No. 86-1088

City of Canton, Ohio

v.

Geraldine Harris, Willie Harris, Bernadette Harris

Cert to CA6 (Lively, Jones, Merritt (dis)) (per curiam).

To be argued Tuesday, November 8, 1988

CONTENTS

October 17, 1988 Kearney

SUMMARY

Resp was denied medical attention by police, and brought §1983 action. The DCt's jury instruction stated that the City could be found liable if it was grossly negligent in failing to adequately train its police, and that failure caused the injuries suffered. The jury awarded petrs $200,000. The CA6 affirmed the DCt's instruction, finding that resp had presented sufficient evidence to allow the issue to go to the jury.

Petr claims that the failure to train was not an unconstitutional policy, and that the failure to train was not a policy because it did not involve a deliberate choice on the part of policymakers. Resp contests these positions, arguing that the case should be DIGed, and that a standard of gross negligence in failure to train properly advances the purposes of §1983 without allowing juries to find municipal respondeat superior liability.

The Ct should DIG this case, as the issue of whether the grossly negligent standard was permissible was not addressed adequately below. In the alternative the CA6 should be affirmed. The language, history, and purposes of §1983 are best satisfied by allowing municipal liability when a city has been grossly negligent in failing to adequately train its police. It is not necessary for municipal policymakers to have been reckless or deliberately indifferent in order for their failures to "cause" the constitutional injuries. It is appropriate to use tort principles in the analysis, and as long as the DCt provides a clear instruction ruling out vicarious liability, a grossly negligent standard is workable.

I. BACKGROUND

Mrs. Harris, a 52-year-old black woman, was stopped by a Canton police officer for speeding, and arrested after she allegedly became uncontrollably upset and uncooperative. She was transported to the station in a patrol wagon, and testified that officers used undue force in placing her in the wagon. The officers said that a minimal amount of force was used and that Mrs. Harris was lifted and placed into the vehicle because she could not or would not walk on her own. When the vehicle's door was opened at the station, Captain Maxson, the shift commander, was present, having been notified that his presence might be needed. He testified that Mrs. Harris "was just lying there," which was unusual because "I don't know of anybody that rides in a wagon on the floor." Maxson thought Mrs. Harris might need medical attention, and asked her if she needed a doctor or medication. She did not respond to the question, but asked incoherently about a person named "Ronnie." No medical care was provided.

During booking Mrs. Harris was standing against a wall when she suddenly slumped to the floor. Officers helped her into a chair, but she slumped to the floor again. She was put back in the chair, but again fell. Maxson testified that Mrs. Harris was left on the floor for a short time, up to ten minutes, to avoid further falls. He explained that emotional behavior is common upon incarceration, and that he and another officer believed that Mrs. Harris was merely excited and would calm down if left alone and permitted to see her family. The City argued at trial that

she chose to slump each time and was fully conscious and aware of her actions.

Captain Maxson testified that after a few minutes in Booking, Mrs. Harris was taken to a cell. She testified that while she was incarcerated, she was twice taken from her cell for searches of her person. After bond procedures were completed, Mrs. Harris was released at about 9:00 a.m., having been at the city jail for about 30 to 40 minutes. A little more than an hour had elapsed since she was stopped while driving.

Mrs. Harris's family had her taken by ambulance from the police station to a hospital, where she remained for a week. She was diagnosed as suffering from gross stress reaction, anxiety, and depression, with symptoms including immobility and respiratory difficulty. She required psychiatric therapy for more than a year.

Mrs. Harris, together with her husband and daughter, brought a civil action against the police officers, city officials, and the City of Canton under §§ 1981, 1983, 1985, and 1986, and the 4A, 5A, 8A, 13A, and 14A.[1] Petrs sought compensatory damages of 1 million dollars, and exemplary damages of 2 million. The suit was originally dismissed on statute of limitations grounds, but the CA6 reversed, and a jury trial was held in ND Ohio(Bell, J.).

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[1]Mrs. Harris claimed the following constitutional violations: unlawful seizure, cruel and unusual punishment, deprivation of liberty and physical well being without due process, failure to provide equal protection of the law because of her race, and unlawful search. She also claimed false imprisonment and assault and battery under state law.

