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Municipal Fault Before Municipal Liability: Kibbe v. City of Springfield, 777 F.2d 801 (1st Cir. 1985)

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MUNICIPAL FAULT BEFORE MUNICIPAL LIABILITY: *KIBBE v. CITY OF SPRINGFIELD*, 777 F.2d 801 (1st Cir. 1985)

The Civil Rights Act of 1871,[1] now codified in Title 42, section 1983 of the United States Code,[2] provides broad remedies[3] for persons de-

1. Congress originally enacted § 1983 as § 1 of the Ku Klux Klan Act of 1871. Although its major purpose was to remedy post-Civil War racial violence in the South, § 1983 is now a predominant civil means to remedy violations of all constitutional rights. Section 1 of the Ku Klux Klan Act provides in part:

> [A]ny person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress; such proceeding to be prosecuted in the several district or circuit courts of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts, under the provisions of the act of the ninth of April, eighteen hundred and sixty-six, entitled "An act to protect all persons in the United States in their civil rights, and to furnish the means of their vindication."

Civil Rights Act of 1866, ch. 14, 14 Stat. 27.

2. 42 U.S.C. § 1983 (1982) provides:

> 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.

Id.

For an overview of § 1983 and its prima facie case, see Mahoney, *The Prima Facie Section 1983 Case*, 14 URB. LAW. 131 (1982).

3. Section 1983 creates no substantive rights. It merely provides remedies for deprivations of statutory or constitutional rights. *See* Carey v. Piphus, 435 U.S. 247 (1978) (section 1983 establishes nominal and compensatory damages for victims deprived of constitutional rights). *See generally* Whitman, *Constitutional Torts*, 79 MICH. L. REV. 5 (1980) (a comprehensive discussion of damage remedies for § 1983 violations). *See also* Fee Awards Act of 1976, 42 U.S.C. § 1988 (1981), which provides: "In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title . . ., the Court, in its discretion, may allow the prevailing party other than the United States, a reasonable attorney's fee as part of the costs." *Id.*

prived of their constitutional rights "under color of state law."[4] Section 1983 is a primary statutory basis for federal actions[5] by individuals seeking to remedy municipal police misconduct.[6] In *Kibbe v. City of Springfield*[7] the United States Court of Appeals for the First Circuit held that a jury may find a police department violates the Constitution[8] if it is grossly negligent by failing to train adequately its officers.[9]

In *Kibbe*,[10] the Springfield Police Department received a report of a criminal incident in progress.[11] Upon arriving at the scene, police officers found that Clinton Thurston had abducted Pamela Etter.[12] A high speed chase ensued between several police officers and the suspect.[13] During the chase two officers set up road blocks that Thurston avoided.[14] As Thurston passed the first barrier, one officer fired at the car.[15] When a second barrier failed to stop him,[16] a motorcycle officer

4. To bring a cause of action under § 1983, a plaintiff must allege a deprivation of federal rights occurring "under color of any statute, ordinance, regulation, custom or usage." 42 U.S.C. § 1983 (1982). *See generally* Lugar v. Emondson Oil Co., 457 U.S. 922 (1982) (describing the contours of "under color of state law"). *See also* Mahoney, *supra* note 2, at 135.

5. Between 1871 and 1921 only 21 cases were brought under § 1983. In contrast, plaintiffs filed 15,419 cases in 1981 alone. For an analysis of recent § 1983 caseloads and § 1983 litigation, see Eisenberg, *Section 1983: Doctrinal Foundations and Empirical Study*, 67 CORNELL L. REV. 482, 522-56 (1982); *see generally* Whitman, *supra* note 3, at 26.

6. Police misconduct denotes behavior by municipal police officers that violates federal constitutional or statutory rights. *See generally* M. AVERY & D. RUDOVSKY, POLICE MISCONDUCT: LAW AND LITIGATION (2d ed. 1987).

7. 777 F.2d 801 (1st Cir. 1985).

8. *Id.* at 809.

