City of Canton v. Harris
No. 86-1088

Eric's Outline
Argument: Tuesday, Nov. 8, 1988

Cert to CA6
G: CJ; WJB; BRW; TM; SOC; AS; AMK
D: HAB; JPS
Recommendation: Reverse

BACKGROUND

Respondent Harris, a 52-year-old black woman, was stopped by a Canton police officer for speeding while driving her teenage daughter to school. Because she was upset and uncooperative in supplying the information necessary to write out a traffic citation, the officer arrested her. Harris was lifted and placed in a patrol wagon by two officers because she could not or would not walk on her own.

When the door of the patrol wagon was opened upon arrival at the police station, Harris was sitting on the floor rather than on a seat. The jail supervisor thought her seated position unusual, and because he had been informed that she had to be lifted into the patrol wagon, he asked Harris whether she needed medical attention. Harris replied that she wished to see her son Ronnie. The police called her son and took Harris inside for booking. No medical care was ordered.

During booking, Harris slumped to the floor in a seated position. Officers assisted her to a chair, but she again slumped to the floor. She slumped to the floor yet again when put in the chair a second time. Harris was then left sitting on the floor for perhaps ten minutes to avoid injury. The supervisor and officers testified that emotional distress was common following arrest and that they believed that Harris would calm down if left alone and permitted to see her family, as most arrestees do. The officers testified that Harris was fully conscious at all times and aware of her actions.

Harris was then taken to a cell. When bond procedures were completed, her son arrived and arranged to have an ambulance take her to a hospital. Harris had spent between 30 and 40 minutes at the station; approximately one hour had elapsed since her car was stopped. At the hospital, Harris was diagnosed as suffering from gross stress reaction, anxiety and depression. She remained in the hospital for one week, and received psychiatric therapy after that time.

Harris sued, inter alia, for improper denial of medical treatment under § 1983. 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.

A former police chief testified that shift commanders are authorized to implement this regulation based on personal observation. The City offered no evidence that shift commanders were given medical training other than minimal first aid instruction. One police officer testified that, in cases of emotional distress (as opposed to physical injury), medical care was provided only when the arrestee posed a clear danger to herself.

The jury awarded Harris $200,000 in compensatory damages against the City. On appeal, CA6 reversed and remanded for a new trial, because the trial judge improperly submitted the issue to the jury on a theory of participation of supervisory personnel in the decision to withhold medical care as well as on a theory of inadequate training, and it was impossible to say whether the jury's general verdict was based on the erroneous first theory or on the second. However, CA6 approved the district court's instruction that the City could be held liable if it "failed to supervise its police force and [if] such supervision was so reckless, grossly negligent, inadequate, and the result of deliberate indifference that police misconduct and violations of citizen's [sic] rights were probably certain to result." (CA6 said nothing about the possibility of confusion resulting from the district court's list of non-synonymous standards or the self-contradictory phrase "probably certain.") The City petitioned for cert on the correctness of CA6's ruling on inadequate training as a possible ground for liability under § 1983.

QUESTION PRESENTED

May the City of Canton be held liable for Harris' injuries as a result of its failure to provide adequate medical training to its police officers or to take other precautions?

DISCUSSION

1. Should Cert Be Dismissed As Improvidently Granted?

Canton argues that inadequate police training cannot constitute a municipal "policy" for purposes of § 1983 because it cannot be characterized as an explicit command from City policymakers to City employees. It concedes, however, that inadequate training may constitute a "custom" for purposes of § 1983 if a

number of constitutional violations have resulted from a City's failure to act in a certain way, thereby justifying the inference that City policymakers were aware of the problem and deliberately indifferent to the harm that was occurring or reckless in failing to take remedial action. Harris contends that Canton did not adopt this position below, nor did it present this argument squarely in its cert petition. Hence, this Court may not consider the issue whether inadequate training can ever constitute a "policy" under Monell.

