No. 83-1919

THE CITY OF OKLAHOMA CITY

v.

ROSE MARIE TUTTLE

Cert to CA10 (Doyle, Seymour; Barrett, conc.)

To be argued Tuesday, January 8, 1984

CONTENTS

January 4, 1985

Been

I. SUMMARY

Julian Rotramel, a rookie police officer employed by Oklahoma City, entered the We'll Do Bar in Oklahoma City in response to a report of an armed robbery in progress. Once inside, he told resp's husband, a customer who matched the description of the robber, to "stay put." When resp's husband, who was unarmed, nevertheless left the bar, Officer Rotramel shot him in the back, killing him. Resp sued Oklahoma City and Officer Rotramel pursuant to 42 U.S.C. §1983, alleging that Officer Rotramel had used excessive force against her husband, and that the City had inadequately trained and supervised Officer Rotramel. In instructing the jury regarding the law of municipal liability, the TCt stated that a single, unusually excessive use of force could be sufficiently out of the ordinary to warrant an inference that it was attributable to inadequate training or supervision amounting to deliberate indifference or gross negligence on the part of the City's supervisory personnel. The jury awarded resp $1.5 million against the City, and found in favor of Officer Rotramel on the basis that he had acted in good faith.

The CA10 upheld the verdict, rejecting the claim that the jury instruction was in error, as well as petr's argument that a single incident of excessive force can never establish municipal liability for inadequate training and supervision. I recommend that you vote to reverse and remand. The instruction allowing the jury to infer a policy of inadequate training from a single incident of excessive force was prejudicial error. Proof of a

single incident of excessive force, under the circumstances of this case, does not support a finding that the police officer acted as he did because he had received inadequate training -- it is equally likely that he violated his training or acted negligently or recklessly despite proper training. Because the City cannot be held liable on a theory of respondeat superior, the possibility that the instruction allowed the jury to infer inadequate training and supervision from facts that are equally consistent with a finding of negligence or misconduct solely on the part of the officer requires that the decision below be reversed and the case remanded for retrial. The City's broader contention that a single incident of inadequate training can never subject a municipality to liability is unsound, however, and I recommend that you reject that contention.

II. FACTS AND DECISIONS BELOW

Resp's husband was shot and killed by an Oklahoma City police officer, Julian Rotramel. Resp sued Oklahoma City ("the City") and Officer Rotramel, pursuant to 42 U.S.C. §1983, in the WD Okla (West, J.), alleging that Officer Rotramel had deprived her husband of his constitutional rights to life and liberty, and that the City had failed to train and supervise its police officers adequately to prevent such incidents. According to the evidence presented at trial,[1] the City's Police Department

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[1]Because the extent and nature of the evidence presented at trial is crucial to the legal issue posed, I review it here in some detail. Please bear with me -- the relevance of the details will become apparent in the discussion of the issues.

received a call on October 4, 1980 reporting an armed robbery in progress at the We'll Do Club. The caller was resp's husband, William Tuttle, who gave his own description as that of the robber. After hearing a dispatch regarding the robbery, Officer Rotramel arrived at the bar by himself. Rotramel parked his patrol car directly in front of the entrance to the bar, and without waiting for back-up assistance, or checking to see if there were other entrances to the building, entered the building through the front door, without drawing his gun.

The testimony regarding what happened in the bar differs sharply. According to Rotramel, when he entered the bar, Tuttle started to walk past him. Rotramel grabbed Tuttle's arm and asked that he stay in the bar. Tuttle again attempted to leave, and Officer Rotramel again asked him to stay put. Officer Rotramel held Tuttle while asking the bartender if she had reported a robbery; Tuttle continued to attempt to get loose from the officer, and reached for his boots. Before the barmaid could answer, Tuttle broke loose, ignored Officer Rotramel's command to halt, and bolted through the door. Rotramel followed, with his gun drawn. Outside, he saw Tuttle in a crouched position, with his hands located near his boots. When Tuttle ignored Rotramel's command to halt, and started to come up from the crouched position, Rotramel shot Tuttle in the back. Tuttle died a short time later.

