

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 8, 1978

Re: 75-1914 - Monell v. Department of Social Services of the City of New York

Dear Bill,

I am content with your circulation
of May 4, 1978.

Sincerely yours,



Mr. Justice Brennan
Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL


May 5, 1978

Re: No. 75-1914 - Monell v. Department of Social
Services of the City of New York

Dear Bill:

I am still with you and hope you will not have
to make any further changes.

Sincerely,



T.M.

Mr. Justice Brennan

cc: The Conference

Under these circumstances, the burden is upon the City to demonstrate in the clearest and most convincing manner that municipal corporations are exempt from the Act.

B. THE ONLY NATURAL INFERENCE FROM THE LANGUAGE, PURPOSE, FUNCTION, AND LEGISLATIVE HISTORY OF THE FOURTEENTH AMENDMENT AND THE CIVIL RIGHTS STATUTE, IS THAT MUNICIPAL CORPORATIONS ARE LIABLE IN CIVIL ACTIONS BROUGHT UNDER THESE ENACTMENTS.

Revised Statutes §1979 makes liable in damages "every person" who violates the constitutional rights of another while acting under color of law.

(1) Petitioners contend that the rule of *respondeat superior* is so ancient and basic a legal concept and is so obviously related to the purpose and function of the Fourteenth Amendment and its enforcement legislation, that it must be considered part and parcel of R.S. §1979, even if the words "every person" are thought to refer merely to human individuals.

(2) In the alternative, petitioners contend that the statutory words "every person" include municipal corporations.

1. Respondeat Superior Is Implicit in the Statute.

We deal with a broadly phrased remedial statute which is to be construed liberally.

Section 1979 was entitled "An Act to Enforce the Provisions of the Fourteenth Amendment . . ." 17 Stat. 13 (1871). The fourteenth amendment explicitly proscribes action by states. It would therefore seem, without more, that the implementing statute must apply to state municipal corporations. The implication seems clear:

- (b) *Immunity is unjust to the individual employee who commits a municipal tort.*

The doctrine of immunity frequently operates with almost incredible harshness upon individual officers:

“This burden, under modern conditions, should not be borne by the officer, for many reasons—the fact that his fault may be very slight and yet the results may be very serious, a situation which will mean injustice to either the officer or the injured person unless the responsibility is borne by the government; the fact that even if the officer is greatly at fault, it does not follow that he is solely so, or that the government should disclaim responsibility for his acts”

Blachly and Oatman, “Approaches to Governmental Liability in Tort: A Comparative Survey,” 9 *Law & Contemp. Prob.* 181, 213 (1942).

This last point is of particular significance when the institutionalized nature of civil liberties violations by metropolitan police departments is noted. See, for example, *Secret Detention by the Chicago Police: A Report by the American Civil Liberties Union, Free Press, Glencoe* (1959) (20,000 illegal incommunicado detentions in Chicago in 1956); Comment, “Search and Seizure in Illinois: Enforcement of the Constitutional Right of Privacy,” 47 *Nw. U.L. Rev.* 493, 497 (1952) (4,593 unconstitutional searches and seizures exposed in one branch of the Municipal Court of Chicago in 1950).

The most frightening thing about what happened to the Monroe family is not that they were terrorized by bad men who bore ill will against them. The sobering truth of the matter is precisely that what was done to the Monroes was

done almost casually—as part of a routine investigation. This case portrays a standard police procedure—whose victims are often innocent. This case is, among other things, a “custom or usage” case.²⁹

(c) *Immunity is unjust to the community as a whole.*

It cannot be denied that the citizens who live in a city have a significant interest in their police department's operating in accord with the Constitution. If there were no such interest, we would not, with such endless pains and tribulation, have articulated in our basic public document the rights of man. These rights, of course, mean nothing if they are confined to paper. They must be lived, or they are worthless. This means that violations must not occur, not merely that they must be redressed.

Imposition of municipal liability applies deterrent pressures at the only level where they can be truly effective—the level of policy decision and command. If the City must pay for the wrongful acts of its agents, the public will quickly know of it. The resultant pressures will be reflected in the policy decisions and command performance of those who govern the City and rule its police department. Disciplinary controls will be exercised at the top—the level where it really counts in a modern big city police department which more nearly resembles a large business corporation than it does an old fashioned town constabulary. Things will change. Not only will past in-

²⁹ Compare Paulsen, "Safeguards in the Law of Search and Seizure," 52 *Nw. U.L. Rev.*, 65, 75-76 (1957), with regard to the Los Angeles practice of "bugging" private homes:

