MONELL LIABILITY AND DISCOVERY ISSUES

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COURSE OUTLINE

- Legal History
- Four Methods to Establish Municipal Liability Under Monell
  1. Plaintiffs May Point To An Officially Adopted Or Promulgated Policy
  2. Customs and/or Practices
  3. Failure To Train, Supervise, Discipline, Adequately Screen
  4. Final Policymaker
- Written Discovery Under *Monell*
  - Affirmative Defense Discovery
  - Responses To Written Discovery

MONELL V. DEPT OF SOC. SERVS, 436 U.S. 658 (1978)

- **42 U.S.C. § 1983: Every "person" who, under color of any statute, ordinance, regulation, custom, or usage of any State subjects, or "causes to be subjected," any person to the deprivation of any federally protected rights, privileges or immunities shall be subject to civil liability to the injured party.**
  - **Initially passed in 1871 as the Enforcement Act in response to political violence by the KKK during reconstruction.**
- ***MONROE v. PAPE*, 365 U.S. 167 (1961)**
  - **State officers who violated the constitutional rights of a Plaintiff can be subject to civil liability.**
  - **Congress had not intended the word "person" in § 1983 to apply to municipalities.**

***MONELL*:**

- **Overruled *MONROE* holding that a local government is a "person" under § 1983 and that claims against municipal entities must be based on implementation of a policy or custom.**
- **No *respondeat superior* liability.**

FOUR METHODS TO ESTABLISH MUNICIPAL LIABILITY UNDER *MONELL*

1. PLAINTIFFS MAY POINT TO AN OFFICIALLY ADOPTED OR PROMULGATED POLICY
2. CUSTOMS AND/OR PRACTICES
3. FAILURE TO TRAIN, SUPERVISE, DISCIPLINE, ADEQUATELY SCREEN
4. FINAL POLICYMAKER

I. PLAINTIFFS MAY POINT TO AN OFFICIALLY ADOPTED OR PROMULGATED POLICY

- NOT MANY FACIALLY UNCOSTITUTIONAL POLICIES, BUT THERE ARE SOME THAT ARE UNCONSTITUTIONAL AS APPLIED.

  EX: *LANIER v. CITY OF WOODBURN*, 518 F. 3D 1147 (9TH CIR. 2008).

  CITY HAD A DRUG-TESTING POLICY FOR NEW EMPLOYEES. AS APPLIED TO A TEENAGE GIRL APPLYING TO BE A PAGE, THE POLICY WAS DEEMED UNCONSTITUTIONAL AS APPLIED.

- FACIALLY NEUTRAL POLICY WITH AN ALLEGED IMPERMISSIBLE MOTIVE

  LEGISLATIVE IMMUNITY MAKES THIS A HARDEN BURDEN OF PROOF.

- LOCAL OFFICIALS ENFORCING STATE LAWS

  HOW MUCH DISRECRETION DID THE LOCAL MUNICIPALITY HAVE IN ENFORCING THE STATUTE?

2. CUSTOMS AND/OR PRACTICES

- NO OFFICIALLY ADOPTED POLICY, BUT A PRACTICE OR CUSTOM EXISTS THAT HAS THE FORCE OF LAW.
- *PRICE v. SERY*, 513 F. 3D 962 (9TH Cir. 2008): CITY OF PORTLAND HAD A UOF POLICY THAT WAS FACIALLY CONSTITUTIONAL. PLAINTIFF'S ALLEGATION WAS THAT PPD HAD A LONG-STANDING PRACTICE OF MISINTERPRETING THE POLICY. FACTS ALLEGED WERE SUFFICIENT TO DEFEAT MSJ.
- IT IS NOT SUFFICIENT FOR PLAINITFF TO SIMPLY SHOW THE CUSTOM OR PRACTICE. RATHER, IT MUST BE LINKED TO A POLICY-MAKER. CONSTRUCTIVE KNOWLEDGE IS TYPICALLY SUFFICIENT.

3. FAILURE TO TRAIN, SUPERVISE, DISCIPLINE, ADEQUATELY SCREEN (*CITY OF CANTON*, 489 U.S. 378 (1989))

- FAILURE TO SCREEN (*BRYAN COUNTY v. BROWN*, 520 U.S. 397 (1997))

  PLAINTIFF MUST SHOW THE REQUISITE DELIBERATE INDIFFERENCE ON THE PART OF THE FINAL POLICYMAKER. TOUGH BURDEN FOR PLAINTIFF.

