as a defendant, "individually and as Commissioner of the Bureau of State Police." *Id.*

majority, Justice Marshall started with the notion that personal capacity suits "seek to impose personal liability upon a government official for actions he takes under color of state law."³⁴ In contrast, official capacity suits "generally represent only another way of pleading an action against an entity of which an officer is an agent."³⁵ The official capacity suit is not against the supervisor personally because the real party in interest is the governmental entity. An award of damages against the supervisor in his personal capacity may be executed only against the supervisor's personal assets, while damages awarded in an official capacity suit must be paid by the governmental entity.³⁶

To establish personal liability in a section 1983 action, the plaintiff need only show that the supervisor, acting under color of state law, caused the deprivation of a constitutional right.³⁷ The plaintiff must prove more in an official capacity action. Because the suit is really against the governmental entity, the entity is liable only when the entity itself is a "moving force"

The district court dismissed the case against the Commonwealth of Kentucky on eleventh amendment grounds. *Id.* The case was settled. *Id.* at 162. The respondents moved under 42 U.S.C. § 1988 (1988) for the Commonwealth to pay their attorney fees. Section 1988 provides in pertinent part:

In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as a part of the costs. . . .

42 U.S.C. § 1988 (1988).

The district court granted the attorney fees, and the Sixth Circuit affirmed. *Graham*, 473 U.S. at 162. The issue confronting the Supreme Court was whether the Commonwealth could be compelled to pay the attorney fees when the plaintiff prevails in a suit against a governmental employee acting in his personal capacity. *Id.* at 161-63. The Court found the case to be a personal-capacity one. As a result, the plaintiffs could not collect damages from the Commonwealth. The Court reversed the award of attorney fees. *Id.* at 168-69.

34. *Id.* at 159.

35. *Id.* at 165. The language about official capacity suits was taken from *Monell*, 436 U.S. at 690 n.55.

36. *Graham*, 473 U.S. at 166. Justice Marshall noted that in a personal capacity suit, if the official dies before the case is resolved, the plaintiff would have to pursue the action against the official's estate. In contrast, in the official capacity suit, if the named official dies or is replaced, the official's successor in office will be automatically substituted as the defendant. *Id.* at 166 n.11. See also FED. R. CIV. P. 25(d); FED. R. APP. P. 43(c)(1).

37. *Graham*, 473 U.S. at 166.

behind the violation.³⁸ The plaintiff must show that the entity's "policy or custom" played a part in the deprivation of constitutional rights.³⁹

In a personal capacity suit, the supervisors may be able to assert the affirmative defense of qualified immunity. The officials would have to prove that they reasonably relied on existing law as a justification for their action. In contrast, the affirmative defense is unavailable in official capacity suits. The only types of immunity that may be raised in an official capacity suit are forms of sovereign immunity that the government could raise itself, such as the eleventh amendment for states.⁴⁰

Justice Marshall went on to hold in *Graham* that "it is clear that a suit against a government official in his or her personal capacity cannot lead to imposition of fee liability upon the governmental entity."⁴¹ The victory is against the individual official, not the entity that employs the official. The entity is not even a party to the personal capacity suit; the entity has no right to present a defense unless a cause of action is raised against the entity specifically.⁴²

The distinction between personal and official capacity suits is important because the plaintiff's case is more difficult in the official capacity suit. The plaintiff must meet the requisites of *Monell*, just as if the plaintiff were suing the municipality. The cases are often not clear if the plaintiff is suing the supervisor in a personal or official capacity. In addition, theories of liability are used interchangeably between the two types of suits, leading to even more confusion.⁴³

A. Individual Participation

Supervisors may be held liable under section 1983 if they participate in the events causing the constitutional deprivation.⁴⁴ The supervisors may actually be involved in the constitutional injury, or the supervisors may

38. *Id.*

39. *Id.*

40. *Id.* at 166-67.

41. *Id.* at 167.

42. *Id.* at 167-68.

43. See *infra* notes 101-107 and accompanying text. For example, failure to train or supervise can be a theory of liability against a police chief in both his individual capacity and in his official capacity if the failure leads to a "policy or custom" of deprivations. A general rule of thumb seems to be that whenever *Monell* itself or *Monell's* buzzwords, "policy or custom" are mentioned, the court is discussing an official capacity case.

44. *Hansen v. Black*, 885 F.2d 642, 646 (9th Cir. 1989); *Lewis v. Smith*, 855 F.2d 736, 738 (11th Cir. 1988).

authorize employees to act in an unconstitutional manner.⁴⁵ There must be a causal connection between the supervisors' actions and the constitutional violation.⁴⁶

In *Specht v. Jensen*⁴⁷ the Tenth Circuit affirmed supervisory liability. The plaintiffs were a husband and wife who sued three members of a municipal police department for an unlawful search of their home and business.⁴⁸ The Tenth Circuit affirmed the judgment on a jury's verdict against the supervisor because there was sufficient evidence to support the jury's finding of direct participation by the supervisor.⁴⁹

Although active participation in a constitutional deprivation will make the supervisor liable under section 1983, the Seventh Circuit has held that failure to stop an unconstitutional act will not make the supervisor liable. In *Cyngar v. Chicago*,⁵⁰ police officers sued the mayor and the executive director of the city, alleging racial and political discrimination in their transfer out of the Office of Municipal Investigation.⁵¹ The court of appeals upheld a directed verdict for the mayor because he had not actually participated in the transfers.⁵² The mayor's failure to stop the transfers was not enough for section 1983 liability. The court noted that

45. *Meehan v. County of Los Angeles*, 856 F.2d 102 (9th Cir. 1988) (supervisory liability as to deputy not allowed because no evidence connected him to the misconduct or showed him to have authorized the conduct).

46. *Hansen*, 885 F.2d at 646; *Lewis*, 855 F.2d at 738.

47. 832 F.2d 1516 (10th Cir. 1987).

48. The plaintiffs sued a police supervisor, a former (at the time of the incident) police officer and an officer who was off duty on medical leave at the time of the incident. *Id.* at 1518-19. The officers illegally searched the plaintiffs' office and home while helping a creditor execute an order to repossess a computer. *Id.* at 1519-20.

49. *Id.* at 1524.

50. 865 F.2d 827 (7th Cir. 1989).

51. The Office was an elite force of police detectives who were chosen on the basis of experience and performance records. *Id.* at 831. The officers who were transferred out of the office were Caucasian. *Id.* The executive director was African-American. *Id.* This case occurred just after Harold Washington's election as mayor of Chicago and reflects the executive director's goal of making the Office more racially balanced. *Id.* Before the transfer, 28 of the 32 officers were white males; after the transfers, the numbers dropped to 15 of 32. *Id.* at 831-32.