At trial there was evidence presented about the policies of the Canton police department in regard to medical treatment for prisoners. Section 334.7 of the Canton Police Regulations provides:

> He[the jailer] shall, when a prisoner is found unconscious or semi-conscious, or when he or she is unable to explain his or her condition, or who complains of being ill, have such person taken to a hospital for medical treatment, with permission of his supervisor before admitting the person to the city jail.

There was testimony that shift commanders are authorized to make medical decisions under §334.7 in their sole discretion based on personal observation. In the face of this grant of discretion, there was no evidence offered that the City provided any training or instructions to shift commanders, other than minimal first aid instruction, to prepare them for making such determinations.

The DCt denied the defs' motion for a directed verdict, and the jury found for the defs on each claim except one. The jury found that Mrs. Harris had been unreasonably denied medical attention while incarcerated, and it awarded her $200,000 against the City. The DCt denied the City's motions for remittiter, a new trial, or judgment n.o.v., and an appeal to the CA6 followed.

II. DECISION BELOW

On appeal the City contended that Mrs. Harris had not put forward evidence on her claim of deprivation of medical attention sufficient to justify that claim going to the jury, and that the DCt improperly instructed the jury on Harris's theories of municipal liability. The CA6 (Lively, Merritt, Jones) affirmed the

DCT's instructions concerning the municipal policy, but reversed and remanded for a new trial on other grounds. Mrs. Harris based municipal liability for the deprivation of medical care on two theories: (1) inadequate training by the City of its police officers, which proximately caused the deprivation; and (2) the participation of supervisory personnel in the deprivation. Where a municipality has wholly failed to train or has been grossly negligent in training its police force, it may be concluded that there was a municipal custom that allowed or condoned certain violations of constitutional rights by police. A plaintiff must prove that the municipality acted recklessly, intentionally, or with gross negligence, and that the inadequate training was causally connected to the deprivation. In other words, petr was required to prove that the lack of training was so reckless or grossly negligent that deprivations of persons' constitutional rights were substantially certain to result.

Harris's theory of grossly inadequate training was based on the established police policy of allowing shift commanders unfettered discretion under rule 334.7 to make the decision to refer a a prisoner based on his personal judgment and perceptions, coupled with the fact that these commanders were given no training or guidelines for making this decision. The former police chief testified as to the discretion in decisionmaking, and the City showed no evidence of adequate training. Mrs. Harris's evidence on these two facts thus raised a valid jury issue of municipal liability for negligent failure to train. The DCt did not err in submitting the theory to the jury. We have reviewed the DCt's

instructions on this theory of liability, and find them adequate.[The CA6 also reviewed jury instructions concerning the participation of supervisory personnel, found them to be in error, and reversed and remanded as a result.]

Judge Merritt dissented in part, finding that the policy contained in rule 334.7 was not unconstitutional, and that there was no custom of unconstitutional application of the policy. I read the maj opinion to conclude that a delegation of unregulated authority to the jailor to make decisions concerning the need for medical care raises a colorable substantive due process claim suitable for submission to the jury on remand. I cannot think of a way that the City could more specifically regulate this decision without providing medical specialists of some type at the jail. Such authority must be delegated to intake persons if it is to be exercised by the City at all. It seems to me that ordinary common sense review and handling of cases on an individual basis by intake officers should pass constitutional muster. Intake officers must meet the deliberate indifference standard of Estell v. Gamble, 429 U.S. 97 (1976), but there is no reason to add a subsidiary special training requirement.

III. CONTENTIONS

A. Petitioner

Section 1983 provides a basis of relief against a municipality only where municipal actions directly subject a person to constitutional injury, and those actions constitute a policy or custom. Monell v. Department of Social Services, 436 U.S. 658, 690-694 (1978). In general, liability exists under the policy

prong of Monell where the City's policymakers consciously adopt a final rule of general application which gives rise to the injury. Liability under the custom or practice prong arises under less formal circumstances, where a pattern of behavior by City representatives places the City on notice of those acts and gives rise directly to the reasonable inference that the City has authorized the custom in question. The inadequate training theory upheld by the CA6 fails to establish a basis for liability under either prong.