- LIABILITY UNDER *CANTON AND BROWN* IS DERIVATIVE. A CONSTITUTIONAL VIOLATION MUST HAVE BEEN COMMITTED BY A NON-POLICYMAKER
  - BIFURCATION: FORCES PLAINTIFF TO ESTABLISH THE UNDERLYING CONSTITUTIONAL VIOLATION BEFORE ALLOWING TO PURSUE *MONELL*.
  - IF OFFICER IS GRANTED QUALIFIED IMMUNITY, THE MUNICIPALITY CAN STILL BE LIABLE ON A *MONELL* CLAIM.

4. FINAL POLICYMAKER

- A SINGLE DECISION MADE BY AN OFFICIAL COULD CONSTITUTE OFFICIAL POLICY THAT COULD BE ATTRIBUTED TO THE MUNICIPALITY (*PEMBAUR v. CITY OF CINCINNATI*, 475 U.S. 469 (1989))
- FINAL POLICYMAKER: AN OFFICIAL WHOSE DECISIONS ARE NOT SUBJECT TO REVIEW BY ANOTHER OFFICIAL OR GOVERNMENTAL BODY.

WRITTEN DISCOVERY UNDER *MONELL*

1. **AFFIRMATIVE DEFENSE DISCOVERY:**
   - **NOT MUCH…CONTENTION INTERROGATORIES ARE OFTEN INEFFECTIVE. SAME AS DOCUMENT REQUESTS. MOSTS COURTS WILL INITIALLY DEEM A MOTION TO COMPEL PREMATURE.**

2. RESPONSES TO WRITTEN DISCOVERY



PRIOR COMPLAINTS



DISCIPLINE



POLICIES



TRAINING

PRIOR COMPLAINTS:

- CIVILIAN
- INTERNAL
- OMBUDSMEN
- IA INVESTIGATIONS
  - WITNESS STATEMENTS
  - OFFICER STATEMENTS
  - MANNER IN WHICH IA IS CATEGORIZED AND FILED
- IF THERE IS A RECORD OF PRIOR COMPLAINTS, PLAINTIFFS WILL HAVE AN EASIER TIME ESTABLISHING NOTICE.

DISCIPLINE:

- HEARING DOCUMENTATION
- NOTICES OF FINAL DISCIPLINE
- DISCIPLINE OF ALL OFFICERS, NOT JUST THE ONE(S) INVOLVED IN THE SUBJECT INCIDENT
- DISCIPLINE RELATED TO POLICY MAKERS.



POLICIES:

- GENERAL ORDERS/MANUALS
- DISCIPLINE POLICIES
- POLICES RELATED TO HOW COMPLAINTS ARE TRACKED

TRAINING:

- ALL TRAINING MATERIALS
- POLICE ACADEMY RECORDS
- UOF/EXCESSIVE FORCE TRAINING
- DISCHARGE OF A FIREARM
- SIGN-OFF SHEETS FOR TRAINING
- CURRICULUM STANDARDS
- CONTINUING EDUCATION

BIFURCATION

- An order bifurcating will halt all discovery related to the Monell claim
- City of Los Angeles v. Heller, 475 U.S. 796 (1986)
- Plaintiffs will frequently not pursue the Monell claim after fully litigating the claim against the individual officer(s)
- Some circuits preclude Monell going forward if the officer is exonerated. Less likely if the officer is granted Qualified Immunity

MONELL AND THE REPTILE THEORY

- "The Reptile Theory" is a reference to a plaintiff's technique to trial practice described by, among others, *Reptile: The 2009 Manual of the Plaintiff's Revolution* (Ball and Keenan)

- Origins in trucking cases and medical malpractice case but has in the interim decade-plus begun expanding into other areas of law, including Section 1983 cases.

- *Monell* pattern and practice standard lends itself to the Reptile Theory and efforts to combat it start in discovery, and in earnest in preparation for your client's deposition.

THE REPTILE: WHAT IS IT?

- The central premise behind the Reptile Theory is to appeal to each juror's basic survival instincts-- what they identify as the reptilian part of our brains.

- To do this, the general goal is to establish through testimony an agreed set of overgeneralized safety rules so that they can argue these rules were broken.

- Then, they can paint the defendant(s) as a menace to the community– 'if it happened to the plaintiff, it could happen to you.' They break the "golden rule" without breaking the "golden rule."

THEMATIC "TENTACLES OF DANGER"

- Embellish the frequency of harm;
- Embellish the maximum harm an act could have cause;
- Oversimplify the concept of conscious choice (i.e., nothing is an unintentional); and
- Extrapolate the safety rule to other everyday interactions.

