



LIABILITY *of* POLICE EMPLOYERS

HISTORY *and* BACKGROUND

In a standard civil case where someone is injured by a person who is working within the course and scope of their employment, that person’s employer can be held responsible for the harm. A classic example is a case where a delivery truck driver crashes into a car while on a delivery route. In that case, the driver’s employer has to pay damages. This legal doctrine is called *respondeat superior* – roughly translated as “the master answers for the servant.” The doctrine has important public benefits: an employer is more likely than an employee to have resources or insurance to compensate injured parties and the risk of liability causes employers to take care to hire competent employees and ensure that they are properly trained and supervised—especially in jobs where there is a risk of causing injury.¹ These same rules usually apply to municipal governments (counties, cities, towns, and townships). So, when a city trash truck driver crashes into a car, the city has to pay for the damage caused to the car.

When it comes to municipal police, however, the Supreme Court has established an entirely different set of rules that are far more favorable to municipal employers and limit the remedies available to victims of police misconduct.² In *Monell v. Department of Social Services*, 436 U.S. 658 (1978),³ the Court ruled that, in civil rights cases, *respondeat superior* does not apply to municipalities. Instead, a municipality can only be held liable if its “official policy” caused a constitutional violation. Under that rule, a person whose civil rights are violated by a municipal police officer can only sue the municipality if its policies required the officer to act in an unconstitutional way. Realistically, this type of situation is very rare, as municipalities know that they can avoid liability by issuing written policy statements that are consistent with the Constitution. For example, if a police department has a policy stating, “all police officers should use reasonable force,” then, if an officer uses excessive force and harms someone, the municipality’s “policy” did not cause a constitutional violation.

In *Monell*, the Supreme Court also explained that a municipality’s official policy could include “customs” or “practices”—that is, even if there is no written policy requiring unconstitutional conduct, the municipality is responsible if its officers are known to regularly violate people’s rights. But, the standard to establish the

¹ The doctrine does not apply in every case. There are sometimes difficult issues concerning the meaning of “scope and course of employment.” For example, in the well-known cases concerning Larry Nassar’s systematic sexual assault of the women and girls he treated, his employers [have argued that they cannot be held responsible](#) for his intentional criminal conduct. In the police context, though, some courts have ruled that when a police officer intentionally uses unlawful physical force during the course of an arrest, that force is, in essence, consistent with employer’s expectations and part of the job. See *Justice v. Lombardo*, 208 A.3d 1057 (Pa. 2019) (<https://law.justia.com/cases/pennsylvania/supreme-court/2019/17-eap-2018.html>).

² This discussion applies only to municipal police employers. Different sets of rules apply to state employers and the federal government. The overwhelming majority of police officers in the United States, however, are employed by municipal entities. See United States Department of Justice, Federal Bureau of Investigation, *Uniform Crime Reporting; Police Employee Data*, 2019; retrieved July 20, 2020, from <https://crime-data-explorer.fr.cloud.gov/downloads-and-docs>.

³ <https://supreme.justia.com/cases/federal/us/436/658/>

existence of a custom or practice is rigorous, applying only to practices “so persistent and widespread as to practically have the force of law.”

In a later decision, the Supreme Court expanded the liability of municipalities to situations in which the municipality fails to train, supervise, or discipline its employees. Here too, however, the Court made the standard for proving such failures a strict one, saying that municipalities can only be liable for a failure to train, supervise, or discipline if their policymakers (that is, their high-level leaders) have been “deliberately indifferent” to the risk of constitutional violations. This standard means that a victim of police misconduct seeking to hold a municipality accountable has to prove that the leaders of a police department were aware of and consciously disregarded the risk that officers would violate people’s civil rights.

In a practical sense, this means that in order to hold a municipal employer responsible, the victim of an officer’s misconduct has to show a series of previous incidents which can be said to have placed the municipal policymaker on notice that an officer was at risk of violating a person’s constitutional rights. For example, if an officer assaults a civilian and causes injury, in the typical case, the municipal employer will not be held responsible unless its leaders were aware that the officer had engaged in similar unlawful conduct on a number of prior occasions.