The CA6 ignores the fact that the City had a written policy to protect resp and to ensure that she received medical care, and invites the jury to hold the City liable for an amorphous failure to train. This Ct should reaffirm the bright line standard implicit in Monell which restricts municipal liability under §1983 to injuries resulting from a policy which is itself unconstitutional. Monell and its progeny are concerned with a city's responsibility for constitutional violations, and require a differentiation between whether a municipality-- as opposed to an employee or agent of that municipality-- has caused the constitutional injury. Only when a city policy is unconstitutional can it be fairly said that a city has caused the injury. In every case in which the Ct has affirmed liability on the basis of a municipal policy, the policy in question was unconstitutional. See petr brief at 15. Articulating a clear rule would only confirm what has been implicit to date.

A bright line rule would allow cities to avoid the recurring problem of allowing §1983 plaintiffs to argue for city liability

on the basis of non-existent policies. Unlike questions of custom, there should rarely be a question as to a policy's existence. A municipal policy exists where there is a rule of general application that "establish[es] fixed plans of action to be followed under similar circumstances consistently and over time." Pembaur v. City of Cincinnati, 475 U.S. 469, 480-481 (1986). Often policies are written, and generally they have well-defined terms. A bright line standard would eliminate claims that blur the line between policy and custom and leave municipalities unable to present an effective defense. In such cases, the city is held accountable for a single incident--as in policy cases--but is faced with plaintiff's reliance on an amorphous, unwritten practice which the City is unable to prove does not exist, which is more usually the situation in claims relying on custom. A clearer rule would also give municipalities a fair opportunity to confine municipal "conduct" to constitutional norms. As cities lack a qualified good faith immunity defense, the opportunity for city officials to review and update policies is essential; yet such a task is impossible if unwritten and unarticulated norms are subjected to the hindsight of a jury. Nor would this rule leave injured parties without a remedy, as they could argue a single manifestation of a custom, and might recover based on state tort law, administrative remedies, and the liability of individual officers.

In order to prevail on a §1983 claim under the theory that a municipal policy caused the injury, the plaintiff must prove that: (1) the city has "acted" by adopting a policy; (2) the city

deliberately adopted the policy from among various alternatives, and (3) the policy was the moving force behind the constitutional injury. As to prong #1, in Tuttle, this Ct reversed on the basis that a jury instruction allowed an inference from a single unwarranted use of force that it was attributable to inadequate training or supervision amounting to deliberate indifference or gross negligence on the part of the city. 471 U.S., at 821. Here, as there, the theory used by the lower ct allows an inference of the existence of a city policy based upon a complete lack of evidence. Here the only evidence was the written policy, and the only thing the City did was "cause" its employees to provide Mrs. Harris with medical assistance if she requested it or if they believed she needed it. In no way can a single failure to properly apply that policy support a holding that the City acted to injure Mrs. Harris. The CA6 premised liability on the delegation of unfettered discretion to the jailer coupled with failure to train. But in City of St. Louis v. Praprotnik, 108 S.Ct. 915, 924 (1988), the Ct rejected a similar delegation argument, holding that a city may be held liable only for "acts which the municipality has officially sanctioned or ordered." The delegation of discretion is both necessary and desirable, and such an exercise cannot reflect city policy for §1983 purposes unless another city policy causes that discretion to be exercised in an unconstitutional way.

The inadequate training theory also fails to meet the requirement of intentional or deliberate conduct inherent in the term "policy." There is no evidence that the policymakers delib-

erately chose a training program which would prove inadequate. See Tuttle, 471 U.S., at 823. Although municipal liability may be based on acts undertaken recklessly or with deliberate indifference to consequences under the custom prong of Monell, allowing a "policy" argument based on a single act will force a city to disprove that it had a passive policy of failing to train. This problem is illustrated here, where there was no evidence of a deliberate choice of limiting the training of jailers. In the absence of any evidence that the City was the source of a policy, this case should not have reached the jury.

Finally, the theory of inadequate training adopted by the CA6 fails to ensure that the municipal policy is the moving force of the constitutional violation. Tuttle, 471 U.S., at 820. The causation element is a significant one, and is not satisfied by a "but for" rationale. The policy must be responsible for the particular constitutional violation alleged. Here, there is simply no basis on the record for concluding that the officers' medical training had any causal relationship to the injury suffered by Mrs. Harris. Under the CA6's view, a showing of "forseeability" is a substitute for causation, in that the City should have realized that the lack of training would likely result in unconstitutional deprivations. But the two are not the same, and in the absence of proof of causation, liability cannot be assigned.