52. *Id.* at 847. The executive director had written a memo to the mayor's chief of staff stating his intention to alter the racial make up of the office. *Id.* at 835. Other than these memos, the mayor's office had no contact with the incident. *Id.* After the transfers were ordered, the executive director wrote the mayor another memo stating that the racial composition of the office had been changed. *Id.* at 835-36.

[F]ailure to take corrective action cannot in and of itself violate 1983. Otherwise the action of an inferior officer would automatically be attributed up the line to his highest supervisor and thence to the local government, since the misconduct of policy making officials . . . is attributed to the government.⁵³

The court found that imposing liability on the mayor in this situation would be inconsistent with *Monell*.⁵⁴

B. Failure to Supervise or Train Employees

One way around the unavailability of *respondeat superior* is to maintain a personal capacity suit against supervisory officials on the grounds that the officials failed to adequately supervise or train their employees.⁵⁵ The District of Columbia Circuit Court of Appeals discussed the parameters of this theory in *Haynesworth v. Miller*.⁵⁶ The court said it was "well established" that a government officer may be held liable under section 1983 for constitutional wrongs caused by her failure to adequately train subordinates.⁵⁷

53. *Id.* at 847. See also *Jones v. Chicago*, 856 F.2d 985, 992 (7th Cir. 1988) (supervisors who are merely negligent in failing to detect and prevent subordinates' misconduct are not liable; superiors must "know about the conduct and facilitate it, approve it, condone it, or turn a blind eye for fear of what they see" to be liable).

54. *Cyngar*, 865 F.2d at 847.

55. See, e.g., *Haynesworth v. Miller*, 820 F.2d 1245 (D.C. Cir. 1987) (discussion of maintenance of a section 1983 cause of action against police chief on a failure to supervise theory). See also cases cited at *Haynesworth*, 820 F.2d at 1259 n.110. It seems that the burden of proving failure to supervise is high; the theory is often plead, but seldom won. See *infra* notes 155-57 and accompanying text. Also, the failure to supervise theory is very similar to the "policy or custom" theory discussed *supra* notes 30-31 and accompanying text.

56. 820 F.2d 1245 (D.C. Cir. 1987). The case dealt with a retaliatory prosecution. The court found that section 1983 did not apply because the act occurred in the District of Columbia prior to the 1979 amendment to section 1983 that brought the District under the coverage of section 1983. *Id.* at 1246-50. The court, however, used a section 1983 analysis. *Id.*

57. *Haynesworth*, 820 F.2d at 1259. All the courts of appeals that have addressed the issue have found that a failure to train can create section 1983 liability. See *Spell v. McDaniel*, 824 F.2d 1380, 1389-91 (4th Cir. 1987); *Warren v. City of Lincoln, Neb.*, 816 F.2d 1254, 1262-63 (8th Cir. 1987); *Bergquist v. County of Cochise*, 806 F.2d 1364, 1369-70 (9th Cir. 1986); *Wierstak v. Heffernan*, 789 F.2d 968, 974 (1st Cir. 1986); *Fiacco v. City of Rensselaer, N.Y.*, 783 F.2d 319, 326-27 (2d Cir. 1986); *Gilmere v. City of Atlanta, Ga.*, 774 F.2d 1495, 1503-04 (11th Cir. 1985); *Rock v. McCoy*, 763 F.2d 394, 397-98 (10th Cir. 1985); *Languirand v. Hayden*, 717 F.2d 220, 227-28 (5th Cir. 1983); *Hays v. Jefferson County, Ky.*, 668 F.2d 869, 874 (6th Cir.

The court noted that this type of responsibility on the part of the official was not premised on vicarious liability.⁵⁸

The District of Columbia Circuit examined the elements that a plaintiff must prove to prevail on the failure to supervise theory. First, the plaintiff must prove that the official had an obligation to supervise or train the wrongdoer.⁵⁹ Second, the plaintiff must show that the official breached this duty.⁶⁰ Third, the plaintiff must prove that this breach was the cause of the injury.⁶¹ Even though these elements mirror a simple negligence action, the court found that "something more than mere negligence on the part of the supervisor is necessary" under *Rizzo v. Goode*.⁶² The injured party must establish that the supervising official was either "grossly negligent" or "deliberately indifferent" in failing to take precautions against the constitutional violation.⁶³

The Supreme Court recently ruled in *City of Canton, Ohio v. Harris*⁶⁴ on the plaintiff's burden of proof as to the standard of care in failure to supervise cases. The Court dealt with the failure to train claim as it related

1982).

Two other courts of appeals have not expressly adopted this theory of section 1983 liability, but they seem to have implicitly endorsed it. *See Colburn v. Upper Darby Township*, 838 F.2d 663, 672-73 (3d Cir. 1988); *Lenard v. Argento*, 699 F.2d 874, 885-87 (7th Cir. 1983).

The Supreme Court recently ruled on this issue in *City of Canton, Ohio v. Harris*, 489 U.S. 381 (1989). For a more detailed discussion of this issue, see *City of Canton*, 489 U.S. at 387 n.6. *See also infra* notes 64-83 and accompanying text.

58. *Haynesworth*, 820 F.2d at 1259.

59. *Id.* at 1260.

60. *Id.*

61. *Id.*

62. *Id.* at 1260 (citing *Rizzo v. Goode*, 423 U.S. 362 (1976)).

The issue of how negligent the supervisory official must be is a reoccurring one in section 1983 cases, no matter which theory the plaintiff uses as a basis for supervisory liability. Some cases seem to say that gross negligence on the part of the supervisor is enough; others seem to require more than gross negligence. Still others talk about imposing liability on what the supervisor should have known (i.e. that the supervisor should have found out about the abuses and remedied them). The last definition seems to be a reasonableness standard, which sounds much like simple negligence. *See infra* notes 56-57 and accompanying text.

63. *Haynesworth*, 820 F.2d at 1260. Here, the court found that gross negligence on the part of the official may have been enough; however, a recent Supreme Court case changed the standard of fault to "deliberate indifference" for failure to supervise cases. For a discussion of the "deliberate indifference" standard, see *infra* notes 57-64 and accompanying text for a discussion of the *City of Canton* case.