9. *Id.*

10. *Id.*

11. *Id.* at 802. Clinton Thurston, the suspect, threatened the occupants of an apartment with a knife. Other calls reported that Thurston violated a restraining order and broke down a door. *Id.*

12. *Id.*

13. *Id.* Before the actual chase began, an unmarked policeman attempted to stop Thurston by flashing his headlights, turning on his portable blue light, and activating his siren. When the police officer walked up to the driver's window, Thurston drove off. *Id.*

14. *Id.* One of the police officers claimed that Thurston accelerated when approaching the roadblock and narrowly missed an officer. *Id.*

15. *Id.* at 802. After Thurston drove by, the police officer reported that the suspect attempted to run over another police officer. The dispatcher then broadcasted, "This is not only a violation of a restraining order, it's assault by means of a vehicle." *Id.*

According to the department's rules and regulations, the police department allows

joined the pursuit.[17] Three times Thurston swerved to hit the officer,[18] who then fired two shots at Thurston, the second hitting the suspect in the head.[19] Thurston's car collided with another vehicle and rolled to a stop.[20] Not realizing the bullet had hit Thurston, the officer ordered the suspect out of the car.[21] When Thurston failed to do so, the officer struck him on the head, pulled him from the auto,[22] and handcuffed him. The officer took Thurston to the hospital, where he later died.[23]

Following the shooting, the administratrix[24] of Thurston's estate filed suit under section 1983 alleging that the City of Springfield[25] had deprived Thurston of his civil rights. She claimed that the City's inadequate police training deprived Thurston of his life without due process of the law.[26] The jury found for the plaintiff and awarded monetary damages against the City.[27] The United States Court of Appeals for the First Circuit affirmed.[28]

The Supreme Court first applied section 1983[29] to redress unconsti-

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the use of deadly force to effect an arrest when certain circumstances exist, including an officer's reasonable belief that the crime in question includes the use or threatened use of deadly force. *Id.*

16. *Id.* The second roadblock consisted of a police vehicle across the right hand lane and a police officer in the middle of the other lanes attempting to flag down Thurston's car. *Id.*

17. *Id.* at 803.

18. *Id.*

19. *Id.* The first shot apparently hit a nearby house. In addition, the police officer failed to notify his supervisor of the shots. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* The officer used his flashlight as a weapon to hit the suspect. *Id.*

23. *Id.*

24. *Id.* at 801. The administratrix, Lois Thurston Kibbe, was the appellee. *Id.*

25. *Id.* Kibbe also named several police officers in the action. The appellants were the City of Springfield and the police officers. *Id.*

26. *Id.* at 801-02. *See* U.S. CONST. amend. XIV, which provides in part: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law . . . ."

27. 777 F.2d at 802. More specifically, the jury returned verdicts against the police officer who fired the fatal shot and against the City. The jury awarded one dollar in compensatory damages, five hundred dollars in punitive damages against the officer, and compensatory damages in the amount of fifty thousand dollars against the City. *Id.*

28. *Id.* at 810.

29. To recover in any § 1983 violation, including municipal liability cases, plaintiffs must allege and prove two essential elements. First, the plaintiff must show that the

tutional acts committed by police officers in *Monroe v. Pape*.[30] *Monroe* arose from an incident involving thirteen Chicago police officers[31] who unlawfully searched and ransacked the plaintiffs' home,[32] detained the father at a police station without an opportunity to consult an attorney,[33] and ultimately released him without pressing charges.[34] Plaintiffs sued the City of Chicago, claiming a violation of their constitutional rights.[35] The court held that while Congress intended section 1983 to remedy violations of constitutional rights committed by police officers, municipalities were not "persons" within the meaning of the statute.[36] Although *Monroe* advanced the cause of personal liberty, its rejection of municipal liability has weakened the statute's remedial function.[37]

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conduct occurred under the color of state law. *See* Lugar v. Edmondson Oil Co., 457 U.S. 992 (1982). Second, plaintiffs must show that this conduct deprived plaintiffs of rights, privileges, or immunities secured by the United States Constitution under federal law. *See* Adickes v. Kress & Co., 398 U.S. 144 (1970).

In municipal liability cases, two additional elements are required. First, plaintiffs must show that the challenged act occurred under a governmental "custom or usage." Second, plaintiffs must demonstrate that the custom or usage proximately caused the deprivation. *See infra* note 52 and accompanying text for discussion of proximate cause.

30. 365 U.S. 167 (1961).

31. *Id.* at 169.

32. *Id.* The police officers broke into the plaintiffs' home without a warrant in the middle of the night and made them stand naked while the officers pillaged every room. They emptied drawers and ripped clothing. The officers then took Mr. Monroe to the police station where he stood waiting for ten hours. The officers did not allow him to call an attorney or his family.