Although it is not clear whether this issue is before the Ct, the City can not be held liable under §1983 for following an alleged custom of providing detainees with inadequate medical care. The DCt's instructions, which were generally approved by

the CA6, included language which could be construed to include a "custom" analysis, by which the City would be liable for "implicitly authorizing" a long-standing custom or practice of inadequate medical care for detainees. The instruction allowed the jury to find from a single incident that the City had such a custom, an impermissible result. Only a repeated course of conduct give rise to an inference that the city is on notice.

B. Respondents

1. Cert should be DIGed since the issue of whether a failure to train may constitute a policy for purposes of municipal liability under Monell is not properly before the Ct. In its pretrial brief and oral motion for a directed verdict, the City acknowledged that it could be held liable for improper training of its police officers. The City made no objection to the relevant jury instruction. In the CA6, the City pressed its respondeat superior objection and its claim that the evidence was insufficient to prove a policy of denying medical treatment, but again failed to object to (or even mention) the imposition of liability for a failure to train or supervise. Perhaps most telling, in its petn for rehearing the City expressly agreed with the CA6's conclusion that a failure to train stated a valid basis for imposing liability on a municipality. The City stated: "The majority opinion, quite correctly in our view, states that grossly inadequate training may be a basis for a City's liability under [§1983]."

The cert petn does not repudiate these express statements, and clearly assumes that there are circumstances in which a fail-

ure to train will constitute an actionable municipal policy. Question #1 implies that inadequate training is actionable where the city "should have known that training was inadequate" and that "violation of constitutional rights might forseeably result." The petr's argument assumed the validity of the failure to train theory. Further, the record in this case does not squarely present the issue of the appropriate standard of culpability for claims that a municipality is liable for its failure to train its employees. The City expressly adopted the gross negligence standard, and the DCt's instruction actually specified a higher standard. Now the petr seeks to challenge the holdings that the City has itself asserted throughout this case.

The Ct ordinarily limits its review to issues that were raised and argued below, and regardless of whether this policy is prudential or jurisdictional, at a minimum it counsels against deciding issues that were not only not raised below, but were explicitly conceded by the petr. See City of Springfield v. Kibbe, 107 S.Ct. 1114 (1987). Although it may be appropriate in some cases to overlook technical defects in the record, it would defy sound principles of judicial restraint to permit a litigant to reverse his explicit and consistent former position on appeal. This case is strikingly similar to Kibbe, although there the petr at least argued against the grossly negligent failure to train theory on its motions for directed verdict and its motion for a j.n.o.v. This record contains none of the factors that justify review of issues despite the failure to comply with procedural rules. The only issue properly before this Ct is whether the

evidence was sufficient to support the jury verdict that a custom or policy caused the constitutional injury. This issue is not sufficiently important to warrant independent review and cert should be dismissed as improvidently granted.

2. Petr's argument that the failure to train can never amount to a violation of §1983 has been explicitly rejected by 7 Justices of this Court, and by every CA that has addressed the question. Petr's "bright line" test could only be achieved at the unacceptable price of altering established doctrine and undermining the purposes of §1983. Monell held that a city could be held liable in a §1983 action whenever a city policy had caused a constitutional violation to an aggrieved plaintiff. Training and supervision are in many instances the exclusive manner in which a city announces and implements its policies. There is no valid or meaningful distinction under §1983 between an unconstitutional city policy and an otherwise improper city policy which directly causes a constitutional violation.

In Tennessee v. Garner, 471 U.S. 1 (1985), state policies permitted police to use lethal force against nonviolent fleeing felons, but did not require police to do so. After Garner, the failure to train officers that certain uses of deadly force are unconstitutional would reasonably be understood as similarly authorizing such action, even where the City announced an intent to abide by the constraints of the 4A. The same reasoning applies to the 4A principles of Payton v. New York, 445 U.S. 573 (1980). Violations of constitutional rts are equally likely to occur where a police department (1) expressly authorizes entries into

homes to arrest suspects where the police have an arrest warrant, but no search warrant or exigent circumstances; (2) has no written policy, but trains its officers to enter homes if an arrest warrant is in hand; or (3) has a written policy requiring compliance with all 4A doctrines, but does not train its officers as to the requirements of the 4A under Payton. Apparently, petr would label #1 as a Monell violation, but not #2 and #3. Such a semantic distinction is illogical and thoroughly inconsistent with §1983 and Monell.