Two of the bartenders testified, however, that one of them had assured Rotramel that no robbery was in progress before Tuttle approached the officer. They asserted that the officer

never tried to restrain Tuttle, but had merely asked Tuttle to stay put until the officer had finished talking to the bartender. Tuttle never bent down or made any movements like he was trying to retrieve a weapon. When Tuttle left, the officer did not shout for him to stop, and did not pursue him, but "whirled around" and shot him from just inside the door of the club.

The parties do not dispute that Tuttle never brandished a weapon, or made any overt threat to Officer Rotramel. At the scene of the shooting, another police officer searched Tuttle's boots for a weapon, but found nothing. When Tuttle's boots later were removed at the hospital, a toy cap pistol allegedly was found in one. There was no evidence at trial that Officer Rotramel had used excessive force on any other occasion, or that any other Oklahoma City police officer had been involved in incidents of misconduct or unauthorized or excessive use of force. Officer Rotramel had successfully completed 18 weeks of training at the Oklahoma City Police Academy in December, 1979, ten months prior to the incident. Following his graduation, he patrolled for some time in the company of senior officers, and performed satisfactorily.

Rotramel had been instructed that the Oklahoma City Police Department's policy regarding the use of force to effect an arrest was that "a police officer is justified in using his firearm only in defense of life and instances where the suspect is armed and/or making an attempt to kill or do great bodily harm." He testified at trial that he "felt like [Tuttle] ... had recovered a weapon and was preparing to use it on me in order to

make his escape," and that he felt his life was in danger. J.A. 184. He asserted that he had used the utmost discretion in firing the gun, that he "would have to" do the same thing if confronted with the situation again, and that he believed that he had responded in a manner consistent with his training. J.A. 227.

Resp called as an expert witness Dr. Kirkham, a criminologist who specializes in training police to respond to high stress situations. He testified that in the 40 to 45 excessive force cases he had been involved in, Officer Rotramel's actions were the "worst departure from acceptable, universal ... standards of police conduct ..." he had seen. J.A. 285. He stated that Rotramel's conduct violated so many well-established principles of police conduct that the conclusion was inevitable that he had not been properly trained, and that the training he had received was so grossly inadequate and reckless that police misconduct was inevitable. J.A. 286-287. Dr. Kirkham gave as examples of departures from normal police practice Rotramel's failure to wait for back-up assistance, his parking directly in front of the door and thereby signaling his presence, his failure to examine the building to determine whether there were other entrances and to ascertain whether a get-away car was waiting, his entering the club through the front door without a gun drawn, his failure to search Tuttle immediately if he suspected Tuttle was reaching for his boot, and his failure to attempt lesser means of stopping Tuttle. He noted that the curriculum of the police academy that Rotramel had attended devoted only 24 minutes

to how to respond to robbery in progress calls, J.A. 287-288, 304, and stated that a program that did not include training on how to approach buildings with possible felonies in progress, as the police academy's apparently did not, was grossly inadequate. J.A. 291. In answer, the City's former Chief of Police testified that the City's Police Academy had for years been rated one of the top three police academies in the nation. Petr's Brief 6.

Judge West instructed the jury that the City could not be held liable for the deprivation of Tuttle's rights solely because it hired and employed Rotramel, and that resp was required to show that an official policy or custom of the City caused Rotramel to violate Tuttle's rights. He stated that the City could be liable only "if an official policy ... can be inferred from acts or omissions of supervisory city officials ....," and that a policy could be inferred from the acts and omissions of the supervisory officials "if the inaction amounts to deliberate indifference or to tacit approval of an offensive act." He then explained:

> Absent more evidence of supervisory indifference, such as acquiescence in a prior matter of conduct, official policy such as to impose liability of the City ... cannot ordinarily be inferred from a single incident of illegality such as a first excessive use of force to stop a suspect; but a single, unusually excessive use of force may be sufficiently out of the ordinary to warrant an inference that it was attributable to inadequate training or supervision amounting to "deliberate indifference" or "gross negligence" on the part of the officials in charge.