33. *Id.*

34. *Id.* Petitioners were six black children and their parents. *Id.* at 167.

35. *Id.* at 169. Petitioners claimed a deprivation of their guaranty against unreasonable searches and seizures, contained in the fourteenth amendment and made applicable to states through the due process clause of the fourteenth amendment. *Id.* at 167.

36. *Id.* at 191 n.50. After an extensive investigation of the statute's legislative history, the *Monroe* Court found that Congress' rejection of the Sherman Amendment indicated its intent to exclude municipalities from the meaning of persons as used in § 1983. Congress believed that this amendment would unconstitutionally impose civil liability upon county and town organizations. *Id.* at 190. For the text of the Sherman Amendment and a discussion of its congressional debate, see generally Mead, *42 U.S.C. Section 1983 Municipal Liability: The Monell Sketch Becomes a Distorted Picture*, 65 N.C.L. REV. 517, 525 n.53 (1987).

37. *Monroe* dealt with two issues that ultimately advanced the protection of constitutional rights: whether the invasion of the Monroe home constituted a deprivation of the Monroes' rights secured by the Constitution within the meaning of § 1983, and whether Congress intended to give a remedy under § 1983 to parties deprived of consti-

Seventeen years later the Supreme Court reversed its position on the municipal liability issue in *Monell v. Department of Social Services.*[38] The Court held that a municipality could be liable for damages inflicted pursuant to official governmental policy or custom.[39] In *Monell,* female employees of the Department of Social Services and the Board of Education for the City of New York alleged that the agencies unconstitutionally maintained an official policy[40] that compelled a pregnant employee to take unpaid leave before it was medically necessary.[41] In overruling *Monroe,* the Court concluded that Congress intended section 1983 to include municipalities as persons[42] and that municipal liability existed for such actions.[43]

The *Monell* Court also defined the contours of municipal liability under section 1983.[44] Expressly rejecting the theory of *respondeat superior,*[45] the Court held that a municipality could be liable only for acts

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tutional rights by an official's abuse of position. 365 U.S. at 171-72, 187. The *Monroe* Court answered both issues affirmatively, and its ruling is still good law. The Court's rejection of municipal liability because a municipality is not a "person" under § 1983 seriously impaired the full development of § 1983. For criticism of the *Monroe* holding, see Oliver, *Municipal Liability for Police Misconduct Under 42 U.S.C. Section 1983 After City of Oklahoma v. Tuttle,* 64 WASH. U.L.Q. 151 (1986); *See also* Comment, *Municipal Liability for Constitutional Violations: Can You Fight City Hall? A Survey of the Circuits,* 16 DUQ. L. REV. 373 (1978) (also discussing other methods and theories of maintaining a cause of action against a municipality under federal statutory and constitutional authority).

38. 436 U.S. 658 (1978).

39. *Id.* at 690-91.

40. *Id.* at 660-61.

41. *Id.* The suit sought injunctive relief and back pay for periods of unlawful forced leave.

42. *Id.* at 665. The Court undertook a fresh analysis of the legislative history leading to the passage of the Civil Rights Act. In particular, the Court focused on Congress' rejection of the Sherman Amendment. *See supra* note 36. Writing for the seven-member majority, Justice Brennan decided that Congress did not intend a municipality to be immune from "its own violations of the Fourteenth Amendment." *Id.* at 683. *See generally* Mead, *supra* note 36.

43. 436 U.S. at 690-91.

44. *Id.* at 691.

45. *Id.* The majority felt that Congress did not intend to hold municipalities liable unless action pursuant to official municipal policy of some nature caused a constitutional tort. Furthermore, the Court ruled that a municipality cannot be liable solely because it employs a tortfeasor. For a discussion on vicarious liability and *respondeat superior,* see W. PROSSER & W. KEETON, PROSSER & KEETON ON TORTS §§ 69-70 (5th ed. 1984). *See also* C. MORRIS, MORRIS ON TORTS 251 (2d ed. 1980) (defining *respondeat superior* as a theory that holds a master responsible for his servant's torts commit-

committed pursuant to a governmental custom or policy.[46] The Supreme Court defined custom to include any act promulgated by municipal employees and sanctioned by policymakers.[47]

In order to satisfy the *Monell* Court's policy or custom requirement, plaintiffs generally allege that the municipality's policy or custom of training or supervising its police officers is inadequate.[48] The Supreme Court first faced the inadequate training theory in *City of Oklahoma City v. Tuttle*.[49] In *Tuttle*, the Court reversed the Tenth Circuit's[50] holding that a single, isolated incident of unusually excessive force is insufficient to impose section 1983 liability upon a municipality for its

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ted while acting within the scope of his employment even when the master has used due care in the selection, instruction, and supervision of the servant).