Petr's argument is also inconsistent with the language of §1983, which imposes liability on any person who "shall subject, or cause to be subjected, any person ... to the deprivation ...[of constitutional rights]." The statute clearly contemplates that the defendant may be liable by directly violating a plaintiff's constitutional rights, or by causing another party to do so. Monell recognized this second ground of recovery. It applies to individuals and municipalities, and is consistent with the normal rules of agency. When respondeat superior is inapplicable, a principal is still under a duty to exercise reasonable care in the training and supervision of its agents. Violations of that duty caused by a policymaker lead to direct liability on the part of the municipality. Praprotnick is consistent with this view, in that it addressed only the question of whether a supervisor had final policymaking power, and not whether a failure to train and supervise attributable to city policymakers can be a policy or practice under Monell.

The decision not to train, or not to measure up to the accepted norms for training, constitutes a policy no different than any other consciously chosen practice. The proper level of culpability to be established should be gross negligence. Section 1983 has no state of mind or fault requirements. The dual causation required for municipal liability (proof of individual conduct and culpability sufficient to establish the underlying constitutional deprivation, and proof that the city caused the conduct by a policy or custom) has been satisfied here. The jury found that resp's due process rights were violated, because the officers were deliberately indifferent to her needs. But Monell's purposes are best served by a gross negligence standard, which imposes fault sufficient to ensure that municipal liability will not be based on respondeat superior. The legislative history of the statute makes it clear that a negligence-based standard was to be controlling. The view of the Kibbe dissent, which suggested a standard of reckless disregard or deliberate indifference, is met in this case, but unnecessarily immunizes clearly improper police training practices. While some heightened standard may be appropriate, it need go no higher than gross negligence.

While we agree that a single incident can never establish a municipal custom, we disagree with petr's submission that custom or practice can never be established until a series of deprivations has actually occurred. Clearly customs exist before constitutional violations result from them. A city practice of not training police in marksmanship does not somehow become a custom

the first time a policeman shoots a bystander; the custom has been there all along. Certainly the plaintiff bears a more difficult burden of proof in the absence of multiple violations, but evidence as to the custom, even in the absence of constitutional violations, can satisfy it.

Here the evidence supports the jury verdict. There is nothing in Monell to suggest that the critical factual issues must be determined by a judge rather than by a jury. First, the testimony at trial showed that the police had received no training in the relevant areas, and that a policymaker decided to leave critical decisions to the untrained officers. The existence of the written city policy only begins the relevant inquiry, for by its failure to train the City has undermined the very policy it has adopted. The failure to train speaks far louder than the written rule. The denial of medical treatment was not the unforeseeable action of a malicious employee, but a lack of proper judgment caused by a lack of training. Second, the evidence also established that the city custom of providing medical care varied greatly from the written rule. The evidence showed that the police followed the rule in cases of physical injury, but ignored emotional and psychological disorders. This custom clearly can lead to serious injury, as physical difficulties may be masked by emotional reactions. In addition, individuals suffering from emotional stress are entitled to treatment as well. Here the evidence clearly showed that city police had a custom of denying proper medical care to a class of individuals entitled to it. A

municipality cannot engage in such conduct, and then claim it was not on notice when an injury occurs.

C. Amicus in Support of Petitioner

A host of local government organizations, including the International City Management Association and the U.S. Conference of Mayors, have filed a brief making essentially the same arguments as the petr. [Richard Willard and Benna Solomon are on the brief] In addition, their brief points out that the due process clause is not violated by negligence or by gross negligence. See Daniels v. Williams, 474 U.S. 327 (1986); Davidson v. Cannon, 474 U.S. 344 (1986). It seems doubtful that the distinction between simple negligence and "gross" negligence has much relevance under the Due Process Clause. The Ct's recent cases make it clear that due process violations require an abuse of governmental power, which requires deliberate action or inaction. Even gross negligence lacks the cognitive element inherent in the concept of a municipal "policy."

