Renewed 3/29 - Rainer perceptively Q we overlooked at time of Grant.

1. Are the Merits (punitive damages vs. a municipality?) here for review?

PS 03/28/81 Petrs failed to object to punitive damages instruction. On motion for mistrial & directed verdict, DC noted this procedural default & Rule 51 that would preclude subsequent reliance. But DC nevertheless addressed punitive damage issue. CA1 noted all of this, & applied the "plain error" exception to Rule 51: Only where DC has committed "plain error" in its instruction. CA1 held the error, if any, was not "plain" because law as to punitive damages is not settled. decided

Thus, CA1 did not (as WHRs opinion states and BENCH MEMORANDUM understood) rule punitive damage issue.

See p7 for "one possible way" for us to reach merits. But this appears weak. I think error of DC was "plain", but this is debatable.

2. Merits - If we reach, Reverse. History seems clear - no such damages vs municipalities in 1871, & no policy for them

To: Mr. Justice Powell March 28, 1981

From: Paul Smith

No. 80-396, City of Newport et al. v. Fact Concerts, Inc. et al.

Question Presented

Whether a municipality is liable for punitive damages in a First Amendment damages case brought under § 1983.

Background

This case involves a concert held in Newport, Rhode

Island. The City Council attempted to revoke permission for an outdoor concert--given in a contract--when the promoters substituted a rock band for a jazz performer. Although the concert went ahead as planned, after respondents obtained a temporary restraining order from a state court, its attendance was substantially diminished by news reports of its cancellation by the City Council.

Resps brought suit in federal court against petrs--the City and the members of the City Council. They sought damages for a violation of the First Amendment and for breach of contract. The jury returned a verdict of liability on both counts, awarding $72,000 in compensatory damages plus $275,000 in punitive damages--$200,000 against the City and a total of $75,000, in varying amounts, against the individual councilmen. Seventy-five percent of the punitive damages award was assessed under the First Amendment count. Petrs moved for a judgment N.O.V. and a new trial, and the District Court rejected these motions. It did, however, decide to remit $125,000 of the punitive damages against the City, on the theory that the City could not have culpability greater than the sum of the culpability of its officials.

In its opinion, the District Court noted that petrs had failed to object to the instruction on punitive damages given to the jury. It referred to the requirement of Fed. R. Civ. P. 51, requiring such an objection if a party wishes to assign as error an instruction. But it refused to "rest its

Petrs failed to object - Rule 51

decision on this procedural ground alone." Pet. at B-3. It went on to hold that "a municipality may be held liable for punitive damages" in a § 1983 action. Id., at B-10. DC

The CA1 affirmed. With respect to the punitive damages instruction, the court noted that petrs had failed to object. It stated that such a failure to object may only be overlooked when the error is "plain" and has seriously affected the fairness, integrity or public reputation of a case. Id., at A-14. The court then went on to decide whether the error in this case was "plain," concluding that it was not--because the state of the law in this area is uncertain:

> [T]here is a distinct possibility that municipalities, like all other persons subject to suit under section 1983, may be liable for punitive damages in the proper circumstances. There certainly is no imposing body of law to the contrary.
>
> In short, the present state of the law as to municipal liability is such that we cannot with confidence predict its future course. Where the law is in such a state of flux and there is no appellate decision to the contrary, we would be hard-pressed to say that the trial judge's punitive damages instruction was plain error.

not plain error

Id., at A-15.

In sum, it is quite clear that the CA1 did not decide whether punitive damages may be awarded against a municipality; it merely decided that the issue is sufficiently unsettled to require the conclusion that any error in the district court was not plain error.

CA1 did not decide whether punitive damages may be awarded to a municipality. It merely held DC's ruling was not "plain error" ~~& therefore not reviewable~~

Discussion

There are two issues presented by this case: whether the Court can reach the merits, and whether on the merits municipalities may be subjected to punitive damages under § 1983.