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The jury found against the City, and awarded resp $1,500,000 in actual damages. The jury found in favor of Officer Rotramel, however, on the ground that he acted in good faith. The City moved for a judgment NOV on the ground that resp had failed to prove that the incident was anything more than a single, isolated occurrence, or that the City had any indication prior to the incident that its training and supervision was inadequate. J. West denied the motion, stating that this case was distinguishable from McClelland v. Facteau, 610 F.2d 693 (CA10 1979), in which the CA10 held that evidence of an isolated incident was insufficent to raise an issue of fact regarding the adequacy of training procedures, because in McClelland, the plaintiff did not rebut defendant's evidence that its training and supervision had been adequate, while the resp here presented evidence of inadequate training.

The City appealed and petr cross-appealed the verdict in favor of Officer Rotramel. The CA10 affirmed. The Ct rejected petr's claim that the jury instruction regarding a single instance of excessive use of force was in error, stating that Judge West's statement was proper, and that the instructions taken as a whole correctly stated the law of municipal liability. In rejecting the City's arguments that a single incident is not adequate to establish liability for inadequate training and supervision, the ct stated:

> The act here was so plainly and grossly negligent that it spoke out very positively on the issue of lack of training. ... Our holding requires proof of a city's violation of its duty such as to constitute deliberate indifference to the rights of its citizens.

> Here there was plenty of independent proof of lack of training. In this case the individual defendant had been on the police force for a very short period of time; moreover, he admitted his lack of training to cope with robberies. Nevertheless, he was allowed to go in on a suspected robbery by himself. Also, his gross failure to successfully handle the problem clearly demonstrated his complete lack of training and also his lack of ability. Thus, the incident itself, as well as independent evidence, attested to the officer's lack of knowledge and ability. ... The single incident rule is not to be considered as an absolute where the circumstances plainly show a complete lack of training. Petn 9a-10a.

J. Barrett concurred, stating that while he was convinced that the trial court properly and adequately instructed the jury, he was at a loss to understand the basis for the jury's finding that Officer Rotramel was so lacking in training to cope with robberies that the City could be considered deliberately indifferent to the rights of its citizens.

III. CONTENTIONS

A. Petr's:

A municipality may not be held liable for damages under §1983 absent proof of an established official policy or custom. A custom is a persistent practice, Adickes v. Kress & Co., 398 U.S. 144 (1970), not an isolated incident. See Gilmere v. City of Atlanta, 737 F.2d 894 (CA11 1984); Bennett v. City of Slidell, 735 F.2d 861 (CA5 1984); Webster v. City of Houston, 735 F.2d 838 (CA5 1984); Languirand v. Hayden, 717 F.2d 220 (CA5 1983); Wellington v. Daniels, 717 F.2d 932 (CA4 1983). The policy of the City was that police officers are not justified in using firearms except in defense of life or where the suspect is armed and/or attempting to kill or do great bodily harm. The CA10

found that Officer Rotramel had admitted at trial that he violated that policy. Thus, there is no proof here that the officer acted pursuant to an established official policy. Nor is there proof that the City had a custom of ignoring the improper use of firearms by its police officers, or a policy or custom of providing inadequate training for its officers. Officer Rotramel received the same training as all other officers in his class, and there is no proof that any of those officers ever acted in a manner that indicated inadequate training. It is difficult to see what the City could have done differently to anticipate and prevent the Tuttle shooting. It is not too much to require that a plaintiff submit proof of some pattern of misbehavior that is sanctioned, or at least tolerated, by high ranking city officials, before a municipality may be held liable for damages under §1983.

