dac 07/04/84

CFR

Grant

An imp. case

Resp's husband was shot in the back & killed by a police officer who mistakenly thought the victim was a robbery suspect

Resp sued the officer & City under §1982. Jury found officer had acted in "good faith" but found City negligent re poor training – verdict $1,500,000.

CA 10 affirmed, finding ev. of inadequate train supported the verdict.

PRELIMINARY MEMORANDUM

But Monell requires that the officer acted pursuant to a City policy

September 24, 1984 Conference
Summer List 5, Sheet 2

No. 83-1919 Cert to CA 10 (Barrett, Doyle, Seymour)

OKLAHOMA CITY
v.
TUTTLE Federal/Civil Timely

1. SUMMARY: Petr contends that the courts below applied an incorrect standard in determining whether an incident of

CFR & grant.

Discussion

I agree with David that this case raises a very important issue, and a check of the record is necessary to determine

police misconduct reflected a policy of petr for which it could be held liable.

2. FACTS AND DECISION BELOW: Resp's husband was shot and killed by a police officer. Apparently, the officer arrived at a bar in response to a report of an armed robbery. The officer ordered resp's husband, who met the description of the robber, not to leave the bar. Resp's husband left the bar, however and, as he was doing so, the officer shot him in the back.

Resp filed suit against the officer and petr in federal DC under §1983 for violation of her husband's constitutional rights to life and liberty. The jury returned a verdict for the officer, finding that he acted in good faith; however, the jury awarded $1.5 million in actual damages against petr. On appeal, petr contended inter alia that the facts of the incident did not themselves establish an official policy of the municipality sufficient to render the municipality liable for damages under §1983. The CA found evidence in the record sufficient to support liability, however. "The act here was so plainly and grossly negligent that it spoke out very positively on the issue of lack of training, the problem which is presented." The officer had shot the decedent without the least justifiable provocation. Further, "there was plenty of independent proof of lack of actual training": the officer, who had been on the force on a very short time, was sent alone to deal with the incident; and he admitted his lack of training to cope with robberies.

3. CONTENTIONS: Under Monell v. Department of Social Services, 436 U.S. 658 (1978), the municipality is only liable if

the police officer's use of deadly force was pursuant to an official policy or custom. Such a finding cannot be based on a single incident. The decision below conflicts with Languirand v. Hayden, 717 F.2d 220, 228 (CA5 1983), that held that a policy of inadequate training could be established only by a "pattern of similar incidents in which citizens were injured ... by police misconduct or that serious incompetence ... was widespread throughtout the force." See also Wellington v. Daniels, 717 F.2d 932 (CA4 1983) (single incident did not support finding of city policy to allow use of dangerous weapons by police). Other cases illustrate general confusion as to the "custom or usage" requirement that the Court should clarify by granting cert in this case. Herrera v. Valentine, 653 F.2d 1220 (CA8 1981); Hayes v. Jefferson County, Kentucky, 668 F.2d 869 (CA6 1982); Turpin v. Mailet, 619 F.2d 196 (CA2 1980).

Resp contends that, as the CA 10 found, the officer admitted that he had not been properly trained. Further, expert testimony in the record indicated that the incident was a departure from acceptable police conduct by sending a rookie officer to handle the incident without direct supervision by a more experienced, better trained officer. Other courts have agreed that a plaintiff may recover for a single incident of misconduct that is shown to be caused by inadequate training or supervision. Owens v. Haas, 601 F.2d 1232 (CA2 1979), cert. denied, 440 U.S. 980 (1979); Liete v. City of Providence, 463 F. Supp. 585 (DCRI 1976). Hence the only issue presented here is a factbound question as to the sufficiency of the evidence.

4. DISCUSSION: The issue presented here is a recurring and important one. There appear to be differences in emphasis among the circuits, see generally, Languirand v. Hayden, 717 F.2d, at 226-227; Wellington v. Daniels, id., at 936 (summarizing cases). The circuits are agreed that the victim of police misconduct may recover from the municipality only upon a showing of a municipal policy authorizing or condoning police misconduct, that may be inferred from gross negligence in the supervision and training of the police. The problem is whether multiple incidents of police misconduct must be shown to establish gross negligence. Many of those cases that require multiple incidents of misconduct generally have found for the plaintiff, so that they cannot be read to establish minimum standards of proof. E.g., Herrara v. Valentine, 653 F.2d 1220 (CA8 1981). In others, such as Languirand, there was only equivocal evidence that the defendant officer had not been properly trained, so that the evidence must be supplemented by further background evidence as to police misconduct. Nonetheless, as petr argues, there is inconsistency in the standards of liability that have been formulated by the different circuits.

As a matter of principle, it seems to be a close question whether training can be shown to be inadequate when only a single incident of misconduct is proven. On the one hand, training so inadequate as to constitute gross negligence presumably would give rise to more than one incident of misconduct; on the other hand, there is no reason to think that the evidence of such incidents readily will be available to individual plaintiffs. On

balance, expert testimony as to generally accepted procedures and standards would seem adequate to prove the standard of care in this context, as it generally is in tort law. If this conclusion is accepted, the question presented here is factbound.

Nonetheless, the only evidence that the CA opinion cites to prove negligence is the officer's conduct in handling this incident. It is not clear how the court inferred a policy or practice of inadequate training or supervision. The officer's own testimony on the matter is unreliable, as he may have understood that he would be less likely held liable if he placed the blame for the incident on the city. And resp's brief admits that petr "did not follow its own policy" in permitting the officer to handle the incident unsupervised. Resp. Mem., at 6. The lax standard that the CA seems to have applied to determine petr's gross negligence may bring it into conflict with other circuits. The Court therefore may wish to examine the record in this case to see whether the CA's affirmance was based only on evidence as to the single incident of misconduct or whether the "independent proof" to which its opinion summarily alludes includes general testimony as to petr's policies. If the record contains only testimony as to the officer's handling of the incident in question here, I would grant cert to clarify the standard of proof to be applied in determining municipal liability for police misconduct under the "policy or custom" standard.

There is no reason to hold the case for Tennessee v. Garner, No. 83-1035, that presents wholly different questions

concerning when the police may use deadly force consistently with the due process clause.

5. RECOMMENDATION: I recommend CFRecord.

There is a response.

July 4, 1984 Charny Opin in petn

if the CA based its finding of negligence on more than the single incident at issue here.