BENCH MEMORANDUM

Tuesday, January 8, 1984

Recommendation: Reverse and Remand for Harmless Error Determination

No.83-1919

Oklahoma City v. Tuttle

Cert to CA 10 (Barrett, Doyle, Seymour)

Initial Votes:

Grant: WEB, HAB (J3), LFP, WHR

Deny: WJB, TM, BRW, JPS, SDO'C

ISSUE

As presented by petr, the question is: Whether a single isolated incident of the use of excessive force by a police officer establishes an official policy or custom of a municipality sufficient to render the municaplity liable in damages under §1983.

FACTS

The Oklahoma City Police recevied a telphone call reporting an armed robbery in progress at a local bar. The caller gave a description of the supposed robber, and the police dispatcher radioed the report to police cars in the vicinity. The first car to arrive at the scene was driven by a rookie officer who was by

himself and who had been out of the police academy for only 10 months. Without waiting for a backup, the rookie officer parked his car in front of the bar and went in alone.

When he entered, there was nothing to indicate a robbery in progress; everyone looked calm, and no one shouted anything about a robbery. Soon after entering, the officer was approached by William Tuttle, who matched the description of the robber; Tuttle, however, was carrying a drink, not a gun, and the officer told him to remain the bar. Tuttle at first complied, but then apparently darted out of the bar. The rookie officer gave chase, drawing his revolver. Outside the bar, the officer saw Tuttle crouched down in the parking lot; Tuttle was about 10 feet from the officer and had his back to him. According to the officer, Tuttle then started to reach for his boot and whirl toward the officer in the same moment, and, although the officer did not see any weapon, he shot Tuttle dead; Tuttle was killed by a bullet that entered through his back, so he evidently did not turn around very far before the officer shot him. A search at the scene did not turn up any gun in Tuttle's boot or elsewhere, although when Tuttle got to the hospital and was undressed a toy gun was discovered buried deep in his boots.

There is no dispute that Tuttle was neither an armed robber or chargeable with any other felony. Nor is there any dispute that Tuttle never posed any actual danger to any officer or any other individual. In addition, the Oklahoma City Police Manual on deadly force states 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." There is no dispute in this case that the officer could not have had a reasonable belief that Tuttle was armed or that the shooting was necessary to defend life.

Tuttle's wife then brought a damages action under §1983 against the rookie officer and the City. Her theory insofar as the city's liability was concerned was that the city had inadequately trained the officer to handle armed robberies and had acted improperly in sending so inexperienced an officer out on his own patrols. The jury returned a verdict for the officer and against the city; evidently the jury found that the officer had a good faith defense to the shooting, but found that the city's policies or practices had been a cause of Tuttle's death. The City attacked these verdicts as inconsistent, but the DJ held that the jury could reasonably have found that the officer had a reasonable belief, based on his training, that he was allowed to shoot under the circumstances, but that that belief had resulted from the poor training he had received from the city -- in other words, the officer should have known better, but it was the city's fault, not his, that he did not. The verdict against the city was for 1.5 million dollars.

The question presented is whether, given Monell's holding that municipalties cannot be held strictly liable on a respondeat superior basis for the conduct of their agents, it was proper to impose liability on the municipality on the facts of this case.

DISCUSSION

The most important aspects of this case are the elements

that are not at issue. First, there is no challenge made as to whether the underlying constitutional violation occurred; that is, it is conceded that the officer violated §1983 in shooting and killing Tuttle. Second, no challenge is raised as to the standard of care that the municipality was required to meet; the jury was instructed that the city could be found liable only if it had been "grossly negligent" or had acted with "deliberate indifference" to Tuttle's civil rights. I think this is too high a standard, and that simply negligence should perhaps suffice, but the question is not presented in the case. Third, there is no dispute over the proper causation standard; the jury was told that, if the city had a policy or practice that was grossly negligent and if that policy that had been a cause of Tuttle's injuries, the city could be held liable.

Finally, and most important, this is not a sufficiency of the evidence case. There is no question in my mind that there was more than enough evidence to take the case against the city to the jury. The plaintiffs introduced expert testimony designed to show that the city was responsible for Tuttle's death on at least one of three bases: (1) that the shooting in this case was authorized by city policy; (2) that even if the shooting was not so authorized, the city's training of police officers was woefully inadequate; (3) that the city's policy of putting rookie officers out on the street without supervision so soon after they had completed the police academdy was bad police practice. Although the evidence on these points is not at issue in this case as it comes to this Court, it may be useful to summarize

briefly the evidence offered at trial on each of these points. On (1), the defense's theory in the DC was that the shooting was reasonable and legal; that an officer was authorized to shoot if he believed, however wrongly, that a suspect was armed and dangerous. There was also testimony from a police captain that officers were permitted to shoot without actually waiting to see if a suspect had a gun. Both parties now assume that §1983 would permit a shooting only when the officer has a reasonable belief that the suspect was armed or dangerous, and the jury certainly could have concluded that the city's official practice was inconsistent with this standard.