Harris' contention seems to me unpersuasive. Throughout the litigation below, Canton attempted to argue that inadequate training is not actionable under Monell because it cannot be shown to have caused Harris' injury or to represent an affirmative choice by City policymakers. Moreover, the first question in Canton's cert petition reads: "Whether inadequate training can be found to be a 'policy or custom' of a City within the meaning of Monell, without independent evidence that the City knew or should have known that the training was inadequate and therefore that violations of constitutional rights might foreseeably result from any inadequate training." Harris did not object to this question in her brief opposing the petition on the grounds that the City failed to raise it below. Under Tuttle and Kibbe, she therefore appears to have waived whatever right she had to object. In Tuttle, the Court held that nonjurisdictional defects of the sort Harris alleges "should be brought to our attention no later than in respondent's brief in opposition to the petition for certiorari; if not, we consider it within our discretion to deem the defect waived." 471 U.S. at 816 (emphasis in original). In Kibbe, five members of the Court voted to dismiss the petition as improvidently granted, but only because the petition did not explicitly present the question whether negligence was an adequate basis for liability for inadequate training, thereby depriving respondent of an opportunity to object in its opposition brief that the issue was not argued below. See 107 S. Ct. at 1116. In this case, by contrast, the issue seems to have been raised with sufficient clarity in Canton's petition. It is time that this Court decided it.

2. Canton's Preferred Approach

Canton urges this Court to resolve the unanswered question whether a municipality can be held liable under § 1983 for a policy or custom of inadequate police training in the following way. A **policy**, Canton says, should be defined as an express pronouncement by municipal policymakers following their deliberate choice of an action or a rule of conduct for municipal agents. Moreover, a policy should trigger liability under § 1983 only if it commands or authorizes unconstitutional actions by municipal agents. An actionable **custom**, in Canton's lexicon, is a long-standing pattern of action or inaction that has resulted in numerous violations of constitutional rights and of which policymakers can therefore be presumed to be aware; only if there is reason to believe that policymakers' acquiescence is deliberate -

- and only repeated constitutional violations can fairly be said to put them on notice -- can liability be imposed under § 1983.

Canton musters three types of argument on behalf of its recommendation: an appeal to legislative history; the invocation of desirable policy implications; and the judicious citation of some of this Court's recent opinions.

Canton's reliance on the legislative history of § 1983 is really a reiteration, with emphasis, of this Court's assertion in Monell and subsequent cases that Congress did not intend to permit a municipality to be held liable under § 1983 on a theory of respondeat superior. This Court's inferences from Congress' rejection of the Sherman Amendment by the 42nd Congress might well be incorrect, but Justice Stevens is the only member of the Court who believes that § 1983 imposes respondeat superior liability, and I shall assume that § 1983 precludes it. Canton's argument is that only if a municipality explicitly adopts a policy that requires or clearly authorizes unconstitutional acts can it be said, in the words of § 1983, to "subject[], or cause[] to be subjected," a U.S. citizen to the deprivation of constitutional rights. Any less demanding precondition to liability, in its view, would be tantamount to, or slide dangerously in the direction of, allowing a municipality to be held liable for the actions of its employees merely because they work for the City, rather than because the City has directed their actions.

In tandem with this argument based loosely on this Court's reading of the legislative history, Canton submits that its favored approach would have beneficial ramifications from a policy perspective. Municipalities would not incur massive liabilities for actions taken by City employees of which City policymakers were ignorant. Cities would be obliged to compensate only those who were harmed by actions authorized by the City following a conscious decision by its elected or appointed policymakers; they would not unfairly be held liable for omitting to adopt a host of potential policies that City officials lack the time to consider and any reason to assess in the absence of evidence that City policies or City neglect is currently precipitating constitutional injury. In addition, this strict definition of "policy or custom" would simplify litigation and eliminate contentious disputes over the existence of an actionable policy or custom, as well as reduce the inconsistency that now exists between the definitions and thus the standards of liability that are currently used in different jurisdictions. Finally, Canton argues, its proposed definitions would not deprive plaintiffs of reasonable recoveries for injuries. Plaintiffs could still avail themselves of state tort and administrative remedies, and they could sue City officials in their individual capacities under § 1983 for violations of their constitutional rights.