I. The Plain Error Problem

The notes on the cert memo indicate that you were initially concerned that the punitive damages issue was not presented here as a result of the failure to object in the trial court. You were, however, persuaded that the question is presented by Justice Rehnquist's dissent from denial, which you joined. That opinion does not, however, contain a persuasive argument for the view that there is no "plain error" problem here. It states that the merits of the punitive damages issue were addressed by the Court of Appeals, but fails to acknowledge that the court addressed this issue only in a limited way--for purposes of deciding whether there was sufficient uncertainty to negate a finding of plain error. In sum, that opinion does not contain any justification for treating this case as if the punitive damages issue were fully raised and decided below.

Not fully raised & decided

Unless such a justification is found, the Court will face a difficult situation. While it is probably true that no punitive damages should be awarded against a municipality, see II infra, it is hard to see how the Court can disturb the ruling of the CA1 that it was not plain error to give a punitive damage instruction.

punitive damages instruction. Fed. R. Civ. P. 51 does not even authorize appellate review of plain errors in civil cases. It states that "[n]o party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection." The plain error exception in civil cases is judicially created, and not even recognized in the Ninth Circuit. Moore v. Telfon Communications Corp., 589 F.2d 959, 967 (CA9 1978); Bock v. United States, 375 F.2d 479, 480 (CA9 1967). But cf. Brown v. Avemco Inv. Corp., 603 F.2d 1367, 1375 (CA9 1979) (authorizing review, despite absence of an objection, where the issue was "central to the trial and justice requires review of the treatment of that issue in the instructions as a whole"). It apparently has not been discussed or authorized by this Court, and it is generally acknowledged by other courts that this exception must be quite narrow:

> Most circuits have said, by way of dicta, that the appellate court may reverse for plain error in an instruction that was not objected to, though these statements recognize that this is a power to be exercised only rarely, where necessary to prevent a miscarriage of justice. Actual reversals on the basis of plain error are rare, though they have become more numerous in recent years.

Wright & Miller, Federal Practice and Procedure § 2558, at 672.

In sum the plain error exception applicable to

review by courts of appeals of district court errors to which there was no objection, if it exists, is quite narrow and quite close to the "plain error" rule applicable to this Court's own review of decisions. Compare Connor v. Finch, 431 U.S. 407, 421 (1977) ("[T]his Court has the authority and the duty in exceptional circumstances to notice federal-court errors to which no exception has been taken, when they 'seriously affect the fairness, integrity or public reputation of judicial proceedings.'"), with the CA1's Opinion Below (Pet. at A-14) ("We may overlook a failure [to object] ... but only where the error is plain and 'has seriously affected the fairness, integrity or public reputation of a judicial proceeding.'"). See also Wood v. Georgia, No. 79-6027, slip op. at n. 5. It is hard to see how the CA1 can be said to have committed reversible error in its application of this standard to the case at hand. Nor, in light of the reasoning of the CA1, is it easy to see how this Court could apply its own plain error rule and decide to reach the merits. After all, there certainly is no clear existing law in this area that makes the decision of the District Court "plainly" erroneous. Indeed there are several recent decisions in which the courts have upheld punitive damage awards against municipalities and their officials, without any real discussion of the question presented here. See Simeneo v. School District No. 16, 594 F.2d 1353 (CA10 1979); Bradshaw v. Zoological Society, 569 F.2d 1066 (CA9 1978). Moreover, the

CA1 noted our exception

award of punitive damages hardly can be said to have affected significantly the fairness or integrity of this proceeding or ruined its "public reputation."