B. Resp's:

The essential elements of liability established by Monell v. New York City Dep't of Social Services, 436 U.S. 658 (1978) -- official policy or custom, and causation -- are essentially factual in nature, and therefore are within the province of the jury. The DC properly instructed the jury, and its resolution of the factual disputes should not be set aside. There were three theories upon which the jury could have found the City liable for Mr. Tuttle's death. First, there was substantial evidence from which the jury could have inferred that Rotramel was acting pursuant to City policy in shooting Tuttle. Although the City takes the position here that Rotramel violated City policy by

firing his gun, the City's position at trial was that Rotramel acted consistently with the City's policy because he reasonably feared for his life. Further, Rotramel insisted at trial that he had acted consistently with City policy. Other officers gave conflicting testimony regarding whether they understood the City's policy to authorize shooting under the circumstances with which Rotramel was confronted. Second, there was evidence from which the jury could have inferred that the shooting was caused by a City policy of inadequately training police officers. Rotramel acknowledged that his training was inadequate, and that he had received no training on such questions as whether to wait for a backup unit, how to apprehend a fleeing suspect, and how to shoot a suspect so as to disable but not kill him. Further an expert witness testified that the City's training program was "slipshod" and focused heavily on how to kill a suspect, while devoting little or no attention to such matters as how to act at the scene of an armed robbery. Third, there was evidence from which the jury could have inferred that the City's policy of allowing rookie officers to patrol alone just six months after completing the police academy caused Mr. Tuttle's death.

Petr argues persuasively that the mere occurrence of a single constitutional violation should not compel a finding of municipal liability. But that issue is not in fact presented by the facts of this case. Resp offered evidence of far more than just a single incident of excessive force; she adduced evidence regarding the training and supervision of the City's officers, and regarding the use of firearms by the officers.

Monell does not require proof of both the existence of a policy or custom and a regular pattern of unconstitutional deprivations. Indeed, Owen v. City of Independence, 445 U.S. 622 (1980), found muncipal liability on the basis of a single isolated decision with a single victim. Nothing in Monell indicates that redress is to be denied the victims of a policy or custom merely because the policy or custom by its very nature will injure only a single person, or because the victims happen to be the first to suffer deprivations. While evidence of a pattern of violations certainly is relevant in proving the existence of an official policy or custom, such a pattern is not the only way to establish a policy or custom. The jury could have been, but wasn't asked to draw an adverse inference from the fact that respondent did not prove a pattern of excessive force. Petr should not now be heard to complain that the jury did not draw an adverse inference it failed to urge upon the jury.

C. Amici in support of petr:

The State of Oklahoma: A municipality should not be held liable for the act of an employee absent proof that the municipality had an unconstitutional policy or custom, or participated in the supervision of the allegedly illegal act, or had prior notice of improper conduct or inadequate training of the employee or of any employee. The result reached by the CA10 will cause a municipality and supervising officers to have to face the rigors of a federal jury trial every time the plaintiff raises an issue of fact regarding the training that an individual employee received, even if that employee was guilty of improper

action on a single, isolated occasion. Under the CA10's holding, a municipality must now be responsible for the training of each of its officers for the duration of his or her career. Indeed, every chief of police, training officer, and supervisor will be put in the position of having to guarantee that every officer he or she has taught has been adequately trained. Municipalities increasingly will be held liable, because an individual officer will seek to exculpate himself by claiming that he was not properly trained, and juries will sympathize with the individual employee rather than the municipality.

Monell requires proof of either an official policy or an official custom. Here, the City's official policy regarding the use of force to effect an arrest was not the cause of Mr. Tuttle's injuries, because the CA10 found that Officer Rotramel admitted that he had violated the City's policy. Nor did resp prove an official custom; indeed, there was no evidence of other incidents of police misconduct. Monell's requirement that the resp prove an official policy or custom necessarily implies that the municipality have notice of previous improper conduct. See Owen v. City of Independence, 445 U.S., at 673 (Powell, J., dissenting). The other circuits have required proof of a pattern of misconduct, or at least a complete failure to train, or training so reckless or grossly negligent that future police misconduct is almost inevitable. See, e.g., Hays v. Jefferson County, Kentucky, 668 F.2d 869 (CA6), cert. denied, 459 U.S. 833 (1982); Turpin v. Mailet, 619 F.2d 196 (CA2 1980).