64. 489 U.S. 378 (1989).

to municipal liability because the defendants were sued in their official capacities.⁶⁵ The standard of care, however, probably would be the same in personal capacity cases.⁶⁶

Geraldine Harris was arrested by officers of the Canton Police Department. She sued the city and its officials under section 1983 alleging that she was not provided with medical attention while in police custody.⁶⁷ At trial the jury found for Harris on the section 1983 claim.⁶⁸ The court of appeals held that there had been no error in submitting the "failure to train" theory to the jury.⁶⁹ The court of appeals, however, reversed the judgment for Harris and remanded the case for a new trial because it found that "certain aspects of the District Court's jury instructions might have led the jury to believe that it could find against the city on a mere *respondeat superior* theory."⁷⁰ Because the jury's verdict did not state the specific basis on which it ruled for Harris, the court of appeals ordered a new trial.⁷¹ The city petitioned for certiorari arguing that the Sixth Circuit's holding was "an impermissible broadening of municipal liability under section 1983."⁷²

65. See *infra* notes 108-154 for a discussion of the official capacity cases.

66. The Court did not say this specifically, but the language the Court adopted was already used by several circuits. *City of Canton*, 489 U.S. at 381.

67. *Id.* Harris was brought to the police station in a patrol wagon; when she arrived at the police station, she was sitting on the floor of the wagon. *Id.* Police officers asked her if she needed medical attention. She responded with an incoherent remark. *Id.* When she was brought inside, she slumped to the floor twice, and the officers left her on the floor to prevent her from falling down again. *Id.* No one summoned medical attention for Harris. *Id.* After an hour, the police released Harris from custody. *Id.* She was then taken to the hospital in an ambulance provided by her family. *Id.* At the hospital, Harris was diagnosed as suffering from "several emotional ailments;" she was hospitalized for one week and underwent outpatient treatment for an additional year after she was released. *Id.*

68. *Id.* at 382. Harris also brought other constitutional and state law claims against the city and its officials; the jury rejected all but the section 1983 claim. *Id.*

69. *Id.* at 383. The court of appeals held that "a municipality is liable for failure to train its police force, [where] the plaintiff . . . prove[s] that the municipality acted recklessly, intentionally, or with gross negligence." *Id.* at 382. In addition, the court of appeals stated that the plaintiff must also prove "that the lack of training was so reckless or grossly negligent that deprivations of person's constitutional rights were substantially certain to result." *Id.* at 383. Construing the evidence in a light favorable to Harris could have led to a jury finding that the city "'had a custom or policy of vesting complete authority with the police supervisor of when medical treatment would be administered to prisoners.'" *Id.* at 382 (quoting the unpublished district court opinion).

70. *Id.* at 378.

71. *Id.* at 383.

72. *Id.* at 385.

Because the case involved municipal liability, the Court's first inquiry was whether there was a direct causal link between a municipal policy or custom and the alleged constitutional deprivation.⁷³ The Court examined the alleged failure to train as a policy of failing to train police officers that resulted in the denial of medical care.⁷⁴ The Court concluded that there are "limited circumstances in which an allegation of a 'failure to train' can be the basis for municipal liability under section 1983."⁷⁵

Second, the Court observed that even though the circuits agreed that a failure to train may be a basis for liability under section 1983,⁷⁶ the circuits disagreed on what degree of fault rendered the municipality (and the supervising officials sued in their official capacity) liable.⁷⁷ The Court held that the inadequacy of police training must amount to "deliberate indifference" to the rights of people with whom the police come into contact with for section 1983 liability to exist.⁷⁸ The training program must be closely connected to the ultimate injury.⁷⁹ The Court found this "deliberate indifference" approach the most consistent with *Monell*.⁸⁰

Justice White noted that a lesser standard of fault would expose municipalities to unprecedented liability under section 1983. This would lead

73. *Id.* Justice White, writing for the majority, commented that this inquiry has been a difficult one for the Court, leaving the Court deeply divided in the cases decided after *Monell*. See *infra* notes 108-154 for a discussion of these cases.

74. *Id.* at 386 n.5. Again, the theories on which supervisory liability may be predicated will often overlap. For more discussion of the unconstitutional "policy or custom" theory of supervisory liability, see *infra* notes 101-154 and accompanying text.

75. *Id.* at 387. Justice White noted that all of the circuits that had considered the issue had also allowed liability on the failure to train theory, and that six members of the current Court had joined opinions that endorsed section 1983 liability on this theory. *Id.* at 387 n.6.

76. See *supra* note 57.

77. *Id.* at 388. Justice White noted that some circuits found "gross negligence" in a city's failing to train its employees sufficient to impose section 1983 liability, while others required the city to exhibit "deliberate indifference" toward the constitutional rights of the allegedly injured party. *Id.* See *supra* notes 62-63 and accompanying text for a discussion of the degree of negligence necessary in personal capacity suits. Justice White may have been referring to some of these cases.

78. *City of Canton*, 489 U.S. at 389. The Court mentioned only police training. Failure to train cases dealing with prison officials would probably also be subjected to the same standard.

79. *Id.* at 391.

80. *Id.* at 388-89. The *Monell* Court said that the municipality should be liable under section 1983 only where its policies are the "moving force [behind] the constitutional violation." *Id.* at 389 (quoting *Monell*, 436 U.S. at 694).

to *de facto respondeat superior* liability for municipalities, a basis of liability rejected in *Monell*.⁸¹ Finally, wrote Justice White, a lower standard of fault would put the federal courts in the position of second-guessing employee training programs. The federal courts are ill-suited for this purpose, and such a role would implicate serious federalism questions.⁸² For all these reasons, the Court vacated the judgment of the court of appeals and remanded the case for a new trial consistent with the "deliberate indifference" standard.⁸³

C. Failure to Act on Repeated Constitutional Violations

A second theory of supervisory liability under section 1983 is to allege that the constitutional violation should have come to the attention of the supervisor. This constructive notice often occurs when there has been a pattern of violations.⁸⁴

In *Fundiller v. Cooper City*,⁸⁵ the plaintiff sued the city, the mayor, officials in the police department, and eleven police officers. The plaintiff was a participant in a narcotics transaction and was shot by an undercover police officer.⁸⁶ The district court dismissed the federal counts for failure to state a claim. The Eleventh Circuit Court of Appeals reversed, finding that a claim had been stated against the police officer who wounded the plaintiff, the other officers who took part in the arrest, the city, and the city's public safety director.⁸⁷ With regard to the supervisory liability of the public safety director, the court of appeals held that the complaint did state a claim because it alleged a pattern of excessive force about which the director should have

81. *Id.* at 391-92. Justice White points out that in every case where section 1983 liability is asserted, the plaintiff will always be able to point to something the city "could have done" to prevent the violation of constitutional rights. *Id.*

82. *Id.* at 392.

83. *Id.* at 393. Justices O'Connor, Scalia, and Kennedy dissented as to the remand. They felt that the plaintiff "has not and could not satisfy the fault and causation requirements we adopt today," and that remand was unnecessary. *Id.*

84. The "pattern" argument is often very similar to the argument that a municipality has a "custom" of causing the violation. The "policy or custom" theory is used to implicate municipalities and supervisory officials who are sued in their official capacity. For example, suing the mayor or the police chief is, in effect, the same as suing the municipality itself. This theory is discussed *infra* notes 101-154 and accompanying text. Constructive notice is another area where the overlap between different theories of supervisory liability causes confusion; courts enhance the confusion by using the theories interchangeably.