There is one possible way out of this problem. Perhaps "plain error" reasoning does not apply where, as here, the District Court did not rely [entirely] on the failure of petrs to object and went on to discuss the merits of the issue and draw conclusions. It is quite clear that the District Court did not need to reach the merits, since a failure to object is generally equally fatal to any claim raised on a motion for a new trial. Wright & Miller § 2553, at 641-42. Indeed the District Court recognized this when it quoted Rule 51 and stated that "defendants' untimely objections are not the proper basis for this post-trial motion." Pet. at B-3. Thus it can be argued that the District Court's comments on the merits are mere dicta and that the CA1 was right in treating this as a plain error matter. On the other hand, one might argue that once the District Court reached the merits, appellate review should treat this case as one where the original procedural default never took place. On balance I would reject this view, because under Rule 51 the District Court itself was only empowered to reach the merits if the plain error standard was met, and thus the proper standard on appeal was the one the CA1 considered--whether the error here was sufficiently obvious and important to justify an exception to Rule 51.

One possible way to avoid plain error problem. DC did it need to reach merits

Paul would reject this view

II. The Merits

If the Court somehow manages to reach the merits, unencumbered by concerns about plain error, I tend to believe that the decision should be reversed insofar as it imposed punitive damages directly on a municipality, rather than on individual officials. Petrs raise a powerful argument that when § 1983 was passed there was an established immunity for municipalities from punitive damages. Moreover, it seems to make little sense to punish the municipal entity for "malice," rather than limiting this additional penalty to the officials who were malicious.

A. Are Punitive Damages Ever Available Under § 1983?

The initial question must be whether punitive damages are available under § 1983 against any defendant. This question is largely settled by the decision last term in Carlson v. Green, 446 U.S. 14 (1980). Carlson involved a Bivens suit under the Eighth Amendment, and dealt with the question whether the Bivens remedy was preempted by the available remedy under the Federal Tort Claims Act. The Court held that a Bivens remedy is appropriate, in part because the remedy under the FTCA is inadequate. Part of this inadequacy stemmed from the unavailability of punitive damages under FTCA. By contrast, the Court held that punitive damages are available in Bivens cases because they are "especially appropriate to redress the violation by a Government official of a citizen's constitutional rights." Id., at 22. The Court

then referred to its view that "punitive damages are available in a 'proper' § 1983 action," id., citing Carey v. Piphus, 435 U.S. 247, 257, n. 11 (1978), for this proposition.

Although this is probably something of a "stretched" reading of your opinion in Piphus, which stated quite clearly that it was taking no position on the availability of punitive damages under § 1983, id., after Carlson I see no grounds or substantial reason for reversing the trend in the lower courts in favor of punitive damages in proper cases under § 1983. Where there has been truly malicious conduct, a penalty may be appropriate and may serve an important deterrent function.

But this leaves open the question whether municipalities may be liable for punitive damages.

B. The Special Case of Municipalities

Resps make no effort to undermine petrs' historical assertion that in 1871 municipalities were immune from punitive damages under common law. Instead, they assert that extension of such immunity to constitutional cases under § 1983 would not further the objectives of that provision, and point to the undisputable fact that previous § 1983 cases have based their reasoning as much on weighing of policy as on historical case law. See especially Scheuer v. Rhodes, 416 U.S. 232 (1974). But resps cannot dispute the fact that a number of previous immunity cases have at least started with an analysis of the state of the common law. See Pierson v. Ray, 386 U.S. 547, 554 (1967) ("The immunity of judges for

acts within the judicial role is ... well established, and we presume that Congress would have specifically so provided had it wished to abolish the doctrine."); Imbler v. Pachtman, 424 U.S. 409, 424 (1976) (prosecutors) ("The common-law rule of immunity is thus well settled. We now must determine whether the same considerations of public policy that underlie the common-law rule likewise countenance absolute immunity under § 1983."). These cases provide substantial support for the notion that § 1983 did not repeal common-law immuity of municipalities from punitive damages.[1]

Moreover, resps' policy arguments do not provide much support for the view that the common law rule should be disregarded on policy grounds. The purpose of punitive damages is to punish tortfeasors who act in bad faith, and presumably to deter such malicious actions. A rule barring punitive damages against municipalities would still allow the imposition of punitive damages on the individuals who acted in

