

Local Governments and Vicarious Liability

by Sophia M. Stadnyk, Senior Associate Counsel

On this Term's docket, the U.S. Supreme Court has a couple of cases dealing with the liability of local government officials. On October 12, the Court will hear oral arguments in one such case, *Connick v. Thompson*, 578 F.3d 293, *cert. granted*, 130 S. Ct. 1880 (U.S. Mar. 22, 2010) (No. 09-571), on the extent of a local government's liability for a prosecutor's failure to disclose evidence favorable to the defense. The broader issue in this appeal is whether, as urged by some amici, the rule in *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658, 692-695 (1978) should be overruled.

In brief, *Monell* established that Congress had not intended to include municipal bodies within the class of "persons" to which 42 U.S.C. § 1983 applied; thus, a local government could not be held vicariously liable solely because it employed the wrongdoer. Instead, in the words of the *Monell* Court, the constitutional violation had to arise in furtherance of a municipal "policy statement, ordinance, regulation, or decision officially adopted or promulgated by those whose edicts or acts may fairly be said to represent official policy." The Court refined this liability theory in *City of Canton v. Harris*, 489 U.S. 378 (1978) (in a Section 1983 case alleging an inadequate training program, the plaintiff had to demonstrate that the municipal action was not just negligent, but was taken with "deliberate indifference" as to its known or obvious consequences) and *Bd. of County Comm'rs of Bryan County v. Brown*, 520 U.S. 397 (1997). In that case, involving allegations of inadequate screening of employees, the Court held that it was insufficient for a plaintiff to identify conduct properly attributable to the municipality; he or she had to establish that the "municipal action was taken with the requisite degree of culpability and ... demonstrate a direct causal link between the municipal action and the deprivation of federal rights." These decisions established a relatively high bar for plaintiffs who seek to make a local government liable for the constitutional violations of its employees and agents.

At the time the facts in *Connick v. Thompson* arose, the Orleans Parish District Attorney was Harry Connick. In December 1984, Liuzza was robbed and killed in New Orleans. Three weeks later, in an armed robbery, a perpetrator left his blood on the pants of one of the victims. John Thompson had been charged with the murder and his photo was published in the local paper. After seeing the photo, the victims of the robbery contacted the District Attorney's Office (DAO) and identified Thompson as their robber. The district attorneys successfully petitioned the court to switch the order of the trials so that Thompson would be tried for the attempted armed robbery first, reasoning that a guilty verdict in that case would make it less likely that Thompson would be willing to take the stand in his murder trial (since the prosecution could use his robbery conviction to impeach his testimony). At the time, the attorney from the DAO stated, in open court, that it was "the state's intention to file a motion to take a blood sample" from Thompson. A week before Thompson's robbery trial, the results of the blood test on the pants came back, showing the blood type was type B. This report was never turned over to Thompson, he was never tested, and the blood evidence was not included in the trial evidence or mentioned at trial. Thompson was convicted on the robbery charge. As expected, he chose not to testify on his own behalf at the subsequent murder trial, and was convicted of murder.

In 1999, investigators came across a copy of the crime lab report containing the blood type of the armed robber. Thompson was tested and found to be blood type O, which ruled him out as the perpetrator. The trial court conducted an evidentiary hearing and, in 1999, vacated the attempted armed robbery conviction. Thompson's attorneys had also provided the blood typing information to the DAO, and the ensuing investigation revealed that in 1994, assistant district attorney Deegan, who tried Thompson's robbery case, had confessed to Riehlmann, a former assistant district attorney, that Deegan had intentionally withheld the blood evidence. Riehlmann himself did nothing with this information. Thompson claimed that other evidence was not turned over to him as required by *Brady v. Maryland*, 373 U.S. 83 (1963). Connick convened a grand jury to investigate the concealment of the blood evidence but eventually dismissed the grand jury. In 2003, Thompson was retried for the Liuzza murder and was able to use 13 pieces of evidence that the prosecutors did not turn over during the first murder trial. The jury returned a verdict of not guilty in 35 minutes, and Thompson was released from prison.

Thompson sued the DAO and various attorneys under 42 U.S.C. § 1983 for wrongful suppression of exculpatory evidence and for conspiracy under 42 U.S.C. § 1985(3). He adduced evidence that there was no written *Brady* policy at the time of the prosecution (and possibly no policy at all that was communicated to the assistant attorneys). He did not claim that Connick himself withheld *Brady* material, but argued that the assistant attorneys were delegated final policymaking authority to decide for themselves what constituted *Brady* material, such that their failure to produce such evidence created liability for the DAO. Denying the defendants' summary judgment motion, the district court held that the nondisclosure of the

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streets and commercial door hangers on residences, abandoned natural gas lines, and drafting language in service contracts that defined ownership of the written materials and drawings created from the contract. An inquiry about suspending an employee with or without pay pending an investigation morphed into questions about last-chance agreements and suspending employees who failed to earn education credits for recertification to continue performing their essential functions.