D. Amici in support of resp:

American Civil Liberties Union: The lower courts generally permit an inference that a municipal custom caused a constitutional violation upon proof of 1) municipal inaction in the face of a pattern of prior, similar incidents, or 2) a single injurious incident plus evidence warranting a finding that deliberate indifference to adequate hiring, training, or supervision of the police force caused the injury. See, e.g., Hays v. Jefferson County, 668 F.2d, at 874; Owen v. Haas, 601 F.2d 1242, 1246 (CA2), cert. denied, 444 U.S. 980 (1979). This action is not an attempt to impose liability on the City for an isolated incident of police brutality with no link to City policy or custom. A single incident alone usually will not be sufficient to establish municipal liability. Here, however, resp introduced extensive evidence proving the grossly inadequate training afforded all police officers in Oklahoma City, as well as proof that the City had a well-established custom of permitting rookie officers to patrol and to respond to suspected armed robberies alone.

The petr's arguments would arbitrarily restrict plaintiffs trying to prove the existence of a custom to a single method of proof -- evidence of a pattern of similar conduct. In Adickes, 398 U.S., at 173, this Ct reversed the CA2, which had affirmed a directed verdict for the defendant on the grounds that plaintiff had failed to show other instances of discrimination. Adickes therefore indicates that a plaintiff can prove a "custom" under §1983 without showing a pattern of past similar abuse. A municipality's failure to train can only constitute deliberate

indifference to constitutional violations if the municipality knew or had reason to know that such violations were likely to occur were preventive measures not taken. A plaintiff could prove such actual or constructive knowledge not only with evidence of a pattern of similar incidents, but also with evidence that the training program was so deficient as to support an inference that policymaking officials were deliberately indifferent to the inevitable results of inadequate training and supervision.

The City's argument amounts to a claim that a municipality can be held liable for failing to act only in those cases in which action was clearly necessary to prevent continued repetition of demonstrated harm. Such a rule would provide a municipality with a qualified immunity even broader than that afforded government officials, who may be held liable not only where they actually knew action was necessary, but where their conduct violates "clearly established ... constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). By shielding a municipality from liability for deliberate indifference to the potential for constitutional violations, the rule would interfere with the compensatory and deterrent purposes of §1983. When a municipality's willful indifference to the training or supervision of its police officers is so substantial as to predictably cause a deprivation of liberty and life without due process, albeit in a single incident, the victim should receive compensation. The rule advocated by the City would always leave

uncompensated at least the first victims of what turns out to be a municipality's custom. The possibility of liability for such incidents provides municipalities with an incentive to reduce the likelihood of such an injury; the rule advocated by petr would provide no such incentive.

IV. DISCUSSION

This case comes to the Ct in an unfortunate posture. As is illustrated by the description of testimony presented at trial, and as resp and her amicus point out, the evidence in this case goes far beyond proof of a single incident of misconduct. Therefore, absent the challenged jury instructions, the case simply would not present the issue whether a single incident of excessive force can be a sufficient basis for municipal liability. Judge West's instruction regarding a single incident left the door open for the jury to infer a City policy or custom of inadequate training solely from Rotramels' excessive use of force, however, so the issue of liability based upon a single incident is raised. To address the issue, we have to assume that the jury disbelieved all the direct evidence regarding the training Officer Rotramel had received, and relied exclusively on the fact that Rotramel used excessive force to infer that he had been so poorly trained that the City was deliberately indifferent to constitutional rights or grossly negligent. Unfortunately, the briefs do a particularly poor, muddled job of addressing the issue. Its resolution requires analysis of two separate questions: 1) Is inadequate training and supervision a policy or custom for which municipalities can be held liable under Monell?

2) Was the instruction erroneous because a single incident of excessive force can never give rise to an inference of inadequate training and supervision?