46. *Id.* at 690-91. The court used Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970), to establish its rationale that a custom could lead to a constitutional deprivation. *See also* Note, *Municipal Liability Under Section 1983: The Meaning of "Policy or Custom,"* 79 COLUM. L. REV. 304 (1979) (describing the transition from *Monroe* to *Monell* and the Court's justification for such a drastic change and dramatic expansion of civil rights enforcement under 42 U.S.C. § 1983).

47. *Id.* A number of lower courts have interpreted the *Monell* "custom" definition differently. *See generally* Bennet v. Slidell, 728 F.2d 762 (5th Cir. 1984), *cert. denied*, 472 U.S. 1016 (1986); Wellington v. Daniels, 717 F.2d 932 (4th Cir. 1983); Turpin v. Mailet, 619 F.2d 196 (2d Cir. 1980).

48. *See, e.g.*, Votour v. Vitale, 761 F.2d 812 (1st Cir. 1985) (misconduct attributed to inadequate training); Wellington v. Daniels, 717 F.2d 931 (4th Cir. 1983) (failure to properly train officers in weapons use); Languirond v. Hayden, 717 F.2d 220 (5th Cir. 1983) (alleged inadequacy in use of firearm); Hays v. Jefferson, 668 F.2d 869 (6th Cir. 1982). *See also* Penland & Boardman, *Section 1983—Contemporary Trends in the Police Misconduct Arena*, 20 IDAHO L. REV. 661 (1984); Comment, *Municipal Liability Under Section 1983: Rethinking the "Policy or Custom" Standard After City of Oklahoma City v. Tuttle*, 71 IOWA L. REV. 1209 (1986).

49. 471 U.S. 808 (1985). In *Tuttle*, a police officer from Oklahoma City, while responding to an all-points bulletin concerning a robbery in progress, shot and killed Mrs. Tuttle's husband. *Id.* at 811. Mrs. Tuttle alleged that the actions of both the officer and the city deprived her husband of his constitutional rights. *Id.* at 811. She further alleged that the city's inadequate training policies caused her husband's death. *Id.* She attempted to prove her theory in two ways. First, she alleged that the circumstances surrounding the shooting conflicted with accepted police practices. *Id.* at 826. Second, she attempted to establish an inadequate training policy through the testimony of an expert on police training procedures. *Id.*

50. The Tenth Circuit held that the shooting was so plainly and grossly negligent that it strongly showed a lack of adequate training. City of Oklahoma City v. Tuttle, 728 F.2d 456, 461 (1984).

In the Supreme Court, however, both the plurality consisting of Rehnquist, Burger, White, and O'Connor, and the concurrence composed of Brennan, Marshall, and Blackman, agreed that evidence of a single incident is insufficient to support an inference of inadequate municipal training policies. 471 U.S. 808 (1985).

inadequate training policy.[51] The plaintiff must demonstrate that the city, as opposed to a nonpolicymaking municipal employee, is responsible for the constitutional violation.[52] As a result of *Tuttle*, a section 1983 plaintiff bears a heavier burden of pleading and proving the inadequacy of the police training curriculum.[53]

The plaintiff must also demonstrate that the policy or custom caused the constitutional violation.[54] In *Rizzo v. Goode*,[55] the Supreme Court held that a police officer's misconduct must be both causally linked to the constitutional deprivation[56] and the result of a municipal procedure.[57] The Supreme Court's requirement of this additional element in municipal liability cases forces an injured party to prove that the policy or custom was the cause-in-fact[58] and the proximate cause[59] of the injury.[60]

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51. The Court indicated that while general liability could be imposed for a single incident, it was insufficient to establish municipal liability. The Court did state that in all cases considerably more proof is necessary to establish the requisite fault of the municipality. 471 U.S. at 811.