The list proves that it must a creed in the municipal attorney kingdom that the interruptions become the agenda for the day. The immediacy of the resources, including the listserve, assist getting closer to "quitting time."

For those of you who would like to join the listserv, go to http://www.municode.com and select the *Listservs* link to get the page on *Mailing Lists*. Click on *Municipal Attorneys* to bring up the subscription page. Fill it out and hit Subscribe. To sign up for the Water Cooler, send an e-mail to MunicAttyWaterCooler@yahoogroups.com that identifies you and the local government you represent. You will get a response from YahooGroups asking if you want to join. Respond to the message as directed.

Warren Kraft is an Assistant City Attorney/Director of Human Resources for the City of West Bend, serves of counsel to the Murphy-Desmond law firm of Madison and as attorney for the Village of McFarland, WI. A 2006 IMLA Local Government Fellow, he is a commissioned lay pastor, an active Scout leader, and a substitute lifeguard at the local YMCA. ML

Ordinances

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Notes

1. DDT is the commonly used name for the chemical dichlorodiphenyltrichloroethane.
2. Available at http://www.compoundsecurity.co.uk/. If you are curious as to how sensitive your ears are, go to the Mosquito's USA distributors site, http://www.movingsoundtech.com and listen to the different frequencies.
3. Valerie Strauss, *Amid Metro Brawl, Family's Night Out Turns Into Pandemonium*, Washington Post, Aug. 9, 2010, available at http://www.washingtonpost.com/wp-dyn/content/article/201%8/08/AR2010080802755.html.
4. "Public disturbance" standard is also referred to as a "nuisance" or "reasonableness" standard.
5. D.C. Municipal Regulations § 20-2701.01.
6. *Id.*
7. D.C. Municipal Regulations § 20-2714.01.
8. IMLA Model Ordinance Service, Art. 11-4.
9. *Id.*
10. B & W Management, Inc. v. Tasea Inv. Co., 451 A.2d 879 (D.C. 1982) (citation omitted).
11. 47 U.S.C. § 12101, *et seq.* (2006).
12. *Id.* at § 12181.
13. For more information about these ear-related medical conditions, see http://www.aafp.org/afp/ 2004 /0101/p127.html; see also http://www.ncbi.nlm.nih.gov/pmc/articles/PMC539655/.
14. Eric Fidler, *Teens and Young Adults aren't Mosquitoes* (Sept. 2, 2010), available at http://greatergreaterwashington.org/post.cgi?id=7008. ML

Inside Canada

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is what must be pursued. The court did hold, however, that if those responsible for enforcing the legislation do not meet their duties under the Act, the applicants could bring a judicial review application for mandamus or an application for mandatory injunctive relief.

Lucy still resides at the Valley Zoo.

(Scott McAnsh is the Municipal Prosecutor for the City of Edmonton. Steve Phipps is a Solicitor with the City of Edmonton.) ML

Supreme Court

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blood evidence and the infringement of Thompson's right to testify in his own defense at the murder trial violated his constitutional rights. Addressing *Monell* liability, the district court found the claims survived summary judgment: it appeared the assistant attorneys were authorized to create the office's policy on the nature of *Brady* duties and the DAO "knew to a moral certainty" that the assistants would acquire *Brady* material. Without training, it was not always obvious what *Brady* required, and withholding *Brady* material would always lead to a substantial violation of constitutional rights. Accordingly, "a reasonable jury could find that the need for training in this situation [was] so obvious that the failure to offer it could properly be characterized as 'deliberate indifference.'" After a jury trial, the trial court found liability predicated on the district attorney's failure to train, monitor, or supervise, and awarded Thompson $14 million in damages. On a motion for rehearing, the Fifth Circuit en banc panel split evenly, resulting in an affirmation of the district court decision.

The DAO sought Supreme Court review on the basis that imposing failure-to-train liability on a district attorney's office for a single *Brady* violation contravened the culpability and causation standards established by *City of Canton* and *Bd. of County Comm'rs of Bryan County*, and undermined the prosecutors' absolute immunity recognized by the Court more recently in *Van de Kamp v. Goldstein*, 129 S. Ct. 855 (2009). However, certiorari was granted on the *Canton* and *Bryan County* issue only.

As can be expected, a large number of *amicus* briefs have been filed in this case. IMLA has signed onto a brief in support of the petitioners prepared by the State and Local Legal Center. An *amicus* brief filed on behalf of the Alliance Defense Fund and the CATO Institute in support of the respondent, Thompson, states that amici "believe the *Monell* rule unfairly circumscribes the protections of 42 U.S.C. § 1983 by imposing a restriction on municipal liability that is unwarranted by either the text or history of the statute." It urges the Court to overturn the *Monell* rule "so that municipalities hereafter may be subject to liability for the constitutional violations of their agents and employees according to the ancient common law rule of *respondeat superior*," adding "[e]very basis" for applying *respondeat superior* "to a corporate employer applies with equal logical and practical force to a municipal employer." ML