There is an added difficulty caused by the inability of police abuse victims to access information about a police officer’s history of misconduct. Disciplinary records and the results of internal misconduct investigations are (if conducted at all) kept secret and usually will not be disclosed to a victim.⁴ One method to obtain information is to bring a lawsuit where the victim can use the tools of discovery (e.g., subpoenas for testimony and documents) to obtain information about the officer’s history. Even that option, however, has limited likelihood of success because courts will only allow civil rights plaintiffs to take discovery in support of a claim that the municipality failed to train, supervise, or discipline an officer if, at the beginning of the case, the plaintiff can make plausible allegations of a pattern of misconduct. Victims of police abuse are, therefore, caught in a vicious cycle: they cannot discover information about an officer’s misconduct history unless they can credibly claim that there is such a history, but they have little access to information which would help support the credibility of such a claim in the first place.

The apparent purpose of these restrictive rules on municipal liability is to ensure that a municipality only has to pay damages for the harm that its policymakers cause through their affirmative misconduct or indifference to employees’ misconduct. We should not punish taxpayer-funded municipal governments, the reasoning goes, unless they are directly responsible for causing harm. This theory does not translate to real practice. In the overwhelming majority of civil rights cases, municipal employers indemnify their employee officers—that is, they pay for damages awards or settlements when the officer is sued personally.⁵

⁴ See, e.g. WNYC, *Is Police Misconduct a Secret in Your State?* (2015), <https://project.wnyc.org/disciplinary-records/>; Stephanie Wykstra, *The fight for transparency in police misconduct, explained*, Vox (June 16, 2020), <https://www.vox.com/2020/6/16/21291595/new-york-section-50-a-police-misconduct> (discussing New York Governor Cuomo only recently signing several police transparency and accountability bills); Claudia Lauer & Colleen Long, *Across the US, most police disciplinary records are secret*, The Associated Press (June 12, 2020), <https://www.mercurynews.com/2020/06/12/across-the-us-most-police-disciplinary-records-are-secret/>.

⁵ Joanna Schwartz, *Police Indemnification*, 89 N.Y.U. L. Rev. 885 (2014) (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2297534)

The upshot of these rules and their larger impact on civil rights litigation is as follows:

- It is very difficult to sue individual police officers who violate people’s civil rights due to the doctrine of qualified immunity.⁶
- It is equally difficult, if not more difficult, to sue municipal employers of police officers who violate civil rights; municipalities make it difficult to obtain information that would support a claim against the municipality, and courts will not let claims proceed without the information that municipalities hide from the public.
- Taxpayer funded municipalities enjoy the protection of these legal rules based on the supposed policy preference to save municipal governments money—when, in the rare event an officer is found liable for misconduct, the municipality pays for the harms caused anyway.
- Municipal employers of police officers avoid the important incentives imposed on private employers by the *respondeat superior* doctrine and, therefore, have reduced incentives to ensure the hiring of competent officers and to provide sufficient training and supervision of employed officers.

EXAMPLES of POLICE EMPLOYER AVOIDANCE of LIABILITY

The following are examples of cases that illustrate the rigorous rules that courts apply to claims concerning municipal liability:

Outlaw v. City of Hartford, 884 F.3d 351 (2d Cir. 2018): The plaintiff alleged that police use of excessive force against him (he won a jury verdict against the individual officer) was caused by the City’s actions based on the fact that a civilian review board’s evaluation of use of force practices as met with mass protest by officers, the city had a history of 66 excessive force lawsuits and 87 other claims submitted to an insurance company, the defendant officer had documented 11 uses of force in a little more than a year prior to the incident, a previous class action lawsuit had required more training for officers, and an expert opinion faulted the City for not systematically tracking its officers’ use of force. Despite these facts, the court found that there was not sufficient evidence to prove that the city had caused the constitutional violation.