A. Can inadequate training and supervision ever be a policy or custom for which a municipality can be held liable under Monell?

yes

The major premise underlying petr's argument is that inadequate training of a single officer will always be mere negligence, and can never be a policy or custom of a municipal police force. Petr understandably focuses on the word "custom" in their argument, pointing out that Monell adopted the definition of custom set forth in Adickes, 398 U.S. at 167-168: practices that are "persistent and widespread", "permanent and well-settled", "settled", or "deeply embedded." Petr correctly asserts that an isolated incident by definition cannot be "persistent and widespread." The City fails, however, to explain why a police department's decisions regarding the training of a single officer cannot constitute a "policy." This Ct adopted the lower court's finding that a single incident constituted municipal policy in Owen v. City of Independence, 445 U.S., at 633, and has never indicated that a plaintiff must show both a policy and a custom. Indeed, the Ct's definition of the two in Monell indicates that they are virtually mutually exclusive. A policy is a "statement, ordinance, regulation, or decision officially adopted and promulgated by th[e] body's officers," while a custom "has not received formal approval through the body's official decisionmaking channels." Monell, 436 U.S., at 690-691.

To hold that a decision not to train, or to inadequately train, a single officer could not constitute policy because it is a single incident would be non-sensical. In a small town such as my home town, there are only two officers, and five or ten years might go by before one resigned and a new officer was hired. Under petr's theory, the decision of my town's council to put a new officer on the street without any training would not be policy, while the repeated decisions of the town council of a larger city not to require that city's new police officers to undergo training would be policy. Similarly, if one of the two police officers in my town told the mayor that he needed a refresher course on the use of force to make arrests, and the mayor denied leave to take the refresher course, the mayor's decision would not be policy until the second officer made such request and was denied leave.

While petr does not clearly articulate them, there are more substantial, but ultimately unpersuasive, arguments in support of the proposition that a single instance of inadequate training cannot constitute a municipal policy or custom. First, the failure to train a single officer would not be municipal policy unless it is attributable to an official "whose edicts or acts may fairly be said to represent official policy." Monell, 436 U.S., at 694. The portions of the trial transcript included in the joint appendix do not include any reference to who adopted or approved the curriculum of the training Rotramel received. Judge West's jury instructions indicated that the policy had to be attributable to "supervisory city officials" and petr apparently

did not object to that instruction or otherwise dispute the policy-making authority of those who approved (or passively failed to change) the curriculum.

Second, an argument could be made that the passive failure to provide training on responding to robbery in progress calls, as distinguished from an affirmative decision not to provide such training, cannot be a "policy." That argument draws support from the Ct's decision in Rizzo v. Goode, 423 U.S. 362, which overturned an award of equitable relief despite evidence of a pattern of police misconduct, because the "District Court found that the responsible authorities had played no affirmative part in depriving any members of the two respondent classes of any constitutitional rights." Id., at 371. In dissenting from Rizzo, you indicated that you understood it to hold that the failure to act to prevent future misconduct cannot be the basis for municipal liability. Id., at 385 (Blackmun, J., dissenting). The majority of the Ct seemed to retreat from such a reading in Monell, by referring to Rizzo as deciding "that the mere right to control without any control or direction having been exercised and without any failure to supervise is not enough to support §1983 liability." Monell, 436 U.S., at 694 n. 58 (emphasis added). In addition, Rizzo stressed the issue of causation rather than the issue of what constitutes a policy. The Ct stated, for example:

> [T]here was no affirmative link between the occurrence of the various incidents of police misconduct and the adoption of any plan or policy by petitioners -- express or otherwise -- showing their authorization or approval of such misconduct. Instead, the sole causal connection found by the District Court

> between petitioners and the individual respondents was that in the absence of a change in police disciplinary procedures, the incidents were likely to continue to occur, not with respect to them, but as to the members of the classes they represented. Id., at 371 (emphasis in original).

Here, Judge West properly instructed the jury that it must find that the policy or custom of inadequate training caused the deprivation of Tuttle's rights. Petr does not expressly challenge the sufficiency of the evidence of causation.