Canton and amicus International City Management Association further note that the view they champion is consistent with, perhaps even endorsed by, this Court's precedents. Writing for 6

members of the Court in Monell, WJB said that a municipality could be held liable for an employee's action if the employee "implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that [local governing] body's officers." 436 U.S. at 690. WJB also stressed that official policy must be "the moving force of the constitutional violation." Id. at 694. In Tuttle, Justice Rehnquist's opinion for the 4-person plurality (of which WJB was not a member) went further: "In the first place, the word 'policy' generally implies a course of action consciously chosen from among various alternatives; it is therefore difficult in one sense even to accept the submission that someone pursues a 'policy' of 'inadequate training,' unless evidence be adduced which proves that the inadequacies resulted from conscious choice -- that is, proof that the policymakers deliberately chose a training program which would prove inadequate." 471 U.S. at 823. Justice Rehnquist further stated that there must at least be an "affirmative link" between an alleged policy and a constitutional wrong for liability to attach. Still more recently, in writing for 4 members of the Court who dissented from the dismissal of the petition as improvidently granted in Kibbe, Justice O'Connor averred that "the 'inadequacy' of police training may serve as the basis for § 1983 liability only where the failure to train amounts to a reckless disregard for or deliberate indifference to the rights of persons within the city's domain. . . . Negligence in training alone is not sufficient to satisfy the causation prong of § 1983." 107 S. Ct. at 1121 (footnote omitted). Justice O'Connor (who seems to regard a custom as a species of policy) also said that where an explicit statement of policy is not unconstitutional on its face, "considerably more proof than the single incident will be necessary in every case to establish both the requisite fault on the part of the municipality, and the causal connection between the 'policy' and the constitutional deprivation." Id. at 1122 (quoting from Rehnquist's plurality opinion in Tuttle). This view accords with and arguably supports Canton's recommendation, because it seems to require that municipal policymakers either expressly order or endorse constitutional violations by municipal agents, or that such violations occur with sufficient regularity to allow a jury reasonably to infer that municipal policymakers are deliberately indifferent to the wrongs perpetrated by City employees. Canton's view is therefore on fairly firm ground.

(In her Kibbe dissent from denial, Justice O'Connor made an even more extreme statement which seems difficult to reconcile with her view that policymakers' omissions are actionable if they betray reckless disregard or deliberate indifference. She said: "Respondent does not contend that the City's police training program authorizes the use of deadly force in the apprehension of fleeing vehicles; rather, her argument is that the methods taught in the City's training program were 'inadequate,' and that if individual officers had received more complete training, they would have resorted to those alternative methods without engaging in the unconstitutional conduct. The difficulty with respond-

ent's argument is that at the time of the officers' alleged misconduct, any number of other factors were also in operation that were equally likely to contribute or play a predominant part in bringing about the constitutional injury: the disposition of the individual officers, the extent of their experience with similar incidents, the actions of the other officers involved, and so forth. To conclude, in a particular instance, that omissions in a municipal training program constituted the 'moving force' in bringing about the officer's unconstitutional conduct, notwithstanding the large number of intervening causes also at work up to the time of the constitutional harm, appears to be largely a matter of speculation and conjecture." 107 S. Ct. at 1120 - 21. By this reasoning, it appears impossible for a plaintiff to show that a City's omissions subjected her to a deprivation of her constitutional rights. Yet O'Connor said clearly in her Kibbe dissent from denial that a municipal custom leading to repeated constitutional violations may furnish the basis for § 1983 liability, and she reiterated this position in writing for the 4-person plurality in Praprotnik. See 108 S. Ct. at 926 - 27. So I suppose the dangerous musings quoted above are best ignored.)