For discussion of *Tuttle* and its subsequent effects on the theory of municipal liability, see generally, Comment, *City of Oklahoma City v. Tuttle: Causation in Municipal Liability Cases Under Section 1983*, 11 OKLA. CITY U.L. REV. 207 (1986); Comment, *Municipal Liability After City of Oklahoma City v. Tuttle: A Single Incident of Police Misconduct May Establish Municipal Liability Under 42 U.S.C. Section 1983 When Based on Inadequate Training or Supervision*, 20 SUFFOLK U.L. REV. 551 (1986) [hereinafter *Municipal Liability After Tuttle*].

52. This qualification on municipal liability effectively raises the burden of proof. Plaintiff must now show a causal connection between the policy and the constitutional deprivation. 471 U.S. at 823. In formulating this standard, the Court required that the plaintiff show at least an affirmative link between the policy and the violation. *Id. See generally* Votour v. Vitale, 761 F.2d 812 (1st Cir. 1985); Hays v. Jefferson County, 668 F.2d 869 (6th Cir. 1982); Wellington v. Daniels, 717 F.2d 936 (4th Cir. 1983). *See also* C. MORRIS, MORRIS ON TORTS 174 (2d ed. 1980) (defining proximate cause as those causes which are so closely connected with the result and of such significance that the law is justified in imposing liability).

53. 471 U.S. at 822-24.

54. A plaintiff can establish the existence of a policy or custom by using the *Tuttle* technique and alleging that the municipality's policy or custom of training or supervising its police officers is inadequate. *See* City of Oklahoma City v. Tuttle, 471 U.S. 808 (1985).

55. 423 U.S. 362 (1976).

56. *Id.* at 375.

57. *Id.*

58. *See generally* W. PROSSER & W. KEETON, *supra* note 45, at 265. (the "but for" test and the "substantial factor" test establish cause-in-fact).

59. *See* C. MORRIS, *supra* note 52, at 174.

60. Courts have recently sought to clarify further municipal liability analysis. *See*

Recently, in the *City of Springfield v. Kibbe*,[61] the Supreme Court granted certiorari to address the controversial issue of municipal liability for inadequate training of employees[62] and to decide whether this liability is consistent with *Monell*.[63] The majority did not decide the case on the merits,[64] however, because it felt the case was an inappropriate vehicle for resolving the inadequate training issue.[65] The majority[66] refused to decide questions not raised or litigated in the lower court,[67] especially where the petitioner failed to object to a jury instruction.[68] By deciding *Kibbe* solely on procedural grounds, the Supreme Court has effectively left any decision on the substantive issues to the appellate courts.[69]

The dissent[70] believed the case warranted a decision on the merits.[71] Disagreeing with the court of appeals, the dissent contended that the

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Owens v. City of Independence, 445 U.S. 622 (1980) (establishing the right of qualified immunity for municipalities on certain occasions); City of Newport v. Fact Concerts Inc., 453 U.S. 247 (1981) (courts should not assess punitive damages against municipalities).

61. 480 U.S. 257 (1987). Because the Supreme Court dismissed the case on procedural grounds instead of addressing the merits, the substantive issues remain undecided. The First Circuit is the highest court to discuss the substantive issues, and therefore, the author chooses to comment on this decision, not the procedural decision of the Supreme Court.

62. *Id.* The Court also considered whether more than "negligence" in training is required to establish municipal liability.

63. 436 U.S. 658 (1978) (municipality liable for damages inflicted pursuant to official governmental policy or custom).

64. The Court dismissed the case on procedural grounds. 480 U.S. at 258-60.

65. *Id.*

66. The majority's opinion was a per curiam decision. *Id.* at 258.

67. *Id.* The Court based its decision on California v. Taylor, 353 U.S. 553, 556 n.2 (1957), which gave the Supreme Court the power to dismiss a case because the issue was not raised or litigated in the lower court. *See also* FED. R. CIV. P. 51, which provides that "[n]o party may assign as error the giving . . . [of] an instruction unless he objects thereto before the jury retires to consider its verdict." *Id.*

68. *Id.*

69. *See infra* note 71 listing the two substantive issues in *Kibbe*.

70. Justice O'Connor wrote the dissent, with whom Chief Justice Rehnquist, Justice White, and Justice Powell joined. 480 U.S. at 260-72.