85. 777 F.2d 1436 (11th Cir. 1985).

86. *Id.* at 1438.

87. *Id.* at 1443-44.

known. The complaint also alleged that the director failed to take corrective steps after he knew about the pattern of excessive force.⁸⁸

Similarly, in *Chapman v. Pickett*,⁸⁹ the Seventh Circuit held that supervisors may be personally liable for failing to act when they have knowledge of a constitutional violation.⁹⁰ In *Chapman*, an inmate sued prison officials.⁹¹ The court stated that "the knowledge that is required [for personal liability] is not only that a constitutional deprivation exists but also that the supervisor's personal action is necessary to set it right."⁹² The court found that the prison official had this knowledge.⁹³

Several courts of appeals have held that the supervisory official must be more than merely negligent for section 1983 liability to exist. The Seventh Circuit held in *Rascon v. Hardiman*⁹⁴ that mere negligence was insufficient to hold the executive director of a prison liable. The court said that the plaintiff must show that the official knowingly, willfully, or recklessly caused the deprivation by either his action or by his failure to act.⁹⁵

Another related issue arising in section 1983 cases is whether the incident giving rise to the case was a single, isolated incident, or whether it was part of a pattern of incidents.⁹⁶ In *Wilson v. Attaway*⁹⁷ the three plaintiffs were wrongfully arrested during a race riot and exposed to unconstitutional

88. *Id.* at 1443. The court also found that the plaintiff's allegations against the municipality, if true, would be permissible under *Monell*. *Id.* at 1442-43.

89. 801 F.2d 912 (7th Cir. 1986), *vacated*, 484 U.S. 807 (1987).

90. *Id.* at 918.

91. The plaintiff alleged that his rights were violated when he was placed in segregated confinement for refusing, on religious grounds, to clean pork off of food trays. *Id.* at 913.

92. *Id.* at 918.

93. *Id.*

94. 803 F.2d 269 (7th Cir. 1986). A widow sued the executive director and the corrections officer of the county correctional facility where her husband had been held. The husband had allegedly been beaten while at the facility. *Id.* at 271.

A jury found for the plaintiff as against all defendants. The court of appeals held that the verdict against the executive director could not stand and that a new trial was required because the liability of the officer, who was not alleged to have personally inflicted any injury on the inmate was not fairly represented to the jury. *Id.* at 275-76.

95. *Id.* at 274. See also *Wilson v. City of N. Little Rock, Ark.*, 801 F.2d 316, 322-23 (8th Cir. 1986) (police chief must have either personally ordered or breached a duty to supervise roadblock alleged to have caused constitutional violation; mere negligence not enough).

96. In this case, the theory may be intertwined with a failure to supervise theory or with an unconstitutional policy theory. See *infra* notes 101-154 and accompanying text.

97. 757 F.2d 2227 (11th Cir. 1985).

conditions in the county jail.⁹⁸ The plaintiffs sued several defendants, including the mayor. The Eleventh Circuit upheld the trial court's grant of a directed verdict in favor of the mayor because the violations were the result of a single incident and not a history of abuse.⁹⁹ The court noted that a causal connection between the mayor's actions and the deprivation of rights could be established only where a history of widespread prior abuse puts the official on notice of the need for improved training or supervision.¹⁰⁰

V. SUING SUPERVISORS IN THEIR OFFICIAL CAPACITY

A. Overview

Officials may be liable in their official capacities only when "execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury."¹⁰¹ The Supreme Court has narrowed the contours of the "policy or custom" basis for supervisory liability since *Monell*.¹⁰² The plaintiff must now meet several general requirements when suing supervisors in their official capacity.

First, proving that one unconstitutional incident occurred is usually not enough to prove that the municipality is engaged in an unconstitutional policy or custom.¹⁰³ According to the Seventh Circuit, "proof of a single incident of unconstitutional activity is not enough to impose liability under *Monell*, unless proof of the incident includes proof that it was caused by an existing, unconstitutional policy, which policy can be attributed to a municipal policy

98. The plaintiffs were African-Americans; the defendants were Caucasian. The incident arose out of a protest rally held in Georgia by African-Americans. Violence broke out at the rally. "Witnesses for the plaintiffs testified that whites attacked the blacks and that the . . . police participated in the attack." *Id.* The defendants denied these allegations. *Id.* at 1233.

99. *Id.* at 1242.

100. *Id.* at 1241-42. See also *Marachant v. City of Little Rock, Ark.*, 741 F.2d 201, 204-05 (8th Cir. 1984) (police chief could not be held liable for injuries suffered by pretrial detainee resulting from failure to give detainee her prescribed medicine during incarceration; improper dispensing of medicine was an isolated incident about which chief had no knowledge).

101. *Monell v. Dep't of Social Servs.*, 436 U.S. 658, 694 (1978).

102. The Court in *Monell* stated that it would not address the parameters of "policy or custom," but would "leave the decision for another day." *Id.* at 695.

103. *Thompkins v. Belt*, 828 F.2d 298 (5th Cir. 1987); *Rascon v. Hardiman*, 803 F.2d 269 (7th Cir. 1986).

maker.¹⁰⁴ Second, the plaintiff must prove that the unconstitutional policy actually caused the injury.¹⁰⁵ The plaintiff must establish an "affirmative link" between her deprivation of rights and the "adoption" of a plan or policy by the supervisors "showing their authorization or approval of such misconduct."¹⁰⁶ The plaintiff proves the causal link, according to the Ninth Circuit, if she shows the supervisor "set in motion a 'series of acts by others which the actor knows or reasonably should know would cause others to inflict the constitutional injury.'¹⁰⁷

B. City of St. Louis v. Paprotnik: The Supreme Court's Recent Discussion of Official-Capacity Cases

Suing supervisors in their official capacity is, in effect, the same as suing the governmental entity directly. The supervisors act as agents for the governmental entity.¹⁰⁸ As a result, a discussion of the current status of municipal liability under section 1983 is necessary. In the 1980's the Supreme Court handed down several opinions examining the "policy or custom" issue; these opinions show definite divisions within the Court.¹⁰⁹ *City of St. Louis v. Paprotnik*¹¹⁰ summarizes the Court's recent commentary on the matter.

In *Paprotnik*, a city employee who was transferred and later laid off filed suit against the city claiming that he had been penalized for filing a complaint with the city's Civil Service Commission.¹¹¹ The Court reviewed

104. *Rascon*, 803 F.2d at 274 (quoting *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 822 (1985)).