3. Objections To Canton's Approach

The principal objection to the standard advanced by Canton is that it inappropriately requires a showing of intent or indifference on the part of policymakers while only allowing plaintiffs to prove the requisite state of mind by pointing to a clear pronouncement approving or commanding constitutional violations or by identifying repeated invasions of citizens' constitutional rights as a result of the same customary practice. As WJB rightly said in his 3-person concurrence in Tuttle: "A rule that the city should be entitled to its first constitutional violation without incurring liability -- even where the first incident was the taking of the life of an innocent citizen -- would be a legal anomaly, unsupported by the legislative history or policies underlying § 1983. A § 1983 cause of action is as available for the first victim of a policy or custom that would foreseeably and avoidably cause an individual to be subjected to deprivation of a constitutional right as it is for the second and subsequent victims; by exposing a municipal defendant to liability on the occurrence of the first incident, it is hoped that future incidents will not occur." 471 U.S. at 832.

Unfortunately, WJB seems to have taken a different view in Pembauer. His majority opinion states: "We hold that municipal liability under § 1983 attaches where -- and only where -- a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question." 475 U.S. at 483 - 84. WJB seems to be saying that it is not enough that constitutional violations would foreseeably result from a municipal custom; rather, City policymakers must have considered the custom and alternatives to it and have decided not to alter the prevailing practice in order for the City to

be held liable under § 1983. For the reason WJB stated so forcefully in Tuttle, this statement seems to me mistaken, perhaps stemming from a failure to consider the possibility of liability for failure to act because the claim in Pembauer was predicated on official action, not inaction.

In my view, the proper standard is that which WJB enunciated in Tuttle. Obviously, if an edict from policymakers authorizes or commands City officials to trammel constitutional rights, liability should attach under § 1983. But a municipality should not be able to escape liability simply because its policymakers refused to discuss official policy in some area, especially when the failure to take up the issue could foreseeably result in constitutional infractions. To take one of Harris' examples: if a City failed to provide instruction on the apprehension of fleeing felons after this Court's decision in Garner (police may not use lethal force against nonviolent fleeing felons), with the result that City police shot to death someone attempting to avoid arrest who posed no danger to others, then it seems clear that the victim's survivors should be able to bring a § 1983 action, even though there had not been several shootings by police officers to put City policymakers on notice; the fact that violations would likely occur from failure to instruct seems sufficient to generate liability.

If this view is correct, then two interrelated and important questions remain. First, what standard (negligence? gross negligence? recklessness? deliberate indifference?) should be used to determine whether the City is liable for the failure of its policymakers to take measures to prevent constitutional violations by City employees pursuant to an official policy or custom of which they were or ought to have been aware? Second, in determining whether that standard has been met, how should possible constitutional harms be weighed against the costs of preventing or reducing their occurrence? (A third, less significant, question relevant to the resolution of this case is what evidence is necessary to demonstrate the existence of a custom for purposes of § 1983 liability.)

Although these are in theory questions of statutory construction, nothing in the legislative history of § 1983 dictates an answer. Perhaps the second question need not be answered definitively in deciding this case; perhaps it cannot be decided in the abstract at all, but must be left for case-by-case resolution. However, the first question must be answered in order to determine the appropriate jury instructions in Harris' case. (The third must also be answered, given Harris' claim that there was a custom of not providing medical assistance to arrestees who were not physically injured and who did not appear to pose a danger to themselves or others.)

Amicus ICMA contends that simple negligence is indistinguishable in practice from gross negligence, and that simple negligence should be rejected because this Court has ruled in Daniels

and Davidson that negligence is insufficient to ground liability under the Due Process Clause. This argument seems to me to rest on confusion. Daniels and Davidson make clear that no liability can attach under the Due Process Clause for simple negligence by State officials. It appears a separate question, however, whether a municipality should be held liable if it is negligent in tolerating constitutional violations, that is, in failing to halt more-than-negligent conduct by its employees. The standard for liability under the Due Process Clause cannot be transferred automatically to § 1983.