D. Amicus in Support of Respondent

The ACLU joins in resps' arguments, but writes to present policy issues not discussed by the parties. When a policymaker has been grossly negligent in failing to establish policies in an area where he or she is responsible for setting policy, a policy has been set by inaction. It should not be excused under a remedial statute like §1983. Requiring that a policy be deliberated and clearly articulated is not in step with this Ct's decisions, and would virtually eliminate Monell "policy" claims.

Petr's proposed bright line rule limiting policy claims under Monell would virtually eliminate municipal liability claims in police abuse cases brought under §1983, since official statements of law enforcement policy almost always condemn uses of excessive force. Training is an essential part of implementing police policies, and in its absence an official policy is little more than a piece of paper. A municipality which has appropriate policies and takes the steps necessary to implement those policies need not fear Monell liability. Indeed, imposition of municipal liability for failing to train police officers has greatly reduced police misconduct, by encouraging better training. Therefore, Monell liability directly furthers the purposes of §1983, by deterring future constitutional violations.

Municipal liability for failure to train will not result in respondeat superior liability. Inadequate training cases under §1983 have carefully followed this Ct's precedents, and cases finding liability have been supported by the evidence. The flood of cases leading to vicarious liability for municipalities has not materialized. Forcing plaintiffs to rely solely on the custom prong of Monell would allow municipalities to ignore potential problems until they materialize, and eliminate the incentive to improve police procedures. But where a city is grossly negligent in providing such training, with a result that it causes a foreseeable violation of constitutional rights, liability must attach to fulfill the promise of §1983.

E. Petitioner's Reply

Petr argues that there is no basis for a DIG in this case. Our argument is that a policy of inadequate training cannot be the basis of liability unless that policy is itself unconstitutional, or in the alternative unless the city deliberately adopted such a policy and that the policy was the moving force of the violation. The ultimate issue in this case--the City's Monell liability--has been vigorously litigated since the outset of this case, and while the briefs in this Ct have raised new arguments, they have not raised new issues. Our petn squarely presented the issue of whether inadequate training can serve as a basis for municipal liability under §1983, and stated that the issue was identical to that presented in Kibbe. But the holding of Kibbe is completely inapposite to the present case, in that in Kibbe the City actually proposed the faulty jury instructions, whereas here the City objected to the proposed instructions, and offered its own. Our actions below were completely consistent with our position in this Ct.

On the merits, the petr argues that the requiring the policy itself to be unconstitutional is entirely consistent with the language of §1983, in that it requires that the injury be caused by the City's unconstitutional act. A city can only be liable if the evidence shows that there was a deliberate policy choice made as to the level of training. Resp's position invites the jury to infer liability, contrary to the directives of this Ct. Even if the inference is allowed, the resps have still not met the necessity of intentional or deliberate conduct that is inherent in the

"policy" prong of Monell. Resp's arguments impermissibly stretch the meaning of "policy," and ignore the fact that deliberate wrongful conduct reflects a higher degree of culpability than mere inaction. Nor is there any basis for retrial on the issue of whether there is liability on the basis of a municipal custom.

IV. DISCUSSION

1. Was Cert improvidently granted? In many ways, this case is Kibbe revisited. Here, as there, the petr failed to object to the jury instruction given on the policy of a failure to train and the grossly negligent standard. The objection the petr did make only complained about the instruction being improper under Monell, in that it was "simply a glorified version of the respondeat superior instruction." This objection was not sufficient to apprise the DCt that the petr disagreed with assessing liability based on gross negligence.

Unlike Kibbe, the petr's proposed jury instruction did not authorize a finding of liability for gross negligence in failure to train, but neither did it rule it out. See petr's reply brief at 4, n.4. It also appears that here petr did not argue in either the DCt or the CA6 that liability could not be based on the grossly negligent failure to train. Rather, petr argued that the instruction given allowed the jury to find liability through respondeat superior. Finally, the petr did endorse the standard used by the CA6 in its petn for rehearing, where it stated, "The majority opinion, quite correctly in our view, states that grossly inadequate training may be a basis for a City's liability

under [§1983]." The petr in Kibbe likewise failed to make the appropriate arguments in the CA.