105. *Bergquist v. County of Cochise*, 806 F.2d 1364, 1369-70 (9th Cir. 1986).

106. *Id.* at 1370. Note the language concerning "authorization or approval." This language usually connotes individual liability, not official capacity liability.

107. *Id.* at 1370 (quoting *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978)).

108. *See Geter v. Willie*, 842 F.2d 1352, 1354 (11th Cir. 1988).

109. *See, e.g., City of St. Louis v. Paprotnik*, 485 U.S. 112 (1988); *Springfield v. Kibbe*, 480 U.S. 257 (1987); *Los Angeles v. Heller*, 475 U.S. 796, *reh. denied*, 476 U.S. 1154 (1986); *Oklahoma City v. Tuttle*, 471 U.S. 808 (1985).

110. 485 U.S. 112 (1988).

111. The plaintiff, an architect, was a management-level employee in one of the city's agencies who successfully appealed a temporary suspension to the city's Civil Service Commission. *Id.* at 116. Two years after the appeal, he was transferred to a clerical position in another agency; he was terminated from the job one year later. *Id.* A jury found the city liable under section 1983 on the theory that the plaintiff's first amendment rights had been violated by the retaliatory actions taken after his appeal to the Commission. *Id.* The Eighth Circuit affirmed, finding that the jury had "implicitly determined that [plaintiff's] layoff from [the agency] was brought about by an unconstitutional city policy." *Id.* at 116-17.

the *Monell* decision, noting that governmental bodies can only act through people, and that the governments should be held responsible only when "their official policies cause their employees to violate another person's constitutional rights."¹¹² This interpretation follows from the language in the statute that provides liability when a government "subjects [a person], or causes [that person] to be subjected," to a deprivation of constitutional rights. This language sets out a causation requirement that would be incompatible with vicarious liability.¹¹³

The Court noted that since *Monell*, it had considered cases involving isolated acts by government officials and employees. In these cases, the Court found that an unconstitutional governmental policy could be "inferred from a single decision taken by the highest officials responsible for setting policy in that area of the government's business."¹¹⁴ In contrast, the Court noted, "we have held that an unjustified shooting by a police officer cannot, without more, be thought to result from official policy."¹¹⁵

The Court then discussed when a decision made on a single occasion would be enough to establish municipal policy. Justice O'Connor, writing for a plurality of the Court,¹¹⁶ recalled *Pembaur v. Cincinnati*.¹¹⁷ In *Pembaur*, Justice Brennan's plurality opinion announced several guiding principles for analysis of municipal liability. First, a municipality may only be liable under section 1983 for acts for which the municipality is itself responsible. The municipality must have officially sanctioned the act. Second, only those municipal officials who have "final policymaking authority" can subject the government to liability for their actions. Third, whether the official has final policymaking authority is a question of state law. Finally, the action alleged to be an unconstitutional policy must have been taken by officials authorized under state law to make policy in that area of the city's business.¹¹⁸

Justice O'Connor clarified these principles. She emphasized that the identification of policy-making officials is a question of state law. States have wide latitude in choosing forms of local government, and as a result of local

112. *Id.* at 121.

113. *Id.* at 122.

114. *Id.* at 123. Note that a single illegal action cannot be a policy, but a single decision by an official with authority to make policy can be a "policy" under *Monell*.

115. *Id.*

116. Justice O'Connor wrote the plurality opinion in which Chief Justice Rehnquist, Justice White, and Justice Scalia joined. Justice Brennan wrote a concurring opinion in which Justices Marshall and Blackmun joined. Justice Stevens dissented. Justice Kennedy took no part in the decision.

117. 475 U.S. 469 (1986).

118. *Praprotnik*, 485 U.S. at 123.

preferences, there are many distinct forms of local government. Whether a specific official has responsibility for making policy decisions in a given area of the local government's business is not a question of fact for the federal courts. State law will always direct a federal court to the official or body who has policymaking authority. Even though state law will not always be perfectly clear, Justice O'Connor saw no more difficulty here for the federal courts in interpreting state law than in any other context.¹¹⁹ The plurality held the following:

A federal court would not be justified in assuming that municipal policy-making authority lies somewhere other than where the applicable law purports to put it. And certainly there can be no justification for giving a jury the discretion to determine which officials are high enough in the government that their actions can be said to represent a decision of the government itself.¹²⁰

Justice O'Connor pointed out that the result would be indistinguishable from *respondeat superior* liability if the mere exercise of discretion by an employee could give rise to a constitutional violation. Conversely, section 1983 could not serve its intended purpose if a city's lawful policymakers could insulate the city from liability simply by delegating their policymaking authority to other employees.¹²¹

Justice O'Connor offered some principles to guide federal courts in dealing with this dilemma of municipal policymakers avoiding constitutional liability by delegating their authority. First, any attempt by government officials to insulate themselves from liability for unconstitutional policies would be addressed under the "custom" aspect of section 1983 liability. Although not expressly authorized by municipal policy, the plaintiff may prove that the unconstitutional practice is "so permanent and well settled as to constitute a 'custom or usage' with the force of law."¹²²

Second, O'Connor emphasized that the authority to make municipal policy is the authority to make final policy. "When an official's discretionary decisions are constrained by policies not of that official's making, those policies, rather than the subordinate's departures from them, are the act of the

119. *Id.* at 125-26. In the instant case, the Court examined the St. Louis City Charter to find that the mayor and aldermen were authorized to adopt ordinances relating to personnel administration. The Charter authorized the Civil Service Commission to prescribe rules for the administration and enforcement of personnel matters. The Court found that action by any of the above parties would be attributable to the city itself. *Id.*

120. *Id.* at 126.

121. *Id.*

122. *Id.* at 127.

municipality.¹²³ Thus, when the municipality's authorized policymakers have the power to review a subordinate's decision, they have retained the power to examine the subordinate's conduct to make sure it conforms with their policies. If the policymakers approve the subordinate's decision and the basis for that decision, the municipality would be responsible for the approval because the policymakers' decision is final.¹²⁴ When policymaking officials simply go along with decisions made by their subordinates, however, they do not delegate to them the authority to make policy. This is especially true when the subordinate's decision reflects a retaliatory or otherwise wrongful motive. In such a situation, the purposes of section 1983 are not furthered by treating the subordinate's decision as if it were an indication of the municipality's policy.¹²⁵

Justice Brennan wrote a concurring opinion, joined by Justices Blackmun and Marshall.¹²⁶ He saw the issue as whether respondent's supervisor possessed the authority to establish final employment policy for the city of St. Louis. If so, the city could be held liable under section 1983 for the supervisor's allegedly unlawful decision to transfer plaintiff to a dead-end job.¹²⁷ Justice Brennan concluded that the supervisor did not have final policymaking authority.¹²⁸ Justice Brennan believed, however, that the plurality's formulation of municipal liability was too narrow and would lead municipalities to insulate themselves from liability for the acts of a great number of actual municipal policymakers.¹²⁹

123. *Id.*

124. *Id.* In the instant case, the plaintiff never contended that anyone in the city government promulgated an unconstitutional policy. He argued that his appeal to the Civil Service Commission angered his superiors, that new supervisors in a new administration chose to retaliate against him two years later by transferring him to another agency, and that this transfer was part of a scheme that caused his termination a year and a half later. *Id.* The Court noted that even if the accusations were true, the plaintiff said nothing about the actions of those whom the law established as makers of municipal policy regarding personnel administration: the mayor, aldermen, and Civil Service Commission. *Id.* at 126-28.