71. The dissent would have granted certiorari to determine whether a city can be held liable under 42 U.S.C. § 1983 for providing inadequate police training, and if so, what standard should govern the imposition of such liability. 480 U.S. at 260. Because the court of appeals had expressly ruled on the negligence issue, the dissent could find no jurisdictional or prudential reason why the Court should not review the decision on the merits. *Id.* at 263-64.

element of causation was necessary to a finding of municipal liability.[72] Without proximate causation between the custom or policy of inadequate training and the alleged constitutional violation, the dissent would not hold the municipality liable for the negligent acts of its employees.[73]

In *Kibbe v. City of Springfield*[74] the First Circuit reaffirmed the principle that section 1983 liability arises from injuries inflicted by government policy or custom.[75] With this in mind, the First Circuit affirmed the trial court's decision, thus distinguishing *Kibbe* from *Oklahoma City v. Tuttle*.[76] In *Tuttle*, the Supreme Court held that a single incident of police misconduct by itself does not permit an inference of inadequate police training.[77]

The court of appeals distinguished these cases in two respects. First, the court reasoned that unlike the defective jury instruction in *Tuttle*,[78] the *Kibbe* instruction expressly informed the jury that they could not find the city liable solely on evidence of a single incident of police misconduct.[79] The court then found that while sparse evidence regarding the Springfield Police Department's training policy existed in the record,[80] the jury could have reasonably concluded from testimony,[81] facts,[82] and assumptions[83] that the training was grossly inadequate.[84]

The court drew a second distinction between *Kibbe* and *Tuttle*[85] in

72. *See* Rizzo v. Goode, 423 U.S. 362 (1976).

73. *See supra* note 52 for discussion of proximate cause.

74. 777 F.2d 801 (1st Cir. 1985).

75. *Id.* at 803. The court also affirmed that § 1983 may not be imposed on a basis of vicarious liability. *Id. See also supra* note 45.

76. 471 U.S. 808 (1985).

77. *Id.* at 815.

78. *Id.* at 811-15. The judge instructed the jury that if they found the incident of police misbehavior so outrageously out of accord with accepted police practices, they could infer from those actions that the city's policies or customs caused the injury. *Id.*

79. 777 F.2d at 809-10.

80. *Id.* at 807.

81. *Id.* Testimony from two officers indicated that the department gave no guidance in apprehending suspects fleeing in motor vehicles. *Id.*

82. *Id.* at 804. In reviewing the case, the court admitted that the facts were close and thus refutable. *Id.*

83. *Id.* at 807. The court lists a chain of inferences that the jury could have made in determining the training program was inadequate. *Id.*

84. *Id.*

85. *Id.* at 806. *See also infra* note 88 and accompanying text.

its definition of a "single incident." The court claimed that the *Tuttle* circumstances involved a single officer and a single act of misconduct.[86] The *Kibbe* situation, however, involved ten police officers and many different acts of alleged misconduct.[87] The court distinguished the single incident in *Tuttle* from the supposed single incident in *Kibbe*,[88] stating that there is stronger evidence of municipal fault when incidents involve many acts of police misconduct, even if the acts occur during one episode.[89] Therefore *Kibbe* met the *Tuttle* standard, which requires considerably more proof to meet the requisite causation.[90]

The *Kibbe* court next addressed whether the jury could properly find that the training program proximately caused Thurston's death.[91] The court found sufficient evidence to support the conclusion that the city's training policy caused the constitutional deprivation.[92] Once again the court used inferences and assumptions to support its conclusion.[93] By analyzing the particular events of the evening and concluding that a reasonable jury could find a nexus between the training program and the resulting injury, the court found the city liable.[94]

A narrow reading of *Kibbe* leaves a bold mark on municipal liability cases involving police misconduct under section 1983. The court's analysis and rationale are tenuous and deficient at best.

Although the First Circuit legitimately distinguished *Tuttle* and *Kibbe*,[95] it failed to establish fully a case of liability against the city. Courts have repeatedly stressed the need to find a direct, causal connection between municipal conduct and constitutional deprivation.[96]

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86. *Id.* at 805. The court called this situation a "true single incident," meaning that the misconduct only involved one officer and one wrongdoing. *Id.*

87. *Id.* at 805-06.