Nevertheless, virtually all lower courts that have faced the issue have required at least gross negligence by municipal policymakers for liability to attach under § 1983. Their rationale has invariably been this Court's repudiation of respondeat superior liability and the repeated statements by at least four members of the Court that conscious decisions by policymakers or reckless indifference to constitutional violations is necessary for liability under § 1983. I do not know what WJB thinks about this issue. In his short Davidson dissent, WJB said that "official conduct which causes personal injury due to recklessnes or deliberate indifference, does deprive the victim of liberty within the meaning of the Fourteenth Amendment." 474 U.S. at 349. If the reasoning of the preceding paragraph is correct, however, this standard need not prevail under § 1983 as well. And in any case, WJB did not address the question whether gross negligence suffices for a violation of the Due Process Clause. The legislative history of § 1983 is of course no help in resolving the question what precondition to liability it requires: whatever standard this Court endorses and attributes to the 42nd Congress will be its own fabrication. WJB's opinions in earlier cases do not indicate whether he would settle for gross negligence, or whether he would require reckless disregard or deliberate indifference, which is the standard that most members of the Court seem to favor. I suggest that we discuss this problem when we consider the case as a group.

4. The Proper Resolution Of This Case

The trial court's instructions (see page 2) are a hopeless muddle and must be revised if the Court decides to affirm and thus to remand the case for a new trial. The question is whether Harris should get another trial, or whether a verdict should be directed against her on this issue. Harris contends that the evidence she presented was sufficient to support the verdict against Canton under two theories of municipal liability: (1) that the City had recklessly failed to train or supervise its police officers regarding their responsibility to provide medical care to persons visibly suffering from emotional distress; and (2) that the City's custom was to deny necessary medical treatment to persons in police custody suffering from emotional distress unless they presented a physical danger to themselves or others.

With respect to the second theory, it is unclear whether Harris provided sufficient evidence that such a custom existed. Only one officer testified briefly that dangerous or physically injured arrestees were alone given medical care. However, Canton does not claim in its brief (I have not read the record) that police practice was other than the officer testified. That factual question probably should have gone to the jury.

As for Canton's liability, the question should be answered by a jury after proper instructions as to the appropriate standard of liability, unless there is insufficient evidence to support a verdict against the City. I find it hard to believe that Harris suffered a constitutional deprivation at all, and would probably be inclined to reverse because absent a constitutional violation there can be no § 1983 liability. But the jury appears to have reached the opposite conclusion at the first trial, which gives me pause. If this is properly a question for the jury, then the question becomes whether there is sufficient evidence for a jury to conclude that Canton was grossly negligent (or deliberately indifferent, or whatever) in failing to train or in tolerating the custom of not providing care to emotionally distraught arrestees. My own view is that the police regulation is irreproachable and that the failure to provide instruction on emotional distress to all police officers who act as jail supervisors on rotating shifts is not even grossly negligent, because the policy would not foreseeably cause police officers to recklessly fail to obtain medical care for someone suffering from extreme emotional distress and because the cost of training would be substantially outweighed by the constitutional violations that would likely attend the failure to incur that cost. Usually arrestees who are upset calm down quickly, and those who are in a bad way will usually have physical symptoms, such as hyperventilation, that would lead police officers to ask them (as they asked Harris) whether they would like medical care or to order it if they seem incapable of responding rationally. Canton's policy of allowing police offices to make commonsense judgments about the need for care does not strike me as unreasonable, especially in the absence of evidence that its implementation has caused or seriously risked significant injury to a number of arrestees. As for the alleged custom of ignoring emotional distress unless the arrestee posed a potential danger to herself, it seems reasonable to construe the statement of that policy as meaning that unless the arrestee seemed in physical danger or unless she appeared to pose a physical risk to herself or others, then no medical assistance would be requested. But construed in that way, the City appears not to have been grossly negligent in tolerating that custom (assuming that Harris could prove its existence, which is far from clear).

CONCLUSION

I would set out a standard for § 1983 municipal liability for failures to adopt a policy or custom, but reverse CA6's deci sion in part because there was insufficient evidence to satisfy that standard.