The court of appeals mistakenly concluded, according to Justice O'Connor, that officials who had the authority to effect transfers and layoffs were municipal policymakers. *Id.* at 127-28. The Supreme Court found that such officials did not have the authority to establish employment policy for the city with respect to transfers and layoffs; the City Charter expressly stated that the Civil Service Commission had these duties. *Id.* at 128-29.

125. *Id.* at 130.

126. *Id.* at 131-32 (Brennan, J., concurring).

127. *Id.* at 132.

128. *Id.*

129. *Id.*

Although state law should be a starting point for determining whether a municipal official has policymaking authority, Justice Brennan believed that the fact finder must ultimately ascertain where the authority actually resides, not "where the applicable law purports to put it."¹³⁰ Justice Brennan considered the "custom or usage" doctrine inadequate to compensate for a rule that leaves the identification of policymakers exclusively to state statutory law.¹³¹ State statutes often have little bearing on the issue of whether a city has delegated *de facto* policymaking authority to a given official.¹³² Justice Brennan also disagreed with the plurality's "narrow and overly rigid view" of when an official's policymaking authority is "final."¹³³ He noted that supervising officials may, as a matter of practice, never invoke their power to review the decisions of subordinates. In those situations, the subordinates' decisions are "in effect the final municipal pronouncement on the subject."¹³⁴

The circuits that have considered the matter accepted the *Praprotnik* plurality's approach without much discussion or dissent. All agree that courts must look at state law to determine who is a final policymaker.¹³⁵ The Sixth

130. *Id.* at 143. Justice Brennan noted that the plurality could state no authority for the "startling" proposition that state statutory law should provide the exclusive means to identify municipal policy-makers. "We have never suggested that municipal liability should be determined in so formalistic and unrealistic a fashion." *Id.* Note that Brennan wrote the majority opinion in *Monell*.

131. *Id.* at 143-44.

132. *Id.* at 144. Brennan saw a "gaping hole" in the plurality's construction of section 1983. He gave the example of a city practice of delegating final policy-making authority to a subordinate or mid-level official. The delegation itself would be constitutional. An isolated unconstitutional act by an official so authorized would not amount to a municipal "custom or usage." Brennan felt that such an isolated act should give rise to municipal liability under *Pembaur v. Cincinnati*, 475 U.S. 469 (1986); yet, such a case would fall through the plurality's construction because state statutory law would not identify the official as a municipal policymaker. *Praprotnik*, 485 U.S. at 144 (Brennan, J., concurring).

133. *Id.* at 143-44.

134. *Id.* at 144-45. Justice Brennan concluded that a section 1983 plaintiff should be able to have a jury decide whether a given official has "final" decision-making power, "for the law is concerned not with the niceties of legislative draftsmanship but with the realities of municipal decisionmaking, and any assessment of a municipality's actual power structure is necessarily a factual ad practical one." *Id.*

135. See, e.g., *Johnson v. Hardin County, Ky.*, 908 F.2d 1280 (6th Cir. 1990); *Crowley v. Prince George's County, Md.*, 890 F.2d 683 (4th Cir. 1989); *Worsham v. City of Pasadena, Tex.*, 881 F.2d 1336 (5th Cir. 1989); *Gobel v. Maricopa County, Ariz.*, 867 F.2d 1201 (9th Cir. 1989); *Wulf v. City of Wichita, Kan.*, 883 F.2d 842 (10th Cir. 1989); *Mandel v. Doe*, 888 F.2d 783 (11th Cir. 1989); *Bordanaro v. McLeod*, 871 F.2d 1151 (1st Cir.), *cert. denied*, 110 S. Ct. 75 (1989); *Baez v. Hennessy*, 853 F.2d 73 (2d Cir.), *cert. denied*, 488 U.S. 1014 (1988); *Williams v.*

Circuit followed the Supreme Court's narrow interpretation of who is a final policymaker in *Johnson v. Hardin County, Kentucky*.¹³⁶ In that case, a former prisoner sued the jailor and the county for alleged deliberate indifference to serious medical needs.¹³⁷ The court upheld the verdict against the jailor but set aside the verdict against the county.¹³⁸ Although the jailor had authority to make medical policy decisions at the prison, the court found that the jailor did not have statutory authority to make medical policy decisions for the entire county.¹³⁹ The Sixth Circuit found the plurality's approach "particularly reasonable" because many governmental officials have the discretion to make some final decisions without the approval of those who have the authority to set policy on that subject matter.¹⁴⁰ The Sixth Circuit found that any other outcome would result in municipal liability for "every discretionary decision of every municipal employee, a result rejected by the [Supreme] Court."¹⁴¹

The Eighth Circuit has taken a broader view.¹⁴² In *Williams v. Butler*,¹⁴³ the Eighth Circuit upheld municipal liability under *Praprotnik*, stating that the city of Little Rock, Arkansas may be held liable for the unconstitutional discharge of a municipal court clerk by a municipal judge.¹⁴⁴

Butler, 863 F.2d 1398 (8th Cir. 1988), *cert. denied*, 492 U.S. 906 (1989).

136. *Johnson*, 908 F.2d at 1280.

137. *Id.* at 1280-81.

138. *Id.*

139. *Id.* at 1286-87. The court referred to language in Justice O'Connor's opinion stating that "when an official's discretionary decisions are constrained by policies not of that official's making, those policies, rather than the subordinate's departures from them are the act of the municipality." *Id.*

140. *Id.* at 1285-87.

141. *Id.* at 1286-87. The jailor did have final policy-making authority over his prison according to Kentucky statute, therefore alleviating many problems of imposing municipal liability. *Cf. infra* notes 141-150 and accompanying text, where courts found the final policy-making authority to exist.

142. *See also* Mandel v. Doe, 888 F.2d 783, 793-94 (11th Cir. 1989). The Eleventh Circuit also took a broader view of final decision-making policy in a factual situation similar to *Johnson*.