Resp also is correct that the questions presented for review in the petn do not squarely present the issue now raised. The petn's first question presented was whether inadequate training can be found to be a Monell policy or custom "without independent evidence that the City knew or should have known that the training was inadequate and therefore that violations of constitutional rights might forseeably result from any inadequate training." This question easily can be read to admit that given sufficient evidence of the City's gross negligence the City may be found liable. It does not suggest that some higher standard is needed. It is not surprising, therefore, that resp did not address the DIG issue until its response on the merits. This is again very similar to what happened in Kibbe, and provides some excuse for why the Ct may have been unwise in granting cert. It is also probably worth knowing that the petn was filed on Jan 2, 1987. Kibbe was handed down Feb 25, 1987. This probably has at least something to do with the change in petr's arguments.

What petr has done, both in the CA6 and here, is present the general question of whether Monell allows liability to be assessed in these circumstances. Because this much has been done, and because the issue is not one in which the particular facts are likely to have controlling significance, the decision to DIG is more difficult. Also favoring the petr's cause is the fact that the CA6 in previous cases allowed municipal liability for grossly negligent failure to train, making the petr's failure to

argue it somewhat more understandable. [As an aside, the City's own lawyers handled this until the petn for cert was prepared, when the City employed a Washington firm. This, it seems to me, is another reason for the change in the City's arguments.]

The standard for deciding these issues appears to be a flexible one, summed up in Kibbe as the Ct "will ordinarily not decide questions not raised or litigated in the lower courts." This is a prudential and not a jurisdictional rule. I think it puts the Ct in a somewhat awkward position; if this case is DIGed so soon after Kibbe, it makes the law clerks look bad for recommending grants in two cases with precisely the same problems. But to hear the case might appear to be inconsistent with the result in Kibbe. My cautious view is to wait and see what happens at argument, and hope that the Ct presses the petr's atty as to how this case is different ~~than~~ from Kibbe, and why the Ct should decide this case on the merits. For now, I think a DIG remains a possible, but not certain, resolution.

2. Municipal liability for grossly negligent failure to train. The basic issue in this case is whether a municipality may be found liable for gross negligence in failing to properly train its police force, and more precisely whether that failure to train can constitute a policy. The Ct is in the somewhat unusual situation of having had four Justices address the issue, in a dissent to the DIG in Kibbe. There SOC, BRW, LFP, and the CJ found that the failure to train must rise to the level of deliberate indifference or reckless disregard for individual rights before any municipal §1983 liability may be found. 107 S.Ct., at

1121. SOC based this requirement on the need to prevent juries from imposing vicarious liability on cities, and on the related heightened causation requirement, noting that "the law has been willing to trace more distant causation when there is a cognitive component to the defendant's fault than when the defendant's conduct results from simple or heightened negligence." Id. But the dissent's support for this proposition consists of a little noticed comment in the Restatement(Second) of Torts, §501 comment a, a citation to Prosser and Keeton on Torts, and several lower ct cases which used a "deliberate indifference" standard.

The petr's arguments are based largely on the dissent in Kibbe, and on the plurality opinion written by the CJ in Tuttle. That opinion first questioned whether a policy which is not itself unconstitutional can ever be the basis of Monell liability for a municipality, and then wondered how a failure to train could even be a policy, as the term generally implies a course of action consciously chosen from among various alternatives. However, the CJ did leave this question open, suggesting that "gross negligence" in establishing police training procedures could conceivably establish a policy as well. SOC's opinion in Kibbe states that it cannot.

The counterarguments made by resps are also taken from Tuttle, although from Justice Brennan's concurring opinion. There WJB pointed out that the important inquiry for §1983 is whether a policy has caused a constitutional violation, and that the deliberate choice issue is not significant, at least where a municipality has opted to provide some training procedures. Once

the deliberate decision to provide training has been made, the choice to allocate resources to one area, and as a result ignore another, is sufficient. His opinion also points out that the plurality's concern with "but-for" causation is misplaced; it is proximate cause which confers §1983 liability. 471 U.S., at 833 n.9. Therefore, if the constitutional violations were reasonably foreseeable from the particular police training procedures selected (or lack of training), then the city would be liable.