88. *Id.*

89. *Id.*

90. *See supra* note 50 (in order to hold a municipality liable the plaintiff must have more proof than just the single incident of misconduct); *see generally Municipal Liability After Tuttle, supra* note 51.

91. 777 F.2d at 806. *See supra* note 52 for a definition of proximate cause and its relation to legal liability.

92. *Id.* at 807. The court used the word "sparse" to describe the evidence supporting municipal liability. *Id.*

93. *Id.*

94. *Id.* at 808.

95. *See supra* notes 58-69 and accompanying text.

96. *See* Monell v. New York Dep't of Social Servs., 436 U.S. 658 (1978) (municipal liability under § 1983 can be imposed only where the municipality itself causes the vio-

In this case, the causal connection between the municipal policy and the constitutional violation is inherently tenuous. The court neglected to consider that a number of other causal factors operated at the time of the officer's alleged misconduct.[97] These factors may have played a predominant part in bringing about the constitutional violation.[98] For instance, the disposition of the individual officers, the extent of their experience with similar circumstances, and the actions of other police officers involved may have contributed to Thurston's death.[99]

By imputing section 1983 liability to the municipality based on speculation and conjecture, the court does not establish that the training program caused[100] the misconduct. The court's inferences directly conflict with the *Tuttle* standard, which requires more than a single incident to establish the requisite fault.[101] This result brings the municipal liability standard closer to vicarious liability than to

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lation); Rizzo v. Goode, 432 U.S. 362 (1976) (policy must be "moving force" behind deprivation). *See also supra* note 51. City of Springfield, Mass. v. Kibbe, 480 U.S. at 260-72. The dissent in this case discussed thoroughly the importance of a causal connection between the municipal policy, here the police training program, and the constitutional violation. The dissent stated that the language and the history of § 1983 require that the municipality is only liable for its own constitutional violations. *Id.* at 268. The government's policy or custom must actually inflict the constitutional injury. *Id.*

97. 480 U.S. at 268. These additional factors represent intervening causes that break the causal connection. If there is no causal connection, there is no liability. *See* W. PROSSER & W. KEETON, *supra* note 45, at 301. ("An intervening cause is one which comes into active operation in producing the result *after* the negligence of the defendant.") (emphasis in original).

98. 480 U.S. at 268.

99. *Id.*

100. *See* Monell v. New York Dep't Social Servs., 436 U.S. 658 (1978). *See also* 480 U.S. at 269 (O'Connor, J., dissenting) ("A jury should be permitted to find that the municipality's inadequate training *caused* the plaintiff's injury only if the inadequacy of the training amounts to deliberate indifference or reckless disregard for the consequences. Negligence in training alone is not sufficient to satisfy the causation requirement of section 1983.").

101. The *Tuttle* standard requires considerably more proof than a single incident. To meet this standard the court of appeals needs more than just inferences and conjecture to hold the municipality liable. If inferences such as those made by the First Circuit in *Kibbe* satisfy the causation element, then practically any negligent or near negligent act may result in a § 1983 suit. *See* 480 U.S. at 270 (O'Connor, J., dissenting) (the plurality opinion in *Tuttle* held that to establish municipal liability for a policy that is not itself unconstitutional, the plaintiff must introduce evidence sufficient to establish the existence of a policy; evidence proving the city's fault in its establishment of the policy; and evidence establishing the policy as the moving force in causing the constitutional harm).

causation.[102]

Kibbe constitutes a major setback in municipal liability cases. The court's use of inferences and conjecture to establish the causation element[103] needed in section 1983 suits exposes all negligent acts by police officers to possible violations of section 1983. This holding is contrary to established standards.[104] A municipality should only be held liable for the acts of its police officers if the plaintiff proves that the municipality maintained a policy of inadequate training or supervision.

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102. *See supra* note 45. *See also* Monell v. Dep't of Social Servs., 436 U.S. at 691 ("A municipality cannot be held liable *solely* because it employs a tortfeasor.") (emphasis in original). *But see generally* Mead, *supra* note 36 (examines the rejection of *respondeat superior* and claims the Court erred in rejecting that concept in favor of the policy or custom causation requirement).

103. The text of *Kibbe* lists the inferences made by the court to establish liability. 777 F.2d at 807.

104. *See, e.g.*, Monell v. New York Dep't of Social Servs., 436 U.S. 658 (1978); Rizzo v. Goode, 432 U.S. 362 (1976).