143. 863 F.2d 1398 (8th Cir. 1988).

144. *Id.* at 1399. The court had upheld the liability of Little Rock twice before, but both times the decision had been remanded by the Supreme Court. The Supreme Court remanded in 1986 so that the Eighth Circuit could reconsider the case in light of *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986). The Eighth Circuit's decision on remand was vacated for reconsideration in light of *City of St. Louis v. Paprotnik*, 485 U.S. 112 (1988).

The court of appeals characterized the *Praprotnik* holding in terms of how much authority was delegated to the official.¹⁴⁵ The court noted that a "very fine line" exists between the delegation of final policymaking authority, for which the municipality may be held liable, and giving discretionary authority to that official, for which the municipality may not be held liable.¹⁴⁶ The court found the distinction to lie in the amount of authority the authorized policymakers retain.¹⁴⁷ *Praprotnik* delivered a "clear message" that when the authorized policymakers retain a right to review the decisions of the subordinate, there cannot be municipal liability because the delegation of authority is not absolute. In contrast, when there is an absolute delegation of authority to a subordinate with no right of review by the authorized policymakers, the municipality may be held liable for that official's decisions.¹⁴⁸ The court found that the city delegated final policymaking authority to the municipal judge for the hiring and firing of his staff. The city admitted that the judge had sole authority to discharge clerks and determine the clerks' working conditions.¹⁴⁹ The city's Personnel Policy Statement placed municipal court employees under the exclusive jurisdiction of the judge for whom they worked.¹⁵⁰ The court held that the city granted absolute authority to the judge with regard to employment policy in his court, and that this grant of absolute authority would support municipal liability under *Praprotnik*.¹⁵¹

The *Williams* decision should be compared to the Sixth Circuit's *Johnson* decision, where municipal liability would not always exist when the subordinate's action was unreviewable. The Sixth Circuit would look further to determine whether the subordinate's decision was "constrained" by a "policy not of that official's making."¹⁵² The Eighth Circuit would only look at whether the subordinate's decision was subject to review.¹⁵³ It will remain for the Supreme Court to further clarify when an official has "final" policymaking authority.¹⁵⁴

145. *Williams*, 863 F.2d at 1399-1400.

146. *Id.* at 1407.

147. *Id.*

148. *Id.* at 1402.

149. *Id.*

150. *Id.*

151. *Id.* at 1402-03.

152. *See supra* notes 136-141 and accompanying text.

153. *See supra* notes 142-151.

154. In addition, it appears that the question of municipal liability turns on how a court characterizes the official in relation to the governmental entity. In *Johnson*, for instance, the jailor clearly had final authority in that prison for the decisions he made. The court, however, characterized the jailor's decision-making power relative

VI. PRACTICE NOTES

There are several factors the practitioner must keep in mind when dealing with section 1983 cases. First, the practitioner must take care to allege all possible bases of liability in the complaint. Given the great number of section 1983 cases, federal courts are likely to require more than the notice pleading required by Federal Rule of Civil Procedure 8(a).¹⁵⁵ Although the pleading may survive the initial motion to dismiss for failure to state a claim, a mere notice pleading may not be sufficient to allow remand after appeal. For example, the plaintiff initiates a section 1983 suit suing the supervisor in his individual and official capacities. Assuming there is no personal involvement by the supervisor, the plaintiff pleads failure to train as the theory of liability. If the failure to train theory is rejected on appeal, the appellate court need not remand the case to see if there was a "custom or policy" of abuse because the plaintiff did not plead "custom or policy." The appellate court may do this even when reasonable people would differ as to the facts; that is, the district court could not have granted summary judgment on the custom or policy issue had it been pled.¹⁵⁶

This type of action by the courts of appeals clearly runs contrary to the federal policy of notice pleading. Presumably, under notice pleading, once the plaintiff sues a supervisor in her official capacity, the official is on notice that

to the whole county. *Johnson*, 908 F.2d at 1286-87. Since the jailor did not have final policy-making authority with regard to medical matters for the whole county, there was not a delegation of policy-making authority sufficient for liability under *Praprotnik*. *Id.* The Eighth Circuit, conversely, characterized the judge's policy making authority relative to his own chambers in *Williams* and it upheld liability. *Id.* at 1287-89. As a result, the Sixth Circuit took a wide view, while the Eighth Circuit took a narrower view. Presumably, the Sixth Circuit would not have upheld municipal liability in *Williams* because it would have found that the judge had no final authority to make personnel decisions for all of the municipal courts in Little Rock.

155. FED. R. CIV. PROC. 8(a) deals with claims for relief and states the following:

A pleading which sets forth a claim for relief . . . shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

See also FED. R. CIV. P. 9 on pleading special matters.

156. See *Williams v. Cash*, 836 F.2d 1318, 1320 (11th Cir. 1988) (no allegation by plaintiff of policy or custom or of constructive notice; summary judgment granted against plaintiff); *Patton v. Przybyisni*, 822 F.2d 697, 701 (7th Cir. 1987) (complaint inadequate and therefore dismissed).

the main issue of liability will be whether there is a policy or custom. The reviewing court should then look for any facts that would support a finding of a policy or custom, even if the plaintiff did not specifically allege it. Then, the court would be construing the facts in the light most favorable to the plaintiff.

A second suggestion for practitioners relates to the prayer for damages. The practitioner should ask for nominal damages in the amount of one dollar separate from any compensatory or punitive damages. The pleading should ask for these damages even if no compensatory damages are awarded. The reason for asking for the nominal damages is that the plaintiff may be awarded his attorney fees under section 1988 if the plaintiff "prevails" in the section 1983 case.¹⁵⁷ This may occur because in supervisory liability cases, often the plaintiff will not win any compensatory damages because the plaintiff will not be allowed to maintain the suit against one or more of the defendants.¹⁵⁸ Further, in many cases the plaintiff will not find out that he lost until the case is decided on appeal. By this stage, the attorneys have worked many hours on the case. Thus, by asking for the nominal damages, the plaintiff has a greater chance of "prevailing" and thus being awarded attorney fees under section 1988.

VII. COMMENT

In the years since *Monell*, the Supreme Court has narrowed the chance of recovery for plaintiffs in cases under section 1983. The cases indicate fewer circumstances where municipal liability will be imposed. Plaintiffs have a difficult burden of proof in official capacity cases because they must prove not only how the defendant treated them, but also how the defendant treated others. Plaintiffs are definitely at a great disadvantage in obtaining this information.