JUROR DOPAMINE: PLEASURE, ALTRUISM, AND IMPORTANCE

- Creators of the Reptile Theory rationalize its cynical manipulation by claiming we started it in the defense bar.
- They claim the tort reform movement relied on the Reptile Theory to move public opinion and pass legislation, so they can use it in a court of law.
- They implore plaintiff's practitioners to convince the jury–by traps laid in discovery– that giving them money is an act of pleasure, an act of altruism, and importance. For example:

"It's up to you to decide how badly a company can violate safety rules before this community will rise up and make them meet their responsibility."

(Ball and Keenan, 42-43)

THE REPTILE VIEW ON JUSTICE

"Justice is not a Reptilian drive. It is, rather, an excuse– a feel-good rationale– for people to protect themselves and their families. Cases are not won by logic… you have to offer safety."

"What about protecting wrongfully accused defendants? Isn't that a good thing? Absolutely. But Plaintiff's lawyers can't afford the time or money to prosecute a defendant who did nothing wrong."

"...[the Reptile Theory] relies on outside-of-trial factors… but factors material to the case."

DEPOSITIONS: "YOU JUST NEED HIM TO AGREE IT'S A RULE"

- "Umbrella rules"– overgeneralized safety rules– must prevent danger, be in clear English, and– *crucially*– "one the Defendant has to agree with– or reveal himself as stupid, careless, or dishonest for disagreeing with."

- This is achieved in large part in deposition. However, many would-be practitioners of the Reptile Theory have no "Plan B" if you have prepared your client or clients for deposition specifically to combat the "has to agree with" concept.

PATTERN AND PRACTICE: POLICIES, SUPERVISION, AND TRAINING

- *Monell* provides several openings for plaintiffs to try and establish umbrella rules with city representatives.
- It is far too easy to agree that every policy was written for safety, that every decision to discipline a wayward officer or not should be grounded in safety, and that every training module is designed for the safety of all involved.
- Thus, under the Reptile Theory, the police department has "needlessly endangered" the community for any failure of the City to enforce its policies, discipline its officers, or train its officers on the precise issue at hand in the case.

MONELL DISCOVERY & THE CASE AGAINST THE INDIVIDUAL OFFICER

- In my experience, the *Monell* claim is pled for the purposes of gaining discovery and is often not litigated to trial.
- Instead, the expansive discovery allowed to try and prove the *Monell* claim is weaponized against the individual officer in a Reptile maneuver, drilling from the umbrella rule to more specific rules that become increasingly difficult to disagree with because the witness agreed with the general rule.

"You agree that a police officer cannot needlessly endanger the public?"

"You would agree your first priority is safety?"

"Isn't the purpose of this training to provide for public safety?"

PREPARING FOR THE REPTILE: EMPOWERING THE WITNESS

- Rigorous practice for Reptile examination in deposition is imperative. Traditional and well-known concepts like listening for the premise of the question serve as relatable starting points.
- The constitutional case against officers in main is about the totality of circumstances. This provides a natural defense against the Reptile.
- If an officer or city representative in a deposition knows what to listen for, they can feel empowered not to agree with the general safety rule posed to them.

PREPARING FOR THE REPTILE: "NOTHING IS MOST IMPORTANT"

"Nothing is most important."

- …because it's not. That shouldn't be the quote from the witness, but it's a good mantra for the prep. Draw out from your client(s)the myriad of factors that go into most decision-making on a pragmatic level– from the split-second decisions on the ground to the various policymaking debates.
- Even if safety *is* the top-priority– who's safety? In a law enforcement action and policymaking– there are often at least *three* safety groups to consider and, thus, agreement with the umbrella safety rule is justified:

The safety of the *public*, the safety of the *subject*, and the safety of the *officer(s)*.

ALL THREE ARE NOT ALWAYS POSSIBLE IN THE FIELD.

PREPARING FOR THE REPTILE: TURNING THE TABLES

- By preparing your client(s) to answer Reptile questions, in law enforcement actions, often the safety of the public can be used to your benefit.

- In many other cases, the Reptile relies on analogizing the safety of the *subject* (the plaintiff) to the safety the public.

- Officers in the individual actions and city/department officials in the *Monell* context have the opportunity to pivot *to* public safety expressly instead of *from* public safety.

IN THE DEPOSITION: PREPARE FOR ANGER

- If the client executes on the preparation, prepare for opposing counsel's wrath. Unless a seasoned Reptile practitioner, there is no Plan B. They must establish the umbrella rule to unleash the Reptile.
- Warn the client to prepare for escalating frustration and withering and blunt force attempts to get them to agree with the umbrella rule.
- Object for the record often.