Andrews v. Fowler, 98 F.3d 1069, 1075–76 (8th Cir. 1996): The plaintiff alleged she had been raped by the defendant officer and that the officer’s employer was responsible because of its awareness of two prior incidents. In the first of those incidents, the officer was found late at night prowling around the inside a young woman’s home. In the second incident, the officer made comments to female driver suggesting that sexual favors could result in elimination of a traffic violation. The court, however, held that these incidents were not sufficient evidence of a “widespread” pattern of misconduct such that the municipal employer could be held responsible for the officer’s unconstitutional conduct.

Connick v. Thompson, 563 U.S. 51, 62-63 (2011): Prosecutors hid a lab report that revealed the accused, John Thompson, had a different blood type than the armed robber who committed the crime in question. He spent 18 years in prison before his conviction was overturned. Under *Brady v. Maryland*, prosecutors must turn over any evidence favorable to defendants and material to their guilt or punishment. The court found that this failure to disclose evidence constituted a *Brady* violation. Despite several other *Brady* violations by prosecutors from the same office (within the 10 years preceding Thompson’s original trial), the court refused to hold the municipality liable for the inadequate training of their lawyers. Because none of those overturned cases

⁶ For more information on qualified immunity and its impact on civil rights cases against police, see: <https://www.nlg-npap.org/wp-content/uploads/2020/07/Final-QI-Fact-Sheet.pdf>

specifically involved a failure to disclose evidence similar to Thompson, the court believed there could not have been sufficient notice that better training was necessary to avoid this constitutional violation.

Lewis v. Pugh, 289 F. App'x 767, 772 (5th Cir. 2008): The plaintiff was sexually assaulted by a police officer while in his custody and brought suit alleging the police chief failed to adequately supervise the officer. Even though the police chief had knowledge of four excessive force and unlawful arrest claims against the officer, the chief could not be held liable because there were no allegations of sexual misconduct. Though rumors were circulating and numerous other incidents were uncovered subsequently, the plaintiff was unable to establish the deliberate indifference needed to support her claim without pointing to a well-established pattern of sexual assaults known to supervisors at the time.

Crete v. City of Lowell, 418 F.3d 54, 66 (1st Cir. 2005): The City of Lowell hired a police officer with criminal history that included an assault and battery charge and was aware of prior complaints of physical violence and acts of aggression. During an arrest, that officer threw the defendant to the ground and pushed his head into the sidewalk three or more times. The court found that it was not “plainly obvious” that the officer was going to engage in excessive force in the context of his job, and therefore the City could not be held liable for its hiring policies.

Estate of Davis v. City of N. Richland Hills, 406 F.3d 375, 384-85 (5th Cir. 2005): While executing a search warrant, an officer shot and killed the occupant of the home. The victim was unarmed and entirely peaceful. The plaintiff argued that officials knew prior to the shooting that the officer was prone to use excessive force without cause based on repeated behavior during SWAT trainings, including shooting when he was not supposed to. The court held that incidents occurring during training are not constitutional violations, and therefore the officer’s supervisors did not make deliberate or conscious choice to endanger the constitutional rights of others by allowing the officer to participate in SWAT raids.

LINKS to FURTHER READING

The following two pieces provide accessible and recent summaries of the state of the law and calls for reform:

- Orion De Nevers, A Dubious Legal Doctrine Protects Cities From Lawsuits Over Police Brutality, Slate (June 2, 2020), <https://slate.com/news-and-politics/2020/06/monell-supreme-court-qualified-immunity.html>
- Peter H. Schuck, The Other Police Immunity Problem, Wall Street Journal (June 4, 2020), <https://www.wsj.com/articles/the-other-police-immunity-problem-11593039526>

The following piece provides an academic perspective on legal bases for reform of the municipal liability doctrine:

- Fred O. Smith, Local Sovereign Immunity, 116 Columbia L. Rev. 409 (2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3083491

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Last updated: 07/20/2020