The Ct has recognized that §1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." Monroe v. Pape, 365 U.S. 167 (1961). Ordinary tort law recognizes that both acts and omissions can constitute negligence or gross negligence, and that the failure to train one's employees can serve as the basis of tort liability. Further, the Ct has recognized the §1983 was passed "to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by state agencies. Monroe v. Pape, 365 U.S., at 180 (emphasis added). To hold that only affirmative decisions can constitute a policy or custom therefore would ignore the history of §1983.

A third, related, argument that could be advanced for the proposition that a single failure to adequately train an officer cannot constitute a municipal policy is that a city cannot have a policy or custom of inadequate training unless it knows or should have known that the training was deficient, and such knowledge

cannot be established by proof of a single incident of excessive force. It is true that the plaintiff must show that the City knew or should have known of the inadequacies of its training.[2] But there is no good reason for holding that the only way a plaintiff can prove the knowledge element is through proof of a series of incidents that put the city on notice. The unsoundness of such a rule is illustrated by the CA4's decision in Wellington v. Daniels, 717 F.2d 932 (1983). There, a policeman hit a suspect over the head with a Kel-lite flashlight, causing a skull fracture, brain damage, and permanent complete body paralysis. The evidence at trial included expert testimony that many police departments had experienced problems with officers causing serious injuries with Kel-lites, that the problem had been chronicled in numerous law enforcement publications, and that many police departments had either outlawed the use of the flashlight altogether, or directed their officers that the flashlights were not to be used as weapons. The police chief admitted that he kept abreast of such problems by reading, attending seminars, and talking with other police chiefs, and that he was aware that Kel-lites had been used by police as weapons and had caused severe injuries. He even admitted that he knew his own officers used the lights as weapons. Nevertheless,

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[2]The jury instructions do not clearly direct the jury that it must find that those responsible for the training program knew or should have known that its inadequacies would be likely to result in conduct such as Officer Rotramel's. The knowledge element may be implicit in the notion of deliberate indifference, but if the Ct decides to remand the case, the Ct may want to make the point that the knowledge requirement should be spelled out.

the CA4 held that because the police chief was not aware of any prior incidents of injury from his officers' use of the lights, the single incident that resulted in plaintiff's injuries was insufficient to establish that his failure to train his officers not to use the lights as weapons was a city policy. Id., at 937. It strains credulity to say that the police chief neither knew nor should have known of the likely consequences of his failure to train his officers given the proof regarding his knowledge of "industry practice." To allow plaintiffs to prove knowledge only through proof of prior incidents ignores the value of such evidence of industry practice. Such evidence is commonly used in regular tort cases, and no persuasive reason is offered for treating the knowledge element of constitutional torts differently. Further, the rule gives every police department in the nation one free violation -- until one of the city's own officers actually has caused injuries, the police department need not train its officers to prevent such injuries, even if the department knows of the likelihood of such injuries because their occurence in other cities has been well-publicized.

In sum, there is no sound reason that the decision to allow even a single inadequately trained police officer to go on patrol, or the negligent or grossly-negligent failure to ensure that a single officer is adequately trained, cannot constitute municipal policy if that act or omission is made by a person in a policy-making position, and the plaintiff proves that the policy-maker knew or should have known that the training was inadequate.

B. Was the instruction erroneous?

The troublesome sentence in the instructions reads as follows:

> Absent more evidence of supervisory indifference, such as acquiescence in a prior matter of conduct, official policy such as to impose liability of the City ... cannot ordinarily be inferred from a single incident of illegality such as a first excessive use of force to stop a suspect; but a single, unusually excessive use of force may be sufficiently out of the ordinary to warrant an inference that it was attributable to inadequate training or supervision amounting to "deliberate indifference" or "gross negligence" on the part of the officials in charge.

The instruction essentially gives the plaintiff/resp the benefit of a res ipsa loquitur inference: if an occurrence is so out of the ordinary that it could not have happened but for gross negligence[3] the jury is entitled to infer gross negligence even absent direct proof of such gross negligence. The propriety of the instruction turns first on whether the inference it allows is valid.[4]

I don't think the inference was valid here. Again, to analyze the issue clearly, we have to assume that there was no direct evidence regarding Rotramel's training, and no evidence of his actions, other than the actual use of force, that might indicate a lack of training. Where the only evidence presented is that a single officer used excessive force in effecting an

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[3]The gross negligence standard was applied at trial, and is not challenged here, so I am not addressing the issue whether negligence, gross negligence, or deliberate indifference is required to establish liability for inadequate training.