On (2), a great deal of expert testimony was introduced designed to show that the city's training policies for handling armed robberies were woefully inadequate. For example, the training program provided 80 hours of practice on the firing range, but only 24 minutes on how to respond to an armed robbery. The expert testified that good police practice would have been to wait for a backup rather than bursting into the bar. In addition, the rookie officer testfied that he had not been trained to handle the sort of situation he faced in the bar. Finally, on (3) the plaintiffs introduced evidence that the city used to not let rookie officers patrol on their own until they had at least 18 to 24 months experience with a senior officer; the officer involved in this case had only 10 months of such training. Of course, the parties disputed whether this policy regarding rookie officers could have caused Tuttle's death, but that was a jury question.

In sum, plaintiffs introduced sufficient evidence to justify sending the case to the jury on any or all of the three theories by which they sought to ascribe liability to the municipality. The sufficiency of the evidence should therefore not be in dispute in this case.

ANALYSIS

The sole question actually before the Court is how a plaintiff is allowed to establish a municipal custom or policy within the meaning of Monell, given that Monell prohibits making municipalities strictly liable for the unconstitutional acts of their agents. In particular, petrs challenge one aspect of the jury instructions that they claim impermissibly subjects a city to the possibility of strict liability verdicts.

The instructions on municipal liability are found at pp.42-46 of the Joint Appendix. The jury was instructed that, to find the city liable, "more than a negligent act of failure to act must be shown. The plaintiff must show that the conduct of the municipality was gorssly negligent, reckless, or of deliberate indifference." A city policy was said to exist "when a city implicitly or tacitly authorizes, sanctions, ratifies, or acquiesces in the constitutional deprviations in such a manner that such constititutional deprivation can be found to result from the execution of a city's official policy or custom." The judge then pointed out that the plaintiffs were relying on the theory that the city had inadequately trained and supervised the rookie officer, and that the existence of inadequate training or supervision was a question of fact for the jury to determine, as

was the question of whether the city's failings were a cause of the constitutional violation. There is no problem with any of these instructions.

However, the judge also allowed the jury to infer a city policy from the mere occurrence of a single, unusually excessive use of force that was sufficiently out of the ordinary to support an inference that it could not have happened without the city being responsible in some way. The key portion of the instruction was:

> [O]rdinarily, [a city policy cannot] 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. JA 44.

In my view, this instruction is erroneous, at least on the facts of this case. If the only evidence of the municipality's liability is the single act of one officer, and, as in this case, there is nothing to indicate that the officer had a history of such incidents or that the city knew or should have known that he had a propensity for violence, then I think it is improper to tell the jury that they can infer a city practice from the incident itself. In such circumstances, it seems equally likely that the incident was the result of one officer's inability to follow his instructions, or the officer going berserk or panicing, as it is that the city's policies caused the incident. That is, if all the plaintiff introduces is the fact that the officer shot when he was constitutionally forbidden to, the jury

would have no better basis for holding the city liable than for concluding that the officer's individual actions were responsible for the incident.

That is not to say that a single-incident instruction is always wrong. In some circumstance, the nature of the incident of excessive force could be probative evidence of a municipal policy or custom; the most likely situation in which this would be so would be where several actors acted in concert to cause an injury. For example, in Owens v. Haas, 601 F.2d 1241 (CA 2 1979), a prionser was brutally beaten by 7 prison guards, many of whom were higher ups in the prison hierarchy. The prisoner's 1983 action against the County of Nassau, in which the prison was located, was dissmissed by the DC for failure to state a claim, but the CA reversed. The CA ruled that the nature of the beating, the number of officers involved, and their rank, suggested that the prison might have acquiesced in these kinds of beatings. The plaintiff was allowed to proceed to discovery. In a case in which, as a matter of common sense and experience, it is more likely than not that the single incident would not have occurred but for some municipal approval or acquiescence, I see nothing wrong with a single-incident instruction. This case, however, is not such a case, and I tend to doubt that a single-incident instruction would ever be proper when the incident involves only a single officer; in such a case, it would seem that the officer is just as likely to have acted independently as it is that the city has trained him to act improperly. Thus, I believe the instruction was erroneous.