"This police conduct is not only an example of illegality, it is illegality elaborately planned with the connivance of the Los Angeles Chief of Police. It is not the case of the over-eager rookie misjudging the fine lines of the law of arrest. It is constitutional violation as a matter of police policy."

justice be redressed, but, far more important, future injustice will be prevented. "The purpose of the law . . . is to prevent such misconduct, not to put a price on it." *Secret Detention by the Chicago Police*, supra, at 17.³⁰

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Professor Caleb Foote has, with specific reference to police violations of individual rights, summarized all three reasons for municipal liability in one paragraph:

"Governmental liability is important not only to provide financially responsible Defendants, but primarily so that the deterrent will be effective where it is needed—at the level where police policy is made. If cities are responsible for torts committed by officers who are known to be vicious and ill tempered or dangerously insane or chronically alcoholic, the liability is likely to discourage the retention of such officers and compel a better police force. Most illegal arrests and searches probably arise within the scope of everyday police activity, a fact recognized by cities which allow the city attorney to defend officers sued for false imprisonment. Where the officer makes an illegal arrest under the orders of his superiors, while this may not excuse him, evidence of the fact will be admissible in mitigation of damages. However justifiable this may be as an act of justice to the Defendant, it should be irrelevant to the Plaintiff's cause of action and illustrates the desirability of enforcing the sanction at the policymaking level. Furthermore, some police illegality is an inevitable concomitant of law enforcement. The ex-

³⁰ It is worth recalling that *Entick v. Carrington*, 19 How. St. Tr. col. 1029 (1765) and the associated damage actions *stopped short* the use of the general warrant in England—and that Parliament paid the damages for constitutional violations committed pursuant to a long established English custom of searches under the general warrants. See Lasson, *The History and Development of the Fourth Amendment to the United States Constitution*, 45, 48-50 (1937).

pense should be borne by the state, which can spread the loss where actual monetary damage results and which is in the position to control and minimize the risk."

Footnote, "Tort Remedies for Police Violations of Individual Rights," 39 *Minn. L. Rev.* 493, 514 (1955).

Lon Fuller and Andrew Casner made the same point with interesting variations:

"One of the standard objections to municipal liability is that such a doctrine would tend to eliminate the officer's feeling of personal responsibility. But should the officer be judgment proof, the incentives to non-tortious conduct are in no way affected by municipal liability. Even when a judgment against him is collectible, his feeling of personal responsibility may persist despite the imposition of liability upon the municipality, for he is still subject to an action over brought by the city. In any event, the proper method for developing incentives to non-tortious conduct is through adequate administrative supervision Public safety becomes a matter of real concern to the city fathers when the city is liable for its torts"

Fuller & Casner, "Municipal Tort Liability in Operation," 54 *Harv. L. Rev.* 437, 459 (1941).

Dean Leon Green has summed up the policy factors at stake:

"There is no good reason why the basis of liability applicable to private corporations should not give municipal corporations all the protection they require. The defenses available are extensive and no one can contend that they are not ably presented and consistently upheld by the courts. Even in the most extreme case, that of injuries inflicted by police officers, the protective doctrines are adequate. If the officer is not on duty, as in the recent case of the shooting of a

sailor by two city policemen, the city is protected by the 'scope of employment' doctrine. On the other hand, if it were found that a policeman while on duty, as in the recent case of shooting a Negro boy in the back, did so either negligently or wantonly, why should the city not pay for the harm done as would a private employer? Why should the victim be required to bear the injury while the city does nothing to atone for the conduct of its unfit employee? Incidentally, if a city in such a case were held responsible, how long would it be before municipalities everywhere would be taking the same attitude towards the quality of their personnel that must be taken by private companies? The opportunity offered through civil actions for making indifferent city governments responsive to their duties is staggering."

Green, "Freedom of Litigation—Municipal Liability for Torts," 38 *Ill. L. Rev.* 355, 377 (1944).

The conclusion is apparent:

"There is no way of assuring a maximum of justice and a minimum of suffering except by the assumption of responsibility by the unit of government."

Blachly and Oatman, "Approaches to Government Liability in Tort: A Comparative Survey," 9 *Law & Contemp. Prob.* 181, 213 (1942).

2. The Rule of Immunity Is Not Well Grounded In History.

In *Tenney v. Brandhove*, 341 U.S. 367 (1951), this Court read into R.S. §1979 a rule of legislative privilege, because that rule was "... well grounded in history and reason" 341 U.S. at 376. We have dealt with the "reason" of municipal irresponsibility for torts. We turn to irresponsibility's history.