[4]It is not clear that petrs objected to the jury instruction at issue, although the CA10 addressed the issue on appeal. I recommend that the petrs be asked at oral argument whether they objected.

arrest on a particular occasion, the inference that he did so because he had been inadequately trained or supervised, or because the police department had a policy or custom or encouraging the use of excessive force, is weak. It is at least as likely that the officer simply lost control of his temper, or crumbled under pressure, or otherwise acted completely on his own accord. Therefore, to hold the municipality liable on just that proof would be to risk the substantial possibility that the jury was merely imposing respondeat superior liability on the municipality.

On the other hand, there may be situations in which the inference contained in these jury instruction will be valid. If seven officers work together to beat a prisoner or suspect, the inference that they had not been instructed regarding the proper use of force, or that they thought they were actually allowed to use such force, or at least that they would not be punished for doing so, is fairly strong, because it's hard to believe that seven officers would crumble under pressure simultaneously, or that at least one of the seven would not be sufficiently responsible to remind his colleagues that they shouldn't engage in such behavior, or at least to refuse to participate in the beating. See Owens v. Haas, 601 F.2d 1242, 1247 (CA2), cert. denied, 444 U.S. 980 (1979) (Where seven prison guards beat an inmate severely, the brutal and premeditated nature of the beating and the number and rank of the officers "suggest official acquiescence on some level").[5]

Footnote(s) 5 will appear on following pages.

Therefore, I would leave open the possibility that the inference suggested by the jury instructions could in some cases be proper. In this case, however, I do not see how the instruction can be justified. Nor can it be excused under a civil "harmless error" analysis. Jury instructions must be read as a whole, of course, but nothing in the remainder of the instructions counters the statement at issue. The statement was far from a "technical error," and it cannot be considered trivial or irrelevant.

V. RECOMMENDATION

I recommend that you vote to reverse, on the ground that the instruction allowing the jury to infer inadequate training from a

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[5]The jury instruction allowed an inference of inadequate training from a "single unusually excessive use of force." Had the judge merely changed the instruction to say that inadequate training may be inferred from the officer's actions on a single occasion, the inference might have been valid here, because of the cumulative effect of Rotramel's many errors. Putting aside the evidence from Rotramel and the expert witness about his training, common sense would tell a jury that barging in to a supposed armed robbery, without drawing one's gun, without so much as looking in a window, and without radioing to find out when back-up cars would arrive, indicates a lack of even basic police skills. It's hard to draw an inference that Officer Rotramel was acting out of personal malice or anger, or that he was over-reacting to pressure, because before he even encountered Tuttle, he unnecessarily jeopardized his own life by walking into a potential armed robbery completely unprepared to deal with the situation. Similarly, common sense (along with television) would tell a jury that a police officer who thinks that he sees a person reaching for a potential weapon twice would check to see if the person had a weapon rather than simply holding the suspect by the front of the shirt and telling him to stay put. J.A. 178. The number and nature of the errors make the inference that Rotramel was never adequately trained much stronger than the inference that he had been adequately trained but was acting on his own and ignoring his training.

single incident of excessive force was error. I recommend that you reject the broader argument that a single instance of inadequate training may never be a municipal policy. Even a single instance of inadequate training can constitue a policy if a person in a policy-making position decided to provide, or failed to correct, training that the policy-maker knew or should have known was so inadequate that constitutional violations were likely to result. I recommend that you also reject the argument that only a pattern of incidents can serve as proof of a policy of inadequate training. Proof that a policy-maker knew that other municipalities had found it necessary to provide certain training, for example, may suffice to prove that the policy-maker knew or should have known that the City's training was inadequate.