That would seem to leave three questions. First, was this instruction properly objected to? Under Rule 51 of the Fed. Rules of civ. Pro, an instruction must state distinctly the matter to which a party objects and the grounds of objection. Here, it appears that the only objection made by the city was put in these terms: "we make a second objection, your honor, particularly to the one, the Oklahoma City language, the language in the light of the City of Oklahoma City, which is the single occurrence language." Arguably, this language does not satisfy the requirements of Rule 51, for this Court has said that, "in fairness to the trial court and to the parties, objections must be "sufficiently specific to bring into focus the precise nature of the alleged error." Palmer v. Hoffman, 318 U.S. 109, 119 (1943). I would give serious consideration to this question, and if the objection were not found to be properly made, the writ should be dismissed.

Second, since the instructions must be read as a whole, and since the instructions were basically fine, rspts argue that the instruction was not erroneous when the instructions are read as a whole. This is a close question, for the instructions clearly put the emphasis on the need for a finding that the city had improperly trained the officer. Moreover, the fact that the jury returned a verdict for the officer and against the city is some indication that the jury believed that the city's policies had caused the officer to have a good faith but unconstitutional belief that he could shoot. Nonetheless, I do not think the instructions, taken as a whole, can be said to cure the defect of

the erroneous instruction. The erroneous instruction stands out prominently when one reads the charge to the jury, and if the jury disbelieved all the expert testimony it could still have imposed liability on the basis of this instruction. Thus, I think the instructions as a whole were erroneous.

Third, the erroneous instruction may have been merely harmless error. Since this court is willing to recognize that even constitutional errors in jury instructions in criminal cases may be harmless, see Zant and Chapman, surely a harmless error rule applies to jury instructions in civil cases. Here, the argument is very strong that any error in the instruction was irrelevant; counsel never argued the case in terms of inferring municipal liability from the incident itself, lots of evidence was put on regarding deficient training practices, and it is difficult to imagine that the jury would have disbelieved all of the testimony about improper training, including the officer's own testimony to this effect, and then nonetheless inferred municipal liability from the incident itself -- that scenario is so implausible that I think the error was probably harmless. However, the issue is not very well briefed, and there is no indication what the proper standard is for harmless error in jury instructions in civil cases. Thus, it may be that this issue should be left to the CA on remand.

CONCLUSION

A single-incident instruction will generally be impermissible in a §1983 action, at least when the incident involves only one officer. The instruction may be permissible,

however, when the incident is most plausibly the result of official custom or practices -- such as when several officers get together, use department resources, and act in concert with high level officials. On the facts of this case, I believe the single-incident instruction was improper. I also think the instruction remains erroneous even when read with the instructions as a whole. However, I suspect the instruction error was harmless, given the way the case was actually litigated. The harmless error determination may have to be left to the lower courts, since it has not been briefed very extensively before this Court.

REVERSE ON INSTRUCTION

FIND ERROR IN INSTRUCTION HARMLESS OR REMAND ON THIS ISSUE

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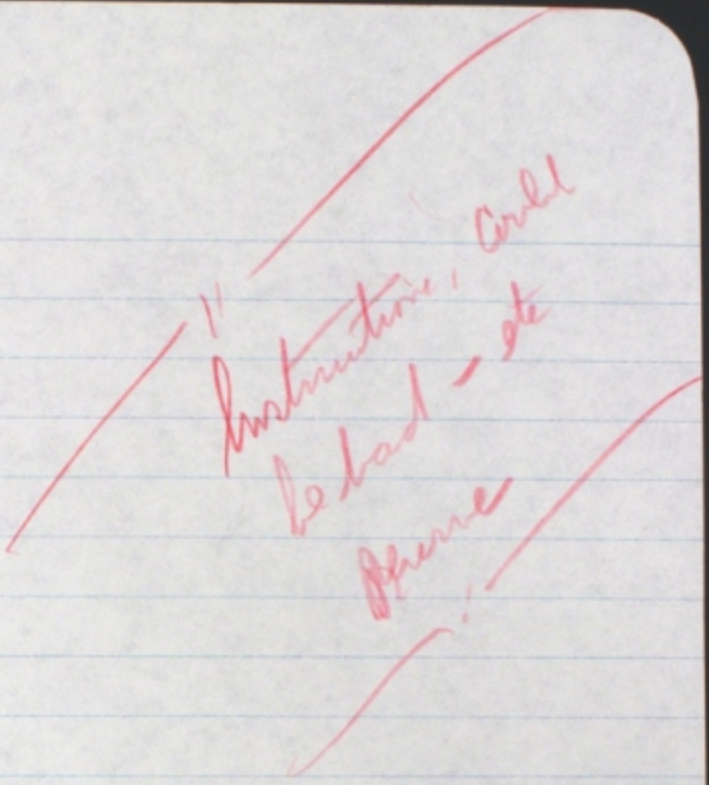
January 7, 1985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