84-1160 [M.d.J]

PEMBAUR v. CITY OF CINCINNATI

I would reverse for the following reasons:

1. In Monell, we held that a municipality should not be held liable solely on a theory of respondeat superior. The tortious acts must have been acts "of the municipality," and not simply acts of an employee of the municipality. The underlying notion is one of responsibility; the inquiry is whether action by county officials, though under color of state law, is in fact officially sanctioned by those responsible for approving such conduct or instead constitutes an unauthorized departure from approved action. Only in the former case may the municipality be held liable.

a. This was the point of the legislative history traced in Monell. That history disclosed Congress' concern that municipalities not be made, in effect, insurers for the conduct of its citizens and employees. The liability of municipalities was to be limited to acts fairly attributable to the municipality.

b. Acts may be attributable to a municipality for purposes of §1983 liability in any of several ways. One way is the promulgation of a written rule through legislative or administrative procedures, as was the case in Monell itself. Another way, also described in Monell, is by following a practice so consistently that it may be said to constitute a custom.

c. But Monell also referred to "decisions" and other means of making policy. Thus, while the word "policy" is used in the opinion, read in context, it clearly was sued to draw the distinction I have indicated above between acts "of the county" and acts of county employees.

d. Repetition over time is not required for this. A single act tailored to a single instance may be an official act "of the municipality" notwithstanding the fact that it will not be repeated. The President's decision to intercept the Egyptian plane with the hijackers of the Achille Lauro was surely an official act of United States policy even though it was not intended to establish a practice we will follow in the future.

e. A municipality may be held liable under Monell whenever a deliberate choice among available alternatives is made by those responsible for making such choices and then executed by officials acting under color of law.

2. Under this test, Hamilton County may be held liable.

a. Petitioner argues that legal advice by the County prosecutor cannot constitute official County policy. However, the court below reached the contrary conclusion. It found that the municipality could not be held liable only because it assumed that a single act by any policymaker cannot constitute "policy" under Monell. While this assumption was mistaken, the lower court's construction of state law respecting the instructions of the County prosecutor should be binding on us here.

b. In any event, the petitioner's argument is specious. The Sheriff, who even petitioner concedes could make such policy, told the officers to seek and follow the advice of the County prosecutor. Ohio law authorizes the Sheriff to delegate legal decisions to the Prosecutor and also authorizes the Prosecutor to issue instructions as to such issues. According to the Sheriff's testimony, delegating such decisions to the Prosecutor was a practice commonly followed. Indeed, the Sheriff even testified that what was done here was in fact in accordance with his policy.

c. I do not find the points raised at oral argument concerning the law at the time of the break-in persuasive. No one has ever argued that Steagald should not be retroactively applied. Instead, the fact that this entry violated the Fourth Amendment has been conceded. In any event, Steagald should not be applied prospectively only under our decisions in this area. The argument that the County should not be liable for the good-faith acts of its officials was answered to the contrary in Owens.