Petr's argument that there is a distinction between policies which are unconstitutional themselves and policies which only cause constitutional deprivations seems to be little more than an invitation to limit §1983 on the basis of municipal convenience, or dislike for §1983. There is nothing in the statutory language, or history[2], to suggest that the word "cause" should mean less than it normally means, and no reason that I can see for cutting back on the policy prong of Monell with the thought that the custom prong would properly cover all injuries not related to a facially unconstitutional policy. Nor is there any reason to treat decisions concerning training any differently than decisions about other municipal policies. Training is the only ef-

[2]The state laws which §1983 was enacted to combat were not facially discriminatory. Rather, they were not equally enforced. "Everywhere laws are just and equal on their face, yet, by a systematic maladministration of them, or a neglect or refusal to enforce their provisions, a portion of the people are denied equal protection." Cong. Globe, 42 Cong., 1st Sess. 374 (1871) (remarks of Rep Garfield), quoted in Kritchevsky, "Or Causes to be Subjected": The Role of Causation in Section 1983 Municipal Liability Analysis.

fective way that police can learn the constitutional rules by which they are bound. Although it may be difficult to determine whether the failure to train has been a cause in a particular case, it is the type of decision that a properly instructed jury can make as well as a judge.

The question of whether to apply a gross negligence standard, or to require a reckless disregard standard, is essentially concerned with causation, which is as it should be. All of the debate over policy and custom seems to me to cloud the fact that the necessary inquiry under §1983 is whether a municipality itself has caused a constitutional deprivation. This causation requirement must be fashioned in light of the Ct's prior holdings that §1983 does not contain a state of mind requirement. In Parratt v. Taylor, 451 U.S. 527 (1981), the Ct examined the language, legislative history, and prior history of §1983, and concluded that it "contains no state-of-mind requirement independent of that necessary to state a violation of the underlying constitutional right." Daniels v. Williams, 474 U.S. 327, 331 (1986). Yet the Kibbe dissent, as I understand it, would require that a municipality be shown to be reckless before its failure to train can be actionable. This seems to me to include a state of mind requirement distinct from the constitutional violation itself. I think that this is inappropriate.

The proper course seems to be one which guarantees that municipalities will not be hit with vicarious liability for the acts of employees, but at the same time holds municipalities to the level of responsibility embodied in §1983. I do not think it

appropriate to go so far as to require that the policy involved be enacted with the conscious desire to cause constitutional violations, or with deliberate indifference to the substantial liklihood of such violations. This would probably make it impossible to ever find municipal liability.

More importantly, §1983 has always been read against a backdrop of tort liability, and has never required a finding of specific intent to deprive an individual of his or her constitutional rights. Monroe v. Pape, 365 U.S. 167, 187 (1961). Cases dealing with municipal liability have always seemed to embody a heightened causation requirement, see Rizzo v. Goode, 423 U.S. 362, 371 (1976), requiring that the city policy be the "moving force of the constitutional violation," Monell, 436 U.S., at 694. But I do not read Monell as including any fault requirement. Its concern is with responsibility, which I understand to be broader than fault. A standard of gross negligence appears to fit between the two extremes of respondeat superior and fault, although it may present difficulties in coming up with a precise verbal formulation. It will undoubtedly require district courts to devise jury instructions which focus not only on what a jury may find, but at the same time stress what a jury may not infer.

Finally, it seems to me that the real issue here, as you pointed out in your Madison Lecture at NYU in 1984, is the burden that the petr, and the Kibbe dissenters, must meet in order to justify any further restrictions on §1983. I can see nothing beyond the generalized fear of massive §1983 judgments, and the attitudes that find a home under the label federalism, which sug-

gests that limiting municipal liability under §1983 is necessary or desirable. In the absence of more principled arguments, there is no reason to require more than gross negligence in failing to adequately train police.

V. RECOMMENDATION

Although it is a very close call, I think that this case should be DIGed. The arguments before the Ct were not made below, and were not presented with sufficient clarity in the petn for cert. Although this point may be clarified at oral argument, and the Ct may want to reach this issue even if it is in less than perfect posture, my feeling at this time is that the writ should be dismissed.

If the Ct decides to reach the merits, I think that the CA6 should be affirmed. There is no reason to require that a "policy" be unconstitutional on its face in order to find a municipality liable for causing constitutional injuries by failing to adequately train its officers. Nor is it appropriate to read a state of mind requirement into §1983's causation requirement. Although a DCt must make it clear to a jury that liability may not be found on the basis of respondeat superior, the fear of vicarious liability should not shield the municipality from responsibility where it was clearly foreseeable that the failure to train could lead to the deprivation of constitutional rights.