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[1]And the historical argument made by petrs appears to be a valid one. See Hines, Municipal Liability for Exemplary Damages, 15 Cleve.-Mar. L. Rev. 304, 304 (1966) ("it is a settled principle that exemplary damages may not be recovered against a municipal corporation, nor a state, in the absence of statutory authority"). One possible counterargument is that these common law cases are inapposite because they include cases of municipal liability based on respondeat superior--i.e, where there is no actual responsibility or knowledge on the part of the head city officials. Under Monell, there must be a municipal policy or an official municipal act before the city can be held liable.

bad faith. It simply would prevent an additional windfall recovery against the city itself. To the extent that municipalities are willing to reimburse employees who are assessed punitive damages for their official acts, then this penalty is already being felt by the municipality. To the extent that the individuals are left on their own with respect to punitive damages, this seems appropriate--since it was the malice of the individuals that gave rise to this additional burden on top of full compensation for the tort victims.

The fact that a municipality cannot have malice of its own, independent of the malice of its officials, suggests that there is no basis for an additional assessment against a city. There is no reason to punish all of the taxpayers of a city because of the intentional wrongdoing of one official. Such a penalty is imposed on those who have not done any wrong. While it may make sense to require cities to compensate victims of official torts under Monell, it makes very little sense to treat the city itself as a wrongdoer and impose an additional penalty. Certainly there will be little additional deterrence gained from such a rule, since the loss will be felt by no particular official.

Moreover, to the extent that juries are told that they may assess punitive damages against cities directly, they will lose much of their concern about bankrupting the tortfeasor, and will be likely to give exorbitant recoveries to sympathetic tort victims, payable out of the "deep pocket"

of the municipal coffers. Indeed that is arguably what occurred here, where the jury initially awarded punitive damages against the City in an amount that exceeded the total punitive damages awarded against all of the individual defendants.

I do not believe that a holding immunizing cities from punitive damages would be inconsistent with Monell, 436 U.S. 658 (1978), and Owen v. City of Independence, 445 U.S. 622 (1980). I cannot pretend to be familiar with the detailed legislative history discussed in Monell, but it seems clear that that holding allows imposition of some limits on municipal liability. Indeed the opinion states that it is expressing "no views on the scope of any municipal immunity beyond holding that municipal bodies sued under § 1983 cannot be entitled to an absolute immunity." 436 U.S., at 701. And, while the opinion in Owen did not find any common-law tradition on which to base a good-faith immunity for municipalities, its exhaustive examination of this question suggests that the Court should give recognition to the traditional municipal immunity from punitive damages.

Summary and Recommendation

First, it will be very difficult for the Court to reach the merits on this record. Justice Rehnquist was wrong in stating in his dissent from denial that the First Circuit had decided the punitive damages issue on the merits. In

fact, the First Circuit merely decided that there was sufficient uncertainty in this area to prevent it from finding "plain error." Thus it relied squarely in the failure of petrs to object in the trial court. The District Court relied on this same failure to object in rejecting a motion for new trial, but also went on to discuss the merits.

To reach the merits the Court could simply rely on the fact that the District Court discussed the merits--implying that this action "forgave" the earlier procedural default--or it could decide that the error here was sufficiently egregious to constitute plain error. Neither of these outcomes is too supportable, but they are both at least barely possible.

Unfortunately, on the merits, I do tend to believe that there was error below. Although I have not done any real research into the common law, there appears to have been a well-established rule in 1871 exempting municipalities from liability for punitive damages. In the absence of an expressed congressional intent to preempt this immunity, previous immunity cases justify a holding that this immunity survives. Moreover this outcome seems to make sense on policy grounds. The wrongdoer in these cases is always an individual. The municipality may choose to reimburse individuals for punitive damages, but whether or not it does so it makes little sense to impose separate punitive damages on the city itself. Either the city will end up paying a

double penalty, or the city will end up matching the penalty imposed on the wrongful individual official. I see no reason why taxpayers should have to bear this additional burden.