Even though the road to recovery is a difficult one for section 1983 plaintiffs alleging supervisory liability, plaintiffs can win. *Monell* could be read on its face as requiring a strict prohibition against any form of supervisory liability. The contours of the decisions following *Monell*, however, provide plaintiffs with a means to hold supervisors liable. Unfortunately, injured plaintiffs are often left in the hands of the attorney and the judge, neither of whom may be familiar with the subtleties of the section 1983 cause of action. Judicial confusion is evident when one reads cases that mix the terminology and rules of official capacity and individual capacity cases. For example, an

157. See *supra* note 33 for the rest of the text of 42 U.S.C. section 1988. See also *Carrey v. Piphus*, 435 U.S. 247 (1978).

158. This lack of success would result from the complex rules governing supervisory liability

opinion may examine whether a policy or custom exists when the official is being sued in an individual capacity. In addition to the confusion produced by the supervisory liability cases, there are also policy problems resulting from the current status of section 1983 law. Section 1983 is a blend of tort and constitutional law. Given the plaintiff's diminished chances of recovering against supervisors, however, neither the policies of tort law nor constitutional law are served.

Narrowing the section 1983 plaintiff's chance for recovery does not further tort law policies. Currently, plaintiffs often receive no compensation for their injuries. Many section 1983 plaintiffs, especially victims of police and prison brutality, suffer tangible physical injuries. If these plaintiffs are not able to sue a party who can afford to pay a judgment, then the plaintiffs must absorb these costs themselves. Under normal tort law principles, *respondeat superior* would protect innocent parties from bearing the costs of their own injury. Under section 1983, however, plaintiffs have no such protection. This allocation of losses is unsatisfactory.

Also, a plaintiff's section 1983 case has no deterrent effect if a supervisor or municipality is shielded from liability. One may argue that the price of litigating the case, in terms of attorney's fees and publicity, deters supervisors and municipal officers from violating constitutional rights. Additionally, any large jury award against the municipality would be paid by the taxpayers. It is clear, however, that a large jury award against a supervisor or municipality would have a deterrent effect. When supervisors are sued in their personal capacity, they must pay any damage award individually. A supervisor who lost a section 1983 personal capacity case would surely be very careful about future conduct on the job. When the municipality loses a section 1983 case, the taxpayers pay the award, but they will not continue to pay damage awards forever. Eventually, the taxpayers will demand the ouster of those municipal officials responsible for abuses. Another issue related to deterrence is that tort awards force defendants to increase the safety of their actions to prevent further suits. If plaintiffs' chances for recovery continue to be diminished, defendants clearly will have no impetus to reform the way they conduct themselves.

The policies of constitutional law are more difficult to isolate. Section 1983 is based on the fourteenth amendment Due Process clause, which in turn comes from the fifth amendment Due Process clause. The overall philosophy of these clauses is to protect the individual from government. The founders of this country feared a central government that was too powerful. The Congress that passed the fourteenth amendment feared state governments that had become too negligent of civil rights. Thus, one may reasonably conclude that the constitutional policy behind section 1983 is to protect the individual from oppression by government and to give the individual a method for compensation if oppression does occur. Decreasing a plaintiff's chance of recovery against supervisory officials increases the chance that those officials

will deprive people of their constitutional rights. The officials can get away with misconduct, even oppression, without fear of punishment.¹⁵⁹

Of course, the argument for preventing vicarious liability in section 1983 cases is made in many of the opinions cited in this Comment. Municipal supervisors cannot be held liable for the action of their employees because to do so would put too great a risk on the supervisors and on the municipality. The cost to the municipality would be great and supervisors would be inhibited from doing their jobs. These arguments are unpersuasive. Taxpayers pay when the municipality loses a section 1983 case. Taxpayers also pay when the plaintiff is not allowed to recover in a section 1983 case. When that plaintiff is disabled as a result of injuries sustained at the hands of a police officer, and when that plaintiff cannot recover against the supervisor, the taxpayers often bear the price of that person's use of Medicare or Medicaid. When an inmate dies in prison from inadequate medical care, the taxpayers pay social security benefits to the inmate's spouse and children. Either way, the taxpayers pay. The real question is, "How do we want to pay?" Many section 1983 victims are not financially able to wage a lengthy court battle. Clearly, it is better to compensate these victims up front than to wait until they become dependent on state assistance.

The argument that supervisors will be "chilled" in their official activities if vicarious liability is allowed in supervisory cases is also unconvincing. The person who directly caused the injuries is still personally liable for any damages. Usually this person is not the supervisor; it is the law enforcement officer on the beat or the prison guard on duty. These people are not insulated from liability, yet they are still able to perform their jobs. If these people can do their jobs even though they are constantly threatened with a lawsuit, so can the supervisors.

Given the current composition of the Supreme Court, one may foresee that the plaintiffs' chances for recovery under section 1983 will not be broadened. It may well be that chances for recovery are diminished even further. The Supreme Court must continue to act on what it perceives to be Congress' intent in 1871 when Congress originally enacted section 1983. Accordingly, the solution is for Congress to show a different intent by amending section 1983.

The best way to amend section 1983 to allow vicarious recovery against supervisors and municipalities would be to add a new sentence¹⁶⁰ specific-

159. This was precisely Justice Brennan's point in his dissent in the *Praprotnik* case. He felt that the true policy makers would delegate their policy making authority to subordinates to insulate themselves from liability. See *supra* notes 126-130 and accompanying text.

160. This sentence would be best positioned as the second to last sentence in section 1983.

ly allowing *respondeat superior* liability. The sentence could read as follows: "This section permits vicarious recovery by the party injured from any supervisor, employer or governmental entity." The advantage of this type of change is that it defines Congress' intent regarding *respondeat superior*. The disadvantage of this type of change is that new terms will be introduced into the statute, such as "supervisor" and "employer." To prevent the courts from narrowly interpreting these terms, Congress must define them. For example, "supervisor" could be defined as "any person who supervises, oversees, reviews, evaluates, controls, manages or governs the work of another." The definition must be specific enough to prevent courts from interpreting it themselves, yet it must be broad enough to include any superior connected with the tortfeasor, not only those who possess "final decision making power."

This course of action should result in more judgments collectable under section 1983. The fiscal effect of more damage awards against governmental entities is hard to estimate. An amended section 1983 could lead to the development of errors and omissions insurance for public employees. The taxpayers would have to fund the premiums for such insurance, but surely it would be more efficient to use taxpayers' money for insurance than for lengthy trials and later for public welfare for the uncompensated injured parties. If private physicians and attorneys can afford malpractice insurance, so can governmental entities.

Congress must reexamine the current status of supervisory liability under section 1983. The confusing web of Supreme Court cases attempting to reconstruct the intentions of the men who passed the statute 120 years ago must be supplanted by a clear statement of Congress' intent today. In view of the reasons for having a statute like section 1983 in the first place, surely that intent must be to broaden supervisory liability by allowing *respondeat superior* under the statute.

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